NORTH CAROLINA REPORTS

VOLUME 219

This book is an exact photo-reproduction of the original Volume 219 of North Carolina Reports that was published in 1941.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1978

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS

VOL. 219

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1940

SPRING TERM, 1941

REPORTED BY
JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1941

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1940, AND SPRING TERM, 1941.

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ASSOCIATE JUSTICES:

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OF THE

SUPERIOR COURTS OF NORTH CAROLINA

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CLAWSON L. WILLIAMS	Fourth	Sanford.
J. PAUL FRIZZELLE	Fifth	Snow Hill.
HENRY L. STEVENS, JR.	Sixth	Warsaw.
W. C. HARRIS	Seventh	Raleigh.
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LEO CARR	Tenth	Burlington.

SPECIAL JUDGES

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LUTHER HAMILTON	Morehead City.
RICHARD DILLARD DIXON†	Edenton.
JEFF D. JOHNSON†	Clinton.

WESTERN DIVISION

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H. HOYLE SINK	Twelfth	Greensboro.
F. DONALD PHILLIPS	Thirteenth	Rockingham.
WILLIAM H. BOBBITT	Fourteenth	Charlotte.
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FELIX E. ALLEY, SR.	Twentieth	Waynesville.
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G. V. COWPER	Kinston.

*Resigned July 1, 1941.
†Appointed July 1, 1941.

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R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, SPRING TERM, 1941

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1941—Judge Stevens.

Beaufort—Jan. 13* (2); Feb. 17† (2); Mar. 17* (A); April 7†; May 5† (2); June 23.
Camden—Mar. 10.
Chowan—Mar. 31.
Currituck—Mar. 3.
Dare—May 26.
Gates—Mar. 24.
Hyde—May 19.
Pasquotank—Jan. 6†; Feb. 10†; Feb. 17* (A); Mar. 17†; May 5† (A) (2); June 2*; June 9† (2).
Perquimans—Jan. 13† (A); April 14.
Tyrrell—Feb. 3†; April 21.

SECOND JUDICIAL DISTRICT

Spring Term, 1941—Judge Harris.

Edgecombe—Jan. 20; Mar. 3; Mar. 31† (2); June 2 (2).
Martin—Mar. 17 (2); April 14† (A) (2); June 16.
Nash—Jan. 27; Feb. 17† (2); Mar. 10; April 21† (2); May 26.
Washington—Jan. 6 (2); April 14†.
Wilson—Feb. 3; Feb. 10†; May 12*; May 19†; June 23†.

THIRD JUDICIAL DISTRICT

Spring Term, 1941—Judge Burney.

Bertie—Feb. 10; May 5 (2).
Halifax—Jan. 27 (2); Mar. 17† (2); April 28*; June 2† (2).
Hertford—Feb. 24; April 14‡ (2).
Northampton—Mar. 31 (2).
Vance—Jan. 6*; Mar. 3*; Mar. 10†; June 16*; June 23†.
Warren—Jan. 13 (2); May 19 (2).

FOURTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Nimocks.

Chatham—Jan. 13; Mar. 3†; Mar. 17†; May 12.
Harnett—Jan. 6*; Feb. 3† (2); Mar. 17* (A); Mar. 31† (A) (2); May 5†; May 19*; June 9† (2).
Johnston—Jan. 6† (A) (2); Feb. 10 (A); Feb. 17† (2); Mar. 3 (A); Mar. 10; April 14 (A); April 21† (2); June 23*.
Lee—Jan. 27† (A) (2); Mar. 24 (2).
Wayne—Jan. 20; Jan. 27†; Feb. 3† (A); Mar. 3† (A) (2); April 7; April 14†; April 21† (A); May 26; June 2†; June 9† (A).

FIFTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Carr.

Carteret—Mar. 10; June 9 (2).
Craven—Jan. 6*; Jan. 27† (3); April 7‡; May 12†; June 2*.
Greene—Feb. 24 (2); June 23.
Jones—Mar. 31.
Pamlico—April 28 (2).
Pitt—Jan. 13†; Jan. 20; Feb. 17†; Mar. 17† (2); April 14 (2); May 5† (A); May 19† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Thompson.

Duplin—Jan. 6† (2); Jan. 27*; Mar. 10† (2).
Lenoir—Jan. 20*; Feb. 17† (2); April 7; May 12† (2); June 9† (2); June 23*.
Onslow—Mar. 3; April 14† (2).
Sampson—Feb. 3 (2); Mar. 24† (2); April 28† (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Bone.

Franklin—Feb. 3*; Mar. 17† (A) (2); April 14* (A).
Wake—Jan. 6*; Jan. 13† (3); Feb. 3* (A); Feb. 10† (3); Mar. 3* (2); Mar. 17† (2); April 7*; April 14† (3); May 5*; May 12† (3); June 2* (2); June 16† (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Parker.

Brunswick—Jan. 6†; April 7; June 16†.
Columbus—Jan. 27; Feb. 3 (A); Feb. 17† (2); April 28 (2); June 23*.
New Hanover—Jan. 13*; Feb. 3† (2); Mar. 3† (2); Mar. 17*; April 14† (2); May 12*; May 26† (2); June 9*.
Pender—Mar. 24 (2).

NINTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Williams.

Bladen—Jan. 6; Mar. 17*; April 28†.
Cumberland—Jan. 13*; Feb. 10† (2); Mar. 3* (A); Mar. 10*; Mar. 24† (2); May 5† (2); June 2*.
Hoke—Jan. 20; April 21.
Robeson—Jan. 13† (A) (2); Jan. 27* (2); Feb. 24† (2); Mar. 17* (A); April 7* (2); April 21† (A); May 5* (A) (2); May 19† (2); June 9†; June 16.

TENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Frizzelle.

Alamance—Jan. 27† (A); Feb. 24* (A); Mar. 31†; May 12* (A); May 26† (2).
Durham—Jan. 6† (3); Feb. 17*; Feb. 24† (3); Mar. 17† (A); Mar. 24*; April 21† (A) (3); May 19*; May 26† (A) (3); June 23*.
Granville—Feb. 3 (2); April 7 (2).
Orange—Mar. 17; May 12†; June 9; June 16†.
Person—Jan. 20 (A); Jan. 27†; April 21.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Rousseau.

Ashe—April 14*; May 26† (2).
Alleghany—April 28.
Forsyth—Jan. 6 (2); Jan. 20† (2); Feb. 3 (2); Feb. 17† (2); Mar. 3 (2); Mar. 17† (2); Mar. 31 (2); April 14† (A) (2); May 5 (2); May 26† (A) (2); June 9 (2); June 23† (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Pless.

Davidson—Jan. 27*; Feb. 17† (2); April 7† (2); May 5*; May 26† (A) (2); June 23*.
Guilford—Jan. 6† (2); Jan. 20*; Feb. 3† (2); Feb. 17† (A) (2); Mar. 3* (2); Mar. 17† (2); Mar. 24* (A); Mar. 31† (A) (2); April 14† (A) (2); April 28*; May 12† (2); May 26; June 2† (2); June 16*.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Nettles.

Anson—Jan. 13*; Mar. 3†; April 14 (2); June 9†.
Moore—Jan. 20*; Feb. 10†; Mar. 24† (A) (2); May 19*; May 26†.
Richmond—Jan. 6*; Feb. 3†; Mar. 17†; April 7*; May 26† (A); June 16†.
Scotland—Mar. 10; April 28†.
Stanly—Feb. 3† (A) (2); Mar. 31; May 12†.
Union—Jan. 27*; Feb. 17† (2); Mar. 24†; May 5†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Alley.

Gaston—Jan. 13*; Jan. 20† (2); Mar. 10† (A); Mar. 17† (2); April 21*; May 19† (A) (2); June 2*.
Mecklenburg—Jan. 6*; Jan. 6† (A) (2); Jan. 20* (A) (2); Jan. 20† (A) (2); Feb. 3† (3); Feb. 3† (A) (2); Feb. 17† (A) (2); Feb. 24*; Mar. 3† (2); Mar. 3† (A) (2); Mar. 17* (A) (2); Mar. 17† (A) (2); Mar. 31† (2); Mar. 31† (A) (2); April 14†; April 21† (A); April 28† (2); April 28† (A) (2); May 12*; May 12† (A) (2); May 19† (2); May 26† (A) (2); June 9*; June 9† (A) (2); June 16†; June 23* (2).

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Clement.

Alexander—Feb. 3 (A) (2).
Cabarrus—Jan. 6 (2); Feb. 24† (2); April 21 (2); June 9† (2).
Iredell—Jan. 27 (2); Mar. 10†; May 19 (2).
Montgomery—Jan. 20*; April 7† (2).
Randolph—Jan. 27† (A) (2); Mar. 17† (2); Mar. 31*; June 23*.
Rowan—Feb. 10 (2); Mar. 3† (A) (2); May 5 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Sink.

Burke—Feb. 17; Mar. 10† (2); June 2 (3).
Caldwell—Feb. 24 (2); May 19† (2).
Catawba—Jan. 13† (2); Feb. 3 (2); April 7† (2); May 5† (2).
Cleveland—Jan. 6; Mar. 24 (2); May 19† (A) (2).
Lincoln—Jan. 20† (A) (2).
Watauga—April 21 (2); June 9† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Phillips.

Avery—April 7*; April 14†.
Davie—Mar. 17; May 26†.
Mitchell—Mar. 24 (2).
Wilkes—Mar. 3 (2); April 28† (2); June 2† (2).
Yadkin—Feb. 24*; May 12† (2).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Gwyn.

Henderson—Jan. 6† (2); Mar. 3 (2); April 28† (2); May 26† (2).
McDowell—Feb. 10† (2); June 9 (2).
Polk—Jan. 27 (2).
Rutherford—Feb. 24†; April 14† (2); May 12 (2); June 23† (2).
Transylvania—Mar. 31 (2).
Yancey—Jan. 20†; Mar. 17 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1941—Judge Bobbitt.

Buncombe—Jan. 13† (2); Jan. 27; Feb. 3† (2); Feb. 17; Mar. 3† (2); Mar. 17, Mar. 31; April 7† (2); April 21; May 5† (2); May 19; June 2† (2); June 16; June 23 (2).
Madison—Feb. 24; Mar. 24; April 28; May 26.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1941—Judge Armstrong.

Cherokee—Jan. 20† (2); Mar. 31 (2); June 16† (2).
Clay—April 28.
Graham—Jan. 6† (A) (2); Mar. 17 (2); June 2† (2).
Haywood—Jan. 6† (2); Feb. 3 (2); May 5† (2).
Jackson—Feb. 17 (2); May 19† (2); June 9* (A).
Macon—April 14 (2).
Swain—Jan. 13† (A) (2); Mar. 3 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Spring Term, 1941—Judge Warlick.

Caswell—Mar. 17 (2).
Rockingham—Jan. 20* (2); Mar. 3†; Mar. 10*; April 14†; May 5† (2); May 19* (2); June 9† (2).
Stokes—Jan. 6* (A); Mar. 31*; April 7†; June 23*.
Surry—Jan. 6; Jan. 13†; Feb. 10*; Feb. 17† (2); April 21*; April 28†; June 2†.

*For criminal cases.
†For civil cases.
‡For jail and civil cases.
(A) Special Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

Raleigh, criminal term, eighth Monday after the first Monday in March and September; civil term, second Monday in March and September. THOMAS DIXON, Clerk.

Fayetteville, third Monday in March and September. S. H. BUCK, Deputy Clerk.

Elizabeth City, fourth Monday in March and September. SADIE A. HOOPER, Deputy Clerk, Elizabeth City.

Washington, fourth Monday after the first Monday in March and September. J. B. RESPASS, Deputy Clerk, Washington.

New Bern, fifth Monday after the first Monday in March and September. MATILDA H. TURNER, Deputy Clerk, New Bern.

Wilson, sixth Monday after the first Monday in March and September. G. L. PARKER, Deputy Clerk.

Wilmington, seventh Monday after the first Monday in March and September. 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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1940

MRS. NANNIE W. CLARK v. THE HENRIETTA MILLS.

(Filed 8 January, 1941.)

1. **Corporations § 16—Right to declaration of accrued dividend on cumulative preferred stock before dividend is declared on any other stock may not be defeated by subsequent reorganization.**

The provision in a certificate of cumulative preferred stock that dividends due thereon shall be paid before any dividend on any other stock is set apart or paid, vests a property right in the holder which may not be defeated by subsequent reorganization or by legislative enactment, and the fact that, at the time of reorganization, there were no funds out of which the accrued dividends could be paid does not affect this result, since the right to accrued dividends is vested, and only the time of payment is conditioned upon the declaration of the dividend by the board of directors out of accrued profits or the insolvency and liquidation of the corporation.

2. **Same: Corporations § 39—Failure of holder of cumulative preferred stock to make positive protest against reorganization plan does not waive her right to accrued dividend.**

Evidence tending to show that the husband of plaintiff stockholder was her duly authorized agent and attended the meeting at which the plan of reorganization of the corporation was adopted, but held no proxy and did not vote her stock and gave notice to the president of the corporation immediately after the meeting that plaintiff was not in favor of the plan, that in response to letters requesting her to turn in her old stock and accept the new issue in accordance with the plan, her husband wrote the corporation that plaintiff had decided not to do anything in regard to her stock at that time, that plaintiff did not call for or accept the new stock

or cash dividends thereon, *is held* not to show a waiver by plaintiff of her right to have dividends accrued on her stock at the time of the reorganization paid before dividends on the new stock are set aside or paid, nor an implied consent by plaintiff to the reorganization plan.

3. Limitation of Actions § 3a—Action to enforce priority in payment of dividends is based on contract, and accrues when dividend is paid in violation of priority.

The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of the reorganization of the corporation declared and paid in accordance with the stipulation of the certificate before dividends are set aside or paid on any other stock, is based on contract, and plaintiff's request for injunctive relief is merely ancillary thereto, and plaintiff's cause of action arises when dividends are paid on the new stock before accrued dividends on her stock are paid, and her action instituted within three years thereafter is not barred.

4. Equity § 2—

Even when the action is peculiarly and essentially equitable in its nature, courts of equity will ordinarily be governed by the statute of limitations in applying the doctrine of laches, and it is only when plaintiff's delay in instituting the action has been prejudicial either to defendant or to intervening property rights that statutory limitations will be disregarded.

5. Same—

Where it is apparent that a corporation, having obtained the approval of more than 75% of its stockholders to its reorganization plan, was proceeding as a matter of right to reorganize without regard to the disapproval of minority stockholders, the failure of a minority stockholder to institute action until after three quarterly dividends had been paid on the new stock issued pursuant to the reorganization, does not prejudice the corporation, and therefore the delay will not support the invocation of the doctrine of laches.

6. Appeal and Error § 39b—

Where, upon the facts admitted and the evidence offered, peremptory instructions on each issue are warranted, error, if any, in the admission of other evidence and in the instructions of the court are harmless.

7. Corporations §§ 16, 39—Where certificate provides that prior preferred stock might be issued upon approval of holders of three-fourths of stock, plaintiff is not entitled to restrain payment of dividends on new stock prior to payment of dividends accruing on her stock subsequent to reorganization.

Plaintiff was the holder of cumulative preferred stock which stipulated that dividends due thereon should be paid before dividends on any other stock should be set apart or paid. The certificate further provided that with the consent of 75% or more of the holders of the preferred stock the corporation might issue other stock having priority over or equality with the old preferred stock. More than 75% of the holders of the preferred stock approved a subsequent reorganization plan under which new preferred stock bearing a smaller dividend rate was issued in exchange for the old preferred stock. *Held:* Although plaintiff, who did not consent to or approve the reorganization plan and did not exchange her stock

thereunder, is entitled to have dividends which had accrued on her stock up to the time of the reorganization paid before any dividends are paid on the new stock, she consented under the terms of her contract to the issuance of new preferred stock having priority over the old upon consent of 75% of the holders of the old stock, and she is bound by the assent thus given, and although she may not be compelled to surrender the certificates of her old stock in exchange for the new stock, she is not entitled to restrain the corporation from paying dividends upon the new prior preferred stock issued under the plan of reorganization before the payment of dividends accruing upon plaintiff's stock subsequent to the reorganization.

APPEAL by defendant from *Nettles, J.*, at August Term, 1940, of GUILFORD. Modified and affirmed.

Civil action to have a corporate reorganization, together with amendments to the charter of defendant, declared invalid as to plaintiff; to protect plaintiff's rights to accrued dividends on preferred stock claimed to be unlawfully invaded or defeated by the reorganization; to compel the payment of such dividends prior to the payment of dividends on reorganization stock; and to restrain defendant from the prior payment of dividends on any stock until dividends on plaintiff's preferred stock are first paid.

This action involves the same reorganization proceedings discussed in *Patterson v. Henrietta Mills*, 216 N. C., 728, 6 S. E. (2d), 531. The rights of the holder of preferred stock are here, as there, involved. The pertinent provisions contained in the certificates of preferred stock and the declared purposes of the reorganization in reference to the preferred stock are set forth in that opinion, to which reference is made.

The plaintiff, on and prior to the date of the adoption of the plan of reorganization, was the owner of one hundred fifty shares of the preferred stock of the defendant corporation. As of 1 July, 1937, accrued and unpaid dividends thereon amounted to $74.75 per share.

The plan of reorganization was adopted 18 August, 1937, and thereafter, on 15 September, 1937, on 15 December, 1937, and on 15 March, 1938, defendant paid dividends upon the prior preferred stock issued under the plan of reorganization before first paying the accumulated dividends, or any part thereof, accrued on plaintiff's stock.

Plaintiff has not exchanged her stock for new certificates and has not received or accepted the cash and stock dividend authorized by the plan of reorganization to be paid upon the preferred stock to be issued in lieu of old preferred stock.

Issues were submitted to and answered by the jury as follows:

"1. Is the plaintiff the holder and owner of the 150 shares of 7% cumulative preferred stock of the defendant described in paragraph 3 of the complaint?

"Answer: Yes.

"2. Did the plaintiff consent to the amendment to the charter of the defendant filed by the defendant with the Secretary of State of North Carolina on August 19, 1937, and to the terms and provisions of the same?

"Answer: No.

"3. What was the amount of accrued and unpaid dividends on each share of the defendant's then outstanding 7% cumulative preferred stock, as of August 18, 1937?

"Answer: $74.75.

"4. Did plaintiff protest in the meeting of stockholders on August 18, 1937, against the adoption of the plan of reorganization?

"Answer: No.

"5. Did the plaintiff protest against the consummation of the plan after its adoption at the meeting of stockholders and before its consummation and exchange of stock and payment of dividends on September 15, 1937, under the plan?

"Answer: No.

"6. Did the plaintiff protest or make any demand after September 15, 1937, and prior to February 9, 1939, the date of the letter from J. A. Spence, counsel?

"Answer: Yes.

"7. When was the suit instituted?

"Answer: 3-5-40.

"8. Did the defendant company issue and distribute new classes of stock, incur expenses in connection with the reorganization, declare and pay cash dividends to stockholders who exchanged their stock under the plan on the new preferred stock on September 15, 1937, and on the new prior preferred stock on December 15, 1937, and on March 15, 1938, or after the adoption of the plan of reorganization on August 18, 1937, and before March 5, 1940?

"Answer: Yes.

"9. Did the plaintiff impliedly consent to or acquiesce in the consummation of the plan of reorganization?

"Answer: No.

"10. Is the plaintiff estopped by laches, as alleged by the defendant?

"Answer: No.

"11. What percentage of stock consented to the adoption and consummation of the plan?

"Answer: 96 plus."

The court thereupon entered judgment invalidating the plan of reorganization to the extent that it adversely affects the preferred stock owned by plaintiff; requiring the defendant to discharge the accumulated and unpaid dividends on plaintiff's preferred stock before paying any dividends upon any other stock; and restraining the defendant from

declaring or paying dividends either in stock or in cash upon any other class of stock now or hereafter issued by it prior to the payment of the accumulated and unpaid dividends due the plaintiff. The defendant excepted and appealed.

Brooks, McLendon & Holderness for plaintiff, appellee.

Smith, Leach & Anderson, John E. Lawrence, and Smith, Wharton & Hudgins for defendant, appellant.

BARNHILL, J. When defendant issued to plaintiff her certificates of stock it, by the stipulations printed thereon, contracted to pay her "a fixed, annual, guaranteed, cumulative dividend," of 7%, payable quarterly "before any dividend shall be set apart or paid on any stock preferred or common, heretofore or hereafter issued by this corporation."

Under this contract plaintiff became vested with a property right in and to such dividends as they accrued, which property right cannot be divested without her consent, either by a subsequent reorganization or by legislative enactment. *Patterson v. Hosiery Mills,* 214 N. C., 806, 200 S. E., 906; *Patterson v. Henrietta Mills, supra.* It is only the time of payment thereof which is conditioned either upon the action of the board of directors in declaring the dividend out of accrued profits or insolvency and liquidation of the corporation. That there was not presently in the treasury at the time of the reorganization sufficient net profits out of which the accrued dividends might be paid does not affect this result. Defendant "guaranteed" the payment of the dividends due plaintiff before any dividend on any other stock "shall be set apart or paid."

It follows, therefore, that upon admitted facts and the uncontradicted evidence plaintiff is entitled to relief unless the defendant can sustain one or more of the affirmative defenses relied on by it, to wit: (1) implied consent; (2) waiver; and (3) laches.

Defendant has failed to offer any evidence tending to show that plaintiff has either waived her rights or impliedly consented to an impairment thereof.

Her husband, who was her duly authorized agent, attended the meeting at which the plan of reorganization was adopted but he held no proxy (of which fact he gave due notice) and he did not vote her stock. As the jury has found in its answer to the sixth issue, under the instructions of the court, he gave notice to the president of the defendant immediately after the meeting that plaintiff was not in favor of the plan. On 27 September, 1937, in response to letters requesting plaintiff to turn in her old stock and accept the new issue bearing the lower rate of interest, her husband wrote the defendant that plaintiff "has decided not to do anything in regard to the preferred stock she holds at this time." She

did not call for or accept the new stock the defendant proposed to issue in lieu of her old stock. Nor did she accept the stock and cash dividend thereon. Thus the defendant was put on notice that the plaintiff did not approve and was not assenting to the plan of reorganization.

Plaintiff was not required to enter any positive protest against the plan and her failure to do so constituted neither waiver of her rights nor an implied consent to the plan. The defendant was, or should have been, as fully aware of its obligations as plaintiff was of her rights.

Essentially this action sounds in contract. Plaintiff invokes injunctive relief merely as an ancillary remedy incident to her main cause of action to preserve and enforce her rights. The three-year statute of limitations, C. S., 441, applies. The plan of reorganization was adopted 18 August, 1937. The defendant, on 15 September, 1937, paid a dividend on other stock before first paying the accrued dividends on stock held by plaintiff in violation of the terms of its contract. It was only then that her cause of action arose. As this action was instituted within three years thereafter, it is not barred by the statute of limitations.

Nor is plaintiff estopped by laches to assert her rights. Even when the courts are administering equitable relief, they are governed, ordinarily, by the statute of limitations. *Taylor v. McMurray,* 58 N. C., 357; *Marshall v. Hammock,* 195 N. C., 498, 142 S. E., 776. It is only when the action is peculiarly and essentially in the nature of an action in equity at common law that the doctrine of laches will accelerate, or rather disregard, statutory limitations. Even then this is done only when it is made to appear that the delay by the plaintiff in the institution of the action has been prejudicial either to the defendant or to intervening property rights. *McAden v. Palmer,* 140 N. C., 258; *Teachey v. Gurley,* 214 N. C., 288, 199 S. E., 83.

The record does not sustain the contention of the defendant that it has been prejudiced by the alleged delay in the institution of this action, which delay was in part due to the request of defendant, in letters written by it to plaintiff, that she postpone the institution of her action "pending the ultimate determination of the Patterson case."

The plan of reorganization was adopted and the defendant, with knowledge that the plaintiff and other stockholders had not approved such plan and had not surrendered their stock for exchange, paid dividends in violation of the terms of its contract. It is apparent that the defendant was asserting its right to proceed with the reorganization upon the approval of 75% of the holders of the original preferred stock. It continued to assert its right to proceed after an action was instituted 9 May, 1938, by other nonassenting stockholders, and it still undertakes to maintain its position. There is nothing in the record to indicate that it would have abandoned its plan however vigorous and persistent objections made by plaintiff may have been.

It follows that the errors, if any, in the admission of evidence and in the instructions of the court are harmless. On the facts admitted and the evidence offered, a peremptory instruction on each issue submitted was warranted.

While the plaintiff has a vested right in the unpaid dividends which had accumulated on her preferred stock at the time of the adoption of the plan of reorganization, her contract further provides that with the consent of 75% or more of the holders of the outstanding preferred stock, the corporation may issue other stock "having priority over or equal in rank with this issue of preferred stock." More than 75% of the holders of the then outstanding issue of preferred stock having assented to the plan of reorganization, the plaintiff, as to dividends accruing on her stock subsequent to the adoption of the plan of reorganization, is bound by the assent thus given. In effect, she agreed that the approval of less than all the stockholders but more than 75% thereof should be deemed and held to be the consent of all.

Under this agreement plaintiff cannot be compelled to surrender her certificates of stock and to accept a new certificate in lieu thereof guaranteeing a dividend at a rate less than 7% per annum. The defendant may, however, with the approval of 75% of the holders of the original preferred stock, which consent has been obtained, issue a new stock having priority over the stock held by plaintiff as to the payment of dividends thereafter accruing. In so far as the judgment entered undertakes to restrain the defendant from paying dividends upon the prior preferred stock issued under the plan of reorganization before the payment of dividends accruing upon plaintiff's stock subsequent to 15 September, 1937, it is erroneous.

To this extent the judgment entered must be

Modified and affirmed.

RUFUS L. PATTERSON, JOHN F. WILY AND J. LATHROP MOREHEAD, TRUSTEES U/W OF MRS. LUCY L. MOREHEAD, AND THE FIDELITY BANK, TRUSTEE BY ASSIGNMENT, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, v. THE HENRIETTA MILLS.

(Filed 8 January, 1941.)

1. Corporations §§ 16, 39: Trusts § 5—Trustee held not to have assented to reorganization in his capacity as trustee, and therefore cestuis were not bound by his acts.

Evidence that one of the trustees holding stock for *cestuis que trustent* advocated the reorganization of the corporation and thereafter was elected a director, but that prior to the meeting at which the reorganization plan

was finally adopted, told the president and a director of the corporation that his cotrustees did not agree to the reorganization plan, that he would not vote the trustees' stock, and that at a board meeting he offered to resign as a director but was urged to distinguish between his duties as director and as trustee and remain a director, but that he voted in favor of the reorganization only proxies obtained by him from other stockholders, *is held* to show that he did not act or purport to act as representative of the trustees and gave due notice of such fact to the corporation, and therefore his conduct did not constitute consent by the trustees, either express or implied, and does not bind the *cestuis que trustent;* and further, one trustee is without authority to bind his cotrustees.

2. Corporations § 20—

Notice to the president of a corporation is notice to the corporation.

3. Corporations §§ 16, 39: Estoppel § 6d—Where evidence discloses that plaintiffs gave notice of their intention, estoppel by conduct is untenable.

Defendant corporation's contention that plaintiffs, holders of stock as trustees, by their conduct misled other stockholders and caused them to approve the reorganization plan for the corporation, and that therefore plaintiffs should be estopped from attacking the reorganization, *is held* untenable, first, because the stockholders alleged to have been thus injured are not parties and their rights may not be determined in this action, and second, because the evidence discloses that plaintiff trustees gave notice to more than a majority of the holders of stock and holders of proxies that they did not approve the reorganization.

4. Corporations § 9—

Notice to the proxy is notice to the owner of the stock.

APPEAL by plaintiffs and by defendant from *Harris, J.,* at February-March Term, 1940, of DURHAM. Affirmed.

Civil action to have a corporate reorganization, together with amendments of charter of defendant, declared invalid as to plaintiffs; to protect the plaintiffs' rights to accrued dividends on preferred stock claimed to be unlawfully invaded or defeated by the reorganization; to compel the payment of such dividends prior to the payment of dividends on reorganization stock; and to restrain defendant from the prior payment of dividends on any stock until dividends on plaintiffs' preferred stock are first paid.

There was a verdict and judgment for the plaintiffs. The defendant excepted and appealed. The plaintiffs likewise excepted and appealed.

Albert W. Kennon, Jr., and Marshall T. Spears for plaintiffs.

Smith, Leach & Anderson, John E. Lawrence, and Robert M. Gantt for defendant.

BARNHILL, J. This is a companion case to *Clark v. Henrietta Mills, ante,* 1. The pertinent facts are there stated.

Plaintiffs excepted to the refusal of the court below to sign judgment tendered by them. They further assign as error the restricted nature of the judgment entered, contending that it does not accord them the full relief to which they are entitled. On their appeal the decision in the *Clark case, supra,* is controlling.

That decision is likewise controlling on defendant's appeal unless the conduct of the plaintiff Morehead constitutes affirmative assent by the plaintiffs, trustees.

In 1933, the defendant having failed for a number of years to pay the dividends on the preferred stock, Morehead, acting in behalf of the plaintiffs, instituted an investigation. He called on defendant for information and later procured a list of preferred stockholders. Prior to the meeting on 13 December, 1934, he wrote each of them calling their attention to certain conditions and urging that they attend the meeting. As a result he obtained a number of proxies, attended the meeting and was elected a director. He served as such until December, 1937.

Upon his election as a director he began to advocate a reorganization of the capital structure and actively participated in the formation of the plan which was finally adopted.

After receiving an offer to exchange Martel Mills stock for the stock held by plaintiffs he told Jones, a director active in the reorganization, "being a director, I am going to leave the decision on any reorganization matters or any exchange of Martel Mills Stock for the Henrietta Mills Stock up to Mr. Patterson and Mr. Wily."

On 31 July, 1937, at the board meeting, he told the directors that his co-trustees did not agree to the plan and that, therefore, he felt he should resign as director. In answer the president of defendant said: "Well, Mr. Morehead, you should distinguish between your duty as a director and as a trustee and, if you feel that this is for the best interest of the corporation . . . you should remain as a director and vote for it." Morehead replied: "Well, I do feel that it is for the best interest of the corporation and stockholders and under those conditions, I will remain as a director."

Prior to the meeting at which the plan was finally adopted, Morehead told Jones that his co-trustees did not agree and that he was not going to vote the trustees' stock, but would vote other proxies held by him. He likewise so advised the president. Huggins then told him that it didn't matter, that they had well above the amount required but he would, of course, like to have 100% approval.

Thus, it appears that Morehead did not act, or purport to act, as the representative of the trustees. Of this he gave due notice, and notice to the president of the corporation was notice to the corporation. 3 Fletcher's Cyc. on Corps., sec. 791; 2 Mechem on Agency (2d), sec. 1831;

3 Thompson on Corps. (3d), sec. 1784. The defendant was in nowise misled by his conduct. On the contrary, it appears that it, through its officers, proposed to proceed without the approval of all of the stockholders and with full knowledge that some were opposed to the plan.

As Morehead's conduct did not constitute consent, either express or implied, by the trustees as such, we need not discuss the power of one trustee to bind the others further than to say that he was without authority to do so. 3 Bogert on Trusts, 1761, sec. 554; 65 C. J., 667, sec. 531; *Larmer v. Price,* 183 N. E. (Ill.), 230; *In re Kirkman's Estate,* 256 N. Y. Supp., 495; Restatement of Trusts, sec. 194; Scott on Trusts (1939 Ed.), 1048, sec. 193.

Defendant stresses the argument that plaintiffs, by their conduct, misled other stockholders and caused them to approve the plan and that to now permit plaintiffs to recover would be inequitable and unjust to them. This contention disregards the fact that the corporation is a separate and distinct entity. It made the contract and, by the payment of dividends on other stock, it breached the terms thereof. The assenting stockholders are not parties to this action. If they have any grievance—which is not conceded—their rights may not be determined in this action.

Even so, it appears that there was notice of plaintiffs' objections given to holders of more than a majority of the preferred stock. Huggins, the president, held 929 shares; Jones, a director, held 955 shares; and Huggins, Jones and Davenport, together, held proxies for 4,030 shares, and notice to the proxy was notice to the owner. *Seamon v. Ironwod Corp.,* 278 N. W. (Mich.), 51.

On both appeals the judgment below is

Affirmed.

M. C. COOK, D. C. JOHNSON AND MAGGIE JOHNSON HARRIS, ADMINISTRATORS OF S. E. JOHNSON, DECEASED, v. J. WILEY BRADSHER AND RUFUS H. JOHNSON, TRUSTEE FOR J. WILEY BRADSHER.

(Filed 8 January, 1941.)

1. Clerks of Court § 3—

The clerk of the Superior Court is a court of very limited jurisdiction and has only that authority given by statute.

2. Judgments § 9—

The clerk of the Superior Court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon tender by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. Public Laws, Extra Session 1921, ch. 92, sec. 1 (9), 12; C. S., 595.

3. Judgments § 22b—

A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause.

APPEAL by defendants from *Stevens, J.*, at October Civil Term, 1940, of PERSON.

Civil action instituted 2 September, 1938, for cancellation of deed of trust and for surrender of notes secured thereby, heard upon motion in the cause to set aside judgment by default final entered by clerk of Superior Court upon the failure of defendants to file answer within the time allowed by law.

Plaintiffs, in their complaint, allege substantially these facts:

(1) That on 31 March, 1924, as evidence of balance of purchase price of a certain lot of land in Person County conveyed to them by defendant, J. Wiley Bradsher, and his wife, plaintiff M. C. Cook and S. E. Johnson executed and delivered to J. Wiley Bradsher nine promissory notes in the amount of $200 each, bearing interest from date, and maturing one each year, the first on 1 April, 1925, and the last 1 April, 1933, and as security therefor they executed to defendant, Rufus H. Johnson, as trustee, a deed of trust on the land so purchased, which deed of trust was duly registered.

(2) That at the time of the purchase of the land, as above stated, the parties agreed verbally that M. C. Cook should have the southern part of the lot upon which is located a blacksmith shop, and that S. E. Johnson should have the northern part; that thereafter and at request of defendant, J. Wiley Bradsher, plaintiff M. C. Cook, for a rental of $5.00 per month, rented the blacksmith shop to Rufus H. Johnson, who was to pay the rent to defendant J. Wiley Bradsher, to be credited upon the purchase money notes above described; that Rufus H. Johnson took possession of the shop at once and has remained in possession of same from that date until the present time; and that "plaintiffs are informed, believe and allege that he has paid the rent to J. Wiley Bradsher, and that M. C. Cook is entitled to credits of $5.00 each and every month from date until the shop is surrendered by Rufus H. Johnson."

(3) "That both M. C. Cook and S. E. Johnson have made numerous payments on the notes . . ."

(4) That plaintiffs, D. C. Johnson and Maggie Johnson Harris, who on 20 December, 1937, were duly appointed administrators of the estate of S. E. Johnson, who died intestate on 4 December, 1937, "advertised for creditors as provided by law, and have given J. Wiley Bradsher personal notice of the administration and requested him to file his account, and he has failed and refused . . . to file an itemized

verified account as required by law," and that on request of plaintiff M. C. Cook he has failed and refused to render a statement of the amount due.

(5) "That according to the records kept by the plaintiffs, the amount now due J. Wiley Bradsher on account of said notes, with interest calculated to October 1, 1938, is $290.08, of which amount S. E. Johnson's estate is due the sum of $180.29, and M. C. Cook is due $109.79;" and that "M. C. Cook is due to J. Wiley Bradsher the sum of $97.59, with interest from September 22, 1937, to October 1, 1938, amounting to $5.90 . . . for a new metal roof placed on the blacksmith shop . . ." that is, "the total amount due J. Wiley Bradsher as of October 1, 1938, is $393.57."

(6) That "plaintiffs hereby tender to J. Wiley Bradsher the sum of $393.57 in full payment of all amounts due him and to pay the money into the office of the clerk of the Superior Court of Person County, North Carolina."

On Monday, 7 November, 1938, the assistant clerk of Superior Court of Person County entered judgments in which, after finding that plaintiffs had paid into court the sum of $393.57, that time for filing answer had expired on 20 October, 1938, and that both defendants had failed to file answer, it is adjudged that "J. Wiley Bradsher recover from the plaintiffs the sum of $393.57; that from said amount the defendant J. Wiley Bradsher pay the cost of this action amounting to $....., and the defendants J. Wiley Bradsher and Rufus H. Johnson are hereby ordered and directed to cancel the deed of trust . . . and the defendant J. Wiley Bradsher is further directed to deliver to M. C. Cook and D. C. Johnson and Maggie Johnson Harris, administrators, all notes that he now has in possession for the purchase price of the lots described in the complaint in this action, together with the deed of trust as set out above."

On 3 August, 1940, defendants, through their attorneys, filed motion in the cause, moving the court to set aside and vacate the said judgment for that the clerk of Superior Court is without jurisdiction to enter judgment by default final in this action, and for that in the complaint no cause of action is stated against the defendants by the plaintiffs, administrators.

In the motion it is stated that at the time of the filing of this action J. Wiley Bradsher held eight of said promissory notes, secured by the deed of trust, and that "there is now due and owing and unpaid on said notes and deed of trust the approximate sum of $1,600.00 principal and $ ..... interest, all of which is fully set out in answer by the movants filed in a second suit pending in the Superior Court between the same parties to this action, which is referred to and asked to be taken as a

part of the motion. In the further defense therein, and for affirmative relief, the defendants aver that S. E. Johnson and M. C. Cook have paid in full note No. 1, and same has been delivered to them; that they have also paid $432.95 on the accrued interest; that, after allowing all credits and offsets, M. C. Cook and the estate of S. E. Johnson owe J. Wiley Bradsher the sum of $2,940, principal and interest; that the action is prematurely instituted, that is, within one year next after the appointment of administrators of the estate of S. E. Johnson, which estate is insolvent.

Without waiving any rights the attorneys for the parties agreed that the motion be heard by the judge holding court at October Term of Person County. The judge holding said term being of opinion that the judgment of the clerk of Superior Court "is in all respects valid and binding," denied the motion and adjudged that "the judgment of the clerk, dated November 7, 1938, be, and the same is hereby, in all respects approved and confirmed."

Defendants appeal therefrom to Supreme Court, and assign error.

Nathan Lunsford and Melvin H. Burke for plaintiffs, appellees.
Cooper A. Hall and F. O. Carver for defendants, appellants.

WINBORNE, J. In brief of plaintiffs, appellees, it is stated that "The only question involved is the legality of the judgment signed by the clerk of Superior Court of Person County, November 7, 1938." Upon that arises this question:

When defendants in this action failed to answer, did the clerk of Superior Court have authority, upon the allegations of the complaint, to render a judgment by default final? The statute points to a negative answer. Public Laws, Extra Session 1921, ch. 92, subsection 12 of section 1.

In this State the clerk of Superior Court is a court of very limited jurisdiction, having only such authority as is given by statute. *McCauley v. McCauley,* 122 N. C., 288, 30 S. E., 344; *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579; *Beaufort County v. Bishop,* 216 N. C., 211, 4 S. E. (2d), 525.

The statute, Public Laws, Extra Session 1921, ch. 92 relating to civil procedure in regard to process and pleadings, and to expediting and to reducing the cost of litigation, provides in subsection 9 of section 1 that "if no answer is filed, the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by sections 595, 596 and 597 of Consolidated Statutes of 1919, and all present or future amendments of said sections"; and in subsection 12 of section 1, that "the clerks of the Superior Courts are authorized to enter the following

judgments: (a) All judgments of voluntary nonsuit; (b) all consent judgments . . . (c) in all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the Superior Court. (d) All judgments by default final and default and inquiry as are authorized by sections 595, 596, 597 of the Consolidated Statutes, and in this act provided." It is noted that C. S., 596, pertains to judgments by default and inquiry, and C. S., 597, to judgments by default on counterclaims set up by answer. Under C. S., 595, judgment by default final may be had on failure of defendant to answer "(1) When the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation . . ."

Other sections are patently not applicable here.

Applying these statutes to the facts alleged in the complaint in the present action, and by process of elimination, it is seen that the clerk of Superior Court is given no authority to enter the judgment sought to be set aside and vacated. The action is not upon notes, bill, bond, stated account, balance struck or other evidence of indebtedness. It is not to recover for "the breach of an express or implied contract to pay . . . a sum of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation." But, rather, the purpose is for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by the plaintiffs to defendant of an amount of indebtedness which plaintiffs alleged they owe to defendant on their notes. Indeed, the judgment is in favor of defendants and against the plaintiffs, and taxes the defendants with the cost.

The clerk having undertaken to act in a case in which he has no authority to render a judgment by default final, the purported judgment is subject to attack and may be set aside and vacated. Hence, there is error in the judgment below. The cause will be remanded for further proceedings on the motion of defendants in the light of this opinion and in accordance with law in such cases.

We deem it inappropriate at this time to advert to the further contention of appellant that, in so far as the plaintiffs, administrators, are concerned, the action is not maintainable within one year next after their appointment.

The judgment below is

Reversed.

STATE v. LEROY WAGSTAFF.

(Filed 8 January, 1941.)

1. Criminal Law § 78f—

It is not necessary that it appear of record what the answer of the witness would have been to a question asked by defendant's counsel on cross-examination in order that defendant's exception to the action of the court in sustaining the State's objection to the question be considered on appeal.

2. Criminal Law § 29g: Rape § 7—

In this prosecution for rape, a physician testified for the State in regard to his examination of prosecutrix, and also stated that he had had two other like cases. Defendant's counsel, on cross-examination, asked him whether the other cases had exhibited like calm. *Held:* The State's objection to the question was properly sustained, since the witness' answer would have related to *res inter alios acta.*

3. Criminal Law § 33—

Unless challenged, the voluntariness of a confession will be taken for granted.

4. Same—

The fact that the defendant was under arrest and a number of officers were present at the time it was made does not *ipso facto* render a confession incompetent for lack of voluntariness.

5. Same—

Where the court hears evidence offered by the State tending to show that the confession sought to be introduced in evidence was voluntary, and defendant offers no evidence in regard thereto, the conclusion of the court upon the evidence that the confession was competent is not reviewable.

6. Criminal Law § 38a—

Photographs of the scene of the crime are competent and are properly admitted for the limited purpose of explaining the testimony of the witnesses.

7. Same—

Since photographs are competent only to explain the testimony of the witnesses, testimony as to lost photographs is incompetent and is properly excluded, since photographs not produced cannot be used to explain testimony.

8. Criminal Law § 53g—

An exception to the court's statement of contentions in the charge will not be sustained when the matter asserted as error was not brought to the court's attention in time to afford opportunity for correction.

9. Criminal Law §§ 40, 53h—Charge held without error when construed as a whole.

In this prosecution for rape, defendant put his character in issue and offered evidence of his good character. The court charged that the char-

acter evidence related to the credibility of the witnesses "except as to defendant," to which defendant objected. Immediately following this charge the court instructed the jury that defendant "not only gets that benefit from testimony as to good character, but further, testimony of good character on the part of defendant becomes and is substantive evidence going to the question of guilt or innocence." *Held:* The instruction construed contextually as a whole was not erroneous but was a correct statement of the law.

10. Criminal Law § 53d—When charge on less degrees of crime is not required by evidence, exception for failure to charge more fully thereon is untenable.

Since the court need not instruct the jury as to less degrees of the crime charged when there is no evidence of defendant's guilt of such less degrees, an instruction that a verdict of guilty of less degrees of the crime is permissible only when there is evidence tending to support a milder verdict but that a milder verdict would not be disturbed since it would be favorable to defendant, followed by definitions of less degrees of the crime charged, cannot be held for error for failing to charge more fully upon the question of the right to convict defendant of such less degrees of the crime.

11. Criminal Law §§ 59, 81a—

A motion to set aside a judgment as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant same is not reviewable on appeal.

12. Rape § 10—

A verdict of guilty of rape not only supports sentence of death but makes such sentence mandatory. C. S., 4204.

APPEAL by defendant from *Johnston, Special Judge,* at May Term, 1940, of ALAMANCE. No error.

The State's evidence tended to show that the defendant, a young Negro man, in the nighttime, during the absence of her husband, entered her residence and got in the bed where the prosecutrix, a middle-aged white woman, was sleeping, and by force and threats, and against her will, had sexual intercourse with her.

The defendant's evidence tended to show the defendant entered her residence upon the invitation of the prosecutrix, in the nighttime, during the absence of her husband, and there had sexual intercourse with her with her consent.

The jury returned a verdict of guilty of rape as charged in the bill of indictment, and from judgment of death predicated upon the verdict the defendant appealed, assigning errors.

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

William L. Robinson for defendant, appellant.

SCHENCK, J. The first exceptive assignment of error discussed in defendant's brief is addressed to the court's sustaining the State's objection to the interrogatory propounded by defendant's counsel to the State's witness, a physician, as follows: "And in those other instances was there the same measure of calm and placidity that you observed here?" The witness had testified that he was called to see the prosecutrix in the early morning after the alleged assault was committed upon her and that he found one small mark "just reddened and might have been caused by trauma, blow or force or something" on her thigh, and that "I think I have had two other cases, similar cases to this one."

The answer that the witness would have given had he been permitted to answer the interrogatory, or what the defendant proposed to prove by the interrogatory, does not appear in the record, but since the interrogatory was propounded on cross-examination of an adverse witness it may not be essential that this should so appear to have the exception considered, but whether the answer would have been in the affirmative or in the negative it would have been incompetent as *res inter alios acta.* And even if this were not true the failure to permit answer to the interrogatory is rendered harmless by the subsequent statement of the witness: "I have no opinion as to her (prosecutrix') nervous temperament in a situation like that." This assignment of error cannot be sustained.

The second, third and fourth assignments of error discussed in the defendant's brief are addressed to the court's refusal to sustain his objection to the testimony of certain witnesses as to confessions made by the defendant after his arrest. The State's evidence tends to show that in the courthouse in Graham within a half hour after his arrest the defendant told the officers that he had entered the residence of the prosecutrix when he knew her husband was absent and against her will had sexual intercourse with her, and that the following night in the jail in Greensboro the defendant signed a statement to the same effect. The sheriff of Alamance County and the jailer of Guilford County both testified that no threats were made to extort and no promises held out to induce the confessions, and that the prisoner was warned that any statements made by him would be used against him. When the evidence of the confessions were offered the defendant tendered no evidence of their involuntariness as he was permitted to do. *S. v. Whitener,* 191 N. C., 659. Unless challenged, the voluntariness of a confession will be taken for granted. *S. v. Sanders,* 84 N. C., 729; *S. v. Richardson,* 216 N. C., 304. The fact that the defendant was under arrest and a number of officers were present at the time it was made does not *ipso facto* render a confession incompetent for lack of voluntariness. *S. v. Murray,* 216 N. C., 681. Where the evidence is conflicting as to voluntariness of a confession, and the trial judge finds that such confession was volun-

tarily made and admits it to be introduced and there is any evidence to support such finding, the conclusion of the judge is not reviewable, *S. v. Whitener, supra,* and *a fortiori* when there is no evidence tendered of coercion or inducement. These assignments cannot be sustained.

The fifth and sixth exceptive assignments of error discussed in defendant's brief are addressed to the admission in evidence of certain photographs of the house wherein it was contended the crime was committed and to the exclusion of certain testimony relative to certain photographs that were lost. The photographs were competent for the limited purpose of explaining the testimony of the witnesses and were admitted only for this purpose. *S. v. Perry,* 212 N. C., 533. The testimony as to lost photographs was incompetent, since photographs not produced obviously could not be used to explain testimony. These exceptions cannot be sustained.

The seventh and eighth assignments of error discussed in defendant's brief are addressed to certain excerpts from the charge, namely: in recapitulating the evidence his Honor stated that the prosecutrix told someone soon after the alleged crime was committed that "she had been abused," and that the defendant soon after his arrest "in a rather boastful manner told how he had had intercourse with this white woman, said he wanted to get it over with and tell the truth about it." We think these expressions are fair interpretations of the evidence, but even if they were not, it was incumbent upon the defendant to call the attention of the court to the errors, if errors they were, at the time they were made in order to permit the court to make correction, and failing to do this the assignment made for the first time in this Court cannot be sustained. *S. v. Hobbs,* 216 N. C., 14.

The ninth exceptive assignment of error discussed in the defendant's brief is addressed to the following excerpt from the charges: " . . . character evidence always goes to the credibility of the witness, that is, it being the theory of the law that a man of good character is more likely possibly to tell the truth than a man of bad character. That is true in every instance except as to the defendant." Standing alone, this would unquestionably constitute prejudicial error, but when read in connection with what immediately preceded and followed it there is no error. The paragraph in full reads: "Now as to character witnesses, character evidence always goes to the credibility of the witness, that is, it being the theory of the law that a man of good character is more likely possibly to tell the truth than a man of bad character. That is true in every instance except as to the defendant. Then in the defendant, he not only gets that benefit from the testimony as to good character, but further, testimony of good character on the part of the defendant becomes and is substantive evidence going to the question of guilt or innocence."

Since the defendant had put his character in issue and had offered evidence of his good character, this charge, when read contextually and not disjointedly, was in accord with the decisions of this Court. *S. v. Moore,* 185 N. C., 637.

The tenth exceptive assignment of error discussed in defendant's brief is addressed to the following excerpt from the charge: "A verdict of a lesser degree as I have called your attention, to the crime charged in the bill of indictment, is permissible only when there is evidence tending to support a milder verdict although there are decisions by our Court if without such supporting evidence a verdict is rendered for a lesser offense the same will not be disturbed because it is in favor of the prisoner." This was practically all the court told the jury relative to the right to convict the defendant of a lesser offense except to follow it with instructions as to what it took to constitute an assault with intent to commit rape and an assault upon a female. There was no error in not instructing more fully upon the question of the right to convict of a lesser offense, and there would have been no error in omitting any mention of such a right, since there is in the record no evidence to sustain a verdict of guilty of a lesser offense. This assignment cannot be sustained.

The eleventh exceptive assignment of error discussed in the defendant's brief is to the following excerpt from the charge: "That he (the defendant) is a strong healthy young negro with the normal appetite of a young negro, that he had had his eye on this woman." The statement was used in stating the contention of the State and no objection was made thereto at the time in order to give the court an opportunity to make correction if there was an error (which to us is not apparent), and objection made for the first time in this Court cannot be sustained. *S. v. Hobbs, supra.*

The twelfth and thirteenth exceptive assignments of error discussed in the defendant's brief are addressed to the court's refusal to grant the defendant's motion to set aside the verdict as being contrary to the greater weight of the evidence and to the entering of the judgment of death. These exceptions are formal and are disposed of in the discussion of the exceptions that preceded them. The granting of a motion to set aside a judgment as being against the weight of the evidence is within the discretion of the trial judge and his refusal to grant same is not reviewable on appeal. *S. v. Caper,* 215 N. C., 670. The judgment is not only sustained by the verdict, but is made mandatory thereupon by the statute, C. S., 4204.

This case presented but one issue, namely, was the sexual intercourse by the defendant with the prosecutrix obtained by her consent or by his force. The evidence of the State and of the defendant, sordid in

extreme, was in direct conflict; and when contemplated with an unagitated mind seems unreasonable and unreal. The entry into a dwelling house of a white woman, in the absence of her husband, by a young Negro man and the ravishment by him of her, to the average mind presents an unnatural story; and likewise the extending of an invitation by a white woman to a Negro man to enter her dwelling to voluntarily indulge in sexual intercourse with him to the average mind presents an equally unnatural story. However this may be, the issue raised by the conflicting evidence was fairly submitted to the jury and the jury has spoken and the judgment has been pronounced. Notwithstanding the able and earnest efforts of defendant's counsel and the gravity of the result, the judgment must be sustained, since upon the record we find

No error.

W. W. ROSE v. TALITHA ROSE.

(Filed 8 January, 1941.)

1. Wills § 42—

Where the devisee of an intervening life estate dies prior to the first taker, her life estate is at an end.

2. Wills § 33b—

The rule in *Shelley's case* applies equally whether the remainder to the heirs is limited mediately or immediately after the estate to the ancestor.

3. Same—

The rule in *Shelley's case* is a rule of law, and its application depends not upon the estate intended to be devised to the ancestor but upon the estate devised to the heirs, the rule being applicable if the limitation over is to the same persons who would take the same estate as heirs, since the law will not permit a person to take in the character of heir unless he takes also in the quality of heir.

4. Same—Rule in Shelley's case held applicable to devise in question.

Testator devised the land in question to his son "his lifetime" then to his son's wife for her life or widowhood "but in case" the son "have any heirs said land to go to said heirs." *Held:* There is no reverter and no limitation over in case the first taker should "die without heirs" and nothing to indicate the use of the word "heirs" in any restricted sense, and the rule in *Shelley's case* applies to give an estate for life to the son, an intervening life estate to his wife, and a fee simple in expectancy to the son, and upon the termination of the intervening life estate by the death of his wife, the son may convey in fee simple.

APPEAL by defendant from *Carr, J.*, at November Term, 1940, of JOHNSTON.

Controversy without action submitted on an agreed statement of facts.

Plaintiff, being under contract to convey a 79-acre tract of land to defendant, duly executed and tendered deed sufficient in form to invest the defendant with a fee-simple title to the property, and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed and refuses to make payment of the purchase price on the ground that the title offered is defective.

The court, being of opinion that upon the facts agreed, the deed tendered was sufficient to convey a fee-simple title to the *locus in quo,* gave judgment for the plaintiff, from which the defendant appeals, assigning error.

Wellons & Wellons for plaintiff, appellee.
W. O. Rosser, Jr., for defendant, appellant.

STACY, C. J. The question in difference arises out of the construction of the following item in the will of J. C. Rose:

"5. I give and bequeath to my son, W. W. Rose, the Pierce place where he now lives . . . his lifetime, then to his wife, Sarah, her life time or widowhood but in case said W. W. Rose have any heirs said land go to said heirs."

It is conceded that if W. W. Rose take a fee simple in the land devised to him under the above clause in his father's will, the deed tendered is sufficient, and the judgment in favor of the plaintiff is correct, but the defendant questions the devise as vesting in W. W. Rose a fee-simple estate.

The record states that plaintiff's wife, mentioned as Sarah in the will, died in 1937, leaving her surviving the plaintiff, her husband, and no children, as none was born to their marriage. The plaintiff has not remarried, and he has no children. The intervening life estate of plaintiff's wife, Sarah, is therefore at an end, she having predeceased her husband.

It would seem that according to what was said in *Cooper, Ex parte,* 136 N. C., 130, 48 S. E., 581, the limitations in the present devise are so framed as to attract the rule in *Shelley's case,* which says, in substance, "that if an estate in freehold be limited to A., with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A., the ancestor." *Martin v. Knowles,* 195 N. C., 427, 142 S. E., 313. It operates to vest in the first taker a fee simple or a fee tail, as the case may be, divided or split by intervening limitations, where there are any. *Welch v. Gibson,* 193 N. C., 684, 138 S. E., 25; *Bank v. Dortch,* 186 N. C., 510, 120 S. E., 60. There were intermediate estates in *Shelley's case* itself. *Benton v. Baucom,* 192 N. C., 630, 135 S. E., 629.

A very satisfactory statement of the rule by Lord Macnaghten will be found in *Van Grutten v. Foxwell,* Appeal Cases, Law Reports (1897), at p. 658: "It is a rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

It is hardly necessary to observe that every part of this statement is deserving of attention, from the opening words, which declare it to be "a rule in law," to the last clause, which says that "the heirs" can never take by purchase when the rule applies. "In determining whether the rule in *Shelley's case* shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. The material inquiry is, What is taken under the second devise? If those who take under the second devise take the same estate, they would take as heirs or heirs of his body, the rule applies"—*Perley, C. J.,* in *Crockett v. Robinson,* 46 N. H., 454. "It (The Rule) applies when the same persons will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent"—*Brown, J.,* in *Tyson v. Sinclair,* 138 N. C., 23, 50 S. E., 450.

It will be noted that the limitation to the heirs of W. W. Rose does not change the course of descent. "The law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit anyone to take in the character of heir unless he takes also in the quality of heir." *Steacy v. Rice,* 27 Pa. St., 95, 65 Am. Dec., 447.

Reduced to its simplest terms, the devise in question is one to W. W. Rose for life, remainder to his wife Sarah for life, remainder to his heirs. *Rowland v. Building & Loan Assn.,* 211 N. C., 456, 190 S. E., 719. This under the rule in *Shelley's case* gives to W. W. Rose an estate for life in possession, with a fee simple in expectancy. *Hileman v. Bouslaugh,* 13 Pa. St., 344. He may deal with the property as full owner and convey it, subject only to the intervening life estate and its incidents. *Welch v. Gibson, supra; Smith v. Smith,* 173 N. C., 124, 91 S. E., 721; *Cotten v. Moseley,* 159 N. C., 1, 74 S. E., 454. As the intervening life estate is at an end, he may convey it absolutely and in fee simple.

The suggestion that the limitation to the heirs of W. W. Rose was intended as a shifting devise, or as a substitute for the limitation to his wife Sarah, even though arguable, when reduced to its final analysis, seems to lead to the same conclusion, or at least to no different result. *Whitfield v. Garris,* 131 N. C., 148, 42 S. E., 568; on rehearing, 134 N. C., 24, 45 S. E., 904. The disjunctive clause, "but in case said

W. W. Rose have any heirs," appears to be only an awkward expression, and should perhaps be disregarded as surplusage, *Cooper, Ex parte, supra,* but if not, its ultimate effect is to prevent a reverter, and in either event, the limitation falls within the rule in *Shelley's case.*

Here, there is no reverter and no limitation over in case the first taker should "die without heirs," *Willis v. Trust Co.,* 183 N. C., 267, 111 S. E., 166, and nothing to indicate the use of the word "heirs" in any restricted sense. *Leathers v. Gray,* 101 N. C., 162, 7 S. E., 657; *Whitley v. Arenson, post,* 121. See cases assembled in *Williamson v. Cox,* 218 N. C., 177, 10 S. E. (2d), 662.

The conclusion is reached that the judgment should be upheld.

Affirmed.

D. C. PATTERSON v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 8 January, 1941.)

Bill of Discovery § 8—Affidavit for inspection of writings must set forth facts showing materiality and necessity of papers sought.

Plaintiff, carrier by truck, instituted this action against several railroad companies alleging that defendants conspired to reduce rates on certain commodities between designated termini in order to destroy plaintiff's business, with intent and purpose of raising such rates as soon as competition was removed, C. S., ch. 53. Plaintiff moved for the inspection of all correspondence, memoranda, and other writings among the several defendants and others relative to the establishment of such lower rates. Plaintiff's affidavit for such order did not designate any specific letters or documents or state the contents thereof, and did not aver that the information sought is not obtainable elsewhere. *Held:* The affidavit is insufficient to support the order, since it is required that the affidavit set forth facts showing the materiality and necessity of the papers sought to have produced, and the mere averment that they are material and necessary is insufficient. C. S., 1823, 1824.

APPEAL by defendants from *Carr, Resident Judge of the Tenth Judicial District,* in Chambers in ALAMANCE, 10 June, 1940.

Cooper & Sanders, W. Clary Holt, and Roy L. Deal for plaintiff, appellee.

Robert H. Dye for Aberdeen & Rockfish Railroad Company.

W. T. Joyner for H. P., R. A. & Southern R. R. Company, and Yadkin R. R. Company, and Southern Railway Company.

Hobgood & Ward for Atlantic & Yadkin R. R. Company.

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

SCHENCK, J. This appeal is from an order entered upon motion of the plaintiff directing the defendants to produce, for the purpose of inspection and copying, the correspondence, memoranda and other writings among the several defendants and others, relative to the establishment of rates upon petroleum products from Wilmington and River Terminal to points in North Carolina, bearing dates between November, 1934, and December, 1937, said motion having been lodged by virtue of C. S., 1823 and 1824.

The plaintiff alleges in his complaint that the rates on petroleum products from Wilmington and River Terminal were established by agreement among the defendants as a result of a conspiracy existing among them to lower the rates and thereby destroy the plaintiff's business of transporting such products by motor trucks, with the intent and purpose of raising such rates as soon as the competition of the plaintiff was removed, in violation of Consolidated Statutes, ch. 53, Monopolies and Trusts. The defendants in their answers admit that such rates were established by agreement among themselves but deny that they conspired to destroy the plaintiff's business, or in any way violated the law.

The order appealed from directs the production, for inspection and copy, of all correspondence, memoranda and other writings among the eight defendant railroad companies, and between said companies and the Southern Freight Association, relative to the establishment of rates on petroleum products from Wilmington and River Terminal to other points in the State of North Carolina, from November, 1934, to December, 1937.

The plaintiff's affidavit upon which he bases his application for the order fails to designate any specific letters or documents desired, and fails to state the contents thereof, and does not aver that the information or proof sought is not obtainable elsewhere. Such an affidavit is an insufficient basis for an order to produce practically all the correspondence and writings among the defendants relative to the establishment of the rates involved upon the theory that they will have a direct bearing on an issue addressed to an unlawful conspiracy among the defendants to injure the plaintiff by destroying his business and thereby remove competition. It is required by the statute that the facts showing the materiality and necessity of the documents sought be set forth, the mere naked averment that they are material and necessary, is insufficient, being nothing more than an expression of the applicant's opinion.

Adams, J., in speaking of the requirements of the statute, C. S., 1823, in *Dunlap v. Guaranty Co.*, 202 N. C., 651, says: "If the requirements are not complied with, or if the order of the court goes beyond the powers contemplated and conferred by law, the order will be set aside. *Sheek v. Sain*, 127 N. C., 266; *Ross v. Robinson, supra* (185 N. C., 548).

The order of the court is usually based upon an affidavit and if the affidavit is insufficient the order is invalid. *Mica Co. v. Express Co.*, 182 N. C., 669. In *Evans v. R. R.*, 167 N. C., 415, the Court said: 'As to whether a paper writing comes within the description of the statute is a question of law. It would seem that the affidavit in this case is not a sufficient description of the paper to justify the court in ordering its production. "A mere statement that an examination is material and necessary is not sufficient. This is nothing more than the statement of the applicant's opinion. The facts showing the materiality and necessity must be stated positively and not argumentatively or inferentially." 14 Cyc., 346. Again, it is said that "A party cannot obtain a roving commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case. He is entitled to production or inspection only when the same is material and necessary to establish his cause of action." ' 14 Cyc., 370."

The affidavit made by the plaintiff is insufficient to support it and therefore the order made must be set aside.

Error.

FRED MILLS, ADMINISTRATOR OF THE ESTATE OF DORIS MARIE MILLS, DECEASED, v. HENRY MOORE AND CLEM JENKINS, JR.

(Filed 8 January, 1941.)

1. Negligence §§ 1, 5—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 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.

2. Negligence § 19a: Automobiles § 18a—

Negligence is not presumed from the mere fact that a person is injured or killed by an automobile, but plaintiff is required to offer legal evidence tending to establish beyond a mere speculation or conjecture every essential element of negligence, and upon failure of plaintiff so to do a nonsuit is proper.

3. Negligence § 17b—

Whether there is enough evidence to support a material issue is a matter of law.

4. Automobiles § 8—

The operator of a motor vehicle is under duty to keep same under control and to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances.

5. Automobiles § 9a—

The operator of a motor vehicle is under duty to keep a proper lookout so as to avoid collision with persons or vehicles upon the highway.

6. Automobiles § 18a—Evidence held to raise mere speculation as to whether death of 18-months-old child resulted from negligence of driver.

The evidence favorable to plaintiff tended to show that plaintiff's intestate, a child 18 months of age, resided with her parents in a house fronting on a dirt highway, that the front door of the house was some 30 feet from the highway, that in front of the house and some four or five feet from the road were some stables, that some lumber was piled about 1½ feet high on the edge of the road, that intestate was in the room with her mother, that a short time thereafter, estimated by one witness as only two minutes, the mother missed the child, and immediately searched for her, and found the child in the highway, dead. There was also evidence that the child was struck by a trailer truck operated by defendant driver, and that the road was straight and unobstructed for about 325 yards on each side of the house. Defendant driver testified that he saw two children in a field on the side of the highway opposite the house but that he did not see intestate and did not know of the fatal accident until he was informed thereof some time later. *Held:* Since the evidence is silent as to how long the child had been in the highway when struck, and whether she was struck by the front of the truck or by some part of the trailer after the cab had passed, the evidence leaves in the realm of speculation and conjecture whether the child entered the highway at a time when the driver, seated in the cab on the opposite side from the house, could have seen her in the exercise of his duty to keep a reasonably careful lookout, and defendants' motion to nonsuit was properly allowed.

SEAWELL, J., dissenting.

CLARKSON and DEVIN, JJ., concur in dissent.

APPEAL by plaintiff from *Parker, J.*, at June Term, 1940, of LENOIR.

Civil action for recovery of damages for alleged wrongful death. C. S., 160, 161.

Plaintiff alleges in part that on 30 April, 1935, the intestate, Doris Marie Mills, eighteen months and twenty days of age, "momentarily unobserved by her mother, ran out of the house, crossed the front yard thereof, entered the . . . public road," and was killed by a Chevrolet motor truck of defendant, Henry Moore, traveling from the direction of Pleasant Hill toward Ervin's Cross Roads, and operated by his servant and agent, the defendant Clem Jenkins, Jr., "in the prosecution and in the course of his master's business"; that said truck ran over her when she was about the middle of the public road in front of her parents' home in Jones County, North Carolina; that the "public road where it passed the house is straight for a considerable distance in both directions from the place where said child entered the same, and anyone driving a motor vehicle approaching her along said road from either direction, and particularly from the direction of Pleasant Hill, could and would,

by the exercise of even slight observation, have seen that said child had entered and was in said public road and would be struck by such motor vehicle if it was not stopped"; that defendant Clem Jenkins, Jr., while so operating said truck, "willfully, carelessly, recklessly, negligently, unlawfully and wantonly ran the said truck over and upon the said Doris Marie Mills," killing her instantly; and that her death "was solely and proximately caused by the willful, careless, reckless, negligent, unlawful and wanton conduct of the said defendant Clem Jenkins, Jr., . . . as aforesaid, and without which her death as aforesaid would not have occurred."

While defendants, in their separate answers, admit that on 30 April, 1935, the defendant Clem Jenkins, Jr., was the agent and servant of defendant Moore, and was operating a Chevrolet truck of eight-ton capacity, belonging to Moore, in hauling logs from Pleasant Hill in Jones County to Ervin's Cross Roads in Lenoir County, they deny all other material allegations of the complaint.

On the trial below plaintiff offered evidence tending to show that intestate, a child eighteen months and twenty days of age, when she was killed on the afternoon of 30 April, 1935, in front of her parents' home, lived with her parents, Mr. and Mrs. Fred Mills, in a house located on the north side of the road or highway leading from Pleasant Hill in Jones County, North Carolina, to Ervin's Cross Roads in Lenoir County, that is, on the right-hand side of one traveling toward Ervin's Cross Roads; that, according to Mrs. Mills she "imagines" the front door is about ten feet from the road, "practically right on the road," and according to Mr. Mills about thirty feet from the road; that there was no fence around the house; that in the yard there were 7 or 8 trees—"none of them are so large"; that between the house and the road, and some four or five feet from the road, were stables; and that between the house and stables some lumber was piled on the edge of the road, "a little short pile," as to which Mrs. Mills guessed it was "about two feet from the edge of the road," and she thought it was not over six inches high by ten or twelve feet long, and as to which Mr. Mills said: "I imagine about one foot from the highway, off from where they pulled the road. It was about 1½ feet high."

Plaintiff further offered evidence tending to show that the road in front and for about 325 yards on each side of the Mills home was straight; that it was about 30 or 40 feet wide, on each side of which was "a ditch, where they pull the road"; that it was a good road, "sandy, before you get to the house," but "no deep ruts there where cars had to stay in—not by our home . . . enough room there for two trucks to pass." "It is not very deep sand and only one rut where all cars follow that one rut along where she was killed."

Plaintiff further offered evidence tending to show intestate was killed about five o'clock in the afternoon; that about fifteen minutes before, she and her two older brothers, aged 8 and 4 years, respectively, were there at the house when relatives left, after which intestate was playing around a sewing machine at which her mother was at work, on the right side of the front door of the house, facing the road, and the two little boys had taken their wagon and gone across the road to a field in front of the house to get lightwood stumps; that a truck, consisting of a cab and trailer loaded with logs, passed the house; that just then the mother of intestate missed her and on going to front yard to look for her saw her lying "in the middle of the road" . . . "about five feet from the edge of the pile of lumber on up to where she was"; that the brothers were then across a little caterpillar ditch on the other side of the road from the house, in the field, with the wagon; that while the mother ran to the field for the father, the older brother carried intestate to the porch; that she was dead; that there was "a little scar about its head, back of its head, a very little scar, it looked like, to have killed the child . . . just a slight place on the side of its head, above its ear, kinder back of its ear; just a little red looking place" as one witness testified; "a scar on its head, but I disremember where . . . bleeding at the nose and ear . . . other marks on the child were just a place on its head, . . . don't remember whether on the back of its head or on the side of the head," said another; and "It was injured on the back of its head . . . a small scar . . . it seems like there were other small scars on its head," another stated.

Plaintiff further offered evidence tending to show that there was a spot of blood in the road where intestate lay; that this spot was variously described as being "in the middle of the road," "right in the middle of the road, kinder off from the lumber pile," and, by the father of intestate, as being "in the middle of the highway . . . I reckon it was about five yards from the pile of lumber to the blood. . . . The end of the pile of lumber towards the house was nearest the blood; that would put the pile of lumber between the spot of blood and the house; it was 15 yards from the porch to where the baby was lying."

Plaintiff further offered evidence tending to show that while one Thomas had two trucks hauling logs that day along the road by the Mills home, neither of them had a cab, and that the last truck seen to pass there was a Chevrolet with a cab and trailer, and loaded with logs, operated by defendant Clem Jenkins, Jr., and traveling toward Ervin's Cross Roads; that this latter truck was heard "to go from whatever gear he was pulling in back in low and he went on by Mills' house"; that about a half mile from Mr. Mills' a witness met and spoke to Jenkins, who stopped to let witness pass; that then "he was running slow—it

looked to me as though he was driving the truck in a very careful manner"; and that in just a minute or two, variously estimated at three to ten minutes, the mother of intestate made an outcry.

Plaintiff further offered evidence tending to show that in consequence of what Mr. Mills, the father of the intestate, said to him, one E. B. Thomas later went to look for defendant Clem Jenkins, Jr., and saw him at the mill, 13½ miles away, after he had unloaded, standing there at the left-hand side of his truck, checking his oil. Thomas testified: "I drove up side of him and asked did he know what he had done and he said, 'No, why?' and I said, 'Do you know that you killed Mr. Mills' child?' and he said, 'No, he didn't kill a child; didn't see it or know anything about it; that he saw two little children playing on the left-hand side of the road.'"

Plaintiff further offered evidence tending to show that intestate was in good health—"could walk very good—had been walking since she was 11 months old—could run around anywhere she wanted to."

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

Sutton & Greene for plaintiff, appellant.

John D. Larkins, Jr., and Whitaker & Jeffress for defendants, appellees.

WINBORNE, J. Taking all the evidence shown in the record on this appeal in the light most favorable to plaintiff, and giving to him the benefit of every reasonable inference therefrom, distressing though the situation is, we are unable to find error in the judgment below. *Rountree v. Fountain,* 203 N. C., 381, 166 S. E., 329.

In order to establish actionable negligence: "The plaintiff must show: First, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed to 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; *Murray v. R. R.,* 218 N. C., 392, 11 S. E. (2d), 326, and cases cited.

Negligence is not presumed from the mere fact of injury or that the intestate was killed. *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, supra; 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.*, 217 N. C., 127, 6 S. E. (2d), 837; *Mercer v. Powell*, 218 N. C., 642.

There must be legal evidence of every material fact necessary to support the verdict and the verdict "must be grounded on a reasonable certainty as to probabilities arising from a fair consideration of the evidence, and not a mere guess, or on possibilities." 23 C. J., 51; *S. v. Johnson*, 199 N. C., 429, 154 S. E., 730; *Denny v. Snow*, 199 N. C., 773, 155 S. E., 874; *Shuford v. Scruggs*, 201 N. C., 685, 161 S. E., 315; *Allman v. R. R.*, 203 N. C., 660, 163 S. E., 981; *Rountree v. Fountain, supra; Cummings v. R. R., supra; Mercer v. Powell, supra.*

If the evidence fails to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. Whether there is enough evidence to support a material issue is a matter of law.

The alleged negligence relied upon and charged by plaintiff in the present case is that the defendants, in operating the truck in question along the road, failed to keep a proper lookout, which failure proximately caused the death of the intestate.

It is a general rule of law, even in 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. *Murray v. R. R., supra.*

These principles applied to the evidence offered leaves the instant case in the realm of speculation. Assuming that there is sufficient evidence to show that the intestate was stricken by the truck of the defendant, there is no evidence as to what part of the truck struck her. No one saw the intestate in the road at any time before she was stricken. How long she had been there no one knows. The physical facts present no reasonable theory to the exclusion of many others as to the circumstances under which the accident occurred. When did she enter the road? Was it at a time when the driver of the truck, seated in the cab on the opposite side from the Mills yard, could have seen her? Or, did she run under and into the trailer after the cab passed? Was she stricken by the front of the truck, or was she stricken by some part of the trailer? The evidence is consonant with any of many theories which may be advanced with equal force, but all of which are speculative and rest on mere conjecture.

In the case of *Rountree v. Fountain, supra,* this Court sets forth principles of law applicable and applies same to a factual situation similar to that here. There a four-year-old child was run over by an oil

truck as it backed into an alley between a store building and the lot on which the child resided with his mother. The truck backed into the alley to transfer oil from the tank on the truck to the tank in the store. There was no objection to defendant using the alley, though it as well as the garage at the north end of it, were rented to the mother of the intestate along with the dwelling. On the morning of the accident the child went across the alley to the home of a neighbor, who gave him a small box and left him in her yard picking up berries under a magnolia tree, and went across the street. A few minutes afterward an employee of defendant backed a gasoline or oil truck into the alley, suddenly left the truck, and went to the owner of the store and exclaimed, "Come here, I have killed a child." The body was found about three feet from the sidewalk and about the same distance from the store. Blood was on the sand; nearby was the box. There were bruises on the child's body and his nose was bleeding. The cause of his death was a fractured skull. *Adams, J.*, speaking for the Court, after stating facts and applicable principles of law, said: "No one saw the deceased in the alley at any time before the impact. How long he had been there no one knows. There is no evidence he was there when the truck began to move backward. When last seen alone he was on the Southerland lot. When did he leave the magnolia tree? Had he been in the alley long enough for the driver to see him and avert the injury, or did he at the fatal moment rush into the alley immediately in front of the advancing truck? The witnesses do not inform us, and at this point the plaintiff's case fails him. In the absence of evidence we cannot conclude that the deceased went into the alley at any particular time. Negligence is not presumed from the mere fact that he was killed; something more is required. The plaintiff had the burden of establishing the proximate causal relation of the alleged negligence to the injury and death, and in his search for it he is led into the uncertain realm of conjecture."

Paraphrasing that case, the probabilities arising from a fair consideration of the evidence in the instant case afford no reasonable certainty on which to ground a verdict.

The judgment below is

Affirmed.

SEAWELL, J., dissenting: No human eye had an opportunity of observing the tragedy, resulting in the death of plaintiff's eighteen-months-old child, save that of the driver of the truck, which, according to the evidence, killed it. He says he did not see the child; but his silence on the subject would have been just as significant, since the circumstances of the case indicate that a reasonable lookout, which it was his duty to keep, would have discovered it.

We cannot treat this case and the evidence from which the jury could draw reasonable inferences, as if it were an adult, or an older child, who was killed. Entering into an appraisal of the probative force of the evidence, we must not only examine the confines within which it is necessary for the driver of a motor vehicle to observe the duty of a reasonable lookout, but in connection therewith we must call to our aid our common knowledge, not only of the habits of children, but of their physical powers and attainments at the tender age of eighteen months, of which no account seems to be taken in this decision. If considered at all, a conclusion is reached which is startlingly opposed to the facts of common experience.

The question here is a simple one: whether the fact that the driver did not see the child at all is, under the circumstances of this case, any evidence from which the jury might infer a want of proper lookout. In an affirmative answer to that question, I recite certain facts of the evidence, assembled upon the principle that the plaintiff is entitled to have the evidence considered in the light most favorable to him, and is entitled to all reasonable inferences therefrom.

The door of plaintiff's house from which the child went out on its fatal venture was from thirty to forty feet from the road. This road was about thirty feet wide—a sandy road, with two wheel ruts made by travel. Near to the road, but not in a position to obscure the vision of the driver, was a barn or stable. Still nearer, a pile of lumber about eighteen inches high. This latter is mentioned only because of the remarkable suggestion made in the argument—that the child might have fallen from this lumber pile, received its fatal wound, and thereafter walked into the middle of the road to die! The road from the direction the truck approached was straight for half a mile, with no obstruction whatever to obscure the view. The vehicle was not a complete truck carrying a trailer, but it was a truck of the trailer type, loaded with logs.

The child, eighteen months old, had been playing in the room beside the mother, who was sewing. In just a few minutes—the evidence puts it as low as two—the mother missed the child, heard a truck going past, hurried out to look for the child, and found it lying in the middle of the road between the two wheel ruts, dead. There was a small bruised red spot on the back of the head and blood was coming from the nose and ears.

(The evidence is conceded to be sufficient to go to the jury to establish the death of the child by the defendant's truck and it will not be repeated here.) The truck driver was overtaken some distance away and stated that he did not see the child; that he did see two children in the field to the left. The house was to his right.

The court declined to accept these facts as any evidence of the failure to keep a reasonable lookout.

I may ask here, must the plaintiff in a civil action, where it becomes necessary to establish his case by circumstantial evidence, exclude every contrary hypothesis, reasonable or speculative, which may be presented, or may occur to the judicial mind, before he can be permitted to go to the jury?

Speculative hypotheses which have been freely indulged in during the argument of this case may be useful as testing the probative force of circumstantial evidence, but not a few of them are absurd, if adopted. Here we have the suggestion that this eighteen-months-old child "may have rushed" in the way of the truck too suddenly to be seen or for the accident to be avoided. This is a good defense where the facts are known or observed, but, taking it as here presented, it is so contrary to experience as to be at least improbable. Children of eighteen months old do not run or "rush out" that way. It is highly improbable that a child of that age could have traversed the distance from the house to the passing truck, or to have traversed any part of the zone of obligation by rushing from the roadside so quickly as to have escaped the notice of the driver if he had been exercising a prudent lookout.

It was the duty of the driver to pay attention to objects and movements immediately near the line of travel, especially to the movements of children. He saw the children to the left. Under the circumstances of this case, the evidence that he did not see the child to the right bears upon the duty of lookout.

Evidence that a driver did not see what he ought to have seen has always been considered as evidence of a failure to keep a proper lookout.

"It may be stated that the driver of an automobile is charged with a notice of such conditions *in and along the road* as he should have seen." Huddy on Automobiles, Vols. 3-4, p. 89. Italics supplied. "Failure to see what he should have seen of the surrounding circumstances is evidence of negligence."

The rule of the prudent man cannot be reduced to the standards observed by tunnel-visioned drivers, whether this condition is physical, mental, or comes about through a habit of inattention. In several states, where strict attention is given to the qualifications of drivers, they are kept off the road altogether.

There is no authority for the theory that the duty of the lookout is confined to the wheel ruts or the width of the open road, or even to the right of way, or straight ahead. "The driver must look not only *straight* ahead, but *laterally* ahead." *Hornbuckle v. McCarty,* 295 Mo., 162, 163, 243 S. W., 329, 25 A. L. R., p. 1508. This view is adopted by practically all text writers on the subject. "He is conclusively presumed to

have seen such surrounding circumstances as he would have seen had he properly exercised his faculty of vision." *McDonald v. Yoder,* 80 Kansas, 25, 101 P., 468; *Kelly v. Schmidt,* 142 La., 91, 76 So., 250, 251, citing Thompson on Negligence (White's Supplement), Vol. 8, paragraph 1340 (h); *Kokowsky v. Collier,* 236 N. Y. S., 622. The duty of lookout implies the duty to see. *Fitzgerald v. Norman* (Mo.), 252 S. W., 43. In this case failure to see a child which had to traverse some thirty feet before coming in front of the automobile was considered evidence of a failure to keep a proper lookout. In *Breeden v. Hurley,* 13 Tenn., 599, where the attention of the driver was directed to one boy and another was run down, failure to see the latter was considered evidence of negligence.

Uniformly, the authorities have emphasized the duty of lookout with respect to children of tender age. "The vigilance and care of the operator of an automobile vary with respect to persons of different ages and different physical conditions, and he must increase his exertions in order to avoid danger to children whom he may see, or by the exercise of ordinary care could see, on or near the highway." Blashfield Encyclopedia, Vol. 2, pp. 520, 521, citing *S. v. Gray,* 180 N. C., 697, 104 S. E., 647.

From these authorities we gather no new principle of law, only an emphatic statement of something that has always been the law—that the duty of care on the part of the driver does not first begin when the victim, infant or adult, is actually observed in a perilous position, but as soon as he should have been seen by keeping a proper lookout. If he is not so seen, a legitimate inference of negligence arises, with which the jury alone is permitted to deal.

Upon the authorities cited, and upon the rule of common sense, such an inference arises *upon the evidence.* There is no inference from the evidence of the speculative suggestions made in defense, namely, that this child, eighteen months old, *ran* into the road before the car, or *ran* into the trailer part after the cab had passed, with such speed as not only to make the accident unavoidable, but as to prevent the driver from being able to see it. I have never heard of another case in which that sort of thing prevailed, without evidence to support it.

The evidence should have been submitted to the jury.

CLARKSON and DEVIN, JJ., concur in dissent.

MRS. HUGH PINNIX, ADMINISTRATRIX OF THE ESTATE OF WILLIAM RIGHTSELL, DECEASED, v. C. D. GRIFFIN AND GATE CITY LIFE INSURANCE COMPANY.

(Filed 8 January, 1941.)

1. Automobiles § 24b—Evidence held for jury on the question of whether agent was acting in scope of employment at time of accident.

The evidence tended to show that defendant driver, who operated the car which struck plaintiff's intestate, inflicting fatal injury, was employed by defendant insurance company, upon salary, to sell industrial insurance and collect premiums, that his employment was full time, that about the middle of the afternoon of a working day he called at a house and inquired for persons who had just moved there who might properly be considered prospects, that at that time he had his collection book in his hand, and that the accident in suit occurred a few minutes after he had gotten in his car and driven off, and while he was still in the particular territory assigned to him. *Held:* The evidence is sufficient to be submitted to the jury upon the question of whether at the time of the accident the agent was engaged in the duties of his employment, and defendant insurance company's motion to nonsuit on the issue of *respondeat superior* should have been denied.

2. Master and Servant § 21b—

Where the fact of employment is admitted or established, the courts should be slow to assume that there has been any deviation from the course of employment upon any speculative hypotheses, and all doubt as to whether the employee was acting within the scope of his employment will be resolved in favor of liability.

3. Principal and Agent §§ 7, 10a: Automobiles § 24b—

Plaintiff offered testimony of a witness that he heard defendant driver state to an officer at the scene of the accident that he (the driver) at the time of the accident was going to a certain locality to make collections. *Seawell, J.*, writing for the Court, is of the opinion that the fact of agency having been established by evidence *aliunde*, testimony of the declaration was competent to show that at the time the agent was engaged in the duties of his employment. *Stacy, C. J., Devin, Barnhill,* and *Winborne, JJ.*, are of the opinion that testimony of the declaration is incompetent.

4. Appeal and Error § 40e—

Upon appeal from judgment as of nonsuit, competent evidence offered by plaintiff which was excluded in the court below will be considered in passing upon the sufficiency of the evidence.

5. Automobiles § 24a—

The fact that the automobile involved in the collision is owned by the agent does not preclude liability on the part of the principal when it is made to appear that the agent customarily used the car in the discharge of his duties and that the principal knew, or in the exercise of due diligence should have known, of its use for such purpose by the agent.

DEVIN, J., concurring in part.

BARNHILL, J., dissenting.

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

PINNIX *v.* GRIFFIN.

APPEAL by plaintiff from *Rousseau, J.*, at March Term, 1940, of GUILFORD. Reversed.

Action to recover for the alleged wrongful injury and death of plaintiff's intestate, through the negligence of defendants. Judgment as of nonsuit, as to Gate City Life Insurance Company, upon the evidence.

Under appropriate pleading, the evidence discloses that the defendant, Gate City Life Insurance Company, was engaged in the business of industrial insurance in the city of Greensboro, and the type of business done demanded frequent collections of insurance premiums in small amounts from workers in factories and industrial plants living in scattered areas throughout the city. Griffin was a whole-time employee of defendant, Gate City Life Insurance Company, upon salary, engaged in selling insurance and making these collections. While his particular assignment of territory was in West Greensboro, he was not confined to this area. The occurrence for which it is sought to hold the appellee liable, however, took place in this territory. The employee habitually used a Ford automobile, of which he was the owner, in prosecution of his employer's business, and had been doing so for some time, according to the testimony of Mrs. Fargas, E. C. Albert, and others. Malcombe Lee testified: "Mr. Griffin traveled by automobile in performing his duties."

On 18 January, 1939, between 3 and 3:30 o'clock p.m., Griffin called at the home of a Mrs. Rogers on Jackson Street, and asked for Mr. and Mrs. Otis Heath, who were described as "workers" who had recently moved in with the Rogers'. He had in his hand an insurance collection book. He was traveling in an automobile.

J. M. Holladay, Jr., testified that he "headed out" West Market Street about 3:30 p.m., and when he reached Westover Terrace (which is west of Jackson Street), he saw a commotion and found that an accident had occurred. An ambulance was coming up. This witness saw Griffin there and heard the statement he made to the officer. The statement was excluded in so far as it related to the defendant Insurance Company, appellee. Griffin, among other things, stated that he "was going out in Sunset Hills to make collections."

W. S. Gallamore, Jr., testified that he saw Griffin's car coming "very fast" up the road while Rightsell (the deceased) was in the middle of the street, watching the car—picked up pace—began to run or walk fast. When he had gotten 6 or 7 feet from the sidewalk he was struck by the car and thrown against the fender and radiator. The car continued until it hit the curb and got a hard jolt, throwing Rightsell 8 or 9 feet from the car. The car kept on, tore down some shrubbery and hit a concrete wall.

From this injury Rightsell died.

Other testimony as to negligence is that of Officer Leonard, who drove Griffin's car from the place of the collision and said the brakes were very bad.

This witness, also, would have testified, if permitted, that Griffin told him when he arrived at the scene of the accident that he was on his way to make collections.

Shuping & Hampton for plaintiff, appellant.

R. M. Robinson for defendant, Gate City Life Insurance Company, appellee.

SEAWELL, J. We think the evidence was sufficient to be submitted to the jury on the question of Griffin's negligence. That question does not seem to have been raised in the court below and needs no extended discussion here. But, regardless of Griffin's negligence, which one must assume the jury might have found, the appellee strenuously insists that there is nothing in the evidence that would impute such negligence to it, on the doctrine *respondeat superior*. It is argued that the evidence fails to show that Griffin, its employee, was about his employer's business at the time of the alleged negligent conduct, and that the employer, at any rate, should not be held liable for his acts in the use of his own automobile.

Griffin, a whole-time employee, on salary, appeared at the Rogers home on Jackson Street a few minutes before the accident, with an insurance collection book in his hand, calling for certain workers who had recently moved in. It was in the middle of the afternoon of what is ordinarily termed a working day. A reasonable inference from this is that he was, at the time, engaged in the duties of his employment. That inference could not be defeated in the few minutes it took Griffin to reach Westover Terrace, still within his collection territory, and run into the deceased.

In *Barrow v. Keel,* 213 N. C., 373, 196 S. E., 366, the point at issue was whether Quinn, an employee of Keel, was at the time of an alleged negligent injury "about his master's business." The fact that Quinn had on his person some checks "payable to persons in the vicinity of Newport," who had sold tobacco in defendant's warehouse the week before, was considered, amongst other things, evidence on that point for the jury. Griffin was found with an insurance collection book in his hands, in the territory where it was his duty to be, on a contract which called for his whole time.

Where the actual employment is admitted, courts should be slow to assume that there has been any deviation from the course of employment upon speculative hypothesis. In *Cole v. R. R.,* 211 N. C., 591, 597,

191 S. E., 353, it is aptly said: "Moreover, it is well settled, as stated in 39 C. J., 1284, and quoted with approval in *Colvin v. Lumber Co.*, 198 N. C., 776, that 'where it is doubtful whether a servant was acting within the scope of his authority, it has been said that the doubt will be resolved against the master because he set the servant in motion, at least to the extent of requiring the question to be submitted to the jury.'" *Long v. Eagle Store Co.*, 214 N. C., 146, 151, 198 S. E., 573; *Robinson v. McAlhaney*, 214 N. C., 180, 183, 198 S. E., 647; *Daniel v. Packing Co.*, 215 N. C., 762, 765, 3 S. E. (2d), 282. We regard the evidence as sufficient to carry the case to the jury on the point considered.

Hitherto, we have not discussed the excluded statement of Griffin at the scene of the wreck that he was going into Sunset Hills to make collections. It was clearly competent, for the purpose offered, under *Smith v. Miller*, 209 N. C., 170, 173, 183 S. E., 370:

"The defendant objected to testimony offered by the plaintiff tending to show that immediately after the plaintiff was injured, Paul Miller said that at the time he struck and injured the plaintiff with defendant's automobile, he was going after defendant's morning newspaper.

"This objection was overruled, and properly so. The testimony was not offered as evidence tending to show that Paul Miller was an employee or agent of the defendant Jerry Swaim. The admission to that effect in the answer of the defendant had been offered in evidence by the plaintiff. There was ample evidence tending to show that Paul Miller habitually drove the automobile owned by the defendant Jerry Swaim as his employee. Therefore, *Brown v. Wood*, 201 N. C., 309, 160 S. E., 281, has no application to the instant case. The testimony was offered as evidence tending to show that at the time the plaintiff was injured by the negligence of Paul Miller, the said Paul Miller was acting within the scope of his employment by the defendant Jerry Swaim. It was competent and properly admitted for that purpose. There was no error in the ruling of the judge of the Superior Court to that effect. See *Brittain v. Westall*, 137 N. C., 30, 49 S. E., 54."

It is proper to consider this testimony on a successful motion to nonsuit. The trial court, however well intentioned, will not be permitted to trim down plaintiff's case by the exclusion of competent evidence and throw it out of court for the lack of it.

May the negligence of a servant in the use of his own car in the master's business render the latter liable for an injury when such use is habitual and known to the master, or could, by reasonable diligence, have been known to the master? From the wide field of encyclopedic law many decisions may be cited *pro* and *con* on this subject, and some of the opinions cited in the briefs in the instant case maintain the position taken by the respective courts with commendable vigor. But it is no

longer an open question in this State. For well considered reasons, no doubt, this Court has adopted the view that the employer is liable where the employee causes an injury by the negligent operation of his own car, used in the prosecution of the employer's business, when the latter knew, or should have known, that he was so using it.

In *Davidson v. Telegraph Co.,* 207 N. C., 790, 178 S. E., 603, a messenger boy, employed by defendant, used his own car in delivering a message, and injured a pedestrian through his negligence. A verdict against the employer was sustained, upon demurrer, *Chief Justice Stacy,* in a terse opinion, saying for a unanimous Court: "It is likewise in evidence that the defendant knew, or should have known, that Mills was in the habit of using his automobile to deliver messages." *Miller v. Wood,* 210 N. C., 520, 187 S. E., 765; *Barrow v. Keel, supra.*

From some of the jurisdictions holding this view we cite: *Cotton Mills v. Byrd,* 38 Ga. App., 241, 143 S. E., 610; *Tel. Co. v. Michael,* 120 Fla., 511, 163 So., 86; *Tucker v. Home Stores,* 91 S. W. (2d), 1153; *Marchand v. Russell,* 257 Mich., 96, 241 N. W., 209.

We think the evidence as to the liability of the defendant Insurance Company should be submitted to the jury, under appropriate instructions.

The judgment of nonsuit is

Reversed.

DEVIN, J., concurring: I concur in the majority opinion that the evidence was sufficient to carry the case to the jury, but I do not agree that the testimony of the witness Holladay, as to a statement made by defendant Griffin after the accident, should be held competent against defendant Insurance Company, under the circumstances of this case.

BARNHILL, J., dissenting: Agency having been established either by proof or by admission, the declaration of the agent made in the course of his employment and within the scope of his agency and while he is engaged in the business (*dum fervet opus*) are competent as, in that case, they are, as it were, the declarations of the principal himself. *Brittain v. Westall,* 137 N. C., 30, and cases cited; *Hunsucker v. Corbitt,* 187 N. C., 496, 122 S. E., 378.

To be competent the statement must be made while the agent is engaged in transacting some authorized business and must be so connected with it as to constitute a part of the *res gestæ.* It must be a part of the business on hand or the pending transaction, as regards which for certain purposes the law identifies the principal and the agent. *Queen v. Ins. Co.,* 177 N. C., 34, 97 S. E., 741; or it must be the extempore utterance of the mind under circumstances and at a time when there

has been no sufficient opportunity to plan false or misleading statements—such statement as exhibits the mind's impression of immediate events and is not narrative of past happenings. Tiffany on Agency, p. 252; *Queen v. Ins. Co., supra; Hubbard v. R. R.*, 203 N. C., 675, 166 S. E., 802, and cases cited.

Statements of an agent that are nothing more than a narrative of a past occurrence, *Northwestern Union Packet Co. v. Clough*, 22 L. Ed., 406; and which do not characterize or qualify an act presently done within the scope of the agency, *Nance v. R. R.*, 189 N. C., 638, 127 S. E., 625, are, as against the principal, nothing more than hearsay and are incompetent. *Brown v. Montgomery Ward & Co.*, 217 N. C., 368, 8 S. E. (2d), 199, and cases cited. See also Anno., 76 A. L. R., 1125; 20 Am. Jur., 510, sec. 599; *Winchester & P. Mfg. Co. v. Creary*, 116 U. S., 161, 29 L. Ed., 591.

A driver's statement to a policeman, made before the person injured by his truck was taken away, that he was working for the defendant, *Renfro v. Central Coal & Coke Co.*, 19 S. W. (2d), 766, or a chauffeur's declaration that he was on a mission for his employer, is incompetent for "the act done cannot be qualified or explained by the servant's declaration, which amounts to no more than a mere narrative of a past occurrence." *Frank v. Wright*, 140 Tenn., 535, 205 S. W., 434. Likewise, a remark made by an automobile driver, immediately after returning to the place where he ran the car into a wagon and horses, that he was working for the defendant is hearsay and inadmissible for any purpose. *Beville v. Taylor*, 202 Ala., 305, 80 So., 370; see also *Sakolof v. Donn*, 194 N. Y. Supp., 580; *Lang Floral & Nursery Co. v. Sheridan*, 245 S. W., 467 (Tex.); and *Moore v. Rosenmond*, 238 N. Y., 356, 144 N. E., 639, which are to the same effect.

That such declarations are hearsay and inadmissible in evidence is sustained not only by the text writers and decisions of other courts but by many decisions of this Court in addition to those heretofore cited. *Cole v. Funeral Home*, 207 N. C., 271, 176 S. E., 553; *Smith v. R. R.*, 68 N. C., 107; *Rumbough v. Improvement Co.*, 112 N. C., 751; *Gazzam v. Ins. Co.*, 155 N. C., 330, 71 S. E., 434; *Hubbard v. R. R., supra; Parrish v. Mfg. Co.*, 211 N. C., 7, 188 S. E., 17, and cases cited.

Brittain v. Westall, supra, cited in the majority opinion, is likewise in point and sustains this position rather than the position there assumed.

It follows that the testimony as to declarations made by the defendant Griffin was incompetent and inadmissible as against the defendant Insurance Company. These declarations were made some time after the occurrence and after police had arrived at the scene and after the removal of the deceased. They clearly come under the hearsay rule.

To sustain the conclusion that these declarations were admissible the

majority opinion cites *Smith v. Miller,* 209 N. C., 170, 183 S. E., 370. The opinion in this case is out of line with other decisions of this Court on this question. Even so, it is distinguishable. There the agent was driving the automobile of the principal, which automobile he habitually drove. Here the automobile belonged to the agent and not to the principal. Furthermore, it appears that the statement of the agent, which was held to be competent, was made "immediately after the plaintiff was injured."

The only other evidence offered by the plaintiff tends to show that Griffin was regularly employed by defendant Insurance Company to make collections, that he was within the territory assigned to him, that he had in his possession shortly before the accident an insurance collection book, that the accident occurred during working hours, and that he was driving his own automobile which he frequently used in making collections.

This evidence is insufficient to be submitted to a jury. It fails to show that the relation of master and servant existed between Griffin and the defendant *at the time of and in respect to* the very transaction out of which the injury arose—a fatal defect in plaintiff's case. *Robinson v. Sears, Roebuck & Co.,* 216 N. C., 322, 4 S. E. (2d), 889; *Jeffrey v. Mfg. Co.,* 197 N. C., 724, 150 S. E., 503; *Cole v. Funeral Home, supra; Van Landingham v. Sewing Machine Co.,* 207 N. C., 355, 177 S. E., 126.

There is no evidence that the defendant had any interest in or control over the automobile which belonged to and was being operated by Griffin. Neither is there testimony tending to show that defendant retained any right to say how he should travel in performing the duties of his employment. While he was regularly employed and the accident occurred during the day, there is no evidence tending to show that he was required to devote all of his time to his work or that he was not at liberty to regulate his own conduct and activities as best suited his own convenience and desires. There was no proof that defendant knew Griffin was using his automobile in covering the territory assigned to him other than such notice as may be implied from the testimony of three witnesses. Mrs. Fargas testified that he came to her house weekly "in a little Ford roadster." Mrs. Albert testified that he came weekly "each time in an automobile," and Malcombe Lee testified that "Mr. Griffin traveled by automobile in performing his duties." So the questions arise: Was it the same automobile Griffin used in the performance of his duties? Where was he going? What was his mission—was it personal or did it relate to defendant's business? The record fails to answer.

That he was at the time in the general employment and pay of defendant does not necessarily make the latter chargeable. *Robinson v. Sears, Roebuck & Co., supra; Wyllie v. Palmer,* 137 N. Y., 248; *Bright v.*

Telegraph Co., 213 N. C., 208, 195 S. E., 391; *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 849; *Linville v. Nissen*, 162 N. C., 95, 77 S. E., 1096; *Van Landingham v. Sewing Machine Co., supra.* Nor does the fact that he had an insurance collection book in his possession shortly before the accident, *Tribble v. Swinson*, 213 N. C., 550, 196 S. E., 820; *Van Landingham v. Sewing Machine Co., supra*, or that he was at his place of employment during working hours, *Robinson v. Sears, Roebuck & Co., supra*, render the evidence sufficient to be submitted to a jury.

The case of *Barrow v. Keel*, 213 N. C., 373, 196 S. E., 366, is easily distinguishable. It is true that in that case there was evidence that the agent at the time of the occurrence had on his person some checks "payable to persons in the vicinity of New Port," who had sold tobacco in the defendant's warehouse the week before. However, this evidence alone was not held to be sufficient. It was admitted only as an incidental circumstance. Two witnesses testified in that case that they had heard the master say he had sent the agent on the very trip during which the accident occurred.

It is my view that the judgment of nonsuit should be sustained.

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

M. A. SIMONS v. HARVEY LEBRUN.

(Filed 8 January, 1941.)

1. Ejectment § 2—

Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. C. S., 2365, *et seq.*

2. Landlord and Tenant § 1: Master and Servant § 4b—

Where the servant occupies premises of the master and the rent therefor is satisfied by service, the relation of landlord and tenant exists between the parties in regard to the premises unless occupancy by the servant is reasonably necessary for the better performance of the particular service, inseparable from it, or required by the master as essential to it.

3. Same: Ejectment § 2—Under terms of contract, relation of landlord and tenant existed in regard to occupancy by servant, and summary ejectment would lie.

Plaintiff, the owner of two houses, entered into a contract with defendant under which defendant was employed to rent rooms and apartments

in the houses, care for and supervise the houses, collect rents, see that no cooking was done in either house except in the kitchen or basement thereof, with further provision that plaintiff was not to be liable for any expense other than emergency repairs unless he had previously authorized such expense, that plaintiff should not be liable for any part of cost of maid service unless the gross rents should exceed a specified sum per month, and that as compensation for his services defendant should be allowed to occupy his room and other parts of one of the houses not rented, without charge, and that the parties should divide gross rents received in any month in excess of a specified sum. The contract provided that either party might terminate the agreement at the end of any academic year upon thirty days notice to the other. *Held:* In regard to the occupancy by defendant the relation of landlord and tenant existed between the parties, since, obviously, defendant could not occupy both houses, and occupancy was not reasonably necessary for the better performance of the service or required by plaintiff as an essential thereto, and upon termination of the agreement in accordance with its terms, and the holding over of defendant thereafter, plaintiff may maintain an action in summary ejectment to regain possession of the part of the premises occupied by defendant.

4. Appeal and Error § 8—

Where defendant tenant does not controvert in the trial court the sufficiency of notice to quit, he will not be heard to do so in the Supreme Court on appeal, since an appeal will be determined in accordance with the theory of trial in the lower court.

APPEAL by defendant from *Harris, J.*, at June Term, 1940, of ORANGE.

Civil action in summary ejectment instituted 29 December, 1939, for possession of a dwelling house at No. 120 Marlette Street in the town of Chapel Hill, North Carolina, heard in Superior Court upon appeal thereto by defendant from judgment in the court of a justice of the peace.

Plaintiff claims that defendant was his tenant and that such tenancy has expired, but defendant continues to hold possession and refuses to vacate the property.

On the other hand, the contention of defendant in both courts, as shown in return to notice of appeal, and in the agreed statement of case on appeal, is that there is no lease, but that the contract establishes the relationship of employer and employee, and not that of landlord and tenant, and that, hence, the action should be dismissed for want of jurisdiction.

Upon the trial below plaintiff offered evidence tending to show these facts: On 11 September, 1939, plaintiff being the owner of two brick veneer houses at No. 120 and No. 122 Marlette Street in Chapel Hill, North Carolina, entered into a written agreement with the defendant, Harvey Lebrun, by the terms of which plaintiff employed defendant "as manager and custodian of said houses" for a term commencing 15 September, 1939, and ending 28 August, 1940. It was agreed therein "that

Harvey Lebrun shall be responsible: (1) for assistance in renting out the room or rooms not occupied by himself and his wife; (2) for collection, and weekly transmission to M. A. Simons of all rents; (3) for proper care and supervision of the houses; (4) for seeing that no unlawful use is made of the premises; (5) for seeing that no cooking shall be done in either house, except in the kitchen or basement of that house; and (6) for seeing that the rental contracts with roomers are carried out in full"; that "except in case of emergency repairs and replacements necessary to safeguard life or property, M. A. Simons shall not be held responsible for expenses of any kind incurred by Harvey Lebrun unless such expenses have previously been authorized by M. A. Simons"; that "when there are no additional roomers in the houses, Harvey Lebrun shall settle, at his own expense, all bills for light, fuel and maid service"; that "unless there are a sufficient number of roomers, in either or both houses, to bring in seventy-five dollars net income over and above the expense of paying a maid, no maid service shall be paid for out of the income from such house or houses"; that "the general scale of rentals to be charged and the general classes of roomers or tenants to be secured will be in accordance with instructions from M. A. Simons but that in details of rental, accounting, management, operation, and maintenance, and, in general, in all matters not specifically excepted elsewhere in this agreement, Harvey Lebrun shall have authority to act on his own initiative and discretion on behalf of M. A. Simons, as fully as though M. A. Simons were acting personally"; that "the advice of M. A. Simons will be obtained in advance of any important actions; that any actions, decisions, etc., affecting the rental and the management of these houses that may be subject to question or doubt will be discussed by Harvey Lebrun with M. A. Simons"; that "all expenses for taxes, assessments, insurance, improvements, equipment, furniture, furnishings, and repairs or replacements other than those necessitated by current use, wear and tear shall be handled and paid for by M. A. Simons"; that "such expenses shall not enter into any calculations of net income, profits, or commissions under this agreement"; that "if the net income from either house (after the payment of current expenses for operation and maintenance) is in excess of seventy-five dollars during any *money* (month) from September to May, inclusive, or in excess of fifty dollars during any month from June to August, inclusive, Harvey Lebrun shall receive, semi-monthly, on the first and fifteenth of each month, fifty per cent of any such excess on each house"; that "in case the kitchen at 120 Marlette Street is not rented out as part of an apartment, Mr. and Mrs. Harvey Lebrun shall occupy and use the kitchen, in addition to their other room"; that "in that case, if the frigidaire and the electric range are used by Mr. and Mrs. Lebrun during any month in which Harvey

Lebrun is not already paying either all of the electricity bill" when there are no additional roomers, "or half" in ascertainment of net income as above provided, "and if the bill . . . is in excess of ten dollars ($10.00) during such month, such excess expense shall be shared on a 50-50 basis between Harvey Lebrun and M. A. Simons, provided that any amounts received from tenants for special uses of electricity shall be first charged off against this excess"; that "M. A. Simons shall, at all reasonable times, have full right of entry, inspection, installation, repairs, etc., to each house"; that "the terms and conditions of this agreement may be modified or canceled at any time by mutual consent"; that "the entire arrangement may be terminated at the end of any academic quarter, on thirty days' notice either from Harvey Lebrun to M. A. Simons or from M. A. Simons to Harvey Lebrun"; and that "in any notification, authorization, or other action under this agreement, either M. A. Simons or Harvey Lebrun may act either orally or in writing, . . ."

Evidence for plaintiff further tended to show that this agreement is the only one between the parties; that after the execution of said agreement defendant Harvey Lebrun went into, and has continuously remained in possession of the property; that plaintiff notified defendant several times orally that he was going to terminate the contract in accordance with the contract "at the end of any academic quarter," and on 16 November, 1939, gave defendant written notice in person, as follows: "Dear Mr. Lebrun: With regard to our 'agreement' of September 11, 1939, this is to remind you that 'The entire agreement may be terminated at the end of any academic quarter, on thirty days' notice either from Harvey Lebrun to M. A. Simons or from M. A. Simons to Harvey Lebrun.' In accordance with this provision, I hereby notify you to see to it that every one, including yourself, have vacated the house at 120 Marlette Street and has moved all of his belongings from it by December 16, 1939. Sincerely yours, Manning A. Simons"; that the last rent he accepted from defendant was around the first of December, 1939; that at the time he told defendant orally that he desired to terminate the arrangement, defendant said that they would be glad to get out; that defendant is married and he and his wife live at 120 Marlette Street; that defendant was not asked to vacate the house at No. 122 Marlette Street because he had never occupied rooms there; and that $75 is a fair monthly rental for the property at 120 Marlette Street.

Defendant, on the other hand, testified: That he entered the property at 120 Marlette Street under the terms of the contract on September 12, 1939; that he occupied one room continuously, used the kitchen after it was found that it could not be rented as a part of an apartment and occasionally used other rooms as they became vacant; that he is engaged in research and writing from which he earned his living; that he ac-

cepted employment from plaintiff to supplement his earnings; that he was not getting his living out of the house, but was supplementing his income in accordance with the contract; that he was not paying any rent to plaintiff but was only expected to turn over to him rents which he collected; that he was to occupy one or more rooms as available and was not to pay rent for them; and that he had made reports to plaintiff as long as he would accept same.

Defendant reserved exceptions to refusal of court to grant his motion for judgment as in case of nonsuit at close of plaintiff's evidence, and renewed at close of all the evidence.

These issues were submitted to and answered by the jury as follows:

"Was defendant tenant of plaintiff under contract entered into September 11, 1939, as alleged by plaintiff? Answer: 'Yes.'

"Did defendant hold over after termination of his estate and tenancy? Answer: 'Yes.'

"What is fair monthly rental value of the premises in controversy? Answer: '$65.00 per month.' "

The jury, under peremptory instructions from the court, answered both the first and the second issues as indicated. Defendant excepted to such instructions.

From judgment on the verdict, defendant appeals to Supreme Court and assigns error.

Henry A. Whitfield for plaintiff, appellee.
L. J. Phipps for defendant, appellant.

WINBORNE, J. By exceptions to the refusal of the court to grant his motions for judgment as in case of nonsuit under C. S., 567, and to the peremptory instructions as to the first and second issues, assigned as error, and by demurrer *ore tenus* in this Court, defendant appellant challenges the jurisdiction of the court over the subject matter of this action. In the light of the facts as they appear in the record on this appeal we are of opinion and hold that the challenge is not well founded.

The jurisdiction of a justice of the peace in civil actions for recovery of possession of real estate is entirely statutory—and is derived from the landlord and tenant act providing for summary ejectment. Chapter 46, Article 3, sections 2365, *et seq.*, of Consolidated Statutes of North Carolina, 1919. Such jurisdiction may be exercised only in cases where the relationship of landlord and tenant existed within the terms and meaning of the landlord and tenant act, and where the tenant holds over after the expiration of the term. *Credle v. Gibbs,* 65 N. C., 192; *McCombs v. Wallace,* 66 N. C., 481; *Hughes v. Mason,* 84 N. C., 473; *Forsythe v. Bullock,* 74 N. C., 135; *Parker v. Allen,* 84 N. C., 466; *McDonald*

v. Ingram, 124 N. C., 272, 31 S. E., 677; *Hauser v. Morrison,* 146 N. C., 248, 59 S. E., 693; *McIver v. R. R.,* 163 N. C., 544, 79 S. E., 1107; *McLaurin v. McIntyre,* 167 N. C., 350, 83 S. E., 627; *Ins. Co. v. Totten,* 203 N. C., 431, 166 S. E., 316.

In *Hughes v. Mason, supra, Dillard, J.,* speaking for the Court, said: "The landlord and tenant act in Battle's Revisal, ch. 64, sec. 19 (C. S., 2365), by its terms and the construction put upon it by the Court, gives the remedy of summary ejectment before a justice of the peace only in the case when the simple relation of lessor and lessee has existed and there is a holding over after the term has expired, either by afflux of time or by reason of some act done or omitted contrary to the stipulations in the lease."

In *McCombs v. Wallace, supra,* speaking of tenancy embraced within the meaning of the landlord and tenant act, the Court said: "Upon a careful consideration of this act, we think it was intended only to apply to a case in which the tenant entered into possession under some contract, either actual or implied, with the supposed landlord. . . . The words of the section clearly require that the entry should be under a demise of some sort, although there is no reason for saying that it must be for any definite term; it may be at will."

The plaintiff contends that while he employed the defendant as manager and custodian of the two houses at 120 and 122 Marlette Street in Chapel Hill, the entry into and occupancy by defendant and his wife of a room or rooms in the house at 120 Marlette Street was as tenant, and not as servant or employee, or agent. On the other hand, defendant contends that he entered and occupies the room as the employee of plaintiff and for that reason the remedy of summary ejectment is not open to plaintiff.

This basic question now arises: Did the relation of landlord and tenant or lessor and lessee, within the meaning of the landlord and tenant act, exist between plaintiff and defendant with respect to the house at 120 Marlette Street in Chapel Hill? If so, has the term of tenancy terminated? Upon the facts of this record, both questions are answered in the affirmative.

While, as a general rule, it is held that a person who occupies the premises of his employer as part of his compensation is in possession as a servant, and not as a tenant, where the occupancy is connected with, or is required for the necessary performance of his service, there are qualifications to the rule. A person may occupy premises as a tenant and yet be a servant of the owner, and where the occupation of the employer's premises is not a mere incident to the service, the principle of landlord and tenant applies, even though the rental is satisfied by service. Annotations 39 A. L. R., 1145-1149.

The trend of decisions on the subject in this State is reflected in the cases of *S. v. Smith,* 100 N. C., 466, 6 S. E., 84, and *Tucker v. Yarn Mill Co.,* 194 N. C., 756, 140 S. E., 744.

The case of *S. v. Smith, supra,* was a criminal prosecution for forcible entry, heard upon special verdict. The facts there are these: The defendant Smith hired Jacob Etheridge to work for him during 1887, as a laborer on his farm in Wake County, agreeing to pay for his services a stipulated amount of money, to furnish him with a certain monthly allowance of meal and meat, and a house to live in, and all crops on three acres of land to be worked by Etheridge, Smith to furnish the plowing. Under this agreement Etheridge was put in and allowed to occupy a house on Smith's plantation, separated several hundred yards from the Smith dwelling house. After having discharged Etheridge and given him notice to vacate the house, Smith, by threats and demonstrations of deadly weapon and an array of numbers, against which resistance would have been useless, drove Etheridge out of the house. The court below adjudged Smith to be not guilty. This Court, in reversing the judgment below, speaking through *Smith, C. J.,* after distinguishing the case of *S. v. Curtis,* 20 N. C., 363, where the building occupied by the servant was within the curtilage, said: "Etheridge occupied with his family a separate and distinct dwelling, several hundred yards from that of the defendant Smith, and under a special contract by which for his services as a laborer he was to have furnished him a dwelling place and a monthly allowance of meal and meat, as well as the privilege of cultivating a small strip of land for his own benefit. Under this contract he went into possession, raised the crop, and, while in the occupancy of the house, was driven out. There were created, in our opinion, the legal relations of lessor and lessee between the parties, which did not warrant the invasion of the prosecutor's possession of the premises no more than if he had been on other lands of Smith instead of on the plantation whereon he lived."

The case of *Tucker v. Yarn Mill Co., supra,* was an action for recovery of damage resulting from injury sustained by plaintiff in falling through a porch floor. There the plaintiff was employed by defendant as a spinner in defendant's mill. Defendant agreed to pay her weekly wages and also to furnish her a house in which to live during such time as she continues in its employment—the rent for which was deducted from her weekly wages. The plaintiff contended that while she was occupying the house the relationship between defendant and her was that of master and servant, or employer and employee, and not that of landlord and tenant. *Connor, J.,* speaking thereto, said: "While plaintiff was in defendant's mill, engaged in the performance of her duties as its employee, the relation between them was that of employer and em-

ployee, but while she was in the house, occupying it as her home, defendant was her landlord and she was its tenant. It cannot be held that plaintiff, while in a house furnished her by defendant, to be occupied by her as her home, was in a place furnished by her employer for the performance of her duties as an employee. The house was not furnished her as a place in which to work. When she entered this house she was in her home. Its duties to her, while in the house, arose solely from the relationship of landlord and tenant."

The trend of thought in textbooks and in decisions of other jurisdictions is that in order to establish relationship of master and servant, or employer and employee, with respect to occupancy by the servant, the occupancy must be reasonably necessary for the better performance of the particular service, inseparable from it, or required by the master as essential to it.

In Wood's Landlord and Tenant, Vol. 1, Second Edition, p. 81, the author states: "The question is, whether it is subservient and necessary to the service. The mere fact that the relation of master and servant exists, and that the servant occupies one of the master's rooms, without paying rent therefor, as a part of his compensation, is not of itself sufficient to establish a holding as a servant, but the occupancy must also be subsidiary, and necessary to the service. It must be dependent upon and necessarily connected with the service, for if it is independent or unconnected with the service, and not in aid thereof, although the house belongs to the master and no rent is paid therefor, or even though the house is hired by the master and he pays the rent therefor, the occupancy is that of a tenant, and the master cannot eject him at will." See *Snedaker v. Powell*, 32 Kan., 396, 4 Pac., 869.

In *Womach v. Jenkins*, 128 Mo. App., 408, 107 S. W., 423, *Johnson, J.*, said: "Where the occupation of the master's house by the servant is directly connected with the service, or if it is required expressly or impliedly by the employer for the necessary or better performance of the service, the relation of the parties with respect to the property is not that of landlord and tenant, but of master and servant, and the latter will be required by law to surrender possession of the premises at the end of the employment. . . . But there is no inconsistency between the relation of landlord and tenant and that of master and servant, and where, as in the case in hand, it appears that the occupation of the master's premises were not treated by the parties themselves as a mere incident of the service, it should be regarded in law as the occupation by a tenant, and the rights of the parties should be determined according to the laws and principles applicable to the relation of landlord and tenant."

In *Crossgrove v. A. C. L. R. R. Co.*, 30 Ga. App., 462, 118 S. E., 694, it is said: "It is possible for one to be a servant, and at the same time

a tenant of his master. He may have a contract of employment, and also a contract to rent a dwelling or parcel of land. If so, his right to retain possession of the premises, or to require a proceeding to remove him as a tenant, depends on the contract involved. If the occupancy is required expressly or impliedly by the employer, for the necessary or better performance of the service, and is subservient and not merely casual to the performance or better performance of the duties of the servant's employment, the relation of landlord and tenant does not exist. . . . But a servant whose occupancy is independent of his employment in the sense that it is not subservient thereto, even though liable to be terminated by the dissolution of the contract of employment, is a tenant at will. . . . The occupancy is not that of servant merely because it may be in some way connected with or convenient for the contract or duties of employment; but in order to render it such, the occupancy must be reasonably necessary for the better performance of the particular service, inseparable therefrom, or required by the master as essential thereto."

Applying these principles to the case in hand, the contract of employment does not require the defendant to occupy a room in either house, nor does it appear to be essential for it is self-evident that he could not actually occupy a room in both houses. It is, therefore, clear that the occupancy by defendant was as tenant of plaintiff.

Though it is admitted that defendant entered into possession of the room or rooms in the house at 120 Marlette Street under the agreement, it is silent as to the term. The occupancy is manifestly a tenancy at will which may be terminated at any time by either the landlord or the tenant. *Rental Co. v. Justice,* 212 N. C., 523, 193 S. E., 817.

In the court below defendant did not controvert the sufficiency of proof that 16 December, 1939, indicated in the notice to quit, was the end of an academic quarter. Hence, he cannot now be heard to do so. It is a well settled principle in this State that the theory upon which a case is tried in the courts below must prevail in considering the appeal and in interpreting a record and in determining the validity of exceptions. *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123; *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5, and cases cited in each.

In the judgment below there is

No error.

ALICE D. BOGEN v. H. L. BOGEN.

(Filed 8 January, 1941.)

1. Husband and Wife § 6—

The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, Art. X, sec. 6, Constitution of North Carolina; Michie's Code, 2513, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property.

2. Courts § 1a—

A nonresident plaintiff may sue a nonresident defendant in the courts of this State upon a transitory cause of action.

3. Process § 8—

Plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State. *Held:* Service of process on defendant by service on the Commissioner of Revenue under the provisions of Michie's Code, 491 (a), is valid.

STACY, C. J., concurring in result.

SCHENCK, J., joins in concurring opinion.

BARNHILL, J., dissenting.

WINBORNE and SEAWELL, JJ., concur in dissent.

APPEAL by defendant from *Harris, J.,* at June Civil Term, 1940, of ORANGE. Affirmed.

This was a civil action brought by plaintiff againt defendant for actionable negligence, alleging damage. The plaintiff is a citizen and resident of Columbus, Ohio, and this action is brought against her husband, also a citizen and resident of Columbus, Ohio, for personal injuries resulting from an automobile accident which occurred in Orange County, North Carolina, on or about 17 August, 1937. The summons and copy of complaint were served upon Commissioner of Revenue of the State of North Carolina who mailed copies thereof to the defendant at his home in Columbus, Ohio. In apt time, the defendant, through his attorneys, made a special appearance in the cause and moved for a dismissal thereof upon the grounds that there had been no legal and valid service of process upon the person of the defendant, that the attempted service of process was defective and void and that the Superior Court had no jurisdiction of the person of either of the parties to the action.

The order of Harris, J., is as follows: "This cause coming on to be heard at this the June Term, 1940, of Orange Superior Court, upon motion of the defendant who entered a special appearance and moved to

dismiss for want of jurisdiction and defective service of process on the defendant. Upon hearing the argument of counsel for plaintiff and defendant, it is ordered that the motion of the defendant be, and the same is hereby overruled. It is ordered that the defendant be, and he is hereby granted 45 days from date within which to answer, demur or otherwise plead. This the 19th day of June, 1940. W. C. Harris, Judge Presiding."

The defendant excepted, assigned error: (1) To the action of the court in overruling defendant's motion to dismiss as set out in the record; (2) to the action of the court in signing judgment as set out in the record, and appealed to the Supreme Court.

Bonner D. Sawyer for plaintiff.
Cooper & Saunders and W. Clary Holt for defendant.

CLARKSON, J. The question involved: Where the statutory law of North Carolina prescribes the method and manner in which an action may be brought in this State and this Court has held the statute to be constitutional, and where the provisions of the statute have been complied with, will this Court hold that the plaintiff is not entitled to the damages recovered on the ground that she is not a resident of this State? We think not.

There is no contention made by defendant that the statute as to service of summons on nonresident motorists was not complied with. N. C. Code, 1939 (Michie), sec. 491 (a).

In *Alberts v. Alberts,* 217 N. C., 443 (444), speaking to the subject: "In *York v. York,* 212 N. C., 695 (699), it is said: 'In this jurisdiction a wife has the right to bring an action for actionable negligence against her husband, *Roberts v. Roberts,* 185 N. C., 566 (567); *Shirley v. Ayers,* 201 N. C., 51 (55); *Jernigan v. Jernigan,* 207 N. C., 831.' We think that although plaintiff is a nonresident and the action transitory, the doors of the courts of this State are open to her to determine her rights. *Howard v. Howard,* 200 N. C., 574; *Steele v. Telegraph Co.,* 206 N. C., 220; *Ingle v. Cassady,* 208 N. C., 497 (498)."

The *Alberts case, supra,* cites many authorities from other jurisdictions sustaining the right of nonresidents to sue.

The defendant contends: "A nonresident married woman living with her husband is not entitled to the privileges of separate property rights as conferred upon resident married women by our State Constitution and statutes enacted in connection therewith." We cannot so hold.

Article X, sec. 6, of the Constitution of the State of North Carolina, reads as follows: "The real and personal property of any female in this State acquired before marriage, and all property real and personal to

which she may after marriage become in any manner entitled shall be and remain the sole and separate estate and property of such female," etc.

In 1913, the Legislature enacted the following statutory provision, known as the "Martin Act": "The earnings of a married woman by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her can be recovered by her suing alone and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried." N. C. Code, 1939 (Michie), sec. 2513.

In *Crowell v. Crowell,* 180 N. C., 516, the Martin Act was upheld and a recovery had against a husband in tort for personal injuries by infecting her with a lothsome disease. At pp. 523-4, it is said: "It must be remembered that there is not, and never has been, any statute in England or this State declaring that 'husband and wife are one, and he is that one.' It was an inference drawn by courts in a barbarous age, based on the wife being a chattel, and therefore without any rights to property or person. It has always been disregarded by courts of equity. Public opinion and the sentiment of the age as expressed by all laws and constitutional provisions since have been against it. The anomalous instances of that conception, which still survive, in some courts are due to construing away the changes made by corrective legislation or restricting their application. Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to 'love, cherish and protect' her. Civilization and justice have progressed thus far with us, and never again will 'the sun go back ten degrees on the dial of Ahaz.' Isaiah, 38:8."

The Martin Act is broad and comprehensive as to the right of the wife to sue the husband in tort for personal injuries. The defendant contends that this right given by the Constitution, *supra,* is applicable to "any female in this State" and the Martin Act goes beyond the purview of the Constitution. This contention is too technical and attenuated. The plaintiff was injured by the negligence of her husband, as charged in the complaint, in Orange County, N. C., on or about 17 August, 1937. Her cause of action arose in this State when she received the injury and at the time she was a "female in this State," and the Martin Act was applicable. The Constitution says nothing about nonresidents in the State. May it be said to the glory of North Carolina that the courts of this State are open to all, rich and poor alike, and law and justice, tempered with mercy, are sought to be administered. The great writer Paul, in his Epistle to the Hebrews, ch. 13, vs. 2, which has come down through the ages, said: "Be not forgetful to

entertain strangers: for thereby some have entertained angels unawares."

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

Affirmed.

STACY, C. J., concurring in result: Plaintiff sues to recover for injuries sustained in an automobile accident which occurred on Highway No. 70, in Orange County, 17 August, 1937. The action is transitory. It arose in this State. It is brought here. Hence, the law of North Carolina is to govern, both in its substantive and adjective features. *Farfour v. Fahad,* 214 N. C., 281, 199 S. E., 521; *Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11; *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562; *Wright v. Pettus,* 209 N. C., 732, 184 S. E., 494; *Wise v. Hollowell,* 205 N. C., 286, 171 S. E., 82.

Plaintiff and defendant are residents of the State of Ohio. While not alleged in the complaint, it is stated in the case on appeal that they are husband and wife. Neither their nonresidency nor their relationship is a bar to the action in this State. *Alberts v. Alberts,* 217 N. C., 443, 8 S. E. (2d), 523; *Steele v. Telegraph Co.,* 206 N. C., 220, 173 S. E., 583; *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101. Here a wife may maintain an action against her husband for negligent injury. *Roberts v. Roberts,* 185 N. C., 566, 118 S. E., 9; *Jernigan v. Jernigan,* 207 N. C., 851, 175 S. E., 713; *York v. York,* 212 N. C., 695, 194 S. E., 486.

It is provided by ch. 13, Public Laws 1913 (Martin Act), now C. S., 2513, that a married woman, suing alone, can recover for personal injuries, and such recovery "shall be her sole and separate property" as fully as if she were unmarried. The changes wrought by this statute are substantive as well as remedial in character. They are not limited in their enjoyment to residents of the State. Indeed, such a limitation might import some constitutional difficulty. *McDonald v. MacArthur,* 154 N. C., 122, 69 S. E., 832; *Steele v. Telegraph Co., supra.* Under the Federal Constitution, Art. IV, sec. 2, the citizens of each State are "entitled to all privileges and immunities of citizens in the several states."

The right to sue without the right to take the benefits of a recovery would be an empty privilege. The courts are not open for shadow-boxing. The plaintiff is entitled to maintain her action in this jurisdiction.

There is no occasion to inquire whether a wife can sue her husband under the Ohio Law. The law of the forum is alone applicable to the case. *Howard v. Howard, supra.*

SCHENCK, J., joins in this opinion.

BARNHILL, J., dissenting: Plaintiff is defendant's wife. They are residents of Ohio. Their marital status is determined by the law of that State.

The right to compensation for personal injury negligently inflicted is a chose in action; a species of personal property. The *situs* of the ownership of personal property is the residence of the owner. In this instant it is personal to the plaintiff. In no sense is it located in North Carolina except when and if she comes to this State.

In Ohio the common law fiction of the unity of the person of the husband and wife, with certain modifications, still exists. Plaintiff and defendant are, in the eyes of the law of that State, one person. Upon her marriage her legal existence was merged in that of her husband and she cannot possess or sue upon a claim against him.

So long as she remains there she has no right to compensation on the cause of action alleged. When she came to this State to institute this action she became possessed of this right so soon as she crossed the State line. Having instituted this action and upon her return to Ohio she was divested of the right. When she returns to this State for the trial of this cause she will be revested therewith. When she obtains judgment—if she does—she will have to sue upon it in Ohio so as to be entitled to execution. She will be met at the threshold of that suit by her disability. Thus, in practical effect, she will own nothing. Why is not this permitting our courts to engage in shadow-boxing? In any event, it involves a logic I am unable to follow.

Furthermore, when the action does not involve property located in this State, which is the subject matter of the suit, and all parties are nonresidents, our courts are open to them as a matter of courtesy and not as a matter of right. When the action is so patently an effort to evade the limitations of the law of their State, the courtesy should be denied.

It is true that the action is transitory and, conceding that plaintiff has a cause of action, she may be permitted to maintain her action in the courts of this State. That is not the question here. We are now dealing with plaintiff's want of capacity to sue her husband due to her disability. Under the law of her State she and her husband are but one and, as against him, she has no legal existence. Plaintiff and defendant being one person, and the plaintiff possessing no legal existence as against the defendant, the Court has no jurisdiction.

I may say that I am not in sympathy with the common law rule. However, we are interested now in applying the law as it is and not as we believe it should be.

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

J. W. McGUINN ET AL. v. CITY OF HIGH POINT ET AL.

(Filed 31 January, 1941.)

1. Injunction § 14—

The parties are concluded by decree granting a permanent injunction, affirmed on appeal, and the matters therein decided may not be relitigated, but courts of equity have the power to entertain a motion by the party restrained for a modification of the decree upon an assertion of substantial changes in the facts and situation of the parties obviating the grounds upon which the decree was based.

2. Municipal Corporations § 10—Municipal power board held to have authority to rescind prior ultra vires resolution of city council.

Defendant municipality, by resolution passed by its city council, proposed to construct a hydroelectric plant. Later, the council passed an amendatory resolution under which the city proposed to submit to the control of the Federal Power Commission in the operation of the plant, and pursuant thereto obtained a Federal license. Thereafter a board of power commissioners was created and authorized by statute to exercise all the powers and duties of the city with respect to the plant contemplated in the prior resolutions. *Held:* The submission by the city to the control of the Federal Power Commission being *ultra vires*, the board of power commissioners has the authority to rescind the amendatory resolution of the council in regard thereto.

3. Same—Municipal board of power commissioners held without authority to change fundamental character of project it was created to prosecute.

Defendant municipality, by resolution of its council, proposed to construct a hydroelectric plant and finance same by issuing bonds under the Revenue Bond Act of 1935 (ch. 473, Public Laws of 1935). Thereafter the council amended the prior resolution by resolution making substantial changes in the original plan so that the bonds contemplated would be issued under the Revenue Bond Act of 1938 (ch. 2, Public Laws, Extra Session of 1938). The General Assembly, by private act, then created a board of power commissioners for the city and gave said board all the powers and duties of the city with respect to the plant proposed by the original resolution of the council and the amendments thereto. *Held:* The board of power commissioners was created and authorized to prosecute the project as then constituted, which contemplated the issuance of bonds under the Revenue Bond Act of 1938, and the board is without power to change the fundamental character of the project by resolution rescinding the amendatory resolution of the council and reënacting the original resolution of the council, so as to bring the project within the purview of the Revenue Bond Act of 1935, and thus obviate the necessity of a certificate of convenience from the Utilities Commissioner.

4. Same—Under provisions of statute creating it, municipal power board held without authority to affect pending litigation by changing character of project.

Defendant municipality, by resolution of its council, as amended, proposed to construct a hydroelectric plant and finance same by issuing bonds under the Revenue Bond Act of 1938. The General Assembly, by private act,

created a board of power commissioners for the city and gave said board all the powers and duties of the city with respect to the proposed plant, and the private act expressly provided that it should not affect pending litigation. At the time of the passage of the private act this action was pending and it was determined on the former appeal that a certificate of convenience was prerequisite to the construction of the proposed plant. *Held:* Since the statute creating the board of power commissioners expressly provided that it should not affect pending litigation, *a fortiori*, the board of power commissioners created by the act is without power to affect the pending litigation by passing a resolution rescinding the amendatory resolution of the council and reënacting the original resolution of the council, seeking thus to bring the project within the purview of the Revenue Bond Act of 1935 so as to obviate the necessity for the certificate.

5. Municipal Corporations § 5—

Municipal corporations are creatures of the State, endowed for the public good with a portion of its sovereignty, and they must be at all times subject to its will.

6. Municipal Corporations § 8: Utilities Commission § 2: Injunction § 14—Certificate of convenience held necessary to construction of municipal hydroelectric plant in this case.

The board of power commissioners of defendant municipality was created and authorized to prosecute a project for the construction of a municipal hydroelectric plant under the provisions of the Revenue Bond Act of 1938. At the time of the creation of the board of power commissioners, this action was pending in which it was judicially determined on the former appeal that a certificate of convenience from the Utilities Commissioner was a prerequisite to the construction of such plant, and the municipality was restrained from proceeding further with the project without obtaining a certificate of convenience. The board of power commissioners attempted to amend the project so as to bring it within the purview of the Revenue Bond Act of 1935, under which a certificate of convenience is not required, and the municipality made a motion for modification of the restraining order and asserted such alteration in the nature of the project as a change in conditions warranting such relief. *Held:* The board of power commissioners, being without authority to make such fundamental change in the nature of the project, its action in respect thereto is void, and the municipality has not shown a change in conditions justifying the court in modifying the permanent injunction.

7. Municipal Corporations § 8: Utilities Commission § 2—

The Revenue Bond Act of 1935 authorizing certain municipal projects without requiring a certificate of convenience from the Utilities Commissioner, was continued as to defendant municipality by chapters 65 and 561, Public-Local Laws of 1937. *Held:* The continuation of authority relates solely to projects within the scope of the Act of 1935, and the Public-Local Laws do not authorize the municipality to construct and finance projects beyond the scope of the Act of 1935 without obtaining a certificate of convenience.

8. Contempt of Court § 2b—

Where a municipality is permanently enjoined from prosecuting a particular project, and thereafter it makes fundamental changes in the char-

acter of the project to obviate the grounds of the injunction, the court, upon proper findings, correctly dismisses a rule for contempt for violation of the prior order.

9. Equity § 1f—

Equity follows the law.

10. Injunction § 14—

Upon motion for modification of a prior restraining order on the ground of change of conditions, the former decree is *res judicata* and the matters therein determined are conclusive and may not be relitigated, the sole question presented being whether movants have shown a change in conditions warranting the relief sought.

BARNHILL, J., concurring.

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

SEAWELL, J., dissenting.

APPEAL by Adams-Millis Corporation *et al.*, plaintiffs by intervention, and Duke Power Company, intervening plaintiff, from judgment modifying restraining order and from order dismissing rule for contempt, from *Nettles, J.*, at August Civil Term, 1940, of GUILFORD.

The chronology of this case, since the former appeal, follows:

I. At the May Term, 1940, Guilford Superior Court, judgment of modification and affirmance, dated 23 May, was duly entered in conformity to the opinion of the Supreme Court rendered 17 April and reported in 217 N. C., 449.

II. On 27 May, petition to rehear the case was filed in the Supreme Court and denied 12 June.

III. Thereafter, on 15 July, 1940, the board of power commissioners of the city of High Point adopted two resolutions:

1. The first being entitled, "A Resolution Repealing a Resolution Adopted by the Council of the City of High Point on March 20, 1939, Entitled 'A Resolution Accepting License for the High Point Hydroelectric Project Issued Pursuant to Order of the Federal Power Commission on March 10, 1939.'"

The purpose of this resolution is to free the city from its agreement to abide by the conditions imposed in the license issued by the Federal Power Commission for the construction, operation and maintenance of the project. Pursuant thereto the Federal Power Commission was requested to vacate its order of 10 March, 1939, authorizing the issuance of the license, and, also, that the city be permitted to withdraw its original application therefor. Accordingly, on 25 October, 1940, the Federal Power Commission adopted a resolution vacating its order of 10 March, 1939.

2. The second being entitled, "A Resolution to Amend and Reënact a Resolution Adopted by the City Council of the City of High Point

March 20, 1939, Entitled 'A Resolution to Amend a Resolution Adopted April 27, 1938, Entitled "A Resolution Authorizing the Construction of Hydroelectric Plant and System by the City of High Point for the Use of the City and Consumers in the City, and Authorizing the Issuance of Revenue Bonds to Finance a Part of the Cost." ' "

The end sought to be accomplished by this resolution is to relieve the city from the effects of the amendatory resolution of 20 March, 1939, placing the project under the provisions of the Revenue Bond Act of 1938, ch. 2, Public Laws, Extra Session, 1938, and to declare its intention of proceeding under the original resolution of 27 April, 1938, as amended and reënacted by the resolution of 15 July, 1940, thus predicating the issuance of the proposed revenue bonds on authority of the city charter and the Revenue Bond Act of 1935, ch. 473, Public Laws 1935, and seeking to obviate the need of a certificate of convenience and necessity required by the Revenue Bond Act of 1938.

IV. At the August Term, 1940, Guilford Superior Court, with the foregoing resolutions as bases for their motion, the city of High Point and its officers, parties defendant herein, applied to the court for a modification of the judgment and restraining order previously entered in the cause.

This application was allowed, and from the judgment entered thereon the Adams-Millis Corporation *et al.*, plaintiffs by intervention, and the Duke Power Company, intervening plaintiff, entered exceptions and gave notice of appeal.

At the same time, the court dismissed the rule for contempt—previously issued on affidavit of J. W. McGuinn, plaintiff—and based its ruling on the findings incorporated in the judgment of modification. Similar entries, as above, were noted, and appeals taken from this ruling.

Carter Dalton and John A. Myers for Adams-Millis Corporation et al., plaintiffs by intervention, appellants.

R. M. Robinson, H. S. Haworth, Wm. B. McGuire, Jr., and W. S. O'B. Robinson, Jr., for Duke Power Company, intervening plaintiff, appellant.

Grover H. Jones and Roy L. Deal for City of High Point et al., defendants, appellees.

STACY, C. J. This proceeding is supplemental and summary in character. By motion after judgment the defendants have applied for vacation or modification of the decree entered in the Superior Court of Guilford County at the April Term, 1939, enjoining the defendants from proceeding with the construction of a hydroelectric power plant and system at Styer's dam site on the Yadkin River, in Yadkin County,

about 25 miles from the city of High Point. On appeal to this Court, the order of the Superior Court was modified and affirmed. Judgment on the certificate was duly entered at the May Term, 1940, Guilford Superior Court. The present motion was made at the August Term, following.

Due to the unusuality of the questions presented, the matter was thoroughly pounded and hammered at the bar. In addition, the parties have filed elaborate briefs. The restraining order heretofore entered in the cause is sought to be relaxed or obviated on account of certain changes or modifications made in the enterprise.

First. At the threshold of the hearing, the court was met with a challenge of its power to modify the judgment previously entered in the cause.

If we concede, for the moment, the authority of the board of power commissioners to adopt the resolutions of 15 July, 1940, it would seem that the court was justified in undertaking to modify the restraining order, in one particular at least, for these resolutions were intended to effect substantial changes in the enterprise. The changes sought to be accomplished were, not only from fact to fact—from interstate to intrastate commerce, but also from law to law—from Federal to State authority, and from one State statute to another. *Capps v. R. R.*, 183 N. C., 181, 111 S. E., 533. If valid, the undertaking was thus converted from one under the jurisdiction of the Federal Power Commission to one under the exclusive control of local authorities.

The parties are in sharp disagreement in respect of the authority of the board of power commissioners to adopt the resolutions of 15 July, 1940. In the court below the case was made to turn on the existence of this power. The appellants insisted then, and insist now, that no such power is vested in the board, and that without it, the resolutions are unavailing. It will be noted that the two resolutions are not alike either in kind or purpose.

We are not disposed to question the authority of the board in so far as the first resolution is concerned. Its only purpose is to rescind the prior acts of the city council in applying for, accepting and agreeing to abide by the conditions imposed in the license issued by the Federal Power Commission for the construction, operation and maintenance of the contemplated project. As these acts were *ultra vires* in the first instance, it ought not to take any great amount of power to disavow them. Having authority to act in the premises, it would seem that the first resolution was within the board's determination. Nor is the debate as to the ultimate effect of this resolution particularly germane in view of the previous holding that the city is without authority to accept the Federal license and to agree to abide by all the conditions imposed therein.

Sufficient unto the future are the problems thereof. The resolution is one of compliance and not one of circumvention.

The second resolution, however, presents a matter of different substance.

The character of the project was fixed by resolution of the council of the city of High Point on 27 April, 1938, as amended by the supplemental resolution of 20 March, 1939, which amendatory resolution brought it within the terms of the Revenue Bond Act of 1938, necessitating a certificate of convenience and necessity from the Public Utilities Commissioner.

Thereafter, on 4 April, 1939, the board of power commissioners of the city of High Point was created by Act of Assembly, ch. 600, Public-Local Laws 1939, and vested with full municipal authority over the project then established. The act provides that from and after 1 May, 1939, the city council "shall no longer exercise the powers or authority theretofore vested in them with respect to the said electric light, heat and power plant and system"; and that "all the powers and duties of the City of High Point, . . . with respect to the . . . electric light, heat and power plant and system of said city pursuant to the resolution adopted by the Council of the City of High Point on April twenty-seventh, one thousand nine hundred and thirty-eight, and amendments thereto, shall be vested in and exercised by the Board of Power Commissioners."

It will be observed that at the time of the creation of the board of power commissioners the municipality was proceeding under the Revenue Bond Act of 1938. This required a certificate of convenience and necessity from the Public Utilities Commissioner for the project in question. The purpose of the second resolution adopted by the board of power commissioners on 15 July, 1940, is to take the project from under the provisions of this act and to free it from any and all supervision on the part of the Public Utilities Commissioner. This would seem to be at variance with the grant of power which the General Assembly vested in the board of power commissioners of the city of High Point. At the time of the grant, certificate from the Public Utilities Commissioner was required and the grant is with specific reference to this requirement. The project entrusted to the board of power commissioners was the one established "pursuant to the resolution" adopted by the council of the city of High Point on 27 April, 1938, "and amendments thereto." Can the board, by later resolution, thus free itself from the supervision imposed by one of these valid amendments? The supervision attached prior to the creation of the board and subsisted at the time of its creation. It is not thought that in a matter of this kind, the law-making body intended to vest uncontrolled power in a board which is itself

beyond the reach and voice of the electorate, as is the project also. The idea of supervision may have arisen from the Federal requirement. If a Federal license when a navigable stream is involved, why not a State certificate when nonnavigable waters are touched? At any rate, it was not perceived by the General Assembly that a municipality of the State would welcome Federal domination and control and eschew all State supervision. It is axiomatic that municipal corporations, being creatures of the State, endowed for the public good with a portion of its sovereignty, must at all times remain amenable to its will.

Moreover, it is provided in the act creating the board of power commissioners, "Nor shall this act affect pending litigation." The present litigation was pending at the time of the passage of the act, and it was held on the former appeal that the city could not lawfully proceed with the undertaking without first obtaining a certificate of convenience and necessity from the Public Utilities Commissioner of the State of North Carolina. It follows, therefore, that this is still an essential requirement of the law. If the act itself is not to "affect pending litigation," what shall be said of a resolution adopted under and by virtue of the act which has as its purpose the affectation of pending litigation? The resolution appears to be one of circumvention rather than one of compliance.

In this view of the matter, it seems unnecessary to discuss the authority of the court to entertain the defendants' application for modification of the judgment. The authority may be conceded, in proper instances, upon a clear showing of changed conditions meriting relief. *Wilson v. Comrs.*, 193 N. C., 386, 137 S. E., 151; *Berrier v. Comrs.*, 186 N. C., 564, 120 S. E., 328; *United States v. Swift & Co.*, 286 U. S., 105; Annotation, 68 A. L. R., 1180. This is not to say that equity will lightly set aside its decrees, nor that matters determined on the original hearing may thus summarily be relitigated. *Lowe v. Prospect Hill Cemetery Ass'n.*, 75 Neb., 85, 106 N. W., 429. In the instant case, the matter of obtaining a certificate of convenience and necessity from the Public Utilities Commissioner was decided on the original hearing after full debate and thorough consideration. The arguments then advanced were the same as the ones now urged.

Speaking to a similar situation in *Lowe v. Prospect Hill Cemetery Ass'n., supra, Holcomb, C. J.*, delivering the opinion of the Court, said: "It is obvious that the defendants are in these subsequent proceedings concluded by the original decree as to all matters urged as a defense in that action, as well (as) any defense which might have been presented to defeat the plaintiff's demand for a permanent injunction restraining the defendants from doing the things therein prohibited. From the consequence of the decree, as to all such matters, neither of the parties can now escape. Our present consideration of the case is limited to an

inquiry as to whether, because of subsequent changes in the situation of the parties and of facts since arising creating different conditions, the defendants ought in equity to be relieved from the force and effect of a just and valid decree entered against them."

Second. From what is said above, it appears that the question of issuing revenue bonds under the city charter and the Revenue Bond Act of 1935 has been rendered largely academic. It may be added, however, that this, too, was the subject of consideration on the former appeal. Reference was then made to the discussion of the subject in the first *Williamson case,* 213 N. C., 96, 195 S. E., 90, where it was pointed out that the revenue bonds contemplated by the Act of 1935 had reference to "any undertaking, within the municipality." The same matter was again presented in the petition to rehear, which was denied.

Conceding that by amendments to the city charter, chs. 65 and 561, Public-Local Laws of 1937, the city of High Point is authorized to issue within a period of four years from 15 February, 1937, revenue bonds under the terms of the Revenue Bond Act of 1935 "for any purpose which said city is now authorized by the Municipal Finance Act or any other law to finance by the issuance of bonds," in the absence of a more definite expression, it is not thought that this would extend the provisions of the act to undertakings not originally intended to be covered by its terms, and forsooth in conflict therewith. It was said in the first *Williamson case, supra,* that in this act, "the right of acquisition, purpose of operation, and manner of financing an undertaking are linked together, and limit the extent of the undertaking." The act expired by its own limitation, and was continued for the benefit of the city of High Point for a period of four years from 15 February, 1937, and this, we apprehend, for undertakings originally within the purview of the act. *Kennerly v. Dallas,* 215 N. C., 532, 2 S. E. (2d), 538. It is provided in section 13 of the act that in case of conflict with any other general, special or local law, "the provisions of this act shall be controlling."

By the Revenue Bond Act of 1935, the municipalities of the State were authorized, for a limited time, to construct, improve and extend self-supporting undertakings, "within the municipality," and to finance them with funds derived from the sale of revenue bonds, payable solely out of the revenues of the undertaking. No certificate of convenience or necessity was required under the provisions of this act, except the approval of the Local Government Commission.

By the Revenue Bond Act of 1938, the municipalities of the State were again authorized, for a limited time, to construct, improve and extend "revenue-producing undertakings" of various kinds, including hydroelectric plants or systems, "wholly within or wholly without the municipality, or partially within and partially without the munici-

pality," and to finance them with funds derived from the sale of revenue bonds, payable solely out of the revenues of the undertaking.

Because of the extension of authority contained in this later act, it was provided that "no municipality shall construct any systems . . . useful in connection with the generation . . . of electric energy for lighting, heating and power, for public and private uses, without having first obtained a certificate of convenience and necessity from the Public Utilities Commissioner" (with exception not now pertinent).

It was insisted on the original hearing, on the former appeal and in the petition to rehear, that by amendments to its charter the city was authorized to proceed in the premises under the terms of the Revenue Bond Act of 1935, and to issue revenue bonds, payable solely out of the revenues of the undertaking, without first obtaining the certificate of convenience and necessity required by the Revenue Bond Act of 1938. The conclusion reached was, that the certificate should first be obtained. The judgment of the Superior Court on the motion to vacate the injunction is apparently at war with the decision in this respect.

Third. On the showing made at the hearing as appears from the first resolution of 15 July, 1940, the trial court was justified in dismissing the rule for contempt under authority of what was said in the second *Williamson case,* 214 N. C., 693, 200 S. E., 388.

It results, therefore, that the defendants have not yet complied with the law as it is written in respect of the undertaking in question, if it is to be financed without resort to taxation.

It should be remembered that the city of High Point is here proceeding with a project, not in the exercise of its general municipal powers, but pursuant to special legislative authority. The legislation is new and not altogether free from ambiguity. The undertaking is likewise out of the ordinary. Liability to taxation has sought to be avoided. Difficulties have been encountered. It is agreed on all hands, however, that the defendants are authorized to proceed only as the law prescribes.

Finally, it may be useful to recall that the case is controlled by the record as presented and the law as it is written. Neither is to be ignored or disregarded. Equity still follows the law. Attention is also again directed to the fact that matters heretofore determined are not to be relitigated in this subsequent proceeding. Much of what is said in favor of a different conclusion seems to overlook this circumstance and to proceed upon the assumption that the board of power commissioners can pull itself up by its own boot straps into a field of municipal activity broader than the one established by the act of its creation—a premise not heretofore regarded as sound. *Briggs v. Raleigh,* 195 N. C., 223, 141 S. E., 597. The original decision is *res judicata* on the record as it then stood. See second *Williamson case, supra.* The question now is

whether, on account of later changes, the movants are entitled to relief from the injunction previously granted. We are not at liberty to reverse the former decision, even if regarded as erroneous, which it is not. Nor are we permitted to decide the case as legislators substituting our own notions of policy for those of the General Assembly as expressed in the statutes. *S. v. Barksdale,* 181 N. C., 621, 107 S. E., 505. To say that the defendants may avail themselves of the benefits of the several enactments and at the same time repudiate their limitations and conditions, or to hold that the Court is without jurisdiction in the premises, would be to announce a doctrine at once novel and confused. The rule has always been that granted powers are to be exercised according to the tenor of the grant, and that alleged unwarranted acts of municipal corporations are proper subjects of judicial inquiry. It is not after the manner of the courts of equity to close their doors on allegations of excessive use of power, even in the face of other available remedies. See concurring opinion in *McCormick v. Proctor,* 217 N. C., 23, 6 S. E. (2d), 870. But these matters are beside the point. They have already been concluded. Our present concern is limited to the defendants' request for a revocation of the decree on a showing of changed conditions. The showing is not sufficient.

Error and remanded.

BARNHILL, J., concurring: A municipality has authority under the general law to construct and maintain its own electric light and power plant wholly within, or partly within and partly without, or wholly without, the corporate limits of the municipality. This right is not challenged either by the plaintiffs or by this Court. When, however, a city undertakes to establish and maintain such a project under special legislative authority through a board or commission which, legally, is not accountable to the citizens of the municipality, and under which authority the taxpayers are not afforded opportunity to approve or to disapprove, it must comply with the provisions of the act under which it seeks to proceed.

That the project is under the Revenue Bond Act of 1938 has already been adjudicated by this Court. Defendants do not now challenge that decision. They simply move for a modification of the former judgment upon the theory that there are changed conditions which relieve them from some of the burdens of that act.

It seems apparent to me that the Legislature, in creating the board of power commissioners of High Point, clearly limited the powers of this board. It is authorized to act pursuant to the resolution of the board of commissioners of High Point of 27 April, 1938, as amended.

This Court is bound by the intent disclosed by the language used by

the Legislature in creating the board. It "cannot attribute to the Legislature an intent which is not in any way expressed in the statute." Nor can we call a legislative requirement a mere technicality. To do so would be something new or an innovation in statutory construction.

I fully concur in the majority opinion which so clearly and succinctly points out wherein the defendants have failed to show any changed conditions which would warrant any modification of the former judgment. The act under which they are proceeding requires a certificate of convenience and necessity from the Utilities Commissioner. In this particular the defendants have failed to comply with the terms of the statute under which they are attempting to proceed.

CLARKSON, J., concurring in part and dissenting in part: *The facts:* By resolution first adopted on 30 November, 1936, the city council of the city of High Point authorized the construction and operation of a hydroelectric system. It was proposed to finance the costs of the system by grant from PWA of 45% of the costs and issuance of electric revenue bonds payable from the revenues of the system. The project was questioned in an injunction proceeding by plaintiff, the Duke Power Company, which has an electric distribution system in High Point. The city of High Point also has its own electric distribution system, which it has operated for more than thirty years. It purchases its own current for its own distribution system from the Duke Power Company. Previous opinions of the Supreme Court with regard to the city's efforts to build its own electric plant may be found in *Williamson v. High Point,* 213 N. C., 96, and 214 N. C., 693, and *McGuinn v. High Point,* 217 N. C., 449, decided 17 April, 1940. In the first Williamson opinion the Court held: (1) That bonds payable solely from revenues from such a project and not from general or tax funds of the city are not "debts" within the meaning of Art. VII, sec. 7, and Art. V, sec. 4, as amended; (2) that an electric light and power plant was a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution; and (3) that under the city charter and the Revenue Bond Act of 1935, the city was not authorized to go into the "power business generally."

On the handing down of the first decision in the *Williamson case, supra,* the city council of the city of High Point changed the project, not as to location or very much as to physical characteristics, but as to purpose for which current would be used. This was done by resolution of 27 April, 1938 (this is the resolution which authorizes the present project and is now before the court for consideration). This resolution provides specifically that no distribution line or other distribution facilities shall be constructed outside of the corporate limits of the city of High Point.

The statutory authority of the resolution of 27 April, 1938, was the charter of the city of High Point, particularly Article 2-a, being chapters 65 and 561 of the Public-Local Laws of 1937, and the Revenue Bond Act of 1935. N. C. Code, 1939 (Michie), 2969 (1 to 15). When the resolution of 27 April, 1938, was adopted, the Revenue Bond Act of 13 August, 1938, had not been passed by the Legislature. The Revenue Bond Act of 1938 appears in N. C. Code, 1939 (Michie), 2969 (16 to 27).

On the adoption of the resolution of 27 April, 1938, the city of High Point and its officers were cited for contempt of court. The Superior Court held with the defendants. On appeal to the Supreme Court it was held that the lower court was correct in discharging the rule for contempt. *Williamson v. High Point,* 214 N. C., 693. On 20 March, 1939, the city council of the city of High Point adopted a resolution amending the resolution of 27 April, 1938, but made no change in the provisions of the former resolution authorizing the project, except to increase somewhat the estimated cost. The resolution of 20 March, 1939, provided for bond maturities, set out the bond form, provided for payments of electric energy furnished to the city, remedies of bondholders, etc.

The city council on 20 March, 1939, accepted a license from the Federal Power Commission under the terms of the Federal Power Act.

On 30 June, 1939, Hon. H. Hoyle Sink, Judge holding the courts of the Twelfth Judicial District, issued an order restraining the city of High Point from proceeding with the project, on a large number of grounds: (1) That the project would cost more than the funds available; (2) that the bonds would constitute a general indebtedness of the city, because the city had agreed with PWA to complete it by a set date and because the city agreed to pay for current it might use from the project for its own needs; (3) that the bonds would be issued under the 1938 Revenue Bond Act, and, therefore, the city could not proceed without obtaining the certificate of convenience and necessity provided for by that act; and (4) that the Yadkin-Pee Dee River was not navigable, and that it was *ultra vires* for the city to accept the license from the Federal Power Company.

The Supreme Court of North Carolina, on 17 April, 1940, modified the judgment of Judge Sink and held, as follows: (1) That the cost of the project was not for the Court to consider; (2) that the bonds did not constitute a general indebtedness of the city but were revenue bonds only within the principles of *Brockenbrough v. Commissioners,* 134 N. C., 1; (3) that the city was proceeding under the Revenue Bond Act of 1938, and, therefore, the certificate of convenience and necessity provided for by that act was required; and (4) that the Yadkin River in North Carolina was not navigable; that the project would have no effect on the navigable capacity of the Yadkin-Pee Dee River; that the Federal

Power Commission not being a party to the action, the Court could not pass on its jurisdiction, and that it was *ultra vires* for the city of High Point to accept the Federal Power license and to agree to comply with its terms and conditions.

In deference to the opinion of the Supreme Court and in order to remove the legal objections to the project which the Court had pointed out, the board of power commissioners of the city of High Point, on 15 July, 1940, adopted two resolutions, copies of which are attached to the motion filed in the cause. The first of these resolutions repealed the resolution of 20 March, 1939, accepting the Federal Power license, and provided that the city should no longer be bound by the terms of the license. The second resolution struck out every provision of the bond resolution of 20 March, 1939, that could possibly be construed to be predicated on the Revenue Bond Act of 1938, and reënacted that resolution so as to make it perfectly clear that the city was proceeding under its original resolution of 27 April, 1938, and the amendatory resolution of 15 July, 1940, each of which resolutions is predicated solely on the city charter and the Revenue Act of 1935.

On 17 July, 1940, the city of High Point mailed to the Federal Power Commission a copy of the resolution repealing the resolution accepting the license and under date of 18 July, 1940, the Federal Power Commission, through its secretary, acknowledged receipt thereof. Subsequently and on 17 October, 1940, the city requested that the Commission vacate its order of 10 March, 1939, authorizing the issuance of the license, and, also, that if this request be granted the city requested permission to withdraw its application. On 25 October, 1940, the Federal Power Commission adopted a resolution vacating its order of March 10, 1939 (on 25 October, 1940), which authorized the issuance of the license.

The estimated cost of the project is $6,492,600, of which $2,921,600 will be a grant from the Federal Government, PWA, and the rest from proceeds of the sale of revenue bonds. The plant will have a capacity of 21,000 kilowatts, and will deliver at High Point approximately 49,000,000 kilowatt hours per annum. The consumption of electricity in the city of High Point in the year preceding June, 1939, was approximately 44,500,000 kilowatt hours.

The court below found the facts and rendered judgment thereon for defendant city of High Point.

The judgment, on motion for modification, in the court below, is as follows:

"This cause coming on to be heard before the undersigned Judge Presiding, and holding the courts of the Twelfth Judicial District according to law, at the August 26th, 1940, Term of this Court, upon a motion in the cause by the defendants to modify the judgment entered in this

cause on June 30th, 1939, as modified by the opinion and judgment of the Supreme Court, and to modify the judgment entered in this cause at the May 1940 Term of this Court pursuant to and in conformity with the opinion and judgment of the Supreme Court, and the answer and *addendum* to the answer of Adams-Millis Corporation *et al.*, plaintiffs by intervention, and the Duke Power Company, intervening plaintiff to said motion of defendants, and upon the record and exhibits attached to said motion, and to the answer and *addendum* to answer, and resolutions of the Board of Power Commissioners of the City of High Point of July 15th, 1940, and upon the admissions of counsel for both the plaintiff and the interveners and the defendants, and from inspection of the record and the admissions of counsel, the pleadings and exhibits heretofore filed in this cause, and used by agreement of the parties herein, the Court finds the following facts:

"1. At the May, 1940, Term of the Superior Court for Guilford County a final judgment was entered in this action, which judgment permanently enjoined and restrained the defendants from constructing the proposed hydroelectric plant and system described in the pleadings filed in this action, and from any further activities, operation, development, advancement or continuation of the hydroelectric plant and system described in the pleadings filed in this action, and from any further activities, operation, development, advancement or continuation of the hydroelectric project described in said judgment.

"2. By resolution adopted April 27, 1938, a copy of which is attached to the original complaint of the plaintiff J. W. McGuinn in this action and marked 'Exhibit A,' the Council of the City of High Point authorized the construction, operation and maintenance of the hydroelectric plant and system therein described, the generating units of which are to be located at 'Styers' Ferry' on the Yadkin River in Forsyth, Davie and Yadkin Counties, North Carolina, and the distribution units of which are to be located within the corporate limits of the city of High Point, and authorized the issuance of revenue bonds to aid in financing the costs thereof.

"3. On March 20th, 1939, the Council of the City of High Point adopted a resolution entitled 'A Resolution to Amend a Resolution Adopted April 27, 1938, Entitled "A Resolution Authorizing the Construction of a Hydro-electric Plant and System by the City of High Point for the Use of the City and Consumers in the City, and authorizing the Issuance of Revenue Bonds to Finance a Part of the Cost,"' a copy of which is attached to the amended complaint of the intervening plaintiff, Duke Power Company.

"4. On March 20, 1939, the Council of the City of High Point, adopted a resolution entitled 'A Resolution Accepting License for the

High Point Hydro-electric Project Issued Pursuant to Order of the Federal Power Commission on March 10, 1939,' a copy of which is attached to the complaint of the intervening plaintiff, Duke Power Company, as 'Exhibit II.'

"5. The General Assembly of North Carolina on April 4th, 1939, adopted an Act entitled 'An Act to Amend Chapter One Hundred and Seven of the Private Laws of One Thousand Nine Hundred and Thirty-one and All Acts Amendatory Thereof Relating to the Charter of the City of High Point,' whereby all of the powers and duties of the City of High Point with respect to the establishment, acquisition, construction, improvement and operation of an electric light, heat and power plant and system of the city, pursuant to the resolution adopted by the Council of the City of High Point on April 27, 1938, was vested in the Board of Power Commissioners created by said Act. The defendants E. L. Briggs, F. Logan Porter, J. C. Siceloff, R. B. Terry and J. N. Wright are the duly qualified and acting members of said Board of Power Commissioners.

"6. Said resolution of the Board of Power Commissioners of the City of High Point, which repealed the resolution of the Council of the City of High Point of March 20, 1939, accepting the license of the Federal Power Commission, was adopted by the Board of Power Commissioners of the City of High Point in deference to the opinion of the Supreme Court of North Carolina of April 17, 1940, and with the purpose and intent of complying with the terms of said opinion, and with the judgment of the Superior Court for Guilford County entered pursuant to the opinion of the Supreme Court. The defendants City of High Point and the members of the Board of Power Commissioners now allege that the Yadkin-Pee Dee River in North Carolina is not navigable; that it is subject to the sole jurisdiction of the State of North Carolina; that the proposed hydroelectric plant and system will have no effect, either detrimental or beneficial, to the navigable capacity of the Pee Dee River in South Carolina, and will not affect the interests of interstate or foreign commerce. It is the intention of the City of High Point and of the Board of Power Commissioners of the City of High Point in good faith to construct, maintain and operate the proposed hydroelectric plant and system strictly in conformity with the laws of the State of North Carolina.

"On July 17th, 1940, E. M. Knox, City Manager of the City of High Point, sent to the Federal Power Commission at Washington, D. C., copies of the resolution of July 15th, 1940, repealing the acceptance of the Federal Power License, and, under date of July 18th, 1940, the Federal Power Commission, through its Secretary, acknowledged receipt of said communication and of the enclosed resolution.

"7. Likewise, in deference to the opinion of the Supreme Court of April 17th, 1940, in this case, and after the rendition of the judgment of the Superior Court at the May 1940 Term, pursuant to the opinion of the Supreme Court, and in order to comply with the terms of said opinion and judgment, the Board of Power Commissioners of the City of High Point on July 15th, 1940, adopted a resolution entitled 'A Resolution to Amend and Reënact a Resolution Adopted by the City Council of the City of High Point March 20, 1939, Entitled "A Resolution to Amend a Resolution Adopted April 27, 1938, Entitled 'A Resolution Authorizing the Construction of a Hydroelectric Plant and System by the City of High Point for the Use of the City and Consumers in the City, and Authorizing the Issuance of Revenue Bonds to Finance a Part of the Cost.'"' Said resolution eliminated from the amendatory resolution of March 20, 1939, all reference to the Revenue Bond Act of 1938, and all provisions predicated upon or authorized by the Revenue Bond Act of 1938. By the adoption of said resolution of July 15th, 1940, the Board of Power Commissioners of the City of High Point has declared its intention that the proposed hydroelectric project as to authorization, construction, maintenance and operation, as to the issuance of revenue bonds to aid in the financing thereof, and in all other respects, is predicated solely upon the Charter of the City of High Point as amended, and the Revenue Bond Act of 1935. The Court's reference to the Charter of the City of High Point is intended to include Chapter 65 of the Public-Local Laws of 1937, as amended by chapter 561 of the Public-Local Laws of 1937. It is the intention of the City of High Point and the Board of Power Commissioners, as disclosed by said amendatory resolution of July 15th, 1940, that said project shall be authorized, constructed, maintained and operated, and that the revenue bonds for its financing shall be issued solely under the Charter of the City of High Point as amended by said private Acts, and the Revenue Bond Act of 1935, and without availing themselves of any of the provisions or authority of the Revenue Bond Act of 1938. The project was originally authorized by resolution of April 27th, 1938, prior to the adoption of the Revenue Bond Act of 1938, and the resolution of April 27th, 1938, was based upon authority contained in the Charter of the City of High Point and the Revenue Bond Act of 1935. By the amendatory resolution of July 15th, 1940, the City of High Point and the Board of Power Commissioners have established the fact that it is their intention to construct, maintain, operate and finance said project under authority of the City Charter as amended, and the Revenue Bond Act of 1935, as originally contemplated.

"8. At the time of the entry of the decree of the Superior Court as of June 30th, 1939, and the decree of the May 1940 Term, entered pursuant

to the opinion of the Supreme Court, the proposed hydroelectric plant and system was to be constructed, operated and maintained under the license from the Federal Power Commission, and subject to the provisions of the Federal Power Act. By resolution of April 27th, 1938, adopted prior to the acceptance of the Federal Power License, the City of High Point had authorized the construction, maintenance and operation of said project solely under the laws of the State of North Carolina. By the adoption of the resolution of July 15th, 1940, repealing the resolution accepting the Federal Power License, the City of High Point and the Board of Power Commissioners have repudiated and disclaimed the Federal Power License, and it is now their intention to construct, maintain and operate the project solely under the jurisdiction of the State of North Carolina.

"9. At the time of the entry of the judgment of June 30th, 1939, and of the judgment of the May 1940 Term, pursuant to the opinion of the Supreme Court, the City of High Point and the Board of Power Commissioners were proceeding under the Revenue Bond Act of 1938 in certain respects. The project was first authorized under the Charter of the City of High Point as amended, and the Revenue Bond Act of 1935, by resolution adopted April 27th, 1938, prior to the enactment of the Revenue Bond Act of August 13th, 1938. The provisions of the Revenue Bond Act of 1938 were resorted to only by certain provisions of the resolution of March 20th, 1939; all of said provisions have been repealed by the amendatory resolution of July 15th, 1940, above referred to. It is now the intention of the City of High Point and the Board of Power Commissioners that the project shall be constructed, maintained, operated and financed solely under the authority of the Charter of the City of High Point as amended, and the Revenue Bond Act of 1935.

"10. Since the entry of the decree at the May 1940 Term of this Court, as above set forth, substantial and fundamental changes in the facts and in the resolutions and proceedings of the City of High Point have occurred, which authorize and control the acquisition, construction, maintenance, operation and financing of the proposed hydroelectric plant and system.

"The Court, therefore, concludes as a matter of law:

"1. That the City of High Point has authorized construction, operation and maintenance of the proposed hydroelectric plant and system under its Charter as amended, and under the Revenue Bond Act of 1935, the bonds authorized to be issued for the purpose of financing a part of the costs of construction of said project to be issued under the authority of the Charter of the City of High Point as amended, and the Revenue Bond Act of 1935.

"2. The Court further finds as a conclusion of law that the City of High Point is no longer proceeding in any of these respects under the Revenue Bond Act of 1938, but has so amended and modified its proceedings as again to predicate them upon the Charter of the City of High Point as amended, and the Revenue Bond Act of 1935, which was the authority for the resolution of April 27th, 1938, and which resolution originally authorized the construction of the project and the issuance of the necessary revenue bonds.

"3. The Court further finds as a conclusion of law that the proposed bonds will not constitute a general indebtedness of the City of High Point, but will be special revenue bonds, payable solely out of the revenues of the proposed project, and are within the provisions approved by the Supreme Court of North Carolina in *Brockenbrough v. Board of Water Commissioners of Charlotte,* 134 N. C., page 1.

"4. The Court further finds as a conclusion of law that the provisions and covenants contained in the loan and grant agreement between the City of High Point and the Federal Government as of February 13th, 1939 (see record), as amended by the resolution of the Board of Power Commissioners of the City of High Point adopted November 7th, 1939, will not create a general indebtedness of the city, and said provisions and covenant likewise do not exceed the provisions approved in the decision of the Supreme Court of North Carolina in *Brockenbrough v. Board of Water Commissioners of Charlotte,* 134 N. C., page 1.

"5. The Court further finds as a conclusion of law that all the provisions and covenants of the bonds and of the resolutions of April 27th, 1938, as now amended, and all of the provisions and covenants of the loan and grant agreement of February 13th, 1939, as amended by the resolution of the Board of Power Commissioners of the City of High Point as of November 7th, 1939, are fully authorized by the Charter of the City of High Point as amended, and the Revenue Bond Act of 1935.

"6. The Court further adopts and finds as a conclusion of law that since the City of High Point is not proceeding under the Revenue Bond Act of 1938, but is proceeding under authority of its charter as amended, and the Revenue Bond Act of 1935, it may lawfully construct, operate and maintain said plant and system without a certificate of convenience and necessity from the Public Utilities Commissioner of North Carolina, and none of the limitations of the Revenue Bond Act of 1938 are applicable either to the construction or financing of the proposed project.

"7. The Court further adopts and finds as a conclusion of law that the acceptance of the Federal Power License by the City of High Point was *ultra vires,* and was so held by the Supreme Court of the State of North Carolina, and that such acceptance was not binding on the City of High Point, and that the resolution of July 15th, 1940, of the Board of Power

Commissioners of the City of High Point constitutes a rejection and disclaimer of the Federal Power License, and the Federal Power License no longer constitutes a part of the proposed project.

"8. The Court further adopts and finds as a conclusion of law that there have been substantial and controlling changes in the facts since the entry of the judgment at the May Term, 1940, of this Court, and since the opinion and judgment of the Supreme Court, which would render the enforcement of said decree with respect to the proposed hydroelectric plant and system as now designed and planned, as to construction, operation, maintenance and financing, as shown by said amended resolutions of the City of High Point, both unjust and inequitable, and the Court should, therefore, modify said decree so as no longer to restrain the defendants from proceeding with the construction, maintenance and operation of said plant and system, or the issuance and sale of its proposed electric revenue bonds.

"It is, therefore, considered, ordered, adjudged and decreed by the Court:

"That the decree entered at the May 1940 Term of Superior Court of Guilford County, pursuant to and in conformity with the opinion and judgment of the Supreme Court, as well as judgment of June 30th, 1939, shall not be deemed to restrain or prohibit and no longer shall restrain or prohibit the defendants (including the City of High Point) from proceeding with the acquisition, ownership, construction, operation, maintenance and financing of the proposed hydroelectric plant and system, or the issuance of the proposed revenue bonds to aid in financing the costs thereof, or from doing other acts reasonably necessary to carry out said purposes, within the limitations set forth below.

"It is further adjudged that this judgment is not intended to authorize, and shall not be construed to authorize, the City of High Point, its officers, agents or employees to acquire, construct, maintain or operate the proposed hydroelectric plant and system subject to the terms of the Federal Power Act, or subject to any license of the Federal Power Commission heretofore or hereafter issued, or subject to the jurisdiction or control of the Federal Power Commission.

"This the 5th day of September, 1940, This cause having been first heard at the August 5 Term of this Court and being held under advisement until this term. Zeb V. Nettles, Judge Presiding."

The policy of the State is set forth in the following statutes—N. C. Code, 1939 (Michie), sec. 2807: "The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens and to any person, firm or corporation desiring the same outside the corporate limits, where the service is available, and shall in no case be liable for damages for a

failure to furnish a sufficient supply of either water or light. And the governing body shall have power to acquire and hold rights of way, water rights, and other property, within and without the city limits."

Section 2832 goes into the needs of municipality, including electric lighting systems. "Any city shall have the right to acquire, establish, and operate waterworks, electric lighting systems, gas systems, schools, libraries, cemeteries, market houses, wharves, play or recreation grounds, athletic grounds, parks, abattoirs, slaughterhouses, sewer systems, garbage and sewerage disposal plants, auditoriums or places of amusement or entertainment, and armories. The city shall have the further right to make civic survey of the city, establish hospitals, clinics, or dispensaries for the poor, and dispense milk for babies; shall have the power to establish a system of public charities and benevolences for the aid of the poor and destitute of the city; for the welfare of visitors from the country and elsewhere, to establish rest rooms, public water-closets and urinals, open sales places for the sale of produce, places for hitching and caring for animals and parking automobiles; and all reasonable appropriations made for the purposes above mentioned shall be binding obligations upon the city, subject to the provisions of the constitution of the state." Public Laws 1917, ch. 136.

The municipality has the power to purchase electricity for its own use and the use of its citizens, and where it is authorized by general and special statutes to purchase current from a power company and to resell and distribute it at a profit to its citizens and to those within the three-mile zone therefrom, the grant of power to do so is effective in law under the authority of the Legislature to grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established unless prohibited by the organic law. *Holmes v. Fayetteville,* 197 N. C., 740 (741).

The defendants contend: "Since the City is now clearly proceeding only under its charter and the Revenue Bond Act of 1935, no certificate of convenience and necessity is required." There are two Revenue Bond Acts in North Carolina under which the City could proceed. One is the Revenue Bond Act of 1935 and the other is the Revenue Bond Act of August, 1938. The Revenue Bond Act of 1935, by its terms, expired in 1937. However, two amendments to the Charter of the City of High Point, Chapters 65 and 561 of the Public-Local Laws of 1937, provided that the City of High Point might continue to exercise the powers conferred by the Revenue Bond Act of 1935, notwithstanding any time limitation upon the exercise of said powers contained in that Revenue Bond Act, and that the City was authorized to issue within a period of four years from February 15, 1937, revenue bonds under the 1935 Revenue Bond Act for any purpose for which the City was authorized

by any other law to issue bonds. The Revenue Bond Act of 1938 was ratified August 13, 1938. In most respects, its provisions are substantially the same as those of the Revenue Bond Act of 1935. It was necessary to enact another revenue bond act in 1938 because the old one had expired and because the State itself and many of its municipalities were anxious to obtain the benefits of PWA grants and loans. The chief difference in the two acts is contained in Section 9 of the Revenue Bond Act of 1938, which provides in effect that any municipality *proceeding under that act* should obtain a certificate of convenience and necessity from the Utilities Commissioner before constructing a gas or electric plant. Section 10 of the Revenue Bond Act of 1938 provides that: *"The powers conferred by this article shall be in addition and supplemental to, and not in substitution for; and the limitations imposed by this article shall not affect the powers conferred by any other general, special or local law."* (Italics mine.)

Section 12 of the Revenue Bond Act of 1935, C. S., 2669 (12), provides that: "It shall *not* be necessary for any municipality *proceeding under this Act* to obtain any certificate of convenience and necessity . . . from any bureau, board, commission . . ., except the approval of the Local Government Commission as required by the Local Government Act." (Italics mine.)

The record discloses that the consent of the Local Government Commission was obtained.

This project was authorized on 27 April, 1938, both as to construction and issuance of bonds under the charter of the city of High Point and the Revenue Bond Act of 1935, because the Revenue Bond Act of 1938 had not been adopted. After the adoption of the Revenue Bond Act of 1938, the city amended its bond resolution, not with respect to the authorization of the project, but only with respect to certain provisions relating to the terms of the bonds. The city has now amended the resolution of 20 March, 1939, so as to eliminate every provision that can be said to be based on the 1938 Revenue Bond Act, and so as to recite the city charter and the Revenue Bond Act of 1935 only as authority, and has reënacted the amendatory resolution of 20 March, 1939, as amended "pursuant to authority of Article 2-a of the Charter of the City of High Point."

The city is not now proceeding under the Revenue Bond Act of 1938, is not availing itself of any of the powers contained in that act; therefore, does not require the certificate of convenience and necessity, *which is necessary only for municipalities proceeding under the 1938 Act.*

As I understand the opinion on the former appeal, it only held that the city was then proceeding under the Revenue Bond Act of 1938 and therefore the certificate was required. The Court did not hold that the

city *could not proceed* under the Revenue Bond Act of 1935, and its Charter, but only that *it was proceeding* under the 1938 Revenue Bond Act. The question did not and could not arise whether the bonds *could be* issued under the Revenue Bond Act of 1935. Now, the city has amended its bond resolution so that it is in fact proceeding under the Revenue Bond Act of 1935 and the city charter. The law of the case is unchanged, but it does not apply to the present fact situation.

As I understand, the majority opinion of this Court is to the effect that defendant has followed the chart set forth in the last opinion of this Court and practically complied with its pronouncements except that the city of High Point "could not lawfully proceed with the undertaking without first obtaining a certificate of convenience and necessity from the Public Utilities Commission of the State of North Carolina."

Defendant, city of High Point, contends that under its charter and Revenue Bond Act of 1935, it is not necessary for a municipality to obtain a certificate of convenience and necessity. This contention was sustained by the court below, in which I agree.

If the city of High Point had to obtain a certificate of convenience and necessity, this must be obtained from the Utilities Commission (N. C. Code, *supra,* sec. 1037 [d]): "No person, or corporation, their lessees, trustees or receivers shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control of, either directly or indirectly, without first obtaining from the Utilities Commissioner a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to new construction in progress at the time of the ratification of this act, nor to construction into territory contiguous to that already occupied and not receiving similar service from another utility, nor to construction in the ordinary conduct of business. *The utilities commissioner is hereby empowered to make rules governing the application for, and the issuance of such certificates* of public convenience and necessity." (Italics mine.)

This section is not applicable to an electric membership corporation, organized under the provisions of sec. 1694 (7-28). And by reason of the provisions of section 1694 (28) of the statute under which it was organized, there was no error in the holding of the lower court that the defendant electric membership corporation was not required, before beginning the construction or operation of its facilities for serving its members by furnishing them electricity for lights and power, to obtain from the Utilities Commissioner of North Carolina a certificate that public convenience and necessity requires, or will require, the construction and operation of said facilities by said defendant. *Light Co. v. Electric Membership Corp.,* 211 N. C., 717 (720). The defendants con-

tend that certificate of convenience and necessity is not applicable here. The statutes on which it relies do not so require. If it was not required, the city of High Point, in not obtaining the certificate, was not acting *ultra vires,* or beyond its powers. I do not think that the Duke Power Company, or the intervening plaintiffs, are proper parties who are permitted to raise this objection. The Utilities Commissioner represents the sovereign. N. C. Code, *supra,* sec. 446: "Every action must be prosecuted in the name of the *real party* in interest," etc. The plaintiffs are not the real parties in interest. The Duke Power Company, and the interveners, as taxpayers, under our decisions, are permitted to inquire into certain illegal conduct effecting a taxpayer. *Barbee v. Comrs. of Wake,* 210 N. C., 717.

I can find no authority for plaintiffs, Duke Power Company, or the interveners, taxpayers, to act for the sovereign State in forcing the defendant city of High Point, if it was required to do so, to obtain a certificate of convenience and necessity. Until through the sovereign, the State proceeds, this action does not present this aspect of the case for the Court's determination.

In *S. v. Scott,* 182 N. C., 865 (869), *Walker, J.,* said for the Court: "We then have a case, in the name of the State upon the relation of its Attorney-General and D. H. McCullough against the defendants, to enjoin the violation by the latter of the law creating them, wherein it is alleged that they have committed an *ultra vires* act, and to the extent that, if they pay their expenses in the doing of the alleged unlawful act, they will misapply the trust fund established by the statute for the lawful costs and expenses of the board, and thereby are diminishing the amount which should go into the public treasury by the terms of the law, which provides in C. S., 7019, that after paying expenses, 'Any surplus arising shall, at the end of each year, be deposited by the treasurer of the board with the State Treasurer to the credit of the general fund.' C. S., 1143, entitled 'Actions by the Attorney-General to prevent *ultra vires* acts by corporations,' provides: In the following cases the Attorney-General may, in the name of the State, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of—1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter. 2. Restraining any person from exercising corporate franchises not granted, . . .' "To restrain corporations from *ultra vires* acts and which was applicable where purpose was not to dissolve a corporation, as under section 1187, but to preserve it in its functions without abuse of its powers, *Attorney-General v. R. R.,* 28 N. C., 456. This section embodies provisions of Rev. Code, ch. 26, sec. 28; Rev. Statutes, ch. 26, sec. 10; Acts of 1831, ch. 24, sec. 5, which

authorize injunction proceedings in a court of equity. The authority, given by statute, as approved by this Court, would seem to be ample justification for granting the relief prayed for by plaintiff in this action. *The Attorney-General is doing only what the statute permits him to do in the interest of the public, of his own motion, or upon the complaint of a private party.*" (Italics mine.) Upon motion in the above case, the Attorney-General was made a party, which was held legal and gave the Court jurisdiction.

In *Singer & Sons v. Union Pacific Railroad Co.*, 61 Sup. Ct. Rep., 254, U. S. Law Ed., 4089 (No. 34, decided 15 December, 1940), it is held: "Under sec. 1 (18) of the Interstate Commerce Act an extension of a line of railroad may not be constructed by a railroad subject to the Act, except upon the issuance by the Interstate Commerce Commission of a certificate that the extension is required by public convenience and necessity. Under sec. 1 (20) any party in interest may maintain a suit to enjoin construction of an extension not approved by the required certificate. But a property owner, conducting a business served by a public market, which will be adversely affected by diversion of traffic and customers to a new market to be served by the allegedly illegal extension, is not a party in interest within the meaning of sec. 1 (20). . . . *The interests of merely private concerns are amply protected even though they must be channelled through the Attorney-General or the Interstate Commerce Commission or a state commission.*" (Italics mine).

The question is jurisdictional. In *Rental Co. v. Justice*, 211 N. C., 54 (55), we find: "In speaking of section 55 of the Code of Civil Procedure, which was substantially the same as C. S., 446, *Ruffin, J.*, says: 'Under The Code there is no middle ground; for whenever the action can be brought in the name of the real party in interest, *it must be so done.*' *Rogers v. Gooch*, 87 N. C., 442. A real party in interest is a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. The real party in interest in this action is the Life Insurance Company of Virginia and not its rental agent, the Choate Rental Company, and it was, therefore, error to charge the jury that under all the evidence they should answer the issue in the affirmative."

The real party in interest here is the sovereign, acting through the Attorney-General or the Utilities Commissioner.

In *Branch v. Houston*, 44 N. C., 86 (87), *Pearson, J.*, said: "The distinction is this: If there be a defect—*e.g.*, a total want of jurisdiction apparent upon the face of the proceedings, the court will, of its own motion, 'stay, quash, or dismiss' the suit. This is necessary, to prevent

the court from being forced into an act of usurpation, and compelled to give a void judgment. For if there be no plea to the jurisdiction, and the 'general issue' is not pleaded (without which there cannot be a judgment of nonsuit), unless the court can stay, quash, or dismiss the proceedings, it must, *nolens volens,* go on in an act of usurpation and give a void judgment, which is against reason. 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." *Henderson County v. Smyth,* 216 N. C., 421 (423-4).

In the previous hearing of the instant case this question was not raised, though numerous others were. Nor is this question properly raised on this record. This Court is without jurisdiction to pass upon a question not properly before it on appeal. Const. of North Carolina, Art. IV, sec. 8.

If there is any wrong done to the sovereign, the State, by the defendants' not obtaining a certificate of convenience and necessity, the Utilities Commissioner or the Attorney-General alone are empowered to inquire into the violation of the statute—if there is such. The Duke Power Company and the interveners cannot substitute themselves and do what the sovereign is required to do.

In *McCormick v. Proctor,* 217 N. C., 23, the majority opinion holds: The general rule is that courts of equity will not interfere with the enforcement of the criminal laws of the State through injunctive procedure, but will remit the person charged to setting up his defense or attacking the constitutionality of the statute in a prosecution thereunder.

The only exceptions are when it "is necessary to protect effectually property rights and to prevent irremediable injuries to the rights of person." There are no rights of person involved here and in the present case the plaintiffs have no property rights to effectually protect. The State, through its Attorney-General and Utilities Commission, are the only ones to question the failure to obtain a "certificate of convenience and necessity."

28 Amer. Jurisprudence, sec. 163, at p. 253, in part, says: "Persons or corporations seeking to restrain acts of public corporations or officials must have sufficient title or interest to enable them to maintain the suit. Suits for the protection of public rights are ordinarily brought by the Attorney-General."

In *Merrimon v. Paving Co.,* 142 N. C., 539 (549), *Connor, J.* (Henry G.), said: "Municipal corporations would find themselves embarrassed at every point of their activity, unless protected by some such restraint upon suits by the citizens. Officious intermeddlers or interested competitors could easily prevent all corporate action if, without notice to the

corporation or its governing body, courts entertained such suits." *Wheeler v. Bank,* 209 N. C., 258 (260); 124 A. L. R., p. 574 (585).

The sovereign is interested in all its citizens and corporations to see that all have equal rights and opportunities. The plaintiff, Duke Power Company, and the interveners are interested alone in their private businesses. It is for the sovereign and not them to act, if defendants' action is *ultra vires* on this phase of the controversy. North Carolina ranks first in developed water power of all Southern States and fourth in the nation. Industries and homes should have as cheap electricity as feasible, always realizing that those who have invested their money in their businesses should have and are entitled to a just and fair return on the investment. At no time should we kill the goose that lays the "golden egg." The production of power, in industries and the home, by wood fuel is a thing of the past. Coal has to be imported and we have fortunately in the State vast water power possibilities for electricity.

It is a matter of common knowledge that dozens of North Carolina municipalities own their own water and electric power plants; some in, and others outside of city limits. This power is granted by the General Assembly and therefore legal. The city of High Point has a population of 38,495. It has splendid manufacturing enterprises, including the manufacture and display of furniture, which is only excelled by one other city in the nation; and a pay roll each year of millions of dollars. The estimated cost of the project is $6,492,600, of which $2,921,600 will be a grant from the Federal Government, PWA, and the rest from proceeds of the sale of revenue bonds. The plant will have a capacity of 21,000 kilowatts, and will deliver at High Point approximately 49,000,000 kilowatt hours per annum. The consumption of electricity in the city of High Point in the year preceding June, 1939, was approximately 44,500,000 kilowatt hours.

This is the fourth time this case has been in this Court and the litigation has been pending for years. The defendant has the legislative authority to build this project and has already invested a large sum of money in the preliminary stages. The purpose is to get a larger volume of, and cheaper, electricity for all the people of High Point. Perhaps nothing is now more important than water and electricity for a city.

In *McAllister v. Pryor,* 187 N. C., 832 (1924), speaking to the subject, it was said at pp. 835-6: "Electric appliances are becoming more in use each day. The old methods are giving way to the new. These appliances are used for ironing, cooking, washing, heating, etc. The North and South Carolina Public Utility Information Bureau states that there are now some 52 electric appliances that can be used in the home and elsewhere, such as electric ranges, bake ovens, sewing machine motors, washing machines, churns, disk stoves, dish washers, fireless cookers,

fans, grills, ironing machines, etc. Many new uses will be discovered. These appliances can be purchased at all the leading electric power stores. These appliances have been of great benefit and use, saving of time and money, to the women in the homes and in other places." Since the above decision, still newer uses have come into existence. The manufacturers of the State are now almost entirely dependent upon electricity for power; old methods are discarded. I do not question the good faith of the plaintiffs who brought this action. It is their duty as trustees to look after the interest of their properties and stockholders. May I be so bold as to say that the Duke Power Company has done a great work in North and South Carolina, through efficient officials and able attorneys, to build up the States, encourage old and new industries that have large pay rolls, and give employment to an army of bread-winners. We have a large State, with vast water power possibilities. It is of interest to home-owners, manufacturers and others to have as cheap electricity as is reasonable, but in getting this it is important not to cripple going concerns. Competition is the life of trade. The door should be open to all, as far as possible, to use this God-given power for all the people of the State. There is abundant room for everybody.

I concur in the majority opinion except in so far as it deals with the question as to who may challenge the power of the city and the question of certificate of convenience and necessity. As to these, I think the contention of defendant, city of High Point, is correct, and that the acts, under which it is operating, do not require such a certificate. Further, the plaintiffs have no authority in this injunction proceedings (equitable in its nature) to challenge High Point's power to proceed with the project. If the authority of the city of High Point to proceed is to be questioned, it is the duty of the Utilities Commissioner or the Attorney-General to raise this question. Jurisdiction cannot be granted by consent. The above public officers may conclude that there is nothing appearing on the record that requires interference if so the Utilities Commissioner may quickly grant the license so that this project may go forward—giving employment to thousands of workers and providing perhaps cheaper electricity for all of the people and going concerns of High Point. This seems to be the object and the General Assembly has granted the authority.

For the reasons given, I think the judgment of the court below should be affirmed, the injunction vacated, and the project permitted to proceed in accordance with the judgment.

SEAWELL, J., dissenting: After a candid examination of the present case and those which have preceded it (*Williamson v. High Point*, 213 N. C., 96, 195 S. E., 90; *Williamson v. High Point*, 214 N. C., 693, 200

S. E., 388; *McGuinn v. High Point,* 217 N. C., 449, and parallel cases of *Yadkin County v. High Point,* 217 N. C., 462), and of the laws, proceedings, and resolutions through which, from time to time, the defendant municipality has sought to remove any legal impediments pointed out by this Court, I am convinced that the matter has been removed from the field of substantial objection into a territory largely technical. In my judgment the questions now raised do not present any principles of law or procedure of such value that they must be preserved at all costs; none, in fact, of sufficient force to overcome the presumption in favor of the correctness of the decision in the lower court.

Counsel for the plaintiffs have not fought without a measure of success. They have been instrumental, at least, in reducing the High Point project down to universally recognized standards of municipal necessity, both territorially and in concept of purpose. They have aided in preventing the expropriation of control of a State-created municipality to Federal jurisdiction. They have removed the city of High Point as a potential competitor for business from the general public. To further reductions or restrictions, or total defeat of the project, I do not believe the interveners entitled, either in morals or in law. They now stand opposed to the city's purpose to provide electric current for its own inhabitants within its own territory, to acquire and conduct facilities for that purpose of the same character and kind that other municipalities of the State now possess and freely enjoy without question as to their powers. The objections now advanced to justify this position relate to supposed defects of procedure and not to anything inherent in the project itself which would render it *ultra vires,* or which might necessarily prove detrimental to the public or to any taxpayer as such. And from the procedural point of view, into which the controversy has now drifted, the objections are without merit.

Certainly the want of a certificate of convenience and necessity is not a technical matter, if the law should require such a thing in order to license the municipality to supply its inhabitants with a public service specifically authorized by the general laws, as well as by its own charter, and considered so necessary to decent government that the financing is not required to be referred to the electorate. *Williamson v. High Point, supra; Ellison v. Williamston,* 152 N. C., 147, 67 S. E., 255. But it would be passing strange if the law did require it. The result would be to make the city of High Point unique amongst the municipalities of the State, none other of which is subjected to such license and supervision with respect to a service rendered its own inhabitants, or the acquisition and conduct of facilities therefor. It would strike down the principle of local self-government, violate a State policy of more than 150 years standing, and would discriminate against a municipality and

the citizens thereof by withholding from them the exercise of governmental powers intended for their welfare and comfort, freely enjoyed by all other such political subdivisions of the State, without the proposed suzerainty. Any construction of pertinent statutes, either singly or in combination, which brings about such a consequence, must be supported by reasons sufficiently compelling. 59 C. J., p. 968, section 574, and cases cited. No such reasons are to be found in the record.

When the municipality was more ambitious in its designs, intending to serve the general public outside its own territory and take its proprietary profit, it was fair and just, if not within the intendment of the statute, that it could do so only upon such conditions as applied to private enterprises with which it sought to come into competition. But that is water under the bridge. The Court decided that the city had no right to engage in such an enterprise under the restrictive provisions of the 1935 Revenue Bond Act, section 3. *Williamson v. High Point,* 214 N. C., 693, 200 S. E., 388; *Holmes v. Fayetteville,* 197 N. C., 740, 150 S. E., 624. *Cessat ratio, cessat lex.*

I have never believed that the 1938 Revenue Bond Act at any time intended that a municipality availing itself of its privileges should be compelled to obtain from the Utilities Commissioner a certificate of convenience and necessity with respect to any project it might undertake under powers already conferred upon it by the general law. But that question is unimportant to the decision of the present appeal, and further consideration of it will but confuse the issue. We may as well leave this matter as it is, and pass to other ground.

The city of High Point, perforce, accepts the ruling of *McGuinn v. High Point, supra,* construing the 1938 Revenue Bond Act and striking down the exceptive provision with respect to its project. It rests its case here on the availability of the 1935 Revenue Bond Act to meet its present needs, and upon the choice which it has made, through what it regards as valid municipal action, to proceed with the financing of its electric power project through the provisions of that act. For that purpose the 1935 Revenue Bond Act is incorporated, by sufficient reference, into the city charter. Public-Local Laws of 1937, chapter 65 and chapter 561. And the High Point Power Commission, created by chapter 600, Private Laws of 1939, and succeeding to the powers of the city council with respect to this project, has, by appropriate resolution, 15 July, 1940, adopted this act as authority for its proceeding, and purposes to issue its bonds thereunder.

This the Court, in the main opinion, says cannot be done. And here, for convenience, I quote the pertinent part of the statute at which the argument of the Court is aimed:

"Sec. 2. All of the powers and duties of the City of High Point, North Carolina, with respect to the establishment, acquisition, construction, improvement and operation of an electric light, heat and power plant and system of said city pursuant to the resolution adopted by the Council of the City of High Point on April twenty-seventh, one thousand nine hundred and thirty-eight, and amendments thereto, shall be vested in and exercised by the Board of Power Commissioners, in the name of the City of High Point, and all resolutions and acts of the Council of the City of High Point prior to May first, one thousand nine hundred and thirty-nine, with respect to the said electric light, heat and power plant and system shall be deemed and considered as acts of said Board of Power Commissioners."

The obvious purpose of the reference to the resolutions as intending only to identify the project herein undertaken and to distinguish it from an electric distribution plant already existing, which, under the law, section 3, is still left under the control of the city council, is ignored.

It is held in the opinion that the phrase "pursuant to the resolution of April 27th, 1938, *and amendments thereto,*" must be confined to the resolution of 27 April, 1938, and the *one amendment* made thereto—the resolution of 20 March, 1939—which latter refers to the 1938 Revenue Bond Act requiring a certificate of convenience and necessity. As we have seen, the Revenue Bond Act of 1935, to which the first resolution above mentioned referred, requires none. The opinion does not go so far as to hold that the language used in the statute is not sufficiently broad and apt to include, prospectively, all amendments which might be made under sufficient authority. Such a conclusion would be obviously specious and untenable. The conclusion is based upon an alleged want of authority in the board of power commissioners to act in the premises at all or make any further amendment.

It is clear that the restriction of the 1938 Revenue Bond Act, referring to a certificate of convenience and necessity, has no application except to a procedure under that act, and is not intended to affect powers given to municipal corporations under other laws, general or special, when no resort is had to this particular Bond Act for financing. Neither does the act creating the High Point Board of Power Commissioners mention any such condition or restriction on the powers it purports to transfer from the city council to that body. Whence, then, comes the condition or restriction which the majority opinion attaches to that power? What renders them powerless to amend or rescind the resolution of 1939 and adopt the 1935 Revenue Bond Act as authority for financing their electric power project?

The reasoning upon which the opinion in chief stops the clock at this point and freezes the situation with the 1939 resolution in force and

denies to the board of power commissioners the power to rescind or amend it rests upon a very simple speculation which is made regarding the intention of the Legislature. *It is thought that the Legislature would never have given to the board of power commissioners such uncontrolled power as the act confers without the supervision of the Utilities Commissioner, since they are not responsible to the electorate—that is, they are not elective officers.* This is further supported by the suggestion that since the Federal Government requires a license with regard to navigable streams within its jurisdiction, why is it not the policy of the State to require such license and supervision with regard to nonnavigable streams within its jurisdiction? This is remarkable, since we are not discussing the requisites of procedure under the 1938 Revenue Bond Act, but the *power* of the board of power commissioners to proceed under any act available to the municipality.

I do not think we can reach a proper construction of the act creating the board of power commissioners and conferring powers upon it as a municipal agency by piling the Pelion of surmise upon the Ossa of conjecture. "The Court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the Legislature." 59 C. J., p. 955; *Dean v. Bell,* 230 N. Y., 1, 128 N. E., 897; *Greer v. Kansas City C. C. & St. J. Railway Co.,* 286 Mo., 523, 228 S. W., 454. The meaning of the law must be found within its terms; *Hunt v. Eure,* 188 N. C., 716, 125 S. E., 484; *Abernethy v. Commissioners,* 169 N. C., 631, 86 S. E., 577; *State v. Leuch,* 156 Wis., 101, 144 N. W., 290; *United States v. Standard Brewery Co.,* 251 U. S., 210, 64 L. Ed., 229; and the situation to which it is to be applied. *Blair v. New Hanover County,* 187 N. C., 488, 122 S. E., 298; *Bowman v. Industrial Commission,* 289 Ill., 126. We must credit the Legislature with a knowledge of the English language and with the ability to make its meaning clear through the terms it employs in the statute. And its silence upon such an important matter is significant. The law is written primarily for the people who administer it, not for courts. For this reason, it is my thought that the Legislature would not have sent out this law, plain enough as it is for the understanding of the administrational officers for whom it is made, accompanied, so to speak, by a rider upon the winds, with a cryptic message which can only be unriddled by the astute minds of learned men.

A more practical examination of the statute thus challenged is in order, to see whether, upon such an hypothesis, it can be made to mean what it does not say.

It cannot be disputed that if the city council were still functioning with relation to this project it would still have power to pass the resolution, basing its financing on the 1935 Act, as the substituted power com-

mission has attempted to do. The spectacle of a municipality choosing the more favorable and liberal source as authority for the exercise of its powers may be disconcerting, but it is not *per se* unlawful; and this Court would not undertake to coerce the city in its choice, while acting under such plenary power, unless it intended to exhibit a bad example of government by injunction in intermeddling with the administrational affairs of the city by usurping a discretion which the law has wisely left within the exclusive province of the city authorities. It becomes a question, then, whether the statute, in substituting the board of power commissioners for the city council, succeeded, as was its apparent purpose, in securing an uninterrupted flow of power and function from the one to the other—transferring all the power which the city council itself had—which would, indeed, be adequate to take over the project in its initial stages, as it is, and carry it on to completion, making such provision for its financing as the city council itself might have done.

The statute itself, construed contextually and as a whole, leaves no doubt that it was intended to vest in the board of power commissioners all the power which the city council had with reference to the electric power project.

Returning, then, to the speculations as to legislative intent upon which the majority opinion critically hinges its conclusion, it is one of the fundamental rules of construction that "the Court cannot attribute to the Legislature an intent which is not in any way expressed in the statute." 59 C. J., p. 958, section 570, and cases noted. "The intention of the Legislature in enacting a law is the law itself." *Justice Adams* for the Court in *Hunt v. Eure, supra. Edwards v. Morton,* 92 Texas, 152, 153, 46 S. W., 792; *Cheney v. Cheney,* 110 Me., 61, 63, 85 A., 387. Speculation as to the reasons or motives of the Legislature is of little value, even when there are doubts in the statute to be cleared up. When they are indulged to the extent of imposing upon a statute drastic conditions wholly foreign to its terms, it becomes judicial legislation; *Norman v. Ausbon,* 193 N. C., 791, 793, 138 S. E., 162; *S. v. Bell,* 184 N. C., 701, 115 S. E., 190; *S. v. Barco,* 150 N. C., 792, 796, 63 S. E., 673; *Hubbard v. Dunn,* 276 Ill., 598, 115 N. E., 210; *Commonwealth v. Acker,* 308 Pa., 29, 162 A., 159; and we are forcibly reminded that it is the prerogative of the Legislature, not of this Court, to engraft limiting conditions upon the powers it confers upon a municipal agency with respect to its essential governmental duties.

Moreover, the attitude of mind attributed to the Legislature toward the High Point Board of Power Commissioners is refuted by the long established policy of the Legislature with respect to such municipal agencies. In the orderly distribution of political powers, particularly those of government, the State has not regarded the Utilities Commission

as a general board of control, or a suitable body to license or supervise either State or municipal agencies to whom has been entrusted, in no matter how small a measure, the duties of government, and some degree of the State's sovereignty. The Legislature has never required such supervision because the members of the boards, or agencies, were "not responsible to the electorate." The State went as far in that direction as it thought sound policy would permit when it created for the fiscal control of counties and municipalities the Local Government Commission, whose official approval, we find from the record, has already been sought and obtained.

Out of scores of instances I might list in which the Legislature has forgotten to place municipal agencies under the Utilities Commissioner, although the members were not "responsible to the electorate," I might mention the Morehead City Port Commission, chapter 75, Private Laws of 1933; *Webb v. Port Commission,* 205 N. C., 663; the many housing authorities constituting municipal agencies appointed under the State Housing Act, chapter 456, Public Laws of 1935; *Wells v. Housing Authority,* 213 N. C., 744; and numerous other boards of like kind now functioning throughout the State. I have yet to see a single one where that sort of supervision is required. Whether the Legislature was presumed to take cognizance of the fact that the resolution of 1939 was on the city records, I do not know. What they did know, however, because it is a rule of construction that these laws relating to the same subject are to be read together (*In re: Town of Rutland,* 128 N. Y. S., 94; *McCullough v. Scott,* 182 N. C., 865, 109 S. E., 789; *Keith v. Lockhart,* 171 N. C., 451, 88 S. E., 640; *United States v. Commissioner of Immigration of Port of New York,* 261 U. S., 611, 67 L. Ed., 826; *United States v. McCarl,* 275 U. S., 1, 72 L. Ed., 131), was that the charter of the city gave it the authority to proceed under the Revenue Bond Act of 1935, which it now desires to do, and they put nothing in the act creating the board of power commissioners which indicates a purpose to deny them that power.

To save time, I refrain from comment on the internal evidences that the act creating the board of power commissioners intended them to exercise the right to make all resolutions necessary to establish and complete the project, including appropriate resolutions as to its financing. The act makes all prior resolutions of the city council the acts of the board of power commissioners. It would be odd if they could not amend their own resolutions.

I think the assumption in the opinion in chief that the project had been established *by the resolution of 1938, as amended by the resolution of 1939,* was inadvertent. It is not supported either by the statute itself or by the condition of the project at the time the board of power com-

missioners was substituted for the city council. It presents a concept of the condition of the project calculated to do the defendants here no little harm in the appraisal of the powers intended to be given to this agency. Also it is refuted by the wording of the act. This refers to the project as yet to be established. It was still, and is now, nothing more than an undertaking in its initial, unfinanced stages. From inception to the present it has been kept so by the restraining hand of the court. Every movement has been opposed by plaintiffs and intervening interests and every inch of progress disputed by able counsel.

In substituting a board of power commissioners for the city council as a convenient method of handling this important project, it is not to be supposed that the Legislature intended to cripple the power of the municipality in making such ordinances as might be necessary for its financing and completion by the only authority left by the Power Commission Act through which this might be done—the board of power commissioners to whom the project was entrusted.

After all, the power intended to be given the board of power commissioners by the act creating it may be measured correlatively by the power which was taken away from the city council. After using as comprehensive language as the dictionary affords in conferring full powers on the power board, the statute provides: "The City Council after May first, one thousand nine hundred and thirty-nine, shall no longer exercise the powers or authority theretofore vested in them with respect to said electric light, heat and power plant and system." Where, then, did this power of the city council to deal with this important enterprise go? Under the main opinion a substantial part of it went nowhere. It is nonexistent.

I do not know to what extent a city of many thousands of inhabitants, or any municipality, and the people within it, may be constitutionally deprived of the powers of government necessary to their welfare by legislative action, while other cities of the State are left immune, but I do know that such a blackout of municipal power and function is not conceivably within the intention of any group qualified by intelligence to make their way into a legislative assembly.

The decision admits that there are some powers which the board of power commissioners may exercise without the supervision of the Utilities Commission, and without receiving a certificate of convenience and necessity. One of them is, by resolution, to cancel the commitment to the Federal Power Commission and rescind the resolution accepting the license. It is said, since that transaction was merely *ultra vires,* it did not "take much power" to rescind it. And yet it was of sufficient substance as to justify this Court in refusing to modify its injunction so long as it lasted. *McGuinn v. High Point, supra.* The present plea of

the plaintiffs relates to the same sort of thing—whether the injunction shall be continued to prevent an *ultra vires* act—the further prosecution of the project without a certificate of convenience and necessity. If the want of such certificate goes to the power of the commission to act, as the opinion certainly indicates, it defeats its power to act in the one case as completely as it does in the other; if it goes only to limit municipal procedure in financing, the power of the commission to act in the one case is as valid as it is in the other, and the exercise of that power in selecting the 1935 Act as authority for financing the power project contravenes nothing which this Court has the right to maintain as an obstruction.

There is, therefore, more behind the High Point Board of Power Commissioners than a simple pull on their own bootstraps. In good faith they have attempted only to exercise a power given them by legislative enactment. The reasons assigned are not sufficient to justify us in destroying it by judicial interpretation. The functions and powers they were called into being to exercise were not new, but had existed long before this controversy began, and the grant of powers given them was not a special one, directed to a fixed situation. It was, as was the power of the city council before it, limited only by the needs of the project entrusted to them, to be exercised in as full and ample a manner as might have been done before the powers were transferred.

The position that the city of High Point is confined to "special law" for its procedure, without the aid of the general laws conferring powers on municipalities with respect to the acquisition, creation, and conduct of facilities of the kind projected, is untenable. Under the Revenue Bond Act of 1935, such powers possessed by municipalities under the general laws are recognized, mentioned, respected, and the projects to which they relate are specifically within the financing provisions of the act. The interpretation of this act as applying solely to construction of facilities wholly within the city is, therefore, upon the face of it, unwarranted. I quote for convenience: (Chapter 473, Public Laws of 1935, section 4): *"Additional powers of municipalities. In addition to the powers which it may now have, any municipality shall have power under this article:* (a) to construct, acquire by gift, purchase, or the exercise of the right of eminent domain, reconstruct, improve, better or extend any undertaking, within the municipality, and to acquire by gift, purchase, or the exercise of the right of eminent domain, lands or rights in land or water rights in connection therewith, (b) to operate and maintain any undertaking for its own use or for the use and benefit of its inhabitants and also to operate and maintain such undertaking for the use and benefit of persons, firms, and corporations (including municipal corporations and inhabitants thereof) whose residences or places

of business are (or which are) located in such municipality, (c) to issue its bonds to finance in whole or in part the cost of the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of any undertaking," etc.

Under the general laws thus recognized and incorporated into the act, municipalities had power to purchase, conduct, own and lease public utilities (C. S., 2787 [3]), to acquire land or water rights, either within or without the city, to be used for water, light, or electric power (C. S., 2791), as within the projects to be financed under the provisions of the act, so long as they are used for the inhabitants of the city. The statutes cited put facilities for a water supply and for electric current on the same footing—"within or outside the city"—and I am sure it will be found few cities can find suitable water supply within the city.

The defendants are not seeking to relitigate anything heretofore decided by this Court. The question presented here is clear cut: Whether the board of power commissioners had the power to rescind the resolution of 1939 relating to procedure under the 1938 Revenue Bond Act, requiring a certificate of convenience and necessity. If they had that power, it *is* rescinded and a new situation or changed condition is presented, justifying the equitable relief prayed for. There is nothing in the case of *McGuinn v. High Point, supra,* or the second *Williamson case, supra,* that touches this question even remotely. To hold that there is anything in the second *Williamson case, supra,* so restricting the coverage of the 1935 Revenue Bond Act as to make it unavailable to the municipality for financing its project as now presented is to do violence to the express terms of the opinion. The *McGuinn case, supra,* simply held that a certificate of convenience and necessity was necessary to procedure under the 1938 Revenue Bond Act. The question of the authority of the board of power commissioners to rescind that resolution and adopt another law for its procedure could not, in the nature of things, have arisen until there was an attempt made to exercise that power, which was not until 15 July, 1940, after the opinion in the *McGuinn case, supra,* was handed down.

The plea of *res adjudicata* is strictly definitive in its nature; there is a pattern both of law and fact upon which it must be imposed. This does not appear in this record.

The conclusion reached in the main opinion that there has been no change in the condition of defendants' project is based entirely on a supposed want of power, and that, in turn, is predicated upon an attempted limitation, through statutory construction, upon the power conveyed to that body, which I regard, under the authorities cited, as arbitrary and unsupported.

The provision in the Power Commission Act that it shall not affect pending litigation is cited as militating against the relief sought by the defendant municipality. It is said that its purpose was the affectation of pending litigation. I do not agree with this, but I am sure it can have no such effect. It accomplishes, and was intended only to accomplish, a simple transfer of the power vested in the city council to the board of power commissioners. There is not a power added which the city council did not have, not a change attempted under its authority which the city council might not have made. The act itself does not alter the *"status quo,"* and it confers no authority, not already existing, by which this might be done.

The rights with which we are dealing are brought within the equity jurisdiction of the Court. There is no denial that the equity exists. It is true we cannot override positive law in the application of equitable principles, but when reliance is placed on the strict law—the *"strictum et summum jus"*—we are not required to follow a harsh construction which would make the law discriminatory and defeat equity, when a more consonant interpretation seems to be well within the legislative intent. It is our duty, if we can, to reconcile the two. Pomeroy, Eq. Jur., 4th Ed., sec. 427; *Riggs v. Palmer,* 115 N. Y., 506, 22 N. E., 188; *Higdon v. Dixon,* 150 U. S., 182, 37 L. Ed., 1044; 19 Am. Jur., p. 313.

The power of the court to modify or dissolve its permanent restraining orders, when changed conditions justify it, is fully established. *Emergency Hospital v. Stevens,* 146 Md., 159, 126 A., 101; *Weaver v. Mississippi & R. Boom Co.,* 30 Minn., 477, 16 N. W., 269; *Larson v. Minnesota N. W. Electric R. Co.,* 136 Minn., 423, 162 N. W., 523; *Lowe v. Prospect Hill Cemetery Assn.,* 75 Neb., 85, 106 N. W., 429 (see 75 Neb., 100, 108 N. W., 478). There is little room for doubt that the injunction, properly granted to plaintiffs for the protection of their rights as they then stood, has, through changed conditions, been controverted into an instrument of oppression, depriving the defendant of that freedom of action, or right, it ought to have, and which the law has sought to preserve to it (*United States v. Swift & Co.,* 286 U. S., 105, 76 L. Ed., 799), and should be dissolved.

Far more reliable as a guide to the interpretation of this statute is to conceive it in harmonious relation to a public policy which, it is presumed, is intended to embrace the city of High Point as well as all other municipalities of the State, and the necessity of uniformly broad municipal power and a discretion adequate to deal with its public undertakings of this character in all their phases. *Idaho Power, etc., Co. v. Bloomquist,* 26 Idaho, 222, 141 P., 1083; *State v. Kelly,* 71 Kansas, 811, 81 P., 450; *Jersey City Gaslight Co. v. Consumers Gas Co.,* 40 N. J. E., 427.

It is the policy of the State, fully established by both general and special laws pertinent to the subject, that municipalities shall have the right to acquire, create and conduct facilities for furnishing to their inhabitants electric current for power and light, if they choose to do so, rather than be dependent upon private enterprises for such current; and in doing so to resort to the few sources of hydroelectric power which have not yet been captured and exploited by private concerns. The mere existence of such a power, and its exercise where occasion warrants, has proven the best protection against exorbitant rates and inadequate service. I see no reason why such a policy should be reduced in its scope by hammering down the laws through which it is expressed below their intended level. The result is to lower the standard of municipal government to the leanest output of public service, whereas, modern thought and experience cry out for the richest. If I could bring myself to believe that the extraordinary theories advanced for putting a new meaning into the law are more reliable than what I find written between the caption and the ratifying clause, I might agree that the Legislature has signally failed to include the city of High Point in this program of emancipation.

Not only the city of High Point, but all the cities and towns in the State, depend upon the continuation of this policy for the power and freedom they suppose themselves to have. It is necessary to that conception of public policy that the statute under review be construed as transferring to this municipal board of power commissioners—as by its terms it does—all the powers which were vested in the municipality for the accomplishment of this legitimate and important public purpose. The appellants have shown no sufficient reason why the Court should acquire callouses in its hands by dragging at the skirts of progress.

Delays in the construction of this project, and particularly in its financing, must have been costly and may be fatal. If we can conceive of a race between natural forces and legal proceedings to see which may be in first at the finale, I fear the result would not be predictable. The Yadkin River runs red with the blood of Appalachian giants. The site may be silted up before the controversy is ended. But I am not willing, without a protest, that action should be taken by this Court the result of which would be simply to transfer the controversy to another forum, in which the city with respect to governmental powers and duties in serving its own inhabitants will be put upon an equal footing with a private enterprise in obtaining a certificate of convenience and necessity—a fight in which it would be more than half beaten at the beginning by the outcome of this litigation.

The judgment of the court below should be affirmed.

YADKIN COUNTY ET AL. v. CITY OF HIGH POINT ET AL.

(Filed 31 January, 1941.)

Appeal and Error § 2—Appeals dismissed as premature, the conditions upon which the order appealed from was to be effective not having occurred.

A decree in favor of movants on their motion for a modification of a prior restraining order entered in the cause was conditioned upon the final adjudication in favor of movants of a similar motion made in another case. There was no exception to the conditionality of the decree. *Held:* Until final adjudication in favor of movants in the other case, plaintiffs are not aggrieved, and their appeals will be dismissed as premature. C. S., 632.

CLARKSON, J., dissenting.

SEAWELL, J., dissents.

APPEALS by plaintiff, intervening plaintiffs and defendants from judgment of *Gwyn, J.*, modifying restraining order conditionally, at Chambers in Yadkinville, 22 August, 1940.

1. On 15 July, 1940, the plaintiff and defendants herein, applied to the judge holding the courts of the 17th Judicial District, by joint petition, asking for vacation or modification of the decree entered in this cause in the Superior Court of Yadkin County on 30 June, 1939, enjoining the city of High Point and its officers, defendants herein, from proceeding with the construction of a dam and reservoir on the Yadkin River for use in connection with proposed hydroelectric system, etc., which said judgment was affirmed on appeal, and is reported in 217 N. C., 462, 8 S. E. (2d), 470.

2. The basis of the joint application was an agreement between the parties purporting to adjust and compromise all differences which had produced this litigation and which resulted in the decree of 30 June, 1939.

3. When the matter came on for hearing on the following day, certain taxpayers of Yadkin County, sixty in number, filed petition to intervene as parties plaintiff, which was allowed in the court's discretion, and the intervening plaintiffs thereupon filed answer to the joint petition and opposed the application for modification on the ground that the purported agreement of settlement and compromise was illegal and void.

After extended arguments and hearings, the court found the facts and entered judgments, in part, as follows:

"It is, therefore, considered, ordered and adjudged that the judgment and restraining order heretofore entered in this cause be modified as follows: That upon the procurement of final judgment of modification in the case of *McGuinn v. High Point, et al.*, above referred to, permitting the City of High Point to proceed with the construction of the hydroelectric project, described in the pleadings, or upon its being finally

adjudged, in contempt proceedings or otherwise, that the City of High Point by reason of changed facts or circumstances is proceeding legally in the construction, operation and maintenance of said hydroelectric project; that the said City of High Point and the County of Yadkin shall be authorized and permitted to proceed in this case according to the terms and conditions of the contract entered into and hereto attached. That until one of the foregoing conditions is met the judgment in this case shall remain in full force and effect."

From this judgment the plaintiff, intervening plaintiffs and defendants appeal.

W. M. Allen for plaintiff, Yadkin County, appellant and appellee.

Grover H. Jones, Roy L. Deal, and Boone Harding for defendants, City of High Point, et al., appellants.

Roy L. Deal, Grover H. Jones, and F. O. B. Harding for City of High Point, et al., defendants, appellees.

B. S. Womble and D. L. Kelly for intervening plaintiffs, appellants.

STACY, C. J. It will be observed that the effectiveness of the order entered herein is dependent "upon the procurement of final judgment of modification in the case of *McGuinn v. High Point, et al.*, . . . or upon its being finally adjudged . . . that the City of High Point by reason of changed facts and circumstances is proceeding legally in the construction, operation and maintenance of said hydroelectric project." Neither of these conditions has been met, and may not be, as will appear by reference to the case of *McGuinn v. High Point, ante,* 56. Hence, the order entered in this subsequent proceeding has not yet become operative, and may not become operative. No appeal lies from a judgment until somebody is hurt or "aggrieved" by it. C. S., 632. None of the parties here is challenging the present judgment on the ground of its conditionality. The plaintiff and defendant are content with its form, and the intervening plaintiffs are the beneficiaries of the condition. It was inserted at their instance. In the absence of an exception to the form of the judgment, which stays its effectiveness, the appeals will be dismissed as premature.

It will be noted that the proceeding is one in equity, supplemental and summary in character, and not one in an action at law.

Appeals dismissed.

CLARKSON, J., dissenting: From the view I take in the action of *McGuinn v. High Point, ante,* 56, I think the judgment in this action should be affirmed. I think the city of High Point has done everything required by the former decision in this action.

SEAWELL, J., dissents.

OSCAR O. EFIRD v. THE BOARD OF COMMISSIONERS FOR THE COUNTY OF FORSYTH; JAMES G. HANES, T. E. JOHNSON AND D. C. SPEAS, MEMBERS OF THE BOARD OF COMMISSIONERS FOR THE COUNTY OF FORSYTH, AND THE COUNTY OF FORSYTH.

(Filed 31 January, 1941.)

1. Courts § 5—

The General Assembly has the power to create county, municipal, and recorders' courts, Constitution of North Carolina, Art. IV, sec. 2, Art. IV, sec. 12, and *a fortiori* has the power to abolish or suspend a court created by it, even during the term of office of the judge of such court.

2. Public Offices § 6—

A person accepting a public office created by the General Assembly takes same subject to the right of the General Assembly to abolish such office, unless restrained by the Constitution, even during the term of office, since tenure does not rest on contract and is not necessarily protected by the Constitution.

3. Constitutional Law § 4c: Courts § 5—Legislature may delegate to county commissioners power to suspend or abolish county court.

While the Legislature may not delegate its power to make laws, it may delegate to local political subdivisions the power to find facts determinative of whether a particular law should become effective in the locality, and therefore it may delegate to county commissioners the power to establish a county court when necessary in the public interest, and, *a fortiori* it may also delegate to the county commissioners similar authority to abolish a county court established by the Legislature.

4. Same: Public Offices § 11—Legislature need not state facts which must be found by political subdivision before it can exercise delegated power, but may delegate discretionary power.

The General Assembly created the Forsyth County Court by ch. 520, Public-Local Laws of 1915, prior to the adoption of Art. II, sec. 29, of the State Constitution. By subsec. 15 of sec. 1, ch. 519, Public-Local Laws of 1939, it gave the board of county commissioners the power to abolish or temporarily suspend the said county court. Pursuant to the delegated authority, the commissioners suspended the county court by resolution duly passed. The judge of the court instituted this action to recover his salary subsequent to the suspension, contending that the Act of 1939 is void as an unconstitutional delegation of legislative power in that the act fails to specify the facts which should be found by the county commissioners as a basis for the exercise of the delegated power. *Held:* The act delegates a discretionary power to the commissioners, which contemplates that they should act in the public interest in accordance with their fair and honest judgment, and the act is constitutional, and defendants' demurrer to the complaint on this cause of action was properly sustained.

5. Same—Legislature may delegate to county commissioners discretionary power to fix salary of judge of county court.

The fixing of the salary of the judge of a county court is essentially a local matter which the General Assembly may delegate to the commis-

sioners of the county, and therefore subsec. 14 of sec. 1, ch. 519, Public-Local Laws of 1939, providing that the board of county commissioners of Forsyth County should have the power to fix the salary of the judge of the county court is a constitutional delegation of the power of the Legislature, Art. IV, sec. 18, and vests in the commissioners a discretionary power to act in the premises in the public interest, and therefore the judge of the county court is not entitled to recover the difference in the salary theretofore fixed by statute (ch. 335, Public-Local Laws of 1932) and the amount of the salary after it had been reduced by the county commissioners by resolution pursuant to the Act of 1939, in the absence of allegation that the county commissioners had acted arbitrarily.

6. Same—

The provision of Art. IV, sec. 18, of the Constitution of North Carolina that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the Constitution and not to those established by legislative enactment.

7. Counties § 16: Public Offices § 11—Claims against county, including claims ex contractu for amount certain, must be filed as required by statute.

Plaintiff, the judge of a county court, alleged that under an agreement with the county commissioners he voluntarily took a cut of $25 per month in his salary as fixed by statute, that subsequently, at the beginning of a fiscal year, he requested that his salary be restored to the amount fixed by statute, and that his request was ignored. This action was instituted to recover the amount of the reduction for the period in question. Defendants demurred to the complaint on the ground of want of allegation that plaintiff had presented his claim to the proper authorities as required by C. S., 1330, 1331, as a condition precedent to the right of action thereon. *Held:* The purpose of the statute is to give the authorities an opportunity to consider and definitely to pass upon a claim before suit can be instituted thereon, and the fact that a claim is *ex contractu* for an amount certain does not relieve claimant from complying therewith, and the demurrer was properly sustained, the allegation that plaintiff had requested the authorities to restore his salary not being one of substantial compliance with the statute.

8. Counties § 1: Public Offices § 11—Complaint alleging injury resulting from arbitrary and abusive exercise of discretionary power states cause.

The county commissioners were given discretionary power to fix the salary of the judge of the county court. Plaintiff, the judge of the county court, alleged that the commissioners twice reduced his salary and that in both instances the commissioners did not act for the purpose of fixing a fair and just compensation, but that their action was arbitrary and in bad faith and constituted an abuse of discretion. Defendants demurred to the complaint. *Held:* Although the courts will not ordinarily interfere with discretionary powers, such powers are not unlimited, but must be exercised in good faith free from ulterior motives, and since the complaint alleges injury resulting from arbitrary and abusive exercise of discretionary powers, defendants' demurrer should have been overruled, since, if the allegation is supported by evidence, the issue as to the *bona fides* of the action of the commissioners is one for determination by a jury.

9. Pleadings § 20—

A demurrer admits the truth of the facts alleged in the complaint.

10. Public Offices § 11: Election of Remedies § 5—Officer may sue for amount salary was reduced by arbitrary exercise of discretionary power.

This action was instituted by the judge of a county court against the county commissioners and the county to recover the amount by which his salary had been reduced by the commissioners under a statute giving them discretionary power to fix his salary. Plaintiff alleged that the commissioners' action in reducing his salary was arbitrary and constituted an abuse of the discretionary power. *Held:* Although *mandamus* would lie to compel the commissioners to fix a proper salary, this remedy is not exclusive, and defendants' demurrer should have been overruled.

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

APPEAL by plaintiff from judgments sustaining demurrers before *Olive, Special Judge,* at September Term, 1940, of FORSYTH.

There were two cases with the same parties, plaintiff and defendants, and the defendants demurred in each case to the complaint therein upon the ground that it did not state facts sufficient to constitute a cause of action.

The first complaint, filed 18 March, 1940, alleges that the plaintiff was, in 1926 and biennially thereafter until the present time, duly appointed by the Governor, judge of the Forsyth County Court, created and existing by virtue of chapter 520, Public-Local Laws 1915, and amendments thereto; that the salary of the judge of said court was fixed at $4,500.00 per year, payable in equal monthly installments out of the treasury of Forsyth County, by chapter 335, Public-Local Laws 1925, and that he was paid at the rate of $375.00 per month until the first day of August, 1932, at which time the plaintiff voluntarily agreed to take a cut of $300.00 per annum and was thereafter paid at the rate of $350.00 per month; that in July, 1934, the plaintiff requested the county commissioners of Forsyth County to restore his salary to the amount provided by statute, namely, $375.00 per month, and repeated this request in July, 1935, which requests were refused and ignored, and payment was continued to be made to the plaintiff at the rate of $350.00 per month until the first day of July, 1939, notwithstanding the plaintiff had never agreed to a reduction since the first day of July, 1934; that on April 3, 1939, the Legislature enacted chapter 519, Public-Local Laws 1939, subsection 14 of section 1, which provided: "The salary of the judge of the Forsyth County Court shall be fixed from time to time by the Board of County Commissioners of Forsyth County," and pursuant to said act the county commissioners of Forsyth County, on 5 June, 1939, did "attempt" to reduce the salary of the judge of said court to $200.00 per month, and thereafter, on 5 September, 1939,

"attempted" further to reduce said salary to $1.00 per month; "that the action of the defendants in attempting said reductions of the salary of the judge of the Forsyth County Court was taken in bad faith, was not for the purpose of fixing fair and just compensation for the judge of said court but was an attempt on their part, indirectly, to abolish and destroy the court without authority of law. Said action on the part of the defendants constituted an abuse of discretion on their part;" that subsection 14, section 1, chapter 519, Public-Local Laws 1939, is unconstitutional and void in so far as it purports to delegate to the board of county commissioners authority to fix the salary of the judge, or to reduce the salary of the judge during his continuance in office, and is in violation of Art. IV, sec. 18, of the Constitution of North Carolina; that the said Act of 1939 contained subsection 15, section 1, which provided: "That the Board of Commissioners of Forsyth County shall have the right to abolish or temporarily suspend the said Forsyth County Court after the expiration of twelve months from the ratification of this act;" that the county commissioners procured this enactment for the purpose of having the plaintiff removed as judge of said court; that the attempt of the Legislature to delegate to the board of commissioners power to fix or reduce the salary of the judge, or to abolish or temporarily suspend the court is against public policy and in contravention of Art. IV, sec. 2, Art. IV, sec. 12, and Art. IV, sec. 30, of the Constitution of North Carolina; that the plaintiff is advised, and so alleges, that the defendants intend to abolish or temporarily suspend said court as soon after 3 April, 1940, as they can have a meeting; that under date of 18 December, 1939, plaintiff demanded in writing of the defendants the payment of his official salary as fixed by law, which demand the defendants have ignored, and that the amount due and demanded is $3,800.00. Whereupon the plaintiff prays that he recover $25.00 per month from 1 July, 1934, until 30 June, 1939, $1,500.00; the sum of $175.00 per month from 1 July, 1939, until 15 October, 1939, $612.50; the sum of $375.00 per month from 15 October, 1939, to 1 March, 1940, $1,687.50; and that the defendants be restrained from abolishing or temporarily suspending or attempting to abolish or temporarily suspend the Forsyth County Court, or in anywise interfering with the administration of justice by said court.

The second complaint, filed 24 July, 1940, makes practically the same allegations as the first, except that instead of alleging that the defendants intend to abolish or temporarily suspend the court, or attempt so to do, it alleges that on 6 May, 1940, the board of commissioners adopted a resolution purporting to suspend temporarily the Forsyth County Court, and pursuant to said resolution the clerk of the Superior Court of Forsyth County, acting under instructions from the board of commis-

sioners of said county, had transferred from the docket of the county court to the docket of the Superior Court all cases that were on the docket of the Forsyth County Court; and that whereas the plaintiff had heretofore entered suit to recover what was due him up to 1 March, 1940, this action was to recover salary from 1 March, 1940, to 1 July, 1940; that the plaintiff was at all times willing, anxious, ready and able to perform the duties of judge of the Forsyth County Court, but was finally prevented by the defendants from doing so; that on 5 July, 1940, the plaintiff made demand upon the board of commissioners for his salary as judge for the months of March, April, May, and June, 1940; the complaint further alleges, on information and belief, that the attempt to delegate by the Legislature to the board of commissioners the power to fix or reduce the salary of the judge of the Forsyth County Court is unconstitutional and void and in contravention of Art. IV, sec. 2; Art. IV, sec. 12; Art. IV, sec. 18; and Art. II, sec. 29, of the Constitution of North Carolina, and the attempt on the part of the Legislature to delegate to the county commissioners the power to abolish or temporarily suspend the Forsyth County Court is likewise unconstitutional and void and in contravention of the same provisions of said Constitution. Whereupon the plaintiff prays that he recover as salary for the judge of the Forsyth County Court at the rate of $375.00 per month for the months of March, April, May, and June, 1940, *i.e.*, $1,500.00.

The defendants in apt time filed demurrers upon the ground that neither of the complaints stated facts sufficient to constitute a cause of action.

The first demurrer states as grounds therefor that the complaint fails to allege (1) that the plaintiff presented his claim for $25.00 per month from 1 July, 1934, until 30 July, 1939, to the board of commissioners of Forsyth County for audit as required by C. S., 1330 and 1331; and that (2) it fails to state a cause of action for $175.00 per month from 1 July, 1939, until 15 October, 1939, in that it alleges that the board of commissioners fixed the salary of the judge of the Forsyth County Court at $200.00 per month from 1 July, 1939, and that the statute cited in the complaint, subsection 14, sec. 1, ch. 519, Public-Local Laws 1939, authorized such fixing of the salary as aforesaid; and that (3) it fails to state a cause of action for $375.00 per month from 15 October, 1939, to 1 March, 1940, for that it appears from the complaint that the board of county commissioners reduced the salary of the judge of the Forsyth County Court to $1.00 per month from 15 October, 1939, pursuant to subsec. 14, sec. 1, ch. 519, Public-Local Laws 1939, and that a cause of action for $1.00 per month for the time involved is not alleged, and also there is no allegation that any claim therefor was ever filed with and refused by the county commissioners as required by C. S., 1330 and

1331; and that (4) the allegations that the board of commissioners of Forsyth County acted in bad faith and abused their discretion in fixing the salary of the judge of the Forsyth County Court at $1.00 per month do not state a cause of action, as the plaintiff's remedy to determine the question presented is by *mandamus* proceeding to require the board of commissioners to fix a proper salary, if any salary be due.

The second demurrer states as grounds therefor that (1) the complaint fails to state a cause of action for salary from 1 March, 1940, to 6 May, 1940, for the reason that it appears therefrom that the board of commissioners reduced the salary to $1.00 per month pursuant to subsec. 14, sec. 1, ch. 519, Public-Local Laws 1939, and also does not allege a cause of action for $1.00 per month for the time involved or that a claim therefor had been filed for audit with the board of commissioners as required by C. S., 1330 and 1331; and that (2) the complaint fails to state a cause of action for salary from 6 May, 1940, to 1 July, 1940, for the reason that it appears therefrom that the board of commissioners, pursuant to subsec. 15, sec. 1, ch. 519, Public-Local Laws 1939, did, on 6 May, 1940, by proper resolution temporarily suspend the Forsyth County Court, and that the officers of said court *ipso facto* ceased; and that (3) the allegations that the board of commissioners acted in bad faith and abused their discretion in fixing the salary of the judge of the Forsyth County Court at $1.00 per month do not state a cause of action as the plaintiff's remedy to determine the question involved is by *mandamus* proceeding to require the board of commissioners to fix a proper salary, if any is due.

Judgments sustaining the demurrers and dismissing the actions were entered, to which the plaintiff preserved exceptions, and appealed.

J. M. Wells, Jr., Roy L. Deal, Felix L. Webster, and Richmond Rucker for plaintiff, appellant.

Fred S. Hutchins, H. Bryce Parker, and Ransom S. Averitt for defendants, appellees.

SCHENCK, J. The first question discussed in the briefs relates to the allegations that the plaintiff is entitled to recover as salary $375.00 per month from 6 May, 1940, until 1 July, 1940, after the board of commissioners by resolution temporarily suspended the Forsyth County Court on 6 May, 1940. It is the contention of the defendants that it appears upon the face of the complaint that the plaintiff is not entitled to recover upon the allegations, since subsec. 15, sec. 1, ch. 519, Public-Local Laws 1939, gave the board of commissioners power to temporarily suspend the court and that such suspension *ipso facto* terminated the office of judge. It is the contention of the plaintiff that said subsection of the Act of

1939 is unconstitutional and void, and therefore the attempted suspension of the court by the commissioners was ineffective.

The constitutionality of the said subsection is clearly presented. It reads as follows: "15. That the Board of Commissioners of Forsyth County shall have the right to abolish or temporarily suspend the said Forsyth County Court after the expiration of twelve months from the ratification of this Act; and that in the event the said court is abolished or temporarily suspended all cases then pending therein shall be transferred to the civil issue docket of the Superior Court of Forsyth County and the offices herein created shall *ipso facto* terminate." (The act was ratified 3 April, 1939.)

It is contended by the plaintiff that the subsection is in contravention of Art. IV, sec. 12, North Carolina Constitution, which, in part, reads: ". . . but the General Assembly shall allot and distribute that portion of this (judicial) power and jurisdiction which does not pertain to the Supreme Court among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; . . ."

Art. IV, sec. 2, North Carolina Constitution, is also pertinent to this discussion. It reads: "The judicial power of the State shall be vested in a Court for the trial of impeachment, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law."

It is apparent from these two sections that the General Assembly may provide courts not named therein. The court here involved was created by the General Assembly (ch. 520, Public-Local Laws 1915). The plaintiff contends that since the court was created by the General Assembly only the General Assembly has the power to abolish it, and that this power cannot be delegated to the board of county commissioners. That the General Assembly had authority to abolish the court cannot be gainsaid. "If the Legislature had the right to create the court, it had the right to abolish. *Quo ligatur, eo dissolvitur.* By the same mode by which a thing is bound, by that it is released. . . . The courts we are now considering are the creatures of the Legislature. The creator can establish and abolish." *Queen v. Comrs. of Haywood,* 193 N. C., 821. This was the holding notwithstanding the term for which the judge was elected had not expired. Whoever accepts public office does so with the principle of law extant that the Legislature which established the office is vested with the power to abolish it, except where restrained by the Constitution, and since the tenure of office does not rest on contract it is not necessarily protected by the Constitution. 22 R. C. L., p. 579, sec. 293.

Since the Legislature had the inherent power to abolish the Forsyth

County Court, even during the term of office of the judge thereof, we are confronted with the question as to whether the Legislature was authorized to delegate to the board of commissioners of Forsyth County the right to abolish or temporarily suspend said court.

It is a well established principle of law that a legislative body may refer to local authorities questions pertaining to their particular localities for action thereupon, on the theory that local authorities are better advised as to local questions. The Forsyth County Court was a local court, established by a local, private and special act, prior to adoption of Art. II, sec. 29, North Carolina Constitution. The distinction between courts created by the General Assembly and those existing by virtue of the Constitution is well recognized. *Queen v. Comrs. of Haywood, supra.*

While the Legislature may not ordinarily delegate its power to make laws, it may nevertheless make laws and delegate the power to subordinate divisions of the Government to determine facts or state of things upon which the law shall become effective. *Provision Co. v. Daves,* 190 N. C., 7. It was held in *Meador v. Thomas,* 205 N. C., 142, that while the Legislature could not delegate to another agency the authority committed to it by the sovereign power of the State, the principle had no application to the establishment of a county court by the board of commissioners clothed with the power to find facts with respect to the necessity of the court. If the board of commissioners by authority of the legislative enactment could establish a county court, *a fortiori,* they could abolish such a court by similar authority.

"While legislative power granted by the Constitution may not as a rule be delegated, it is fully recognized that under our system of government such power may be delegated to municipal corporations for local purposes where as agencies of the State they are possessed and in the exercise of governmental powers in designated portions of the State's territory, whether such localities are the ordinary political subdivisions of the State, or local governmental districts created for special and public *quasi* purposes." *Tyrrell v. Holloway,* 182 N. C., 64.

Since the Legislature had the power to abolish the Forsyth County Court, and since it had authority to delegate this power to the board of county commissioners, we are confronted with the question: Has the Legislature actually delegated such power? The language of the act is plain and unambiguous; but it is argued that since the act fails to state what facts must be found by the board of commissioners as a condition precedent to the abolition of the court, that it is arbitrary, discriminatory, and void. Rather than arbitrary, the act is discretionary, which means that the board of commissioners are authorized when, in their fair and honest judgment the public interest dictates it, to abolish or temporarily suspend the court. To hold that the act should specify what

facts must be found by the board of commissioners as a condition precedent to the abolition or suspension of the court, would be to place upon the Legislature an almost impossible task, and to destroy the very purpose of placing a local problem before a local tribunal. The law does not so fetter the legislative action, and many statutes have been enacted providing for the establishment and abolition of county courts when in the discretion of the board of county commissioners such courts are deemed desirable, the jurisdiction of such courts having been fixed by legislative enactment prior to the establishment of the individual courts.

The demurrers, in so far as they relate to the allegations in the complaints that subsec. 15, sec. 1, ch. 519, Public-Local Laws 1939, is unconstitutional and void, and for that reason plaintiff is entitled to recover $375.00 per month from 6 May, 1940, until 1 July, 1940, were properly sustained by the Superior Court.

The second question discussed in the briefs relates primarily to the allegations that the plaintiff is entitled to recover as salary $175.00 per month from 1 July, 1939, until October 15, 1939, namely, $612.50, being the difference between $375.00 per month fixed by ch. 335, Public-Local Laws 1925, and $200.00 per month fixed by the board of commissioners on 5 June, 1939, by virtue of subsec. 14, sec. 1, ch. 519, Public-Local Laws 1939.

Said subsec. 14, in part, reads: "14. The salary of the Judge of Forsyth County Court shall be fixed from time to time by the Board of County Commissioners of Forsyth County." It is contended by the defendants that it appears upon the face of the complaint that the reduction in the salary made by the board of commissioners was authorized by said subsection 14, and it is contended by the plaintiff that said subsection 14 is unconstitutional and void, being in contravention of Art. IV, sec. 18, which reads: "The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this article; but the salaries of the judges shall not be diminished during their continuance in office."

The plaintiff contends (1) that the General Assembly cannot delegate to the board of commissioners the right to fix the salary of the judge of the Forsyth County Court, since the Constitution provides that the General Assembly shall prescribe and regulate the salaries of all officers provided for in Art. IV, and said article provides for a court for the trial of impeachments, a Supreme Court, Superior Courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law, and since the Forsyth County Court has been duly established by statute the Legislature could not delegate the right to fix the salary of the judge thereof to the board of county commissioners. This contention is untenable for the same reasons ad-

vanced against the position that the Legislature could not delegate to the board of commissioners the right to abolish or temporarily suspend the court. The fixing of the salary of a judge of a county court is essentially a local question, of purely local interest, and can best be determined by a local body, and it is therefore delegable to the sound discretion of such a body to determine the facts upon which to base their conclusion.

The plaintiff further contends (2) that the fixing of the salary at a less figure than originally fixed by statute is contrary to the constitutional provision that "the salaries of the judges shall not be diminished during their continuance in office." This provision applies only to judges of courts existing by virtue of the Constitution and not those established by legislative enactment. The distinction between constitutional courts and legislative courts is one well recognized. If the Legislature could delegate the finding of the facts necessary to abolish or suspend a county court it could *a fortiori* delegate the finding of facts necessary for the reduction of the salary of the judge of such court, and this whether it resulted in a reduction in salary during the continuance in office of the incumbent or otherwise. That the board of commissioners had the power to abolish the court during the term of the judge was held in *Queen v. Comrs. of Haywood, supra.*

The demurrers, in so far as they relate to the allegations in the complaints that subsec. 14, sec. 1, ch. 519, Public-Local Laws 1939, is unconstitutional and void and for that reason plaintiff is entitled to recover $175.00 per month from 1 July, 1939, to 15 October, 1939, were properly sustained by the Superior Court.

The third question discussed in the briefs relates to whether the plaintiff is in a position to challenge the constitutionality of the act involved in so far as it relates to the reduction made in his salary, since he acquiesced in such reduction by accepting the reduced salary. Since we are of the opinion that the act does not contravene the Constitution, and is therefore valid, the question here presented becomes moot and calls for no decision.

The fourth question discussed in the briefs relates to the plaintiff's alleged cause of action for $25.00 per month from 1 July, 1934, until 1 July, 1939. The defendants demur to these allegations upon the ground that the complaint nowhere alleges that the plaintiff presented this claim to the board of county commissioners for audit and allowance or disallowance as required by C. S., 1330 and 1331. This claim is not affected by the Act of 1939. C. S., 1330, provides: "And every such action (against a county) shall be dismissed unless the complaint is verified and contains the following allegations: (1) That the claimant presented his claim to the lawful municipal authorities to be audited and

allowed, and that they neglected to act upon it, or had disallowed it; . . ." The nearest approach to such an allegation is that the plaintiff requested the municipal authorities to "restore" his salary to $375.00 per month. This falls far short of the requirements of the statute. The fact that the claim was *ex contractu* and for an amount certain does not relieve the claimant from complying with the statute, the purpose of which is to give the municipal authorities an opportunity to consider and definitely to pass upon the claim before suit can be instituted. *Nevins v. Lexington,* 212 N. C., 616, and cases there cited. Failure to allege the filing of the claim as required by the statute may be taken advantage of by demurrer. *Williams v. Smith,* 134 N. C., 249.

The demurrers, in so far as they relate to the allegations in the complaints that plaintiff is entitled to recover $25.00 per month from 1 July, 1934, until 1 July, 1939, the difference between $375.00 per month and $350.00 per month for this period, were properly sustained by the Superior Court.

The fifth and sixth questions discussed in the briefs are treated together and relate to the allegations in the complaint to the effect that if the Court should hold subsecs. 14 and 15 of sec. 1, ch. 519, Public-Local Laws 1939, constitutional and valid, the defendants in fixing the salary of the judge of the Forsyth County Court at $200.00 per month from 1 July, 1939, until 15 October, 1939, and at $1.00 per month from 15 October, 1939, to 1 March, 1940, and $1.00 per month for the months of March, April, May, and June, 1940, acted in bad faith, not for the purpose of fixing a fair and just compensation for the judge, and attempting indirectly to abolish and destroy the court without authority of law, which action constituted an abuse of discretion by the board of commissioners. These allegations are by the demurrers admitted to be true.

While it is a well recognized principle of law with us that the courts will not ordinarily interfere with the discretionary powers conferred on municipal corporations for the public welfare, still when the actions of such corporations become so unreasonable as to manifest an abuse of such discretion, the courts will furnish relief to one aggrieved thereby. The discretion vested in the municipal corporations is not entirely without limitation. It must be exercised at least in good faith and be free from ulterior motives. It is not consonant with our conception of municipal government that there should be no limitation upon the discretion granted municipalities, and that no remedy is left to him who may be injured by an abuse thereof. *Jones v. North Wilkesboro,* 150 N. C., 646; *Hayes v. Benton,* 193 N. C., 379, and cases there cited.

The demurrers, in so far as they relate to the allegations in the complaints that the defendants acted in bad faith and not for the purpose

of fixing a fair and just compensation for the judge of the Forsyth County Court, which action was an abuse of discretion by the board of commissioners, we are constrained to hold were improperly sustained, since we are of the opinion that the alleged facts are sufficient to constitute a cause of action for $175.00 per month from 1 July, 1939, until 15 October, 1939, and for $375.00 per month from 15 October, 1939, until 1 March, 1940, and from 1 March, 1940, until 6 May, 1940 (date alleged in complaint court was temporarily suspended by board of commissioners).

Upon the filing of an answer there may or may not be a failure on the part of the plaintiff to prove that the action of the defendants in first fixing the salary of the judge at $200.00 per month, and later at $1.00 per month, was not taken in good faith, nor for the best interest of the public, nor in an effort to honestly exercise the discretion vested in them. It is not the function of the court to say, under the circumstances then existing, what was or what was not a reasonable compensation for the judge, but to submit to the jury an issue as to the *bona fides* of the action of the board of commissioners.

While it is true as contended by the appellees the plaintiff may have had the remedy of *mandamus* to compel the defendants to fix a proper salary for the judge of the Forsyth County Court, if they had neglected or refused so to do, we apprehend that this remedy was not an exclusive one.

As the cases are before us on demurrer, we forbear discussing the questions presented further than necessary to dispose of the exceptions to the judgments below.

The judgments sustaining the demurrers, in so far as they relate to the alleged cause of action for the difference between $375.00 per month and $200.00 per month from 1 July, 1939, until 15 October, 1939, and for $375.00 per month from 15 October, 1939, until 1 March, 1940, and from 1 March, 1940, until 6 May, 1940 (date alleged in complaint court was temporarily suspended by board of commissioners), by reason of the abuse of the discretion vested in the defendants, are reversed; otherwise, they are affirmed.

The judgments of the Superior Court will be modified in accord with this opinion.

Modified and affirmed.

SEAWELL, J., concurring in part, dissenting in part: In my judgment, the Legislature was without constitutional power to delegate to the board of commissioners of Forsyth County the unqualified right "to abolish or temporarily suspend" the Forsyth County Court.

1. Under our system, the creation and establishment of courts has

been considered a legislative function, controlled, of course, by appropriate constitutional restrictions. I think the abolishment or suspension of a court is strictly a legislative function, involving a nondelegable power.

It is true that under a general law, and if not restricted by the Constitution, no doubt, under a special law, the power may be delegated to a fact-finding body to determine the existence of conditions or circumstances under which the establishment or abolishment of a court might be achieved by operation of the law and declare the same; that is to say, that they may find the conditions under which the law itself operates to establish or abolish the court. 11 Am. Jur., p. 494, sec. 235; *A. L. A. Schecter Corporation v. United States,* 295 U. S., 495, 79 L. Ed., 729; *Brown v. Arkansas City,* 135 Kansas, 453, 11 P. (2d), 607; *State v. Smith,* 130 Kansas, 228, 285 P., 542. This is but the event upon the happening of which the law comes into effect and involves the exercise of no discretion on the part of the fact-finding body. But this is far from saying that the Legislature could delegate to such a body, or any body, the "right" to abolish or suspend a court at their pleasure. 11 Am. Jur., p. 943, sec. 230. Moreover, I think such an act is void, unless the limitations upon its exercise are plainly stated in the act, not in detail certainly, but in such a way that would indicate that the Legislature did not intend the body to either create or suspend the court at its pleasure, and without the finding of those facts. It is a question here of the power delegated and its extent. It is not a question as to whether reasonable men would act discreetly and abolish or suspend the court under a conscientious guidance by the public interest, convenience, or necessity. Such powers are to be construed strictly and there is nothing in the act justifying the assumption that the Legislature intended other than the plain naked power which it gave to the county commissioners to abolish or suspend the court. The power to establish or abolish a court is strictly within the nondelegable legislative function. It cannot abdicate or delegate its discretion with reference thereto. *Albertson v. Albertson,* 207 N. C., 547, 178 S. E., 352; Constitution, Art. IV, sec. 2. This is easily illustrated in the present case, since the inference is compelling that the board of county commissioners suspended the court, not because it had become unuseful or the public interests ceased to demand it, but solely in order to get rid of the incumbent judge.

Article 24 of subchapter 5 of the Consolidated Statutes relates to the establishment, organization, and jurisdiction of general county courts. Sections 1608 (f) (1) and 1608 (f) (2) provide how such courts may be established and abolished. They require the board of county commissioners, by resolution, to recite the reasons for the establishment or abolition of the court, upon facts which they have found, that the public

interest will be promoted by the establishment of the court in the case of establishment, and "that the conditions prevailing in such county are such as to no longer require the said court." Similar provisions apply to the establishment and discontinuance of recorders' courts. These provisions have no application to the suspension or abolishment of the Forsyth County Court, which was established by chapter 520, Public-Local Laws of 1915. But they were carefully drawn, fully respecting the constitutional inhibition against the delegation of the legislative function, and are mentioned here only by way of illustration.

2. Article II, section 29, of the Constitution, provides: "The General Assembly shall not pass any local, private, or special act or resolution relating to the establishment of courts inferior to the Superior Court . . . but the General Assembly may, at any time, repeal local, private, or special laws enacted by it."

I am of the opinion that to give this section of the Constitution the broad construction which its terms require, the suspension of Forsyth General County Court, or its abolishment, must necessarily come within this prohibition relating to the establishment of courts. If so, the only manner in which the General Assembly is constitutionally permitted to pass a law affecting this court as established by such public-local act is not by way of suspension but by way of repealing the act.

I think the plaintiff, under the pleading in a proper showing of fact, is entitled to his salary for so much of his term as may have existed during the attempted suspension of the court.

In other parts of the opinion I concur.

MATTIE BYNUM v. THE FIDELITY BANK OF DURHAM, NORTH CAROLINA (LEON W. POWELL, ADMINISTRATOR OF THE ESTATE OF JOANNA LEATHERS, DECEASED, SUBSTITUTED DEFENDANT).

(Filed 31 January, 1941.)

1. Gifts § 4—

In order to constitute a *donatio mortis causa* there must be an intention on the part of the donor to give the *res* to the donee, the gift must be made in contemplation of death from a present illness or immediate peril, and there must be an actual or constructive delivery of the *res* to the donee.

2. Same—

In an action to establish a *donatio mortis causa*, especially where the delivery is constructive and the declarations and acts relied upon to show such delivery are ambiguous, evidence tending to show motive for making

the gift, the relationship between the parties, the setting and the intention of the donor, and also the state of his health and the circumstances surrounding his death, is relevant and admissible if otherwise competent.

3. Same: Pleadings § 29—

In an action to establish a *donatio mortis causa*, allegations setting forth facts tending to show motive, the setting, the relationship between the parties, the intention of the donor, and the state of his health and the circumstances surrounding his death, are proper, and defendant administrator's motion to strike such allegations from the complaint is properly denied. C. S., 537.

4. Courts § 2c—

The Superior Court acquires jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein, and may set aside a previous order of the clerk and substitute therefor an order of its own without finding that the clerk had abused his discretion or committed error of law in signing the order, the clerk being but a part of the Superior Court. Michie's Code, 637, 460.

5. Parties § 11—Superior Court, upon appeal, has power to make proper order for substitution or joinder of parties.

This action was instituted against a bank to establish plaintiff's right to a deposit as a donee of a gift of the deposit *causa mortis*. The bank, after proper notice, filed petition, supported by proper affidavit, requesting that the administrator of the alleged donor be made a party and be substituted as the defendant, upon the bank's payment into court the amount of the deposit. The clerk granted the bank's petition over exception of plaintiff. Upon appeal to the Superior Court, the judge set aside the order of the clerk and entered an order that the bank should hold the funds in controversy until the termination of the litigation, and should remain a party, but that it should not be liable for any costs or expenses. *Held:* The Superior Court had jurisdiction to enter the order and the order protects all the litigants and does not prejudice the administrator, and his exception thereto cannot be sustained. Michie's Code, 460.

BARNHILL, J., dissenting.

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

APPEAL by defendant, Leon W. Powell, administrator of the estate of Joanna Leathers, deceased, from *Williams, J.*, at April Civil Term, 1940, of DURHAM. Affirmed.

The order and decree of the court below indicates the controversy and is as follows:

"This cause coming on to be heard before the undersigned Judge Presiding over the Superior Court of Durham County at the request of counsel for Leon W. Powell, Administrator of the Estate of Joanna Leathers, upon the appeal of the plaintiff duly taken from the order of the Clerk of the Superior Court of Durham County entered on the 4th day of April, 1940, at which hearing in the Superior Court both the plaintiff Mattie Bynum and the defendant The Fidelity Bank were

represented by their respective counsel, and Leon W. Powell, Administrator of the Estate of Joanna Leathers, appeared through his counsel and tendered a judgment dismissing said appeal which the undersigned declined to sign, to which ruling said defendant in apt time excepted, and both the Administrator and The Fidelity Bank having objected in open Court to the allowance of any change in the said order of the Clerk, and the Court, after hearing the evidence, the argument of counsel and the pleadings, is of the opinion and finds the following to be the facts:

"1. That this is an action brought by the plaintiff against the Fidelity Bank of Durham, North Carolina, by summons issued and complaint filed March 4, 1940, for the recovery of certain funds on deposit in said Bank at the time of the institution of this action in the sum of $10,218.10.

"2. That since the institution of this action Leon W. Powell has been appointed by the Clerk of the Superior Court of Durham County as Administrator of the Estate of Joanna Leathers, and duly qualified and entered upon his duties as Administrator and as such Administrator has without collusion with said Bank also made demand upon The Fidelity Bank, the defendant in this action, for the said funds which are the subject matter of this action prior to the expiration of time to file answer.

"3. That The Fidelity Bank has refused to pay said funds to the said Leon W. Powell, Administrator, and has also refused to pay said funds to Mattie Bynum, the plaintiff in this action.

"4. That The Fidelity Bank, the defendant in this action, on March 21, 1940, filed with the Clerk of the Superior Court of Durham County, under Section 460 of the Consolidated Statutes, a duly verified Petition and Application for Substitution of Party Defendant; that there was also filed therewith an affidavit of E. S. Booth, Vice President of The Fidelity Bank; that the said E. S. Booth, Vice President of The Fidelity Bank, in his said affidavit recited that the said Leon W. Powell, Administrator, was not a party to the said action; that he had made demand against The Fidelity Bank for the money sued for in the above entitled action without collusion with the said The Fidelity Bank, and that the amount of the said fund was $10,218.10, and that the said The Fidelity Bank, upon its verified petition, prayed that it be granted a hearing upon the said petition and application, and that the Court make an order substituting the said Leon W. Powell, Administrator, in its place as a defendant in said action, upon the payment by it into Court of the said sum of $10,218.10, and that it, the Bank, be thereupon discharged from liability on account of said sum to the plaintiff and also to the said Administrator; that a notice of the filing of said petition and of the hearing thereon was served upon the counsel for the plaintiff Mattie Bynum, and also upon the counsel for Leon W. Powell, Administrator; that the plaintiff Mattie Bynum in apt time filed an answer to this petition.

"5. That upon the hearing of the said petition of the said The Fidelity Bank, and its application for the substitution of Leon W. Powell, Administrator, as defendant in said action, the said W. H. Young, Clerk of the Superior Court, having before him the said petition of The Fidelity Bank and application for the substitution of Leon W. Powell, Administrator, as a party defendant, and after argument of counsel and in the presence of counsel for plaintiff and defendant in the above entitled action and in the presence of H. G. Hedrick and C. V. Jones, attorneys for Leon W. Powell, Administrator, who attended the said hearing in response to a notice duly served upon Leon W. Powell, Administrator, announced that he would grant the petition of The Fidelity Bank and substitute the said Leon W. Powell, Administrator, as party defendant upon the payment into Court of the said sum of $10,218.10, and duly made and entered an order to that effect; that the plaintiff Mattie Bynum in apt time tendered findings and duly excepted and appealed from the signing and entry of said order.

"6. That the defendant The Fidelity Bank, through its counsel, Jones Fuller, Esq., has stated in open Court that it claims no interest in the funds which are the subject matter of this controversy.

"7. That the Court is of the opinion that the *status quo* existing at the time of the death of Joanna Leathers and at the time of the institution of this action should be preserved in so far as possible until the determination of the issues in order that the rights of all the parties involved in this controversy may be fairly and justly protected and decided; that in order to do this The Fidelity Bank is a necessary and proper party defendant and should remain a party to these proceedings to the conclusion of this litigation, without liability, however, for any court costs or expenses, including attorneys' fees, by consent of plaintiff to be hereafter fixed by the Court in connection with the same, and said Bank should hold the funds in controversy in its possession until the termination of this litigation, in order that the same may be disbursed in accordance with such judgment as may be finally entered by the court.

"8. That Leon W. Powell, Administrator of the Estate of Joanna Leathers, is entitled to assert in this action such claim as he may have, if any, against the funds involved, and through his attorneys has made a motion to strike certain portions of the plaintiff's complaint, and has entered an appearance in this action.

"9. That the order heretofore entered by the Clerk of the Superior Court of Durham County on the 4th day of April, 1940, should be set aside to the end that this order may be entered.

"10. That pursuant to the signing of said judgment The Fidelity Bank paid to the Clerk of Superior Court the sum of $10,218.10.

"Now, Therefore, It Is Hereby Ordered, Considered, Adjudged and Decreed:

"(1) That the order of the Clerk of the Superior Court of Durham County heretofore entered on April 4, 1940, be, and the same is hereby set aside.

"(2) That the Fidelity Bank remain a party defendant to this proceeding pending the final determination of the issues involved; that the Clerk of the Superior Court of Durham County repay to the Fidelity Bank the sum of $10,218.10 without cost or deduction, and that said Bank retain in its possession, on interest, said funds in controversy until there has been a final determination of the issues involved in this action; that since The Fidelity Bank is claiming no interest in said funds it is hereby ordered that no court costs in this action be taxed against said Bank, and that by consent of plaintiff at the trial of this action in the Superior Court any expenses of the Bank, including its attorneys' fees, be deducted from said deposit and paid to said Bank; that said Bank is hereby allowed thirty (30) days from the date of the entry of this order in which to answer or otherwise plead to the complaint filed herein.

"(3) That Leon W. Powell, Administrator of the Estate of Joanna Leathers, be, and he is hereby allowed thirty (30) days from the date of this order in which to file pleadings setting forth any claim which he desires to assert against the funds in question in this controversy.

"(4) Leon W. Powell, Administrator of the Estate of Joanna Leathers, having notified the Court through his attorneys that he intended to appeal from the order overruling the motion to strike certain portions of the complaint, The Fidelity Bank is hereby allowed thirty (30) days from the final determination of any appeal from said order in which to file answer or other pleadings in this matter. This the 11th day of May, 1940. Clawson L. Williams, Judge Presiding."

To the signing of the foregoing order, and the rulings of his Honor as contained therein, and to his failure to find facts requested by counsel for defendant Leon W. Powell, Administrator, as set forth in the formal request filed in this cause and presented to his Honor prior to the entry of the foregoing order, the defendant, Leon W. Powell, administrator, excepted, assigned error, and appealed to the Supreme Court. The material exceptions and assignments of error and other material facts will be set forth in the opinion.

Victor S. Bryant and F. C. Owen for plaintiff.
Hedrick & Hall and Claude V. Jones for appellant.

CLARKSON, J. The record discloses that the Fidelity Bank of Durham, N. C., did not appeal from the order and decree of the court below. The

defendant Leon W. Powell, administrator of the estate of Joanna Leathers, deceased, alone appealed.

The first question involved, as stated by defendant Powell, administrator, is as follows: "1. Did the Court err in overruling substituted defendant's motions to strike from the complaint paragraphs 3 through 15, or any of them?" We think not.

Mattie Bynum, the plaintiff, brought this action against the Fidelity Bank of Durham, N. C., alleging a *donatio mortis causa,* made by Joanna Leathers to her in her last fatal illness and impending death, of some $10,166.85 in the said Fidelity Bank.

This motion of defendant Powell, administrator, is premised on the statute—N. C. Code, 1939 (Michie), sec. 537, which is as follows: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

Section 506 provides: "The complaint must contain: . . . (2) A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered."

The motion of defendant Powell, administrator, was made in apt time.

Section 535 is as follows: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

The action of plaintiff is bottomed on a *donatio mortis causa.* "A gift made by a person in sickness, who, apprehending his dissolution near, delivers, or causes to be delivered, to another the possession of any personal goods, to keep as his own in case of the donor's decease. 2 Bl. Comm., 514." Black's Law Dictionary, p. 612.

In *Thomas v. Houston,* 181 N. C., 92-3, is the following: "To constitute a gift *causa mortis* not only is an intentional transfer and actual or constructive delivery necessary, but it must be made in view of impending dissolution, or in contemplation of death from a present illness or some immediate peril. 12 R. C. L., 962; *Patterson v. Trust Co.,* 157 N. C., 13; *Newman v. Bost,* 122 N. C., 524; and *Wilson v. Featherston,* 122 N. C., 747. As very tersely and succinctly stated in *McCord v. McCord,* 77 Mo., 166: 'To constitute such a gift, it must be made in the last illness of the donor, or in contemplation and expectation of death. There must be a delivery of the subject by the donor, and it is "defeasible by reclamation, the contingency of survivorship, or delivery from peril."

(2 Kent. Com., 444.) It must be a delivery as a gift, and such a delivery, as in case of a gift *inter vivos,* would invest the donee with the title to the subject of the gift.' "

In 28 Corpus Juris, sec. 137, at pages 703-4, under the section dealing with gifts *causa mortis,* we find the following language: "Where there is a controversy as to the fact of making a gift of this kind, evidence tending to show a motive and reason for making it is always admissible, especially where the declarations of the donor, or the acts performed which are relied upon to show delivery, are ambiguous. Evidence showing the donor's affection and regard for the donee is admissible. In the case of a gift by a married woman to a person other than her husband, evidence of his ill-treatment of her is admissible as tending to show a reason and motive for making the gift and so preventing the property from descending to her husband." Section 138: "Prior declarations of the donor constituting part of the *res gestæ,* and showing an intent to give the property in dispute to the donee are admissible as tending to show *quo animo* the act was done, and as corroborative evidence of a gift. A writing signed by the donor, declaring or showing an intention to make a gift of the property in dispute, is admissible. So also his statements showing a state of mind and purpose inconsistent with an alleged gift are admissible to show that no gift was made. Subsequent declarations of the donor in the nature of admissions against interest are admissible in evidence as tending to show that he had given the property in question to the donee. But such declarations are not admissible to defeat a gift consummated by delivery. It has been held that an admission of the donor that he had delivered the property to the donee is competent evidence on the question of delivery." *Riggs v. Strank,* 89 W. Va., 575, 110 S. E., 183; *Bank v. O'Bryne,* 177 Ill. App., 473; *Young v. Anthony,* 104 N. Y. Supp., 87.

In proving a gift *causa mortis* an intentional transfer and actual or constructive delivery is necessary and must be made in view of impending death from present illness. To show the intention of the donor it is proper to allege the setting. As was said in *In re Westfeldt,* 188 N. C., 702 (711): "The setting surrounding the testatrix when the paper-writings were signed, the home conditions and family relationship, when shown, as was proper and done on the trial below, makes it clear as to the disposition of the property—the persons taking and the things taken."

It is proper for the plaintiff, in order to show the intention of the donor, to allege, as she has in paragraphs 3 through 15 of the complaint, the surrounding circumstances of her relationship to the donor. In order to show the transfer and constructive delivery of the *corpus* of the gift she must allege facts to show this transfer and delivery. It is also proper for the plaintiff to allege facts concerning the state of the health of the donor and the circumstances surrounding the donor's death.

We have read the complaint with care—it is prolix, but gives a consecutive story, leading up to the alleged *donatio mortis causa.* We cannot hold that the allegations were irrelevant or redundant, but construing them liberally "with a view to substantial justice between the parties" we think the court below correct in refusing the motion to strike.

In *Poovey v. Hickory,* 210 N. C., 630 (631), it is written: "The motion under the provisions of C. S., 537, concedes that there are facts alleged in the complaint which are sufficient to constitute a cause of action. Only the propriety, relevancy, or materiality of the allegations sought to be stricken from the complaint are brought in question by the motion, which ought to be allowed only when the allegations are clearly improper, irrelevant, or immaterial. Ordinarily, the plaintiff has the right to state his cause of action in his complaint, as he sees fit or as he may be advised. The allegations may be admitted or denied by the defendant in his answer."

In the recent case of *Scott v. Bryan,* 210 N. C., 478 (482), *Devin, J.,* for the Court, said: "While an appeal will ordinarily lie from the denial of a motion to strike from the pleadings material allegations of matters which are incompetent or irrelevant and prejudicial, it has been well said in recent opinions by the Court that the questions involved could be better determined by rulings upon the competency of the evidence if and when offered, than by undertaking to chart the course of the trial by passing upon allegations as yet undenied. *Hardy v. Dahl,* 209 N. C., 746; *Pemberton v. Greensboro,* 205 N. C., 599.

"While nothing ought to remain in a pleading, over objection, which is incompetent to be shown in evidence, the matter can be determined with greater certainty after consideration of all the pleadings and the evidence adduced on the hearing. *Pemberton v. Greensboro,* 203 N. C., 514."

The second question involved, as stated by Powell, administrator, is as follows: "2. Did the Court err in reversing the order of the Clerk Superior Court for substitution of Powell, Administrator, as defendant in the place and stead of The Fidelity Bank, in the absence of a finding by the Court that the Clerk Superior Court had abused his discretion or committed error of law in signing the order of substitution?" We think not.

Exceptions and assignments of error 15, 16, 17, and 18, made by Powell, administrator, cannot be sustained. We think the order of the court below contains all necessary facts to be found.

N. C. Code, *supra,* section 637, is as follows: "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either

party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so."

In construing the above statute, *Hoke, J.,* in *Williams v. Dunn,* 158 N. C., 399 (402-3), said: "This well-considered statute, which has done so much to facilitate the efficient administration of justice, has always received the liberal interpretation that would best promote its beneficent purpose (*Roseman v. Roseman,* 127 N. C., 494; *Faison v. Williams,* 121 N. C., 152; *Capps v. Capps,* 85 N. C., 408), and whether the present case comes strictly within its terms or not, it is well understood that the clerk is but a part of our Superior Court, and when a motion of this character is brought before the judge in term, all parties having been duly notified, there is no good reason why the principle expressly established by this law in all civil actions and special proceedings should not prevail here and the court have full jurisdiction." *Hall v. Artis,* 186 N. C., 105; *Spence v. Granger,* 207 N. C., 19 (22).

N. C. Code, *supra,* section 460, is as follows: "The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the right of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs. The court may make such an order."

Under this section the vice-president of the Fidelity Bank of Durham made affidavit before the clerk (after due notice to plaintiff) "that Leon W. Powell, Administrator of the Estate of Joanna Leathers, and who is not a party to this action, has made a demand against said defendant for the money sued for in this action without collusion with said defendant; that the amount of money which is the subject of this action, together with interest thereon to April 1, 1940, is $10,218.10. That this affidavit is made in support of the petition and application of the above

named defendant to substitute said Administrator as defendant in its place, and to discharge it from liability to the plaintiff and said Administrator upon paying into Court the money which is the subject of this action." The clerk granted the petition of the bank over the objection and exception of plaintiff, who appealed to the Superior Court. See sections 633, 634, 635, 636, and 637.

In *In re Estate of Wright,* 200 N. C., 620 (629), we find: "As we are of the opinion that Judge Grady acquired jurisdiction of the entire matter, by virtue of the appeal from the orders of the clerk, and therefore had power, in his discretion, to retain the consolidated causes and to appoint a receiver of the estate of R. H. Wright, deceased, the judgment is affirmed."

The last question involved, as stated by defendant: "3. Did the Court err to the prejudice of Powell, Administrator, in retaining the Fidelity Bank as a party defendant, under the facts disclosed in this record?" We think not.

By reference to the order and decree heretofore set forth by the court below, we think the court below fully protected the rights of the appealing defendant. The Fidelity Bank of Durham seems to be satisfied with the order and decree, and does not appeal. We see nothing prejudicial in the judgment. It is just, as it protects all the litigants. The order and decree of the court below is

Affirmed.

BARNHILL, J., dissenting: This appeal involves only a question of proper pleading. That being true, I would merely note my dissent except for the fact that through her complaint, as presently drafted, the plaintiff will be permitted to present to the jury her sworn statement concerning many matters about which she should not be permitted to testify. Thus, the defendant's cause, in all probability, will be substantially prejudiced. This the defendant seeks to prevent.

The motion to strike is made in apt time as a matter of right. *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794; *Bank v. Atmore,* 200 N. C., 437, 157 S. E., 129; *Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364; *Herndon v. Massey,* 217 N. C., 610, 8 S. E. (2d), 914. It should be decided on its merits. *Skinner v. Carter,* 108 N. C., 106.

The oft repeated pertinent provision of C. S., 506, is: "The complaint must contain—(2) a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered."

This means that the material, essential or ultimate facts upon which the right of action is based should be stated, and not collateral or evidential facts, which are only to be used to establish the ultimate facts.

The plaintiff should allege all of the material facts—the ultimate facts which constitute the cause of action—but not the evidence to prove them. McIntosh P. & P., 389, sec. 379; *Winders v. Hill,* 141 N. C., 694; *Sams v. Price,* 119 N. C., 572; *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738; *Hosiery Mill v. Hosiery Mills, supra.* Only the facts to which the pertinent legal or equitable principles of law are to be applied are to be stated in the complaint. McIntosh P. & P., 388, sec. 379; *Moore v. Hobbs,* 79 N. C., 535; *Webb v. Hicks,* 116 N. C., 598; *Lassiter v. Roper,* 114 N. C., 17; *Crump v. Mims,* 64 N. C., 767.

The function of a complaint is not the narration of the evidence, but a statement of the substantive and constituent facts upon which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required and they are always such as are directly put in issue. *Winders v. Hill, supra.*

"This is not mere matter of form. It is the essential substance of the litigation." *McLaurin v. Cronly,* 90 N. C., 50. The test is not whether evidence in support of an allegation would be competent upon the trial. It is whether the allegation is of a probative or of an ultimate fact, *Revis v. Asheville, supra;* and the ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts. 4 Enc. Pl. & Pr., 612; *Winders v. Hill, supra.*

When a complaint is drawn in accord with the statute and states a cause of action, evidence of the facts alleged is admissible. It does not follow that it is proper to allege any and every fact, evidence of which will be competent at the hearing. The requirement of the statute is based on reason. Its purpose is at least threefold: (1) To clarify the issue or issues of fact to be determined by the jury and to limit and chart the course of the trial; (2) to prevent the presentation of evidential and immaterial facts to the jury through the medium of the complaint; and (3) to altogether exclude from the jury any irrelevant or hearsay matter about which evidence may not be offered and by which the jury might be influenced in its verdict.

Measured by these principles of law, it appears to me that the complaint is not drawn in accord with the statute but contains many immaterial and irrelevant allegations, some of which are nothing more than hearsay, which should be stricken from the complaint.

The only fact "directly put in issue" in this case is the alleged *donatio causa mortis.* And yet, the complaint constitutes a thumbnail sketch of plaintiff's birth, informal adoption, life, family relations, business transactions and the like. It constitutes a synopsis of the life history of the plaintiff and a somewhat detailed summary of the evidence plaintiff apparently will rely upon to prove her cause of action. It includes

not only what would constitute substantive evidence but that which would be admissible for corroboration only. It likewise includes much that would be inadmissible by reason either of C. S., 1795, or of its irrelevancy.

That deceased was the foster parent of plaintiff and that plaintiff lived in the home as a member thereof, waited upon deceased and her husband as a dutiful child would, and that the affectionate regard and consideration one would expect between parent and child existed between deceased and plaintiff are evidential facts which may be offered in evidence as tending to show the reasonableness and probability of such evidence as may be offered to establish the alleged gift, which is the ultimate fact constituting plaintiff's cause of action. They are not facts which are properly pleadable.

There are many other allegations which have no place in the complaint, such as these: "That the plaintiff never knew her own mother, has never seen her since the time the plaintiff was two years old, and never knew what she looked like"; that plaintiff and her husband moved to and lived in New Jersey and New York for a period of time; that plaintiff got a letter from Frank Leathers, her foster father—giving the contents thereof; that plaintiff's foster father, on several occasions, made statements in plaintiff's presence "that after his death everything he had would belong to his wife, Joanna, and to the plaintiff Mattie Bynum, and at different times and different places, clearly indicated such to be his intention"; that deceased constituted plaintiff an agent to draw checks on her bank account, giving the details of the transaction; that deceased got together her shroud clothes and gave plaintiff directions as to where she wished to be buried; that deceased realized that she was suffering from an incurable disease, including in this allegation conversations of the deceased with her doctor, with the plaintiff and between plaintiff and the doctor; as to statements made by the deceased to the plaintiff after the alleged gift had been consummated; and other like matter.

I am of the opinion that all of these numerous allegations which have no place in the complaint should be culled out and stricken in accord with the defendant's motion.

In respect to this my views are succinctly and forcefully expressed by *Shepherd, C. J.*, in *Lassiter v. Roper, supra,* as follows: "In *Bayard v. Malcolm,* 1 Johnson, 453, *Chief Justice Kent* remarked: 'I entertain a decided opinion that the established principles of pleading, which compose what is called its science, are rational, concise, luminous and admirably adapted to the investigation of truth, and ought consequently to be very carefully touched by the hand of innovation.' It was but in keeping with the spirit of these views that our present system of civil

procedure was framed and enacted, and we find this Court very shortly after its adoption repudiating the idea that loose and uncertain pleading would be tolerated.

"In *Crump v. Mims,* 64 N. C., 767, the Court said: 'We take occasion here to suggest to pleaders that the rules of common law as to the pleading, which are only the rules of logic, have not been abolished by The Code.' In *Parsley v. Nicholson,* 65 N. C., 210, it was said: 'The rules of pleading at common law have not been abrogated. The essential principles still remain, and have only been modified as to technicalities and matters of form' . . . 'It was a false notion . . . that the Code of Civil Procedure is without order or certainty, and that any pleading, however loose and irregular, may be upheld; on the contrary, while it is not perfect, it has both logical order, precision and certainty, when it is properly observed. Bad practice, too often tolerated and encouraged by the courts, brings about confusion and unjust complaints against it.'"

The complaint was filed prior to the time the administrator was made a party defendant. This may entail a redrafting of the complaint. It would not be amiss for the court below to require that this be done in conformity with the statute.

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

FANNIE V. WHITLEY ET AL. V. L. ARENSON ET AL.

(Filed 31 January, 1941.)

1. Deeds §§ 13a, 13b: Wills §§ 33b, 34—C. S., 1739, providing that "heirs" of living person be construed "children" applies only when no preceding estate is devised or conveyed to such living person.

C. S., 1739, providing that a limitation to the heirs of a living person shall be construed to be to the children of such person, applies only to a devise or conveyance to the heirs of a living person when no preceding estate is devised or conveyed to such living person, the purpose of the statute being to validate devises or conveyances to the "heirs" of a living person, which under the common law would be void for want of a grantee, but the statute does not apply to a devise or conveyance to a living person and his "heirs" or "bodily heirs" or "heirs of his body" or to a living person for life, remainder to his heirs. The statute does not convert "heirs" from a word of inheritance to one of purchase, or affect the rule in *Shelley's case.*

2. Deeds § 13a: Wills § 34—

Since an "heir" is a person on whom the law casts an estate upon the death of the ancestor, a living person, strictly speaking, can have no heir.

3. Deeds §§ 13a, 13b—

The effect of C. S., 991, is to obviate the common law requirement that the word "heir" be used to convey an estate of inheritance, and to vest the fee in the first taker unless it is made to appear from the language of the deed that an estate of less dignity is intended to be conveyed, and the statute does not convert the word "heir" from a word of limitation to one of purchase, or convert a common law estate of inheritance into one for life.

4. Deeds §§ 13a, 13b: Wills §§ 33b, 34—

A devise or conveyance to "A and his heirs" and one to "A for life, remainder to his heirs" have the identical effect of vesting the fee in the first taker, the former by the use of words of inheritance and the latter by operation of the rule in *Shelley's case*.

5. Same—

The word "heir" is primarily a word of limitation and not of purchase, and will be given its technical meaning unless it is made to appear from the language of the instrument that it was used in some other permissible sense.

6. Deeds § 13a—

A deed to a married woman and her heirs by her present husband, with granting clause, *habendum* and warranty to "parties of the second part, their heirs and assigns," *is held* to convey to the married woman a fee tail special, which is converted into a fee simple absolute by C. S., 1734.

7. Appeal and Error § 49b—

The doctrine of *stare decisis* has as its purpose the stability of the law and the security of titles, and it is necessary that the established rules be uniformly observed so that those who are called upon to advise may safely give opinions on titles to real property.

8. Deeds § 11: Wills § 33a—

While a will or deed will be construed from its four corners to ascertain and give effect to the intent of the testator or grantor, this intent must be ascertained from the language used in the instrument, and he will be deemed to have used technical words and phrases in their legal and technical sense unless he indicates in some appropriate way that a different meaning be ascribed to them, and when he uses technical words and phrases invoking some settled rule of law, like the rule in *Shelley's case*, the rule of law will prevail.

CLARKSON, J., dissenting.

SEAWELL, J., concurs in dissent.

APPEAL by plaintiffs from *Clement, J.*, at May Term, 1940, of STANLY.

Civil action to restrain sale of land under execution.

A temporary restraining order was issued and continued to the final hearing, when the facts were agreed upon and the cause submitted to the court for determination thereon. In summary, they follow:

1. On 1 March, 1920, J. I. Efird and wife conveyed a tract of land in Stanly County, consisting of 8¾ acres, to "M. E. J. Kelly and her heirs by T. D. Kelly."

A printed form was used in the preparation of this deed. The blank spaces were filled out by the county surveyor. In the premises the grantee is designated "*M. E. J. Kelly and her heirs by T. D. Kelly* . . . of the second part." In the granting clause, in the *habendum* and in the warranty the appellation of the grantee is, "par*ties* of the second part, *their* heirs and assigns." (Italics within the quotations used to show insertions with pen and ink.)

2. On 28 April, 1930, in the Superior Court of Mecklenburg County, L. Arenson obtained a judgment against T. D. Kelly and his wife, M. E. J. Kelly, for $1,000, and duly docketed transcript thereof in Stanly County. Execution was issued on this judgment, and the present action is to restrain sale thereunder.

3. Plaintiffs are the children of M. E. J. Kelly by her husband, T. D. Kelly, and were living at the time of the delivery of the deed in 1920, except Lola F. Kelly, one of the plaintiffs, who was born on 1 March, 1922.

The court being of opinion that the deed in question "conveyed to M. E. J. Kelly a fee tail special which by our statute is converted into a fee simple," held that the plaintiffs have no interest in the property, dissolved the injunction and dismissed the action. From this ruling the plaintiffs appeal, assigning errors.

W. L. Mann and Carswell & Ervin for plaintiffs, appellants.
Morton & Williams for defendants, appellees.

STACY, C. J. The case turns on the proper construction of the Efird deed of 1 March, 1920. This deed conveys an estate to "M. E. J. Kelly and her heirs by T. D. Kelly." At common law such an estate was a fee tail special, which is converted by C. S., 1734, into a fee simple absolute. *Revis v. Murphy,* 172 N. C., 579, 90 S. E., 573.

According to our previous decisions, C. S., 1739, providing 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," applies only when there is "no precedent estate conveyed to said living person." *Marsh v. Griffin,* 136 N. C., 333, 48 S. E., 735; *Jones v. Ragsdale,* 141 N. C., 200, 53 S. E., 842. Nor is this section applicable "where there is a *conveyance* to a living person, with a limitation to his heirs." *Thompson v. Batts,* 168 N. C., 333, 84 S. E., 347. In other words, when the limitation is to a living person and his bodily heirs, general or special, C. S., 1734, applies and C. S., 1739, does not. *A fortiori,* the latter section would not apply when the limitation is to a living person and his heirs.

The word "heirs" is primarily a word of limitation and not a word of purchase. 8 R. C. L., 1056. In *Neal v. Nelson,* 117 N. C., 393, 23

S. E., 428, it was said that "a deed to a person not then living 'and his heirs' is void because the word 'heirs' is a word of limitation and not of purchase." *Ready v. Kearsley,* 14 Mich., 225. By the same token, then, a deed to "A and his heirs," A being alive, is good and vests in A a fee-simple estate. The word "heirs," in such a case is not a word of purchase carrying title to the heirs, but a word of inheritance qualifying the estate of the grantee. *Hunter v. Watson,* 12 Cal., 363, 73 Am. Dec., 543. And the authorities so hold. *Real Estate Co. v. Bland,* 152 N. C., 225, 67 S. E., 483; *Boggan v. Somers, ib.,* 390, 67 S. E., 965; *Walker v. Miller,* 139 N. C., 448, 52 S. E., 125.

At common law, in order to convey an estate of inheritance it was necessary that the word "heirs" appear in connection with the name of the grantee, either in the premises or in the *habendum* of the deed. 2 Blk., 298; *Real Estate Co. v. Bland, supra.* "It is familiar elementary learning," says *Ashe, J.,* in *Stell v. Barham,* 87 N. C., 62, "that the word *heirs* is necessary to be used either in the premises or *habendum* of a deed to convey an estate of inheritance." True, he was then speaking to a deed executed in 1854 and of the law as it existed prior to the enactment of ch. 148, Laws 1879, now C. S., 991, providing that a deed with or without the word "heirs" should be construed a conveyance in fee simple, "unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." But this statute did not purport to change, and does not change, a common-law conveyance of inheritance to a conveyance of less effectiveness, *i.e.,* to one conveying only a life estate. *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228. Quite the reverse was intended and accomplished by the statute. No Act of Assembly has been found which purports to convert words of inheritance into words of purchase.

Speaking to the question in *Smith v. Proctor,* 139 N. C., 314, 51 S. E., 889, *Hoke, J.,* delivering the opinion of the Court, said: "In cases, therefore, where the word 'heirs' or 'heirs of the body' are used, they will be construed to limit or define the estate intended to be conveyed, and will not be treated as words of purchase, and no supposed intention on the part of the testator or grantor arising from the estate being conveyed, in the first instance, for life, will be permitted to control their operation as words of limitation. In all such cases the estate becomes immediately executed in the ancestor, who becomes seized of an estate of inheritance."

An *heir,* according to Blackstone, is one upon whom the *law* casts an estate at the death of the ancestor. 2 Blk., ch. 14. "Heir" and "ancestor" are correlative terms. There can be no heir without an ancestor. Hence, there can be no heirs of the living, *nemo est haeres viventis.* One may be heir apparent or heir presumptive, yet he is not *heir,* during the

life of the ancestor. *Campbell v. Everhart,* 139 N. C., 503, 52 S. E., 201. Consequently, under the strictness of the old law, a limitation to the heirs of a living person was void for want of a grantee. The purpose of C. S., 1739, is to validate such limitations, whether created by deed, will or other writing, by construing "heirs" to mean "children," when there are any, unless a contrary intent appears, and this is its only purpose.

In ultimate effect, there is no difference between a conveyance to "A and his heirs" and a limitation to "A for life, remainder to his heirs." They both import fee-simple estates, the former by use of words of inheritance and the latter by operation of the rule in *Shelley's case. Starnes v. Hill,* 112 N. C., 1, 16 S. E., 1011; 2 Wash. Real Prop., 647; Williams Real Prop., 254.

In *Perrett v. Bird,* 152 N. C., 220, 67 S. E., 507, it was held that a devise to "David Oates, and the lawful heirs of his body lawfully begotten," carried the fee to David Oates.

The deed in *Harrington v. Grimes,* 163 N. C., 76, 79 S. E., 301, is identical in principle with the one here presented for construction. There, in the premises, in the granting clause, in the *habendum* and in the warranty the grantee is designated as "N. J. Buckner and her bodily heirs." The decision in that case is a direct authority for the holding here. The only difference between the deeds considered in the two cases is, that the one creates a fee tail, while the other creates a fee tail special, both of which are now converted into fee-simple estates. *Revis v. Murphy, supra.* For all practical purposes, the two cases are exactly alike. They are the same in principle. It is not perceived how we can reverse the judgment below without overruling the *Harrington-Grimes* decision, opinion by *Hoke, J.* Also, of similar import are the decisions in *Blake v. Shields,* 172 N. C., 628, 90 S. E., 764; *Paul v. Paul,* 199 N. C., 522, 154 S. E., 825; and *Sessoms v. Sessoms,* 144 N. C., 121, 56 S. E., 687.

"So, it has been held that a deed conveying land to a married woman and her heirs 'by her present husband' vests an estate in fee"—*Adams, J.,* in *Morehead v. Montague,* 200 N. C., 497, 157 S. E., 793.

The reasoning in the case of *Willis v. Trust Co.,* 183 N. C., 267, 111 S. E., 166, is likewise in full support of the judgment below. There, it was said that a deed "to Mary Regan and her bodily heirs" conveyed a fee-simple estate under C. S., 1734, which was later affected in the warranty by a limitation over in case she should die without issue or bodily heirs living at the time of her death. Here, we have no such limitation over in any part of the deed. There was no suggestion in that case, however, that the word "heirs" should be construed to mean "children."

It was said in *Marsh v. Griffin, supra,* that C. S., 1739, "providing

that a limitation 'to the heirs of a living person shall be construed to be the children of such person,' applies only when there is no precedent estate conveying to said living person, else it would not only repeal the rule in *Shelley's case,* but would pervert every conveyance to 'A and his heirs' into something entirely different from what those words have always been understood to mean." And further, "the words 'bodily heirs' have the same meaning as 'heirs of the body,' and are words of limitation and not words of purchase." To like effect are the decisions in *Worrell v. Vinson,* 50 N. C., 91; *Donnell v. Mateer,* 40 N. C., 7; *Ham v. Ham,* 21 N. C., 598; *Floyd v. Thompson,* 20 N. C., 616.

In *May v. Lewis,* 132 N. C., 115, 43 S. E., 550, *Connor, J.,* delivering the opinion of the Court, observed that according to the pertinent authorities, "the word 'heirs' is to be understood in that sense which is given it by the law," and that technical terms are to be ascribed their legal meaning, unless it clearly appears from the instrument itself that they were used in some other permissible sense. *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5; *Williams v. McPherson,* 216 N. C., 565, 5 S. E. (2d), 830.

In short, the applicable decisions are all one way, with none to the contrary. The deed in question was good at common law; it is good now. It conveyed a fee tail special then. It conveys a fee simple now. To hold otherwise would be to depart from the beaten path and to inject an element of uncertainty into the settled law as it pertains to the subject of real property. It was never the intention of the General Assembly, in any case, (1) to convert sole seizin into tenancy in common, (2) to change a fee simple into a life estate, (3) to abrogate the rule in *Shelley's case.* A limitation "to the heirs of a living person," with which the statute alone purports to deal, is not the same as a limitation to a living person and his heirs.

The doctrine of *stare decisis* has as its purpose the stability of the law and the security of titles. The use of words is subject to such a variety of combinations that often the interpretation or construction of deeds, and especially of wills, is fraught with puzzling effect upon those who are required to determine their meaning. It is therefore necessary to establish rules, and equally important that they be uniformly observed, so that those who are called upon to advise may safely give opinions on titles to real property. *Campbell v. Everhart, supra.*

Moreover, it is not to be overlooked that while the significance of a deed, like that of a will, is to be gathered from its four corners, *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79, the four corners are to be ascertained from the language used in the instrument. *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. In other words, to paraphrase a certain parody,

"the recipe for gathering the purport of an instrument from its four corners, begins by saying 'first look at the corners.'" *Leathers v. Gray,* 101 N. C., 162, 7 S. E., 657. This, the trial court properly did in the instant case.

When a grantor or testator uses technical words or phrases to express his intent in conveying or disposing of property, he will be deemed to have used such words or phrases in their well-known legal or technical sense, unless he shall, in some appropriate way, indicate a different meaning to be ascribed to them. *Lytle v. Hulen,* 128 Or., 483, 275 P., 45, 114 A. L. R., 587, and annotation. See special concurrence in *Shoemaker v. Coats,* 218 N. C., 251, at p. 257. So, also, if the use of such words or phrases bring his intention within a settled rule of law, like the rule in *Shelley's case,* the latter will prevail; otherwise, technical words would have no certain meaning, and the rule of law would itself become uncertain. *Leathers v. Gray, supra.*

There is nothing here to show any intention on the part of the grantor to employ the words, "and her heirs by T. D. Kelly," other than in their ordinary sense. So understood, they convey to the grantee, M. E. J. Kelly, a fee simple estate.

The judgment below is supported by the decisions on the subject, and accordingly it will be upheld.

Affirmed.

CLARKSON, J., dissenting: The only material exception and assignment of error to be considered: Did the court below err in signing the judgment set out in the record? I think so.

N. C. Code, 1939 (Michie), sec. 1739, is as follows: "'Heirs' construed 'children' in certain limitations.—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."

It seems that the main object of the section is to convert a contingent into a vested remainder under certain circumstances. It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless there was something in the deed which indicated "that by 'the heirs' was meant the children of the person named." 3 Washburn Real Prop., 882. The act in question provides that in such a case the word "heirs" shall be construed to mean "children" and the limitation therefore would be good. By this construction of the section it does not affect the rule in *Shelley's case. Starnes v. Hill,* 112 N. C., 1 (2 and 23); *Hartman v. Flynn,* 189 N. C., 452.

A deed to "the heirs" of John A. Barrett, he being still alive, although void at common law, is good under the section, and is construed to be a limitation to the children of John A. Barrett, and includes afterborn children. *Graves v. Barrett,* 126 N. C., 267.

Section 1739, *supra,* providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person. *Jones v. Ragsdale,* 141 N. C., 200.

In *Tate v. Amos,* 197 N. C., 159, at p. 161, we find: "This Court has uniformly held that a devise to 'A,' and her children, 'A' having children, vests the estate to them as tenants in common. *Hunt v. Satterwhite,* 85 N. C., 73; *Silliman v. Whitaker,* 119 N. C., 89; *Lewis v. Stancil,* 154 N. C., 326; *Cullens v. Cullens,* 161 N. C., 344; *Snowden v. Snowden,* 187 N. C., 539; *Cunningham v. Worthington,* 196 N. C., 778."

In *Mayberry v. Grimsley,* 208 N. C., 64 (65), citing authorities, it is written: "Plaintiff's action is grounded on the principle, settled by numerous decisions, that a conveyance or devise to 'Nonnie and her children' vests in Nonnie and her children then living, including any *in ventre sa mere,* as tenants in common, the present estate conveyed or devised."

In *Edmondson v. Leigh,* 189 N. C., 196 (201), citing authorities, it is said: "It is settled law in this State that the intent of the testator, as expressed by the terms and language of the entire will, must be given effect unless in violation of law. 'Every tub stands upon its own bottom,' except as to the meaning of words and phrases of a settled legal purport. A will must be construed 'taking it by its four corners.'" *Williamson v. Cox,* 218 N. C., 177 (179); *Smith v. Mears,* 218 N. C., 193 (197); *Shoemaker v. Coats,* 218 N. C., 251.

In *Boyd v. Campbell,* 192 N. C., 398, at p. 401, we find: "Whatever the former doctrine may have been, the courts do not now regard with favor the application of such technical rules as will defeat the obvious intention of the parties to a deed, it being an elementary rule of construction that their intention as expressed in the deed shall prevail unless it is repugnant to the terms of the grant or is in conflict with some canon of construction or some settled rule of law. *Seawell v. Hall,* 185 N. C., 80; *Lumber Co. v. Herrington,* 183 N. C., 85; *Pugh v. Allen,* 179 N. C., 307; *Williams v. Williams,* 175 N. C., 160; *Springs v. Hopkins,* 171 N. C., 486."

In *Buckner v. Maynard,* 198 N. C., 802, it was held: "While ordinarily and standing alone an estate conveyed by deed to 'R and children, her bodily heirs and assigns,' would carry a fee-simple estate to R, it will not so operate when taking the deed in its entirety, the intent of the

grantor is ascertained to convey the lands to R and her children as tenants in common, and such intent is in conformity with like expressions used in the other material and relevant portions of the deed."

The language in the present deed (taking it by its four corners), is as follows: (1) "This Indenture, Made this the 1st day of March in the year of our Lord one thousand nine hundred and twenty between J. I. Efird and wife A. E. Efird of the County of Stanly, and State of North Carolina, of the first part, and *M. E. J. Kelly and her heirs by T. D. Kelly,* of the County of Stanly, and State of North Carolina, of the second part." . . . (2) "Have bargained, sold and conveyed, and by these presents do bargain, sell and convey *unto the said parties of the second part, their heirs and assigns,* the following described real estate, situate, lying and being in Endy Township, in the County of Stanly, and State of North Carolina, bounded as follows, to-wit: (describing same)." . . . (3) "TO HAVE AND TO HOLD, all and singular the above granted premises, with the appurtenances, *unto the said parties of the second part, their heirs and assigns forever.*" . . . (4) And the said J. I. Efird and A. E. Efird, parties of the first part, for themselves their heirs, executors and administrators, *do hereby covenant with the said parties of the second part, their heirs and assigns,*" etc.

In the deed in controversy the grantees are set out in the *premises as M. E. J. Kelly and her heirs by T. D. Kelly.* In the granting clause, *habendum* clause, the covenant, and the warranty, the grantees are referred to as the *parties of the second part,* their heirs and assigns, and not as M. E. J. Kelly, her heirs and assigns. There is no estate precedent and the word "heirs" in the premises means "children."

Construing the deed and "taking it by its four corners," the irresistible conclusion is that M. E. J. Kelly and plaintiffs, her children, took an estate in the lands described in the deed as tenants in common.

The main opinion and the defendants in their brief cite several cases to support their contention, but which I think distinguishable from the present case.

The facts in *Jones v. Ragsdale,* 141 N. C., 200: On 19 December, 1882, Alexander W. Robbins conveyed to "Zilphia S. Jones and her heirs by her present husband, Levy Jones, the land in controversy . . . To have and to hold the said land and appurtenances thereunto belonging, to the said Zilphia Jones and her heirs by her present husband, and assigns to her only use and behoof." The *habendum* clause was consistent with the granting clause. The statute, N. C. Code, 1939 (Michie), sec. 1734—Fee-tail Special was converted into fee simple became applicable. This case states further: "As stated in *Marsh v. Griffin,* 136 N. C., 334, 'The Code, section 1329 (now Revisal, sec. 1583) (Sec. 1739, *supra*), providing that a limitation to the heirs of a living person shall

be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person.'"

In *Revis v. Murphy,* 172 N. C., 579 (580), the deed contained the following: "Do give, grant, bargain, sell, convey, and confirm unto the party of the second part, her heirs by the body of F. H. Revis, and assigns forever. . . . *'To have and to hold the above described land and premises,* with all the appurtenances thereunto belonging or in any wise appertaining *unto the said party of the second part, her heirs and assigns,* to the only use and behoof *of her and her said heirs and assigns forever. And the said parties of the first part do hereby covenant to and with the said party of the second part, her heirs and assigns,* that the said parties of the first part are lawfully seized in fee simple of said land and premises, and have the full right and power *to convey the same to the said party of the second part in fee simple,* and that said land and premises are free from any and all encumbrances, and that they will, and their heirs, executors, and administrators shall, forever warrant and defend the title to the said land and premises, with the appurtenances, *unto the said party of the second part, her heirs and assigns,* against the lawful claims *of all persons whomsoever."* (Italics ours.) At p. 581: "Counsel for defendant relied on *Kea v. Robeson,* 40 N. C., 373; *Rowland v. Rowland,* 93 N. C., 214; *Gudger v. White,* 141 N. C., 507; *Triplett v. Williams,* 149 N. C., 394; *Beacom v. Amos,* 161 N. C., 357; and other cases to the same effect, which decided that the intention of the grantor must be sought for in the language of the entire deed and the latter construed in accordance therewith; but that is what we do when we hold this estate to be a fee simple, as the grantor has used language which conveys that kind of estate and no other. If we are to ascertain his intention by his words, that is the clear result, and if the law did not require us to give that construction to the deed, by reason of the particular words of limitation used, 'her heirs by the body of F. H. Revis,' and the statute defining what the same shall mean, we would, by a survey of the whole deed, construing one part with another, reach the same conclusion."

In *Blake v. Shields,* 172 N. C., 628, it was held: "An estate granted to 'B,' 'and to the heirs of her own body,' etc., 'it being expressly understood that the hereinafter described premises are to descend at her demise to the heirs of her body,' etc., with *tenendum* 'to have and to hold the above particularly described premises to the said party of the second part and to her heirs forever,' conveys an estate in fee tail to B. which our statute converts into a fee simple absolute. Revisal, sec. 1578 (now sec. 1734, *supra*)."

In *Paul v. Paul,* 199 N. C., 522, the facts were: "It appears from the facts found by the trial court that on 1 June, 1905, John F. Paul

executed and delivered to Mattie Paul a deed in which for a consideration of $3,000 he conveyed 'to said Mattie Paul and the heirs of her body by Smith Paul begotten, or upon failure thereafter her death to the nearest heirs of Smith Paul, a certain tract or parcel of land in Pamlico County,' containing fifty acres. The *habendum* is 'to the said Mattie Paul, *aforesaid heirs and assigns,* and the covenants were made with *'said Mattie Paul, aforesaid heirs and assigns.'* . . . (p. 523). When John F. Paul made the deed to Mattie Paul, she had two living children by her husband, Smith Paul, and within ten lunar months thereafter another child, the defendant, Gladys P. Paul, was born to them. Mattie Paul and Smith Paul, her husband, are living." The Court said (p. 523): "The judge presiding at the trial was of opinion that John F. Paul's deed conveyed the land in controversy to Mattie Paul and the children living and *in esse* as tenants in common. This would have been correct if the deed had been made to Mattie Paul and her children. *Tate v. Amos,* 197 N. C., 161. But it was executed 'to Mattie Paul and the heirs of her body by Smith Paul begotten.' The estate thus created was under the old law a fee tail special (2 Bl., 113), which our statute enlarges into a fee simple. C. S., 1734. The law is clearly stated in *Revis v. Murphy,* 172 N. C., 579, and *Jones v. Ragsdale,* 141 N. C., 200. In the last case the conveyance was 'to Zilphia S. Jones and her heirs by her present husband'; and at the time the deed was executed they had one living child. It was held that Zilphia and her child were not tenants in common, the statute (C. S., 1739), providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person. *Marsh v. Griffin,* 136 N. C., 334. . . . (p. 523) This inartificial language reminds us that, as said by *Lord Chief Justice Wills,* such a construction should be made of the words of a deed *as is most agreeable to the intention of the maker,* because 'words are not the principal thing in a deed, *but the intent and design of the grantor.' Cobb v. Hines,* 44 N. C., 343, 349. The intent must be such as is expressed in the deed and not such as may have existed in the grantor's mind if inconsistent with the language he used. *McIver v. McKinney,* 184 N. C., 393; *West v. Murphy,* 197 N. C., 488. *Technical rules of construction* serve only as aids to this end, because the meaning of the deed largely depends upon the circumstances of the grantor as they appear in the deed itself." (Italics mine.)

It will be seen that the *habendum* is "to the said Mattie Paul aforesaid heirs and assigns" and the covenants were made with "said Mattie Paul, aforesaid heirs and assigns." Construing the deed as a whole, the Court said, at p. 534: "By this construction Mattie Paul took an estate in fee simple, defeasible upon her dying without bodily heirs by Smith Paul, living at her death."

This dissent is based on the intention of the maker, construing the will in its entirety.

The cases cited in the main opinion are not applicable.

In *Harrington v. Grimes,* 163 N. C., 76—the deed was to "N. J. Buckner and her bodily heirs," and in the *habendum* "said N. J. Buckner and her bodily heirs and assigns." *Hoke, J.,* said, at pp. 77-78: "Under the old law, the deed in question would have conveyed to N. J. Buckner an estate in fee tail, converted by our statute into a fee simple (Revisal, sec. 1578), and his Honor correctly ruled that plaintiff could make a good title (citing authorities). . . . In those cases it was held that, on a perusal of the entire instrument and by reason of the language in which same was expressed, a deed in the one case and a will in the other, it plainly appeared to be the intent of the grantor to convey only a life estate to the first taker, and that the words 'bodily heirs' and 'heirs of the body' did not refer to those persons as inheritors of such taker, but were used as a *descriptio personarum,* carrying to them an estate in remainder and as purchasers from the grantor. But no such intent can be gathered from this instrument, nor does it contain any words or expressions to qualify or affect the ordinary meaning of the words 'bodily heirs' in connection with the estate limited to N. J. Buckner, and the deed, as stated, has been properly held to convey to such grantee an estate in fee simple."

In *Sessoms v. Sessoms,* 144 N. C., 121, the language in the will was (p. 122): "I lend to my grandson, Joseph W. Sessoms, the Wyman tract of land, whereon his father, H. B. Sessoms, lived and died, the number of acres not known, to him and his lawful heirs of his body forever; and if he should die without lawful heirs of his body, I then lend it to his sister my granddaughter, Martha Sessoms, and her lawful heirs of her body forever." *Hoke, J.,* at p. 123, said: "The clause in question conferred on Joseph W. Sessoms an estate-tail, converted by our statute into a fee-simple, Revisal, Sec. 1578; and the court below was correct, therefore, in holding that Joseph W. Sessoms acquired an absolute estate under the terms of his grandfather's will."

In *Harrington v. Grimes,* 163 N. C., 76, it was decided that an estate to B. and his bodily heirs under the old law would have conferred a fee tail, which, under our statute, where a contrary intent may not be gathered from the instrument, construed as a whole, is converted into a fee simple.

In *Willis v. Trust Co.,* 183 N. C., 267, the deed was "To his daughter Mary Regan and her bodily heirs." The other clauses and the *habendum* clause is to "Mary Regan and her bodily heirs and to their only use and behoof forever." The Court said (at p. 271): "Applying these principles, we conclude that the deed should be construed as if it read 'to

Mary Regan and the heirs of her body (a fee simple, C. S., 1734), and if she should die not having such heirs or issue living at the time of her death, then to the heirs of the grantor.' C. S., 1737."

In *Morehead v. Montague,* 200 N. C., 497: "A conveyance of land 'to Della Todd during her lifetime and at her death to the heirs of her body' without additional words, would transfer the fee." . . . *Adams, J.,* said (at p. 499): "Under the former law the estate would have been a fee tail special, but our statute provides that every person seized of an estate tail shall be deemed to be seized thereof in fee simple. C. S., 1734."

All these decisions are premised on language which converted the fee tail under C. S., 1734, into a fee simple. In the present action the intention, as shown by the whole deed, is to the contrary. Any other construction would nullify clear English language.

The true rule is stated by *Devin, J.,* in *Williamson v. Cox,* 218 N. C., 177 (179): "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., 530: '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 are used in some other sense.' 4 Kent's Com., 231." *Shoemaker v. Coats, supra.*

A devise to the "heirs" of a person will be construed to be his "children" in the absence of a contrary intention expressed in the instrument. *Moseley v. Knott,* 212 N. C., 651.

"In wills, in order to effectuate the intention of the testator, the word 'heirs' is sometimes construed to mean the 'next of kin' (1 Jac. & W., 388) and *children* (Ambl., 273)." Cyc. Law Dict. Shumaker and Longdorf, p. 436.

"It may be a word of purchase, and is frequently deemed *synonymous with 'children,' Cultrice v. Mills,* 97 Ohio St., 112, 119 N. E., 200, 201." Black's Law Dict., p. 888, citing a wealth of authorities.

To give meaning to the language used in the entire deed, indicates that the words "her heirs" were used as synonymous with *children.* This construction would harmonize the whole deed and all its parts and give the language, their heirs and assigns, in other parts of the deed the usual, ordinary and accepted interpretation, that more than one taker was indicated in the deed.

The cases cited by defendants deal with instances where the clear language of the deed shows a fee tail, which by statute becomes a fee simple, or where the deed is taken as a whole to gather the intention that a fee was intended to be conveyed.

In the present case to construe the deed as contended for by defendants would abrogate the "four corners" rule to gather the intention of the entire deed and nullify four times the clear language in the deed "*their* heirs and assigns." Whose heirs and assigns? "M. E. J. Kelly and her heirs (meaning children) by T. D. Kelly."

All the decisions are to the effect that the "polar star" is to gather the intention from the entire instrument. The clear language of the deed should not be struck down by technical construction. The English language is known to those who make deeds and wills, but the technical decisions of a court are sometimes unknown. They become a "feather on the water" and are blown about by every passing breeze of judicial construction. Titles are made so uncertain that instead of the intention from the language used governing the deed or will and the construction from its "four corners," every case will have to come to this Court to discover what specialized meaning will be given the English language and what rights owners have in their property; instead of settling titles to property, overly technical constructions create chaos. We have in the present majority opinion no beaten path to guide us, but are going into the jungle of judicial construction.

SEAWELL, J., concurs in dissent.

MRS. REBECCA SOSNIK KOLMAN v. H. SILBERT AND MRS. HANNAH SILBERT SIFF.

(Filed 31 January, 1941.)

1. Automobiles § 9c—

The violation of provisions of the statute regulating speed constitutes *prima facie* evidence of negligence, and the violation of other statutes designed and intended to protect life, limb and property, constitutes negligence *per se*.

2. Automobiles § 18h—Court must declare and apply to evidence provisions of safety statutes relied on by plaintiff as basis of negligence.

Plaintiff's allegations, supported by evidence, were to the effect that the driver of the car in which plaintiff was riding was negligent in driving the car on a wet and slippery highway, with worn and slick tires, at an excessive speed under the circumstances, and in a manner so as to endan-

ger the life and limb of plaintiff, that the driver failed to keep the car under proper control and failed to keep a proper lookout and give proper attention to the driving of the automobile, and that as a result, the car skidded off the highway, causing the injuries in suit. *Held:* The failure of the court to charge and apply to the evidence the provisions of sec. 102, ch. 407, Public Laws 1937, that a motorist must at all times drive with due caution and circumspection and at a speed or in a manner that will not endanger, or be likely to endanger, any person or property, and the failure to charge the provisions of sec. 103, ch. 407, Public Laws 1937, that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing, constitutes reversible error.

3. Same: Automobiles § 12a—Motorist may not lawfully drive at speed which is not reasonable and prudent under circumstances notwithstanding that speed is less than limit set by statute.

Where there is evidence of special hazards, a charge that the speed law is 45 miles per hour upon the open highway and that a speed in excess thereof is *prima facie* evidence that the speed is unlawful, without qualification, is erroneous, since whether a speed of 45 miles per hour is lawful depends upon the circumstances existing at the time, it being required by statute, Public Laws of 1937, ch. 407, secs. 102, 103, that a motorist must at all times drive with due caution and circumspection and at a speed or in a manner that will not endanger, or be likely to endanger, any person or property, and that he may not lawfully drive at a speed greater than is reasonable or prudent under the conditions then existing, and the statutory speed limit of 45 miles per hour on a rural road being subject to the express provision that a speed less than the limit does not relieve the driver of the duty of decreasing speed when special hazards exist.

4. Automobiles § 18h—

The failure of the court to explain and apply the provisions of safety statutes relied on by plaintiff is not cured by a subsequent charge stating and explaining the common law rule of the prudent man.

CLARKSON, J., concurs in result.

APPEAL by plaintiff from *Pless, J.*, at October Term, 1940, of FORSYTH. New trial.

The defendant, H. Silbert, owns and maintains an automobile for family use. On 23 May, 1938, his wife and his daughter, the defendant, Mrs. Hannah Silbert Siff, used this automobile on a trip to attend a convention in Durham. The plaintiff became a guest passenger on the return trip to Winston-Salem. Mrs. Siff was driving and it was raining. The automobile suddenly began to skid, ran down an embankment and turned over. As a result plaintiff sustained certain personal injuries.

Thereafter, plaintiff instituted this action to recover compensation for the personal injuries received, alleging that the driver was operating the motor vehicle at the time "in a careless and reckless manner, without due caution and circumspection and at a speed and in a manner so as to endanger the life and limb of the plaintiff; in that she was driving

the said automobile at a high and unlawful rate of speed upon a wet and slippery highway, to wit, from 45 to 50 miles per hour; in that she was driving the said automobile without having the same under proper control, without keeping a proper lookout and without having her mind and attention properly upon the driving of the said automobile under the circumstances; in that she was attempting to raise or lower the side window in the said car without slowing down the said car and without keeping her eyes upon the highway and in so doing caused the said automobile to swerve in a careless and negligent manner, whereupon it began to slip and slide . . .; in that she was driving an automobile with the tires worn and slick."

Appropriate issues were submitted to the jury and it answered the issue of negligence in the negative. From judgment entered thereon plaintiff appealed.

Fred S. Hutchins and H. Bryce Parker for plaintiff, appellant.
Ratcliff, Hudson & Ferrell for defendants, appellees.

BARNHILL, J. In automobile cases where the alleged negligence rests in the violation of one or more of the provisions of the law governing the operation of motor vehicles enacted, designed and intended to protect life, limb and property, it is mandatory that the judge in his charge shall state, in a plain and correct manner, the evidence in the case and declare and apply the pertinent provisions of the Motor Traffic Law. *Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170; *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630.

"Where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is encumbent (incumbent) upon the judge to apply to the various aspects of the evidence such principles of law of negligence as may be prescribed by statute, as well as those which are established by the common law," *Bowen v. Schnibben, supra; Orvis v. Holt,* 173 N. C., 231, 91 S. E., 948; *Matthews v. Myatt,* 172 N. C., 230, 90 S. E., 150; *Nichols v. Fibre Co.,* 190 N. C., 1, 128 S. E., 471; *Williams v. Coach Co., supra; Comr. of Banks v. Mills,* 202 N. C., 509, 163 S. E., 598; *Spencer v. Brown, supra;* and the violation of the provisions of the statute regulating speed constitutes *prima facie* evidence of negligence and the violation of the other provisions thereof constitutes negligence *per se.*

The courts have been rather meticulous—and properly so—especially in the matter of negligence—in requiring that the law be explained in its connection with the facts in evidence. *Smith v. Bus Co.,* 216 N. C., 22, 3 S. E. (2d), 362.

In undertaking to comply with this requirement the court below charged the jury: (1) "Now, gentlemen, the speed law with reference to a place out on the highway at that time and place reads as follows:

" 'Provided, that if any person should operate a motor vehicle upon the highway at a speed in excess of 45 miles per hour that that speed is *prima facie* evidence that the speed was not justified and was a violation of the speed limits' "; and (2) "If the plaintiff shall have satisfied you by the greater weight of the evidence that the defendant, Mrs. Siff, was operating the car in such a manner as to be in violation of the speed law—and you will recall the rule the Court gave you as to the speed law, being at that time forty-five miles an hour, but that you are not, merely because you find she was operating it in excess of forty-five miles an hour, if you shall find she was doing so, hold her guilty of negligence; that is, you may or may not do so upon that finding—if you find she was operating the car in violation of the speed laws under that instruction and shall further find that was the proximate cause of the injury to the plaintiff, then you will answer this first issue YES." In so doing it made no reference to section 102, ch. 407, Public Laws 1937, which provides that "Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful 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." Nor did it direct the attention of the jury to the primary provision of section 103 of said act, to-wit:—

"No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." It contented itself by quoting and charging upon the proviso therein.

Sections 102 and 103 of ch. 407, Public Laws 1937, constitute the hub of the Motor Traffic Law around which all other provisions regulating the operation of automobiles revolve. A proper explanation and application thereof to the evidence in the case was essential and the omission of any reference thereto affected a substantial right of the plaintiff.

The charge as given was erroneous. Whether the speed law is 45 miles per hour depends upon the circumstances existing at the time. The motorist must at all times drive with due caution and circumspection and at a speed and in a manner so as not to endanger, or be likely to endanger, any person or property. At no time may he lawfully drive at a speed greater than is reasonable and prudent under the conditions then existing. While the statute provides that "where no special hazard exists," forty-five miles per hour on a rural road is lawful, it further provides that "the fact that the speed of a vehicle is lower than the fore-

going *prima facie* limits shall not relieve the driver from the duty to decrease speed . . . when special hazard exists by reason of weather or highway conditions and speed shall be decreased as may be necessary . . . in compliance with the duty of all persons to use due care."

That part of sec. 103, which fixes the rate of speed that is lawful when no special hazard exists, is secondary, facilitating proof, and must at all times be considered with proper regard to its relation to the primary and fundamental provisions of the section.

It is conceded that it was raining very hard at that time. Mrs. Siff, the driver, so testified. She testified further, "it had been raining. I know that in driving a car in the first rain before it washes the scum off the highway it is much slicker than after it has rained enough to wash that off . . . The rain started after we left Durham . . . When I spoke of the accident I said I don't know how it could have happened unless there was something wrong with one of the tires." In addition there was testimony that the left rear tire was worn to the fabric and was slick and that Mrs. Siff was somewhat irritated and nervous as a result of complaints from one of the passengers on the rear seat relative to the rain blowing in on her.

Under these conditions, giving proper consideration to all the provisions of sec. 103, it was error to state without qualification that 45 miles per hour was the speed law at that time and place. The admitted hazards due to the condition of the weather and of the road and the other circumstances required that the jury determine whether the speed at which the car was being driven was, under all the circumstances, reasonable and proper and, if not, whether such speed was the proximate cause of the injury.

The duty imposed by statute is positive. The subsequent charge in which the court stated and applied the common law rule of the prudent man is not sufficient to remedy the failure to properly explain and apply the statutory provisions. *Bowen v. Schnibben, supra.*

For the reasons stated there must be a

New trial.

CLARKSON, J., concurs in result.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1941

H. ARTHUR OSBORNE, A CITIZEN AND TAXPAYER OF THE TOWN OF CANTON IN HAYWOOD COUNTY ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE TOWN OF CANTON DESIRING TO BE MADE PARTIES TO THIS ACTION, v. THE TOWN OF CANTON AND J. PAUL MURRAY, MAYOR, C. L. WESTMORELAND, C. GUY HIPPS AND CARROLL McCRACKEN, ALDERMEN OF THE TOWN OF CANTON,

and

STATE OF NORTH CAROLINA, EX REL. WAY KINSLAND, TOWN OF CANTON, AND WAY KINSLAND, TAX COLLECTOR, v. J. D. MACKEY.

(Filed 26 February, 1941.)

1. Trial § 11—Separate causes in which neither parties nor purposes are identical, nor the plaintiffs united in interest, cannot be consolidated.

An action in the nature of *quo warranto* was instituted by the person elected to the office by the municipal aldermen against the person previously elected to the office by the aldermen, to try title to the office. Another action was instituted by a taxpayer against the town and its aldermen to restrain them from paying the emoluments of office to the person elected by them upon the contention that the person previously elected to the office by the aldermen and discharging the duties of the office, was entitled to the emoluments thereof up to the time he surrendered possession of the office. *Held:* Neither the parties nor the purposes of the two separate causes of action are the same and the respective plaintiffs therein are not united in interest, and therefore the causes cannot be joined in the same action under C. S., 457.

2. Appeal and Error § 20—

Where two separate actions which cannot be joined in the same action are tried together for convenience but not consolidated by the court into one action, separate appeals should be taken and separate records filed by the respective appellants, and Rule of Practice in the Supreme Court, No. 19 (2), providing that only one record is required where there are two or more appeals in one action, is not applicable.

3. Pleadings § 22: Appeal and Error § 37b—

After time for filing answer has expired, defendant's motion to be allowed to amend is addressed to the discretion of the trial court, and its denial of the motion is not subject to review except in case of manifest abuse. C. S., 547.

4. Same: Appeal and Error § 38—

It will be presumed on appeal that the court's denial of defendant's motion to be allowed to amend answer after time for filing answer had expired, was properly denied in the exercise of its discretionary power even if it does not affirmatively appear from the record that the denial of the motion was discretionary, since the ruling of the court will be presumed correct, but in this case it did affirmatively appear that the court denied the motion in the exercise of its discretion.

5. Pleadings § 22: Appeal and Error § 5—

The Supreme Court has the power to grant a motion by defendant to be allowed to amend his answer, C. S., 1414, but the motion is denied in this case, since the matter sought to be alleged by amendment is immaterial to the defense.

6. Quo Warranto § 2—When defendant refuses to surrender the office on the ground that he is the de jure officer, relator is not required to file bond or take the oath of office.

Where, in an action in the nature of *quo warranto*, the defendant alleges that he refused to surrender the office because he was entitled thereto, his motion to amend his answer to allege, as a further reason for his refusal to surrender the office, that the relator had not filed bond as required by statute or taken the oath of office, is properly denied, since such further allegations do not constitute a defense, the filing of bond and the taking of oath not being required of relator when defendant refuses to surrender the office on the ground that he is the *de jure* officer, because in such circumstances such action would be a vain thing which the law does not require, and it being expressly provided by statute, C. S., 885, that if judgment is rendered in favor of the relator he shall be entitled to take over the office after taking oath and executing the official bond, and the fact that the motion is made after defendant has surrendered the office and the relator has filed bond and taken the oath, does not alter this result, the defense not being germane on the question of the right to the emoluments of the office between the time of relator's election and his actual induction into office.

7. Same—

In an action in the nature of *quo warranto*, to try title to public office, the question of damages, including the right to the fees and emoluments of the office, must be determined in the proceeding, and when the judg-

ment of the Superior Court that relator is entitled to the office is affirmed on appeal, the cause remains open for further proceedings in the Superior Court for the adjudication of damages.

8. Public Officers § 11—

The *de jure* officer is entitled to the fees, salary and emoluments pertaining to the office from the date he is entitled to the office by valid election or appointment notwithstanding that the *de facto* officer actually performs the duties of the office pending the adjudication of the title. C. S., 878, 879, 880, 885.

9. Same—

A municipality can be required to pay the salary of an officer only once, and therefore where it has paid the salary to the *de facto* officer, the *de jure* officer may not recover the salary for the same period from the municipality, but where the salary of the office has not been paid by the municipality pending the determination of title to the office, the *de jure* officer is entitled thereto.

APPEAL by plaintiffs in the first action, above named, and by defendant in the second, from *Warlick, J.*, at September Term, 1940, of HAYWOOD.

Two actions—the second (4936) in the nature of *quo warranto* to try title to office of tax collector of the town of Canton, North Carolina, and the first (5059) to enjoin the town of Canton and its board of aldermen from paying to Way Kinsland, the relator in the second, salary as tax collector of said town claimed by him *de jure* for the period during which he alleges the office was wrongfully withheld from him by J. D. Mackey, defendant in the second action.

The two cases as stated in the caption in the record of this appeal are in reverse order of priority in point of time the actions were instituted. The second was instituted 17 August, 1939, by leave of the Attorney-General (C. S., 870 and 871) in the name of the State upon the relation of Way Kinsland, joined by town of Canton, against J. D. Mackey, to try title to office of tax collector of town of Canton, as between Way Kinsland and J. D. Mackey.

The first was instituted on 28 August, 1940, by H. Arthur Osborne, a taxpayer, against the town of Canton and the individuals composing its board of aldermen to enjoin the payment to Way Kinsland of the salary of the office of tax collector for the period during which title to the office was in dispute, upon the ground that J. D. Mackey is the tax collector *de jure* rather than Way Kinsland.

The record fails to disclose that the two actions were consolidated, but rather it appears that in the court below they were heard together for convenience. The record shows statement of presiding judge that "It is agreed that the evidence offered in the two cases (Nos. 4936 and 5059) shall apply to the two cases and shall constitute the evidence in

both cases, with the exception that the court in hearing the evidence has undertaken to segregate it as it relates to the pleadings in the cases properly filed." The record contains separate statements of the records proper, the evidence, judgments and assignments of error in the two cases, except as to certain oral testimony applicable to both.

Appellees move to dismiss for failure to bring separate records on appeal. Rule 19 of Rules of Practice in the Supreme Court, 213 N. C., 808.

In the complaint in the action in the nature of *quo warranto* it is alleged in substance that by virtue of appointment or election by the board of aldermen of the town of Canton on 30 June, 1939, the relator, Way Kinsland, is the tax collector of said town and entitled to the office as of that date; that that appointment or election had the effect of removing J. D. Mackey from the office of tax collector of said town to which he was appointed or elected by the said board on 5 June, 1939; that demand had been made upon Mackey to surrender said office to Kinsland; that he had refused the demand, and that he intrudes into and wrongfully withholds the office.

Defendant Mackey, in answer, denies that relator, Way Kinsland, is duly appointed or elected tax collector of said town and denies that he is entitled to the office. On the contrary, defendant avers that on 5 June, 1939, he was duly and lawfully re-elected and reappointed to said office by the board of aldermen of said town "for another and additional term of two years," and, in paragraph 7 of the original answer, while admitting that demand was made upon him to deliver the office and books and records pertaining thereto to Way Kinsland, and further admitting that on 24 July, 1939, at a meeting of the board of aldermen of said town, W. Bowen Henderson, a certified public accountant, was instructed and authorized to receive from him all moneys and things then in his possession as tax collector, and to transfer same to Way Kinsland, he avers that "he refused and still refuses to surrender the said office of tax collector and the books and records appertaining thereto to Way Kinsland or to any other person . . . for the reason that at the time said demands and requests were made on defendant he had theretofore, on the 5th day of June, 1939, been re-elected and reappointed as tax collector of said town, and, by virtue of said re-election and reappointment was lawfully entitled and authorized to hold and retain said office and all books, records, moneys and other things of value appertaining thereto."

On former hearing the case was tried upon the theory manifested by the pleadings—plaintiffs contending that Way Kinsland is rightfully entitled to the office, and defendant contending that the board of aldermen elected him for a term of two years from 5 June, 1939, and that,

therefore, it had no authority to remove him on 30 June, 1939, without preferring charges and giving him an opportunity to be heard. The trial judge charged the jury in accordance with theory of defendant. On appeal to this Court, 217 N. C., 508, 8 S. E. (2d), 598, the Court held that "no definite term having been prescribed by statute for the office of tax collector for the town of Canton, the appointment of defendant at the regular meeting of the Board of Aldermen on 5 June, 1939, entitled him to hold the office only at the will or pleasure of the Board"; that "this is true, even if it be conceded that the Board by resolution specified that the appointment be for a definite term"; further, that "in the absence of constitutional or statutory provision therefor the Board under the power of removal incidental to the power of appointment, had the power to remove the defendant at any time without cause, notice or hearing"; and that "the appointment of another, the plaintiff, to the position of tax collector, of which fact defendant had notice, operated as a removal of the defendant." In accordance with these principles of law a new trial was granted.

When the case came on for hearing at September Term, 1940, defendant Mackey, pursuant to notice, made a motion to be permitted to amend paragraph 7 of his original answer so as to set up, as further reasons for his refusal to surrender the office and to turn over the moneys, books and records pertaining thereto, these averments: (1) That at the time said demands were made upon him neither Way Kinsland nor W. Bowen Henderson, certified public accountant, was a bonded officer of the town of Canton; nor had Way Kinsland taken and filed oath of office and bond conditioned as required by law; (2) that the law required him, Mackey, to make settlement with and to turn over to the treasurer of the town of Canton all moneys, books, receipts, etc., which came into his hands as tax collector during his term of office, and, if he had delivered to another and a loss had occurred, he and his bondsman would have been liable therefor; and (3) that "Way Kinsland never filed any bond as tax collector of the town of Canton with the treasurer of said town until on or about the 3rd day of September, 1940." The record shows "Motion denied. Defendant excepts." In the judgment entered from which appeal is taken, it is stated "that the court . . . denied the motion to amend, all in the court's discretion."

After the evidence was closed, defendant requested the court to find as a fact: "That from June 30, 1939, to September 3, 1940, the relator, Way Kinsland, never filed with any officer of the town of Canton a bond as required by the statute, and the town charter, and that upon the foregoing finding of fact it is adjudged as a matter of law that the relator, Way Kinsland, was never qualified as tax collector of the town of Canton and, therefore, not entitled to the emoluments of that office from June 30,

1939, to September 3, 1940." The court declined to do so "for that there is no allegation in the answer of the respondent setting up that defense, and evidence offered without allegation is held by the court to be unavailing." Defendant excepts.

Thereupon, defendant moved the court to be allowed to amend his answer "to set up that Way Kinsland, the relator, never filed any bond in this action as tax collector of the town of Canton, as required by statute, and therefore was never duly qualified as tax collector of the town of Canton. That the pleadings conform to this evidence." The "motion is found by the court to be the same or a similar motion as offered heretofore and disallowed by the court in its discretion." Defendant excepts.

Defendant now moves in this Court to be permitted to amend his answer in accordance with amendment as first proposed in Superior Court, as above set forth. C. S., 1414.

Upon the retrial, a jury trial being waived, the court finds, among others, substantially these facts: (1) That at a special meeting of the board of aldermen of the town of Canton held on 30 June, 1939, upon motion, duly seconded, and by a two-to-one vote, Way Kinsland, the relator, was appointed tax collector of said town at salary of $145.00 per month. (2) That at a regular meeting of said board, upon motion made and seconded, and carried by two-to-one vote, W. Bowen Henderson, certified public accountant, was "requested and authorized to receive from Mr. J. D. Mackey all moneys and things now in his custody and possession as tax collector and deputy clerk of the town of Canton, and to transfer all moneys and things so received immediately to Mr. Way Kinsland"; (3) that on 3 September, 1940, in paper writing addressed to the mayor and board of aldermen of the town of Canton, defendant J. D. Mackey tendered his resignation as tax collector of said town, without prejudice, effective 1 September, 1940, and requested pay for his services "for the past twelve months and also for extra services rendered on the tax scroll set up in 1939" as indicated; (4) that on the same date the board accepted the resignation of J. D. Mackey "as a surrender of the office in accordance with the former orders of the board, but without prejudice to the rights of the board, and without obligation to pay the salary of the said J. D. Mackey during the period since Way Kinsland was elected."

Upon these findings of fact the court concludes that on 30 June, 1939, the board of aldermen of the town of Canton had the authority to appoint Way Kinsland as tax collector of said town and to remove defendant, J. D. Mackey, from said office; that its acts and deeds in respect thereto in the meeting on 30 June, 1939, were in all respects valid and enforceable; and that "Way Kinsland, in so far as the pleadings and the evidence bottomed thereon show is properly qualified as tax collector for

said town, and having properly qualified, he is, as a matter of law, the tax collector for said town, and was at all times entitled to the books and records thereof and in line therewith to the emoluments of said office"; and, thereupon, adjudges that Way Kinsland is the duly elected and qualified tax collector of the town of Canton, and is entitled to be inducted into such office under said appointment and receive the emoluments thereof, and that defendant "pay the costs of the action and that his bond heretofore executed in defense of this action be amenable to process for the collection thereof."

Defendant appeals therefrom to Supreme Court and assigns error.

In the Osborne Case: Plaintiff alleges, in the main upon information and belief, briefly stated, that on 5 June, 1939, J. D. Mackey was duly elected as tax collector of the town of Canton for a term of two years, and has entered upon and performed the duties of the office; that on 30 June, 1939, the board of aldermen had no authority to remove him and to appoint Way Kinsland in his place; that J. D. Mackey has refused to surrender the office; that in the trial of the action to try title to the office a verdict was rendered in favor of Mackey and on appeal to Supreme Court a new trial was ordered and the case is now pending in Superior Court of Haywood County; that J. D. Mackey tendered his resignation effective 3 September, 1940; that defendants are threatening and intend to induct Way Kinsland into the office and to pay, and unless restrained, will pay to him the salary of tax collector of the town of Canton for the period from 30 June, 1939, to 3 September, 1940, at the rate of $145.00 per month.

While defendants, in answer thereto, aver the facts to be substantially as alleged in the complaint in the action in the nature of *quo warranto,* they deny any lack of authority to remove J. D. Mackey as of 30 June, 1939, or to appoint Way Kinsland, and assert that on that date Way Kinsland was duly appointed as tax collector in place of J. D. Mackey. They further aver that, upon the institution of the said action on relation of Way Kinsland, being of opinion that "J. D. Mackey was not entitled to the office, and, therefore, not entitled to the emoluments thereof, refused to pay him any salary from and after the first day of September, 1939," and now hold same to be paid to the party whom this Court in said action shall determine is entitled thereto.

Upon the hearing pursuant to notice to show cause why the temporary injunction should not be continued, the court, from affidavit and oral testimony offered, "involving substantially the same evidence" as in action in the nature of *quo warranto,* finds, in addition to facts found in that action, among others, these pertinent facts: (1) That following the election of Way Kinsland as tax collector on 30 June, 1939, demand was made on J. D. Mackey to turn over to his successor in office such prop-

erty and records belonging to the town of Canton as he possessed as former tax collector, and, upon such demand, "refusal came about"; (2) that on 25 July, 1939, Way Kinsland filed with the board of aldermen the oath of office and on said date gave to the mayor of the town the application for his bond in the sum of $4,000 with the American Surety Company as prospective bondsman; (3) that for many years prior thereto, as permitted by statute, the town, through its board of aldermen, paid the costs of bonds of its employees and officials, and that on 25 July, 1939, after J. D. Mackey "reasserted his desire and determination to retain the office" by refusing to surrender same to his successor, Way Kinsland, the mayor advised Way Kinsland that, as the town did not want to pay for two bonds on the same office, he had best do nothing further about the bond other than to make application until it could be determined who is lawfully entitled to the office of tax collector; (4) that if J. D. Mackey had vacated the office the mayor would have taken the application from Way Kinsland and secured the bond for him, and that the surety company, through its Canton agent, would have written the bond acceptable to the town authorities. (To this finding defendant excepts); (5) that, though the town joined with Way Kinsland in the action in the nature of *quo warranto,* to try title to the office, and during the pendency of same, the town, in order to preserve its finances, permitted a renewal of the bond of J. D. Mackey, but the court finds that "this was not any recognition on the part of the town that he was the duly qualified tax collector, but only to preserve the assets of the town and to make safe the funds coming into his hands pending the appeal to the Supreme Court" (to this finding defendant excepts); that immediately after J. D. Mackey surrendered the office, the board of aldermen "installed Way Kinsland as tax collector, accepting his oath of office as filed on July 25, 1939, and took bond with the Fidelity and Guaranty Company in the sum required by law and paid the premium thereon"; (7) that from 30 June, 1939, until his proper induction in office on 3 September, 1940, Way Kinsland has at all times "stood ready to comply with the requirements of the governing body and held himself in readiness to accept the duties of the position to which he had been elected"; but (8) that he did not tender to or file with or have accepted or approved by the board of aldermen, a bond as tax collector, nor did he during said period perform any act as tax collector of said town, but did on 3 September, 1940, file a bond which was accepted and approved by the board for the term beginning that date.

Upon these findings of fact the court concluded as a matter of law that temporary injunction should be dissolved, and so decreed. Defendant appeals to Supreme Court and assigns error.

W. R. Francis, F. E. Alley, Jr., and Smathers & Meekins for plaintiff, appellant, H. Arthur Osborne, and defendant, appellant, J. D. Mackey.

Morgan & Ward and Jones, Ward & Jones for appellees.

WINBORNE, J. Regarding motion of appellee to dismiss: It is noted that the two actions were tried together for convenience. They were not consolidated in the sense that they became, by order of court, one action. The parties are not the same. The purposes are not the same. The plaintiffs are not united in interest. Separate causes of action are alleged. Therefore, they could not be joined in the same action under C. S., 457. Hence, there should have been separate appeals. The amendment to Rule 19 of Rules of Practice in the Supreme Court, 213 N. C., 808, now Rule 19 (2), does not relieve the situation for appellants. That applies only when there are two or more appeals in one action. In such event, it shall not be necessary to have more than one transcript. But, without intending to make a precedent of the case in this respect, we will pass the defect, and proceed to consider the case as constituted upon its merits.

Regarding the appeal in State ex rel. Way Kinsland v. J. D. Mackey:

Appellant's assignments in the main revolve around the refusal of the court to allow amendments to his original answer to set up in defense additional reasons for his refusal to surrender the office of tax collector, as shown in the foregoing statement of facts.

That the judge or court may, before or after judgment, in furtherance of justice, allow any pleading to be amended when the amendment does not change substantially the claim or defense is well settled. C. S., 547. Also, decisions of this Court are uniform in holding that after time for answering a pleading has expired, an amendment thereto may not be made as of right, but is a matter which is addressed to the discretion of the court and its decision thereon is not subject to review, except in case of manifest abuse, *Hogsed v. Pearlman,* 213 N. C., 240, 195 S. E., 789; *Biggs v. Moffitt,* 218 N. C., 601, 11 S. E. (2d), 870, where the rules have been recently restated.

While counsel for appellant are in agreement with these principles, it is said that when first passing on the motion to amend the court merely ruled, "Motion denied." Even so, if it did not elsewhere appear in the record that the ruling was made in the discretion of the court, as it does, "the ruling of the court below in the consideration of an appeal therefrom is presumed to be correct." *Hogsed v. Pearlman, supra.* See, also, *Warren v. Land Bank,* 214 N. C., 206, 198 S. E., 624. Moreover, in the judgment here the court below states that the motion to amend was denied "all in the court's discretion."

Again, it is said that matters in defense, which defendant desires to

plead, were inadvertently omitted in the original answer, and further, that in the course of the hearing of the two actions, evidence was adduced tending by its greater weight to support each of the matters covered by the proposed amendment. Hence, motion is made here that this Court, for the purpose of furthering justice, allow the amendment. The Supreme Court has the power to grant such motion. It is so specifically provided in C. S., 1414. But the factual situation here presented does not appear to merit favorable exercise of that power.

In this connection, among the statutes in this State pertaining to *quo warranto,* it is provided in C. S., 885, which originated in the Code of Civil Procedure of 1868, as section 371, that "if judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office . . ." Thus is manifested the intention of the law-making power that one who is rightfully entitled to an office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. This principle of long standing in this State is in harmony with decisions of the courts of this and other States. *Howerton v. Tate,* 68 N. C., 546; *Kreitz v. Behrensmeyer* (Ill.), 36 N. E., 983; *Booker v. Donohoe* (Va.), 28 S. E., 584.

In *Howerton v. Tate, supra,* an action to recover offices of directors, for the State, on board of Western North Carolina Railroad, it was contended that since the Constitution, Art. III, section 10, requires the Governor in making such appointments to consult the Senate, and, as he failed to do so, the Howerton board, appointed by the Governor by and with advice of Council of State, has no valid claim to the road. The Court said: "The question is, should the Governor have sent nominations to the Senate after the General Assembly had in express terms taken the power of appointment from him and exercised it themselves in one instance, and by the presiding officers of the two branches in another instance? It would have been a mockery to have done so, for they had already said by their action, you have nothing to do with the matter. This action on the part of the Legislature dispensed with the necessity of sending in nominations, and left the Governor to pursue the law as far as he could."

In *Kreitz v. Behrensmeyer, supra,* an action by officer *de jure* to recover of officer *de facto,* the emoluments of that office, the Illinois Court stated: "The law will not require a useless act, and by taking the oath of office, and filing bonds, as collector, for the several years, 1888-89-90, no purpose could have been subserved, as the contest was not determined

until after the full term had expired. Appellee's right of recovery is therefore not affected by these considerations."

In *Booker v. Donohoe, supra,* after reviewing some decisions of other courts, the Virginia Court said: "It was not necessary, as conditions precedent to the recovery against the defendant, that plaintiff should have qualified himself to discharge the duties of the office to which he was elected, by taking the oaths and executing the bonds prescribed by law. To hold that the injured party must qualify as a condition precedent to his right of action against an intruder would be to allow the wrongdoer to take advantage of his own wrong . . ."

In the case in hand, defendant J. D. Mackey in his answer admits that he has possession of the office in question, that demand has been made for the surrender of it, and that he refused and still refuses to surrender it to Way Kinsland or to any other person, for the reason that on 5 June, 1939, he had been appointed or elected by the board of aldermen for a term of two years, and, on 30 June, 1939, the board had no authority to remove him, without preferring charges and giving him an opportunity to be heard, which had not been done, and, hence, Way Kinsland had no right to the office.

Maintaining that attitude, the other reasons, set forth in the proposed amendment, for defendant's refusal to surrender the office, if pleaded, would be wholly incompatible and inconsistent with those in the original answer. And, the fact that defendant surrendered the office on 3 September, 1940, before making the motion, does not change the situation. So, applying the principles, evidenced by the statute, C. S., 885, and cited decisions, the amendments, if allowed, would avail nothing to defendant.

Other assignments are considered, but, in view of the ruling above, treatment of them is deemed unnecessary.

While the judgment appealed from herein is hereby affirmed, the cause remains open for further proceedings in accordance with the decision and suggested procedure set forth in *McCall v. Webb,* 135 N. C., 356, 47 S. E., 802, not inconsistent with this decision.

Judgment is

Affirmed.

Regarding appeal in Osborne v. Town of Canton:

Counsel for appellant state: "The question involved in this appeal is whether or not the town of Canton has the right to pay Way Kinsland the salary of $145.00 per month as tax collector of the town of Canton from June 30, 1939, to September 3, 1940, when he had only filed an oath of office and showed to the mayor a copy of the application for bond, but never tendered, filed or had the acceptance or approval of a bond by the municipal authorities?"

Having held in the foregoing opinion in the companion case of "State *ex rel.* Way Kinsland *v.* Mackey" that, as of 30 June, 1939, Way Kinsland is rightfully entitled to the office of tax collector of the town of Canton, that is, tax collector *de jure,* the question here is answered "Yes" in so far as concerns and to the amount of salary which the town has withheld.

It is well settled that the right to the fees, salary and emoluments of a public office is incidental to the office, and that the one who is rightfully entitled to hold the office, that is, the officer *de jure,* is entitled to the fees, salary and emoluments pertaining to the office, *Howerton v. Tate,* 70 N. C., 161.

This is true even though another, who is in wrongful possession of the office, that is, one who is officer *de facto,* actually performs the duties of the office pending adjudication of title to the office. It is so provided by statute in this State, C. S., 879, 878, 880, 885, and so held in *Howerton v. Tate, supra.*

In the *Howerton case, supra,* an action in which Howerton as president *de jure* of the Western North Carolina Railroad, under authority of decision in *Howerton v. Tate,* 68 N. C., 546, sued to recover of Tate, president *de facto,* the salary of that office received by him during period title was in controversy, the Court said: "Howerton, being the president *de jure* of the road, was entitled to receive the salary attached to that office; but Tate having usurped the same and having received a portion of, if not all of the salary, without the assent of Howerton, either expressed or implied, he must be held as having received it for the use of Howerton."

In C. S., 879, it is provided that when in an action the title to an office is involved, the defendant, being in possession of the office and discharging the duties thereof shall continue therein pending the action, and receive the emoluments thereof, and may not be interfered with by injunction. The public good requires that the office function. *Howerton v. Tate,* 70 N. C., 161. But, before defendant may answer or demur to the complaint, it is provided in C. S., 878, that he must execute and file as indicated an undertaking in amount specified, which may be increased from time to time in the discretion of the judge, conditioned that he, defendant, pay to plaintiff "all such cost and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover." It is further provided in C. S., 880, that plaintiff may by motion obtain an order to require defendant to give bond as specified in section 878. It is therein further provided that if defendant shall give the undertaking and if judgment is for plaintiff, the court shall render judgment against defendant and his sureties for costs and damages, in-

cluding loss of fees and salary. *McCall v. Webb,* 135 N. C., 356, 47 S. E., 802. The principle is fair and just. One who is so in possession of an office and asserting title thereto, is charged with and has knowledge that, if he lose in contest for title to the office, he will lose the fees, salary and emoluments, even though he has performed the duties of the office.

Further, the authorities generally agree that where the salary has been paid to the officer *de facto,* it cannot be collected from the municipality again by the officer *de jure,* for the reason of public policy, but the remedy of the rightful claimant is against the one who has wrongfully received the money. See Annotations 55 A. L. R., 997; 59 A. L. R., 117.

But where, by judgment, title has been determined and the salary of the office has been paid to neither the *de jure* nor the *de facto* officer, the right of action of the *de jure* officer is not against the *de facto* officer, but against the public authority whose duty it is to pay the salary. *Whitaker v. Topeka* (1900), 9 Kan. App., 213, 59 P., 668.

Applying these principles to the case in hand, the town of Canton can only be required to pay the salary of the tax collector once. If it has paid to J. D. Mackey any part of the salary due in the period during which title to the office was in controversy, it may not again be required to pay, but, that part of the salary withheld is due to Way Kinsland as officer *de jure,* and may not now be paid to J. D. Mackey.

In accordance with the principles here set forth, the judgment below dissolving the injunction is

Affirmed.

State ex rel. Kinsland v. Mackey

Affirmed.

Osborne v. Town of Canton

Affirmed.

GEORGE D. WALSH, ROBERT M. WALSH, ALEXIS B. WALSH, JOSEPH D. WALSH, MARY WALSH DUNNE, CHARLES H. WALSH, ELIZABETH WALSH ANHUT AND LOUISE WALSH AMAN v. EMANUEL FRIEDMAN, TRUSTEE, ANNIE B. KEYS, THE ST. EMMA INDUSTRIAL & AGRICULTURAL INSTITUTE, ROSA DALTON, WILL NIXON, NANCY DALTON, HENRY DALTON, AND ALL OTHER PERSONS WHO MAY NOW OR HEREAFTER HAVE OR CLAIM UNDER THE WILL OF CATHERINE WALSH AN INTEREST IN THE LANDS HEREINAFTER DESCRIBED.

(Filed 26 February, 1941.)

1. Wills § 38—

A clause will be construed as a residuary clause if the intention is apparent from the instrument that the clause should operate to dispose of all of the property of the testator not otherwise disposed of.

2. Same: Wills § 33f—A residuary clause will operate as an exercise of a power of disposition unless contrary intention appears from the will.

Under the will in question testatrix' daughter took a life estate in the *locus in quo* with power of disposition during her lifetime but without power of disposition by will. Three of testatrix' sons were given life estates in the property after the termination of the daughter's life estate, with power to each to dispose of one-third of the land by will, with further provision that upon their failure to exercise the power of disposition the property should go to testator's grandchildren *per stirpes*. All the sons predeceased their sister. One of the sons left a will containing a residuary clause in favor of his sister. *Held:* The residuary clause operated as an exercise of the power of disposition, no contrary intent appearing in the son's will, and testatrix' daughter took the fee simple under her brother's will to that part of the *locus in quo* over which he had power of disposition.

3. Wills § 31—

A will must be construed to give effect to the intention of the testator as expressed in the language used construed from the four corners of the instrument unless such intent is contrary to some principle of law or public policy.

4. Wills §§ 33f, 34—Will held to devise daughter life estate with power of disposition during her lifetime, but did not convey fee to daughter or give her power of disposition by will.

The will in question devised the *locus in quo* to testatrix' daughter for life with power to sell or dispose of the whole or any part during her life, with further provision that upon her death the land should go to testatrix' three sons for life with power of disposition by will to the sons, with further provision that if the sons failed to exercise the power of disposition the land should go to testatrix' grandchildren *per stirpes*. *Held:* The daughter did not take the fee simple to the *locus in quo*, but took only a life estate with power of disposition during her lifetime and without power to dispose of same by will, and the fact that testatrix' sons predeceased testatrix' daughter does not enlarge the daughter's interest in the lands.

5. Wills § 34c—

The words "*per stirpes*" are not words of inheritance but merely indicate that the property devised shall be distributed by representation among the devisees designated in the will.

6. Same—Where testatrix leaves land to grandchildren per stirpes and only one of testatrix' children leaves children him surviving, such children take the entire locus in quo as a class.

The will in question devised to testatrix' daughter a life estate with power of disposition during her life but not by will, with provision that upon the death of the daughter the land should go to three of testatrix' sons for life with power to each to dispose of one-third of the land by will, with further provision that upon failure of the sons to exercise the power of disposition the land should go to testatrix' grandchildren *per stirpes*. Two of the sons predeceased testatrix' daughter without exercising the power of disposition and one of them left children him surviving, which children were the only grandchildren of testatrix. The other son prede-

ceased testatrix' daughter but exercised the power of disposition in favor of the daughter. Testatrix' daughter died leaving a will devising the entire *locus in quo* to a trustee for charitable purposes. *Held:* The grandchildren of testatrix take as a class the share of both sons who failed to exercise the power of disposition, and are entitled to recover same as against the devisee of testatrix' daughter.

7. Wills § 39—

Where, in an action to determine the rights of the respective parties in the lands devised, it is held that plaintiffs are entitled to two-thirds of the *locus in quo* and defendant is entitled to one-third, the cost should be taxed in that proportion, and plaintiffs are entitled to recover of the defendant, who took and remained in possession, two-thirds of the rents and profits from the date plaintiffs' right of possession attached.

APPEAL by respondents, defendants, from *Thompson, J.*, at Chambers in Elizabeth City, PASQUOTANK County, on 11 October, 1940. Modified and affirmed.

This is an action brought by petitioners, plaintiffs, against respondents, defendants, to recover certain land in Pasquotank County, N. C.

Margaret B. Walsh died testate on 7 December, 1902, a citizen and resident of the State of New Jersey. At the time of her death she was seized and possessed of the lands which are the subject of the present action, said land being in Pasquotank County, North Carolina. She left her surviving five sons and one daughter, Catherine Walsh. Her original will is dated 17 May, 1886, but at various times after said date until the time of her death Margaret Walsh added various codicils to the original, some of which materially changed the original provisions. The fourth or next to the last codicil, which is dated 8 February, 1899, very materially changed the provisions theretofore existing. The material parts for the determination of this action are as follows:

Item, in part, under codicil of 17 May, 1886: "Upon the death of my daughter Catherine without having been married and without having entered a convent, I give and bequeath the same to and among such of my four sons, William S; John F.; Charles H. and Henry C., as may be then living and the children then living of such as may have died *per stirpes*, in equal shares, absolutely."

Item, in part, under codicil of 8 February, 1899 (next to the last codicil): "Item:—By my said will I gave my residuary estate subject to a provision for my son Robert unto my daughter Catherine until she married, entered a convent or died. Now I desire to revoke so much of that will as refers to her marriage or entering a convent and now give and bequeath Catherine during her life, without security with power to sell or dispose of the whole or any part of my real and personal estate during her life, with the right to use the proceeds of any such sale toward her support, re-investing any balances in any way she may deem most

advantageous not confining herself to legal investments if there be any balance. . . . Item: Upon the death of my daughter I give, devise and bequeath unto my three sons William S. Walsh, Charles H. Walsh and Henry C. Walsh my real and personal estate subject to the provision for my son Robert, for and during their respective lives without being required to give security for the same. I have left out my son John Francis because he has been left an annuity. I direct, however, that if for any cause that annuity becomes reduced his brothers shall make up the difference to him from the income of my estate.

"Item:—In the event of my son John Francis marrying, I authorize my four sons William S. Walsh, John F. Walsh, Charles H. Walsh and Henry C. Walsh each to dispose of one fourth of my residuary estate by will, subject, however, to the provision in favor of my son Robert and my daughter Catherine and in default of such disposition, I direct that my estate shall descend to the children of my said four sons *per stirpes*. In the event of my son John Francis remaining unmarried, I empower my three sons William S. Walsh, Charles H. Walsh and Henry C. Walsh each to dispose of one-third of my said residuary estate by will subject as aforesaid and in default of such disposition, I direct that the same shall descend to the children of my said three sons *per stirpes*."

The last codicil: "I desire to give my daughter Catherine Walsh the right to will the hundred shares of Pennsylvania Railroad stock. The remainder of my property at her death to be divided amongst my sons according to my Will and Codicils."

Catherine Walsh, Margaret B. Walsh's daughter, outlived all of her brothers, and died testate on 9 November, 1937, her will being dated 11 June, 1937. Sec. 9, in part, is as follows:

"Ninth. I give and devise all of my real property, including the improvements thereon, in the State of North Carolina, to Emanuel Friedman, in fee simple, in trust for the persons and corporations and the uses following:" (naming them).

The petitioners are all of the eight living grandchildren of the late Margaret B. Walsh, who died testate on 7 December, 1902, a citizen and resident of the State of New Jersey; that at the time of her death the said Margaret B. Walsh was seized and possessed in fee simple of the certain tract or parcel of land free and clear of all encumbrances, described as follows: "That certain tract or parcel of land in Salem Township, Pasquotank County, bounded on the North and East by Flatty Creek; on the South by the Robinson or Leigh farm and the public road, and on the West by the Lister land, and is known as the Walsh or Mullen farm."

Margaret B. Walsh left her surviving six children, to wit: William S. Walsh, John F. Walsh, Charles H. Walsh, Henry C. Walsh, Robert M.

Walsh and Catherine Walsh. Under and by virtue of the next to the last codicil to the last will and testament of Margaret B. Walsh, the land in controversy was devised to Catherine Walsh for life, with power to dispose of the same during her life and after her death said land was devised to William S. Walsh, Charles H. Walsh, and Henry C. Walsh, sons of Margaret B. Walsh, for and during their respective lives, with power to dispose of their respective shares by will; and in default of such disposition by will, the said property was to descend to the children of four of the sons of the testatrix, Margaret B. Walsh, viz.: the children of John F. Walsh, William S. Walsh, Charles H. Walsh and Henry C. Walsh. John Francis Walsh, son of Margaret B. Walsh, never married and, therefore, never had power to dispose of any of the property by his will or otherwise. Catherine Walsh neither attempted to nor did transfer any of the said property during her lifetime and all of the sons of the testatrix, Margaret B. Walsh, died before the vesting of their life estates and without disposing of the remainder by will; except that William S. Walsh died testate on 8 December, 1919, leaving the residue of his property to his sister, Catherine Walsh.

The material part of his will is as follows: "I give and bequeath to my sister Catherine Walsh all the residue of my property real and personal subject to any widow's rights emmanent in Mrs. Harriet M. Walsh, my house and furniture and six acres opposite Lynch's are already her property by deed dated November, 1913, and duly recorded in Newton whose conditions she has fulfilled in advance having paid me more than the stipulated two thousand dollars. I constitute the said Catherine Walsh my executor as well as my residuary legatee unless she predecease me when I give and bequeath to my brother Henry C. Walsh and Dr. J. F. Walsh all that I hereby leave to my sister, including property real and personal, book copyrights, etc. I appoint Henry C. Walsh my executor if my sister predecease me."

John F. Walsh died on the ..... day of ....., 1933; Charles H. Walsh died on 9 May, 1912; Henry C. Walsh died on 29 April, 1929, and Robert M. Walsh died on the ..... day of ....., 1919. Catherine Walsh, daughter of Margaret B. Walsh, never married and died testate on 9 November, 1937, a citizen and resident of the State of Pennsylvania. By Item 9 of her last will and testament, the said Catherine Walsh disposed of the land described in this petition to the respondents, defendants, devising and granting to them various and certain interests in and to said land. All the wills and codicils have been duly probated in Pasquotank County, N. C., where the land in controversy is situated.

The judgment of the court below is as follows:

"This cause having heretofore come to be heard on the 11th day of October, 1940, before the undersigned Judge of the Superior Court, in Chambers, and the Court, having heard and considered the pleadings, the stipulations and admissions in the record, and the argument of counsel, for both sides, finds the following facts, to-wit:

"1. That the petitioners are all the grandchildren of Margaret B. Walsh, deceased, and are the only grandchildren she ever had, all of them being the children of her son Charles H. Walsh, deceased.

"2. That the said Margaret B. Walsh, died testate on the 7th day of December, 1902, leaving the Will and Codicils thereto as set forth in petitioners' Exhibit A in this cause; that she left her surviving six children, William S. Walsh, John F. Walsh, Charles H. Walsh, Henry C. Walsh, Robert M. Walsh and Catherine Walsh.

"3. That John F. Walsh died testate on the ..... day of ....., 1933, and, having never married, had no power to dispose of any of the land involved in this controversy; that Charles H. Walsh died intestate on the 9th day of May, 1912, survived by his children, the petitioners herein; that Henry C. Walsh died intestate on the 29th day of April, 1929; that Robt. M. Walsh died intestate on the ..... day of ....., 1919; that William S. Walsh died testate on the 8th day of December, 1919, leaving the Will set forth in petitioners' Exhibit B in this cause; and that Catherine Walsh died testate on the 9th day of November, 1937, leaving the Will set forth in petitioners' Exhibit C in this cause.

"4. That by his Will, William S. Walsh, after making certain bequests to his wife, devised the residue of his estate to his sister, Catherine Walsh.

"5. That the aforesaid wills of Margaret B. Walsh are all duly of record in the office of the Clerk of the Superior Court of Pasquotank County in which is situate the land in controversy.

"6. That Catherine Walsh did not dispose of the lands in controversy except as appears from her said Will, petitioners' Exhibit C.

"WHEREUPON, the Court is of the opinion and adjudges and decrees as follows, to-wit:—

"(a) That Catherine Walsh, under the Will of her mother, Margaret B. Walsh, took a life estate in the land in controversy, with power of disposition during her life, but had no power whatsoever to dispose of said land by her will.

"(b) That John F. Walsh, the son of Margaret B. Walsh, never married and under the Will of Margaret B. Walsh, her sons, William S. Walsh, Charles H. Walsh and Henry C. Walsh, were devised life estates in the land in controversy after the death of Catherine Walsh, with power to dispose of one-third of the remainder interest by their respective wills.

"(c) That the Will of William S. Walsh, the only one of the aforesaid sons who left a will, did not exercise the power given him and Catherine Walsh took no interest in these lands by reason of said Will.

"(d) That by virtue of the provisions of the next to the last Codicil to the Last Will and Testament of Margaret B. Walsh, the land in controversy descended to her grandchildren, the petitioners herein, on the failure of the sons of Margaret B. Walsh to exercise the powers given them.

"(e) That by reason of the next to the last Codicil to the Last Will and Testament of Margaret B. Walsh and by reason of the matters and things hereinbefore set forth, the petitioners herein are the sole owners and are entitled to the immediate possession of the following described tract of land, to-wit: 'That certain tract or parcel of land in Salem Township, Pasquotank County, bounded on the North and East by Flatty Creek; on the South by the Robinson or Leigh farm and the public road, and on the West by the Lister land, and is known as the Walsh or Mullen farm.'

"(f) That the petitioners have and recover of the respondents all rents and profits that have accrued from the above described land since the death of Catherine Walsh, that is, since November 9, 1937.

"(g) That petitioners have and recover of the respondents the costs of this action to be taxed by the Clerk."

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

M. B. Simpson and R. M. Cann for plaintiffs, petitioners.
Wilbur H. Royster for defendants, respondents.

CLARKSON, J. The first exception and assignment of error made by defendants, respondents, we think must be sustained—which is as follows: "For that the Court found as a matter of law that the Will of William S. Walsh did not exercise the power given him and Catherine Walsh took no interest in these lands by reason of said Will."

The pertinent parts of the codicil to the will of Margaret B. Walsh, after leaving a life estate to her daughter, Catherine Walsh, provides: "Now give and bequeath my said residuary estate unto my daughter Catherine, during her life, without security with power to sell or dispose of the whole or any part of my real and personal estate during her life, with the right to use the proceeds of any such sale toward her support, reinvesting any balance in any way she may deem most advantageous not confining herself to legal investments if there be any balance. . . . Item:—Upon the death of my daughter I give, devise and bequeath unto my three sons William S. Walsh, Charles H. Walsh and Henry C. Walsh

my real and personal estate subject to the provision for my son Robert, for and during their respective lives without being required to give security for the same. I have left out my son John Francis because he has been left an annuity. . . . I direct that my estate shall descend to the children of my said four sons *per stirpes.* In the event of my son John Francis remaining unmarried I empower my three sons William S. Walsh, Charles H. Walsh and Henry C. Walsh each to dispose of one-third of my said residuary estate by will subject as aforesaid and in default of such disposition, I direct that the same shall descend to the children of my said three sons *per stirpes.*" John Francis Walsh never married. Catherine Walsh, daughter of Margaret B. Walsh, never married, and died testate on 9 November, 1937, a citizen and resident of the State of Pennsylvania; by Item 9 of her last will and testament, the said Catherine Walsh disposed of the land in controversy to the respondents, defendants, devising and granting to them various and certain interests in and to said land—viz., section 9: "I give and devise all of my real property, including the improvements thereon, in the State of North Carolina, to Emanuel Friedman, in fee simple, in trust for the persons and corporation and the uses following" (naming them), etc. They are the defendants in this action.

William S. Walsh, under the codicil to the will of his mother, Margaret B. Walsh, was empowered "to dispose of one-third of my said residuary estate by Will." Before the death of Catherine Walsh (who died 9 November, 1937), William S. Walsh made a will on 3 November, 1914 (he died 8 December, 1919), disposing of his property, as follows: "I give and bequeath to my sister Catherine Walsh all the residue of my property real and personal subject to any widow's rights, . . . I constitute the said Catherine Walsh my executor as well as my residuary legatee unless she predecease me when I give and bequeath to my brother Henry C. Walsh and Dr. J. F. Walsh all that I hereby leave to my sister including property real and personal, book copyrights, etc. I appoint Henry C. Walsh my executor if my sister predecease me."

As has been hereinbefore noted, the codicil to the will of Margaret B. Walsh endowed certain of her sons with power to dispose of "one-third of my said residuary estate by Will." Since it is admitted in the pleadings that John Francis Walsh never married, and that William S. Walsh was the only son who left any will at all, we must now consider whether his will executed the power he had.

In *Van Winkle v. Missionary Union,* 192 N. C., 131 (134), we find: "The legal characteristics of a residuary clause in a will are described as follows, by *Walker, J.,* in *Faison v. Middleton,* 171 N. C., 170: 'Residue, meaning that which remains, no particular mode of expression is necessary to constitute a residuary clause. The words "rest," "resi-

due" or "remainder" are commonly used in the residuary clause, whose natural position is at the end of the disposing portion of the will; but all that is necessary is an adequate designation of what has not otherwise been disposed of, and the fact that a provision so operating is not called the residuary clause is immaterial.' In discussing the question of a residuary clause in a will the learned Justice says further: 'In order to ascertain what is given, or whether any particular thing is well given, by a specific gift, you must look to see whether that particular item is included. The question is whether it is included or not; but once given a residuary gift large enough in its language to comprehend residue, the question is, not what is included, but what is excluded.' *Gordon v. Ehringhaus,* 190 N. C., 147."

William S. Walsh, by his will, executed on 3 November, 1914, devised "all the residue of my property, real and personal" to his sister Catherine Walsh. "I constitute the said Catherine Walsh my executor as well as my *residuary* legatee." He did not refer expressly to the power of appointment given him in the will of his mother Margaret B. Walsh, nor to the land in controversy. Was the power given by the next to the last codicil of the will of Margaret B. Walsh to William S. Walsh to devise a one-third interest in the land in controversy executed by the residuary clause of the will of William S. Walsh, devising the residue of his property to Catherine Walsh? We think so.

C. S., sec. 4167 (1844), is as follows: "A general devise of the real estate of the testator, or of his real estate in any place or in the occupation of any person mentioned in the will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper; and shall operate as an execution of such power; unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property, described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." No contrary intention appears by the will in the present case.

In *Johnston v. Knight,* 117 N. C., 122 (123-4), we find: "When it is not done in express terms, by reference to the power or the subject, then a construction must be given by looking to the whole instrument and the intent therein, for the intent must govern. If the donee of the power intends to execute, that intention, however manifested—whether directly or indirectly, positively or by just implication—will make the

execution valid and operative. 'The general rule is settled that a general residuary devise will operate as an execution of a power to dispose of property by will, unless there is something to show that such was not the testator's intention.' *Cumston v. Bartlett,* 149 Mass., 243." 91 A. L. R., 437 (440, 445).

In *Smith v. Mears,* 218 N. C., 193 (197), citing a wealth of authorities, it is said: *"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."

By a careful reading of *Carraway v. Moseley,* 152 N. C., 351, it can readily be differentiated from *Johnston v. Knight, supra,* for the question of whether there was an execution of the power in the *Carraway case, supra,* as not a question of a general devise in a residuary clause but a special devise in a separate item of the will wherein from the express words the Court held that Snoad B. Carraway had not intended to execute the power.

The decision in *Herring v. Williams,* 158 N. C., 1 (on rehearing), is based on the conclusion that the words used in the will are not sufficient to create power to dispose of the real property of the testator in fee.

By the will of William S. Walsh, Catherine Walsh, life tenant, became seized and possessed in fee of an undivided one-third interest in the lands in controversy; and thereby she devised this one-third interest in fee in her will to respondent, defendant, Emanuel Friedman, in trust, and the respondents, defendants, therefore are entitled to an undivided one-third interest in the land in controversy.

The second exception and assignment of error made by respondents, defendants, we think cannot be sustained—which is as follows: "For that the Court found as a matter of law that by virtue of the provisions of the next to the last Codicil to the Last Will and Testament of Margaret B. Walsh all of the right, title and interest in the lands in controversy descended to her grandchildren, the petitioners herein, in the failure of the sons of Margaret B. Walsh to exercise the powers given them, except as to William S. Walsh, who devised his one-third interest to his sister, Catherine Walsh, as before set forth.

The language of the codicil of 17 May, 1886, of Margaret B. Walsh, is as follows: "Upon the death of my daughter Catherine without having been married and without having entered a convent, I give and bequeath the same to and among such of my four sons, William S.; John F.; Charles H. and Henry C., as may be then living and the children then living of such as may have died *per stirpes,* in equal shares, absolutely."

The language of the codicil of the will of Margaret B. Walsh, dated 18 February, 1899, is as follows: "I direct that my estate shall descend to the children of my said four sons *per stirpes.* In the event of my son John Francis remaining unmarried I empower my three sons William S. Walsh, Charles H. Walsh and Henry C. Walsh each to dispose of one-third of my said residuary estate by will subject as aforesaid and in default of such disposition, I direct that the same shall descend to the children of my said three sons *per stirpes.*"

John Francis Walsh never married and therefore never had power to dispose of any of the property by will or otherwise. Chas. H. Walsh and Henry C. Walsh died without disposing of their one-third interest each. Charles H. Walsh died intestate on 9 May, 1912, survived by his children, the petitioners, plaintiffs, herein. Henry C. Walsh died intestate on 29 April, 1929, leaving no children. The petitioners, plaintiffs, are the only surviving children of Chas. H. Walsh and are Margaret B. Walsh's grandchildren.

The devise to Catherine Walsh for life, with power to dispose of during her life, contained in the next to the last codicil of the will of Margaret B. Walsh, did not give Catherine Walsh a fee simple interest in the land in controversy. The language is so clear that it did not, that it is hardly necessary to discuss this. We think that Catherine Walsh took no interest in the land in controversy on the death of her brothers, Charles H. and Henry C. Walsh.

In *Irvin v. Brown et al.,* 160 S. C., 374 (378), is the following: "The appellant urges that *'stirpes'* is not a word of inheritance or purchase, but relates to the mode of distribution. After very careful consideration, we think the appellant's contention should be sustained. The term *'per stirpes'* is defined in 30 Cyc., 1533, to be 'a term of the civil law, extensively used in the modern English and American law, to denote that mode of the distribution and descent of intestate's estates, where the parties entitled take the shares which their stocks (such as a father), if living, would have taken.' It is true that *'stirpes'* denotes roots or common stocks, and that the term *'per stirpes'* means literally 'by stocks or roots,' yet, as has been indicated, that term as employed in our law relates to the mode of distribution—not who shall take, but the manner in which those shall take who come within the class entitled to take. . . . (p. 379) But by the use of that term, the testator did not mean to identify or name the devisees—he had already done that—but to prescribe the manner in which they should take."

The term *"per stirpes"* relates to the mode of distribution. Black's Law Dictionary, 3rd Ed., p. 1349, defines *"per stirpes"* as follows: "By roots or stocks; by representation. This term, derived from the civil

law, is much used in the law of descents and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased would have been entitled to, taking thus by their right of representing such ancestor, and not as so many individuals," citing authorities. In *Burton v. Cahill,* 192 N. C., 505 (509), *Brogden, J.,* quotes with approval from *Walker, J.,* in *Mitchell v. Parks,* 180 N. C., at 634, as follows: "It is generally held that a devise or bequest to the children of two or more persons whether expressed as to the children of A and B, or to the children of A, and the children of B, or two relatives of different persons, usually means that such children or relatives shall take *per capita* and not *per stirpes,* unless it is apparent from the will that the testator intended them to take *per stirpes.*" *Lamm v. Mayo,* 217 N. C., 261.

It is readily apparent, therefore, that Margaret B. Walsh, by employing the term *"per stirpes"* in both her codicils, intended to and did defeat what otherwise would have been a *"per capita"* distribution, nothing else appearing. In fact the codicil of 17 May, 1886, says "in equal shares absolutely." The grandmother used the words *"per stirpes"* as a mode of distribution. The children should inherit not *per capita,* but through their ancestor and what was his share. We hardly think the question arises, as only one left children, the plaintiffs, petitioners. The petitioners, plaintiffs, are not limited to the one-third interest of their father, but may take, as we think their grandmother intended, the entire gift to the class. For the direction "that the same shall descend to the children of my said three sons *per stirpes*" was, as we see it, a gift to a class. *Mason v. White,* 53 N. C., 421; *Leggett v. Simpson,* 176 N. C., 3; *Burton v. Cahill, supra; Lamm v. Mayo, supra;* Page on Wills (2d Ed.), Vol. 2, sec. 918, *et seq.*

As the petitioners, the plaintiffs, under our construction of the will, is entitled to two-thirds of the property in controversy and the respondents, or defendants, one-third, the costs shall be paid in that proportion. As to the rents and profits of the land since the death of Catherine Walsh, the petitioners, the plaintiffs, are entitled to two-thirds and the respondents, defendants, one-third.

The judgment of the court below, in accordance with this opinion, is

Modified and affirmed.

ROBERTSON WALL, ADMINISTRATOR OF THE ESTATE OF LUCY E. PLYMPTON, DECEASED, v. THE CITY OF ASHEVILLE, A MUNICIPAL CORPORATION.

(Filed 26 February, 1941.)

1. Trial § 22b—

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

2. Negligence § 17—

The plaintiff has the burden of proof on the issue of negligence and defendant has the burden of proof on the issue of contributory negligence.

3. Municipal Corporations § 14—

A municipal corporation is under duty to exercise due care to keep its streets and sidewalks in a reasonably safe condition, and although it is not an insurer of their safety, it is required, in the exercise of due care, to remedy defects of which it has express or implied knowledge.

4. Same—

Where a pit or embankment is adjacent to a sidewalk, whether the situation is such as to require the city, in the exercise of due care, to erect guard rails to protect pedestrians, or, if it has erected guard rails, whether such guard rails are adequate or sufficient, is ordinarily a question for the jury.

5. Same—Evidence of municipality's failure to exercise due care to keep sidewalk in reasonably safe condition held for jury.

Plaintiff's allegations and evidence were to the effect that defendant municipality maintained a sidewalk only three feet wide on top of a retaining wall, that the ground on the outer edge of the sidewalk was approximately eighteen feet below the sidewalk level, that the guard rail maintained by the city along the dangerous declivity was inadequate, that the *locus in quo* was inadequately lighted and that the surface of the sidewalk was allowed to remain in a rough and uneven condition so that when plaintiff's intestate attempted to step upon the sidewalk from the street, she fell upon the sidewalk and through the guard rails to the ground eighteen feet below, resulting in mortal injury. *Held:* The allegations and evidence are sufficient to take the case to the jury upon the issue of negligence of the municipality in failing to exercise due care to keep its sidewalk in a reasonably safe condition.

6. Same—Whether pedestrian was guilty of contributory negligence in failing to confine her path of travel to sidewalk held for jury.

While a pedestrian is guilty of contributory negligence if, when confronted by two ways of travel, one safe and the other dangerous, she chooses the dangerous way with knowledge of the danger, whether plaintiff's intestate, alighting at a bus terminal as a stranger in defendant municipality, was guilty of contributory negligence in walking along the street from the bus terminal to an automobile waiting for her on the same side of the street, and, upon reaching the car, in turning and

attempting to step back up on the sidewalk from the street instead of confining her path of travel to the three-foot sidewalk, *is held* a question for the jury upon the evidence in this case.

7. Negligence §§ 19a, 19b—

Ordinarily, the questions of negligence and contributory negligence are for the jury and not the court, and is only when but one inference can be reasonably drawn from the evidence that a nonsuit on the ground of negligence or contributory negligence may be properly entered by the court.

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

APPEAL by plaintiff from *Armstrong, J.*, at the Regular September, 1940, Civil Term, of BUNCOMBE. Reversed.

This is an action for actionable negligence, brought by plaintiff against defendant for damage for the death of plaintiff's intestate. The plaintiff alleges in the complaint, in part:

"That on or about the 15th day of September, 1939, and at about 10:30 o'clock P.M., and during the night time, the plaintiff's intestate, who was a citizen and resident of the State of Florida, was transported to Asheville on a bus, which said bus delivered plaintiff's intestate along with other passengers at the Asheville Union Bus Terminal located on Wall Street in the City of Asheville; that said plaintiff's intestate was a stranger to the City of Asheville and was not familiar with the location and general construction of said Wall Street or the sidewalk along the South side thereof, or the fact that there was a high stone wall along said street and that the adjacent ground on the South side thereof was approximately eighteen feet below the level of the sidewalk of said Wall Street.

"That after said plaintiff's intestate got off said bus at the Union Bus Terminal, she was attempting to walk to an automobile located some distance Westwardly on Wall Street from said Bus Terminal, to which automobile she was being conducted for the purpose of being transported to the home of friends in the City of Asheville, and that plaintiff's intestate walked along the Street portion of said Wall Street and for the reason that due to the negligent construction of said sidewalk it was not of sufficient width to permit two people to walk along the same side by side, and upon reaching the parked automobile which she intended to enter, said plaintiff's intestate was attempting to step onto the sidewalk of said Wall Street in order to enter said automobile; that as plaintiff's intestate attempted to step on to the sidewalk of said Wall Street, and because of the irregularity and variation in the height of said sidewalk and due to the rough, uneven and improper construction of the surface of said sidewalk, she was caused to lose her balance and fall to her knees across the width of said sidewalk, and because of the improper, negligent

and careless manner in which said guard rail was constructed, and in the absence of any proper barrier, guard rail or other safety device to protect her, she fell headlong from the sidewalk some eighteen feet to the ground below, thereupon suffering severe and serious injuries which resulted in her death several hours afterward.

"The injury and death of plaintiff's intestate resulted directly and proximately from the wrongful actions and neglect of the defendant corporation in the construction and maintenance of the sidewalk and guard rail as hereinbefore described, and in its failure to repair and maintain a reasonably safe walkway and guard rail adjacent thereto, all of which negligent acts of the corporate defendant were in violation of its positive duty to maintain said sidewalk and guard rail in a reasonably safe condition for pedestrian traffic under the circumstances there existing.

"That the wrongful and negligent acts of the defendant which directly and proximately caused the injury and death of plaintiff's intestate are particularly set forth as follows:

"(a) In negligently constructing and maintaining a sidewalk or walkway along the South margin of Wall Street on top of a stone wall and of only three feet in width and without leaving adequate and sufficient walking surface whereby pedestrians could traverse the same in reasonable safety.

"(b) In constructing and maintaining the surface of said three foot sidewalk in a defective, rough and uneven condition, thereby rendering the said walkway highly dangerous for any pedestrian using the same.

"(c) In negligently constructing, maintaining and failing to keep in repair the surface of said three foot walkway, whereby the height of the said sidewalk from the street level was irregular, defective, sloping and otherwise unsafe for pedestrian traffic to use the same.

"(d) In negligently constructing and maintaining a guard rail along the outer edge of said sidewalk where the adjacent ground was approximately eighteen feet below said sidewalk level, when said guard rail was so improperly and inadequately constructed and maintained that it did not and could not offer reasonably safe and sufficient protection to any person using said sidewalk, whereby such persons would be prevented from falling from said sidewalk and from a height of approximately eighteen feet to the ground below.

"(e) In negligently and wrongfully failing to construct and maintain a guard rail along said dangerous declivity of such a character as the circumstances there presented reasonably demanded.

"(f) In negligently failing to provide sufficient guard rails, wire or other protection whereby any pedestrian using said walkway would be prevented from falling from a height of approximately eighteen feet

to the ground below while attempting to traverse and walk upon said faultily and negligently constructed and maintained sidewalk or walkway.

"(g) In negligently failing to provide for the use of pedestrian traffic and the public generally a reasonably safe way to travel over and upon said walkway.

"(h) In negligently failing to maintain adequate and sufficient lights or a lighting system along said Wall Street, thereby leaving an inherently and intrinsically dangerous nuisance open to anyone using said walkway or sidewalk of said Wall Street, in darkness, and thereby increasing the hazard and probability of serious and permanent injuries resulting in anyone attempting to use said sidewalk or walkway during the night time.

"(i) In negligently, carelessly, and in violation of its positive duty, constructing and maintaining a highly dangerous, inadequate and insufficient sidewalk and walkway on said Wall Street, without reasonable, proper or adequate guard rails along the same, and thereby causing the death of plaintiff's intestate.

"Plaintiff's intestate at the time of her death was an elderly woman, a widow, and the mother of a family, and was at said time and had for a long period of time prior thereto enjoyed excellent health, and was an educated and accomplished person, engaged in a life work of value to herself and her family, and had every reasonable anticipation of many years of active and useful endeavor, and that by reason of the negligent and wrongful acts of omission and commission by the defendant plaintiff's intestate came to her death and the plaintiff has been damaged thereby in the sum of Fifteen Thousand Dollars ($15,000.00).

"That due notice of this claim was presented to the defendant corporation by filing written notice of said claim with the council duly assembled, which said notice of claim was regularly acknowledged on the 14th day of December, 1939, and the payment of which claim was denied by the defendant." Demand for damages, etc.

The defendant denied the material allegations of the complaint and as a further answer and defense, alleges:

"The defendant is informed and believes and so alleges that the plaintiff's intestate did on the 15th day of September, 1939, arrive in the City of Asheville, at what is known as the Union Bus Terminal; that when she arrived on the bus in which she had traveled from the State of Florida, she was met by two citizens of the City of Asheville, and proceeded in a westerly direction in the middle of the public street for some feet to where an automobile, the property of Mr. Harry Parker, was parked; that when the plaintiff's intestate reached said automobile she was at that time in the middle of the street where vehicular traffic

was carried on and where pedestrians were forbidden to walk; that she made a diagonal left-hand turn and stepped upon the curb, tripping herself and falling over the embankment; that she was warned two times to watch her step, that there was a curb there, and that she might slip and fall; and after receiving said warning the plaintiff's intestate negligently and carelessly stepped upon the curb, causing herself to trip and stumble; and that her careless acts constitute contributory negligence, and contributory negligence is hereby pleaded in bar of any recovery.

"That if, after having gotten off of said bus as mentioned above, the plaintiff's intestate had taken the usual route and walked along a sidewalk that had been provided for pedestrians the accident to the plaintiff's intestate would never have happened, because she could not have tripped over said curb in stepping up; that in failing to comply with the laws of the State of North Carolina and the charter of the City of Asheville, namely, to use said sidewalk instead of the main public street, plaintiff's intestate contributed to her own injury, and her negligent acts herein constitute contributory negligence, and contributory negligence is hereby pleaded in bar of any recovery.

"That the injury to said plaintiff's intestate was due to her own negligence in not keeping a safe look-out in walking along the street, and in walking along in a hurried manner, and in not watching where she was going; and that the plaintiff's intestate by the exercise of ordinary care should have known the condition of the said sidewalk; that said injury was due to her own negligence and she contributed to her own injury, and contributory negligence is hereby pleaded in bar of any recovery.

"That the place where the plaintiff's intestate fell is in an absolutely safe condition and has been at all times; and that said injury was caused by her own negligent acts and not those of this defendant, as alleged in the complaint, and contributory negligence on the part of plaintiff's intestate is hereby pleaded in bar of any recovery.

"Wherefore, having fully answered, the defendant prays: That the plaintiff recover nothing by this action," etc.

In reply plaintiff denies the allegations in the further answer and defense and replying further, alleges and avers:

"This plaintiff denies that his intestate was negligent and that her negligence contributed to any injury which she received, and says further that the negligence of the defendant, as set forth and related in the complaint filed herein, was the primary and proximate cause of the injury and death of plaintiff's intestate, and that the said defendant should have reasonably foreseen that its negligence in the construction and maintenance of the sidewalk, guard rail and lighting system on said Wall Street at said time and place would result in serious and permanent

injury to this plaintiff's intestate or any other person placed in the same circumstances; and that if it should be adjudicated that plaintiff's intestate was negligent in any manner, which negligence is expressly denied, said alleged negligence was insulated by the primary and original negligence of the defendant, and such negligence of the said defendant was the proximate and direct cause of the death of plaintiff's intestate."

The plaintiff introduced evidence sustaining the allegations of the complaint. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion, the plaintiff excepted, assigned error and appealed to the Supreme Court.

Harkins, Van Winkle & Walton for plaintiff.
Philip C. Cocke, Jr., and S. G. Bernard for defendant.

CLARKSON, J. We think there was error in granting the nonsuit in the court below. On a motion to nonsuit, the evidence tending to support plaintiff's cause of action will be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

The *first* question involved: Was there sufficient evidence of negligence on the part of defendant proximately causing the death of plaintiff's intestate and should an issue have been submitted to the jury with respect thereto? We think so.

The burden on the question of negligence is on the plaintiff, and as to contributory negligence on defendant.

In *Bunch v. Edenton,* 90 N. C., 431 (434), *Merrimon, J.,* speaking for the Court, said: "It was the positive duty of the corporate authorities of the town of Edenton to keep the streets, including the side-walks, in 'proper repair'; that is, in such condition as that the people passing and repassing over them might at all times do so with reasonable ease, speed and safety. And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls and the like perilous places and things very near and adjoining the streets, shall be guarded against by proper railings and barriers. Positive nuisances on or near the streets should be forbidden under proper penalties, and, when they exist, should be abated. . . . (p. 435). The side of the street is a material part of it, and must be kept free from danger, however the same may arise, as well as other portions of the street. Pits and other dangerous places immediately adjoining it and near to it make it perilous, and such places are nuisances. When these are permitted to exist and the streets are not properly protected against them, the latter are not in reasonable repair." *Russell v. Town of Monroe,* 116 N. C., 720;

Dillon v. Raleigh, 124 N. C., 184 (188-189); *Fitzgerald v. Concord,* 140 N. C., 110; *Brown v. Durham,* 141 N. C., 249; *Bailey v. Winston,* 157 N. C., 252; *Alexander v. Statesville,* 165 N. C., 527 (533); *Darden v. Plymouth,* 166 N. C., 492; *Graham v. Charlotte,* 186 N. C., 649; *Goldstein v. R. R.,* 188 N. C., 636; *Willis v. New Bern,* 191 N. C., 507 (511); *Speas v. Greensboro,* 204 N. C., 239; *Gasque v. Asheville,* 207 N. C., 821 (829); *Doyle v. Charlotte,* 210 N. C., 709 (711); *Whitacre v. Charlotte,* 216 N. C., 687; *Barnes v. Wilson,* 217 N. C., 190.

The *Bunch case, supra,* has been the unbroken law in this jurisdiction and the principle reiterated in *Radford v. Asheville, post,* 185.

In 43 C. J., part sec. 1837, at p. 1062, we find: "The precaution should be sufficient to give such warning as will reasonably notify all persons using the street that the danger is there, and *whenever a barrier or guard rail is erected, it should be of such a character and placed in such position in reference to the use of the street as will afford protection, and not produce a peril to persons passing on the way.*" (Italics ours.) Sec. 2046, p. 1286: "In case of an accident occurring because of an unguarded or unlighted opening, pitfall, or obstruction on a sidewalk or driveway, it is ordinarily a question for the jury whether, under the circumstances of the particular case, it was defendant's duty to have guards, barriers, or lights at the place of the accident for the protection of travelers; whether there were guards, barriers, or lights; whether they were adequate or sufficient for the purpose," etc.

In *Dowell v. Raleigh,* 173 N. C., 197 (202-203), it is stated: "But the city cannot be held liable unless it had or should have had notice of the defect, if one existed. 'The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. Code, sec. 3803; *Bunch v. Edenton,* 90 N. C., 431; *Russell v. Monroe,* 116 N. C., 720. 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 a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town "knew or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated." It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from circumstances, and will be imputed to the town if its officers could have discovered the defect by the exercise of proper dili-

gence.' *Fitzgerald v. Concord,* 140 N. C., 110 (citing and quoting 1 Sh. and Redf., sec. 369)." *Gasque v. Asheville, supra,* pp. 828-829.

The *second* question involved: Was the evidence sufficient to hold plaintiff's intestate guilty of contributory negligence as a matter of law? We think not.

We think the question of contributory negligence was one for the jury to pass on, under proper instructions.

In *Groome v. Statesville,* 207 N. C., 538 (540), *Schenck, J.,* speaking for the Court, says: " 'If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence. . . . And where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery.' *Dunnevant v. R. R.,* 167 N. C., 232; 45 C. J., 961."

The generally accepted definition of "contributory negligence," citing a wealth of authorities, is thus stated in Black's Law Dictionary, 3rd Ed., p. 1231: "Contributory negligence, when set up as a defense to an action for injuries alleged to have been caused by the defendant's negligence, means any want of ordinary care on the part of the person injured (or on the part of another whose negligence is imputable to him), which combined and concurred with the defendant's negligence, and contributed to the injury as proximate cause thereof, and as an element without which the injury would not have occurred." *Battle v. Cleave,* 179 N. C., 112 (114); *Boswell v. Hosiery Mills,* 191 N. C., 549; *Elder v. Plaza Ry.,* 194 N. C., 617.

In *Absher v. Raleigh,* 211 N. C., 567 (568-9), the question of contributory negligence is fully discussed, citing authorities. It is there said: " 'A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negligence and take away the question of negligence and contributory negligence from the jury. The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the Court.' *Moseley v. R. R.,* 197 N. C., 628, 150 S. E., 184."

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

Reversed.

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

MRS. LENORA BERRY, R. C. BERRY, MRS. W. E. CLARK, R. S. COX, S. D. COX, MRS. J. O. CREDLE, SAMMY CUTHRELL, W. C. DAVIS, C. B. GIBBS, DURWOOD GIBBS, MRS. J. B. GIBBS, J. L. GIBBS, T. A. GIBBS, J. O. GIBBS, SR., MRS. S. J. GIBBS, J. C. GROCE, C. S. GUTHRIE, G. M. GUTHRIE ESTATE, H. B. GUTHRIE, MISS JANIE GUTHRIE, J. S. HARRIS, MRS. CORA L. HODGES, MRS. LAURA LITCHFIELD, MAX G. MANN, B. C. MARSHALL, MISS ANNIE MIDYETTE, MRS. J. L. SANDERSON, E. D. STOWE, MRS. ADDIE SPENCER, MISS FANNIE, RUDOLPH R., W. J. AND SAM C. SPENCER, SAM H. SPENCER, JOSHUA SWINDELL, MRS. J. V. SWINDELL, J. W. SWINDELL, MRS. L. B. SWINDELL, W. J. SWINDELL, C. W. WATSON, RUFUS WILLIAMS, IN THEIR OWN BEHALF AND ON BEHALF OF ANY AND ALL OTHER PROPERTY OWNERS RESIDING IN THE COMMUNITY OF ENGELHARD WHO MAY BE INTERESTED IN THE SUBJECT OF THIS LITIGATION AND WHO DESIRE TO COME IN AND MAKE THEMSELVES PARTY PLAINTIFFS, v. W. W. PAYNE, CLOSS GIBBS, R. S. SPENCER, S. S. NEAL, I. B. WATSON AND GEORGE C. BROWN.

(Filed 26 February, 1941.)

1. Appeal and Error § 37e—

Where the parties waive a jury trial and agree to trial by the court, the court's findings of fact from the evidence are binding and conclusive upon appeal. Michie's Code, 556, 569.

2. Public Officers § 5b—

A *de facto* officer is one whose title is not good in law, but who is in fact in the unobstructed possession of the office, discharging its duties in full view of the public, in such manner and in such circumstances as not to give the appearance of being an usurper.

3. Same—

The acts of a *de facto* officer will be held valid upon principles of policy and justice as to third persons having occasion to deal with the officer, since third persons have the right to act upon the assumption, without investigating his title, that he is a rightful officer.

4. Same—Mayor and commissioners reorganizing municipal government after lapse of fourteen years, during which two of them accepted other public offices, held de facto officers of the municipality.

The mayor and board of commissioners of a municipality were named in the act creating the municipality. Upon the calling of an election at the end of two years, no voters presented themselves, and thereafter for a period of twenty-four years none of the officers named in the charter performed any official duties. During this period two of them were elected to other public offices and duly qualified and acted in the discharge of the duties pertaining to such other offices. At the expiration of this period the mayor and surviving commissioners named in the charter reorganized the municipal government, elected successors to commissioners who had died, and acted openly in procuring a WPA grant for the construction of a town hall or municipal building, in obtaining county aid therefor, and in levying municipal taxes after due advertisement to meet the

municipality's share of the cost of constructing said building. *Held:* The mayor and the commissioners of the town were *de facto* officers, and their acts are valid and binding as to all third persons dealing with them in their official capacity in regard to the construction of the municipal building.

5. Municipal Corporations § 45a—Taxpayers held estopped by their conduct from attacking validity of municipal tax levy.

De facto officers of a municipality in response to a petition, signed by residents of the municipality, including some of plaintiffs, reorganized the municipal government for the purpose of procuring a town hall or municipal building, and, pursuant to this purpose, obtained a WPA grant therefor and aid from the county in its construction, duly levied taxes to raise the town's part of the cost of said construction after due advertisement, and collected a large part of the taxes so levied without protest on the part of plaintiffs, although they had full knowledge of each and every step taken. Thereafter plaintiffs instituted this action to restrain the collection of the taxes on the ground that the *de facto* officers were not the duly authorized governing agency of the town. *Held:* Plaintiffs having failed to make protest and having accepted the benefits of the aid obtained in the construction of the municipal building, are estopped from maintaining this action to restrain the collection of the taxes.

APPEAL by plaintiffs from *Harris, J.*, 5 December, 1940, at Hertford, N. C. From HYDE. Affirmed.

The judgment of the court below is as follows:

"This cause was heard before the undersigned at Hertford, N. C., by consent of the parties upon application of the plaintiffs for a permanent injunction, restraining the collection of taxes which had been levied by the Mayor and Board of Commissioners of the Town of Engelhard, N. C., for the fiscal year 1939-1940, to provide funds with which to pay a note which the Town had issued in anticipation of said taxes and for the operating expenses of the Town during the fiscal year. The Court finds the following facts:—

"In 1913, the Town of Engelhard, N. C., was incorporated by acts of The General Assembly of North Carolina, Chapter 48 of the Private Laws of 1913, and Chapter 15, Extra Session of Private Laws of 1913. The Mayor and Board of Commissioners were named in the statute an those who were named qualified as Mayor and members of the Board of Commissioners, and performed their duties for some time. In 1915, an election was called, but no voters presented themselves for the purpose of voting for Mayor and members of the Board of Commissioners, and thereafter said Mayor and members of the Board of Commissioners therein performed none of the functions of their offices until the year 1939. Two of the members of the Board of Commissioners died during that time and the Mayor, Closs Gibbs, was elected and qualified in 1927, as a member of the General Assembly of North Carolina. R. S. Spencer,

one of the Commissioners named in the bill incorporating the Town, after qualifying as a member of the Board of Commissioners of the Town of Engelhard, was elected and qualified as a member of the Local School Committee for the Engelhard district.

"No election had been held for the purpose of electing a Mayor and the members of the Board of Commissioners for the Town of Engelhard since 1915, until this date.

"In 1939, a large number of the citizens and taxpayers of the corporation of Engelhard petitioned Closs Gibbs, Mayor, and the remaining living members of the Board of Commissioners, to reorganize the town government and to petition the WPA for a grant of money to aid in the building of a municipal building or Town Hall and also petitioned the said officers to levy such taxes as might be necessary to supplement the sum to be received from the WPA in order to provide an adequate municipal building. Among the petitioners were some of the plaintiffs in this action. The matter received much public discussion and the contemplated action was known by all of the citizens of the Town of Engelhard. Acting upon such petition, Closs Gibbs, as Mayor, and R. S. Spencer and S. S. Neal held a formal meeting and levied the tax sought to be enforced and thereafter elected I. B. Watson and George C. Brown as Commissioners to fill the place of the two who had died, to-wit: George E. Roper and Guy Guthrie. The Board of Commissioners then proceeded to elect the Town Officers, to-wit: Constable, Tax Collector, Town Clerk, and Financial Officer.

"(Prior to the organization meeting, the Mayor and members of the Board of Commissioners had caused the Local Government Commissioner in Raleigh to be interviewed with respect to the legality of their contemplated action and were advised that a municipal building was a necessary expense and that the Mayor and living members of the Board had the legal right to reorganize and issue the town's note in anticipation of the collection of the tax to provide a part of the funds for constructing such a building.) To the foregoing portion of the judgment in parentheses, constituting a finding of fact, plaintiffs excepted and assigned error.

"(Having reorganized and having elected commissioners to succeed those who had died, application was made to the WPA for a grant of money to assist in the construction of said municipal building. The WPA granted the sum of approximately $2,900.00. Hyde County donated by way of material and labor, approximately $700.00. Various individuals donated materials and labor so that the cost to the Town of Engelhard was about $1,200 in actual money.) To the foregoing portion of the judgment in parentheses, constituting a finding of fact, the plaintiffs excepted, and assigned error.

"In August, 1939, at a meeting attended by Gibbs, Neal and Spencer, a budget was passed as follows:

"For Building Supplies necessary for proposed Municipal Building	$700.00
For Purchase of Lot for Site of Municipal Building	250.00
For necessary Expense and Current Expenses	125.00

"At said meeting a list of all property in the Town of Engelhard was presented, amounting to a total of $157,188.00. At said meeting, motion was made and unanimously carried that an *ad valorem* tax of one-half of one per cent on the $100.00 valuation be levied and a poll tax of $1.50 on each taxable poll also be levied for the purpose of meeting the budget adopted at said meeting. Notices of the budget and the tax levy as above set out were posted in conspicuous places in the Town of Engelhard.

"(Thereafter, the WPA furnished to the Town of Engelhard the sum it had agreed to furnish. Hyde County furnished approximately $700.00 in material and labor which went into the construction of said building, and various individuals contributed material and labor. It became necessary for the collection of the 1939 tax as levied. Application for permission to issue this note was made to the Local Government Commission and notice of such application was printed in *Hyde County Herald,* as provided by law, and at the time fixed for the sale, sold the same to the Engelhard Banking & Trust Company for par and accrued interest. Said bank paid for said note and is now the owner thereof. Said note was in the form prescribed by the Local Government Commission and was executed by Closs Gibbs, as Mayor, and I. B. Watson as Town Clerk, and was approved by O. I. Williams, Attorney for the Town of Engelhard.) To the foregoing portion of the judgment in parentheses, constituting a finding of fact, plaintiffs excepted and assigned error.

"The construction of the municipal building was begun in the latter part of 1939, and was completed in the late summer of 1940, and was erected on a lot purchased for the use of the Town of Engelhard, deed for which is held in escrow by the Engelhard Banking and Trust Company to be delivered to the Town of Engelhard upon such payment of the purchase price.

"Prior to the tax levy made in August, 1939, the Town of Engelhard did not owe any money whatsoever and there were no expenses to be incurred by said Town until after the reorganization in August, 1939. (Said building is now completed, and serves a useful purpose in housing fire equipment, furnishing to the Town of Engelhard office rooms for its officers, and providing an auditorium for the use of such purposes as

municipal buildings are usually used for.) To the foregoing portion of the judgment in parentheses, constituting a finding of fact, plaintiffs excepted and assigned error.

"(All the citizens of the Town of Engelhard, particularly the plaintiffs in this action, had full knowledge that the Mayor and Board of Commissioners were reorganizing the Town Government; they knew that said officers were holding meetings in response to the petition of the citizens of the town; knew that they had made application to WPA for a grant of money for the purpose of assisting in the construction of said municipal building and also knew that a part of the cost thereof was to be paid from the proceeds of a tax levy made in August, 1939; they knew that said levy had been made. They knew that the Mayor and Board of Commissioners of the Town of Engelhard had applied to the County Government Commission for permission to issue the town's note in the sum of $450.00, and later knew that permission had been given to issue such note and knew that the sale thereof was advertised by public notice as required by law; they knew when said note was being sold, and knew that the Engelhard Banking & Trust Company had purchased the same and had lent its money to the Town of Engelhard based on its faith in the legality of said note, and the legality of the tax which had been levied to pay it. During all the time of the reorganization of the town government, the levying of the tax, advertising and selling the town's note and the actual construction of the building, they had full knowledge of each and every step taken and no protest was ever made by any one of them against any act taken by the Mayor and Board of Commissioners in respect to the levying of the tax, the borrowing of the money, or the construction of the building. They also knew that during the spring and summer of 1939, a large number of the citizens and taxpayers of the town were paying the tax levied against them by the Mayor and Board of Commissioners, to-wit: at least two-thirds of said citizens and taxpayers. They knew that the WPA had granted approximately $2,000.00 which was being used in the construction of the Municipal Building; they knew that Hyde County had appropriated about $700.00 in labor and material, which was being used in the construction of the building, and that various individuals were also contributing labor and material for such purpose.) To the foregoing portion of the judgment in parentheses, constituting a finding of fact, plaintiffs excepted and assigned error.

"(Upon the foregoing facts, it is ordered, adjudged and decreed that the restraining order heretofore issued in this cause by Honorable C. E. Thompson, Superior Court Judge, on September 4, 1940, be, and the same hereby is dissolved.) To the foregoing adjudication plaintiffs excepted and assigned error. This December 5, 1940. W. C. Harris, Superior Court Judge."

From the above judgment plaintiffs appealed to the Supreme Court.

Rodman & Rodman for plaintiffs.
Carter & Carter and O. L. Williams for defendants.

CLARKSON, J. This is an action brought by plaintiffs, residing in the town of Engelhard, against defendants to restrain them from levying a certain tax which plaintiffs contend is illegal and void. That they owed no tax and the levy "would cast a cloud upon their title." The court below found the facts and rendered judgment in favor of defendants, dissolving the restraining order. The record imports verity. None of the exceptions and assignments of error set forth in the judgment of the court below, made by plaintiffs, can be sustained on the facts found. We therefore think the judgment is correct. It will be noted that the cause was heard "by consent of the parties."

N. C. Code, 1939 (Michie), sec. 556, is as follows: "An issue of law must be tried by the judge or court, unless it is referred. An issue of fact must be tried by a jury, unless a trial by jury is waived on a reference ordered. Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it."

Sec. 569: "Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the fact found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly."

The learned and efficient judge in the court below found the facts and his conclusions of law, in accordance with the statutes, *supra,* and dissolved the restraining order. *Ins. Co. v. Carolina Beach,* 216 N. C., 778 (788-9).

The court below found: *"All the citizens* of the Town of Engelhard, particularly the plaintiffs in this action, had full knowledge that the Mayor and Board of Commissioners were reorganizing the Town Government; they knew that said officers were holding meetings in response to the petition of the citizens of the town; knew that they had made application to WPA for a grant of money for the purpose of assisting in the construction of said municipal building and also knew that a part of the cost thereof was to be paid from the proceeds of a tax levy made in August, 1939; they knew that said levy had been made," etc.

In *Smith v. Carolina Beach,* 206 N. C., 834 (836-7), *Brogden, J.,* speaking for the Court, said: "What is a *de facto* municipal officer?

A comprehensive definition of the term is found in *Waite v. Santa Cruz,* 184 U. S., 302, 46 L. Ed., 552, and is in the following language: 'A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.' The same general idea has been expressed by this Court, speaking through *S. v. Lewis,* 107 N. C., 967, 12 S. E., 457, as follows: 'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised. . . . under color of an election or appointment, by or pursuant to a public unconstitutional law, before the same is adjudged to be such.' See, also, *Van Amringe v. Taylor,* 108 N. C., 196, 12 S. E., 1005; *Hughes v. Long,* 119 N. C., 52, 25 S. E., 743; *Rodwell v. Rowland,* 137 N. C., 617, 50 S. E., 319; *Whitehead v. Pittman,* 165 N. C., 89, 80 S. E., 976; *Markham v. Simpson,* 175 N. C., 135, 95 S. E., 106."

In 22 R. C. L., sec. 306, p. 588, it is said: "Lord Ellenborough has defined an officer *de facto* as one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law, and this definition has been quoted with approval in many cases. Another and more comprehensive definition is as follows: A person is a *de facto* officer where the duties of the office are exercised: 'First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be. Second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent, requirement, or condition, as to take an oath, give a bond, or the like. Third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public. Fourth, under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such.' And this has been widely accepted."

The court below further found: "During all the time of the reorganization of the town government, the levying of the tax, advertising and

selling the town's note and the actual construction of the building, they had full knowledge of each and every step taken and no protest was ever made by any one of them against any act taken by the Mayor and Board of Commissioners in respect to the levying of the tax, the borrowing of the money or the construction of the building."

It will be noted in the finding of facts above set forth "They had full knowledge of each and every step taken." We think plaintiffs are estopped by their conduct to make the contention here made.

In *R. R. v. Lassiter & Co.*, 207 N. C., 408 (415), speaking to the subject: "The law is as follows, as stated in *R. R. v. Kitchin*, 91 N. C., 39 (44): 'Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss.' *Barnes v. Lewis*, 73 N. C., 138; *Vass v. Riddick*, 89 N. C., 6; *Bank v. Liles*, 197 N. C., 413 (418); *Bank v. Clark*, 198 N. C., 169 (173); *Lightner v. Knights of King Solomon*, 199 N. C., 525 (528)." *Warehouse Co. v. Bank*, 216 N. C., 246 (254).

It appears from the findings of fact, argument and brief of defendants that "Engelhard is a thriving community and the building which has been constructed was badly needed. It houses the fire equipment for the town, furnishes necessary offices, and an auditorium for community activities. Its need was felt by all the citizens, including the plaintiffs. They were willing that the building be built and that the Government and the County of Hyde furnish its money for such purpose. Yet they voice objection only when it came to paying the taxes which had been levied against them. They are willing to accept the benefits which they have obtained from this building and ought to now be made to pay their proper part of the expenses."

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

Affirmed.

MARIAN MITCHELL v. JOHN T. SAUNDERS, JULIAN A. MOORE AND BILTMORE HOSPITAL.

(Filed 26 February, 1941.)

1. Physicians and Surgeons § 15a—

Where one surgeon assists another in performing an operation and both assist in placing gauze sponges in the wound, both are charged with the duty of exercising due care to remove all the gauze sponges.

2. Appeal and Error § 40e: Trial § 22b—

Upon appeal from the denial of a motion for judgment as of nonsuit, the Supreme Court cannot consider the evidence of defendant, whether contradicted or uncontradicted, except in so far as it may tend to support

plaintiff's case, and the reviewing court is not concerned with the credibility of the evidence but will determine only whether there is any evidence sufficient to support plaintiff's cause of action.

3. Physicians and Surgeons § 15e—Applicability of doctrine of res ipsa loquitur to malpractice cases.

Since a physician or surgeon is not an insurer of results, no presumption of negligence can arise from the mere result of treatment upon the theory that it was not satisfactory, or less than could be desired, or even different from what might be expected. However, when the cause of injury does not occur in the ordinary course of things when proper care is exercised, and proper inferences may be drawn by ordinary men from the facts adduced, so that the presumption rests upon more than the mere fact of disappointing results from the treatment, the doctrine of *res ipsa loquitur* may apply, the applicability of the doctrine depending upon the facts and circumstances of each case.

4. Negligence § 19c—Evidence of defendant in explanation does not preclude application of doctrine of res ipsa loquitur.

Proof of facts invoking the doctrine of *res ipsa loquitur* establishes a *prima facie* case entitling plaintiff to the submission of the issue of negligence to the jury, and the doctrine does not merely cast the burden of going forward with the evidence on the defendant to explain the matters which are supposed to be peculiarly within his knowledge, and evidence in explanation offered by defendant does not rebut the presumption, but merely raises for the determination of the jury the question whether plaintiff has established negligence by the preponderance of the evidence, the credibility of the evidence remaining within the exclusive province of the jury.

5. Physicians and Surgeons § 15e—Res ipsa loquitur applies when it is established that defendant surgeons left gauze sponge in wound after operation.

Where it is established that defendant surgeons left a gauze sponge in a wound after an operation the doctrine of *res ipsa loquitur* applies upon the presumption that defendants failed to exercise due care to remove all foreign bodies from the wound after the operation, which presumption entitles plaintiff to go to the jury notwithstanding evidence on the part of the physicians as to the methods employed during the operation, the manner in which the gauze sponges were handled and the exercise of great care in the usual and customary manner to prevent leaving any sponges in the wound.

6. Same—

Plaintiff's evidence established that defendant physicians left a gauze sponge in the wound after the operation and that plaintiff suffered damages as a result thereof. *Held:* The fact of leaving a sponge in plaintiff's body is so inconsistent with due care as to raise an inference of negligence entitling plaintiff to go to the jury irrespective of the application of the doctrine of *res ipsa loquitur.*

STACY, C. J., concurring.

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

MITCHELL *v.* SAUNDERS.

APPEAL by defendants, John T. Saunders and Julian A. Moore, from *Nettles, J.*, at December Term, 1940, of BUNCOMBE. Affirmed.

Vonno L. Gudger for plaintiff, appellee.
Smathers & Meekins for defendants, appellants.

SEAWELL, J. This cause comes here upon an appeal of the defendants, John T. Saunders and Julian A. Moore, from a judgment of Nettles, J., rendered in the Superior Court of Buncombe County, affirming the judgment of the general county court of Buncombe County, where recovery had been made against the defendants for injuries which the plaintiff alleges she sustained through the negligence of the defendants in leaving a gauze sponge deeply buried in the side of her leg or hip, about one-half inch from the thigh bone, where it had been placed during an operation performed upon her by the defendant Saunders, assisted by the defendant Moore.

It was admitted by the defendant Saunders that the gauze sponge had been thus left in plaintiff's body at the conclusion of the operation and that it had remained there for a period of some months until the second operation, when it was removed. The defendant Moore was not present at the second operation, but proof that the gauze had been left in the surgical wound, which had been closed over it, was plenary.

The evidence tends to show that suppurating channels, or sinuses, were formed in the leg, beginning in the vicinity of the gauze sponge and extending through intervening tissues to the exterior, where quantities of offensive pus were discharged until the second operation. Prior to this second operation, opaque oil was injected into these canals, and one of them traced the canal, or sinus, to its origin at the sponge, and another sinus, or canal, lay within a quarter of an inch of this. Methylene blue, similarly injected to define the sides of the sinus for excision, followed the same course and stained the sponge a greenish blue. The hospital chart showed that the gauze sponge was infiltrated with scar tissue.

There was evidence sufficient for the jury to consider as showing proximate causative connection between the presence of the pad and certain deleterious conditions complained of—amongst them excessive pain, inconvenience, physical and mental discomfort and suffering, disorder of the nervous system, and possibly permanent injury through the stiffening of the knee joint.

Both of the defendants assisted in placing the gauze sponges in the wound and, under the evidence, we think were both charged with the duty of exercising due care in their removal.

Both of the defendants testified as to the methods employed during the operation, the manner in which the gauze sponges, nearly one hundred in number, had been handled, and both from observation and as experts testified that great care had been exercised in the usual and customary manner to prevent leaving any sponges in the wound. They described the system used as "palpating," or feeling for the sponges, and testified that this was done thoroughly and with due care.

Several experts were examined who, in answer to hypothetical questions, approved of the methods employed by the defendants. Their evidence, however, was largely directed to an approval of the general treatment given by Dr. Saunders to his patient and to the general result produced.

There are some exceptions to the instructions given to the jury upon the trial, but it is unnecessary to discuss them in detail here, as we do not find them sufficiently meritorious to entitle the defendants to a new trial.

The real controversy here is over the refusal of the trial judge to grant the defendants' motions for judgment as of nonsuit, made upon the trial.

The defendants contend that there was no evidence of negligence on the trial of the cause, except that which might be inferred from the doctrine of *res ipsa loquitur,* applied to the fact of leaving the gauze sponge in plaintiff's body at the first operation. They contend that the doctrine of *res ipsa loquitur* has no application to the facts of this case; but that if it does apply, its force is spent, and the presumption of negligence raised by it is fully met, when upon the trial an explanation was given with regard to the matter and the facts made fully known.

It is a well settled rule that upon a motion by the defendant for judgment as of nonsuit, the reviewing court cannot consider the evidence of defendant, whether contradicted or uncontradicted, except in such respect as it may tend to support plaintiff's case. *Davidson v. Telegraph Co.,* 207 N. C., 790, 178 S. E., 603. The plaintiff may predicate his recovery upon his own evidence or upon the evidence of the defendant, or both. The concern of the Court is to ascertain whether there is any evidence—not to determine whether that produced by one side or the other should be believed. We have thought it convenient, however, to refer to the defendants' evidence that due care had been exercised, in order to discuss their contention with regard to the motion for judgment as of nonsuit, particularly in connection with the view they take of the nonapplicability of *res ipsa loquitur,* and its effect upon the case, if applied, in view of defendants' explanation of the facts.

Much loose discussion has been given to the question of the availability of *res ipsa loquitur* in medical and surgical cases involving charges

of malpractice. Our own Court has been somewhat restrictive in applying the doctrine. The restrictions, none too well defined and, therefore, the source of controversy, seem to spring from the recognized and often repeated rule that a physician or surgeon is not a guarantor of the result of his treatment. Some further obstacles to the application of the doctrine in certain connections have arisen from two conflicting theories, which we sometimes find advanced in the same case: First, that the practice of medicine and surgery is largely empirical (which means unscientific), therefore, the doctrine would have little or no significance; and, second, that these professions are so highly scientific that the doctrine or inference would have no meaning except to men learned in the profession—certainly not to a jury. Either way you put it, on these theories all facts are considered consistent with proper treatment until professionally shown to be otherwise.

It follows, from the rule that the physician or surgeon is not an insurer of results, that no presumption can arise from the mere result of a treatment upon the theory that it was not satisfactory or less than could be desired, or different from what might be expected. *Red Cross Medical Service Co. v. Greene,* 126 Ill. A., 214; *Thorp v. Talbert,* 197 Iowa, 95, 196 N. W., 716. We must not be understood as holding that under no circumstances might the condition in which the plaintiff has been left, as the result of the treatment, give rise to the presumption of *res ipsa loquitur,* or that under no circumstances may a treatment, however unreasonable and plainly destructive of the curative purpose, give rise to the doctrine, despite the empiric and professional veil. Such cases must stand upon their own bottoms.

But where proper inferences may be drawn by ordinary men from proved facts which give rise to *res ipsa loquitur* without infringing this principle, there should be no reasonable argument against the availability of the doctrine in medical and surgical cases involving negligence, just as in other negligence cases, where the thing which caused the injury does not happen in the ordinary course of things, when proper care is exercised. *Vergeldt v. Haartzell,* 1 F. (2d), 633; *Brown v. Shortlidge,* 277 P., 134; *Shockley v. Tucker,* 127 Iowa, 456, 103 N. W., 360; *Beckwith v. Boynton,* 235 Ill. App., 469; *Sweeney v. Erving,* 35 App. (D. C.), 57 (Aff. 228 U. S., 233, 57 L. Ed., 815).

The case at bar stands entirely clear from this field.

Uniformly, in this and other courts, *res ipsa loquitur* has been applied to instances where foreign bodies, such as sponges, towels, needles, glass, etc., are introduced into the patient's body during surgical operations and left there. *Pendergraft v. Royster,* 203 N. C., 384, 166 S. E., 285, and cases cited; *Quell v. Tennery,* 262 Mass., 54, 159 N. E., 45; *Sellers v. Noah,* 209 Ala., 103, 95 S., 167; *Ault v. Hall,* 119 Ohio State, 422, 164 N. E., 518; *Davis v. Kerr,* 239 Pa., 35, 86 A., 1007.

Shearman & Redfield on Negligence, section 59 (quoted in *Pendergraft v. Royster, supra,* and *Covington v. James,* 214 N. C., 71, 197 S. E., 701), is a guarded statement of the applicability and propriety of the doctrine that should anticipate and free it from the objections usually urged in cases of this kind. "The maxim *res ipsa loquitur* applies in many cases, for the affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury, but in these cases the surrounding circumstances which are necessarily brought into view, by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof that the injured person is able to offer or that it is necessary to offer." We think the doctrine is applicable to the present case.

We cannot agree with the defendants' counsel that *res ipsa loquitur* affords only an infertile presumption, designed merely to require the defendants to go forward with the evidence, or that the inferences drawn from it are fully met when evidence of the facts is introduced. We are aware that the rule, as contended for by the defendants, has been applied in some jurisdictions; but in those States where both the credibility of witnesses and the weight of evidence is a matter for the jury, and the explanation is in defendant's evidence, the rule, necessarily, does not apply. *Tennessee C. R. Co. v. Walker,* 155 Ky., 768, 160 S. W., 494; *Louisville v. Dahl,* 170 Ky., 281, 185 S. W., 1127; *Lally v. Prudential Life Ins. Co.,* 75 N. H., 148, 172 A., 208; *Ohio National Ins. Co. v. Craddock,* 221 Ky., 821, 299 S. W., 964; *Ryan v. Fall River Iron Works Co.,* 200 Mass., 188, 86 N. E., 310; *Lindenbaum v. N. Y., N. H., & Hudson R. Co.,* 197 Mass., 314, 84 N. E., 129; *Gannon v. LaClede Gaslight Co.,* 145 Mo., 502, 43 L. R. C., 505, 46 S. W., 908, 47 S. W., 907.

The effect of the presumption is no longer an open question in this State. The decisions are contrary to the proposition that any explanation which the defendant may see fit to furnish of matters which are supposed to be peculiarly within his knowledge is sufficient to rebut the *prima facie* case which *res ipsa loquitur* has made, or to repel the presumption, or, rather, inferences, which the jury may draw from it. It is still a matter for the jury. *"Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.* Such, we think, is the view generally taken of the matter in well considered judicial opinions." *Modlin v. Simmons,* 183 N. C., 63, 65, 110 S. E., 661. That the probative force of *res ipsa loquitur* does not disappear upon the introduction of defend-

ants' explanatory evidence is made clear from the comprehensive and discriminating opinion by *Justice Adams*, speaking for the unanimous Court, in *White v. Hines*, 182 N. C., 275, 109 S. E., 31, in which the result is summed up: "In cases of negligence, in which the doctrine of *res ipsa loquitur* applies, after all the evidence is introduced, the vital question is not whether the defense specifically relied on is established to the entire satisfaction of the jury, *but whether on the issue of negligence the evidence preponderates in favor of the plaintiff, and by this test the answer to the issue is to be determined.*" Announcing the same principle are: *Page v. Mfg. Co.*, 180 N. C., 330, 104 S. E., 667; *Morrisett v. Cotton Mills*, 151 N. C., 31, 65 S. E., 514; *Winslow v. Hardwood Co.*, 147 N. C., 275, 60 S. E., 1130; *Stewart v. Carpet Co.*, 138 N. C., 60, 50 S. E., 562; *Womble v. Grocery Co.*, 135 N. C., 474, 47 S. E., 493. This is in accord with the uniform holding in the great majority of the jurisdictions of this country. 45 C. J., p. 1219, sections 783, 784, and notes. The small number of cases holding otherwise have been rejected by our Court.

But the plaintiff need not invoke the doctrine of *res ipsa loquitur* in order to prevail in this case. The fact itself, that is, the leaving of a sponge within the body of the patient, is so inconsistent with due care as to raise an inference of negligence. Whatever may be said of the applicability of *res ipsa loquitur*, natural evidence cannot be withdrawn from the jury by applying to it a doctrinal label.

We think the challenged evidence sufficient to sustain the verdict. We find no error in the trial of the case, and the judgment of the court below is

Affirmed.

STACY, C. J., concurs on the ground that the evidence is sufficient to carry the case to the jury, but is not in accord with all that is said in the opinion on the application of *res ipsa loquitur*, especially in respect of its presumptive effect. 20 Am. Jur., 215; 20 R. C. L., 185, *et seq.*

The charge contains an inexact expression in reference to the "proper degree of skill" required of the defendant. Taken contextually, however, it is not perceived that any material prejudice resulted therefrom.

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

T. S. RADFORD, PLAINTIFF, v. THE CITY OF ASHEVILLE, DEFENDANT.

(Filed 26 February, 1941.)

1. Municipal Corporations § 14—

The duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition for travel implies the duty of making reasonable inspection to discover defects and obstructions, and the municipality is guilty of negligence if it fails to repair a dangerous condition of which it has either express or implied notice.

2. Same—

The duty of a municipality to exercise due care to keep its streets and sidewalks in a reasonably safe condition for travel applies to manhole covers, unloading chutes, coal chutes, or any other device forming an integral part of the public ways.

3. Same—Evidence held for jury on question of municipality's implied notice of dangerous defect in sidewalk.

Evidence that the metal lid of a coal chute forming an integral part of a sidewalk, had become warped and that its hinges had rusted off, so that it would rear up or slide down the hill, and would clang and clatter when stepped on, and that for some time prior to the injury in suit children would jump up and down on it to make noise, tends to show an unsafe and dangerous condition in the sidewalk and that the condition had existed for a sufficient length of time to give the city implied notice thereof, and in an action by a pedestrian injured as a result of such condition, the evidence is sufficient to be submitted to the jury on the issue of the city's negligent failure to exercise due care to keep its sidewalk in a reasonably safe condition.

4. Same—

The duty of a municipality to make reasonable inspection of its streets and sidewalks is not affected by the extent and number of its streets and sidewalks.

APPEAL by defendant from *Nettles, J.*, at November Term, 1940, of BUNCOMBE. No error.

This action was brought by the plaintiff to recover damages for an injury sustained by him through the alleged negligence of the defendant in failing to keep a certain sidewalk in the city in good repair and safe for the use of pedestrians.

Under appropriate pleadings, evidence was introduced for the plaintiff and the defendant, the parts of which pertinent to this appeal may be summarized:

The plaintiff was walking on the sidewalk on Broadway Street in Asheville on the way to his rooming house. The sidewalk in question was immediately adjacent to the rooming house. The lower part of this building was occupied as a furniture store. Near the upper corner

of the building, which the plaintiff was trying to reach, there was a coal chute near to and just above the door leading downstairs into the storeroom, which chute went under the floor of the building at an angle. The top of the chute was a metal leaf running out into the sidewalk about 18 inches from the wall and running up and down the sidewalk in an oblong shape. This door was designed to be opened up and turned back upon hinges, and when in a closed position formed a part of the sidewalk. The hinges were off, as well as the angle irons. The door was about 20 inches wide and 25 inches long and about a quarter of an inch thick. The hinges were all rusted off the butts. They were rusted down to the butts and wouldn't hold. There was a little lever on the bottom of it that worked back toward the street to keep the door from being raised from the outside. There had been angle irons under the covering. The angle irons were worn off clear down in the chute.

Plaintiff was uncertain whether he stepped on this door, but when he recovered consciousness he was lying on the sidewalk, with the door off to one side—the plaintiff on the left side down the street. Plaintiff's right leg was down in the coal chute, and his left elbow was fractured.

This occurred between nine and ten o'clock at night on the 12th of September. There were automobiles and trucks parked around the side, and the street light was around forty to eighty steps from the place. These lights did not shine in there and there were no other lights.

Plaintiff called to a Mr. Gilbert for help after he recovered consciousness. He did not know how long he had lain there, because in falling to the sidewalk he hit the left side of his head and was unconscious. The joint of the right elbow was fractured; plaintiff had it dressed three times and pus had come out of it. The left knee and left hip were bruised, the right leg skinned from the knee down, the right ankle sprained, and the shin on that side fractured. Later on a piece of bone was taken out from that leg in February and still later plaintiff got a piece of shivered bone out himself. Plaintiff testified that he suffered great pain and continued to suffer pain and inconvenience from the injury. Plaintiff further testified that he had been running a place of business in Asheville and making a good living out of it, but was not able to continue it and was compelled to sell it and had done no work since; not able to do any hard lifting or digging of any kind.

Plaintiff later had the coal chute measured. The print of his right foot was still there two weeks later and the coal chute in the same shape as when he got hurt, that is, the lid was.

Plaintiff then offered in evidence certain pieces of iron and wood gotten from the coal chute as explaining its condition. He exhibited one iron as lying where his foot hit the coal chute.

Further describing the condition of the chute covering, plaintiff testified that there had been angle irons around four sides of the coal chute, fastened with rivets, but they had all rusted off, indicating one of these irons was off the lid. The angle irons were insufficient to hold the lid, which would slide when you stepped on it—move up and down the street, or "slide ever which way you stepped and pushed it."

The street at this point had a decided downward inclination northward.

Enough of the retaining parts of the lid had rusted off to cause it to slide when stepped upon, and the lower end would "rear up." Plaintiff further testified that after he had been hurt and the lid replaced on the hole that he could lie in his rooming house and hear a clang as people passed over it.

J. P. Ducker, a witness for the plaintiff, testified that he knew the location of the coal chute, which was approximately eight or ten feet from the door of the place where he was working—the front door on the east side of Broadway and the west side of the building. The building was occupied by Mr. McClintock's woodworking place, refinishing, upholstering, etc. The second floor was apartments. The building had a brick front. The street was paved and was made of concrete, and the sidewalk was approximately five feet wide. At that point the street was down hill going northward.

Witness described the opening in the cover. He had seen it open as much as an inch and a half; had seen it slide down hill, and he had kicked on it a couple of times. That was before Mr. Radford fell. The cover looked like a thin piece of metal over it about a quarter of an inch in thickness and seemed to be warped or out of place.

Witness said that he had put the cover back on a couple of times before Mr. Radford fell. That he would not swear the exact date but did not believe it was so long before. He would put it something from a week to a year.

Witness testified that he called the attention of a city employee on a truck to the condition of this cover, saying: "Look at this thing; somebody is going to get hurt on it."

He testified that kids would go down there and jump up and down on it with both feet, back and forth, making a racket on the chute cover, and that you could hear it while people were walking on it. He had examined the supports at the time Mr. Radford was hurt. The rivets were supposed to keep it from slipping off, but they had rusted off, and you could take your hand and take it off, or you could jump up and down on it, and it would slide off. It was supposed to have a groove around it to keep it in place, but it was not sufficient. In going down hill, if you stepped on one end of it, it would raise the other, if you

stepped on it hard, it would slide. When sliding it would leave an opening on the upper side of a quarter of an inch to two and a half inches. The hole from the top to the bottom of the chute was about eight feet.

The lid was a piece of metal a little longer than wide, about a quarter of an inch thick, had cleats on it, but they had been broken off or rusted, the ends were still there. It was warped and the sidewalk is not level and when you step on it it slips. Witness had seen the top of the coal chute off two or three times and had been working there several months; had seen children jumping up and down on the coal chute at least 25 times; saw none of them fall in.

R. Lee Gilbert, witness for the plaintiff, testified that he roomed in the apartment building near the place of the accident, heard Mr. Radford calling for help, went down and saw that he was "down in the place in the sidewalk," the place where they put coal in the basement. Where the coal chute breaks the sidewalk to go under the building the depth underneath was about two feet. The lid had slid down the street, moved off its regular place, where it set down and slid down to the right and Mr. Radford was down in that place. It seemed to have slid about a foot.

Plaintiff told this witness that he did not know how long he had been there, that it "knocked him out when he fell."

Witness gave the plaintiff first aid treatment with iodine and mercurochrome. Witness went on a trip and when he came back three or four days later he was advised that plaintiff had not been able to work, so they had a doctor with him. He was laid up for a week or ten days and told witness he would not be able to work and would have to sell his stand and go back in the country and stay a while. His arm was bruised up and he couldn't straighten up. He could not stand up and there was pain around his back. Plaintiff had been in active work at the stand and helping with trucking.

Witness stated that he had heard noises frequently at this place—a rattle when anyone stepped on the cover.

It was developed from defendant's evidence (C. L. McClintock), that the hinges to the cover had rusted in two and this made the lid loose, that the lid "wobbled" when feet were placed on either end of it.

Bearing upon the inspection of the streets, Dan Furr, witness for the defendant, testified that he was street superintendent of the city of Asheville; that he had gone to the place of the accident and had tried to get the cover off the chute and was compelled to use a screwdriver in that effort. "It was hooked on one side, and it slid back the other way. We took the screwdriver and tried to get it up; it would rock, but we couldn't raise it up enough to get my fingers under it." This witness

further testified that he had gone to this place because a formal notice of the accident had been filed with the city. On cross-examination this witness said that the first he had ever heard of it was when they were notified; that he did not know the condition of the coal chute on 12 September, 1939, because he was not down there; that he had never examined it before this time; that he had been along the street there a number of times but had never had any complaint; had walked along Broadway a number of times but had had no complaint; that he had not been down there prior to this time. "I have not, but (addressing the Court) Judge, here is what I wanted to explain. We have over two hundred miles of streets in the City of Asheville, and it is impossible for anyone to go around and examine every place all the time, and he has asked me if I've ever been down there, and I have been on the street before, but I hadn't noticed this particular place, because it hadn't been called to my attention that there had been anything wrong with it." Witness stated that he had not approved of the manner in which the coal chute had been placed, that it had been approved by someone else a long time ago; that he knew nothing about the coal chute only as he had just described. "And the only time these matters come before you is when a complaint is made."

At the conclusion of the plaintiff's evidence and at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit, which was denied.

Three issues were submitted to the jury relating to the negligence of the defendant, contributory negligence of the plaintiff, and the damages sustained, if any. The jury answered all issues in favor of the plaintiff and assessed the damages at $1,850.00. Motion to set aside the verdict for errors was denied and defendant excepted. From the judgment upon the verdict the defendant also excepted and appealed to this Court, assigning errors.

Sanford W. Brown and J. W. Haynes for plaintiff, appellee.
Philip C. Cocke, Jr., for defendant, appellant.

SEAWELL, J. Defendant's appeal rests upon its exceptions to the denial of its motions for nonsuit made at the close of the plaintiff's evidence and renewed after all the evidence was in.

Upon the whole evidence we do not think that the defendant could reasonably contend that the cover to the coal chute, which was a part of the sidewalk on a much used street and opposite a rooming house, was in a reasonably safe condition when the plaintiff sustained his fall and injury, or that the faulty and defective condition of the cover was not proximately the cause of the said fall and injury. The defendant, how-

ever, contends that it had no notice of this defective condition and was, therefore, not negligent in failing to repair it.

Such a plea is, of course, good against any sudden or recently appearing obstruction or other dangerous condition of which the defendant had no actual knowledge or which it could not have discovered by the exercise of due diligence. *Bell v. Greensboro,* 170 N. C., 179, 86 S. E., 1041. However, not only upon the principles of the common law but by statutory requirement it is the duty of the defendant to keep its streets, and particularly the sidewalks of the city, in a reasonably safe condition for travelers and those who have the right to use them. *Bunch v. Edenton,* 90 N. C., 431; *Fitzgerald v. Concord,* 140 N. C., 110, 112, 52 S. E., 309; *Tate v. Greensboro,* 114 N. C., 392, 19 S. E., 767; *Bailey v. Asheville,* 180 N. C., 645, 105 S. E., 320; *Russell v. Monroe,* 116 N. C., 720, 726, 21 S. E., 550. The very existence of such a duty requires a reasonable inspection of the streets from time to time, in order that this condition of safety may be maintained, and in order that dangerous obstructions, holes or surfaces may be discovered and the danger removed. This duty applies to manhole covers, unloading chutes, coal chutes, or any other device forming an integral part of the sidewalk over which pedestrians find it necessary or convenient to pass in the use of the streets. *Russell v. Monroe, supra; Tate v. Greensboro, supra.*

In the present case it is clear from the evidence as to the warped, rusted, hingeless condition of the coal chute, its habit of rearing up when the foot was placed on one end or sliding down hill, of clanging and clattering when stepped on, that it not only was unsafe for travel but that it had been so for a considerable period of time.

We do not attach much importance to the controversy over the sufficiency of the notice given to a city employee, the driver of a truck whose official capacity is not clear, but we do think that the evidence tended to show that the dangerous condition of the sidewalk had existed for a period of time sufficient to support the inference of implied notice, that is, that in the exercise of reasonable diligence the condition might have been known to the defendant and to justify the consequent finding by the jury that the defendant had negligently failed to perform its duty of keeping the sidewalk in proper repair and reasonably free from dangerous condition, and that this negligence was the proximate cause of plaintiff's injury. *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286; *Bailey v. Asheville, supra; Seagraves v. Winston,* 170 N. C., 618, 87 S. E., 507; Shearman & Redfield on Negligence, 6th Edition, Vol. 2, section 369.

The testimony of the Superintendent of Streets as to the manner in which the duty of inspection was performed does not lessen this conviction. Contrary to the implications of that testimony, this duty is not

affected by the extent and number of the street or sidewalks. *Barr v. Kansas City,* 105 Mo., 550, 16 S. W., 483; *Lindsey v. Des Moines,* 68 Iowa, 368, 27 N. W., 283; *Covington v. Visse,* 158 Ky., 134, 164 S. W., 332.

We find

No error.

S. M. HALE v. W. B. HALE.

(Filed 26 February, 1941.)

1. Automobiles § 19—

Under the provisions of the Virginia statute, sec. 2154 (232), Acts of Virginia General Assembly, 1938, a passenger in an automobile is a guest without payment unless there is some contractual relationship between the parties under which the passenger was obligated to pay for the transportation, or unless the transportation was contractually for the mutual benefit of both the passenger and the operator.

2. Same—

Where a passenger in the automobile owned and operated by his son on a trip to visit a relative, voluntarily pays the cost of gasoline on the trip, the father is a guest without payment for such transportation within the purview of sec. 2154 (232), Acts of Virginia General Assembly, 1938, since the father was not under any contractual obligation to pay for the gas and oil.

3. Same—

In order for a gratuitous guest to recover of the owner or operator of a car for negligent injury under the Virginia statute, sec. 2154 (232), Acts of Virginia General Assembly, 1938, he must show such gross negligence or willful and wanton misconduct on the part of the owner or operator as would raise the presumption of conscious indifference to consequences.

4. Same—

Evidence that the owner and operator of an automobile was driving 40 or 45 miles an hour on a winding road on a clear, dry day and that on a particularly bad "S" curve he lost control of the car, which ran off the road resulting in injury to a guest without pay, *is held* insufficient to show gross negligence on the part of the driver, and the driver's motion to dismiss as of nonsuit in an action governed by the Virginia law was properly allowed.

APPEAL by plaintiff from *Rousseau, J.,* at September Term, 1940, of SURRY. Affirmed.

Plaintiff, the father of the defendant, was, on 8 January, 1939, a passenger on the automobile of defendant on a trip into the State of

Virginia to visit a relative. At a point between Radford and Christiansburg, the automobile, which was being operated by defendant, ran off the road and down a fill. As a result plaintiff sustained certain personal injuries.

Thereafter, plaintiff instituted this action to recover damages alleging certain negligent conduct on the part of the defendant in the operation of the car. In the complaint no reference was made to the point of the accident.

Defendant, answering, denies negligence and pleads sec. 2154 (232), Acts of Virginia General Assembly, 1938. Plaintiff filed a reply thereto in which he denies that said statute or the decisions thereunder have any application, "for that plaintiff was not a guest of the defendant, without pay."

The accident is described by plaintiff as follows:

"Approaching the point where the car went off of the road there was quite a curve in the road to the left; it is what we call an 'S' curve, and there was a bridge there over a creek, and the road then curves again as it goes on to Christiansburg. The car ran off the road on the left-hand side the way it was going, and went down a fill about 25 feet, landing at the bottom . . . He was driving around 40 to 45 miles an hour. He had driven about 25 yards beyond the bridge when the car ran off the road. The road enters that bridge on a slight curve and after you get to the end of it there is a curve . . . I don't know just the exact distance, but I expect it was 150 yards from the point where he entered the curve until the car ran off the fill . . . The road was winding and curving all the way from Fancy Gap to the place of the wreck except for short straight stretches, but I believe the curve we had the accident on is worse than any of the others we had passed that morning . . . The day was clear and the road was dry, . . . The first thing I noticed about the movement of the car just before the wreck it looked like there was some irregularity in the movement of the car. The car was not operating just right. My son, who was driving, got to jerking the steering wheel backward and forward, and the first thing you knew over we went. The direction of the car had to change when he was jerking the steering wheel backward and forward. The jerking of the steering wheel started after the car began to get off its course, and that was the cause of it I reckon . . . After I noticed that something was wrong the car went over pretty soon. I thought my son was a little excited, but except for the excitement he was in complete possession of his faculties as far as I could tell at the time." The defendant testified: "I tried to control the direction of the car after some-

thing seemed to go wrong . . . I could not control the car. I don't know whether the front wheels of the car responded to the turning of the steering wheel or not; we just went over."

At the conclusion of the evidence on motion of the defendant, the court entered judgment dismissing the action as of nonsuit. Plaintiff excepted and appealed.

Folger & Folger for plaintiff, appellant.
Woltz & Barber for defendant, appellee.

BARNHILL, J. Section 2154 (232), Acts of Virginia General Assembly of 1938, provides that a person transported by the owner or operator of a motor vehicle as a guest without pay for such transportation is entitled to recover damages against such owner or operator for injuries to the person or property of such guest resulting from the operation of such vehicle only upon proof that the injury "was caused or resulted from the gross negligent or wilful and wanton disregard of the safety of the person or property of the person being so transported on the part of such owner or operator." The statute makes a distinction between the social or invited guest and the commercial or business passenger. The motorist who transports for pay or some other direct benefit is accountable as at common law, while the "host" who transports his "guest without payment for such transportation" is liable only for injuries caused by his gross negligence or willful or wanton misconduct.

The passenger is "a guest without payment for such transportation" when there is no contractual relationship between the parties under which the passenger was obligated to pay for the transportation and there are no sufficient facts to show that the transportation was contractually for the mutual benefit of both the passenger and the operator. *Master v. Horowitz,* 262 N. Y., 609, 188 N. E., 86, 95 A. L. R., 1182. It does not include persons who are being transported for the mutual benefit of both the passenger and the operator or owner of the car. However, the extent and nature of the reciprocal advantages which will exclude the passenger are not unlimited but are confined to certain definite relations, such as Master and Servant, and to tangible benefits accruing from the transportation—as in saving time for which he, as master, pays—facilitation of a servant's work, or the like. *Kruy v. Smith,* 144 Atl., 304; *Sullivan v. Richardson,* 6 Pac. (2d), 567; *Crawford v. Foster,* 293 Pac., 841 (Cal.); *Master v. Horowitz, supra; Chaplowe v. Powsner,* 175 Atl., 470 (Conn.), 95 A. L. R., 1177.

The fact that the person who is carried voluntarily pays for the gas and oil and other running expenses of the trip without being under any

contractual obligation so to do is insufficient to show that the passenger is not a guest within the meaning of the statute. 4 Bashfield, 87, sec. 2293; *Perkins v. Gardner,* 191 N. E., 350 (Mass.); *Master v. Horowitz, supra.*

Thus, the evidence is insufficient to take the plaintiff out of the provisions of the Virginia guest statute and to show that he was a passenger for hire. The facts in the present case depict, at most, a situation of reciprocal hospitality between members of the same family—that of the car extended by the son and that of the payment of the cost of gasoline by the plaintiff. It is barren of such definite relations, contractual or otherwise, and of such tangible mutual benefits as the statute contemplates in order to remove the plaintiff from the status of a guest and the consequences attaching thereto. Manifestly, there was no charge made by the defendant for the transportation of his father and the purchase of the gasoline was not intended by the father as an obligatory payment for services rendered. Doubtless the suggestion that there was a formal contract for transportation under which compensation was to be charged by the son and paid by the father would have met the displeasure of both at the time, and until self-interest of the plaintiff intervened. *Chaplowe v. Powsner, supra; McQuire v. Armstrong,* 255 N. W., 745, Anno. 95 A. L. R., 1180.

Plaintiff, being a guest without the payment for such transportation, to recover, must offer proof either of gross negligence or of willful and wanton misconduct. Gross negligence, as used in the statute, is elaborately defined in *Altman v. Aronson,* 231 Mass., 588, 121 N. E., 505, 4 A. L. R., 1185.

This definition has been quoted and approved by the courts of Virginia. *Thomas v. Snow,* 174 S. E., 837; *Young v. Dyer,* 170 S. E., 737; *Margiotta v. Aycock,* 174 S. E., 831 (Va.); *Boggs v. Plybon,* 157 Va., 30, 160 S. E., 77; *Jones v. Massie,* 158 Va., 121, 163 S. E., 63; *Osborn v. Berglund,* 159 Va., 258, 165 S. E., 410; *Collins v. Robinson,* 160 Va., 520, 169 S. E., 609; *Yonker v. Williams,* 192 S. E., 753 (Va.). Briefly, it is that degree of want of care which would raise the presumption of conscious indifference to consequences. It is the conduct of a person who is wantonly neglectful of the consequence of his acts, showing little or no regard for the effect upon the rights of others.

To make out liability in case of a gratuitous undertaking the plaintiff ought to prove a materially greater degree of negligence than he has to prove where the defendant is to be paid for doing the same thing. *Boggs v. Plybon, supra; Massaletti v. Fitzroy,* 228 Mass., 487.

To hold that a guest who, for his own pleasure, is driving with his

host may recover from him for injuries suffered where there is no culpable negligence, shocks one's sense of justice. The driver is often not an expert and makes no implied representation beyond these, namely; that he will not knowingly or wantonly add to those perils which may ordinarily be expected and that there are no known defects in the car which makes the operation particularly hazardous. *Boggs v. Plybon, supra; Jones v. Massie, supra.*

In *Young v. Dyer, supra,* in which the facts are very similar, the Court said: "A mere failure to skilfully operate an automobile under all conditions or to be alert and observant and to act intelligently and to operate an automobile at a lawful rate of speed, may or may not be a failure to do what an ordinarily prudent person would have done under the circumstances and thus amount to lack of ordinary care; but such lack of attention and diligence or mere inadvertence does not amount to wanton or reckless conduct or constitute culpable negligence for which defendant would be responsible to an invited guest."

The operation of an automobile at an excessive rate of speed by an inexperienced, unskillful and incompetent person 17 years of age who, by reason of his inexperience, lack of skill and incompetency, lost control of the car which leaves a pavement and goes into a ditch, does not constitute gross negligence. *Naudzius v. Lahr,* 234 N. W., 581 (Mich.), 74 A. L. R., 1189.

Measured by the standard prescribed by these and many other cases of the courts of Virginia and of other states having a similar statute, the evidence offered by the plaintiff fails to show more than the want of ordinary care on the part of the defendant.

As the evidence offered, considered in the light most favorable to the plaintiff, is not sufficient to establish gross negligence the defendant's motion to dismiss as of nonsuit was properly allowed.

Affirmed.

G. B. LACKEY v. SOUTHERN RAILWAY COMPANY, J. B. ROBINSON AND COCA-COLA BOTTLING COMPANY OF ASHEVILLE, INC.

(Filed 26 February, 1941.)

1. Torts § 6—

When a defendant in a negligent injury action files answer denying negligence but alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant under C. S., 618, as amended

by ch. 68, Public Laws of 1929. Whether the statute is applicable to an action brought under the Federal Employers' Liability Act, *quœre.*

2. Indemnity § 4—

No cause of action can accrue on a contract of strict indemnity until after liability of the indemnitee to a third person on a matter within the purview of the agreement has been established, and loss to the indemnitee has been made absolute and certain, and the indemnitor fails to indemnify the indemnitee in accordance with the agreement.

3. Removal of Causes § 4a—Complaint determines separability of action regardless of allegations in cross action set up by original defendant against alleged joint tort-feasor.

Plaintiff instituted this action under the Federal Employers' Liability Act to recover for injuries sustained when he hit a structure maintained in close proximity to the track while engaged in the performance of his duties on the train, alleging negligent failure on the part of the defendant to provide a reasonably safe place to work. Defendant denied negligence but alleged that if it were guilty of negligence, the company owning the structure was also guilty of negligence which concurred in producing the injury, and that the owner of the structure had executed a contract indemnifying the railroad company from liability in regard thereto, and the owner of the structure was made a party defendant under C. S., 618, as amended. The owner of the structure then moved for a removal to the Federal Court on the ground of the separability of the action and diversity of citizenship. *Held:* The question of separability will be determined from the allegations of the complaint irrespective of the allegations in the cross action, and the fact that the cross action improperly joins an action on the indemnity agreement and fails to state a good cause of action thereon, cannot be asserted by the codefendant as the basis of its contention of separability, and the codefendant's motion to remove is properly denied.

APPEAL by defendant Coca-Cola Bottling Company of Asheville, Inc., from *Alley, J.,* 27 December, 1940, of SWAIN. Affirmed.

Jordan & Horner for Coca-Cola Bottling Company of Asheville, Inc., defendant, appellant.

Edwards & Leatherwood for plaintiff, appellee.

SEAWELL, J. Plaintiff's action was brought under the Federal Employers' Liability Act (sections 51 to 59, Title 45, U. S. C. A.), and the complaint sets up the cause of action against the Southern Railway Company, the sole defendant brought in by plaintiff's process, arising out of the negligence of the defendant in failing to provide for plaintiff, its employee, a safe place in which to work, and for other negligence of the employer. The negligence alleged was the maintenance of a structure belonging to the Coca-Cola Bottling Company of Asheville, Inc., in such close proximity to the railroad track as to constitute a source of danger to the employees in passing the said structure, which seriously

injured the plaintiff in the performance of the duties required of him as a brakeman, as the train upon which he was riding brought him into collision with the structure. The Railroad Company denied its negligence, set up a contract of indemnity executed by the Coca-Cola Bottling Company, and alleged that if it was negligent in producing the injury the Coca-Cola Bottling Company was also negligent, and asked that this company be brought in as a joint tort-feasor under the 1929 Amendment to C. S., 618. This was done without exception from the plaintiff.

Thereupon, the Coca-Cola Bottling Company filed a petition and moved for the removal of the cause to the Federal Court on the ground of disparity of citizenship and separability of the action. This defendant is a Delaware corporation. The motion was denied in the court below and the defendant appealed to this Court.

The 1929 Amendment to C. S., 618—chapter 68, Public Laws of 1929—permits a proceeding in which a defendant sued in tort may bring into the case a joint tort-feasor, and defendants may litigate mutual contingent liabilities before they have accrued. The question whether such a proceeding is applicable to an action brought under the Federal Employers' Liability Act has been permitted to go by default.

Upon a motion to remove a cause from the State to the Federal Court on the ground of diversity of citizenship and separability of the action, the test of separability lies in the complaint and the statement of the action therein found. *Burleson v. Snipes,* 211 N. C., 396, 190 S. E., 220; *Rucker v. Snider Bros., Inc.,* 210 N. C., 777, 188 S. E., 405; *Trust Co. v. R. R.,* 209 N. C., 304, 183 S. E., 620; *Hood v. Richardson,* 208 N. C., 321, 180 S. E., 706; *Timber Co. v. Insurance Co.,* 190 N. C., 801, 130 S. E., 864.

The Court has found the rule to apply where a joint tort-feasor has been brought in under C. S., 618, *supra; Mangum v. R. R.,* 210 N. C., 134, 185 S. E., 644. This is regardless of the suggested cross action between the defendants thus brought in.

The appealing defendant claims, however, that it has been brought into the case unwillingly by virtue of a contract of indemnity which it had executed to the Railroad Company, and which is set out in full in the answer of that defendant, and claims that this takes the present case out from under the rule in *Mangum v. R. R., supra.* The cross action thus originating supplied the conditions of separability.

To illustrate the necessity and fairness of the rule that separability must be tested by the complaint, we have the defendant Coca-Cola Bottling Company brought into the case by the Southern Railway Company, original defendant, both under the statute—C. S., 618—and by reason of this contract of indemnity, upon which the Railroad Company seeks to recover against the new defendant. Examining the contract, we find

it one of strict indemnity and no provision of the contract has been breached, nor, indeed, is there any allegation that it has been breached in that part of the answer referring to the contract. It is also significant that the answer does not specifically ask for relief with respect to the contract. Therefore, no cause of action has accrued thereon against the indemnitor and in favor of the indemnitee. *Hilliard v. Newberry,* 153 N. C., 104, 68 S. E., 1056; *Reynolds v. Magness,* 24 N. C., 26; *Robinson v. Connell,* 240 Pa., 96, 87 A., 300; *Schwartz & Co., Inc., v. Aimwell Co., Inc.,* 227 N. Y., 184, 124 N. E., 892. The Coca-Cola Bottling Company preferred to remove the case to the Federal Court, rather than release itself by demurrer, although it claims to be a defendant here *in invitum.*

It is also true that plaintiff has made no motion with respect to the injection into his case of the irrelevant controversy.

There is a question here how far the Court may go on a motion to remove the cause to another jurisdiction in taking notice of the fact that the suggested separable cause involving the cross action on which removability is mainly predicated has been improperly joined in the answer and states no cause of action. We believe it to be consonant with a proper interpretation of the Federal Act relating to the removal of causes, and certainly consistent with its purposes, to apply the rule above laid down and refer the question of separability to the statement of the cause of action made in the complaint. Judged by that standard, it is not contended by the defendants that a separable action is involved. *Mangum v. R. R., supra.*

The appealing defendant admits, and we think properly, that if it is brought in solely by virtue of C. S., 618, the case is governed by the adverse ruling in the *Mangum case, supra.* That rule is applied with some positiveness to the facts in that case, although it was the original defendant which sought removal. We think the principle remains the same.

We find quoted with approval in that case the following from *Powers v. Chesapeake & Ohio Railway Co.,* 169 U. S., 97: "The cause of action is the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings."

It is, of course, true that if the plaintiff goes outside of the Federal Employers' Liability Act and states a separable cause of action, it may be removed, and several of the authorities cited to us by defendant are subject to that limitation.

Jurisdiction has been given the State courts to entertain actions arising under the Federal Employers' Liability Act because of the convenience and economy thus afforded suitors, and the Act expressly forbids removal. The rationale of this provision is given in *Southern Rail-*

way v. Lloyd, 239 U. S. (Sup. Ct.), p. 496: "The Act of 1910 (see Section 56 of Title 45, Railroads) expressly gives jurisdiction to the State Court, and provides that no case arising under its provisions, brought in a State Court of competent jurisdiction, shall be removed to any Court of the United States. Section 28 of the Judicial Code, 36 Statutes 1087, See 231 (this section) contains a like provision, and expressly provides that no case arising under the Employers' Liability Act or any amendment thereto, brought in a State Court of competent jurisdiction, shall be removed to any Court of the United States." *Hulac v. Chicago, etc., Ry. Co.,* 194 F., 747.

Whether there may be instances in which the Federal statute providing for removal of causes must prevail over this prohibition, we do not need to inquire. We hold that the present case is not removable.

The judgment of the court below is

Affirmed.

MARSHALL MOTOR COMPANY v. UNIVERSAL CREDIT COMPANY.

(Filed 26 February, 1941.)

1. Removal of Causes § 5: Actions § 1a—Plaintiff is entitled to bring suit in the manner and form he may elect, and may choose forum to which jurisdiction of his cause appertains.

Plaintiff's action against a nonresident corporation to recover the penalty for usury in a sum in excess of $15,000, based upon numerous independent transactions between the parties, was removed to the Federal Court. Plaintiff took a voluntary nonsuit in the Federal Court and thereafter instituted four separate actions in the State Court embracing the identical items set out in the original action, the sum demanded in each case being less than $3,000. *Held:* Plaintiff may divide the cause of action into groups of items and institute separate suits thereon in the State Court, since a party, provided he properly states a cause of action, has the right to bring his suit in the manner and in the form he may elect, and may choose the forum to which the jurisdiction of his cause appertains.

2. Limitation of Actions § 15—

Statutes of limitations, unless they are annexed to the cause of action itself, must be specifically pleaded, and may not be invoked by demurrer or by preliminary motion to dismiss.

3. Appeal and Error § 2—

The denial of a motion to dismiss is not ordinarily appealable.

4. Limitation of Actions § 11b—

Plaintiff took a voluntary nonsuit in the Federal Court on his cause of action to recover the penalty for usury, based on numerous separate trans-

actions between the parties. Within a year thereafter he instituted four separate actions in the State Court embracing the identical items declared on in the original action. *Held:* If the original action was instituted within the time prescribed, the four separate causes of action would not be barred by the statute of limitations, C. S., 415.

APPEAL by defendant from *Rousseau, J.,* at October Term, 1940, of ROCKINGHAM. Affirmed.

This action was instituted by plaintiff for the recovery of the statutory penalty for usury. The complaint sets out numerous separate transactions wherein it is alleged usury was charged by the defendant and paid by the plaintiff. Defendant interposed demurrer and motion to dismiss, which were denied by the court below, and defendant appealed. Three other actions between the same parties, involving identical questions, were consolidated herewith for the purposes of the appeal.

The facts material to the questions presented may be summarized as follows: The plaintiff is a North Carolina corporation, and the defendant is a corporation of the State of Delaware. On 16 November, 1938, plaintiff instituted action for usury arising out of 191 separate and independent transactions, extending over the period from 19 November, 1936, to 10 December, 1937. The total amount claimed was in excess of $15,000. Upon petition the cause was removed to the U. S. District Court. In that forum plaintiff submitted to a voluntary nonsuit 21 January, 1939, and thereafter instituted in the State court four separate actions against the defendant on the identical causes of action set out in the original suit, that is, one action instituted 15 September, 1939, embraced 81 of the transactions originally complained of, another action instituted 5 January, 1940, embraced 27 of these transactions, another instituted 5 January, 1940, embraced 13 of these transactions, and a fourth action instituted 6 January, 1940, embraced the remaining 70 of the transactions set out in the original complaint. In none of these four cases was the sum demanded as much as $3,000.

Defendant sought to remove these actions to the U. S. District Court on the ground that they were in effect one suit, and that the aggregate of the sums demanded brought them within the jurisdiction of the Federal Court. The U. S. District Judge, being of opinion that plaintiff had a right to maintain separate actions for the different transactions embodied in the original complaint, and that the U. S. Court was without jurisdiction, remanded the cases to the State court.

Defendant thereupon in the State court, in apt time, entered demurrer and motion to dismiss in each of the four suits, chiefly upon the ground that the plaintiff, having in its original suit joined 191 transactions, had elected a joinder of causes of action from which it could not thereafter escape, and that the new action after nonsuit must be founded upon

the same transaction alleged in the original action, and could not be divided into separate actions, each relating only to distinct portions of the items originally complained of; and that in these suits, by eliminating successively portions of the items embodied in the original suit, plaintiff had abandoned the causes of action represented by those items, and could not now sue on them.

Defendant further contended that the causes of action set up in the four suits were barred by the statute of limitations, and that the nonsuit in the original action, under the facts here appearing, could not avail the plaintiff to prevent the bar of the statute, even though the new suits were brought within one year of the nonsuit. The defendant also called attention to the fact that plaintiff on 26 January, 1939, instituted an action based on certain of the items in the original suit, and thereafter in March, 1939, submitted to a voluntary nonsuit as to that action.

Defendant's demurrer was overruled, and the motion to dismiss was denied in each of the four cases, and defendant excepted and appealed to this Court.

P. W. Glidewell, Sr., and J. C. Brown for plaintiff, appellee.
C. L. Shuping and G. C. Hampton, Jr., for defendant, appellant.

DEVIN, J. This appeal presents the question whether the plaintiff, having previously submitted to a voluntary nonsuit in the U. S. District Court in an action wherein more than fifteen thousand dollars was claimed as penalty for usury in numerous independent transactions, has the right, thereafter, to institute in the State court four separate suits embracing the identical items set out in the original action, the sum demanded in each case being less than three thousand dollars. In other words, may the plaintiff, having submitted to nonsuit upon the cause of action originally stated, embracing many independent transactions, be permitted to divide the cause of action into groups of items, and institute separate suits thereon?

We think the plaintiff has the right to bring his suit in the manner and in the form he may elect, provided he properly states a cause of action, and that he may choose the forum to which jurisdiction of his cause appertains. *Southern Rwy. Co. v. Miller,* 217 U. S., 209; *Friederichsen v. Renard,* 247 U. S., 207; *Waltman v. Union Central Life Ins. Co.,* 25 Fed. (2), 320. That facts sufficient to constitute causes of action are stated in the several complaints is not specifically controverted. Demurrer on that ground could not be sustained.

Appellant challenges plaintiff's procedure here as insufficient to protect its asserted claims from the bar of the statute of limitations, and contends that the provisions of C. S., 415, extending the time within

which suit may be instituted for one year after nonsuit, have no application to the situation presented here.

It is a well recognized rule of procedure that statutes of limitations, unless they are annexed to the cause of action itself, *Hanie v. Penland,* 193 N. C., 800, 138 S. E., 165, must be specifically pleaded to be available as a defense, *McNeill v. Suggs,* 199 N. C., 477, 154 S. E., 729, and that the question may not be raised by demurrer, *Bacon v. Berry,* 85 N. C., 124, or by preliminary motion to dismiss. *Oldham v. Rieger,* 145 N. C., 254, 58 S. E., 1091. Nor is the denial of a motion to dismiss ordinarily appealable. *Johnson v. Ins. Co.,* 215 N. C., 120, 1 S. E. (2d), 381.

However, it would seem that if the original action was brought in time, and that the instant cases were begun within one year of a voluntary nonsuit, upon the identical causes of action originally complained of, defendant's objection to the ruling below would be without merit. *Brooks v. Lumber Co.,* 194 N. C., 141, 138 S. E., 532; *Blades v. R. R.,* 218 N. C., 702. The fact that plaintiff instituted an action 26 January, 1939, upon certain items, and thereafter took a nonsuit in March, 1939, does not affect the right of plaintiff to bring other suits within one year from the nonsuit in the original action, for the same cause of action. *Trull v. R. R.,* 151 N. C., 545, 66 S. E., 586.

The principle stated in *Lumber Co. v. Trust Co.,* 179 N. C., 211, 102 S. E., 205, is inapplicable to the facts appearing on this record. In that case numerous transactions, so interlocked as to make them practically inseparable, were set up as constituting a mutual running account, and were thus interrelated. Here, the transactions were alleged to have consisted of separate and distinct conditional sales agreements and notes discounted, connected with sales of automobiles, each transaction independent of the other.

The judgment of the Superior Court must be

Affirmed.

R. L. JOHNSON v. PILOT LIFE INSURANCE COMPANY.

(Filed 26 February, 1941.)

1. Limitation of Actions § 7—

In actions based on fraud the cause of action does not accrue and the statute of limitations does not begin to run until the facts constituting the fraud are known by plaintiff or until he should have discovered them in the exercise of reasonable business prudence. C. S., 441 (9).

2. Same—Evidence of whether guardian knew or should have known of facts constituting fraud more than three years before institution of action held for jury.

This action was instituted by insured to rescind on the ground of fraud a release of insurer from liability on a disability clause in a life policy. Insurer contended that the guardian appointed for insured in lunacy proceedings knew or by the exercise of due diligence should have known the facts constituting the fraud more than three years prior to the institution of the action, so that the failure of the guardian to sue was the failure of the ward, entailing the same legal consequences in regard to the bar of the statute. *Held:* Conflicting evidence relating to the knowledge of the guardian raised a question of fact within the exclusive province of the jury, and the insurer's motion to nonsuit and request for peremptory instructions on the issue of the bar of the statute were properly denied.

3. Appeal and Error § 49a—

Where it is determined on a former appeal that the evidence relative to a particular issue was sufficient to be submitted to the jury, and upon the subsequent trial the evidence relating to the issue is without substantial difference, the denial of defendant's motion to nonsuit upon the issue in the second trial will not be disturbed on appeal.

BARNHILL, J., not sitting.

APPEAL by defendant from *Hamilton, Special Judge,* at September Term, 1940, of NASH. No error.

This was an action to recover upon the disability insurance provisions of a life insurance policy issued by defendant, and to set aside on the ground of fraud, a settlement and surrender of the policy. The defendant denied fraud, pleaded fairness of the settlement, and set up the statute of limitations. The case was here at Spring Term, 1939 (215 N. C., 120, 1 S. E. [2d], 381), and again at Spring Term, 1940 (217 N. C., 139, 7 S. E. [2d], 475). In the reports of these appeals the facts are sufficiently set out.

On the last trial below issues were submitted to the jury and answered as follows:

"1. Did the plaintiff on or about May 20, 1929, and for 90 days thereafter become totally and permanently disabled so that he was totally and permanently prevented from engaging in any occupation or performing any work for compensation or profits as alleged in the complaint? Answer: 'Yes, by consent.'

"2. If so, did such permanent and total disability continue to exist up to and including the 28th day of November, 1936, as alleged in the complaint? Answer: 'Yes.'

"3. Was the plaintiff incompetent and insane continuously from May 20, 1929, through the month of December, 1934, as alleged in the complaint? Answer: 'Yes.'

"4. If so, did the defendant Pilot Life Insurance Company on October 16, 1929, have knowledge of the fact that the plaintiff was incompetent and insane? Answer: 'Yes.'

"5. Was the consideration paid to the plaintiff by the defendant for the surrender and cancellation of insurance policy No. 72891 fair and adequate as alleged in the answer under the circumstances then existing? Answer: 'No.'

"6. Is the plaintiff's cause of action barred by the statute of limitations as alleged in the answer? Answer: 'No.'

"7. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: 'One hundred and fifty dollars with interest from Oct. 1, 1929, and a similar sum on the first day of each month thereafter up to and including Nov. 1, 1936, with interest on each of said sums less credits of $5,000.00 with interest from Oct. 16, 1929, of $136.15 with interest from Sept. 1, 1929, and of $136.15 with interest from Dec. 1, 1929.'"

From judgment on the verdict, defendant appealed.

Itimous T. Valentine, Dan B. Bryan, and Harold D. Cooley for plaintiff, appellee.

O. B. Moss, Smith, Wharton & Hudgins, and Battle, Winslow & Merrell for defendant, appellant.

DEVIN, J. In presenting its appeal, the defendant makes the following formal concession: "Defendant concedes that under the former opinion of the Supreme Court in this case there was evidence sufficient to sustain the verdict on all the issues except the sixth issue, 'Was the action barred by the statute of limitations?' And defendant further concedes that there was evidence sufficient to sustain the verdict on the sixth issue with respect to the mental incapacity of R. L. Johnson himself, but defendant contends that the statute began to run against Daniel L. Johnson, as guardian of R. L. Johnson, more than three years before action was begun."

This narrows our consideration to a single point: Was the evidence upon the question of the discovery by the guardian of the facts constituting fraud such as to entitle the defendant to a judgment of nonsuit on the issue of the statute of limitations?

This same question, among others, was considered on the former appeal, reported in 217 N. C., 139, and decided against the defendant. The rationale of the decision on this point was that while the failure of the guardian to sue in apt time was the failure of the ward, entailing the same legal consequences with respect to the bar of the statute of limitations (*Culp v. Lee,* 109 N. C., 675, 14 S. E., 74), in cases of fraud

the statute would not begin to run until the discovery of the fraud or knowledge of circumstances which would put the person claiming the right to sue on inquiry; and it was held that on this point the evidence then appearing in the record was sufficient to carry the case to the jury.

The statute, C. S., 441 (9), prescribes that in actions based on fraud "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." This has been interpreted to mean that the statute would not begin to run "until the impeaching facts were known or should have been discovered in the exercise of reasonable business prudence" (*Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348), or should have been discovered "in the exercise of ordinary prudence" (*Peacock v. Barnes,* 142 N. C., 215, 55 S. E., 99). *Sanderlin v. Cross,* 172 N. C., 234, 90 S. E., 213; *Latham v. Latham,* 184 N. C., 55, 113 S. E., 623.

The evidence on this point adduced at the last trial, compared with that offered on the former trial, which was held sufficient to carry the case to the jury, does not reveal such substantial difference as would justify the reversal of our former ruling. The evidence clearly presented contradictions which it was the exclusive province of the jury to settle. The court fully and correctly charged the jury as to the law applicable to all the testimony on the point which appellant now presses. The jury determined the issues of fact against the defendant. No sufficient ground has been shown which would warrant us in disturbing the result.

The action of the court below in denying the defendant's motion for judgment of nonsuit, and in declining to give the peremptory instructions prayed for must be upheld. *Haywood v. Ins. Co.,* 218 N. C., 736.

In the trial we find

No error.

BARNHILL, J., not sitting.

EMILY E. HAMPTON, ADMINISTRATRIX OF A. M. HAMPTON, v. M. S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 26 February, 1941.)

1. Automobiles § 23b—

Where the owner of a truck, riding therein, is driven by his employee, the negligence or contributory negligence of the employee is in law attributable to the owner.

2. Negligence § 19b—

Since the defendant has the burden of proof upon the issue of contributory negligence, a nonsuit on the ground of contributory negligence can be rendered only when contributory negligence is the only logical conclusion that can be drawn from plaintiff's own evidence, considered in the light most favorable to him.

3. Railroads § 9—Evidence held to establish as matter of law contributory negligence on part of driver constituting proximate cause of crossing accident.

Plaintiff's intestate was fatally injured in a collision between his truck, driven by his employee, and defendant's train. The accident occurred at a right angle grade crossing on a clear day, in level country, and plaintiff's own evidence tended to show that the driver was familiar with the crossing and approached same at about ten miles an hour and could have stopped the truck almost instantaneously, and that his view of the approaching train was unobstructed for at least thirty feet from the crossing. *Held:* Even though plaintiff introduces evidence tending to show negligence on the part of the railroad company in failing to give timely signal of the approach of the train to the crossing, plaintiff's own evidence discloses that the driver was guilty of contributory negligence as a matter of law, which is imputed to intestate, since the only reasonable inference that can be drawn from the evidence is that the driver knew he was approaching a crossing and failed to look for the train when by doing so he could have seen it and avoided the collision and that such failure was a proximate contributing cause to the injury and death of plaintiff's intestate.

APPEAL by plaintiff from *Hamilton, Special Judge,* at October Term, 1940, of CAMDEN. Affirmed.

Action for wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendants. Motion for judgment of nonsuit, renewed at the close of all the evidence, was allowed, and from judgment dismissing the action, plaintiff appealed.

Q. C. Davis and John H. Hall for plaintiff, appellant.
K. Kenyon Wilson for defendants, appellees.

DEVIN, J. The plaintiff's intestate came to his death as the result of a collision between a motor truck in which he was riding and one of defendant's freight trains on the Norfolk Southern Railroad. The motor truck was the property of plaintiff's intestate and was being driven for him at the time by his employee.

As there was evidence of negligence on the part of defendants in failing to give timely warning of the approach of the train to a grade crossing, it would seem that the only ground upon which judgment of nonsuit could be predicated was that plaintiff's evidence conclusively established contributory negligence upon the part of the driver of the

truck, whose negligence, if any, was in law attributable to the plaintiff's intestate.

As the burden of proof upon the issue of contributory negligence was upon defendants, it is the settled rule in this jurisdiction that judgment of nonsuit on this ground can be rendered only when a single inference, leading to that conclusion, can be drawn from the evidence. *Manheim v. Taxi Corp.*, 214 N. C., 689, 200 S. E., 382; *Cole v. Koonce*, 214 N. C., 188, 198 S. E., 637. As was said in *Hayes v. Tel. Co.*, 211 N. C., 192, 189 S. E., 499, judgment of nonsuit becomes proper only "when the contributory negligence of the plaintiff is established by his own evidence, and he thus proves himself out of court." It is equally well settled that on this motion the evidence must be considered in the light most favorable to the plaintiff.

Examining the record of the testimony in the light of these principles, we deduce the material facts and surrounding circumstances as follows:

The motor truck in which plaintiff's intestate was riding was being driven in an eastward direction over an unpaved public road in Currituck County. The road, as well as the local terrain, was level. The road, which was twenty feet wide from ditch to ditch, crossed defendant's railroad tracks at grade, at right angles, near Gregory Station. There was an elevation of twelve inches at the crossing. The injury occurred about 10:30 a.m., 16 May, 1938. The day was clear. There was no other traffic on the road. The train with which the truck collided was coming from the south, at a speed of forty miles per hour, approaching from the truck driver's right. The driver of plaintiff's intestate was familiar with the crossing, having driven over it, on an average of once a week, for several years. On the right of the driver of the truck, as he approached the crossing, scattered along a distance of some 250 yards, was a stable, barn, several small outhouses, and near the crossing a storehouse facing in the direction of the railroad tracks. On the front of the store was a porch, the roof supported by posts. The plaintiff's witness testified the store was "about 30 feet" from the tracks. However, it was admitted the defendant's right of way extended 33 feet westward, and the store and porch were beyond the right of way. The surveyor, who measured the distance, testified that the porch was 9.2 feet wide, that from the track to the front of the porch was 36.5 feet, making 45.7 feet to the building itself. The store building was 20 or 30 feet from the road, or 46 feet, according to the surveyor. Plaintiff's witness testified that along a wire fence, which ran from the end of the store south, parallel with the tracks, presumably to the barn, were weeds growing higher than the fence—5 or 6 feet. The truck was a ton and a half truck, and had been used eight or nine months. The brakes were in good condition.

The driver testified he had been driving previously that morning at a speed of 20 miles per hour, and that he reduced his speed to 10 miles per hour on passing the store, taking his foot off the accelerator. He testified that at that speed he could have stopped about as quick as he could put his foot on the brake. He testified there was a space between the stable and the store through which he could look to his right and see down the railroad tracks; that he looked at that point that morning and saw nothing. After passing the store the view to the right is unobstructed along the track in the direction from which the train came for 600 or more feet, the track curving slightly to the southeast. The driver of the truck testified that after passing the store he looked to his left—north—saw nothing, and that when he was 10 feet (at another time he said 15) from the railroad track he looked to his right and saw the train coming about 30 feet away. He put on his brake, but the front bumper of his truck was struck by the train, the truck was overturned and plaintiff's intestate killed.

The driver of the truck testified that his view was obstructed by the store and by the weeds. He first referred to them as bushes, but later explained he meant weeds. But the weeds could not have been in his line of vision to the southeast after he passed the store, as he had testified the weeds were along the fence that ran from the store south, parallel with the tracks.

It does not appear whether the posts, which supported the roof of the store porch, obstructed his view at all, but, if they did, after passing beyond the line of the store and porch, the driver of the truck had an unobstructed view to his right—to the south—if he had looked, and could have seen as large and conspicuous an object as a moving freight train, which, at the rate of speed testified, could hardly have been more than 120 feet away. There were no woods, hills, trees or buildings to conceal it. The land was level, the day clear. If the driver had looked to his right at any time while he traversed at 10 miles per hour the space between the store and the tracks, until too close to effectively apply his brakes, he must necessarily have observed the train in time to have stopped in safety. By his own testimony he could have stopped almost instantaneously.

His failure to stop before being struck by the train can be ascribed to no other cause than that, though he knew he was approaching and about to cross a main line railroad track, he did not look for the train, when by looking he could have seen it and avoided the collision. His failure so to do must be held a proximate contributing cause to the injury and death of the plaintiff's intestate, and sufficient in law to bar recovery. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598.

Many cases involving injuries due to collision between motor vehicles and trains at grade crossings have found their way to this Court. No good can be obtained from attempting to analyze the close distinctions drawn in the decision of these cases, for, as was said in *Cole v. Koonce, supra,* each case must stand upon its own bottom, and be governed by the controlling facts there appearing.

We conclude that the judgment of nonsuit must be

Affirmed.

IN THE MATTER OF THE WILL OF ELLA McDONALD.

(Filed 26 February, 1941.)

1. **Wills § 8—Party signing instrument in afternoon prior to signing of instrument by purported testatrix the following night is not subscribing witness.**

Where a witness signs his name to an instrument during the afternoon, and the purported testatrix signs the instrument the following night, but not in the presence of the witness, the signing of the instrument by the parties cannot be construed as one and the same transaction, and the witness is not a subscribing witness within the requirements of C. S., 4131, and, upon proof that the instrument was properly subscribed by only one witness, a peremptory instruction in favor of caveators is without error.

2. **Appeal and Error § 49b—**

A case must be decided in accordance with settled rules of law notwithstanding that the decision works an apparent hardship in the particular case.

APPEAL by propounders from *Harris, J.,* at the September Term, 1940, of CHOWAN.

John W. Graham and Herbert R. Leary for propounders, appellants.
J. N. Pruden and W. D. Pruden for caveators, appellees.

SCHENCK, J. This is an issue of *devisavit vel non.*

A paper writing purporting to be the last will and testament of Ella McDonald, deceased, was admitted to probate in common form in the office of the clerk of the Superior Court of Chowan County, and a caveat thereto was subsequently filed by W. M. Walters, on behalf of himself and other heirs at law of the decedent, wherein it is alleged that said paper writing is not the will of Ella McDonald "for the reason that the same is not in the handwriting of the said Ella McDonald; nor was it

signed by her nor by any person in her presence and by her direction; nor was it signed nor any signature acknowledged by her in the presence of two witnesses; nor was it subscribed by two witnesses in her presence or at her request." The paper writing purports to devise and bequeath to her cousin Sophronia Backus all of the real and personal property of the testatrix, and to appoint Mrs. E. D. Herritage executrix thereof. It was propounded by Mrs. E. D. Herritage and Sophronia Backus.

There is no evidence nor contention that the paper writing was in the handwriting of the decedent. It was admitted to probate upon the oath and examination of Janie McClenney, Rosa L. Bright and S. N. Griffith, who purported to be subscribing witnesses thereto.

As to the witnessing by Janie McClenney the evidence is plenary that she saw the decedent sign the paper writing and that the decedent requested her to sign it as a witness and that she did so sign it in the presence of the decedent. No contention is made as to the validity of her witnessing.

As to the witnessing by the witness Rosa L. Bright the evidence is to the effect that she signed the paper writing at a different time and place from the decedent, and that she did not see the decedent sign and the decedent did not see her sign. There is no contention that she was a valid witness to the paper writing.

The sole question presented on the record is whether the signing of the paper writing by S. N. Griffith constituted him a valid witness thereto. The evidence tends to show that Griffith is the minister of the colored Episcopal Church of Edenton and that the propounder, Mrs. E. D. Herritage, is a member of his church, that he signed the paper writing as a witness, at the request of the decedent Ella McDonald in her presence, but that he did not see the decedent sign it and she had not signed it when he signed it, and that he never saw her sign it and that he did not know the decedent's handwriting; that she subsequently acknowledged her signature to him after Janie McClenney signed as a witness; that he signed the instrument in the afternoon and that the decedent and Janie McClenney signed it the following night, that the decedent stated to him that night after she had signed it that she wanted him and Janie McClenney to sign as witnesses to her will.

C. S., 4131, provides that no will (other than a holograph one) shall be good and sufficient in law unless signed by the testator "and *subscribed* in his presence by two witnesses at least."

Although the general rule is that the testator must have signed the instrument propounded as a will before the witness signed it to constitute a subscription or attestation, in some jurisdictions there is a recognized exception that when the witness and the testator signed at practically the *same time* and place so as to be a part of one and the same trans-

action, even though in such transaction the witness actually signed first, the instrument is held to be properly witnessed and to constitute a valid will. 68 C. J., p. 659, Wills, Par. 293, and 28 R. C. L., p. 128, Wills, Par. 83—and our Court seems to have reluctantly recognized this exception in *Cutler v. Cutler,* 130 N. C., 1, 40 S. E., 689, wherein it is written: "It seems singular that the witnesses should have signed before the testator, as there was nothing at that time for them to attest. It was certainly awkward and illogical for them to do so, and can only be sustained by its being all a part of one and the same transaction. This exception of the caveator is not sustained . . ." Although subsequently *Hoke, J.,* in *In re Will of Pope,* 139 N. C., 484, 52 S. E., 235, wrote: "In construing the statute as to written wills, with witnesses, it is accepted law that the witness must *subscribe* his name to the paper writing *animo testandi,* in the presence of the testator, and *after* the testator has himself signed the same."

However, even if the exception be recognized, the evidence in the case at bar fails to bring it within the exception. Viewing the evidence in the light most favorable to the propounders it shows that the witness Griffith signed the instrument as a witness in the afternoon and that the testatrix signed it the following night but not in the presence of the witness, although she did subsequently acknowledge to witness that she had signed it. The signing by the purported witness Griffith and the signing by the purported testatrix was done on separate occasions, one in the afternoon and one the following night, and cannot be construed as one and the same transaction.

While this may appear to be one of the "hard cases (which) are the quicksands of the law," "the argument of hardship has been said to be always a dangerous one to listen to. It is apt to introduce bad law; and has occasionally led to the erroneous interpretation of statutes. Courts ought not to be influenced or governed by any motions of hardships. They must look at hardships in the face rather than break down the rules of law." Enlich on the Interpretation of Statutes, p. 349, Par. 263. We cannot allow the apparent hardship to change the relative rights of the parties under the law as it is written, and are therefore constrained to hold that there was no error in the instruction of the Superior Court to the effect that if the jury found the facts to be as shown by all the evidence they should answer the issue of *devisavit vel non* in favor of the caveators.

On the record we find

No error.

STATE v. E. L. MANN.

(Filed 26 February, 1941.)

1. **Perjury § 3—Evidence that defendant "testified" on former trial, together with transcript stating he was "duly sworn," held sufficient for jury on question of whether false statement was under oath.**

While testimony in a prosecution for perjury that defendant "testified" to the material, false statement on the former trial, alone, is insufficient proof that defendant's statement on the former trial was under oath, where in addition thereto, the transcription of his testimony, properly identified by the court reporter and admitted in evidence, contains the statement that defendant "being duly sworn" testified to the false statement, the evidence, in the absence of inquiry by defendant of the reporter as to what was meant by the phrase "being duly sworn," is sufficient to be submitted to the jury upon the question of whether defendant's testimony on the former trial was under oath.

2. **Criminal Law § 52b—**

Upon motion to nonsuit in a criminal prosecution, the evidence will be considered in the light most favorable to the State, and the court must determine only whether there is any evidence to sustain the indictment, the credibility and weight of the evidence being within the exclusive province of the jury. C. S., 4643.

APPEAL by defendant from *Harris, J.*, at October Term, 1940, of DARE.

The defendant was tried and convicted upon a bill of indictment charging that he committed perjury in the trial of the case of "State of North Carolina against E. L. Mann" in Superior Court of Dare County by falsely asserting on oath or solemn affirmation that Mrs. W. W. Midgette was driving and operating an automobile belonging to the defendant at the time it collided with an automobile operated by M. C. Tillett on Highway No. 34, on 18 May, 1939, at which time it was charged the defendant was driving and operating such automobile while intoxicated.

When the State had produced its evidence and rested its case the defendant moved to dismiss the action or for a judgment of nonsuit. The motion was refused and defendant excepted. C. S., 4643. The defendant offered no evidence.

The jury returned a verdict of guilty. From a judgment of imprisonment predicated upon the verdict, the defendant appealed to the Supreme Court, assigning as error the refusal of the court to sustain his motion for judgment of nonsuit.

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

M. B. Simpson for defendant.

SCHENCK, J. The sole question presented by the brief of the appellant is: Was there sufficient evidence to be submitted to the jury upon an essential element of the crime charged, namely, that the defendant was sworn in the former trial in which it was alleged the false statement was made? There was ample evidence that the statement was made in a court of competent jurisdiction, that it was false, and that it was material to the issue being tried.

The evidence relied upon by the State relative to the question involved in this appeal consisted of (1) the testimony of Miss Kate Wade, who testified that she was the court reporter at the October Term, 1939, of Dare County Superior Court, in the case of "State *v.* E. L. Mann," and that she transcribed the evidence that E. L. Mann gave in that case, and identified the trancription of his testimony, whereupon (2) such transcription was introduced in evidence, containing, *inter alia,* the following: "E. L. Mann, *being duly sworn,* testified: . . . I wasn't driving at all. . . . Mrs. Midgette was driving and stopped and said let somebody else drive, she didn't want to drive any more. . . ." (3) the testimony of W. J. Griffin that he was one of the jurors in the case where the defendant "was tried for drunken driving," and that "he *testified* that Mrs. Midgette was driving the night of the collision," and (4) the testimony of C. S. Gregory that "Mr. Mann *testified* that the car was stopped at the time of the collision. . . ."

Both the defendant and the State rely upon *S. v. Glisson,* 93 N. C., 506. Upon a careful examination of this case we are constrained to hold that it sustains the position of the State rather than that of the defendant. The case holds in effect that while it is a reasonable inference from the delivery of testimony in a trial it comes under the sanction of an oath or solemn affirmation, upon the legal maxim *"Omnia presumuntur rita esse acta,"* the Court is not disposed to carry the inference so far as to dispense with any further proof of the administering of an oath, which is an essential element in the crime of perjury, and allow a conviction in its absence.

In the *Glisson case, supra,* there was other evidence than that the false testimony was delivered in a regularly constituted trial to the effect that "the defendant swore upon trial" and that the witness "was present when the defendant was sworn." It was held in absence of any evidence from the defendant that the evidence of the State was sufficient to sustain a verdict of guilty.

In the case at bar we have substantially the same situation: Evidence that the false testimony was delivered by the defendant in a court of competent jurisdiction, evidence of the defendant "E. L. Mann, *being duly sworn,*" and evidence that the defendant testified when "tried for drunken driving" that "Mrs. Midgette was driving."

If the defendant did not in fact take an oath it was easy for him to inquire what the witness meant when she transcribed his evidence, and made the entry, "E. L. Mann, being duly sworn." The entry is tantamount to a positive statement of the fact of the defendant having been sworn and unchallenged was proper to be submitted to the jury for their consideration. *S. v. Glisson, supra.* This is strengthened by the other evidence that the defendant testified in the former trial.

"In considering a motion to dismiss the action under the statute, we are merely to ascertain whether there is any evidence to sustain the indictment; and in deciding the question we must not forget that the State is entitled to the most favorable interpretation of the circumstances and of all inferences that may fairly be drawn from them. *S. v. Carlson,* 171 N. C., 818; *S. v. Rountree,* 181 N. C., 535. It is not the province of this Court to weigh the testimony and determine what the verdict should have been, but only to say whether there was any evidence for the jury to consider; if there was, the jury alone could determine its weight. *S. v. Cooke,* 176 N. C., 731." *S. v. Carr,* 196 N. C., 129, 144 S. E., 698.

On the record we find

No error.

R. H. CARAWAN, A PERSON OF UNSOUND MIND, BY HIS GUARDIAN, G. B. CARAWAN, v. GEORGE CLARK.

(Filed 26 February, 1941.)

1. Insane Persons § 12—

A contract entered into by a person who is mentally incompetent is not void, but is voidable at the election of the incompetent upon the return by him of the consideration and the restoration of the *status quo*, and under certain circumstances, may be avoided even though the incompetent is unable to place the other party *in statu quo.*

2. Same—Evidence held not to show that defendant paid fair consideration for contract with incompetent, and guardian was entitled to rescission.

In an action by a guardian to rescind a contract of his incompetent, the burden is on the guardian to establish that his ward was incompetent at the time the contract was entered into, and such proof raises the presumption of invalidity entitling him to rescission unless defendant proves that he was ignorant of the mental incapacity, had no notice thereof which would put a reasonably prudent man upon inquiry, paid a fair and full consideration, took no unfair advantage of the incompetent, and that the incompetent has not restored and is not able to restore the consideration, and where the jury has found that the incompetent paid

in money and property $750.00 in exchange for property of the value of $400.00, defendant fails to show that no unfair advantage was taken and that a fair and full consideration was paid by him, and plaintiff guardian is entitled to rescission.

APPEAL by plaintiff from *Burgwyn, Special Judge,* at October Term, 1940, of HYDE. Error and remanded.

Civil action to rescind a contract and to recover damages.

On 18 April, 1935, plaintiff and defendant entered into a contract for the exchange of boats, under the terms of which plaintiff delivered his boat and $500.00 boot money to the defendant in exchange for defendant's boat.

On 6 February, 1913, plaintiff was adjudged to be a lunatic and was committed to the State Asylum for the Insane from which he was paroled 14 April, 1914. On 21 July, 1914, he was again adjudged to be insane and was recommitted to said asylum where he remained until 1918. On 20 July, 1935, plaintiff was adjudged incompetent to handle his business affairs and G. B. Carawan was duly appointed guardian. On 4 February, 1936, plaintiff, through his said guardian, instituted this action to annul the contract entered into 18 April, 1935.

When the cause came on for trial issues were submitted to and answered by the jury as follows:

"1. Did the plaintiff, Hertford Carawan, and the defendant, contract for the exchange of boats, the David Bradley and Ottis Terrell, as alleged in the complaint?

"Answer: Yes.

"2. Did the plaintiff, Hertford Carawan, on April 18, 1935, the date of the making of the said trade, possess sufficient mental capacity to attend to his own business?

"Answer: No.

"3. If not, did the defendant have knowledge of such mental condition on the part of the plaintiff, Hertford Carawan?

"Answer: No.

"4. What was the value of the plaintiff's boat, David Bradley, on April 18, 1935?

"Answer: $250.00.

"5. What was the value of defendant's boat, the Ottis Terrell, on April 18, 1935?

"Answer: $400.00."

Pending judgment on the issues counsel for plaintiff consented to a compromise judgment. At the October Term, 1940, on motion of plaintiff, the consent judgment was vacated and thereupon the court below

entered judgment dismissing the action at the cost of the plaintiff. Plaintiff excepted and appealed.

D. D. Topping for plaintiff, appellant.
Carter & Carter for defendant, appellee.

BARNHILL, J. No contention is made that plaintiff was, at the time of making of the contract, an adjudicated lunatic, and no rights of innocent parties are involved. Therefore, the question presented is this: Upon the facts found by the jury and admitted in the record, was defendant entitled to a judgment upon the verdict? We are of the opinion that the question should be answered in the negative.

A contract entered into by a person who is mentally incompetent is voidable and not void. *Riggan v. Green,* 80 N. C., 237; *Creekmore v. Baxter,* 121 N. C., 31; *Brittain v. Mull,* 99 N. C., 483; *Ellington v. Ellington,* 103 N. C., 54; 2 Blackstone, 295; *Beeson v. Smith,* 149 N. C., 142; *Hood, Comr. of Banks, v. Holding,* 205 N. C., 451, 171 S. E., 633; 28 Am. Jur., 714. At the election of the incompetent and upon the return of the consideration and the restoration of the *status quo,* it will be annulled by a court of equity.

Under certain conditions such a contract may be avoided by the incompetent even when he is unable to place the other party to the contract *in statu quo,* but the greater weight of authority supports the rule that where a contract with an insane person has been entered into in good faith, without fraud or imposition, for a fair consideration, of which the incompetent has received the benefit, without notice of the infirmity, and before an adjudication of insanity, and has been executed in whole or in part, it will not be set aside unless the parties can be restored to their original position. 28 Am. Jur., 716, and numerous authorities cited in notes; 14 R. C. L., 584; *Odom v. Riddick,* 104 N. C., 515; 7 L. R. A., 118; *Sprinkle v. Wellborn,* 140 N. C., 163; *Riggan v. Green, supra;* Anno., 46 A. L. R., 419, and 95 A. L. R., 1443; *Carr v. Holliday,* 21 N. C., 344.

Thus, in an action to rescind a contract, as here, for that the plaintiff was, at the time, mentally incompetent, the plaintiff must show insanity or mental incompetency at the time the contract was entered into. Upon such showing the contract will be annulled unless it is made to appear—the burden being on the defendant—that the defendant (1) was ignorant of the mental incapacity; (2) had no notice thereof such as would put a reasonably prudent person upon inquiry; (3) paid a fair and full consideration; (4) took no unfair advantage of plaintiff; and (5) that the plaintiff has not restored and is not able to restore the consideration or to make adequate compensation therefor. *Wadford v. Gillette,* 193 N. C.,

413, 137 S. E., 314, and cases cited. *Creekmore v. Baxter, supra;* Story Eq. Jur., sec. 227; Adams Eq., 183.

Upon such showing by the defendant any inference of fraud or undue advantage is rebutted and a court of equity will not intervene.

Applying these principles of law it appears that the defendant has failed to carry the burden in establishing those facts essential to repel the inference of undue advantage and to prevent the rescission of the contract upon the finding by the jury that the plaintiff was insane at the time the contract was made. *Creekmore v. Baxter, supra; Wadford v. Gillette, supra.*

It is admitted that plaintiff paid $500.00 boot money. In addition, on the finding of the jury, he delivered to the defendant a boat worth $250.00, in return for which he received a boat of the value of $400.00. Thus, for property of the value of $400.00, he paid, in money and property, $750.00. These facts fail to show that no unfair advantage was taken and fall short of establishing a fair and full consideration. They are not sufficient to rebut the presumption of invalidity which arises upon proof of insanity.

The cause is remanded to the end that the judgment entered may be vacated and judgment entered for the plaintiff.

Error and remanded.

PAUL MAX RAY, BY AND THROUGH HIS NEXT FRIEND, VONNO L. GUDGER, v. J. E. RAY.

(Filed 26 February, 1941.)

1. Parent and Child § 2—

The old common law rule that the husband is conclusively presumed to be the father of his wife's child unless it is shown that he was impotent or not within the four seas, has been tempered so that now access or nonaccess of the husband is a fact to be established by proper proof and the question of legitimacy or illegitimacy is one for the jury upon such evidence, but proof of access still raises an irrebuttable presumption of legitimacy.

2. Same—

Neither testimony of the wife nor testimony of declarations made by her is competent to prove the nonaccess of her husband, but when the parentage of the child is directly involved the wife is competent to testify as to her illicit relations.

3. Same—

That the wife is notoriously living in open adultery is a potent circumstance tending to show nonaccess.

4. Same: Bastards § 10—

In an action by a child against his alleged putative father to compel the defendant to provide adequate support, a written contract entered into by the defendant and the child's mother, in which the defendant agrees to make certain contributions to the mother for the support of the child, is competent as being in the nature of an admission by the defendant, and the fact that it may tend to show indirectly declarations of the mother is not sufficient to justify its exclusion.

5. Same—In this action by a child to compel defendant to provide support, evidence of defendant's paternity held sufficient for jury.

This action was instituted in behalf of a child against his alleged putative father to compel the defendant to provide adequate support for the child. The evidence considered in the light most favorable to plaintiff tended to show that plaintiff's mother separated herself from her husband at the solicitation of the defendant, that she thereafter lived in open adultery with defendant for a period of two years, including the time when plaintiff was begotten, that the husband was living elsewhere and was not seen in the community where plaintiff's mother was living and did not have access to her, and that defendant entered into a contract with the mother in which the defendant agreed to make certain contributions to the mother for the support of the child. *Held:* The evidence is sufficient to be submitted to the jury, and defendant's motion for judgment as of nonsuit should have been denied.

APPEAL by plaintiff from *Armstrong, J.*, at September Term, 1940, of BUNCOMBE. Reversed.

Civil action to compel the defendant, alleged putative father of plaintiff, to provide adequate support for his said child.

Plaintiff, who was born 7 June, 1934, is the son of Jennie Allen, who is the wife of Hicks Allen. The evidence for plaintiff tends to show that in 1932 Jennie Allen, at the solicitation of the defendant, left her husband and went to live with her sister (who was a tenant on defendant's farm), where she remained for about two years. During this period defendant cohabited with her regularly in the home of her sister; that during a part of the time of the separation the husband was confined in the insane asylum and at other times he lived near Lenoir, N. C., and at Sandy Mush in Madison County; and that Hicks Allen did not go into the community or about Jennie Allen while she was living on defendant's farm.

Plaintiff offered in evidence a contract entered into between Jennie Allen and the defendant dated 31 July, 1934, in which the defendant agreed to pay Jennie Allen $75.00 in cash, one cow and 10 bushels of corn and $1.00 on the first day of each and every month until the plaintiff becomes 21 years of age, in settlement of his financial responsibility for the maintenance of plaintiff. On objection of defendant this contract was excluded.

Likewise, plaintiff tendered the evidence of Jennie Allen for the purpose of showing the nonaccess of her husband during the time she was living on the farm of defendant. He also tendered other witnesses for the purpose of showing her declarations as to the paternity of plaintiff and as to the nonaccess of her husband. On objection this testimony was excluded and plaintiff excepted.

At the conclusion of the evidence for the plaintiff the court, on motion of the defendant, entered judgment as of nonsuit. Plaintiff excepted and appealed.

W. K. McLean for plaintiff, appellant.
J. Scroop Styles for defendant, appellee.

BARNHILL, J. Under the old English or common law rule a child born of a married woman was presumed legitimate unless the husband was shown to be impotent or not within the four seas—that is, he was conclusively presumed to be legitimate so long as there remained a possibility that the husband was the father. The presumption could not be rebutted if the husband was capable of procreation and was within the four seas during the period of gestation. *S. v. Pettaway,* 10 N. C., 623; *Woodward v. Blue,* 107 N. C., 407; *S. v. Liles,* 134 N. C., 735; *Ewell v. Ewell,* 163 N. C., 233, 79 S. E., 509; *West v. Redmond,* 171 N. C., 742, 88 S. E., 341; *S. v. Green,* 210 N. C., 162, 185 S. E., 670. But this rather harsh rule has been tempered by the application of a degree of common sense, so that now access or nonaccess of the husband is a fact to be established by proper proof. The question of legitimacy or illegitimacy of the child of a married woman, under the prevailing rule, rests on proof as to the nonaccess of the husband and the evidence in respect thereto must be left to the jury for determination. If there was access in fact then, now, as formerly, there is a conclusive presumption that the child was lawfully begotten in wedlock. "If a husband have access, and others at the same time are carrying on a criminal intimacy with his wife, a child born under such circumstances is legitimate in the eye of the law." *Cope v. Cope,* 5 Car. & P., 604.

This modification of the common law rule was first indicated in *Pendrell v. Pendrell,* Stra. 925, and the *Banbury Peerage Case* in the House of Lords, 1 Sim & Stuart, 153, and is now consistently applied. *Woodward v. Blue, supra; S. v. Pettaway, supra; S. v. Liles, supra; Ewell v. Ewell, supra; West v. Redmond, supra; S. v. McDowell,* 101 N. C., 734; *S. v. Green, supra;* Schouler Dom. Relations, sec. 225.

The wife is not a competent witness to prove the nonaccess of the husband, *S. v. Pettaway, supra; S. v. Wilson,* 32 N. C., 131; *S. v. Green, supra; S. v. McDowell, supra; Ewell v. Ewell, supra; West v.*

Redmond, supra; nor may such be shown by evidence of declarations of the wife. *Ewell v. Ewell, supra; West v. Redmond, supra* (citing many authorities). Her testimony and declarations are excluded not only as violative of the confidential relations existing between husband and wife but pursuant to a sound public policy which prohibits the parent from bastardizing her own issue. However, she is permitted to testify as to the illicit relations in actions directly involving the parentage of the child, for in such cases, proof thereof frequently would be an impossibility except through the testimony of the woman. *S. v. Pettaway, supra; S. v. Wilson, supra; S. v. McDowell, supra.*

That the wife is notoriously living in open adultery is a potent circumstance tending to show nonaccess. "But if the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that, under these circumstances, he would avail himself of such opportunity." *Cope v. Cope, supra; Woodward v. Blue, supra; Ewell v. Ewell, supra; S. v. Green, supra.*

Applying these principles, there was ample evidence offered to repel the defendant's motion for judgment as of nonsuit. When considered in the light most favorable to the plaintiff this testimony tends to show that his mother separated herself from her husband at the solicitation of the defendant; that she thereafter lived in open adultery with the defendant for a period of two years, including the time when plaintiff was begotten; that the husband was living elsewhere and was not seen in the community where plaintiff's mother was living and did not have access to her. In addition thereto there is the written contract, which was competent and which should have been admitted. It is in the nature of an admission by the defendant. That it may tend indirectly to show declarations of the mother is not sufficient to justify its exclusion. This aspect of the evidence can be guarded against by proper instruction.

The judgment below is

Reversed.

STATE v. JACK LEON POWELL.

(Filed 26 February, 1941.)

1. Gaming § 5—

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same, *is held* sufficient to be submitted to the jury in this prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a *prima facie* case under the provisions of statute. C. S., 4428, as amended by ch. 434, Public Laws of 1933.

2. Gaming § 4: Criminal Law § 81c—Testimony that witness had experience with type of lottery in question held competent to show he was qualified to testify that tickets were lottery tickets.

Where an officer testifies that lottery tickets found in defendant's possession are of the type used in connection with a "butter and egg lottery," it is competent for the officer to testify in response to a question by the solicitor that he had had lots of "cases of this kind" in order to show that the witness was familiar with the lottery in question and was qualified to testify that the tickets were of that character, but further, even if it should be conceded that the testimony was immaterial, it is not prejudicial, there being nothing in the record to connect defendant with, or even raise a suspicion that defendant had been connected with, the other cases.

APPEAL by defendant from *Rousseau, J.*, at October Term, 1940, of ROCKINGHAM.

Criminal prosecution tried upon warrant charging defendant with operation of a lottery and with illegal possession of lottery tickets tried *de novo* in Superior Court of Rockingham County, North Carolina, on appeal thereto from the recorder's court of the city of Reidsville in said county.

In the trial court the State offered evidence tending to show these facts: On the morning of 22 February, 1940, two police officers of the city of Reidsville, under authority of a search warrant therefor, entered the barber shop of Reubin Williamson on Market Street in said city. At that time Williamson was in the front cutting hair, and defendant and three others, one of whom was named Carter, were standing at the back of the barber's counter upon which there were numerous envelopes containing lottery tickets. Upon seeing the officers all except Williamson ran into a back room. Defendant threw behind a shoe box, which was in the back of the shop, four envelopes on which were written the initials "J. P." and in which there were tickets which are used in connection with what is known as "butter and egg lottery." Nothing else was in these envelopes. "The Carter boy" threw down a book with a quarter in it. Other tickets were found under the floor mat and "a quantity of new books" were found in the back of the shop. Neither defendant nor Carter worked in the barber shop. All were arrested. Williamson and Carter were indicted. Carter was convicted.

Officer Allen testified that: "These tickets are used in connection with a lottery known as 'butter and egg lottery.'" Then, over objection of defendant, in answer to the question, "Have you had any experience in investigating this type of case?" the officer was permitted to answer: "Yes, sir, we have had lots of cases of this kind in Reidsville." Defendant moved to strike the answer. Denied. Exception.

Verdict: Guilty as charged in the warrant.

Judgment: Confinement in the common jail of Rockingham County

for a period of six months and assigned to work on the roads under the control and supervision of State Highway and Public Works Commission. Defendant appeals therefrom to Supreme Court and assigns error.

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

Sharp & Sharp for defendant, appellant.

WINBORNE, J. Defendant contends that there is error (1) in refusing to grant his motion for judgment of nonsuit under C. S., 4643, and (2) in admitting testimony of officer that "We have had lots of cases of this kind in Reidsville." Upon the facts shown neither contention is tenable.

(1) The statute, C. S., 4428, declaring it to be a misdemeanor for any person to "open, set on foot, carry on, promote, make or draw, publicly or privately, a lottery, by whatever name, style or title the same may be denominated or known, . . .," as amended by chapter 434 of Public Laws of 1933, further provides that: "Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be *prima facie* evidence of the violation of this statute."

When tested by the provisions of this statute the evidence in the case in hand is sufficient to make out a *prima facie* case for the consideration of the jury. See *S. v. Jones,* 213 N. C., 640, 197 S. E., 152.

The cases *S. v. Fowler and Brincefield,* 205 N. C., 608, 172 S. E., 191, and *S. v. Sherman and Wray,* 216 N. C., 719, 6 S. E. (2d), 529, relied upon by defendant, are distinguishable, for there the evidence against Brincefield in the first case and Wray in the second, as to whom nonsuits were granted, fails to show either of them in actual possession of lottery tickets. Nor can defendant find comfort in *S. v. Bryant,* 74 N. C., 207, which dealt with the law as it then existed long prior to the enactment of chapter 434 of Public Laws 1933.

(2) Defendant contends that the evidence to which objection is taken is immaterial and prejudicial. When read in connection with preceding testimony of the witness, the evidence was both relevant and competent for the purpose of showing that the witness was familiar with the lottery in question and qualified to testify that the tickets in hand were of that character. But, if it should be conceded that it were immaterial, it is not prejudicial for there is nothing in the record to connect defendant, or raise even a suspicion that defendant has been connected with the other cases.

In the trial below, we find

No error.

BRUCE KING v. ROBINSON TRANSFER MOTOR LINES, INC.

(Filed 26 February, 1941.)

Process § 6g—

Plaintiff, a nonresident, instituted this action against a nonresident corporation doing business as a common carrier, on a transitory cause of action arising in another state. *Held:* Service of process on the person designated as process agent for the State of North Carolina by defendant in compliance with U. S. C. A. Title 49, sec. 321 (c), is invalid and defendant is entitled to have the action dismissed. *Steele v. Tel. Co.*, 206 N. C., 220, cited and distinguished.

APPEAL by plaintiff from *Nettles, J.*, at December Term, 1940, of BUNCOMBE.

Transitory action brought by a nonresident in the General County Court of Buncombe County against a foreign corporation on a cause of action arising in the State of Tennessee.

It appears from the complaint that the plaintiff is a resident and citizen of Tennessee; that the defendant is a corporation organized under the laws of the State of Tennessee, doing business as a common carrier by motor vehicle in that State and in the States of North and South Carolina, and that the cause of action upon which plaintiff sues is one in tort to recover damages for personal injuries arising out of a collision between plaintiff's automobile and one of defendant's trucks on 7 August, 1939, in the State of Tennessee.

Service of process was sought to be had on the defendant by "leaving a copy of the summons and verified complaint with R. R. Williams, process agent of defendant corporation for North Carolina."

The defendant appeared specifically and moved to dismiss on the ground that it had not been brought into court on any valid and binding service of process. The motion was denied in the county court, and on appeal to the Superior Court this ruling was reversed and the cause remanded with direction that the action be dismissed.

From this judgment the plaintiff appeals, assigning error.

George M. Pritchard and M. A. James for plaintiff, appellant.
Williams & Cocke for defendant, appellee.

STACY, C. J. The plaintiff and defendant are both from Tennessee. The cause of action arose in that State.

The only service of process is on R. R. Williams, designated as process agent for the State of North Carolina by the defendant in compliance with an Act of Congress, U. S. C. A. Title 49, sec. 321, subsec. (c).

Without undertaking to decide whether service of process on such agent would suffice to bring the defendant into the courts of this State on a cause of action arising here, the case of *Old Wayne Mut. Life Asso. v. McDonough,* 204 U. S., 8, is authority for the position that such attempted service will not suffice on a cause of action arising in another jurisdiction.

Again, in *Simon v. Southern Ry. Co.,* 236 U. S., 116, it is held that service of process on the State officer designated by La. Acts, No. 54, for that purpose, was not effective to give the courts of Louisiana jurisdiction of a suit against a foreign corporation doing business in that State as to a cause of action arising in Alabama.

These authorities are decisive of the question presented by the appeal. The plaintiff relies upon the case of *Steele v. Tel. Co.,* 206 N. C., 220, 173 S. E., 583, but the question there decided is not controlling here. That case did not involve service of process on an agent designated by defendant in compliance with an Act of Assembly or an Act of Congress.

Affirmed.

SAMUEL J. PEGRAM, ADMINISTRATOR DE BONIS NON, CUM TESTAMENTO ANNEXO, OF THE ESTATE OF W. O. WOLFE, LATE OF BUNCOMBE COUNTY, DECEASED, v. WACHOVIA BANK AND TRUST COMPANY AND JULIA E. WOLFE.

(Filed 26 February, 1941.)

Executors and Administrators § 10: Parties § 10—

This action was instituted by an administrator *d. b. n., c. t. a.,* against the life tenant and the trustee of an active trust for the management of the property created by the life tenant. The complaint alleged mismanagement of the trust and the procuring of judgments by the trustee through fraud and the acquisition of title to certain lands of the estate by the trustee through foreclosure of the said judgments. *Held:* The remaindermen under the will are properly made parties by order of the court upon motion of the trustee.

APPEAL by plaintiff from *Armstrong, J.,* at August Term, 1940, of BUNCOMBE.

Civil action to set aside certain judgments relating to the foreclosure of alleged liens on real estate on ground of alleged fraud in the procurement thereof.

In complaint filed plaintiff alleges in substance: That W. O. Wolfe died testate in September, 1922, leaving defendant Julia E. Wolfe, as his widow, and Effie W. Gambrell, Frank O. Wolfe, Mabel W. Wheaton,

Fred W. Wolfe and Thomas C. Wolfe, as his only surviving children; that in his will, probated 19 September, 1922, after providing for payment of his debts and certain bequests to his children, above named, he devised and bequeathed all the rest, residue and remainder of his estate, real, personal or mixed, to his wife, Julia E. Wolfe, for the term of her natural life to do with as she sees fit, with full power of sale, management and control as though owned by her in fee, and, subject to said provisions for his children and his widow, he directed that upon the death of his wife, all his property, real, personal or mixed, and wheresoever situate, shall be divided equally between his children hereinbefore named share and share alike, provided that his executors shall have power and authority to charge to said heirs all advancements received by them; that soon after the death of testator, the executors qualified and performed certain of the more important duties but soon became inactive, and the estate passed informally into the hands of the widow, who executed to corporate defendant an "Irrevocable Living Trust Agreement" in which the property, real and personal, conveyed and assigned, included that owned by testator, which she has taken over under the will; that through the foreclosure of certain alleged liens upon the "Home Place" acquired by corporate defendant in course of its administration of said trust agreement, the ownership of said "Home Place" was vested, *prima facie,* in said defendant, trustee in said trust agreement; that the judgments by which ownership was so vested "were induced and procured by the wilful frauds, deceits, and fraudulent concealments of the corporate defendant, and especially by the fraudulent concealment of authentic information . . . that all of the real property of every character acquired by testator . . . in Asheville had been carried in the name of his wife, as well as the valuable *situs* of his marble works on the Public Square, as his nearby home on Spruce Street." Upon the allegations plaintiff prays among other things that the judgments be vacated and set aside and that he recover certain specific real estate "the whole being known as the 'W. O. Wolfe Home Place.' "

It being made to appear by petition of defendant Wachovia Bank and Trust Company that the children of W. O. Wolfe, above named, and the spouse of each, have interest in this action "in common with the interest of the plaintiff and are necessary and indispensable parties to a final determination" of it, the court below entered order that they be and are "hereby made parties defendant to this action, and that a summons be issued notifying them to appear and answer any cross action which may be filed by the defendant, Wachovia Bank & Trust Company, and when said summons and said answer and cross action of said Wachovia Bank and Trust Company have been served upon said defend-

ants, each of said defendants so served shall be deemed to be properly in court in this action."

Plaintiffs except thereto and appeal therefrom to Supreme Court and assign error.

Frank Carter, George M. Pritchard, and Don C. Young for plaintiff, appellant.

Williams & Cocke, George H. Wright, and S. G. Bernard for defendant, appellee.

PER CURIAM. In view of the allegations in the complaint, and upon the findings of the court below upon which it is based, the judgment below is proper, and is

Affirmed.

STATE v. L. A. MUSE.

(Filed 26 February, 1941.)

1. Constitutional Law § 27—

When a defendant in a criminal prosecution in the Superior Court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, and the determinative facts cannot be referred to the decision of the court even by consent, but must be found by the jury.

2. Appeal and Error § 40g—

The Supreme Court will not venture an advisory opinion on a constitutional question unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment.

APPEAL by defendant from *Warlick, J.*, at November Term, 1940, of HAYWOOD.

Defendant was tried upon warrant charging violation of ch. 52, Public Laws 1931, as amended, in that he did engage in plumbing contracting business without first having obtained license so to do.

The record discloses that the defendant "pleaded not guilty to the charge and moved to quash the warrant," and that "said motion was overruled," and "after hearing the evidence for the State defendant moves for directed verdict of not guilty. Motion denied. Defendant rests and renews motion. Motion denied. Court enters verdict of guilty and enters judgment thereon that defendant pay a fine of $100.00 and the costs."

It appears from the brief of appellant that he seeks to test the constitutionality of the act under which he was indicted.

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

Cecil C. Jackson for defendant.

PER CURIAM. The Attorney-General confesses error.

When a defendant in a criminal prosecution in the Superior Court enters a plea of not guilty he may not, without changing his plea, waive his constitutional right of trial by jury, *S. v. Hill,* 209 N. C., 53, 182 S. E., 716, the determinative facts cannot be referred to the decision of the court even by consent—they must be found by the jury. *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075.

The Supreme Court will not venture an advisory opinion on a constitutional question unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment. *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22.

Since it appears that there is no verdict upon which a valid judgment could be based, the case must be remanded to the Superior Court for trial according to the usual course and practice. *S. v. Lueders, supra.*

Error and remanded.

SCOTT DILLINGHAM, SOLE TRUSTEE FOR SOUTHERN FINANCE & BONDING COMPANY, v. L. H. GARDNER AND O. K. BENNETT, TRUSTEE.

(Filed 5 March, 1941.)

1. Ejectment § 14—

Where the evidence discloses that the deed and the deed of trust constituting links in defendant's chain of title were registered in the office of the register of deeds, the instruments are competent in evidence without proof of their signatures or execution in the absence of any question of defect in the probates.

2. Bills and Notes § 23—

Possession of a note raises the presumption that the possessor is a holder thereof and he may sue thereon without proof of the signatures of the endorsers, since a mere holder of a negotiable instrument may sue thereon in his own name. C. S., 3032.

3. Mortgages §§ 30a, 39f—

Upon attack of foreclosure by the owner of the equity of redemption, the holder of the notes secured by the deed of trust is entitled to introduce them in evidence without proof of the signatures of the endorsers

when it appears of record that the notes were signed by the trustor, since the mere holder of a negotiable instrument which is past due, is entitled to require the trustee to foreclose.

4. Evidence § 42f—

Objection to the admission in evidence of a paragraph of the original complaint on the ground that it was drawn prior to the time when defendant seeking its admission was made a party, and therefore in no way affected him, is untenable when it appears that after the joinder of the defendant, plaintiff in his reply adopted his original complaint and averred that each and every allegation therein was true.

5. Ejectment § 14—

Where, in an action to quiet title, a defendant later joined sets up a cross action asserting title in himself, a paragraph of the complaint alleging that the original defendant's sole claim was under a particular instrument, is competent and is properly admitted in evidence in behalf of the defendant later joined who claims under deed from the original defendant, since he is entitled to its admission in order to show a common source of title and to connect plaintiff with that source.

6. Ejectment § 15—

Where, in an action to quiet title, defendant sets up a cross action asserting title in himself, defendant's evidence tending to establish a common source of title and a better title from that source is sufficient to overrule plaintiff's motion for judgment as in case of nonsuit on defendant's further defense and counterclaim.

7. Mortgages § 39f—

The recitals in the trustee's deed to the purchaser at the foreclosure sale are *prima facie* evidence of the correctness of the facts therein set forth, and the burden of proving otherwise is on the person attacking the validity of the foreclosure.

8. Same—Evidence held sufficient to support conclusion that foreclosure sale was properly conducted.

Evidence, including the recitals in the trustee's deed, tending to show that defendant was a holder of notes secured by two deeds of trust on adjacent property, that the notes were past due, that proper advertisement was made under both deeds of trust and the sale held jointly, that the amount of defendant's bid in a sum a few dollars less than the amount of the notes was announced by the person holding the sale as representative of the trustees, that further bids were asked for but no further bids offered, that defendant was declared the last and highest bidder, that the owner of the equity of redemption was represented at the sale by his attorney who made no objection of the method of sale and approved same, that the sale was reported to the clerk and no advance bid was made or attempted to be made, and that after the expiration of ten days the trustee executed deed to him, *is held* sufficient to support conclusions of law that the foreclosure was properly conducted and that defendant acquired title thereunder.

9. Mortgages §§ 32c, 39f—Holding of joint sale in foreclosure of separate deeds of trust held not prejudicial to owner of equity of redemption.

The owner of adjacent tracts of land executed deeds of trust on the respective tracts to different trustees. Defendant was the holder of the notes secured by both deeds of trust. Upon default, foreclosure was advertised by the respective trustees, but the same person conducted the sale as representative of both trustees. Each tract was separately offered for sale and bid in by defendant for approximately the amount of the respective notes secured thereby, and then both tracts were offered together and bid in by defendant at a slightly higher figure. *Held:* Although the manner of sale was unusual, no prejudice resulted to plaintiff, the owner of the equity of redemption, and he is not entitled to upset the foreclosure.

10. Mortgages §§ 34c, 39f—

The statute, C. S., 2591, does not require a report of the sale to the clerk until an advance bid has been properly made, and therefore when separate deeds of trust are foreclosed at one sale, the owner of the equity of redemption is not prejudiced by a joint report of the sale, resulting in the necessity of the depositing or securing of a larger sum for a resale, when he fails to show that any person desired or proposed to advance the bid or that the sale was for less than the proprety was worth.

11. Mortgages § 35a—When trustee merely announces bid of cestui theretofore given him and sells to cestui, and parties act in good faith, sale is valid.

When the person conducting the sale for the trustee enters a bid for, and sells the property to the *cestui*, conflicting evidence as to the *bona fides* of the sale raises an issue for the jury, but where the judge of the county court in which the action is instituted, in the absence of a request for a jury trial, tries the case in accordance with its statutory procedure, the court's finding that the person conducting the sale for the trustee merely announced the bid theretofore given him by the *cestui*, is equivalent to the verdict of a jury and supports the conclusion that the sale was valid.

12. Appeal and Error § 37e—

Where the county court in which the action is instituted hears the evidence and finds the facts in accordance with its practice in the absence of a request for a jury trial, its findings, affirmed by the Superior Court, are binding upon the Supreme Court on appeal when the findings are supported by evidence.

13. Husband and Wife § 4c: Mortgages § 39f—

When the purchaser at the foreclosure sale makes out a *prima facie* case in his cross action in ejectment, the burden is on the owner of the equity of redemption to prove the irregularity in the sale relied on by him, and his attack of the deed of trust on the ground that the husband of the *feme* trustor did not sign the instrument cannot be sustained when, although the marriage of the *feme* testator is admitted, he fails to show that she was married on the date the instrument was executed.

14. Appeal and Error § 40a—

An exception to a conclusion of law cannot be sustained when the facts found support the conclusion.

DILLINGHAM *v.* GARDNER.

APPEAL by plaintiff from *Armstrong, J.*, at October Term, 1940, of BUNCOMBE.

J. Scroop Styles and James E. Rector for plaintiff, appellant.
Don C. Young for defendant L. H. Gardner, appellee.

SCHENCK, J. This was an action originally instituted in the general county court of Buncombe County by the plaintiff against the defendant O. K. Bennett, trustee, wherein it is sought to have plaintiff's title quieted to Lots 20 and 27 in Middlebrook subdivision, Buncombe County, under the provisions of C. S., 1743, by having declared void a deed of trust upon said lots executed by Mary Elizabeth Dillingham to O. K. Bennett, trustee, securing a note for $500.00 payable to C. C. Willis, agent, recorded in office of the register of deeds for Buncombe County, 21 August, 1937, in Book of Deeds of Trust 354, at page 347, the gravamen of the action being that said deed of trust was executed by Mary Elizabeth Dillingham as if she were a *feme* sole, whereas at the time of the execution thereof, 14 August, 1937, she was married to and was living with one Howard Scarborough, who did not execute said deed.

The defendant O. K. Bennett, trustee, answered and denied the allegations of the complaint, and alleged that the deed of trust mentioned therein had been foreclosed and that deed to the Lots 20 and 27 therein described had been made by him to L. H. Gardner, who became the last and highest bidder therefor at the foreclosure sale; and suggested that the said Gardner be made a party defendant.

L. H. Gardner was duly made party defendant, and came into court and filed answer wherein he denied the allegations of the complaint, and by way of further answer and counterclaim alleged that he was the owner and entitled to the possession of the said Lots 20 and 27, by virtue of deed from O. K. Bennett, trustee, made pursuant to foreclosure of said deed of trust, and asked that judgment be entered that the plaintiff take nothing by its action and that he, L. H. Gardner, be declared owner and entitled to the possession of the *locus in quo*.

The plaintiff filed reply to the further defense and counterclaim of the defendant L. H. Gardner in which it denied that there had been a valid foreclosure of said deed of trust to O. K. Bennett, trustee, from Mary Elizabeth Dillingham, and adopted and reiterated its allegations in the complaint to the effect that said deed of trust was never validly executed by Mary Elizabeth Dillingham, the purported grantor therein.

The judge of the Buncombe County court heard the evidence, found the facts, entered conclusions of law, and adjudged the defendant L. H. Gardner to be the owner and entitled to the possession of the *locus in quo*, namely, Lots 20 and 27 of the Middlebrook subdivision, Buncombe County.

From the judgment of the county court the plaintiff appealed to the Superior Court, assigning as error the admission of certain evidence, the findings of facts, the conclusions of law, and the judgment of the county court, all of which assignments were overruled and the judgment affirmed by the Superior Court.

From the action of the Superior Court overruling the assignments of error in the trial in the county court and the entering of judgment affirming the judgment of the county court the plaintiff appealed to the Supreme Court, assigning error.

Assignments of error Nos. 1, 2 and 3 are abandoned.

Assignments of error Nos. 4, 5 and 6 are to the admission in evidence of the deed of trust to O. K. Bennett, trustee, from Mary Elizabeth Dillingham, and of the deed from O. K. Bennett, trustee, to L. H. Gardner, without proof of the signature or execution by the grantors therein. The evidence does reveal, however, that both deeds were registered in the office of the register of deeds. This made them competent evidence, in the absence of any suggestion of defect in the probates. *Wilhelm v. Burleyson,* 106 N. C., 381, 11 S. E., 590; *Everett v. Newton,* 118 N. C., 919, 23 S. E., 961; *Hodgin v. Liberty,* 201 N. C., 658, 161 S. E., 94.

One of these exceptions is to the admission in evidence without proof of signature of the note of Mary Elizabeth Dillingham to C. C. Willis, agent, for $500.00 secured by the deed of trust to O. K. Bennett, trustee, and assigned by C. C. Willis, agent, to R. W. Willis, assigned by R. W. Willis to Mary Frances Willis, and assigned by R. W. Willis and Mary Frances Willis to L. H. Gardner. The record contains the following: "The defendant L. H. Gardner introduced in evidence a promissory note dated August 12th, 1937, signed by Mary Elizabeth Dillingham under seal for the sum of $500.00, payable to C. C. Willis, agent, or order, four months after date with interest from date until paid at the rate of 6% per annum, said note with credits and endorsements thereon as follows:

"$500.00 Asheville, N. C., August 12th, 1937.

"Four months after date, for value received, the undersigned promise to pay C. C. Willis, Agent, or order, the sum of $500.00, with interest from date until paid at the rate of six per cent per annum. . . .

MARY ELIZABETH DILLINGHAM (Seal).

"Scott Dillingham
Pay to R. W. Willis, C. C. Willis, Agent
Pay to Mary Francis Willis R. W. Willis
Payment of principal on this note extended for one year from Sept. 24, 1938—Int. to remain as shown on face of note.

This September 24, 1938.
For value received this note is assigned and transferred to L. H. Gardner—without recourse on me. This September 24, 1938.
R. W. WILLIS, MARY FRANCIS WILLIS."

The appearance in the record of the entry that there was introduced in evidence "a promissory note, dated August 12th, 1937, *signed* by Mary Elizabeth Dillingham," and the further evidence that such note was in the possession of the defendant Gardner would be sufficient evidence of his being a holder of the note and therefore make it competent evidence in an action attacking the validity of a foreclosure sale to collect said note, irrespective of any requirements to prove the signatures of the endorsers to show a holder in due course, since a mere holder of a negotiable instrument may sue thereon in his own name. C. S., 3032.

Assignments of error 4, 5 and 6 are untenable.

Assignment of error No. 7 is to the admission in evidence of the fifth paragraph of the original complaint to the effect that the sole claim of the defendant O. K. Bennett, trustee, to any title to the *locus in quo* is the deed of trust executed by Mary Elizabeth Dillingham. It is contended by the plaintiff that this was error for the reason that the original complaint in no way affected the defendant Gardner since he was not a party to the action when it was filed. This contention is untenable, if for no other reason than the fact that in its reply to the further defense or counterclaim of the defendant Gardner the plaintiff adopted its complaint theretofore filed and averred that each and every allegation therein was true. It was also competent to show a common source of title of the defendant and of the plaintiff for the purpose of further showing a better title in the defendant from that source, the allegation being that the plaintiff claimed through Mary Elizabeth Dillingham Scarborough, the same source through which the defendant claimed. *Mobley v. Griffin,* 104 N. C., 112, 10 S. E., 142.

Assignments of error Nos. 8 and 9 are to the refusal of the court to grant plaintiff's motion for a judgment as in case of nonsuit on defendant's further defense and counterclaim at the close of defendant's evidence and renewed at the close of all the evidence. These assignments are untenable. The defendant Gardner introduced his chain of title consisting of deed to him from O. K. Bennett, trustee, and deed of trust from Mary Elizabeth Dillingham to O. K. Bennett, trustee, and then introduced deed from Mary Elizabeth Dillingham Scarborough to the plaintiff, thereby connecting his title with the same source as that of the plaintiff, and by reason of the fact that the deed of trust to Bennett, trustee, was prior to the deed to plaintiff showed a better title in himself. *Mobley v. Griffin, supra,* and cases there cited.

The plaintiff contends that the evidence fails to establish facts sufficient to justify the conclusion of law that the foreclosure of the deed of trust to O. K. Bennett, trustee, from Mary Elizabeth Dillingham, was properly conducted, and therefore the deed from O. K. Bennett, trustee, to defendant Gardner was void. The recitals in this deed are *prima facie* evidence of the correctness of the facts therein set forth and the burden of proving otherwise is on the person attacking the sale, in this case the plaintiff. *Brewington v. Hargrove,* 178 N. C., 143, 100 S. E., 308. The facts as recited in this deed support the conclusion that there was a valid foreclosure.

The recitals in the deed of foreclosure, as well as the other evidence in the case, tend to show that the defendant was the holder of two notes executed by Mary Elizabeth Dillingham, that they were past due, that the first of these notes for $500.00 was secured by the deed of trust to O. K. Bennett, trustee, from Mary Elizabeth Dillingham, and the second for $1,500.00 was secured by a deed of trust to one J. C. Ramsey, trustee, from the same grantor, and that O. K. Bennett and J. C. Ramsey advertised foreclosure sales in different advertisements but to take place at the same time and place, that Don C. Young represented both trustees, and conducted both sales, that at the sale under the deed of trust to O. K. Bennett, Young announced that he was instructed by defendant Gardner, who held the note, to bid $500.00, and asked for other bids, but no further bids were offered, and Gardner was declared to be the last and highest bidder; a similar proceeding was followed under the deed of trust to J. C. Ramsey and L. H. Gardner was declared to be the last and highest bidder for $1,500.00; and then the property included in both deeds of trust were offered together and a bid of $2,200.00 was announced by Young for Gardner, and no further bids were offered, and Gardner was declared to be the last and highest bidder; that present at the sale was James E. Rector, attorney for the plaintiff, the grantee of the maker of the deeds of trust, and the owner of the equity of redemption, who made no objection to the method of the sale, and approved same; that the principal security for the two notes was a house which was constructed partially on Lot No. 28, which was included in the Ramsey deed of trust, and partially on Lot No. 27, which was included in the Bennett deed of trust; that said sale was reported to the clerk, that no advanced bid was made to the clerk, and no effort made to advance said bid, and no desire manifested upon the part of the plaintiff or anyone else to advance the bid; that after the expiration of ten days O. K. Bennett, trustee, executed deed to L. H. Gardner for the land included in the deed of trust to him, and J. C. Ramsey, trustee, did likewise for the land included in the deed of trust to him; that Don C. Young did not act as agent of Gardner at the foreclosure sale but merely announced bids for him as he had been requested to do.

While the offering of the properties in the two deeds of trust together was unusual, no prejudice was thereby created against the plaintiff, but, on the contrary, this proceeding inured to its benefit rather than to its detriment in that the amount realized thereby was increased by $200.00, and the amount thereof, $2,200.00, was within $4.00 of the total amount due on both notes, $2,204.00.

So far as the report of the sale to the clerk was concerned, no report is required to be made by the statute, C. S., 2591, until an advanced bid has been made and properly safeguarded or paid into the office of the clerk, *Pringle v. Loan Assn.*, 182 N. C., 316, 108 S. E., 914, and no prejudice is shown to have arisen therefrom since there is no evidence of any desire or purpose of anyone to advance the bid or bids, or that the sale was for a less value than the property possessed.

In the cases relied upon by the plaintiff, *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288; *Mills v. B. & L. Assn.*, 216 N. C., 664, 6 S. E. (2d), 549; and *Warren v. Land Bank,* 214 N. C., 206, 198 S. E., 624, it was held that if the evidence was conflicting the issue of the *bona fides* of the sale should be submitted to the jury. The equivalent of this was done in the case at bar, the judge of the Buncombe County court, in accord with the statute governing the court (N. C. Code, 1939 [Michie], 1608 [u]), in the absence of a request for a jury, heard the evidence and found the facts—and these facts found by him and affirmed by the Superior Court, are binding upon this Court, since there was evidence to support them. *Chandler v. Conabeer,* 198 N. C., 757, 153 S. E., 313.

The case at bar is somewhat similar to that of *Elkes v. Trustee Corporation,* 209 N. C., 832, 184 S. E., 826, wherein is reiterated the principle that the burden is upon the trustor attacking a foreclosure to prove his grounds for attack, since the execution of the power of sale contained in the deed of foreclosure is presumed regular. However, there is no suggestion in the case at bar of inadequacy of price paid as was made in the *Elkes case, supra.*

There was no evidence offered by the plaintiff tending to show that Mary Elizabeth Dillingham was not a *feme* sole when she executed the deed of trust to O. K. Bennett, trustee, which constituted a link in defendant Gardner's chain of title. While her marriage to Howard Scarborough is admitted, the date of such marriage is not in evidence.

Assignment of error No. 10 is to certain of the findings of fact contained in the judgment of the judge of the Buncombe County court. We have examined this assignment, and each of its subdivisions, and are of the opinion that each of such findings of fact is supported by competent evidence, and, since affirmed by the Superior Court, are binding upon us. Those subdivisions of this assignment that relate to the conclusion of law of the judge of the county court are untenable, since they are sustained by the facts found.

Any discussion of the remaining assignments of error is obviated by what has been said as to those assignments preceding them.

Since upon the record we find no error, the judgment of the Superior Court overruling the assignments of error made in the Buncombe County court and affirming the judgment of that court must be

Affirmed.

OLIVER D. JOHNSON, CORA HOLCOMBE, JAMES L. WAGNER, JAMES D. RAY, W. T. DUCKWORTH, J. R. OWEN, E. E. WHEELER, H. W. BROOKS, JOHN W. INZER, EDGAR J. DUCKWORTH, AS TRUSTEES OF THE HAYWOOD STREET BAPTIST MISSION, v. JAMES L. WAGNER, JAMES D. RAY, W. T. DUCKWORTH, J. R. OWEN, E. E. WHEELER, H. W. BROOKS, JOHN W. INZER, EDGAR J. DUCKWORTH, AS TRUSTEES OF THE REVELL HEIGHTS BAPTIST CHURCH ASSEMBLY GROUNDS AND ALL PERSONS OF THE BAPTIST DENOMINATION AFFILIATED WITH THE BUNCOMBE COUNTY BAPTIST ASSOCIATION, THE NORTH CAROLINA BAPTIST STATE CONVENTION, AND MRS. JOHN BOMAR.

(Filed 5 March, 1941.)

1. Declaratory Judgment Act § 2a—

An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who are beneficiaries of the trust are made parties, is justiciable under the Declaratory Judgment Act.

2. Trusts § 11—

Courts of equity, in the exercise of their inherent and supervisory jurisdiction of charitable trusts, upon proper application of the trustees, will construe the trust, determine the duties imposed upon the trustees, and advise the means of effectuating the general and ultimate beneficial intent of the trustor.

3. Same—

Where the particular method prescribed by the trustor for effecting the general and ultimate purpose of a charitable trust becomes impossible to pursue, the trust does not fail, but courts of equity have the power to grant relief to the end that the general and ultimate intent of the trustor may be effectuated.

4. Same—Decree that trustee should sell trust property in order to effectuate general and ultimate purpose of trust is upheld.

Testator devised certain realty to named trustees to be used by designated agencies of a church denomination as an assembly ground and a site for churches, schools, homes, hospitals, and cottages for retired ministers and returned missionaries. In an action to construe the rights of the parties in the trust it was made to appear that the land was inaccessible, that the cost of developing same was excessive, and that adequate funds for such development were not available, and that the specified agencies of the denomination already maintained an assembly ground

where the ultimate purposes of the trust could be effectuated and that said agencies would not accept the land for the purposes of the trust. *Held:* The Superior Court, in the exercise of its equitable jurisdiction, has power and authority to authorize the trustees to sell the land in order that the ultimate purposes of the trust may be effectuated.

5. Same—Equity may decree that trust property be sold and proceeds of sale and income from other trust property be used to accomplish ultimate purposes of the trust.

Testator devised certain land to trustees to be used by the agencies of a church denomination for an assembly ground and other particular purposes set forth. In another item of the will testator set up another trust and stipulated that a part of the income therefrom should be used by the trustees first named, in furtherance of the purpose of the trust for the assembly ground, and for such religious purposes as the trustees may deem worthy. *Held:* Although the phrase "for such other religious purposes" must be confined to the objectives of the trust, upon determination that the land devised cannot be used in effectuating the purpose of the trust, but that the agencies of the denomination maintained another assembly ground at which the purposes of the trust could be effectuated, and decreeing that the trustees might sell the realty, the court has the power to further decree that the proceeds of the sale and the income from the other trust property should be used to accomplish the general and ultimate purposes of the trust.

APPEAL by plaintiffs from *Nettles, J.*, at December Term, 1940, of BUNCOMBE. Affirmed.

Narvel J. Crawford for plaintiffs.
Sale, Pennell & Pennell for defendants.

DEVIN, J. This action was instituted under the North Carolina Declaratory Judgment Act (Public Laws 1931, ch. 102), for the purpose of obtaining judicial construction of certain provisions of the will of O. D. Revell, deceased, and for advice in the administration of charitable trusts created by said will, and for a declaration of the rights of the parties in relation thereto.

In Item 27 of the will the testator devised to the board of trustees of Revell Heights Baptist Church Assembly Grounds certain real property, therein particularly described, consisting of the "top of what is known as Woodfin Mountain," then known as Revell Heights, but to be thereafter known as Revell Heights Baptist Church Assembly Grounds. He directed that this property be used perpetually by the Missionary Baptist Denomination, affiliated with the Buncombe County Baptist Association, the North Carolina Baptist State Convention, and the Southern Baptist Convention, as a Baptist Assembly Ground for the building of churches, schools, homes, hospitals and cottages for retired ministers and returned missionaries.

The board of trustees named in this item of the will, who are the defendants here, were authorized to "make such rules and regulations as they shall deem meet and proper covering the use and occupancy of said property or any part thereof, and shall have at all times full and complete control thereof." The trustees were directed to use the income from a fund provided in the will for leveling off the top of the land so that it might be rendered suitable for building sites. The property was to be "maintained for the white Baptist Denomination." The trustees were given power to name successors to those who should die or resign. It was further provided that Rev. John Bomar and his wife should have right to occupy during their lives one of the cottages on said ground, when built. It was admitted that John Bomar is dead, and the residence of his widow is unknown. She was made a party defendant and served by publication.

In Item 28 the testator created another trust and devised to the board of trustees of Haywood Street Baptist Mission certain real property in Asheville, consisting of a vacant lot on Haywood Street, "to be used as a Baptist Mission for the purpose of holding religious meetings." Funds were to be solicited for the purpose of erecting a suitable building on said lot. The same trustees previously named for the Revell Heights Baptist Church Assembly Grounds were also appointed trustees of the Haywood Street Baptist Mission, with power, however, to appoint additional trustees for said mission, if deemed proper.

In Item 29 of the will all the residue and remainder of the testator's property (not thereinbefore disposed of) was devised to certain persons as trustees to hold, manage, invest and reinvest the proceeds of sales of the property therein devised; and in Item 34 of the will it was provided that the income thus devised should be distributed as follows: ten per cent to be retained for investment, and ten per cent paid "to the Board of Trustees of Revell Heights Baptist Church Assembly Grounds and for the purposes designated in paragraphs number 27 and 28 thereof, and for such other religious purposes as said Board of Trustees may determine as worthy." The remainder of the income was directed to be paid to the nieces and nephews of the testator.

It was admitted in the pleadings and found as a fact by the court below that the real property described in Item 27 is inaccessibly located and impracticable for the purposes described in the will, and that the cost of developing the land for the purposes set forth would be exorbitant, and that the funds available are entirely insufficient. It was further admitted that those of the Missionary Baptist Denomination affiliated with the Buncombe County Baptist Association, the North Carolina Baptist State Convention, and the Southern Baptist Convention maintain an adequate assembly ground at Ridgecrest, North Carolina,

wherein all the purposes expressed in Item 27 may be fully carried out, and that, through the proper boards and committees of the Baptist organizations named, methods have been adopted for carrying out the general purposes expressed in said will of providing for retired ministers and their widows, and returned missionaries.

It was further admitted in the pleadings that the defendants, trustees of Revell Heights Baptist Church Assembly Grounds, had tendered to the executive committees and boards representing the Baptist organizations named in the will, for whose use the property was devised, such legal rights, benefits and privileges as were granted to them by the will, and each of the named organizations, through its duly constituted committee or board, rejected the use of said real estate for the purposes set forth in the will, and declined to make contributions for the development and operation of the land for the purposes and ideas set forth in the will, on the ground that the land was inaccessible and impracticable for the uses designated.

The trustees named in Items 27 and 28 are substantially the same, and appear here both as plaintiffs and defendants, but all the agencies representing the white Missionary Baptist Churches of Buncombe County, the State of North Carolina, and the Southern States, and all persons of the Baptist Denomination affiliated with these representative bodies, are made parties, and the purpose of the action is to determine the rights of all the parties with respect to the property devised by O. D. Revell. Hence, we hold that a proper justiciable question is presented for our decision under the provisions of the North Carolina Declaratory Judgment Act.

1. Do the defendants have the right and power to sell the real property devised in Item 27 of the will of O. D. Revell?

One of the most important subjects of equitable jurisdiction is that of trusts, and the construction of charitable trusts created by wills, the determination of the duties imposed upon trustees, the powers granted, and the means of effectuating the ultimate benefits conferred, constitute matters peculiarly within the province and jurisdiction of courts of equity. In the exercise of the supervisory power of the courts of equity over trusts, trustees and those interested in the administration of trusts are permitted to apply to the court for plenary and authoritative advice in relation thereto. *Bank v. Alexander,* 188 N. C., 667, 125 S. E., 385.

Cases involving the subject of charitable trusts have frequently engaged the consideration of this Court, and the questions there decided have given occasion for the statement of the equitable principles controlling upon the facts appearing in those cases. *Bond v. Tarboro,* 217 N. C., 289, 7 S. E. (2d), 617; *Carswell v. Creswell,* 217 N. C., 40, 7 S. E. (2d), 58; *Williams v. Williams,* 215 N. C., 739, 3 S. E. (2d),

334; *Woodcock v. Trust Co.*, 214 N. C., 224, 199 S. E., 20; *Whitsett v. Clapp*, 200 N. C., 647, 158 S. E., 183; *Holton v. Elliott*, 193 N. C., 708, 138 S. E., 3; *Shannonhouse v. Wolfe*, 191 N. C., 769, 133 S. E., 93; *Bank v. Alexander*, 188 N. C., 667, 125 S. E., 385; *Trust Co. v. Ogburn*, 181 N. C., 324, 107 S. E., 238; *Church v. Ange*, 161 N. C., 314, 77 S. E., 239; *Paine v. Forney*, 128 N. C., 237, 38 S. E., 885; *Keith v. Scales*, 124 N. C., 497, 32 S. E., 809. Many older cases are cited and analyzed in *Woodcock v. Trust Co., supra.* The power of the Court in upholding charitable trusts has been fortified by recent statute. Public Laws 1925, ch. 264.

In this case, while the general purpose of the testator to donate property to charitable uses, and the designation of the ultimate beneficiaries for whom the trust is created, sufficiently appear, the fact seems to have been definitely established that the particular mode for the use of the designated property has failed. The gift of the property for a designated use in a particular manner has been declined as impracticable. The donation of the land for use as an assembly ground has failed, but that does not destroy the trust. It seems to be a generally recognized principle controlling the decisions of courts of chancery on the subject that when a definite charity has been created, the failure of the particular mode in which it is to be effectuated does not destroy the trust. It has been well said, "the substantial intention shall not depend on the insufficiency of the formal intention." *Trust Co. v. Ogburn, supra.* The general intent of the testator must prevail over the particular mode prescribed. Zollman Am. Law of Charities, sec. 137. Notwithstanding the impossibility of effectuating the particular method prescribed for carrying out the provisions of a trust, the Court will exercise its equitable jurisdiction and supervise the administration of the fund so as to accomplish the purposes expressed in the will. *Paine v. Forney, supra; Trust Co. v. Ogburn, supra.*

In 2 Bogert on Trusts and Trustees, sec. 392, will be found collected numerous cases relating to the power of courts of equity to authorize sales of real property conveyed to charitable uses, when necessary for the proper administration of the trust. The general doctrine is stated in 14 C. J. S., page 505, as follows: "It is recognized that a court of equity has a general and inherent jurisdiction, as incident to the administration of a charity estate, to order the alienation of charity property in a proper case." See, also, 2 Scott on Trusts, sec. 167.

In *Holton v. Elliott, supra,* it was said: "Courts of equity have jurisdiction to order, and, in proper cases, do order the alienation of property devised for charitable uses. *Keith v. Scales,* 124 N. C., 497; *Vidal v. Girard,* 43 U. S., 127, 11 Law Ed., 205; 11 C. J., 323; Eaton on Equity, 349. The power is not infrequently exercised where conditions change

and circumstances arise which made alienation of the property necessary or beneficial to the administration of the trust." And in *Church v. Ange, supra, Allen, J.,* speaking for the Court, uses this language: "Courts of equity have long exercised jurisdiction to sell property devised for charitable uses when, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale." In *Shannonhouse v. Wolfe, supra,* this Court held that a sale of property would be ordered when "indispensable to the preservation of the interests of the parties in the subject matter of the trust."

In *Bond v. Tarboro, supra,* it was said, referring to the effect of exigencies arising which had not been contemplated by the donor, that the Court should occupy, as far as may be, the place of the creator of the trust, and do with the fund what he would have directed had he anticipated the emergency. The Court quoted from *Curtiss v. Brown,* 29 Ill., 201, as follows: "From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence, that power is vested in the court of chancery." *Trust Co. v. Laws,* 217 N. C., 171, 7 S. E. (2d), 470; *Cutter v. Trust Co.,* 213 N. C., 686, 3 S. E. (2d), 5; *Trust Co. v. Nicholson,* 162 N. C., 257, 78 S. E., 152; *Ex Parte Wilds,* 182 N. C., 705, 110 S. E., 57.

It will be noted that while the will contains no express authority to the trustees to sell, neither is the sale of the property described in Item 27 forbidden. There is no condition imposed, no limitation over prescribed, no clause of reversion inserted. *Hall v. Quinn,* 190 N. C., 326, 130 S. E., 18; *Lassiter v. Jones,* 215 N. C., 298, 1 S. E. (2d), 845.

The facts upon which the decision in *Penick v. Bank,* 218 N. C., 686, was predicated, were substantially different from those appearing here. In that case it was held that the income from one trust fund could not be applied to the purposes of another fund, in violation of the express terms of the will.

We conclude that the court below has correctly held, upon the facts established, that the defendants trustees are clothed with power and authority to sell the land described in Item 27 of the will.

2. It follows that defendants have the right to use the proceeds of sale of the land, as well as the income received under Item 34 of the will, in accord with the dominant intention of the testator in donating his property to charitable uses under the control of the religious organizations named, representing those who belong to the Baptist Denomination, in carrying out the primary purposes for which these agencies were established. The fund was expressly set apart to be used for the purposes designated in Items 27 and 28 of the will, and "for such other religious purposes as said Board of Trustees may determine as worthy." This

must be held, however, to be confined to those objects for the administration of which the named agencies of the Baptist Denomination were constituted.

For the reasons herein set out, we conclude the defendants board of trustees have full power and authority to receive the income granted in Item 34 of the will and to expend the same for religious purposes in accordance with the powers conferred upon said board as herein defined.

The sale of the real property herein authorized will be under the supervision of the Superior Court of Buncombe County. Judgment will be entered in accord with this opinion. Except as herein modified, the judgment below is

Affirmed.

TOWN OF OLD FORT v. J. F. HARMON, J. B. JOHNSON, GEORGE E. MOORE, H. R. EARLY, T. R. KANIPE AND C. L. TATE.

(Filed 5 March, 1941.)

1. Public Officers § 7a—

Public officers may not be held individually liable for breach of their official and governmental duties which involve the exercise of judgment and discretion unless they act corruptly and of malice.

2. Same—Public officers may not be held individually liable for breach of ministerial duty unless statute imposing such duty so provides.

Public officers may not be held individually liable for negligent breach of purely ministerial duties imposed upon them by statute for the public benefit unless the statute itself makes provision for such liability, since the statutes creating municipal offices and imposing duties upon the officials must be construed *in para materia* and, under the maxim *expressio unius est exclusio alterius*, the fact that in some instances the statutes impose personal liability while in other instances they fail to impose such liability is equivalent to a legislative declaration that in the latter instances personal liability does not exist.

3. Same—Complaint failing to allege that breach of duty was corrupt or malicious or that statute imposing such duty provided for personal liability, held demurrable.

This action was instituted by a municipality against its former mayor and former aldermen alleging negligent breach of duty on the part of said aldermen in not requiring the mayor, who acted as superintendent of waterworks and collector of taxes, to be bonded, and in failing to perform their duties in regard to supervision, accounting and auditing of the municipal finances, and in failing to attentively look after the business of the plaintiff municipality in violation of their statutory duties, C. S., 2818, 2809, 2840, 2687, and in violation of duties imposed upon them by the municipal charter, secs. 8, 12, ch. 271, Private Laws 1911. *Held:* If the allegations of breach of duty by the aldermen related to the performance of official and governmental duties involving the exercise of judgment

and discretion, there was no allegation that such breach was corrupt and malicious, and if the allegations related to public ministerial duties there was no allegation that the statutes imposing the duties provided for personal liability, and therefore defendant aldermen's demurrer to the complaint was properly sustained.

4. Same—Complaint which fails to allege that loss resulted as direct and immediate result of breach of duty held demurrable.

In this action by a municipality the complaint alleged that the former mayor failed and refused to account for funds of the municipality in a certain sum, resulting in loss to the municipality in said sum, and that its former aldermen negligently failed to perform their duties in regard to supervision, accounting and auditing of the municipal finances. *Held:* Since it does not appear that the loss to the municipality would not have occurred had the aldermen performed all the duties alleged to have been breached by them, the demurrer of the aldermen was properly sustained for failure of the complaint to allege that the loss was a direct and immediate result of their alleged breach of duty.

APPEAL by plaintiff from *Bobbitt, J.*, at September Term, 1940, of MCDOWELL.

G. F. Washburn and Whitlock, Dockery & Shaw for plaintiff, appellant.

Robert W. Proctor and W. R. Chambers for defendants, appellees.

SCHENCK, J. This is an appeal by the plaintiff from judgment sustaining demurrer filed by the defendants other than J. F. Harmon, who filed answer.

The complaint to which demurrer was filed alleged that the plaintiff was a municipal corporation and that the defendants were the duly elected mayor and aldermen thereof from 1 May, 1935, to 30 April, 1937; that the defendant aldermen duly elected the mayor, J. F. Harmon, superintendent of waterworks and collector of taxes, and that the said Harmon assumed the duties of said office in May, 1935, and continued in said office through April, 1937, during which period he collected and secured moneys of the plaintiff totaling $22,998.23, and deposited with the treasurer of the plaintiff $20,043.98, and that the said Harmon wrongfully and fraudulently failed to account to the plaintiff for $2,954.25, property of the plaintiff, and still wrongfully refuses to pay said funds to the plaintiff; and

"9. That the defendants, other than the defendant Harmon, and each of them, by virtue of their offices as Aldermen of the plaintiff, were charged with the duty of attending to the business of the plaintiff and keeping a vigilant watch over their employees and agents, including the defendant J. F. Harmon as waterworks superintendent and tax collector of the plaintiff.

"10. That the defendants violated their said duties to the plaintiff in that they were negligent in: (1) not requiring the defendant Harmon to be bonded as required by statute and the Charter of the plaintiff; (2) not requiring proper books of account to be kept with respect to the waterworks and the revenue of the plaintiff derived therefrom, as required by statute; (3) not having a proper accounting system to show the conditions of the plaintiff with respect to its assets and liabilities, the value of its several properties and the state of its several funds as required by statute; (4) not requiring publication of the receipts and disbursements of the moneys of the plaintiff as required by statute; (5) not requiring an audit of the affairs of the plaintiff, especially of the funds handled by the defendant Harmon as waterworks superintendent and tax collector; (6) not requiring the defendant Harmon to furnish quarterly, in writing, to the other defendants as Aldermen of the plaintiff a general statement of the condition of the plaintiff; (7) not requiring meetings of the Board of Aldermen to be held as required by the Charter of the plaintiff, and (8) not attentively looking after the business of the plaintiff, as it was their duty to do, but sleepily doing nothing with respect to the same.

"11. That because of the matters and things hereinbefore set forth the plaintiff has sustained a loss of $2,954.25; and that the defendants are jointly and severally indebted to the plaintiff in the sum of $2,954.25 and interest thereon from May 10, 1937."

It is the established law in this jurisdiction that public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty unless they act corruptly and of malice. *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735. It is also a recognized principle with us that in case of duties plainly ministerial in character the individual liability of public officers for negligent breach thereof does not attach where the duties are of a public nature, imposed entirely for public benefit, unless the statute creating the office or imposing the duties makes provision for such liability. *Hudson v. McArthur,* 152 N. C., 445, 67 S. E., 995; *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831.

In the complaint under consideration there is no allegation, direct or by implication, that the demurring defendants acted corruptly or of malice, the allegations of wrongful and fraudulent actions being limited to those of the defendant Harmon, who is not demurring. Therefore, if it is sought to hold the demurring defendants liable for negligent failure to perform official or governmental duties involving the exercise of judgment and discretion, the complaint fails to state facts sufficient to constitute a cause of action.

If it is sought to hold the demurring defendants liable for negligent failure to perform purely ministerial duties imposed for public benefit, the complaint fails to state facts sufficient to constitute a cause of action, unless the statutes creating such duties make provision for such liability. According to plaintiff's brief the duties alleged to have been negligently breached by the demurring defendants are those imposed by C. S., 2818, and sec. 8, ch. 271, Private Laws 1911, charter of the town of Old Fort, providing that the governing body of the city or town shall require bond of tax collectors; C. S., 2809, providing the governing body of cities and towns shall keep separate statement and account of the money received by the city or town from the waterworks system; C. S., 2840, providing that the governing body of the city or town shall have a proper accounting of assets and liabilities, the value of its several properties and the state of its several funds; C. S., 2687, providing that the governing body of the city or town shall require the publication of the receipts and disbursements of the money of the municipal corporation; the requirement of an audit of the affairs of the plaintiff, especially as to the money received by the defendant Harmon as tax collector and waterworks superintendent; section 12, ch. 271, Private Laws 1911, charter of the town of Old Fort, providing that they shall require the defendant Harmon, as mayor, to furnish to themselves as aldermen quarterly a written statement of the condition of the plaintiff town; and the provision of said last mentioned section requiring them to have monthly meetings of themselves as aldermen.

We have carefully examined each of these statutes cited and none of them makes provision for civil liability of the individual members of the governing body of a municipality in the event of a failure to comply therewith, hence the complaint is demurrable upon the score of breaches of purely ministerial duties.

Throughout ch. 56, Municipal Corporations, Consolidated Statutes, sec. 2622 *et seq.*, the Legislature has prescribed the powers, duties and liabilities of the governing bodies of municipal corporations with exactness, and numerous statutes relating to the duties of city and town officials have been enacted. In some of these statutes members of the boards of aldermen are made individually liable, and in some they are made indictable, and in yet others they are otherwise penalized, for the nonperformance of the duties imposed upon them, and the holding with us has been that the maxim of *"expressio unius est exclusio alterius"* is applicable to such a situation, and unless personal liability is provided by the statute imposing the duty, no personal liability attaches for the nonperformance thereof. *Moffitt v. Davis,* 205 N. C., 565, 172 S. E., 317.

"The entire body of law applicable to this subject, being *in pari materia,* is to be construed as one and the same statute, and the fact that

the Legislature, having created in terms a corporate duty, has imposed the personal liability in the one case and failed to do so in the other is equivalent to a legislative declaration that, in the latter instance, the liability does not exist." *Fore v. Feimster,* 171 N. C., 551, 88 S. E., 977.

Furthermore it is not perceived how the loss alleged to have been sustained by the plaintiff could have been the direct or immediate result of the alleged acts of the demurring defendants. The only direct or immediate cause of the loss alleged to have been sustained was the wrongful and fraudulent acts of the defendant Harmon in failing to account for funds of the plaintiff received by him as tax collector and superintendent of the water system. The demurring defendants could have observed the statutes that they are alleged to have breached to the very letter and the alleged loss of the plaintiff could have been the same. The tax collector or waterworks superintendent could have failed and refused to account for the moneys collected by him with or without strict compliance with the statutes alleged to have been breached by the demurring defendants. *Ellis v. Brown,* 217 N. C., 787, 9 S. E. (2d), 467.

The judgment of the Superior Court sustaining the demurrer filed is Affirmed.

TOWN OF OLD FORT v. J. F. HARMON, J. B. JOHNSON, GEORGE E. MOORE, H. R. EARLY AND T. R. KANIPE.

(Filed 5 March, 1941.)

Public Officers § 7a—Allegations that municipal officers elected alderman the chief of police and paid him salary of that office held insufficient to state action against officers individually.

This action was instituted by a municipality against its former mayor and its former aldermen alleging that defendants elected a member of the board of aldermen the chief of police, that the salary of the chief of police was paid by the municipality and that such payment constituted an illegal expenditure, since an alderman may not hold any other office or position with the municipality, and that defendants were indebted to the municipality in the amount of the salary so paid. The person elected chief of police and alleged to have received salary therefor was not made a party. The complaint failed to allege that defendants' action was malicious or corrupt or even wrongful and willful, and further failed to allege that the statutes which imposed the duties upon defendants which plaintiff alleged they breached, provided for individual liability for breach of said duties, and further failed to allege that the municipality did not receive adequate consideration for the moneys expended, and failed to allege intent on the part of defendants to evade the law. *Held:* Defendants' demurrer to the complaint was properly sustained. *Moore v. Lambeth,* 207 N. C., 23, cited and distinguished.

OLD FORT *v.* HARMON.

APPEAL by plaintiff from *Bobbitt, J.*, at September Term, 1940, of MCDOWELL.

G. F. Washburn and Whitlock, Dockery & Shaw for plaintiff, appellant.

Robert W. Proctor and W. R. Chambers for defendants, appellees.

SCHENCK, J. This is an appeal by plaintiff from judgment sustaining demurrers filed respectively by the defendant Harmon singly and by the other defendants jointly, upon the ground that the complaint fails to state facts sufficient to constitute a cause of action.

The complaint alleges that the plaintiff is a municipal corporation, and the defendant Harmon was mayor and the other defendants were aldermen of said corporation, and that while serving as mayor and aldermen respectively the defendants "elected C. L. Tate, one of the members of the Board of Aldermen of the plaintiff with themselves, Chief of Police of the plaintiff," that from 1 May, 1935, to 1 May, 1937, said Tate, member of said board, "received from the funds of the plaintiff $1,625.00 salary as Chief of Police of the plaintiff," that "the payment of such sums of money to C. L. Tate was an illegal expenditure on the part of the defendants from funds of the plaintiff, the same being contrary to the laws of the State of North Carolina in that a member of the Board of Aldermen of a town cannot hold any other office or position of profit with such town;" that the defendants are indebted to the plaintiff in the sum of $1,625.00, with interest, and although demand has been made upon them therefor they have wrongfully refused to repay the same.

It will be noted that C. L. Tate, who is alleged to have been elected chief of police and to have received the money for acting as such, is not made a party defendant, but only those who are alleged to have elected him to such office. Therefore *Carolina Beach v. Mintz,* 212 N. C., 578, 194 S. E., 309; *Comrs. v. Walker,* 203 N. C., 505, 166 S. E., 385; *Davidson v. Guilford,* 152 N. C., 436, 67 S. E., 918; and *Snipes v. Winston,* 126 N. C., 374, 35 S. E., 610, in each of which cases the money involved was illegally paid or illegally authorized to be paid and was sought to be recovered or to be paid from or to the person who had received or sought to receive such money by virtue of such illegal authorization, are not applicable to the case at bar wherein the person to whom the money is alleged to have been illegally paid is not made a party defendant.

Moore v. Lambeth, 207 N. C., 23, 175 S. E., 714, was an action by taxpayers against the mayor and city commissioners, the city engineer and a contractor, to recover on behalf of the city of Charlotte money

alleged to have been paid upon a contract illegally entered into by the governing body of the city with a building contractor, wherein exorbitant amounts were paid for the work performed, and the present *Chief Justice* there writes: "But it is stressfully contended by the other defendants (mayor and board of commissioners) that what they did was done in their official capacity, and that no liability attaches to them as individuals in the absence of express statutory provision imposing such liability, unless they acted corruptly and of malice. For this position they rely, *inter alia,* upon the following authorities: *Noland v. Trustees,* 190 N. C., 250, 129 S. E., 577; *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831; *Templeton v. Beard,* 159 N. C., 63, 74 S. E., 735.

"The case rests upon another principle. Where public funds are wrongfully, wilfully and knowingly disbursed by municipal officers without adequate consideration moving to the municipality and with intent to evade the law, as found upon the present record, those responsible for such illegal withdrawal of said funds may be required to make good the loss to the public treasury. *Brown v. Walker,* 188 N. C., 52, 123 S. E., 633; 19 R. C. L., 1142; 43 C. J., 718."

While the *Moore case, supra,* is similar to the case at bar in that the members of the governing body of the city who authorized the payment under an illegal contract were sought to be held liable, it is widely different in that it is bottomed upon "public funds" being "wrongfully, wilfully and knowingly disbursed by municipal officers without adequate consideration moving to the municipality and with intent to evade the law." No such allegations appear in the complaint in the case at bar. The nearest approach thereto being that the payment to Tate "of such sums of money . . . was an illegal expenditure on the part of the defendants from funds of the plaintiff."

In the light of the fact that the strongest allegation against the defendants is that they authorized an "illegal expenditure," without any allegation of wrongful and willful action, much less of corruption or malice, without any allegation of violation of any statute imposing personal liability, without any allegation of failure of adequate consideration moving to the municipality for the funds expended, and without any allegation of intent to evade the law, we are of the opinion, and so hold, that *Noland v. Trustees, supra; Hipp v. Ferrall, supra; Templeton v. Beard, supra;* and *Old Fort v. Harmon, ante,* 241, are applicable to the case at bar, and that the demurrers of the defendants were properly sustained.

The judgment of the Superior Court is

Affirmed.

W. H. DAVIS AND HIS WIFE, MARGARET DAVIS, v. THE FEDERAL LAND BANK OF COLUMBIA, W. B. WILLIS AND JOSEPH DICKSON KELLY, AND P. C. CAMPBELL, GUARDIAN AD LITEM.

(Filed 5 March, 1941.)

1. Mines and Minerals § 1—

Title to the surface of the earth and title to the mining and mineral rights under the surface may be severed, and when severed the title to the mining and mineral rights is governed by the ordinary rules governing real property.

2. Same: Ejectment § 9: Adverse Possession § 17—Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for twenty years.

Plaintiffs instituted this action to remove cloud on title to the mineral rights in the *locus in quo*, which had been severed from the title to the surface, and for possession of same claiming title thereto by adverse possession. Plaintiffs did not claim under paper title or under color of title. *Held:* Plaintiffs may not rely upon the weakness of defendants' title but must establish their own title good against the world or good against the defendants by estoppel, and there being no question of estoppel involved, plaintiffs must prove title to the mineral rights by adverse possession for a period of twenty years under known and visible lines and boundaries. C. S., 430.

3. Mines and Minerals § 1: Adverse Possession §§ 3, 6—Mere prospecting does not constitute possession of mine and mineral rights.

In order to constitute possession of mines and mineral rights the possessor must make such use of the mines and mineral rights as they are capable of, in order to show that the acts of dominion are done in the character of owner in opposition to the rights or claims of all other persons, and mere prospecting does not constitute such possession, and therefore evidence tending to show one year's mining operations and four years' work in sinking shafts, together with prospecting over a period of more than twenty years, does not show sufficient continuity of possession of the mines and mineral rights to establish adverse possession for a period of twenty years under known and visible lines and boundaries.

4. Adverse Possession § 5—Where claim is not under color of title possessor must show possession under known and visible lines and boundaries.

Plaintiffs introduced no evidence of title and did not claim under color of title, but claimed the mine and mineral rights in the *locus in quo* by twenty years adverse possession. Plaintiffs' evidence tended to show that they worked the fertilizer minerals at various places on the *locus in quo* for over twenty years but did not otherwise locate such work. *Held:* Since plaintiffs do not claim under color of title there can be no presumption that their possession was to the outer boundaries of their claim, and the evidence is insufficient to show adverse possession of the mining rights under known and visible lines and boundaries.

DAVIS *v.* LAND BANK.

APPEAL by plaintiffs from *Rousseau, J.*, at October Term, 1940, of STOKES.

This is an action to remove cloud upon title by adverse possession to the mining and mineral rights in a certain 122½-acre tract of land in Sauratown Township, Stokes County.

There was allegation in the complaint and record evidence that the title to mining and mineral rights in the *locus in quo* had been severed from the title to the surface thereof, but there was no evidence that the plaintiffs had any record title to the mining and mineral rights. The defendants denied the title of the plaintiffs to the mining and mineral rights, and alleged that they were the owners and entitled to the possession of the *locus in quo* free from any claim or estate in the plaintiffs.

When the plaintiffs had introduced their evidence and rested their case the defendants moved to dismiss the action and for a judgment as in case of nonsuit, which motion was refused and defendants excepted; the defendants offered their evidence and renewed their motion to dismiss after all the evidence was in, which motion was allowed, and plaintiffs excepted, C. S., 567, and from judgment of nonsuit appealed to the Supreme Court, assigning error.

J. W. Hall, D. C. Kirby, Roy L. Deal, and Benbow & Hall for plaintiffs, appellants.

Ingle, Rucker & Ingle for defendant Land Bank, appellee.

SCHENCK, J. Title to the surface of the earth and title to the mining and mineral rights under the surface may be severed, and the mining and mineral rights being a part of the realty, title thereto is governed by the ordinary rules governing title to real property, and when severed they constitute two distinct estates. *Vance v. Pritchard,* 213 N. C., 552, 197 S. E., 182; *Hoilman v. Johnson,* 164 N. C., 268, 80 S. E., 249.

By virtue of C. S., 430, adverse possession of real property under known and visible lines and boundaries for twenty years gives title in fee to the possessor of such property, and this without regard to a color of title.

". . . title founded upon adverse possession of a mine will be limited to that area of which actual possession has been enjoyed." 18 R. C. L., p. 1185, Mines, Par. 93. *Glynn v. Howell,* 1 Ch. (Eng.), 666, 3 B. R. C., 405, 13 A. L. R., 375.

In ejectment the plaintiff must rely upon the strength of his own title, and not upon the weakness of his adversary's. To recover in such action the plaintiff must show title good against the world, or good against the defendant by estoppel. It makes no difference whether the defendant has title or not, the only inquiry being whether the plaintiff has it.

Carson v. Jenkins, 206 N. C., 475, 174 S. E., 271, and cases there cited.

In the absence of any evidence of record title or of any color of title in the plaintiffs, the sole question presented on this appeal is whether the plaintiff introduced sufficient evidence to be submitted to the jury upon the issue of their possession of the mining and mineral rights in the *locus in quo* under known and visible lines and boundaries adversely to all persons for twenty years, there being no question of estoppel involved. The judge of the Superior Court held that they did not, and with this holding we concur.

The evidence fails to show the plaintiffs' possession of any particular mine or minerals for any definite period of time, in any particular area, or under any known and visible lines and boundaries. The nearest approach to such evidence is the testimony of the plaintiff W. H. Davis, as follows: "Q. When did you commence prospecting . . . for . . . minerals? A. In 1904. Q. Then did you cease to prospect for those minerals since 1904? A. No sir. I prospected for anything I could find there of any value. Well, we drove five shafts, some of them bearing from 25 feet to 135, but regular prospecting openings in the outcroppings dozens of them. . . . The last work I done in the way of mining minerals outside of the fertilizer materials was in 1936, I believe it was. We worked at the fertilizer material continuously since we found it. Some of the people worked for me in 1904, and on down to 1906 or '07, on up to 1914, and from 1914 on to 1930, and in 1930, we did a little heavier prospecting that year than we had been at. . . . I never discontinued working at the mines and minerals since 1906, but, of course, I had to work at something else; of course it taken money to do that kind of work. Q. State about how much money you have expended? A. Around $13,000. I spent it in work and hiring men and cost of driving the slopes, material and equipment connected with it. I never closed any of the slopes after opening them. I am familiar with the boundaries of the 122-acre tract of land, know the corners and the lines. I have prospected for, worked for minerals practically all over the boundary. I worked for samples, picked up samples of different stuff and determined what it was, if it had any value. Q. All you did was prospecting except at this place where you drove those slopes, was it? A. About one year's work right there in them slopes. Elsewhere on the farm we got some openings over on the far end, but they were old openings and we reopened them and thoroughly tested them to see what was there. The large slope, large opening is near the east line of the property. Five there. Nineteen openings in all, including five over on the east line of the property. The large openings were made in 1935 or '36, I believe it was '34, '35 or '36. Q. You did no mining operations there after 1936, didn't you? A. We worked at the fertilizer material.

Q. You didn't do any digging after 1936? A. Not in them holes there. Q. You mean on the east line? A. Yes, them large pits. We worked the fertilizer materials since we closed the mine operation for coal. Haven't done anything in the big holes since 1936, because we know what is in them."

Prospecting is not making such use of mines and mineral rights as to evidence that such acts are done in the character of owner, in opposition to the rights or claims of other persons. Such use must have been made of the mines and mineral rights as they were capable of to establish title by adverse possession. *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347. About one year's work in the holes and making openings, nineteen of them, in 1934, 1935 or 1936, together with prospecting over a period of more than twenty years, does not show sufficient continuity of possession of mines and mineral rights to establish adverse possession for twenty years, under known and visible lines and boundaries.

While there is some evidence of the plaintiffs having worked the fertilizer intermittently for over twenty years, it does not establish where such work was done. At most it only tends to show that it was done at various places on the *locus in quo* without otherwise locating such work. It should also be borne in mind that the plaintiffs do not claim title by virtue of any color of title, and that therefore the law does not extend the force and effect of their possession to the outer boundaries of their claim, as it might have done had they claimed under a deed. *Ware v. Knight,* 199 N. C., 251, 154 S. E., 35; *Hayes v. Lumber Co.,* 180 N. C., 252, 104 S. E., 527; *Ray v. Anders,* 164 N. C., 311, 80 S. E., 403. This evidence is likewise insufficient to establish adverse possession of the mines and mineral rights under known and visible lines and boundaries.

The judgment of the Superior Court is

Affirmed.

LINDSEY M. GUDGER v. ROBINSON BROTHERS CONTRACTORS, INC., AND PRITCHARD PAINT & GLASS COMPANY, OF ASHEVILLE, INC.

(Filed 5 March, 1941.)

1. Bill of Discovery § 1—

Where one of defendants sued as joint tort-feasors alleges, among other defenses, that plaintiff's injuries resulted solely from the negligence of its codefendant, such codefendant is not entitled to an examination of respondent defendant, since, even though the defenses of defendants are antagonistic in regard to this defense, they are jointly interested in the defense of the action and a joint verdict and judgment against both is possible. C. S., 900, 901, 907.

2. Bill of Discovery § 3—Petition must allege facts upon which petitioner bases conclusion that examination of adverse party is necessary.

A petition for the examination of a codefendant which is not in the form of an affidavit, and further fails to allege the facts upon which petitioner bases its allegation that the examination of respondent is necessary to enable it to prepare its defense, is insufficient to support an order for examination. In the present case the codefendant alleged upon information and belief that the negligent acts of petitioner's employees were the sole proximate cause of the injury in suit, thus making it apparent that the information sought is available to petitioner through its own employees, and that the examination was not necessary but that the petition was merely an effort to ascertain the names of witnesses through whom respondent intends to prove the facts alleged.

3. Appeal and Error § 39a—

When it appears that the denial of a petition for the examination of an adverse party has not prejudiced petitioner, the order denying the petition will not be disturbed on appeal, since an order will not be reversed except for error which is prejudicial.

APPEAL by defendant Pritchard Paint & Glass Company of Asheville, Inc., from *Armstrong, J.*, at October Term, 1940, of BUNCOMBE. Affirmed.

Petition and motion in the cause made by the defendant Glass Company for an order permitting the examination before trial of certain officers and agents of its codefendant, Robinson Brothers Contractors, Inc.

Plaintiff instituted this action against the defendants as joint tortfeasors to recover damages for personal injuries alleged to have resulted from the joint and concurrent negligence of the defendants.

Respondent, Contractors, Inc., contracted to make repairs to a building in Asheville occupied by Belks, Inc. In connection with the work and for the protection of pedestrians it erected a board fence or wall along the sidewalk in front of the building, leaving a small space of sidewalk for the use of pedestrians. The petitioner, Glass Company, contracted with respondent to furnish and install plate glass and to do certain other work in connection with the original contract. While plaintiff was passing along the sidewalk the fence fell, inflicting certain personal injuries upon plaintiff. The respondent, in its answer, denied negligence and alleged that: (1) such injuries as were sustained by plaintiff were caused by the active negligence of the defendant, Glass Company, in that it removed certain braces and supports to said fence in connection with the work done by it, and that if it were negligent its negligence was negative and the negligence of the Glass Company was active so that, in any event, its liability is secondary; (2) the injuries sustained by plaintiff resulted from the sole negligence of the defendant Glass Company;

and (3) if it was negligent the defendant Glass Company was concurrently negligent as a result of which it is entitled to contribution.

The defendant, Glass Company, filed a motion in which it asserts that the allegation of Contractors, Inc., in respect to its second defense as to the sole liability of its codefendant, was made on information and belief and that it is necessary for it to determine the information upon which the said Contractors, Inc., bases such allegations, and prays an order permitting it to examine certain officers and agents of Contractors, Inc., to the end that it may ascertain such information.

When the cause came on to be heard in the county court of Buncombe County the judge thereof denied the motion. Defendant, Glass Company, appealed. Upon hearing of the appeal in the Superior Court the judge thereof affirmed the judgment of the county court and said defendant appealed.

Harkins, Van Winkle & Walton for defendant Pritchard Paint & Glass Company, appellant.

Heazel, Shuford & Hartshorn and Weaver & Miller for defendant, Robinson Brothers Contractors, Inc., appellee.

BARNHILL, J. C. S., 907, makes provision for the examination of a party to an action on behalf of his coplaintiff or codefendant "as to any matter in which he is not jointly interested or liable with such coplaintiff or codefendant and as to which a separate and not joint verdict or judgment can be rendered." The language of the statute does not include a party jointly interested or liable and against whom a joint verdict or judgment can be rendered. It excludes those who have any community of interest and for or against whom there may be a joint verdict and judgment. That the trial might also result in a several or individual verdict is not sufficient to bring a coplaintiff or codefendant within the terms of the statute. Thus, petitioner, appellant, is not permitted to proceed under this section. It and its codefendant are sued as joint tortfeasors. They are jointly interested in the defense of the action (though, in some respects, their defenses may be antagonistic); a joint verdict and judgment can and, if plaintiff prevails, must be rendered unless one of the defendants is completely exculpated.

Petitioner and its codefendant are not adverse parties within the meaning of C. S., 900, and C. S., 901. Even so, the petition is not sufficient to support an order for examination. It is not in the form of an affidavit and does not aver that the desired information is not available to the applicant and that the examination is material. *Bell v. Bank*, 196 N. C., 233, 145 S. E., 241. While it asserts "that it is necessary, in order for this defendant to properly prepare his case for trial," it

does not aver the facts upon which the allegation of necessity is based. *Evans v. R. R.*, 167 N. C., 415, 83 S. E., 617; *Mica v. Express Co.*, 182 N. C., 669, 109 S. E., 853; *Bell v. Bank, supra.*

On the contrary, the respondent alleges the specific facts upon which it asserts that petitioner is solely liable. The allegations, while made upon information and belief, are to the effect that agents and employees of the petitioner, in the work of installation of the plate glass, removed, loosened or interfered with the braces attached to said building and to the fence and that the removal, loosening or interference with the braces, and the failure to properly and securely replace the same, was the sole proximate cause of the injury. Thus, it appears that the desired information is available to the petitioner through the medium of its own employees, to whom it may resort.

In its final analysis petitioner's motion appears to be nothing more than an effort to ascertain the names of the witnesses through whose testimony respondent intends to prove the facts alleged. This is not the purpose or objective of the statute.

The petitioner may examine such witnesses as it desires at the trial. It fails to point out wherein it has been prejudiced by the denial of this right before trial. This Court will not reverse an order entered by the court below for error and no more. It must appear that the error is prejudicial. *Hicks v. Nivens*, 210 N. C., 44, 185 S. E., 469; *Butner v. Whitlow*, 201 N. C., 749, 161 S. E., 389; *Thigpen v. Trust Co.*, 203 N. C., 291, 165 S. E., 720.

The judgment below is

Affirmed.

R. A. POWERS v. PLANTERS NATIONAL BANK & TRUST COMPANY.

(Filed 5 March, 1941.)

1. Limitation of Actions § 16—

Where defendant pleads the statute of limitations, the burden is upon the plaintiff to show that his action was begun within the time allowed.

2. Actions § 6: Negligence § 1: Fraud § 1—

Plaintiff alleged that the defendant leased him certain property infected with germs of pulmonary tuberculosis without informing him of the fact, and that in consequence he contracted tuberculosis. *Held:* The action is for alleged negligent failure of defendant to inform plaintiff of the danger, and is based on negligence and not on fraud.

3. Actions § 6: Negligence § 1: Nuisances § 1—

Plaintiff alleged that defendant leased him certain property infected with germs of pulmonary tuberculosis without informing him of the fact,

and that in consequence he contracted tuberculosis, and that the negligence of defendant was continuing and created a nuisance. *Held:* The gravamen of the complaint is negligence and not nuisance.

4. Limitation of Actions § 4—

An action for negligence accrues, and the statute of limitations begins to run, from the time the wrongful act or omission complained of occurs, without regard to the time when the harmful consequences are discovered.

5. Limitation of Actions § 2c—

Any action under the provisions of chapter 2, Public Laws 1923, relative to sanitation, is governed by the three-year statute of limitations.

6. Appeal and Error § 41—

Where it is determined that defendant's motion to nonsuit was correctly allowed because of the bar of the statute of limitations, whether the complaint is sufficient to show that plaintiff's injury was proximately caused by the negligent acts or omissions complained of, need not be determined.

APPEAL by plaintiff from *Burney, J.*, at November Term, 1940, of NASH. Affirmed.

Dan B. Bryan, Harold D. Cooley, W. H. Yarborough, and W. F. Taylor for plaintiff, appellant.

Battle, Winslow & Merrell and J. P. Bunn for defendant, appellee.

DEVIN, J. Plaintiff instituted his action against defendant bank for wrongfully leasing and conveying to him certain property which he alleged had been used by one infected with the germs of pulmonary tuberculosis, without informing him of that fact. He alleged that in consequence thereof he contracted tuberculosis and suffered substantial injury to his health. Defendant was acting as agent for the owner in leasing the premises, and as administrator in conveying the personal property.

The defendant, among other defenses, pleaded the statute of limitations. It was therefore incumbent upon the plaintiff to show that his action was begun within the time limited by the statute, and not afterward. It was admitted that the lease and conveyance of the property described was made 30 November, 1934. The record shows that this action was begun 15 December, 1938.

To rebut the conclusion that the action was barred by the three years' statute of limitations, the plaintiff contended that the action was based on fraud—fraudulent concealment—and that the statute did not begin to run until discovery of the fraud. *Johnson v. Ins. Co., ante,* 202. But the complaint is bottomed on negligence. It alleges the breach of a duty on the part of the defendant in failing to inform him that the house had

been occupied and the furniture used by a person suffering from tuberculosis. There was neither allegation nor proof of fraud. It is well settled that in an action for damages, resulting from negligent breach of duty, the statute of limitations begins to run from the breach, from the wrongful act or omission complained of, without regard to the time when the harmful consequences were discovered. 17 R. C. L., 763-775; 37 C. J., 881-882; *Bank v. McKinney,* 209 N. C., 668, 184 S. E., 506; *Gordon v. Fredle,* 206 N. C., 734, 175 S. E., 126; *Daniel v. Grizzard,* 117 N. C., 105, 23 S. E., 93; *Blount v. Parker,* 78 N. C., 128; *Sullivan v. Stout,* 120 N. J. L., 304; 118 A. L. R., 211; *Schmidt v. Merchants Despatch Transportation Co.,* 270 N. Y., 287, 104 A. L. R., 450.

In his complaint the plaintiff alleged that the negligence of defendant was "continuing negligence in that it created or maintained a nuisance." This view is not presented in the brief, nor is it supported by the evidence. The only suggestion of nuisance in the complaint is with reference to negligence. It was "negligence-born, and must, in the legal sense, make obeisance to its parentage," as was said by *Seawell, J.,* in *Butler v. Light Co.,* 218 N. C., 116. The gravamen of the charge is negligence, not nuisance, and the proof is directed to a distinct breach of duty at a particular time. The alleged wrongful act or omission was the failure to give the plaintiff information at the time of the lease as to the previous use of the property. The cause of action accrued upon the breach of the obligation which the plaintiff alleges was imposed upon the defendant by virtue of its relationship to the property and to the plaintiff, and the statute of limitations began to run at that time.

Any action under the provisions of chapter 2, Public Laws 1923, relative to sanitation, would also be barred by the statute of limitations.

It was urged by the defendant that the evidence was insufficient to show that the alleged negligent act or omission on the part of the defendant was the proximate cause of the injury complained of, in view of the testimony that plaintiff, prior to the lease, had inactive tubercular infection, and the absence of substantial evidence as to the source of his present infection. It was pointed out that the case of *MacRae v. Unemployment Com.,* 217 N. C., 769, which arose under the Workmen's Compensation Act, has no application to the facts here in evidence. However, we deem it unnecessary to determine this question, as we conclude that the motion for judgment of nonsuit was properly allowed.

Judgment affirmed.

CHARLES P. LINEBERRY v. TOWN OF MEBANE.

(Filed 5 March, 1941.)

1. Master and Servant § 39a—

An infant employee is bound by the terms of the North Carolina Workmen's Compensation Act regardless of his age. Secs. 4, 5, ch. 120, Public Laws of 1929.

2. Master and Servant § 47—

For the purpose of filing and prosecuting claim for compensation, an injured employee is *sui juris* at the age of eighteen.

3. Same—

The limitation of time for filing claim under the Workmen's Compensation Act, sec. 24, ch. 120, Public Laws of 1929, is tolled as to an employee under eighteen years of age who is without guardian or other legal representative until he arrives at the age of eighteen, the common law rule as to disability of infants not having been modified in this respect by the Compensation Act.

PETITION to rehear. Original opinion reported in 218 N. C., 737.

Long, Long & Barrett for plaintiff, appellant.
Thos. C. Carter and June A. Crumpler for defendant, appellee.

BARNHILL, J. Claimant was born 7 July, 1921. He was injured 31 May, 1938. He was 18 years of age 7 July, 1939, and filed claim on 24 July, 1939. Thus it appears that the statement in the original opinion "that more than 12 months expired after claimant became 18 years of age before claim was filed" was due to a miscalculation of time. This being true, it becomes necessary to determine whether the limitation of time provided in the Workmen's Compensation Act (sec. 24, ch. 120, Public Laws 1929) for filing claim thereunder is tolled in behalf of a person under 18 years of age who is without guardian or other legal representative.

At common law an infant was under disability and without legal capacity to contract or to act in his own name in asserting a right in any legal proceeding. He could neither sue nor defend a suit in his own name. So long as he was without guardian limitations of time were tolled during the continuance of the disability. This common law rule still prevails in this State, except as it may have been modified by statute.

To what extent, if any, is this common law rule, as to the disability of infants, modified by the Workmen's Compensation Act? The answer to this question answers the question posed by this appeal.

For the purpose of becoming bound by the Workmen's Compensation Act the disability of an infant of whatever age is removed. The term "employee" is defined to mean "every person engaged in an employment under any appointment of hire or apprenticeship, express or implied, oral or written, including aliens and also including minors, whether lawfully or unlawfully employed." Every employee is presumed to have accepted the provisions of the act, sec. 4, and is bound thereby unless he has given notice of nonacceptance, sec. 5, or is otherwise excluded by the terms of the act.

Whenever payment is made to any person 18 years of age or over the written receipt of such person acquits the employer. When the employee is under 18 years of age and the amount to be received does not exceed $300.00 his father, mother or natural guardian is authorized to receive and receipt for the money and to acquit the employer. Whenever the amount received for compensation exceeds $300.00 it must be made to some person or corporation appointed by the Superior Court as a guardian and the receipt of such guardian acquits the employer. Sec. 47, see, however, sec. 7, ch. 274, Public Laws 1931.

The guardian, trustee or committee of an employee who is mentally incompetent or is under 18 years of age at the time when any right or privilege accrues to him under this act, may, in behalf of such employee, exercise such right or privilege. Sec. 48.

Sec. 49 is applicable only to the mentally incompetent and the minor dependent.

These sections (other than sec. 49) are enabling provisions in derogation of the common law rule. The common law, to the extent therein provided, is modified. Except as so modified it still prevails.

No provision is made in respect to the filing of a claim by an infant under 18 years of age other than that contained in sec. 48. This section is a mere declaration of the common law rule. If the employee is under 18 years of age his claim may be filed and prosecuted by his guardian. As to him, he is under the disability of infancy. If he has no guardian he is without capacity to file or prosecute his claim or by his receipt to acquit his employer until he arrives at the age of 18.

It follows that the limitation of time, as provided by sec. 24, as against an employee under 18 years of age, begins to run at the time of the accident if there is a guardian, and, if not, then upon appointment of a guardian or on his 18th birthday, whichever shall first occur.

It would create an anomalous situation to hold that a claimant who is without capacity to receive and receipt for compensation or to assert his right must nevertheless present his claim or forever thereafter be barred from so doing. Such an interpretation would be as unjust to the employer as to the employee.

We conclude, therefore, that: (1) an infant employee is bound by the terms of the act without regard to his age; (2) for the purpose of filing and prosecuting a claim for compensation an injured employee is *sui juris* at the age of 18; and (3) the limitation of time provided by sec. 24, as against an employee under 18 years of age, who is without guardian or other legal representative, is tolled until he arrives at the age of 18.

The claimant filed his claim in apt time. In dismissing it the commission acted upon an erroneous interpretation of the law. The claim should be heard upon its merits.

Petition allowed.

PAGE C. KEEL, J. W. KEEL AND FRANCES C. KEEL v. PEOPLES BANK & TRUST COMPANY, ADMINISTRATOR OF THE ESTATE OF BETTIE BAILEY, DECEASED, AND W. A. WEATHERSBY, SHERIFF OF WILSON COUNTY.

(Filed 5 March, 1941.)

1. Execution § 11: Judgments § 35—Facts found held sufficient to support decree dissolving temporary order restraining execution.

In this action to restrain execution, the court found that in a former action between the parties or their privies it was determined that defendant's judgment had priority over the deed of trust under which plaintiffs' claim, that plaintiffs had failed to show any other property subject to the lien of the judgment which might be properly sold to satisfy the judgment, and that the action was not prosecuted in good faith. *Held:* The facts found support the court's conclusion that the findings constitute a complete determination of the entire controversy and entitle defendant to dissolution of the temporary restraining order.

2. Appeal and Error § 40a—

Where there is no objection to any of the findings of fact made by the court they will be presumed correct, and where the facts found support the judgment, appellant's sole exception to the signing of the judgment cannot be sustained.

APPEAL by plaintiffs from *Burney, J.*, at November Term, 1940, of WILSON. Affirmed.

Chas. C. Pierce and Keel & Keel for plaintiffs, appellants.
Adams & Spruill for defendants, appellees.

DEVIN, J. Plaintiff Page C. Keel instituted his action against defendant bank as administrator of the estate of Bettie Bailey, deceased, and the sheriff of Wilson County, for the purpose of restraining the sale of

certain land under execution. Pending the hearing J. W. Keel and Frances C. Keel, at their request, were made parties plaintiff. This action concerns the same subject matter and substantially the same parties as in the case of *Keel v. Bailey,* 214 N. C., 159, 198 S. E., 654. The defendant bank succeeded Willie Bailey as administrator of the estate of Bettie Bailey, and the defendant sheriff is the successor in office of the sheriff named in the former suit. The additional parties plaintiff derive their title as tenants for life from the same source as the plaintiff Page C. Keel, who owns the remainder in fee in the land in question. It was held in the former suit that the lien of the judgment, under which the execution sought to be restrained was issued, was superior to the deed of trust under which plaintiffs claim. In this action the former judgment was pleaded as *res judicata.* Temporary restraining order was issued, but upon the hearing the restraining order was dissolved. The court below found the facts, and, upon those facts, adjudged that the decision in the former suit was *res judicata,* and that defendants were entitled to proceed to enforce the judgment in favor of the estate of Bettie Bailey.

The plaintiffs made no objection to any of the findings of fact made by the court below, and only excepted to the signing of the judgment. The facts found by the judge who heard the matter fully support his conclusions and judgment. These findings established the fact that all the matters and things alleged in the complaint have been fully adjudicated in the action entitled "Page C. Keel *v.* Willie Bailey, Administrator of Estate of Bettie Bailey," and that the same questions concerning the same subject matter, by substantially the same parties, were here sought to be relitigated, and that the additional parties plaintiff were in privity with the original plaintiff, not only in estate, but by agreement.

The judge below further found, upon consideration of matters transpiring in his court, which are fully set out, that this action was not being prosecuted in good faith; that the judgment referred to has not been satisfied; and that the judgment debtor has no other property to which the judgment can attach, except the Dawes tract owned by plaintiffs; and that plaintiffs have failed to show any other property subject to the lien of the judgment.

Predicated upon these findings, it was adjudged that the restraining order be dismissed; that the judgment was a valid lien on the plaintiffs' land, and that the administrator had suffered damage in the sum of $18.20. The court further adjudged that the facts found constituted a determination of the entire controversy, which was for the sole purpose of restraining the sale under execution, and the action was thereupon dismissed at the cost of the plaintiffs.

There was no objection to any of the findings of fact made by the court below, and they are presumed to be correct. *Wentz v. Land Co.*, 193 N. C., 32, 135 S. E., 480; *Smith v. Mineral Co.*, 217 N. C., 346, 8 S. E. (2d), 225; *Rosser v. Matthews*, 217 N. C., 132, 6 S. E. (2d), 849. The facts found support the judgment. The only exception was to the signing of the judgment. *Query v. Ins. Co.*, 218 N. C., 386. No error appears on the face of the record.

The judgment is

Affirmed.

LOUISE WILSON, BY HER NEXT FRIEND, NELL DALTON, v. E. H. POSEY, TRADING AND DOING BUSINESS AS PARKWAY CLEANERS AND LAUNDRY.

(Filed 5 March, 1941.)

Bailment § 6—

Where plaintiff alleges a bailment for hire on the part of defendant dry cleaning company in accepting plaintiff's coat to be cleaned, and defendant's failure to return the coat, but the complaint fails to contain a sufficient allegation of special damages, plaintiff's recovery should be confined to the fair market value of the coat as of the date it was delivered to defendant.

APPEAL by plaintiff from *Armstrong, J.*, at August Term, 1940, of BUNCOMBE. Affirmed.

Plaintiff delivered to the defendant a winter coat to be cleaned. The coat was lost and never returned. Plaintiff instituted this action in the county court of Buncombe County to recover damages, alleging the value of the coat to be $22.50, and alleging, further, inconvenience, loss of time from school and the like.

At the trial in the county court, defendant requested, in writing, special instruction as follows: "That in no event would the jury be authorized to answer the issue in an amount exceeding the fair market value of the coat as of the date the same was delivered to the defendant, and the court charges the Jury that in no event could the Jury award the plaintiff an amount exceeding $22.50."

The court declined to give this instruction but gave certain other instructions which would permit a larger recovery. There was a verdict and judgment for the plaintiff in the sum of $70.00. Defendant appealed assigning error.

When the cause came on to be heard in the court below the judge sustained, among others, defendant's assignment of error directed to the

refusal of the court to give the tendered prayer for instruction, and ordered a new trial. Plaintiff excepted and appealed.

Don C. Young for plaintiff, appellant.
Jones, Ward & Jones for defendant, appellee.

PER CURIAM. Plaintiff alleges a bailment for hire, and there is no sufficient allegation of special damage. The failure of the judge of the county court to instruct the jury on the measure of damages as prayed by the defendant was prejudicial error and the court below properly so held.

The judgment below is

Affirmed.

GREENLEE NICHOLS v. ARTHUR YORK AND WIFE, VIRGINIA YORK.

(Filed 19 March, 1941.)

1. Husband and Wife §§ 4c, 4d—

A married woman who has been abandoned by her husband is a free trader, Michie's Code, 2530; Art. X, sec. 6, N. C. Constitution, and she may execute a valid conveyance of her lands without his joinder.

2. Adverse Possession § 9a—

An instrument constitutes color of title if it purports to be a conveyance of the title, even though it be defective or void.

3. Same—Where wife has been abandoned, her deed constitutes color of title.

The evidence tended to show that plaintiff, the owner of the *locus in quo*, left the State and abandoned his wife and children, that thereafter a tax lien on the *locus in quo* was foreclosed and deed was made by the commissioner to plaintiff's attorney, who, by direction of plaintiff, executed a quitclaim deed to plaintiff's youngest child. That some 13 years prior to the institution of the action, relying upon the belief that the husband was dead, the wife executed quitclaim deed and the other children executed deed to the youngest child, and that the following day the youngest child and her husband executed deed of trust upon the property in which she represented that her father was dead and that she had title. Defendants claim title as grantee from the purchaser at the foreclosure sale of the deed of trust. *Held:* The tax deed and the deeds of the wife and the other children to the youngest child constituted color of title, and defendants' evidence that the youngest child went into possession under such color of title and remained in possession for a period in excess of 7 years is sufficient to take the case to the jury upon defendants' contention that they had acquired title to the *locus in quo* by adverse possession under color of title, C. S., 428, and the verdict of the jury under correct instructions from the court is determinative of the question.

4. Adverse Possession § 7—

The grantee of the purchaser at the foreclosure of the deed of trust on the land is entitled to tack the possession of the trustor, there being no interruption in favor of the true title, and the grantee's possession relates back to the original entry by the trustor and the color of title under which it was made.

5. Adverse Possession § 4f—Under facts of this case possession of child was hostile to father's title.

The evidence tended to show that plaintiff, the owner of the *locus in quo*, left the State and abandoned his wife and children, that thereafter the tax lien on the property was foreclosed and deed made by the commissioner to plaintiff's attorney, that by plaintiff's direction the attorney executed quitclaim deed to plaintiff's youngest child, and that thereafter plaintiff's wife and other children, relying upon the belief that plaintiff was dead, executed deed to the youngest child, who executed a deed of trust on the property in which she represented that her father was dead and that she had title. Defendants claim under foreclosure of the deed of trust. *Held:* The possession of the youngest child was under color of title, and upon the facts of this case, was adverse to plaintiff, her father, and defendants, claiming under the child, are not estopped to claim title by adverse possession as against the father in the father's action in ejectment.

6. Estoppel § 2—Doctrine of estoppel by after acquired title held inapplicable to this case.

The evidence tended to show that plaintiff, the owner of the *locus in quo*, left the State and abandoned his wife and children, that thereafter tax lien on the property was foreclosed and deed made by the commissioner to plaintiff's attorney, and that by plaintiff's direction the attorney executed quitclaim deed to plaintiff's youngest child. Thereafter plaintiff's wife and other children, relying upon the assumption that plaintiff was dead, conveyed to the youngest child, who executed a deed of trust on the property. Defendants claim under foreclosure of the deed of trust. *Held:* Defendants are not estopped to assert the title of the youngest child as against the plaintiff.

7. Trial § 32—

If a party desires a fuller or more particular charge upon a subordinate or collateral feature of the case he must aptly tender request therefor.

APPEAL by plaintiff from *Armstrong, J.*, at September Term, 1940, of BUNCOMBE. No error.

This was an action in ejectment for the recovery of the possession of certain real estate described in the complaint as 130 Pine Street, Asheville, N. C. It was commenced by the issuance of summons on 17 July, 1940, which was personally served upon the defendants on 27 July, 1940, and was heard before his Honor, Frank M. Armstrong, and a jury, at the September Term, 1940, of the Superior Court of Buncombe County. The defendants entered a plea of adverse possession under color of title and pleaded sole seizin and set up as a defense to the action the seven-year statute of limitations.

The facts: Counsel for both plaintiff and defendants stipulated that title to the land involved in this action was vested in B. J. Alexander under a trustee's deed dated 8 January, 1897, recorded in Book 104, at p. 119, in the office of the register of deeds, and that this is a common source of title.

All the conveyances offered in evidence by defendants were duly recorded. Plaintiff offered in evidence: (1) Deed dated 24 September, 1901, from B. J. Alexander (unmarried) to Arthur Rogers and Greenlee Nichols for the land in controversy. (2) Deed from Arthur Rogers and wife to Greenlee Nichols, dated 3 October, 1903, for one-half interest in all lands embraced in the aforesaid Alexander deed. (3) Deed from Greenlee Nichols and wife, Belle Nichols, to Arthur Rogers, dated 3 October, 1903, conveying all the land embraced in the Alexander deed except the lot of land embraced in this controversy designated as *130 Pine Street in the City of Asheville, N. C.*

Greenlee Nichols, plaintiff, testified, in part: "I am 62 years old. I was born in Madison County; I married Belle Ponder. I bought the property from Mr. Alexander one day and moved into it with my wife and family the next day; I occupied the property as my home until 1913 when I went to Chattanooga, Tennessee, to work; I left my wife and children in possession of my property occupying it as our home; two of my sons were under age but old enough to work and I let their earnings go towards the support of the family; I sent money from time to time to pay taxes, doctors' bills for the children and other expenses. My wife and I never separated; we were never divorced; she continued in the possession of the property until her death in January, 1934. She and my youngest daughter Gertrude Whitesides occupied the home after the other children left and until my wife's death; Gertrude married Whitesides and she and her husband lived in the home with my wife and continued to occupy it after her death. I never signed any papers about the property; never owed anybody anything on it and my wife and family were never disturbed during my wife's lifetime and not until Mr. York claimed the property last April or May. When I heard of his claim, I came to Asheville with Mr. Dixon, my attorney from Chattanooga, and met Mr. James S. Howell in Mr. Rector's office and signed the lease which you hand me. (Plaintiff introduces lease dated May 11, 1940, signed by himself as lessor and Hattie Robinson as lessee for the premises at #130 Pine Street in the City of Asheville, to take effect on June 1, 1940, and end on May 31, 1941, at the rate of $2.50 per week, with privilege of renewal for another year at the rate of $3.00 per week.) (Cross-examination) I left here in 1913, and went to Chattanooga. I came home every two weeks during the first three years, and then didn't come back any more. The last time I was in Asheville before this suit

arose was in 1916. That was 24 years ago. I did not attend my wife's funeral when she died and was buried in Asheville. I think I was sick. This lease agreement offered in evidence by my lawyers was signed by a colored woman named Hattie Robinson. At the time I signed it she wasn't here. She was in Ohio. I had not seen her in 26 years. My lawyer told me I would have to get somebody in possession and I told Mr. Rector to write Hattie up in Ohio. The last time I had seen her was in 1914. The lease I offered in evidence was signed by a woman living in Ohio whom I had not seen for 26 years. I know Mr. J. E. Rector. This deed from him and his wife, Nelle Rector, to my daughter, Gertrude Whitesides, described this land by metes and bounds. Yes, the deed is dated January 12, 1927. I don't recollect now whether I authorized Mr. Rector to make a deed to her for this property. Q. Did you authorize him to convey this property to your daughter by this deed dated January 12, 1927? Ans.: I said I wanted it made to my daughter. Q. If you told Mr. Rector that you wanted it made to your daughter, then you knew that the title passed from you to your daughter? Ans.: If he got it straightened out. The Belle Nichols who made one of the deeds for this property to my daughter, Gertrude Nichols Whitesides, was my wife. Alphonso Nichols, Joseph Nichols, William Nichols and Leita Nichols Fuller are my other children. I don't know whether Sylvia Nichols is the wife of my son Joseph Nichols. I didn't know he was married. The children's names that you have read and my wife were the only members of my family. I don't know about their wives. I didn't come back from Tennessee any more after 1916. I married while I was down there. I heard my daughter say she borrowed money on the property. The house that is on the property now is not the house that was there when I left North Carolina in 1913. It is a different house. I don't know anything about my daughter losing the house by the foreclosure of a mortgage which she gave on it. I have not lived in North Carolina since 1913, but I have a little common judgment about rents as I was born and raised here, and I think the rent of this house is worth about $2.50 per week. The lease which I signed to Hattie Robinson was written up by Mr. Rector and I signed it in his office. Hattie was up in Ohio at that time and I hadn't talked to her in 26 years. I left it with Mr. Rector and told him to get somebody in the house. (Re-direct examination) I never heard of any claim by S. A. Lynch or J. E. Rector to my property; never heard of any adverse claim by anybody until a short time ago, about March or April of this year. I did not marry until after my wife died."

Gertrude Whitesides, a witness for plaintiff, testified, in part: "Greenlee Nichols is my father; I was born at 130 Pine Street and lived there until Mr. York put me out in June, 1940. My mother lived in the house

and occupied it as her home continuously until her death on January 7, 1934; nobody ever disturbed her possession; she and my father were not separated; they were never divorced; my father visited us a few times after he went to Chattanooga; we heard from him from time to time; he sent us money. I married and my husband lived with me and my mother at 130 Pine Street; I went into possession as one of my father's children and a member of his family; and I occupied the place with my mother until her death and I continued in possession until Mr. York put me out. (Cross-examination) I am familiar with the various deeds which were made to me and which were read to the jury a few minutes ago while you were examining my father. I got a deed from my mother and another deed from Mr. Rector and wife and another from my brothers and sister. At that time my father had been gone from North Carolina so long that we all thought he was dead. All of the family was putting the title in me. I went to a concern in the Medical Building and borrowed $1,500.00 on the property, and I made payments for a while and I couldn't make the payments and they foreclosed the property. Then I rented it from the Consolidated. I knew the Consolidated bought it and afterwards I leased it from them. The paper you hand me and which is marked 'Defendant's Exhibit #1' for identification is my signature to one of the leases. The other marked 'Exhibit #2' is also my signature. Mr. Connor, the Welfare Officer of Buncombe County, signed one of the leases for me and he paid the rent for me for a while. After Mr. York bought the property I paid him rent. Finally suit was brought to put me out. It was before Mr. Bramlett, Justice of the Peace. Mr. Rector was my attorney in that suit. A judgment was rendered to put me out of possession. When I gave the mortgage on the property I represented that it was my property. My father had been gone so long that I thought he was dead and after getting the deeds from Mr. Rector and my brothers and sister and my mother, who is now dead, I gave the mortgage on the property. The amount of the loan was $1,500.00. We remodeled the house. The photograph you show me is a picture of the new house. I couldn't say how long we got support from the Welfare Department. My mother died on the 6th day of January, 1934. I know that my husband and I made affidavits that our father was dead at the time we got the loan from the Mortgage Company and the Company granted the loan after they got the affidavits and deeds from everybody. After the Consolidated bought the property at foreclosure sale, they brought a suit against me and got judgment and officer John Garrison put me out then. They let me go back because I was sick. After I got back in I signed a new lease. The loan which I got through the Federal Mortgage was to pay Mr. Thompson, the Contractor, for remodeling the house. Thompson was paid after we got the loan. That

is what the loan was made for. Yes, I have a suit against Mr. York and his wife for $6,000 to recover damages because I was put out of the house under execution. It is here on the docket awaiting the outcome of this case. When I leased this property from Mr. York he gave me a copy of the lease agreement. He said it was the same kind of lease which I had previously signed with the Consolidated. After I lost the property by foreclosure I paid rent. I paid rent to the Consolidated until they sold it to Mr. York and then I paid it to him. (Re-direct examination). My mother, Belle Nichols, was never disturbed in her possession; she lived there in peaceable and quiet possession until her death on January 7, 1934; neither S. A. Lynch nor J. E. Rector ever had any possession of the property or claimed any ownership of it, and their quitclaim deeds were made without payment of any consideration."

Arthur A. York, one of the defendants, testified in substance: "I purchased the property at 130 Pine Street from the Consolidated Realty Company; my deed is dated March 27, 1940, and is recorded in Book 524, at page 446. I found Gertrude Whitesides and her two children in possession; I demanded possession about the time I bought the property; she told me her father was living and that he owned the property; she referred me to her attorney, James S. Howell; she afterwards signed a lease dated April 2, 1940; I brought ejectment suit against her before J. H. Bramlett, J. P."

John Garrison testified: "I am Deputy Sheriff; in 1935 or 1936, under an execution issued out of the General County Court pursuant to a judgment of that court dated December, 1932, I put Gertrude Whitesides out of possession, and the Consolidated Realty Company into possession; I could not remove her from the property under previous executions issued on that judgment on account of illness in the family."

The defendants, over objection and exception of the plaintiff, offered in evidence the following records:

1. Commissioner's deed from Charles G. Lee, Commissioner, to S. A. Lynch, dated 1 November, 1911, registered on 1 November, 1911, in Book 172, page 549, office of the register of deeds of Buncombe County. It was stipulated that this deed covered the lands in controversy in this action, together with certain additional tracts.

2. Quitclaim deed from S. A. Lynch to James E. Rector and wife, Nellie H. Rector, dated 22 December, 1926, registered on 22 December, 1926, in Book, 370, page 255, office of the register of deeds for Buncombe County. It was stipulated that the foregoing deed covered the lot in controversy in this action, together with certain additional lots.

3. Quitclaim deed from J. E. Rector and wife, Nellie H. Rector, to Gertrude Nichols Whitesides, dated 12 January, 1927, and registered 12 January, 1927, in Book 370, page 254, office of the register of deeds

for Buncombe County. It was admitted that this deed described the lot involved in this action.

4. A quitclaim deed, dated 11 July, 1927, from Belle Nichols to Gertrude Nichols Whitesides, conveying the land in controversy in fee simple.

5. A deed from Alphonso Nichols and others, children of plaintiff, to Gertrude Nichols Whitesides, dated 18 May, 1927, conveying the land in controversy in fee simple. In the deed is the following: "That, whereas, the party of the second part and the parties of the first part are the sole heirs and survivors of Greenlee Nichols," etc.

6. Deed of trust from Gertrude Whitesides and husband, Nelson Whitesides, to Central Bank & Trust Company, Trustee, dated 12 July, 1927, and registered 12 July, 1927, in Book of Deeds of Trust 260, page 106, consideration $1,500.00. It was agreed that this deed of trust conveyed the lot in controversy in this action.

7. Deed from Asheville Safe Deposit Corporation, Successor Trustee to Consolidated Realty Corporation, dated 6 October, 1932.

8. Deed from Consolidated Realty Corporation to Arthur A. York and wife, Virginia York, dated 27 March, 1940, registered in Book of Deeds 534, page 446, which deed conveyed to defendants the lot at #130 Pine Street, being the same involved in this action.

9. The original summons, complaint, default judgment, in an action instituted in the General County Court of Buncombe County by Consolidated Realty Corporation against Gertrude Whitesides and husband, Nelson Whitesides, said judgment being dated December, 1932, and adjudging that Gertrude Whitesides and husband, Nelson Whitesides, are in the wrongful possession of said property, and the title and right of possession of said property is in Consolidated Realty Corporation.

10. The leases executed from Gertrude Whitesides to Consolidated Realty Corporation and Arthur York, respectively, being the same referred to in the testimony of Gertrude Whitesides, page 15 of this record, to wit, leases dated 9 May, 1934, and 16 February, 1938, to Consolidated, and lease dated 2 April, 1940, to Arthur A. York and Company.

The issue submitted to the jury (by consent) was as follows: "Have the defendants, Arthur York and wife, Virginia York, and those under whom they claim, been in the adverse possession of the property described in the complaint under known and visible lines and boundaries and under colorable title for seven years or more next prior to the institution of this action, as alleged in the answer?" The jury answered "Yes."

The court below rendered judgment on the verdict. The plaintiff made numerous exceptions and assignments of error and appealed to

the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Dixon & Dixon, of Chattanooga, Tenn., and James S. Howell and James E. Rector for plaintiff.

Johnson & Uzzell for defendants.

CLARKSON, J. The question involved: Is the seven-year statute of limitations, pleaded by the defendants in their answer, available to them as a defense? We think so.

Two contentions were made by plaintiff's counsel in the trial court: (1) That the deeds offered in evidence by defendants were not sufficient to constitute color of title; (2) that a wife cannot establish title to her husband's real estate by adverse possession. Neither contention can be sustained on the record.

N. C. Code, 1939 (Michie), sec. 428, is as follows: "When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability."

We think, under the facts and circumstances of this case, that it is unnecessary to consider the 20-year adverse possession, under secs. 430 and 433, *supra*.

It is contended by plaintiff that the possession of plaintiff's wife, Belle Nichols, or his daughter, Gertrude Whitesides, was not adverse to him. We cannot so hold on this record, and the jury decided to the contrary under competent evidence and a charge of the court below free from error. The plaintiff testified that he left his wife and children in 1913 and went to Chattanooga, Tenn. That his wife died in January, 1934, in Asheville, N. C., and he did not attend her funeral. That they were never legally separated or divorced. That after leaving in 1913 he came home every two weeks the first three years. The last time he was in Asheville before the suit was brought was in 1916—24 years. J. E. Rector had a tax title deed to the property and he and his wife deeded it to plaintiff's daughter, Gertrude Whitesides, on 12 January, 1927. Plaintiff testified: "Q. Did you authorize him to convey this property to your daughter by this deed dated January 12, 1927? Ans.: I said I wanted it made to my daughter." Plaintiff never paid the taxes and the land was sold for taxes in 1909. He never supported his wife, but

abandoned her. His wife and his children in 1927 made deeds to Gertrude Whitesides, the other child, who in turn borrowed money to build on the land. It was foreclosed and defendant claims adverse possession to the *locus in quo* for seven years and more, through conveyances. Gertrude Whitesides leased the property after it was foreclosed from the purchaser and afterwards under court proceedings a judgment dispossessing her was rendered, from which she never appealed.

N. C. Code, *supra,* sec. 2530, is as follows: "Every woman whose husband abandons her, or maliciously turns her out of doors, shall be deemed a free trader, so far as to be competent to contract and be contracted with, and to bind her separate property, but the liability of her husband for her reasonable support shall not thereby be impaired. She may also convey her personal estate and her real estate without the assent of her husband."

Abandonment of the wife by the husband is sufficient for her to execute a valid conveyance of her lands without his joinder.

In *Keys v. Tuten,* 199 N. C., 368 (370), we find: "The validity of C. S., 2530, notwithstanding the provisions of section 6 of Article X of the Constitution, has been sustained by the decisions of this Court, upon the ground, as stated by *Faircloth, C. J.,* in *Hall v. Walker,* 118 N. C., 377, 24 S. E., 6, that 'there is no constitutional inhibition upon the power of the Legislature to declare where and how the wife may become a free trader. Article X, section 6, was not intended to disable, but to protect her.' In *Bachelor v. Norris,* 166 N. C., 506, it is said: 'The constitutionality of the statute authorizing a married woman to execute a valid conveyance of real property without the joinder of her husband, when she has been abandoned by her husband, has been sustained in several decisions of this Court. *Hall v. Walker,* 118 N. C., 377, 24 S. E., 6; *Brown v. Brown,* 121 N. C., 8, 27 S. E., 998; *Finger v. Hunter,* 130 N. C., 531, 41 S. E., 890.' See, also, *Vandiford v. Humphrey,* 139 N. C., 65." *Pardon v. Paschal,* 142 N. C., 538; *Hancock v. Davis,* 179 N. C., 282 (284); *Whitten v. Peace,* 188 N. C., 298 (302-3).

In *Locklear v. Savage,* 159 N. C., 236 (237-8), it is written: "What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal

indication to all persons that he is exercising thereon the dominion of owner," citing many authorities. *Owens v. Lumber Co.,* 210 N. C., 504; *Stephens v. Clark,* 211 N. C., 84 (89); *Berry v. Coppersmith,* 212 N. C., 50.

In *Alsworth v. Cedar Works,* 172 N. C., 17 (23), it is stated: "Colorable title, then, in appearance is title, but in fact is not, or may not be, any title at all. It is immaterial whether the conveyance actually passes the title to property, for that is not the inquiry. Does it appear to do so, is the test; and any claim asserted under the provisions of such a conveyance is a claim under color of title, and will draw the protection of the statute of limitations to the possession of the grantee if the other requisites are present. *Dickens v. Barnes,* 79 N. C., 490. 'A deed, though it be defective, will constitute color of title.' So the rule is broadly stated in a very large number of decisions that a deed purporting to convey the land in controversy will give color of title to a possession taken under it, even though it be void. And a deed void for matters *dehors* the instrument will constitute color of title, provided it purports to convey the land in controversy. 1 Cyc., 1085-1087." *Neal v. Nelson,* 117 N. C., 393 (405); *Dorman v. Goodman,* 213 N. C., 406 (413).

The court below charged the jury: "Adverse possession may be said to be based on distinct elements, though when considered they are in some respects interlocking or overlapping, and those elements are as follows: (1) Actual possession, (2) open and notorious possession, (3) continuous possession, (4) exclusive possession, (5) hostile possession, and (6) under the evidence and pleadings in this case, under color of title, and (7) under known and visible lines and boundaries. Taking up these different elements, in order that you may understand what we mean by adverse possession."

In *Vanderbilt v. Chapman,* 172 N. C., 809 (812), it is said: "When the continuity and identity of possession is established between a subsequent and next preceding and prior occupant, shutting out all opportunity of interruption in favor of the true title, in such case the claimant or subsequent holder may, in connection with his own, avail himself of the adverse occupation of his predecessors and refer the same to the original entry and the color of title under which it was made."

In detail the court defined accurately each element, citing authorities from this Court. The court, with minuteness, gave the contentions on each side, and charged: "So, this case finally resolves itself to certain questions of fact for you to determine, then apply the law to it as given to you by the court and say what the truth is. That is what the word 'verdict' means—to speak the truth. . . So, in this case, the court charges you that if the defendants have satisfied you by the greater weight of the evidence that they and those under whom they claim, went

into possession of the lands in question under color of title, as heretofore defined to you by the court, and such possession was actual, open and notorious and continuous, exclusive and hostile, under known and visible lines and boundaries, in accordance with the definitions of the court which the court has previously given to you, and that such possession continued for a period of at least seven years, then the court charges you that would constitute adverse possession, under Consolidated Statutes, sec. 428, which the court read and explained to you. If you find those to be the facts, by the greater weight of the evidence, you will answer the issue 'Yes.' . . . If you fail to so find, that is, if the defendants have failed to so satisfy you, the burden being on them, it will be your duty to answer the issue 'No.'"

We see no estoppel, as contended by plaintiff, in the purchase of the land by the daughter, Gertrude Whitesides. "I said I wanted it made to my daughter." The wife, having been abandoned by her husband, had a right to convey it to Gertrude Whitesides.

Plaintiff contended that "The ruling of the trial court that C. S., 428, the seven-year statute of limitations, could in any event apply as a bar to plaintiff's action, and insists that if any such statute applies, it is C. S., 433, the twenty-year statute of limitations; and challenges also the sufficiency of the charge of the court to measure up to the requirements of C. S., 564." We cannot so hold.

In *Pardon v. Paschal,* 142 N. C., 538 (539), it is said: "The only exception presented in the brief of the appellant is that there is no sufficient evidence of abandonment, and that the judge should have so instructed the jury. It nowhere appears in the record that the plaintiff requested the court so to charge, or that the plaintiff handed up any prayer for instructions to the jury. He cannot be heard, therefore, to raise that question by motion to set aside the verdict. 'If he is silent when he should speak, he ought not to be heard when he should be silent.' *Boon v. Murphy,* 108 N. C., 187, and cases cited. If it is any satisfaction to the plaintiff to know it, we will state that an examination of the record discloses ample evidence to justify the court in submitting the matter to the jury."

The court below charged carefully the law applicable to the facts on every aspect of the case.

We see no merit in the other exceptions and assignments of error made by plaintiff. The plaintiff's brief, with authorities cited, is persuasive, but not convincing nor applicable.

For the reasons given, we find

No error.

WATT JUSTICE, ADMINISTRATOR OF WAYNE JUSTICE, DECEASED, v. SOUTHERN RAILWAY COMPANY, E. O. MOOSE, B. L. PUGH, W. E. WINCHESTER, AND U. G. McGALLIARD.

(Filed 19 March, 1941.)

1. Trial § 22b—

Upon demurrer to the evidence, the evidence must be considered in the light most favorable to plaintiff. C. S., 567.

2. Railroads § 10—When there is no evidence as to how long intestate had been prone on track when struck, doctrine of last clear chance is inapplicable.

Plaintiff's evidence tended to show that his intestate was prone on the track when struck by defendant's train, that the accident occurred on a clear day, that the place of the accident could have been seen 200 or 300 yards from the engine of the approaching train, and that the train could have been stopped in 150 to 200 feet. *Held:* In the absence of evidence that intestate was prone on the track for a sufficient length of time for him to have been seen by the engineer in time to have stopped the train before striking him, the doctrine of last clear chance is inapplicable.

3. Same—

When from the evidence it is just as probable that intestate staggered into the side of the moving train as it is that he was prone on the track for a sufficient length of time for the engineer to have seen him and stopped the train before striking him, plaintiff is not entitled to recover on the doctrine of last clear chance, since the burden is on plaintiff to do more than balance probabilities.

4. Same—

Testimony of a witness that about three minutes before the train came, he looked down the track and did not see anyone on the track, that he could have seen anyone standing on the track but, because of the grade, could not have seen anyone prone on the track, is no evidence that intestate was prone on the track at that time.

5. Same—

Expert testimony that intestate was prone on the track at the time he was struck by defendant's train is no evidence that intestate was prone on the track for a sufficient length of time before he was struck for the engineer to have seen him and stopped the train before striking him.

DEVIN, J., dissenting.

CLARKSON and SEAWELL, JJ., concur in dissent.

APPEAL by defendants from *Nettles, J.*, at December Term, 1940, of BUNCOMBE.

This is an action against the Southern Railway Company and its employees for the wrongful death of the plaintiff's intestate alleged to have been caused by the negligent failure of the defendants to avail themselves of the last clear chance to avoid running a train over and

fatally injuring the plaintiff's intestate while down helpless on the track of the defendant company. The action was instituted in the general county court of Buncombe County and there tried upon the issues of negligence, contributory negligence, last clear chance, and damage. All of the issues, except the second relating to contributory negligence, were answered in favor of the plaintiff, and from judgment predicated upon the verdict, the defendants appealed to the Superior Court of Buncombe County. In the Superior Court all of the assignments of error brought forward by the appellants were overruled and judgment was entered affirming the judgment of the county court. From this judgment the defendants appealed to the Supreme Court, assigning errors.

W. W. Candler and Harkins, Van Winkle & Walton for plaintiff, appellee.

W. T. Joyner and Jones, Ward & Jones for defendants, appellants.

SCHENCK, J. The appellants assign as error the refusal of the trial court to allow their motion for judgment as in case of nonsuit lodged when the plaintiff had introduced his evidence and rested his case, and renewed when all of the evidence was in. C. S., 567.

When viewed in the light most favorable to the plaintiff, as it must be upon a demurrer thereto, the evidence tends to show that the plaintiff's intestate, while drunk, was upon the track of the defendant company about 2½ miles east of Canton, and that the company's freight train, operated by the individual defendants, while going in a westerly direction from Asheville to Canton, ran over the plaintiff's intestate, thereby severing his right hand and crushing his left elbow, from which wounds he died; that the intestate "was lying with one elbow and hand on the track when the train came along"; that the track east of the place where the intestate was run over is practically straight for some distance and is down grade, that the train of the defendant company was composed of two engines and 37 cars, some loaded and some unloaded, and was running between 20 and 30 miles per hour and could have been stopped in 150 to 200 feet; that the place where the intestate was run over could be seen from down the track east 200 or 300 yards; that the train did not slow up or stop; that neither of the engineers nor other employees of the defendant company saw the intestate on the track.

While there is evidence that the intestate "was lying with one elbow and hand on the track when the train came along," the evidence is silent as to how long the intestate had been in this position when he was run over. In fact, the appellee in his brief states, in reference to the testimony of Dr. Rich, by whom it was sought to show the position of the intestate when run over by the train, that "we point again to the fact

that Dr. Rich did not undertake, in any part of his testimony or in any answer on direct or cross-examination, to say when or how long the deceased had been upon the track before the train which injured him came along."

Although there is evidence tending to show that if he had been down on the track a sufficient length of time the intestate could have been seen from the engine soon enough to have stopped the train and avoided running over him, there is no evidence as to how long he had been in that position. When last seen by anyone the intestate was to the side of the track some 8 or 10 feet, in a drunken condition. It is just as reasonable and just as probable that the intestate staggered into the side of the moving train as it came by him, as it is that he was prone and apparently helpless on the track before the train reached him; and the burden is upon the plaintiff to do something more than balance probabilities.

As was said by *Winborne, J.*, in *Mercer v. Powell,* 218 N. C., 642, in the most recent utterance of this Court upon the doctrine of the last clear chance when sought to be applied in cases of this kind: ". . . the burden is upon 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* (128 N. C., 173, 38 S. E., 736); *Clegg v. R. R., supra* (132 N. C., 272, 43 S. E., 826); *Henderson v. R. R.,* 159 N. C., 581, 75 S. E., 1092; *Smith v. R. R.,* 162 N. C., 30, 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* (217 N. C., 127, 6 S. E. [2d], 837.)" See, also, *Owens v. So. Ry. Co.,* 33 Fed. R. (2d), 870.

Since there is no evidence as to how long the intestate was prone upon the track, the jury could not have found that the engineer saw, or by the exercise of ordinary care could have seen him in such position and condition in time to have stopped the train before striking him.

The testimony of Lawton Johnson, corroborated by other evidence, to the effect that he was crossing the track about 50 yards west of the place where the intestate was run over as the train approached from the east, about three minutes before the train came, about 2½ miles ahead of the train, that he looked east down the track and saw no one standing on the track, that he could have seen a person standing on the track at this place, but he could not have seen a person lying down on the track at this place, is no evidence that the intestate was there prone upon the

track at that time. It is conceded that the intestate was prone upon the track when run over, but as to when he became prone upon the track the evidence is silent.

While we have considered the expert opinion given in answer to a hypothetical question by Dr. Rich to the effect that the intestate was lying down on the track when the train came along we do not decide the question raised by an exception to its competency. We simply hold that even if it be conceded, without deciding, that such evidence is competent as has been held relative to expert opinion testimony based upon personal examination of the body and wounds thereon, *McManus v. R. R.*, 174 N. C., 735, 94 S. E., 455, there is no evidence of the fact essential to cases of this nature that the deceased was down or apparently helpless on the track long enough to have been seen by an engineer or other train operative soon enough to have stopped the train in time to have avoided running over him.

Entertaining, as we do, the opinion expressed relative to the demurrer to the evidence, it becomes supererogatory to discuss the other interesting questions presented by the able briefs filed in this case.

The judgment of the Superior Court is

Reversed.

DEVIN, J., dissenting: The evidence in this case shows that at the time of the injury the plaintiff's intestate was lying face down beside the railroad track, his body perpendicular to the rail, with his left elbow and right hand extended beyond his head and resting on top of the rail. In this position his hand and arm were crushed under the wheels of the train. This much is conceded.

But it is held that the trial judge should have allowed defendant's motion for judgment of nonsuit, on the ground that there was no evidence that deceased had been in that position long enough for the defendant's employees to have observed him and stopped the train before striking him. With due deference to the views of the majority, I venture the opinion, however, that the evidence does warrant the reasonable inference that he had lain there long enough for the train crew to have seen him and avoided the injury, if a proper lookout had been maintained. Let us analyze the testimony bearing on this point, in the light most favorable for the plaintiff.

The injury occurred at a point where the railroad track, between Asheville and Canton, passes through a cut spanned by an overhead bridge. The general direction of the railroad is east and west. The injury occurred on the south rail of the track. The same train and crew, on the day of the injury, passed this point twice before the plaintiff's intestate was struck. It was on the third trip that the injury

occurred. The train—a freight, with two engines—first passed this point going from Asheville to Canton at 11:15, and then from Canton to Asheville at 12:15, and on a third trip, going west from Asheville to Canton, at 3:15. This was the time of the injury. The day was clear. The evidence shows the deceased was very drunk that day. He was not only nearly insensible from his potations, but he had an unfinished bottle with him. He lay down in the cut on the base or mud sill of the overhead bridge, 6 to 10 feet from the railroad track. Members of the train crew saw him there at 11:15 when the train first passed, and again at 12:15 on the return trip to Asheville, still lying in a drunken stupor. On the third trip, a member of the crew, the fireman on the front engine, testified he looked at the same place where he had seen him before, on the sill, but he was not there. He did not see him at all. He said, "If there was anybody on the track I didn't see him." But admittedly the deceased was lying beside the track with his arm and hand on the rail, for he was struck in that position by that very train. How long had he been in that position?

It is in evidence that at 3:00 p.m., 15 minutes before the train reached this point, two witnesses passed through the cut on the railroad track and saw the deceased on the sill. At that time he was trying to sit up, but was too drunk to do so, was bent over, swaying from side to side, "like he was trying to sit up and couldn't," mumbling incoherently. These two witnesses passed on. Later another witness, named Johnson, crossed the railroad track in an automobile at a point 100 yards west of the bridge. At this time the smoke of the train coming from the east was visible. The track in approaching the place of injury was nearly straight for a quarter of a mile. This witness, Johnson, stopped at the crossing, looked east through the cut under the bridge, and saw no one. From his position he could see through the cut and 200 yards beyond, but due to the grade, he could not see down on the ground at the point of injury. He could see the ends of the crossties at that point (on the north), but not the ground on the south side of the rail. If the deceased had been erect, the witness could and would have seen him; if down on the ground on that side of the track, he was below witness' line of vision. The train was then a mile away, running 20 miles an hour. This was three minutes before the injury. It seems reasonably clear that at that time deceased was down on the ground or Johnson would have seen him; he was helpless, too drunk to sit up.

Another witness, Westmoreland, corroborated Johnson. He testified that he had noted the place of injury indicated by blood and pieces of bone, and that standing at the point where Johnson crossed the railroad at the west end of the cut "I could have seen a man if he had been standing up. I could have seen, I think, about a foot or 18 inches at that point. But you couldn't see him if he was lying down."

The evidence thus places deceased at 3:00 p.m. trying to sit on the sill, bent over, drunkenly swaying, six feet from the track—about the length of his body and extended arm from the rail on which he was struck—with the train 15 minutes away, running 20 miles an hour. The deceased was incapable of sitting erect or standing; obviously the limit of his mobility was to fall to the ground. Now, according to witness Johnson, when the train was a mile away—three minutes before it arrived—the deceased was down on the ground, else Johnson would have seen him. As the train approached, the train crew could see the point of accident from a distance of 200 to 300 yards. The fireman on the left side of the front engine, on same side as deceased, looked at the sill where he had previously seen the deceased and he was not there. He said, "As we approached the overhead bridge there was no person or *obstruction* under the bridge or about the bridge"—that is no motion—nothing to meet the eye of one looking in that direction. This evidence shows that the deceased was neither standing, walking nor sitting erect. Witness did not see him, but he was there. If he had looked on the ground beside the rail, he could have seen him on or dangerously near the rail, helpless. He could have seen him from a distance of 200 yards. The train, a heavy freight going slowly upgrade, could have been stopped in 50 yards. True, the witness said he did not see him on the track, but he qualified that by saying, "If there was anybody on the track, I did not see him." Less than half a minute after the fireman looked for the man on the sill and saw nothing, the deceased's arm and hand on the rail were crushed under the wheels of the train. At the point where the blood showed deceased was struck, the scuffed-up ground extended back some five feet, showing where the deceased had lain. As the rear end of the freight train passed this point a few moments after the injury, the conductor and brakeman saw deceased sitting in "crumpled over position" four or five feet from the track, head on chest. Even the pain and shock of his injury were not sufficient to rouse him fully from his stupor.

This is an analysis of the testimony of the witnesses and of the inferences necessarily to be drawn therefrom. It is the established rule in this jurisdiction that on a motion to nonsuit "the plaintiff must be given the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence." *Stacy, C. J.*, in *Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353.

Applying this rule, the conclusion seems to my mind inescapable that the deceased was lying in the position in which he was struck when the approaching train came near enough for the crew to have seen him. If they, or any of them, had looked with proper care, they could have seen him, and the train could have been stopped according to the evidence in

two or three car lengths—less than fifty yards. The jury heard all the evidence, and, under a correct charge from the trial judge, came to the conclusion that the plaintiff's intestate was lying down on or dangerously near the railroad track, in an apparently helpless condition, and that the defendants operating the train, in the exercise of due care, could and should have seen him in time to have stopped the train and avoided the injury.

I think there was evidence enough to carry the case to the jury on all the elements necessary to invoke the application of the doctrine of last clear chance, and that the verdict and judgment should be upheld.

This case is stronger for the plaintiff than the similar case of *Hill v. R. R.*, 169 N. C., 740, 86 S. E., 609, where the evidence was held sufficient to go to the jury. The facts here are substantially different from those in the *Mercer case,* and I do not think that that case should be held controlling.

CLARKSON and SEAWELL, JJ., concur in this opinion.

FOREST CITY COTTON COMPANY ET AL. v. HENRIETTA MILLS.

(Filed 19 March, 1941.)

1. Trespass § 1a: Waters and Watercourses § 7—Allegations and evidence held insufficient to establish trespass resulting from operation of milldam.

Allegations and evidence to the effect that defendant's milldam caused the flow of the water in the river above the dam to be impeded, resulting in the deposit of sand in the river bed, which in turn impeded the flow of the water in a tributary creek flowing through plaintiff's land, resulting in the deposit of sand and other debris in the creek bed so that plaintiff's land could not be properly drained, without allegation or evidence that the dam ponded water back upon plaintiff's land, is insufficient to show a trespass and, plaintiff having abandoned its cause of action for negligence in the operation of the milldam, the verdict of the jury in defendant's favor under instructions to answer the issue of liability in the negative if the jury should find that the defendant made no unreasonable use of its riparian rights and had not taken in whole or in part any of plaintiff's land, will be upheld.

2. Appeal and Error § 43—

Under the rules of the Court relating to petitions to rehear, the Supreme Court can correct an inadvertence in a former decision in the case without the necessity of another trial in the Superior Court. Rule of Practice in the Supreme Court, No. 44.

CLARKSON, J., dissenting.

SEAWELL, J., joins in dissent.

COTTON CO. *v.* HENRIETTA MILLS.

PETITION to rehear this case, reported in 218 N. C., 294, 10 S. E. (2d), 806.

Hamrick & Hamrick and Paul Boucher for plaintiff.
C. O. Ridings and Oscar J. Mooneyham for defendant.

STACY, C. J. As was said on the rehearing of *Peele v. Powell,* 161 N. C., 50, 76 S. E., 698, there is no division in the Court as to the correctness of the propositions of law first announced herein, but upon a fuller consideration of the record, the conclusion is now reached that the judgment of the Superior Court should be upheld.

The plaintiff's land is on Puzzle Creek, a tributary of Second Broad River. It is eight miles above the defendant's milldam. It is not alleged that the waters of the river, or of the creek, were ponded back upon plaintiff's land, thus creating a trespass as in the cases originally cited and relied upon, see *Clark v. Guano Co.,* 144 N. C., 64, 56 S. E., 858, but the allegation is that the defendant's dam has caused the flow of the water in the river above the dam to be impeded and slowed up, and caused sand carried by the river to be deposited in the river bed, which in turn has impeded and slowed up the flow of Puzzle Creek, and caused sand and other debris carried by the creek to be deposited in the creek bed until "it is now impossible to drain plaintiff's land." See *Sink v. Lexington,* 214 N. C., 548, 200 S. E., 4.

With the allegations of negligence eliminated on the hearing and the plaintiff stipulating "this case may be tried upon the theory of permanent damages," it would seem that the validity of the trial should be sustained. The jury, after hearing the evidence and viewing the premises, answered the issue of liability in favor of the defendant.

Our first impression is not confirmed by the above portions of the record and a further critical re-examination of the transcript. Fortunately the rule permits a correction of the inadvertence without the necessity of another trial in the Superior Court. Rule 44 of the Rules of Practice, 213 N. C., 832; *Carruthers v. R. R.,* 218 N. C., 377.

Petition allowed.

CLARKSON, J., dissenting: The plaintiff owns several acres of land on Puzzle Creek. It had on this land a large number of very valuable magnolia trees and other nursery plants. Puzzle Creek runs into Second Broad River, across which the defendant has constructed and now maintains a dam. This dam caused the velocity of the water in the river to be considerably reduced, and therefore the sand which the river had formerly carried was deposited in the bottom of the stream, thereby gradually raising the bed of the river. The raising of the bed of the

river materially reduced the fall of Puzzle Creek, which in turn greatly lessened the speed of that stream. As the velocity of the creek was reduced, sand, silt, etc., which had formerly been carried by the creek was deposited on the bottom; causing the bed of the stream to gradually fill up until finally—a short time ago—the bed of the stream became so high that it was impossible to drain the plaintiff's land and consequently it became sobbed and worthless. The magnolia trees and other nursery plants were all killed by reason of the sobbing of the land which was caused by the building up of the bed of the creek, which was in turn caused by the dam in the river. Plaintiff sued the defendant for the injury to its land and for the value of the magnolia trees and other nursery plants which were killed.

The issue submitted to the jury was correct: (2) "Has the defendant, by the construction and operation of its dam, wrongfully caused the lands of the plaintiff to become flooded or sobbed, as alleged in the complaint?"

The court below charged the jury, to which exceptions and assignments of error were duly made, as follows:

"A riparian landowner is entitled to have the waters of a stream to continue to flow by his lands in its usual channel and in its normal quantity and any unreasonable invasion of these rights by another riparian landowner gives rise to a cause of action proximately caused thereby.

"The court further charges you that the right of a riparian landowner to the use of the water flowing by his premises in a natural stream and as an incident to the ownership of the soil and to have it flow by his lands in its usual channel and in its normal quantity has been recognized in this State for over a century. This does not mean that a riparian landowner on a nonnavigable stream actually owns the running water, but he has the reasonable use of it so long as he does not substantially and unreasonably invade the rights of other riparian owners.

"The court further instructs you that *in determining the right of an upper riparian owner, the question is whether the lower riparian proprietor is engaged in a reasonable exercise of his right to use the stream as it flows by, through or to his lands,* whether with or without retaining the water for a time or obstructing temporarily the accustomed flow.

"Every riparian landowner has a property right to the reasonable use of running water for manufacturing purposes as well as for domestic and agricultural purposes conformable to the uses and needs of the community, qualified only by the requirement that it must be enjoyed with reference to similar rights of other riparian owners, above and below.

"The court further instructs you as to what constitutes a reasonable use is a question of fact for the jury to determine, having due regard to the subject matter and the use; the occasion and manner of its appli-

cation; its object and extent and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party and the extent of the injury caused by it to the other party.

"*So, gentlemen of the jury, a lower riparian owner may not erect a dam or operate a dam or a plant and take or appropriate the property of an upper riparian landowner in whole or in part, without paying to it just compensation for the land taken or damage or both, and this is true, regardless of whether the lower riparian owner's use of the water is reasonable or not.*

"Now, gentlemen of the jury, the plaintiff does not contend in this case that the defendant's pond or lake or reservoir actually floods its lands, but contends that the defendant in the construction and unreasonable maintenance of its dam has proximately caused the velocity of the water in Broad River to be considerably reduced.

"*The court charges you that if you should find by the greater weight of the evidence that the defendant in the operation and construction of its dam at Caroleen in the exercise of its riparian rights made an unreasonable use of same as defined by the court, thereby proximately causing the bed of the river to fill up with sand by reason of reducing the velocity of the water contained therein, and that this filling up of the river with sand,* if you find it has filled up, proximately caused the fall in Puzzle Creek to be reduced and the bed of the creek to fill up, if you find it has filled up, proximately causing the water in the creek to overflow, flood and sob plaintiff's lands, proximately causing damages to said lands, you would answer the second issue Yes.

"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 plaintiff's land as the court has heretofore instructed you, then you would answer the second issue No. . . ."

The trial court, by giving the instructions set out above, committed reversible error because anyone who constructs or maintains a dam which causes the property of an upper riparian owner to become flooded or sobbed is liable to such owner for any damage resulting from said flooding or sobbing regardless of whether the construction or operation of the dam was a reasonable or unreasonable use of the water, or stream.

In *Cagle v. Parker,* 97 N. C., 271 (1887), *Davis, J.,* writing for the Court, says at p. 275: "If, by the increased height of the dam, injury resulted to the plaintiff's land, by sobbing and destroying its value, though not actually overflowed, he was entitled to damages. It was not

necessary that the land should be actually overflowed and covered by the water. If so ponded back as to sob the soil and render its drainage impossible, the plaintiff has a right to damages for the injury sustained, and he was entitled to the issue which was refused, without deciding that the instrument set out in the answer was in any way binding upon the plaintiff." 67 C. J., p. 728, par. 69 (2); 27 R. C. L., p. 1196, par. 113.

In *Clark v. Guano Co.,* 144 N. C., 64 (75-76), it is stated: "The principle governing this case has frequently been recognized and applied by this Court. In *Overton v. Sawyer,* 46 N. C., 308, it was held that without reference to the plaintiff's acquisition of an easement by presumption, the defendant had a right to have the water allowed to pass off his land through a natural drain, and when the plaintiff, by means of an embankment across the drain, obstructed the flow of the water and thus interfered with the rights of the defendant, the latter had a cause of action against him for the resulting injury to his property. So in *Pugh v. Wheeler,* 19 N. C., 50, the Court decided that ponding water back upon another's land by any act which impedes its natural flow is a clear and direct invasion of the proprietary interest in the land itself and is an actionable wrong, unless protected by a grant of the right so to do or by an easement in some other way acquired. It was asserted in *Porter v. Durham,* 74 N. C., 767, as being an elementary principle, which is founded on reason and equity, and common both to the civil and common law, that the owner of land cannot raise any barrier or dyke, even for better enjoyment of his own property, so as to obstruct the natural drainage of another's land and thus intercept and throw back the water upon it. 'An owner may not use his property absolutely as he pleases. His dominion is limited by the maxim, *Sic utere tuo ut alienum non laedas.*'" The principle has been consistently followed by this Court. *Bryan v. Burnett,* 47 N. C., 305; *Wright v. Stowe,* 49 N. C., 516; *Little v. Stanback,* 63 N. C., 285; *Cline v. Baker,* 118 N. C., 780; *Chaffin v. Mfg. Co.,* 135 N. C., 95.

The error of the court below came from what was said in the decision in the case of *Dunlap v. Light Co.,* 212 N. C., 814. Dunlap owned land *below* the dam and the reasonable use doctrine was applied, it is not like plaintiff who owned land *above* the dam.

The reasonable use doctrine has no application to this case, as the *Dunlap case, supra,* concerned a lower riparian owner. Any backing water on plaintiff's land that materially effected it was a trespass for which nominal or other damages may be recovered. The confusion in the charge of the court below was caused by applying the law of a lower riparian owner to an upper riparian owner, as is the present case. The court below, as is seen, correctly charged the law in reference to an

upper riparian owner and also charged the reasonable use doctrine as applied to an upper riparian owner. The charge was conflicting and misled the jury.

In *May v. Grove,* 195 N. C., 235 (237), citing a wealth of authorities, it is said: "In *Edwards v. R. R.,* 132 N. C., at p. 101, it is held: 'It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly.' "

In *Cotton Co. v. Henrietta Mills,* 218 N. C., 294, *Stacy, C. J.,* for a unanimous Court, said: "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."

I think the original opinion above quoted correct and the law, and the change on the rehearing in the present case incorrect and not the law. The evidence in this case was the same as in *Sink v. Lexington,* 214 N. C., 548 (550): "The sand and silt has filled up a whole lot. When the water from Leonard's Creek that drains through my place hits the back waters of the lake, it naturally stops, and the silt and sand stops, too. It continually fills up. It keeps just piling up on top of it." In that case we said that the question was for a jury.

The court below thought the evidence sufficient to be submitted to the jury. Plaintiff's evidence in abundance is to the effect that plaintiff's land was damaged. John Clemmer, a witness for plaintiff, testified, in part: "From my observation Puzzle Creek and the territory above the river and this property, I have an opinion satisfactory to myself as to what has caused it to fill up. My opinion is that the dam kills the water. It don't have the flow it once had and sand is building up. . . . It stops the flow of the water, and, of course, the sand and other stuff comes in and keeps backing up the stream. This is the effect on the bed of the stream above of causing it to fill, and it is my opinion that it backs on up the stream. That is my opinion of what has happened at this particular land."

Howard Miller, a civil engineer and witness for plaintiff, who made a survey of the situation, testified: "My opinion is that the stream has not sufficient velocity to clean its channel at present. I observed the condition of the bed of the river and creek all the way up with reference as to whether it was cleaning its channel. I have had experience in observing other streams with reference to velocity and cleaning out the channel. When a stream does not have velocity sufficient to clean its channel it silts up. This causes the bed of the channel to silt and fills it up and in time it overflows the bank. The bed of the stream and creek are filled up; there was not any land in cultivation up and down the river. This is for the whole eight miles. I observed the bank of the river and creek all the way up to Forest City Cotton Company's land; from my observation I have an opinion satisfactory to myself as to what caused Puzzle Creek to fill up. . . . A. My opinion is that this silt raised and elevated the stream bed in time has worked up the river and up to Puzzle Creek, and you find the fills will average three and a half feet most of the way up—about two feet the first two miles. This silt was deposited up the river and up Puzzle Creek. This still water—when you get a freshet bringing down silt and dumping it here in the still water, it begins to build up and that is the cause of the overflow up river and the creek. That is caused by the construction and maintenance of the dam."

G. B. Hyder, a witness for plaintiff, testified, in part: "I am in the nursery business; have been in the nursery business eighteen years. I have been down and looked at the nursery in question on Puzzle Creek—the magnolia trees and shrubbery there. I went down there three or four weeks ago. I observed the magnolia trees. They are practically dead now. . . . I observed the condition of the land where those trees were. It was wet. I could see water marks on the trees where water had stood. I have an opinion satisfactory to myself as to what caused those magnolia trees to die. My opinion is that the water killed them, the wet soil."

I do not think the petition for rehearing should be allowed, for the reasons given. Since one law is applied to what happens below the dam and another law to what happens above the dam, it is as if in assault it made a difference in law whether the victim is hit on the nose or kicked in the rear.

SEAWELL, J., joins in this opinion.

TOWN OF DUNN v. JOHN J. TEW AND WIFE, FANNIE G. TEW; LENA SMITH, ADMINISTRATRIX OF C. J. SMITH, TRUSTEE, DECEASED; COMMERCIAL BANK OF DUNN, N. C., AND COUNTY OF HARNETT.

(Filed 19 March, 1941.)

1. Pleadings § 28—

Where the answer admits the material allegations of the complaint and alleges new matter not relating to a counterclaim, the new matter is deemed denied, Michie's Code, 543, but when such new matter does not raise issues of fact but presents only questions of law, the court may render judgment on the pleadings, there being no controverted issues of fact for the determination of the jury. Michie's Code, 554, 556.

2. Taxation § 38b—Where taxpayers' answer in action to foreclose tax certificate presents questions of law only, court may render judgment on the pleadings.

This was an action by a municipality to foreclose a tax lien. Defendants admitted the amount of the tax levied, the *locus in quo*, the amount due on the tax sale certificate and that payment had been demanded, that default was made in payment of said taxes, that plaintiff is the owner of the tax sale certificate, and that the period for payment of the certificate at the foreclosure had expired, but denied the right of the municipality to levy and collect the taxes. *Held:* The answer presents questions of law only, and the court may render judgment on the pleadings without submitting an issue to the jury.

3. Municipal Corporations § 42—Municipality may levy and collect taxes within territory annexed without regard to public improvements and notwithstanding that taxes may be used to pay prior indebtedness of city.

Where the corporate limits of a municipality have been extended by legislative act (chapters 82, 201, Private Laws of 1925), the municipality has jurisdiction over the territory annexed and may levy and collect taxes on the property embraced therein, notwithstanding that the taxes so collected may be used to pay municipal indebtedness incurred prior to the time of the annexation and notwithstanding that streets and public improvements comparable to those enjoyed by the other residents of the municipality had not been afforded to those within the territory annexed, the making of improvements within the territory annexed being within the sound discretion of the municipality.

4. Municipal Corporations §§ 3, 5—

Municipal corporations are creatures of the legislative will and are subject to its control, and the Legislature, in its discretion, may provide for the annexation of new territory and enlarge the municipal jurisdiction to the new boundaries, and prescribe the terms and circumstances under which the annexation may be had and the manner in which it may be made, in the absence of constitutional restriction.

APPEAL by defendants John J. Tew and Fannie G. Tew, from *Williams, J.*, at October Term, 1940, of HARNETT. Affirmed.

This was a civil action instituted in November, 1935, and which came on for hearing before Williams, Judge, and a jury, at the October Term, 1940, of the Civil Term of Superior Court of Harnett County. After the jury was selected and impaneled, the court of its own volition and without submitting issues to the jury, rendered the judgment hereinafter set out, from which judgment the defendants John J. Tew and Fannie G. Tew, and each of them, excepted, assigned errors and appealed to the Supreme Court of North Carolina.

The judgment of the court below was as follows:

"This cause coming on to be heard, and being heard, upon motion for judgment on the pleadings before the undersigned Judge holding the Court of the October Term for the trial of civil cases in Harnett Superior Court, no evidence being submitted by the defendant John J. Tew and wife; and the Court finding that all parties defendant were duly served with summons and copy of complaint by the Sheriff of Harnett County; and that all parties in interest named as parties defendant herein are properly before the Court, and that all defendants having failed to answer except the County of Harnett and John J. Tew and wife, Fannie G. Tew, and that these answering defendants offered no evidence, and that time for filing answer or demurring on the part of the other parties defendant having expired; and it further appearing to the Court and the Court finding that defendants John J. Tew and wife, Fannie G. Tew, are indebted to the plaintiff for taxes duly and properly assessed and levied for the years sued on (1932) in the amount of $15.93, together with costs, interests, and penalties as alleged by law; and that the said defendants John J. Tew and wife are also indebted to the County of Harnett in the sum of $12.19 for taxes duly and properly assessed and levied by it for the year as set out in the answer filed herein, together with the costs, interest, and penalties as allowed by law; and that the aforementioned amounts of money due the Town of Dunn, Plaintiff, and the County of Harnett, as above set forth, should be declared specific liens against the lands described in the complaint filed herein, and that the said lands should be condemned and foreclosed to satisfy the said liens; and that the proceeds of such sale should be applied in ratio in satisfaction of the said specific liens, after paying costs and expenses of sale to satisfaction of said liens, which said liens are found to be superior liens of equal dignity and preferred to all other liens on said lands:

"It is, Therefore, Considered, Ordered, Adjudged and Decreed upon motion of plaintiff's counsel that the Town of Dunn has a specific lien for taxes duly and properly assessed and levied, and as above recited, against the lands hereinafter described of said defendants John J. Tew and wife in the sum of $15.93, the said sum being the amount of said

taxes together with penalties thereon in the sum of $9.29, together with interest at the rate of 6% per annum from October 9, 1940, and the cost of this action; and that the County of Harnett has a specific lien against the lands hereinafter described in the sum of $12.19, said sum being the amount of said taxes found to be due the County of Harnett with such penalties due thereon in the sum of $ ....., with interest on said taxes at the rate of six per cent per annum from October 9, 1940, until paid; and that the aforementioned sums be and they are hereby declared first and prior liens of equal dignity upon the lands and premises described in the complaint filed herein, to-wit: (land described).

"And it is Further Decreed that the said lands and premises be, and the same are hereby condemned and Ordered sold for cash at public auction at the Courthouse door of Harnett County on the 25th day of November, 1940, after publishing notice of said sale for once a week for four consecutive weeks in the *Dunn Dispatch,* a newspaper published in Harnett County, and by posting notice of said sale at the Court House door of Harnett County, and otherwise as prescribed by law; and to that end J. Shepard Bryan is appointed Commissioner of the Court with full power to conduct said sale and upon confirmation thereof by the court to execute and deliver deed to the purchaser conveying title to the lands in fee simple and thereupon all the rights, title, interest and estate of the defendants in and to the said lands shall be forever thereafter barred. That the plaintiff and other interested parties hereto be, and they are hereby permitted to bid at said sale. That the Commissioner herein appointed to make said sale shall immediately file his report with the Court and upon confirmation thereof, the receipt of the purchase price, execution and delivery of the deed to the purchaser, shall pay into Court the amount received by him to be disbursed by the Court as follows: (a) to the payment of the costs and expenses of sale including a reasonable allowance to the Commissioner for his services in the matter (b) to the discharge in ratio of the specific liens herein declared (c) to subsequent lienholders according to priority (d) to those legally entitled.

"And this cause is retained for further order of the Court. This the 10th day of October, 1940. Clawson L. Williams, Judge Presiding."

The other material facts will be set forth in the opinion.

J. Shepard Bryan for plaintiff.

J. R. Young for appealing defendants.

CLARKSON, J. The defendants' exceptions and assignments of error are as follows: "1. For that the Court erred in signing the judgment without submitting issues to the jury, the burden being on the plaintiff to prove its case, and as appears in the record over the objections of the

defendants. 2. For that the Court erred over the objection of the defendants in signing judgment in favor of the plaintiff." These exceptions and assignments of error cannot be sustained on the record.

The complaint alleges: (1) that plaintiff is a municipal corporation and under the law has the power to levy and collect taxes on real and personal property in the town and assessments for street and sidewalk improvements. This is admitted by defendants, but they allege it is inoperative as to defendants' property.

(2) That the appealing defendants, owners of the land in controversy, listed them for the year 1932. This is admitted in defendants' answer.

(3) That the amount of tax assessed for the year 1932 by the town of Dunn was $15.93. This is admitted in defendants' answer.

(4) That default was made in the payment of the above taxes and the land sold by the tax collector and purchased by plaintiff. This is admitted in defendants' answer, but defendants allege that the tax collector had no authority to sell the land.

The appealing defendants, for a further defense, allege: That the plaintiff, the town of Dunn, is without legal authority to levy against or collect any taxes whatsoever against the property of these defendants, for the following reasons:

(1) That the Act of the General Assembly of North Carolina, extending or attempting to extend the corporate limits of the plaintiff municipal corporation is unconstitutional and is therefore void, in that no general election was had or vote had on the matter and these defendants or other residents did not have an opportunity to say whether they should be incorporated.

(2) That the rate is in excess of that allowed by law.

(3) That the levy included a rate to take care of certain outstanding bonded indebtedness prior to the time of the extension.

(4) That the bonded indebtedness was incurred and expended for the sole purpose and benefit of the residents of the town of Dunn, and property owners, and that these defendants have not received anything in the way of improvements, any streets, no sidewalks, any sewer or water facilities for which indebtedness was incurred.

(5) That the plaintiff had furnished the appealing defendants no improvements although requested so to do, such as streets, sidewalks, sewer, water, fire protection, etc. That they have been denied the same privileges and conveniences that the other citizens and residents have been accorded by the reason of the improvements heretofore made by the said town of Dunn, for which said taxes have been levied.

(6) That the appealing defendants have been damaged in more than the taxes levied, by not being furnished the above improvements. These defendants pray that the action be dismissed as to these defendants, and

each of them, and that they be permitted to go hence without day until the said town of Dunn has furnished to these defendants the necessary improvements and protection that the other residents are enjoying.

The *first* question presented: Does the court below have the right to render judgment for the plaintiff on the pleadings, on plaintiff's motion, when the pleadings present no controverted issues of fact? We think so.

N. C. Code, 1939 (Michie), sec. 554, is as follows: "A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact."

Sec. 556: "An issue of law must be tried by the judge or court, unless it is referred. *An issue of fact must be tried by a jury,* unless a trial by jury is waived or a reference ordered. *Every other issue is triable by the court,* or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it." (Italics ours.)

The admissions by defendants in the answer raised no issue of fact to be submitted to a jury. There was no fact that the jury had to pass on. The court below was careful to note that the answer filed admitted the amount of the tax levied; admitted the *locus in quo;* admitted the amount due on tax sale certificate; and that payment of said sum had been demanded; admitted that default was made in payment of said taxes; admitted that plaintiff is owner of tax sale certificate; and admitted that period of payment of certificate without foreclosure, as provided by statute, has expired—but that it denied that the town of Dunn had any authority to levy and collect said taxes or to sell the property assessed for any purported taxes that had been levied. This denial presents questions of law only.

In *Miller v. Miller,* 89 N. C., 209, it is held: "Only such issues as arise upon the pleadings should be submitted to the jury, and it is the duty of the court to determine what they are."

In *Riley v. Carter,* 165 N. C., 334 (337), it is said: "There being no conflict of testimony, and the facts being virtually admitted, the court could direct a verdict or instruct the jury as it did. *Purifoy v. R. R.,* 108 N. C., 101."

In *Jeffreys v. Ins. Co.,* 202 N. C., 368 (372): "Only issues of fact which arose on the pleadings, and are determinative of the rights of the parties to the action, must be submitted to the jury."

Under the statute, *supra,* "An issue of fact must be tried by a jury." In the present action there is no issue of fact. As said in *Bank v. Stone,* 213 N. C., 598 (602): "The jury only may find controverted issues of fact."

N. C. Code, *supra,* sec. 543, is as follows: "Every material allegation of the complaint not controverted by the answer, and every material

allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the action, taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires."

The *second* question presented: Do the pleadings raise only questions of law? We think so.

Conceding that the town of Dunn taxes levied on defendants' property were partly used to retire bonded indebtedness or pay interest on same incurred prior to annexation of defendants' land within the corporate limits of the town, as the defendants set forth in answer, did the town of Dunn have legal authority to levy and collect by foreclosure the taxes against the defendants, as alleged in the complaint? We think so.

The corporate limits of the town of Dunn were extended by act of the General Assembly, as appellant admits. (See chapters 82 and 201, Private Laws of North Carolina, 1925.) The legal authority of the town of Dunn to exercise corporate jurisdiction, over territory annexed by Act of General Assembly, is clearly set forth in many cases in this jurisdiction.

In *Lutterloh v. Fayetteville,* 149 N. C., 65 (69), it is said: "We have held, in common with all the courts of this country, that municipal corporations, in the absence of constitutional restrictions, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion. *Manly v. Raleigh,* 57 N. C., 370; *Dorsey v. Henderson,* 148 N. C., 423; *Perry v. Commissioners,* 148 N. C., 521. Consequently, it follows that the enlargement of the municipal boundaries by the annexation of new territory, and the consequent extension of their corporate jurisdiction, including that of levying taxes, are legitimate subjects of legislation. In the absence of constitutional restriction the extent to which such legislation shall be enacted, both with respect to the terms and circumstances under which the annexation may be had, and the manner in which it may be made, rests entirely in the discretion of the Legislature. With its wisdom, propriety, or justice, we have naught to do. It has therefore been held that an act of annexation is valid which authorized the annexation of territory without the consent of its inhabitants, to a municipal corporation, having a large unprovided-for indebtedness, for the payment of which the property included within the territory annexed became subject to taxation." *Holmes v. Fayetteville,* 197 N. C., 740; *Penland v. Bryson City,* 199 N. C., 140; *Chimney Rock Co. v. Lake Lure,* 200 N. C., 171; *Highlands v. Hickory,* 202 N. C., 167.

Other matters complained of by defendants as to improvements in the

section, were in the sound discretion of plaintiff, the municipality. We see no prejudice to defendants in the other matters complained of in defendants' brief.

From a careful reading of the record and briefs, we think the judgment of the court below must be

Affirmed.

H. A. PARRIS v. H. G. FISCHER & COMPANY.

(Filed 19 March, 1941.)

1. Appeal and Error § 40a: Process § 6b—

In the absence of a request by defendant that the court find the facts supporting its conclusion that defendant was doing business in this State, it will be presumed that the court found facts sufficient to support its conclusion, and if there is sufficient evidence appearing in the record to support the court's ruling, the ruling will be sustained.

2. Process § 6b—Evidence held sufficient to support conclusion that defendant was doing business in this State for purpose of service under C. S., 1137.

Defendant was a nonresident corporation engaged in the business of manufacturing and selling electro-surgical medical equipment. The evidence tended to show that defendant maintained dealer-representatives in this State, that one of them sold a machine to plaintiff under a title retaining conditional sales contract, that he executed the contract for and in the name of the defendant, that defendant accepted the contract, that thereafter the dealer-representative made two visits to plaintiff for the purpose of collecting installments due, and on his last visit undertook collection by repossession of the property, and that defendant wrote letters to plaintiff justifying its agent's repossession. *Held:* The evidence discloses that the agent was more than a mere broker or factor, and is sufficient to sustain the conclusion of law by the court that defendant was doing business in this State within the meaning of C. S., 1137, authorizing service of process on the Secretary of State.

3. Same—

The meaning of the phrase "doing business in this State" as used in C. S., 1137, is not susceptible to an all embracing definition, and each case must be decided upon the particular facts therein appearing, the general criteria being that a foreign corporation is doing business in this State if it transacts in this State the business it was created and authorized to do, through representatives in this State, and thus is present in this State through the person of its representatives.

4. Same—Phrase "doing business in this State" connotes some degree of continuity, but proof that agent did business for defendant and that defendant maintained agents in this State is sufficient.

While the phrase "doing business in this State" connotes some degree of continuity and an isolated instance is insufficient to support service

of process under C. S., 1137, evidence that defendant nonresident corporation maintained dealer-representatives in this State, and that in the particular instance in suit the corporation was doing business in this State through its dealer-representative, *is held* sufficient to support service of process under C. S., 1137, since the fact that it employed dealer-representatives for the purpose of selling its products and carrying on its business, presumably in a similar manner, implies a sufficient continuity of conduct within the purview of the statute.

APPEAL by defendant from *Nimocks, J.*, at October Term, 1940, of NORTHAMPTON. Affirmed.

Action to recover damages for alleged wrongful seizure of certain personal property. The plaintiff is a physician resident in Northampton County, and the defendant is an Illinois corporation engaged in the manufacture and sale of electro-surgical medical equipment.

Plaintiff attempted to bring defendant into court by service of process on the Secretary of State in accord with the provisions of C. S., 1137. Defendant entered special appearance and moved to strike out the purported service of summons on the ground that defendant was not doing business in this State and had no property therein. The court found as a fact that defendant was doing business in the State, and denied the defendant's motion.

It is alleged in the verified complaint that the property in question, a short wave therapeutic machine, was purchased by plaintiff from defendant through its representative, and payment secured by a conditional sale contract, providing payment in monthly installments, defendant accepting in part payment plaintiff's own therapeutic machine. Plaintiff alleged that, in consequence of false representations in the sale and defendant's failure to make adjustment, the violation of his home in the wrongful seizure of this property by defendant's agent constituted an actionable wrong for which damages were prayed.

The following letter from defendant to plaintiff, under date of 3 April, 1940, was offered: "Under date of March 30th, our dealer representative, Mr. George F. Hatch, of Henderson, wrote us that he had made a second trip to Rich Square to see you but unfortunately did not find you in although he waited over an hour. As he is located quite a distance from you and because of the press of business he has not been able to get into your territory very often lately, when he noticed that your door was left open so that anyone might enter and found that the Short Wave was apparently not being used as it was covered with dust, he decided the best thing to do was to take it back to Henderson with him. This, of course, is strictly in accordance with our legal rights as your contract was in default. However, we are indeed sorry that he was unable to see you personally and demonstrate the machine to your satis-

faction so that you might reinstate the contract by bringing it up to date."

Also another letter from defendant to plaintiff, dated 12 April, 1940, was offered: "Under date of November 16, 1939, you signed a conditional sale contract, covering the purchase of a Model 'S' Short Wave outfit. You agreed by this contract, to pay us $14.10 a month beginning January 1, 1940, for a period of 23 months and a final payment of $17.30 to be paid December 1, 1941. When you signed the contract you acknowledged the outfit to be in perfect working order as represented and you agreed to make the payments. On December 11, 1939, we mailed you a schedule of your payments and we asked you, at that time, to notify us if there were any irregularities. You did not notify us at that time that there were and we naturally assumed that everything was okay. Our Dealer Representative, Mr. Hatch, went to Rich Square on March 30th, which was the second time he was there, but was unable to see you. Your place of business was wide open and Mr. Hatch removed the Short Wave machine. We would be very glad to instruct Mr. Hatch to replace the machine in your office upon receipt of certified check for $56.40, covering the first four installments, which are delinquent."

The conditional sale contract was offered showing sale of the machine by the defendant to the plaintiff for $401.60, subject to credit of $60.00 (for plaintiff's own machine), payable in monthly installments. This contract provided that the title to the property should remain in the defendant corporation until the payment in full of the purchase price, and was signed by the plaintiff, and on behalf of the defendant by Geo. F. Hatch, "dealer representative." At the time of repossessing the machine defendant's representative left a note for the plaintiff in which he said, "We have taken out the machine," and signed it as representing the defendant.

Defendant offered affidavits of its treasurer and of Geo. F. Hatch, setting out its method of doing business through dealer-representatives in North Carolina, who were limited in authority to the sale of defendant's products on a discount basis, offers to purchase to be accepted by defendant at its home office.

The defendant excepted to the ruling of the court below in denying its motion to strike out the service of summons, and appealed.

V. D. Strickland for plaintiff, appellee.
Eric Norfleet for defendant, appellant.

DEVIN, J. It was conceded that the defendant is a foreign corporation without process agent or property in the State, and that service of process could only be had under the provisions of C. S., 1137, upon the

ground that it was "doing business in this State." It was found as a fact in the court below that defendant was doing business in the State, and that finding constituted the basis upon which defendant's motion for dismissal for want of lawful service was denied.

There was no request that the court find the supporting facts upon which its conclusion that defendant was doing business in the State was based, and hence it will be presumed that the court found sufficient facts to support its conclusion. *Rosser v. Matthews,* 217 N. C., 132, 6 S. E. (2d), 849; *Hinkle v. Scott,* 211 N. C., 680, 191 S. E., 512. If the finding by the court below that defendant was doing business in this State is supported by evidence appearing in the record, the ruling against defendant's motion must be upheld. *Brown v. Coal Co.,* 208 N. C., 50, 178 S. E., 858. This necessitates an examination of the record to determine if there was evidence of facts sufficient to sustain the ruling.

It appears that defendant is engaged in the business of manufacturing and selling electro-surgical medical equipment, including short wave therapeutic machines, and for that purpose maintains "dealer-representatives" in this State. The number and specific territory of these representatives did not appear. One of them is Geo. F. Hatch, who, as such, transacted the business with plaintiff. He sold to the plaintiff one of defendant's short wave therapeutic machines, and took in part payment an old machine of plaintiff. He also had plaintiff execute a conditional sale contract, as security for the balance of the purchase price, payable to the defendant, and this was signed on behalf of defendant by Mr. Hatch, and accepted by defendant. This contract provided, among other things, that the title to the machine sold should remain in the defendant corporation until the payment in full of the purchase price. Some four months later, the plaintiff having, as defendant contended, failed to make all the payments agreed on, Geo. F. Hatch, acting for and on behalf of the defendant, entered the home of plaintiff, in his absence, and took possession of the machine, under circumstances which gave rise to plaintiff's action. Thereafter, the defendant, in a letter to plaintiff, advised him of the action taken by Mr. Hatch, and in justification of the seizure of the property said, "This, of course, is strictly in accordance with our legal rights, as your contract was in default." Subsequently, defendant again wrote plaintiff about the matter, saying: "We would be very glad to instruct Mr. Hatch to replace the machine in your office upon receipt of certified check for $56.40, covering the first four installments which are delinquent."

It would seem reasonably clear that this evidence would tend to support the conclusion that in this instance the defendant was doing the business in North Carolina for which the corporation was created, through its representative, and was thus present in his person. The evi-

dence tends to show that its representative sold defendant's products to plaintiff, executed for it and in its name conditional sale contract, title to the property being retained by defendant corporation; that on behalf of the defendant he made two visits to plaintiff for the purpose of collecting installments due, and on his last visit undertook collection by repossessing the property; that he was apparently under the control of the defendant—subject to its instructions—and that his actions in the premises were ratified and approved by the defendant, as shown by its letters. This conduct on the part of Hatch transcends the functions of a mere factor or commission merchant who distributes the goods of a manufacturer on commission. As was said in *R. R. v. Cobb,* 190 N. C., 375, 129 S. E., 828: "He who acts as distributor for another and not merely as distributor of goods manufactured by the other, acts as his agent."

The right of the State to impose, as a condition upon which corporations may be permitted to do business in the State, that they will accept, as sufficient, service of process on a designated person, is well settled. *Lunceford v. Assn.,* 190 N. C., 314, 129 S. E., 805; *Anderson v. Fidelity Co.,* 174 N. C., 417, 93 S. E., 948; *Peoples Tob. Co. v. Am. Tob. Co.,* 246 U. S., 79; *International Harvester Co. v. Ky.,* 234 U. S., 579; *Am. Asphalt Roof Corp. v. Shankland,* 205 Iowa, 862, 219 N. W., 28; *St. Clair v. Cox,* 106 U. S., 350.

The statute, C. S., 1137, provides that jurisdiction of our courts to entertain suits against foreign corporations, having no property or process agent in the State, may be acquired by service of summons on the Secretary of State, who is thus designated for the purpose, when the corporation is "doing business in this State."

The meaning of the phrase "doing business in this State" was considered in an able opinion written for this Court by *Winborne, J.,* in *C. T. H. Corp. v. Maxwell,* 212 N. C., 803, 195 S. E., 36, where numerous authorities on the subject are cited. While no all-embracing definition of these words as used in the statute has been attempted (*Timber Co. v. Ins. Co.,* 192 N. C., 115, 133 S. E., 424; *Peoples Tob. Co. v. Am. Tob. Co.,* 246 U. S., 79), each case being decided by the Court upon the facts brought before it, the following criteria were suggested in an opinion by *Connor, J., in Commercial Trust v. Gaines,* 193 N. C., 233, 136 S. E., 609: "It has been generally held that a foreign corporation cannot be held to be doing business in a state, and therefore subject to its laws, unless it shall be found as a fact that such corporation has entered the state in which it is alleged to be doing business, and there transacted, by its officers, agents or other persons authorized to act for it, the business in which it is authorized to engage by the state under whose laws it was created and organized. The presence within the state of such officers,

agents or other persons, engaged in the transaction of the corporation's business with citizens of the state, is generally held as determinative of the question as to whether the corporation is doing business in the state." In *Ruark v. Trust Co.*, 206 N. C., 564, 174 S. E., 441, *Stacy, C. J.*, succinctly states the rule in this way: "The expression 'doing business in this State,' as used in C. S., 1137, means engaging in, carrying on or exercising, in this State, some of the things, or some of the functions, for which the corporation was created."

The general rule was laid down in *Peoples Tob. Co. v. Am. Tob. Co.*, 246 U. S., 79, as follows: "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted." *Consolidated Textile Corp. v. Gregory*, 289 U. S., 85.

It was said in *Fond du Lac. C. & B. Co. v. Henningsen P. Co.*, 141 Wis., 70: "A corporation ordinarily acts and moves in the person of some individual, and when any individual, officer, or agent is, within the authority committed to him, performing an act of the corporation, the latter must be deemed present physically in the person exercising its powers." *Atkinson v. U. S. Op. Co.*, 129 Minn., 232. In *St. Louis S. W. R. Co. v. Alexander*, 227 U. S., 218, it was said: "In a general way it may be said that the business must be such in character and extent as to warrant the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served."

The conclusion that the evidence appearing in the record in the instant case tends to support the finding that the defendant was doing business in the State is in accord with the general consensus of judicial opinion. *International Harvester Co. v. Kentucky*, 234 U. S., 579; *Penn. L. F. M. Ins. Co. v. Meyer*, 197 U. S., 407; *Conn. Mutual Accident Co. v. Davis*, 213 U. S., 245; *St. Louis S. W. R. Co. v. Alexander*, 227 U. S., 218; *Browning v. Waycross*, 233 U. S., 16; *Case v. Mills Novelty Co.*, 193 So., 625; *Clement v. Coon*, 161 Okl., 216; *International Shoe Co. v. Lovejoy*, 257 N. W., 576; *Grams v. Harvester Co.*, 105 Wash., 602; *Oil Co. v. Baccus*, 207 Ala., 75; 101 A. L. R., 126; 60 A. L. R., 994; 23 Am. Jur., 333, *et seq.*; 20 C. J. S., 150.

The defendant, however, contends that, even if it be properly found that in this particular instance defendant corporation transacted, through its representative, the business with the plaintiff of which he now complains, this was a single isolated instance and insufficient to constitute doing business in the State within the meaning of the statute.

Undoubtedly the rule is that a single act, contract or transaction within the State by a foreign corporation will not, ordinarily, be regarded as

doing business therein. 23 Am. Jur., 353; *C. T. H. Corp. v. Maxwell, supra.* The doing of a single act pertaining to a particular transaction will not be considered doing business, as the phrase denotes some degree of continuity. *Am. Asphalt Roof Corp. v. Shankland,* 205 Iowa, 862; *Metal Door & Trim Co. v. Hunt,* 170 Okl., 240; *Cooper Mfg. Co. v. Ferguson,* 113 U. S., 727; 20 Am. Jur., 155; *Penn Colleries v. McKeever,* 83 N. Y., 98. But this rule does not apply when the evidence permits the inference that the act is done pursuant to a course of business, and indicates the intention to engage in a continuing business in the State, rather than in a single, isolated transaction. *Int. Harvester Co. v. Ky.,* 234 U. S., 579; *International Text Book Co. v. Pigg,* 217 U. S., 91; *Colorado Iron Works v. Sierra Grande Mining Co.,* 15 Col., 499; *Glass Mfg. Co. v. Superior Court, King County,* 166 Wash., 41; *Moore v. Racine Rubber Co.,* 194 Ky., 106; *Dobson v. Maytag Sales Co.,* 292 Mich., 107; 23 Am. Jur., 354-355; 20 C. J. S., 166.

In *International Harvester Co. v. Kentucky,* 234 U. S., 579, where it was held that the Harvester Company was doing business in Kentucky when it appeared that its representatives, though limited in authority, were soliciting orders in that state for the sale of its goods to be shipped there, the Court said: "Here was a continuous course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered in the State of Kentucky. This was a course of business, not a single transaction."

Here there is evidence tending to support the finding that the defendant corporation was doing business in the State, making a continuous, not merely casual or incidental, effort to sell its products in this State. Its representative, located in Henderson, was carrying on the business for the defendant and not for himself. The employment of other representatives in the State in like capacity as Geo. F. Hatch for the purpose of selling its products, and carrying on its business, presumably in a similar manner, implies continuity of conduct in that respect, sufficient to afford evidence that the defendant was engaged in business within the State. 60 A. L. R., 994; 20 C. J. S., 155.

The decision of this Court in *Plott v. Michael,* 214 N. C., 665, 200 S. E., 429, was based on different facts from those here appearing. In that case it was held that the presence in the State of a traveling salesman of a foreign corporation, who merely took orders, subject to approval at the home office of the corporation, for goods to be subsequently shipped into the State, did not constitute doing business in the State on the part of the corporation.

We conclude that there was evidence appearing in the record to support the finding of the court below that defendant was doing business in

this State, and that defendant's motion to strike out the service of summons under C. S., 1137, was properly denied. The judgment of the Superior Court is

Affirmed.

WILLIAM HENRY OLIVER v. FLORENCE BOLAND OLIVER.

(Filed 19 March, 1941.)

1. Divorce § 11—

The right to alimony *pendente lite*, both under statute, C. S., 1666, and under the common law, is predicated upon the justice of affording the wife sufficient means to cope with her husband in presenting their case before the court, and a finding, supported by evidence, that the wife has earnings and means of support equal to that of her husband, sustains the court's order denying her motion for alimony *pendente lite*.

2. Divorce § 2a—

In order to be entitled to a divorce on the ground of separation, plaintiff must show the fact of marriage, that the parties have lived separate and apart for two years, and that plaintiff has been a resident of the State for one year. Ch. 72, Public Laws of 1931, as amended by ch. 163, Public Laws of 1933; as amended by ch. 100, Public Laws of 1937.

3. Same—Conflicting evidence as to separation by agreement held to take issue to the jury.

A separation, as contemplated by the divorce statute, is more than a mere abandonment, and means a cessation of cohabitation of husband and wife by mutual agreement, but evidence on the part of the husband that he and defendant separated by mutual agreement, including the admission in evidence of a letter written by her to him agreeing to a separation without divorce, *is held* sufficient to take the issue to the jury notwithstanding evidence on her part that there was no agreement to separate but that he abandoned her.

4. Divorce § 4—Charge that leaving State with intention of returning at expiration of reasonably definite time would not interrupt residence here, held without error.

Plaintiff's evidence tended to show that he made his residence in this State, that after a physical breakdown his doctor advised him to go to Florida, that he went to Florida for the winter months, that he intended to and did return to this State after the end of the severe weather. *Held:* An instruction to the effect that if plaintiff had satisfied the jury by the greater weight of the evidence that he left the State with the intention of returning here at the expiration of a reasonably definite time, always regarding North Carolina as his place of residence, his physical absence from the State for such reasonably definite period of time would not affect his legal residence, *is held* without error.

5. Trial § 37—

Issues submitted will be held sufficient if they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

6. Divorce § 2a—Where plaintiff alleges, and case is tried upon theory of separation by consent, refusal to submit issue of abandonment is not error.

In an action for divorce on the ground of two years separation in which plaintiff alleges that he and defendant separated through no fault of plaintiff, and the case is tried upon the theory of separation by mutual consent upon defendant's defense that plaintiff abandoned her, an issue as to whether plaintiff and defendant separated as alleged in the complaint and lived separate and apart for two years next preceding the institution of the action, presents all determinative facts in dispute in regard to the separation, and defendant's objection to the action of the court in failing to submit another issue as to whether plaintiff abandoned defendant, cannot be sustained.

APPEAL by defendant from *Bobbitt, J.*, at December Term, 1940, of TRANSYLVANIA.

Civil action instituted 22 May, 1940, for absolute divorce upon ground of two years separation. Public Laws 1931, chapter 72, as amended by Public Laws 1933, chapter 163, as amended by Public Laws 1937, chapter 100.

Plaintiff in his complaint alleges: (1) That he and defendant were married at Hartwell, Ohio, on 15 June, 1910; (2) that he and she separated in June, 1936, through no fault of his, and have since lived separate and apart, that is, for more than two successive years next preceding institution of this action; (3) that he is and for more than one year next preceding the bringing of this action has been a resident of the State of North Carolina, and (4) defendant is a resident of Tennessee.

Defendant in answer filed admits the fact of marriage as alleged but denies all other allegations of the complaint, and further avers that plaintiff having deserted and separated himself from her without provocation, excuse or justification, or any fault on her part, and against her will, and having willfully abandoned her without providing adequate support, is not the injured party.

Defendant moved for order allowing alimony *pendente lite* and counsel fees. Upon such motion the court, "finding as a fact that the defendant is not without sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary and proper expenses thereto, but is receiving the sum of $20.13 disability benefits from an insurance policy of plaintiff, and is earning approximately $120.00 as a civil service employee, and has equal, if not greater, means of support than the plaintiff and is not entitled to an order for alimony *pendente lite*," denied the motion. Exception.

Upon the trial in Superior Court plaintiff offered evidence tending to show substantially these facts: That he and defendant were married in

the year 1910 as alleged in the complaint; that he suffered financial reverses in 1924; that in the latter part of 1930 he had a physical breakdown and his health failed, requiring hospitalization at Veterans' Hospital in Illinois; that afterward he lived in Ohio, at Dayton, then in Cincinnati and again in Dayton; that while in Dayton he and his wife had discussion about their marital affairs, and both agreed that they were incompatible and ill-mated and could not get along together; that in May, 1936, he left Dayton and came to Penrose in Transylvania County, North Carolina, in search of health; that when he left his wife bade him a friendly good-by at the bus station and he told her where he was going; that his wife, who had been working for several years prior to his financial reverses and had been working since that time, continued to work in Dayton; that in June, 1936, his wife, "at her own invitation," came to visit him and they spent their twenty-fifth anniversary together; that he next saw her in Dayton, Ohio, the latter part of December, 1936, while en route north to visit his sister and to attend an art school in Philadelphia; that when he went to Dayton on this trip he and she discussed their differences . . . he testifying that "we agreed that we belonged to two different schools of thought, the defendant a Catholic and I a Protestant. We came to a very definite understanding that we would live apart because we were ill-mated and incompatible. We had not lived together as man and wife and had occupied different beds for years prior to 1936. There was no change in that respect between June, 1936, and December, 1936"; that in early part of 1937 he attended an art school in Philadelphia; that while there on 13 April, he wrote his wife that he expected to go by bus the first week in June *via* Dayton on his return to Penrose for the purpose of discussing their "affairs in life" which he believes, she must agree, should "take on a definite understanding, instead of permitting them to drift on and on, as they have been doing"; that he had "decided after mature deliberation that it is best for us to live apart"; that on 1 May, 1937, his wife replied that she thought his idea of a friendly separation a very sensible one and that she would consent to such a separation without a divorce, and in closing stated, "As to your coming to Dayton on your way to Penrose, I would much prefer that you do not do so. Anything we have to say to each other can better be said by mail. I knew when I said good-by to you at Christmas time that it was a final good-by. Our parting was friendly and not sad and I would like to keep that in mind as our good-by"; that when school closed in May, 1937, he returned to Brevard and lived there; that in May, 1939, he suffered a stroke of paralysis and was taken to Veterans' Administration Hospital at Oteen, North Carolina; that over his protest his wife came there; that in September, 1939, after he left the hospital he sold his home in Brevard, for which he was paying in

monthly installments, and upon advice of "his ward surgeon" went to Florida for the winter for his health; that, after cold weather had ended in the spring, he went from Florida to Charleston, South Carolina, for several weeks, then to Columbia, South Carolina, for a few days, then to Weaverville, North Carolina, for a visit, then to the Y. M. C. A. in Asheville in June, 1940, and then back to Brevard in July, 1940; that when he came to Transylvania County, North Carolina, in 1936, he intended and decided to become a resident of that county; that when he went to Philadelphia in 1937 he intended to return to North Carolina, and did return and bought a home in Brevard after that time; that he registered and voted in Transylvania County in the general election in 1938; that when he went to Florida in 1939, it was for his health and upon advise of his ward surgeon; that he intended to stay only for the winter and intended, and did, return to Transylvania County.

Defendant offered evidence tending to show that she never agreed to a severance of marital relations; that there was no discussion about that either in Penrose in June, 1936, when they had "a very happy vacation together," or when plaintiff visited her for a week or so at Dayton in December, 1936; that plaintiff wrote to her almost daily while he was visiting his sister and after he went to the art school in Philadelphia, many of the letters being offered in evidence; that while his letter of 13 April, 1937, surprised and shocked her, she admits writing him the letter of 1 May, 1937; that the next time she saw him was in 1939, when on being informed by Mr. Moore of Brevard that plaintiff had suffered a stroke, she came down "over his protest and in spite of it." Defendant testified: "It was against my principles, but I agreed for him to leave me in 1936. I consented in 1937 to let him live separate from me; I had no choice in the matter."

Further evidence was introduced on the part of the plaintiff tending to show that the separation was by mutual agreement. On the other hand, much evidence was introduced by defendant tending to show that there was no mutual agreement to separate, and that in her letter of 1 May, 1937, she consented to separation only, without divorce. Likewise, much testimony was introduced with respect to the war insurance policies, payment of part of premiums by defendant and the assignment to her of part of the benefits.

At the close of evidence the court in its discretion permitted plaintiff to amend his complaint to allege the separation took place in December, 1936, rather than in June, 1936, so as to conform to the evidence. Exception.

These issues were submitted to and answered by the jury:

"1. Were the plaintiff and the defendant married to each other, as alleged in the complaint? Answer: 'Yes' (by consent).

"2. Has the plaintiff been a resident of the State of North Carolina for one year next preceding the filing of the complaint? Answer: 'Yes.'

"3. Did the plaintiff and the defendant separate, as alleged in the complaint, as amended, and have they lived separate and apart from each other for a period of two years next preceding the institution of this action and the filing of the complaint? Answer: 'Yes.'"

A fourth issue, reading: "Did the plaintiff willfully abandon the defendant, his wife, without providing adequate support for her, as alleged in the answer?" was presented and appeared on the sheet containing the other issues, but was not submitted to the jury. Exception by defendant.

From judgment on verdict defendant appeals to Supreme Court and assigns error.

Ralph H. Ramsey, Jr., for plaintiff, appellee.
James E. Rector for defendant, appellant.

WINBORNE, J. The assignments of error principally relied upon by defendant are these: Did the court err: (1) In refusing motion of defendant for alimony *pendente lite* and counsel fees? (2) In overruling her motions, aptly made, for judgment as in case of nonsuit? (3) In charging the jury with respect to residence of plaintiff; and (4) in withdrawing the fourth issue from consideration by the jury. Our views relative to these questions are in accord with those of the court below.

(1) Upon the finding of fact with regard thereto, we find no error in the ruling of the judge below in denying motion of defendant for alimony *pendente lite* and counsel fees. Whether proceeding under the provisions of C. S., 1666, or at common law, the right to an allowance either for support pending the action or for expenses of the action, is predicated upon a finding that the wife is without sufficient means to cope with her husband in presenting their case before the court. C. S., 1666; *Medlin v. Medlin,* 175 N. C., 529, 95 S. E., 857; *Holloway v. Holloway,* 214 N. C., 662, 200 S. E., 436.

(2 and 3) The second and third questions may be properly considered together. The statute under which this action is prosecuted provides that: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year." Public Laws 1937, chapter 100, amending Public Laws 1933, chapter 163, which amended Public Laws 1931, chapter 72. See *Brown v. Brown,* 213 N. C., 347, 193 S. E., 409.

In order to maintain an action for divorce under this statute, these facts must exist: (1) Marriage; (2) the husband and wife must have lived separate and apart for two years; and (3) the plaintiff, husband or wife, must have resided in the State of North Carolina for a period of one year. In the case in hand the first factor, the fact of marriage, is admitted. As to the second, "The word 'separation' as applied to the legal status of a husband and wife means more than 'abandonment'; it means 'a cessation of cohabitation of husband and wife, by mutual agreement.'" *Parker v. Parker,* 210 N. C., 264, 186 S. E., 346; *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352; Black's Law Dictionary, Third Edition.

When considered in the light of this definition of separation, the evidence in this aspect of the present case, though controverted, is abundantly sufficient to take the case to the jury.

As to the third factor, defendant contends that the clause "the plaintiff . . . has resided in the State for a period of a year" means actual, physical presence in the State for that period of time. She, therefore, challenges the correctness of the law as declared by the court below, and applied to the evidence in the case. While the exceptions relate to several portions of the charge, the following portion covered by Exception 6 is typical: "Now, Gentlemen of the Jury, the court instructs you as a matter of law that when a person actually ceases to dwell within a State for an uncertain period of time without any definite intention of returning, then his leaving the State under such circumstances makes him a nonresident of the State, although there may be a vague intention to return at some indefinite future time.

"On the other hand, Gentlemen of the Jury, if a man or resident of North Carolina, who leaves the State for a temporary purpose and for a reasonable definite length of time, with the fixed intention of returning to North Carolina immediately at the end of that fixed period of time, rather than some indefinite idea of returning at some indefinite future time, then the court instructs you that that would not interrupt his residence in North Carolina; so that with reference to the evidence in this case the court instructs you that if the plaintiff has satisfied you from the evidence and by its greater weight that the plaintiff left Brevard, Transylvania County, North Carolina, or left North Carolina in October, 1939, having been up to that time and being then a resident of North Carolina, for Florida under the advice of a physician for the definite purpose of staying there during the winter months, and with a definite idea of returning to North Carolina immediately upon the passing of the severe months here in Western North Carolina, and that at all times during his temporary absence from the State of North Carolina in the State of Florida had the fixed intention of returning to North Carolina

under those circumstances, and always regarding North Carolina as his place of residence or home in Western North Carolina, the court instructs you that the plaintiff, under those facts, if you find those to be the facts from the evidence and by its greater weight, was a resident of the State of North Carolina during the period of his physical absence therefrom, during the time from October, 1939, up to 1940, and his residence in North Carolina under those facts, if you find those to be the facts from the evidence and by its greater weight, would not interrupt his previously established residence, if you find he did have a previous established residence, and so find from the evidence and by its greater weight."

Exception, directed to the second paragraph of the quoted charge, is not well taken. See *Moore v. Moore,* 130 N. C., 333, 41 S. E., 943.

(4) Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Hill v. Young,* 217 N. C., 114, 6 S. E. (2d), 830; *Saieed v. Abeyounis,* 217 N. C., 644, 9 S. E. (2d), 399. When thus tested, the issues submitted in the present case meet all the requirements. While in the complaint it is alleged that plaintiff and defendant separated "through no fault of plaintiff," and while in the answer it is averred that plaintiff willfully abandoned defendant without providing adequate support for her, the case was tried upon the theory advanced by plaintiff that their separation was by mutual consent. In any event, the third issue, predicated upon the allegation in the complaint as above stated, is sufficient to present to the jury the proper inquiry as to the facts surrounding the separation, and to afford defendant opportunity to introduce all pertinent evidence in support of her contention that plaintiff had willfully abandoned her without providing adequate support, as alleged by her, and to apply the evidence fairly. The affirmative answer to that issue negatives the averment of defendant, and renders harmless any error that may have been committed in not submitting the fourth issue. Moreover, defendant does not deny her consent to a separation, but contends that her consent was to a separation, without divorce.

Other exceptions have been considered and are found to be without merit.

In the judgment below there is

No error.

IN RE GEORGE J. STEELMAN ET AL., CLAIMANTS, EMPLOYEES, AND NEBEL KNITTING COMPANY, INC., EMPLOYER.

(Filed 19 March, 1941.)

1. Master and Servant § 60—Right to unemployment benefits during stoppage of work as result of labor dispute.

Under the provisions of the Unemployment Compensation Act, sec. 5 (d), ch. 1, Public Laws of 1936, employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the Commission that he is not disqualified under the terms of this section.

2. Same—

The provisions of the Unemployment Compensation Act seeking to maintain neutrality on the part of the State in labor disputes will be given effect by the courts, since the matter of policy is in the exclusive province of the Legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relation to the end sought to be accomplished.

3. Same—

Sec. 5 (d), ch. 1, Public Laws of 1936, which makes specific provision in regard to disqualification of employee-claimants during stoppage of work because of labor disputes, prevails over the provision of sec. 2 of the Act, stating the general policy of the Act to provide for benefits to workers who are "unemployed through no fault of their own."

4. Statutes § 5a—

It is a recognized principle of statutory construction that when words of general import, the subject of a statute, are followed by words of particular or restricted import relating to the same subject matter, the latter will operate to limit or restrict the former.

5. Same—

The end of all statutory construction is to discover and to effectuate the legislative intent.

6. Master and Servant § 60—When evidence supports finding that claimants were disqualified during stoppage of work, finding is conclusive.

When the Unemployment Compensation Commission finds, upon supporting evidence, that employee-claimants were not entitled to benefits during the stoppage of work caused by a labor dispute because claimants either participated in, financed, or were directly interested in the labor dispute which caused the stoppage of work, or belonged to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurred, some of whom were participating in, or financing, or directly

interested in the dispute, the ruling of the Commission denying compensation during the stoppage of the work will be upheld.

7. Master and Servant § 62—

Upon appeal to the Superior Court from any final decision of the Unemployment Compensation Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the Superior Court on appeal being limited to questions of law. Sec. 6 (i), ch. 1, Public Laws of 1936.

8. Master and Servant § 60—Employer held not prejudiced by order that eligibility of claimants after resumption of operations should be determined.

The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute, but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The Commission ruled that claimants were not entitled to benefits during the stoppage of work. *Held:* The employer is not prejudiced by the further order of the Commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the Commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in the Act, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. Sec. 5 (c) (2), ch. 1, Public Laws of 1936.

9. Master and Servant § 61—

The Unemployment Compensation Commission is charged with administering the benefits provided in the Unemployment Compensation Act in accordance with the objective standards and criteria set up in the Act, but the merits of labor disputes do not belong to the Commission, these being matters properly pertaining to the field of labor relations.

APPEALS by Nebel Knitting Company, Inc., employer, and a number of employee-claimants from *Johnston, Special Judge,* at Extra September Term, 1940, of MECKLENBURG.

Proceeding under Unemployment Compensation Law to determine validity of claims and disqualifications for unemployment benefits.

The facts, essential to an understanding of the questions presented by the appeals, follow:

I. The Nebel Knitting Company is engaged in the manufacture of ladies' full-fashioned silk hosiery in the city of Charlotte, and normally employs about 400 workers.

II. For a period of five weeks, from 10 April to 13 May, 1940, there was a stoppage of work at the plant or factory of the Nebel Knitting Company because of a labor dispute—a strike having been called by the

union to which some of the employees belonged, picket lines established, etc.

III. On 29 April, the company addressed a letter to all of its employees, including the claimants, notifying them that operations would be resumed on 13 May, 1940, and that "all present employees" who reported for work on that day would be put back on their "former jobs" without reference to whether they belonged to a union or had participated in the current strike. This letter contained the further notice that "from and after May 13, 1940, if the company is operating, it will, on a permanent basis, fill vacant jobs, which it desires to run, with whoever applies or whomever it can employ to fill such jobs satisfactorily."

IV. On 13 May, the company resumed operations to such an extent that there was no longer a stoppage of work within the meaning of the Act. The labor dispute still continued, however, and the picket line was maintained for some time thereafter. The president of the Nebel Knitting Company testified that all the employees on strike would be taken back to work if they would "make application or signify their intention of coming back or come in." There was evidence on behalf of the claimants that they did not return to their jobs because of the labor dispute.

V. A large number of these workers filed claims for unemployment benefits. A group hearing was had pursuant to the rules established by the Unemployment Compensation Commission, and the following conclusions finally reached:

1. The employee-claimants, 108 in number, referred to as James C. Jones and others, and represented by Jones & Smathers, attorneys, and the employee-claimants, 7 in number, referred to as Sarah R. Bean and others, and represented by John Newitt, attorney, were denied benefits for the period from 10 April to 13 May, 1940, because it was found as a fact that they were either (a) "participating in or financing or directly interested in the labor dispute which caused the stoppage of work at the plant or premises of Nebel Knitting Co., Inc.," or that they did (b) "belong to a grade or class of workers which, immediately before the commencement of the stoppage, there were members employed at the premises, at which the stoppage occurred, which said members were participating in or financing or directly interested in the dispute."

From this ruling, the employee-claimants excepted and appealed to the Superior Court of Mecklenburg County.

2. It further appearing to the Commission that operations were resumed on 13 May, 1940, to such an extent that there was no longer a stoppage of work at the plant or factory of the Nebel Knitting Company, it was adjudged that the above claimants would be entitled to benefits

from and after this date, the date on which the stoppage of work at the plant or factory of the employer ceased, if they were found to be otherwise eligible for benefits under the Unemployment Compensation Law, and it was ordered that the eligibility of the claimants should be determined from and after 13 May, 1940.

From this ruling the Nebel Knitting Company entered exceptions and appeal to the Superior Court.

In the Superior Court, the findings and conclusions of the Commission were sustained and confirmed.

From this judgment, the Nebel Knitting Company and the claimants as above designated, noted exceptions and appeal.

Guthrie, Pierce & Blakeney for Nebel Knitting Co., employer, appellant.

J. Laurence Jones for James C. Jones et al., employee-claimants, appellants.

John Newitt for Sarah R. Bean et al., employee-claimants, appellants.

Adrian J. Newton, Ralph Moody, and J. C. B. Ehringhaus, Jr., for Unemployment Compensation Commission.

STACY, C. J. The impression is gained from a careful perusal of the record that the Unemployment Compensation Law has been properly interpreted and applied to the facts of the instant case. While the record presents only a question of statutory construction, it may be useful to consult the opinion of the Supreme Court of the United States in *Carmichael v. Southern Coal Co.,* 301 U. S., 495, where the validity of the Alabama Act was considered and upheld. See, also, *Stewart Machine Co. v. Davis,* 301 U. S., 548; "Unemployment Compensation in Labor Disputes," 49 Yale Law Journal, 461; "Unemployment Insurance," Columbia Law Review, 858.

APPEALS OF EMPLOYEE-CLAIMANTS.

The questions presented by the appeals of the employee-claimants relate to the disqualifications for benefits proscribed in section 5 (d) of the Unemployment Compensation Law. Ch. 1, Public Laws 1936. The pertinent provisions follow:

"Sec. 5. An individual shall be disqualified for benefits: . . . (d) For any week with respect to which the commission finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that—

"(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"(2) He does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute."

The statute withholds benefits during the stoppage of work which is caused by a labor dispute, from all persons participating in or financing or directly interested in the labor dispute and from all grades or classes of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, and any of whom are participating in or financing or directly interested in the dispute. Each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under the terms of this section. It thus appears that the State seeks to be neutral in the labor dispute as far as practicable, and to grant benefits only in conformity to such neutrality. Of course, it is recognized that in a matter of this kind, some allowance must be made in fixing the line or point of difference between granting and withholding benefits during the stoppage of work caused by a labor dispute. *Supply Co. v. Maxwell,* 212 N. C., 624, 194 S. E., 117. "But when it is seen that a line or point there must be, and there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark" —*Mr. Justice Holmes* in *Louisville Gas Co. v. Coleman,* 277 U. S., 32. The wisdom or impolicy of such decision belongs to the legislative, and not to the judicial, department of the Government. *United States v. F. W. Darby Lumber Co.,* ..... U. S., ..., decided 3 February, 1941— (Fair Labor Standards Case).

The appealing employee-claimants take the position that the interpretation of this section is perforce controlled by the declaration of policy contained in sec. 2 of the Act, the general designation of workers there selected for benefits being those who are "unemployed through no fault of their own." The Commission and the court below thought otherwise. They followed the usual and accepted rule of construction that "where a statute expresses first a general intent, and afterwards an inconsistent particular intent, the latter will be taken as an exception from the former and both will stand." 1 Lewis' Sutherland on Stat. Constr. (2 Ed.), sec. 268; *Rogers v. U. S.,* 185 U. S., 83.

It is an established canon of construction that where there are two provisions in a statute, one of which is special or particular, and certainly includes the matter in hand, and the other general, which, if standing alone, would include the same matter and thus conflict with the

particular provision, the special will be taken as intended to constitute an exception to the general provision, as the General Assembly is not to be presumed to have intended a conflict. *Nance v. R. R.*, 149 N. C., 366, 63 S. E., 116; *Crane v. Reeder*, 22 Mich., 322; *Dahnke v. People*, 168 Ill., 102, 48 N. E., 137, 39 L. R. A., 197.

Indeed, it may be doubted whether any serious conflict exists in the present law between the general intent expressed in the declaration of policy and the particular intent found in sec. 5 (d) of the Act. *School Comrs. v. Aldermen*, 158 N. C., 191, 73 S. E., 905. It is a recognized principle of statutory construction, that when words of general import, the subject of a statute, are followed by words of particular or restricted import relating to the same subject matter, the latter will operate to limit or to restrict the former. *Nance v. R. R., supra; Supply Co. v. Eastern Star Home*, 163 N. C., 513, 79 S. E., 964. The end of all construction is to discover and to effectuate the legislative intent. *Abernethy v. Comrs.*, 169 N. C., 631, 86 S. E., 577.

Accordant with the terms of this section, the Commission found that the employee-claimants, appellants herein, were not entitled to benefits during the stoppage of work at the factory, establishment, or other premises of the Nebel Knitting Company because it appeared from the evidence that they were either (a) participating in or financing or directly interested in the labor dispute which caused the stoppage of work, or (b) that they belonged to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurred, some of whom were participating in or financing or directly interested in the dispute. The ruling of the Commission was upheld on appeal to the Superior Court. It is supported by the language of the statute and the evidence in the case.

It is provided in sec. 6 (i) that on appeal to the Superior Court from any final decision of the Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, shall be conclusive and the jurisdiction of the court is confined to questions of law. It is further provided that an appeal may be taken from this decision, as in civil cases, without bond and without stay of the judgment unless otherwise ordered.

APPEAL OF NEBEL KNITTING COMPANY, INC.

The employer appeals from the ruling of the Commission in respect of the eligibility of the employee-claimants herein who did not return to their work on 13 May, 1940, the date on which the stoppage of work at its plant is found to have ceased. The effect of this ruling, as we understand it, is to declare the stoppage of work which theretofore pre-

vailed at the plant of the Nebel Knitting Company because of a labor dispute, no longer existed, or had come to an end, and that the disqualifications effective only during such stoppage would be eliminated in thereafter determining the eligibility of claimants. It is not perceived wherein the employer can presently complain at this ruling. So far as appears, the individual determinations have not yet been made, and we cannot assume the Commission will omit to observe the provisions of the statute in making them. The group hearing was for the purpose of determining the disqualifications of claimants during the stoppage of work caused by the labor dispute. Eligibility thereafter will arise from week to week as each claimant continues to apply for benefits.

Perhaps it is fair to say, however, that the effect of the present determination is to declare the employer's letter of 29 April and his testimony that the claimants' positions were still open, if they cared to apply for them, would not perforce disqualify the claimants or render them ineligible for benefits from and after 13 May, 1940, the date on which the stoppage of work ceased. The position finds support in sec. 5 (c) (2) of the Act, which provides: "Notwithstanding any other provisions of this Act, no work shall be deemed suitable and benefits shall not be denied under this Act to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (a) If the position offered is vacant due directly to a strike, lockout, or other labor dispute." There was evidence on behalf of the claimants that they did not return to their jobs because of the labor dispute.

The existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits, all of which are to be determined by the Unemployment Compensation Commission according to certain objective standards or criteria, but the merits of the labor dispute do not belong to the Commission. These are matters more properly pertaining to the field of labor relations.

The whole case, then, comes to this:

First. The employee-claimants, appellants herein, were denied compensation during the stoppage of work at the factory, establishment, or other premises of the Nebel Knitting Company because it appeared from the evidence, and the Commission so found, that they were either (a) participating in or financing or directly interested in the labor dispute which caused the stoppage of work, or (b) that they belonged to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurred, some of whom were participating in or financing or directly interested in the dispute.

Second. The employee-claimants herein who did not return to their work on 13 May, 1940, are declared to be entitled to benefits from and after this date, the date on which the stoppage of work at the plant or factory of the employer ceased, if they are found to be eligible for benefits under the Unemployment Compensation Law, and it was accordingly ordered that their eligibility for benefits should be determined from and after this date.

Both rulings are apparently accordant with the provisions of the Unemployment Compensation Law.

On the record as presented, the judgment of the Superior Court will be upheld.

Affirmed.

W. F. WOLFE AND WIFE, MRS. IDA WOLFE, v. NORTH CAROLINA JOINT STOCK LAND BANK.

(Filed 19 March, 1941.)

1. Trusts § 1b: Mortgages § 40—

To create a parol trust there must be an agreement amounting to an undertaking to act as agent for another in the purchase of land, constituting a covenant to stand seized to the use or benefit of such other, but a mere parol agreement to convey land to another raises no trust in the latter's favor and comes within the provisions of the statute of frauds.

2. Same: Estoppel § 6d—Person signing lease as tenant and thus recognizing title of landlord held estopped to assert parol trust as against landlord.

Plaintiff alleged that the *cestui que trust* in the deed of trust executed by plaintiff on the *locus in quo*, agreed to purchase at the foreclosure sale for plaintiff's benefit and to reconvey to plaintiff upon certain terms. During conversations with officers of the defendant relative to repurchasing the property plaintiff occupied same as tenant. Defendant consistently refused to convey the property upon the terms that plaintiff alleged it had agreed so to do. Thereafter ejectment proceedings were instituted and plaintiff made no defense therein that he was the equitable owner, and the ejectment action was compromised by agreement under which plaintiff paid the rent and entered into a new rental agreement prepared by plaintiff's attorney in which it was stipulated that plaintiff claimed no interest in the land other than as tenant. *Held:* Plaintiff's conduct was inconsistent with the existence or continuation of his asserted equitable interest in the land and estops him from asserting the alleged parol trust.

3. Cancellation of Instruments § 2—Evidence held insufficient to show that execution of instrument was procured by fraud.

Plaintiff instituted this action to establish an alleged parol trust. Defendant asserted as an estoppel a lease agreement executed by plaintiff in which it was stipulated that plaintiff's only interest in the land was that of a tenant. Plaintiff attacked the lease on the ground that its execution

was procured by fraud. The evidence tended to show that the lease agreement was prepared by plaintiff's attorney, that he had opportunity to read it or to have it read to him, and the only representation relied upon was the statement of defendant's agent that the lease agreement was a "plain rental contract." *Held:* Plaintiff is not entitled to avoid the legal effect of the instrument upon mere proof that the agent of defendant informed him that it was a lease agreement.

4. Same: Mortgages § 40—

After foreclosure and the purchase of the property by the *cestui* there is no presumption of fraud arising from the relationship between the parties which would vitiate the execution by the former trustor of a lease agreement.

5. Estoppel § 11c—

Where plaintiff's own evidence establishes the execution by him of a lease agreement estopping him from asserting an alleged parol trust in the lands, and plaintiff's evidence of fraud in procuring his execution of the lease is wholly insufficient, defendant's motion for judgment as of nonsuit should have been sustained.

APPEAL by defendant from *Carr, J.*, at October Term, 1940, of WAYNE. Reversed.

Civil action to establish a parol trust in land.

In 1925, the plaintiff, W. F. Wolfe (the plaintiff, Ida Wolfe, being joined as wife of the real plaintiff), subdivided his tract of land containing 111 acres into three separate parcels and procured three several loans from the defendant in the total sum of $6,400.00. Each loan was secured by a deed of trust. In 1934, the plaintiff having defaulted in the payment of four semiannual installments and in the payment of the 1932 and 1933 taxes, in addition to certain insurance premiums, his land was advertised under the deeds of trust and sold on 17 March, 1934. At the sale, plaintiff being present, the defendant became the purchaser of each tract and foreclosure deeds were executed accordingly.

The plaintiff offered evidence tending to show that in February, 1934, prior to the foreclosure sale, the vice-president of the defendant company suggested that plaintiff apply to the Federal Land Bank for a loan and stated that the defendant would have the trustee sell the land and that at the sale the bank would bid it off and "he was to let me have it back at what I could borrow from the Federal Land Bank."

The plaintiff made application to the Federal Land Bank and procured a commitment in the sum of $3,200.00. He so advised the defendant and offered to pay the proceeds of such loan for a reconveyance of his land. The defendant refused to accept the same. Plaintiff then procured a commitment from the Federal Land Bank in the sum of $3,500.00. The defendant likewise declined to accept this amount. He was fully advised in August, 1934, that the defendant declined to accept

the amount of the commitment from the Land Bank. "Mr. Smith said he wasn't going to do it and I couldn't make him do it."

During the negotiations for the repurchase or redemption of the land plaintiff and his attorney consulted with the general counsel of the defendant and also with the treasurer. The agent of the Land Bank, accompanied by plaintiff, also conferred with officers of the defendant. In each instance defendant declined to accept the amount of the commitment and to make conveyance.

In the spring of 1934, plaintiff leased the premises in controversy from the defendant agreeing to pay $225.00 rent therefor. It does not appear whether this contract was made before or after the foreclosure. On 17 November, 1934, counsel for plaintiff, at his instance, wrote the defendant as follows:

"My information is that in the above matter your bank foreclosed this property some time ago and now holds title to the same.

"Mr. Wolfe is very desirous of obtaining from Federal Land Bank of Columbia a loan with which to re-purchase this land. I have been negotiating with the Federal Land Bank in regard to this matter since June of this year and have not been able to get as much money as is necessary to complete this loan, however, am hopeful that I can get a loan that will be sufficient to enable him to re-purchase this property. To do this, however, it is necessary that I have a statement from your bank as to the exact amount you will accept for this land provided Mr. Wolfe can re-purchase the same. I would greatly appreciate your furnishing me with such a letter, giving me the maximum time in which to accept your offer and at the same time make your offer as low as you possibly can so that he can work out a proposition with the Federal Land Bank."

Thereafter, the plaintiff having defaulted in the payment of rent, defendant instituted a summary proceeding in ejectment. In this proceeding plaintiff was represented by counsel and the parties entered into an agreement of compromise settlement under the terms of which the plaintiff paid his rent and the defendant agreed to and did enter into a rental agreement for 1935. This contract of rental was prepared by counsel for the plaintiff and contained the following stipulation:

"It is further understood and agreed between the parties that the said party of the first part is seized of the legal title to the lands described in this contract and that the said party of the second part (plaintiff) has no interest in the farm except for the term and duration of this lease."

On 28 September, 1935, plaintiff's counsel, at his instance, again wrote defendant, in part, as follows: "Will you please let me know immediately the price of this farm, together with your best terms; that is, cash payment and purchase money mortgage securing the balance. I would

appreciate this information immediately as Mr. Wolfe is about to obtain assistance to regain this farm and it is necessary that I have the figures at once."

In the fall of 1935 plaintiff instituted an action to establish a parol trust agreement entered into between the defendant and plaintiff prior to the foreclosure sale. Judgment of voluntary nonsuit was entered at the March Term, 1937, and plaintiff brought this action 1 January, 1938, alleging substantially the same cause of action.

The defendant filed answer denying any parol agreement or contract to reconvey and alleged the acts and conduct of the plaintiff, including the rental agreements, as an estoppel. Plaintiff replied thereto alleging that the rental contract entered into in 1935, if executed by him (which was not admitted), was procured by the fraud and misrepresentations of the defendant.

When the cause came on to be tried issues were submitted to and answered by the jury as follows:

"1. Did the North Carolina Joint Stock Land Bank, prior to the foreclosure on March 17, 1934, agree with the plaintiffs that it would buy the lands at the foreclosure sale and hold title to the same to the use and benefit of the plaintiffs, as alleged in the pleadings of the plaintiffs?

"Answer: 'Yes.'

"2. If so, were the plaintiffs ready, willing and able to perform their part of the contract according to its terms within a reasonable time and as agreed, as alleged by the plaintiffs' pleadings?

"Answer: 'Yes.'

"3. Was the contract of rental entered into between the plaintiffs and the defendant dated January 18, 1935, obtained by fraud of the defendant?

"Answer: 'Yes.'"

From judgment on the verdict defendant appealed.

J. Faison Thomson and Scott B. Berkeley for plaintiffs, appellees.

D. H. Bland and J. S. Patterson for defendant, appellant.

BARNHILL, J. To create a parol trust there must be an agreement amounting to an undertaking to act as agent in the purchase and constituting a covenant to stand seized to the use or benefit of another.

"The jurisdiction to enforce the performance of trusts arises where property has been accepted by one person on terms of using or holding it for the benefit of another." *Reynolds v. Morton*, 205 N. C., 491, 171 S. E., 781; *Shelton v. Shelton*, 58 N. C., 292; *Riggs v. Swann*, 59 N. C., 118; *Lefkowitz v. Silver*, 182 N. C., 339, 109 S. E., 56; *Lutz v. Hoyle*, 167 N. C., 632, 83 S. E., 749; *Wilson v. Jones*, 176 N. C., 205, 97 S. E.,

18; *Boone v. Lee,* 175 N. C., 383, 95 S. E., 659; *Weaver v. Norman,* 193 N. C., 254, 136 S. E., 612; *Mulholland v. York,* 82 N. C., 510; *Rush v. McPherson,* 176 N. C., 562, 97 S. E., 613, and cases cited; *Avery v. Stewart,* 136 N. C., 426, 68 L. R. A., 776.

"A mere parol agreement to convey land to another raises no trust in the latter's favor and comes within the provisions of the statute of frauds." *Avery v. Stewart, supra; Campbell v. Campbell,* 55 N. C., 364.

The theme of the conversation with the vice-president of the defendant related by the plaintiff is that the bank would buy the property at the sale and would reconvey to the plaintiff for the amount procured from the Federal Land Bank. There is, however, other evidence from witnesses for the plaintiff which tends more nearly to establish a parol trust agreement. In any event, the defendant in its brief does not challenge the sufficiency of the evidence for this purpose.

On its motion to nonsuit defendant rests its case upon its plea of estoppel. This plea must be sustained.

Plaintiff, after the sale, in company with a representative of the Land Bank, and later accompanied by his counsel, had conversations with officers of the defendant relative to repurchasing the property. At that time he occupied it as tenant under a rental agreement. Nothing was said in respect to an alleged agreement to reconvey or to purchase for the use and benefit of the plaintiff. At plaintiff's instance his counsel corresponded with the defendant, beginning shortly after the sale. In none of these letters is reference made to any such contract. The plaintiff was merely seeking to repurchase his land and to obtain the best possible price. When ejectment proceedings were instituted in 1934 he made no defense that he was the equitable owner of the property. On the contrary, he paid the rent and entered into a new agreement of rental, stipulating in the contract that he claimed no interest in the land other than as tenant. This conduct of the plaintiff is wholly inconsistent with and in negation of any claim of beneficial interest. At the time he entered into the rental contract for the year 1935 he well knew that defendant had consistently refused to reconvey the property upon the terms plaintiff alleges it had agreed so to do. In the ejectment proceedings it asserted title in itself and claimed the right of possession. With this knowledge and in settlement of the ejectment action he paid the 1934 rent and executed a lease for the premises. Under the decisions of this Court he is now, by his conduct, estopped to assert equitable title to the land. *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869; *Council v. Land Bank,* 213 N. C., 329, 196 S. E., 483; *Bank v. Hardy,* 211 N. C., 459, 190 S. E., 730; *Minton v. Lumber Co.,* 210 N. C., 422, 187 S. E., 568; *Bunn v. Holliday,* 209 N. C., 351, 183 S. E., 278; *Shuford v. Bank,* 207 N. C., 428, 177 S. E., 408.

Speaking directly to the subject, *Winborne, J.*, in *Hare v. Weil, supra,* says: "The language of this agreement is clear and explicit. A reading of it manifests the clear intention of the plaintiffs to recognize the defendants as the landlord, and assume for themselves the role of tenants . . . The execution of this agreement is conduct positive, unequivocal and inconsistent with the claim of title under the alleged parol agreement. It is not in harmony with the existence or continuation of the trust, and manifests conclusively an intention not to rely thereon."

Here, however, plaintiff seeks to avoid the effect of his 1935 lease agreement on the grounds of fraud. The fraud relied upon is neither sufficiently pleaded nor proven. While he testified that "they (the agent of the bank), just asked me to sign my name, said it was a plain rental contract," the fact remains that the lease agreement was prepared by plaintiff's counsel who was present when it was executed. He had full opportunity to read it or to have it read to him by his counsel. It was "a plain rental contract" and the clause in which he stipulated that he claimed no interest in the land was just above his signature. He cannot now avoid the legal effect thereof upon mere proof that the agent of the defendant informed him that it was a lease agreement.

The relationship of the parties was not such as to raise a presumption of fraud. The record discloses that at no time from the foreclosure until plaintiff instituted his action in the fall of 1935 was any mention made of an alleged parol trust agreement. The plaintiff had made repeated efforts to ascertain the terms on which defendant would reconvey and the defendant had consistently and repeatedly declined to sell for the sums offered. If there existed any parol trust agreement plaintiff well knew that defendant was claiming ownership in its own right. The parties were dealing at arms length.

There being no proof of fraud, the effect of the plea of estoppel, on the evidence offered by the plaintiff, was properly presented by the motion for judgment as of nonsuit. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Hare v. Weil, supra.*

The motion for judgment as of nonsuit should have been sustained.

Reversed.

SOUTHERN RAILWAY COMPANY v. DEWEY LISSENBEE.

(Filed 19 March, 1941.)

1. Railroads § 2—Railroad right of way may be acquired by statutory presumption.

A right of way for railroad purposes may be acquired by statutory presumption, and evidence tending to show that plaintiff railroad company was successor to the Western North Carolina Railroad Company which

constructed its tracks over the lands of defendant, that the tracks had been in continuous use, and further that the right of way was not acquired by purchase or condemnation, *is held* sufficient to be submitted to the jury on the question of plaintiff's acquisition of an easement for 100 feet on either side of the center of its tracks under the statutory presumption of a grant from the owner of the land (Private Laws of 1854-55, ch. 228, sec. 29).

2. Same—

The statutory presumption of a grant of land for a railroad right of way arises only in the absence of contract in relation to the land through which the railroad may pass, and the burden is upon the party claiming the benefit of such presumption to show every fact out of which it arises.

3. Same—

When a railroad company acquires a right of way for railroad purposes it may be occupied and used by the railroad company to its full extent, and the railroad company is the judge of the extent of use necessary for the proper operation of its trains and may enjoin the owner of the land from interfering from a proper increase in the use of the easement.

4. Same—

The fact that shortly after tracks are laid they are relocated does not affect the acquisition of an easement along the relocated tracks by statutory presumption, since the relocation is under authority of the company's charter giving rise to the statutory presumption of a grant after the expiration of the time prescribed.

APPEAL by defendant from *Armstrong, J.*, at September Term, 1940, of MADISON.

Civil action to require defendant to remove obstruction on and around, and restraining him from interfering with electrical signal and switching system of plaintiff allegedly located on its right of way.

These pertinent facts appear to be uncontroverted. Plaintiff has a line of railroad running generally east and west through the town of Marshall in Madison County, North Carolina. In said town there is a street, referred to in defendant's answer and in the issues, as Lower Bridge Street, which runs south from Main Street at or near the courthouse yard to and over the railroad, and then to and across the French Broad River. Defendant owns, subject to the railroad right of way of plaintiff, a lot of land which lies on the west side of Lower Bridge Street and extends from a point north of the railroad to the French Broad River on the south thereof. In connection with the operation of its trains over the track of said railroad, plaintiff has installed and operates an automatic electrical signal and switching system. Also, in connection with said system and for the purpose of indicating to those traveling upon Lower Bridge Street the approach of train on said railroad, plaintiff has installed on the north side of the railroad and on the west edge of said street, and at said intersection, and within the boundaries of the

said lot of defendant, an automatic electrical signal system. As a part thereof and auxiliary thereto, plaintiff has built a cement box and installed therein wet batteries with relay boxes attached to post above so that in the event the electric power which operates the crossing signal shall fail, the batteries automatically cut in and govern the crossing signal. This battery box, as defendant avers, "extends into the defendant's property about fifteen feet from the center of its (plaintiff's) track." Defendant has covered the box and the batteries with sand, which interferes with maintenance of the system. Upon the trial below, "It is conceded by defendant that the plaintiff . . . is the successor to and stands in the same position as to the property in question as The Western North Carolina Railway (Railroad) Company."

Plaintiff offered in evidence chapter 228 of the Private Laws of the General Assembly of North Carolina 1854-55, entitled, "An Act to Incorporate the Western North Carolina Railroad Company," and especially section 29 thereof relating to acquisition of right of way. Plaintiff contends that under the charter of the Western North Carolina Railroad Company, it has by statutory presumption a right of way one hundred feet in width on each side of the center line of its railroad track, over the property of defendant. On the other hand, defendant contends that as the railroad crosses his lot of land, it is built on a rock wall, and that the right of way or easement of the plaintiff is limited to "the width of the rock wall" upon which the track is situated.

Plaintiff further offered evidence tending to show that the railroad as now located through the town of Marshall and over the property in question was constructed in the year 1896, and has been since operated continuously; that it runs along the north side of and close to the French Broad River on a rock wall; that when the railroad was first constructed through said town about the year 1882 or 1883 it "ran through the middle of the street (Main Street) for about a year"; that this first location was "just a short distance north of where it is now located"; that "then they built a pine pole trestle between the street where the track was originally located and where it is now located," and along the north side of and by its present location over the property in question, and operated the railroad there for eight or ten years; that "the pine pole trestle started at the depot, which is a block or two east of the property in question and kept getting closer to the present location until it got down to the Lissenbee property in question, and then ran across the same immediately north of its present location."

Plaintiff further offered evidence tending to show defendant's chain of title to property in question connectedly from 1866 to date; also, that a search of the records of deeds and other instruments required to be registered in the office of the register of deeds of Madison County, and

a further search in the office and files of plaintiff in Washington, D. C., by officer in charge of files of the contracts and deeds of the company, fail to show that the Western North Carolina Railroad Company and its successor, the plaintiff, "received any conveyances or contracts for right of way over the property in question"; and that "there have never been any condemnation proceedings covering this property."

Plaintiff further offered evidence tending to show that the battery box in question was required for the signal system at the crossing.

The record shows that these four issues were submitted to and answered by the jury:

"1. Is the plaintiff the owner of a right of way on either side of its main line as same runs through the property of the defendant on the west side of Lower Bridge Street in the Town of Marshall, N. C., as alleged in the complaint? Answer: 'Yes.'

"2. If so, what is the width of same on each side of the center of the railway track of the plaintiff? Answer: 'Yes, 100 feet on each side of the center of the plaintiff's railway track, said right to exist so long as said property shall be necessary for railway purposes, and used for said purposes and no longer.'

"3. Has the defendant wrongfully entered upon said right of way and wrongfully interfered with the rights of the plaintiff on that part of said right of way upon which plaintiff's signal box and signal system is located? Answer: 'Yes.'

"4. What damage, if any, is the defendant entitled to recover of the plaintiff, as alleged in defendant's counterclaim? Answer: 'Nothing.'"

However, plaintiff has filed with the clerk of this Court a certified copy of the judgment incorporating the issues as submitted, showing that only the first and third were actually submitted, and answered by the jury.

Upon the verdict as rendered the court below adjudged that "plaintiff, under authority of chapter 228, section 29, of the Private Acts of 1854-1855, is the owner of an easement or right of way one hundred feet in width, on either side of the center of main line of the plaintiff, as the same runs through and across the lands of the defendant, with all the rights and privileges conferred by chapter 228 of the Private Acts of 1854-55, and subject to the limitations therein contained," and granted the injunctive relief prayed by plaintiff.

Defendant appeals to Supreme Court and assigns error.

W. T. Joyner and Jones, Ward & Jones for plaintiff, appellee.

John H. McElroy for defendant, appellant.

WINBORNE, J. This is the determinative question on this appeal: Under the charter of the Western North Carolina Railroad Company (Private Laws 1854-55, chapter 228, section 29) may right of way for railroad purposes be acquired by statutory presumption? Upon the evidence in this case, appellant says "No," and, in that view, challenges the ruling of the court in refusing to grant his motions, aptly made, for judgment as in case of nonsuit. However, the ruling finds uniform support in the decisions of this Court.

The charter of the Western North Carolina Railroad Company, under which as amended the railroad along the French Broad River through the town of Marshall in the State of North Carolina was located and constructed and has been since operated, provides three methods by which the right of way for the railroad may be acquired: (1) By purchase, section 27; (2) by condemnation, section 29; (3) by statutory presumption, under the further provisions of section 29, that "in the absence of any contract or contracts in relation to lands through which said road may pass, it shall be presumed that the land over which said road may be constructed, together with one hundred feet on each side thereof, has been granted by the owner or owners to the company, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same so long as it shall be used for the purposes of said road, and no longer, unless the owner or owners shall apply for an assessment of the value of said lands as hereinbefore directed, within two years next after that part of said road has been located; and in case the owner or owners of such lands or those claiming under him, her or them shall not apply within two years from the time aforesaid, he, she, or they shall be forever barred from recovering the same or having an assessment or compensation therefor."

Provisions of similar character and like effect, to this quoted portion of section 29, appearing in the charters granted by the General Assembly to other railroad companies in the early era of railroad building in North Carolina have been considered in numerous decisions of this Court, among which are these: *Vinson v. R. R.*, 74 N. C., 510; *R. R. v. McCaskill*, 94 N. C., 746; *R. R. v. Sturgeon*, 120 N. C., 225, 26 S. E., 797; *Dargan v. R. R.*, 131 N. C., 623, 42 S. E., 979; *Barker v. R. R.*, 137 N. C., 214, 49 S. E., 115; *R. R. v. Olive*, 142 N. C., 257, 55 S. E., 263; *Earnhardt v. R. R.*, 157 N. C., 358, 72 S. E., 1062.

The tenor of these decisions is expressed in *Barker v. R. R., supra*, in this manner: "This mode of acquisition is not an exercise of the right of eminent domain; it is based upon a purely statutory presumption. The concurring conditions are (1) entry and construction of the road, and (2) the failure of the owner to prosecute an action for two years. These concurring conditions existing, the statute fixes the term of two

years within which the owner may prosecute his action, and in default of which the road acquires the easement described, to wit: '100 feet on each side of the center of the road' with the limitation fixed as to time and use."

Again, in *Earnhardt v. R. R., supra,* it is said: "The effect of inaction on the part of the owner for a period of two years after the completion of the road has been considered in several cases in this Court, under charters similar to the one before us, and without difference of opinion, it has been held that under such circumstances, a presumption of a grant from the owner arises for the land on which the road is located and for the right of way provided for in the charter."

This presumption, however, only arises in the absence of contract in relation to the lands through which the railroad may pass. Hence, the burden is upon the party claiming the benefit of such presumption to show every fact out of which it arises. *Barker v. R. R., supra.*

"Our decisions are to the effect that a railroad right of way when once acquired may be occupied and used by the company to its full extent, whenever the proper management and business necessities of the road may so require, and the company is made the judge of such necessity." *R. R. v. Bunting,* 168 N. C., 579, 84 S. E., 1009; *R. R. v. McLean,* 158 N. C., 498, 74 S. E., 461; *Earnhardt v. R. R., supra; R. R. v. Olive, supra.*

Applying these principles to the case in hand, the evidence shown in the record is sufficient to take the case to the jury upon the issues submitted and to support the verdict rendered thereon.

Moreover, the fact that the present location of the railroad, constructed in the year 1896 over the land in question, does not coincide with the location as originally made is, in the light of the evidence, immaterial. It is not contended that the present location is not by virtue and under authority of the provisions of the charter of the Western North Carolina Railroad Company. Hence, while a change in exact location of the roadbed might have subjected the company to liability for additional right of way, such additional right of way could have been acquired in any of the three methods provided in the charter. The evidence tends to show that the right of way was not acquired either by purchase or by condemnation, and that sufficient time has long since elapsed for acquiring it by statutory presumption.

Upon the record presented, there is, in the judgment below,

No error.

A. B. ROSS v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 19 March, 1941.)

1. Master and Servant § 21b—

The doctrine of *respondeat superior* applies only when the relationship of master and servant exists between a wrongdoer and the person sought to be charged at the time of, and in respect to, the very transaction out of which the injury arose.

2. Evidence § 17—

While a party will not be allowed to impeach the character of his own witness, he may show the facts to be otherwise than as testified to by his witness.

3. Automobiles § 24b—Evidence held to show that employee was not acting within course of employment at time of injury.

Evidence tending to show that a messenger boy employed by defendant telegraph company customarily delivered telegrams by bicycle, that on occasion, with the permission of the defendant's manager, he used his car to deliver out-of-town telegrams, in which instance the sender or receiver, and not the defendant, paid the charges, and that the accident in suit occurred while the messenger was traveling from his home to a garage to have repairs made on his car at his own expense, in the morning before reporting for work, *is held* insufficient to be submitted to the jury on the issue of *respondeat superior*.

APPEAL by plaintiff from *Olive, Special Judge,* at Special August Term, 1940, of HENDERSON. Affirmed.

This is an action of actionable negligence, brought by plaintiff against defendant alleging damage. 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. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

M. F. Toms and A. J. Redden for plaintiff.
Adams & Adams for defendant.

CLARKSON, J. We think the judgment of nonsuit rendered in the court below correct. The evidence of plaintiff was to the effect that on 5 September, 1938, about nine, or before, in the morning, he was injured by one Grady Deaton, who was driving a Ford car, and who negligently and carelessly ran into him, striking his leg and foot and causing serious injury.

The action is not brought against Grady Deaton, but against the Western Union Telegraph Company. The record shows that Grady

Deaton was working for the defendant as a messenger boy, with cap and clothes *indicia* of his employment. His automobile was frequently used, with defendant's knowledge and consent, for delivering out-of-town telegrams.

The sole question for determination is: Was Grady Deaton about his master's business or in the course of his employment when he injured plaintiff? We think not. He was about his own private business. The plaintiff and defendant subpœnaed Grady Deaton and plaintiff made him a witness. Deaton testified, in part:

"On September 5th, 1938, I owned a Thirty-three Model Ford V8. That was the same car I drove into the Thomas Buick Motor Company. That was the same car Mr. Ross was injured by. I have delivered messages in that car. I don't know how many times. I would say around 10 or 15 or 20 times. The manager had me go on long trips and deliver messages once or twice. I delivered those messages as he requested me to. I have not worked for the Western Union for a week and a half. I was working there on the 5th day of September, 1938, and prior thereto. I was subpœnaed here by the Western Union. (Cross-examination.) I live here in Hendersonville. I have lived here about eight years, I did work for the Western Union about 1937 as a messenger boy and I was working as a bicycle messenger boy on the 5th day of September, 1938, and was working for them on the day Mr. Ross was hurt. At that time I was living on the Tracey Grove Road. It is east on the Chimney Rock road. I was living about three miles from town. I owned a car at that time. It was a Model 33 black Ford V8 Sedan, a five passenger car. It had a black metal top, and the *Western Union had no interest in the car.* I bought it in Asheville at the Parkland Chevrolet Company. *The Western Union Company did not pay any part of the repair bills.* My regular job was delivering telegrams *in town by bicycle.* I would come in the morning in my *automobile and would leave it before I went to work. And then would go riding my bicycle.* This bicycle was used in the free delivery zone. That was for telegrams in town, in Hendersonville, and then for delivering telegrams out in the country from time to time I used my automobile, with permission from the manager for the trip. Sometimes the one to whom it was sent would pay the charges; sometimes it would be guaranteed by the sender. It was either by the sender or the receiver. I was under no obligation to take these telegrams out in the country. The Western Union did not pay any part of the cost. The trip was paid for by the sender or the receiver. *The larger part of my work was done on bicycle,* and when the Manager turned over telegrams not to be delivered in the city I delivered them in the country. On the 4th day of September, 1938, I went in my car to Tracy's here in Hendersonville. It is on the corner

of 7th and Main. It is a restaurant right across Main Street from the Thomas Motor Company. I parked my automobile there in front of Tracy's and a fellow backed his car off the parking lot and bent my door and fender in. *I later took my car into a garage for repairs.* I discussed repainting it with other people on the 4th. I went down to see Mr. Dixon about having it fixed. I did not leave the car there that night. I drove it home and brought it in the next morning. That was by arrangement with Mr. Dixon. I brought it from my home on the Tracey Grove road. I left my home that morning about eight o'clock. *I did not go to the Western Union office at all before going to the Thomas Motor Company.* I did not go by or near the Western Union office in going from my home to the Thomas Buick Company. The Tracey Grove Road is east from here. You drive from the Tracey Grove Road into the Chimney Rock Road, and I came from the East down to Thomas Motor Company on 7th and Main. I did not stop anywhere or go out of my way. *My purpose in going to the Thomas Buick Company was to have some repairs made on the car,* for the injuries Tracy had caused. I went into the main street entrance. I saw Mr. Dixon in the garage. They wanted the car brought around to the back and so I took it to the back entrance. There is an entrance on the front and one on the back. One is on 7th Avenue. After I got into Main Street entrance, I pulled around to the inside door. I looked back and did not see anyone and *I pulled out to the sidewalk and looked again and did not see anyone and I started back and then I saw Mr. Ross standing up against the wall near the grease rack.* (Indicating on diagram.) I came around on 7th Avenue and went in on a curve. I don't remember whether I went right straight or not. I saw Mr. Ross leaning up against the wall and that was about 10 feet from where my car was when I came out. My car had not been closer to the wall than that at anytime. I was ten feet from the wall at all times. Then I backed my car into Main Street and pulled around into 7th Avenue. I did not have any conversation with Mr. Ross, at that time. I did not ask Mr. Ross if he was hurt. I did not say anything to him, and he did not say anything to me. *I did not know anything was wrong with him. I did not hear anything about it until I got to the Western Union office.* I went into the 7th Avenue entrance to see about the repairs. *No part of the cost of the repairs were charged to the Western Union Company. I paid the bill.* They said it would probably take all day. I was to get it that night after work. I went from there to Mr. Tracy's to get my breakfast. *The best I remember I got to the Western Union office at about ten minutes of nine, or five minutes of nine.* I had not been around the office before that, that morning. I had not delivered any telegrams and had not done any work for the telegraph company. I did not deliver any tele-

grams that morning. *I started work that morning at nine o'clock.* After I left my car at Thomas Buick Company it was my time to go to work. That is right. At that time and before that I had received a messenger boy's uniform. It did not belong to me. It belonged to the Western Union. The office in Hendersonville does not have a regular dressing room, and sometimes I would wear my uniform home or part of it, and then wear it back the next morning. And sometimes I would not. I could not say whether I had on my uniform the morning I left my car at the garage. *I did not have any telegrams while I was at the Thomas Motor Company, before I got to the Western Union Office, for delivery that morning.* When we had uniforms we wore them always while on duty. When telegrams were delivered out of the free zone, either the sender or receiver would pay for the messages."

The exceptions and assignments of error as to questions asked certain witnesses, which were excluded by the court below, cannot be sustained; they were not germane to the controversy.

The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between a wrongdoer and person sought to be charged for result of wrong at time and in respect to the very transaction out of which injury arose. *Van Landingham v. Sewing Machine Co.*, 207 N. C., 355.

While a party will not be allowed to impeach the character of his own witness, he may show the facts to be otherwise than as testified by his witness. *S. v. Cohoon*, 206 N. C., 388.

In the present action there is no sufficient competent evidence to show that Deaton was acting within the scope of his employment and about his master's business when the injury to plaintiff took place. Deaton's testimony as a witness for plaintiff showed he was not acting within the scope of his employment and about his master's business when plaintiff was injured.

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

Affirmed.

MACK INTERNATIONAL TRUCK CORPORATION AND UTILITY TRAILER DISTRIBUTING CORPORATION ET AL., V. R. G. WILKINS AND KENNETH WILKINS, TRADING AS R. G. WILKINS & SON, EARL McD. WESTBROOK ET AL.

(Filed 19 March, 1941.)

Chattel Mortgages and Conditional Sales § 9a: Attachment § 22: Courts § 11—

Under the general rule of comity, the lien of a retention title contract on personal property duly registered and indexed in the state wherein it

was executed and the property was then located, has priority over the lien of an attachment subsequently issued against the same property in this State, notwithstanding that the retention title contract is not registered here.

APPEAL by defendants Westbrook *et al.* from *Carr, J.*, at September Term, 1940, of HARNETT.

I. R. Williams for plaintiffs, appellees.
J. A. McLeod for defendants Westbrook et al., appellants.

SCHENCK, J. According to the agreed statement of facts, the plaintiffs were owners of retention title contracts on certain personal property from the defendants Wilkins & Son, which were executed, registered and indexed in the proper registry in the county of Polk and State of Florida. Subsequent to such registrations in the State of Florida the defendants Westbrook *et al.* caused to be issued attachments against the said personal property in the county of Harnett and State of North Carolina to collect certain debts due them by the defendants Wilkins & Son.

This action was instituted by the plaintiffs to have the liens of the retention title contracts registered in the State of Florida declared superior to the liens of the attachments subsequently issued in the State of North Carolina. The Superior Court held with the plaintiffs and entered judgment accordingly, from which the defendants Westbrook *et al.* appealed, assigning error.

The sole question presented is: Are the liens of title retention contracts on personal property duly executed, registered and indexed in the State of Florida superior to the liens of attachments subsequently issued against the same personal property in the State of North Carolina? The answer is in the affirmative.

The general rule of comity, in the absence of a modifying statute, protects the lien of a retention title contract or chattel mortgage on personal property duly registered and indexed in the State wherein it was executed and the property was then located, after the removal thereof to another state without registration in the latter state. *Applewhite Co. v. Etheridge,* 210 N. C., 433, 187 S. E., 588, 5 R. C. L., at p. 987, Conflict of Laws, Chattel Mortgages, par. 68.

The judgment of the Superior Court is

Affirmed.

JAMES HENRY FREEMAN v. PEARSON BALL ET AL.

(Filed 19 March, 1941.)

1. Pleadings § 22—Order of court held tantamount to amendment curing defect in complaint.

Upon the call of this case for trial, the *feme* defendant demurred. Whereupon counsel for plaintiff stated that through inadvertence her name had been omitted from the allegations of the complaint, but that the allegations against the male defendant were intended to apply to her also, and asked leave to so amend. It was stipulated that this might be considered as done, and the trial proceeded. *Held:* The procedure was tantamount to an amendment curing the defect, and the *feme* defendant's demurrer in the Supreme Court is overruled.

2. Deeds § 2a—Evidence of mental incapacity of grantor held sufficient.

Testimony of a medical expert that he had known the grantor for 20 years and that in the witness' opinion the grantor is feebleminded and would not know right from wrong, together with lay testimony to the effect that the grantor is not capable of transacting business, with evidence that the grantor received no benefit from the transaction, *is held* sufficient to support judgment setting aside the deed for mental incapacity of the grantor.

3. Trial §§ 43, 52—Parties may agree that court enter verdict in accordance with how majority of jurors stand.

Since a civil action to set aside deeds for undue influence and mental incapacity of the grantor may be submitted by agreement of the parties to the court and a jury trial waived, a stipulation of the parties, upon the jury being unable to agree upon a verdict, that the court might take a poll of the jury and answer the issue in accordance with how the majority stood, will sustain the judgment of the court upon a verdict arrived at in accordance with the stipulation.

APPEAL by defendants from *Armstrong, J.*, at October Term, 1940, of MADISON.

Civil action to set aside three deeds and to place the parties *in statu quo ante*.

When the case was called for trial, the defendant, Nettie Ball, entered a demurrer *ore tenus* to the complaint. Whereupon counsel for plaintiff stated that through inadvertence her name had been omitted from the allegations of the complaint, but that she had been served as a party defendant and it was intended that the allegations against her husband should also apply to her, and asked leave of the court so to amend the complaint. It was stipulated that this might be considered as done, and the trial proceeded.

It was further stipulated that all the matters in controversy would be determined by the submission of the following issue to the jury:

"Did the plaintiff's ward, James Henry Freeman, have sufficient mental capacity, to wit: on January 23, 1939, to make, execute and deliver the deed to Mae Roberts Freeman, recorded in Book 63, at page 556, of the Madison County Registry?"

It was agreed that if the jury should answer this issue "No," the three deeds in question should be declared void and of no force and effect and canceled of record.

The jury being unable to agree upon a verdict, the parties stipulated, and had it entered of record, that the court might take a poll of the jury and answer the issue in accordance with how the majority stood. A poll was taken and it appearing that eleven jurors were in favor of answering the issue "No," the court so answered the issue.

On the issue, as thus answered, and in accordance with the stipulations of the parties, judgment was entered declaring the deeds in question to be null and void and ordering their cancellation. From this judgment the defendants appeal, assigning errors.

Roberts & Baley for plaintiff, appellee.
Calvin R. Edney and Ellis C. Jones for defendants, appellants.

STACY, C. J. The defendant, Nettie Ball, interposed a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against her, which was overruled with the understanding that the allegations against her husband were to be considered as applicable to her. This was tantamount to an amendment curing the defect, and was so understood by the trial court. It is sufficient to defeat a renewal of her demurrer here. The complaint states a cause of action. *Cotton Mills v. Mfg. Co.*, 218 N. C., 560.

The defendants also challenge the sufficiency of the evidence to support the finding of mental incapacity on the part of plaintiff's ward to execute the deed of 23 January, 1939, conveying the property in question to Mae Roberts Freeman. Dr. J. N. Moore, a medical expert, testified that he had known plaintiff's ward for twenty years, "I think he is feeble-minded and would not know right from wrong." There was other lay testimony to the same effect; "that he is not capable of transacting business;" that he received no benefit from the transaction, etc. It would seem that this evidence is amply sufficient to warrant the finding under authority of what was said in *Lamb v. Perry*, 169 N. C., 436, 86 S. E., 179.

There is no exception to the manner in which the issue was answered. In an action of this kind, the parties may waive a jury trial and submit the whole controversy to the court for final determination, both as to the law and the facts. *McGuinn v. High Point*, 217 N. C., 449, 8 S. E. (2d), 462.

The remaining exceptions are not of sufficient moment to call for any discussion. They are not sustained. The validity of the trial will be upheld.

No error.

STATE v. HORACE GARDNER.

(Filed 19 March, 1941.)

1. Indictment § 13—

When it appears upon the face of the bill of indictment that no crime is charged therein, defendant's motion to quash must be allowed.

2. Parent and Child § 9: Statutes § 8—

The statute, C. S., 4447, pertaining to abandonment of wife and children, being a penal statute, must be strictly construed.

3. Same—

C. S., 4447, has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime.

4. Same—

In this State there is no statutory crime of abandonment of an illegitimate child, and no such crime existed at common law.

5. Criminal Law § 81d—

Where defendant, on appeal from the county court, is tried upon a bill of indictment returned by the grand jury and not upon the warrant issued out of the general county court, the question as to the sufficiency of the warrant may not be raised on appeal to the Supreme Court.

APPEAL by defendant from *Armstrong, J.*, at September Term, 1940, of BUNCOMBE.

Proceeding upon indictment charging defendant with willful abandonment of his illegitimate child without providing adequate support.

The record discloses that, on 10 March, 1938, upon sworn written complaint of Gladys Autrey that she is to become the mother of an illegitimate child, that Horace Gardner is the father of said child, that she and Horace Gardner are not married to each other, that said child will become a charge upon the county, and that Horace Gardner has failed and refused to provide any aid for her, a warrant issued out of the general county court of Buncombe County, North Carolina, for defendant. On that charge the record shows: "Plea, Not guilty. Verdict, Guilty. The judgment of the court is that defendant, Horace Gardner, be confined to the common jail of Buncombe County for a period of six (6) months, to be assigned to work on the State Highway." Defendant appealed to Superior Court.

At regular term of Superior Court, on the third Monday in November,

1939, for the trial of both criminal and civil causes, the grand jury returned a true bill on indictment, which reads: "The jurors for the State, upon their oath, present: That Horace Gardner, late of Buncombe County, on the 1st day of Nov., 1939, with force and arms, at and in said county, did unlawfully, wilfully and feloniously abandon his illegitimate child, without providing adequate support for the said illegitimate child which he, the said Horace Gardner, had begotten upon the body of Gladys Autrey."

The solicitor for the State elected to try the defendant upon this indictment. Thereupon, defendant, through his counsel, moved the court (1) to quash the bill of indictment on the ground that the Superior Court did not have jurisdiction to find a bill or try the defendant on said bill; and (2) to quash the warrant of the general county court on the ground that same is defective. Motions overruled. Defendant excepts.

From judgment on adverse verdict upon trial in Superior Court, defendant appeals to Supreme Court and assigns error.

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

James S. Howell and Worth McKinney for defendant, appellant.

WINBORNE, J. It appearing upon the face of the bill of indictment that no crime is charged therein, the motion to quash it is well taken.

The wording and phraseology in the bill of indictment clearly indicate that it is drawn under the provisions of section 4447 of Consolidated Statutes of North Carolina, 1919, as amended by Public Laws 1925, chapter 290, pertaining to abandonment. That statute provides that "if any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor: Provided, that the abandonment of children by the father shall constitute a continuing offense . . ." But this being a penal statute, it must be strictly construed. Hence, the children there referred to, are limited to those which the husband "may have begotten upon" the wife. It has no application to illegitimate children. Therefore, while undertaking to charge a crime under the statute, the descriptive words relating to the illegitimacy of the child take the charge out of the statute.

Furthermore, there is in this State no statutory crime of abandonment of an illegitimate child, and no such crime existed at common law.

As defendant was not tried in the Superior Court upon warrant issued out of general county court of Buncombe County, the question as to the sufficiency of the warrant may not be raised on this appeal.

The judgment below is

Reversed.

C. D. JEFFERSON v. C. M. JEFFERSON.

(Filed 26 March, 1941.)

1. Deeds § 11—General rules for the construction of deeds.

A deed is to be construed from its four corners to ascertain and give effect to the intent of the grantor as expressed in the language used, and each clause therein should be reconciled and given effect if possible, and technical words of conveyance, nothing else appearing, must give way to clearer expressions of intent if they are found in other parts of the instruments, and artificial importance must not be given to the formal parts of the instrument and the order in which they occur.

2. Deeds § 13a—Deed held to convey life estate with remainder in fee to male children of grantee.

The granting clause of the deed in question was to one of the grantor's sons, his heirs and assigns, and following the description "this deed is conveyed to the said grantee to him his lifetime and then to his boy children" with *habendum* to the said son "and his heirs and not to assign only to his brothers their only use and behoof for ever" with warranty to the said son "and his heirs and assigns." *Held:* The portion of the *habendum* restraining assignment except to the brothers of the grantee is equally consistent with an assignment of a life estate as with an assignment of the fee, and to hold that the grant to the "son and his heirs" conveyed the fee simple would require that other portions of the instrument expressive of the intent of the grantor be disregarded, and in accordance with the intention of the grantor as gathered from the entire instrument the deed conveys a life estate to the son with remainder to the son's male children, the intent of the grantor to convey an estate of less dignity than a fee being apparent. C. S., 991.

3. Same—

Under the rule favoring early vesting of estates, a conveyance to A for life with remainder to his male children, vests the remainder in the male children of A *in esse* at the time the deed is made, subject to be opened up to admit after-born children.

4. Descent and Distribution § 3—

Where the remainder vests in the male children of the life tenant at the time of the execution of the deed, subject to be opened up to include after-born children, the surviving children take by descent the estate of children dying in infancy or childhood.

5. Tenants in Common § 2—

A, the owner of the life estate in the *locus in quo*, and one of the two remaindermen executed separate deeds to A's brother. *Held:* Upon A's death the life estate conveyed to his brother terminated, and A's brother and the other remainderman each owned a one-half undivided interest in the *locus in quo* as tenants in common.

6. Limitation of Actions § 18—Action to reform deed for mistake as to interest conveyed, instituted some 37 years after deed was recorded, held barred.

The deed in question conveyed a life estate to the grantee with remainder to the grantee's male children. The grantee later conveyed to his

brother. In this action, instituted some thirty-seven years after the original deed was executed and recorded, the brother asserted the right to reform the original deed for mutual mistake of the parties or mistake of the draftsman as to the interest conveyed. *Held:* A peremptory instruction that if the jury believe the evidence to find that the right to reformation was barred, is without error.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concur in dissent.

APPEAL by defendant from *Parker, J.*, at September Term, 1940, of BEAUFORT. No error.

This proceeding began as a petition for partition, the plaintiff alleging that he was the owner as cotenant with the defendant of a one-half undivided interest in a certain tract of land which he describes, making specific reference to a deed of D. A. Jefferson and wife to R. O. Jefferson, from which quotations are made below.

The defendant denied that the plaintiff had any interest in the lands and pleaded sole seizin, claiming title through the D. A. Jefferson deed to R. O. Jefferson, and *mesne* conveyance by R. O. Jefferson to himself. He further claimed by virtue of a deed from Nolan Jefferson, the son of R. O. Jefferson. The defendant further asked equitable relief by way of reformation of the D. A. Jefferson deed, alleging that it was the intention of the parties to convey the lands in fee simple to Jefferson in such a way that he might convey the lands in fee simple to his brothers, but that if he did not so convey to one of his brothers during his lifetime that upon his death the land should become vested in his boy children; and avers that "if said deed fails to express such an intent, then such failure is due to the mutual mistake of the grantors and grantees or to a mistake of the draftsman."

The plaintiff, replying to that portion of the answer asking affirmative relief pleaded that the cause of action, if any existed, arose more than three years prior to the bringing of this action, and pleaded the statute of limitation; and further pleaded estoppel of the defendant by laches on the ground of his knowledge of the mistake for a long time and his failure to take any action during the lifetime of the grantor and grantee in the deed.

The plaintiff offered in evidence a deed from D. A. Jefferson to R. O. Jefferson dated 14 August, 1903, and duly recorded.

The defendant admitted that the petitioner is one of the "boy heirs" of the grantee in this deed, "he having left two boy children."

The petitioner testified that R. O. Jefferson, the grantee of the foregoing deed, was his father; that he died 9 March, 1940; that he left one son besides witness, named Nolan Jefferson, who was much older than witness.

The plaintiff then offered in evidence a deed from Nolan Jefferson and wife, Viola, to C. M. Jefferson, dated 10 December, 1924, duly recorded.

It was agreed that the deed covered the same tract of land as that conveyed by D. A. Jefferson and wife to R. O. Jefferson in the deed previously introduced.

The plaintiff rested. Thereupon, the defendant moved for judgment as of nonsuit, which was denied.

The defendant then offered in evidence a deed from R. O. Jefferson and Mary T. Jefferson to the defendant, dated 14 February, 1914, duly recorded. It was admitted by the plaintiff that the first tract of land described in this deed is the identical land described in the deed from D. A. Jefferson and wife to R. O. Jefferson, and from Nolan Jefferson to C. M. Jefferson.

C. M. Jefferson, the defendant, testified that he was the C. M. Jefferson referred to in the deed from R. O. Jefferson; that R. O. Jefferson was his brother; that they were both sons of D. A. Jefferson. According to his testimony, there were three or four boy children born to R. O. Jefferson, but only two lived after his death. Nolan was born some six years prior to 14 August, 1903. Nolan and C. D. Jefferson had brothers who died as small children. Witness had in his possession the deed from D. A. Jefferson and wife to R. O. Jefferson since 1914, and had read it. He knew what was in it but didn't know that he knew the meaning. He got a deed from Nolan Jefferson for his interest in the tract of land in 1924, but paid him nothing for it; had known since then what was in the deed, "but about the meaning of what was in it I could not say I did." Witness was not present when the deed of D. A. Jefferson to R. O. Jefferson was drawn.

E. H. Jefferson, a witness for defendant, testified that he was a son of D. A. Jefferson and brother of C. M. Jefferson. He stated that he prepared the deed of D. A. Jefferson to R. O. Jefferson at the instance of his father and his mother. He stated that his father had directed him to write the deed in a way that R. O. Jefferson could give title for the land to one of his brothers if the brother saw fit to buy, and he wished to sell, but, otherwise, he would not have a right to convey the land. He assigned as a reason for giving this instruction that he did not want R. O. Jefferson to sell the land to somebody that would be unattractive to the other owners of his own brothers' land and, therefore, he did not want him to sell it unless he sold it to his brothers. On cross-examination, witness stated that he put in the deed exactly what his father told him to put in there, as nearly as he could; stated that his father told him that he wanted R. O. Jefferson's boy children to have this land after R. O. Jefferson's death, if he died before he had the opportunity to sell

to one of his brothers. "He told me to put in there whatever is there. He didn't want R. O. Jefferson to sell it unless he sold it to his brothers. He told me to put in there to give it to R. O. Jefferson for his lifetime and then to R. O. Jefferson's boy children, if he died before making a conveyance." "The deed presents that to the best of my knowledge. I wrote it just like he said, with a provision in the deed giving it to R. O. Jefferson for his lifetime and then to his boy children, but in case an emergency came and he wished to sell he could sell to a brother; he could sell his life estate to a brother at any time."

Upon the conclusion of all the evidence the defendant renewed his motion for judgment of nonsuit, which was overruled.

Further evidence gave the chronology of the birth and death of the children of R. O. Jefferson, as follows: Cecil, who was born and died before the execution of the deed; Lonnie Hunter and Delmar, twins, who were born in 1911 and died respectively in 1911 and 1916; Willie, who was born in 1915 and died in 1917. Petitioner, C. D. Jefferson, was born in 1908; Nolan was born about 1895.

The deed from D. A. Jefferson and wife to R. O. Jefferson, omitting parts not essential for consideration, is as follows:

"STATE OF NORTH CAROLINA,
BEAUFORT COUNTY.

"THIS DEED Made this the 14th day of August, 1903, by D. A. Jefferson and wife, Leurany C. Jefferson, of Beaufort County and State of N. C., of the first part, to R. O. Jefferson of Beaufort County and State of N. C., of the second part:

"WITNESSETH, That said party of first part in consideration of Fifty Dollars, to them in hand paid by party of 2nd part, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do bargain, sell and convey to said R. O. Jefferson heirs and assigns, a certain tract or parcel of land in Beaufort County, State of N. C., adjoining the lands of C. M. Jefferson and others, bounded as follows, viz.: . . .

"This deed is conveyed to the said grantee to him his lifetime and then to his boy children.

"TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said R. O. Jefferson and his heirs and not to assign only to his brothers their only use and behoof forever.

"And the said D. A. Jefferson and wife, Leurany C. Jefferson, covenant with said R. O. Jefferson and his heirs and assigns, that they are seized of said premises in fee, and have right to convey in fee simple;

that the same are free and clear from all incumbrances, and that they will warrant and defend the said title to same against the claims of all persons whomsoever."

Three issues were submitted to the jury, as follows:

"1. Is the plaintiff, Carl D. Jefferson, the owner in fee simple, and entitled to the immediate possession of a one-half undivided interest to the land described in the complaint?

"2. Was the deed from D. A. Jefferson and wife to R. O. Jefferson, recorded in Book 120, page 558, public registry of Beaufort County, executed by mutual mistake of the grantor and the grantee in said deed, or was there a mistake of the draftsman in said deed?

"3. If so, is the defendant's cause of action for mutual mistake or for mistake of the draftsman barred by said limitations?"

Upon the issues submitted, the court charged as to the first issue: "The court instructs you that if you find the facts to be as all the evidence, oral and documentary, in this case tends to show, and by its greater weight, it will be your duty to answer that issue Yes."

As to the second issue: "The court instructs you that if you find the facts to be as all the evidence in the case tends to show it will be your duty to answer that issue No."

And as to the third issue: "If you find the facts to be as all the evidence in the case tends to show, the court instructs you to answer the third issue Yes."

Thereupon, the jury answered as to the first issue "Yes," the second issue "No," and the third issue "Yes."

To these instructions, severally, the defendant objected and excepted. From the judgment ensuing the defendant appealed, assigning errors.

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

SEAWELL, J. The first question for decision is whether the deed of D. A. Jefferson conveys to his son, R. O. Jefferson, an estate in fee or an estate for life only, with remainder to his "boy children."

It will be noted that in the conveying clause the grant is to "R. O. Jefferson heirs and assigns," and in the *habendum* clause we have "to the said R. O. Jefferson and his heirs and not to assign only to his brothers for their only use and behoof forever," and the warranty is made "to the said R. O. Jefferson and his heirs and assigns." While it does not appear in the evidence, it seems probable that the draftsman used some printed form which he endeavored to adapt to the purpose of the parties, with such changes as seemed suitable.

The portion of the *habendum* clause which restrains any assignment except to the brothers of the grantee is equally consistent with the assignment of the life estate as with an assignment of the fee, and it throws little light upon a proper construction of the deed.

Defendant's counsel strenuously contend that we must confine ourselves to the more formal parts of the deed as controlling interpretation, and for reasons mostly technical, arising from the frequent use of the word "heirs," as above stated, it is insisted that the effect is to convey to the grantee R. O. Jefferson an estate in fee simple. But we feel impelled to consider, as expressive of a different intent, the clause written into the instrument between the conveying and the *habendum* clauses: "This deed is conveyed to the said grantee to him his lifetime and then to his boy children." This provision cannot be regarded as a mere interpretative expression of the grantor as to the effect of his deed. It is an essential part of the instrument and, standing alone, would be sufficient to convey the lands in the manner and with the effect indicated. It must, therefore, be compared, and if possible reconciled, with other parts of the deed, in order to give effect to its intention, as construed from its four corners.

It is obvious that if we are guided only by other parts of the deed which, because of the use of the word "heirs" would carry to the grantee the estate in fee, we should have to ignore entirely the mention of the grantee's life estate, the direct reference to the boy children, and the remainder which the grantor desired them to have, and, in fact, would be compelled to strike the whole clause from the deed, no matter how prominently the grantor thrusts it upon our attention. This, we think, would be to ignore a part of the deed which in comparison with the more formal technical expressions used elsewhere might be considered the clearest expression of intent to be found in the instrument, and explanatory of its seemingly contradictory expressions. Even if we should consider some repugnancy to exist, it is still our duty to construe the deed upon consideration of all its parts in such a way as to give effect to that which we find to be its true intent. *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79; *Midgett v. Meekins,* 160 N. C., 42, 75 S. E., 728; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273, 87 S. E., 40; *In re Dixon,* 156 N. C., 26, 72 S. E., 71. See annotations to *Triplett v. Williams, supra,* p. 399.

Amongst the technicalities discarded in the modern rules of interpretation, as pointed out in *Triplett v. Williams, supra,* and cases following, is the artificial importance given to clauses in the deed, the labels they bear, and the order in which they occur. Even those technical words which, under the common law and by virtue of long use have come to designate the particular kind of an estate conveyed, nothing else appear-

ing, must give way to clearer expressions of intent if they are found in other parts of the instrument. In that case we find expressions pointedly applicable to the present case. With reference to the use of the word "heirs," we find: "All conveyances of land executed since the passage of the act" (Act of 1879, C. S., 991) "are to be taken in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. . . . The insertion of the word 'heirs' in the premises was evidently in deference to an established formula and creates, in our opinion, no repugnance between the granting clause and the *habendum,* inasmuch as the same estate would pass to the plaintiff whether this word be inserted or omitted." We apprehend that the same principle applies here, although the expression of intent occurs elsewhere than in the *habendum.*

In *Jones v. Whichard,* 163 N. C., 241 (246), 79 S. E., 503, *Justice Hoke,* speaking for the Court, said: "In *Triplett v. Williams, supra,* this Court, in a well sustained opinion by *Associate Justice Brown,* announced the decision that although a deed in its terms professed to convey an estate to a grantee and its heirs, it would not have the effect of conveying a fee simple when it clearly appeared from the *habendum or other portions of the instrument* that it was the intent to convey only a life estate." Italics supplied.

We hold that the effect of the deed from D. A. Jefferson to R. O. Jefferson was to convey to R. O. Jefferson an estate for life only, with remainder in fee to his "boy children." C. S., 991.

Under the rule favoring early vestment of estates, and since one of the boy children, Nolan Jefferson, was *in esse* at the time the deed was made, the remainder immediately vested in him, subject to be opened up, however, to admit the after-born children mentioned in the evidence. *Powell v. Powell,* 168 N. C., 561, 84 S. E., 860; *Waller v. Brown,* 197 N. C., 508, 149 S. E., 687; *Roe v. Journegan,* 175 N. C., 261, 95 S. E., 495. Consulting the chronology of births and deaths above given, we find that, in accordance with the statute of descents, the interests of the children who were born and who died subsequently to the making of the deed, devolved upon the plaintiff, C. D. Jefferson, and Nolan Jefferson.

It follows that the deed of R. O. Jefferson to the defendant conveyed only his life estate in the property, which has terminated by the death of the grantor. The defendant derives his title from Nolan Jefferson, and thereby acquired a one-half undivided interest in the lands, which he holds as cotenant with the plaintiff.

In view of the conclusion we have reached, it becomes unnecessary to discuss the evidence relating to the alleged mistake of the draftsman of

the D. A. Jefferson deed, or the exceptions based thereupon, since we are convinced that the trial judge committed no error in his instruction to the jury on the bar of the statute of limitation. The other instructions were free from error.

In the trial, we find

No error.

STACY, C. J., dissenting: It was said in *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79, that "all conveyances of land executed since the passage of the Act (ch. 148, Laws 1879, now C. S., 991) are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity."

Here, we have a deed with all of its operative provisions conveying an estate in fee simple. *Whitley v. Arenson, ante,* 121. Following the description of the land conveyed are these words: "This deed is conveyed to the said grantee to him his lifetime and then to his boy children." In the granting clause, however, which precedes this expression, and twice thereafter (1) in the *habendum* and (2) in the warranty, the grantor uses words of inheritance to make known the character of the estate conveyed. Can it be said, therefore, that "such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity"? C. S., 991. I think not.

Conceding that the significance of a deed, like that of a will, is to be gathered from its four corners, *Triplett v. Williams, supra,* it is not to be overlooked that the four corners are to be ascertained from the language used in the instrument. *Brown v. Brown,* 168 N. C., 4, 84 S. E., 25; *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. We must not pass by the crucial expressions employed by the grantor. If we do, we shall make the deed rather than interpret it. *McCallum v. McCallum,* 167 N. C., 310, 83 S. E., 250. "When language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect." *Campbell v. Cronly,* 150 N. C., 457, 64 S. E., 213.

In some respects, the case resembles *Wilkins v. Norman,* 139 N. C., 39, 51 S. E., 797. There, in the granting clause, and in the *habendum,* the conveyance is to "Berrick Norman, to him, his heirs and assigns forever." Following the usual covenant of warranty is a clause undertaking to limit the estate to the life of the grantee and his wife, with remainder to three of "their heirs," naming them. This latter clause was held to be repugnant to the estate already conveyed, and was disregarded. To like effect is the decision in *Blackwell v. Blackwell,* 124 N. C., 269, 32 S. E., 676.

Perhaps the nearest case in support of a different interpretation is that of *Willis v. Trust Co.*, 183 N. C., 267, 111 S. E., 166. But there, in the warranty, was a limitation over in case the grantee should die without issue or bodily heirs living at the time of her death. Here, we have no such limitation over in any part of the deed.

The sentence following the description does not purport to lessen or to qualify the estate originally granted. Its language is purely interpretative. But even if it be regarded as expressive of the grantor's intent, it is at variance with the formal provisions of the deed fixing the quality of the estate as a fee. The intention to convey a fee simple, thrice expressed, and favored by the law, is not overborne by this sentence. *Bagwell v. Hines,* 187 N. C., 690, 122 S. E., 659; *Johnson v. Lee,* 187 N. C., 753, 122 S. E., 839.

The grantor understood, and so provided in the *habendum,* that the grantee would have the right to convey the property absolutely and in fee simple to his brothers. The grantee did convey it to his brother, C. M. Jefferson, in 1914, with full covenants of warranty, and C. M. Jefferson has been in possession of it ever since. Without objection, the draftsman of the deed testified as follows: "My father told me that he wanted R. O. Jefferson's boy children to have this land after R. O. Jefferson's death if he died before he had opportunity to sell, before he made conveyance to one of his brothers. . . . The deed represents that to the best of my knowledge." So, unless the clear purpose of the grantor is to be defeated, the deed in question must be held to convey an estate in fee simple. The voiding of the partial restraint on alienation is apparently upon the assumption that it is annexed to a grant in fee. *Combs v. Paul,* 191 N. C., 789, 133 S. E., 93; *Wool v. Fleetwood,* 136 N. C., 460, 48 S. E., 785; *Williams v. McPherson,* 216 N. C., 565, 5 S. E. (2d), 830. Compare *Greene v. Stadiem,* 198 N. C., 445, 152 S. E., 398.

Moreover, if the interest conveyed be construed to be a life estate with power in the grantee, as expressed in the *habendum,* to sell to his brothers in fee, and the life tenant has sold to one of his brothers, does not this give the purchaser a fee? *Smith v. Mears,* 218 N. C., 193, 10 S. E. (2d), 659; *Chewning v. Mason,* 158 N. C., 578, 74 S. E., 357.

My vote is for a reversal of the judgment below.

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

COUNTY OF ROCKINGHAM AND CITY OF REIDSVILLE v BOARD OF TRUSTEES OF ELON COLLEGE.

(Filed 26 March, 1941.)

1. Taxation § 20—

The power of the Legislature to exempt from taxation property not owned by the State or its political subdivisions is perforce limited and restricted by the scope of the constitutional grant of the permissive power of exemption. Article V, sec. 5.

2. Same: Taxation § 1—

The power vested in the General Assembly to tax and to exempt property from taxation are both circumscribed, and are required by the Constitution to be exercised with equality and fair play so that all similarly situated be subject to the same rule.

3. Taxation § 20—

The criteria in determining whether the General Assembly has the power to exempt certain property from taxation is the purpose for which the property is held and not the character of the owner, exemptions permitted by the Constitution not being *in personam* but *in rem*, based upon the purpose for which the *res* is held.

4. Same—Business property owned by educational institution and held by it for profit is not exempt from taxation.

Defendant is an educational institution. Its charter (ch. 216, Private Laws of 1889, as amended by ch. 64, Private Laws of 1917) provided that property to a stated amount held by its trustees for said college should be exempt from taxation. The property in question, owned by defendant, is business property situate in plaintiff county and is rented by defendant for offices and business purposes to private enterprises, and the net profit derived therefrom is devoted exclusively to educational purposes by defendant. *Held:* The exemption granted defendant in its charter applies, and was intended to apply, only to property held by defendant for educational purposes, and the statutory exemptions contained in the Revenue Acts for the years in question (ch. 291, sec. 600 [7], Public Laws 1937; ch. 310, sec. 600 [7], Public Laws 1939), though broad enough in their terms to exempt the *locus in quo*, are, when applied to the facts, beyond the scope of the constitutional grant of permissive power of exemption, and therefore the property must be held subject to *ad valorem* assessment and taxation.

SEAWELL, J., dissents.

APPEAL by defendant from *Rousseau, J.*, at December Term, 1940, of ROCKINGHAM.

Civil action to enforce collection of *ad valorem* taxes alleged to be due by the defendant for the years 1938 to 1940, inclusive.

The case was submitted to the court on an agreed statement of facts, which, in summary, follows:

1. Elon College is an educational institution under the management of the Christian Church, with its campus and school buildings located in Alamance County, this State. It was incorporated in 1889 by Act of Assembly, which, among other things, provides that property to the amount of $500,000.00 held by the trustees for the college "shall forever be exempt from taxation." By amendment to its charter in 1917, this exemption was increased to $5,000,000. Its present holdings do not amount to more than $1,500,000.00.

2. In July, 1937, the defendant purchased a modern three-story building in the city of Reidsville at the corner of Gilmer and Scales Streets, known as the "Citizens' Bank Building," which it has improved, installed elevator, etc., "and is now renting said property as an office and business building to various persons and corporations who operate private businesses." Its present gross annual rental is $4,500, and the defendant receives an annual net rental income therefrom of approximately $2,500.

3. There are other office and business buildings in Reidsville owned by individuals and corporations which are duly assessed for *ad valorem* taxes by the plaintiffs.

4. The plaintiffs, who are the local taxing authorities, have caused the defendant's property to be placed on the tax list and assessment roll of the county and city for the years 1938 to 1940, inclusive.

5. The listing and assessment of defendant's property for *ad valorem* taxes was over defendant's protest and objection. Exemption is claimed under the Revenue Acts of 1937 and 1939, and also under the provisions of the defendant's charter.

6. All rents and profits arising from said property are devoted to and used exclusively for educational purposes by the defendant.

7. The defendant purchased the property in question with trust and endowment funds, and is mainly dependent upon such investments for revenue or income. None of its property is held for speculation.

From judgment upholding the assessment and levy of the taxes in question, the defendant appeals, assigning error.

J. C. Brown for plaintiff, Rockingham County, appellee.
Susie Sharp and P. W. Glidewell, Jr., for City of Reidsville, appellee.
Shuping & Hampton for defendant, appellant.
Chase Brenizer for Trustees of Davidson College, amicus curiæ.

STACY, C. J. The question for decision is whether the three-story office building situate at the corner of Gilmer and Scales Streets in the city of Reidsville and owned by the defendant is subject to an *ad valorem* assessment and taxation for the years 1938 to 1940. The court below answered in the affirmative, and we approve.

I. *The Statutory Exemptions:*

It is provided by the Revenue Act of 1937, ch. 291, sec. 600 (7), Public Laws 1937, that the following real property, and no other, shall be exempted from taxation: "Property beneficially belonging to or held for the benefit of . . . educational . . . institutions or orders, where the rent, interest or income from such investment shall be used exclusively for . . . educational . . . purposes." This same provision was brought forward in the Revenue Act of 1939, ch. 310, sec. 600 (7), Public Laws 1939, and was therefore in force from 1937 through 1940.

The defendant's charter also provides: "Property to the amount of five million dollars held by said trustees for said college shall forever be exempt from taxation." Ch. 216, Private Laws 1889, as amended by ch. 64, Private Laws 1917.

It is the position of the defendant that for the years from 1938 to 1940, inclusive, its real property was not subject to an *ad valorem* assessment and taxation, under the Revenue Acts then in force, because the rent, interest or income from its investment was used exclusively for educational purposes; and for the further reason that all of the property now owned by the defendant is withdrawn from taxation by specific charter exemption.

It must be conceded that the statutory exemptions, here invoked, are broad enough to cover the *locus in quo,* unless they are perforce delimited by the constitutional grant under which they were made. It is axiomatic that all legislative exemptions are to be read in the light of the power of their enactment, and interpreted accordingly. The question then arises to what extent, if any, are these statutory exemptions restricted by constitutional limitation? This is the crux of the case.

II. *The Pertinent Constitutional Provisions:*

In Article V of the Constitution, the General Assembly is vested with the power of taxation and with the power of exemption, but neither is absolute. Both are circumscribed.

1. "The power of taxation shall be exercised in a just and equitable manner. . . . Taxes on property shall be uniform as to each class of property taxed." Art. V, sec. 3.

2. "Property belonging to the State or to municipal corporations shall be exempt from taxation. The General Assembly may exempt . . . property held for educational, scientific, literary, charitable, or religious purposes," etc. Art. V, sec. 5.

The pervading principle to be observed by the General Assembly in the exercise of these powers is equality and fair play. It is the will of the people of North Carolina, as expressed in the organic law, that justice shall prevail in tax matters, with "equal rights to all and special

privileges to none." Of course, it is recognized that in devising a scheme of taxation, "some play must be allowed for the joints of the machine" and many practical inequalities may exist, still they are not to result from obvious discrimination. The goal must be kept in sight. The thesis of the Constitution is, that all 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.

While we are not presently concerned with property of a municipal corporation, it may be useful to consult some of the cases arising under the first sentence of Art. V, sec. 5, where the properties mentioned therein are peremptorily exempted.

In the case of *Board of Financial Control v. Henderson County,* 208 N. C., 569, 181 S. E., 636, a bank building in the city of Hendersonville was acquired by the liquidating agent of the city of Asheville and rented out as an office building to various persons and corporations engaged in private businesses. The question posed and answered was this: "Can the city of Asheville, a municipal corporation, acquire business property in another county, hold and rent it, without the payment of taxes in that county? We think not." It is implicit in the Constitution, so the Court held in interpreting the above provisions, that when property of this kind is operated as a private competitive business for profit or gain, regardless of the character of the owner, it is to bear its just share of the community burdens, including the cost of providing for its own protection, etc.

Similarly, in the case of *Warrenton v. Warren County,* 215 N. C., 342, 2 S. E. (2d), 463, it was held that a hotel acquired by the town of Warrenton at foreclosure to protect its investment, and afterwards leased for operation as a private business enterprise, was not exempt from taxation by the county.

To like effect are the decisions in *Benson v. Johnston County,* 209 N. C., 751, 185 S. E., 6, and *Winston-Salem v. Forsyth County,* 217 N. C., 704, 9 S. E. (2d), 381.

Coming then to the discretionary exemptions, which the General Assembly is authorized to make, we find the following pertinent expression in the recent case of *Odd Fellows v. Swain,* 217 N. C., 632, 9 S. E. (2d), 365:

"The power to grant exemptions under authority of the second sentence in Art. V, sec. 5, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. *Southern Assembly v. Palmer,* 166 N. C., 75, 82 S. E., 18; *United Brethren v. Comrs.,* 115 N. C., 489, 20 S. E., 626. Property held for any of these purposes is supposed to be withdrawn from the competitive field of commercial

activity, and hence it was not thought violative of the rule of equality or uniformity, to permit its exemption from taxation while occupying this favored position. But when it is thrust into the business life of the community, it loses its sheltered place, regardless of the character of the owner, for it is then held for profit or gain. *Trustees v. Avery County,* 184 N. C., 469, 114 S. E., 696. The test to be applied in determining the validity of exemptions granted under this provision of the Constitution is the purpose for which the property is held. *Davis v. Salisbury,* 161 N. C., 56, 76 S. E., 687; *Corp. Com. v. Construction Co.,* 160 N. C., 582, 76 S. E., 640. Note, the language is not that the General Assembly may exempt property *held by* educational, scientific, literary, charitable, or religious institutions, but the grant is in respect of property *held for* one or more of the designated purposes. *Latta v. Jenkins,* 200 N. C., 255, 156 S. E., 857. It is true that property held for one or more of these purposes is usually held by an institution of such like character, still it does not follow that an institution of a given kind necessarily holds all of its property for a kindred purpose, or for any of the purposes enumerated in this section of the Constitution. *Warrenton v. Warren County,* 215 N. C., 342, 2 S. E. (2d), 463. It is not the character of the corporation or association owning the property which determines its status as respects the privilege of exemption, but the purpose for which it is held. *Grand Lodge, F. A. M., v. Taylor,* 146 Ark., 316, 226 S. W., 129. This is the plain meaning and intent of the Constitution. *Corp. Com. v. Construction Co., supra.*"

It is the use of property other than in private competitive business that justifies its exemption from taxation. *Hospital v. Guilford County,* 218 N. C., 673. This is the rationale of all the decisions on the subject. Those who are required to pay taxes on their property are deserving of equal consideration. Their burden is made heavier whenever property of any kind is withdrawn from the field of taxation. It is difficult for the owners of other rental properties to understand why their buildings should be taxed and the office building of their neighbor granted an exemption. They are competitors in the same kind of business, and they look to the same government for protection. They pay their share of the public cost incurred for fire protection, police protection, streets and sidewalks, health and sanitation, and for the various facilities and instrumentalities of government which are maintained by the community for the common good. The Constitution declares that those in the same class shall be treated alike.

It appears from the foregoing analysis of the cases on the subject that the path of exemption has equality prescribed on one side and discrimination proscribed on the other. The fact that a commercial enterprise devotes its entire profits to a charitable or other laudable purpose does

not change the character of its business nor the purpose for which it is held. It is still a commercial enterprise, and is held as such. A merchant may use his entire income for the education of his children, but this would not render his store exemptible. Likewise, a philanthropist may segregate the earnings of one or more of his factories and turn them over to eleemosynary uses without making the designated factory or factories exemptible. So, when an educational institution sees fit to engage in an outside competitive business for the purpose of increasing its revenues, the trade part of its business falls into the category of a commercial undertaking.

The Revenue Acts, therefore, and the exemptions contained therein, must be regarded as limited by the constitutional grant under which they were enacted. Exemptions are not allowed as releases *in personam,* but are confined to releases *in rem,* based on the purpose for which the *res* is held.

The exemption granted the defendant in its charter applies, and was intended to apply, to property held by the trustees for use in promoting and carrying out the objects of Elon College. The only property in Reidsville which the defendant holds for this purpose is the income derived from its building.

The case, then, comes to this: The defendant purchased the property in question as an investment, from which it hopes to derive an income. It is held for profit or gain, *i.e.,* for the purpose of making money. It is in a business district and devoted to rental purposes. If it did not yield an income the defendant would have no use for it. It competes with other property similarly situated and shares equally in community benefits. It is but meet that it should bear its ratable part of the public burdens.

It results, therefore, that the defendant is entitled to exemption on the campus and is liable to tax in the market-place.

Affirmed.

SEAWELL, J., dissents.

TRUSTEES OF GUILFORD COLLEGE v. GUILFORD COUNTY ET AL.

(Filed 26 March, 1941.)

1. Taxation § 20—

Residential property owned by an educational institution, not used in connection with the college, but rented to individuals and the rent therefrom used for educational purposes, is subject to assessment and levy of taxes.

2. Appeal and Error § 48—

When, in an action to determine whether certain real properties of an educational institution are subject to assessment and levy of *ad valorem* taxes, the facts agreed in regard to one of the parcels of land are insufficient to determine with definiteness the taxable status of the property, the cause will be remanded for further proceedings as to justice appertains and the rights of the parties may require.

SEAWELL, J., dissents.

APPEAL by defendants from *Nettles, J.*, at October Term, 1940, of GUILFORD.

Controversy without action submitted on facts agreed, which, in summary, follow:

I. The corporate name of the plaintiff is Trustees of Guilford College. It is an educational institution of the Society of Friends with its campus and school buildings located in Guilford County, this State.

II. During the year 1940, the plaintiff was the owner of two lots in Guilford County with houses thereon, which were not used in connection with the college and which were held on lease or rented out—the rentals derived therefrom being used by the plaintiff exclusively for educational purposes:

1. Lot No. 100 Magnolia Street, in the residential section of the city of Greensboro, which the plaintiff acquired by foreclosure of deed of trust securing an investment from its endowment funds. The house on this lot is rented for $50.00 a month.

2. Lot No. 918 West Lee Street, in the city of Greensboro, which the plaintiff acquired by will from Newton F. Farlow. The house on this lot rents for $20.00 a month and the rent is used in providing scholarships for students attending Guilford College in accordance with the will of the testator.

III. The plaintiff also owns a lot on Friendly Road (Dolly Madison Birthplace), located about 300 yards from the entrance of the college campus, with a small brick house erected thereon "in which a member of the faculty of the college resides, and the sum of $30.00 per month is considered in the fixing of his salary, and the said $30.00 then completely used as endowment income and applied in operating said college."

IV. The defendants, who are the local taxing authorities, caused all three of these properties to be placed on the tax list and assessment roll for the year 1940.

V. The taxes were paid by the plaintiff under protest, and this proceeding is to test their validity.

From judgment holding the taxes in question to be illegal and ordering their refund, the defendants appeal, assigning error.

Frazier & Frazier for plaintiff, appellee.

D. Newton Farnell, Jr., B. L. Fentress, and H. C. Wilson for defendants, appellants.

G. H. Jones of counsel for defendants, appellants.

STACY, C. J. It follows from what is said in *Rockingham County v. Elon College, ante,* 342, that two of plaintiff's properties are subject to tax, *i.e.,* the two that are not used in connection with the college, but are held on lease or rented out for profit or gain. These are designated as Lot No. 100 Magnolia Street and Lot No. 918 West Lee Street.

The facts are insufficient to determine with definiteness the taxable status of the house and lot on Friendly Road, the Dolly Madison Birthplace. See Revenue Act of 1939, ch. 310, sec. 600 (4), Public Laws 1939; *Harrison v. Guilford County,* 218 N. C., 718. Hence, in respect of this piece of property, the cause will be remanded for further proceedings as to justice appertains and the rights of the parties may require. Such procedure finds support in the recent case of *Weinstein v. Raleigh,* 218 N. C., 549.

Error and remanded.

SEAWELL, J., dissents.

BESSIE R. BROWN, ADMINISTRATRIX OF THE ESTATE OF W. B. BROWN, v. JOSEPH DANIEL AND WIFE, LOUISA DANIEL.

(Filed 26 March, 1941.)

1. Trial § 37—

Issues must be formulated not only with regard to the pleadings but also to the phases of the evidence pertinent thereto.

2. Same: Judgments § 17b—

A judgment entered upon issues which are not determinative of the controversy is erroneous.

3. Mortgages § 16—Duty of mortgagee to account for timber cut and removed.

A mortgagee must account to the mortgagor for timber cut from the *locus in quo,* (1) when the mortgagee is in possession and the timber is cut and removed at the instance of the mortgagee for his own benefit, (2) when the mortgagee is not in possession but the timber is cut and removed at his instance and through his agency and for his benefit, regardless of whether the cutting is done with or without the consent of the mortgagor, unless he has a special agreement with the mortgagor which would relieve him of such liability.

4. Same—

When the mortgagor attempts to cut and remove timber and receive the proceeds, the mortgagee has the right to intervene and even restrain the cutting although he may consent thereto and thus release his security *pro tanto*, but if the mortgagee intervenes and demands that the proceeds be paid to him and thereby makes it impossible for the mortgagor to collect for the timber, the mortgagee is ordinarily liable for the proceeds.

5. Same—Issues and instructions based upon theory that consent of mortgagor to removal of timber by mortgagee was prerequisite to liability of mortgagee held erroneous.

In this action to foreclose a mortgage, defendant mortgagors alleged and offered evidence tending to show that they attempted to sell the standing timber, that the mortgagee intervened and consented to the cutting of the timber only upon condition that the purchaser of the timber pay the proceeds to him, the mortgagee. *Held:* An issue importing that the consent of the mortgagors to the sale of the timber by the mortgagee was prerequisite to the duty of the mortgagee to account for the proceeds, and instructions to the effect that the mortgagors had the burden of proving by the greater weight of the evidence that they did not consent to the agreement between the mortgagee and the purchaser of the timber, are *held* for error.

APPEAL by defendants from *Carr, J.*, at January Term, 1941, of PITT. New trial.

The defendants, Daniel and wife, purchased a tract of land from W. B. Brown, plaintiff's intestate, and gave several notes, representing the purchase price, which were secured by mortgage deed upon the premises. During the lifetime of the mortgagee, Brown, payments were made upon these notes. It appears from the pleadings that the mortgagee attempted to foreclose, under the power of sale contained in the mortgage, but both parties to the action have conceded the invalidity of such attempt at foreclosure. After the death of Brown his administratrix, the present plaintiff, instituted an action for foreclosure and sale of the premises, alleging that a part of the purchase price, represented by notes in her hands, was still unpaid.

The defendants opposed the foreclosure upon the ground that there was nothing due on the mortgage; alleging that during the lifetime of Brown, the mortgagee, payments had been made upon the notes, and that a quantity of timber had been cut off the premises by Brown for his own benefit, which ought to be credited upon the purchase price, and which, in value, exceeded the balance due thereupon, and asked that the notes be canceled and returned to them.

The plaintiff replied, alleging that Joseph Daniel authorized a lumber dealer to go upon the land and cut the timber and that timber was cut under the said authorization and not that of the mortgagee, and that defendants have never accounted for the proceeds of such cutting.

The evidence of the defendants tended to show that the timber was

cut upon the premises at the instance of Brown, and for his benefit and for application upon the mortgage notes, and that a sufficient quantity of the timber had been cut to discharge the indebtedness altogether.

The evidence of the plaintiff upon the pertinent matter tended to show that Harrison, a lumberman, was cutting the timber off of the adjoining Manning Place; had seen Joe Daniel, one of the defendants, who told him that he would be glad for him to "log off" the timber on his place, and that he began upon it but was interrupted next day by a letter, in consequence of which he had a conversation with Mr. Brown; that Mr. Brown told him that he would be glad that he would log the tract but not to pay any money to the Daniels, but, on the contrary, to pay it to him, Brown, as he wanted to get the money on his mortgage.

Over the objection of the defendants, the following issue was submitted to the jury: "Did the plaintiff's intestate, W. B. Brown, mortgagee, sell the timber standing and growing on the lands in controversy without the consent of the defendants, and was a quantity thereof cut and removed from said premises, as alleged in the answer?" Defendants excepted. In lieu thereof the defendants tendered the following issue: "Did the plaintiff's intestate sell the timber standing and growing on the land in controversy and was a quantity thereof cut and removed from said premises by the purchaser as alleged in the answer?" This was declined and defendants excepted.

The defendants excepted to several of the instructions given to the jury, and especially the following: "But, if the defendants have failed to satisfy you that Mr. Brown made any agreement with the witness Harrison to sell this timber—they must satisfy you by the greater weight of the evidence—or if the defendants have failed to satisfy you by the greater weight of the evidence, if you should find from the evidence that the defendant, Joe Daniel, authorized the cutting of the timber and that upon such finding if the defendants have failed to satisfy you further by the greater weight of the evidence that an additional agreement was made with Mr. Brown and Mr. Harrison whereby Mr. Brown authorized Harrison to cut it and to pay him for it; and the defendants have failed to satisfy you by the greater weight of the evidence that such agreement was made or, if made have failed to satisfy you by the greater weight of the evidence that the defendants consented to such agreement, then it would be your duty to answer that second issue No."

The jury answered all the issues against the defendants; whereupon a judgment was entered granting the relief prayed for and appointing a Commissioner for the sale of the land. From the judgment the defendants appealed, assigning, *inter alia,* the errors noted.

Harry M. Brown for plaintiff, appellee.
Albion Dunn for defendants, appellants.

SEAWELL, J. The purpose of the trial is to determine the controversy between the parties in accordance with the law. Issues are raised by the pleadings, but in their formulation they must have regard not only to the pleadings but to the phases of the evidence pertinent thereto. *Elliott v. Power Co.*, 190 N. C., 62, 128 S. E., 730; *Martin v. Knight*, 147 N. C., 564, 61 S. E., 477. Where the issues submitted to the jury are not determinative of the controversy, a judgment entered thereupon is erroneous. *Bank v. Broom Co.*, 188 N. C., 508, 125 S. E., 12.

In applying these principles we must bear in mind that the main controversy between the parties to this action was over the question of authority and responsibility for the cutting of the timber on the mortgaged lands and liability therefor, the defendants contending that it was done at the instance and for the benefit of the mortgagee, the plaintiff contending that it was done at the sole instance of the mortgagor.

The mortgagee in possession is liable to the mortgagor for timber cut and removed from the premises during such possession at the instance or by permission of the said mortgagee, and for his benefit, and is compelled to credit the proceeds, or the market value, upon the mortgage debt. *Fleming v. Land Bank*, 215 N. C., 414, 417, 2 S. E. (2d), 3; *Kistler v. Development Co.*, 205 N. C., 755, 172 S. E., 413; *Green v. Rodman*, 150 N. C., 176, 111 S. E., 408. Where the mortgagee is not in possession, he is still liable to the mortgagor for timber which is cut upon the premises at his instance or through his agency and for his benefit, in the absence of a special agreement with the mortgagor, which would relieve him from such liability, whether the cutting is done with or without the consent of the owner and mortgagor. If the timber is cut at the instance of the owner, with the mere consent of the mortgagee, the latter is under no liability to account, since it is his privilege to release the security altogether if he desires.

However, if the mortgagor attempts, either by himself or through a contract with another, to cut and remove the timber and receive the proceeds, the mortgagee may assert his rights, intervene and even restrain the cutting of the timber. If, in the assertion of this right, he consents to the cutting but demands that the proceeds should be paid to him and thereby makes it impossible for the owner or mortgagor to collect them, ordinarily he will be responsible for the proceeds. Furthermore, it may be a question of fact as to whether the transaction merely gave consent or conferred authority.

These general principles are pertinent to the pleadings and evidence as we construe them, but do not seem to be in accord with the theory upon which the issues in the case were framed and the instructions given to the jury.

The issue submitted to the jury assumes that Brown would not be liable to the defendants unless the cutting, at his instance and through his agency, was without the consent of the defendants, and that the burden is upon the defendants to show such want of consent. Since there is no evidence that the mortgagee was in possession (unless the evidence that he did enter and cut the timber might be considered evidence of his assertion of the right to possession) it was, no doubt, proper to put the burden upon the defendants to show such conduct and such acts on the part of the mortgagee as would make him liable for the proceeds of the timber, or the fair market value thereof. But under the pleadings and evidence in this case that liability cannot be made to depend upon the theory that the cutting was done without the consent of the mortgagor, as the issue assumes the case to be. If the cutting was done under the authority and agency of the mortgagee, and for his benefit, whether done with or without the consent of the mortgagor, liability would ensue, nothing else appearing.

We, therefore, think that the second issue, as formulated and submitted, is not expressive of the real issue between the parties, arising from the pleadings and reflected in the evidence, and is not determinative of the controversy. *Clinard v. Kernersville,* 217 N. C., 686, 688; *Greene v. Greene,* 217 N. C., 649, 652; *Teseneer v. Mills Co.,* 209 N. C., 615, 184 S. E., 535; *Hooper v. Trust Co.,* 190 N. C., 423, 130 S. E., 49; *Erskine v. Motor Co.,* 187 N. C., 826, 832, 123 S. E., 193; McIntosh Practice and Procedure, p. 545. The instructions upon this issue, particularly the excerpt quoted above, to which objection has been made, are contradictory and confusing and calculated to mislead the jury with respect to what was required of the defendants in carrying the burden of fixing responsibility of plaintiff's intestate.

Perhaps it was the intention of the court to charge that if the timber was cut by agreement between Brown and Harrison, to which agreement the defendants were not parties, it was incumbent on the defendants, in order to recover, to show these facts. But the instruction goes much further. It puts the burden upon the defendants to satisfy the jury that they did not consent to any agreement between Brown and Harrison whereby the latter was to pay Brown for the timber cut, and in the same instruction puts the burden upon the defendants to show that they did consent to such agreement.

In this connection we quote from the instruction to the jury brought forward in defendants' Exception No. 6, pertaining to the same issue: "And now, upon that second issue, if the defendants have satisfied you by the greater weight of the evidence, that Mr. Brown, Mr. W. B. Brown, did sell some of the timber on that land in question, that he made an agreement with Harrison to have it cut, and that the defendants did not

have any part in that agreement, that is, that they did not consent to it, and that the agreement was to the effect that the timber was to be cut and that the man, Harrison, was to account to Mr. Brown for it, and that the defendants did not enter into that agreement and consent to it, then it would be your duty to answer that second issue, Yes." In this it will be noted that the burden was put upon the defendants to show an agreement between Brown and Harrison, and that agreement was "to the effect that the timber was to be cut and that the man Harrison was to account to Mr. Brown for it." The defendants were certainly not required to show by the greater weight of the evidence that there was an agreement between Brown and Harrison that the former should receive the proceeds of the cutting. But attention is called to the circumstance that this part of the instruction places the burden upon the defendants to show that the transaction was without their consent, whereas, the instruction just noted puts the burden upon them to show that it was with their consent.

We think there is error in the submission of the issue above set out over defendants' objection and in the instructions noted, entitling the defendants to a new trial. It is so ordered.

New trial.

STATE v. L. R. WELLS.

(Filed 26 March, 1941.)

Conspiracy § 5—Competency of declarations of coconspirator.

When a *prima facie* case of conspiracy has been established, declarations of a conspirator made before the termination of the conspiracy, in the absence of the coconspirators, is competent against the coconspirators only if the declarations are in furtherance of the common design and within the *res gestæ*, and declarations of one conspirator which are merely narrative of what another conspirator had done or, by inference, would do, are incompetent as to the third conspirator, and the admission of such declarations in evidence entitles him to a new trial.

APPEAL by defendant from *Bobbitt, J.*, at August Term, 1940, of POLK. New trial.

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

J. E. Shipman and Pearsall & Barnhill for defendant, appellant.

SEAWELL, J. The appealing defendant, with others—Arthur Suber, Hattie Smith, and Cleveland Rice—was indicted for conspiring to burn

the Tryon Colored Public School Building, and the defendant separately was indicted for procuring Arthur Suber, Hattie Smith and Cleveland Rice "to set fire to and burn" said building.

It does not appear anywhere in the record that these indictments were consolidated—C. S., 4622—but they were tried together without objection or exception by this defendant.

Without going into the evidence in detail, it may serve the purpose of our present investigation to concede that the evidence was sufficient to go to the jury upon either or both of the indictments.

During the course of the trial, the appealing defendant objected to the admission of certain testimony which, in its setting, is as follows:

"Before they reached Tryon, they stopped at a lumber yard and told a man to come get the car in about thirty minutes. We got to Suber's house about 5:30 or 6 o'clock. Sometime after supper Suber asked the biggest girl if there was any kerosene, and she said no, and he said I guess I will have to go and get some. Just as he went out of the house and down the road fifteen or twenty feet a car pulled out to the side of the road and stopped. I don't know who it was, but they talked there fifteen or twenty minutes. The car pulled off and went around the hill, and Suber kept on down the street. In a few minutes Suber came and set the kerosene in the house. The car came back and pulled on the right hand side above the house. Suber went out and talked to the fellow. I did not hear anything that the man in the car said. Suber came back and said: ('That was the professor. Well, I have everything fixed. I have got everything going nicely; everything will work out lovely. Professor has gone to see about getting the key from the janitor.')"

The objection is made to that part of the evidence included within the parentheses, occurring in the testimony of Cleveland Rice.

Upon this indictment for conspiracy it may be conceded that the State had made out a *prima facie* case by evidence other than that objected to, which was, of course, incompetent to connect the appealing defendant with the crime. *Kuhn v. United States,* 26 F. (2d), 463. It was offered and admitted under the rule that once a *prima facie* case has been established the acts and declarations of any one of the conspirators in the furtherance of the common design may be used in evidence against any of the others. *S. v. Dale,* 218 N. C., 625; *S. v. Lea,* 203 N. C., 13, 27, 164 S. E., 737; *S. v. Jackson,* 82 N. C., 565. The limitation to acts and declarations in furtherance of the common design necessarily excludes evidence of acts or declarations made after the accomplishment or abandonment of the common enterprise which were not within the *res gestæ.* But even within this period there are certain restrictions, sometimes referred to as exceptions, which narrow the scope of the evidence which

may be admitted, since the acts and declarations of the conspirator made the subject of the evidence must necessarily relate to acts or declarations of a similar nature on the part of the coconspirator sought to be bound, when not made in his presence.

Elliott on Evidence, 4th Volume, p. 206, section 2943: "The rule as to the admission of acts and declarations of a coconspirator must not be misunderstood, and must not be extended beyond its legitimate limits. The authorities go to the proposition that the acts or statements competent to be proved must have been done or made in the prosecution of the criminal conspiracy, or in the furtherance of the object or common design of the conspiracy. So it has been held that the admissibility of the acts and declarations of a conspirator are proper only when they are either in themselves acts or accompany and explain acts for which the others are responsible; but that they are not admissible when in the nature of narratives, descriptions, or subsequent confessions." This we conceive to apply as a limitation upon the admission of evidence where the acts or declarations are made pending the conspiracy, and not to refer to the well understood rule that declarations of a narrative nature are not admissible as against the coconspirator after the termination of the conspiracy.

As sustaining the limitation thus set upon the admission of this kind of testimony, we find in *Spies and others v. People,* 122 Ill., 1, 12 N. E., 865, 980 (the *Haymarket* or *Anarchists' Case*): "It is undoubtedly the law that, after a conspiracy is established, only those declarations of each member *which are in furtherance of the common design* can be introduced in evidence against the other members. Declarations that are merely narrative as to what has been done or will be done are incompetent, and should not be admitted except as against the defendant making them, or in whose presence they are made."

We see in the testimony of Rice nothing more than a second-hand statement of the defendant Suber, constituting a narrative statement as to what this defendant had gone to do, or, by inference would do. However wide the practice has been, and must necessarily be, in making out a full picture of the conspiracy, we cannot accept this as within the rule. In this respect there was error and the defendant is entitled to a

New trial.

ARTHUR BURCHAM AND W. E. BURCHAM, v. MOLLIE (MRS. W. J.) BURCHAM, INDIVIDUALLY AND AS ADMINISTRATRIX OF W. J. BURCHAM; COLLIE DARNELL AND DANIEL CREED.

(Filed 26 March, 1941.)

1. Wills § 33f—

The will in this case *is held* to unequivocally express the intent of the testator that the whole of testator's property be put to the use of his widow during her lifetime or widowhood, without any limitations upon the purposes, manner or extent of that use, so as to necessarily imply a power of disposition, although the instrument fails to so devise the property *in ipsissimis verbis*.

2. Wills § 33a—

A devise or bequest by implication should not be presumed except upon cogent reasoning and in order to carry out the intent of the testator categorically appearing from the language used construed as a whole.

APPEAL by plaintiffs from *Rousseau, J.*, at September Term, 1940, of SURRY. Modified and affirmed.

Ottis J. Reynolds, Wilson Barber, and H. O. Woltz for plaintiffs, appellants.

Parks Hampton and Folger & Folger for defendants, appellees.

W. M. Allen and Hoke F. Henderson for Collie Darnell, appellee.

SEAWELL, J. This is a proceeding brought under the Declaratory Judgment Act to determine the rights of the parties with respect to the will of W. J. Burcham, deceased.

The will is as follows:

"Elkin, N. C., Feb. 22, 1928—
"I make my will as Folows—
"Secion 1 to Elvin Burcham I will one dollar—
Arthur Burcham I will one Dollar.
Callie Darnell I will One Dollar—
"Secion two.
"to Mollie Burcham I will Her Suport As Long as She Remains my widow if She maries then she is not to have any mor Suport From my Estate But if She Does not Mary She must have any thing She Wants as long as he Lives. And Stay any where She wants to. I want Moll to Have a good time as Land as he Lives and not Work go Places and have a good time the Remainder of Her Life if there is any Surplus Moneny Left after the Death of Mollie it must Bee Put in a Safe Place to keep the property in good shape.

"Secion Three—

"After the Death of Mollie the Taxes and Insurance must Bee paid on the Property After that ½ One Haf of the Remainder Mus Bee Kept to keep the property in good Repair each year and the other half bee divided as Folows Which would Bee one Fourth to Callie Darnell One Fourth as long as she lives Dannie Creed One Fourth as Land as He Lives

"At the death of either it Will go in Secion Four and when the other Dies then then Theirs goes in Secion Four

"Secion Four

"After the Death of the Above is Dead I will to Jonesville and Pleasanthill Semiteries. to Keep them up and to a Monument to Papa & Mothers Grave and if Jonesville move the church to the Semitary to Help Build the New One.

"W. J. Burcham (Seal)"

The plaintiffs contend that the effect of this will is to create a trust estate out of which testator's wife and beneficiary shall receive support according to the terms of the will for her natural life, with condition that such support shall terminate upon her remarriage; that, therefore, regardless of the other provisions of the will, the plaintiffs have a fee simple estate by inheritance, subject to a charge upon the said estate for the support of Mollie Burcham, and subject to such valid distribution of the personal property as might be made under the will.

The defendants contend that, upon a proper interpretation of the will, Mollie Burcham is seized of a determinable fee in the whole property, subject to termination upon her remarriage, and that the plaintiffs have no interest therein. On perusal of the will and consideration of these contentions the trial judge entered a judgment favorable to the view taken by the defendants and plaintiffs appealed.

The main controversy is over the construction of section 2 of the will: ". . . to Mollie Burcham I will her Suport as Long as She Remains my widow if She maries then she is not to have any mor Suport From my Estate But if She Does not Mary She must have any thing She Wants as long as he Lives. and Stay any where She wants to. I want Moll to Have a good time as Land as he Lives and not Work go Places and have a good time the Remainder of Her Life" . . . While the language used is "I will her support," this expression is so qualified by the accompanying expressions of the testator's desire as to lead to the inference that he intended the entire property to be used for the benefit of Mollie Burcham, if she so desired, and at her will and pleasure. This conviction is so strong that we think it necessarily implies that the testator intended for her to have the disposition of the property for that

purpose during her natural life or widowhood. Reading the whole Will, we think it is reasonably clear that the testator intended other beneficiaries named in the will to take only upon the condition that there might be property left undisposed of at the death of Mollie Burcham, or upon her remarriage, when power of disposition should cease.

While a devise or bequest by implication should not be presumed except upon cogent reasoning and where necessary to carry out the intent of the testator, the doctrine is well established in the law. *Kerr v. Girdwood,* 138 N. C., 473, 50 S. E., 852, 107 American State Reports, 551; *Ferrand v. Jones,* 37 N. C., 633; *Charter v. Charter,* 22 Hawaii, 34, 38; *Bell v. Dukes,* 158 Miss., 563, 130 S., 734; *McCoury's Executors v. Leek,* 14 N. J. Equity, 70.

In this instance the sweeping expressions as to the uses to which the property may be put strongly implies, as a necessity to such use, the accompanying power of disposition. *Parker v. Tootal,* 11 H. S. Cas., 143, 161. "If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared." 1 Underhill on Wills, section 463.

It is generally held that a devise of the use, income, rents, profits, etc., of property, amounts to a devise of the property itself, and will pass the fee unless the will shows an intent to pass an estate of lesser duration. 19 Am. Jur., p. 484, section 24, and note; *Schwren v. Falls,* 170 N. C., 251, 87 S. E., 49. While here the use of the property has not been devised *in ipsissimis verbis,* we think the effect of the will and the intention of the testator is to put the whole property to the use of Mollie Burcham during her lifetime or widowhood without any limitation upon the purposes, manner, or extent of that use, in such a way as to necessarily imply the power of disposition.

The judgment of the court below is consistent with this view, but there is some inconsistency in designating the character of the estate taken by Mollie Burcham, since at one time it is declared to be a defeasible fee and at another an estate for life, with power of disposition. In that respect the judgment must be modified to conform to this opinion.

Modified and affirmed.

NANNIE DAVIS BARNES *v.* NETTIE AYCOCK; GLADYS AYCOCK HARE AND HUSBAND, ALBERT HARE; W. A. LUCAS AND WIFE, MAMIE LUCAS; W. A. LUCAS, TRUSTEE; BRANCH BANKING & TRUST COMPANY, TRUSTEE; W. A. LUCAS, EXECUTOR; BRANCH BANKING & TRUST COMPANY, EXECUTOR; MARJORIE BARNES; ED DAVIS AND WIFE, FLOSSIE E. DAVIS; FRED DAVIS AND WIFE, MATTIE DAVIS; THURMAN DAVIS AND WIFE, BERNICE DAVIS; LILLIAN BLALOCK AND HUSBAND, PAUL C. BLALOCK; BESSIE DAVIS DANIEL; NETTIE DAVIS BARNES; RENA DAVIS PEEDIN AND HUSBAND, C. B. PEEDIN; JOSEPHINE DAVIS SMITH AND HUSBAND, BRAXTON SMITH; BETTIE DAVIS PENNINGTON AND HUSBAND, CASH PENNINGTON; CAREY DAVIS CRAWFORD AND HUSBAND, WILL CRAWFORD; BERTHA DAVIS; ANNIE AYCOCK DANIEL AND HUSBAND, RICHARD DANIEL, AND MARGARET DAVIS.

(Filed 26 March, 1941.)

1. Deeds § 5—

Delivery of a deed is necessary to pass title, and to constitute delivery there must be a parting with the possession of the deed and with all power and control over it by the grantor, for the benefit of the grantee at the time of delivery.

2. Same—Evidence held insufficient to show delivery of deed.

Evidence that the deed in question was placed by the grantor in his Bible on the dresser in his bedroom, that he told the witness, the daughter of the grantee, where he was putting the deed and to tell the grantee where it was and to have it recorded, but that this message was undelivered and that the deed remained in the Bible and never came into the possession of the grantee or anyone for her, *is held* insufficient to show a delivery necessary to complete the conveyance.

3. Lost or Destroyed Instruments §§ 1, 3—

In an action to establish a lost deed the burden is upon plaintiff to show delivery necessary to complete the conveyance, and upon failure of evidence of delivery, defendant's motion to nonsuit should have been allowed.

APPEAL by defendants from *Carr, J.*, at October Term, 1940, of WAYNE. Reversed.

Action to set up a lost deed. Issues were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict defendants appealed.

Paul B. Edmundson for plaintiff, appellee.

Finch, Rand & Finch and W. A. Dees for defendants, appellants.

DEVIN, J. The only question raised by this appeal relates to the delivery of the deed. The defendants concede that there was evidence of the execution and acknowledgment of the deed by the grantor, but

deny that there was sufficient evidence of delivery to operate as a transfer of the legal title to the plaintiff. The deed was lost and never recorded. Defendants' only exception is to the denial of their motion for judgment of nonsuit.

The material facts were these: In 1937, the grantor, J. T. Aycock, had his attorney prepare two deeds, one to J. T. Aycock for the land in question from Mewborn, Trustee (which was duly executed), and the other from J. T. Aycock and wife to the plaintiff, who was his niece. J. T. Aycock died July 1, 1939. Three or four months prior to his death he and his wife acknowledged the execution of a deed, presumably that to the plaintiff, before a notary public. Marjorie Barnes, daughter of the plaintiff, testified as follows: "About two weeks before he (J. T. Aycock) died, he showed me two deeds. He said, 'Marjorie, one is one I got for the Calvin Aycock place, and the other one is the one I have made to your mother, and I am putting them in the Bible, and I want you to be sure and remember where they are, and tell her to have them recorded.' I saw him put these two in the Bible. Q. Did he give the Bible to you or did he put it away himself? A. No, the Bible stayed on the dresser ever since I could remember, never was moved unless someone was reading it. Q. Is that where he left it after he put the deeds in it? A. Yes, sir. Q. You didn't take hold of the Bible? A. No." There was no evidence that Marjorie Barnes told the plaintiff of her conversation with the grantor, or that plaintiff ever saw or had possession of the deed. There was evidence that another witness saw the two deeds in the Bible four or five days before his death. At that time he was sick and unable to get up. He was paralyzed immediately preceding his death. There was other evidence that J. T. Aycock had expressed his intention of giving the land to the plaintiff and had permitted her to have control of it. After the death of J. T. Aycock the deed from Mewborn, Trustee, was found in the Bible, but the deed to the plaintiff was not there and was never found.

It is elementary that in order to effectuate the present transfer of the legal title to land there must be an instrument in writing to that effect, signed, sealed, and delivered. In this case there was evidence that the instrument under which plaintiff claims was written in proper form, and that it was signed, and presumably sealed, by the grantor. There was evidence of his intention to convey the land to the plaintiff. Was there a constructive delivery of the deed so as to vest the title in the plaintiff?

In the leading case of *Tarlton v. Griggs*, 131 N. C., 216, 42 S. E., 591, it was said: "There must be an intention of the grantor to pass the deed from his possession and beyond his control, and he must actually do so with intent that it shall be taken by the grantee or by someone for him. Both the intent and act are necessary to a valid delivery." Said *Daniel*,

J., in *Baldwin v. Maultsby*, 27 N. C., 505: "The delivery of a deed, a transmutation of the possession, is an essential ceremony to the complete execution of it."

This rule has been steadily adhered to by this Court. *Perry v. Hackney*, 142 N. C., 368, 55 S. E., 289; *Fortune v. Hunt*, 149 N. C., 358, 63 S. E., 82; *Gaylord v. Gaylord*, 150 N. C., 222, 63 S. E., 1028; *Dunlap v. Willett*, 153 N. C., 317, 69 S. E., 222; *Weaver v. Weaver*, 159 N. C., 18, 74 S. E., 610; *Carroll v. Smith*, 163 N. C., 204, 79 S. E., 497; *Buchanan v. Clark*, 164 N. C., 56, 80 S. E., 424; *Foy v. Stephens*, 168 N. C., 438, 84 S. E., 758; *Lee v. Parker*, 171 N. C., 144, 88 S. E., 217; *Gillespie v. Gillespie*, 187 N. C., 40, 120 S. E., 822; *Thomas v. Conyers*, 198 N. C., 229, 151 S. E., 270; *Ins. Co. v. Cordon*, 208 N. C., 723, 182 S. E., 496.

In the last case in which this question was considered, *Ins. Co. v. Cordon, supra, Clarkson, J.*, speaking for the Court, quoted from *Gillespie v. Gillespie, supra*, as follows: "Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title." To the same effect is the holding in the recent case of *Orris v. Whipple*, 224 Iowa, 1157.

The effect of these decisions is to establish the rule that to constitute delivery there must be a parting with the possession of the deed and with all power and control over it by the grantor for the benefit of the grantee at the time of delivery. *Phillips v. Houston*, 50 N. C., 302; *Tate v. Tate*, 21 N. C., 22; *Robbins v. Rascoe*, 120 N. C., 79, 26 S. E., 807. To constitute delivery the papers must be put out of possession of the maker. *Hall v. Harris*, 40 N. C., 303.

Applying these principles of law to the facts appearing in the record here, we reach the conclusion that the evidence fails to show delivery. The deed was placed by the grantor in his Bible on the dresser in his bedroom. He told the witness, whose testimony constitutes the sole evidence on the point, where he was putting the deed, and to tell the plaintiff where it was and to have it recorded. This message was undelivered. The deed never came into the possession of the plaintiff or anyone for her. It remained in the grantor's own receptacle and under his control. There was a failure to show a parting with the possession of the deed by the grantor, or with all power and control over it, so as to operate as a delivery, necessary to complete the conveyance. The burden was on the plaintiff to show delivery. It was said in the case of *Moore v. Collins*, 15 N. C., 384: "The words (spoken by the grantor) must amount to an authority or license, in the person addressed, to take possession of the deed, and a reception of the instrument by the person spoken unto must follow the speaking of the words."

In the case of *Erbach v. Brauer,* 188 Wis., 312, cited by the plaintiff, there are expressions tending to support the view that whether a deed has been delivered is a question of intention merely, and that, if an intention appears that it shall be legally operative, there would be a sufficient delivery. This is not in accord with the decisions in this jurisdiction. And, upon an examination of the facts in the Wisconsin case, it will be noted that there the deed was signed and acknowledged by the grantor and placed in an envelope in his box in the bank. On the envelope was written by the grantor, "This belongs to Mrs. John Brauer and Roman Brauer. She must open it." The Court held this did not constitute a delivery and the deed was set aside. In 129 A. L. R., 11, will be found collected annotations of numerous decisions on this point.

Defendant's motion for judgment of nonsuit, on the ground that there was no evidence of delivery sufficient to warrant submission of the case to the jury, should have been allowed.

The judgment of the Superior Court must be

Reversed.

H. W. EARLY v. W. A. TAYLOE.

(Filed 26 March, 1941.)

1. Wills § 33g—

Testator provided that after the termination of his widow's life estate his land should be divided in equal parts for allotment to his children and grandchildren, and devised "to my son Hufham or his children one share." *Held:* The son named takes the fee, the gift to the son's children being a substituted gift to take effect only in the event that the son named should predecease the testator.

2. Wills § 33a—

A devise of real estate will be construed to be in fee simple unless an intention to convey an estate of less dignity plainly appears from the language of the devise or from some other part of the will. C. S., 4162.

3. Same—

An unrestricted devise of property carries the fee.

4. Wills § 35—

An expression following the devise of land in fee that it "is not to be conveyed out of the family" is void if it be considered a restraint on alienation, and is equally ineffectual if regarded merely as an expression of desire on the part of the testator.

APPEAL by defendant from *Nimocks, J.,* in Chambers at Fayetteville, 22 November, 1940. From BERTIE.

Controversy without action, submitted on an agreed statement of facts.

Plaintiff being under contract to convey to the defendant a 607-acre tract of land, known as "Tract No. Six (6) of the A. W. Early Estate Lands," duly executed and tendered deed sufficient in form to invest the defendant with a fee-simple title to the property, and demanded payment of the purchase price as agreed, but the defendant declined to accept the deed and refuses to make payment of the purchase price on the ground that the title offered is defective.

The court being of opinion that upon the facts agreed, the deed tendered was sufficient to convey a fee simple title to the *locus in quo*, gave judgment for the plaintiff, from which the defendant appeals, assigning error.

Tyler & Jenkins for plaintiff, appellee.
Joseph B. Burden for defendant, appellant.

STACY, C. J. On the hearing, the question in difference was made to turn on the construction of a clause in the will of Abner W. Early, late of Bertie County, this State.

The testator provided that after the death of his wife and the falling in of her life estate, his lands should be divided "into eight equal divisions" and allotted to his children and grandchildren in equal shares, that is: . . . "to my son Hufham or his children one share."

Under the allotment made pursuant to the testator's directions, following the death of the life tenant, the plaintiff, who is designated as Hufham in his father's will, was assigned "Tract No. Six (6)," the lot here in controversy. Divisional deeds or cross-conveyances were also executed by the several devisees.

At the time the will was made and at the death of the testator, the plaintiff, Hufham W. Early, had two living children, and he now has four living children.

It is the contention of the plaintiff that he is the owner in fee of "Tract No. Six (6) of the A. W. Early Estate Lands" by virtue of the division made pursuant to his father's will and the divisional or cross-deeds executed by the respective devisees.

The plaintiff's contention prevailed in the court below, and we approve. *Tate v. Amos*, 197 N. C., 159, 147 S. E., 809. The devise is "to my son Hufham," with a substituted gift to "his children" in the event Hufham should predecease the testator. In other words, the substitution is in prospect of, and with a view to guarding against, a failure of the devise by lapse. 1 Jarman on Wills, 612; *Bender v. Bender*, 226 Pa. St., 607, 75 Atl., 859, 134 A. S. R., 1088. The devise "to Hufham or his children" means that Hufham will take if he survive the testator, and, if

not, his children will take. *Ready v. Kearsley*, 14 Mich., 225; *Hunter v. Watson*, 12 Cal., 363. See *Whitley v. Arenson, ante*, 121.

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; *Henderson v. Power Co.*, 200 N. C., 443, 115 S. E., 425; *Lineberger v. Phillips*, 198 N. C., 661, 153 S. E., 118; *Washburn v. Biggerstaff*, 195 N. C., 624, 143 S. E., 210; *Barbee v. Thompson*, 194 N. C., 411, 139 S. E., 838; *Carroll v. Herring*, 180 N. C., 369, 104 S. E., 892; *Holt v. Holt*, 114 N. C., 242, 18 S. E., 967.

An unrestricted devise of real property carries the fee. *Heefner v. Thornton*, 216 N. C., 702, 6 S. E. (2d), 506.

The testator expressed a wish or desire in item 6 of his will that his home and farm should be and remain the property of his children, grandchildren and their children and so on, "and is not to be conveyed out of the family." If this be regarded as a restraint on alienation it is void, *Williams v. McPherson*, 216 N. C., 565, 5 S. E. (2d), 830, and if merely the expression of a desire on the part of the testator, it is likewise ineffectual. *Brooks v. Griffin*, 177 N. C., 7, 97 S. E., 730.

On the facts as presented, the judgment appears to be correct.

Affirmed.

STATE v. JAMES WILLIAMS.

(Filed 26 March, 1941.)

1. Larceny § 7—Evidence of defendant's guilt of larceny held sufficient.

Evidence that sacks of cotton seed disappeared from the ginhouse of the prosecuting witness from time to time for a period of several weeks, that during this period defendant from time to time sold sacks of cotton seed to a third person, and that the prosecuting witness identified four of the sacks of cotton seed which defendant had sold as belonging to him, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of larceny.

2. Larceny § 5—

Recent possession of stolen property raises a presumption of the possessor's guilt of larceny of such property, the strength of the presumption depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and their discovery in the possession of the defendant.

3. Larceny § 8—

The evidence tended to show the larceny of sacks of cotton seed from the ginhouse of the prosecuting witness over a period of several weeks. *Held:* Inexactness or want of definiteness in the instruction of the court as to the dates the sacks were stolen does not entitle defendant to a new trial, the exact dates not being regarded as capitally important.

4. Same—

In a prosecution for larceny, an exception to the court's instruction to find the defendant guilty if the jury was satisfied beyond a reasonable doubt that defendant had taken or stolen the articles in question, on the ground that the court failed to define "taken and stolen," is untenable when the record discloses that the court had previously charged the jury the constituent elements of larceny.

5. Criminal Law § 53h—

The charge is to be considered contextually.

APPEAL by defendant from *Burgwyn, Special Judge,* at January Term, 1941, of HARNETT.

Criminal prosecution tried upon indictment charging the defendant, in three counts, (1) with breaking and entering a ginhouse, (2) with the larceny of 84 bushels of cotton seed, of the value of thirty dollars, the property of one Henry Elliott, and (3) with receiving said cotton seed, knowing them to have been feloniously stolen or taken in violation of C. S., 4250.

It is in evidence that Henry Elliott had a quantity of cotton seed in sacks stored in his ginhouse. The sacks were fastened or tied with wires. They began to disappear on 23 November, 1940, and continued to disappear from time to time until 13 December, 1940, when all were gone.

On the morning of 16 December, 1940, Elliott saw four sacks of seed which had been taken from his gin at Casper Tart's gin. Tart testified that he purchased the sacks full of seed from the defendant. He also testified that he had bought cotton seed from the defendant on several occasions during the time Elliott's sacks were disappearing. Checks showing payments to Williams by Tart covering these purchases were offered in evidence, and endorsements by Williams duly identified.

The defendant interposed a demurrer to the evidence, which was overruled. Exception. The case was thereupon submitted to the jury on the State's evidence, the defendant offering none.

Verdict: "Guilty of larceny of goods of the value of less than twenty dollars."

Judgment: Nine months on the roads.

The defendant appeals, assigning errors.

STATE *v.* WILLIAMS.

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

Neill McK. Salmon for defendant.

STACY, C. J. The record discloses that Elliott's cotton seed began to disappear from his ginhouse on 23 November and continued to disappear from time to time for several weeks thereafter. Tart made a number of purchases of cotton seed from the defendant during this period. Elliott identified four of the sacks of seed which the defendant sold to Tart as belonging to him. This is some evidence tending to connect the defendant with the theft and permitting the inference that he participated therein as a principal. *S. v. Williams,* 187 N. C., 492, 122 S. E., 13; *S. v. Hullen,* 133 N. C., 656, 45 S. E., 513; *S. v. McRae,* 120 N. C., 608, 27 S. E., 78.

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. *S. v. Jones,* 20 N. C., 120; *S. v. Turner,* 65 N. C., 592; *S. v. Patterson,* 78 N. C., 470; *S. v. Rights,* 82 N. C., 675. The case put by Hale, where a horse thief was pursued, finding himself pressed, got down, desiring a man in the road to hold his horse till he returned, and the innocent man was taken with the horse, illustrates the necessity of using caution in convictions founded on presumptive evidence. *S. v. Adams,* 2 N. C., 463. See *S. v. Cannon,* 218 N. C., 466. This was explained to the jury, the court stating that the strength of the presumption would depend upon the circumstances of the case and the length of time intervening between the larceny of the goods and their discovery in the possession of the defendant. "Ordinarily, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time before a possession is shown in the accused, the *law* does not infer his guilt, but leaves that question to the jury under the consideration of all the circumstances"—*Ashe, J.,* in *S. v. Rights, supra.*

The following excerpt from the charge also forms the basis of one of defendant's exceptive assignments of error: "If you are satisfied from the testimony and beyond a reasonable doubt that the seed found by Elliott in the possession of Tart were in fact the seed of Elliott, and that they were taken and stolen by the defendant from his gin on or about the 12th or 10th day of December, whichever date it was, it would become your duty to find the defendant guilty."

The defendant objects to this instruction on the ground (1) that the dates specified therein are not supported by the evidence, and (2) that it fails to define what is meant by "taken and stolen." The exact dates are not regarded as capitally important, *S. v. Overcash,* 182 N. C., 889, 109 S. E., 626; *S. v. Pate,* 121 N. C., 659, 28 S. E., 354; and the court had previously given the jury the constituent elements of larceny. *S. v. Martin,* 82 N. C., 672. The charge is to be considered contextually. *S. v. Lee,* 192 N. C., 225, 134 S. E., 458. The exception is not sustained.

The trial of the case is apparently accordant with the decisions on the subject. No sufficient reason has been discovered for disturbing the result. Hence, the verdict and judgment will be upheld.

No error.

RENA WARREN v. PILOT LIFE INSURANCE COMPANY.

(Filed 26 March, 1941.)

Appeal and Error § 49a—

When the evidence upon the subsequent hearing is substantially the same as that considered upon the former appeal, a peremptory instruction given in accord with the opinion in the former appeal will not be held for error.

DEVIN, J., dissents for the reasons stated in former appeal.

CLARKSON and SEAWELL, JJ., concur in dissent.

APPEAL by plaintiff from *Hamilton, Special Judge,* at November Term, 1940, of PITT. Affirmed.

Civil action to recover on double indemnity provision of a life insurance policy.

From judgment on verdict for defendant plaintiff appeals.

Smith, Wharton & Hudgins and J. B. James for defendant, appellee.

Albion Dunn for plaintiff, appellant.

PER CURIAM. This is the fourth appeal in this case. Former appeals are reported in 212 N. C., 354, 193 S. E., 293; 215 N. C., 402, 2 S. E. (2d), 17; and 217 N. C., 705, 9 S. E. (2d), 479, where the material facts are set forth.

The substantive evidence tending to show the circumstances under which deceased met his death offered in the trial below is substantially the same as that appearing in the record on the last appeal. There is no material variance. This evidence, considered in the light most favorable

to the plaintiff, tends to show that the deceased suffered death as a result of a gunshot wound intentionally inflicted by another. If believed and accepted by the jury, when considered in connection with such evidence as tendered to contradict the same and to impeach the witness, it was such as to require a finding favorable to the defendant. The peremptory instruction given was in accord with the opinion in the former appeal reported in 217 N. C., 705, 9 S. E. (2d), 479.

In the judgment below there is

No error.

DEVIN, J., dissents for the reasons stated in former appeal.

CLARKSON and SEAWELL, JJ., concur in dissent.

FRANCIS A. CODY v. GEORGE I. HOVEY.

(Filed 9 April, 1941.)

1. Pleadings § 23—

A demurrer to an affirmative defense was sustained on the former appeal. Thereafter defendant moved in the trial court to be allowed to amend. *Held:* The motion to be allowed to amend the answer was addressed to the discretion of the trial court.

2. Appeal and Error § 37b—

A discretionary ruling of the Superior Court is not reviewable on appeal unless it clearly appears that there has been an abuse of the discretionary power, and defendant's exception to a discretionary ruling of the trial court in the present case cannot be sustained.

3. Pleadings § 23—

Plaintiff appealed from the order of the clerk allowing defendant's motion to be allowed to amend answer after judgment sustaining demurrer to an affirmative defense set up therein had been affirmed on appeal. *Held:* Upon appeal to the judge, the fact that the clerk had ruled on the motion, in vacation, in no way limits the discretion of the Superior Court, but the court has the power to consider the motion *de novo* in the exercise of its sound discretion.

4. Courts § 2c—

Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, C. S., 403, the jurisdiction of the Superior Court is not derivative but the judge hears the matter *de novo*.

5. Same—Defendant held to have waived any irregularity in procedure for hearing appeal from clerk by appearing and arguing appeal without objection.

Where an appeal from an order of the clerk is noted at the time and is heard without objection at the term of the Superior Court beginning two

days thereafter, but upon failure of the judge to decide the appeal before leaving the district, is placed on the calendar and reached the second term following, at which time without objection the parties appear and argue the matter before the presiding judge, any irregularity in procedure is waived, and defendant's contention that the appeal from the clerk should have been dismissed for failure to comply with C. S., 635, is untenable.

6. Trial § 1—

The fact that the court's order setting an appeal from the clerk for hearing is made out of the term, is immaterial when the parties voluntarily appear on the date set, and full opportunity is afforded the parties to present their cause.

7. Courts § 1b—When matters affecting jurisdiction are brought to court's attention, it must determine jurisdictional question before rendering final judgment.

In this action upon a judgment of another state, defendant sought leave to amend to allege that the judgment sued on by plaintiff was based upon a gambling contract denounced by C. S., 2144, and contended that by provision of the statute the court was without jurisdiction of the action. *Held:* Even though the Superior Court has the power in its discretion to deny the motion to be allowed to amend, yet the facts alleged in the proposed amendment are in the nature of a plea to the jurisdiction, and the court cannot render final judgment until it has determined such plea.

8. Courts § 1a—

Jurisdiction of a court cannot be conferred by failure of defendant to properly plead to the jurisdiction.

9. Judgments § 40: Constitutional Law § 23—

The provision of the Federal Constitution, Art. IV, sec. 1, that each state give full faith and credit to the judicial proceedings of every other state does not prevent a state from withdrawing the jurisdiction of its courts from an action to enforce a judgment rendered in another state when it is made to appear clearly that the judgment was awarded on transactions forbidden by the public policy or statute of the state.

10. Same: Contracts § 7d—In action on foreign judgment, defense that it was based on gaming contract may not be asserted when such defense is concluded by the judgment sued on.

This action was instituted on a judgment of the State of New York. Defendant sought to amend its answer to allege that the judgment was based on a gaming contract proscribed by C. S., 2144, and contended that by provision of the statute our Court was without jurisdiction of the action. *Held:* Under the provisions of the full faith and credit clause of the Federal Constitution, Art. IV, sec. 1, our courts are precluded from determining the question of the validity of the contract if that question was or should have been presented as a defense in the original action and the defendant is precluded by the judgment sued on from asserting such defense in this jurisdiction, since in such instance the judgment of the State of New York is conclusive here while it stands unreversed in the court where rendered, but if such defense was not considered or concluded in the New York court such defense is available to defendant in plaintiff's action on the judgment.

11. Contracts § 7d—

Under New York law, a wagering contract under which profit or loss to the parties is to be determined by the market quotations of stocks or commodities, without intending a *bona fide* purchase or sale of same, is illegal.

12. Appeal and Error § 48—Cause remanded for determination of jurisdictional question presented by proposed amendment to answer.

In this action on a judgment of the State of New York, defendant moved for leave to amend his answer to allege that the judgment was based on a gaming contract, and that therefore our Court was without jurisdiction of the action. The trial court, in its discretion, denied the motion to amend, and, there being no valid defense set up in the answer as constituted, entered judgment on the pleadings. *Held:* The denial of the motion to amend is affirmed, but the cause is remanded in order that the court find facts determinative of whether the question of the invalidity of the contract was concluded by the New York judgment, and if not, whether the contract constituting the basis of the judgment is one condemned by C. S., 2144, since the court cannot render final judgment until it has determined the jurisdictional question.

APPEAL by defendant from *Phillips, J.*, at November Term, 1940, of CALDWELL. Error and remanded.

This was an action upon a judgment rendered in the State of New York. The case was here at Fall Term, 1939, reported in 216 N. C., 391, 5 S. E. (2d), 165, and again at Spring Term, 1940, reported in 217 N. C., 407, 8 S. E. (2d), 479. On the first appeal the Court considered plaintiff's demurrer to the answer, wherein it was attempted to set up as an affirmative defense that the transaction upon which the New York judgment was founded was a gambling contract prohibited by C. S., 2144. It was held that the answer did not set up sufficient facts to constitute a valid defense on that ground. The demurrer was sustained, with right to defendant to move for leave to amend in accordance with the statute. Other matters pertaining to the pleadings, not now pertinent, were disposed of by the opinion on that appeal. The second appeal was from the denial, as a matter of law, of the motion to amend, on the ground that the motion had not been made in time. It was held here that the Superior Court had power to entertain the motion, and that the refusal to do so as a matter of law was error.

Thereafter motion was made before the clerk for leave to file an amendment to the answer. The motion was allowed by the clerk and the plaintiff excepted and appealed to the judge. The matter finally came on for hearing at the November Term of the Superior Court of the county before Judge Phillips, who, after hearing the arguments of counsel for plaintiff and defendant, and being of opinion that it would not be in the furtherance of justice to allow the proposed amendment, in his discretion, denied the defendant's motion for leave to file the amendment.

The defendant having admitted all the allegations of the complaint, and the demurrer to his affirmative defense having been sustained, the court thereupon rendered judgment on the pleadings for the amount alleged in the complaint. The defendant appealed.

Gover & Covington and Hugh L. Lobdell for plaintiff, appellee.
Pritchett & Strickland for defendant, appellant.

DEVIN, J. This case comes to us upon appeal by defendant from an order of the court below denying his motion for leave to file amendment to his answer, and from judgment on the pleadings for plaintiff.

It was admitted in the pleadings that in an action duly constituted in the Supreme Court of the State of New York, a court of general jurisdiction, wherein Francis A. Cody was plaintiff and Herman W. Booth and George I. Hovey were defendants, judgment was rendered that plaintiff recover of defendant the sum of money alleged. It was also admitted that defendant Hovey was duly served with process in that case, and that he answered, appeared and defended on the merits; that the trial resulted in verdict and judgment for plaintiff; that defendant appealed to the Appellate Division of the Supreme Court of New York, and that the judgment of the trial court was affirmed, April, 1938. No part of the judgment has been paid. The case is reported, without opinion, in 4 N. Y. S. (2), 187, under the title of "Francis A. Cody *v.* Herman W. Booth, defendant, impleaded with George I. Hovey, appellant."

The defendant having admitted all the allegations of the complaint, and relying solely upon the affirmative defense set up in his answer, when the demurrer to that defense in the answer was sustained, the defendant was left defenseless, and, nothing else appearing, the plaintiff was entitled to judgment on the pleadings. Therefore, the defendant seeks to have us reverse the ruling of the court below denying his motion for leave to file the amendment to his answer.

The denial of defendant's motion for leave to file amendment to his answer was specifically declared to be in the exercise of the discretion of the court. When discretion to do or not to do an act is vested in the court, its exercise may not be called in question, unless it clearly appears that there has been an abuse of the discretionary power. It was said in *Osborne v. Canton, ante*, 139: "Decisions of the Court are uniform in holding that after time for answering a pleading has expired, an amendment thereto may not be made as of right, but it is a matter which is addressed to the discretion of the court and its decision thereon is not subject to review, except in case of manifest abuse." *Biggs v. Moffitt*, 218 N. C., 601, 11 S. E. (2d), 870; *Hogsed v. Pearlman*, 213 N. C., 240, 195 S. E., 789; *Church v. Church*, 158 N. C., 564, 74 S. E., 14.

In this case we find nothing in the record before us that would require us to hold that the denial of defendant's motion was characterized by abuse of the judicial discretion vested in the judge below. *Hensley v. Furniture Co.*, 164 N. C., 148, 80 S. E., 154. Defendant's exception on that ground cannot be sustained.

The point is made that the clerk, who first heard defendant's motion for leave to file amendment to his answer, allowed the motion, and that the judge heard the matter upon appeal from the ruling of the clerk. But that did not deprive the judge of the power to decide the matter in his discretion when it was properly brought before him. The clerk's ruling, in vacation, upon a motion in a civil action pending in the Superior Court, could not fetter the power of the judge upon appeal duly taken from such ruling. The cause was in the Superior Court and when the matter came before the judge for review his jurisdiction to hear and determine was not derivative. He had the power to consider it *de novo*. *Caldwell v. Caldwell*, 189 N. C., 805, 129 S. E., 329; *In re Estate of Wright*, 200 N. C., 620, 158 S. E., 192; *Windsor v. McVay*, 206 N. C., 730, 175 S. E., 83; C. S., 637; McIntosh Prac. & Proc., 62; *Hall v. Artis*, 186 N. C., 105, 118 S. E., 901; *Thompson v. Dillingham*, 183 N. C., 566, 112 S. E., 321; *Roseman v. Roseman*, 127 N. C., 494, 37 S. E., 518. While the clerk is given certain powers, under C. S., 403, with respect to procedure in civil actions, in vacation, his action is under the control and supervision of the judge when the matter is brought before him by appeal. *Turner v. Holden*, 109 N. C., 182, 13 S. E., 731; C. S., 547. In *Cushing v. Styron*, 104 N. C., 338, 10 S. E., 258, the clerk denied the motion to amend the affidavit in attachment. The plaintiff in that case appealed to the judge, who remanded the cause. Upon appeal to the Supreme Court, the judge was reversed, and it was held that the case being before the judge by appeal it was his duty to allow or deny the motion in his discretion. The Court said: "The whole action was before him (the judge), and he could grant or deny the amendment of the affidavit in the exercise of sound discretion. The jurisdiction of the whole action, including all the incidental and ancillary proceedings, was that of the court—not that of the clerk thereof; he was acting out of term for the court and as its servant."

Defendant further challenges the correctness of the ruling below on the ground that the appeal from the clerk should have been dismissed for failure to comply with C. S., 635. This position, however, cannot be sustained. It appears that the order of the clerk allowing the motion to amend was dated 18 May, 1940, and the appeal therefrom by the plaintiff was noted at that time. Without objection the appeal was heard at the May Term of the Superior Court of the county by Judge Gwyn, who, after hearing argument by both sides, took the matter under advise-

ment, but did not decide it before leaving the district. Thereafter the case was placed on the calendar and was reached at the November Term, on 2 December, 1940. At that time, without objection, the defendant appeared by counsel and argued the matter before the presiding judge. If there was any irregularity in the procedure by which the appeal came on to be heard by the judge, manifestly defendant has waived any right now to object. The fact that the order setting the matter for hearing 2 December, 1940, was made by the judge out of term is of no consequence, since the parties voluntarily appeared on that date, and full opportunity was afforded defendant to present his cause.

The defendant in his argument in this Court presented the view that his proposed amendment, regardless of the manner and form in which it reached the court, contains allegations of fact which raise the question of the jurisdiction of the court to hear and determine the cause, and that it was necessary for the court to consider it and to find the facts essential to its jurisdiction before rendering final judgment.

While the court below denied defendant's motion for leave to file the amendment, still, by virtue of the defendant's appeal, the proposed amendment is in the record, and we have examined it and noted the allegations of pertinent facts therein stated. It is substantially alleged that the transactions and dealings upon which the New York judgment was based were purely gambling transactions and gambling contracts, mere wagering upon the rise and fall of the market prices of certain stocks, and that there were no actual purchases or sales or deliveries of securities nor intention that there should be actual purchases or deliveries, nor were the contracts in regard thereto in accord with the rules of any exchange where the securities were dealt in. It is apparent that the transactions, as alleged, come within the definition of transactions and dealings denounced by C. S., 2144. While the gambling transactions described are alleged to have taken place between plaintiff and Herman W. Booth and the connection of this defendant therewith does not appear, it is alleged that the judgment of the New York court against this defendant was based upon those transactions.

The statute, C. S., 2144, after defining gambling contracts, contains this provision: "Nor shall the courts of this state have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract." Defendant relies upon this clause in the statute as sufficient to deprive the court of power to entertain plaintiff's action and to render void the judgment entered therein.

It is declared in Art. IV, sec. 1, of the Constitution of the United States that, "Full faith and credit shall be given in each state to the . . . judicial proceedings in every other state," but this would not prevent a state from withdrawing the jurisdiction of its courts from an

action to enforce a judgment rendered in another state when it is made to appear clearly that the judgment was awarded on transactions forbidden by the public policy or statute law of the state, and that the question of the illegality of such transactions had not been raised, considered or determined in the court of the original forum. This is the principle enunciated by this Court in *Mottu v. Davis,* 151 N. C., 237, 65 S. E., 969; *Williamson v. Jerome,* 169 N. C., 215, 85 S. E., 300.

We quote from the well considered opinion of *Hoke, J.,* in *Mottu v. Davis, supra,* as follows: ". . . we are clearly of opinion that the legislation relied upon by defendant for his protection (Rev., 1689, now C. S., 2144) is not available for that purpose on the facts presented here, and for the reason indicated, that on pleas properly entered in the Virginia court the very question was raised whether the plaintiff's demand arose out of a gaming transaction, and on investigation had was determined against the defendant; and when this occurs, as indicated in *Fauntleroy v. Lum, supra* (210 U. S., 230), an erroneous ruling of the trial court would be an error of law, to be corrected only by some procedure in the court rendering the judgment; and while the judgment stands unreversed and unassailed, it comes directly within the protection of Article IV, sec. 1, its recognized and established purpose being to prevent any question in the domestic court as to the validity of a claim which had been considered and adjudged in the courts of another state." *Provision Co. v. Davis,* 191 U. S., 373; *Milwaukee County v. White Co.,* 296 U. S., 268; *Adams v. Saenger,* 303 U. S., 59.

The defendant alleged in his proposed amendment that there is no statute in New York comparable to C. S., 2144, and that therefore he could not plead same in defense to the action in the New York court. An examination of the New York statutes, however, reveals that there are general provisions in the statutes of that state declaring all wagers made to depend upon any chance or contingent event to be unlawful, and that all contracts for or on account of any money or property so wagered shall be void. By ch. 40 of the Consolidated Laws of New York (Penal Law), sec. 390, it is provided, in effect, that any person who shall make any contract respecting the purchase or sale of securities or commodities, intending that such contract shall be terminated or settled according to or on the basis of market quotations or prices on any exchange, and without intending a *bona fide* purchase or sale of same, shall be guilty of a criminal offense. In *Weld v. Postal Telegraph-Cable Co.,* 199 N. Y., 88, it was said: "If the transactions between the plaintiffs and their clients or customers were mere wagering contracts, they are void under the statutes of this state and the general law of the land. The generally accepted rule upon this subject can be very simply stated. A man may lawfully sell goods or stocks for future delivery, even though he has none

in his possession, if he really intends and agrees to deliver them at the appointed time. Such a transaction constitutes a valid contract, which is enforceable in the courts. But a man may not, under the guise of such contract, enter into a naked speculation upon the rise or fall of prices, in which there is to be no delivery of property, and no payment except such as may be necessary to provide for differences arising purely from market fluctuations. Such a transaction is a mere wager, which is condemned alike by statute and public policy. (*Embrey v. Jemison*, 131 U. S., 343; *Bigelow v. Benedict*, 70 N. Y., 202; *Hurd v. Taylor*, 181 N. Y., 231.)" This statement of the law was quoted with approval in *Brooks v. People's Bank*, 233 N. Y., 87. See, also, *Zeller v. Leiter*, 189 N. Y., 361.

It is apparent that, under the New York statutes as interpreted by the court of last resort of that state, the plea that the transactions sued on constituted wagering contracts was open to the defendant as a defense if he had opportunity to present it.

Applying these principles of law to the facts shown by the record before us, we reach the conclusion that the ruling of the court below, in its discretion, in denying the defendant's motion for leave to file amendment to his answer, must be upheld, but that the facts alleged in the proposed amendment presented to the court raised questions pertaining to the jurisdiction of the court and its power to render final judgment in the cause. It is in the nature of a plea to the jurisdiction. It cannot be disregarded even though leave to file it as an amendment to an answer was denied. Jurisdiction cannot be conferred by failure of defendant to plead it properly. *Randolph v. Heath*, 171 N. C., 383, 88 S. E., 731. It was the duty of the judge to consider and determine the facts affecting the jurisdiction of the court before proceeding to render final judgment.

Hence, the cause must be remanded in order that the judge presiding in the court below may find the facts as to whether the plaintiff's claim against defendant Hovey was based upon gambling transactions coming within the definition set out in C. S., 2144, and, if so, whether or not this question was raised by appropriate pleas in the trial of the case in the New York court. If the defendant raised the question by proper plea, and judgment was rendered after investigation had in such case, the judgment would be conclusive here while it stood unreversed in the court where rendered. *Mottu v. Davis, supra; Roberts v. Pratt*, 152 N. C., 731, 68 S. E., 240. Manifestly if the question was litigated in that trial and determined against the defendant, he could not now complain, and his plea to the jurisdiction would have no ground upon which to rest. If, however, it be found by the court, upon consideration of the evidence presented, that plaintiff's cause of action was based on gaming transactions as defined by the statute, and that defendant did not have

opportunity in the original forum to present his defense on that ground, or if his failure to plead the illegality of the transactions sued on was not conclusive in the New York courts, and for that reason the defense now set up was not raised and the matters upon which it is based were not considered or concluded in the New York court, his plea that the jurisdiction of the North Carolina court had been by the statute withdrawn from plaintiff's action would be available to the defendant in support of his exception to the judgment rendered below.

So much of the judgment of the court below as denies the motion for leave to file amendment to the answer is affirmed, but the cause is remanded for further proceeding in accord with this opinion.

Error and remanded.

FRANK D. PERRY AND JULIAN H. RUMLEY v. S. W. MORGAN. C. K. HOWE AND JOEL H. DAVIS.

(Filed 9 April, 1941.)

1. Deeds § 18—

The statute providing for the registration of land under the "Torren's System" is not in derogation of common right but is of a remedial character, and should be liberally construed according to its intent. Michie's Code, 2377, *et seq.*

2. State Lands § 1a—

All vacant and unappropriated lands belonging to the State, with certain well defined exceptions, are subject to entry and grant, C. S., 7540, *et seq.*, and when there are successive grants of the same land, the prior grant prevails.

3. Boundaries § 3—

A patent ambiguity cannot be explained by parol, a latent ambiguity can.

4. Same: State Lands § 1b—

The description in the State grant under which defendants claim in this case *is held* sufficiently definite to be aided by parol, and defendants' parol evidence as to its location *is held* sufficient to be submitted to the jury.

5. Boundaries § 1—

The meaning of a deed as to what land it covers and what estate it conveys are questions of law for the court, where the boundaries are on the land is a question of fact for the jury.

6. Deeds § 18: State Lands § 1b—In this proceeding for registration of land under "Torren's System," exceptions held to raise issue of fact for jury.

In this proceeding for the registration of land under the "Torren's System," defendants' evidence of claim under a prior State grant and parol evidence in explanation of a latent ambiguity as to the location of the land

embraced in the grant, *is held* sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants' exception to the refusal of the court to submit an issue to the jury as to whether petitioners are the owners of the land and entitled to have title thereto registered under the statute, is sustained. Michie's Code, 2387, subsec. 3.

7. State Lands § 1a—

While lands covered by navigable waters are not subject to State grant, defendants' evidence tending to show that the *locus in quo* is not covered by navigable waters *is held* sufficient to raise issue of fact for the determination of a jury.

APPEAL by C. K. Howe and Joel H. Davis, defendants, respondents, from *Thompson, J.*, at November Term, 1940, of CARTERET. New trial.

The petitioners, Frank D. Perry and Julian H. Rumley, filed a petition in the Superior Court of Carteret County to have the title to certain lands claimed by them registered and brought under the operation and provisions of chapter 90 of the Public Laws of 1913, as amended, which is now chapter 47, N. C. Code, 1939 (Michie), chapter designated "Land Registrations." The respondents Howe and Davis filed separate answers.

The petitioners plaintiffs claimed title by reason of two grants to them by the State of North Carolina, one dated 6 May, 1937, and the other dated 19 July, 1937.

The respondents claim title to the same land under grant issued by the State of North Carolina to Joel H. Davis and Joe P. Roberson, dated 25 October, 1853, and recorded in Book AA, at page 223, office of the register of deeds for Carteret County.

The matter was referred to Hon. R. A. Nunn, as examiner of title, and was heard by him. At the hearing of the matter, evidence was submitted by both petitioners and respondents in support of their claims and the respondents especially claimed the petitioners had no title to the land for the reason that the lands claimed by them under their grants were the same lands as were granted to Joel H. Davis and Joe P. Roberson by grant dated 25 October, 1853.

The report of the examiner of title was duly filed decreeing the petitioners owned the land and were entitled to have title registered. To this report the respondents, Howe and Davis, filed their exceptions, as provided by section 2387, subsection 3, North Carolina Code, 1939, and requested the court to submit the following issue to the jury: "Are the petitioners the owners and entitled to have title to the lands described in the petition registered, as provided by law?"

N. C. Code, *supra*, ch. 47, sec. 2387, subsec. 3, is as follows: "Exceptions to Report—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the

judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the supreme court, as in other special proceedings."

The court refused to submit the issue of fact properly requested, and dismissed the exceptions of the respondents and signed judgment, confirming and approving the examiner of title's report, his finding of facts and conclusions of law; to which the respondents excepted, assigned error and appealed to this Court. The material exceptions and assignments of error will be set forth, with the necessary facts, in the opinion.

J. F. Duncan, W. B. R. Guion, R. E. Whitehurst, and John A. Guion for plaintiffs.

D. M. Clark and C. R. Wheatley for defendants.

CLARKSON, J. The proceeding resorted to by plaintiffs, petitioners, is known generally as the Torren's Law. The principle of the "Torren's System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. This statute is not in derogation of common right, but is of a remedial character, and should be liberally construed according to its intent. *Cape Lookout Co. v. Gold*, 167 N. C., 63; *Mfg. Co. v. Spruill*, 169 N. C., 618; *Dillon v. Broeker*, 178 N. C., 65.

The court below rendered judgment and decree of registration for plaintiffs. In the judgment is the following: "The above entitled cause coming on to be heard at the November Term, 1940, of Carteret County Superior Court, upon the pleadings and the report of Hon. R. A. Nunn, Examiner of Titles, and upon the exceptions thereto filed by the respondents C. K. Howe and Joel H. Davis, and the Court having heard the evidence and the findings of fact and conclusions of law and examined the Exhibits introduced in evidence and having heard full argument by counsel for petitioners and respondents and thereupon being of the opinion upon the evidence that no issue of fact arises and that it would

be improper to submit any issue to the jury; and upon such full consideration of the record the Court finding the title to the land described in the petition to be in the petitioners and finding that said petitioners are entitled upon the record to a decree of registration of their title to said land; It Is Thereupon Ordered and Adjudged," etc.

The plaintiffs, petitioners, present the following questions for our determination: Was there any evidence warranting submission of an issue as to the location of a grant of 25 October, 1853, issued by David S. Reid, Governor, under which appellants claim. We think so.

The defendants, respondents Howe and Davis, excepted to the examiner's finding of facts on the ground that sufficient and competent evidence was presented at the hearing to the fact that the land upon which the U. S. Government deposited the material as dredged from the channel was an addition to the island of marsh already existing and within the boundary lines of the grant by the State of North Carolina to Joel H. Davis and Joe P. Roberson, dated 25 October, 1853, and recorded in Book AA, at page 223, office of the register of deeds for Carteret County. That the grants to Perry and Rumley, dated 6 May and 19 July, 1937, by Clyde R. Hoey, Governor, was the land within the boundaries of the grant to Davis and Roberson in the year of 1853. The respondents, Howe and Davis, excepted to the examiner's conclusions of law for the reason that they were erroneous and not in accordance with the evidence. The lands set forth in the petition had been granted by the State of North Carolina to Joel H. Davis and Joe P. Roberson on 25 October, 1853, and therefore could not be granted to the petitioners in 1937. That the State is without power to make a grant of land which has already been granted and in the event such a grant is made, the same is void.

In *Janney v. Blackwell,* 138 N. C., 437 (438-9), is the following: "The statutes in force in this State for more than a century have permitted 'all vacant and unappropriated lands belonging to the State' (with certain well defined exceptions) to be entered and grants taken therefor. Code, section 2751. 'To be subject to entry under the statute, lands must be such as belong to the State and such as are vacant and unappropriated.' *Hall v. Hollifield,* 76 N. C., 476; *S. v. Bevers,* 86 N. C., 588."

There is no question but that defendants, Howe and Davis, are the successors in title to the grant of 1853 to Joel H. Davis and Joe P. Roberson. The evidence of defendants was to the effect that the land granted was described as follows: "A tract of land containing fifty acres, lying and being in the County of Carteret on the East side of Newport Channel and Northeast of Bogue Channel and about South West of Town Marsh beginning on the South side of the mouth of a slue, that

runs on the South side of Reed Marsh where said slue empties into Newport Channel, running thence the various courses of the channel, viz.: South twenty-six degrees West Sixty-eight poles, South five degrees East fifty-eight poles, South forty-seven and a half degrees East eighty poles, South fifty-five degrees East one hundred and ten poles, then North thirty-five degrees East twenty-seven poles, then North fifty-five degrees West one hundred and seven poles, then North forty-seven and a half degrees West sixty-eight poles, then North five degrees West forty poles, then North twenty-six degrees, East sixty poles and thence to the Beginning."

It will be noted that it recites nine courses and distances, it also recites the (1) acreage (fifty), (2) being in the County of Carteret on the East side of Newport Channel, (3) Northeast of Bogue Channel, (4) about Southwest of Town Marsh—Beginning on the South side of the mouth of the slue, that runs on the South side of Reed Marsh where said slue empties into Newport Channel, running thence the various courses of the Channel, etc.

Capt. Geo. J. Brooks, a civil engineer, testified, in part: "I worked for the U. S. Government from 1907 to 1917, until war was declared, and worked in Beaufort Harbor. I know Reed's Creek and Reed's Marsh, and have been through the slough running south of Reed's Marsh and north of Shark Shoal, which is known as Westernhead Slough. (Capt. Brooks examined the map attached to the petition, and Mr. Wheatley read the description from the grant to Joel H. Davis and J. P. Roberson.) . . . The beginning point in the description read by Mr. Wheatley is somewhere in the mouth of the creek, as shown on the map attached to the petition. . . . The mouth of the slough varies from time to time as much as 150 feet; in my time it has changed its location several times as much as 150 feet. . . . On this map attached to the petition, I identify the beginning point called for in the Grant of 1853, read by Mr. Wheatley and locate it where I mark the letter 'A,' and beginning there and following the calls in the description read by Mr. Wheatley, I would say the land described in the Grant of 1853 lies within the boundaries of the grants to Mr. Perry. Since I have known the land I have known it as Shark Shoal with some grass on it and in some places a little land." This is qualified, on cross-examination, that he never attempted to locate the land shown on the map, on the ground.

C. K. Howe testified, in part: "I have been with the U. S. War Department and worked in the department between 1907 and 1912, and surveyed Beaufort harbor and know the territory of Reed's Marsh. I have been through the slough one hundred times or more and once platted Shark Shoal. I made a survey for the U. S. Government in 1908 and

made a map of this part of Beaufort harbor, and this is the map of the survey. The original is in the Wilmington office and this is a copy of it. (The map identified by Mr. Howe is offered in evidence and marked Respondents' Exhibit 1.) . . . The land described in the Grant of 1853 to Davis and Roberson lies within the boundaries of Perry's Grant as shown on map attached to petition. . . . Marsh Island lay in the waters of Newport River. The land described in the Grant of 1853 is bounded by Westernhead Slough, and Newport River, on the east by Sand Shoal, on south by Port Channel. The marsh was filled by material dredged from Port Channel and Marsh Island and shoal was filled in. We were engaged several months in surveying the harbor in 1908, and I have seen Marsh Island at highwater. I don't recall seeing water bushes growing on it. At high tide it was 5 or 6 inches above water. It was an island." (No cross-examination of Mr. Howe.)

There was other corroborating evidence. We think the evidence was sufficient to have been submitted to a jury.

A patent ambiguity cannot be explained by parol, a latent ambiguity can.

In *Hurley v. Morgan*, 18 N. C., 425 (430), *Chief Justice Ruffin*, for the Court, said: "The meaning of a deed as to what land it covers, or as to what estate it conveys, is equally a question of law, and therefore is to be decided by the court. What are the *termini* of the lines, are points of construction; *where they are*, questions of fact. These observations are found in so many cases as to be familiar, without particular references."

We think the present case presented questions of fact to be determined by a jury, both record and parol evidence is permissible to aid in the identification of the *locus in quo*. *Farmer v. Batts*, 83 N. C., 387; *Green v. Harshaw*, 187 N. C., 213; *Bissette v. Strickland*, 191 N. C., 260. The beginning corner and the calls and distances, and other boundary lines in the grant of 1853, *where they are* can be substantially determined by parol evidence.

The second question of plaintiffs, petitioners: "Was land covered by navigable waters at normal high tide subject to entry and grant?" It is well settled that land covered by navigable water is not subject to entry and grant. N. C. Code, *supra*, sec. 7540.

It is also settled, as said in *Ins. Co. v. Parmele*, 214 N. C., 63 (68): "By 'navigable waters' are meant such as are navigable in fact and which by themselves or their connection with other waters, form a continuous channel for commerce with foreign countries or among the states. *U. S. v. The Montello*, 11 Wall., 411, 20 L. Ed., 191; *Miller v. N. Y.*, 109 U. S., 385, 27 L. Ed., 971." See *U. S. v. Appalachian Elec. Power Co.*, decided 16 December, 1940; 85 Law Ed. (Adv. Op.), p. 201.

There was sufficient evidence to be submitted to the jury that the *locus in quo* was not navigable, but subject to entry and grant. C. K. Howe testified: "At high tide it was 5 or 6 inches above water. It was an island." There was other corroborating evidence on this aspect.

It is a pregnant circumstance that the land in controversy was granted by the State in 1853, this would hardly have been if the land was not subject to entry and grant, it not being "navigable waters."

For the reasons given, we think there must be a

New trial.

CLIFFORD WARREN AND LUBY WARREN v. E. L. BREEDLOVE.

(Filed 9 April, 1941.)

1. Trial § 22b—

Upon motion to nonsuit, all the evidence, whether offered by plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Agriculture § 7d: Landlord and Tenant § 15b—Mere intention to breach lease does not constitute breach.

Plaintiffs contended that defendant had breached his farm lease by planting cotton, and that such violation terminated the tenancy under the provisions of the lease. Plaintiffs' evidence was to the effect that defendant had plowed land and put in fertilizer for cotton, but there was no evidence that defendant had actually planted any cotton. *Held:* The mere threat or intimation that defendant would breach the agreement is not a breach, and the evidence is insufficient to show a breach terminating the tenancy.

3. Agriculture § 7a: Landlord and Tenant § 19—

Plaintiffs alleged that they had made demand on their tenant to surrender the premises because of breach of the lease contract. *Held:* Failure of evidence of demand in support of the allegation is fatal to plaintiffs' right to recover possession of the premises.

4. Ejectment § 6b—

In this action in summary ejectment, plaintiffs contended that defendant had breached the terms of the lease contract by planting cotton, entitling plaintiffs under the provisions of the agreement to terminate the tenancy. Plaintiffs' evidence failed to show that defendant had actually breached the lease contract as alleged, and failed to show demand for the surrender of the premises. *Held:* Defendant's motion for nonsuit was properly allowed.

5. Agriculture § 7d: Landlord and Tenant § 7—Lease must be construed most strongly against lessor.

A lease must be construed most strongly against lessor, and when in an agricultural lease no stipulations are made to cover the eventuality of

changes in Federal crop control policies, the landlord is not entitled to declare the lease forfeited because the tenant planted cotton contrary to the terms of the lease when it appears that, because of crop restrictions upon tobacco, the tenant was unable to plant crops upon the same basis as he had planted them during the prior year as required by the lease.

APPEAL by plaintiffs from *Bone, J.*, at October Term, 1940, of SAMPSON. Affirmed.

This is an action in summary ejectment, brought by plaintiffs against defendant. The plaintiff introduced the following evidence:

"The plaintiff maketh oath, that the defendant entered into the possession of a piece of land in said County adjoining the lands of Jessie B. Lee and others containing 86 acres, under a lease from the plaintiffs, Clifford and Luby Warren; that the term of defendant expired on the 23rd day of March, 1940; that the plaintiff has demanded the possession of the premises of the defendant, who refused to surrender it, but holds over; that the estate of the plaintiff is still subsisting and the plaintiff asks to be put in possession of the premises. Clifford Warren, Plaintiff. (Duly verified.)"

Return to Notice of Appeal: "An appeal having been taken in this action by the defendant, E. L. Breedlove, I, Carlisle Jackson, the Justice of the Peace before whom the same was tried, in pursuance of the notice of appeal, do hereby certify and return that the following proceedings were had by and before me in this said action:

"On this 2nd day of April, 1940, at the request of the plaintiff, Clifford Warren, I issued a summons in his favor and against the defendant, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place the parties appeared.

"The plaintiff complained he did not rent to E. L. Breedlove any crops for the year 1940, and brought ejectment proceedings for possession, and the Court gave defendant possession for the year 1940, *and that he was to have the same crops for the year 1940 that he had for 1939*, and did not have any cotton for 1939, and on the first of April, 1940, the plaintiff received a letter from defendant, that he was going to plant all the cotton he could tend up to forty and one-half acres, and buy fertilizers and have same charged to Clifford and Luby Warren, and on the 2nd of April he went to the farm of E. L. Breedlove and found him plowing and putting out fertilizers, for cotton, and that he, E. L. Breedlove, had breached his contract.

"The defendant contends that he rented a farm from plaintiffs for the year 1939 and 1940; that he did not rent or tend any crops of cotton for the year 1939, but Mr. Warren told him if the sign-up came up next year that he could have some cotton, and, on those grounds, he wrote Mr. Warren that he was going to tend the cotton on which there was

forty and one-half acres of cotton allotted for the farm he was tending.

"I rendered judgment in favor of plaintiffs, Clifford and Luby Warren, and against E. L. Breedlove for possession of premises, together with $8.00 cost of this action.

"I also certify that on the 18th day of April, 1940, the appellant paid me my fee of thirty cents for making my return.

"All of which I send, together with the process and other papers in the cause. Dated this 20th day of April, 1940. Carlisle Jackson, Justice of the Peace."

The judgment in the Superior Court was as follows: "The above entitled cause coming on to be heard and being heard before His Honor, Walter J. Bone, Judge Presiding, and a jury, and it appearing to the Court that at the close of the evidence, the plaintiffs had not made out a case sufficient to go to the jury, and that counsel for defendant thereupon made motion for judgment of nonsuit; and it appearing to the court that the defendant is entitled to such judgment, said motion is allowed, to which ruling the plaintiff excepts. It is thereupon considered, ordered, and adjudged by the Court that the above entitled cause be and the same is hereby nonsuited, and the plaintiffs are taxed with the cost of the action. Walter J. Bone, Judge Presiding."

From the foregoing judgment the plaintiffs excepted, assigned error and appealed to the Supreme Court. The exceptions and assignments of error of plaintiffs, and other necessary facts, will be set forth in the opinion.

Butler & Butler for plaintiffs.

D. C. Wilson and P. D. Herring for defendant.

CLARKSON, J. At the close of plaintiffs' evidence the defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The court below sustained the motion and in this we can see no error.

The plaintiff Clifford Warren testified, in part: "On November 20, 1939, I gave notice to Mr. Breedlove to vacate the premises at the end of the 1939 crop year. I went to see him and told him I wanted to rent him the farm if I could, because it was time to rent it, if it was going to be rented, and he told me that he had the farm rented for two years, and that he was not going to rent it again."

The latter part of 1939 plaintiffs brought an action of ejectment before a justice of the peace to dispossess defendant. The defendant claimed that he had rented the land for two years, 1939 and 1940. The justice of the peace decided in favor of defendant and plaintiffs took no appeal.

Plaintiff Clifford Warren further testified: "During 1939, the defendant and myself got along nicely. He treated me all right. He worked hard and paid me $1,500.00 or something for my part, and I would not swear he didn't pay me over $2,000.00."

The defendant furnished two mules to work the crops. Plaintiffs had a chattel mortgage on same. Defendant had paid plaintiffs the price of one mule and interest in the 1939 settlement. Plaintiff testified: "After our 1939 settlement, I suggested to Mr. Breedlove that there be a contract drawn up between us for 1940. Mr. Breedlove said, 'I have already made my contract with you, and I am going to stick to mine, and you stick to yours!'"

In planting the crop in the spring of 1940, defendant had broken up around 20 acres of land and had fixed his plant beds for tobacco. Fertilizer was sent defendant by plaintiffs to finish planting his corn for 1940.

The plaintiffs and defendant wrote letters setting forth their respective rights in regard to the 1940 crops. In April, 1940, plaintiffs brought a second ejectment (the present) suit against defendant to dispossess him. The justice of the peace decided in favor of plaintiffs, the defendant appealed to the Superior Court, and the justice of the peace required a $1,500 bond for the rent, which defendant was unable to give. Plaintiffs took claim and delivery for the mules and possession of the crops that defendant had planted and also the farming implements which were plaintiffs', and left defendant without anything to farm. The defendant when ejected had planted 12 acres in corn and 10 acres in wheat, and has never received anything for the corn and wheat. In dispossessing defendant in the spring of the year everything was taken, and he and his wife and several children were turned out of house and home.

The contract between plaintiffs and defendant for 1939, which applied to 1940, was on the same terms. In 1939 there was no tobacco control and defendant planted about 15 to 18 acres of land in tobacco. Plaintiff testified: "There was no provision made between us in case of control of tobacco for 1940." In 1940, 3.6 acres was all the tobacco allotment made on this particular farm by the Government. Defendant claimed that in lieu of tobacco for 1940, the 40.05 cotton allotment he should be permitted to plant. Plaintiffs denied defendant this right and insist here that the threat to plant cotton forfeited the lease. When the ejectment proceeding was instituted, plaintiffs contend that defendant had made arrangements to plant cotton and had said he would, and had purchased the fertilizer. But plaintiff testified: "I could not swear of my own knowledge that Mr. Breedlove was going to plant cotton."

N. C. Code, 1939 (Michie), sec. 2365, in part, is as follows: "Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and

continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in either of the following cases: 1. When a tenant in possession of real estate holds over after his term has expired. 2. When the tenant or lessee, or other person under him, has done or omitted any act by which according to the stipulations of the lease, his estate has ceased," etc.

The basis and scope of summary ejectment in actions between landlord and tenant are established by sec. 2365, *supra*. The only section of said statute which could possibly fit the facts in this case is subsection 2.

Plaintiff testified: "Q. Your reason for getting him out now is that he planted some cotton; will you tell this jury if this man planted one bale of cotton? Ans.: No. He has made an effort to plant cotton, of my own knowledge, by putting out fertilizer." No demand was made by plaintiffs on defendant to surrender the premises. The affidavit so states, but there was no evidence to the effect.

Upon a motion of nonsuit, all the evidence, whether offered by the plaintiff or elicited from defendant's witnesses, is to be considered in the light most favorable to the plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

There was no sufficient evidence to be submitted to the jury that the plaintiffs made a demand on defendant to surrender the premises or that defendant had ever planted cotton, and in so doing breached his contract with plaintiffs. Defendant said he would, but he had not when this action was instituted. Defendant could change his mind, there was a *locus poenitentiae*. Plaintiffs jumped before they were spurred. A mere gesture of a breach does not constitute a breach.

In another aspect of the case, plaintiffs are barred from recovering. A lease is construed most strongly against the lessor. Here the lessor made no stipulation covering the eventuality of changes in Federal Crop Control policies, but contracted with defendant for the farming of a specific area and specific crops. Defendant correctly insists upon his rights under the contract. Plaintiffs must suffer any inconvenience resulting from their lack of foresight in failing to provide for adjustments in line with Government allotments later to be made.

In the language of the statute, *supra*, and evidence, we think that the defendant tenant has done no act or omitted to do any act by which, according to the stipulations of the lease, his estate has ceased.

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

Affirmed.

MRS. ETTA JORDAN, ADMINISTRATRIX OF C. T. JORDAN, DECEASED, *v.* PHILLIP GLICKMAN.

(Filed 9 April, 1941.)

1. Evidence § 45a—Ordinarily, testimony must be confined to statements of fact, and opinion evidence is competent only in well defined exceptions.

As a general rule, the testimony of a witness must be confined to statements of concrete fact within his own knowledge, observation and recollection, even when he is testifying as to matters within the common knowledge and experience, with exceptions permitting in evidence the conclusions and opinions of witnesses when the facts involved call for special skill and study, or when the facts are incapable of being clearly and adequately described.

2. Evidence § 48b: Death § 7—Nonexpert witness held incompetent to testify that injuries received by intestate caused his death.

In this action for wrongful death, the mother of intestate testified as to bruises and cuts on his body after the accident in suit, but her testimony that the injuries resulted in intestate's death, which occurred almost four months after the accident, was excluded. *Held:* Plaintiff's exception to the exclusion of the nonexpert opinion testimony cannot be sustained, since it does not fall within any of the exceptions to the general rule excluding conclusions and opinions of witnesses.

3. Same: Evidence that injuries sustained in accident caused intestate's death held sufficient for jury.

In this action for wrongful death, the evidence tended to show that defendant negligently drove his car into a wagon in which intestate was riding, hurling intestate to the ground and injuring him. Intestate's mother and father testified as to the injuries sustained by intestate at the time of the collision, that he complained of pains in his chest on the afternoon he was hurt, and testified that intestate's chest began to swell and continued to grow larger and larger, that he had no such pains or swelling before the collision, and that his condition continued to grow worse until he died a little less than four months after the accident. *Held:* Proof of the cause of death is not confined to expert opinion evidence, and the testimony is sufficient to be submitted to the jury upon the question of whether the injuries sustained by intestate in the accident caused his death.

CLARKSON, J., concurring in result.

APPEAL by plaintiff from *Carr, J.*, at October Term, 1940, of LEE.

Gavin, Jackson & Gavin for plaintiff, appellant.
No counsel for defendant, appellee.

SCHENCK, J. This is an action for the wrongful death of the plaintiff's intestate alleged to have been proximately caused by the negligence of the defendant.

There was evidence tending to prove that on 1 December, 1939, the intestate, a youth of fourteen years of age, was riding in a wagon driven southward by his father on U. S. Highway No. 1, about six miles north of Sanford; that at the same time the defendant's automobile, in which he was riding, was being driven in the same direction on the same highway; that the driver of the wagon drove to his left across said highway to enter a private road to his home, and after he had traversed the greater portion of said highway and all of the wagon, except two or three feet of the rear thereof, was off the hard surface, the defendant's automobile, driven at an unlawful and negligent rate of speed and on its left side of the highway, struck the wagon and hurled the plaintiff's intestate to the ground; that the said intestate was injured by his impact upon the hard surface; and that said intestate died on 29 March, 1940.

When the plaintiff had introduced her evidence and rested her case the defendant moved to dismiss the action and for a judgment as in case of nonsuit. C. S., 567. The motion was allowed, and from judgment accordant therewith, the plaintiff appealed, assigning error.

According to the plaintiff's brief, the only question presented is: "Did the court err in excluding the evidence of the witness Mrs. C. J. Jordan, and (in) sustaining defendant's motion of nonsuit at the close of plaintiff's evidence?" (for want of evidence of proximate cause).

Mrs. C. J. Jordan, mother of the intestate, C. T. Jordan, a lad of fourteen years, testified substantially that she saw her son later in the afternoon of the same day on which the collision between the wagon in which he was riding and the automobile of the defendant took place, that he was bruised and cut about the face, his arms and hips and chest were swelling, he had severe pains in his chest, and that she dressed his wounds and rubbed his chest with liniment and poulticed it, he grew worse; he was unable to sleep and sat up most of the nights, his chest seemed to give him the most trouble, it was swelling when the witness got home the evening he was hurt and continued to swell and at the time of his death it stuck way out; he was not in that condition before the injury, he had a normal chest, was in good health and was unusually active; he was taken to the hospital for about a month and when he returned home he was unable to be up or out and could not sleep lying down, he could not get his breath, "I give him the medicine the doctors prescribed and rubbed his chest and put poultices on it. Nothing helped him I did. He died March 29, 1940."

The witness, Mrs. C. J. Jordan, was then asked if she had an opinion satisfactory to herself as to what caused the death of her son, and if so, what it was. Objections to these questions were sustained, and such ruling is assigned as error by the appellant. It appears from the record that if the witness had been permitted to answer she would have stated

that she had such an opinion, and it was that the death of her son "was caused from the injury received when the automobile collided with the wagon. It hurt his chest and affected his heart in such way that I could tell it was the same condition that was produced by the injury that continued to grow worse until he died from it. He was able to work and to eat, play and sleep before his injuries. He was not able to do either after that and ate very little and got to the place he could not eat anything hardly."

It is a fundamental principle of the law of evidence as administered by our courts, both in civil and criminal cases, that the testimony of witnesses upon matters within the scope of common knowledge and experience of mankind, given upon the trial of a case, must be confined to statements of concrete facts within their own observation, knowledge and recollection. While there are exceptions to this rule which admit in evidence the conclusions and opinions of witnesses when the facts involved in the issue call for special skill and study, or when such facts are incapable of being clearly and adequately described, we do not think that the opinion evidence of Mrs. Jordan sought to be introduced by the plaintiff falls within the exceptions, and therefore we hold there was no error in sustaining the defendant's objection thereto.

However, we are of the opinion, and so hold, that there was evidence, other than the opinion evidence of Mrs. Jordan, that the death of the plaintiff's intestate resulted from the injury he received when the wagon in which he was riding was struck by the defendant's negligently operated automobile. The testimony of Mrs. Jordan as to the extent of the physical injuries sustained by her son at the time of the collision, her detailed description of the injury to his chest, and the progress of the illness resulting, and of how immediately after the injury the boy's chest began to swell and continue to grow worse until he died, together with the testimony of C. J. Jordan, the father of the intestate, who was driving the mule to the wagon in which the intestate was riding at the time the automobile of the defendant collided with it, to the effect that the intestate was bruised and hurt about the chest, that his chest began to swell and he complained of it and could not sleep, that his wife put liniment on the intestate's chest, that the intestate went to school only intermittently until about Christmas, and that his condition grew worse and worse until he was carried to the hospital in January, 1940, where he stayed about four weeks and was brought home and was never able to get up again, that the witness noticed that the intestate's chest grew larger and larger and it stuck out, and that he died 29 March, 1940, affords some evidence that the death of the intestate was proximately caused by the injury received in the collision; and since this was more than a scintilla of competent evidence that the proximate cause of the

death was such injury the case should have been submitted to the jury. *Harper v. Bullock,* 198 N. C., 448, 152 S. E., 405.

We do not subscribe to the doctrine that the cause of death can be proven only by the opinion of a physician, or other expert witness. *Harper v. Bullock, supra.* The parents who had kept constant vigil over their wounded child for four long months, who had observed the swelling in his chest and had heard him complaining of pains in his chest on the same afternoon of the collision in which he was hurt, and saw his chest continue to swell throughout his illness, who knew that he had no such pains or swelling before the collision, and saw him gradually grow worse and die, we apprehend could (and in this case did) testify to sufficient facts to sustain an inference drawn by the jury that the injury received in the collision was the proximate cause of their child's death.

There was error in granting the motion for judgment as in case of nonsuit.

The judgment of the Superior Court is

Reversed.

CLARKSON, J., concurring in result: It was in evidence that the witness, Mrs. C. J. Jordan, was asked if she had an opinion satisfactory to herself as to what caused the death of her son, and if so, what it was. Objections to these questions were sustained, and such ruling is assigned as error by the appellant. It appears from the record that if the witness had been permitted to answer she would have stated that she had such an opinion, and it was that the death of her son "was caused from the injury received when the automobile collided with the wagon. It hurt his chest and affected his heart in such way that I could tell it was the same condition that was produced by the injury that continued to grow worse until he died from it. He was able to work and to eat, play and sleep before his injuries. He was not able to do either after that and ate very little and got to the place he could not eat anything hardly." This was the testimony of the mother who watched the condition of her son from the time of his injury until his death. I concur in the view that there was sufficient evidence to carry the case to the jury, but do not agree that the evidence of the opinion of Mrs. Jordan was incompetent.

In 20 American Jurisprudence, under the head of Evidence, part sec. 859, pp. 719-720, is the following: "Nonexpert.—The opinions of lay or nonexpert witnesses who are familiar with a person whose physical condition is in question and have had opportunity for observing him are competent evidence on issues concerning the general health, strength, and the bodily vigor of such person, his feebleness or apparent illness, or changes in his apparent state of health or physical condition from one

time to another. Lay witnesses have been permitted to testify that a person looked bad, that he looked feeble, that he was lame or could scarcely walk, that he appeared to be very sick, and that he was so ill as to be beyond asking anything or in a condition to know anything." *Farming Co. v. R. R.*, 189 N. C., 63 (69); *Street v. Coal Co.*, 196 N. C., 178 (183); *McCord v. Harrison-Wright Co.*, 198 N. C., 742 (745-6); *Keller v. Furniture Co.*, 199 N. C., 413 (417); *Teseneer v. Mills Co.*, 209 N. C., 615 (622); *Pack v. Katzin*, 215 N. C., 233 (235). The evidence was competent, the probative force was for the jury.

EDNA LAUGHRIDGE, JOHN LAIL, ERNEST LAIL, PAULINE ZIMMERMAN, ELLIS ZIMMERMAN, CLAUDE ZIMMERMAN, THE LAST FOUR BY THEIR DULY APPOINTED NEXT FRIEND, J. H. LAUGHRIDGE, v. VIRGINIA-CAROLINA JOINT STOCK LAND BANK, INC., JULIUS INGLE, BUTLER GILES, JOHN STROUPE AND MATTIE FOGLE, ADMINISTRATRIX OF W. F. FOGLE, DECEASED.

(Filed 9 April, 1941.)

1. Election of Remedies § 6: Partition § 10—

Where, after sale for partition, the tenants in common who failed to receive their *pro rata* part of the sale price of the lands, elect to ratify the sale and sue for their *pro rata* share of the sale price, such election eliminates all question of title and the validity of the partition proceedings.

2. Partition § 10: Mortgages § 17—Where purchaser at partition sale borrows purchase price under deed of trust, cestui is not under duty to see to proper application of proceeds of loan.

Minor tenants in common, who failed to receive their *pro rata* part of the proceeds of the partition sale, elected to ratify the sale and sought to recover the amount due them from the sale price. It appeared that the purchaser at the partition sale, who was one of the tenants in common, borrowed the purchase price and secured the loan by a deed of trust on the property. After default the deed of trust was foreclosed, but the purchaser at the foreclosure sale was not made a party to the action. There was no evidence that the *cestui* had any connection with the partition proceeding, which was practically completed before the loan was made, nor that the loan was ever repaid, nor that the *cestui* had any notice that the proceeds of the partition sale had not, or would not be properly distributed. *Held:* The evidence does not sustain the finding of the lower court that the *cestui* was the purchaser of the *locus in quo*, and judgment that the *cestui* is liable to plaintiffs for their *pro rata* part of the proceeds of the partition sale is reversed.

3. Appeal and Error § 37e—

Where the court's findings of fact are not supported by the evidence, the findings are not conclusive and the judgment based on such findings is erroneous.

LAUGHRIDGE v. LAND BANK.

APPEAL by defendant Virginia-Carolina Joint Stock Land Bank from *Phillips, J.*, at September Term, 1940, of BURKE.

Mull & Patton for plaintiffs, appellees.

Worth & Horner for defendant Virginia-Carolina Joint Stock Land Bank, appellant.

SCHENCK, J. This is an action to recover the *pro rata* share of the plaintiffs in the amount contracted to be paid for a tract of land of 66.34 acres, in Icard Township, Burke County, North Carolina.

Upon motion of the plaintiffs the cause was referred to C. E. Cowan, Esquire.

The referee found as facts that the plaintiffs were formerly tenants in common and owners of two one-sixth interests in the *locus in quo;* that in a special proceeding, in which the petitioners were the adult tenants in common and the plaintiffs herein (who were minors) were the respondents, the *locus in quo* was ordered sold for partition, that John C. Stroupe was appointed commissioner to make the sale, that Butler Giles was clerk of the Superior Court and appointed Stroupe commissioner and made the order of sale which was confirmed by the judge of the Superior Court; that M. B. (Benjamin) Zimmerman, who was one of the petitioners, became the purchaser of the land and deed therefor was made and delivered to him by Stroupe, as commissioner, and said deed was duly recorded in Burke County; that M. B. Zimmerman borrowed from the Virginia-Carolina Joint Stock Land Bank the sum of $1,000.00 with which to pay a portion of the $1,200.00 which he had agreed to pay for the *locus in quo,* and that to secure said loan from said bank the said M. B. Zimmerman executed a deed of trust for $1,000.00 upon said land; that a cheque for $1,000.00 was executed by said bank payable to R. H. Shuford, attorney, Benjamin Zimmerman and Mary Zimmerman, borrowers, and that after endorsement of said cheque by the payees it was turned over to W. F. Fogle, who had been constituted by M. B. Zimmerman his agent to negotiate a loan and purchase for him the outstanding interests in the *locus in quo;* that W. F. Fogle did not pay to Stroupe, commissioner, nor to Giles, clerk of the Superior Court, the *pro rata* share of the agreed purchase price of the infant tenants in common, the respondents in the special proceeding (and plaintiffs in this action); that said infants have not received any of said agreed purchase price; that said M. B. Zimmerman defaulted in the payment of his loan from the Virginia-Carolina Joint Stock Land Bank and the deed of trust given by him was foreclosed and Julius Ingle became the purchaser of the *locus in quo* at the foreclosure sale; that Julius Ingle was never served with process and is therefore not a party hereto; that W. F. Fogle

is dead and Mattie Fogle, his administratrix, is a party defendant; and the referee further found, *inter alia*, the following:

"18. That it is found that the Virginia-Carolina Joint Stock Land Bank had no notice at the time of making the loan to Benjamin (M. B.) Zimmerman and taking a deed of trust on the land as security for the loan, that any fraud had been, or would be practiced upon the plaintiffs, or that the plaintiffs had not or would not receive the purchase money for their interest in said tract of land from the Commissioner."

The referee concluded as a matter of law and suggested that judgment be entered that the plaintiffs recover of John C. Stroupe, commissioner, and of the estate of W. F. Fogle, and that the action be dismissed as to the other defendants. To these conclusions and suggestion of judgment the plaintiffs preserved exception and appealed to the judge of the Superior Court.

The judge of the Superior Court vacated the findings of fact and conclusions of law of the referee as they related to the defendant Virginia-Carolina Joint Stock Land Bank, and found and adjudged that said land bank was a purchaser of the *locus in quo*, that the special proceeding did not convey title, and that the land bank bought the *locus in quo* with notice of the defect in the title and was, therefore, liable for the amount sued for. From these findings and adjudication the defendant Virginia-Carolina Joint Stock Land Bank appealed to the Supreme Court, assigning errors.

The plaintiffs in the original complaint sued to recover their *pro rata* share of the agreed purchase price for the land, and also an interest in the land itself, but subsequently elected to ratify the sale and to seek to recover only a share of the fund. This eliminated from the litigation all questions relative to title, including those presented in the special proceeding.

There was no evidence to sustain the finding that the Virginia-Carolina Joint Stock Land Bank was a purchaser of the *locus in quo*. The only connection which the bank had with M. B. Zimmerman was that it loaned to him $1,000.00 which was secured by a deed of trust on the land sold to him in the special proceeding for partition. M. B. Zimmerman, as a witness for the plaintiffs, testified that he got the proceeds of the loan and identified the cheque by which it was paid, that he made default in the payment of the loan and the land was sold by the trustee and was bought by Julius Ingle.

There is no evidence that the Virginia-Carolina Joint Stock Land Bank had any connection with the special proceeding, which was practically completed before the loan was made by said bank to M. B. Zimmerman, nor is there any evidence in the record that said land bank ever got back the amount of its loan.

We are of the opinion, and so hold, that any findings of fact which support the conclusion of law of the judge of the Superior Court that the Virginia-Carolina Joint Stock Land Bank was liable to the plaintiffs for the amount sued for are not supported by evidence, and that the court therefore erred in adjudging that said bank was so liable.

The judgment of the Superior Court in so far as it adjudges any liability to the plaintiffs on the part of the defendant Virginia-Carolina Joint Stock Land Bank, the appellant, is

Reversed.

GUARANTY BOND & MORTGAGE COMPANY, INC., v. FAIR PROMISE A. M. E. ZION CHURCH ET AL.

(Filed 9 April, 1941.)

1. Usury § 6—Where original usurious agreement is renewed and new usury added, borrower may set up usury in original agreement notwithstanding stipulation in renewal agreement releasing right to claim usury.

Defendant executed its note, tainted with usury by the inclusion of a discount charge, and secured same by deed of trust. Upon default and threat of foreclosure, the lender, at the request of defendant, allowed defendant to renew and refinance the loan by executing new notes for the amount of the original loan less the payments theretofore made on principal and interest, plus a new usurious discount charge, which renewal notes were secured by deed of trust. At the time of executing the renewal notes, defendant executed a release to the lender discharging the lender of any claims based on usury. *Held:* The refinancing agreement in this case was not an abandonment of the original usurious agreement and the execution of a new obligation eliminating the original usury and providing for the payment of legal interest thereafter, which would purge the original usury, but was a mere renewal of the original usurious loan plus the exaction of additional usury, and defendant borrower, in an action on one of the renewal notes, is entitled not only to set up usury in the renewal notes, but may also claim usury in the original agreement, it being clear that the requirement in the renewal agreement that the borrower promise to pay a part of the old as well as additional usury was a clear imposition against which the usury statutes were designated to protect him.

2. Usury § 2—

The inclusion of a discount charge in the face amount of a note in addition to the principal borrowed and legal interest, constitutes usury knowingly charged in violation of the statute.

3. Usury § 7—

All interest is forfeited when usury is knowingly exacted. C. S., 2306.

APPEAL by defendants from *Carr, J.*, at September Term, 1940, of LEE.

Civil action to recover on promissory note. The defendants set up usury and pleaded payment.

On the hearing the parties agreed to waive a jury trial and to submit the cause to the court for determination on certain stipulated facts. In summary and abridgment, they follow:

1. On 9 May, 1927, the Fair Promise A. M. E. Zion Church borrowed $9,000.00 plus $432.00 expenses from the Industrial Bank of Richmond, Va. (a Virginia Corporation) and executed its promissory note for $13,500 ($9,432.00 plus discount of $2,286.00 plus $1,782.00 interest, amortized into 60 monthly payments of $225.00 each) and secured same by deed of trust on church lot and building in Lee County, this State.

2. The Church made 17 payments aggregating $3,825.00, and when foreclosure was threatened to collect the balance, the Church "requested that the same be refinanced on terms allowing a smaller monthly payment."

3. Thereafter, on 13 December, 1928, at the request of the Church and its officers, the Industrial Bank of Richmond "allowed the said Church to renew and refinance said loan" by agreeing to pay $8,400.00 plus $201.60 expenses. As evidence of this the Church executed a first lien note for $4,200.00, payable 1 January, 1934, and a second lien note for $6,300.00 ($4,401.60 plus discount of $1,066.80 plus $831.60 interest, amortized into 60 monthly payments of $105.00 each) and secured same by deed of trust on the Church property in Lee County. Simultaneously with the registration of this deed of trust the original deed of trust of 9 May, 1927, was canceled.

4. At the same time, to wit, on 13 December, 1928, the defendant Church executed a release to the Industrial Bank of Richmond particularly discharging and releasing the said bank "of any and all claims which we have or may hereafter have to plead usury against said Industrial Bank of Richmond by reason of the making of the old loan herein referred to and the execution of the said deed of trust on May 9, 1927, and the present settlement thereof."

5. The first lien note of $4,200.00 was negotiated to the Mortgage Corporation of Virginia, and was later collected by suit in which judgment by consent was entered without prejudice to or abridgement of the rights of the parties in respect of the second lien note.

6. On 1 September, 1931, the Industrial Bank of Richmond ceased to do business, and a bondholders' protective committee took charge of its collaterals, including the second lien note here in suit.

7. The plaintiff became the holder of the second lien note of $6,300.00 on 1 September, 1937, by purchase from bondholders' committee.

8. The Church has paid $2,175.59 on said note. This action is to enforce collection of the balance alleged to be due thereon.

The trial court held that the plea of usury, so far as the original transaction was concerned, was not available in the face of the release executed on 13 December, 1928, but that such plea was good as applied to the usury charged in the note here in suit. Judgment was accordingly rendered on the note for the difference between $4,401.60 and $2,175.59. Defendants appeal, assigning errors.

Gavin, Jackson & Gavin for plaintiff, appellee.
K. R. Hoyle for defendants, appellants.

STACY, C. J. The question for decision is whether the release of 13 December, 1928, estops the defendants from setting up usury in the original transaction. The answer is "No."

True, the decisions are to the effect that an abandonment of the usurious agreement and the execution of a new obligation for the amount of the original debt, eliminating the usury and providing for the payment thereafter of legal interest, purges the original usury, and renders the second obligation valid and enforceable. *Hill v. Lindsay,* 210 N. C., 694, 188 S. E., 406; *Beck v. Bank,* 161 N. C., 201, 76 S. E., 722; *Ector v. Osborne,* 179 N. C., 667, 103 S. E., 388, 13 A. L. R., 1207, and annotation. But this is not the case *sub judice.* The refinancing of 13 December, 1928, was but a renewal of the original obligation, unpurged of usury, and new usury was added to the note here in suit.

As exaction for the release, the defendants were required to promise to pay a part of the old as well as additional usury. This was a clear imposition upon the borrower. All interest is forfeited when usury is knowingly exacted. C. S., 2306. The items of $2,286.00 in the original note and $1,066.80 in the second lien renewal note obviously render both usurious. These amounts were knowingly charged in violation of the statute. At the time of the release no effort was made to rid the transaction of usury. Contrariwise, in addition to the original taint, more usury was exacted. This distinguishes the present case from *Beck v. Bank, supra,* where the compromise settlement was actually paid by the borrower, and the note stripped of usury. 66 C. J., 291. See *MacRackan v. Bank,* 164 N. C., 24, 80 S. E., 184, for valuable discussion of the whole subject.

The following from *Hill v. Lindsay, supra,* would seem to be decisive of the question here presented: "Usury statutes are designed to protect the borrower whose necessity and importunity may place him at a disadvantage with respect to the exactions of the lender, and the borrower's consent to the payment of usury, or even his subsequent approval of it,

will not debar him from subsequently asserting claim for the penalty prescribed by our broadly remedial statute. *MacRackan v. Bank*, 164 N. C., 24."

The cause will be remanded for judgment in accordance with what is here decided.

Error and remanded.

RUTH SUTTON CAULEY v. GENERAL AMERICAN LIFE INSURANCE COMPANY.

(Filed 9 April, 1941.)

1. Insurance § 30a—

Nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance.

2. Insurance § 30c: Payment § 2—

The giving of a worthless check is not payment.

3. Same—Whether check was wrongfully dishonored and final payment thereon is still rightfully available from bank held for jury.

Insured, in accordance with custom, sent his check in payment of premium, which payment would have kept his certificate in force until after his death. A premium receipt conditioned upon "final cash returns" on the check was issued. The check was returned by the bank for "insufficient funds," but the beneficiary contended upon supporting evidence that the bank wrongfully dishonored the check because of a prior unauthorized debit entered against insured's account. *Held:* If the bank wrongfully returned the check, "final cash returns" are still rightfully available thereon, and therefore the question should have been submitted to the jury for the determination of the rights of the parties in accordance with its verdict, and the granting of insurer's motion to nonsuit was error.

APPEAL by plaintiff from *Bone, J.*, at November Term, 1940, of LENOIR.

Civil action to recover on certificate of group insurance issued by defendant to David P. Cauley, as a member of the Federal-Postal Employees Association of Denver, Colorado, and payable to plaintiff as beneficiary.

The certificate in suit, Certificate No. 39628, provides that, subject to all the terms and conditions of Group Policy No. IN-204164, issued by the defendant and delivered to The Federal-Postal Employees Association of Denver, Colorado:

"The life of David P. Cauley (the member) is Insured for the sum of Three Thousand Dollars Payable to Ruth Sutton Cauley, wife, bene-

ficiary, if death shall occur during the continuance of said Group Life Policy and while the Member is a Member in good standing in the Association and the insurance represented by this certificate is in force."

The insured died on 15 September, 1939. It is conceded that his death occurred during the continuance of the group policy and while he was a member in good standing in the Association. In the court below, the case was made to turn on whether the insurance represented by the certificate in suit was in force at the time of the death of the insured.

A semiannual premium of $21.38 was due on 1 August, 1939. Within the grace period thereafter, to wit, on 30 August, the insured sent the Association his check for the amount of said semiannual premium, drawn upon the First-Citizens Bank & Trust Company of Kinston, N. C. This check was received by the Association in Denver on 5 September, and conditional receipt was issued therefor, reciting that "such tender of payment is received by the Association for collection only and subject to final cash returns to the Association."

The check reached the bank in Kinston on 12 September, and was returned marked "not sufficient funds."

Notice of dishonor reached the Association in Denver on 15 September, several hours after the death of the insured. A letter addressed to the insured was written on the same day enclosing the remittance with the statement that it had been returned for insufficient funds, and continuing: "The grace period has expired, however, if we receive your remittance by return mail we may be able to secure your reinstatement without a new application."

The insured customarily paid his premiums by check.

The insured deposited $21.38 in the First-Citizens Bank & Trust Company on 1 September, 1939, to cover his insurance premium check, and would have had this amount to his credit when said check was presented, but for a debit of $5.25 charged against his account on 4 September. The plaintiff alleges that this debit was unauthorized, as it was made without the knowledge or consent of David P. Cauley, and resulted from the changing of a check in this amount drawn on the Branch Banking & Trust Company on 13 July, 1939, and made payable to H. Stadiem. This check apparently bears the notation: "(This check changed from Branch Banking & Tr. Co.)." It is signed "D. P. Cauley," whereas the deposit in said bank was in the name of "David P. Cauley."

From judgment of nonsuit entered at the close of all the evidence, the plaintiff appeals, assigning errors.

J. A. Jones for plaintiff, appellant.

Smith, Wharton & Jordan for defendant, appellee.

STACY, C. J. It is generally understood that the nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance. *Rees v. Ins. Co.*, 216 N. C., 428, 5 S. E. (2d), 154; *Allen v. Ins. Co.*, 215 N. C., 70, 1 S. E. (2d), 94. This was the theory upon which the case was tried, and it is the basis of the nonsuit. *Williamson v. Ins. Co.*, 212 N. C., 377, 193 S. E., 273. It is also understood that the giving of a worthless check is not payment. *Hayworth v. Ins. Co.*, 190 N. C., 757, 130 S. E., 612. Nor is the case of *Ferrell v. Ins. Co.*, 210 N. C., 831, 187 S. E., 575; *S. c.*, 208 N. C., 420, 181 S. E., 327; *S. c.*, 207 N. C., 51, 175 S. E., 692, authority for a contrary holding.

Here, however, there is no concession that a worthless check was given in payment of the premium due 1 August, 1939. It is the contention of the plaintiff that this check was wrongfully dishonored by the bank, and there is evidence to support the contention. This makes it a case for the jury. *Smith v. Ins. Co.*, 216 N. C., 152, 4 S. E. (2d), 321.

The conditional receipt issued by the Association shows that the check was received subject to "final cash returns." The insured customarily paid his premiums by check, and it is conceded that the check in question would have kept the insurance in force but for its dishonor on 12 September. If it should be found the bank was in error in returning the check and accordingly the "final cash returns" are still rightfully available to the Association, the judgment of nonsuit would seem to be at variance with the rights of the plaintiff. Otherwise the defendant may again prevail. *Hayworth v. Ins. Co., supra.*

Reversed.

STATE v. D. H. SMITH.

(Filed 9 April, 1941.)

False Pretenses § 2: Indictment § 9—Indictment for obtaining money by false pretense should allege that defendant obtained money and state the amount.

This prosecution for false pretense was based upon the contention that defendant executed a note for $200.00 secured by a chattel mortgage on certain mules, which note and chattel mortgage he delivered to the prosecuting witness, falsely representing that there were no prior liens on the mules, and obtained from the prosecuting witness the sum of $150.00 in cash and the promise of the prosecuting witness to pay the sum of $50.00 later. *Held:* The allegation of the indictment that defendant obtained from the prosecuting witness "goods and things of value, evidenced by a note in the sum of $200.00, which note is credited with $50.00," is insuffi-

cient, and defendant's motion to quash should have been allowed, since the prosecution was for fraudulently obtaining money and the indictment not only failed to describe the amount in dollars and cents, but nowhere alleged that money was fraudulently obtained.

APPEAL by defendant from *Grady, Emergency Judge,* at December Term, 1940, of LENOIR.

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

Sutton & Greene for defendant, appellant.

SCHENCK, J. The bill of indictment upon which the defendant was convicted and sentenced charged that he did unlawfully, fraudulently and feloniously obtain from the prosecuting witness, by falsely pretending that two certain mules were free and clear of all encumbrances, "the following goods and things of value, the property of Freeman Grady, to wit: Goods and things of value, evidenced by a note in the sum of $200, which note is credited with $50, with intent then and there to defraud, . . ."

Upon the arraignment and in apt time the defendant moved the court that the indictment be quashed upon the ground that it was defective and insufficient and failed to charge the defendant with the crime of false pretense or any crime at all. The motion was overruled and the defendant preserved exception.

We are constrained to hold that his Honor erred in overruling the motion to quash on account of the want of certainty in the description of the property alleged to have been fraudulently obtained from the prosecuting witness by the defendant. The allegation that the defendant obtained "goods and things of value" is too vague and uncertain. The "goods and things" should have been described specifically by the names and terms usually appropriated to them; and since it was money that was sought to be proven the defendant had fraudulently obtained it should have been described at least by the amount, as, for instance, so many dollars and cents. *S. v. Reese,* 83 N. C., 637; *S. v. Gibson,* 169 N. C., 318, 85 S. E., 7.

The evidence tended to prove that the "goods and things of value" fraudulently obtained by the defendant from the prosecuting witness was one hundred and fifty dollars in money. Money is not sufficiently definitely described by the terms "goods and things of value." Nor is the position of the State strengthened by the words "evidenced by a note in the sum of $200, which note is credited with $50." The evidence tended to show that the prosecuting witness received from the defendant a note

for $200.00 secured by a chattel mortgage on two mules, but "the goods and things of value" which the defendant received from the prosecuting witness was $150.00 in cash, and a promise of $50.00 at a later time. There is a total lack of allegation that any money was fraudulently obtained by the defendant from the prosecuting witness.

There was error in overruling the motion to quash the bill of indictment, and the judgment of the Superior Court must be

Reversed.

ELEANOR G. HILDEBRAND v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 16 April, 1941.)

1. Highways § 6—

A highway is a strip of land appropriated to use by the public at large for the purpose of travel or transportation, subject only to restrictions to secure the largest practical benefit in such use, and the right of public travel and the duty of public maintenance are its prime essentials and the amount of travel is immaterial.

2. Highways § 10a—

A highway right of way is not an easement for unlimited public use, but is limited to use by the public generally for the purpose of travel or transportation.

3. Telegraph and Telephone Companies § 4—

The right of way of a telephone company is not an easement for an unlimited public use, but is limited to *quasi*-public use for the purpose of facilitating the communication of intelligence and news.

4. Highways § 10a: Telegraph and Telephone Companies § 4—

A highway right of way and a right of way of a telephone company, although both are dedicated to public use, are distinct types of easements, and the right to use land for the erection and maintenance of telephone poles and wires is not contemplated when land is acquired for highway purposes and is not embraced in the easement acquired for this purpose, but constitutes an additional burden upon the land.

5. Same—

The erection and maintenance of telephone poles and wires along a highway is a use subordinate to the use of the land for the primary purpose of public travel.

6. Highways § 10a: Easements § 5—

The owner of land over which a highway is constructed has the exclusive right to the soil subject only to the right of travel in the public and the incidental right of keeping the highway in proper repair for public use.

7. Constitutional Law § 15a: Eminent Domain § 2—Erection and maintenance of telephone poles and wires along highway constitutes additional burden on land.

The erection and maintenance of telephone poles and wires along a highway constitutes an additional burden upon the land which amounts to a "taking" *pro tanto*, for which the owner of the fee is entitled to compensation regardless of the fact that the original easement for highway purposes is so extensive that the subservient estate amounts to little more than the right of reverter in the event the easement is abandoned, since any interference with the rights in property is a "taking" to the extent of such interference. The word "property" comprehends not only the thing possessed, but also the right of the owner to possess, use, enjoy, and dispose of the *res* and the corresponding right to exclude others from its use.

8. Highways § 1c—Highway Commission has no authority to grant right of way to telephone company as against the owner of the fee.

Sec. 10, ch. 2, Public Laws of 1921, as amended by sec. 1, ch. 160, Public Laws of 1923, confers on the Highway Commission authority to permit and regulate the erection and maintenance of telegraph and telephone poles and wires along the highway as against the public, but the statute confers no right in regard thereto as against the owner of the fee and does not declare that such additional burden is a legitimate purpose embraced within the easement acquired for highway purposes.

9. Constitutional Law § 15a: Eminent Domain § 1—

Since the erection and maintenance of telegraph and telephone poles and wires along a highway is outside the scope of the easement for highway purposes, the Legislature cannot subject land to such additional burden without the payment of compensation, either directly, or indirectly by granting such power to the Highway Commission, nor may the courts do so by judicial fiat.

10. Highways § 10a: Eminent Domain §§ 8, 23—Instruction as to extent owner could use land taken for highway right of way held error.

Since the Highway Commission has complete control over the surface of the land within a highway right of way, and any use by the owner of the fee, except for the purpose of ingress and egress, is by permission and not as a matter of right, in an action by the owner of the fee to recover damages for the imposition by defendant telephone company of an additional easement upon the land, an instruction that plaintiff owner had the right to use the land in the usual and customary way, plant crops, etc., so long as such use did not interfere with the use of the highway for travel by the public, is error.

11. Eminent Domain § 23—

In an action to recover damages against a telephone company for the imposition of an additional easement upon the land by the erection and maintenance of telephone poles and wires along a highway, an instruction that the amount of the award of damages would be such as the jury finds would accrue in the future is error.

12. Eminent Domain § 22—

In an action by the owner of the fee to recover damages against a telephone company for the imposition of an additional easement upon the

land by the erection and maintenance of telephone poles and wires along a highway, the judgment roll in the action by plaintiff against the Highway Commission to assess damages for the easement taken for highway purposes is competent for the purpose of showing the nature and extent of the easement taken in that action, plaintiff being a party thereto and bound thereby.

APPEAL by plaintiff and defendant from *Armstrong, J.*, at November Term, 1940, of BUNCOMBE. Affirmed.

Civil action instituted in the General County Court of Buncombe County to restrain the defendant from trespassing upon lands of the plaintiff and to recover damages alleged to have been sustained by the wrongful construction by the defendant of a telephone line along and over plaintiff's land.

Plaintiff owns certain land in Buncombe County which is subject to the right of way easement of State Highway No. 70-74, commonly designated as a U. S. highway. On or about 2 August, 1938, defendant began the construction of a telephone line along and upon the right of way of said highway. In so doing it dug holes and erected poles and wires upon the land of plaintiff lying within the right of way. Prior to beginning the construction of said line the defendant procured the consent of the State Highway Commission and of the Board of Commissioners of Buncombe County. Plaintiff instituted this action to restrain the defendant and to recover damages for the trespass upon her land.

When the cause came on to be heard in the General County Court, issues were submitted to and answered by the jury in favor of the plaintiff, permanent compensatory damages being assessed. From judgment on the verdict defendant, assigning error, appealed to the Superior Court.

Upon hearing the appeal in the court below numerous assignments of error were overruled and certain other assignments were sustained. The court having found error in the trial in the General County Court, entered judgment remanding the cause for a new trial. Both plaintiff and defendant excepted and appealed.

Sanford W. Brown and J. W. Haynes for plaintiff.
J. G. Merrimon for defendant.

BARNHILL, J. Defendant's primary assignment of error is directed to the refusal of the court below to sustain its exception to the order of the General County Court denying its motion for judgment as of nonsuit. It stressfully contends that the State Highway Commission is vested with absolute control of all land within the right of way of a public highway of the State and that such right of way is acquired by the State not only for the ordinary mode of travel but for any and all other modes of com-

municating intelligence between points connected by the highways. It asserts, therefore, that when it obtained consent from the Board of Commissioners of Buncombe County and the written assent of the State Highway Commission it was authorized to construct its telephone line on and along the right of way and that in so doing it imposed no new or additional burden upon the land of the plaintiff.

Thus this exception presents this question: Is communication by telephone or telegraph "a mode of travel," so that the construction and maintenance of a telephone line along and upon the right of way of a public highway imposes no new or additional burden upon the fee—that is, does compensation for an easement for highway purposes include compensation for use of telephone and telegraph poles and lines in furtherance of the business of a public service corporation?

Whether a telegraph or telephone line can be erected and maintained upon a public street without compensation to the owner of a fee is a question upon which there is a direct conflict of authority. On the one side, it is said that a telegraph or telephone line is but an improved method of subjecting highways to an old use, and that the poles and wires are just as necessary adjuncts to this new method as are the poles and wires of a street railway or an electric light plant. Accordingly, many authorities are to the effect that the poles and wires of a telegraph or telephone line are not an additional servitude upon a public highway upon the theory that a message sent along the wires takes the place of a messenger and thus relieves the highway of much of the use to which it would otherwise be subjected. On the other hand, it is argued that the use of highways for the permanent maintenance of poles and wires occupying a portion of the highway easement is a use not contemplated in the laying out and construction of highways generally. In the jurisdictions thus holding it is the rule that a telegraph or telephone line is an additional servitude upon the highway. In some jurisdictions a distinction is made between the use of city streets and county roads for such lines. We are interested here only in the suburban highway.

"Highway" means a way open to all the people without distinction for passage and repassage at their pleasure, 29 C. J., 364; a public way or road; a public way open and free to anyone who has occasion to pass along it on foot or with any kind of vehicle; *Atlanta Etc. R. Co. v. Atlanta Etc. R. Co.*, 125 Ga., 529; a thoroughfare in which the public has a right of way for passage; *Parsons v. San Francisco*, 23 Cal., 462; a road maintained at public expense and kept open to the travel of the public. *S. v. Purify*, 86 N. C., 681; *Kennedy v. Williams*, 87 N. C., 6.

A highway is a way open to the public at large *for travel or transportation*, without distinction, discrimination or restriction except such as is incident to regulations calculated to secure to the general public the

largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other. It is the right of travel by all the world and not the exercise of the right that constitutes a way a public highway, and the actual amount of travel upon it is not material. 25 Am. Jur., 339, sec. 2.

An easement acquired for use as a public highway is acquired for a public use but not for all public uses. The use is limited to the right of the public generally to pass and repass, to travel on foot or with any kind of vehicle. It is nothing more or less than a strip of land appropriated to a particular public use—the facilitation of travel.

A telephone company is a public service corporation. It has the right to condemn property in furtherance of the purposes for which it was organized. The use of such property is a *quasi*-public use. This public use is likewise limited. It is to facilitate the communication of intelligence and news. *Godwin v. Tel. Co.*, 136 N. C., 258; *Tel. Co. v. Teleg. Co.*, 66 Md., 399; 59 Am. Rep., 167.

There is a distinct difference between the two types of easements. The right of way for a highway is acquired and maintained by the governing authorities through the medium of taxation and it is dedicated to the use of all the public, while the right of way for a public service corporation is privately owned, is maintained for profit, and serves only those who are willing and able to pay the price.

Defendant contends, however, that communication by telephone is a modern method of travel constituting the use of the highway easement for a telephone line a legitimate use of the highway within "the public use" purposes for which the highway was established. We cannot so hold.

As highways are intended to facilitate travel, poles and wires of telegraph and telephone companies have no reference to this primary purpose of the highway. They are not contemplated in the original appropriation of land for highway purposes. They must be regarded, not as a legitimate highway use, but as a new use and as imposing an additional burden upon the highway. The use of such right of way by a telephone company to facilitate communication is subordinate to its use by the public for the primary purpose. *Ganz v. Ohio Postal Teleg. Co.*, 140 Fed., 692.

"The argument to support the proposition that the right to construct and maintain a telephone line for common public use is within this easement is that the structures required for exercise of the right are merely adaptations of the road to the passage of the electric current, which thus travels along the highway, but the resemblance between this use and that ordinarily enjoyed under the easement scarcely goes beneath the

words by which it may be described. In reality, the electric current does not use the highway for passage, it uses the wire and would be as well accommodated if the wire were placed in the fields or over the houses. The highway is used only as a standing place for the structures. Such a use seems to be so different from the primary right of passage as to be essentially distinct. . . . We, therefore, think that the right now under consideration is not within the public easement, and can be acquired against the consent of the private owner of the fee only by condemnation under the power of eminent domain." *Nicoll v. Tel. Co.*, 62 N. J. L., 733, 42 Atl., 583; *Hodges v. Tel. Co.*, 133 N. C., 225; *Eels v. A. T. & T. Co.*, 143 N. Y. Rep., 133 (citing numerous authorities); *Donovan v. Allert*, 11 N. D., 289, 58 L. R. A., 775; *Cosgriff v. Tri-State Tel. & Teleg. Co.*, 107 N. W., 525; *Dailey v. State of Ohio*, 51 Ohio, 348, 37 N. E., 710, 24 L. R. A., 724; *Western Union Tel. Co. v. Williams*, 86 Va., 696.

Connor, J., speaking for this Court in *Brown v. Electric Co.*, 138 N. C., 533, 69 L. R. A., 635, quoting the Supreme Court of Maryland in *Tel. Co. v. MacKenzie*, 74 Md., 36, says: "And so the condemnation of private property for a highway subjects the land so taken merely to an easement in favor of the public, and does not divest the owner of the fee. Planting telephone or telegraph posts upon a public highway in the country is an appropriation of private property, and unlawful, unless the right to do so is acquired by condemnation." See also *Board of Trade Teleg. Co. v. Barnett*, 107 Ill., 507; *Carpenter v. Capital Elec. Co.*, 178 Ill., 29; *Teleg. Co. v. MacKenzie, supra; Willis v. Teleg. & Tel. Co.*, 37 Minn., 347; *Stowers v. Postal Cable Tel. Co.*, 68 Miss., 559; *Bronson v. Albion Tel. Co.*, 60 L. R. A., 426 (Neb.); *Nicoll v. Tel. Co., supra; Dailey v. State of Ohio, supra; R. R. Co. v. Williams*, 35 Ohio State, 168; *Eels v. Tel. Co., supra.*

"A telephone line in a public highway is an additional burden upon the fee, for which the owner of the fee is entitled to compensation. *Postal Teleg. Cable Co. v. Eaton*, 170 Ill., 513, 39 L. R. A., 722, 62 Am. State Rep., 390, 49 N. E., 365. . . . The fact that a large number of long distance telephone messages are sent over this line daily, and therefore it would be convenient for the public to have the defendant occupy complainant's land, is of no importance whatever. If the land is needed for a public use, the law provides a way for acquiring it, and the Constitution prohibits its appropriation for such a use without compensation." *Burrall v. Tel. & Tel. Co.*, 224 Ill., 266, 8 L. R. A. (N. S.), 1091; *DeKalb Tel. Co. v. Dutton* (Ill.), 10 L. R. A. (N. S.), 1057.

The owner of the land over which a public highway is laid out has the exclusive right to the soil, subject only to the right of travel in the public and the incidental right of keeping the highway in proper repair

for public use, and the construction of a telegraph line along such highway constitutes an additional burden upon the fee for which the owner of the fee is entitled to compensation. *Tel. Co. v. Eaton,* 170 Ill., 513; *Board of Trade v. Darst,* 192 Ill., 47.

When the new use is of a different character from that for which the land was taken, it is not an exercise of the existing easement, but amounts to the imposition of a new and additional easement or servitude upon the land. In such case, if the prior existing easement is abandoned or surrendered, the situation is the same as if a separate enclosure not subject to any public easement had been entered upon; and as an entry and occupation of private land without formal condemnation, it amounts to a "taking" in the constitutional sense without regard to the extent of the injury, and can be made only when the use is public and just compensation is awarded the owner. Thus, the question of additional servitude does not involve any controverted points in constitutional law but depends in each case upon a definition of the exact limits of the original public easement. 18 Am. Jur., 811; *Viliski v. Minneapolis,* 3 L. R. A., 831.

The word "property" extends to every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value. The term comprehends not only the thing possessed but also, in strict legal parlance, means the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use. When, therefore, a physical interference with land subverts one of these essential rights, such interference "takes," *pro tanto,* the owner's property. Where one easement is superimposed upon another and the new use is not justified by the existing easement it constitutes an occupation of the private property of the owner of the fee, and is a "taking" regardless of the extent of the injury.

It may be conceded that the easement acquired by the State for a public highway is, under existing law, so extensive in nature and the control exercised by the Highway Commission is so exclusive in extent that the subservient estate in the land, from a practical standpoint, amounts to little more than the right of reverter in the event the easement is abandoned. Nevertheless, the subservient estate still exists and any encroachment thereon entitles the owner to nominal damages at least. The fact that the injury may be trivial, though material in determining the amount of the owner's damages, does not affect his constitutional rights or the principle of law involved. He is entitled to be protected as to that which is his without regard to its money value.

But the defendant insists that under the power conferred upon the State Highway Commission by sec. 10, ch. 2, Public Laws 1921, as amended by sec. 1, ch. 160, Public Laws 1923, the Commission is vested

with absolute control of a highway right of way and is authorized to grant the right to construct and maintain a telephone line thereon.

Whether the Legislature can grant valid authority to place poles and lines or wires on highways by telegraph and telephone companies without compensation to the owner of the subservient estate has been variously decided. Diametrically opposed views have been adopted on this subject in different jurisdictions. That such a use is a public use authorizing the exercise of the right of eminent domain is not questioned. The point of controversy is whether the legislative sanction constitutes such use a "highway use."

As we view it, the effect of this act (sec. 10, ch. 2, Public Laws 1921, as amended) is to give dominance to the easement acquired by the State. Under the terms thereof the Highway Commission has authority to control the uses to which the land embraced within the easement may be put. If it deems it wise or expedient so to do in the interest of the traveling public, it may altogether exclude the imposition of any additional easement or burden. It may not be held that the Legislature intended thereby to declare that the construction and maintenance of a telephone line is a legitimate highway purpose and embraced within the easement acquired for highway use. The Commission is merely authorized to do whatever is necessary to be done in order to make a safe, convenient, public way for travel, including the right, if necessary, to exclude the owner and others from using any part of the surface of the way for any permanent or private purpose. There is nothing in the statute to justify a contrary conclusion.

If, however, we interpret the act as contended by the defendant, it constitutes an attempt to appropriate private property without compensation. This the Legislature cannot do, either directly or by granting the power to the Highway Commission. We cannot assume it was so intended. Such intent is not to be gathered from the statute. *Brown v. Electric Co., supra; White v. R. R.,* 113 N. C., 611; *Story v. R. R.,* 90 N. Y., 122; *Tel. Co. v. MacKenzie, supra;* see also Anno. 8 A. L. R., 1296.

Whatever grant of rights in the highway is given telephone companies as against the public, no right is attempted to be given them as against the individual. *Dailey v. State of Ohio, supra; R. R. Co. v. Williams, supra; Postal Teleg. Co. v. Eaton, supra.*

The State can neither itself appropriate to its own special continuous and exclusive use, nor can it authorize a corporation to so appropriate, any portion of a rural public highway, by setting up poles therein for the purpose of supporting telegraph or telephone wires. Such use of a highway by a telegraph or telephone company is outside the scope of the public easement and compensation must be made therefor. *Eels v.*

A. T. & T. Co., supra; Tel. Co. v. MacKenzie, supra, 28 Am. St. Rep., 218 Anno., 8 A. L. R., 1296.

The written consent of the State Highway Commission conferred no power on the defendant to use the land of the plaintiff within the easement without compensation. This Court may not do so by judicial fiat.

The opinion in *Hildebrand v. Telegraph Co.,* 216 N. C., 235, 4 S. E., 439, a former appeal herein, is not in conflict with what is here said. The Court there expressly refrained from expressing any opinion upon the sufficiency of the defense relied upon by the defendant. It merely permitted the allegations to remain in the answer to the end that the defendant might present the legal question involved. There was no error in the order overruling the judgment as of nonsuit.

PLAINTIFF'S APPEAL.

The judge of the General County Court instructed the jury that:

(1) Subject to the right of the Highway Commission to use the easement for highway purposes "the plaintiff has a right to cultivate the land; to build on it, use it in the usual and customary way so long as its use did not interfere with the operation of the public highway or travel of the public on it or obstruct the view of the public in using the highway from the ordinary and customary usual course and operation of a public highway"; and (2) "If you award any damages whatever, find plaintiff is entitled to recover anything, the amount of that award should be such as you find will accrue in the future, if you find this is a permanent injury."

The defendant duly excepted to these excerpts from the charge and assigned same as error on its appeal to the Superior Court. The judge of the Superior Court sustained each exception and the plaintiff excepted and assigned the same as error on her appeal to this Court.

1. Sec. 10, ch. 2, Public Laws 1921, as amended, vests in the Highway Commission control of the surface of the land within the easement. Except for the purpose of ingress and egress the plaintiff uses the same, whether for building or cultivation, by permission and not as a matter of right.

2. The charge on the issue of damages is an erroneous statement of the measure of damages in cases of this type. It is not in accord with the decisions of this Court, *Teeter v. Telegraph Co.,* 172 N. C., 783, 90 S. E., 412, and cases cited; *Power Co. v. Power Co.,* 186 N. C., 179, 119 S. E., 213; *Rouse v. Kinston,* 188 N. C., 1, 123 S. E., 482.

In the General County Court defendant offered in evidence judgment roll in the case of *Hildebrand v. State Highway & Public Works Com.* On objection of plaintiff same was excluded. On appeal to the Superior Court defendant's exception thereto was sustained and plaintiff excepted.

This was an action instituted by the plaintiff herein for the assessment of damages for the easement taken by the Highway Commission on and across her land, upon which defendant's telephone line is erected. The judgment roll was competent for the purpose of showing the nature and extent of the easement taken. The plaintiff being a party thereto was bound thereby. Defendant's exception was properly sustained.

The indicated errors in the charge of the judge of the General County Court and the error in excluding the judgment roll in *Hildebrand v. Highway Com.* are such as to support the judgment of the court below directing a new trial.

As the questions presented by other exceptive assignments of error may not again arise, we refrain from a discussion thereof.

On both appeals the judgment below is

Affirmed.

ERNEST ELDER v. J. C. BARNES.

(Filed 16 April, 1941.)

1. Contempt of Court § 2b—Findings supported by evidence that defendant had willfully disobeyed lawful order issued by court having jurisdiction held to support attachment for contempt.

An action instituted by plaintiff to restrain defendant from obstructing a drain ditch on defendant's land, and to require him to remove obstructions wrongfully placed therein, was by agreement submitted to arbitrators recommended by defendant, which agreement was incorporated in an order of court signed by plaintiff and defendant. The arbitrators filed written report in plaintiff's favor, and defendant's motion to set aside the award was denied, and judgment was entered without objection confirming the award and specifically ordering that defendant be restrained from allowing the obstructions to remain in the ditch or from interfering with the flow of water therein, and ordering that defendant cut a proper ditch along a portion of the channel as directed by the arbitrators. Upon plaintiff's motion that defendant be attached for contempt for failure to comply with this order, the court found that defendant had willfully refused to obey the order and fully set forth the facts in regard thereto, and adjudged that defendant be committed to jail until he should comply with the order. *Held:* The order of the court confirming the award of the arbitrators and directing defendant to comply therewith was entered in an action in which the court had jurisdiction both of the parties and the subject matter, and the findings sustain the judgment attaching defendant for contempt. C. S., 5279, relating to party ditches constructed by agreement has no application upon the facts of this case.

2. Same—

The willful violation of a valid order of a court of competent jurisdiction constitutes contempt of court, and in the contempt proceedings de-

fendant may not raise the question of whether the order was in any particular erroneous, the remedy to correct an error of law being by appeal.

3. Waters and Water Courses § 4b—

Where an upper or dominant landowner has the right to drain his land through a drain ditch across the subservient lands of defendant, and defendant wrongfully places obstructions in the ditch on his own land, the court has the power to restrain the wrongful acts and to issue mandatory injunction to compel defendant to restore the drainway to its former condition by removal of the obstructions.

4. Contempt of Court § 2a—

The power of courts to compel obedience to their orders lawfully issued is essential to their jurisdiction and the maintenance of judicial authority.

APPEAL by defendant from *Ervin, Special Judge,* at February Term, 1941, of ALEXANDER. Affirmed.

Defendant was attached for contempt for willful disobedience of an order of court, in an action wherein plaintiff sought to restrain defendant from obstructing a ditch or branch, and to require him to remove obstructions wrongfully placed therein.

Plaintiff's land lies immediately above that of defendant, and it was alleged that the necessary outlet for the water naturally flowing from plaintiff's land was through a branch or ditch on defendant's land, and that defendant had placed obstructions in the branch or ditch impeding the flow and backing water on plaintiff's land to his damage. Plaintiff prayed for an order requiring defendant to remove the obstructions. Defendant answered admitting the ownership and location of the lands, but alleged plaintiff had wrongfully diverted waters, and that the acts complained of had been done to protect defendant's rights, and to prevent sand running into the ditch and filling it up.

At the September Term, 1939, of the court plaintiff and defendant entered into an agreement, at the suggestion of defendant, to submit the matter in controversy to arbitration, and the arbitrators recommended by defendant were agreed upon. This agreement was incorporated in an order of court, and signed by plaintiff and defendant. It was agreed that the report of the arbitrators should constitute a rule of the court, and that pending the decision of the arbitrators the defendant should forthwith remove all brush and similar obstructions in the ditch on defendant's land. It was further set out in the agreement "that the plaintiff and defendant agree that the report and award of said arbitrators shall be final, and agree respectively to do such act or acts as said arbitrators may in their report direct them to do."

The arbitrators agreed on, after viewing the premises and hearing the evidence offered by the parties, reported their award in writing substantially as follows: That the drain ditch or channel, which had been

used to drain the land of plaintiff for forty years, had been wrongfully obstructed by defendant; that the obstructions, such as logs and brush, had not been fully removed, and that said obstructions should be immediately removed and the channel or drain ditch left open in order to allow the land of plaintiff to drain properly; that defendant had not been damaged by any act of plaintiff. It was further declared as the award of the arbitrators that defendant should not only remove the obstructions in the ditch or channel, but that he should cut a proper ditch therein three feet wide and three feet deep along a portion of the channel, and that the plaintiff should cut a proper ditch of same dimensions in another portion of the channel, so as to provide a continuous drain; this to be done forthwith.

At the February Term, 1940, defendant's motion to set aside the award was denied, there being no allegation of corruption, partiality or misconduct, and no allegation that the arbitrators exceeded their powers. The court thereupon entered judgment upon the award and in accord therewith, and it was specifically ordered that defendant be restrained and enjoined from allowing the obstructions in the ditch to remain therein, and from placing obstructions therein or doing any act to interfere with the flow of the water in said ditch as same extends through his land to the creek; and it was ordered that defendant's portion of the ditch referred to in the award be cut in the old channel as directed by the arbitrators in the award. There was no exception to any part of this order and judgment, and no appeal therefrom.

At February Term, 1941, pursuant to motion supported by affidavits, after due notice, order issued that defendant show cause why he should not be attached for contempt of court for willfully failing to obey the orders of the court. Defendant appeared and the matter was duly heard upon affidavits offered by plaintiff and defendant.

Thereupon the court found the facts, setting them out in detail in chronological order, material portions of which are quoted as follows: "That the defendant failed to comply with the award of the arbitrators and the judgment of the court confirming the same in that he permitted the obstructions specified in the award to remain in the said branch and drain ditch mentioned in the complaint and award and in that he failed to open the ditch specified in the award. That the plaintiff, who performed his part of the award, served notice on the defendant on August 21, 1940, that the plaintiff who moved (would move) before the presiding Judge at the August-September 1940 Term of Alexander Superior Court that the defendant be attached as for contempt of court for his failure to remove said obstructions and open said ditch. That upon answer filed by the defendant to plaintiff's said notice and motion, a hearing was had before Hubert E. Olive, the presiding Judge, at the

August-September Court upon the question as to whether the defendant should be attached as for contempt. That upon said hearing the presiding Judge intimated that the defendant would be attached as for contempt, and thereupon the defendant solemnly promised, in open court, that he would comply with the award and judgment immediately after the adjournment of the court if the further prosecution of the contempt proceedings should be stayed. That upon this promise being made by the defendant, the further prosecution of the contempt proceeding was stayed. That the defendant failed to comply with the promise made by him to the court at the August-September 1940 Term of Alexander Superior Court, and did nothing whatever after the adjournment of said court towards removing the obstructions from said branch and drain ditch or towards putting the ditch in the condition specified by the arbitrators and the judgment. That upon the present hearing (Feb. Term 1941) the defendant has failed to show any good cause why he should not be attached as for contempt. That, on the contrary, it appears to the court and the court finds as facts on said hearing that the defendant has failed and refused, and still fails and refuses, to obey the aforesaid award of the arbitrators and the aforesaid judgment of the court confirming the same. That the defendant is now, and at all times herein mentioned has been, both physically and financially able to comply with said award and judgment, and his failure and refusal so to do has ever been, and still is, without just cause, excuse or justification. That, in fact and in truth, the defendant has failed and refused to comply with said award and judgment, and still fails and refuses to comply with the same, merely because he has the set and stubborn purpose and intention not to comply with the said award and judgment. That said branch and drain ditch is obstructed upon the lands of defendant and said obstructions cannot be removed and the ditching specified in said award and judgment cannot be done without entry on the lands of the defendant, and the defendant willfully fails and refuses to remove said obstructions and to do such ditching and willfully fails and refuses to permit anyone else to enter on his said lands for said purposes.

"That the failure and refusal of the defendant to comply with the award and judgment aforesaid has ever been, and still is, willful. That the entry of this order is necessary to enable the court to enforce the award and judgment.

"That during the progress of the hearing upon the order to show cause before the undersigned judge, it was suggested to the court by the defendant that the expense of compliance with the orders of arbitration and of the court herein would be exorbitant, and thereupon the court inquired of counsel for the plaintiff as to what would be the probable cost of compliance on the part of the defendant with the order of the

court, and the court was advised in open court in the presence of defendant, that the probable cost of compliance with the order of the court on the part of the defendant would be less than the sum of $50.00, and the court thereupon suggested to the defendant in open court in the said hearing that the defendant should deposit the sum of $50.00 with the Clerk of this court and permit the said Clerk of the court to expend so much of the said sum as might be necessary for the payment for said labor necessary to carrying out the orders of the court herein. The defendant thereupon stated to the court that he would not accept the said suggestion of the court. The court therefore finds from the record and from the conduct of the parties in the presence of the court that the cost of compliance with the orders and report of the arbitrators and the cost of compliance with the order of the court herein would be comparatively insignificant."

There was no exception to any of the findings of fact.

Upon these findings of fact it was concluded that the defendant had willfully failed and refused to obey the order and judgment of the court; that by reason of the matters recited in the findings of fact the defendant has been, and still is, guilty of a willful contempt of the court, and that this order herein made is necessary for the enforcement of the judgment of the court confirming the award of the arbitrators.

It was thereupon adjudged that the defendant be committed to jail until he should comply with the judgment of the court confirming the award of the arbitrators and perform the acts therein directed.

Defendant "excepted to the foregoing order," adjudging him in contempt, and appealed to the Supreme Court.

Burke & Burke for plaintiff, appellee.
W. H. Childs for defendant, appellant.

DEVIN, J. The ruling of the court below in adjudging the defendant in contempt of court for willful disobedience to an order lawfully issued by the court was based upon comprehensive findings of fact to which there was no exception. These findings were supported by the evidence and are sufficient to sustain the judgment. The order, for violation of which the contempt proceedings were instituted, was entered without objection, in an action in which the court had jurisdiction both of the parties and of the subject matter. The defendant was a party to the action and was present with counsel when the order was made and at all times when the recited proceedings were had. The order was not void and was entitled to respect. If in any particular erroneous, defendant's remedy was by appeal. *Nobles v. Roberson,* 212 N. C., 334, 193 S. E., 420.

It having been properly determined, without objection, and in the manner to which defendant had given his written assent, and by the arbitrators he had selected, that the defendant had wrongfully placed on his own land obstructions in the ditch or branch by which the upper or dominant landowner had a right to drain his land, and it having been found by the court that he has refused to remove the obstructions or to permit entry on his land for that purpose, the court had power to restrain the wrongful acts and to issue mandatory injunction to compel the defendant to restore the drainway to its former condition by removal of the obstructions. *Keys v. Alligood,* 178 N. C., 16, 100 S. E., 113; *Woolen Mills v. Land Co.,* 183 N. C., 511, 112 S. E., 24.

The power of the court to compel obedience to its orders lawfully issued is essential to the exercise of jurisdiction and the maintenance of its authority. *Cromartie v. Commissioners,* 85 N. C., 211. It was well said in *Pain v. Pain,* 80 N. C., 322: "Without the ability to compel obedience to its mandates—whether the order be to surrender writings in possession of a party, to execute deeds of conveyance, . . . or to perform any other act the court is competent to require to be done—many of its most important and useful functions would be paralyzed."

The provisions of C. S., 5279, relating to party ditches constructed by agreement, are inapplicable upon the facts found. It appears from the court's findings that the defendant may relieve himself of the unpleasant consequences of his willful failure to obey the order of the court by means readily available to him.

The judgment is

Affirmed.

MRS. EMMA LYNE LIVINGSTON v. THE ESSEX INVESTMENT CO.

(Filed 30 April, 1941.)

1. Landlord and Tenant § 10—

In the absence of an agreement between the parties, the lessor is not under duty to keep the premises in repair.

2. Pleadings § 27: Negligence § 16—

If defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the charge of negligence, he must aptly request that the court require the pleading to be made more definite and certain, C. S., 537, or request a bill of particulars, C. S., 534.

3. Same—

The right of a defendant to require plaintiff to make the complaint more definite and certain by amendment, or to require him to file a bill of particulars, must be preserved by motion made in apt time, and after answer is filed the matter is waived.

4. Landlord and Tenant § 11—

Where a landlord, having agreed with its tenant to repair the premises, undertakes to make repairs, the landlord is under duty to see that the repairs are properly made so as not to cause injury to the tenant, members of his family, his guests and invitees, and the landlord is liable in tort for injuries proximately resulting from the performance of the repair work in a careless and negligent manner.

5. Same—

Where the landlord undertakes to make repairs, he may not escape liability for negligence in the performance of the work on the ground that he employed an independent contractor to do the work, and the landlord is liable for negligent breach of duty in failing to see that the repairs are made in a workmanlike manner so as not to cause injury to the tenant regardless of whether the repair work is done by the landlord's employee, agent, or an independent contractor.

6. Master and Servant § 4a—

Evidence that defendant's authorized agent employed a workman by the hour to do certain repair work on the principal's property, that the agent took the workman to the premises, visited the premises several times during the progress of the work, and directed what work should be done, establishes the relationship of master and servant between the principal and the workman, and not that of principal and independent contractor.

7. Principal and Agent § 8a—

Where an authorized agent employs a workman to do certain work for the principal, the legal effect is the same as though the principal itself had employed the workman, and the relationship of master and servant exists between the principal and the workman under the doctrine of *qui facit per alium facit per se.*

8. Appeal and Error § 8—

Where a landlord, sought to be held liable for negligence in the performance of repair work, does not contend in the lower court that the work was done by an independent contractor, and does not present such contention by allegation, evidence, exception to the issues submitted, or request for special instructions, he may not raise such contention in the Supreme Court on appeal, since the appeal will be decided in accordance with the theory of trial in the lower court.

9. Landlord and Tenant § 11—Evidence held for jury on question of whether landlord, undertaking to make repairs, did work in negligent manner resulting in injury to tenant's wife.

Plaintiff's evidence tended to show that her husband leased the premises in question from defendant, that the lease provided that defendant should keep the premises in repair, and further that defendant verbally agreed to repair the steps leading to the house, that defendant undertook to repair the steps and advised that the repairs had been completed, that after the repairs were made no defect was apparent in the steps, and that as plaintiff and her husband were walking down the steps, plaintiff stepped on a loose brick which caused her to fall to her injury. Defendant's allegation and evidence were to the effect that it knew of no defect in the steps, that it did not undertake to repair same, and that no repair

work was actually done on the steps. *Held:* The conflicting evidence raises an issue of fact for the determination of a jury and the denial of defendant's motion to nonsuit was proper.

10. Trial § 32—

If a party desires more particular instructions upon subordinate features of the case he must aptly tender request therefor.

BARNHILL, J., dissenting.

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

APPEAL by defendant from *Olive, Special Judge,* at August Term, 1940, of HENDERSON. No error.

This is an action for actionable negligence brought by plaintiff against defendant alleging damage. The defendant denied negligence and set up the plea of contributory negligence.

The plaintiff in her complaint alleged, in part:

"That said steps at the time of plaintiff's first inspection of the premises, were made of brick, and that a number of the bricks were loose and a larger number had been removed from the tread of the steps, and that the dangerous condition of the steps was readily apparent to even a casual inspection; that in order to repair said steps it would be necessary to replace the bricks that had been removed and reset them in mortar, and reset in mortar the bricks that were loose. . . . That defendant sent workmen out to the premises to make said repairs, and that said workmen worked at said repairs from time to time during October and November, 1937, and announced that the job was completed some time after the first of December, 1937. . . . That on the night of December 31, 1937, or in the early morning of January 1, 1938, plaintiff and her husband were going down the steps, which were well lighted, and that plaintiff's husband had hold of plaintiff's arm, and that in going down the steps together, side by side, plaintiff's position on the steps was off the center and to the left side of said steps, and on a part of said steps that was off the regular tread of said steps and which had not been used by plaintiff since said repairs, and that as plaintiff stepped on one of the bricks, the brick turned under her foot and threw her violently down the steps, breaking and shattering the bone of her upper left arm, and that plaintiff was completely disabled, etc. . . . That the said defendant in making repairs to said steps, was negligent in that the said bricks on that portion of the steps from which plaintiff was precipitated, as hereinbefore set out, were not properly encased in mortar and were left in an insecure and loose condition, by reason of which carelessness and negligence the said steps were in an insecure and unsafe condition at the time of the said injuries, and which said negligence was the proximate cause of the injuries hereinbefore set out. . . . That the defendant was negligent and responsible for said damages, for that the

servants employed by it conformably to its specific contract to repair said steps, instead of properly repairing the same and properly setting the bricks in mortar, negligently and carelessly replaced several bricks on the side of the steps apparently without any mortar at all, and left them loose and freely movable, and at the same time left said steps with the appearance of having been properly repaired and in such a condition as would deceive any person into believing that the steps were safe and ready for use, and that said defendant's servants or employees stated that said steps had been completely repaired, and had announced that they had finished the job on the steps, leaving the plaintiff and her husband under the impression and secure in the feeling that the steps had been repaired as had been contracted by said defendant."

The defendant in its answer says: "The defendant says that plaintiff's husband took possession of said premises under said written agreement on October 6, 1937, and that shortly thereafter the defendant entered into an agreement with one W. R. Douglas, a reputable, reliable and competent builder and contractor to make certain repairs to said house, but said contract with the said Douglas did not include or embrace any repairs to the steps referred to in plaintiff's complaint. That the workmen referred to . . . were sent by the said Douglas and not by this defendant, and said workmen were employed and paid by the said Douglas and were working for the said Douglas, and this defendant had no authority or control over the said workmen. . . . Answering further the complaint the defendant again denies that it had any agreement with anyone with respect to repairs of said steps and did not authorize or ratify any such repairs. The defendant alleges that it had no knowledge whatever of any defect in said steps either before or after the occupancy of said premises by the tenant and the first notice or knowledge that the plaintiff had claimed damages on account of the injury referred to in the complaint was a letter from plaintiff's attorney dated December 14, 1938, or approximately one year after plaintiff's alleged injury. And in this connection the defendant alleges that at the time written agreement was entered into as hereinbefore alleged that there was no noticeable defect in said steps and that the use of said steps, *per se*, was in no way dangerous, and that there was nothing about the appearance of said steps to put either the plaintiff or the defendant on notice of the alleged condition of same."

In the further answer it is said: "That such repairs as the defendant undertook to make were done through an agreement with a reputable, competent and reliable contractor and builder. That the contract between said contractor and the defendant did not provide for any such repairs as alleged in the complaint and the defendant is advised and believes that said contractor did not in fact make, or attempt to make any repairs to said steps," etc.

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

"1. Was the plaintiff damaged by the negligence of the defendant? Ans.: 'Yes.'

"2. If so, did the plaintiff by her own negligence contribute to her injuries, as alleged in the answer? Ans.: 'No.'

"3. What amount, if any, is plaintiff entitled to recover of the defendant? Ans.: 'Two thousand ($2,000) Dollars.'"

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.

C. D. Weeks and L. B. Prince for plaintiff.

R. L. Whitmire for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the court below made motions for judgment as in case of nonsuit. C. S., 567. The court below overruled these motions and in this we can see no error.

This action is brought by plaintiff, a tenant, against the defendant, the landlord, for actionable negligence.

It is well settled in this jurisdiction, as was said in *Salter v. Gordon,* 200 N. C., 381 (382): "In the absence of an agreement as to repairs the landlord is not obligated to keep the building in repair for the benefit of his tenant. *Improvement Co. v. Coley-Bardin,* 156 N. C., 255; *Fields v. Ogburn,* 178 N. C., 407; *Tucker v. Yarn Mill Co.,* 194 N. C., 756." *Williams v. Strauss,* 210 N. C., 200 (201).

In *Mercer v. Williams,* 210 N. C., 456 (458-9), the rule is again stated: "The *general rule* is, that a landlord is not liable to his tenant for personal injuries sustained by reason of a defective condition of the demised premise, unless there be a contract to repair which the landlord undertakes to fulfill and does his work negligently to the injury of the tenant. *Fields v. Ogburn, supra* (178 N. C., 407); *Colvin v. Beals,* 187 Mass., 250."

In the *Fields case, supra, Hoke, J.,* goes into the subject with thoroughness, citing a wealth of authorities, and says at p. 408: "In the absence of express stipulation on the subject, there is usually no obligation or assurance on the part of the landlord to his tenant that the premises will be kept in repair, or that the same are fit or suitable for the purposes for which they are rented. It is true that in the case of latent defects of a kind that import menace of appreciable injury when these are known to the landlord, and of which tenant is ignorant and not likely to discover on reasonably careful inspection, liability has been recognized

and recoveries sustained both on the ground of negligent breach of duty, and at times for fraud and deceit. . . . In *Colvin v. Beals,* 187 Mass. 250 (252), injury from a defective railing on a piazza, recovery was denied, the Court stating the general position applicable, as follows: 'The general rule in this commonwealth must be considered as settled, that a tenant cannot recover against his landlord for personal injuries occasioned by defective condition of the premises let, unless the landlord promises to repair, makes the repairs, and was negligent in making them.' " *Miles v. Janvrin,* 196 Mass., 431 (439).

The judge in the court below charged the jury correctly, to which no exception was taken, as follows: "Now, gentlemen of the jury, the court instructs you, as a matter of law, the general rule is: 'That the landlord, that is, the defendant in this case is not liable to the tenant for personal injury (and "tenant" includes his family and wife), the landlord is not liable to the plaintiff for injuries from the demised premises, that is, the defendant, as a general rule of law, would not be liable to the plaintiff for any personal injury sustained by reason of any defective condition there around the premises, but if there is a contract to repair and the landlord undertakes to fulfill the contract and does the work negligently to the injury of the plaintiff, in that case, gentlemen of the jury, the landlord would be liable.' "

In the present action there was an express stipulation between the landlord and the tenant to repair. In the lease is the following: "The lessor agrees to keep the building in repair during the said term except as against injuries thereto not due to natural causes."

C. E. Livingston, the husband of plaintiff, testified—unobjected to: "I made a contract with Mr. (Edward R.) Sutherland for the lease of a house, part of which was in writing and part verbal. Mr. Sutherland made or agreed to have the steps repaired." Mr. Sutherland signed the lease as agent of the defendant, Essex Investment Company, to make repair. The agency of Mr. Sutherland is in no way denied.

It will be noted that defendant did not demur, but answered the complaint.

In *Ricks v. Brooks,* 179 N. C., 204 (209), it is stated: "This case has been tried upon its merits, and the plaintiff has won upon the facts. Defendant showed by his answer that he understood the cause of action, and has actually supplied the omission, if any, in the complaint. If he found it too meager in its allegations, he had a remedy by asking that it be made more definite and certain by amendment. Rev., 496; *Blackmore v. Winders,* 144 N. C., 212; *Allen v. R. R.,* 120 N. C., 548; *Conley v. R. R.,* 109 N. C., 692; *Oyster v. Mining Co.,* 140 N. C., 135. Instead of availing himself of the several remedies above mentioned, the plaintiff trusted his case to the jury upon the issue, and having had a fair chance

to present it, his motion does not commend itself to our favorable consideration."

N. C. Code, 1939 (Michie), sec. 537 (former Rev., 496), is as follows: "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment."

The plaintiff's evidence on the trial was substantially the allegations set forth in the complaint, the defendant's evidence was to the contrary. The issues submitted to the jury were in accordance with the complaint and answer. Defendant neither objected to the issues nor submitted other issues. The case in the court below was tried out on the allegations and denials in the complaint and answer. If the defendant desired more specific and detailed allegations in the complaint as to the charge of negligence, it should have requested the complaint to be made more definite and certain under the statute *supra,* or requested a bill of particulars under section 534, *supra.* Having answered, the matter is waived.

In *Allen v. R. R.,* 120 N. C., 548, it is held: "Where a complaint in an action for negligence was defective in not definitely and sufficiently setting out the negligence complained of, objection thereto should have been taken, not by demurrer, but by motion to have the plaintiff make his complaint more definite." *Bowling v. Bank,* 209 N. C., 463.

If the landlord, having agreed with its tenant to repair the brick steps on the demised premises leading to the dwelling, undertakes to repair said steps through its agent and employees, who do the work in a negligent and careless manner, as a proximate result of which the tenant's wife sustains physical injuries, is the landlord liable in damages? We think so, under the facts and circumstances of this case.

In 16 R. C. L., sec. 565, p. 1045, citing a wealth of authorities, is the following: "It is the generally accepted rule that whether there is a covenant to repair or not, the lessor will be liable for injuries caused by his negligence or unskillfulness or that of his servants and employees in making repairs to the leased premises, and it has been held that a landlord undertaking to repair leased premises at the request of his tenant, when under no obligation so to do, and who assures his tenant that such repairs have been made, is answerable to the tenant if the latter, relying on such assurance, suffers injury by reason of the defects not being properly repaired. . . . (p. 1046). But if the landlord voluntarily repairs and actually enters upon the carrying out of his scheme of repair, he will be responsible for the want of due care in the execution of the

work, upon the principle of liability for negligence, without reference to any question of implied contract to repair, or implied consideration. Even in those jurisdictions where it is held that a tenant cannot sustain an action of tort for personal injuries received by him because of the breach of the landlord's covenant to keep the premises in repair, *if the landlord makes the repairs in accordance with the agreement, and is negligent in making them, the tenant may recover for resulting personal injuries.*" (Italics ours.) *Miles v. Janvrin, supra.*

The same rule is set forth in 32 American Jurisprudence, "Landlord and Tenant," sec. 724, p. 599, citing a wealth of authorities. In section 741, pp. 618-19, the rule is thus stated: "It is a well-established principle that one cannot relieve himself of the consequence of neglect in the performance of his agreement by employing an independent contractor to do the work, and the courts generally agree that a landlord who undertakes to make repairs or improvements for the benefit of his tenant, whether he is obligated by law or by agreement with the tenant to do so, or whether he does so gratuitously, cannot relieve himself from his liability for negligence in making such repairs or improvements by employing an independent contractor to do the work; if he does employ an independent contractor who does the work so negligently as to cause injury thereby, the landlord is liable to the same extent as if he had done the work himself. The landlord in making repairs and improvements on the demised premises owes a duty of reasonable care to the occupying tenant which he cannot escape by placing the work with an independent contractor, especially if the work to be done is attended with danger to the tenant. The rule extends in favor of members of the tenant's family and his guests and invitees,—those to whom the landlord owes the same duty of care and protection from negligent injury as he does to the tenant."

The defendant contends that he "had discharged his liability in employing a competent person to do the work, whether that competent person served as his servant, agent or as an independent contractor." We cannot so hold.

In *Doyle v. Franek,* 118 N. W. (Neb.), 468 (469), a landlord undertook to move a dwelling occupied by the plaintiff and removed the front steps which were immediately replaced but in a negligent manner resulting in injuries to the plaintiff, and the Court said: "The defendant argues that because the steps were removed and replaced by an independent contractor, or without any direction from or knowledge of the defendant, he is thereby relieved from liability. It is urged the negligence complained of was not the neglect of the defendant, but that of an independent contractor. We do not think this contention is sound. Conceding that the relation of landlord and tenant existed between the parties to this action, we think it is clear that the landlord is not relieved

of liability for injury to his tenant by the fact that he employed an independent contractor to perform the work of moving the house. So long as the relation of landlord and tenant existed between the parties, the landlord owed a duty to the defendant not to do, or cause to be done, anything which would render the premises dangerous and unsafe for his tenant. Where one owes an absolute duty to another, he cannot acquit himself of liability by delegating that duty to an independent contractor (citing authorities). In *Peerless Mfg. Co. v. Bagley,* 126 Mich., 229, 53 L. R. A., 287, it was held: 'Where a landlord undertakes to make repairs or improvements for his tenant, he cannot relieve himself of the consequences of neglect in the performance of his agreement by employing an independent contractor.'"

The rule as set out in Restatement of the Law of Torts, sec. 420, p. 1135: "A lessor of land who employs an independent contractor to make repairs which the lessor is under no duty to make, is subject to the same liability to the lessee and others upon the land with the consent of the lessee for bodily harm caused by the contractor's negligence in making or purporting to make the repairs as though the contractor's conduct were that of the lessor."

In *Vollrath v. Stevens* (Mo.), 202 S. W., 283, a carpenter was engaged by a landlord to repair steps on leased premises and the following was stated by the Court, at p. 286, par. 14: "The evidence shows that when plaintiff complained of the defective condition of the premises in 1909, defendant's agent sent a carpenter to make the repairs and defendant says that, as the carpenter furnished his own materials and used his own methods in doing the job, he was an independent contractor, and for that reason, if the result of his work was that the repairs were not properly made, the defendant is not liable. This contention of the defendant is not well taken. If the lessor undertakes to have repairs made when he has not covenanted to do so, a duty is cast upon him to see that the repairs are made so as not to injure the tenant, and the rule concerning independent contractors has no application." *Blake v. Fox,* 17 N. Y. Supp., 508.

W. R. Douglas testified, in part: "I know where the Livingston house is and did some work out there. I started the work November 24, 1937, and finished it the 4th day of December, 1937. Mr. Sutherland had me to do the work. I did the work by the hour. . . . Mr. Sutherland took me out there and showed me what repairs he wanted and we went back afterwards and he said we should paint the entire outside. . . . I examined the steps briefly and Mr. Sutherland was with me and we decided there was nothing sufficient to warrant any work being done on them. . . . Mr. Sutherland engaged me to go out there and do the repairs. Mr. Sutherland was probably out there a couple of times during

the process of the work." The foregoing constitutes all of the testimony of the witness, W. R. Douglas, as to the contract. The witness, E. R. Sutherland, did not attempt to testify as to the terms of his contract with W. R. Douglas. The only testimony from him relative to that is as follows: "In dealing with Mr. Douglas I did not retain any control over the method he used."

In *Aderholt v. Condon,* 189 N. C., 748 (755), we find: "The test of independence and agency or servant is laid down in 14 R. C. L., pp. 67-8, as follows: 'The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor.'" *Greer v. Construction Co.,* 190 N. C., 632 (637).

In *Rosenberg v. Zeitchik,* 101 N. Y. Suppl., 591 (592), we find: "Under the circumstances of this case, it was the duty of the landlord to make the repairs, and the fact that he made a contract with someone to do the work does not relieve him from liability for negligence to his tenant."

The work that Sutherland, the agent of the defendant, employed Douglas to do, was in the relation of master and servant. He was not an independent contractor. The principle is well settled: *Qui facit per alium facit per se.* He who acts through another acts himself—*i.e.,* the acts of an agent are the acts of the principal. Broom, Max., 818, *et seq.;* 1 Bl. Comm., 429; Story, Ag., sec. 440. We see no good reason why a landlord should be an exception to the ordinary rule of master and servant. We can find nowhere in the pleadings or evidence in the court below where defendant contended that Douglas was an independent contractor. Defendant's defense was: (1) Denial that the defendant made an agreement to repair the steps, that the defendant did not employ Douglas or anyone else to repair the steps, and that the steps were not repaired at all. (2) That the plaintiff was guilty of contributory negligence.

Counsel for defendant tendered no issue relating to the principle of independent contractor, did not except to the issues submitted by the court, did not ask for any special instruction relating to the principle of independent contractor, made no contention that this relationship existed, and at the close of the judge's charge, after he had stated all of the contentions of the parties without embracing in such contentions for the defendant any reference to the doctrine of independent contractor, the court directed this question to counsel for all parties: "Is there any other evidence or any other contentions to which you wish to call the court's attention, gentlemen (of counsel)?" To this question, counsel for the defendant made no answer.

It is well settled, as stated in McIntosh Prac. and Proc., at pp. 803-4: "When the case has been tried below on a certain theory, it must be heard on appeal upon the same theory, and the party will not be allowed to change his ground between the lower court and the appellate court. The erroneous admission of a proposition of law in the lower court will not be binding, but the appellate court has respect to the theory upon which the case was tried. Any other course would be unjust to the judge who tried the case and to the appellee, and the party, having selected the ground upon which he chooses to fight, should not be allowed to have another chance, after losing, by shifting his ground. When the case was tried upon the theory of a tort, or upon a certain theory of damages, the appellate court will not determine it upon a different theory which might have been adopted."

The plaintiff's evidence as to defendant's duty to repair the steps on which plaintiff was injured, was denied by defendant. This was a question for the jury. All the evidence was to the effect that Sutherland was the agent of defendant. He had the authority to make the contract with the plaintiff for repairing the steps and signed the contract for defendant. The witness Hollingsworth testified, in part, for plaintiff: "I am a mechanic, carpenter and bricklayer. . . . I examined the steps the next morning and found there were two loose bricks that you could lift out in the last flight of steps a little bit more than half down. It was on the second flight. I replaced the bricks myself. Mr. Livingston asked me if I could fix them and I said 'Yes,' and went out there and cleaned them off and put them back with cement. The material I found between the brick was lime and sand because I cleaned them off without any trouble. No cement. I have done work laying brick. The brick sloped over at least an inch over the foundation that the brick was laid on." This evidence was not objected to by defendant and was permissible under plaintiff's complaint. The court below charged so carefully and accurately the law applicable to the facts that defendant made no exception to same. If the defendant in a proper prayer for instruction did not request the court below to charge subordinate features of the case, it is now too late for defendant to complain.

In *Peterson v. McManus*, 210 N. C., 822 (823), the law is thus stated: "If they desire special instructions upon any phase of the law involved, not given in the general charge, they should have filed written request therefor. *Harris v. Turner*, 179 N. C., 322 (325), and cases there cited."

From a careful review of the record and the able briefs of the parties, the exceptions and assignments of error made by defendant cannot be sustained. We can see on the record no prejudicial or reversible error.

No error.

BARNHILL, J., dissenting: There is sufficient evidence in the record tending to show that the defendant, through its agent, at the time it leased the residence to plaintiff's husband, contracted to make repairs, including repairs to the steps. There is also evidence that the defendant undertook to comply with this agreement and did, in fact, through a contractor employed by it, make repairs to steps, as well as to the dwelling.

The steps from which plaintiff fell are not steps to the residence. The residence is located upon a lot, the elevation of which is above the street level. The steps to which reference is made are those which lead from the surface of the lot to the level of the street. The plaintiff having fallen as she passd down the steps and having received personal injuries, brings this action in tort for damages, alleging negligence.

The allegation of negligence is this:

"8. That the said defendant in making repairs to said steps, was negligent in that the said bricks on that portion of the steps from which plaintiff was precipitated, as hereinbefore set out, were not properly encased in mortar and were left in an insecure and loose condition by reason of which carelessness and negligence the said steps were in an insecure and unsafe condition at the time of said injuries, and which said negligence was the proximate cause of the injuries hereinbefore set out."

The plaintiff expressly alleges further that after the repairs to the steps were made that the steps "appeared to have been properly repaired, and that the bricks that had been removed were replaced, and that the plaintiff, with her husband, detected no defects in the steps and used the same for a period of two or three weeks . . . that there was nothing about the appearance of said steps to indicate in any way the condition hereinafter set out."

The liability of a lessor who is under contract to make repairs, for failure to make such repairs or for failure to have the repairs made in a workmanlike manner, depends upon the circumstances and is, to a large measure, dependent upon the purpose for which the premises are leased and the terms of the agreement. Thus it is that when premises are demised for the common use of several tenants and certain parts thereof —such as passageways in tenant houses, apartment buildings and the like—are reserved by the landlord for the common use of all the tenants, there is liability for a negligent failure to keep such property reserved for the common use of all in proper repair. *Bolitto v. Mintz,* 148 Atl., 737, and cases cited.

Here, however, the property was demised for private use as a dwelling. What is the liability, if any, of the landlord for personal injuries sustained by the tenant's wife because of the defective condition of the

steps leading from the surface of the lot down to the surface of the street, is the question presented.

While, in ordinary parlance, the word "negligence" may mean any type of carelessness, when used in a legal sense, it has a definite, technical meaning. The term as used in the textbooks and in the decisions of this and other courts means a failure to perform some duty imposed by law. It is a want of due care in the performance of a legal duty. To establish actionable negligence it must appear: 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 when charged with a like duty, and second, that such negligent breach of duty was the proximate cause of injury to person or damage to property. If we are to follow an unbroken line of decisions of this Court and the generally prevailing view we must give the word "negligence" this meaning in interpreting and applying decisions and textbook statements in arriving at our conclusion upon the question presented.

Negligence is bottomed on a breach of duty imposed by law. An action of damages caused by negligence is an action *ex delicto*, and it is a cardinal principle of law that a mere breach of contract does not, in and of itself, constitute a tort. The contract creates a relationship. The relationship so created, in some instances, imposes a legal duty. It is the breach of the legal duty thus imposed, and not the breach of the contract, that gives rise to an action in tort for negligence.

Where there is a contract to repair, a failure to make repairs or a failure to adequately and properly repair, is nothing more than a breach of contract. To give rise to an action in tort something more must appear.

The view is taken that where the only relation between the parties is contractual the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the *law* imposes because of the relationship or because of the negligent manner in which some act which the contract provides for is done, and the mere violation of the contract where there is no legal duty is not the basis of such an action. 32 Am. Jur., 598; Anno., 8 A. L. R., 774; Anno., 68 A. L. R., 1203; *Jacobson v. Leventhal*, 128 Me., 424; 68 A. L. R., 1192.

"The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note, or any other promise to pay money, would sustain an action in tort for negligence, and thus the promisor be made liable for all the consequential damages arising from such failure. As a general rule, there must be some active negligence or misfeasance to

support tort. There must be some breach of duty distinct from breach of contract." *Tuttle v. Mfg. Co.*, 145 Mass., 169. There must be something more than a breach of contract, *viz.*, negligence. Upon no other theory can a basis be established for an action sounding in tort. *Kohnle v. Paxton*, 268 Mo., 463. "Put more plainly, an agreement to repair does not contemplate a destruction of life or an injury to the person which may result accidentally from an omission to fulfill the terms of the agreement." *Kohnle v. Paxton, supra.*

While some relationships created by contract—such as master and servant, carrier and passenger—impose certain legal duties, no such legal duties result from the creation by contract of the relationship of lessor and lessee or landlord and tenant, when the property demised is for a private use.

Where the right of possession and enjoyment of the leased premises passes from the lessor the cases are practically agreed that in the absence of concealment or fraud by the landlord as to some defect in the premises known to him and unknown to the tenant the rule of *caveat emptor* applies and the tenant takes the premises in whatever condition they may be in, thus assuming all risks of personal injuries from defects therein. This doctrine is in harmony with the common law rule that a lease is a conveyance of an estate or of an interest in real property or a transfer of the right to the possession and enjoyment of real property for a specified period of time or at will. In other words, it is a demise of real property for a limited time. The lessor merely sells, and the tenant buys, the right of use and occupancy for the period specified in the lease. So far as concerns the condition of the premises the relation created by a lease is substantially similar to that created by a deed or a contract for the sale of real property with the right of possession. By the greater weight of authority the fact that the lessor covenants to repair the premises does not affect this rule so far as concerns the lessor's liability for personal injuries to the lessee or those in privity with him due to defects in the premises leased for a private purpose, the possession of which has passed to the lessee, although the existence of the defect is attributable to the failure of the lessor to repair according to his covenant. See numerous cases cited in Anno., 8 A. L. R., 766. If the tenant claims that the repairs are not sufficient it is his duty to give notice thereof to the landlord and if he continues to occupy the premises the presumption obtains that he is satisfied with the repairs that have been made. Anno., 28 A. L. R., 1527; *Cromwell v. Allen*, 151 Ill. App., 404.

What then is the meaning of the statement contained in decisions of this and other courts to the effect that "the general rule is, that a landlord is not liable to his tenant for personal injuries sustained by reason of a defective condition of the demised premises, unless there be a con-

tract to repair which the landlord undertakes to fulfill and does his work negligently to the injury of the tenant." *Mercer v. Williams,* 210 N. C., 456, 187 S. E., 556; *Jordan v. Miller,* 179 N. C., 73, 101 S. E., 550; *Fields v. Ogburn,* 178 N. C., 407, 100 S. E., 583; *Colvin v. Beals,* 187 Mass., 250.

It certainly does not mean that a tenant may recover for personal injuries alleged to have resulted from a mere failure on the part of the lessor to make repairs in a careful and workmanlike manner, for such damages are too remote and are not deemed to have been within the contemplation of the parties in making the contract. *Jordan v. Miller, supra; Hudson v. Silk Co.,* 185 N. C., 342, 117 S. E., 396; *Williams v. Fenster,* 103 N. J. L., 566, 137 Atl., 406; *Jacobson v. Leventhal, supra;* 16 R. C. L., 1095; Anno., 68 A. L. R., 1195.

A contract to repair does not contemplate as damages for the failure to perform it that any liability for personal injuries shall grow out of the defective condition of the premises; but the duty of the tenant, if the landlord fails to properly perform his contract to repair, is to do the work himself and recover the costs in an action for that purpose. *Jordan v. Miller, supra;* 16 R. C. L., 1059, sec. 580; Anno., 8 A. L. R., 766; Anno., 68 A. L. R., 1195. The tenant may either notify the landlord that the repairs are insufficient or he may make the repairs and recover the reasonable expense or costs thereof from the landlord or charge it against the rent. Cases cited in notes 32 Am. Jur., 591.

The question is to be answered by first determining what legal duty, if any, is imposed upon the landlord under a contract of rental.

In the absence of warranty, deceit, or fraud on the part of the landlord, the rule of *caveat emptor* applies to leases of real estate, the control of which passes to the tenant, and it is the duty of the tenant to make examination of the demised premises to determine their safety and adaptability to the purposes for which they are hired. Hence, for personal injuries received by him from latent defects therein, of which the landlord had no knowledge at the time of the lease, the latter cannot be held responsible. 32 Am. Jur., 538, and cases cited in notes. 16 R. C. L., 775. So a landlord may be liable for not disclosing a latent source of danger, known to him to be such, and not discoverable by the tenant, 32 Am. Jur., 539, and cases cited in notes. This duty of disclosure arises not directly from the contract but from the relationship created by the contract, *and is imposed by law* by reason of such relationship.

When the lessor knows of latent defects which are attended with danger to an occupant and which a careful examination would not disclose, the lessor is bound to reveal them, in order that the lessee may guard against them. While the failure to reveal such facts may not be actual fraud or misrepresentation, it is such negligence as may lay the foundation of

an action against the lessor if injury occurs. 32 Am. Jur., 541; 16 R. C. L., 776; *Fields v. Ogburn, supra,* and cases cited; *Jordan v. Miller, supra; Hudson v. Silk Co., supra; Tucker v. Yarn Mill Co.*, 194 N. C., 756, 140 S. E., 744; *Mercer v. Williams, supra.*

In the *Miller case, supra,* it is said that even where the lessor contracts to keep the premises in repair, the breach by the landlord of his contract will not ordinarily entitle the tenant, personally injured by a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injuries, whether in contract or in tort, since such damages are too remote and cannot be said to be fairly within the contemplation of the parties. The *Mercer case, supra,* is to like effect.

When the lessor contracts to make repairs and fails to make needed repairs or makes such repairs in an unworkmanlike manner this amounts to a breach of his duty imposed by the contract and does not give rise to an action in tort for negligence. By the greater weight of authority a breach of the covenant to repair, except as to latent defects known to the lessor and of which the tenant is ignorant, imposes no liability for personal injuries to the lessee or those in privity with him due to defects in the premises leased for a private use. Anno., 8 A. L. R., 766; 32 Am. Jur., 597.

Hence, as I view the law as disclosed by our decisions, by the textbooks and by the decisions of other courts, the only legal duties resting upon the landlord by reason of his contract relation created by the demise are: (1) to give notice of latent defects, existing at the time of the demise, of a kind to import menace of appreciable injury, when these are known to the landlord and of which the tenant is ignorant and is not likely to discover on reasonably careful inspection; and (2) in making repairs to refrain from creating such latent dangerous defects, and, if created, to give notice thereof to the tenant.

A breach of either of these duties imposed by law creates liability for resulting personal injuries under the law of negligence, the liability of the landlord not being so much dependent upon or affected by the covenant to repair as it is upon his affirmative wrong in creating or failing to give notice of a dangerous condition not observable by the tenant.

If the repairs are made in such manner as to leave latent dangerous defects which are known to the landlord and of which the tenant is ignorant and is not likely to discover on reasonably careful inspection, liability has been recognized and recovery sustained on the ground of negligent breach of duty. While the failure to reveal such facts may not be actual fraud or misrepresentations it is such negligence as may lay the foundation of an action against the lessor if injury results. 32 Am. Jur., 541; *Fields v. Ogburn, supra.*

Whether we accept the law as I understand it to be or as stated in the majority opinion (and there is no substantial difference when the proper meaning is given to the term "negligence," as used in the authorities cited), the plaintiff has failed to offer evidence sufficient to sustain her alleged cause of action.

On the question of negligence the evidence is brief.

Plaintiff's husband testified: "After the work was done the appearance of the steps was good. The steps appeared to be in good shape. There was nothing about their appearance to indicate that any brick might be loose or improperly set in the mortar. . . . After daybreak I examined the steps and found one brick had come out and there seemed to be another loose one next to it *on the right side coming down* . . . The steps where my wife fell were made of brick that had mortar between them . . . The mortar is apparent to anyone walking the steps . . . My wife and I went up and down the steps during that period every day and we observed nothing at all wrong with them . . . During that time as I walked up and down the steps I did not feel any loose bricks. Every day during that period of time my wife and children were going up and down the steps. There was not a thing in the world to indicate anything other than that those steps had been properly repaired . . . She (plaintiff) walked on my left side . . . She slipped and fell and I picked her up . . . On the night my wife was injured *she was on the extreme left side* and I was on the right side."

The plaintiff testified: "I used the steps after they were repaired usually going down the center. I observed the steps. They seemed to be in perfect condition. On the night of the accident *I was going down the left-hand side.* We were walking down the steps together . . . When I stepped on the brick it gave away with me. It gave way under my weight. It threw me and I hit my chin against the running board of the car and fell on my left arm . . . After the steps were repaired they looked like they were in perfect condition. As I walked up and down the steps the bricks were in plain view. The spaces between the bricks were clearly visible to me as I walked up and down. My husband and I had been going up and down the steps practically every day from the time they were repaired until I was hurt. There was about one-half inch of mortar between the bricks. It just looked like any other finished brick job. The steps were built by the bricks being placed side by side with mortar between them."

The witness who repaired the steps after the accident testified: "I examined the steps the next morning and found there were two loose bricks that you could lift out in the last flight of steps a little bit more than half down. It was on the second flight . . . The material I found between the brick was lime and sand because I cleaned them off

without any trouble. No cement . . . There was one brick separate and two together. The two were still sticking together after I made the examination. I broke them apart with my hands. Nothing to hold them but lime and sand. There was about one-half inch of mortar between the bricks. I have heard of builders who would tie bricks together without cement. They will not hold together securely. They will stick together if the foundation is wide. The filling was between the bricks. But looking at the filling between the bricks I don't know whether you can tell the mortar has cement in it or not. I cannot tell by looking at the mortar whether it has cement or whether it hasn't . . . When brickwork is exposed to the weather day in and day out and even if the mortar has cement, I think it will rot out in time. *This mortar that I saw between those bricks had the appearance of having been there a long time* . . . I saw the steps before they were repaired and the Livingstons moved in. At that time there were several bricks out. These bricks were out at the same place that I repaired them. I could see there were repairs."

Another witness for plaintiff testified: "I remember seeing the steps fixed before Christmas and the men who fixed them put mortar between the bricks . . . There was a couple of brick off of the bottom step. *Not the step she fell off of.* The family had been using the steps during that six weeks period."

This evidence tends to show that the brick were properly encased in mortar. There is testimony that there were two loose brick. It is significant, however, that these loose brick were found on the right-hand end of the steps going down, while all the testimony tends to show that plaintiff went down the extreme left-hand end. According to her testimony and the testimony of all the other witnesses for plaintiff, she passed nowhere near the two loose brick about which testimony was offered.

The argument was made here that in laying the tread of the steps the outer line of brick was so laid that they extended about one inch over the base and that it was one of these brick that came loose and tripped the plaintiff. There is not a particle of evidence in the record to sustain this argument. "There was a couple of brick off of the bottom step. *Not the step she fell off of.*" Thus, there is a total absence of evidence that there were any loose brick in the steps along the course followed by the plaintiff at the time she fell.

The only suggestion that the repairs were not made in a workmanlike manner is contained in the evidence of the witness who repaired the steps after the accident. He stated that the mortar appeared to have been made with lime rather than with cement. There is, however, no evidence that lime is not a proper ingredient in common use in making mortar.

On the contrary, it is a matter of common knowledge that it is used as an adhesive or binder. "Lime is much used in the preparation of cements and mortars . . . to lime is to glue together; to cement." Webster's New Inter'n. Dict. (2d).

Plaintiff and her husband used these steps for about six weeks after they were repaired. There was mortar between the brick and they appeared to be in a perfectly safe condition. They anticipated no damage from the use thereof. How then can it be said, even if we admit negligence, that the defendant, domiciled in another state, could or should have foreseen that injury was likely to occur?

At most the evidence shows that plaintiff stepped on a loose brick and it "gave way under my weight." There is no evidence that this brick was not "properly encased in mortar" or that it was "in an insecure and loose condition" before the accident. *Res ipsa loquitur* does not apply. We may not assume, in the absence of proof, that the brick gave way under her weight due to the manner in which it was set by defendant. Furthermore, there is a total failure of proof that the brick on which she stepped was one of those replaced by the workmen in making repairs. Nor is there any evidence that its condition prior to the accident was such as to put defendant on notice and thus impose liability for a failure to repair.

There is no allegation that defendant in making repairs created a latent dangerous defect. Nor is there any evidence thereof. Hence, there is neither allegation nor proof of the breach by defendant of any duty imposed by law. In fact, there is scant, if any, evidence of a failure to make repairs in a careful and workmanlike manner. I am, therefore, of the opinion that the motion for judgment as of nonsuit should have been sustained.

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

MAE JOHNSON SINEATH, ADMINISTRATRIX OF W. P. SINEATH, A. G. HEARON, AND A. G. HEARON, SURVIVING PARTNER, TRADING AS GOLDSBORO DRY CLEANERS & HATTERS, *v.* NICK J. KATZIS, MECHANICS & FARMERS BANK, R. L. McDOUGALD, TRUSTEE, H. B. PARKER, TRUSTEE, JOHN S. PEACOCK, SUBSTITUTED TRUSTEE, AND H. B. PARKER AND JOHN S. PEACOCK, INDIVIDUALLY.

(Filed 30 April, 1941.)

1. Appeal and Error §§ 37c, 38—

On appeal in injunction cases the findings of fact by the judge of the Superior Court are not conclusive and the Supreme Court may review

the evidence, but there is a presumption that the proceedings below are correct and the burden is upon appellant to assign and show error.

2. Judgments § 32—Prior adjudication is conclusive in subsequent action between same parties or those in privity with them.

In a prior action between the same parties or those in privity with them, certain notes executed by plaintiffs were attacked for want of consideration. Judgment was entered, affirmed on appeal, that the notes were valid. *Held:* The prior adjudication precludes plaintiffs from attacking the notes on the ground of want of consideration, and, since plaintiffs assert no other equity for challenging the validity of the notes, the validity of the notes is established by the prior judgment, and the rights of the parties in the second action must be determined in accordance with such adjudication.

3. Mortgages § 30b—Equitable owner of mortgage notes is entitled to request trustees to foreclose.

Where the *cestui qui trust* endorses and assigns absolutely to another the notes secured by the deed of trust, and the assignee in turn assigns the notes as collateral security for his note to a bank in a sum less than the face amount of the mortgage notes, the assignee of the *cestui* is interested in the payment of the whole amount of the mortgage notes, the amount due him after payment to the bank as well as the amount due the bank as represented by his note, and he has an equitable interest in the notes and is entitled to request the trustees to foreclose the deed of trust notwithstanding that he does not have physical possession of the mortgage notes.

4. Mortgages § 30a—

In order for equity to restrain the foreclosure of a mortgage or a deed of trust to prevent injustice to the rights of a mortgagor or trustor or others interested in the property, there should be some equitable element involved, such as fraud, mistake, or the like.

5. Injunctions § 11—

As a general rule, a temporary restraining order will be dissolved upon hearing of the order to show cause when the answer denies the equity of the bill, unless injunctive relief is the main purpose of the action and not merely ancillary thereto.

6. Mortgages § 30e—In this action for damages and to restrain foreclosure upon allegation that cestui is insolvent, dissolution of temporary order held without error upon defendants' denial of insolvency.

Plaintiffs or their privities executed the notes in controversy, secured by a deed of trust, as part payment for a business purchased by them. Contemporaneously with the purchase of the business the president of the seller executed a noncompetitive covenant. In a prior action, binding upon the parties, it was adjudicated that the notes were not void for want of consideration but that they are valid and outstanding, and it was further adjudicated that the president had breached his noncompetitive covenant and that plaintiffs were entitled to nominal damages for such breach. In this action to recover damages for subsequent breach of the noncompetitive covenant, plaintiffs sought to restrain the foreclosure of the deed of trust. *Held:* The validity of the notes having been concluded by the former judgment and there being no controversy as to the amount

thereof, and the injunctive relief sought by plaintiffs being merely ancillary to the main purpose of the action to recover damages for breach of the noncompetitive covenant, and the allegation of insolvency of the *cestui* having been denied, the dissolution of the temporary order upon the hearing of the order to show cause was without error.

SEAWELL, J., dissenting.

CLARKSON, J., concurs in dissent.

APPEAL by plaintiffs from *Nimocks, J.*, at November Term, 1940, of WAYNE.

Civil action to recover of defendant Katzis damages for breach of noncompetitive agreement, and to enjoin foreclosure of deed of trust securing purchase money notes executed in sale of laundry in connection with which said agreement was executed.

This appeal is from order dissolving order which temporarily restrained foreclosure sale under the deed of trust. The basic facts involved are fully stated in the opinion of this Court in former action between same parties, and others, filed 8 January, 1941, and reported in 218 N. C., 740, 12 S. E. (2d), 671, subsequent to institution of present action.

Briefly stated, the facts there, in so far as pertinent to this appeal, are these: The plaintiffs sought to have canceled notes aggregating $10,900 executed by them and payable to Goldsboro Dry Cleaners & Hatters, Inc., as the unpaid part of balance of purchase price for all its assets, including good will, as well as the deed of trust executed by them to H. B. Parker and Paul B. Edmundson, Trustees, as security for said notes, which were endorsed by Goldsboro Dry Cleaners & Hatters, Inc., to Nick J. Katzis at the time and as a part of the transaction involving the sale. The alleged ground for cancellation was failure of consideration in that Katzis had breached his noncompetitive agreement entered into as a part of the same transaction. Plaintiffs there also alleged damages by reason of said breach. Katzis denied any breach of his agreement and, in cross action, averred that Sineath and Hearon were indebted to him in the sum of $10,900, and interest, as evidenced by said notes.

Mechanics and Farmers Bank of Durham, North Carolina, and R. L. McDougald, Trustee, were brought in as additional parties defendant to that action, for that the bank was asserting right to possession of said notes, which it averred had been assigned to it by Katzis as collateral security to his note for $2,463.07, as set forth in deed of trust executed to R. L. McDougald, Trustee. Plaintiffs there alleged and contended that whatever rights the bank had in said notes were acquired from Katzis, and were subject to superior right of plaintiffs against Katzis to have same canceled and surrendered. The bank and trustee denied

this allegation and contention, and set up cross action upon the note and deed of trust given by Katzis by which the notes of plaintiffs were assigned by Katzis to the bank.

In the trial court, the jury found that Katzis had breached his noncompetitive agreement and that plaintiffs had been damaged in a nominal amount. Also in response to the fifth issue, "In what amount, if any, are plaintiffs indebted on the notes referred to in the complaint?" the jury answered: "$10,900 and interest." Upon verdict on that issue judgment was entered "that the plaintiffs, W. P. Sineath and A. G. Hearon, as represented by the notes . . . and secured by a deed of trust (describing it), are indebted to the defendant Nick J. Katzis in the sum of $10,900, with interest . . . subject to the assignment to R. L. McDougald, Trustee, hereinafter referred to." The court further decreed "that R. L. McDougald, Trustee, and Mechanics and Farmers Bank of Durham . . . be and they are hereby declared to be the owners of, and entitled to the possession of thirty-six notes, aggregating $10,900, referred to in the complaint filed in this cause, and the deed of trust to Paul B. Edmundson and H. B. Parker, Trustees, whereby said notes are secured, and for the purposes set forth in the deed of trust . . . to the end that the proceeds from the collection of said notes shall be applied, first, in payment of the indebtedness due said Mechanics and Farmers Bank by Nick J. Katzis, and the balance to be paid over to Nick J. Katzis, or his order, as provided in said deed of trust." The judgment was affirmed on appeal to this Court.

In the present action plaintiffs allege in effect that since the date of institution of the former action, Nick J. Katzis has further violated and breached the same noncompetitive agreement, that such breach also constitutes failure of consideration for the same notes, that by reason of such failure of consideration the same notes should be canceled, and that the pending sale by foreclosure under their deed of trust to H. B. Parker and Paul B. Edmundson, Trustees, should be enjoined, as "unlawful and violative of the plaintiffs' rights for the reason (a) that nothing is due on said deed of trust or the notes secured thereby, and (b) because no holder of said notes has requested the trustees to offer said property for sale under said deed of trust," that the sale of the property, if consummated, would irreparably injure the plaintiffs, and that Nick J. Katzis is insolvent. Plaintiffs by reference incorporate the deed of trust in their complaint, and allege that by proper proceeding John S. Peacock has been substituted as Trustee for Paul B. Edmundson. Plaintiffs further allege that, before the date of sale, defendants, Mechanics and Farmers Bank and R. L. McDougald, Trustee, withdrew their request for said foreclosure, and, further upon information, allege that no holder of said notes at any time requested the foreclosure.

Defendants plead *res judicata,* and deny plaintiffs' allegations that Katzis has breached his noncompetitive agreement, that plaintiffs have been damaged, and that Katzis is insolvent, and further deny right of plaintiffs to injunctive relief. And, while defendant bank and McDougald, Trustee, admit withdrawal of request for foreclosure, defendants Katzis and Parker and Peacock, Trustees, aver that prior to the time the property was advertised by the trustees, said Katzis requested the foreclosure, and that by the terms of the deed of trust, by reason of default in payment, the entire indebtedness is due and unpaid and defendant Nick J. Katzis is entitled to have the trustees offer the property for sale, and execute a deed to last and highest bidder.

Otherwise, this action is identical with the former action.

Upon the complaint as filed the court issued a temporary injunction against sale by foreclosure, and an order to the defendants to show cause why the same should not be continued to the final hearing. Upon the hearing thereon the plaintiffs offered in evidence as an affidavit the complaint and replies filed herein. The defendants Katzis and Parker and Peacock, Trustees, offered in evidence as affidavits the answer filed by them and also the complaint, the answer of Nick J. Katzis, Letha White and White's Laundry and Cleaners, Inc., and the judgment in the former action, together with transcript therein of the testimony of W. P. Sineath and A. G. Hearon. "The court finding that the plaintiffs are not entitled to have the temporary restraining order herein continued to the final hearing of the cause," entered judgment dissolving same.

Plaintiffs appeal therefrom and assign error.

Royall, Gosney & Smith, Paul B. Edmundson, and James Glenn for plaintiffs, appellants.

J. Faison Thomson and J. A. Jones for defendants, appellees.

Claude V. Jones for Mechanics and Farmers Bank and R. L. McDougald, Trustee, appellees.

WINBORNE, J. In their brief filed on this appeal plaintiffs contend that the judge below erred in dissolving the temporary restraining order for these reasons: (1) That the trustees have no authority to foreclose the deed of trust upon demand of defendant Katzis. (2) That there is nothing due by the plaintiffs on the indebtedness secured by the deed of trust sought to be foreclosed.

While the findings of fact by the judge of Superior Court are not conclusive on appeal in injunction cases "in which we look into and review the evidence, . . . still there is a presumption always that the judgment and proceedings below are correct and the burden is upon appellant to assign and show error." *Hyatt v. DeHart,* 140 N. C., 270,

52 S. E., 781; *Plott v. Comrs.*, 187 N. C., 125, 121 S. E., 190.

Upon consideration of the pleadings and evidence in the present case as shown in the record and case on appeal, we are of opinion, and hold, that appellant fails to show error in the judgment below.

The notes, secured by the deed of trust here involved, are the same notes as those involved in the former action. There the plaintiffs contended that by reason of the breach by Nick J. Katzis of his noncompetitive agreement there was failure of consideration for the notes. But there the jury found that plaintiffs are indebted on those notes in the sum of $10,900, and interest. Upon that verdict the court adjudged that W. P. Sineath and A. G. Hearon are indebted to Nick J. Katzis in the sum of $10,900, with interest, subject to the assignment to R. L. McDougald, Trustee. The judgment was affirmed on appeal to this Court. 218 N. C., 740, 12 S. E. (2d), 671. The opinion there concludes with these two sentences: "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."

The question of failure of consideration for those notes, therefore, may not again be raised by W. P. Sineath and A. G. Hearon, and those standing in privity to them, as do plaintiffs in the present action. Plaintiffs assert no other equity for challenging the validity of the notes. Hence, the notes stand as valid obligations of the makers secured by the deed of trust in question.

Now, with regard to the right of defendant Katzis to request the trustees to foreclose the deed of trust: The judgment in the former action recognizes that said Katzis has an equity in and to the notes in question. Recurring to the factual situation, bear in mind that the notes were executed by W. P. Sineath and A. G. Hearon and payable to Goldsboro Dry Cleaners & Hatters, Inc., and by it assigned absolutely to Nick J. Katzis, who in turn assigned them to R. L. McDougald, Trustee for Mechanics and Farmers Bank of Durham, as collateral security for an indebtedness less in amount than the face value of the notes. While the court adjudged that said trustee and bank are the owners and entitled to the possession of the notes "for the purposes set forth in the deed of trust," it is provided that this is to "the end that the proceeds from the collection of said notes shall be applied, first, in the payment of the indebtedness due said Mechanics and Farmers Bank by Nick J. Katzis, and the balance to be paid over to Nick J. Katzis, or his order," that is, that W. P. Sineath and A. G. Hearon are indebted to Katzis for the face amount of their notes, $10,900, with interest, subject to the payment to the bank of the amount of his note, $2,463.07, to which as collateral

security he assigned the Sineath and Hearon notes. By such assignment of these notes as collateral security for his own debt of less amount than the face value of the notes, Katzis does not lose his interest in the deed of trust by which the notes are secured. 41 C. J., 681 and 882. *Hughes v. Johnson,* 38 Ark., 285. While it may be true that Katzis does not have physical possession of the notes, he had the right, unless otherwise agreed, to call upon the trustees to foreclose the deed of trust. He is interested in the payment of the whole amount, not only that which is due to him but that to which the bank is entitled, as represented by his note. The record contains no restriction upon his right to request foreclosure.

The court has the power to restrain the exercise of the power of sale under a mortgage or deed of trust where a sale thereunder would work an injustice to the rights of the mortgagor or trustor or others interested in the property; but there should be some equitable element involved, as fraud, mistake, or the like. For example, the sale will be restrained when there is serious controversy as to the amount actually due on the indebtedness secured by the mortgage or deed of trust, so that the debtor or those claiming under him may know the proper amount and pay without a sacrifice of property. McIntosh, N. C. P. & P., 980; *Bridgers v. Morris,* 90 N. C., 32; *Broadhurst v. Brooks,* 184 N. C., 123, 113 S. E., 576.

In the present state of the instant case there can be no controversy as to the validity, and there is none as to the amount of the notes in question. Furthermore, where the answer denies the equity of the bill, the general rule is that the injunction will be dissolved. When, however, the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is of itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing. *Cobb v. Clegg,* 137 N. C., 153, 49 S. E., 80; *Hyatt v. DeHart, supra; Boone v. Boone,* 217 N. C., 722, 9 S. E. (2d), 383.

In the present case, when stripped of the allegations of failure of consideration for the notes, the main relief sought is recovery of alleged damages for alleged breach of contract, to which injunction against foreclosure of the deed of trust is merely ancillary.

Upon careful consideration, the record fails to show cause for disturbing the ruling of the judge of Superior Court.

Hence, the judgment below is

Affirmed.

SEAWELL, J., dissenting: I think the main opinion fails to apprehend the real issue in the controversy between the parties upon which decision should rest. Whatever other claims the plaintiff may have, and however

vigorously they may have been projected into the argument of the case, the fact remains, upon a proper showing, that there is sufficient in her pleading and in the record history of the case to entitle her to equitable set-off or recoupment against whatever interest the defendant Katzis may have, and that it is within the power of the Court, in the exercise of its equity jurisdiction, to make orders to protect the corporate defendant in whatever interest it may have, so that the major equity—the protection of the plaintiff in the assertion of her claim and a proper hearing thereupon—may be achieved. The case has been viewed merely as another attempt to attack the note now held by the bank (of which Katzis is the equitable owner), and defeat it for want of consideration, and the decision is based upon the principle of *res adjudicata*. But the pleadings and the brief of plaintiffs present to us the question of equitable set-off, which has nothing to do with a failure of consideration or any adjudication which has been made upon the note.

We have advanced from the common law, where no set-off was recognized, to statutory set-off or counterclaim, as provided in the statute, C. S., 521, where an action has been brought for the enforcement of contrary demands, but that is by no means the end of the law. It is familiar learning that a judgment, and, *a fortiori*, the foreclosure of a mortgage, may be enjoined and stayed where to enforce either would be unjust, and especially where because of the relation of parties and the connection between the items of indebtedness on either side the enforcement of the demand would be inequitable. There is presented here a situation which, according to the practice of the courts, has been considered peculiarly a subject of equity jurisdiction.

For convenience, I use the name "Sineath" to represent the plaintiffs, and "Katzis" to represent the defendants, unless it otherwise appears.

On 1 February, 1937, Katzis sold to Sineath his business as Goldsboro Cleaners and Hatters, Inc., in the town of Goldsboro, consisting of the good will of the business and a quantity of stock and equipment suitable for carrying it on. Katzis agreed not to engage in that business within Wayne County for a period of fifteen years from that date. Sineath paid $10,000.00 in cash and executed several notes aggregating $20,200.00, and to secure these notes he executed a deed of trust or mortgage on the stock and equipment. Subsequently, Katzis borrowed money from the Bank of Wayne and assigned the Sineath note and mortgage in security. There is now due upon this mortgage the sum of $10,900.00, and the interest of the Bank of Wayne is approximately $2,463.07.

Almost immediately after this transaction, Katzis opened up the same kind of business in the town of Goldsboro, operating through other parties. Sineath enjoined Katzis from further prosecution of the business and asked that his note be delivered up and canceled because of the

breach of the contract and for total failure of consideration, and for damages for the breach of the contract.

Upon the trial of this case the jury found that the contract was breached, and, under the instruction of the court, awarded nominal damages. As to the note, an issue was submitted upon which it was found that Sineath was indebted thereon as appeared in the note. The bank was held to be owner and holder in due course, by reason of the assignment. The injunction against Katzis with regard to prosecution of the business was continued. On appeal to this Court the judgment was upheld. *Sineath v. Katzis,* 218 N. C., 740.

Afterward, plaintiff instituted the present action, alleging further breaches of the contract on the part of Katzis since the trial of the former case, obtained an injunction against the enforcement of the deed of trust or mortgage, and sought to have such damages as might be awarded applied in offset or recoupment against the note. It is alleged that the defendant is insolvent.

In the court below, the injunction against the enforcement of the mortgage, pending a hearing, was dissolved and plaintiffs appealed.

At the time of the purchase of the business, the contract between Sineath and Katzis, of which the note was a part, was executory, or continuing, both with respect to the payment of the purchase price on the part of Sineath, and the performance on the part of Katzis of his agreement to refrain from carrying on the business. Except as partly performed on the part of Sineath, and, further, as qualified by the former trial, the mutual performance of this contract is still a matter for the court when its jurisdiction is properly invoked, with the rights of the parties to be adjusted as far as may be done under established rules of law and equity.

Leaving aside all extraneous matter, I return to the question: Are plaintiffs entitled to equitable set-off or recoupment for losses or damages sustained since the former trial, through breach of the contract, as against whatever interest the defendant Katzis may now have in the note and mortgage given for the purchase price?

As stated, the question of failure of consideration of the note as between Sineath and Katzis is not involved in the question of set-off. The right of set-off or recoupment would exist in favor of the plaintiffs, notwithstanding any adjudication in that respect, which did not include the subject matter of the proposed set-off. It becomes a question whether there are now legal or equitable means to enforce it.

Insolvency on the part of one who seeks to enforce a claim against a judgment debtor-creditor has long been recognized as raising the right of equitable set-off to secure justice between the parties. *Schuler v. Israel,* 120 U. S., 506, 30 L. Ed., 707; *North Chicago Rolling Mill Co. v. St.*

Louis Ore & Steel Co., 152 U. S., 596, 38 L. Ed., 565; *Citizens Bank v. Kendrick*, 92 Tenn., 437, 21 S. W., 1070.

Upon this point I quote from 24 R. C. L., p. 807, section 15: "In order to effect an equitable set-off it is well settled that equity has jurisdiction to restrain a judgment creditor from collecting his judgment against the judgment debtor, until a claim of the latter against the former has been judicially established, and then to permit an equitable offset of the one against the other, where the judgment creditor is either insolvent or has no property out of which the judgment debtor can collect his claim" . . .

In *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., supra*, the plaintiff obtained an injunction against the defendant to restrain the enforcement of a judgment under circumstances similar to those in the case at bar. The opinion of the Court denied the plea of the defendant that the claim of the plaintiff in equity was unliquidated and disposed of the other matters at issue as follows: "Again, it is well established that equity will entertain jurisdiction and afford relief against the collection of a judgment where in justice and good conscience it ought not to be enforced, as where there is a meritorious, equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing. Illustrations of these general principles are found in the cases of *Leeds v. Marine Ins. Co.*, 19 U. S. 6 Wheat. 565 (5:332); *Scammon v. Kimball*, 92 U. S., 362 (23:483); *Crim v. Handley*, 94 U. S., 652 (24:216); *Embry v. Palmer*, 107 U. S., 3 (27:346); *Knox County v. Harshman*, 133 U. S., 154 (33:586); *Marshall v. Holmes*, 141 U. S., 589 (35:870).

"By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference. *Leeds v. Marine Ins. Co.*, 19 U. S., 6 Wheat. 565 (5:332); *Lindsay v. Jackson*, 2 Paige, 581; *Gay v. Gay*, 10 Paige, 369; *Pond v. Smith*, 4 Conn., 302; *Robbins v. Holley*, 1 T. B. Mon., 194; *Hinrichsen v. Reinback*, 27 Ill., 295; *Raleigh v. Raleigh*, 35 Ill., 512; *Hall v. Kimball*, 77 Ill., 161; *Chicago D. & V. R. Co. v. Field*, 86 Ill., 270; *Doane v. Walker*, 101 Ill., 628; *Davis v. Milburn*, 3 Iowa, 163; *Tuscumbia R. Co. v. Rhodes*, 8 Ala., 206; *Wray v. Furniss*, 27 Ala., 471; *Keightley v. Walls*, 27 Ind., 384; *Wulschner v. Sells*, 87 Ind., 71; *Laybourn v. Seymour* (Minn.), April 27, 1893; *Rothschild v. Mack*, 115 N. Y., 1; *Richards v. La Tourette*, 119 N. Y., 54; *Schuler v. Israel*, 120 U. S., 506 (30:707)."

Where it is shown that the right of equitable set-off exists in behalf of the plaintiff by reason of matters happening since the judgment, and the defendant is insolvent, that right may be protected by injunction against further proceeding even after execution has been issued upon

the judgment. *Wiggin v. Janvrin,* 47 N. H., 295; *Steere v. Stafford,* 12 R. I., 131; *Markey v. Markey,* 13 N. Y. S., 295; *Bass v. Chambliss,* 9 La. Ann., 376.

Some early cases, much outweighed and largely abandoned in the development of this subject, are to the effect that the insolvency of a party alone will not give rise to the equitable jurisdiction. Amongst them is *Riddick v. Moore,* 65 N. C., 382. The latter case is not followed in this respect by subsequent cases.

At any rate, insolvency has always been considered "a material circumstance to be considered in determining whether an equitable set-off should be allowed, and, when coupled with other matters, may authorize the allowance of the set-off." *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., supra; Dewey v. West Fairmont Gas Coal Co.,* 123 U. S., 329, 31 L. Ed., 179; *Cromwell v. Parsons,* 219 Mass., 299, 106 N. E., 1020; *Smith v. Smith,* 79 N. C., 455.

In this State the scope of this remedy has been enlarged by our statute declaring unliquidated demands connected with the transaction, out of which the action arises, to be proper matters of set-off.

Courts of equity have for a very long period of time entertained actions and provided a forum for equitable relief with regard to set-off, counterclaim, and recoupment, without the statutory authority later found necessary to make such relief available in courts of law. And they still proceed under that authority where, as here, their jurisdiction has not been curtailed by the statute. "Equity follows the law," and it can make no difference whether the matter pleaded as set-off is yet to be established. It is for that purpose equity creates the forum. A party who has the right of equitable set-off is not confined in asserting it to an action brought by the contrary party and his answer with respect thereto. Such a forum at law may not exist, but the party having the right may create the forum by appeal to a court of equity by way of injunction to stay the judgment or restrain the foreclosure of the mortgage until his countervailing claim is established. *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co., supra.*

Recoupment, as included in the remedy generally classed as "set-off," has been variously defined in terms which distinguish it from a plea of failure of consideration: "The keeping back and stopping something which is due." *Fricke v. W. E. Fuetterer Battery, etc., Co.,* 220 Mo. A., 623, 288 S. W., 1000; Waterman Set-Off, 2nd Edition, 457. "The keeping back or stopping something which is otherwise due because the other party to the contract has violated some duty devolving upon him in the same transaction." *Nelson Co. v. Goodrich,* 159 Wash., 189, 292 P., 406, 408. "The keeping back of something that is due because there is an equitable reason to withhold it." *Michigan Yacht, etc., Co. v. Busch,*

143 Fed., 929, 936. "A *quasi* offset of counterclaims not liquidated." *Barber v. Chapin,* 28 Vt., 413, 416. The distinctions between recoupment, offset and counterclaim are of no practical value excepting as showing the intimate connection of this form of offset with the demand made by the other party and, therefore, its equitable implication. It proceeds on the equitable principle that because of the acts of the other party to the contract who seeks to enforce the obligation, the party who seeks relief by way of set-off has been denied the full enjoyment of the right he has purchased, and has been thereby damaged. It is, in itself, equitable in its nature. *Johnston v. Grimm,* 209 Iowa, 1050, 229 N. W., 716; *Bryne v. Dorey,* 221 Mass., 399, 109 N. E., 146.

No one can contend that it is fair or just to permit the defendant to continue in the enjoyment of the full measure of the purchase price received for the good will of the business, when in open violation of his contract, and in defiance of the injunction of this Court, he continues to engage in the business from which he has solemnly contracted to desist, and thereby deprives the plaintiff of the very thing he agreed to deliver to him. Under the facts as they have been found, he has never completely delivered the good will of the business. He now seeks to take away the physical stock and equipment. After paying around $20,000.00 of the purchase price, there is little left to the plaintiff but a lot of experience.

It may be conceded that there are instances of wrong where no remedy is provided. If so, a court of equity should not be astute to find them or multiply them.

In formulating its judgments the Court has power to protect the interests of all persons before it. The right of the bank to realize on its collateral cannot be questioned. An order should be made either requiring that this money should be paid to the bank, or that a sufficient bond be given to protect it against loss. Upon such condition, the injunction should be continued to the hearing.

CLARKSON, J., concurs in dissent.

HERMAN M. JOHNSON v. METROPOLITAN LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 30 April, 1941.)

1. Trial § 45—

A judgment *non obstante veredicto,* in effect, is nothing more than a belated judgment on the pleadings.

2. Vendor and Purchaser § 25—

Upon the breach by a vendor of his contract to convey realty, the purchaser is entitled to recover those damages naturally and proximately resulting from such breach, which comprise not only the part of the purchase price paid by him with interest, but also the difference between the contract purchase price and the fair market value of the land at the time of the breach, as compensation for the loss of his bargain.

3. Same—

The damages recoverable by the purchaser for the vendor's breach of a contract to convey realty is not diminished by good faith nor aggravated by bad faith on the part of the vendor.

4. Same—When vendor breaches contract prior to acceptance of deed, purchaser may recover for loss of his bargain even though the contract is to convey by special warranty deed.

Plaintiff alleged a contract on the part of the defendant to convey to plaintiff the *locus in quo* by deed of special warranty, and that, being unable to convey a marketable title, defendant refused to accept the balance of the purchase price and execute deed. Plaintiff admitted that in accordance with a prior order entered in the cause defendant had returned the part of the purchase price paid with interest. The verdict of the jury established breach by defendant of the contract to convey and assessed the market value of the land. *Held:* Even considering plaintiff's admission of the reimbursement of the part of the purchase price paid by him as amounting to an amendment of the pleadings or as a fact of which the court could take judicial notice, the granting of defendant's motion for judgment *non obstante veredicto* is erroneous, since plaintiff is also entitled to compensation for the loss of his bargain, and plaintiff's exception thereto is sustained.

5. Estoppel § 3—

The acceptance by the plaintiff of the amount paid by defendant under order of court, representing the total amount which the defendant contends plaintiff is entitled to recover, does not estop plaintiff from further prosecuting the action to recover another element of damage to which he claims he is entitled when the order under which the payment is made specifically provides that the payment should be made without prejudice to the rights of either party.

6. Trial § 45—

Since a motion for judgment *non obstante veredicto* is, in effect, a belated motion for judgment on the pleadings, the court, strictly speaking, is confined to the pleadings in passing upon the motion, but where a material fact is admitted by the adverse party, the court may treat such admission as being in the nature of an amendment to the pleadings or as a fact of which the court can take judicial notice, and rule on the motion accordingly.

7. Judgments § 17b—

There is no error in the refusal of the court to sign a judgment on the verdict, tendered by the plaintiff, which provides for the recovery of a sum in excess of the amount to which plaintiff is entitled on the verdict, and

the fact that the error in the amount of the judgment tendered is due to a miscalculation of counsel in preparing the judgment cannot affect this conclusion.

8. Appeal and Error § 2—

Where no judgment has been entered against defendant, it is not prejudiced by any error committed in the trial, and questions presented by its exceptions noted during the progress of the trial are not properly before the appellate court, and its appeal will be dismissed as premature.

APPEAL by plaintiff and defendant from *Bone, J.*, at November Term, 1940, of LENOIR.

Civil action to recover damages for breach of contract to convey real property.

In 1930 John Duncan Leach *et al.*, being the owners of a certain tract of land in Lenoir County, borrowed $5,000.00 from the defendant. The loan was evidenced by note and secured by trust deed upon the premises. Default having been made in the payment of the installments maturing upon the loan, the substituted trustee, on demand of the defendant, foreclosed the trust deed. The defendant became the purchaser at the foreclosure sale and received foreclosure deed for the premises dated 3 April, 1933. On 5 May, 1933, defendant executed and delivered to the plaintiff a paper writing designated as an "earnest money contract of sale" in which defendant contracted to convey the *locus in quo* to plaintiff on certain conditions and provided the defendant was successful in acquiring title to the farm. It was also agreed that the defendant would give possession to the plaintiff "on the 15th. day of May, 1933, or so soon thereafter as possession can be obtained."

The original owners, after the foreclosure, refused to surrender possession of the premises. Thereupon, on 18 July, 1933, this defendant instituted an action in ejectment against Leach *et al.* The plaintiff herein became a party plaintiff in that action. The defendants therein answered, attacking the validity of the foreclosure and praying that same be annulled. This action resulted in a verdict and judgment for the defendant and the foreclosure sale was set aside and vacated.

On 5 September, 1933, defendant executed and delivered to plaintiff a contract to convey the *locus in quo* to plaintiff, by deed of special warranty, upon the terms and conditions therein set out, and to furnish at the time of the execution of the deed, abstract of title showing a fee simple title in the defendant herein. This contract superseded all prior agreements.

On 22 December, 1936, Leach *et al.*, original owners, instituted an action against the defendant and the original trustees in the deed of trust and the substituted trustees, to restrain foreclosure sale under said deed of trust. Subsequent thereto the indebtedness to defendant was adjusted.

After the judgment in the ejectment action was affirmed on appeal to this Court, the plaintiff herein tendered to the defendant the balance of the purchase money due under the contract of purchase and demanded deed. The defendant declined to accept the purchase money or to execute a deed in fee for said premises. Thereupon plaintiff instituted this action to recover damages for the alleged breach of said contract. Pending the trial the defendant repaid to the plaintiff so much of the purchase money, plus interest, as had been received by the defendant, in addition to all items which plaintiff had paid out for taxes and insurance, with interest thereon. This repayment was made under an order entered by Spears, J., "without prejudice to the rights of either party."

When the cause came on for trial issues were submitted to and answered by the jury in favor of the plaintiff. The court below declined to sign judgment thereon tendered by plaintiff but in lieu thereof signed judgment for the defendant *non obstante veredicto*. Both plaintiff and defendant appealed.

F. E. Wallace, T. J. White, Jr., and J. A. Jones for plaintiff.

R. W. Winston, Jr., Whitaker & Jeffress, and John G. Dawson for defendant.

BARNHILL, J. A judgment *non obstante veredicto,* in effect, is nothing more than a belated judgment on the pleadings. *Jernigan v. Neighbors,* 195 N. C., 231, 141 S. E., 586; *Iron Works v. Beaman,* 199 N. C., 537, 155 S. E., 166; *Little v. Furniture Co.,* 200 N. C., 731, 158 S. E., 490; *Buick Co. v. Rhodes,* 215 N. C., 595, 2 S. E., 699.

"At common law a judgment *non obstante veredicto* could be granted only when the plea confessed the cause of action and set up matters in avoidance which, if true, were insufficient to constitute either a defense or a bar to the action. It was entered only upon the application of the plaintiff, and never in favor of the defendant. Under the modern practice, it may be given for either party, but only when the party against whom the verdict was returned is entitled to judgment upon the pleadings. 33 C. J., 1178; *Fowler v. Murdock,* 172 N. C., 349; *Baxter v. Irvin,* 158 N. C., 277; *Doster v. English,* 152 N. C., 339; *Shives v. Cotton Mills,* 151 N. C., 290." *Jernigan v. Neighbors, supra.*

A careful reading of the complaint discloses that the plaintiff has adequately alleged a contract of sale of the *locus in quo* and a breach thereof resulting in damages. Hence, the judgment below cannot be sustained for that the plaintiff has failed to state a cause of action.

The judgment itself discloses that this was not the theory upon which the court acted. It provides in part as follows:

"The Court is of the opinion that notwithstanding the verdict of the jury the plaintiff is entitled to recover only such portion of the purchase money as he has paid, plus interest thereon, and the items which he has paid out for taxes and insurance, with interest thereon. It was admitted by both parties that all of said moneys, with interest, had already been paid to the plaintiff under the terms of an order entered in this cause by Honorable Marshall T. Spears, Judge Presiding at the November Term, 1936, of this court, said order having been entered without prejudice to the rights of either party.

"Although the Court is of the opinion that plaintiff is entitled to recover the purchase money paid by him, plus interest and the other items as aforesaid, yet when said recovery is credited with the amount already received by plaintiff from defendant there is no balance left:

"IT IS NOW, THEREFORE, BY THE COURT ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing further by this action," etc.

It, therefore, appears, affirmatively, that the Court concluded, as a matter of law, that the amount paid by the defendant to the plaintiff under the judgment of Spears, J., represents the full measure of damages to which the plaintiff is entitled upon proof of the breach of the contract alleged.

The defendant relies upon this payment as a full discharge of its liability. It contends that, conceding the breach of contract, the amount recoverable by plaintiff is the sums so paid by him, with interest. The trial judge concurred in this view. This position cannot be sustained.

In some jurisdictions the rule obtains that where the vendor in an executory contract for the sale of land is guilty of no bad faith or fraud, but the sale fails in consequence of a defect in his title, and the vendee has paid any part of the consideration, he may recover back the money, with interest; but he can recover nothing for the loss of his bargain. Anno., 48 A. L. R., 19. It is upon this rule that the defendant, asserting good faith, relies. But, good faith is a question of fact. Mere allegation of good faith is not proof thereof.

Even so, this rule is not followed in this jurisdiction. The general rule which has been adopted and applied by this Court is this: the damages recoverable for breach of contract by the vendor to convey real estate are only such as may fairly and reasonably be well considered as arising naturally—that is, according to the usual course of things—from such breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as a probable result of the breach. The loss of the vendee's bargain is assessed upon the basis either of the difference between the contract price and the actual value of the land, or the actual value of the land less the

amount, if any, remaining unpaid on the contract price. One element taken into account is the difference between the contract price and the actual value of the land at the time of the breach. Anno., 48 A. L. R., pp. 14 and 17.

"The proper measure of damages for the breach by a vendor of his contract to sell real property is the difference between the contract price and the market value of the land at the time of the breach, plus any part of the purchase price which has been paid, with interest." *Howell v. Pate*, 181 N. C., 117, 106 S. E., 454; *Newby v. Realty Co.*, 180 N. C., 51, 103 S. E., 909. Good faith on the part of the vendor does not serve to diminish, nor does bad faith aggravate, the damages which naturally and proximately flow from the breach of a contract. If the defendant has breached its contract to convey the *locus in quo* to the plaintiff, it must suffer the consequences under the rule or measure of damages prevailing in this jurisdiction.

The defendant contends here that in any event acceptance by the plaintiff of the amount paid under the order of Spears, J., estops the plaintiff from asserting any right to further compensation. In this connection it must be noted that this order, entered at the November Term, 1936—apparently by consent, and at least without exception—provides that the payment is made "without prejudice to the rights of either party." Plaintiff's rights, if any, having been expressly reserved, it cannot be successfully contended that he is now estopped to assert them.

The court below did not decree, or attempt to decree, that any one of the several affirmative defenses relied upon by the defendant is sufficient in law to constitute a valid defense or to estop the plaintiff or bar his right of recovery. While this question is not presented, perhaps it is not amiss to say that we have carefully examined the affirmative defenses relied upon and are of the opinion that neither is sufficient, as a matter of law, to sustain a judgment *non obstante veredicto.*

In deciding a motion for judgment on the pleadings the Court is confined to the pleadings. The repayment by the defendant to the plaintiff of the amounts received by it under the contract is not alleged. It is admitted by the plaintiff. The judgment is based on this admission. It follows that, strictly speaking, the judgment entered is not a judgment *non obstante veredicto.* Even so, we have treated the admission in the nature of an amendment to the pleadings, or, at least, as a fact of which the Court could take judicial notice, and have decided the question presented.

The judgment on the verdict, tendered by the plaintiff, provides for the recovery of a sum in excess of the amount to which the plaintiff would be entitled on the verdict. There was no error in the refusal of

the Court to sign the same. That the amount in the judgment tendered was due to an error of counsel in preparing the judgment cannot affect this conclusion.

The judgment below was ill advised. Plaintiff's exception thereto must be sustained to the end that further proceedings may be had on the verdict rendered.

DEFENDANT'S APPEAL.

Appeals are permitted from final judgments and judgments affecting a substantial right. No judgment has been signed on the verdict rendered. Until judgment has been entered, questions presented by exceptions noted during the progress of the trial are not properly before this Court. McIntosh P. & P., sec. 676 (7). Until a judgment is entered against the defendant it is not prejudiced by any error committed in the trial. Its appeal is premature and is dismissed. *Smith v. Matthews*, 203 N. C., 218, 165 S. E., 350, and cases cited.

On plaintiff's appeal, Reversed.

Defendant's appeal, Dismissed.

MRS. ELIZABETH S. PACE v. NEW YORK LIFE INSURANCE COMPANY, A CORPORATION.

(Filed 30 April, 1941.)

1. **Insurance § 36g—Where facts are admitted, determination of expiration date of extended term insurance by construction of policy is question of law.**

Where the sole question in issue is the expiration date of paid-up extended term insurance purchased after lapse of the policies with the balance available therefor after deducting amounts due on lien notes, in accordance with the policy provisions, it being admitted that the computation by insurer of the amount and the length of the extended term is without error, the determination of the expiration date of the extended term insurance by construction of the language of the policies is a question of law for the court and not an issue of fact for the jury, and the court may properly direct the verdict which should be rendered.

2. **Insurance § 30e—Held: Under terms of policies, extended term insurance must be computed on basis of effective date of policies and not dates of delivery.**

Each application for the policies in suit stipulated that the insurance applied for therein should not take effect unless the first premium was paid and the policy delivered, but that the policy, when issued, should relate back to the date of the first application. The policies issued stipulated the date of the first application as the effective date of both poli-

cies, and that annual premiums should be due on the anniversaries of the effective date. Upon lapse of the policies for nonpayment of premiums, paid-up extended term insurance was purchased in accordance with the terms of each policy. Insured died three days after the expiration of the extended term, if computed on the basis of the effective date stipulated in the policies, but within the extended term if computed on the basis of the dates the policies were delivered and the first premiums paid. *Held:* Under the express provisions of the policies and the applications, the extended term must be computed on the basis of the effective date of the policies as therein stipulated notwithstanding the reservations that the insurance should not be effective until the policies were delivered and the first premium on each policy paid, and a directed verdict that plaintiff beneficiary is not entitled to recover on the policies is without error. *Wilkie v. Ins. Co.*, 146 N. C., 513, cited and applied.

3. Insurance § 32d—

Where a twenty-year-pay life insurance policy is lapsed for nonpayment of premiums before the expiration of the twenty-year period, and paid-up extended term insurance is purchased under the provisions of the policy, insured is not entitled to the options provided in the policy for those who have paid all premiums for the full twenty-year period, nor to share in the dividends or profits accruing after the lapse of the policy.

4. Insurance § 13b: Courts § 11—

A contract of insurance based upon the application of insured made while residing in this State, must be construed in accordance with the laws of this State rather than the laws in force at the time of the inception of the contract in the state in which insurer is incorporated. C. S., 6287.

APPEAL by plaintiff from *Bone, J.*, at January Term, 1941, of WAKE. No error.

Separate actions upon two policies of insurance issued by defendant upon the life of William H. Pace, now deceased, were consolidated for trial. Under instructions from the court there was verdict for defendant, and from judgment thereon plaintiff appealed.

Wilbur H. Royster and Arthur I. Ladu for plaintiff, appellant.
Pou & Emanuel for defendant, appellee.

DEVIN, J. The proofs were entirely documentary and there was no controversy as to the material facts. The questions at issue involved the construction of insurance contracts between insured and defendant, and the legal effect of the failure of the insured to pay the premiums on the policies since 26 August, 1921. The only exception noted by the plaintiff was to the ruling of the court and the instructions to the jury that the insurance was not in force and effect at the time of the death of the decedent, 4 January, 1940.

From the insurance policies, the applications for insurance, correspondence, and stipulations of counsel, we summarize these pertinent facts. On 26 August, 1905, William H. Pace made written application to the defendant for a twenty-year dividend-accumulation policy in the sum of $2,000. This application contained these words:

"I agree, on behalf of myself and of any person who shall have or claim any interest in any policy issued under this application, as follows: . . . 2. That in any apportionment or distribution of profits, the principles and methods which may be adopted by the Company for such apportionment or distribution, and its determination of the amount equitably belonging to any policy which may be issued under this application, shall be conclusive upon the Insured under said policy and upon all parties having or claiming any interest thereunder. 3. That the insurance hereby applied for shall not take effect unless the premium is paid and the policy delivered to me during my lifetime, and that, unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application."

Thereupon the policy was issued accordingly, and delivered in due course some ten days later. The policy recited: "This policy takes effect as of the Twenty-sixth day of August, Nineteen Hundred and Five. This agreement is made in consideration of the sum of Sixty Dollars and Sixty-two Cents, the receipt of which is hereby acknowledged, constituting payment for the period terminating on the twenty-sixth day of August, Nineteen Hundred and Six, and in further consideration of the payment of a like sum on said date, and thereafter on the Twenty-sixth day of August in every year during the continuance of this Policy, until premiums shall have been paid for Twenty years in all from the date on which this Policy takes effect."

Subsequently, on 23 September, 1905, the insured made application for another similar policy in sum of $3,000, stating: "I hereby agree that any policy which may be issued on this application shall be based on the written application for insurance made by me on August 26th, 1905, on which Policy No. 5052732 was issued, and that such policy shall take effect as of the 26th day of Aug. 1905."

Shortly thereafter, in due course, and upon this application, the second twenty-year policy in sum of $3,000 was issued and delivered by defendant to the insured. This policy contained the identical provisions with the first policy, except in amount, that the policy should take effect 26 August, 1905, and fixing 26 August, annually thereafter, as the premium due date during the continuance of the policy, "until premiums shall have been paid for twenty years in all from the date on which this policy takes effect."

Insured paid the premiums on both policies up to and including the due date in 1921, and paid no premiums thereafter. At the time insured failed to pay the premiums due 26 August, 1922, his lien notes to the defendant in the aggregate sum of $797 (given for the premiums in 1915, 1916, 1917, 1920, and 1921) were due and unpaid. Upon the failure of insured to pay the premiums due 26 August, 1922, the amount of the lien notes was deducted from the sum otherwise available for the purchase of insurance in event of nonpayment of premiums, and the balance was used to purchase paid-up extended term insurance of about $4,200 for a period of 17 years and 128 days. The insured was notified 19 January, 1923, that pursuant to the terms of the contract his insurance in the amount stated was extended for that period. Upon inquiry by insured in January, 1939, he was again advised of the exact period of extended insurance and of the amount payable if death should occur not later than 1 January, 1940, and that if he survived the end of the period the policy would have no value. The insured died 4 January, 1940, three days after the period of extension had expired.

By written stipulation, appearing in the record, it was agreed in effect that by reason of the failure of deceased to pay the premiums due for the year 1922, the policies lapsed, and that "in accordance with the terms of said two policies" the lien notes were satisfied by deducting the amount thereof from the sum available for the purchase of insurance in the event of nonpayment of premiums when due, and the balance was used to purchase "paid-up extended term insurance under each policy." The computation of the amount and of the length of the extended term, for a period of 17 years and 128 days, was agreed as correct.

Upon this undisputed documentary and written evidence and the stipulation of facts agreed, it is apparent that, unfortunately for the plaintiff, the policies of insurance sued on had ceased to have any value at the time of the death of the decedent, and that there was no error in the instructions of the court below to the jury to answer the issue accordingly. In this situation the case presented a question of law rather than an issue of fact.

The facts in this case are strikingly like those in *Wilkie v. Insurance Co.*, 146 N. C., 513, 60 S. E., 427. In that case a similar twenty-year policy was issued 2 December, 1901. The policy contained provisions designating the end of the accumulation period as 22 November, 1921, and fixing 22 November in each year as the due date for the payment of premiums. After two full premiums were paid, insured in that case made no further payment and the policy lapsed. By the terms of the policy insurance was automatically continued for two years and two months, and no longer. The insured died 26 January, 1906. It was contended that the period of two years and two months should be com-

puted from 2 December, 1903 (the anniversary of the date of delivery of the policy), and that this would show the insurance in force until 2 February, 1906. But the Court held that the extension period must be computed from the date stipulated in the contract of insurance, that is, 22 November, and that the period of two years and two months from 22 November, 1903, expired 22 January, 1906, four days before the death of the insured. As the policy was automatically continued in force for two years and two months "from the date to which premiums were duly paid," the Court said: "The question, then, is presented, to what date had premiums been fully paid, under the terms of this policy? Manifestly, as we read the contract, and in view of the law applicable to such cases, to 22 November, 1903. . . . In view of the plain language of the policy, it can make no difference that the policy was not issued until 2 December, 1901. We find this provision in the policy: 'This agreement is made in consideration of the sum of $63.66, the receipt of which is hereby acknowledged, and of the payment of a like sum on 22 Nov. thereafter, in every year during the continuance of this policy, until twenty full years premiums shall have been paid.'"

The case of *Wilkie v. Insurance Co., supra,* has been cited by courts in other jurisdictions where cases based on similar facts were under consideration. *Timmer v. Ins. Co.,* 222 Iowa, 1193; *Harvey v. Ins. Co.,* 45 F. (2), 78; *McCampbell v. Ins. Co.,* 288 F., 465; *Shira v. Ins. Co.,* 90 F. (2), 953; *Ins. Co. v. Matthews,* 33 F. (2), 899; *Ratliff v. Ins. Co.,* 87 F. (2), 965; *Ins. Co. v. Wheeler,* 265 Ky., 269. We think it apparent that the *Wilkie case, supra,* is generally regarded as stating the rule established in North Carolina, and that it has been followed by other courts in cases involving similar facts.

The plaintiff has endeavored to differentiate this case from the *Wilkie case, supra,* but we are constrained to hold that case controlling on the facts presented by the record here. The contention that the period of 17 years and 128 days should be computed from the date of delivery of the policies is met by the very terms of the applications and policies. To uphold this contention would result in making a contract which the parties, themselves, did not make. The fact that the policies were delivered and the first premiums paid on subsequent days did not change the due date of the premiums as fixed by the express words of the contract. The cases cited by plaintiff in support of her contention, in the main, are grounded upon the construction given the clauses in the contracts considered which provide that the insurance shall not be effective until the policy is issued and delivered by the Company and the first premium thereon paid in full. This is held, under the facts in some cases, to determine the date for the payment of subsequent annual or quarterly premiums, rather than the date mentioned in the policy. *Newman v.*

Ins. Co., 7 S. W. (2), 1015; *Bigalke v. Ins. Co.,* 34 S. W. (2), 1019; *Ins. Co. v. Stewart,* 237 F., 70; *Halliday v. Assurance Society,* 209 N. W., 965; *Stramback v. Ins. Co.,* 94 Minn., 281. But we do not think this rule should be applied to the facts in the case at bar, where there was an express agreement fixing a definite date upon which the policy should take effect and the annual premiums should be paid.

The general rule, as declared in *Wilkie v. Insurance Co., supra,* and supported by the weight of authority in other jurisdictions, is that where a policy expressly specifies the date on which it is to take effect and the date on which recurring premiums are due and payable, such date must be held controlling, regardless of the date on which the policy is delivered, and notwithstanding the reservation that the insurance is not effective until the policy is delivered and the first premium paid. *McConnell v. Life Assurance Society,* 92 F., 769; *Wilkinson v. Ins. Co.,* 176 Ky., 833; *Ins. Co. v. Wheeler,* 265 Ky., 269; *Wolford v. Ins. Co.,* 114 Kan., 411. Numerous cases on this point are collected in the annotation in 6 A. L. R., 774, and 32 A. L. R., 1253. The plainly expressed provisions of the contract must be upheld. *Harden v. Ins. Co.,* 206 N. C., 230, 173 S. E., 617.

The particular provisions of the policies sued on and the agreements entered into between the insured and the company, as expressed in the applications and policies, sustain the position of the defendant that the extension period of 17 years and 128 days must be computed from 26 August, 1922, and that it terminated before the death of the insured.

It is apparent also that the insured was not entitled to the options open to those who paid all the premiums for twenty years, nor to share in the dividends or profits accruing after the lapse of his policies, for it is expressly stated in the face of the policy that these are applicable only if the insured is living at the end of the period, and "if the premiums have been duly paid, and not otherwise." *McCampbell v. New York Life Ins. Co.,* 288 F., 465; *Orange v. Mutual Benefit Life Ins. Co.,* 199 Ky., 429.

Under the provisions of C. S., 6287, this contract of insurance, based upon the application of the insured, who was then residing in the city of Raleigh, must be construed in accordance with the laws of North Carolina rather than those of New York in force at the time of the inception of the contract.

We have been aided in the consideration of this case by the able briefs of counsel who, with their usual diligence, have collected and analyzed numerous decisions from other courts on the questions here involved.

Upon the uncontroverted facts shown by the record in the case, we think the court's instructions to the jury on the issue submitted must be upheld, and in the trial we find

No error.

CHARLES W. CREECH v. NATIONAL LINEN SERVICE CORPORATION AND LOUIS A. CARTER.

(Filed 30 April, 1941.)

1. Master and Servant § 21b—

The doctrine of *respondeat superior* applies only when the relation of master and servant or principal and agent exists between the wrongdoer and the person sought to be charged at the time of and in respect to the very transaction out of which the injury arises.

2. Same—

A servant is acting in the course of his employment when he is performing that which he is employed to do and is about his master's business, and while every deviation from the strict execution of his duty will not interrupt the course of the employment, the master cannot be held liable for negligence of the servant committed while engaged in some private matter of his own outside the scope of his employment.

3. Automobiles § 24b—Evidence held insufficient to make out prima facie case that servant, at time of injury, was acting in course of his employment.

Plaintiff instituted this action to recover for injuries sustained in a collision between his car and the car owned and driven by defendant employee. The employee, called by plaintiff and sworn in as an adverse witness, testified that on the morning of the accident he had loaded his truck and left the loaded truck at the laundry, and at the time of the accident was driving his own car to his home for breakfast, that the employer did not permit the employees to use the trucks in going to breakfast, and did not permit the employees to use their personal cars in picking up or delivering laundry, and that he had never used his personal car for such purpose. There was also evidence that on occasion the drivers were required to use their personal cars in making deliveries, and that immediately after the accident there were bundles of linen in defendant employee's car. *Held:* Considering the evidence in the light most favorable to plaintiff, the evidence is insufficient to show that the relation of master and servant existed between the employer and the employee in respect to the very transaction out of which the injury arose, and the evidence was insufficient to have been submitted to the jury on the doctrine of *respondeat superior.*

APPEAL by defendant National Linen Service Corporation from *Harris, J.,* at September Civil Term, 1940, of WAKE.

Civil action to recover damages for personal injuries allegedly resulting from actionable negligence of defendants.

On 2 January, 1937, about 7:30 o'clock in the morning, plaintiff was injured in a collision, at a street intersection in Raleigh, between an automobile owned and operated by him and one owned and operated by defendant Louis A. Carter.

Defendant National Linen Service Corporation, through one of its subsidiaries, known as Raleigh Linen Supply Company, was on and prior to said date engaged in the business of laundering linens, coats, aprons, etc., and furnishing the same to business firms and corporations in the city of Raleigh and elsewhere. Defendant Louis A. Carter was employed by said corporate defendant as a driver in delivery and "pick up" of linens in said city.

Plaintiff alleges in his complaint and on the trial below offered evidence tending to show that his injuries were proximately caused by the negligence of defendant Carter.

Plaintiff further alleges upon information and belief that at the time of said collision "defendant Louis A. Carter, under the order and direction of his employer, National Linen Service Corporation, was undertaking to make delivery of certain laundered coats, aprons, etc., and for that purpose was authorized and directed by his said employer to use his personal automobile."

This and other material allegations of the plaintiff are denied by defendant National Linen Service Corporation in its answer filed. Defendant Carter did not answer.

The trial below, in so far as pertinent to this appeal, revolved around the question as to whether at the time of the said collision the defendant Carter was acting in the line of duty and in the course of his employment by the said corporation.

As bearing thereon, defendant Carter, called by plaintiff and sworn as an adverse witness, testified to substantially these facts: That in January, 1937, he was employed by the Raleigh Linen Supply Company to "pick up and deliver" linen in the city of Raleigh; that his hours for work were from 5 o'clock in the morning "until however long it took to finish" his route—that is, that he had regular hour for reporting for duty in the morning, with "no specified hours of employment after reporting except to finish the job"; that he would load his truck in the morning, go out on one trip, making deliveries and pick-ups, and come back in and get the rest of his load; that when he had reloaded the truck he would check out and go to breakfast; that on the morning of 2 January, 1937, he reported for duty at 4:55 o'clock and worked until 7:32, at which time he said: "I got in my car and went to breakfast . . . I went home to breakfast in my personal car. I was on the way to my home when this accident occurred. . . . I did not go in my truck because it was not the company's policy. I know the general policy and custom about driving in my personal car and the company's trucks. It was not to use the personal car for deliveries . . . I have never delivered any goods of the Raleigh Linen Supply Company in my personal car; I never knew any other driver to do it." And, again: "Taking

this card, . . . at 7:37 that morning I had my complete load for the day. I was getting ready to leave for breakfast . . . The second check means I received my complete load of linens from the linen room for the day." Then, in response to question from the court as to what he then did with the load, he answered: "Left my load in front of the plant and got in my automobile and went to breakfast." And, again: "It was my usual custom to go to breakfast in my private car, and when I came back to the plant I delivered in the company's truck." The witness further testified that all the drivers of the company wore uniforms; that he bought his own uniform; and that on the morning in question he had on a whipcord suit, consisting of pants, jacket and cap, identifying him as an employee of the Raleigh Linen Supply Company.

Plaintiff further offered evidence tending to show that immediately after the accident when plaintiff was placed in the car of defendant Carter to be taken to the hospital, there were some packages of linen, or something that looked like linen, "in the foot of the car."

Plaintiff further offered evidence tending to show that while trucks were furnished by the company for that purpose, "it was the custom for the boys to make deliveries on the cars." One witness testified: "We would use the trucks unless we wanted to take it on our part and use the car. We were furnished trucks for that purpose. We were hired to drive the truck and the truck was there for that purpose, and when we used private cars we did it for our own convenience most of the time, but there were times perhaps when all the trucks were busy and the route salesmen standing around would say such and such a firm needed something and would take his car and run it up there. The business solicitor or collector or any of them would say that, and did say it numbers of times."

From judgment on adverse verdict, defendant National Linen Service Corporation appeals to Supreme Court and assigns error.

Pou & Emanuel, John Hicks Johnson, and Stanley L. Seligson for plaintiff, appellee.

Clem B. Holding for defendant, appellant.

WINBORNE, J. It is conceded by the parties that the liability, if any, of defendant National Linen Service Corporation for injury to plaintiff proximately caused by the negligence of its servant or employee, the defendant Louis A. Carter is grounded solely upon the doctrine of *respondeat superior.*

The question then arises as to whether the evidence in the case, taken in the light most favorable to plaintiff, is sufficient to make out a *prima facie* case on the essential facts necessary under that doctrine to hold

defendant National Linen Service Corporation responsible for the negligent acts of defendant Carter. Careful consideration of the evidence in that aspect leads to a negative conclusion.

This doctrine applies only when the relation of master and servant, employer and employee, or principal and agent, is shown "to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose," *Linville v. Nissen*, 162 N. C., 95, 77 S. E., 1096; *Martin v. Bus Line*, 197 N. C., 720, 150 S. E., 501; *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 849; *Tribble v. Swinson*, 213 N. C., 550, 196 S. E., 820; *Parrott v. Kantor*, 216 N. C., 584, 6 S. E. (2d), 40; *McLamb v. Beasley*, 218 N. C., 308, 11 S. E. (2d), 283, and numerous other cases.

In *Martin v. Bus Line, supra*, this Court said: "It is elementary law that the master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting within the scope of his employment and about the master's business. *Roberts v. R. R.*, 143 N. C., 176, 55 S. E.,509, 8 L. R. A. (N. S.), 798, 60 Ann. Cas., 375. It is equally elementary that the master is not responsible if the negligence of the servant which caused the injury occurred while the servant was engaged in some private matter of his own, or outside the legitimate scope of his employment. *Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137; *Doran v. Thomsen*, 76 N. J. L., 754." See, also, *Parrott v. Kantor, supra*.

"A servant is acting in the course of his employment when he is engaged in that which he is employed to do, and is at the time about his master's business. He is not acting in the course of his employment if he is engaged in some pursuit of his own. Not every deviation from the strict execution of his duty is such an interruption of the course of employment as to suspend the master's responsibility, but, if there is a total departure from the course of the master's business, the master is not answerable for the servant's conduct." Tiffany on Agency, p. 270; *Robertson v. Power Co.*, 204 N. C., 359, 168 S. E., 415; *Parrott v. Kantor, supra*.

Applying these principles to the factual situation of the present case, plaintiff has failed to offer evidence tending to show that the relation of master and servant, of employer and employee, or of principal and agent, existed between defendant Carter and National Linen Service Corporation at the time and in respect to the very transaction out of which the injury to plaintiff arose. There is no evidence that at that time Carter was acting within the scope of his employment and about the business of the Linen Corporation. On the contrary, the uncontradicted testimony of Carter, as witness for plaintiff, is that at the time

of the accident he had loaded and left the loaded truck of the corporation in front of the plant, and was riding in his own automobile on his way to his home for breakfast, and further, that he has never delivered any goods of the company in his car. As was said in *McLamb v. Beasley, supra,* Carter "was his own master while driving home." This defeats recovery on the theory of *respondeat superior. Parrott v. Kantor, supra.*

Therefore, the judgment below is

Reversed.

PRIMROSE PETROLEUM COMPANY v. MRS. GERTRUDE JONES ALLEN.

(Filed 30 April, 1941.)

1. Sales § 15—

Where the seller of roofing material gives a written special warranty of roof protection for a period of ten years if the product is applied as directed, both parties are bound by the special warranty, and the warranties ordinarily implied in contracts of purchase and sale are excluded thereby.

2. Same—

A stipulation in the written order given by the purchaser to the seller that the seller will not be liable for any agreement, verbal or otherwise, not written or printed on the order, waives any prior purported guarantee, oral or otherwise, made by the seller's agent.

3. Sales § 13—Purchaser must show that he has complied with conditions of special warranty in order to recover thereunder.

Where the parties are bound by a written guarantee that the merchandise sold would give the buyer roof protection for a period of 10 years if properly applied, and that if the product should fail to give such protection the seller would furnish sufficient additional like material to afford such protection for the ten-year period, an instruction to the effect that the purchaser would be liable for the purchase price if the roof coating was good for the purpose for which such roofing is generally good for, irrespective of whether it was good for the roof of the building of purchaser, cannot be held for error when there is no evidence that the roof coating was applied as directed or that the purchaser had demanded "additional like material to keep the roof in leak proof condition."

4. Sales § 15—

In contracts of purchase and sale, the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract.

5. Trial § 31—Illustration of principal of law growing out of evidence by statement of hypothetical facts held not error as expression of opinion.

A charge upon an implied warranty of a liquid roof coating that the seller warranted that the product should be good for the purpose for

which sold but that a person buying liquid roofing could not "expect to fill up a gap that was 30 feet wide" with such material, *is held* not error as an expression of opinion by the court, it appearing that the court was merely illustrating a principle growing out of the testimony of various witnesses that the defendant's roof was in such condition that no roofing paint could repair it, but that other roofing material to stop up the holes therein was necessary.

6. Sales § 14b—

Where the seller's written guarantee excludes all prior warranties or guarantees made by its agent, if any, a requested instruction based upon prior purported guarantees of the seller's agent is properly refused, since such instruction would be foreign to the issues involved.

APPEAL by defendant from *Pless, J.*, at February Term, 1941, of WAKE.

Jones & Brassfield and Armistead Jones Maupin for plaintiff, appellee.
John W. Hinsdale for defendant, appellant.

SCHENCK, J. This is an action on contract to recover the balance of purchase price for asbestos roof coating, known as "Hydrotex," sold by the plaintiff to the defendant, wherein the defendant admits the receipt of the merchandise and the agreement to pay therefor, but avers that the merchandise failed to meet the warranty made in the sale thereof, and therefore makes counterclaim to recover of the plaintiff the amount paid to it by her.

The order given by the defendant to the plaintiff for the asbestos roof coating contained the following clause: "Notice: This order not subject to countermand or cancellation. This company is not liable for any agreement, verbal or otherwise, not written or printed on this order, and assumes no responsibility to supervise or apply products purchased on this order unless so specified on this order. . . .

"I have read this agreement, thoroughly understand it, and have customer's yellow copy containing guarantee in my possession. I have checked Roof Record on the reverse side, and it is correct.

(Signed) MRS. GERTRUDE JONES, Owner."

Reversed side.

"With our instructions, which are furnished with each invoice, it is easy to apply Hydrotex. It is not at all necessary to employ an expert, though care and the observance of the simple printed instructions are absolutely necessary."

The plaintiff at the time of the sale of the asbestos roof coating to the defendant furnished her with a written guarantee in the following words:

"HYDROTEX 10 YEAR GUARANTEE BOND

"The said Primrose Petroleum Company binds itself, its successors and assigns that should said Hydrotex Black Liquid Asbestos Roof Coating and/or Plastic Cement, as described on the reverse side hereof, be applied according to its simple printed instructions and payment discharged by said purchaser in conformity to the contract of purchase and the terms thereof, and thereafter the said applied material fails to give said buyer Roof Protection for a period of ten years from the date of invoice therefor, from the undersigned (damage from windstorm, cyclone, earthquake or other acts of Providence beyond the control of the undersigned excepted); then and in that event to furnish buyer, free of cost, sufficient additional like material for him to keep his roof in a leak proof condition for the full duration of the Ten Year Period aforesaid.

PRIMROSE PETROLEUM COMPANY,
(Signed) RAYMOND BRIN, *Vice President.*"

The defendant offered evidence tending to show that the agent of the plaintiff, one Ennis, examined the roof of a building on East Davie Street, in the city of Raleigh, in which the defendant had a life estate, and represented to defendant that the materials offered for sale by the plaintiff "would take care of the roof and he would guarantee it."

The defendant offered further evidence that after the order was given for the asbestos roof coating and after the coating had been applied to the roof of the defendant's building by the said Ennis there was no improvement in its condition, that the roof continued to leak, and the defendant was compelled to have an entirely new roof placed upon her building.

The only exceptions set out in the brief of the defendant, appellant, relate to the charge of the court.

The first question presented is, Did the court err in instructing the jury in effect that the seller and buyer (the plaintiff and the defendant) were limited to the terms of the special warranty? We think there was no error in this instruction. There was set up in the contract between the plaintiff and defendant a special warranty of "roof protection," evidenced by the "Guarantee Bond," and by this special warranty both parties were bound, and the warranties ordinarily implied in contracts of purchase and sale were excluded thereby. *Ward v. Liddell Co.*, 182 N. C., 223, 108 S. E., 634; *Farquhar Co. v. Hardware Co.*, 174 N. C., 369, 93 S. E., 922.

Any effect of any purported guarantee made orally or otherwise to the defendant by the agent of the plaintiff was rendered nugatory by the defendant's signing a waiver of liability arising out of any agreement not written in the order.

The second question presented is, Did the court err in instructing the jury in effect that the only implied warranty involved in the trial was

that the asbestos roof coating was good for the purpose that liquid roofing is generally good for, irrespective of whether it was good for the roof of the building of the defendant?

The court charged the jury in effect that if they should find by the greater weight of the evidence that the plaintiff's asbestos roof coating was generally good for roofing purposes, the fact that it was not suitable and fit to be used on the particular roof of the building of the defendant would not enable the defendant to escape liability or to recover on her counterclaim. This was a correct charge in view of the fact that the only special warranty relating to the defendant's building was that if the asbestos roof coating was applied as directed the defendant would have "Roof Protection for a period of ten years," and in the event of failure to render such roof protection the plaintiff would furnish the defendant sufficient additional like material to keep her roof in a leak proof condition for the full duration of the ten years. There is no evidence that the asbestos roof coating was applied as directed, or that the defendant has ever applied to the plaintiff for "additional like material to keep the roof in leak proof condition."

In contracts of purchase and sale "the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale." *Ashford v. Shrader,* 167 N. C., 45, 83 S. E., 29; *Randall v. Hewsom,* 2 Q. B., 109.

The third question presented is, Did the court err in charging the jury as follows: "Now, under the implied warranty in the sale of the asbestos roofing the Primrose Petroleum Company warrants that the liquid asbestos roofing sold by it for the purpose of repairing a roof is good and will stand up under the use and for the purpose for which it is sold. Now, that doesn't necessarily mean, gentlemen of the jury, that one who buys liquid roofing from somebody could expect to fill up a gap that was 30 feet wide with it." We do not apprehend that the jury could have interpreted this excerpt from the charge as an expression of an opinion by the court. The court was merely illustrating a principle growing out of the testimony of various witnesses to the effect that the roof on defendant's building was burst to pieces and it was necessary that large rolls of roofing paper be used to stop up the holes therein, and that no roofing paint could repair the deteriorated condition thereof.

The fourth question presented is, Did the court err in refusing to give a special instruction prayed for by the defendant? This question is answered in the negative for the reason, *inter alia,* that the instruction is hypothesized upon the jury finding the fact that the agent of the plaintiff examined the roof of the house of the defendant and reported

to her that the product of the plaintiff would remedy the leaks in such roof, and in consequence thereof the defendant gave the order to the plaintiff. Since the written contract signed by the defendant excludes all agreements not contained in the written order, the instruction prayed for would have been foreign to the issues involved.

We have examined the charge as a whole and are of the opinion, and so hold, that there is in it and in the record

No error.

PATRICK CASEY v. W. J. BARKER ET AL.

(Filed 30 April, 1941.)

1. Process § 8—Service of process under Indiana law on nonresident auto owner is predicated upon receipt for registered mail containing notice and copy of process, or refusal to accept or claim such registered mail.

Under the Motor Vehicle Law of Indiana, substituted service on a nonresident automobile owner, when defendant's return receipt for registered mail containing notice of service and copy of process is not appended to the original process and filed in the court, is predicated upon defendant's refusal to accept or claim such registered mail, and in a suit here on a judgment rendered by that state on substituted service, an allegation that defendant "failed to claim" the registered mail is insufficient, the difference between a refusal to accept or claim the registered mail, and failure to claim it being material, since one imports notice while the other does not, nor is the defect cured by the recital in the attorney's affidavit that the registered mail was returned unclaimed by the Post Office Department, since the Indiana statute requires that such return be predicated on the refusal of the defendant to accept or claim the registered mail.

2. Judgments § 22h—

A judgment *in personam* without voluntary appearance or valid service of process in some way sanctioned by law, is void for want of jurisdiction.

3. Judgments § 22b—

A judgment which is void for want of jurisdiction may be treated as a nullity, disregarded, vacated on motion, attacked directly or collaterally.

4. Judgments § 40—

Where, in an action against a resident of this State on a judgment *in personam* rendered by another state, the allegations of the complaint are insufficient to show valid service of process on defendant in accordance with the laws of the state rendering the judgment, such defendant's demurrer on the ground that the complaint fails to state a cause of action is properly sustained.

APPEAL by plaintiff from *Ervin, Special Judge,* at October Term, 1940, of MECKLENBURG.

Civil action to recover on foreign judgment.

The complaint alleges that on 19 June, 1939, the plaintiff recovered a judgment in Lake Superior Court, County of Lake, State of Indiana, against W. J. Barker and Conover Furniture Company in the sum of $4,635.00 as damages for the negligent operation of an automobile in said county and state; that substituted service in said action was had upon the defendants through the Chief Administrative Officer of the Department of Treasury as provided by the Motor Vehicle Law of that state; that under the provisions of the Indiana law it is sufficient to obtain service on the nonresident motorist if "notice of such service and a copy of the process are forthwith sent by registered mail to the defendant and the defendant's return receipt is appended to the original process and filed therewith in the court"; that in the event "the defendant refuses to accept or claim such registered mail," it shall be sufficient service if the return of such registered mail shall be appended to the original process and the facts attested by proper affidavit; that notice of service and copy of process were duly sent by registered mail to the defendants at Conover, N. C.; that while the Conover Furniture Company accepted the registered mail, "W. J. Barker failed to claim the same"; that the Conover Furniture Company advised the Chief Administrative Officer of the Department of the Treasury of the State of Indiana that W. J. Barker was no longer associated with it, and that he could be reached at 208 East Trade Street, Charlotte, N. C.; that thereafter, notice of service and copy of process were duly sent to W. J. Barker at his Charlotte address by registered mail; that "the defendant, W. J. Barker, failed to claim the same," and that due proof thereof was appended to the original process; that default judgment was entered against the defendants in the amount as above stated; that on 21 August, 1939, the Conover Furniture Company was adjudged a bankrupt; that the American Mutual Liability Insurance Company is liable to the plaintiff by reason of its policy of insurance issued to W. J. Barker agreeing to pay any final judgment which might be rendered against the assured on account of the operation of the automobile in question, etc.; wherefore, plaintiff demands judgment.

Separate demurrers were interposed by the defendants on the grounds (1) that the complaint does not state facts sufficient to constitute a cause of action against the defendants, and (2) for that there is a misjoinder of parties and causes.

From judgment sustaining the demurrers on the first ground, the plaintiff appeals, assigning errors.

Guthrie, Pierce & Blakeney for plaintiff, appellant.
Helms & Mulliss for defendants, appellees.

STACY, C. J. It appears on the face of the complaint that the Indiana judgment, here sued upon, is void as against W. J. Barker for want of proper service. It is not alleged, as required by the Indiana law, that W. J. Barker "refused to accept or claim such registered mail" containing notice of service and copy of process. The allegation is, that he "failed to claim the same." To refuse to accept or claim registered mail is not the same as to fail to claim it. The one imports notice, while the other does not. The difference is material.

It is a requirement of the Indiana law that notice of service and copy of process shall be sent "to the defendant," and his return receipt appended to the original process, or in case the defendant "refuses to accept or claim" the notice, service may be completed by the return of the registered mail appended to the original process and attested by proper affidavit. It is not provided that service may be completed where the defendant has merely "failed to claim" the registered mail. The allegation of failure to claim the registered mail, therefore, falls short of the requirement of the statute. *Syracuse Trust Co. v. Keller,* 165 Atl. (Del.), 327. It is universally held that unless one named as a defendant has been brought into court in some way sanctioned by law, or makes a voluntary appearance in person or by attorney, a judgment rendered against him is void for want of jurisdiction. *Groce v. Groce,* 214 N. C., 398, 199 S. E., 388; *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737; *Downing v. White,* 211 N. C., 40, 188 S. E., 815.

Nor is the defect cured by the recital in the affidavit of counsel for plaintiff that the registered mail was "returned unclaimed" by the Post Office Department. True this is the language of the statute, but such return is to be preceded by the refusal of the defendant to accept or claim the registered mail.

The allegations of the complaint clearly show that the Indiana court acquired no jurisdiction over the defendant, W. J. Barker. *Lowman v. Ballard,* 168 N. C., 16, 84 S. E., 21. It is the accepted principle here and elsewhere that a judgment *in personam* without voluntary appearance or valid service of process within the jurisdiction is void. *Graves v. Reidsville,* 182 N. C., 330, 109 S. E., 29; *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283; *Stevens v. Cecil,* 214 N. C., 217, 199 S. E., 161; *Adams v. Cleve,* 218 N. C., 302, 10 S. E. (2d), 911; *Pennoyer v. Neff,* 95 U. S., 714. "Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him"—*Merrimon, J.,* in *Stancill v. Gay,* 92 N. C., 462.

A void judgment may be treated as a nullity, disregarded, vacated on motion, attacked directly or collaterally. *Dunn v. Wilson,* 210 N. C.,

493, 187 S. E., 802; *Oliver v. Hood*, 209 N. C., 291, 183 S. E., 657; *Abernethy v. Burns*, 210 N. C., 636, 188 S. E., 97. It affords no basis for a recovery.

The demurrers were properly sustained.

Affirmed.

W. E. VESTAL v. MOSELEY VENDING MACHINE EXCHANGE, INC., AND H. F. MOSELEY, PERSONALLY.

(Filed 30 April, 1941.)

1. Appearance § 2—

The filing of a bond for the release of property attached, the filing of a demurrer, and the filing, as a stipulation of record, an agreement to extend the time for filing answer, each constitutes a general appearance waiving any defect or irregularity in the service of summons.

2. Appeal and Error § 6d—

An exception "to the rulings of the court and the findings of fact" and an assignment of error that the court "erred in its rulings and findings of fact" fails to point out or designate the particular finding of fact to which exception is taken, and is bad as a broadside exception and assignment of error, and further, is insufficient to challenge the sufficiency of the evidence to support the findings, or any one or more of them.

3. Appeal and Error § 40a—

Where the evidence does not appear of record it will be presumed that there was sufficient evidence to support the findings sustaining the judgment of the court.

APPEAL by defendants from *Johnston, Special Judge*, at December Term, 1940, of MECKLENBURG. Affirmed.

Civil action to recover damages for a breach of contract of employment.

That summons was served on the corporate defendant is not challenged. No summons was served on the defendant Moseley, a nonresident.

In the original complaint it is alleged that the corporate defendant is a corporation organized, existing and doing business under the laws of the State of North Carolina and of the laws of the State of Virginia. In an amended complaint it is alleged that said defendant is a North Carolina corporation, has withdrawn from the State of North Carolina and has left no process agent upon whom service can be had.

A writ of attachment was issued and, according to the return of the sheriff, certain debts due the corporate defendant were garnisheed and personal property belonging to the defendants was attached.

A bond for the release of the attached property was filed with the clerk. This bond is signed by the surety but not by the defendants. It is designated as "defendants' bond" and recites the attachment and the fact that certain property belonging to the defendants was attached thereunder. There also appears of record a written agreement under which counsel for plaintiff consented that the "attorneys for the defendant should have additional time within which to answer."

The defendant Moseley appeared specially and moved to dismiss the action for that there has been no service of summons upon him and no property belonging to him personally was attached and that, therefore, the court is without jurisdiction.

The Moseley Vending Machine Exchange, Inc., of North Carolina and the Moseley Vending Machine Exchange, Inc., of Virginia demurred to the complaint "on the grounds that, to-wit, for the incapacity of the defendant to be sued, so as to give the court jurisdiction. It appears that on the face of the complaint that said corporation is one organized under the laws of the State of North Carolina and the State of Virginia."

When the cause came on to be heard in the court below on the special appearance and the demurrer the court found the facts and, upon the facts found, concluded: (1) that defendant Moseley is properly in court; and (2) that the demurrer filed should be overruled. It thereupon entered judgment overruling the demurrer and denying the motion of the defendant Moseley to dismiss. Each defendant excepted and appealed.

Henry L. Strickland for plaintiff, appellee.
H. Haywood Robbins for defendants, appellants.

BARNHILL, J. We are unable to determine upon what grounds the corporate defendant bases its contention that it is not subject to suit in the courts of North Carolina. It contends that there are two separate corporations. Both demurred. If it is a Virginia corporation then the service of the summons under C. S., 491, and the attachment of its property gives jurisdiction. If it is a North Carolina corporation which has withdrawn from the State and left no process agent within the State, as appears by affidavit, then the service of summons upon the Secretary of State is sufficient. Conceding, however, the want of proper service, defendant has appeared and filed bond. This is equivalent to a general appearance. *Bizzell v. Mitchell,* 195 N. C., 484, 142 S. E., 706. Likewise, when defendant appeared and filed demurrer it waived any irregularity in the service of summons. In this connection it is to be noted that the demurrer is on behalf of both corporate defendants. The agreement to extend time for filing answer which was filed as a stipulation of record likewise constitutes a general appearance. *Lexington v. Indem-*

nity Co., 207 N. C., 774, 178 S. E., 547; *Cook v. Bank*, 129 N. C., 149; *Scott v. Life Assn.*, 137 N. C., 516.

We are unable to discover any error in the judgment overruling the demurrer.

The defendant Moseley is in court, if at all, by virtue of a general appearance. The court below found, in part, that this defendant filed bond for the release of the property attached and that he, through counsel, obtained an agreement for an extension of time within which to answer. This defendant excepts "to the rulings of the court and findings of fact upon which the judgment was signed." His assignment of error is "that the court erred in its rulings and findings of fact." This is a broadside exception and assignment of error. It fails to point out or designate the particular finding of fact to which exception is taken. Nor is it sufficient to challenge the sufficiency of the evidence to support the findings, or any one or more of them. *Buchanan v. Clark*, 164 N. C., 56; *Assurance Society v. Lazarus*, 207 N. C., 63, 175 S. E., 705; *Odom v. Palmer*, 209 N. C., 93, 182 S. E., 741; McIntosh P. & P., 554, sec. 517. It does not avail the defendant upon his general contention, here made, that there is no sufficient evidence to support certain findings made by the court.

The case on appeal does not disclose the evidence offered. When the testimony does not appear in the record it is presumed that there was sufficient evidence to support the findings. *Bronson v. Paynter*, 20 N. C., 527; *Bernhardt v. Dutton*, 146 N. C., 206; *Wadford v. Gillette*, 193 N. C., 413, 137 S. E., 314; *Caldwell v. Robinson*, 179 N. C., 518; *Thornton v. Barbour*, 204 N. C., 583, 169 S. E., 153.

We are unable to discover any sufficient reason for disturbing the judgment denying the motion of the defendant Moseley to dismiss the action as to him for want of proper service. From the findings of fact contained in the judgment it appears that he has made a general appearance and subjected himself to the jurisdiction of the court.

The judgment below is

Affirmed.

HENRY MAYNARD AND WIFE, DESSIE MAYNARD, v. GENEVA MARTIN HOLDER, WIDOW, GRACIE HOLDER JONES AND ROBERT JONES, HER HUSBAND, ET AL.

(Filed 30 April, 1941.)

1. Appeal and Error § 21—

When the charge of the court is not contained in the record, it will be assumed on appeal that it is free from prejudicial error.

2. Boundaries § 9c—While witness may not testify as to declarations of interested party as to corner, she may testify that she there saw natural object.

Testimony of a defendant, who claimed an interest in the *locus in quo* under the will of her deceased husband, that her husband had shown her the corners, was excluded, but she was permitted to testify that she saw a rock buried in the ground at the place which defendants contended was the corner of their land. *Held:* The court properly excluded testimony which would violate the rule that declarations as to boundaries are not competent unless made *ante litem motam* by a disinterested party since deceased, and the testimony admitted is relevant and competent, since defendants contended that the rock referred to was the terminus of the disputed line between the tracts of land of the plaintiffs and defendants.

3. Appeal and Error § 6g—

An appellant may not successfully contend that the court erred in refusing his motion to strike certain testimony which appellant himself has elicited from an adverse witness on cross-examination.

4. Appeal and Error § 29—

Exceptive assignments of error in support of which no argument is stated or authority cited in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by plaintiffs from *Harris, J.*, at September Term, 1940, of WAKE.

This is an action to remove a cloud upon the title to a triangular shaped tract of land about 66 feet wide at the base and 1,605 feet long, alleged to lie on the northern boundary of the plaintiffs' land and on the southern boundary of the defendants' land.

The jury answered the issues in favor of the defendants, and from judgment predicated on the verdict the plaintiffs appealed, assigning errors.

John W. Hinsdale and Stanley Seligson for plaintiffs, appellants.
Douglass & Douglass for defendants, appellees.

SCHENCK, J. The charge of the court is not contained in the record and is therefore assumed to be free from prejudicial error. *Hornthal v. R. R.*, 167 N. C., 627, 82 S. E., 830.

The assignments of error brought forward in the brief of the plaintiffs, appellants, are all addressed to the admission of certain testimony over objection of the plaintiffs.

The first exceptive assignment of error is addressed to a portion of the testimony of Mrs. Geneva Martin Holder, one of the defendants, and widow of T. Quincy Holder, by whose will she claimed a life estate in the land in controversy, and appears from the following excerpt from the record:

"Q. Who showed you the corners? A. My husband. Objection—Sustained. Mr. Douglass: Q. Did you make any observations of your own at the corners? Objection. Q. Do you know where the southwest corner of that 30-acre tract is? The Court: Q. If you know of your own knowledge. Mr. Douglass: Q. And what you saw there with your own eyes. Objection—Overruled—Exception. Exception No. 1. Q. Don't state what anybody said, just what you saw. A. I saw a rock buried in the ground about that long (indicating). Q. Do you know of your own knowledge when that rock was buried there with respect to the time your husband bought this tract of land? A. I do."

The only portion of the testimony to which the exception seems to apply is the answer of the witness, "I saw a rock buried in the ground about that long (indicating)." This testimony was both material and competent, since it was the contention of the defendant that the rock referred to was the terminus of the disputed line between the tracts of land of the plaintiffs and of the defendants. The ruling of the court did no violence to the well established principle of law that declarations as to boundaries are not competent unless made *ante litem motam* by a disinterested party since deceased. What the late husband of the witness told her was definitely excluded, and only what she saw and knew of her own knowledge was testified to by her. This assignment cannot be sustained.

The second exceptive assignment of error is addressed to the refusal of the court to strike a portion of the testimony of Mrs. Geneva Martin Holder, a witness for the defendants, elicited on cross-examination by counsel for plaintiffs, appellants. Manifestly, such an assignment cannot be sustained. A ruling to the contrary would be to allow the appellants to profit by their own wrong.

The third exceptive assignment of error is addressed to the refusal of the court to strike a portion of the testimony of the defendants' witness, D. S. Wall, shown by the following excerpt from the record: "Q. You wouldn't know where the corners were unless they were showed to you by Mr. Quincy Holder? A. Yes, sir. Q. How would you know it? A. By the way the line was run. Q. You mean to tell the jury you can get on a line and walk two or three hundred yards and locate a corner? A. I can if I stay on it a year. Q. How? A. I worked on it a year. Q. Mr. Quincy Holder showed you the corners? A. I didn't say he didn't. Q. He did? A. Yes. Q. He was the first man who showed them to you? A. I reckon he was. Q. Up to the time he showed them to you you didn't know where they were? A. I knew (they were) bound to run near to it, according to the way I farmed. Q. Up to the time he showed you you didn't know where they were? A. No, sir."

This evidence was elicited by the counsel for the plaintiffs, appellants, on cross-examination, and therefore cannot be made the basis for a successful assignment of error for the refusal to grant a motion to strike lodged by the party who elicited it.

No reason or argument is stated or authority cited in the appellants' brief to sustain the fourth and fifth exceptive assignments of error in the record and are therefore taken as abandoned. Rule 28, Rules of Practice in the Supreme Court. 213 N. C., 825.

No error.

E. H. PEITZMAN, TRADING AS U. S. ELEVATED TANK MAINTENANCE COMPANY, v. THE TOWN OF ZEBULON AND AVON PRIVETT AND R. VANCE BROWN.

(Filed 30 April, 1941.)

Pleadings §§ 2, 16a—Where plaintiff is in doubt as to persons liable, he may join them as defendants and seek to recover in the alternative.

Plaintiff alleged that he did certain work in reliance upon a written contract with defendant municipality to clean, paint and test its water tank, which contract was executed in the name of the town by the individual defendants as mayor and clerk, and that he was interrupted and stopped in the performance of the work by the town. Plaintiff sought to recover against the town on the contract or, if the town were not liable on the contract, to recover against the individual defendants for wrongfully inducing him to enter into an unauthorized contract. *Held:* The facts alleged are not in the alternative, but the complaint alleges a series of transactions forming one whole and connected story, and under the provisions of C. S., 456, as amended by sec. 2, ch. 344, Public Laws of 1931, plaintiff, being in doubt as to those from whom he is entitled to redress, may seek to recover of the defendants in the alternative, C. S., 507 (1), and defendants' demurrer for misjoinder of parties and causes is properly overruled.

APPEAL by individual defendants from *Pless, J.*, at February Term, 1941, of WAKE. Affirmed.

Simms & Simms for plaintiff, appellee.

A. R. House and J. G. Mills for defendants, appellants.

SCHENCK, J. The plaintiff alleges that he rendered certain services in reliance upon a written contract to clean, paint and test the elevated water tank of the defendant town, which contract was executed in the name of said town by its mayor and clerk, and that he was interrupted and stopped in the performance of the contract by the town. The defend-

ant town filed answer and alleged that the written contract was executed by the mayor and clerk without authority. Upon motion of the plaintiff the mayor and clerk, Privett and Brown as individuals, were made parties defendant. The plaintiff then pleaded that either the defendant town was liable on the contract or that the defendants Privett and Brown were liable for wrongfully entering into the contract and for inducing the plaintiff to enter into an unauthorized contract. Whereupon the individual defendants filed demurrer, alleging misjoinder of causes of action and of parties defendant. The demurrer was overruled, and the sole question presented on this appeal is the correctness of this ruling.

It is the contention of the appellants that there are two causes of action alleged, one for breach of contract against the defendant town, and one *ex delicto* against the individual defendants for fraudulently entering into and inducing the plaintiff to enter into an unauthorized contract; and that since the town is not affected by the tort action against the individual defendants, and the individual defendants are not affected by the *ex contractu* action against the defendant town, there is a misjoinder; and for authority cite *Land Co. v. Beatty,* 69 N. C., 329; *R. R. v. Hardware Co.,* 135 N. C., 73, 47 S. E., 234; *Wilkesboro v. Jordan,* 212 N. C., 197, 193 S. E., 155, and similar cases.

It is the contention of the plaintiff, appellee, that there is but one set of facts alleged, told as one connected story, and that the plaintiff is in doubt as to which of the defendants are liable thereunder, and that by virtue of C. S., 456, as amended by sec. 2, ch. 344, Public Laws 1931, allowing certain joinder of parties and alternative pleadings, he is authorized to maintain the action as instituted against the several parties defendant.

We concur in the plaintiff's contention and his Honor's ruling. C. S., 456, as amended, reads: "All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. . . . If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable."

In *Fry v. Pomona Mills,* 206 N. C., 768, 175 S. E., 156, *Justice Clarkson* wrote: "N. C. Code, 1931 (Michie), section 507, in part is as follows: 'The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of: (1) The same transaction, or transactions connected with the same subject of action.' The general rule which may be deduced from the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of

transactions forming one dealing and all tending to one end, if one connected story can be told of the whole—they may be joined in order to determine the whole controversy in one action. *Trust Co. v. Peirce,* 195 N. C., 717; *Shaffer v. Bank,* 201 N. C., 415; *Craven County v. Investment Co.,* 201 N. C., 523. An action arising upon a contract united in the same complaint with one arising in tort is not a misjoinder, and a demurrer thereto will not be sustained 'where they arise out of the same transaction or are connected with the same subject of action.' *Hawk v. Lumber Co.,* 145 N. C., 48."

The cause of action in the case at bar is in the alternative against the municipal defendant and the individual defendants and arises out of a series of transactions forming one dealing and all tend to one end and the whole is told in one connected story. There are no alternative facts alleged, the only alternative involved under the allegations is as to which of the defendants are liable. The plaintiff is in doubt as to the persons from whom he is entitled to redress, and may, therefore, under the statute, join the defendants to determine which is liable. C. S., 456. See also title Parties, 47 C. J., pp. 74 and 75, paragraphs 153 and 154.

The judgment of the Superior Court is

Affirmed.

J. W. ROBBINS v. KATE L. ALEXANDER AND HUSBAND, W. P. ALEXANDER.

(Filed 30 April, 1941.)

Evidence § 26—Plaintiff held entitled to new trial for admission of evidence of collateral matters not relating to issue in suit.

In an action to enforce a lien for the balance due for work and labor performed, under contract, in drilling a well on defendants' land, defended on the ground that the well was not properly drilled in accordance with the contract, resulting in the failure of defendants to obtain good water, testimony as to plaintiff's general reputation for drilling wells and his want of success in other specific instances does not relate to the issue of whether plaintiff complied with his contract for drilling the particular well on defendants' land, and the admission of such evidence constitutes prejudicial error.

APPEAL by plaintiff from *Johnston, Special Judge,* at September Term, 1940, of MECKLENBURG. New trial.

McRae & McRae for plaintiff, appellant.

Henry L. Strickland for defendants, appellees.

DEVIN, J. Plaintiff sued to enforce a lien for the balance due for work and labor performed, under contract, in drilling a well on defendants' land. The suit was defended on the ground that the well was not properly drilled in accordance with the contract, and that in consequence defendants did not obtain good water. The verdict went for the defendants and there was judgment accordingly.

The plaintiff assailed the validity of the judgment against him chiefly on the ground that the trial judge erred in the admission of incompetent testimony prejudicial to his cause. Over the plaintiff's objection the following question and answer were admitted:

"Q. Do you know about his (plaintiff's) general reputation for drilling wells, and do you know anybody else there that he has dug a well like this one is?

"A. I know that he dug a well for Mr. Darby and Mr. Darby does not use his well, and had to have another one dug, by a man from Landis. He is the man that measured my well. Mr. Darby has got a good well now."

Since the question at issue related to the manner and extent of plaintiff's compliance with his contract for drilling the particular well on defendants' land, evidence as to his general reputation for drilling wells and his want of success in other specific instances was incompetent. *In re Will of Nelson,* 210 N. C., 398, 186 S. E., 480; *Edwards v. Price,* 162 N. C., 243, 78 S. E., 145. This evidence tended to introduce collateral issues and was sufficiently prejudicial on the merits of the case to entitle the plaintiff to a new trial.

As there must be a new trial for the error pointed out, it is unnecessary to discuss the other questions presented by plaintiff's exceptions, as they may not arise upon another trial.

New trial.

B. F. WELLONS v. M. B. SHERRIN ET AL.

(Filed 30 April, 1941.)

1. Negligence § 20—Whether particular conduct is at variance with conduct of reasonably prudent man in similar circumstances is question for jury.

The court's charge, after reciting plaintiff's evidence, that if the jury found those to be the facts by the greater weight of the evidence, and further found "that that was negligence," *is held* not error as submitting a question of law to the jury, but the charge properly left it for the jury to determine whether upon the facts as contended for by plaintiff, defendants' conduct constituted negligence, *i.e.*, whether defendants had done or failed to do what a reasonably prudent man would have done in the circumstances of the case.

2. Negligence § 1—

Negligence is doing other than, or failing to do, what a reasonably prudent man, similarly situated, would have done.

3. Negligence § 20—Charge, construed as a whole, held not prejudicial.

The court charged the jury that if they found by the greater weight of the evidence the facts and circumstances to be as contended for by plaintiff, and that the conduct of defendants in such circumstances constituted negligence, to answer the issue of negligence in the affirmative, but that "if you are not so satisfied about it" to answer the issue in the negative. *Held:* The quoted phrase, when taken in connection with other portions of the charge, merely instructed the jury, in effect, that the plaintiff was required to satisfy them of the correctness of his position by the greater weight of the evidence, and the use of the phrase, construing the charge as a whole, was not prejudicial to plaintiff.

4. Negligence § 4a—

This action was predicated upon alleged negligence of defendants, landlord and tenants, in maintaining an open pit on the land of one of the tenants to take care of the overflow from a septic tank on the leased premises, the expense of digging the pit and connecting it with the septic tank being prorated among defendants. There was no evidence that the landlord participated in the maintenance of the pit. *Held:* If the conduct of the tenants did not constitute negligence, the landlord cannot be guilty of negligence.

APPEAL by plaintiff from *Johnston, Special Judge,* at Extra Civil Term, September, 1940, of MECKLENBURG.

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 defendants.

The defendant Sherrin leased a filling station and grill to his co-defendants, the Sappenfields. The septic tank on the premises became unsatisfactory, so the landlord and his tenants agreed to prorate the expense and to dig a cinder pit six or nine feet deep some distance away on a lot belonging to the Sappenfields and to run an overflow pipe from the septic tank to the pit. This was done. It is alleged that this pit was negligently left open, and on the afternoon of 16 February, 1939, plaintiff's intestate, a child 4½ years of age, fell into the pit and was drowned.

There is no evidence that the landlord participated in the maintenance of the pit at any time after its construction.

Two separate issues of liability were submitted to the jury, first, the liability of the tenants, and, second, the liability of the landlord.

After a recital of the plaintiff's evidence, the trial court concluded his charge on the first issue as follows: "Now if you find those to be the facts by the greater weight of the evidence (A) and you further find that that was negligence on the part of the defendants, the Sappenfields,

and you further find that that negligence was the proximate cause of the death or injury to this child, you would answer the first issue 'Yes.' But if you do not find that to be true, or if you are not satisfied about it, then you would answer that issue 'No.'" (B) Exception.

The jury answered the first issue "No" and returned its verdict without answering the other issues.

Plaintiff appeals, assigning errors.

Jake F. Newell, B. F. Wellons, and John A. McRae for plaintiff, appellant.

Hartsell & Hartsell for defendants, appellees.

STACY, C. J. The instruction which the plaintiff assigns as error was patterned after the language of the majority opinion when the case was here on demurrer of the landlord at the Spring Term, 1940, reported in 217 N. C., 534, 8 S. E. (2d), 820. There it was said:

"If the defendant Sherrin was in fact at the time participating in the maintenance of the pit or hole located on the premises of the defendants Sappenfield, and the plaintiff offers evidence tending to support the other allegations, then it is for the jury to say whether, in the exercise of ordinary care, it was his duty to provide protection by fence or other devices and to give warning of the danger incident to the existence of the pit."

The court was not submitting a question of law to the jury when he used the expression, "and you further find that that was negligence," etc. Rather, he was leaving it for the jury to say whether the defendants, in the exercise of ordinary care, had done or failed to do what a reasonably prudent man would have done in the circumstances of the case. Negligence is doing other than, or failing to do, what a reasonably prudent man, similarly situated, would have done. *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358. The further expression, "or if you are not satisfied about it," of which the plaintiff complains and cites *Willis v. R. R.,* 122 N. C., 905, 29 S. E., 941, as authority for his position, only had the effect, when taken in connection with other portions of the charge, of saying to the jury that the plaintiff was required to satisfy them of the correctness of his position by the greater weight of the evidence. *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. It is not perceived wherein the charge was prejudicial to the plaintiff. *Williams v. Woodward,* 218 N. C., 305, 10 S. E. (2d), 913.

There is no evidence that the landlord participated in the maintenance of the pit. And, of course, if his tenants are not liable, he is not.

The verdict and judgment are supported by the record.

No error.

W. C. RYALS v. CAROLINA CONTRACTING COMPANY.

(Filed 7 May, 1941.)

1. Highways § 19—Evidence of failure of contractor to place warning signs on highway under construction held to take issue of negligence to jury.

Defendant contractor was engaged in widening an old highway, which was 18 feet wide, by constructing an additional strip of concrete 6 feet wide adjoining the old pavement on its western edge. The construction of the additional pavement had been completed except for an unfinished space 40 to 60 to 100 feet, at a point where a creek ran under the highway through a culvert, the surface of the unfinished space being 10 to 12 inches below the surface of the old pavement. The evidence tended to show that, as plaintiff approached this point on his right side of the highway, which was the east side thereof, a truck approaching from the opposite direction on its right side of the highway, suddenly turned to its left in the path of travel of plaintiff's car, causing plaintiff to run onto the shoulder of the road on his right and, in attempting to get back on the highway, to lose control and run off the highway on the left into the unfinished space and against the culvert, wrecking his car and causing personal injuries. Plaintiff's evidence tended to show that the unfinished space so blended with the road as to be unobservable until a motorist got within 40 or 60 feet of it, and that there were no warning signs of the danger. Defendants' evidence was to the effect that it had erected warning signs lighted by flambeaux on either side of the unfinished portion and at the cities constituting the terminus of each end of the project. *Held:* The questions of negligence, contributory negligence, intervening negligence, proximate cause and damage were for the jury upon the evidence, and the court's refusal to grant defendants' motion to nonsuit was without error.

2. Trial §§ 29b, 31—

C. S., 564, proscribes the judge in charging the jury from expressing an opinion as to the weight and credibility of the evidence, and prescribes that he declare and explain the law arising upon the evidence, and the two provisions are linked together and are of equal dignity, and the failure to observe either is error.

3. Trial § 29b—

C. S., 564, prescribes that the judge in charging the jury shall "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," and it is the duty of the court to do so without request for special instructions, and the failure of the judge to explain the law arising upon the evidence constitutes reversible error.

4. Negligence § 20—Charge held erroneous in failing to declare and explain the law applicable to the evidence.

In this action involving negligence, contributory negligence, intervening negligence, proximate cause and damage, the court in its charge to the jury correctly defined each of these terms, and properly placed the burden of proof upon the issues, and stated the respective contentions of the parties as to what the evidence tended to show relative to the issues and the respective contentions of the parties as to the verdict the jury should

return on each of the issues upon the facts which the parties contended the evidence established, and charged that the jury should apply the principles of law defined to the controverted questions. *Held:* The failure of the judge to declare and explain the law applicable to the facts as the jury may find them to be from the evidence constitutes reversible error.

DEVIN, J., concurs in result.

CLARKSON, J., dissenting.

SEAWELL, J., concurring in dissent.

APPEAL by defendant from *Frizzelle, J.*, at November Term, 1940, of JOHNSTON.

Civil action for recovery for injury allegedly resulting from actionable negligence of defendant.

In the trial court, the evidence, briefly stated, tends to show that on 12 October, 1938, the date of injury to plaintiff, U. S. Highway No. 301 —also numbered U. S. 70—between Smithfield and Selma in this State, had an old paved surface 18 feet in width; that defendant was engaged in constructing an additional strip of concrete 6 feet wide along and adjoining the west edge of said old pavement, and had finished same with exception of space 40 to 60 to 100 feet at the point where Buffalo Creek passes under the highway; that there was a concrete culvert under the highway through which the water of that creek flowed; that in said unfinished space the surface was 10 to 12 inches below the paved surface of the highway; that adjacent to this unfinished portion, the old pavement was intact to its full width, and open to traffic.

Plaintiff offered evidence tending to show that between seven and eight o'clock on the night of above date, while he was traveling north in his automobile, from Smithfield to Selma, at a rate of speed 30 to 35 miles per hour, along his right-hand side of the old pavement, and approaching Buffalo Creek, an unidentified truck traveling south from the direction of Selma toward Smithfield, at a rate of speed 25 to 30 miles per hour, on its right-hand side of the road, was also approaching Buffalo Creek; that each of them dimmed the lights on his vehicle; that suddenly the truck turned to its left side of the road, "coming across the corner of the road," into the lane in which plaintiff was traveling; that in order to avoid collision with the truck plaintiff drove his automobile on to the shoulder on his right side; that in doing so he lost control of it and in turning back on to the old pavement lost control and ran across the pavement into the said unfinished space against the culvert on his left side of the road, thereby wrecking his automobile and causing the injury of which complaint is made.

Plaintiff further offered evidence tending to show that while he knew that the road had been under construction, there were then no warning signs or lights at Smithfield to indicate to him, or at Selma to indicate

to the driver of the truck, that the road was still under construction; and that there were no barricades or lights at either end of the unfinished space in the strip on the west side of the road to warn of its existence; and that in approaching the place he assumed that it was completed.

Plaintiff further offered evidence tending to show that the unfinished space so blended with the road as to be unobservable to plaintiff and others traveling upon the highway, until within 40 or 60 feet of it.

On the other hand, defendant offered evidence tending to show that there were large signs it had placed at each end of the project, at Smithfield and at Selma, warning of danger on account of road being under construction, which signs were properly lighted by flambeaux, or Toledo torches; and that at Buffalo Creek there was a small barricade at each end of the unfinished portion and several feet in front of each there was a flambeau, or Toledo torch.

Plaintiff in his complaint alleges in substance that his injury was proximately caused by the negligence of defendant in failing to exercise ordinary care in the performance of its duty to provide adequate warning signs at the unfinished strip of pavement to indicate to the traveling public the danger there.

Defendant denies the allegations of negligence. On the other hand, defendant avers that proper warning signs, barricades and lights were provided, and pleads contributory negligence of plaintiff in bar of his right to recover.

The case was submitted to the jury upon issues as to negligence, contributory negligence and damage. From judgment on adverse verdict, defendant appeals to Supreme Court and assigns error.

Wellons & Wellons and Royall, Gosney & Smith for plaintiff, appellee.
Abell & Shepard for defendant, appellant.

WINBORNE, J. When the evidence in the record on this appeal is taken in the light most favorable to plaintiff, giving to him the benefit of every reasonable intendment, we are of opinion that the case is one for the jury. Hence, exceptions to refusal of the court below to allow defendant's motions, aptly made, for judgment as in case of nonsuit are overruled. But there is error in the trial below.

The exceptions to the charge and to the failure to charge are well taken and meritorious. They are directed (1) to that portion of the charge which reads as follows: "The court has stated to you and has defined to you as clearly as it could, the principles of law applicable to these controverted questions. You are to bear them in mind and apply them to the facts and the evidence in this case," and (2) to the failure of the court to declare and explain the law, particularly pertaining to negli-

gence, contributory negligence, concurring negligence, intervening or insulating negligence, and that relating to sudden emergencies arising upon the evidence in the case as required by the provisions of C. S., 564, which prescribes that the judge "shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

It is appropriate to pause here and to note that this statute, C. S., 564, had its inception in the year 1796, in an act of the Legislature entitled "An act to secure the impartiality of trial by jury, and to direct the conduct of judges in charges to the jury." As thus originally enacted section one of the act reads: "It shall not be lawful for any judge, in delivering a charge to the petit jury, to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury; but it is hereby declared to be the duty of the judge in such case to state in a full and correct manner the facts given in evidence, and to declare and explain the law arising thereon." Iredell's Law 1796, ch. 4, sec. 1. The provisions of this act, in substantially identical language, have been brought down through successive subsequent legislative enactments by which codifications of the law have been adopted. See Potters Laws of North Carolina (1821), Vol. 1, ch. 452, sec. 1; Revised Statutes (1837), ch. 31, sec. 136; Revised Code (1854), ch. 31, sec. 130; Code of Civil Procedure (1868), sec. 237; Battle's Revisal (1873), ch. 17, sec. 237; Code of 1883, sec. 413; Revisal of 1905, sec. 535; Consolidated Statutes of North Carolina, 1919, sec. 564. Charges in both civil and criminal actions are expressly included in the statute. See Code of 1883, sec. 413, and succeeding citations *supra*.

Thus, it is seen that for one hundred and forty-five years the Legislature of this State has seen fit to preserve this salutary statute, and, from time to time, to reiterate and approve its provisions of inhibition against the judge invading the province of the jury in the trial of an action, and prescribing his duty upon such trial with respect to the evidence and the law. The two provisions are linked together, and are of equal dignity. To fail to observe either is error. Moreover, referring to this statute in the case of *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187, this Court, speaking through *Connor, J.,* said: "The wisdom of the policy upon which it was enacted and in accordance with which it has since been maintained as the law in this State is not for the courts to determine."

Furthermore, the decisions of this Court are uniform in holding that the failure of the presiding judge to declare and explain the law arising upon the evidence is and will be held for error. These are some of the cases: *S. v. Matthews,* 78 N. C., 523; *S. v. Rogers,* 93 N. C., 523; *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *Hauser v. Furniture Co.,* 174 N. C., 463, 93 S. E., 961; *Nichols v. Fibre Co.,* 190 N. C., 1, 128 S. E.,

471; *Wilson v. Wilson,* 190 N. C., 819, 130 S. E., 834; *Watson v. Tanning Co.,* 190 N. C., 840, 130 S. E., 833; *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630; *Smith v. Bus Co.,* 216 N. C., 22, 3 S. E. (2d), 362; *Mack v. Marshall Field & Co.,* 218 N. C., 697, 12 S. E. (2d), 235; *Kolman v. Silbert, ante,* 134, 12 S. E. (2d), 915.

"The statement of the general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute." *Nichols v. Fibre Co., supra; Williams v. Coach Co., supra; Spencer v. Brown, supra; Mack v. Marshall Field & Co., supra.*

In *S. v. Matthews, supra,* it is said: "We think he (the judge) is required, in the interest of human life and liberty, to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be the true one. To do otherwise is to fail to 'declare and explain the law arising on the evidence,' as by the act of Assembly he is required to do. C. C. P., sec. 237," now C. S., 564.

Speaking to the question in *S. v. Merrick, supra, Hoke, J.,* said: "The authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instruction to that effect. Charged with the duty of seeing that impartial right is administered, it is a requirement naturally incident to the great office he holds, and made imperative with us by statute law. Rev., 535," now C. S., 564.

In *Wilson v. Wilson, supra, Varser, J.,* stated: "This statute, C. S., 564, created a substantial legal right in the parties." *Nichols v. Fibre Co., supra; Williams v. Coach Co., supra; Spencer v. Brown, supra.*

The case of *Mack v. Marshall Field & Co., supra,* is strikingly similar to that in hand. There, *Schenck, J.,* writing for the Court, makes this pertinent observation: "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. This is a noncompliance with the statute."

In the present case it is appropriate to consider the charge in the light of the statutory duty thus imposed upon the presiding judge, and in the light of the factual situation in hand.

A reading of the charge discloses that as to the issue, "Was the plaintiff injured and damaged by the negligence of the defendant, as alleged in the complaint?" the court stated the rule of law as to burden of proof, gave a general definition of negligence and actionable negligence, that is, negligence, proximate cause and injury, and stated the rule of law as to duty of driver of motor vehicle to stop within the range of his lights. In other respects the charge consists of: (1) Statement of the contentions of plaintiff as to what the evidence tends to show relative to negligence of defendant, proximate cause, intervening negligence of operator of the truck, and injury to plaintiff, "so that, upon the evidence offered by him he contends you ought to be satisfied by its greater weight that his contentions are true and answer that issue 'Yes.'" (2) Statement that defendant contends that the jury ought not to find upon the evidence that defendant was "in any wise, or in any degree, negligent" and ought not to answer the issue "Yes," followed by statement of contentions of defendant as to what the evidence tends to show (a) as to the proper performance of its duty to plaintiff and others traveling upon the highway, in accordance with the rule of the prudent man; (b) as to the negligence of the truck as the sole cause of injury to plaintiff; and (c) as to principle of intervening negligence of the operator of the truck as the proximate cause of injury to plaintiff, upon all of which defendant contends the jury should answer the issue "No." (3) These instructions, in summation: "So that, gentlemen, ultimately it becomes a question of fact for you. (The court has stated to you and has defined for you as clearly as it could, the principles of law applicable to these controverted questions. You are to bear in mind and apply them to the facts and the evidence in this case.)" Exception. "If the plaintiff has satisfied you upon the evidence, and by its greater weight, that his allegations are true and correct that he was injured by the negligence of the defendant, then you would answer the first issue 'Yes.' If the plaintiff has failed to so satisfy you upon the evidence, by its greater weight, then you would answer the first issue 'No.'"

As to the issue of contributory negligence, the charge consists of: (1) A proper placing of burden of proof; (2) definition of and general principles of law relating to contributory negligence; (3) statement of the contentions of defendant, and of the plaintiff, followed by summation as to each similar to those given as bearing on issue of negligence.

While it was probably an oversight on the part of the presiding judge, the charge fails to give any instruction as to the law arising upon and applicable to the facts which the jury may find from the evidence. It fails to declare and explain the duties which the law imposed upon the defendant with respect to the matters involved in the allegations of negligence. It fails to instruct the jury as to the law with respect to the

breach of any of these duties, and the relation of such breach to the injuries as the proximate or concurrent cause thereof. It fails to state the duties imposed by law upon the operator of the truck with respect to any of the matters involved in the averments of intervening negligence, other than that pertaining to stopping within the range of his lights, or as to the law with respect to the breach of any of these duties, and the relation of such breach to the injuries to plaintiff as the proximate cause thereof. It fails to declare and explain the duties imposed by law upon the plaintiff with respect to any of the matters involved in the averments of contributory negligence. It fails to instruct the jury as to the law with respect to the breach of any of these duties, and the relation of such breach to his injuries, as the proximate or concurrent cause thereof.

These failures affect substantial rights of the parties, and are reversible error.

Also, defendant presents with force objections to the admission of evidence, which is the subject of exceptions 1, 2, 3, 4, 5, 13, and 14, and of exceptions 16, 17, and 18. But, as cause for the objection may not occur upon another trial, we deem it unnecessary to discuss them.

For error pointed out a new trial is ordered.

New trial.

DEVIN, J., concurs in result.

CLARKSON, J., dissenting: There is an old saying, "Put yourself in his place." We have here a man of fifty-four years of age, his automobile broken up and he seriously injured. The jury assessed his automobile damage at $250.00 and his injuries at $1,750.00. He says: "From then on I had a terrible pain in my feet and could not hardly walk and I have not since. . . . I cannot get around and travel to do business. I can't drive an automobile in the conduct of my business as I did before the injury and I can't walk to see prospects as I did before the injury. Those are the reasons I am unable to engage in that business." A new trial will perhaps bankrupt him. The plaintiff is a wrecked man and unable to do his ordinary calling in life, and this case is sent back on technical grounds. As said by *Chief Justice Ruffin* (hereinafter fully quoted), "A disease of the law."

In the main opinion it is conceded that there was sufficient evidence to submit the case to the jury. The granting of a new trial was on the ground that C. S., 564, was not complied with, in that the court below did not "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The court below, in a charge of some 30-odd pages, taken as a whole, I think, is free from error or prejudicial or reversible error. The main opinion extracts dis-

connected portions of the charge. I quote copiously from the charge showing it was correct as a whole, and that there was no prejudicial or reversible error.

The issues submitted to the jury were the usual and simple issues submitted in a damage suit of this kind—negligence, contributory negligence and damage. The defendant incorrectly states that the court failed to apply the law to the evidence in the case. On the contrary, the record clearly shows that the court not only stated the rules of law correctly and fully, but applied these rules in detail to the evidence offered by each party. A reading of the full and careful charge will show that in stating the defendant's contentions the court expressly related the defendant's evidence *to the rules of law announced* and that a *similar course* was followed in stating the plaintiff's contentions.

The only exception made by defendant in this long and careful charge is as follows: "The court has stated to you and has defined for you as clearly as it could, the principles of law applicable to these controverted questions. You are to bear them in mind and apply them to the facts and the evidence in this case."

The court below in its charge set forth in detail plaintiff's allegations of negligence in his complaint against defendant, and in detail defendant's answer denying the material allegations of the complaint and defendant's plea of contributory negligence.

In the charge, after fully setting forth plaintiff's and defendant's allegations, in part, is the following:

"The plaintiff alleges that the defendant was negligent in that it left that section of the road, that strip of one hundred feet, fifty feet on either side of the culvert, unprotected, without proper safe-guard, and that it failed to erect and maintain any sort of warning barricade or lighting device, and the plaintiff alleges that the negligence of the defendant in these particulars was the proximate cause of the injury which he sustained to his person and the damage which was done to his car. . . .

"Now, the defendant denies that it was negligent in any of the particulars alleged, pointed out and complained of by the plaintiff, or otherwise. It denies entirely, and *in toto*, any negligence, either acts of omission or commission, on its part, and alleges that if the plaintiff were injured in his person, or to his person, and his property damaged at the time and place, that the injuries to the plaintiff, and the damage to his car, *were proximately caused by the sole and exclusive negligence of the operator of the approaching truck*, the defendant alleging that the truck approaching on the west side of the highway proceeding from the direction of Selma towards Smithfield was being operated in violation of a certain statute in this State regulating and governing the manner in which motor vehicles shall be operated, and further that the truck was

being operated at the time and place without the exercise of proper care and circumspection on the part of the driver of the truck; that he was not keeping a proper lookout, and that he was proceeding over and upon a heavily used highway without proper regard to the rights and to the safety of the general public, and particularly this plaintiff, the defendant particularly pointing out, alleging and contending that the operator of that truck was operating at such a speed that he could not bring his truck to a stop within the radius of his lights, and that therefore the operator of the truck was negligent, and that the owner of the truck, or the operator of the truck's negligence was the sole proximate cause of the injuries sustained by the plaintiff in this case; the defendant further alleging and contending that even if the jury should find that the defendant in this case was originally negligent in failing to erect and maintain barriers, or to place and maintain warning lights, which negligence the defendant denies, *that the negligence of the truck driver was a new, independent, efficient and wrongful negligence, intervening after the original negligence on the part of the defendant prior to the injury, thereby isolated and insulated the negligence of the defendant, thereby in law becoming the sole tort-feasor, and its negligence the sole proximate cause of the plaintiff's injury.*

"The defendant makes the further allegation and contention that if the jury should find that the defendant was negligent in one or more, or all of the particulars alleged by the plaintiff, and if the jury should further find that the negligence of the truck driver did not intervene and become a new and independent efficient and wrongful cause of the plaintiff's injuries, that the plaintiff himself was guilty of contributory negligence; that he himself failed to exercise proper care, and was proceeding over and upon a highway at that time and place in such a manner as to constitute the operation of his car and his conduct with respect thereto, a negligent operation and contributing factor to the injuries which he sustained at that time and place, and that because of the contributing negligence of the plaintiff he is barred from recovery in this action.

"Now, upon these allegations and upon the evidence offered in this case, both by the plaintiff and the defendant, and upon the contentions of the respective parties based upon the allegations and evidence there arise certain questions or issues for you gentlemen to answer. The first one of these questions or issues is: Was the plaintiff injured and damaged by the negligence of the defendant as alleged in the complaint?

"*The burden of that issue is upon the plaintiff,* to satisfy you upon the evidence, by its greater weight, that his allegations are true and correct.

"*Negligence is the failure to perform some duty imposed by law.* It is doing other than, or failing to do, in a given situation, what a reason-

ably prudent person would have done under the same or similar circumstances when charged with a like duty. It is sometimes defined as a want of proper care, proper care being that degree of care which a reasonably prudent person would use under the facts and circumstances and surroundings and when charged with a like duty. And in given case in determining whether proper care has been used by the person sought to be charged with negligence, reference must be had to the facts and circumstances of the person so charged, and by the circumstances surrounding him and the parties at the time, and his conduct must be judged by the influence which those facts and surroundings would have had upon a person of ordinary prudence in shaping his conduct under similar circumstances, and when charged with a like duty, or similar duty.

"But every negligent act does not involve liability upon a defendant. The mere fact that there has been an accident upon the highway, whether a collision between two motor vehicles, or between a motor vehicle and a horse drawn vehicle, or between a motor vehicle and a railroad locomotive train inflicting injuries or even producing death, does not necessarily involve liability upon any one. *In order to fix a defendant charged with negligence it is incumbent upon the plaintiff to establish by the greater weight of the evidence actionable negligence. And in order to establish actionable negligence, in order to make it a case of actionable negligence it is incumbent upon the plaintiff to establish by the greater weight of the evidence: (first)* that there has been a failure on the part of the defendant to exercise proper care, proper care being that degree of care which a reasonably prudent person would have used under the same or similar circumstances when charged with a like duty, and *(second)* that the failure of the defendant to exercise proper care was the proximate cause of the plaintiff's injury, the cause which produced the injurious results in continuous sequence, and without which the injuries would not have been inflicted or sustained, and one from which any person of ordinary care could reasonably have foreseen that such injuries would have resulted, or at least that results of an injurious character would flow from the negligent acts of the defendant." (Italics mine.)

There could not be a clearer charge on actionable negligence than the above. "The plaintiff has offered evidence which he contends tends to support that issue, and to establish his contention that he was damaged as to his property, and injured as to his person by the negligence of the defendant in several particulars."

Then the court below gives the evidence of plaintiff in detail, in some six pages. It places the burden of proof correctly on plaintiff on this issue, defines negligence, actionable negligence and proximate cause and

sets forth: "The plaintiff contends that if the negligence of the truck driver and the resulting injury were reasonably foreseeable by the plaintiff in the exercise of ordinary care, then the negligence of a truck driver, if the truck driver were negligent, in the opinion of the jury, and in the conclusion of the jury, would not be a new and independent and efficient proximate cause, so as to isolate or insulate the negligence of the plaintiff, and to save the defendant from liability for the injuries sustained by the plaintiff as a proximate result of the defendant's original negligence, and that, therefore, the jury should answer the first issue Yes.

"Now, gentlemen, involved in that first issue, of course, is the consideration of the question of whether the plaintiff was negligent or not. Even if the jury should find that an accident occurred there, even if the jury should find that an accident occurred as the proximate result of the defendant's negligence, as alleged, there is the further question involved of whether or not the plaintiff was injured. The burden as to the whole issue, every phase of it, every aspect of it, every consideration to be determined in that issue, the burden is upon the plaintiff, as to every aspect of it, the burden rests upon the plaintiff to satisfy you upon the evidence and by its greater weight."

On the part of defendant, the charge goes on: "Now, the defendant, Gentlemen, contends that you ought not to answer the issue Yes, and that you ought not to find upon the evidence in this case that the defendant was in any wise, or in any degree, negligent.

"The Court calls your attention to the fact that the plaintiff in this action is an individual, a citizen of Johnston County, and that the defendant in this case apparently is a corporation, and a non-resident of this State. Of course, Gentlemen, the Court has a right to assume, and does assume, that you will not let a consideration of that sort enter into your deliberations and affect them in the slightest degree. That would be a subversion of the very foundation of the principles of justice itself if a jury were to consider one moment a question of that sort for the purpose of arriving at the truth involved in the controversy in this action, this controversy, and to influence or color or affect in any manner to any extent the same sort of fair and impartial consideration that a resident of Johnston County.

"The law contemplates that jurors are too honest and too honorable, and have too much reverence and veneration for justice in the administration of the law to be influenced by a consideration of that kind. Try the case, Gentlemen, upon the evidence and the law, fairly and impartially and reach a conclusion which an honest and faithful analysis, after weighing all of the evidence, convinces you is the correct conclusion.

"The defendant has offered evidence which it contends should satisfy you, not by the greater weight of the evidence, because the burden is not

upon the defendant—that the defendant at all times exercised proper care in the construction of the strip of pavement extending from Smithfield to Selma, and that upon the beginning of the construction at the initial point, that is both at the starting point in Smithfield and at the starting point in Selma, it placed warning signs and illuminated those signs by flare lights—I don't remember the technical name, I believe they were called flambos. A number of witnesses, Gentlemen, have testified that those warning signs were placed there, describing them in detail, my own recollections of the evidence being that those warning signs were from four to six feet tall, several feet wide, yellow background with black letters, and that at night they were lighted by flares. . . .

"The defendant has offered evidence which it contends tends to show that the defendant was not negligent either in any of the several particulars alleged in the complaint, or otherwise, and that if the plaintiff did sustain painful and serious, or even permanent injuries on that occasion that the defendant was not in anywise responsible therefor or chargeable therewith; that the plaintiff's injuries were either caused solely by the negligence of the truck driver or by the joint negligence of the truck driver and the plaintiff himself.

"The defendant contends that it has offered evidence tending to show that the truck driver at the time and place was violating the laws of North Carolina, in that he was operating his truck in violation of a statute enacted by the General Assembly of this State intended and designed to promote, protect and preserve life, limb and property upon the streets and highways of this State. The law does make it the duty, mandatory upon him and every other person in the operation of a motor vehicle at any time at any place at night to so operate it and to operate it at such speed that it can be stopped, brought to a dead stop within the radius of its lights. *In a recent discussion of the duty resting upon a driver of a motor vehicle the Court has this to say:*

" 'The general rule under such circumstances is thus stated in Huddy on Automobiles: It was negligent 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 to avoid any obstruction within the radius of his lights, or within the distance which his lights would disclose the existence of an obstruction. If the lights of the automobile would disclose an obstruction 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 an obstruction within that distance. If the lights of his 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 he could have seen.'

"And further in that connection: 'It is not enough that the driver of an automobile be able to begin to stop within the range of his lights, or that he exercise due diligence after seeing an obstruction upon the highway. He should have so driven that he could and would discover it and be able to perform the manual acts necessary to stop and bring his automobile to a complete stop within the range of his lights. When blinded by the lights of an 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 the defendant's truck.'

"Now, Gentlemen, the defendant in this case has offered evidence which it contends has to do in its application of that principle of law; that the evidence in this case tends to show that notwithstanding that the road was illuminated and barriers located by the defendant so as to warn and caution travelers over that road and to protect and secure them against them, that the operator of the truck which was approaching the plaintiff's car on the occasion was negligent for the reason that he was operating his car at a speed too fast for him to do the manual acts necessary to stop it, and to stop it before running into that dirt section, and before he found it necessary in a sudden emergency, and having breached that duty to so do, and having failed to do so, because he had breached his duty in the operation of his car pulling his truck directly across the road in front of the plaintiff, jeopardizing the plaintiff in that manner. The defendant contends that the jury ought not to have any trouble in reaching the conclusion that was not only a cause, but the sole cause of the injury to the plaintiff and the damage to his car, and that was a negligent act on the part of the driver of the truck which the defendant could not reasonably anticipate, and that the law does not require, or the rule of common sense does not require a person to assume that another person using a highway is going to recklessly and heedlessly violate the law of the land, and that he is going to operate his car at a careless and reckless rate of speed, or in a manner characterized by want of circumspection or lack of due regard for the rights and safety of others.

"The defendant therefore contends that the other principle of law which the court read to you a few minutes ago, or cited and discussed with you a few minutes ago extensively *as to a new and independent and efficient and wrongful negligence by a third party applies to the facts in this case as disclosed by the evidence,* and all of the evidence, and the defendant contends particularly from the evidence offered by the defend-

ant, that here was a new, and independent factor and element of negligence intervening and constituting itself the sole efficient proximate cause of the injuries and damage to the plaintiff and his property, and that thereby, and therefore, even if the jury should find that the defendant had been negligent in any particular that *the new intervening negligence isolated and insulated the defendant's negligence by becoming a new and independent cause, efficient cause and, therefore, and thereby the sole proximate cause of the injuries to the plaintiff.*

"The defendant contends that the jury ought to be satisfied upon the evidence in this case that even if there were no lights, and even if there was no barricade at that point, if there were present any circumstances such as alleged and testified to and contended by the plaintiff, to-wit: a broken place in the pavement of 100 feet that the dirt in that place was of such character and nature and resembled it so closely that it harmonized and resembled the color of the pavement; that it was the duty of the driver of that truck when he could not see that pavement clearly and understandingly, to modify and slacken the speed with which he was operating that truck, and if necessary, actually to stop it before proceeding in that broken place, and that his failure to do so was negligence, and that that negligence on the part of the truck driver, under the principle of law of a new and independent factor, became the sole proximate cause of the plaintiff's injuries, and that the jury should answer the issue No.

"The defendant makes the further contention that if you should not accept the defendant's theory and contention in this case, and if you should reach the conclusion that the defendant was negligent in one or more of the particulars alleged, that you should also reach the conclusion that the driver of the truck was likewise negligent, and that upon that aspect of it, the negligence of the defendant and the negligence of the truck driver each became a proximate cause of the injury sustained by a plaintiff.

"The defendant makes the further contention that you should find that while there may be more than one proximate cause, that in this case you ought to find that the negligence of the truck driver was the sole proximate cause, and therefore, that the first issue should be answered No, for the reason that if the truck driver's negligence intervened after the defendant's negligence started, and if it occurred prior to the injury and continued up until the time of the injury, then the negligence of the defendant in the first instance has not the effect of rendering the defendant liable to the plaintiff in this case. So that, Gentlemen, ultimately it becomes a question of fact for you.

"The Court has stated to you and has defined for you as clearly as it could, the principles of law applicable to these controverted questions. You are to bear them in mind and apply them to the facts and the evidence in this case." (Italics mine.)

The court below gave defendant's contentions, in some four pages, and charged: "There is just one more statement with respect to contributory negligence that I desire to call to your attention, and that is that there is no difference, no substantial difference, between negligence and contributory negligence, only negligence on the part of the plaintiff is called contributory negligence. If the defendant has satisfied you upon the evidence, and by its greater weight, that the plaintiff did by his own negligence, contribute to his injuries then you would answer the second issue Yes. If the defendant has failed to so satisfy you, you would answer it No."

The only exception, of five lines, made by defendant, is as follows: "The Court stated to you, and has defined for you as clearly as it could, the principles of law applicable to these controverted questions. You are to bear them in mind and apply them to the facts and the evidence in this case."

The court below did what it said it had done: It declared and explained the law as to negligence, contributory negligence, concurring negligence, intervening or insulating negligence, and that relating to sudden emergencies applicable to the controverted questions of fact. For more detail on this aspect defendant should have requested a prayer for instruction.

The main opinion incorrectly states that the court failed to apply the law to the evidence in the case. On the contrary, the record clearly shows that the court not only stated the rules of law correctly and fully, but applied these rules in detail to the evidence offered by each party. A reading of the full and careful charge will show that *in stating the defendant's contentions the court expressly related the defendant's evidence to the rules of law announced* and that a *similar course* was followed in stating the plaintiff's contentions.

The main opinion impinges the court's instructions to the jury "to apply the law to the evidence," and is a novel criticism on this record. It is the duty of the jury to do just this very thing under our jury system; and I believe it can be truthfully said that this type of instruction is given the jury by the presiding judge in three-fourths of the cases that are tried in North Carolina. It is well settled that, if the defendant desired more explicit instructions on any particular point, it was its duty to ask for the same at the trial. *In re Will of Beale*, 202 N. C., 618; *Lightner v. Raleigh*, 206 N. C., 496; *Sherrill v. Hood, Comr. of Banks*, 208 N. C., 472; *Wilson v. Casualty Co.*, 210 N. C., 585; *Falls v. Moore*, 210 N. C., 839.

The defendant did not make such request; and not even in its brief has it pointed out to the Supreme Court in what particular the trial court failed to properly state the defendant's contentions or failed to

apply the defendant's evidence (as well as the plaintiff's) to the rules of law announced by the court.

In other words, the defendant's position is what has been so frequently designated by this Court as "a broadside exception" to the charge, which is uniformly held to be insufficient. *Arnold v. Trust Co.,* 218 N. C., 433.

The truck driver's actions result from an emergency created by the defendant's negligence. Under such circumstances the defendant is responsible for the results of this emergency conduct. *Norris v. R. R.,* 152 N. C., 505; *Parker v. R. R.,* 181 N. C., 95; *Odom v. R. R.,* 193 N. C., 442; *Nash v. R. R.,* 202 N. C., 30.

Leaving out of account the theory of "outrunning his lights," which the court below charged correctly, the defendant failed to show any insulating negligence. On the contrary, the undenied facts disclose affirmatively that, at the exact point where the truck driver could first see the obstruction, he turned to the left in an effort to avoid the same. The defendant has not and cannot point out any negligence in this conduct of the truck driver. It is not sufficient for the defendant to speculate as to what *might* have been the condition of the truck or the truck driver, when the evidence discloses conduct that was entirely reasonable.

I see no more merit in the defendant's contention that an accident of this kind could not have been foreseen by the defendant. In this connection it is well settled that it is not necessary to foresee the exact occurrence, but only to foresee that some injury of the same character would result. *Drum v. Miller,* 135 N. C., 204; *Hudson v. R. R.,* 142 N. C., 199; *Hall v. Rinehart,* 192 N. C., 706; *Speas v. Greensboro,* 204 N. C., 239.

In *Bank v. Yelverton,* 185 N. C., 314 (320), *Adams, J.,* for the Court, said: "Exceptions were entered on the ground that the court did not explain to the jury the legal principles and present the contentions involved in the case as required by sec. 564 of the Consolidated Statutes. His Honor instructed the jury generally on the essential features of the case and if under these circumstances the plaintiff desired that any particular phase of the testimony or contentions be presented or more fully explained it should have submitted special prayers for instructions to such effect. *S. v. Merrick,* 171 N. C., 795; *S. v. Thomas,* 184 N. C., 759; *Jarrett v. Trunk Co.,* 144 N. C., 301; *Butler v. Mfg. Co.,* 182 N. C., 552."

The evidence in the instant case shows that a person traveling along the highway with lights could not see the excavation until he was "right on it." The evidence also discloses that there was nothing to put the approaching vehicle on notice that there was or was likely to be any such excavation. The open space "blended with" the road; and to a driver of a vehicle it appeared like one continuous stretch of pavement until it was "too late to stop."

I see no prejudicial or reversible error.

In 5 C. J. Secundum, "Appeal and Error," p. 1331, part sec. 1848, the following well-settled principle is stated: "The judgment of the lower court will be affirmed where there is no error, or where the record as it stands, does not clearly and affirmatively show error of any kind. Likewise the judgment will be affirmed where the record does not *clearly and affirmatively show reversible, material, substantial, or prejudicial error.*" (Italics mine.)

In *In re Ross*, 182 N. C., 477 (478), we find: "In fact, it is now the settled rule of appellate courts that verdicts and judgments will not 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 was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. 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 Edens' 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.'"

Varser, J., in *Perry v. Surety Co.*, 190 N. C., 284 (292), says: "We do not presume prejudicial error and the burden is upon the appellant to show, not only error, but that it is prejudicial. The judgment will be affirmed if, upon the entire record, no substantial right to the appellant has been denied, and even if irregular, when the correct result has been accomplished. The appellant is not, upon any view of the record, entitled to recover," citing a wealth of authorities.

Schenck, J., in *Pulverizer Co. v. Jennings*, 208 N. C., 234 (235), says: "We have examined with care the many objections to the charge of the court, but upon reading the charge as a whole we are left with the impression that it was complete and fair to the defendant, and in accord with the theory upon which the case was tried. It is said in *Murphy v. Coach Co.*, 200 N. C., 92, 'In a long charge, we do not think technical matters contended as errors, fished out of the charge, can be held as reversible or prejudicial error, when on the whole the charge is correct.' And it is further said in *Leggett v. R. R.*, 173 N. C., 698, 'The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not

overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.' "

In *R. R. v. Thrower,* 217 N. C., 77 (82), we find: *"Devin, J.,* in *Collins v. Lamb,* 215 N. C., 719 (720), for the Court says: ' "Verdicts and judgments are not to be set aside for harmless error, for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right." *Wilson v. Lumber Co.,* 186 N. C., 56 (citing many authorities.)' "

In *Moss v. Brown,* 199 N. C., 189 (192), it is written: " 'In *Bank v. Rochamora,* 193 N. C., at p. 8, quoting numerous authorities, the law is thus stated: "Where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it." This applies to subordinate elaboration, but not substantive, material and essential features of the charge. C. S., 564.' *McCall v. Lumber Co.,* 196 N. C., at p. 602."

N. C. Code, 1936 (Michie), sec. 565, is as follows: "Counsel praying of the judge instructions to the jury, must put their requests in writing entitled of the cause, and sign them; otherwise the judge may disregard them. They must be filed with the clerk as a part of the record." This section has continuously followed C. S., 564, from ancient times, showing the two should be continued together. These subordinate features of the controversy must be requested in prayer for instructions in apt time. *Hauser v. Furniture Co. (Hoke, J.),* 174 N. C., 463 (466); *Murphy v. Lumber Co.,* 186 N. C., 746 (748-9); *Dulin v. Henderson-Gilmer Co.,* 192 N. C., 638 (641); *Insurance Co. v. Edgerton,* 206 N. C., 402 (411); *School District v. Alamance County,* 211 N. C., 213 (226).

N. C. Const., Art. I, sec. 19, reads: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Article I, sec. 35: "All courts shall be open; and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, *and right and justice administered without sale, denial, or delay."* (Italics mine.)

In *S. v. Hedgecock,* 185 N. C., 714 (720), we find: *"Chief Justice Ruffin,* in *S. v. Moses,* 13 N. C., at p. 463, as far back as 1830, in reference to the Act of 1811, ch. 809 (now C. S., 4623), said that it was 'enacted that in all criminal prosecutions in the Superior Court it shall be sufficient that the indictment contain the charge in a plain, intelligible, and explicit manner; and no judgment shall be arrested for or by reason of any informality or refinement, when there appears to be sufficient in

the face of the indictment to induce the court to proceed to judgment.' And he added these memorable words, which express the best judicial thought of his day, and which since has obtained everywhere: 'This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law, and reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, especially in those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance, that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth.' " *S. v. Switzer*, 187 N. C., 88 (96).

The modern conception of "Law and Justice" is that cases should be decided on their merit and if on the whole charge there is no prejudicial or reversible error, the verdict and judgment thereon should not be disturbed. Technicalities, refinements and attenuated and cloistered reasoning should be relegated to the dark ages of the law. In seeking for justice, errors that are not material should not be fished out of a record to grant a new trial, subjecting litigants to be harassed by a series of trials and often destroying their rights on technical grounds—in this way they are sometimes unable to bear up under the law's delay. The law requires juries to be "men of good moral character and sufficient intelligence." N. C. Code, *supra*, sec. 2312. Then, again, we have splendid, capable and conscientious Superior Court judges. In a trial they, as it were, shoot on the wing, we on the ground; therefore, where on the whole charge no material aspect is overlooked, we should not hunt for immaterial and nonprejudicial error.

C. S., 564, is hoary with age—dead in the Federal Courts and discarded in most of the states, and a crippled germ in others. To cling to it, where there is no prejudicial or reversible error, is to shackle a court to a "living death," denying justice on the merits of a case, when the whole record shows no prejudicial or reversible error.

An orderly procedure, and the statute, *supra*, in regard to prayer for instructions intended that litigants before the charge of the court should hand up prayers for instruction covering the incidental and subordinate features of the controversy. The court below could then charge the law applicable to the facts and the disputed attitudes of the case could be considered. To sit in silence and then on appeal fish out of the charge matters that perhaps had not affected the verdict and pick up C. S.,

564, should not be permitted by this Court unless some serious, prejudicial, and reversible error had been made going to the very heart of the controversy.

The late lamented *Justice Brogden,* in *Horne Corp. v. Creech,* 205 N. C., 55 (63-4), wrote: "In cases of this type the eye of the law sinks deep into the situation and dealings between the parties to discover the heart of the transaction. The law moves along straight lines to ascertain, establish and enforce fundamental justice between men and does not dissipate its energies in fencing with legal fictions, boxing with legal shadows, and wrestling with legal puppets."

SEAWELL, J., concurring in dissenting opinion: My conception of the proper functions and limitations of the statute leads me to dissent from the majority opinion. I wish to make it clear that I make no assault on the law or the duty of the Court to enforce it. But I am impressed with the danger to the administration of justice involved in creating standards not within the reasonable contemplation of the statute, which affect the character and amplitude of instructions to the jury.

I am of the opinion that the charge reveals no prejudicial error.

W. T. BRINSON AND MRS. LAURA H. HARVEY, EXECUTRIX OF THE ESTATE OF MRS. HARRIET L. HYMAN, v. THE MILL SUPPLY COMPANY, INCORPORATED (E. F. SMALLWOOD, RECEIVER).

(Filed 7 May, 1941.)

1. Corporations § 20—

In order for a contract executed by an officer of a corporation to be binding on the corporation it must appear that it was incidental to the business of the corporation or was expressly authorized, and that it was properly executed.

2. Corporations § 15—Contract held not method adopted by corporation to purchase its own stock.

The president of defendant corporation executed a note for money borrowed by him from a third person and put up as collateral security capital stock of the corporation owned by him. The note provided that upon the payment of each $1,000 on the note, stock in the same amount should be released to the maker and that payment of the note should be guaranteed by the corporation. Later the corporation, through its officers, executed a guaranty of payment containing the same provision for the release of the capital stock to its president upon the payment of each $1,000 on the

note. Thereafter the treasurer of the corporation wrote the payee reciting the conditions of the note but reciting the condition for the release of the collateral as being that it should be released and turned over to the corporation rather than to its president. *Held:* The letter formed no part of the contract, and there being no evidence that any of the capital stock was released to the corporation, the payee may not successfully contend that the contract was a method adopted by the corporation for the purchase of its own stock as authorized by its charter.

3. Corporations § 18—Guaranty of payment of its president's note solely as accommodation to its president held beyond scope of express powers.

The express power granted defendant corporation in its charter to undertake the liabilities of any firm or corporation, refers to the power granted to acquire the good will, rights, property and assets of any firm or corporation, and does not authorize the corporation to guarantee payment of a note executed by a third person solely for the accommodation of such third person, nor does such guaranty come within the express power conferred by the charter to raise money for the purpose of the corporation, and its act in guaranteeing payment of the note of its president solely for his accommodation is not within the express powers of the corporation.

4. Corporations § 17—

A corporation is a creature of the State and has only the powers specifically granted it in its charter and such other powers as are fairly and reasonably to be implied from the express powers granted.

5. Corporations § 19—

The implied powers of a corporation are merely those necessarily inferred for the accomplishment of the express powers granted, and implied powers can never enlarge the express powers and thereby authorize the corporation to engage in activities collateral to the purposes of its incorporation.

6. Same—

A corporation does not have the implied power to guarantee payment of a note executed by its president solely for the accommodation of its president.

7. Corporations § 21—

The doctrine that a corporation is estopped to plead that a certain act is *ultra vires* applies when the corporation has accepted the benefits of the transaction in question, and does not apply when the *ultra vires* act is solely for the accommodation of its president or other third person and no consideration or benefit is received by the corporation.

8. Corporations § 34—

The payee of a note executed by the president of a corporation, the corporation not being a party to the note, is not entitled to the allowance of her claim against the receiver of the corporation based upon the action of the corporation in guaranteeing the payment of the note for the sole

accommodation of the president, since the act of the corporation in guaranteeing payment of the note is outside the scope of its express and implied powers and is *ultra vires*.

APPEAL by Mrs. Laura H. Harvey, executrix, claimant, from *Thompson, J.*, at September Term, 1940, of CRAVEN. Affirmed.

Civil action instituted by W. T. Brinson in behalf of himself and all the stockholders and creditors of The Mill Supply Company against The Mill Supply Company, alleging insolvency and seeking the appointment of a receiver and the liquidation of the corporation.

When the original action came on to be heard on the motion for the appointment of a receiver, E. F. Smallwood was appointed receiver and placed in charge of the assets of the defendant corporation to the end that the corporation might be liquidated and the assets applied to the payment of creditors.

The claimant, Laura H. Harvey, executrix of the last will and testament of Harriet L. Hyman, filed claim with the receiver in the amount of $2,318.97, representing the balance due on a note in the sum of $5,000.00, executed by Albert F. Patterson, who was at the time of the execution thereof president of the defendant company. The facts in respect thereto are as follows:

On 14 March, 1931, Albert F. Patterson borrowed from Harriet L. Hyman the sum of $5,000.00, evidenced by his note which, under the terms thereof, was payable in stipulated monthly installments. Fifty shares of the capital stock of The Mill Supply Company was deposited with the payee as collateral security and the note contained the stipulation "that upon payment of the sum of $1,000 on the principal of this note that $1,000 of the par value of said stock shall be released to the maker of this note and upon payment of each subsequent $1,000 a like amount of collateral shall be released to the maker.

"The payment of this note is guaranteed by The Mill Supply Company in accordance with a separate contract of guaranty of even date herewith executed by The Mill Supply Company."

On 2 April, 1931, A. F. Patterson, president, and the secretary of the defendant corporation, executed, in the name of the corporation, a contract of guaranty of said note, which contract of guaranty was executed pursuant to a resolution duly adopted by the executive committee, 14 March, 1931. This contract contains a similar stipulation to the effect that upon the payment of one thousand dollars upon the principal of the note, one thousand dollars par value of the stock deposited as collateral is to be released to A. F. Patterson, the maker.

The executive committee in adopting the resolution authorizing the execution of the contract of guaranty acted by virtue of a resolution of the board of directors vesting it, during the interim between meetings of the board, "with the same power and authority as is vested in the Board of Directors and by any act of said committee taken between the meetings of the Board of Directors shall be as equally binding on the company as though said action had been taken by the Board of Directors."

The receiver denied the claim and the claimant appealed to the Superior Court. Upon hearing in the Superior Court the judge found the facts and concluded that the contract of guaranty was *ultra vires*. It thereupon adjudged that the claimant recover nothing of the receiver. The claimant excepted and appealed.

R. A. Nunn for Laura H. Harvey, executrix, claimant, appellant.
R. E. Whitehurst for receiver, appellee.

BARNHILL, J. Was the act of the officers of the defendant corporation, in authorizing and executing the contract of guaranty, *ultra vires* as contended by the receiver? The court below so concluded. In this conclusion we concur.

For a contract executed by the officer of a corporation to be binding on the corporation it must appear that (1) it was incidental to the business of the corporation; or (2) it was expressly authorized; and (3) it was properly executed.

The charter of the defendant corporation vests it with general authority to acquire, own, mortgage, sell and otherwise deal in real estate, chattels and chattels real without limit as to amount; to deal in mortgages, notes, shares of capital stock and other securities; to acquire the good will, rights, property and assets of all kinds and to undertake the whole or any part of the liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock, bonds, debentures, notes or other securities of this corporation, or otherwise; to purchase or acquire its own capital stock from time to time to such an extent and in such manner and upon such terms as its board of directors shall determine; to borrow or raise money for any purpose of its incorporation, and to issue its bonds, notes or other obligations for money so borrowed, or in payment of or in exchange for, any real or personal property or rights of franchises acquired or other value received by the corporation and to secure such obligations by pledge or mortgage; and "to do all and everything necessary, suitable, convenient or proper for the accomplish-

ment of any of the purposes, or the attainment of any one or more of the objects herein enumerated, or incident to the power herein named, or which shall at any time appear conducive or expedient for the protection or benefit of the corporation, either as holders of or interest in, any property, or otherwise; with all the powers now or hereafter conferred by the laws of North Carolina upon corporations." There are other powers granted which are in nowise pertinent to the question here presented.

The powers thus granted do not expressly authorize the corporation to issue accommodation paper or to guarantee the obligations of a third party.

It is true that in a letter addressed to the payee of the note the treasurer of the defendant corporation recited the conditions of the note, including the provision in respect to the surrender of the collateral, and says in the letter that such stock "shall be released and turned over to The Mill Supply Company, free and discharged of the lien of said note." But this letter was merely one of transmittal. It constitutes no part of the contract. The guaranty enclosed, as well as the note, which together form the contract, provides that such stock, on compliance with the condition, is to be surrendered to the maker A. F. Patterson. Furthermore, there is no evidence tending to show that any of the stock was ever delivered to the corporation. Hence, the contract was not a method adopted for the purchase by the defendant of its own stock as authorized by its charter. Claimant's contention in that respect cannot be sustained.

The provision in the charter authorizing the corporation "to undertake the whole or any part of the liabilities of any person, firm, association or corporation and to pay for the same in cash, stock, bonds, debentures, notes or other securities of this corporation or otherwise" is in connection with, related to and a part of the power granted "to acquire the good will, rights, property and assets of all kinds of any other person," etc. The power granted is the power to assume the liabilities of such firm or corporation whose rights, property and assets are acquired by the corporation. This provision may not be construed to mean that the corporation was vested with power to issue accommodation paper or to become guarantor upon the obligation of a third party.

The contract of guaranty was no part of a transaction in which the corporation was borrowing or raising money for the purposes of its incorporation. It was clearly and exclusively an act in aid and for the accommodation of its president as an individual. From it the corporation received no benefit.

Hence, it appears that the undertaking of the corporation was not directly "necessary, suitable, convenient or proper for the accomplishment of" either of these or of any other purpose authorized by the charter.

Was the contract of guaranty incidental to or in furtherance of the powers expressly granted? If not, it was *ultra vires* and unenforceable.

A corporation is an artificial being, created by the State, for the attainment of certain defined purposes, and, therefore, vested with certain specific powers and others fairly and reasonably to be inferred or implied from the express powers and the object of the creation. Acts falling without that boundary are unwarranted—*ultra vires.* 7 R. C. L., 673, 19 C. J. S., 965.

"A corporation, being the mere creation of the law, possesses only those properties which the charter of its creation either expressly or as incidental to its creation confers." *Marshall, C. J.,* in *Dartmouth College case,* 4 Wheaton, 518, 4 L. Ed., 629. "An incidental power exists only for the purpose of enabling a corporation to carry out the purposes expressly granted to it—that is to say, the powers necessary to accomplish the purposes of its existence—and can in no case avail to enlarge the express powers and thereby warrant it to devote its efforts or capital to other purposes than such as its charter expressly authorizes, or to engage in collateral enterprises, not directly, but only remotely, connected with its specific corporate purposes." 19 Cyc., 1096; *Victor v. Mills,* 148 N. C., 107.

Ordinarily, the power to endorse or guarantee the payment of negotiable instruments for the benefit of a third party is not within the implied powers conferred upon a private business corporation.

The general rule is that no corporation has the power, by any form of contract or endorsement, to become a guarantor or surety or otherwise lend its credit to another person or corporation. 19 C. J. S., 917, sec. 1230, and numerous authorities cited in note 14; 7 Fletcher on Corps., 647; 7 R. C. L., 675.

In the absence of express statutory authorization, a corporation has no implied power to lend its credit to another by issuing or endorsing bills or notes for his accommodation, where the transaction is not related to the business activity authorized by its charter as a necessary or usual incident thereto. 14A C. J., 732, sec. 2781; 19 C. J. S., 915, sec. 1228.

A corporation is without implied power to guarantee for accommodation the contract of its customers with third persons on the ground that it may thus stimulate its own business. Such use of its credit is clearly beyond the power of an ordinary business corporation. *Bowman Lum-*

ber Co. v. Pearson, 221 S. W., 930 (Tex.); 11 A. L. R., 547; *Northside R. Co. v. Worthington,* 88 Tex., 562, 53 Am. State Rep., 778. It has no authority to use its credit for the benefit of a stockholder or officer. *Hunter v. Garanglo,* 246 Mo., 131, 151 S. W., 741; *1st Sav. & T. Co. v. Romadca,* 132 C. C. A., 357; 216 Fed., 113.

A claim of the holder of promissory notes made by an officer of a corporation against the corporation as accommodation endorser thereon, which endorsement was authorized by the stockholders, is not provable against the corporation in subsequent bankruptcy proceedings. *Re Amdur Shoe Co.,* 13 Fed. (2d), 147.

Trustees v. Realty Co., 134 N. C., 41, and other cases to the same effect, holding that where the contract is executed by the other party to the contract and the corporation has received the benefit thereof it is estopped from setting up the defense that it was *ultra vires,* are not in point.

The question here presented is not whether there was sufficient consideration to support the note. The question is, was there sufficient consideration moving to the corporation to support the contract of guaranty. The liability of the individual upon the note (which was not signed by the corporation) is not contested. It is the liability of the corporation which is at issue. Hence, the rule that where the corporation has received the benefits under a contract which is not incidental, it will be held liable under the doctrine of estoppel, for the reason that it should not be permitted to accept and retain the benefits and at the same time disavow the contract on the plea of *ultra vires,* has no application. It is when the corporation has received the full benefit of the contract that it will not be relieved of liability because the contract was *ultra vires. Bank v. Bank,* 198 N. C., 477, 152 S. E., 403; *Quarries Co. v. Bank,* 190 N. C., 277. See, also, *Lumber Co. v. Al & Lloyd Parker, Inc.,* 122 Tex., 487, 62 S. W. (2d), 63; *Brand v. Lumber Co.,* 77 S. W. (2d), 600; 14A C. J., 329, note 16. This rule does not impose liability upon the corporation when no benefit has accrued to it by reason of its contract—here the contract of guaranty.

"If it shall be found that the notes executed by the president of defendant corporation, not in pursuance of or as an incident of the corporate business, wholly without consideration, or benefit of any kind to the corporation, then such execution and delivery of the notes would be an *ultra vires* act." *Lentz v. Johnson & Sons, Inc.,* 207 N. C., 614, and cases cited. *Comrs. of Brunswick v. Bank,* 196 N. C., 198, 145 S. E., 227.

The contract of guaranty was executed for the benefit of an individual. No part of the consideration moved to the defendant corporation. It

was not either expressly or impliedly authorized by its charter to enter into contracts for the accommodation of a third party. To permit the payment of the claim would clearly result in an invasion of the assets of the defendant corporation in the hands of the receiver as a trust fund for the payment of legitimate creditors. See 7 R. C. L., 198. The defendant's plea of *ultra vires* must be sustained.

The judgment below is

Affirmed.

W. T. BRINSON, IN BEHALF OF HIMSELF AND ALL THE STOCKHOLDERS AND CREDITORS OF THE MILL SUPPLY COMPANY, v. THE MILL SUPPLY COMPANY, A CORPORATION.

(Filed 7 May, 1941.)

1. Corporations § 34—Payee of individual notes of secretary-treasurer of corporation may not file claim against receiver on corporation's accommodation endorsement of the notes.

The agreed facts disclose that the secretary-treasurer of a corporation purchased stock from the corporation, executing his note to the corporation secured by the stock certificates, that thereafter he borrowed money from a third person and took up his note to the corporation and executed to the third person his individual note for the money borrowed and delivered the stock certificates to her as security, and, at her request, endorsed the note in the name of the corporation by himself as secretary-treasurer, and that later, in order to buy more stock, he borrowed another sum of money from the same third person and executed to her his note secured by the stock certificate purchased, and endorsed the note in the name of the corporation by himself as secretary-treasurer. *Held:* Both the transaction in borrowing money to take up his note to the corporation for stock previously purchased by him, and the transaction in borrowing money with which to purchase additional stock, was for the individual benefit of the secretary-treasurer of the corporation, from which transactions the corporation received no benefit, and the endorsements being beyond the express or implied powers of the corporation and *ultra vires*, the claim of the payee of the notes against the corporation on the endorsements should have been disallowed.

2. Corporations § 21—Corporation is not estopped from asserting that transaction was ultra vires unless it accepts and retains benefit from the transaction.

The secretary-treasurer of a corporation borrowed money with which to pay the corporation for shares of its capital stock purchased by him, and executed to the lender his notes for the amounts borrowed, and

endorsed the notes in the name of the corporation by himself as secretary-treasurer. The corporation entered on its accounts receivable the checks drawn by such third person for the money loaned, and credited the checks on the stock account of its secretary-treasurer. *Held:* The corporation received no benefit from the act of its officer in borrowing the money, and therefore its act in accepting the checks and crediting the same to the stock account of its officer does not estop the corporation from asserting that the endorsement of the notes was *ultra vires* the corporation.

3. Same: Principal and Agent §12—

The doctrine of ratification generally applies only when the person sought to be charged accepts the benefits of an unauthorized or *ultra vires* act and, with full knowledge of the material facts, fails to repudiate the transaction.

4. Corporations § 21—Corporation held to have received no benefit from ultra vires act of secretary-treasurer and therefore doctrine of ratification is inapplicable.

The secretary-treasurer of a corporation borrowed money with which to pay the corporation for shares of its capital stock purchased by him, and executed to the lender his notes for the amounts borrowed and endorsed the notes in the name of the corporation by himself as secretary-treasurer. Thereafter the corporation, in paying dividends on the stock represented by the certificates issued to its officer, made checks payable to the third party holding the certificates as collateral security and credited same to the personal account of the officer. *Held:* The action of the corporation in issuing its dividend checks to such third person is not a ratification by the corporation of the act of its secretary-treasurer in endorsing the notes in the name of the corporation, since the corporation received no benefit from the *ultra vires* endorsement, and further, was not chargeable with knowledge of the acts of its officer.

5. Same—

A corporation is not chargeable with knowledge of its officers or agents in respect to a transaction in which they act for their own personal benefit and not in any official or representative capacity for the corporation.

6. Same: Estoppel § 6e—

The rule that where one of two innocent parties must suffer loss from the wrongful acts of a third person, the party first reposing confidence in the wrongdoer must suffer the loss, does not apply where a corporate officer uses the credit of the corporation for his own personal benefit, since the person dealing with the corporate officer is charged with knowledge that the officer has no authority to so bind the corporation.

APPEAL by Edward F. Smallwood, receiver of The Mill Supply Company, from *Thompson, J.*, at 26 December, 1940, Term, of CRAVEN.

Civil action instituted 3 February, 1940, for the appointment of receiver on account of imminent danger of insolvency of defendant, The Mill Supply Company, a corporation.

The court appointed Edward F. Smallwood as such receiver and he entered upon the duties of the position.

The estate of Mrs. Lida P. Duffy, who died 8 January, 1938, filed claim with the receiver, predicated upon two notes, the first dated 19 May, 1927, for $2,500, and the second 1 April, 1929, for $1,000, each executed by A. F. Patterson, and each bearing on the back thereof this endorsement: "The Mill Supply Company, by A. F. Patterson, Secretary and Treasurer." The receiver disallowed the claim and reported such disallowance to the court. The executor of Mrs. Lida P. Duffy, to wit, Rudolph Duffy, excepted and appealed to the Superior Court, and upon controversy thus arising the parties agreed upon and submitted to the judge holding the courts of the district a statement of facts and agreed that such judge should pass upon same and render judgment with like effect as though same had been found by a jury in term.

The agreed facts are substantially these: The Mill Supply Company was incorporated by charter filed 10 December, 1923. Among the pertinent provisions contained in the charter, briefly stated, are these: (1) ". . . To lend money on bonds secured by mortgages on real estate or other personal property . . ."; (2) To "purchase . . . bonds, . . . shares of capital stock, and other securities, obligations and contracts and indebtedness of any private . . . corporation; . . . to receive . . . and dispose of . . . debentures, notes, shares of capital stock, securities, obligations, contracts, evidence of indebtedness and other property held or owned by it, and to exercise in respect of all such . . . any and all the rights, powers and privileges of individual owners thereof; to do any and all acts and things tending to increase the value of the property at any time held by the corporation . . ."; but "nothing herein is to be construed as intended to form a banking company, a trust company, a savings bank or a corporation intended as a part of its business to derive profit from the loan and use of money"; (3) To "acquire the good will, rights, profit and assets of all kinds and to undertake the whole or any part of the liabilities of any person, firm, association or corporation, and to pay for the same in cash, stock, bonds, debentures, notes or other securities of this corporation or otherwise"; (4) To "use and apply its surplus earnings or accumulated profits authorized by law to be reserved, to the purchase or acquisition of property and to the purchase or acquisition of its own capital stock from time to time, to such extent and in such manner and upon such terms as its board of directors shall determine"; (5) "To borrow or raise moneys for any purpose of its incorporation, to issue its bonds, notes, or other obligations for moneys so borrowed, or in payment of or in exchange for, any

real or personal property or rights . . . acquired or other value received by the corporation and to secure such obligations by pledge or mortgage under a deed of trust or otherwise, of or upon the whole or any part of the property at any time held by the corporation, and to sell or pledge such bonds, or discount such notes or other obligations, for its proper corporate purposes."

The by-laws provide for a manager and treasurer, and prescribe their duties. It is provided, among other things not here pertinent, that the manager shall have general control of the operation and affairs of the company, subject to the control of the directors. It is further provided that the treasurer "shall perform all the duties usually performed by a treasurer, and as such, he shall collect, receive and hold the money of the company; endorse and collect all checks and negotiable instruments and keep full and accurate accounts of the receipts and disbursements of the company, rendering a full account to each regular stockholders' meeting."

According to the minutes of the first meeting of the stockholders and directors held on 21 December, 1923, A. F. Patterson was elected to the position of secretary-treasurer and general manager and held these positions up to and including the meeting on ..... February, 1933, at which time he was elected president and served in that capacity until receiver was appointed, in February, 1940.

At a stockholders' meeting in 1925 the officers were empowered to issue stock up to $110,000, including the stock already issued, provided it were deemed necessary by them. From time to time theretofore and thereafter directors authorized loans to be obtained or money borrowed—to wit: (a) On 18 February, 1924, A. F. Patterson was authorized to procure a loan not to exceed $20,000 from the Murchison National Bank, of Wilmington, North Carolina, and to pledge the faith and credit of the company for same; (b) on 10 August, 1926, the secretary was authorized to borrow $5,000 from the Seaboard National Bank of Norfolk, Virginia, and to open an account with it; (c) on 11 January, 1927, the secretary was authorized to borrow $5,000 from the Murchison National Bank of Wilmington, North Carolina, and to arrange an extension on bonds held against the real estate of the company; (d) on 19 December, 1927, the secretary was authorized to arrange for loan not over $15,000 for five years and to give a second mortgage on the real estate of the company to protect same; (e) on 1 November, 1929, the executive committee authorized the general manager to borrow such additional funds as were found to be necessary to meet the current obligations of the company in addition to bonds maturing on or before 1 January, 1930, and to hypothecate insurance policies on any and all

employees of the company, and to use the equity accumulated against these policies, and such portion as has accumulated in the Building and Loan stock of the company for this purpose; and (f) on 21 February, 1930, the secretary and treasurer was authorized to negotiate a loan with the South Carolina National Bank at Charleston not to exceed $10,000—to be used for the specific purpose of retiring any loans of equal amount which the company may have with the Seaboard National Bank of Norfolk or the North Carolina Bank & Trust Company at Wilmington.

There were no other specific directions or authority expressed in the minutes to borrow money between the date of the organization of the corporation and the date of 21 February, 1930.

Under date of 19 May, 1927, A. F. Patterson executed and delivered his note for $2,500 to Mrs. Lida P. Duffy, payable on demand at the office of The Mill Supply Company, and entered on back of said note this endorsement, "The Mill Supply Company, A. F. Patterson, Secretary," and secured the same by deposit with her of certificate No. 50 for 35 shares of capital stock of The Mill Supply Company issued to A. F. Patterson. He informed her that the purpose of borrowing said money was to enable him to pay a note given by him to The Mill Supply Company for said stock. She requested that the company endorse the note and Patterson, "believing that he had the authority and privilege entered the endorsement recited above," and thereupon delivered the note as so endorsed by him to Mrs. Duffy, and received the payments hereinafter recited. Patterson had previously agreed with Mrs. Duffy that since the stock paid ten per cent dividend, she would receive ten per cent on the money so loaned.

The general ledger of the company, under heading of "Notes Receivable," contains entries of credits by checks—two as "(A. F. Patterson) L.D." and one "(A. F. Patterson) on note for L. D."—aggregating $2,500, indicating and meaning that Mrs. Lida Duffy's checks were credited on the note of A. F. Patterson given to and held by Mill Supply Company for purchase price of stock evidenced by said stock certificate No. 50, which the company held as collateral to the note.

On 1 April, 1929, A. F. Patterson executed and delivered to Mrs. Lida P. Duffy his note for $1,000 payable on demand at the office of The Mill Supply Company, and endorsed on the back thereof, "The Mill Supply Company by A. F. Patterson, Secretary and Treasurer," and secured same by stock certificate No. 97, issued to A. F. Patterson on 1 April, 1929, for ten shares of capital stock of The Mill Supply Company. The certificate was transferred in blank by Patterson and deposited with Mrs. Duffy, who then issued check for $1,000, which was received by The Mill Supply Company on 12 April, 1929, entered upon

its "Accounts Receivable" ledger as a charge to capital stock account and credited to A. F. Patterson.

The general ledger of the company shows that beginning in the month following the dates of the two notes, respectively, and continuing monthly thereafter to and through the year 1936, during which time The Mill Supply Company paid ten per cent dividend on its stock, checks of the company for an amount equal to monthly installment of ten per cent annual dividend on the number of shares of stock represented by said certificates Nos. 50 and 97, respectively, payable to Mrs. Lida P. Duffy, were paid and charged to the account of A. F. Patterson—the same account in which his salary check was credited. The general ledger also shows that after 1936 the checks, reduced to an amount equal to monthly installment of six per cent annual dividend on such number of shares of stock, were issued and credited in like manner to those issued prior thereto.

"In addition to payment by check, merchandise was purchased by Mrs. Duffy and later by her executor and charged to her and . . . certain of these charges were offset against interest payments on the notes by the company and to that extent were likewise charged on the company's book to the account of A. F. Patterson."

At time of her death Mrs. Duffy was indebted to company for merchandise, and since her death her executor has purchased other items. Eliminating any charged items for which account has been taken, it is agreed that the account is now $500, which shall be credited on notes if Court should hold that receiver shall allow claim. But if claim be not allowed, the estate of Mrs. Duffy is indebted to company in the sum of $500.

While denying the claim filed, the receiver admits that the stock held as collateral to the notes given by Patterson to Mrs. Duffy will be entitled to share in any distribution of assets to stockholders.

Upon the facts agreed, the court below being of opinion that the two notes are liabilities of The Mill Supply Company, and should be allowed as such, entered judgment therefor less the agreed credit of $500.

The receiver appeals therefrom to Supreme Court, and assigns error.

W. B. R. Guion for Duffy, Executor, appellee.
R. E. Whitehurst for Receiver, appellant.

WINBORNE, J. The factual situation shown in the record on this appeal presents these determinative questions:

1. When the secretary-treasurer of a corporation borrows money from a third party for the express purpose of paying, and pays his indebtedness to the corporation for purchase of shares of its capital stock—

evidenced by his note to which as collateral security certificate previously issued to him for such stock is attached, and, for the money borrowed, executes and delivers to such third party his note with and secured by such stock certificate and, with the knowledge and at the request of such third party, endorsed by the secretary-treasurer in the name of the corporation by him as such officer, without express charter authority, is the corporation liable to such third party by reason of such endorsement?

2. When the secretary-treasurer of a corporation thereafter borrows money from the same third party with which to buy and does buy from the corporation shares of its capital stock and stock certificate is issued to him, and, for the money borrowed, he executes and delivers to the third party his note, with and secured by such stock certificate, and endorsed by him in the name of the corporation by him as such officer, without express charter authority, is the corporation liable to such third party by reason of such endorsement?

3. If not, do the facts that checks of the third party, covering the amount of the first loan to the officer, secretary-treasurer, were actually received by the corporation and entered upon "Notes Receivable" ledger account as credit on the note of officer, and that the check for the second loan was actually received by the corporation and entered upon its "Accounts Receivable" ledger as a charge to capital stock account and credited to the officer, so inure to the benefit of the corporation as to render it liable under the doctrine of estoppel?

4. Does the fact that the corporation, in paying dividends on the stock, represented by the two certificates issued to the officer, individually, and deposited by him with the third party as collateral to his notes, made checks payable to the third party, and credited same to the personal account of the officer, constitute a ratification of the endorsement on the notes of the officer entered by him in the name of the corporation without express charter authority, and held by the third party?

5. Upon the facts of this case, is the principle that where one of two persons must suffer by the wrongful act of another the loss must fall upon the one who first reposed the confidence and made it possible for the loss to occur, available to claimant?

Careful consideration of them calls for a negative answer to each of these questions.

At the outset it is pertinent to note that all the evidence leads to one conclusion, that is, that the transactions here involved were for the sole benefit of A. F. Patterson individually.

In this light, the first and second questions are controlled by the decision of this Court entered cotemporaneously herewith in the case of *Brinson v. Supply Co., ante,* 499, involving a claim filed in the same receivership by the executrix of Mrs. Harriett L. Hyman, deceased.

There the Court, speaking through *Barnhill, J.*, holds as *ultra vires* the act of the Executive Committee of the Board of Directors of The Mill Supply Company in undertaking to guarantee the payment of a note of $5,000 given by A. F. Patterson to Mrs. Hyman and secured by certificate issued to him for fifty shares of the capital stock of said company.

The ruling is prefaced upon the principle that for a contract executed by an officer of a corporation to be binding upon the corporation it must appear that it was either expressly authorized or incidental to the business of the corporation and was properly executed.

The Court, then referring to the powers granted in the charter of The Mill Supply Company, the same powers involved in the present action, holds that no express authority is given to the corporation to issue accommodation paper or to guarantee the obligations of a third party. The Court further holds that under such circumstances the contract of guaranty is not incidental to or in furtherance of the powers expressly granted. Hence, the power to endorse or to guarantee the payment of a negotiable instrument for the benefit of a third party is not within the implied powers conferred upon the corporation. Therefore, the corporation had no authority to use its credit for the benefit of a shareholder or an officer. Reference is here made to the full discussion of the subject there. Further treatment here would be useless repetition.

3. As is stated by *Barnhill, J.*, in the case of *Brinson v. Supply Co., supra,* the principle that where a corporation has received the benefits under a contract which is incidental, it will be held liable under the doctrine of estoppel for the reason that it should not be permitted to accept and retain the benefits and at the same time disavow the contract on the plea of *ultra vires* has no application to the situation in hand. "It is when the corporation has received the full benefit of the contract that it will not be relieved of liability because the contract is *ultra vires,*" citing authorities.

Here, A. F. Patterson, in the first instance, being indebted to the corporation for shares of its stock, and in the second desiring to buy more of its stock, purposes personal to him, borrowed money from Mrs. Duffy with which to discharge the first and to accomplish the second. No such benefit as is contemplated in the above principle accrued to the corporation.

4. Generally, a ratification, to bind the corporation, must be made with full knowledge of the material facts of the transaction. The principle is applicable when benefits of the unauthorized act or contract of the officer or agent accrue to the corporation and it fails to repudiate the transaction and to offer restitution. Likewise, a ratification will be implied when, in addition to receiving the benefits of the unauthorized transaction the corporation, with full knowledge of the facts, makes pay-

ments on account of such benefits, as where it pays interest under an unauthorized contract or makes payments on a note executed or endorsed on its behalf without authority. However, the general rule does not apply where no benefits result from the transaction, or where it receives the benefits under a separate and distinct transaction. 19 C. J. S., 488 and 500, Corporations, sections 1015 and 1020. See, also, *Lumber Co. v. Elias,* 199 N. C., 103, 154 S. E., 54; *Morris v. Basnight,* 179 N. C., 298, 102 S. E., 389.

In the present case it is sufficient to say that not only is there an absence of benefits to the corporation from the unauthorized acts of A. F. Patterson in endorsing the notes, but the payment of interest was for A. F. Patterson. He was entitled to dividends on the stock which he had deposited with Mrs. Duffy. The method of payment adopted, in so far as the corporation is concerned, merely constituted payment of dividends to Patterson.

Furthermore, it is a well settled principle of law that a corporation is not chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf and does not act in any official or representative capacity for the corporation. *Brite v. Penny,* 157 N. C., 110, 72 S. E., 964; *Stansell v. Payne,* 189 N. C., 647, 127 S. E., 693.

5. In regard to the fifth question, the principle of law is well settled that an officer of a corporation cannot bind the corporation by his acts in respect to matters in which he is personally interested, *Brite v. Penny, supra; Grady v. Bank,* 184 N. C., 158, 113 S. E., 667; *Stansell v. Payne, supra,* and third persons are bound to know that an officer has no authority to use the credit of the corporation for his personal benefit. *Stansell v. Payne, supra.* Hence, the principle referred to in this question is not open to claimant.

Mrs. Duffy had notice that Patterson was acting, in these transactions, in the interest of himself and not for The Mill Supply Company. It appears that both she and Patterson acted in good faith, and believed that an endorsement made upon the note in the name of the company by him would be valid. But, as stated in *Stansell v. Payne, supra,* "this fact elicits sympathy . . . but cannot fix defendant with liability for the unauthorized act of" Patterson.

The judgment below is

Reversed.

STATE v. JOSEPH SAMUEL MILLER.

(Filed 7 May, 1941.)

1. Homicide § 23: Criminal Law § 38a—

The admission in evidence of photographs of the scene of the homicide, one as deceased was found and the other after he had been turned over to show his face in order to identify him, for the purpose of illustrating the testimony of the witnesses, and the use of the photographs by the solicitor in his argument for such purpose, is not error.

2. Homicide § 27h—Where all evidence tends to show murder in perpetration of robbery, court need not submit question of guilt of less degrees of crime.

The State's evidence tended to show that defendant killed deceased in the perpetration of, or attempt to perpetrate, a robbery. Defendant's testimony was to the effect that he and a companion, pursuant to a conspiracy, were perpetrating or attempting to perpetrate a robbery, and that, both being present, his companion fired the fatal shot. *Held:* The court correctly limited the jury to a verdict of guilty of murder in the first degree or not guilty, there being no evidence of defendant's guilt of a less degree of the crime. C. S., 4200.

3. Homicide § 2—

Where, in pursuance of a preconceived plan to rob, one of the conspirators, both being present, shoots their victim while perpetrating or attempting to perpetrate the robbery, both are guilty of murder in the first degree. C. S., 4200.

4. Homicide § 27h—

Where all the evidence tends to show defendant's guilt of murder committed in the perpetration of, or attempt to perpetrate, a robbery, the fact that after charging the law on this aspect of the case, the court also charges the law of premeditation and deliberation, does not render the court's failure to submit to the jury the question of defendant's guilt of a less degree of the offense erroneous.

5. Homicide § 27f—

Where defendant does not plead insanity and offers no evidence that he was not capable of understanding and knowing what he was doing, the court is not required to charge the jury on the question as to whether defendant was mentally capable of committing the crime.

6. Criminal Law § 79—

Exceptions not brought forward in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28.

APPEAL by defendant from *Alley, J.*, at regular term of criminal court, January, 1941, of MECKLENBURG.

Criminal prosecution upon indictment charging defendant with murder of C. C. Ritter.

In the trial court evidence for the State tends to show these facts: About midnight on the night of 13 December, 1940, the body of C. C. Ritter was found crumpled under a tree near an automobile on a lot just off the sidewalk of Central Avenue and across the avenue from his barber shop in the city of Charlotte, Mecklenburg County, North Carolina. He was dead. His death was caused by a wound inflicted by a 38 caliber bullet fired into the back of his head, and which lodged in the brain.

Defendant, a Negro boy, then approximately one month less than eighteen years of age, was arrested on the following Wednesday morning, and voluntarily confessed to police officers that he killed C. C. Ritter. His statement was taken down by Mr. Hunter, of the *Charlotte Observer*.

His statements in this connection are to the effect that he had previously worked at the shop of C. C. Ritter and knew him and his habits; that prior to 13 December, 1940, he had obtained a pistol from John Henry Thomas, a Negro boy, and on Wednesday before that date, had bought five "38" caliber cartridges from a hardware store operated by a Mr. Cathey on Central Avenue; that on the night of 13 December, 1940, as he was walking along Lamar Avenue towards and near Central Avenue he saw Mr. Ritter "coming out of his place" and locking his door; that he, defendant, had this gun which he had obtained from John Thomas; that he came across to Mr. Ritter's automobile and waited behind it until Mr. Ritter got there; that when Mr. Ritter opened the door of his car, he, defendant, "throwed the pistol on him and told him to give him his money"; that Mr. Ritter turned around and started to walk off, and said or told defendant that he would call the police, and he shot him; that he did not intend to kill him—just meant to shoot him in the shoulder, to keep him from calling the police; that he, defendant, then ran down the railroad toward Barnhardt Manufacturing Company, and returned about an hour later to see if Mr. Ritter was there, "thinking that the man was only wounded, and that he would be gone"; that when he returned he found Mr. Ritter was dead, and "then took his money off him and went back to Lamar Avenue, and . . . to the railroad"; that he got twenty-nine dollars, consisting of bills and silver; that he took the money and went to the Brooklyn section and gave Mildred Reid six dollars, and bought clothing for himself with the balance; that he had been drinking some on the night of the killing; that he carried the pistol back and put it in John Thomas' house.

The State further offered testimony of Mildred Reid to the effect that she saw defendant at eleven o'clock and after on the night of the killing, and, in her words, "Joe didn't seem to be drunk that night, seemed to be sober. He was nice and quiet and acted like he always *have* acted."

The State further offered testimony of John Henry Thomas, a Negro boy, twenty years of age, to the effect that on Sunday, 15 December, 1940, having heard while caddying at a golf course that Joe Miller shot Mr. Ritter, he said to defendant as they were returning, "Joe, I heard you shot Mr. Ritter with my gun, and I want to know if it's so," and that after some conversation he said: "Yes, I shot Mr. Ritter . . . I did not mean to kill him, just meant to shoot him in the shoulder, to keep him from calling the police."

The State further offered evidence tending (1) to identify defendant as the one who purchased cartridges from Mr. Cathey, and (2) to show (a) that he did give Mildred Reid six dollars on night of 13 December, (b) that pistol was found at the place named by defendant; and (c) that defendant took officers to each place where he bought clothing.

Defendant as witness for himself testified that about ten-thirty o'clock on Friday morning, 13 December, John Thomas talked with defendant, said that he had some bills to pay, and suggested getting some money; that on being asked by defendant where he was going to get the money, he said he didn't know but he had found a place to get some; that at 7:15 that night John Thomas showed defendant where he kept his gun, and said, "We are going to get the gun or we're going to get some money," and that he was going out to Mr. Ritter's barber shop; that on being asked by defendant what he was going to do with the gun, he said, "We're going to take it along for a bluff"; that he, defendant, did not know that Thomas had any intention of using that gun to kill Mr. Ritter. Then, continuing, defendant testified: "The gun that Mr. Ritter was killed with was the gun of John Thomas. On the night of this homicide John Thomas and I . . . come down there on Lamar Avenue and Central and waited behind the sign board till Mr. Ritter started from his barber shop, and then as he was crossing the street I stepped behind his car and Thomas stepped out in front of him and asked him for his money . . . I did not have any weapon with me at all . . . I did not have any desire to injure Mr. Ritter. . . . So far as I know Mr. Ritter never did see me . . . After Mr. Ritter was shot we went down the railroad, down by the Louise Mill . . . We stayed there about an hour and . . . come back up where his body was. I got Mr. Ritter's money. It was folded in his hip pocket in bills; Yes, sir, he had some silver, I think about five or six dollars of silver in his coat pocket. Mr. Ritter had fifty-six dollars in all, and I got twenty-eight dollars and John Thomas got the other. After Mr. Ritter was shot we went . . . and . . . stopped and divided the money—there in the light of the laundry . . . After dividing the money I went over to Mildred Reid's, my girl friend's, house that night . . . I did give her six dollars. John Thomas carried the gun home with him . . ."

Continuing, defendant testified: "On December 13th we left home about a quarter past seven. I went over to John Thomas' house, that is where we started from to go rob Mr. Ritter . . . At the time I started up there with John Thomas and at the time Mr. Ritter was shot,—I was drinking wine. I had had just about two pints. I had been drinking wine that night; well, I started around six-thirty . . . I had been drinking wine a pretty good while . . ."

And, continuing, defendant testified: "When I got over here to the police I told them that I had done it; I told them very much what I have told on the witness stand. Well, before it happened Thomas said if I got caught he wanted me to take it on myself and leave him out of it, and if he got caught he would do the same for me. Yes, sir, I took it on myself about two weeks before court time . . . I want to say that I did not have anything against Mr. Ritter and I did not kill Mr. Ritter, and I want to ask the court to spare my life, because I did not kill him."

Then, on cross-examination, defendant testified that he knew the time Mr. Ritter quit the shop at night, knew he took in considerable money on Friday, knew he carried money home with him when he left the shop, knew he did not keep any money in his cash-register, knew he put it in his pocket, knew he left in an automobile to go home, knew where he parked his car, and knew the direction he was going to take to his home. He said: ". . . I and Thomas had planned this to go get his money, and if I got caught, whoever got caught would take it on himself. I will say it was planned that day about ten-thirty in the morning. . . . I had planned the whole thing out what I was going to do and how I was going to rob him. . . . I had planned to take this old pistol down there and use it, and if it took that to get the money that was what I was going to do. . . . I shot to wound him, to keep him from telling the police. Yes, sir, he told me he was going to tell the police, but I didn't shoot him. . . . I shot to wound him that was the idea. . . . This boy and I were working together by way of an agreement, . . . in furtherance of the agreement that I had between us at ten-thirty that morning before Mr. Ritter got killed . . . I told Mr. Ernest Hunter, the City Editor of the *Charlotte Observer*, that night and these men in his presence that I had shot Mr. Ritter and I shot him to wound him in the shoulder because he was going to get the police after me. We made up that story that we were going to shoot him in the shoulder before we left home. . . . The purpose was if we had to shoot him that we would shoot him in the shoulder to wound to keep him from going after the police. . . . Thomas said if he started to holler he would shoot him in the shoulder and wound him . . . I helped frame that up . . . I first saw Mr. Ritter in his barber

shop. We was passing his shop, going up Central Avenue; he was cutting somebody's hair, and we went straight on out Central Avenue up to Pecan; we went up Pecan Avenue and stayed at the drug store about ten minutes; went down Pecan to the railroad, came up Pecan and out High Street, crossed Clement and went down to Lamar and stayed behind the sign-board there until he came out of his shop. Yes, sir, I mean we hid and concealed ourselves and waited on the man to come out so we could rob him. After he was shot we ran. . . . We went back and got his money."

And, finally, defendant said: "I did not kill Mr. Ritter on December 13th, I didn't shoot him. Yes, sir, it was part of a plot. I again say I didn't kill him."

As witness for defendant, his grandmother testified: "Since Joe growed up he likes to have his own way. It seems his mind don't go right like it ought to. Now, when he was small, I could get him to go most any way. Since he growed up, since he got that lick on his head, he got hit in the head with a brick in June, he has been sort-a 'modest' like, that was in June, 1940. He went to the hospital. He was in there from Saturday night till Thursday . . . Since that time he has acted like he didn't have good sense. Just sit and looked. I would say, 'Joe, what's the matter,' and he would say, 'Nothing.' He would say that any time, when he was up, sitting down he just sit and looked and looked. When he come home from the hospital he had a place over this eye, and that place bled two or three times. He had to go and have it dressed, but whether it broke the skull or not, I don't know. No, he has not acted since then like he did before. He acted crazy like around the house."

Verdict: Guilty of murder in the first degree.

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.

J. C. Newell and Hiram P. Whitacre for defendant, appellant.

WINBORNE, J. A painstaking scrutiny of the record, and a careful consideration of the questions presented in brief of counsel for defendant fail to disclose prejudicial error.

The first exception relates to the admission in evidence of photographs identified as having been taken at one o'clock on the morning of 14 December at the scene where the body of deceased was found, one the "way it was when we got there"—and the other after he was turned over "to get a facial picture of him to see if he could be definitely identified."

The seventh exception is directed to the action of the solicitor in showing the photographs to the jury during his argument. The record shows that when these photographs were admitted in evidence the court instructed the jury that they were not offered as substantive evidence, but only for the purpose of illustrating the testimony of the witness, if the jury should find that they do illustrate it. Then, again, in his charge the court repeated the instruction, and further expressly charged that the jury should not consider them as substantive evidence as "tending to prove any of the main facts at issue." For the purpose for which the photographs were offered and received in evidence, they are competent. The record fails to show that the solicitor used them for any other purpose. Hence, their admission in evidence for the purpose stated is in accord with well settled rule of law in this State. *Pickett v. R. R.*, 153 N. C., 148, 69 S. E., 8; *S. v. Jones*, 175 N. C., 709, 95 S. E., 576; *S. v. Lutterloh*, 188 N. C., 412, 124 S. E., 752; *Honeycutt v. Brick Co.*, 196 N. C., 556, 146 S. E., 227; *S. v. Perry*, 212 N. C., 533, 193 S. E., 727; *S. v. Holland*, 216 N. C., 610, 6 S. E. (2d), 217.

Defendant next contends that the court erred in limiting the jury to the rendition of one of two verdicts, "Guilty of murder in the first degree" or "Not Guilty." Exceptions 8 and 9.

It is provided in C. S., 4200, that "A murder . . . which shall be committed in the perpetration, or attempt to perpetrate any . . . robbery, . . . or other felony, shall be deemed to be murder in the first degree and shall be punished by death." Speaking thereto in the case of *S. v. Spivey*, 151 N. C., 676, 65 S. E., 995, *Manning, J.*, for the Court, said: "Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.' If, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury. It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades of murder." See, also, *S. v. Newsome*, 195 N. C., 552, 143 S. E., 187; *S. v. Donnell*, 202 N. C., 782, 164 S. E., 352.

In the present case, if the evidence for the State is to be believed, the defendant, in the perpetration of, or in an attempt to perpetrate a robbery of C. C. Ritter, shot and killed him. The homicide so committed is murder in the first degree. C. S., 4200; *S. v. Logan,* 161 N. C., 235, 76 S. E., 1; *S. v. Miller,* 197 N. C., 445, 144 S. E., 590; *S. v. Donnell, supra; S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Green,* 207 N. C., 369, 177 S. E., 120; *S. v. Alston,* 215 N. C., 713, 3 S. E. (2d), 11; *S. v. Kelly,* 216 N. C., 627, 6 S. E. (2d), 533.

If, on the other hand, the testimony of the defendant, as witness in his own behalf, is to be believed, the killing of C. C. Ritter was done by John Henry Thomas, while he and defendant, as co-conspirators in a preconceived plan to rob C. C. Ritter, were perpetrating or attempting to perpetrate a robbery of him. This too made the homicide murder in the first degree, and both of them would be guilty. *S. v. Bell,* 205 N. C., 225, 171 S. E., 50; *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Green, supra.*

There is no evidence of a lesser degree of homicide. *S. v. Spivey, supra; S. v. Myers,* 202 N. C., 351, 162 S. E., 764; *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323.

Hence, there is no error in limiting the jury to one of two verdicts, murder in the first degree or not guilty. *S. v. Donnell, supra; S. v. Satterfield, supra.*

Defendant further complains that in addition to charging the jury on the subject of homicide committed while in the perpetration, or attempt to perpetrate a robbery, the court went further and charged on the subject of "a willful, deliberate and premeditated killing," and still limited the jury to one of two verdicts as hereinbefore stated. Even so, as was similarly stated by this Court in *S. v. Logan,* 161 N. C., 235, 76 S. E., 1, his honor might well have omitted from his charge all reference to "premeditation and deliberation," for the entire evidence in the record shows that C. C. Ritter was slain either by defendant as principal, or by John Henry Thomas as co-conspirator of defendant, acting in a concerted plan with defendant, in the perpetration of, or attempting to perpetrate a robbery of C. C. Ritter. See, also, *S. v. Alston, supra.*

Defendant further contends that the court should have instructed the jury on the question as to whether defendant was mentally capable of committing the crime. There is no evidence that the defendant was not capable of knowing and understanding what he was doing. Compare *S. v. Murphy,* 157 N. C., 614, 72 S. E., 107; *S. v. Alston, supra.* In fact, it appears from the charge of the court below that defendant did not then undertake to exculpate himself upon the ground of insanity. Yet the court was liberal in charging the jury as to his contentions in respect to all that the evidence tends to show as to the blow on his head,

as well as to the circumstances under which he was reared by an aged grandmother, and as to his condition in life.

There are other exceptions appearing in the record which are not brought forward in defendant's brief and are deemed abandoned. Rule 28 of the Rules of Practice in the Supreme Court, 213 N. C., 808. However, we find no merit in them.

In the judgment below there is

No error.

CLYDE BEACH, EMPLOYEE, v. R. E. McLEAN AND/OR LONG SHOALS COTTON MILLS, EMPLOYER, AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 7 May, 1941.)

1. Master and Servant § 55d—

The Industrial Commission is the body designated by statute to find the facts in proceedings for compensation, and its findings of fact, when supported by competent evidence, are conclusive and are not subject to review by the Superior Court or by the Supreme Court.

2. Same—

A conclusion of law of the Industrial Commission is reviewable on appeal.

3. Master and Servant § 4d—

Whether the relationship between the parties is that of master and servant or principal and independent contractor involves a mixed question of law and of fact, the terms of the contract being a question of fact, and the relationship created by the contract being a question of law.

4. Master and Servant § 55d—

While the findings of the Industrial Commission as to the terms of the contract between the parties is final, its conclusion as to the relationship created by the contract is a conclusion of law which is reviewable on appeal.

5. Master and Servant § 4a—

An independent contractor is one employed to do a specific job or piece of work who is not under the control or supervision of the employer as to the methods or manner used, but who is responsible to the employer solely for the results.

6. Same—Contract held to create relationship of principal and independent contractor and not that of master and servant.

Findings that defendant corporation purchased certain machinery located in another mill, that it was its duty under the contract of sale to dismantle and move the machinery, that thereafter the corporation entered into a contract with an individual to dismantle and move the machinery,

under which agreement the individual was to furnish the labor and trucks to do the work, was to be paid on the basis of the machinery actually dismantled and salvaged and not on the basis of the work done, without evidence that the corporation undertook to supervise or direct the work, *is held* to establish the relationship of principal and independent contractor and not that of master and servant between the corporation and the individual.

7. Same—

The reservation by the employer of the right to terminate the agreement under which he employs an independent contractor is not a reservation of control and supervision over the work so as to make the relationship that of master and servant.

8. Same—

While insolvency of the purported independent contractor may be considered upon the question of the relationship between the parties when the evidence is conflicting as to whether the employer actually retained control and supervision over the work, where there is no evidence tending to support an inference that the contract was used merely as a front to avoid liability, insolvency of the contractor is immaterial in determining the relationship.

9. Master and Servant § 55d—

Where the Industrial Commission makes a conclusion involving a mixed question of law and fact, without finding the ultimate facts upon which the conclusion is founded, the courts on appeal can review the conclusion only to ascertain whether there was sufficient competent evidence to support the factual element involved therein, but where the commission finds all of the facts, the findings supported by evidence are final, but the courts can review the conclusion of law based thereon.

10. Master and Servant § 39b—

Upon the findings of fact and the uncontradicted evidence before the Industrial Commission as to the terms of the contract between the parties, *it is held* that the contract created the relationship of principal and independent contractor and not that of master and servant between the person employing claimant and the defendant corporation, and judgment of the Superior Court reversing the award of the Industrial Commission granting compensation against the corporation is affirmed.

11. Master and Servant § 4a—

The fact that the work let is intrinsically dangerous does not affect the relationship of principal and independent contractor existing between the parties, but only enlarges the legal duty and liability of the principal to the employees of the independent contractor.

12. Master and Servant § 39b—

It would seem that an employee of an independent contractor may not hold the principal liable under the Compensation Act upon the doctrine that the work let was intrinsically dangerous, since he could not establish the relationship of master and servant between himself and the principal, the liability of the principal to him in such cases being founded upon the common law doctrine of negligence.

13. Same—

Section 19, chapter 120, Public Laws of 1929, relates to contractors and subcontractors and not to employers and independent contractors.

APPEAL by plaintiff from *Clement, J.*, at September Term, 1940, of GASTON. Affirmed.

Claim for compensation under the Workmen's Compensation Act filed by plaintiff, alleged employee of the Long Shoals Cotton Mills. The defendant, American Mutual Liability Insurance Company, is a carrier for the alleged employer.

The essential facts are set forth in the opinion of the hearing commissioner, the material parts of which are as follows:

"The Commissioner finds it a fact that some time prior to October 28, 1937, that the Duke Power Company, which is the owner of the Tuckaseegee Plant located in Gaston County, had sold to the Long Shoals Cotton Mills of Lincoln County, North Carolina, certain machinery that had previously been used by the Tuckaseegee Cotton Mill; and the Commissioner further finds that under the contract of sale to the Long Shoals Cotton Mills it was the duty of the buyer to dismantle said machinery and move the same from the Tuckaseegee Mill to the Long Shoals Cotton Mills in Lincoln County, and after the sale had been consummated the Long Shoals Cotton Mills entered into an agreement with one R. E. McLean to move said machinery from the plant of the Duke Power Company to the plant of the Long Shoals Cotton Mills; and under the contract and agreement between the Long Shoals Cotton Mills and R. E. McLean, McLean was to furnish his labor and trucks and move the machinery from the Tuckaseegee Mills to the Long Shoals Cotton Mills, and that in pursuance of said understanding and agreement R. E. McLean approached the plaintiff, Clyde Beach, who was a regular employee of the Tuckaseegee Mill as a machine room mechanic, in an effort to procure the services of the plaintiff, Clyde Beach, to assist in dismantling the machinery consisting of generators and water wheels, and after some conferences between McLean and Beach and the superintendent over Mr. Beach, it was agreed that the Tuckaseegee Mill would release Mr. Beach temporarily and allow him to assist Mr. McLean in dismantling the machinery; so, on Monday morning about 10 o'clock preceding the day of the injury the plaintiff temporarily severed his relations with the Tuckaseegee Mill and became an employee of R. E. McLean during the time required to move the machinery in question; and on Thursday morning the plaintiff was engaged in hammering some machinery in the course of his employment for R. E. McLean and a piece of steel flew and hit the plaintiff in the left eye, and that as a result of said injury the plaintiff has lost the total vision of his left eye, and in addition

thereto was disabled for a period of six weeks. And the Commissioner finds as a fact that this injury arose out of and in the course of the plaintiff's employment.

"The main question in this case is to determine who the plaintiff, Clyde Beach, was working for at the time of the alleged injury. The Commissioner finds as a fact that the plaintiff was not an employee of the Tuckaseegee Mill, which is owned by the Superior Yarn Mills, Inc., or the Duke Power Company. There is no question but that the plaintiff was employed by R. E. McLean and he was paid for his labor by R. E. McLean's check, and said Clyde Beach never had any contractual relation with anyone in connection with his employment except R. E. McLean, and the Commissioner has heretofore found that R. E. McLean did not have as many as five employees and is not subject to the North Carolina Workmen's Compensation Act; then we arrive at the proposition to determine whether R. E. McLean was an independent contractor for the Long Shoals Cotton Mills or whether he was an employee of the Long Shoals Cotton Mills. The Commissioner finds as a fact from the evidence that the said R. E. McLean was not an independent contractor but was an employee or agent of the Long Shoals Cotton Mills employed by them for the purpose of removing the machinery in question from the Tuckaseegee Mill to the mill of the defendant, Long Shoals Cotton Mills; therefore, the said R. E. McLean, being an agent of the Long Shoals Cotton Mills for the purpose of doing the work in question, the plaintiff, Clyde Beach, when employed by said R. E. McLean as agent of the Long Shoals Cotton Mills, became an employee of the Long Shoals Cotton Mills and, therefore, the plaintiff's injury arose out of and in the course of his employment for the defendant, Long Shoals Cotton Mills."

Having made the foregoing findings and having arrived at the conclusion stated, the hearing Commissioner directed an award against the corporate defendant and it appealed to the Full Commission, which affirmed the findings of fact and the award. Upon appeal to the Superior Court the judge below concluded that upon the facts found McLean was an independent contractor, and that the claimant was an employee of said independent contractor and not of the Long Shoals Cotton Mills. Judgment was thereupon entered, reversing the award and dismissing the appeal. Claimant excepted and appealed to this Court.

George B. Mason and W. B. McGuire, Jr., for plaintiff, appellant.
J. Laurence Jones for defendants, appellees.

BARNHILL, J. Ch. 120, Public Laws 1929, known as the North Carolina Workmen's Compensation Act, in section 58 thereof, requires the Commission not only to make an award but to likewise file with the

award a statement of the finding of fact, rulings of law and other matters pertinent to the question at issue. Hence, under the statute the commission is made a fact-finding body. The finding of facts is one of its primary duties and it is an accepted rule with us that when the facts are found they are, when supported by competent evidence, conclusive on appeal and not subject to review by the Superior Court or by this Court. *Cloninger v. Bakery Co.*, 218 N. C., 26, and cases cited; *McGill v. Lumberton*, 218 N. C., 586.

Is the "finding" of the hearing Commissioner, as affirmed by the Full Commission, to the effect that McLean was not an independent contractor but was an employee or agent of the Long Shoals Cotton Mills and that the employment of the claimant by McLean constituted an employment by the Long Shoals Cotton Mills a finding of fact, a mixed question of fact and law or a conclusion of law? If a finding of fact, it is conclusive and binding on us. If it is a mixed question of fact and law, it is likewise conclusive, provided there is sufficient evidence to sustain the element of fact involved. If a question of law only, it is subject to review.

This finding, or conclusion, that McLean was an employee of Long Shoals Cotton Mills and not an independent contractor, standing alone and nothing else appearing, would involve a mixed question of fact and law. Its correctness would depend upon the answer to two questions: (1) What were the terms of the agreement—that is, what was the contract between the parties; and, (2) what relationship between the parties was created by the contract—was it that of master and servant or that of employer and independent contractor? The first involves a question of fact and the second is a question of law.

When, however, the Commission finds the facts, as it is required to do under the statute, thus answering the first question, then the conclusion becomes strictly a question of law reviewable by the Superior Court and, upon appeal, by this Court.

The Commission having found the facts in respect to the terms and conditions upon which McLean undertook the work of dismantling and salvaging the machinery purchased by defendant from Superior Yarn Mills, it settled the question of fact involved in the "finding" or conclusion as to the nature and extent of the contract. Hence, the element of fact involved in the conclusion is settled. Both the court below and this Court are bound thereby. The only question presented is the legal status of McLean under the contract. The Commission's conclusion in this respect is reviewable. *Thomas v. Gas Co.*, 218 N. C., 429.

In addition to the facts found by the Commission it appears from uncontroverted testimony, much of which was offered by the claimant, that the claimant worked under the exclusive supervision and control of McLean; that the corporate defendant reserved no right of control

or direction in respect to the work; that McLean was to be paid not upon the basis of work done but for the machinery actually dismantled and salvaged; that McLean, in fact, did considerable work for which he received no pay, some of the machinery he attempted to dismantle having fallen into the river; and that McLean was not regularly employed by the corporate defendant but was engaged in the business of dismantling, salvaging and moving heavy machinery.

Was the court below correct in concluding, upon the facts found, as supported by the other testimony, that McLean was an independent contractor?

An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified. Pollock, Torts, 78; Barrows on Negligence, 160. The vital test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Stated as a general proposition, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. 14 R. C. L., pp. 67, 68; *Aderholt v. Condon,* 189 N. C., 748, 128 S. E., 337; *Russell v. Oil Co.,* 206 N. C., 341, 174 S. E., 101.

An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to the employer except as to the results of the work, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses. *Greer v. Construction Co.,* 190 N. C., 632, and cases cited; *Drake v. Asheville,* 194 N. C., 6, 138 S. E., 343; *Teague v. R. R.,* 212 N. C., 33, 192 S. E., 846; *Craft v. Timber Co.,* 132 N. C., 151, 43 S. E., 597.

Measured by the standard of these definitions the conclusion of the court below was clearly correct. This conclusion is not affected by evidence tending to show that at times an agent of the defendant was present while the work progressed. None of the testimony tends to show that he undertook to supervise or to direct the work. Nor is the fact that one of the trucks of the defendant was used in moving a small part of the machinery material, since it does not appear under what conditions it was so used or that the defendant reserved any right in respect thereto. The suggestion in the testimony that defendant reserved the right to discharge McLean is not proof of a reservation of a right to supervise and direct. It was, if made, merely a reservation of the privilege to terminate the agreement without incurring any liability for breach of contract.

But, says claimant, McLean is insolvent and this alters the relationship and sustains the conclusion of the Commission. Insolvency, where the evidence is conflicting, may be considered in determining the relationship created by the contract. *Keech v. Lumber Co.*, 166 N. C., 503, 82 S. E., 836. Here, however, where all the evidence tends to show that he was an independent contractor and there is no testimony to support an inference that he was used merely as a front to avoid liability, McLean's insolvency, while unfortunate, is immaterial.

It is true that in a certain line of decisions of this Court, involving compensation cases, we have said that where the Commission makes a conclusion as a basis for an award we will review the testimony to ascertain whether sufficient evidence appears to support the element of fact involved in the conclusion. *Berry v. Furniture Co.*, 201 N. C., 847, 161 S. E., 552; *Webb v. Tomlinson*, 202 N. C., 860, 164 S. E., 341; *Parrish v. Armour & Co.*, 200 N. C., 654, 158 S. E., 188; *Michaux v. Bottling Co.*, 205 N. C., 786, 172 S. E., 406; *Singleton v. Laundry Co.*, 213 N. C., 32, 195 S. E., 34; *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, 196 S. E., 342; *Moore v. Sales Co.*, 214 N. C., 424, 199 S. E., 605. It is upon this line of cases that the claimant now relies. He contends that inasmuch as the conclusion involved an element of fact the court below was without authority to reverse it.

It must be noted in this connection that in the cases cited and relied upon by the claimant the Commission found only the ultimate fact or conclusion without finding the evidential and probative facts upon which the conclusion was based. We are required, in those instances, to review the testimony to ascertain whether there was sufficient competent evidence to support the factual element involved in the conclusion. Here the Commission has found the facts which constitute the contract. The facts as thus found are conclusive. *Moore v. Sales Co., supra.*

If the difference in the question presented, when only the ultimate fact is found on the one hand, and when all the facts are found on the other, is considered it becomes apparent that the line of cases relied on by claimant are distinguishable and are not in point.

The claimant contends here that if McLean was an independent contractor the evidence tends to show that the work contracted to be done was intrinsically dangerous and that the defendant could not, by a delegation of such perilous operations to McLean as an independent contractor, escape liability for the plaintiff's injury. This was not the theory of the trial below. The Commission found or concluded that claimant was an employee and not an independent contractor. Even so, this is a common law doctrine under the law of negligence. That work is intrinsically dangerous does not affect the relationship of the parties. It merely enlarges and extends the legal duty and liability of the other

party to the contract in respect to the employees of the independent contractor.

It is doubtful that plaintiff could seek relief before the Industrial Commission under this rule of law for the reason that he could not establish the relationship of employer and employee. Apparently his remedy, if any, based on this theory, must be enforced in an action *ex delicto*.

Sec. 19, ch. 120, Public Laws 1929, has no application here. That section relates to contractors and subcontractors—not to employers and independent contractors.

The judgment below is

Affirmed.

DAISY CHINNIS, ADMINISTRATRIX OF THE ESTATE OF HELEN BRINSON, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY AND MRS. ETTA RUSS.

(Filed 7 May, 1941.)

1. Appeal and Error § 39—

Where it is determined on appeal that defendant's motion for judgment as of nonsuit should have been allowed, errors, if any, in the admission or exclusion of evidence or in the charge of the court, are harmless.

2. Railroads § 9—Upon evidence in this case, negligence of driver was sole proximate cause of accident at crossing.

The evidence tended to show that plaintiff's intestate was riding as a guest in a car which was being driven at night at a speed of about 60 miles per hour along a straight, hard surfaced highway, approaching defendant's railroad crossing, that the view of the crossing itself was unobstructed for a distance of 225 feet or more, and that the automobile crashed into the rear of the 42nd car of defendant's freight train after the engine and 41 cars, traveling at a speed of about 15 miles per hour, had already passed over the crossing. Skid marks on the highway started about 200 feet from the crossing. *Held:* The evidence discloses as a matter of law active negligence on the part of the driver intervening after any alleged negligence on the part of the engineer in failing to give warning of his approach to the crossing by sounding the bell or blowing the whistle, which negligence of the driver continued to operate to the instant of injury, and therefore the negligence of the driver was the sole proximate cause of the injury, and defendant railroad company's motion for nonsuit should have been allowed.

3. Same—

Where the evidence discloses that the driver of an automobile traveling about 60 miles per hour crashed into the 42nd car of defendant's freight train after the engine and 41 cars, traveling at about 15 miles per hour, had already passed over the crossing, and that the view of the crossing itself was unobstructed for 225 feet or more, the fact that the railroad company

had left a tank car on either side of the crossing so as to obstruct the view of approaching trains, cannot be held a proximate cause of the collision.

4. Same—

The evidence disclosed that the accident in suit occurred where defendant's tracks crossed at a grade a short paved highway connecting two other highways, that the connecting highway, although a public road, was not a thoroughfare, that it was in a rural section, and that there were only a few houses and no unusual amount of travel along the two miles of the road's extent, and there was no evidence of unusual or hazardous conditions existing at the crossing. *Held:* It was not the duty of the railroad to provide signal lights or a watchman at the crossing late at night.

APPEAL by plaintiff from *Williams, J.*, at October Term, 1940, of NEW HANOVER. No error.

This was an action for wrongful death resulting from collision between an automobile in which plaintiff's intestate was riding and a freight train of defendant railroad company. Voluntary nonsuit was entered as to defendant Russ. Upon issues submitted, the jury answered the issue of negligence in favor of the defendant railroad. From judgment on the verdict, plaintiff appealed.

Isaac C. Wright and W. K. Rhodes, Jr., for plaintiff, appellant.

L. J. Poisson, Wm. B. Campbell, and Alan A. Marshall for defendant, appellee.

DEVIN, J. The plaintiff, seeking relief from the unfavorable result below, has brought forward with her appeal several assignments of error relating to the admission of testimony, and also to the judge's charge to the jury. However, these exceptions become immaterial and the errors, if any, harmless, since we think the evidence insufficient to require the submission of the case to the jury, and that defendant's motion for judgment of nonsuit should have been allowed.

The evidence offered by the plaintiff tended to show that the injury complained of occurred at a point, north of the limits of the city of Wilmington, where a short east and west road, connecting two highways, crosses the defendant's railroad tracks at grade. The general direction of the railroad is north and south, and the crossing is about one mile north of the Smith Creek bridge. There are two tracks, the west track being the main line, and the east track a siding, the distance between the two tracks being about eight feet. On the sidetrack were two tank cars, one south and the other north of the crossing, the one forty feet from the road, and the other about nine or ten feet therefrom. The east and west road was level and straight for some three hundred yards. The paved

portion was eighteen feet wide, with shoulders of six and five feet. The usual signs indicating the railroad crossing were in place. There were some trees on the north side of the road near the crossing and cultivated fields on the south. The automobile in which plaintiff's intestate was riding was being driven west along the road toward the crossing, and at the same time defendant's freight train, composed of forty-nine cars, was proceeding north, up grade, at a speed of fifteen miles per hour. As one approached the crossing from the east, the crossing could be plainly seen for a distance of 225 to 295 feet. The tank cars on the sidetrack would obstruct the view to the north and south if one were on or near the crossing over the sidetrack, but there was no obstruction to the view of the crossing itself at any point along the road leading from the east.

The collision between the automobile and the train occurred about 11:10 p.m., 25 April, 1939. The automobile was being driven toward the crossing at a speed of sixty miles per hour. The driver was a young man named Russ, and, besides plaintiff's intestate, there were two others in the automobile, another young man and young woman. The engine and forty-one cars of the train had already passed over the crossing, and the automobile struck the rear of the forty-second car in the train, an aluminum colored tank car. The impact of the automobile was so violent that the rear trucks of the tank car were derailed and portions of the car broken. The automobile was smashed and the four occupants, including plaintiff's intestate, killed. The automobile was crushed and jammed against the tank car on the siding. There were skid marks on the pavement, made by the tires of the automobile, which extended back from the crossing two hundred feet. One of plaintiff's witnesses testified he did not hear whistle or bell as the train approached the crossing from the south. There was evidence to the contrary.

It is apparent from the speed of the automobile, and the length and speed of the train, that the engine was approximately one-third of a mile beyond the crossing when the automobile struck the forty-second car, and that the failure of the train crew to give timely warning by bell or whistle of the approach of the train, at the proper distance, before it reached the crossing did not affect the result. Sounding the whistle or bell at that time would not have served the driver of the automobile who then, at the speed at which he was traveling, was more than a mile away. The automobile was not struck by the engine at the crossing. The automobile struck near the rear of a long moving freight train when the cars in motion over the crossing were rendered plainly visible by the lights of the automobile. The injury is attributable to the high speed of the automobile, and the apparent failure of the driver to observe the moving train and his inability to stop the automobile, due to its speed, in time to avoid striking the train.

The conclusion is inescapable that the negligence of the driver of the automobile was the sole proximate cause of the unfortunate injury and death of plaintiff's intestate, and that the defendant railroad cannot be held liable therefor under the testimony in this case. Conceding that there was evidence of failure on the part of defendant to sound whistle or bell to give warning of the approach of the train to the crossing, it is clear that the active negligence of the driver of the automobile, subsequently operating, was the real efficient cause of the injury to plaintiff's intestate. *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446; *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 560. Any negligence on the part of defendant in failing to give proper warning of the approach of the train to the crossing was insulated by the subsequent intervention of the active negligence of the driver of the automobile in striking the rear end of the moving freight train some appreciable time after the engine had passed the crossing. *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808; *Quinn v. R. R.,* 213 N. C., 48, 195 S. E., 85; *Boyd v. R. R.,* 200 N. C., 324, 156 S. E., 507. Under the rule laid down in *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108, we think the evidence here clearly shows that the injury complained of was independently and proximately produced by the active negligence of an independent agency in the person of the driver of the automobile.

The negligence of the driver of the automobile was patent. It intervened between the failure of the defendant to give warning of the approach of the train to the crossing and the injury to plaintiff's intestate, and it began to operate subsequent to any act of negligence on the part of defendant, and continued to operate to the instant of injury. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342.

In *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361, *Stacy, C. J.,* speaking for the Court, expressed the applicable principle in this language: "Even if the engineer or fireman did fail to ring the bell or sound the whistle, of which there is only negative testimony with positive evidence to the contrary, still the defendant had a right to operate the train over its track, and the negligence of the driver of the automobile is so palpable and gross, as shown by plaintiff's own witnesses, as to render his negligence the sole proximate cause of the injury."

It is apparent that the obstructions to the view of a person on or near the sidetrack, in looking to the north or south, did not affect the visibility of the crossing itself, or of the moving cars thereon, or prevent a person approaching the crossing along the road from the east from having a clear and unobstructed view of the train for a distance of 225

feet or more. This is not a case where the view of an approaching train is obstructed, and many of the principles of law relating to such cases are inapplicable. Here the engine and forty-one cars had already passed over the crossing, and the automobile collided with one of the rear cars of the train as the car was moving on the track over the crossing. It was in evidence that the automobile was being driven along the center of the paved portion of the road, and from the marks on the pavement it is apparent that the driver of the automobile applied his brakes two hundred feet from the crossing but was unable to stop. We conclude that the evidence does not warrant the reasonable inference of actionable negligence on the part of the defendant with respect to the visibility of the crossing or of the moving cars with which the automobile collided. The presence of the two tank cars on the siding in the position in which the evidence shows they were, may not be held the proximate cause of the injury. *Osborne v. Coal Co.*, 207 N. C., 545, 177 S. E., 796; *Gant v. Gant*, 197 N. C., 164, 148 S. E., 34.

Nor can we hold that it was the duty of the defendant to provide for this crossing signal lights, or a watchman at this hour of the night. While this was a public road, it was not a thoroughfare; it was in a rural section, and there were only a few houses along the two miles of the road's extent. There was no unusual amount of traffic, nor other evidence of unusual or hazardous conditions existing at the crossing so as to impose upon the railroad in the exercise of due care the further duty to provide such warning devices in addition to signaling the approach of the train to the crossing by sounding whistle or bell. *Caldwell v. R. R.*, 218 N. C., 63; *Moseley v. R. R.*, 197 N. C., 628, 150 S. E., 184.

For the reasons stated, there was no error in rendering judgment for the defendant.

No error.

STATE v. JOE RODDEY.

(Filed 7 May, 1941.)

1. Homicide § 27f—

Where all the evidence tends to show that when defendant shot deceased, both were inside defendant's house, a charge on the duty to retreat in case of a nonfelonious assault, even though correct in itself, constitutes prejudicial error, although the right of defendant to kill in defense of his home is given in other portions of the charge, since the duty to retreat in case of a nonfelonious assault is not applicable to the evidence.

2. Homicide § 11—

A man who is in his own home and who is innocent of guilt in bringing on the affray, is not required to retreat, but may stand his ground and repel the assault with such force as is necessary, even to the point of killing his adversary, regardless of the original character of the assault.

STATE *v.* RODDEY.

APPEAL by defendant from *Clement, J.*, at 11 November, 1940, Regular Term, of MECKLENBURG.

Criminal prosecution upon indictment charging defendant with the murder of one Ernest Brown.

The defendant entered plea of not guilty, and upon the call of the case the solicitor for the State announced in open court that State would not ask for a verdict of guilty of murder in the first degree, but would only ask for a verdict of murder in the second degree, or manslaughter, as the evidence might warrant. Whereupon counsel for defendant announced in open court that defendant would invoke the doctrine of self-defense in defending his own home.

Pertinent facts of record are these: On Sunday, 1 September, 1940, the deceased, Ernest Brown, lived on one side of Swartz's Alley in the city of Charlotte, and the defendant lived on the other side. Defendant's house consisted of front room, middle room, kitchen and back porch. On the afternoon of above date defendant complained of conduct of alleged intoxicated persons in the alley, and, in consequence, he and deceased became involved in a verbal quarrel and fist fight in the alley. They separated. Deceased was escorted to his home by his wife and another. He soon went to and sat on the porch of Mary Wallace near defendant's house. Defendant was accompanied into his house.

From this point the State offered evidence tending to show that defendant got his pistol and went to his back door, called deceased to come over and talk over their differences, and as deceased, in a peaceful manner, came to the door where defendant was, defendant renewed the quarrel, and as deceased stood inside the screen door, defendant shot him with the pistol which he had in his right hand hidden from view of those outside; and that deceased stumbled forward, straightened up and fell into the middle room, after which defendant shot him twice.

On the other hand, defendant offered evidence tending to show that he and deceased had been friends; that he expressed a desire to talk with deceased as to why he had stricken him; and that, hearing this expression, deceased came in a fighting attitude to the back porch of defendant. What followed, as contended by defendant, is described by him briefly in this manner: "I was standing in the door, and he was coming on my porch. . . . I said 'Ernest, don't come in my house.' And I commenced backing up. He rushed in after me . . . I told him to leave me alone, and I backed into the middle room to the fireplace, and when I got there, there was the pistol laying up there. I reached and got it, and he was right on me then, and he grabbed me and said, 'Oh, God damn you, I'm going to kill you.' I thought he was going to kill me, just like he said. . . . All the shots was made there in that middle room. I did not have my pistol at any time before he come into the middle

room . . . I say I shot Ernest Brown trying to protect myself after he grabbed me . . . I don't know what Ernest Brown had . . . when he grabbed me, he had one hand in back of him. He reached back . . ."

Verdict: Guilty of manslaughter.

Judgment: Confinement in common jail of Mecklenburg County for a period of two years, and to be assigned to work under the control and supervision of the State Highway & Public Works Commission.

Defendant appeals to Supreme Court and assigns error.

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

G. T. Carswell and Joe W. Ervin for defendant, appellant.

WINBORNE, J. The court below, speaking to the subject of the right of a man to fight in self-defense, among other things, charged as follows: "Now, if an assault is made on him and is not a felonious assault, then before he can slay his assailant and do so in self-defense, the law requires that he retreat, get away if he can do so without subjecting himself to great bodily harm or death. . . . In such cases a person is required to withdraw, if he can do so, and retreat as far as is consistent with his own safety. In either case, he can only kill from necessity, but in the one he can have that necessity determined in view of the fact that he had a right to stand his ground; in the other, he must show, as one feature of the necessity, that he has retreated to the wall. That is, if it was not a felonious assault, then he is required to retreat if he can do so in safety, rather than to slay his assailant." Exception by defendant.

Defendant appropriately contends that while the doctrine of retreat enunciated in these instructions may be correctly applied to different factual situations, it does not apply to a controversy in a man's home, as in the present case. Hence, he contends that, even though the court did further instruct on the right of a man to protect his home and family, the instructions to which exception is taken are calculated to mislead the jury to his prejudice. With this contention we agree. *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143, and cases cited.

Ordinarily, when a person, who is free from fault in bringing on a difficulty, is attacked in his own dwelling or home, the law imposes upon him no duty to retreat before he can justify fighting in self-defense. 26 Am. Jur., 263; Homicide, sec. 155; *S. v. Harman,* 78 N. C., 515; *S. v. Bryson, supra.* Compare *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663.

The principle is expressed in the case of *S. v. Harman, supra,* in an opinion by *Reade, J.,* in this manner: "If the prisoner stood entirely on the defensive and would not have fought but for the attack, and the

attack threatened death or great bodily harm, and he killed to save himself, then it was excusable homicide, although the prisoner did not run and flee out of his house. For, being in his own house, he was not obliged to flee, but had the right to repel force with force, and to increase his force, so as not only to resist, but to overcome the assault."

Again, in *S. v. Bryson, supra, Stacy, C. J.*, speaking to the subject, said: "The defendant being in his own home and acting in defense of himself, his family and his habitation—the deceased having called him from his sleep in the middle of the night—was not required to retreat regardless of the character of the assault. *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Bost,* 192 N. C., 1, 133 S. E., 176. This, however, would not excuse the defendant if he employed excessive force in repelling the attack. *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617."

Applying these principles, the doctrine of retreat has no place in the present case. All of the evidence tends to show that the shooting took place in the home of defendant.

As the case goes back for a new trial for cause stated, we deem it unnecessary to discuss other exceptive assignments. The matters to which they relate may not again occur.

Let there be a

New trial.

MRS. MATTIE H. HAWES AND JOHN ROBERT HAWES v. C. L. HAYNES AND WIFE, MRS. C. L. HAYNES.

(Filed 7 May, 1941.)

1. Parent and Child § 7—

Parents are not responsible for the torts of their minor son by reason of the relationship, but liability must be predicated upon evidence that the son was in some way acting in a representative capacity, such as would make the master responsible for the servant's torts.

2. Automobiles § 23—

Ordinarily, the owner of an automobile is not liable for the negligence of a person to whom he has loaned the car for such person's own purposes, unless the lender knew that the borrower was incompetent and that injury might occur.

3. Automobiles § 25—

Admissions that defendants were husband and wife, that their minor son resided with them, and that at the time of injury the son was operating the car registered in the name of the wife, with the consent and approval of his parents, is insufficient to support the application of the family purpose doctrine, there being no admission that the car was owned and used for the convenience and pleasure of the family, and no evidence or admission that the son had driven the car at any time other than the time of the collision in suit.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at December Special Term, 1940, of PENDER.

John J. Best and David Sinclair for plaintiffs, appellants.

A. J. Fletcher, F. T. Dupree, Jr., Ehringhaus & Ehringhaus, and Charles Aycock Poe for defendants, appellees.

SCHENCK, J. There were separate actions by the plaintiffs against the same defendants which were consolidated for the purpose of trial.

The plaintiffs allege that they were injured by the negligence of the driver of an automobile owned and maintained by the defendants as a "family purpose" car; that the automobile of the plaintiff, Mrs. Mattie H. Hawes, in which she was riding, was being operated by the plaintiff, John Robert Hawes, in a lawful and careful manner on Highway No. 60 about 26 miles west of Wilmington, and was run into by the automobile of the defendants while being operated in an unlawful and negligent manner by the 19-year-old son of the defendants; and that as a proximate result of the collision between the said two automobiles thus caused, the plaintiffs received personal injury and property damage.

When the plaintiffs had introduced their evidence and rested their case, the defendants moved to dismiss the actions and for a judgment as in case of nonsuit, which motion was allowed (C. S., 567), and from judgment predicated upon the ruling, the plaintiffs appealed, assigning errors.

We concur in the ruling of his Honor, the trial judge.

There is no evidence that the driver of the defendant's automobile was acting as the agent of the defendants, or was in any way operating said automobile in the service of the defendants, there being no evidence which brings the operation of the automobile within the family purpose doctrine.

The plaintiffs apparently relied upon the admissions in the pleadings, although they did not introduce any pleadings in evidence. However, if these admissions be considered on the demurrer to the evidence, there is still an absence of sufficient evidence to carry the case to the jury.

The pertinent portions of the pleadings in the action instituted by Mrs. Mattie H. Hawes are the following excerpts from the complaint and answer: Complaint: "2. That on the dates hereinafter mentioned, the defendants were and are husband and wife, and reside together in Wake County; that they have a minor son, Bill Haynes, of the age of about ..... years, who did reside, and now resides with them, as a member of the family. That defendants owned a five-passenger Plymouth automobile, title of which is in the name of Mrs. C. L. Haynes, and defendants owned and provided said car for the convenience and pleasure of the family, and the said Bill Haynes, a minor boy, a member of the family,

was using the car at the time and place hereinafter mentioned for his own purposes with the consent and approval of the defendants." Answer: "2. It is admitted that on the date referred to in the complaint, the defendants were and are husband and wife, and reside together in Wake County, and they have a son, C. B. Haynes, of the age of 18 years, who did reside and now resides with them, as a member of the family. It is further admitted that at the time referred to in the complaint, the said C. B. Haynes was operating a Plymouth automobile, belonging to the defendant, Mrs. C. L. Haynes, with the consent of the said defendant, Mrs. C. L. Haynes. Except as herein admitted, the allegations of said paragraph are denied."

The pertinent portions of the pleadings in the action instituted by John Robert Hawes are the following excerpts from the complaint and answer: Complaint: "2. That on the dates hereinafter mentioned, the defendants were and are husband and wife, and reside together in Wake County; that they have a minor son, Bill Haynes, of the age of about 19 years, who did reside and now resides with them, as a member of the family, was using the car at the time and place hereinafter mentioned for his own purposes with the consent and approval of the defendants." Answer: "2. That the allegations of paragraph two are not denied."

It will be noted that there is no admission that the automobile of the defendants was owned and maintained as a family purpose car at the time of the collision, but only that it was being used by the son of the defendants for his own purposes by the consent of the defendants.

Parents are not responsible for the torts of their minor son by reason of the relationship of parent and child, and to make them so it must appear that the son was in some way acting in a representative capacity, such as would make the master responsible for the servant's torts. *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096. When a motor car is used by one to whom it is loaned for his own purposes, no liability attaches to the lender unless, possibly, when the lender knew that the borrower was incompetent, and that injury might occur. *Reich v. Cone,* 180 N. C., 267, 104 S. E., 530, and cases there cited; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852. There is no evidence, allegation or admission that the driver of the defendants' automobile, their son, was an incompetent driver.

There is no evidence or admission in the pleadings that bring this case within the purview of the family purpose doctrine. A concise statement of this doctrine, as applied in this jurisdiction, is set out by *Hoke, J.,* in *Robertson v. Aldridge,* 185 N. C., 292, 116 S. E., 742, as follows: ". . . where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and

approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect."

While there may be allegation, there is no admission or evidence that the defendants owned the automobile involved in the collision for the convenience and pleasure of the family. There is no evidence nor admission of any use to which the automobile had ever been put nor of its ever having been driven by the son of the defendants, or by anyone else, at any other time than at the time of the collision in which it is alleged the plaintiffs were injured. The allegations without proof or admission can avail the plaintiffs nothing.

Taking the view of the case that we do, it becomes supererogatory to consider the questions presented in the briefs as to whether there was sufficient evidence of negligence on the part of the driver of defendants' automobile to carry the case to the jury, and as to whether upon their own evidence the plaintiffs were guilty of contributory negligence as a matter of law.

The judgment of the Superior Court is

Affirmed.

STATE v. TOM MELVIN.

(Filed 7 May, 1941.)

Homicide § 27f—

Where defendant does not plead insanity, either by formal plea or under the plea of not guilty, and there is no evidence tending to show that defendant was insane either at the time of the trial or at the time of the homicide, an instruction of the court, engendered by the argument of counsel for the defense, that there was no evidence of insanity and that the jury should not consider such defense, is without error.

APPEAL by defendant from *Williams, J.*, at January Criminal Term, 1941, of WAYNE. No error.

Upon an indictment for the murder of one Irby Holmes, the defendant was tried at the January, 1941, Criminal Term of Wayne County Superior Court, and convicted of murder in the first degree. From a sentence of death ensuing upon the verdict, the defendant appealed to this Court.

The evidence, including the confession of the defendant introduced in the evidence, tended to establish the following history of the murder:

The defendant had worked for Goldsboro Floral Company, about half a block from where the Holmes lived, for many years. While so employed he started writing "numbers" with the Holmes and went to their

house often. According to this confession, Mrs. Holmes begged the defendant many times to get rid of her husband and promised to give him enough money out of the insurance to go into the floral business, which would be from $2,000.00 to $2,400.00. She persisted in this demand for many months. The defendant went to the house very often to check on "numbers" that he had written and frequently found her crying, and she was very persistent with him to do the job and said it would be a great favor to her. He was to get the money as soon as she collected from the insurance company, although there might be a delay. The last time they discussed the money was when she finally told him she had only received $1,600.00 and would not be able to pay what she promised. After he killed Irby she gave him $14.00 on one occasion and $8.00 on another—in all, small sums, a total of $150.00. Defendant and Mrs. Holmes traded, that is, they shook hands, and she said she would sit in the chair until Doomsday before she would ever tell it.

Preceding the killing, and on the same night, Mrs. Holmes passed defendant in the street and asked: "When are you going to do it?" and he replied: "We will take a little ride tonight."

While he was at the Floral Company, about half a block away, he saw a car drive up to the Holmes house. Defendant then went to the house, rang the bell, and told Mr. Holmes he wanted him to take him off a piece, as he wanted to "pick up something." They rode out the Raleigh highway and after passing the Broadcasting Station they turned to the left toward the woods. Here Mr. Holmes stopped the car to attend to a call of nature, and as he started to get back in, with the door still open, defendant struck him with a hatchet several times. Holmes slid down to the ground. Defendant walked back toward Goldsboro, throwing his hatchet into the weeds; went to the Floral Company and burned his vest and jumper. Later Mrs. Holmes asked him if Mr. Holmes suffered and he said no as the first lick passed him out. Defendant further stated that he was induced to kill Holmes because many times Mrs. Holmes was crying and telling him that Holmes was beating her and treating her so bad and spending all her money, he just felt sorry for the woman and, feeling so sorry for her, that he just weakened and gave in and agreed to do it.

Defendant stated in his confession that he waited so long because he did not want to do it, but that Mrs. Holmes over a long period of time kept persuading him to kill her husband. He had to go to the house often on account of writing "numbers" and Mrs. Holmes did most of the settling for the "numbers" business. He had been approached first about six months before the killing. He had tried to persuade Mrs. Holmes to quit Holmes instead of having him killed. Defendant said he did not know why he did it except over-persuasion; that he had no malice

towards Holmes—"she just nagged him, persuaded him, and was so persistent that something took place."

The making of the confession, as related, was corroborated by other testimony.

There was evidence as to the finding of Holmes' body and the character of the wounds.

The defendant went upon the stand, confirming substantially the confession theretofore made.

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

John S. Peacock and F. Ogden Parker for defendant, appellant.

SEAWELL, J. The exceptions relied on by the defendant are related to the charge of the judge, to the effect that there was no evidence of insanity in the case and that the jury would not consider any.

It does not appear in the record that the defendant made any formal plea of insanity, either as existing at the time of the hearing or as existing at the time of the homicide. As to the latter, such defense might be made, of course, under the plea of not guilty. While from the record it appears to have been made a part of the argument of counsel justifying the reference to it in the judge's charge, there actually is no evidence in the record tending to show that the defendant was insane either at the time of the trial or at the time of the homicide, and there is no error in the charge in that respect.

Since the defendant was convicted of murder in the first degree, we have very carefully inspected the record and the case on appeal to find error if it is present. We find none in the record and none in the trial, and the judgment of the court below must be affirmed.

No error.

ANNIE A. EVERETT v. R. D. JOHNSON ET AL.

(Filed 7 May, 1941.)

1. Judgments § 17d—Finding held insufficient to warrant conclusion that defendants had notice of hearing on referee's report.

By consent it was agreed by the parties that the hearing on the report of the referee, filed in the cause, and on defendants' exceptions thereto, might be had out of term and outside the district. Thereafter the court set the place and date of the hearing upon condition that plaintiff's counsel notify defendants' counsel. Defendants' counsel were not present at the hearing and judgment was entered in favor of plaintiff. Upon

defendants' motion to set aside the judgment, the court found that one of plaintiff's attorneys saw one of defendants' attorneys on the street and verbally notified him, but that through some oversight, lapse of memory or misunderstanding, defendants' attorney failed to notify defendants or their other attorneys. *Held:* The finding that through some misunderstanding defendants' attorney failed to notify defendants or their other attorneys, considered in connection with the attorney's affidavit that he had no recollection of being notified and denying notice, is insufficient to warrant the conclusion that defendants had notice, since if the attorney did not understand the time and place of the hearing, he had no notice of it.

2. Judgments § 22g—

An irregular judgment is one entered contrary to the usual course and practice of the court, and will be vacated upon proper showing of irregularity and merit.

3. Same—

A judgment confirming the referee's report and overruling defendants' exceptions thereto, which exceptions constitute a sufficient showing of merit, entered out of the county and out of the district without notice or opportunity to defendants to be heard, is contrary to usual course and practice and should be set aside for irregularity upon defendants' motion aptly made.

APPEAL by defendants from *Bone, J.,* in Chambers at Nashville, 12 December, 1940. From ONSLOW.

Civil actions in trespass to restrain cutting of timber, consolidated and tried together under order of reference; exceptions by defendants to report of referee; judgment overruling exceptions signed by special judge out of the district and out of the county; motion to vacate judgment for irregularity, surprise and excusable neglect; motion overruled, and from this order the defendants appeal.

George W. Phillips, John D. Warlick, and Bailey, Lassiter & Wyatt for plaintiff, appellee.

Summersill & Summersill, A. McL. Graham, and Isaac C. Wright for defendants, appellants.

STACY, C. J. At the April Term, 1940, Onslow Superior Court, Hamilton, Special Judge, presiding, these consolidated causes came on for hearing on the report of the referee and exceptions filed thereto by the defendants. By consent of all the parties it was agreed that Judge Hamilton might determine the matter at such time and place outside the county and district "as might be convenient for said presiding judge and for counsel representing the parties."

Thereafter, counsel for plaintiff saw Judge Hamilton at his home in Morehead City and he set the hearing for 17 July, 1940, at Burgaw, in

Pender County, "upon condition that attorneys for plaintiff would notify attorneys for defendants that the hearing had been set for that time."

It is found as a fact that on the following day "G. W. Phillips, one of plaintiff's attorneys, saw E. W. Summersill, one of the attorneys representing all of the defendants, on the street in Jacksonville, N. C., and notified him verbally that Judge Hamilton had set the hearing as aforesaid and the said E. W. Summersill caused said G. W. Phillips to understand that the date would be satisfactory; that through some oversight, lapse of memory, or misunderstanding, the said E. W. Summersill failed to notify the defendants and their other attorneys of said hearing, and consequently none of them attended the same."

The plaintiff and her counsel appeared at the time and place designated, and judgment was rendered in her favor. The defendants made no appearance at the hearing in Burgaw, and were not apprised of the judgment until some time thereafter when they immediately moved to have it set aside.

It is readily conceded that the judgment should be set aside for irregularity, if in fact counsel for the defendants had no notice of the time and place of the hearing. We think the finding is insufficient to warrant the conclusion that they had such notice. Note, the finding is that "through some . . . misunderstanding . . . Summersill failed to notify the defendants," etc. It follows that if he did not understand the time and place of the hearing, he had no notice of it.

The finding is to be considered in the light of the affidavit of E. W. Summersill in which he says: "Affiant has talked with opposing counsel, and they claim that Mr. Phillips notified affiant on the street, when he was eating an ice cream cone, that they were going to present the matter before Judge Hamilton in Burgaw. Affiant has no recollection of it whatever, and did not notify Mr. Wright, or any of the defendants, and denies same."

An irregular judgment is one entered contrary to the usual course and practice of the court, *Dail v. Hawkins,* 211 N. C., 283, 189 S. E., 774; *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716, and will be vacated on proper showing of irregularity and merit. *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568; *Hood v. Stewart,* 209 N. C., 424, 184 S. E., 36. The exceptions filed by the defendants to the report of the referee constitute sufficient showing of merit to entitle them to be heard. *Sutherland v. McLean,* 199 N. C., 345, 154 S. E., 662.

It was said in *Wilson v. Allsbrook,* 205 N. C., 597, 172 S. E., 217, that a supplemental report of a referee made without additional hearing or notice to the parties was irregular. *A fortiori,* a final judgment confirming the report of a referee and overruling defendants' exceptions

thereto, entered out of the county and out of the district and without notice or opportunity to the defendants to be heard, is contrary to the usual course and practice in such cases, and will be set aside on motion duly made. *Anderson v. McRae,* 211 N. C., 197, 189 S. E., 639; *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1.

Error and remanded.

STATE v. CORNELIUS GRAHAM, ALIAS NEIL GRAHAM.

(Filed 7 May, 1941.)

Criminal Law § 80—

When defendant, convicted of a capital crime, is allowed to appeal *in forma pauperis,* but fails to make out and serve his statement of case on appeal within the time allowed, the appeal will be dismissed on motion of the Attorney-General and the judgment affirmed when the record is free from apparent error.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

Attorney-General McMullan for the State.

STACY, C. J. At the January-February Term, 1941, Columbus Superior Court, the defendant herein, Cornelius Graham, *alias* Neil Graham, was tried upon indictment charging him with the murder of one Jenkins Robinson, which resulted in a conviction of murder in the first degree and sentence of death as the law commands. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed 40 days to make out and serve his statement of case on appeal, and the solicitor was given 25 days thereafter to prepare and file exceptions or countercase.

The clerk certifies that "the time for perfecting appeal has expired and case on appeal has not been filed in this office." *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426. In a letter to the Attorney-General counsel for defendant states that the appeal will not be perfected. "We have decided to go to the Governor asking commutation of sentence to life imprisonment." No bond was required as the defendant was granted the privilege of appealing *in forma pauperis. S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

As the record is apparently free from error, the motion of the Attorney-General will be allowed. *S. v. Flynn,* 217 N. C., 345, 7 S. E. (2d), 700.

Judgment affirmed. Appeal dismissed.

STATE v. JAMES SHAW.

(Filed 7 May, 1941.)

Criminal Law § 80—

When defendant, convicted of a capital crime, is allowed to appeal *in forma pauperis*, but fails to make out and serve his statement of case on appeal within the time allowed, the appeal will be dismissed on motion of the Attorney-General and the judgment affirmed when the record is free from apparent error.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

Attorney-General McMullan for the State.

STACY, C. J. At the January-February Term, 1941, Columbus Superior Court, the defendant herein, James Shaw, was tried upon indictment charging him with the murder of one James Freeman, which resulted in a conviction of "first degree murder" and sentence of death as the law commands. From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed 40 days within which to prepare and serve his statement of case on appeal, and the solicitor was given 25 days thereafter to prepare and file exceptions or countercase.

The clerk certifies that "the time for perfecting appeal has expired and no case on appeal has been filed in this office." In a letter to the Attorney-General he states that counsel for the defendant "has advised me that he does not intend to file case on appeal." No bond was required as the defendant was allowed to appeal *in forma pauperis*.

As no error appears on the face of the record, the motion of the Attorney-General will be allowed. *S. v. Watson*, 208 N. C., 70, 179 S. E., 455.

Judgment affirmed. Appeal dismissed.

THEOPHILUS BARROW v. ETHEL BOAZ BARROW.

(Filed 7 May, 1941.)

Divorce § 11—

Findings of the court, upon competent evidence, *held* sufficient to support order granting wife alimony *pendente lite*.

STATE *v.* CALCUTT.

APPEAL by plaintiff from *Olive, Special Judge,* at March Term, 1941, of MOORE.

This is an action by the plaintiff for divorce *a mensa et thoro,* wherein the defendant filed cross action for an absolute divorce upon the ground of adultery. From order allowing defendant's motion for alimony and counsel fees, the plaintiff appealed, assigning error.

Seawell & Seawell for plaintiff, appellant.
W. A. Lucas and U. L. Spence for defendant, appellee.

PER CURIAM. The court having found, upon competent evidence, that the defendant in good faith denied the allegations of the complaint, was unable to defend the action or prosecute her cross action and adequately meet other expenses, that the plaintiff is financially able to pay allowances for her support and counsel fees, and (for the purposes of defendant's motion) the facts alleged in the answer and affidavits filed in support of the motion were true, there was no error in entering the order, from which appeal is taken. *Vaughan v. Vaughan,* 211 N. C., 354, 190 S. E., 492; *Holloway v. Holloway,* 214 N. C., 662, 200 S. E., 436.

Affirmed.

STATE v. JOSEPH CALCUTT.

(Filed 21 May, 1941.)

1. Gaming § 2b—

Licenses for slot machines issued by the Department of Revenue relate only to such machines as are lawful, and therefore when a defendant pleads guilty to an indictment charging ownership, sale, lease, transportation, operation, and possession of slot machines which are prohibited by law, the fact that he has obtained licenses for lawful machines is immaterial.

2. Same—

The law forbids the ownership, sale, demise, or transportation of certain slot machines, and permits the possession, use and operation of others, under license.

3. Same—

Ch. 138, Public Laws of 1923, proscribing the operation and possession of slot machines of the type therein defined, is not repealed by ch. 196, Public Laws of 1937, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary.

4. Statutes § 10—

The repeal of statutes by implication is not favored, and a later statute will not repeal a former, dealing with the same subject matter, if the two

statutes can be reconciled and both declared to be operative without repugnance.

5. Indictment § 8: Gaming § 3—

The indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, ch. 196, Public Laws of 1937, and charged defendant in the second count with the operation and possession of certain illegal slot machines, ch. 138, Public Laws of 1923. *Held:* The different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable.

6. Criminal Law §§ 63, 72—Suspension of execution of judgment must not be so conditioned as to interfere with right of appeal.

Upon defendant's plea of guilty, judgment was entered on one of the counts that defendant be confined to the county jail for a term of two years to be assigned to work on the public roads, with further provision that execution of the judgment should be suspended and the defendant placed on probation upon certain specified conditions, among which were that he pay a fine in a stipulated amount and the cost of the action at the trial term, and that he perform certain other acts within 30 days from the date of judgment. *Held:* While a perfected appeal stays execution during the pendency of the appeal, C. S., 4654, and in case of affirmance, until the clerk of the Superior Court receives certificate of the opinion of the Supreme Court, C. S., 4656, an appeal does not affect the terms of suspension or conditions of probation, unless the judgment so provides, and therefore, since defendant could not meet the conditions upon which execution of the judgment was suspended if he exercised his right to appeal, C. S., 4650, the judgment on this count is erroneous, and the cause is remanded for proper judgment thereon.

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

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

SEAWELL, J., joins in the opinion of DEVIN, J.

APPEAL by defendant from *Parker, J.*, at December Term, 1940, of WAKE.

Criminal prosecution heard upon indictment charging the defendant, in two counts, (1) with the ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, and (2) with the operation and possession of certain slot machines (described as gambling devices) against the form of the statute in such cases made and provided and against the peace and dignity of the State.

To this bill of indictment the defendant entered a plea of guilty.

Judgment on the first count: Twelve months in the Wake County jail to be assigned to work on the public roads.

Judgment on the second count: Two years in the Wake County jail to be assigned to work on the public roads; execution to begin at the expiration of sentence on the first count. (The sentence on the second count was first fixed at eighteen months and later during the term changed to two years.)

It is further provided that the road sentence imposed on the second count, which is to begin at the expiration of the road sentence on the first count, shall be suspended and the defendant thereafter placed on probation for a period of three years; *Provided:* (1) That he pay a fine of $10,000 and the costs of the action in cash at this term; (2) that he dispose of all unlawful slot machines in his possession within thirty days from this order and report same to the presiding judge at the next criminal term of this court (none to be sold, disposed of or placed in North Carolina); (3) that he observe the slot machine laws of the State for said three-year period; (4) that he refrain from any political activity in North Carolina during said three years; (5) that he remain under the supervision of the probation officer assigned to Wake County and make no request that the case be assigned to Cumberland County; (6) that he be law-abiding during said probation period; (7) that he not change his address or leave the county or State without first securing the permission of the probation officer; (8) that he report to the probation officer as directed and permit the probation officer to visit his home or elsewhere; (9) that he appear with the probation officer during said three years of probation in open court at the May and November Terms, Wake Superior Court, to show his good behavior and that he has complied with all and singular the terms of suspension of the road sentence—failing in which he is to serve said two-years road sentence in full.

From the foregoing judgment, the defendant in open court gave notice of appeal to the Supreme Court and was allowed fifteen days to serve his case on appeal. Appearance and appeal bonds fixed at $25,000 and $100.00 respectively. Numerous errors are assigned by the appellant.

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

Bunn & Arendell, Douglass & Douglass, and Malcolm McQueen for defendant.

STACY, C. J. The burden of the defendant's first complaint is, that having paid the State of North Carolina $105,555.00 in license taxes for the privilege of operating 5,258 slot machines within the State, he ought not now to be prosecuted for exercising these licenses. The soundness of the defendant's position in this respect is not questioned by the State. Indeed, it would perhaps be conceded. But this is not the case *sub judice*. The defendant has pleaded guilty to violations of the criminal law, and the licenses issued by the Revenue Department do not purport to authorize any such conduct. Nor did the defendant think so when he entered his plea. The licenses issued by the Revenue Department, therefore, may be put aside as having no bearing, legal or otherwise, upon the prosecution.

It is well understood that the law forbids the ownership, sale, demise or transportation 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 pleaded guilty to such ownership, sale, lease, transportation, operation and possession of slot machines as is prohibited by law. This disposes of his suggestion of duplicity. *S. v. Christmas*, 101 N. C., 749, 8 S. E., 361.

The first count in the bill is couched in the language of ch. 196, Public Laws 1937. The second count follows the language of ch. 138, Public Laws of 1923. It is the position of the defendant that the earlier statute was repealed by the later act, and that, in reality, only one offense is charged in the bill of indictment. The position is not supported by the authorities. *S. v. Humphries*, 210 N. C., 406, 186 S. E., 473; *S. v. Johnson*, 171 N. C., 799, 88 S. E., 437; *S. v. Perkins*, 141 N. C., 797, 53 S. E., 735; *S. v. Biggers*, 108 N. C., 760, 12 S. E., 1024.

The applicable principle is clearly and succinctly stated by *Adams, J.*, in *Story v. Comrs.*, 184 N. C., 336, 114 S. E., 493, as follows: "The repeal of statutes by implication is not favored. The presumption is against the intention to repeal where express terms are not used, and it will not be indulged if by any reasonable construction the statutes may be reconciled and declared to be operative without repugnance."

The latter act is not so repugnant to the former as to work a repeal, either intentionally or otherwise. *Lumber Co. v. Welch*, 197 N. C., 249, 148 S. E., 250; *Waters v. Comrs.*, 186 N. C., 719, 120 S. E., 450. Indeed, the two enactments are more nearly complementary than inconsistent. Hence, the different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon. *S. v. Moschoures*, 214 N. C., 321, 199 S. E., 92; *S. v. Malpass*, 189 N. C., 349, 127 S. E., 248; *S. v. Jarrett*, 189 N. C., 516, 127 S. E., 590.

No sufficient reason has been made to appear why the judgment on the first count should not be upheld. It is well within the terms of the statute. *S. v. Farrington*, 141 N. C., 844, 53 S. E., 954.

The judgment entered on the second count, however, presents a matter of different substance.

It seems to have been overlooked on all hands that the privilege of probation, which the court clearly intended to offer the defendant pursuant to ch. 132, Public Laws 1937, is so conditioned as to be inconsistent with his right of appeal. To exercise the one he must forego the other. The first requirement could only be met at the December Term, 1940, and the second condition was to be performed within thirty days thereafter, otherwise under paragraph 9 of the suspension, the two-year road sentence was to become absolute. In other words, by appealing the defend-

ant has lost his opportunity to accept the terms of the suspended sentence. This, we apprehend, was an inadvertence and unintentional. It was perhaps occasioned by the fact that at the time the sentence was imposed no appeal was contemplated, and when an appeal was later noted, the conflict was not observed. However this may be, the defendant was so circumstanced, by the conditions imposed, that he could not elect to comply with the terms of suspension without rendering his appeal nugatory or certainly premature, and by appealing without such election, he necessarily forfeited the privilege of probation. We are well assured that it was not the purpose of the trial court to force him into this dilemma. His appeal was allowed, and it is not to be supposed that any penalty was attached thereto or imposed as a result thereof. C. S., 4650.

The perfecting of an appeal in a criminal case as required by law, either by giving bond or *in forma pauperis,* stays execution therein during the pendency of the appeal, C. S., 4654, and, in case of affirmance, until the clerk of the Superior Court receives certificate of the opinion of the Supreme Court, C. S., 4656 (otherwise in capital felonies, C. S., 4663), but this would not affect the terms of suspension, or conditions of probation, unless so provided. No provision is made for extending the terms of suspension where timely performance is made the essence of such terms. Here, the time limits annexed to the first two conditions are unbending and they conflict with the defendant's right of appeal.

A judgment rendered under a misapprehension of its effect, which inadvertently denies a substantial right, will be vacated on appeal. *S. v. Fuller,* 114 N. C., 886, 19 S. E., 797; *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324, and cases there cited.

It is not worth while to discuss the terms of the suspension, as they are no longer available to the defendant and a different judgment may hereafter be rendered. The principle involved is more important than the disposition of a single case.

The judgment on the second count will be vacated and the cause remanded for further consideration of this count.

On the first count: Judgment affirmed.

On the second count: Error and remanded.

CLARKSON, J., concurring in part and dissenting in part: I concur on the *first count* and dissent on the *second count.*

The defendant was indicted under the following bill of indictment:

"No. 3236—State v. Joseph Calcutt, trading as Vending Machine Company. Illegal Possession Slot Machines, which said Bill of Indictment is in words and figures as follows, to-wit:

"State of North Carolina—Superior Court. Wake County—November Term, A. D., 1940.

"The Jurors for the State, upon their oath present, That Joseph Calcutt, Individually, and Joseph Calcutt, trading as Vending Machine Company of Fayetteville, N. C., late of the County of Wake, on the 9th 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, did unlawfully and willfully own, store, keep, possess, sell, rent, lease, let on share, transport and offer to sell, rent, lease and let on share for the purpose of operation in the said County of Wake certain slot machines and devices prohibited by law, to-wit: certain machines, apparatus and devices that were adapted or might be readily converted into ones that were adapted for use in such way that as a result of the insertion of a piece of money or coin or other object such machines or devices were caused to operate or might be operated in such manner that the user might receive or become entitled to receive certain pieces of money, credit, allowance or thing of value, or a check, slug, token or memorandum which might be exchanged for money, credit, allowance, or some thing of value or which might be given in trade or the user of such machines, apparatus or devices might secure additional chances or rights to use such machines, apparatus or devices or in the playing of which the operator or user had a chance to make varying scores or tallies upon the outcome of which wagers might be made.

"And the Jurors for the State upon their oath do further present, That Joseph Calcutt, individually, and Joseph Calcutt, trading as Vending Machine Company of Fayetteville, N. C., late of the County of Wake, on the 9th 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, did unlawfully and wilfully operate, keep in their possession or in the possession of another for the purpose of being operated, certain slot machines that did not produce for or give to the person who placed a coin or money or the representative of either therein the same return in market value each and every time such machine was operated by placing money or coin or the representative of either therein, 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."

The judgment on the bill of indictment was as follows:

"The defendant, Joseph Calcutt, trading as the Vending Machine Company heretofore at this term of Court, entered a plea of guilty to the Bill of Indictment in this case, which Bill of Indictment has two counts, and it further appearing to the Court that the defendant admitted in open Court that he was the sole owner of the Vending Machine Company of Fayetteville, which is his trade name, and that he has been in the slot machine business for years and has paid fines in some 20 to 21 cases, and it further appearing to the Court from his income tax returns

that his business during 1937, 1938 and 1939 has grossed in excess of four and one-half million dollars, and that during said time he has paid $73,000 for legal expense, and it further appearing to the Court that while he was being tried yesterday one-armed bandits, *i.e.*, slot machines that paid off in money, belonging to him, were being operated in Fayetteville, North Carolina.

"The Judgment of the Court in the first count in the Bill of Indictment is that the defendant, Joseph Calcutt, be confined in the common jail of Wake County for a term of twelve months to be assigned to work the public roads under the direction of the State Highway & Public Works Commission.

"As to the second count in the Bill of Indictment the Judgment of the Court is that the defendant, Joseph Calcutt, be confined in the common jail of Wake County for a term of two years to be assigned to work the public roads under the direction of the State Highway and Public Works Commission. Execution of the road sentence in the second count to begin at the expiration of the road sentence in the first count.

"It is Further Ordered and Decreed that the road sentence in the second count in this case which is to begin at the expiration of the twelve months road sentence in the first count which the defendant, Joseph Calcutt, is to serve be, and the same is hereby suspended, and the defendant is hereby placed on probation for a period of three years after his twelve months road sentence imposed in the first count in the Bill in this case has been served, under the supervision of the North Carolina Probation Commission and its officers subject to the provisions of the laws of this State and the rules and orders of said Commission and its officers with leave that execution may be prayed at any time during the period of probation; that as a condition of probation the said defendant, Joseph Calcutt, shall:

"1. Pay a fine of $10,000 and the costs of this action in cash at this term.

"2. That he shall within thirty days from this order dispose of every machine of any kind which he owns, possesses or has any interest in, direct or indirect, that violates the North Carolina Slot Machine Law, and that he shall show that to the presiding Judge of this Court on the first day of the next Criminal Term of this Court, and that he shall not sell nor dispose of nor place any of these machines in North Carolina.

"3. That he shall not during said three years either directly or indirectly or in any way, form, shape, or manner, violate the Slot Machine Laws of this State.

"4. That he shall not, during said three years, either directly or indirectly in any way, form, shape, or manner, have anything to do with any politics in the State of North Carolina, either himself or through anyone else.

"5. That he shall at all times remain under the supervision of the Probation Officer assigned to Wake County, and shall not request that this case be assigned to Cumberland County.

"6. That he shall not violate, during said three years, any State law.

"7. That he shall not change his address or leave the County or State without first securing the permission of his Probation Officer.

"8. That he shall report to the Probation Officer as directed and permit the Probation Officer to visit his home or elsewhere.

"9. That he shall appear with the Probation Officer of this County during said three years of probation in open Court at the May and the November Term of this Court, and if he cannot satisfy the presiding Judge of those terms that he has not violated the conditions or any of them upon which said two years road sentence is suspended, capias and mittimus shall issue at term and he shall serve said two years road sentence in full.

"It is Further Ordered that this judgment be recorded in the minutes of this Court and that the Clerk forthwith forward a copy of the same to the Probation Officer of this District. R. Hunt Parker, Judge Presiding."

"The Court, in its discretion, modified the judgment in the second count in this respect: As to the second count in the Bill of Indictment the judgment of the Court is that the defendant Joseph Calcutt be confined in the common jail of Wake County for a term of two years. The change being from 18 months to two years. The Court, in its discretion, further modified the second condition of probation by adding thereto the following language, to-wit, 'and that he shall not sell nor dispose of nor place any of these machines in North Carolina.' This modification done in open Court in the presence of the defendant Joseph Calcutt and his counsel Messrs. Clyde A. Douglass and Wilbur Bunn. R. Hunt Parker, Judge Presiding."

Agreed statement of case on appeal: "This Criminal action was called for trial at the December Term, 1940, of Wake Superior Court. The defendant was present in the court and through his attorneys, Clyde A. Douglass and J. W. Bunn, entered a plea of guilty. It was admitted by the defendant Joseph Calcutt that he is the sole owner of the Vending Machine Company of Fayetteville, which is a trade name and not a corporation or association."

At the November Term, 1940, of Wake County Superior Court, the grand jury returned a true bill of indictment containing two counts against the defendant. In the *first count* of this bill of indictment the defendant was charged with the ownership, sale, transportation, lease, etc., of slot machines and devices prohibited by law. In the *second count* of the bill of indictment the defendant was charged with the operation

of illegal slot machines. The defendant made no motion to quash the bill of indictment, but, on the contrary, entered a general plea of guilty to all the allegations contained in the indictment.

It appears from the evidence offered by the State and by the defendant that the defendant has been engaged in the coin slot machine business in the State of North Carolina for a period of about 25 years. During this period of time the defendant has been arrested in North Carolina about twenty times for violation of the slot machine laws and paid fines in various amounts in these cases. The gross receipts realized by the defendant from his slot machine business for the year 1937 amounted to $1,327,785.40. For the year 1938, $1,379,241.13, and for the year 1939, $1,847,718.15. His legal expenses alone during the three years above mentioned amounted to $73,000.00. This does not include the amounts spent in attempting to secure legislation favorable to the defendant's business. The defendant had as his representative in Wake County one J. N. Finch, and through Finch slot machines were placed in various places of business, with the understanding that the defendant would pay any fine or costs in event these various persons were indicted under the provisions of the slot machine laws.

During the time evidence was being taken in this case, the officers of the law, under orders and instructions of the presiding judge, seized several slot machines in the city of Fayetteville, the home of the defendant. These machines were brought into court and it appeared that some of them were what is known as "one-armed bandits." Some of these machines were owned by the defendant and are illegal under the provisions of any of the laws enacted by the General Assembly of North Carolina relative to slot machines.

From the evidence contained in the record in this case, it clearly appears that the defendant has for many years been the biggest slot machine operator in the State of North Carolina, and that during these years he has used his own brain and the brains of the various members of his organization in formulating plans and schemes, not only to secure legislative sanction of the slot machine business, but to devise and formulate schemes to evade and disregard the laws of the State of North Carolina regulating and prohibiting the operation of slot machines. This is clearly shown by the fact that during the years 1937 and 1938, when the Flanagan Act was without question in full force and effect, the defendant's income from the slot machine business was over a million dollars for each of said years. When the defendant entered his plea of guilty to the bill of indictment contained in the record, he admitted he had violated every provision of the Slot Machine Act of 1923, and of the Flanagan Act, and the evidence bears out the fact that the defendant was not mistaken when he admitted these various violations of the law. The

machines distributed by the defendant were of various types, the majority being clearly illegal under any of the slot machine laws, and even those about which there could be some doubt were so constructed as to be easily changed into what everyone knew to be an illegal machine with practically no effort. The whole record shows an absolute disregard of the plain provisions of the law. The evidence justifies the judgment and the sentence.

I. *The indictment charges more than one offense.* One of the principal arguments advanced by the defendant to establish the invalidity of the judgment in the instant case is that the bill of indictment, although containing two counts, really charges but one offense and, therefore, will not support the separate sentences imposed under the two counts. I think that the bill of indictment charges separate offenses in separate counts for which separate punishment may be imposed.

A. The first count. The first count in the indictment is couched in the language of the Flanagan Act. Public Laws of 1937, ch. 196. The description of the machines with which this count is concerned follows the definition of illegal machines contained in section 3 of the act, and under the decision in *S. v. Abbott,* 218 N. C., 470, these were illegal machines.

It is charged in the indictment, *supra,* that the defendant did "own, store, keep, possess, sell, rent, lease, let on share, transport and offer to sell, rent, lease and let on share for the purpose of operation in the said County of Wake" certain slot machines of the type referred to above. It will be noted that the language of this portion of the indictment is patterned after section 1 of the Flanagan Act, which provides: "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."

Since each of the Acts mentioned in section 1 is made unlawful and the violation of any of the provisions of the Flanagan Act is made a misdemeanor by section 6, the result is that the statute creates, not *one* offense which may be evidenced in a variety of ways, but a *number* of *distinct* and *separate* offenses, each of which constitutes a misdemeanor.

It is true that some of the infractions of section 1, for example, keeping and possessing, may amount to the same thing. An offer to sell may be included in a consummated sale so as to preclude a punishment for both. However, there can be no doubt that infractions such as manufacture, ownership, sale, lease, transportation, and permitting operation

on one's premises are separate offenses for which separate punishments may be imposed. Such a construction of the Flanagan Act as that suggested above finds support in a similar construction placed on section 3411 (b) of the Consolidated Statutes, which makes it illegal to "manufacture, sell, barter, transport, import, export, deliver, furnish, purchase or possess any intoxicating liquor."

In *S. v. Jarrett,* 189 N. C., 516, this Court held that possession and delivery of intoxicating liquors were separate offenses under the statute, and that separate punishments could be imposed for each when both were charged in the same warrant and the defendant was convicted. Later, in *S. v. Moschoures,* 214 N. C., 321, the defendant having pleaded guilty to a warrant charging unlawful possession and sale of intoxicating liquors, it was held that separate sentences could be imposed for each offense. From the holding of this Court it seems evident that—exclusive of offenses which were included in, or the same as, other offenses—the *first* count of the bill of indictment charged the defendant with at least four separate and distinct offenses, viz.: the ownership, sale, lease, and transportation of illegal slot machines.

Ordinarily, it is bad pleading to charge more than one offense in the same count of the bill of indictment, although this rule is subject to exceptions. *S. v. Dale,* 218 N. C., 625. However, an objection to a bill of indictment on the ground of duplicity must be seasonably made; and it is well settled that the defect is waived if the defendant fails to move to quash the indictment before pleading. *S. v. Hart,* 26 N. C., 246; *S. v. Simons,* 70 N. C., 336; *S. v. Hart,* 116 N. C., 976; *S. v. Burnett,* 142 N. C., 577; *S. v. Beal,* 199 N. C., 278.

The defendant has waived the right to object to duplicity in the first count by failing to move to quash. The result is that this count charges him with the four distinct offenses of possession, sale, lease, and transportation as effectively as if they had been set out in separate counts. By his plea the defendant has confessed that he is guilty of each of them.

B. The Second Count. The second count of the bill of indictment is couched in the language of chapter 138 of the Public Laws of 1923, section 1 of which provides: "That it shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein." Section 5 of the Act is as follows: "That a violation of any of the provisions of this Act shall be a misdemeanor punishable by a fine or imprisonment, or, *in the discretion of the court, by both.*" (Italics mine.)

It is alleged in the second count that Joseph Calcutt, individually, and Joseph Calcutt, trading as the Vending Machine Company, did "operate, keep in their possession or in the possession of another for the purpose of being operated" certain slot machines answering the description in the 1923 Act. The effect of this count is to charge the offenses of unlawful operation and unlawful possession of slot machines, with any objection to the count on the ground of duplicity being waived by the defendant's plea of guilty.

The defendant contends that this count does not charge any criminal offense for the reason that the 1923 Act on which it is based has been repealed. He argues that, since Public Laws of 1935, chapter 37; Public Laws of 1935, chapter 282; and Public Laws of 1937, chapter 196, each deals comprehensively with the subject of slot machines, the 1923 Act is repealed by implication, although none of the later acts contains an express repealing clause.

This position is untenable, first, because implied repeals are looked upon with disfavor. In Crawford, Statutory Construction, it is stated, at page 630, that: "As is thus apparent, the courts do not look with favor upon implied repeals, and the presumption is always against the intention of the Legislature to repeal legislation by implication. The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption, . . ." It is stated again, at page 631, that: "The inconsistency or repugnancy between two statutes necessary to supplant or repeal the earlier one, must be more than a mere difference in their terms and provisions. There must be what is often called 'such a positive repugnancy between the provisions of the old and the new statutes that they cannot be reconciled and made to stand together.' In other words, they must be absolutely repugnant, or irreconcilable. Otherwise, there can be no implied repeal, as we have pointed out in the preceding section, for the intent of the Legislature to repeal the old enactment is utterly lacking. Since there is a presumption against an implied repeal, and since the court will seek to avoid such a repeal by any fair and reasonable construction, the inconsistency must be clear, manifest and irreconcilable." The principle that a later statute will not, by implication, repeal an earlier one dealing with the same subject matter unless they are irreconcilable is the law in North Carolina. *S. v. Biggers,* 108 N. C., 760 (764); *Bramham v. Durham,* 171 N. C., 196 (198); *S. v. Johnson,* 171 N. C., 799 (801).

The rule is stated by *Justice Adams* in *Story v. Commissioners.,* 184 N. C., 336 (341), as follows: "The repeal of statutes by implication is not favored. The presumption is against the intention to repeal where express terms are not used, and it will not be indulged if by any reasonable construction the statutes may be reconciled and declared to be operative without repugnance." *S. v. Foster,* 185 N. C., 674 (677).

The fact that a later statute covers the whole subject matter of an earlier one does not result in the repeal of the earlier one. To this effect *Justice Hoke* quotes from Cyc., with approval in *State Sanatorium v. State Treasurer,* 173 N. C., 810 (813): "In 36 Cyc., *supra,* it is further said: 'When two statutes cover, in whole or in part, the same subject-matter, and are not absolutely irreconcilable, the court will, if possible, give effect to both.' "

The defendant's contention that the 1923 Act has been repealed is also untenable for the reason that a similar contention has been rejected by this Court in *S. v. Humphries,* 210 N. C., 406. In 1935, the General Assembly passed two different statutes, both of which comprehensively regulated slot machines. The provisions of the two acts were strikingly similar. The defendant contended that, since the second act, Public Laws of 1935, chapter 282, covered the whole field, the earlier act, Public Laws of 1935, chapter 37, was repealed. This Court held that the two statutes were *in pari materia* and that they remained side by side in full force and effect. Speaking for the Court, *Justice Devin* said (at p. 413): "The rule is that if two statutes cover the same matter in whole or in part, and are not absolutely irreconcilable, it is the duty of the Court to give effect to both (Black Int. Laws, p. 325), and the later act does not repeal the earlier. *S. v. Broadway,* 157 N. C., 598; *Castevens v. Stanly County, supra* (209 N. C., 75). So that these two acts take their places *with the other statutes* and enactments of the General Assembly, emphasizing the settled policy of this State to outlaw the devices described in the bill of indictment under which this defendant was convicted. We hold that the defendant might well have been indicted under either act, or by a bill charging in more concise language the possession of an unlawful slot machine in violation of the statutes in such cases made and provided." (Italics mine.)

If the fact that the second 1935 Act covered the whole field of slot machine regulation did not cause the earlier 1935 Act to be repealed, there is no more reason why it should have resulted in the repeal of the 1923 Act. This is recognized in the passage quoted above. When *Justice Devin* stated that the two 1935 Acts took their place with the other statutes relating to slot machines, he had reference to the 1923 Act, and considered that act remained in force. The 1937 Flanagan Act no more completely preëmpts the entire field of slot machine regulation than did the second 1935 Act; and, if that act did not repeal prior legislation, it cannot be consistently held that the Flanagan Act did. The 1923 Act is not inconsistent with the Flanagan Act; the latter merely goes further. As the Flanagan Act does not expressly make it unlawful to "operate" slot machines, and the 1923 Act (Public Laws of 1923, chapter 138, section 1) does, it is not improbable that the Legislature understood that

this particular offense should be governed by the 1923 Act alone and be subject to the more severe punishment therein prescribed. Certainly, under the decisions of this Court relating to repeals by implication, I think it reasonable to hold that the 1923 Act remains in effect and that, when a given act happens to constitute a violation of this and other statutes, the solicitor may elect under which he will proceed.

C. Separate Punishments. Although the defendant contends that the bill of indictment charges only one offense, it is apparent from the foregoing decisions that it charges not one, but many offenses. Some of the offenses may be identical with others, and some may be merged in others, but those which, under each count, are separate and distinct may be listed as follows: *First Count:* Ownership, Sale, Lease, Transportation. *Second Count:* Operation, Possession. The defendant by his plea of guilty has admitted his guilt and stands convicted of every one of them. He has waived any objection which he might have made to the charging of more than one offense in a single count. This being true, the court could properly have imposed separate sentences for each offense. It is folly for the defendant to complain because two sentences were imposed, when the court would have been justified in imposing six.

The court having imposed a single sentence under the first count instead of imposing sentences severally for the offenses charged therein, the sentence on this count should be upheld if supported by the plea of guilty to any one of the offenses charged. The same is true of the sentence under the second count. This principle finds recognition in the decisions of this Court.

In *S. v. Miller,* 29 N. C., 275, the defendant was tried and convicted under a two-count bill of indictment, one count being good, the other, bad. The judgment of the court below was affirmed because supported by the good count. To the same effect is *S. v. Sprouse,* 150 N. C., 860. Similarly, where defendants have been tried on indictments containing good and bad counts, general verdicts have been held to relate to and be supported by the good counts. *S. v. Smiley,* 101 N. C., 709; *S. v. Toole,* 106 N. C., 736; *S. v. Lee,* 114 N. C., 844; *S. v. Avery,* 159 N. C., 495; *S. v. Coleman,* 178 N. C., 757 (760); *S. v. Maslin,* 195 N. C., 537.

The defendant's contention that only one sentence should have been imposed is not strengthened by the argument that possession, which is charged in the second count, is merged in ownership or some other offense in the first count. If possession were merged in an offense in the first count, the charge of operation would still support the sentence on the second count. Furthermore, if the punishment under the second count should be regarded as a punishment for possession and the result should be to preclude punishment for ownership under the first count; the punishment under the first count would still be supported by the charges of sale, lease, or transportation under the first count.

The reasoning advanced by the State in justification of the separate sentences on the two counts of the bill of indictment seems to have been accepted by the United States Circuit Court of Appeals for the Second Circuit in *United States v. Busch,* 64 F. (2d), 27. In that case the defendant had been indicted for violation of the Federal narcotic laws. The indictment contained three counts: the first for concealing heroin downstairs in a building; the second for concealing cocaine and heroin upstairs in a desk, and the third for conspiracy. After a conviction, the trial court imposed separate sentences on all three counts. The appellate court approved these sentences, taking the position that, even if the first and second counts overlapped in charging concealment of heroin, separate sentences could be imposed because the second count also charged concealment of cocaine, which was a separate offense.

The defendant's contention that the bill of indictment will not support any judgment because the statutes under which the two counts were drawn authorize different punishments is entirely without merit. The cases which he cites, *S. v. Lawrence,* 81 N. C., 522, and *S. v. Goings,* 98 N. C., 766, were decided prior to the enactment of the North Carolina statute regulating joinder and consolidation in criminal cases. This statute, C. S., 4622, was enacted in 1917, and its effect was to permit charges relating to the same transaction or the same series of transactions to be joined in one indictment and to permit consolidation where separate bills of indictment embodying such charges have been returned.

Justice Varser stated the present rule as to joinder in *S. v. Malpass,* 189 N. C., 349 (351), as follows: "The rule in the State now is that different counts relating to the same transaction, or to a series of transactions, tending to one result, may be joined, although the offenses are *not* of the same grade. *S. v. Lewis,* 185 N. C., 640; *S. v. Burnett,* 142 N. C., 577; *S. v. Howard,* 129 N. C., 584; *S. v. Harris,* 106 N. C., 683; *S. v. Mills, supra* (181 N. C., 530); C. S., 4622."

Under the statute it is even permissible to join a count for a misdemeanor with one for a felony in the same indictment. *S. v. Lewis,* 185 N. C., 640.

When charges of distinct offenses have been joined or there has been a consolidation under C. S., 4622, separate punishments may be imposed upon the different counts. *S. v. Mills, supra; S. v. Harvell,* 199 N. C., 599.

II. *The Prison Sentences Imposed Under the First and Second Counts Are Not Excessive.* If the bill of indictment charges separate offenses separately punishable under the first and second counts, it follows that the judgment in the instant case should be affirmed if the sentences imposed are authorized by law and are not excessive.

Section 6 of the Flanagan Act, chapter 196 of the Public Laws of

1937, authorizes punishment for offenses under that act *by fine or imprisonment in the discretion of the court.* Section 5 of chapter 138 of the Public Laws of 1923 authorizes punishment of offenders under that act *by fine or imprisonment, or both, in the discretion of the court.*

The first count charges violations of the Flanagan Act. A sentence of one year was imposed. The second count charges violation of the 1923 Act. A two-year suspended sentence was imposed. As neither statute prescribes a maximum period of imprisonment, these sentences must be regarded as valid unless sentences of one and two years are so excessive as to violate the constitutional prohibition against cruel and unusual punishments. The propriety of these sentences is established by the decisions of this Court which hold that a sentence of imprisonment for two years for a misdemeanor is not a cruel and unusual punishment. *S. v. Apple,* 121 N. C., 584; *S. v. Farrington,* 141 N. C., 844.

In *S. v. Moschoures,* 214 N. C., 321, the defendant pleaded guilty to two misdemeanors. On the first count a sentence of imprisonment for eighteen months was imposed. On the second a suspended sentence for the same period commencing at the expiration of the first was imposed. The Court upheld these sentences, stating at page 322: "The defendant also contends that these sentences inflicted cruel and unusual punishment in violation of Article I, sec. 14, of the Constitution of North Carolina, with which contention we likewise cannot concur. 'It is equally well settled that when no time is fixed by the statute, this Court will not hold imprisonment for two years cruel and unusual.' *S. v. Farrington,* 141 N. C., 844; *S. v. Daniels,* 197 N. C., 285, and cases there cited."

III. *The Judgment is NOT an Alternative or Conditional One and is NOT Void for Indefiniteness; It Is a Valid Judgment Suspended on Reasonable Conditions.*

The defendant's contention that the judgment pronounced on the second count of the bill of indictment is an alternative judgment not permitted by law is clearly without merit. The judgment is unquestionably a valid imposition of a two-year jail sentence, within the maximum limit permitted for the violation of a misdemeanor, suspended upon certain enumerated conditions, and it also places the defendant on probation. As such, it is sanctioned by statute and all the current decisions of this State. Public Laws of 1937, ch. 132, secs. 1, 2, 3 (Michie's N. C. Code, 1939, secs. 4665 [1]-4665 [3]); *S. v. Hardin,* 183 N. C., 815; *S. v. Wilson,* 216 N. C., 130. That the judgment does just this may be readily ascertained from its unmistakable language. After stating that the judgment of the court on the second count in the bill of indictment is "that the defendant, Joseph Calcutt, be confined in the common jail of Wake County for a term of two years to be assigned to work the public roads under the direction of the State Highway & Public Works Com-

mission," the court provides in the next paragraph: "It is *further Ordered and Decreed* that the road sentence in the second count in this case which is to begin at the expiration of the twelve months road sentence in the first count which the defendant, Joseph Calcutt, is to serve be, *and the same is hereby suspended, and the defendant is hereby placed on probation* for a *period of three years* after his twelve months road sentence imposed in the first count in the Bill in this case has been served; *under the supervision of the North Carolina Probation Commission and its officers* subject to the provisions of the laws of this State and the rules and orders of said Commission and its officers with leave that execution may be prayed at any time during the period of probation; that as a condition of probation the said defendant, Joseph Calcutt, shall:" etc. (Italics mine.)

Immediately following this part of the judgment the conditions of its suspension are annexed. It is difficult to imagine how this judgment can be called an alternative judgment. Of course, in a broad or catholic sense as contra-distinguished from a legal sense, all suspended judgments are alternative. That is, the defendant may elect to accept the terms of the suspension rather than to undergo the full vigor of the judgment. This, very obviously, does not constitute an alternative judgment prohibited by our decisions. The distinction is lucidly and succinctly explained by *Seawell, J.*, in *S. v. Wilson*, 216 N. C., 130. In speaking of a judgment suspended on the condition of the payment of a fine and on the further condition that the defendant remain law-abiding for a term of five years, it is stated, at page 133: "Nor is the judgment alternative, although an alternative is presented to the convicted defendant whether he shall remain a good citizen or be subject to imprisonment. An alternative judgment is a judgment 'for one thing or another' (33 C. J., p. 1197), which does not specifically and in a definite manner determine the rights of the parties. A judgment is said to be alternative because it requires the performance of one or more alternative propositions and is incapable of enforcement because the selection involves a function which may be performed only by the court, and such a judgment is void. *Strickland v. Cox*, 102 N. C., 411, 9 S. E., 414; *S. v. Hatley*, 110 N. C., 522, 14 S. E., 751. With some exceptions, not necessary to consider here, it must be sufficiently definitive to permit enforcement ministerially by its inherent directions. The sentence before us meets this test."

As has been shown, the defendant was placed on probation under the provisions of the probation statute and placed under the supervision of the North Carolina Probation Commission. The judgment entered in the instant case is specifically provided for and contemplated by the Probation Act of 1937. Section 1 of chapter 132 of the Public Laws of 1937 provides as follows: "After conviction or plea of guilty or *nolo*

contendere for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may impose a fine and also place the defendant on probation."

Section 3 of this act sets out several conditions which may be imposed for such suspension. *S. v. Bennett,* 20 N. C., 170, chiefly relied on by the defendant in support of his position that the judgment in the case at bar is alternative, and the other early cases cited in his brief, have in effect been overruled by later and more recent decisions which recognize the right of the trial court to suspend judgment on certain conditions aside from the probation statute above referred to. In *S. v. Hardin,* 183 N. C., 815, it is stated by *Hoke, J.,* at page 818: "The power of a court having jurisdiction to suspend judgment on conviction in criminal cases for determinate periods and for a reasonable length of time is fully recognized in this jurisdiction. *S. v. Hoggard,* 180 N. C., 678; *S. v. Greer,* 173 N. C., 759; *S. v. Tripp,* 168 N. C., 150; *S. v. Everitt,* 164 N. C., 399; *S. v. Crook,* 115 N. C., 760."

The transition from the early holdings that a suspended judgment was void as an alternative one to the recent decisions fully recognizing and sanctioning the rights to impose such a judgment, is noted in 15 N. C., Law Review, at page 345, as follows: "The legislature in its early days of power undertook to prescribe the punishment for crime with some exactness and to make the judge the mouthpiece to pronounce it. Gradually it began merely to fix the limits of punishment, and allowed the judge within these limits, freedom to fix the punishment in each particular case. But the suspended sentence did not meet with much favor in North Carolina in the beginning. In *S. v. Bennett, supra,* the Supreme Court expressed the opinion that it was 'irregular to annex to the sentence any condition for its subsequent remission,' and in *S. v. Hatley, supra,* 'Such course is not infrequent, and though dictated by the best intentions to benefit the public as well as offenders, is not to be commended.' In 1894, the Court underwent a change of heart and in *S. v. Crook, supra,* termed the practice of suspending sentences 'very salutary' and thus marked a turning point in the administration of criminal law."

In the case of *S. v. Schlichter,* 194 N. C., 277, execution of a judgment of from three to five years was suspended on condition that the defendant pay to receivers of a bank the sum of $8,830.00 with interest. This was held to be a valid and not an alternative judgment.

In *Myers v. Barnhardt,* 202 N. C., 49 (1932), it was said that a judgment that defendant be fined and imprisoned, but that he be released upon the payment of the fine and filing a bond to indemnify prosecuting

witnesses, was not a judgment void for alternativeness. The judgment in the instant case is the same in effect. It is a judgment suspended on the payment of a fine and other reasonable conditions.

This Court held in *S. v. Ray,* 212 N. C., 748 (1938), that execution of a judgment may be suspended on the condition that the defendant pay certain sums for the benefit of a person wronged by him, and upon his failure to pay such money, the sentence may be put into effect. At p. 750, it is said: "The power of the Superior Court to continue the prayer for judgment and to suspend the execution of a judgment, upon conditions, in proper cases and upon terms that are reasonable and just, and thereafter, upon determination that the conditions had been breached, to impose sentence and execute the judgment, has been upheld by this Court in numerous cases. *S. v. Hilton;* 151 N. C., 687, 65 S. E., 1011; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Burnett,* 174 N. C., 796, 93 S. E., 473; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Shepherd,* 187 N. C., 609, 122 S. E., 467; *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37; *Berman v. U. S.,* 82 Law Ed. (U. S.), 212."

The judgment in the *Ray case, supra,* is substantially similar to that in the instant case. Thus, it is evident that the judgment and suspended sentence upon conditions here under consideration are expressly sanctioned by statute and approved by the authorities. The terms of the suspension are certain and definite. If the defendant elects to fulfill the conditions imposed, he may avoid the execution of the sentence; otherwise, under the authorities, it may be put into effect. He is not required to guess at the meaning of the judgment or the conditions. The language is clear and unambiguous; his duty is plain.

The statement contained in the portion of the judgment placing the defendant on probation, to the effect that "execution may be prayed at any time during the period of probation," is not susceptible of the misinterpretation put upon it by the defendant. It very obviously means that execution may be prayed at any time during the period of probation (three years) upon the violation of any of the conditions of the terms of the suspension. The order states that the judgment is suspended and the defendant is placed on probation "subject to the provisions of the laws of this State." The Probation Act plainly provides, in section 4, that "At any time during the period of probation or suspension of sentence, the Court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence." Public Laws of 1937, ch. 132, sec. 4. His Honor was stating the time limit during which the sentence might be put into effect, and was not attempting to place an arbitrary power in the trial court to pray execution regardless of the fulfillment of the conditions.

IV. *The Conditions Upon Which the Judgment on Second Count of the Bill of Indictment is Suspended are Valid.*

A. The Fine of $10,000.00 is a Valid Condition for the Suspension of the Judgment.

The order of the court below suspending the judgment states that as one of the conditions of the suspension and probation the defendant shall: "1. Pay a fine of $10,000.00 and the costs of this action in cash at this term." Very clearly this is one of the permitted conditions for the suspension of the sentence imposed on the second count, and not a part of the punishment for the violation of the slot machine laws. The language of the order and judgment admits of no other interpretation. The power to impose such a condition is specifically granted the trial court by the Probation Act. Section 3 of chapter 132 of the Public Laws of 1937 provides: "The Court shall determine and may impose, by order duly entered, and may at any time modify the conditions of probation and may include among them the following, or any other: That the probationer shall: . . . (naming other conditions) . . . (g) Pay a fine in one or several sums as directed by the Court."

The power to impose a fine under any circumstances does not exist unless the criminal statute under which the judgment is imposed permits it, as was pointed out in *S. v. Wilson,* 216 N. C., 130. The court in the instant case had plenary power to enforce both the sentence of imprisonment and the fine. As has been pointed out, the second count in the bill of indictment was drawn under, and couched in, the language of chapter 138 of the Public Laws of 1923. This slot machine statute provides in section 5, that the violation of its provisions "shall be a misdemeanor punishable by a fine or imprisonment, or, in the discretion of the Court, by both." (Public Laws of 1923, ch. 138, sec. 5.) However, the *Wilson case, supra,* is distinguishable from the instant case in that the judgment therein did not place the defendant on probation and thereby bring the judgment within the empowering provisions of the Probation Act. Therefore, the question of whether or not the trial court had the power to impose a fine under the penal provisions of the slot machine law pleaded guilty to, is rendered purely academic in the instant case. The court had the power to impose a fine as a condition of the probation under the probation laws of this State, aside from the criminal statute violated, and it has exercised that power.

Since it is plain, therefore, that a fine could be validly imposed, the sole remaining question to be considered as to the fine, is: Is it proper and reasonable, so that it does not impinge Article I, section 14, of the Constitution, which states: "Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

It is well settled in this jurisdiction that where the Legislature prescribes a fine or other punishment for a crime, and does not fix definite limits as to type or amount, the amount to be imposed rests in the discre-

tion of the trial court judge, and will not be reviewed or disturbed unless there is a plain and palpable violation of the above constitutional provision. *S. v. Pettie,* 80 N. C., 367; *S. v. Farrington,* 141 N. C., 844; *S. v. Dowdy,* 145 N. C., 432; *S. v. Woodlief,* 172 N. C., 885; *S. v. Jones,* 181 N. C., 543.

This rule is plainly stated by *Walker, J.,* in *S. v. Woodlief, supra,* at p. 891, as follows: "We are not prepared to say that this Court cannot review the judge, as to the *quantum* of punishment, even where there is a limit set to the exercise of his discretion; but if the right exists, we will not do so except in a plain case, where the violation of the constitutional provision is palpable, and not involved in any doubt—a case not likely to occur."

In the case of *S. v. Pettie, supra, Dillard, J.,* speaking for the Court and quoting from *S. v. Driver,* 78 N. C., 423, stated, at p. 369: "What the precise limit is, cannot be prescribed. The Constitution does not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge, who inflicts it under the circumstances of each case, and it ought not to be interfered with except when the above is palpable." And further, at page 370: "In respect to the kind and *quantum* of the punishment, regard is always to be had to the circumstances as developed on the trial; and the judge presiding has the opportunity to know the case better than an appellate tribunal."

The fine imposed in the instant case, as a condition for probation, was amply justified by the circumstances in the case and did not amount to an abuse of discretion. It is not open to question but that the trial court may take into consideration any and all aggravating circumstances in any particular instance, and such may form the background or basis for the punishment of a particular offender. It goes without saying such may be considered in deciding what is to be the limit or amount of a condition for the suspension of a judgment. *S. v. Reid,* 106 N. C., 714; Coats, "Punishment for Crime in North Carolina," 17 N. C. Law Rev., 224.

The circumstances taken into consideration by the judge below to form the basis for imposing such a fine are ample and sufficient to support his discretion as to the amount. There was evidence taken at the trial tending to show that the defendant is (or was) the largest distributor of slot machines in the country; that the defendant was the owner of a slot machine empire which grossed in a three-year period over $4,500,000.00; that actually while he was in court being tried for a violation of the slot machine laws of the State, and claiming that he had conscientiously endeavored to operate only legal machines, "one-armed bandits" paying off in cold cash were being operated by him in Fayetteville, North Carolina—manifestly, a shining example of inconsistency, and that he has

engaged in the slot machine business for a number of years, and has paid fines in some twenty to twenty-one cases; and that he has paid in a three-year period legal fees amounting to $73,000.00. The defendant testified in open court that he operated at least 40% of the slot machines being operated in the State.

The argument advanced by the counsel for the defendant in his brief, that Calcutt is unable to pay such a fine because of the amount of income tax paid, becomes unconvincing in view of the testimony of the defendant's own auditor. He testified that "The question of legal expense charged in there covers lawyers' fees, *Court costs and things like that,* in all of the five or six States." A fine in the amount of that imposed in the instant case would be charged off as a legal expense and thereby escape income taxation; a small item of expense in a business of the magnitude of the defendant.

That the court took these circumstances into consideration in formulating the judgment appears from his finding. In the first paragraph of the judgment it is stated: "The defendant, Joseph Calcutt, trading as the Vending Machine Company heretofore at this term of Court, entered a plea of guilty to the Bill of Indictment in this case, which Bill of Indictment has two counts, and it further appearing to the Court that the defendant admitted in open Court that he was the sole owner of the Vending Machine Company of Fayetteville, which is his trade name, and that he has been in the slot machine business for years and has paid fines in some 20 to 21 cases, and it further appearing to the Court from his income tax returns that his business during 1937, 1938, and 1939, has grossed in excess of Four and a half Million Dollars, and that during said time he has paid over $73,000.00 for legal expense, and it further appearing to the Court that while he was being tried yesterday 'one-armed bandits,' *i.e.,* slot machines that paid off money, belonging to him, were being operated in Fayetteville, North Carolina."

Thus, it would seem that the fine imposed as a condition in the case at bar is amply justified, and in view of the circumstances appearing as a matter of record, is very reasonable. Nor is the Court without authority for requiring the payment of a sum as large as the fine complained of.

In *S. v. Schlichter,* 194 N. C., 277, the defendant was required, upon conviction of violating the banking laws, to pay to the receiver of the bank $8,830.00 with interest, in addition to $12,000 already paid, as a condition for the suspension of a three-year sentence. This condition was approved in the opinion. See, also, *S. v. Miller,* 94 N. C., 902. The fine imposed on the defendant should not be disturbed.

B. Conditions 2, 3 and 6 Are Valid.

Conditions 2, 3 and 6, requiring the defendant to dispose of all machines violating the slot machine laws of the State, and requiring the

defendant to refrain from violating the slot machine law or any State law, are undeniably valid. The defendant concedes them to be so in his brief. They are sanctioned by the decisions of this Court. *S. v. Wilson*, 216 N. C., 130, and cases there cited. N. C. Code, 1939 (Michie), sec. 4435.

C. Condition 4 Is Not Invalid.

The fourth condition upon which the execution of the sentence on the second count was suspended was that during the period of suspension the defendant should refrain from political activity. This condition is assailed on the ground that it has the effect of disfranchising the defendant for the commission of a misdemeanor. It should be noted that it is not expressly provided that the defendant shall not vote.

The evidence showed that the defendant, during the 1937 and 1939 Sessions of the General Assembly, had maintained headquarters in Raleigh, had hired agents to engage in extensive lobbying, and had spent large sums of money to influence legislation relating to slot machines. In imposing the condition against political activity, the judge undoubtedly had this evidence in mind. It was natural that he should consider it harmful to the best interests of the State for a confessed law-breaker, who, by admission of wholesale violations of the slot machine laws, had evidenced his contempt for decent law enforcement, to be permitted, while at liberty under suspended sentence, to continue to bring such political and economic pressure to bear against the Legislature and other branches of government in the State. The condition, in view of this background, may reasonably be construed as prohibiting lobbying, campaigning, and other active political conduct rather than as taking away the right to vote. Upon the facts of this case, such a condition is not unreasonable.

As between a construction of the condition which would render it unreasonable and invalid and one which renders it reasonable and sustainable, it is submitted that the latter should prevail.

D. Conditions 5, 7 and 8 Are Valid.

The fanciful argument advanced by the defendant that because, as required by condition No. 5, he must "at all times remain under the supervision of the probation officer assigned to Wake County, and shall not request that this case be assigned to Cumberland County," he must remain in Wake County during his three-year period of probation, finds no support in reason or logic. This condition requires only that he remain under the supervision of the Wake County officer, not that he must reside in Wake County. He was tried in Wake County and it is a reasonable requirement that he be under the supervision of the officer assigned to this county. Actually, there is not a probation officer in each county. Each probation officer is assigned to a district comprised of several counties, and at present the probation officer assigned to the

district including Wake County lives in Durham. The Probation Act of 1937, Public Laws of 1937, chapter 132, section 8, provides, in part: "That probation officers appointed under this Act shall be assigned to serve in such courts or districts or otherwise as the Director of Probation may determine." There is no probation officer assigned to Cumberland County alone, and who resides therein. It is very probable that at the times the defendant would have to report to the officer in Wake County, such officer would be nearer to him than the officer assigned to the district including Cumberland County. Certainly the requirement that he be assigned to a probation officer in one county does not mean that he must reside in that county.

The requirement of condition No. 7 that the defendant "shall not change his address or leave the county or State without first securing the permission of his probation officer," also shows that it was not intended that he move his residence to Wake County and remain therein for the period of probation. The record shows that his Honor knew that the defendant's address at the time he was sentenced was in Fayetteville in Cumberland County. Hence the command that he not change his address or leave the county obviously and unquestionably referred to Cumberland County, and shows that it was not intended that he reside in Wake County. The power to require him to remain therein as a condition of the suspension is expressly conferred by subsection (f) of chapter 132 of the Public Laws of 1937. It states that the individual on probation may be required to "remain within a specified area." This is a very reasonable requirement and is not questioned by the defendant. He also concedes that if he is not required to remain in Wake County, condition No. 8 would be proper.

Condition No. 9, "That he shall appear with the probation officer of this county during the said three years of probation in open court at the May and November Term of this Court, and if he cannot satisfy the presiding Judge of those terms that he has not violated the conditions or any of them upon which said two years road sentence is suspended, capias and mittimus shall issue at term and he shall serve said two years road sentence in full," is a reasonable requirement, imposed to guarantee fulfillment of the other conditions. A similar requirement has already been passed on and approved by the court. *S. v. Hardin,* 183 N. C., 815.

If the court should find that one or more of the conditions upon which the sentence was suspended in this case are invalid, such finding would not invalidate either the sentence or the other valid conditions. They would still stand and be enforceable against the defendant. *S. v. Hatley,* 110 N. C., 522.

V. The Order Modifying the Judgment Did Not Constitute Error.

Under the decisions of this Court, it is within the discretion of the trial judge to modify a sentence imposed in a criminal case prior to the expiration of the term of court at which it is imposed if the sentence has not been executed. *S. v. Warren,* 92 N. C., 825 (827). The power to modify in such cases includes the power to increase the sentence. *S. v. McLamb,* 203 N. C., 442; *S. v. Godwin,* 210 N. C., 447.

Devin, J., speaking for the Court in *S. v. Godwin, supra,* at p. 449, said: "Until the expiration of the term the orders and judgments of the court are *in fieri,* and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice, and to this end he may hear further evidence, in open court, both as to the facts of the case and as to the character and conduct of the defendant. *In re Brittain,* 93 N. C., 587; *S. v. Manly,* 95 N. C., 661; *S. v. Stevens,* 146 N. C., 679; *Cook v. Telegraph Co.,* 150 N. C., 428."

In the instant case, the judge made certain modifications in the sentence before the expiration of the term of court. The judgment as modified is one which conforms to the law of this State. The reasons for the modification do not appear of record, and it does not appear that defendant requested that they be stated. Where the record is silent, the defendant cannot reasonably expect this Court to attribute to the judge a frivolous motive such as to make his action constitute an abuse of discretion.

VI. It Follows That Defendant's Constitutional Objections Are Without Merit and the Judgment Is Valid.

The brief of the Attorney-General and his assistants is a masterpiece as to the law applicable to the facts in this case. It is carefully and thoroughly prepared and, after a painstaking examination of its contents, I quote from it copiously to sustain the judgment on the first count and to this dissent to the majority opinion on the second count.

The facts in the case show a persistent and lawless course on the part of the defendant, for years. He has defied the laws of his State, he has paid fines in the courts of his State for some 20 to 21 times and thereafter continued his lawless acts. It is to the everlasting credit of the solicitor that he brought the defendant to the bar of justice, before a judge who had the courage and backbone to so sentence the defendant (who pleaded guilty) and render a judgment which should break up this lawless slot machine and gambling business, corrupting the morals of the people, and which has brought millions of dollars to defendant through his nefarious business. His gross business during 1937, 1938 and 1939 was in excess of four and a half million dollars, and during that time he paid $73,000.00 in legal expenses. He employed lobbyists to persuade the General Assembly to enact laws to allow him to operate these slot

machines—"one-armed bandits." The record discloses that even a newspaper lauded his gambling machines and others used laudatory language.

These "one-armed bandits" even menace the courts. In a letter that Judge Henry L. Stevens, Jr., wrote to the State Bureau of Investigations, dated 8 March, 1940, is the following, in part: "I am now presiding in the Ninth Judicial District and there is a situation existing in Fayetteville that demands the help of your Bureau if we are to *prevent the flaunting of law and order.* There is an element in Cumberland County that has the idea that the laws of North Carolina do not apply to that; Slot Machines run wide open day and night and *they vary from simple pin board to the 'one-armed bandit.'* There are several emporiums in which there are located fifty to one hundred machines. Conditions are such and the views of the law enforcement agencies in that county are such that nothing will be done without the aid of your department. . . . I earnestly request that you assign a number of men to go into Fayetteville about three weeks from now with sufficient cash money to play the machines, having the men keep up with the amount spent in such manner which of course can be returned when the machines are confiscated, and round up every one of them and I will spend the week running the slot machine gamblers out of Fayetteville. *They have no regard for judges or officers of the law,* and I really want help but you must bear in mind if this information gets out in any manner or way, in the meantime, to any resident or official of that county that *your efforts will prove fruitless.*" (Italics mine.)

The judge was mindful of his oath. Const. of N. C., Art. VI, sec. 7: "I do solemnly swear (or affirm) that I will support and maintain the Constitution and laws of the United States, and *the Constitution and laws of North Carolina* not inconsistent therewith, *and that I will faithfully discharge the duties of my office* as (Judge of the Superior Court), so help me, God." (Italics mine.) In consequence of this militant and praiseworthy letter, the agents of the North Carolina Bureau of Investigations made a thorough investigation. The report was headed: "Synopsis: The general conditions regarding slot machines and gambling in and around Fayetteville, N. C."

In their report it shows their visit to dozens of places where these "one-armed bandits" were operated. They found them in numerous places, and I give the report of one of these: "Visited a roadhouse located on Highway N. C. #301, on the road leading from Fayetteville to Lumberton. While there Agent Zimmerman played one slot machine, Serial No. 434373, winning fifty cents, and spent seventy-five cents. This debt was paid by a white girl behind the counter. As agents had been asked to particularly note the circumstances and conduct of those in and around the station, Agent would like to mention that on this visit

he counted ten women inside of the place and two on the outside talking to men in cars. There were fifteen very rough, tough and shabbily dressed men in and around the roadhouse; one Negro girl behind the counter smoking a cigarette and two men inside completely passed out. All had been drinking heavily and all were using very vile language. Two men were noted using the northeast end of the building, near the highway, as a toilet. While there a couple, man and a girl, were seen to leave the station and enter the back seat of a car parked off to the side and in the dark. . . . While standing in the door in conversation with a man whom Agent did not know, made the statement that he keeps three or four girls around there all the time just so the boys would come around." These roadhouses are in easy access of the soldiers at Fort Bragg.

In *Carpenter, Solicitor, v. Boyles,* who was convicted for running a similar kind of roadhouse, this Court sustained the conviction and said in that case (213 N. C., 432 [450]): "Centuries ago the Almighty entered a judgment, 'destruction by fire,' against two cities in the plain of the Jordan. Today the fire of the law must sometimes be applied by upright citizens to the Sodoms and Gomorrahs that have sprung up along our highways, creating nuisances against public morals. In an age in which the respect for law and order has well-nigh withered away, the power of righteous indignation which springs from deep moral convictions, it is encouraging to find patient and long-forbearing, but upright, citizens aroused against cancerous growths on our social body. They will find the processes of the law ever ready and adequate for such social surgery, all too often necessary to the wholesome health of society."

These places where liquor-drinking, "one-armed bandits," drunkenness and lewdness run riot, not only trap the civilian population, but the soldiers at Fort Bragg, and are a menace to morals and decency. These traps to catch and tempt the unwary are open day and night and Sundays, too, and should be wiped out, or we will go like France.

It appears in the record that after paying licenses to the Revenue Department on a lawful machine, there was a trick device on the machine which enabled the lawful machines to be changed to "one-armed bandits," or illegal slot machines. It is refreshing and heartening to note the persistent efforts with which Judge Stevens, the Attorney-General and his assistants, the solicitor of the district and the judge holding the court below (who imposed the sentence after a plea of guilty), have tried to enforce this law, known as the Flanagan Act. This act was held in full force and effect in *S. v. Abbott, supra* (218 N. C., 470). At p. 480, the Court said: "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* (210 N. C., 406); *Calcutt v. McGeachy,* 213 N. C., 1." Defendant owned and operated a big business, commercialized gambling in unlawful slot machines, which was a source of sure and steady profit.

In 24 Amer. Jurisp., p. 399 (400), it is said: "It is well settled that the police power of the state may be exerted to preserve and protect the public morals. It may regulate or prohibit any practice or business the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it or to encourage idleness instead of habits of industry. Whether gambling, in the various modes in which it is practiced, is demoralizing in its tendencies and, therefore, an evil which the law may rightfully suppress without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure is no longer an open question. Gambling is injurious to the morals and welfare of the people, and it is not only within the scope of the state's police power to suppress gambling in all its forms, but its duty to do so."

In the main opinion it is said: "It seems to have been overlooked on all hands that the privilege of probation, which the court clearly intended to offer the defendant pursuant to ch. 132, Public Laws 1937, is so conditioned as to be inconsistent with his right of appeal." I cannot see how this statement is tenable, under our statutes on the subject. N. C. Code, 1939 (Michie), sec. 4650, is as follows: "In all cases of conviction in the superior court for any criminal offense, the defendant shall have the right to appeal, on giving adequate security to abide the sentence, judgment or decree of the supreme court; and the appeal shall be perfected and the case for the supreme court settled, as provided in civil actions." Sec. 4654, *supra,* is as follows: "In criminal cases an appeal to the supreme court *shall not have the effect of vacating the judgment appealed from,* but upon perfecting the appeal as now required by law, either by giving bond or *in forma pauperis, there shall be a stay of execution during the pendency of the appeal.* The clerk of the superior court shall, as soon as may be after execution is stayed, as provided in this section, notify the attorney-general thereof. Said notice shall give the name of defendant, the crime of which he was convicted, and, if the statutory time for perfecting the appeal has been extended by the agreement, the time of such extension. If for any reason the defendant should wish to withdraw his appeal before the same is docketed in the supreme court, he may go, or be taken before the clerk of the superior court in which he was convicted, and said clerk shall enter such withdrawal upon the record of the case, and notify the sheriff, who shall proceed forthwith to execute the sentence." (Italics mine.)

I think the main opinion makes nugatory and wipes out the above section, which holds the judgment *in fieri* and maintains *in statu quo* the judgment appealed from. I see no conflict in the judgment of the court below with defendant's right of appeal. It is stayed until his appeal is passed on. If defendant intended to take such a position on appeal, he waived it by not bringing it to the attention of the court below when sentenced. If the judgment on appeal is affirmed the original stands. Sec. 4656, *supra,* says: "The clerk of the superior court, in all cases where the judgment has been affirmed (except where the conviction is a capital felony), shall forthwith on receipt of the certificate of the opinion of the supreme court notify the sheriff, who shall proceed to execute the sentence which was appealed from. In criminal cases where the judgment is not affirmed the cases shall be placed upon the docket for trial at the first ensuing term of the court after the receipt of such certificate." I think the law according to the above statutes has been consistently followed from time immemorial.

The majority opinion on this aspect is a new departure and I think contrary to the plain language of the statutes on the subject of appeal and allowed on a record, in which defendant showed defiance to the laws of his country founded on decency and good morals and pleaded guilty for so doing. For 20 to 21 times heretofore he has escaped with a fine, a kind of license to continue his unlawful business. At last, by continuing his nefarious business, which he pleaded guilty of, he came up before a judge that determined to stop this powerful, entrenched lawbreaker. The case goes back for judgment on the second count. I feel assured that the Superior Court judge will not overrule what has been done so well under the circumstances, by the able and courageous Judge R. Hunt Parker, in the court below.

By analogy I quote what is said in *Davis v. Land Bank*, 217 N. C., 145 (149): "It is well established in this jurisdiction that one Superior Court judge may not review the judgment of another Superior Court judge or restrain him from proceeding in a cause in which he has full jurisdiction," citing a wealth of authorities.

In this opinion I have been careful to base what I have written on the facts appearing in the record, and have written at length so that all the facts may be known in the persistent lawlessness of the defendant (as shown by the record), in violation of the laws of this State. I think from the facts as they appear of record that the fine of $10,000.00, and the conditions of the suspended judgment on the second count, are reasonable. If the defendant pays the fine and performs the conditions of the suspended sentence, he is relieved of future punishment. It is the certainty and not the severity of punishment that makes for law and order and orderly government.

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."

DEVIN, J., concurring in part and dissenting in part: I concur in what is said in the majority opinion as to the judgment on the first count in the bill of indictment, but cannot agree with the disposition of the case on the second count.

I do not understand that the power of a Superior Court judge in suspending execution of a prison sentence and placing the defendant on probation is limited by all the provisions of the Act of 1937, ch. 132. It is in that act expressly stated "the court shall determine and may impose the conditions of probation." Certainly, the judge has the discretion and a wide latitude in imposing such conditions as from his knowledge of the case he deems just and proper in the administration of the criminal law.

Nor do I think the judgment imposing conditions upon which execution of prison sentence is to be suspended is inconsistent with the defendant's right of appeal. The judgment is entered with the knowledge that in North Carolina a defendant, whether he pleads guilty or is convicted, has unlimited right of appeal from a final judgment, though the judge may not expect him to avail himself of that right in a particular case. Every final judgment "in all cases" is subject to right of appeal, whether entered in open court or by notice subsequent to the adjournment of the court. I do not understand that there is anything in the probation statutes, or rules of law with respect to suspended sentences, which requires the defendant to waive his right of appeal. With great respect for the opinion of the majority, I cannot bring myself to agree with the view that the fact of an appeal from a judgment imposing a definite sentence, with provision that execution of the sentence be suspended upon certain conditions, in any event should be given the effect of vacating the judgment. I do not think it should be held that the mere exception to and appeal from such a judgment would destroy its vitality for the reason assigned in the opinion that the time fixed for the performance of certain conditions would pass before the appeal could be heard, thus preventing an election by the defendant, or that a serious conflict would be thereby caused, or that there is an inconsistency between the form of the judgment and the defendant's right of appeal therefrom.

When an appeal has been properly perfected, the effect is that all proceedings of whatever nature in the Superior Court are suspended until the appeal has been disposed of by the Supreme Court or withdrawn, and when the judgment is affirmed and the certificate of the Clerk of the

Supreme Court sent down, the judgment and orders of the Superior Court then become again in force with the same vigor as if there had been no interruption by the appeal. The dates fixed in the original judgment for the performance of certain conditions upon which suspension of execution is made to depend would be referred to the next term after the case gets back in the Superior Court. This is clearly the rationale of the statute (C. S., 4654) and the decisions of this Court (*S. v. Casey,* 201 N. C., 185, 159 S. E., 337). And if that rule has not been fully established, this Court has the right, in the exercise of its constitutional power, to "issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts," to hold that, in determining the date on which a thing shall be done under a judgment appealed from, the time consumed by the appeal shall not be counted. I think there is ample provision for this in the statute, but, if not, the Court should establish this fair and reasonable rule, rather than set aside the judgment on the ground of conflict.

The appeal from the judgment presents for review the validity of the conditions upon which execution of the sentence in this case is suspended.

The defendant has a right to know now by the decision of this Court whether or not he shall be required, as the alternative of a two years' prison sentence, to comply with each condition imposed in the judgment. Certainly, he should not be required to elect between a road sentence and a condition which is impossible, unreasonable, or which unnecessarily infringes his personal rights not forfeited by his confession of guilt as charged. While the majority opinion, in view of the disposition of the case, did not decide this question, I take the occasion to express my personal views thereon.

The payment of a fine of $10,000, under the facts found by the court, may not be held unreasonable. A contribution to the school fund in that amount may not be held impossible or even burdensome considering the extent of the unlawful business in which defendant has been engaged. The requirements that he shall dispose of unlawful slot machines, that he shall not violate the slot machine law, or any other State law, and that he shall permit the probation officer to visit his home, may not be held unreasonable or improper. That he shall appear in court from time to time is in accord with the usual practice in suspended judgment cases.

The compulsory requirement that he shall not change his address or leave the county or State without first securing permission, or request that the case be transferred to another county, or that he shall not "have anything to do with any politics" in the State would seem to impose restrictions upon the exercise of rights of personal liberty which he has not forfeited by pleading guilty of a misdemeanor.

While the defendant is not entitled to a declaratory judgment (*Calcutt v. McGeachy*, 213 N. C., 1, 195 S. E., 49), by his plea of guilty and exception to the terms of the judgment, it seems he would be entitled to have this Court rule on the points thus properly presented so that he may make his election whether to comply with the valid conditions imposed or serve the prison sentence. I think some of the conditions as stated in the judgment on the second count should be modified in the respects herein pointed out, and that except as modified the judgment of the able and conscientious judge, who heard the case below, should be affirmed.

SEAWELL, J., joins in this opinion.

STATE OF NORTH CAROLINA EX REL. UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA v. NATIONAL LIFE INSURANCE COMPANY.

(Filed 21 May, 1941.)

1. **Master and Servant § 56—The State unemployment compensation tax need not conform strictly to the tax levied by the Federal Government.**

It is not required that there be strict uniformity in the incidents of the unemployment compensation tax levied by the State and Federal laws, the enactment by the State not being under compulsion but being voluntary under the inducements of a recognized social necessity and the offer of a gift by the Federal Government in aid of the enterprise, and there is sufficient co-ordination between the Federal and State laws if there is within the State sufficient reciprocity between the employment upon which the tax is levied and those who receive its benefits.

2. **Same—**

The Federal contribution in aid of unemployment compensation insurance is in the nature of a gift, since the employment tax collected by the Federal Government could be expended by it for any legitimate Federal purpose, or the contribution could be made by the Federal Government from any other source of taxation.

3. **Master and Servant § 58—Employments taxable under Compensation Act are to be determined by its definitions and not definitions of common law.**

Employments taxable under the State Unemployment Compensation Act are not confined to the common law relationship of master and servant, but the Legislature, under its power to determine employments which shall be subject to the tax, has, by the definitions contained in the act and the administrational procedure set up therein for determining whether an employment is subject to the act, sec. 19 (g), enlarged the coverage of the act beyond the common law definition of master and servant, and the scope of the act must be determined upon the facts of each particular case.

4. Same—Control exercised by insurance company over State and local agents held such as to bring their employment within the provisions of the Unemployment Compensation Act.

The findings of fact, to which no exception was taken, established that defendant insurance company paid the license of its State agent and exercised control and supervision over him in the prosecution of the business and also in his selection of local agents, and paid the license of the local agents, and that it also exercised control and supervision over the local agents in the performance of their duties in prosecuting defendant's business. *Held:* Under the terms of the contract between the State agent and defendant, and the contracts between the local agents and the State agent, over which defendant exercised control and supervision, and also because of the control and supervision which insurance companies must exercise over their agents in discharging their obligations to the public, the State agent is an employee within the meaning of the Unemployment Compensation Act, and the employment by him of local agents is made by him in his capacity as such employee, and the employment of the State and local agents is an employment within the meaning of the Unemployment Compensation Act, and is taxable thereunder.

APPEAL by defendant from *Harris, J.,* at September, 1940, Civil Term, of WAKE. Affirmed.

This is an appeal by the National Life Insurance Company and C. C. Wimbish, general agent for the National Life Insurance Company, from a judgment of the Superior Court affirming an order of the Unemployment Compensation Commission which, upon certain findings of fact and conclusions of law, imposed a tax of contribution on the defendant with respect to the employment of certain individuals. Upon appeal from the Unemployment Compensation Commission to the Superior Court, a jury trial was waived.

The facts in the case are succinctly stated in the opinion of the Commission and its findings of fact and conclusions of law as follows:

"*FINDINGS OF FACT.* That on or about the 10th day of January, 1933, the National Life Insurance Company, through its proper officers, executed a general agency contract with Mr. Chas. C. Wimbish, of Greensboro, North Carolina, effective as of the first day of February, 1933, being marked EXHIBIT 1; that in said contract the company appointed the said C. C. Wimbish General Agent with authority, powers and duties and subject to the terms and conditions and regulations, and the said General Agent accepted such appointment and employment, and agreed to develop and manage the general agency for the company and perform such duties in connection therewith as may be properly required of him; that in said contract the General Agent was authorized to employ sub-agents subject to the approval of the company and to employ such other assistants as were reasonably required to efficiently operate the general agency; the contracts with sub-agents are required to be in

writing and the company is entitled to be furnished copies thereof for its information at the time of the making of said contract; the contract with the General Agent further provides: 'he will act exclusively for the company; he will devote his entire time and energy to the service of the company; he and his agents and employees will faithfully perform all duties pertaining to his appointment; he will endeavor in all things to promote and further the company's interest; he will work for no other life insurance company during the continuance of the contract, but nothing herein contained shall prevent him from taking an application to another company if such application shall have been first declined by the company or if the applicant is already insured by the company for the full amount carried by it on a single life at the applicant's age; he will forward all applications for insurance to the home office of the company for approval or rejection, whether the same are reported on favorably or otherwise by the local medical examiner; he will furnish to the company a bond, satisfactory to it in the sum of $5,000 conditioned upon the faithful performance of the contract and the discharge of all obligations thereunder, but the amount of the bond may be increased from time to time in the discretion of the company.

"It is further found as a fact that he is required to comply with the law in force in the territory to which he is assigned in the transaction of the business of the company. He is authorized to receive money due or to become due in payment of premium, interest or other indebtedness to the company only on delivery of one of the company's insurance or annuity contracts or in exchange for the receipt of the company. He is not permitted, as General Agent, to extend credit with regard to premiums or otherwise, but if he does so on his own responsibility he will be responsible therefor and is required to account for the same as cash in his next succeeding report. All monies, securities or other property received or collected by him for the company are to be held by him as trust funds and he is required to report upon and properly transfer the same to the company in accordance with its instructions whether received by him personally or through any of his assistants, agents, partners or other persons employed or appointed by him. He is required to keep an account of the company's business according to its rules and instructions and his account must show all transactions by prompt and accurate entries.

"The Commission further finds that the said General Agent is required, as the company may prescribe, to transmit, by blanks furnished for that purpose, complete reports of all collections made and of all business done since the last preceding report and therewith to remit to the company the balance due to it at such time, day or days, of each week as the company desires. He must also furnish such other reports as the company may require and must return to the company in accordance with the com-

pany's rules all policies and receipts for unpaid premiums and interest charges not delivered in accordance with its regulations.

"It is found that the company agreed that it would pay all state and local taxes, license taxes and medical fees incurred in the business. It will pay as full compensation for his services certain commissions provided for in said contracts plus all salaries beginning February 1, 1933, and ending January 31, 1935, in lieu of one-third of renewal commissions on all business written under this contract at the rate of $500 per month payable at the end of each month and the General Agent is required to devote a substantial part of his time to the development and building of the agency. In addition to certain commissions and salary aforesaid and as set forth in the contract the general agent was also to receive certain renewal commissions. Under the contract the company may require the General Agent to collect premiums on insurance written by other general agencies of the company for which no collection fee is allowed and the General Agent is not permitted to make any charge for general expenses or other services except pursuant to a written agreement between him and the company. The company agreed to pay as its share of agency expense not to exceed $300 per month plus 15% of paid first payments not in excess of $18,000 excluding premiums paid to other companies for re-insurance, single premiums not exceeding all annual premiums for the same form of insurance, term prefix premiums, and annuities. Such payments were to be continued on this basis until the first day of February, 1935, providing this contract continued in force until that time. All books, documents, vouchers, letters and all other property and papers connected with the business transacted under the agreement aforesaid is the property of the company and were to be open to inspection at all times by its officers or other representatives and in event of termination of the contract are to be turned over to the company or its duly authorized representative on demand. The territory of the General Agent is limited, as set forth in the contract herein referred to. The General Agent is authorized under the contract to establish and conduct branch offices within the territory assigned to him. This contract known as EXHIBIT 1, may be terminated by either party giving to the other thirty days notice in writing to that effect. The Commission finds that the General Agent's contract with the company was amended January 1, 1939, with reference to commission schedule as shown on the contract known as EXHIBIT 2, and again amended on the 8th day of March, 1933, as shown by Exhibit 3, said amendment provided that thereafter the General Agent became the State Agent in lieu of the title General Agent. Certain changes were made in agency expenses as provided therein and the amended contract extended the territory to the entire State of North Carolina. The original contract was again amended August

31, 1933, effective August 1, 1933, to provide for certain agency expenses and additional remuneration as set forth in EXHIBIT 4. It was again amended as shown by EXHIBIT 5, with reference to the agency expenses, travel, supervisory expenses and certain changes in remuneration for the General Agent and for certain advances by the General Agent to the agents as set out in EXHIBIT 5. It was again amended as to the same items by agreement dated August 29, 1936, effective as of the first day of September, 1936, and again on September 27, 1938, effective as of October 1, 1938, as shown by EXHIBITS 6 and 7 regarding remunerations, agency expense, etc.

"It is further found that EXHIBIT 8, dated the 24th day of May, being a contract between Chas. C. Wimbish of Greensboro, General Agent, and George W. Perrett of Greensboro, is a typical contract in effect in North Carolina. It provided for the employment of the agent to solicit applications for life insurance and annuity contracts in the National Life Insurance Company and to collect such premiums as may be committed to him. It is found as a fact that agents operating under contracts similar to the exhibit are required to devote their time and energy to the business by faithful performance of the duties and services in strict accordance with instructions received from time to time from the General Agent and in accordance with the rules of the company and it is agreed that they are not to engage in any other business. They must solicit effectively for policies or contracts to be issued by the National Life Insurance Company although they are not prevented from taking an application to other companies if such application is first declined by the National Life Insurance Company or if the applicant is already insured by the National Life Insurance Company for the full amount carried by it on a single life at the applicant's age. The agents are to account for all money or securities received or collected for or on account of the General Agent as trust funds and cannot use such funds for any purpose whatever, but they are required properly to report upon and transfer the same to the General Agent in accordance with his instructions. They must furnish the General Agent a bond satisfactory to him in a sum of money conditioned upon the faithful performance of their contracts and the discharge of all the obligations thereunder and the bond may be increased from time to time in the discretion of the General Agent. The agents were to receive money for and on account of the General Agent which is due or to become due in payment of premiums, interest or other indebtedness to the company, but only on delivery of one of the company's insurance or annuity contracts or in exchange for the receipt of the company. They are required to transmit at such times as may be required a complete report of all collections made and of the business done since the last succeeding report and to remit to the General

Agent the balance due to him. They must make any reports that are required by the General Agent and they are to receive certain commissions as provided in the contracts herein referred to for their services. The agreements with the General Agent terminate upon the termination of the general agency contract with the National Life Insurance Company. The contracts, however, provide that in case of termination of the contract between the General Agent and the National Life Insurance Company, the agents shall continue to solicit effectively for insurance contracts to be issued by the National Life Insurance Company. The agents' contracts embraced stated territories and may be terminated by either party by giving the other thirty days notice in writing to that effect.

"It is further found as a fact that C. C. Wimbish, General Agent aforesaid, is a General Agent for the Provident Life & Accident Insurance Company of Chattanooga, Tennessee, in both its life, accident and health departments, General Agent for the St. Paul Mercury Indemnity Company, State Agent for the Provident Accident Insurance Company of New York, District Agent for the Provident Accident Insurance Company of New York, District Agent for the Lincoln Life Insurance Company of Fort Wayne, Indiana, Local Agent for the John Hancock Mutual Life Insurance Company, for the Connecticut Mutual Life Insurance Company, for the Pennsylvania Casualty Company, for the Dixie Fire Insurance Company, for the Globe and Rutger Life Insurance Company, for the Mercury Fire Insurance Company and the Paul Revere Fire Insurance Company, the Hartford Steam Boiler and the National Casualty Company of Detroit, Michigan; that the said C. C. Wimbish has offices in the City of Greensboro, North Carolina, in the building known and named as the Security Bank Building, upon which offices the said C. C. Wimbish pays the rent. It is further found from the evidence that the agents operating under contracts like the contract designated EXHIBIT 2 (the Perrett contract) have contracts with other companies represented by C. C. Wimbish, as General Agent, District Agent, and State Agent; that since February 1, 1938, the said C. C. Wimbish, General Agent aforesaid, has not received any salary from the National Life Insurance Company; that since February 1, 1938, he has been compensated on a percentage of premium basis; that the five employees in the office of the General Agent in Greensboro are paid by C. C. Wimbish, General Agent; that the company, except as herein stated, does not exercise any control over the said C. C. Wimbish, General Agent, as to where he shall work and when he shall work and how he shall perform his services as General Agent except in the collection of premiums and in accounting to the National Life Insurance Company of the collection made by him; that the company does, however, reserve the right to con-

trol the agent as to how he shall perform his services and also reserves the right to say where he shall work and reserves the right also to require his full-time services. It is found that the agents are compensated purely on a percentage of the premiums on the business which they write and it is the only compensation they receive; that C. C. Wimbish loans them money in order to set them up in business; that the National Life Insurance Company makes certain contributions toward agency expenses out of first year premiums and renewal premiums; that some of the commissioned agents also engage in other business such as operating peanut stands and selling other forms of insurance and some of them have other incomes other than that derived from insurance sold by them for the National Life Insurance Company; that the company operates not only through a general agency system in the State of North Carolina, but also upon a district manager or district agency plan, however, the district managers or district agents enter into the same contract as the regular commission agents enter into; that such district agents or district managers operate the territory of Greensboro and vicinity, Wilmington and vicinity, Charlotte and vicinity, Leaksville and vicinity, Carthage and vicinity, and a number of other smaller towns in North Carolina; that each agent has a certain territory or district assigned to him, however, with the privilege of writing insurance anywhere in the State of North Carolina; that a small amount is provided for the office of the district manager out of which he pays his office rent and where an agent is unable to get started without some financial assistance the General Agent advances him money against his agency contract.

"The Commission further finds that all contracts with soliciting agents are between the General Agent and the Soliciting Agent, but, however, a copy of all these contracts is forwarded to the National Life Insurance Company for its information and a record of the agent is also forwarded to the Company and these agents, upon being appointed by the General Agent, are approved by the National Life Insurance Company; that the National Life Insurance Company issued a manual of instructions to its agents in January, 1935, and that the said agents are bound by the instructions as set out therein so far as the handling of the business of the National Life Insurance Company is concerned except where it is orally changed or changed by letter; that in the Charlotte, North Carolina, office, provision is made for an increased rate of commissions in order to provide for office expenses such as telephone, etc., which is listed in the name of National Life Insurance Company and the name 'National Life Insurance Company' appears on the door or near the office; that where advertising is done by the district agent or district manager, the General Agent pays part and the Company pays a part and sometimes the district manager and district agent pays a part of

the expenses where it is done for the National Life Insurance Company; that there are approximately forty agents operating in North Carolina under contracts similar to that of Mr. Perrett; that there are a number of district or local agents who employ helpers in their offices; that the National Life Insurance Company is engaged in the life insurance business and the sale of annuities and also has an investment department with a number of employees operating in the State of North Carolina; that all notices of premiums due are sent from the home office of the National Life Insurance Company at Montpelier, Vermont, and a copy of the receipt is sent to the office of the General Agent; that any of the soliciting agents are empowered and authorized to collect and turn over the premium to the proper collection office wherever it may be whether or not they solicited and wrote the policy in the first place; these agents are permitted to accept checks payable to the National Life Insurance Company in payment of premiums and are permitted to accept cash in payment of premiums and as a part of the services to the policyholders they are asked to make collection of premiums and in case a claim is filed by a beneficiary, they usually request that they be permitted to handle the claim for the possible service it would give and for the possible business as a result of it; that the company or the General Agent does not require it, but the company or the General Agent sends the claim form to the agent to enable the agent to get the best results; that the agents are required to maintain a close contact with the policyholders and see that any National Life Insurance Company policyholders receive the finest service that it is possible for the company to grant; that the soliciting agents and general agents are engaged in the usual trade, occupation or business of the National Life Insurance Company; that some of the correspondence of the National Life Insurance Company is conducted directly with the agents who are under contract with the General Agent; that the form of contract in effect with the General Agent and soliciting agents in North Carolina is also prepared by the National Life Insurance Company; that the agents are required under the manual of instructions to devote their entire time and attention to the interests of the National Life Insurance Company unless their contracts expressly modify this feature and to refrain from work for any other person, firm, or corporation and are required to conduct it in accordance with the rules of the company as instructed to do from time to time from the home office of the General Agent; that all taxes, licenses and fees are paid by the company from the home office.

"CONCLUSIONS OF LAW

"From the foregoing findings of fact the Commission holds as a matter of law:

"1. That the National Life Insurance Company is engaged in employment with respect to said General Agent and said soliciting agents within the meaning of the Unemployment Compensation Law of the State of North Carolina, and has been so engaged during the calendar years 1936, 1937 and 1938.

"2. That the National Life Insurance Company of Montpelier, Vermont, is an employing unit within the meaning of the Unemployment Compensation Law of North Carolina.

"3. That the National Life Insurance Company of Montpelier, Vermont, is an employer within the meaning of the Unemployment Compensation Law of North Carolina.

"4. That C. C. Wimbish, General Agent, and soliciting agents in North Carolina, operating under contracts similar to the contract of George W. Perrett, are engaged in employment and performing services for the National Life Insurance Company of Montpelier, Vermont.

"5. That with respect to said General Agent, the National Life Insurance Company of Montpelier, Vermont, has not shown to the satisfaction of the Commission the requirements of Section 19 (g) (6) (A) (B) and (C) of the Unemployment Compensation Law as follows:

"'(6) Services performed by an individual for remuneration shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the commission that: (A) such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and (B) such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (C) such individual is customarily engaged in an independently established trade, occupation, profession or business.'

"6. That the individuals operating and soliciting insurance under contracts similar to the contract of George W. Perrett, herein referred to as EXHIBIT 8, in the performance of their services under the terms of the contract and in fact do not meet the conditions set forth in section (19) (g) (A) (B) and (C) of the Unemployment Compensation Law, and the company has not shown these requirements to our satisfaction, and that the said agents are therefore engaged in employment within the meaning of said section of the Unemployment Compensation Law.

"7. That the National Life Insurance Company of Montpelier, Vermont, is accordingly liable for the payment of contributions with respect to the wages or remuneration received by said General Agent and soliciting agents and paid by the company with respect to services performed for employment under these contracts."

The Commission concludes with the following order:

"NOW, THEREFORE, it is ordered by the Commission that the National Life Insurance Company pay contributions required by Section 7 of the Unemployment Compensation Law based upon the wages or commissions as therein defined paid to such General Agent and soliciting agents within the calendar years 1937, 1938 and 1939, and thereafter until such coverage is terminated under the provisions of the Unemployment Compensation Law of North Carolina, and make such reports as are required by said law and the regulations issued pursuant thereto.

"This the 22nd day of August, 1939.

"UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA, BY: C. G. POWELL, CHAIRMAN.

"ATTEST: E. W. PRICE, SECRETARY."

The defendant excepted to the conclusions of law made by the Commission upon its findings of fact and to the order holding it liable for contributions for the years 1937, 1938 and 1939, with respect to the individuals mentioned in the findings of fact and requiring reports to be made as set out in the statute. The exceptions and the grounds thereof were filed in writing and, upon considering them, the Commission entered an order overruling them all. Whereupon, the defendant appealed to the Superior Court, where the conclusions of law and order of the Commission upon the facts found by them were approved. Thereupon, defendant appealed to this Court, assigning errors.

Smith, Wharton & Jordan for defendant, appellant.

Adrian J. Newton, Ralph Moody, and W. D. Holoman for plaintiff, appellee.

SEAWELL, J. The question presented to us for decision is whether the National Life Insurance Company, the appellant, is, upon the record in the case, liable for unemployment compensation contributions demanded by the plaintiff. That question, however, is resolved into several minor inquiries which require attention.

The appellant concedes that unless the case at bar can be distinguished from *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co.*, 215 N. C., 479, 2 S. E. (2d), 584, the decision of the Commission must be upheld or the cited case must be overruled before relief can be extended to it. While it contends that there are factual differences which distinguish the *Jefferson Standard case* from the case at bar, the main argument is addressed to the propriety of overruling that case, reviving the controversy over coverage of the act and the meaning of taxable employment within its intent. The questions presented are identical, the arguments are the same. The only difference

seems to be in the more formidable array of definitions and illustrations collected on the subject. These are focused on the proposition that "employer and employee" and "master and servant" are interchangeable terms, and that the Unemployment Compensation Act is confined to the strict master-servant relation, as understood at common law, in its demands for contributions.

The fact that the State has engaged in a coöperative scheme with the Federal Government does not necessarily imply strict uniformity in the incidence of the tax levied by the State and Federal laws. Conformity in that respect is not a condition of approval of the State law under Title III, section 303, of the Federal Act. The so-called "draft bills" present the minimum of requirement for such approval, but it is made clear that the several states are under no compulsion as to "just what type of legislation it desires and how it shall be drafted." In fact, under the decision of the highest Federal Court, the State was not coerced or compelled to pass any law at all, but presumably was induced to do so both because of a recognized social necessity, the offer of the Government of a gift in aid of the enterprise, and the advantage of credit on payment of the Federal taxes. *Steward Machine Co. v. Davis*, 301 U. S., 548; *Carmichael v. Southern Oil Co.*, 301 U. S., 495. The Federal contribution is in the nature of a gift in aid which might as well have come from any other source of taxation and, correlatively, the employment tax collected by the Federal Government might have been expended for any other legitimate Federal purpose. Considering the social security intended to be afforded by the State and Federal laws in their joint adventure, these laws are sufficiently coördinated, provided there is within the State sufficient reciprocity between the employment upon which the tax is levied and those who receive its benfits. In the construction which the Court has given the State Unemployment Compensation Law, this balance is not disturbed.

Once having entered the field of social security of this kind, the State Legislature was not required to conform in every respect to the national ideology on the subject as expressed in the Acts of Congress.

The exhaustive opinion in *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co., supra*, commits this Court to the view that our Unemployment Compensation Act, which is similar to those of the majority of the states where this form of social security obtains, does not confine taxable employment to the relation of master and servant. "The scope and purpose of the present act are exceptional in breadth. The draftsmanship of the definition section, which gives flesh and sinew to the whole, shows a careful, considered and deliberate purpose to leap many legal barriers which would halt less ambitious enactments. As far as language will permit it, the act evinces a studied

effort to sweep beyond and to include, by re-definition, many individuals who would have been otherwise excluded from the benefits of the act by the former concepts of master and servant and principal and agent as recognized at common law." *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co., supra; Industrial Commission of Colorado v. Northwestern Mutual Life Ins. Co.,* 88 P. (2d), 560; *McDermott v. State,* 82 P. (2d), 568; *Globe Grain & Milling Co. v. Industrial Commission,* 91 P. (2d), 512; *In re Mid-American Co.,* 31 Fed. Supp., 601 (citing *Jefferson Standard case, supra*); *National Tunnel & Mines Co. v. The Industrial Commission of Utah,* 102 P. (2d), 508; *In the matter of Schomp and Board of Review v. The Fuller Brush Company* (N. J.), 12 Atl. (2d), 702; *Equitable Life Insurance Company of Iowa v. Industrial Commission of Colorado,* 95 P. (2d), 4.

How much wider may be its scope is a matter to be determined in the particular case.

We think it is self-evident that the Legislature, for the purpose of levying the tax, may determine what shall constitute employment subject to taxation, without regard to existing definitions or categories. *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co., supra; Industrial Commission of Colorado v. Northwestern Mutual Life Ins. Co., supra; Supply Co. v. Maxwell,* 212 N. C., 624, 626, 194 S. E., 117; *Fox v. Standard Oil Co.,* 294 U. S., 87. It may do this by direct definition or, perhaps with greater exactness, by providing a reasonable administrational procedure by which such employment may be defined or ascertained. In its opinion above cited this Court has expressed the opinion that such provision is found in the section devoted to definitions, as section 19 (g) (6) (A), (B), and (C).

This provision is not regarded as a mere method of distinguishing between the master-servant relation and independent contract, on the theory that choice must be confined to one or the other of these alternatives, but taken with the other subdivisions of the section, particularly 19 (g), as defining or circumscribing the employment with respect to which contribution is demanded. As thus ascertained, employment will include the master-servant relation and frequently more. This should occasion no surprise. It is the privilege of the Legislature, by a more particular expression of its policy than may be found in the preamble, to find room and reason for extending the relief which the law is intended to afford into this field.

On facts similar in significance to those determining the issue in *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co., supra,* the application of the statutory method in the case at bar resulted in the inclusion of appellant as employer with respect to its state or general agent and the local agents appointed under the type of

contract exhibited in the record. We think the law was properly applied and cannot find that the Commission acted unreasonably or arbitrarily or without giving proper consideration to the evidence. There is no exception to the findings of fact.

It has not been our purpose to elaborate or enlarge on the opinion in *Unemployment Compensation Commission v. Jefferson Standard Life Ins. Co., supra,* in which the Court decided the points at issue in the case at bar contrarily to the view contended for by appellant. We only restate its conclusions in view of the renewed assault. Many courts have relied on its authority and adopted its views. We see no reason to overrule a decision so carefully considered and so recently made.

2. The appellant points to certain facts in the record upon which it is thought the *Jefferson Standard case, supra,* should be distinguished from the case at bar, and questions its applicability. Mainly, the contention is that appellant operates under the general agency plan, while the *Jefferson Standard Life Insurance Company,* operates under the managerial plan, under which closer connection between the company and its agents is maintained. The difference seems to us unsubstantial in view of the facts.

The licenses of State Agents are procured or paid for by the company. The State Agent, Wimbish, under the findings of the Commission—justified as we think by the evidence—is an employee within the meaning of the statute—not an independent contractor—and his power to appoint sub-agents is referable to this relation. Such a position in the organization would scarcely serve to insulate the local agents from some measure of control on the part of the superior. Looking at the contracts and the set-up under them, and the functions performed by the local agents which render service in the production of business, there is seen a substantial line of authority reaching back to the company, with more than a suggestion of the important element of control in certain aspects of the service. Effective control over the personnel of local agencies is retained. The company approves or disapproves, as it will, of the appointment of these local agents. Also, the manner in which they conduct the business is of concern to the Insurance Company. In dealing with the public they are required to conform to the manual of instructions issued by the company. The nature of the service rendered by these agents is hardly consistent with the ordinary conception of independent contract.

Not resting decision alone upon this point, but referring to the relations which are ordinarily understood to exist between an insurance company and the public, necessarily affected by the activities and behavior of its agents, doubtless it seemed to the Commission inconsistent with the commendable restrictions in that regard appearing in the evidence that an insurance company, the nature of whose business with the public

involves relations of trust and confidence, should view itself as operating on the principle of independent contract—both powerless and indifferent with regard to the details of service, or the manner in which the local "agent" got the business. On the contrary, the contracts and the manner in which performance is required show that the Company had a proper conception of its duty to the public and undertook to maintain the high standard of ethical service required in discharging it by retaining adequate control over these details. Such control is evidenced with respect to these persons who have been found to be "soliciting agents and general agents engaged in the usual trade, occupation, or business of the National Life Insurance Company" without exception to the finding.

There are no exceptions to the findings of fact by the Commission. Section 6 (i); section 11 (m) (n). In our opinion, they are supported by the evidence, and the conclusions of law based thereupon are justified.

The judgment of the court below sustaining them is

Affirmed.

JUNIUS McKAY v. G. F. BULLARD.

(Filed 21 May, 1941.)

1. Appeal and Error § 1—

The jurisdiction of the Supreme Court on appeal is confined to questions of law or legal inference. Constitution of North Carolina, Art. IV, sec. 8.

2. Trial § 22b—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom.

3. Ejectment § 14—

The exhibition of a map as substantive evidence cannot be held for error when it appears that several witnesses identified the map as an official map of the city in which the *locus in quo* is situate.

4. Appeal and Error § 39—

An exception to the admission of certain testimony of a witness cannot be sustained when it appears that other witnesses were permitted to testify to the same effect without objection.

5. Evidence § 21—

Whether counsel shall be permitted to ask a leading question is within the discretion of the trial judge, and the exercise of such discretion will not be reviewed on appeal.

6. Ejectment § 14—

Parol evidence is competent to identify the land claimed and to fit it to the description contained in the instrument. N. C. Code, 1783.

7. Ejectment § 13—

In this action in ejectment the charge of the court *is held* to have correctly placed the burden on plaintiff to prove his title and also to prove wrongful possession by defendant, defendant having denied title and wrongful possession.

8. Ejectment § 14—

A charge that listing the *locus in quo* for taxation is not evidence of ownership but is merely a circumstance which might be considered by the jury along with other evidence, is without error.

9. Appeal and Error § 6g—

Appellant's exception to the charge on an issue which was answered by the jury in appellant's favor will not be considered, since appellant could not be prejudiced thereby.

10. Trial § 40—

Appellant cannot complain of the form of an issue submitted when he did not except to the issue or tender other issues.

11. Trial § 32—

A party desiring more particular instructions on a subordinate feature of the case must aptly tender request therefor. Michie's Code, 565.

APPEAL by defendant from *Hamilton, Special Judge,* at November Special Term, 1940, of BLADEN. No error.

This is an action in ejectment, brought by plaintiff against defendant for a certain piece of land in Elizabethtown, Bladen County, N. C. The plaintiff alleges in his complaint: "That the plaintiff and Mary Williams, Hattie Reaves, Monelle Byrd, Daisy Villet, George Davis, and two children of Maggie McKay, deceased, whose names are not known to the plaintiff, are the owners in fee simple and entitled to the immediate possession of that certain lot, tract or parcel of land in the Town of Elizabethtown, Bladen County, North Carolina, described and defined as follows, towit": (describing same).

The succinct facts are as follows: The plaintiff claims the ownership of a lot in the town of Elizabethtown on the northeast corner of the intersection of Queen and Poplar Streets. Deed was made to plaintiff's father, Richard L. McKay, by James M. White, of date 21 May, 1873, and recorded in Book 4, page 225, Bladen County registry. Plaintiff and co-tenants inherited the lands from Richard L. McKay and conveyed by deed to J. L. Wright 12 August, 1926. J. L. Wright reconveyed to Junius McKay 10 May, 1933. This action was brought 7 June, 1933. This lot is referred to in the evidence as the upper part of the Richard L. McKay land. Richard L. McKay also owned an adjoining lot for which he had no deed. This is known as the lower half acre of the Richard L. McKay land and was conveyed by Junius McKay to J. M. Clark; thence by James H. Clark, Commissioner, to G. F. Bullard. The

contention of the defendant is that the conveyance to him of the lower lot covers the lot of the plaintiff described in the complaint. The defendant, appellant, undertakes to identify the lower one-half acre of land as that conveyed to him by James H. Clark, Commissioner, to cover the upper one-half acre lot described.

Defendant denied the allegations of the complaint and set up seven years adverse possession, under N. C. Code, 1939 (Michie), sec. 428, and alleged: "That this defendant and those under whom he claims have been in the open, notorious, adverse, and continuous possession of the lands set out and described in the complaint under color of title and under known and visible lines and boundaries for a period of more than seven years next before the institution of this action, and any action or cause of action which the plaintiff has, or might have had, which is denied, the same arose and accrued more than seven years next before the institution of this action and is, therefore, barred by the seven year statute of limitations, in such cases made and provided, which said seven year statute of limitations the defendant especially pleads in bar to any recovery of the plaintiff, or anyone else in the action." The other statutes as a bar are not germane on the facts developed in the case on the trial.

The judgment of the court below was as follows:

"This cause being heard before His Honor, Luther Hamilton, Judge presiding, and a jury, at the November, 1940, Special Term of Superior Court of Bladen County, and the issue submitted to the jury and the answers thereto are as follows:

"1. Are the plaintiffs the owners of, and entitled to the possession of the lands and premises described in the complaint? Ans.: 'Yes.'

"2. Does the defendant unlawfully withhold the possession of said lands from the plaintiff? Ans.: 'Yes.'

"3. Is the plaintiff's cause of action barred by the seven-year statute of limitations? Ans.: 'No.'

"4. What damage, if any, is the plaintiff and his co-tenants entitled to recover? Ans.: 'None.'

"It is now, upon motion of Herbert McClammy, Ordered, Adjudged and Decreed that the plaintiff, Junius McKay, and his tenants in common, are the owners in fee simple of and are entitled to the immediate possession of that said lot, tract or parcel of land in the Town of Elizabethtown, Bladen County, North Carolina, described and defined as follaws:, to-wit:

"In the Town of Elizabethtown, beginning at the Northeast corner of the intersection of Queen and Poplar Streets, and running thence as the East line of Poplar Street, now North 22¼ East 3.18 chains (210 ft.) to an iron rod a corner of lot; thence as a line of that lot, now South

67¾ degrees East 3.18 chains (210 ft.) across the end of the Cape Fear River Bridge fill to an iron rod now large tree, a corner of.....lot; thence a line of that lot, South 22¼ West 3.18 chains to a piece of piping in the North line of Queen Street; thence as a line North 67¾ degrees West 3.18 chains to the beginning. The above description is intended to convey all the lands owned by the heirs at law of Richard McKay, deceased, in the Town of Elizabethtown, N. C.

"It is Further Ordered, Adjudged and Decreed that the plaintiff have and recover of the defendant the cost of this action, and that the Clerk of this Court issue a writ of assistance demanding him to eject the defendant and all persons claiming by, through and under him, and to put the plaintiff and his tenants in common in possession of the above-described lands and premises. Luther Hamilton, Judge Presiding."

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

Hector H. Clark and Edward B. Clark for plaintiff.
A. M. Moore for defendant.

CLARKSON, J. This case was before this Court at the Fall Term, 1934, when a new trial was granted the defendant. *McKay v. Bullard,* 207 N. C., 628.

From a careful reading of the record it seems that the case was mainly one of fact for the jury to determine. This Court, on appeal, can consider only questions of "law or legal inference." Const. of N. C., Art. IV, sec. 8.

At the close of plaintiff's evidence and at the close of all the evidence, the defendant in the court below moved for judgment as of nonsuit. N. C. Code, *supra, sec.* 567. Technically the motion at the close of all the evidence did not comply with the statute, *supra,* as it appears of record "The defendant moved for judgment"; yet we consider it as of nonsuit—which motions we think cannot be sustained. It is well settled that upon a motion for nonsuit, the evidence is to be taken in the light most favorable to the plaintiff and he is entitled to the benefits of every reasonable intendment upon the evidence and reasonable inference to be drawn therefrom.

The plaintiff offered in evidence deed from James M. White to Richard L. McKay, dated 21 May, 1873, duly recorded; the testimony of Junius McKay, the plaintiff and son of Richard L. McKay, who inherited the property; deed from Junius McKay and others to J. L. Wright, 12 August, 1926, duly recorded, and deed from J. L. Wright and others to Junius McKay, dated 10 May, 1933, duly recorded. The McKay land

described in the complaint was identified by the plaintiff, Junius McKay, Tom Sheridan and others, and the use to which it was made when it was in the possession of Junius McKay and others under whom he claims. *Owens v. Lumber Co.*, 210 N. C., 504 (508).

The defendant contends that the plaintiff should not have been permitted to introduce a map of the town of Elizabethtown in evidence, it not being shown to be true, accurate or authentic. We cannot so hold on the evidence in this case.

John D. Beatty testified for plaintiff: "I survey and am an attorney at law; I am familiar with this map. I recognize it as the official map of the old part of the town of the Town of Elizabethtown (Defendant objected, overruled). I locate property and lots in the Town of Elizabethtown with reference to this map as being official. I have regarded this as an official map of the town for the past 15 years. Property owners of the Town of Elizabethtown recognize this as the official map of the old part of the town."

Newton Robinson testified for plaintiff: "I have known this plat or map for a long time. I would say about 25 years. It is generally accepted as an official map. Poplar Street is still used. There are houses on the lower part of Poplar Street. It is in pretty bad shape but it is still used. There has not been any change of Poplar Street to my knowledge. I have known it all my life—I am 47."

Defendant made no exception to the evidence of this witness, Newton Robinson. M. O. Ballard, a witness for defendant, testified in part: "I got my information from this map and the deed for it. . . . I surveyed No. 50 from the map, recorded in the records of Bladen County. I read the R. L. McKay deed. I had it in my hands. No, I don't know that you are in possession of that deed of R. L. McKay, I got the data from the records. I located the R. L. McKay property by that deed and had the old map there to check it from."

In Handbook of Evidence for North Carolina (Lockhart), pp. 26-27, part sec. 29, is the following: "Maps are divided into two classes, public and private. Public maps, such as official maps of cities, etc., may be exhibited as substantive evidence, it seems, but private maps and diagrams cannot be exhibited as substantive evidence, though they may be admitted and shown to the jury to elucidate and explain the testimony of witnesses, and photographs may be admitted and shown to the jury, if the photographs are properly taken and identified. Medical and other scientific books cannot be shown to the jury; neither can the law reports, nor can a written contract." *Lamb v. Copeland*, 158 N. C., 136; *Corpening v. Westall*, 167 N. C., 684; *Thompson v. Buchanan*, 195 N. C., 155.

M. O. Ballard used the map. In *Thompson v. Buchanan*, 198 N. C., 278 (281), we find: "It has been repeatedly held by this Court that if

testimony of the same nature as that objected to, is given by a witness in other portions of his testimony, without objection, that the exception thereto cannot be sustained. *Marshall v. Telephone Co.*, 181 N. C., 410, 107 S. E., 498; *Shelton v. R. R.*, 193 N. C., 670, 139 S. E., 232; *Tilghman v. Hancock*, 196 N. C., 780, 147 S. E., 300."

The defendant contends: That plaintiff was allowed to ask leading questions over his objection on direct examination and to cross-examine his own witnesses. On the record the contention cannot be sustained.

In *S. v. Buck*, 191 N. C., 528, it is written: "Whether counsel shall be permitted to ask a leading question, is within the discretion of the trial judge. The exercise of such discretion will not be reviewed on appeal. *Crenshaw v. Johnson*, 120 N. C., 270; *Bank v. Carr*, 130 N. C., 479; *S. v. Cobb*, 164 N. C., 419; *Howell v. Solomon*, 167 N. C., 588."

The defendant contends that "The Court erred in permitting the plaintiff to testify as to the lands sold to Marvin Clark, when the deed was the best evidence, and his answer was in contradiction of the deed itself, and to vary a written instrument. There is presumption of regularity in judicial sales." *Johnson v. Sink*, 217 N. C., 702. We cannot so hold on the facts in this record. There is no question raised as to the regularity of the judicial sale of James H. Clark, Commissioner, to G. F. Bullard. Parol evidence was admitted and properly so, to identify the land which is claimed by the plaintiff and the adjoining land which the plaintiff sold to Mr. Marvin Clark. Identification of two lots is the bone of contention in this case. Parol evidence may be used to identify the lands sued for, and fit it to the description contained in the paper writing offered as evidence of title. In this case it was necessary to identify the land described in the complaint and to distinguish it from that land conveyed to the defendant by an indefinite description in the deeds under which the defendant claims.

N. C. Code, *supra*, section 1783, is as follows: "In all actions for the possession of or title to any real estate parol testimony may be introduced to identify the land sued for, and fit it to the description contained in the paper-writing offered as evidence of title or of the right of possession, and if from this evidence the jury is satisfied that the land in question is the identical land intended to be conveyed by the parties to such paper-writing, then such paper-writing shall be deemed and taken to be sufficient in law to pass such title to or interest in such paper-writing is in all other respects sufficient to pass such title or interest."

The law in reference to burden of proof in an action for ejectment is to the effect that where defendants in ejectment denied allegations that plaintiff was owner of land, and that defendants were in wrongful possession and wrongfully withheld possession from plaintiff, burden as to

issues of plaintiff's title and possession by defendants was upon plaintiff. *Mortgage Co. v. Barco,* 218 N. C., 154.

We think the charge covered this aspect. The court charged: "Now, the Court instructs you, Gentlemen, that listing property for taxes is not evidence of ownership by anybody. It is a circumstance, however, which may be considered along with other evidence, but the bare fact that one lists property for taxes does not mean that that one is the owner and it is not at all conclusive of ownership and is not evidence of ownership, it is merely a circumstance that might be considered along with other matters." To the foregoing charge defendant excepted. We see no error in this portion of the charge. *Belk v. Belk,* 175 N. C., 69 (75). This charge is correct, but it is no evidence of value. *Bunn v. Harris,* 216 N. C., 366 (373).

The defendant contended that the court erred in charging the jury, "You should find to be a fair and reasonable value of the property during the time that it has been wrongfully detained or withheld by the defendant Bullard, whatever you find to be a fair allowance or reasonable rental during the time he has had it in possession." We see no error in this charge, if there was, it is not prejudicial, as the jury answered "None." "4. What damage, if any, is the plaintiff and his co-tenants entitled to recover? Ans.: None."

The court below charged correctly as to the 7-year statute of adverse possession, under sec. 428, *supra,* applied the law applicable to the facts, and charged on that issue the burden was on plaintiff, who contended that the deed of Commissioner Clark never conveyed the land in controversy. The defendant contends that the court below directed a verdict in favor of plaintiff as to the 2nd issue in the charge. In respect to this issue we see no error. The defendant did not except to the issue and submit other issues. Nor did defendant request prayers for instruction on the subordinate features of the charge. N. C. Code, *supra,* sec. 565.

There were other contentions made by defendant which we do not think material or prejudicial. The jury on the facts decided against defendant, and we can see on the record no prejudicial or reversible error.

No error.

CARRIE LEWIS SIMPSON v. THE AMERICAN OIL COMPANY AND BOON-ISELEY DRUG COMPANY.

(Filed 21 May, 1941.)

1. Appeal and Error § 49a—

When it is determined on appeal that plaintiff's evidence is sufficient to go to the jury upon the question of defendant's breach of express war-

ranty and damages, the decision becomes the law of the case and defendants' motion to nonsuit upon the issue in the subsequent trial upon substantially the same evidence, is properly refused.

2. Evidence § 26—Plaintiff may introduce in evidence results of approved medical tests to show that substance was poisonous.

Plaintiff instituted this action alleging that she was poisoned by an insecticide which she used in accordance with the directions printed on the bottle by defendant manufacturer. The label on the bottle warranted that the insecticide was not poisonous to humans when used as directed. Plaintiff's expert witness, a skin specialist, testified that he performed approved medical tests with the insecticide on plaintiff and others, and was permitted to testify as to the results of the tests. Defendant objected to the testimony on the ground that the conditions under which the tests were made differed greatly from those existing when plaintiff used the insecticide as a spray in accordance with the directions on the bottle. *Held:* The purpose of the testimony was not to show that plaintiff could have been poisoned by the insecticide when used according to directions, but to show that the insecticide was poisonous to humans in violation of the warranty, and was competent for this purpose.

3. Evidence § 30b—

Where a photograph is offered in evidence, testimony of witnesses as to its correctness as a true representation of the condition of plaintiff's body at the time in question, made during the preliminary identification and authentication of the photograph, the photograph not being exhibited to the jury at that time, cannot be held violative of the rule that photographs are competent solely for the purpose of illustrating the testimony of witnesses, the use of the photograph in question being so limited by the trial court after it had been admitted in evidence.

4. Appeal and Error § 39—

The exclusion of testimony of a witness cannot be held prejudicial when it does not appear from the record what the answer of the witness would have been had he been permitted to testify.

5. Evidence § 24—

Plaintiff instituted this action alleging that she was poisoned by an insecticide manufactured by defendant. *Held:* Testimony of defendants' expert witness as to whether he knew of any other person other than plaintiff who was allergic to the insecticide is properly excluded when the extent of witness' experience with other persons who had been in contact with the insecticide is not made to appear, since in the absence of such predicate the testimony has no materiality upon the question of the prevalence or rarity of allergy to the insecticide.

6. Trial § 48—

Plaintiff, while testifying as a witness in her own behalf, collapsed on the witness stand. There was nothing to indicate bad faith on the part of the plaintiff or fraudulent imposition on the court. *Held:* Defendants' motion for a mistrial on the ground that the disturbance might have aroused the sympathy of the jury was addressed to the discretion of the trial court.

7. Election of Remedies § 1—

Plaintiff instituted this action alleging that she was poisoned by an insecticide manufactured by defendant. Defendant requested that plaintiff be forced to elect between negligence and breach of warranty, and, subsequently, between breach of implied warranty and breach of express warranty. It appeared that the court, in the formation of the issues and in its charge, eliminated from the case all questions of negligence and implied warranty. *Held:* Defendant could not have been prejudiced by the refusal of his motions that plaintiff be required to elect between the remedies.

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

BARNHILL, J., not sitting.

APPEAL by defendant, The American Oil Company, from *Bone, J.*, at January Civil Term, 1941, of WAKE.

Defendant's appeal is from an adverse verdict and judgment thereupon in a case involving substantially the following features:

The defendant, American Oil Company, manufactures and puts on the market in sealed containers an insecticide under the trade name of "Amox," the ingredients or chemical constituents of which were not revealed at the trial.

On the package the defendant caused to be printed the following:

"For Best Results use *Amox* hand sprayer
How to Use
Amox
The 100% Active Insecticide.

"Amox is made for the purpose of killing insects, it is not poisonous to human beings but is sure death to insects.

"Amox Liquid Spray is non-poisonous to human beings, but is not suited for internal use. Do not spray on food or plants.

"Note with all its insect killing power Amox may be used freely indoors."

Plaintiff purchased such a package from a retailer into whose hands it had come from the defendant by purchase and sale in the regular course of trade. Using it as directed, she sprayed her apartment very thoroughly with the insecticide. It was a hot day, plaintiff was scantily dressed, and some of the spray got upon her person. Itching, burning, and, in time, blisters and boils ensued, covering, as the pathological condition progressed, her face and all of the upper part of her body in patches. She suffered pain, debilitation, nervous breakdown, loss of sleep, and great distress of mind during the progress of the trouble, which lasted for several months, with frequent recurrence in severity. Plaintiff complains of permanent injury.

Dr. Bolus, an expert on skin diseases, who treated her throughout the whole period, stated after diagnoses and tests that her condition was due to poisoning by the "Amox." He further stated that he made a test on five persons—nurses and interns—as well as on Mrs. Simpson, and that the manifestations were the same except in degree—and that "Amox" was poisonous to them all. He gave his opinion, however, as he had upon the former trial, that Mrs. Simpson's condition was due to her allergy or hypersensitivity to "Amox," or to something in its composition, and that a normal person might use it as directed without harmful effect. He described the patch test which he used on the prison group and on Mrs. Simpson as an approved test.

Dr. Carpenter, a witness for defendant, was of the opinion, on tests made by him upon a group of students, that "Amox" was not harmful to human beings.

Answering a hypothetical question addressed to him in behalf of the plaintiff, he gave it as his opinion that if the jury should find from the evidence in the case that "Amox" caused itching, burning, boils, blisters, and sores that existed over a period of months, he would have to say that "Amox" was a poisonous substance.

Defendant noted several exceptions to the admission and exclusion of evidence, which will be referred to in the opinion.

The evidence is very voluminous and, for reasons stated in the opinion, it is not considered necessary to reprint it in full.

The plaintiff brought action for damages, basing it both upon negligence and breach of warranty.

Upon the trial, the defendant in apt time requested the court to compel the plaintiff to elect between negligence and warranty as her ground of recovery and made a similar motion with respect to an election between implied warranty and express warranty, both of which motions were declined, the judge declaring that he would confine the recovery to the breach of warranty as would appear from his charge and the issues submitted.

The following issues were submitted:

"1. Was the plaintiff injured by a breach of warranty made by the defendant with respect to the use of 'Amox' as alleged in the complaint? Answer: 'Yes.'

"2. What amount of damages, if any, is the plaintiff entitled to recover from the defendant? Answer: '$7,000.00.'"

The jury answered both issues against the defendant and judgment was rendered thereupon. Defendant appealed, assigning errors.

John W. Hinsdale and Douglass & Douglass for plaintiff, appellee.

Ruark & Ruark for defendant, American Oil Company, appellant.

SEAWELL, J. This case was before the Court at the Spring Term, 1940, and is reported as *Simpson v. Oil Co.*, 217 N. C., 542. A new trial was granted because of error in the instructions to the jury involving the possibility of a double recovery on both theories presented in the pleadings—negligence and breach of warranty. The only important difference between that case and the one at bar is that in the second trial the questions of negligence and implied warranty were eliminated altogether and the case went to the jury solely upon the express warranty printed upon the sealed package in which the commodity was purchased.

The question most seriously urged upon us here—that of nonsuit upon the evidence—was decided upon the same state of facts upon the first appeal. The evidence in the trial now under review is substantially the same as that of the former trial—careful comparison fails to disclose any distinction or difference helpful to the defendant.

The Court passed upon the matter in the former appeal adversely to the defendant, and the decision stands as the law of the case. *Harrington v. Rawls,* 136 N. C., 65, 48 S. E., 571; *Johnson v. Ins. Co., ante,* 202; *Fisher v. Fisher,* 218 N. C., 42.

Exceptions were taken to the admission in evidence of tests made by Dr. Bolus—a skin specialist—on a group of five nurses and interns at State's Prison, and on the plaintiff. It is pointed out that these tests were made under conditions differing greatly from those under which the plaintiff came in contact with the spray, with alleged disastrous consequences. But the objection seems to be based on a misunderstanding of the nature and purpose of the test. It was not made to demonstrate experimentally whether Mrs. Simpson could have sustained the serious injury she complains of by coming in contact with Amox in the manner she describes—which seems to have been the purpose of the experiment performed by Dr. Carpenter. The purpose was to ascertain whether Amox had noxious qualities that were poisonous to humans. The test was pronounced by defendant's expert witness to be an approved test. It was also made on plaintiff in a precisely similar manner, and comparisons noted. Of the propriety of the test and its admission in evidence, we have no doubt. Its weight and significance upon the point at issue were matters which might well have been argued to the jury.

A photograph was exhibited in explanation of the testimony regarding the physical condition and appearance of the plaintiff. We cannot see that the rules of evidence were violated or the function of this aid to testimony abused. The incident brought under review goes no further than a preliminary identification of the photograph and testimony as to its correctness as a true representation of the condition of plaintiff's body at the time of the treatment. The record does not show that the photograph was shown to the jury at the time. This preliminary authentica-

tion was necessary to authorize even its limited use. *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743; *Hampton v. R. R.,* 120 N. C., 534, 27 S. E., 96; *Alberti v. New York L. E. & W. R. Co.,* 118 N. Y., 77, 23 N. E., 35. The thin line between the substantive and auxiliary function of photographs in this connection which this Court seems still, on occasion, to regard, was not violated. Later, upon further identification, it was used to illustrate the testimony, the trial judge limiting it to that purpose. *Kelly v. Granite Co.,* 200 N. C., 326, 156 S. E., 517; *Hoyle v. Hickory,* 167 N. C., 619, 83 S. E., 738; *Davis v. R. R.,* 136 N. C., 115, 48 S. E., 591; *Lupton v. Express Co.,* 169 N. C., 671, 86 S. E., 614; *Eaker v. Shoe Co.,* 199 N. C., 379, 154 S. E., 667.

Dr. Carpenter, expert witness for defendant, was asked on redirect examination: "Is or is not Mrs. Simpson the only person that you know of that is allergic to Amox, if she is allergic to it?" This was ruled out and defendant excepted. The record does not disclose what the witness would have said, if permitted. But it was also incompetent for another reason: There is no evidence, except that contained in the test made by the witness, as to the extent of the doctor's experience with persons who have been in contact with Amox. We have the numerator but no denominator. It affords no evidence of the degree of prevalence or rarity of the condition of allergy with reference to Amox.

During the trial the plaintiff collapsed while giving her testimony, necessitating an adjournment and recess of the court. The defendant moved for a mistrial, based upon this incident and the possibility that it might have aroused the sympathy of the jury. The request was declined, and the trial proceeded. There was nothing to indicate bad faith on the part of the plaintiff, or fraudulent imposition on the court. The collapse was consistent with what witnesses, and the plaintiff herself, had said about her condition. Granting or refusing the motion, upon the facts presented, was well within the discretion of the trial judge, and we do not find that he abused that discretion. *In re Hinton,* 180 N. C., 206, 104 S. E., 341; *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838; *Gregory v. Perry,* 126 Me., 99, 136 A., 354; *Graves v. Rivers,* 3 Ga. App., 510; *Edwards v. Metropolitan Street Railway Co.,* 143 Miss. App., 371, 127 S. W., 605; *Hudson v. Devlin,* 28 Ga. App., 458, 111 S. E., 693; *Hunt v. Van,* 61 Mont., 395, 202 P., 513.

At the conclusion of the evidence the defendant asked the court to compel the plaintiff to elect between negligence and breach of warranty as ground of recovery; and in a second request demanded an election between express warranty and implied warranty. The judge declined both motions and announced that he would submit the case to the jury only upon the "breach of warranty, as will be shown by the issues and the charge of the Court."

Simpson v. Oil Co., supra, did not foreclose the plaintiff from pro-

ceeding either upon the warranty or for the negligence. It was based upon the principle that upon the issues framed the plaintiff might have made a double recovery for the same injury. It is not necessary for us to decide here whether two causes of action—one in negligence and one upon the warranty—are so incompatible as to require an election. It may be that there are circumstances in which it would be more important to ascertain whether a real wrong and injury were inflicted upon the plaintiff than it would be to assign a technical name to the fault in the transaction. But it is certain that the implications of negligence and those of warranty ordinarily are so different that negligence cases dealing with proximate cause are misleading as applied to warranty, and the analogy between the consequences of negligence and the consequences of a breach of contract may not be pushed too far.

It may be inferred from the decision in *Simpson v. Oil Co., supra,* that the matter printed upon the package of Amox constituted an express warranty to the ultimate user that the Amox used, in the manner directed, was harmless to human beings, and of such other conditions as were within reasonable interpretation of the language employed; and that one suffering injury by reason of a breach of such warranty might recover damages. And that the warranty was still effectual, although the product was bought from a middleman. That question, therefore, is no longer open.

The case appears to have been tried with a strict regard to the decision in this case on the former appeal; but in the second trial, from which the present appeal arose, all questions as to negligence or as to implied contract were eliminated from the case—negligence by direct ruling of the judge and the submission of an issue on warranty only, and implied warranty by confining the consideration of the jury to the warranty written upon the package. The defendant is, therefore, unable to gain any advantage by injecting either subject into the discussion. If there had been a danger, which the record does not indicate, that the jury might have taken into consideration an implied warranty, the defendant might have made it the subject of a precautionary prayer for instructions to the jury in that respect. We doubt, however, that under the evidence the court would have been justified in giving any instruction on the point.

The exceptions were ably and forcefully argued, but we do not find in them sufficient cause for disturbing the result of the trial.

We find

No error.

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

BARNHILL, J., not sitting.

NORA BLACKBURN v. SOVEREIGN CAMP OF THE WOODMEN OF THE WORLD (Now WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY).

(Filed 21 May, 1941.)

1. Insurance § 37—

In an action on a certificate of insurance in a mutual benefit society, proof of the death of the member, presentation of the certificate by the beneficiary, and denial of liability by the society, establishes a *prima facie* case, and the society has the burden of proof upon its contention of mutual mistake or other defenses.

2. Insurance § 30e—Defendant insurance society held estopped to deny that expiration date of term insurance was other than therein stipulated.

Under an agreement of the parties that the court should find the facts, the court found that defendant benefit society issued to a member a ten-year term benefit certificate, which certificate provided that within eight years it might be exchanged for a ten-year term insurance certificate, that within the eight-year period the member exchanged his certificate under this provision, and was issued a ten-year term insurance certificate, which certificate provided that it should be subject to the constitution, laws and by-laws of the society and should be effective until a specified date if the dues were paid thereon. Insured died prior to the expiration of the time specified. Defendant society contended that through mutual mistake the wrong expiration date was inserted in the certificate and that under its laws and by-laws the dues paid were insufficient to entitle the beneficiary to recover. The trial court further found that defendant had in its possession the original certificate at the time it issued the exchange certificate and that it accepted dues on the exchange certificate which paid it until after insured's death, and made no effort to correct the policy or warn the insured or the beneficiary that the certificate failed to speak the truth. *Held:* The findings of fact, supported by the evidence, support the judgment of the court that the beneficiary is entitled to recovery on the certificate.

3. Appeal and Error § 37e—

Where the parties consent that the court hear the evidence and find the facts, the court's findings are as conclusive as the verdict of a jury when they are supported by the evidence.

APPEAL by defendant from *Warlick, J.*, at January Term, 1941, of LINCOLN. Affirmed.

The court below found the facts and made conclusions of law, as follows:

"This cause coming on to be heard before His Honor, Wilson Warlick, Judge, at the January Term Superior Court of Lincoln County, and being heard, the plaintiff being represented in court by Bruce Heafner and A. L. Quickel, Esqs., and the defendant by Henderson & Henderson, attorneys, of Charlotte, N. C., and it appearing to the Court that the

plaintiff and defendant have and do waive a jury trial, and agree that the Court shall find the facts and conclusions of law, after hearing the pleadings and the evidence offered by the plaintiff and the defendant, the Court finds the following facts:

"*Facts:* 1. That the plaintiff is a resident of the County of Lincoln and the State of North Carolina.

"2. That the defendant, Woodmen of the World Life Insurance Society, is the successor of the Sovereign Camp of the Woodmen of the World, and is a fraternal benefit society, incorporated under the laws of the State of Nebraska, with a lodge system, a ritualistic form of work and a representative form of government, without capital stock, and transacts its business without profit and for the sole benefit of its members and their beneficiaries. That it has been licensed to do business in the State of Nebraska since 1891, as a fraternal benefit society, and it has been licensed to do business in the State of North Carolina, as a fraternal benefit society, since June 15, 1899.

"3. That on December 14, 1928, W. L. Wacaser made written application for membership in the defendant society and for the issuance to him of a ten-year term benefit certificate in the sum of $1,000, and consented and agreed that the application and the provisions of the constitution, laws and by-laws of the society then in force, and that might thereafter be adopted, should constitute the basis for and form a part of any beneficiary certificate issued to him by the Sovereign Camp of the Woodmen of the World, now the Woodmen of the World Life Insurance Society.

"4. That on December 31, 1928, the defendant issued to W. L. Wacaser a ten-year term benefit Certificate TE-803472, in the sum of $1,000 in which Vianna Wacaser, wife, was designated as beneficiary. That said certificate sets out, among other things, that it was subject to all conditions therein, and the provisions of the Constitution, Laws and By-Laws of the Society, or which might be thereafter adopted. It further provided that the certificate should cease and all benefits thereunder terminate after the tenth anniversary of the date of the certificate by the Sovereign Officers of the Society, but that the member might at any time within eight years from the date thereof, and prior to attaining the age of sixty years, surrender the certificate and receive in exchange therefor a certificate providing for term insurance for a period of ten years, and providing that the member would be required to pay the rate on the new certificate as fixed for his then attained age.

"5. On February 10, 1932, Mr. Wacaser executed on the back of said certificate a request to have the beneficiary in his certificate changed to Mrs. Nora Blackburn, daughter, and at the same time cancelled and surrendered said certificate as follows:

" 'I, W. L. Wacaser, to whom this certificate was issued, do hereby cancel and surrender this certificate and order that a new one shall be issued and that the benefit shall be of the amount of $1,000, and shall be payable to Mrs. Nora Blackburn, who bears relationship to myself of daughter. Signed at Lincolnton, State of N. C., this 10th day of February, 1932. W. L. Wacaser. Witness: W. M. Yoder.

" 'I certify that Sov. W. L. Wacaser is now in good standing and has complied with the Constitution, Laws and By-Laws of the Society. W. M. Yoder, Clerk Camp No. 45, Woodmen of the World.'

"6. The certificate was received at the office of the Secretary of the defendant on February 17, 1932, with request for change of beneficiary, accompanied by a fee of 25c for said change, as required by the Constitution, laws and by-laws, and the Society on February 19th, 1932, issued to him a new ten-year term certificate in lieu of said original certificate, bearing the same number and in the same amount, but designating Mrs. Nora Blackburn, daughter, as beneficiary. The following was endorsed on the certificate:

" 'Issued in lieu of surrender certificate #TE-803472, issued 12/31/28, and based upon the application for membership, said original certificate being hereby rendered null and void.'

"7. That the monthly rate under the original certificate was $1.78, and the annual rate, $20.50, and that there was no change in the rate made in the second certificate issued in lieu of the original. That the member paid the dues and assessments as set out in the certificate, until November, 1938.

"8. That on November 2, 1938, the President of the defendant society advised W. L. Wacaser by letter that his certificate would expire on December 31, 1938, and would be completely terminated, and at the same time advised him to discontinue his monthly payments after the payment for November, 1938. The member made no further payments on said certificate after the month of November, 1938. That during the month of December, 1938, the beneficiary tendered the same identical premium to Mr. F. P. Bartley, Secretary of the local lodge, Camp 45, and showed him the letter received by the insured of date November 2, 1938, from the Sovereign Camp and signed by D. E. E. Bradshaw, President, and upon said tender being made in December, 1938, the said Clerk of the local camp refused to accept said amount tendered, or any further amount prior to the death of the insured.

"9. That W. L. Wacaser died on January 12, 1939, and that demand has been made for payment of the principal amount of the policy, and that payment has been refused.

"10. That notice of the death of the insured, W. L. Wacaser, was duly given to the Sovereign Camp, as is provided by the Constitution, Laws and By-Laws, and that notice of death was accepted as given.

"11. That the duly designated officials having control over the affairs of the defendant had all the facts and circumstances as evidenced by the exhibits in their possession and control at the time of the issuance of the policy dated February 19, 1932, and marked defendant's Exhibit ..... (Plaintiff's exhibit A).

"12. That the defendant Company, in the face of its issuance of the policy, dated February 19, 1932, by its duly authorized and constituted agents, continued to accept the amounts paid monthly by the beneficiary who had an insurable interest in the life of the deceased; as paid by the beneficiary to the local Clerk of the Camp in Lincolnton, North Carolina, and at no time during the life of the insured, (prior to November 2, 1938), refused any payments to its local Camp representative or made any effort to correct the policy, or to warn the insured, or his beneficiary, that the policy as issued on the 19th of February, 1932, did other than speak the truth. That after the delivery of the letter of November 2, 1938, its local Camp representative, Mr. F. P. Barkley, accepted from the beneficiary (who, through the years, had been making the payments) the payment for the month of November, 1938, which the Court finds as a fact, carried the insurance up to the time of its payment.

"13. That the certificate sued on in this action, according to the terms of the contract itself, would expire as of the 19th day of February, 1942, inclusive.

"WHEREFORE, the Court concludes, as a matter of law, that the contract of insurance dated February 19, 1932, and marked Plaintiff's Exhibit A, is an outstanding enforcible contract on the life of Wm. L. Wacaser, and that the plaintiff, the named beneficiary therein, is entitled to have and recover of the defendant the sum of $1,000 and interest thereon from the 14th day of May, 1939. Wilson Warlick, Judge Presiding."

To each of the findings of fact subsequent to Fact No. 8, the defendant, in apt time, objected and excepted, and asked the court to find as a fact that the date of issuance of the certificate issued in lieu of the original certificate should have been as of the 31st day of December, 1928, the date of the original certificate, and that the certificate issued in lieu of the original certificate fails to express the real agreement as to the date thereof, which was placed in said certificate by mistake of both parties.

To the court's refusal to find the requested finding of fact by the defendant, the defendant objected and excepted.

The defendant, in apt time, requested the court to find as a fact that under no view of the case would the plaintiff be entitled to recover the face of the certificate, not having paid sufficient dues to have entitled her to the same, as provided by the Constitution and By-Laws. To the court's refusal to find such fact, the defendant objected and excepted.

The judgment of the court below was as follows: "This cause coming on to be heard, and being heard before His Honor, Wilson Warlick, Judge presiding at the January Term of Superior Court of Lincoln County, upon the foregoing findings of fact, it is adjudged that the plaintiff, Mrs. Nora Blackburn, have and recover of the defendant, the Woodmen of the World Life Insurance Society, the sum of $1,000, with interest on said sum from the 14th day of May, 1939, until paid, and that she recover of the defendant the costs in this action. This January 27, 1941. Wilson Warlick, Judge presiding."

To the foregoing conclusions of law, as made on the facts found, the defendant, in apt time, preserves its rights by objecting and excepting, and objects and excepts to the signing of the judgment and gives notice of appeal to the Supreme Court in open court.

Bruce F. Heafner and A. L. Quickel for plaintiff.
Henderson & Henderson for defendant.

CLARKSON, J. In the agreed case is the following: "And it appearing to the Court that the plaintiff and defendant have and do waive a jury trial, and agree that the Court shall find the facts and conclusions of law, after hearing the pleadings and the evidence offered by the plaintiff and the defendant."

The court below found the facts and there was competent evidence to sustain the findings of fact. We think, under the findings of fact, the conclusions of law found by the court below were correct.

In *Lyons v. Knights of Pythias,* 172 N. C., 408 (410), it is said: "On proof of the death of the member, presentation of the policy by the beneficiary and denial of any liability by the company, a *prima facie* right of recovery is established, and defendant, claiming to be relieved by reason of nonpayment of dues or other like default, has the burden of proof in reference to such defenses. *Harris v. Junior Order, etc.,* 168 N. C., 357; *Wilkie v. National Council,* 147 N. C., 637; *Doggett v. Golden Cross,* 126 N. C., pp. 477-480." *Blackman v. W. O. W.,* 184 N. C., 75; *Green v. Casualty Co.,* 203 N. C., 767 (773); *Creech v. Woodmen of the World,* 211 N. C., 658 (660).

The defendant did not allege fraud, but set up mutual mistake. The court below, whom it was agreed could find the facts, found the facts contrary to defendant's contentions. It was bound by the findings of fact by the court below to the same extent as if a jury had so found.

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

Affirmed.

R. F. BOST, JR., v. LAWRENCE METCALFE. REPRESENTED HEREIN BY HIS DULY APPOINTED GUARDIAN AD LITEM, W. A. METCALFE, AND J. FRED MERRITT.

(Filed 21 May, 1941.)

1. Damages § 3—

A person whose negligence proximately causes injury to another is liable for all damages naturally and proximately resulting from the negligent act, including suffering which might have been obviated if the physician treating the injured party had administered proper treatment, in the absence of any contention that the injured party failed to use reasonable care in selecting his physician.

2. Negligence § 8—

The doctrine of primary and secondary liability in tort actions is bottomed on acts of active and negative negligence of joint tort-feasors.

3. Same—

A physician who negligently fails to administer proper treatment to a person injured through the wrongful act of a motorist is not, as to such motorist, primarily liable, in whole or in part, since his conduct constitutes an act of omission and not of commission, and the two are not joint tort-feasors.

4. Torts § 4—

In law, joint tort-feasors are persons who act together in committing the wrong, or who commit separate wrongs without concert of action or unity of purpose, which separate acts concur as to place and time and unite in proximately causing the injury.

5. Torts § 6—Party whose negligence causes the injury is not entitled to joinder of physician as joint tort-feasor upon allegations of physician's malpractice in treating person injured.

In this action to recover for injuries sustained in a collision between the automobiles in which plaintiff and defendant, respectively, were riding, defendant filed a cross action alleging that plaintiff's negligence was the sole proximate cause of the collision. Plaintiff filed a reply alleging that defendant was treated after the injury by a physician who failed to discover and remove a piece of metal imbedded in defendant's leg and failed to discover that there were bones broken in defendant's foot, and contended that if plaintiff should be held liable to defendant, the physician was primarily liable for injury resulting from the alleged malpractice, and was a joint tort-feasor in producing the injury within the rule of contribution, or that at least plaintiff was entitled to partial exoneration for that part of the injury attributable to the alleged malpractice. The physician was joined as a party defendant upon plaintiff's motion. *Held:* The alleged negligence of plaintiff and the alleged malpractice of the physician did not concur in producing one indivisible and inseparable injury, and the physician's demurrer to the plaintiff's reply was properly sustained. C. S., 456, 457, 460, 602, 618.

APPEAL by plaintiff from *Nettles, J.*, at October Term, 1940, of GUILFORD. Affirmed.

The plaintiff instituted this action against the defendant Metcalfe to recover damages for personal injuries sustained when an automobile operated by him collided with another automobile allegedly being operated under the supervision and control of the defendant Metcalfe. The action is based upon allegations of negligence on the part of said defendant.

The defendant answered, denying negligence on his part and setting up a cross action against the plaintiff for damages for personal injuries sustained and expenses incurred, which he alleges were proximately caused by the negligence of the plaintiff.

Plaintiff filed a reply to the counterclaim or cross action of the defendant Metcalfe, denying negligence and alleging that after said defendant sustained personal injuries resulting from the wreck of the two automobiles he employed and was treated by the defendant Merritt, a physician; that the defendant Merritt was guilty of malpractice in that he did not exercise ordinary care and apply the requisite degree of skill and knowledge in treating the defendant, as a result of which the injuries sustained by Metcalfe were materially aggravated; that for so much of the damages as resulted from such malpractice Merritt is primarily liable; and that if plaintiff is liable Merritt is jointly and concurrently liable therefor. He then prays judgment: (1) that in the event the issue of negligence is answered against him the jury be required to assess and determine that portion of the damages sustained by Metcalfe which was proximately caused by and resulted from the malpractice of Dr. Merritt for which plaintiff alleges the physician is primarily liable; (2) that the court make such orders in entering judgment as are necessary to adjust the rights and liabilities as between plaintiff and Merritt; (3) that Merritt be adjudged a joint tort-feasor either in respect to the entire damages or at least as to that portion of the damages caused by his malpractice; and (4) that the court adjust, protect and determine the rights and liabilities existing between the plaintiff and Dr. Merritt with reference to and in connection with the contribution rights and joint liability provisions as contained in C. S., 618, as amended by ch. 68, Public Laws 1929.

Thereupon the court, on motion of the plaintiff, entered an order making J. Fred Merritt, the physician, a party defendant. Summons, a copy of all the pleadings and order making him a party defendant were served upon Merritt. In due time he appeared and filed a demurrer to the plaintiff's reply for that (1) no sufficient cause of action is alleged against him; (2) he is neither a necessary nor a proper party to said action; and (3) there is a misjoinder of both parties and causes of action, and several causes of action have been improperly united. In his demurrer he sets forth with particularity wherein the pleadings fail to state a cause of action against him or to show that he is a proper or necessary party.

When the cause came on to be heard upon the demurrer the court sustained the same and entered judgment dismissing the action as against the defendant Merritt. Plaintiff excepted and appealed.

Smith, Wharton & Jordan for plaintiff, appellant.
Sapp, Sapp & Atkinson for J. Fred Merritt, appellee.

BARNHILL, J. Under no possible aspect of the case could plaintiff claim the right to have Merritt made a party to this action except upon the theory that he is, or may be found to be, guilty of negligence proximately causing injury to the defendant Metcalfe. Hence, we can approach the question presented to best advantage by assuming that the issue of negligence will be answered against him.

Neither the plaintiff nor the defendant Metcalfe pray any recovery against Merritt. Plaintiff simply seeks to have it adjudged that Merritt is a joint tort-feasor in respect to the injury sustained by Metcalfe as a basis for a demand for contribution; or, alternatively, to have the damages caused by the negligence of the plaintiff on the one hand, and the damages resulting from the negligence of Merritt on the other, apportioned, so that the plaintiff will be required to pay only such damages as proximately resulted from his own negligence other than those attributable, in whole or in part, to the negligence of Merritt.

Plaintiff frankly admits that, since there is no allegation that Metcalfe failed to use reasonable care in selecting his physician, he is liable, if at all, for all damages which proximately resulted from the original injuries, including such as were partly caused by the unsuccessful or negligent treatment by the physician or surgeon. This admission is in accord with the general rule. *Sears v. R. R.*, 169 N. C., 446, 86 S. E., 176; *Lane v. R. R.*, 192 N. C., 287, 134 S. E., 855; *Smith v. Thompson*, 210 N. C., 672, 188 S. E., 395; Anno. 8 A. L. R., 507. He further concedes that in the event of a recovery against him he would have no cause of action by independent suit against Merritt.

In view of these admissions, which are in accord with the established law, may the plaintiff, by the simple device of having Merritt made a party to this action, enforce contribution or obtain partial exoneration?

He, in support of his position, argues that Merritt is primarily liable for so much of the damages sustained by Metcalfe as proximately resulted from his negligent conduct, and that he (plaintiff) is only secondarily liable therefor. Hence, plaintiff invokes the doctrine of primary and secondary liability. This contention cannot be sustained. The doctrine of primary and secondary liability in tort actions is bottomed on acts of active and negative negligence of joint tort-feasors. Here the plaintiff committed the act which proximately caused the injury to defendant and

for which he is primarily liable. But for his act no injury would have resulted. He cannot, under any view of the case, assume the position of a joint tort-feasor whose wrong was one of omission and not of commission.

A careful reading of the allegations of negligence made by the plaintiff in his reply against the defendant Merritt discloses that he asserts that Merritt failed to exercise ordinary care and to apply the requisite skill in minimizing the damages. There is no allegation that any act on the part of Merritt aggravated or increased the injury. The mere failure of the physician to take X-rays and to discover that bones in Metcalfe's foot were broken and that a piece of the metal door handle was lodged in his leg are acts of omission. The injury and the incidental suffering due to these conditions are the proximate result of the original wrong. Anno. 8 A. L. R., 507. Merritt's failure to discover them in nowise aggravated the result. His failure to discover the condition and to furnish proper treatment constitutes a failure to minimize. The plaintiff is in no respect secondarily liable, as against Merritt, for any part of the damages proximately resulting from the original injury.

Plaintiff and Merritt are not joint tort-feasors so as to permit the joinder of Merritt as a party to this action for the purpose of enabling plaintiff to obtain contribution or partial exoneration.

Strictly speaking, joint tort-feasors are persons who act in concert in committing a wrong which results in injury to person or damage to property. In law the term is used to include those who commit separate wrongs without concert of action or unity of purpose, when the acts are concurrent as to place and time and unite in setting in operation a single destructive and dangerous force which produces a single and indivisible injury.

The well established and familiar rule that a plaintiff may consistently and properly join as defendants in one complaint several joint tort-feasors applies where different persons, by related and concurring acts, have united in producing a single or common result upon which the action is based. 9 A. L. R., 942; Anno. 35 A. L. R., 410. It is likewise now the law in this State that one joint tort-feasor against whom an action is pending may have other joint tort-feasors made parties to the action. C. S., 618.

Where two or more persons acting independently, without concert, plan or other agreement, inflict damage or cause an injury to another person, the persons inflicting the damage are not jointly liable therefor. In such case a joint action against them cannot be maintained. Especially is this true where the damage sued for was not the ordinary and natural result of the preceding negligence. *United Cigar Stores Co. v. Ga. R. & P. Co.*, 107 S. E., 781 (Ga.).

Independent and unrelated causes of action cannot be litigated by cross action. 31 Cyc., pp. 223-224; *Bowman v. Greensboro,* 190 N. C., 611, 130 S. E., 502. Distinct claims against several defendants cannot be joined. *Gilmore v. Christ Hospital,* 52 Atl., 241; *Dickey v. Willis,* 215 Mass., 292, 102 N. E., 336; *Keyes v. Little York Gold Washing & Water Co.,* 53 Cal., 724. An action cannot be maintained against two or more defendants for distinct torts which were committed by the different defendants independently of and not in connection with each other, although the consequences of the tort, which was committed by one defendant, united with the consequences of the tort which was committed by the other. In such case the one defendant cannot be made liable for the consequences of the tort of the other. *Stephens v. Schadler,* 182 Ky., 833, 207 S. W., 704.

To be joint tort-feasors the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury. *Young v. Dille,* 127 Wash., 398, 220 Pac., 782; *Holbrook v. Nolan,* 10 N. E. (2d), 744; *Kirkland v. Ensign-Bickford Co.,* 267 Fed., 472. There must be a common intent to do that which results in injury, *The Ross Coddington,* 6 Fed. (2d), 191; or their separate acts of negligence must concur in producing a single and indivisible injury. *Strauhal v. Asiatic S. S. Co.,* 85 Pac., 230; *Ice Machine Co. v. Keifer,* 25 N. E., 799, 10 L. R. A., 696; *Van Troop v. Dew,* 150 Ark., 560, 234 S. W., 993.

A party whose negligent conduct causes an injury and the physician who negligently treats the injury thus inflicted, thereby aggravating the damages flowing from the original injury, are not joint tort-feasors. *Fisher v. Electric Rwy. & Light Co.,* 173 Wis., 57, 180 N. W., 269; *Ader v. Blau,* 241 N. Y., 7, 148 N. E., 771, 41 A. L. R., 1216; *Noll v. Nugent,* 214 Wis., 204, 252 N. W., 574; *Parchefsky v. Kroll Bros.,* 267 N. Y., 410, 196 N. E., 308, 98 A. L. R., 1387. See, also, *Hoover v. Indemnity Co.,* 202 N. C., 655, 163 S. E., 758.

There was no concert of action between plaintiff and Merritt. Nor did their acts of negligence concur in producing a single indivisible injury. The cause of action, if any, against plaintiff arises out of his alleged negligence in operating an automobile, while that against Merritt is grounded upon the breach of duty the law placed upon him by reason of the relationship created by the contract of employment. They are only incidentally related in the sense that it so happened Merritt was treating an injury inflicted by plaintiff.

Recovery against plaintiff is in no way dependent on proof of negligence on the part of Merritt. In the controversy between Metcalfe and the plaintiff Merritt is not interested. Contrariwise, proof of negligence against Merritt is in no sense dependent upon proof of any wrong on the

part of plaintiff. Metcalfe, upon proper proof, may recover from Merritt though plaintiff was blameless.

Since the doctrine of primary and secondary liability does not apply and plaintiff and Merritt are not joint tort-feasors whose wrongful acts concurred in producing one indivisible and inseparable injury, plaintiff is not entitled to contribution. As his wrong was the primary cause of the resulting injury, which, as alleged, Merritt failed to properly minimize, plaintiff is not entitled to partial exoneration.

Plaintiff cites and relies upon *Fisher v. Electric Rwy. & Light Co., supra*. That case is distinguishable. It was there held that the original tort-feasor and the surgeon who treated the injury produced by the original tort are in no sense joint tort-feasors. The joinder of the physician in the action was permitted by virtue of the terms of a Wisconsin statute which is broader in scope than any appearing upon our statute books.

We conclude that the sections of our Code upon which plaintiff relies, C. S., 456; C. S., 457; C. S., 460; C. S., 602; and C. S., 618, have no application. These sections, considered either separately or *in pari materia*, contain no provision sufficiently broad to permit the joinder of Merritt as a party defendant in this action.

We have read the able brief filed by counsel for the plaintiff and have examined the cases cited. The authorities relied upon, in our opinion, are distinguishable and are not in conflict with our view of the law as herein stated.

The judgment below is

Affirmed.

STATE v. BERLIN BLUE.

(Filed 21 May, 1941.)

1. Criminal Law § 53c—

C. S., 564, prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive province of the jury.

2. Criminal Law § 28a—

Upon defendant's plea of not guilty, the presumption of innocence attaches and follows defendant until removed by the verdict of a jury.

3. Criminal Law § 17—

A plea of not guilty not only puts in issue the question of defendant's guilt but also the credibility of the evidence.

4. Homicide § 15—

In this State a defendant will not be permitted to plead guilty to murder in the first degree, C. S., 4642, and this rule applies to all indictments for murder, including murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise, C. S., 4200.

5. Homicide § 27b—

In a prosecution for murder, an instruction to the effect that defendant's own evidence established guilt of murder committed by means of lying in wait which constitutes murder in the first degree under the statute, C. S., 4200, and that defendant had admitted every essential element of the offense, except the question of mental capacity relied on by him, *is held* for error as an expression of opinion on the evidence prohibited by C. S., 564, since under defendant's plea of not guilty the credibility of the evidence, including defendant's own testimony, is in the exclusive province of the jury.

APPEAL by defendant from *Grady, Emergency Judge*, at January-February Term, 1941, of ROBESON.

Criminal prosecution upon indictment charging defendant with murder of one Anderson Clark.

Plea: Not guilty.

Evidence for the State in the trial below tends to show in brief these facts: Anderson Clark was shot in the head and killed about 8 o'clock on the night of 30 November, 1940, while he was sitting before the fire talking with his wife's brother and another in a room in the home of Elpalear Locklear, an aunt of his wife and of defendant, with whom defendant resided. The shot was fired from outside the house through a window, where a pasteboard substituted for a pane had been removed, about eight feet from Clark. Clark, who resided with his father-in-law in "hollering distance" of the Locklear home, had come there with his brother-in-law, James Blue. Soon thereafter defendant came in and stood before the fire and for a few minutes talked with them and another sitting there, and then left the room. In ten, fifteen or twenty minutes thereafter the shot was fired. Immediately afterward defendant Berlin Blue, a sixteen-year-old Indian boy, who is the son of a deceased brother of Elpalear Locklear and a first cousin to wife of Anderson Clark, told his aunt "I done it." When the officers came about an hour later he told them that he shot Anderson Clark because "he has been picking on me, cussing me and threatening killing me."

Elpalear Locklear, testifying for the State and speaking of defendant, said: "Seemed like he had more the mind of a child than he had of a grown person . . . he has got awfully childish ways. . . . I do not have an opinion whether he knows right from wrong."

Dr. H. M. Baker, testifying at length as witness for defendant, gave as his opinion that the defendant is of the mental capacity of the age of ten years, and that he is not fully aware of the consequence of his acts. The doctor stated: "I do not think he knows the consequences now . . . and I do not think it has occurred to him that he has committed any wrong."

Defendant, as witness for himself, states that he had seen Anderson Clark that night at Fred Blue's, about a quarter of a mile from the Locklear home, and Clark had said "he was going to kill me"; that when the defendant returned home Clark was there; and that when he entered the room, "Anderson got up and grabbed me a-holt . . . grabbed me with one hand, and he had one hand in his bosom, and said he was going to kill me . . . I snatched away from him and went out in the other room . . . I got the gun and then went out and shot him . . . from out doors . . . I was afraid of him, he told me two or three times he was going to kill me."

Verdict: "Guilty of the felony and murder as charged in the bill of indictment, in the first degree."

Judgment: Death by asphyxiation.

Defendant appeals to Supreme Court and assigns error.

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

John G. Proctor and F. D. Hackett for defendant, appellant.

WINBORNE, J. Upon the trial in Superior Court the court, in charging the jury, read the provisions of the statute, C. S., 4200, that "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 by death," and stated that where the killing is by any of the means defined in this statute the element of premeditation and deliberation is presumed. Then the court proceeded to give the following instructions which defendant assigns for error:

"Now, in this case, gentlemen, and I want you to listen at me carefully, in this case the defendant, the prisoner at the bar has gone upon the stand, and he has admitted that the deceased, Anderson Clark, was sitting in a room in a house which was his home; that two or three other people were in the room; that Anderson Clark was sitting in a rocking chair with both of his hands thrust in the jacket of his overalls; that at that particular time he was not doing anything at all in aggravation, or anything at all which would have caused the defendant to think that

he was going to harm him; that he went out into the kitchen and took down a shot gun and inserted in that shot gun a cartridge, which he had bought a few days prior thereto; that he then went around the house to a window where one of the sash, where one of the lights had been knocked out and where a piece of card board had been substituted in the place of the light; that he removed that card board, placed his gun through the sash, and blew this man's brains out, killing him instantly." Exception No. 12.

"I charge you, gentlemen, upon that statement from the defendant, nothing else appearing, he is guilty of murder in the first degree, because the method of the killing admitted by him, comes directly and exactly within the purview of the statute which I have just read to you." Exception No. 13.

"Now, there is no need of my referring to the testimony of other witnesses, because the defendant himself has admitted every single element which goes to make up the crime of murder in the first degree except one, and that is, gentlemen, he contends, and his only defense as argued to you through counsel, is that at the time of the killing he did not have mental capacity sufficient to premeditate and deliberate, and that at most you can only convict him of murder in the second degree." Exception No. 14.

Defendant contends that the charge as thus given by the court is violative of the provision of the statute, C. S., 564, which provides that: "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 or sufficiently proven, that being the true office and province of the jury . . ." C. S., 564. With this contention we agree. See *S. v. Dixon,* 75 N. C., 275; *S. v. Riley,* 113 N. C., 648, 18 S. E., 690; *S. v. Green,* 134 N. C., 658, 46 S. E., 761; *S. v. Hill,* 141 N. C., 769, 53 S. E., 311; *S. v. Langley,* 204 N. C., 687, 169 S. E., 705; *S. v. Maxwell,* 215 N. C., 32, 1 S. E. (2d), 125.

Speaking thereto in the case of *S. v. Dixon, supra,* the Court said: "This statute is but an affirmance of the Constitution, Art. I, sections 13-17, and the well settled principles of the common law, as set forth in Magna Charta. The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced . . . If, in the case before us, the evidence had made a clear case of guilt against the prisoner, still its credibility was for the jury, and it should have been so submitted

to them by the court, for they must say whether they believe or disbelieve it." *S. v. Hill, supra.*

Again, in the *Hill case, supra, Hoke, J.,* writing for the Court, states: "When a plea of not guilty has been entered and stands on the record undetermined, it puts in issue not only the guilt, but the credibility of the evidence. As is said in *S. v. Riley,* 113 N. C., 648, 'The plea of not guilty disputes the credibility of the evidence, even when uncontradicted, since there is a presumption of innocence which can only be overcome by a verdict of a jury' . . . And this has been held to be the correct doctrine, though guilt may be inferred from the defendant's own testimony as in *S. v. Green,* 134 N. C., 658."

In *S. v. Langley, supra,* it is stated that the credibility and probative force of the evidence is for the jury. And in *S. v. Maxwell, supra, Schenck, J.,* writing for the Court, uses this language: "The defendant had pleaded not guilty and the presumption of innocence followed him until removed by the verdict of the jury . . . the credibility of the testimony being for the jury to determine." And, further, "Under our system of trial the judge is prohibited from expressing an opinion as to defendant's guilt," citing and quoting from *S. v. Dixon, supra.*

Moreover, in this State a defendant will not be permitted to plead guilty to murder in the first degree. It is provided in C. S., 4642, that "the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." In *S. v. Matthews,* 142 N. C., 621, 55 S. E., 342, the Court states that this section applies equally to all indictments for murder, whether perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise." C. S., 4200. See, also, *S. v. Bazemore,* 193 N. C., 336, 137 S. E., 172.

Applying these principles to the facts in the present case, it is manifest that the portions of the charge to which the exceptive assignments relate are contrary to the law as declared in this State, and infringe upon substantive rights of the defendant. The court, instead of leaving it to the jury to pass upon the credibility of the evidence and to find from the evidence beyond a reasonable doubt all of the elements necessary to constitute the crime of murder in the first degree, in effect passes upon the credibility, and finds or assumes the facts to be as testified by defendant, and rules that the statement of defendant constitutes an admission of "every single element which goes to make up the crime of murder in the first degree, except one," that is, "that at the time of the killing he did not have mental capacity sufficient to premeditate and deliberate." Thus the jury is told that in order to convict defendant of murder in the first degree the only factual element left for it to find is that defendant

had mental capacity sufficient to premeditate and deliberate. This is contrary to law in the State, and is error, for which defendant is entitled to a

New trial.

EDITH TYSON v. W. G. TYSON.

(Filed 21 May, 1941.)

1. Divorce § 19: Courts § 11: Judgments § 31: Constitutional Law § 23—

A decree of divorce entered in another state upon constructive service against a resident of this State, who makes no appearance and does not in any way participate in the proceedings, is invalid in this State, since the judgment of such other state, rendered without jurisdiction over the parties or the status, and without notice and an opportunity to be heard, can have no extraterritorial effect, and this conclusion does not violate the Full Faith and Credit Clause of the Federal Constitution.

2. Constitutional Law § 15a—

Notice and hearing are essential to due process of law under the Fourteenth Amendment of the Constitution of the United States.

APPEAL by defendant from *Olive, Special Judge,* at 17 February, 1941, Civil Term, of GUILFORD. No error.

The plaintiff brought an action against the defendant for alimony without divorce under C. S., 1667, alleging indignities to her person, desertion, and nonsupport, and asked, as incidental relief, an allowance for support and attorneys' fees *pendente lite,* and for the permanent custody of her ten-year-old child.

The defendant denied the main allegations of the complaint and set up, as a further defense, that a decree of absolute divorce had been granted him in a proceeding brought by him in a Florida court. The plaintiff replied, alleging that the Florida decree was obtained through fraud upon the jurisdiction of that court with respect to residential requirements, and was, therefore, void.

Upon the trial, plaintiff submitted evidence tending to establish the contentions in her pleadings and put in evidence a certified exemplified copy of the proceeding in the divorce suit brought by defendant Tyson in Duval County, Florida, including the affidavit for order of constructive service, showing that the defendant in that proceeding (plaintiff in this) was not a resident of the State of Florida. The certificate showed that service was made by publication in a newspaper published in Duval County, and by posting at the courthouse door.

Defendant introduced an exemplified copy of the final judgment or decree entered in the same proceeding, purporting to grant an absolute divorce.

The defendant, in apt time, moved for judgment as of nonsuit, which was refused, and defendant excepted. Issues were tendered by defendant and declined, and defendant excepted. Issues were submitted as to the fact of marriage, the separation, the indignities offered plaintiff, and fraud in procuring the Florida decree. Upon the third and fourth of these issues the defendant specially asked for an instruction that "if the jury find the facts, as the evidence tends to show," they will answer the issue "No," referred to as a request for a directed verdict. The court declined to give the instruction and defendant excepted.

Other exceptions were made to various parts of the charge as given. Sufficient reference to these is made in the opinion.

The issues were answered in favor of the plaintiff and judgment rendered in accordance therewith. Defendant excepted to the refusal to set aside the verdict on matters of law, and to the signing of the judgment, assigning error.

George A. Younce for plaintiff, appellee.

F. D. Hackett, John R. Hughes, and McLean & Stacy for defendant, appellant.

SEAWELL, J. The defendant states in his brief that the main question involved in the present case is the validity in this State of the divorce decree granted him in Florida. He contends that it should be given full faith and credit here, as a judgment of a sister state.

The attitude of the North Carolina Court in refusing to recognize as valid a decree of divorce granted against a resident of this State upon whom no personal service has been made in the jurisdiction of the forum does not offend against the full faith and credit clause (Article IV, sec. 1), of the Federal Constitution. *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565; *Maynard v. Hill*, 125 U. S., 190, 51 L. Ed., 564; *Haddock v. Haddock*, 201 U. S., 562, 50 L. Ed., 867; *Pridgen v. Pridgen*, 203 N. C., 533, 538, 539, 166 S. E., 591; *Irby v. Wilson*, 21 N. C., 568.

Marriage is regarded as creating a status within the protection and control of the laws of the matrimonial domicile, which from considerations of public policy, will not be deemed destroyed unless the resident party has been brought within the jurisdiction of the foreign state by more than constructive notice.

It is fundamental that a State "has no power to enact laws to operate upon things or persons not within her territory." *Irby v. Wilson, supra.* Notice and hearing are essential to due process of law under the Fourteenth Amendment of the Constitution of the United States, McGehee, Due Process of Law, 76; Honnold, Supreme Court Law, 847; *Scott v. McNeal*, 154 U. S., 34, 36, 38 L. Ed., 896, 901; and there is neither

notice nor hearing under such fictional service. *Pennoyer v. Neff, supra.*

Whatever the effectiveness of such a proceeding where both parties are within the jurisdiction of the forum, it has no extraterritorial effect upon a resident of another State or the matrimonial status there existing, unless the laws of the State of such residence recognize the proceeding as valid. Here they do not. It has been the law of this State since early times that a divorce decree obtained in a foreign State against a resident of this State, where there has been no personal service within the jurisdiction of the forum, and no answer or appearance or other participation in the proceeding which might be considered its equivalent, is void here. *Irby v. Wilson, supra; Arrington v. Arrington,* 102 N. C., 491, 512, 9 S. E., 200; *Harris v. Harris,* 115 N. C., 587, 20 S. E., 187; *S. v. Herron,* 175 N. C., 754, 94 S. E., 698; *Pridgen v. Pridgen, supra.*

The case of *Bidwell v. Bidwell,* 139 N. C., 402, 52 S. E., 55, relied on by defendant, does contain a dictum of contrary significance. This case is discussed in *S. v. Herron, supra,* and *Pridgen v. Pridgen, supra* (p. 541), and the conclusion reached that the "obiter" in the *Bidwell case, supra,* "does not show that North Carolina should be taken out of the class of States which decline to recognize the validity of a divorce rendered in a court which had jurisdiction over only one of the parties." *Pridgen v. Pridgen, supra.*

On inspection of the record, it appears that the divorce decree rendered in the State of Florida is void, and unavailable as a defense in this action.

Defendant's counsel concede that the motions for judgment as of nonsuit, the requested instructions to the jury, and the exceptions to the charge, are without validity unless the Florida divorce can be upheld, since they are predicated on that theory. But if we have misunderstood the extent of the concession, we, nevertheless, find that the defendant is, in fact, at such a disadvantage in regard to these exceptions, since the invalidity of the Florida divorce deprives them of merit.

The plaintiff, in the course of her examination, was permitted to relate a conversation which she said took place between her and Mr. Hughes, defendant's attorney, regarding the whereabouts of defendant during his alleged residence in Florida. Defendant objected and excepted. Since this evidence related to the fraud issue, which may be ignored because of the invalidity of the decree for another reason, the error, if any, was harmless.

We find

No error.

STATE v. AMOS JESSUP.

(Filed 21 May, 1941.)

1. **Criminal Law § 53c—**

The portion of the charge devoted to reviewing the evidence for the State cannot be held for error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the State's evidence. C. S., 564.

2. **Criminal Law § 53h—**

The charge of the court will be construed as a whole, and segregated clauses and sentences may not be taken from their setting to make it appear that the court expressed an opinion upon the weight and credibility of the evidence when the charge read contextually is free from this objection.

3. **Criminal Law § 53c—**

The court's capitulation of the evidence and statement of the contentions of the State cannot be held for error as expressing an opinion on the merits of the case when any apparent prejudicial or harmful effect is due to the strength of the State's case and not to any partiality on the part of the court.

4. **Same—**

Where the defendant offers no evidence, the fact that the court necessarily consumes more time in reviewing the evidence for the State and in stating its contentions than it does in stating the contentions of the defendant, cannot be held for error.

5. **Criminal Law § 53f—**

If a defendant considers that the court failed to give fully and accurately the contentions made by him, or if he desires any amplification thereof, it is his duty to call the court's attention thereto at the time.

APPEAL by defendant from *Williams, J.*, at January Term, 1941, of BLADEN. No error.

Criminal action tried on bill of indictment charging the defendant with the crime of seduction.

The evidence offered by the State tended to show that the prosecutrix was, at the time charged in the bill, 19 years of age; that the defendant was a man 37 years of age; that the defendant paid court to the prosecutrix for more than 3 years; that he took her to numerous public places; that he gave her several presents and gifts; that he promised to marry her and that they became engaged; that she submitted to his embraces because of his promise of marriage and because she trusted him; that as a result of the seduction she became pregnant and gave birth to his child; that upon learning of her pregnancy he expressed his regret, stat-

ing that they would make the best of it and he would see her through; that she purchased her wedding clothes; that they agreed to be married 28 August, 1939; that they went to get a blood test and at the time the defendant stated to the doctor that they were applying for a marriage license; that he told prosecutrix that he had been to Whiteville to obtain a marriage license but was unable to do so because he had no birth certificate and no proof of the age of the prosecutrix; that prosecutrix obtained the birth certificate for him; that they made plans for the building of a home; that the defendant did not appear on the date set for the marriage and the prosecutrix did not thereafter see him until the preliminary hearing. There was also evidence tending to show that the prosecutrix was an innocent and virtuous woman and that at the time the warrant was issued the defendant could not be found in Bladen County.

The defendant offered no evidence.

The jury returned a verdict of guilty. From judgment pronounced on the verdict defendant appealed.

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

L. J. Britt and McLean & Stacy for defendant, appellant.

BARNHILL, J. The record contains 47 exceptions, of which 45 are directed to alleged error in the charge and two are formal. All of them are directed to the contention of the defendant that the charge as a whole constitutes an expression of opinion on the facts, contrary to C. S., 564.

A careful examination of the charge discloses that the court undertook to and did "state in a plain and correct manner" the evidence in the case. It then stated the contentions of the State, based on the evidence, a recapitulation or synopsis of which it had given. This was followed by a statement of the contentions of the defendant. The court then correctly and clearly applied the law of the case to the evidence, properly placing the burden upon the State and requiring the jury not only to find, before returning a verdict of guilty, that they were satisfied beyond a reasonable doubt of his guilt, but to also find that there was independent supporting evidence of every essential element of the crime as defined by the court. The judge went even further than the statute requires in charging "and the burden is upon the State to satisfy you beyond a reasonable doubt by independent facts and circumstances that each and every element of the offense has been established . . ." This is a heavier burden upon the State than the law imposes.

The defendant complains, first, that the court, in detailing the evidence, expressed an opinion that certain facts were fully proven. This contention cannot be sustained. In reviewing the evidence the court

clearly indicated that it was so doing by making reference to the witness and then detailing the substance of his testimony. A careful examination of the charge discloses that when it is considered as a whole the court below carefully followed the requirements of C. S., 564, in stating the evidence in a plain and correct manner. The defendant is not permitted to segregate clauses or sentences thereof which, when considered alone, unrelated to the charge as a whole, make it appear that the judge was indicating his own personal opinion in respect to the weight and sufficiency of the evidence. For numerous authorities see 18 N. C. Digest, Trial, pp. 134-36.

The defendant then contends that the charge of the court constitutes "a powerful summing up of the whole argument for the State" which amounted to a clear indication of an opinion on his part as to the merits of the case. We can find nothing in the charge to sustain this contention. If the recapitulation of the evidence and the statement of the contentions made by the State arising thereon seem to be prejudicial or harmful to the defendant it is due to the convincing nature of the testimony offered and not to the conduct of the judge who, with commendable accuracy, followed the requirements of the statute. This type of prejudicial effect gives the defendant no cause to complain. He did not elect to undertake to refute any of the evidence offered by the State. It was amply sufficient to support the verdict. He must abide the result.

The defendant likewise asserts that there was prejudicial error in that the court consumed considerably more time in stating the contentions for the State than it did in stating the contentions of the defendant. This contention is untenable. The burden was on the State. It had to offer evidence tending to show the seduction and it was required further to offer testimony, independent of that of the prosecutrix, tending to support every essential element of the crime. On the other hand, the defendant offered no evidence. His defense revolved around the contentions: (1) that the evidence offered by the State was not credible and should not be accepted and believed by the jury; (2) that the evidence, independent of that of the prosecutrix, was not worthy of belief and did not tend to support the evidence of the prosecutrix in respect to the essential elements of the crime; and (3) that even if believed and accepted by the jury, the testimony as a whole was insufficient to show beyond a reasonable doubt that the defendant had committed the crime with which he stood charged. Under such circumstances, considering that the burden was on the State and the defendant offered no evidence, it was inevitable that the court should consume more time in reviewing the evidence and in outlining the contentions for the State than it did in stating the contentions of the defendant. We find nothing in the charge to indicate that the court acted otherwise than in a fair and impartial manner.

If the defendant considered that the court had failed to give fully and accurately the contentions made by him, or if he desired any amplification thereof, it was his duty to call the court's attention thereto at the time. *S. v. Blackwell,* 162 N. C., 672, 78 S. E., 310; *S. v. Wade,* 169 N. C., 306, 84 S. E., 768; *S. v. Burton,* 172 N. C., 939, 90 S. E., 561; *S. v. Martin,* 173 N. C., 808, 92 S. E., 597; *S. v. Hall,* 181 N. C., 527, 106 S. E., 483; *S. v. Jones,* 213 N. C., 640, 197 S. E., 152.

In the trial below we find

No error.

W. H. HEARN v. ERLANGER MILLS, INC.

(Filed 21 May, 1941.)

Corporations § 20—

Where, in an action against a corporation, the complaint alleges that defendant's superintendent had authority, on behalf of the corporation, to make the contract of employment sued on, the corporation's demurrer on the ground that its superintendent did not have authority in law to enter into such contract because of its extraordinary nature, and that the complaint failed to allege express authority, is properly overruled, since the allegation of authority must be taken as true upon demurrer.

APPEAL by defendant from judgment overruling demurrer by *Olive, Special Judge,* at April Term, 1941, of DAVIDSON. Affirmed.

J. Lee Wilson and J. F. Spruill for plaintiff, appellee.
Don A. Walser for defendant, appellant.

SCHENCK, J. The plaintiff alleges:

"2. That in September, 1925, and before and after said dates, the defendant had H. D. Townsend employed as Superintendent of said Nokomis Mill, which superintendent had authority to employ for defendant foremen and other employees to work in the various departments of said Nokomis Mill;" and that said Townsend, in September, 1925, employed or hired the plaintiff as spinning room foreman and "contracted to pay the plaintiff straight time as long as plaintiff worked for the defendant, until the plaintiff was discharged"; and under said contract plaintiff worked for defendant from September, 1925, until 25 November, 1939, at which time he was discharged without being paid; that during the years 1932, 1935 and 1938 the defendant closed its said mill for 21, 31 and 17 weeks respectively, but said Townsend and S. W. Rabb, Vice President and General Manager of said mill, "requested the plaintiff to

stay around and hold himself in readiness during the times said mill was closed, which the plaintiff did, and was ready, able and willing to perform his duties as foreman in said mill"; that at other times between 1925 and 1932 said mill was closed and plaintiff was paid by the defendant for such time, and that plaintiff did not know that defendant was going to refuse to pay him for such time as the mill was closed during 1932, 1935 and 1938, until after his discharge; that the plaintiff has not been paid for the time the mill was closed during the years 1932, 1935 and 1938, notwithstanding he has made demand therefor.

The defendant filed demurrer to the complaint upon the ground that it fails to state facts sufficient to constitute a cause of action, for that (1) if the contract alleged in the complaint was entered into between the defendant's superintendent, Townsend, and the plaintiff the defendant would not be bound thereby "because as a matter of law a superintendent of a corporate defendant could not bind his principal to contracts of an extraordinary nature and of such a character as would involve the corporation in obligations for long periods of time without express authority from the principal"; (2) "that no allegation is contained in the complaint that the said H. D. Townsend, superintendent, had express authority given him by his principal to enter into such a contract as set forth in the complaint," and (3) "that upon all the facts alleged in the complaint there is no allegation that H. D. Townsend, superintendent, had authority from the defendant to enter into the contract set forth in the complaint."

We are of the opinion, and so hold, that all of the grounds of the demurrer are fully met by the allegations of the complaint that "the defendant had H. D. Townsend employed as superintendent of said Nokomis Mill, which superintendent had authority to employ for the defendant foremen and other employees to work in the various departments of said Nokomis Mill," and that said Townsend did employ the plaintiff as spinning room foreman in said Nokomis Mill for straight time as long as plaintiff worked for defendant. These allegations, when construed liberally in favor of the pleader, as they must be upon demurrer, *Enloe v. Ragle,* 195 N. C., 38, 141 S. E., 477, state facts sufficient to constitute a cause of action.

If the alleged authority of the defendant's superintendent to employ and hire foremen and other employees for the defendant at the Nokomis Mill was so limited as not to authorize the making of the contract alleged in the complaint on account of its extraordinary nature and the long period of time involved such limitation upon such authority can be pleaded, and if such plea is sustained by the evidence, may be a bar to plaintiff's cause of action.

The judgment of the Superior Court is

Affirmed.

MRS. WILLA DAVIS v. MRS. LILLA CRUMP.

(Filed 21 May, 1941.)

1. Partition § 4b—

Upon plea of sole seizin in an action for partition, the introduction in evidence by plaintiff of the admissions in the answer that the person dying intestate without issue seized of the land was the nephew of the parties, and that his father predeceased him, makes out a *prima facie* case, and it is error for the court to rule that plaintiff has the burden of going forward with the evidence, the burden being upon defendant to introduce evidence in support of her allegation that plaintiff is illegitimate before plaintiff should be required to offer evidence in rebuttal.

2. Same: Descent and Distribution § 10b—

The owner of the *locus in quo* died intestate without issue. His father predeceased him. Plaintiff and defendant were his aunts. In this action for partition, defendant alleged that plaintiff is illegitimate. Plaintiff offered evidence that their deceased brother was also illegitimate. *Held:* The question of the legitimacy of the deceased brother must be determined in order that the rights of the parties may be fully adjudicated.

APPEAL by plaintiff from *Alley, J.*, at October Term, 1940, of STANLY. Reversed.

Special proceeding instituted before the clerk for the partition of real estate.

The defendant answered, alleging sole seizin. She admitted the family relationship but pleaded that plaintiff is illegitimate. The answer having raised an issue of fact, the proceeding was transferred to the civil issue docket.

When the cause came on to be heard below, at the conclusion of the evidence for the plaintiff, the court, on motion of the defendant, entered judgment dismissing the action as of nonsuit. Plaintiff excepted and appealed.

A. C. Huneycutt for plaintiff, appellant.
Morton & Williams for defendant, appellee.

BARNHILL, J. Defendant admits in her answer that Lucy Howell, mother of plaintiff and the defendant, died seized and possessed of the land described in the petition; that said Lucy Howell also had a son who predeceased her, leaving one child, Ezell Howell; that after the death of Lucy Howell, plaintiff and defendant and Arthur Howell, husband of Lucy Howell, executed and delivered to Ezell Howell a quitclaim deed for said land; that said Ezell Howell died intestate, without issue, seized and possessed of the premises.

The plaintiff, having offered the admissions made in the answer, suggested that the burden shifted to the defendant. The court held that it was the duty of the plaintiff to go forward with the introduction of evidence. Plaintiff excepted and then offered additional evidence tending to show that she was born while her mother was living with one Jim Richardson as man and wife. She likewise offered evidence tending to show that Jason Howell, deceased brother of plaintiff and defendant and father of Ezell Howell, was born to Lucy Davis (Howell), prior to her marriage to Arthur Howell, and rested. Thereupon the judgment of nonsuit was entered.

The admissions offered by the plaintiff were sufficient to make out a *prima facie* case of joint ownership. At that time, while it had been alleged, there was no evidence tending to show that the plaintiff was born out of wedlock. We may concede that the burden rested upon the plaintiff to show that she was a tenant in common. Even so, at the time she rested there was no evidence of illegitimacy to be rebutted and there is no presumption that she was born out of wedlock. The defendant, having pleaded the bastardy of plaintiff in bar of her claim, notwithstanding the admitted relationship, must assume the burden on this phase of the case.

Furthermore, it appears from the evidence offered by plaintiff that the deceased brother, Jason Howell, was born out of wedlock, and that the plaintiff and defendant were the only children of Lucy Howell. If it is found as a fact that plaintiff is illegitimate, then the legitimacy or illegitimacy of the deceased brother should also be determined to the end that the respective rights of the parties may be fully adjudicated. *Powers v. Kite,* 83 N. C., 156.

The judgment below is

Reversed.

MAUDE RAE REYNOLDS v. GEORGE T. WOOD AND WIFE, BESSIE M. WOOD.

(Filed 21 May, 1941.)

1. Reformation of Instruments § 3—Evidence held insufficient to support finding that description was inserted in deed through mutual mistake.

Evidence that the grantee desired to purchase the particular lot which was described in her deed, and that, at the time she offered to purchase, the parties thought that grantors owned the lot, without evidence that the parties had gone on the premises or that they had mistakenly inserted the description of the lot intended to be conveyed, is insufficient to support a finding that the parties intended to describe another lot in the subdivision to which grantors had title, and grantors are not entitled to reformation for mutual mistake of the parties.

2. Courts § 2a—

Where the only exception is to that part of the judgment of the municipal court relating to the allowance of the defendants' counterclaim, the Superior Court upon its determination that judgment on the counterclaim was erroneously allowed, is limited to remanding the case to the municipal court for proceedings therein in accordance with the judgment of the Superior Court.

APPEAL by defendants from *Pless, J.*, at January Term, 1941, of GUILFORD. Modified and affirmed.

Julian C. Franklin for plaintiff, appellee.
Walser & Wright for defendants, appellants.

DEVIN, J. Plaintiff instituted her action in the municipal court of the city of High Point for the recovery of $350 which she alleged she paid defendants for the conveyance of a city lot, designated as No. 198 and described in the complaint, to which lot she alleged defendants had no title. The defendants admitted they did not own lot No. 198 described in the deed, but set up, as an affirmative defense or counterclaim, that there was a mutual mistake in the description in the deed, and that the plaintiff intended to purchase and the defendants intended to convey lot No. 196 in the same division, which lot the defendants did own, and asked for reformation of the deed in accord with that intention.

In the municipal court jury trial was waived, and it was agreed that the judge should find the facts. From the evidence offered the court found that there was a mutual mistake in the deed, and that the parties intended that lot No. 196 be described instead of lot No. 198, and thereupon overruled plaintiff's motion to dismiss the counterclaim, and ordered the deed reformed as prayed. To this finding and judgment the plaintiff noted exception and appealed to the Superior Court.

In the Superior Court it was adjudged that there was no evidence to support the finding that the description of the property in the deed as lot No. 198 was inserted by mutual mistake, or that the parties intended to describe lot No. 196 instead of No. 198 as expressed in the deed.

The appeal of the defendants brings this ruling of the court to us for review, and requires an examination of the testimony offered in the municipal court to determine whether there was any evidence to support the finding that there was a mutual mistake in the deed as asserted in defendants' counterclaim. Upon such examination we are led to the conclusion that the ruling in the Superior Court was correct. We do not think there was evidence to support the finding that there was a mutual mistake in the description of the lot conveyed so as to entitle the defendants to the equity of reformation. All the evidence is to the effect that

the plaintiff wished to purchase lot No. 198 and not lot No. 196, and that she had no intention of purchasing lot No. 196. There is no evidence that the parties had gone upon the premises, or that they had mistakenly inserted a different description of the lot intended to be conveyed. At the time plaintiff offered to purchase lot No. 198 it was erroneously supposed that defendants owned that lot. There was no meeting of the minds of the parties as to the purchase of lot No. 196, and plaintiff did not agree to purchase that lot, and does not wish to do so. The court cannot, under the guise of reformation, enforce a contract which the parties themselves have not made.

"A person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be comformable continued concurrently in the minds of all parties down to the time of its execution." *Long v. Guaranty Co.*, 178 N. C., 503, 101 S. E., 11; *Sills v. Ford*, 171 N. C., 733, 88 S. E., 636.

As the exception to the judgment of the municipal court related only to the defendants' counterclaim, the judgment of the Superior Court should have been limited to remanding the case to the municipal court for proceeding in that court in accord with the judgment of the Superior Court. *Bernhardt v. Brown*, 118 N. C., 701, 24 S. E., 527.

Except as thus modified, the judgment of the Superior Court is

Affirmed.

J. E. SMITH v. DUKE UNIVERSITY, A CORPORATION.

(Filed 21 May, 1941.)

1. Trial § 24—

While the evidence must be considered in the light most favorable to plaintiff upon motion to nonsuit, plaintiff is required to offer evidence which reasonably tends to prove each fact essential to make out his case, and evidence which raises a mere conjecture or suspicion is insufficient.

2. Hospitals § 3—

In order to hold a hospital liable under the doctrine of *respondeat superior* for negligence of a physician, plaintiff must show that the physician was an employee or agent of the hospital and that the physician, at the time of and in respect to the very treatment complained of, was acting as such within the scope of his employment.

3. Same—

When a person goes to a hospital for treatment, and expresses no preference for a physician, and the hospital assigns a physician from its staff who is engaged in the private practice of medicine and does not treat the

patient as an agent of the hospital, the hospital cannot be held liable for unskillful or negligent treatment of the patient by the physician unless it failed to exercise reasonable care in his selection.

4. Same—Evidence held insufficient to show that physician was agent of hospital or that hospital failed to exercise due care in his selection.

This action was instituted to recover of a hospital for alleged negligent or unskillful treatment of a patient by a physician. The physician was not made a party to the action. The evidence tended to show that plaintiff brought his wife to defendant hospital as a pay patient and that, neither plaintiff nor his wife having expressed preference for any particular physician, a reputable physician was assigned from the hospital staff. The evidence further tended to show that the physician was employed as a professor by the hospital in its school of medicine and that under the terms of his employment he was permitted to engage in the private practice of medicine and was given an office in the hospital as part compensation for his teaching and free ward work, and that he was paid for teaching and for free ward and dispensary work by the hospital, but that fees collected by him for private practice, although collected in some instances by the hospital as an accommodation, were his own, and that the hospital received no part thereof. *Held:* The evidence is insufficient to show that the physician in treating plaintiff's wife was acting as an agent or employee of the hospital or that the hospital held him out as such or subsequently ratified his treatment as an act of its agent or employee, and there being no evidence that the hospital failed to exercise reasonable care in selecting the physician, its motion to nonsuit was properly allowed.

5. Appeal and Error § 41—When it is determined that nonsuit was properly granted on one ground, other grounds advanced to sustain the nonsuit need not be considered.

Where, in an action against a hospital to recover for alleged negligence of a physician under the doctrine of *respondeat superior*, it is determined that defendant hospital's motion for judgment as of nonsuit was properly allowed for failure of evidence that the physician in treating the patient was acting as an agent or employee of the hospital, whether the evidence was sufficient to show actionable negligence in his treatment of the patient, or whether the nonsuit should have been allowed on the ground that defendant was, and is, an eleemosynary institution, and thus exempt from liability for negligence on the part of its agents and employees when due care has been exercised in their selection, need not be determined,

6. Trial § 22c—

A nonsuit cannot be sustained upon an affirmative defense unless plaintiff's own evidence establishes such defense as a matter of law.

APPEAL by plaintiff from *Williams, J.*, at September Term, 1940, of FRANKLIN. Affirmed.

This was an action to recover damages for an injury alleged to have been caused by the negligent treatment of plaintiff's wife in the hospital which is operated by the defendant Duke University. An action by Naomi Smith, wife of plaintiff, against the defendant for the same cause, was by consent consolidated for trial with the above entitled case.

At the conclusion of the evidence defendant's motion for judgment of nonsuit was allowed, and from judgment accordingly plaintiff appealed.

Yarborough & Yarborough, E. F. Griffin, and Royall, Gosney & Smith for plaintiff, appellant.

Jones & Brassfield, W. L. Lumpkin, R. L. Savage, T. D. Bryson, and E. C. Bryson for defendant, appellee.

DEVIN, J. The determination of the correctness of the nonsuit below necessitates consideration of the primary question whether plaintiff offered sufficient evidence to show that the physician and surgeon, whose treatment of the plaintiff's wife is complained of, was at the time acting within the scope of his agency or employment by the defendant so as to impose liability upon it under the principle of *respondeat superior*, and, if so, whether there was evidence of actionable negligence on the part of the physician sufficient to require submission of the case to the jury.

While the consideration of a motion for judgment of nonsuit requires that the evidence be viewed in the light most favorable for the plaintiff, it is the established rule that there must be legal evidence of the fact in issue, and not merely such as raises a conjecture or suggests a possibility. The plaintiff is required to offer evidence which reasonably tends to prove the facts essential to the maintenance of his case. *Byrd v. Express Co.*, 139 N. C., 273, 51 S. E., 851; *Mills v. Moore, ante*, 25.

Examining the record of the testimony in accord with these cardinal principles, we find the evidence tends to show that in the fall of 1935, plaintiff's wife, following child-birth, was suffering from profuse uterine hemorrhage, and that on 31 October, 1935, by the advice of her local physician, plaintiff took her from their home in Franklin County to Duke Hospital for treatment and operation. On arrival he explained her trouble to the person in charge of the admitting office of the hospital. Neither plaintiff nor his wife knew any physician or surgeon and expressed no preference for any particular physician. Owing to the nature of her malady she was assigned to Dr. Bayard Carter, who is a specialist in obstetrics and gynecology, and she was taken to his office, which is located in Duke Hospital. It appeared that Dr. Carter, a duly licensed physician, was Professor of Obstetrics and Gynecology in the School of Medicine of Duke University, and was a member of the committee having to do with the relation of the Medical School to clinical medicine. It also appeared that under the terms of his employment by Duke University he was permitted to engage, and did engage, in the private practice of medicine and was permitted to maintain an office in Duke Hospital. Dr. Carter, after his examination of Mrs. Smith, decided that, owing to her physical condition and the fact that she was a large, fleshy woman

with high blood pressure, a surgical operation was not advisable, and, finding indications suggestive of cancer, advised radium treatment as proper for controlling the hemorrhage and as preventive of cancer. Plaintiff was told by "someone down there" (not Dr. Carter) that the charge for the room would be $3.50 per day, and that the cost of the operation would be $35.00. The written consent of Mrs. Smith for the treatment prescribed and for the operation of curettement having been given, the operation was performed and the radium treatment administered 2 November, and on 7 November she went home. On 25 November she returned to the hospital for post-operation check, and again 1 December. At that time there was no bleeding, but a profuse discharge. She returned to the hospital 5 January, 1936, when diabetic conditions appeared. She was there again 11 February. Dr. Carter, also, at plaintiff's request, went to Louisburg to see her in May, 1936, at which time he told plaintiff there would be no charge for the visit. At all times Dr. Carter was the treating physician. Following the discovery of the diabetic condition of his wife, plaintiff followed the directions given him by Dr. Carter, and kept records and reported her reaction to treatment. All correspondence relative to her case was between plaintiff or members of his family and Dr. Carter. Mrs. Smith was again in the hospital in the fall of 1937 for further treatment by Dr. Carter for vesico vaginal fistula which resulted from the first operation.

Plaintiff's evidence tended to show that following the initial treatment Mrs. Smith suffered great pain, and that later both rectal and vaginal fistulas appeared, accompanied by impairment of the functions of the bladder and offensive discharges, and that her mind became weakened and her physical health seriously injured. It also appeared that since her treatment at defendant's hospital she has been at times under care of different local physicians and was treated at hospitals in Rocky Mount and Raleigh.

Plaintiff offered the testimony of three physicians, who had examined Mrs. Smith after her treatment at Duke Hospital, which tended to show that her condition indicated "marked radium reaction" or radium burns, and that the injuries complained of were attributable to radium reaction. There was further evidence by the medical witnesses, without objection, that if radium had been properly used the kind and extent of radium reaction observed in her case would not have resulted; that the ordinary dose of radium for carcinoma of the uterus was 5,000 milligram hours, that is the number of milligrams of radium multiplied by the number of hours of exposure to the affected tissues. The method of confining the emanations from radium to the Beta and Gamma rays was explained. It was testified that the amount of radium to be used would depend to some extent on the patient and the condition to be treated. "A mistake

in the quantity used and the length of time it is left in may produce disastrous results if precautions are not used."

There was evidence also that in human beings there are different degrees of susceptibility to the effects of radium—that is, its effects are more pronounced in some than others—and that there are individuals who are supersensitive or allergic to its effects, and that there was no way of determining this beforehand. And it was also brought out that a person suffering with diabetes is more susceptible to unfavorable reaction from radium treatment, and that, as it takes some six months for radium treatment to become effective, if a few months after operation a person developed diabetes, the reaction would be increased and might result in consequences deleterious to the patient which could not have been anticipated. There was other evidence, however, tending to negative the inference that Mrs. Smith had had diabetes, or that true diabetes developed subsequently.

Plaintiff offered the deposition of the Superintendent of Duke Hospital for the purpose of showing its method of operation, and the relationship between the hospital and physicians who treat patients therein. From this testimony it appears that the amounts collected by the hospital from patients do not include the fees for the services of physicians. The hospital gets no part of that. The charges for pay patients are made, collected and pocketed by the individual practitioners. Duke University in the operation of Duke Hospital employs physicians who are paid for teaching, for free ward work, and for free dispensary work, but their private fees are not touched. Their charges (not made by the hospital) represent a wide range of fluctuations, in the main scaled upon the ability of the patient to pay. Sometimes physicians' charges are collected as a courtesy and accommodation by the office, but no responsibility is assumed. Occasionally the patient's weekly statement for room and board will also show the amount due for medical or surgical services. The doctors employ on their own account a business organization which does the work of collecting from the patient the bill for their services, but that is separate from the hospital organization. With respect to pediatrical or medical patients, this doctors' organization is headed by Mr. Cobb. If they happen to be surgical, obstetrical or gynecological patients, the matter is handled by Mr. Roper, or one of the members of his organization. They are separate organizations and have no connection with the hospital. When a patient is carried to the hospital he invariably gets the physician he asks for. If he has no knowledge sufficient to make a choice, he is assigned to one whose specialty happens to coincide more nearly with the patient's condition. The assigning is done by a young woman who is paid from three sources; on the one hand, by the medical and pediatrical organization; on the other, by the surgical,

obstetrical and gynecological organization, and third, by the hospital organization. "Her role is that of referee or impartial differentiate." The doctors' private organization, or private diagnostic clinic, is operated within the confines of Duke Hospital with some of the hospital's facilities and some of theirs. The hospital has nothing to do with this organization. The doctors are charged for the use of the hospital's facilities.

In order to maintain his action against Duke University, it was incumbent upon the plaintiff to show that Dr. Carter, by whom or under whose care the alleged negligent treatment of his wife was administered, was an employee or agent of the University, and to go further and show that Dr. Carter was, at the time and in respect to the treatment complained of, acting as such within the scope of his employment. *Dover v. Mfg. Co.*, 157 N. C., 324, 72 S. E., 1067; *Bucken v. R. R.*, 157 N. C., 443, 73 S. E., 137; *Gurley v. Power Co.*, 172 N. C., 690, 90 S. E., 943; *Gallop v. Clark*, 188 N. C., 186, 124 S. E., 145; *Martin v. Bus Line*, 197 N. C., 720, 150 S. E., 501; *Cole v. Funeral Co.*, 207 N. C., 271, 176 S. E., 553; *Parrott v. Kantor*, 216 N. C., 584, 6 S. E. (2d), 40; *Creech v. Linen Supply Co., ante*, 457. "Where one person is sought to be charged with the negligence or wrongdoing of another, the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person so sought to be charged, at the time and in respect to the very transaction out of which the injury arose. The fact that the former was at the time in the general employment and pay of the latter, does not necessarily make the latter chargeable." *Wyllie v. Palmer*, 137 N. Y., 248. This accurate statement of the law was quoted with approval in *Linville v. Nissen*, 162 N. C., 95, 77 S. E., 1096; *Van Landingham v. Sewing Machine Co.*, 207 N. C., 355, 177 S. E., 126; *Liverman v. Cline*, 212 N. C., 43, 192 S. E., 849; *Bright v. Telegraph Co.*, 213 N. C., 208, 195 S. E., 391; *Robinson v. Sears, Roebuck & Co.*, 216 N. C., 322, 4 S. E. (2d), 889; *Creech v. Linen Supply Co., ante*, 457.

It is well settled that an employer is not liable if the negligence of the employee which causes the injury occurs while the employee is acting outside the legitimate scope of his employment and is then engaged in some private matter of his own. *McLamb v. Beasley*, 218 N. C., 308, 11 S. E. (2d), 283; *Tribble v. Swinson*, 213 N. C., 550, 196 S. E., 820; *Van Landingham v. Sewing Machine Co., supra; Bowditch v. French Broad Hospital*, 201 N. C., 168, 159 S. E., 350.

Evidence that Dr. Carter was employed as Professor of Obstetrics and Gynecology in the Medical School of Duke University, and that his employment included "free ward work" in the treatment of charity patients in the hospital, and that he was a member of the professional staff of the hospital as a physician and surgeon, was not alone sufficient to show that

in the treatment of Mrs. Smith he was, at the time and in respect to the particular treatment given her, acting within the scope of his employment by the defendant University, as distinguished from his private and individual practice, for which he was paid by the patient. He was not employed by the defendant to treat pay patients in the hospital, or any others except those in the free ward, and received no compensation from the defendant therefor. *Penland v. Hospital,* 199 N. C., 314, 154 S. E., 406; *Barfield v. South Highland Infirmary,* 191 Ala., 553. Nor can the fact that Dr. Carter was furnished an office in the hospital, which he used as part compensation for teaching and for free ward work, be held sufficient to show that he was the agent of the defendant in treating the plaintiff's wife. The evidence indicates that in treating her he was exercising independent and individual professional skill and judgment. *Johnson v. Hospital,* 196 N. C., 610, 146 S. E., 573; *Black v. Fischer,* 30 Ga. App., 109, 117 S. E., 103.

The rule may fairly be deduced from the decisions of this Court that when a person goes to a hospital for treatment for a particular malady, and expresses no preference as to the physician by whom he is to be treated, and is there directed to or assigned to a reputable physician, one who is not in that respect an employee of the hospital and who is apparently qualified to treat such malady, it is the duty of those in charge of the hospital to exercise reasonable care in the selection of the physician, and that without proof of negligence in this respect no liability attaches to the hospital for injury due to negligence or unskillful treatment of the patient by the physician. *Penland v. Hospital, supra; Johnson v. Hospital, supra; Gosnell v. R. R.,* 202 N. C., 234, 162 S. E., 569. Ordinarily, the hospital undertakes only to furnish room, food, facilities for operation, and attendance, and is not liable for damages resulting from the negligence of a physician in the absence of evidence of agency, or other facts upon which the principle of *respondeat superior* can be applied. *Martin v. Hospital,* 195 Ill. App., 388.

The case of *Pangle v. Appalachian Hall,* 190 N. C., 833, 131 S. E., 42, cited by plaintiff, is not in point. The statement of the legal duty resting on private hospitals with respect to the treatment of patients was made in that case with reference to physicians and attendants employed to treat patients in the hospital.

The doctrine of *respondeat superior* does not apply to a physician who acts upon his own initiative, and in the exercise of his own judgment and skill, without direction or control of an employer, *Norton v. Hefner,* 132 Ark., 18; and if there is negligence in the treatment of a patient on the part of a physician who is not the servant or employee of the hospital, and who is pursuing an independent calling, the responsibility is not that of the hospital, and there is no distinction in that respect between a

visiting and a resident physician. *Schloendorff v. New York Hospital,* 211 N. Y., 125.

The rationale of the general rule which exempts employers from liability for the negligence of a physician is stated in 19 L. R. A., 1183, to be that physicians are not the servants of their employers but are professional men who "exercise their profession to the best of their abilities according to their own discretion; but in exercising it they are in no way under his (the employer's) orders or bound to obey his directions." This statement of the law is quoted in the recent case of *Woodburn v. Standard Forgings Corp.,* 112 F. (2d), 271, 129 A. L. R., 337.

In *Stewart Circle Hospital Corp. v. Curry,* 173 Va., 136, 3 S. E. (2d), 153, it was said: "It is conceded that a hospital is not responsible for the acts of an attending physician, whether a member of its staff or an outsider, except where by contract it has assumed responsibility. This is based on the ground that such physician is an independent contractor and alone is responsible for the exercise of professional skill and judgment, subject to no control by the hospital in the execution thereof." See, also, cases cited in the annotation in 124 A. L. R., 190.

There was no evidence that Dr. Carter in treating Mrs. Smith assumed to act for Duke University otherwise than in his individual capacity as a practicing physician, or that Dr. Carter was held out by the defendant as having been employed by it to treat pay patients, or that the hospital undertook to furnish physicians and surgeons for the treatment of the maladies of patients, and hence no liability can attach to defendant on the theory that Dr. Carter was acting within the scope of an apparent authority or employment. Nor is there evidence of subsequent ratification by defendant University of any action on the part of Dr. Carter beyond the limits of his employment. 2 Am. Jur., 82, 166.

Dr. Carter, personally, has not been sued. He is not a party to the action. Since we are of opinion that the evidence was insufficient to show that in the treatment of plaintiff's wife he was acting within the scope of his employment by Duke University, it becomes unnecessary to determine whether the evidence was sufficient to show actionable negligence on his part, under the rule laid down in *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356; *Ferguson v. Glenn,* 201 N. C., 128, 159 S. E., 5; and *Davis v. Pittman,* 212 N. C., 680, 194 S. E., 97, or whether the fact of the radium burns and the injurious consequences therefrom were sufficient to afford evidence that they were caused by negligent treatment (*Covington v. James,* 214 N. C., 71, 197 S. E., 563; *Butler v. Lupton,* 216 N. C., 653, 6 S. E. [2d], 523), or were due to the diabetic condition, or to hyper-sensitiveness on the part of the patient (*Lippard v. Johnson,* 215 N. C., 384, 1 S. E. [2d], 889; *Runyan v. Goodrum,* 147 Ark., 481; *Sweeney v. Erving,* 228 U. S., 233), or whether the matter was left in

the field of speculation or conjecture (*Smith v. McClung,* 201 N. C., 648, 161 S. E., 91; *Kuchneman v. Boyd,* 193 Wis., 588).

One of the questions provoking debate here was whether the nonsuit should have been allowed on the ground that the defendant was and is an eleemosynary institution, and thus exempt from liability for negligence on the part of its agents and employees when due care had been exercised in their selection. We need not determine this question as we hold, upon another ground, that the nonsuit was properly allowed. It may be said, however, that judgment of nonsuit cannot be sustained upon evidence tending to support an affirmative defense, unless the plaintiff's own evidence establishes such defense as a matter of law. *Hedgecock v. Ins. Co.,* 212 N. C., 638, 194 S. E., 86.

For the reasons stated, the ruling of the court below in allowing the motion for nonsuit and entering judgment dismissing the action is

Affirmed.

M. Z. PEARCE v. SAMUEL WATKINS AND WIFE, BESSIE WATKINS, DEVEREAUX WATKINS AND WIFE, RUTHIE WATKINS, ALONZA MERRITT AND WIFE, FARELLA MERRITT, CHARLES HODGE AND WIFE, LORICE HODGE.

(Filed 21 May, 1941.)

1. Mortgages § 23—

The purchaser of the equity of redemption is entitled to all the rights, titles and equities of his grantor, including the right to pay off the debt according to the terms of the deed of trust.

2. Mortgages § 13b—

A substituted trustee, the substitution having been made in accordance with the statutory provisions, succeeds to all the rights, titles and duties of the original trustee, and has the power to foreclose the instrument according to its terms upon default. Michie's Code, 2583 (a).

3. Same—

The duly appointed substituted trustee can bind the *cestui.*

4. Mortgages § 39b—

While it is necessary that a deed of trust be foreclosed according to its terms and the trustor is entitled to a strict compliance therewith, the recitals in the trustee's deed to the purchaser are *prima facie* correct and the presumption of law is in favor of the regularity of the execution of the power of sale, and the burden is upon the parties attacking the foreclosure to prove the irregularities relied upon by them.

5. Mortgages § 39c: Equity § 2—Purchaser of equity of redemption with notice of pendency of action to restrain consummation of foreclosure, held estopped by laches from attacking foreclosure sale.

Plaintiff, the purchaser of the *locus in quo* at the foreclosure sale, instituted this action to recover possession of the land against the purchasers

of the equity of redemption. It appeared that at the time defendants purchased the equity of redemption the land had been sold under foreclosure and there was then pending an action by the trustor, defendants' grantor, seeking to enjoin the consummation of the sale, and that defendants had actual knowledge of the suit. It further appeared that judgment was entered in the suit dissolving the restraining order and directing the trustee to execute deed to the purchaser, plaintiff in this action, that the trustee executed deed to plaintiff in compliance with the judgment, and that thereafter plaintiff advised defendants he had purchased the land, and made certain improvements on the land, defendants being in possession at the time with the consent of plaintiff and making no protest. *Held:* The action of the court in sustaining plaintiff's demurrer to defendants' counterclaim and cross action attacking the foreclosure, the trustee's deed, and the prior judgment entered in the cause, on the ground of irregularity, there being no allegation of fraud or mutual mistake, and the action of the court in excluding evidence offered by defendants in support of their counterclaim, and directing a verdict for plaintiff on the issue of title, cannot be held for prejudicial error, since if defendants had any rights they slept on them and are now estopped by their laches.

APPEAL by defendants Samuel Watkins and wife, Bessie Watkins, from *Sink, J.*, at November Civil Term, 1940, of WAKE. No error.

This is an action brought by plaintiff against defendants for the recovery of certain pieces of land and rents. The plaintiff alleged that he was the owner in fee simple of the land and defendants were in the unlawful possession of same and refuse to surrender possession of same. The defendants Watkins denied these allegations and for a further answer and defense, and as a counterclaim and cross action pray for certain affirmative relief.

The plaintiff acquired title to said lands under a deed from Joseph B. Cheshire, Jr., Substituted Trustee, under date 20 June, 1939. Joseph B. Cheshire, Jr., Substituted Trustee, sold the said lands under authority of the deed of trust executed by Charles E. Montague and wife, Lillian Montague, dated 21 February, 1928, to A. M. Bonner, Trustee, which deed of trust is duly registered in the office of the register of deeds for Wake County, North Carolina. Joseph B. Cheshire, Jr., was thereafter substituted trustee in the place and in the stead of A. M. Bonner.

The defendants Watkins claim the equity of redemption under a deed from Charles E. Montague to defendants, Bessie Watkins and her husband, Samuel Watkins, dated 28 November, 1938, filed for registration in the office of the register of deeds for Wake County, on 27 January, 1939, and recorded in Book 795, p. 378.

In the trial of the case, plaintiff offered the record of said deed from Joseph B. Cheshire, Jr., Substituted Trustee, to M. Z. Pearce, Register's Book 795, page 500, which deed is dated 20 June, 1939, and describes the lands described in the complaint, and among other things contains recitals as follows:

"That whereas on February 21, 1928, Charles E. Montague and wife, Lillian Montague, executed and delivered to A. M. Bonner, Trustee, a certain deed of trust securing an indebtedness therein recited, which deed of trust is recorded in the office of the Register of Deeds of Wake County, North Carolina, in Book 523, page 170:

"And Whereas, default was made in the payment of the indebtedness thereby secured as therein provided, and at the request of the holder of the said indebtedness and under and by virtue of the authority in the said deed of trust, and in accordance with the terms of same, and after due advertisement as in said deed of trust prescribed and by law provided, the said Joseph B. Cheshire, Jr., Trustee; as aforesaid, did on the 15th day of December, 1936, at 12 o'clock noon, at the Courthouse door of Wake County, expose to public sale the lands hereinafter described and also described in the said deed of trust, when and where A. J. Templeton became the last and highest bidder at the price of $300.00.

"And Whereas, on December 23, 1936, the bid was raised by deposit with the Clerk of the Superior Court by M. Z. Pearce, and resale ordered by the Court, which sale was duly advertised in accordance with the law and the said deed of trust, and the land resold at the Courthouse door of Wake County on January 11, 1937, when and where W. R. Pearce became the last and highest bidder at the price of $335.00.

"And Whereas, both at the sale on December 15, 1936, and at the resale on January 11, 1937, the said property hereinafter described was sold specifically subject to any and all taxes as announced in the advertisements and at the sales.

"And Whereas, the said sale and resale were reported to the Clerk of the Superior Court of Wake County, in Book J, at page 14.

"And Whereas, the bid of said W. R. Pearce was duly assigned to M. Z. Pearce.

"And Whereas, a suit was instituted in the Superior Court of Wake County by Charles E. Montague and wife, et als, against A. M. Bonner and Joseph B. Cheshire, Jr., Substituted Trustee, et als, wherein the said substituted Trustee was enjoined from completing and making a deed under the resale and assignment of bid to M. Z. Pearce.

"And Whereas, in the said suit by Judgment, C. I. D. No. C-312, Minute Docket No. 42, Page 47, and Judgment Docket 47, Page 138, the said resale, as set out, and assignment of bid were confirmed and approved, and the said Substituted Trustee was ordered and directed by the said Judgment to complete the said resale and convey the property hereinafter described and in the said deed of trust described to M. Z. Pearce, upon his complying with the terms of said resale.

"And Whereas, the said M. Z. Pearce has complied with the terms of resale and paid the purchase price, and also complied with the terms of said Judgment."

The judgment of the court below is as follows: "This cause coming on to be heard at this November Civil Term, 1940, of the Superior Court of Wake County, by the Hon. H. Hoyle Sink, Judge presiding, and a jury. In apt time the plaintiff demurred ore tenus to the cross-action of the defendants, and it appearing to the Court, and the Court finds it a fact, that the defendants, by their cross-action, seek relief affecting parties other than those to this action, and by their cross-action seek to have set aside, cancelled and declared void a judgment rendered in a suit in this Court, to which suit none of the parties to this action were parties. It is, therefore, Ordered and Decreed that the plaintiff's demurrer *ore tenus* to the cross-action of the defendants be, and the same is allowed."

The following issues were submitted to the jury:

"1. Is the plaintiff the owner and entitled to possession of the land described in the complaint?

"2. What amount, if any, is the defendant indebted to plaintiff for rents for the year 1939 and 1940?

"The jury having answered the first issue, 'Yes,' and the second issue '$125.00.'"

"Now therefore, it is hereupon Ordered, Adjudged and Decreed that the plaintiff, M. Z. Pearce, is the owner of, and entitled to possession of the land described in the complaint, and that the plaintiff have and recover possession of the said land from the defendants, and that the plaintiff have and recover of the defendants the sum of $125.00 to be paid from and out of the deposit made in this case by the defendants in lieu of bond. H. Hoyle Sink, Judge Presiding."

The defendants, Watkins, made several exceptions and assignments of error and appealed to the Supreme Court. The material ones and other necessary facts will be set forth in the opinion.

Little & Wilson and Jones & Brassfield for plaintiff.

R. Roy Carter for defendant.

CLARKSON, J. An action over the land in controversy in this case was before this Court heretofore. *Pearce v. Montague,* 209 N. C., 42. The decision in that action is not material to this controversy, but it is there said, at pp. 43-4: "When the defendant executed and delivered to the plaintiff his mortgage, he was the owner of the equity of redemption in the lands and the mortgagee could not extinguish this equity of redemption by his purchase of the land at the tax sale, and the title which the mortgagee acquired at the tax sale is held by him in trust for himself and the defendant, the mortgagor, since when a mortgagee pays off an encumbrance and acquires a title superior to his title as mortgagee, he holds such title so acquired as trustee for the benefit of himself and the mortgagor. *Cauley v. Sutton,* 150 N. C., 327."

The defendants set forth certain questions involved: "1. Did the Court commit error in sustaining plaintiff's demurrer ore tenus to defendants' further answer and defense and cross-action?" We think not, taking the record as a whole the judgment below was correct. The defendants purchased the equity of redemption of the lands in controversy.

In *Dameron v. Carpenter,* 190 N. C., 595 (597), the principle of law is thus stated: "The plaintiffs, purchasers, are entitled to all the rights, titles and equities of their grantor, McLean, including the right to pay off the indebtedness according to the terms of the mortgage, and thereby clear their title. *Baker v. Bishop Hill Colony,* 45 Ill., 264; *Schoffner v. Fogleman,* 60 N. C., 564. Equity subrogates the purchaser of the equity redemption to the rights of the mortgagor to clear the title and procure the legal estate only as to the mortgaged premises, and no further."

We think it is unnecessary to set forth in detail the further answer and defense, as a counterclaim and cross action of defendants. It is long and treats mostly of records. In it defendants pray judgment: "That the defendants, Samuel Watkins and wife, Bessie Watkins, have an appropriate order and decree cancelling, setting aside, annulling and striking from the records as a lien or a cloud upon their title the following instruments of record: (a) deed of trust, Charles E. Montague and wife, to A. M. Bonner, Trustee, dated February 21, 1928, recorded in Book 523, page 170, registry of Wake County; (b) deed from Joseph B. Cheshire, Jr., substituted Trustee, dated June 20, 1939, recorded in Book 795, page 500, registry of Wake County; and (c) judgment in the case of Charles E. Montague, et als, v. A. M. Bonner, et als, entered at June Term, 1939, and docketed in Judgment Docket 47, page 138, office of the Clerk of the Superior Court of Wake County."

M. Z. Pearce, the plaintiff, testified, in part: "The day that I had the deed recorded, I went to see Sam Watkins, and asked him if he knew that I had a deed for the land. He said that he was expecting me or Mr. Beck one to get a deed, he didn't know which one. I told him that I had the deed recorded that day and asked him what he wanted to do, and he said 'I would like to rent the land for this year and will pay the fourth.' I said, *'That is all right, I will rent it to you for the fourth.'* I served notice and made demand on Sam Watkins for the land after the first of the year, and rented it to another man, O. C. Pearce, *and before Christmas I went down there and covered the house that the tenant was living in and built a barn.* Sam Watkins made no complaint about the improvements I was making, and said nothing at all to me. I spent about $300.00 on these repairs. After I put the repairs and improvements on the land, and after I thought he had plenty of time to sell his crop, I demanded the place, and the payment of the rent. He said that he had a deed for the land, and that was the first time that I knew that

he claimed the land. That was just before I was ready to move my man on the property."

Defendant, Samuel Watkins, testified, in part: "I took possession of the land under that deed from Charles E. Montague, and he had been living there on the land for 34 or 35 years, and *he claimed the land all that time. He died January 13, 1939. I took possession of the land when he died* and planted crops on it. Mr. Pearce came to see me on June 20th or 21st, and I went with him to see the lines, and *he told me that he had bought the land,* and he asked me some questions about the amount of fertilizer I had used under the crops planted on this land. When he got back to his car parked in front of my door, he said to me, *'Sam, I am glad you are tending this here land because it was so late I couldn't plant nothing on there by the time I got it. Now, when this fall comes I will have a little rent and since it's so late you can just give me the fourth.' I told him if it is necessary for me to pay you rent, I will.* (Cross-examination). *I heard there was a lawsuit going on. I went on cultivating the land and I saw Mr. Pearce painting barns and stables and repairing the house. I didn't object to Mr. Pearce, but I did object to his son when he come to do the work.* I told him 'I object to you or Mr. Pearce doing anything over here because I have got a deed to it.' I went to him in September and offered to pay something, but it was not because I thought his claim was ahead of mine. I thought mine was ahead of his, yet I wanted to pay him something because he had bought the mortgage that I was due to pay off and I wanted to pay him."

The above evidence indicates that Watkins knew of the lawsuit and he did not make himself a party or attempt to pay the prior lien; nor was R. D. Beck, whom he now claims was the owner of the debt to whom it was transferred, made a party. The trustee, A. M. Bonner, was a party to the restraining order. The trustee held the legal title to the land and under the applicable statute the substituted trustee was successor of the legal title.

In *Carswell v. Creswell,* 217 N. C., 40 (46), it is written: "In *Orange County v. Wilson,* 202 N. C., 424 (427), is the following: 'Besides, the trustees of the petitioners were parties defendant and were served with process.' The principle was so well settled that it was recognized without citing authorities, that a trustee could bind the *cestui que trustent.*"

In the recital in the deed to plaintiff is the following: "And Whereas, default was made in the payment of the indebtedness thereby secured as therein provided, *and at the request of the holder of the said indebtedness and under and by virtue of the authority in the said deed of trust, and in accordance with the terms of same,*" etc. (Italics ours.)

N. C. Code, 1939 (Michie), sec. 2583 (a), provides for substitution of

trustees in mortgages and deeds of trust, which the record indicates was done in this case.

In *Pendergrast v. Mortgage Co.*, 211 N. C., 126 (128), is the following: "Under the provisions of the deed of trust which appear in the record, and under the provisions of the statute (ch. 78, Public Laws of N. C., 1931, N. C. Code of 1935, sec. 2583 [a]), the substitute trustee was authorized to complete the foreclosure of the deed of trust by the execution of a deed to the purchaser at the sale made by the original trustee, upon his compliance with his bid. See *Mortgage Corp. v. Morgan*, 208 N. C., 743, 182 S. E., 450."

We see no error in the exclusion of certain instruments set forth in the record and offered by defendants. The court below in the judgment set forth, in part: "In apt time the plaintiff demurred *ore tenus* to the cross-action of the defendants, and it appearing to the Court, and the Court finds it a fact, that the defendants, by their cross-action, seek relief affecting parties other than those to this action, and by their cross-action seek to have set aside, cancelled and declared void a judgment rendered in a suit in this Court, to which suit none of the parties to this action were parties."

No attack on any of the conveyances complained of by defendants was made by them on the ground that they were procured by fraud or mutual mistake, nor was this set up as a defense. If defendants had any rights, they slept on them and it is now too late for them to complain. In fact, the deed from J. B. Cheshire, Jr., Substituted Trustee, to plaintiff, sets forth in detail and recites all the instruments by which the power was exercised which gave him authority to make the deed. This was *prima facie* evidence of their *bona fide* correctness and there is neither allegation or proof to show they were not.

In *Jenkins v. Griffin*, 175 N. C., 184 (186), it is said: "Powers of sale in a mortgage are contractual, and as there are many opportunities for oppression, courts of equity are disposed to scrutinize them and to hold the mortgage to the letter of the contract. It is essential to the validity of a sale under a power to comply fully with the requirements as to giving notice of the sale. *Eubanks v. Becton*, 158 N. C., 234. This is the rule, but in its enforcement 'The presumption of law is in favor of the regularity in the execution of the power of sale; and if there were any failure to advertise properly, the burden was on defendant (here on plaintiffs) to show it.' *Cawfield v. Owens*, 129 N. C., 288; *Troxler v. Gant*, 173 N. C., 425. How have the plaintiffs sustained this burden? The deed to the purchaser was introduced, and it recites that the sale was duly advertised, which recital is *prima facie* evidence of its correctness (*Lunsford v. Speaks*, 112 N. C., 608)." *Freeman v. Ramsey*, 189 N. C., 790 (796).

In *Mfg. Co. v. Jefferson*, 216 N. C., 230 (232), we find: "The recitals

in the recorded deed from the trustee to the Roanoke Bank & Trust Company established *prima facie* right in the purchaser at the foreclosure sale, and the plaintiff as grantee of the purchaser occupied the status of an innocent purchaser for value without notice."

The defendants make the further contentions: "2. Did the Court commit error in excluding testimony of defendant and in excluding defendants' evidence of records of title to the lands involved, including judgment alleged to be void? 3. Did the Court commit error in directing a verdict for the plaintiff upon the issue of title? 4. Did the Court err in denying defendants' motion for judgment or directed verdict in their favor?" For the reasons given, none of these contentions made by defendants can be sustained.

On the entire pleadings, record and evidence, we think the judgment of the court below is correct. Allegations without *probata* is of no avail to defendants. If technically the further defense was not demurrable—mainly conclusions of law—yet on the entire record there was no prejudicial or reversible error.

No error.

ALEC WEINSTEIN AND BEN WEINSTEIN, TRADING AS WEINSTEIN HIDE AND METAL COMPANY, v. THE CITY OF RALEIGH.

(Filed 21 May, 1941.)

Municipal Corporations §42—

The findings of fact made by the trial court under the agreement of the parties *are held* to support the court's conclusion of law that plaintiff, although his place of business was located one-half mile outside the limits of defendant municipality, was engaged in the business of buying and selling junk within the municipality, and the judgment holding plaintiff liable for license tax levied by the municipality under authority of the Revenue Act of 1939, ch. 158, is affirmed.

STACY, C. J., concurring in result.

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

SEAWELL, J., dissenting.

SCHENCK, J., concurs in dissent.

APPEAL by plaintiffs from *Pless, J.*, at February Term, 1941, of WAKE. Affirmed.

The judgment indicates the controversy, and is as follows:

"This cause was heard before J. Will Pless, Jr., Judge Presiding, without the intervention of a jury, upon the agreement of the parties that he could hear the evidence and find the facts and render judgment thereon. After hearing the evidence and the argument of counsel repre-

senting the plaintiff and the defendant the Court finds the following facts:

"1. The plaintiff is a resident of the City of Raleigh, and maintains and operates a junk business approximately one-half mile outside the limits of the City of Raleigh, which is a City of more than 30,000 population.

"3. The Legislature of 1939, passed the Revenue Act, being Chapter 158, Section 168, of the Public Laws of 1939, applying to junk dealers' licenses, as follows:

" 'Sec. 168. Every person, firm or corporation engaged in the business of buying and/or selling or dealing in what is commonly known as junk, including scrap metals, glass, waste paper, waste burlap, waste cloth and cordage of every nature, kind and description, shall apply for and obtain from the Commissioner of Revenue a State license for the privilege of engaging in such business in this State and shall pay for such license an annual tax for each location where such business is carried on, according to the following schedule:

" 'In unincorporated communities and in cities or towns of less than 2,500 population	$ 25.00
In cities or towns of 2,500 and less than 5,000 population	30.00
In cities and towns of 5,000 and less than 10,000	50.00
In cities or towns of 10,000 and less than 20,000	75.00
In cities or towns of 20,000 and less than 30,000	100.00
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; Provided, however, that any person, firm or corporation dealing solely in waste paper shall not be liable for said tax.'

"4. Thereafter the City of Raleigh adopted an ordinance in words and figures, as follows:

" '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.

" 'It shall be the duty of all junk dealers to register all articles purchased by them showing date of purchase, description of every article purchased, and the name of the party or parties from whom purchased;

and every article purchased by any junk dealer shall remain in their respective places of business for at least three days before being broken up or shipped; and it shall be the duty of such junk dealer to admit the chief of police or any other officer of the police department into their place of business at any time admittance may be demanded to inspect their books and stock of goods and any person violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not more than $50.00 or imprisoned for not more than 30 days, in the discretion of the court. Raleigh City Code, Chapter 23, Section 10.'

"6. The Charter of the City of Raleigh provides as follows:

" 'All ordinances, rules and regulations of the City of Raleigh now in force or that may hereafter be enacted by the Board of Commissioners in the exercise of the police powers given to it for sanitary purposes, or for the protection of the property of the city, unless otherwise provided by the Board of Commissioners, shall, in addition to applying to the territory within the city limits apply with equal force to the territory outside of said city limits within one mile in all directions of same and to Pullen Park and to the right of way of all sewer, water, and electric light lines in the city, without the corporate limits, and to the rights of way without the city limits of any street railway company, or extension thereof, operating under a franchise by the city and upon all property and rights of way of the city outside the said corporate limits and the above mentioned territorial limits, wheresoever the same may be located. Article 5, Section 10, Raleigh City Code.'

"7. The plaintiff paid the tax under protest to the City Tax Collector and brings this suit to recover the amount of taxes and penalty paid; all of the above facts having been stipulated and agreed to by the parties.

"In addition to the foregoing findings of fact based upon the stipulations of the parties the Court makes the further additional findings from the evidence introduced in the cause:

"The plaintiff firm regularly and customarily makes purchases of such articles of junk as old automobiles, automobile frames, tires, scrap iron and scrap copper from a large number of persons and firms having these articles for sale within the City of Raleigh, and regularly deals with practically all of the automobile dealers and tire stations in said city, buying quantities of old tires, car frames and cars in a unit, and selling individual items from old cars to garages and mechanics of the City of Raleigh. A large portion of the purchases made by the plaintiff firm are the result of telephone communications from the place of business of the seller to the plaintiff and in some instances the goods bought are delivered by the seller upon his trucks while in other instances and in particular where large and bulky junk is bought, the same is delivered to the plaintiff's place of business on his own vehicles. Sales of indi-

vidual items from old cars and similar sales are generally had by inspection and examination of the articles by the purchaser at the plaintiff's place of business outside the city limits.

"It is agreed by all parties and the Court finds as a fact that the amount of goods and junk bought by the plaintiff under the above circumstances from firms in the City of Raleigh, amounts to approximately $10,000 a year. The Court further finds as a fact that said firms and dealers having junk for sale generally and usually communicate with the plaintiff by telephone and receive competitive bids for the aforesaid article and where the price offered by the plaintiff is the highest the property is sold to it.

"Upon the foregoing findings of fact the Court holds as a matter of law that the plaintiff is engaged in the business of buying and selling and dealing in what is commonly known as junk, within the city of Raleigh, which is a city of more than 30,000 population and, further, that the plaintiff is subject to the tax imposed under the ordinance of the city of Raleigh.

"Upon the foregoing findings of fact and conclusions of law it is, therefore, considered, ordered and adjudged by the Court that the plaintiff have and recover nothing from this action and the defendant its costs.

"This, the 28th day of February, 1941.

J. WILL PLESS, JR., Judge Presiding."

To the foregoing findings of fact and conclusions of law, the plaintiff excepted, assigned error and appealed to the Supreme Court.

Jones & Brassfield and Armistead Jones Maupin for plaintiff.
Alfonso Lloyd for defendant.

CLARKSON, J. Plaintiff paid the junk dealers' license tax levied by the defendant, city of Raleigh, under protest and brought this action to recover same. N. C. Code, 1939 (Michie), sec. 7979.

This action has been before this Court heretofore. *Weinstein v. Raleigh,* 218 N. C., 549. It was there held: "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."

The only question presented on this appeal is whether the plaintiff, junk dealers, were "buying and/or selling material commonly known as junk, within the City of Raleigh," under the provisions of the city ordinance and section 168 of the Revenue Act of 1939, chapter 158. Under the facts found by the court below, we think plaintiff was. The record shows that the parties to the controversy agreed that the court below could "hear the evidence and find the facts and render judgment thereon." The court below found: "The plaintiff firm *regularly and customarily* makes purchases of such articles of junk as old automobiles, automobile frames, tires, scrap iron and scrap copper from a large number of persons and firms having these articles for sale within the City of Raleigh, and *regularly deals* with practically all of automobile dealers and tire stations in said city, *buying quantities* of old tires, car frames and cars in a unit, *and selling* individual items from old cars to garages and mechanics of the City of Raleigh," etc.

Upon the findings of fact the court below held as a matter of law: "That the plaintiff is engaged in the business of buying and selling and dealing in what is commonly known as junk, within the City of Raleigh, which is a city of more than 30,000 population, and, further, that the plaintiff is subject to the tax imposed under the ordinance of the City of Raleigh."

We think the following cases support defendant's contentions: *Hilton v. Harris,* 207 N. C., 465; *S. v. Bridgers,* 211 N. C., 235, as well as the opinion of the Court in this case on the former hearing. See *S. v. Johnston,* 139 N. C., 640.

The case of *Kenny Co. v. Brevard,* 217 N. C., 270, is distinguishable from the present case. It was said in *Hilton v. Harris, supra,* at p. 473: "If the plaintiffs were not required to pay this tax for the trade or business it carries on in Concord, a situation would arise that those living in Concord and carrying on this kind of trade or business, who paid the tax—it would injure their business, as they would have to pay a tax of $100.00 and the plaintiff would not; consequently, the plaintiffs would undersell the Concord bakers. Such favoritism would tend to monopolize and, in time, destroy competition, which is sometimes called 'the life of trade.'"

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

Affirmed.

STACY, C. J., concurring in result: The trial court concluded, from the facts found in accordance with the stipulation of the parties, that "the plaintiff is engaged in the business of buying and selling and dealing in what is commonly known as junk within the City of Raleigh." The conclusion is supported by the finding that the plaintiff regularly deals

with practically all the automobile dealers and tire stations within the city, "buying quantities of old tires, car frames and cars in a unit, and selling individual items from old cars to garages and mechanics of the city of Raleigh."

Even if it be conceded that a contrary conclusion is arguable from the finding, "sales of individual items from old cars and similar sales are generally had by inspection and examination of the articles by the purchasers at the plaintiff's place of business outside the city limits," it does not follow that an erroneous interpretation has been placed upon the record. The presumption is otherwise. *Jackson v. Bell,* 201 N. C., 336, 159 S. E., 926.

This is the only question presented by the appeal. The judgment results from a permissible understanding of the evidence and the determinations made thereon. It is not contended that buying within the city limits or making purchases therein, without more, would require a dealer's license.

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

SEAWELL, J., dissenting: I dissent on the ground that the taxing statute refers throughout to a located business and not to the type of transactions described in the opinion. Any other construction, applied to the State tax, would lead to an absurd situation—would result in double, triple, and multiple taxation, although he had but one place of business. It would leave the schedule set out in the Act without meaning. The power of the city to tax is expressly referred to the State levy, and is limited to the same condition—the presence of a located business. The statute uses terms of physical measurement. The city authorities recognized this as the proper construction in their ordinance imposing the tax. Under the reasonable interpretation of the statute—without straining at the bolts—the city is not authorized to tax a business located beyond its boundaries.

The effect of the decisions is to build up another of those trade barriers which experts in the commercial field point out as one of the major curses of this country. Its principle and effect is that of a local protection tariff, with multiplied opportunities of retaliation. I have no idea that the Legislature intended to enact a law of such extensive application, or to adopt a policy so retrogressive.

SCHENCK, J., concurs in this opinion.

JAMES I. ALBERTY, ADMINISTRATOR OF THE ESTATE OF CHESTER ALBERTY, DECEASED, PLAINTIFF, v. CITY OF GREENSBORO, DEFENDANT.

(Filed 21 May, 1941.)

Municipal Corporations § 14—

Nonsuit *held* proper in this action to recover for death of intestate, who was killed when he failed to discover and take a curve in the street, but drove straight on into a ditch and trees growing near an old abandoned road.

APPEAL by plaintiff from *Pless, Jr., J.*, at 3 February Term, 1941, of GUILFORD. Affirmed.

Harry R. Stanley for plaintiff, appellant.
Andrew Joyner, Jr., and H. C. Wilson for defendant, appellee.

PER CURIAM. Plaintiff's action is for damages against the city of Greensboro for alleged negligence in failing to keep a portion of Randolph Avenue safe for travel. At the place the injury occurred there is a decided curve in the street, and straight ahead, in the direct line of travel, there is a disused road, formerly a part of the main way. This old road is not barricaded from the street, and the allegation is that the street was not sufficiently lighted at that point to enable the deceased to discover the surroundings. There was a slight declivity, a ditch, and trees growing near the old road which it is alleged were a source of danger, and the whole situation is alleged to be of such a character as to lure deceased into a trap.

Driving down this street with some companions late at night, deceased failed to take the curve, drove off the highway, and was killed.

We agree with the court below that there is no evidence to sustain a verdict for the plaintiff and the judgment as of nonsuit was proper.

Affirmed.

BLADEN COUNTY v. ANNIE J. SQUIRES AND HUSBAND, L. E. SQUIRES, REX SQUIRES AND WIFE, L. A. SQUIRES, W. S. MURCHISON AND WIFE, MRS. W. S. MURCHISON, C. E. PHINNEY, TRUSTEE, AND ALL OTHER PERSONS CLAIMING ANY INTEREST IN THE LANDS HEREINAFTER DESCRIBED.

(Filed 21 May, 1941.)

1. Taxation § 40e—

The last and highest bidder at the foreclosure sale of a tax sale certificate is but a preferred bidder with no rights in the property in law or equity until after his bid has been accepted and confirmed by the court,

at least until after the time for upset bids has expired, and a subsequent order of resale within the time permitted for upset bids is a rejection of his bid, and he is not entitled to contest the validity of judgment of confirmation of the bid entered at the second sale.

2. Same—

The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions or an increased bid, Public Laws of 1939, ch. 310, sec. 1719 (r), but in this case the judgment of the court that the order of resale for an increased bid was properly entered is upheld on the findings which are supported by the evidence.

APPEAL by one C. E. Stevens, from *Hamilton, Special Judge,* at November Term, 1940, of BLADEN. Affirmed.

Civil action under C. S., 7990 to foreclose tax lien.

Judgment was entered at August Term, 1940, decreeing foreclosure, appointing a commissioner and directing sale. At the sale conducted by the commissioner, C. E. Stevens became the last and highest bidder in the sum of $1,675.00. Within the time allowed by statute the clerk received an upset bid, accepting a check in the sum of $250.00 endorsed by solvent persons in lieu of cash. He thereupon ordered a resale at which E. B. Clark became the last and highest bidder at $2,100.00.

Upon report of the resale the last bidder at the first sale filed a written petition and protest praying that the resale be adjudged a nullity and for an order confirming the first sale to him. The petition and protest was denied and judgment of confirmation was entered. The petitioner Stevens excepted and appealed.

J. A. McNorton for petitioner, appellant.
Leon D. Smith for plaintiff, appellee.

PER CURIAM. Stevens occupied the position of a preferred bidder with no rights in the property in law or equity until his bid had been accepted and confirmed by the court, at least until after the time for upset bids had expired. A subsequent order of resale within the time permitted for upset bids is a rejection of the original bid and the bidder is not entitled to contest the validity of the judgment of confirmation. *Vance v. Vance,* 203 N. C., 667, 166 S. E., 901; *Richmond County v. Simmons,* 209 N. C., 250, 183 S. E., 282. The court had authority to reject the bid and to order a resale in the absence of exceptions or an increase bid. Sec. 1719 (r), ch. 310, Public Laws 1939. Even if it be conceded (and it is not) that the appellant has a sufficient interest to entitle him to be heard, the facts found by the court below are supported by evidence and sustain the judgment entered.

Affirmed.

R. P. HALES, GEORGIA HALES AND TAMAH SHAW v. NATIONAL LAND EXCHANGE, A CORPORATION.

(Filed 21 May, 1941.)

Judgments § 24—Interlocutory consent judgment is subject to modification by court order which does not encroach upon rights of parties.

In an action on notes secured by mortgage and to foreclose same, consent judgment was entered for the sale of the land by two commissioners with provision that the cause be remanded to the clerk for further orders. Sale was enjoined, and upon dissolution of the injunction, the court entered an order that the lands be sold, and appointed one of the two commissioners named in the consent judgment to make the sale after advertisement. *Held:* As far as the sale was concerned, the consent judgment was interlocutory, and the court had the power to modify it by order of sale which did not infringe upon the rights of the parties.

APPEAL by defendant from *Hamilton, Special Judge,* at November Special Term, 1940, of BLADEN.

Civil action for recovery on notes secured by mortgage deed and for foreclosure of mortgage under power of sale therein contained.

At May Term, 1939, a consent judgment was entered in favor of plaintiffs against defendant for the amount of indebtedness alleged in the complaint, to the payment of which certain lands described in the judgment were condemned to be sold on Monday, 11 December, 1939, at public auction for cash under the direction of the court, and in which two commissioners were appointed to so sell the land, and in which the cause was remanded to clerk of Superior Court for further orders. Pending advertisement the sale was enjoined, and later the injunction was dissolved. Thereupon, at November Special Term, 1940, the presiding judge entered a judgment, ordering that the lands be sold on Monday, 30 December, 1940, at public auction for cash, and appointing one of the two commissioners named in the consent judgment to make the sale after advertising notice thereof as therein set forth.

In other respects this judgment is in conformity with the consent judgment. The cause is retained for further orders.

Defendant appealed therefrom to Supreme Court and assigns error.

R. J. Hester, Jr., and H. H. Clark for plaintiffs, appellees.
Kirkpatrick & Kirkpatrick for defendant, appellant.

PER CURIAM. The consent judgment, in so far as it pertained to the sale of the land, was an interlocutory order in the cause, and has validity because of the approval of the judge, and was subject to modification by

the judge like any other such order, provided it did not infringe upon the rights of the parties. See *Fowler v. Winders,* 185 N. C., 105, 116 S. E., 177. Compare *Coburn v. Comrs.,* 191 N. C., 68, 131 S. E., 372.

No encroachment upon rights of parties appears. Hence, the judgment will be

Affirmed.

W. E. WHITE, ADMINISTRATOR OF W. E. WHITE, JR., *v.* HEMBY CHAPPELL AND NORFOLK SOUTHERN BUS CORPORATION.

(Filed 31 May, 1941.)

1. Death § 3—

In an action for wrongful death the burden is on plaintiff to prove negligence on the part of the defendant, and that such negligence, acting in continuous and unbroken sequence, and without which injury would not have occurred, resulted in the injury producing death, and that under the circumstances a man of ordinary prudence could have foreseen that such result was probable.

2. Carriers § 21a—

While a carrier is held to the highest degree of care for the safety of its passengers consistent with the practical operation and conduct of its business, a carrier is not an insurer of their safety, but its liability is based on negligence.

3. Carriers § 15—

Ordinarily, the relationship of carrier and passenger terminates when the carrier discharges the passenger in a place of safety at the destination contracted for, or designated by the passenger.

4. Same—Interurban bus terminates relationship of carrier and passenger when it discharges passenger in place of safety on highway near place designated.

The evidence tended to show that an interurban bus carrier had regular scheduled stops at cities between its termini, that a mother and son purchased tickets for transportation from one of such cities to another, and, at the mother's request to stop at a particular house before reaching the destination called for in their tickets, the driver stopped on the right side of the highway in front of the house and permitted them to alight on the shoulders of the road. *Held:* The relationship of carrier and passenger terminated when the passengers alighted in a place of safety on the shoulders of the road notwithstanding that the house designated was on the opposite side of the highway therefrom, the carrier being under no duty to transport them to the house designated.

5. Carriers § 22c—

Ordinarily, there is no duty resting upon a carrier to assist passengers in boarding or alighting from its train, or car, or bus.

6. Same—Where mother and son are traveling together as passengers on bus, primary duty of caring for son is on the mother.

Where a mother and her eight-year-old son are traveling as passengers on a bus, the primary duty of caring for the child is on his mother, and when the bus stops on the right of the highway at a place designated by the mother, and the child first alights on the shoulders of the road, followed by his mother, the carrier, through its employees, has the right to assume that the mother will take proper care of him and that the child in leaving his seat and alighting from the bus is acting with her knowledge and consent in the absence of any indication to the contrary, and even though the carrier's porter helps the child to alight, the carrier is not under duty to anticipate that he would run away from her and attempt to cross the highway ahead of her in the dark, or to warn them of cars approaching from the opposite direction, the mother having said nothing to put its employees on notice that the child required restraint and the mother having full knowledge that they were stopping on a much traveled highway and being cognizant of the dangers incident thereto.

7. Same—Evidence held insufficient as matter of law to show negligence on part of carrier causing death to passenger struck on highway by car after alighting from bus on shoulders of road.

The evidence tended to show that a mother and her eight-year-old son were passengers on defendant's bus, that in compliance with the mother's request to stop at a designated house on the highway before reaching the destination called for in their tickets, the driver stopped the bus on the right side of the highway in front of the house, which was on the opposite side of the highway, that the child first alighted followed by his mother, that when she alighted she called him but did not see him, and that after the porter had reëntered the bus but while the bus was still motionless, the child ran around the rear of the bus and across the highway and was hit by a car traveling in the opposite direction. Plaintiff's evidence tended to show that the porter assisted the child to alight, and that the bus driver saw the lights of cars approaching from the opposite direction and failed to give warning thereof. *Held:* The evidence is insufficient, as a matter of law, to establish negligence on the part of the carrier causing the fatal injury, and its motion for judgment as of nonsuit should have been allowed.

8. Same—

The fact that a bus stops on the right side of the highway at night without warning and stands without dimming its lights while passengers alight therefrom onto the shoulders of the highway, can have no causal connection with the death of one of such passengers, a boy eight years of age, resulting from injuries inflicted by a car traveling in the opposite direction which struck him as he attempted to run across the highway in its path from the rear of the bus.

DEVIN, J., dissenting.

CLARKSON and SEAWELL, JJ., concur in dissent.

APPEAL by defendant Norfolk Southern Bus Corporation from *Harris, J.*, at September Term, 1940, of CHOWAN.

Civil action for recovery of damages resulting allegedly from wrongful death of W. E. White, Jr. C. S., 160-161.

The record tends to show this factual situation:

Plaintiff's intestate, W. E. White, Jr., a bright and intelligent boy, nine days less than eight years of age, was fatally injured about 7:30 o'clock on the night of 8 April, 1939, when stricken by an automobile owned and operated by defendant Hemby Chappell, traveling south along the paved portion of the western half of the highway between Hertford and Winfall in this State. The boy had just alighted from a motor bus of defendant Norfolk Southern Bus Corporation, a common carrier of passengers, operated over its duly franchised route between Raleigh, North Carolina, and Norfolk, Virginia, an "interurban" bus having scheduled intermediate stops at Edenton, Hertford, and other cities and towns, traveling north on said highway, and on which he, accompanied by and in the care of his mother, Mrs. W. E. White, was a passenger. She, desiring to take her son on a visit to his paternal grandmother, who resided in the country between the towns of Hertford and Winfall, purchased tickets at the station of Bus Corporation at Edenton, North Carolina, for bus transportation for herself and son, from Edenton to Winfall. They entered the 7 o'clock bus, of 33-passenger capacity, and sat on the right-hand side somewhere between the middle and the front, as she states, that is, three or four seats from the front, as shown by evidence for defendant—she sitting by the window and he beside her next to the aisle. As they entered the porter took her large suitcase, but she retained a shoe box which she placed on the floor at her feet. At Hertford, the first stop after leaving Edenton, she told the driver of the bus that she wanted to stop at the second house on the other side, north side, of Major Loomis' office, "this side of Winfall." Testifying relative thereto, she said: "I did not tell him which side of the highway to stop on, all I told him was to stop at the second house beyond Major Loomis' office." The bus stopped at the point designated by her, which was in front of the home of intestate's grandmother located on the west side of highway. It came to rest with all four wheels on its right-hand side, that is, east side of center line of the paved portion of the highway, according to evidence for plaintiff, and with its right wheels two feet from east edge thereof, on the right shoulder, as evidence for defendant tends to show. Mrs. White and the boy left the bus by usual way through the door on the right at front of bus opposite the driver's seat, and alighted upon the right or east shoulder of the highway. After alighting the intestate went to the rear of the bus, which was thirty-five feet long, and, while there started to run across the highway from the east to west side and was stricken by automobile of defendant Chappell, as above stated.

When the bus stopped, Mrs. White, according to her testimony, leaned over to get the shoe box from the floor at her feet. When she raised up the boy had left his seat beside her. She saw him going behind the

porter who had her suitcase. The door was open. The porter was going down the steps, and the boy was ready to go down. She did not call the boy "nor ask him to wait, or anything of the kind." She proceeded to the front and as she went down the steps the porter was at the door ready to get on. As soon as she alighted he "hopped back in and pulled the door to." The bus started to shift gears. She testified: "When I got out of the bus the first thing I did was to look for my boy. I did not see him. Then I called but he did not answer. The next thing I heard was just a slam" that seemed to come from the rear of the bus, which was not then in motion,—that she stood there five minutes or more before the bus moved.

In describing the situation and their actions after the bus stopped, Mrs. White testified: "All I had to do was to lean over and take hold of the package. I waited until the bus stopped, and then leaned over to get my package. I didn't see the boy when he got up. I know he was there when the bus stopped. Then I leaned over to get my package in preparation to get off the bus. Then I looked and saw my little son standing in the front of the bus ready to get off . . . behind the porter . . . Nobody else was at that point . . . There were no passengers in front of me . . . There was nobody in the aisle . . . It didn't take me long to get that package off the floor . . . Immediately after I got my package I got up to get off . . . When I looked up my son had left. I saw where he was. I did not ask him to wait or anything of the kind. I had not gotten to the door before my son left the bus, because he had stepped out before I could get off . . . When I got there I immediately got off . . . as soon as I could. I knew my son had gotten off, and I thought I had better get off the bus to take care of him. When I got off . . . however, I did not see him. . . . The porter . . . got off before my son did . . . I did not see any automobile coming from the opposite direction . . . I didn't notice . . . Sure, there was one coming . . ."

She further testified: "I did not see any cars coming down the highway from the direction of Winfall while I was on the bus, or at any time before I heard this crash. Neither the driver of the bus nor the porter notified or warned me that any cars were coming down the highway. Nor did they notify or warn my little boy, in my presence . . . I don't know how long I stood there outside the door before the bus moved off . . . about five minutes or more. It was shifting gears when I got off." Again, she testified: "He (speaking of her son) had visited this point on the highway before, but not at night. I had been there at that point on the highway. I knew that automobiles traveled up and down there, certainly. It is a very busy highway."

At the time and at the point of the accident the paved portion of the highway was sixteen feet wide, with dirt shoulders approximately ten feet in width,—in good condition to the bank of the ditch which sloped at an angle of forty-five degrees for a further distance of six feet. The point was about midway of a straight section of the highway three-fourths of a mile in length, north of the causeway just out of Hertford. When the bus leaving Hertford entered this section the driver saw in the distance the lights of two automobiles, that of defendant and that occupied by one John Moore and others, traveling south, and the occupants of those cars saw the lights of the bus. The driver of the bus gave no signal before stopping.

Plaintiff's evidence further tends to show these facts: Along this straight section Chappell passed the Moore car which was traveling at rate of speed of forty to forty-five miles per hour, and after passing "increased its distance ahead . . . just a little." These two cars were approaching the point and meeting the bus when it stopped. At the time the front of "Chappell's car was just passing the front end of the bus," "the little boy ran out from behind the bus," and was stricken by the right front of the car just before clearing the pavement, the west side, and "was picked up" a hundred feet from where he was stricken. Chappell's car stopped at a point fifty feet further up the highway. At the moment of the impact the bus had not moved forward.

Evidence for plaintiff further tended to show that the bus was six feet seven inches wide and had bright lights, which were not dimmed when it stopped; that the front of the bus was so lighted as to show its destination "Norfolk"; and that the occupants of the Moore car, following defendant Chappell, could and did see that it was a bus and that it had stopped and was on the highway.

Testimony of defendant Chappell tended to show that he was driving a Mercury sedan automobile in which five others were riding; that the lights and brakes of the automobile were in good condition; that he first saw the lights of the bus approximately one-half mile from the place where the bus stopped; that they were "kind of blinding," but, he testified: "As I got up nearer I saw it was the bus," "may be 100 yards away"; that he had been driving at speed of fifty miles per hour, but when he saw it was a bus he slackened up as he always does at night to around forty miles an hour; that to the best of his judgment when he was approaching the bus he was going around forty miles an hour. He testified: "As I got off against it the bus started up, and as it did I saw this boy flash out from behind it, and from the time I saw him to the time I applied my brakes I had already hit him . . . At the time I saw the boy running out I could still see the bus to the left. The bus started off and the boy ran out, directly behind the bus. When I saw

him he was right in front of me, right on me, I would say. . . . I could not have avoided striking the boy by turning to the left, not at that time; I would have to have turned into the bus, and the boy was running to the right all the time, and he would be probably caught under the car if I had tried to turn to the right. . . . I was about 8 feet from the child when I first saw him, I think. . . . In my best judgment I was going 40 miles an hour." . . . And, again: "He came out not over 15 feet ahead of my car. My judgment is that it was between 8 and 15 feet . . . When that boy ran out I had 15 feet before reaching him to turn to the left if the bus had not been there." Then on further cross-examination Chappell stated that the bright lights would blind a little, that they caused him to slow down and to look out more, that they did not interfere with his seeing the boy after he, Chappell, passed the bus; that the boy did not come out from behind the bus until he, Chappell, had passed the front of the bus, and, finally, in answer to question, "The glaring lights, however bright they were, did not interfere with your seeing that little boy?" he said, "No, sir."

There was evidence for defendant Bus Corporation tending to show that Mrs. White did not tell the driver or the porter where she was going; that they didn't know where she was going; that when the bus stopped the porter set off Mrs. White's suitcase; that she came out next; that the porter helped her, and she stood by the bag, and that he "reached back on the bus and took the little boy and set him down, and got back into the bus"; that neither the driver nor porter said "anything to Mrs. White when she got off, nor to the little boy"; and that the bus pulled out and they knew nothing of the accident until next day.

While alleging concurrent negligence of the defendants, plaintiff alleges these acts of negligence against the Bus Corporation: (1) That it failed to denote its intention to stop the bus upon the highway; (2) that while approaching and after stopping, it failed to dim the headlights of the bus; (3) that it parked or left the bus standing upon the paved portion of the highway,—with a clear and unobstructed width of only about eight feet of same opposite the bus free for passage for other vehicles; (4) that it failed to warn plaintiff's intestate, or his mother, of the danger of attempting to cross the highway, or of the approach of other motor vehicles from the north; (5) that it failed to assist intestate in his attempt to cross the highway and in permitting him to do so, when his mother was still in the bus, or descending therefrom, and so unable either to warn or restrain him; and (6) that it failed to provide plaintiff's intestate with a reasonably safe place in which to alight from said bus in that, knowing that the home of his grandmother was west of the highway, it stopped the bus on the eastern side of the paved portion and discharged the intestate on the east shoulder, well knowing at the time

that he would be compelled to cross the highway to reach his destination, and would probably attempt to do so, under the existing conditions, unless warned or restrained, whereas by waiting until the approaching automobiles had passed before discharging intestate from the bus, or by stopping on the western shoulder of the highway, it could in the exercise of due care have discharged him in such manner as to permit him to reach his destination without danger, and particularly without exposing him to the peril arising from the then existing traffic upon the highway.

Defendant, Bus Corporation, in its answer denied the material allegations of the complaint, and pleaded contributory negligence of the mother of intestate in bar of plaintiff's right to recover.

As the jury failed to find that the injury and death of plaintiff's intestate was caused by negligence of defendant Chappell, and plaintiff does not appeal, the allegations against him and his answer thereto will not be stated.

The jury answered the issue as to negligence of defendant Bus Corporation in the affirmative, and as to contributory negligence of the mother in the negative, and assessed damages.

From judgment on verdict defendant Bus Corporation appeals to Supreme Court, and assigns error.

McMullan & McMullan for plaintiff, appellee.

R. C. Dozier, Fred C. Martin, J. C. B. Ehringhaus, and Chas. Aycock Poe for defendants, appellants.

WINBORNE, J. While appellant presents other exceptive assignments which are worthy of serious reflections, those pertaining to the refusal of the trial court to grant its motions, aptly made, for judgment as in case of nonsuit, and to give peremptory instruction for negative answer to issue of negligence are decisive of this appeal. When taken in the light most favorable to plaintiff, the evidence as to actionable negligence of defendant, Norfolk Southern Bus Corporation, the appellant, is in our opinion insufficient to take the case to the jury and to support the verdict against it, and we so hold.

In an action for recovery of damages for wrongful death, resulting from alleged actionable negligence, the plaintiff must show: First, that there has been a failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed plaintiff's intestate under the circumstances in which they were placed; and, second, that such negligent breach of duty was the proximate cause of the injury which produced the death,—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; *Murray v. R. R.,* 218 N. C., 392, 11 S. E. (2d), 326; *Mills v. Moore, ante* 25, 12 S. E. (2d), 661, and cases cited.

Generally where the relation of carrier and passenger exists the carrier owes to the passengers the highest degree of care for their safety so far as is consistent with the practical operation and conduct of its business. But, the liability of the carrier for injuries to a passenger is based on negligence. The carrier is not an insurer of the safety of passengers. *Hollingsworth v. Skelding,* 142 N. C., 246, 55 S. E., 212; *Marable v. R. R.,* 142 N. C., 557, 55 S. E., 355; *Briggs v. Traction Co.,* 147 N. C., 389, 61 S. E., 373; *Mills v. R. R.,* 172 N. C., 266, 90 S. E., 221. See, also, Annotations 4 A. L. R., 1500; 31 A. L. R., 1202; 45 A. L. R., 297; 69 A. L. R., 980; 96 A. L. R., 727.

Ordinarily, when the relationship of carrier and passenger is created it continues until the journey, expressly or impliedly, contracted for has been concluded, unless the passenger sooner terminates or relinquishes his right as such. 13 C. J. S., 1075, Carriers, 566; *Wallace v. R. R.,* 174 N. C., 171, 93 S. E., 731. In either event, whether the journey so contracted for has been concluded, or sooner terminated or his right thereto relinquished by the passenger, such relationship ordinarily ends when the passenger has alighted from the bus in a place of safety on the street or highway. 13 C. J. S., 1074, Carriers, section 565; *Waldron v. Southwestern Bus Co.,* 42 Ohio App., 549, 182 N. E., 596; *Roden v. Connecticut Co.,* 113 Conn., 408, 155 A., 721; *Lewis v. Pacific Greyhound Bus Co.,* 147 Ore., 588, 34 P. (2d), 616, 96 A. L. R., 718; Annotations 31 A. L. R., 572, and 96 A. L. R., 727, where cases are assembled. See, also, *Cooke v. Elk Coach Line* (Del.), 180 A., 782.

In the present case when the plaintiff's intestate and his mother, in whose care he was traveling, entered the bus of defendant Norfolk Southern Bus Corporation at Edenton with tickets for their transportation thereon to Winfall, the relation between the Bus Corporation and them became that of carrier and passengers. Hence, the legal duty which defendant Bus Corporation, as a common carrier of passengers, owed to them arose out of the relationship of carrier and passenger, and ended when the passenger alighted in a place of safety. See Annotations 96 A. L. R., 727.

In this State there are no cases dealing with the subject of the duty owed by the owner of a bus, a common carrier of passengers, to alighting passengers. But, there are two cases which treat the question of the duty of a street car company to alighting passengers: *Wood v. Public-Service Corp.,* 174 N. C., 697, 94 S. E., 459; *Loggins v. Utilities Co.,* 181 N. C., 221, 106 S. E., 822.

While in these cases the factual situations are different from that in the present case and they are, therefore, distinguishable from the present case, the Court there recognized that the weight of authority is that the relation of carrier and passenger ceases when the passenger has safely alighted. In the *Loggins case, supra,* where plaintiff was struck after alighting in the lane of traffic, it is said: "By the clear weight of authority the relation of passenger and carrier ordinarily ends when the passenger safely steps from a street car to the street. He then becomes a pedestrian on the public highway, and the carrier is not responsible for his safe passage from the street to the sidewalk; for once safely landed in the street, his rights as a passenger cease," citing *Wood v. Public-Service Corp., supra,* and other cases. But, continuing, the Court said: "Obviously there is a difference between a safe landing and a landing in safety. The one has reference to the act of the passenger in stepping from the car to the street, the other to the condition in which he finds himself immediately after accomplishing this act.

"We think a fair statement of the rule would be to say that a passenger, on alighting from a street car at the end of his journey, loses his status as a passenger when he has stepped from the car to a place of safety on the street or on the highway. The question should not be made to depend entirely upon the number of steps which the passenger may take on leaving the car, but rather the circumstances and conditions under which he alights. He is entitled to be discharged in a proper manner and at a time and place reasonably safe for that purpose." The ruling there that the duty of carrier to an alighting passenger extends not only to "a safe landing" but to "a landing in safety" is the limit to which any of the courts have carried the principle, even where the passenger alights on the traveled portion of the street or highway.

If the case in hand be tested by that standard all the evidence clearly shows that defendant Bus Corporation fully performed its duty to plaintiff's intestate in both respects. He was not injured in alighting or at the place of landing, but at a point some distance away to which he had moved after landing in safety. The courts in other jurisdictions have applied the principle to cases involving the duty of common carriers of passengers by means of buses.

In *Waldron v. Bus Co., supra,* plaintiff, a passenger having alighted from an eastbound bus in safety on the southerly side of the pavement, although on the corner of an intersecting street opposite the regular stopping place, walked west to the rear of the bus, while the bus began to move on, and started north across the highway when she was struck by a westbound car. The Ohio Court of Appeals, in opinion by *Richards, J.,* held that the defendant owed to her, while she was a passenger, a high degree of care for her safety, but that the relationship of carrier

and passenger terminated when she alighted from the bus in a place of safety, and that the proximate cause of her subsequent injury was either her own negligence in walking in front of an approaching automobile or the negligence of the operator of the automobile, and "the defendant was in no sense responsible for the injury resulting therefrom,—having discharged the passenger in a place of safety, there could be no causal connection between that act and the injury which she suffered."

In the *Roden case, supra,* the plaintiff, a boy seven years old, rode as a passenger in the bus of defendant from New Britain to the end of its run on Farmington Avenue. The driver drove the bus toward the left. The only door was on the right side of the bus, the side toward the macadam. The driver opened the door and the boy descended the steps to go to his home on the opposite side of the street. He was struck by an automobile proceeding in the same direction as the bus. The Supreme Court of Errors of Connecticut, speaking through *Maltbie, C. J.,* said: "The duty of a common carrier of passengers includes an obligation to furnish them a safe place in which to alight, as far as that place is provided by it or is affected or conditioned by the movement of the vehicle, and that duty is only satisfied if it exercises the highest degree of care and skill which reasonably may be expected of intelligent and prudent persons engaged in such a business, in view of the instrumentalities employed and the dangers naturally to be apprehended. . . . An automobile bus is able to move or stop in the street at the will of its driver, and the safety of the place he offers its passengers to alight may be affected or conditioned by the passing traffic. . . . The care to be exercised toward a young child traveling by himself must be proportioned to the degree of danger inherent in his youth and inexperience. . . . When, however, the duty of the carrier to provide a safe place to alight has been fulfilled and the passenger has left the vehicle, it ceases to owe to him any duty other than that which it owes to any person coming within the range of its activities, not to do him injury by a failure to exercise reasonable care." The last two sentences read together are significant. And, continuing, the Court said: "In the instant case the driver had abundant opportunity to let the plaintiff out at the side of the road, off the highway, in a place of safety. Yet, instead of doing so, he chose to invite him to alight upon the macadam of the street at a time when the jury might have found that the automobiles were approaching in such a way as to endanger him as he stepped upon the pavement and when, had the driver looked with any care to the rear, he must have seen them."

And, in *Lewis v. Pacific Greyhound Lines, supra,* a case strikingly similar to case at bar, the plaintiff, a man, was discharged as a passenger on the right side of the bus. He went out the front door on the gravel

shoulder of the pavement. After having alighted in safety, he walked thirty-five feet to the rear and halfway across the pavement, which was sixteen feet wide, when he was struck by a passing automobile. The opinion of the Supreme Court of Oregon, by *Belt, J.*, is epitomized in the third headnote, which reads: "A bus company is as a matter of law not guilty of any breach of duty to a passenger in setting him down at night, without warning of danger, at a place on the side of the road where he was out of danger from vehicular traffic, though such place was on the opposite side of the road from a restaurant where it maintained an agency for the sale of tickets, and which bore a sign marking it as a bus depot, in walking toward which, across the highway, the passenger was struck by an automobile, though he supposed, in view of the fact that he boarded a bus on the fill in front of the restaurant on the previous day, that he was being set down there." And, continuing, the Court uses this language: "Assuming, but not conceding, that the defendant bus company was negligent in failing to discharge the plaintiff as a passenger on the west side of the highway in front of the restaurant or barbecue stand, it is believed that such negligence has no causal connection with the injury sustained. . . . The proximate cause of the injuries of which plaintiff complains was either the negligence of the driver of the car which struck him, or his own negligence in failing to exercise due care to avoid being injured while undertaking to cross the highway."

In applying these principles, a fair appraisal of the case in hand requires that these facts be borne in mind: (1) The defendant Bus Corporation is engaged in the business of a common carrier of passengers by means of interurban buses operated over a duly franchised route upon the highway from Raleigh, North Carolina, to Norfolk, Virginia, having scheduled intermediate stops at Edenton, Hertford, and other cities and towns along the way. (2) The mother of intestate, in whose care he was traveling, purchased, and they were traveling on tickets for their transportation, upon a bus of defendant Bus Corporation from Edenton to Winfall in North Carolina. (3) At the request of mother of intestate the bus stopped on the highway before reaching Winfall for intestate and his mother to alight at a point designated by her. (4) The intestate and his mother alighted upon the right shoulder of the road out of the line of and danger from traffic upon the highway in the light of all the evidence in the case.

When so appraised there is lacking any evidence of contractual relationship between defendant Bus Corporation and plaintiff's intestate by which duty is imposed upon the former, as carrier, to do more than provide for the intestate, its passenger, a safe landing and a landing in safety.

In brief, for plaintiff it is virtually conceded that if plaintiff's intestate had remained in the place in which he alighted, he would have been perfectly safe from the danger of traffic upon the highway. But it is insisted that the destination of his intestate was "across the highway at his grandmother's home." While it appears from the evidence that such was the ultimate destination of intestate and his mother, yet as regards the obligation of defendant Bus Corporation there is no evidence that it either expressly or impliedly agreed, or from which it may be inferred that it agreed to transport them to the home of the grandmother. On the contrary, all the evidence tends to show that the Bus Corporation was carrying on the business of common carrier over the highway between certain designated points with certain scheduled stops along the way. Hence, "to stop at the second house on the other side . . . of Major Loomis' office, this side of Winfall" means no more than to stop on the highway at that point. It was not a regular stop, but was made patently as an accommodation to plaintiff's intestate and his mother, at a point selected by her and with which she and he, a bright and intelligent boy, were familiar.

However, the plaintiff insists that the duty owed by defendant Bus Corporation to his intestate continued until he was safely across the highway, and for support he relies upon these cases in other jurisdictions: *Draper v. Robinson* (Texas), 106 S. W. (2d), 825, modified upon other points in 127 S. W. (2d), 191; *Taylor v. Patterson's Adm'r.*, 272 Ky., 415, 114 S. W. (2d), 488; *Mackenheimer v. Falknor*, 144 Wash., 27, 255 P., 1031; *Gazaway v. Nicholson* (Ga.), 5 S. E. (2d), 391; *Stuckwich v. Hagon Corp.* (Pa.), 175 A., 381; *Shannon v. Central Gaither Union School Dist.*, 133 Cal. App., 124, 23 P. (2d), 769; *Phillips v. Hardgrove* (Wash.), 296 P., 559.

An examination reveals that each of these cases relates to the duty owed by the operator of a school bus in transporting children from their homes to school and from school to their homes—and are clearly distinguishable from the case in hand. For example, the case of *Taylor v. Patterson's Adm'r., supra,* sets forth the distinguishing features. In this case Taylor was owner and operator of a jitney bus and a public carrier of passengers. The transportation of his passenger, Billy Patterson, a Negro boy less than seven years of age, from his home to the school in the morning and from the school to his home in the afternoon was for an agreed fee. In the afternoon of day in question Taylor received the boy for transportation from school to his home on Greenup Avenue, a busy and much used street, and discharged him upon the sidewalk on the opposite side of street from his home, when neither his mother nor any other person was present to receive him, and from which point to reach his home he must of necessity cross the street. The danger in so doing

was obvious and apparent and known to Taylor. Upon these unchallenged facts the Court, in asking the question, "Did Taylor, the operator of the bus, deliver the boy at a safe place?" said: "It must be kept in mind that this jitney bus was not such a vehicle for transporting passengers for hire that is operated upon a permanent track as a passenger train or a street car, nor does it run from one certain point to another, nor does it have any special platform or place to discharge passengers, but, on the other hand Taylor in operating his jitney bus could stop at any place, where it might be necessary or safe in fulfilling his duty to the passenger as a public carrier." And, continuing, the Court said: "The operator of a taxi who permits a passenger to alight from a car at a place not ordinarily used in discharging passengers and where many vehicles are accustomed to pass is not bound to warn the passengers of the danger of passing traffic nor to protect him from such danger after he has left the car . . . but under his special contract Taylor's duty as a carrier continued and required that he exercise the highest degree of care for the boy's safety until he was safely across Greenup Avenue to the side where his mother's home was located where he was out of danger of injury of the passing traffic."

Plaintiff further relies upon *Roden v. Connecticut Co.* (Conn.), *supra*. Yet we are unable to find in it support for his position. While the Court states that the care to be exercised to a young child traveling alone must be apportioned to the degree of danger inherent in his youth and inexperience, it says, "When, however, the duty of the carrier to provide a safe place to alight has been fulfilled and the passenger has left the vehicle, it ceases to owe to him any duty other than that which it owes to any person coming within the range of its activities, not to do him injury by a failure to exercise reasonable care."

Plaintiff further contends that the porter having lifted the plaintiff's intestate from the bus to the shoulder of the road before his mother alighted, it became his duty as representative of defendant Bus Corporation to retain the child in the custody he had assumed until the child's mother appeared.

In this connection, the rule is universal that ordinarily there is no duty resting upon a carrier of passengers to assist a passenger in boarding or alighting from its train or car or bus. 55 A. L. R. Annotations; *Morarity v. Traction Co.*, 154 N. C., 586, 70 S. E., 938; *Graham v. R. R.*, 174 N. C., 1, 93 S. E., 428.

Furthermore, the primary duty of caring for a child of tender years is on the parents or their representative who has the immediate custody of the child. Therefore, where such child is traveling on a bus in the care of his parent, the owner of the bus, that is, the carrier, through its employees, has the right to presume and to rely on the presumption that

the parent will take such care of the child as the natural love of the parent would prompt him or her to exercise under the circumstances. 13 C. J. S., 1291, Carriers, sec. 694; *St. Louis, etc., R. Co. v. Rexroad,* 59 Ark., 180, 26 S. W., 1037.

However, the carrier is not entitled to act upon such presumption where the carrier's employees who are engaged in the operation of its bus know, or, in the exercise of reasonable care and diligence should know, that such child is or will be exposed to danger or injuries by acts or negligence of the carrier's employees.

In the instant case there is no evidence that plaintiff's intestate did anything from the time he boarded the bus until the bus stopped at the place designated by his mother except to sit in the seat by his mother. Nor is there any evidence that, in leaving his seat after the bus stopped, and in coming to the front to alight, there was anything in his manner to indicate that he was not acting with the consent, approval and confidence of his mother. Admittedly, she said nothing to put the driver and porter on notice that the boy required restraint. Although she knew the highway was much used, and knew that she and her son were going to his grandmother's on the west side of the highway, apparently she did not anticipate that he would run ahead in the dark and leave her. Should the defendant have exercised more foresight? Under such circumstances the employees of the Bus Corporation had the right to presume and to act upon the presumption that the boy was acting with the approval of his mother, from whose side he came and who followed to the door of the bus. Moreover, the Bus Corporation, having performed its duty to the intestate as an alighting passenger, was not responsible for dangers incident to intervening causes.

Finally, in the light of all the evidence we are unable to perceive any causal relation between the failure of the driver of the bus to give signal for stopping or to dim the lights on the bus or in stopping on the pavement to the right of the center of the highway, and the injury and death of intestate.

As the jury has exonerated the driver of the death car, the case resolves itself into one of those most unfortunate and deplorable accidents for which none of defendants is responsible.

The judgment is

Reversed.

DEVIN, J., dissenting: I find myself unable to agree with the disposition of this case. I think there was evidence sufficient to require the submission of the case to the jury, and to sustain the ruling of the judge below in denying the motion for nonsuit.

The evidence, considered in the light most favorable for the plaintiff, tended to show that defendant's large passenger bus, in the nighttime, stopped without signal on the paved surface of a much traveled highway, there 16 feet wide, leaving unoccupied only 8 feet of the traveled portion of the highway. Here the bus remained, with lights undimmed, for five minutes, though the shoulders of the road were wide and level. This would seem to constitute a violation of the Motor Vehicle Act of 1937, ch. 407, sec. 123 (a).

The road was straight for half a mile and the driver of the bus saw the lights of an automobile approaching from the north—an automobile which he knew would pass the bus on his left, on the unoccupied 8 feet of the highway. The bus driver knew that one of his passengers was a child, and he knew or should have known from the directions given him that the child intended to cross the highway to the left, in the path of the approaching automobile, in order to go to the home of the child's grandmother, just west of the road.

Under these circumstances, according to some of the evidence, the bus porter assisted the child off the bus to the ground, on the right side of the bus, at a time when the child was momentarily unattended, and when the child's mother was still on the bus, and this was done without any warning to the child of the danger from the automobile which was rapidly approaching. The child, in obedience to the impulsiveness of his age, dashed around the rear of the bus and across the highway, eager to reach his grandmother's, and was struck on the west edge of the highway by the automobile, and killed. The driver of the automobile, suddenly confronted by the emergency, was unable to turn to his left because that portion of the highway was occupied by the bus, and was unable to stop or avoid striking the child who was running to his right.

This evidence, it seems to me, tended to show that the defendant, in the conduct of its business as a carrier of passengers for hire, and as the operator of a motor bus on the highway, failed to perform its full duty in that it failed to exercise reasonable care for the protection of plaintiff's intestate under the circumstances, and in putting off an inexperienced child, beside the road, at an unusual place, without warning him of the known danger from an approaching automobile. The facts were known to defendant's employees and were not appreciated by the child. A word or a restraining hand would have saved a human life. I cannot agree that this was an unavoidable accident, and that the Bus Company was free from blame.

CLARKSON and SEAWELL, JJ., concur in dissent.

STATE v. M. A. KING.

(Filed 31 May, 1941.)

1. Criminal Law § 53e—

In a prosecution for "hit and run driving," Michie's Code, 2621 (313), an instruction that defendant was charged with the violation of one of the motor vehicle statutes designed for the protection of life and property, cannot be held for error, the statement not being related to any fact in issue or any evidence introduced in the case, and containing no inference as to the guilt or innocence of defendant, it further appearing that the court correctly charged upon the presumption of innocence and the burden of proof.

2. Criminal Law §§ 32a, 52b—

In order to sustain a conviction on circumstantial evidence, the evidence must tend to prove the fact of guilt to a moral certainty and exclude any reasonable hypothesis of innocence, but when the evidence reasonably conduces to the conclusion of guilt as a fairly logical and legitimate deduction and not merely such as raises only a conjecture, it is for the jury to say whether the evidence convinces them of defendant's guilt beyond a reasonable doubt.

3. Automobiles § 28—Circumstantial evidence that defendant was driver of "hit and run" car held sufficient to be submitted to jury.

All the evidence tended to show that the car of the prosecuting witness was struck by a car which was traveling at the time of the accident with its left wheels over the center line of the highway, that an occupant in the car of the prosecuting witness was injured, and that the car which collided with her car failed to stop after the collision, Michie's Code, 2621 (313). The State's circumstantial evidence, including marks on the highway leading uninterruptedly from the point of collision to a car parked at defendant's place of business, which defendant admitted to be his, the condition of defendant's car, a hub cap and other automobile parts found at the scene of the collision which were missing from defendant's car, and other circumstances tending to show efforts on the part of defendant to conceal the identity of his car as the one involved in the collision, together with testimony by defendant that no one else had driven his car on the evening in question, *is held* sufficient to have been submitted to the jury on the question of defendant's guilt, and his motions for judgment as of nonsuit were properly refused.

4. Criminal Law § 52a—

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

5. Criminal Law § 53g—

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

6. Same—

In a prosecution for "hit and run driving" a charge that defendant admitted that there was a collision causing damage to the car of the

prosecuting witness and injury to one or more occupants thereof, and that the other car failed to stop after the collision, if deemed a misstatement of defendant's admissions, should have been called to the court's attention in apt time in order to afford the court an opportunity to make correction.

7. Criminal Law § 48d—

During the examination in chief, the court permitted the State's witness to testify over objection as to whether defendant was intoxicated at the time the witness saw him some time after the collision in question. During cross-examination of the witness the court stated that it sustained the objection to the question as to defendant's condition, and directed that the jury not consider it and that it be stricken from the record. *Held:* The court properly corrected its inadvertence in the admission of the testimony and withdrew it from the consideration of the jury.

APPEAL by defendant from *Frizzelle, J.*, at February Term, 1941, of GRANVILLE. No error.

The bill of indictment on which defendant was tried and convicted is as follows: "The Jurors for the State upon their oath present: That M. A. King, late of the County of Granville, on the 26th day of October, in the year of our Lord, one thousand nine hundred and forty, with force and arms, at and in the County aforesaid, did unlawfully, willfully and feloniously fail to stop his motor vehicle, involved in an accident, at the scene of such accident, and give his name, address, operator's or chauffeur's license number, registration number of his vehicle and render assistance to Mrs. G. G. Ragland, the person injured in said accident against the form of the statute in such case made and provided and against the peace and dignity of the State. Murdock, Solicitor."

Mrs. G. G. Ragland testified, in part, as follows:

"The accident occurred between King's place of business and Oxford, about 250 yards or something, from King's place of business. The accident occurred about 7:00 o'clock in the evening and it was dark. I was traveling (north) in the direction of Oxford. There were four others in the car with me. Mrs. Garland Ragland, Miss Helen Harris, Frances Ragland, my daughter, and Dorothy Ragland, Mrs. Garland Ragland's daughter.

"The accident occurred just before the beginning of a curve. The highway is slightly down-grade in the direction I was traveling. I was driving at about 30 miles an hour on my right-hand side of the highway. The other car involved in the accident with my car was going (south) toward Durham. I was meeting the other car. As I approached the curve I saw the lights of an approaching car coming around the curve. I was unable at that time to tell on what part of the highway the approaching car was being driven. As it straightened out and focused its lights on me I noticed that it was being driven entirely on my side of the highway. I pulled out upon the shoulder and applied my brakes. Just

then the car struck my car. I drove on to the shoulder as far as I could without going down an embankment. My left-hand front wheel and rear wheel were about two feet on the paved portion of the highway. When the collision occurred my car was practically at a standstill. It rolled about a foot more after the collision. The left-hand front fender and wheel and running board of my car were struck. I am unable to say at what speed the car which struck my car was traveling.

"The other car kept going. The car was going very fast, but I would not say how fast. It was going more rapidly than my own car was going. I do not know who was driving the car that collided with my car. I do not know what kind of an automobile it was or what model, nor do I know the color of the car. I did not observe the other car in any way except that it struck my car. The collision knocked up the front left-hand fender of my car and tore it up and ripped up the running board and knocked the hub cap off my front left wheel and burst a hole in the tire and bent the rim. I drove my car into Oxford after the collision, but was unable to make a left-hand turn for the reason that the fender was crushed down so near the wheel. I remained at the scene of the collision about 15 or 20 minutes, and the other car did not come back. I was not injured, but Mrs. Garland Ragland sustained a bruised knee, being thrown from the back seat into the front of the car. My daughter's arm was bruised."

Mrs. G. G. Ragland (recalled), testified further: "(Upon being shown a piece of hub cap): I have seen that before, I first saw it on the highway at the scene of the collision. It was opposite the rear end of my car, probably in the middle of the highway. It has the word 'Chevrolet' on it. It did not come off my automobile. I was driving a 1936 Chevrolet. (Upon being shown two other articles.) I picked up the smaller piece, the ring. When I saw the other piece, Mr. Carter, the Highway Patrolman, had it. These three parts of an automobile, apparently automobile parts, did not come off the car I was driving."

W. B. Dixon testified, in part: "I saw the car that struck Mrs. Ragland's car just before the collision. My opinion is that the car which struck Mrs. Ragland was traveling at about 40 miles an hour. It did not stop after the collision and kept coming and appeared to pick up speed. The distance between my car and the Ragland car at the time of the collision was something like 100 feet or more. After this car struck Mrs. Ragland's car it seemed to be going toward me, turning further to its left. Just before it got to me, less than one-half the distance across the courtroom, it made a sharp turn back to the right, away from me. I heard the noise made by the collision of the two cars. I was about 100 feet away at the time. I know the defendant, M. A. King, just enough to know him when I see him. I reckon I have known

him for twenty years. I do not know who was driving the car that struck Mrs. Ragland's car, nor do I know the make of automobile it was. Neither do I know the color of the car, except that it was a dark car. It was a closed car. I do not know that I have seen the car involved in the collision with Mrs. Ragland's car since the collision occurred. (Upon being shown hub caps and being asked if he had seen these hub caps before): They look like the same things that were picked up by Mrs. Ragland at the scene of the accident—two hub caps and a piece. The car that struck Mrs. Ragland's car did not stop. I stopped at the scene of the collision and stayed there for some time."

W. T. Beasley testified, in part: "I have been deputy sheriff for six years. On the night of October 26, 1940, I went out on the Durham road near the defendant, M. A. King's, place of business. I am familiar with the curve in the highway about 250 yards north (in the direction of Oxford) of King's place of business. I went to the curve with Mr. Otis Harrison, Mr. W. C. Carter, Mr. Al Jenkins and Mr. Ragland. The first time I went was between 8:00 and 8:30 o'clock. I went back somewhere around 10 or 11 o'clock. I discovered some marks in the highway. These marks were on the left-hand side of the highway (traveling in the direction of Durham) and in the middle of the curve. The curve is about 75 yards long. The marks were in the middle of the curve on the left-hand side of the highway coming toward Durham. They were about 18 inches or 2 feet to the left of the center of the highway (traveling toward Durham). The mark was a white mark on the pavement. I did not see any other marks. I followed this mark back up the road toward Durham to the defendant M. A. King's service station. There I found a wrecked car with the wheel down, a 1939 Chevrolet. The car was sitting on the right side of the defendant's service station. The mark that I had been following led continually and unbrokenly from where I began to follow it in the center of the curve to where I found the car. The mark led to the left front wheel of King's car. There were no marks beyond the left front wheel. The hub cap on the left front wheel was off, and the running board was bent up on the left side. I did not see the left front tire. When I got there, there was a new tire on the left front wheel. We found the owner of the car, the defendant M. A. King. He was in his service station. I had a conversation with him about the car. There was no hub cap on the left front wheel when I saw the car. We called King out, talked to him about the car, about the wreck on it, and he said he wrecked the car over beyond Durham. He said that was not his car there that done that (evidently referring to collision). He said that he had a wreck over toward Durham around 6 o'clock the same night; said he ran into a bridge. He said Mr. Wilbur Whitfield had knocked his hub cap off about a week or two before. He

said that he had not had a new hub cap since Mr. Whitfield knocked it off. Q. What was the condition of the defendant at the time you talked to him, Mr. Beasley? (Objection by defendant—overruled—exception, Exception No. 1.) Ans.: He was well under the influence of some intoxicant, Mr. King was. (Motion by defendant to strike—overruled—exception, Exception No. 2.) King said that he had had an accident; ran into a bridge about 6:00 o'clock that night over near Durham. He showed us what damage had been done. He showed us the running board and hub cap and fender on the left side. The left side and fender were bent. He said there had been no hub cap on his left front wheel for a week or two. He said that Mr. Whitfield was going to get him one. He said that the collision with the bridge bent his running board and fender. Q. Did he (King) say whether or not anyone else had been driving his car that night? Ans.: He said that they had not. Q. Had not since 6:30 when he ran into the bridge? Ans.: Yes, sir. (Motion to strike all of witness' testimony—denied—exception—Exception No. 3.) (Cross-examination) Q. At what time did you do the tracking which you have described to the jury, on which of your visits to the scene of the collision? Ans.: Somewhere around 9:30 and 10 o'clock was one time, then we went back again. Q. You stated first that you went out there somewhere between 8:00 and 8:30. You went back again about 10:00? Am I correct about that? Ans.: Yes, sir. (The Court: I sustain your objection to the question and answer as to the condition of the defendant. Do not consider that testimony, gentlemen, strike it from the record.) . . . I talked to Mr. King on the trip I made out to his place about 10 o'clock. It was then that Mr. King told me his hub cap had been knocked off by Wilbur Whitfield. He did not tell me that it had been knocked off by a man named Whitfield. He told me that it was knocked off by Wilbur Whitfield. He did not tell me that he had knocked his hub cap off in a collision with a bridge. He said that the other damage done to his car was done in collision with a bridge."

G. G. Ragland testified, in part: "At that time I had a conversation with him (King). I asked if that was his car, to which he replied 'Yes.' I told him that my car had been wrecked about an hour and a half ago. He said 'This is my car here,' and I said 'I noticed one wrecked.' I did not know it was his car until he told me that it was. The fender was torn up, and running board and the hub cap was knocked off. He said, 'I done that in two wrecks.' He said that he had run into a bridge, tore off his fender and mashed it up, and then later Whitfield backed into him one night, knocking his hub cap off. He said that was the reason that he had no hub cap on his wheel."

Hubert Moore testified, in part: "I work for Blalock Chevrolet Company in Oxford. I have worked with them for about two years. I know

the defendant Mr. M. A. King. I know where his place of business is on the Durham road. I was working on the night of October 26th. I went to Mr. King's place of business that night for the purpose of fixing a tire. It was about 8:30 that I went, I think. I saw Mr. King and I saw his automobile sitting behind his place of business. The right-hand side, that is on the side nearer to Oxford than to Durham. It was about 10 or 15 yards from the building, I reckon. It was at his place of business, by his building and in front of the highway. The front wheel on Mr. King's automobile was bad—the left front wheel it was bent and battered up. There was no tire on the left front wheel. There was no hub cap on the left front wheel." On account of a dispute about the price, he did not put on the new tire.

W. C. Carter testified, in part: "I am a member of the State Highway Patrol. On the night of October 26, 1940, I got a call to an accident on the Durham-Oxford road. I went out to the defendant M. A. King's place of business. I know the defendant and I know where his place of business is. It is about three miles from Oxford. I saw the defendant there. I also saw a 1939 Chevrolet automobile. It was a coach, dark green in color. The car was parked in the yard of the defendant's filling station on the side nearest to Oxford. When I saw it the left-hand front fender was bent up and the hub cap on the left front wheel was gone. The grease cup on the hub was bent up. . . . There was a new tire on the left front wheel. The left front wheel was good. I went there about 10:30. I had a conversation with the defendant King. After looking at the car I called for Mr. King to come out. He came out and I asked him about his fender being bent up. He stated that the fender was bent up some time that afternoon. I said 'Well, have you driven this car since this afternoon?' He first said, 'This car has been parked here ever since 4:30.' Then in a few minutes in talking to him he said the car was parked there about 6:30. I asked him about the fender being bent up. He told me that a part of that was done on a bridge over Tar River between there and Franklinton. . . . I first asked him about the rim and wheel he did not tell me immediately that it was in the back of the car. I told him, 'I have got to see this rim.' He said, 'All right, it is there in the back, go look at it.' I went and looked at it. I asked him where the tire was. He did not tell me where the tire was. He never told me where the tire was. There was no tire on that rim. He did not say where he got the rim or whether that was on the left front of his car when I saw it. He did not say whether or not it was a spare. . . . The marks that I saw on the highway were some 25 or 30 feet in rear of where the defendant's car was sitting, and these marks led in the direction of Oxford about 250 yards. I did not see any marks on the dirt. The mark that I saw led from the right-hand edge of the concrete

(going in the direction of Durham), then back to the center and then toward Oxford. The marks that I have described left the paved highway, going in the direction of where the defendant's car was parked. I am familiar with the curve in the highway about 250 yards (north) of the defendant's service station. The marks that I have described led from the front of the defendant's service station along the highway (north) to a point in the highway just beyond which the curve to the left began. Mr. Ragland was with me all of the time that night. Mr. Ragland told me that the wreck occurred near the curve just described. He undertook to point out the place of the collision from what his wife had told him. There was dirt at the point on the paved portion of the highway. The track that I have described ended where this dirt was on the left-hand side of the highway coming toward Durham."

The defendant introduced no evidence. The jury returned a verdict of guilty. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be considered in the opinion.

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

B. S. Royster, Jr., for defendant.

CLARKSON, J. At the close of the State's evidence the defendant made a motion in the court below for judgment as of nonsuit. C. S., 4643. The court below overruled this motion and in this we can see no error.

The defendant was indicted under N. C. Code, 1939 (Michie), sec. 2621 (313)—Duty to stop in event of accident: "(a) The driver of any vehicle involved in an accident resulting in injury or death to any person shall immediately stop such vehicle at the scene of such accident, and any person violating this provision shall upon conviction be punished as provided in section 2621 (327). (b) The driver of any vehicle involved in an accident resulting in damage to property and in which there is not involved injury or death to any person, shall immediately stop such vehicle at the scene of the accident, and any person violating this provision shall be guilty of a misdemeanor and fined or imprisoned, or both, in the discretion of the court. (c) The driver of any vehicle involved in any accident resulting in injury or death to any person or damage to property shall also give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the person struck or the driver or occupants of any vehicle collided with, and shall render to any person injured in such accident reasonable assistance, including the carrying of such person to a physician or surgeon for medical or surgical treatment if it is apparent that such treatment is

necessary or is requested by the injured person, and it shall be unlawful for any person to violate this provision, and shall be punishable as provided in section 2621 (327)."

Section 2621 (327) penalty for failure to stop in event of accident involving injury or death to a person.

All the evidence is to the effect that the party driving an automobile was on the wrong side of the road, when it struck the automobile driven by Mrs. G. G. Ragland and did not stop. Was the evidence, circumstantial in its nature, sufficient to have been submitted to the jury that defendant King was the party driving the automobile? We think so.

The court below in beginning its charge said: "The defendant, M. A. King, is being tried under a bill of indictment which charges on the 26th day of October, 1940, the defendant did unlawfully, wilfully and feloniously fail to stop his motor vehicle involved in accident, at the scene of such accident, give his name, address, and motor or chauffeur's license, and registration number of his vehicle, render assistance to Mrs. S. G. Ragland, the person injured in such accident. The bill of indictment is laid upon a specific statute, one of a large number of motor vehicular laws, enacted by the General Assembly of North Carolina, designed to protect life, limb and property upon the streets and highways of this State."

The defendant contends: "That the language 'designed to protect life, limb and property upon the streets and highways of this State' was calculated, though not intended, to prejudice the jury. The court has held that the trial judge ought to be careful at all times not to make any remark or comment during the progress of a trial, nor in his charge to the jury, which might prejudice the jury against the defendant."

This statement is not related to any fact in issue or any evidence introduced in the case. The judge has voiced no opinion as to the guilt or innocence of the defendant. He has merely explained the purpose of the law.

The court then read the statute above set forth under which defendant was indicted. Taking this part of the charge as a whole, we can see no error either prejudicial or otherwise. The court goes on and charges the jury in accordance with the statutory law applicable, to which no exception is taken.

The court below in its charge, which is correct and to which no exception was taken, said: "The burden is upon the State to satisfy the jury upon the evidence in this case beyond a reasonable doubt of the defendant's guilt. The defendant is presumed to be innocent, and that presumption of innocence remains with him throughout the trial and would entitle him to a verdict of not guilty unless or until the State overcomes that presumption of innocence cast about him by the law and establishes

in the minds of the jury the guilt of the defendant beyond a reasonable doubt. A reasonable doubt is not an imaginary, capricious, or possible doubt nor one born of sympathy for the defendant or those interested in or dependent upon him, nor of a humanitarian desire or inclination on the part of the jury to shield or protect a defendant against the consequence of an unlawful act, but it is a fair doubt, a reasonable doubt, based upon reason and common sense, legitimately warranted by and arising out of the testimony in the case."

In *S. v. Newton,* 207 N. C., 323 (327), it is written: "Circumstantial evidence is not only recognized and accepted instrumentality in ascertainment of truth, but in many cases is quite essential to its establishment. In cases where State relies upon circumstantial evidence for conviction, circumstances and evidence must be such as to produce in minds of jurors moral certainty of defendant's guilt and to exclude any other reasonable hypothesis, but evidence should be submitted to them if there is any evidence tending to prove fact in issue, or which reasonably conduces to its conclusion as fairly logical and legitimate deduction, and not merely such as raises only suspicion or conjecture, and it is for the jury to say whether they are convinced from evidence of defendant's guilt beyond reasonable doubt. *S. v. McLeod,* 198 N. C., 649." *S. v. Stiwinter,* 211 N. C., 278 (279).

The State's evidence was to the effect that defendant King had a place of business on the road leading from Oxford to Durham, it was about two and a half miles on the Durham road. Mrs. G. G. Ragland, on 26 October, 1940, about dark, was traveling north towards Oxford when the accident occurred between King's place of business and Oxford, at 7:00 o'clock in the evening. The accident was about 250 yards from King's place of business, it occurred just before the beginning of a curve in the highway slightly down grade in the direction she was traveling. She was traveling about 30 miles an hour on the right-hand side of the highway. The car that struck her car was going south towards Durham. As she approached the curve a car was coming meeting her car, lights burning, and as it straightened out and focused its lights she noticed that it was being driven entirely on her side of the highway. She pulled out on the shoulder and applied the brakes; when the car struck her car her left-hand front wheel and rear wheel were about two feet on the paved highway and her car was practically at a standstill. The left-hand front fender, wheel and running board were struck by the other car—which kept going.

Evidence of identity of the car: (1) a hub cap was picked up at the place of the collision. "It was opposite the rear end of my car, probably in the middle of the highway. It has the word 'Chevrolet' on it. It did not come off my automobile. I was driving a 1936 Chevrolet. (Upon

being shown the other two articles) I picked up the smaller piece, the ring. When I saw the other piece, Mr. Carter, the Highway Patrolman, had it.—These three parts of an automobile, apparently automobile parts, did not come off the car I was driving."

(2) A mechanic of the Blalock Chevrolet Company, in Oxford, was sent out to the defendant's place of business at the request of defendant King, for the purpose of fixing a tire. This was about 8:30 o'clock on 26 October, 1940, the night of the accident. King and his automobile were both there. "It was at his place of business, by his building and in front of the highway. The front wheel on Mr. King's automobile was bad—the left front wheel it was bent and battered up. There was no tire on the left front wheel. There was no hub cap on the left front wheel. I started to change the tire, but I did not finish the job. I was going to put on a new tire. I had carried one with me." On account of a dispute about the price, the mechanic did not put on the new tire.

(3) The Highway Patrolman Carter got a call, notifying him of the accident, and went to King's place of business about 10:30. He knew defendant and the place of business. He testified, in part: "I had a conversation with the defendant King. After looking at the car I called for Mr. King to come out. He came out and I asked him about his fender being bent up. He stated that the fender was bent up some time that afternoon. I said, 'Well, have you driven this car since this afternoon?' He first said 'This car has been parked here ever since 4:30.' Then in a few minutes in talking to him he said the car was parked there about 6:30. I asked him about the fender being bent up. He told me that a part of that was done on a bridge over Tar River between there and Franklinton. . . . When I first asked him about the rim and wheel he did not tell me immediately that it was in the back of the car. I told him, 'I have got to see this rim.' He said 'All right, it is there in the back, go look at it.' I went and looked at it. I asked him where the tire was. He did not tell me where the tire was. He never told me where the tire was. There was no tire on that rim. He did not say where he got the rim or whether that was on the left front of his car when I saw it. He did not say whether or not it was a spare." In the interim before 8:30 o'clock it will be noted that defendant got someone else than the mechanic to put the new tire on. There was other corroborating evidence that the car, after the accident, traveled from about the place of the accident to the wrecked Chevrolet at King's place of business, admitted by King to be his car.

(4) The Patrolman Carter testified: "I saw the defendant there. I also saw a 1939 Chevrolet automobile. It was a coach, dark green in color. The car was parked in the yard of the defendant's filling station on the side nearest Oxford. When I saw it the left-hand front fender

was bent up and the hub cap on the left front wheel was gone. The grease cup on the hub was bent up. . . . There was a new tire on the left front wheel."

The identity of defendant as being the man who was driving the car: The accident occurred about 7:00 o'clock. The Patrolman Carter testified: "I said, 'Well, have you driven this car since this afternoon?' He first said, 'This car has been parked here ever since 4:30.' Then in a few minutes in talking to him he said the car was parked there about 6:30. . . . I told him that the fender had been bent up." The Deputy Sheriff Beasley testified: "Q. Did he (King) say whether or not anyone else had been driving his car that night? Ans.: He said that they had not. Q. Had not since 6:30 when he ran into the bridge? Ans.: Yes, sir." The evidence of changing the tire to conceal his identity and other circumstances.

Taking all the evidence, it was of sufficient probative force to be left to the jury to determine, it was more than a scintilla. The competency, admissibility and sufficiency of evidence is for the court; the weight, effect and credibility is for the jury.

The defendant contends that the portion of the charge in which the judge said that the State contended that both officers and private citizens found markings in the highway continuing in an unbroken sequence from the place of the accident to the defendant's car, was in error. Under the decisions of this Court, the defendant waived any objection he might have had to the manner in which this contention was stated by failing to complain to the judge before the case was submitted to the jury. *S. v. Baldwin,* 184 N. C., 789; *S. v. Johnson,* 207 N. C., 273; *S. v. Bowser,* 214 N. C., 249. The testimony of Beasley and others bore out the contentions of the court below.

The court below charged the jury: "The defendant admits that there is no controversy as far as he is concerned about the fact there was a wreck or collision at the time and place alleged and contended by the State; that there is no controversy about the fact that the damage in that collision resulted to the car and to the person of one or more of the occupants of the car and that the operator of the car involved in that collision drove away without complying with the mandates of the statute which has been read in your presence." All of the evidence bears out the correctness of the charge.

This Court has held that a misstatement of an admission by a party does not constitute error unless it is called to the attention of the court at the time in order that there may be a correction. *S. v. McKinnon,* 197 N. C., 576; *S. v. Parker,* 198 N. C., 629; *S. v. Sloan,* 199 N. C., 598; see *S. v. Redman,* 217 N. C., 483 (485).

In *S. v. Parker, supra,* no error was found in a statement that the

defendant had admitted that he was guilty of manslaughter, although the statement was inaccurate. *Justice Adams* said, at p. 634: "At no time during the progress of the charge did the prisoner's counsel object to the instruction or suggestion or intimation that the admission had not been made. In *Barefoot v. Lee,* 168 N. C., 89, the Court remarked in reference to an admission of counsel that if the plaintiffs wished to challenge its correctness they should have called it to the attention of the court at the proper time, and that it was too late, after verdict, to avail themselves of its incorrectness as a matter of right. The situation is similar to that which arises out of the misstatement of a contention. The trial court is entitled to an opportunity to restate any contention and to correct any erroneous statement of an admission, and failure to request a correction or to give a special instruction on the point eliminates the assignment of error. *S. v. Steele,* 190 N. C., 506 (518)."

In the testimony of W. T. Beasley is the following: "Q. What was the condition of the defendant at the time you talked to him, Mr. Beasley? Ans.: He was well under the influence of some intoxicant, Mr. King was. (Exception by defendant. Exception overruled.) King said that he had had an accident; ran into a bridge about 6 o'clock that night over near Durham. He showed us what damage had been done. He showed us the running board and hub cap and fender on the left side. The left side and fender were bent. He said there had been no hub cap on his left front wheel for a week or two. He said that Mr. Whitfield was going to get him one. He said that the collision with the bridge bent his running board and fender. Q. Did he (King) say whether or not anyone else had been driving his car that night? Ans.: He said that they had not. Q. Had not since 6:30 when he ran into the bridge? Ans.: Yes, sir. (Cross-examination) Q. What time did you do the tracking, which you have described to the jury, on which of your visits to the scene of the collision? Ans.: Somewhere around 9:30 and 10:00 o'clock was one time, then we went back again. Q. You stated first that you went out there somewhere between 8:00 and 8:30. You went back again about 10:00? Am I correct about that? Ans.: Yes, sir." When the witness was being cross-examined, the court said: "I sustain your objection to the question and answer as to the condition of the defendant. Do not consider that testimony, gentlemen, strike it from the record."

In *S. v. Stewart,* 189 N. C., 340 (345), *Adams, J.,* citing a wealth of authorities, said: "In *McAllister v. McAllister,* 34 N. C., 184, *Ruffin, C. J.,* said: 'It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury, or by giving such explanations of an error as will prevent it from misleading a jury.' He expressed the same opinion more than three-quarters of a century ago and the practice has been observed since that time."

There are other exceptions and assignments of error made by defendant. We have examined them with care and see no merit in them. On the whole record, we find

No error.

MRS. IDA LANCASTER v. ATLANTIC GREYHOUND CORPORATION.
(Filed 31 May, 1941.)

1. Courts § 13—

In an action instituted in this State involving the rights and liabilities of the parties arising out of an automobile collision occurring in South Carolina, the laws of South Carolina control except as to matters of procedure.

2. Automobiles § 9a—

The common law rule of the ordinary prudent man prevails in the operation of motor vehicles, the rule not being made obsolete but rather preserved in statutory traffic regulations, and even a technical violation of statute or ordinance may be required under circumstances in which a reasonably prudent man can foresee that injury would likely result from a strict compliance with the regulations.

3. Negligence § 9a—

In order for negligence to constitute the proximate cause of injury it is not required that the particular injury which resulted should have been foreseeable, it being sufficient if, under the circumstances, a reasonably prudent man could have foreseen that some injury would probably result.

4. Negligence § 7—

Active negligence which continues to the moment of injury can rarely be insulated by intervening negligence, since if it is a substantial contributing factor to the injury it becomes the proximate cause or one of the proximate causes thereof.

5. Automobiles § 18d—Evidence held insufficient to show intervening negligence on part of third party insulating as matter of law negligence of defendant.

The accident in suit occurred in South Carolina. Plaintiff was a passenger for hire in a taxicab furnished by defendant. The evidence tended to show that the cab entered a street intersection which was heavily congested with traffic at a speed of 18 to 24 miles per hour, that a van was standing on the right side of the street near the center waiting an opportunity to make a left turn, that the cab passed to the right of the van, and that as it cleared the front of the van it was struck by a truck which had approached the intersection from the opposite direction and was attempting to make a left turn. A statute of the State of South Carolina was introduced in evidence which provided that in making a left turn a vehicle should give right of way to other vehicles in the intersection or so close thereto as to constitute an immediate hazard, but that having done so, vehicles approaching the intersection from the opposite direction should yield the right of way to it. *Held:* Even conceding that a jury might

find from the evidence that the driver of the truck was negligent, left turns at the intersection were permitted, and his act in turning in front of the cab was not unforeseeable and cannot be held as a matter of law to insulate the negligence of the driver of the cab in entering the intersection when his vision was partially obstructed by the standing van at a speed inconsistent with due care under the circumstances in violation of statutory regulations of the State of South Carolina and in violation of the rule of the ordinary prudent man.

APPEAL by defendant from *Rousseau, J.*, at February Term, 1941, of FORSYTH. No error.

This is an action to recover damages for an injury sustained by plaintiff through the alleged negligence of defendant in the operation of a taxicab by its servant and agent in the city of Anderson, South Carolina.

Evidence of the plaintiff tends to show that she purchased a ticket and became a passenger on defendant's bus in Winston-Salem, North Carolina, bound for Atlanta, Georgia. When the bus reached Anderson, as there was not room on the next scheduled bus, defendant employed a taxicab driver to transport plaintiff, with her daughter, and another passenger along the route until she could get room on the regular scheduled bus of defendant farther south, and plaintiff was transferred to this cab.

While still in Anderson the taxicab, following the bus, but separated from it some distance, came into collision with another motor vehicle at the intersection of South Main and River Streets, injuring plaintiff.

There is evidence to the effect that the bus driver had told the driver of the taxicab to "keep right up with him"; that the taxicab had been delayed for a short period by a red light, and the bus was "going on out of sight"; that the taxicab took off with great speed, jerking an occupant back on the seat, and that it was running between 30 to 35 miles an hour immediately preceding the collision.

C. H. Crane, the driver of the Chevrolet truck which was in collision with the taxicab, testified that he was going north on South Main Street, south of the intersection therewith of River Street. About 2½ blocks from the intersection he met a Greyhound bus headed south. He was driving on the right-hand side of the street as he approached the intersection of River Street. While about a block back he noticed a big van truck coming south, and started slowing up, and the van likewise slowed up, so that both the Chevrolet truck driven by witness and the van were almost stopped. The van driver signaled for a left-hand turn and so did the driver of the truck, whereupon the van driver signaled for a stop, and, accordingly, stopped. Witness pulled his car into low gear, turned over the "mushroom"—(a device or marker in the street to regulate traffic)—and proceeded to make the left-hand turn. Just as the front

end of his truck got around the front of the van, the left front wheel and fender of the taxicab struck the truck. Witness first saw the taxicab when it was five or six feet away. The taxicab was passing on the right side of the van. The collision was of such force as to bend the frame of the truck against the motor, turn the truck around and "head it back," the truck going a distance of 38 feet to the south sidewalk line of River Street.

The van was of the truck and trailer type, with a big body, longer than the taxicab and the truck, referred to frequently as "the big van." Witness estimated the speed of the taxicab as 40 miles an hour. The van was of such length that it could not have gone around the "mushroom" and got back into River Street. It was sitting a little to the right of the center of Main Street, and straight up and down the street. At that point Main Street is about 80 feet wide. The witness describes Main Street as being "the most important and the most traveled highway in the town of Anderson." River Street is about 36 feet wide on the east side of Main, and 26 feet wide on the west. The "mushroom" marker is not in the center of the intersection, but nearer the east side.

Albert Elrod, driver of the taxicab, as witness for defendant, testified that he saw the van stopped in Main Street a block before he came to it; the driver of the van was waiting for traffic to clear up so he could make a left turn. Traffic was meeting witness on the left. "The big moving van was sitting in the middle of the street. It was way up on the mushroom, waiting for a left turn. The bus and myself had to drive to the right. When the bus cleared the van, I went the same way he did. Then Mr. Crane made a sharp left turn and come between the Greyhound bus and me, and that made him hit me directly head-on." Witness stated Crane was running 20 to 25 miles an hour. On cross-examination, the witness said: "When I entered the intersection, I slowed down to about 18 miles an hour by lifting my foot off the accelerator. I am positive I slowed down to 18 miles an hour before I entered the intersection of River Street. I knew the speed law in South Carolina in a business district, which this was, is 25 miles per hour. I do not say for that reason I was not going faster than 25 miles an hour. I say it because I wasn't going any faster and that is my only reason. The fact it happens to be 25 doesn't affect anything. I saw this big van in the street half a block away and he was stopped. He remained stopped while I traveled half a block. I could not see his left turn signal from the right side of the moving van. I knew the van driver was signaling for a left turn. I knew what he was there for. I saw him holding his hand out the left door. I tell that jury I saw that. I did not pass on the left-hand side of the van. I saw him as I came up. He had the back of his truck pulled around for a left turn. You can't turn one of those trucks on a

dime. This van had not turned left before I approached it, but it had swung to the left. He was bearing to the left, standing still. His van was not straight in the street, but was at an angle. I saw the hand signal before we even got to the back of the van."

. . . "At the time I entered the intersection of River and Main Streets, the Greyhound bus was around a block ahead of me. I did not say Mr. Crane cut his truck immediately behind the bus. I said he came between the bus and me. When the bus went by, the next thing I saw was him coming across just like he come, head-on. He cut this corner at a left-hand angle and hit me. I did not say that was just as soon as the bus went by. I couldn't watch both things at once. I am trying to tell you about it, give me time. At the time he made his left turn, the bus was around almost a block away. Those are short blocks down there. I am counting from River Street to Reid Street; that is a short block with two houses in it."

J. B. Nicholson, a witness for defendant, testified:

"I saw an accident or collision between a Yellow Cab automobile and a Chevrolet truck at the intersection of River and South Main Sts. on July 27, 1939. I was coming down South Main Street and at the traffic signal at the intersection of Market and Main Streets I had to stop on the red light there, and in the meantime this taxicab pulled up beside me. He was on the right and when the traffic light changed, I pulled off and he pulled off immediately after me. In other words, I was ahead of him.

"I worked on the corner there and was going back to work. I was to make a left-hand turn and pulled up behind this truck, and the cab went to my right and the right of the truck I was parked behind, and the collision occurred to the right in front of this big truck sitting there. This truck there in the street it was a big van and as far as I could see it was just what you might say was a short truck. It was a long truck, but wasn't a trailer truck. It was a single trailer. He was on the right side of the mushroom, pulled up almost against it. He was just to the right of it and his front end right at the mushroom."

. . . "I didn't see the Chevrolet truck before the collision, but just as it happened. It appeared to me it was coming up South Main Street going north and turned in front of the big truck. The truck was in front of me and I couldn't say whether he went to the right or left of the mushroom, but I don't see how he had room to go in front of it. The Yellow Cab was traveling 20 to 23 or 24 miles per hour. I would say the Chevrolet truck was traveling around 10 miles an hour."

"The big van had stopped when I pulled up behind it. I stopped behind it because I meant to make a left-hand turn. I had not seen his signal as to what direction he was going. That van was approximately

30 feet in length. I stopped the front end of my car some 8 to 10 feet of the rear of the van. That would put me some 48 to 50 feet north of the curb line of River Street. You couldn't see through or over the body of this van. It completely obstructed my view so far as my view. I saw the taxicab come by to my right. He was going 20 to 24 miles an hour. I understand the speed limit wasn't that much, and I wasn't breaking the speed limit and I was ahead of him. I understand the speed limit is more than 24 in that section."

. . . "He entered the intersection at 20 to 24 miles an hour. He did not slow down when he passed the van, but kept his speed. He kept his speed right on and he gradually passed me. I didn't see Mr. Crane's truck until the collision, just the flash of the collision. I could not see his truck because of the van."

The following laws of the State of South Carolina were introduced in evidence:

"EXHIBIT A.

"EXCERPTS FROM THE ACT OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA, ADOPTED ON THE 16th DAY OF APRIL, 1937, ENTITLED:

"An Act to Restrict and Limit the Use of Highways by Drivers and Pedestrians; to Regulate Traffic on Highways; to Define Certain Crimes in the Use and Operation of Vehicles; to Require Uniform and Safe Driving Practices; to Require Compulsory Accident Reports; and to Provide for Enforcement of this Act and Penalties for Violations.

"SECTION 1. Be it enacted by the General Assembly of the State of South Carolina: Definitions.—For the purpose of this Act, the following words, phrases, and terms are hereby defined as follows:

"VEHICLE. Every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks.

"MOTOR VEHICLE. Every vehicle which is self-propelled and not operated or driven on fixed rails or tracks.

"INTERSECTION. The area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of two highways which join one another at or approximately at, right angles, or the area within which vehicles traveling upon different highways, joining at any other angle may come in conflict.

"BUSINESS DISTRICT. The territory contiguous to and including a highway when 50 per cent or more of the frontage thereon for a distance of 300 feet or more is occupied by buildings in use for business.

"RESIDENCE DISTRICT. The territory contiguous to and including a highway not comprising a business district when the property on such highway for a distance of 300 feet or more is in the main improved with residences.

"OFFICIAL TRAFFIC CONTROL DEVICES. All signs, signals, markings, and devices not inconsistent with this Act placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic.

"SECTION 2. *SPEED RESTRICTIONS.* (a) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing.

"(b) Where no special hazard exists the following speeds for passenger vehicles shall be lawful and any speed to excess of said limits shall be unlawful:

"1. Twenty-five miles per hour in any business district;

"2. Thirty-five miles per hour in any residence district;

"3. Fifty-five miles per hour under other conditions.

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

"SECTION 8. *OVERTAKING A VEHICLE.* (a) The following shall govern the overtaking and passing of vehicles proceeding in the same direction:

"1. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle."

The plaintiff introduced in evidence the following laws of South Carolina relating to the operation of motor vehicles:

"CHAPTER 175 OF THE MOTOR VEHICLE LAW OF SOUTH CAROLINA, the pertinent portions being as follows:

"Sec. 2. 'No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing. Where no special hazards exist, the following speeds for passenger vehicles shall be lawful and any speed in excess of said limits shall be unlawful:

" 'Twenty-five miles per hour in any business district. . . .

" 'Where no special hazard exists the following speeds for motor trucks and motor truck tractors shall be lawful but any speed in excess of said limits shall be unlawful: Twenty miles per hour in any business district. . . .

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

"Sec. 8. 'Overtaking a vehicle on the right is permitted under the following conditions: The driver of a vehicle may overtake and pass upon the right of another which is making or about to make a left turn.'

"Sec. 13. 'Approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and after entering the intersection, the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered.'

"Sec. 16. 'When signals required. No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such move, or after giving an appropriate signal in the manner hereinafter provided in the event any other vehicle may be affected by such movement. A signal of intention to turn right or left shall be given continuously during not less than the last one hundred feet traveled by the vehicle before turning. The signals herein required shall be given either by means of the hand and arm or by a signal lamp or signal device of a type approved by the Department, but when a vehicle is so constructed or loaded that a hand or arm signal would not be visible both to the front and rear of such vehicle, then said signal must be given by such a lamp or device.' . . .

"Sec. 20. 'The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching

from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but such driver having so yielded and having given the signal when and as required by this Act, may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the vehicle making the left turn.' "

The defendant, in apt time, made motions for judgment as of nonsuit, which were overruled, and defendant excepted.

Issues were submitted on the questions of negligence, and damage, and answered in favor of plaintiff. Judgment for plaintiff ensued, and defendant, having made exceptions preserving the right of review, appealed, assigning error.

Roy L. Deal for plaintiff, appellee.
Fred S. Hutchins and H. Bryce Parker for defendant, appellant.

SEAWELL, J. This appeal presents one question: Should the trial court have allowed defendant's motion for judgment as of nonsuit?

The injury to plaintiff occurred in the State of South Carolina from causes operating in that State, and, except for procedural law of the forum not here challenged, the South Carolina law applies. *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101; *Hipps v. R. R.,* 177 N. C., 472, 99 S. E. (S. C.), 18.

The vast development of travel and traffic by motor vehicles, greatly multiplying the dangers incident to the use of highways and streets, and the necessity of regulation looking to the safety of persons and property, have given rise to an astonishing volume of statutory law, all of which exhibits a sameness of trend but no uniformity of detail in the several states. These statutes frequently impose duties and create obligations unknown to the common law, but there are certain fundamentals of the common law relating to actionable negligence which may be said to persist and frequently to become deciding factors after giving applicable statutes their full effect.

The rule of "the ordinarily prudent man" as a measure of the duty one person owes to another, the violation of which gives rise to actionable tort, is fully recognized in South Carolina law, as indeed it is, with some differences of local interpretation and application, in every state in the Union. *Burnette v. Augusta Coca-Cola Bottling Co.,* 157 S. C., 359, 154 S. E., 645; *Anderson v. Ballenger,* 166 S. C., 44, 164 S. E., 313; *Barkshadt v. Gresham,* 120 S. C., 219, 112 S. E., 923; *King v. Holliday,* 116 S. C., 463, 108 S. E., 186. The principle is so strongly adhered to that it has been held that it is the duty of a person technically to violate

a statute or ordinance if to do so becomes necessary to avoid inflicting injury. *Walker v. Lee,* 115 S. C., 495, 106 S. E., 682; *Sims v. Eleazer,* 116 S. C., 41, 106 S. E., 854.

There is in the South Carolina laws introduced in the evidence an express, and we think, successful attempt to preserve this rule against purely mechanical reliance on the regulating statutes relating to the conduct of those approaching and using intersections where want of care is likely to result in injury.

While the testimony is conflicting, it can hardly be questioned that there is evidence from which the jury might infer negligence on the part of Elrod, the driver of defendant's taxicab, in approaching and entering the intersection at a speed inconsistent with due care; especially in view of the condition of traffic therein, the fact that it was a much used intersection, and that his view was partly obstructed by a large van partly within the intersection.

As we understand the argument of defendant, it is based more strongly on the contention that the evidence fails to show that any negligence of the defendant was proximately connected with the collision and injury. Counsel contend that the negligence of Crane, the driver of the Chevrolet truck, intervened and insulated the negligence of the taxicab driver, if such negligence existed, and that we should so find as a matter of law, notwithstanding the verdict of the jury, and cite numerous cases, mostly from this jurisdiction. *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808; *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840; *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Lineberry v. R. R.,* 187 N. C., 786, 123 S. E., 1; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446, and other cases dealing with the subject. The citations considered of sufficient pertinency will be dealt with later.

If the defendant could base its theory of insulated negligence on clear and undisputed facts, showing the conduct of Crane, the driver of the Chevrolet truck, to have been of the character which defendant ascribes to it, the defense might be worthy of more serious consideration, but there are difficulties in the way. Under the conflicting evidence upon the critical point at issue, we do not feel justified in taking the extreme view of the occurrence necessary to sustain defendant's contention. It would involve an assumption of facts which the jury, on the whole evidence, has obviously found to be otherwise.

Indeed, we are unable to see how, as a matter of law, we might find that Crane, the driver of the Chevrolet truck, was negligent at all. It has not been called to our attention that he violated any South Carolina law that would render his conduct negligent *per se.* On the contrary, he had a right to make a left-hand turn into River Street through this

intersection which, operating from his line of travel on the right-hand side of the street, would carry him across the line of traffic going south on the west side of the street. In doing this, he must, of course, observe due care; but if his testimony is believed, he did everything the law required, not only to make his attempt lawful, but to give him the right of way. See "Section 20," *supra.* He signaled in apt time for a left turn, which gave him the right of way over vehicles not yet within the intersection, and then proceeded to make the turn in low gear. There was not apparent any "immediate hazard" of oncoming cars, since traffic had stopped upon his signal—except that the taxicab alone, with undiminished speed, entered the intersection and intercepted his truck. There are contradictions, of course, but that aspect of the evidence cannot be eliminated.

There is also contradiction of the defendant's view of the situation as to the time and manner in which Crane entered the intersection and made the turn, and the correlation of these elements with the movements of the taxicab.

But conceding Crane's negligence, his conduct lacked that extraordinariness necessary to withdraw it from the limits of foreseeability. Restatement of the Law, Torts, section 447. To incur liability for negligent conduct, it is not necessary that the person guilty of the negligence should foresee the exact nature of the occurrence or injury consequent upon his negligent act or omission. It is only necessary that he may foresee that some injury may reasonably follow as a consequence thereof. The negligence charged to defendant's agent, Elrod, is of a nature peculiarly significant of the obvious danger, which, in this instance, ripened into injury:—driving at a high rate of speed into a busy intersection occupied with traffic, with his vision partly obstructed. Under such circumstances it is usually seen that one who outruns his visual limitations has made a blind date with disaster. In what form it presents itself is immaterial to the issue.

The law upon the subject in this State has been expressed by *Justice Barnhill* in *Dunn v. Bomberger,* 213 N. C., 172, 177, 195 S. E., 364, as follows: "In order to establish actionable negligence the plaintiff must show that the defendant, in the exercise of ordinary care, could foresee that some injury would result from his alleged negligent act."

South Carolina decisions are even stronger: "The liability of a person charged with negligence does not depend on 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 or omission." *Washburn v. Laclede Gas Light Co.,* 202 Mo. App., 102, loc. cit. 115, 214 S. W., 410, 414, approved

in *Horne v. Southern R.*, 186 S. C., 525, 197 S. E., 31, and in *Tobias v. Carolina Power & Light Co.*, 190 S. C., 181, 186. "It is sufficient that in view of all the attendant circumstances, he should have foreseen that his negligence would probably result in injury of some kind to someone." *Tobias v. Carolina Power & Light Co.* (S. C.), *supra;* Restatement of the Law of Torts, Vol. 2, Negligence, p. 1173, section 435.

The situation dealt with in *Butner v. Spease, supra,* is so radically different from that presented in the present case as to distinguish the *Butner v. Spease* case in principle and to make it inapplicable here. Here we are dealing with the conduct of two drivers approaching, entering, and using a much used intersection in a populous town then occupied with traffic and with special, local, or state laws relating to the use of the intersection, and specifically the manner in which left-hand turns might be made and respected under the conditions then prevailing.

It should be said also that in *Beach v. Patton, supra, Justice Schenck,* who wrote the opinion for the Court, was dealing with a passive or inactive primary negligence which lends itself more readily to the doctrine of insulated negligence when active negligence has intervened. Instances in which active negligence, continuing to the moment of the impact, may be insulated by intervening negligence must be comparatively rare. Such primary negligence is never insulated when it is obviously a substantial contributing factor. No doctrine of whatsoever kind ought to be mechanically applied against the reason of the thing.

While the jury, if the issue had been before it, might have inferred from the evidence that Crane was negligent, the ultimate effect could have been no more than make him a joint *tort-feasor* with the defendant, and this, of course, would not alter the result of the trial.

We find

No error.

JOHN GRANT LAUGHTER v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 31 May, 1941.)

1. Master and Servant §§ 2, 25—Fact that minor obtains employment by misrepresenting age does not affect employer's liability for negligent injury.

A minor, 19 years of age, with knowledge of the rule of a railroad company against employment of minors, filed application stating that he was of full age. Upon examination by an authorized representative of the company he was found to be physically and mentally fit and was given

employment. Almost five months later he was injured in the course of his employment in interstate commerce. The jury found that he was guilty of contributory negligence, but allegations of contributory negligence were not predicated upon his minority and there was nothing from which it might be inferred that his minority was a contributing factor to his injury. *Held:* While the misrepresentation rendered the contract of employment voidable, until avoided the injured person was an employee within the meaning of the Federal Employers' Liability Act, and entitled to the protection afforded by law, and could maintain his action under the Act to recover for the injuries sustained. 45 U. S. C. A., secs. 51-59.

2. Master and Servant § 27—

Evidence that plaintiff employee was injured by the negligence of defendant railroad company *held* sufficient to take the case to the jury under authority of *Atlantic Railroad Co. v. Hughes*, 278 U. S., 496, 73 L. Ed., 473.

3. Master and Servant § 33—

In this action under the Federal Employers' Liability Act, the charge of the court on the doctrine of assumption of risk *held* without error on authority of *Hubbard v. R. R.*, 203 N. C., 675.

4. Master and Servant § 29—

The charge of the court on the issue of damages recoverable under the Federal Employers' Liability Act for physical injuries when both negligence and contributory negligence are found by the jury *is held* without error upon authority of *S. A. L. R. R. Co. v. Tilghman*, 35 S. Ct., 653, 237 U. S., 499, 59 L. Ed., 1069.

5. Trial § 36—

An exception to the charge on the ground that excerpts taken therefrom are conflicting cannot be sustained when the charge read contextually as a whole is free from this objection.

APPEAL by defendants from *Nimocks, J.*, at September Term, 1940, of WARREN.

Civil action to recover for injury allegedly caused by actionable negligence of defendants.

Plaintiff for cause of action, briefly stated, alleges: That on 26 August, 1937, he was an employee of the Seaboard Air Line Railway Company, and was on duty as trainman on one of its freight trains, running between Norlina, North Carolina, and Portsmouth, Virginia; that at Boykins, Virginia, it became his duty to uncouple a car to be set off from the train there; that in the performance of that duty it was necessary for him to go between that car and the one next to it, and to release the air hose which there operated the air brake; that while he was between the cars and in the act of turning the angle cocks on the air hose "the said train was suddenly and violently, without any previous warning or notice to this plaintiff, carelessly, recklessly and negligently moved by said defendant . . . and the plaintiff's arm was caught between the

drawhead and bumper . . . and as result . . . mashed, mutilated, and rendered permanently useless, to his great damage."

Defendants in their amended answer deny plaintiff's allegations of negligence, and, for further defense, (1) invoke the provisions of the Federal Employers' Liability Act, (2) plead (a) the contributory negligence of, and (b) assumption of risk by plaintiff, and (c) fraud of plaintiff in obtaining employment by falsely and knowingly representing that he was twenty-one years of age, and (3) aver that as result of such fraud plaintiff cannot maintain an action under the Federal Employers' Liability Act, because he was not an employee.

These facts appear to be uncontroverted:

1. At the time of plaintiff's injury the defendants, receivers of the Seaboard Air Line Railway Company, were engaged in interstate commerce and the right, if any, of plaintiff to recover in this action arises under and must be determined by the provisions of the Federal Employers' Liability Act. U. S. C. A., Title 45, sections 51-59.

2. Rule 705 of defendants' printed Rules and Regulations for the Government of the Operating Department provides that "Minors must not be employed in train, engine or yard service." In printed Train Rules Examination, submitted by defendants, plaintiff answered "Yes" to the question, "Have you secured a copy of the current rules and are you conversant with same?" And, while plaintiff testified that at time of his examination he did not know of Rule 705, he knew that it was a rule of the railroad not to employ minors in train service.

3. Plaintiff, in his written application for employment filed with defendants on or about 15 March, 1937, gave the date of 16 February, 1916, as that of his birth, and stated to defendants' trainmaster, by whom he was examined for employment, that he was twenty-one years of age, when in fact he was born on 13 December, 1917, and was then a minor. The representations as to his age were made by plaintiff for the purpose of deceiving defendants and obtaining employment by them.

4. The trainmaster, who gave the examination, found plaintiff "physically and mentally fit to do the work," and he was given employment about 1 April, 1937, and worked, though not regularly, until 26 August, 1937, when he was injured.

Defendants aver and on the trial below offered evidence tending to show that they were deceived by the misrepresentations made by plaintiff as above stated, and that if they had known he was not twenty-one years of age, he would not have been employed.

Plaintiff replying to amended answer of defendant denies their averments as to contributory negligence and assumption of risk, and alleges that on 1 April, 1937, when he was employed by defendants' agent to work as a trainman on their trains "he was in his twentieth year of age,

was strong in mind and body, weighed about 150 pounds, and was fully able in every respect to do the work and services of a man of mature years"; and that his injury was "in no way caused by the plaintiff's nonage, immaturity or want of physical or mental capacity to do the work he was employed to do and about which he was engaged when . . . injured . . . by the gross negligence and want of care of said defendants and their employees."

Plaintiff, as witness for himself regarding his duties and the manner of his injury, testified substantially as follows: "I had to couple and uncouple cars, throw switches and unload merchandise. Bob Bryant was conductor in charge of the freight train I was on on August 26, 1937, . . . The engineer was Mr. Rozar and a colored fireman . . . I was injured on that day on my hand and arm. I was uncoupling a car at Boykins, Virginia. I was instructed by the conductor to set off a car at Boykins, Virginia, on a sidetrack, and to do this you have to uncouple the air hose, release the air brake and then pull the pin. In uncoupling the air there is one on one car and another on the other over a draw. I turned the angle cock. I turned to the other to turn that out, and in doing so braced myself on the other car, and while in the act of turning that out the train was suddenly moved, and I caught my hand in between the drawhead and the bumper on the car. I did not give the conductor or engineer any order to move the car. I could not. I was in between the two box cars . . . I do not know who signaled the engineer to move the car. The conductor at that time was standing right behind me . . . I was familiar with the duties of coupling and uncoupling cars, just about all you have to do. I had been working for the railroad about six months."

Then, on cross-examination, plaintiff continued: "I was familiar with the construction of box cars and other types of cars on the railroad. There was a hand hold on the end of each of those cars coupled together and which I was uncoupling. The hand hold was a little over one foot long, I guess. . . . A hand hold is a bar on the end of the box car if you want to climb through over the drawhead, or hold to it. I could hold to it. . . . When I went to work Mr. Norris, trainmaster, asked if I was lefthanded . . . I gave a signal and he asked if I was left-handed, and I told him that I was . . . Doing the work with my left hand I could not use any hand rail, could not stretch out that far to hold to the hand rail and turn the angle cocks on the other car."

Plaintiff further testified in substance that he did not look to see if there was a hand hold on the end of each of those cars; that he made no effort to put his hand on a hand hold when uncoupling the car; that he did not try to find one; and that he was reaching over the drawhead to turn the angle cocks with his left hand.

On the other hand, defendants offered evidence tending to show that after the train came to a stop it did not move, nor was any signal to move given, until after plaintiff was injured; that the only way plaintiff could have been injured was by the slack in the cars; that he would not have been injured by the slack if he had not placed his hand on the neck of the coupling, the only place between the cars in which it could have been mashed; that the cars were of standard construction and supplied with grab irons or hand holds for use and protection of employees working between the cars in coupling and uncoupling cars.

These issues were submitted to and answered by the jury as follows:

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

"2. Did the plaintiff, by his own negligence, contribute to his injuries, as alleged in the answer? Answer: 'Yes.'

"3. Did the plaintiff voluntarily assume the risk of injury, as alleged in the answer? Answer: 'No.'

"4. What damage, if any, is the plaintiff entitled to recover? Answer: '$8,000.00.'

"5. Were defendants and plaintiff at the time of his injury engaged in interstate commerce? Answer: 'Yes.' "

From judgment in favor of plaintiff, upon the verdict rendered, defendants appeal to Supreme Court and assign error.

Kerr & Kerr for plaintiff, appellee.
Murray Allen for defendants, appellants.

WINBORNE, J. All parties to this action concede that plaintiff must recover, if at all, under the provisions of the Federal Employers' Liability Act (45 U. S. C. A., sections 51-59) as interpreted by the Supreme Court of the United States. This was the theory of the trial in the Superior Court.

Defendants, appellants, in the main, challenge the status of plaintiff as an employee. The question in this respect is raised by motions, aptly made, for judgment on the pleadings, and for judgment as of nonsuit at the close of all the evidence, and by exception to the charge of the court on the trial below. Here is the question: Where a young man, who is only nineteen years of age, knowing that a railroad company, which is engaged in interstate commerce, has a rule that "minors must not be employed in train . . . service," and in applying to such company for, and for the purpose of obtaining employment as a trainman, represents that he is twenty-one years of age, and, upon examination by its authorized representative, he is found to be "physically and mentally fit to do the work" of a trainman, and is employed as such, and, after work-

ing for several months, and, while in the performance of the duties imposed upon him in that capacity on a freight train engaged in interstate commerce, is injured through the negligence of employees of the company, is he an employee within the meaning of the Federal Employers' Liability Act? If so, may he maintain an action to recover for his injury? The trial judge ruled as a matter of law that plaintiff was such an employee and may maintain this action.

Defendants, however, contend that this ruling is in conflict with the decisions of the Supreme Court of the United States in the case of *Minneapolis St. P. & S. M. Ry Co. v. Rock* (1929), 279 U. S., 410, 49 S. Ct., 363, 73 L. Ed., 766.

While in that case the Court held that the plaintiff, an imposter, was not an employee and could not maintain the action, the case is clearly distinguishable from that at bar.

We are of opinion that the ruling below is consonant with the clear weight of authority. Although the fact that an employee obtains employment by means of false statements may be ground for rescission of the contract of employment, it is insufficient to render such contract void or to terminate the relation of master and servant, or employer and employee thereby created. 39 C. J., 276, M. & S., 40.

Though not heretofore considered by this Court, this principle, in different aspects, including that of misrepresenting the age of the applicant for employment, not only has been applied by the courts of several states, but has been applied and approved by the courts of the United States. Pertinent cases tried under the Federal Employers' Liability Act are these: *Payne v. Daugherty* (1922), C. C. A., 8th Circuit, 283 Fed. Rep., 353 (misrepresenting prior employment and previous injuries); *Minneapolis, St. P. & S. Ste. M. R. R. Co. v. Borum* (1932), 286 U. S., 447, 52 S. Ct., 612, 76 L. Ed., 1218 (misrepresenting age); *Dawson v. Texas & P. Ry. Co.* (1931, Court of Civil Appeals of Texas), 45 S. W. (2d), 367, reversed April, 1934, by Supreme Court of Texas, 123 Texas, 191, 70 S. W. (2d), 392, from which petition to Supreme Court of United States for writ of *certiorari* was denied October, 1934. 55 S. Ct., 110, 293 U. S., 580, 79 L. Ed., 677 (a switchman made false statement as to previous injury while employed by another railroad company); *Texas & N. O. R. Co. v. Webster* (1932 Court of Civil Appeals of Texas), 53 S. W. (2d), 656, reversed April, 1934, by Supreme Court of Texas, 123 Texas, 197, 70 S. W. (2d), 394, from which petition to Supreme Court of United States for writ of *certiorari* was denied October, 1934, and rehearing denied November, 1934, 293 U. S., 58, 79 L. Ed., 677 (plaintiff withheld information that he had employed attorneys to sue and had filed suit against former railroad employer); *Kansas City, M. & O. Ry. Co. of Texas v. Estes* (1918), C. Cir. App. of Texas,

203 S. W., 1155; *Qualls v. A. T. & St. Ry. Co.* (1931), Dist. Ct. of Appeals, Third District, California, 296 P., 645 (misrepresented length of time he worked for his brother). See, also, these cases in which the Federal Employers' Liability Act was not involved: *Williams v. Illinois Central R. R. Co.* (1905), 114 La., 13, 30 So., 992 (a minor employed as brakeman falsely stated age); *Matlock v. Williamsonville, G. & St. L. Ry. Co.* (1906), Mo., 95 S. W., 849 (a minor employed as brakeman misrepresented age); *Galveston, H. & S. A. Ry Co. v. Harris* (1908), 48 Tex. C. Civ. App., 434, 107 S. W., 108 (falsely stated never had any litigation with any railroad); *Lupher v. The Atchison, T. & S. F. Ry. Co.* (1910), 81 Kan., 585, 106 P., 284, 25 L. R. A. (N. S.), 707 (minor falsely stating age); *Hart v. The New York Central & Hudson River R. R. Co.*, 205 N. Y., 317, 98 N. E., 493 (misrepresenting age).

In the *Borum case, supra,* the Supreme Court of United States, distinguishing that from the *Rock case, supra,* said that "Plaintiff's physical condition was not shown to be such as to make his employment inconsistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees."

In *Payne v. Daugherty, supra,* the Circuit Court of Appeals, 8th Circuit, through *Cotteral, District J.,* speaking to ruling of the trial court in excluding evidence offered to defeat the action on the ground that the plaintiff fraudulently secured his employment, as pleaded, and in refusing instructions tendering such defense, said: "In our opinion the rulings are correct. The complaint is not that proof is incompetent which tended to attribute the fall from the car to prior injury or affliction. That is far different from permitting a retroactive dissolution of the relation of master and servant, by virtue of the contract, which even if voidable, was, while it subsisted, attended with the duty, required by law, for the safety of the latter . . . We regard the decisions such as *Lupher v. Atchison, T. & S. F. Ry. Co.*, 81 Kan., 585, 106 Pac., 284, 25 A. L. R. (N. S.), 707, as declaring the sound and just rule, namely, that there is liability to the employee, notwithstanding the inducement to the contract. Furthermore, this action was brought under the Federal Employers' Liability Law . . . And in our opinion we should hold that the defense urged was not available, in view of the positive terms of Sections 1 and 5 of the . . . Act," citing authorities.

In the *Lupher case, supra,* a rule of defendant railway company forbade the employment of minors in capacity of brakemen. In 1904 plaintiff entered the service of defendant as brakeman. At that time he was eighteen years of age, but represented that he was twenty-one, and obtained his position by that misrepresentation. In 1906, while throwing a switch, he slipped and fell upon the tracks and was run over and injured. He sued the company alleging that his injury was due to its

negligence. His evidence disclosed these facts. The trial court sustained demurrer thereto, basing its decision, it is said, upon the case *Norfolk & W. Ry. Co. v. Bondurant,* 107 Va., 515, 59 S. E., 1091, upon the ground that his misrepresentation in securing his employment prevented the establishment of the relation of master and servant, and that at the time of his injury he was either a trespasser or at most a mere licensee, to whom the company owed no other duty than not to injure him willfully or wantonly. In reversing the decision of the lower court, the Supreme Court of Kansas epitomized in the syllabus its decision in this language: "The fact that a brakeman obtained his position by falsely stating that he was of full age when he was in fact but eighteen years old (a rule of the company forbidding the employment of minors in that capacity) does not relieve the company from its obligation to exercise the same care for his protection that is due to any other employee, or disentitle him to recover for an injury due to the want of such care and not occasioned by his minority or immaturity."

In the *Williams case, supra,* the first headnote correctly interpreting the decision, reads: "When a young man was employed as a brakeman on a sworn application, in which he stated that he was 21 years old, he at the time having the physique of a man, his minority is no factor in an action for damages for personal injuries."

In the *Hart case, supra,* the Court of Appeals of New York said: "The appellant proposed to show that, in the written application made by him (plaintiff), he falsely represented that he was over twenty-one years of age and, having obtained his position by the false representation, that his rights were only those of a licensee. The trial court committed no error in excluding the evidence, as constituting no defense. The misrepresentation of the deceased affected the contract of employment, in the sense, that it made it voidable; but it did not affect the relation of master and servant, with respect to the former's obligation under the statute respecting the safety of the person serving it. Notwithstanding that the deceased, by his misrepresentation, evaded the rule of the defendant forbidding the employment of minors, he was, actually, in its service and, therefore, was entitled to the protection of an employee accorded by the law," citing among others the *Lupher case, supra.*

The case of *Dawson v. Texas & P. Ry. Co., supra,* as well as the case of *Texas & N. O. Ry. Co. v. Webster, supra,* was decided in the Court of Civil Appeals of Texas under authority of the *Rock case, supra.* But the Supreme Court of Texas, in reversing the decision of the Court of Civil Appeals in the *Dawson case, supra,* has this to say: "It is clearly established as a fact, that at the time Dawson applied for employment to defendant he was in every way physically fit to perform the duties of his employment, and had performed such duties for a period of twelve

years in a satisfactory manner before his injury, and that there was no causal connection with his injury and the false statements in his application, and that his injury was in no way related to said false statements. The fact that he concealed his employment by the Texas Midland Railroad Co., and concealed that he had been injured while in its service, and had filed a suit against it, if seasonably applied, might have been a ground for cancelling his contract of employment with defendant in error, but would be insufficient to render it void or to terminate the relation of master and servant. 39 C. J., 276, sec. 401. As such employee, and while in the full discharge of his duties, he could not be deprived of the protection of the law or of his right to recover for unlawful or negligent injuries inflicted upon him." Then, after quoting from the *Harris* and *Estes cases, supra,* in the latter of which the *Harris, Hart* and *Lupher cases, supra,* are cited, and after citing others, among which are *Qualls, Borum* and *Lupher cases, supra,* the Court continued: "The conclusion reached by the Supreme Court of the United States in the *Rock case* appeals to reason and justice. . . . Joe Rock made application for employment as a switchman in the yards of the Minneapolis, etc., Ry. Co. He underwent a physical examination at the hand of the Company's surgeon, and was found to be in exceedingly bad physical condition, and for that reason was rejected. He then applied under another name, and secured another man, who was well and strong, to stand the examination. He went to work under the assumed name, and was injured. The Supreme Court of the United States held that Joe Rock never became an employee of the railway company; that his gross fraud was a continuing act; that at no time was he entitled to the protection or benefits of the Federal Employers' Liability Act, and could not recover thereunder. It did not hold that where the applicant made a false statement about a matter disconnected from or not associated with his employment, and which was in no wise connected with the cause of his injury and not related to his fitness or his ability to discharge the duties required of him, he could not recover under the Federal Employers' Liability Act (45 U. S. C. A., 51-59). That it did not intend to so hold we think is made reasonably clear in the opinion written by the same eminent jurist in the case of *Minneapolis, etc., Ry. Co. v. Borum,* 286 U. S., 447, 52 S. Ct., 612, 76 L. Ed., 1218." And, concluding, the Court said: "Dawson was an employee of defendant in error within the meaning of the Federal Employers' Liability Act at the time he was injured. It was conclusively shown that he was physically and mentally sound, thoroughly competent to perform the duties required of him by defendant in error . . ."

In the *Webster case, supra,* it is said: "When Webster was employed by the Galveston, Harrisburg & San Antonio Railway Company, . . .

in 1916, the physical examination of him showed him to be physically fit. There was no untrue statement which affected the physical fitness of Webster to hold his position with the company, and it is assumed his physical condition was the same when he became an employee of plaintiff in error. At least it was not shown that his physical condition was such as to make his employment inconsistent with plaintiff in error's proper policy or its reasonable rules to insure discharge of its duty to select fit employees. Applicable here is the language used in the case of *Minneapolis, etc., Ry. Co. v. Borum* . . . by the Supreme Court of the United States: 'It is clear that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, etc., Ry. Co. v. Rock* . . . *supra,* or the reasons upon which that decision rests.' "

In both the *Dawson* and *Webster cases, supra,* petitions for *certiorari* were denied by the Supreme Court of the United States, and in the latter case a rehearing was also denied.

In the present case, although plaintiff John Grant Laughter obtained employment by defendants by falsely representing that he was twenty-one years of age, when in fact he was then only nineteen, and although defendants had a rule that minors must not be employed in train service, and would not have employed plaintiff if they had known that he was a minor, defendants, finding him to be "physically and mentally fit to do the work," actually employed him as a trainman. This constitutes a contract of employment, even though voidable, by which the relation of master and servant, or employer and employee, was created between defendants and plaintiff. Hence, in the light of applicable principles enunciated in the authorities to which reference is hereinbefore made, defendants, so long as that relation subsisted, owed to plaintiff the duty to exercise the same degree of care for his protection that is due to any other employees under the provisions of the Federal Employers' Liability Act.

Moreover, while it is true that the jury has found that plaintiff, by his own negligence, contributed to his injury, there is no averment by defendants nor is there evidence that such negligence was attributable to his minority. The defendants in pleading contributory negligence aver: "That, if the plaintiff was injured as alleged in the complaint, which is again expressly denied, such injury was the result of his own negligence in going between the cars of the defendants' train and in placing his arm and hand in the position in which it was placed at the time of his injury, and in failing to exercise the care of an ordinarily prudent person under the circumstances."

The defense relating to misrepresentations by the plaintiff is summarized in paragraph 16 of defendants' further answer in this manner:

"16. That plaintiff, having procured his alleged employment by fraud, the relation of master and servant under the Federal Employers' Liability Act did not in fact exist, and plaintiff was not an employee of the defendants, Receivers, in contemplation of said Act, and plaintiff is not entitled to recover in this action."

Therefore, the fact that plaintiff was guilty of contributory negligence standing alone is not sufficient to raise an inference that his minority was a proximate cause of his injury.

The cases of *Norfolk & W. Ry. Co. v. Bondurant, supra,* and *Fort Worth & D. C. Ry. Co. v. Griffith* (1930), Court of Civil Appeals of Texas, 27 S. W. (2d), 351, cited by defendants, are distinguishable from the present case.

As an additional ground for motion for judgment as of nonsuit, defendants contend that the evidence of negligence is not sufficient to take the case to the jury. Tested by the Federal Rule, as stated in *Western and Atlantic Railroad Co. v. Hughes,* 278 U. S., 496, 73 L. Ed., 473, that to carry the case to the jury "more than a scintilla of evidence" must be offered, we are of opinion that evidence of plaintiff is sufficient. See *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802.

The charge of the court relating to assumption of risk, to which exceptions 25, 26 and 27 are taken, is in substantial accord with the provisions of section 4 of the Federal Employers' Liability Act as interpreted in decision of the courts of the United States. The exceptions are not sustained. See *Cobia v. R. R.,* 188 N. C., 487, 125 S. E., 18, and *Hubbard v. R. R., supra,* for review of authorities.

Defendants further except to the charge on the issue of damage, exceptions 28 to 34, inclusive. We are of opinion that the charge as given conforms substantially with the provisions of section 3 of the Federal Employers' Liability Act, relating to recovery of damages for physical injuries where both negligence and contributory negligence have been found by the jury, as interpreted and applied by the Supreme Court of the United States. See *S. A. L. Ry. Co. v. Tilghman,* 35 S. Ct., 653, 237 U. S., 499, 59 L. Ed., 1069, and cases cited therein. See, also, *Cobia v. R. R., supra.* It is contended, however, that portions of the charge to which these exceptions are taken are conflicting. We are of opinion that the charge on this phase of the case, when read as a whole, is intelligible and free from the vice charged.

After giving due consideration to all other exceptions, we find no cause for disturbing the judgment of the trial court.

No error.

STATE OF NORTH CAROLINA, EX REL. R. B. JONES, ADMINISTRATOR, CUM TESTAMENTO ANNEXO, DE BONIS NON, OF HENRY HAYNIE, DECEASED, V. E. C. GRIGGS, PRINCIPAL; AND K. W. ASHCRAFT; L. D. ROBINSON; W. HENRY LILES; L. J. HUNTLEY; AND F. M. HIGHTOWER, JR., AND ELIZABETH RATLIFF HIGHTOWER, EXECUTORS OF F. M. HIGHTOWER, DECEASED; AND EFFIE A. LITTLE AND H. W. LITTLE, JR., EXECUTORS OF H. W. LITTLE, DECEASED; AND THE FIRST NATIONAL BANK OF WADESBORO, N. C., ADMINISTRATOR OF C. M. BURNS, DECEASED, SURETIES (ORIGINAL PARTIES DEFENDANT), AND E. C. GRIGGS, EXECUTOR OF SARAH ANNE GRIGGS, E. C. GRIGGS, INDIVIDUALLY, H. BATTLE GRIGGS, HERBERT C. GRIGGS AND MRS. DAVID BALLINGER (ADDITIONAL PARTIES DEFENDANT).

(Filed 31 May, 1941.)

1. Appeal and Error § 40a—

A sole exception to the judgment as signed presents only the question of whether the judgment is supported by the record.

2. Same—

In the absence of a request that the court find the facts, it will be presumed on appeal that the court found sufficient facts, upon supporting evidence, to support the judgment.

3. Parties § 10—

It is the duty of the court to bring in all parties necessary to a complete determination of the controversy, Michie's Code, 460.

4. Same: Executors and Administrators § 31—In this action against administrator c. t. a., joinder of executor and beneficiaries under will of remainderman held proper upon the record.

This action was instituted by the administrator, *c. t. a., d. b. n.*, against the former administrator, *c. t. a.*, and his sureties. Defendant administrator and his sureties filed answer alleging that under the will of plaintiff's testator the entire estate, real and personal, passed to testator's daughter upon the death of testator's wife and the falling in of her life estate, that defendant administrator was appointed executor under the daughter's will, and that he and the daughter's children were her sole beneficiaries and had divided the estate between them under the terms of her will by quitclaim deeds and had divided the personalty, and that the daughter's children had instigated the action by plaintiff administrator in order to avoid the plea that they were estopped by their conduct from claiming any interest in testator's estate, that all debts of testator's estate had been paid, and that the settlement between the parties constituted a complete settlement of testator's estate and of the daughter's estate. Upon motion of defendant administrator and his sureties, the court found that defendant administrator in his individual capacity and in his capacity as executor of the daughter's estate, and the daughter's children, beneficiaries under her will, were necessary parties to a complete determination of the controversy, and granted defendants' motion for their joinder. *Held:* Upon the record, the allowance of the motion for the joinder of the additional parties defendant was properly granted. Michie's Code, 456, 460.

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

JONES *v.* GRIGGS.

APPEAL by plaintiff from *Alley, J.*, at November Term, 1940, of ANSON. Affirmed.

This is an action brought by plaintiff, administrator, *cum testamento annexo, de bonis non,* of Henry Haynie, deceased, against E. C. Griggs, principal, and the sureties on his bond, for an accounting. The record discloses the complaint and answer—which are lengthy.

Defendants in their answer deny liability and set up certain defenses and pray that certain parties be made defendants to the action. The facts set forth, in part, as alleged in the answer of E. C. Griggs, are: "Henry Haynie died on March 1, 1910. His last will and testament was dated July 15, 1886, and was admitted to probate in the office of the Clerk of the Superior Court of Anson County on March 18, 1910, recorded in Will Book E, at pages 159, etc. Margaret Haynie, widow of the said Henry Haynie, was appointed executrix of said will, but she renounced her right to qualify as such and recommended the appointment of E. C. Griggs, her son-in-law, as Administrator, *cum testamento annexo.* Under his will, Henry Haynie devised and bequeathed all of his property both real and personal, to his widow, Margaret Haynie, 'To have, hold, use, occupy and enjoy for and during the period of her natural life only. After her death to my daughter, Sarah Anne Haynie, to have and to hold absolutely and in fee simple.' The Sarah Anne Haynie mentioned in said Will was the only surviving child of Henry Haynie and Margaret Haynie, and the said Sarah Anne Haynie subsequent to the execution of said Will, married E. C. Griggs, the Administrator herein. The said Sarah Anne Haynie by a prior marriage to a brother of the said E. C. Griggs had one child namely, David Griggs, who is now the wife of Fred B. Ballinger. Two children were born of the marriage of E. C. Griggs and Sarah Anne Haynie namely, H. Battle Griggs and Herbert C. Griggs.

"After the death of Henry Haynie on March 1, 1910, his widow, Margaret Haynie, and the said Sarah Anne Haynie Griggs and her husband, E. C. Griggs, and the three children above-named, all lived together as one family at the residence of the late Henry Haynie, and continued so to live up until the date of the death of Margaret Haynie on April 26, 1920; that the children of Sarah Anne Griggs, and her husband E. C. Griggs, continued to make their home with their parents up until the date of their respective marriages, as follows: H. Battle Griggs married July 13, 1922; Herbert C. Griggs, married October 7, 1924, and David Griggs married November 26, 1924.

"Mrs. Sarah Anne Griggs died May 27, 1929, after having first made, published and declared her last will and testament, which has been admitted to probate in the office of the Clerk of the Superior Court of Anson County. E. C. Griggs was appointed executor of the last will

and testament of his wife, Sarah Anne Griggs. Under the provisions of her will she devised to her husband, E. C. Griggs, one-fourth (1/4) in value of her real estate to have and to hold for and during the period of his natural life, with the remainder to her three children, David Griggs, H. Battle Griggs and Herbert C. Griggs, share and share alike. Under said Will she bequeathed her personal property, share and share alike, to her husband, E. C. Griggs, and to her children, David Griggs, H. Battle Griggs and Herbert C. Griggs.

"Following the death of Sarah Anne Griggs in 1929, the devisees under her last Will and testament, namely, E. C. Griggs, David Griggs (who married Ballinger), H. Battle Griggs and Herbert C. Griggs undertook to divide between themselves, and in accordance with the provisions of her said Will all of the farming lands owned by the said Sarah Anne Griggs at the time of her death, said division was made by quit-claim deeds to said devisees. In said division 633 acres of land, more or less, was conveyed to E. C. Griggs for and during the period of his natural life, subject to the terms of the Will of the said Sarah Anne Griggs; 412½ acres, more or less, were conveyed to Herbert C. Griggs; 555 acres, more or less, were conveyed to H. Battle Griggs, and 511 acres, more or less, were conveyed to David G. Ballinger. All of the debts of the estate of the said Sarah Anne Griggs have been fully paid and satisfied.

"In January 1930, H. Battle Griggs, Herbert C. Griggs and David Griggs Ballinger and E. C. Griggs, the legatees and devisees named in the last Will and testament of Sarah Anne Griggs, mutually agreed upon a division in accordance with the said last Will and testament of the stock, farming tools and implements and substantially all of the personal property belonging to the estate of the said Sarah Anne Griggs, with the exception of certain personal property set out and enumerated in paragraph 14 of the plaintiff's complaint, which said personal property was and is as this defendant verily believes a part of the estate of the said Sarah Anne Griggs and that the said E. C. Griggs, as Executor of said estate, is now entitled to the possession of said property; that thereafter about July 1930, the said devisees named in the last Will and testament of the said Sarah Anne Griggs, deceased, mutually agreed upon and made a division of the lands belonging to the said Sarah Anne Griggs at the time of her death and executed quit-claim deeds to the several devisees above named; that all of the real estate owned by the said Sarah Anne Griggs at the time of her death was divided as aforesaid, with the exception of the lots of land on the West side of the Camden Road in the Town of Wadesboro, which was the residence of the said Sarah Anne Griggs and her husband E. C. Griggs, at the time of the death of the said Sarah Anne Griggs, and a certain lot and store building on the North side of East Wade Street in the town of Wadesboro; that said real estate was

not then divided between the said parties as it was not susceptible of actual division between said parties and it was deemed advisable on account of economic conditions to hold said property and sell the same for division at a later time; that the devisees named in the last Will and testament of Sarah Anne Griggs above named, entered into possession of the respective lands mutually allotted to and conveyed to each of said parties, under the terms of said last Will and testament, at or prior to the time of the execution of the quit-claim deeds hereinbefore referred to, and each of said devisees has used his or her portion of said land as the individual property of such devisee since said time.

"That in making the division of the real and personal property referred to in the preceding paragraph, and by participating in and holding and recognizing the property allotted to each of said devisees, by mutual consent of parties referred to in preceding paragraph, the said parties are now estopped to deny that said property was a part of the property owned by Sarah Anne Griggs at the time of her death and that the same passed under the last Will and testament of the said Sarah Anne Griggs, and the plaintiff in this action is also estopped by the acts and conduct of the said legatees and devisees to claim any interest in said property, and has no right to recover anything from the defendants herein.

"That this defendant is informed, advised, believes and so alleges, that the plaintiff in this action has no interest whatsoever in the estate of Sarah Anne Griggs, deceased, and that the said plaintiff, R. B. Jones, Administrator, *c. t. a., d. b. n.,* of Henry Haynie, deceased, is not now the owner of any property sued for in this action, and is not entitled to and should not be permitted to maintain said action against this defendant or the sureties on his Administration Bond. This defendant further says and alleges, that the personal property set out and referred to in paragraph 14 of the plaintiff's complaint is a part of the estate and property of Sarah Anne Griggs, deceased, and that R. B. Jones, *c. t. a., d. b. n.,* of the estate of Henry Haynie, deceased, is not the owner of any of said property and has no right to administer the same, and that the Court had no power or authority to permit or allow the said plaintiff to dispose of any of said property or to make use of the same in any way whatsoever in payment of costs and charges of Administration, including any alleged attorneys' fees, commissions or costs of any kind, and that no legal determination has been had of the title to said property and such orders as have heretofore been made by the Court do not have the legal effect of transferring the title to said property to the plaintiff herein; and this defendant is informed, advised, believes and so alleges, that the said E. C. Griggs, Executor of Sarah Anne Griggs, deceased, is entitled to have the said property returned to him forthwith without any deduction or impairment thereof, and that he is entitled to recover interest

thereon while the same has been wrongfully held by and wrongfully used and misapplied by the plaintiff herein."

A motion was made in the cause as follows:

"Now come the defendants, L. D. Robinson, W. Henry Liles and F. M. Hightower, Jr., and Elizabeth Ratliff Hightower, Executors of F. M. Hightower, deceased, and Effie A. Little and H. W. Little, Jr., Executors of H. W. Little, deceased, and the First National Bank, of Wadesboro, N. C., Administrator of C. M. Burns, deceased, through their undersigned counsel, and move the Court to enter an Order herein making the following parties defendants herein, to-wit: E. C. Griggs, individually, E. C. Griggs, Executor of the last Will and testament of Mrs. Sarah Anne Griggs, deceased, H. Battle Griggs, Herbert C. Griggs and Mrs. David G. Ballinger.

"These defendants respectfully show to the Court that the said above named parties are necessary and proper parties hereto, and are interested in the result of this action for that:

"The defendants will set forth in their answer, as against said parties, that all of the property of the estate of H. Haynie in existence after the death of Margaret Haynie, widow of H. Haynie, went by virtue of the will of H. Haynie, to his only child, Mrs. Sarah Anne Haynie Griggs, and by her will her property in existence at the time of her death was bequeathed and devised to E. C. Griggs, together with her three children, Mrs. David G. Ballinger, H. Battle Griggs and Herbert C. Griggs, and that there has been a settlement and division of the property of the said Mrs. Sarah Anne Griggs, deceased, which settlement extended to and included all of the lands which belonged to the said Mrs. Sarah Anne Griggs under the Will of H. Haynie, deceased, with the exception of two pieces thereof located in the Town of Wadesboro, one constituting a dwelling place, and the other a store building and lot.

"The defendants will also set up that all of the property of the estate of H. Haynie, deceased, which was not used by his widow, before named, was, after her death, used by the said Mrs. Sarah Anne Griggs, the sole legatee and devisee under the said H. Haynie's will, and her children, whose names appear above, and that after the children of the said Mrs. Sarah Anne Griggs attained their majorities, they ratified, approved and consented to all of the uses made thereof, participated therein, consumed and used the same, and are estopped now to claim the same from the defendant, E. C. Griggs, Administrator, *c. t. a.*, of H. Haynie, or individually, and from the defendants who were sureties on the administration bond of the said H. Haynie estate.

"They will allege, in good faith, and offer evidence tending to show that the application for and the appointment of R. B. Jones, Administrator, *d. b. n., c. t. a.*, of H. Haynie, deceased, was on the part of

H. Battle Griggs, who claims also to be the assignee of Herbert C. Griggs, without the consent of Mrs. David G. Ballinger, in an effort to attempt to avoid the applicability of pleas on account of their conduct when they had used and enjoyed, and had benefited from the use and enjoyment of the property of their mother, Mrs. Sarah Anne Griggs.

"The defendants will allege and offer evidence tending to show that a gin was built on one of the tracts of the H. Haynie land, which at that time was the property of Mrs. Sarah Anne Griggs, which she took under the will of H. Haynie, and the said gin was constructed out of funds belonging to the said Mrs. Sarah Anne Griggs, and by her consent and direction, but in this action, the plaintiff, Jones, at the instance of H. Battle Griggs, and such other of said children as may desire to participate therein, seek to collect this fund from these defendants after they have received it in the improvement of the lands, and each of said children benefited in the division of said lands by the increase in value on account of the construction of said ginnery, and these defendants are informed and believe that they are entitled to plead these facts against the children of the said Mrs. Sarah Anne Griggs, who took all of their property rights, if any, under the will of Mrs. Sarah Anne Griggs, and are now estopped to assert any claim thereto on the grounds that said fund was a part of the H. Haynie estate.

"That, for the reason set forth with respect to the above matter, and other matters appearing in the affidavit of E. C. Griggs, which was made on the 10th day of June 1937, which is hereto attached and made a part hereof, these defendants make this motion.

"WHEREFORE, the defendants move the Court to enter an order making the above-named parties, parties to this action, and that process be issued for them as provided by law, and that they be allowed to file such pleadings as they may desire, and that Order be served on the plaintiff, R. B. Jones, Administrator, *d. b. n., c. t. a.*, of H. Haynie, deceased, or his attorneys Fred J. Coxe, or J. C. Sedberry, to show cause why this Motion should not be granted."

The defendant sureties on the bond of E. C. Griggs, administrator of Henry Haynie, deny liability and in their answer say:

"These defendants are informed and believe that there was a full and complete settlement of the Henry Haynie estate by and between the defendant, E. C. Griggs, Administrator thereof, and Sarah Anne Griggs, and that all of the property of said estate not consumed during the lifetime of Margaret Haynie, widow, was delivered and turned over to the said Sarah Anne Griggs, and that the same constitutes a complete and final settlement of said estate.

"These defendants are informed and believe that there was an agreement between Margaret Haynie, widow, and Sarah Anne Griggs, imme-

diately after the debts of Henry Haynie estate had been paid and practically one year after the qualification of E. C. Griggs, Administrator, *c. t. a.*, of Henry Haynie, deceased, that the said estate should be and remain the property of Margaret Haynie and Sarah Anne Haynie Griggs, according to their respective rights under the aforesaid will of Henry Haynie, deceased, and should be used and managed by E. C. Griggs for them as their property and that the same constituted a full and complete settlement and a complete administration of the estate of Henry Haynie, deceased.

"That on account of the aforesaid agreement and settlement there has been a complete and full administration of the estate of Henry Haynie, deceased, and the plaintiff and H. Battle Griggs, Herbert C. Griggs and Mrs. David Ballinger are estopped and barred from the maintenance of any suit in respect to the same, or to recover any portion or part thereof, and these defendants plead and rely upon such estoppel and bar against any recovery herein.

"WHEREFORE, these defendants having fully answered, pray judgment that the plaintiff recover nothing herein, and that H. Battle Griggs, Herbert C. Griggs and Mrs. David Ballinger be decreed to be estopped and barred from asserting any claim whatsoever against these defendants, and for costs, and for such other and further relief as to the Court may seem just and proper."

The judgment of the court below was as follows:

"This cause coming on to be heard, and being heard before the undersigned Judge, presiding at the November Term, 1940, of the Superior Court of Anson County, upon the motion of the defendants to make parties, whereupon, after hearing the pleadings and the arguments of counsel, and after considering the authorities relied upon by the respective counsel in support of, and in opposition to, the said motion, it appearing to the Court that E. C. Griggs, as Executor of the Last Will and Testament of Sarah Anne Griggs, deceased, and individually, is a necessary party, and that H. Battle Griggs, Herbert C. Griggs and Mrs. David Ballinger, are likewise necessary parties to certain causes of action alleged in the complaint, particularly the causes of action set forth in paragraphs 16, 18, 20 and 21 of the complaint, and the cause of action set forth in the pleading in paragraph 32 of the complaint:

"It is, therefore, Considered, Adjudged and Ordered by the Court, that the said E. C. Griggs, Individually, and E. C. Griggs as Executor of the Last Will and Testament of Sarah Anne Griggs, deceased, and H. Battle Griggs, Herbert C. Griggs and Mrs. David Ballinger be, and they are hereby made party defendants in said action, and it is directed that summons issue from the Clerk of the Superior Court of Anson County, and be served on said defendants, and when so served the said defendants

are allowed thirty days from the date of such service to file such pleadings herein as they may be advised, and that the plaintiff be allowed thirty days thereafter in which to file answer, reply, or other proper pleading. Felix E. Alley, Judge Presiding."

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

J. C. Sedberry and Fred J. Coxe for plaintiff.

Varser, McIntyre & Henry for L. D. Robinson and W. Henry Liles.

E. A. Hightower for F. M. Hightower, Jr., and Elizabeth R. Hightower, Executors of F. M. Hightower, deceased.

R. L. Smith for Effie A. Little and H. W. Little, Jr., Executors of H. W. Little, deceased.

B. M. Covington for First National Bank, Administrator of C. M. Burns, deceased.

CLARKSON, J. Was there error in the court below making E. C. Griggs, executor of the last will and testament of Sarah Anne Griggs, E. C. Griggs, individually, and H. Battle Griggs, Herbert C. Griggs and Mrs. David Ballinger parties to the action? We think not.

The court below, in the judgment, after hearing the pleadings and the arguments of counsel and authorities relied on by counsel for plaintiff and defendants in support of their contentions, held that they were necessary parties. In this we see no error. The only exception made by plaintiff is to the "judgment as signed." The only question, therefore, before the Court is whether, on the face of the record, the judgment is supported by the record. *Dixon v. Osborne,* 201 N. C., 489 (493); *In re Will of Beard,* 202 N. C., 661; *S. v. Abbott,* 218 N. C., 470 (474).

It is a rule of this Court that where there has been no request to find the facts, it will be presumed that the court below, upon competent evidence, found sufficient facts to support the judgment. *McCune v. Mfg. Co.,* 217 N. C., 351 (354-5); *Wood v. Woodbury & Pace, Inc.,* 217 N. C., 356 (359-60); *Parris v. Fischer & Co., ante,* 292 (295).

From an examination of the record, we think the additional parties were necessary to a complete determination of the action. N. C. Code, 1939 (Michie), sec. 456, is as follows: "All persons may be made defendants, jointly, severally, or in the alternative, who have or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the question involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action. If the plaintiff is in doubt as to the

persons from whom he is entitled to redress, he may join two or more defendants, to determine which is liable."

N. C. Code, *supra*, sec. 460, in part is as follows: "The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the rights of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment," etc. When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. *Kornegay v. Steamboat Co.*, 107 N. C., 115 (117); *Parton v. Allison*, 111 N. C., 429 (431); *Burnett v. Lyman*, 141 N. C., 500; *McKeel v. Holloman*, 163 N. C., 132 (134); *Barbee v. Cannady*, 191 N. C., 529; *Bank v. Lewis*, 203 N. C., 644; *Fry v. Pomona Mills*, 206 N. C., 768.

The bringing in of necessary parties, when a complete determination of the whole matter cannot be had without their presence, is a duty of the trial court. The plain language of N. C. Code, sec. 460, *supra*, permits and requires this to be done. *Kornegay v. Steamboat Co., supra; Maxwell v. Barringer*, 110 N. C., 76 (84); *Parton v. Allison, supra; Burnett v. Lyman*, 141 N. C., 500; *McKeel v. Holloman*, 163 N. C., 132 (134).

In *Rental Co. v. Justice*, 212 N. C., 523, the Court reviews the authorities relating to amendments and says, at p. 523: "By virtue of the liberal powers of amendment the court may, before or after judgment, in furtherance of justice amend any pleading, process or proceeding by adding, or striking out, the name of any party; and at the hearing of the cause, or between terms, or at a regular term, the court may require new parties to be brought in by proper order or sufficient process." McIntosh N. C. Practice & Procedure, 245; N. C. Code, secs. 460 and 547; *Walker v. Miller*, 139 N. C., 448; *Rushing v. Ashcraft*, 211 N. C., 627; *Clevenger v. Grover*, 212 N. C., 13; *Peitzman v. Zebulon, ante*, 473.

An analogous case is found in *McLeod v. Maurer*, 215 N. C., 795. This was a suit by creditors for the settlement of an estate, in which the sureties on an administration bond and the heirs-at-law were made parties, and the sureties demurred on the ground of misjoinder of parties and causes of action. The Court affirmed the trial court in overruling this demurrer. N. C. Code, secs. 135, 456 and 507; *Leach v. Page*, 211 N. C., 622; *Robertson v. Robertson*, 215 N. C., 562.

Under the liberal practice in reference to parties to an action, for the purpose of settling all matters in one action, we think that the additional parties were necessary and proper and the refusal of the court below to have them made parties would have been prejudicial to their rights. We do not discuss whether the amendment making new parties is discretionary with the court below and therefore not appealable. *Wilmington v. Board of Education,* 210 N. C., 197 (198).

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

Affirmed.

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

STATE OF NORTH CAROLINA, EX REL. UNEMPLOYMENT COMPENSATION COMMISSION v. J. M. WILLIS BARBER AND BEAUTY SHOP, AND REYNOLDS BUILDING BARBER SHOP, WINSTON-SALEM, N. C.

(Filed 31 May, 1941.)

1. Master and Servant § 61—Appellant from Unemployment Compensation Commission is not entitled to jury trial upon exceptions to finding of fact.

When, in a proceeding under the Unemployment Compensation Law to determine the liability of a defendant for taxation as an employer, exceptions are taken to the findings of fact made by the Commission in accordance with the procedure prescribed by the Act (ch. 1, Extra Session of 1936, amended by ch. 27, Public Laws 1939), the defendant is not entitled to a trial *de novo* of the issues raised by his exceptions, the provision of sec. 11 (n) that upon exceptions to any facts found the cause should be placed on the civil issue docket not necessarily requiring a trial by jury, C. S., 562, 952, and it being expressly provided by secs. 11 (m) and 6 (i) that the findings of fact by the Commission should be conclusive when supported by evidence, and that the jurisdiction of the Superior Court should be confined to questions of law.

2. Constitutional Law § 17: Taxation § 34—

The constitutional right to trial by jury, N. C. Constitution, Art. I, sec. 19, does not apply to matters concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact.

3. Same: Master and Servant § 61—

The provisions of the Unemployment Compensation Law that the Commission's findings of fact in a proceeding before it should be conclusive on appeal when supported by competent evidence is constitutional, and objection thereto on the ground that it deprives a defendant of his right to trial by jury is untenable, since the provision relates to the administration of a tax law and the machinery for the collection of taxes, and further, since in addition to the remedy of appeal from the decision of the

Commission, the Act provides that a defendant may pay the tax under protest and sue for its recovery. Sec. 14 (e).

4. Same—

A defendant in a proceeding under the North Carolina Unemployment Compensation Law is given the right to appeal, and also to pay the tax under protest and sue for its recovery, but he must pursue his remedy in the manner prescribed by the Act, and when he appeals upon exceptions to the findings of fact made by the Commission in a proceeding to determine his tax liability he may not object to the provisions of the Act that the Commission's findings are conclusive when supported by evidence.

5. Master and Servant § 58: Constitutional Law §§ 13, 16—

An individual who operates three places of business, employing in the aggregate more than 8 employees, is an "employer" as defined in sec. 19 (f) (4) of the North Carolina Unemployment Compensation Act, and he cannot successfully maintain that the application of this section to him and the imposition of the unemployment compensation tax deprives him of property without due process of law or denies him of the equal protection of the laws, 14th Amendment to the Federal Constitution, Art. I, sec. 17 of the State Constitution, sec. 19 (f) (4) of the Act not being violative of constitutional provisions when properly interpreted and applied.

6. Master and Servant § 56—

The intent of the Legislature to provide a wide scope in the application of the Unemployment Compensation Act to mitigate the economic evils of unemployment, and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language of the Act, and all doubts as to constitutionality should be resolved in favor of the validity of the Act and all its provisions.

APPEAL by defendant J. M. Willis from *Rousseau, J.*, at February Term, 1941, of FORSYTH. Affirmed.

This was a proceeding under the Unemployment Compensation Law to determine the liability of the defendant J. M. Willis for taxation as an employer under the statute. In accord with the procedure prescribed by the Act (ch. 1, Extra Session, 1936, amended by ch. 27 and ch. 209, Public Laws 1939), the facts in relation thereto were found by the Unemployment Compensation Commission, and upon the facts so found it was concluded as a matter of law that three employing units were controlled by the defendant, and that he was responsible for contributions to the Unemployment Compensation fund with respect to wages payable for employment therein.

Exceptions to the findings of fact and conclusions of law were duly noted and appeal taken to the Superior Court. In the Superior Court defendant demanded trial *de novo* by the court and jury at term time, upon issues raised by his exceptions. Motions to this effect were denied. The court held that the findings of fact by the Unemployment Compen-

sation Commission were supported by competent evidence, and adjudged that these findings, as well as the conclusions of law thereon, be in all respects approved and affirmed.

Defendant appealed to this Court, assigning errors.

Adrian J. Newton, Ralph Moody, and W. D. Holoman for plaintiff, appellee.

Winfield Blackwell and Gilbert L. Shermer for defendant, appellant.

DEVIN, J. Upon investigation, conducted in accordance with the procedure prescribed by the Unemployment Compensation statute, and from the testimony thereby obtained, it was found as a fact by the Unemployment Compensation Commission that defendant J. M. Willis was proprietor of three employing units, "J. M. Willis Barber & Beauty Shop, 124 Burke Street," "J. M. Willis Barber & Beauty Shop, 114 Reynolds Building," and "Reynolds Building Barber Shop," all in the city of Winston-Salem, and that in these places, where the business indicated was carried on under the ownership or control of the defendant, more than a sufficient number of persons were regularly employed to require contributions under the Unemployment Compensation statute.

The first question presented by the appeal, and the one chiefly debated in the argument, is whether the findings of fact made by the Unemployment Compensation Commission, in determining the liability of the defendant under the Unemployment Compensation Law, were conclusive on appeal, or whether, upon exceptions to the findings of fact, duly noted and brought forward on appeal to the Superior Court, the defendant was entitled to a trial of the issues by the court and jury *de novo*.

The provisions of the statute which relate to appeals from the Commission and the procedure thereon are contained in sec. 11 (m) and (n), the pertinent portions of which we quote as follows:

"(m) The Commission after due notice shall have the right and power to hold and conduct hearings for the purpose of determining the rights, status and liabilities of any 'employing unit' or 'employer' as said terms are defined by Section 19(e) and Section 19(f) and subsections thereunder of this Act. The Commission shall have the power and authority to determine any and all questions and issues of fact or questions of law that may arise under the Unemployment Compensation Law that may affect the rights, liabilities and status of any employing unit or employer as heretofore defined by the Unemployment Compensation Law including the right to determine the amount of contributions, if any, which may be due the Commission by any employer. All hearings shall be conducted and held at the office of the Commission and shall be open to the public and shall be stenographically reported and the Commission shall

provide for the preparation of a record of all hearings and other proceedings. The Commission may provide for the taking of evidence by a deputy in which event he shall swear or cause the witnesses to be sworn and shall transmit all testimony to the Commission for its determination. From all decisions or determinations made by the Commission any party affected thereby shall be entitled to an appeal to the Superior Court. . . . When an exception is made to the facts as found by the Commission, the appeal shall be to the Superior Court in Term Time but the decision or determination of the Commission upon such review in the Superior Court shall be conclusive and binding as to all questions of fact supported by any competent evidence. . . .

"(n) The cause shall be entitled 'State of North Carolina on Relationship of the Unemployment Compensation Commission of North Carolina against (here insert name of appellant),' and if there are exceptions to any facts found by the Commission it shall be placed on the civil issue docket of such Court and shall have precedence over other civil actions except those described in Section 14(b) of the Unemployment Compensation Law, and such cause shall be tried under such rules and regulations as are prescribed for the trial of other civil causes."

It is contended that the language of subsection (n) implies a trial by jury when exceptions are noted to findings of fact, since the cause is required to be placed on the "civil issue docket," and tried under the rules "prescribed for the trial of other civil causes."

On the other hand, it should be said that, while placing a case on the civil issue docket usually indicates a trial by jury of issues of fact, this does not necessarily follow, nor compel the conclusion that the Legislature so intended, as there may be, and frequently are, issues of law and questions of fact, triable by the judge, which properly find their way to this docket. C. S., 562, 952. Hence, we think the mandatory provisions in subsection (m) immediately preceding must be held controlling, and that the trial in the Superior Court on appeal must be subject to the limitation that the decision or determination of the Commission upon such review in the Superior Court "shall be conclusive and binding as to all questions of fact supported by any competent evidence." In sec. 6(i) of the Act there is a similar provision, declaring that "the findings of the Commission as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive and the jurisdiction of said court shall be confined to questions of law." The question of the power of the court to review findings of jurisdictional facts is not presented by this appeal. The effort to invoke the rule of procedure prescribed for appeals from the Utilities Commission is unavailing. The statutes, C. S., 1097 and 1098, providing appeal from that administrative agency, while expressed in language similar to that used in subsections (m) and (n), do

not contain the provision that the findings of fact by the Utilities Commission shall be conclusive on appeal. Hence, the procedure approved in *Utilities Com. v. Coach Co.,* 218 N. C., 233, and *Corporation Com. v. R. R.,* 196 N. C., 190, 145 S. E., 19, may not be held applicable here.

The validity of the provision in the Workmen's Compensation Act making the findings of fact by the Industrial Commission conclusive on appeal, when supported by competent evidence, has been uniformly upheld by this Court. *Buchanan v. Highway Com.,* 217 N. C., 173, 7 S. E. (2d), 382. Jury trials in cases arising under that Act have been eliminated. True, the Workmen's Compensation Act proceeds upon the assumption that the employer and the employee have accepted its provisions, *Heavner v. Lincolnton,* 202 N. C., 400, 162 S. E., 909, but it was also held in that case that the constitutionality of the Act on the ground of denial of trial by jury could not be successfully assailed, and that power was conferred by the Legislature upon the Commission to administer all the provisions of the Act in accord with its terms. In *Hagler v. Highway Com.,* 200 N. C., 733, 158 S. E., 383, it was said: "Under this Act trial by jury is not a constitutional right."

In *Cowles v. Brittain,* 9 N. C., 204, in an opinion written for the Court by *Chief Justice Taylor,* it was said: "There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers entrusted with the execution of the laws transcend their powers to the injury of an individual the common law entitled him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue; and it is not believed that such a mode was contemplated by the Constitution." A hundred years later, in *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568, *Adams, J.,* speaking to a similar question, used this language: "That a State cannot deprive a person of his property without due process of law does not necessarily imply that all trials in the State courts shall be by a jury composed of twelve men. *Maxwell v. Dow,* 176 U. S., 581; *Walker v. Sauvinet,* 92 U. S., 92. Nor is the contention of the defendants necessarily determined in their favor by Art. I, sec. 19, of the Constitution of North Carolina. The right to a trial by jury, which is provided in this section, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted, and not to those when the right and the remedy with it are thereafter created by statute. 16 R. C. L., 194." A similar view is expressed in *National L. R. Bd. v. Jones & Laughlin Steel Corp.,* 301 U. S., 1.

In a recent case the Supreme Court of the State of Washington held that the findings of the Commissioner under the Unemployment Compensation statute of that state were conclusive on appeal. The Court said: "Looking to the quoted portion of the act in question relative to appeals taken to the Superior Court, and having in mind our former decisions relative to statutes of this nature, we are constrained to hold that the administrative determination of the facts is conclusive on the Court unless it be wholly without evidential support or wholly dependent upon a question of law, or clearly arbitrary or capricious." *In re Persons Employed at St. Paul & Tacoma Lumber Co.*, 110 Pac. (2d), 877.

The right to trial by jury has always been regarded as one of the most important safeguards of the liberties of the individual against oppression and injustice, and the Constitution of North Carolina declares that "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." Art. I, sec. 19.

However, this constitutional provision has been generally held inapplicable to matters concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. "In the assessment and collection of taxes the constitutional provisions relating to trial by jury do not apply; and the taxpayer cannot complain of the mode of proceeding if he is given an opportunity to defend against the legality of the tax or the liability of his property before some competent board or tribunal." Black's Constitutional Law (3rd Ed.), p. 625; 35 C. J., 185.

The Unemployment Compensation Law provides remedies for an employer who claims a valid defense to the enforcement of the tax or to the collection of the contributions assessed. In addition to right of appeal from the decision of the Commission, it is provided that he may pay the tax under protest and sue for its recovery. Sec. 14 (e). It was said by *Barnhill, J.*, speaking for the Court, in *Ins. Co. v. Unemployment Compensation Com.*, 217 N. C., 495, 8 S. E. (2d), 619: "Where an administrative remedy is provided by statute for revision, against collection, or for recovery of taxes assessed or collected, the taxpayer must first exhaust the remedy thus provided before the administrative body, otherwise he cannot be heard by a judicial tribunal to assert its invalidity (citing cases). He must not only resort to the remedies that the Legislature has established but he must do so at the time and in the manner that the statute and proper regulations provide." The remedy provided by the statute must be pursued in the manner therein prescribed. *Myers v. Bethlehem Corp.*, 303 U. S., 41.

The defendant raises the question of the constitutionality of the definition of "employer" as contained in sec. 19 (f) (4), which reads as follows: "Any employing unit which together with one or more other employing units, is owned or controlled (by legally enforcible means or otherwise) directly or indirectly by the same interests, or which owns or controls one or more other employing units (by legally enforcible means or otherwise), and which, if treated as a single unit with such other employing unit, would be an employer under paragraph (1) of this subsection." It is urged that this offends against the 14th Amendment to the Constitution of the United States, and also tends to deprive defendant of his property in violation of Art. I, sec. 17, of the Constitution of North Carolina. In support of his contention defendant cites the recent case of *Independent Gasoline Co. v. Bureau of Unemployment Compensation,* 190 Ga., 613, where it was held that the application of a similar section in the Georgia Unemployment Compensation Law to a case where an individual owned the majority of the stock in two different corporations, would deny to the appealing corporation the equal protection of the laws guaranteed by the Federal Constitution. It was thought that to tax the appealing corporation because of the fact that the owner of the majority of its stock also owned a majority of the stock of another corporation would constitute denial of the equal protection of the laws. Upon substantially the same facts the same conclusion was reached by the Supreme Court of Indiana in *Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Board,* 29 N. E. (2d), 776.

However, we are not inclined to apply the principle held controlling on the facts in those cases to the facts of this case, where it is sought to collect the tax from an individual who, it is found, operates three places of business, employing in the aggregate more than eight employees. Nor do we regard this subsection, when properly interpreted and applied, as open to successful attack on the ground that it would result in the deprivation of property without due process of law or constitute a denial of the equal protection of the laws. *Belk Bros. Co. v. Maxwell,* 215 N. C., 10, 200 S. E., 915; *Tea Co. v. Maxwell,* 199 N. C., 433, 154 S. E., 838.

In *Unemployment Compensation Com. v. Coal Co.,* 216 N. C., 6, 3 S. E. (2d), 290, this Court upheld the validity of the definition challenged as applied to three small corporations having the same officers and directors and, with two exceptions, the same stockholders, with a central business office. It was said: "The General Assembly has declared that if the separate enterprises are 'controlled directly or indirectly by the same interests' the fiction of corporate identity is to be ignored in the face of reality to the contrary and the affiliated enterprises are to be taxed as a single employing unit. . . . That the General Assembly has the power to determine the scope of the Act and to lay down definitions and

tests to be applied in administering it, has already been determined. *Unemployment Compensation Com. v. Ins. Co.*, 215 N. C., 479."

A similar provision in the Oklahoma statute was considered in *Gibson Products Co. v. Murphy*, 186 Okl., 714, and held not to offend state constitutional provisions. To the same effect is the holding in *Maine Unemployment Compensation Com. v. Androscoggin*, 16 Atl. (2d), 252, and *Florida Industrial Com. v. Gary-Lockhart Drug Co.*, 196 Sou., 845. See, also, cases from other jurisdictions cited in *Unemployment Compensation Com. v. Ins. Co., ante*, 576. The application of this provision in the South Carolina statute to the particular facts of that case was considered in *Ulmer v. Daniel*, 7 S. E. (2d), 829. See, also, *Unemployment Compensation Com. v. Trust Co.*, 215 N. C., 491, 2 S. E. (2d), 592.

In *Carmichael v. Southern Coal & Coke Co.*, 301 U. S., 495, where the constitutionality of the Alabama Unemployment Compensation Act (similar to the North Carolina statute) was upheld, it was said: "Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation."

From the clear language in which the underlying purposes of the Unemployment Compensation Act are declared, as well as from the comprehensive definitions of those sought to be embraced within its terms, it is to be gathered that the Legislature intended to provide a wide field of usefulness for this agency for social security and for mitigating the economic evils of unemployment. *Unemployment Compensation Com. v. Ins. Co.*, 215 N. C., 479, 2 S. E. (2d), 584. And all doubts suggested by objections on constitutional grounds should be resolved in favor of the validity of the Act and all its provisions. *Stewart Machine Co. v. Davis*, 301 U. S., 548; *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U. S., 1; *Fletcher v. Comrs.*, 218 N. C., 1. In the last case on this subject considered by this Court, *Unemployment Compensation Com. v. Ins. Co., ante*, 576, it was said: "We think it is self-evident that the Legislature, for the purpose of levying the tax, may determine what shall constitute employment subject to taxation, without regard to existing definitions or categories."

The correctness of the judgment below is assailed upon another ground. It is argued that the findings of fact made by the Unemployment Compensation Commission, upon which it based its conclusion that defendant was liable for the tax, were not supported by competent evidence. This contention cannot be sustained. An examination of the record discloses evidence tending to show that the defendant J. M. Willis, during the period for which tax liability was adjudged, was the proprietor of three employing units wherein more than eight persons were employed for the requisite time. *McDermott v. State*, 82 Pac. (2d), 568. The defendant offered testimony that the Reynolds Building Barber Shop was managed

by his brother, and operated for the joint benefit of his brother and himself; and that the J. M. Willis Barber and Beauty Shop on Burke Street, though operated in his name, was owned and operated exclusively by his wife. However, there was evidence *contra,* and the facts have been found against the defendant. The Commission found upon competent evidence that defendant's operations came within the definition set out in sec. 19 (f) (4), and that he was liable for the tax assessed for the purpose of carrying out the Act, in accordance with its terms. Upon appeal these findings and conclusions were in all respects approved and confirmed by the judge of the Superior Court, and judgment was rendered accordingly.

For the reasons stated, we conclude that the judgment below must be Affirmed.

B. R. PEARSON, ADMINISTRATOR OF THE ESTATE OF JO ANN PEARSON, DECEASED, v. NATIONAL MANUFACTURE AND STORES CORPORATION, TRADING AND DOING BUSINESS AS HUNTLEY-STOCKTON-HILL COMPANY, AND CHESTER B. HOWELL.

(Filed 31 May, 1941.)

1. Negligence §§ 17b, 19a—

What is negligence is a question of law, and, when the facts are admitted or established, the court may say whether negligence exists and whether it was a proximate cause of the injury.

2. Negligence § 19b—

A nonsuit is properly entered on the ground of contributory negligence when contributory negligence is established by plaintiff's own evidence, but where the facts are not admitted or where more than inference may reasonably be drawn from the evidence, the issue must be submitted to the jury.

3. Automobiles § 18c—Evidence held insufficient to establish contributory negligence as matter of law on part of mother of 2½-year-old child struck on highway.

The evidence tended to show that intestate, a child 2½ years old, in company with her mother and others, walked down a driveway from a house to the hard-surface highway, that while the mother and others were standing on the shoulders of the road, intestate ran across the road to the opposite shoulder, and that while attempting to recross the road she was struck and fatally injured by the car driven by the individual defendant after it had traveled 200 yards or more of straight, unobstructed highway. The mother testified that she did not see the approaching car until it was too late for her to take any action to avoid the injury. *Held:* The evidence considered in the light most favorable to plaintiff administrator, the father of intestate, is insufficient to show contributory negligence as a matter of law on the part of intestate's mother.

4. Negligence § 13b—

In an action to recover for wrongful death of a 2½-year-old child, contributory negligence on the part of its mother is a bar to so much of the recovery as would accrue to her as a beneficiary of the child's estate, but negligence of the child's mother will not be imputed to the child's father, and is no bar to the recovery of the amount which would inure to his benefit as beneficiary of the child's estate. C. S., 160, 137 (6).

APPEAL by plaintiff from *Stevens, J.*, at September Term, 1940, of ALAMANCE.

Civil action for recovery of damages for alleged wrongful death. C. S., 160-161.

Plaintiff alleges: That the death of intestate, Jo Ann Pearson, two and a half years of age, on 9 August, 1939, was solely and proximately caused by the carelessness and negligence of the defendant Howell while operating an automobile on State Highway No. 10 in Alamance County, North Carolina, within the scope of his employment as agent and servant of his corporate defendant (1) in that said automobile was driven "carelessly, recklessly and heedlessly, in wanton and willful disregard of the rights and safety of others, and without due caution and circumspection, and at a speed and in a manner so as to endanger or to be likely to endanger the person of this plaintiff's intestate, as well as other persons who might be upon said highway"; (2) in that defendant Howell "continued to drive said automobile at a highly excessive rate of speed and in a careless and reckless manner, without slowing the same down or bringing it under proper control," and (3) in that "he carelessly and negligently drove said automobile into and against said plaintiff's intestate when" he "had a clear and unobstructed vision of said highway and saw, or should have seen plaintiff's intestate, a small child of tender years, standing on or near the dirt shoulder of said highway."

While defendants, in their respective answers, admit that on 9 August, 1939, defendant Howell was employed by corporate defendant as a salesman in its store located in the city of Burlington, N. C.—his hours of work being from eight o'clock a.m. to five-thirty p.m., they deny that at the time (7:30 p.m.) and place of the fatal injury of intestate, defendant Howell was acting within the scope of his employment. They further deny that defendant Howell was negligent, or that the injury to intestate was caused by any negligence on the part of defendant Howell. As further defense defendants, among other things, aver: (1) That plaintiff, B. R. Pearson, and his wife, as her father and mother, are the sole beneficiaries of the estate of intestate, and as such will take any recovery had in this case; and (2) that they, by their own negligence, contributed to the injury of intestate (a) in that, the intestate, being a child two years of age, and at all times in the actual or constructive care

and custody of her parents, they knew or by the exercise of ordinary care should have known at all times where she was, and (b) in that they permitted her to walk upon said highway unattended, and carelessly and negligently permitted her to run into the side of the automobile operated by defendant Howell, which contributory negligence is pleaded in bar of plaintiff's right to recover in this action.

Evidence for plaintiff, introduced on trial below, tends to show these facts: On 9 August, 1939, a little past 7 o'clock p.m., Jo Ann Pearson, two and one-half years of age, daughter of plaintiff, B. R. Pearson, and his wife, while standing on the dirt shoulder on the south side of State Highway No. 10 at a point in front of and across the highway from the residence of W. J. Pearson, located not quite one-half mile east of the village of Trollingwood in Alamance County, North Carolina, was stricken and fatally injured by an automobile traveling east from the direction of said village, and being operated by defendant Chester B. Howell. From that point west to the store of W. J. Pearson, a distance of 300 yards, the highway, of standard width eighteen or twenty feet, with dirt shoulders on each side, is straight and practically level. To the east the highway is straight for 200 yards or more. There were about eight or ten houses on the north side of the highway and several on the south side between the store and the residence of W. J. Pearson.

The accident is narrated by Mrs. B. R. Pearson, witness for plaintiff, in this manner: "On August 9, 1939, my little girl and I went to the home of W. J. Pearson about five o'clock in the afternoon to visit my sister in law . . . Mrs. W. J. Pearson and I and the two little girls started away from her house on a visit to a neighbor's house. We . . . went down to the highway. When we got to the highway, or as we approached the highway, there was no car in sight or passing. There is a driveway that leads from the house down to the highway. We went down this driveway . . . When we got to the edge of the highway at the bridge, we just stopped momentarily . . . the two children were with us, . . . between us. When I stopped momentarily my little girl stopped too. She was standing there with me and my sister in law and the other little girl. While we were standing there she ran across the road. She went to the other side. She went directly across the highway . . . A moment after she had gone across the highway I looked up and saw the car coming from the direction of Trollingwood. I would say it was about a hundred feet away when I first saw it, right in front of the next house. I don't recall hearing the horn blow. At that time the little girl was on the shoulder of the road, on the other side from me. She went completely to the other side of the road and she looked like she had started back. She did start back. When she indicated she had started back and when I noticed the car and saw she

couldn't make it, and I couldn't either, I tried to be calm and told her to stand still. . . . She was still on the shoulder of the road . . . furtherest from me,—on the south side of the paved road. There was no other car approaching other than the car I afterwards learned was driven by Mr. Howell. There was no other car parked along there. I didn't attempt to go to her. I suppose I was shocked. I didn't know what to do. When I first saw the car there wasn't time for me to have gotten to her before the car reached that point, driven at the rate he was driving. The car didn't slow down any whatsoever. . . . In my opinion, from the time I saw it until it went by me, it was going about sixty miles an hour. The car struck the little girl. She was on the south shoulder of the road when the car struck her . . . When I got to her she was lying on the shoulder, on the dirt . . . She was dead when we got to the hospital with her."

On cross-examination, Mrs. Pearson testified in part: "This highway No. 10 is a much traveled highway. I have been familiar with it ever since it has been hard surface . . . used it on many occasions . . . My little girl was standing beside me . . . I didn't have hold of her hand as I approached the highway. She was walking right beside of me. When I reached the highway I could see on up in front of Pearson's store. . . . The automobile driven by Mr. Howell was coming from that direction. No, I didn't let my little child run across the highway unaccompanied and unattended by anybody. I couldn't prevent it. I usually did hold her hand, but I just happened not to be . . . at that time. I didn't let her run across the highway. She did run across. No, I didn't follow her immediately when I saw her run across. I don't know why. I knew automobiles were apt to come along there at any moment. The reason I didn't go and get my little girl, there wasn't time . . . Yes, I was paying attention to where my little girl was, too. . . . The reason I didn't go immediately across over to her was she had started coming back and the car was coming right at us . . . Immediately after my child crossed the highway, I don't remember whether I looked up the highway to see if an automobile was coming or not. If I had looked, I suppose I could have seen this automobile when it was 300 yards away. I didn't look then. No, I didn't let the little girl stand there on that side of the highway when I could have gone immediately after her, because when she got to the other side of the road, the car was right there at us. Q. 'Then why didn't you go immediately . . . ?' A. 'I don't know why I didn't. It all happened so quick I didn't know what to do.' . . . The front of the automobile then didn't hit her."

There was much other evidence.

After plaintiff had introduced his evidence and rested his case, motion on behalf of both defendants was made for judgment as of nonsuit, under the authority of *Reid v. Coach Co.*, 215 N. C., 469, each taking the position that upon the statement of the mother of intestate, she herself was guilty of contributory negligence.

Judgment as of nonsuit was granted upon the ground on which the motion was made.

Plaintiff appeals to Supreme Court and assigns error.

Long, Long & Barrett for plaintiff, appellant.

Barnie P. Jones and Fuller, Reade, Umstead & Fuller for defendant, appellee.

WINBORNE, J. Considering the ground upon which judgment as of nonsuit was entered in Superior Court, these questions arise here for decision: (1) When the evidence is taken in the light most favorable to plaintiff, is the mother, who is a beneficiary of the estate of intestate, as a matter of law, guilty of negligence which proximately contributed to the injury and death of intestate? (2) If so, may such contributory negligence be imputed to the father of intestate, who is also a beneficiary of the estate, and bar the prosecution of this action? Both questions are properly answered in the negative.

1. 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 negligent breach of duty, but also to the feature of proximate cause." *Hicks v. Mfg. Co.*, 138 N. C., 319, 50 S. E., 703; *Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326, and cases cited.

It is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit, "when contributory negligence is established by plaintiff's own evidence." *Smith v. Sink*, 211 N. C., 725, 192 S. E., 108, and cases there cited. See, also, *Murray v. R. R., supra.* But where the facts are not admitted, or where more than one inference may reasonably be drawn from the evidence, the issue must be submitted to the jury. Such is the situation in the present case.

2. In this State, it is provided by statute, C. S., 160, that in an action for wrongful death, "the amount recovered . . . is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." See *Baker v. R. R.*, 91 N. C., 308; *Avery v. Brantley*, 191 N. C., 396,

131 S. E., 721. The statute referred to, C. S., 137, provides that: "(6) If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. . . ."

Where the right of action created by statute for wrongful death does not constitute an asset of the estate, but belongs to the beneficiaries designated by the statute as the beneficiaries of the recovery, as is the law in this State, the administrator in bringing the action is *pro hac vice* their representative and not the representative of the estate. In such cases the prevailing view is to the effect that the negligence of the parent, directly or proximately contributing to the death of a child *non sui juris*, will bar the recovery in an action by the administrator, at least to the extent that the recovery, if any, would inure to the benefit of the parent so guilty of contributory negligence. *Davis v. R. R.*, 136 N. C., 115, 48 S. E., 951, 1 Anno. Cas., 214. See, also, *Harton v. Telephone Co.*, 141 N. C., 455, 54 S. E., 299; *Reid v. Coach Co.*, 215 N. C., 469, 2 S. E. (2d), 578; Annotations 23 A. L. R., 670; 69 A. L. R., 478, where the authorities are assembled.

In *Davis v. R. R., supra*, is laid down what is considered the correct principle as follows: "While the negligence of parents, or others *in loco parentis*, cannot be imputed to a child to support the plea of contributory negligence, when the action is for his benefit, yet, when the action is by the parent, or the parent is the real beneficiary of the action as distributee of the deceased child, the contributory negligence of the parent can be shown in evidence in bar of the action."

However, the weight of authority and the better view is that the contributory negligence of one parent, even though it bar recovery for his or her benefit, or to the extent of his or her interest in an action by the administrator for the death of a child, will not defeat recovery by or for the benefit of the other parent who is not negligent, but that the amount of the verdict will merely be reduced to the extent of the negligent parent's share. Annotations 23 A. L. R., 670, IV 690.

Applying these principles to the case in hand, the judgment below is Reversed.

P. C. IDOL, H. C. MARTIN, T. A. CREWS, J. DEWEY LEWIS AND G. W. MATTHEWS, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS OF THE VILLAGE OF WALKERTOWN WHO DESIRE TO JOIN WITH THEM IN THIS ACTION, v. J. G. HANES, T. E. JOHNSON AND D. C. SPEAS, COMMISSIONERS OF FORSYTH COUNTY, AND C. L. STRAUGHAN, I. W. STRAUGHAN, D. G. WARNER AND C. STAPLES WAGGONER, INTERVENING DEFENDANTS.

(Filed 31 May, 1941.)

Sanitary Districts § 1—

Signers of a petition for the creation of a sanitary district under the provisions of ch. 100, Public Laws 1927 (Michie's Code, 7077 [a], *et seq.*), are entitled as a matter of right to withdraw their names from the petition at any time before action is taken on the petition by the county commissioners on the question of approval, and when their withdrawal reduces the number of signers to less than 51% of the resident freeholders within the proposed district the board of county commissioners is without jurisdiction and its approval of the petition may be enjoined.

APPEAL by defendants from *Pless, J.*, at November Term, 1940, of FORSYTH. Affirmed.

This was a proceeding brought by certain petitioners before the Board of Commissioners of Forsyth County to secure their approval to the creation of a sanitary district under the provisions of chapter 100, Public Laws of 1927 (Michie's Code, Art. 4A, sections 7077 [a], *et seq.*), and to have further proceedings thereupon looking to the establishment of the district. The Act, as it relates to the powers and duties of the Board of County Commissioners, provides:

"7077 (c). Petition from freeholders.—Fifty-one per cent or more of the resident freeholders within the proposed district may petition the board of county commissioners of the county in which all or the major portion of the proposed district is located setting forth the boundaries of the proposed sanitary district and the objects it is proposed to accomplish. Upon receipt of such petition the board of county commissioners if the same is approved by them, shall, through its chairman, transmit the petition to the State Board of Health requesting that the proposed sanitary district be created. Provided, however, that the board of county commissioners before passing upon said petition shall hold a public hearing upon the same and shall give prior notice of such hearing by advertising to be made by posting a notice at the court-house door of their county and also by publication in a newspaper published in said county at least once a week for four successive weeks; and in the event such hearing is to be before a joint meeting of the boards of county commissioners of more than one county, or in the event the land to be affected

lies in more than one county, then in either of such events a like publication of notice shall be made and given in each of said counties."

The petition, containing the required 51% of the resident freeholders, was filed with the Board of Commissioners and advertisement was made in accordance with the law. But before any action toward approval was taken by the Commissioners, and before the hearing was had, a number of signers signified their desire to withdraw as petitioners and have their names stricken from the petition.

It is stipulated in the case on appeal:

"9. That the original petition was signed by 51%, or more, of the resident freeholders of the proposed Sanitary District when it was filed with the Board of County Commissioners of Forsyth County on July 1, 1940.

"10. That if the persons who requested that their names be withdrawn from the petition, as hereinbefore set out, had the right to withdraw and could not be counted as signers by the defendant County Commissioners at their meeting on September 3, 1940, then the petition did not contain 51% of the resident freeholders of the proposed sanitary district."

The Board of Commissioners, at an adjourned hearing, proceeded to approve the petition, notwithstanding the requested withdrawals, and prepared to forward such approval to the State Board of Health for further action toward establishment of the district, under the provisions of the law. Certain of the petitioners who had signified their withdrawal objected, and, their protests proving unavailing, proceeded to bring this suit to enjoin the defendant Commissioners from any further action in the proceeding, and obtained a temporary restraining order. At the hearing before Judge Pless, at November Term, 1940, of Forsyth Superior Court, the order was made permanent and defendants, including those who in the meantime were permitted to intervene, appealed to this Court.

Fred S. Hutchins and H. Bryce Parker for intervening defendants, appellants.

Elledge & Wells for plaintiffs, appellees.

SEAWELL, J. The questions presented for our decision are: Whether the petitioners had the right to withdraw their names before action by the Board of Commissioners on the question of approval, and whether such withdrawal abated the authority of the Commissioners to act in the premises. We answer both of these questions in the affirmative.

Since the general type of procedure set up in the statute under review is common all over the United States, as applied to various kinds of improvement, from schools to drainage and to elections upon a multitude

of subjects, counsel for both sides, ranging a fertile field, have been able to present to us a great number of decisions, *pro* and *con*, on the subject. We do not have altogether a free choice in the matter, since the question has been practically settled, in principle at least, in analogous cases. *Shelton v. White*, 163 N. C., 90, 79 S. E., 427; *Armstrong v. Beaman*, 181 N. C., 11, 105 S. E., 879. If we had, we believe it would be our duty to adopt the more reasonable view and the one which seems to be more consistent with the genius of our people, which, exercised upon more than one occasion, has resolved itself into a policy which recognizes the liberty of individual action where no hurt may follow to the persons immediately concerned, or to the public at large.

It is supposed that second thoughts are apt to be sounder, and this conviction has led courts to consider the right of withdrawal favorably, both as a matter of justice to the individual, who is entitled to apply his best judgment to the matter in hand, and as sound policy in community and public affairs, where the establishment of governmental institutions should rest upon mature consideration rather than be mere unnecessary excrescences upon the body politic, raised by the whim and fancy of a few men.

The facility with which signatures may be obtained to petitions is proverbial, and in other instances the amount and character of the persuasion is unknown. "What good reason is there why one who has changed his mind since signing such a petition, and who concludes that either the public good or his own interest is not in harmony with the petition, may not recede from his signature before action taken thereon? The rule which permits a withdrawal at any time before final action upon the petition is much more likely to get at the real and mature judgment of the voters, and it is calculated to discourage a hasty presentation of a petition for signatures without a full disclosure of the real merits of the question. Circulators of the petition can usually avoid sufficient withdrawals to defeat the petition by taking care that the matter is fully understood by those to whom it is presented for signature." *County Ct. v. Pogue*, 115 Ill. App., 391 (affirmed in *Kinsloe v. Pogue*, 72 N. E., 906).

A *locus poenitentiae* is usually afforded in most matters where it can be indulged without injury to another's right. And in considering the effect of the withdrawal upon other petitions we must remember that the defeat of an aspiration is not the destruction of a right.

The plaintiff in an action may, as a matter of right, take a nonsuit if his opponent has not asked for affirmative relief, and some courts, with reason we think, have applied the analogy to cases of this sort: *In re Central Drainage District Cush, et al., v. Kruschke, et al.*, 113 N. W., 675; *St. Lawrence Independent School District v. Board of Education*,

235 N. W., 697; *Roslyn v. Board of Education,* 173 N. W., 461; *Webster v. Bridgewater,* 63 N. H., 296. It would be remarkable if we attached more importance to a petition than to the summons and complaint in a civil action.

The signer of a petition has made no commitment to his co-petitioners or to the administrative body. In this respect it has been held that his action in signing the petition is analogous to an offer which stands open until accepted: 44 C. J., 239, citing *Hay v. Cincinnati,* 9 OhNP; *Andrew v. Auditor,* 5 OhNP, 123; *White v. Buffalo,* 61 Barb. (N. Y.), 415; *Wilkinson v. Lincoln* (Neb.), 181 N. W., 161; *Waco v. Chamberlain* (Tex.), 45 S. W., 191.

Furthermore, while the petitioners address the board in behalf of a public enterprise, the individual petitioner is dealing with a prospective burden upon his own pocketbook, or a lien upon his property—a very substantial right—and his privilege to withdraw before injury to others should be judged of in that relation.

There is, of course, some significance respecting the extent of public interest implied in the statute by the requirement of 51% of the resident freeholders, but this is not by any means an election upon the proposal as determining the rights of the parties *inter sese,* or as fixing its status before the board. The election is one of the individual and remains so until action is taken. Viewed as a guaranty of the worth-whileness of instigating the project, the statute might as well have required the signature of only 25% of the resident freeholders—a percentage rather frequently employed in the calling of local elections. If the petition is considered as conveying a minimum expression of public interest such as would justify further action by the authorities—in the nature of an assurance to the law—then, unless it be regarded as a mere device for the entrapment of Lady Progress, that assurance should carry through until the law has taken stock of the demand.

From considerations of public policy and individual right, we think the better rule is that the individual petitioner may, as of right, withdraw his name from the petition at any time before final action thereupon, and this rule we affirm. It should satisfy any reasonable requirement as to constancy of purpose, to be expected of those who deal with the courts and administrative bodies.

The withdrawal of these petitioners, conceded in the stipulation to reduce the number to less than 51% of the resident freeholders, was fatal to the jurisdiction of the defendant Board of County Commissioners, and the judgment of the Superior Court so holding must be affirmed. *Tarboro v. Forbes,* 185 N. C., 59, 116 S. E., 81; *Armstrong v. Beaman, supra; Charlotte v. Brown,* 165 N. C., 435, 81 S. E., 611; *Shelton v. White, supra;* McQuillin's Municipal Corp., 1921 Supp., sec. 1858.

Affirmed.

JOHN A. WILLIAMS v. H. N. THOMAS,
and
HATCHER C. WILLIAMS v. H. N. THOMAS.

(Filed 31 May, 1941.)

1. Trial § 22b—

Upon motion for judgment as of nonsuit the evidence is to be taken in the light most favorable to plaintiff and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567.

2. Automobiles § 17—

The principal of *res ipsa loquitur* does not prevail in this State as to the skidding of an automobile.

3. Same: Automobiles § 18a—

Evidence tending to show that defendant's car was seen skidding on the highway on the right side thereof, but that just as plaintiff's car, traveling in the opposite direction on its right side of the highway, got almost parallel therewith, defendant's car suddenly whipped across the highway in front of plaintiff's car so that the front of plaintiff's car struck the rear of defendant's car, *is held* to show more than mere skidding and was sufficient to be submitted to the jury upon the issue of negligence.

BARNHILL, J., dissents.

APPEAL by defendant from *Carr, J.*, and a jury, at November Term, 1940, of GRANVILLE. No error.

These were actions for actionable negligence, brought by plaintiffs against defendant, alleging damage. Defendant denied liability. By consent the two actions were consolidated for trial.

Hatcher C. Williams' testimony, in part, was as follows: "I am 21 years old; my home is at Oxford; have lived there all my life. I am the son of John A. Williams. On the 30th of August, I was on the highway between Burlington and Greensboro, I was in my father's car, and I was driving. I was going west toward Greensboro. Miss Jeanette Biggs, Mrs. J. H. Landrum and Miss Jacqueline Ray were with me.

"On that morning it was raining. The Southern Railway Company's underpass between Burlington and Greensboro is about five miles from Greensboro, east of Greensboro, in the direction of Burlington. Miss Ray was on the front seat with me, Miss Biggs and Mrs. Landrum were on the back seat. About 400 or 500 yards from the underpass east, in the direction of Burlington, we had a collision. Mr. H. N. Thomas was driving the car which we had the collision with. I was traveling west, towards Greensboro, Thomas was traveling east.

"On the 30th of August, the highway was macadamized, I believe, a hard surface road, the width was 33 feet. The highway was marked for

three lanes of traffic. I saw Mr. Thomas before the collision occurred; I did not know what kind of automobile he was operating at that time. When I first saw Thomas he was about 150 or 200 feet away from me, I estimated. The highway is straight behind there, but a curve in front of me, Thomas was on the curve. As I was traveling in the direction towards Greensboro, the curve curved to the right; it curved to Mr. Thomas' left.

"When I first saw Mr. Thomas I was going approximately 40 miles an hour, or 45, or something like that. That is the rate of speed at which I was going. I do not know the rate of speed Mr. Thomas was traveling when he approached me. I was driving on my right side of the highway; there was a shoulder on that highway; I was driving within a foot or so of the shoulder. I was keeping a careful lookout on the road in front of me. I came over a hill and as soon as I came over the hill, I saw Mr. Thomas. When I first looked I didn't realize he was skidding, then in maybe less than a second I saw he was skidding, and skidded on towards me. He was on his right side of the highway at the time, my left. He was about 150 feet away from me, I would say, approximately, when I was first able to tell he was skidding. At that time he was on his right side of the highway.

"After I saw Mr. Thomas was skidding I began to slow down and apply brakes. From the time I saw Mr. Thomas was skidding, the rear end of his car swung out toward the middle. He was still on the right, but the rear was getting toward the center, then 30 or 40 feet from me he whipped right across the road in front of me facing back towards Greensboro. When he was 30 or 40 feet away from me he whipped across the road in front of me. I was applying my brake but did not push them all the way when he came across. The front of my automobile collided with the rear of his, the collision occurred on my right side of the highway, right nearly on the shoulder. The shoulder at that time was muddy and slippery. It had been raining about 20 minutes or half an hour, hard, then started raining steady then. The shoulders were of dirt, mud, I believe, it was light red, in color."

He was corroborated by Miss Jacqueline Ray, who was riding on the front seat with him. She testified, in part: "When I first saw the automobile with which Hatcher's car collided, it was on my left side of the highway, his right. Hatcher's car was on the right side of the highway, it seemed to be pretty close to the shoulder. I couldn't say what kind of shoulders they were, I wasn't noticing the shoulders. I saw the automobile which was meeting Hatcher's car, it seemed to be skidding. When I first observed that it was skidding, Thomas' car was on his right side, it changed its course, he skidded a bit and then he turned completely, I mean, sideways in the road, in the middle of the road, that is all I remember. No, sir, I don't remember the collision."

The defendant introduced no evidence.

The judgment of the court below is as follows:

"The actions pending in the Superior Court of Granville County, entitled John A. Williams v. H. N. Thomas, and Hatcher C. Williams v. H. N. Thomas, coming on for trial, and being tried before the undersigned Judge presiding, and a jury, at the November Term, 1940, of the Superior Court of Granville County, and being, by consent of the parties, plaintiff and defendant, consolidated, the following issues were submitted to the jury, and the following answers to said issues returned by the jury:

"1. Was the plaintiff, John A. Williams, injured and damaged as the result of the defendant's negligence, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, John A. Williams, contribute to his injury through his own negligence? Answer: 'No.'

"3. What amount, if any, is plaintiff, John A. Williams, entitled to recover of the defendant? Answer: '$470.00.'

"4. Was the plaintiff, Hatcher Williams, injured and damaged as the result of the defendant's negligence, as alleged in the complaint? Answer: 'Yes.'

"5. Did the plaintiff, Hatcher Williams, contribute to his injury through his own negligence? Answer: 'No.'

"6. What amount, if any, is plaintiff, Hatcher Williams, entitled to recover of the defendant? Answer: '$150.00.'

"It is now, therefore, on motion of B. K. Lassiter, T. G. Stem and B. S. Royster, Jr., attorneys for the plaintiffs, Considered, Adjudged and Decreed that the plaintiff, John A. Williams, have and recover of the defendant the sum of $470.00, and his costs of this action; and that the plaintiff, Hatcher C. Williams, have and recover of the defendant the sum of $150.00 and his costs of said action, both amounts, namely, $470.00 and $150.00, to bear interest at the rate of six per centum per annum from and after November 11, 1940, to the first day of this term of Court. Leo Carr, Judge Presiding."

B. S. Royster, Jr., Ben K. Lassiter, and T. G. Stem for plaintiffs.

Hedrick & Hall and Fred M. Parrish for defendant.

CLARKSON, J. At the close of plaintiffs' evidence (the defendant introduced none), defendant in the court below made a motion for judgment as in case of nonsuit. C. S., 567. The court below overruled this motion, and in this we can see no error.

On motion to dismiss or judgment of 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 to be drawn therefrom.

The principle of *res ipsa loquitur* does not prevail in this State as to skidding.

In *Clodfelter v. Wells,* 212 N. C., 823 (827), *Devin, J.,* for the Court, said: "Coming back to the determinative question presented by the appeal, whether the doctrine of *res ipsa loquitur* applied to the facts in this case, it seems to have been definitely settled in North Carolina that this principle does not apply to the skidding of an automobile resulting in injury to a passenger. It was so held in *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251, and reaffirmed in *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389, and *Waller v. Hipp,* 208 N. C., 117, 179 S. E., 428."

The charge of the court does not appear in the record, and the presumption is that the court below charged the law applicable to the facts and that the case was not submitted to the jury on the theory of *res ipsa loquitur,* but on the grounds of negligence, irrespective of *res ipsa loquitur.*

Hatcher C. Williams testified: "After I saw Mr. Thomas was skidding, I began to slow down and apply the brakes. From the time I saw Mr. Thomas was skidding the rear end of his car swung out towards the middle. He was still on the right, but the rear was getting towards the center, then 30 or 40 feet from me he whipped right across the road in front of me, facing back towards Greensboro. When he was 30 or 40 feet away from me, he whipped across the road in front of me." It will be noted that this witness used the language "the rear end of his car swung out towards the middle," and the further language "but the rear was getting towards the center, then 30 or 40 feet from me, he *whipped* right across the road in front of me, facing back towards Greensboro. When he was 30 or 40 feet in front of me, he whipped across the road in front of me." Williams testified on cross-examination: "I do not think that Thomas' car stopped. I saw him cut across, then he just loomed up in front of me, then I saw the car skid across in front of me."

Miss Jacqueline Ray testified: "When I first observed that it was skidding, Thomas' car was on his right side, it changed its course; he skidded a bit and then he *turned completely; I mean sideways in the road,* in the middle of the road, that is all I remember."

The evidence above showed more than skidding, it was sufficient to be submitted to the jury on the aspect of negligence. The jury found that the injury to both person and property was caused by the negligence of defendant.

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

No error.

BARNHILL, J., dissents.

LILLIAN SUTER McFETTERS v. GEORGE ALBERT McFETTERS.

(Filed 31 May, 1941.)

1. Divorce § 13—

C. S., 1667, provides two separate remedies, one for alimony without divorce, and second, for reasonable subsistence and counsel fees *pendente lite*.

2. Actions § 11—

An action is pending from the issuance of summons, C. S., 475, until determination by final judgment. C. S., 592.

3. Trial § 25—

A voluntary nonsuit must be effected by a judgment of the clerk of the Superior Court, C. S., 593, or by the judge at term.

4. Divorce § 11—Court may allow counsel fees to plaintiff's attorneys before judgment of voluntary nonsuit is entered.

In this action under C. S., 1667, for alimony and counsel fees *pendente lite* and for alimony without divorce, plaintiff, on the day set for hearing of the motion for alimony and counsel fees *pendente lite*, filed "certificate and affidavit" stating that there had been a reconciliation between plaintiff and defendant and that plaintiff "withdraws and renounces the complaint" and "takes a voluntary nonsuit . . . and prays the court to dismiss" the action as of nonsuit. Plaintiff's attorneys filed petition for counsel fees against defendant, and defendant's attorney filed plaintiff's "certificate and affidavit" as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him. After the petition was filed and after the court had announced its intention of allowing same, judgment as of nonsuit was tendered and signed by the court. *Held:* At the time the petition for counsel fees was filed, the complaint was still a part of the record and the action was still pending, and the petition amounted to a motion to have the court act upon the prayer as made by plaintiff in her complaint, and the action of the court in allowing counsel fees to plaintiff's attorneys against defendant is affirmed.

5. Pleadings § 24—

After a pleading is filed it becomes a part of the record and passes beyond the control of the pleader, and, ordinarily, thereafter the question of withdrawal of the pleading must be presented to the court by motion addressed to its discretion.

APPEAL by defendant from *Grady, Emergency Judge,* at 31 March, 1941, Civil Term, of GUILFORD.

Civil action for allotment of subsistence without divorce and for counsel fees under provision of C. S., 1667.

The record on appeal shows: In this action, instituted in Superior Court of Guilford County, North Carolina, 25 March, 1941, plaintiff for causes alleged in her complaint, duly verified by her and asked to be taken as an affidavit in support of motion therefor, prayed not only for

an order allotting to her reasonable subsistence, but for order for temporary allowance of $750 per month for maintenance and support and $2,500 counsel fees *pendente lite,* all as provided in C. S., 1667.

Summons and complaint, as well as notice that on 1 April, 1941, at 9:30 a.m., plaintiff would present to the court motion for temporary subsistence and counsel fees, were duly served on defendant on 25 March, 1941. At 9:20 a.m., on 1 April, 1941, there was filed in office of clerk of Superior Court "certificate and affidavit" dated 31 March, 1941, signed and verified by plaintiff, reading as follows:

"The undersigned, being the plaintiff in the above entitled action, having heretofore advised her counsel of the matters herein stated, does not wish to prosecute the application for subsistence as prayed for in the complaint and hereby certifies that she has resumed marital relations with her husband, the defendant, withdraws and renounces the complaint; and she, therefore, takes a voluntary nonsuit in the said action and prays the court to dismiss the same as of judgment of nonsuit."

On 3 April, 1941, subpœna for plaintiff to appear before the judge of Superior Court at courthouse in Greensboro on Friday, 4 April, 1941, at 9:30 a.m., to give evidence in this action was issued and served on her. On 4 April, 1941, Sapp, Sapp & Atkinson, attorneys, by petition filed, moved in the cause for an order for an allowance of counsel fees for services rendered to plaintiff in the action, as provided by C. S., 1667, and for an order requiring defendant to pay the same.

Upon hearing of that petition on 8 April, 1941, the court finds as facts, numbered by us, as follows: (1) That this action was brought under C. S., 1667; (2) that plaintiff and defendant are husband and wife; (3) that plaintiff employed the petitioning attorneys to represent her in said action; (4) that at the time she sought the services of the petitioning attorneys she explained to them that she was without resources and had no money with which to pay a fee; (5) that said attorneys brought said action on behalf of plaintiff after investigating the facts and after they realized that plaintiff should receive legal assistance under the circumstances narrated by her, and relied upon the provisions of C. S., 1667, that the court would make an order as therein provided for reasonable counsel fees; (6) that said action was duly brought, the complaint was duly verified, and the summons was duly and regularly served upon the defendant; (7) that the complaint, which was duly verified by plaintiff, states a valid, sufficient, and meritorious cause of action as provided by the terms of C. S., 1667; (8) that after said action had been begun, the summons and complaint served upon the defendant, and while the petitioning attorneys were at work preparing plaintiff's case for trial, the plaintiff called the petitioning attorneys, over the telephone, and stated that the defendant had asked that she give him one more trial, and that

she desired to withdraw the suit; (9) that the petitioner then filed the petition, as aforesaid, as will appear from the records; (10) that Harry R. Stanley, attorney for defendant, drafted the certificate and affidavit appearing of record and now on file and signed by the plaintiff, in which she withdraws her action against the defendant and judgment of nonsuit is this day entered by the court; (11) that said attorney for defendant did not attend the signing of said certificate and affidavit, and thereafter the same was filed in this cause as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him, as sworn to by Harry R. Stanley, attorney, in an affidavit dated 7 April, 1941; (12) that the petitioning attorneys rendered valuable assistance and services to plaintiff before the reconciliation of plaintiff and defendant, and the allegations in respect thereto in the petition filed by the petitioning attorneys are found to be facts; (13) that after the hearing on the attorney's petition aforesaid and after the court had announced its holdings, Harry R. Stanley, attorney, presented to the court the judgment of nonsuit; and (14) that the services rendered by the petitioning attorneys in this matter are reasonably worth the sum of $250; "and the same is allowed, and the court orders and adjudges that this sum be paid to the petitioner, Sapp, Sapp & Atkinson, by the defendant, George Albert McFetters, as provided by C. S., 1667; that this order shall have the effect of a judgment and shall be a lien and a charge against the real and personal property of the said George Albert McFetters, defendant in this action, and unless paid within 10 days from the date hereof execution shall issue by the Clerk of the Court to the Sheriff of Guilford County for the collection and payment of same, and this cause is retained for further orders."

Defendant, reserving exception thereto, appeals therefrom to Supreme Court, and assigns error.

Sapp, Sapp & Atkinson for plaintiff, appellee.
Harry R. Stanley for defendant, appellant.

WINBORNE, J. Defendant, appellant, in brief filed on this appeal, states that he does not ask the review of any finding of fact in the judgment of the lower court, but challenges the right and the power of the court to render the judgment. Upon the findings of fact appearing in the judgment the challenge is untenable.

The statute, C. S., 1667, as amended by chapter 123, Public Laws 1921, and by chapter 52, Public Laws 1923, under which this action is instituted, authorizes an independent action in which two remedies are provided:

"If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the Superior Court," (1) "to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband." (2) "Pending the trial and final determination of the issues involved in such action, . . . the wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife . . ."

In the present action the plaintiff in her complaint invoked both remedies. The allowance is made under the second. Thereupon, this question arises: Was the action pending when the court ruled on the motion for counsel fees for service theretofore rendered in the cause? We so hold.

An action is deemed to be pending from the time it is commenced until its final determination. 1 Am. Jur., 455, Actions, sec. 64. See *Pettigrew v. McCoin*, 165 N. C., 472, 81 S. E., 701, 52 L. R. A. (N. S.), 79; also *Barber v. Barber*, 216 N. C., 232, 4 S. E. (2d), 447.

In this State a civil action is commenced by the issuance of a summons. C. S., 475. The final determination is by judgment. C. S., 592. While a plaintiff, in cases where nothing more than costs can be recovered against him, may elect to be nonsuited, the nonsuit must be effected by a judgment of the clerk of Superior Court (C. S., 593) or by the judge at term. McIntosh, N. C. P. & P., 703; *Bynum v. Powe*, 97 N. C., 374, 2 S. E., 170; *Oil Co. v. Shore*, 171 N. C., 51, 87 S. E., 938; *Caldwell v. Caldwell*, 189 N. C., 805, 138 S. E., 329.

In the present case the court makes specific finding that the judgment was presented after the hearing of attorneys' petition and after the court had announced its decision. Hence, applying the above principle, the action was pending at the time the allowance of counsel fees was made.

It is contended, however, by defendant that the "certificate and affidavit" of plaintiff filed in the cause on 1 April, 1941, had as of that date the effect of a nonsuit by plaintiff. In this connection, if it be conceded that plaintiff could so nonsuit her case, the finding of fact is that this "certificate and affidavit," prepared by the attorney for defend-

ant, was filed in this cause as an affidavit in support of defendant's resistance to judgment allowing counsel fees against him. This finding of fact, coupled with the further finding that the judgment of nonsuit was presented to the court after the hearing on the attorneys' petition and after the court had announced its holding, negatives any suggestion that the "certificate and affidavit" were presented to the court in behalf of plaintiff as motion for judgment of nonsuit—particularly in view of the absence of a finding that it was so presented.

Furthermore, when this case came on for hearing, after notice to defendant, plaintiff's complaint, in which a cause of action within the meaning of the provisions of C. S., 1667, is alleged against defendant and in which allowance of counsel fees *pendente lite* is prayed, was a part of the record. Hence, the petition of the attorneys was no more than a motion to have the court act upon the prayer as made by plaintiff in that respect at the time she instituted the action.

On the other hand, it is contended that in the "certificate and affidavit" of plaintiff she had withdrawn her complaint. This she could not do without the order of court, which the record fails to show she obtained. A pleading, when filed, passes beyond the control of the pleader and becomes a part of the record in the case. Thereafter the subject of its withdrawal, as a general rule, is a question addressed to the reasonable discretion of the court. 31 R. C. L., 593.

In the light of what has been said above, the question as to the right of attorneys to continue a separate maintenance action against the wishes of their client for the sole purpose of having fees allowed them against the husband under C. S., 1667, does not arise.

The judgment below is

Affirmed.

IN THE MATTER OF PINE HILL CEMETERIES, INCORPORATED.

(Filed 31 May, 1941.)

1. Municipal Corporations § 40—

The procedure to obtain a review by the courts of an order of a municipal board of adjustment relative to the enforcement of zoning ordinances is by *certiorari*, sec. 7, ch. 250, Public Laws 1923.

2. Same—

A municipal board of adjustment, when sitting as a body to review a decision of the building inspector relative to the enforcement of zoning ordinances, is a body with judicial or *quasi*-judicial and discretionary powers, and its findings of fact upon controverted questions of fact pre-

sented by the appeal are conclusive upon review by the Superior Court when the findings are made in good faith and are supported by evidence.

3. Same—

In reviewing an order entered by a municipal board of adjustment relative to the enforcement of a zoning ordinance, the Superior Court is an appellate court with jurisdiction to review questions of law and legal inference only, and it may not substitute its judgment for, or undertake to exercise discretion vested by law in, the board, and, the record being complete, may not order the board to reopen or rehear for the consideration of additional evidence, or require the board to enter a new determination in the absence of clear legal error or oppressive and manifest abuse of discretion by the board.

APPEAL by respondent, Pine Hill Cemeteries, Incorporated, from *Carr, J.*, at March Term, 1941. Error and remanded.

In May, 1926, the city of Durham, under authority contained in ch. 250, Public Laws 1923, adopted a comprehensive zoning ordinance. That portion of the land within the eastern part of the city which embraces lands owned by the petitioner and by the respondent were placed in a residence district. The respondent owns 27.58 acres of land within the district. It asserts that this property had been set apart and dedicated for cemetery purposes prior to the enactment of the zoning ordinance. The petitioner, J. L. Morehead, owns property within the district adjoining that of the respondent.

On 8 November, 1940, the respondent applied for a certificate of occupancy for the continued use of its land within said residence district in the city of Durham, asserting that such land was dedicated to a nonconforming use prior to the enactment of the ordinance. The building inspector declined to issue the certificate and respondent appealed to the board of adjustment. After a full hearing upon public notice, the board of adjustment found certain facts upon which it reversed the decision of the building inspector and directed the issuance of a certificate of occupancy. The petitioner, J. L. Morehead, appeared at the public hearing, offered evidence and resisted the granting of the certificate.

Upon the entry of the order of the board of adjustment, said Morehead applied to the Superior Court for a writ of *certiorari*, which was granted.

When the cause came on for hearing in the court below the petitioner moved the court (1) that it hear additional evidence and find additional facts; (2) that he be allowed to cross-examine one Walter B. Markham; (3) that he be allowed to introduce newly discovered evidence. He further moved that in the event the foregoing motions were disallowed, then that the court re-refer the entire matter to the board of adjustment with instructions to take further evidence and find such further facts as may be found therefrom and to recall Walter B. Markham for examination.

The court, "being of the opinion that for a proper determination of the matters in controversy it is necessary that the testimony be specifically correlated to the exhibits so as to show the type of land adjoining the proposed cemetery and that additional evidence be taken," ordered that this entire matter be referred to the adjustment board of the city of Durham to correlate the testimony and exhibits and to permit the parties to produce newly discovered evidence and witnesses relative to the controversy and to the matters and things set forth in the affidavit of Walter B. Markham. It further ordered that "upon rehearing, the adjustment board is directed to determine facts upon all the evidence and enter a new determination." The respondent Pine Hill Cemeteries, Incorporated, appealed.

W. L. Foushee and Marshall T. Spears for respondent, appellant.
Albert W. Kennon, Jr., and J. L. Morehead for petitioner, appellee.

BARNHILL, J. The act, ch. 250, Public Laws 1923, which authorizes cities and towns to adopt zoning ordinances and to provide machinery for the enforcement thereof makes no provision for an appeal from a determination by the board of adjustment to the courts. It does provide, in sec. 7 thereof, that "every decision of such board shall, however, be subject to review by proceedings in the nature of *certiorari.*" It follows that petitioner has adopted the proper procedure.

The writ of *certiorari,* as permitted by the zoning ordinance statute, is a writ to bring the matter before the court, upon the evidence presented by the record itself, for review of alleged errors of law. It does not lie to review questions of fact to be determined by evidence outside the record. 5 R. C. L., 253; *Williams v. Williams,* 71 N. C., 427. Petitioner so understood when he filed his petition in which he asserts, in substance, that there was error in law in that (1) the board of adjustment is without jurisdiction to authorize the use of the tract of land owned by the respondent for the construction and maintenance of the cemetery or as an extension of its present cemetery; (2) that it is without jurisdiction to vary any requirement of the zoning ordinance relative to the use of land within the residence zone; (3) that there was error in the conclusion of the board that the use of the land of the respondent is an extension of a nonconforming use and the use thereof within the residence zone is not permitted by the ordinance; (4) that said board exceeded its authority which is limited to the right to determine and vary the application of the regulations of the zoning ordinance in specific cases in harmony with the general purposes and intent of the regulations prescribed in and by the zoning ordinance; and (5) the action of the

board constituted a change in boundaries of a residence district without foundation of law.

The board of adjustment is an administrative body. It is authorized to hear and decide appeals from and review any order, requirement, decision or determination made by the building inspector or other administrative official charged with the enforcement of zoning ordinances. Sec. 7, ch. 250, Public Laws 1923. When sitting as a body to review a decision of the building inspector it is vested with judicial or *quasi*-judicial and discretionary powers. *Harden v. Raleigh,* 192 N. C., 395, 135 S. E., 151. Its decisions are final subject to the right of the courts to review errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority. *Harden v. Raleigh, supra; In re Appeal of Parker,* 214 N. C., 51, 197 S. E., 706.

Speaking to the subject in *Harden v. Raleigh, supra, Adams, J.,* says: "*Quasi*-judicial functions, when exercised, not arbitrarily, but in subordination to a uniform rule prescribed by statute, ordinarily are not subject to judicial control. It is only in extreme cases, those which are arbitrary, oppressive or attended with manifest abuse, that the courts will interfere. In *Rosenthal v. Goldsboro,* 149 N. C., 128, it is said: 'it may now be considered as established with us that our courts will always be most reluctant to interfere with these municipal governments in the exercise of discretionary powers conferred upon them for the public weal, and will never do so unless their action should be so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion.'" See also cases cited in *Rosenthal's case, supra.*

The duties of the building inspector being administrative, appeals from him to the board of adjustment present controverted questions of fact—not issues of fact. Hence it is that the findings of the board, when made in good faith and supported by evidence, are final. *Little v. Raleigh,* 195 N. C., 793. Such findings of fact are not subject to review by the courts. They are *res judicata* even upon a petition to the board of adjustment to reopen and rehear upon the same evidence. *Little v. Raleigh, supra.*

While it may be that the board has authority, on proper showing, to reopen or rehear for the consideration of additional evidence, it has the exclusive right to determine when and upon what conditions this shall be done. The court will not substitute its judgment for that of the board. Nor will it undertake to exercise discretion vested by law in the board.

Furthermore, in the hearing below on the writ of *certiorari,* the judge was sitting as an appellate court. As such, he was authorized to review questions of law and legal inference arising on the record. The broad discretionary powers vested in him as a trial judge were absent.

It follows that the court below was without authority to remand the

cause for a rehearing except for errors of law committed by the board. Nor could he require the board to enter a new determination in the absence of clear legal error or oppressive and manifest abuse of discretion.

As there is no suggestion that the record is not complete, including all of the evidence and the exhibits, the questions of law presented by the writ of *certiorari* should be determined by the court below on the record as sent up by the board. If it does not sufficiently disclose error in law or action so clearly unreasonable as to amount to an oppressive and manifest abuse of discretion, the action of the board should be affirmed and the writ dismissed.

Error and remanded.

S. E. CASEY, EMPLOYEE, v. BOARD OF EDUCATION OF THE CITY OF DURHAM, EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER, AND THE STATE SCHOOL COMMISSION, SELF-INSURER.

(Filed 31 May, 1941.)

1. Master and Servant § 55d—

Findings of fact by the Industrial Commission, supported by competent evidence, are binding upon the courts upon appeal.

2. Master and Servant § 39d—Finding that employee was injured in course of his employment by municipal board of education held conclusive.

The findings of fact of the Industrial Commission, supported by evidence, were to the effect that claimant employee was employed as janitor of a school for 8 months out of the year, his salary for this work being paid in part by the State School Commission, and was also employed in school maintenance work outside of his regular working hours as janitor and during the remaining four months of the year, his compensation for maintenance work being paid exclusively by the municipal board of education, and that he was injured in the course of his employment in maintenance work after regular hours in a school of which he was not custodian. *Held:* The findings support the conclusion of law that he was injured during his employment by the municipal board of education and that the municipal board and its carrier are solely liable for compensation for his injury. Ch. 358, sec. 22, Public Laws 1939.

3. Master and Servant § 41a—

Claimant was employed as janitor, his compensation for such work being paid in part by the State School Commission, and was also employed in school maintenance work, his compensation for the maintenance work being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. *Held:* An award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the Commission's finding of exceptional conditions, is upheld. Ch. 120, sec. 2 (e), Public Laws 1929.

4. Master and Servant § 45b—

A condition in a compensation insurance policy issued to a municipal board of education, relieving or lessening the carrier's liability in cases where an employee receives his remuneration in whole or in part from the State, has no application when the employee is injured while engaged solely in maintenance work paid for exclusively by the municipal board.

APPEAL by the Board of Education of the city of Durham and the Travelers Insurance Company from *Grady, Emergency Judge,* at March Term, 1941, of DURHAM.

This is a proceeding under the North Carolina Workmen's Compensation Act to determine the liability for injuries received by the plaintiff from an accident arising out of and in the course of his employment.

The facts found by the individual Commissioner and adopted and affirmed upon appeal by the Full Commission and by the judge of the Superior Court are as follows:

"1. That the Board of Education, City of Durham, has accepted the provisions of the Compensation Law and the Travelers Insurance Company is the carrier.

"2. That the plaintiff, S. E. Casey, was employed as janitor or custodian of the Southside School, Durham, on a 12-months basis, and for eight months of this time was in part paid by the State School Commission, the remaining four months was paid from the local funds furnished through the Board of Education, City of Durham, and in addition thereto, was paid through the Board of Education, City of Durham's special funds for extra maintenance work performed out of regular hours; that for his services as custodian he received $18.00 per week, and for his extra work, approximately 30c per hour.

"3. That the plaintiff, S. E. Casey, and P. H. Melvin, night watchman of the Junior High School, Durham, were properly requested by the school officials to do some painting and maintenance work in a room at the Durham Junior High School on the night of November 29, 1939, so that the room would be ready for the use of the band following Thanksgiving; that on said night Casey, along with other custodians, attended a custodian's school, and at the conclusion of the school he and Melvin went to the premises of the Junior High School to engage in the work, when Casey accidentally fell from one concrete walk, which was elevated, onto another, about 9:30 p.m., falling on his right arm and shoulder; that said injury was by accident arising out of and in the course of said Casey's employment by the Board of Education, City of Durham; and, that as a result of said injury he was totally disabled for a week and a half, when he returned to his former employment, doing selective work, and receiving full wages until June 1, 1940, when he was laid off because of his inability to do the more laborious maintenance work during the

summer season; that the plaintiff has definite limitation of the use of the injured right arm at the present time due to the injury by accident and that he is entitled to further medical care.

"4. That said Casey was not working for and was not being paid by the State School Commission at the time of his injury by accident, November 29, 1939.

"5. That for exceptional reasons it would be unfair to the employee to take his earnings for the extra work he was doing at the time of his injury to establish his average weekly wage, and, it is, therefore, necessary to use his full earnings to establish a wage that will most nearly approximate his earnings if he were not injured."

From judgment of the Superior Court affirming the award of the Full Commission "that said Board (Board of Education of the City of Durham) pay to the plaintiff compensation at the rate of $10.80 per week, for a week and a half's total disability, beginning November 29, 1939, and thereafter at said rate beginning as of June 1, 1940, and in addition thereto, furnish the plaintiff with additional, reasonable, medical, surgical, and hospital care as may be necessary and pay for same after bills have been submitted to and approved by the Commission, and specifically furnish reasonable treatment necessary for the injured shoulder. The question of permanent disability will be determined at a later date, if there is any," and dismissing the State School Commission as a party defendant, appeal was taken by the city board of education and its insurance carrier.

Hedrick & Hall for plaintiff, appellee.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Patton for State School Commission, appellee.

Sapp, Sapp & Atkinson for defendants, appellants.

SCHENCK, J. The findings of fact are amply supported by competent evidence, and were therefore binding upon the Superior Court and upon this Court. Public Laws 1929, ch. 120, sec. 60 (N. C. Code of 1939 [Michie], 8081 [ppp]); *Early v. Basnight & Co.*, 214 N. C., 103, 198 S. E., 577; *Saunders v. Allen*, 208 N. C., 189, 179 S. E., 754; *Buchanan v. Highway Commission*, 217 N. C., 173, 7 S. E. (2d), 382.

The Workmen's Compensation Act is applicable to the State School Commission and to county and city administrative school units. Ch. 358, sec. 22, Public Laws 1939. The pertinent portion of said section of said act being as follows: "Liability of the State for compensation shall be confined to school employees paid by the State from State School funds for injuries or death caused by accident arising out of and in the course of their employment in connection with the State operated eight months

school term. . . . The County and City administrative units shall be liable for Workmen's Compensation for school employees whose salaries or wages are paid by such local units from local funds, . . ."

According to the findings of fact by the Commission the plaintiff was not working for and was not being paid by the State School Commission at the time of his injury by accident. He was engaged in the performance of his duties incident to school plant maintenance, for which the State School Commission was in no wise responsible and for which employment the State School Commission was not liable. He was engaged in this work at night, under a separate contract of employment with the Board of Education of the city of Durham, in a school building of which he was not the custodian, and while so engaged in the employment of the city board he sustained an injury arising out of and in the course of such employment. The facts found support the conclusion of law reached and the award made.

It would seem that the principal question involved in this appeal is whether the Commission employed a proper method in the computation of the average weekly wage of the plaintiff. The pertinent provision of the Workmen's Compensation Act for determining the average weekly wage of an injured employee is found in chapter 120, section 2, subsection (e), of the Workmen's Compensation Act of 1929. That section, after providing for the methods of computing the average weekly wage which are not applicable to this case, provides as follows: "But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computation of average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for his injury."

The Commission found as a fact that on account of exceptional reasons, arising upon the facts, it would be unfair to the employee to employ the other methods for computing the average weekly wage and that it would be fair to compute such wage upon the basis of the amount customarily earned. It would seem that upon the facts found the Commission, in the exercise of its broad administrative powers, adopted a fair method of computing the average weekly wage of the plaintiff by ascertaining the approximate amount the plaintiff would have earned had he not been injured. *Early v. Basnight & Co., supra.*

The endorsement 1721 attached to the policy issued by appealing insurance carrier, which relieves or lessens the carrier's liability in cases where the employee receives his remuneration in whole or in part from the State, would seem to have no application in this case, since the Commission has found, upon competent evidence, that the plaintiff's accident

arose out of and in the course of his employment by the city board, in the payment of the remuneration for such employment the State had no part.

The judgment of the Superior Court is

Affirmed.

ANNA PEARL HESTER, ADMINISTRATRIX, v. HORTON MOTOR LINES ET AL.

(Filed 31 May, 1941.)

1. Automobiles § 18d: Torts § 4—

Where a passenger in a car is thrown therefrom to the hard surface by the negligent act of the driver, and while lying prone on the highway, is run over by a truck, through negligence of the truck driver in failing to avoid striking her, and the passenger dies of the injuries thus inflicted, both drivers are liable as joint *tort-feasors*. In the instant case evidence of negligence on the part of the driver of the car in which intestate was riding *is held* sufficient to have been submitted to the jury, but a new trial is awarded on the appeal of the truck driver and his employer for the exclusion of expert opinion evidence that intestate was not struck or run over by the truck.

2. Judgments § 33d: Damages § 1—

Where the driver of a car is convicted of manslaughter in causing the death of a passenger therein, and sentence is suspended on condition that he pay a stipulated sum to the mother of the deceased passenger, payments made in the criminal prosecution will not support a plea of estoppel in an action by the administratrix of the deceased passenger to recover for wrongful death, credit on the verdict for the amount paid in the criminal prosecution being the most to which he is entitled.

3. Evidence §§ 18, 42d—

While the testimony by an officer of a truck driver's narration of how the accident occurred, made by the driver on the second day after the accident, is incompetent as substantive evidence against the truck driver's employer, sought to be held under the doctrine of *respondeat superior*, and as against a third defendant, sought to be held as a joint *tort-feasor*, when the truck driver goes upon the stand and gives in substance the same testimony, testimony of the narration becomes competent for the purpose of corroboration, and an exception entered by the third defendant cannot be sustained.

4. Evidence § 48b: Death § 7—Exclusion of expert opinion evidence as to the cause of death held error.

In this action for wrongful death, plaintiff administratrix contended that her intestate, while riding as a passenger in an automobile, was thrown therefrom by the negligent act of the driver, and that while intestate was prone on the highway she was negligently run over by a truck.

The truck driver and his employer, sought to be held liable under the doctrine of *respondeat superior*, tendered an expert medical witness, who had attended intestate prior to her death and who had examined the injuries found upon her body, who would have testified to the effect that deceased's death was caused by her striking the concrete when she was thrown from the car, and that none of the wounds were caused by a truck striking or passing over her body. *Held:* The substance of the proposed expert testimony was competent and its exclusion constitutes prejudicial and reversible error.

APPEAL by defendants from *Nettles, J.*, at October Term, 1940, of GUILFORD.

Civil action to recover damages for the death of plaintiff's intestate alleged to have been caused by the negligence, default, or wrongful acts of the defendants.

At an early hour on the morning of 6 June, 1939, Mildred Hester, a girl sixteen years of age, was riding in a Ford coupe with Herbert Coleman driving and D. F. Campbell sitting on her right, when the car crashed into the side railing of White Oak Bridge over Buffalo Creek on Summit Avenue in the city of Greensboro, throwing Campbell and plaintiff's intestate out of the car and upon the hard-surfaced highway in front of an on-coming truck owned by the Horton Motor Lines, Inc., and driven at the time by H. L. Helms. The young girl was taken to the hospital and died shortly thereafter from the injuries she sustained.

As a consequence, Herbert Coleman was indicted and convicted of manslaughter. He was given a suspended sentence on condition that he pay to the mother of the deceased the sum of $1,500.

Thereafter, this action was instituted by the young girl's mother as administratrix of her estate. The plaintiff alleges that her intestate's death was caused by the wrongful acts of the driver of the car in which she was riding and the driver of the truck. She seeks to hold the corporate defendant on the principle of *respondeat superior*.

The corporate defendant and the driver of the truck disclaim any injury to plaintiff's intestate on their part, as they contend her body was not run over or hit by the truck.

The defendant Coleman says the crash was the result of a blow-out, an accident, and he pleads the judgment in the criminal prosecution as a bar or an estoppel.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff's intestate injured and killed by the negligence of H. L. Helms and Horton Motor Lines, Inc., as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff's intestate injured and killed by the negligence of Herbert Coleman, as alleged in the complaint? Answer: 'Yes.'

"3. Did the plaintiff's intestate, by her own negligence, contribute to her injury and death, as alleged in the answer? Answer: 'No.'

"4. What amount of damages, if any, is the plaintiff entitled to recover? Answer: '$6,570.00
1,500.00
$5,070.00.'"

From judgment on the verdict, the defendants appeal, assigning errors.

Frazier & Frazier and Robert A. Merritt for plaintiff, appellee.
Sapp, Sapp & Atkinson for defendants, Motor Lines and Helms, appellants.
J. O. Atkinson, Jr., for defendant, Coleman, appellant.

STACY, C. J. The instant case is controlled by the principles announced in *Lewis v. Hunter,* 212 N. C., 504, 193 S. E., 814, and *West v. Baking Co.,* 208 N. C., 526, 181 S. E., 551.

APPEAL OF HERBERT COLEMAN.

The record discloses a clear case of negligence on the part of the driver of the Ford coupe in which plaintiff's intestate was riding at the time of her injuries. He and his companions had spent a night out, riding around town, drinking, etc. It ended in tragedy. Coleman's contention that his car struck the side of the bridge as a result of a blowout was not accepted by the jury.

The defendant's plea of estoppel by reason of the payments made in the criminal prosecution was properly overruled. *Meacham v. Larus & Bros. Co.,* 212 N. C., 646, 194 S. E., 99; *LeRoy v. Steamboat Co.,* 165 N. C., 109, 80 S. E., 984. The matters here litigated were not involved in that action, nor were they there asserted, either in the right now claimed or otherwise. *Gillam v. Edmonson,* 154 N. C., 127, 69 S. E., 924. The jury has credited him with all payments made in the criminal prosecution, and this is as much as he can expect in the present action. *Holland v. Utilities Co.,* 208 N. C., 289, 180 S. E., 592; 24 C. J. S., 1260.

There is one exception which the defendants stress with confidence. It deserves to be noticed. On the second day after the injury a traffic officer of the city of Greensboro, F. B. Money, took the defendant Helms, the driver of the truck, to the scene of the wreck and there had Helms describe the situation and point out to him how it all happened. Over objection, Money was permitted to relate on the witness stand what Helms had said to him about the accident and how it occurred. It is readily conceded that at the time this evidence was offered, it was competent only as against the defendant Helms, and was not competent as

against his employer or the other defendant. *Parrish v. Mfg. Co.*, 211 N. C., 7, 188 S. E., 817. What an agent or employee says after an event, merely narrative of the past occurrence, is generally regarded as hearsay and is not competent as substantive evidence against the principal or employer. *Hubbard v. R. R.*, 203 N. C., 675, 166 S. E., 802. It appears, however, that the defendant Helms later took the witness stand and gave in substance the same testimony. This made the evidence of officer Money competent in corroboration, and rendered the prior exception feckless.

The impression is gained from a careful perusal of the remaining exceptions that the verdict and judgment should be upheld as against the defendant Coleman. It would serve no useful purpose to consider the assignments in detail or *seriatim*, as they only call for the application of familiar principles. They are not sustained.

APPEAL OF HORTON MOTOR LINES, INC., AND H. L. HELMS.

The appeal of the driver of the truck and his employer presents a different case from that of the defendant Coleman. Helms testified that he passed the scene of the wreck without striking the body of the injured girl as it lay prone upon the pavement and that he stopped immediately thereafter and returned to render assistance. The plaintiff contends that the truck ran over the deceased and hastened her death. Helms was not permitted to testify that, in his opinion, if the loaded truck, weighing 37,500 pounds, had passed over any part of the body of the deceased "she would have been crushed or smashed." Whereupon the defendants called Dr. A. J. Tannenbaum, a medical expert, who saw the deceased and attended her before her death. He proffered the opinion that, from a professional examination of the injuries found upon the body of the deceased—considering the nature, condition and position of the wounds—none of them was caused by a truck striking or passing over her body. This evidence was excluded. True, he was allowed to say that in his opinion the injuries found upon the body of the deceased came from her striking the concrete when she was thrown from the car, but under the decisions in *George v. R. R.*, 215 N. C., 773, 3 S. E. (2d), 286, and *McManus v. R. R.*, 174 N. C., 735, 94 S. E., 455, it would seem that this witness, who proposed to speak as an expert and from a professional and personal examination of the body of the deceased, was competent to give in substance the evidence sought to be elicited. It apparently comes within the purview of expert, opinion evidence. *Ferebee v. R. R.*, 167 N. C., 290, 83 S. E., 360; *Parrish v. R. R.*, 146 N. C., 125, 59 S. E., 348; *S. v. Jones*, 68 N. C., 443. The materiality of the evidence is not questioned. It goes to the heart of the case so far as the corporate

defendant and the driver of the truck are concerned. Its exclusion entitles them to a new trial.

On appeal of Herbert Coleman,

No error.

On appeal of Horton Motor Lines, Inc., and H. L. Helms,

New trial.

J. L. MOREHEAD v. H. L. BENNETT.

(Filed 31 May, 1941.)

1. Receivers § 11—

A receiver's authority to sell real estate is predicated upon, and limited by, the court's order of sale, and the sale is made effective by the court's order of confirmation, and therefore, in ascertaining the receiver's authority to sell and in determining what land is conveyed, the order of sale, the report of sale, and the order of confirmation must be considered together as one instrument.

2. Same—

It is the duty of the purchaser at a receiver's sale to see that the receiver was authorized by the court to make the sale, that the sale was made under such authority, that the sale was confirmed, and that the deed accurately described the land which the receiver was directed to sell.

3. Same—Receiver's deed cannot convey property which he was not authorized and directed to sell.

A receiver was authorized and directed to abandon certain lots which were subject to municipal liens for public improvements, and was further ordered to sell all the property of the insolvent corporation "except such lots as are surrendered to the city as herein provided for." The report of sale recited the land sold as all the real estate of the corporation in the city "consisting of certain unimproved lots or other real estate." The order of confirmation described the land in the language of the receiver's report. The deed to the purchaser recited the order of sale, including the direction for the abandonment of certain lots to the city. *Held:* The purchaser did not acquire title to the lots directed by the court to be abandoned to the city.

DEVIN, J., not sitting.

APPEAL by plaintiff from *Stevens, J.*, at December Term, 1940, of DURHAM. Affirmed.

Civil action to compel specific performance of a contract to purchase real estate.

The receiver appointed for the Durham Land & Security Company, an insolvent corporation, reported to the court that certain land belonging to the corporation, situate within the corporate limits of the city of Durham, was subject to assessments for streets, sewer, gas and water in

an amount equal to or in excess of its value and recommended that such land be abandoned to the city, which held tax sales certificates therefor. Thereupon the court "Ordered that the Receiver is authorized, instructed and directed to abandon those lots, and to surrender same to the City of Durham, against which street paving assessments and assessments for gas, water and sewer connections had been levied by the City."

It was further "Ordered That the Receiver be, and he is hereby authorized and directed to sell all of the property, estates, and assets of the defendant, Durham Land and Security Company, except such lots as are surrendered to the City of Durham as herein provided for, said sale to be held, etc. . . ."

Pursuant to said order, the receiver, after due advertisement, sold said land on 16 December, 1933, at public auction to plaintiff. He reported the sale to the court for confirmation.

The report of sale described the land sold as follows: "All of the real estate or rights, titles or interest in the real estate of the Durham Land & Security Company, consisting of certain unimproved lots or other real estate in the eastern section of the City of Durham, or adjacent thereto or wheresoever located."

The court, on 29 December, 1933, entered a decree of confirmation reciting that sale was had pursuant to the former order of the court and describing the land in the language contained in the receiver's report.

Deed was executed by the receiver 2 January, 1934, and delivered to the purchaser. This deed recites the order of sale, specifically quoting that part thereof which directed the sale of the land of the corporation "except such lots as are surrendered to the City of Durham as herein provided for." It further recites that the land was sold pursuant to the order of sale and that the order of sale had been complied with in all respects.

In 1940, plaintiff contracted to sell to defendant and defendant agreed to purchase a lot situate on the corner of Holloway and Flora Streets, which lot is admittedly one of those the court directed to be abandoned to the city. The defendant declined to comply with his contract for that the plaintiff's title is defective and he cannot convey a good, marketable title as he contracted to do. Thereupon this action was instituted to compel performance by defendant. When the cause came on to be heard on the pleadings the court, "being of the opinion that title to the lot in question, and described in the complaint, was not transferred or conveyed to plaintiff by the deed of the receiver of the company holding title to said lot," entered judgment denying the relief prayed and dismissing the action. Plaintiff excepted and appealed.

Albert W. Kennon, Jr., for plaintiff, appellant.
No counsel for defendant, appellee.

BARNHILL, J. Plaintiff asserts that no abandonment of the property subject to assessment was ever effected by the execution of any instrument of conveyance or release and that the city of Durham, on 19 August, 1940, executed a disclaimer, renouncing all claim to said property, but reserving its tax and assessment liens. Hence, he argues, title to all of the property of the insolvent corporation vested in him.

Plaintiff's title is not dependent upon what the city did or did not receive. Nor is the effectiveness of the order directing an abandonment material. He acquired title to only so much of the property as was sold by the receiver and conveyed in his deed.

The receiver had no authority to sell the real estate of the corporation, except upon the order of the court and he could sell only such as the court directed. 23 R. C. L., 98. Upon sale being made, it was the duty of the purchaser to see that such receiver was authorized by the court to make sale; that the sale was made under such authority; that the sale was confirmed; and that the deed accurately described the land which the receiver was directed to sell. 23 R. C. L., 101.

There can be no judicial sale except upon a preëxisting order of sale. Freeman, Void Jud. Sales, 3rd, p. 1. If a sale be void because it included property not described in the decree or order of sale, an order confirming it is necessarily inoperative. Freeman, etc., p. 73. The order directing the sale and the order confirming it give vitality to the purchase. Freeman, etc., 74. Both are essential. Neither, alone, is sufficient.

Hence, to ascertain the receiver's authority and to determine what land was conveyed to plaintiff the order of sale, the report of sale and the decree of confirmation must be considered together as one instrument.

This property was expressly excepted from the order of sale. The property sold was duly advertised and the sale was had "pursuant to the order of sale." It was so reported to the court and the decree of confirmation so recited. It is, therefore, apparent that the receiver did not convey or attempt to convey any of the property which he was directed to abandon to the city.

This conclusion is confirmed by the deed itself. Express reference is made to the order of sale and the sale thereunder, and that part of the decree which excepted the property to be released to the city is quoted *verbatim.*

The report by the receiver that he had sold the property of the corporation, incorporating a description which, standing alone, is sufficient to include all the property owned by the corporation at the time of the appointment of the receiver, as confirmed by the court, is not sufficient to pass title to the land directed to be released and abandoned to the city. The record as a whole discloses that it was not so intended.

Likewise, the suggestion that the judge confirmed the sale of land not included in but expressly excepted from the original order and thus validated the sale of the *locus in quo* is without merit and cannot be sustained.

The plaintiff, under the deed to him from the receiver, has no just claim to the lot in controversy and the other land "directed to be abandoned."

To whom the property belongs since the city has disclaimed title thereto is not at present our concern. That is another matter.

The judgment below is

Affirmed.

DEVIN, J., not sitting.

CITY OF DURHAM v. A. J. POLLARD AND E. G. BELVIN, SHERIFF OF DURHAM COUNTY.

(Filed 31 May, 1941.)

1. Judgments § 20—

The lien of a docketed judgment attaches to all land situated in the county in which the judgment is docketed which is owned by the judgment debtor at the time the judgment is docketed, or which is acquired by him at any time within ten years of the date of the rendition of the judgment, but it is not a lien on land conveyed by the judgment debtor by deed duly registered prior to the docketing of the judgment. C. S., 614.

2. Deeds § 10—

A deed is ineffective as against creditors and purchasers for value from the grantor until the deed is registered, but upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantor acquired title is unregistered. C. S., 3309.

3. Judgments § 20—

The *locus in quo* was conveyed to the judgment debtor by unregistered deed, but some five years prior to the docketing of the judgment the judgment debtor conveyed the property by deed which was duly recorded. *Held:* The lien of the judgment did not attach to the *locus in quo*.

APPEAL by defendant A. J. Pollard from *Carr, J.*, at March Term, 1941, of DURHAM.

Civil action to restrain sale of certain land under execution and to permanently enjoin defendants from otherwise interfering with plaintiff's use, title and possession of the same.

The parties waived jury trial, and the case was heard upon an agreed statement of facts. Substantially, the pertinent facts are these:

1. (a) J. R. Patton, Jr., and C. Corbett Cole, by virtue of a deed from Clarence Thorp, duly registered 4 August, 1924, became the owners in fee simple of the land involved in this action;

(b) J. R. Patton, Jr., and wife and C. Corbett Cole and wife conveyed said land to S. M. Credle by deed dated 15 August, 1925, acknowledged and delivered 20 August, 1925, and registered 15 August, 1931;

(c) S. M. Credle and wife conveyed the same to Gregory Sales Company by deed dated 19 August, 1925, acknowledged and delivered on or about 20 August, 1925, and duly registered 25 June, 1926;

(d) The said land was conveyed by Gregory Sales Company to Durham Realty and Insurance Company, by it to John Sprunt Hill and by him to plaintiff by successive deeds duly registered.

2. Each of the deeds in the chain of conveyances above described was based upon valuable consideration, was duly executed and delivered and registered as stated, and was sufficient in form to convey and purported to convey the land in question by proper and sufficient description.

3. On 1 June, 1931, the Merchants Bank obtained a judgment against S. M. Credle in the sum of $2,500, with interest and cost, less certain credit, and same was duly docketed in office of clerk of Superior Court of Durham County on the same day. This judgment was transferred and assigned to defendant A. J. Pollard, who now owns it.

4. A. J. Pollard, assignee of said judgment, has caused an execution to be issued thereunder to the sheriff of Durham County, who, by virtue thereof, is advertising said property for sale at the courthouse door.

Upon these facts the court, being of opinion that the judgment of the Merchants Bank against S. M. Credle, now owned by A. J. Pollard, as assignee, is not a lien upon the land involved, and that, therefore, defendants have no right to sell the land, and being further of the opinion that plaintiff is entitled to a permanent injunction restraining defendants from advertising or selling or attempting to sell the same under any execution issued or which may be issued in the future under authority of said judgment, entered judgment in accordance with such opinion.

Defendant A. J. Pollard appeals to Supreme Court and assigns error.

Claude V. Jones for plaintiff, appellee.

S. C. Brawley and B. I. Satterfield for defendant, appellant.

WINBORNE, J. The question for decision is this: Where S. M. Credle, the grantee of land under an unregistered deed, conveys the same to Gregory Sales Company, for valuable consideration, by deed which is duly registered, is a judgment, thereafter obtained by the Merchants

Bank against S. M. Credle and docketed in the county where the land lies before the deed to Credle is registered, a lien upon the land? The answer is "No."

A docketed judgment, directing the payment of money, is a lien on the real property situated in the county in which the judgment is docketed and owned by the judgment debtor at the time the judgment is docketed, or on such land as is acquired by him at any time within ten years from the date of the rendition of the judgment. However, "it is not a lien on land which has been conveyed by the judgment debtor by deed, duly registered prior to the docketing of the judgment." C. S., 614. *Helsabeck v. Vass,* 196 N. C., 603, 146 S. E., 576.

Furthermore, the Connor Act, Laws 1885, chapter 147, now C. S., 3309, provides that "no conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies . . ." However, an unregistered deed conveys title from date of its delivery as against the grantor and all others except creditors of and purchasers for value from the grantor, donor or lessor. *Warren v. Williford,* 148 N. C., 474, 62 S. E., 697; *Bank v. Mitchell,* 203 N. C., 339, 166 S. E., 69, and cases there cited.

Hence, the Connor Act protects only creditors of the grantor, bargainor, or lessor, and purchasers for value, against an unregistered conveyance of land, contract to convey, or lease of land for more than three years. *Gosney v. McCullers,* 202 N. C., 326, 162 S. E., 746, and cases cited.

This means that where the owner of land conveys the same by deed, or contracts to convey it, or leases it for more than three years, such deed, contract or lease, until registered in the county where the land lies is invalid only as against his creditors and any who purchase for value from him.

In the present case the judgment is not against Patton and Cole, the grantors, in the deed to Credle which was unregistered on the first of June, 1931, the date on which the judgment against Credle was docketed. More than five years prior thereto and for valuable consideration Credle had conveyed the land to Gregory Sales Company by a deed which was registered on 25 June, 1926. Applying the principles above set forth, that deed conveyed the title from the date of its delivery as against Credle and all others except his creditors and purchasers for value from him. However, under the provisions of the Connor Act it became valid upon registration, even as against his creditors and purchasers for value from him.

The case of *Glass v. Shoe Co.*, 212 N. C., 70, 192 S. E., 899, and others relied upon by appellant, are distinguishable in factual situations from the case at bar.

Judgment of the court below is

Affirmed.

MRS. RUTH LEE SHARPE v. GEORGE ISLEY AND WIFE, JEWEL ISLEY, GROVER ISLEY AND WIFE, BETTY ISLEY, EULA ISLEY AND HUSBAND, ZEB ISLEY, AND NEWMAN ISLEY.

(Filed 31 May, 1941.)

1. Wills § 31—

In construing a will, the intention of the testator must be ascertained from the language in which it is expressed, and it is the duty of the court to give the words used their legal effect.

2. Wills § 33c—

A fee may not be limited after a fee unless there be some contingency which defeats or abridges the estate of the first taker in order to make room for the ulterior limitation.

3. Wills § 34a—Testator's wife held to take fee simple without limitation over to testator's heirs.

A devise to testator's wife, "to her and her heirs by me," vests in the wife a fee tail special, converted by statute into a fee simple, and her estate is not affected or limited to a life estate with remainder in fee to the heirs of testator by subsequent provision in the item that testator's wife should have exclusive and sole use of the property and "should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple," in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator.

APPEAL by defendants from *Carr, J.*, at Chambers, 22 February, 1941. From ALAMANCE. Affirmed.

This was a proceeding under the Declaratory Judgment Act for the construction of the will of Joel J. Sharpe with respect to plaintiff's title to certain land described in the will. There was no controversy as to the facts. From judgment that plaintiff was owner of the land in fee simple, defendants appealed.

John H. Vernon and Thos. C. Carter for plaintiff, appellee.
Long, Long & Barrett for defendants, appellants.

DEVIN, J. The third item in the will of Joel J. Sharpe, concerning which this controversy arose, was expressed in the following words: "I

devise to my beloved wife, Ruth Lee Sharpe, to her and her heirs by me, all of my personal property of whatever nature and kind which may be found in my possession at my death, and all of my real estate consisting of my home place where I now live, being a farm of about two hundred and seventy-five (275) acres, and any and all other real estate that I may acquire or come in possession of during my life time. My wife is to have the exclusive and sole use of both my personal and real property and should she have living heirs by me, then all my estate, save and except as otherwise devised, shall belong to her and her heirs in fee simple."

It is admitted that plaintiff is the Ruth Lee Sharpe referred to in the quoted item of the will of Joel J. Sharpe, and that no children were born of her marriage to the testator.

It is apparent that the language in the first clause of Item III of the will, wherein the testator devised his real estate to his wife, "Ruth Lee Sharpe, to her and her heirs by me," constituted a fee tail special, which by the statute was converted into a fee simple (*Whitley v. Arenson, ante,* 121; *Morehead v. Montague,* 200 N. C., 497, 157 S. E., 793; *Revis v. Murphy,* 172 N. C., 579, 90 S. E., 573); and the only question is whether the subsequent words, "and should she have living heirs by me, then all my estate, save and except as otherwise devised, shall belong to her and her heirs in fee simple," should be construed to defeat the first provision, and to limit plaintiff's tenure to a life estate with remainder in fee to the heirs of the testator.

If the testator had incorporated in his will a provision for a limitation over in the event his wife did not have "living heirs" or children by him, a different situation would have been presented. *Daly v. Pate,* 210 N. C., 222, 186 S. E., 348. But there are no such words here and we may not add them to the will in order to serve a supposed intent. The intention of the testator must be ascertained from the language in which it is expressed, and it is the duty of the court to give the words used their legal effect. *Williamson v. Cox,* 218 N. C., 177. There was no reverter or limitation over in the event plaintiff should not have children born of her marriage with testator. *Rose v. Rose, ante,* 20; *Willis v. Trust Co.,* 183 N. C., 267, 111 S. E., 163; *Silliman v. Whitaker,* 119 N. C., 89, 25 S. E., 742.

The language used by the testator in the latter portion of Item III is susceptible of the more reasonable interpretation that he intended to reaffirm his desire that his widow should have the land, and that in the event she bore him children it should belong to her and her heirs in fee simple. This may not be properly interpreted to have the effect of defeating the previously expressed intention which carried the legal significance of a devise of the land to her in fee simple. It has long been the

established law that there can be no limitation of a fee after a fee unless there be some contingency which defeats or abridges the estate of the first taker, in order to make room for the ulterior limitation. *Daniel v. Bass,* 193 N. C., 294, 136 S. E., 733; *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121; *Smith v. Brisson,* 90 N. C., 284; *McDaniel v. McDaniel,* 58 N. C., 351.

The judge below has correctly interpreted the effect of the language of the will under consideration and his judgment thereon is

Affirmed.

LILLIAN GRAHAM v. MARGARET HOKE, ADMINISTRATRIX OF J. G. PHILLIPS, DECEASED.

(Filed 31 May, 1941.)

1. Banks and Banking § 8a: Bills and Notes § 1—

An order on a bank, in the form of a check, to pay a designated person a specified sum at the death of the drawer is entirely without effect, since by its terms it has no effect as long as the drawer lives, and his death revokes any authority of the bank to make payment to the drawee.

2. Wills § 5—

The complaint alleged that plaintiff was a member of intestate's family and performed domestic services for him at his request in reliance upon a written agreement for payment. The written agreement alleged consisted of an order on a bank in the form of a check to pay plaintiff a designated sum out of drawer's estate. *Held:* The written agreement declared upon being entirely ineffective, and there being no allegation of an implied contract of *quantum meruit,* defendant administratrix' demurrer should have been sustained.

APPEAL by defendant from judgment of *Nimocks, J.,* overruling demurrer, at March Term, 1941, of LEE.

Hastings, Booe & Abbott for plaintiff, appellee.
K. R. Hoyle for defendant, appellant.

SCHENCK, J. The pertinent portions of the complaint are as follows: "3. That on January 26, 1925, the deceased, J. G. Phillips, entered into a written agreement with the plaintiff, in which he promised the plaintiff $2,000.00, to be paid to her out of his estate at his death, said agreement is hereby incorporated by reference in as full and ample a manner as if set out word for word in these pleadings, and which contract will be offered in evidence at the trial of this cause.

"4. That prior to the execution of the agreement referred to above, and as consideration for same and for about two years beginning in 1919, immediately after the death of J. G. Phillips' second wife, the plaintiff worked for J. G. Phillips in his store in Sanford, and also helped keep house and care for his three children. That J. G. Phillips induced plaintiff, in the Fall of 1921, to go to the Mary Potter Boarding School and take a three-month special course in cooking and sewing; and in the Spring of 1922 the plaintiff, at the request of J. G. Phillips, went to Morristown, Tenn., and kept house for J. G. Phillips and his invalid third wife. From 1922 until death of J. G. Phillips' third wife, in 1924, plaintiff cared for J. G. Phillips' invalid wife and his home in Morristown, and after her death, and upon request of J. G. Phillips, came with J. G. Phillips to Winston-Salem and kept J. G. Phillips' house and cared for J. G. Phillips' children. During all this time plaintiff was not receiving any weekly pay, but was treated as a member of J. G. Phillips' family, J. G. Phillips informing her that she would be taken care of at his death and giving her the contract referred to in paragraph 3 of this complaint as evidence of his promise and intentions."

The alleged "written agreement" is in words and figures as follows (italics indicate handwriting in ink, the balance of instrument being a printed form):

"Winston-Salem, N. C.
Jan. 26, 1925 No.....

WACHOVIA BANK and TRUST COMPANY

PAY TO THE
ORDER OF *Lillian Graham at my death*
$2000.00 *TWO THOUSAND* DOLLARS
out of my estate payable $500
at each payment till all has
been paid.

J. G. Phillips"

The defendant demurred to the complaint upon the grounds that it does not state facts sufficient to constitute a cause of action.

The "written agreement" alleged in the complaint cannot be construed *ex vi termini* as a valid contract to pay a member of the family of the deceased for domestic services rendered, since it is in the form of a cheque payable upon the death of the drawer. It became *functus officio* at the death of the drawer, as the death of the drawer before presentation of the cheque for payment revoked any authority of the bank to make payment to the drawee; and the cheque by its terms never had any validity as long as the drawer lived.

It is specifically alleged that the plaintiff was a member of the family of the deceased in these words: "During all this time plaintiff was not receiving any weekly pay, but was treated as a member of J. G. Phillips' family." As a member of the family of the deceased she was presumed to have rendered the alleged services gratuitously, and in the absence of an allegation of a valid special contract that she was to be paid therefor there is no cause of action alleged. The plaintiff is not aided by the allegation that the deceased informed her "that she would be taken care of at his death and giving her the contract referred to . . . as evidence of his promise and intentions." The words of this allegation do not create a special contract of the alleged "written agreement" which had neither vitality nor validity as such; and no implied contract to pay for the services rendered upon a *quantum meruit* is alleged.

The plaintiff having declared upon a "written agreement," as a special contract, she is not allowed to likewise declare upon an implied contract of *quantum meruit,* and in truth she has not so declared. True she may have pleaded an implied contract as well as a special contract in the alternative, but when the case came on for trial she could have been compelled to elect upon which declaration she would proceed.

The alleged "written agreement," not being executed in a manner to constitute testamentary disposition, cannot be construed as such, and furthermore this is not an appropriate form of action to establish a will.

In view of the allegation that the plaintiff was a member of the family of the deceased when she rendered the alleged domestic services, and of the absence of an allegation of a valid special contract to be paid therefor, and of the absence of an allegation of an implied contract of *quantum meruit,* we are constrained to hold that his Honor erred in overruling the demurrer.

The judgment of the Superior Court is

Reversed.

STATE v. MARVIN LEE JOHNSON, ALIAS HARRISON.

(Filed 31 May, 1941.)

1. Criminal Law § 53c—

Slight inaccuracies in the charge in stating portions of the evidence will not be held for reversible error when not called to the court's attention in apt time and when the charge construed as a whole is not prejudicial.

2. Criminal Law § 53h—

The charge will be construed contextually as a whole.

3. Criminal Law §§ 53e, 53g—

A charge that the State contended that the prosecutrix was corroborated in every detail by a witness put on the stand by defendant who vouched for the witness' veracity cannot be held for error as an expression of opinion by the court, C. S., 564, it being incumbent upon defendant if he thought the statement of the contention erroneous or misleading to have called the matter to the court's attention in apt time.

APPEAL by defendant from *Phillips, J.*, at January Special Term, 1941, of GUILFORD.

Criminal prosecution tried upon indictment charging the defendant with rape.

The prosecutrix, Della Black, and the defendant are both members of the Negro race. They live in High Point. The prosecutrix is twenty-four years of age; the defendant twenty-eight.

The State's evidence tends to show that on the night of 15 November, 1940, the prosecutrix got dinner at a cafe in High Point about a block and a half from where she lives. While in the cafe she saw the defendant, whom she knew by sight but not by name. She left for her home around eleven o'clock and as she approached her house she saw the defendant standing near the doorsteps. He seized her, struck her in the face, held his hand over her mouth, twisted her arm behind her back, threatened to kill her, carried her to a briar patch some distance away and ravished her, and then assisted her home.

The evidence offered by the defendant tends to show that Della Black left the cafe before the defendant in company with another man; that she was later found by the defendant lying by the path in an unconscious condition, with her face battered and bruised; that he helped her to her home, and that she was not assaulted by the defendant.

There was evidence in corroboration of the State's case and of the good character of the prosecutrix. The defendant also offered evidence of his good character.

Verdict: Guilty of the felony of rape whereof the defendant stands indicted.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

R. Kennedy Harris for defendant.

STACY, C. J. The case presents little more than a disputed question of fact. The exceptions all relate to the charge. While there may be some slight inaccuracies in stating portions of the evidence, they were not

called to the judge's attention, and, in the main, are really not important. *S. v. Sterling,* 200 N. C., 18, 156 S. E., 96. Nor did the defendant think so at the time. Considered contextually and as a whole, the defendant has no just cause to complain either at the context or the form of the charge. It is free from reversible error. *S. v. Johnson,* 207 N. C., 273, 176 S. E., 581. A detailed consideration of the exceptions would only result in the restatement of familiar principles. The exceptions are not sustained.

The recitation of the State's contention that the prosecutrix was "corroborated in every detail by Mildred Williams," defendant's witness, and that the defendant who put her on the stand "vouches for her veracity," to which the defendant excepts, is not in violation of the statute, C. S., 564, prohibiting an expression of opinion on the part of the judge, for the court was here giving the State's contention in regard to the matter. If thought to be erroneous or misleading, it should have been called to the court's attention at some appropriate time before the issue was submitted to the jury. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. This was not done.

The case is controlled by the principles announced in *S. v. Jessup, ante,* 620. Compare *S. v. Blue, ante,* 612.

The verdict and judgment will be upheld.

No error.

STATE v. CHARLES E. INSCORE.

(Filed 31 May, 1941.)

1. Automobiles § 32c—

Evidence that defendant's culpable negligence in the operation of his automobile resulted in the death of an occupant of another car *is held* sufficient to have been submitted to the jury and fully justifies its verdict of manslaughter.

2. Criminal Law § 81c—New trial will not be awarded for mere technical error which is not prejudicial.

In this prosecution for manslaughter committed in the operation of an automobile, one of the State's witnesses made a written statement shortly after the collision. Upon the trial, the solicitor, thinking that the witness' testimony was at variance with the prior written statement, asked and was permitted to cross-examine the witness. Thereafter the solicitor offered portions of the written statement in evidence to corroborate the witness. *Held:* Even if some technical irregularities be conceded, the culpable conduct of defendant being abundantly established by other witnesses, the matter cannot *be held* to constitute prejudicial error.

APPEAL by defendant from *Pless, J.,* at October Term, 1940, of FORSYTH.

Criminal prosecution tried upon indictment charging the defendant with the felonious slaying of one J. L. McAlister.

Verdict: "Guilty of manslaughter with the recommendation for March" (mercy).

Judgment: Imprisonment in the State's Prison for a term of not less than 4 nor more than 7 years.

The defendant appeals, assigning errors.

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

John D. Slawter and Richmond Rucker for defendant.

STACY, C. J. On 19 August, 1940, following a wild automobile ride through the streets of Winston-Salem, in which he was pursued by an officer, the defendant collided with a car at a filling station near the intersection of Sprague and Peachtree Streets, occupied at the time by J. L. McAlister and his wife. Mr. McAlister died within thirty minutes of injuries sustained in the collision. The evidence fully justifies the verdict of manslaughter.

Several exceptions were taken to the manner in which the solicitor was allowed to examine one of the State's witnesses, J. P. Davis, Jr., who was a "thumb rider" in the defendant's car at the time of the collision. Davis had made a statement in writing to the police shortly after the occurrence, and the solicitor gained the impression that his testimony on the stand was at variance with his prior written statement. Whereupon, he asked the privilege of cross-examining the witness, which was granted. Following the cross-examination, the solicitor said he would offer portions of the written statement in corroboration of the witness. The record is not quite clear as to what then happened in respect of the matter: "The Court: You can offer it. I want to think about that a little. The Court permitted you to cross-examine the witness and now you offer the statement to corroborate him." Objection; overruled; exception.

The question thus presented by the record has been discussed in both briefs with much learning and manifest research. Even if some technical irregularity be conceded, we think the matter is too attenuate, considering the case in its entirety, to warrant a disturbance of the result. *S. v. Noland,* 204 N. C., 329, 168 S. E., 412. The culpable conduct of the defendant is abundantly established by other witnesses. The cases cited by the defendant, *S. v. Freeman,* 213 N. C., 378, 196 S. E., 308; *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; and *S. v. Melvin,* 194 N. C., 394, 139 S. E., 762, are not controlling on the instant record.

The remaining exceptions are directed to portions of the charge and the alleged insistence of the court upon a verdict. They present no new question of law or one not heretofore settled by the decisions. The case was tried in compliance with the principles announced in *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

A careful perusal of the entire record engenders the conclusion that the validity of the trial should be upheld.

No error.

ELIZABETH F. CROOM v. J. H. CORNELIUS.

(Filed 31 May, 1941.)

1. Wills § 35c—

An unrestricted devise followed by a provision that in the event the devisee died intestate, testator wished such devisee's share to descend to her children, vests the fee in the devisee, C. S., 4162, the precatory words being repugnant to the estate previously devised and insufficient to limit or divest it.

2. Wills § 46: Estoppel § 2—

Testator devised to each of his children certain lands in fee but by subsequent clause provided that if they should die without issue, the land should "revert to my other children or grandchildren." Thereafter two of the children conveyed their interests to the third child. *Held:* The child to whom the others conveyed their interests may convey the fee, since even if the devisees took a defeasible fee, the deeds executed by the two devisees would estop them and their heirs, and any interest which might accrue to them under the will would feed the estoppel.

APPEAL by defendant from *Grady, Emergency, Judge,* at April Term, 1941, of FORSYTH. Affirmed.

This was an action to determine the title to land, the subject of a contract to convey. Judgment was rendered, upon an agreed statement of facts, that plaintiff's title was good. Defendant appealed.

Hutchins & Parker for plaintiff.
Henry Roane for defendant.

DEVIN, J. The determination of the question of title to the land contracted to be conveyed involves the construction of the will of J. P. Fearrington. The testator devised his property to his wife and to their three children (one of whom is the plaintiff) in these words: "I wish my estate of whatever nature equally divided among the aforesaid four." By a

subsequent clause the testator added this provision to his will: "In the event that either child die without will, I wish that child's share to descend to his or her children (share and share alike), or if there are no surviving children to go not to any inlaws or other outsiders, but revert to my other children or grandchildren."

The provision first quoted contains an unrestricted devise, and nothing else appearing, carried the fee. C. S., 4162; *Heefner v. Thornton,* 216 N. C., 702, 6 S. E. (2), 506. In the subsequent clause, the words "in the event that either child die without will, I wish that child's share to descend to his or her children," must be held repugnant to the estate previously devised and insufficient to limit or divest it. *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862.

The only difficulty arises upon consideration of the latter portion of the clause, which contains this language: "if there are no surviving children . . . to revert to my other children or grandchildren." By these words it is apparent that the testator intended to provide that in the event either of his three children should die without surviving issue, that child's share should pass to the other children and their lineal descendants. It was admitted that by proper deed all the other devisees under the will have conveyed their interests in the land to the plaintiff. So that whether, under the principle enunciated in *Barco v. Owens, supra,* the clause should be disregarded, or whether it should be construed as providing a contingency upon the happening of which the title may be defeated, *Hampton v. West,* 212 N. C., 315, 193 S. E., 290, it is apparent that in the most favorable light for the defendant a fee was devised to the plaintiff and her brother and sister defeasible only in the event of the death of either without surviving issue. Hence, upon the happening of the condition of defeasance, under the will the title must descend in the same channel and by the same line of descent as if no provision for defeasance had been inserted in the will. That is upon the death of either of the three children, without surviving issue, the title would descend successively to the others. There is no further limitation. *Heath v. Corey,* 215 N. C., 721, 2 S. E. (2d), 858. Plaintiff's title is supported by deed from all the other devisees under the will, from all those to whom in the event of the happening of the contingency the land would descend. Hence they and their heirs would be estopped by their deed. *James v. Griffin,* 192 N. C., 285, 134 S. E., 849; *Crawley v. Stearns,* 194 N. C., 15, 138 S. E., 403; *Woody v. Cates,* 213 N. C., 792, 197 S. E., 561; *Ins. Co. v. Sandridge,* 216 N. C., 766, 6 S. E. (2d), 876; *Thames v. Goode,* 217 N. C., 639, 9 S. E. (2d), 485; 10 Am. Jur., 610; 58 A. L. R., 346. The interests of the other devisees, if they should accrue, would feed the estoppel. *Door Co. v. Joyner,* 182 N. C., 518, 109 S. E., 259.

The ruling of the court below that upon the facts agreed plaintiff's deed would convey a good title to the defendant, is

Affirmed.

STATE v. HOWARD McDANIELS.

(Filed 31 May, 1941.)

1. Automobiles § 34—

A driver's license is evidence of a privilege granted by the State to the holder thereof to operate a motor vehicle upon the public highways, and the Legislature has full authority to prescribe the conditions upon which it will be issued and to designate the court or agency through which, and the conditions upon which, it will be revoked.

2. Automobiles § 36—

A municipal court is without authority to revoke a driver's license, the power to suspend or revoke drivers' licenses being vested exclusively in the Department of Revenue, subject to the right of review by the Superior Court. Secs. 18 (e), 19, ch. 52, Public Laws 1935. (Ch. 36, Public Laws 1941.)

3. Same—

A judgment of a municipal court in a prosecution for reckless driving which provides, among other things, that defendant's driver's license be revoked, is insufficient, standing alone, to support a subsequent conviction of driving without license, the burden being upon the State to show that the license was duly revoked.

APPEAL by defendant from *Pless, J.*, at November Term, 1940, of FORSYTH. Reversed.

Criminal action on warrant charging that defendant unlawfully operated a motor vehicle upon a public highway after his driver's license had been revoked.

On 3 January, 1940, defendant was tried in the municipal court of Winston-Salem on a warrant charging reckless driving. There was a verdict of guilty and judgment providing in part "that the defendant's driver's license be revoked for a period of twelve months" was pronounced.

Thereafter, on 23 October, 1940, the warrant appearing of record was issued out of said court. The defendant was tried thereon and convicted. He appealed from the judgment entered to the Superior Court. When the cause was heard in the Superior Court he was again convicted. From the judgment entered the defendant appealed.

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

Wm. H. Boyer and Richmond Rucker for defendant, appellant.

BARNHILL, J. The defendant challenges the sufficiency of the testimony for that there is no evidence that his driver's license was revoked. He bases this argument upon the contention that the municipal court of Winston-Salem was without power to revoke the defendant's license.

The exact nature of the judgment in the original cause does not appear. The only reference thereto is a stipulation of record as follows:

"It is stipulated by the defendant that he was indicted in the Municipal Court of the City of Winston-Salem on January 3, 1940, for reckless driving and that the judgment provided, among other things, that the defendant's driver's license be revoked for a period of twelve months."

This stipulation is subject to either of two interpretations: (1) that the court undertook, by its judgment, to revoke defendant's driver's license; or (2) it directed that the license be revoked in the manner provided by statute.

1. A driver's license is evidence of a privilege granted by the State to the holder thereof to operate a motor vehicle upon the public highways. The Legislature has full authority to prescribe the conditions upon which it will be issued and to designate the court or agency through which and the conditions upon which it will be revoked. This the Legislature has done, prescribing in detail the rules under which such license, once issued, shall be suspended or revoked. Ch. 52, Public Laws 1935. The enforcement of these provisions is vested exclusively in the Department of Revenue of the State, sec. 18 (e), subject to the right of review by the Superior Court, sec. 19. (For present status of law, see ch. 36, Public Laws 1941, as related to sec. 1, ch. 52, Public Laws 1935.)

Any attempt by the municipal court to revoke defendant's license was void for want of jurisdiction.

2. If the municipal court was proceeding under sec. 18, ch. 52, Public Laws 1935, in directing that the defendant's driver's license be revoked, then there is no evidence tending to show that such license was surrendered to and forwarded by the court to the Department of Revenue or that it was received and revoked by the department. As the conviction on the charge of reckless driving was not for a second offense within twelve months, its revocation was not mandatory, sec. 12 (6), but was a matter of discretion resting in the Department of Revenue.

There is nothing in the record to justify the assumption that the judgment, directing that the license be forfeited, was in the form of a suspended sentence. It does not so appear and the burden was on the State.

There is no sufficient evidence to support the verdict. The defendant's motion to dismiss as of nonsuit should have been allowed.

Reversed.

ELIZABETH DUDLEY v. F. E. DUDLEY.

(Filed 31 May, 1941.)

Venue § 1a—

The provision of C. S., 1667, that a wife may institute action for alimony without divorce in the county in which the cause of action arose does not prescribe the exclusive venue, but the wife may institute the action in the county in which she resides at the commencement of the action, C. S., 469.

APPEAL by defendant from *Carr, J.*, at February Term, 1941, of ALAMANCE.

Civil action for alimony without divorce under C. S., 1667.

Plaintiff and defendant were married on 30 September, 1939, and lived together as husband and wife in the city of Wilson until 18 December, 1940, at which time, plaintiff alleges, she was forced to flee from the home of the defendant because of his cruel and barbarous treatment of her and to seek refuge as a matter of personal safety in the home of her brother in Alamance County, where she now resides.

This action was instituted in Alamance County on 15 January, 1941.

The defendant seeks to have the cause removed to Wilson County as a matter of right, for that, the cause of action arose there. Motion denied, and defendant appeals.

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

W. A. Lucas for defendant, appellant.

STACY, C. J. Plaintiff resides in Alamance County; the defendant in Wilson County. The action is for alimony without divorce under C. S., 1667. The question presented is one of venue.

The defendant says the cause of action arose in Wilson County and is to be tried there according to the clear terms of the statute giving the right. The plaintiff says the cause of action arose in Alamance County, and further that she now resides there.

In an action of this kind, *i.e.*, one for alimony without divorce, the statute provides that "the wife may institute an action in the Superior Court of the county in which the cause of action arose," but the venue, thus prescribed, is not exclusive, if either the plaintiff or the defendant reside in another county at the commencement of the action, C. S., 469.

Under the pertinent decisions it would seem that the motion was properly denied. *Rector v. Rector,* 186 N. C., 618, 120 S. E., 195; *Miller v. Miller,* 205 N. C., 753, 172 S. E., 493.

Affirmed.

J. M. CHADWICK, ADMINISTRATOR OF THE ESTATE OF J. I. CHADWICK; J. M. CHADWICK; ELLA SAVAGE; LAURA LEARNED; CHRISTINE MURRAY; BERTHA BURCH; EDWARD CHADWICK; HENRY CHADWICK; FLORENCE FINBERG AND OSCAR CHADWICK, ALL NEXT OF KIN OF J. I. CHADWICK, DECEASED (EMPLOYEE), PLAINTIFFS, v. NORTH CAROLINA DEPARTMENT OF CONSERVATION AND DEVELOPMENT, AND WEST VIRGINIA PULP AND PAPER COMPANY, BOTH EMPLOYERS BEING SELF-INSURERS, DEFENDANTS.

(Filed 31 May, 1941.)

1. Master and Servant §§ 38, 46a—

It must appear affirmatively by evidence or by admission of record that a defendant sought to be held liable under the Workmen's Compensation Act had in his employ five or more employees in order to sustain the jurisdiction of the Industrial Commission, and when this fact is not made to appear, the award of compensation against such defendant must be reversed.

2. Master and Servant § 46a—

In its functions as a court, the jurisdiction of the Industrial Commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver.

APPEAL by defendant, West Virginia Pulp & Paper Company, from *Williams, J.,* at December Term, 1940, of NEW HANOVER. Reversed.

Corbett & Johnson for plaintiffs, appellees.

Poisson & Campbell for defendant, West Virginia Pulp & Paper Company, appellant.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Patton for defendant, North Carolina Department of Conservation and Development.

PER CURIAM. This is a proceeding under the Workmen's Compensation Act for an award to the next of kin of deceased, Chadwick, because of his injury and death by accident while allegedly employed by defendants.

The appealing defendant, West Virginia Pulp & Paper Company, entered into a contract with the State Department of Conservation and

Development under which the Pulp Company contributed one-half the expense (with a maximum limitation based on acreage), the Department one-fourth, and the Federal Government one-fourth—to be placed in a fund handled by the Department—to employ a "forest ranger" or "fire warden" to prevent or control fires on a large tract of timbered land owned exclusively by appellant. Under this contract the deceased, Chadwick, was employed as forest ranger or fire warden—and took the oath of office as fire warden—and was paid the agreed salary by the Department out of the fund so provided. The Pulp Company denied it was an employer.

Chadwick sustained the injury resulting in his death through a fall from a bridge being constructed by the Pulp Company, over which a fire lane was to be established. The Industrial Commission awarded compensation against both defendants, and the award was sustained upon appeal to the Superior Court. From the judgment of the Superior Court affirming the award, the Pulp Company, alone, appealed.

In the case on appeal we find the following stipulation:

"The defendant, West Virginia Pulp & Paper Company, raises no objection as to the cause of the death of the deceased or to the dependents as established by the Commission, or to the fact that deceased was injured in the course of and growing out of his employment, and that part of the transcript of testimony dealing with these points is omitted in this statement of case. The sole question is: By whom was deceased employed?"

Here, however, the appealing defendant raises the question of jurisdiction, based on the fact that there is no evidence in the record that, at the time deceased received his injury, the Pulp Company had as many as five men in its employment. An examination of the record confirms this view of the evidence. Uniformly it has been held that such evidence must affirmatively appear, to sustain the jurisdiction. *Poole v. Sigmon,* 202 N. C., 172, 162 S. E., 198; *Pine v. State Industrial Commission,* 108 Okla., 185, 235 P., 617; *Hardman v. Industrial Commission,* 60 Utah, 203, 207 P., 460. Doubtless an admission in the record as to the fact would be sufficient in lieu of such evidence, but the majority of the Court are of the opinion that the stipulation above quoted is not of that character.

The Industrial Commission, viewed as a court, is one of limited jurisdiction, the defect relates to the subject matter, and jurisdiction cannot be conferred by agreement or waiver. *Reaves v. Mill Co.,* 216 N. C., 462, 5 S. E. (2d), 305; *Hartford Accident and Indemnity Co., et al., v. Thompson* (Ga.), 147 S. E., 50, 51.

On authority of *Poole v. Sigmon, supra,* the judgment affirming the award is reversed as to the appellant West Virginia Pulp and Paper

Company. As to the Department of Conservation and Development, which did not appeal, the judgment, as of course, is binding.

As to appellant

Reversed.

JOE SMITH v. ZELMORE SMITH.

(Filed 31 May, 1941.)

Divorce § 11—

The presence of plaintiff husband in court with his witnesses is tantamount to a tender of such witnesses and a request for findings of fact, and in such circumstances it is error for the court, without finding any facts, to order plaintiff to pay defendant counsel fees "before empanelling the jury to try the issues" involved in the husband's action for divorce and the wife's cross action for divorce *a mensa et thoro*.

APPEAL by plaintiff from order allowing counsel fees by *Rousseau, J.*, at December Term, 1940, of FORSYTH.

W. Avery Jones for plaintiff, appellant.

Hastings, Booe & Abbott for defendant, appellee.

PER CURIAM. Plaintiff instituted divorce action against defendant, his wife, upon the ground of more than thirteen years separation. Defendant filed cross action against plaintiff, her husband, for *divorce a mensa et thoro*, wherein more than thirteen years separation is admitted and the further allegation is made of such treatment of her by him as to render her condition intolerable and life burdensome. In this cross action alimony and counsel fees are asked.

The cause came on for trial. Whereupon the court, without finding any facts, ordered the plaintiff to pay the defendant $50.00 counsel fees, and deferred the question of alimony until the trial of the cause. Included in this order was the following: ". . . said (counsel) fees to be paid before empanelling the jury to try the issues." To this order the plaintiff excepted and appealed, assigning error.

We are constrained to hold that the exception of the plaintiff is well taken. ". . . 'whether the wife is entitled to alimony is a question of law upon the facts found,' reviewable on appeal by either party, and the 'court below must find the facts' upon request." *Caudle v. Caudle*, 206 N. C., 484, 174 S. E., 304. The same is true of counsel fees. The fact that the plaintiff was in court with his witnesses prepared, perhaps, to show that the separation was due to the fault of the defendant and that she was able to pay her own counsel was tantamount to a tender of said

witnesses and a request that the facts upon which any order was based be found after a hearing by the court of such witnesses, and the failure to find the facts under these circumstances was error, since until such facts are found this Court is unable to determine the correctness of the ruling as a matter of law. *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9; *Caudle v. Caudle, supra.*

Error.

W. L. JOHNSON v. W. A. CHAMBERS AND O. L. CHAMBERS, TRADING AS PEERLESS ICE CREAM COMPANY.

(Filed 31 May, 1941.)

Process § 1: False Imprisonment § 1—

Where a justice of the peace, because of bad eyesight, requests his secretary to sign his name to the summons, which she does in his presence and under his supervision, the summons is valid, Michie's Code, 1487, and when the summons is issued in an action in arrest and bail and the defendant therein is later arrested upon return of execution against his property unsatisfied, the manner of the issuance of the summons will not support an action for false imprisonment.

APPEAL by plaintiff from *Rousseau, J.,* at February Term, 1941, of FORSYTH. Affirmed.

The defendants, W. A. Chambers and O. L. Chambers, trading as Peerless Ice Cream Company, of Winston-Salem, North Carolina, have manufactured ice cream and other frozen products which they sell to retailers on consignment. The company consigned certain goods to W. L. Johnson, who sold same and failed to account therefor. Action in arrest and bail was instituted before C. F. Penry, a justice of the peace, *whose eyes were bad on account of a cataract. He requested his secretary to sign his name to the summons, which she did in his presence and under his supervision.* The summons was duly served on the plaintiff, who failed to answer or appear in court and judgment in arrest and bail was rendered against him. This judgment was docketed in the office of the clerk of the Superior Court and an execution issued thereon was returned unsatisfied. Later, an execution against the person was issued and the sheriff held W. L. Johnson in custody for about five hours until the judgment was paid and satisfied in full. W. L. Johnson then instituted this action for false arrest. The trial judge held that the summons was void and would not permit the magistrate to explain about the signature except in the absence of the jury. After the jury had returned a verdict of $300, the court, feeling that it had erred in holding

that the summons was void and in excluding certain evidence, set the verdict aside and directed a judgment of nonsuit, from which the plaintiff excepted, assigned error and appealed to the Supreme Court.

Fred M. Parrish for plaintiff.
A. B. Cummings for defendants.

PER CURIAM. The question involved: Can a magistrate deputize another to sign his name to a summons? We think so, under the facts and circumstances of this case.

N. C. Code, 1939 (Michie), sec. 1487, deals with the commencing of an action in a justice of the peace court, a portion of which reads as follows: "The summons shall be issued by the justice and signed by him."

Section 476, dealing with institution of actions in the Superior Court, says, among other things: "The summons must run in the name of the State, be signed by the Clerk of the Superior Court."

The similarity of these two sections is striking and it follows that they should be interpreted the same.

N. C. Practice and Procedure in Civil Cases (McIntosh), sec. 310, pp. 301-2, in part, reads: "The summons usually concludes with a general order to the officer:

" 'Herein fail not, and of this summons make due return.' It is attested by the clerk and dated of the day of issue: 'Given under my hand and seal of office, this.....day of....., ...' It must be signed by the clerk, and when it is issued to another county the official seal should be attached. The statute does not prescribe any particular method of signing, and, where it appears that it was issued under proper authority, any formal irregularity may be corrected by amendment. The signing may be by the clerk himself, or by someone in his presence and under his direction. Since it is a ministerial act, it may be signed by a deputy clerk, usually in the name of the clerk by the deputy; or by an assistant clerk, who might sign in his own name. But a blank summons, handed to an attorney and by him filled up, signing the clerk's name, is not sufficient."

The judgment of the court below is

Affirmed.

WILLIE BLAYLOCK AND WIFE, EFFIE BLAYLOCK, v. F. G. SATTERFIELD, F. S. SATTERFIELD, GEORGE T. CUNNINGHAM AND WALKER STONE, TRADING AS THE LIBERTY WAREHOUSE, AND Z. A. McGEE.

(Filed 31 May, 1941.)

Evidence § 18—

Plaintiffs' objection to the admission in evidence of a letter written by plaintiffs' attorney to one of defendants, on the ground that the letter contained confidential communications between attorney and client, cannot be sustained when it appears that the letter was written at the instance or by the consent of plaintiffs for the purpose of communicating their claim, and that the *feme* plaintiff testified upon the trial as to all matters contained in the letter.

APPEAL by plaintiffs from *Frizzelle, J.*, at January Term, 1941, of DURHAM. No error.

Bennett & McDonald for plaintiffs.
B. I. Satterfield for defendants.

PER CURIAM. Plaintiffs instituted this action to recover $223.85, proceeds of sale of tobacco cultivated by them on land sub-rented from the defendant McGee. This amount the other defendants, tobacco warehousemen, had paid to McGee over plaintiffs' objection. Plaintiffs claimed this money belonged to them, less $65.56 due McGee for advancements to make the crop. Defendant McGee claimed he had made advancements to plaintiffs in an amount larger than the proceeds of the sale, and that he owed them nothing. There was verdict for defendants, and plaintiffs appealed, assigning errors in the admission of testimony.

The exception chiefly relied on was the admission, over objection, of a letter written to defendant McGee by an attorney who at the time represented plaintiffs. It was argued this letter referred to matters which had been communicated to the attorney by the plaintiffs, and that its admission violated the rule excluding evidence of confidential communications between attorney and client. *Hughes v. Boone,* 102 N. C., 137, 9 S. E., 286; *Guy v. Bank,* 206 N. C., 322, 173 S. E., 600. However, upon examination, it appears that the letter was written at the instance or by the consent of plaintiffs for the purpose of communicating plaintiffs' claims to the defendant (70 C. J., 426; 28 R. C. L., 563; Wigmore on Ev. [2d Ed.], sec. 2311; *Koeber v. Somers,* 52 L. R. A., 512), and that the only matters referred to in the letter were those to which the *feme* plaintiff had already testified at the trial. The judge, in his charge to the jury, to which there was no exception, limited their consideration

of the amount of the advancements to those which had been made to produce the crop in question.

The issue of fact involved was decided adversely to the plaintiffs, and on the record we find no prejudicial error which would justify us in disturbing the result.

No error.

J. T. SWINSON, MRS. ALTHEA SWINSON, MRS. RUTH SWINSON AND AARON J. SWINSON v. E. E. NANCE.

(Filed 14 June, 1941.)

1. Appeal and Error § 39—

This action involved a collision at an intersection. Defendant's witness was permitted to testify that she saw the car in which plaintiffs were riding approaching the intersection at a rapid rate of speed, but her testimony that at the time she exclaimed to her sister "Why don't they slow up" was stricken out. *Held:* Even conceding that the exclamation was competent as part of the *res gestæ*, its exclusion cannot be held prejudicial in view of the fact that the witness was permitted to testify as to the speed of the car.

2. Same: Evidence § 18—

Plaintiffs questioned defendant's witness as to statements made by the witness on a former trial involving the same collision in suit. On redirect examination, the witness was not permitted to answer defendant's questions as to whether his testimony was the same as that given on the former trial, which questions the witness would have answered in the affirmative. Defendant then introduced the transcript of the testimony of the witness on the former trial for the purpose of corroboration. *Held:* Even conceding that defendant's questions as to the identity of the witness' testimony on both trials were sufficiently particularized to bring them within the rule, the introduction of the transcript of the witness' testimony was the best method of corroboration, and the exclusion of the testimony was not prejudicial.

3. Evidence § 29—

This was a civil action involving a collision at an intersection. Plaintiff had been convicted of reckless driving in a prosecution involving the same collision. *Held:* Objection to defendant's interrogation of plaintiff on cross-examination as to whether plaintiff had not been convicted of reckless driving in a prosecution growing out of the collision in suit was properly sustained even though asked for the purpose of impeaching plaintiff, since if the sole purpose was to impeach plaintiff by showing that he had been convicted of a criminal offense, the question was too particularized.

4. Automobiles § 12c—

The failure of a defendant traveling upon a servient highway to stop before entering an intersection with a through highway is not contributory negligence *per se*, but such failure is merely evidence to be consid-

ered by the jury in the light of the surrounding circumstances, C. S., 2621 (305), and this rule is unaffected by a municipal ordinance making such failure to stop unlawful, since the State law prevails over the ordinance.

5. Same—Right of way of motorist traveling along through street over vehicles entering intersections from servient highways is not absolute.

A motorist traveling along a through highway does not have an unqualified right of way over vehicles entering intersections from servient highways, such right of way being subject to the rule of the reasonably prudent man, and when he enters the intersection with a servient highway at an excessive speed, the fact that he had the right of way is no longer a conclusive factor in considering his behavior and he is not entitled to rely upon his right of way to absolve him from liability for injuries proximately caused by his negligent speed, and his exceptions to instructions consonant with this rule and his exceptions to the court's refusal to give specific instructions at variance therewith, cannot be held for error.

6. Automobiles § 20b—

Where a driver's wife, his brother and his sister-in-law are passengers in his car while taking his sister to the hospital for examination, the occupants of the car are not engaged in a joint enterprise so as to make them responsible for the negligence of the driver.

7. Same: Appeal and Error § 39—

Whether the alleged negligence of the driver of a car should be imputed to the passengers of the car becomes academic when the jury finds that the driver of the car was not guilty of negligence, and exceptions to the refusal of the court to give instructions upon the doctrine of imputed negligence cannot be sustained.

8. Trial § 31: Negligence § 20—

Where the jury is instructed that if they answer the issue of contributory negligence in the affirmative they should not proceed further, but should leave the issue of damages unanswered, a further instruction that an affirmative finding of contributory negligence would end the case and plaintiffs could not recover, cannot be held for error, since the jury, being composed of men of intelligence, could have inferred that an affirmative finding of contributory negligence would bar recovery notwithstanding the further instruction.

BARNHILL, J., dissenting.

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

APPEAL by defendant from *Nettles, J.*, at September Civil Term, 1940, of DAVIDSON. No error.

As the result of an automobile collision, separate suits were brought by the four plaintiffs against the defendant, all claiming personal injury and damage sustained through defendant's negligence, and the plaintiff, J. T. Swinson, claiming, in addition, damages for injury to his car. For purposes of trial the four suits were consolidated, without objection, and tried. Issues relating to negligence, contributory negligence and damages in each case, were submitted to the jury and answered in favor of all the plaintiffs, respectively, and defendant appealed.

Under appropriate pleadings evidence was introduced by plaintiffs and defendant which, as pertinent to this appeal, is substantially as follows:

J. T. Swinson testified that he was driving an automobile on Sprague Street in the city of Winston-Salem at the time of the collision, in which Aaron Swinson, Mrs. Althea Swinson and Mrs. Ruth Swinson were passengers. They were taking Mrs. A. J. Swinson to the Baptist Hospital for an examination. The witness and his wife were in the front seat and the brother and his wife in the rear seat, the brother on the right.

Sprague Street runs east and west and Main Street runs north and south. Sprague Street is about 40 feet wide and Main Street 38 feet wide. Approaching and intending to cross the intersection of Main Street, witness says he slowed down to about 10 miles an hour, looking both ways. He could see to the right about 200 feet, and saw no one approaching. According to his testimony, when he got about midway of the street he saw a car approaching. It collided with witness' car about the curb line—or what would be the curb line if extended—on the west side of the street, striking his car about the middle. The car turned over twice and landed on the opposite side of the street, about 40 feet away, headed in a direction opposite to that they were traveling.

Continuing his testimony, approaching Main Street there were obstructions consisting of shrubbery, a house on a bank which was about four feet from the road, and maple trees along the side. The view of the stop sign was obstructed. It was about 12 to 20 feet from the entrance into Main Street where witness could first see to his right. Witness saw a stop sign that afternoon "about halfway between the sidewalk and the road" in front of the house. The sign post is to the left of the road, the sign part six feet from the ground. It was yellow. Witness' view of Main Street was obscured by a hedge of evergreen trees, some as high as his head. Witness saw defendant when he was about 30 feet away, and believes he was making 70 miles an hour, says Nance applied brakes and was going about 30 miles an hour when the cars collided; says Nance told him he could not stop—that if he had turned to the left he would have turned over, and if he turned to the right he would have hit a post, so he had to hit the Swinson car "center." Other testimony relates to the injuries received in the collision.

On cross-examination, several exceptions were taken to the exclusion of evidence from this witness relating to his conviction on a criminal charge of reckless driving growing out of this transaction.

A. J. Swinson testified that his brother came to "a slow stop" before entering Main Street, or very nearly stopped, and looked to the right, then released his brakes. He testified the Nance car was coming at a rate of 60 or 70 miles an hour. He further testified as to his injuries.

On cross-examination, he testified that he wanted to take his wife to the hospital for examination and his brother volunteered to take them; testified the stop sign was not where it could be seen.

Mrs. A. J. Swinson testified that she looked to the right on going into Main Street and could not see anyone approaching. She gave evidence tending to corroborate other witnesses as to the circumstances of the collision.

Pertinent evidence for the defense contradicted that of plaintiff in important particulars.

The defendant, E. E. Nance, testified that side streets across Main Street all had stop signs except those that had stop lights. He was going, he testified, south down Main Street toward Lexington, and when he approached Sprague Street, just before he got to the street he saw a car coming down Sprague Street making 50 or 60 miles an hour. Witness expected him to stop, but he did not. He ran in front of witness' automobile and they collided. There was a stop sign on each side of the street, consisting of a disc 24 inches across, containing the word "Stop." Witness was traveling about 25 or 30 miles an hour and applied brakes when he saw the car was not going to stop. Witness thinks he was in the intersection first. The collision occurred when witness was about 8 or 9 feet within the intersection. The Swinson car had already passed the stop sign when witness saw it. Witness denied that he had told J. T. Swinson that witness was going too fast to stop.

On cross-examination, witness stated that he was going about 10 or 12 miles an hour at the time of the collision. Swinson's car was about 15 feet from the intersection when he saw it—between 30 and 40 feet away. Witness was not looking in that direction; didn't know which car got to the intersection first. Witness doesn't know why his car hit the Swinson car right in the side.

Defendant introduced ordinances of the city of Winston-Salem designating Main Street as a "through highway" and making it unlawful to enter such highway from an intersecting street without stopping, where there is a stop sign.

Dorothy Jones testified for the defense as to the visibility of the stop sign.

Mrs. Belle Heath testified that she saw the Swinson car approaching at a rapid rate of speed and exclaimed to her sister, "Gosh, why don't they slow up!" This evidence as to what she said to her sister was stricken out and defendant excepted. She estimated the speed of the car as from 40 to 45 miles per hour.

Mrs. E. M. Johnson testified that the Swinson car was going 40 to 45 miles an hour and did not check up speed at all. She also gave evidence as to the visibility of the stop sign.

J. L. Heath testified that just before the collision the Swinson car passed him at a rapid rate of speed, 45 or 50 miles per hour, and made no effort to stop. The Nance car was in the intersection first.

On cross-examination, this witness was questioned as to whether certain statements had been made on a former trial. On redirect examination, several questions were addressed to him as to whether the testimony on that trial was the same as at present. The evidence was excluded and exceptions were taken. Later the plaintiffs introduced the transcript of the evidence of this witness at the former trial in question.

Other evidence relates principally to the injuries sustained in the collision and damage to the Swinson car.

The plaintiff, J. T. Swinson, was recalled. The court excluded an inquiry whether the witness had not been convicted of reckless driving in connection with this collision, and defendant excepted.

The defendant moved for judgment of nonsuit at the conclusion of all the evidence, and the motion was overruled. Defendant excepted.

The defendant made numerous exceptions to the refusal of the court to give instructions requested and to the instructions as given, which will be noted in the opinion where thought material.

In apt time, defendant excepted to refusal to set aside the adverse verdict, and to the signing of the judgment, and appealed.

D. A. Troutman, Phillips & Bower, and McCrary & DeLapp for plaintiffs, appellees.

Don A. Walser for defendant, appellant.

SEAWELL, J. The defendant took 39 exceptions to the conduct of the trial, all of which have been brought forward. It will be impossible to give these exceptions individual attention in formulating our opinion, although, of course, they have not been overlooked in our study of the case. We necessarily confine our observations to the more challenging objections.

There are three exceptions to the exclusion of evidence offered by the defendant which merit attention.

In the testimony of Mrs. Belle Heath, who was an eye-witness to the collision, the following occurred: "Q. What, if anything, did you observe going West on Sprague Street? A. Well, I seen a car going at a rapid rate of speed and I have seen so many wrecks out there I exclaimed to my sister, 'Gosh, why don't they slow up!' "

Upon objection by the plaintiffs, a part of this answer was stricken out, the court holding that what the witness said to her sister was incompetent. The defendant contends that this was a spontaneous exclamation, part of the *res gestæ*, which ought to have been admitted. We

doubt if the admission of this evidence could be held for error under the decisions of this Court. *Young v. Stewart,* 191 N. C., 297, 131 S. E., 735, and cited cases. But this does not mean that its exclusion is necessarily error. Some discretion must be conceded to the trial court in the admission of evidence of this sort, 20 Am. Jur., p. 557, sec. 663, especially in marginal cases. We doubt whether the declaration here is so clear in its implication as to qualify under the rule. At any rate, the witness testified fully as to the speed of the Swinson car, and we do not think the defendant was materially prejudiced by its exclusion.

On cross-examination, J. L. Heath, witness for defendant, was questioned with regard to statements made by him on a former trial involving facts of the collision. On redirect examination, at the instance of the defendant, he was asked several questions, different in form but identical in purpose, of which the following is typical: "Q. State whether or not your answers in the Winston trial in the Court you spoke of were the same you gave here yesterday?" To all of these questions the witness, if permitted, would have answered "yes." The defendant excepted to the exclusion of this evidence. Later, the plaintiff introduced, without objection, the entire transcript of Heath's evidence at the former trial referred to in these questions.

Ordinarily, when for the purpose of impeachment the testimony of the witness is challenged as contradictory to a former statement, he would be permitted to testify that his former statements were the same as he now made. We doubt whether the questions addressed to the witness were of such particularity as to bring them within the rule, since they had a broadside reference to everything he might have said on the previous occasion. The point loses importance, however, in view of the fact that his testimony had been reduced to writing and the record thereof was before the jury for comparison, a more satisfactory method of corroboration or contradiction as the case might be. We cannot see that the defendant was prejudiced in this connection.

Growing out of the collision, J. T. Swinson, one of the plaintiffs, had been indicted and convicted in the Superior Court of Forsyth County for reckless driving. Near the close of the trial, when plaintiff had been returned to the stand for direct testimony, defendant's counsel, on cross-examination, sought to bring into the evidence the fact that he was so convicted. In the absence of the jury, the following question was addressed to the witness: "Q. I ask you if in the case of State against yourself where, in this testimony that has been referred to by your counsel and this cross-examination of Mr. Heath, you were not convicted by the Court up there of reckless driving?" The witness would have admitted that he had been so convicted. Counsel for the defendant stated that he asked the question solely for the purpose of impeaching

the witness. The court observed: "This is not in the presence of the jury. It appears to the court that the case to which the question refers is a criminal indictment based on the wreck or collision involved in this lawsuit; therefore, objection is sustained." To this defendant excepted. The jury returned to the courtroom and, in view of the intimation of the court, the question was not asked. Passing the fact that the question was not renewed when the jury returned, we think its exclusion was proper anyway. If the sole purpose was to impeach the witness by showing that he had been convicted of a criminal offense, the question might have been formulated differently. The question tied the testimony to the transaction then under civil investigation and the effect, if the evidence should be admitted, was to bring before the jury on the question of contributory negligence the fact that the plaintiff had been convicted of careless driving by another jury because of the same act of negligence. The situation is novel as far as we can discover, but we are convinced that the exclusion of the evidence was proper, on this principle *ut res magis valeat quam pereat.*

Other exceptions in this group, we do not consider meritorious.

The defendant in his assignments of error has grouped a number of exceptions to the refusal to give special instructions to the jury, presented in his request. They fill nearly five mimeographed pages of the record and cover practically all of the important features of the case on which the judge might be expected to charge the jury. Most of these instructions, in so far as they were consistent with the law, were given to the jury independently by the judge according to his own method of formulating his charge. As presented by the defendant, they were refused.

To understand the effect of such refusal, as well as the objections to various parts of the charge as given, we must refer to the type of accident disclosed by the evidence or, rather, the situation which the evidence presents as existing at that time.

(1) The Swinson car was approaching a main thoroughfare along an intersecting road marked with stop signs, the main thoroughfare being regarded as dominant and the road along which the Swinson car was approaching servient. The defendant was proceeding towards the intersection of the dominant highway. Plaintiffs and defendant were thus approaching the intersection simultaneously. (2) The evidence is conflicting with regard to the behavior of J. T. Swinson, the driver on the servient road, and of Nance, the defendant. But there is evidence tending to show that both Swinson and Nance were approaching at a high and unlawful rate of speed, as well as evidence to the contrary in both instances. (An ordinance of the town of Winston-Salem purports to make it unlawful and a criminal offense for one approaching a main

thoroughfare at an intersection marked with a stop sign not to stop before entering thereon. The State law, C. S., 2621 [305], provides, under these circumstances: "That no failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to person or property; but the facts relating to such failure to stop may be considered with the other facts in the case in determining whether the plaintiff in such action was guilty of contributory negligence.") (3) The defendant was the driver and sole occupant of his car. The plaintiffs were four in number, the plaintiff J. T. Swinson driving up to the time of the collision. The question of joint enterprise is raised, with insistence on common responsibility of all the occupants of the car for the negligence of the driver as a legal consequence.

Without analyzing the prayers for special instructions separately, an impossible and unnecessary task as we view it, we may say that, collectively, they are largely based upon what we regard as erroneous conceptions of the law, and assumptions of the truth of undetermined facts, within the province of the jury. The result is that the categories they present do not lead to the conclusions of law which it is desired the Court should adopt. The two more prominent misconceptions of the law presented by the requested instructions may be considered in order. The first relates to the insistence of the defendant that the failure of the plaintiff to obey the stop sign was negligence *per se*. This view is incorrect, since an ordinance of the town cannot displace the applicable State law, which makes such a failure merely evidence to go to the jury to be considered in the light of the surrounding circumstances. C. S., 2621 (305); *Stephens v. Johnson,* 215 N. C., 133, 1 S. E. (2d), 367; *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539.

The other is the view that the defendant, traveling the dominant highway, had an unqualified privilege in the right of way, regardless of his own conduct in approaching and negotiating the intersection.

Right of way is not absolute. Valuable as the principle may be in determining questions of negligence, particularly between participants in a collision, nothing could be more disastrous than to regard it, either in law or in fact, as displacing the predominant duty of due care resting on those who use the streets and highways. The law applicable to this state of facts is stated in *Groome v. Davis,* 215 N. C., 510, 516, as follows: "The holder of the right of way, even on an arterial highway, does not possess an unqualified privilege in its exercise. The duty still rests on him to use due care in approaching an intersection, notwithstanding he may know that it is protected by a stop sign on the less favored highway; and without the exercise of such care his right of way will not avail him. His right to rely on the assumption that a driver approaching the intersection on the servient road will observe the stop sign is forfeited

when he approaches the intersection and attempts to traverse it at an unlawful or excessive speed. And even when he is within the law, it may be necessary for him to surrender his right of way, in the exercise of due care, to avoid the consequences of another's negligence. The principles, thus summarized, are clearly stated in leading texts: Huddy on Automobiles, 9th Ed. 3-4, pp. 228, 263, 264, 277; Berry on Automobiles, 3.2; Babbitt on Motor Vehicles, 4th Ed., 439, 461; and they find expression in numerous well considered opinions of the courts, from which we cite the following as containing a more detailed exposition of the rules under consideration than we find convenient to make here: *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Anthony v. Knight,* 211 N. C., 637, 191 S. E., 323; *McCulley v. Anderson* (Neb.), 227 N. W., 321; *Richard v. Neault,* 126 Maine, 17, 135 Atl., 524, 525; *Brown v. Saunders,* 44 Ga. App., 114, 160 S. E., 542; *Rosenau v. Peterson,* 147 Minn., 95, 179 N. W., 647; *Carter v. Vadeboncoeur,* 32 Manitoba L. R., 102, 11 B. R. C., 1113; *Carlson v. Meusenberger,* 200 Iowa, 65, 204 N. W., 432; *Ray v. Brannon,* 196 Ala., 113, 72 So., 16."

It was the duty of the defendant, notwithstanding his right of way, to observe due care in approaching and traversing the intersection and to take such action as an ordinarily prudent person would take in avoiding the collision when the danger was discovered, or by the exercise of reasonable care could have been discovered in time.

Ordinarily it is said that a defense of this kind is available only to one who is himself free from negligence, or, to put it more accurately, of negligence such as might stand in proximate relation to the injury. It is also said that a person may forfeit his right of way by his own negligence. Here, too, it might be better to put it that his right of way is no longer a conclusive factor in considering his behavior. "Simply stated, the right to make the assumption is available only to one who himself is free from negligence. Some States, by express wording of the statute, have rendered such a defense unavailable to negligent drivers; *Morris v. Bloomgren,* 127 Ohio State, 147, 187 N. E., 2, 89 A. L. R., 831; *Wolfe v. Fay Bros. Auto and Taxicab Co.,* 18 La. App., 321, 138 So., 453; *Jordan v. Western Motor Ways,* 213 Cal., 606, 2 P. (2nd), 786; and in others the courts have reached the same result by judicial reasoning." *Groome v. Davis, supra,* p. 516. From the same case, where the facts were similar in outline, we quote: "From the time defendant came into the zone of obligation, and the duty of care with regard to this intersection arose, his acts must be considered as a continuing sequence. The negligence of the defendant, if the jury should find such negligence, might have begun some distance up the road when he surrendered control for speed, finding later he could not retrieve it." See p. 518. The evidence tends to show negligence on the part of defendant in approaching

the crossing at a high rate of speed, and perhaps in other respects, and the court had no right to give instructions which assumed the contrary.

Other requested instructions are based on the theory that all of the plaintiffs were engaged in a joint enterprise for their mutual benefit, and, therefore, responsible for the negligence of the driver. The facts do not bring the case within the bounds of that doctrine. *Montgomery v. Blades,* 218 N. C., 680; *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573; *Smith v. Barnhardt,* 202 N. C., 106, 161 S. E., 715; *Butner v. Whitlow,* 201 N. C., 749, 161 S. E., 389; *S. v. Norfolk, etc., R. Co.* (Md.), 135 A., 827. Furthermore, since the jury absolved J. T. Swinson, the driver, of negligence, the question is now academic.

Exceptions to the instructions given, for the most part, may be correlated with the contrary view of the law, and significance of the evidence, represented in the prayer for special instructions, since they bear largely on the features of the evidence and of the law, just considered. We think they constitute a proper application of the law to the facts, and do not find in them cause for reversal.

There remains to be considered an objection to the charge which defendant stresses as gravely prejudicing his case. After retiring and considering the case for some time, the jury returned to the courtroom, where further instruction was given them. The part to which defendant objects was as follows: "If you answer the second issue 'Yes,' then that ends the lawsuit and, of course, the plaintiff could not recover, gentlemen of the jury, if they were guilty of contributory negligence."

The law requires that persons of intelligence be selected as jurors. As such, when repeatedly told to proceed no further if they answered the issue of contributory negligence "yes," leaving the issue of damages unanswered, they must have inferred that the plaintiff would, in that event, get nothing. The exception is without merit.

Separate and detailed comment on the numerous exceptions noted in the trial would serve no useful purpose. We have dealt with the main features of the case out of which the important exceptions arise. Others have been carefully considered.

We find

No error.

BARNHILL, J., dissenting: The conflicting and contradictory evidence in this case requires the application of more than one rule of the road as prescribed by our statutes.

1. If the facts are as the defendant's testimony tends to show and the two cars approached the intersection at approximately the same time, the defendant, under the law, possessed the right of way, and it was the duty of Swinson to stop and permit the passage of defendant's car before he

entered the intersection. This is true without regard to the speed of defendant's car. Secs. 117-118, ch. 407, Public Laws 1937.

2. If, however, the Swinson car was in the intersection at the time the defendant approached, as the evidence of the plaintiffs tend to show, Swinson had the right of way although he failed to stop before entering the intersection, sec. 117 (b), ch. 407, Public Laws 1937, and it was the duty of defendant, in approaching the intersection occupied by plaintiff's car, to immediately decrease his speed, bring his car under control and, if necessary, to stop in order to yield the right of way to the plaintiff and to avoid a collision. Sec. 103 (4-c), ch. 407, Public Laws 1937, and

3. If at the time Swinson approached and entered the intersection defendant's automobile was a sufficient distance away, when operated at a reasonable and lawful rate of speed, to permit Swinson to cross in safety, Swinson, notwithstanding his prior violation of the law in entering the intersection without stopping, had the right to assume that the defendant would exercise due caution and approach at a reasonable rate of speed and yield the right of way.

On this phase of the case the court charged the jury as follows: (1) "His (defendant's) right to rely on the assumption that a driver approaching the intersection on the servient road will observe the stop sign is forfeited when he approaches the intersection and attempts to traverse it at an unlawful or excessive rate of speed." (2) "The right of a driver on the more favored road—and, in this case, Gentlemen of the Jury, the more favored road would be Main Street—to assume that another car approaching on the servient road—and the servient road would be Sprague Street—will observe a stop sign, or laws, respecting the right of way, is conditioned on the behavior of the defendant, and the assumption can be made only when it will not be inconsistent with the paramount duty to exercise due care, incumbent on the person who would assert the right. Simply stated, Gentlemen of the Jury, the right to make the assumption, that is, to assume that the man will stop before entering—that is, the assumption that the defendant may make that the plaintiff, J. T. Swinson would stop his automobile before he went into Main Street is available to the defendant only in the event that E. E. Nance on this occasion was free from negligence. Simply stated, the Court charges you the right to make the assumption is available only to one who himself is free from negligence." (3) "Now, in reference to that, the Court again charges you, Gentlemen of the Jury, that the defendant had the right to assume that J. T. Swinson would stop his automobile, provided that the defendant, E. E. Nance, was operating his automobile within the law, that is, free from negligence."

At the same time it declined to charge the converse as prayed by the defendant as follows: (1) "The court charges the jury that in determin-

ing whether reasonable care was exercised by the defendant it must be remembered that the defendant having the right of way on Main Street may take into consideration the duty of other drivers to obey the law and the probability that they will do so." (2) "The driver of an automobile on a main or 'through' highway has a right to rely on stop signs at said intersecting highway and is not guilty of negligence in assuming that a vehicle on the intersecting street will regard the stop sign before entering the primary highway, and cannot be charged with negligence in acting upon such assumption." (3) "As a matter of law, if the defendant Nance, at the time of said collision, or at the time he approached said intersection, was operating his car at a speed in excess of 25 miles per hour, said unlawful speed would not lose the right of way given to him pursuant to section 2621 (302), Consolidated Statutes of North Carolina. And (4) "The Swinson car being to the left of the defendant Nance's car at said intersection, if the defendant Nance's car did approach or enter said intersection at approximately the same time with the Swinson car, that it would be the duty of the driver of the Swinson car to yield the right of way to the Nance car, notwithstanding the fact that the Nance car at said time was being operated in excess of 25 miles per hour."

Is the right to assume that others will observe the law available only to one who is free from negligence?

Does a motorist who is exceeding the speed limit thereby forfeit his right to assume that other motorists will observe stop signs and other traffic regulations at intersections?

Is his assumption that other motorists will observe stop signs before entering a primary highway evidence of negligence?

Does a motorist, by driving at a speed in excess of 25 miles per hour forfeit his right of way at an intersecting highway?

Is it improper for a jury, in judging the conduct of a motorist, to consider the fact that he who has the right of way may take into consideration the duty of others to observe the law and the probability that they will do so?

The court, in giving the charge quoted and in declining to instruct as requested, answered each of these questions in the affirmative. In my opinion these conclusions are erroneous and constitute harmful error.

A motorist is not under the 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; *Murray v. R. R.*, 218 N. C., 392, and cases cited; *Coach Co. v. Lee,* 218 N. C., 320.

A traveler upon a public highway has a right to assume, within reasonable limits, that others using it will exercise reasonable care and will obey traffic regulations, and the failure to anticipate the omission of such care does not render him negligent, until the contrary is brought to his attention. 4 Blashfield, Auto L. & P., 478; *Mast v. Claxton,* 107 Cal. App., 59, 209 Pac., 48; *McCulley v. Anderson,* 227 N. W., 321 (Neb.); *Richard v. Neault,* 135 Atl., 524; 3-4 Huddy on Automobiles (9d), pp. 228-63; 3-4 Huddy (9d), pp. 276-77; Babbitt on Motor Vehicles (4d), 439.

A motorist having the right of way "approaches a crossing expecting and entitled to expect that one approaching from the left will recognize his right, and his conduct is to be judged of in view of that circumstance." *Carlson v. Meusenberger,* 204 N. W., 432. He is not required to anticipate negligence on the part of other highway travelers at crossings or intersections, but in the absence of any circumstance giving notice to the contrary, he has the right to assume and act on the assumption, that they will exercise ordinary care, not only for their own safety but for the safety of others, whether such duty or care is imposed by common law or statute or ordinance. 3-4 Huddy (9d), pp. 228, 263. "The fact that one is entitled to the right of way in the intersection is a very material element in determining whether he has exercised the required degree of vigilance." 3-4 Huddy (9d), pp. 276, 277.

Greater care to avoid a collision is imposed on the driver not having the right of way than upon the other. Thus, if the driver of a vehicle upon an intersecting highway reaches a main or arterial thoroughfare, it is his duty to look to the right and to the left; and if another vehicle is approaching the intersection on the main thoroughfare it is his duty, before entering the intersection, to wait until the approaching vehicle has passed, unless a prudent person would have reasonable grounds to believe that the approaching vehicle, proceeding at a lawful speed, is so far distant from the intersection that he could safely cross in advance. 3-4 Huddy (9d), 262.

"Ordinarily, the driver having the right of way at an intersection need not stop before proceeding to the intersection. He is not bound to anticipate that the other driver will fail to slow down. In fact, he may assume that the other driver will slow down or stop" and "the driver not having the right of way . . . has a special duty to stop." Babbitt on Motor Vehicles (4d), 439. See also *Rosenau v. Peterson,* 179 N. W., 647 (Minn.).

Our automobile law at one time contained the provision that a motorist having the right of way forfeited it by traveling at an unlawful rate of speed. Sec. 18-a, ch. 148, Public Laws 1927. This provision has been repealed and the only limitations upon the right are those set forth in

sec. 118, ch. 407, Public Laws 1937. The statute under consideration in *Morris v. Bloomgren,* 187 N. E., 2, 89 A. L. R., 831, cited in the majority opinion, contained a limitation on the right similar to that in the 1927 law. Hence that decision is not in point.

The rule is designed to avoid those dangers that are inherent when two automobiles simultaneously approach an intersection by designating the one that should yield the right of way to the other and to prevent careless drivers from crashing highway intersections.

It is not invoked and has no application until and unless the two automobiles approach the intersection at approximately the same time, so that, unless one yield, a collision is likely to occur. *Piner v. Richter,* 202 N. C., 573. "It very clearly means that when a vehicle on each of these streets approaches their intersection, visible to each other, at such a time and under such a speed as would render their collision imminent, if one should not give way to the other, then the vehicle going north or south must, at its peril, be so conducted, circumstances permitting, as to allow the vehicle going east or west to pass in front." *Ray v. Brannon,* 72 So., 16 (Ala.), (in that case the motorist going east or west had the right of way).

To avail a defendant he is not required to show that he was free from negligence. As the rule applies only when two cars approach intersections at approximately the same time additional speed merely means that he will clear the intersection more quickly and leave it clear for the use of the other motorist.

It does not exist when there is another automobile already in the intersection when a motorist on the dominant road approaches. Nor does it apply when the motorist on the servient road approaches and attempts to cross the intersection at a time when a motorist on the dominant road is a sufficient distance away, when and if he is operating at a reasonable rate of speed, to permit the motorist on the servient road to cross in safety. *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539. In such case the motorist on the servient road has the right of way and may assume that the oncoming car on the dominant road will decrease its speed and permit him to pass in safety.

This right of way rule, which the plaintiff can claim if he was already in the intersection at the time defendant approached, and which the defendant can claim if the two cars approached the intersection at approximately the same time, is quite different from and is independent of the rule which requires a motorist, when approaching a crossing or intersection, to decrease his speed to such extent as may be necessary, under the circumstances, to avoid colliding with any person, vehicle or other conveyance on or entering upon the highway, in compliance with legal requirements and the duty of all persons to use due care. Sec. 103 (4-c), ch. 407, Public Laws 1937.

When a motorist does not have the right of way as he approaches the intersection, it is his duty, upon seeing another car approaching on an intersecting street and possessing the right of way, either under statutory provision, sec. 117, ch. 407, Public Laws 1937, or by reason of the fact that the other car is already in the intersection, to immediately decrease his speed, put his car under complete control and, if necessary, stop in order to yield the right of way to motorists entitled thereto. When, however, he possesses the right of way, he has the right to assume that the approaching motorist will observe the law, and his duty to take positive action to make it possible for him to stop his car before reaching the immediate zone of danger arises when it becomes apparent that the other party will, or is about to, disregard the law and enter the zone of danger in violation of the statute. Sec. 103 (4-c), ch. 407, Public Laws 1937.

This right is conferred by statute. It is subject only to the limitations provided by statute.

Non constat the right is not forfeited by a mere failure to strictly observe statutory regulations as to speed, a motorist may be required under some circumstances, in the exercise of proper care, to forego the right and yield it to another. The right does not relieve a motorist of the duty to exercise due care. When he has had time to realize, or by the exercise of proper care and watchfulness, should realize, that the other motorist is unaware of his presence, or does not intend to observe the law, or is in a somewhat helpless condition, or is apparently unable to avoid the approaching machine, he must exercise increased exertion to avoid a collision, and, if necessary, must forego his right of way. *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707, 2 R. C. L., 1185; *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; *James v. Coach Co.,* 207 N. C., 742.

Hence, while the right of way is not absolute and is not sufficient, in and of itself, to absolve from blame, its presence or absence is a very material circumstance to be considered by the jury in deciding whether one's conduct was that of a reasonably prudent man, or was or was not the proximate cause of the collision. *Carlson c. Meusenberger, supra.*

To say that the right of way is forfeited is to say that it no longer exists and must not be taken into consideration in judging the conduct of the parties. This is not in accord with the decisions.

The rules of the road are reciprocal. If the rule applied by the court below works one way, it operates both ways. Swinson admittedly drove into an intersection of a through street, against a stop sign, when his view was partially obstructed, without stopping. He looked to his right just as he entered the intersection. He then drove 30 feet without again looking to the right, from which direction the defendant was approach-

ing. At the time, according to his testimony, there was no car sufficiently near the crossing to endanger him, provided such car was being operated at a reasonable rate of speed. Sans the right on his part to assume that any approaching car would observe the law and yield the right of way to him after he entered the intersection, his conduct constituted gross negligence and the cause, as to him, should have been nonsuited.

But this is not the law. If, as he states, he was in the intersection when defendant's car approached, he had the right to assume, *non constat* his unlawful conduct, that the approaching car would slow down, and, if necessary, stop in order to permit him to pass in safety.

The purpose of the automobile law is to provide for every contingency or condition which creates or is likely to create danger to life or property. To adopt the view expressed in the charge of the court below, as approved in the majority opinion, would have the opposite effect. It would create a vacuum in the law which would produce confusion and uncertainty.

Defendant, if he approached the intersection at approximately the same time as did the plaintiff, driving in excess of the speed limit, forfeited the right of way accorded him by the statute. It did not pass to the plaintiff by inheritance. Even if it did, plaintiff in turn forfeited it by his conduct in driving into an intersection against a stop sign, without stopping. Thus, we have a situation where neither possessed the right of way and it was not the duty of either to slow up or stop to allow the other to pass in safety. Certainly the duty rests on either the one or the other to yield—except in cases such as this. I cannot believe that sound reason dictates the exception.

A careful examination of the authorities cited in the majority opinion discloses that they sustain the right of a motorist to assume that others will obey the law. Most of them I have cited. While they hold that the right of way is relative—not absolute—no one of them contains any suggestion that a motorist can claim his right of way only when and if he is free of negligence. They do hold that the jury should consider as a material circumstance the presence of the right of way in determining whether the motorist on the dominant highway exercised reasonable care under all the circumstances.

It is only fair to the court below to say that it acted upon expressions contained in *Groome v. Davis,* 215 N. C., 510, 2 S. E., 771, which, on the facts in that case, are merely obiter. There the unlawful conduct of the plaintiff in driving across a stop sign onto the line of traffic of a vehicle on the main arterial road was negatived by proof that the defendant's automobile was a sufficient distance away to permit him to pass in safety, provided the oncoming car was operated at a reasonable rate of speed. That case was properly decided under the law as stated in the

Sebastian case, supra. It was on that theory that I concurred in the opinion filed. Nonetheless the court applied these statements as the law of this case. Their correctness now becomes material.

In my opinion a new trial should be awarded.

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

BLUE BIRD CAB COMPANY, INC., v. AMERICAN FIDELITY AND CASUALTY COMPANY, INC.

(Filed 14 June, 1941.)

1. Insurance § 13a—

A policy of insurance will be construed most strongly against insurer and all doubt and ambiguity will be resolved in favor of insured.

2. Insurance § 46—

A provision in a liability or indemnity contract that insured should not, without the written consent of insurer, admit or voluntarily assume any liability nor incur any expense except for such immediate surgical relief as is imperative, will be construed as a limitation upon the liability of the insurer for medical and surgical attention to injured third parties and not as a provision for forfeiture, since insured, being liable for all recoveries over the face amount of the policy, is entitled to mitigate its own liability by furnishing such medical attention, and since such aid could in no way contribute to loss or liability on the part of insurer.

3. Principal and Agent § 8a—

A principal is bound by the acts of his agent which are within the authority actually conferred and also those which are within the authority which may be implied as usual and necessary to the proper performance of the work entrusted to the agent, and third persons dealing with the agent are not bound by secret limitations upon the agent's authority.

4. Insurance § 47—

An adjuster for a liability and indemnity insurance company has at least implied authority to authorize or ratify the acts of insured in agreeing to pay for emergency medical and surgical attention, including necessary nursing, for injured third persons, the matter being one of adjustment.

5. Insurance § 44—

The policy of liability and indemnity insurance in suit provided that insured, without the consent of insurer, might assume liability for such immediate surgical relief to injured third persons as might be imperative. The evidence disclosed that a passenger in insured's taxicab was injured in an accident and was in an unconscious and critical condition. *Held:* The acts of insured in taking her to a hospital and assuming liability for her doctor's bills and necessary nursing were within the terms of the policy.

6. Insurance § 50—

Evidence that some four or five months after notice to insurer that insured had assumed liability for medical and nursing attention to one of the passengers injured in an accident to one of insured's taxicabs, insurer compromised and settled a claim of another passenger injured in the accident, is competent against insurer to show that insurer recognized its continuing obligation under the policy and had waived or ratified the acts of insured in assuming such medical expenses for the first passenger as against insurer's subsequent contention that the assumption of such medical expenses forfeited the policy.

7. Insurance § 45—

Notice to the adjuster of a liability and indemnity insurance company or notice to the attorney employed by it to defend the suit against insured is notice to the insurer.

8. Insurance § 49—

After notice to insured in a liability or indemnity contract that insurer contended that the policy had been forfeited and that insurer would no longer continue to defend the suit against insured, insured may continue to defend the suit and make a reasonable compromise or settlement of the claim against it, and insurer is liable for the amount reasonably required to effect the settlement notwithstanding that the policy provides for recovery against insurer only when payment is in satisfaction of a judgment.

9. Trial § 49—

A motion by defendant to set aside the verdict as to certain issues is addressed to the sound discretion of the trial court.

10. Trial § 36—

A charge will be construed contextually as a whole, and appellant's exceptions thereto will not be sustained when the charge so construed is without prejudicial error.

STACY, C. J., BARNHILL and WINBORNE, JJ., concur in result.

APPEAL by defendant from *Rousseau, J.*, and a jury, at 20 January, 1941, Term, of FORSYTH. No error.

The issues and verdict indicate the controversy:

"1. Did the plaintiff assume liability and incur expense in connection with the claim of Dorothy Rumley contrary to the terms of the policy, as alleged in the answer? Ans.: 'No.'

"2. Did the plaintiff incur expense for the imperative surgical relief of Dorothy Rumley, as alleged in the complaint? Ans.: 'Yes.'

"3. Did the defendant authorize, or ratify, the incurring of such medical expense, as alleged in the complaint? Ans.: 'Yes.'

"4. Was the settlement of the claim of Dorothy Rumley and Gladys Rumley Hoffman made by the plaintiff in good faith, upon reasonable terms and with reasonable prudence and care, as alleged in the complaint? Ans.: 'Yes.'

"5. What amount, if any, is the plaintiff entitled to recover of the defendant by reason of the defense of the actions brought by the guardian of Dorothy Rumley and Mrs. Gladys Rumley Hoffman and by reason of the settlement of said claims? Ans.: '$3,591.50, with interest from January 29, 1940, on the sum of $2,981.50.'

"6. What amount, if any, is the plaintiff entitled to recover of the defendant by reason of expense incurred by the plaintiff for the imperative surgical relief of Dorothy Rumley? Ans.: '$485.00, with interest from April 29, 1940.'"

The court below rendered judgment on the verdict.

The pertinent portions of the policy relied on either by the plaintiff or the defendant, are as follows:

"Stock Company Automobile Policy—No. PT 29210.

"American Fidelity and Casualty Co., Incorporated, Richmond, Virginia. (Herein called the Company). In consideration of the Premium Herein Provided, DOES HEREBY AGREE:

"To Indemnify the Assured named in Statement (I) of the Schedule of Statements and herein called the Assured:

"Against Loss from the Liability Imposed Upon the Assured arising or resulting from claims upon the assured for actual damages to persons accidentally receiving bodily injuries, and damage to property by reason of the ownership, maintenance or use of any of the automobiles or motor vehicles as enumerated and described in Statement VI of the schedule of statements only while being operated for the purposes stated and subject to the limitations in Statement VIII of said schedule, to an amount not exceeding the limits hereinafter stated in Statement IV of said schedule, if such claims are made on account of BODILY INJURY TO PERSONS.

"(1) Bodily Injury or Death suffered by any person or persons, other than the Assured or his employees, as the result of an accident occurring while this Policy is in force; *including such first medical aid as shall be imperative at the time of any such accident.*

"DEFEND AND PAY COSTS AND EXPENSE—

"(3) To Defend in the name and on behalf of the Assured any suit brought against the Assured to enforce, a claim, whether groundless or not, provided notices are given to it as hereinafter required, for damages suffered or alleged to have been suffered on account of bodily injuries or death, or the damage to or the destruction of property, as the result of an accident covered by this Policy and caused in the manner and under the circumstances as herein provided, and while this Policy is in force and to pay all costs taxed against the Assured in any legal procedure against the Assured, which is defended by the Company in accordance with the foregoing agreement; and to pay interest accruing upon

any judgment rendered in connection therewith, on that portion of the judgment not in excess of the Policy limit, until the Company has paid, tendered, or deposited in court, such part of such judgment as does not exceed the limits of the Company's liability under this Policy, provided, however, that the Company shall not be obligated to make or furnish any appeal bond in connection with any suit or suits defended hereunder.

"This Policy is issued by the Company subject to the following conditions, limitations and agreements which are a part of the Policy and to which the Assured, by the acceptance of this Policy, agrees:

"CO-OPERATION OF ASSURED; EXPENSE.

"(B) The assured shall cooperate with the Company in securing information and evidence and the attendance of witnesses and in the settlement or defense of any suit or prosecution of any appeal. In case of trial the Assured, if requested, shall present himself in due time for the preparation of his defense at the office of the attorneys designated by the Company and shall attend such trial of such suit. The Assured shall not admit or voluntarily assume any liability nor offer to settle any claim, nor incur any expense, *except for such immediate surgical relief as is imperative, without the written consent of the Company.* The Assured shall at all times render to the Company all co-operation and assistance within his power. Failure to co-operate in any of the foregoing respects shall render this Policy null and void.

"ASSURED'S RIGHT OF RECOVERY, ETC.

"(E) This insurance is intended solely as an indemnification to the Assured against loss from the causes named and for certain expenses enumerated herein, and is not intended to be for the benefit of third parties, except as herein specifically set out. Provided, however, that should any law regulating the vehicles insured hereunder require the Company to alter the terms of this Policy by endorsement or otherwise so as to make the Company liable for any loss which it would not otherwise be required to pay under the terms of this Policy, then the Assured shall reimburse the Company for any and all such loss, cost or expense, paid or incurred by the Company as the result of any such statute or statutory endorsement. The Company shall not be liable to pay any loss nor shall any action be brought against the Company, to recover under this Policy until a final judgment shall have been recovered against the Assured in the Court of last resort after trial of the issue, and in which suit the Company is not joined as a party, provided, however, that the Company shall have the right to deduct from the payment of any loss hereunder, any sums due the Company by the Assured. Bankruptcy or insolvency of the Assured shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this Policy and in case execution against the Assured is returned

unsatisfied in an action brought by the injured person, or by his or her personal representative in case death results from the accident, because of such bankruptcy or insolvency, an action may be maintained by such injured person, or his or her personal representative, against the Company on this Policy and subject to its terms and limitations for the amount of the judgment in said action, not exceeding the limits provided in this Policy. In no event shall any action be maintained against the Company under this Policy unless brought within one year after right of action accrues, provided, however, that the minimum time set by the statutes of the State in which the Assured resides shall govern. The inclusion herein of more than one Assured shall not operate to increase the limits of the Company's liability.

"ALTERATIONS IN POLICY; NOTICE

"(L) No erasure or change appearing on this Policy as originally printed nor change or waiver of any of its terms or conditions or statements, whether made before or after the date of this Policy, shall be valid unless set forth in an endorsement added hereto and signed by either the President, Vice-President, Secretary or one of the Assistant Secretaries of the Company. Neither notice given to nor the knowledge of any agent or any person, whether received or acquired before or after the date of this Policy, shall be held to waive any of the terms or conditions, or statements of this Policy, or to preclude the Company from asserting any defense under said terms, conditions, and statements, unless set forth in an endorsement added hereto and signed by one of the said officers.

"AUTHORIZED AGENTS

"(M) No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by either the President, one of the Vice-Presidents, Secretary or one of the Assistant Secretaries of the Company."

It is stipulated and agreed that the Policy above mentioned covered thirty-five taxicabs owned and operated by the plaintiff. The court below rendered judgment for plaintiff on the verdict.

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

Roy L. Deal for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

CLARKSON, J. This was an action brought by the plaintiff against the defendant to recover on a policy of indemnity or liability insurance issued by the defendant, insuring the plaintiff as a taxicab company

against liability from the operation of its taxicabs. The policy was in full force and effect and the premium was paid when the accident occurred. The plaintiff brings this action to recover against defendant certain sums of money paid out by it and as shown by judgment recovered against it, and contends that this was done under the terms of the policy above set forth; that the action was brought against it by passengers for injuries alleged to have been caused by the negligence of plaintiff. It is the plaintiff's contention that the language of the policy authorizes the assured to render such immediate surgical relief as is imperative, without the consent of the company; that it appoints the assured the agent of the insurance company to employ such immediate surgical relief at the expense of the company, and is advance authorization to do so. Such a purpose is both humanitarian and serves the best interest of the company and the assured by mitigating damages. That the provision is not one of forfeiture, but only a limitation on expense to be incurred for the company. We think the contention correct.

The defendant in its brief states some of its contentions thus: "The Court erred in refusing, upon motion of the defendant, to strike from plaintiff's pleadings all references by the plaintiff to a compromise settlement with claimants other than Dorothy Rumley and in admitting evidence relative thereto over the objection of the defendant. In view of the specific provisions of the indemnity contract of insurance, entered into between the plaintiff and the defendant, relating to the matter of the extent to which the plaintiff could employ surgical relief, the condition precedent to the right of the plaintiff to bring action against the defendant to recover under the policy contract, change or waiver of the terms or conditions, notice or knowledge of any agent or person, and the limitation on who should be deemed an agent of the defendant, the Court erred as to the admission of evidence over the objection of the defendant, particularly on the questions of estoppel or waiver." We think not.

In *Smith v. Fire Ins. Co.*, 175 N. C., 314 (317-18), we find: " 'The rule of construction prevails almost universally that contracts of insurance are construed against the insurer and in favor of the insured, and this has not been changed by the adoption of standard form of insurance. *Wood v. Ins. Co.*, 149 N. Y., 385; *Gazzam v. Ins. Co.*, 155 N. C., 338; *Cottingham v. Ins. Co.*, 168 N. C., 265.' *Johnson v. Ins. Co.*, 172 N. C., 146. Doubts as to the meaning of ambiguous terms and phrases are resolved against the insurer, and Mr. Vance says in his work on Insurance, quoted in *Jones v. Casualty Co.*, 140 N. C., 264: 'Probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract shall be resolved in favor of the insured.' . . . *Johnson v. Ins. Co., supra:* 'The courts look with disfavor upon forfeitures.'

Skinner v. Thomas, 171 N. C., 98, and the trend of modern authority is that a stipulation in a policy which might avoid it does not have this effect if it in no way contributes to the loss. *Cottingham v. Ins. Co.,* 168 N. C., 264."

In *Baum v. Ins. Co.,* 201 N. C., 445 (449), it is written: "Law and equity abhors a forfeiture. To make void a policy like the present, the language of the provision in the policy and the rider in controversy, must be free from ambiguity."

In the present action there was liability over and above the policy limits, and the cab company paid more than the policy limits. To say that it would forfeit its insurance by undertaking to mitigate its own liability by furnishing medical and nursing aid without the insurance company's consent, would be unreasonable and hard measure. Furnishing medical, hospital or nursing aid could in no way contribute to loss or liability on the part of the insured or the insurance company.

In *Barber v. R. R.,* 193 N. C., 691 (696), the Court said: "The defendant, not knowing whether it was liable or not, had the humanity to take plaintiff, who was struck by its engine, to a hospital in Danville and employed Dr. Miller to attend him. It was an act of mercy which no court should hold in any respect was an implied admission or circumstance tending to admit liability. If a court should so hold, it would tend to stop, instead of encourage, one injuring another from giving aid to the sufferer. It would be a brutal holding, contrary to all sense of justice and humanity."

The following is in the record:

"State of North Carolina—Insurance Department.

"No. 88284—Date 4/1/38.

"The American Fidelity & Casualty Insurance Company, of Richmond, Va., has been licensed for the year ending March 31, 1939, and James E. Gay, Jr., of Winston-Salem, N. C., is the duly authorized and licensed Adjuster agent for said Company. This license expires March 31, 1939, unless sooner revoked. Dan C. Boney, Insurance Commissioner. Fee Paid $2.00."

Much evidence was introduced on the part of plaintiff that Gay authorized and ratified the payment of the doctors and nurses. The evidence disclosed that Dorothy Rumley was severely injured, sustaining fractures of the pelvis and scapula, severe cuts, injury to her knee, a severe brain concussion and was in a semi-conscious condition for 8 or 9 days. The nurse, Mrs. McGee, testified that in her opinion the girl was in "imperative need for nursing, immediate nursing attention" at the time the nurse

first saw her, and that this condition continued until she left the hospital. The nurse, Mrs. Grace Shore, testified to the same effect.

In *Bobbitt Co. v. Land Co.,* 191 N. C., 323 (328), is the following: "*Hoke, J.,* in *Powell v. Lumber Co.,* 168 N. C., p. 635, speaking to the subject says: 'A general agent is said to be 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. *Latham v. Field,* 163 N. C., 356; *Stephens v. Lumber Co.,* 160 N. C., 107; *Gooding v. Moore,* 150 N. C., pp. 195-198; Tiffany on Agency, pp. 180, 184, 191 *et seq.* 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. *Law Reporting Co. v. Grain Co.,* 135 Mo. App. Rep., pp. 10-15; 31 Cyc., pp. 1326-1331,'" citing many authorities. *Warehouse Co. v. Bank,* 216 N. C., 246 (253).

The license reads: "Jas. E. Gay, Jr., is the duly licensed adjuster agent for said Company." Black's Law Dictionary, p. 57, defines "Adjuster": "One who makes any adjustment or settlement. *Popa v. Northern Ins. Co.,* 192 Mich., 237, 158 N. W., 945, 946, or who determines the amount of a claim, as a claim against an insurance company. *Samchuck v. Ins. Co. of North America,* 99 Or., 565, 194 P., 1095." The question here was one of adjustment. We think, under the evidence, Gay had authority to make and ratify the employment of doctors and nurses. We think the terms of the policy permits this "such immediate surgical relief as is imperative without the written consent of the Co." Surgical relief would include nurses.

The insurance company, after notice to its adjuster Gay that the cab company had employed doctor and nurses and had agreed to pay the nurses, after similar notice to the attorney employed by it to defend the suits and by inference notice to the insurance company's agent and

branch office manager, C. B. Trent, continued the defense of the suits. Its attorneys filed answer in the Rumley suits and some four or five months after such notice to Gay, Hutchins and Trent, the company compromised and settled the claim of another passenger in the same taxicab, who was injured in the same accident. Defendant contends that allegations and proof of such settlement was incompetent. Ordinarily an offer of compromise is incompetent, as is the fact that a defendant has settled the claim of one claimant when sought to be introduced by another claimant whose claim is based on the same or similar facts. Dorothy Rumley, for instance, probably could not have introduced in evidence against the cab company the fact that it or its insurance carrier had settled with another passenger. It would not be doubted, however, that if the insurance company had defended a suit brought against the cab company by the other passenger that fact would be admissible as tending to show that the insurance company was doing so under the terms of the policy, and would be evidence of a waiver on its part of the alleged breach of condition of the policy or a ratification of the employment of medical aid. The material fact was not that the claim of the other passenger had been settled, but that the insurance company recognized its continuing obligation under the policy to defend or settle, as it deemed best, the claim of the other passenger.

In *Lowe v. Casualty Co.*, 170 N. C., 445 (447), we find: "The failure of the defendant to defend the suit, after repudiating its liability to the assured, constituted a distinct breach of contract and justified the plaintiff in defending it at his own expense. *Beef Co. v. Casualty Co.*, 201 U. S., 173."

In 7 Couch Cyc. of Insurance Law, sec. 1875 (e), at page 6255, it is said: "If the insurer refuses to defend a suit against the insured under the policy stipulations and insured is compelled to undertake the defense and does so, insurer is liable for the amount of the judgment and expenses incurred in conducting said defense." In *Insurance Co. v. Harrison-Wright Co.*, 207 N. C., 661, matters involved in this case are decided in that case in line with the contentions of plaintiff.

In *Anderson v. Ins. Co.*, 211 N. C., 23 (27), it is written: "It goes without saying that the compromise amount sued for by plaintiff, which was paid by plaintiff to those injured, must be reasonable and made in good faith."

The general rule is stated in Huddy, Encyclopedia of Automobile Law (9th Ed.), Vol. 13-14, sec. 294, as follows: "By denying liability or refusing to settle claims against insured, which are covered by the automobile indemnity policy, the insurance company commits a breach of the policy contract and thereby waives the provisions defining the duties and obligations of the insured. Thereafter, the insured may properly assume

responsibility for the conduct of his own defense of the case, and may either continue the litigation and go to trial with the case, or, if his judgment so dictates, he may make a reasonable settlement of the claim. Under such circumstances, he may recover from the company the amount which is reasonably required to effect the settlement as damages ordinarily and naturally resulting from the insurer's failure to defend the action, even though the contract provided for recovery only when the payment is in satisfaction of a judgment."

The defendant contends: "In view of the specific provisions of the indemnity contract and the complete lack of evidence on the part of the plaintiff tending to establish specific authority in either the witness James E. Gay or Fred S. Hutchins to bind the defendant by contract or to waive any of the provisions of said contract, the Court erred in overruling the various motions of the defendant for judgment as of nonsuit." We think not.

We think the language of the contract gave authority and the evidence on the record is plenary that Jas. E. Gay, Jr., and Fred S. Hutchins, the attorney, had implied, if not express, authority to bind defendant in the aspects claimed by plaintiff.

In *Horton v. Ins. Co.*, 122 N. C., 498 (503-4), this Court said: "It is well settled in this State that the knowledge of the local agent of an insurance company is, in law, the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, and that such waiver may be presumed from the acts of the agent. . . . One further citation will suffice: Wood on Insurance, 496, cited and approved in *Collins v. Ins. Co.*, 79 N. C., 279, at page 284, says: 'When the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance; and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement. . . . And such waiver may be implied from what is said or done by the insurer. So, the breach of any condition in the policy, as against an increase of risk or by keeping of certain hazardous goods . . . or, indeed, the violation of any of the conditions of the policy, may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken.'" *Conigland v. Ins. Co.*, 62 N. C., 341; *Ins. Co. v. Powell*, 71 N. C., 389; *Grubbs v. Ins. Co.*, 108 N. C., 472; *Dibbrell v. Ins. Co.*, 110 N. C., 193; *Strause v. Ins. Co.*, 128 N. C., 64; *Colson v. Assurance Co.*, 207 N. C., 581. These cases likewise establish the proposition that knowledge of an agent or adjuster of the insur-

ance company acting within the scope of his employment will be imputed to the insurance company.

In *Colson v. Assurance Co., supra,* at pp. 583-4, it is said: "In *Laughinghouse v. Ins. Co.,* 200 N. C., 434 (436), speaking to the subject, we find: 'It is held that in the absence of fraud or collusion between the injured and the agent, the knowledge of the agent, when acting within the scope of the powers entrusted to him, will be imputed to the company, although the policy contains a stipulation to the contrary. *Short v. LaFayette Ins. Co.,* 194 N. C., 649; *Ins. Co. v. Grady,* 185 N. C., 348.'"

It is well settled that the motion made by defendant to set aside the verdict as to certain issues was in the sound discretion of the court below.

The defendant contends that there was error in the charge of the court below by stating the law erroneously; by failing to apply the law to the facts; by stating law to which no facts were applicable; by failing to define the provisions of the policy contract in controversy, and by failing to charge the jury on the law applicable to this case.

None of the contentions can be sustained. We think the charge of the court below, taken as a whole, fully complied with all the matters complained of by defendant. After a careful review of the charge, we can detect no prejudicial or reversible error. Certain matters complained of by defendant cannot be sustained—they were subordinate features and no prayer was requested. We think the issues submitted by the court determinative of the controversy. The record is a long one, the able briefs cover every aspect of the case. On the whole record, we find

No error.

STACY, C. J., BARNHILL and WINBORNE, JJ., concur in result.

C. T. HALLMAN v. THE WOOD, WIRE & METAL LATHERS' INTERNATIONAL UNION AND WM. J. McSORLEY, TERRY FORD, GRADY C. KILPATRICK, D. E. HENRY, B. L. HENRY, A. W. SWANN, R. F. GLEASON AND A. B. SMITH, INDIVIDUALLY, AND FOR AND ON BEHALF OF THEMSELVES AND ALL OTHER MEMBERS OF THE WOOD, WIRE & METAL LATHERS' INTERNATIONAL UNION.

(Filed 14 June, 1941.)

1. Actions § 1d—

An unincorporated labor union is without capacity to sue or be sued in the name of the association, since in law it has no legal entity, and there being no statutory provisions enabling it to sue or be sued as an association. Ch. 24, Public Laws 1933, ch. 182, Public Laws 1933; C. S., 457, 483 (4), apply only to suits by or against mutual benefit associations on certificates or policies of insurance.

2. Process § 7—

Attempted service of process in any way upon an unincorporated labor union is void, since such association has no legal entity and may not sue or be sued in the name of the association.

STACY, C. J., BARNHILL and WINBORNE, JJ., concur in result.

APPEAL by defendant, the Wood, Wire & Metal Lathers' International Union, from *Johnston, Special Judge,* at February, 1941, Extra Term, of MECKLENBURG. Reversed.

This is a civil action, setting forth two causes of action, charging actionable wrong, brought by plaintiff against defendants. In a long, detailed complaint, setting forth the wrongs done by defendants to plaintiff, it is alleged by plaintiff:

"2. That the Wood, Wire & Metal Lathers' International Union, hereinafter referred to as the International Union, is a voluntary unincorporated association, consisting of several thousand members, and has a recognized group name, with headquarters in Cleveland, Ohio.

. . . . . .

"33. That, when said defendants caused the plaintiff to be black-listed as a lathing contractor, as aforesaid, said defendants knew that the plaintiff had been given the sub-contract to perform the lathing work on the Chavis Heights Housing Project; and that the acts and conduct of said defendants were done with full knowledge upon the part of the defendants that said acts would result in the termination of the sub-contract between said Kirkland and the plaintiff and would cause substantial loss and great injury and damage to the plaintiff.

"34. That, by reason of the termination of said sub-contract between said Kirkland and the plaintiff, plaintiff was damaged in the sum of $3,000.

"35. That the damage to the plaintiff, as herein set forth, was due, caused and occasioned by, and followed as a direct and proximate result of, the acts and conduct of the International Union and of William J. McSorley, Terry Ford, Grady C. Kilpatrick, D. E. Henry and B. L. Henry, as hereinbefore set forth, and in having the plaintiff black-listed as a lathing contractor and in causing said W. C. Kirkland to be notified thereof.

"36. That the wilful, wanton and malicious acts of the defendants in calling the strike referred to in the first cause of action herein and in black-listing the plaintiff, as a lathing contractor, as referred to in the second cause of action herein, have become well known among building contractors; that, as a direct and proximate result of said wilful, wanton and malicious acts, plaintiff has been unable to procure several other lathing sub-contracts which he otherwise could and would have procured at a profit to himself if it had not been for the wilful, wanton and malicious acts of the defendants in calling said strike and having the

plaintiff black-listed as a lathing contractor and in notifying various contractors that plaintiff had been black-listed as a lathing contractor and that the International Union would not permit its members to work for plaintiff, as a lathing contractor, as hereinbefore set out.

"37. That, by reason of the wilful, wanton and malicious acts of said defendants, as herein set forth, many contractors, who would otherwise have been glad to deal with the plaintiff and award him lathing sub-contracts have failed and refused to deal with him or to permit him to bid, because of the fact that plaintiff has been black-listed as a lathing contractor by the International Union; that, on many jobs on which plaintiff would bid, union labor is used exclusively, and that, consequently, plaintiff's ability to work and earn a livelihood for himself has been greatly restricted by the wilful, wanton and malicious acts of said defendants.

"38. That, by reason of the acts of said defendants in having the plaintiff black-listed as hereinbefore set forth, and by reason of the plaintiff's consequent inability to procure other lathing sub-contracts which he otherwise would have procured, plaintiff has suffered further actual damage in the sum of $5,000.

"39. That, by reason of the wilful, wanton and malicious acts of the defendants in having the plaintiff black-listed on jobs which he could and would have procured as a lathing contractor, except for said acts, the plaintiff is entitled to recover of the defendants as punitive damages the sum of $25,000 on plaintiff's second cause of action.

"WHEREFORE, the plaintiff prays judgment against the defendants for the sum of $9,900 as actual damages and for the sum of $35,000 as punitive damages, and for the costs of the action to be taxed by the Clerk."

D. E. Henry and B. L. Henry filed answer denying material allegations of the complaint. Grady C. Kilpatrick and R. F. Gleason filed answer denying the material allegations of the complaint. A. W. Swann denied the material allegations of the complaint. Special appearance and motion to dismiss was filed on behalf of the defendants, Wood, Wire and Metal Lathers' International Union, Wm. J. McSorley and Terry Ford.

The order of the court below is as follows:

"This cause coming on to be heard before the undersigned, Judge presiding at the February 1941 Extra Term of Mecklenburg Superior Court for the trial of civil cases, and being heard upon the special appearance and motion to dismiss the action as to William J. McSorley, Terry Ford, and The Wood, Wire and Metal Lathers' International Union, and being heard upon the papers hereinafter referred to and upon the argument of counsel, and it appearing that said motion to dismiss should be allowed as to the defendants William J. McSorley and

Terry Ford and should be denied as to The Wood, Wire and Metal Lathers' International Union:

"Now, Therefore, It is Ordered, Adjudged and Decreed that the motion to dismiss the above-entitled action as to the defendants William J. McSorley and Terry Ford should be, and the same is hereby allowed.

"It is further ordered that the motion to dismiss the above entitled action as to The Wood, Wire and Metal Lathers' International Union be, and the same is hereby denied. This 27th day of February, 1941. A. Hall Johnston, Judge Presiding."

The motion was allowed as to the defendants Wm. J. McSorley and Terry Ford. To the order denying the motion to dismiss the above entitled action as to The Wood, Wire and Metal Lathers' International Union, said defendant excepted, assigned error and appealed to the Supreme Court.

The defendant The Wood, Wire and Metal Lathers' International Union groups its exceptions and makes its assignments of error as follows:

"1. That the Court denied its motion to dismiss made on its special appearance on the grounds that said defendant has not been properly served with process in this action. The defendant The Wood, Wire and Metal Lathers' International Union excepted to the ruling of the Court, which is defendant Wood, Wire and Metal Lathers' International Union's Exception No. 1.

"2. That the Court denied its motion to dismiss this action as to the defendant Wood, Wire and Metal Lathers' International Union on the ground that it is an unincorporated association of tradesmen which has no legal residence in the State of North Carolina and service of process has not been had upon it in any way provided by the laws of the State of North Carolina. The defendant Wood, Wire and Metal Lathers' International Union excepted, which is said defendant's Exception No. 2."

G. T. Carswell and Joe W. Ervin for plaintiff.

McDougle & Ervin and Francis H. Fairley for defendant, appellant.

CLARKSON, J. The *first* question involved on the appeal: (1) Can the plaintiff maintain in the courts of this State an action at law for damages against the appealing defendant, The Wood, Wire and Metal Lathers' International Union, which is a voluntary unincorporated association of individuals commonly known as a labor union? We think not.

Plaintiff alleges that the appealing defendant is a "voluntary unincorporated association." This matter has long been settled in this State contrary to the plaintiff's contention.

In *Tucker v. Eatough,* 186 N. C., 505 (507), it is stated: "The com-

plaint in this case shows plainly that the action was brought against the association, and in this State only natural or artificial persons can be brought into court upon summons. The defendant, United Textile Workers of America, not being incorporated, is without capacity to sue or be sued, and the court properly dismissed the action *ex mero motu.* . . . (p. 508) Among other cases, in the *Coronado Coal case,* 259 U. S., 344, *Chief Justice Taft* uses the following language: 'Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett v. Walsh,* 192 Mass., 572; *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union,* 165 Ind., 421; *Baskins v. United Mine Workers of America,* 234 S. W., 464. But the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes, when they do not violate law or the rights of others, has been declared.' In the famous *Taff-Vale case,* in which an unincorporated labor union was held to be suable, this was placed solely upon the ground that Parliament had passed the Trade Union Act of 1871, which permitted trade unions to be registered, and gave to registered unions the power to own property and to act by agents. This is cited and explained by *Judge Taft* in the *Coronado Coal decision, supra.* In North Carolina there is no legislation thus changing the common-law, and the Legislature has not authorized, but has refused to authorize these unincorporated associations to take and hold property in their association name. In the *Coronado case* it is said by *Chief Justice Taft:* 'There is no principle better settled than that an unincorporated association cannot, in the absence of a statute authorizing it, be sued in the association or company name, but all the members must be made parties, since such bodies, in the absence of statute, have no legal entity distinct from that of its members.' 5 C. J., 1369; 20 R. C. L., 672, and many other cases. . . . (p. 509) But upon the broader ground, if contrary to common law, an action could be brought without authority of a statute against an unincorporated body, it would be permissible for any person to bring an action against the Confederate Veterans Association, or the American Legion, or the League of Women Voters, or any other unorganized body upon an allegation that one of their members had committed the libel or other legal wrong against the person bringing the action. It certainly cannot be necessary to discuss further the proposition that the United Textile Workers of America not being a legal entity, and there being no statute authorizing them to be sued, that the action was properly dismissed as to them."

In *Citizens Co. v. Typographical Union,* 187 N. C., 42, it was held:

"An unincorporated company or association of workmen is not, as such, subject to be sued or the object of injunctive relief. The individual members of a labor organization may ordinarily combine in their efforts, by peaceful persuasion and picketing, to induce others to quit their employment by uniting with them in ceasing to work for employers, whether corporations or individuals; but the employers and employees have relative rights, the one to the services and the other to render services, free from coercion, intimidation, or other unlawful or threatening influences; and there the complaint states a definite cause of action against individual members of an unincorporated labor organization, a demurrer admits the truth of the relevant and pertinent allegations, and thereupon a temporary injunction issued upon due notice to show cause should be continued to the hearing, upon the merits of the cause, for the finding of the facts by the jury." At p. 52, it is said: "The exceptions of plaintiff have been considered on the demurrer, *ore tenus* of defendants to the complaint. The judgment of the court below dissolving the restraining order against the Asheville Typographical Union, No. 263, is affirmed. As against the individuals set out in the complaint, the judgment is reversed and modified in accordance with this opinion. The restraining order under the judgment of the court below is continued against the individual defendants to the hearing and modified in accordance with this opinion." *Jinkins v. Carraway,* 187 N. C., 405; *Winchester v. Brotherhood of R. R. Trainmen,* 203 N. C., 735 (744, 745). In the *Winchester case, supra,* the plaintiff had a Beneficiary Certificate or Insurance Policy. The case was decided on the applicable statutes in reference to the regulation and control of fraternal benefit and insurance associations.

At the next session of the General Assembly, Public Laws of N. C., 1933, chapter 24, was enacted:

"Section 1. That section number four hundred and eighty-three of the Consolidated Statutes of North Carolina be and the same is hereby amended by adding another section thereto as follows: 'Every unincorporated, fraternal, beneficial organization, fraternal benefit order, association and/or society issuing certificates and/or policies of insurance, whether foreign or domestic, now or hereafter doing business in this State, shall be subject to service of process, in the same manner as is now or hereafter provided for service of process on corporations: *Provided,* this act shall only apply in actions concerning such certificates and/or policies of insurance."

Also was enacted chapter 182, which reads: "Section 1. That section number four hundred and fifty-seven of the Consolidated Statutes of North Carolina shall be and the same is hereby amended by adding another section thereto, as follows: 'Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or

societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in the State, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it; *Provided,* however, this act shall apply only in actions concerning such certificates and/or policies of insurance."

The General Assembly, the law-making body, has never seen fit to pass an act allowing or permitting a voluntary unincorporated association of individuals, commonly known as a labor union, to sue or be sued, or the method by which process can be served. The above quoted acts do allow service of process on unincorporated organizations and permit them to sue and be sued that issue certificates or policies of insurance. These are enabling acts and seem to follow the decision in the *Winchester case, supra.*

N. C. Code, 1939 (Michie), sec. 457 and sec. 483, are not applicable. The proviso in both say: *"Provided,* however, this section shall apply only in actions concerning such certificates and/or policies of insurance." The last sentence of these sections, relating to unincorporated, beneficial organizations, fraternal orders, etc., were added by Public Laws 1933, ch. 24 and ch. 182, *supra.*

We do not discuss the United States statutes or decisions. We are deciding the action in the light of the decisions in this jurisdiction, which we believe are in accord with the majority rule of the states in the Union.

The *second* question involved: Has the appealing defendant, The Wood, Wire and Metal Lathers' International Union, been properly served with process in this case? We think not.

The defendant, The Wood, Wire and Metal Lathers' International Union, having no legal entity, the attempted service in any way is null and void. Of course plaintiff has a remedy by suing the wrongdoers, as he has done, as was said in the *Citizens Co. case, supra.* This type of action denotes a chaotic and nebulous condition—such as the world was in until the Supreme Commander said, "Let there be light, and there was light." Until the General Assembly enacts the power to sue and be sued and the manner of service of process, there is no legal entity capable of being served with process or to sue and be sued.

For the reasons given, the judgment of the court below in reference to the appealing defendant is

Reversed.

STACY, C. J., BARNHILL and WINBORNE, JJ., concur in result.

MRS. ADDIE JONES HALL AND HUSBAND, CLAUDE T. HALL, v. MADELINE ELAINE HALL, HULDAH JONES HALL, C. T. HALL, JR., JOHN LOCKSLEY HALL, NANCY MAE HALL AND ANY UNBORN CHILDREN OF MRS. ADDIE JONES HALL, AND CLAUDE T. HALL, GUARDIAN OF HULDAH JONES HALL, C. T. HALL, JR., JOHN LOCKSLEY HALL AND NANCY MAE HALL.

(Filed 14 June, 1941.)

1. Estates § 9b—

Where a tenant, with knowledge that she has only a life estate in the *locus in quo* with limitation over to her children, makes permanent improvements upon the land, the life tenant is solely liable for the cost of the improvements and is not entitled to compensation therefor, nor does the cost thereof constitute a charge upon the land when it passes to the remaindermen, notwithstanding that the improvements are, in part at least, for the benefit of the remaindermen.

2. Estates § 10—In order for court to authorize that interest of contingent remaindermen be mortgaged it must be made to appear that their interest would be materially enhanced thereby.

The *locus in quo* was devised to testator's daughter for life with limitation over to the daughter's children. The daughter and her husband expended large sums in making permanent improvements upon the property, and instituted this proceeding against their children, *in esse* or which might thereafter be born, seeking to have a mortgage in the sum of $20,900 placed on the property to refinance an existing mortgage on the property in the sum of $10,000, and also unsecured notes executed by the life tenant representing a part of the moneys used in making said improvements. *Held:* Since the remaindermen are in no way liable for any sums expended by the life tenant in making permanent improvements, the finding by the court that the execution of the mortgage to refinance the indebtedness would materially enhance the interest of the remaindermen is erroneous, and judgment directing the execution of the mortgage to refinance the indebtednesses is reversed. C. S., 1744.

3. Guardian and Ward § 16a—

A guardian may not be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to refund notes executed by the life tenant representing a part of the moneys expended by the life tenant in making permanent improvements upon the land, since, the remaindermen being in no way liable for the sums expended by the life tenant, the execution of the mortgage could not be to the interest of the remaindermen. C. S., 2180.

4. Same—

The refinancing of a mortgage on the *locus in quo* in order to secure a new loan carrying a greatly reduced interest rate, could not inure to the benefit of the remaindermen, since any savings in interest would inure to the benefit of the life tenant who is entitled to the usufruct.

HALL *v.* HALL.

APPEAL by defendants from *Carr, Resident Judge* of Tenth Judicial District, in Chambers at Graham, 3 May, 1941. From PERSON.

Cooper A. Hall for plaintiffs, appellees.
Barnie P. Jones for defendants, appellants.

SCHENCK, J. This is a special proceeding instituted before the clerk of the Superior Court of Person County by the plaintiffs, the life tenant and her husband, against the defendants, their children and remaindermen, for the purpose of placing a mortgage upon the interests in remainder of minors, together with interest of the life tenant, to secure the payment of a loan of $20,900.00 from the Federal Land Bank, the money to be used in retiring a note for $10,000.00 secured by mortgage on the entailed property, and the balance in retiring unsecured notes of the life tenant and her husband, the proceeds of all of said notes having been duly and wisely expended in enhancing the value of and increasing the income from the entailed property.

D. S. Brooks was duly appointed guardian *ad litem* for all of the minor defendants and of any unborn children of Mrs. Addie Jones Hall.

The clerk found substantially the following facts: (1) that M. L. Jones, late of Person County, died 19 May, 1920, seized of a lot of land in the town of Roxboro, upon a portion of which was situated the Hotel Jones Building and two dilapidated residences, and 3,300 acres of farm land in Person County, and that he left a last will and testament wherein he devised to his daughter, the plaintiff, a life estate in said lands with remainder to her children, in the following language: "I give and devise to my beloved daughter Addie Garnet Jones all of my real estate for and during the term of her natural life and at her death all of said real estate shall go to her children in fee simple"; (2) that Addie Garnet Jones (the plaintiff) married Claude T. Hall (her coplaintiff) and that they now have five living children (the defendants), four of whom are minors, (3) that in order to pay the increasing taxes, street assessments, insurance, etc., the plaintiffs concluded it was to the best interest of the life tenant and of the remaindermen to develop the real estate by placing permanent improvements upon the town lot, and accordingly, over the years, have expended approximately $78,000.00 in constructing brick buildings thereon, all of which have been paid for from the income from the property except $10,000.00 now secured by mortgage thereon, thereby greatly increasing the income from said property and enhancing the permanent value thereof, and in addition to the improvements placed upon the town lots plaintiffs have constructed a brick veneer residence on the farm at a cost of approximately $10,000.00 and "said improvements were necessary and material additions to the value of said farm,"

(4) that in addition to the permanent improvements aforesaid the plaintiffs have renovated and modernized the hotel, and have placed a water system and are now installing an elevator therein, and have paid all taxes thereon and have kept the property insured for the benefit of the life tenant and remaindermen; and that "said improvements will add greatly to the permanent value of the property in remainder," (5) "that the cost of the permanent improvements to the town and the farm properties, placed there by said life tenant and her husband, to say nothing of the barns, etc., added to the farm, approximate the sum of $88,000; that said cost has been paid and satisfied in full from the income of said estate, save and except the amount of $21,945.00 set out in paragraph 5 of the petition, and $22,000.00 received from the sale of some timber from said farm, which amount was used in the payment of the cost of some of the buildings placed upon the town property; and that the moneys used in paying for the improvements were borrowed upon the individual notes of said life tenant and her husband without mortgage, save and except the note for $10,000 referred to in paragraph 5 of the petition," (6) "that the life tenant and her husband are supporting and educating their children, and that they have and are exercising the same care and business acumen in handling and developing said estate as a prudent owner of the fee would exercise if he had been in possession, cultivating and using the lands and property for support, or for profit, and the sole purpose of asking to fund the debt of $11,945 and to pay the $10,000 six per cent (6%) mortgage is to save 2½ or 3% interest and to amortize the principal over the period of 20 years, which will enable them to apply more of the net income from said estate in adding needed and profitable improvements and preserving the estate," (7) "that $11,945 of the liabilities set out in paragraph 5 of the petition is now evidenced by the individual notes of the life tenant and her husband, C. T. Hall, and secured by an insurance policy on the life of C. T. Hall in the sum of $15,000; that said funds were used solely and exclusively in adding permanent worthwhile and needed improvements to the town and farm properties, referred to in the cause, the expenditure of which has been of great and lasting profit to the remaindermen of said estate," (8) "that after careful consideration, weighing and investigating the advantages and disadvantages of borrowing the sum of $20,900 at 2½ or 3% interest to fund and pay off the obligations referred to in paragraph 5 of the petition, and to secure the payment of said loan by putting a mortgage on the interest of the remaindermen in said farm, the Court finds it as a fact that the interest of the minors, Huldah Jones Hall, C. T. Hall, Jr., John Locksley Hall and Nancy Mae Hall, as well as the contingent remaindermen yet unborn, requires it and would be materially enhanced by borrowing the money from the Federal

Land Bank and securing the payment by a mortgage on the farm property as prayed for by the petitioners." (9) That all of the children of Mrs. Addie (Garnet) Jones Hall, as well as any unborn children of her, are represented by D. S. Brooks, guardian *ad litem,* who has filed answer for them, and are duly before the court.

Upon the foregoing findings of facts the clerk concluded as a matter of law that the court "is authorized and empowered under the conditions of the provisions of C. S., sec. 1744, and the broad principles of equity, to direct the borrowing of the money from the Federal Land Bank with which to pay off and satisfy the obligations referred to in paragraph 5 of the petition and to secure the payment of the same by a mortgage, or mortgages, binding the interest of the remaindermen in and to the farm property described in the petition," and entered judgment accordingly.

To the conclusion of law of and the judgment entered by the clerk, the guardian *ad litem* of the minor defendants and of the unborn children of Mrs. Addie Jones Hall excepted and appealed to the resident judge.

The resident judge found the findings of fact by the clerk to be correct and adopted them as the findings of fact of the court; and as an additional finding of fact found from other evidence taken at the hearing, that "at the time the timber on the property was sold for $22,000.00, the life tenant was then twenty-nine years of age and entitled to $12,968.56 as her share of the proceeds of said sale; and that the life tenant has paid out of her own funds on the permanent improvements upon said land the sum of approximately $57,023.00" and further that "the type of improvements which have been made upon the land owned by the remaindermen described in the petition are permanent structures built of brick and the remaindermen will receive far more profit from the improvements than the life tenant can hope to receive; and that the life tenant has paid a sum in excess of her equitable portion of the expenses of said permanent improvements."

The judge also adopted the conclusions of law of the clerk, and, in addition, concluded that "the remaindermen should in equity be required to bear some portion of the expenses of said permanent improvements to their property and that the amount which is now proposed shall be placed as a lien upon their farm property in the sum of $20,900 is adjudged to be a sum that is not in excess of that which is fair and equitable and is a fair and equitable amount for said remaindermen to pay."

Whereupon the court entered judgment authorizing and directing the guardian of the infant defendants and the guardian *ad litem* of said infant defendants and of any unborn children of Mrs. Addie Jones Hall to execute notes and mortgage, with the life tenant and her husband,

and Madeline Elaine Hall, the *sui juris* daughter of the plaintiffs, to the Federal Land Bank, upon the farm lands; and adjudging that such mortgage will bind "every and all interest, or interests, right or title, vested or contingent, in such lands to such an extent as to give the purchaser, purchasers, at any foreclosure sale, under said mortgage a good, fee simple title, free and clear of all conditions and limitations," and that, after paying costs and expenses, "the remainder of said funds shall be used to pay off and retire the obligations referred to in paragraph 5 of the petition," (*i.e.*, the $10,000.00 note secured by mortgage on the town lot, and the $11,945.00 evidenced by the unsecured notes of the plaintiffs).

To the conclusions of law and the judgment entered by the judge the guardian *ad litem* of the minor defendants and of the unborn children of Mrs. Addie Jones Hall excepted and appealed to the Supreme Court, assigning error.

As praiseworthy and as well intentioned as have apparently been the actions of the plaintiffs in this case in an effort to improve and conserve the property for their children, we are constrained to hold under the decisions of this Court that their contentions herein made are untenable.

All of the indebtednesses which are proposed to be funded and paid by the proceeds of the loan sought to be made are solely indebtednesses of the life tenant, and her husband, except $10,000.00 which is now secured by mortgage on the town lot. $11,945.00 of the total indebtedness of $21,945.00 is evidenced by notes of the plaintiffs for which the defendants, who are remaindermen, or their property, are in nowise responsible or liable.

Improvements put on land by a life tenant during his occupancy thereof do not constitute a charge upon the land when it passes to a remainderman. *Merritt v. Scott,* 81 N. C., 385. A devise of lands for life with limitation over does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy, under the equitable principle allowing it, or our statute relating thereto. *Northcott v. Northcott,* 175 N. C., 148, 95 S. E., 104. One who makes permanent improvements upon land knowing at the time he owns only a life estate therein, may not recover against the remaindermen a proportionate part of the value of the improvements on the ground that they were for the benefit, in part at least, of the remaindermen. *Smith v. Suitt,* 199 N. C., 5, 153 S. E., 602. While it is true that a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he owned a fee therein, is entitled to recover for betterments he has thus made, *Pritchard v. Williams,* 181 N. C., 46, 106 S. E., 144; *Harriett v. Harriett,* 181 N. C., 75, 106 S. E., 221, there is no allegation or evidence that the life tenant in this case had any *bona fide* belief that she owned a fee in the land involved.

The plaintiffs are not aided by C. S., 1744, which makes provision for the sale or mortgage of real estate wherein there is a vested interest and a contingent remainder over to persons not in being by a special proceeding as therein pointed out. The pertinent portion of this statute reads: "The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof . . ." Since the defendant remaindermen in this case and their interest in the real estate involved are in no wise responsible or liable for as much as fifty per centum of the indebtednesses which it is proposed to fund and pay, any finding of fact or conclusion of law to the effect that the execution of a mortgage on the interest of the defendants in such real estate, authority for which is sought in this proceeding, is required or would materially enhance the interest of the defendants is erroneous.

The plaintiffs are likewise unaided by the fact that Claude T. Hall as guardian of the minor defendants has filed answer admitting the allegations of the petition and joining in the prayer thereof. While this may be construed as tantamount to the filing of a petition by a guardian under C. S., 2180, still this statute provides that application of the guardian upon petition "showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, . . . and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had. . . ." It does not appear, nor can it be found "that the interest of the wards would be materially promoted" by the mortgage sought to be authorized in this proceeding. In fact, just the opposite appears.

The contention is made that the difference in the rate of interest now being paid, 6%, and the interest that would be paid on the loan sought to be made, 2½ or 3%, would materially benefit and enhance the interest of the defendants. This does not follow, since any savings in interest would inure to the benefit of the life tenant instead of to the remaindermen—the life tenant being entitled to the usufruct. And, besides, the estate of the defendant remaindermen is now liable for the interest on only $10,000.00, whereas under the mortgage sought to be made such estate would be liable for interest on $20,900.00.

The judgment of the Superior Court is

Reversed.

STATE v. GORRELL SHEEK.

(Filed 14 June, 1941.)

1. **Homicide §§ 16, 27b—Upon proof of killing with deadly weapon burden is on defendant to prove matters in justification or mitigation.**

In this prosecution for homicide defendant did not plead justification or excuse, but contended that the State's evidence disclosed that he inflicted the fatal wounds in a fight with the deceased under circumstances reducing the crime to manslaughter. *Held:* A charge to the effect that upon proof of an intentional killing with a deadly weapon the law presumes that the killing was unlawful and that there was malice, placing the burden upon defendant of showing to the satisfaction of the jury matters in justification, must be held for error for omitting from the charge that defendant was entitled to show matters in mitigation.

2. **Homicide § 6—**

Defendant's contention that the State's evidence was susceptible of only the one inference that the killing was the result of passion produced by a fight, and that therefore the court, as a matter of law, should have limited the jury to a verdict no greater than manslaughter *is held* untenable, the question of malice being for the determination of the jury upon the evidence in the case and the presumption arising from proof of an intentional killing with a deadly weapon.

APPEAL by defendant from *Rousseau, J.*, at January Term, 1941, of FORSYTH.

Criminal prosecution upon indictment charging defendant with the murder of one Frank Moses.

Defendant pleaded not guilty.

Upon the trial the State offered expert medical testimony tending to show that Frank Moses, when examined at the hospital at 9 o'clock on Saturday night, 21 December, 1940, had two wounds—one a gash six inches long involving the skin and muscle under his left arm, and the other about three inches long near the belt line in the abdomen, and that, though neither his pleural nor abdominal cavities were penetrated, he died three hours later from loss of blood from these wounds.

The following narrative, based in the main upon testimony of Myrtle Smith, witness for the State, tends to show the facts leading up to the infliction of these wounds, as the State contends, by the defendant.

On 21 December, 1940, around 11 o'clock a.m., defendant Gorrell Sheek, called Jack, went to the room of Myrtle Smith, where she resided, at the Biltmore Hotel in High Point, North Carolina. Later the same day, about 2 o'clock p.m., Frank Moses, the deceased, called Myrtle Smith to lobby of hotel and asked "where Jack was." Then they joined him in her room. After talking awhile Moses suggested a ride and

something to drink. They rode in defendant's automobile out from High Point, and, after Moses had obtained "a pint of liquor," they stopped at another place, played the piccolo, drank and danced. Then another pint was procured. After half of it was consumed, the three came back through High Point and went "straight to Winston-Salem," arriving there around 6 o'clock. Sheek went to Irene Ward's house and in a few minutes came out with and introduced her to Myrtle Smith and deceased. Myrtle Smith "had a date with Sheek that day. Moses was dating Irene." The four, Sheek and Myrtle Smith on the front seat, rode to Friendly Tavern. It was dark then. There the piccolo was played, the rest of the second pint was consumed by them, and they danced. Defendant and Irene Ward then went for and returned with "a pint of liquor." This was opened and "just one drink" was taken. "There had been no words or anything before" they left Friendly Tavern, where they had been for two or three hours. Leaving there Myrtle Smith started to get in the front seat and defendant asked her "to get in the back with Frank," and she did. Irene Ward sat on the front seat with defendant, who "drove the car straight." They came back to town and went to Irene Ward's house. She and defendant went into the house, as they said, to get a drink. Though invited to go in also, the deceased and Myrtle Smith stayed in the car. When defendant and Irene Ward returned in about ten minutes, deceased said to Sheek, "Let's go to High Point." Defendant drove from there to Hattie Avenue. He and deceased were fussing. Deceased was trying to get defendant to carry him and Myrtle Smith back to High Point. Defendant wanted to go to a beer garden. Deceased told him to stop the car, but he would not. Deceased picked up a bottle in the car and started to hit defendant over the head with it, but Myrtle Smith "grabbed him." Deceased threw the bottle on the floor, and defendant stopped the car. Myrtle Smith first got out, she was followed by Irene Ward, who began fussing and calling her names and trying to make her get back in the car. Myrtle Smith "smacked her." Deceased then got out of the car. Myrtle Smith put Irene Ward back in the car and "told her and Jack to go on wherever they wanted to." They did not drive off. Deceased told defendant that he and Myrtle Smith were going to get a way back to High Point if they had to get a cab to go in, and, in the language of Myrtle Smith, "for him to go on and leave us alone." Then she and deceased walked across to the sidewalk and started up the street. Defendant turned the car around and "hollered and asked" deceased for a cigarette. Myrtle Smith told deceased "not to give him a cigarette, not to go back to the car, there might be trouble." Defendant again asked for a cigarette. Deceased still refused. Defendant jumped out of the car and started toward deceased and Myrtle Smith—taking his knife out of his pocket and

starting to open it. Deceased told him not to come on him, and threw a bottle at him. Defendant said to deceased, "I will kill you, G—— d—— you." Deceased ran across the street, 30 or 40 feet, and fell down at the curb on the other side. The defendant ran after him. He had his knife open when he passed Myrtle Smith. She testified that she ran into a field, that she saw defendant bend over deceased "with his hand up," but that "she could not tell exactly what Sheek had in his hand." She further said: "When I got in the field I heard someone coming toward me hollering 'Oh.' I looked back and it was Frank. I went to him and asked him if he was hurt, and he said 'Yes, I am cut all to pieces.' . . . I would say it was four or five minutes from the time I saw defendant stoop over Frank until Frank overtook me."

Irene Ward testified for the State that she did not know anything about deceased being cut until next day. There was also evidence from an officer that he arrested defendant that night and took a knife off of him, and that the knife had blood on it, though no blood was found on the clothes of the defendant. The officer also testified that defendant appeared to be drinking, but was not so drunk that he would have arrested him for it.

Defendant offered no evidence.

Verdict: Guilty of murder in the second degree.

Judgment: Confinement in the State Prison, at Raleigh, North Carolina, for a period of not less than fifteen nor more than twenty-two years, and assigned to work under the control and supervision of the State Highway & Public Works Commission.

Defendant appeals therefrom to Supreme Court, and assigns error.

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

John D. Slawter and Richmond Rucker for defendant, appellant.

WINBORNE, J. While defendant stresses for error many assignments, we are of opinion that exceptions three and four to portions of the charge of the court below are, in the respects here indicated, well taken.

The charge to which exception three relates is as follows: "Now, gentlemen, there is another principle of law applicable in second degree murder and that is this: (Where it has been proven by the State or admitted by the defendant that one killed another and killed him with a deadly weapon, that raises two presumptions. That raises a presumption that the killing was unlawful and that there was malice, and then the burden rests upon the defendant, gentlemen, not to satisfy you gentlemen beyond a reasonable doubt, or by the greater weight of the evidence or by a preponderance of the evidence, but simply satisfy you gentlemen that the killing was justified on his part.)"

Then after stating contention of the State that deceased died as result of knife wounds, and after defining a deadly weapon, the court further charged: "So the State argues you ought not to have any doubt that there was a killing; that this defendant did it; that he inflicted the wounds that brought about death a few hours later of the deceased; that this was a deadly weapon and then, nothing else appearing, the defendant would be guilty of murder in the second degree, as the burden then rests upon him to satisfy you gentlemen that he was justified in what he did do." Exception 4.

When the intentional killing of a human being with a deadly weapon is admitted, or is established by the evidence, the burden is upon the defendant to show to the satisfaction of the jury facts and circumstances sufficient to justify or excuse the homicide, or to reduce it to manslaughter. *S. v. Quick,* 150 N. C., 820, 64 S. E., 168; *S. v. Atwood,* 176 N. C., 704, 97 S. E., 12; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Robinson,* 213 N. C., 273, 195 S. E., 830; *S. v. Bright,* 215 N. C., 537, 2 S. E. (2d), 541, and numerous other cases.

The vice in the charge given is that, in order to escape the presumption arising from an intentional killing with a deadly weapon, the burden is on defendant to justify his acts. While doubtless a slip of the tongue, this denies to him the opportunity, to which he is entitled, to show facts and circumstances in mitigation sufficient to reduce the crime to manslaughter. The defendant does not plead justification or excuse. He pleads not guilty, and contends that, in any event, the evidence for the State shows facts and circumstances in mitigation sufficient to reduce the crime to manslaughter.

Defendant further contends, with respect to these and other portions of the charge to which exceptions are also taken, that all the evidence, considered in the light most favorable to the State, is susceptible of only one inference, that is, that the killing was the result of passion produced by a fight, and that under the principle stated in *S. v. Quick, supra; S. v. Baldwin,* 152 N. C., 822, 68 S. E., 148; and *S. v. Gregory, supra,* the court as a matter of law should have limited the jury to a verdict no greater than manslaughter. We are of opinion, however, that the evidence is not so clear as to admit of decision as a matter of law.

We refrain from discussing other exceptions to matters which may not recur on another trial.

For errors pointed out, let there be a

New trial.

MRS. ETHEL O. CURRIN v. E. M. CURRIN.

(Filed 14 June, 1941.)

1. Bills and Notes § 2c: Seals § 2—

The maker's admission that he signed the printed form of a note having the word "seal" printed at the usual place after his signature, places the burden upon him of showing that he did not adopt the seal, and his testimony that he could not say that he intended to show the word "seal" and couldn't say at the time of testifying that he remembered seeing the word "seal" is no evidence that he had not adopted the seal.

2. Appeal and Error § 39—

The exclusion of a question asked a witness cannot be held for error when the record does not show what answer the witness would have given, since it cannot be determined on appeal whether appellant was prejudiced by the exclusion of the testimony.

3. Limitation of Actions § 18—

While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute is based upon defendant's contention that the note was not under seal, but defendant offers no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his signature as maker, the question of the statute becomes a matter of law, and the court properly refuses to submit an issue as to whether the action was barred.

4. Bills and Notes § 9f: Evidence § 42g—

In this action on a note, plaintiff's evidence tended to show that she acquired same for value before maturity. Defendant maker sought to testify as to a conversation with the payee tending to show that the payee still held the note after maturity. *Held:* The fact that the payee held the note at the time of making the declaration must be established independently before testimony of the declaration would be competent as a declaration against interest, and when offered solely for the purpose of affirmatively showing that he did hold the note at that time, it is hearsay and inadmissible.

5. Evidence § 42g—

Testimony of declarations against interest is ordinarily admissible only when the declarant is dead or insane or otherwise unavailable.

6. Appeal and Error § 29—

Exceptions not argued in the brief are deemed abandoned.

APPEAL by defendant from *Stevens, J.*, at October Term, 1940, of GRANVILLE. No error.

The plaintiff brought this action to recover the sum of $893.00, and interest, upon a note which she alleges was made and issued by the defendant on 2 March, 1931, and before maturity and without notice of any defect in the title was transferred to her, and of which she is now the holder in due course. The note is apparently under seal, as the word

"seal" appears in the usual place after the alleged signature of the defendant. The defendant denied that he had any recollection of making the note or that he had any knowledge or information sufficient to form a belief with regard to the truthfulness of the plaintiff's allegation, therefore denied the same.

Subsequent paragraphs set up specific denials to the material paragraphs of plaintiff's complaint, denying any indebtedness.

For a further defense, defendant alleged that "the said note is not under seal, in that he is informed and believes and, therefore, alleges, that the word 'seal' appearing after his purported signature was printed on said note and was not adopted by the defendant as his 'seal' in the execution of the said note, and it is, therefore, barred by the three years statute of limitation, Section 441 of the Consolidated Statutes of North Carolina," which statute he pleads. For a second further defense he sets up that the note was without consideration and, therefore, void; and that plaintiff took and received the note from her husband, D. F. Currin, the payee therein, after maturity, with the full knowledge that the said note was without consideration and was void, and, therefore, subject to all defenses and equities which might exist in favor of the defendant and against the said D. F. Currin, all of which equities the defendant pleaded.

Upon the trial, the defendant admitted the execution of the note. Plaintiff's evidence tended to show that the note had been transferred to her for a valuable consideration by the holder, D. F. Currin, to whom it had been issued, such transfer being before its maturity, and without any notice of any defect therein, or any equity of the defendant.

With respect to the adoption of the seal upon the instrument, the defendant testified as follows: "The word 'seal' is on this. I can't say that I intended to show 'seal,' that the note there shows 'seal.' He asked me for the note for a very short time, would return the note within thirty days. It is filled out for thirty days. I just looked at it and signed it with the understanding that it would come back to me in thirty days; I couldn't say right now that I remember seeing the word 'seal,' but I only signed the note to accommodate him for thirty days because he said he had to have some help that day."

Other evidence relating to the exceptions involved is noted in the opinion.

Upon appropriate issues the jury answered in favor of the plaintiff and against the contentions of the defendant, and judgment ensued for the amount of the demand. From this judgment defendant appealed, assigning several errors.

Dupree & Strickland and Neill McK. Salmon for defendant, appellant.

T. Lanier, R. W. Winston, and B. S. Royster, Jr., for plaintiff, appellee.

SEAWELL, J. Two questions were stressed by the defendant in the argument of this case: Should not the court have submitted to the jury an issue relating to the bar of the statute of limitation? Was the defendant entitled to have admitted in evidence his testimony as to the declarations of D. F. Currin, which he claims tended to show that the plaintiff purchased the note, if at all, after its maturity and subject to the equities which existed in favor of the defendant?

1. If the note was without seal, then the three-year statute of limitation, C. S., 441, applies and action is barred. If under seal, the ten-year statute of limitation, C. S., 437 (2), applies, and the action is not barred. *Williams v. Turner,* 208 N. C., 202, 179 S. E., 806.

The note is, upon its face, a sealed instrument, since the word "seal" appears after the signature in the usual place. The defendant admitted the execution of the note, which admission carries with it, amongst other things, the burden of showing that he had not adopted the seal. We do not think the negative testimony of the defendant, above set out, amounts to evidence regarding the fact of adoption.

But upon this, defendant's counsel propounded the question: "I will ask you to state whether or not, Mr. Currin, if you intended when you signed that note to adopt the word 'seal'?" This question was excluded and defendant excepted. The record does not show what the witness would have said.

Exceptions of this kind are unavailing because of the obvious impossibility of the court to divine what answer would have been given. *Everett v. Williamson,* 107 N. C., 204, 12 S. E., 187; 64 C. J., p. 223, section 237; 26 R. C. L., p. 1057, section 64, and cases cited.

2. Ordinarily, the bar of the statute of limitation is a mixed question of law and fact. But upon the admissions of the defendant that he executed the note, as made, and upon inspection of the instrument, the question of the statute became a matter of law, especially in the absence of evidence to be submitted to the jury as to the non-adoption of the seal. Failure to submit such an issue upon the evidence in this case will not be held for error. *Moody v. Wike,* 170 N. C., 541, 543, 87 S. E., 350; *Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348; *Garland v. Arrowood,* 172 N. C., 591, 594, 90 S. E., 766; *Phillips v. Lumber Co.,* 151 N. C., 519, 521, 66 S. E., 603; *Cherry v. Canal Co.,* 140 N. C., 422, 53 S. E., 138; *Butts v. Screws,* 95 N. C., 215.

The special manner in which the statute is pleaded is worthy of note. The bar is made to depend upon the fact of non-adoption of the seal to the note, the proof of which, after the admission by him of its execution, in the form made, is a burden of the defendant.

Plaintiff's evidence tended to show that she purchased the note for value before maturity, from her husband, D. F. Currin, without the

knowledge of any defect therein, and that she is the innocent holder thereof in due course. Defendant sought to refute this evidence by testifying to a conversation which he had with D. F. Currin, admittedly the former holder of the note, tending to show that the latter still held the note after its maturity. Ordinarily, when other conditions appear, such as are noted below, such conversation might have been admitted if directed toward some declaration against interest by a person who held the note at the time of the declaration. *Wooten v. Outlaw*, 113 N. C., 281, 18 S. E., 252. This is a relaxation of the rule against hearsay evidence, depending solely upon the principle that the declaration is against interest; but the fact of the possession is an independent preliminary question as to a condition essential to its admission. When offered solely for the purpose of affirmatively showing that he did hold the note at the time, it is but hearsay and inadmissible. At any rate, such evidence is ordinarily admissible only where the declarant is dead or insane or otherwise unavailable. 20 Am. Jur., p. 467, sec. 556. The evidence was properly excluded.

Other exceptions pertinent to the second issue are not argued in the brief and, therefore, are deemed to have been abandoned.

We do not regard the other assignments of error sufficient to justify a new trial.

No error.

STATE v. HUBERT Y. CASH.

(Filed 14 June, 1941.)

1. Homicide § 25—

Evidence tending to show that defendant lay in wait outside his wife's residence, that he immediately appeared when she left the house to go to work in the morning, that he chased her for about 167 steps and fired three shots, inflicting mortal wounds, *is held* amply sufficient to support the jury's verdict of murder in the first degree.

2. Homicide § 10: Criminal Law § 5b—

Defendant's plea that he was insane at the time of the homicide due to the continued use of liquor, morphine and other opiates, was rejected by the jury.

3. Criminal Law § 50a—

The remarks of the trial court, in answer to argument of defendant's counsel upon the question of the competency of certain evidence, that "I am against you on that" amounted to no more than a ruling on the evidence and cannot be held for error as an intimation upon the weight or credibility of the evidence.

4. Constitutional Law § 29—

Defendant pleaded insanity at the time of the homicide due to the continued use of liquor and opiates. The record failed to show any compulsion on the part of the officers in obtaining specimens of defendant's blood and urine in order to ascertain the presence or absence of alcohol or morphine in his system. *Held:* Defendant's contention that the obtaining of the specimens compelled him to give evidence against himself is untenable. Art. I, sec. 11.

5. Same—

Incriminating physical facts disclosed by examination or interrogation of defendant are competent even though the examination be under compulsion or the communications privileged, albeit declarations of the accused made at the time, if obtained by improper influence, are to be excluded.

6. Homicide § 21—

Defendant suddenly appeared upon the scene just as his wife was leaving her residence in the morning to go to work. Defendant objected to the admission of evidence that freshly smoked cigarette butts were found around a chair in the woodhouse near the dwelling. It appeared that the woodhouse was the most logical place for a person to secret himself on the premises. *Held:* The evidence of the finding of the cigarette butts at the place indicated was competent as a circumstance tending to show lying in wait or premeditation and deliberation.

7. Criminal Law § 32a—

Circumstantial evidence, when properly understood and applied, is a recognized and accepted instrumentality in the ascertainment of truth.

8. Criminal Law §§ 5d, 53c—

Where, in the first part of the charge, the court instructs the jury that the burden is upon the defendant to establish his plea of insanity to the satisfaction of the jury, the fact that the court thereafter in several instances placed the burden of showing insanity upon defendant without restating the requisite intensity of proof, cannot be held for error, since the charge must be read contextually as a whole.

9. Criminal Law § 53c—

In a prosecution for a capital offense, an instruction to the jury that the jurors are called upon to discharge a solemn duty "as solemn as may ever come to you again in the course of your life," cannot be held for error as an inadvertent intimation to the jury that they were called upon to render a verdict of guilty of the capital offense, since the remark is equal predicate for an intimation that the jurors should render a verdict of not guilty, and merely called to the jurors' attention their duty to find the facts and do justly in a hard case.

APPEAL by defendant from *Williams, J.*, at December Special Term, 1940, of DURHAM.

Criminal prosecution tried upon indictment charging the defendant with the murder of his wife, Ruth Copley Cash.

Verdict: Guilty of murder in the first degree whereof he stands indicted.

Judgment: Death by asphyxiation.

The prisoner appeals, assigning errors.

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

E. C. Brooks, Jr., for defendant.

STACY, C. J. The record discloses that on the morning of 17 September, 1940, the defendant fired three shots at his wife as she was fleeing from him, crying for help, and he in pursuit. The shots proved fatal. It was about 7:00 a.m. The deceased had started to her work. She was crossing the street in front of her house when she first saw the defendant and began to run, at the same time calling for help. As the defendant gave pursuit, their little girl was jumping up and down and screaming, "Don't let him kill my mother." The race continued for about 167 steps when the first shot was fired. "She started wobbling and as she got on the curb he fired the second shot. As she was falling he fired the third shot. . . . She never did speak. We carried her to the hospital and they pronounced her dead." The evidence shows a clear case of murder in the first degree, and the jury has so found. *S. v. Keaton,* 205 N. C., 607, 172 S. E., 179.

The defendant pleaded that he was insane at the time of the homicide, due to the continued use of liquor, morphine and other opiates, and that he had no recollection of the killing. *S. v. Lee,* 196 N. C., 714, 146 S. E., 858. The jury rejected his plea of insanity or mental irresponsibility. *S. v. Jones,* 203 N. C., 374, 166 S. E., 163.

The principal exceptions taken during the trial are those addressed (1) to comments made by the judge on the competency of evidence, (2) to the admission and exclusion of testimony, and (3) to portions of the charge.

First. The remark made by the judge to counsel for defendant in answer to his argument directed to the competency of certain evidence, "I am against you on that," amounted to no more than a ruling upon the evidence. Such was its purpose and intent. It is not perceived how the remark could have been hurtful to the defendant. *S. v. Puett,* 210 N. C., 633, 188 S. E., 75. There are other exceptions of similar import, not necessary to be set out. They fall in the same category. It is conceded that any intimation of the presiding judge, made in the presence of the jury, that a disputed fact in the case has been fully or sufficiently established, is reversible error. *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. The remarks here challenged are not of such character.

Second. Numerous exceptions were taken to the admission and exclusion of evidence. The defendant chiefly complains in this respect that while he was in jail, specimens of his blood and urine were taken for chemical analyses to determine the presence or absence of alcohol and morphine in his system. In this way, the defendant contends, he was compelled to give evidence against himself in violation of the constitutional inhibition against compulsory self-incrimination. Const., Art. I, sec. 11.

Both sides have directed their attention to this question in thorough fashion, but the record fails to disclose any compulsion on the part of the officers in obtaining specimens of the defendant's blood and urine. The exceptions are therefore feckless. *S. v. Eccles,* 205 N. C., 825, 172 S. E., 415. They are not sustained. It is the rule in this jurisdiction that physical facts discovered by witnesses on information furnished by the defendant may be given in evidence, even where knowledge of such facts is obtained in a privileged manner, *S. v. Garrett,* 71 N. C., 85 (examination by physician), by force, *S. v. Graham,* 74 N. C., 646 (compelling accused to put his shoe in track), by intimidation, duress, etc. Factual information thus brought to light is competent evidence, though the declarations of the accused made at the time, if obtained by improper influence, are to be excluded. *S. v. Gatton,* 60 Ohio App., 192, 20 N. E. (2d), 265.

The defendant also complains because the State was permitted to show the condition of the premises where the deceased lived; that freshly smoked cigarette butts were found around a chair in the woodhouse, and that a person sitting in the chair could not have been seen from the dwelling. It was the contention of the State that the defendant had secreted himself on the premises—the most logical place being in the woodhouse—and that he was there waiting for the deceased to come out of the house. The defendant suddenly appeared upon the scene just as the deceased was crossing the street in front of her house on her way to work, and began chasing her. While it does not appear that the assignment is an exceptive one, it would seem that the evidence was competent as tending to show lying in wait or premeditation and deliberation. It was circumstantial evidence from which the jury might infer the fact. For this purpose it was admissible. "Circumstantial evidence is not only a recognized and accepted instrumentality in the ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of the gravest moment"—*Merrimon, C. J.,* in *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284.

Third. There are several exceptions addressed to portions of the charge. The defendant complains that on the issue of insanity the court failed to declare by what degree of proof the defendant was required to

satisfy the jury of his mental irresponsibility. This was done in the first part of the charge, "the burden of this plea is upon the defendant . . . to show it to the satisfaction of the jury." *S. v. Jones*, 191 N. C., 753, 133 S. E., 81. It is true that thereafter in several instances the burden of showing insanity was placed upon the defendant without stating the requisite intensity of proof, but the charge must be taken as a whole and read contextually. When thus considered, no prejudice has been made to appear.

Finally, in closing his charge to the jury the court admonished them, "You are called upon to discharge a solemn duty, as solemn as may ever come to you again during the course of your life," etc. The defendant contends that the court here inadvertently suggested or intimated to the jury that they were called upon to render a verdict of murder in the first degree. No more so, we apprehend, than that they were called upon to render a verdict of not guilty if they found the defendant to be insane at the time of the homicide. The responsibility of which the court was here speaking was to find the facts and to do justly in a hard case.

A careful perusal of the entire record leaves us with the impression that the case has been conducted in substantial conformity to the decisions on the subject and that the validity of the trial should be sustained.

No error.

EDWIN SALMON v. DR. WORTHAM WYATT.

(Filed 14 June, 1941.)

Torts § 8c—

Release from liability for tort *held* effective on the principle of ratification upon authority of *Presnell v. Liner*, 218 N. C., 152.

APPEAL by plaintiff from *Pless, J.*, at January Term, 1941, of FORSYTH.

Civil action instituted 25 June, 1940, to recover damages for personal injuries alleged to have been caused by an excessive dosage of X-ray administered to the plaintiff by the defendant on 26 June, 1937.

The defendant denied liability and pleaded a release signed by the plaintiff and his wife on 2 October, 1937, as a bar to the action.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning errors.

Elledge & Wells and Gilbert L. Shermer for plaintiff, appellant.

Sapp, Sapp & Atkinson, Manly, Hendren & Womble, and W. P. Sandridge for defendant, appellee.

PER CURIAM. The facts in the instant case in respect of the release signed by the plaintiff and his wife are not materially different from those appearing in the case of *Presnell v. Liner,* 218 N. C., 152, 10 S. E. (2d), 639. There, the release was held to be effective on the principle of ratification. The same principle is applicable here.

The judgment of nonsuit will be upheld on authority of the *Presnell case, supra.*

Affirmed.

JAMES H. BARNES v. NELLO TEER.

(Filed 28 June, 1941.)

1. Appeal and Error § 43—

Petition to rehear this case involving a highway accident is allowed for inadvertence in former decision in failing to sustain appellant's exception to the failure of the trial court to instruct the jury upon the statutory law arising upon the evidence.

2. Automobiles § 18h: Trial § 29b—

In automobile accident cases it is the duty of the court to charge the jury upon the provisions of the Motor Vehicle Law arising upon the evidence, and a charge embracing only general provisions of the common law is not sufficient. C. S., 564.

3. Same: Automobiles § 12a—Instruction held for error in failing to charge pertinent statutory speed limit and the evidentiary significance of speed in excess thereof.

This action arose out of an accident occurring when plaintiff's car, traveling down grade around a curve on a highway under construction, encountered defendant's truck, which was heavily loaded with stone and traveling in the opposite direction up grade. Plaintiff contended that the truck was traveling on its left side of the highway. There was evidence that plaintiff knew of the condition of the highway, which was covered with loose crushed stone four or five inches deep, and knew that defendant was at work there with trucks and other machinery. Defendant's evidence was to the effect that plaintiff was driving around 50 miles per hour, swinging around the curve with the stone flying. *Held:* An instruction upon the issue of contributory negligence which stated the common law duty to use due care but failed to charge the statutory requirement that a person shall not drive a motor vehicle on a highway at a speed in excess of that which is reasonable and prudent under conditions then existing, and the statutory provision that speed in excess of the limits prescribed should be *prima facie* evidence of negligence or that the speed is not reasonable or prudent and is unlawful, ch. 407, Public Laws 1937, sec. 103, must be held for error.

4. Appeal and Error § 48—

Where the municipal court in which the case is originally tried is abolished pending the decision of the Supreme Court granting a new trial, the cause will be remanded to the Superior Court of the county. Ch. 117, Public Laws 1941.

SEAWELL, J., dissents.

CLARKSON, J., dissenting.

DEVIN, J., dissenting.

PETITION to rehear this case, reported in 218 N. C., 122, 10 S. E. (2d), 614.

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

STACY, C. J. The case was brought back because of an alleged oversight in disposing of the following question presented by the 11th exception: In an action involving a highway injury, where there are statutes on the subject, some of evidentiary significance, and the general principles of the common law are also applicable, is it a sufficient compliance with the provisions of C. S., 564, for the trial court to instruct the jury on the general principles of negligence and contributory negligence without any reference to the pertinent statutes?

In originally upholding the judgment, this question was inadvertently answered *sub silentio* in the affirmative. The authorities are to the contrary. *Kolman v. Silbert, ante,* 134, 12 S. E. (2d), 915; *Smith v. Bus Co.,* 216 N. C., 22, 3 S. E. (2d), 362; *Spencer v. Brown,* 214 N. C., 114, 198 S. E., 630; *Williams v. Coach Co.,* 197 N. C., 12, 147 S. E., 435; and *Bowen v. Schnibben,* 184 N. C., 248, 114 S. E., 170. These cases all deal with the question here presented. They are at one in holding that the duty of the judge to declare and explain the law arising upon the evidence in a case means that he shall declare and explain the statutory law as well as the common law arising thereon.

Speaking directly to the point in the case last cited, it was said: ". . . where a statute appertaining to the matters in controversy provides that certain acts of omission or commission shall or shall not constitute negligence, it is incumbent upon the judge to apply to the various aspects of the evidence such principles of the law of negligence as may be prescribed by statute, as well as those which are established by the common law."

The latest expression on the subject is to be found in *Kolman v. Silbert, supra,* decided 31 January, 1941: "In automobile cases where the alleged negligence rests in the violation of one or more of the provisions of the law governing the operation of motor vehicles enacted,

designed and intended to protect life, limb and property, it is mandatory that the Judge in his charge shall state, in a plain and correct manner, the evidence in the case and declare and apply the pertinent provisions of the Motor Traffic Law."

It is in evidence that the plaintiff was driving down a steep mountain road, then under construction, and covered with loose crushed stone, four or five inches deep. Plaintiff was familiar with the road and its condition. He knew the defendant was at work there with trucks and other machinery. Defendant's truck, loaded with stone, was proceeding up the hill, an 8% grade. The plaintiff says he did not see the truck until within 30 feet of it, that it was on the wrong side of the road. The plaintiff ran onto the soft shoulder in order to avoid a collision, his car turned over, and he was injured.

There is evidence that plaintiff was driving "real fast," as he came around the curve and down the grade, "swinging around—the stone was flying. He was making around 50 miles an hour."

The plaintiff testified: "As we rounded the curve we met the truck right in the face. . . . I put on my brakes when I first saw the truck. I didn't stop; it wouldn't stop, wouldn't hold on gravel. . . . I was going 15 miles an hour when I first saw the truck. . . . The defendant's truck struck me with his rear end as he attempted to pull out of the way."

The defendant's evidence tends to show that the plaintiff's car did not collide with the truck at all, but passed the truck, plowed into the soft shoulder, and was turned over when the plaintiff undertook to cut sharply back into the graveled portion of the highway.

From the foregoing it appears that in respect of the issue of contributory negligence (which issue is inappropriately worded) there is evidence tending to show the plaintiff was traveling in excess of the speed limits set out in the Motor Vehicle Law, or at a speed greater than was reasonable and prudent under the conditions then existing, which, by the statute, is made *prima facie* evidence of negligence, or that the speed is not reasonable or prudent and that it is unlawful. Ch. 407, Public Laws 1937, sec. 103. *Morris v. Johnson,* 214 N. C., 402, 199 S. E., 390. The judge in his charge to the jury made no reference to any of the applicable provisions of the Motor Vehicle Law, notwithstanding the defendant's plea and the evidentiary significance of such provisions. Where the issue of liability is sharply disputed, as it is on the instant record, the parties are entitled to have the court hew to the line and let the chips fall wherever they may. Such was the holding in *Robinson v. Transportation Co.,* 214 N. C., 489, 199 S. E., 725; *Farrow v. White,* 212 N. C., 376, 193 S. E., 386; *Orvis v. Holt,* 173 N. C., 231, 91 S. E., 948; *Matthews v. Myatt,* 172 N. C., 230, 90 S. E., 150. The decisions

in *Ryals v. Contracting Co., ante,* 479; *Mack v. Marshall Field & Co.,* 218 N. C., 697, 12 S. E. (2d), 235; and *Smith v. Kappas, post,* 850, are likewise in full support of this view.

The conclusion heretofore reached that the judgment should be affirmed will be vacated and the cause remanded to the Superior Court of Buncombe County for a new trial. Ch. 117, Public Laws 1941.

Petition allowed.

SEAWELL, J., dissents.

CLARKSON, J., dissenting to petition to rehear, which was allowed: This case is reported in 218 N. C., 122. I write fully so the case can be understood.

Appeal by defendant from *Nettles, J.,* at July, 1940, Civil Term, of Buncombe Superior Court.

The material allegations of the complaint are as follows:

"That on or about said 21st day of January, 1939, while the plaintiff was driving his automobile in a careful and lawful manner along said highway and on the right-hand side thereof, after turning a sharp curve in said highway, the truck, hereinbefore mentioned, owned by the defendant and operated by the defendant's agent, servant and employee, and while acting in the scope of his employment, approached said curve in a fast, dangerous and reckless manner on the wrong, or left-hand, side of said highway, completely blocking plaintiff's right of proceeding down, along and over said highway, whereupon the plaintiff endeavored to avoid a collision with the defendant's truck, but notwithstanding his desperate efforts to avoid a collision, the defendant's truck struck the automobile of the plaintiff, knocking the same over on a soft shoulder which gave way, causing the plaintiff's automobile to slide off a steep embankment, turning it completely over and seriously injuring and damaging plaintiff as hereinafter more specifically set forth.

"That the specific acts of negligence which were the sole and proximate cause of the plaintiff's injuries and damage are:

"(a) The defendant carelessly, negligently and recklessly operating said automobile on said State Highway in violation of the laws of the State of North Carolina.

"(b) The defendant carelessly, negligently and recklessly operating his automobile on the wrong side of the highway and particularly when approaching a sharp curve along a highway in process of construction, with soft shoulders along a steep embankment.

"(c) The defendant carelessly, negligently and recklessly failed to sound any horn or give other audible warning of the approach of his truck when approaching a sharp curve.

"That as a result of the defendant's negligence, the plaintiff's automobile which was of the reasonable value of $400.00 was practically destroyed.

"That by reason of the negligent acts of the defendant the plaintiff was seriously and permanently disabled and injured," setting same forth in detail. Prayer for damages for personal injury. The defendant denied negligence and set up the plea of contributory negligence.

"The evidence on the part of plaintiff sustained the allegations of the complaint. The evidence of the defendant was to the contrary. The jury answered all the issues of negligence and contributory negligence in favor of plaintiff and awarded damages, 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 damage, if any, is the plaintiff entitled to recover of the defendant? Ans.: "$5,000.00." ' "

The case was tried in the General County Court of Buncombe County, N. C., before Judge J. P. Kitchin. From the judgment rendered in the General County Court of Buncombe County, the defendant made numerous exceptions and assignments of error and appealed to the Superior Court. The Superior Court overruled these exceptions and assignments of error and in the judgment of the General County Court of Buncombe County there was found to be no error. The defendant excepted and assigned error to the judgment of the Superior Court, and made numerous exceptions and assignments of error and appealed to the Supreme Court. This Court affirmed the judgment of the court below.

I have read with care the former opinion and think that it is correct, and the rehearing opinion incorrect. The case is not in the least a complicated one. It grew out of a collision between the plaintiff's Ford automobile and the defendant's truck. It was mainly an issue of fact for a jury to determine.

The evidence was to the effect that plaintiff and his companion were in a Ford car going down the mountain, and defendant's truck, on the wrong side of the road, going up the mountain, ran into them. Plaintiff could not see the truck when it was coming up the mountain, until he was within 30 feet of it, and that the left rear end of the truck collided with the plaintiff's car. That plaintiff was going 15 miles an hour, and he put on his brakes. That his car was in good condition; it had good brakes, tires and horn. *Before he rounded the curve he blew his horn.* That the driver of the truck was "speeding" and driving in a "reckless manner." This was denied by defendant. The jury decided for plaintiff and accepted his and his witnesses' version of the collision.

The statutes applicable, N. C. Code, 1939 (Michie), sec. 2621 (288), is, in part, as follows:

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

"(b) Where no special hazard exists the following speeds shall be lawful, but any speed in excess of said limits shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful:

"1. Twenty miles per hour in any business district;

"2. Twenty-five miles per hour in any residence district;

"3. Thirty-five miles per hour for motor vehicles designed, equipped for, or engaged in transporting property, and thirty miles per hour for such vehicles to which a trailer is attached.

"4. Forty-five miles per hour under other conditions.

"5. Notwithstanding the foregoing *prima facie* limits it shall be unlawful to drive any vehicle at a speed in excess of sixty (60) miles per hour, except those exempted in section 2621 (292).

"(c) The fact that the speed of a vehicle is lower than the foregoing *prima facie* limits shall not relieve the driver from the duty to decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance or on entering the highway in compliance with legal requirements and the duty of all persons to use due care. It shall be unlawful to violate any provisions of this section, and upon conviction shall be punished as provided in section 2621 (326)."

The above quoted "speed restrictions" are taken from ch. 407, Public Laws of 1937, sec. 103, entitled "Speed restrictions," ratified 23 March, 1937. Sec. 145 "repealing clause" says: "That all laws and clauses of laws *in conflict with the provisions of this Act or laws or clauses of laws providing otherwise for the subject matter of this Act are hereby repealed.*"

Sec. 2616 was enacted in 1917, ch. 140, part of sec. 15. This was repealed by the Act of 1937, *supra*. *Kelly v. Hunsucker*, 211 N. C., 153, was decided 27 January, 1937, before sec. 2616 was repealed by Public Laws 1937, *supra*, and not applicable to the facts in this case. The construction of the statutes on the subject was settled by *Devin, J.*, in *Wooten v. Smith*, 215 N. C., 48. The trial judge complied with C. S., 564, and charged the jury in the very language of the 1937 Act, *supra*, which was applicable, and, as will be seen by the charge here-

after fully quoted, charged every Road Act on the subject applicable to the facts in full accord with all the authorities. To say that upon approaching a "sharp curve" or "curve or deep descent" the speed limit is 10 miles per hour, from a practical viewpoint such speed restrictions would be prohibitive to mountain travel. The tourist trade would be destroyed and our mountain people marooned. Our modern speed restrictions, by legislative enactments, have gotten away from the "ox cart" days.

On the former hearing of the case, the defendant quoted N. C. Code, *supra,* sec. 2616, in part, as follows: "Upon approaching an intersecting highway, a bridge, dam, curve or deep descent, and also in traversing such intersecting highway, bridge, dam, curve or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public," and said: "The plaintiff then was negligent according to his own showing. He was driving at a speed in excess of that provided by law, which is negligence *per se. Holland v. Strader,* 216 N. C., 436." In the brief of defendant, on the petition to rehear, this contention is again made. The same question now presented was considered before. In the former hearing and the rehearing defendant relied on sec. 2616, *supra.* I do not think the provisions of sec. 2616, *supra,* apply to the operator of an automobile in North Carolina, on 21 January, 1939—at the time of the collision in this action. This is now conceded in the main opinion allowing a rehearing.

The trial court, as affirmed by the Superior Court and this Court in its opinion in this case, followed the applicable Road Acts on the subject and the decision in *Wooten v. Smith, supra,* cited and approved in *Smart v. Rodgers,* 217 N. C., 560.

In the *Wooten case, supra,* the trial court charged the jury that the driver was responsible under sec. 2616, *supra,* and a new trial was granted for this error, the Court saying, at p. 50: "By chapter 311, Public Laws of 1935, the speed restrictions contained in Article 2, sec. 4, of the Uniform Motor Vehicle Law of 1927, were repealed and the following pertinent regulations in force at the time of the injury here complained of were substituted in lieu thereof. . . . (51) Defendant duly noted exception to the judge's charge to the jury in that in stating the elements constituting negligence, under the first issue he charged the jury under sec. 2616 that the law required the driver of an automobile in approaching and traversing an intersecting highway 'to operate it at such speed not to exceed 10 miles an hour.' In view of the amendments to statutes hereinbefore fully set out, and considering the law with respect to speed at intersections of highways in force at the

time of the injury, and in accord with the decisions of this Court in *Fleeman v. Coal Co.*, 214 N. C., 117; *Woods v. Freeman*, 213 N. C., 314; and *Sebastian v. Motor Lines*, 213 N. C., 770, this instruction must be held for error, entitling the defendants to a new trial. *Williams v. Hunt*, 214 N. C., 572." Ch. 407, Public Laws of 1937, sec. 103, *supra*.

I think that upon the date of the injury to the plaintiff (now nearly two and a half years ago), the law provided that "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing." Ch. 407, Public Laws of 1937, sec. 103, *supra; York v. York*, 212 N. C., 695; *Wooten v. Smith, supra*.

The court, upon the trial of this case, fully declared and charged the law applicable and properly placed the burden of that "prudent and reasonable operation upon both plaintiff and defendant under the attending circumstances." Had the court given the instructions sought by the petitioner on the hearing before and now as to 10 miles an hour, error would have been committed entitling the plaintiff to a new trial—if the verdict of the jury had been against him.

In *Woods v. Freeman*, 213 N. C., 314 (319), it is written: "Proof of excessive speed alone does not establish actionable negligence as a matter of law. The plaintiff must show by the greater weight of the evidence that under all the facts and circumstances appearing from the evidence the speed was not in fact reasonable and prudent and proximately caused the collision and resulting injury." *Fleeman v. Coal Co.*, 214 N. C., 117.

And the same requirement holds good as to proof of contributory negligence. In *Liske v. Walton*, 198 N. C., 741 (742), we find: "There is no essential difference between negligence and contributory negligence, except that in actions like the present one, the negligence of plaintiff is called contributory negligence." *Sebastian v. Motor Lines*, 213 N. C., 770.

In this cause the plaintiff found the defendant on his right of way (sec. 2621 [293]) and had "the right to assume" and act on the assumption that the defendant would reasonably turn to his right-hand side of the highway so as to pass in safety. *Hancock v. Wilson*, 211 N. C., 129 (134); *Guthrie v. Gocking*, 214 N. C., 513; *Coach Co. v. Lee*, 218 N. C., 320.

The charge of the court below covers like a glove the statutes and decisions of this Court. The court below charged fully and correctly, charged what constituted actionable negligence, contributory negligence, proximate cause, greater weight of the evidence, placed the burden of the issues correctly on the respective parties, and charged the law applicable to the facts. I quote:

"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.

"Proximate cause is that cause without which the injuries would not have been sustained. It is the real efficient cause, a cause operating in continuous sequence, without the intervention of any new or independent cause, produced the injury complained of and one which the defendant, in the exercise of due care, should have foreseen would result in injury, not necessarily the injury complained of, but some injury, and should have provided against it, so that in every case involving negligence there are three things necessary to its existence:

"First, the existence of a *legal duty* owing from the defendant to the plaintiff; second, the failure on the part of the defendant to *exercise due care* in the performance of that duty, and, third, *injuries proximately resulting* from such failure. When these three elements unitedly occur, they constitute actionable negligence. The absence of either one is fatal to the plaintiff's case, so when you come to answer this issue, the first thing you want to know is what duty was owing from the defendant to the plaintiff under the circumstances in which they were placed." The trial court then applies the law applicable to the facts in this case and charges the jury:

"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 defendant further owed the plaintiff the duty to keep a proper lookout and when circumstances require to give a timely warning signal

of his approach, to keep his car under control, drive it at a reasonable rate of speed commensurate with the circumstances surrounding the parties at the time. *The driver of each automobile who is himself observing the rule has a right ordinarily to assume the driver of the other automobile will also observe the rule and thus avoid a collision between the two automobiles when they meet each other. Neither is under the duty to the other to anticipate a violation of the rule by him.*

"When the driver of one of the automobiles is not observing the rule when the automobiles approach each other, the other may assume 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. One is not under the duty of anticipating negligence on the part of the other, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume and act on the assumption that others will exercise ordinary care for their own safety. A person operating an automobile and is himself exercising due care has the right to act upon the assumption that every person whom he meets will also exercise ordinary care and caution according to the circumstances and will not negligently or recklessly expose himself to danger but rather make an attempt to avoid it, but when an operator of a motor vehicle has had time to realize, or by the exercise of proper care and watchfulness should realize that a person whom he meets is in somewhat helpless condition or apparently unable to avoid the approaching automobile, he must exercise increased exertion to avoid the collision. While it is incumbent upon the plaintiff to satisfy the jury by the greater weight of the evidence that defendant was negligent in one of the respects which the plaintiff alleges he was negligent, plaintiff is not bound to prove more than enough to raise a fair presumption of negligence on the part of the defendant and the resulting injury to plaintiff.

"Direct evidence of negligence is not required, but same may be inferred from acts and attendant circumstances, and if the facts proved by the greater weight of the evidence establish the more reasonable probability that the defendant has been guilty of actionable negligence, you will answer the first issue 'Yes.' The burden is upon the plaintiff to satisfy you by the greater weight of the evidence in the case of his contentions.

"*If you find, by the greater weight of the evidence, that on the occasion in question,* while the plaintiff was driving his car at a reasonable rate of speed on his right-hand side of the road, exercising due care for his own protection, that the defendant's truck was being operated without due care and under circumstances which plaintiff relates here, on the wrong side of the road, that is, on the truck driver's left-hand side of the road, so that the plaintiff could not, in the exercise of due care, pass the truck in safety, and that in consequence of that manner of operation

by the defendant's truck driver, the two cars came into contact with each other and as a proximate result of that the plaintiff's car was knocked off the road, turned over, and the plaintiff injured, if you find such conduct on the part of the defendant of the failure to exercise due care and it was the proximate cause of the plaintiff's car turning over and injuring plaintiff, then you would answer the first issue 'Yes,' but if you are not so satisfied you would answer it 'No,' the burden being upon the plaintiff to so satisfy you, or, if the evidence is so evenly balanced in your minds you are unable to say how the fact is, it would be your duty to answer the issue 'No,' because the burden is on the plaintiff to satisfy you by the greater weight of the evidence. If you answer the first issue 'No'—find that the defendant was not negligent—then you would not answer the second issue nor the third issue, but if you answer the first issue 'Yes,' you would come to a consideration of the second issue."

On the second issue as to contributory negligence, the court charged, in part:

"The law which I have given you in the case on the first issue applies to the parties on the second issue. It applies alike to both parties. The law which I have read to you and given you applies to each of the parties alike, and it is your duty to consider the facts under the rules which I have given you.

"*Contributory Negligence* is the want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof without which the injury would not have occurred.

"There may be two proximate causes or may be more than one proximate cause.

"If you find from the evidence although the defendant was guilty of negligence that the plaintiff also was guilty of negligence, and the two negligences each combining, concurring with the other, coöperating together, were both the proximate cause of the collision and consequent injuries, you would answer this issue 'No,' because plaintiff would not be entitled to recover anything from the defendant. . . .

"Mr. Hartshorn: Answer it 'Yes,' Your Honor. Court: Strike out the 'No,' and answer it 'Yes'; if you find those to be the facts, because the plaintiff is not entitled to recover where he was negligent and his negligence became one of the proximate causes of the collision and injuries he complains of.

"For injuries negligently inflicted upon one person by another there can be no recovery of damages if the injured person by his own negligence, or by the negligence of another legally imputable to him, proximately contributed to the injury.

"Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of due care, as, concurring and co-operating with the negligent act of defendant, is a proximate cause or occasion of the injury sustained. Two elements at least are necessary to constitute contributory negligence. First: A want of due care on the part of the plaintiff, and, second, a proximate connection between the plaintiff's negligence and the injury. These are the vital questions to be determined upon this issue of contributory negligence. There must be not only negligence on the part of the plaintiff, but contributory negligence, a real causal connection between the plaintiff's negligent act and the injury."

Section 2616, *supra,* provided a speed limit of ten (10) miles an hour "upon approaching an intersecting highway, a bridge, dam, curve, or deep descent." The Court in the *Wooten case, supra,* said that this section "speed limit of 10 miles per hour" did not apply to "an intersecting highway." We said before, following this precedent, and I say now that it does not apply to a curve or deep descent. In the *Wooten case, supra,* "intersecting highway" does not apply, it follows that "curve or steep descent" in the same paragraph does not apply to the facts in the instant case. Defendant's contention is, I think, illogical and cannot be sustained. Furthermore, chapter 407, Public Laws of 1937, sec. 103, *supra,* is the present law governing this case. The repealing clause wipes out all other laws in regard to "speed restrictions."

I think the charge does not impinge C. S., 564, taking the charge as a whole. It sets forth the contentions of plaintiff and defendant fully and accurately and applies the law applicable to the facts. This section should never be applied to subordinate features of a charge, but only material and essential features, as was set forth by *Schenck, J.,* in *Mack v. Marshall Field & Co.,* 218 N. C., 697, and cases cited. The vice in the construction of the statute is where subordinate features are taken to impinge the charge and where upon the charge, taken as a whole, there is no prejudicial or reversible error. This difference has been the bone of contention.

In *Boon v. Murphy,* 108 N. C., 187, decided over a half century ago, at pp. 190-191, it is said: "As to the exception that the judge did not repeat the testimony nor recapitulate it beyond the summary of it which appears in the charge, the precedents are amply that this is not error, unless the appellant had requested the recital in full of the testimony or of such parts as he deemed material, and which had been omitted by the Court. The law is so stated by *Taylor, C. J.,* in *State v. Morris,* 3 Hawks, 388, and approved by *Henderson, C. J.,* and *Ruffin, J.,* in *State v. Lipsey,* 14 N. C. (3 Dev.), 486, where it is again held 'the Judge is not bound to charge on all the facts that being a matter left to

his discretion.' In *State v. Haney,* 19 N. C. (2 Dev. & Bat.), 390, it is held by *Gaston, J.,* citing *State v. Lipsey,* that the 'Judge is not bound to recapitulate all the evidence to the jury; it is sufficient for him to direct their attention to the principal questions which they have to investigate and to explain the law applicable to the case, and this particularly when he is not called upon by counsel to give a more full charge.' The construction placed by these eminent Judges upon the act of 1796 (now The Code, sec. 413), (N. C. Code, 564), has been recognized and followed by numerous cases. The jury being the judges of the fact, the object of the recapitulation is to so place the facts before the jury that the Judge can 'declare and explain the law arising thereon,' which is his province. When the facts are simple, or the Judge 'directs the attention of the jury to the principal questions, they have to investigate,' as here, by stating the respective contentions of the parties, the failure to recapitulate the evidence is not error. If either party wishes fuller instructions, he should ask for them, and if any material evidence is omitted he should call it to the attention of the Court. To permit a party to ask for a new trial because of an omission of the Judge to recite all the details of prolix testimony, or for an omission to charge in every possible aspect of the case, would tend not so much to make a trial a full and fair determination of the controversy as a contest of ingenuity between counsel. The proper course is for counsel to ask, before the charge, for instructions on the point of law he deems material, and to direct the attention of the Judge, after hearing the charge; to any omission of important evidence which he may have made. The appellant should present his views on these matters in apt and proper time and not 'speculate upon the verdict.' If he is silent when he should speak, he ought not to be heard when he should be silent. It is too late certainly after verdict to raise the objection that the Judge did not charge upon a particular aspect of the case. *Morgan v. Lewis,* 95 N. C., 296; *King v. Blackwell,* 96 N. C., 322; *Willey v. R. R.,* 96 N. C., 408, and cases there cited; or omitted to recapitulate any part of the evidence, *State v. Grady,* 83 N. C., 643, and cases cited; *State v. Reynolds,* 87 N. C., 544. Nor do we think the Judge failed to declare and explain the law applicable to the evidence. If it was not as full as the appellant desired, it was his own fault that he did not, in apt time, ask for special instructions. *State v. Bailey,* 100 N. C., 528, and cases there cited."

The defendant rehashed well defined principles, not applicable to the facts in this case. I think the court below charged the rule of law and applicable statutes governing the operation of motor vehicles in conformity with the facts in this case. Judge Nettles, on an appeal from the General County Court of Buncombe County, overruled all the exceptions and assignments of error made by defendant. I thought before,

and think now, that none of the exceptions and assignments of error made by defendant in the court below can be sustained. On the whole record there was no prejudicial or reversible error.

The charge of Judge J. P. Kitchin is a long and carefully prepared one, some 20 pages. I think he applied the law in a clear, concise and correct manner, applicable to the facts. Since the trial of this case, Judge Kitchin has "crossed over the River and rests in the shade of the Tree," mourned by the people of this commonwealth for his fine qualities of heart and mind.

I now come to the main opinion on this rehearing. It says: "The case was brought back because of an alleged oversight in disposing of the following question presented by the 11th exception: In an action involving a highway injury, where there are statutes on the subject, some of evidentiary significance, and the general principles of the common law are also applicable, is it a sufficient compliance with the provisions of C. S., 564, for the trial court to instruct the jury on the general principles of negligence and contributory negligence without any reference to the pertinent statutes? In originally upholding the judgment, this question was inadvertently answered *sub silentio* in the affirmtive."

The trial court did exactly, as I view it, what the main opinion says it did not do. The authorities cited are not applicable to the facts in this case or the charge of the trial court. Defendant's *main contention* in the former case and on the rehearing, that C. S., 2616, *supra,* as to 10 miles an hour, is not the law upon approaching a "sharp curve," but it has been repealed and cites ch. 407, Public Laws 1937, sec. 103, which the original opinion was principally predicated upon—also the *Wooten case, supra,* and there was no prejudicial or reversible error.

The charge of the trial court of some 20 pages, cannot be impinged as it is so complete and thorough, but this rehearing opinion picks out the 11th exception of defendant that reads as follows: (C. S., 564) "The defendant excepts to the charge for that the Judge did not state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

In the original opinion it was held that there was no prejudicial or reversible error in the charge and the court did not impinge C. S., 564. There was one dissent to that opinion.

I said, concurring in the able opinion of *Devin, J.,* in *Caldwell v. R. R.,* 218 N. C., 63 (82), speaking of C. S., 564: "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. . . . Usually a litigant who can find no prejudicial or reversible error cries out C. S., 564. Madam Roland, a famous French Lady during the French Revolu-

tion, when on the scaffold, looking at the statue of 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."

Our great *Chief Justice Ruffin,* in *State v. Moses,* 13 N. C., 452 (464), in 1830 (over 110 years ago), said: "This law was certainly designed to uphold the *execution of public justice,* by freeing the Courts from those *fetters of form, technicality and refinement,* which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a *disease of the law, and reproach to the bench.*"

We should see that justice is administered on the whole record and merits of the case, where there is no essential or material matter omitted, that would constitute prejudicial or reversible error. We should "Go forward" and hew to the line of justice under law and let the chips fall where they may. *Fiat justitia, ruat coelum,*—Let justice be done, though the heavens fall.

DEVIN, J., dissenting: I think this case was fairly tried by a competent judge and an intelligent jury, and the result ought not to be disturbed. After careful consideration of the case by this Court, following arguments clearly presenting both sides, it was so held. *Barnes v. Teer,* 218 N. C., 122, 10 S. E. (2d), 614. A majority of the Court now vote for a new trial. I cannot agree.

The case as originally tried was almost entirely a question of fact, arising out of conflicting claims about a collision of motor vehicles on the highway. No unusual or complicated principle of law was involved. It was a case where each party claimed he was on the right side of the road and the other party on the wrong side. Jurors familiar with the operation of automobiles and capable of judging the credibility of witnesses decided in favor of the plaintiff. Their decision ought to stand. Verdicts and judgments ought not to be set aside except for some reason materially impeaching the fairness of the trial, or for some error of law prejudicial to the complaining party, and which obviously affected the result. It has been repeatedly said by this Court that the burden is on the appellant not only to show error but also to show that the ruling complained of was material and prejudicial, amounting to a denial of some substantial right. *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863.

EFFIE PERRY, JOHN OWENS, MARY E. BLOUNT, MRS. CLAUDIA READ, B. F. READ, JACK READ, TAYLOR READ, LOU READ, RAYMOND LEGGETT, ANNIE L. HOOKER, ONWARD LEGGETT, JOSEPH LEGGETT, ANNIE B. DUPREE, B. O. DUPREE, ELIZABETH DUPREE BROWN, A. R. DUPREE, JR., LAYTON OWENS, MARION OWENS WHITSON, DORIS OWENS PARRISH, L. L. OWENS, JR., MAXIEN OWENS RICKERBY, HENRY B. OWENS, WM. W. OWENS, JACK OWENS AND EARL OWENS, v. ANNIE L. BASSENGER, MARGARET M. SMITH, CARRIE HERMAN MARROW, LUCILLE OWENS, EDWIN OWENS, MILDRED OWENS, LLOYD OWENS, MARIE IVACHIW, R. S. MARTIN, R. L. EDWARDS AND WIFE, MRS. R. L. EDWARDS, BOARD OF EDUCATION OF WASHINGTON COUNTY, JANIE C. DUNNING, ZENO G. LYON AND WIFE, LOUISE H. LYON, LILLIAN C. CAMPBELL, MARY O. SAWYER, SABRIE REID, R. L. WHITEHURST, HELEN E. EDMUNDSON, D. O. PATRICK, VAN B. MARTIN, JR.

(Filed 28 June, 1941.)

1. Partition § 6: Estates § 14—Sale of life estates and remainders under order of court will not be upset except for compelling reasons when rights of third parties have attached.

Where land subject to life estates and remainders to the children of the life tenants, including after-born children, is sold for partition by a commissioner under order of court upon petition of the life tenants and the remaindermen *in esse*, and bought in by one of the life tenants, the unborn children of each life tenant being represented by a member of his class *in esse* and by a trustee appointed by the court, and thereafter the land is subdivided and sold to numerous purchasers who place improvements thereon, the partition sale, even though irregular, will not be upset except for compelling reasons, and any irregularities may be cured in a subsequent proceeding in partition by the life tenants and remaindermen against those claiming from the tenant who purchased at the partition sale.

2. Adverse Possession §§ 4a, 9a—

The *locus in quo* was devised to testator's children with remainder to testator's grandchildren. The land was sold under order of court by a commissioner to one of the life tenants. Defendants are the purchasers by *mesne* conveyances from the life tenant to whom the commissioner executed deed. *Held:* The deed executed by the commissioner, being similar to a deed from a stranger, constitutes color of title. C. S., 428.

3. Adverse Possession § 9a—

Seven years adverse possession under an instrument constituting color of title inflexibly ripens title in the possessor as against all persons not under disability.

4. Same—

An instrument is none the less color of title because of defects discoverable from the record, the purport of the statute being to afford protection to apparent titles, void in law, and supply a defense where none existed without its aid. C. S., 428.

5. Adverse Possession § 1—

Lands owned by life tenants and remaindermen as tenants in common was sold by a commissioner under order of court. *Held:* Adverse possession under the commissioner's deed ripens title in the purchaser and those claiming under *mesne* conveyances from him as against those not under disability and as against each remainderman upon the expiration of seven years after he reaches his majority, regardless of whether he was a party to the proceeding for the sale of the land and notwithstanding he may not have been *in esse* at the time of the execution of the commissioner's deed.

6. Partition § 6: Estates § 14—Proceeding for sale of life estates and defeasible remainders for partition instituted before clerk held not void.

The *locus in quo* was devised to testator's children for life with remainder to testator's grandchildren, the remainder to the children of each child being defeasible if all the children of such child should predecease the first taker, and the limitation over being subject to be opened up to include after-born children. Petition was filed before the clerk by the life tenants and the remaindermen *in esse* for sale of the land for partition, C. S., 3234. The minor remaindermen were represented by their next friend, duly appointed by the court, who filed supplemental petition alleging that the sale would materially promote the interest of the minors. The clerk appointed a trustee for any unborn remaindermen and ordered the land sold. Unborn children of each life tenant were also represented by a child of such life tenant then *in esse*. The judge holding the courts of the district entered an order at chambers, upon its finding that the interest of the minors would be materially promoted by the sale, confirming the decree of sale. Thereafter the clerk approved the commissioner's report of sale to one of the life tenants and later appointed the respective parents of the remaindermen, *in esse* and *in posse*, trustees to receive the share of their respective children. The judge, apparently at term, approved the order of confirmation. *Held:* Even conceding the proceeding was irregular, the Superior Court acquired jurisdiction and the proceeding was not so fatally defective as to render it void.

7. Partition § 4c—

The purchaser of lands at sale for partition conducted by a commissioner appointed by the court is not under duty to see that the purchase price is properly disbursed.

8. Judgments § 29—Unborn remaindermen, represented by member of their class in esse, held concluded by decree for sale of the land.

The *locus in quo* was devised to testator's children with remainder to testator's grandchildren, the remainder to the children of each child being defeasible if all the children of such child predecease the first taker, and the remainder being subject to be opened up to include after-born children. In a proceeding to sell the land, the minors and unborn children were represented by a trustee appointed by the court, and the unborn children of each child were also represented by a brother or sister *in esse*. *Held:* Decree of confirmation of sale approved by the judge of the Superior Court is binding on the remaindermen, including those who were not *in esse* at the time, but who were represented by members of their respective classes, even conceding that the proceeding for sale was irregular, there being no suggestion of overreaching or that the sale price did not represent full value of the land at the time of sale.

9. Estoppel § 3—

Tenants in common, parties to a proceeding to sell the lands for partition, later acquired a part of the *locus in quo* by *mesne* conveyances from the purchaser at the partition sale, and in turn sold to third parties. *Held:* Upon subsequent attack of the partition proceedings the claim of such tenants is contradicted by their later deeds.

10. Courts § 2c—

The clerk is but a part of the Superior Court, and when a proceeding before the clerk in any manner is brought before the judge, the Superior Court's jurisdiction is not derivative, but it has jurisdiction to hear and determine all matters in controversy in the proceeding. C. S., 637.

DEVIN, J., dissenting.

CLARKSON and SEAWELL, JJ., concur in dissent.

APPEAL by plaintiffs from *Nimocks, J.*, at November Special Term, 1940, of WASHINGTON.

Petition for partition.

Petitioners, as the last surviving children, and the grandchildren of Annie L. Owens, deceased, under and by virtue of her last will and testament, claim title to certain land situated in Washington County, North Carolina, adjoining the town of Plymouth, and lying on both sides of the public road leading from said town to Mackey's Ferry.

Respondents also claim title to said land, and plead sole seizin thereof, under and by virtue of *mesne* conveyances from L. L. Owens and wife, Mary Owens, to whom H. S. Ward, Commissioner, executed a deed purporting to convey same pursuant to an order entered in January, 1910, in a proceeding in the Superior Court of said county to which the children named in the will of Annie L. Owens, all of whom survived her, and her grandchildren then in being were named as parties. As against them the present petitioners, some of whom were not then born, attack the sufficiency of that proceeding to pass title to L. L. Owens and wife, Mary Owens.

Respondents further assert that they, and their predecessors in title, have been in open, notorious, continuous and adverse possession of the lands claimed by them, respectively, under known and visible boundaries and under color of title for more than twenty years, and plead the seven and twenty years statutes of limitations, C. S., 428 and 430, in bar of petitioners' right to recover in this action, and also plead the three-year statute of limitation. C. S., 407.

When the case came on for trial the parties waived jury trial and agreed that the court might find the facts and, upon the facts found, enter judgment. Pursuant thereto the parties submitted an agreed statement of facts and evidence substantially as follows:

I. Annie L. Owens died on 31 December, 1909, seized and possessed in fee simple of the lands in controversy, and leaving a last will and

testament, pertinent portions of which are these:

"1st. I give and bequeath to my beloved husband, Benjamin F. Owens, all my real . . . property . . . I may be possessed of at the time of my death, to hold during the said Benjamin F. Owens' life, then . . . to be equally divided between my children as follows:

"2nd. Henry S. Owens, Claudia Owens Read, Louis L. Owens, Clyde W. Owens, Lucille Owens Murphy, Annie B. Owens Dupree, Mabel Owens and then to their children.

"3rd. Henry S. Owens is to have equal share with the others less $150.00 for lot given him during my life.

"4th. Claudia Owens Read is to have equal share with the others less $290.00 for lot given her during my life.

"6th. I want my named children to be their own executors in dividing the property, and if either of my named children should die without an heir, their part is to come back to their surviving brothers and sisters."

On the date when the will was signed, 17 April, 1902, three of the children of the testatrix, to wit: L. L. Owens, Clyde W. Owens and Mabel Owens, had no children. However, the testatrix was survived by her husband, Benjamin F. Owens, who died 30 October, 1912, and by all the children named in her said will, each of whom then had one or more children in being.

II. After the probate of the will of Annie L. Owens and in January, 1910, an action or proceeding was instituted in the Superior Court of Washington County entitled: "H. S. Owens, Claudia Read and her husband, J. W. Read, L. L. Owens, C. W. Owens, Lucille Murphy, and her husband, C. L. Murphy, Annie B. Dupree and her husband, A. R. Dupree, Mabel Leggett and her husband, C. R. Leggett, Effie B. Owens, minor, John L. Owens, minor, Doris Evelyn Owens, minor, Lou C. Read, minor; Jack W. Read, minor, Brook F. Read, minor; Dave Taylor Read, minor; Marion V. Owens, minor; Clyde Latham Owens, minor; Mary Jarvis Murphy, minor; B. F. Owens Dupree, minor; Allen Dupree, minor; Elizabeth Dupree, minor; Raymond Leggett, minor, and C. W. Owens, executor of Annie L. Owens, deceased."

The petitioners in this proceeding, H. S. Owens, Claudia Read, L. L. Owens, C. W. Owens, Lucille Murphy, Annie B. Dupree and Mabel Leggett, are the children of Annie L. Owens named in her said will. Of the other petitioners therein, all of whom were then minors, Effie B. Owens, now Effie O. Perry, and John L. Owens are the children of Henry S. Owens; Doris Evelyn Owens, now Doris Owens Parrish, is the child of L. L. Owens; Lou C. (Luther C.) Read, Jack W. (Jack) Read, Brook F. (B. F.) Read and Dave Taylor (Taylor) Read are the children of Claudia Owens Read; Marion V. Owens, now Marion Owens Whitson,

and Clyde Latham (Clyde L.) Owens are the children of Clyde W. Owens; Mary Jarvis Murphy, now Mary E. Blount, is the child of Lucille Owens Murphy; B. F. Owens (B. O.) Dupree, Allen (A. R., Jr.) Dupree and Elizabeth Dupree, now Brown, are the children of Annie O. Dupree, and Raymond Leggett is the child of Mabel Owens Leggett.

In verified petition filed in said proceeding it is alleged: That the minor children above named are represented "by Clarence Latham as their next friend who has been thereunto duly appointed by the court"; (the record contains an order to that effect); that after the death of the testatrix the petitioners H. S. Owens, Claudia Read and her husband, J. W. Read, Clyde W. Owens, Lucille Murphy and her husband, C. L. Murphy, Annie B. Dupree and her husband, A. R. Dupree, and Mabel Leggett and her husband, O. R. Leggett, believing that under the said will of Annie L. Owens that they, in common with L. L. Owens, were owners in fee of the said land, covenanted and agreed to sell their interest therein, and to convey a fee simple title therefor to the said L. L. Owens for the sum of $4,360, which is "a full and fair value of said land, subject to the life estate of B. F. Owens"; that after said contract was executed they were advised by counsel that the children of the said parties, to wit: the minors above named, who represent all of the parties in interest to this cause, own a present vested interest in said property under said will; that the interest of the several minors would be materially promoted by a sale of said property for the reason that their interests cannot vest in possession during the life of their several parents, and same can represent no present income, and the character of the property, being farm property on which are situated a dwelling house and out-houses, is such as to require constant repairs; and that the petitioners believe that a public sale of the property would not yield as large an income as the amount agreed to be paid by said L. L. Owens, because of the "super-incumbent life-estate of B. F. Owens, the said L. L. Owens being the son of B. F. Owens, and all of said petitioners are anxious that said contract be consummated." Whereupon the petitioners pray the court to order a private sale of the said property through a commissioner in accordance with contract above stated.

The said next friend of the above named minors filed a supplemental petition in which it is stated: That he is personally acquainted with the property described in the above petition, and believes that a sale in accordance with the prayer of petitioners would materially promote the interest of said minors; that he is advised and believes that said minors have a present vested interest in said property, and asks that the court adjudge their several rights and interests, and order the payment therefor into the court "as in such cases provided by law."

Thereupon, on 6 January, 1910, the clerk of the Superior Court signed an order in which, after reciting that the cause coming on for hearing before him upon the petition, and all the parties being regularly before the court—"the minors by their next friend, Clarence Latham, who has filed a supplemental petition," and that "it appearing to the court that a sale of the land, in accordance with the agreement of sale set out in the petition would materially promote the interest of said minors," it is "ordered, adjudged and decreed that H. S. Ward be and he is hereby constituted and appointed commissioner of this court, without fee or compensation as such . . . and authorized and empowered to sell the lands and property described in the petition, by a private sale, and to execute a title deed therefor, in fee simple, subject to the life estate of B. F. Owens, and to report the said sale to this court." The order further directed the commissioner "to deposit the proceeds of the said sale in the Bank of Plymouth to await the judgment of this court, as to the several rights of the minors and this cause is continued to await the judgment of this court upon a construction of their rights under said will." And it is further ordered and decreed therein that Clarence Latham be, and he is thereby appointed trustee for any and all unborn children of the first named devisees, to wit, H. S. Owens, L. L. Owens, Claudia Read, C. W. Owens, Lucille Murphy and Annie Dupree, and that C. R. Leggett be and is appointed trustee for unborn children of Mabel Leggett.

Thereafter, on 11 January, 1910, G. S. Ferguson, judge riding the First Judicial District, entered an order in said proceeding, in which after reciting that "this cause coming now before me at chambers, upon the foregoing petition and affidavit, and that the court finds as a fact, that the interest of the minors would be materially promoted by a sale of said property," it is adjudged "that the foregoing decree of . . . clerk of the superior court, be and the same is hereby in all respects confirmed."

Thereafter, on 14 January, 1910, H. S. Ward, commissioner, reported "To the Honorable, the Superior Court" that pursuant to decree of 6 January, 1910, he had bargained and sold the lands and tenements described in the petition to L. L. Owens for the sum of $4,360, which amount "is a full and fair price therefor, and stands ready to execute the deed upon the confirmation of his said sale." Then, after reciting the amount which H. S. Owens, Claudia Read, Clyde Owens, Lucille Murphy, Annie Dupree and Mabel Leggett and their children, respectively, would receive out of the purchase price, the commissioner reported that certain named devisees in the said will are still of child bearing age and future born children may be expected to share in the said fund, and further reciting that he is advised that a certain unborn

child is then *in esse,* he asked that he be authorized to pay the said money into the hands of said trustee for the said afterborn child or children.

Upon this report and on 14 January, 1910, the clerk, finding that the sale reported was a fair one and the consideration thereof was full and sufficient and that the interests of the minors, parties to the action, would be materially promoted by a consummation of the sale, "ordered, adjudged and decreed that the said commissioner, in compliance with his bargain and contract of sale herein reported, execute to the said L. L. Owens a title deed in fee simple for the lands described in the petition"; and, after further adjudging the portion of the purchase price to which the several devisees, parents and their children, respectively, as set out in the report, would be entitled, to be divided between them by the commissioner according to the annuity table set out in section 1627 of the Revisal of 1905—now C. S., 1791, "it is further ordered that the commissioner pay to Onward W. Leggett, trustee for unborn children the part of the funds in his hands accruing to the children of Mabel Leggett, and that his receipt therefor shall be sufficient voucher"; and further directed the said trustee "to deposit same in the Bank of Plymouth, subject to the further orders of this court."

On 18 January, 1910, the clerk of Superior Court entered an order in the cause, revoking in that particular the order theretofore made appointing Clarence Latham trustee for unborn children of the parties to said proceeding, other than those of Mabel Leggett, and ordered and adjudged that J. W. Read be appointed trustee for the unborn children of Claudia Read, if any; that C. W. Owens be appointed trustee for the unborn children of himself; that C. L. Murphy be appointed trustee for the unborn children of Lucille Murphy, and that A. R. Dupree be appointed trustee for the unborn children of Annie S. Owens, and further ordered that "the said trustees are hereby authorized and empowered to receive from the commissioner appointed in this cause any part of the fund accruing to their said children now living, that may accrue hereafter to any children now unborn, and the receipt therefor, as such trustee, is sufficient voucher in the hands of said commissioner."

Thereafter, on 20 January, 1910, G. S. Ferguson, Judge, entered an order which reads: "This cause being now before the undersigned Judge of the Superior Court, upon the report of the sale and the confirmation of the clerk, it is hereby ordered, adjudged and decreed that the decree of the clerk be and the same is hereby in all respects confirmed."

H. S. Ward, acting as commissioner under the authority conferred by said proceeding, by deed dated 14 January, 1910, and delivered on or about 21 January, 1910, purported to convey the lands in question to L. L. Owens and wife, Mary Owens, and "it is through this deed that

the defendants in this proceeding claim title. By deeds duly recorded in Washington County the defendants trace their title to the parties described in their respective answers to L. L. Owens."

The clerk testified and the court finds that, in accordance with the orders and decrees entered in said proceeding, the value of the life estate of the respective children of Annie L. Owens was computed and the value so computed was paid to each, and the balance was paid to the guardians of each set of children, the guardians being the respective parents of the children, and being those appointed by the clerk of Superior Court as shown in special proceeding docket and as set out in this record.

III. Since L. L. Owens and his wife took possession in 1910 of the lands in question, he and those claiming under him have been in actual possession thereof, claiming to be absolute owners, and none of the plaintiffs has been in possession of or attempted to exercise any control over same.

IV. After L. L. Owens received his deed from Ward, commissioner, the properties were subdivided into city lots and sold. Numerous residences have been built on these lots by the purchasers from L. L. Owens or by the grantees of said purchasers. Washington County purchased part of the land for a school site, and has erected thereon a brick school building of the value of approximately $35,000. One lot on the north side of the road claimed by respondent Marie Ivachiw was sold to B. F. Read, and by him and his wife to Doris Read, wife of J. W. Read. J. W. Read and B. F. Read are petitioners in the present action.

Upon the foregoing findings and the deeds and records which were offered, the court, being of that opinion, adjudged and decreed (1) that the plaintiffs own no interest in the lands in question and are not entitled to recover, and (2) that the defendants are sole seized of the parts of the said lands described in their answers.

Plaintiffs appeal to Supreme Court and assign error.

Langston, Allen & Taylor for plaintiffs, appellants.

H. S. Ward, Norman & Rodman, W. M. Darden, Carl Bailey, Edward L. Owens, and Rodman & Rodman for defendants, appellees.

STACY, C. J. The impression is gained from a careful perusal of the record that the judgment below should be affirmed.

In the first place, there is much in the suggestion that the devise to the children of Annie L. Owens was intended to be in fee simple, determinable upon their dying without heirs. C. S., 1737; *Willis v. Trust Co.*, 183 N. C., 267, 111 S. E., 166. It is provided by C. S., 4162, that when real estate is devised to any person, the same shall be held in fee

simple, unless such devise shall, in plain and express words show, or it shall be plainly intended by the will, or some part thereof, that the testator intended to convey an estate of less dignity. *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417. There is also authority for the position that where it appears from the context of a will that the word "children" has been inaccurately used, when heirs or heirs of the body was intended, such meaning may be ascribed to the inaccurate expression, and the intention of the testator thus effectuated. *Cole v. Robinson,* 23 N. C., 541. This view may find support in items three and four of the will. In these items it is noteworthy the testatrix does not say her son Henry and his children and her daughter Claudia and her children, respectively, are "to have equal shares with the others." The gifts are to Henry and to Claudia, and each is charged with the value of a lot which the testatrix, during her lifetime, had given to each of them.

But passing this, and conceding that the children of Mrs. Owens did not take fees, but life estates only, with remainders in fee vested in the grandchildren, subject to be divested by their predeceasing their parents, it does not follow that the sale of the land in 1910 by Ward, commissioner, was void and of no effect. C. S., 3234; *Baggett v. Jackson,* 160 N. C., 26, 75 S. E., 86.

All of the present petitioners who were then *in esse,* sixteen in number, were parties to that proceeding, and at least one member of each class of remaindermen was present to represent the class. *Lumber Co. v. Herrington,* 183 N. C., 85, 110 S. E., 656.

The jurisdiction of the Superior Court is not derivative in matters of this kind originating before the clerk. He is but a part of the same court. *Cf. Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209. For this reason it is provided by C. S., 637, that whenever a civil action or special proceeding begun before the clerk of a Superior Court is "for any ground whatever" sent to the Superior Court before the judge, the judge shall have jurisdiction; and it is his duty, upon request of either party, to proceed to hear and determine all matters in controversy in such proceeding. It has been held that even when the proceeding originally had before the clerk is void for want of jurisdiction, the Superior Court may yet proceed in the matter. *Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99; *In re Anderson,* 132 N. C., 243, 43 S. E., 649.

Moreover, the parties being the same and the subject matter identical, there is no reason why the irregularities, if any, in the proceeding of 1909-1910 may not now be cured in this proceeding, if need be. *Roberts v. Roberts,* 143 N. C., 309, 55 S. E., 721. Full value has heretofore been paid for the property. A proceeding had more than thirty years ago, upon the strength of which titles have passed and valuable improve-

ments have been erected on the property, ought not to be upset except for compelling reasons, which do not appear on this record. *Ipock v. Bank,* 206 N. C., 791, 175 S. E., 127.

Finally, it is to be observed that the deed of Ward, commissioner, being similar to a deed from a stranger, *Amis v. Stephens,* 111 N. C., 172, 16 S. E., 17, or one not connected with the cotenancy, *McCulloh v. Daniel,* 102 N. C., 529, 9 S. E., 413, was manifestly colorable title, *Lumber Co. v. Cedar Works,* 165 N. C., 83, 80 S. E., 982, and the cotenants were barred by seven years adverse possession thereunder, even as to those, if any, who were not parties to the proceeding. *Alexander v. Cedar Works,* 177 N. C., 137, 98 S. E., 312; *Lumber Co. v. Cedar Works, supra.* The case is not like *Cooley v. Lee,* 170 N. C., 18, 86 S. E., 720, where claim of title was under deeds of purchase from the cotenants. Here, the commissioner's deed which closely resembles a deed from a third person, was color of title, and seven years adverse possession thereunder, "ripened it into a perfect title." *Johnson v. Farlow,* 35 N. C., 84; *Wilson v. Brown,* 134 N. C., 400, 46 S. E., 762.

In *Greenleaf v. Bartlett,* 146 N. C., 495, 60 S. E., 419, this Court adopted the dissenting views of *Chief Justice Taney* and *Justice Catron* in *Moore v. Brown,* 11 How. (U. S.), 414, where it was said that if every legal defect in the title papers of a purchaser in possession, as they appear on the record, may be used against him after the lapse of seven years, the law itself is a nullity and protects nobody. The statute has no reference to titles good in themselves, but was intended to protect apparent titles, void in law, and supply a defense where none existed without its aid. Its object is repose. It operates inflexibly and on principle, regardless of particular cases of hardship. The condition of society and the protection of ignorance, as to what the law was, required the adoption of this rule. The law should be liberally construed.

In any event, therefore, all of the petitioners, not under disability, are barred by the seven years statute of limitations. C. S., 428.

In other words, even if the invalidity of the proceeding of 1909-1910 be conceded, which it is not, all of the petitioners, not under disability, are barred by the lapse of time. So far as they are concerned, regardless of the ground upon which it is put, the case was properly dismissed. Some of those thus barred by the statute of limitations were not in being at the time of the proceeding, but have since become of age. It can make no difference whether they were parties to the proceeding or not. The flight of time is inexorable, and the statute of repose is inflexible.

In this view of the matter, the only question remaining is whether the proceeding which resulted in the sale of 1910 is sufficient to estop those, under disability, who may or may not have been parties thereto, but who were represented therein by all the members of their respective

classes then *in esse*. The cases of *Lumber Co. v. Herrington, supra; Ryder v. Oates,* 173 N. C., 569, 92 S. E., 508; and *Springs v. Scott,* 132 N. C., 548, 44 S. E., 116, would seem to suggest an affirmative answer.

The petitioners under disability, however, take the position that the proceeding was without form and void and hence nugatory as to them. Of course, an argument can always be made against an irregular proceeding. The one presently advanced did not prevail in the court below, and it is not accepted here.

The proceeding is not so fatally defective as to render it void. *Smith v. Gudger,* 133 N. C., 627, 45 S. E., 955. The petitioners, under disability, were represented therein, both by trustees appointed for the purpose and by members of their respective classes; it was found that a sale would best subserve the interests of all; full value was paid for the property at the time, and the sale was approved by the judge of the Superior Court. *Ex parte Dodd,* 62 N. C., 97. The final order of confirmation seems to have been made at term. It was not incumbent upon the purchaser to see that the money paid for the property was properly disbursed. *Pendleton v. Williams,* 175 N. C., 248, 95 S. E., 500; *Bullock v. Oil Co.,* 165 N. C., 63, 80 S. E., 972. It appears from the clerk's testimony that the purchase money was paid to the life tenants according to the computed value of their respective life estates, and "the balance was paid to the guardians of each set of grandchildren, . . . appointed by the clerk of the Superior Court, . . . being the respective parents of the children." There is no suggestion of any imposition or overreaching in the matter. *Starnes v. Thompson,* 173 N. C., 466, 92 S. E., 259.

Nor is this all. Some of the present petitioners were parties to the proceeding in 1909-1910; they have seen the *locus in quo* subdivided into building lots and grow from a vacant block into a thickly settled portion of the town of Plymouth; two of them have subsequently purchased a lot therein and acquired title under the deed made by Ward, commissioner, in 1910, later transferred it and then sold it to one of the defendants herein. Hence, their present assertion of claim in remainder is contradicted by their later deeds. A brick school building, valued at approximately $35,000.00, has also been erected on the property in reliance upon the validity of the commissioner's deed.

The point is stressed that no jurisdiction was acquired by the Superior Court because the proceeding was erroneously begun before the clerk and "went before the judge only for his approval of the order of sale and the decree of the clerk confirming it." If this position be accepted we would have the "anomaly," decried in *Roseman v. Roseman,* 127 N. C.,

494, 37 S. E., 518, of a proceeding declared void, not because the petitioners entered the wrong court, but because they entered through the wrong door. The enactment of C. S., 637, was to prevent such "useless countermarching" at the expense of innocent persons. "Even if the proceeding before the clerk had been without authority, the judge could retain jurisdiction after the action was brought before him." *Ryder v. Oates, supra.* It is established by numerous decisions that the clerk is but a part of the Superior Court, and when a proceeding of this character is brought before the judge for his approval, he is vested with ample authority to deal with it. *Williams v. Dunn, supra; Smith v. Gudger, supra; In re Anderson, supra.*

The judgment below is

Affirmed.

DEVIN, J., dissenting: Annie L. Owens devised land to her sons and daughters "and then to their children." It is agreed that this constituted a life estate in her children, with remainder to her grandchildren, and that the terms of the will were such as to permit the opening up and inclusion within the devise of those grandchildren born subsequent to the death of the testator.

The special proceeding instituted in 1909 before the clerk to sell the interests of the infant remaindermen, on the ground that it would be to their interest to do so, with the approval of the judge was sufficient to authorize the sale, and to bar those then in being, but I do not think this proceeding should be held to bar children yet unborn. However, most of the grandchildren not then *in esse* are now barred by the defendants' adverse possession under color, and by the statute of limitations. But one of the plaintiffs was born nine years after the special proceeding was concluded, and came of age only a few months before this action was instituted in 1940. I cannot agree that upon any principle of representation this plaintiff can be held barred of the inheritance devised him by his grandmother. Three other plaintiffs appear to be similarly situated.

CLARKSON and SEAWELL, JJ., concur in dissent.

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, INCORPORATED.

(Filed 28 June, 1941.)

1. Appeal and Error § 43: Torts § 6—

Plaintiff's petition to rehear is allowed in this case for inadvertence in the original opinion in stating that before trial appealing defendant had filed amended answer asking affirmative relief against its codefendant under C. S., 618, precluding plaintiff from taking a voluntary nonsuit as against the codefendant, it appearing of record that appealing defendant did not tender amended answer and move that it be permitted to file same and did not request that its codefendant be made a party as a joint tort-feasor until after verdict.

2. Appeal and Error §§ 43, 49a—

Where exceptions brought forward and duly preserved in appellant's brief and assigned as error are not discussed or decided in the original opinion, the questions thus presented by the assignments of error remain open for decision and may be considered and determined upon appellee's petition to rehear.

3. Trial § 29b—

It is the duty of the trial court without request for special instructions to declare and explain the law arising upon the evidence in the case, which duty is not discharged by general definitions or abstract discussions of the law, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative and under which it should be answered in the negative, and the failure of the court to comply substantially with the mandate of the statute impinges a substantial legal right of the party aggrieved entitling him to a new trial. C. S., 564.

4. Same—

Trial by jury vouchsafed in the Constitution contemplates a verdict of the jury rendered upon the evidence guided by correct instructions as to the law applicable thereto in conformity with C. S., 564.

5. Same: Negligence § 20—Charge held for error in failing to apply the law to the evidence.

The individual defendant ordered new cafe equipment from the corporate defendant. Plaintiff was injured when a piece of old equipment, which had been placed on the sidewalk while the new equipment was being installed, fell and struck plaintiff. There was serious controversy as to whether the corporate defendant was obligated and undertook to remove the old equipment under the contract of sale. The court in its charge outlined the evidence and defined negligence and proximate cause in general terms, explained the liability of a corporation for the acts of its agents and employees, and gave the respective contentions of the parties. *Held:* The failure of the court to charge the jury as to the scope and

meaning of the written contract between the defendants and the duty of the corporate defendant thereunder, and the failure of the court to apply the law to the conflicting testimony must be held for reversible error upon the corporate defendant's exceptive assignment of error.

SEAWELL, J., dissenting.

CLARKSON and DEVIN, JJ., concur in dissent.

ON REHEARING. Original opinion reported 218 N. C., 758, 10 S. E. (2d), 707.

O. W. Duke and E. D. Kuykendall, Sr., for plaintiff, petitioner.

R. M. Robinson for defendant, respondent.

BARNHILL, J. The original opinion herein decides three questions: (1) that the motion for judgment as of nonsuit was properly overruled; (2) that certain testimony as to agency was properly admitted in evidence; and (3) that it was error for the court to permit the voluntary judgment of nonsuit as to the defendant Kappas after an amended answer was filed by the defendant in which allegations of joint tort-feasorship and liability for contribution were made. A new trial was ordered for error on the third question.

The plaintiff now petitions for a rehearing for that the record does not sustain the statement in the original opinion that "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), under sec. 618." A careful examination of the record discloses that this statement was due to an inadvertence. The petition is meritorious. The defendant did not tender its proposed amended answer and move that it be permitted to file the same until after verdict. Nor did it request that Kappas be made a party defendant, as a joint tort-feasor, prior to verdict. This, we understand, the defendant concedes.

Having decided that the plaintiff is entitled to the correction prayed in her petition for a rehearing, this question is presented: Is the record otherwise free of harmful error so that we should rescind the order for a new trial?

During the trial the defendant noted a number of exceptions. On its appeal it presents several assignments of error, among which are assignments bottomed on C. S., 564. These exceptions are brought forward and duly preserved in its brief. In the original opinion these assignments were not discussed or decided. As to them no opportunity for concurrence or dissent was afforded. Hence, the questions thus presented remain open for decision.

We are constrained to hold that the court below failed to comply with the requirements of C. S., 564. In its charge it outlined the evidence, quoted the issues, defined negligence and proximate cause in general terms, explained the liability of a corporation for the acts of its agents and employees, gave the contention of the parties and then charged the jury as follows: "Now, gentlemen, if you answer this issue No, that is, Issue No. 1, that this plaintiff was not injured and hurt by the negligence of the defendant company and the agents and servants of the company, then that ends this case, but if you answer it Yes, that the plaintiff was hurt by the negligence of the defendant, then you will proceed to Issue No. 2, which is:" This charge was later repeated in substantially the same language.

What is the proper construction, scope and meaning of the written contract between the original defendants herein and what was the defendant's duty thereunder? As to this there was a serious controversy. What was the duty of the defendant under the various aspects of the evidence and in what respect does the testimony tend to show that it breached such duty? The court, inadvertently, failed to advise the jury on these questions. Its failure so to do constitutes prejudicial error.

"The authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instruction to that effect." *S. v. Merrick,* 171 N. C., 788, 88 S. E., 501; *Hauser v. Furniture Co.,* 174 N. C., 463, 93 S. E., 961; *School District v. Alamance County,* 211 N. C., 213; *Wilson v. Wilson,* 190 N. C., 819.

The requirements of C. S., 564, "are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. While the manner in which the law shall be applied to the evidence must to an extent be left to the discretion of the judge, he does not perform his duty if he fails to instruct the jury on the different aspects of the evidence and give the law which is applicable to them, or if he omits from his charge an essential principle of law, *Blake v. Smith,* 163 N. C., 274; *Bowen v. Schnibben,* 184 N. C., 248, . . . His Honor did not declare and explain the duties which the law imposed upon defendant as employer . . . with respect to any of the matters involved in the allegations of negligence. Nor did he instruct the jury as to the law with respect to the breach of any of these duties and the relation of such breach to the injuries as the proximate or concurrent cause thereof. The statement of general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute. *Hauser v. Furniture Co.,* 174 N. C., 463; *S. v. Merrick,*

supra. . . . It is of course elementary that while the jury must determine the facts from the evidence, it is both the function and duty of the judge to instruct them as to the law applicable to the facts. The answers to the issues submitted in this case are not to be determined altogether by the facts; each issue involved matters of law, and the jury should have been instructed by the judge as to the law." *Williams v. Coach Co.*, 197 N. C., 12, 147 S. E., 435; *Comr. of Banks v. Mills*, 202 N. C., 509, 163 S. E., 598.

"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 evidence that he had been injured by the negligence of the defendant as alleged, and if not, to return a negative answer' . . . 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." *Schenck, J.*, in *Mack v. Marshall Field & Co.*, 218 N. C., 697, 12 S. E. (2d), 235; *Ryals v. Contracting Co., ante*, 479.

Speaking to the subject in *Smith v. Bus Co.*, 216 N. C., 22, 3 S. E. (2d), 362, *Seawell, J.*, says: "The trial court, with admirable precision and with apt illustration, defined and explained negligence, which proximately resulting in injury, is compensable at law. The defendant objects that these definitions are entirely abstract and that they do not comply with the requirements of C. S., 564, that the law be applied to the evidence.

"The courts have been rather meticulous, especially in the matter of negligence, in requiring that the law be explained in its connection with the facts in evidence. We feel that the court was inadvertent to this necessity and the fact that perhaps the jury, being laymen, would not be so apt to see the connection between the principles of law laid down and the facts in the case which so clearly appears to an experienced lawyer or judge. We understand the requirement of the statute to be based upon this reasoning. We do not regard the instruction as adequately meeting the requirements of the statute, and in this respect there is error entitling defendant to a new trial." See also *Spencer v. Brown*, 214 N. C., 114, 198 S. E., 630; *Kolman v. Silbert, ante*, 134; *Barnes v. Teer, ante*, 823.

The provisions of this statute confer a substantial legal right. *Williams v. Coach Co., supra; Wilson v. Wilson*, 190 N. C., 819, 130 S. E., 834; *S. v. O'Neal*, 187 N. C., 22, 120 S. E., 817; *Nichols v. Fibre Co.*,

190 N. C., 1, 128 S. E., 471. A failure to comply therewith, without prayer for special instruction, is error. *Spencer v. Brown, supra; Hauser v. Furniture Co., supra.*

Trial by jury which is vouchsafed in the Constitution means more than a mere trial by jurors. It implies a trial by a jury in the presence of a judge empowered to supervise and instruct. The duty of guidance perforce devolves upon the judge—a duty incident to the high office which he holds and made imperative with us by statute. McIntosh on Procedure, 584. The feature of the statute here invoked is declaratory of this constitutional right. To emasculate the one is to impinge upon the other. *Capital Traction Co. v. Hof.*, 174 U. S., 1 (13); 43 L. Ed., 873 (877).

To declare and explain the law arising upon the evidence in a case means to declare and explain it as it relates to the various aspects of the testimony offered. While no general formula is or should be prescribed, something substantially more than a general definition or an abstract discussion is required. The judge should at least give a resume of the facts upon which plaintiff relies, and as to which she has offered evidence, and instruct them as to the law arising thereon. He should do likewise as to the evidence offered by the defendant. That is, it is the duty of the judge to instruct the jury as to the circumstances under which the issue should be answered in the affirmative and under which it should be answered in the negative.

When the law is thus explained and applied it can be followed with intelligent understanding. On the other hand, a general definition or an abstract discussion of the law, and nothing more, leaves the jurors to grope in the dark for a fair and righteous answer to the issue. It is for this reason that the court has been somewhat meticulous in insisting upon a substantial compliance with its requirements. Without it there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented.

That is the state of the instant case. The court made no reference to the duties imposed upon the defendant under the contract and the evidence. Nor did it undertake to apply the law to the conflicting testimony. The verdict, therefore, is not the result of that type of trial required by law and to which defendant was entitled.

The former opinion is modified in accord with the petition to rehear. At the same time, for error in the charge, the order directing a new trial is approved.

As the defendant may now move for permission to amend and also to have Kappas made a party defendant under C. S., 618, prior to trial, we need not discuss the assignments of error in respect to the voluntary judgment of nonsuit and as to the refusal of the court to permit the

defendant to amend after verdict. Likewise, as the case goes back for a new trial for the error stated, other exceptions will not be considered.

Petition allowed.

SEAWELL, J., dissenting: The majority opinion, as I understand it, deals with two exceptions taken to the judge's charge which are thought of sufficient merit to reopen this case on a rehearing and grant a new trial to the defendant. Both of them were discussed at length on the original hearing, both in oral argument and by brief, and I think in order to prevent a rehearing being used as merely a reappeal they ought to be eliminated from further consideration and attention confined to the inadvertence of the Court with reference to the proposed amendment to defendant's answer, supposed to have been admitted but really declined by the trial court. I believe the course followed to be a departure from sound rules and likely to lead to confusion. *Weston v. Lumber Co.,* 168 N. C., 98, 83 S. E., 693; *Weathers v. Borders,* 124 N. C., 610, 32 S. E., 881; *Lewis v. Rountree,* 81 N. C., 20.

But I also think that the objections are untenable. Exception No. 38 reads:

"The defendant further excepts to the charge of the Court in that the Court failed to comply with Section 564 of the Consolidated Statutes, in that the Court failed to declare and explain the law to the jury and to apply the law of negligence, agency and proximate cause to the evidence in the case and failed to instruct the jury as to the law applicable to the facts as they might be found by the jury, and failed to instruct the jury on the different aspects or phases of the evidence and to give the law applicable thereto, which is defendant's Exception No. 38."

Broadside exceptions have uniformly been rejected. Appellant should not expect the Court to go hunting for some sort of error or to condemn the charge generally as substandard.

But if the exception is not regarded as "broadside," I still think the charge, both as to the matter it contains and the juxtaposition of its parts, fully meets the requirement of the statute.

Assignment of error No. 39 is as follows:

"The defendant excepts to the charge of the Court in that the Court failed to comply with C. S., 564, in that the Court failed to instruct the jury as to the proper construction, scope and meaning of the written contract between the original defendants herein (plaintiff's Exhibit No. 2)—(R. p. 24), and to apply such construction to the evidence in the case, which is defendant's Exception No. 39."

It is not specified in the objection what instruction the defendant thought should have been given or how he was prejudiced by its omission, or even what part of the contract should have been made the subject

of instruction. The theory of review does not privilege the appellant to hold the trial court to an abstract perfection, but only to have his grievance audited. If the court must assume the burden of articulation, we may suppose the objection is concerned with a failure to deal with that part of the contract relating to installation of furniture in Kappas' place.

Since the uncontradicted evidence shows that the agents and servants of the defendant actually did install the equipment and, incidentally thereto, removed and placed in a precarious position on the sidewalk an old counter, which fell on plaintiff's foot, I know of no inference or conclusion of law which the judge could draw from the contract that might be favorable to the defendant. He certainly could not have charged the jury that the contract, as a matter of law, relieved the defendant from liability for the conduct of its agents and servants, as disclosed by the evidence, on the principle *respondeat superior*. The judge properly instructed the jury as to such a liability of the defendant for acts of its servants arising within the scope of their employment. It is well established that the master is liable for the negligent acts or omissions of his servant within the scope of his employment resulting in injury to third persons. *Moore v. R. R.*, 165 N. C., 439, 81 S. E., 603; *Brittingham v. Stadiem*, 151 N. C., 299, 66 S. E., 128.

The judge was dealing with a comparatively simple case, and, taking the charge as a whole, I think he left no doubt in the minds of the jurors as to questions of negligence involved, proximate cause, agency, or scope of employment, and their relation to the evidence in the case; and I do not think the verdict should be disturbed. *Harrison v. Ins. Co.*, 207 N. C., 487, 177 S. E., 423; *Braddy v. Pfaff*, 210 N. C., 248, 186 S. E., 340; *Gore v. Wilmington*, 194 N. C., 450, 457, 147 S. E., 71.

CLARKSON and DEVIN, JJ., concur in dissent.

LEONARD E. WASHINGTON v. SAFE BUS, INCORPORATED.

(Filed 28 June, 1941.)

1. Bill of Discovery § 3—

The verified petition for examination of an adverse party must state facts showing the nature of the cause of action, that the information sought is material and necessary and not otherwise accessible to applicant, and that the motion is meritorious and made in good faith.

2. Bill of Discovery § 1—

An order for the examination of an adverse party will not be granted to enable the plaintiff to spread a dragnet or to harass defendant under the guise of a fair examination. C. S., 899, *et seq.*

3. Bill of Discovery § 3—Petition held insufficient to support an order for the examination of defendant.

Plaintiff filed a verified petition for the examination of the corporate defendant praying that an officer of the defendant appear with books and records of the corporation to furnish information in regard to interstate trips made by buses of defendant and in regard to hours of work and remuneration received by petitioner, upon allegations that petitioner had filed suit to recover sums due him under the Wage and Hour Law, that the information sought was otherwise inaccessible to petitioner and was necessary to the filing of the complaint, and that the petition was made in good faith. *Held:* The petition is insufficient to support an order for the examination of defendant, since petitioner is not entitled to examine defendant in regard to hours of work and remuneration which petitioner himself received, and since it does not appear from the petition what relationship, if any, existed between petitioner and defendant or under what circumstances money is due petitioner, or in what respect the Federal Fair Labor Standards Act, presumably referred to, applies, or what person is sought to be examined or the office he holds with defendant corporation.

4. Same—

Where it is determined on appeal that there was error in approving the order for the examination of defendant upon the affidavit presented, plaintiff may thereafter move in apt time for examination of defendant upon proper affidavit setting out facts sufficient to entitle him to that relief.

SCHENCK, J., dissenting.

APPEAL by defendant from an order entered by *Rousseau, J.*, at March Term, 1941, of FORSYTH. Reversed.

Motion for examination of defendant under C. S., 900 and 901. From an order directing the examination as prayed, defendant appealed.

Webster & Little for plaintiff, appellee.

Hosea Van Buren Price, Manly, Hendren & Womble, and W. P. Sandridge for defendant, appellant.

DEVIN, J. The defendant's appeal raises the question of the sufficiency of the verified petition upon which the plaintiff based his motion for the examination of the defendant, preliminary to filing his complaint. The challenged petition is in these words:

"Whereas, petitioner has instituted action against Safe Bus, Inc., for money alleged to be due under the Wage and Hours Law; and

"Whereas, certain information with regard to interstate trips made by buses and drivers of the Safe Bus, Inc., and other information, par-

ticularly as shown by books and records of Safe Bus, Inc., with regard to hours of work and remuneration received by petitioner, is material and necessary for the purpose of filing complaint in said action; that the information desired is not already accessible to petitioner; and the motion hereby made is made honestly and in good faith, and not for the purpose of harassing and pressing the defendant.

"Wherefore, petitioner prays that an order issue out of this Court requiring an officer of Safe Bus, Inc., to appear, with books and records of the corporation relating to matters hereinabove referred to, at the office of the Clerk of the Superior Court of Forsyth County on the 25th day of February, 1941, at 10:00 o'clock A.M., there to give such information as may be necessary to the petitioner for the purpose of filing complaint in his action against Safe Bus, Inc."

The statutory provisions authorizing examination of adverse parties in order to obtain information necessary for the filing of proper pleadings are contained in section 899, *et seq.*, of the Consolidated Statutes. Interpreting these statutes, this Court has established the rule that in order to justify the examination the verified application must state facts which will show the nature of the cause of action, and that the information sought is material and necessary and not otherwise accessible to the applicant, and further that the motion is meritorious and made in good faith. But the court will not permit a party to spread a dragnet for an adversary to gain facts upon which to sue him, or to harass him under the guise of a fair examination. *Patterson v. R. R., ante,* 23; *Knight v. Little,* 217 N. C., 681, 9 S. E. (2d), 377; *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403; *Jones v. Guano Co.,* 180 N. C., 319, 104 S. E., 653; *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92.

Considering plaintiff's petition in the light of the statutes as interpreted by this Court, we reach the conclusion that sufficient cause has not been shown in this case to entitle plaintiff to the examination prayed.

The grounds for the relief prayed, as set out in the application, are contained in two clauses, each beginning with the word "whereas." In the first clause it appears that the plaintiff has instituted action "for money alleged to be due under Wage and Hours Law." Presumably this refers to the Federal Fair Labor Standards Act of 1938 (29 U. S. C. A., sec. 201), but in what respect this statute applies, or under what circumstances money is due does not appear. *U. S. v. American Trucking Association,* 310 U. S., 534; *Hart v. Gregory,* 218 N. C., 184, 10 S. E. (2d), 644. It is not disclosed what relationship, if any, plaintiff bore to the defendant. It may be noted that the provisions of the Federal statute referred to, establishing minimum wages and maximum hours for labor, do not apply to employees of local motor bus carriers, nor to those as to whom the Interstate Commerce Commission has power

to make regulations as to maximum hours. U. S. C. A. 29-30, sec. 213.

In the second clause it is stated that the information desired relates to interstate trips made by buses and drivers of the defendant, and the "other information" sought is with regard to hours of work and remuneration received by plaintiff. It is not alleged that defendant is engaged in interstate commerce, or that plaintiff is engaged in any interstate activities, nor is it shown in what capacity or under what relationship money is due him. Manifestly, plaintiff would not be entitled to examine defendant to ascertain the hours of work and the remuneration which he himself received. Furthermore, it appears that the plaintiff asks for an order to examine "an officer" of the defendant. Neither the person to be examined nor the office he holds with defendant corporation is designated.

While we think the judge below was in error in approving order for the examination of defendant upon the affidavit presented, this would not prevent the plaintiff from moving, in apt time, for an examination of defendant under the statute, based upon proper affidavit setting out facts sufficient to show he is entitled to that relief. *Bohannon v. Trust Co.*, 210 N. C., 679, 188 S. E., 390.

Upon the record before us, we are constrained to hold that the order directing examination of defendant as prayed was improvidently granted, and that the judgment below must be

Reversed.

SCHENCK, J., dissenting: The defendant bottoms its appeal from judgment directing its appearance with its books and records relating to money alleged to be due the plaintiff under the wage and hour law to be examined for the purpose of obtaining information to draw complaint upon the question whether the "plaintiff's 'affidavit and petition' state a cause of action."

The rule has thus been laid down in *Johnson v. Mills Co.*, 196 N. C., 93, 144 S. E., 534: "C. S., 900, provides that 'where a corporation is a party to the action, this examination may be made of any of its officers or agents.' When no pleadings have been filed the plaintiff by proper and sufficient affidavit may apply to the court for an order of examination. *Bailey v. Matthews*, 156 N. C., 78, 72 S. E., 92; *Fields v. Coleman*, 160 N. C., 11, 75 S. E., 1005; *Chesson v. Bank*, 190 N. C., 187, 129 S. E., 403. And when a proper order for such examination has been duly made, an appeal therefrom to the Supreme Court is premature and will be dismissed. *Ward v. Martin*, 175 N. C., 287, 95 S. E., 621; *Monroe v. Holder*, 182 N. C., 79, 108 S. E., 359; *Abbitt v. Gregory, ante*, 9."

However, in *Knight v. Little,* 217 N. C., 681, 9 S. E. (2d), 377, *Barnhill, J.,* writes: "Even though an appeal be premature this Court may, in its discretion, consider the questions presented and express an opinion upon the merits thereof. *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 917; *Milling Co. v. Finlay,* 110 N. C., 411; *Bargain House v. Jefferson,* 180 N. C., 32, 103 S. E., 922; *Taylor v. Johnson,* 171 N. C., 84, 87 S. E., 981; *Ward v. Martin,* 175 N. C., 287, 95 S. E., 621; *Cement Co. v. Phillips,* 182 N. C., 437, 109 S. E., 257."

Further, in *Knight v. Little, supra,* it is written: "In a proceeding of this kind it is of first importance that the petition for an order of examination should state facts which will show the nature of the cause of action and make it appear that the information sought is material and necessary; that the information desired is not already accessible to the applicant; and that the motion is made honestly and in good faith and not maliciously—in other words, that it is meritorious. The law will not permit a party to spread a dragnet for an adversary in the suit in order to gather facts upon which he may be sued, nor will it countenance an attempt under the guise of a fair examination, to harass or oppress his opponent. It is seldom that the exercise of this function of the Court is required. *Chesson v. Bank,* 190 N. C., 187, 129 S. E., 403; *Bailey v. Matthews,* 156 N. C., 78, 72 S. E., 92; *Fields v. Coleman,* 160 N. C., 11, 75 S. E., 1005; *Jones v. Guano Co.,* 180 N. C., 319, 104 S. E., 653; *Monroe v. Holder, supra.*"

The pertinent portion of the affidavit and petition of the plaintiff is as follows:

"Whereas, petitioner has instituted action against Safe Bus, Inc., for money alleged to be due under the Wage and Hours Law; and

"Whereas, certain information with regard to interstate trips made by buses and drivers of the Safe Bus, Inc., and other information, particularly as shown by books and records of Safe Bus, Inc., with regard to hours of work and remuneration received by petitioner, is material and necessary for the purpose of filing complaint in said action; that the information desired is not already accessible to petitioner; and the motion hereby made is made honestly and in good faith, and not for the purpose of harassing and pressing the defendant."

I am of the opinion that the affidavit and petition is a substantial compliance with requirements as enunciated by the decisions of this Court. It will be noted from the petition that the information sought is in regard to interstate trips made by the buses and drivers of the defendant and other information, as shown by the books and records of the defendant, relative to hours of work and remuneration received by the petitioner, and that such information is material and necessary to the filing of the complaint. It will be further noted that the requirement

is that the petition shall "state facts which will show the *nature* of the cause of action." This is in contradistinction to requiring the setting forth of all of the facts upon which the cause of action is bottomed. This for the obvious reason that all of such facts are not known to the petitioner and the very object of the petition is to ascertain them that they may be alleged in the complaint if deemed helpful and relevant.

It is apparent from the affidavit and petition that the nature of the cause of action is an effort to recover "money alleged to be due under the Wage and Hours Law," and, since the information sought relates to interstate trips made by the buses and drivers of the defendant, it is apparent that the wage and hours law referred to is a Federal law—in all probability the Fair Labor Standards Act of 1938 (52 Stat. at L. 1060, ch. 676, 29 U. S. C. A., par. 201), or the Motor Carrier Act of 1935 (49 Stat. at L. 543, ch. 498, 49 U. S. C. A., par. 301). Whether the plaintiff, after an examination of an officer and records of the defendant, can file a complaint that will withstand the assault of a demurrer remains to be seen, but until he has had opportunity for such examination as by statute provided, a denial of an order therefor or the granting of an order of dismissal of the action, is tantamount to sustaining a demurrer to his complaint before it is filed. This, I think, should not be done, and to that end the judgment of the Superior Court should be affirmed.

ROBERT ROUSE WILLIAMS v. JOHN R. ELSON.

(Filed 26 February, 1941.)

APPEAL by plaintiff from *Nettles, J.*, at December Term, 1940, of BUNCOMBE.

Civil action for breach of warranty in the sale of food for human consumption.

Upon denial of liability and issues joined, the jury answered the issue of warranty in favor of the defendant.

From judgment on the verdict, the plaintiff appeals, assigning errors.

Ford & Lee for plaintiff, appellant.
Harkins, Van Winkle & Walton for defendant, appellee.

PER CURIAM. This is the same case that was here at the Fall Term, 1940, on plaintiff's appeal from a judgment of nonsuit, reported in 218 N. C., 157, 10 S. E. (2d), 668.

In the present trial, which was limited to issues arising on plaintiff's allegations of breach of warranty, there seems to be no substantial departure from the rules of procedure, as plaintiff alleges. The verdict and judgment will be upheld.

No error.

NELL LUTHER v. MOUNTAIN TRANSPORTATION COMPANY, INCORPORATED.

(Filed 5 March, 1941.)

APPEAL by defendant from *Armstrong, J.*, at September Term, 1940, of BUNCOMBE. No error.

Sanford W. Brown for plaintiff, appellee.
John C. Cheesborough for defendant, appellant.

PER CURIAM. This action was brought to recover for injury to property and consequent damage to the plaintiff through the alleged negligence of the defendant, in the operation of its motor vehicle.

The defendant company was the owner of an automobile which, in the service of the defendant, collided with the automobile of plaintiff on the occasion complained of.

The plaintiff introduced evidence tending to show that the collision was the result of unlawful speeding and failure to keep a proper lookout on the part of defendant's servant and driver.

Upon careful perusal of the exceptions taken during the progress of the trial, we find

No error.

J. A. VINSON v. P. L. EVERETTE, TRADING AS A. & E. TRUCK LINE.

(Filed 19 March, 1941.)

APPEAL by plaintiff from *Nimocks, J.*, September Term, 1940, of WAYNE. No error.

This was an action to recover damages for personal injury growing out of collision between the plaintiff's automobile and the defendant's truck, at a street crossing in Goldsboro. The defendant set up the defense of contributory negligence. Issues of negligence, contributory

negligence and damages were submitted to the jury. The jury answered the issue addressed to the defendant's negligence in favor of plaintiff, but found that the plaintiff by his own negligence contributed to his injury. From judgment on the verdict in favor of defendant, the plaintiff appealed.

J. Faison Thomson and Scott B. Berkeley for plaintiff, appellant.
Royall, Gosney & Smith and James Glenn for defendant, appellee.

PER CURIAM. There being evidence to support the verdict of the jury in favor of the defendant on the issue of contributory negligence, the judgment dismissing the action must be upheld, unless there was error in the admission of evidence or in the charge of the court addressed to that issue. A careful examination of the record leads us to the conclusion that the exceptions to the admission of testimony and to the instructions given by the court to the jury are without substantial merit.

In the trial we find

No error.

A. N. DRYE, PLAINTIFF, v. RADIATOR SPECIALTY COMPANY, DEFENDANT.

(Filed 30 April, 1941.)

APPEAL by defendant from *Clement, J.*, at October Term, 1940, of MECKLENBURG. No error.

Suit by plaintiff to recover for amount alleged to be due as balance on salary under special contract. Defendant denied contract or that it owed plaintiff anything upon his demand, pleaded the statute of limitation and set up cross action by way of counterclaim. Verdict and judgment for plaintiff in the sum of $5,208.32, with interest, subject to stated credits, including counterclaim.

Defendant appealed.

G. T. Carswell and Joe W. Ervin for plaintiff, appellee.
Robinson & Jones for defendant, appellant.

PER CURIAM. The evidence is rather voluminous and is quite contradictory as between that of the plaintiff and that of the defendant. The evidence of the plaintiff, if believed, was fully adequate to maintain his contentions, and the evidence of the defendant, if believed, was sufficient to defeat him.

It was peculiarly a jury case, and the jury has spoken. We find nothing in the exceptions of the defendant that would justify a new trial.

No error.

ANNE LIBBY McDONALD v. ATLANTIC GREYHOUND CORPORATION.

(Filed 30 April, 1941.)

APPEAL by plaintiff from *Parker, J.*, at December Civil Term, 1940, of WAKE.

Civil action for recovery for personal injuries allegedly resulting from actionable negligence.

The jury answered the issue of negligence in the negative. From judgment thereon, plaintiff appeals to Supreme Court and assigns error.

Little & Wilson and R. L. McMillan for plaintiff, appellant.

Douglass & Douglass for defendant, appellee.

PER CURIAM. A careful consideration of the several assignments of error shown in the record on this appeal fails to reveal cause for disturbing the result of the trial in the Superior Court. Hence, in the judgment below, there is

No error.

EVA LEE JUSTICE FOY, WIDOW: EVA LEE FOY, J. H. FOY, JR., GEORGE EDWARD FOY AND JEAN ELIZABETH FOY, CHILDREN, v. MAUDLIN MOTOR COMPANY, EMPLOYER, AND U. S. FIDELITY & GUARANTY COMPANY, CARRIER.

(Filed 7 May, 1941.)

APPEAL by plaintiffs from *Williams, J.*, at December Term, 1940, of NEW HANOVER. Affirmed.

Harriss Newman and E. K. Bryan for plaintiffs.

Thomas A. Banks, R. L. Savage, and Joyner & Yarborough for defendants.

PER CURIAM. This was a proceeding under the Workmen's Compensation Act to secure compensation for the death of John Henry Foy.

The Industrial Commission found as a fact, from the evidence offered, that the injury by accident resulting in the death of the decedent did not arise out of nor in the course of his employment as an automobile salesman, and denied compensation. Upon appeal to the Superior Court the award was affirmed and judgment rendered accordingly. As there was evidence to sustain the finding and conclusion of the Industrial Commission, the judgment below must be affirmed. *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342; *Buchanan v. Highway Com.,* 217 N. C., 173, 7 S. E. (2d), 382. The exception to the denial of plaintiffs' motion to remand the case to the Industrial Commission cannot be sustained. *Byrd v. Lumber Co.,* 207 N. C., 253, 176 S. E., 572.

Judgment affirmed.

ADDRESS

BY L. R. VARSER

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

WILLIAM JACKSON ADAMS

TO THE

SUPREME COURT OF NORTH CAROLINA

MAY 20, 1941

I have been asked by Mrs. Adams and her son, W. J. Adams, to present to the Court this excellent portrait of their husband and father, the Honorable William Jackson Adams, a former Associate Justice of this high tribunal.

It is fitting and in accord with the precedents that at this time there should be an attempt to characterize and appraise the man and his life.

William Jackson Adams was born in Rockingham, Richmond County, North Carolina, 27 January, 1860, the son of Shockley D. Adams, a Methodist Minister, native of Marlborough County, South Carolina, and Mary Jackson Adams, of Moore County, North Carolina. He was a descendant on his father's side from the Adams and Gibson families of South Carolina. Mary Jackson Adams, his mother, was of gifted ancestry—the Clarke and Jackson families of Moore County. The parents of Judge Adams gave him the best in character, intellect and ancestry. It is a rich heritage to be brought up under the tutelage of a minister father and a good mother.

Judge Adams was prepared for college in the schools in Carthage, Warrenton and Greensboro.

In the fall of 1877 he entered the Freshman Class of Trinity College—then located in Randolph County—an institution consistently distinguished for its sincerity and high standards. He remained at Trinity until the close of the fall term of 1878 and in January, 1879, he transferred to the University of North Carolina and entered the Sophomore Class. In 1881 he graduated from the University of North Carolina in the largest class since its reopening after Reconstruction. In 1924 the

University of North Carolina conferred upon him the honorary degree of LL.D. This degree was well earned—a fitting recognition of ripe scholarship and outstanding statesmanship.

To those who knew him intimately it was no surprise that he should turn to the Law for his life work. He entered the School of Law at the University immediately after his graduation and pursued his law course under Dr. John Manning. The impress of this great teacher on young Adams was lasting. His conception of the law was high—this had been taught him by this great teacher. License was issued to him by this Court at the October Term, 1883, and he began immediately to practice in Carthage, North Carolina.

He pursued the law zealously and was a wise counsellor, as well as a successful advocate.

In 1890, Judge Adams formed a law partnership with J. C. Black, under the firm name of Black & Adams. This partnership continued until Mr. Black's death in 1902. Thereafter Judge Adams practiced alone until December 12, 1908, when he was appointed Judge of the Superior Court, to succeed Honorable Walter H. Neal, resigned.

The law practice of Judge Adams from 1883 until 1908 covered, not only a wide territory, including the appellate courts, but such a variety of litigation that gave him a rich and full experience in the practice, as well as in the habits of the people of the State. His course as a lawyer was eminently successful, characterized at all times by a sincerity of purpose and honesty of conviction. The confidence that the people had in him, while great, was well placed and honestly deserved.

In politics Judge Adams was not without experience. His first political employment was as Attorney for the County of Moore—a position then full of work, but remarkably free from substantial remuneration. He was called to public station in times that "tried men's souls." He was well fitted for great office, great events. He was loyal to his political party. He voted for its nominees, State and National. He did not substitute his judgment for that of his party in the selection of nominees. He believed in government through political parties. Judge Adams served as Chairman of the Democratic Executive Committee of Moore County. The strength of his influence was a big element in Democratic influence in Moore County.

In 1892, Judge Adams was elected to represent Moore County in the House of Representatives. In 1894, he was elected to the Senate from his Senatorial District, then composed of the counties of Moore and Randolph. When this Senate was organized in January, 1895, it was found that, excepting R. A. Doughton, Lieutenant Governor and President of the Senate, there were only six Democrats in that body: Abell, Adams, Dowd, Green, Mercer, and Mitchell. This lonely six withstood

the surge of the times and kept the Democratic rudder straight. Their record is a proud history for North Carolina.

Judge Adams served as a member of the Board of Internal Improvements from 1899 to 1901. On 8 April, 1915, Governor Craig appointed Judge Adams a member of the Commission to revise the system of Court procedure.

Judge Adams came to the Superior Court bench upon the resignation of Judge Walter H. Neal, and was elected for a full term in 1910 and another full term in 1918. On 19 September, 1921, Governor Morrison appointed Judge Adams Associate Justice of this Court to fill the unexpired term of Justice W. R. Allen, deceased. In 1922, he was elected to the same office for the unexpired term and in 1926 for a full term of eight years. Judge Adams died 20 May, 1934. On 19 December, 1906, he married Miss Florence Wall, of Rockingham, Richmond County, North Carolina. This marriage united two families, long distinguished in North Carolina. These two lives so blended that each ministered to each in all high inspirations of mind and character. To this union one son was born, W. J. Adams, Jr., a member of the bar of this Court, who is now a member of the Attorney-General's staff.

In early life Judge Adams joined the Methodist Church, and remained a consistent and devoted member to the time of his death. Judge Adams attempted no show of religion. He did not believe in the kind that "vaunteth itself." His religion was a vital part of his personality. It was at all times a dependable guide and comfort.

Judge Adams' great service was in his judicial labors. His long and wide experience as Superior Court Judge, holding court in every county in the State, constituted a rich field for the application of the law to the people he loved. While a great student, with unceasing desire to learn, not only what the law is, but its sources, his labors and ministrations on the Superior Court bench were thoroughly practical. The office of Superior Court Judge has been characterized by many of our greatest men as the most important office in the State. The reason assigned is that it is the great trial Court administered by the people in which the law is directly applied to the conduct of the individual citizen. It is a rare gift when a Judge is able to know what the law is and to temper its strong hand, not only with accuracy, but with mercy. There has been no waste of judicial machinery on account of his errors as a trial judge. He enjoyed from the beginning of his judicial career the respect of the bar and the officers and jurors of his courts. While the thief felt the halter draw, he found no excuse for a lack of respect of the law.

When Judge Adams came to the Supreme Court of this State he brought a rich experience at the bar, and in the trial court to its service. True scholarship is a necessity for great judicial attainments, but equally

necessary is a practical experience gained at first hand, either at the bar or on the trial bench, or in both of these spheres. Judge Adams was wealthy in his experience in both.

Judge Adams' mind was not only trained in the acquisition of knowledge, but it was full of the power of analysis. From his admission to the bar to the end of his career Judge Adams was a most diligent student of the science of the law and the application of its sublime principles to the transactions of men and their relations to each other. He was a lawyer of ability and distinction—a great mind, with judicial poise, all of which commanded the respect of his brethren of the bar. These qualities brought to him a clientele worthy of the best legal minds of the State. He was equally successful in his judicial roles. His long and useful service is known in every county in the State. To his other qualities he added sound judgment, with a rare knowledge of an insight into human nature. He was quick to perceive both from the muddled facts in the trial court, as well as from an obscure record in the appellate Court, what justice and equity directed. His nature was warm and sympathetic. He was always merciful, but just. He had too much regard for the "light of jurisprudence" and its proper administration to pretend to be better and wiser than the law. His opinions contained in Volumes 182 to 206, inclusive, of the North Carolina Reports, will always serve as monuments to him and guide-posts to his brethren who come after him.

Judge Adams was not only learned in the law, but his scholarship had a wide culture. He was deeply read in the science of government. He loved history and especially the record of his own State. He was familiar with the great authors of the world and of all times. He indulged for long hours in association with good books. He loved the loveliness of natural things—flowers and trees, the colors of autumn and the birth of spring. He was a lover of nature, of books, of friends. He found in these the happiness that riches cannot buy. He was generous in heart, cultured in mind, courtly and chivalrous among men and women. He was courageous and yet gentle. He never faltered when once he had found the truth.

"And is he dead whose glorious mind
Lifts thine on high?
To live with those we leave behind
Is not to die."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE ASSOCIATE JUSTICE WILLIAM J. ADAMS, IN THE SUPREME COURT ROOM, 20 MAY, 1941.

The Court is pleased to accept this splendid portrait of the late Associate Justice William J. Adams, and it has heard with sympathetic understanding and gratification the just and faithful tribute of his friend and ours, who has spoken today. We heartily agree with the speaker that he will take his place among the ablest and most learned judges of the commonwealth. He was a lawyer of the first rank.

In twenty-five volumes of our Reports, beginning with the 182nd and ending with the 206th, his opinions reveal a marked accuracy of learning and constant devotion to duty. In his first case here he was assigned the task of dealing with the *Rule in Shelley's Case. Reid v. Neal,* 182 N. C., 192. In his last prepared opinion, which was adopted by the Court after his death, the question was the discontinuance of a neighborhood road. *In re Petition of Edwards,* 206 N. C., 549. His investigations covered a wide variety of subjects. He delighted in the pursuit of the ideal. Always courteous, he was a most agreeable as well as a most valuable member of the Court. While a profound student of the law, he never assumed that his knowledge was all-embracing, or that his conclusions were sacrosanct, albeit his mind ranged upon the mountain heights. He freely accorded to others the right to their views and the privilege of expressing them. This made him most helpful in conference, and his familiarity with the decisions, their meaning and significance, gave him an unique place among his associates and in the esteem and affection of the members of the bar. We welcome the opportunity of receiving his portrait.

The Marshal will see that it is assigned to its proper place, and these proceedings will be published in the forthcoming volume of the Reports.

WORD AND PHRASE INDEX.

(References are to the Analytical Index, which begins on page 904, and to the case.)

Abandonment—Abandoned wife is free trader see *Nichols v. York*, 262; separation as grounds for divorce requires more than mere abandonment see *Oliver v. Oliver*, 299; there is no common law or statutory offense of abandonment of illegitimate child see *S. v. Gardner*, 331.

Actions—Right of married woman to maintain action against husband see *Bogen v. Bogen*, 51; consolidation of actions for trial see *Osborne v. Canton*, 139; joinder of causes see *Peitzman v. Zebulon*, 473; joinder of counts see *S. v. Calcutt*, 545; Declaratory Judgment Act see *Johnson v. Wagner*, 235; parties who may sue or be sued: Nonresidents see *Bogen v. Bogen*, 51; labor unions see *Hallman v. Union*, 798; forms of action in general see *Motor Co. v. Credit Co.*, 199; distinctions between actions in tort see *Powers v. Trust Co.*, 254; pendency and termination see *McFetters v. McFetters*, 731.

Admissions—In pleadings see *Dillingham v. Gardner*, 227.

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ANALYTICAL INDEX.

ACTIONS.

§ 1c. Parties Who May Sue or Be Sued: Nonresidents.

A nonresident plaintiff may sue a nonresident defendant in the courts of this State upon a transitory cause of action. *Bogen v. Bogen*, 51.

§ 1d. Labor Unions.

An unincorporated labor union is without capacity to sue or be sued in the name of the association, since in law it has no legal entity, and there is no statutory provisions enabling it to sue or be sued as an association. Ch. 24, Public Laws 1933, ch. 182, Public Laws 1933; and C. S., 457, 483 (4), apply only to suits by or against mutual benefit associations on certificates or policies of insurance. *Hallman v. Union*, 798.

§ 5. Forms of Action in General.

Plaintiff is entitled to bring suit in the manner and form he may elect, and may choose forum to which jurisdiction of his cause appertains. *Motor Co. v. Credit Co.*, 199.

§ 8. Distinctions Between Actions in Tort.

Plaintiff alleged that defendant leased him certain property infected with germs of pulmonary tuberculosis without informing him of the fact, and that in consequence he contracted tuberculosis, and that the negligence of defendant was continuing and created a nuisance. *Held:* The gravamen of the complaint is negligence and not nuisance or fraud. *Powers v. Trust Co.*, 254.

§ 11. Pendency and Termination.

An action is pending from the issuance of summons, C. S., 475, until determination by final judgment. C. S., 592. *McFetters v. McFetters*, 731.

ADVERSE POSSESSION.

§ 1. In General.

Adverse possession for the requisite number of years inflexibly ripens title in the possessor as against those not under disability, and upon the termination of the disability the statute begins to run even against those who were not *in esse* at the time of the execution of the deed under which possession is claimed. *Perry v. Bassenger*, 838.

§ 8. Actual, Hostile, and Exclusive Possession in General.

In order to constitute possession of mines and mineral rights the possessor must make such use of the mines and mineral rights as they are capable of, in order to show that the acts of dominion are done in the character of owner in opposition to the rights or claims of all other persons, and mere prospecting does not constitute such possession, and therefore evidence tending to show one year's mining operations and four years' work in sinking shafts, together with prospecting over a period of more than twenty years does not show sufficient continuity of possession of the mines and mineral rights to establish adverse possession for a period of twenty years under known and visible lines and boundaries. *Davis v. Land Bank*, 248.

ADVERSE POSSESSION—*Continued.*

§ 4a. Tenants in Common.

The *locus in quo* was devised to testator's children with remainder to testator's grandchildren. The land was sold under order of court by a commissioner to one of the life tenants. Defendants are the purchasers by *mesne* conveyances from the life tenant to whom the commissioner executed deed. *Held:* The deed executed by the commissioner, being similar to a deed from a stranger, constitutes color of title. C. S., 428. *Perry v. Bassenger*, 838.

§ 4f. Hostile Character of Possession as Affected by Domestic Relationships.

The evidence tended to show that plaintiff, the owner of the *locus in quo*, left the State and abandoned his wife and children, that thereafter the tax lien on the property was foreclosed and deed made by the commissioner to plaintiff's attorney, that by plaintiff's direction the attorney executed quitclaim deed to plaintiff's youngest child, and that thereafter plaintiff's wife and other children, relying upon the belief that plaintiff was dead, executed deed to the youngest child, who executed a deed of trust on the property in which she represented that her father was dead and that she had title. Defendants claim under foreclosure of the deed of trust. *Held:* The possession of the youngest child was under color of title, and upon the facts of this case, was adverse to plaintiff, her father, and defendants, claiming under the child, are not estopped to claim title by adverse possession as against the father in the father's action in ejectment. *Nichols v. York*, 262.

§ 5. Necessity of Claim Under Known and Visible Lines and Boundaries.

Plaintiffs introduced no evidence of title and did not claim under color of title, but claimed the mine and mineral rights in the *locus in quo* by twenty years adverse possession. Plaintiff's evidence tended to show that they worked the fertilizer minerals at various places on the *locus in quo* for over twenty years but did not otherwise locate such work. *Held:* Since plaintiffs do not claim under color of title there can be no presumption that their possession was to the outer boundaries of their claim, and the evidence is insufficient to show adverse possession of the mining rights under known and visible lines and boundaries. *Davis v. Land Bank*, 248.

§ 7. Tacking Possession.

The grantee of the purchaser at the foreclosure of the deed of trust on the land is entitled to tack the possession of the trustor, there being no interruption in favor of the true title, and the grantee's possession relates back to the original entry by the trustor and the color of title under which it was made. *Nichols v. York*, 262.

§ 9a. What Constitutes Color of Title.

An instrument constitutes color of title if it purports to be a conveyance of the title, even though it be defective or void. *Nichols v. York*, 262.

The evidence tended to show that plaintiff, the owner of the *locus in quo*, left the State and abandoned his wife and children, that thereafter a tax lien on the *locus in quo* was foreclosed and deed was made by the commissioner to plaintiff's attorney, who, by direction of plaintiff, executed a quitclaim deed to plaintiff's youngest child. That some 13 years prior to the institution of the action, relying upon the belief that the husband was dead, the wife executed quitclaim deed and the other children executed deed to the youngest child, and that the following day the youngest child and her husband executed deed of trust upon the property in which she represented that her father was dead

and that she had title. Defendants claim title as grantee from the purchaser at the foreclosure sale of the deed of trust. *Held:* The tax deed and the deeds of the wife and the other children to the youngest child constituted color of title. *Ibid.*

An instrument is none the less color of title because of defects discoverable from the record, the purport of the statute being to afford protection to apparent titles, void in law, and supply a defense where none existed without its aid. C. S., 428. *Perry v. Bassenger*, 838.

The *locus in quo* was devised to testator's children with remainder to testator's grandchildren. The land was sold under order of court by a commissioner to one of the life tenants. Defendants are the purchasers by *mesne* conveyances from the life tenant to whom the commissioner executed deed. *Held:* The deed executed by the commissioner, being similar to a deed from a stranger, constitutes color of title. C. S., 428. *Ibid.*

§ 13c. Time Necessary to Ripen Title as Between Individuals Under Color of Title.

Seven years adverse possession under an instrument constituting color of title inflexibly ripens title in the possessor as against all persons not under disability. *Perry v. Bassenger*, 838.

Lands owned by life tenants and remaindermen as tenants in common were sold by a commissioner under order of court. *Held:* Seven years adverse possession under the commissioner's deed ripens title in the purchaser and those claiming under *mesne* conveyances from him as against those not under disability and as against each remainderman who was under disability at the time of the execution of the commissioner's deed upon the expiration of seven years after he reaches his majority, regardless of whether he was a party to the proceeding for the sale of the land and notwithstanding he may not have been *in esse* at the time of the execution of the commissioner's deed. *Ibid.*

AGRICULTURE.

§ 7a. Notice of Termination of Lease.

Plaintiffs alleged that they had made demand on their tenant to surrender the premises because of breach of the lease contract. *Held:* Failure of evidence of demand in support of the allegation is fatal to plaintiffs' right to recover possession of the premises. *Warren v. Breedlove*, 383.

§ 7d. Termination of Lease for Breach of Agreement by Tenant.

Plaintiffs contended that defendant had breached his farm lease by planting cotton, and that such violation terminated the tenancy under the provisions of the lease. Plaintiffs' evidence was to the effect that defendant had plowed land and put in fertilizer for cotton, but there was no evidence that defendant had actually planted any cotton. *Held:* The mere threat or intimation that defendant would breach the agreement is not a breach, and the evidence is insufficient to show a breach terminating the tenancy. *Warren v. Breedlove*, 383.

A lease must be construed most strongly against lessor, and when no stipulations are made in an agricultural lease to cover the eventuality of changes in Federal crop control policies, the landlord is not entitled to declare the lease forfeited because the tenant planted cotton contrary to the terms of the lease when it appears that, because of crop restrictions upon tobacco, the tenant was unable to plant crops upon the same basis as he had planted them during the prior year as required by the lease. *Ibid.*

APPEAL AND ERROR.

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§ 1. Nature and Grounds of Appellate Jurisdiction of Supreme Court in General.

The jurisdiction of the Supreme Court on appeal is confined to questions of law or legal inference. Constitution of North Carolina, Art. IV, sec. 8. *McKay v. Bullard*, 589.

§ 2. Judgments Appealable: Premature Appeals.

A decree in favor of movants on their motion for a modification of a prior restraining order entered in the cause was conditioned upon the final adjudication in favor of movants of a similar motion made in another case. There was no exception to the conditionality of the decree. *Held:* Until final adjudication in favor of movants in the other case, plaintiffs are not aggrieved, and their appeals will be dismissed as premature. C. S., 632. *Yadkin County v. High Point*, 94.

The denial of a motion to dismiss is not ordinarily appealable. *Motor Co. v. Credit Co.*, 199.

Where no judgment has been entered against defendant, it is not prejudiced by any error committed in the trial, and questions presented by its exceptions during the progress of the trial are not properly before the appellate court, and its appeal will be dismissed as premature. *Johnson v. Ins. Co.*, 445.

§ 5. Motions in Supreme Court.

The Supreme Court has the power to grant a motion to be allowed to amend, but the motion is denied in this case because the matter sought to be alleged is immaterial. *Osborne v. Canton*, 139.

APPEAL AND ERROR—*Continued.*

§ 6d. Exceptions to Findings of Fact.

An exception "to the rulings of the court and the findings of fact" and an assignment of error that the court "erred in its rulings and findings of fact" fails to point out or designate the particular findings of fact to which exception is taken, and is bad as a broadside exception and assignment of error, and further, is insufficient to challenge the sufficiency of the evidence to support the findings, or any one or more of them. *Vestal v. Vending Machine Co.*, 468.

§ 8. Theory of Trial.

Where defendant tenant does not controvert in the trial court the sufficiency of notice to quit, he will not be heard to do so in the Supreme Court on appeal, since an appeal will be determined in accordance with the theory of trial in the lower court. *Simons v. Lebrun*, 42.

Where a landlord, sought to be held liable for negligence in the performance of repair work, does not contend in the lower court that the work was done by an independent contractor, and does not present such contention by allegation, evidence, exception to the issues submitted, or request for special instructions, he may not raise such contention in the Supreme Court on appeal, since the appeal will be decided in accordance with the theory of trial in the lower court. *Livingston v. Investment Co.*, 416.

§ 20. Form and Requisites of Transcript.

Where two separate actions which cannot be joined in the same action are tried together for convenience but not consolidated by the court into one action, separate appeals should be taken and separate records filed by the respective appellants, and Rule of Practice in the Supreme Court, No. 19 (2), providing that only one record is required where there are two or more appeals in one action, is not applicable. *Osborne v. Canton*, 139.

§ 29. Abandonment of Exceptions and Assignments of Error by Failure to Discuss Same in Briefs.

Maynard v. Holder, 470; *Currin v. Currin*, 815.

§ 37b. Review of Discretionary Rulings.

A motion to be allowed to amend answer after time for answering has expired is addressed to the discretion of the lower court, and the denial of the motion is not reviewable in the absence of manifest abuse. *Osborne v. Canton*, 139; *Cody v. Hovey*, 369.

§ 37c. Review of Injunctive Proceedings.

On appeal in injunction cases the findings of fact by the judge of the Superior Court are not conclusive and the Supreme Court may review the evidence, but there is a presumption that the proceedings below are correct and the burden is upon appellant to assign and show error. *Sineath v. Katzis*, 434.

§ 37e. Review of Findings of Fact. (Review of judgments on findings see Appeal and Error § 40a.)

Where the parties waive a jury trial and agree to trial by the court, the court's findings of fact from the evidence are binding and conclusive upon appeal. Michie's Code, 556, 569. *Berry v. Payne*, 171; *Blackburn v. Woodmen of the World*, 602.

Where the county court in which the action is instituted hears the evidence and finds the facts in accordance with its practice in the absence of a request

for a jury trial, its findings, affirmed by the Superior Court, are binding upon the Supreme Court on appeal when the findings are supported by evidence. *Dillingham v. Gardner*, 227.

Where the court's findings of fact are not supported by the evidence, the findings are not conclusive and the judgment based on such findings is erroneous. *Laughridge v. Land Bank*, 392.

Evidence and findings are reviewable in injunction cases. *Sineath v. Katzis*, 434.

§ 38. Presumptions and Burden of Showing Error. (Presumption that court found facts supporting judgment see hereunder § 40a.)

It will be presumed on appeal that the court's denial of defendant's motion to be allowed to amend answer after time for filing answer had expired, was properly denied in the exercise of its discretionary power even if it does not affirmatively appear from the record that the denial of the motion was discretionary, since the ruling of the court will be presumed correct, but in this case it did affirmatively appear that the court denied the motion in the exercise of its discretion. *Osborne v. Canton*, 139.

On appeal in injunction cases the findings of fact by the judge of the Superior Court are not conclusive and the Supreme Court may review the evidence, but there is a presumption that the proceedings below are correct and the burden is upon appellant to assign and show error. *Sineath v. Katzis*, 434.

When the charge of the court is not contained in the record, it will be assumed on appeal that it is free from prejudicial error. *Maynard v. Holder*, 470.

§ 39. Harmless and Prejudicial Error.

Where, upon the facts admitted and the competent evidence offered, peremptory instructions on each issue are warranted, error, if any, in the admission of other evidence and in the instructions of the court are harmless. *Clark v. Henrietta Mills*, 1.

When it appears that the denial of a petition for the examination of an adverse party has not prejudiced petitioner, the order denying the petition will not be disturbed on appeal, since an order will not be reversed except for error which is prejudicial. *Gudger v. Robinson Bros.*, 251.

Where it is determined on appeal that defendant's motion for judgment as of nonsuit should have been allowed, errors, if any, in the admission or exclusion of evidence or in the charge of the court, are harmless. *Chinnis v. R. R.*, 528.

An exception to the admission of certain testimony of a witness cannot be sustained when it appears that other witnesses were permitted to testify to the same effect without objection. *McKay v. Bullard*, 589.

An appellant may not successfully contend that the court erred in refusing his motion to strike certain testimony which appellant himself has elicited from an adverse witness on cross-examination. *Maynard v. Holder*, 470.

Appellant's exception to the charge on an issue which was answered by the jury in appellant's favor will not be considered, since appellant could not be prejudiced thereby. *McKay v. Bullard*, 589.

The exclusion of testimony of a witness cannot be held prejudicial when it does not appear from the record what the answer of the witness would have been had he been permitted to testify. *Simpson v. Oil Co.*, 595; *Currin v. Currin*, 815.

In this action involving an automobile collision, a witness who saw plaintiff's car was permitted to testify as to its speed, but her testimony that at

the time she exclaimed "Why don't they slow up?" was excluded. *Held:* Even conceding that the exclamation was competent as part of the *res gestæ*, its exclusion was not prejudicial in view of the admission of the testimony as to speed. *Swinson v. Nance*, 772.

Exclusion of witness' testimony that his evidence given in the trial was the same as that given on a former trial involving the same collision in suit *held* not prejudicial in view of the fact that the transcript of the testimony on the former trial was introduced in evidence. *Swinson v. Nance*, 772.

Whether the alleged negligence of the driver of a car should be imputed to the passengers of the car becomes academic when the jury finds that the driver of the car was not guilty of negligence, and exceptions to the refusal of the court to give instructions upon the doctrine of imputed negligence cannot be sustained. *Ibid.*

§ 40a. Review of Exceptions to Judgment or to Signing of Judgment on Findings of Fact.

An exception to a conclusion of law cannot be sustained when the facts found support the conclusion. *Dillingham v. Gardner*, 227.

Where there is no objection to any of the findings of fact made by the court they will be presumed correct, and where the facts found support the judgment, appellant's sole exception to the signing of the judgment cannot be sustained. *Keel v. Trust Co.*, 259.

In the absence of a request by defendant that the court find the facts supporting its conclusion that defendant was doing business in this State, it will be presumed that the court found facts sufficient to support its conclusion, and if there is sufficient evidence appearing in the record to support the court's ruling, the ruling will be sustained. *Parris v. Fischer & Co.*, 292.

Where the evidence does not appear of record it will be presumed that there was sufficient evidence to support the findings sustaining the judgment of the court. *Vestal v. Vending Machine Co.*, 468.

A sole exception to the judgment as signed presents only the question of whether the judgment is supported by the record. *Jones v. Griggs*, 700.

In the absence of a request that the court find the facts, it will be presumed on appeal that the court found sufficient facts, upon supporting evidence, to support the judgment. *Ibid.*

§ 40c. Review of Judgments on Motions to Nonsuit.

Upon appeal from judgment as of nonsuit, competent evidence offered by plaintiff which was excluded in the court below will be considered in passing upon the sufficiency of the evidence. *Pinnix v. Griffin*, 35.

Upon appeal from the denial of a motion for judgment as of nonsuit, the Supreme Court cannot consider the evidence of defendant, whether contradicted or uncontradicted, except in so far as it may tend to support plaintiff's case, and the reviewing court is not concerned with the credibility of the evidence but will determine only whether there is any evidence sufficient to support plaintiff's cause of action. *Mitchell v. Saunders*, 178.

§ 40g. Review of Constitutional Questions.

The Supreme Court will not venture an advisory opinion on a constitutional question unless it is properly presented, and will not decide such a question even then when the appeal may be properly determined on a question of less moment. *S. v. Muse*, 226.

§ 41. Questions Necessary to Determination of Appeal.

Where it is determined that defendant's motion to nonsuit was correctly allowed because of the bar of the statute of limitations, whether the complaint

is sufficient to show that plaintiff's injury was proximately caused by the negligent acts or omissions complained of, need not be determined. *Powers v. Trust Co.*, 254.

When it is determined that nonsuit was properly granted on one ground, other grounds advanced to sustain the nonsuit need not be considered. *Smith v. Duke University*, 628.

§ 43. Petitions to Rehear.

Under the rules of the Court relating to petitions to rehear, the Supreme Court can correct an inadvertence in a former decision in the case without the necessity of another trial in the Superior Court. Rule of Practice in the Supreme Court, No. 44. *Cotton Co. v. Henrietta Mills*, 279.

Petition to rehear this case involving a highway accident is allowed for inadvertence in former decision in failing to sustain appellant's exception to the failure of the trial court to instruct the jury upon the statutory law arising upon the evidence. *Barnes v. Teer*, 823.

Petition to rehear allowed for inadvertence in former opinion in holding that plaintiff could not take voluntary nonsuit against defendant against whom codefendant had demanded affirmative relief under C. S., 618; it appearing that amended answer demanding affirmative relief under the statute was not tendered until after verdict. *Smith v. Kappas*, 850.

Where exceptions brought forward and duly preserved in appellant's brief and assigned as error are not discussed or decided in the original opinion, the questions thus presented by the assignments of error remain open for decision and may be considered and determined upon appellee's petition to rehear. *Ibid.*

§ 48. Remand.

When, in an action to determine whether certain real properties of an educational institution are subject to assessment and levy of *ad valorem* taxes, the facts agreed in regard to one of the parcels of land are insufficient to determine with definiteness the taxable status of the property, the cause will be remanded for further proceedings as to justice appertains and the rights of the parties may require. *Guilford County v. Guilford College*, 347.

Cause remanded for determination of jurisdictional question presented by proposed amendment to answer. *Cody v. Hovey*, 369.

Where the municipal court in which the case is originally tried is abolished pending the decision of the Supreme Court granting a new trial, the cause will be remanded to the Superior Court of the county. Ch. 117, Public Laws 1941. *Barnes v. Teer*, 823.

§ 49a. Law of the Case.

Where it is determined on a former appeal that the evidence relative to a particular issue was sufficient to be submitted to the jury, and upon the subsequent trial the evidence relating to the issue is without substantial difference, the denial of defendant's motion to nonsuit upon the issue in the second trial will not be disturbed on appeal. *Johnson v. Ins. Co.*, 202.

When the evidence upon the subsequent hearing is substantially the same as that considered upon the former appeal, a peremptory instruction given in accord with the opinion in the former appeal will not be held for error. *Warren v. Ins. Co.*, 368.

When it is determined on appeal that plaintiff's evidence is sufficient to go to the jury upon the question of defendant's breach of express warranty and damages, the decision becomes the law of the case and defendants' motion to nonsuit upon the issue in the subsequent trial upon substantially the same evidence, is properly refused. *Simpson v. Oil Co.*, 595.

APPEAL AND ERROR—*Continued.*

Where exceptions brought forward and duly preserved in appellant's brief and assigned as error are not discussed in the original opinion, the questions thus presented by the assignments of error remain open for decision and may be considered and determined upon appellee's petition to rehear. *Smith v. Kappas*, 850.

§ 49b. Stare Decisis.

The doctrine of *stare decisis* has as its purpose the stability of the law and the security of titles, and it is necessary that the established rules be uniformly observed so that those who are called upon to advise may safely give opinions on titles to real property. *Whitley v. Arenson*, 121.

A case must be decided in accordance with settled rules of law notwithstanding that the decision works an apparent hardship in the particular case. *In re Will of McDonald*, 209.

APPEARANCE.

§ 2. General Appearance.

The filing of a bond for the release of property attached, the filing of a demurrer, and the filing, as a stipulation of record, an agreement to extend the time for filing answer, each constitutes a general appearance waiving any defect or irregularity in the service of summons. *Vestal v. Vending Machine Co.*, 468.

ATTACHMENT.

§ 22. Liens and Priorities.

Under comity, lien of title retention contract on personalty, duly registered in state wherein it was executed and property was then located, has priority over lien of an attachment subsequently issued against the same property in this State, notwithstanding that the title retention contract is not registered here. *Truck Corp. v. Wilkins*, 327.

AUTOMOBILES.

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36. Revocation and Suspension. S. v. McDaniels, 763.

AUTOMOBILES—*Continued.*

§ 7. **Pedestrians.** (Liability of carrier for death of minor passenger struck after alighting on shoulder of road see Carriers § 21c.)

A 2½-year-old child in mother's care ran across highway and was struck by speeding motorist as she attempted to recross highway to her mother. *Held:* Evidence did not show contributory negligence as a matter of law on part of mother. *Pearson v. Stores Corp.*, 717.

Fact that 18-months-old child was found dead in highway, and circumstantial evidence that it was struck by truck driven by defendant *held* not sufficient to be submitted to jury on question of negligence. *Mills v. Moore*, 25.

§ 8. **Due Care in Operation of Vehicles in General.**

The operator of a motor vehicle is under duty to keep same under control and to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances. *Mills v. Moore*, 25.

The common law rule of the ordinary prudent man prevails in the operation of motor vehicles, the rule not being made obsolete but rather preserved in statutory traffic regulations, and even a technical violation of statute or ordinance may be required under circumstances in which a reasonably prudent man can foresee that injury would likely result from a strict compliance with the regulations. *Lancaster v. Greyhound Corp.*, 679.

§ 9a. **Attention to Road and Proper Lookout.**

The operator of a motor vehicle is under duty to keep a proper lookout so as to avoid collision with persons or vehicles upon the highway. *Mills v. Moore*, 25.

§ 9c. **Safety Statutes in General.**

The violation of provisions of the statute regulating speed constitutes *prima facie* evidence of negligence, and the violation of other statutes designed and intended to protect life, limb and property, constitute negligence *per se*. *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823.

§ 12a. **Speed in General.**

Motorist may not lawfully drive at speed which is not reasonable and prudent under circumstances notwithstanding that speed is less than limit set by statute. *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823.

Speed in excess of statutory limit is *prima facie* evidence of negligence or that the speed is not reasonable or prudent and is unlawful. *Barnes v. Teer*, 823.

§ 12c. **Instructions.**

Evidence *held* to show that driver entered intersection at speed greater than that consistent with due care under circumstances in violation of rule of reasonably prudent man. *Lancaster v. Greyhound Corp.*, 679.

The failure of a defendant traveling upon a servient highway to stop before entering an intersection with a through highway is not contributory negligence *per se*, but such failure is merely evidence to be considered by the jury in the light of the surrounding circumstances, C. S., 2621 (305), and this rule is unaffected by a municipal ordinance making such failure to stop unlawful, since the State law prevails over the ordinance. *Swinson v. Nance*, 772.

A motorist traveling along a through highway does not have an unqualified right of way over vehicles entering intersections from servient highways, such right of way being subject to the rule of the reasonably prudent man, and when he enters the intersection with a servient highway at an excessive speed, the fact that he had the right of way is no longer a conclusive factor

AUTOMOBILES—*Continued.*

in considering his behavior and he is not entitled to rely upon his right of way to absolve him from liability for injuries proximately caused by his negligent speed, and his exceptions to instructions consonant with this rule and his exceptions to the court's refusal to give specific instructions at variance therewith, cannot be held for error. *Ibid.*

§ 17. Skidding.

The principal of *res ipsa loquitur* does not prevail in this State as to the skidding of an automobile, but evidence of negligence in this case *held* sufficient for jury. *Williams v. Thomas*, 727.

Upon evidence that tires of car were worn and slick and that road was wet, court was under duty to charge statutory provisions that driver should not exceed speed which is reasonable and prudent under circumstances. *Kolman v. Silbert*, 134.

§ 18a. Sufficiency of Evidence of Negligence and Proximate Cause and Nonsuit.

Negligence is not presumed from the mere fact that a person is injured or killed by an automobile, but plaintiff is required to offer legal evidence tending to establish beyond a mere speculation or conjecture every essential element of negligence, and upon failure of plaintiff so to do a nonsuit is proper. *Mills v. Moore*, 25.

Evidence that 18-months-old child was missed by her mother, and a few moments afterward was found dead in dirt highway in front of house, and that truck driven by defendant traveled that highway at that time, and that child was killed by this truck, *held* insufficient to be submitted to jury on question of driver's negligent failure to keep reasonably careful lookout. *Mills v. Moore*, 25.

Evidence that defendant's driver entered intersection at excessive speed *held* to take issue of negligence to jury. *Lancaster v. Greyhound Corp.*, 679.

Evidence tending to show that defendant's car was seen skidding on the highway on the right side thereof, but that just as plaintiff's car, traveling in the opposite direction on its right side of the highway, got almost parallel therewith, defendant's car suddenly whipped across the highway in front of plaintiff's car so that the front of plaintiff's car struck the rear of defendant's car, *is held* to show more than mere skidding and was sufficient to be submitted to the jury upon the issue of negligence. *Williams v. Thomas*, 727.

§ 18c. Contributory Negligence.

Evidence *held* insufficient to establish contributory negligence as matter of law on part of mother of 2½-year-old child struck on highway. *Pearson v. Stores Corp.*, 717.

§ 18d. Intervening and Concurring Negligence.

The evidence tended to show that defendant's driver entered street intersection at excessive speed and collided with truck attempting to make left turn from opposite direction, resulting in injury to plaintiff, who was passenger in defendant's car. *Held:* Even conceding that truck driver was negligent, his acts cannot be held as a matter of law to insulate negligence attributable to defendant. *Lancaster v. Greyhound Corp.*, 679.

Where a passenger in a car is thrown therefrom to the hard surface by the negligent act of the driver, and while lying prone on the highway is run over by a truck, through negligence of the truck driver in failing to avoid striking her, and the passenger dies of the injuries thus inflicted, both drivers are liable as joint tort-feasors. *Hester v. Motor Lines*, 743.

AUTOMOBILES—*Continued.*

§ 18h. Instructions in Automobile Accident Cases.

Instruction *held* for error in failing to charge pertinent statutory speed limit and the evidentiary significance of speed in excess thereof. *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823.

The failure of the court to explain and apply the provisions of safety statutes relied on by plaintiff is not cured by a subsequent charge stating and explaining the common law rule of the prudent man. *Kolman v. Silbert*, 134.

§ 19. Liability of Owner or Driver for Injuries to Guests and Passengers.

Where a passenger in the automobile owned and operated by his son on a trip to visit a relative, voluntarily pays the cost of gasoline on the trip, the father is a guest without payment for such transportation within the purview of sec. 2154 (232), Acts of Virginia General Assembly, 1938, *Hale v. Hale*, 191.

In order for a gratuitous guest to recover of the owner or operator of a car for negligent injury under the Virginia statute, sec. 2154 (232), Acts of Virginia General Assembly, 1938, he must show such gross negligence or willful and wanton misconduct on the part of the owner or operator as would raise the presumption of conscious indifference to consequences. *Ibid.*

Evidence that the owner and operator of an automobile was driving 40 or 45 miles an hour on a winding road on a clear, dry day and that on a particularly bad "S" curve he lost control of the car, which ran off the road resulting in injury to a guest without pay, *is held* insufficient to show gross negligence on the part of the driver, and the driver's motion to dismiss as of nonsuit in an action governed by the Virginia law was properly allowed. *Ibid.*

§ 20b. Negligence of Driver Imputed to Guest or Passenger.

Where the owner of a truck, riding therein, is driven by his employee, the negligence or contributory negligence of the employee is in law attributable to the owner. *Hampton v. Hawkins*, 205.

Where a driver's wife, his brother and his sister-in-law are passengers in his car while taking his sister to the hospital for examination, the occupants of the car are not engaged in a joint enterprise so as to make them responsible for the negligence of the driver. *Swinson v. Nance*, 772.

Doctrine of imputed negligence cannot arise when jury finds that driver was not negligent. *Ibid.*

§ 23. Liability of Owner for Driver's Negligence in General.

Ordinarily, the owner of an automobile is not liable for the negligence of a person to whom he has loaned the car for such person's own purposes, unless the lender knew that the borrower was incompetent and that injury might occur. *Hawes v. Haynes*, 535.

§ 24a. Liability of Employer for Negligent Driving of Employee in General.

The fact that the automobile involved in the collision is owned by the agent does not preclude liability on the part of the principal when it is made to appear that the agent customarily used the car in the discharge of his duties and that the principal knew, or in the exercise of due diligence should have known, of its use for such purpose by the agent. *Pinnix v. Griffin*, 35.

AUTOMOBILES—*Continued.*

§ 24b. Course of Employment.

Whether insurance agent, driving own car, was acting in course of employment in collecting premiums and soliciting insurance at time of fatal injury to pedestrian, *held* for jury on issue of *respondeat superior*. *Pinnix v. Griffin*, 35.

Evidence tending to show that a messenger boy employed by defendant telegraph company customarily delivered telegrams by bicycle, that on occasion, with the permission of the defendant's manager, he used his car to deliver out-of-town telegrams, in which instance the sender or receiver, and not the defendant, paid the charges, and that the accident in suit occurred while the messenger was traveling from his home to a garage to have repairs made on his car at his own expense, in the morning before reporting for work, *is held* insufficient to be submitted to the jury on the issue of *respondeat superior*. *Ross v. Tel. Co.*, 324.

Evidence that driver was using his own car in going to breakfast at time of injury *held* to show that he was not engaged in course of employment. *Creech v. Linen Service Corp.*, 457.

§ 25. Family Car Doctrine.

Admissions that defendants were husband and wife, that their minor son resided with them, and that at the time of injury the son was operating the car registered in the name of the wife, with the consent and approval of his parents, is insufficient to support the application of the family purpose doctrine, there being no admission that the car was owned and used for the convenience and pleasure of the family, and no evidence or admission that the son had driven the car at any time other than the time of the collision in suit. *Hawes v. Haynes*, 535.

§ 28. Failing to Stop After Accident.

Circumstantial evidence that defendant was driver of "hit and run" car *held* sufficient to be submitted to jury. *S. v. King*, 667.

§ 32e. Sufficiency of Evidence and Nonsuit in Murder and Manslaughter Prosecutions.

Evidence that defendant's culpable negligence in the operation of his automobile resulted in the death of an occupant of another car *is held* sufficient to have been submitted to the jury and fully justifies its verdict of manslaughter. *S. v. Inscore*, 759.

§ 34. Right to Require Licensing.

A driver's license is evidence of a privilege granted by the State to the holder thereof to operate a motor vehicle upon the public highways, and the Legislature has full authority to prescribe the conditions upon which it will be issued and to designate the court or agency through which, and the conditions upon which, it will be revoked. *S. v. McDaniels*, 763.

§ 36. Revocation and Suspension.

A municipal court is without authority to revoke a driver's license, the power to suspend or revoke drivers' licenses being vested exclusively in the Department of Revenue, subject to the right of review by the Superior Court. Secs. 18 (e), 19, ch. 52, Public Laws 1935. (Ch. 36, Public Laws 1941.) *S. v. McDaniels*, 763.

AUTOMOBILES—*Continued.*

A judgment of a municipal court in a prosecution for reckless driving which provides, among other things, that defendant's driver's license be revoked, is insufficient, standing alone, to support a subsequent conviction of driving without license, the burden being upon the State to show that the license was duly revoked by the Department of Revenue pursuant to the prior judgment. *Ibid.*

BAILMENT.

§ 6. Actions for Failure to Return or Surrender Property.

Where plaintiff alleges a bailment for hire on the part of defendant dry cleaning company in accepting plaintiff's coat to be cleaned, and defendant's failure to return the coat, but the complaint fails to contain a sufficient allegation of special damages, plaintiff's recovery should be confined to the fair market value of the coat as of the date it was delivered to defendant. *Wilson v. Posey*, 261.

BANKS AND BANKING.

§ 8a. Duties and Liabilities in Paying Checks.

An order on a bank, in the form of a check, to pay a designated person a specified sum at the death of the drawer is entirely without effect, since by its terms it has no effect as long as the drawer lives, and his death revokes any authority of the bank to make payment to the drawee. *Graham v. Hoke*, 755.

BASTARDS.

§ 10. Action by Child Against Putative Father to Compel Support.

In an action by a child against his alleged putative father to compel the defendant to provide adequate support, a written contract entered into by the defendant and the child's mother, in which the defendant agrees to make certain contributions to the mother for the support of the child, is competent as being in the nature of an admission by the defendant, and the fact that it may tend to show indirectly declarations of the mother is not sufficient to justify its exclusion. *Ray v. Ray*, 217.

This action was instituted in behalf of a child against his alleged putative father to compel the defendant to provide adequate support for the child. The evidence considered in the light most favorable to plaintiff tended to show that plaintiff's mother separated herself from her husband at the solicitation of the defendant, that she thereafter lived in open adultery with defendant for a period of two years, including the time when plaintiff was begotten, that the husband was living elsewhere and was not seen in the community where plaintiff's mother was living and did not have access to her, and that defendant entered into a contract with the mother in which the defendant agreed to make certain contributions to the mother for the support of the child. *Held:* The evidence is sufficient to be submitted to the jury, and defendant's motion for judgment as of nonsuit should have been denied. *Ibid.*

BILL OF DISCOVERY.

§ 1. Nature and Scope of Remedy of Examination of Adverse Party.

Where one of defendants sued as joint tort-feasors alleges, among other defenses, that plaintiff's injuries resulted solely from the negligence of its codefendant, such codefendant is not entitled to an examination of respondent defendant, since, even though the defenses of defendants are antagonistic in regard to this defense, they are jointly interested in the defense of the action and a joint verdict and judgment against both is possible. C. S., 900, 901, 907. *Gudger v. Robinson Bros.*, 251.

An order for the examination of an adverse party will not be granted to enable the plaintiff to spread a dragnet or to harass defendant under the guise of a fair examination. C. S., 899, *et seq.* *Washington v. Bus, Inc.*, 856.

Where it is determined on appeal that there was error in approving the order for the examination of defendant upon the affidavit presented, plaintiff may thereafter move in apt time for examination of defendant upon proper affidavit setting out facts sufficient to entitle him to that relief. *Ibid.*

§ 3. Affidavit and Proceedings to Secure Examination of Adverse Party.

A petition for the examination of a codefendant which is not in the form of an affidavit, and further fails to allege the facts upon which petitioner bases its allegation that the examination of respondent is necessary to enable it to prepare its defense, is insufficient to support an order for examination. *Gudger v. Robinson Bros.*, 251.

The verified petition for examination of an adverse party must state facts showing the nature of the cause of action, that the information sought is material and necessary and not otherwise accessible to applicant, and that the motion is meritorious and made in good faith. *Washington v. Bus, Inc.*, 856.

Petition *held* insufficient to support an order for the examination of defendant. *Ibid.*

§ 8. Affidavits and Procedure to Secure Inspection of Writings.

Plaintiff, carrier by truck, instituted this action against several railroad companies alleging that defendants conspired to reduce rates on certain commodities between designated termini in order to destroy plaintiff's business, with intent and purpose of raising such rates as soon as competition was removed, C. S., ch. 53. Plaintiff moved for the inspection of all correspondence, memoranda, and other writings among the several defendants and others relative to the establishment of such lower rates. Plaintiff's affidavit for such order did not designate any specific letters or documents or state the contents thereof, and did not aver that the information sought is not obtainable elsewhere. *Held:* The affidavit is insufficient to support the order, since it is required that the affidavit set forth facts showing the materiality and necessity of the papers sought to have produced, and the mere averment that they are material and necessary is insufficient. *Patterson v. R. R.*, 23.

BILLS AND NOTES.

§ 1. Form and Validity.

Check ordering bank to pay designated sum to payee out of drawer's estate is entirely without effect. *Graham v. Hoke*, 755.

§ 2c. Seals.

The maker's admission that he signed the printed form of a note having the word "seal" printed at the usual place after his signature, places the burden upon him of showing that he did not adopt the seal, and his testimony that

BILLS AND NOTES—*Continued.*

he could not say that he intended to show the word "seal" and couldn't say at the time of testifying that he remembered seeing the word "seal" is no evidence that he had not adopted the seal. *Currin v. Currin*, 815.

§ 8. Presumption of Negotiation from Possession.

Possession raises presumption that possessor is holder thereof and he may sue thereon without proof of signatures of endorsers. *Dillingham v. Gardner*, 227.

§ 9f. Holders in Due Course.

In this action on a note, plaintiff's evidence tended to show that she acquired same for value before maturity. Defendant maker sought to testify as to a conversation with the payee tending to show that the payee still held the note after maturity. *Held:* The fact that the payee held the note at the time of making the declaration must be established independently before testimony of the declaration would be competent as a declaration against interest, and° when offered solely for the purpose of affirmatively showing that he did hold the note at that time, it is hearsay and inadmissible. *Currin v. Currin*, 815.

§ 23. Parties.

Possession of a note raises the presumption that the possessor is a holder thereof and he may sue thereon without proof of the signatures of the endorsers, since a mere holder of a negotiable instrument may sue thereon in his own name. C. S., 3032. *Dillingham v. Gardner*, 227.

BOUNDARIES.

§ 1. General Rules for Ascertainment of Boundaries.

The meaning of a deed as to what land it covers and what estate it conveys are questions of law for the court, where the boundaries are on the land is a question of fact for the jury. *Perry v. Morgan*, 377.

§ 3. Definiteness of Description and Admissibility of Parol Evidence.

A patent ambiguity cannot be explained by parol, a latent ambiguity can. *Perry v. Morgan*, 377.

The description in the State grant under which defendants claim in this case *is held* sufficiently definite to be aided by parol, and defendants' parol evidence as to its location *is held* sufficient to be submitted to the jury. *Ibid.*

§ 9c. Declarations.

Testimony of a defendant, who claimed an interest in the *locus in quo* under the will of her deceased husband, that her husband had shown her the corners, was excluded, but the witness was permitted to testify that she saw a rock buried in the ground at the place which defendants contended was the corner of their land. *Held:* The court properly excluded testimony which would violate the rule that declarations as to boundaries are not competent unless made *ante litem motam* by a disinterested party since deceased, and the testimony admitted is relevant and competent, since defendants contended that the rock referred to was the terminus of the disputed line between the tracts of land of the plaintiffs and defendants. *Maynard v. Holder*, 470.

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud.

Plaintiff instituted this action to establish an alleged parol trust. Defendant asserted as an estoppel a lease agreement executed by plaintiff in which

it was stipulated that plaintiff's only interest in the land was that of a tenant. Plaintiff attacked the lease on the ground that its execution was procured by fraud. The evidence tended to show that the lease agreement was prepared by plaintiff's attorney, that he had opportunity to read it or to have it read to him, and the only representation relied upon was the statement of defendant's agent that the lease agreement was a "plain rental contract." *Held:* Plaintiff is not entitled to avoid the legal effect of the instrument upon mere proof that the agent of defendant informed him that it was a lease agreement. *Wolfe v. Land Bank*, 313.

After foreclosure and the purchase of the property by the *cestui* there is no presumption of fraud arising from the relationship between the parties which would vitiate the execution by the former trustor of a lease agreement. *Ibid.*

CARRIERS.

§ 15. Relationship of Carrier and Passenger.

Ordinarily, the relationship of carrier and passenger terminates when the carrier discharges the passenger in a place of safety at the destination contracted for, or designated by the passenger. *White v. Chappell*, 652.

Interurban bus terminates relationship of carrier and passenger when it discharges passenger in place of safety on highway near place designated. *Ibid.*

§ 21a. Degree of Care and Liability to Passengers in General.

While a carrier is held to the highest degree of care for the safety of its passengers consistent with the practical operation and conduct of its business, a carrier is not an insurer of their safety, but its liability is based on negligence. *White v. Chappell*, 652.

§ 21b. Injuries by Accident in Transit.

Plaintiff was a passenger in a taxicab employed by defendant bus company to follow bus route until there should be room on the bus for plaintiff. At a street intersection in a city in South Carolina, the cab and a truck, which was attempting to make a left turn from the opposite direction, collided. There was evidence that the taxicab entered the intersection at excessive speed under the circumstances. *Held:* The evidence was sufficient to be submitted to the jury on the question of the carrier's negligence, and it cannot be held as a matter of law that the driver of the truck was guilty of intervening negligence insulating the negligence of the taxicab driver. *Lancaster v. Greyhound Corp.*, 679.

§ 21c. Injuries in Boarding or Alighting.

Ordinarily, there is no duty resting upon a carrier to assist passengers in boarding or alighting from its train, or car, or bus. *White v. Chappell*, 652.

The evidence tended to show that intestate, an eight-year-old child, was traveling on defendant's interurban bus in company with his mother, that the bus stopped on the highway across from the house designated by the mother, that the child first alighted on the shoulders of the road on the right side of the highway, followed by his mother, and that before the bus started and before she could bring him under surveillance the child ran around the back of the bus and started across the highway in the dark and was struck by a car traveling in the opposite direction from the bus. *Held:* The primary duty of looking after the child was on his mother, and the evidence fails to disclose actionable negligence on the part of the bus company. *White v. Chappell*, 652.

CARRIERS—*Continued.*

The fact that a bus stops on the right side of the highway at night without warning and stands without dimming its lights while passengers alight therefrom onto the shoulders of the highway, can have no causal connection with the death of one of such passengers, a boy eight years of age, resulting from injuries inflicted by a car traveling in the opposite direction which struck him as he attempted to run across the highway in its path from the rear of the bus. *Ibid.*

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 9a. Lien and Priorities Under Registered Instruments.

Under the general rule of comity, the lien of a retention title contract on personal property duly registered and indexed in the state wherein it was executed and the property was then located, has priority over the lien of an attachment subsequently issued against the same property in this State, notwithstanding that the retention title contract is not registered here. *Truck Corp. v. Wilkins*, 327.

CLERKS OF COURT.

(Jurisdiction of Superior Court upon appeal from clerk see Courts § 2c.)

§ 3. Jurisdiction and Powers as a Court in General.

The clerk of the Superior Court is a court of very limited jurisdiction and has only that authority given by statute. *Cook v. Bradsher*, 10.

CONSPIRACY.

§ 5. Competency of Acts and Declarations of Coconspirator.

When a *prima facie* case of conspiracy has been established, declarations of a conspirator made before the termination of the conspiracy, in the absence of the coconspirators, is competent against the coconspirators only if the declarations are in furtherance of the common design and within the *res gestæ* and declarations of one conspirator which are merely narrative of what another conspirator had done or, by inference, would do, are incompetent as to the third conspirator, and the admission of such declarations in evidence entitles him to a new trial. *S. v. Wells*, 354.

CONSTITUTIONAL LAW.

§ 4c. Delegation of Authority by Legislature.

Legislature may delegate authority to county commissioners to suspend or abolish county court and to fix salary of judge thereof, and need not state facts which must be found by commissioners before exercising delegated powers, but may delegate discretionary authority. However, delegation of discretionary authority implies use of such power in good faith, and does not warrant arbitrary and abusive action. *Efird v. Comrs. of Forsyth*, 96.

§ 4d. Legislative Power Over Counties and Municipal Corporations.

Municipal corporations are creatures of the State, and must at all times be subject to the legislative will. *McGuinn v. High Point*, 56. And Legislature may prescribe manner and extent of city limits extension. *Dunn v. Tew*, 286.

§ 13. Equal Protection, Application and Enforcement of Laws.

Imposition of unemployment compensation tax on individual who operates three places of business employing in aggregate more than 8 employees does

not deny him equal protection and application of law. *Unemployment Compensation Com. v. Willis*, 709.

§ 15a. Due Process of Law: Law of the Land.

Since the erection and maintenance of telegraph and telephone poles and wires along a highway is outside the scope of the easement for highway purposes, the Legislature cannot subject land to such additional burden without the payment of compensation, either directly or indirectly, by granting such power to the Highway Commission, nor may the courts do so by judicial fiat. *Hildebrand v. Tel. Co.*, 402.

Notice and hearing are essential to due process of law under the Fourteenth Amendment of the Constitution of the United States. *Tyson v. Tyson*, 617.

Imposition of unemployment compensation tax on individual who operates three places of business employing in aggregate more than 8 employees does not deprive him of property without due process of law. *Unemployment Compensation Com. v. Willis*, 709.

§ 17. Right to Jury Trial. (In criminal prosecutions see hereunder § 27.)

The constitutional right to trial by jury, N. C. Constitution, Art. I, sec. 19, does not apply to matters concerned with the administration of the tax laws and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. *Unemployment Compensation Com. v. Willis*, 709.

§ 20. Impairment of Obligations of Contract.

The provision in a certificate of cumulative preferred stock that dividends due thereon should be paid before any dividend on any other stock shall be set apart or paid, vests a property right in the holder which may not be defeated by subsequent reorganization or by legislative enactment, and the fact that, at the time of reorganization, there were no funds out of which the accrued dividends could be paid does not affect this result, since the right to accrued dividends is vested, and only the time of payment is conditioned upon the declaration of the dividend by the board of directors out of accrued profits or the insolvency and liquidation of the corporation. *Clark v. Henrietta Mills*, 1.

Tenure in public office does not rest on contract, and therefore is not necessarily protected by the Constitution. *Efird v. Comrs. of Forsyth*, 96.

§ 23. Full Faith and Credit to Judicial Proceedings of Other States.

(Actions on foreign judgments see Judgments § 40.)

The provision of the Federal Constitution, Art. IV, sec. 1, that each state give full faith and credit to the judicial proceedings of every other state does not prevent a state from withdrawing the jurisdiction of its courts from an action to enforce a judgment rendered in another state when it is made to appear clearly that the judgment was awarded on transactions forbidden by the public policy or statute of the state, but when the judgment sued on determines or concludes question of public policy under similar laws, the question may not be raised again here. *Cody v. Hovey*, 369.

Full Faith and Credit Clause does not require that courts of this State recognize divorce decree rendered against resident by court of another state on substituted service. *Tyson v. Tyson*, 617.

§ 27. Right to Trial by Jury in Criminal Prosecutions.

When a defendant in a criminal prosecution in the Superior Court enters a plea of not guilty he may not, without changing his plea, waive his constitu-

CONSTITUTIONAL LAW—*Continued*

tional right of trial by jury, and the determinative facts cannot be referred to the decision of the court even by consent, but must be found by the jury. *S. v. Muse*, 226.

§ 29. Right Not to Be Compelled to Incriminate Self.

Defendant pleaded insanity at the time of the homicide due to the continued use of liquor and opiates. The record failed to show any compulsion on the part of the officers in obtaining specimens of defendant's blood and urine in order to ascertain the presence or absence of alcohol or morphine in his system. *Held:* Defendant's contention that the obtaining of the specimens compelled him to give evidence against himself is untenable. Art. I, sec. 11. *S. v. Cash*, 818.

Incriminating physical facts disclosed by examination or interrogation of defendant are competent even though the examination be under compulsion or the communications privileged, albeit declarations of the accused made at the time, if obtained by improper influence, are to be excluded. *Ibid.*

CONTEMPT OF COURT.

§ 2a. Contempt of Court in General.

The power of courts to compel obedience to their orders lawfully issued is essential to their jurisdiction and the maintenance of judicial authority. *Elder v. Barnes*, 411.

§ 2b. Willful Disobedience of Court Order.

Where a municipality is permanently enjoined from prosecuting a particular project, and thereafter it makes fundamental changes in the character of the project to obviate the grounds of the injunction, the court, upon proper findings, correctly dismisses a rule for contempt for violation of the prior order. *McGuinn v. High Point*, 56.

Findings supported by evidence that defendant had willfully disobeyed order requiring him to open drainage ditch on his land, which order was lawfully issued by court having jurisdiction of the cause and parties, *held* to support attachment for contempt. *Elder v. Barnes*, 411.

The willful violation of a valid order of a court of competent jurisdiction constitutes contempt of court, and in the contempt proceedings defendant may not raise the question of whether the order was in any particular erroneous, the remedy to correct an error of law being by appeal. *Ibid.*

CONTRACTS.

§ 7d. Gaming Contracts.

Under New York law, a wagering contract under which profit or loss to the parties is to be determined by the market quotations of stocks or commodities, without a *bona fide* purchase or sale of same, is illegal. *Cody v. Hovey*, 369.

In action on foreign judgment, defense that it was based on gaming contract may not be asserted when such defense is concluded by the judgment sued on. *Ibid.*

CORPORATIONS.

§ 9. Meetings of Stockholders, Voting and Proxies.

Notice to the proxy is notice to the owner of the stock. *Patterson v. Henrietta Mills*, 7.

CORPORATIONS—*Continued.*

§ 15. Purchase of Own Stock by Corporation.

Guaranty by corporation of note of its president executed for money borrowed to buy stock and secured by stock so purchased, *held* not method employed by corporation to buy its own stock as it was authorized to do under its charter, since upon payment of note, stock collateral was to be released to its president and not to the corporation. *Brinson v. Supply Co.*, 498.

§ 16. Dividends. (Laches and limitation of actions to enforce priority in payment of dividends see Equity § 2, Limitation of Actions § 3a.)

Right to declaration of accrued dividend on cumulative preferred stock before dividend is declared on any other stock may not be defeated by subsequent reorganization. *Clark v. Henrietta Mills*, 1.

Failure of holder of cumulative preferred stock to make positive protest against reorganization plan does not waive her right to accrued dividend. *Ibid.*

Where certificate provides that prior preferred stock might be issued upon approval of holders of three-fourths of stock, plaintiff is not entitled to restrain payment of dividends on new stock prior to payment of dividends accruing on her stock subsequent to reorganization. *Ibid.*

Trustee *held* not to have consented to reorganization in his capacity as trustee, and therefore *cestuis*, the beneficial owners of prior cumulative preferred stock, were not precluded from asserting right to have dividends accrued at time of reorganization paid before dividends were set apart or paid on new preferred stock. *Patterson v. Henrietta Mills*, 7.

§ 17. Powers of Corporation in General.

A corporation is a creature of the State and has only the powers specifically granted it in its charter and such other powers as are fairly and reasonably to be implied from the express powers granted. *Brinson v. Supply Co.*, 498.

§ 18. Express Powers.

The express power granted defendant corporation in its charter to undertake the liabilities of any firm or corporation, refers to the power granted to acquire the good will, rights, property and assets of any firm or corporation, and does not authorize the corporation to guarantee payment of a note executed by a third person solely for the accommodation of such third person, nor does such guaranty come within the express power conferred by the charter to raise money for the purpose of the corporation, and its act in guaranteeing payment of the note of its president solely for his accommodation is not within the express powers of the corporation. *Brinson v. Supply Co.*, 498.

Corporation does not have express power to sign note of its president as accommodation endorser. *Brinson v. Supply Co.*, 505.

§ 19. Implied Powers.

The implied powers of a corporation are merely those necessarily inferred for the accomplishment of the express powers granted, and implied powers can never enlarge the express powers and thereby authorize the corporation to engage in activities collateral to the purposes of its incorporation. *Brinson v. Supply Co.*, 498.

A corporation does not have the implied power to guarantee payment of a note executed by its president solely for the accommodation of its president. *Ibid.*

CORPORATIONS—*Continued.*

A corporation does not have implied power to sign note of its president as an accommodation endorser. *Brinson v. Supply Co.*, 505.

§ 20. Representation of Corporation by Officers and Agents.

Notice to the president of a corporation is notice to the corporation. *Patterson v. Henrietta Mills*, 7.

In order for a contract executed by an officer of a corporation to be binding on the corporation it must appear that it was incidental to the business of the corporation or was expressly authorized, and that it was properly executed. *Brinson v. Supply Co.*, 498.

Where, in an action against a corporation, the complaint alleges that defendant's superintendent had authority, on behalf of the corporation, to make the contract of employment sued on, the corporation's demurrer on the ground that its superintendent did not have authority in law to enter into such contract because of its extraordinary nature, and that the complaint failed to allege express authority, is properly overruled, since the allegation of authority must be taken as true upon demurrer. *Hearn v. Erlanger Mills*, 623.

§ 21. Estoppel and Ratification of Ultra Vires Acts.

The doctrine that a corporation is estopped to plead that a certain act is *ultra vires* applies when the corporation has accepted the benefits of the transaction in question, and does not apply when the *ultra vires* act is solely for the accommodation of its president or other third person and no consideration or benefit is received by the corporation. *Brinson v. Supply Co.*, 498; *Brinson v. Supply Co.*, 505.

Corporation *held* to have received no benefit from *ultra vires* act of secretary-treasurer and therefore doctrine of ratification is inapplicable. *Brinson v. Supply Co.*, 505.

A corporation is not chargeable with knowledge of its officers or agents in respect to a transaction in which they act for their own personal benefit and not in any official or representative capacity for the corporation. *Brinson v. Supply Co.*, 505.

§ 34. Claims Against Receiver.

The payee of a note executed by the president of a corporation, the corporation not being a party to the note, is not entitled to the allowance of her claim against the receiver of the corporation based upon the action of the corporation in guaranteeing the payment of the note for the sole accommodation of the president, since the act of the corporation in guaranteeing payment of the note is outside the scope of its express and implied powers and is *ultra vires*. *Brinson v. Supply Co.*, 498.

Payee of individual notes of secretary-treasurer of corporation may not file claim against receiver on corporation's accommodation endorsement of the notes. *Brinson v. Supply Co.*, 505.

§ 38. Right to Reorganize.

Where certificates of preferred stock provide that prior preferred stock might be issued upon vote of 75% of the holders of the preferred stock, corporation may not force holders of preferred stock to exchange it for preferred stock issued under reorganization plan, and may not defeat right of holders of old stock to have dividends accrued at time of reorganization paid before dividends are set apart or paid on new stock, but as to dividends accruing

CORPORATIONS—*Continued.*

subsequent to reorganization, dividends on new stock may be paid before dividends on old stock are set apart or paid. *Clark v. Henrietta Mills*, 1.

Trustee *held* not to have consented to reorganization in his capacity as trustee, and therefore his acts were not binding on *cestuis* who were beneficial owners of stock, and since trustee gave notice that he was not acting for *cestuis*, his conduct could not form basis of estoppel against *cestuis*. *Patterson v. Henrietta Mills*, 7.

COUNTIES.

§ 1. Functions and Powers in General.

The discretionary powers delegated to county commissioners is not unlimited, but must be exercised in good faith free from ulterior motives, and the courts will grant relief from an arbitrary exercise of discretionary powers. *Efird v. Comrs. of Forsyth*, 96.

§ 16. Conditions Precedent to Suits Against Counties.

Claims against county, including claims *ex contractu* for amount certain, must be filed as required by statute. *Efird v. Comrs. of Forsyth*, 96.

COURTS.

§ 1a. Jurisdiction of Courts in General.

Jurisdiction of a court cannot be conferred by failure of defendant to properly plead to the jurisdiction. *Cody v. Hovey*, 369.

§ 1b. Objections to Jurisdiction.

In this action upon a judgment of another state, defendant sought leave to amend to allege that the judgment sued on by plaintiff was based upon a gambling contract denounced by C. S., 2144, and contended that by provision of the statute the court was without jurisdiction of the action. *Held:* Even though the Superior Court has the power in its discretion to deny the motion to be allowed to amend, yet the facts alleged in the proposed amendment are in the nature of a plea to the jurisdiction, and the court cannot render final judgment until it has determined such plea. *Cody v. Hovey*, 369.

§ 2a. Appeals to Superior Court from Municipal Courts.

Where the only exception is to that part of the judgment of the municipal court relating to the allowance of the defendants' counterclaim, the Superior Court upon its determination that judgment on the counterclaim was erroneously allowed, is limited to remanding the case to the municipal court for proceedings therein in accordance with the judgment of the Superior Court. *Reynolds v. Wood*, 626.

§ 2c. Appeals to Superior Court from Clerks of Court.

The Superior Court acquires jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein, and may set aside a previous order of the clerk and substitute therefor an order of its own without finding that the clerk had abused his discretion or committed error of law in signing the order, the clerk being but a part of the Superior Court. Michie's Code, 637, 460. *Bynum v. Bank*, 109.

Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, C. S., 403, the jurisdiction of the Superior Court is not derivative but the judge hears the matter *de novo*. *Cody v. Hovey*, 369.

Defendant *held* to have waived any irregularity in procedure for hearing appeal from clerk by appearing and arguing appeal without objection. *Ibid.*

The clerk is but a part of the Superior Court, and when a proceeding before the clerk is brought in any manner before the judge, the Superior Court's jurisdiction is not derivative, but it has jurisdiction to hear and determine all matters in controversy in the proceeding. C. S., 637. *Perry v. Bassenger*, 838.

§ 5. Establishment, Suspension and Abolition of County, Municipal and Recorders' Courts.

The General Assembly has the power to create county, municipal, and recorders' courts, Constitution of North Carolina, Art. IV, sec. 2, Art. IV, sec. 12, and *a fortiori* has the power to abolish or suspend a court created by it, even during the term of office of the judge of such court. *Efird v. Comrs. of Forsyth*, 96.

Legislature may delegate authority to county commissioners to suspend or abolish county court, and need not state facts which must be found by county commissioners before exercising delegated power, but may delegate discretionary power. *Ibid.*

§ 11. Effect and Application of Laws of Other States in General.

Decree of divorce against resident of this State rendered by court of another state on substituted service under its laws can have no extraterritorial effect. *Tyson v. Tyson*, 617.

§ 12. What Law Governs: Comity.

Under comity, lien of title retention contract on personalty, duly registered in state wherein it was executed and property was then located, has priority over lien of attachment subsequently issued against same property in this State, notwithstanding that title retention contract is not registered here. *Truck Corp. v. Wilkins*, 327.

§ 13. What Law Governs: Transitory Causes of Action in Tort.

The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, Art. X, sec. 6, Constitution of North Carolina; Michie's Code, 2513, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 51.

In an action instituted in this State involving the rights and liabilities of the parties arising out of an automobile collision occurring in South Carolina, the laws of South Carolina control except as to matters of procedure. *Lancaster v. Greyhound Corp.*, 679.

§ 14. What Law Governs: Actions on Contract.

A contract of insurance based upon the application of insured made while residing in this State, must be construed in accordance with the laws of this State rather than the laws in force at the time of the inception of the contract in the state in which insurer is incorporated. C. S., 6287. *Pace v. Ins. Co.*, 454.

CRIMINAL LAW.

(Prosecutions for particular crimes see particular titles of crimes.)

II. Capacity to Commit and Responsibility for Crime
5b. Mental Capacity as Affecting by Intoxicants and Drugs. S. v. Cash, 818.
5d. Instructions on Mental Capacity. S. v. Miller, 514; S. v. Melvin, 538; S. v. Cash, 818.
V. Arraignment and Pleas
18. Plea of Not Guilty. S. v. Blue, 612.
VII. Evidence
28a. Presumptions and Burden of Proof. S. v. Blue, 612.
29. Facts in Issue and Relevant to Issues.
g. Res Inter Alios Acta. S. v. Wagstaff, 15.
32a. Circumstantial Evidence in General. S. v. King, 667; S. v. Cash, 818.
33. Confessions. S. v. Wagstaff, 15.
38a. Photographs. S. v. Wagstaff, 15; S. v. Miller, 514.
40. Character Evidence as Substantive Proof. S. v. Wagstaff, 15.
VIII. Trial
48d. Withdrawal of Evidence. S. v. King, 667.
50a. Expression of Opinion on Evidence by Court During Trial. S. v. Cash, 818.
52a. Province of Court and Jury In General. S. v. King, 667.
52b. Nonsuit. S. v. Mann, 212; S. v. King, 667.
53. Instructions in Criminal Cases.
c. Instructions on Burden of Proof, S. v. Cash, 818.
d. Instructions on Less Degrees of the Crime. S. v. Wagstaff, 15.
e. Expression of Opinion on Evidence in Charge. S. v. Jessup, 620; S. v. Blue, 612; S. v. King, 667; S. v. Johnson, 757; S. v. Cash, 818.
g. Statement of Contentions and Admissions and Objections thereto. S. v. Wagstaff, 15; S. v. King, 667; S. v. Johnson, 757; S. v. Jessup, 620.
h. Construction of Instructions. S. v. Jessup, 620; S. v. Johnson, 757.
IX. Motions after Verdict
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80. Prosecution of Appeals and Dismissal. S. v. Graham, 543; S. v. Shaw, 544.
81a. Matters Reviewable. S. v. Wagstaff, 15.
81c. Harmless and Prejudicial Error. S. v. Powell, 220; S. v. Inscore, 759.
81d. Questions Presented or Necessary to Determination of Appeal. S. v. Gardner, 331.

§ 5b. Mental Capacity as Affected by Intoxicants or Drugs.

Defendant's plea that he was insane at the time of the homicide due to the continued use of liquor, morphine and other opiates, was rejected by the jury. *S. v. Cash*, 818.

§ 5d. Instructions on Mental Capacity.

Where defendant does not plead insanity and offers no evidence that he was not capable of understanding and knowing what he was doing, the court is not required to charge the jury on the question as to whether defendant was mentally capable of committing the crime. *S. v. Miller*, 514.

Where defendant does not plead insanity, either by formal plea or under the plea of not guilty, and there is no evidence tending to show that defendant was insane either at the time of the trial or at the time of the homicide, an instruction of the court, engendered by the argument of counsel for the defense, that there was no evidence of insanity and that the jury should not consider such defense, is without error. *S. v. Melvin*, 538.

When court correctly charges that burden is on defendant to prove defense of insanity to satisfaction of jury, failure of court in latter portion of charge to define intensity of proof required in stating that burden on question of mental incapacity was on defendant, is not error. *S. v. Cash*, 818.

§ 18. Plea of Not Guilty.

A plea of not guilty not only puts in issue the question of defendant's guilt but also the credibility of the evidence. *S. v. Blue*, 612.

§ 28a. Presumptions and Burden of Proof.

Upon defendant's plea of not guilty, the presumption of innocence attaches and follows defendant until removed by the verdict of a jury. *S. v. Blue*, 612.

CRIMINAL LAW—*Continued.*

§ 29g. Res Inter Alios Acta.

In this prosecution for rape, a physician testified for the State in regard to his examination of prosecutrix, and also stated that he had had two other like cases. Defendant's counsel, on cross-examination, asked him whether the other cases had exhibited like calm. *Held:* The State's objection to the question was properly sustained, since the witness' answer would have related to *res inter alios acta*. *S. v. Wagstaff*, 15.

§ 32a. Circumstantial Evidence in General.

Circumstantial evidence is approved instrumentality in ascertainment of truth. *S. v. King*, 667; *S. v. Cash*, 818.

But should prove guilt to moral certainty and exclude every reasonable hypothesis of innocence. *S. v. King*, 667.

§ 33. Confessions.

Unless challenged, the voluntariness of a confession will be taken for granted. *S. v. Wagstaff*, 15.

The fact that the defendant was under arrest and a number of officers were present at the time confession was made does not *ipso facto* render confession incompetent for lack of voluntariness. *Ibid.*

Where the court hears evidence offered by the State tending to show that the confession sought to be introduced in evidence was voluntary, and defendant offers no evidence in regard thereto, the conclusion of the court upon the evidence that the confession was competent is not reviewable. *Ibid.*

§ 38a. Photographs.

Photographs of the scene of the crime are competent and are properly admitted for the limited purpose of explaining the testimony of the witnesses. *S. v. Wagstaff*, 15.

Since photographs are competent only to explain the testimony of the witnesses, testimony as to lost photographs is incompetent and is properly excluded, since photographs not produced cannot be used to explain testimony. *Ibid.*

Photographs *held* properly admitted in evidence under restriction that they were competent solely to explain testimony of witnesses. *S. v Miller*, 514.

§ 40. Character Evidence as Substantive Proof.

In this prosecution for rape, defendant put his character in issue and offered evidence of his good character. The court charged that the character evidence related to the credibility of the witnesses "except as to defendant," to which defendant objected. Immediately following this charge the court instructed the jury that defendant "not only gets that benefit from testimony as to good character, but further, testimony of good character on the part of defendant becomes and is substantive evidence going to the question of guilt or innocence." *Held:* The instruction construed contextually as a whole was not erroneous but was a correct statement of the law. *S. v. Wagstaff*, 15.

§ 48d. Withdrawal of Evidence.

During the examination in chief, the court permitted the State's witness to testify over objection as to whether defendant was intoxicated at the time the witness saw him some time after the collision in question. During cross-examination of the witness the court stated that it sustained the objection to the question as to defendant's condition, and directed that the jury not consider it and that it be stricken from the record. *Held:* The court properly cor-

CRIMINAL LAW—*Continued.*

rected its inadvertence in the admission of the testimony and withdrew it from the consideration of the jury. *S. v. King*, 667.

§ 50a. Expression of Opinion on Evidence During Trial.

The remarks of the trial court, in answer to argument of defendant's counsel upon the question of the competency of certain evidence, that "I am against you on that" amounted to no more than a ruling on the evidence and cannot be held for error as an intimation upon the weight or credibility of the evidence. *S. v. Cash*, 818.

§ 52a. Province of Court and Jury in General.

The competency, admissibility and sufficiency of the evidence is for the court; its weight, effect and credibility is for the jury. *S. v. King*, 667.

§ 52b. Nonsuit in Criminal Prosecutions.

Upon motion to nonsuit in a criminal prosecution, the evidence will be considered in the light most favorable to the State, and the court must determine only whether there is any evidence to sustain the indictment, the credibility and weight of the evidence being within the exclusive province of the jury. C. S., 4643. *S. v. Mann*, 212.

In order to sustain a conviction on circumstantial evidence, the evidence must tend to prove the fact of guilt to a moral certainty and exclude any reasonable hypothesis of innocence, but when the evidence reasonably conduces to the conclusion of guilt as a fairly logical and legitimate deduction and not merely such as raises only a conjecture, it is for the jury to say whether the evidence convinces them of defendant's guilt beyond a reasonable doubt. *S. v. King*, 667.

§ 53c. Instructions on Burden of Proof. (In homicide prosecutions see Homicide § 27b.)

Where, in the first part of the charge, the court instructs the jury that the burden is upon the defendant to establish his plea of insanity to the satisfaction of the jury, the fact that the court thereafter in several instances placed the burden of showing insanity upon defendant without restating the requisite intensity of proof, cannot be held for error, since the charge must be read contextually as a whole. *S. v. Cash*, 818.

§ 53d. Instructions on Less Degrees of the Crime.

Since the court need not instruct the jury as to less degrees of the crime charged when there is no evidence of defendant's guilt of such less degrees, an instruction that a verdict of guilty of less degrees of the crime is permissible only when there is evidence tending to support a milder verdict but that a milder verdict would not be disturbed since it would be favorable to defendant, followed by definitions of less degrees of the crime charged, cannot be held for error for failing to charge more fully upon the question of the right to convict defendant of such less degrees of the crime. *S. v. Wagstaff*, 15.

§ 53e. Expression of Opinion on Evidence in Charge.

The portion of the charge devoted to reviewing the evidence for the State cannot be held for error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the State's evidence. C. S., 564. *S. v. Jessup*, 620.

The court's capitulation of the evidence and statement of the contentions of the State cannot be held for error as expressing an opinion on the merits of

the case when any apparent prejudicial or harmful effect is due to the strength of the State's case and not to any partiality on the part of the court. *Ibid.*

Where the defendant offers no evidence, the fact that the court necessarily consumes more time in reviewing the evidence for the State and in stating its contentions than it does in stating the contentions of the defendant, cannot be held for error. *Ibid.*

C. S., 564, prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive province of the jury. *S. v. Blue*, 612.

In a prosecution for "hit and run driving," Michie's Code, 2621 (313), an instruction that defendant was charged with the violation of one of the motor vehicle statutes designed for the protection of life and property, cannot be held for error, the statement not being related to any fact in issue or any evidence introduced in the case, and containing no inference as to the guilt or innocence of defendant, it further appearing that the court correctly charged upon the presumption of innocence and the burden of proof. *S. v. King*, 667.

A charge that the State contended that the prosecutrix was corroborated in every detail by a witness put on the stand by defendant who vouched for the witness' veracity cannot be held for error as an expression of opinion by the court, C. S., 564, it being incumbent upon defendant if he thought the statement of the contention erroneous or misleading to have called the matter to the court's attention in apt time. *S. v. Johnson*, 757.

In a prosecution for a capital offense, an instruction to the jury that the jurors are called upon to discharge a solemn duty "as solemn as may ever come to you again in the course of your life," cannot be held for error as an inadvertent intimation to the jury that they were called upon to render a verdict of guilty of the capital offense, since the remark is equal predicate for an intimation that the jurors should render a verdict of not guilty, and merely called to the jurors' attention their duty to find the facts and do justly in a hard case. *S. v. Cash*, 818.

§ 53g. Statement of Contentions and Admissions, and Objection and Exceptions Thereto.

An exception to the court's statement of contentions in the charge will not be sustained when the matter asserted as error was not brought to the court's attention in time to afford opportunity for correction. *S. v. Wagstaff*, 15; *S. v. King*, 667; *S. v. Johnson*, 757.

If a defendant considers that the court failed to give fully and accurately the contentions made by him, or if he desires any amplification thereof, it is his duty to call the court's attention thereto at the time. *S. v. Jessup*, 620.

In a prosecution for "hit and run driving" a charge that defendant admitted that there was a collision causing damage to the car of the prosecuting witness and injury to one or more occupants thereof, and that the other car failed to stop after the collision, if deemed a misstatement of defendant's admissions, should have been called to the court's attention in apt time in order to afford the court an opportunity to make correction. *S. v. King*, 667.

§ 53h. Construction of Instructions.

A charge will be construed as a whole. *S. v. Wagstaff*, 15; *S. v. Williams*, 365; *S. v. Johnson*, 757.

CRIMINAL LAW—*Continued.*

The charge of the court will be construed as a whole, and segregated clauses and sentences may not be taken from their setting to make it appear that the court expressed an opinion upon the weight and credibility of the evidence when the charge read contextually is free from this objection. *S. v. Jessup*, 620.

Slight inaccuracies in the charge in stating portions of the evidence will not be held for reversible error when not called to the court's attention in apt time and when the charge construed as a whole is not prejudicial. *S. v. Johnson*, 757.

§ 59. Motion to Set Aside Verdict as Being Against Weight of Evidence.

A motion to set the verdict on the ground that it is against weight of the evidence is addressed to discretion of court. *S. v. Wagstaff*, 15.

§ 63. Suspended Judgments and Executions.

Suspension of execution of judgment must not be so conditioned as to interfere with right of appeal. *S. v. Calcutt*, 545.

§ 72. Effect of Appeal.

An appeal stays execution but does not affect the terms of suspension of execution or conditions of probation. *S. v. Calcutt*, 545.

§ 78f. Objections and Exceptions to Evidence.

It is not necessary that it appear of record what the answer of the witness would have been to a question asked by defendant's counsel on cross-examination in order that defendant's exception to the action of the court in sustaining the State's objection to the question be considered on appeal. *S. v. Wagstaff*, 15.

§ 79. Briefs.

Exceptions not brought forward in appellant's brief are deemed abandoned. Rule of Practice in the Supreme Court No. 28. *S. v. Miller*, 514.

§ 80. Prosecution of Appeals and Dismissal.

When defendant, convicted of a capital crime, is allowed to appeal *in forma pauperis*, but fails to make out and serve his statement of case on appeal within the time allowed, the appeal will be dismissed on motion of the Attorney-General and the judgment affirmed when the record is free from apparent error. *S. v. Graham*, 543; *S. v. Shaw*, 544.

§ 81a. Matters Reviewable.

A motion to set aside a judgment as being against the weight of the evidence is addressed to the discretion of the trial court, and its refusal to grant same is not reviewable on appeal. *S. v. Wagstaff*, 15.

§ 81c. Harmless and Prejudicial Error.

In prosecution for operating a lottery or for illegal possession of lottery tickets, testimony of officer who identified tickets as of type used in "butter and egg lottery," that he had had "lots of cases of this kind," *is held* not prejudicial, even if conceded to be immaterial, there being nothing in the record to connect defendant with, or even raise a suspicion that he had been connected with the other cases. *S. v. Powell*, 220.

In this prosecution for manslaughter committed in the operation of an automobile, one of the State's witnesses made a written statement shortly after the collision. Upon the trial, the solicitor, thinking that the witness' testimony was at variance with the prior written statement, asked and was per-

CRIMINAL LAW—*Continued.*

mitted to cross-examine the witness. Thereafter the solicitor offered portions of the written statement in evidence to corroborate the witness. *Held:* Even if some technical irregularities be conceded, the culpable conduct of defendant being abundantly established by other witnesses, the matter cannot be held to constitute prejudicial error. *S. v. Inscore*, 759.

§ 81d. Questions Presented or Necessary to Determination of Appeal.

Where defendant, on appeal from the county court, is tried upon a bill of indictment returned by the grand jury and not upon the warrant issued out of the general county court, the question as to the sufficiency of the warrant may not be raised on appeal to the Supreme Court. *S. v. Gardner*, 331.

DAMAGES.

§ 1. Nature and Scope of Compensatory Damages.

While an injured party is entitled to recover but one compensation for the injuries sustained, where the tort-feasor has been prosecuted and convicted of manslaughter and sentence has been suspended upon payment of a stipulated sum to intestate's mother, the payments under the criminal prosecution do not estop the mother as administratrix from maintaining an action for wrongful death, credit by the jury on the verdict in the civil action for the sums paid in the criminal prosecution being the most to which the tort-feasor is entitled. *Hester v. Motor Lines*, 743.

§ 3. Sole and Contributing Cause of Injury or Loss.

A person whose negligence proximately causes injury to another is liable for all damages naturally and proximately resulting from the negligent act, including suffering which might have been obviated if the physician treating the injured party had administered proper treatment, in the absence of any contention that the injured party failed to use reasonable care in selecting his physician. *Bost v. Metcalfe*, 607.

DEATH.

§ 3. Grounds and Burden of Proof.

In an action for wrongful death the burden is on plaintiff to prove negligence on the part of the defendant, and that such negligence, acting in continuous and unbroken sequence, and without which injury would not have occurred, resulted in the injury producing death, and that under the circumstances a man of ordinary prudence could have foreseen that such result was probable. *White v. Chappell*, 652.

§ 7. Evidence That Death Resulted from Negligence Complained of.

Nonexpert witness *held* incompetent to testify that injuries received by intestate caused his death. *Jordan v. Glickman*, 388.

In this action for wrongful death, the evidence tended to show that defendant negligently drove his car into a wagon in which intestate was riding, hurling intestate to the ground and injuring him. Intestate's mother and father testified as to the injuries sustained by intestate at the time of the collision, that he complained of pains in his chest on the afternoon he was hurt, and testified that intestate's chest began to swell and continued to grow larger and larger, that he had no such pains or swelling before the collision, and that his condition continued to grow worse until he died a little less than four months after the accident. *Held:* Proof of the cause of death is not

DEATH—*Continued.*

confined to expert opinion evidence, and the testimony is sufficient to be submitted to the jury upon the question of whether the injuries sustained by intestate in the accident caused his death. *Ibid.*

In this action for wrongful death, plaintiff administratrix contended that her intestate, while riding as a passenger in an automobile, was thrown therefrom by the negligent act of the driver, and that while intestate was prone on the highway she was negligently run over by a truck. The truck driver and his employer, sought to be held liable under the doctrine of *respondeat superior*, tendered an expert medical witness, who had attended intestate prior to her death and who had examined the injuries found upon her body, who would have testified to the effect that deceased's death was caused by her striking the concrete when she was thrown from the car, and that none of the wounds were caused by a truck striking or passing over her body. *Held:* The substance of the proposed expert testimony was competent and its exclusion constitutes prejudicial and reversible error. *Hester v. Motor Lines*, 743.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who are beneficiaries of the trust are made parties, is justiciable under the Declaratory Judgment Act. *Johnson v. Wagner*, 235.

DEEDS.

§ 2a. Competency of Grantor.

Testimony of a medical expert that he had known the grantor for 20 years and that in the witness' opinion the grantor is feebleminded and would not know right from wrong, together with lay testimony to the effect that the grantor is not capable of transacting business, with evidence that the grantor received no benefit from the transaction, *is held* sufficient to support judgment setting aside the deed for mental incapacity of the grantor. *Freeman v. Ball*, 329.

§ 5. Delivery.

Delivery of a deed is necessary to pass title, and to constitute delivery there must be a parting with the possession of the deed and with all power and control over it by the grantor, for the benefit of the grantee at the time of delivery. *Barnes v. Aycock*, 360.

Evidence that the deed in question was placed by the grantor in his Bible on the dresser in his bedroom, that he told the witness, the daughter of the grantee, where he was putting the deed and to tell the grantee where it was and to have it recorded, but that this message was undelivered and that the deed remained in the Bible and never came into the possession of the grantee or anyone for her, *is held* insufficient to show a delivery necessary to complete the conveyance. *Ibid.*

§ 10. Rights of Parties Under Unregistered Instruments and Effect of Registration.

A deed is ineffective as against creditors and purchasers for value from the grantor until the deed is registered, but upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantor acquired title is unregistered. C. S., 3309. *Durham v. Pollard*, 750.

DEEDS—*Continued.*

§ 11. General Rules of Construction.

While a will or deed will be construed from its four corners to ascertain and give effect to the intent of the testator or grantor, this intent must be ascertained from the language used in the instrument, and he will be deemed to have used technical words and phrases in their legal and technical sense unless he indicates in some appropriate way that a different meaning be ascribed to them, and when he uses technical words and phrases invoking some settled rule of law, like the rule in *Shelley's case*, the rule of law will prevail. *Whitley v. Arenson*, 121.

A deed is to be construed from its four corners to ascertain and give effect to the intent of the grantor as expressed in the language used, and each clause therein should be reconciled and given effect if possible, and technical words of conveyance, nothing else appearing, must give way to clearer expressions of intent if they are found in other parts of the instruments, and artificial importance must not be given to the formal parts of the instrument and the order in which they occur. *Jefferson v. Jefferson*, 333.

§ 13a. Estates and Interests Created in General.

C. S., 1739, providing that "heirs" of living person be construed "children" applies only when no preceding estate is devised or conveyed to such living person. *Whitley v. Arenson*, 121.

Since an "heir" is a person on whom the law casts an estate upon the death of the ancestor, a living person, strictly speaking, can have no heir. *Ibid.*

The effect of C. S., 991, is to obviate the common law requirement that the word "heir" be used to convey an estate of inheritance, and to vest the fee in the first taker unless it is made to appear from the language of the deed that an estate of less dignity is intended to be conveyed, and the statute does not convert the word "heir" from a word of limitation to one of purchase, or convert a common law estate of inheritance into one for life. *Ibid.*

Devise to "A and his heirs" vests the fee in A by the use of words of inheritance. *Ibid.*

The word "heir" is primarily a word of limitation and not of purchase, and will be given its technical meaning unless it is made to appear from the language of the instrument that it was used in some other permissible sense. *Ibid.*

A deed to a married woman and her heirs by her present husband, with granting clause, *habendum* and warranty to "parties of the second part, their heirs and assigns," *is held* to convey to the married woman a fee tail special, which is converted into a fee simple absolute by C. S., 1734. *Ibid.*

The granting clause of the deed in question was to one of the grantor's sons, his heirs and assigns, and following the description "this deed is conveyed to the said grantee to him his lifetime and then to his boy children" with *habendum* to the said son "and his heirs and not to assign only to his brothers their only use and behoof for ever" with warranty to the said son "and his heirs and assigns." *Held:* The portion of the *habendum* restraining assignment except to the brothers of the grantee is equally consistent with an assignment of a life estate as with an assignment of the fee, and to hold that the grant to the "son and his heirs" conveyed the fee simple would require that other portions of the instrument expressive of the intent of the grantor be disregarded, and in accordance with the intention of the grantor as gathered from the entire instrument the deed conveys a life estate to the son with remainder to the son's male children, the intent of the grantor to convey an estate of less dignity than a fee being apparent. C. S., 991. *Jefferson v. Jefferson*, 333.

DEEDS—*Continued.*

Under the rule favoring early vesting of estates, a conveyance to A for life with remainder to his male children, vests the remainder in the male children of A *in esse* at the time the deed is made, subject to be opened up to admit after-born children. *Ibid.*

§ 13b. Rule in Shelley's Case.

C. S., 1739, providing that a limitation to the heirs of a living person shall be construed to be to the children of such person, applies only to a devise or conveyance to the heirs of a living person when no preceding estate is devised or conveyed to such living person, the purpose of the statute being to validate devises or conveyances to the "heirs" of a living person, which under the common law would be void for want of a grantee, but the statute does not apply to a devise or conveyance to a living person and his "heirs" or "bodily heirs" or "heirs of his body" or to a living person for life, remainder to his heirs. The statute does not convert "heirs" from a word of inheritance to one of purchase, or affect the rule in *Shelley's case. Whitley v. Arenson*, 121.

A devise or conveyance to "A and his heirs" and one to "A for life, remainder to his heirs" have the identical effect of vesting the fee in the first taker, the former by the use of words of inheritance and the latter by operation of the rule in *Shelley's case. Ibid.*

§ 18. Torren's Registration.

The statute providing for the registration of land under the "Torren's System" is not in derogation of common right but is of a remedial character, and should be liberally construed according to its intent. Michie's Code, 2377, *et seq. Perry v. Morgan*, 377.

In this proceeding for the registration of land under the "Torren's System," defendants' evidence of claim under a prior State grant and parol evidence in explanation of a latent ambiguity as to the location of the land embraced in the grant, *is held* sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants' exception to the refusal of the court to submit an issue to the jury as to whether petitioners are the owners of the land and entitled to have title thereto registered under the statute, is sustained. Michie's Code, 2387 (3). *Ibid.*

DESCENT AND DISTRIBUTION.

§ 10a. Collateral Heirs in General.

Where the remainder vests in the male children of the life tenant at the time of the execution of the deed, subject to be opened up to include after-born children, the surviving children take by descent the estate of children dying in infancy or childhood. *Jefferson v. Jefferson*, 333.

§ 10b. Collateral Heirs from or Through Bastards.

The owner of the *locus in quo* died intestate without issue. His father predeceased him. Plaintiff and defendant were his aunts. In this action for partition, defendant alleged that plaintiff is illegitimate. Plaintiff offered evidence that their deceased brother was also illegitimate. *Held:* The question of the legitimacy of the deceased brother must be determined in order that the rights of the parties may be fully adjudicated. *Davis v. Crump*, 625.

DIVORCE.

§ 2a. Divorce on Ground of Separation.

In order to be entitled to a divorce on the ground of separation, plaintiff must show the fact of marriage, that the parties have lived separate and

DIVORCE—*Continued.*

apart for two years, and that plaintiff has been a resident of the State for one year. Ch. 72, Public Laws of 1931, as amended by ch. 163, Public Laws of 1933; as amended by ch. 100, Public Laws of 1937. *Oliver v. Oliver*, 299.

A separation, as contemplated by the divorce statute, is more than a mere abandonment, and means a cessation of cohabitation of husband and wife by mutual agreement, but evidence on the part of the husband that he and defendant separated by mutual agreement, including the admission in evidence of a letter written by her to him agreeing to a separation without divorce, *is held* sufficient to take the issue to the jury notwithstanding evidence on her part that there was no agreement to separate but that he abandoned her. *Ibid.*

Where plaintiff alleges, and case is tried upon theory of separation by consent, refusal to submit issue of abandonment is not error. *Ibid.*

§ 4b. Residence as Condition Precedent.

Plaintiff's evidence tended to show that he made his residence in this State, that after a physical breakdown his doctor advised him to go to Florida, that he went to Florida for the winter months, that he intended to and did return to this State after the end of the severe weather. *Held:* An instruction to the effect that if plaintiff had satisfied the jury by the greater weight of the evidence that he left the State with the intention of returning here at the expiration of a reasonably definite time, always regarding North Carolina as his place of residence, his physical absence from the State for such reasonably definite period of time would not affect his legal residence, *is held* without error. *Oliver v. Oliver*, 299.

§ 11. Alimony Pendente Lite.

The right to alimony *pendente lite*, both under statute, C. S., 1666, and under the common law, is predicated upon the justice of affording the wife sufficient means to cope with her husband in presenting their case before the court, and a finding, supported by evidence, that the wife has earnings and means of support equal to that of her husband, sustains the court's order denying her motion for alimony *pendente lite*. *Oliver v. Oliver*, 299.

Findings of the court, upon competent evidence, *held* sufficient to support order granting wife alimony *pendente lite*. *Barrow v. Barrow*, 544.

In action for alimony without divorce and for counsel fees *pendente lite*, court may allow counsel fees to plaintiff's attorneys before judgment of voluntary nonsuit is entered. *McFetters v. McFetters*, 731.

The presence of plaintiff husband in court with his witnesses is tantamount to a tender of such witnesses and a request for findings of fact, and in such circumstances it is error for the court, without finding any facts, to order plaintiff to pay defendant counsel fees "before empanelling the jury to try the issues" involved in the husband's action for divorce and the wife's cross action for divorce *a mensa et thoro*. *Smith v. Smith*, 768.

§ 13. Alimony Without Divorce.

C. S., 1667, provides two separate remedies, one for alimony without divorce, and second, for reasonable subsistence and counsel fees *pendente lite*. *McFetters v. McFetters*, 731.

§ 19. Validity of Decrees of Foreign Courts Based on Substituted Service.

A decree of divorce entered in another state upon constructive service against a resident of this State, who makes no appearance and does not in any way participate in the proceedings, is invalid in this State, since the judgment of such other state, rendered without jurisdiction over the parties

DIVORCE—*Continued.*

or the status, and without notice and an opportunity to be heard, can have no extraterritorial effect, and this conclusion does not violate the Full Faith and Credit Clause of the Federal Constitution. *Tyson v. Tyson*, 617.

EASEMENTS.

§ 5. Extent of Right Granted and Rights Reserved in Owner.

The owner of land over which a highway is constructed has the exclusive right to the soil subject only to the right of travel in the public and the incidental right of keeping the highway in proper repair for public use. *Hildebrand v. Tel. Co.*, 402.

EJECTMENT.

§ 2. Relation of Landlord and Tenant.

Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease contract, express or implied, and the tenant has held over after the expiration of the term, and while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. C. S., 2365, *et seq.* *Simons v. Lebrun*, 42.

Under terms of contract, relation of landlord and tenant existed in regard to occupancy by servant, and summary ejectment would lie. *Ibid.*

§ 6b. Sufficiency of Evidence in Summary Ejectment.

In this action in summary ejectment, plaintiffs contended that defendant had breached the terms of the lease contract by planting cotton, entitling plaintiffs under the provisions of the agreement to terminate the tenancy. Plaintiffs' evidence failed to show that defendant had actually breached the lease contract as alleged, and failed to show demand for the surrender of the premises. *Held:* Defendant's motion for nonsuit was properly allowed. *Warren v. Breedlove*, 383.

§ 13. Burden of Proof in Ejectment to Try Title.

Plaintiffs instituted this action to remove cloud on title to the mineral rights in the *locus in quo*, which had been severed from the title to the surface, and for possession of same, claiming title thereto by adverse possession. Plaintiffs did not claim under paper title or under color of title. *Held:* Plaintiffs may not rely upon the weakness of defendant's title but must establish their own title good against the world or good against the defendants by estoppel, and there being no question of estoppel involved, plaintiffs must prove title to the mineral rights by adverse possession for a period of twenty years under known and visible lines and boundaries. C. S., 430. *Davis v. Land Bank*, 248.

In this action in ejectment the charge of the court *is held* to have correctly placed the burden on plaintiff to prove his title and also to prove wrongful possession by defendant, defendant having denied title and wrongful possession. *McKay v. Bullard*, 589.

§ 14. Competency and Relevancy of Evidence in Ejectment to Try Title.

Where the evidence discloses that the deed and the deed of trust constituting links in defendant's chain of title were registered in the office of the register of deeds, the instruments are competent in evidence without proof of their signatures or execution in the absence of any question of defect in the probates. *Dillingham v. Gardner*, 227.

EJECTMENT—*Continued.*

Where, in an action to quiet title, a defendant later joined sets up a cross action asserting title in himself, a paragraph of the complaint alleging that the original defendant's sole claim was under a particular instrument, is competent and is properly admitted in evidence in behalf of the defendant later joined who claims under deed from the original defendant, since he is entitled to its admission in order to show a common source of title and to connect plaintiff with that source. *Ibid.*

The exhibition of a map as substantive evidence cannot be held for error when it appears that several witnesses identified the map as an official map of the city in which the *locus in quo* is situate. *McKay v. Bullard*, 589.

Parol evidence is competent to identify the land claimed and to fit it to the description contained in the instrument. N. C. Code, 1783. *Ibid.*

A charge that listing the *locus in quo* for taxation is not evidence of ownership but is merely a circumstance which might be considered by the jury along with other evidence, is without error. *Ibid.*

§ 15. Sufficiency of Evidence and Nonsuit in Ejectment to Try Title.

Where, in an action to quiet title, defendant sets up a cross action asserting title in himself, defendant's evidence tending to establish a common source of title and a better title from that source is sufficient to overrule plaintiff's motion for judgment as in case of nonsuit on defendant's further defense and counterclaim. *Dillingham v. Gardner*, 227.

ELECTION OF REMEDIES.

§ 1. In General.

Plaintiff instituted this action alleging that she was poisoned by an insecticide manufactured by defendant. Defendant requested that plaintiff be forced to elect between negligence and breach of warranty, and, subsequently, between breach of implied warranty and breach of express warranty. It appeared that the court, in the formation of the issues and in its charge, eliminated from the case all questions of negligence and implied warranty. *Held:* Defendant could not have been prejudiced by the refusal of his motions that plaintiff be required to elect between the remedies. *Simpson v. Oil Co.*, 595.

§ 6. Effect of Election.

Where, after sale for partition, the tenants in common who failed to receive their *pro rata* part of the sale price of the lands, elect to ratify the sale and sue for their *pro rata* share of the sale price, such election eliminates all question of title and the validity of the partition proceedings. *Laughridge v. Land Bank*, 392.

EMINENT DOMAIN.

§ 1b. Necessity for Compensation.

Since the erection and maintenance of telegraph and telephone poles and wires along a highway is outside the scope of the easement for highway purposes, the Legislature cannot subject land to such additional burden without the payment of compensation, either directly, or indirectly by granting such power to the Highway Commission, nor may the courts do so by judicial fiat. *Hildebrand v. Tel. Co.*, 402.

§ 2. Acts Constituting "Taking."

The erection and maintenance of telephone poles and wires along a highway constitutes an additional burden upon the land which amounts to a "taking"

EMINENT DOMAIN—*Continued.*

pro tanto, for which the owner of the fee is entitled to compensation regardless of the fact that the original easement for highway purposes is so extensive that the subservient estate amounts to little more than the right of reverter in the event the easement is abandoned, since any interference with the rights in property is a "taking" to the extent of such interference. The word "property" comprehends not only the thing possessed, but also the right of the owner to possess, use, enjoy, and dispose of the *res* and the corresponding right to exclude others from its use. *Hildebrand v. Tel. Co.*, 402.

§ 8. Amount of Compensation in General.

In an action to recover damages against a telephone company for the imposition of an additional easement upon the land by the erection and maintenance of telephone poles and wires along a highway, an instruction that the amount of the award of damages would be such as the jury finds would accrue in the future is error. *Hildebrand v. Tel. Co.*, 402.

Since the Highway Commission has complete control over the surface of the land within a highway right of way, and any use by the owner of the fee, except for the purpose of ingress and egress, is by permission and not as a matter of right, in an action by the owner of the fee to recover damages for the imposition by defendant telephone company of an additional easement upon the land, an instruction that plaintiff owner had the right to use the land in the usual and customary way, plant crops, etc., so long as such use did not interfere with the use of the highway for travel by the public, is error. *Ibid.*

§ 22. Competency and Relevancy of Evidence on Issue of Damages.

In an action by the owner of the fee to recover damages against a telephone company for the imposition of an additional easement upon the land by the erection and maintenance of telephone poles and wires along a highway, the judgment roll in the action by plaintiff against the Highway Commission to assess damages for the easement taken for highway purposes is competent for the purpose of showing the nature and extent of the easement taken in that action, plaintiff being a party thereto and bound thereby. *Hildebrand v. Tel. Co.*, 402.

EQUITY.

§ 1f. Equity Follows the Law.

McGuinn v. High Point, 56.

§ 2. Laches.

Even when the action is peculiarly and essentially equitable in its nature, courts of equity will ordinarily be governed by the statute of limitations in applying the doctrine of laches, and it is only when plaintiff's delay in instituting the action has been prejudicial either to defendant or to intervening property rights that statutory limitations will be disregarded. *Clark v. Henrietta Mills*, 1.

Where it is apparent that a corporation, having obtained the approval of more than 75% of its stockholders to its reorganization plan, was proceeding as a matter of right to reorganize without regard to the disapproval of minority stockholders, the failure of a minority stockholder to institute action until after three quarterly dividends had been paid on the new stock issued pursuant to the reorganization, does not prejudice the corporation, and therefore the delay will not support the invocation of the doctrine of laches. *Ibid.*

Purchaser of equity of redemption with notice of pendency of action to restrain consummation of foreclosure, *held* estopped by laches from attacking foreclosure sale. *Pearce v. Watkins*, 636.

ESTATES.

§ 9b. Rights of Life Tenant and Remaindermen as to Improvements.

Where a tenant, with knowledge that she has only a life estate in the *locus in quo* with limitation over to her children, makes permanent improvements upon the land, the life tenant is solely liable for the cost of the improvements and is not entitled to compensation therefor, nor does the cost thereof constitute a charge upon the land when it passes to the remaindermen, notwithstanding that the improvements are, in part at least, for the benefit of the remaindermen. *Hall v. Hall*, 805.

§ 10. Sale or Mortgaging of Lands Owned by Life Tenant and Remaindermen.

In order for court to authorize that interest of contingent remaindermen be mortgaged it must be made to appear that their interest would be materially enhanced thereby. *Hall v. Hall*, 805.

Court may not authorize mortgaging of interest of remaindermen in order to refinance cost of improvements placed on land by life tenant or to secure lower interest rate. *Ibid.*

Sale of life estates and remainders under order of court will not be upset except for compelling reasons when rights of third parties have attached. *Perry v. Bassenger*, 838.

Proceeding for sale of life estates and defeasible remainders for partition instituted before clerk *held* not void. *Ibid.*

ESTOPPEL.

§ 1. Estoppel by Deed.

The evidence tended to show that plaintiff, the owner of the *locus in quo*, left the State and abandoned his wife and children, that thereafter tax lien on the property was foreclosed and deed made by the commissioner to plaintiff's attorney, and that by plaintiff's direction the attorney executed quitclaim deed to plaintiff's youngest child. Thereafter plaintiff's wife and other children, relying upon the assumption that plaintiff was dead, conveyed to the youngest child, who executed a deed of trust on the property. Defendants claim under foreclosure of the deed of trust. *Held:* There is no estoppel in the purchase of the land by the daughter, and defendants are not estopped to assert title against plaintiff. *Nichols v. York*, 262.

Testator devised to each of his children certain lands in fee but by subsequent clause provided that if they should die without issue, the land should "revert to my other children or grandchildren." Thereafter two of the children conveyed their interests to the third child. *Held:* The child to whom the others conveyed their interest may convey the fee, since even if the devisees took a defeasible fee, the deeds executed by the two devisees would estop them and their heirs, and any interest which might accrue to them under the will would feed the estoppel. *Croom v. Cornelius*, 761.

Tenants in common, parties to a proceeding to sell the lands for partition, later acquired a part of the *locus in quo* by *mesne* conveyances from the purchaser at the partition sale, and in turn sold to third parties. *Held:* Upon subsequent attack of the partition proceedings the claim of such tenants is contradicted by their later deeds. *Perry v. Bassenger*, 838.

§ 3. Estoppel by Record.

The acceptance by the plaintiff of the amount paid by defendant under order of court, representing the total amount which the defendant contends plaintiff is entitled to recover, does not estop plaintiff from further prosecut-

ESTOPPEL—*Continued.*

ing the action to recover another element of damage to which he claims he is entitled when the order under which the payment is made specifically provides that the payment should be made without prejudice to the rights of either party. *Johnson v. Ins. Co.*, 445.

§ 6d. Estoppel by Conduct.

Defendant corporation's contention that plaintiffs, holders of stock as trustees, by their conduct misled other stockholders and caused them to approve the reorganization plan for the corporation, and that therefore plaintiffs should be estopped from attacking the reorganization, *is held* untenable, first, because the stockholders alleged to have been thus injured are not parties and their rights may not be determined in this action, and second, because the evidence discloses that plaintiff trustees gave notice to more than a majority of the holders of stock and holders of proxies that they did not approve the reorganization in their capacity as trustees. *Patterson v. Henrietta Mills*, 7.

Plaintiff mortgagor signed a lease from the *cestui* after foreclosure of the deed of trust and the purchase of the property by the *cestui*. Plaintiff instituted this action to establish a parol trust based upon the alleged agreement of the *cestui* to bid in the property and reconvey to the trustor. *Held:* Plaintiff's conduct was inconsistent with the existence or continuation of his asserted equitable interest in the land and estops him from asserting the alleged parol trust. *Wolfe v. Land Bank*, 313.

§ 6e. Wrongful Acts of Third Persons.

The rule that where one of two innocent parties must suffer loss from the wrongful acts of a third person, the party first reposing confidence in the wrongdoer must suffer the loss, does not apply where a corporate officer uses the credit of the corporation for his own personal benefit, since the person dealing with the corporate officer is charged with knowledge that the officer has no authority to so bind the corporation. *Brinson v. Supply Co.*, 505.

§ 11c. Nonsuit on Ground of Estoppel.

Where plaintiff's own evidence establishes the execution by him of a lease agreement estopping him from asserting an alleged parol trust in the lands, and plaintiff's evidence of fraud in procuring his execution of the lease is wholly insufficient, defendant's motion for judgment as of nonsuit should have been sustained. *Wolfe v. Land Bank*, 313.

EVIDENCE.

III. Privileged Communications
13. Communications Between Attorney and Client. Blaylock v. Satterfield, 771.

IV. Credibility of Witnesses. Impeachment and Corroboration
17. Rule that Party May Not Impeach Own Witness. Ross v. Tel. Co., 324.
18. Evidence Competent to Corroborate or Impeach Witness. Hester v. Motor Lines, 743; Swinson v. Nance, 772.

V. Examination of Witnesses
21. Direct Examination: Leading Questions. McKay v. Bullard, 589.

VI. Relevancy and Materiality of Evidence
25. Facts in Issue and Relevant to Issues. Robbins v. Alexander, 475; Simpson v. Oil Co., 595.
26. Similar Facts and Transactions. Simpson v. Oil Co., 595.

VII. Competency of Evidence in General
29. Evidence of Former Trial or Proceedings. Swinson v. Nance, 772.
30. Photographs. Simpson v. Oil Co., 595.

VIII. Documentary Evidence
34c. Registered Instruments. Dillingham v. Gardner 227.

XI. Admissions and Declarations
42d. Declarations of Agents or Employees. Pinnix v. Griffin, 35; Hester v. Motor Lines, 743.
42f. Admissions in Pleadings. Dillingham v. Gardner, 227.
42g. Declarations Against Interest. Currin v. Currin, 815.

XII. Expert and Opinion Evidence
45a. Opinion Evidence in General. Jordan v. Glickman, 388.
48b. Opinion Evidence as to Cause of Death. Jordan v. Glickman, 388; Hester v. Motor Lines, 743.

EVIDENCE—*Continued.*

§ 13. Communications Between Attorney and Client.

Plaintiffs' objection to the admission in evidence of a letter written by plaintiffs' attorney to one of defendants, on the ground that the letter contained confidential communications between attorney and client, cannot be sustained when it appears that the letter was written at the instance or by the consent of plaintiffs for the purpose of communicating their claim, and that the *feme* plaintiff testified upon the trial as to all matters contained in the letter. *Blaylock v. Satterfield*, 771.

§ 17. Rule That Party May Not Impeach Own Witness.

While a party will not be allowed to impeach the character of his own witness, he may show the facts to be otherwise than as testified to by his witness. *Ross v. Tel. Co.*, 324.

§ 18. Evidence Competent to Corroborate or Impeach Witness.

While the testimony by an officer of a truck driver's narration of how the accident occurred, made by the driver on the second day after the accident, is incompetent as substantive evidence against the truck driver's employer, sought to be held under the doctrine of *respondeat superior*, and as against a third defendant, sought to be held as a joint tort-feasor, when the truck driver goes upon the stand and gives in substance the same testimony, testimony of the narration becomes competent for the purpose of corroboration, and an exception entered by the third defendant cannot be sustained. *Hester v. Motor Lines*, 743.

Exclusion of question as to whether defendant had not been convicted of reckless driving in prosecution growing out of same accident in suit *held* proper, even though offered to impeach defendant, since if offered for this purpose the question was too particularized. *Swinson v. Nance*, 772.

Exclusion of testimony that witness had testified to same effect on former trial *held* not prejudicial in view of fact that transcript at former trial was introduced in evidence. *Ibid.*

§ 21. Direct Examination: Leading Questions.

Whether counsel shall be permitted to ask a leading question is within the discretion of the trial judge, and the exercise of such discretion will not be reviewed on appeal. *McKay v. Bullard*, 589.

§ 25. Facts in Issue and Relevant to Issues.

In an action to enforce a lien for the balance due for work and labor performed, under contract, in drilling a well on defendants' land, defended on the ground that the well was not properly drilled in accordance with the contract, resulting in the failure of defendants to obtain good water, testimony as to plaintiff's general reputation for drilling wells and his want of success in other specific instances does not relate to the issue of whether plaintiff complied with his contract for drilling the particular well on defendants' land, and the admission of such evidence constitutes prejudicial error. *Robbins v. Alexander*, 475.

Plaintiff instituted this action alleging that she was poisoned by an insecticide manufactured by defendant. *Held:* Testimony of defendants' expert witness as to whether he knew of any person other than plaintiff who was allergic to the insecticide is properly excluded when the extent of witness' experience with other persons who had been in contact with the insecticide is not made to appear, since in the absence of such predicate the testimony has no materiality upon the question of the prevalence or rarity of allergy to the insecticide. *Simpson v. Oil Co.*, 595.

EVIDENCE—*Continued.*

§ 26. Similar Facts and Transactions.

This action was instituted to recover for poisoning resulting from use of insecticide. Plaintiff's expert witness was permitted to testify that the insecticide poisoned others given approved skin tests. *Held:* The testimony was competent to show that substance was poisonous to humans, and defendants' objection that tests were not under conditions similar to those existing when plaintiff alleged she was poisoned, is untenable, whether plaintiff was poisoned when she used substance according to directions being for jury. *Simpson v. Oil Co.*, 595.

§ 29. Evidence of Former Trial or Proceedings.

This was a civil action involving a collision at an intersection. Plaintiff had been convicted of reckless driving in a prosecution involving the same collision. *Held:* Objection to defendant's interrogation of plaintiff on cross-examination as to whether plaintiff had not been convicted of reckless driving in a prosecution growing out of the collision in suit was properly sustained even though asked for the purpose of impeaching plaintiff, since if the sole purpose was to impeach plaintiff by showing that he had been convicted of a criminal offense, the question was too particularized. *Swinson v. Nance*, 772.

§ 30b. Photographs.

Where a photograph is offered in evidence, testimony of witnesses as to its correctness as a true representation of the condition of plaintiff's body at the time in question, made during the preliminary identification and authentication of the photograph, the photograph not being exhibited to the jury at that time, cannot be held violative of the rule that photographs are competent solely for the purpose of illustrating the testimony of witnesses, the use of the photograph in question being so limited by the trial court after it had been admitted in evidence. *Simpson v. Oil Co.*, 595.

§ 34c. Registered Instruments.

Registered deeds and deeds of trust are competent in evidence without proof of their signatures or execution in absence of any question of defect in the probates. *Dillingham v. Gardner*, 227.

§ 42d. Declarations of Agents or Employees.

Plaintiff offered testimony of a witness that he heard defendant driver state to an officer at the scene of the accident that he (the driver) at the time of the accident was going to a certain locality to make collections. *Seawell, J.*, writing for the Court, is of the opinion that the fact of agency having been established by evidence *aliunde*, testimony of the declaration was competent to show that at the time the agent was engaged in the duties of his employment. *Stacy, C. J., Devin, Barnhill*, and *Winborne, JJ.*, are of the opinion that testimony of the declaration is incompetent. *Pinnix v. Griffin*, 35.

While the testimony by an officer of a truck driver's narration of how the accident occurred, made by the driver on the second day after the accident, is incompetent as substantive evidence against the truck driver's employer, sought to be held under the doctrine of *respondeat superior*, and as against a third defendant, sought to be held as a joint tort-feasor, when the truck driver goes upon the stand and gives in substance the same testimony, testimony of the narration becomes competent for the purpose of corroboration, and an exception entered by the third defendant cannot be sustained. *Hester v. Motor Lines*, 743.

EVIDENCE—*Continued.*

§ 42f. Admissions in Pleadings.

Objection to the admission in evidence of a paragraph of the original complaint on the ground that it was drawn prior to the time when defendant seeking its admission was made a party, and therefore in no way affected him, is untenable when it appears that after the joinder of the defendant, plaintiff in his reply adopted his original complaint and averred that each and every allegation therein was true. *Dillingham v. Gardner*, 227.

§ 42g. Declarations Against Interest.

In this action on a note, plaintiff's evidence tended to show that she acquired same for value before maturity. Defendant maker sought to testify as to a conversation with the payee tending to show that the payee still held the note after maturity. *Held:* The fact that the payee held the note at the time of making the declaration must be established independently before testimony of the declaration would be competent as a declaration against interest, and when offered solely for the purpose of affirmatively showing that he did hold the note at that time, it is hearsay and inadmissible. *Currin v. Currin*, 815.

Testimony of declarations against interest is ordinarily admissible only when the declarant is dead or insane or otherwise unavailable. *Ibid.*

§ 45a. Opinion Evidence in General.

As a general rule, the testimony of a witness must be confined to statements of concrete fact within his own knowledge, observation and recollection, even when he is testifying as to matters within the common knowledge and experience, with exceptions permitting in evidence the conclusions and opinions of witnesses when the facts involved call for special skill and study, or when the facts are incapable of being clearly and adequately described. *Jordan v. Glickman*, 388.

§ 48b. Opinion Evidence as to Cause of Death.

In this action for wrongful death, the mother of intestate testified as to bruises and cuts on his body after the accident in suit, but her testimony that the injuries resulted in intestate's death, which occurred almost four months after the accident, was excluded. *Held:* Plaintiff's exception to the exclusion of the nonexpert opinion testimony cannot be sustained, since it does not fall within any of the exceptions to the general rule excluding conclusions and opinions of witnesses. *Jordan v. Glickman*, 388.

Exclusion of expert testimony that wounds found on deceased's body were not caused by truck striking or running over deceased *held* for error. *Hester v. Motor Lines*, 743.

EXECUTION.

§ 11. Enjoining Execution.

In this action to restrain execution, the court found that in a former action between the parties or their privies it was determined that defendant's judgment had priority over plaintiffs' subsequent deed from the judgment debtor, that plaintiffs had failed to show any other property subject to the lien of the judgment which might be properly sold to satisfy the judgment, and that the action was not prosecuted in good faith. *Held:* The facts found support the court's conclusion that the findings constitute a complete determination of the entire controversy and entitle defendant to dissolution of the temporary restraining order. *Keel v. Trust Co.*, 259.

EXECUTORS AND ADMINISTRATORS.

§ 12d. Protection of Assets.

This action was instituted by an administrator *d. b. n., c. t. a.*, against the life tenant and the trustee of an active trust for the management of the property created by the life tenant. The complaint alleged mismanagement of the trust and the procuring of judgments by the trustee through fraud and the acquisition of title to certain lands of the estate by the trustee through foreclosure of the said judgments. *Held:* The remaindermen under the will are properly made parties by order of the court upon motion of the trustee. *Pegram v. Trust Co.*, 224.

§ 15d. Claims Against Estate for Personal Services Rendered Deceased.

The complaint alleged that plaintiff was a member of intestate's family and performed domestic services for him at his request in reliance upon a written agreement for payment. The written agreement alleged consisted of an order on a bank in the form of a check to pay plaintiff a designated sum upon intestate's death. *Held:* The written agreement declared upon being entirely ineffective, and there being no allegation of an implied contract of *quantum meruit*, defendant administratrix' demurrer should have been sustained. *Graham v. Hoke*, 755.

§ 31. Action for Accounting.

In this action against administrator *c. t. a.*, joinder of executor and beneficiaries under will of remainderman *held* proper upon the record. *Jones v. Griggs*, 700.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

Where a justice of the peace, because of bad eyesight, requests his secretary to sign his name to the summons, which she does in his presence and under his supervision, the summons is valid, Michie's Code, 1487, and when the summons is issued in an action in arrest and bail and the defendant therein is later arrested upon return of execution against his property unsatisfied, the manner of the issuance of the summons will not support an action for false imprisonment. *Johnson v. Chambers*, 769.

FALSE PRETENSES.

§ 2. Prosecution and Punishment.

Indictment for obtaining money by false pretense should allege that defendant obtained money and state the amount. *S. v. Smith*, 400.

FRAUD.

§ 1b. Distinction Between Fraud and Other Torts.

Plaintiff alleged that the defendant leased him certain property infected with germs of pulmonary tuberculosis without informing him of the fact, and that in consequence he contracted tuberculosis. *Held:* The action is for alleged negligent failure of defendant to inform plaintiff of the danger, and is based on negligence and not on fraud. *Powers v. Trust Co.*, 254.

GAMING.

§ 2b. Slot Machines.

Licenses for slot machines issued by the Department of Revenue relate only to such machines as are lawful, and therefore when a defendant pleads

GAMING—*Continued.*

guilty to an indictment charging ownership, sale, lease, transportation, operation, and possession of slot machines which are prohibited by law, the fact that he has obtained licenses for lawful machines is immaterial. *S. v. Calcutt*, 545.

The law forbids the ownership, sale, demise, or transportation of certain slot machines, and permits the possession, use and operation of others, under license. *Ibid.*

Ch. 138, Public Laws of 1923, proscribing the operation and possession of slot machines of the type therein defined, is not repealed by ch. 196, Public Laws of 1937, proscribing ownership, sale, lease and transportation of such slot machines, since the two statutes are not repugnant, but are complementary. *Ibid.*

§ 3. Indictment.

The indictment charged defendant in one count with ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, ch. 196, Public Laws of 1937, and charged defendant in the second count with the operation and possession of certain illegal slot machines, ch. 138, Public Laws of 1923. *Held:* The different counts in the bill may stand as separate and distinct offenses, and separate judgments may be entered thereon, and defendant's contention of duplicity is untenable. *S. v. Calcutt*, 545.

§ 4. Competency and Relevancy of Evidence.

Testimony that witness had experience with type of lottery in question *held* competent to show he was qualified to testify that tickets were lottery tickets. *S. v. Powell*, 220.

§ 5. Sufficiency of Evidence and Nonsuit in Prosecution for Operating Lottery.

Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same, *is held* sufficient to be submitted to the jury in this prosecution for operating a lottery and for illegal possession of lottery tickets, the evidence being sufficient to make out a *prima facie* case under the provisions of statute. C. S., 4428, as amended by ch. 434, Public Laws of 1933. *S. v. Powell*, 220.

GIFTS.

§ 4. Nature and Essentials of Donatio Causa Mortis.

In order to constitute a *donatio mortis causa* there must be an intention on the part of the donor to give the *res* to the donee, the gift must be made in contemplation of death from a present illness or immediate peril, and there must be an actual or constructive delivery of the *res* to the donee. *Bynum v. Bank*, 109.

In an action to establish a *donatio mortis causa*, especially where the delivery is constructive and the declarations and acts relied upon to show such delivery are ambiguous, evidence tending to show motive for making the gift, the relationship between the parties, the setting and the intention of the donor, and also the state of his health and the circumstances surrounding his death, is relevant and admissible if otherwise competent. *Ibid.*

GUARDIAN AND WARD.

§ 16a. Purpose for Which Interest of Wards May Be Mortgaged.

A guardian may not be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to refund

notes executed by the life tenant representing a part of the money expended by the life tenant in making permanent improvements upon the land, since, the remaindermen being in no way liable for the sums expended by the life tenant, the execution of the mortgage could not be to the interest of the remaindermen. C. S., 2180. *Hall v. Hall*, 805.

The refinancing of a mortgage on the *locus in quo* in order to secure a new loan carrying a greatly reduced interest rate, could not inure to the benefit of the remaindermen, since any savings in interest would inure to the benefit of the life tenant who is entitled to the usufruct. *Ibid.*

HIGHWAYS.

§ 1c. Power of Commission Over Rights of Way.

Sec. 10, ch. 2, Public Laws of 1921, as amended by sec. 1, ch. 160, Public Laws of 1923, confers on the Highway Commission authority to permit and regulate the erection and maintenance of telegraph and telephone poles and wires along the highway as against the public, but the statute confers no right in regard thereto as against the owner of the fee and does not declare that such additional burden is a legitimate purpose embraced within the easement acquired for highway purposes. *Hildebrand v. Tel. Co.*, 402.

§ 6. "Public Roads" in General.

A highway is a strip of land appropriated to use by the public at large for the purpose of travel or transportation, subject only to restrictions to secure the largest practical benefit in such use, and the right of public travel and the duty of public maintenance are its prime essentials and the amount of travel is immaterial. *Hildebrand v. Tel. Co.*, 402.

§ 10a. Rights of Way.

A highway right of way is not an easement for unlimited public use, but is limited to use by the public generally for the purpose of travel or transportation. *Hildebrand v. Tel. Co.*, 402.

Erection and maintenance of telephone poles along highway is not contemplated when land is acquired for highway purposes and is not embraced in easement for highway purposes. *Ibid.*

Easement for highway purposes is primary and superior to easement for telephone lines. *Ibid.*

The owner of land over which a highway is constructed has the exclusive right to the soil subject only to the right of travel in the public and the incidental right of keeping the highway in proper repair for public use. *Ibid.*

Since the Highway Commission has complete control over the surface of the land within a highway right of way, and any use by the owner of the fee, except for the purpose of ingress and egress, is by permission and not as a matter of right, in an action by the owner of the fee to recover damages for the imposition by defendant telephone company of an additional easement upon the land, an instruction that plaintiff owner had the right to use the land in the usual and customary way, plant crops, etc., so long as such use did not interfere with the use of the highway for travel by the public, is error. *Ibid.*

§ 19. Warnings and Signs on Highways Under Construction.

Evidence of failure of contractor to place warning signs on highway under construction and that such failure was proximate cause of injury to plaintiff, notwithstanding intervening acts of another motorist, *held* for jury. *Ryals v. Contracting Co.*, 479.

HOMICIDE.

§ 2. Parties and Offenses.

Where, in pursuance of a preconceived plan to rob, one of the conspirators, both being present, shoots their victim while perpetrating or attempting to perpetrate the robbery, both are guilty of murder in the first degree. C. S., 4200. *S. v. Miller*, 514.

§ 10. Mental Capacity.

Defendant's plea that he was insane at the time of the homicide due to the continued use of liquor, morphine and other opiates, was rejected by the jury. *S. v. Cash*, 818.

§ 11. Self-Defense.

A man who is in his own home and who is innocent of guilt in bringing on the affray, is not required to retreat, but may stand his ground and repel the assault with such force as is necessary, even to the point of killing his adversary, regardless of the original character of the assault. *S. v. Roddey*, 532.

§ 15. Arraignment and Pleas.

In this State a defendant will not be permitted to plead guilty to murder in the first degree, C. S., 4642, and this rule applies to all indictments for murder, including murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture or otherwise, C. S., 4200. *S. v. Blue*, 612.

§ 16. Presumptions and Burden of Proof.

Upon proof of killing with deadly weapon burden is on defendant to prove matters in justification or mitigation. *S. v. Sheek*, 811.

§ 21. Evidence of Premeditation and Deliberation.

Defendant suddenly appeared upon the scene just as his wife was leaving her residence in the morning to go to work. Defendant objected to the admission of evidence that freshly smoked cigarette butts were found around a chair in the woodhouse near the dwelling. It appeared that the woodhouse was the most logical place for a person to secrete himself on the premises. *Held:* The evidence of the finding of the cigarette butts at the place indicated was competent as a circumstance tending to show lying in wait or premeditation and deliberation. *S. v. Cash*, 818.

§ 23. Photographs.

The admission in evidence of photographs of the scene of the homicide, one as deceased was found and the other after he had been turned over to show his face in order to identify him, for the purpose of illustrating the testimony of the witnesses, and the use of the photographs by the solicitor in his argument for such purpose, is not error. *S. v. Miller*, 514.

§ 25. Sufficiency of Evidence and Nonsuit.

Defendant's contention that the State's evidence was susceptible of only the one inference that the killing was the result of passion produced by a fight, and that therefore the court, as a matter of law, should have limited the jury to a verdict no greater than manslaughter *is held* untenable, the question of malice being for the determination of the jury upon the evidence in the case and the presumption arising from proof of an intentional killing with a deadly weapon. *S. v. Sheek*, 811.

Evidence tending to show that defendant lay in wait outside his wife's residence, that he immediately appeared when she left the house to go to work in the morning, that he chased her for about 167 steps and fired three shots, inflicting mortal wounds, *is held* amply sufficient to support the jury's verdict of murder in the first degree. *S. v. Cash*, 818.

HOMICIDE—*Continued.*

§ 27b. Instructions on Presumptions and Burden of Proof.

In a prosecution for murder, an instruction to the effect that defendant's own evidence established guilt of murder committed by means of lying in wait, which constitutes murder in the first degree under the statute, C. S., 4200, and that defendant had admitted every essential element of the offense, except the question of mental capacity relied on by him, *is held* for error as an expression of opinion on the evidence prohibited by C. S., 564, since under defendant's plea of not guilty the credibility of the evidence, including defendant's own testimony, is in the exclusive province of the jury. *S. v. Blue*, 612.

In this prosecution for homicide defendant did not plead justification or excuse, but contended that the State's evidence disclosed that he inflicted the fatal wounds in a fight with the deceased under circumstances reducing the crime to manslaughter. *Held:* A charge to the effect that upon proof of an intentional killing with a deadly weapon the law presumes that the killing was unlawful and that there was malice, placing the burden upon defendant of showing to the satisfaction of the jury matters in justification, must be held for error for omitting from the charge that defendant was entitled to show matters in mitigation. *S. v. Sheek*, 811.

§ 27f. Instructions on Defenses.

Court need not charge on question of mental capacity when defendant does not plead insanity or offer evidence that he did not know right from wrong. *S. v. Miller*, 514.

Where defendant does not plead insanity, either by formal plea or under the plea of not guilty, and there is no evidence tending to show that defendant was insane either at the time of the trial or at the time of the homicide, an instruction of the court, engendered by the argument of counsel for the defense, that there was no evidence of insanity and that the jury should not consider such defense, is without error. *S. v. Melvin*, 538.

Where all the evidence tends to show that when defendant shot deceased, both were inside defendant's house, a charge on the duty to retreat in case of a nonfelonious assault, even though correct in itself, constitutes prejudicial error, although the right of defendant to kill in defense of his home is given in other portions of the charge, since the duty to retreat in case of a nonfelonious assault is not applicable to the evidence. *S. v. Roddey*, 532.

§ 27h. Duty to Charge on Less Degrees of Crime.

Where all evidence tends to show murder in perpetration of robbery, court need not submit question of guilt of less degrees of crime. *S. v. Miller*, 514.

Where all the evidence tends to show defendant's guilt of murder committed in the perpetration of, or attempt to perpetrate, a robbery, the fact that after charging the law on this aspect of the case, the court also charges the law of premeditation and deliberation, does not render the court's failure to submit to the jury the question of defendant's guilt of a less degree of the offense erroneous. *Ibid.*

HOSPITALS.

§ 3. Agents and Employees Within Meaning of Doctrine of Respondeat Superior.

In order to hold a hospital liable under the doctrine of *respondeat superior* for negligence of a physician, plaintiff must show that the physician was an employee or agent of the hospital and that the physician, at the time of and

HOSPITALS—*Continued.*

in respect to the very treatment complained of, was acting as such within the scope of his employment. *Smith v. Duke University*, 628.

When a person goes to a hospital for treatment, and expresses no preference for a physician, and the hospital assigns a physician from its staff who is engaged in the private practice of medicine and does not treat the patient as an agent of the hospital, the hospital cannot be held liable for unskillful or negligent treatment of the patient by the physician unless it failed to exercise reasonable care in his selection. *Ibid.*

Evidence *held* insufficient to show that physician was agent of hospital or that hospital failed to exercise due care in his selection. *Ibid.*

HUSBAND AND WIFE.

§ 4c. Conveyances to Third Persons.

When the purchaser at the foreclosure sale makes out a *prima facie* case in his cross action in ejectment, the burden is on the owner of the equity of redemption to prove the irregularity in the sale relied on by him, and his attack of the deed of trust on the ground that the husband of the *feme* trustor did not sign the instrument cannot be sustained when, although the marriage of the *feme* trustor is admitted, he fails to show that she was married on the date the instrument was executed. *Dillingham v. Gardner*, 227.

§ 4d. Wife as Free Trader.

A married woman who has been abandoned by her husband is a free trader, Michie's Code, 2530; Art. X, sec. 6, N. C. Constitution, and she may execute a valid conveyance of her lands without his joinder. *Nichols v. York*, 262.

§ 6. Right to Maintain Action Against Husband.

The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, Art. X, sec. 6, Constitution of North Carolina; Michie's Code, 2513, but a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 51.

INDEMNITY.

§ 4. Rights and Remedies of Person Indemnified.

No cause of action can accrue on a contract of strict indemnity until after liability of the indemnitee to a third person on a matter within the purview of the agreement has been established, and loss to the indemnitee has been made absolute and certain, and the indemnitor fails to indemnify the indemnitee in accordance with the agreement. *Lackey v. R. R.*, 195.

INDICTMENT.

§ 8. Joinder of Counts and Duplicity.

An indictment charging in one count ownership, sale, lease and transportation of certain slot machines and devices prohibited by law, and charging in second count operation and possession of such slot machines *held* good, and defendant's contention of duplicity is untenable. *S. v. Calcutt*, 545.

§ 9. Charge of Crime.

When it appears upon the face of the bill of indictment that no crime is charged therein, defendant's motion to quash must be allowed. *S. v. Gardner*, 331.

INDICTMENT—*Continued.*

In prosecution for obtaining money by false pretense, indictment charging that defendant obtained "goods and things of value, evidenced by a note in the sum of $200.00, which note is credited with $50.00," is insufficient, since the indictment not only fails to describe the amount in dollars and cents, but nowhere alleges that money was fraudulently obtained. *S. v. Smith*, 400.

INJUNCTIONS.

§ 11. Continuance, Modification and Continuance of Temporary Orders.

As a general rule, a temporary restraining order will be dissolved upon hearing of the order to show cause when the answer denies the equity of the bill, unless injunctive relief is the main purpose of the action and not merely ancillary thereto. *Sineath v. Katzis*, 434.

§ 14. Violation, Modification and Enforcement of Permanent Restraining Order.

The parties are concluded by decree granting a permanent injunction, affirmed on appeal, and the matters therein decided may not be relitigated, but courts of equity have the power to entertain a motion by the party restrained for a modification of the decree upon an assertion of substantial changes in the facts and situation of the parties obviating the grounds upon which the decree was based. *McGuinn v. High Point*, 56.

Upon motion for modification of a prior restraining order on the ground of change of conditions, the former decree is *res judicata* and the matters therein determined are conclusive and may not be relitigated, the sole question presented being whether movants have shown a change in conditions warranting the relief sought. *Ibid.*

Defendant municipality was restrained from building proposed hydroelectric plant without certificate of convenience from Utilities Commissioner. Upon this hearing for a modification of the order, defendant *is held* to have failed to show a change of conditions entitling it to the relief sought, since the resolution of the municipal board of power commissioners changing the statutory authority for the plant from the Revenue Bond Act of 1938 to the Revenue Bond Act of 1935, was *ultra vires* the power commissioners. *Ibid.*

INSANE PERSONS.

§ 12. Validity and Rescission of Contracts.

A contract entered into by a person who is mentally incompetent is not void, but is voidable at the election of the incompetent upon the return by him of the consideration and the restoration of the *status quo*, and under certain circumstances, may be avoided even though the incompetent is unable to place the other party *in statu quo*. *Carawan v. Clark*, 214.

In an action by a guardian to rescind a contract of his incompetent, the burden is on the guardian to establish that his ward was incompetent at the time the contract was entered into, and such proof raises the presumption of invalidity entitling him to rescission unless defendant proves that he was ignorant of the mental incapacity, had no notice thereof which would put a reasonably prudent man upon inquiry, paid a fair and full consideration, took no unfair advantage of the incompetent, and that the incompetent has not restored and is not able to restore the consideration, and where the evidence discloses that the incompetent paid in money and property $750.00 in exchange for property of the value of $400.00, defendant fails to show that no unfair advantage was taken and that a fair and full consideration was paid by him, and plaintiff guardian is entitled to rescission. *Ibid.*

INSURANCE.

§ 13a. Construction and Operation of Insurance Contracts in General.

A policy of insurance will be construed most strongly against insurer and all doubt and ambiguity will be resolved in favor of insured. *Cab Co. v. Casualty Co.*, 788.

§ 13b. What Law Governs.

A contract of insurance based upon the application of insured made while residing in this State, must be construed in accordance with the laws of this State rather than the laws in force at the time of the inception of the contract in the state in which insurer is incorporated. C. S., 6287. *Pace v. Ins. Co.*, 451.

§ 15. Reformation.

Defendant insurance society *held* estopped to deny that expiration date of term insurance was other than therein stipulated. *Blackburn v. Woodmen of the World*, 602.

§ 30a. Forfeiture for Nonpayment of Premiums in General.

Nonpayment of a premium when due, or within the period of grace thereafter, in the absence of some extension or waiver, automatically avoids a policy of insurance. *Cauley v. Ins. Co.*, 398.

§ 30c. Evidence and Proof of Payment.

The giving of a worthless check is not payment. *Cauley v. Ins. Co.*, 398.

Insured, in accordance with custom, sent his check in payment of premium, which payment would have kept his certificate in force until after his death. A premium receipt conditioned upon "final cash returns" on the check was issued. The check was returned by the bank for "insufficient funds," but the beneficiary contended upon supporting evidence that the bank wrongfully dishonored the check because of a prior unauthorized debit entered against insured's account. *Held:* If the bank wrongfully returned the check, "final cash returns" are still rightfully available thereon, and therefore the question should have been submitted to the jury for the determination of the rights of the parties in accordance with its verdict, and the granting of insurer's motion to nonsuit was error. *Ibid.*

§ 32d. Rights of Parties Upon Termination or Cancellation.

Where a twenty-year-pay life insurance policy is lapsed for nonpayment of premiums before the expiration of the twenty-year period, and paid-up extended term insurance is purchased under the provisions of the policy, insured is not entitled to the options provided in the policy for those who have paid all premiums for the full twenty-year period, nor to share in the dividends or profits accruing after the lapse of the policy. *Pace v. Ins. Co.*, 451.

§ 36g. Paid-up and Term Insurance.

Where the sole question in issue is the expiration date of paid-up extended term insurance purchased after lapse of the policies with the balance available therefor after deducting amounts due on lien notes, in accordance with the policy provisions, it being admitted that the computation by insurer of the amount and the length of the extended term is without error, the determination of the expiration date of the extended term insurance by construction of the language of the policies is a question of law for the court and not an issue of fact for the jury, and the court may properly direct the verdict which should be rendered. *Pace v. Ins. Co.*, 451.

Held: Under terms of policies, extended term insurance must be computed on basis of effective date of policies and not dates of delivery. *Ibid.*

Defendant insurance society *held* estopped to deny that expiration date of term insurance was other than therein stipulated. *Blackburn v. Woodmen of the World*, 602.

§ 37. Actions on Life Policies.

In an action on a certificate of insurance in a mutual benefit society, proof of the death of the member, presentation of the certificate by the beneficiary, and denial of liability by the society, establishes a *prima facie* case, and the society has the burden of proof upon its contention of mutual mistake or other defenses. *Blackburn v. Woodmen of the World*, 602.

§ 46. Acts and Admissions of Insured as Affecting Insurer's Liability on Indemnity or Liability Policy.

A provision in a liability or indemnity contract that insured should not, without the written consent of insurer, admit or voluntarily assume any liability nor incur any expense except for such immediate surgical relief as is imperative, will be construed as a limitation upon the liability of the insurer for medical and surgical attention to injured third parties and not as a provision for forfeiture, since insured, being liable for all recoveries over the face amount of the policy, is entitled to mitigate its own liability by furnishing such medical attention, and since such aid could in no way contribute to loss or liability on the part of insurer. *Cab Co. v. Casualty Co.*, 788.

The policy of liability and indemnity insurance in suit provided that insured, without the consent of insurer, might assume liability for such immediate surgical relief to injured third persons as might be imperative. The evidence disclosed that a passenger in insured's taxicab was injured in an accident and was in an unconscious and critical condition. *Held:* The acts of insured in taking her to a hospital and assuming liability for her doctor's bills and necessary nursing were within the terms of the policy. *Ibid.*

§ 47. Estoppel and Ratification by Insurer of Acts of Insured.

An adjuster for a liability and indemnity insurance company has at least implied authority to authorize or ratify the acts of insured in agreeing to pay for emergency medical and surgical attention, including necessary nursing, for injured third persons, the matter being one of adjustment. *Cab Co. v. Casualty Co.*, 788.

Notice to the adjuster of a liability and indemnity insurance company or notice to the attorney employed by it to defend the suit against insured, that insured had assumed liability for nursing and medical attention to persons injured, is notice to insurer and insurer's acts thereafter recognizing liability constitutes ratification. *Ibid.*

§ 49. Defense of Action Against Insured.

After notice to insured in a liability or indemnity contract that insurer contended that the policy had been forfeited and that insurer would no longer continue to defend the suit against insured, insured may continue to defend the suit and make a reasonable compromise or settlement of the claim against it, and insurer is liable for the amount reasonably required to effect the settlement notwithstanding that the policy provides for recovery against insurer only when payment is in satisfaction of a judgment. *Cab Co. v. Casualty Co.*, 788.

§ 50. Actions on Liability Policies.

Evidence that some four or five months after notice to insurer that insured had assumed liability for medical and nursing attention to one of the passen-

gers injured in an accident to one of insured's taxicabs, insurer compromised and settled a claim of another passenger injured in the accident, is competent against insurer to show that insurer recognized its continuing obligation under the policy and had waived or ratified the acts of insured in assuming such medical expenses for the first passenger as against insurer's subsequent contention that the assumption of such medical expenses forfeited the policy. *Cab Co. v. Casualty Co.*, 788.

JUDGES.

§ 3. Salary.

Legislature may delegate to county commissioners discretionary power to fix salary of judge of county court. *Efird v. Comrs. of Forsyth*, 96.

The provision of Art. IV, sec. 18, of the Constitution of North Carolina that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the Constitution and not to those established by legislative enactment. *Ibid.*

Judge of county court may recover for arbitrary reduction of salary by county commissioners. *Ibid.*

JUDGMENTS.

§ 9. Judgments by Default Final.

The clerk of the Superior Court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon tender by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. Public Laws, Extra Session 1921, ch. 92, sec. 1 (9), (12); C. S., 595. *Cook v. Bradsher*, 10.

§ 17b. Conformity to Verdict and Pleadings.

There is no error in the refusal of the court to sign a judgment on the verdict, tendered by the plaintiff, which provides for the recovery of a sum in excess of the amount to which plaintiff is entitled on the verdict, and the fact that the error in the amount of the judgment tendered is due to a miscalculation of counsel in preparing the judgment cannot affect this conclusion. *Johnson v. Ins. Co.*, 445.

A judgment entered upon issues which are not determinative of the controversy is erroneous. *Brown v. Daniel*, 349.

§ 17d. Notice.

Finding *held* insufficient to warrant conclusion that defendants had notice of hearing on referee's report. *Everett v. Johnson*, 540.

§ 20. Land Upon Which Lien Attaches.

The lien of a docketed judgment attaches to all land situated in the county in which the judgment is docketed which is owned by the judgment debtor at the time the judgment is docketed, or which is acquired by him at any time within ten years of the date of the rendition of the judgment, but it is not a lien on land conveyed by the judgment debtor by deed duly registered prior to the docketing of the judgment, C. S., 614, even though the deed by which the judgment debtor acquired title was unregistered. *Durham v. Pollard*, 750.

JUDGMENTS—*Continued.*

§ 22b. Procedure for Attack of Judgments.

A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause. *Cook v. Bradsher*, 10.

A judgment which is void for want of jurisdiction may be treated as a nullity, disregarded, vacated on motion, attacked directly or collaterally. *Casey v. Barker*, 465.

§ 22g. Irregular Judgments.

An irregular judgment is one entered contrary to the usual course and practice of the court, and will be vacated upon proper showing of irregularity and merit. *Everett v. Johnson*, 540.

A judgment confirming the referee's report and overruling defendants' exceptions thereto, which exceptions constitute a sufficient showing of merit, entered out of the country and out of the district without notice or opportunity to defendants to be heard, is contrary to usual course and practice and should be set aside for irregularity upon defendants' motion aptly made. *Ibid.*

§ 22h. Validity and Attack for Want of Jurisdiction.

A judgment *in personam* without voluntary appearance or valid service of process in some way sanctioned by law, is void for want of jurisdiction. *Casey v. Barker*, 465.

§ 24. Modification of Judgments.

Interlocutory consent judgment is subject to modification by court order which does not encroach upon rights of parties. *Hales v. Land Exchange*, 651.

§ 29. Parties Concluded.

Unborn remaindermen, represented by member of their class *in esse, held* concluded by decree for sale of the land. *Perry v. Bassenger*, 838.

§ 31. Conclusiveness of Foreign Judgments.

Decree of divorce against resident of this State rendered by court of another state on constructive service has no force or effect in this State, and does not preclude action here for alimony without divorce. *Tyson v. Tyson*, 617.

§ 32. Operation of Judgments as Bar to Subsequent Litigation in General.

In a prior action between the same parties or those in privity with them, certain notes executed by plaintiffs were attacked for want of consideration. Judgment was entered, affirmed on appeal, that the notes were valid. *Held:* The prior adjudication precludes plaintiffs from attacking the notes on the ground of want of consideration, and, since plaintiffs assert no other equity for challenging the validity of the notes, the validity of the notes is established by the prior judgment, and the rights of the parties in the second action must be determined in accordance with such adjudication. *Sineath v. Katzis*, 434.

§ 33d. Criminal Judgments as Bar to Civil Action.

Where the driver of a car is convicted of manslaughter in causing the death of a passenger therein, and sentence is suspended on condition that he pay a stipulated sum to the mother of the deceased passenger, payments made in the criminal prosecution will not support a plea of estoppel in an action by the administratrix of the deceased passenger to recover for wrongful death, credit on the verdict for the amount paid in the criminal prosecution being the most to which he is entitled. *Hester v. Motor Lines*, 743.

JUDGMENTS—*Continued.*

§ 35. Plea of Bar, Hearings and Determination.

In this action to restrain execution, the court found that in a former action between the parties or their privies it was determined that defendant's judgment had priority over plaintiffs' subsequent deed from the judgment debtor, that plaintiffs had failed to show any other property subject to the lien of the judgment which might be properly sold to satisfy the judgment, and that the action was not prosecuted in good faith. *Held:* The facts found support the court's conclusion that the findings constitute a complete determination of the entire controversy and entitle defendant to dissolution of the temporary restraining order. *Keel v. Trust Co.*, 259.

§ 40. Action on Foreign Judgments.

The provision of the Federal Constitution, Art. IV, sec. 1, that each state give full faith and credit to the judicial proceedings of every other state does not prevent a state from withdrawing the jurisdiction of its courts from an action to enforce a judgment rendered in another state when it is made to appear clearly that the judgment was awarded on transactions forbidden by the public policy or statute of the state. *Cody v. Hovey*, 369.

In action on foreign judgment, defense that it was based on gaming contract may not be asserted when such defense is concluded by the judgment sued on. *Ibid.*

Where, in an action against a resident of this State on a judgment *in personam* rendered by another state, the allegations of the complaint are insufficient to show valid service of process on defendant in accordance with the laws of the state rendering the judgment, such defendant's demurrer on the ground that the complaint fails to state a cause of action is properly sustained. *Casey v. Barker*, 465.

LANDLORD AND TENANT.

§ 1. The Relationship.

Where the servant occupies premises of the master and the rent therefor is satisfied by service, the relation of landlord and tenant exists between the parties in regard to the premises unless occupancy by the servant is reasonably necessary for the better performance of the particular service, inseparable from it, or required by the master as essential to it. *Simons v. Lebrun*, 42.

§ 7. Construction and Operation of Leases in General.

A lease must be construed most strongly against lessor. *Warren v. Breedlove*, 383.

§ 10. Duty to Repair.

In the absence of an agreement between the parties, the lessor is not under duty to keep the premises in repair. *Livingston v. Investment Co.*, 416.

§ 11. Liability of Landlord for Injuries From Defective or Unsafe Conditions.

Where a landlord, having agreed with its tenant to repair the premises, undertakes to make repairs, the landlord is under duty to see that the repairs are properly made so as not to cause injury to the tenant, members of his family, his guests and invitees, and the landlord is liable in tort for injuries proximately resulting from the performance of the repair work in a careless and negligent manner. *Livingston v. Investment Co.*, 416.

Where the landlord undertakes to make repairs, he may not escape liability for negligence in the performance of the work on the ground that he employed

an independent contractor to do the work, and the landlord is liable for negligent breach of duty in failing to see that the repairs are made in a workmanlike manner so as not to cause injury to the tenant regardless of whether the repair work is done by the landlord's employee, agent, or an independent contractor. *Ibid.*

Evidence *held* for jury on question of whether landlord, undertaking to repair steps, did work in negligent manner causing injury to tenant's wife. *Ibid.*

§ 15b. Termination for Breach of Conditions.

Mere intention to breach does not constitute breach, and mere threat or intimation on part of tenant that he would do act constituting breach entitling landlord to terminate lease, does not constitute breach. *Warren v. Breedlove*, 383.

§ 19. Notice of Intent to Terminate.

Plaintiffs alleged that they had made demand on their tenant to surrender the premises because of breach of the lease contract. *Held:* Failure of evidence of demand in support of the allegation is fatal to plaintiffs' right to recover possession of the premises. *Warren v. Breedlove*, 383.

LARCENY.

§ 5. Presumptions and Burden of Proof.

Recent possession of stolen property raises a presumption of the possessor's guilt of larceny of such property, the strength of the presumption depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and their discovery in the possession of the defendant. *S. v. Williams*, 365.

§ 7. Sufficiency of Evidence and Nonsuit.

Evidence that sacks of cotton seed disappeared from the ginhouse of the prosecuting witness from time to time for a period of several weeks, that during this period defendant from time to time sold sacks of cotton seed to a third person, and that the prosecuting witness identified four of the sacks of cotton seed which defendant had sold as belonging to him, *is held* sufficient to be submitted to the jury on the question of defendant's guilt of larceny. *S. v. Williams*, 365.

§ 8. Instructions in Prosecutions for Larceny.

The evidence tended to show the larceny of sacks of cotton seed from the ginhouse of the prosecuting witness over a period of several weeks. *Held:* Inexactness or want of definiteness in the instruction of the court as to the dates the sacks were stolen does not entitle defendant to a new trial, the exact dates not being regarded as capitally important. *S. v. Williams*, 365.

In a prosecution for larceny, an exception to the court's instruction to find the defendant guilty if the jury was satisfied beyond a reasonable doubt that defendant had taken or stolen the articles in question, on the ground that the court failed to define "taken and stolen," is untenable when the record discloses that the court had previously charged the jury the constituent elements of larceny. *Ibid.*

LIMITATION OF ACTIONS.

§ 2e. Actions Barred in Three Years.

Any action under the provisions of chapter 2, Public Laws 1923, relative to sanitation, is governed by the three-year statute of limitations. *Powers v. Trust Co.*, 254.

LIMITATION OF ACTIONS—*Continued.*

§ 3a. Accrual of Right of Action in General.

The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of the reorganization of the corporation declared and paid in accordance with the stipulation of the certificate before dividends are set aside or paid on any other stock is based on contract, and the request for an injunctive relief is merely ancillary thereto, and plaintiff's cause of action arises when dividends are paid on the new stock before accrued dividends on her stock are paid, and her action instituted within three years thereafter is not barred. *Clark v. Henrietta Mills*, 1.

§ 4. Fraud and Ignorance of Cause of Action.

In actions based on fraud the cause of action does not accrue and the statute of limitations does not begin to run until the facts constituting the fraud are known by plaintiff or until he should have discovered them in the exercise of reasonable business prudence. C. S., 441 (9). *Johnson v. Ins. Co.*, 202.

An action for negligence accrues, and the statute of limitations begins to run, from the time the wrongful act or omission complained of occurs, without regard to the time when the harmful consequences are discovered. *Powers v. Trust Co.*, 254.

Action to reform deed for mistake as to interest conveyed, instituted some 37 years after deed was recorded, *held* barred. *Jefferson v. Jefferson*, 333.

Evidence of whether guardian knew or should have known of facts constituting fraud more than three years before institution of action *held* for jury. *Johnson v. Ins. Co.*, 202.

§ 11b. Institution of Action Within One Year From Nonsuit.

Plaintiff took a voluntary nonsuit in the Federal Court on his cause of action to recover the penalty for usury, based on numerous separate transactions between the parties. Within a year thereafter he instituted four separate actions in the State Court embracing the identical items declared on in the original action. *Held:* If the original action was instituted within the time prescribed, the four separate causes of action would not be barred by the statute of limitations, C. S., 415. *Motor Co. v. Credit Co.*, 199.

§ 15. Pleading Statute.

Statutes of limitations, unless they are annexed to the cause of action itself, must be specifically pleaded, and may not be invoked by demurrer or by preliminary motion to dismiss. *Motor Co. v. Credit Co.*, 199.

§ 16. Burden of Proof.

Where defendant pleads the statute of limitations, the burden is upon the plaintiff to show that his action was begun within the time allowed. *Powers v. Trust Co.*, 254.

§ 18. Sufficiency of Evidence, Nonsuit and Directed Verdict.

The deed in question conveyed a life estate to the grantee with remainder to the grantee's male children. The grantee later conveyed to his brother, who was the draftsman for the original deed. In this action, instituted some thirty-seven years after the original deed was executed and recorded, the brother asserted the right to reform the original deed for mutual mistake of the parties or mistake of the draftsman as to the interest conveyed. *Held:* A peremptory instruction that if the jury believe the evidence to find that the right to reformation was barred, is without error. *Jefferson v. Jefferson*, 333.

While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute is based

LIMITATION OF ACTIONS—*Continued.*

upon defendant's contention that the note was not under seal, but defendant offers no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his signature as maker, the question of the statute becomes a matter of law, and the court properly refuses to submit an issue as to whether the action was barred. *Currin v. Currin*, 815.

LOST OR DESTROYED INSTRUMENTS.

§ 3. Burden of Proof.

In an action to establish a lost deed the burden is upon plaintiff to show delivery necessary to complete the conveyance, and upon failure of evidence of delivery required by law, defendant's motion to nonsuit should have been allowed. *Barnes v. Aycock*, 360.

MANDAMUS.

§ 2b. Discretionary Duty.

Although *mandamus* will lie to compel exercise of discretionary power in proper way, the fact that this remedy is available will not preclude judge of county court from maintaining action against county to recover amount salary was reduced upon allegations that county commissioners acted arbitrarily in making reduction. *Efird v. Comrs. of Forsyth*, 96.

MASTER AND SERVANT.

I. The Relation
2. Requisites and Validity of Contract of Employment. Laughter v. Powell, 689.
4a. Distinction between Relationship of Master and Servant and Principal and Independent Contractor. Livingston v. Investment Co., 416; Beach v. McLean, 521.
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V. Federal Employers' Liability Act
25. To What Cases and Employments Federal Act Applies. Laughter v. Powell, 689.
27. Negligence of Railroad Employer. Laughter v. Powell, 689.
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33. Assumption of Risk under Federal Act. Laughter v. Powell, 689.
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38. Employers and Concerns Subject to Act. Chadwick v. Dept. of Conservation and Development, 766.
39a. Employees within Purview of Compensation Act in General. Lineberry v. Mebane, 257.
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39d. Dual Employment. Casey v. Board of Education, 739.
41a. Amount of Recovery. Casey v. Board of Education, 739.
45b. Employees and Risks Covered by Compensation Insurance Policy. Casey v. Board of Education, 739.
46a. Nature and Functions of Industrial Commission. Chadwick v. Dept. of Conservation and Development, 766.
47. Notice and Filing of Claim. Lineberry v. Mebane, 257.
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VIII. Unemployment Compensation Act
56. Validity, Nature, and Construction of Unemployment Compensation Act in General. Unemployment Compensation Com. v. Ins. Co., 576; Unemployment Compensation Com. v. Willis, 709.
58. Employments Taxable. Unemployment Compensation Com. v. Ins. Co., 576; Unemployment Compensation Com. v. Willis, 709.
60. Right to Unemployment Compensation. In re Steelman, 306.
62. Appeals to Superior Court. In re Steelman, 306; Unemployment Compensation Com. v. Willis, 709.

§ 2. Requisites and Validity of Contract of Employment.

Fact that applicant obtains employment by misrepresenting his age does not render contract of employment void, but voidable; and until avoided, relationship of master and servant exists. *Laughter v. Powell*, 689.

MASTER AND SERVANT—*Continued.*

§ 4a. Distinction Between Relationship of Master and Servant and Principal and Independent Contractor.

Evidence that defendant's authorized agent employed a workman by the hour to do certain repair work on the principal's property, that the agent took the workman to the premises, visited the premises several times during the progress of the work, and directed what work should be done, establishes the relationship of master and servant between the principal and the workman, and not that of principal and independent contractor. *Livingston v. Investment Co.*, 416.

Whether the relationship between the parties is that of master and servant or principal and independent contractor involves a mixed question of law and of fact, the terms of the contract being a question of fact, and the relationship created by the contract being a question of law. *Beach v. McLean*, 521.

An independent contractor is one employed to do a specific job or piece of work who is not under the control or supervision of the employer as to the methods or manner used, but who is responsible to the employer solely for the results. *Ibid.*

The reservation by the employer of the right to terminate the agreement under which he employs an independent contractor is not a reservation of control and supervision over the work so as to make the relationship that of master and servant. *Ibid.*

While insolvency of the purported independent contractor may be considered upon the question of the relationship between the parties when the evidence is conflicting as to whether the employer actually retained control and supervision over the work, where there is no evidence tending to support an inference that the contract was used merely as a front to avoid liability, insolvency of the contractor is immaterial in determining the relationship. *Ibid.*

The fact that the work let is intrinsically dangerous does not affect the relationship of principal and independent contractor existing between the parties, but only enlarges the legal duty and liability of the principal to the employees of the independent contractor. *Ibid.*

§ 4b. Distinction Between Relationship of Master and Servant and Landlord and Tenant.

Where the servant occupies premises of the master and the rent therefor is satisfied by service, the relation of landlord and tenant exists between the parties in regard to the premises unless occupancy by the servant is reasonably necessary for the better performance of the particular service, inseparable from it, or required by the master as essential to it. *Simons v. Lebrun*, 42.

§ 21b. Course of Employment.

Where the fact of employment is admitted or established, the courts should be slow to assume that there has been any deviation from the course of employment upon any speculative hypotheses, and all doubt as to whether the employee was acting within the scope of his employment will be resolved in favor of liability. *Pinnix v. Griffin*, 35.

The doctrine of *respondeat superior* applies only when the relationship of master and servant exists between a wrongdoer and the person sought to be charged at the time of, and in respect to, the very transaction out of which the injury arose. *Ross v. Tel. Co.*, 324; *Creech v. Linen Service Corp.*, 457.

A servant is acting in the course of his employment when he is performing that which he is employed to do and is about his master's business, and while every deviation from the strict execution of his duty will not interrupt the

course of the employment, the master cannot be held liable for negligence of the servant committed while engaged in some private matter of his own outside the scope of his employment. *Creech v. Linen Service Corp.*, 457.

§ 25. To What Cases and Employments Federal Act Applies.

Plaintiff obtained employment with defendant railroad company by misrepresenting his age. There was nothing tending to show that his minority was contributing cause of his injury. *Held:* While the misrepresentation rendered the contract of employment voidable, until avoided the injured person was an employee within the meaning of the Federal Employers' Liability Act, and entitled to the protection afforded by law, and could maintain his action under the Act to recover for the injuries sustained. 45 U. S. C. A., secs. 51-59. *Laughter v. Powell*, 689.

§ 27. Negligence of Railroad Employer.

Evidence that plaintiff employee was injured by the negligence of defendant railroad company *held* sufficient to take the case to the jury under authority of *Atlantic Railroad Co. v. Hughes*, 278 U. S., 496, 73 L. Ed., 473. *Laughter v. Powell*, 689.

§ 29. Contributory Negligence of Employee.

The charge of the court on the issue of damages recoverable under the Federal Employers' Liability Act for physical injuries when both negligence and contributory negligence are found by the jury *is held* without error upon authority of *S. A. L. R. R. Co. v. Tilghman*, 35 S. Ct., 653, 237, U. S., 499, 59 L. Ed., 1069. *Laughter v. Powell*, 689.

§ 33. Assumption of Risk Under Federal Act.

In this action under the Federal Employers' Liability Act, the charge of the court on the doctrine of assumption of risk *held* without error on authority of *Hubbard v. R. R.*, 203 N. C., 675. *Laughter v. Powell*, 689.

§ 38. Employers and Concerns Subject to Compensation Act.

It must affirmatively appear by evidence or admission that defendant had in his employ five or more employees in order for Compensation Act to be applicable. *Chadwick v. Dept. of Conservation and Development*, 766.

§ 39a. Employees Within Purview of Compensation Act in General.

An infant employee is bound by the terms of the North Carolina Workmen's Compensation Act regardless of his age. Secs. 4, 5, ch. 120, Public Laws of 1929. *Lineberry v. Mebane*, 257.

§ 39b. Independent Contractors.

The findings and evidence before the Industrial Commission *is held* to show that claimant was an employee of an independent contractor, and therefore not entitled to recover under the Compensation Act against the independent contractor's principal. *Beach v. McLean*, 521.

It would seem that an employee of an independent contractor may not hold the principal liable under the Compensation Act upon the doctrine that the work let was intrinsically dangerous, since he could not establish the relationship of master and servant between himself and the principal, the liability of the principal to him in such cases being founded upon the common law doctrine of negligence. *Ibid.*

Section 19, chapter 120, Public Laws of 1929, relates to contractors and subcontractors and not to employers and independent contractors. *Ibid.*

MASTER AND SERVANT—*Continued.*

§ 39d. Dual Employment.

Claimant was employed as school janitor, his compensation therefor being paid in part by the State School Commission, and was also employed in school maintenance work after his regular working hours as janitor, his compensation for maintenance work being paid exclusively by defendant municipal board of education. *Held:* The Industrial Commission's finding, supported by evidence that claimant was injured during employment in school maintenance work, supports conclusion that municipal board of education and its carrier were solely liable. *Casey v. Board of Education*, 739.

§ 41a. Amount of Recovery.

Claimant was employed as janitor, his compensation for such work being paid in part by the State School Commission, and was also employed in school maintenance work, his compensation for the maintenance work being paid exclusively by the municipal board of education. He was injured while engaged in duties pertaining exclusively to school maintenance work. *Held:* An award computed on the basis of the total compensation customarily earned by claimant, rather than the compensation earned solely in school maintenance work, upon the Commission's finding of exceptional conditions, is upheld. Ch. 120, sec. 2 (e), Public Laws 1929. *Casey v. Board of Education*, 739.

§ 45b. Employees and Risks Covered by Compensation Insurance Policy.

A condition in a compensation insurance policy issued to a municipal board of education, relieving or lessening the carrier's liability in cases where an employee receives his remuneration in whole or in part from the State, has no application when the employee is injured while engaged solely in maintenance work paid for exclusively by the municipal board. *Casey v. Board of Education*, 739.

§ 46a. Nature and Functions of Industrial Commission.

In its functions as a court, the jurisdiction of the Industrial Commission is limited, and jurisdiction cannot be conferred on it by agreement or waiver. *Chadwick v. Dept. of Conservation and Development*, 766.

It must appear affirmatively by evidence or by admission of record that a defendant sought to be held liable under the Workmen's Compensation Act had in his employ five or more employees in order to sustain the jurisdiction of the Industrial Commission, and when this fact is not made to appear, the award of compensation against such defendant must be reversed. *Ibid.*

§ 47. Notice and Filing of Claim.

For the purpose of filing and prosecuting claim for compensation, an injured employee is *sui juris* at the age of eighteen. *Lineberry v. Mebane*, 257.

The limitation of time for filing claim under the Workmen's Compensation Act, sec. 24, ch. 120, Public Laws of 1929, is tolled as to an employee under eighteen years of age who is without guardian or other legal representative until he arrives at the age of eighteen, the common law rule as to disability of infants not having been modified in this respect by the Compensation Act. *Ibid.*

§ 55d. Review of Award of Industrial Commission.

The Industrial Commission is the body designated by statute to find the facts in proceedings for compensation, and its findings of fact, supported by competent evidence, are conclusive and are not subject to review by the Superior Court or by the Supreme Court. *Beach v. McLean*, 521.

A conclusion of law of the Industrial Commission is reviewable on appeal. *Ibid.*

Where the Industrial Commission makes a conclusion involving a mixed question of law and fact, without finding the ultimate facts upon which the conclusion is founded, the courts on appeal can review the conclusion only to ascertain whether there was sufficient competent evidence to support the factual element involved therein, but where the commission finds all of the facts, the findings supported by evidence are final, but the courts can review the conclusion of law based thereon. *Ibid.*

While the findings of the Industrial Commission as to the terms of the contract between the parties is final, its conclusions as to the relationship created by the contract is a conclusion of law which is reviewable on appeal. *Ibid.*

Findings of fact by the Industrial Commission, supported by competent evidence, are binding upon the courts upon appeal. *Casey v. Board of Education*, 739.

§ 56. Validity, Nature and Construction of Unemployment Compensation Act in General.

It is not required that there be strict uniformity in the incidents of the unemployment compensation tax levied by the State and Federal laws, the enactment by the State not being under compulsion but being voluntary under the inducements of a recognized social necessity and the offer of a gift by the Federal Government in aid of the enterprise, and there is sufficient coordination between the Federal and State laws if there is within the State sufficient reciprocity between the employment upon which the tax is levied and those who receive its benefits. *Unemployment Compensation Com. v. Ins. Co.*, 576.

The Federal contribution in aid of unemployment compensation insurance is in the nature of a gift, since the employment tax collected by the Federal Government could be expended by it for any legitimate Federal purpose, or the contribution could be made by the Federal Government from any other source of taxation. *Ibid.*

The intent of the Legislature to provide a wide scope in the application of the Unemployment Compensation Act to mitigate the economic evils of unemployment, and to bring within its provisions employments therein defined beyond the scope of existing definitions or categories, is apparent from the language of the Act, and all doubts as to constitutionality should be resolved in favor of the validity of the Act and all its provisions. *Unemployment Compensation Com. v. Willis*, 709.

§ 58. Employments Taxable.

Employments taxable under Compensation Act are to be determined by its definitions and not definitions of common law. *Unemployment Compensation Com. v. Ins. Co.*, 576.

Control exercised by insurance company over State and local agents *held* such as to bring their employment within the provisions of the Unemployment Compensation Act. *Ibid.*

An individual who operates three places of business, employing in the aggregate more than 8 employees, is an "employer" as defined in sec. 19 (f) (4) of the North Carolina Unemployment Compensation Act, and he cannot successfully maintain that the application of this section to him and the imposition of the unemployment compensation tax deprives him of property without due process of law or denies him the equal protection of the laws, 14th Amendment to the Federal Constitution, Art. I, sec. 17, of the State Constitution, sec. 19 (f) (4) of the Act not being violative of constitutional provisions when

MASTER AND SERVANT—*Continued.*

properly interpreted and applied. *Unemployment Compensation Com. v. Willis*, 709.

§ 60. Right to Unemployment Compensation.

Under the provisions of the Unemployment Compensation Act, sec. 5 (d), ch. 1, Public Laws of 1936, employees who participate in, finance or who are directly interested in a labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance or are directly interested in such labor dispute, are not entitled to unemployment compensation benefits during the stoppage of work, and each employee-claimant is required to show to the satisfaction of the Commission that he is not disqualified under the terms of this section. *In re Steelman*, 306.

The provisions of the Unemployment Compensation Act seeking to maintain neutrality on the part of the State in labor disputes will be given effect by the courts, since the matter of policy is in the exclusive province of the Legislature and the courts will not interfere therewith unless the provisions relating thereto have no reasonable relation to the end sought to be accomplished. *Ibid.*

The Unemployment Compensation Commission is charged with administering the benefits provided in the Unemployment Compensation Act in accordance with the objective standards and criteria set up in the Act, but the merits of labor disputes do not belong to the Commission, these being matters properly pertaining to the field of labor relations. *Ibid.*

Sec. 5 (d), ch. 1, Public Laws of 1936, which makes specific provision in regard to disqualification of employee-claimants during stoppage of work because of labor disputes, prevails over the provision of sec. 2 of the Act, stating the general policy of the Act to provide for benefits to workers who are "unemployed through no fault of their own." *Ibid.*

When evidence supports finding that employee-claimants were disqualified during stoppage of work because of labor dispute, finding is conclusive. *Ibid.*

The evidence tended to show that employee-claimants not only did not work during the period of stoppage of work at the employer's plant caused by a labor dispute, but also that they did not resume work after operations at the plant were resumed, and after notification by the employer that jobs were available. There was also evidence on behalf of claimants that they did not return to their jobs because of the labor dispute. The Commission ruled that claimants were not entitled to benefits during the stoppage of work. *Held:* The employer is not prejudiced by the further order of the Commission that the eligibility of claimants to benefits subsequent to the resumption of operations at the plant should be determined, since it must be presumed the Commission will determine eligibility of each claimant for such benefits in accordance with objective standards or criteria set up in the Act, but the existence and effect of a labor dispute may have an essential bearing upon the eligibility of claimants, the suitableness of work offered, and the disqualifications for benefits. Sec. 5 (c) (2), ch. 1, Public Laws of 1936. *Ibid.*

§ 62. Appeals to Superior Court.

Upon appeal to the Superior Court from any final decision of the Unemployment Compensation Commission, the findings of the Commission as to the facts, if supported by evidence, and in the absence of fraud, are conclusive, the jurisdiction of the Superior Court on appeal being limited to questions of law. **Sec. 6 (i), ch. 1, Public Laws of 1936.** *In re Steelman*, 306.

MASTER AND SERVANT—*Continued.*

Appellant from Unemployment Compensation Commission is not entitled to jury trial upon exceptions to findings of fact, and the provisions of the act to this effect does not violate constitutional right to jury trial. *Unemployment Compensation Com. v. Willis*, 709.

A defendant in a proceeding under the North Carolina Unemployment Compensation Law is given the right to pay the tax under protest and sue for its recovery, but he must pursue this remedy in the manner prescribed by the Act, and when he appeals upon exceptions to the findings of fact made by the Commission he waives the right to trial by jury, and may not object to the provisions of the Act that the Commission's findings are conclusive when supported by evidence. *Ibid.*

MINES AND MINERALS.

§ 1. Title to Mineral Rights.

Title to the surface of the earth and title to the mining and mineral rights under the surface may be severed, and when severed the title to the mining and mineral rights is governed by the ordinary rules governing real property. *Davis v. Land Bank*, 248.

Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for twenty years. *Ibid.*

Mere prospecting does not constitute possession of mine and mineral rights. *Ibid.*

MORTGAGES.

§ 13b. Substituted Trustees.

A substituted trustee, the substitution having been made in accordance with the statutory provisions, succeeds to all the rights, title and duties of the original trustee, and has the power to foreclose the instrument according to its terms upon default. Michie's Code, 2583 (a). *Pearce v. Watkins*, 636.

The duly appointed substituted trustee can bind the *cestui*. *Ibid.*

§ 16b. Cutting of Timber From Lands Mortgaged.

A mortgagee must account to the mortgagor for timber cut from the *locus in quo*, (1) when the mortgagee is in possession and the timber is cut and removed at the instance of the mortgagee for his own benefit, (2) when the mortgagee is not in possession but the timber is cut and removed at his instance and through his agency and for his benefit, regardless of whether the cutting is done with or without the consent of the mortgagor, unless he has a special agreement with the mortgagor which would relieve him of such liability. *Brown v. Daniel*, 349.

When the mortgagor attempts to cut and remove timber and receive the proceeds, the mortgagee has the right to intervene and even restrain the cutting although he may consent thereto and thus release his security *pro tanto*, but if the mortgagee intervenes and demands that the proceeds be paid to him and thereby makes it impossible for the mortgagor to collect for the timber, the mortgagee must ordinarily account for the proceeds. *Ibid.*

Issues and instructions based upon theory that consent of mortgagor to removal of timber by mortgagee was prerequisite to liability of mortgagee *held* erroneous. *Ibid.*

§ 17. Duties and Liabilities of Cestuis and Mortgagees.

Where purchaser at partition sale borrows purchase price under deed of trust, *cestui* is not under duty to see to proper application of proceeds of loan. *Laughridge v. Land Bank*, 392.

MORTGAGES—*Continued.*

§ 23. Purchasers of Equity of Redemption.

The purchaser of the equity of redemption is entitled to all the rights, titles and equities of his grantor, including the right to pay off the debt according to the terms of the deed of trust. *Pearce v. Watkins*, 636.

§ 30a. Right to Foreclose and Defenses in General.

In order for equity to restrain the foreclosure of a mortgage or a deed of trust to prevent injustice to the rights of a mortgagor or trustor or others interested in the property, there should be some equitable element involved, such as fraud, mistake, or the like. *Sineath v. Katzis*, 434.

§ 30b. Parties Entitled to Request Foreclosure.

Mere holder of notes secured by deed of trust, which notes are past due, is entitled to require trustee to foreclose. *Dillingham v. Gardner*, 227.

Where the *cestui que trust* endorses and assigns absolutely to another the notes secured by the deed of trust, and the assignee in turn assigns the notes as collateral security for his note to a bank in a sum less than the face amount of the mortgage notes, the assignee of the *cestui* is interested in the payment of the whole amount of the mortgage notes, the amount due him after payment to the bank as well as the amount due the bank as represented by his note, and he has an equitable interest in the notes and is entitled to request the trustees to foreclose the deed of trust notwithstanding that he does not have physical possession of the mortgage notes. *Sineath v. Katzis*, 434.

§ 30e. Denial of Amount Claimed, Offsets and Accounting.

Where there is no controversy as to the amount due on the mortgage notes or that the trustors were in default, but trustors seek to enjoin foreclosure on the ground that the equitable owner of the notes was liable to them for damages for breach of a collateral contract and that he is insolvent, dissolution of the temporary restraining order is proper upon the defendants' denial that the equitable owner of the notes is insolvent. *Sineath v. Katzis*, 434.

§ 34c. Report of Sale.

The statute, C. S., 2591, does not require a report of the sale to the clerk until an advance bid has been properly made, and therefore when separate deeds of trust are foreclosed at one sale, the owner of the equity of redemption is not prejudiced by a joint report of the sale resulting in the necessity of the depositing or securing of a larger sum for a resale, when he fails to show that any person desired or proposed to advance the bid or that the sale was for less than the property was worth. *Dillingham v. Gardner*, 227.

§ 35a. Right of Mortgagee, Cestui or Trustee to Bid in Property.

When the person conducting the sale for the trustee enters a bid for, and sells the property to the *cestui*, conflicting evidence as to the *bona fides* of the sale raises an issue for the jury, but where the judge of the county court in which the action is instituted, in the absence of a request for a jury trial, tries the case in accordance with its statutory procedure, the court's finding that the person conducting the sale for the trustee merely announced the bid theretofore given him by the *cestui*, is equivalent to the verdict of a jury and supports the conclusion that the sale was valid. *Dillingham v. Gardner*, 227.

§ 39b. Presumptions and Burden of Proof Upon Attack of Foreclosure.

While it is necessary that a deed of trust be foreclosed according to its terms and the trustor is entitled to a strict compliance therewith, the recitals in the trustee's deed to the purchaser are *prima facie* correct and the pre-

MORTGAGES—*Continued.*

sumption of law is in favor of the regularity of the execution of the power of sale, and the burden is upon the parties attacking the foreclosure to prove the irregularities relied upon by them. *Dillingham v. Gardner*, 227; *Pearce v. Watkins*, 636.

§ 39c. Waiver of Right to Attack Foreclosure and Estoppel.

Purchaser of equity of redemption with notice of pendency of action to restrain consummation of foreclosure, *held* estopped by laches from attacking foreclosure sale. *Pearce v. Watkins*, 636.

§ 39f. Actions to Set Aside Foreclosure.

Upon attack of foreclosure by the owner of the equity of redemption, the holder of the notes secured by the deed of trust is entitled to introduce them in evidence without proof of the signatures of the endorsers when it appears of record that the notes were signed by the trustor, since the mere holder of a negotiable instrument which is past due, is entitled to require the trustee to foreclose. *Dillingham v. Gardner*, 227.

Evidence, including recitals in trustee's deed, *held* sufficient to support conclusion of law that foreclosure was properly conducted and was valid. *Ibid.*

The owner of adjacent tracts of land executed deeds of trust on the respective tracts to different trustees. Defendant was the holder of the notes secured by both deeds of trust. Upon default, foreclosure was advertised by the respective trustees, but the same person conducted the sale as representative of both trustees. Each tract was separately offered for sale and bid in by defendant for approximately the amount of the respective notes secured thereby, and then both tracts were offered together and bid in by defendant at a slightly higher figure. *Held:* Although the manner of sale was unusual, no prejudice resulted to plaintiff, the owner of the equity of redemption, and he is not entitled to upset the foreclosure. *Ibid.*

Nor was joint report of sales prejudicial in absence of evidence that any person desired to increase bid or that property failed to bring its worth. *Ibid.*

When trustee merely announces bid of *cestui* theretofore given him and sells to *cestui*, and parties act in good faith, sale is valid. *Ibid.*

§ 40. Agreements to Purchase at Foreclosure for Benefit of Mortgagor or Trustor.

To create a parol trust there must be an agreement amounting to an undertaking to act as agent for another in the purchase of land, constituting a covenant to stand seized to the use or benefit of such other, but a mere parol agreement to convey land to another raises no trust in the latter's favor and comes within the provisions of the statute of frauds. *Wolfe v. Land Bank*, 313.

Trustor leasing property from *cestui que trust* after foreclosure and purchase of property by *cestui held* estopped to assert parol trust based upon alleged agreement of *cestui* to bid in property and reconvey to trustor. *Ibid.*

After foreclosure and the purchase of the property by the *cestui* there is no presumption of fraud arising from the relationship between parties which would vitiate the execution by the former trustor of a lease agreement. *Ibid.*

MUNICIPAL CORPORATIONS.

§ 3. Territorial Extent and Annexation.

Municipal corporations are creatures of the legislative will and are subject to its control, and the Legislature, in its discretion, may provide for the

MUNICIPAL CORPORATIONS—*Continued.*

annexation of new territory and enlarge the municipal jurisdiction to the new boundaries, and prescribe the terms and circumstances under which the annexation may be had and the manner in which it may be made, in the absence of constitutional restriction. *Dunn v. Tew*, 286.

§ 5. Municipal Powers in General: Legislative Control and Supervision.

Municipal corporations are creatures of the State, endowed for the public good with a portion of its sovereignty, and they must be at all times subject to its will. *McGuinn v. High Point*, 56; *Dunn v. Tew*, 286.

§ 8. Private Powers.

Defendant municipality, by resolution, passed by its city council, proposed to construct a hydroelectric plant. Later, the council passed an amendatory resolution under which the city proposed to submit to the control of the Federal Power Commission in the operation of the plant, and pursuant thereto obtained a Federal license. Thereafter a board of power commissioners was created and authorized by statute to exercise all the powers and duties of the city with respect to the plant contemplated in the prior resolutions. *Held:* The submission by the city to the control of the Federal Power Commission being *ultra vires*, the board of power commissioners has the authority to rescind the amendatory resolution of the council in regard thereto. *McGuinn v. High Point*, 56.

Municipal board of power commissioners *held* without authority to change fundamental character of project by resolution rescinding prior resolution of commissioners, so as to bring the project within the purview of the Revenue Bond Act of 1935, and thus obviate the necessity of a certificate of convenience from the Utilities Commissioner. *Ibid.*

Under provisions of statute creating it, municipal power board *held* without authority to affect pending litigation by changing character of project. *Ibid.*

The Revenue Bond Act of 1935 authorizing certain municipal projects without requiring a certificate of convenience from the Utilities Commissioner, was continued as to defendant municipality by chapters 65 and 561, Public-Local Laws of 1937. *Held:* The continuation of authority relates solely to projects within the scope of the Act of 1935, and the Public-Local Laws do not authorize the municipality to construct and finance projects beyond the scope of the Act of 1935 without obtaining a certificate of convenience. *Ibid.*

§ 14. Defects and Obstructions in Streets and Sidewalks.

A municipal corporation is under duty to exercise due care to keep its streets and sidewalks in a reasonably safe condition, and although it is not an insurer of their safety, it is required, in the exercise of due care, to remedy defects of which it has express or implied knowledge. *Wall v. Asheville*, 163.

Where a pit or embankment is adjacent to a sidewalk, whether the situation is such as to require the city, in the exercise of due care, to erect guard rails to protect pedestrians, or, if it has erected guard rails, whether such guard rails are adequate or sufficient, is ordinarily a question for the jury, and nonsuit was correctly denied in this case. *Ibid.*

A pedestrian is guilty of contributory negligence if, when confronted by two ways of travel, one safe and the other dangerous, she chooses the dangerous way with knowledge of the danger. *Ibid.*

Pedestrian had choice between sidewalk two feet wide with embankment adjacent thereto, and street in which her escort could walk abreast with her. *Held:* Whether she was guilty of contributory negligence in failing to confine her path of travel to sidewalk was for jury, and denial of nonsuit for contributory negligence was proper. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

The duty of a municipal corporation to keep its streets and sidewalks in a reasonably safe condition for travel implies the duty of making reasonable inspection to discover defects and obstructions, and the municipality is guilty of negligence if it fails to repair a dangerous condition of which it has either express or implied notice. *Radford v. Asheville*, 185.

The duty of a municipality to exercise due care to keep its streets and sidewalks in a reasonably safe condition for travel applies to manhole covers, unloading chutes, coal chutes, or any other device forming an integral part of the public ways. *Ibid.*

Evidence that the metal lid of a coal chute forming an integral part of a sidewalk, had become warped and that its hinges had rusted off, so that it would rear up or slide down the hill, and would clang and clatter when stepped on, and that for some time prior to the injury in suit children would jump up and down on it to make noise, tends to show an unsafe and dangerous condition in the sidewalk and that the condition had existed for a sufficient length of time to give the city implied notice thereof. *Ibid.*

The duty of a municipality to make reasonable inspection of its streets and sidewalks is not affected by the extent and number of its streets and sidewalks. *Ibid.*

Nonsuit *held* proper in this action to recover for death of intestate, who was killed when he failed to discover and take a curve in the street, but drove straight on into a ditch and trees growing near an old abandoned road. *Alberty v. Greensboro*, 649.

§ 40. Violation and Enforcement of Police Regulations.

The procedure to obtain a review by the courts of an order of a municipal board of adjustment relative to the enforcement of zoning ordinances is by *certiorari*, sec. 7, ch. 250, Public Laws 1923. *In re Pine Hill Cemeteries*, 735.

A municipal board of adjustment, when sitting as a body to review a decision of the building inspector relative to the enforcement of zoning ordinances, is a body with judicial or *quasi*-judicial and discretionary powers, and its findings of fact upon controverted questions of fact presented by the appeal are conclusive upon review by the Superior Court when the findings are made in good faith and are supported by evidence. *Ibid.*

In reviewing an order entered by a municipal board of adjustment relative to the enforcement of a zoning ordinance, the Superior Court is an appellate court with jurisdiction to review questions of law and legal inference only, and it may not substitute its judgment for, or undertake to exercise discretion vested by law in, the board, and, the record being complete, may not order the board to reopen or rehear for the consideration of additional evidence, or require the board to enter a new determination in the absence of clear legal error or oppressive and manifest abuse of discretion by the board. *Ibid.*

§ 42. Levy and Collection of Taxes.

Where the corporate limits of a municipality have been extended by legislative act (chapters 82, 201, Private Laws of 1925), the municipality has jurisdiction over the territory annexed and may levy and collect taxes on the property embraced therein, notwithstanding that the taxes so collected may be used to pay municipal indebtedness incurred prior to the time of the annexation and notwithstanding that streets and public improvements comparable to those enjoyed by the other residents of the municipality had not been afforded to those within the territory annexed, the making of improvements within the territory annexed being within the sound discretion of the municipality. *Dunn v. Teer*, 286.

MUNICIPAL CORPORATIONS—*Continued.*

The findings of fact made by the trial court under the agreement of the parties *are held* to support the court's conclusion of law that plaintiff, although his place of business was located one-half mile outside the limits of defendant municipality, was engaged in the business of buying and selling junk within the municipality, and the judgment holding plaintiff liable for license tax levied by the municipality under authority of the Revenue Act of 1939, ch. 158, is affirmed. *Weinstein v. Raleigh*, 643.

§ 45a. Rights and Remedies of Taxpayers.

Taxpayers *held* estopped by their conduct from attacking validity of municipal tax levy. *Berry v. Payne*, 171.

Where taxpayers' answer in action to foreclose tax certificate presents questions of law only, court may render judgment on the pleadings. *Dunn v. Tew*, 286.

NEGLIGENCE.

§ 1a. 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 were placed; and second, that such negligent breach of duty was the proximate cause of the injury. *Mills v. Moore*, 25.

Negligence is doing other than, or failing to do, what a reasonably prudent man, similarly situated, would have done. *Wellons v. Sherrin*, 476.

§ 1b. Distinction Between Negligence and Other Torts.

Plaintiff alleged that the defendant leased him certain property infected with germs of pulmonary tuberculosis without informing him of the fact, and that in consequence he contracted tuberculosis. *Held:* The action is for alleged negligent failure of defendant to inform plaintiff of the danger, and is based on negligence and not on fraud. *Powers v. Trust Co.*, 254.

§ 4a. Condition and Use of Land and Buildings in General.

This action was predicated upon alleged negligence of defendants, landlord and tenants, in maintaining an open pit on the land of one of the tenants to take care of the overflow from a septic tank on the leased premises, the expense of digging the pit and connecting it with the septic tank being prorated among defendants. There was no evidence that the landlord participated in the maintenance of the pit. *Held:* If the conduct of the tenants did not constitute negligence, the landlord cannot be guilty of negligence. *Wellons v. Sherrin*, 476.

§ 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. *Mills v. Moore*, 25; *White v. Chappell*, 652.

§ 7. Intervening Negligence.

Active negligence which continues to the moment of injury can rarely be insulated by intervening negligence, since if it is a substantial contributing factor to the injury it becomes the proximate cause or one of the proximate causes thereof. *Lancaster v. Greyhound Corp.*, 679.

NEGLIGENCE—*Continued.*

§ 8. Primary and Secondary Liability.

The doctrine of primary and secondary liability in tort actions is bottomed on acts of active and negative negligence of joint tort-feasors. *Bost v. Metcalfe*, 607.

A physician who negligently fails to administer proper treatment to a person injured through the wrongful act of a motorist is not, as to such motorist, primarily liable, in whole or in part, since his conduct constitutes an act of omission and not of commission, and the two are not joint tort-feasors. *Ibid.*

§ 9. Anticipation of Injury: Foreseeability.

In order for negligence to constitute the proximate cause of injury it is not required that the particular injury which resulted should have been foreseeable, it being sufficient if, under the circumstances, a reasonably prudent man could have foreseen that some injury would probably result. *Lancaster v. Greyhound Corp.*, 679.

§ 13b. Contributory Negligence of Parents as Bar to Recovery for Wrongful Death of Child.

In an action to recover for wrongful death of a 2½-year-old child, contributory negligence on the part of its mother is a bar to so much of the recovery as would accrue to her as a beneficiary of the child's estate, but negligence of the child's mother will not be imputed to the child's father, and is no bar to the recovery of the amount which would inure to his benefit as beneficiary of the child's estate. C. S., 160, 137 (6). *Pearson v. Stores Corp.*, 717.

§ 16. Pleadings.

If defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the charge of negligence, he must aptly request that the court require the pleading to be made more definite and certain, C. S., 537, or request a bill of particulars. C. S., 534. *Livingston v. Investment Co.*, 416.

§ 17a. Burden of Proof.

The plaintiff has the burden of proof on the issue of negligence and defendant has the burden of proof on the issue of contributory negligence. *Wall v. Asheville*, 163.

§ 17b. Questions of Law and of Fact.

Whether there is enough evidence to support a material issue is a matter of law. *Mills v. Moore*, 25.

Whether particular conduct is at variance with conduct of reasonably prudent man in similar circumstances is question for jury. *Wellons v. Sherrin*, 476.

What is negligence is a question of law, and, when the facts are admitted or established, the court may say whether negligence exists and whether it was a proximate cause of the injury. *Pearson v. Stores Corp.*, 717.

§ 19a. Sufficiency of Evidence and Nonsuit on Issue of Negligence.

Negligence is not presumed from mere fact of injury, but plaintiff must offer legal evidence tending to establish beyond a mere speculation or conjecture every essential element of negligence, and upon failure of plaintiff to do so, a nonsuit is proper. *Mills v. Moore*, 25.

Ordinarily, question of negligence is for jury. *Wall v. Asheville*, 163.

NEGLIGENCE—*Continued.*

§ 19b. Sufficiency of Evidence and Nonsuit on Issue of Contributory Negligence.

Since the burden of proving contributory negligence is on defendant, a nonsuit on the ground of contributory negligence can be granted only when but one inference can be reasonably drawn from the evidence. *Wall v. Asheville*, 163; *Hampton v. Hawkins*, 205.

A nonsuit is properly entered on the ground of contributory negligence when contributory negligence is established by plaintiff's own evidence, but where the facts are not admitted or where more than inference may reasonably be drawn from the evidence, the issue must be submitted to the jury. *Pearson v. Stores Corp.*, 717.

§ 19c. Res Ipsa Loquitur. (Does not apply to skidding see Automobiles.)

Proof of facts invoking the doctrine of *res ipsa loquitur* establishes a *prima facie* case entitling plaintiff to the submission of the issue of negligence to the jury, and the doctrine does not merely cast the burden of going forward with the evidence on the defendant to explain the matters which are supposed to be peculiarly within his knowledge, and evidence in explanation offered by defendant does not rebut the presumption, but merely raises for the determination of the jury the question whether plaintiff has established negligence by the preponderance of the evidence, the credibility of the evidence remaining within the exclusive province of the jury. *Mitchell v. Saunders*, 178.

§ 20. Instructions.

The court's charge, after reciting plaintiff's evidence, that if the jury found those to be the facts by the greater weight of the evidence, and further found "that that was negligence," *is held* not error as submitting a question of law to the jury, but the charge properly left it for the jury to determine whether upon the facts as contended for by plaintiff, defendants' conduct constituted negligence, *i.e.*, whether defendants had done or failed to do what a reasonably prudent man would have done in the circumstances of the case. *Wellons v. Sherrin*, 476.

The court charged the jury that if they found by the greater weight of the evidence the facts and circumstances to be as contended for by plaintiff, and that the conduct of defendants in such circumstances constituted negligence, to answer the issue of negligence in the affirmative, but that "if you are not so satisfied about it" to answer the issue in the negative. *Held:* The quoted phrase, when taken in connection with other portions of the charge, merely instructed the jury, in effect, that the plaintiff was required to satisfy them of the correctness of his position by the greater weight of the evidence, and the use of the phrase, construing the charge as a whole, was not prejudicial to plaintiff. *Ibid.*

Charge *held* erroneous in failing to declare and explain the law applicable to the evidence. *Ryals v. Contracting Co.*, 479; *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823; *Smith v. Kappas*, 850.

Where the jury is instructed that if they answer the issue of contributory negligence in the affirmative they should not proceed further, but should leave the issue of damages unanswered, a further instruction that an affirmative finding of contributory negligence would end the case and plaintiffs could not recover, cannot be held for error, since the jury, being composed of men of intelligence, could have inferred that an affirmative finding of contributory negligence would bar recovery notwithstanding the further instruction. *Swinson v. Nance*, 772.

NUISANCES.

§ 1b. Distinction Between Nuisance and Other Torts.

Plaintiff alleged that defendant leased him certain property infected with germs of pulmonary tuberculosis without informing him of the fact and that in consequence he contracted tuberculosis and that the negligence of defendant was continuing and created a nuisance. *Held:* The gravamen of the complaint is negligence and not nuisance. *Powers v. Trust Co.*, 254.

PARENT AND CHILD.

§ 2. Proof of the Relationship and Presumption of Paternity. (Action by child against alleged putative father to compel him to provide support see Bastards § 10.)

The old common law rule that the husband is conclusively presumed to be the father of his wife's child unless it is shown that he was impotent or not within the four seas, has been tempered so that now access or nonaccess of the husband is a fact to be established by proper proof and the question of legitimacy or illegitimacy is one for the jury upon such evidence, but proof of access still raises an irrebuttable presumption of legitimacy. *Ray v. Ray*, 217.

Neither testimony of the wife nor testimony of declarations made by her is competent to prove the nonaccess of her husband, but when the parentage of the child is directly involved the wife is competent to testify as to her illicit relations. *Ibid.*

That the wife is notoriously living in open adultery is a potent circumstance tending to show nonaccess. *Ibid.*

§ 7. Liability of Parent for Tort of Child. (Family car doctrine see Automobiles § 25.)

Parents are not responsible for the torts of their minor son by reason of the relationship, but liability must be predicated upon evidence that the son was in some way acting in a representative capacity such as would make the master responsible for the servant's torts. *Hawes v. Haynes*, 535.

§ 9. Nature and Elements of Offense of Abandonment.

The statute, C. S., 4447, pertaining to abandonment of wife and children, being a penal statute, must be strictly construed. *S. v. Gardner*, 331.

C. S., 4447, has no application to illegitimate children, and therefore an indictment drawn under this section charging defendant with the abandonment of his illegitimate child fails to charge a crime. *Ibid.*

In this State there is no statutory crime of abandonment of an illegitimate child, and no such crime existed at common law. *Ibid.*

PARTIES.

§ 10. Joinder of Additional Parties.

This action was instituted by an administrator *d. b. n., c. t. a.*, against the life tenant and the trustee of an active trust for the management of the property created by the life tenant. The complaint alleged mismanagement of the trust and the procuring of judgments by the trustee through fraud and the acquisition of title to certain lands of the estate by the trustee through foreclosure of the said judgments. *Held:* The remaindermen under the will are properly made parties by order of the court upon motion of the trustee. *Pegram v. Trust Co.*, 224.

It is the duty of the court to bring in all parties necessary to a complete determination of the controversy, Michie's Code, 460. *Jones v. Griggs*, 700.

PARTIES—*Continued.*

§ 11. Substitution of Parties.

This action was instituted against a bank to establish plaintiff's right to a deposit as a donee of a gift of the deposit *causa mortis*. The bank, after proper notice, filed petition, supported by proper affidavit, requesting that the administrator of the alleged donor be made a party and be substituted as the defendant, upon the bank's payment into court the amount of the deposit. The clerk granted the bank's petition over exception of plaintiff. Upon appeal to the Superior Court, the judge set aside the order of the clerk and entered an order that the bank should hold the funds in controversy until the termination of the litigation, and should remain a party, but that it should not be liable for any costs or expenses. *Held:* The Superior Court had jurisdiction to enter the order and the order protects all the litigants and does not prejudice the administrator, and his exception thereto cannot be sustained. Michie's Code, 460. *Bynum v. Bank*, 109.

PARTITION.

§ 4b. Evidence and Burden of Proof.

Upon plea of sole seizin in an action for partition, the introduction in evidence by plaintiff of the admissions in the answer that the person dying intestate without issue seized of the land was the nephew of the parties, and that his father predeceased him, makes out a *prima facie* case, and it is error for the court to rule that plaintiff has the burden of going forward with the evidence, the burden being upon defendant to introduce evidence in support of her allegation that plaintiff is illegitimate before plaintiff should be required to offer evidence in rebuttal. *Davis v. Crump*, 625.

§ 4e. Distribution of Proceeds of Sale.

When one tenant in common purchases the land at the partition sale and borrows the purchase price, securing the sum borrowed by a deed of trust on the property, other tenants in common ratifying the sale and suing to recover their *pro rata* part of the sale price, may not hold the *cestui que trust* liable, there being no evidence connecting the *cestui* with the partition sale, nor that the *cestui* knew or had reason to apprehend that the proceeds of the loan would not be properly distributed. *Laughridge v. Land Bank*, 392.

The purchaser of lands at sale for partition conducted by a commissioner appointed by the court is not under duty to see that the purchase price is properly disbursed. *Perry v. Bassenger*, 838.

§ 6. Partition Between Life Tenants and Remaindermen.

Sale of life estates and remainders under order of court will not be upset except for compelling reasons when rights of third parties have attached. *Perry v. Bassenger*, 838.

Proceeding for sale of life estates and defeasible remainders for partition instituted before clerk *held* not void. *Ibid.*

PAYMENT.

§ 2. Payment by Check.

The giving of a worthless check is not payment. *Cauley v. Ins. Co.*, 398.

PERJURY.

§ 3. Prosecution and Punishment.

Evidence that defendant "testified" on former trial, together with transcript stating he was "duly sworn," *held* sufficient for jury on question of whether false statement was under oath. *S. v. Mann*, 212.

PHYSICIANS AND SURGEONS.

§ 15a. Liability for Negligence in General.

Where one surgeon assists another in performing an operation and both assist in placing gauze sponges in the wound, both are charged with the duty of exercising due care to remove all the gauze sponges. *Mitchell v. Saunders*, 178.

§ 15e. Sufficiency of Evidence of Negligence.

Since a physician or surgeon is not an insurer of results, no presumption of negligence can arise from the mere result of treatment upon the theory that it was not satisfactory, or less than could be desired, or even different from what might be expected. However, when the cause of injury does not occur in the ordinary course of things when proper care is exercised, and proper inferences may be drawn by ordinary men from the facts adduced, so that the presumption rests upon more than the mere fact of disappointing results from the treatment, the doctrine of *res ipsa loquitur* may apply, the applicability of the doctrine depending upon the facts and circumstances of each case. *Mitchell v. Saunders*, 178.

Where it is established that defendant surgeons left a gauze sponge in a wound after an operation the doctrine of *res ipsa loquitur* applies upon the presumption that defendants failed to exercise due care to remove all foreign bodies from the wound after the operation, which presumption entitles plaintiff to go to the jury notwithstanding evidence on the part of the physicians as to the methods employed during the operation, the manner in which the gauze sponges were handled and the exercise of great care in the usual and customary manner to prevent leaving any sponges in the wound. *Ibid.*

Plaintiff's evidence established that defendant physicians left a gauze sponge in the wound after the operation and that plaintiff suffered damages as a result thereof. *Held:* The fact of leaving a sponge in plaintiff's body is so inconsistent with due care as to raise an inference of negligence entitling plaintiff to go to the jury irrespective of the application of the doctrine of *res ipsa loquitur*. *Ibid.*

PLEADINGS.

§ 2. Joinder of Causes.

Plaintiff did certain work under a contract with a municipality. He alleged that the town wrongfully prevented him from completing the work and sought to recover of the town on the contract or against the individual defendants, officers of the municipality, for wrongfully inducing him to enter into an *ultra vires* contract. *Held:* Under the provisions of C. S., 546, as amended, plaintiff may unite the cause in tort and the cause *ex contractu* and seek to recover of defendants in the alternative. *Peitzman v. Zebulon*, 473.

§ 16a. Demurrer for Misjoinder of Parties and Causes.

Complaint alleging cause against municipality on contract and cause against municipal officers for wrongfully inducing plaintiff to enter into unauthorized contract, *held* not demurrable for misjoinder of parties and causes. *Peitzman v. Zebulon*, 473.

§ 20. Office and Effect of Demurrer.

A demurrer admits the truth of the facts alleged in the complaint. *Efird v. Comrs. of Forsyth*, 96; *Hearn v. Erlanger Mills*, 623.

§ 22. Amendment During Trial.

After time for filing answer has expired, defendant's motion to be allowed to amend is addressed to the discretion of the trial court, and its denial of

PLEADINGS—*Continued.*

the motion is not subject to review except in case of manifest abuse. C. S., 547. *Osborne v. Canton*, 139.

The Supreme Court has the power to grant a motion by defendant to be allowed to amend his answer, C. S., 1414, but the motion is denied in this case, since the matter sought to be alleged by amendment is immaterial to the defense. *Ibid.*

Upon the call of this case for trial, the *feme* defendant demurred. Whereupon counsel for plaintiff stated that through inadvertence her name had been omitted from the allegations of the complaint, but that the allegations against the male defendant were intended to apply to her also, and asked leave to so amend. It was stipulated that this might be considered as done, and the trial proceeded. *Held:* The procedure was tantamount to an amendment curing the defect, and the *feme* defendant's demurrer in the Supreme Court is overruled. *Freeman v. Ball*, 329.

§ 23. Amendment After Judgment Sustaining Demurrer.

A demurrer to an affirmative defense was sustained on the former appeal. Thereafter defendant moved in the trial court to be allowed to amend. *Held:* The motion to be allowed to amend the answer was addressed to the discretion of the trial court. C. S., 547. *Cody v. Hovey*, 369.

Plaintiff appealed from the order of the clerk allowing defendant's motion to be allowed to amend answer after judgment sustaining demurrer to an affirmative defense set up therein had been affirmed on appeal. *Held:* Upon appeal to the judge, the fact that the clerk had ruled on the motion, in vacation, in no way limits the discretion of the Superior Court, but the court has the power to consider the motion *de novo* in the exercise of its sound discretion. *Ibid.*

§ 24. Withdrawal of Pleadings.

After a pleading is filed it becomes a part of the record and passes beyond the control of the pleader, and, ordinarily, thereafter the question of withdrawal of the pleading must be presented to the court by motion addressed to its discretion. *McFetters v. McFetters*, 731.

§ 27. Motion for Bill of Particulars or That Allegations Be Made More Definite and Certain.

If defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the charge of negligence, he must aptly request that the court require the pleading to be made more definite and certain, C. S., 537, or request a bill of particulars. C. S., 534. *Livingston v. Investment Co.*, 416.

The right of a defendant to require plaintiff to make the complaint more definite and certain by amendment, or to require him to file a bill of particulars, must be preserved by motion made in apt time, and after answer is filed the matter is waived. *Ibid.*

§ 28. Judgment on the Pleadings.

Where the answer admits the material allegations of the complaint and alleges new matter not relating to a counterclaim, the new matter is deemed denied, Michie's Code, 543, but when such new matter does not raise issues of fact but presents only questions of law, the court may render judgment on the pleadings, there being no controverted issues of fact for the determination of the jury. Michie's Code, 554, 556. *Dunn v. Tew*, 286.

PLEADINGS—*Continued.*

§ 29. Motions to Strike.

In an action to establish a *donatio mortis causa*, allegations setting forth facts tending to show motive, the setting, the relationship between the parties, the intention of the donor, and the state of his health and the circumstances surrounding his death, are proper, and defendant administrator's motion to strike such allegations from the complaint is properly denied. *Bynum v. Bank*, 109.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

Plaintiff offered testimony of a witness that he heard defendant driver state to an officer at the scene of the accident that he (the driver) at the time of the accident was going to a certain locality to make collections. *Seawell, J.*, writing for the Court, is of the opinion that the fact of agency having been established by evidence *aliunde*, testimony of the declaration was competent to show that at the time the agent was engaged in the duties of his employment. *Stacy, C. J., Devin, Barnhill*, and *Winborne, JJ.*, are of the opinion that testimony of the declaration is incompetent. *Pinnix v. Griffin*, 35.

§ 8a. Liability of Principal for Acts of Agent.

Where an authorized agent employs a workman to do certain work for the principal, the legal effect is the same as though the principal itself had employed the workman, and the relationship of master and servant exists between the principal and the workman under the doctrine of *qui facit per alium facit per se*. *Livingston v. Investment Co.*, 416.

A principal is bound by the acts of his agent which are within the authority actually conferred and also those which are within the authority which may be implied as usual and necessary to the proper performance of the work entrusted to the agent, and third persons dealing with the agent are not bound by secret limitations upon the agent's authority. *Cab Co. v. Casualty Co.*, 788.

§ 12. Ratification.

The doctrine of ratification generally applies only when the person sought to be charged accepts the benefits of an unauthorized or *ultra vires* act and, with full knowledge of the material facts, fails to repudiate the transaction. *Brinson v. Supply Co.*, 505.

PROCESS.

§ 1. Form and Requisites of Process.

Justice of the peace may deputize secretary to sign his name to summons in his presence and under his supervision. *Johnson v. Chambers*, 769.

§ 6b. Service on Foreign Corporation by Service on Secretary of State.

The meaning of the phrase "doing business in this State" as used in C. S., 1137, is not susceptible to an all embracing definition, and each case must be decided upon the particular facts therein appearing, the general criteria being that a foreign corporation is doing business in this State if it transacts in this State the business it was created and authorized to do, through representatives in this State, and thus is present in this State through the person of its representatives. *Parris v. Fischer & Co.*, 292.

Phrase "doing business in this State" connotes some degree of continuity, but proof that agent did business for defendant and that defendant maintained agents in this State is sufficient. *Ibid.*

PROCESS—*Continued.*

Defendant was a nonresident corporation engaged in the business of manufacturing and selling electro-surgical medical equipment. The evidence tended to show that defendant maintained dealer-representatives in this State, that one of them sold a machine to plaintiff under a title retaining conditional sales contract, that he executed the contract for and in the name of the defendant, that defendant accepted the contract, that thereafter the dealer-representative made two visits to plaintiff for the purpose of collecting installments due, and on his last visit undertook collection by repossession of the property, and that defendant wrote letters to plaintiff justifying its agent's repossession. *Held:* The evidence discloses that the agent was more than a mere broker or factor, and is sufficient to sustain the conclusion of law by the court that defendant was doing business in this State for the purpose of service of process on it by service on the Secretary of State under the provisions of C. S., 1137. *Ibid.*

§ 6g. Service on Foreign Motor Carriers.

Plaintiff, a nonresident, instituted this action against a nonresident corporation doing business as a common carrier, on a transitory cause of action arising in another state. *Held:* Service of process on the person designated as process agent for the State of North Carolina by defendant in compliance with U. S. C. A. Title 49, sec. 321 (c), is invalid and defendant is entitled to have the action dismissed. *Steele v. Tel. Co.*, 206 N. C., 220, cited and distinguished. *King v. Motor Lines*, 223.

§ 7. Service on Unincorporated Associations.

Attempted service of process in any way upon an unincorporated labor union is void, since such association has no legal entity and may not sue or be sued in the name of the association. *Hallman v. Union*, 798.

§ 8. Service on Nonresident Automobile Owners.

Plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State. *Held:* Service of process on defendant by service on the Commissioner of Revenue under the provisions of Michie's Code, 491 (a), is valid. *Bogen v. Bogen*, 51.

Service of process under Indiana law on nonresident auto owner is predicated upon receipt for registered mail containing notice and copy of process, or refusal to accept or claim such registered mail. *Casey v. Barker*, 465.

PUBLIC OFFICERS.

§ 5b. De Facto Officers.

A *de facto* officer is one whose title is not good in law, but who is in fact in the unobstructed possession of the office, discharging its duties in full view of the public, in such manner and in such circumstances as not to give the appearance of being an usurper. *Berry v. Payne*, 171.

The acts of a *de facto* officer will be held valid upon principles of policy and justice as to third persons having occasion to deal with the officer, since third persons have the right to act upon the assumption, without investigating his title, that he is a rightful officer. *Ibid.*

Mayor and commissioners reorganizing municipal government after lapse of fourteen years, during which two of them accepted other public offices, *held de facto* officers of the municipality. *Ibid.*

PUBLIC OFFICERS—*Continued.*

§ 6. Tenure and Removal.

A person accepting a public office created by the General Assembly takes same subject to the right of the General Assembly to abolish such office, unless restrained by the Constitution, even during the term of office, since tenure does not rest on contract and is not necessarily protected by the Constitution. *Efird v. Comrs. of Forsyth*, 96.

§ 7a. Personal Liability to Public in General.

Public officers may not be held individually liable for breach of their official and governmental duties which involve the exercise of judgment and discretion unless they act corruptly and of malice. *Old Fort v. Harmon*, 241.

Public officers may not be held individually liable for negligent breach of purely ministerial duties imposed upon them by statute for the public benefit unless the statute itself makes provision for such liability, since the statutes creating municipal offices and imposing duties upon the officials must be construed *in para materia* and, under the maxim *expressio unius est exclusio alterius*, the fact that in some instances the statutes impose personal liability while in other instances they fail to impose such liability is equivalent to a legislative declaration that in the latter instances personal liability does not exist. *Ibid.*

This action was instituted by a municipality against its former mayor and former aldermen alleging negligent breach of duty on the part of said aldermen in not requiring the mayor, who acted as superintendent of waterworks and collector of taxes, to be bonded, and in failing to perform their duties in regard to supervision, accounting and auditing of the municipal finances, and in failing to attentively look after the business of the plaintiff municipality in violation of their statutory duties. *Held:* Since the complaint fails to allege that the breaches of duty were corrupt or malicious, or that the statutes imposing the duties provided for personal liability, defendant aldermen's demurrer was properly sustained. *Ibid.*

In this action by a municipality the complaint alleged that the former mayor failed and refused to account for funds of the municipality in a certain sum, resulting in loss to the municipality in said sum, and that its former aldermen negligently failed to perform their duties in regard to supervision, accounting and auditing of the municipal finances. *Held:* Since it does not appear that the loss to the municipality would not have occurred had the aldermen performed all the duties alleged to have been breached by them, the demurrer of the aldermen was properly sustained for failure of the complaint to allege that the loss was a direct and immediate result of their alleged breach of duty. *Ibid.*

This action was instituted by a municipality against its former mayor and its former aldermen alleging that defendants elected a member of the board of aldermen the chief of police, that the salary of the chief of police was paid by the municipality and that such payment constituted an illegal expenditure, since an alderman may not hold any other office or position with the municipality, and that defendants were indebted to the municipality in the amount of the salary so paid. The person elected chief of police and alleged to have received salary therefor was not made a party. The complaint failed to allege that defendants' action was malicious or corrupt or even wrongful and willful, and further failed to allege that the statutes which imposed the duties upon defendants which plaintiff alleged they breached, provided for individual liability for breach of said duties, and further failed to allege that the municipality did not receive adequate consideration for the moneys expended, and

PUBLIC OFFICERS—*Continued.*

failed to allege intent on the part of defendants to evade the law. *Held:* Defendants' demurrer to the complaint was properly sustained. *Old Fort v. Harmon*, 245.

§ 11. Amount of Compensation.

The provision of Art. IV, sec. 18, of the Constitution of North Carolina that the salaries of judges shall not be diminished during their continuance in office applies only to judges of courts existing by virtue of the Constitution and not to those established by legislative enactment. *Efird v. Comrs. of Forsyth*, 96.

Legislature may delegate to county commissioners discretionary power to fix salary of judge of county court, but when commissioners act arbitrarily in reducing salary the judge may recover from county. *Ibid.*

§ 12. Persons Entitled to Emoluments of Office.

The *de jure* officer is entitled to the fees, salary and emoluments pertaining to the office from the date he is entitled to the office by valid election or appointment notwithstanding that the *de facto* officer actually performs the duties of the office pending the adjudication of the title. C. S., 878, 879, 880, 885. *Osborne v. Canton*, 139.

A municipality can be required to pay the salary of an officer only once, and therefore where it has paid the salary to the *de facto* officer, the *de jure* officer may not recover the salary for the same period from the municipality, but where the salary of the office has not been paid by the municipality pending the determination of title to the office, the *de jure* officer is entitled thereto. *Ibid.*

§ 13. Action to Recover Emoluments of Office.

This action was instituted by the judge of the Forsyth County Court to recover (1) salary during suspension of the court, (2) salary after reduction voluntarily taken from date of his demand for restoration, (3) amount of subsequent reductions in salary upon allegations that commissioners exercise discretionary power to reduce salary in arbitrary manner in bad faith. *Held:* Defendant county's demurrer to first cause was properly sustained, since they had discretionary power to suspend court; demurrer to second cause was properly sustained for failure of allegation that claim had been filed as required by statute; demurrer to third cause should have been overruled since courts will grant relief from arbitrary exercise of discretionary power. *Efird v. Comrs. of Forsyth*, 96.

Although *mandamus* would lie to compel exercise of such discretionary power in correct manner, such remedy is not exclusive and does not preclude suit to recover. *Ibid.*

QUO WARRANTO.

§ 2. Proceedings.

When defendant refuses to surrender the office on the ground that he is the *de jure* officer, relator is not required to file bond or take the oath of office as conditions precedent. *Osborne v. Canton*, 139.

In an action in the nature of *quo warranto*, to try title to public office, the question of damages, including the right to the fees and emoluments of the office, must be determined in the proceeding, and when the judgment of the Superior Court that relator is entitled to the office is affirmed on appeal, the cause remains open for further proceedings in the Superior Court for the adjudication of damages. *Ibid.*

RAILROADS.

§ 2. Right of Way.

A right of way for railroad purposes may be acquired by statutory presumption, and evidence tending to show that plaintiff railroad company was successor to the Western North Carolina Railroad Company which constructed its tracks over the lands of defendant, that the tracks had been in continuous use, and further that the right of way was not acquired by purchase or condemnation, *is held* sufficient to be submitted to the jury on the question of plaintiff's acquisition of an easement for 100 feet on either side of the center of its tracks under the statutory presumption of a grant from the owner of the land (Private Laws of 1854-55, ch. 228, sec. 29.) *R. R. v. Lissenbee*, 318.

The statutory presumption of a grant of land for a railroad right of way arises only in the absence of contract in relation to the land through which the railroad may pass, and the burden is upon the party claiming the benefit of such presumption to show every fact out of which it arises. *Ibid.*

When a railroad company acquires a right of way for railroad purposes it may be occupied and used by the railroad company to its full extent, and the railroad company is the judge of the extent of use necessary for the proper operation of its trains and may enjoin the owner of the land from interfering from a proper increase in the use of the easement. *Ibid.*

The fact that shortly after tracks are laid they are relocated does not affect the acquisition of an easement along the relocated tracks by statutory presumption, since the relocation under authority of the company's charter gives rise to the statutory presumption of a grant after the expiration of the time prescribed. *Ibid.*

§ 9. Accidents at Crossings.

Evidence *held* to establish as matter of law contributory negligence on part of driver constituting proximate cause of crossing accident. *Hampton v. Hawkins*, 205.

Evidence that driver was traveling at night along highway at 60 miles per hour and ran into 42nd car of train, the engine and 41 cars having already passed over crossing, *held* to disclose intervening negligence on part of driver insulating any negligence on part of railroad in failing to give warning of train's approach, and railroad's motion to nonsuit in action for wrongful death of passenger in car should have been granted. *Chinnis v. R. R.*, 528.

Where the evidence discloses that the driver of an automobile traveling about 60 miles per hour crashed into the 42nd car of defendant's freight train after the engine and 41 cars, traveling at about 15 miles per hour, had already passed over the crossing, and that the view of the crossing itself was unobstructed for 225 feet or more, the fact that the railroad company had left a tank car on either side of the crossing so as to obstruct the view of approaching trains, cannot be held a proximate cause of the collision. *Ibid.*

The evidence disclosed that the accident in suit occurred where defendant's tracks crossed at a grade a short paved highway connecting two other highways, that the connecting highway, although a public road, was not a thoroughfare, that it was in a rural section, and that there were only a few houses and no unusual amount of travel along the two miles of the road's extent, and there was no evidence of unusual or hazardous conditions existing at the crossing. *Held:* It was not the duty of the railroad to provide signal lights or a watchman at the crossing late at night. *Ibid.*

§ 10. Injuries to Persons on or Near Track.

Plaintiff's evidence tended to show that his intestate was prone on the track when struck by defendant's train, that the accident occurred on a clear day,

RAILROADS—*Continued.*

that the place of the accident could have been seen 200 or 300 yards from the engine of the approaching train, and that the train could have been stopped in 150 to 200 feet. *Held:* In the absence of evidence that intestate was prone on the track for a sufficient length of time for him to have been seen by the engineer in time to have stopped the train before striking him, the doctrine of last clear chance is inapplicable. *Justice v. R. R.*, 273.

When from the evidence it is just as probable that intestate staggered into the side of the moving train as it is that he was prone on the track for a sufficient length of time for the engineer to have seen him and stopped the train before striking him, plaintiff is not entitled to recover on the doctrine of last clear chance, since the burden is on plaintiff to do more than balance probabilities. *Ibid.*

Testimony of a witness that about three minutes before the train came, he looked down the track and did not see anyone on the track, that he could have seen anyone standing on the track but, because of the grade, could not have seen anyone prone on the track, is no evidence that intestate was prone on the track at that time. *Ibid.*

Expert testimony that intestate was prone on the track at the time he was struck by defendant's train is no evidence that intestate was prone on the track for a sufficient length of time before he was struck for the engineer to have seen him and stopped the train before striking him. *Ibid.*

RAPE.

§ 7. Competency and Relevancy of Evidence.

In this prosecution for rape, a physician testified for the State in regard to his examination of prosecutrix, and also stated that he had had two other like cases. Defendant's counsel, on cross-examination, asked him whether the other cases had exhibited like calm. *Held:* The State's objection to the question was properly sustained, since the witness' answer would have related to *res inter alios acta*. *S. v. Wagstaff*, 15.

§ 10. Verdict and Sentence.

A verdict of guilty of rape not only supports sentence of death but makes such sentence mandatory. C. S., 4204. *S. v. Wagstaff*, 15.

RECEIVERS.

§ 11. Sales and Conveyances.

A receiver's authority to sell real estate is predicated upon, and limited by, the court's order of sale, and the sale is made effective by the court's order of confirmation, and therefore, in ascertaining the receiver's authority to sell and in determining what land is conveyed, the order of sale, the report of sale, and the order of confirmation must be considered together as one instrument. *Morehead v. Bennett*, 747.

It is the duty of the purchaser at a receiver's sale to see that the receiver was authorized by the court to make the sale, that the sale was made under such authority, that the sale was confirmed, and that the deed accurately described the land which the receiver was directed to sell. *Ibid.*

REFORMATION OF INSTRUMENTS.

§ 3. Mutual Mistake.

Evidence that the grantee desired to purchase the particular lot which was described in her deed, and that, at the time she offered to purchase, the

REFORMATION OF INSTRUMENTS—*Continued.*

parties thought that grantors owned the lot, without evidence that the parties had gone on the premises or that they had mistakenly inserted the description of the lot intended to be conveyed, is insufficient to support a finding that the parties intended to describe another lot in the subdivision to which grantors had title, and grantors are not entitled to reformation for mutual mistake of the parties. *Reynolds v. Wood*, 626.

REMOVAL OF CAUSES.

§ 4a. Determination of Whether Controversy Is Separable.

Plaintiff instituted this action under the Federal Employers' Liability Act to recover for injuries sustained when he hit a structure maintained in close proximity to the track while engaged in the performance of his duties on the train, alleging negligent failure on the part of the defendant to provide a reasonably safe place to work. Defendant denied negligence but alleged that if it were guilty of negligence, the company owning the structure was also guilty of negligence which concurred in producing the injury, and that the owner of the structure had executed a contract indemnifying the railroad company from liability in regard thereto, and the owner of the structure was made a party defendant under C. S., 618, as amended. The owner of the structure then moved for a removal to the Federal Court on the ground of the separability of the action and diversity of citizenship. *Held:* The question of separability will be determined from the allegations of the complaint irrespective of the allegations in the cross action, and the fact that the cross action improperly joins an action on the indemnity agreement and fails to state a good cause of action thereon, cannot be asserted by the codefendant as the basis of its contention of separability, and the codefendant's motion to remove is properly denied. *Lackey v. R. R.*, 195.

SALES.

§ 13. Warranties in General.

In contracts of purchase and sale, the fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract. *Petroleum Co. v. Allen*, 461.

§ 14a. Operation and Construction of Special Warranties.

Where the parties are bound by a written guarantee that the merchandise sold would give the buyer roof protection for a period of 10 years if properly applied, and that if the product should fail to give such protection the seller would furnish sufficient additional like material to afford such protection for the ten-year period, an instruction to the effect that the purchaser would be liable for the purchase price if the roof coating was good for the purpose for which such roofing is generally good for, irrespective of whether it was good for the roof of the building of purchaser, cannot be held for error when there is no evidence that the roof coating was applied as directed or that the purchaser had demanded "additional like material to keep the roof in leak-proof condition." *Petroleum Co. v. Allen*, 461.

§ 14b. Exclusion of Implied Warranties by Stipulation or by Express Warranties.

Where the seller of roofing material gives a written special warranty of roof protection for a period of ten years if the product is applied as directed, both parties are bound by the special warranty, and the warranties ordinarily

SALES—*Continued.*

implied in contracts of purchase and sale are excluded thereby. *Petroleum Co. v. Allen*, 461.

A stipulation in the written order given by the purchaser to the seller that the seller will not be liable for any agreement, verbal or otherwise, not written or printed on the order, waives any prior purported guarantee, oral or otherwise, made by the seller's agent. *Ibid.*

Where the seller's written guarantee excludes all prior warranties or guarantees made by its agent, if any, a requested instruction based upon prior purported guarantees of the seller's agent is properly refused, since such instruction would be foreign to the issues involved. *Ibid.*

SANITARY DISTRICTS.

§ 1. Establishment.

Signers of a petition for the creation of a sanitary district under the provisions of ch. 100, Public Laws 1927 (Michie's Code, 7077 [a], *et seq.*), are entitled as a matter of right to withdraw their names from the petition at any time before action is taken on the petition by the county commissioners on the question of approval, and when their withdrawal reduces the number of signers to less than 51% of the resident freeholders within the proposed district the board of county commissioners is without jurisdiction and its approval of the petition may be enjoined. *Idol v. Hanes*, 723.

SEALS.

§ 2. Adoption and Affixing.

The maker's admission that he signed the printed form of a note having the word "seal" printed at the usual place after his signature, places the burden upon him of showing that he did not adopt the seal, and his testimony that he could not say that he intended to show the word "seal" and couldn't say at the time of testifying that he remembered seeing the word "seal" is no evidence that he had not adopted the seal. *Currin v. Currin*, 815.

STATE LANDS.

§ 1a. Land Subject to State Grant.

All vacant and unappropriated lands belonging to the State, with certain well defined exceptions, are subject to entry and grant, C. S., 7540, *et seq.*, and when there are successive grants of the same land, the prior grant prevails. *Perry v. Morgan*, 377.

While lands covered by navigable waters are not subject to State grant, defendants' evidence tending to show that the *locus in quo* is not covered by navigable waters *is held* sufficient to raise issue of fact for the determination of a jury. *Ibid.*

§ 1b. Sufficiency of Description.

The description in the State grant under which defendants claim in this case *is held* sufficiently definite to be aided by parol, and defendants' parol evidence as to its location *is held* sufficient to be submitted to the jury. *Perry v. Morgan*, 377.

In this proceeding for the registration of land under the "'Torren's System," defendants' evidence of claim under a prior State grant and parol evidence in explanation of a latent ambiguity as to the location of the land embraced in the grant, *is held* sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants' exception to the refusal of the court to submit an issue to the jury as to

STATE LANDS—*Continued.*

whether petitioners were the owners of the land and entitled to have title thereto registered under the statute, is sustained. *Ibid.*

STATUTES.

§ 5a. General Rules of Construction.

It is a recognized principle of statutory construction that when words of general import, the subject of a statute, are followed by words of particular or restricted import relating to the same subject matter, the latter will operate to limit or restrict the former. *In re Steelman*, 306.

The end of all statutory construction is to discover and to effectuate the legislative intent. *Ibid.*

§ 8. Construction of Penal or Criminal Statutes.

Penal statutes must be strictly construed. *S. v. Garäner*, 331.

§ 10. Repeal by Implication.

The repeal of statutes by implication is not favored, and a later statute will not repeal a former, dealing with the same subject matter, if the two statutes can be reconciled and both declared to be operative without repugnance. *S. v. Calcutt*, 545.

TAXATION.

§ 1. Uniform Rule and Discrimination.

The power vested in the General Assembly to tax and to exempt property from taxation are both circumscribed, and are required by the Constitution to be exercised with equality and fair play so that all similarly situated be subject to the same rule. *Rockingham County v. Elon College*, 342.

§ 20. Exemption of Property of Educational, Charitable and Religious Institutions From Taxation.

The power of the Legislature to exempt from taxation property not owned by the State or its political subdivisions is perforce limited and restricted by the scope of the constitutional grant of the permissive power of exemption. Article V, sec. 5. *Rockingham County v. Elon College*, 342.

The power vested in the General Assembly to tax and to exempt property from taxation are both circumscribed, and are required by the Constitution to be exercised with equality and fair play so that all similarly situated be subject to the same rule. *Ibid.*

The criteria in determining whether the General Assembly has the power to exempt certain property from taxation is the purpose for which the property is held and not the character of the owner, exemptions permitted by the Constitution not being *in personam* but *in rem*, based upon the purpose for which the *res* is held. *Ibid.*

Business property owned by educational institution and held by it for profit is not exempt from taxation. *Ibid.*

Residential property owned by an educational institution, not used in connection with the college, but rented to individuals and the rent therefrom used for educational purposes, is subject to assessment and levy of taxes. *Guilford College v. Guilford County*, 347.

§ 34. Duties and Authority of Collecting Agencies and Procedure for Collection.

The constitutional right to trial by jury, N. C. Constitution, Art. I, sec. 19, does not apply to matters concerned with the administration of the tax laws

and the machinery for the collection of taxes, unless the statute affords express authority for this method of determining questions of fact. *Unemployment Compensation Com. v. Willis*, 709.

§ 38b. Actions to Prevent Levy or Collection of Taxes.

This was an action by a municipality to foreclose a tax lien. Defendants admitted the amount of the tax levied, the *locus in quo*, the amount due on the tax sale certificate and that payment had been demanded, that default was made in payment of said taxes, that plaintiff is the owner of the tax sale certificate, and that the period for payment of the certificate at the foreclosure had expired, but denied the right of the municipality to levy and collect the taxes. *Held:* The answer presents questions of law only, and the court may render judgment on the pleadings without submitting an issue to the jury. *Dunn v. Tew*, 286.

§ 40e. Upset Bids and Resales.

The last and highest bidder at the foreclosure sale of a tax sale certificate is but a preferred bidder with no rights in the property in law or equity until after his bid has been accepted and confirmed by the court, at least until after the time for upset bids has expired, and a subsequent order of resale within the time permitted for upset bids is a rejection of his bid, and he is not entitled to contest the validity of judgment of confirmation of the bid entered at the second sale. *Bladen County v. Squires*, 649.

The court has authority to reject the bid made at the foreclosure sale of a tax sale certificate and order a resale, even in the absence of exceptions or an increased bid, Public Laws of 1939, ch. 310, sec. 1719 (r), but in this case the judgment of the court that the order of resale for an increased bid was properly entered is upheld on the findings which are supported by the evidence. *Ibid.*

TELEGRAPH AND TELEPHONE COMPANIES.

§ 4. Rights of Way.

The right of way of a telephone company is not an easement for an unlimited public use, but is limited to *quasi*-public use for the purpose of facilitating the communication of intelligence and news. *Hildebrand v. Tel. Co.*, 402.

A highway right of way and a right of way of a telephone company, although both are dedicated to public use, are distinct types of easements, and the right to use land for the erection and maintenance of telephone poles and wires is not contemplated when land is acquired for highway purposes and is not embraced in the easement acquired for this purpose, but constitutes an additional burden upon the land. *Ibid.*

The erection and maintenance of telephone poles and wires along a highway is a use subordinate to the use of the land for the primary purpose of public travel. *Ibid.*

TENANTS IN COMMON.

(Partition see Partition.)

§ 2. Creation and Existence of Tenancy in Common.

A, the owner of the life estate in the *locus in quo*, and one of the two remaindermen executed separate deeds to A's brother. *Held:* Upon A's death the life estate conveyed to his brother terminated, and A's brother and the other remainderman each owned a one-half undivided interest in the *locus in quo* as tenants in common. *Jefferson v. Jefferson*, 333.

TORTS.

§ 4. Determination of Whether Tort Is Joint Tort.

In law, joint tort-feasors are persons who act together in committing the wrong, or who commit separate wrongs without concert of action or unity of purpose, which separate acts concur as to place and time and unite in proximately causing the injury. *Bost v. Metcalfe*, 607.

Where a passenger in a car is thrown therefrom to the hard surface by the negligent act of the driver, and while lying prone on the highway, is run over by a truck, through negligence of the truck driver in failing to avoid striking her, and the passenger dies of the injuries thus inflicted, both drivers are liable as joint tort-feasors. *Hester v. Motor Lines*, 743.

§ 6. Contribution and Remedies of Defendant Against Joint Tort-Feasor.

When a defendant in a negligent injury action files answer denying negligence but alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant under C. S., 618, as amended by ch. 68, Public Laws of 1929. Whether the statute is applicable to an action brought under the Federal Employers' Liability Act, *quære*. *Lackey v. R. R.*, 195.

Party whose negligence causes the injury is not entitled to joinder of physician as joint tort-feasor upon allegations of physician's malpractice in treating person injured. *Bost v. Metcalfe*, 607.

Plaintiff's petition to rehear is allowed in this case for inadvertence in the original opinion in stating that before trial appealing defendant had filed amended answer asking affirmative relief against its codefendant under C. S., 618, precluding plaintiff from taking a voluntary nonsuit as against the codefendant, it appearing of record that appealing defendant did not tender amended answer and move that it be permitted to file same and did not request that its codefendant be made a party as a joint tort-feasor until after verdict. *Smith v. Kappas*, 850.

§ 8c. Acceptance of Benefits of Release and Ratification.

Release from liability for tort *held* effective on the principle of ratification upon authority of *Presnell v. Liner*, 218 N. C., 152. *Salmon v. Wyatt*, 822.

TRESPASS.

§ 1e. Trespass by Ponding or Discharge of Waters on Land.

Allegations and evidence to the effect that defendant's milldam caused the flow of the water in the river above the dam to be impeded, resulting in the deposit of sand in the river bed, which in turn impeded the flow of the water in a tributary creek flowing through plaintiff's land, resulting in the deposit of sand and other debris in the creek bed so that plaintiff's land could not be properly drained, without allegation or evidence that the dam ponded water back upon plaintiff's land, is insufficient to show a trespass and, plaintiff having abandoned its cause of action for negligence in the operation of the milldam, the verdict of the jury in defendant's favor under instructions to answer the issue of liability in the negative if the jury should find that the defendant made no unreasonable use of its riparian rights and had not taken in whole or in part any of plaintiff's land, will be upheld. *Cotton Co. v. Henrietta Mills*, 279.

TRIAL.

I. Time of Trial, Notice, and Preliminary Proceedings
1. Notice and Calendars. Cody v. Hovey, 369.
II. Order, Conduct, and Course of Trial
11. Consolidation of Actions for Trial. Osborne v. Canton, 139.
III. Reception of Evidence
15. Motions to Strike Evidence. Maynard v. Holder, 470.
V. Nonsuit
22b. Consideration of Evidence on Motion to Nonsuit. Wall v. Asheville, 163; Warren v. Breedlove, 383; McKay v. Bullard, 589; Williams v. Thomas, 727; Justice v. R. R., 273.
22c. Nonsuit in Favor of Party Having Burden of Proof. Smith v. Duke University, 628.
24. Sufficiency of Evidence. Smith v. Duke University, 628.
25. Voluntary Nonsuit. McFetters v. McFetters, 731; Smith v. Kappas, 850.
VII. Instructions
29b. Statement of Evidence and Application of Law Thereto. Ryals v. Contracting Co., 479; Kolman v. Silbert, 134; Barnes v. Teer, 823; Smith v. Kappas, 850.
31. Expression of Opinion by Court on Evidence. Petroleum Co. v. Allen, 461; Ryals v. Contracting Co., 479; Swinson v. Nance, 772.
32. Requests for Instructions. Nichols v. York, 262; Livingston v. Investment Co., 416; McKay v. Bullard, 589.
36. Construction of Instructions and General Rules of Review. Laughter v. Powell, 689; Cab Co. v. Casualty Co., 788.
VIII. Issues and Verdict
37. Form and Sufficiency of Issues. Oliver v. Oliver, 299; Brown v. Daniels, 349.
40. Objections and Exceptions to Issues. McKay v. Bullard, 589.
IX. Verdict
43. Form, Sufficiency, and Acceptance of Verdict. Freeman v. Ball, 329.
X. Motions After Verdict
45. Motions for Judgment Non Obstante Veredicto. Johnson v. Ins. Co., 445.
48. Motions for New Trial for Misconduct of or Affecting Jury. Simpson v. Oil Co., 595.
49. Motions to Set Aside Verdict as Being Against Weight of Evidence. Cab Co. v. Casualty Co., 788.
XI. Trial by Court by Agreement
52. Agreements and Waiver of Jury Trial. Freeman v. Ball, 329.

§ 1. Notice and Calendars.

The fact that the court's order setting an appeal from the clerk for hearing is made out of the term, is immaterial when the parties voluntarily appear on the date set, and full opportunity is afforded the parties to present their cause. *Cody v. Hovey*, 369.

§ 11. Consolidation of Actions for Trial.

Separate causes in which neither parties nor purposes are identical, nor the plaintiffs united in interest, cannot be consolidated. *Osborne v. Canton*, 139.

§ 15. Motions to Strike Evidence.

An appellant may not successfully contend that the court erred in refusing his motion to strike certain testimony which appellant himself has elicited from an adverse witness on cross-examination. *Maynard v. Holder*, 470.

§ 22b. Consideration of Evidence on Motion to Nonsuit. (Review of judgments on motions to nonsuit see Appeal and Error § 40e.)

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action will be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Wall v. Asheville*, 163; *Warren v. Breedlove*, 383; *McKay v. Bullard*, 589; *Williams v. Thomas*, 727.

Upon demurrer to the evidence, the evidence must be considered in the light most favorable to plaintiff. C. S., 567. *Justice v. R. R.*, 273.

§ 22c. Nonsuit in Favor of Party Having Burden of Proof.

A nonsuit cannot be sustained upon an affirmative defense unless plaintiff's own evidence establishes such defense as a matter of law. *Smith v. Duke University*, 628.

§ 24. Sufficiency of Evidence.

While the evidence must be considered in the light most favorable to plaintiff upon motion to nonsuit, plaintiff is required to offer evidence which

reasonably tends to prove each fact essential to make out his case, and evidence which raises a mere conjecture or suspicion is insufficient. *Smith v. Duke University*, 628.

§ 25. Voluntary Nonsuit.

A voluntary nonsuit must be effected by a judgment of the clerk of the Superior Court, C. S., 593, or by the judge at term. *McFetters v. McFetters*, 731.

Opinion holding that plaintiff could not take voluntary nonsuit against defendant against whom codefendant had demanded affirmative relief reversed on rehearing for that it appeared of record that amended answer demanding affirmative relief was not tendered until after verdict. *Smith v. Kappas*, 850.

§ 29b. Statement of Evidence and Application of Law Thereto.

C. S., 564, proscribes the judge in charging the jury from expressing an opinion as to the weight and credibility of the evidence, and prescribes that he declare and explain the law arising upon the evidence, and the two provisions are linked together and are of equal dignity, and the failure to observe either is error. *Ryals v. Contracting Co.*, 479.

C. S., 564, prescribes that the judge in charging the jury shall "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," and it is the duty of the court to do so without request for special instructions, and the failure of the judge to explain the law arising upon the evidence constitutes reversible error. *Ibid.*

In automobile accident cases it is the duty of the court to charge the jury upon the provisions of the Motor Vehicle Law arising upon the evidence, and a charge embracing only general provisions of the common law is not sufficient. C. S., 564. *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823.

It is the duty of the trial court without request for special instructions to declare and explain the law arising upon the evidence in the case, which duty is not discharged by general definitions or abstract discussions of the law, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative and under which it should be answered in the negative, and the failure of the court to comply substantially with the mandate of the statute impinges a substantial legal right of the party aggrieved entitling him to a new trial. C. S., 564. *Smith v. Kappas*, 850.

§ 31. Expression of Opinion by Court on Evidence.

A charge upon an implied warranty of a liquid roof coating that the seller warranted that the product should be good for the purpose for which sold but that a person buying liquid roofing could not "expect to fill up a gap that was 30 feet wide" with such material, *is held* not error as an expression of opinion by the court, it appearing that the court was merely illustrating a principle growing out of the testimony of various witnesses that the defendant's roof was in such condition that no roofing paint could repair it, but that other roofing material to stop up the holes therein was necessary. *Petroleum Co. v. Allen*, 461.

Court may not express opinion on weight or credibility of evidence. *Ryals v. Contracting Co.*, 479.

Where the jury is instructed that if they answer the issue of contributory negligence in the affirmative they should not proceed further, but should leave the issue of damages unanswered, a further instruction that an affirmative

finding of contributory negligence would end the case and plaintiffs could not recover, cannot be held for error, since the jury, being composed of men of intelligence, could have inferred that an affirmative finding of contributory negligence would bar recovery notwithstanding the further instruction. *Swinson v. Nance*, 772.

§ 32. Requests for Instructions.

If a party desires a fuller or more particular charge upon a subordinate or collateral feature of the case he must aptly tender request therefor. *Nichols v. York*, 262; *Livingston v. Investment Co.*, 416; *McKay v. Bullard*, 589.

§ 36. Construction of Instructions and General Rules of Review.

An exception to the charge on the ground that excerpts taken therefrom are conflicting cannot be sustained when the charge read contextually as a whole is free from this objection. *Laughter v. Powell*, 689.

A charge will be construed contextually as a whole, and appellant's exceptions thereto will not be sustained when the charge so construed is without prejudicial error. *Cab Co. v. Casualty Co.*, 788.

§ 37. Form and Sufficiency of Issues.

Issues submitted will be held sufficient if they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Oliver v. Oliver*, 299.

Issues must be formulated not only with regard to the pleadings but also to the phases of the evidence pertinent thereto. *Brown v. Daniel*, 349.

§ 40. Objections and Exceptions to Issues.

Appellant cannot complain of the form of an issue submitted when he did not except to the issue or tender other issues. *McKay v. Bullard*, 589.

§ 43. Form, Sufficiency and Acceptance of Verdict.

Since a civil action to set aside deeds for undue influence and mental incapacity of the grantor may be submitted by agreement of the parties to the court and a jury trial waived, a stipulation of the parties, upon the jury being unable to agree upon a verdict, that the court might take a poll of the jury and answer the issue in accordance with how the majority stood, will sustain the judgment of the court upon a verdict arrived at in accordance with the stipulation. *Freeman v. Ball*, 329.

§ 45. Motions for Judgment Non Obstante Veredicto.

A judgment *non obstante veredicto*, in effect, is nothing more than a belated judgment on the pleadings. *Johnson v. Ins. Co.*, 445.

Since a motion for judgment *non obstante veredicto* is, in effect, a belated motion for judgment on the pleadings, the court, strictly speaking, is confined to the pleadings in passing upon the motion, but where a material fact is admitted by the adverse party, the court may treat such admission as being in the nature of an amendment to the pleadings or as a fact of which the court can take judicial notice, and rule on the motion accordingly. *Ibid.*

§ 48. Motion for New Trial for Misconduct of or Affecting Jury.

Plaintiff, while testifying as a witness in her own behalf, collapsed on the witness stand. There was nothing to indicate bad faith on the part of the plaintiff or fraudulent imposition on the court. *Held:* Defendants' motion for

a mistrial on the ground that the disturbance might have aroused the sympathy of the jury was addressed to the discretion of the trial court. *Simpson v. Oil Co.*, 595.

§ 49. Motions to Set Aside Verdict as Being Against Weight of Evidence.

A motion by defendant to set aside the verdict as to certain issues is addressed to the sound discretion of the trial court. *Cab Co. v. Casualty Co.*, 788.

§ 52. Agreements and Waiver of Jury Trial.

Since a civil action to set aside deeds for undue influence and mental incapacity of the grantor may be submitted by agreement of the parties to the court and a jury trial waived, a stipulation of the parties, upon the jury being unable to agree upon a verdict, that the court might take a poll of the jury and answer the issue in accordance with how the majority stood, will sustain the judgment of the court upon a verdict arrived at in accordance with the stipulation. *Freeman v. Ball*, 329.

TRUSTS.

§ 1b. Parol Trusts.

To create a parol trust there must be an agreement amounting to an undertaking to act as agent for another in the purchase of land, constituting a covenant to stand seized to the use or benefit of such other, but a mere parol agreement to convey land to another raises no trust in the latter's favor and comes within the provisions of the statute of frauds. *Wolfe v. Land Bank*, 313.

Person signing lease as tenant and thus recognizing title of landlord *held* estopped to assert parol trust as against landlord. *Ibid.*

§ 5. Control, Management and Authority of Trustee.

Trustee holding stock in corporation in active trust *held* not to have assented to reorganization of corporation in his capacity as trustee, and therefore *cestuis* were not bound by his acts. *Patterson v. Henrietta Mills*, 7.

One trustee is without authority to bind his cotrustees. *Ibid.*

§ 11. Construction and Modification of Charitable Trusts.

Courts of equity, in the exercise of their inherent and supervisory jurisdiction of charitable trusts, upon proper application of the trustees, will construe the trust, determine the duties imposed upon the trustees, and advise the means of effectuating the general and ultimate beneficial intent of the trustor. *Johnson v. Wagner*, 235.

Where the particular method prescribed by the trustor for effecting the general and ultimate purpose of a charitable trust becomes impossible to pursue, the trust does not fail, but courts of equity have the power to grant relief to the end that the general and ultimate intent of the trustor may be effecuated. *Ibid.*

Testator devised certain realty to named trustees to be used by designated agencies of a church denomination as an assembly ground and a site for churches, schools, homes, hospitals, and cottages for retired ministers and returned missionaries. In an action to construe the rights of the parties in the trust it was made to appear that the land was inaccessible, that the cost of developing same was excessive, and that adequate funds for such development were not available, and that the specified agencies of the denomination already maintained an assembly ground where the ultimate purposes of the

TRUSTS—*Continued.*

trust could be effectuated and that said agencies would not accept the land for the purposes of the trust. *Held:* The Superior Court, in the exercise of its equitable jurisdiction, has power and authority to authorize the trustees to sell the land and to use the proceeds of sale and the income from other trust property set up for the same purpose to accomplish the ultimate purposes of the trust. *Ibid.*

USURY.

§ 2. Contracts and Transactions Usurious.

The inclusion of a discount charge in the face amount of a note in addition to the principal borrowed and legal interest, constitutes usury knowingly charged in violation of the statute. *Mortgage Co. v. Zion Church*, 395.

§ 6. Waiver and Estoppel.

Where original usurious agreement is renewed and new usury added, borrower may set up usury in original agreement notwithstanding stipulation in renewal agreement releasing right to claim usury. *Mortgage Co. v. Zion Church*, 395.

§ 7. Forfeitures.

All interest is forfeited when usury is knowingly exactly. C. S., 2306. *Mortgage Co. v. Zion Church*, 395.

UTILITIES COMMISSION.

§ 2. Jurisdiction.

Certificate of convenience *held* necessary to construction of municipal hydro-electric plant in this case. *McGuinn v. High Point*, 56.

VENDOR AND PURCHASER.

§ 25. Damages for Breach by Vendor of Contract to Convey.

Upon the breach by a vendor of his contract to convey realty, the purchaser is entitled to recover those damages naturally and proximately resulting from such breach, which comprise not only the part of the purchase price paid by him with interest, but also the difference between the contract purchase price and the fair market value of the land at the time of the breach, as compensation for the loss of his bargain. *Johnson v. Ins. Co.*, 445.

The damages recoverable by the purchaser for the vendor's breach of a contract to convey realty is not diminished by good faith nor aggravated by bad faith on the part of the vendor. *Ibid.*

When vendor breaches contract prior to acceptance of deed, purchaser may recover for loss of his bargain, even though the contract is to convey by special warranty deed. *Ibid.*

VENUE.

§ 1a. Residence of Parties.

The provision of C. S., 1667, that a wife may institute action for alimony without divorce in the county in which the cause of action arose does not prescribe the exclusive venue, but the wife may institute the action in the county in which she resides at the commencement of the action, C. S., 469. *Dudley v. Dudley*, 765.

WATERS AND WATER COURSES.

§ 4b. Drainage of Surface Waters.

Where an upper or dominant landowner has the right to drain his land through a drain ditch across the subservient lands of defendant, and defendant wrongfully places obstructions in the ditch on his own land, the court has the power to restrain the wrongful acts and to issue mandatory injunction to compel defendant to restore the drainway to its former condition by removal of the obstructions. *Elder v. Barnes*, 411.

§ 7. Damages From Construction and Operation of Dams.

Allegations and evidence to the effect that defendant's milldam caused the flow of the water in the river above the dam to be impeded, resulting in the deposit of sand in the river bed, which in turn impeded the flow of the water in a tributary creek flowing through plaintiff's land, resulting in the deposit of sand and other debris in the creek bed so that plaintiff's land could not be properly drained but without allegation or evidence that the dam ponded water back upon plaintiff's land, is insufficient to show a trespass and, plaintiff having abandoned its cause of action for negligence in the operation of the milldam, the verdict of the jury in defendant's favor under instructions to answer the issue of liability in the negative if the jury should find that the defendant made no unreasonable use of its riparian rights and had not taken in whole or in part any of plaintiff's land, will be upheld. *Cotton Co. v. Henrietta Mills*, 279.

WILLS.

II. Contracts to Devise or Bequeath
5. Contracts to Devise or Bequeath. Graham v. Hoke, 755.

III. Statutory Wills
8. Subscribing Witnesses. In re Will of McDonald, 209.

IX. Construction and Operation of Wills
31. General Rules of Construction. Whitley v. Arenson, 121; Walsh v. Friedman, 151; Sharpe v. Isley, 753.
33a. Estates and Interest Created in General. Whitley v. Arenson, 121; Early v. Tayloe, 363.
33b. Rule in Shelley's Case. Rose v. Rose, 20; Whitley v. Arenson, 121.
33c. Defeasible Fees. Sharpe v. Isley, 753.
33f. Devises with Power of Disposition. Walsh v. Friedman, 151; Burcham v. Burcham, 357.
33i. Termination of Particular Estates and Vesting of Remainder. Rose v. Rose, 20.
34a. Determination of Whether Devise is for Life or in Fee. Sharpe v. Isley, 753; Croom v. Cornelius, 761.
34c. Designation of Devisees and Legatees and their Respective Shares. Whitley v. Arenson, 121; Walsh v. Friedman, 151; Early v. Tayloe, 363.
35a. Restraint on Alienation. Early v. Tayloe, 363.
38. Residuary Clauses. Walsh v. Friedman, 151.
39c. Costs, Rents, and Profits. Walsh v. Friedman, 151.
46. Nature of Title and Right of Devisee to Convey. Croom v. Cornelius, 761.

§ 5. Contracts to Devise or Bequeath.

The complaint alleged that plaintiff was a member of intestate's family and performed domestic services for him at his request in reliance upon a written agreement for payment. The written agreement for payment alleged consisted of an order on a bank in the form of a check to pay plaintiff a designated sum upon intestate's death. *Held:* The written agreement declared upon being entirely ineffective, and there being no allegation of an implied contract of *quantum meruit*, defendant administratrix' demurrer should have been sustained. *Graham v. Hoke*, 755.

§ 8. Subscribing Witness.

Party signing instrument in afternoon prior to signing of instrument by purported testatrix the following night is not subscribing witness. *In re Will of McDonald*, 209.

WILLS—*Continued.*

§ 31. General Rules of Construction.

While a will or deed will be construed from its four corners to ascertain and give effect to the intent of the testator or grantor, this intent must be ascertained from the language used in the instrument, and he will be deemed to have used technical words and phrases in their legal and technical sense unless he indicates in some appropriate way that a different meaning be ascribed to them, and when he uses technical words and phrases invoking some settled rule of law, like the rule in *Shelley's case*, the rule of law will prevail. *Whitley v. Arenson*, 121.

A will must be construed to give effect to the intention of the testator as expressed in the language used construed from the four corners of the instrument unless such intent is contrary to some principle of law or public policy. *Walsh v. Friedman*, 151.

In construing a will, the intention of the testator must be ascertained from the language in which it is expressed, and it is the duty of the court to give the words used their legal effect. *Sharpe v. Isley*, 753.

§ 33a. Estates and Interest Created in General.

A devise to "A and his heirs" conveys the fee to A by the use of words of inheritance. *Whitley v. Arenson*, 121.

The word "heir" is primarily a word of limitation and not of purchase, and will be given its technical meaning unless it is made to appear from the language of the instrument that it was used in some other permissible sense. *Ibid.*

A devise or bequest by implicataion should not be presumed except upon cogent reasoning and in order to carry out the intent of the testator categorically appearing from the language used construed as a whole. *Ibid.*

A devise of real estate will be construed to be in fee simple unless an intention to convey an estate of less dignity plainly appears from the language of the devise or from some other part of the will. C. S., 4162. *Early v. Tayloe*, 363.

An unrestricted devise of property carries the fee. *Ibid.*

§ 33b. Rule in Shelley's Case.

The rule in *Shelley's case* applies equally whether the remainder to the heirs is limited mediately or immediately after the estate to the ancestor. *Rose v. Rose*, 20.

The rule in *Shelley's case* is a rule of law, and its application depends not upon the estate intended to be devised to the ancestor but upon the estate devised to the heirs, the rule being applicable if the limitation over is to the same persons who would take the same estate as heirs, since the law will not permit a person to take in the character of heir unless he takes also in the quality of heir. *Ibid.*

Testator devised the land in question to his son "his lifetime" then to his son's wife for her life or widowhood "but in case" the son "have any heirs said land to go to said heirs." *Held:* There is no reverter and no limitation over in case the first taker should "die without heirs" and nothing to indicate the use of the word "heirs" in any restricted sense, and the rule in *Shelley's case* applies to give an estate for life to the son, an intervening life estate to his wife, and a fee simple in expectancy to the son, and upon the termination of the intervening life estate by the death of his wife, the son may convey in fee simple. *Ibid.*

C. S., 1739, providing that a limitation to the heirs of a living person shall be construed to be to the children of such person, applies only to a devise or

WILLS—*Continued.*

conveyance to the heirs of a living person when no preceding estate is devised or conveyed to such living person, the purpose of the statute being to validate devises or conveyances to the "heirs" of a living person, which under the common law would be void for want of a grantee, but the statute does not apply to a devise or conveyance to a living person and his "heirs" or "bodily heirs" or "heirs of his body" or to a living person for life, remainder to his heirs. The statute does not convert "heirs" from a word of inheritance to one of purchase, or affect the rule in *Shelley's case*. *Whitley v. Arenson*, 121.

A devise or conveyance to "A and his heirs" and one to "A for life, remainder to his heirs" have the identical effect of vesting the fee in ths first taker, the former by the use of words of inheritance and the latter by operation of the rule in *Shelley's case*. *Ibid.*

§ 33c. Defeasible Fees.

A fee may not be limited after a fee unless there be some contingency which defeats or abridges the estate of the first taker in order to make room for the ulterior limitation. *Sharpe v. Isley*, 753.

§ 33f. Devises With Power of Disposition.

Will *held* to devise testator's daughter life estate with power of disposition during her lifetime but not by will, and life estate to sons after termination of daughter's life estate, with power of disposition by will to sons, and fact that sons predeceased daughter did not enlarge her estate, but residuary clause in will of one of sons in favor of his sister gave her the fee in that part of land over which he had power of disposition. *Walsh v. Friedman*, 151.

The will in this case *is held* to unequivocally express the intent of the testator that the whole of testator's property be put to the use of his widow during her lifetime or widowhood, without any limitations upon the purposes, manner or extent of that use, so as to necessarily imply a power of disposition, although the instrument fails to so devise the property *in ipsissimis verbis*. *Burcham v. Burcham*, 357.

§ 33i. Termination of Particular Estates and Vesting of Remainder.

Where the devisee of an intervening life estate dies prior to the first taker, her life estate is at an end, and the first taker, having the fee in remainder, may convey the fee simple. *Rose v. Rose*, 20.

§ 34a. Determination of Whether Devise Is for Life or in Fee.

A devise to testator's wife, "to her and her heirs by me," vests in the wife a fee tail special, converted by statute into a fee simple, and her estate is not affected or limited to a life estate with remainder in fee to the heirs of testator by subsequent provision in the item that testator's wife should have exclusive and sole use of the property and "should she have living heirs by me, then all my estate . . . shall belong to her and her heirs in fee simple," in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. *Sharpe v. Isley*, 753.

An unrestricted devise followed by a provision that in the event the devisee died intestate, testator wished such devisee's share to descend to her children, vests the fee in the devisee, C. S., 4162, the precatory words being repugnant to the estate previously devised and insufficient to limit or divest it. *Croom v. Cornelius*, 761.

WILLS—*Continued.*

§ 34c. Designation of Devisees and Legatees and Their Respective Shares.

Since an "heir" is a person on whom the law casts an estate upon the death of the ancestor, a living person, strictly speaking, can have no heir. *Whitley v. Arenson*, 121.

C. S., 1739, providing that "heirs" of living person be construed "children" applies only when no preceding estate is devised or conveyed to such living person. *Ibid.*

Will *held* to devise daughter life estate with power of disposition during her lifetime, but did not convey fee to daughter or give her power of disposition by will. *Walsh v. Friedman*, 151.

The words "*per stirpes*" are not words of inheritance but merely indicate that the property devised shall be distributed by representation among the devisees designated in the will. *Ibid.*

Testator provided that after the termination of his widow's life estate his land should be divided in equal parts for allotment to his children and grandchildren, and devised "to my son Hufham or his children one share." *Held:* The son named takes the fee, the gift to the son's children being a substituted gift to take effect only in the event that the son named should predecease the testator. *Early v. Tayloe*, 363.

§ 35a. Restraint on Alienation.

An expression following the devise of land in fee that it "is not to be conveyed out of the family" is void if it be considered a restraint on alienation, and is equally ineffectual if regarded merely as an expression of desire on the part of the testator. *Early v. Tayloe*, 363.

§ 38. Residuary Clauses.

A clause will be construed as a residuary clause if the intention is apparent from the instrument that the clause should operate to dispose of all of the property of the testator not otherwise disposed of. *Walsh v. Friedman*, 151.

Where testator has life estate in lands with power of disposition by will, the residuary clause in his will operates as an exercise of the power of disposition, no contrary intention appearing from the instrument. *Ibid.*

§ 39c. Costs, Rents and Profits.

Where, in an action to determine the rights of the respective parties in the lands devised, it is held that plaintiffs are entitled to two-thirds of the *locus in quo* and defendant is entitled to one-third, the cost should be taxed in that proportion, and plaintiffs are entitled to recover of the defendant, who took and remained in possession, two-thirds of the rents and profits from the date plaintiffs' right of possession attached. *Walsh v. Friedman*, 151.

§ 46. Nature of Title and Right of Devisee to Convey.

Testator devised to each of his children certain lands in fee but by subsequent clause provided that if they should die without issue, the land should "revert to my other children or grandchildren." Thereafter two of the children conveyed their interests to the third child. *Held:* The child to whom the others conveyed their interests may convey the fee, since even if the devisees took a defeasible fee, the deeds executed by the two devisees would estop them and their heirs, and any interest which might accrue to them under the will would feed the estoppel. *Croom v. Cornelius*, 761.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

160, 137 (6). In action for wrongful death of child, contributory negligence of mother will bar so much of recovery as would inure to her benefit, but will not be imputed to father and will not bar part of recovery that would inure to his benefit. *Pearson v. Stores Corp.*, 717.

403. Upon appeal from rulings of clerk in vacation upon procedural motions in pending civil actions, the jurisdiction of the Superior Court is not derivative but the judge hears the matter *de novo*. *Cody v. Hovey*, 369.

415. When voluntary nonsuit is taken in Federal court in action to recover penalty for usury, based on numerous separate transactions, separate actions on each transaction, instituted in State court within year of voluntary nonsuit, are not barred if original action was instituted in time. *Motor Co. v. Credit Co.*, 199.

428. Instrument is color of title notwithstanding defects appearing of record. *Perry v. Bassenger*, 838. Deed executed by commissioner appointed by court to sell interests of life tenant and remaindermen in partition proceedings is color of title. *Ibid.* Where wife has been abandoned, her deed constitutes color of title. *Nichols v. York*, 262. Under facts of this case, possession of child under color of title was adverse to father. *Ibid.*

430. Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries, and evidence tending to show one year's mining operations and four years' work in sinking shafts, together with prospecting for more than twenty years, is insufficient. *Davis v. Land Bank*, 248.

441 (9). Statute does not begin to run against cause of action based on fraud until fraud is discovered or should have been discovered in exercise of due diligence. *Johnson v. Ins. Co.*, 202. Evidence of whether guardian knew or should have known of facts constituting fraud more than three years before institution of action *held* for jury. *Ibid.*

456. Plaintiff may join action against municipality *ex contractu* with action against municipal officers for wrongfully inducing him to enter into the contract. *Peitzman v. Zebulon*, 473.

456, 457, 460, 602, 618. Party whose negligence causes the injury is not entitled to joinder of physician as joint tort-feasor upon allegations of physician's failure to give proper treatment to injured person. *Bost v. Metcalfe*, 607.

456, 460. In this action against administrator *c. t. a.*, joinder of executor and beneficiaries under will of remainderman *held* proper upon the record. *Jones v. Griggs*, 700.

457, 483 (4). Apply only to suits by or against mutual benefit associations on certificates or policies of insurance, and labor union cannot sue or

CONSOLIDATED STATUTES—*Continued.*

SEC.

be sued in the name of the association. *Hallman v. Union*, 798. Separate causes in which neither parties nor purposes are identical, nor plaintiffs united in interest, cannot be consolidated. *Osborne v. Canton*, 139.

460. Superior Court, upon appeal from clerk, has power to make proper order for substitution or joinder of parties. *Bynum v. Bank*, 109.

469, 1667. Wife may institute action for alimony without divorce in county in which she resides at commencement of action notwithstanding that cause of action arose in another county. *Dudley v. Dudley*, 765.

475, 592. Action is pending from the issuance of summons until determination by final judgment. *McFetters v. McFetters*, 731.

491 (a). Service of process may be had under statute in action by nonresident married woman against nonresident husband to recover for automobile accident occurring in this State. *Bogen v. Bogen*, 51.

507 (1). Plaintiff may join action against municipality *ex contractu* with action against municipal officers for wrongfully inducing him to enter into the contract. *Peitzman v. Zebulon*, 473.

537. In action to establish *donatio mortis causa*, allegations setting forth facts tending to show motive, the setting, relationship between the parties, and circumstances surrounding donor's death are proper, and motion to strike is properly denied. *Bynum v. Bank*, 109.

537, 534. If defendant desires more specific and detailed allegations he must aptly request court to require pleading to be made more definite and certain or request bill of particulars. *Livingston v. Investment Co.*, 416.

543. When answer admits material allegations of complaint and alleges new matter not relating to a counterclaim, the new matter is deemed denied. *Dunn v. Tew*, 286.

547. After time for filing answer has expired, defendant's motion to be allowed to amend is addressed to discretion of court. *Osborne v. Canton*, 139.

554, 556. When pleadings raise only issues of law and no issues of fact, court may render judgment on the pleadings. *Dunn v. Tew*, 286.

556, 569. When parties waive jury trial and agree to trial by court, court's findings of fact are as binding and conclusive as verdict of jury. *Berry v. Payne*, 171.

564. General statement of common law is insufficient, but court must apply the law to the evidence, and this without request for special instructions. *Ryals v. Contracting Co.*, 479; *Smith v. Kappas*, 850. Court must charge pertinent statutory law as well as common law, and charge embracing only general provisions of common law is insufficient. *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823. Instruction that defendant's own testimony disclosed guilt of murder in first degree *held* for error as expression of opinion. *S. v. Blue*, 612. Where de-

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fendant offers no evidence, fact that court necessarily takes more time in reviewing State's evidence and contentions than in stating defendant's contention cannot be held for error as expression of opinion. *S. v. Jessup*, 620. Portion of charge devoted to stating State's evidence and contentions cannot be held for error as expression of opinion when it appears that court categorically indicated to jury that it was stating State's evidence and contentions. *Ibid.* Charge that State contended that prosecutrix was corroborated in every detail by a witness put on stand by defendant cannot be held for error as expression of opinion, it being incumbent on defendant, if he thought statement of contention was misleading or inaccurate, to have called matter to court's attention in apt time. *S. v. Johnson*, 757.

565. Party desiring more particular instructions on subordinate feature of the case must aptly tender request therefor. *McKay v. Bullard*, 589.

567. Upon motion to nonsuit, evidence must be considered in light most favorable to plaintiff. *Wall v. Asheville*, 163; *Justice v. R. R.*, 273; *Warren v. Breedlove*, 383; *Williams v. Thomas*, 727.

595. Clerk of Superior Court is given no authority to render judgment by default final in an action for cancellation of deed of trust upon tender of amount claimed to be due by trustor. *Cook v. Bradsher*, 10.

614. Lien of docketed judgment does not attach to land conveyed by judgment debtor by deed duly recorded prior to docketing of judgment notwithstanding that deed by which judgment debtor acquired title was not registered. *Durham v. Pollard*, 750.

618. When defendant alleges that if it were negligent, negligence of third person was contributing cause of injury, and demands affirmative relief against such third person, he is entitled to joinder of such third person. *Lackey v. R. R.*, 195. But such third person's motion to remove on the ground of separable controversy is correctly denied, since complaint determines separability. *Ibid.* When amended answer demanding affirmative relief against codefendant is not tendered until after verdict, defendant is not entitled to object to plaintiff's taking voluntary nonsuit against codefendant. *Smith v. Kappas*, 850. Defendant is not entitled to joinder of physician who treated plaintiff upon allegations of malpractice. *Bost v. Metcalfe*, 607.

632. Where judgment is conditioned upon final adjudication in favor of defendants in another pending action, plaintiffs are not aggrieved and their appeal will be dismissed as premature. *Yadkin County v. High Point*, 94.

635. When parties appear and argue matter before presiding judge, any irregularity in procedure is waived, and contention that appeal from clerk should be dismissed for failure to comply with this section is untenable. *Cody v. Hovey*, 369.

637. Clerk is but part of Superior Court, and when controversy in any manner comes before judge, the Superior Court acquires jurisdiction to determine entire controversy. *Bynum v. Bank*, 109; *Perry v. Bassenger*, 838.

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SEC.

878, 879, 880, 885. *De jure* officer is entitled to emoluments of office from date he is entitled to the office notwithstanding that *de facto* officer actually performs duties of the office pending adjudication of title. *Osborne v. Canton*, 139.

885. When defendant refuses to surrender the office on the ground that he is the *de jure* officer, relator is not required to file bond or take oath of office. *Osborne v. Canton*, 139.

899, *et seq.* Order for examination of adverse party will not be granted to enable plaintiff to spread dragnet or to harass defendant under guise of fair examination. *Washington v. Bus, Inc.*, 856.

900, 901. Petition must allege facts upon which petitioner bases conclusion that examination of adverse party is necessary. *Gudger v. Robinson Brothers Contractors, Inc.*, 251; *Washington v. Bus, Inc.*, 856.

907. Defendant, alleging that plaintiff's injuries resulted solely from negligence of codefendant, is not entitled to examination of codefendant, since even though the defenses are antagonistic in regard to this defense, they are jointly interested in defense of the action and a joint verdict against both is possible. *Gudger v. Robinson Brothers Contractors, Inc.*, 251.

991. Statute merely obviates common law requirement that word "heir" be used to convey estate of inheritance, and does not convert the word "heir" from word of limitation to one of purchase. *Whitley v. Arenson*, 121. Deed *held* to convey life estate with remainder in fee to male children of grantee, intent to convey estate of less dignity than fee to first taker being apparent from the instrument. *Jefferson v. Jefferson*, 333.

1137. Evidence *held* sufficient to support conclusion that defendant was "doing business" in this State for purpose of service under the statute. *Parris v. Fischer & Co.*, 292.

1330, 1331. Claims against county, including claims *ex contractu* for amount certain, must be filed as required by statute. *Efird v. Comrs. of Forsyth*, 96.

1414. Supreme Court has power to grant defendant's motion to be allowed to amend, but will do so only in proper instances. *Osborne v. Canton*, 139.

1487. Justice of peace may have his secretary sign his name to summons in his presence and under his supervision. *Johnson v. Chambers*, 769.

1659 (a). Conflicting evidence as to whether separation was by agreement *held* to take case to jury. *Oliver v. Oliver*, 299.

1666. Finding, supported by evidence, that wife has earnings and means of support equal to that of husband, sustains order denying alimony *pendente lite*. *Oliver v. Oliver*, 299.

1667. Court may allow counsel fees to plaintiff's attorneys before judgment of voluntary nonsuit is entered. *McFetters v. McFetters*, 731.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1734. Deed to married woman and her heirs by her present husband conveys fee tail special, converted by statute into fee simple absolute. *Whitley v. Arenson*, 121.

1739. Applies only to devise or conveyance to heirs of living person when no preceding estate is conveyed to such living person. *Whitley v. Arenson*, 121.

1744. In order for court to authorize that interest of contingent remaindermen be mortgaged it must appear that their interest would be materially enhanced thereby, and their interest may not be mortgaged to refinance the cost of improvements placed upon the land by the life tenant. *Hall v. Hall*, 805.

1783. Parol evidence is competent to identify the land claimed and to fit it to the description contained in the instrument. *McKay v. Bullard*, 589.

1823, 1824. Affidavit for inspection of writings must set forth facts showing materiality and necessity of papers sought. *Patterson v. R. R.*, 23.

2144. In action on foreign judgment, defense that it was based on gaming contract may not be asserted when such defense is concluded by the judgment sued on. *Cody v. Hovey*, 369.

2180. Since remaindermen are in no way liable for money expended by life tenant in making improvements, guardian of minor remaindermen may not be authorized to join with life tenant in executing mortgage to refinance cost of improvements. *Hall v. Hall*, 805.

2306. All interest is forfeited when usury is knowingly exacted. *Mortgage Co. v. Zion Church*, 395. Where original usurious agreement is renewed and new usury added, borrower may set up usury in original agreement notwithstanding stipulation in renewal agreement releasing right to claim usury. *Ibid.*

2365. Tenancy at will is sufficient to support action in summary ejectment. *Simons v. Lebrun*, 42.

2377. Statute is not in derogation of common law, and should be liberally construed. *Perry v. Morgan*, 377.

2387 (3). In this proceeding for registration of land under "Torren's System," exceptions *held* to raise issue of fact for jury. *Perry v. Morgan*, 377.

2513. Nonresident married woman may maintain action here against husband in tort for automobile accident occurring in this State, even though state of her residence does not allow such suit. *Bogen v. Bogen*, 51.

2530. Married woman who has been abandoned by her husband is a free trader, and her deed constitutes color of title. *Nichols v. York*, 262.

2583 (a). Duly substituted trustee succeeds to all rights, title and duties of original trustee. *Pearce v. Watkins*, 636.

2591. Does not require report of sale to clerk until advanced bid has been properly made, and therefore joint report of sale under separate

CONSOLIDATED STATUTES—*Continued.*

SEC.

deeds of trust does not prejudice trustor when there is nothing to show that any person desired or proposed to advance the bid. *Dillingham v. Gardner*, 227.

2621 (167) (e), 2621 (168). Municipal court is without authority to revoke driver's license, such power being invested exclusively in Department of Revenue. *S. v. McDaniels*, 763.

2621 (287, 288). Motorist may not lawfully drive at speed which is not reasonable and prudent under the circumstances notwithstanding that speed is less than limit set by statute. *Kolman v. Silbert*, 134; *Barnes v. Teer*, 823.

2621 (313). Circumstantial evidence that defendant was driver of "hit and run" car *held* sufficient to be submitted to jury. *S. v. King*, 667.

2621 (305). The failure of a defendant traveling upon a servient highway to stop before entering an intersection with a through highway is not contributory negligence *per se*, but is merely evidence to be considered by the jury upon the issue. *Swinson v. Nance*, 772. Right of way of motorist traveling along through street over vehicles entering intersections from servient highways is not absolute, but he is required to exercise due care. *Ibid.*

2776 (x). The procedure to obtain a review of an order of a municipal board of adjustment relative to the enforcement of zoning ordinances is by *certiorari*. *In re Pine Hill Cemeteries*, 735. Appeal is limited to questions of law. *Ibid.*

2809, 2818, 2840, 2687. Complaint failing to allege that breach of duty by public officer was corrupt or malicious or that statute imposing such duty provided for personal liability, *held* demurrable. *Old Fort v. Harmon*, 241; *Old Fort v. Harmon*, 245.

2969 (1 to 27). Where municipal hydroelectric plant is proposed under the Revenue Bond Act of 1938, municipal board of power commissioners created to carry out project is without authority to rescind the resolution of the city council so as to bring the project within the purview of the Revenue Bond Act of 1935. *McGuinn v. High Point*, 56.

3032. Possession of note raises presumption that possessor is holder and he may sue thereon in his own name without proof of signatures of endorsers. *Dillingham v. Gardner*, 227.

3234. Proceeding for sale of life estates and defeasible remainders for partition instituted before clerk *held* not void. *Perry v. Bassenger*, 838.

3309. Lien of docketed judgment does not attach to land conveyed by judgment debtor by deed duly recorded prior to docketing of judgment notwithstanding that deed by which judgment debtor acquired title was not registered. *Durham v. Pollard*, 750.

3846 (j). Highway Commission has no authority to grant right of way to telephone company as against owner of fee. *Hildebrand v. Tel. Co.*, 402.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4131. Party signing instrument in afternoon prior to signing of instrument by purported testatrix the following night is not subscribing witness. *In re Will of McDonald*, 209.

4162. Devise of real estate will be construed to be in fee unless an intention to convey an estate of less dignity appears from language of instrument. *Early v. Tayloe*, 363. Unrestricted devise followed by provision that in event devisee died intestate, testator wished devisee's share to descend to her children vests fee in devisee, the precatory words being ineffective as repugnant to fee previously granted. *Croom v. Cornelius*, 761.

4200. Where pursuant to a conspiracy to rob, one conspirator shoots and kills their victim, both conspirators being present, both are guilty of murder in first degree. *S. v. Miller*, 514. Where all evidence tends to show murder committed in perpetration of robbery, court need not submit question of guilt of less degrees of the crime. *Ibid.* Instruction that defendant's own testimony disclosed murder committed by means of lying in wait, constituting murder in first degree *held* erroneous as expression of opinion. *S. v. Blue*, 612.

4204. Sentence of death is mandatory upon conviction of rape. *S. v. Wagstaff*, 15.

4428. Evidence that officers apprehended defendant with lottery tickets in his possession and that upon seeing the officers he tried to dispose of same *held* sufficient to take case to jury. *S. v. Powell*, 220.

4437 (r) (s). These sections do not repeal 4437 (a) (b), since the two statutes are not repugnant, but are complementary. *S. v. Calcutt*, 545.

4447. Must be strictly construed. *S. v. Gardner*, 331. Has no application to illegitimate children. *Ibid.*

4642. Defendant will not be permitted to plead guilty to murder in first degree. *S. v. Blue*, 612.

4643. Upon motion to nonsuit in criminal prosecution, evidence must be taken in light most favorable to State. *S. v. Mann*, 212.

4650, 4654, 4656. Perfected appeal stays execution but appeal does not affect the terms of suspension of execution of the judgment or conditions of probation, and suspension of execution and terms of probation must not be so conditioned as to interfere with right of appeal. *S. v. Calcutt*, 545.

5279. Has no application to proceeding to enforce court order for drainage of surface waters. *Elder v. Barnes*, 411.

6287. Policy based on application of insured made while residing in this State is governed by our laws. *Pace v. Ins. Co.*, 451.

7077 (a). Signers of petition for creation of sanitary district are entitled as a matter of right to withdraw their names at any time before action is taken on the petition by the county commissioners on the question of approval. *Idol v. Hanes*, 723.

CONSOLIDATED STATUTES—*Continued.*

SEC.

7251 (x). Any action under provisions of this statute relative to sanitation is governed by three-year statute of limitations. *Powers v. Trust Co.*, 254.

7540. Evidence that lands were not covered by navigable waters *held* to take question to jury. *Perry v. Morgan*, 377. Prior State grant prevails over subsequent grant of same lands. *Ibid.*

7971 (129) (6). Property owned by educational institution and rented by it for profit is not exempt from taxation. *Rockingham County v. Elon College*, 342; *Guilford College v. Guilford County*, 347. Power of General Assembly to exempt property from taxation is limited by constitutional grant of power. *Rockingham County v. Elon College*, 342.

8052 (6) (d). Employees who participate in, finance, or who are directly interested in labor dispute which results in stoppage of work, or who are members of a grade or class of workers which has members employed at the premises at which the stoppage occurs, any of whom, immediately before the stoppage occurs, participate in, finance, or who are directly interested in such labor dispute, are not entitled to benefits during such stoppage of work; and when evidence supports finding of Unemployment Compensation Commission that claimants were disqualified during stoppage of work, finding is conclusive. *In re Steelman*, 306.

8052 (6) (i). Findings of fact by Unemployment Compensation Commission are conclusive when supported by evidence. *In re Steelman*, 306.

8052 (11) (m) (n). Appellant from Unemployment Compensation Commission is not entitled to jury trial upon exceptions to findings of fact. *Unemployment Compensation Com. v. Willis*, 709.

8052 (19) (f) (4). Individual who operates three places of business employing in the aggregate more than eight employees is liable for compensation tax. *Unemployment Compensation Com. v. Willis*, 709.

8052 (19) (g) (6). Control exercised by insurance company over State and local agents *held* such as to bring their employment within the provisions of the Unemployment Compensation Act. *Unemployment Compensation Com. v. Ins. Co.*, 576.

8081 (i) (e). Claimant did janitor work paid for in part by State School Commission and also did school maintenance work paid for by municipal board of education. He was injured while engaged in school maintenance work. Compensation was properly based on total weekly earnings rather than solely upon remuneration for school maintenance work. *Casey v. Board of Education*, 739.

8081 (k) (l). Infant employee is bound by Compensation Act regardless of his age. *Lineberry v. Mebane*, 257.

8081 (ff). Limitation of time for filing claim is tolled as to an employee under eighteen years of age who is without guardian or legal representative. *Lineberry v. Mebane*, 257.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 11. Does not prohibit compulsion in obtaining blood and urine specimens from defendant as evidence upon his defense of insanity from use of alcohol and opiates. *S. v. Cash*, 818.

I, sec. 17. Imposition of unemployment compensation tax upon individual operating three places of business employing in aggregate more than eight employees does not deprive him of property without due process of law. *Unemployment Compensation Commission v. Willis*, 709.

I, sec. 19. Right to jury trial does not apply to matters concerned with the administration of the tax laws; appellant from Unemployment Compensation Commission is not entitled to jury trial upon exceptions to findings of fact. *Unemployment Compensation Commission v. Willis*, 709.

IV, secs. 2, 12. General Assembly may create and abolish county courts, and may delegate to county commissioners discretionary power to abolish court for the county. *Efird v. Comrs. of Forsyth*, 96.

IV, sec. 8. Jurisdiction of Supreme Court on appeal is confined to questions of law or legal inference. *McKay v. Bullard*, 589.

IV, sec. 18. Section applies to salaries of judges of courts existing by virtue of the Constitution and not to salaries of judges of county courts. *Efird v. Comrs. of Forsyth*, 96.

V, sec. 5. Property owned by educational institution and rented by it for profit is not exempt from taxation. *Rockingham County v. Elon College*, 342; *Guilford College v. Guilford County*, 347. Power of General Assembly to exempt property from taxation is limited by constitutional grant of power. *Rockingham County v. Elon College*, 342.

X, sec. 6. Married woman who has been abandoned by her husband is a free trader, and her deed constitutes color of title. *Nichols v. York*, 262. Nonresident married woman may maintain action here against husband in tort for automobile accident occurring in this State, even though state of her residence does not allow such suit. *Bogen v. Bogen*, 51.