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NORTH CAROLINA REPORTS

VOL. 220

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1941

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1942

CITATION OF REPORTS

Rule 46 of the Supreme Court is as follows:

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

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2 "	"	6	"
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9 Iredell Law	as	31	N. C.
10 " "	"	32	"
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13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
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5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

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

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1941.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

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

ATTORNEY-GENERAL:

HARRY McMULLAN.

ASSISTANT ATTORNEYS-GENERAL:

T. W. BRUTON,
L. O. GREGORY,†
GEORGE B. PATTON.

SUPREME COURT REPORTER:

JOHN M. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD MURRAY.‡

MARSHAL AND LIBRARIAN:

DILLARD S. GARDNER.

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*Died 27 January, 1942. Succeeded by Hon. Emery B. Denny.
†Died 18 October, 1941. Succeeded by W. J. Adams, Jr.
‡Died 1 October, 1941. Succeeded by Adrian J. Newton.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

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

SPECIAL JUDGES

W. H. S. Burgwyn	Woodland.
Luther Hamilton	Morehead City.
Richard Dillard Dixon	Edenton.
Jeff D. Johnson, Jr.	Clinton.

WESTERN DIVISION

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

SPECIAL JUDGES

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

EMERGENCY JUDGES

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

SOLICITORS

EASTERN DIVISION

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

WESTERN DIVISION

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

*Died 16 October, 1941. Succeeded by Thos. L. Johnson.

SUPERIOR COURTS, FALL 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

Fall Term, 1941—Judge Frizzelle.

Beaufort—Sept. 15* (A); Sept. 22†; Oct. 6†; Nov. 3* (A); Dec. 1†.
Camden—Sept. 29.
Chowan—Sept. 8; Nov. 24.
Currituck—July 21†; Sept. 1.
Dare—Oct. 20.
Gates—Nov. 17.
Hyde—Aug. 18†; Oct. 13.
Pasquotank—Sept. 15†; Oct. 6† (A) (2); Nov. 3†; Nov. 10*.
Perquimans—Oct. 27.
Tyrrell—Sept. 29 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1941—Judge Stevens.

Edgecombe—Sept. 8; Oct. 13; Nov. 10† (2).
Martin—Sept. 15 (2); Nov. 17† (A) (2); Dec. 8.
Nash—Aug. 25; Sept. 15† (A) (2); Oct. 6†; Nov. 24*; Dec. 1†.
Washington—July 7; Oct. 20†.
Wilson—Sept. 1; Sept. 29†; Oct. 27† (2); Dec. 1 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1941—Judge Harris.

Bertie—Aug. 25 (2); Nov. 10 (2).
Halifax—Aug. 11 (2); Sept. 29† (A) (2); Oct. 20* (A); Nov. 24 (2).
Hertford—July 28; Oct. 13 (2).
Northampton—Aug. 4; Oct. 27 (2).
Vance—Sept. 29*; Oct. 6†.
Warren—Sept. 15*; Sept. 22†.

FOURTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Burney.

Chatham—July 28† (2); Oct. 20.
Harnett—Sept. 1* (A); Sept. 15†; Sept. 29† (A) (2); Nov. 10* (2).
Johnston—Aug. 11*; Sept. 22† (2); Oct. 13 (A); Nov. 3†; Nov. 10† (A); Dec. 8 (2).
Lee—July 14; Sept. 8†; Sept. 15† (A); Oct. 27.
Wayne—Aug. 18; Aug. 25† (2); Oct. 6† (2); Nov. 24 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Nimocks.

Carteret—Oct. 13; Dec. 1†.
Craven—Sept. 1*; Sept. 29† (2); Nov. 17† (2).
Greene—Dec. 1 (A); Dec. 8 (2).
Jones—Aug. 11†; Sept. 15; Dec. 8 (A).
Pamlico—Nov. 3 (2).
Pitt—Aug. 18*; Aug. 25; Sept. 8†; Sept. 22†; Oct. 20†; Oct. 27; Nov. 17† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Carr.

Duplin—July 21*; Aug. 25† (2); Sept. 29*; Dec. 1† (2).
Lenoir—Aug. 18; Sept. 22†; Oct. 13; Nov. 3† (2); Dec. 8 (A).
Onslow—July 14‡; Oct. 6; Nov. 17† (2).
Sampson—Aug. 4 (2); Sept. 8† (2); Oct. 20† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Thompson.

Franklin—Sept. 8†; Oct. 6*; Nov. 3† (2).
Wake—July 7*; Sept. 1*; Sept. 8* (A); Sept. 15† (2); Oct. 6* (A); Oct. 13† (3); Nov. 3* (A); Nov. 10† (A); Nov. 17† (2); Dec. 1* (2); Dec. 15†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Bone.

Brunswick—Sept. 8; Sept. 15†.
Columbus—July 7†; Sept. 29†; Oct. 6*; Nov. 24†; Dec. 1† (A); Dec. 15*.
New Hanover—July 21*; Aug. 18†; Aug. 25*; Oct. 13† (2); Nov. 3*; Nov. 10; Dec. 1† (2).
Pender—July 14†; Sept. 22; Oct. 27†.

NINTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Parker.

Bladen—Aug. 4†; Sept. 15*.
Cumberland—Aug. 25*; Sept. 22† (2); Oct. 6* (A); Oct. 20† (2); Nov. 17* (2).
Hoke—July 28†; Aug. 18; Nov. 10.
Robeson—July 7† (2); Aug. 11*; Aug. 25† (A); Sept. 1* (2); Sept. 22* (A); Oct. 6† (2); Oct. 20* (A); Nov. 3*; Nov. 10† (A); Dec. 1† (2); Dec. 15*.

TENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Williams.

Alamance—July 28†; Aug. 11*; Sept. 1† (2); Nov. 10† (A) (2); Nov. 24*.
Durham—July 14*; July 28† (A) (2); Sept. 1* (A) (2); Sept. 15† (3); Oct. 6*; Oct. 13† (A) (2); Oct. 27† (2); Dec. 1*.
Granville—July 21; Oct. 20†; Nov. 10 (2).
Orange—Aug. 18; Aug. 25†; Sept. 29†; Dec. 8.
Person—Aug. 4; Oct. 13.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Warlick.

Ashe—July 21† (2); Oct. 20*.
Alleghany—Sept. 29.
Forsyth—July 7 (2); Sept. 1 (2); Sept. 15† (2); Sept. 29† (A); Oct. 6 (2); Oct. 20† (A); Oct. 27†; Nov. 3 (2); Nov. 17† (2); Dec. 1 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Rousseau.

Davidson—Aug. 18*; Sept. 8†; Sept. 15† (A); Oct. 6† (A) (2); Nov. 17 (2).
Guilford—July 7* (2); July 28*; Aug. 4† (2); Aug. 25† (2); Sept. 8* (A); Sept. 15* (2); Sept. 15† (A) (2); Sept. 29† (2); Oct. 13*; Oct. 20*; Oct. 27* §; Oct. 27† § (2); Nov. 3* §; Nov. 10*; Nov. 17† (A) (2); Dec. 1*; Dec. 8*; Dec. 15*.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Pless.

Anson—Sept. 8†; Sept. 22*; Nov. 10†.
Moore—Aug. 11*; Sept. 15†; Sept. 22 (A); Dec. 8†.
Richmond—July 14†; July 21*; Sept. 1†; Sept. 29*; Nov. 3†.
Scotland—Aug. 4; Oct. 27†; Nov. 24 (2).
Stanly—July 7; Sept. 1† (A) (2); Oct. 6†; Nov. 17.
Union—July 28*; Aug. 18† (2); Oct. 13† (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Nettles.

Gaston—July 21*; July 28† (2); Sept. 8* (A); Sept. 15† (2); Oct. 20*; Oct. 27† (A); Nov. 24* (A); Dec. 1† (2).
Mecklenburg—July 7* (2); July 28* (A) (2); Aug. 11* (2); Aug. 25*; Sept. 1† (2); Sept. 1† (A) (2); Sept. 15† (A) (2); Sept. 15* (A) (2); Sept. 29*; Sept. 29† (A) (2); Oct. 6† (2); Oct. 13† (A) (2); Oct. 27† (2); Oct. 27† (A) (2); Nov. 10*; Nov. 10† (A) (2); Nov. 17† (2); Nov. 24† (A) (2); Dec. 1* (A) (2); Dec. 8† (A); Dec. 15†.

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Alley.

Alexander—Aug. 25 (A) (2).
Cabarrus—Aug. 18*; Aug. 25†; Oct. 13 (2); Nov. 10† (A); Dec. 1† (A).
Iredell—July 28 (2); Nov. 3 (2).
Montgomery—July 7; Sept. 22†; Sept. 29; Oct. 27†.
Randolph—July 14† (2); Sept. 1*; Oct. 20† (A) (2); Dec. 1 (2).
Rowan—Sept. 8 (2); Oct. 6†; Oct. 13† (A); Nov. 17 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Clement.

Burke—Aug. 4 (2); Sept. 22† (3); Dec. 8 (2).
Caldwell—Aug. 18 (2); Sept. 29† (A) (2); Nov. 24 (2).
Catawba—June 30 (2); Sept. 1† (2); Nov. 10*; Nov. 17†; Dec. 1† (A).
Cleveland—July 21 (2); Sept. 8† (A); Sept. 15† (A); Oct. 27 (2).
Lincoln—July 14; Oct. 13† (2).
Watauga—Sept. 15.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Sink.

Avery—June 30 (2); Oct. 13*; Oct. 20†.
Davie—Aug. 25; Dec. 1†.
Mitchell—July 21† (2); Sept. 15 (2).
Wilkes—Aug. 4 (2); Sept. 29† (2); Dec. 8 (2).
Yadkin—Aug. 18*; Nov. 17† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Phillips.

Henderson—Oct. 6 (2); Nov. 17† (2).
McDowell—July 7† (2); Sept. 1 (2).
Polk—Aug. 18 (2).
Rutherford—Sept. 22† (2); Nov. 3 (2).
Transylvania—July 21 (2); Dec. 1 (2).
Yancey—Aug. 4 (2); Oct. 20† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1941—Judge Gwyn.

Buncombe—July 7† (2); July 14 (A) (2); July 21*; July 28; Aug. 4† (2); Aug. 18*; Aug. 18 (A) (2); Sept. 1† (2); Sept. 15*; Sept. 15 (A) (2); Sept. 29† (2); Oct. 13*; Oct. 13 (A) (2); Oct. 27; Nov. 3† (2); Nov. 17*; Nov. 17 (A) (2); Dec. 1†; Dec. 15*; Dec. 15 (A) (2).
Madison—Aug. 25; Sept. 22; Oct. 20; Nov. 24; Dec. 22.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1941—Judge Bobbitt.

Cherokee—Aug. 4 (2); Nov. 3 (2).
Clay—Sept. 29.
Graham—Sept. 1 (2).
Haywood—July 7 (2); Sept. 15† (2); Nov. 17 (2).
Jackson—Oct. 6 (2).
Macon—Aug. 18 (2); Dec. 1 (2).
Swain—July 21 (2); Oct. 20 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1941—Judge Armstrong.

Caswell—June 30; Nov. 10*; Nov. 17†.
Rockingham—Aug. 4* (2); Sept. 1† (2); Oct. 20†; Oct. 27* (2); Nov. 24† (2); Dec. 8*.
Stokes—Aug. 18; Oct. 6*; Oct. 13†.
Surry—July 7† (2); Sept. 15*; Sept. 22† (2); Dec. 15*.

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

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.
WORTH MCKINNEY, Assistant United States Attorney, Asheville.
W. M. NICHOLSON, Assistant United States Attorney, Charlotte.
CHARLES R. PRICE, United States Marshal, Asheville.
J. Y. JORDAN, Clerk United States District Court, Asheville.

LICENSED ATTORNEYS

FALL TERM, 1941.

I, EDWARD L. CANNON, Secretary of the Board of Law Examiners of the State of North Carolina, do certify the following named persons have duly passed examination of the Board of Law Examiners as of August 7, 1941:

JAMES HINTON POU BAILEY	Raleigh.
WALTER CLARK BENSON	Edenton.
CRIST WATTS BLACKWELL	Winston-Salem.
HENRY CLAY BLAIR	Chapel Hill.
JOHN HENRY BLALOCK	Norwood.
HARVEY JAMES BONEY, JR.	Rose Hill.
ALAN MAX BROMBACHER	Brevard.
MAX BUSBY	Salisbury.
JOSEPH BLOUNT CHESHIRE, IV	Raleigh.
WILLIAM ALLEN COBB	Louisburg.
WILLIAM MCWHORTER COCHRANE	Newton.
JAMES MYERS COLE	Charlotte.
WILLIAM OWEN COOKE	Greensboro.
ARCHIBALD CRAIGE	Winston-Salem.
WILLIAM LUNSFORD CREW	Roanoke Rapids.
DANIEL ROBERT DIXON	Rocky Mount.
JAMES KYE DORSETT, JR.	Salisbury.
WILLIAMSON WHITEHEAD FULLER, II	Southern Pines.
HARRY GANDERSON	Elizabeth City.
NATHANIEL CHAPMAN WEEMS GENNETT, JR.	Asheville.
EUGENE ANDREW GORDON	Brown Summitt.
ALEXANDER HAWKINS GRAHAM, JR.	Hillsboro.
EARL THOMAS HART	Youngsville.
RUFUS FRANKLIN HARWARD, JR.	Raleigh.
LEWIS SNEED HIGH	Durham.
GILBERT CLARENDON HINE	Winston-Salem.
BENJAMIN SHAMBAUGH HORACK	Durham.
WILBUR MORTON JOLLY	Ayden.
SAMUEL RICHARDSON LEAGER	Raleigh.
ROBERT WING LEAVENWORTH	Durham.
WALTER STANLEY LENOX	Ridgefield Park, N. J.
WOODROW PERSHING LIPSCOMB	Hinton, W. Va.
ROBERT JONES LOVILL, JR.	Mount Airy.
MARION LEONARD LOWE	Caroleen.
PHILIP EDWARD LUCAS	Burgaw.
NEILL HECTOR MCGEACHY, JR.	Fayetteville.
ROBERT CRAIG MCINNES	Raleigh.
JAMES BRYAN MCMILLAN	Raleigh.
EDWIN VAN TUYL MACK	Rutherfordton.
JAMES RICHARDSON MATTOCKS	High Point.
WILLIAM ELLIS MEEHAN	Chapel Hill.
JOHN WILLIAM MORAN	Durham.
ROMULUS BRAGG PARKER	Enfield.
JAMES HICKS PITTMAN	Rockingham.
JOHN B. PITTMAN	Rockingham.

ROBERT JERRY RANDOLPH.....Mount Airy.
THOMAS PORCHER RAVENEL.....Greensboro.
EDGAR LEONIDAS ROEBUCK, JR. .....Washington.
CHARLES EDWIN ROTH.....Henderson.
GEORGE WASHINGTON SANDLIN.....Old Fort.
DAVID HAMILTON SCOTT.....Wilmington.
EDWARD HARDING SEAWELL.....Raleigh.
EARL FRANKLIN SHUFORD.....Hickory.
WILLIAM PERRY SHUFORD.....Asheville.
HENRY HARRISON SINK.....Greensboro.
JOHN MCNEILL SMITH, JR.....Rowland.
JOHN JOYNER SNOW.....McAdenville.
WARREN CARLISLE STACK.....Monroe.
WILLIAM WAYNE STATON.....Reidsville.
JACOB CALVIN TAYLOR.....Bethel.
RIPLEY URQUHART TAYLOR.....Whitakers.
WILLIS SIDNEY TURNER.....Raleigh.
HAL HAMMER WALKER.....Asheboro.
JULIEN KNOX WARREN, JR.....Trenton.
ROBERT DENNETT WATERMAN.....Asheville.
ROBERT WILSON WELLS.....Asheville.
CLAUD ROBERSON WHEATLEY, JR.....Beaufort.
DANIEL P. WHITLEY, JR.....High Point.
BILL JUSTIN WILLIAMS.....Durham.
JOHN LIVINGSTON WILLIAMS.....Boone.
THOMAS HENDRIX WILLIAMS.....Wade.
VAUGHAN SHARP WINBORNE.....Raleigh.
GEORGE HENRY WINDSOR.....Greensboro.
JULIAN DALLAS WINSLOW.....Elizabeth City.
ARTHUR ROY WOODS, JR.....Chapel Hill.
FRANK MARION WOOTEN, JR.....Greenville.
JOHN DEMETRIUS XANTHOS.....Wilmington.
MELVIN JACKSON YANCEY.....Oxford.

COMITY LICENSEES.

CARLYSLE A. BETHEL.....Winston-Salem, from New York.
FRANK DOWNS BOZARTH, JR.....Durham, from Georgia.
PEARL LESLEY JOHNSON.....Lake Junaluska, from Tennessee.
WILLIAM HENRY FRECKER MILLAR.....Waynesville, from Illinois.
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Given under my hand and the seal of the Board of Law Examiners, this the 9th day of August, 1941.

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The Board of Law Examiners.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1941

HESTER L. FERGUSON, ADMINISTRATRIX OF THE ESTATE OF JAMES FERGUSON, DECEASED; HESTER L. FERGUSON, INDIVIDUALLY; JAMES W. FERGUSON, JR., EDWIN C. FERGUSON, AND ISABEL FERGUSON, v. J. C. BLANCHARD; JOHN R. BRINKLEY; ....., ADMINISTRATOR OF THE ESTATE OF J. D. HOOD, DECEASED, AND ....., THE WIDOW, AND ....., THE HEIRS AT LAW OF THE SAID J. D. HOOD, DECEASED.

(Filed 17 September, 1941.)

1. Mortgages § 24—

The relationship between the trustor and the *cestui que trust* is not such as to render an absolute conveyance of the land by the trustor to the *cestui que trust* after default in the payment of the notes secured by the deed of trust, presumptively fraudulent in law.

2. Mortgages § 2a—Determination of whether deed from debtor to creditor and contemporaneous agreement to reconvey constitute equitable mortgage.

When a debtor conveys land to a creditor by a deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and the creditor agrees to reconvey upon the payment of the debt, the transaction is a mortgage, but if, under the terms of the agreement, the debtor does not obligate himself to pay the debt and take a reconveyance, the transaction does not constitute a mortgage unless the debt continues to exist after the execution of the deed and the parties intend the deed to be security for the debt, and the party asserting that the deed constitutes an equitable mortgage must establish the intention that the deed should constitute security for the debt by proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute conveyance.

3. Same—Deed from trustor to cestui coupled with contract of reconveyance held not a mortgage as matter of law.

This action was instituted to have a deed and a contract to reconvey declared an equitable mortgage, and for an accounting by the grantee as a mortgagee in possession. The cause was referred to a referee, who found from the uncontroverted facts appearing in the pleadings that the owners of land executed a deed of trust thereon to secure money borrowed, that after default the owners executed a deed absolute in form to the creditor, whereupon the deed of trust was canceled of record, that the creditor, as a part of the same transaction, gave the debtors an option to repurchase for the amount of the debt within a time specified, and further agreed that the debtors should have exclusive right to sell the land or timber therefrom for a further period of time, with provision that if the debtors sold the land they should have 90% of any sum realized in excess of the amount of the debt, and if they sold timber therefrom they should have 90% of the sum received in excess of the debt and the creditor would reconvey the land. The option was not exercised and the debtors did not sell timber or land to the amount of the debt within the time stipulated. After executing the deed the debtors exercised no dominion over the land and the creditor thereafter listed and paid all taxes. The referee found further that there was no evidence of coercion or undue influence on the part of the creditor, and that the dealings between the parties were *bona fide* and entered into between men of equal understanding and business ability. *Held:* The deed of trust having been canceled upon the execution of the deed and the debtors not being obligated thereafter to pay the debt, the transaction did not constitute a mortgage as a matter of law, and the referee having found from the evidence that the transaction was *bona fide* and therefore that the parties did not intend the deed as security, plaintiffs' exception to the referee's conclusion of law, approved by the court, that the deed did not constitute a mortgage, cannot be sustained.

APPEAL by plaintiffs from *Alley, J.*, at February Term, 1941, of JACKSON. Affirmed.

This was an action to have a deed and an agreement to reconvey declared to constitute a mortgage, and for an accounting. The facts alleged in the complaint were substantially these. J. W. Ferguson and wife, under whom plaintiffs claim, executed in 1922 two deeds of trust to T. W. Wilson, trustee, to secure an indebtedness of $20,000 to the defendant J. C. Blanchard, the deeds of trust conveying 4,000 acres of unimproved mountain land in Jackson County. After default in payment, in April, 1924, J. W. Ferguson and wife conveyed the land by deed absolute, with covenants of seizin and warranty, to Blanchard, and as a part of the same transaction an agreement was entered into between Blanchard and Ferguson whereby it was agreed that the amount of the debt and interest to September, 1924, would be $22,500, and an option was given Ferguson to repurchase for that amount on or before that date. It was also agreed that Ferguson should have exclusive right to sell the property on or before 19 June, 1929, for $22,500, plus interest

from 22 September, 1924, and taxes, and of any amount in excess Ferguson should have 90%, and if Ferguson should sell the timber for an amount in excess of the cost price so defined, Ferguson should have 90% of the profits, and Blanchard would reconvey the land to Ferguson subject to the timber sale.

It was further alleged that thereafter, in 1926, Ferguson sold 958 acres of the land to one Hood at the price of $28,740, and received $2,000 cash and notes for the balance secured by deed of trust on the 958 acres; that Blanchard joined in the conveyance, and Hood's notes of the face value of $14,370 were turned over to him, though it was not alleged that anything was ever paid on the notes. Plaintiffs alleged that by virtue of the deed and agreement the relationship of mortgagor and mortgagee between Ferguson and Blanchard was extended, and still continues, and that the plaintiffs, the successors in interest of J. W. Ferguson, are now entitled to an accounting. They alleged that by reason of the sale and cutting of certain timber, and by the renunciation or abandonment of a boundary line to the benefit of defendant Brinkley, the plaintiffs have been damaged by the acts of defendant Blanchard as mortgagee in possession in the sum of $30,000.

Defendant Blanchard in his answer alleged that the deeds of trust executed by Ferguson were given to secure $20,000 cash loaned by Blanchard to Ferguson in 1922; that having failed to pay the debt at maturity or any interest thereon, J. W. Ferguson and his wife conveyed the land in fee simple to the defendant Blanchard in consideration of the cancellation of the two deeds of trust; that this was done without coercion or imposition, Ferguson being a trained and experienced lawyer; that it was agreed that the amount of the debt and interest to 22 September, 1924, would be $22,500, and an option was given Ferguson to repurchase the land at that price on or before that date, which he failed to do; that while Ferguson was given an opportunity to sell the land and obtain 90% of the profits over the agreed amount, plus interest and taxes, this authority was expressly agreed to end 19 June, 1929; that while Ferguson sold some of the land to Hood (Blanchard executing the quitclaim to Hood), Blanchard received no money, only notes secured by deed of trust on the land sold, and nothing has been paid to Blanchard thereon; that Blanchard, after the execution of the deed to him by Ferguson, has paid all the taxes on the land, including those for 1924, amounting to more than $3,000; that in the agreement referred to it was expressly stated that it should constitute a full settlement of all dealings between the parties, and that it contained "all agreements between said parties"; that all rights under the agreement expired 19 June, 1929; that the agreement referred to was not executed until 21 June, 1926; that in 1932 defendant received $1,399.68 from the sale of some wood.

The allegation as to the abandonment of any land to defendant Brinkley was denied. The defendants set up the ten and three years' statutes of limitation. This action was begun 23 August, 1937. Defendant offered to execute and deliver deed to plaintiffs for the land upon payment of $22,500, plus interest and taxes paid by Blanchard.

The action was referred to S. W. Black, Esq., as referee, who reported his findings of fact and conclusions of law to the court. The findings of fact may be briefly stated as follows: Plaintiffs' predecessors in title, J. W. Ferguson and wife, on 24 July, 1922, and 21 September, 1923, executed deeds of trust conveying 4,000 acres of rough, unimproved timber, and possibly mineral land, to secure the payment to Blanchard of $20,000, money borrowed, evidenced by notes due 24 July, 1923, and 21 March, 1924. On 2 April, 1924, neither principal nor any interest having been paid, Ferguson and wife executed and delivered to Blanchard deed in fee simple conveying to Blanchard the land described in the deeds of trust. A contract or agreement, dated 2 April, 1924, but actually signed 21 June, 1926, was executed by Blanchard and wife and J. W. Ferguson in which defendant Blanchard agreed to reconvey the 4,000 acres of land to J. W. Ferguson upon condition that he pay to Blanchard on or before 22 September, 1924, the sum of $22,500, it being the amount which would have been due on the original debt at that date. The agreement contained provision to the effect that if Ferguson failed to pay said sum on or before 22 September, 1924, the option and agreement to reconvey should be null and void. This agreement contained the further provision granting Ferguson option to sell the property on or before 19 June, 1929, and in event of sale pay Blanchard $22,500 with interest and taxes paid, and that if profit was realized over and above this amount on or before 19 June, 1929, Ferguson should receive 90% of net profits.

In 1926, J. W. Ferguson effected a sale of 958 acres of the land to one J. D. Hood, who paid $2,000 cash, which was retained by Ferguson, and also executed notes and deed of trust on the 958 acres for the balance of the purchase price of $28,740. It was agreed that the Hood notes should be divided between Ferguson and Blanchard, the latter to credit the notes as and when paid on the original amount of Ferguson's debt. Hood failed to pay any part of the notes or interest, and no credits have been applied therefrom. J. C. Blanchard has paid the taxes on the land for the year 1924, and for the years 1925 to 1935, inclusive, $3,054.80. J. C. Blanchard has received from sale of spruce wood $1,399.68.

The referee found "that there was no evidence of any coercion or undue influence on the part of J. C. Blanchard at the time of the execution of the contract and agreement and at the time of the deed from Ferguson and wife to Blanchard on the 2nd day of April, 1924, and

that the dealings between said Ferguson and Blanchard were *bona fide* and entered into between men of equal business ability and understanding."

There was no evidence offered as to any transaction relating to Jno. R. Brinkley. Service of summons was had only on Blanchard and Brinkley. The referee concluded as a matter of law that the deed executed by J. W. Ferguson and wife to J. C. Blanchard on 2 April, 1924, was and is *bona fide,* and does not have the effect of a mortgage; that all transactions between J. C. Blanchard and J. W. Ferguson with relation to said lands became final and settled as between these parties on 19 June, 1929; that J. C. Blanchard is owner in fee simple of the lands described; that J. C. Blanchard as holder of some of the notes has right to have the J. D. Hood deed of trust foreclosed as prayed by both parties; that no evidence having been offered as to Jno. R. Brinkley, he is entitled to judgment dismissing the action as to him.

Plaintiffs filed exceptions to the referee's conclusions of law, and also filed motion for interlocutory decree declaring the deed a mortgage, on the ground that the deed and agreement, as a matter of law, constituted the relationship of mortgagor and mortgagee between the parties, and that plaintiffs were thereupon entitled to an accounting with defendant Blanchard as mortgagee in possession.

The court below denied plaintiffs' motion for interlocutory decree, overruled the exceptions to the referee's conclusions of law, and upon consideration of the referee's findings of fact and conclusions of law adopted and approved each and all of the findings of fact and conclusions of law, and in all respects confirmed the report of the referee. Judgment was entered for the defendant Blanchard in accord with this ruling, and plaintiffs excepted and appealed.

Frank Carter, John M. Queen, C. C. Buchanan, and Varser, McIntyre & Henry for plaintiffs, appellants.

Whedbee & Whedbee and Stillwell & Stillwell for defendants, appellees.

DEVIN, J. The plaintiffs filed exception to the referee's conclusions of law, making no objection to his findings of fact as such, and challenge the judgment rendered below solely on the ground that the deed executed by J. W. Ferguson and wife to defendant Blanchard in 1924, together with the agreement appearing in the record, as a matter of law, constituted the relationship of mortgagor and mortgagee between these parties, which relationship still continues and entitles the plaintiffs, heirs and personal representatives of J. W. Ferguson, to the right of redemption and to an accounting with defendant Blanchard as mortgagee in posses-

sion. The plaintiffs supported their exception by a motion for an interlocutory decree based upon the same ground.

The material facts are not controverted. They sufficiently appear from the pleadings. No oral evidence was offered. In 1922 J. W. Ferguson borrowed $20,000 from J. C. Blanchard and to secure the same executed deed of trust conveying to a trustee 4,000 acres of unimproved mountain land. Nothing was paid on this debt, principal or interest, and in April, 1924, after maturity, J. W. Ferguson and wife conveyed the land to J. C. Blanchard by deed absolute with covenants of seizin and warranty, and the deeds of trust were canceled of record. By an agreement, dated the same time but executed subsequently, Blanchard gave Ferguson the option to repurchase the land for the amount of the debt and interest, agreed to be then $22,500. By express terms, unless this option was exercised on or before 22 September, 1924, it became null and void. The option was not exercised. The agreement, however, gave to Ferguson, in the event he did not repurchase, the right to effect a sale of the land on or before 19 June, 1929, and, if he could do so within that time at a price in excess of $22,500, plus additional interest and taxes paid, Ferguson should receive 90% of the excess; and in addition it was provided that if Ferguson could, before 19 June, 1929, sell the timber on the land for an amount sufficient to pay the stipulated amount, Blanchard would convey to Ferguson the land subject to the timber sale. This agreement contained this stipulation: "It is further understood and agreed that this contract is given and accepted in full settlement of all dealings or agreements heretofore made by and between the parties hereto, and all matters between them have been settled in full, and that this contract contains all agreements between said parties."

The referee found that in the execution of the deed there was no evidence of coercion or imposition on the part of defendant Blanchard, that the dealings between Ferguson and Blanchard were *bona fide* and entered into between men of equal business ability and understanding.

It seems to be well settled that where land has been conveyed to a trustee to secure the debt of a third person, the relationship between the trustor and the secured creditor is not such as to characterize a subsequent conveyance of the land by the trustor to the creditor as in law presumptively fraudulent. *Murphy v. Taylor,* 214 N. C., 393, 199 S. E., 382; *Simpson v. Fry,* 194 N. C., 623, 140 S. E., 295.

It is also settled that a deed absolute on its face cannot be converted into a mortgage unless it be established that the clause of defeasance was omitted by ignorance, mistake, fraud, or undue influence. *Perry v. Surety Co.,* 190 N. C., 284, 129 S. E., 721. However, there is neither allegation nor proof in the instant case that a clause of defeasance was omitted from the deed by mistake or inequitable conduct.

But plaintiffs do not base their exception to the referee's conclusion of law on this ground. The plaintiffs' contention is that the intention to constitute the relationship of mortgagor and mortgagee appears from the contract, and that, taking it in connection with the transmutation of the legal title by the deed, all the elements of a mortgage conclusively appear. They rely upon the principle enunciated in *Perry v. Surety Co., supra:* "Whenever a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is, in equity, a mortgage. . . . There are no special words required to constitute a mortgage. The test is whether the conveyance, or the whole transaction, is a security for the payment of money, or the performance of any act or thing."

It is true that when a debtor conveys land to a creditor by deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and takes from the grantee an agreement to reconvey upon payment of the debt, the transaction is a mortgage. *Robinson v. Willoughby,* 65 N. C., 520. But if the agreement leaves it entirely optional with the debtor whether he will pay the debt and redeem the land or not, and does not bind him to do so, or continue his obligation to pay, the relationship of mortgagor and mortgagee may not be held to continue unless the parties have so intended. The distinction is pointed out in *O'Briant v. Lee,* 212 N. C., 793, 195 S. E., 15, where *Connor, J.,* speaking for the Court, quotes with approval from 41 C. J., 325, as follows: "If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed to the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance, he has not the rights of a mortgagor, but only the privilege of repurchasing the property." And in Pomeroy's Equity Jurisprudence (sec. 1194) it is said: "Where land is conveyed by an absolute deed, and an instrument is given back as a part of the same transaction, not containing the condition ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a specified time, the two taken together may be what on their face they purport to be—a mere sale with a contract of repurchase, or they may constitute a mortgage."

Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction seems to be whether the debt existing prior to the conveyance is still left subsisting or has been entirely discharged or satisfied by the conveyance. If no relation whatsoever of debtor and creditor is left

subsisting, the transaction is a sale with contract of repurchase, since there is no debt to be secured. Pomeroy's Equity Jurisprudence, sec. 1195.

Is the relation of debtor and creditor still existing? Was the deed intended as security? The answer to these questions determines the character of the transaction. The real intention of the parties at the time of the execution of the instrument controls. It was said in *Watkins v. Williams,* 123 N. C., 170, 31 S. E., 388, that the intention that the deed shall constitute a mortgage or security for a debt must be established by proof of facts and circumstances *dehors* the deed inconsistent with the idea of an absolute conveyance.

In *O'Briant v. Lee,* 214 N. C., 723, 200 S. E., 865, *Barnhill, J.,* discussed this subject, with citation of numerous authorities, supporting the ruling in the former opinion in that case wherein it was held that if the facts were susceptible of different interpretations, an issue for the jury was presented. Here such inferences as are capable of being drawn from the facts in evidence were found by the referee against the plaintiffs.

We are unable to concur in the view that a deed absolute on its face coupled with a contract of reconveyance for a stipulated amount within a limited time should be held, as a matter of law, without further evidence, to constitute a mortgage. There is here no extrinsic evidence of facts and circumstances that would tend to stamp the transaction as a mortgage or to give to the deed the effect of security for a subsisting obligation. It is not denied that upon the execution of the deed the deeds of trust were canceled of record, and that the defendant Blanchard thereafter listed and paid all taxes on the land. No acts of possession on this land were exercised by Ferguson. Nothing was done pursuant to the agreement save the sale of a portion of the land for which Blanchard received only notes still unpaid. The authority given to sell the land or the timber, and, if for enough to pay the stipulated amount, obligating the defendant to convey the balance, was expressly limited in time, and expired 19 June, 1929. This may not be held conclusively to denominate the transaction as a mortgage and the deed as security for a debt.

We cannot hold on this record that all the elements of a mortgage conclusively appear on the face of the written instruments. The referee's conclusion, upon the facts found, that the deed and agreement did not have the effect of a mortgage, was approved by the trial judge. In this we find no error. The order decreeing foreclosure of the Hood deed of trust was proper.

The ruling of the court below on the plaintiffs' exception to the referee's report, and on their motion for interlocutory judgment, must be

Affirmed.

EMMERSON SEARS v. MARYLAND CASUALTY COMPANY.

(Filed 17 September, 1941.)

1. Insurance § 48—Injured third party may not recover against insurer in liability policy, even under Virginia statute, when insured is not liable.

In an action instituted against a Virginia "U-Drive-It" company and the bailee for hire of one of its cars to recover for injuries sustained as a result of the negligent operation of the car by the driver, plaintiff recovered judgment against the driver but judgment of involuntary nonsuit was entered in favor of the Virginia company and appeal therefrom was not perfected. Execution on the judgment against the driver was returned wholly unsatisfied. Plaintiff then instituted this action against the insurer in a liability policy issued to the Virginia company. Plaintiff relied not only on the policy, but also upon the provisions of sec. 4326 of the Code of Virginia, prescribing that liability or indemnity policies issued in that State shall provide for liability on the part of insurer if judgment against insured is uncollectible by reason of bankruptcy or insolvency, and further that such policies shall provide for liability on the part of insurer for damages resulting from negligence in the operation of the insured vehicles by any person legally using same with the express or implied permission of insured. *Held:* Even conceding that the Virginia statute should be considered as a part of the insurance contract in an action thereon in this State, the Virginia statute, although it enlarges insurer's liability to cover any liability of the insured for damages inflicted while the vehicles covered are operated by third parties with insured's express or implied consent, a correct construction of the statute does not impose liability on the part of insurer when there is no liability on the part of insured, and plaintiff having established the want of liability on the part of insured, insurer's motion to nonsuit should have been allowed.

2. Same—

A party injured by the negligent operation of an automobile covered by a liability insurance contract can have no greater right against insurer under the contract than that of insured, and his rights are perforce limited by the terms and conditions of the policy.

CLARKSON, J., dissents.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1941, of PASQUOTANK. Reversed.

Civil action to recover on automobile liability policy issued by defendant to U-Drive-It Company, Inc., of Norfolk, Va.

On 27 April, 1939, the defendant issued its "garage liability policy" to the U-Drive-It Company of Norfolk, Va. This policy was in full force and effect at the time of the happening of the matters and things alleged in the complaint and included the automobile described in the complaint within its coverage.

On 19 August, 1939, the U-Drive-It Company rented to one Hobbs, by written agreement, one of its automobiles maintained in connection with its business. Hobbs, while operating the automobile in Currituck County, North Carolina, ran the automobile into the plaintiff inflicting certain personal injuries.

Thereafter, in February, 1940, plaintiff instituted an action in the Superior Court of Currituck County against the said Hobbs and the U-Drive-It Company to recover damages resulting from such personal injuries. At the trial of the cause, at the conclusion of the evidence for the plaintiff, judgment of involuntary nonsuit was entered as to the defendant U-Drive-It Company. The jury, as against Hobbs, answered the issues in favor of the plaintiff, awarding $3,000.00 damages. Judgment was duly entered on the verdict. Plaintiff excepted to the judgment of nonsuit as to the U-Drive-It Company but failed to perfect his appeal. Execution was issued on the judgment against Hobbs and was returned wholly unsatisfied. Thereafter, the plaintiff, in August, 1940, instituted this action against the defendant seeking to recover the amount of the judgment obtained, alleging that under the terms of its policy and the statutes of Virginia the defendant is liable for the payment thereof.

When this cause came on to be heard in the court below, parties waived trial by jury and submitted the cause to the judge presiding. Upon the hearing the judge overruled the motion for judgment as of nonsuit duly entered by the defendant when plaintiff rested, and renewed at the conclusion of all the evidence, and rendered judgment for the plaintiff. The defendant appealed.

M. B. Simpson for plaintiff, appellee.
Whedbee & Whedbee for defendant, appellant.

BARNHILL, J. On its appeal the defendant challenges the correctness of the ruling of the court below in permitting the proof over objection of the statutes of Virginia relating to Motor Vehicle Liability policies and contends that in any event the statute has no extraterritorial application. Interesting as these questions may be, we may pass them without discussion or decision and come to the exception to the refusal of the court to dismiss as of nonsuit. This exception is based primarily upon the contention that the court below misinterpreted the contract of insurance. We may decide the question thus raised upon the assumption (though we do not so decide) that the Virginia statute is to be considered a part of the policy in a suit thereon in this State.

Under its contract the defendant agreed "to pay on behalf of the insured all sums which the insured shall become obligated to pay by

reason of the liability imposed upon him by law for damages" either for personal injuries or property damage. The several automobiles covered and the conditions of liability are set out in the policy and the automobile which caused injury to the plaintiff is included.

The plaintiff relies not only on the policy as written but as amended by operation of law by sec. 4326 (a) of the Code of the State of Virginia. This statute requires that all liability policies thereafter issued shall contain the standard bankruptcy provision giving the injured person a remedy over against the insurance company when the judgment against the insured is uncollectible by reason of bankruptcy or insolvency. Thus it puts an end to any defense that the contract is one of indemnity only and not one of liability.

It further provides that:

"No such policy (policy of insurance against loss or damage resulting from accident to or injuries suffered by an employee or other person and for which the person insured is liable) shall be issued or delivered in this State, to the owner of a motor vehicle, by any corporation or other insurer authorized to do business in this State, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with permission, express or implied, of such owner."

Passing the question whether a bailee for hire is one operating an automobile "with the permission" of the owner within the meaning of the statute, we come to the crux of the controversy between the parties: Can there be any liability under the policy in favor of a third party injured by the operator of an automobile embraced within the policy when there is no liability on the part of the insured?

That there is no liability on the part of the U-Drive-It Company to the plaintiff on account of the injuries sustained by him while Hobbs was operating its automobile has been established. Plaintiff sued the insured and his action was dismissed by judgment of involuntary nonsuit. He neither appealed nor instituted a new action. The judgment dismissing the action is *res judicata.*

Even so, plaintiff contends that Hobbs was the owner while operating the automobile within the meaning of the statute. In support of this position he relies upon *Newton v. Employer's Liability Assur. Corp.*, 107 Fed. (2d), 164. After a careful reading of this opinion we find that we are unable to concur in the conclusion reached. Hence, we are unable to adopt the view of the plaintiff.

Under the statute, as well as under the policy, the defendant insured the owner against liability for damage, for death or injury to person or

property. The first paragraph thereof gives the injured person a right of action over against the insured when judgment has been obtained against the insured and execution thereon has been returned unsatisfied or when the insured, by reason of bankruptcy, is unable to pay. The primary purpose of the second paragraph is to meet the defense in an action on the policy that the owner was not at the time of the accident operating the car personally or by his agent, although it was being operated by a member of his family or another with his express or implied consent. This is the interpretation which has been placed upon a similar statute by the courts of the State of New York. *Brustein v. New Amsterdam Casualty Co.*, 255 N. Y., 137; *Lavine v. Indemnity Co.*, 260 N. Y., 399; *Bakker v. Ætna Life Ins. Co.*, 264 N. Y., 150.

The contract is one between the defendant and the U-Drive-It Company. Its purpose, as amended by the statute, is to protect the insured. The statute does not convert it into a third party beneficiary contract, and a third party can have no greater right under the contract than the insured. *Small v. Morrison,* 185 N. C., 577, 118 S. E., 12; Appleman, Automobile Liability Insurance, 293.

The parties have made their contract in plain and unambiguous language. The statute, while it enlarges the coverage, makes no change as to the contracting parties or the party insured. It does not amount to a third party beneficiary clause. The coverage is no greater when the automobile is being used with the permission of the assured than when it is being used by the owner himself. The defendant under the statute merely agrees to pay any liability of the owner arising out of the operation of the designated automobile by a third party with his express or implied consent. Hence, a third party cannot recover from the insurer in the absence of proof of liability on the part of the insured.

The liability assumed by the insurer both under the policy and under the statute is the liability of the owner resulting from the negligent operation of the automobiles within the coverage of the policy. It relates to a cause of action which arises in favor of the injured person against the insured. The insurer is liable only when the insured is liable. It is this liability that the defendant assumed and agreed to pay—and none other.

It would require a strained construction of the language of the policy and of the statute to hold that the plaintiff in this action who is not a party to the contract between defendant and the U-Drive-It Company acquired rights, either under the policy or under the statute, which are superior to those of the assured and that the defendant is liable to him although it is not liable to the party with whom the contract was made. One who seeks to take advantage of a contract made for his benefit—if

indeed the contract of insurance can be so construed—must take it subject to all its terms and conditions. *Peeler v. Casualty Co.*, 197 N. C., 286, 148 S. E., 261.

As it is made to appear from the evidence offered by the plaintiff that there is no liability to the plaintiff on the part of the assured for the injuries received by him, there is no right of the insured to which plaintiff is subrogated under the terms of the Virginia statute. The evidence offered fails to make out a cause of action. The motion for judgment of nonsuit should have been allowed.

Reversed.

CLARKSON, J., dissents.

PAUL WILKINS v. THOMAS A. BURTON
and
LAWRENCE WARD v. THOMAS A. BURTON.

(Filed 17 September, 1941.)

1. Public Officers § 8—

A public officer may not be held individually liable for breach of an official or governmental duty involving the exercise of discretion unless he acts corruptly or maliciously, and he may not be held liable for breach of a ministerial duty imposed for the public benefit unless the statute imposing such duty provides for such liability.

2. Public Officers § 8: Highways § 2—State highway engineer may not be held liable for negligence in failing to remove obstruction unless he acts corruptly or maliciously or is guilty of wanton negligence.

This action was instituted to recover for injuries sustained when the car in which plaintiffs were riding struck a limb lying on a dirt highway. Admissions in the answer introduced by plaintiffs established that defendant was a divisional engineer of the State Highway & Public Works Commission and that the highway in question is embraced within his division. Plaintiffs also introduced evidence tending to show that defendant was given notice that the limb was lying across the highway and that the accident occurred some six hours after such notice. *Held:* Even conceding that the failure of defendant to have had the limb removed during the length of time elapsing between the notice to him and the accident constituted evidence of negligence, defendant's motion to nonsuit was properly allowed, since if defendant's failure to remove the limb was a breach of an official or governmental duty involving the exercise of discretion there was neither allegation nor evidence of corruption or malice, and if such duty was a ministerial duty it was of a public nature imposed entirely for the public benefit, and there was neither allegation nor proof that the statute imposing the duty provided for personal liability. To

the contrary, the statute, sec. 50, ch. 2, Public Laws 1921, provides that such officers shall not be individually liable except for wanton and corrupt negligence.

Two cases consolidated for trial before *Warlick, J.*, at April Term, 1941, of STOKES.

The actions were to recover for physical injuries and property damage caused by the alleged negligence of the defendant, as Division Engineer of the State Highway & Public Works Commission, in failing to remove or have removed a large limb of a tree which had fallen across a highway in Rockingham County, under the jurisdiction of the defendant as such engineer, and by reason of which failure the automobile in which the plaintiffs were riding collided with said limb and was overturned, thereby injuring the plaintiffs and damaging said automobile.

When the plaintiffs had introduced their evidence and rested their case, the defendant moved for a judgment as in case of nonsuit, which motion was allowed (C. S., 567), and accordant therewith judgment was signed. The plaintiffs appealed, assigning errors.

Roy L. Deal for plaintiffs, appellants.
Charles Ross and R. J. Scott for defendant, appellee.

SCHENCK, J. It appears from the evidence that the defendant, Thomas A. Burton, was Division Engineer of the State Highway & Public Works Commission, having in charge the administrative division of the State and county highway system established by the State Highway & Public Works Commission, including the State and county highways of Rockingham County; that on Sunday, 3 December, 1939, a tree near one of the graded soil covered highways in Rockingham County was struck by lightning and set on fire, that a large limb from the tree was caused to fall across the highway; that the limb was discovered across the highway in the forenoon and was soon thereafter reported to the defendant, who said he would "attend to it"; that the limb was not removed, and that between sundown and dark on the evening of 3 December, 1939, the car in which the plaintiffs were riding while being driven on the said soil covered highway ran into the said limb, resulting in the injuries and damage of which complaint is made.

Conceding but not deciding that the time elapsing between the notice given to the defendant of the position of the limb across the highway till the collision between the automobile in which plaintiffs were riding—from about 11:30 a.m. till about 5:30 p.m.—with no action on the part of a person responsible for the condition of the highway might under certain circumstances constitute evidence of actionable negligence, we do

not concur in the contention that the evidence in this case was sufficient to have been submitted to the jury.

The defendant, according to admissions in the answers introduced in evidence, was a public officer, namely, "Division Engineer of the State Highway & Public Works Commission for the Fifth Division, and that the County of Rockingham is embraced within said division." It therefore clearly appears that the defendant was a public officer and any liability that attached to him was due to the public office which he held.

In *Hipp v. Ferrall,* 173 N. C., 167, 91 S. E., 831, it is said: "It is held in this State 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; *Baker v. State,* 27 Ind., 485." If it be contended that the defendant in this case was in the performance of official or governmental duties involving the exercise of discretion, the plaintiffs' case must fail for the want of both allegation and proof of corruption or malice.

Further in *Hipp v. Ferrall, supra,* it it said: "It is also the recognized principle here, and the position is sustained by the great weight of authority elsewhere, that in case of duties plainly ministerial in character the individual liability of such officers for negligent breach of duty should not attach where the duties are of a public nature, imposed entirely for the public benefit, unless the statute creating the office or imposing the duties makes provision for such liability, and this principle was approved and applied here in the case of *Hudson v. McArthur,* 152 N. C., 445, opinion by *Associate Justice Manning,* and is in accord with the great weight of authority in other jurisdictions. *McConnell v. Dewey,* 5 Neb., 385; *Bates v. Horner,* 65 Vt., 471, reported with full note by the editor in 22 L. R. A., p. 824; *S. v. Harris,* 89 N. E., 169." If it be contended that any duty of the defendant with relation to the situation created by the limb across the highway was ministerial in character, it is also perfectly clear that such duty was imposed for the public benefit, and the statute imposing such duty makes no provision for such liability. In fact, the provision of the statute has a contrary intendment. Section 50, ch. 2, Public Laws 1921, reads: ". . . the State Highway Commission, both as a commission and the individual members thereof, shall not be liable for any damage sustained by any person, firm or corporation on the State Highway System, except for wanton and corrupt negligence." There is no allegation nor proof of wantonness or corruption. See, also, *Ruffin v. Garrett,* 174 N. C., 134, 93 S. E., 449.

In the recent case of *Old Fort v. Harmon,* 219 N. C., 241, it is written: "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," and, further, "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."

Holding, as we do, that the motion for judgment as in case of nonsuit was properly allowed, it becomes supererogatory to discuss the other interesting points presented in the brief of the appellants.

The judgment of the Superior Court is

Affirmed.

MINNIE RUSH BROOKS v. CHARLES P. BROOKS.

(Filed 17 September, 1941.)

Courts § 2a—Superior Court acquires jurisdiction of cause upon docketing of interlocutory judgment of General County Court.

In this action for subsistence without divorce, C. S., 1667, tried in the General County Court, judgment was rendered in favor of plaintiff. This judgment was duly docketed in the office of the clerk of the Superior Court of the county. Thereafter order was entered in the General County Court reducing the amount of the monthly allowance. Upon the abolition of the General County Court, the judge thereof, pursuant to previous notice given to the county bar, entered a general order transferring all cases then pending to the Superior Court of the county. Thereafter defendant failed to further comply with the orders for the payment of subsistence and plaintiff moved in the Superior Court for an order that defendant show cause why he should not be adjudged in contempt and for an order increasing the amount of subsistence. Defendant entered a special appearance and demurred to the jurisdiction of the Superior Court. *Held:* Upon the docketing of the judgment in the Superior Court, it acquired jurisdiction of the cause, and defendant's demurrer to the jurisdiction was properly overruled, C. S., 1608 (dd). Whether the provisions of ch. 69, Public-Local Laws of 1941, or the order of the General County Court transferring pending actions to the Superior Court, are sufficient to effect the transfer need not be considered.

APPEAL by defendant from *Bobbitt, J.,* at March Term, 1941, of BUNCOMBE.

Civil action for subsistence without divorce, under C. S., 1667.

Plaintiff moved in the Superior Court for an order for defendant to appear and show cause why he should not be adjudged in contempt of

court for failure to comply with judgment and orders theretofore entered in General County Court of Buncombe County, requiring him to pay reasonable subsistence to plaintiff and her children, and for an order increasing the amount of subsistence, and for attorney's fees.

On 20 February, 1941, defendant filed special appearance and demurred to the jurisdiction of the Superior Court upon the ground that the action tried in the General County Court came to the Superior Court upon an omnibus order signed by the judge of the General County Court on the last day of its existence, transferring all pending civil actions to the Superior Court—the defendant contending that the transfer was without notice to or consent of the parties and was not in compliance with provision of law for transfer of cases from General County Court to Superior Court.

The trial court finds facts substantially these: This action, having been commenced in the Superior Court of Buncombe County on 23 June, 1933, was by consent transferred to the General County Court of said county on 30 June, 1933. Thereafter, on 15 December, 1933, upon verdict favorable to plaintiff, judgment was rendered in said County Court ordering and requiring defendant to pay certain amount twice each month at stated time, after said date, for the benefit of plaintiff and her children, and a further amount on counsel fees allowed.

A transcript of this judgment was duly docketed in the office of the clerk of Superior Court on 18 December, 1933.

Thereafter, on 10 January, 1936, order was entered in the General County Court reducing the amount of monthly allowance.

Defendant complied with the orders in this cause up to 15 February, 1941, but failed to make payment on that date and all subsequent payments.

The board of county commissioners of Buncombe County having theretofore adopted a resolution abolishing the General County Court as of 1 January, 1941, the judge of the General County Court, pursuant to previous notice given in a meeting of the Buncombe County Bar, entered a general order on 31 December, 1940, transferring to the Superior Court all civil cases then pending in said General County Court. Thereafter, the General Assembly of North Carolina, at the 1941 session, passed an act entitled, "An Act relating to the transfer of civil and criminal cases from the General County Court of Buncombe County to the Superior Court of Buncombe," effective from and after its ratification, 21 February, 1941. Public-Local Laws 1941, ch. 69.

Upon such findings of fact, the judge of Superior Court being of opinion that the judgment entered upon verdict of the General County Court of Buncombe County, transcripted to and recorded in the office of the clerk of Superior Court, is a valid and binding judgment, and

enforceable under the laws of this State, overruled and dismissed the special appearance, demurrer and motion to dismiss of the defendant. The judge further ordered that defendant appear on a date named and show cause why there should not be entered an order directing him to pay to plaintiff the amounts heretofore fixed by the court, or such an amount as to the court may seem just and proper in this cause.

Defendant objects and excepts, and appeals to Supreme Court and assigns error.

Weaver & Miller for plaintiff, appellee.
J. W. Haynes for defendant, appellant.

WINBORNE, J. Upon the facts found, does the Superior Court of Buncombe County have jurisdiction of this cause of action? An affirmative answer is found in section 19 of chapter 216, Public Laws 1923; section 1608 (dd) of 1924 Consolidated Statutes of North Carolina. There, referring to judgment of general county courts, it is provided that: ". . . transcripts of such judgments may be docketed in the Superior Court as now provided for judgments of justices of the peace, and the judgment when docketed shall in all respects be a judgment of the Superior Court in the same manner and to the same extent as if rendered by the Superior Court . . ." Therefore, when the judgment of the General County Court was docketed in Superior Court, it became a judgment of the Superior Court, and within its jurisdiction. See *Investment Co. v. Pickelsimer,* 210 N. C., 541, 187 S. E., 813.

In the light of the above, it is unnecessary to consider whether either the order of the judge of the General County Court or the act of the Legislature be sufficient to effect the transfer from the General County Court to the Superior Court.

The judgment below is

Affirmed.

W. H. BULLINGTON v. FURMAN ANGEL.

(Filed 17 September, 1941.)

1. Mortgages § 36—

Ch. 36, Public Laws 1933, Michie's Code, 2593 (f), providing that the mortgagee or trustee or holder of notes for balance of the purchase price of real property, executed after the effective date of the statute, "shall not be entitled to a deficiency judgment" operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the statute applies to all such deficiency judgments, including those predicated upon

notes secured by mortgages or deeds of trust executed in another state upon realty lying therein.

2. Constitutional Law § 23: Courts § 14—Denial of deficiency judgment on notes executed in another state does not impinge Full Faith and Credit Clause.

This action was instituted to recover a deficiency judgment on notes secured by a deed of trust executed in the State of Virginia on real estate situate in Virginia. Defendant demurred on the ground that the complaint failed to state a cause of action for that it appeared upon the face of the complaint that the action was to recover a deficiency judgment for the balance of the purchase price of realty on notes executed subsequent to the effective date of ch. 36, Public Laws 1933, Michie's Code, 2593 (f). *Held:* Judgment sustaining the demurrer does not impinge the Full Faith and Credit Clause of the Federal Constitution or violate the general doctrine that a contract will be construed in accordance with the laws of the state wherein it is executed, since the statute operates upon the adjective law and not the substantive law and procedural matters are governed by the *lex loci*.

APPEAL by defendant from *Alley, J.*, at April Term, 1941, of MACON.

Morphew & Morphew and R. Roy Rush for plaintiff, appellee.
Jones & Jones and Jones, Ward & Jones for defendant, appellant.

SCHENCK, J. The plaintiff alleges in effect that he contracted in the State of Virginia with the defendant for the sale and purchase of a tract of land in Virginia, that he executed a deed to the defendant for said land, and the defendant paid him a part of the purchase price and executed to trustees a deed of trust on said land to secure several notes representing the balance of the purchase price therefor; that there was a default in the payment of one of said notes when due, and plaintiff exercised the right given in said deed of trust to declare the remaining notes due, and called upon said trustees to sell the land to provide funds with which to pay the unpaid notes; that said trustees advertised and sold said land and applied the funds arising therefrom to the payment of said notes; that after such application of such funds there was a deficiency still due on said notes and this action is to recover such deficiency.

To the complaint the defendant filed a demurrer upon the ground that it failed to state facts sufficient to constitute a cause of action, for that it appears from the face thereof that the action is to recover a deficiency judgment on notes given for the purchase price of real estate.

The court entered judgment overruling the demurrer, to which the defendant preserved exception and appealed.

The question presented is: When it appears from the complaint that the notes and deed of trust upon which the action is predicated were executed subsequent to 6 February, 1933, in Virginia, and relate to real

estate in Virginia, do the provisions of the law of North Carolina, ch. 36, Public Laws 1933 (N. C. Code of 1939 [Michie], sec. 2593 [f]), prevent the holder of the notes secured by such deed of trust from obtaining a deficiency judgment thereon in the courts of North Carolina? The answer is in the affirmative.

Section 1, ch. 36, Public Laws 1933, which was ratified 6 February, 1933, in part, reads: "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed, or where judgment or decree is given for the foreclosure of any mortgage executed after the ratification of this act to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same; . . ."

It will be noted that the limitation created by the statute is upon the jurisdiction of the court in that it is declared that the holder of notes given to secure the purchase price of real property "shall not be entitled to a deficiency judgment on account" thereof. This closes the courts of this State to one who seeks a deficiency judgment on a note given for the purchase price of real property. The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State.

The Legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State. The Legislature has exercised its prerogative to so limit the jurisdiction of the courts of this State that holders of notes given for purchase price of real estate are not entitled to a deficiency judgment thereon in such courts. We cannot hold that this action upon part of the legislative branch of our government impinged the full faith and credit clause of the Constitution of the United States or the general doctrine that the validity of a contract is determined by the law of the place where made, the *lex loci contractus* as distinguished from the *lex fori*. Both the constitutional provision urged and the general doctrine invoked by the appellee are substantive law and the statute involved, as aforesaid, relates solely to the adjective law. No denial of the full force and credit of the Virginia contract is made, and no interpretation or construction of the contract involved is attempted. The court, being deprived of its jurisdiction, has no power to render a judgment for the plaintiff in the cause of action alleged. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon

authority than upon principle." *Ex parte McCardle,* 7 Wall (74 U. S.), 506, 19 Law Ed., 264.

It would be an anomaly to hold that the courts of North Carolina are closed to a plaintiff having a claim for a deficiency on notes secured by real estate in North Carolina and are yet open to a plaintiff having a similar claim secured by real estate in a state other than North Carolina.

The court should have sustained the demurrer and dismissed the action, and to the end that this may now be done the case is remanded to the Superior Court.

Reversed.

W. S. RHODES AND D. G. MATTHEWS, TRADING AS SLADE RHODES & COMPANY, AND A. R. SHERROD (ADDITIONAL PARTY PLAINTIFF), v. SMITH-DOUGLASS FERTILIZER COMPANY, A CORPORATION.

(Filed 17 September, 1941.)

1. Agriculture § 1a—

A landlord's lien for rent is superior to all other liens and attaches to the crops raised upon the land by the tenant and entitles the landlord to possession of the crops for the purpose of the lien until the rents are paid, C. S., 2355, and, when it is not required that the lease be in writing, a note for the rent executed by the tenant constitutes mere evidence of the contract.

2. Agriculture § 2a—

An agricultural lien for advances, when in writing, takes priority over all other liens except the laborer's and landlord's liens, to the extent of advances made thereunder. C. S., 2488.

3. Same—

An agricultural lien for advances executed by the landlord attaches to all the crops grown on the lands embraced within the lien and constitutes a transfer and assignment of the landlord's lien for rents on crops grown by his tenant on such lands, and the lienee is not required to see that the supplies advanced are used upon the farm or by any particular tenant, and his rights as assignee of the landlord's lien for rents may not be defeated by proof that the tenant failed to receive any part of the advances made under the contract.

4. Agriculture § 4b—Assignee of landlord's lien for rent has priority over assignee of note executed by tenant for rent.

A landlord executed a lien for advancements on crops produced upon the lands described, including the part of his lands leased to his tenant, which lien for advancements was assigned to defendant who duly furnished advances, but no part of the advances were used upon the land leased the tenant. Thereafter the tenant executed a note for the cash rent agreed upon for the year and the landlord assigned the note to another, who in turn assigned it to plaintiff. The tenant paid the rent

to both plaintiff and defendant and was thereafter joined as a party plaintiff in this action. *Held:* Defendant, as assignee of the landlord's lien for rents, is the owner of the crops raised by the tenant to the extent of the cash rent due and is entitled thereto as against the tenant and the holder of the note for the rent.

APPEAL by A. R. Sherrod, plaintiff, from *Harris, J.*, at March Term, 1941, of MARTIN. Affirmed.

Civil action to recover amount of rents paid by agriculture tenant.

W. M. Highsmith, owner of farm lands, in December, 1938, rented 16 acres thereof to plaintiff Sherrod for the year 1939 for a cash rent of $96.00. On 23 February, 1939, Sherrod executed a rent note therefor to Highsmith. Highsmith assigned the note to Hamilton Supply Company, who in turn assigned it to the plaintiff, Slade Rhodes & Company. On 14 February, 1939, W. H. Highsmith, *et al.*, executed and delivered to the Farmers Supply Company, Inc., a crop lien upon the crop to be cultivated on the lands of Highsmith for the year 1939. This lien described all of the land owned by the said Highsmith. The Farmers Supply Company, Inc., transferred and assigned said lien to defendant and the defendant furnished to Highsmith cash and supplies under the lien to the amount of $375.00, which amount has not been paid.

None of the supplies furnished to Highsmith were received by Sherrod or used by him in the cultivation of the land leased by him.

A controversy having arisen as to the ownership of the rent due by Sherrod, he paid into the clerk's office a sum sufficient to discharge the same and he later agreed that the defendant should receive the same upon its promise to return it in the event it was finally adjudged that it was not entitled thereto. He likewise paid the amount of rent due to the plaintiff Slade Rhodes & Company. After the institution of the action Sherrod was made a party plaintiff.

When the cause came on to be heard the parties entered into a stipulation agreeing upon the facts, waived trial by jury and submitting the cause to the judge presiding for determination. The judge, being of the opinion that upon the agreed statements of facts the defendant is the owner of the crops raised by Sherrod to the extent of the cash rent due, rendered judgment for defendant. Plaintiff Sherrod excepted and appealed.

B. A. Critcher and D. E. Johnson for plaintiff, appellant.
Paul R. Waters and Peel & Manning for defendant, appellee.

BARNHILL, J. A landlord's lien for rent is superior to that of all other liens and any and all crops raised by the lessee on the lands leased are deemed to be vested in possession of the lessor or his assigns at all

times until the rents are paid. C. S., 2355. As the lease is not required to be in writing, C. S., 2355, the execution of the rent note merely constituted evidence of the contract.

An agricultural lien for advances, when in writing, takes priority over all other liens except the laborer's and landlord's liens to the extent of advances made thereunder. C. S., 2488.

When Highsmith, the landlord, executed the agricultural lien for advances which is now held by the defendant he thereby transferred and assigned, as security for the payment thereof, all crops cultivated during the year 1939 upon the lands described in the lien. At that time as landlord of Sherrod he was vested with the title in possession of crops cultivated by Sherrod as security for the payment of his rent. His contract conveyed his right therein. The lien executed by him takes priority over all other claims and is superior to any right of the plaintiff Slade Rhodes & Company. Thus it is written in the statute.

While it is agreed that Sherrod received no part of the advances made under the agricultural lien this will not avail him. The lienee discharged his obligation when he furnished the supplies to the lienor. He is not required to see to it that such supplies are used upon the farm or by any particular tenant. *Womble v. Leach,* 83 N. C., 84; *Wooten v. Hill,* 98 N. C., 48; *Collins v. Bass,* 198 N. C., 99, 150 S. E., 706. Under the statute the rights of the holder of the lien may not be defeated by proof that the tenants of the landlord-lienor failed to receive any part of the advances made under the contract.

The appellant cites and relies upon *Clark v. Farrar,* 74 N. C., 686, contending that the prerequisites of a valid agricultural lien as therein defined have not been met by the defendant for that it is admitted that no money or supplies were advanced to plaintiff Sherrod. The decision is sound but the contention is not. The defendant met its obligation when it made advances to the landlord, the lienor. The risk that the landlord might create a lien upon the crops to be raised by Sherrod, which has been so unfortunate for him, was assumed by him when he entered into his contract of rental. *Thigpen v. Leigh,* 93 N. C., 47; *Thigpen v. Maget,* 107 N. C., 39.

The facts disclose that the defendant is entitled to the $96.00, proceeds of crops raised by Sherrod. Hence, we concur in the conclusion of the court below. The judgment below is

Affirmed.

THE BOARD OF COMMISSIONERS FOR THE COUNTY OF BEAUFORT v. W. J. ROWLAND.

(Filed 17 September, 1941.)

1. Taxation § 40b—

C. S., 8037, as rewritten in sec. 4 of ch. 221, Public Laws 1927, requires that in a tax foreclosure suit a description of the real estate, which is in fact and law sufficient, shall be set out in the published notice.

2. Same—Description of land in tax foreclosure held insufficient in absence of evidence aliunde tending to identify the land.

This action was instituted by a county to compel defendant to comply with his contract to purchase certain lands from the county which the county had purchased at the foreclosure of a tax sale certificate. The cause was submitted upon an agreed statement of facts to the effect that in the tax foreclosure suit the published notice, after stating the number of the suit, gave the names of the defendants and described the lands as "Surry Parker and wife, 300 a. swamp . . ." and that the description set forth in the interlocutory order read "300 acres swamp, the said land being two miles from Pinetown and adjoining the land" of others named, and the deed executed by the commissioner pursuant to the decree of confirmation gave the same description except the word "swamp" was omitted. *Held:* Although the description appears to be sufficiently definite to admit of parol evidence for the purpose of identification, the description in itself is insufficient, and there being no evidence *aliunde* in the agreed statement of facts to identify the land, judgment in plaintiff county's favor is reversed.

APPEAL by defendant from *Thompson, J.*, at 14 May, 1941, Term, of BEAUFORT.

Controversy without action submitted upon an agreed case. C. S., 626.

The facts are substantially these:

Plaintiff agreed to sell to defendant, and defendant agreed to purchase from plaintiff, a tract of land as described in a deed dated 7 January, 1937, from W. A. Blount, Jr., Commissioner, to Beaufort County. This deed was executed under and by virtue of the authority of the judgment of confirmation in a tax foreclosure suit numbered and entitled "4-x-86, Beaufort County *v.* Surry Parker and wife."

Defendant declines to comply with his contract to purchase and pay for said land for that, among other things, the description thereof, as contained in the published notice of summons, as well as that in the deed from W. A. Blount, Jr., Commissioner, to Beaufort County, is insufficient to identify the land, and that by reason thereof, the deed is void and plaintiff is not vested with a good and valid title in fee simple thereto, and is unable to comply with its contract.

Plaintiff contends that the descriptions are sufficient and that Beaufort County acquired title in fee simple.

In the published notice of summonses in foreclosure suits for Beaufort County for taxes due for the year 1930 on real estate in Long Acre Township, the number of the suit relating to the land herein involved, the names of defendants and the land embraced in same were set forth as follows: "4-x-86 Surry Parker and wife, 300 a. swamp . . ." The description set forth in the interlocutory order, in which the tax lien was adjudged and sale ordered, reads as follows: "300 acres swamp, the said land being two miles from Pinetown and adjoining the land of H. N. Waters, James D. Boyd heirs and others." In the deed executed to Beaufort County by W. A. Blount, Jr., Commissioner, pursuant to decree of confirmation, the lands were described as last above stated, omitting the word "swamp."

In accordance with plaintiff's contention, Thompson, resident judge of the First Judicial District, to whom the controversy was submitted, ruled (1) that the description contained in the Commissioner's deed was sufficient to identify the lands described therein; (2) that Beaufort County is vested with a good and valid title thereto; and (3) that defendant is bound by his contract to accept deed from the county and to pay the purchase price, and entered judgment accordingly, from which defendant appeals to Supreme Court and assigns error.

E. A. Daniel for plaintiff, appellee.
Norman & Rodman for defendant, appellant.

WINBORNE, J. The description involved appears to be sufficiently definite to admit of parol evidence for the purpose of identification. See *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889, and cases cited. Compare *Johnston County v. Stewart,* 217 N. C., 334, 7 S. E. (2d), 708. But such evidence is absent from the agreed case. Hence, unaided in that respect, the description of itself is insufficient to identify the land.

The statute, C. S., 8037, as rewritten in section 4 of chapter 221, Public Laws 1927, in effect when the tax foreclosure suit in question was pending, requires that, in the published notice, a description of the real estate, which is in fact and in law sufficient, shall be set out.

Plaintiff contends, however, that the question here is controlled by the opinion in *Craven County v. Parker,* 194 N. C., 561, 140 S. E., 155. There, the description "Richard Parker, 250 acres, Washington Road, No. One Township," was accompanied by the admission that "this is the only land owned by Richard Parker in Craven County." This distinguishes it from the one at bar.

In view of the decision here reached, other points raised are not considered on this appeal.

The judgment below is

Reversed.

CHARLIE TEMPLE v. M. S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 17 September, 1941.)

Railroads § 9—In this action to recover for personal injuries at crossing, doctrine of last clear chance held inapplicable upon the evidence.

This action was instituted by the driver of a truck to recover for personal injuries sustained when the truck was struck by defendants' train at a grade crossing. The evidence tended to show that plaintiff, although he saw defendants' train leaving or about to leave defendants' station some 1,500 feet away, drove upon defendants' main line track, and that the truck stalled on the track and that plaintiff remained therein trying to start the truck until too late to escape from his position of peril. There was evidence that the engineer failed to give warning of the train's approach to the crossing and that the train was operated at an excessive speed. *Held:* Conceding negligence and contributory negligence, the evidence is insufficient to support the doctrine of last clear chance, since the engineer had a right to assume up to the very moment of the collision that the plaintiff could and would extricate himself from danger, and the failure of the engineer to give warning does not militate against this conclusion, since the evidence discloses that the driver of the truck was fully aware of his position of peril.

APPEAL by plaintiff from *Stevens, J.*, at January Term, 1941, of PASQUOTANK.

Forrest V. Dunstan and McMullan & McMullan for plaintiff, appellant.

J. Kenyon Wilson for defendants, appellees.

SCHENCK, J. This is an action to recover damages for personal injuries alleged to have been negligently inflicted upon the plaintiff by the defendants. There are allegations by the plaintiff of negligence and of last clear chance on the part of the defendants, and by the defendants of contributory negligence on the part of the plaintiff.

There was evidence tending to show that the plaintiff was driving the loaded truck of his employer on the street or public road across the railroad track of the defendants in or near Elizabeth City; that the track ran practically north and south and that the street or public road ran

practically east and west; that there were two spur tracks running practically parallel with the main track which the public road also crossed; that the plaintiff drove the truck up to the side track more distant from the main track, about 30 feet therefrom, and stopped; that the driver looked south down the main track and saw the defendants' train at the depot, about 1,500 feet away from him, either moving or in the act of starting north on the main track; that the plaintiff then drove the truck east across the two side tracks and on to the main track; that the truck, for unrevealed cause, stalled astride the main track; that the plaintiff operated the mechanism of the truck in an endeavor to make it move on across the track; that neither the whistle was blown nor the bell rung, nor other danger signal given from the defendants' engine, but a passenger in the truck said to the plaintiff, the driver of the truck: "Look out. There's the train;" the plaintiff then tried to leave the truck, but got only as far as the running board thereof when the truck was struck by the engine, and the plaintiff was hurled down the track and injured; that the train approached the truck at a speed of 25 or 30 miles per hour and ran 184 feet after striking the truck before stopping.

When the plaintiff had introduced his evidence and rested his case the defendants moved the court for a judgment as in case of nonsuit, which motion was allowed (C. S., 567), and judgment accordant therewith was entered, from which the plaintiff appealed assigning error.

The sole question presented on this appeal is the correctness of his Honor's ruling on the defendants' demurrer to the plaintiff's evidence.

The evidence of the defendants' negligence in failing to give due and timely warning of the approach of the train, and of operating the train at an excessive rate of speed may be conceded, albeit, it clearly appears that the plaintiff was guilty of contributory negligence in driving the truck upon the main track of the defendants in front of a train which he had seen 1,500 feet away either moving or starting to move in the direction of the crossing.

However, it is the contention of the plaintiff, that notwithstanding any contributory negligence on his part, his position of peril in the truck stalled on the railroad track was apparent, or in the exercise of due care should have been apparent, to the engineer of the defendants' train in time to have enabled him to have stopped the train and avoided the collision between the engine and the truck—in other words, that the defendants had the last clear chance to avoid injury to the plaintiff.

We do not concur in this contention. The engineer had a right to assume up to the very moment of the collision that the plaintiff could and would extricate himself from danger. The fact of the failure to give a signal from the engine could not militate against the defendants, since all that such signal could have availed the plaintiff would have

been to give him notice of the approach of the train, and this notice the plaintiff already had, since he saw the train at a distance of 1,500 feet down the track moving or in the act of starting to move in the direction of the crossing he was taking.

There is no evidence that the engineer knew, or by the exercise of due care could have known, that the plaintiff was helpless upon the track of the defendants—if indeed plaintiff was so helpless. Plaintiff may have been courageous and loyal to the extent of being foolhardy in his effort to save his employer's truck, but the evidence does not tend to show that he was either helpless or oblivious of his danger. Like Casabianca of old, he stayed by his ship—alas too long! This may, perhaps, have been praiseworthy, but the consequences thereof are not the liability of the defendants.

The judgment below is

Affirmed.

MARIE W. BROCK v. ETHEL PORTER.

(Filed 17 September, 1941.)

1. Contracts § 11a—Under terms of contract in suit, plaintiff's obligation to furnish water to adjacent premises was not limited to one dwelling.

Plaintiff executed a written contract agreeing to furnish the adjacent landowner and his wife, their heirs and assigns, water from plaintiff's well for household purposes for $1.00 per month, the monthly payments to begin the first month after the covenantees had constructed a dwelling house on their premises. The contract further stipulated that the words "heirs and assigns" should include only such heirs or assigns of the covenantees who should occupy the premises. The covenantees constructed a dwelling on the premises which they later sold to defendant, and plaintiff furnished water to this house from her well. Thereafter defendant constructed a small dwelling on the premises to be occupied by her son and his wife. *Held:* Under the terms of the contract, plaintiff is obligated to furnish water for the second dwelling erected on the premises as well as the first, there being nothing in the agreement to limit it to a single dwelling erected on the premises, nor to a single party occupying the premises, the provision that the monthly payments should begin when the covenantees had constructed a dwelling house on the premises being merely to fix the time for the commencement of the monthly payments and not to limit the use of the water to a single dwelling.

2. Contracts § 8—

Where a written contract is submitted to the court for construction, the agreement made by the parties as expressed in the language used must be given effect.

BROCK *v.* PORTER.

APPEAL by defendant from *Warlick, J.*, at April Term, 1941, of SURRY.

Controversy without action heard upon facts agreed, which, in abridgment and summary, follow:

1. Joe W. Brock and C. C. Hale were adjacent landowners in a suburban section of Mount Airy. Brock and wife owned "Lot No. 12 and half of Lot No. 13" in the Brock-Merritt Development, and Hale and wife owned "Lot No. 15 and half of Lot No. 16" in the same development. Brock installed a well on his land for the purpose of supplying his dwelling with water.

2. On 11 September, 1929, Brock and wife, by written contract duly executed, agreed to furnish Hale and wife, their heirs and assigns, upon the payment of $1.00 per month, a perennial water right to the waters of his well to be used "for household purposes and none other." The monthly payments were to begin the first month after C. C. Hale and wife "shall have constructed a dwelling-house" on their premises. "It is understood and agreed that the words 'heirs and assigns of the said C. C. Hale and wife Marie Hale' shall include only such heirs or assigns of said parties who occupy the premises described as Lot No. 15 and half of Lot No. 16 and that Joe W. Brock and wife Marie Brock shall be bound to furnish water as hereinabove provided to party or parties occupying said premises and no others."

3. Thereafter, Hale and wife constructed a seven-room dwelling house on their premises which they later sold to the defendant. Plaintiff furnishes water to this house from her well.

4. Recently the defendant erected on her premises (Lot No. 15 and half of Lot No. 16) a small four-room dwelling to be occupied by her son and his wife.

5. The controversy arises over whether the plaintiff, who is now the sole owner of Lot No. 12 and half of Lot No. 13 is required by the agreement of 11 September, 1929, to furnish water for household purposes to the small house erected on defendant's premises.

The trial court being of opinion that under the contract in question the plaintiff was required to furnish water to only one house erected on defendant's premises and not to two, accordingly entered judgment for the plaintiff. From this ruling the defendant appeals, assigning error.

A. B. Carter for plaintiff, appellee.
Woltz & Barber for defendant, appellant.

STACY, C. J. The parties have submitted a written contract for construction. Its terms are not in dispute. What is its effect? This is the question for decision. *Patton v. Lumber Co.*, 179 N. C., 103, 101

S. E., 613; *Spragins v. White,* 108 N. C., 449, 13 S. E., 171; *Festerman v. Parker,* 32 N. C., 477; *Young v. Jeffreys,* 20 N. C., 357.

It will be observed that the parties themselves undertook to spell out their meaning by limiting the agreement to such heirs or assigns "who occupy the premises," and it is provided that water for household purposes shall be furnished "to party or parties occupying said premises." This includes the smaller dwelling erected on the premises as well as the larger one. The limitation of the agreement is not to a single dwelling erected on the premises, nor yet to a single party occupying the premises. "The parties had a legal right to make their own contract, and if it is clearly expressed, it must be enforced as it is written." *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791. The instrument is explicit. It leaves nothing to inference. It speaks for itself. *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857; *Spragins v. White, supra.*

The provision that the monthly payments should begin when the Hales had "constructed a dwelling-house" on their premises was intended to fix the time for the commencement of the monthly payments, and not to limit the use of the water to a single dwelling. There is no suggestion that the contract fails to express the exact agreement of the parties. It is of their making. *Perry v. Surety Co.,* 190 N. C., 284, 129 S. E., 721.

Reversed.

GROWERS EXCHANGE, INC., v. GEO. B. HARTMAN.

(Filed 17 September, 1941.)

1. Appeal and Error § 38—

When the judge's charge is not in the record it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence.

2. Fraud § 7—

The mere fact that a creditor accepts part payment to be credited on the debt and agrees as to the balance then due does not preclude him from thereafter asserting that the original debt was for property obtained by fraud effected by means of worthless checks given the creditor by the debtor, the acceptance of part payment and the agreement as to the balance due not constituting a novation.

3. Novation § 1—

In order for the acceptance of part payment and an agreement as to the balance due to constitute a novation, the transaction must have been so intended by the parties, and in the absence of evidence that it was so intended it will not have the effect of changing the nature of the original obligation or of depriving the creditor of the remedies available.

4. Bankruptcy § 9—

The balance of a debt after crediting payments and agreement by the parties as to the amount then due is not discharged by the debtor's bankruptcy when it is determined by the jury that the original debt was for property obtained by false pretenses or false representations.

APPEAL by defendant from *Burgwyn, Special Judge,* at May Term, 1941, of PASQUOTANK. No error.

Plaintiff instituted its action against defendant upon a judgment rendered in a court of competent jurisdiction in the State of Virginia. Shortly after process was served on defendant he filed petition in bankruptcy. Plaintiff thereupon amended its complaint and alleged that the debt was for property (certain farm produce) obtained "by false pretenses or false representations," and that the fraud was effected by means of worthless checks given plaintiff by the defendant.

Issues were submitted to the jury as to the amount of the indebtedness, and as to whether that amount was a "liability against defendant for obtaining property by false pretenses or false representations." The amount of the indebtedness was admitted to be $1,678.90 and interest, and the jury answered the issue of fraud in favor of the plaintiff. Defendant appealed.

J. Henry LeRoy for plaintiff.
L. S. Blades, Jr., and W. A. Worth for defendant.

DEVIN, J. The defendant complains of the judgment below on the ground that the court failed to give a peremptory instruction for the defendant on the determinative issue, and also that the court failed to charge the jury, as requested, that if plaintiff and defendant entered into a new agreement by which certain credits were allowed on the indebtedness the issue of fraud should be answered in defendant's favor.

The judge's charge was not sent up, and hence it is presumed the court correctly instructed the jury on every principle of law applicable to the facts in evidence. *Dry v. Bottling Co.,* 204 N. C., 222, 167 S. E., 801; *Miller v. Wood,* 210 N. C., 520, 187 S. E., 767. There was no evidence that the payments made or securities given were intended to satisfy the debt, or to constitute a compromise settlement of plaintiff's claim. It was admitted that there was a balance due plaintiff in the sum of $1,678.90. Neither the mere acceptance of a part payment to be credited on the debt, nor an agreement as to the balance due, would prevent the plaintiff from alleging and proving that defendant was guilty of fraud in obtaining the property for which the obligation was incurred. Ordinarily, in order to constitute a novation the transaction must have been

so intended by the parties. In the absence of evidence that it was so intended, the giving of a note or additional security would not have the effect of changing the nature of the original obligation or deprive the creditor of the remedies available. *Terry v. Robbins,* 128 N. C., 140, 38 S. E., 470; *Grace v. Strickland,* 188 N. C., 369, 124 S. E., 856; *Case v. Fitzsimons,* 209 N. C., 783, 184 S. E., 818; 46 C. J., 589; Collier on Bankruptcy (14th Ed.), sec. 17, pg. 1607; *Gregory v. Williams,* 106 Kan., 819; *Friend v. Talcott,* 228 U. S., 27.

The instructions as prayed were properly declined. Under the findings of the jury plaintiff's debt was not released by the bankruptcy. 11 U. S. C. A., par. 35, pg. 150.

In the trial we find

No error.

MARIE BARRETT v. JOHN T. WILLIAMS ET AL.

(Filed 17 September, 1941.)

1. Betterments § 1—

One of petitioners for betterments admitted that he had notice of the condition of the record title, under which respondents later obtained judgment for the land, some ten years prior to respondents' recovery, and further admitted that all of the improvements placed upon the land by petitioner would exhaust themselves within a period of five years, so that it appeared that at the time of respondents' recovery the value of the land had not been increased by reason of improvements placed thereon by petitioners under a *bona fide* belief that they held the true title. *Held:* Petitioners not being entitled to betterments, an error of the court in directing a verdict in respondents' favor upon the issue of estoppel by record is harmless. C. S., 699, 701.

2. Appeal and Error § 39—

A new trial will be granted only for practical errors which result in harm, and when it conclusively appears upon the facts appearing of record that appellants are not entitled to the relief sought, a new trial will not be awarded for mere technical error.

APPEAL by defendants from *Burgwyn, Special Judge,* at May Term, 1941, of PASQUOTANK.

Petition for betterments.

Following the final adjudication of plaintiff's right to recover the *locus in quo,* consisting of 50 acres of land in Pasquotank County, see 218 N. C., 775, 10 S. E. (2d), 658; 217 N. C., 175, 7 S. E. (2d), 383; 215 N. C., 131, 1 S. E. (2d), 366, petition for betterments was filed herein by the defendants.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the petitioner make permanent improvements upon the land under a title believed by him to be good? Answer: 'Yes.'

"2. If so, did the petitioner have reasonable grounds to believe that he had a good title to the lands when he made such improvements? Answer: 'Yes.'

"3. To what amount is the value of the premises increased by such permanent improvements? Answer: '$2,000.00.'

"4. What was the average rental value of said lands from 1931 to 1941, inclusive? Answer: '$2.00 per acre per year.'

"5. Are the defendants estopped by record from asserting that, at the time of the making of alleged permanent improvements, they reasonably believed their title to be good? Answer: 'Yes' (peremptory instruction by the court)."

From judgment on the verdict denying betterments, the defendants appeal, assigning errors.

McMullan & McMullan for plaintiff, appellee.
J. H. Hall and M. B. Simpson for defendants, appellants.

STACY, C. J. In directing an answer to the 5th issue, the court held as a matter of law that the defendants were estopped by the record herein from asserting any claim for betterments. The ruling seems to have been an inadvertence, *Pritchard v. Williams,* 176 N. C., 108, 96 S. E., 733, on rehearing 178 N. C., 444, 101 S. E., 85; *S. c.,* 181 N. C., 46, 106 S. E., 144; *Faison v. Kelly,* 149 N. C., 282, 62 S. E., 1086, though not necessarily fatal. *Foxman v. Hanes,* 218 N. C., 722, 12 S. E. (2d), 258; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Butts v. Screws,* 95 N. C., 215. It is not after the manner of appellate courts to prolong litigation merely for theoretical reasons. *Munday v. Bank,* 211 N. C., 276, 189 S. E., 779. Litigants are interested only in practical errors which result in harm. *White v. McCabe,* 208 N. C., 301, 180 S. E., 704; *Brewer v. Ring and Valk,* 177 N. C., 476, 99 S. E., 358.

The petitioner, John T. Williams, testified that about fifteen years ago, mayhap in 1910, he went to the bank to borrow some money and "found out at that time how the title to this particular piece of land was." Upon this admission, the court instructed the jury not to consider any improvements thereafter placed upon the land by the defendants. The petitioner further admitted, on cross-examination, that all the improvements which he placed upon the land would exhaust them-

selves in varying periods from one to three to five years. It follows, therefore, that at the time of plaintiff's recovery, the value of the land had not been increased by reason of any permanent improvements placed thereon by the defendants under a *bona fide* belief that they held the true title. C. S., 699 and 701.

In this state of the record, it would seem that no harm has come to the defendants in denying their claim for betterments. Hence, the result of the trial will not be disturbed.

No error.

STATE v. ALF THOMAS.

(Filed 17 September, 1941.)

1. Homicide § 25—

Evidence of defendant's guilt of murder in the second degree held sufficient.

2. Criminal Law §§ 41a, 81c—

The trial court has the discretionary power to permit the State to ask its witness a leading question, and when the testimony so elicited is competent and defendant is not prejudiced thereby, his exception will not be sustained.

3. Criminal Law § 41j: Homicide § 18a—

Where a dying declaration is admitted in evidence and the defendant seeks to attack the credibility of the deceased, the State's objection to a question as to the general reputation of the deceased for truth and veracity is properly sustained.

4. Criminal Law § 81c—

When it does not appear what the answer of the witness would have been had he been permitted to testify, appellant's objection to the exclusion of the testimony cannot be sustained.

5. Homicide § 18a—

The dying declaration of the deceased *held* properly admitted in evidence upon authority of *S. v. Jordan*, 216 N. C., 356.

APPEAL by defendant from *Warlick, J.*, at February Term, 1941, of SURRY. No error.

The defendant was charged with the murder of one Will Matthews. The jury returned verdict of guilty of murder in second degree, and from judgment imposing prison sentence, defendant appealed.

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

Woltz & Barber for defendant.

DEVIN, J. The evidence for the State tended to show that the defendant shot and killed the deceased without provocation. Defendant's evidence tended to show some elements of self-defense, or, at least, mitigation. He testified that the deceased began the shooting, and that he thereupon fired three shots with fatal result.

Under a charge free from error the jury rejected the defendant's plea of self-defense, and convicted him of murder in the second degree. The evidence fully warranted the verdict.

Defendant's assignments of error relate to the rulings of the court on the admission of testimony. We have examined each of the defendant's exceptions with care, and reach the conclusion that none of them can be sustained. While some of the testimony was elicited in response to leading questions, the evidence was competent and the ruling of the trial judge was a matter of discretion. *S. v. Buck,* 191 N. C., 528, 132 S. E., 151. The suggestion of prejudice therefrom is not borne out by the record. *S. v. Hargrove,* 216 N. C., 570, 5 S. E. (2d), 852. Objection to the question propounded to a witness as to the general reputation of the deceased for truth and veracity was properly sustained, (*S. v. Hairston,* 121 N. C., 579, 28 S. E., 492; *Edwards v. Price,* 162 N. C., 243, 78 S. E., 145; *S. v. Pearson,* 181 N. C., 588, 107 S. E., 305; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468), and exception thereto is untenable as the record does not show what answer the witness would have given.

Exception to the ruling of the court in sustaining proffered testimony of defendant as to his conversations with others relating to the deceased prior to the homicide is without substantial merit.

The dying declaration of the deceased was properly admitted in evidence. *S. v. Whitson,* 111 N. C., 695, 16 S. E., 332; *S. v. Jordan,* 216 N. C., 356, 5 S. E. (2d), 156.

In the trial we find

No error.

ROY M. BANKS v. CITY OF RALEIGH ET AL.

(Filed 17 September, 1941.)

1. Municipal Corporations § 3: Taxation § 1—Proviso that annexed territory should not be subject to taxation if improvements and services were not afforded it held void as violating rule of uniformity in taxation.

The statute in question provided for the annexation of new territory by defendant municipality upon the approval of the annexation in an election provided for in the Act, but further provided that if any part or parts of the annexed territory were not afforded municipal improve-

ments and services comparable to those afforded like sections now within the city limits within two years after annexation, taxes should not be levied or collected on such part or parts of the annexed territory. *Held:* The proviso in the Act that taxes should not be levied or collected on the part or parts of the annexed territory upon the contingency specified is void as being contrary to the constitutional requirement of uniformity in taxation. Constitution of North Carolina, Art. V, sec. 3.

2. Municipal Corporations § 3: Statutes § 5b—Unconstitutional proviso held separable so that statute, with proviso deleted, stands as valid.

The Act in question provided for the annexation of additional territory by defendant municipality if the question of annexation should be approved in an election provided for in the Act. The statute also contained an unconstitutional proviso that taxes should not be levied or collected upon property in the annexed territory if it were not afforded public improvements and services comparable with other like sections of the city. A majority of the Court being of the opinion that the unconstitutional proviso is divisible and separable from the remainder of the statute, the Act, with the unconstitutional part deleted, *is held* valid.

APPEALS by plaintiff and defendant from *Thompson, J.*, at July Term, 1941, of WAKE.

Proceeding under Declaratory Judgment Act. ch. 102, Public Laws 1931, to determine validity or constitutionality of ch. 463, Public-Local Laws 1941, instituted pursuant to authority of *Allison v. Sharp,* 209 N. C., 477, 184 S. E., 27.

The Act in question provides for an extension of the corporate limits of the city of Raleigh, provided the matter of annexation of the new territory "shall be submitted to the vote of the qualified voters of said city and of the territory to be annexed, voting together" at an election to be held for the purpose not later than 1 November, 1941.

In section 4 of the Act, it is provided: "If at such election a majority of the votes cast shall be 'For Extension,' then from and after the first day of January, one thousand nine hundred and forty-two, the territory and its citizens and property shall be subject to all the laws, ordinances and regulations in force in said city, and shall be afforded the same privileges, benefits and facilities as are afforded other comparable parts of the said city now within the city limits: Provided, that if after two years from the effective date of the extension, any part or parts of the annexed territory have not been extended the same privileges, benefits and facilities afforded comparable parts of the city now within the city limits, taxes shall not be levied and collected on such part or parts not enjoying such privileges, benefits and facilities until the same are extended to such part or parts of the annexed territory."

The plaintiff alleges that the proviso in section 4 offends against the constitutional rule of uniformity and renders the entire Act void, and that the holding of an election thereunder will result in useless waste

of public funds; wherefore he asks for an injunction to prevent such waste.

It is further alleged that a wide difference of opinion exists among the qualified voters in the city and the territory to be annexed as to the validity of the extension Act; that such confusion hampers an intelligent expression at the ballot box, and that in the interest of fairness the matter should be clarified prior to the election.

The defendant contends that the Act is valid in its entirety.

The court being of opinion that the proviso in question was void, but that this did not affect the remainder of the Act, so declared, and taxed the defendant with the costs. Both sides appeal, assigning errors.

Willis G. Briggs for plaintiff.

Wilbur H. Royster and P. H. Busbee for defendants.

J. C. Little, Jr., J. C. B. Ehringhaus, Jr., W. C. Harris, Jr., and William C. Lassiter for Raleigh Junior Chamber of Commerce, amicus curiæ.

STACY, C. J. The question for decision is whether ch. 463, Public-Local Laws 1941, providing for an extension of the corporate limits of the city of Raleigh, is valid in whole or in part.

It is the opinion of a majority of the Court that with the exception of the proviso in the 4th section which offends against the constitutional requirement of uniformity in taxation, Art. V, section 3, *Anderson v. Asheville,* 194 N. C., 117, 138 S. E., 715, the Act in question is valid, and that the proviso is divisible and separable from the remainder of the statute. *R. R. v. Reid,* 187 N. C., 320, 121 S. E., 534; *Comrs. v. Boring,* 175 N. C., 105, 95 S. E., 43. The Act then stands with the proviso deleted as was decided in the court below.

The view of the minority is, that the presumption of inseparability should prevail and the entire Act declared void. *Minton v. Early,* 183 N. C., 199, 111 S. E., 347; *Keith v. Lockhart,* 171 N. C., 451, 88 S. E., 640; *Electric Bond & Share v. Security Exchange,* 303 U. S., 419.

The pertinent principles of construction are well settled. The divergence of opinion arises over a different conception of the significance to be ascribed to the unconstitutional provision in section 4 of the Act and the effect of its elision. The majority voting in favor of affirmance, the judgment will be upheld.

On plaintiff's appeal, Affirmed.

On defendants' appeal, Affirmed.

ROBERTSON WALL, ADMINISTRATOR OF THE ESTATE OF LUCY E. PLYMPTON, DECEASED, v. THE CITY OF ASHEVILLE, A MUNICIPAL CORPORATION.

(Filed 17 September, 1941.)

Appeal and Error § 49a—

Where, upon a former appeal, it is determined by the Supreme Court that the questions of negligence and contributory negligence were for the determination of the jury upon the evidence and that the judgment of nonsuit should be reversed, the decision becomes the law of the case and upon defendant's appeal from subsequent judgment in plaintiff's favor the Supreme Court cannot consider defendant's contention that its motion for judgment as of nonsuit should have been allowed upon the second trial.

APPEAL by defendant from *Gwyn, J.*, and a jury, at July Term, 1941, of BUNCOMBE. No error.

This was an action for actionable negligence, alleging damage, brought by plaintiff against defendant.

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

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

"2. If so, did the plaintiff's intestate, by her own negligence, contribute to her injury and death, as alleged in the answer? Answer: 'No.'

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

Judgment was rendered on the verdict, as follows: "Now, therefore, it is ordered, adjudged and decreed that plaintiff have and recover of the defendant the sum of Five Thousand ($5,000.00) Dollars." Defendant 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.

PER CURIAM. The defendant says in its brief that the following questions were involved: "Did the court err in not granting defendant's motion for nonsuit at the close of plaintiff's evidence, and at the close of all the evidence, and refusing to admit certain evidence?" Neither of defendant's contentions can be sustained.

This case was first tried at the regular September, 1940, Civil Term of the Superior Court of Buncombe County, at which time, and after the close of plaintiff's evidence, the action was dismissed by judgment

of nonsuit. From such judgment, plaintiff appealed to the Supreme Court, and this Court, in its opinion and judgment rendered in February, 1941 (219 N. C., 163), reversed the lower court and held that there was sufficient evidence of negligence on the part of the defendant proximately causing the death of plaintiff's intestate, and that this question of negligence, together with the question of contributory negligence on the part of plaintiff's intestate, should be submitted to a jury.

Thereafter, defendant filed a petition to rehear before this Court, which petition was, on 18 April, 1941, denied.

Defendant now comes again before this Court and asks this Court to reverse the lower court and its prior decisions in the case and hold that the action should be dismissed as of judgment of nonsuit. This Court has repeatedly held that it is not permitted to review such a question when it has already been passed upon by this Court. *Ray v. Veneer Co.*, 188 N. C., 414.

"A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Robinson v. McAlhaney*, 216 N. C., 674 (679).

The evidence excluded, which the defendant complains of, was incompetent.

In the judgment of the court below, we find

No error.

REGAN JONES v. F. A. ELKS.

(Filed 17 September, 1941.)

Venue § 1a—

In an action for negligent injury, the court's finding, upon conflicting evidence, that the residence of plaintiff is in the county in which the action is instituted, the finding supported by sufficient competent evidence is binding upon appeal, and defendant's exception to the refusal of his motion to remove cannot be sustained.

APPEAL by defendant from *Thompson, J.*, at April Term, 1941, of BEAUFORT. Affirmed.

Civil action to recover compensation for personal injuries resulting from an automobile collision, heard on motion to remove.

An automobile being operated by plaintiff and an automobile being operated by the defendant collided on a public road in Pitt County. Plaintiff alleges that the collision was caused by the negligence of the defendant and that he sustained certain personal injuries as a result thereof.

LeRoy Scott and Carter & Carter for plaintiff, appellee.
J. B. James and Louis C. Skinner for defendant, appellant.

PER CURIAM. On the motion to remove the cause to Pitt County as the proper venue for the trial of the cause the evidence as to the residence of the plaintiff was conflicting. The court found as a fact that he is a resident of Beaufort County. There is sufficient competent evidence to support the finding. It is, therefore, binding on this Court. *McCue v. Times-News Co.*, 199 N. C., 802, 156 S. E., 129.

Affirmed.

O. L. GODWIN AND NEW YORK UNDERWRITERS INSURANCE COMPANY v. FRANK BRICKHOUSE.

(Filed 17 September, 1941.)

Judgments § 22e—

Where the trial court sets aside a judgment by default and inquiry rendered in defendant's favor upon his counterclaim for want of a reply thereto upon the court's finding, supported by evidence, that neither plaintiffs nor their counsel have been guilty of neglect, the order setting aside the default judgment will be upheld when it appears that the facts alleged in the complaint, if believed, constitute a meritorious defense, notwithstanding that the trial court failed to make specific finding to that effect.

APPEAL by defendant from *Stevens, J.*, at April Term, 1941, of TYRRELL.

Civil action for recovery of property damage allegedly sustained by plaintiff Godwin in an automobile collision as result of negligence of defendant, who in answer filed, copy of which was served on plaintiff Godwin, denies liability and sets up counterclaim for damages growing out of the same collision, which he alleges was caused by the negligence of said plaintiff. In absence of reply to counterclaim, the clerk signed judgment by default and inquiry thereon in favor of defendant. Motion of plaintiff to set aside this judgment was denied by the clerk. Upon appeal, the judge of Superior Court, upon facts found, but without specific finding that plaintiffs have a meritorious defense to the counterclaim, adjudged that neither the plaintiffs nor their counsel have been guilty of neglect, and ordered the judgment set aside and vacated.

Defendant appeals to Supreme Court and assigns error.

J. Henry LeRoy for plaintiffs, appellees.
Carl L. Bailey for defendant, appellant.

PER CURIAM. The record discloses evidence to support the findings of fact of the court below. Furthermore, an examination of the complaint discloses that facts are alleged which, if believed, would constitute a meritorious defense. Hence, under authority of *Sutherland v. McLean,* 199 N. C., 345, 154 S. E., 311, the judgment below is

Affirmed.

WILLIE S. EDWARDS v. NATIONAL COUNCIL, JUNIOR ORDER UNITED AMERICAN MECHANICS BENEFICIARY DEGREE.

(Filed 24 September, 1941.)

1. Trial § 22b—

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

2. Trial § 23—

The fact that there are discrepancies and contradictions in plaintiff's evidence does not justify the granting of defendant's motion to nonsuit, the credibility of the evidence being for the jury.

3. Appeal and Error § 39—

Ordinarily, appellant's exception to the admission of evidence, even if incompetent, cannot be sustained when it appears that other witnesses testified to the same import without objection, since in such instance the testimony objected to is rendered harmless.

4. Insurance § 34e: Evidence § 46—Nonexpert witness may testify as to insured's inability to follow gainful occupation.

Plaintiff insured introduced evidence that he suffered serious physical injuries in an accident, which he contended resulted in permanent total disability, that his life work was that of a farmer, but that he had worked for a tobacco warehouse for a short time before the accident. Insured also testified that his injuries incapacitated him for work at the warehouse, and there was no evidence to the contrary. *Held:* Nonexpert opinion evidence based upon personal observation of the witnesses that insured at no time since his injury had been able to do with reasonable regularity the essential duties of a farmer, is competent, and insurer's objection thereto on the ground that the testimony related to only one occupation when the evidence discloses that the insured had two occupations, is untenable.

5. Insurance § 34a—

Total permanent disability as used in disability clauses in life insurance policies means permanent disability rendering insured unable to perform with reasonable continuity the duties of his usual occupation or of any other occupation he is reasonably qualified physically and mentally, under all the circumstances, to pursue, and insured's ability to do odd jobs of comparatively trifling nature does not preclude recovery.

6. Insurance § 34e—

Insured alleged total permanent disability resulting from an accident. *Held:* It was competent for insured to offer evidence, in addition to evidence of the disability pleaded, that he also had heart disease in order to show that he could not in a reasonable time equip himself to follow other similar occupations.

7. Insurance § 34b—

Insurer's denial of total and permanent disability is a waiver of the condition of the policy requiring proof of disability, since such denial is equivalent to a declaration by insurer that it will not pay though proof be furnished, and therefore insurer's objection to the evidence introduced by insured relating to proof of claim is immaterial. In this case insured testified without objection that he had filed proof of claim on blanks sent to him by insurer prior to the institution of the action.

APPEAL by defendant from *Harris, J.,* and a jury, at February Term, 1941, of NASH. No error.

The plaintiff brought this action against defendant on a Certificate No. 103156 of insurance, and endowment at age 70, issued by National Council, Junior Order United American Mechanics of the United States of North America, Beneficiary Degree to Willie S. Edwards of Magnolia Council No. 421, dated 1 November, 1935, which provides, *inter alia,* as follows:

"If the member shall furnish to the Order due and satisfactory proof that he has become Totally and Permanently Disabled by bodily injury or disease, from a cause originating after membership of one full year, and the payment of a full year's rate, and prior to the attainment of the age of seventy (70) years, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work whatever for compensation, gain or profit, or from following any gainful occupation, and that such disability has then existed continuously for not less than ninety days, the Order will pay to the member $2,000.00 (Two thousand dollars) upon surrender of this Certificate properly receipted."

The defendant, after denying the material allegations of the complaint, for a further answer and defense says: "That the defendant denies any liability or responsibility whatever for that proof of total and permanent disability has not been furnished as required by the contract between plaintiff and defendant and until that is done there is no liability whatever on the defendant; that the plaintiff has not followed the contract as to the proof of total and permanent disability and the defendant is justified in refusing payment not only on that ground but upon the further ground that the plaintiff is not totally and permanently disabled."

The plaintiff testified, in part: "I was born and reared at the same place I now live in Coopers Township. I am 34 years old. Up to the time I was hurt on October 12, 1938, I was engaged in farming, doing everything that came into hand, mauled, sawed, cut and hauled wood, plowed tobacco, set tobacco, picked cotton. I farmed myself and lived with my father. After I got married I took my wife there and have been living there ever since. I am not equipped mentally and physically to do any kind of work other than farming when I was able to farm. My education was very limited. I finished the fifth grade. I have not specialized in any branch of work other than farming. I am married and have one child. I am a member of The Junior Order United American Mechanics, Magnolia Council No. 421, Nashville R. F. D. I joined 12 or 14 years ago and am a paid-up member, active in the lodge. I have paid every premium on my certificate of insurance since it was issued up to now. The night of the 12th of October, 1938, myself and four others were headed to Henderson with a load of tobacco on a trailer when a wheel run off and we were out fixing the wheel. I pulled across from the hard surface and a negro came along and ran over us and killed one man with us and put three others besides myself in the hospital. It broke my back in three places, fractured my skull and hurt my ankle and wrist and different little things. I was knocked out for nine days. I was picked up by an ambulance from Louisburg and carried to Park View Hospital; stayed there 23 days, carried home on an ambulance and carried backward and forth to the hospital to be examined and dressing my head and later when I quit going to the hospital, Dr. Wheeless, from Spring Hope, would go back and forth to my home and dress my head. I wore a cast ten and a half months and it was taken off and I wore a wide belt, 10 or 12 inches, and still do. Depends on my back, how stiff it gets, and if I do a little walking and my back gets sore, I wear it a day or two and pull it off. I wore a solid cast from my shoulders down across my legs below my waist line across my hips for ten and one-half months. During the time I was wearing the cast I filed a claim with the defendant for the benefits provided in this policy, but I did not get paid. This scar on the side of my face and head came from the injury. I will put my finger inside the dent. The left side of my head is just a little flat. I have severe headaches in that side of the head. It starts as near around about that sunken place as I can tell and goes around that left eye. I have it usually two or three times a week and have to sleep it off. Since my injury I cannot bend over halfway. To get something on the floor I have to squat down or get down on my knees; I can't bend over. I have shortness of breath, get awfully weak or tired if I do much walking or any unnecessary trying to get around. I have not been able to do

any work on the farm since I was injured October 12, 1938. I have tried to do work and can't do it. I was examined lately by Dr. A. L. Daughtridge of the Sanatorium in Rocky Mount. I filed proof of claim on blank sent me by the company four or five months after I was injured. My injury has been continuous since the wreck. I am not improving that I can tell. If I do too much walking in the daytime I am so stiff I have to have my wife tie my shoes for me. I can walk or stand on my feet about an hour at the time. I do not very often spend any time in bed resting. Sometime, I will, but hardly ever. (Cross-examination.) My father and I operate the farm we live on and have been operating it regularly. I operated it this year. Last year I hired a colored boy to do it. I look after it. My father runs a store. I took in from the farm in 1940 five or six hundred dollars. I got a living off of it but I didn't pay expenses. I told the jury that I had never engaged in any occupation in my life except farming. I worked at the Farmers Warehouse in Henderson that year I got hurt. Because I was employed there, not as a farmer but working at that warehouse for $100.00 a month. . . . At the time I was working for the warehouse, I hauled tobacco. I did not get a commission for drumming; the warehouse paid me by the month. I don't know whether they put me on a salary because I got to making so much commission or not. I went out and got the tobacco if I could, got the load of tobacco and hauled it to the warehouse. . . . The warehouse did not pay a hundred dollars for hauling tobacco. When the farmers carried their own tobacco they didn't pay me but if I carried it they did. The warehouse paid me by the month. I don't know whether you call it a hundred dollars a month for drumming or hauling. I wasn't able to work there last year, so I didn't ask for the job back. . . . That I was employed solely for the purpose of soliciting or drumming business to get the farmer to take it there. . . . The Fall I got hurt I drummed tobacco and hauled it to the warehouse. Before I got hurt I made a living and made a little money, about like the average farmer. I now have a boy hired to work on the farm. I can tell him some things to do. My back is pretty weak when I walk and stand much at the time. I can't walk over plowed ground. Since I got hurt my father has given me practically all I made. Before I was hurt I farmed on halves with him. I am getting it all now except what I give the fellow and the expenses."

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

"1. Has plaintiff, since February 20, 1939, been totally and permanently disabled by bodily injury and disease so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work whatever for compensation, gain or profit, or from following any gainful occupation? Answer: 'Yes.'

"2. Was due and satisfactory proof submitted defendant before the institution of this suit that plaintiff had become totally and permanently disabled by bodily injury or disease so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work whatever for compensation, gain or profit, or from following any gainful occupation? Answer: 'Yes.'"

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

Itimous T. Valentine for plaintiff.
Sharp & Sharp for defendant.

CLARKSON, J. At the close of plaintiff's evidence the defendant made a motion in the court below for judgment as in case of nonsuit. C. S., 567. The defendant introduced no evidence. The motion was denied and in this we can see no error.

In *Lincoln v. R. R.*, 207 N. C., 787 (788), it is written: "On considering a motion to nonsuit under the Hinsdale Act, C. S., 567, or a demurrer to the evidence, it is established by numerous decisions: 1. That the evidence which makes for plaintiff's claim, or tends to support his cause of action, is to be taken in its most favorable light for the plaintiff, and he is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.' 2. That mere discrepancies and contradictions, even in the plaintiff's evidence, are matters for the jury and not for the court," citing authorities.

The defendant complains of the admissibility of opinion evidence about plaintiff's ability to engage in one occupation, when the evidence discloses he had two occupations. The plaintiff testified, "I have not been able to do any work on the farm since I was injured October 1, 1938. I have tried to do work and can't do it. . . . My injury has been continuous since the wreck. I am not improving that I can tell. If I do too much walking in the daytime I am so stiff I have to have my wife tie my shoes for me, *I can walk or stand on my feet about an hour at the time.*"

The first issue is as follows: "Has plaintiff, since February 20, 1939, been totally and permanently disabled by bodily injury and disease so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work whatever for compensation, gain or profit, or from following any gainful occupation?" The jury answered the issue "Yes." This issue is according to the terms of the policy. All

the evidence is to the effect that plaintiff's life work was that of a farmer. The work at the warehouse was not his ordinary calling and all the evidence was to the effect that after his injury he was incapacitated to work at the warehouse. Plaintiff testified, "I wasn't able to work there last year, so I didn't ask for the job back." Plaintiff was incapacitated to work at the warehouse and there was no evidence to the contrary. Plaintiff's life work was that of a farmer. Numerous and sundry witnesses testified in the negative to the following, or substantially the following, question: "In your opinion, has Mr. Edwards, at any time since he was injured in October, 1938, been able to do with reasonable regularity the essential duties of a farmer?" The defendant objected and excepted to many of these questions—to others it did not.

In *Shelton v. R. R.*, 193 N. C., 670, at p. 674, we find: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost." *Tillett v. R. R.*, 166 N. C., 515; *Beaver v. Fetter,* 176 N. C., 334; *Marshall v. Telephone Co.,* 181 N. C., 410; *S. v. Hudson,* 218 N. C., 219 (230). But we consider it well settled that the questions were competent.

In *Keller v. Furniture Co.,* 199 N. C., 413 (417), *Adams, J.,* for the Court said: "The testimony of these witnesses did not involve a question of science or a conclusion to be drawn from a hypothetical statement of facts; it was elicited as a matter within their personal knowledge, experience and observation. The exception to the general rule that witnesses cannot express an opinion is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning; it includes the evidence of common observers testifying to the results of their observation. *Britt v. R. R.,* 148 N. C., 37; *Marshall v. Telephone Co.,* 181 N. C., 292."

In *Leonard v. Ins. Co.,* 212 N. C., 151 (155), it is said: "We think it was competent to admit opinion evidence of nonexpert witnesses to testify as to the ability to engage in work."

In *Bulluck v. Ins. Co.,* 200 N. C., 642 (646), *Brogden, J.,* after citing many authorities, says: "The reasoning of the opinions seem to indicate that engaging in a gainful occupation is the ability of the insured to work with reasonable continuity in his usual occupation, or in such an occupation as he is qualified physically and mentally, under all the circumstances, to perform substantially the reasonable and essential duties incident thereto. Hence, the ability to do odd jobs of comparatively trifling nature does not preclude recovery. Furthermore, our decisions, and the decisions of courts generally, have established the principle that the jury, under proper instructions from the trial judge,

must determine whether the insured has suffered such total disability as to render it 'impossible to follow a gainful occupation.'" *Misskelley v. Ins. Co.,* 205 N. C., 496 (506-7); *Smith v. Assurance Society,* 205 N. C., 387; *Fore v. Assurance Society,* 209 N. C., 548; *Blankenship v. Assurance Society,* 210 N. C., 471; *Leonard v Ins. Co., supra.*

The defendant contends that evidence of plaintiff having heart trouble should not have been permitted, as it was not pleaded. Dr. Daughtridge said, among other things, that an examination of Mr. Edwards' heart showed a leaking heart and that a fluoroscopic examination showed his heart to be enlarged with typical shape found in this type of heart disease. And again, that "Mr. Edwards has already shown early signs of heart failure and that if he puts greater strain on the heart, the heart would not be able to bear it."

It was not necessary to plead heart trouble in order to offer evidence of heart trouble as another reason why the plaintiff appellee could not equip himself within a reasonable time to do some work similar to that of farming. Speaking to this question in *Leonard v. Insurance Co., supra,* the Court, at p. 155-6, said: "The evidence of plaintiff which defendant objected to, as to the nearsightedness of plaintiff, we think was competent under the facts and circumstances of the case. This was admitted by the court, for the purpose of showing that the plaintiff could not within a reasonable time equip himself to be a bookkeeper, conduct a store, or do anything else that required good eyesight. . . . It was wholly unnecessary to refer to the nearsightedness of the plaintiff in his proof of claim, in his specifications of disability, or anywhere else except in his evidence."

The second issue was as follows: "Was due and satisfactory proof submitted defendant before the institution of this suit that plaintiff had become totally and permanently disabled by bodily injury or disease so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work whatever for compensation, gain or profit, or from following any gainful occupation?"

Defendant complains that portions of the complaint and answer introduced in evidence by plaintiff in reference to proof of claim, was erroneous. We think this is immaterial. Defendant denied that the plaintiff was "totally and permanently disabled," and complained that the plaintiff did not furnish "due and satisfactory proofs that he had become totally and permanently disabled." Without objection plaintiff testified, "I filed proof of claim on blanks sent me by the Company four or five months after I was injured."

In *Misskelley v. Ins. Co.,* 205 N. C., 496 (505), quoting from *Gerringer v. Ins. Co.,* 133 N. C., 407 (415), we find: "The weight of authority is in favor of the rule that a distinct denial of liability and

refusal to pay, on the ground that there is no contract or that there is no liability, is a waiver of the condition requiring proof of loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished," citing numerous authorities.

The exceptions and assignments of error to the charge of the court below cannot be sustained. From a careful reading of the charge, we think the court below applied the law applicable to the facts; in fact, in the charge the court read the law from decisions of this Court and applied them to the facts in the case. From the view we take of the case we think the special instructions prayed for by defendant were properly denied. From the whole record we find no prejudicial or reversible error.

No error.

NORTH CAROLINA CORPORATION COMMISSION v. UNITED COMMERCIAL BANK.

(Filed 24 September, 1941.)

1. Judgments § 29—

An order was entered directing the receiver of an insolvent bank to pay petitioner's claim out of any unclaimed funds in hand belonging to the receivership. The University of North Carolina, which later claimed all unclaimed funds in the hands of the receiver, was not given notice of the petition or of the order. *Held:* Ordinarily, only parties and privies are bound by a judgment, and the order is not *res judicata* as to the University.

2. Courts § 3—Prior orders held interlocutory and not binding upon intervener who was not a party, and therefore another judge had jurisdiction to hear and determine the controversy.

A sheriff filed claim against the receiver of an insolvent bank on checks which the sheriff had accepted as payment of the drawers' taxes, the sheriff having paid the county the amount of the checks in his settlement of taxes. Upon the receiver's denial of the claim, the sheriff filed petition in the Superior Court, and the judge ordered that the receiver accept the claim and pay same out of any unclaimed funds of the receivership on hand. The receiver having failed to comply with the order, the same judge, upon his later return to the county in regular rotation, directed the receiver to file a report showing the amount of unclaimed funds in the receivership, and, upon the filing of the receiver's report showing a balance to the credit of the dividend account of the receivership, ordered that the receiver pay said sum to the sheriff. The University of North Carolina, which was not made a party and was not given notice of the application or of the orders entered pursuant thereto, later intervened and filed petition alleging that it was the owner of the said funds under the escheat laws, whereupon the same judge ordered that the prior orders entered should be suspended until further passed on, and directed that

the University appear at the next succeeding term and present its claim. *Held:* The prior orders were interlocutory, and further were not *res judicata* as to the University, and therefore the judge holding the next succeeding term of court in the county had jurisdiction to hear and determine the controversy and direct the application of the funds, which, still being in the hands of the receiver, were subject to the orders of the court.

APPEAL by intervening petitioner, the University of North Carolina, and receiver, the Branch Banking & Trust Company, from *Stevens, J.*, at July Term, 1941, of WASHINGTON.

In January, 1925, the United Commercial Bank, in an action entitled as above, was adjudged insolvent and the Branch Banking & Trust Company was appointed receiver thereof. Shortly before the closing of the bank J. K. Reid, as sheriff and tax collector of Washington County, received checks on said bank from depositors therein in payment of taxes due said county aggregating $1,347.57, for which he delivered to the drawers of said checks tax receipts for the respective amounts thereof, and also paid to said county the amount of said checks in his settlement of taxes. In July, 1927, before any dividends were paid by the receiver, Sheriff Reid filed claim, accompanied by the checks, with the receiver for the amount of said checks. The receiver held said claim and checks till 1936, and then notified Sheriff Reid that he could not pay said claim. Sheriff Reid then filed petition in the cause to compel the receiver to recognize the claim and pay the same out of any unclaimed funds in the hands of the receiver. Judge Harris heard the petition in February, 1936, and entered an order "that the Receiver accept the said claim as a claim against any unclaimed funds which it has on hand and that it pay to the petitioner the sum of $1,347.57 on account of the said unpaid checks out of any unclaimed funds which it has in hand belonging to the said Receivership." No exception was entered to this order. The petitioner, the University of North Carolina, was not given notice of the application therefor or of the order. The receiver failed to comply with this order, and stated from time to time that the auditors had not completed their audit of the receivership accounts and it was unable to determine the amount on hand applicable to the order of the judge. When Judge Harris returned to Washington County in regular rotation at the January Term, 1941, Sheriff Reid brought the matter to his attention and the judge directed the receiver to file report showing the amount it had on hand to apply on the claim and order heretofore filed and made. The receiver immediately, under date of 15 January, 1941, filed report in accord with this order showing a balance standing to the credit of the dividend account of the receivership of $651.36. Whereupon Judge Harris, at the January Term, 1941, of Washington County, entered order reinstating the receivership, which

had theretofore been closed, and directing the receiver "to pay over to J. K. Reid, Sheriff, the said sum of Six Hundred Fifty-One and 36/100 ($651.36) Dollars, and that his receipt shall serve as a full release and acquittance. . . ." No exception was noted to this order. The petitioner, the University of North Carolina, was not made a party thereto and was not given notice thereof. No payment has been made by the receiver to J. K. Reid, Sheriff, under this order. On 23 June, 1941, the University of North Carolina filed a petition in the cause alleging that it, under the escheat laws of the State, was the owner of all unpaid and unclaimed proceeds of the liquidation, and that the $651.36, balance, standing to the credit of the dividend account of the receivership, is the property of the petitioner. J. K. Reid, Sheriff, filed answer to the petition of the University wherein he denied that it was owner of the funds in the dividend account of the receiver, and averred that he is the owner thereof according to law, and by virtue of the orders of Judge Harris. Whereupon Judge Harris "ordered, adjudged and decreed that the execution of all orders heretofore entered by Harris, Judge, in connection with and directing the payment of a certain fund in the hands of Branch Banking & Trust Company, Receiver of the United Commercial Bank, be, and the same are hereby suspended until further passed on, and the University of North Carolina is directed to appear before the judge presiding over the July Term, 1941, of Superior Court of Washington County and present whatever claim they may have for said fund, or show cause why the orders heretofore issued should be vacated or else the said orders shall be in full force and effect.

At the regular July Term, 1941, of Washington County, upon the last order of Judge Harris, the cause came on for hearing before Judge Stevens, who held that since one Superior Court judge has no authority to overrule another Superior Court judge, he was without jurisdiction or authority to pass upon the question involved, since it was already adjudicated by the former orders of Judge Harris.

To this holding and judgment of Judge Stevens, the intervening petitioner, the University of North Carolina, and the receiver, the Branch Banking & Trust Company, excepted and appealed, assigning errors.

W. M. Darden for the University of North Carolina, appellant.

Norman & Rodman for Branch Banking & Trust Company, Receiver, appellant.

W. L. Whitley for J. K. Reid, Sheriff, appellee.

SCHENCK, J. The sole question involved on this appeal is: Was Judge Stevens without jurisdiction or authority to pass upon the question presented by the last order of Judge Harris, namely, the validity of

the claim of the intervening petitioner, the University of North Carolina, to the funds standing to the credit of the dividend account of the receivership. We think, and so hold, the answer to be in the negative.

While it is true, as was said in *In re Adams,* 218 N. C., 379, 11 S. E. (2d), 163, "It is an established rule in this jurisdiction that one Superior Court judge has no power to overrule the judgment or reverse the findings of fact of another judge of the Superior Court previously made in the cause, except in certain well defined cases which have no application here. *Roulhac v. Brown,* 87 N. C., 1; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; *Davis v. Land Bank,* 217 N. C., 145. No appeal lies from one Superior Court judge to another. *Wellons v. Lassiter,* 200 N. C., 474, 157 S. E., 434; *S. v. Lea,* 203 N. C., 316, 166 S. E., 292; *Dail v. Hawkins,* 211 N. C., 283, 189 S. E., 774," it is written in *Temple v. Telegraph Co.,* 205 N. C., 441, 171 S. E., 630, "It is likewise settled by the decisions that the principle of *res judicata* does not extend to ordinary motions incidental to the progress of a cause, but only to those involving substantial rights. *Revis v. Ramsey,* 202 N. C., 815, 164 S. E., 358; *Townsend v. Williams,* 117 N. C., 330, 23 S. E., 461; *Allison v. Whittier,* 101 N. C., 490, 8 S. E., 338; *Mabry v. Henry,* 83 N. C., 298."

This is a controversy between the petitioner, the University of North Carolina, and the respondent, J. K. Reid, sheriff of Washington County. No one else has any financial or material interest therein. The University of North Carolina was not made a party to the orders of Judge Harris, and was not given notice of the applications therefor. Such being the case, the doctrine of *res judicata* had no binding effect upon it. " 'Ordinarily, the rule is that only parties and privies are bound by a judgment. *Bennett v. Holmes,* 18 N. C., 486; *Simpson v. Cureton,* 97 N. C., 112; *Hines v. Moye,* 125 N. C., 8. No estoppel is created by a judgment against one not a party or privy to the record by participation in the trial of the action. *Falls v. Gamble,* 66 N. C., 455; *LeRoy v. Steamboat Co.,* 165 N. C., 109.' *Meacham v. Larus & Brothers Co.,* 212 N. C., 646." *Rabil v. Farris,* 213 N. C., 414, 196 S. E., 321.

"The Receiver is an officer of the Court and is amenable to its instruction in the performance of his duties; and the custody of the receiver is the custody of the law. *Simmons v. Allison,* 118 N. C., 761; *Pellctier v. Lumber Co.,* 123 N. C., 596; *Greenleaf v. Land Co.,* 146 N. C., 505. Courts of equity have original power to appoint receivers and to make such orders and decrees with respect to the discharge of their trust as justice and equity may require. *Skinner v. Maxwell,* 66 N. C., 45; *Lasley v. Scales,* 179 N. C., 578." *Blades v. Hood, Comr. of Banks,* 203 N. C., 56, 164 S. E., 828.

We are of the opinion that the orders of Judge Harris were made incidental to the progress of the receivership, and were interlocutory, and

that the doctrine of *res judicata* for this reason had no application thereto, and for the further reason that the University of North Carolina, the real party in interest in this controversy, was not given notice thereof and was not made a party thereto, and that the funds involved, still being to the credit of the receiver, are still under the jurisdiction of the court, subject to be distributed or paid out as the court may direct.

This cause is remanded that the controversy between the real parties in interest, the intervening petitioner, the University of North Carolina, and the respondent J. K. Reid, sheriff of Washington County, may be heard and determined.

The right or propriety of the appeal of the receiver presents a collateral question unnecessary to be answered on this appeal.

Reversed.

M. A. CROMPTON v. JOHN A. BAKER, TRADING AND DOING BUSINESS AS J. A. BAKER PACKING COMPANY.

(Filed 24 September, 1941.)

1. Constitutional Law § 25b: Master and Servant § 63—

The power of Congress to regulate interstate commerce includes the power to prescribe rules by which this commerce shall be governed, not only to the extent of aiding and protecting such commerce but also in prohibiting it.

2. Same—

While the manufacture of goods is not within itself interstate commerce, the shipment of manufactured goods interstate is such commerce, and Congress has the power to regulate the hours and wages of those employed in such manufacture when the employer at the time of production intends or expects the goods to move in interstate commerce and when the production of such goods, under other than prescribed labor standards, relates to and affects interstate commerce, and the Fair Labor Standards Act is a constitutional exercise of this power by the Congress.

3. Master and Servant § 64—Employer processing goods for intrastate commerce and other goods for sale in interstate commerce is subject to Fair Labor Standards Act.

The verdict of the jury supported by competent evidence established that defendant employer was engaged in slaughtering animals and in selling meat products to wholesale dealers in North Carolina, and also in processing animal grease and selling the tank grease and raw hides to dealers who shipped these products out of the State, and that defendant employer knew that these products would be transported in interstate commerce by such dealers. *Held:* The verdict of the jury supports judgment that defendant was selling part of his products with knowledge that shipment thereof in interstate commerce was intended (29 U. S. C. A. 215 [a] [1]) so as to render him subject to the Federal Fair Labor

Standards Act, and the fact that part of defendant's business was intrastate does not affect this conclusion, since the application of the Act cannot be governed by mere reference to percentages.

4. Master and Servant § 65—Plaintiff employee held engaged in processing goods intended for sale in interstate commerce within meaning of Fair Labor Standards Act.

Defendant employer, in the regular course of his business, slaughtered animals and sold meat products to wholesale dealers within the State, and also obtained grease from the offal of the animals by cooking in vats or tanks, and sold the tank grease and green hides to dealers who shipped same out of the State with knowledge on the part of the defendant that these products would be transported in interstate commerce. Plaintiff employee was employed as night watchman and night engineer and, in the course of his duties, fired the furnace, maintained the heat under the grease tanks, cooked the products, checked the hides and kept up the refrigeration as well as counted and checked-in the animals received during the night. *Held:* The facts disclosed by the record, considered in the light most favorable to the plaintiff, discloses that he was employed in processing goods which were sold by his employer with knowledge that they would be shipped in interstate commerce, and his employment comes within the purview of the Fair Labor Standards Act (29 U. S. C. A. 203 [j]) and he is entitled to enforce as against the defendant the liability for failure to pay him the minimum wages prescribed by the statute for the time he was employed.

APPEAL by defendant from *Bobbitt, J.*, at February Term, 1941, of BUNCOMBE. No error.

Claude L. Love and Roy A. Taylor for plaintiff, appellee.
J. W. Haynes for defendant, appellant.

DEVIN, J. This was an action instituted in the Superior Court of Buncombe County by an employee to recover unpaid minimum wages under the Fair Labor Standards Act of 1938. Issues raised by the pleadings were submitted to the jury, and answered in favor of the plaintiff, and from judgment rendered in accord with the verdict the defendant appealed to this Court.

The material facts determined by the verdict in the trial court were that the defendant was engaged in the meat packing business in the city of Asheville, North Carolina, and that in the course of his business he purchased livestock at points in the State of Tennessee and had same hauled to his premises in Asheville, where the animals were slaughtered and the meat products sold wholesale to dealers in North Carolina. It was also found that in his place of business and in regular course defendant obtained the grease from the offal of the animals by cooking in vats or tanks, and that he sold the tank grease, seven to ten barrels per week, and also green hides, to dealers who shipped all of these products out of

the State, and that this was done with knowledge that these products would thus be transported in interstate commerce by those to whom he sold.

It was further established by the verdict that Crompton, the plaintiff, served the defendant in his plant in Asheville as night watchman, and night engineer, and that, as was his duty to do, he fired the furnace, maintained the heat under the grease tanks, cooked the product, checked the hides and kept up the refrigeration, as well as counted and checked-in the animals received during the night, and that he thus performed functions necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act.

It was found that the plaintiff's minimum hourly wage under the Act, plus one and one-half times for overtime, less the amount paid him by the defendant, for nineteen and two-sevenths weeks, would amount to $321.11, and that plaintiff was entitled to have an additional equal amount as liquidated damages.

The defendant, in the trial below, noted exception to the issues submitted and to certain portions of the judge's charge to the jury, but in his brief in this Court he bases his appeal entirely upon the denial of his motion for judgment of nonsuit (Rule 28, *In re Will of Beard,* 202 N. C., 661, 163 S. E., 748), and contends that the Fair Labor Standards Act has no application here, and that, if it does, the evidence fails to show that the defendant sold his products interstate, or with intent or expectation that they would be shipped in interstate commerce.

The Fair Labor Standards Act of 1938 (29 U. S. C. A. 201) provides that any employer who violates the provisions of the Act establishing a minimum wage (sec. 206), or maximum hours for a work week (sec. 207), for his employees who are engaged in the production of goods for interstate commerce, shall be liable to the employees affected "in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction." Sec. 216.

Section 215 (a) (1) renders it unlawful for any person "to transport, offer for transportation, ship, deliver, or sell in (interstate) commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in (interstate) commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207," with certain exceptions inapplicable here. In section 215 (b) it is declared that "for the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to removal of the goods from such place of employment, shall be

prima facie evidence that such employee was employed in the production of such goods."

The power granted to the Congress by the Constitution to regulate commerce among the several states includes the power to prescribe the rules by which this commerce shall be governed. *Gibbons v. Ogden,* 9 Wheat., 1 (196). It extends not only to those regulations which aid and protect the commerce, but embraces those under which it may be prohibited. *Reid v. Colorado,* 187 U. S., 137; *Kentucky Whip & Collar Co. v. Illinois C. R. Co.,* 299 U. S., 334. While the manufacture of goods is not itself interstate commerce, the shipment of manufactured goods interstate is such commerce, and the rules under which they may be shipped are regulations which the Congress has exclusive power to prescribe.

The constitutionality of the Fair Labor Standards Act of 1938 was placed beyond question by two recent opinions of the Supreme Court of the United States, delivered by the present *Chief Justice,* in the cases of *U. S. v. F. W. Darby Lumber Co.,* 85 Law. Ed. (Adv.), 395, and *Opp Cotton Mills v. Administrator,* 85 Law Ed. (Adv.), 407, wherein the various provisions of the Act were analyzed and discussed. In the *Darby Lumber Company case* it was said: "The recognized need of drafting a workable statute and the well known circumstances in which it was to be applied are persuasive of the conclusion, which the legislative history supports, . . . that the 'production for commerce' intended includes at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce, although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce." It was also said in that case that the validity of the prohibition of the movement in interstate commerce of goods, which were produced in violation of this Act, turned on the question "whether the employment, under other than prescribed labor standards, of employees is so related to the commerce and so affects it as to be within the reach of the power of Congress to regulate it," and that the phrase "produced for interstate commerce" embraced "at least the case where an employer engaged in the manufacture and shipment of goods in filling orders of extrastate customers, manufactures his product with the intent or expectation that according to the normal course of his business all or some part of it will be selected for shipment to those customers."

Applying the appropriate sections of the Act of Congress as thus interpreted to the evidence in the case at bar, we reach the conclusion that the provisions of the Act are applicable, and that defendant's motion for judgment of nonsuit was properly denied. There was evidence

sufficient to sustain the findings upon which the judgment appealed from was predicated. A portion of defendant's business involved the transportation of goods interstate; the plaintiff, his employee, rendered services in the production of certain goods, to wit, tankage grease and hides, which were sold by the defendant to persons who he knew were doing an interstate business, and who resold and caused all of these goods to be shipped out of the State of North Carolina. Thus, the defendant may properly be said to have sold some of his products with knowledge that shipment thereof in interstate commerce was intended.

The fact that a part of defendant's business was intrastate, and that a portion of plaintiff's services were devoted to things which did not enter into interstate commerce could not prevent the application of the statute and the imposition upon the wage contract of the labor standards prescribed by the Act. The reference in sec. 215 (a) (1) is to "any goods." As was said in *Santa Cruz Fruit Packing Co. v. National Labor Relations Board,* 303 U. S., 453, "It is plain that the provision cannot be applied by a mere reference to percentages." *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S., 1; *Hart v. Gregory,* 218 N. C., 184, 10 S. E. (2d), 644; *Capps v. R. R.,* 178 N. C., 558, 101 S. E., 216. Cases on this subject will be found collected and annotated in 132 A. L. R., 1443.

The word "produced" was defined in sec. 203 (j) of the Act to mean "produced, manufactured, mined, handled, or in any other manner worked on in any state; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state." *Hart v. Gregory, supra;* 132 A. L. R., 1446.

The sweep of the Fair Labor Standards statute is far-reaching enough to include the employment of the plaintiff, under the facts disclosed by the record in this case, when considered in the light most favorable for him, and to entitle him to enforce as against the defendant the liability for failure to pay him the minimum wages prescribed by the statute for the time he was employed.

In the trial of the action and the ruling of the court below we find

No error.

NANTAHALA POWER & LIGHT COMPANY v. W. J. CARRINGER AND WIFE, NANNIE CARRINGER.

(Filed 24 September, 1941.)

1. Eminent Domain § 8—

In awarding compensation for an easement, due consideration is to be given to the fact that after the easement is taken the fee remains in the owner burdened by the uses for which the easement is acquired.

2. Same—

The measure of permanent damages for an easement over land acquired by condemnation is the difference in the fair market value of the land as a whole immediately before, and its impaired market value immediately after the taking.

3. Eminent Domain § 10—

Since the measure of damages for an easement acquired by condemnation is the difference between the fair market value of the lands immediately before and immediately after the taking, depreciation in value, if any, of the tract of land outside the bounds of the easement is an element of the damages recoverable, and whether the imposition of the easement is detrimental to the remaining lands is essentially a question of fact for the determination of the jury.

4. Eminent Domain § 18: Trial § 6—

In this proceeding to assess compensation for the taking of an easement over respondent's land for a high voltage transmission line, the court in ruling upon the admissibility of evidence stated that the steel towers on the land and the power lines running over the land did not affect the value of the land outside the easement. *Held:* The remarks of the court constituted a determination, as a matter of law, of an issue of fact within the province of the jury in violation of C. S., 564.

5. Trial § 6: Appeal and Error §39—

Where the court, in ruling upon the admissibility of evidence in a proceeding to assess compensation for an easement for a transmission line, stated that the taking of the easement did not affect the value of the remaining lands of respondent, such error is not cured by subsequent admission of evidence relating to the depreciation in value of the remaining lands, it not appearing of record that the court ever undertook to correct the impression its erroneous remarks must have left upon the minds of the jurors.

6. Same—

In this proceeding to assess compensation for the taking of an easement for a transmission line the court, in ruling upon the admissibility of evidence, made a statement constituting an expression of opinion that the lands outside the bounds of the easement were not adversely affected. *Held:* The charge of the court, when considered in connection with the erroneous statements, did not cure the error, but was subject to the interpretation that compensation should be limited to the land within the

limits of the easement acquired, and in any event the remarks constituted an expression of opinion in violation of C. S., 564, entitling respondent to a new trial.

APPEAL by respondents from *Johnston, Special Judge,* at June Term, 1941, of GRAHAM. New trial.

Civil action to determine the amount of compensation to be awarded the respondents on account of an easement and right of way taken by the petitioner over and across the lands of respondents.

The respondents own a tract of land containing 27 or 28 acres near Robbinsville about one-half mile from the courthouse. It is bisected by a highway leading from Robbinsville to Judson. The petitioner seeks an easement 225 feet wide by 1,655 feet long, or approximately 8½ acres, for the purpose of erecting and maintaining a high tension transmission and distribution line and an auxiliary telephone line, in furtherance of its business of supplying electric current to the general public. The commissioners appointed by the clerk assessed damages and the petitioner excepted and appealed.

When the cause came on for trial in the Superior Court it was admitted that petitioner is a public service corporation having the right to condemn and only the question of compensation was reserved for trial by jury.

Upon the coming in of the verdict of the jury, fixing compensation to be paid by petitioner, judgment was entered condemning to the use of the petitioner the easement sought by it upon the payment of the assessed damages. Respondents excepted and appealed.

T. M. Jenkins and R. L. Phillips for plaintiff, appellee.

Morphew & Morphew and Edwards & Leatherwood for respondents, appellants.

BARNHILL, J. When an easement is acquired in land the fee remains in the original owner burdened by the uses for which the easement is acquired. Hence, in awarding compensation to the owner of land for an easement acquired due consideration is to be given to the fact that the fee remains in the own subject to the prior rights incident to the easement.

Recovery may be had for the depreciated market value of the land actually embraced within the right of way, together with damages, if any, to the remainder of the land used by the owner as one tract. The measure of permanent damages for the appropriation of a right of way for the construction of an electrical overhead system is the difference between the fair market value of the tract as a whole before the right of way was taken and its impaired market value directly, materially and proximately resulting to the respondents' land by the placing of a power

line across the premises in the manner and to the extent and in respect to the uses for which the easement was acquired. *Power Co. v. Russell,* 188 N. C., 725, 125 S. E., 481; *Elks v. Comrs.,* 179 N. C., 241, 102 S. E., 414; *Crisp v. Light Co.,* 201 N. C., 46, 158 S. E., 845; *Power Co. v. Hayes,* 193 N. C., 104, 136 S. E., 353; *Colvard v. Light Co.,* 204 N. C., 97, 167 S. E., 472.

The purpose of the law is to compensate the landowner for his loss resulting from the imposition of the easement. It seeks to place him in the same financial condition, as respects the particular land in question, as he was before the easement was imposed. The market value is the yardstick by which such loss is measured. The owner must be paid such an amount as will equal, when added to the reasonable market value of the land after the imposition of the easement, its reasonable market value just prior to the taking. It follows of necessity that the depreciation in value, if any, of the tract of land outside the bounds of the easement is to be considered in assessing the amount to be paid and that whether the imposition of such easement is detrimental to the remaining land is essentially a question of fact.

During the progress of the trial, while the respondents were undertaking to establish the amount of compensation due, respondent Carringer was asked his opinion as to the market value of his remaining lands adjacent to but outside the bounds of the easement. The court then inquired, "How many contacts did they make on your land?" to which he responded, "Two steel towers." The court then inquired, "In placing your value, taking into consideration the fact that the two steel towers are on your land, that is the only physical contact you have, how much damage did those two steel towers do to your land?" Counsel for respondents then stated to the witness, "I think his Honor means taking into consideration these steel towers being put on your land and the power lines running over your land," to which the court responded, "I am holding the two steel towers and the lines running over there do not affect the balance of the land." Later when a witness was interrogated as to the high voltage lines (154,000 volts), strung over the land the court sustained an objection and remarked "that is what I have ruled out, the line." Thus the court inadvertently invaded the province of the jury. It determined, as a matter of law, what it was the duty of the jury to decide as an issue of fact upon the evidence offered.

It is contended that similar evidence was subsequently admitted for the consideration of the jury. This is not sufficient to cure the error. The court had stated, in the presence of the jury, that the uses to which the easement was to be subjected do not affect the balance of the land and that the presence of the high voltage wires was not to be considered. We cannot find in the record that the court ever undertook to correct the impression these remarks must have left upon the minds of the jury.

It is further argued that in its charge the court correctly stated the law and that this removed any prejudicial effects resulting from the remarks of the court. This we cannot hold. When the charge of the court is taken into consideration in connection with the statements it had made to or in the presence of the jury it is clearly subject to the interpretation that the court was limiting the land to be considered to that within the limits of the easement acquired. In any event its remarks constitute an expression of opinion that the land outside the bounds of the easement was not adversely affected. C. S., 564.

The remarks of the court in ruling upon the admissibility of the evidence, inadvertently made in the presence of the jury, are of such nature as to require a

New trial.

HENRY ROSE v. M. K. PATTERSON.

(Filed 24 September, 1941.)

1. Pleadings § 26a: Trial § 24—

Where the complaint alleges that defendant, as executrix, turned over to herself as legatee, personalty of the estate of plaintiff's debtor, and thus obtained personal enrichment at the expense of creditors of the estate, C. S., 59, *et seq.*, but the evidence tends to show, at most, *devastavit*, defendant's motion to nonsuit is properly allowed on the ground of variance between the allegation and the proof, since the burden is on plaintiff to prove the cause alleged in the complaint.

2. Venue § 1b—

Complaint *held* to allege cause against defendant as devisee for personal enrichment at the expense of creditors of the estate, C. S., 59, and not against her in her capacity as executrix, and her motion to remove to the county of her qualification was properly denied, notwithstanding that plaintiff's evidence tends to show *devastavit*, since an action is governed by the pleadings.

APPEAL by plaintiff from *Bobbitt, J.*, at April Term, 1941, of BUNCOMBE.

Civil action to enforce liability against defendant for debt of A. S. Patterson, deceased, to the value of property received by defendant from decedent.

From judgment of nonsuit entered at the close of all the evidence, plaintiff appeals, assigning error.

Parker, Bernard & Parker for plaintiff, appellant.

Edwards & Leatherwood and Jones, Ward & Jones for defendant, appellee.

STACY, C. J. In this action the plaintiff seeks to hold the defendant personally liable for his claim against the estate of A. S. Patterson, deceased, to the extent of property received by the defendant from the decedent. C. S., 59, *et seq.* The character of the action was considered on two former appeals, reported in 218 N. C., 212, 10 S. E. (2d), 678, and *sub. nom., Thomasson v. Patterson,* 213 N. C., 138, 195 S. E., 389.

The evidence on the trial, if inculpatory at all, points only to a *devastavit* on the part of the defendant as executrix of the estate of A. S. Patterson, deceased, and not to any personal enrichment at the expense of creditors. The nonsuit is justified on the ground of a variance between the allegation and the proof. *S. v. Jackson,* 218 N. C., 373, 11 S. E. (2d), 149; *S. v. Franklin,* 204 N. C., 157, 167 S. E., 569; *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6. "The parties must allege their cause of action or defense, and prove the same on the trial, and a variance arises when the evidence offered does not correspond with the allegations of the pleading." McIntosh, Practice and Procedure, 517.

The refusal to remove the case to Swain County for trial was upheld on the allegations of the complaint. 218 N. C., 212. The case is to be tried on the pleadings. *Green v. Biggs,* 167 N. C., 417, 83 S. E., 553; *S. v. George,* 188 N. C., 611, 125 S. E., 189, and cases there cited.

Affirmed.

G. W. LEE v. D. M. ROBERSON.

(Filed 24 September, 1941.)

1. Master and Servant §§ 19, 37—

Where it is admitted that defendant employer had a sufficient number of employees to bring him under the Workmen's Compensation Act, but that he had elected not to do so, the defense of contributory negligence is properly excluded. Michie's Code, 8081 (v).

2. Master and Servant § 14b—

Plaintiff was injured when his hand came into contact with blades of an electric sausage grinder he was operating in the course of his employment. Plaintiff's evidence was to the effect that he had had no previous experience with an electric machine and that he was not furnished a mallet with which to push the meat through if the meat did not feed through by itself. *Held:* The evidence, though contradicted by defendant's evidence, precludes a nonsuit upon the simple tool doctrine relied on by defendant.

BARNHILL, J., dissents.

LEE *v.* ROBERSON.

APPEAL by defendant from *Johnston, Special Judge,* at April Special Term, 1941, of MARTIN.

Civil action to recover damages for an alleged negligent injury.

Plaintiff was employed by the defendant as a handy man around his slaughter house. On the fourth day of his employment he was grinding sausage when his left hand came in contact with the blades of the electric sausage grinder and cut off four fingers. Plaintiff had had no previous experience with an electric machine, though he had used one on the farm operated by hand. "You could stop the one on the farm if you had your hand in it." If the meat did not feed through by itself a mallet was used to push it down. Plaintiff testifies that he was furnished no mallet and given no instructions as to how to operate the machine; that he was not familiar with a machine driven by electricity.

The defendant's evidence tends to show that plaintiff was warned not to use his hand in pushing the meat into the grinder; that it was dangerous to do so, and that a mallet had been furnished for that purpose.

There was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

Hugh G. Horton for plaintiff, appellee.

Peel & Manning, Clarence W. Griffin, and Wheeler Martin for defendant, appellant.

STACY, C. J. The case was properly submitted to the jury. It is admitted that the defendant had a sufficient number of employees to bring him under the Workmen's Compensation Act "and that he had not done so." Accordingly, without objection or exception, his plea of contributory negligence was stricken out. Michie's N. C. Code of 1939, sec. 8081 (v).

The defendant relies upon the simple tool doctrine. *Newbern v. Great Atlantic, Etc., Tea Co.,* 68 F. (2d), 523, 91 A. L. R., 781. This cannot avail him on the present record, at least, not to the extent of shielding him from liability. *King v. R. R.,* 174 N. C., 39, 93 S. E., 378; *Wright v. Thompson,* 171 N. C., 88, 87 S. E., 963; *Ensley v. Lumber Co.,* 165 N. C., 687, 81 S. E., 1010; *Reid v. Rees,* 155 N. C., 231, 71 S. E., 315; *Mercer v. R. R.,* 154 N. C., 399, 70 S. E., 742. It is true, the jury might have returned a verdict for the defendant, especially in view of the cross-examination of the plaintiff, but the evidence taken as a whole is such as to preclude a nonsuit.

No other question is debated on brief. The verdict and judgment will be upheld.

No error.

BARNHILL, J., dissents.

STATE v. JOHN PEACOCK.

(Filed 24 September, 1941.)

1. Grand Jury § 1—

Ch. 189, Public-Local Laws 1937, providing that the Board of County Commissioners of Wilson County shall select grand juries in the county "in the manner prescribed by law," merely empowers the Board of Commissioners to draw grand juries in the manner prescribed by the general law, C. S., 2333, and does not alter the method of election, challenge, discharge, etc., and there being no provision in the Constitution prescribing or proscribing any particular method of selection, the Act is a valid exercise of legislative power.

2. Indictment § 2—

Defendant's motion to quash on the ground that the grand jury returning the bill of indictment was selected under the provision of ch. 189, Public-Local Laws 1937, should have been overruled, since a party litigant does not have the right to select jurors, but only to challenge or reject them, and the Act relates only to procedure and not to the number or qualifications of jurors or to the composition of the grand jury. C. S., 2335.

APPEAL by State from *Harris, J.*, at May Term, 1941, of WILSON.

Bill of indictment charging the defendant with the larceny of an automobile, of the value of more than $20.00, the property of one Cleo Smith, and (2) with receiving said automobile knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Motion before plea to quash for *propter defectum* in the grand jury allowed, and the State appeals.

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

No counsel for defendant.

STACY, C. J. The question for decision is whether a grand jury selected under the provisions of ch. 189, Public-Local Laws 1937, is a lawfully constituted body and competent to return a true bill against the defendant.

The purpose of the Act, as expressed in the title, is "to regulate the drawing of grand jurors in Wilson County." It provides that on the first Monday in July, 1937, the Board of County Commissioners of Wilson County shall draw, in the manner prescribed by law, nine grand jurors to serve for a period of six months and nine grand jurors to serve for a period of twelve months, and that thereafter, on the first Monday in January and July, the said Board of Commissioners shall draw nine jurors to serve for a period of twelve months.

It is further provided that the judge presiding over any term of the Superior Court of Wilson County may at any time discharge said grand jury from further services, in which event, he shall cause the Board of County Commissioners to draw a new grand jury to serve during the unexpired terms of the members of the grand jury discharged.

It is conceded that the grand jury which returned the bill in the instant case was duly impaneled and sworn at a previous term of the court.

The reason assigned by the trial court for holding the Act invalid is, that it "contains no provision empowering this court to exercise any discretion in respect of the grand jury drawn by the Board of County Commissioners and attempts to deprive this court of its natural, inherent and necessary functions in this respect."

It will be observed that according to the provisions of the statute, the Wilson County Board of Commissioners is empowered to draw the grand jurors "in the manner prescribed by law." This means in the manner prescribed by the general law. C. S., 2333. So, the only difference provided for the selection of grand juries in Wilson County is, that the grand jurors are to be drawn by the Board of County Commissioners. In all other respects the method of selection, challenge, discharge, etc., is to conform to the general law. *S. v. Levy,* 187 N. C., 581, 122 S. E., 386.

Does this single departure invalidate the statute? The pertinent authorities suggest a negative answer. *S. v. Mallard,* 184 N. C., 667, 114 S. E., 17; *S. v. Wood,* 175 N. C., 809, 95 S. E., 1050; *S. v. Brittain,* 143 N. C., 668, 57 S. E., 352; *S. v. Lewis,* 142 N. C., 626, 55 S. E., 600; *S. v. Barker,* 107 N. C., 913, 12 S. E., 115. The change relates only to procedure, and not to the number or qualification of jurors or to the composition of the grand jury.

The right of a defendant, or party litigant, in respect of the jury, grand or petit, is to challenge, or to reject, and not to select jurors. C. S., 2335. *S. v. Levy, supra.* There is no provision in the Constitution prescribing or proscribing any particular method of selection. *S. v. Brittain, supra.* The subject is one which the General Assembly is authorized to regulate by statute. 24 Am. Jur., 844, *et seq.* This it has done here.

The motion to quash on the ground stated should have been overruled. Reversed.

IN THE MATTER OF GEORGE MITCHELL, CLAIMANT, EMPLOYEE, AND BROWN & CRAWLEY, A PARTNERSHIP; AND BROWN & CRAWLEY OIL COMPANY, INC., WILSON, NORTH CAROLINA, EMPLOYING UNITS.

(Filed 24 September, 1941.)

1. Master and Servant § 57—

Where a partnership and a later formed corporation are controlled by the same parties but the businesses are wholly unrelated and are kept separate and distinct as to location, finance and employment, and the work required of the employees of the two concerns are not of the same character, the two concerns do not constitute a single employing unit, and, neither concern having in its employ as many as eight employees, neither is subject to the Unemployment Compensation Act.

2. Appeal and Error §§ 3a, 30h—

Where the real party in interest does not appeal from judgment in favor of an adverse party, the judgment of the court below becomes *res judicata* as to all justiciable issues presented, and there being nothing for determination on the appeal of a formal party, the appeal will be dismissed.

3. Master and Servant § 62—

The Unemployment Compensation Commission is not entitled to appeal from judgment of the Superior Court, entered in a proceeding by an employee for compensation, that defendant employer does not come within the purview of the Compensation Act, and that therefore claimant is not entitled to Unemployment Compensation Insurance. If the Commission desires to have the liability of the employer for unemployment compensation contributions judicially determined on its contentions that the employer and another concern controlled by the same interests constituted but a single employing unit, it must follow the procedure prescribed by sec. 8 (m), ch. 27, Public Laws 1939.

APPEAL by Unemployment Compensation Commission from *Bone, J.*, in Chambers, 7 June, 1941. From WILSON. Appeal dismissed.

Proceeding under sec. 6, ch. 1, Public Laws, Extra Session, 1936, to determine the right of the claimant to benefits under the provisions of the Unemployment Compensation Act.

Claimant filed claim for benefits for unemployment as an employee of Brown & Crawley Oil Company, Inc. The Commission advised that the company had no wage credits for the year 1938. The claimant protested. Thereupon a hearing was had before a claims deputy. The deputy found as a fact that claimant was employed by Brown & Crawley, a partnership; that Brown & Crawley and Brown & Crawley Oil Company, Inc., are controlled directly and indirectly by the same interest and jointly constitute a single employing unit covered by the Act, and that the claimant was entitled to recover compensation to be charged to wage credits created by the collection of taxes from such employing unit. The appeals deputy affirmed.

Upon an appeal by Brown & Crawley and Brown & Crawley Oil Company, Inc., the Full Commission reviewed the finding of fact and conclusions of the claims deputy and the appeals deputy, heard argument and rendered judgment that the claim of Mitchell be allowed and that he receive such benefits to which he is entitled under the law. As a basis for its judgment it concluded that Brown & Crawley and Brown & Crawley Oil Company, Inc., constitute an employing unit covered by the Unemployment Compensation Act. The respondents filed certain exceptions to the findings of fact and to the failure of the Commission to find certain other facts. It was thereupon agreed that the exceptions should be withdrawn and that the additional findings of fact as set out in the exceptions filed should be incorporated as findings of fact of the Commission in the cause. The respondents appealed, agreeing that the cause should be submitted to the resident judge upon the facts found by the Commission as amended by the stipulations.

When the cause came on to be heard in the court below on the appeal the court, being of the opinion that the facts found do not support the Commission's decision and that upon said facts the defendants are not liable for contributions under said Act, entered judgment reversing the judgment of the Unemployment Commission. The Unemployment Compensation Commission excepted and appealed.

Finch, Rand & Finch and Wade A. Gardner for Brown & Crawley and Brown & Crawley Oil Company, Inc., respondents, appellees.

Adrian J. Newton, Ralph Moody, and W. D. Holoman for Unemployment Compensation Commission, appellant.

BARNHILL, J. It is conceded that Brown & Crawley is a copartnership founded in 1926 and is "exclusively engaged in the meat packing industry and in the wholesale processing and distribution of meat products"; that Brown & Crawley Oil Company is a corporation organized in 1936 and is "exclusively engaged in the wholesale distribution of petroleum products"; and that neither employs as many as eight employees. It is further agreed that "the two businesses are wholly unrelated businesses. They occupy separate real estate. Each owns his own real estate. They occupy separate plants. Each owns its own plant. The nature of the duties of their employees is not identical. The work required of the employees of the two concerns are not of the same character. They have never engaged in any exchange of employees, or of the employees' duties. They have always maintained separate books, records, bank accounts and business transactions of every nature and description. Neither business has ever loaned, or advanced, any money, property or equipment to the other. Their identities have always been

maintained entirely separate and distinct. No property or money of the copartnership was used in the formation of the corporation and the two businesses were formed in good faith and not because of any attempt to evade the provisions of the Unemployment Compensation Act."

These admitted facts make *Unemployment Compensation Commission v. Coal Co.*, 216 N. C., 6, 3 S. E. (2d), 290, and *Unemployment Compensation Commission v. Willis*, 219 N. C., 709, easily distinguishable and fully sustain the conclusion of the court below. Apparently the claimant so understood. He did not appeal.

The real party in interest not having appealed, the judgment of the court below becomes *res judicata* as to all justiciable issues presented. Nothing remains for our consideration.

We are not inadvertent to the provisions of sec. 6 (h), ch. 1, Public Laws, Extra Session, 1936, which makes the Commission a party to any judicial action involving any such decision. Under this statute the exact status of the Commission as a party to the action is not defined and the part it is to play as such is left somewhat in the realm of speculation. Suffice it to say that we find nothing in the provision which constitutes the Commission guardian or trustee for a claimant or which would warrant the conclusion that it is authorized to prosecute an appeal from a judgment against a claimant when the claimant is content. Nor may it do so for the purpose of adjudicating issues which are merely incidental to the claimant's cause of action.

If, as the Commission contends, Brown & Crawley and Brown & Crawley Oil Company, Inc., jointly constitute a single employing unit liable for the payment of unemployment compensation contributions and it wishes to have this liability judicially adjudged, it must follow the procedure prescribed by the statute which gives it life and defines its rights and duties. Sec. 8 (m), ch. 27, Public Laws 1939; sec. 14 (b), ch. 1, Extra Session, Public Laws 1936.

Appeal dismissed.

SANDERS HARRIS v. QUEEN CITY COACH COMPANY.

(Filed 24 September, 1941.)

1. Damages § 9—

An instruction to the effect that if the jury found that defendant acted willfully and maliciously in committing the wrong that then it was in the discretion of the jury as to the amount that it would fix as punitive damages, is error, since the finding of willfulness and malice does not in itself entitle plaintiff to recover punitive or exemplary damages, but both the awarding of punitive damages and the amount to be allowed, if any, rests in the sound discretion of the jury.

2. Damages § 8: Carriers § 6—

An instruction that if defendant carrier declined to give plaintiff a seat in its bus because plaintiff is a Negro, to answer the issue of willfulness and maliciousness in plaintiff's favor, *is held* erroneous, since such refusal under certain circumstances might be actuated by protective or benevolent impulses rather than by malice.

APPEAL by defendant from *Johnston, Special Judge,* at March Term, 1941, of BUNCOMBE.

This action is stated in plaintiff appellee's brief to be "to recover compensatory and exemplary damages from the defendant by reason of the defendant's willful and deliberate failure and refusal to transport him on its bus from Rutherfordton to Asheville in an empty seat defendant had in the rear of the said bus at the time."

There was evidence tending to show that the plaintiff, a colored preacher, purchased at the defendant's bus station in Rutherfordton a ticket to Asheville; that when the bus arrived at Rutherfordton there was at least one vacant seat in the rear thereof; that when the plaintiff entered the bus the driver started to seat him on the vacant seat in the rear, but when one of the passengers, a white man sitting in the rear of the bus, shook his head at the driver, the driver told the plaintiff he could ride in the front of the bus in a space near the entrance thereto, and that when the plaintiff stated it would be dangerous to ride there the driver told him to get off the bus; that the plaintiff did get off the bus and it was driven off without him; that the plaintiff surrendered his ticket to the ticket agent from whom he had purchased it and was refunded the amount he had paid therefor; that the plaintiff was caused to miss an appointment to preach in Asheville, that he was exposed to the weather, and that he was damaged and humiliated by being refused transportation on the bus operated by the defendant as a common carrier.

The jury, in response to issues submitted to them, found that the defendant wrongfully refused to transport the plaintiff, and assessed his compensatory damages at $200.00, and further found that the defendant willfully and maliciously refused to transport the plaintiff, and assessed his exemplary or punitive damages at $600.00.

From judgment predicated on the verdict the defendant appealed, assigning errors.

Sanford W. Brown for plaintiff, appellee.
Williams & Cocke for defendant, appellant.

SCHENCK, J. The defendant, appellant, assigns as error the following excerpt from his Honor's charge: "If you answer that issue (the third issue relating to alleged willfulness and maliciousness of the refusal of

the defendant to transport the plaintiff) yes, that is if you find that the wrong done this boy was done in rudeness, with malice, with disregard to the rights of others, then answer that issue yes, or if you find that he was declined that seat because he was a Negro, answer that issue yes. If you fail to so find answer it no.

"Then if you say yes to the issue, it is a question in your sound discretion as to what amount you will fix as punitive damages in this case, not to exceed $1,000.00." We are constrained to sustain this assignment of error.

This charge was tantamount to an instruction that the finding by the jury that the refusal of transportation was willful and malicious *ipso facto* entitled the plaintiff to recover exemplary or punitive damage, the amount of which was in the sound discretion of the jury. We do not understand such to be the rule. The rule as gleaned from the authorities is that upon the finding by the jury that the action of the defendant was willful and malicious, the jury may in their sound discretion, determine whether they would award exemplary or punitive damage. In other words, the result as a matter of law is not that the plaintiff is entitled to exemplary or punitive damage upon the finding of willfulness or maliciousness in the action of the defendant, but the result of such finding is to vest in the jury the discretion to determine whether the plaintiff is entitled to recover any such damage; and, further, if the jury determines that the plaintiff is entitled to recover such damage, the amount thereof is to be fixed by them in the exercise of their sound discretion.

"Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury." *Ford v. McAnally,* 182 N. C., 419, 109 S. E., 91.

"A jury is never compelled to award punitive damages. If the evidence is such as to support an award of punitive damages, it is still discretionary with the jury as to whether such damages will be allowed, subject only to the inherent power of the court to set aside an excessive or disproportionate award. As said in *Hayes v. R. R.,* 141 N. C., 195, 53 S. E., 847: 'This Court has said in many cases that punitive damages may be allowed, or not, as the jury sees proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases the matter is within the sound discretion of the jury.' *Knowles v. R. R.,* 102 N. C., 59, 9 S. E., 7; *Smith v. Ice Co.,* 159 N. C., 151, 74 S. E., 961; *Motsinger v. Sink,* 168 N. C., 548, 84 S. E., 847; *Huffman v. R. R.,* 163 N. C., 171, 79 S. E., 307; *Cobb v. R. R.,* 175

N. C., 130, 95 S. E., 92; *Ford v. McAnally,* 182 N. C., 419, 109 S. E., 91." *Robinson v. McAlhaney,* 214 N. C., 180, 198 S. E., 647.

It will be further observed that his Honor used these words: ". . . or if you find that he (the plaintiff) was declined that seat because he was a Negro, answer that (the third) issue yes." We do not apprehend that it necessarily follows as a matter of law that the declining of a seat in a bus by a common carrier to a passenger because he was a Negro was a willful or malicious action. Circumstances are conceivable under which the declining of a seat in a bus to a passenger because of his race might be actuated by protective or benevolent impulses. The most for which such action could be held would be evidence of willfulness and maliciousness.

As there must be a new trial for the error assigned, any discussion of the other interesting questions presented in the briefs, which are not likely to again arise, becomes supererogatory.

New trial.

J. K. BARROW v. NICODEMUS BARROW AND THE FARMVILLE-WOODWARD LUMBER COMPANY, A CORPORATION.

(Filed 24 September, 1941.)

Estoppel § 6a: Principal and Agent § 12—In order to constitute equitable estoppel, person sought to be charged must have had knowledge of facts.

This action was instituted to recover damages for trespass for the cutting and removal of timber. Defendant claimed he bought the timber from plaintiff's son and that plaintiff was estopped to deny the authority of the son to sell same. Defendant's evidence on the issue of estoppel tending to show that plaintiff left his family and did not return to the community except for one or two short visits, that his oldest son took over and looked after the place, and for a number of years cut wood from the *locus in quo* and sold same. The evidence further tended to show that plaintiff had no knowledge that his son was cutting and selling wood or timber, and there was no evidence that plaintiff expressly authorized his son to cut and sell wood or timber. *Held:* The evidence is insufficient to bring the case within the doctrine of equitable estoppel or the doctrine that a person who, by words or conduct, represents or permits it to be represented that another is his agent, will be estopped to deny the fact of agency as against third persons acting in reliance on the misrepresentations.

APPEAL by defendant, The Farmville-Woodward Lumber Company, a corporation, from *Johnston, Special Judge,* at April Special Term, 1941, of MARTIN.

Civil action to recover damage for trespass.

Plaintiff among other things alleges in his complaint: That defendants have trespassed upon a tract of land in Martin County, North Carolina, owned by him, and have cut and removed therefrom 90,000 feet of timber and committed other wrongful acts thereon to his damage in the sum of $1,000, for which amount judgment is prayed.

Defendant Nicodemus Barrow has not answered.

Defendant, Farmville-Woodward Lumber Company, a corporation, in answer filed, denies the material allegations in the complaint, and avers: (1) That it bought from Nicodemus Barrow some timber which had been cut from said land and sawed into logs and had paid him for said logs. (2) That for some time prior thereto Nicodemus Barrow had been managing and looking after said land, had sold wood therefrom, and had acted with respect thereto as general agent of his father, the plaintiff. (3) That plaintiff, "because and on account of his conduct in allowing said Nicodemus Barrow to act as his agent and to act with respect to said land as his general agent, is estopped to deny that said Nicodemus Barrow was his agent with respect to said property in question, and is therefore not entitled to recover anything out of the defendant, Farmville-Woodward Lumber Company, in this action."

Upon the pleading these issues were framed:

"1. Is the plaintiff, by his conduct, estopped to deny that Nicodemus Barrow was his agent with respect to the property in question?

"2. What amount, if any, is the plaintiff entitled to recover of Nicodemus Barrow?"

Upon the trial below the parties entered into this stipulation:

"It is agreed . . . that the defendant Farmville-Woodward Lumber Company, bought from Nicodemus Barrow 53,842 feet of logs, and that stumpage price at said time was $4.50 per thousand feet. It is agreed and stipulated that the lands in controversy belonged to the plaintiff; that it had certain timber on it; that the lumber company cut 53,842 feet of lumber off the land belonging to the plaintiff. The lumber company contends, however, that they bought the lumber from Nicodemus Barrow, who was the agent of the plaintiff in this case. The plaintiff denies that agency. The question presented is the question of whether or not Nicodemus Barrow was the agent of the plaintiff, and further, whether or not plaintiff's conduct has been such that he is estopped from denying that Nicodemus Barrow was his agent."

Thereupon defendant Lumber Company voluntarily assumed the burden of the issue and offered evidence tending to show: That about 25 years ago, plaintiff J. Knowledge Barrow and his family, consisting of his wife and six or seven children, resided in a house on the land in question; that about that time he left his family there and went away;

that he has not returned to the community except on one or two short visits; that after he departed his family lived in a shack or house on the place until it fell down six or eight years ago; that they tended a garden and potato and corn patches; that Nicodemus was the largest boy and looked after the place; that off and on ever since he was big enough Nicodemus, who is now 25 or 30 years old, has cut a lot of wood off the place and pulled it out to the road, and sold it to wood yards in Williamston and to others; and that he cut wood off the place every winter until the Farmville-Woodward Lumber Company bought the timber from him.

The testimony tended to show, however, that plaintiff, Knowledge Barrow, had no knowledge of the fact that his son Nicodemus Barrow was cutting and selling wood or timber from the land. There is no evidence that Knowledge Barrow expressly authorized Nicodemus to sell either wood or timber.

At the close of defendant's testimony plaintiff moved for directed verdict on the first issue. The court, ruling that defendant Farmville-Woodward Lumber Company had failed to produce and offer testimony sufficient to be submitted to the jury on the question of agency, or estoppel raised by the pleadings, allowed the motion and entered judgment, from which said corporate defendant appeals to Supreme Court and assigns error.

Hugh G. Horton for plaintiff, appellee.
Peel & Manning for defendant, appellant.

WINBORNE, J. The question presented on this appeal is: When taken in the light most favorable to plaintiffs, is there sufficient evidence to take the case to the jury on the issue raised by the plea of estoppel?

The court below answered in the negative. In this we concur.

In equity there may be an estoppel affecting the legal title to land, but of the constituent elements there must be conduct or words of the party against whom the estoppel is pleaded, amounting to a representation, or a concealment of material facts, which at the time must be known to him, or at least the circumstances must be such that the knowledge of them is necessarily imputed to him. *Boddie v. Bond,* 154 N. C., 359, 70 S. E., 824; *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889; 19 Am. Jur., 743, Estoppel, sec. 87.

Further, there is a general principle that "Where a person, by words or conduct, represents or permits it to be represented that another is his agent, he will be estopped to deny the agency as against third persons, who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency exists in fact." See *Wynn v. Grant,*

166 N. C., 39, 81 S. E., 949, quotation from Story on Agency. Also, *Ferguson v. Amusement Co.,* 171 N. C., 663, 89 S. E., 45.

In the present case there is no evidence to bring the case within either of these principles. The cases of *Metzger v. Whitehurst,* 147 N. C., 171, 60 S. E., 907; *Williams v. R. R.,* 155 N. C., 260, 71 S. E., 346; and *McArthur v. Byrd,* 213 N. C., 321, 195 S. E., 777, relied upon by appellant, are distinguishable in factual situations.

The judgment below is

Affirmed.

FRANK McNEILL AND WIFE, BESSIE McNEILL, v. TERRY HALL AND C. E. SILVER.

(Filed 24 September, 1941.)

Conspiracy § 3—Retailers may agree, in absence of fraud or coercion, not to buy from salesmen selling goods to competitor.

The evidence, considered in the light most favorable to plaintiff, tended to show that defendant retail merchants agreed among themselves that they would not purchase goods from salesmen of certain wholesalers if such salesmen continued to sell to plaintiff, that they so notified the salesmen and gave them the choice of selling to defendants or to plaintiff, and that as a result plaintiff was unable to get necessary supplies and was forced to close his retail business. *Held:* In the absence of evidence of malice, fraud or coercion, defendants' motion to nonsuit was properly allowed, since defendants' endeavor to prevent plaintiff from getting merchandise to sell in competition with them in a peaceable manner was not unlawful and did not constitute an unlawful conspiracy or boycott in the absence of fraud or coercion.

APPEAL by plaintiffs from *Olive, Special Judge,* at April Term, 1941, of YANCEY.

This is an action by the plaintiffs to recover damages of the defendants for the reason that they, allegedly, "unlawfully, willfully, and maliciously combined and conspired, without right of justifiable cause, with malicious intent to boycott, injure and utterly destroy the business of the plaintiffs by coercing the packing and baking companies . . . and their salesmen and deliverymen to withdraw and withhold their beneficial business intercourse from the plaintiffs by the use of threats against said companies that unless they withdraw and withhold their business intercourse from the plaintiffs the defendants in concert would refuse to buy any of the merchandise offered for sale by said companies."

The evidence offered by the plaintiffs, when construed in the light most favorable to them, tended to show that the plaintiffs operated a

cafe in the village of Micaville, wherein they sold meals, sandwiches, bread, pies, soft drinks, and other articles usually sold in a cafe; and that they purchased meats, bread, pies, and perhaps other articles, from the salesmen of the baking and packing houses who regularly visited Micaville; that the defendants each operated a store in Micaville at each of which were sold at retail sandwiches, meat, bread, pies and possibly other articles sold at the plaintiffs' cafe, and that the defendants purchased meat, bread, pies and other articles from the same salesmen of the same baking and packing houses as did the plaintiffs; that the defendants agreed between themselves that if said salesmen continued to sell to the plaintiffs they, the defendants, would cease to buy from said salesmen, and so notified said salesmen; that as a result of this agreement and notice thereof to them said salesmen refused to further sell to the plaintiffs, and the plaintiffs, being unable to buy the necessary supplies therefor elsewhere, were forced to close their cafe, to their loss and damage.

When the plaintiffs had introduced their evidence and rested their case (C. S., 567), the defendants moved for a judgment as in case of nonsuit, which motion was allowed, and from judgment accordant with this ruling the plaintiffs appealed, assigning errors.

Huskins & Wilson and Anglin & Randolph for plaintiffs, appellants.
Watson & Fouts for defendants, appellees.

SCHENCK, J. The gravamen of the action alleged is a boycott of the plaintiffs' business. A requisite of any boycott is a conspiracy. Boycott is defined by Black's Law Dictionary (Second Edition) as "a conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business . . ." A conspiracy is "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." The determination of the defendants to decline to buy from the salesmen if they continued to sell to the plaintiffs was not an unlawful act. It was simply the exercise of the right they had to buy from or to refrain from buying from whomsoever they pleased. "If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy." *S. v. Martin,* 191 N. C., 404, 132 S. E., 16.

In the absence of intimidation and coercion, and in a peaceable manner, a person has a right to endeavor to prevent other firms procuring certain articles to be sold in competition with the sale of the same articles by them in a given territory.

"It has been held that a combination of retail dealers in merchandise, which for a legitimate purpose interferes with another's right to buy

goods by persuasion or other peaceable means exerted against the sellers, does not amount to an actionable conspiracy, there being no intimidation or coercion." 15 C. J. S., Conspiracy, par. 12, p. 1020.

"It has been held in several decisions that the members of a combination may lawfully agree among themselves not to patronize any dealer who furnishes supplies of the description used by them to a person not a member thereof, and give notice of their intention so to do. The means used, it was said, are not unlawful and the combination not a boycott because the essential element of coercion is wanting, nor is there any element of fraud." 15 C. J. S., Conspiracy, par. 12, p. 1020. See, also, *Bohn Manufacturing Company v. Northwestern Lumbermen's Association* (Minn.), 21 L. R. A., 337; *Cote v. Murphy* (Pa.), 23 L. R. A., 135.

There was no evidence of coercion or fraud in the case at bar. In fact, the evidence tends to show that the defendant Hall told one of the salesmen, "You can sell to whoever you want to and I will buy from whomever I please"; and that defendant Silver stated that "he couldn't keep the salesman from selling to Mr. McNeill"; and in response to a question by one of the salesmen as to whether it would "be all right to sell the (plaintiffs') cafe," said, "It would be all right and to unload his truck (to the plaintiffs) as far as he was concerned, but he would know where he bought his meat from then on." Taken in the light most favorable to the plaintiffs the evidence tends to show only that the defendants, while conceding the salesmen's right to sell to the plaintiffs, gave notice of their intention to assert their right to purchase from whomsoever they pleased, and to withhold purchasing from the salesmen if they continued to sell articles to the plaintiffs to be used in competition with the defendants' legitimate business.

The salesmen, having been given their choice of continuing selling to the plaintiffs and losing their sales to the defendants or of continuing selling to the defendants and refusing to sell to the plaintiffs, chose the latter. The result of the defendants' action was to give this choice to the salesmen by giving notice that they would withhold their purchasing if the sales continued to their competitor. This, without any evidence of malice, fraud or coercion, did not give rise to the cause of action alleged.

The judgment of the Superior Court is

Affirmed.

E. H. JEFFERSON AND WIFE, AMANDA R. JEFFERSON, v. SOUTHERN LAND SALES CORPORATION, J. FRANK HACKLER, TRUSTEE, AND ELBERT S. PEELE.

(Filed 24 September, 1941.)

1. Judgments § 32—Extent of estoppel by judgment.

A judgment is a bar to a subsequent action between the parties and their privies as to all issuable matters contained in the pleadings, and also as to those material and relevant matters within the scope of the pleadings which the parties, in the exercise of due diligence, could, and should, have brought forward, but the estoppel does not embrace matters which might have been brought into the litigation, but which, in fact, were neither joined nor embraced in the pleadings.

2. Same—Matters alleged in second action held not joined or embraced in pleadings of prior action, and prior action does not bar the suit.

In a prior action to enjoin confirmation of foreclosure sale of a purchase money deed of trust executed by plaintiffs, consent judgment was entered allowing trustors a credit on the notes for money due the male trustor for services rendered the *cestui*, and new notes and deed of trust were executed. The letter written by plaintiffs' counsel forming the basis of the consent judgment stated that the agreement settled all matters of business between the male trustor and the *cestui* except the possibility of a shortage in the acreage of the land sold. Plaintiffs subsequently entered this suit to enjoin foreclosure, alleging a shortage in the acreage of the land sold, and asking that the debt secured by the deed of trust for purchase price of the land be credited with the value of the deficiency. *Held:* The second cause of action was not included in the matters settled by the consent judgment, and the prior judgment does not estop plaintiffs from maintaining the second action.

3. Vendor and Purchaser § 16—

In this action to recover the proportionate part of the purchase price of land for deficiency in acreage arising out of the fact that a third party had superior title to a part of the land described in the deed to plaintiffs, the refusal of the trial court to submit an issue of estoppel by conduct was not error, there being no sufficient evidence that plaintiffs knew the true boundaries when they accepted the deed, nor was the court's refusal to submit an issue of mutual mistake erroneous, there being neither allegation nor evidence of mutual mistake.

APPEAL by defendant Southern Land Sales Corporation, from *Harris, J.*, at March Term, 1941, of MARTIN. No error.

This was an action to enjoin a foreclosure sale of land, and to recover damages for breach of covenants of seizin and warranty to be applied in exoneration of the mortgage debt *pro tanto*.

Plaintiffs alleged that the description of the land conveyed to them by the defendant corporation for the purchase price of $5,000 purported to include 384.5 acres, but that the boundaries set out in the deed embraced

94.48 acres of land which defendant did not own and which belonged to Mrs. Maude B. Everett. They ask that the debt secured by the deed of trust, representing the balance of the purchase price, be credited with the proportional value of the deficiency.

Defendant corporation, among other defenses, pleaded that plaintiffs were estopped by the judgment in a former action between the same parties, and by their conduct in accepting the deed with knowledge of the true boundaries of the land owned by the defendant corporation.

Mrs. Maude B. Everett and her husband were made parties and filed answer asserting title to the 94.48 acres. Issues were submitted to the jury, who, for their verdict, found by consent that Mrs. Maude B. Everett was the owner of the 94.48 acres, and that her land was embraced in the description of the land conveyed by defendant corporation to the plaintiffs. The jury also found from the evidence that the proportionate value of the Maude B. Everett land to the value of the whole tract described in the deed, at the time of the sale in 1936, was twenty per cent of the purchase price, or $1,000. Judgment was rendered accordingly that Mrs. Maude B. Everett was owner in fee of the 94.48 acres of land, and that plaintiffs recover of defendant corporation $1,000.

From the judgment defendant Southern Land Sales Corporation appealed.

Peel & Manning and Grimes & Grimes for plaintiffs.
J. F. Hackler and R. L. Coburn for defendant.

DEVIN, J. Appellant assigns as error the denial of its motion for judgment of nonsuit, and bases its exception to the ruling of the court below upon the ground that plaintiffs' present cause of action was issuable and relevant in a former action between the same parties, and that therefore they are now estopped to pursue the matter in this action.

The pertinent facts were these: Plaintiffs purchased the land by deed dated 13 July, 1936, and executed deed of trust to secure the balance of the purchase price. In July, 1938, the plaintiffs having failed to pay the amount due thereon, the trustee in the deed of trust, at the request of defendant corporation, advertised and sold the land, and plaintiffs instituted action to enjoin confirmation of the sale, on the ground that defendant owed plaintiff E. H. Jefferson a substantial amount for services rendered as real estate broker, for which he was entitled to credit on his notes. This action was concluded by a consent judgment, rendered April Term, 1939, whereby a credit was allowed plaintiffs and new notes in sum of $2,286.57 and deed of trust to secure the same were executed by the plaintiffs.

The appellant contends that in the former action plaintiffs' claim for damages, now sought to be recovered, was a matter relevant and proper to be considered, and was at that time an issuable matter within the scope of the pleadings which could, and should, have been there determined. Appellant relies upon the principle, frequently stated in the decided cases in this jurisdiction, that a judgment in an action estops the parties not only as to all issuable matters contained in the pleadings, but also as to those material and relevant matters within the scope of the pleadings which the parties, in the exercise of reasonable diligence, could, and should, have brought forward. *Bruton v. Light Co.*, 217 N. C., 1, 6 S. E. (2d), 822; *Distributing Co. v. Carraway*, 196 N. C., 58, 144 S. E., 535; *Coltrane v. Laughlin*, 157 N. C., 282, 72 S. E., 961. The reason is that a plaintiff should be required to try his whole cause of action at one time, without splitting up his claim or dividing his grounds of recovery. *Garrett v. Kendrick*, 201 N. C., 388, 160 S. E., 349. It was said, however, in *Shakespeare v. Land Co.*, 144 N. C., 516, 57 S. E., 213: "The judgment is decisive of the points raised by the pleadings or which might properly be predicated on them. This certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings." *Wagon Co. v. Byrd*, 119 N. C., 460, 26 S. E., 144; *Tyler v. Capehart*, 125 N. C., 64, 34 S. E., 108; *Moore v. Edwards*, 192 N. C., 446, 135 S. E., 302.

In the instant case it appears that the consent judgment was entered pursuant to an agreement between the parties, embodied in the form of a letter from plaintiff and his counsel to defendant's counsel, in which occurs this statement: "As I understand this matter this settles all matters of business between Mr. Jefferson and the Southern Land Sales Corporation, except that there may be a possibility of a claim by reason of lappage on the land sold by the Southern Land Sales Corporation to Jefferson in the event that a portion of said land may be taken from him by reason of superior claims." This statement was agreed to by defendant's counsel. Thus, it seems the cause of action now being litigated was not included with the matters settled by the consent judgment.

Upon the facts disclosed by the record, we cannot concur in appellant's view that plaintiffs are estopped by the judgment in the former action, and, since the material facts upon which plaintiffs based their present action were not controverted, except the value of the 94.48 acres of land, defendant's motion for judgment of nonsuit was properly denied.

The appellant assigns as error the failure of the trial judge to submit two issues which it tendered. One of these presented the question of mutual mistake in the description of the land conveyed, and the other

related to an alleged estoppel by conduct on the part of the plaintiffs in accepting the deed with knowledge of the true boundaries of the property owned by defendant.

The exception to the refusal of the court below to submit these issues cannot be sustained. There was neither allegation nor proof of mutual mistake, and the evidence was not sufficient to require the submission of an issue as to estoppel by conduct. While the plaintiff E. H. Jefferson had been, prior to the execution of the deed, employed by defendant, and it was testified that a witness told him where certain lines were, there was no evidence that he had definite knowledge of the boundaries and extent of the land conveyed, or was aware of the defect of title as to so large a portion of the land described in his deed. Plaintiff testified that he relied upon the description of the land set out in the deed, which contained covenants of seizin and warranty, and was accompanied by a map showing by metes and bounds 384.5 acres of land then being sold him by the defendant.

On the appeal of defendant Southern Land Sales Corporation we find

No error.

PLAINTIFFS' APPEAL.

Plaintiffs also appealed from an adverse ruling of the court below in the settlement of the case on appeal, but the disposition of the appeal of the defendant Southern Land Sales Corporation renders unnecessary consideration of the question raised, and accordingly plaintiffs' appeal is

Dismissed.

R. H. PERNELL v. CITY OF HENDERSON.

(Filed 24 September, 1941.)

1. Municipal Corporations § 18: Waters and Watercourses § 3—

A municipal corporation, impounding waters of a private stream and diverting same into its municipal water system does not do so in the character of riparian owner, since the individual citizens of the municipality do not have such riparian rights and therefore the municipality as a political unit does not have them, and the municipality may not defend an action by a lower riparian owner for the diversion and diminishing of the flow of the stream on the ground that it has the right to divert the waters for domestic purposes, even to the extent of taking the entire flow.

2. Same—

In an action by a lower riparian owner against a municipal corporation for diversion of the waters of a stream into its municipal water system, the failure of the complaint to allege the quantity or percentage of the water diverted and the quantity remaining in the stream is not a fatal defect.

3. Municipal Corporations § 16—

A lower riparian owner may maintain an action against a municipality to recover damages resulting from the pollution of the stream by the municipality, notwithstanding that the nuisance had been discontinued prior to the action, the remedies of the lower riparian owner not being restricted to a suit for the abatement of the nuisance or an action for damages for the taking of a permanent easement.

APPEAL by defendant from *Harris, J.*, at March Term, 1941, of VANCE.

Gholson & Gholson and W. H. Yarborough for plaintiff, appellee.

A. A. Bunn, Jasper B. Hicks, and J. H. Bridgers for defendant, appellant.

SEAWELL, J. The plaintiff has for some time owned and operated a grist mill on a stream known as Sandy Creek, near Henderson, a city of some 7,600 inhabitants. The city has constructed and maintains dams and reservoirs on the tributaries of this stream above the mill site, from which it pumps a supply of water through mains to the city and distributes it to the inhabitants and users through a water system in the usual way. The plaintiff claims that this diversion of the water from the natural flow of the stream has so diminished it that the value of his mill site has been destroyed or greatly reduced, and his operation of the mill rendered unprofitable. He further alleges that his injury is constantly increased by the rapid growth of the city and its increasing needs. He alleges that the defendant has expressed its intention of continuing the diversion and that it will continue to his injury and damage.

For a second cause of action, plaintiff complains that for some years prior to 1 January, 1940, while he was owner and in occupation of the premises, the defendant created and continuously maintained a nuisance by emptying raw sewage into an upper tributary of the stream on which his mill was located, which sewage flowed down with the stream and entered his pond, silting and filling it up so as to greatly reduce its capacity, and causing foul odors about the mill and premises, which could be endured only for a short time, and which caused his customers to complain; and that his premises thereby became unhealthy and were otherwise damaged by the noxious qualities of the sewage, in which respects he alleges that he is endamaged in a substantial amount.

To the first cause of action the defendant demurred upon the ground that it appears from the complaint that the defendant is a municipality, distributing to its inhabitants for domestic purposes, the water it diverts, which it has the right to do as a riparian owner, without accountability

to plaintiff, so long as its use for such purpose is reasonable, even though it takes the entire flow. Defendant further points out that such use is preferred by law to that of manufacturing, which it conceives to be the business of plaintiff. It demurred also because the cause of action is insufficiently stated with respect to the quantity of water taken and that left.

It has been held with practical unanimity that a municipal corporation, in its construction and operation of a water supply system, by which it impounds the water of a private stream and distributes such water to its inhabitants, receiving compensation therefor, is not in the exercise of the traditional right of a riparian owner to make a reasonable domestic use of the water without accountability to other riparian owners who may be injured by its diversion or diminution. "The use of the waters of a stream to supply the inhabitants of a municipality with water for domestic purposes is not a riparian right." 67 C. J., 1120. "The weight of authority . . . holds a municipal corporation civilly liable for diverting the waters of a private watercourse for the purposes of a public water supply, either with or without legislative authority." 19 R. C. L., 1096. "A municipal corporation will be liable for diverting the waters of a stream or watercourse and depriving lower riparian owners of the use thereof." McQuillin, Municipal Corporations, Vol. 6, pp. 1251, 1252.

The precise question raised by defendant is dealt with by a leading authority as follows: "The rule giving an individual the right to consume water for his domestic needs is founded upon the needs of the single individual and the possible effect which his use will have on the rights of others, and cannot be expanded so as to render a collection of persons numbering thousands, and perhaps hundreds of thousands, organized into a political unit, a riparian owner, and give this unit the right of the natural unit. The rule, therefore, is firmly established that a municipal corporation cannot, as riparian owner, claim the right to supply the needs of its inhabitants from the stream." Farnham, Water and Water Rights, Vol. 1, p. 611.

The same view finds expression in almost innumerable opinions in the several state jurisdictions, among which the following may be regarded as typical: *Fisher v. Clifton Springs,* 121 N. Y. S., 163; *Smith v. Brooklyn,* 160 N. Y., 357, 54 N. E., 787; *Sparks Mfg. Co. v. Newton,* 60 N. J. Eq., 399, 45 Atl., 596; *Wallace v. City of Winfield,* 96 Kan., 35, 149 Pac., 693. This Court is in accord with the rule. *Smith v. Morganton,* 187 N. C., 801, 123 S. E., 88. The case of *Canton v. Shock,* 66 Ohio St., 19, 63 N. E., 600, seems to stand practically alone in its suggestion to the contrary, and we find it wanting in valid argument to support the conclusion reached.

Conceding that those who own the banks of a stream may, for their own convenience, contrive and use facilities and devices for distribution of water amongst themselves for such purposes, withdrawing from the flow needful quantities, that situation is not presented by the typical construction and use of a water supply system by a municipality, as in the case at bar, which impounds the water in suitable reservoirs, pipes it in large quantities into the city, and distributes and sells it to consumers for any purpose whatever for which it may be used. It could hardly be contended that these users are riparian owners, or that they could invest the city, as representative, or in the role of *parens patriæ,* with rights in that respect which they themselves did not have.

The exigencies involved in supplying its inhabitants with water does not confer on the city an exonerating preference over the lower riparian owner who desires to use the water for purposes of manufacturing. "The right to have a natural watercourse continue its physical existence upon one's property is as much property as is the right to have the hills and forests remain in place, and while there is no property right in any particular particle of water or in all of them put together, a riparian proprietor has the right of their flow past his lands for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor." *Adams, J.,* for the Court, in *Smith v. Morganton, supra.*

The first cause of action is sufficiently stated. McIntosh, North Carolina Practice and Procedure, p. 351.

The objection to the second cause of action is also untenable. The plaintiff may set up as actionable the injury which he has sustained because of the continuing maintenance of the nuisance during his ownership and occupancy of the premises, resulting in provable damages, notwithstanding that the nuisance has been discontinued. His remedy was never restricted to an abatement of the nuisance: *S. v. Brown,* 191 N. C., 419, 132 S. E., 5; and the question of permanent easement is no longer in the case. *Anderson v. Waynesville,* 203 N. C., 37, 164 S. E., 583.

The judgment overruling the demurrer is

Affirmed.

STATE v. GEORGE PEELE.

(Filed 24 September, 1941.)

Criminal Law § 80—

Where a defendant fails to file a brief on appeal, the motion of the Attorney-General to docket and dismiss will be allowed, Rule of Practice in the Supreme Court No. 28, but when the appeal is from the conviction of a capital felony this will be done only after an inspection of the record fails to disclose any error.

MOTION by State to dismiss appeal for failure to file brief.

The defendant was tried before *Parker, J.,* at the February Term, 1941, Superior Court of Bertie County on bill of indictment charging him with the capital felony of murder of one W. E. Grey. There was a verdict of guilty of murder in the first degree. Thereupon judgment that defendant suffer the penalty of death by asphyxiation as provided by law was entered. Defendant excepted and appealed.

Attorney-General McMullan for the State.

PER CURIAM. The defendant, having been permitted to appeal *in forma pauperis,* docketed in this Court typewritten copies of the record and case on appeal, but he failed to file a brief. Thereupon the Attorney-General moved to dismiss under Rule No. 28. *In re Bailey,* 180 N. C., 30, 103 S. E., 986; *Comrs. v. Dickson,* 190 N. C., 330, 129 S. E., 726; *S. v. Dawkins,* 190 N. C., 443, 129 S. E., 814.

As is the custom with us in criminal causes involving the death penalty, before acting upon the motion of the Attorney-General, we have carefully examined the record. No material defect appears therein. We have likewise considered the exceptions appearing in the case on appeal. They are without merit. The rights of the defendant were carefully safeguarded by the trial judge. The motion to dismiss is allowed.

Judgment affirmed.

Appeal dismissed.

JESSIE HENDRIX v. HARRY'S CADILLAC COMPANY, INC., AND GENERAL MOTORS ACCEPTANCE CORPORATION.

(Filed 24 September, 1941.)

Usury § 2—

An action to recover alleged usurious interest paid cannot be maintained upon evidence disclosing that the transaction alleged was not a loan but was a sale with deferred payment secured by conditional sale contract. C. S., 2306.

APPEAL by plaintiff from *Johnston, Special Judge,* at April Term, 1941, of BUNCOMBE.

Geo. F. Meadows for plaintiff, appellant.
Chas. G. Lee, Jr., and James S. Howell for defendants, appellees.

PER CURIAM. This is an action under C. S., 2306, to recover an amount of alleged usurious interest paid by the plaintiff to the defendants in a transaction involving the purchase and sale of a second-hand automobile, with deferred payments secured by conditional sale contract.

An examination of the evidence convinces us that the transaction involved was indeed a sale and not a loan, and therefore the cause of action alleged by the plaintiff is not sustained by the evidence. Note, 48 A. L. R., p. 1442; 57 A. L. R., p. 880; 91 A. L. R., p. 1105.

The judgment of the Superior Court is

Affirmed.

GEORGE W. GRAHAM, EMPLOYEE, v. W. R. WALL AND F. E. WALL, TRADING AS WALL BROTHERS, GENERAL CONTRACTORS; GREAT AMERICAN INDEMNITY COMPANY, CARRIER; AND/OR H. E. ELKINS, ELECTRICAL CONTRACTOR, NON-INSURER.

(Filed 8 October, 1941.)

1. Master and Servant § 55d—

The findings of fact of the Industrial Commission, when supported by competent evidence, are conclusive upon the courts on appeal.

2. Master and Servant § 4a—

An independent contractor is one who contracts to do a piece of work according to his own judgment and methods with the right to employ and direct the action of his workmen, and who is responsible to his principal solely as to the results of the work.

3. Master and Servant § 39b—Evidence held sufficient to support finding that claimant's superior was foreman and not independent contractor.

The evidence before the Industrial Commission was to the effect that the general contractor for the remodeling of a building obtained a bid for the electrical work, that after submitting the bid the electrician informed the general contractor that he had failed to figure certain items in the contract and that he could not do the electrical work for the price stipulated, that thereupon the parties agreed that the electrician should do the work at cost and that the general contractor would pay for all materials and would reimburse the electrician for all labor costs. The electrician had other electrical workers working on the building and himself worked whenever he could spare time from other projects. Claimant was one of the electrical workers and was injured in the course of his employment in performing electrical work on the building. *Held:* The evidence is sufficient to sustain the findings of fact of the Industrial Commission that the original subcontract for the electrical work was abandoned and that in the performance of the work the electrician was in reality serving in the capacity of foreman, and that therefore claimant was an employee of the general contractor.

CLARKSON, J., writing for the Court, is of the opinion that the general contractor is also liable under the provisions of ch. 120, sec. 19, Public Laws 1929, Michie's Code, 8081 (aa), upon the theory that ch. 358, Public Laws 1941, is not an amendment changing the Act of 1929, but is in reality an amendment clarifying the legislative intent under the former statute.

SCHENCK, J., concurs only upon the first ground.

BARNHILL, J., dissenting.

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

APPEAL by defendants from *Bobbitt, J.*, at June Term, 1941, of BUNCOMBE. Affirmed.

This was a claim under the Workmen's Compensation Act, in which the claimant sought compensation for injuries which he alleged were caused by an accident which occurred on 16 November, 1939, in the course of his employment. The claimant at the time of his injury was working for H. E. Elkins, who at that time was completing the electrical work on the Plaza Theatre job in the city of Asheville under an agreement and contract entered into by and between H. E. Elkins as subcontractor and W. R. and F. E. Wall, trading and doing business as Wall Brothers, general contractor.

The defendants, Wall Brothers and their compensation carrier, Great American Indemnity Company, denied liability to the plaintiff and on the ground that the claimant, George W. Graham, was not at the time of his injury an employee of Wall Brothers.

Claimant demanded a hearing before the Industrial Commission and at such hearing the evidence was taken and a findings of fact made as appear in the record, and an award entered awarding to the claimant compensation in accordance with the terms of the Act against Wall Brothers and Great American Indemnity Company, insurance carrier

for Wall Brothers, and dismissed the action as to the defendant H. E. Elkins. From this opinion and award the defendants, Wall Brothers and their insurance carrier, appealed to the Full Commission.

Upon a hearing by the Full Commission the award of the hearing Commissioner was affirmed, and defendants thereupon appealed to the Superior Court of Buncombe County.

Upon the matter coming on to be heard before Nettles, J., the cause was remanded to the Full Commission for further findings of fact, and the Full Commission thereupon amended and revised its findings of fact and again affirmed the award. From this award defendants appealed to the Superior Court, and upon a hearing before Bobbitt, J., the award of the Commissioner was affirmed, and from such judgment defendants appealed to the Supreme Court.

The defendants, Wall Brothers and their insurance carrier, denied liability to the claimant on the ground that at the time of claimant's injury he was an employee of H. E. Elkins and not an employee of Wall Brothers; that an independent contract as to the electrical work on the Plaza Theatre job existed at all times as between H. E. Elkins and Wall Brothers; that H. E. Elkins at all times referred to in the evidence employed less than five employees; that the Industrial Commission, therefore, did not have jurisdiction of this cause, and that the claimant's recourse was against H. E. Elkins at common law.

Opinion of the Full Commission, 31 January, 1941:

"This cause was heard before Chairman T. A. Wilson at Asheville, N. C., February 13, 1940, and the defendants appealed to the Full Commission from the award granting compensation. The Full Commission affirmed the Findings of Fact, Conclusions of Law, and Award of the Single Commissioner, and in due time the defendants took an appeal to the Superior Court of Buncombe County. The case came on for hearing before His Honor, Judge Zeb V. Nettles, and a judgment rendered remanding the case to the Industrial Commission for the purpose of making specific Findings of Fact as set out in said judgment as follows:

" '1. As to whether or not there was a contract, expressed or implied, between the defendants, W. R. and F. E. Wall, and H. E. Elkins.

" '2. If so, what were the facts with respect to the relationship of these contracting parties?

" '3. By whom was the claimant actually employed; by whom was he paid, and for whom was he working at the time of his injury?'

"The Full Commission has again carefully reviewed all of the evidence and briefs filed by counsel for the defendants in this case and affirms the Conclusions of Law and the Award of the Hearing Commissioner with the exception of the Findings of Fact, which are herewith stricken out, and make the following Findings of Fact as requested in the judgment of the Superior Court signed by Judge Nettles:

"1. That at the time the plaintiff sustained his injury there was no contract existing between W. R. and F. E. Wall, and H. E. Elkins.

"2. That H. E. Elkins was not a contractor in the meaning of the term in the instant case, but in reality he was serving in the capacity as a foreman for the said Wall Brothers, and was acting as such on November 16, 1939, when the plaintiff, George W. Graham, sustained his injury.

"3. That the plaintiff, Graham, was not an employee of H. E. Elkins, but was an employee of the said defendants, W. R. Wall and F. E. Wall, and the Commission finds as a fact that he was an employee of the Wall Brothers.

"4. That the plaintiff sustained an injury in the course of and out of his employment for Wall Brothers and has been totally disabled since the date of his injury.

"5. That the plaintiff's wage was in excess of $30.00 per week.

"The Full Commission affirms and adopts as its own the conclusions of law and the award of the said Hearing Commissioner, and makes the above definite findings of fact, and directs that the appeal of the defendants be dismissed.

"Defendants will pay the costs. PAT KIMZEY, Commissioner.

"1/29/41.

"Examined and approved: T. A. Wilson, Chairman. Buren Jurney, Commr."

On appeal to the Superior Court, Bobbitt, J., after making certain recitals consonant with the opinion of the Industrial Commission, rendered judgment for plaintiff as follows:

"Accordingly, it is now Ordered, Adjudged and Decreed that the Findings of Fact and Conclusions of Law and Award of the Full Commission, be and they are hereby affirmed."

Defendant made certain exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

H. Kenneth Lee for plaintiff.
Harkins, Van Winkle & Walton for defendant.

CLARKSON, J. The main question for our determination on this appeal: Was there sufficient competent evidence for the Industrial Commission to find that when plaintiff received the injury complained of, was H. E. Elkins serving in the capacity as a foreman or servant for defendants Wall Brothers and plaintiff was therefore an employee of Wall Brothers? We think so.

It is well settled in this jurisdiction, as set forth in *Beach v. McLean,* 219 N. C., 521 (525): "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 the 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."

In *Johnson v. Hosiery Co.,* 199 N. C., 38 (38-40), this Court holds: "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 his employer, except as to the result of the work, and who has the right to employ and direct the action of the workmen, independent 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. Citing *Greer v. Construction Co.,* 190 N. C., 632." *Gadsden v. Craft,* 173 N. C., 418; *Aderholt v. Condon,* 189 N. C., 748; *Bryson v. Lumber Co.,* 204 N. C., 664.

With the law, as stated, we think there was sufficient competent evidence to sustain the findings of fact of the Industrial Commission. The evidence was to the effect that the original contract made by H. E. Elkins with Wall Brothers made him an independent contractor, but on account of a mistake in the price of material to go into the job the original contract was abrogated and a new one entered into, which altered the relationship.

A statement in the record is as follows: "I am F. E. Wall of Wall Brothers, Contractors, at the time we were bidding on the remodeling of the Plaza Theatre in Asheville we got a bid from H. E. Elkins for the electrical work there. After our bid was turned in and accepted, Mr. Elkins said his price was too low and that he could not go along with it due to the fact that he had failed to figure in some of the necessary fixtures. As a result of this situation we made another agreement with Mr. Elkins that he was to go on with the work with his men and do the job, but that we would pay for the fixtures and carry his men on our payrolls at the completion of the job; *in other words we were to pay all the bills in the end covering labor and material.* Mr. Elkins agreed not to charge anything for his time or supervision since he got into—since he got us into a bid at too low a figure. He agreed to pay all labor bills as such were incurred, and he has done this to date. At the end of the job he was to turn in his total labor charges, which we would reimburse him for, and set his charge up on our books at that time as a charge against this job for labor. (Signed) F. E. Wall."

H. E. Elkins testified, in part: "Decided to let me do it on time and material. In other words, Wall Brothers paid for material used in connection with electric work, and I was furnishing the labor. The agreement we had on this particular job on the completion of the work, I was to get so much per hour for my time. I was to get One Dollar an hour. I had Mr. Cook on the job. I didn't work on the job steady. I left Mr. Cook practically through the entire job. I worked at intervals when I could get off other jobs. On the completion of the job I furnished him the statement of the time that I had put in myself on the job. I kept a record of the time the other employees, Mr. Graham and Mr. Cook, and other employees put in on the job there with me. I furnished the Wall Brothers. . . . They furnished the material themselves. Wall Brothers got a discount for the materials that they purchased for electrical materials. He did not pay me any part of that. . . . In regard to rushing up the work, the electric work, Mr. Floyd Wall said these people are getting impatient. The theatre people wanting us to finish this work and get away. The electric work is not progressing fast enough. Haven't got enough men here, want it rushed. I didn't have any other men available but Mr. Graham, so I asked him a day ahead to go up there and help Mr. Cook. Floyd Wall is F. E. Wall, one of the members of the firm of Wall Brothers. He was there practically all the time on the job."

We think from the evidence the Industrial Commission, the fact finding body, had before them sufficient competent evidence to find that Elkins was foreman or servant on the job and plaintiff an employee of Wall Brothers. On another aspect we think the judgment of the Superior Court should be affirmed.

N. C. Code, 1939 (Michie), sec. 8081 (aa), is as follows: "Any principal contractor, intermediate contractor, or sub-contractor who shall sublet any contract for the performance of any work without requiring from such sub-contractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such sub-contractor has complied with sec. 8081 (www) hereof, shall be liable to the same extent as such sub-contractor for the payment of compensation and other benefits under this article on account of the injury or death of any employee of such sub-contractor, due to an accident arising out of and in the course of the performance of the work covered by such sub-contract. If the principal contractor, intermediate contractor, or sub-contractor shall obtain such certificate at the time of sub-letting such contract to sub-contractor, they shall not thereafter be held liable to any employee of such sub-contractor for compensation or other benefits under this chapter. The Industrial Commission, upon demand, shall furnish such certificate, and may charge therefor the cost thereof, not to exceed

twenty-five (25) cents. Any principal contractor, intermediate contractor, or sub-contractor paying compensation or other benefits under this article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who, independently of such provision, would have been liable for the payment thereof. Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer."

Laws 1929, chapter 120, sec. 19.

Chapter 358, Public Laws of N. C., 1941, is as follows: "Sec. 1. That Section nineteen of Chapter one hundred and twenty, Public Laws 1929, be and the same hereby is amended by adding after the word 'liable' in line six of said section, and before the word 'to' in line seven, the following: 'Irrespective of whether such sub-contractor has regularly in service less than five employees in the same business within this State,' and by inserting after the word 'sub-contractor' and before the word 'for' in line seven of said section the following: 'would be if he had accepted the provisions of this Act.'"

This is not in reality an amendment in the sense that it changed an existing law, but really amounts to an amendment for the purpose of expressing the full legislative intent under the existing law.

It appears from the testimony of Elkins that he had never brought himself under the provisions of the Act; had no insurance; was never asked by Wall as to insurance or compliance with the Act; had never employed more than four men.

We can find no decision in this State construing 8081 (aa), *supra.* Public Laws of 1929, ch. 120, sec. 19. It is well settled in this State that the Workmen's Compensation Act is to be liberally construed, and it is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation.

In Tennessee we think the precise question was presented in the case of *Maxwell v. Beck,* 87 S. W. (2d), 564, ... Tenn., ... In this case Maxwell was the general contractor for the construction of a building; he sublet the plastering contract to one Vetter; Vetter never employed more than four men; an employer of fewer than five men is exempt under the Tennessee Act just as under ours; Beck was one of Vetter's employees and was injured while performing his duties; Beck brought suit against Maxwell and Vetter; the action was dismissed as to Vetter; compensation was awarded against Maxwell. The Tennessee Act, as quoted in the opinion is: "A principal or intermediate contractor or sub-contractor shall be liable for compensation to any employee injured

while in the employ of any of his sub-contractors and engaged upon the subject matter of the contract to the same extent as the immediate employer . . ." The Court says: "To limit the liability thus created to cases where the immediate employer is liable under the Act, would place it within the power of the principal contractor to evade the Act by letting the work to sub-contractors who would stay beyond the reach of the statute by employing less than five persons and not electing to accept the Act. Such construction would be hostile to the very purpose and intent of the Act. The Workmen's Compensation Act is remedial, intended to burden industry with the responsibility of industrial accidents by requiring compensation to injured employees, and is to be applied fairly and broadly to accomplish the ends intended." In this case it was insisted by Maxwell that the words "to the same extent as the immediate employer," found in the first paragraph of the above section of the Act, must be construed as limiting the liability of the principal, intermediate, or subcontractor to cases where the immediate employer is liable for compensation under the Act. The argument is pressed that Maxwell cannot be held liable to Beck, because Vetter did not come within the scope of the Act, in that he employed less than five persons for pay on the work he contracted to perform, and had not elected to accept the Act by filing certain written notices. But the Court, not agreeing with Maxwell's contention, said: "The clear intent and purpose of the Legislature in the enactment of the above section was to insure, as far as possible to all workmen so engaged, payment according to the schedule of benefits provided elsewhere in the Act when injured in the course of their employment. . . . We think that the words 'to the same extent as the immediate employer,' found in the first paragraph thereof, were not intended to limit the liability of the principal, or other contractor, but were inserted for the purpose of imposing upon them liability equal in all respects to the liability imposed, by other provisions of the Act, upon immediate statutory employers. . . . We must, therefore, conclude that the circumstance that Vetter employed less than five persons for pay, on this particular work, and had not elected to accept the Act, and was not by reason of these things a statutory 'employer,' cannot have the effect of releasing Maxwell from liability under the Act."

This case seems to be on all-fours with the proposition under discussion in the instant case. The Tennessee statute differs very little from ours and in no essential manner is it different. The legislative intent was certainly the same, and if one would substitute the names, Graham for Beck, Wall Brothers for Maxwell, Elkins for Vetter, the case might

well stand as a decision in the instant case. It seems that the clear language of sec. 8081 (aa) would apply to the case at bar.

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

Affirmed.

SCHENCK, J., concurs in result only for first reason given in opinion.

BARNHILL, J., dissenting: The Industrial Commission found that no contract existed between Elkins and Wall Brothers and that Elkins was, in reality, a foreman for Wall Brothers and that claimant, employed by Elkins, was in fact an employee of Wall Brothers. It was on this theory that compensation was allowed.

The majority opinion concludes that the judgment below should be affirmed on two theories: (1) that Elkins was a foreman employed by Wall Brothers and that, therefore, the claimant was an employee of Wall Brothers as found by the Commission; and (2) that Elkins was a subcontractor who had not complied with the Workmen's Compensation Act, thus imposing liability on Wall Brothers, the general contractors, under the terms of sec. 19, ch. 120, Public Laws 1929. I am unable to concur on either theory.

Wall was the general contractor employed to make alterations in the Plaza Theatre in Asheville. The general contractor called for bids from electrical contractors for subcontracting the electrical part of the project. Elkins (found by the Commission to be an electrical contractor) sent in his bid. It was accepted. That this contract as thus entered into constituted Elkins a subcontractor seems to be conceded—and it is in substance so found by the Commission. In any event, it cannot be successfully debated that this was not the effect of the contract thus made.

The claimant contends, however, and the Commission found, that this contract was abrogated and a new contract was entered into; and that under the general contract Elkins became a foreman of the general contractor. Later, it inconsistently found that no contract existed between the general contractor and Elkins. That claimant was employed by Elkins is not controverted. But claimant takes the position that when Elkins assigned him to this job he automatically became an employee of the general contractor and not of Elkins.

The record, in my opinion, fails to disclose any evidence to sustain claimant's position or to support the findings based thereon. All the evidence is *contra*. To so hold we must disregard the testimony of every interested party, including claimant, or else place a strained and unnatural interpretation thereon.

The only change or alteration made in the original contract—and it cannot be denied the original contract was made—was as to the amount,

manner and method of payment for the electrical work to be performed by Elkins. Exclusive control of his employees remained with him and he was still accountable only for the proper performance of the subcontract. The general contractor's authorization of changes in location of light bulbs and switches was his prerogative and is not evidence of control over either Elkins or his employees.

When Elkins discovered that he had underestimated the cost of the fixtures he immediately went to see Wall. Wall testified that he "made the proposition that if I would let him continue and go ahead with the job that all we would have to pay would be actual cost of the job. In other words, he give us the invoices from electrical supply and we were to pay these plus the labor that it cost to put it in and we agreed to that." He further testified that he did not exercise any control over Elkins or his employees and did not carry Elkins' employees on his pay roll, keep their time or pay them anything for their labor; that he did not release Elkins from his original contract; that "Elkins was to do the work in his own way and I was to pay him the cost of the work to him. I had nothing to do with bringing any electricians there at all. I simply advanced him money on the contract from time to time. The only difference in this contract and the original contract was he agreed not to charge me any commission or profit on account of the fact he got me in a hole there. He agreed not to charge anything for his time or supervision since he got us into a bid at too low a figure. He agreed to pay all labor bills as such were incurred, and he has done so to this date."

The testimony of Elkins was to the same effect. It is unnecessary to give any detailed recital thereof. In addition he said "We agreed that I should buy the fixtures and when the invoices came in he would advance the money to pay for them . . . I had some other contract or work going on at other places. I had Mr. Graham at some other place working for me. I told Mr. Graham the day before the 16th of November to come up there that morning and start on this job . . . I was doing that work up there in my own way just like I always did my contracts."

The claimant Graham testified: "I had been working for Mr. Elkins somewhere in the neighborhood of six months prior to the date I got hurt. I was working with him the day before. He told me to report here this morning. All that I knew was that I was working for Mr. Elkins. I was under Mr. Elkins' orders . . . Wall Brothers only instructed me as to changes in the location of some light bulbs or switches. They told me nothing about going to work or quitting or anything of that kind."

There is nothing in this or any of the other testimony to indicate an abandonment of the original subcontract agreement or to support a finding that there was any change therein except as to pay. It does not justify a finding that Elkins was anything other than a subcontractor.

Apparently the majority so understands, since a written statement signed by Wall prior to the hearing is quoted and relied upon to support its conclusion.

This statement is not substantive testimony. It was competent and admissible only as it tended to contradict and impeach the witness. It is not sufficient to support the finding that Elkins was a foreman. There must be some competent substantive evidence to support the finding for it to be sustained. *Bank v. Motor Co.,* 216 N. C., 432, 5 S. E. (2d), 318; *Logan v. Johnson,* 218 N. C., 200, 10 S. E. (2d), 653.

The second theory relied upon by claimant is wholly inconsistent with and diametrically opposed to the first. If Elkins was a foreman, as found by the Commission, he was not a subcontractor, and if he was a subcontractor, certainly he was not a foreman.

It is axiomatic with us that a litigant must be heard here on the theory of the trial below and he will not be permitted to switch horses on his appeal. Nor may he ride two horses going different routes to the same destination.

However, as the majority opinion discusses this belated contention of claimant and assigns it as a further reason why the judgment should be affirmed, I am forced to take issue as to the result.

Under the express terms of the Workmen's Compensation Act "employer" means a person, firm or corporation regularly employing five or more employees in the same business or establishment, sec. 2, ch. 120, Public Laws 1929, (a) (c); *Dependents of Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500; *Rape v. Huntersville,* 214 N. C., 505, 199 S. E., 736. Persons regularly employing less than five employees in the same business are not "employers" within the meaning of the Act and they are expressly excluded. Sec. 14, ch. 120, Public Laws 1929; *Miller v. Roberts,* 212 N. C., 126, 193 S. E., 286; *Dependents of Thompson v. Funeral Home, supra; Hanks v. Utilities Co.,* 204 N. C., 155, 167 S. E., 560; *Aycock v. Cooper,* 202 N. C., 500, 163 S. E., 569; *Young v. Mica Co.,* 212 N. C., 243, 193 S. E., 285.

While the principal contractor, under certain conditions, is liable for compensation benefits to injured employees of his subcontractors, sec. 19, ch. 120, Public Laws 1929, this liability is limited "to the same extent as such subcontractor." It is admitted that Elkins employed less than five. It was so found and he was discharged as a party defendant. As he was not liable even though he was working under a subcontract, Wall cannot be held liable under the provisions of sec. 19.

But the majority opinion maintains that ch. 358, Public Laws 1941, is not an amendment to sec. 19, but merely expresses the full legislative intent under the existing law. This cannot be. The 1941 Act enlarges the scope of sec. 19 of the original Act. Under the 1929 Act a general contractor, upon failure to comply with the procedure outlined in sec. 19, becomes liable for compensation payments to employees of a subcontractor to the same extent that the subcontractor is liable. A subcontractor is not liable unless he employs five or more. Under the 1941 law it is immaterial whether the subcontractor employs more or less than five. If the principal contractor, under the latter act, fails to comply with the conditions of sec. 19, he is liable to the same extent that the subcontractor would be if he had accepted the provisions of the Act "irrespective of whether such subcontractor has regularly in service less than five employees in the same business within the State."

As the 1941 law makes a substantial change in the act and is prospective in operation it does not aid the claimant even though we dispose of the appeal upon the assumption that Elkins was a subcontractor, in direct conflict with the findings of the Commission.

The Tennessee case cited and relied upon in the majority opinion does not decide the precise question presented. Under sec. 19, as it existed at the time claimant was injured, the liability of Wall was conditional and the circumstances disclose that no liability attached. The Tennessee law placing liability upon the principal contractor for compensation to employees of subcontractors is positive and unconditional.

For the reasons stated I am of the opinion that the judgment below should be reversed.

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

FLORENCE JEWEL LOCKMAN v. WILLIAM S. LOCKMAN, JR.

(Filed 8 October, 1941.)

1. Pleadings § 5—

The prayer for relief is not a necessary part of the complaint, and may be regarded as immaterial.

2. Judgments § 40: Divorce § 14—

This action was instituted on a decree for divorce and alimony rendered by a court of competent jurisdiction in the State of Florida in a suit in which defendant was personally served with summons and filed answer. Defendant demurred on the ground that the complaint prayed that the

Florida judgment be adopted as the judgment of our court. *Held:* The demurrer was properly overruled, since the relief to which plaintiff is entitled is determined by the facts alleged in the complaint and the proofs thereunder, and not the prayer for relief.

3. Same: Constitutional Law § 23—

A decree for alimony rendered by a court of another state is, to the extent of accrued installments, a final judgment for debt within the protection of the Full Faith and Credit Clause of the Federal Constitution, Art. IV, sec. 1, provided the court rendering the decree is without power to modify or alter it in regard to installments accrued, notwithstanding that as to future installments the decree is interlocutory and subject to modification by the court rendering it.

4. Same—

The courts of the State of Florida are without power to modify or alter a decree for alimony in regard to installments accrued, certainly as to decrees entered prior to the enactment of ch. 16780, Acts of the Legislature of Florida of 1935, so that a decree for alimony rendered in 1934 by a court of that State is a final judgment within the Full Faith and Credit Clause as to installments accrued at the time of the institution of an action on the decree here, no proceedings for the modification of the decree having been instituted in the Florida court.

5. Same: Abatement and Revival § 6—

In an action instituted here on a decree for alimony rendered by a court of another state, a demurrer on the ground of pendency of another action between the same parties for the same cause of action is untenable, since if the demurrer is based upon the contention that the decree sued on is pending in the court rendering it, such decree is final as to installments accrued, or if it is based upon the contention that there is another proceeding pending in the courts of such other state to enforce the payment of accrued installments, the pendency of such proceeding must be raised by answer or plea in abatement and not by demurrer.

6. Judgments § 40: Divorce § 14: Constitutional Law § 23—

Plaintiff brought suit here on a decree for alimony rendered by a court of competent jurisdiction in the State of Florida, in an action wherein divorce *a vinculo matrimonii* was granted. *Held:* The action can be maintained here as to installments of alimony due even though alimony may not be awarded by our courts after a decree for absolute divorce, since the awarding of such alimony is not contrary to public policy and our courts cannot deny full faith and credit to the foreign judgment, rendered by a court having jurisdiction of the parties and subject matter, which establishes an obligation on the part of defendant to pay a sum certain.

APPEAL by defendant from *Gwyn, J.*, at January Term, 1941, of HENDERSON. Affirmed.

Plaintiff's action was based on a judgment rendered in the State of Florida awarding her alimony. In her complaint she alleges that she is a resident of Florida and the defendant a resident of Henderson County, North Carolina; that in 1934 in a court of competent jurisdiction, in Palm Beach County, in the State of Florida, the plaintiff and

defendant were parties to an action wherein final judgment or decree was rendered in favor of plaintiff and against the defendant, a copy of the judgment being attached; that the court was a court of record and had full jurisdiction of the matters referred to in the judgment; that the judgment was based on personal service on the defendant, who filed answer in the cause; that the judgment is still in full force and effect in the State of Florida; "that there is now due and owing the plaintiff by the defendant under the requirements of said judgment the sum of $810 in alimony as of 1 October, 1940."

In the prayer for relief it was asked that "said judgment or decree be made the judgment or decree of the Superior Court of Henderson County, North Carolina, as fully and to the same extent as if said judgment was originally rendered by the courts of North Carolina."

It appears from the judgment that a divorce *a vinculo* was decreed, and that in accordance with the laws of the State of Florida alimony in the sum of $30.00 per week was adjudged to be paid by defendant to the plaintiff as long as she remained unmarried, together with $150.00 attorneys' fees. The custody of the children was awarded plaintiff. The judgment also contained this item: "Provisions as to alimony and as to support and custody of the children shall be subject to further order of the court."

Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, in that (1) it appeared to be an action for the adoption in this State of a judgment rendered in the State of Florida; (2) and the Superior Court of Henderson County is without authority to make its own a judgment in the State of Florida; (3) in that it appears that the judgment is not a final judgment, and that the cause is still pending in Florida, and is subject to the further order of that court; (4) that this court is without jurisdiction to deprive the Florida court of the right to modify its decree as to alimony; (5) that the judgment is interlocutory and cannot be made the basis of an independent action in this court; (6) that it appears from the complaint that there is pending in the Circuit Court for Palm Beach County, Florida, another action between the same parties for the same cause of action; (7) that it appears by the terms of the judgment the plaintiff and defendant were absolutely divorced, and the granting of alimony in such case is contrary to the laws of North Carolina.

The demurrer was overruled, and defendant appealed.

R. L. Whitmire for plaintiff, appellee.
C. D. Weeks for defendant, appellant.

DEVIN, J. It may be noted at the outset that it is admitted for the purposes of the demurrer that the Florida court, which rendered the

judgment sued on, had jurisdiction of the parties as well as of the cause of action; that the defendant was personally served with process and answered; that the judgment was rendered in 1934 adjudging the amount of alimony payable by the defendant to the plaintiff in installments; that the judgment is still in full force and effect in Florida, and that the amount now sued for in this action represents the installments of alimony past due at the commencement of this action.

The demurrer challenges the sufficiency of the complaint upon several grounds. The first objection is that the apparent purpose of the action is to have a judgment or decree rendered in the State of Florida adopted as the judgment of the Superior Court of Henderson County to the same extent as if originally rendered in that court. Objection on this ground would be good except for the fact that it is pointed only to the plaintiff's prayer for relief, and, under our decisions, the prayer for relief is not a necessary part of the complaint, and may be regarded as immaterial. The measure of relief is to be determined by the facts alleged in the complaint, and the proofs thereunder. *Knight v. Houghtalling,* 85 N. C., 17; *Lumber Co. v. Edwards,* 217 N. C., 251 (255), 7 S. E. (2d), 497.

The principal objection is that the Florida judgment, upon which this action is based, is not a final judgment, for that it is recited in the judgment that the provisions as to alimony shall be subject to further order of the court. It is urged that the decree is interlocutory and should not be made the basis of an independent action in the courts of North Carolina. The point is made that for these reasons the judgment sued on does not come within the protection of the Full Faith and Credit Clause of the Constitution of the United States.

Article IV, section 1, of the Federal Constitution not only commands that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," but it adds, "Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Congress exercised this power by providing that judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

In *Milwaukee County v. White,* 296 U. S., 268, it was said: "A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty. Recovery upon it can be resisted only on the grounds that the court which rendered it was without juris-

diction; . . . or that it has ceased to be obligatory because of payment or other discharge . . .; or that it is a cause of action for which the state of the forum has not provided a court, unless it is compelled to do so by the privileges and immunities clause . . .; or possibly because procured by fraud."

Does the Full Faith and Credit Clause of the Constitution apply to actions to recover past-due installments of alimony decreed by a court in a state other than that of the forum? Whatever uncertainty may have existed as to the law on this subject seems to have been definitely settled by the decision of the Supreme Court of the United States in *Sistare v. Sistare,* 218 U. S., 1. The résumé of that decision as set out in the first headnote is this: A decree for the future payment of alimony is, as to installments past due and unpaid, within the protection of the Full Faith and Credit Clause of the Constitution, unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts of that state that they may annul or modify the decree as to overdue and unsatisfied installments. The facts in that case were strikingly like those in the case at bar. In that case by the judgment of a court in the State of New York the wife was granted separation from bed and board from her husband and he was ordered to pay her $22.50 per week for the support of herself and minor child. Five years later, at which time none of the installments of alimony had been paid, the wife commenced action in the Superior Court of New London County, Connecticut, to recover the amount then in arrears of the decreed alimony. The defendant contended that the judgment rendered in the State of New York requiring future payments did not constitute a final judgment for a fixed sum of money which would be enforceable in Connecticut, and that the judgment, being subject to modification by the court which granted it, was not a judgment enforceable in another state, and that the requirement of sums of money to be paid in installments did not constitute it a debt or obligation from the defendant to the plaintiff. In the trial court judgment was rendered in favor of the wife for the arrears of alimony due at the commencement of the action. The Supreme Court of Connecticut reversed the judgment below, and the case was taken to the Supreme Court of the United States where the decision of the Connecticut Supreme Court was reversed. The opinion of *Chief Justice White* states the applicable principle of law to be as follows: "First, that, generally speaking, where a decree is rendered for alimony and is made payable in future installments, the right to such installments becomes absolute and vested upon becoming due, and is therefore protected by the Full Faith and Credit Clause, provided no modification of the decree has been made prior to the maturity of the installments, since, as declared in the *Barber case*

(*Barber v. Barber,* 20 How., 582), 'alimony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is.' Second, that this general rule, however, does not obtain where, by the law of the state in which a judgment for future alimony is rendered, the right to demand and receive such future alimony is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches to receive the installments ordered by the decree to be paid, even although no application to annul or modify the decree in respect to alimony had been made prior to the installments becoming due." The Court distinguished the case of *Lynde v. Lynde,* 181 U. S., 183, where an apparently different view had been expressed, and upon which the Connecticut decision had been based, and declared that the correct principle had been laid down in *Barber v. Barber, supra.*

To the same effect is the decision in the recent case of *Junghaus v. Junghaus,* 112 F. (2), 212, decided April, 1940. In that case the wife had obtained a decree for a limited divorce, with alimony, in the District of Columbia Court. Later she sued the husband in Maryland to collect arrears of alimony. The Court said: "Installments which, when the Maryland action was brought, were already due and not subject to modification, stand on a different basis. As to them, the Maryland court was bound to give full faith and credit to the District Court's decree for alimony." And in *Armstrong v. Armstrong,* 177 Ohio St., 558, 160 N. E., 3, 57 A. L. R., 1108, it was held that a judgment for alimony payable in installments constituted a final judgment entitling it to full faith and credit in another state, unless under the law of the jurisdiction where rendered power of modification extended to accrued as well as future installments. In *Shibley v. Shibley,* 181 Washington, 166, 97 A. L. R., 1191, it was held that a decree for alimony, rendered by a court of another state, is final, so as to permit enforcement in the court of the forum, as to installments due and unpaid, where by the law of the foreign state it is not subject to modification as to such sums without the consent of the parties.

In 19 C. J., 365, commenting on the rule laid down in *Sistare v. Sistare,* 218 U. S., 1, it is said: "The question has been settled by the Supreme Court of the United States."

In *McWilliams v. McWilliams,* 216 Ala., 16, the rule was clearly stated as follows: "The decree for alimony, so far at least as concerns past-due installments, is none the less a final decree because it may be modified by the court which rendered it. Authorities are abundant which hold that such a decree, for a fixed sum, is a judgment of record, and will be received by other courts as such. And such a decree rendered in any state of the United States will be carried into judgment in

any other state," citing *Wells v. Wells,* 209 Mass., 282. To the same effect is the holding in *Rosenberg v. Rosenberg,* 152 Md., 49; *Fanchier v. Gammill,* 148 Miss., 723; *Levine v. Levine,* 121 Or., 44; *Taylor v. Stowe,* 218 Mass., 248; *Campbell v. Campbell,* 28 Okl., 838; *Keck v. Keck,* 219 Cal., 316; *Holton v. Holton,* 153 Minn., 346, 41 A. L. R., 1415.

In *Dyal v. Dyal,* 16 S. E. (2d), 53, decided 16 July, 1941, the Court of Appeals of Georgia considered a suit to recover past-due installments of alimony decreed by a court in the State of Florida, and reaffirmed the principle that the Florida judgment was entitled to the same faith and credit in Georgia that was accorded it in the state where rendered. There the defendant answered, pleading payment and discharge, and demurrer to the answer was overruled. It may be noted that in a previous decision in a case between the same parties (*Dyal v. Dyal,* 187 Ga., 600), the wife's independent application in a Georgia court for temporary alimony and counsel fees was denied. But in the last case suit on the Florida judgment for arrears of alimony already accrued under the decree of that state was permitted.

The case of *Israel v. Israel,* 148 Fed., 148, cited by defendant, was decided (1906) prior to the ruling laid down in the *Sistare case, supra,* and therefore may no longer be regarded as authority for defendant's position. Referring to these cases, as well as the *Lynde case, supra,* we quote what is said in 17 Am. Jur., 576-577, as follows: "Past-due installments, which the court is without power to modify, may be enforced. A few courts, erroneously interpreting a decision of the United States Supreme Court (*Lynde v. Lynde*), have held that a periodical allowance, so far as it awards alimony to become due and payable after its rendition, is not within the protection of the Full Faith and Credit Clause of the Federal Constitution so as to require its enforcement as to such installments in another state (*Israel v. Israel*). In a subsequent decision, however, the United States Supreme Court cleared up the tendency to confusion by holding that, unless it appears from the law of the jurisdiction wherein a decree was granted that the power of modification extends to accrued as well as to future installments of alimony, a periodical allowance constitutes a final judgment within the meaning of the Full Faith and Credit Clause, so far as installments already accrued are concerned, provided no modification of the decree has been actually made prior to the maturity of such installments (*Sistare v. Sistare*)." The defendant also cited *Hewett v. Hewett,* 44 R. I., 308. The opinion in that case quoted with approval the rule in the *Sistare case, supra,* but held that under the laws of Massachusetts (where the original judgment had been rendered) the courts there had power to modify a decree for alimony as to past-due installments, and for that reason the decree was not final.

The case of *Janous v. Bank,* 101 Neb., 393, is not in point. The only other case cited by defendant which tends to support his contention on this point was *Grimm v. Grimm,* 42 Pa. Co., 685. This decision, however, is by a subordinate court and not by the court of last resort of that state.

In accord with the guiding principles enunciated in these authorities, it becomes necessary to determine whether under the Florida law the Circuit Court for Palm Beach County had discretionary power to modify or annul the decree as to past-due and unsatisfied installments of alimony, or whether these constituted vested rights of the plaintiff established by judgment.

The latest case on the subject decided by the Supreme Court of Florida is *Andruss v. Andruss,* reported in 198 So., 213, decided 25 October, 1940. It was said in that case: "Payment of alimony may be usually enforced upon summary application to the court wherein the decree was rendered. 17 Am. Jur., section 659. Although the decree herein was subject to modification, jurisdiction being specifically retained for that purpose, the right to installments of alimony already accrued is vested, and the court has no power to modify provisions as respects past-due installments. 17 Am. Jur., 494; 19 C. J., 309; *Kennard v. Kennard,* 131 Fla., 473." We also quote from *Gaffney v. Gaffney,* 129 Fla., 172: "We now adhere to and apply to this case the enunciation therein (referring to the case of *Dickenson v. Sharpe,* 94 Fla., 25) made as to the power of a trial court to adjudicate the amount of alimony in arrears, render judgment therefor, and order issuance of execution." See, also, *Tivas v. Tivas,* 196 So. (Fla.), 175.

By statute enacted by the Legislature of Florida in 1935 (ch. 16780, Acts 1935), the Circuit Court of Florida was authorized, where there had been a change in conditions, upon application and after giving both parties opportunity to be heard, to make an order decreasing or increasing or confirming the amount of alimony, and it was provided that thereafter the husband should be required to pay only the amount so determined, and that the decree for the purpose of all actions, within or without the state, should be deemed to be modified accordingly. However, this statute was held in *Van Loon v. Van Loon,* 132 Fla., 535, 182 So., 205, to operate prospectively. In that case the divorce decree was rendered in 1929. The Court said: "While the decree awarding alimony as in this case is not a contract obligation that is secured from legislative violation by the contract clause of the Federal and State Constitutions, yet, where past-due installment payments of alimony under a valid judicial decree remain unpaid, they do constitute vested property rights of which the party cannot be deprived except by due process of law. The statute operates prospectively to authorize modifi-

cations of alimony decrees as to future payments from the date of application, to the extent authorized by valid provisions in the statute, even though the court had not expressly reserved the authority to change or modify a decree when it was rendered. The court rendered a decree for past-due installments of alimony. The prayer for modification of alimony decree as to payments in default when the petition was filed was denied, and a special master was appointed to take testimony on the issue as to whether relief should be allowed as to future payments. This was in accord with the law and the prior decisions of the Court. See *Gaffney v. Gaffney,* 129 Fla., 172; *Mooty v. Mooty,* 179 So., 155; and *Kennard v. Kennard,* 179 So., 660." It will be noted that the divorce decree in the case at bar was rendered in 1934, prior to the passage of the act referred to. There was no allegation that any modification had been applied for or allowed. On the contrary, it was alleged that the Florida judgment was final, that it was still in full force and effect, and that accrued installments amounting to $810 were due at the commencement of the action.

It seems clear that under the laws of Florida applicable to a decree for alimony rendered in 1934, as interpreted by the court of last resort of that state, the plaintiff's right to installments of alimony fixed by the judgment and already accrued is deemed vested, and that the court which rendered the judgment has no power to modify its terms as respects past-due installments. The principle enunciated in *Sistare v. Sistare, supra,* is therefore applicable, and the Florida judgment is entitled to the protection of the Full Faith and Credit Clause of the Constitution, and to have such faith and credit given it in the North Carolina courts as it has by law in the courts of the state from which it was taken.

The rule in North Carolina is that a judgment awarding alimony is a judgment directing the payment of money by the defendant, and by such judgment the defendant becomes indebted to the plaintiff for such alimony as it falls due, and when the defendant is in arrears in the payment of alimony, the Court may judicially determine the amount due and enter decree accordingly. It has no less dignity than any other contractual obligation. *Barber v. Barber,* 217 N. C., 422, 8 S. E. (2d), 204. In *Duss v. Duss,* 92 Fla., 1081, the obligation of the divorced husband to pay alimony was stated in language of similar import. See, also, *Craig v. Craig,* 163 Ill., 176, 45 N. E., 153.

The defendant asserts in his demurrer that there is pending in the Circuit Court for Palm Beach County, Florida, another action between the same parties for the same cause of action. If it is intended to allege that there is pending between the parties another suit, as distinguished from that in which the judgment in question was rendered, this should be taken advantage of by answer or plea in abatement and not by de-

murrer, since it refers to a matter which does not appear in the complaint. *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545. If he is simply restating his position that the judgment is not final and in that sense is pending, we have disposed of that contention by what already has been said.

The defendant lastly demurs on the ground that the judgment in the Florida court dissolved the bonds of matrimony between plaintiff and defendant, and that it is contrary to the laws of this State to grant alimony thereafter.

While there is no statute in this State permitting judgment for the payment of alimony where absolute divorce has been decreed, there is no statute forbidding suit on a judgment from another state where alimony was allowed in accord with the laws of that state, nor is there a statute or decision of this State declaring it contrary to the policy of the State. Nor can alimony, as such, be considered as *contra bonos mores,* or inimical to the public welfare, nor has the jurisdiction of the courts of the State been denied to suits on otherwise valid judgments of other states decreeing payment of alimony in such cases. In *Duffy v. Duffy,* 120 N. C., 346, 27 S. E., 28, it was said: "At common law, where a divorce *a vinculo matrimonii* was granted, no allowance for future support of the wife was given, and we have no statute in this State allowing it."

In *Arrington v. Arrington,* 127 N. C., 190, 37 S. E., 212, the plaintiff sued in this State upon an Illinois judgment, which had decreed divorce *a vinculo* with alimony, for past-due installments of the alimony fixed by the Illinois judgment. It was held in effect that the Illinois judgment, duly authenticated, under the Federal Constitution, was entitled to full faith and credit in the courts of North Carolina, citing as authority *Barber v. Barber,* 21 How., 582, and judgment of nonsuit in the Superior Court was set aside. *Justices Clark* and *Douglas* dissented on the ground that the judgment for alimony being subject to modification by the court at any time, was interlocutory and not a final judgment. However, the dissent was based upon the construction given to the case of *Lynde v. Lynde,* 181 U. S., 183. Upon a later appeal in *Arrington v. Arrington,* 131 N. C., 143, 42 S. E., 554, deciding that claims for alimony were debts dischargeable in bankruptcy, it was intimated that the majority of the Court as then constituted would have agreed with *Justice Clark,* basing that view also on *Lynde v. Lynde, supra.* It will be noted, however, that in *Sistare v. Sistare,* 218 U. S., 1, *Chief Justice White* analyzed the cases of *Barber v. Barber, supra,* and *Lynde v. Lynde, supra,* and said if there was a conflict between those cases, the *Lynde case, supra,* "must be restricted or qualified" so as to accord with the *Barber case, supra.*

The North Carolina statutes prohibiting gambling in futures and denying jurisdiction of the courts to suits on judgments based upon such contracts have been upheld as constituting an exception to the application of the Full Faith and Credit Clause of the Constitution, on the ground that the State had not provided a court with jurisdiction to entertain suit on such a judgment though properly rendered in another state. *Mottu v. Davis,* 151 N. C., 237, 65 S. E., 969; *Cody v. Hovey,* 219 N. C., 369; *Provision Co. v. Davis,* 191 U. S., 373; *Milwaukee Co. v. White,* 296 U. S., 268.

That principle, however, is not applicable here, nor do we know of any principle upon which we can deny full faith and credit to a judgment rendered in the State of Florida according to the laws of that state by a court of competent jurisdiction, both as to the subject matter and the parties, wherein an obligation on the part of the defendant to pay money to the plaintiff was definitely decreed.

After careful consideration of the principles of law involved, we reach the conclusion that the complaint may not be overthrown by the demurrer, and that the judgment of the Superior Court should be

Affirmed.

MRS. J. W. CAUDLE v. F. M. BOHANNON TOBACCO COMPANY.

(Filed 8 October, 1941.)

1. Food § 4—

The basis of liability of a manufacturer to a consumer for foreign deleterious substance in prepared articles is negligence and not implied warranty, and the doctrine of *res ipsa loquitur* does not apply.

2. Food § 6c—

Plaintiff's evidence tended to show that she suffered serious personal injury when she bit down on a piece of chewing tobacco which contained a fishhook, that the tobacco was manufactured by defendant and purchased through a retailer. Plaintiff also offered a witness who testified that within two months of the time of plaintiff's injury, he was taking a chew of the same brand of tobacco manufactured by defendant and discovered therein a foreign substance which appeared to be a rat's claw or squirrel's foot. *Held:* The evidence is sufficient to take the case to the jury upon the issue of negligence.

3. Food § 6b—

Plaintiff's witness testified to the effect that within two months of plaintiff's injury, the witness found a foreign substance in a plug of tobacco manufactured by defendant. *Held:* It was competent for the witness to further testify that the foreign substance looked like a rat's

claw or squirrel's foot, and objection on the ground that the description was opinion evidence from an unqualified witness, is untenable.

BARNHILL, J., dissenting.

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

APPEAL by defendant from *Warlick, J.*, and a jury, at April Term, 1941, of SURRY. No error.

This is an action for actionable negligence, brought by plaintiff against the defendant alleging damage. The defendant introduced no evidence. The evidence on the part of plaintiff is to the effect that the defendant is engaged in the manufacture and sale of plug tobacco in Winston-Salem, N. C., under different brands—one of which was that of "Red, White and Blue."

E. M. Gough, a retail merchant of Surry County, N. C., testified that he lived near plaintiff and that this and other brands of tobacco were purchased through defendant's salesman and shipped direct to him by defendant by parcel post from Winston-Salem, N. C., where defendant operated a factory. "As a merchant I have been buying from the Bohannon Tobacco Company such brands of plug chewing tobacco as Detective, Lucky Joe, Favorite, and Red, White and Blue."

Gough sold to plaintiff's husband, who traded with him and usually bought the Bohannon brands—one of the brands being the "Red, White and Blue." Plaintiff's husband testified to the effect that he and his wife chewed "Red, White and Blue" tobacco and he bought a plug from Gough about 1 January, 1939. "I cut it in two and gave my wife half and put the other half in my pocket. I bought it at the store of Mr. Gough. My wife was not with me when I bought that plug of tobacco. I went down, bought it and brought it home. I came straight on home the day I bought it. She was chewing on it something like two or three days. She started using it as quick as I gave it to her. She had no other tobacco. It was just a short plug. It had a seam in the middle of it to cut it by. It was a ten-cent piece, the best I recall. It had a seam in the middle, which made an equal division, and I gave her half and took the other. It was about 10 or 11 o'clock in the day of January 5th that I found out about an injury to my wife. . . . I had been away from home about an hour. I started down there and saw my wife coming, bent over with her hand over her mouth. I knew something was the matter because she was well when I left home. I asked her what was the matter. (The court limited the evidence to corroboration.) She says, 'I have got something in my mouth. I bit it off with a piece of tobacco.' I says, 'Let me see.' I looked in her mouth and saw a wire sticking through her teeth, sticking through her lower teeth into the gum. The hook part was hooked back in the gum on the lower side. I didn't try to fool with it. I carried her to Mr. Lane's, a neighbor, to

get him to carry her to the doctor to get it out. Mr. Lane lives five or six hundred yards from my house. We went down there and Mr. Lane got to work at it and got the hook out. I carried Mrs. Caudle home. She had to lay down when we got about half way home, on the ground. When she got able I got her to the house. In an hour or two I had Mr. Lane carry her to Dr. Tillotson at Pilot Mountain. I do not know just how many times I carried her to Dr. Tillotson but it was two or three times a week for right about four months. . . . Then Dr. Tillotson sent her to the Martin Memorial Hospital in Mount Airy. She was treated at the hospital on each Thursday for eleven weeks straight. I carried her to Dr. Mitchell at Mount Airy and he looked in her mouth. I took her down to Winston one time to Dr. Rousseau, a cancer specialist. Dr. Fry in Pilot Mountain, a dentist, treated her mouth the first day I took her to Dr. Tillotson. He has not treated her since. I have the tobacco and the fish hook. The piece of tobacco I hold in my hand is the piece of tobacco I bought at Mr. Gough's store and gave to my wife. Mr. Lane got the fish hook which I hold in my hand out of Mrs. Caudle's mouth. I got it from Mr. Lane, and that is the same fish hook that came out of my wife's mouth. I took it at that time and have kept it since. The bridgework I hold in my hand is a bridge out of my wife's mouth. It broke out and came out of my wife's mouth. I have kept up with it since then."

He further testified as to the impairment of his wife's health, which had been good before: "She was up at night for a while a whole lot, because she was suffering. She couldn't sleep and couldn't rest. That situation existed for something like four months, all the time Dr. Tillotson was tending on her. My wife weighed approximately 165 pounds on the 5th day of January, 1939. I don't know what her weight was during that four months period but she fell off considerably. I didn't have her weighed but she got mighty lean and fell off a whole lot. She couldn't eat. Ate from the corner of her mouth for a long time. She would drink milk and eat from the side of her mouth. She ate only liquids during that time and she couldn't stand anything with any salt in it. I saw inside her mouth. It was raw and sore in there. That got on the outside. It finally broke out all over her face when she was going to the hospital in Mount Airy. No dentist other than Dr. Fry treated her mouth any time lately. Dr. Hardin bridged her teeth way back, years before that. After that bridge came out, the teeth that the bridge was swung to rotted out. I saw the condition of her teeth, I could see the condition was bad, they rotted."

Plaintiff testified, in part: "My husband and I have been married for about 43 years. I am 61 years of age now. I do not now chew tobacco, but I used to chew. I think I took a chew of tobacco off the

plug which is handed to me. I know I did. The fish hook handed to me is the one that was in my mouth when I bit the tobacco. That bridgework was in my mouth at one time. It was the 5th day of January, 1939, that I bit into the plug of tobacco and got the fish hook in my mouth. I reached up on the mantel board. I had the tobacco in the poke he gave it to me in. I was sitting there sewing and reached up and got the piece of tobacco, taken it out and taken a chew of tobacco. When I first bit it, I thought it was a stem I had. I bit down a little bigger. Whenever I bit the chew off, something slipped through my teeth and come into my lip. I just started off that way to get somebody to help me get it out, do something; I didn't know what. . . . I always chewed plug tobacco, manufactured tobacco. I always told him when he went to the store to get 'Red, White and Blue,' because I liked that brand better than any brand of tobacco I ever chewed. When he got the fish hook out of my mouth, he took out the chew of tobacco in my mouth. The fish hook was plumb through my teeth and sticking in my lip. I guess the tobacco was still in there, too. It never came out until the fish hook was taken out. The tobacco wasn't out of my mouth until the fish hook came out. The fish hook came out first and then the tobacco. Up until that morning I was in very good health all the time, and was doing my work. I got up anywhere from 3:30 to 4:00 o'clock in the morning. I always generally done my house work and if there was anything for me to help my husband do, I did that. I did the milking, the cooking, and cleaned up the house. I worked in the garden. . . . After I received this injury on this fish hook, the whole side of my mouth was plumb raw. My lip had swollen until it was wrong-side-out for I guess a month. Dr.Tillotson treated me for about four months, the best I can recall. Then he said he had done all he could do for me and for me to go to Dr. Ashby, at the Martin Memorial Hospital in Mount Airy, and I went. They treated me there for about eleven weeks. During that period of time I suffered lots in daytime and nights too. Lots of times at night I didn't rest at all. The pains run around, went up and down the leaders all the time."

W. W. Ball testified, in part: "I live in Dobson. I chew tobacco and did in 1939, during the January or February Term of court that year. I chew different kinds but at that time I was chewing 'Red, White and Blue,' which is manufactured by the F. W. Bohannon Company. It was the same type as plaintiff's Exhibit A, a short plug pretty thick. That is the same kind I was chewing. Q. Mr. Ball, did you bite into a plug of this in court about the first court in 1939, January or February? Ans.: I bought a dime's worth at the time. Q. Please tell His Honor and the jury what you found in it? The Court: Was it 'Red, White and Blue' tobacco? Ans.: Yes, sir. The Court: Did it have a tag on it? Ans.: Yes,

sir. Q. What did you find in it, if anything? Ans.: I bit in it and it didn't bite right. I taken it out of my mouth and broke out the piece where I couldn't bite and I pulled it open. I knew there was something or other in it. I thought it was a piece of wood, and it looked more like a rat's claw or foot. Q. Just describe what it was. Ans.: I couldn't describe positively it was a rat's foot. The best of my opinion it was a rat's foot. Q. Go ahead and describe it. How long was it? Ans.: It was short, something like a wharf rat's foot. Pretty good sized or squirrel's. The Court: Just describe it, whether it was hard or soft. Ans.: It was hard and I couldn't bite it. I took it out and opened it up, the piece of tobacco, and looked at it. Q. How long was it? Ans.: It wasn't very long, about as long as an ordinary rat's foot. I have killed wharf rats. Q. How was it shaped? Ans.: I didn't pay so much attention to it after I saw what it looked like to me. I just throwed it down. Just like a rat's foot. Q. Please tell His Honor and the jury if it was sharp at one end and broader at the other. The Court: Just describe the object. Ans.: It looked like there was a little more to one end of it than there was to the other."

Several witnesses corroborated the testimony of the Caudles, who proved that their general reputation was good. Dr. S. M. Tillotson, Dr. E. C. Ashby and Dr. R. A. Fry corroborated Mrs. Caudle's testimony as to how she was injured, the extent of the injury and the treatment administered to her.

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

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

"2. What amount of damage, if any, is the plaintiff entitled to recover of the defendant? Ans.: '$1,200.00.' "

The court below rendered judgment on the verdict. The defendant made several exceptions and assignments of error and appealed to the Supreme Court. The material ones will be considered in the opinion.

Woltz & Barber for plaintiff.

Folger & Folger, Manly, Hendren & Womble, and I. E. Carlyle for defendant.

CLARKSON, J. At the close of plaintiff's evidence, the defendant 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.

The plaintiff's cause of action is based on the alleged negligence of the defendant in the manufacture and sale of a plug of tobacco containing a fishhook.

It is well settled in this jurisdiction that to hold the manufacturer liable, the basis of liability is negligence rather than implied warranty, although in some jurisdictions a recovery may be had under implied warranty. Nor can the plaintiff rely upon the doctrine of *res ipsa loquitur*. *Ward v. Sea Food Co.*, 171 N. C., 33; *Grant v. Bottling Co.*, 176 N. C., 256; *Perry v. Bottling Co.*, 196 N. C., 175; *Thomason v. Ballard & Ballard Co.*, 208 N. C., 1; *Enloe v. Bottling Co.*, 208 N. C., 305.

We think the present action is similar to *Corum v. Tobacco Co.*, 205 N. C., 213, and *Daniels v. Swift & Co.*, 209 N. C., 567. The *Corum case, supra,* was tried by Schenck, J., in the Superior Court and from a verdict for plaintiff an appeal was taken to this Court and there was found no error in the judgment of the lower court. The facts: "The defendant manufactures a brand of plug or chewing tobacco known as 'Apple Sun-cured.' It sold some of this tobacco to J. W. Smitherman, a wholesale merchant in Winston-Salem, who in turn sold it to Norman Brothers at East Bend, in Yadkin County. On 4 June, 1931, the plaintiff bought a plug of it from Norman Brothers and returned to his home, which is about a mile from East Bend. He offered evidence tending to show that at 1:30 o'clock while going back to East Bend he put a part of the plug in his mouth to bite off a chew and 'jerked the tobacco,' when a fish-hook which was embedded in the plug 'stuck in the inner side of his lip and came out on the outside'; that with the fish-hook and the tobacco he went to a physician who removed the hook; that after its removal, the plaintiff 'prized the tobacco open' and found a mark inside 'where the fish-hook had been lying'; that on the end of the hook there was a piece of string about two inches long; that he suffered pain, was given anti-toxin to prevent tetanus, had difficulty in opening and closing his mouth, and complained of stiffness in his jaw and neck." The Court, in its opinion, said, at p. 215 (*Adams, J.*): "There are many decisions to the effect that one who prepares in bottle or packages foods, medicines, drugs, or beverages and puts them on the market is charged with the duty of exercising due care in the preparation of these commodities and under certain circumstances may be liable in damages to the ultimate consumer. *Broadway v. Grimes*, 204 N. C., 623; *Broom v. Bottling Co.*, 200 N. C., 55; *Harper v. Bullock*, 198 N. C., 448; *Grant v. Bottling Co.*, 176 N. C., 256; *Cashwell v. Bottling Works*, 174 N. C., 324. In this case the plaintiff adduced evidence tending to show that the defendant is the sole manufacturer of 'Apple Sun-Cured Tobacco'; that the tobacco in question was of this brand and had the appearance of having recently come from the store; that it was protected by a wrapper; that all the wrapper had not been removed at the time of the injury; that when a part of it was torn away the imprint of the fish-hook and a string which had been embedded in the plug of tobacco was discovered; that some

other foreign substance had been found in the same brand of tobacco within two months preceding the injury; and that the foreman of the machine room had previously had complaints that other foreign substances had been left in the manufactured product. *Perry v. Bottling Co., supra* (196 N. C., 175). Without the necessity of invoking the maxim *res ipsa loquitur,* the plaintiff introduced independent evidence which called for a verdict."

In *Daniels v. Swift & Co., supra,* it was held: "Plaintiff's evidence tended to show that he was injured by particles of glass eaten by him in sausage prepared by defendant manufacturer, and that a short time prior to his injury plaintiff had found grit in similar sausage prepared by defendant, and that the deleterious substances were found inside the casings in which the sausage was stuffed. *Held:* The evidence was sufficient to be submitted to the jury on the issue of defendant's negligence." The above cited cases have never been overruled, and, therefore, the law in this case.

Upon examination of the evidence in the present case respecting the circumstances relied on by the plaintiff to show negligence, we find that the witness Ball, within two months of the time of the injury sustained by the plaintiff, while taking a chew of the same brand of tobacco manufactured by the defendant, discovered what appeared to be a rat's claw, or squirrel's foot. The appellant contends that such evidence is incompetent on the grounds of being opinion evidence from an unqualified witness. The witness, having testified that it was a foreign substance, could certainly go further and testify what it looked like. He made no minute examination of what he found, having been repulsed with the idea of having had it in his mouth. To show his disgust and repulsion at the experience, he "just throwed it down."

The charge of the court below covered every aspect of the case and applied the law applicable to the facts. We see no merit in any of the exceptions and assignments of error made by defendant. We see no prejudicial or reversible error in the contentions of the court below in regard to expenditures for medical and hospital bills. Defendant relied mainly on the motion to nonsuit, which cannot be sustained under the authorities applicable to the facts in this case.

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

No error.

BARNHILL, J., dissenting: This Court is committed to the view that when a plaintiff in cases such as this undertakes to establish negligence by proof of "other instances," it must be made to appear that the "like products" contain harmful or deleterious substances, "were sold by the defendant at about the same time" and were manufactured "under sub-

stantially similar conditions." Similar instances are allowed to be shown as evidence of probable like occurrences at the time of plaintiff's injuries when accompanied by proof of substantially similar circumstances and reasonable proximity in time. *Enloe v. Bottling Co.*, 208 N. C., 305, 180 S. E., 582.

Plaintiff undertook to show only one other "similar instance." The testimony in respect thereto is quoted in full in the majority opinion. This testimony (of witness Ball), is wholly devoid of any suggestion as to when defendant manufactured the tobacco purchased by him, or as to when the retailer from whom he purchased acquired it, or as to similarity of conditions of manufacture. These are essential prerequisites.

Nor does this evidence tend to show that the tobacco purchased by Ball contained harmful or deleterious matter. "What appeared to be a rat's claw or a squirrel's foot" is merely descriptive. *Tickle v. Hobgood*, 216 N. C., 221, 3 S. E. (2d), 362.

The witness did not testify that he was "repulsed with the idea of having had it in his mouth" or that he "threw it down to show his disgust and repulsion at the experience." On the contrary, his testimony discloses his lack of knowledge of the real nature of the object found in the tobacco and his unconcern in respect thereto. He thought it was a piece of wood. It looked like a rat's foot. In his opinion it was a rat's foot. He didn't pay much attention to it after he saw what it looked like, "I just throwed it down."

Even if it be conceded that one other instance is sufficient to carry the case to the jury this evidence signally fails to establish the essentials of such other instance under the rule to which we have consistently adhered.

Corum v. Tobacco Co., 205 N. C., 213, 171 S. E., 78, is not in point. There it was made to appear that the tobacco which was the subject matter of the other instance was manufactured by defendant within two months of the time of the manufacture of the tobacco purchased by plaintiff and deleterious matter was found. The other cases cited in the majority opinion are similarly distinguishable.

In my opinion there was no evidence of negligent manufacture and the cause should have been dismissed as of nonsuit.

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

STATE v. J. P. HOWLEY AND ESTELLA HOWLEY.

(Filed 8 October, 1941.)

1. False Pretense § 1—

The offense of false pretense is a misrepresentation by a writing, words or acts of a subsisting fact which is calculated to deceive, which does deceive and is intended to deceive, by means of which one man obtains value from another without compensation.

2. Indictment § 11—

An indictment is sufficient if it expresses the charge against defendant in a plain, intelligent and explicit manner, and contains sufficient matter to enable the court to proceed to judgment, and defendants' motion to quash will not be allowed for any informality or refinement. C. S., 4623.

3. Same—

An indictment for a statutory crime must set forth all the facts and circumstances essential to bring the case within the statutory definition of the offense.

4. False Pretense § 2—

An indictment charging that defendants knowingly and falsely represented to a bank that all bills for materials and labor used in the renovation of their building had been fully paid, that upon such representations defendants obtained a loan from the bank in a specified sum secured by a mortgage on the building, whereas in truth defendants then owed money for labor and materials, and that by means of such false pretense defendants knowingly and designedly obtained from the bank the specified sum of money with intent then and there to defraud, *is held* sufficient to charge the offense of false pretense defined by C. S., 4277.

5. Criminal Law § 51—

While counsel for a defendant in a criminal prosecution is entitled to argue to the jury the whole case, as well of law as of fact, C. S., 203, it is the duty of the court in the exercise of its discretionary control over the conduct of the trial, to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury, and the court may do so by checking the argument or by making correction in its charge.

6. Criminal Law § 53—Charge correcting remarks of counsel outside scope of evidence held not erroneous as expression of opinion by court.

In this prosecution for false pretense in obtaining a mortgage loan on property by misrepresenting that there was nothing due for labor and materials for the renovation of a building on the *locus in quo*, there was evidence that the mortgagee had its agent appraise the property, but there was no evidence as to the amount of the appraisal. *Held:* The court's instruction to the jury that there was no evidence as to what the appraisal was and that the jury should disregard argument of counsel for the defense that the property was appraised at twice the value of the loan, cannot be held for error as an expression of opinion by the court or as an abuse of the discretion vested in the court over the course and conduct of the trial.

7. False Pretense § 1—

In a prosecution for false pretense it is not necessary that the party deceived should have relied solely upon the misrepresentation, it being sufficient if the misrepresentation is material and is a proximate and immediate inducement to the execution of the contract or transaction in question.

8. False Pretense § 2—

In a prosecution for obtaining a mortgage loan by misrepresenting that bills for all labor and materials for the renovation of the building on the premises had been paid, such misrepresentation is material in view of the statutory liens of laborers and materials furnishers, C. S., 2433, and the fact that the mortgagee had the property appraised and obtained an attorney's certificate of title does not show that the mortgagee did not rely upon the misrepresentation, there being no notice of any unpaid bills for labor and materials on file of public record and there being testimony of the president of the mortgagee that it relied upon the misrepresentation.

9. Criminal Law § 79—

An exceptive assignment of error will be deemed abandoned when no reason or argument is advanced and no authority cited in support thereof in the brief.

APPEAL by defendants from *Sink, J.*, at July Term, 1941, of AVERY.

Criminal prosecution upon indictment for false pretense.

The bill, under which defendants are indicted, is as follows:

"The jurors for the State, upon their oath present, that J. P. Howley and Estella Howley, late of the County of Avery, wickedly and feloniously devising and intending to cheat and defraud Avery County Bank on the 21 day of February, A. D., 1930, with force and arms at and in the County aforesaid, unlawfully, knowingly, designedly and feloniously did unto the Avery County Bank falsely pretend that all the repair bills for materials and labor for repairing a certain theatre building in the town of Elk Park, N. C., had been paid in full and fully discharged, and upon such representations to the Avery County Bank, the said Bank loaned the defendants the sum of $900.00 and the defendants executed a mortgage to said Bank in the sum of $900.00, said mortgage was represented to be a first lien on said building and land. Whereas, in truth and in fact, the said repair bills for materials and labor for the repairing said theatre building in the town of Elk Park, N. C., had not been paid in full and fully discharged at the time of obtaining said loan in the sum of $900.00, and the execution of said mortgage to Avery County Bank in the sum of $900.00 and at the time of obtaining said loan and the execution of said mortgage there was due the sum of $806.55 to Rhea Penland, trading as Burnsville Constructing Company, and Baxter Johnson, trading as Johnson Electric Company. By means of which said false pretense they, the said J. P. Howley and Estella Howley,

knowingly, designedly and feloniously, did then and there unlawfully obtain from the said Avery County Bank the following goods and things of value, the property of Avery County Bank, to-wit: $900.00 in money with intent then and there to defraud against the statute in such case made and provided and against the peace and dignity of the State."

When the case was called for trial in Superior Court, defendants and each of them moved to quash the bill of indictment upon the ground that it does not state a crime. Motion denied. Exception.

Defendants thereupon pleaded not guilty.

The State offered evidence tending to show these facts: That prior to 21 February, 1939, defendants, J. P. Howley and wife, Estella Howley, who were "building a moving picture building" at Elk Park, North Carolina, approached E. C. Guy, president of Avery County Bank, at Newland, North Carolina, with reference to the bank making them a loan of $900, to be secured by mortgage on said building; that Guy told them that new construction was a type of loan that did not appeal to the bank, for that there was always more or less risk involved due to the fact that labor and material liens came ahead of mortgage; that upon Guy asking them where they had been buying material, they gave the name of someone in Johnson City; that they came back and said that they had paid all material and labor liens on everything that went into the building at Elk Park; that after the bank had had an appraisal of the property and had had the public records of Avery County examined and had obtained a certificate of an attorney upon such examination to the effect that "the said J. P. Howley and Estella Howley are seized of the said land and premises in fee and have a right to convey the same in fee simple; that the said mortgage constitutes a first and valid lien thereon," and after defendants had executed the mortgage referred to in the certificate, and in which the defendants covenanted "that they are seized of the said land and premises in fee and have a right to convey the same in fee simple," and "that the same are free and clear from all encumbrances," and had taken out fire insurance on the building, the Avery County Bank, on 21 February, 1939, loaned to defendants the sum of $900, and received from them as evidence thereof their joint note for that amount payable in installments and secured by said mortgage on said property.

The evidence for the State further tended to show: That at the time the loan was made defendants were indebted to Rhea Penland, building contractor, of Burnsville, North Carolina, in the sum of $745, as is stipulated in the record, and to Baxter Johnson, an electrical contractor, of Spruce Pine, North Carolina, in the sum of $61.55 for material furnished and labor performed in the construction of said moving picture building at Elk Park, for which notice of liens were thereafter filed in

Superior Court against defendants on 28 April, 1939, and on 4 May, 1939, respectively—the lien relating to dates prior to 21 February, 1939; that on 28 June, 1939, said Rhea Penland instituted an action in Superior Court of Avery County to foreclose the lien of which notice was given as above stated, and "said proceeding was carried on regularly to its conclusion" and the property sold under execution, and conveyed by deed of the sheriff to B. B. Penland; and that no part of the said $900 loaned by said bank to defendants has been paid, and the whole of it is "still due and owing the bank."

On cross-examination the witness, E. C. Guy, testified that in making this loan, he took into consideration the appraisal and the attorney's certificate, both of which were obtained by the bank, but that "to the extent of the material and what they had bought" he had to and did rely upon what defendants had told him; and that if defendants had told him they owed unpaid labor and material bills, the bank would not have made the loan.

Upon the State resting its case, defendants and each of them moved for judgment as of nonsuit. Motions are denied. Exception. Defendants offered no evidence, and renewed their motions for judgment as of nonsuit at close of all the evidence. Motions are denied. Exception.

Verdict: Guilty.

Thereupon, defendants moved in arrest of judgment. Denied.

Judgment: That the defendant, J. P. Howley, be confined in the State's Prison at Raleigh, North Carolina, for not less than one year nor more than two years, to be assigned to hard labor as provided by law. Prayer for judgment as to defendant Estella Howley is continued for a period of two years on condition of her good behavior.

Defendants appeal to Supreme Court and assign error.

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

W. C. Berry for defendants, appellants.

WINBORNE, J. The assignments of error presented in the record on this appeal fail to reveal prejudicial error.

First: It is contended that the court erred in refusing to grant defendants' motion (a) to quash the bill of indictment, and (b) in arrest of judgment for that the bill fails to charge an offense.

The statute, C. S., 4277, under which defendants are indicted, deleting verbiage not significantly related to the case in hand, declares that "If any person shall knowingly and designedly by means of any . . . other false pretense whatsoever, obtain from any person or corporation within the State any money . . . with intent to cheat or defraud

any person or corporation of the same, such person shall be guilty of a felony . . ." It is further provided therein that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the money.

In *S. v. Phifer,* 65 N. C., 321, speaking of this statute, which was then section 67 of chapter 34 of the Revised Code, *Reade, J.,* said: "We state the rule to be that a false pretense of a subsisting fact calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another without compensation, is a false pretense, indictable under our statute."

The constituent elements of false pretense as defined by the statute, and expressed in the *Phifer case, supra,* have been repeated without variation in numerous decisions of this Court, among which are: *S. v. Dixon,* 101 N. C., 741, 7 S. E., 870; *S. v. Mangum,* 116 N. C., 998, 21 S. E., 189; *S. v. Matthews,* 121 N. C., 604, 28 S. E., 469; *S. v. Whedbee,* 152 N. C., 770, 67 S. E., 60; *S. v. Claudius,* 164 N. C., 521, 80 S. E., 261; *S. v. Carlson,* 171 N. C., 818, 89 S. E., 30; *S. v. Roberts,* 189 N. C., 93, 126 S. E., 161.

In our criminal procedure it is provided by statute, C. S., 4623, that every criminal indictment is sufficient in form if it express the charge against the defendant in a plain, intelligible and explicit manner, and that the indictment shall not be quashed nor the judgment thereon stayed by reason of any informality or refinement, if in the bill sufficient matter appears to enable the court to proceed to judgment. This section, too, has been discussed and applied in numerous decisions of this Court, among which are: *S. v. Moses,* 13 N. C., 452; *S. v. Gallimore,* 24 N. C., 372; *S. v. Whedbee, supra; S. v. Francis,* 157 N. C., 612, 72 S. E., 1041; *S. v. Ratliff,* 170 N. C., 707, 86 S. E., 997; *S. v. Carpenter,* 173 N. C., 767, 92 S. E., 373; *S. v. Sauls,* 190 N. C., 810, 130 S. E., 848; *S. v. Ballangee,* 191 N. C., 700, 132 S. E., 795; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Whitley,* 208 N. C., 661, 182 S. E., 338; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643; *S. v. Dale,* 218 N. C., 625, 12 S. E. (2d), 556.

Furthermore, the decisions of this Court are uniform in holding in substance that in an indictment for a statutory crime all the facts and circumstances essential to bring the case within the statutory definition of the offense must be specifically set forth. *S. v. Ballangee, supra; S. v. Jackson,* 218 N. C., 373, 11 S. E. (2d), 149, and cases cited therein.

The bill of indictment in the present case, when tested by these principles, appears to be sufficient to charge a violation of the statute, C. S.,

4277, relating to false pretense. The form of the bill includes all of the elements of the offense specified in the statute. The facts and circumstances of the offense charged comprise all such elements and are set forth with sufficient particularity to meet the test prescribed by statute, C. S., 4623.

Second: The court charged the jury: "The State alleges that after those negotiations the bank obtained an appraiser and sent him to the premises and made an appraisal of the property. (There is no evidence before you, Gentlemen of the Jury, as to what that appraisal was and the argument of counsel to you that the value of the property was twice the value of the loan is totally beyond the testimony and the Court instructs you that it is your sworn duty to render your verdict upon the evidence and not upon argument of counsel for the State or defendant.)"

Defendants except to that portion in parentheses. It is contended that the charge has the effect of an expression of opinion by the court and of discrediting the argument of counsel to the prejudice of defendant. The instruction here borders dangerously close to that condemned in *S. v. Lee,* 166 N. C., 250, 80 S. E., 977. Yet, we are of opinion that it is distinguishable. Compare *S. v. Hardy,* 189 N. C., 799, 128 S. E., 152, where the right of a person, put on trial upon a criminal charge, to be heard, and to have counsel in all matters necessary for his defense, and the right of counsel to argue to the jury the whole case, as well of law as of fact, is declared by this Court to be too fundamental for discussion. C. S., 203. However, it is the duty of the judge to interfere, when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury. *McLamb v. R. R.,* 122 N. C., 862, 29 S. E., 894. See, also, McIntosh N. C. P. & P., page 621, where the author states that counsel may not "travel outside of the record" and inject into his argument facts of his own knowledge or other facts not included in the evidence. *Perry v. R. R.,* 128 N. C., 471, 39 S. E., 27. When counsel does so, the court may interpose correction by checking the argument and restricting it within proper bounds, or he may correct it in his charge to the jury. See Annotations 86 A. L. R., 899, at page 901. On the other hand, while the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and discretion of the presiding judge, he, to be sure, as stated by *Walker, J.,* in *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838, should be careful that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case.

In the present case counsel states in his brief: "Before the jury I contended that the appraisal must have been sufficient to justify the loan, or the loan would not have been made; that in my opinion the appraisal was at least twice the amount of the loan." There is no evidence as to

the amount of the appraisal. Hence, the latter part of the statement of counsel transcends the bounds of permissible argument.

In the light of the applicable principles applied to the situation before him, we are unable to conclude that the trial judge abused the discretion vested in him.

Third: Defendants challenge the correctness of the charge of the court to the effect that in order to find defendants guilty, it is not necessary that the jury find beyond a reasonable doubt that Avery County Bank in making the loan to defendants relied exclusively upon their representations.

Reliance upon the representation by the party to whom it is made is one of the elements of a criminal prosecution for false pretense. *S. v. Mayer,* 196 N. C., 454, 146 S. E., 64; *S. v. Poe,* 197 N. C., 601, 150 S. E., 25. Moreover, it is well settled in the law pertaining to fraud and deceit that a party is not entitled to relief on the ground of false representations where, instead of relying upon them, he relies on his own knowledge, or resorts to other means of knowledge. *S. v. Mayer, supra,* citing *Patton v. Fibre Co.,* 194 N. C., 765, 140 S. E., 734. Yet, it is not always determinable merely from the fact that outside sources are consulted that there is no reliance on the representations. If under the circumstances the party be unable to learn the truth from his examination or investigation, or, without fault on his part, does not learn it and in fact relies on the representations, he is entitled to relief—all other ingredients being present.

"It is not necessary to the predication of fraud that a misrepresentation be the sole cause or inducement of the contract or transaction in question, and the only element relied upon by the representee contributing to the result, but it is enough that it may constitute a material inducement. Relief may be had under the rule where reliance was in part on one's own investigation." 23 Am. Jur., 946, Fraud and Deceit, sec. 145.

To like effect it is stated in 26 C. J., 1165, Fraud, sec. 76½, that "it is sufficient if it (the representation) constituted one of several inducements and exerted a material influence," citing *White Sewing Machine Co. v. Bullock,* 161 N. C., 1, 76 S. E., 634; *Farrar v. Churchill,* 135 U. S., 609, 10 So., 771, 34 L. Ed., 246.

In the *Farrar case, supra,* the Court, speaking of the representation, said: "It must be the very ground upon which the transaction took place, but it is not necessary that it should have been the sole cause, if it were proximate, immediate and material."

In the present case the evidence tends to show that though the bank had the property appraised and the public records of Avery County pertaining to the real estate to be conveyed as security examined, and

relied upon the information thus obtained, it had to, and did rely upon the representation of defendants that there were no unpaid labor and material bills—there being no notice of any on file in the public records. That this representation of defendants was material to the transaction and relied upon by the bank is testified to by its president. Furthermore, that such representation was material to the transaction is manifest from the statute, C. S., 2433, giving a lien upon real estate for labor performed and materials furnished in repair of buildings thereon, notice of which may be filed at any time within six months after the completion of the labor or final furnishing of the materials. C. S., 2470.

Fourth: Defendants further assign as error the refusal of the court to grant their motions aptly made for judgment as of nonsuit. However, in their brief filed in this Court no reason or argument is advanced and no authority is cited in support of this assignment. Hence, the exceptions in that respect are taken as abandoned by them. Rule 28, Rules of Practice in Supreme Court, 213 N. C., 807. See cases cited under the rule. If, however, the question were presented here, the evidence shown in the record is sufficient to take the case to the jury.

In the trial below we find

No error.

WILLELLA M. RIDDICK AND HUSBAND, JOE L. RIDDICK, AND H. H. RIDDICK v. NATHAN DAVIS AND WIFE, MARY E. DAVIS, CHARLIE DAVIS AND WIFE, MATTIE T. DAVIS, JAMES WOODLEY AND WIFE, FANNIE WOODLEY.

(Filed 8 October, 1941.)

1. Mortgages § 31b—Trustors are necessary parties to action by purchaser at foreclosure sale to obtain authority for infant trustee to execute deed.

A proceeding under C. S., 994, to obtain a "decree" of the court directing an infant trustee to convey the property to the purchaser at the foreclosure sale is an action in the nature of an equitable proceeding to foreclose the deed of trust, and, in the light of the history of the enactment and the doctrine that equity will not deprive a party of his property without a hearing, together with the statutory provisions relating to parties, C. S., 446, 456, 460, and the rule that all parties having an interest in the equity of redemption should be parties to a proceeding for foreclosure, *it is held* that the trustors are necessary parties to an action instituted by the purchaser at the foreclosure sale to obtain authority for the infant trustee to execute deed.

2. Mortgages § 39f: Judgments § 29—

Where the trustors are not made parties to an action by the purchaser at the foreclosure sale to obtain authority for the infant trustee to exe-

cute deed, they are not bound by the decree directing the infant to execute deed, and their equity of redemption is not extinguished thereby and they may redeem the land as against the purchaser at the sale or the transferee of the purchaser.

APPEAL by defendants from *Harris, J.,* at August Term, 1941, of HALIFAX.

Civil action in the nature of ejectment.

On 5 January, 1939, defendants, being indebted to L. A. Parks in the sum of $2,500, evidenced by their five certain interest bearing notes of $500 each, the first being payable 1 December, 1939, and one on each 1 December thereafter until all matured, executed and delivered to Lucille Parks, Trustee, a deed of trust which was duly acknowledged, probated and registered, conveying certain land in Halifax County, North Carolina, known as the Doggett farm, therein described, as security for said indebtedness, granting power to sell in the event of default in the payment of said indebtedness all as therein set forth. Lucille Parks, the trustee, is the daughter of L. A. Parks, the *cestui que trust,* and, though not so stated in the deed of trust, she was at the time of its execution a minor 17 years of age. Thereafter, L. A. Parks assigned said notes to Standard Fertilizer Company.

Upon default in payment of the indebtedness, the trustee, at the request of said company and acting under the provisions of said deed of trust, advertised and sold said land on 15 February, 1940, when said company became the last and highest bidder for the sum of $2,000. This bid not having been raised, Standard Fertilizer Company instituted an action on 4 March, 1940, against Lucille Parks, on whom summons was served and for whom guardian *ad litem* was appointed the same day.

In complaint filed in said action it is alleged that defendants executed the said deed of trust for the purpose of securing certain notes; that L. A. Parks assigned the notes to Standard Fertilizer Company; that defendants had defaulted in payment of notes by reason of which, at request of said company, the trustee advertised and sold the land, when it, the company, became the last and highest bidder for the sum of $2,000; that no upset bid has been made and the company is entitled to have the trustee execute and deliver to it deed for said land upon payment of the purchase price which it is willing and able to do; and that the trustee is willing and ready to complete the sale by executing a deed to it, but that she is a minor of the age of 18 years, and it will be necessary that she be authorized by order of court so to do, in accordance with provisions of section 994 of Consolidated Statutes of North Carolina.

The guardian *ad litem* filed answer admitting each and all of the allegations of the complaint.

Thereupon, on 6 March, 1940, "Carr, Judge, presiding in the Third Judicial District and regularly holding the courts of said District" signed judgment authorizing Lucille Parks, as trustee, to execute a deed in the foreclosure of said deed of trust in the same manner as if she were of full age, and further adjudging "that the acts of the said Lucille Parks, trustee, in advertising and offering for sale the land conveyed in said deed of trust, as set out in the complaint filed herein be, and the same are hereby declared valid."

Pursuant thereto, the trustee executed deed to Standard Fertilizer Company and it conveyed the land to plaintiffs herein, who allege that they now have title thereto and bring this action to recover of defendants possession of same.

Defendants were not parties to the said action.

While in answer filed in the present action, and in court, defendants admit the execution of the deed of trust, the sale by the minor trustee and the judgment in the action instituted by the Standard Fertilizer Company *v.* Lucille Parks, minor, they aver that in view of the fact that they were not parties to the said action, judgment therein is not binding on them, and, hence, as to them there has been no confirmation of the sale, and assert the right to redeem. They aver actual tender of the amount due.

When the case came on for hearing in the Superior Court upon the reading of the pleadings and the exhibits therein referred to, the defendants, through counsel, announced that they were not contending that the sale was not regular and in due form. Whereupon, counsel for plaintiff moved for judgment, and "Upon consideration of the pleadings and the exhibits, to wit, the deed of trust from defendants to Lucille Parks, trustee, the judgment roll in the action by Standard Fertilizer Company *v.* Lucille Parks—it being further admitted that the plaintiffs hold under the deed from the trustee by succession," the court being of opinion that the plaintiffs are owners in fee simple and entitled to possession of the land described in the complaint, so adjudged and ordered that a writ of assistance issue immediately to put plaintiffs in possession of the land.

Upon argument here counsel for defendants announces that defendants are ready, able and willing to pay the amount due, and tender same.

Defendants appeal to the Supreme Court and assign error.

Wade H. Dickens for plaintiffs, appellees.
H. S. Ward for defendants, appellants.

WINBORNE, J. Upon the facts shown in the record on this appeal, these questions arise for decision:

(1) Are the makers of the deed of trust necessary parties to the action instituted under the provisions of C. S., 994, by the purchaser at the foreclosure sale for the purpose of obtaining authority for the infant trustee to execute a deed pursuant thereto?

(2) If so, may the makers of such deed of trust, not having been parties to such action, exercise equity of redemption against such purchaser to whom deed has been made by the infant trustee upon order of court?

The language of the statute and the rationale of kindred decisions point to affirmative answer to each of these questions.

It is provided in C. S., 994, that "When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, . . . the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age."

In this connection it is interesting to note that this statute, C. S., 994, is derived from an Act of the 1821 session of the General Assembly (Laws of North Carolina, 1821, ch. XXXIX), *entitled*: "An Act to enable infants who are seized or possessed of estates in fee, in trust, or by way of mortgage, to make conveyance of such estates."

The preamble to the act and the act read as follows:

"Whereas many inconveniences do and may arise, by reason that persons under the age of one and twenty years, having estates in lands, tenements or hereditaments, only in trust for others, or by way of mortgage, cannot (though by the direction of the *cestay que trust,* or mortgagor) convey any sure estate in any such lands, tenements or hereditaments, to any other person or persons; for remedy thereof,

"Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That it shall and may be lawful to and for any such person or persons, under the age of one and twenty years, by the direction of the Court of Equity of the County in which such lands, tenements or hereditaments are situate signified by an order made upon hearing all parties concerned, on the petition of the person or persons for whom such infant or infants shall be seized or possessed in trust, or of the mortgagor or mortgagors, or guardian or guardians of such infant or infants or person or persons entitled to the moneys secured by or upon any lands, tenements or hereditaments, whereof any infant or infants, are or shall be seized or possessed by way of mortgage, or of the person or persons entitled to the redemption thereof, to convey and assure any such lands, tenements or hereditaments, in such manner as the said Court of Equity shall by such

order so to be obtained, direct to any other person or persons; and such conveyance or assurance so to be had and made as aforesaid, shall be as good and effectual in law, to all intents and purposes whatsoever, as if the said infant or infants were, at the time of making such conveyance or assurance of the full age of one and twenty years; any law, custom or usage to the contrary in any wise notwithstanding.

"II. And be it further enacted by the authority aforesaid, That all and every such infant or infants, being only trustee or trustees, mortgagee or mortgagees as aforesaid, shall and may be compelled by such order so as aforesaid to be obtained, to make such conveyance or conveyances, assurance or assurances as aforesaid in like manner as trustees or mortgagees of full age are compellable to convey or assign their trust, estates or mortgages."

As originally enacted the statute, omitting the preamble, was reenacted in almost the same language in Revised Code Statutes (1837), ch. 37, sec. 31. However, in subsequent enactments the Revised Code (1854), ch. 37, sec. 27, Code of 1883, sec. 1265, and Revisal of 1905, sec. 1036, the statute appears in condensed form reading substantially as appears in sec. 994, C. S., 1919, except in the Revised Code the court referred to is a court of equity.

Too, it may be noted that when this Act was originally passed distinction between actions at law and suits in equity existed in this State—that distinction not having been abolished until the adoption of the Constitution of 1868. See North Carolina Constitution, Art. IV, sec. 1; C. S., 399.

Thus it appears that the Legislature of 1821, in providing a remedy against the imperfection of trust estates conveyed by infant trustees, contemplated specifically an order in a court of equity "made upon hearing all parties concerned," on the petition of "mortgagor or mortgagors," or others therein named. This, at least, throws light upon the intent of subsequent enactments referred to, including C. S., 994.

The language of the statute, C. S., 994, that "the court may decree" is indicative of the procedure prescribed in the original act, that is, a proceeding in equity. A decree is the judgment of a court of equity, corresponding for most purposes to the judgment of a court at law. It is an order of a court, pronounced on hearing and understanding all the points in issue, and determining the rights of all the parties to the suit, according to equity and good conscience. Black's Law Dictionary, 3rd Edition.

The remedy prescribed by the statute, relating as it does, in the present action, to the foreclosure of a deed of trust, must be, under our form of civil procedure, an action in the nature of an equitable proceeding to foreclose a mortgage. No other remedy is given by statute. Hence, it is exclusive and must be resorted to, and in the manner prescribed.

Wilkinson v. Boomer, 217 N. C., 217, 7 S. E. (2d), 491; also *Bar Association v. Strickland,* 200 N. C., 630, 158 S. E., 110; *Maxwell, Comr. of Revenue, v. Hinsdale,* 207 N. C., 37, 175 S. E., 847; *Rigsbee v. Brogden,* 209 N. C., 510, 184 S. E., 24.

Regarding parties to an action in this State, it is provided by statute that every action must be prosecuted in the name of the real party in interest, C. S., 446. It is also provided that all persons who have, or claim to have, an interest in a controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the question involved, may be made defendants. C. S., 456. And the statute further requires that 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. C.S.,460.

Furthermore, the decisions in this State are uniform in holding that all persons, having an interest in the equity of redemption, should be parties to a proceeding for foreclosure. *Jones v. Williams,* 155 N. C., 179, 71 S. E., 222; *Lee v. Giles,* 161 N. C., 541, 77 S. E., 852; *Barrett v. Barnes,* 186 N. C., 154, 119 S. E., 194; *Bank v. Watson,* 187 N. C., 107, 121 S. E., 181; *Trust Co. v. Powell,* 189 N. C., 372, 127 S. E., 242; *Winston-Salem v. Coble,* 192 N. C., 776, 136 S. E., 123; *Guy v. Harmon,* 204 N. C., 226, 167 S. E., 796; *Bank v. Thomas,* 204 N. C., 599, 169 S. E., 189, and many others.

While in a mortgage or deed of trust to secure a debt the legal title to the mortgaged premises passes to the mortgagee or trustee, as the case may be, the mortgagor or trustor is looked upon as the equitable owner of the land—with the right to redeem at any time prior to foreclosure. This right, after the maturity of the debt, is designated "his equity of redemption." See *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210; *Crews v. Crews,* 192 N. C., 679, 135 S. E., 784, and cases cited.

2. Defendants, not having been parties to the proceeding instituted by the purchaser at the foreclosure sale to obtain authority for the infant trustee to execute a deed pursuant to such sale, are not bound by the judgment rendered. See *Trust Co. v. Powell, supra,* an action to compel an administrator to comply with a bid of his intestate for property offered at foreclosure sale under a deed of trust. *Stacy, C. J.,* speaking for the Court, said: "Let it be observed *in limine* that W. D. Wooten and wife, Elizabeth Wooten, makers of the deed of trust and whose equity of redemption in the *locus in quo* is sought to be extinguished and cut off by the judgment rendered herein, are not parties to this proceeding. The judgment, therefore, would not be binding on them," citing *Jones v. Williams, supra.*

Hence, defendants are not foreclosed of their equity of redemption. When a court of equity, or a court having equitable jurisdiction, is

invoked to grant relief, it strives to do justice and will not deprive a party of his property without a hearing. *Jones v. Williams, supra.*

The judgment below will be

Reversed.

STATE v. HORT ABSHER.

(Filed 8 October, 1941.)

Homicide §§ 11, 27f—Evidence held to require instruction on right of self-defense when defendant is assaulted where he has a right to be.

Defendant's evidence was to the effect that he and his wife and son went to live in the household of his father-in-law until defendant should be able to get a job, his father-in-law having given permission; that after a stay of several weeks he got into an argument with his mother-in-law, who sent for two of her sons, that in the controversy which ensued defendant stated he didn't want any trouble and would leave in five minutes; that before his wife could get his clothes his brothers-in-law assaulted him; and that in the ensuing fight he killed one of them. *Held:* Defendant was entitled to have the court charge the jury on his evidence upon his right of self-defense in case of assault while he was in a place where he had a right to be, and a charge limiting the jury solely to the theory that *eo instanti* defendant was ordered to leave he became a trespasser and had no right to resist the force used in ejecting him, is erroneous.

APPEAL by defendant from *Phillips, J.*, at March Term, 1941, of WILKES. New trial.

The defendant was tried upon a charge of murder at March Term, 1941, of Wilkes Superior Court, and was convicted of murder in the second degree and sentenced to the State Prison for not less than ten nor more than fifteen years. That portion of the evidence pertinent to this decision may be summarized as follows:

The defendant was living with his wife, who was a daughter of Zack Lankford, at the latter's home. The evidence tends to show that Lankford told him he might come there and stay until he got a job and that his wife, Maude, could wait on her mother and be a help to her. Absher promised not to drink or give trouble and to make his children mind. There were several other members of the Lankford household, including Lon Lankford, Sam Lankford, Bryce Lankford, and the deceased, Leonard Lankford, all sons of Zack Lankford and brothers-in-law of the defendant.

On the day of the homicide, according to the testimony of Mrs. Zack Lankford, Leonard, the deceased, came in and was eating supper, and the defendant came in and called Leonard out somewhere and talked

with him. She further testified that Absher came in and started an argument with her youngest boy, Don. She then ordered him out, whereupon he told her that he was "going to get your little son, Brycie," a child about fifteen or sixteen years old; that defendant had a grudge against Brycie because the latter was "fast-spoken." Mrs. Lankford then struck him about three licks with a little whip she kept "to whip the young-uns with," and told him to leave, and he backed off to the kitchen door and went into the kitchen. Lon Lankford and Sam Lankford heard the controversy, came in and said, "Hort, you get out of here. I don't want this around my mother." The defendant replied, "Do you own this damn little joint around here?" to which Don said, "Yes, when I am at it I own it." Defendant then said, "Damn you, you make me get out," and Lon said, "Well, I can make you get out." Upon this, Lon and Sam went to take hold of defendant and put him out, and, according to this witness' testimony, the defendant "gave a lick back that way, and socked that knife in that young-un's throat and broke the blade off in his throat, and he cut Lonz in the arm, and him not trying to do a thing with him." She further testified, "The defendant and his wife had been living in my home going on three weeks. They asked my husband—Hort asked my husband to let him come. He let him come. They were just to stay until he could get a place to go to." The other witnesses for the State substantially corroborated the testimony of Mrs. Lankford.

Lon Lankford testified in part that he and Leonard, the deceased, were just trying to push the defendant out of the house when he felt his own arm cut and saw the defendant strike back at Leonard. After he was out, this witness stated, he struck defendant across the back with a chair because he saw that he was coming back to him, and after he had been cut he had tried to hit him with a chair in the house but could not. He testified that Absher "did not look like he was drinking much. He might have had a drink."

Hort Absher, the defendant, testified that he came to the house with his wife and little boy, went to the kitchen to get a drink of water, walked out and talked to Leonard Lankford, deceased, that he had no trouble with him at all, and that when he walked in the house Leonard walked in front of him, went out of the house to the woodpile, got some wood and brought it in, and went out in the direction of the barn. That Sam Lankford and Lon Lankford pretty soon went out of the house toward the barn. That defendant and Mrs. Lankford got into an argument over Brycie's gun barrel, which defendant had hidden. Defendant testified that the boy said he would shoot his father. He refused to tell where the gun barrel was hidden, and Mrs. Lankford began to beat him over the head with a strap fastened to a stick, used profanity and

obscenity toward him, and said she would kill him if she had the strength; and then sent a little girl to the barn, saying, "Tell Lon and Leonard to come in there and kill the s. o. b." Lon and Leonard came into the house, where a controversy ensued about the argument with Mrs. Lankford. Defendant said, "Boys, I am fixing to leave here and I don't want no trouble. I will be gone in five minutes." His wife was fixing his clothes so that he might go to Mount Airy and get a job. The following is a copy from the transcript of defendant's testimony at this point:

"Before she got my clothes ready they jumped on me and Lon jumped on me with the chair, hit me in the head with it, and Leonard Lankford come on me with his fist, and I staggered back to the kitchen door when Lon hit me with the chair, the ceiling was so low he couldn't bring the chair over his head, he brought it sideways and knocked me back into the door and Leonard come in and hit me in the face with his fist. Well, I shoved him backward and I struck at Lon with my fist and missed him, and shoved him back into the table, and he come around with the chair again and hit me, and shoved Leonard back again and somewhere there was a knife laying on the table. I don't say that the boy got the knife. He was making for the knife—Leonard Lankford. Well, I come out with my knife. They told me they were going to kill me. I got my knife out of my right front pocket and used it in my right hand. I struck at Lon Lankford with my knife, and he hit me with the chair, and my knife went over and hit Leonard Lankford. I didn't at any time strike Leonard Lankford with my knife.

"Lonz struck at me again with the chair and I struck at him and cut him across the arm, and the next time he struck at me with the chair I struck at him with the knife, and the knife blade struck the chair and broke off and hit the floor.

"I got my knife out because they beat me with the chair and said they were going to kill me three or four different times. They told me they were going to kill me and beat me with a home-made chair like that over the head, and I expect that was a good idea toward killing a man.

"After the blade was broken—my wife had gotten there by that time, and they got me out at the back door of the porch into the house and off in the yard, and about the time I hit the yard I was knocked down with a chair. Lonz Lankford did that, and by that time my wife got hold of me—I don't know that he struck at me or her, but anyhow he knocked both of us down with a chair. She come in on top of me, and she got up and started to leave with me, and he told her, 'Turn him loose,' Lonz Lankford said, 'Turn him loose,' says, 'I will finish killing the G . . d . . . s. o. b.' So we went on around the house, me and my wife, and Lonz Lankford—and when we got around the house Lonz

Lankford beat me with a chair until we got in the front yard, knocked me down three or four times in the front yard out there, and my wife once or twice—I won't say whether it was once or twice.

"I had five holes knocked in the back of my head. My wounds were bleeding, and I was bloody all over. My shirt (I had on a coat) and coat was torn to pieces, and I had a cut place or two in my coat. I have the coat right here to show for myself, and this Arl Lankford, he come up about that time. He had a bone-handled knife about that long, and he beat me in the head with it, and Sam Lankford was talking to him, begging him not to hurt me, and he said he was going to cut the G . . d . . . s. o. b.'s head off. I begged them to leave me alone.

"I says, 'You boys going to kill me, or what are you going to do?' They followed me as far as from here to below—as far as from here to Dr. Mitchell's down here from the house, beating me."

Defendant further testified: "My father-in-law asked me to move there to the house; I didn't rent it from anybody, it was not rented, but he asked me to move there and take care of his wife, let my wife wait on his wife while she was in a weakly condition. I didn't intend to stay there so very long; I aimed to stay there two or three months; no, not until I could get a job. I was not paying any rent or board; I hoped Mr. Lankford in his field. I helped around the field there and she helped in the house." There is much other evidence which it is unnecessary to print as it does not directly bear upon the point of the decision.

Inter alia, the judge charged the jury as follows:

"Now, gentlemen of the jury, there has been something said in the argument in this case about the defendant being at his home at the time this difficulty ensued. The court charges you, gentlemen of the jury, if you believe the evidence in this case and find it to be true beyond a reasonable doubt, the house of Zack Lankford was not the home of the defendant but was the home of Zack Lankford and the members of his family that were living there and residing at the time. The court charges you that the defendant was an invited visitor in this home and could be expelled at any time at the will of the owner. He and his family were temporary visitors, that is the defendant and his family were temporary visitors in this home until the defendant could get a job and move his family.

"The court further charges you that if you find from the evidence and beyond a reasonable doubt in this case that Zack Lankford was away from home and his wife told the defendant to leave the place or to leave the premises and that he refused to leave, then the defendant became a trespasser in the home and the wife and other members of the home had the right to use such force as was reasonably necessary to

evict him from the premises. . . . Gentlemen of the jury, if you believe the evidence in this case, that is the evidence of the defendant and the State, that the defendant and his wife and family were making their home there temporarily in the home of Zack Lankford; that they were invited guests in the home and were there with the permission and consent of the owner, then at all times the owners of the premises had the right to control the premises and if you find from the evidence in this case and beyond a reasonable doubt that the owner, that is Zack Lankford, the head of the house, was away from home and that his wife, the wife of Zack Lankford who was there in charge of the premises in his absence—she being his wife and living there—that she had the right, if she saw fit, to order the defendant away from there and if he refused to go he then became a trespasser in the eyes of the law, and to evict him from the premises she and the other members of her family had the right to use that force that was reasonably necessary to evict him from the premises and to get him off of the premises, and the court charges you, gentlemen of the jury, that if he was a trespasser he had no right to repel this force but it was his duty to leave when told to do so if he was told to do so."

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

Trivette & Holshouser for defendant, appellant.

SEAWELL, J. In the opinion of the Court, the instructions to the jury are objectionable in that they do not present to the jury the true status of the defendant as an inmate of the Lankford household and entitled to a reasonable consideration of his rights as an occupant thereof. There is no question that he might have been ejected upon reasonable notice; but that he should be reduced to the status of a trespasser *eo instanti* that he was ordered out by Mrs. Lankford or other inmates of the household, is altogether inconsistent with any status which could arise under the evidence relating to the manner, conditions and terms under which he came into the household, and in our opinion did not justify the summary and forcible ejectment which it is admitted was undertaken.

This instruction necessarily placed the defendant in the wrong *ab initio* and materially altered, to his prejudice, the right of self-defense based upon his version of the affair and the rules of law applicable thereto. The instructions given were based upon the view that he was such a trespasser as might be instantly ejected by either Mrs. Lankford or any other member of her family who lived there, and who had no right to resist the force used in such an ejectment, and that such force was peacefully used solely toward that end.

Whether the version of the defendant is true or not, it is in the evidence and cannot be ignored by the court. It demanded, at least as an alternative statement of the law, arising upon this phase of the evidence, that the court should have given the ordinary instructions with regard to the right of self-defense in case of assault where a person has the right to be. *S. v. Greer,* 218 N. C., 660, 666, 12 S. E. (2d), 238; *S. v. Finch,* 177 N. C., 599, 600, 99 S. E., 409.

For error in this respect, the defendant is entitled to a

New trial.

MAGNOLIA RIDDLE, BY HER NEXT FRIEND, E. C. RIDDLE, v. WILBURN WHISNANT AND J. E. GUY.

(Filed 8 October, 1941.)

1. Trial § 22b—

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

2. Automobiles § 24b—Evidence held insufficient for jury upon issue of respondeat superior.

Evidence tending to show that the driver of the car was employed in a garage, that the employer permitted the employee to take his car for use of the employee in driving to his home Saturday night and in returning to work Monday morning, that the employee, in response to questioning by the employer, stated that he would get another car if he had to make a trip on Sunday, and that the accident in suit occurred while the employee was driving the car on Sunday on a personal errand, *is held* insufficient to be submitted to the jury upon the doctrine of *respondeat superior.*

APPEAL by plaintiff from *Olive, Special Judge,* at April-May, 1941, Special Term, of YANCEY. Affirmed.

This is an action brought by plaintiff against the defendants for damages for injuries sustained by the plaintiff while riding as a passenger in an automobile, operated by one E. C. Riddle, which collided with a 1936 Plymouth Tudor Sedan, on 15 December, 1940, while being operated by the defendant Wilburn Whisnant, whom the plaintiff alleges was acting as agent and servant of his codefendant, J. E. Guy.

The defendant Wilburn Whisnant filed no answer in the action. The defendant J. E. Guy filed an answer and denied the allegations of the complaint. "That at said time and place the defendant Wilburn Whisnant was operating the said Plymouth automobile as agent and servant of his codefendant, J. E. Guy."

Wilburn Whisnant, a defendant in this action and a witness for plaintiff, testified, in part: "I began working for Mr. Guy on December 5th, 1940, as a mechanic and to help sell anything there was to sell. I was paid a straight salary of $10.00 per week. I worked there in the shop part of the time. There was no agreement what I was to do, whether I was to sell cars, or mechanic or what, I never sold a car. I would work around there from eight o'clock in the morning to five in the afternoon, I would say, something like that. I live about four miles from Spruce Pine, at Estatoe. Up until Friday, December 13th, I would go back and forward to work with John Miller. Then John Miller quit working there on Friday, the 13th, and I asked Mr. Pierce if I could have a car to go to my home and back the next morning. I had a conversation with Mr. Guy, when I started home Saturday. He asked me which car I was going to drive, he asked me if I was going to use that car on Sunday and I told him if I was going on any particular business of my own I could get another car. He did not tell me he didn't want me to drive that car. He did not ask me if I was going to drive it anywhere on Sunday. He asked me if I was going anywhere on Sunday. I told him not that I knew of, and if I was going anywhere on any other business, I could get another man's car. I told him if I was going anywhere on particular business, I could get another car. I told him I wasn't going to use the car and if I went anywhere on particular business I could get another car. I did not tell him anything about going to Micaville, and I didn't tell him anything about going anywhere with the car on Sunday. At that time, Miss Pearl Wilson was staying with us and she lived with Mr. Zeb Thomas at Micaville. My wife and I did not take Pearl Wilson to Zeb Thomas' house at Micaville on Saturday night. She had gone on Friday on the bus. Mrs. Zeb Thomas is my wife's aunt, I think. I and my wife went to her aunt's house, Zeb Thomas', Saturday night. Miss Faye Wilson was there at that time. She volunteered to come home with us, and came home with us Saturday night. She is no kin to my wife. I did not see Fred Thomas at all that night. I spent the evening at Zeb Thomas' house from around 7:30 to around 9:00 o'clock. On Sunday, I and my wife and family went back to Zeb Thomas' at Micaville, and we took Faye Wilson back with us. . . . On Sunday afternoon, I went to see Fred Thomas and my wife and two children went along with me. Like I told you a while ago, there was no parking place, and I went up to Zeb Thomas' house. It was where I always parked when I used to live there. Faye Wilson was living with her mother upstairs in the same house with Zeb Thomas. I took my wife and two children to Zeb Thomas' house, they went along with me. We got there around two to two-thirty o'clock. . . . Fred Thomas came up to Zeb Thomas' house while my family

and I were there, and he and I got in this car and went from Micaville up to the Jig Mine, which was a little better than five miles from Micaville. That Jig Mine was between Micaville and Estatoe, my home. Fred Thomas and I went to the Jig Mine and I left Fred Thomas at the Jig Mine. That was about five miles East of Micaville. I then went back to Micaville to get my family. Fred Thomas was not with me when I went back to Micaville. I got my wife and children and Pearl Wilson and it was about dusk then. I was going back to see Fred Thomas. I wanted to see him before I went home. . . . I went back and got my family in Micaville and then was going East when this accident happened. This accident happened before I got back to the point where I had left Fred Thomas. I had left Fred Thomas on this main highway from Micaville to Spruce Pine and the accident happened about a mile and a half from Micaville. I had gone back five miles to get my family and was about a mile and a half back on the road when the accident happened East of Micaville. In going from Micaville to Estatoe to my home, I go right by the place I had left Fred Thomas. I did not see Fred Thomas any more that day."

At the close of plaintiff's evidence, the defendant, J. E. Guy, moved for judgment as in case of nonsuit, which motion was allowed, and judgment was thereupon rendered by the court dismissing the action as of nonsuit. Upon the dismissal of the action, as to the defendant, J. E. Guy, the plaintiff took a voluntary nonsuit as to the defendant, Wilburn Whisnant, excepted to the ruling of the court in granting the motion of nonsuit as to the defendant J. E. Guy, excepted, assigned error, and appealed to the Supreme Court.

Briggs & Atkins for plaintiff.
Williams & Cocke for defendant.

CLARKSON, J. At the close of the plaintiff's evidence, on motion of defendant J. E. Guy, the court below granted judgment as in case of nonsuit as to him. C. S., 567. In this we can see no error.

On a motion to nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference drawn therefrom.

There seems to be no controversy that the plaintiff was seriously injured by the negligence of Wilburn Whisnant. He filed no answer to the charge of negligence made by plaintiff against him.

The questions involved: At the time of the injury to plaintiff, was Wilburn Whisnant acting as agent and servant of J. E. Guy; if so, was he acting in the scope of his employment at the time of the accident? We think the answers must be No.

The strongest evidence for plaintiff was that of Wilburn Whisnant, a defendant and driver of the car. He testified, in part: "I was paid a straight salary of $10 per week. I worked there in the shop part of the time. There was no agreement what I was to do, whether I was to sell cars, or mechanic, or what. I never sold a car. I would work around there from around eight o'clock in the morning to five in the afternoon, I would say, something like that. . . . I did not tell him (J. E. Guy) anything about going to Micaville and I didn't tell him anything about going anywhere with the car on Sunday."

In *Grier v. Grier,* 192 N. C., 760 (763), is the following: "The answer to this question depends upon whether or not the salesman, at the time of committing the negligent act, was acting within the 'scope of his employment.' One of the leading cases in this State on the question of 'scope of employment' is *Sawyer v. R. R.,* 142 N. C., 1. *Justice Hoke,* quoting from Wood on Master and Servant, says: 'The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof and were such as may fairly be said to have been authorized by him. By "authorized" is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders.'"

In *Covington v. Threadgill,* 88 N. C., 186 (189), we find: "In *Melvin v. Easley,* 7 Jones, 356, it was conceded by the whole Court, though they differed as to other points, that a contract made on Sunday was *illegal,* and could not support an action, upon the ground that the Act of 1741 (Bat. Rev., ch. 115, sec. 1) declared that 'no person shall on Sunday exercise the work of his ordinary calling, upon pain that he should forfeit and pay one dollar, and it was expressly said that no distinction could be admitted between contracts made in contravention of the policy of the law, whether *malum in se* or *malum prohibitum.*"

The trip made in defendant's automobile was on Sunday, not in the scope of Whisnant's employment, and was without Guy's permission. The purpose was personal—an outing and visit by Whisnant, taking his wife and two children with him. Whisnant went on an errand of his own (to get his wife and children) when the accident occurred. He testified: "Fred Thomas and I went to the Jig Mine and I left Fred Thomas at the Jig Mine. That was about five miles East of Micaville.

I then went back to Micaville to get my family. Fred Thomas was not with me when I went back to Micaville. I got my wife and children and Pearl Wilson and it was about dusk then. I was going back to see Fred Thomas. I wanted to see him before I went home. . . . I went back and got my family in Micaville and then was going East when this accident happened. This accident happened before I got back to the point where I had left Fred Thomas."

In Blashfield Cyc., Vol. 5, pages 175-6, sec. 3029, the following rule is laid down: "The general rule is that a servant in charge of his master's automobile, who, though originally bound upon a mission for his master, completely forsakes his employment and goes upon an errand exclusively his own, and while so engaged commits a tort, does not thereby render the master answerable for such tort under the rule of *respondeat superior*," citing a wealth of authorities. *Parrott v. Kantor*, 216 N. C., 584.

We think the cases cited by plaintiff distinguishable from the present one. We see no error in the exclusion of the evidence in regard to an agreement as to inspecting the automobile of Fred Thomas. It was immaterial and irrelevant.

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

Affirmed.

NATH BLEVINS, EMPLOYEE, v. NELLO L. TEER, CONTRACTOR, EMPLOYER, AND STANDARD ACCIDENT INSURANCE COMPANY, CARRIER.

(Filed 8 October, 1941.)

1. Master and Servant § 55d—

The jurisdiction of the Superior Court on appeal from the Industrial Commission is limited to questions of law or legal inference, the findings of fact of the Industrial Commission being conclusive.

2. Master and Servant § 55g—

The Superior Court has no discretionary power to remand the cause to the Industrial Commission for further or more complete findings of fact when the award of the Commission is supported by findings of fact made upon competent evidence.

3. Same: Master and Servant § 40g—When Commission finds upon supporting evidence that claimant did not sustain injury as result of accident, finding is conclusive and Superior Court may not remand cause.

In this proceeding before the Industrial Commission plaintiff's evidence was to the effect that he felt a sharp pain while carrying a heavy load in the course of his employment. There was expert opinion evidence that claimant has tuberculosis of the spine and arthritis of the lumbar spine,

that the arthritis had existed prior to the accident, with no opinion as to the inception of the tuberculosis, with further medical expert testimony that the conditions were not the result of an accident, although they might have been aggravated by a quick jerk or definite strain. *Held:* The finding of the Industrial Commission upon the evidence that claimant did not sustain his injury as a result of an accident occurring in the course of his employment is conclusive, and judgment of the Superior Court remanding the cause for further or more complete findings of fact is reversed.

APPEAL by defendants from *Phillips, J.,* at August Term, 1941, of YANCEY.

This proceeding began before the North Carolina Industrial Commission, upon complaint of the plaintiff Blevins, employee, against the defendants Teer, employer, and the insurance company, carrier, for compensation which the plaintiff alleged to be due him for injuries sustained while in the employment of the defendant Teer.

He claims that he received his injury through accident while helping to carry one end of a heavy galvanized iron pipe along and down a mountainside, along with several other men. The evidence bearing upon the manner in which the injury was sustained may be summarized as follows:

Some time after plaintiff went into the employment of defendant Teer, he was engaged, with others, in carrying pipe lines across the highway, and was so engaged at the time of the alleged injury. The pipe line was of galvanized steel with a bed of tar on one side of it; plaintiff could not say how much the pipe weighed, but there were about eight men carrying it and he thought it weighed about one thousand pounds. He was holding one end of a stick passed under the pipe line, and the laborer on the other side was holding the other end, the stick bearing part of the load. They were undertaking to carry the pipe line down the mountain, and plaintiff's position was at the lower end, where the weight naturally fell.

Plaintiff experienced a little pain in the side of his back. Since that time, he complains that he has been "punishing"—hurting in his back all the while, and is not able to do any kind of work or to perform any kind of gainful labor. This was on 17 December, 1938, and the plaintiff appears to have filed his claim on 11 December of the next year.

Plaintiff further testified that he had not been able to perform any duties in connection with his former work, and did not return to work for Teer on the following day because he was unable to do so; that he paid little attention to it at the time, but was unable to get back next day, although he thought he would be able to work in a few days. Plaintiff testified that he was thirty-eight years of age and prior to this occurrence he had been able to do hard, laborious work, "most any kind

of work that comes along." He stated that he had not received any medical attention, except that Dr. Robertson had given him an examination. Plaintiff testified that he was not able to do any manual labor, spent most of the time in bed, that this condition did not exist prior to his injury. On cross-examination he stated that he did not remember saying anything to the people around him about being hurt, just went home; that the next time he went to a Nello Teer job was on 9 December, 1939, when he went back to report the accident; and that he had not been able to get about all this time, but thought that he might probably go back to work any day. He testified that he did not report the accident earlier because he thought that it would not amount to anything, but that it had; that he had waited almost a year to report the accident because he thought that he might be able to go back to work. He stated, however, that he had consulted many persons about his accident before he came to the lawyer, but did nothing about it.

Corroborative evidence as to the condition of claimant prior to the injury and after the injury was furnished by Waitz Blevins, his father, and by Arthur Patton.

Dr. Robertson testified that Blevins came to see him about 7 December, 1939, complaining of pain in his left testicle, and upon examination was found to have a varicocele and enlarged cord. Witness did not remember that Blevins made the complaint of pain in his back at that time. Witness stated that varicose veins might cause his back to hurt and give him the trouble complained of "on the stand." He stated that the condition he found was, in his opinion, not the result of any accident sustained in the manner claimed by plaintiff.

A second hearing was had before Hon. Pat Kimzey, Commissioner, in Asheville, on 12 November, 1940. This hearing appears to have been for the purpose of taking the testimony of Dr. James H. Cherry.

This witness, after qualifying as an expert, testified that he had made an examination of Blevins on 6 August, 1940, at which time he discovered that Blevins had two definite lesions in his spine, one of which had the characteristics of tuberculosis, and the other of osteoarthritis of the lumbar spine; in other words, he found that Blevins had tuberculosis of the spine and arthritis of the lumbar spine. He testified that in his opinion the arthritis had existed prior to the injury, but had no definite opinion with regard to the time when the tuberculosis set in. He expressed his opinion that neither condition was the result of the accident described by the plaintiff, nor the result of any strain received at that time. Upon a hypothetical question, witness stated that he had a definite opinion that the conditions he found were not caused by any such accident, but had no definite opinion as to whether they were aggravated

by it or not; he believed, however, that the conditions he found would get progressively worse. Witness thought that recovery from the conditions found by him was retarded for want of medical care. He thought that tuberculosis could be cured in a certain number of cases, but doubted whether the arthritis could ever be cured, although the symptoms might be helped or relieved. Witness further stated that he found a condition of varicocele in plaintiff's left testicle, and had no definite opinion whether such condition might be the result of an accident, as that was entirely out of his field. He found no evidence of rupture.

Witness stated that when he made his examination on 6 August, 1940, he found Blevins to be totally disabled. He thought that the disease could easily have been aggravated by the injury, but stated that he had never had it clearly in his mind as to how the injury did occur. He believed that any strain, if it had occurred, might have exaggerated the conditions both of tuberculosis and arthritis to some extent. Witness stated that any kind of quick jerk was likely to exaggerate the arthritis. He thought that the tuberculosis presented an old lesion, that the conditions might have been aggravated by a definite injury, a quick jerk, a definite strain. The plaintiff introduced a letter written by this witness, couched in technical terms, showing various pathological conditions, including the tubercular and arthritic conditions to which he testified, and stating the impression, "Apparently the disease was present previous to the injury, but could have been easily aggravated by the injury." He further stated that at that time the man was totally disabled and should have prompt medical attention.

The conclusion of the hearing Commissioner proving adverse to claimant, he obtained a hearing before the Full Commission. The Full Commission, upon all the evidence, found that the claimant did not sustain his injury as the result of an accident sustained in the course of his employment, and denied compensation. From the judgment of the Commission, denying such compensation, plaintiff appealed to the Superior Court of Yancey County. Upon the hearing in the Superior Court the following judgment was entered:

"This cause coming on to be heard and being heard at this the August Term, 1941, of the Superior Court of Yancey County, North Carolina, before his Honor, F. Donald Phillips, Judge presiding and holding said court according to law, upon the appeal of the plaintiff from the award of the Industrial Commission entered in this cause of date of February 28, 1941, and upon the transcript of the record and testimony made and taken before the North Carolina Industrial Commission and upon argument of counsel for plaintiff and defendants:

"IT IS ORDERED AND ADJUDGED by the court in its discretion that this cause be remanded to the North Carolina Industrial Commission for further and more complete findings of fact.

"This the 14th day of August, 1941.

"F. DONALD PHILLIPS,
"Judge Presiding."

From this the defendant appealed.

Charles Hutchins for plaintiff, appellee.
Heazel, Shuford & Hartshorn for defendant, appellant.

SEAWELL, J. The judgment from which appeal is taken was no doubt rendered by the court below under a momentary misapprehension of its power. We do not know of any situation that would justify an appellate judge in remanding the proceeding to the Industrial Commission as a matter of pure discretion "for further or more complete findings of fact" where the award or final order of the Commission is in accordance with its findings of fact made upon competent evidence.

An appeal from an order or award of the Industrial Commission to the Superior Court is only upon matters of law or legal inference. Chapter 120, sec. 60, Public Laws of 1929; *Perkins v. Sprott,* 207 N. C., 462, 463, 177 S. E., 404, 405; *Byrd v. Lumber Co.,* 207 N. C., 253, 255, 176 S. E., 572, 573. The same section provides that the award of the Commission "shall be conclusive and binding as to all questions of fact." *Reed v. Lavender Bros.,* 206 N. C., 898, 175 S. E., 927; *Smith v. Hauser & Co.,* 206 N. C., 562, 174 S. E., 455; *Winberry v. Farley Stores, Inc.,* 204 N. C., 79, 167 S. E., 475.

The cases cited in appellee's brief in support of his contention, *Byrd v. Lumber Co., supra,* and *Butts v. Montague Bros.,* 208 N. C., 186, 179 S. E., 799, bear upon the power of the court to remand a case to the Industrial Commission because of newly discovered evidence. Certainly there are many instances in which the appellate judge might remand a case, and a number of such instances are cited in defendant-appellant's brief: *Farmer v. Bemis Lumber Co.,* 217 N. C., 158, 7 S. E. (2d), 376; *Bank v. Motor Co.,* 216 N. C., 432, 5 S. E. (2d), 318; *Tindall v. Furniture Co.,* 216 N. C., 306, 4 S. E. (2d), 894; *Thompson v. Funeral Home,* 208 N. C., 178, 179 S. E., 801; *Perkins v. Sprott Bros., supra; Butts v. Montague Bros.,* 204 N. C., 389, 168 S. E., 215. The list is no doubt incomplete, but we are sure that no investigation will disclose a precedent for the order in the case at bar. *Buchanan v. Highway Commission,* 217 N. C., 173, 7 S. E. (2d), 382; *Rankin v. Mfg. Co.,* 212 N. C., 357, 193 S. E., 389; *McNeill v. Construction Co.,* 216 N. C., 744, 6 S. E. (2d), 491. It is true that this Court has held that a sudden and

unexpected disruption or breaking of the internal tissues caused by a strain may, under qualifying conditions, be compensable as caused by accident arising out of the employment and in its course. *Smith v. Creamery Co.*, 217 N. C., 468, 8 S. E. (2d), 231; *cf. Moore v. Sales Co.*, 214 N. C., 424, 199 S. E., 605. But the Commission, having before them the very full evidence on this point which we have quoted, did not find any lesion attributable to either external or internal accident, or, in fact, any accident at all which might have contributed to plaintiff's condition, but seem rather to have attributed this condition to other causes. *Davis v. Mecklenburg County*, 214 N. C., 469, 199 S. E., 604; *Early v. Basnight & Co.*, 214 N. C., 103, 198 S. E., 577; *Buchanan v. Highway Commission, supra.*

The condition of the plaintiff is such as to arouse the profoundest sympathy and pity. In his frail body, ravaged by dread tuberculosis and stiffened by incurable arthritis, he exemplifies the mystery and pathos of human suffering. His absence from the doctor's office may have been a matter of necessity rather than choice, since malnutrition is listed as one of his afflictions, and he sues here as a pauper. But the Commission has found the situation lacking in those conditions which would justify attaching responsibility to the defendant, and has made its award accordingly. The award is supported by competent evidence, is without legal error, and should have been affirmed. *McNeill v. Construction Co., supra.*

Judgment in the Superior Court will be entered in accordance with this opinion. The judgment of the Superior Court involved in this appeal is

Reversed.

BOARD OF HEALTH OF NASH COUNTY ET ALS. v. BOARD OF COMMISSIONERS OF NASH COUNTY ET AL.

(Filed 8 October, 1941.)

1. Declaratory Judgment Act § 2a—

The Superior Court has jurisdiction of a controversy without action between the board of health of a county and the county commissioners, C. S., 626, in which the facts agreed present the question of the legal duties of the respective boards in regard to the appointment of a county health officer, which duties, according to how the controversy is determined, might be the subject of *mandamus*, notwithstanding that the provisions of the Declaratory Judgment Act, ch. 102, Public Laws 1931, are not specifically referred to.

2. Courts § 1a—

In invoking the jurisdiction of a court, the parties are entitled to the aid of any statute, without specifically naming it, under which such juris-

diction may be exercised, provided substantial compliance has been made with its terms in presenting the controversy.

3. Statutes § 5c—

Chapters 6 and 193, Public Laws 1941, which by their terms apply only to one county, are local statutes.

4. Health § 1—

A law affecting the selection of an officer to whom is given the duty of administering the health laws is a law "relating to health."

5. Statutes § 2—

Art. II, sec. 29, of the Constitution of North Carolina is remedial in its nature and was intended not only to free the Legislature of petty detail but also to require uniform and coördinated action under general laws in regard to the matters therein stipulated which are related to the welfare of the people of the whole State, and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose.

6. Same—Acts applicable to only one county which provide that county commissioners should approve election of health officer, held void.

Chapters 6 and 193, Public Laws 1941, providing that the Board of County Commissioners of Nash County should approve the health officer elected by the County Board of Health, and that if he is disapproved the County Board of Health should select another, and that if such other is not approved, the Secretary of the State Board of Health should make the appointment, are local laws relating to health and are void as being in contravention of Art. II, sec. 29, of the State Constitution, and the election of the county health officer by the County Board of Health under the provisions of the general law, C. S., 7067, is valid and effective without reference to any act by the County Commissioners.

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

STACY, C. J., and WINBORNE, J., for dismissal.

APPEAL by defendant from *Harris, J.* From NASH. Affirmed.

J. P. Bunn and F. S. Spruill for defendant.
Leon T. Vaughan and W. H. Yarborough for plaintiff.

SEAWELL, J. This controversy is over the appointment of a health officer for Nash County.

The general law on this subject is found in C. S., 7067, Michie's Code of 1939, and is as follows: "The board of health shall . . . elect either a county physician or a county health officer, whose tenure of service shall be terminable at the pleasure of the county board of health, and who shall serve thereafter until the second Monday in January of the odd years of the calendar. If the county board of health of any county shall fail to elect a county physician or county health officer within two calendar months of the time set in this section, the secretary

of the state board of health shall appoint a registered physician, of good standing in the said county, to the office of county physician, who shall serve the remainder of the two years, and shall fix his compensation, to be paid by the said county, in proportion to the compensation paid by other counties for like service, having in view the amount of taxes collected by said county."

Two statutes were enacted by the 1941 General Assembly specially applicable to the county of Nash. Chapter 6, Public Laws of 1941, and chapter 193, Public Laws of 1941, amendatory of the prior statute. These statutes provide substantially that the appointment of a health officer of Nash County "shall not become effective until approved by the Board of Commissioners of the County of Nash," and in chapter 193 there is the further provision that if the health officer appointed by the board of health shall be disapproved by the Board of County Commissioners "the person so appointed shall become ineligible for such appointment, and the County Board of Health shall, within 30 days thereafter, appoint some other person for such position; and should the Board of County Commissioners fail to approve this other person so appointed, the secretary of the State Board of Health shall appoint," etc.

The Board of Health, at the regular stated time for such action, appointed Dr. T. O. Coppedge as Health Officer for a term beginning on the second Monday in January, 1941, and ending on the second Monday in January, 1943. The defendants have disapproved such election. The Board of Health has taken no further action in the matter, contending that chapters 6 and 193 of the Public Laws of 1941, above quoted, are unconstitutional and void because in violation of Article II, section 29, of the Constitution of North Carolina.

The pertinent part of Article II, section 29, of the Constitution reads as follows: "The General Assembly shall not pass any local, private, or special act or resolution . . . relating to health, sanitation, and the abatement of nuisances."

In the present proceeding, the parties present this question to the court in a controversy without action under C. S., 626, and under such provisions of the Declaratory Judgment Act, chapter 102, Public Laws of 1931, and amendments, as may be applicable. Neither party has raised any question of the jurisdiction of the court, and we are of opinion that such jurisdiction obtains. C. S., 626; chapter 102, Public Laws of 1931; Michie's Code, secs. 628 (a), *et seq.*, (l), (m); *Light Co. v. Iseley*, 203 N. C., 811, 820, 167 S. E., 56, 60, 61. In invoking the jurisdiction of the court, the parties are entitled to the aid of any statute, without specifically naming it, under which such jurisdiction may be exercised, provided substantial compliance had been made with its terms in presenting the controversy.

The controversy here is between two important public boards, the County Board of Health and the Board of County Commissioners, over a matter importantly affecting the administration of the health laws, and directly affecting the functions, powers and duties of the said boards, which because of the alleged uncertainty of the statutes under which they derive their powers, and accordingly as these duties are determined, might be subject to *mandamus* to compel the performance of omitted public duties. It is easily seen that the matters involved are important not only to the local authorities and community, but to the people of the whole state.

There is no room to doubt that chapters 6 and 193, Public Laws of 1941, are local. By the terms of the statute they apply only to Nash County, one out of the one hundred counties of the State. Chapter 6, section 3, Public Laws of 1941; *S. v. Dixon,* 215 N. C., 161, 1 S. E. (2d), 521; *S. v. Chambers,* 93 N. C., 600.

This Court is also committed to the proposition that a law affecting the selection of officers to whom is given the duty of administering the health laws is a law "relating to health." *Sams v. Comrs. of Madison,* 217 N. C., 284, 7 S. E. (2d), 540.

We have become increasingly conscious of the fact that many of the problems which heretofore we have considered purely local are so related to the welfare of the whole state as to demand uniform and coördinated action under general laws. We believe the section of the Constitution which the plaintiffs have invoked was not intended merely as a device to free the Legislature from the enormous amount of petty detail that had theretofore occupied every session, but we think it was also framed upon the principle that we have just stated, and therefore it should not be so construed as to minimize the provision it has made looking to this result. It is remedial in its nature, and its application should not be denied on an unsubstantial distinction which would defeat its purpose. It especially mentions general "laws relating to health" as being within its protective purview, recognizing that the alleviation of suffering and disease, the eradication or reduction of communicable disease in its humanitarian, social, and economic aspect, is a State-wide problem which ought not to be interfered with by local dilatory laws which are so frequently the outcome of local indifferency, or factional and political disagreements.

The position that a law affecting the selection of a public health officer intimately charged with the administration of such laws, where contact with the subject is more immediate is not a "law relating to health," is not tenable.

This is no doubt the rationale of the case in our reports more nearly bearing upon the question—*Sams v. Comrs. of Madison, supra,* in which the Court reviewed and declared unconstitutional, as offending the above cited section of the Constitution, a local law at variance with the general law providing a method of selecting the County Board of Health. It applies here with equal aptness and force.

In our opinion, chapter 6, Public Laws of 1941, and chapter 193, Public Laws of 1941, are unconstitutional and void. It follows that the election of a county health officer by the Board of Health was valid and effective without reference to any act by the County Commissioners. The judgment of the court below is

Affirmed.

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

STACY, C. J., for dismissal: The proceeding should be dismissed. C. S., 626. *Hicks v. Greene County,* 200 N. C., 73, 156 S. E., 164; *Finney v. Corbett,* 193 N. C., 315, 136 S. E., 878. The jurisdictional requirements set out in the cases just cited are absent from the instant record. McIntosh, P. and P., 557. If the plaintiff's position be correct, the defendant has no interest in the controversy. Conversely, if the defendant be correct, there is nothing at issue. Presumably, both boards have acted under legislative authority. *Board of Education v. Kenan,* 112 N. C., 566, 17 S. E., 485. The beneficiary of such action, it seems to me, is the proper person to assert whatever claim he may have. But he is not a party. Nor is it permissible to determine the validity of his appointment here. *Davis v. Moss,* 81 N. C., 303.

Whose rights are being adjudicated?

The authorities support a dismissal. *Realty Corp. v. Koon,* 216 N. C., 295, 4 S. E. (2d), 850; *Burton v. Realty Co.,* 188 N. C., 473, 125 S. E., 3; *Kistler v. R. R.,* 164 N. C., 365, 79 S. E., 676; *Parker v. Bank,* 152 N. C., 253, 67 S. E., 492; *Millikan v. Fox,* 84 N. C., 107; *Blake v. Askew,* 76 N. C., 325; *McKethan v. Ray,* 71 N. C., 165; *Bates v. Lilly,* 65 N. C., 232. The proceeding is not under the Declaratory Judgment Act, and no effort has been made to invoke its provisions. Nor would the record suffice for the purpose. *Wright v. McGee,* 206 N. C., 52; 16 Am. Jur., 330. Jurisdiction is always essential. *Harrell v. Welstead,* 206 N. C., 817, 175 S. E., 283.

Constitutional questions are properly decided by the courts only in the exercise of the judicial power vested in them by the Constitution. *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22. "It is well understood that this

duty which sometimes devolves upon the courts, not by reason of any superiority in the judicial to the legislative department of the State, but of necessity, when the powers of the people in their Constitution and those reposed in their Legislature are brought in conflict, is to be exercised only as the last resort and when forced upon the court"—*MacRae, J.*, in *Board of Education v. Kenan, supra.*

My vote is for a dismissal of the proceeding.

WINBORNE, J., joins in this opinion.

CHARLIE MAE HARSHAW v. MARY ELIZA HARSHAW, JOHN MICHAUX HARSHAW, JACOB NEWTON HARSHAW AND WIFE, FAYE H. HARSHAW, M. R. HARSHAW AND WIFE, CHLOMA HARSHAW.

(Filed 8 October, 1941.)

1. Libel and Slander § 7c—

As a general rule, pleadings are privileged when pertinent and relevant to the subject under judicial inquiry, however false and malicious the defamatory statements may be.

2. Same—When libelous matter alleged in answer is not available as defense because of estoppel by judgment, such matter is not privileged.

Plaintiff instituted proceedings against the children of deceased by a former marriage to recover a death benefit fund due her as widow and for the allotment of a year's allowance for herself and two children. Consent judgment was therein entered that the plaintiff was entitled to a substantial part of the sums demanded, which judgment expressly recited that the parties agreed that plaintiff's children were legitimate children of deceased. Thereafter plaintiff instituted two proceedings, one for the allotment of dower and one on behalf of her children for partition of lands. Defendants filed answer in both proceedings in which they alleged that plaintiff had not been legally married to deceased and that her two children were illegitimate. *Held:* Defendants were estopped by the recitation in the prior consent judgment from again asserting the defense that plaintiff was not the lawful wife of the deceased and that her children were illegitimate, and therefore such matter was not relevant and available as a defense in the subsequent proceedings and were not privileged, and nonsuit was erroneously entered in plaintiff's later action for libel.

3. Judgments § 30—

A final judgment judicially determining a particular fact involved is conclusive upon the parties or their privies as to such fact in any subsequent proceeding, whether involving the same subject matter or not, when such fact is again in issue between them.

4. Libel and Slander § 2—

A statement inferring that an innocent woman was guilty of incontinence and that her children are illegitimate is libelous. C. S., 2432.

5. Libel and Slander § 5—

The filing of answers in the Superior Court constitutes a publication of defamatory statements contained therein.

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

APPEAL by plaintiff from *Phillips, J.*, at July Term, 1941, of McDOWELL. Reversed.

This was an action for libel. The plaintiff sought to recover damages for the publication of alleged libelous matter contained in the written answers filed by the defendants in certain proceedings in the Superior Court of Caldwell County, wherein it was stated that the plaintiff was the mother of two illegitimate children and had not been lawfully married to her late husband. It was alleged that the defamatory statements contained in the answers were not relevant to the issues nor available as a defense in those proceedings.

The defendants admitted that the statements set out in the complaint were contained in the answers referred to, but alleged that the matters complained of were stated in pleadings in court, and constituted pertinent and legitimate defenses to proceedings which involved the plaintiff's right to dower in the lands of J. M. Harshaw, her alleged husband, and the right of her children to share in the real estate as his heirs at law, and were therefore privileged.

Plaintiff offered evidence tending to show that she was lawfully married to J. M. Harshaw, and that her two children were born of this marriage; that after the death of her husband she and her two children instituted action in the Superior Court of McDowell County against these same defendants, who are the children of J. M. Harshaw by a former marriage, for the recovery of a death benefit fund due her as widow on the death of her husband, and also for the allotment of year's allowance for herself and her children; that this action was terminated by a consent judgment wherein she was adjudged entitled to a substantial part of the sums demanded, and wherein was considered and adjudicated in her favor her claim for year's allowance as widow of J. M. Harshaw, including allowance for her children; that in the judgment it was expressly recited that "plaintiff and defendants have agreed that the said Macon Ann Harshaw and Charles Edgar Harshaw, the infant children of the plaintiff, Charlie Mae Harshaw, are the legitimate children of said J. M. Harshaw, deceased," and it was further recited in the judgment that the action was for the purpose of having the rights of the parties relating to the plaintiff's year's support and to the death benefit fund, "including all questions as to who is the lawful wife of said J. M. Harshaw and who are his lawful children, determined and established by the judgment of the court."

Plaintiff offered the judgment in evidence and testified she would not have consented to the signing of the judgment unless it had adjudged that she was the lawful widow, and her children declared to be the legitimate children, of J. M. Harshaw.

Plaintiff offered the court records tending to show that subsequent to the rendition of the judgment referred to she instituted two proceedings in the Superior Court of Caldwell County, one for the assignment of dower, and the other on behalf of her two children for partition of lands of J. M. Harshaw in that county, and she introduced the answers filed by these defendants in both those proceedings in which were contained the defamatory matters set out in her complaint. Plaintiff was permitted to amend her pleading to conform to the proof by alleging that the defendants were estopped by the judgment in the Superior Court of McDowell County, in the suit between the same parties, wherein her marriage and the legitimacy of her children were judicially established.

At the conclusion of plaintiff's evidence, defendants' motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Robert W. Proctor and E. P. Dameron for plaintiff, appellant.
Pritchett & Strickland and Mull & Patton for defendants, appellees.

DEVIN, J. The appeal presents the single question whether the plaintiff may be permitted to maintain her action for libel when the defamatory matter complained of was contained in pleadings filed in proceedings in a court of competent jurisdiction. The defense is that pertinent statements contained in pleadings in court are absolutely privileged, and no action thereon can arise.

Undoubtedly, the general rule is that pleadings are privileged when pertinent and relevant to the subject under judicial inquiry, however false and malicious the defamatory statements may be. *Baggett v. Grady,* 154 N. C., 342, 70 S. E., 618; *Nissen v. Cramer,* 104 N. C., 574, 10 S. E., 676; 33 Am. Jur., 145. But in this case it is made to appear from the plaintiff's evidence that in a former suit between the same parties, wherein the questions of the legitimacy of her children and her lawful marriage were being litigated, these defendants solemnly agreed to a judgment containing the recital that the plaintiff was the widow of J. M. Harshaw, and that her children were his legitimate children. Thereafter, the defendants filed answers in two other proceedings in court between the same parties concerning the same or similar subject matter, and again set out the defamatory charges of incontinence on the part of the plaintiff and the illegitimacy of her children. Under these circumstances, may the defendants be permitted to interpose the defense

of absolute privilege to an action for libel for repeating charges which by solemn agreement and by judicial determination had been declared untrue? We cannot so hold. We think the defendants were estopped by the judgment, and that the defamatory matter set up in the answers was not relevant and available as a defense. The occasion in this respect was no longer one of absolute privilege. The defendants were stripped of the protection accorded statements in judicial pleadings by the former judgment to which they were parties and to which they agreed, and may not now be heard to claim privilege for the publication of defamation which it thus had been judicially established was false. *Armfield v. Moore,* 44 N. C., 157; *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421; *Gibbs v. Higgins,* 215 N. C., 201, 1 S. E. (2d), 554. "There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court." 2 Freeman on Judgments, sec. 670.

That the matter contained in the answers, of which plaintiff complains, is libelous (C. S., 2432; *Bryant v. Reedy,* 214 N. C., 748, 200 S. E., 896), and that the filing of the answers in the Superior Court of Caldwell County constituted publication, seems beyond question. *Hedgepeth v. Coleman,* 183 N. C., 309, 111 S. E., 517; *Davis v. Retail Stores,* 211 N. C., 551, 191 S. E., 33; *Flake v. News Co.,* 212 N. C., 780, 195 S. E., 55.

We conclude that the court below was in error in allowing motion for judgment of nonsuit, and that the judgment must be

Reversed.

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

ELIZABETH E. FLETCHER, ADMINISTRATRIX OF JAMES RALPH FLETCHER, DECEASED, v. SECURITY LIFE AND TRUST COMPANY.

(Filed 8 October, 1941.)

1. Insurance § 38—

In construing double indemnity clauses in life policies, the terms "accidental death" and "death by external accidental means" are not synonymous, since the second term connotes not only that death be unforeseen and unexpected but also that the means motivating or causing death be unusual, unforeseen, and fortuitous.

2. Same—

A spinal anesthesia was administered insured preparatory to a gall bladder operation. The anesthetic affected the respiratory system and caused death. *Held:* Even though the death was accidental in that it was unforeseen and unexpected, the cause of death was the administration of the anesthetic, which was not accidental but was voluntarily authorized and intentionally given, and therefore the death was not caused by "external accidental means" within the terms of the policy in suit.

3. Same—

A spinal anesthesia was administered insured preparatory to a gall bladder operation. Shortly thereafter insured's respiratory system was adversely affected, and, in the excitement caused by the sudden emergency, insured's head was lowered although the proper treatment would have been to raise the head in such circumstances. *Held:* Even conceding that the lowering of the head was accidental and produced death, the act of lowering the head left no visible contusion or wound on the exterior part of insured's body, prescribed as a prerequisite to the recovery of double indemnity in the policy in suit.

APPEAL by plaintiff from *Phillips, J.*, at May Term, 1941, of YADKIN. Affirmed.

Civil action to recover under the double indemnity provision of a life insurance policy.

Plaintiff's deceased, while confined in a hospital for treatment for chronic inflammation of the gall bladder, agreed to submit to an operation therefor. A spinal anesthesia was administered. Shortly thereafter and before the operation was begun he complained of shortness of breath and his respiration became graduated and shallow. Notwithstanding the emergency efforts of the doctors his respiratory system became completely paralyzed or anesthetized and the patient died.

Spinal anesthesia is injected below the level of the site of the contemplated operation. The extent of its effect upward is due partly to gravity and partly to the force with which it is injected. Its upward rise is controlled largely by lowering or raising the patient's head. The further his head is lowered the more apt it is that the fluid will reach his respiratory system and brain center. There is evidence that after his respiratory system began to fail his head was lowered still further.

The injection of the spinal anesthesia was of the kind and under the circumstances in known and approved use in the medical profession and was given or administered in the usual and ordinary way. It was the usual and ordinary dose as to volume and as to amount, and the point at which injection was made in the spinal column was the point ordinarily used for injections. The force used was not unusual and the instruments used were the proper ones.

The provisions in the policy upon which suit was instituted is as follows:

"The company will pay the beneficiary double the face amount of this policy upon receipt of due proof that the death of the insured occurred, independently and exclusively of all other causes, from accidental drowning or as a direct result of bodily injuries effected through external, violent and accidental means, where there is a visible contusion or wound on the exterior part of the body."

At the close of the evidence for the plaintiff, the court, on motion of the defendant, dismissed the action and entered judgment as of nonsuit. Plaintiff excepted and appealed.

W. M. Allen and Hoke F. Henderson for appellant.
Manly, Hendren & Womble and I. E. Carlyle for appellee.

BARNHILL, J. Are the terms "accidental death" and "death by external accidental means" synonymous? Plaintiff's right to recover depends, in a large measure, upon the answer.

Upon this question there is a distinct cleavage of judicial opinion. Some courts hold that they are synonymous—others that they are not. With us it is not a novel question. This Court has already adopted the view that there is a distinct difference in the meaning of the two terms and that the coverage of the policy is materially affected by the use of the one or the other. *Scott v. Ins. Co.*, 208 N. C., 160, 179 S. E., 843; *Harris v. Ins. Co.*, 204 N. C., 385, 168 S. E., 208; *Mehaffey v. Ins. Co.*, 205 N. C., 701, 172 S. E., 331. This interpretation, we think, is supported by the better reasoning and is in accord with the weight of authority.

"Accidental" means that which happens by chance or fortuitously, without intent or design and which is unexpected, unusual and unforeseen. 29 Am. Jur., 706-7, sec. 931. "Accidental means" refers to the occurrence or happening which produces the result and not to the result. That is, "accidental" is descriptive of the term "means." The motivating, operative and causal factor must be accidental in the sense that it is unusual, unforeseen and unexpected. Under the majority view the emphasis is upon the accidental character of the causation—not upon the accidental nature of the ultimate sequence of the chain of causation.

The insurance is not against an accidental result. To create liability it must be made to appear that the unforeseen and unexpected result was produced by accidental means. The stipulated payment is to be made only if the death, though unforeseen and unexpected, was effected by means which are external, violent and accidental. *Harris v. Ins. Co., supra; Mehaffey v. Ins. Co., supra; Scott v. Ins. Co., supra; Ins. Co. v. Belch*, 100 Fed. (2d), 48 (overruling *Ins. Co. v. Dodge*, 11 Fed. [2d], 486, relied on by plaintiff); *Order of United Commercial Travel-*

ers v. Shane, 64 Fed. (2d), 55; *Landress v. Ins. Co.,* 291 U. S., 491, 78 L. Ed., 934. See also 13 A. L. R., 662, 39 A. L. R., 83, 59 A. L. R., 1295; 29 Am. Jur., 708; Cornelius on Accidental Means, pp. 7 and 8.

If the death resulted from the use of ordinary means voluntarily employed in a not unusual or unexpected way it is not produced by accidental means. *U. S. Mutual Accident Asso. v. Barry,* 131 U. S., 100, 33 L. Ed., 60, Anno. 7 A. L. R., 1131. Hence, it has been held that unanticipated injuries or death resulting from the use of an anesthetic, *Davis v. Ins. Co.,* 73 Fed. (2d), 330, or the administration of Butyn, *Order of United Commercial Travelers v. Shane, supra,* is not produced by accidental means.

In addition to the usual and expected sedative effect of the anesthetic injected into the spine of the deceased, there occurred an unexpected result due to the collapse of the respiratory system. If it be conceded that there was an accidental death caused by external means—the injection of the anesthetic—the fact still remains that the "means" was not accidental but was voluntarily authorized and was intentional. *Davis v. Ins. Co., supra;* 96 A. L. R., 599; *U. S. Mutual Accident Asso. v. Barry, supra;* 29 Am. Jur., 714.

But the plaintiff contends that she offered evidence tending to show that the head of the deceased was accidentally or unintentionally lowered after the anesthetic had begun to affect the respiratory system of the deceased and that the lowering of the head tended to further increase the risk and caused the death. She contends that this evidence brings her case within the provisions of the policy. This contention cannot be sustained. If we concede that this evidence tends to show "death by accidental means" no visible contusion or wound on the exterior part of the body was caused thereby. There is no causal connection between the wound made by the injection and such "death by accidental means." The wound was voluntarily made with the full consent of the deceased. Such death by accidental means arose out of circumstances which developed thereafter.

If the cause of the death of plaintiff's intestate is referred to the injection of the anesthetic, only an accidental death from an intentional act performed in the usual and ordinary way, with the full consent of the deceased, is established. The element of accidental means is absent. If we relate it to the accidental lowering of the patient's head in the excitement caused by the sudden emergency which arose when his respiratory system became affected, there was no exterior visible wound or contusion caused thereby. Hence, the judgment of the court below is in accord with the division of thought on the subject to which we adhere.

Affirmed.

WHITE WAY LAUNDRY, INC., AND S. T. INGRAM AND R. B. LEMMOND v. W. D. UNDERWOOD, TRADING UNDER THE FIRM NAME OF W. D. UNDERWOOD COMPANY, AND A. B. FARQUHAR COMPANY, LIMITED.

(Filed 8 October, 1941.)

1. Appeal and Error § 10e: Judgments § 18—Court may not make order substantially affecting rights of parties out of term and outside district except by consent or unless authorized by statute.

Upon the hearing of an order to show cause why certain temporary injunctions granted in the cause should not be continued, the nonresident defendant made special appearance and moved to dismiss for want of valid service on it, and the resident defendant introduced an affidavit by the nonresident defendant to the effect that the nonresident was a partnership and not a corporation. The court held that the affidavit did not constitute a general appearance by the nonresident and plaintiff appealed. The nonresident made special appearance and moved to dismiss the appeal. The resident defendant, after expiration of the term, filed exceptions to plaintiffs' statement of case on appeal. Upon the hearing to settle case on appeal upon the date set out of term and out of the district, the court found that the nonresident had theretofore made a general appearance and that the appeal was thereby rendered moot. *Held:* The power of the court was limited to settlement of case on appeal, C. S., 644, and the court was without power to find that the nonresident had made a general appearance and to dismiss the appeal as moot.

2. Evidence § 1—

The courts will take judicial notice of the political subdivisions of the State and will note the judicial districts in which the respective counties lie.

APPEAL by defendant A. B. Farquhar Company, Limited, from *Stevens, J.*, at Chambers in Warsaw, Duplin County, North Carolina, on 9 August, 1941—action pending in Lee County.

Civil action for recovery for breach of warranty as to a boiler.

Plaintiffs in their original complaint allege that defendant A. B. Farquhar Company, Limited, is a corporation.

It appears that in this action two notices to show cause why certain temporary injunctions should not be continued to final hearing, and motion to dismiss warrant of attachment issue herein, came on for hearing before Stevens, Judge presiding over Superior Court of Lee County, of Sanford, on 31 January, 1941. On such hearing, the attorney for defendant Underwood introduced in evidence an affidavit of Francis Farquhar, in which it is stated that he is "treasurer of the A. B. Farquhar Company, Limited, a partnership association organized under the laws of the State of Pennsylvania," and in which it is further stated: "This affidavit is made solely for the use of W. D. Underwood and is

not an appearance for A. B. Farquhar Company, Limited." Thereupon, plaintiffs moved the court to rule and hold that the filing of this affidavit constituted a general appearance by the A. B. Farquhar Company, Limited, which had prior thereto filed in this cause two special appearances and moved to dismiss for that it is a partnership, and consequently the attempted service of summons on Secretary of State of the State of North Carolina for it, is void—the ruling upon which the court had not acted. The court overruled the motion. Plaintiffs excepted. Stevens, Judge, at said time and place, entered an order, continuing the restraining orders, and, by consent of plaintiffs and W. D. Underwood, dissolving the attachment, and in which "it is further found as a fact that the affidavit of Francis Farquhar introduced at this hearing does not constitute a general appearance for the defendant A. B. Farquhar Company, Limited." Plaintiffs objected and excepted to that portion of said order finding that the said affidavit does not constitute a general appearance for the A. B. Farquhar Company, Limited, and appealed to the Supreme Court.

On 14 February, 1941, plaintiff made statement of case on appeal and served copy on W. D. Underwood Company, and had the sheriff of Lee County serve a copy on "D. B. Teague, attorney for A. B. Farquhar Company, Limited." Defendant Underwood filed exceptions to case on appeal as served by plaintiffs. Defendant A. B. Farquhar Company, Limited, through its attorneys, D. B. Teague, and Gavin, Jackson & Gavin, entered special appearance for the purpose of the motion only, reserving its right to be heard on special appearances theretofore filed, and moved to dismiss the appellants' statement of case on appeal for the following reasons, briefly stated: (1) That the appellants did not give notice of appeal in open court at the time of the rendition of the order from which appeal is taken; (2) that the appellants have not given notice of appeal as required by C. S., 642, and, hence, service as made is too late; and (3) for that the order is interlocutory and the appeal is premature.

The January-February Term, 1941, of Superior Court of Lee County was a two weeks term, and lasted through 4 February, 1941.

Thereafter, Stevens, Judge, set 3 o'clock p.m., on 8 August, 1941, and his office in Warsaw, North Carolina, as the time and place for settling said case on appeal, at which time and place counsel for plaintiffs and the defendants W. D. Underwood and A. B. Farquhar Company, Limited, were present. Counsel for plaintiff moved that the court find the facts and sign an order thereon. Whereupon, Stevens, Judge, after finding facts substantially as hereinabove set out, overruled the motion of A. B. Far-

quhar Company, Limited, to dismiss the plaintiffs' statement of case on appeal and further finds and concludes as follows: "On consideration of the third ground set out, it appearing that pending plaintiffs' appeal which is prosecuted for the sole purpose of obtaining a ruling of the Supreme Court, that the defendant A. B. Farquhar Company, Limited, had prior to 31 January, 1941, entered a general appearance in this court; and the undersigned finding that the said A. B. Farquhar Company, Limited, had since 31 January, 1941, upon the facts found, entered an appearance which the undersigned holds is in fact and in law a general appearance in this cause, and has thereby rendered plaintiffs' appeal moot, the undersigned declines to settle and certify case on appeal to the Supreme Court."

Defendant A. B. Farquhar Company, Limited, excepts and appeals to Supreme Court, and assigns error.

K. R. Hoyle for plaintiffs, appellees.
D. B. Teague and E. L. Gavin for defendant, appellant.

WINBORNE, J. Appellant challenges the authority of Stevens, J., after adjournment of January-February Term, 1941, of Superior Court of Lee County, and when in another district, to find facts upon which to hold, and to adjudge that, after the entry of the order from which plaintiffs had appealed to Supreme Court, appellant had made a general appearance in the cause, thereby rendering moot the question involved on appeal by plaintiffs then pending. The uniform decisions of this Court sustain the challenge. *Branch v. Walker,* 92 N. C., 87; *Delafield v. Construction Co.,* 115 N. C., 21, 20 S. E., 167; *May v. Ins. Co.,* 172 N. C., 795, 90 S. E., 890; *Dunn v. Taylor,* 187 N. C., 385, 121 S. E., 659; *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1; *S. v. Crowder,* 195 N. C., 335, 142 S. E., 222; *Turnage v. Dunn,* 196 N. C., 105, 144 S. E., 521; *Drug Co. v. Patterson,* 198 N. C., 548, 152 S. E., 632; *Hinnant v. Ins. Co.,* 204 N. C., 307, 168 S. E., 206; *Pendergraph v. Davis,* 205 N. C., 29, 169 S. E., 815; *Bank v. Hagaman,* 208 N. C., 191, 179 S. E., 759, and others.

In *Bisanar v. Suttlemyre, supra,* the Court said: "It is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause, or to make an order substantially affecting the rights of the parties, outside of the county in which the action is pending," citing numerous decisions.

While it is provided by statute, C. S., 644, that when the judge from whose ruling appeal is taken to Supreme Court, has left the district before notice of disagreement as to case on appeal, he may settle the case

on appeal without returning to the district, he has no authority to do more, except by consent, which is lacking in the present case.

In this connection the Court, in accordance with a well established principle (*S. v. R. R.*, 141 N. C., 846, 54 S. E., 294), takes judicial notice of the political subdivisions of the State, and notes that Lee County, where the present action is pending, is in the Fourth Judicial District, and that Warsaw, where the order of Stevens, J., was made, is in Duplin County in the Sixth Judicial District.

The decision here is without prejudice to the rights of the parties on hearing of question when and if presented at appropriate time and place before a judge authorized to act.

Reversed.

GEORGE W. SMITH v. McDOWELL FURNITURE COMPANY, A CORPORATION, WILLIAM E. STEVENS, TRUSTEE IN BANKRUPTCY OF McDOWELL FURNITURE COMPANY, AND J. H. L. MILLER AND FRED C. MORRIS, PARTNERS, TRADING AS BUILDERS SUPPLY COMPANY, A PARTNERSHIP.

(Filed 8 October, 1941.)

1. Removal of Causes § 4a—

In determining the question of separability, the allegations of the complaint control, and when the complaint states a cause of action against defendants as joint tort-feasors the motion of the nonresident defendant to remove to the Federal Court on the ground of diversity of citizenship and separable controversy must be denied.

2. Torts § 4—

In law the term "joint tort-feasors" includes those who commit separate wrongs without concert of action or unity of purpose, when the separate wrongs are concurrent as to time and place and unite in setting in operation a single, dangerous and destructive force which produces a single and indivisible injury, and plaintiff may consistently and properly join such joint tort-feasors as defendants in one action.

3. Removal of Causes § 4a—Complaint held to allege cause of action against defendants as joint tort-feasors, and cause is not separable.

A complaint alleging that one defendant maintained a pipe over and across a street through which it forced steam, forming a blanket of fog or steam in the street, that plaintiff, while operating his car along the street, suddenly ran into this bank of fog or vapor which completely blinded him, that at the same time the agent of the other defendants was driving a car in the opposite direction along the street in a careless and reckless manner and that owing to plaintiff's inability to see because of the steam vapor and owing to the high rate of speed and reckless manner in which the other car was being driven, a collision occurred, proximately causing serious personal injury to plaintiff, and that the wrongful acts of

the defendants concurred in causing such injury, *is held* to state a cause of action against defendants as joint tort-feasors and the cause alleged is not separable.

APPEAL by defendant McDowell Furniture Company from *Gwyn, J.*, at June Term, 1941, of MCDOWELL. Affirmed.

Petition for removal to United States District Court by defendant McDowell Furniture Company on the grounds of diversity of citizenship and separable controversy.

Plaintiff instituted this action to recover damages for personal injuries. It is alleged in the complaint, in substance, that the defendant, in the operation of its plant in Marion, N. C., maintains a steam pipe line leading from the boiler to the large radiators located in the building, thence through the wall to the western margin of Henderson Street and that while its plant is in operation steam or vapor is forced through the pipe over and across Henderson Street, forming a blanket of fog or steam in the street; that plaintiff was operating an automobile along Henderson Street and suddenly ran into this bank of steam or vapor which completely blinded him; that at the same time the agent of the other defendants was operating an automobile on Henderson Street in a reckless and careless manner and at a high rate of speed, going in the opposite direction; that owing to his inability to see due to the steam vapors and the high rate of speed and reckless manner in which the other automobile was being operated a collision occurred, proximately causing serious personal injuries to him; and that the said wrongful acts of said defendants concurred in causing such injuries.

Defendant made a special appearance and moved to dismiss. The motion was denied and the defendant gave notice of appeal and obtained an extension of time within which to serve case on appeal, but the appeal was not perfected. Thereafter, and within the time to answer, defendant filed petition to remove to the Federal Court. The clerk denied the petition and the defendant appealed.

When the appeal from the clerk came on to be heard before the judge below he concluded that the complaint did not state a separable cause of action. For that and other reasons set forth in the judgment the order of the clerk was affirmed and the petition was denied. Defendant McDowell Furniture Company excepted and appealed.

G. F. Washburn and P. J. Story for plaintiff, appellee.
Heazel, Shuford & Hartshorn for appellant McDowell Furniture Company.

BARNHILL, J. The motion to remove is based on the allegation of diversity of citizenship and separable controversy. The diversity of

citizenship is not controverted. Does the complaint state a separable cause of action? This is the primary question presented.

The test of separability lies in the complaint and the cause of action therein stated. If the cause of action, as stated, is not separable the motion must be denied. *Lackey v. R. R.*, 219 N. C., 195; *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; *Newberry v. Fertilizer Co.*, 202 N. C., 416, 163 S. E., 116; *Brown v. R. R.*, 204 N. C., 25, 167 S. E., 409; *Fenner v. Cedar Works*, 191 N. C., 207, 131 S. E., 625; *Timber Co. v. Ins. Co.*, 190 N. C., 801, 130 S. E., 864.

A plaintiff may sue joint tort-feasors in one action and he has the right to have the cause tried as for a joint tort, and in such case no separable controversy exists. *White v. R. R.*, 146 N. C., 340; *Crisp v. Lumber Co.*, 189 N. C., 733, 128 S. E., 146; *R. R. v. Miller*, 217 U. S., 209; *R. R. v. Thompson*, 200 U. S., 206. "Defendant has no right to say that an action shall be several which a plaintiff elects to make joint." *Powers v. R. R. Co.*, 169 U. S., 92, 42 L. Ed., 673; *Crisp v. Lumber Co., supra.*

In law the term "joint tort-feasors" includes those who commit separate wrongs without concert of action or unity of purpose, when the separate wrongs are concurrent as to time and place and unite in setting in operation a single, dangerous and destructive force which produces a single and indivisible injury. *Bost v. Metcalfe*, 219 N. C., 607; *Moses v. Morganton*, 192 N. C., 102, 133 S. E., 421; *Rucker v. Snider Bros., supra*, 26 R. C. L., 746; Cooley on Torts (3rd), 246.

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. *Bost v. Metcalfe, supra; Rucker v. Snider Bros., supra.*

Applying these principles to the facts alleged in the complaint we concur in the conclusion of the court below that the complaint does not allege a separable cause of action. Under the allegations of the complaint neither act alone caused the injury complained of. It was the concurrence of such acts in time and place which inflicted a single and indivisible injury. If the plaintiff prevails the liability of the defendants cannot be apportioned. Each is liable for all the resulting injuries.

As in no event is the cause removable, we need not discuss other questions presented.

The judgment below is

Affirmed.

C. Q. WALKER v. HICKORY PACKING COMPANY.

(Filed 8 October, 1941.)

1. Food § 13—Evidence held insufficient for jury on cause in tort by retailer-consumer against manufacturer of spoiled food.

Plaintiff's evidence was to the effect that he is a retailer and bought lard from defendant manufacturer, some of which he consumed in his own household, that the bucket of lard which he took home, although white and hard on top, was rancid underneath, that he ate some of the lard in a meal prepared by his daughter and that as a result thereof he sustained personal injuries. Plaintiff further testified that the lard had an "odor like carrion," that the biscuits which were prepared with the lard, some of which he ate, had a rank odor and that when pulled open "they knocked you down." *Held:* Defendant's motion to nonsuit on the cause of action sounding in tort should have been allowed, if not upon the issue of negligence for want of evidence as to how the lard was manufactured or what caused it to be bad or when it became rancid, then upon the issue of contributory negligence.

2. Appeal and Error § 41—

When it is determined on appeal that nonsuit should have been allowed on plaintiff's cause of action sounding in tort, defendant's assignment of error addressed to the refusal of the court to require plaintiff to elect between tort and contract is eliminated.

3. Foods § 13—

Evidence that a retailer bought lard from a manufacturer, that the lard, although white and smooth on top in the container buckets, was rancid and spoiled underneath, *is held* sufficient to support a recovery on a cause of action for breach of implied warranty to the extent of the amount paid for the lard.

SEAWELL, J., dissents.

APPEAL by defendant from *Gwyn, J.*, at April Term, 1941, of RUTHERFORD.

Civil action by dealer and ultimate consumer to recover of manufacturer for alleged negligence and breach of contract in the manufacture and sale of food products intended for human consumption.

Two causes of action are set out in the complaint, both bottomed on the same state of facts, (1) the one based on negligence, (2) the other on breach of warranty.

In the first cause of action, plaintiff alleges that during the summer of 1938 he was in the mercantile business in the town of Ruth, Rutherford County, and purchased from the defendant, a processor of meat and meat products, for resale and consumption, numerous quantities of lard, obtaining same from defendant's truck as it called at his store, usually on Tuesdays and Fridays of each week; that on 24 June he purchased 7 or more four-pound buckets of lard which were negligently

prepared by the defendant, rancid and unfit for human consumption; that on Sunday night following, he took one of the buckets to his home; that on the next morning his daughter used some of the lard in preparing breakfast, including biscuits; that plaintiff ate the biscuits, became nauseated, and suffered much pain as a result thereof. Plaintiff further alleges that he sold lard from the other buckets to customers who were unable to use it or were rendered sick from its use, and that as a consequence his customers left him, forcing him out of business to his great injury and damage.

In the second cause of action, the plaintiff reaffirms the facts as set out in the first cause of action and seeks to recover the damages alleged on the theory of implied warranty.

The defendant denied liability, pleaded contributory negligence and that the plaintiff's injuries, if any as alleged, were not within the contemplation of the contracting parties.

Plaintiff testified that he is 56 years of age and weighs 240 pounds; that he was nauseated from the lard his daughter used in cooking breakfast; that he purchased the lard from defendant's agent; that it was in a four-pound bucket bearing the label: "Hickory Packing Company—Pure Hog Lard"; that the bucket was closed with an unsealed lid which was easily removable; that he walked half a mile or more to his store after breakfast and later called a doctor who prescribed a laxative.

Plaintiff further testified: "The biscuits had a rank odor. We examined the lard in the container after breakfast. It looked hard on top, where she ran her finger down in the middle of it, like most ladies do, down so deep it got rotten and had an odor. It was as rotten as lard gets, and had an odor like carrion. . . . (Cross-examination) I farmed all my life up to the last four or five years, and have rendered lard. I had been buying lard from the Hickory Packing Company several months before this bad lard was purchased. Q. These biscuits did not smell as badly as biscuits you have made of your own lard? A. Absolutely. Q. How bad did they smell? A. When you pulled them open they knocked you down. Absolutely the lard was rotten, the top part was white and solid and it was rotten after you went into it. I could feel it. I could see it and I could smell it."

Dr. C. F. Gold, who was called to attend the plaintiff, testified: "I visited him upon his call, at the store. He was waiting on customers. He said he was nauseated and had been having some trouble with his stomach. I told him to take a laxative. . . . I suppose I was in the store with him 10 or 15 minutes. . . . His only complaint was that he was nauseated and vomiting. Most often in summer-time a lot of people have intestinal upsets. I could not swear the lard caused it, could not be positive. From my examination of him and his talk, he needed elimination, regardless of what caused the nausea. . . . The

lard Mr. Walker showed me there at the time I prescribed for him appeared to have a very rancid, bad odor."

The defendant offered no evidence.

Issues of negligence, contributory negligence, warranty, breach and damages were submitted to the jury and answered in favor of the plaintiff.

From judgment on the verdict, the defendant appeals, assigning errors.

Boucher & Boucher and Stover P. Dunagan for plaintiff, appellee.
Eddy S. Merritt and C. W. Bagby for defendant, appellant.

STACY, C. J. The impression is gained from a careful perusal of the record that the demurrer to the evidence on the first cause of action should have been sustained, if not for failure to establish actionable negligence on the part of the defendant, then upon the ground of contributory negligence.

There is no evidence tending to show how the lard was manufactured, or what caused it to be bad, or when it became rancid. It is in evidence, however, that the lard was "rotten and had an odor like carrion" when used by the plaintiff some time after its purchase, and that the biscuits which he ate "had a rank odor . . . when you pulled them open they knocked you down." This defeats recovery on the first cause of action. *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108.

It also eliminates the assignment of error addressed to the refusal of the court to require the plaintiff to elect upon which cause of action he would proceed. *Craven County v. Investment Co.,* 201 N. C., 523, 160 S. E., 753; *Irvin v. Harris,* 182 N. C., 647, 109 S. E., 867; *Huggins v. Waters,* 167 N. C., 197, 83 S. E., 334; *Hawk v. Lumber Co.,* 145 N. C., 48, 58 S. E., 603; *Reynolds v. R. R.,* 136 N. C., 345, 48 S. E., 765; *Davis v. Van Camp Packing Co.,* 189 Iowa, 775, 176 N. W., 382; 26 C. J., 787.

The evidence is sufficient to support a recovery on the second cause of action to the extent of the amount paid for the lard. The action is between the dealer-purchaser and manufacturer-vendor. *Thomason v. Ballard & Ballard Co.,* 208 N. C., 1, 179 S. E., 30; *Swift & Co. v. Aydlett,* 192 N. C., 330, 135 S. E., 141; *Causey v. Davis,* 185 N. C., 155, 116 S. E., 401.

It results, therefore, that judgment of nonsuit will be entered on the cause of action sounding in tort, and a new trial awarded on the cause of action sounding in contract.

Reversed on first cause of action.

New trial on second cause of action.

SEAWELL, J., dissents.

STATE v. ED AYRES.

(Filed 8 October, 1941.)

Intoxicating Liquor § 8—Whether owner had knowledge that car was being used in transportation of intoxicating liquor held for jury upon the evidence.

An instruction that if the jury should find by the greater weight of the evidence that petitioner, the owner of a car seized while being used in the unlawful transportation of intoxicating liquor, aided her husband in attempting flight to avoid arrest, to answer in the affirmative the issue of petitioner's knowledge that the car was being used for the transportation of liquor, is error when petitioner testifies that she did not know her husband was transporting liquor and that she thought the sheriff was pursuing them to serve a capias on her husband for a past offense, there being no evidence inconsistent with such belief on the part of petitioner, and the credibility of petitioner's testimony being for the jury.

APPEAL by petitioner, Dessie Ayres, from *Sink, J.*, at July Civil Term, 1941, of AVERY. New trial.

This was a proceeding to reclaim an automobile which had been seized by the sheriff while it was being used in the unlawful transportation of intoxicating liquor. Ch. 1, Public Laws 1923, section 3411 (f); Michie's Code. At the time of its seizure the automobile was being driven by Ed Ayres, who was arrested and charged with the offense. Thereafter Mrs. Dessie Ayres filed petition in accordance with the statute for the release of the automobile, claiming it as her own and alleging that its use in transporting liquor was without her knowledge and consent. The sheriff filed answer admitting that petitioner was the owner of the automobile, but asserting that she was present in the automobile at the time, and that transportation of the liquor was with her knowledge and consent. The issue thus raised was tried before a jury, who found for their verdict that the use of the automobile in the unlawful transportation of liquor was not without petitioner's knowledge and consent. From judgment on the verdict ordering sale of the automobile, petitioner appealed.

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

George L. Greene and Charles Hughes for petitioner, appellant.

DEVIN, J. The prohibition statute, in force at the time and place where this controversy arose, empowers the sheriff, upon discovering a person in the act of transporting intoxicating liquor, to take possession of the vehicle used in the unlawful transportation and to arrest the

person in charge thereof, the vehicle to be released from custody upon a claimant therefor giving proper bond for its return.

The statute further provides: "The court, upon the conviction of the person so arrested, shall . . ., unless the claimant can show that the property seized is his property, and that the same was used in transporting liquor without his knowledge and consent, with the right on the part of the claimant to have a jury pass upon his claim, order a sale by public auction of the property seized."

Upon the trial of the issue raised by the petition of Mrs. Dessie Ayres for the restoration of her automobile, which had been seized by the sheriff while it was being used by her husband, Ed Ayres, in the unlawful transportation of intoxicating liquor, the following pertinent facts were made to appear: It was admitted that the automobile in question was the property of petitioner. Petitioner and her husband on the evening before the seizure of the automobile had spent the night with petitioner's sister in Alleghany County. Petitioner's husband had left the house at seven o'clock next morning with the automobile and returned about eight. She then got in with him and they proceeded on their return to petitioner's mother's in Mitchell County. While they were proceeding through Avery County the sheriff of that county passed the car of the petitioner on the highway, being driven by Ed Ayres, recognized him, turned his car and followed for the purpose of serving a capias on Ed Ayres on account of some previous case. Ed Ayres recognized the sheriff and attempted to escape. The chase extended some distance, but ended with the sheriff's overtaking the car and serving the capias on Ed Ayres. Several cases of whiskey were found in the trunk of the car which was locked. The car was seized.

The petitioner testified she did not know any whiskey was in the car, and that it was being transported without her knowledge and consent. She also testified that when she saw the sheriff pursuing the car, she told her husband to stop, and that she thought the reason her husband was running away was that the sheriff had a capias for him. The sheriff testified that when he overtook the automobile, the petitioner's husband, Ed Ayres, said in her presence that "he told her to watch me (the sheriff), he would watch the road. I understood she was scared at the way he was driving."

In his charge to the jury the court gave the following instruction: "The court charges you as a matter of law that if you shall find by the greater weight of the evidence that petitioner, while the sheriff was in pursuit of her husband at the wheel of her car, aided and abetted her husband by watching the sheriff and he watching the road in order that he might the better make his flight and get-away, then the court charges you to answer the issue" against the petitioner. This instruction was

repeated in language of similar import. To this instruction petitioner duly noted exception and assigns same as error.

An examination of the evidence as it appears in the record leads us to the conclusion that this instruction was erroneous and prejudicial. Evidence that petitioner watched the pursuing sheriff, or aided her husband in attempting flight to avoid arrest on a capias for a past offense, would not necessarily lead to the conclusion that she knew intoxicating liquor was concealed in the trunk of the automobile. On the contrary, she testified she did not know of the presence of the whiskey and she thought her husband was fleeing to avoid service of the capias. The testimony of the sheriff, upon which the instruction excepted to was based, was not inconsistent with the truth of this statement. The credibility of the witness was a matter for the jury.

While it does not affirmatively appear that Ed Ayres has been convicted of unlawful transportation of the whiskey found in petitioner's car, it seems the issue raised by the petition and answer was tried by consent at the civil term.

For the error pointed out there must be a new trial of the issue raised by petitioner's claim that her automobile was being used in unlawful transportation of intoxicating liquor "without her knowledge and consent."

New trial.

DORIES EUGENE DAVIS v. FRANK S. PEARSON, ADMINISTRATOR OF MARIE PEARSON.

(Filed 8 October, 1941.)

1. Evidence § 32—

A party, as witness in his own behalf, may not testify against the administrator of a deceased person as to transactions with the deceased which are essential or material in establishing liability against the estate. C. S., 1795.

2. Same—

In this action against an administrator to recover for personal injuries, defendant filed answer alleging that at the time of the accident causing injury to plaintiff and death of intestate, plaintiff and not intestate was driving the car. *Held:* Plaintiff's testimony that he was unable to drive a car and that at the time of the accident he and one other person were in the car, when taken in connection with other evidence tending to show that intestate was such other person and customarily drove the car, is within the prohibition of C. S., 1795, as being of a transaction with a deceased person material in establishing liability on the part of the estate.

CIVIL ACTION to recover damages for personal injury, tried before *Phillips, J.*, at June Term, 1941, of WILKES.

It is alleged in the complaint that the plaintiff, a young man of 21 years of age, was riding in the automobile of the defendant's intestate, driven by her, a young woman of about the same age, on the late evening of 26 December, 1938, from North Wilkesboro to Statesville; that the automobile was operated at a negligent and unlawful rate of speed, causing it to leave the highway, miss a bridge and land in a creek, thereby injuring the plaintiff and killing the defendant's intestate.

It is denied in the answer that the defendant's intestate was driving the automobile and averred that the plaintiff was driving it; and it is also denied that the automobile was being operated in a negligent and unlawful manner at the time alleged.

The jury answered the issues as to the actionable negligence of the defendant's intestate and the damage of the plaintiff in favor of the plaintiff, and from judgment predicated on the verdict the defendant appealed, assigning errors.

Trivette & Holshouser and W. H. McElwee for plaintiff, appellee.
Hayes & Hayes for defendant, appellant.

SCHENCK, J. The plaintiff, over objection of the defendant, was permitted to testify, in substance, that neither before nor after 26 December, 1938, was he able to operate an automobile; that about 6 o'clock in the afternoon of that day he started from North Wilkesboro to Statesville in an automobile, that there were two people in the automobile, that he went as far as Snow Creek, and the last thing he remembers was he went off in a trance or something like sleep, that it was dark and he could not see anything, that he went off of the road and was knocked unconscious, that he went off the road "where the curve begins right above the bridge," that the road was wet and it was raining and foggy at the time, that there is an extremely steep hill for about 50 yards before the road reaches the bridge; that when he came to after the automobile ran into the creek he was lodged on a rock, that he could not walk and was helped up and carried to the hospital; that the automobile in which he was riding was a blue Packard 1938 or 1939.

Following the testimony of the plaintiff he offered further evidence tending to show that the automobile in which he was riding, a blue Packard, was the automobile of the defendant's intestate, that she was in the automobile at the time, that the plaintiff did not drive an automobile, and that the intestate was seen driving this automobile at other times prior to 26 December, 1938, and that the body of the intestate was found near where the automobile landed in the creek.

The question presented is: Was the testimony of the plaintiff concerning a personal transaction between him and the defendant's intestate

within the contemplation of C. S., 1795? We are of the opinion, and so hold, that the answer is in the affirmative. The transactions contemplated by the statute and concerning which a party to an action is prohibited from being examined as a witness in his own behalf against the administrator of a deceased person are such transactions as are essential or material links in the chain establishing liability against the estate of such deceased person. *Boyd v. Williams,* 207 N. C., 30, 175 S. E., 832.

While it is true the plaintiff did not testify directly that he was riding in an automobile operated by the defendant's intestate, he did testify that he was riding in an automobile in which there were only two persons, and offered other evidence tending to prove that the defendant's intestate was the other person than himself in the automobile and that he did not operate an automobile and that the defendant's intestate did. His testimony that he did not operate an automobile but was riding in an automobile with another person was at least material, if not essential, to the establishment of his case, and was therefore concerning a transaction between the witness, a party, and a deceased person, the defendant's intestate, as contemplated by the statute. "Indeed, an analysis of many cases leads to the conclusion that, where the transactions and communications become an essential *or* material link in the chain establishing liability against the defendant, the philosophy of the statute, as interpreted and applied in the decisions, would exclude them from the consideration of the jury." *Boyd v. Williams, supra.*

Holding as we do that the admission of testimony of the plaintiff above delineated was error, there must be a

New trial.

LOUIS W. SMITH v. BERT MOORE, TRADING AND DOING BUSINESS AS MOORE AUTO SALES.

(Filed 8 October, 1941.)

1. Master and Servant § 21b—

In order for the doctrine of *respondeat superior* to apply it must be made to appear that the relationship of master and servant existed between the wrongdoer and the person sought to be charged, and that the particular act in which the employee was engaged at the time was within the scope of his employment and was being performed in furtherance of his master's business, and proof of general employment alone is not sufficient.

2. Automobiles § 24b—Evidence held insufficient to be submitted to the jury on the doctrine of respondeat superior.

The evidence tended to show that defendant's automobile salesman and a prospective purchaser each were planning a trip to another town with

their respective friends for social purposes, that they joined their parties at the suggestion of the salesman for companionship and their own pleasure and incidentally so that the prospect could drive the demonstrator on the trip over to "try it out" and provide the means of transportation for the return trip. The evidence further tended to show that the prospect drove the demonstrator to the other town and that then the salesman asked the prospect how he liked the car and that after a favorable response nothing further was said in regard to selling the car, but that the parties thereafter engaged in purely social activities and that the accident in suit occurred some several hours later as the salesman was driving the car on the return trip. *Held:* The evidence is insufficient to be submitted to the jury on the doctrine of *respondeat superior.*

APPEAL by defendant from *Gwyn, J.,* at June-July Term, 1941, of RUTHERFORD. Reversed.

Civil action to recover damages for personal injuries received by plaintiff while a passenger on an automobile being operated by one Don Yelton, alleged agent or employee of defendant.

Defendant employed Yelton as an automobile salesman on a commission basis with a drawing account allowance. Yelton owned his demonstration car but operated it with defendant's license tag attached. He used the car both for business and for pleasure. Plaintiff had been regarded as a prospective purchaser and had been interviewed by defendant and by Yelton in September or October, 1940. At the time the automobile was demonstrated to him Yelton worked on his own time and paid his own expenses.

On Sunday afternoon, 5 January, 1941, plaintiff was at the home of Miss Mary Miller, with whom he had been keeping company. They had planned to go to Chimney Rock for dinner. Yelton went to the Miller home just as they were preparing to leave. He inquired as to where they were going. Upon being told he said: "Well, I want you to drive a good automobile. We want you to drive over to Morganton." He went on to say that he and Mrs. Yelton and a Mrs. Twitty were going to take his niece, Mrs. Cox, on her car and wanted plaintiff to drive Yelton's car over and have dinner and all come back together. They were going to the home of Mrs. Cox in Morganton. He said "for me to drive this one over there and we would have dinner and all come back on his car, the one he wanted me to drive around."

Plaintiff and Miss Miller changed their plans, deciding to go with Yelton and his friends to Morganton. After they got out on the porch Yelton said to plaintiff: "Take my car down to the Washburn Filling Station and have five gallons of gas put in it." He replied: "My car has plenty of gas and has a heater and we will go in mine." Yelton replied: "No, I want you to drive this Ford up here and try it out." Plaintiff further testified: "He did not say anything to me on this occa-

sion other than he wanted me to drive this car and try it out on a trip." When they got to Morganton Yelton asked plaintiff how he liked it and plaintiff said: "It handles very nicely." Nothing further was said in respect to plaintiff's use of the car or as to the nature of its operation, and nothing was said about buying or selling.

The parties got together in Morganton at the home of Mrs. Cox about 6:30 or 7:00 o'clock. They remained there about 20 minutes and had cocktails. They then drove around Morganton for about a half-hour, returned and had more cocktails. They had a steak dinner at about 10:30. After dinner the party, other than Mrs. Cox, started back to Rutherfordton on Yelton's car with Yelton driving. The automobile was wrecked and plaintiff received personal injuries.

Appropriate issues were submitted to and answered by the jury in favor of plaintiff.

From judgment thereon defendant appealed.

Boucher & Boucher, Stover P. Dunagan, and Charles F. Gold, Jr., for plaintiff, appellee.

Hamrick & Hamrick for defendant, appellant.

BARNHILL, J. The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person so sought to be charged at the time of and in respect to the very transaction out of which the injury arose. *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.,* 207 N. C., 355, 177 S. E., 126; *Cole v. Funeral Home,* 207 N. C., 271, 177 S. E., 126. Proof of general employment alone is not sufficient to impose liability. *Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820; *Liverman v. Cline, supra.* It must be made to appear that the particular act in which the employee was at the time engaged was within the scope of his employment and was being performed in the furtherance of his master's business. *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852; *Liverman v. Cline, supra,* and cases cited. Liability of the master is not to be determined by the extent of the authority of the agent, but by the purpose of the act in which the agent was engaged at the time. *Grier v. Grier, supra; Riddle v. Whisnant, ante,* 131.

Plaintiff and Miss Miller were invited to join Yelton's party for their companionship and their own pleasure and so that plaintiff could drive Yelton's car to Morganton and thus provide a means of transportation for the return to Rutherfordton. The record clearly discloses that the request that plaintiff drive Yelton's car on the trip over and "try it out" was purely incidental to the primary purpose, which was social. Even

if we concede that the trip in part was for demonstration purposes—and this is not supported by the evidence—the business ended and the party was on as soon as they gathered at the home of Mrs. Cox. All the evidence discloses that from thence on the parties were gathered together for personal pleasure and entertainment. After arriving at the home of Mrs. Cox they had cocktails and then rode around Morganton for some time. They then returned for more cocktails and ended the evening's pleasure with a steak dinner at about 10:30. After this, near midnight, they started on the return trip and the accident occurred. The only reasonable conclusion to be drawn from this evidence is that plaintiff, Yelton and their associates on this occasion were engaged in a purely social enterprise, wholly disconnected from and in nowise related to Yelton's duties as an employee of defendant.

Defendant stresses the contention that Yelton was an independent contractor. He likewise argues that the record fails to disclose any sufficient evidence of negligence. As we are of the opinion that defendant's motion for judgment as of nonsuit should have been allowed the immateriality of these contentions at this time becomes apparent.

The judgment below is

Reversed.

YADKIN VALLEY MOTOR COMPANY, INC., AND MRS. LILLIE MARTIN v. THE HOME INSURANCE COMPANY OF NEW YORK.

(Filed 15 October, 1941.)

1. Insurance § 44b: Automobiles § 4—

A certificate of title issued by the Department of Revenue some two months after the date in question is some evidence of title on the date in question when there is other evidence that application for the certificate was filled out by the dealer's bookkeeper two months prior to its date of issuance and that the certificate dated title as of that date and not the date of issuance.

2. Insurance § 44b: Appeal and Error § 39—

Where, in an action on a policy of collision insurance, nonsuit is properly entered as to the dealer for want of evidence that the dealer had a lien on the automobile, defendant insurer's exception to the admission of parol evidence as to the alleged conditional sales contract between plaintiff dealer and plaintiff purchaser becomes immaterial.

3. Chattel Mortgages § 1c—

A note signed by the purchaser to the dealer in which the purchaser agrees to pay a stipulated sum monthly for twelve months cannot be construed as a lien or mortgage in itself.

4. Evidence § 22—

In this action on a policy of automobile collision insurance, insurer defended solely on the ground that plaintiff insured was not the owner of the car. *Held:* Cross-examination of insured as to the previous ownership of the car and previous wrecks involving the car and previous cancellations of insurance thereon was not germane to the controversy and was properly excluded, the rule that a party has the absolute right to cross-examine an adverse witness being limited to matters testified to in the examination-in-chief which are germane to the controversy.

5. Appeal and Error § 39—

The admission of certain testimony over objection cannot be held prejudicial when other evidence of the same import is admitted without objection.

6. Insurance § 50—Charge construed as a whole held to fairly present insurer's defense and exception to excerpt therefrom cannot be sustained.

In this action on an automobile collision policy insured defended solely on the ground that plaintiff was not the owner of the car but that in fact the car was owned by plaintiff's brother and was refinanced in plaintiff's name in order to obtain insurance. Insurer admitted the execution and delivery of the policy, that premiums thereon had been paid, and that the car was damaged by upset or collision. Insurer did not tender an issue relating to the validity of the policy, and the determinative issue submitted to the jury without objection was as to plaintiff's ownership of the car. *Held:* An exception to an excerpt from the charge that insurer admitted that the policy was in full force and effect at the time of the collision cannot be sustained when the context of the charge from which this excerpt was taken is that notwithstanding that the policy was in full force and effect plaintiff insured could not recover unless she was the owner of the car.

7. Trial § 36—

A charge will be construed contextually as a whole, and appellant's exception to an isolated portion of the charge cannot be sustained when such portion read contextually with the rest of the charge is not prejudicial.

8. Trial § 32—

If a party desires more specific instructions or fuller definitions of words or phrases used in the charge he must aptly tender prayer for special instructions.

APPEAL by defendant from *Phillips, J.,* and a jury, at June Term, 1941, of WILKES. No error.

This is a civil action to recover the sum of $500.00 under an insurance policy for damages to an automobile resulting from collision or upset. The defendant denied that the plaintiff was the unconditional and sole lawful owner of the automobile at the time the policy was issued and at the time of the loss or damage thereto. From the judgment upon the verdict in favor of plaintiff defendant appealed to the Supreme Court, and assigned errors.

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

"1. Was the plaintiff, Mrs. Lillie Martin, the owner of that certain automobile described in the complaint on the 5th day of October, 1938, and the 11th day of October, 1938? Answer: 'Yes.'

"2. What amount, if any, is the plaintiff, Mrs. Lillie Martin, entitled to recover from the defendant? Answer: '$500.00.'"

The court below rendered judgment on the verdict. The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

W. H. McElwee and Hayes & Hayes for plaintiff.
John R. Jones and Helms & Mulliss for defendant.

CLARKSON, J. At the close of plaintiff's evidence and at the conclusion of all the evidence, defendant made motions for judgment as in case of nonsuit. C. S., 567. Upon the latter motion the court below sustained the motion as to Yadkin Valley Motor Co., Inc., and overruled the motion as to Mrs. Lillie Martin. The exceptions and assignments of error made by defendant as to the court below overruling the motion for judgment as of nonsuit, as to Mrs. Lillie Martin, cannot be sustained. It does not appear in the record that plaintiff, the Yadkin Valley Motor Co., Inc., had a lien on the automobile in controversy. The question of parol evidence to establish a lien is hereafter considered.

Admissions by defendant: "The defendant admits: (1) That the policy sued upon was executed and delivered by the defendant. (2) That the premium on the policy sued upon was fully paid at the time the policy was issued and delivered. (3) That the automobile described in the policy and referred to in the complaint was damaged by collision or upset on or about 11 October, 1938. (4) That the Yadkin Valley Motor Co., Inc., is a corporation organized, existing and doing business under the laws of the State of North Carolina."

The plaintiffs introduced in evidence insurance policy #3165487, dated 5 October, 1938, issued by the Home Insurance Company of New York covering one used Ford DeLuxe Coupe, Motor #4256460, 1938 model; said exhibit or policy being marked "Plaintiff's Exhibit A."

The plaintiffs introduced in evidence summons in the action, dated 2 January, 1939, served 9 January, 1939. The following is in the record: "Q. Mrs. Martin, how much do you owe the Yadkin Valley Motor Co., Inc., on that automobile? Ans.: $408.96. Court: She can testify to what she owes them. Q. Did you owe the same amount on October 11, 1938? Ans.: Yes, sir."

The exhibit indicates that it is a note signed by Mrs. Lillie Martin to Yadkin Valley Motor Co., Inc., for $408.96, dated 5 October, 1938, "Undersigned jointly and severally promise to pay to the order of Yadkin Valley Motor Co., Inc., at the office of Commercial Credit Company, Charlotte, North Carolina, 12 monthly installments of Thirty-four and 08/100 Dollars—$34.08 each." This note was transferred by the Yadkin Valley Motor Co., Inc., to the Commercial Credit Company. The plaintiff, Yadkin Valley Motor Company, Inc., having no lien on the automobile in question, nonsuit as to it was properly granted. There is no language in the note by which it could be construed as a lien or mortgage. The exceptions and assignments of error made by defendant on this aspect are immaterial, as the Yadkin Valley Motor Co., Inc., is eliminated from the controversy. An attempt to establish a lost lien and defendant's motion to nonsuit, which was allowed, made this aspect immaterial, therefore defendant's exceptions and assignments of error cannot be sustained.

Mrs. Lillie Martin testified, in part: "My name is Mrs. Lillie Martin. I am one of the plaintiffs in this action. . . . On October 5, 1938, I owned a 1938 model Ford coupe. The paper which you hand me is the title to the car that I owned. (Plaintiffs offer in evidence certificate of title marked D. The defendant admits that the certificate of title was issued by the Department of Revenue of the State of North Carolina, but objects to the introduction of the certificate of title upon the ground that it was issued on December 5th, 1938, which was exactly two months after the date of the alleged purchase by the plaintiff and almost two months after the date of the collision.) This is my insurance policy; I got it through the mail. I owned the automobile described in the insurance policy on October 11, 1938. On that date it was wrecked. The reasonable market value of the automobile just prior to the time it was wrecked was $600.00, in my opinion. The reasonable market value of the automobile just after it was wrecked, in my opinion, was $50.00."

The defendant contends that the questions involved are:

(1) Did the court err in admitting as evidence of ownership of the automobile the certificate of title issued approximately two months after the time of the purchase of and collision or upset to the automobile in question? We think not.

In the record, on cross-examination of Kenneth Brooks, by defendant (bookkeeper for the Yadkin Valley Motor Co., Inc., on 5 October, 1938), he testified: "She signed the title that day. Q. She did sign the title? Ans.: Yes, sir. Q. And you sent off the application for the title that day? Ans.: I don't remember the day the title was sent off. Q. Do you know why you didn't get the certificate of title on that car until

Dec. 5th? Ans.: No, sir. Q. Did you keep the application until after the wreck happened? Ans.: I don't remember the day the title was mailed off to the Department at Raleigh. Q. You attended to that yourself, she didn't have anything to do with it? Ans.: No, sir; she did not. Q. Well, this is the certificate of title that you are talking about, Plaintiff's Exhibit D, isn't it? Ans.: Yes, sir. Q. And it is dated December 5, 1938? Ans.: The day it is issued and the title is dated October 5, 1938."

On the certificate of title is the following: "And that the applicant has stated under oath that said applicant is the owner of said motor vehicle and that it is subject to the following liens and none other: 2nd Lien—Amount—Kind—Date—Favor of. 1st Lien Amount $408.96—Kind C. S. C.—Date 10-5-38—Favor of Yadkin Valley Motor Co., Inc., North Wilkesboro, N. C."

We think this was some evidence, the probative force was for the jury to determine, to sustain plaintiff's contention that she was the owner of the car in question.

The evidence indicates that she made application on 5 October, 1938, but the Revenue Department did not issue the certificate until 5 December, 1938. This action was brought 2 January, 1939.

(2) Did the court err in permitting the plaintiff and her witnesses to prove by parol testimony the existence and contents of the allegedly lost conditional sale contract to Yadkin Valley Motor Co., Inc., which company was not a named insured in the policy sued upon, and which company was nonsuited at the conclusion of all the evidence? We think not.

The question of parol evidence as to an alleged conditional sale contract, we think, has been eliminated from this controversy. The court below, on motion of defendant, sustained the motion to nonsuit the Yadkin Valley Motor Co., Inc. This, on defendant's motion, made this evidence immaterial.

In the record is the following: "Court: What I want to get in the record here is that you are stating if the jury should find from the evidence in this case and by the greater weight that Mrs. Martin was the owner of that automobile in question on the 5th day of October, 1938, and on the 11th day of October, 1938, the sole owner with the exception of the outstanding lien to the Commercial Credit Company or the Yadkin Valley Motor Co., Inc., that you are not contesting the payment of the policy, if the jury should find she is the owner of it on those dates. Attorney for defendant: No, sir, we are perfectly willing to pay our policyholders whatever we owe them, but we don't want anybody else coming in. Attorney for plaintiff: As I understand it—he will pay the full amount of the policy and then the adjustment of the lien will be between Mrs. Martin and the Yadkin Valley Motor Co.,

Inc. Court: No, sir, he said he would pay whatever the jury said. Attorney for defendant: I mean we will pay whatever we are liable for under the policy. Let's get this stipulation in the record. The defendant, Home Insurance Company, takes the position that under the policy introduced in the case of the Yadkin Valley Motor Co., Inc., is not a named assured, and is not a party to the contract, that the named assureds are Commercial Credit Company and Mrs. Lillie Martin, and the liability, if any, of the defendant is to its named assureds only and that the Commercial Credit Company is asserting no claim under the policy. Court: You are also taking the position if there are any liens outstanding on this car that that is a matter between the lien-holders and Mrs. Lillie Martin? Attorney for defendant: That is right, sir. Court: And that you are not interested in what their adjustment shall be of any loss of any as due under the policy? Attorney for defendant: We don't even get in that. We are not asking that the Commercial Credit Company or anybody else claim any liens or any part of it."

(3) Did the court err in refusing to allow the defendant to cross-examine the plaintiff and her witnesses with reference to the ownership of and previous wrecks involving the automobile in question, and with reference to previous cancellations of insurance thereon by other companies? We think not.

(4) Did the court err in permitting a cross-examination of a witness for the defendant, which cross-examination tended to charge the witness with an attempt to defraud the plaintiff, and in refusing to allow the witness to explain on re-direct examination? We think not.

No issue was tendered by defendant to raise the questions complained of. The only one not objected to was as to whether the plaintiff was the owner of the automobile.

"A party has the right to an opportunity to fairly and fully cross-examine a witness who has testified for the adverse party. This right, with respect to the subject of his examination-in-chief, is absolute and not merely a privilege. A denial of it is 'prejudicial and fatal error.'" *Bank v. Motor Co.*, 216 N. C., 432 (434), and cases cited.

The defendant cites the above cases, wherein the law is well settled, but the cross-examination must be germane to the controversy. In this case it was not.

Defendant contends that testimony as to the number of children Mrs. Martin had was prejudicial. We cannot so hold. There was other evidence in the record, unobjected to, that she had children.

(5) Did the court err in charging the jury that the defendant "admits that the policy was in full force and effect on the 11th day of October, 1938, the day of the alleged collision or upset of the car," when the defendant had not at any time admitted, and did not admit, that the

policy was in full force and effect on the 11th day of October, 1938, the day of the alleged collision or upset of the car, but, on the contrary, had denied that the policy was or had been in full force and effect? We cannot so hold.

The full charge on this aspect is as follows: "Now, gentlemen of the jury, the court charges you that the defendant admits the issuance of the policy in question, admits that it was issued on this car; admits that it was issued to Mrs. Lillie Martin as one of the beneficiaries or one of those entitled to recover under the policy; admits that the policy covers the actual cash value of the car less fifty dollars; admits that the policy was in full force and effect on the 11th day of October, 1938, the day of the alleged collision or upset of the car; admits that the premiums on said policy had been paid to the company and they had received the same, and that the policy was in full force and effect on the date of the alleged collision, to-wit, on the 11th day of October, 1938. Now, gentlemen of the jury, those admissions having been made in the pleadings and in the evidence in the case and admissions of counsel, there arises then the question of whether or not this automobile on the 5th day of October, 1938, and the 11th day of October, 1938, the first date mentioned the date that the policy was issued and the second date mentioned the date of the alleged collision or upset of the car, *whether or not she was the owner on those dates or not.* If she was, gentlemen of the jury, then she is entitled to have you answer these issues in her favor as to the ownership of the car and also as to the damages that were sustained by reason of the collision or upset. If she was not the owner on those dates, then, gentlemen of the jury, she is not entitled to have you answer these issues in her favor because the court charges you if she was not the owner of this automobile on the date the policy was issued and was not the owner of the automobile on the date that the collision or upset occurred, if one did occur, then the court charges you, gentlemen of the jury, that she had no insurable interest and that she was not the true owner of the car and would not be entitled to receive any of the benefits of this policy because she must have been under the terms of the policy the true owner of this automobile before she could be entitled to receive the benefits of this policy, but if she was the true owner on these dates, then she is entitled to receive the benefits of this policy, it having been admitted that the policy was issued and premiums paid and the policy was in full force and effect on those dates."

Taking the entire charge, we see no error. It is well settled that a charge must be considered contextually, and not disjointedly. *Speas v. Bank,* 188 N. C., 524; *Milling Co. v. Highway Com.,* 190 N. C., 692; *Marriner v. Mizzelle,* 207 N. C., 34.

It is held in *Braddy v. Pfaff,* 210 N. C., 248 (headnote): "Where it appears that the charge, when read contextually as a whole, was not

prejudicial in its manner of stating the evidence and contentions of the parties, an exception, based upon detached portions thereof, will not be sustained."

(6) Did the court err in failing to explain to the jury the law with reference to "ownership"; "unconditional and sole lawful ownership"; "misrepresentation and fraud"; "warranties"; or "corroborative evidence"? We think not.

In the event the defendant desired fuller definitions or more specific instructions as to these phrases and words it was the defendant's duty and privilege to tender to the court a prayer for instructions. The defendant failed to do this and he cannot now take advantage of his failure. *S. v. Puckett,* 211 N. C., 66; *Arnold v. Trust Co.,* 218 N. C., 433.

There was no exception on the part of the defendant as to the issues and no issue was tendered as to the validity of the policy. The charge when read as a whole is pertinent to the issues and explains the law as arises on the issues. The Court will not permit the defendant to extract isolated portions of the charge and hold the same for error when the charge in its entirety correctly explains the law arising from the issues and gives to the defendant a fair trial. A charge is to be taken as a whole and not broken up into disconnected and desultory fragments and thus considered. *Gilliland v. Board of Education,* 141 N. C., 482; *Milling Co. v. Highway Com., supra; Gore v. Wilmington,* 194 N. C., 450; *Harrison v. Ins. Co.,* 207 N. C., 488; *S. v. Brackett,* 218 N. C., 369.

Then, again, the only question was that of ownership, and that was the only issue not objected to. The other aspects were not germane or material to the controversy. The most important phase of the controversy as to ownership of the automobile was the contradictory statements made by Mrs. Martin to Mr. Franklin, witness for defendant. This aspect was thoroughly gone into and the jury accepted Mrs. Martin's version. From an examination of the whole record, and hearing the persuasive though not convincing argument of defendant, leads us to the conclusion that none of the exceptions and assignments of error made by defendant can be sustained.

The court below, in the charge of some 20 pages, gave the contentions of the parties accurately and carefully and charged the law applicable to the facts. On the whole record, we can find no prejudicial or reversible error.

The defendant says it wants to pay the policy, but wants to be protected and pay it to the proper party. The jury has settled that question and it will be protected from further liability.

No error.

IN RE ADMINISTRATION OF RUTH M. FRANKS
and
IN RE ADMINISTRATION OF PAUL E. FRANKS.

(Filed 15 October, 1941.)

1. **Executors and Administrators § 2b—Evidence held to sustain finding that nonresidents died intestate in North Carolina leaving bona notabilia here.**

Husband and wife, nonresidents, were involved in a collision resulting in the death of both of them intestate in Henderson County in this State. Evidence tending to show that the wife owned the automobile in which they were riding, that the car was worth two or three hundred dollars immediately after the collision, and that after her death the car was wrongfully removed from the State by an insurance adjuster, giving rise to an action for such unlawful removal, and that at the time of the husband's death he left personalty to the value of $75.00 in Henderson County, the greater portion of which was unlawfully removed from North Carolina, thereby giving rise to a cause of action against the person or persons guilty of such removal, *is held* sufficient to sustain the findings of fact that the nonresidents died intestate leaving *bona notabilia* in this State, whether the term *bona notabilia* is construed as property worth $25.00 or as notable goods of sufficient value to be accounted for, and the clerk of the Superior Court had jurisdiction to appoint administrators for the respective estates, C. S., 1 (4), and the appointment of the person suggested by a creditor of the estates will not be disturbed, certainly in the absence of any suggestion that another had a prior right to such letters or that the person appointed was not a proper person to act as administrator.

2. **Same—**

C. S., 65 (a), merely provides that a debtor owing the sum of $300 or less to an estate for which no administrator has been appointed may relieve himself of such debt by paying the amount thereof to the clerk of the Superior Court and the statute does not have the effect of fixing the sum of $300.00 as *bona notabilia* in determining jurisdiction of the clerk to appoint an administrator for a person not domiciled in this State who dies leaving assets herein.

APPEAL by petitioner, the Liberty National Bank & Trust Company of Louisville, Kentucky, from *Phillips, J.*, at Chambers in Brevard, 24 July, 1941. From HENDERSON.

Ruth M. Franks and her husband, Paul E. Franks, on 9 May, 1941, were riding in the automobile of the former, driven by the latter, in Henderson County. The automobile collided with another automobile driven by Mrs. J. C. Cochran, as a result of which collision Mrs. Franks received injuries from which she died in a hospital in Henderson County on 12 May, 1941, and Mr. Franks received injuries from which he died in the same hospital on 10 May, 1941. On 13 May, 1941, the Jefferson

County Court of Jefferson County, Kentucky, of which county Mr. and Mrs. Franks were residents, appointed the Liberty National Bank & Trust Company of Louisville, Kentucky, administrator of their respective estates, and also appointed said Bank & Trust Company guardian of Mary Alice Franks, infant, only child and next of kin of said decedents. On 30 May, 1941, the clerk of the Superior Court of Henderson County appointed C. D. Weeks administrator of the respective estates of said decedents.

On 25 June, 1941, the Liberty National Bank & Trust Company filed petition before the clerk of the Superior Court of Henderson County wherein it alleged that it is the duly appointed and qualified administrator of the respective estates of the late Mr. and Mrs. Franks and that the appointment of C. D. Weeks as such administrator in North Carolina was unwarranted and unnecessary, since there were no assets of such estates in North Carolina amounting to *bona notabilia,* and asking that said appointment of C. D. Weeks as administrator be vacated.

On 14 July, 1941, C. D. Weeks filed reply to the petition of the Liberty National Bank & Trust Company wherein he alleged that he applied for letters of administration on the two estates at the suggestion of J. C. Cochran, who stated that he was a creditor of said estates by reason of claims there against arising out of the wrongful deaths of his wife and daughter, personal injury to another daughter, and damage to personal property and expenses all proximately caused by the negligence of said decedents resulting in the collision between his automobile driven by his late wife and the automobile of the late Mrs. Franks driven by her husband, in Henderson County, on 9 May, 1941. Further, that he was advised and believed that both Mr. and Mrs. Franks had property in Henderson County at the time of their deaths. That the property of Mrs. Franks consisted of the automobile in which she and her husband were riding at the time of the fatal collision, "reasonably worth several hundred dollars immediately after the collision"; that this automobile, with the exception of certain parts thereof, was unlawfully taken to Spartanburg, South Carolina, by one C. V. DeVault, a liability insurance agent, and that the estate of Mrs. Franks has a valid claim against said DeVault for such unlawful removal of such automobile from North Carolina; and that the portions of said automobile remaining in North Carolina were reasonably worth more than $25.00; that the property of Mr. Franks consisted of "money, travelers checks, a gold watch, hand bags, suitcases, wearing apparel and other personal effects of the value of several hundred dollars," as he was informed and believed.

C. D. Weeks, administrator, also alleged that he was advised and believed that estates of his respective intestates had valid claims for wrongful deaths of said intestates, but these claims or allegations were subsequently abandoned.

On 14 July, 1941, J. C. Cochran, as administrator of his deceased wife and as administrator of his deceased daughter and as next friend of another daughter and individually, was, by order of the clerk of the Superior Court of Henderson County, made a party to this cause.

On 18 July, 1941, the cause came on for hearing before the clerk of the Superior Court of Henderson County, who found, *inter alia,* that at the time of the death of Ruth M. Franks and Paul E. Franks, both of them had and left assets in Henderson County, North Carolina. Whereupon the clerk entered judgment denying the petition of the Liberty National Bank & Trust Company from which said petitioner appealed to the judge holding the courts of the 18th Judicial District.

On 24 July, 1941, the cause came on for hearing before Phillips, J., holding the courts of the 18th Judicial District, at Chambers in Brevard. His Honor found as facts, *inter alia,* "2. That at the time of the death of the said Paul E. Franks and Ruth M. Franks, both of them had and left assets in Henderson County, North Carolina; that the assets of the said Ruth M. Franks consisted of an automobile, the value of $200.00 or $300.00 immediately after the collision; that shortly after the collision and after the death of Ruth M. Franks the said automobile, less certain parts of same, was unlawfully removed from the State of North Carolina to the State of South Carolina under the orders and instructions from one C. V. DeVault, a well known liability insurance agent of Asheville, North Carolina, and that said automobile is now at or near the city of Spartanburg, South Carolina, in the possession of one Tinsley and held subject to the orders of the said DeVault; that a valid cause of action exists in favor of the said C. D. Weeks as administrator of Ruth M. Franks against the said C. V. DeVault for damages on account of the unlawful removal of said automobile from North Carolina. Also that there are now other parts of the said automobile belonging to the estate of Ruth M. Franks and in Henderson County, North Carolina, and held subject to the order of the said C. D. Weeks, Administrator of Ruth M. Franks and of a market value in excess of $25.00," and "3. The Court further finds as a fact that at the time of the death of Paul E. Franks he had and left assets in Henderson County, North Carolina, of the reasonable market value of several hundred dollars, said assets consisting of a watch, currency, two hand bags, a considerable amount of wearing apparel and other assets, and the court further finds as a fact that the greater part of the assets belonging to the estate of Paul E. Franks were unlawfully removed from the State of North Carolina, and that there is a valid cause of action in favor of the said C. D. Weeks as Administrator of Paul E. Franks against the person or persons, removing said assets from the State and for damages on account thereof. The court further finds as a fact that C. D. Weeks, Administrator, does

have in his possession one article of personal property belonging to the estate of Paul E. Franks, and of substantial value," and adjudged "Upon the foregoing finding of facts the court is of the opinion, and so holds as a matter of law that the clerk of the Superior Court for Henderson County, under sec. 1, sub-section 4, of the North Carolina Code, was authorized, and had jurisdiction to appoint an administrator upon the estates of both Paul E. Franks and Ruth M. Franks, and the judgment of the clerk of Superior Court for Henderson County rendered July 18, 1941, is in all respects affirmed."

From this judgment the petitioner, the Liberty National Bank & Trust Company, appealed to the Supreme Court, assigning errors.

Harkins, Van Winkle & Walton for the Liberty National Bank & Trust Company, appellant.

R. L. Whitmire for J. C. Cochran, individually and in his several capacities, appellee.

SCHENCK, J. Although there are 22 assignments of error in the record, the assignments relied upon by the appellant are not set out by number and page of the record in its brief as required by Rule 28 of practice in this Court. However, we gather from the brief and the argument made before us that the chief reliance of the appellant is based upon the exceptions to the findings of the fact that the decedents had sufficient personal property in Henderson County, North Carolina, to constitute *bona notabilia,* and thereby justified the appointment of an administrator in such county.

The evidence tended to show that the late Mrs. Franks owned the automobile involved in the fatal collision and that it was worth from $200.00 to $300.00 immediately after such collision and that it was unlawfully removed after her death from Henderson County, North Carolina, to Spartanburg, South Carolina, by one DeVault, a liability insurance agent, thereby giving rise to a cause of action against said DeVault for such unlawful removal; and that C. D. Weeks had in his possession certain portions of said automobile which were not removed from the State, worth $25.00. The evidence further tended to show that the late Mr. Franks at the time of his death had and left in Henderson County a watch of the value $25.00, and cash and travelers checks to the amount of $50.00; and that the greater portion of such property was unlawfully removed from North Carolina, thereby giving rise to a cause of action against the person or persons guilty of such removal.

This evidence was sufficient to support the findings of fact of the court, and such facts are sufficient to support the conclusions of law contained in the judgment of the court.

Since 1603, in the reign of James I, *bona notabilia* in England seems to have been fixed at a minimum of five pounds. 2 Bl. Comm., 509. If such an amount be *bona notabilia* in North Carolina, there can be no doubt that there was sufficient evidence to justify the findings to that effect as to the estates of both decedents; or, if *bona notabilia* be construed to mean what the words literally signify, "notable goods; property worthy of notice, or of sufficient value to be accounted for," Black's Law Dictionary (2d Ed.), the findings are likewise sustained by the evidence.

We do not concur in the argument advanced by the appellant that C. S., 65 (a), fixes in this State the amount of *bona notabilia* at $300.00. This statute simply provides a method by which a debtor in the sum of $300.00 or less to an estate for which no administrator has been appointed *may* relieve himself of such debt by paying the amount thereof to the clerk of the Superior Court. This statute simply provides the debtor a permissive right and is in no wise mandatory upon him, such right as is given is alternative and not exclusive—and besides, this statute has no application to the case at bar for the reason that it is not applicable to Henderson County, wherein the letters of administration were issued to C. D. Weeks.

We are of the opinion, and so hold, that the decedents, Ruth M. Franks and Paul E. Franks, not being domiciled in this State, but having died intestate in Henderson County, North Carolina, leaving assets in the State, the clerk of the Superior Court of Henderson County had jurisdiction in said county to grant letters of administration to C. D. Weeks. C. S., 1 (4). Certainly this is true in the absence of any suggestion that anyone had a prior right to such letters or of C. D. Weeks not being a proper person to act as such administrator.

The judgment of the judge of the Superior Court is sustained by the evidence and the law, and for this reason is

Affirmed.

MARTIN HART v. P. P. GREGORY.

(Filed 15 October, 1941.)

1. Master and Servant § 65—Ordinary night watchman is not employee within the coverage of Federal Fair Labor Standards Act.

Claimant was employed as a night watchman at a lumber mill producing goods for interstate commerce. The evidence was contradictory as to whether he was required to keep water in the boilers as a part of the regular duties of his employment. *Held:* An ordinary night watchman is not an employee engaged in the production of goods for interstate commerce within the coverage of the Federal Fair Labor Standards Act and

the court did not commit error in charging the jury that the burden was on claimant to prove by the greater weight of the evidence that he put water in the boilers in addition to his regular duties as night watchman in order for him to be entitled to the benefits of the Act. 29 U. S. C. A., sec. 203 (j), sec. 3 (j).

2. Statutes § 5a—

It is the duty of the courts to construe the law as written.

SEAWELL, J., dissenting.

APPEAL by plaintiff from *Stevens, J.*, and a jury, at January Term, 1941, of PASQUOTANK. No error.

This was an action brought by plaintiff against the defendant in which he contended that he was a night watchman engaged in interstate commerce and came within the provisions of the National Fair Labor Standards Act of 1938.

At the first trial a judgment as in case of nonsuit, C. S., 567, was entered. From that judgment an appeal was taken to this Court. The judgment of the Superior Court was reversed. *Hart v. Gregory,* 218 N. C., 184. Upon the mandate coming down to the Superior Court another trial was had.

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

"1. Was the plaintiff employed in an occupation necessary to the production of goods within the meaning of the Fair Labor Standards Act of 1938, as alleged in the complaint? Answer: 'No.'

"2. What amount did defendant pay plaintiff as wages between the dates of November 7, 1938, and June 10, 1939? Answer: .....

"3. How many hours did plaintiff work for defendant during said period of time? Answer: .....

"4. Exclusive of any penalty or attorney's fee, what amount, if any, is the plaintiff entitled to recover of the defendant for unpaid minimum wages and unpaid overtime compensation? Answer: ....."

It was agreed that the court might answer the 2nd, 3rd, and 4th issues, dependent upon the jury's answer to the 1st issue. Judgment was rendered for defendant on the verdict. The plaintiff excepted, assigned error, and appealed to the Supreme Court.

R. B. Lowry and John H. Hall for plaintiff.

R. M. Cann and R. Clarence Dozier for defendant.

CLARKSON, J. The record discloses that the defendant, employer of plaintiff, was operating a lumber mill and was engaged in the production of goods for commerce, under the Fair Labor Standards Act of 1938.

The court below charged the jury as follows (to which plaintiff excepted and assigned error): "Now, gentlemen, when you come to this issue and it is given to you and you retire to your room, I want to say to you that the burden of the issue is upon the plaintiff to satisfy you from the evidence and by its greater weight. The case has heretofore been to the Supreme Court of North Carolina and has been reported in the 218th volume at pages 184 and 193, both inclusive, and that when it went to the Supreme Court the first time our Supreme Court said on page 192 thereof: 'That feeding water to the boilers was necessary in the production of goods.' Therefore it concerns you only to find as a fact, the burden of the issue being upon the plaintiff to so satisfy you from the evidence and by its greater weight as to whether or not Mr. Hart did actually, as a part of his employment, feed the water to the boilers during the evening, and the court charges you if you find from the evidence and by its greater weight that under the terms of the employment between the plaintiff and the defendant, the plaintiff, in addition to his duties as watchman, was required to keep water in the boilers, then it will be your duty to answer the first issue 'Yes.' If you do not so find, gentlemen, it will be your duty to answer it 'No.' " The jury answered the issue "No."

We think the charge correct under the opinion heretofore rendered in this case. We said, at p. 192: "The present case we think comes within the provisions of the Fair Labor Standards Act, as the duties of this night watchman were more than that ordinarily required of one so termed. The duty of plaintiff was to keep water in the boiler so that in the morning steam could easily be available. If the boilers were not kept filled up at night, they would have burned dry and that would have ruined them and made them unfit for use. It is clearly apparent that the man who attended to the boiler in the day was engaged in 'occupation necessary to the production thereof' of goods. Why should not the man at night whose duty it was to keep the boiler fit for service in the production of goods receive the same benefit accorded men directly at work producing these goods? His duties were more than a night watchman, he fed water to the boilers which were necessary in the production of goods."

On the trial in the court below the evidence, pro and con, was conflicting. The jury has decided this question of fact for the defendant.

The plaintiff requested the court below to charge the jury: "If you find from the evidence and by its greater weight that plaintiff was employed by defendant as a watchman of his mill, then it would be your duty to answer the first issue 'Yes.' " This request was refused and in this we can see no error.

The language of the Act to be construed, 29 U. S. C. A., sec. 203 (j), being sec. 3 (j), of the Act, reads as follows: "For the purpose of this Act an employee shall be deemed to have been engaged in the production of goods, if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any State." We think it would be doing violence to the language of the Act to give it such elasticity as contended by plaintiff, that an ordinary night watchman came under the provisions of the Act. Our former decision did not so hold. There is a sharp conflict of decisions over the question, but whatever may be our sympathies we can only construe the law as written. None of the exceptions and assignments of error made by plaintiff can be sustained.

The Fair Labor Standards Act of 1938 on another aspect is fully and ably discussed in *Crompton v. Baker, ante,* 52.

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

No error.

SEAWELL, J., dissenting: In excluding plaintiff from the benefit of the National Fair Labor Standards Act (Act of 25 June, 1938, c. 676, 52 Stat. 1060), I believe we fail to accord to that measure the liberal construction to which all such remedial statutes are entitled. On this, the second hearing before us (see 218 N. C., 184, 10 S. E. [2d], 644), we now know that plaintiff did not put water into the boilers during his nightly vigil, nor did he put his hand upon the manufactured product or the tools by which it was created. He simply stood by and watched against fire and flood, thief and the saboteur. It is my thought that in his case the ends of justice may be met and the humanity intended by the statute may be served by a judicial recognition of the principle, "They also serve who only stand and wait."

In construing statutes which deal with current social and economic problems we must recognize that the words employed in them have often moved from the dictionary meaning into a more advanced significance in the literature of the subject. *Towne v. Eisner,* 245 U. S., 418, 38 S. Ct., 158, 62 L. Ed., 372; *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857. In economic and statistical discussions production is referred to in terms of total output, and I think it is used in this sense when we speak of its flow in interstate commerce. I think it is fully consistent with the definition which the statute provides that a laborer, a watchman, so necessary to the conservation of the product and to the protection of the tools and machines by which manufacture is made possible, and who thereby is engaged in an occupation which results in a larger or undiminished output, put into the flow of interstate commerce and made

available for mankind, should be considered within the statute.

I think we might also consider the probability that controlling Federal judicial opinion will so regard it, as Federal administration has already done.

I think the court committed error in refusing to give the instruction asked for, and that the plaintiff is entitled to a new trial.

MRS. ETTA DAYTON BYRD, WIDOW; IRENE BYRD AND LOUISA BYRD WEBB, DAUGHTERS; EDNA FORBES, GRANDDAUGHTER; BEATRICE WEBB AND J. LEE WEBB, GRANDCHILDREN OF MAC BYRD, DECEASED, v. HOWARD W. JOHNSON, EMPLOYER.

(Filed 15 October, 1941.)

1. Master and Servant § 53c: Constitutional Law § 19—

Ch. 352, Public Laws 1941, amending ch. 120, Public Laws of 1929, and providing that when an employer fails or neglects to keep in effect a policy of compensation insurance and fails to qualify as a self-insurer, claimant may institute a civil action for all compensation as may be awarded by the Industrial Commission and granting claimant in such action the ancillary remedies of attachment and receivership affects procedure only and does not disturb any vested rights.

2. Same—Ch. 352, Public Laws 1941, is available to enforce payment of award although proceedings for compensation were instituted prior to enactment.

Claimants instituted this civil action alleging that the Industrial Commission had awarded them compensation in a stipulated sum, that defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, and that defendant was disposing of and removing all his property from the State. Plaintiff prayed that a writ of attachment issue against defendant's property. It appeared that the award of the Industrial Commission was entered 24 March, 1941. *Held:* The provisions of ch. 352, Public Laws 1941, in force from its ratification on 15 March, 1941, are available to claimants, and defendant's exception to the refusal of the court to vacate the writ of attachment theretofore issued in the cause is without error.

APPEAL by defendant from *Pless, Jr., J.*, in Chambers, 12 June, 1941. From YANCEY. Affirmed.

The complaint and affidavit upon which to obtain warrant of attachment is as follows:

"1. That Etta Dayton Byrd is one of the plaintiffs in the above entitled cause and is the widow of Mac Byrd, deceased.

"2. That the plaintiffs duly filed claim with the North Carolina Industrial Commission for compensation by way of death benefits on

account of the death of the said Mac Byrd while employed by the defendant, Howard W. Johnson, and the matter was heard before a member of the North Carolina Industrial Commission on January 30, 1941, and on the 24th day of March, 1941, an award or judgment was rendered and by the terms thereof it was adjudged that Mrs. Etta Byrd and Irene Byrd were entitled to compensation at the rate of $13.63 per week for 350 weeks; that the defendant pay all the hospital and medical bills; that the defendant pay the funeral costs, not to exceed the sum of $200.00; and that the sum of $5.00 as witness fees, plus 5c per mile for transportation from Bakersville, N. C., to Burnsville, N. C., and return be paid to Dr. Paul McBee and Dr. A. E. Gouge.

"3. That $13.63 per week for 350 weeks, would amount to $4,770.50.

"4. That the defendant failed and neglected to keep in effect a policy of insurance against compensation liabilities as provided by law and did also fail to qualify as a self-insurer, as provided by law.

"5. That under and pursuant to the laws of the State of North Carolina, as affiant is advised, informed and believes, the plaintiffs are entitled to a Warrant of Attachment, attaching all property of the defendant to be found in the State of North Carolina in order to preserve the rights to the plaintiffs pending the final determination of this cause. And this action is instituted in the Superior Court under and by virtue of an Amendment to Chapter 120 of the Public Laws of 1929, which Amendment was passed by the General Assembly of North Carolina in the year 1941. And for the purpose of attaching the property of the defendant, as provided by said amendment, plaintiffs pray the Court that this complaint be adopted and treated as an affidavit upon which to issue a Warrant of Attachment.

"6. That the defendant, Howard W. Johnson, is disposing of and removing all of his property from the State of North Carolina, for the purpose of defeating the payment of compensation to the plaintiffs or claimants in this cause.

"WHEREFORE, this affiant prays the Court that an attachment issue against the property of Howard W. Johnson on the grounds set forth in this affidavit and for a judgment for the sum of $4,770.50, together with the additional amounts shown in this affidavit and complaint, subject to the award and findings of the Industrial Commission of North Carolina."

A warrant of attachment was issued and certain property of defendant was levied on. The defendant entered a special appearance and made a motion to vacate the warrant of attachment. The court below allowed an amendment to the warrant of attachment and rendered the following judgment:

"This cause coming on to be heard, and being heard, before the undersigned Resident Judge of the 18th Judicial District, with all parties to the action being represented by the attorneys of record, and the Court in its discretion, allowing paragraph 6 of the complaint and affidavit to be amended as shown by the amendment filed by the plaintiffs, and it appearing to the Court that the motion to vacate the Warrant of Attachment should be denied:

"Now, Therefore, it is Ordered, Adjudged and Decreed by the Court that the defendant's motion to vacate the Warrant of Attachment issued in this action be, and the same hereby is, denied. This the 12th day of June, 1941. J. Will Pless, Jr., Resident Judge of the 18th Judicial District."

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

McBee & McBee and Watson & Fouts for plaintiffs.
Charles Hutchins and Anglin & Randolph for defendant.

CLARKSON, J. The only exception and assignment of error made by defendant was that "His Honor erred in rendering and signing judgment in this cause." The question involved: Was chapter 352 of the Public Laws of the General Assembly of North Carolina, ratified 15 March, 1941, available to plaintiff under the facts in this case? We think so.

Chapter 120, Public Laws 1929 (Workmen's Compensation Law), was amended as follows: Chapter 352, Public Laws 1941—

"Section 1. That Chapter one hundred and twenty of the Public Laws of one thousand nine hundred and twenty-nine, as amended, be further amended by adding after Section sixty-eight the following new Section, to be known as sixty-eight (a):

" 'Sec. 68 (a). That as to every employer subject to the provisions of this Act who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier, as provided in Section sixty-seven of this Act, or who shall fail to qualify as a self-insurer as provided in the Act, in addition to other penalties provided by this Act, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission, and such action may be brought by the claimant in the county of his residence or in any county in which the defendant has any property in this State; and in said civil action, ancillary remedies provided by law in civil actions of attachment, receivership, and other appropriate ancillary remedies shall be available to the plaintiff therein. Said action may be instituted

before the award shall be made by the Industrial Commission in such case for the purpose of preventing the defendant from disposing of or removing from the State of North Carolina for the purpose of defeating the payment of compensation any property which the defendant may own in this State. In said action, after being instituted, the court may, after proper amendment to the pleadings therein, permit the recovery of a judgment against the defendant for the amount of compensation duly awarded by the North Carolina Industrial Commission, and subject any property seized in said action for payment of the judgment so awarded. The institution of said action shall in no wise interfere with the jurisdiction of said Industrial Commission in hearing and determining the claim for compensation in full accord with the provisions of this Act. That nothing in this Act shall be construed to limit or abridge the rights of an employee as provided in Section 68 (b).'

"Sec. 2. That all laws and clauses of laws in conflict with the provisions of this Act are hereby repealed.

"Sec. 3. That this Act shall be in full force and effect from and after its ratification."

On 24 March, 1941, judgment was rendered by the North Carolina Industrial Commission (Hearing Commissioner) in favor of Mrs. Etta Dayton Byrd, widow, and Irene Byrd, daughter of Mac C. Byrd, in the sum of $4,770.50, hospital and medical bills, etc.

The warrant of attachment against defendant's property was issued after the passage of the above Act on 19 April, 1941. The Act does not disturb a vested right, impair a binding contract, or create a new obligation. If it did it would be void under the authorities in this State. *Hicks v. Kearney,* 189 N. C., 316; *Bank v. Derby,* 218 N. C., 653.

We think the Act effects only the remedy and so must be construed prospectively and retrospectively. As to retroactive laws, this Court (*Ashe, J.*), in *Tabor v. Ward,* 83 N. C., 291 (294-5), said: "It is well settled by a long current of judicial decisions, State and Federal, that the Legislature of a state may at any time modify the remedy, even take away a common law remedy altogether, without substituting any in its place, if another efficient remedy remains, without impairing the obligation of the contract. And whatever belongs to the remedy may be altered, provided the alteration does not impair the obligation of the contract. Cooley Const. Lim., 350. Laws which change the rules of evidence relate to the remedy only. They are at all times subject to modification and control by the Legislature and changes thus made may be made applicable to existing causes of action."

In *Gillespie v. Allison,* 115 N. C., 542 (548), we find: "No vested right of property has been disturbed, and, in our view, this is a remedial statute enlarging rights instead of impairing them. 'Statutes are reme-

dial and retrospective, in the absence of directions to the contrary, when they create new remedies for existing rights, remove penalties or forfeitures, extenuate or mitigate offenses, supply evidence, make that evidence which was not so before, abolish imprisonment for debt, enlarge exemption laws, enlarge the rights of persons under disability, and the like, unless in doing this we violate some contract obligation or divest some vested right.' *Larkins v. Saffarans,* 15 Fed. Rep., 147. These principles as to vested rights and retrospective laws are carefully discussed in the great and leading case of *Calder v. Bull,* 3 Dallas, 386. See, also, many cases collected in Myers on Vested Rights, ch. 1; *Hinton v. Hinton,* Phillips, 410; *Tabor v. Ward,* 83 N. C., 294." *Martin v. Van Landingham,* 189 N. C., 656 (658); *Bateman v. Sterrett,* 201 N. C., 59 (61-2); *Woodmen of the World v. Comrs. of Lenoir,* 208 N. C., 433.

In 16 Corpus Juris Secundum, at page 830, section 383, it is written: "Statutes directed to the enforcement of contracts, or merely providing an additional remedy, or enlarging or making more efficient an existing remedy, for their enforcement, do not impair the obligation of the contracts. In like manner, an act providing a remedy for the enforcement of an agreement which was theretofore unenforceable is valid."

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

Affirmed.

ELLIS P. LUPTON v. B. G. EDMUNDSON AND WIFE, LENA EDMUNDSON, AND CHARLES A. WARREN AND ROYALL H. SPENCE.

(Filed 15 October, 1941.)

1. Judgments § 21—

The life of the lien of a judgment is ten years from the date of its rendition in the Superior Court, C. S., 614, and an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining any proceeding on the judgment.

2. Same—

The issuance of an execution does not prolong the life of the lien of a judgment.

3. Same—

An action to enforce the lien of a judgment by condemning the land of the judgment debtor to be sold is not an action upon a judgment within the purview of C. S., 437 (1), prescribing the limitation of 10 years for

an action on a judgment, but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the ten-year period prescribed by C. S., 614.

APPEAL by plaintiff from *Nimocks, J.*, at June Term, 1941, of WAYNE.

Civil action to enforce the lien of a judgment.

On the trial below counsel for the parties having agreed in open court that the court without a jury should hear the evidence and find the facts and render judgment according to law based upon the facts so found, the court finds the facts to be, briefly stated, as follows:

1. On 20 August, 1930, Wayne National Bank recovered judgment in Superior Court of Wayne County, North Carolina, against B. G. Edmundson for the sum of $608.75, with interest and cost, and same was duly docketed in office of clerk of Superior Court of said county on 22 August, 1930.

2. Plaintiff is now the owner and holder of said judgment by virtue of successive assignments thereof, and no part of same has been paid.

3. On and prior to 17 February, 1936, defendants B. G. Edmundson and his wife, Lena Edmundson, executed and delivered to Charles A. Warren, a deed, for certain real estate situated in Wayne County, North Carolina, which is described in the complaint and which was owned by said B. G. Edmundson, and said deed was duly registered in Wayne County. Charles A. Warren, who is incorrectly named in said deed as "Charles L. Warren," is a party to this action.

4. This action to enforce the lien of said judgment by condemning said land to be sold for the purpose of paying said judgment was commenced on 14 August, 1940—six days prior to the expiration of ten years from the date of rendition of said judgment.

5. Defendants, B. G. Edmundson and wife, Lena Edmundson, and Charles A. Warren, in separate answer duly filed herein, pleaded the ten-year statute of limitations and laches as defense to the action.

6. A sale of the lands described in the complaint, as prayed for therein, could not have been made and concluded within ten years of the rendition of the judgment.

7. The complaint does not allege, and there is no evidence that plaintiff or any of the former owners of the said judgment or the original judgment creditor, has at any time in any manner been restrained from proceeding on the said judgment.

Upon the foregoing findings of fact, the court being of opinion that the action and relief prayed for by the plaintiff is barred by the defendants' plea of the ten-year statute of limitations, and laches of plaintiff pleaded by defendants in bar of the action, entered judgment sustaining said plea of defendants and adjudging that plaintiff take nothing by this

action and that the same be dismissed, and the plaintiff be taxed with the costs of the action.

Plaintiff appeals to Supreme Court and assigns error.

E. Ambrose Humphrey and Royall, Gosney & Smith for plaintiff, appellant.

Paul B. Edmundson for defendants, appellees.

WINBORNE, J. Does the institution of an action to foreclose the lien of a judgment, nothing else appearing, suspend the ten-year statute of limitation, C. S., 614, relating to the lien of such judgment? The answer is No.

It is provided by this statute that a judgment, when docketed in Superior Court, becomes a lien on the real property which the judgment debtor then has in the county where the same is docketed, or "which he acquires at any time, for ten years from the date of the rendition of the judgment."

The same statute further provides that "the time during which the party recovering or owning such judgment shall be or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of an appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such order or making such appeal, or any other person who is a purchaser, creditor or mortgagee in good faith."

It may be noted, by way of interpolation, that this statute, C. S., 614, as it originally appeared in Code of Civil Procedure (1868), section 254, reckoned the ten-year period, during which the lien of a judgment so attached to real estate, from "the time of docketing" the judgment. But this was changed in section 435 of Code of 1883, and made to run from "the date of the rendition of the judgment"—the same as it appears in section 574 of Revisal of 1905, and now in Consolidated Statutes of 1919.

Whether reckoning from "the time of docketing" as provided in C. C. P., 254, or from "the date of the rendition of the judgment" as fixed in subsequent codifications, as above stated, the decisions of this Court, in applying the statute, are uniform in holding that the lien of a judgment ceases to exist at the expiration of ten years—unless that time be suspended in the manner set out in the statute. *Pasour v. Rhyne,* 82 N. C., 149; *Lyon v. Russ,* 84 N. C., 588; *Spicer v. Gambill,* 93 N. C., 378; *Pipkin v. Adams,* 114 N. C., 201, 19 S. E., 105; *McCaskill v. Graham,* 121 N. C., 190, 28 S. E., 264; *Blow v. Harding,* 161 N. C., 375, 77 S. E., 340; *Barnes v. Fort,* 169 N. C., 431, 86 S. E., 340; *Hyman v. Jones,* 205 N. C., 266, 171 S. E., 103.

In *Spicer v. Gambill, supra, Smith, C. J.,* after reviewing former decisions, announced therefrom the conclusion, "that to preserve the judgment lien the process to enforce and render it effectual must be completed by a sale within the prescribed time," and "if delayed beyond these limits, unless interrupted in the manner pointed out in section 435 of the Code, the lien is gone."

While execution is the statutory means provided in this State for the enforcement of a judgment requiring the payment of money, C. S., 663, the decisions bearing upon the subject likewise uniformly hold that the issuance of an execution does not prolong the life of the lien, nor stop the running of the statute of limitation, the bar of which is complete when the ten years have expired. *Barnes v. Fort, supra; Hyman v. Jones, supra.*

In the present case plaintiff, and those under whom he claims ownership of the judgment in question, have not been "restrained from proceeding thereon by an order of injunction, or other order, or by operation of an appeal, or by a statutory prohibition." This is not an action upon a judgment which may be commenced within ten years from the date of its rendition; but, if it were, it would not have the effect to continue the lien of the judgment. C. S., 437 (1). The institution of the present action has not been delayed by any of those provisions by which time can be counted out. C. S., 614. It, therefore, does not have the effect of prolonging the statutory life of the lien of the judgment.

The case of *Rogers v. Kimsey,* 101 N. C., 559, 8 S. E., 159, and other cases cited and relied upon by plaintiff, in the light of different factual situations, are not in conflict with the decisions here reached.

The judgment below is

Affirmed.

J. C. SILVER v. NORA SILVER.

(Filed 15 October, 1941.)

1. Divorce § 11—

In the husband's action for divorce *a vinculo,* the wife's answer denying the allegations stating the husband's grounds for divorce and alleging that the husband had abandoned defendant and the child of the marriage is sufficient to sustain defendant's prayer for alimony *pendente lite* and plaintiff's demurrer thereto on the ground that the cross action did not contain a prayer for divorce *a mensa* is properly overruled.

2. Divorce § 13—

Alimony without divorce under C. S., 1667, may be granted only in an independent suit and cannot be granted upon the wife's cross action filed in the husband's action for divorce.

3. Divorce § 12—

Permanent alimony under C. S., 1665, may be allowed only upon decree for divorce *a mensa*, and is erroneously granted in the wife's cross action in which divorce *a mensa* is neither prayed nor decreed.

4. Divorce § 5—

In the husband's action for divorce *a vinculo*, the wife's answer setting up a cross action must be verified under C. S., 1661, as a jurisdictional prerequisite, and when the answer is not so verified the granting of permanent alimony is erroneous.

APPEAL by plaintiff from *Phillips, J.*, at March-April Term, 1941, of MITCHELL. Error and remanded.

This is a civil action for divorce *a vinculo*. Plaintiff's cause of action is bottomed on allegations of adultery and two years separation. The defendant filed "answer and complaint for affirmative relief" in which she denied the allegations in the complaint other than that of marriage and in which she sets up a cross action alleging that plaintiff abandoned the defendant. She prays an order granting her an allowance for support for herself and child and for attorney's fees *pendente lite* and for permanent alimony. The cross complaint contains a prayer for general relief but not for divorce *a mensa*.

When the cause came on for trial issues were submitted to and answered by the jury as follows:

"1. Did the plaintiff and the defendant marry, as alleged in the complaint?

"Answer: Yes.

"2. Has the plaintiff been a resident of the State of North Carolina for two years prior to the commencement of this action?

"Answer: Yes.

"3. Did the defendant commit adultery, as alleged in the complaint?

"Answer: No.

"4. Did the plaintiff wrongfully abandon the defendant and the child born to the marriage, Hal Silver, as alleged in the answer?

"Answer: Yes."

Thereupon the court entered its judgment requiring the plaintiff to make stipulated monthly payments for the use and benefit of the defendant and her child and for certain attorneys' fees. No judgment of divorce *a mensa* was entered. The plaintiff excepted and appealed.

W. C. Berry, Watson & Fouts, and Anglin & Randolph for appellant.
McBee & McBee and Charles Hutchins for appellee.

BARNHILL, J. The plaintiff in this cause entered a demurrer *ore tenus* to the cross complaint for that it fails to state facts sufficient to constitute a cross action. The demurrer must be overruled. The facts alleged in the cross action are sufficient to sustain at least defendant's prayer for alimony *pendente lite.*

The judgment below cannot be sustained under C. S., 1667. This section "only applies to independent suits for alimony" and a decree thereunder cannot be entered in a cross action by a wife in a suit instituted by the husband. *Dawson v. Dawson,* 211 N. C., 453, 190 S. E., 749, and cases cited; *Adams v. Adams,* 212 N. C., 373, 193 S. E., 274.

The court below was without authority to enter a judgment under C. S., 1665. Under that section alimony may be allowed only "when any court adjudges any two married persons divorced from bed and board." The alimony allowed under this section is incident to and dependent upon a decree of divorce *a mensa.* As no divorce *a mensa* was granted on the verdict no permanent alimony could be allowed.

There is a further impelling reason why the judgment below must be vacated. On the record as it appears here defendant's answer is not verified either under C. S., 529, or under C. S., 1661. This is a jurisdictional prerequisite, and the verification must be under C. S., 1661. *Ragan v. Ragan,* 212 N. C., 753, 194 S. E., 458; *Clark v. Clark,* 133 N. C., 28.

If the record speaks the truth the defendant may apply for leave to amend. C. S., 547; *Ragan v. Ragan, supra; Waters v. Waters,* 125 N. C., 590; *Hendon v. R. R.,* 127 N. C., 110; *Robeson v. Hodges,* 105 N. C., 49. If allowed, the amendment will relate back to the time of the filing of the answer. *Lefler v. Lane,* 170 N. C., 181, 86 S. E., 1022. If the prayer for general relief is deemed insufficient to support a decree of divorce *a mensa,* the same rule as to amendment applies. See, however, *Lipe v. Trust Co.,* 206 N. C., 24, 173 S. E., 316; *Bolich v. Ins. Co.,* 206 N. C., 144, 173 S. E., 320; *McNeill v. Hodges,* 105 N. C., 52; *Presson v. Boone,* 108 N. C., 78.

The decree allowing permanent alimony, not being supported by a judgment of divorce *a mensa,* cannot be sustained. The cause must be remanded for further proceedings.

Error and remanded.

J. B. BUNTING v. C. H. HENDERSON.

(Filed 15 October, 1941.)

Venue § 2a—

A complaint alleging that defendant entered upon the land of plaintiff and cut and removed therefrom a specified amount of timber and praying that plaintiff recover the value of the timber wrongfully cut and removed states a transitory cause of action, and defendant's motion to remove from the county of plaintiff's residence to the county wherein the land is situate, is properly denied. C. S., 463 (1).

APPEAL by defendant from *Carr, J.*, at May Term, 1941, of PITT. Affirmed.

This is a civil action brought by the plaintiff in the Superior Court of Pitt County, wherein the defendant filed a petition before the clerk demanding that the action be removed from Pitt County to Edgecombe County for trial, under the provisions of C. S., 463 (1). The clerk denied the petition and retained the case, and the defendant excepted and appealed, and the judge at term time affirmed the order of the clerk. Whereupon the defendant again excepted and appealed to the Supreme Court, assigning error.

J. H. Harrell and Albion Dunn for plaintiff, appellee.
R. B. Peters, Jr., and Henry C. Bourne for defendant, appellant.

SCHENCK, J. It is alleged in the complaint that the defendant entered upon the land of the plaintiff in Edgecombe County and cut and removed therefrom approximately 30,000 feet of timber, of the value of $200.00, and "that the defendant is now indebted unto the plaintiff, for the timber cut and removed as aforesaid, in the sum of $200.00," and it is prayed that the plaintiff "recover of the defendant the sum of $200.00 (and) the costs of this action."

The question presented to us is whether the action as alleged in the complaint is transitory or local. If it is transitory it should have been retained in Pitt County. If it is local it should have been removed to Edgecombe County. We are of the opinion, and so hold, that the action is transitory.

It will be noted that the plaintiff nowhere seeks to recover real property, or an estate or interest therein, or to recover for injuries to real property, but simply seeks to recover $200.00, the value of 30,000 feet of timber cut and removed from his property. "It is necessary to distinguish in each case what the particular cause of action is, as alleged. If the timber is cut and removed from the land, it becomes personalty,

and the owner has the choice of several remedies. He may sue for the injury to the land by cutting the timber, in the nature of the old action of trespass *quare clausum fregit,* and this is local; he may sue to recover possession of the specific articles of personalty and the venue is determined by where this particular article is located; he may sue for the value of the timber, as in trover and conversion, or for the wrongful taking, as in trespass *de bonis asportatis,* and these are transitory; or, if the article has been sold, he may sue, as in *assumpsit,* for the money received, and this is transitory." McIntosh N. C. Prac. & Proc., par. 275, p. 260.

"Actions are transitory when the transactions on which they are based *might* take place anywhere, and are local when they could not occur except in some particular place. The distinction exists in the nature of the subject of the injury, and not in the means used or the place at which the cause of action arises." *Brady v. Brady,* 161 N. C., 325, 77 S. E., 235, and cases there cited.

The action being transitory, it is governed by the law enunciated in *Blevins v. Lumber Co.,* 207 N. C., 144, 176 S. E., 262, and was properly retained in Pitt County, where the plaintiff is resident and where he has elected to institute it.

In view of our holding that the retention of the case in Pitt County was proper, it becomes supererogatory to decide the question as to whether the defendant waived any right he may have had to ask for such removal by filing answer.

The judgment of the Superior Court is

Affirmed.

DEVIN, J., dissents.

GROVER C. CHILDRESS v. DAN C. LAWRENCE.

(Filed 15 October, 1941.)

1. Trial § 23—

A conflict in the testimony of plaintiff's witnesses upon a material fact raises the issue for the determination of the jury.

2. Landlord and Tenant § 11—

Evidence that defendant landlord maintained a shelter or roof extending from the front wall of his building, that at one end of the building the projection was 68 inches from the ground, that plaintiff struck his head against the shelter or roof while walking on a clear sunshiny day, with conflicting evidence as to whether the projection extended over a

portion of the sidewalk, *is held* to take the case to the jury upon the theory of the landlord's liability to injured third persons when he knowingly demises the premises in a state of nuisance or authorizes a wrong.

APPEAL by plaintiff from *Sink, J.*, at June Term, 1941, of HARNETT.

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

The evidence on behalf of the plaintiff tends to show that on 17 September, 1940, he was walking along the sidewalk on the south side of Wicker Street in the town of Sanford and struck his head against a shelter or roof which protruded out from the defendant's building and extended partly over the sidewalk. Plaintiff's right eye was injured and he ultimately lost the sight of it. The sidewalk slopes from east to west in front of defendant's building, and the shelter or roof of the building protrudes out from the building a distance of 54 inches and extends over a portion of the sidewalk. "At the east end of the shelter or roof it is 68 inches from the ground and at the west end it is 6½ feet." The difference in height is due to the slope of the sidewalk. "The sidewalk is on a hillside, kinder elevated, the sidewalk slopes and street and all." Plaintiff was walking from east to west. A crowd was in front of defendant's building which was then used as a wiener stand or "chicken house." The rafter was in plain view and it was a clear, sunshiny day.

The plaintiff testified, as did the surveyor who measured the distance, that "the shelter or roof of that building protrudes out over the sidewalk."

One of plaintiff's witnesses testified: "The eaves extend out some distance from the walls of the building, 3½ to 4 feet, I think. They do not extend out over the sidewalk or any portion of it."

The defendant contended that plaintiff's injury was due to his own inattentiveness, and that as landlord or owner of the building he was not liable.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

Neill McK. Salmon for plaintiff, appellant.

Williams & Seymour and Gavin, Jackson & Gavin for defendant, appellee.

STACY, C. J. We think the case is one for the jury. True, there is evidence that the eaves of defendant's building do not extend over any portion of the sidewalk. There is also evidence that they do. This presents a conflict in the testimony of plaintiff's witnesses, solvable alone by the jury. *Franck v. Hines,* 182 N. C., 251, 109 S. E., 21; *Shell v.*

Roseman, 155 N. C., 90, 71 S. E., 86; *Evans v. Cowan,* 194 N. C., 273, 139 S. E., 434.

The general rule is, that when a landlord or owner "knowingly demises premises in a ruinous condition or in a state of nuisance," or "where he authorizes a wrong," he renders himself liable to third persons for injuries resulting therefrom. *Knight v. Foster,* 163 N. C., 329, 79 S. E., 614; *Rucker v. Willey,* 174 N. C., 42, 93 S. E., 379; *Brooks v. Mills Co.,* 182 N. C., 719, 110 S. E., 96; *Price v. Travis,* 149 Va., 536, 140 S. E., 644, 56 A. L. R., 209; 13 R. C. L., 404; 25 Am. Jur., 566.

Applying this principle to the facts in hand, it would seem that the evidence is sufficient to carry the case to the jury.

Reversed.

J. K. ABSHER, BY HIS NEXT FRIEND, W. R. ABSHER, v. RUFUS MILLER AND GRADY MILLER.

(Filed 15 October, 1941.)

Negligence § 12: Automobiles § 7—

Plaintiff was injured as he ran across the road in front of defendants' automobile. The evidence tended to show that plaintiff lacked only a few days being eight years old and was a bright boy. *Held:* The issue of contributory negligence should have been submitted to the jury under appropriate instructions, and the court's instruction that plaintiff, due to his tender years, could not be guilty of contributory negligence is error.

APPEAL by defendants from *Phillips, J.,* at April-May Term, 1941, of WILKES. New trial.

This was an action to recover damages for personal injury alleged to have been caused the plaintiff by the negligence of the defendants in the operation of an automobile. The plaintiff, a child eight years of age, was struck and injured as he ran across the road in front of defendants' moving automobile. There was evidence tending to show that the defendants' car was being driven negligently.

Issues of negligence and damage were submitted to the jury and answered in favor of the plaintiff, and from judgment on the verdict defendants appealed.

W. H. McElwee for plaintiff, appellee.
Trivette & Holshouser for defendants, appellants.

DEVIN, J. The defendants in their answer set up the defense of contributory negligence, and in apt time tendered an issue addressed to that

question, which the court declined to submit. The court also instructed the jury that the plaintiff, due to his tender years, could not be guilty of contributory negligence.

There was evidence tending to support the defendants' allegation of negligence on the part of the plaintiff, and the father of the plaintiff testified that at the time of the injury the plaintiff was eight years old lacking a few days, and that he was a bright boy.

We are constrained to hold that the court below was in error in the ruling complained of, and that the issue of contributory negligence should have been submitted, with appropriate instruction, under the rule laid down in *Boykin v. R. R.,* 211 N. C., 113, 189 S. E., 177; *Morris v. Sprott,* 207 N. C., 358, 177 S. E., 13; *Brown v. R. R.,* 195 N. C., 699, 143 S. E., 536; *Foard v. Power Co.,* 170 N. C., 48, 86 S. E., 804.

The defendants' motion for judgment of nonsuit was properly denied, but for the error pointed out there must be a

New trial.

LINCOLN HOWELL v. LYLES HARRIS AND QUEEN CITY COACH COMPANY.

(Filed 15 October, 1941.)

1. Principal and Agent § 7—

This action was instituted for alleged assault and battery committed by the individual defendant while acting in his capacity of ticket agent for defendant carrier. *Held:* Testimony as to what the individual defendant swore to in narrating the occurrence in a previous prosecution for assault is hearsay and is incompetent against the corporate defendant as substantive evidence to prove the fact of agency, the scope of authority, or that the alleged agent was acting for his principal at the time.

2. Trial § 29b—

The trial court correctly withdrew hearsay evidence upon the question of agency, but inadvertently charged the jury that plaintiff contended that such evidence should satisfy the jury that the alleged agent was about the corporate defendant's business. *Held:* The action of the court in placing before the jury evidence material to the issue, which had been excluded, without opportunity on the part of the corporate defendant to answer it or in any way meet it, necessitates a new trial.

3. Evidence § 29—

In a civil action for assault and battery against the wrongdoer and his alleged principal, testimony as to what the individual defendant swore to in narrating the occurrence upon a previous prosecution against him for assault is competent against him individually.

HOWELL *v.* HARRIS.

APPEAL by defendants from *Phillips, J.*, at April-May Term, 1941, of WILKES.

Civil action to recover damages for assault and battery.

The record discloses that the corporate defendant is a common carrier by motor vehicle; that on 4 October, 1940, the plaintiff, intending and desiring to become a passenger on one of defendant's buses, went to its station in Blowing Rock at the Hob Nob Inn and asked the agent in charge, Lyles Harris, for a ticket to North Wilkesboro; that instead of complying with this request, the said Lyles Harris assaulted the plaintiff and ran him out of the station with the statement: "Tell all the other damn Negroes you see that I have the same thing for them."

The defendant, Lyles Harris, was tried in the Mayor's Court that afternoon on a warrant charging him with an assault upon Lincoln Howell. Over objection, the mayor was permitted to testify that the defendant, Lyles Harris, swore in his court "that the trouble came about due to the fact that Lincoln Howell came in and asked for a ticket in a commanding or impudent voice, rather arrogant way," etc.

The Chief of Police testified, over objection, that he heard the defendant's testimony in the Mayor's Court: "He said this colored boy came in and had his hat on and asked for the ticket in an unbecoming manner or something like that is the way he said it and he asked him to go out and he didn't go and he pushed him and he caught his foot under a rug and fell against a bench that was in the bus station."

The foregoing evidence in respect of what the defendant, Lyles Harris, swore in the Mayor's Court was later excluded as to the bus company.

In giving the plaintiff's contentions, the court said: "The plaintiff further insists and contends, gentlemen of the jury, that statements of the defendant under oath in the Mayor's Court would indicate and should satisfy you that he was about his master's business." Exception.

From verdict and judgment against both defendants awarding plaintiff compensatory and punitive damages, the defendants appeal, assigning errors.

Burke & Burke and A. H. Casey for plaintiff, appellee.
John R. Jones and Trivette & Houshouser for defendants, appellants.

STACY, C. J. The evidence offered by the plaintiff tending to show what the agent of the Bus Company testified in the Mayor's Court was properly excluded as against the corporate defendant. *Hester v. Motor Lines,* 219 N. C., 743. What an agent or employee says after an event, merely narrative of the past occurrence, though his agency or employment may continue as to other matters, or generally, is only hearsay and is not competent as substantive evidence against the principal or em-

ployer. *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802, and cases there cited. Nor is such evidence competent to prove the fact of agency or the scope of the agent's authority or that the alleged agent was acting for his principal or employer at the time. *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 817.

It appears, however, that when the court came to charge the jury, this evidence was inadvertently recited as tending to show that the agent was then about his master's business. The evidence had previously been excluded as incompetent for this purpose and it was error thus to recite it in the charge. It has been said in a number of cases that where, by action of the court, evidence material to the issue, which has been excluded, is placed before the jury, without opportunity to answer it or in any way to meet it, necessitates a new trial. *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473; *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83; *S. v. Love,* 187 N. C., 32, 121 S. E., 20.

No error has been discovered in the trial so far as the individual defendant is concerned.

Opposite conclusions, therefore, result in respect of the two appellants:

On appeal of Lyles Harris,

No error.

On appeal of Queen City Coach Company,

New trial.

NANTAHALA POWER & LIGHT COMPANY v. MRS. IDA MOSS,

and

NANTAHALA POWER & LIGHT COMPANY v. W. C. NORTON,

and

NANTAHALA POWER & LIGHT COMPANY v. MRS. ETTA DAVIS, WIDOW; N. D. DAVIS AND WIFE, EVA MAE DAVIS; J. W. DAVIS AND WIFE, LOUISE DAVIS; D. D. DAVIS AND WIFE, LOUISE DAVIS; GLENN DAVIS AND WIFE, MRS. GLENN DAVIS; L. H. CANNON AND WIFE, ELIZABETH CANNON; MYRTLE DAVIS; WOOD DAVIS; S. F. McCLURE; DR. EDGAR ANGEL; TRUSTEE; T. C. LEDBETTER; H. E. BUCHANAN, GUARDIAN M. BUCHANAN, JR., INCOMPETENT; MRS. EDDIE W. WILSON, GUARDIAN J. N. WILSON, INCOMPETENT; MRS. ALVIN STEWART, ADMINISTRATRIX, ALVIN STEWART; W. C. NORTON; AND JOHN D. DAVIS,

and

NANTAHALA POWER & LIGHT COMPANY v. MRS. ETTA DAVIS, WIDOW; N. D. DAVIS AND WIFE, EVA MAE DAVIS; J. W. DAVIS AND WIFE, LOUISE DAVIS; D. D. DAVIS AND WIFE, LOUISE DAVIS; GLENN DAVIS AND WIFE, MRS. GLENN DAVIS; L. H. CANNON AND WIFE, ELIZABETH CANNON; MYRTLE DAVIS; WOOD DAVIS; S. F. McCLURE; DR. EDGAR ANGEL, TRUSTEE; T. C. LEDBETTER; H. E.

BUCHANAN, GUARDIAN M. BUCHANAN, JR., INCOMPETENT; MRS. EDDIE W. WILSON, GUARDIAN J. N. WILSON, INCOMPETENT; MRS. ALVIN STEWART, ADMINISTRATRIX ALVIN STEWART, DECEASED; MRS. MARY ANN STEWART; AND JOHN D. DAVIS.

(Filed 29 October, 1941.)

1. Eminent Domain § 3—

A power company may maintain proceedings against riparian owners to condemn the right to divert the waters of a stream when such diversion is an integral part of its hydroelectric project.

2. Eminent Domain § 9—

The measure of compensation to be paid for the taking of land or any interest therein is the market value of the property, which is the price it will bring when offered for sale by one who desires, but is not obligated to sell, and is bought by one desiring to buy, but not under the necessity of purchasing.

3. Same—

In determining the market value of property, consideration need not be confined to its condition and use at the time of the taking, but the uses to which the property may be applied or for which it is reasonably adaptable, to the extent that such potential uses affect its value at the time of the taking, may be considered.

4. Same—

In assessing compensation for land taken, neither the value of the land as an integral part of the taker's project, nor the taker's necessity of having the land as a part of its project should be considered.

5. Same—Held: Court erred in admitting evidence relating to benefits accruing to petitioner from the taking and in charging the jury thereon.

Petitioner owns a dam above respondents' land and a power house on the stream below respondents' land, and diverts the water from the dam to the power house through a tunnel. This proceeding was instituted to assess compensation for the diversion of the water. The court admitted evidence as to the location of the dam and power plant, the length of the tunnel, the proportionate part of the fall owned by each of respondents, the value of respondents' land when considered as an essential part of the whole development, and reviewed this evidence in its charge to the jury. *Held:* The admission of the evidence and the charge of the court is error, since the jury was permitted to consider, as elements of compensation, the benefits accruing to the petitioner from the taking, the value of respondents' land when considered as an integral part of the development, and petitioner's necessity of acquiring the right of diversion as a part of its project.

6. Appeal and Error § 39—Error in admission of evidence held not cured in charge.

In this condemnation proceeding the trial court erroneously admitted upon the issue of damages evidence relating to the benefits accruing to petitioner from the taking and the value of respondents' lands when considered as units of petitioner's power project. *Held:* The error in the admission of the evidence was not cured by a correct statement in the

charge of the rule for the admeasurement of compensation, when the court in other portions of the charge emphasized the error by modifying petitioner's prayers for instructions to read that benefits accruing to petitioner *by reason of its expenditures* should not be considered.

7. Eminent Domain § 9—In order for evidence of potential uses of land to be competent, such uses must be so immediately probable as to affect the present market value of the land.

This proceeding was instituted by petitioner to condemn the right to divert waters of a stream for a power project. Respondents were permitted to introduce evidence that their lands, together with adjacent lands other than lands belonging to petitioner, might be united in an independent water power project, but respondents' evidence was to the effect that there was no present demand for such additional project and that there was merely a potential possibility of a market for such project. *Held:* While the highest and most profitable uses for which the property is adaptable and needed, or likely to be needed, in the reasonably near future may be properly considered to the extent that such potential uses affect the present market value of the land, in the present case respondents did not show that the conversion of their land into another power project was so reasonably probable or that demand for such potential use was so reasonably immediate as to affect the present market value of respondents' land, and evidence of such potential use under the facts and circumstances of this case was speculative and should have been excluded or the jury cautioned not to consider it.

8. Trial § 29b—

An opinion must be read in connection with the facts of the particular case it decides, and therefore in reading a decision to the jury the trial court must exercise great caution to ascertain that the language used in the decision is a statement of the general law applicable to the facts in the case at issue, and should call the jury's attention to any dissimilarity in the facts in order to apply the general statement of the law to the evidence in the case at issue.

CLARKSON, J., concurring in result.

APPEAL by petitioner from *Alley, J.*, at May Term, 1941, of JACKSON. New trial.

There are four separate condemnation proceedings instituted before the clerk of the Superior Court of Jackson County for the purpose of condemning the right to divert the waters of the west fork of Tuckaseegee River from the lands of the various respondents and for a right of way 240 feet long for a tunnel over the lands of the respondent Ida Moss. The causes were consolidated for the purpose of trial.

The petitioner owns a dam site on the west fork of the Tuckaseegee River upstream from the lands of the several respondents. It also owns a large body of land above the dam site for reservoir purposes. The petitioner also owns all the land on both sides of the river below the dam to the property of the respondents—a distance of about one-half mile—including what is known as High Falls. Below the lands of the peti-

tioner each respondent owns a tract of land running to the thread of the stream, including riparian rights in the waters of the river as follows: (1) On the right-hand side going down the J. W. Davis heirs own 11 acres known as the Davis "little" tract, having a frontage of 450 feet on the stream; (2) the respondent Ida Moss owns 372 acres with 11,731 feet frontage on the stream on the right-hand side; (3) across the river on the left-hand side the respondent W. C. Norton owns a tract containing 525 acres fronting approximately 4,726 feet; (4) next on the left-hand side is situate the J. W. Davis heirs "big" tract. Within the Davis "big" tract and fronting on the river is the Reed & Warren tract with a frontage of 2,417 feet, belonging to the petitioner. The Davis "big" tract has water frontage of 5,038 feet above the Reed & Warren tract, a frontage of 2,155 feet within the boundary of the Reed & Warren tract, and approximately 3,201 feet below the Reed & Warren tract—its frontage, due to the location of Reed & Warren tract, being broken into three sections.

The petitioner established its power house down-stream a considerable distance below the property of respondents and constructed a tunnel or tube from the dam to the power house to convey the water. This diverts all of the water entering the river above the petitioner's dam, but other waters entering the stream furnish water to the lands of the respondents for all ordinary domestic and stock-raising purposes.

These several proceedings were instituted for the purpose of fixing the compensation to be paid to the several respondents for the diversion of such waters through the instrumentality of the tunnel or tube extending from the dam site above the property of respondents to the power plant considerably below such property.

The jury answered the several issues submitted, fixing the amount of compensation to be paid to the individual respondents. From judgments thereon the petitioner appealed.

Dan K. Moore, Stillwell & Stillwell, and Harkins, Van Winkle & Walton for petitioner, appellant.

Hayes Alley and Jones, Ward & Jones for respondents, appellees.

BARNHILL, J. The petitioner has not taken and does not seek to take any part of the property of any one of the respondents except a right of way or easement for the tunnel which passes across the land of the respondent Ida Moss. It only seeks the right to divert the waters of Tuckaseegee River which passes along the boundary line of the respective respondents and to have the compensation to be paid therefor fixed and determined. And it is conceded that as the property line of each respondent extends to the thread of the stream each is a riparian owner

affected by the diversion of the waters of such stream. The right to so divert is a proper basis for condemnation proceedings.

The petitioner complains that the court below permitted the cause to be tried upon the theory, in part, that the respondents are entitled to compensation for the diversion of the waters of Tuckaseegee River on the basis of advantages thereby accruing to the petitioner. That is, on the basis of the enhanced value of its development resulting from the use of the water as diverted. It contends that under the evidence offered and the charge of the court the jury was permitted to award respondents a ratable share of the value to the petitioner based on fall per foot in the whole development. Its contentions in this respect are properly presented by a series of exceptions duly preserved. While the exceptions in this respect are numerous we may consider the one question thereby presented without discussing any one of the exceptions in detail.

Witnesses were permitted to give testimony as to the location and nature of petitioner's reservoir and power plant, the location of its dam, the length of its tunnel and the total fall thereby created, the relative location of the lands of respondents, the proportionate part of the fall owned by them and other facts relating to the benefits accruing to the petitioner from the taking. They were then permitted to estimate the value of respondents' land when considered as an essential part and parcel of the whole development.

In its charge the court reviewed this evidence in detail, calling the attention of the jury to the fact that the witnesses had said: "That the diversion of the river and making the tunnel has enhanced the value of petitioner's proposition, and that he took this in consideration in placing his estimate of value upon respondents' property"; "in considering the hydroelectric proposition he said he figured each one of these tracts as a unit of considerable potential value, assuming that a plant would be developed, that the whole would be developed into what he would consider a great water power"; "he considered the respondents' property as a part of the petitioner's property, as one of its units"; "he has made his estimate on the basis of a unit by the owners, and also in connection with the petitioner"; "that the petitioner could not profitably or practicably proceed or have any such power proposition as it now has without this diversion of the river and that he took this into consideration in placing his value on the respondents' property"; "he arrived at the estimate of its value by considering all the property, including the respondents' property and the petitioner's property as a unit"; "that this property is an essential part of that unit, and that the petitioner is now using all of it as one unit"; and "the petitioner has developed part of the unit and is now trying to get the rest of the unit."

The court then called the attention of the jury to the contentions made by respondents based upon this evidence to the effect in part that the petitioner cannot operate without the right to divert the water from the lands of the respondents and that the acquisition of such right "is indispensable to the petitioner."

The market value of property is the yardstick by which compensation for the taking of land or any interest therein is to be measured and market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all of the capabilities of the property, and all of the uses to which it may be applied, or for which it is adapted, which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. 2 Lewis, Eminent Domain (3d), 1228, and numerous cases cited; *Brown v. Power Co.,* 140 N. C., 333; *Pemberton v. Greensboro,* 208 N. C., 466, 181 S. E., 258; *Highway Com. v. Hartley,* 218 N. C., 438, 11 S. E. (2d), 314, and cases cited; Bonbright, Valuation of Property, Vol. 1, p. 411, *et seq.; Light Co. v. Carringer, ante,* 57, and cases cited. *Ford Hydro-Electric Co. v. Neely,* 13 Fed. (2d), 361; Anno. 75 A. L. R., 857; 10 R. C. L., 128.

That this is the true rule to be followed in ascertaining the compensation due the respondents seems to be conceded. The application of the rule and what is to be excluded from consideration in ascertaining the reasonable market value is the hub of the controversy.

The just compensation rule merely requires that the owner of the property taken shall be paid for what is taken from him. "It deals with persons, not with tracts of land, and the question is, what has the owner lost? not, what has the taker gained?" *Boston Chamber of Commerce v. Boston,* 217 U. S., 189, 54 L. Ed., 725. The value of the property to the condemnor for his particular use is not to be considered. *Power Co. v. Hayes,* 193 N. C., 104, 136 S. E., 353; *United States v. Chandler-Dunbar W. P. Co.,* 229 U. S., 53, 57 L. Ed., 1063, and cases cited; *U. S. v. Hayman,* 115 Fed. (2d), 599.

Value to the taker of a piece of land combined with other parcels for public use is not the measure of or guide to the compensation to which the owner is entitled. *Olson v. U. S.,* 292 U. S., 246, 78 L. Ed., 1236, and cases cited. *Highway Com. v. Hartley, supra.* "The value of the land taken to the party taking it is not the test of what should be paid, nor should the fact that the land is desired or needed for a particular public use be considered when it is taken for that use." 18 Am. Jur., 881. Neither the value to the condemnor nor his necessity can be taken into consideration when fixing the value. 18 Am. Jur., 882; *McGovern*

v. New York, 229 U. S., 363, 57 L. Ed., 1228; *Wadsworth v. Water Co.,* 256 Pa., 106; *San Diego Land Co. v. Neale* (Cal.), 25 Pac., 977; *Thompson v. State,* 189 N. Y., 590; *Kirk v. Buckles,* 134 Okla., 206, 273 Pac., 346.

The very purpose underlying the authority to take by eminent domain is to prevent the owner who is aware of the necessity of the taker from making the most of such necessity and from demanding the highest price such necessity impels. Hence "holdup" or "strategic" values created by the necessity of the taker is not the true criterion. *U. S. v. Chandler-Dunbar W. P. Co., supra; McGovern v. N. Y., supra; Boston Chamber of Commerce v. Boston, supra; Olson v. U. S., supra; Highway Com. v. Hartley, supra.*

It follows that it was error for the court to admit the indicated evidence and to submit the same to the jury for its consideration in the charge.

But the respondents take the position that the admission of this evidence, if error, was rendered harmless by the charge of the court. In this connection it may be conceded that the court in a part of its charge correctly stated the rule to be followed by the jury in the ascertainment of the amounts to be awarded the several respondents.

Whether in any event this would be sufficient to erase from the minds of the jury the impression which must have been made by the admission of the evidence, the recapitulation thereof by the judge, and the statement of the contentions based thereon is subject to serious debate. This we need not now decide for the reason that the court went further and, in our opinion, emphasized the error to such an extent as to make it appear that the jury must have given weight and consideration to the evidence and to the charge in respect thereto in arriving at its verdict, so as to make it manifest that the respondents have been awarded compensation for the benefits accruing to the petitioner from the diversion of the waters in question. *Pemberton v. Greensboro, supra.*

To meet the situation arising from the admission of this testimony and to preserve its exceptions thereto the petitioner tendered a number of prayers for instruction, requesting the court to charge the jury, in substance, that any enhanced value in the property of petitioner resulting from the diversion, the value of the property to the company condemning it, the enhancement of the value of its project, the benefits accruing to the petitioner and the value of the diverted water, when used in connection with the dam, reservoir and power project of the petitioner, were not to be considered. The court modified each of these instructions by adding such terms as "accruing by reason of its expenditures"; "by reason of its expenditures" and "caused by its expenditures," or "arising from its expenditures."

The modifications were unwarranted. The instructions, as given, when viewed in connection with the evidence submitted and the contentions stated, clearly left it open for the jury to consider such elements—except as increased in value by the expenditures of the petitioner—in ascertaining the compensation to be paid.

Other exceptions are directed to the admission of evidence offered for the purpose of showing that by uniting the lands of respondents with adjacent lands, other than that belonging to the petitioner, an independent water power project was available. Related exceptions are to the charge of the court in respect thereto.

It is unnecessary to discuss these exceptions at length. If as one witness testified, "it is speculation, like anything else—I proceeded on the assumption that by some method the property owners on both sides of the street might be combined in some way so that a dam could be built in a similar manner . . . there isn't a market available at the minute, there is a potential possibility of a market," the evidence was speculative in nature and it should have been excluded, or the jury should have been cautioned not to consider it.

Elements affecting value that are dependent upon evidence of combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow more speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth. *Olson v. United States, supra; Ayden v. Lancaster,* 197 N. C., 556, 150 S. E., 40.

Before valuations can be considered as a basis for awarding damages under the theory that the numerous types of land may be brought together and used as one tract in a development, it must be shown that there is a reasonable probability of the unification of the tracts of land involved and that it is feasible and practicable to combine them in the one ownership either by condemnation proceedings or by agreement, and such evidence should not be submitted to the jury under any circumstances when it appears that such unity is impractical or impossible. *R. R. v. Gahagan,* 161 N. C., 190, 76 S. E., 696. See also *Central Power Co. v. Stone,* 139 Ga., 416, 77 S. E., 565; *Chicago, Burlington & Q. R. R. Co. v. City of Chicago,* 166 U. S., 226, 41 L. Ed., 979; *Stockton v. Ellingwood* (Cal.), 275 Pac., 228; *Eichman v. Oklahoma City* (Okla.), 202 Pac., 184; *N. Y. City v. Sage,* 239 U. S., 57, 60 L. Ed., 143; *Medina Valley Irrig. Co. v. Seekatz,* 237 Fed., 805; *Idaho Farm Devel. Co. v. Brackett* (Idaho), 213 Pac., 696; *Emmons v. Utilities Power Co.* (N. H.), 141 Atl., 65, 58 A. L. R., 788; *Gilmore v. Central Maine Power Co.* (Me.), 145 Atl., 137.

Conversely, the highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not as a measure of value but to the full extent that such prospect or demand for such use affected the market value at the time respondents were deprived of their riparian rights. *Olson v. U. S., supra; Miss. & R. River Boom Co. v. Patterson,* 98 U. S., 403, 25 L. Ed., 206; *Clark's Ferry Bridge Co. v. Public Service Com.,* 291 U. S., 227, 78 L. Ed., 767; 2 Lewis, Eminent Domain (3d), sec. 707, p. 1233; 1 Nichols, Eminent Domain (2d), sec. 220, p. 671; *U. S. v. Powelson,* 118 Fed. (2d), 79. The fact that the most profitable use of a parcel of land can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is so reasonably sufficient and the "other uses" are so reasonably probable as to affect market value. *N. Y. City v. Sage, supra; Olson v. U. S., supra; United States v. Powelson, supra.* In making the estimate of market value there should be taken into account all considerations that fairly might be brought forward and reasonably given substantial weight by the seller and buyer at private sale. *Olson v. U. S., supra; Brooks-Scanlon Corp. v. United States,* 265 U. S., 106 68 L. Ed., 934; 18 Am. Jur., 880; *Emmons v. Power Co., supra.*

At the next trial, in ruling upon the admissibility of evidence offered for the purpose of showing the availability and adaptability of the land of respondents for uses other than those to which it is now being subjected the trial judge should be guided by these generally recognized principles.

The petitioner likewise complains that the court below in its charge read extensively from the opinions in *Brown v. Power Co., supra,* and *United States v. Powelson, supra,* in which the facts were essentially different, and from the *Olson case, supra,* and other cases, omitting from such reading statements that qualified and limited the general principles enunciated in those cases.

While the right of a judge to adopt the language used by an appellate court in its opinions, when properly applicable to the facts in the case on trial, cannot be gainsaid, extreme caution should be exercised in so doing.

The law discussed in any opinion is set within the framework of the facts of that particular case and it is often, if not generally, extremely difficult to transplant the law so that it will grow healthily upon another set of facts merely by reading from an opinion without calling attention to the dissimilarity in the facts and applying the law to the evidence in the cause at issue.

"Especially is it difficult to ascertain to what extent the facts in the case are binding upon the language employed. Not infrequently the

statements are not commensurate with their own applicability. They read like statements universalizing some principle when in truth they are intended to express something peculiar to the case. Considerable difficulty is always experienced in so expressing an idea that the language implies no more and no less than just what is intended." Brumbaugh, Legal Reasoning and Briefing, p. 195. The judge should be ever mindful that "a decision . . . draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has assumed to adjudicate." *Ibid.*, p. 172. "It is platitude to say that language wrenched from its context is apt to be misconstrued. Courts repeatedly have held that the language of their opinions must be read in connection with the facts of the case in which the language was used. This is, or ought to be, known to all. The surprising thing is to find how utterly meaningless, how completely ununderstandable, the language of an opinion of a court can be when taken out of its setting." Walter, Brief-Writing and Advocacy, pp. 78-9.

This difficulty in transplanting law is due, in part at least, to the dual nature of the judicial opinion. Its primary function is to furnish the rationale of the decision and disposition of the instant case; its secondary—and incidental—function is the exposition of general legal principles. In each case the particular becomes so blended with the general, the specific so definitely a part of the universal, that he must indeed be a deft and expert craftsman who undertakes to excise that which is general law. It is this danger of coloring the general with the particular which makes so dangerous the reading to the jury of extensive portions of opinions in previously decided cases. When we realize that able lawyers are sometimes perplexed as to the extent of the universality of principles apparently enunciated in cases, how much more apparent it must be that laymen, untrained in the law, are likely to transfer indiscriminately the principles of factually different cases to the case at bar when those principles have been called to their attention by the impartial judge who is trying the case. *Peay v. Durham Life Ins. Co.*, 185 S. C., 78, 193 S. E., 199; *Milhous v. State Highway Dept.*, 194 S. C., 33, 83 S. E. (2d), 852.

The facts in the *Brown* and in the *Powelson cases, supra,* are substantially different from those presented on this record. In the *Olson case, supra,* the Court used expressions which materially qualified the general principles discussed. Care and caution should be exercised in applying the law as stated in those cases to the facts in this cause.

There are other exceptions in the record which are stressed with some force and reason. The questions thus presented may not again arise. Hence, we refrain from discussion thereof.

For the reasons stated the petitioner is entitled to a

New trial.

CLARKSON, J., concurring in result: The principle of law governing this case is stated as follows in *McCandless v. United States,* 298 U. S., 343: "The rule is well settled that, in condemnation cases, the *most profitable use* to which the land can probably be put *in the reasonably near future* may be shown and considered as bearing upon the market value; and the fact that such use can be made *only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value. Olson v. United States,* 292 U. S., 246 (255-6), 78 L. Ed., 1244." (Italics mine).

In the case of *Olson v. United States, supra, Mr. Justice Butler,* speaking for the Court, said, at page 248: "The only substantial question is whether, on the facts disclosed by the record and others of which judicial notice may be taken, the actual use and special adaptability of petitioners' shorelands for the flowage and storage of water, that *inter alia* will be available for the generation of power, may be taken into consideration in ascertaining the just compensation to which petitioners are entitled . . . (p. 255). Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held. . . . (citing authorities). The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York v. Sage,* 239 U. S., 57 (61), (60 L. Ed., 143, 146, 36 S. Ct., 25). It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. *Mississippi & R. River Boom Co. v. Patterson,* 98 U. S., 403 (25 L. Ed., 206), *ubi supra.* But the value to be ascertained does not include, and the owner is not entitled to compensation for, any element resulting subsequently to or because of the taking.

Considerations that may not reasonably be held to affect market value are excluded. Value to the taker of a piece of land combined with other parcels for public use is not the measure of or a guide to the compensation to which the owner is entitled. . . . (p. 257). In respect of each item of property that value may be deemed to be the sum which, considering all the circumstances, could have been obtained for it; that is, the amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy. In making that estimate there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining. *Brooks-Scanlon Corp. v. United States,* 265 U. S., 106 (124), (68 L. Ed., 934, 941, 44 S. Ct., 471). The determination is to be made in the light of all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof."

The most recent decision, which I think is directly in point, is the case of *United States v. Powelson,* 118 Fed. (2d), 79. This was an opinion from this circuit, written by *Judge Parker.* Quoting from the *Powelson* opinion, *Judge Parker* says, at p. 84: "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York v. Sage,* 239 U. S., 57 (61). It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. *Boom Co. v. Patterson, ubi supra,*" citing and quoting from *Olson v. U. S., supra.*

In North Carolina the principle above enumerated is stated in *Brown v. Power Co.,* 140 N. C., 336, and *R. R. v. Gahagan,* 161 N. C., 190.

In the *Brown case, supra,* pp. 341-345, it is written: "It is well settled that when, for the purpose of meeting and providing for a public necessity, the citizen is compelled to sell his property or permit it to be subjected to a temporary or permanent burden, he is entitled by way of compensation, to its actual market value. Lewis on Em. Domain, sec. 478. The difficulty arises not so much in fixing the standard of the right, as in ascertaining what elements or factors may be shown in applying the standard. Certainly where by compulsory process and for the public good the State invades and takes the property of its citizens,

in the exercise of its highest prerogative in respect to property, it should pay to him *full compensation.* The highest authorities are to that effect. 'The market value of property is the price which it will bring when it is offered for sale by one who desires but is not obliged to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted may be considered and not merely the condition it is in at the time and the use to which it is then applied by the owner.' Lewis Em. Dom., *supra. Mr. Justice Field,* in *Boom Co. v. Patterson,* 98 U. S., 403, says: 'In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or be regarded as valueless because he is unable to put it to any use. Others may be able to use it. Its capability of being made thus available gives it a market value which can be readily estimated.' In *L. R. Junction Ry. v. Woodruff,* 49 Ark., 381 (4 Am. St. Rep., 51), it is said: 'Since, then, the market value is the true criterion of damages, we are led to inquire—what is the market value? The word market conveys the idea of selling and the market value, it would seem to follow, is the selling value. It is the price which an article will bring when offered for sale in the market. It is the highest price which those having the ability and the occasion to buy are willing to pay.' Referring to the range which the testimony may take in ascertaining the market value, the Court says: 'As a general guide to the range which the testimony should be allowed to assume, we think it safe to say that the landowner should be allowed to state, and have his witnesses state, every fact concerning the property which he would naturally be disposed to adduce in order to place it in an advantageous light if he were attempting to negotiate a sale of it to a private individual. On the other hand, the jury and the opposing counsel, for the information of the jury, should be allowed to make every inquiry touching the property which one about to buy would feel it to his interest to make.' 'If a tract of which the whole or a part is taken for public use, possesses a special value to the owner, which can be measured by money, he is entitled to have that value considered in the estimate of compensation and damages.' 15 Cyc., 724; Cooley Const. Lim., secs. 567-8. . . . (p. 345). The rule is thus stated by Mr. Lewis (Lewis Em. Dom., *supra*): 'The market value of property includes its value for any use to which it may be put. If, by

reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown and the fact of such adaption may be taken into consideration in estimating the compensation. Some of the authorities hold that its value for a particular use may be proved, but the proper inquiry is, what is its market value in view of any use to which it may be applied and of all the uses to which it is adapted.' "

Arnold H. Vanderhoof, a civil engineer for 30 years, who had wide experience in hydroelectric developments, testified for respondents in regard to the use connected with other lands sufficient to be submitted to the jury: "It is my opinion it would be feasible to do it, practical. The power facilities are not great enough in the country for the demand."

The material vice, I think, in the case is the admission of the following questions and answers, elicited on the part of respondents from their witness Vanderhoof: "Q. Now, I will ask you this question: Mr. Vanderhoof, it is alleged in the petition of the Nantahala Power & Light Company, and also these landowners admit it in their answer, that the diversion of this river through their property, and the building of the tunnel are essential and necessary in order for the Nantahala Power & Light Company to develop its proposition, that is alleged and admitted. I wish you would state whether or not, in your opinion, the Nantahala Power & Light Company could probably or profitably develop and operate its project without the diversion of the Tuckaseegee River under the mountain and away from these landowners' property? (Petitioner objects—overruled—exception.) Ans.: I am of the opinion, without making a careful study of it, that the Nantahala Power & Light Company could develop power at the base of their dam, but without diverting the water from this stream. The available head would be greatly reduced and, therefore, the power which could be developed would be greatly reduced. Q. Then in forming your opinion as to the *market value of these landowners' property you took into consideration in giving the larger figure that it was a part and parcel of this hydroelectric development?* (Petitioner objects—overruled—exception.) Ans.: I did. Q. And in making your calculations and figures when you considered it and treated it as you say it should be, as a part and parcel of the *larger development, you placed the higher value of the two on it?* (Petitioner objects—overruled—exception.) Ans.: Yes, sir." There was other evidence of similar import objected to.

In the charge of the court below based on this incompetent evidence, it is said: "On the re-direct examination he said in substance it would be an advisable proposition to build a dam on the respondents' property

before the water was diverted, that the demand for electric power is much greater at this time than the supply. He says he has not made his figures for a plant under the dam; that the most practicable place would be below the dam and at the southern end of the property which would give something over 400 foot fall; that he has made his estimate on the basis of a unit by the owners, *and also in connection with the petitioner;* that the petitioner could not profitably or practically proceed or have any such power proposition as it now has without this diversion of the river and that he took this into consideration in placing his value on the respondents' property."

In *Ayden v. Lancaster,* 197 N. C., 556 (559), this Court quotes with approval the following language from the case of *U. S. v. Chandler-Dunbar Co.,* 229 U. S., 53, 57 Law. Ed., 1063: "The value should be fixed as of the date of the proceedings with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it is taken."

I think in the charge this incompetent evidence was not so erased from the minds of the jury that they could render an impartial and unprejudicial verdict. After the jury had deliberated until the following morning they requested further instructions. I think these instructions did not eliminate the baneful effect of this incompetent evidence.

There is nothing in the evidence to indicate that these property owners, whose land was taken by the petitioner, wanted anything more than just compensation. There is no evidence that they were seeking to "hold up" or force "strategic" values. Some of the other phases dealt with in the main opinion I think were not so prejudicial as to merit the serious consideration given them. The judge trying the case was learned in the law and in the trial of this cause seemed to be familiar with the authorities and the subject and gave study to the case. The case was well tried, but in so long and varied attitudes (the record contains 420 pages) casualties will sometimes happen to the best of trial judges.

KANSAS BERRY STEWART v. FRANCIS C. CARY AND WIFE, BETTY CARY, AND ELLIS C. SOPER AND WIFE, LARRY SOPER.

(Filed 29 October, 1941.)

1. Ejectment § 9—

While in an action for the recovery of real property, plaintiff must rely upon the strength of his own title, and not upon the weakness of that of defendant, plaintiff may show that he and defendant claim under a common source of title and that plaintiff has a better title from that source.

2. Same—

When in an action for the recovery of real property plaintiff shows that he and defendant claim under a common source of title, defendant may show title in a third person paramount to that of the common source only if defendant shows that he has acquired this paramount title, but he cannot defend by showing a better title outstanding in a third person.

3. Same—

The rule that when plaintiff in an action for recovery of real property establishes a common source of title under which both he and defendant claim, defendant will not be permitted to deny the title of the common source is not strictly an estoppel but an inflexible rule of law, and while the decisions variously refer to it as an estoppel, or a rule of convenience or of evidence, our courts have consistently applied the rule without deviation or confusion of principle.

4. Same—Common source rule applies notwithstanding that plaintiff establishes void deed in chain of title prior to the common source.

In this action for the recovery of real property, plaintiff established paper title from a State grant and established a common source of title with defendants in one of the links of the chain of title. Defendants contended that the common source rule did not apply for that plaintiff's own evidence established that a tax deed, forming one of the links in the chain of title prior to the title of the common source, was void, and that therefore plaintiff by her own evidence had established title in a third person. *Held:* Conceding that plaintiff's evidence established that the tax deed was void, nevertheless defendants will not be permitted to deny the title of the common source under which they claim, and plaintiff having introduced evidence of paramount title from that common source, defendants' motion to nonsuit should have been denied. *Murphy v. Barnett*, 6 N. C., 251, cited and applied.

5. Boundaries § 1—

A deed, to be valid under the statute of frauds, must contain a description of the land either certain in itself or capable of being made certain by resort to matters *aliunde* to which the description refers.

6. Boundaries § 3—

Parol evidence is not admissible to aid a description which is patently ambiguous.

7. Same—

When the description of a deed is insufficient within itself to describe the land intended to be conveyed with certainty but refers to matters *aliunde* from which the description can be made certain, parol evidence is competent to fit the description to the land, but such parol evidence cannot be used to enlarge the scope of the descriptive words.

8. Same—

A description of the land conveyed as "the tract of land on Indian Camp Branch, known as the Hamlin tract," and referring to the sheriff's deed selling the land for taxes owed by the said Hamlin, *is held* sufficient to be aided by parol, and evidence that plaintiff's predecessor in title had acquired only one tract of land which had formerly belonged to Hamlin is sufficient to be submitted to the jury.

9. Ejectment § 15—

In this action for recovery of real property, one of the links in plaintiff's chain of title depended upon the validity of adoption proceedings under which plaintiff's predecessor in title inherited the land from the parent by adoption. *Held:* The record of the adoption proceeding introduced in evidence was sufficient to show that the adoption was in conformity with the statutory procedure then in effect. Code of 1883, ch. 1, as amended by Laws of 1885, ch. 390.

APPEAL by plaintiff from *Alley, J.*, at April Term, 1941, of MACON.

Civil action to recover mineral interest in land, and remove cloud upon title. C. S., 1743.

Plaintiff, a resident of Macon County, alleges in her complaint, among other things, (1) that she is "the owner in fee simple in law and in equity of the minerals, metals, ores and mining privileges in, under and upon" a certain tract of land "in Ellijay Township, Macon County, North Carolina," specifically described, containing 136 acres more or less, "being the property known as the B. E. Hamlin property in said Ellijay Township, Macon County, North Carolina"; (2) that defendants wrongfully and unlawfully assert and claim an estate or interest or right of title in and to said minerals, metals, ores, and mining privileges in said land adverse to plaintiff, which plaintiff is entitled to have removed as cloud upon her title to same; and (3) that defendant, Francis C. Cary, a resident of Virginia, has wrongfully and unlawfully entered upon said land without regard to the rights of plaintiff and is digging, mining, raising and removing therefrom valuable minerals in large quantities, thereby irreparably damaging plaintiff.

Defendants Francis C. Cary and wife, Gladys May Cary, erroneously named in complaint, Betty Cary, in their answer deny the title of plaintiff in and to the mineral, metals, ores and mining privileges described in complaint, and assert title in themselves, and plead adverse possession for 7 years under color of title, and for 20 years in bar of any claim of plaintiff, and, further, while admitting that they are digging, mining and removing certain minerals from said land, they assert a right to do so.

Defendants Ellis C. Soper and wife, Larry Soper, in their answer deny the ownership of plaintiff as alleged, but aver that she is the owner in fee of an undivided one-sixth interest in the minerals, metals, ores and mining privileges in and to the land described in her complaint, and that they, themselves, own in fee simple the remaining five-sixths interest therein. Said defendants further admit the allegation of plaintiff with regard to wrongful claim of and trespass by defendants Francis C. Cary and wife.

In the trial court plaintiff offered in evidence record of the following muniments of title:

1. Five certain State grants to David P. Ammons, each dated 7 September, 1883, and registered in office of register of deeds of Macon County, N. C., 8 October, 1883.

2. Deed from David P. Ammons to Byron E. Hamlin, dated 14 September, 1891, and registered 21 September, 1891.

3. A tax deed from T. B. Higdon, sheriff of Macon County, to W. H. Haskett, dated 1 June, 1903, registered 8 June, 1903, together with affidavit of W. H. Haskett as purchaser, purporting to have been executed pursuant to sale of real estate as property of B. E. Hamlin for nonpayment of taxes for the year 1901. Defendants Cary objected to the introduction of this deed for that the affidavit does not comply with the requirements of law for affidavits in support of tax titles effective at date this deed purports to have been executed and the rights accrued. "Overruled for the present." Exception by defendants.

4. Will of W. H. Haskett, dated 27 February, 1893, admitted to probate 1 April, 1908, in which he devised, and bequeathed, all his property, real, personal and mixed, other than certain items of cash, absolutely and in fee simple to his wife, Nancy Jane Haskett.

5. Deed from N. J. Haskett to Andy Haskett, dated 9 October, 1908, registered 15 June, 1936, "for two-thirds of the mineral interest in a certain tract of land in Macon County, N. C., . . . known as the B. E. Hamlin property and conveyed to W. H. Haskett by sale of taxes," and referring to deed from T. B. Higdon, sheriff.

6. Deed from N. J. Haskett to A. C. Haskett, dated 7 August, 1908, registered 15 August, 1908, "for a one-third interest in a tract of land situated in Ellijay Township, known as the Hamlin lands," and refers to the sheriff's deed.

7. Deed from A. C. Haskett and wife to J. T. Berry, dated 8 August, 1908, registered 15 August, 1908, for "an undivided sixth interest in a tract of land situated in Ellijay Township, known as Hamlin property, and fully described in a deed from T. B. Higdon, sheriff, to W. H. Haskett," dated and registered as above indicated, "to which reference is hereby made."

8. Deed from Andy Haskett and wife to J. T. Berry dated 15 December, 1925, registered 24 December, 1925, in which the description following the granting clause reads: "A certain tract or parcel of land in Macon County, State of North Carolina, adjoining the lands of J. M. Bryson heirs and others bounded as follows"; then follows specific description of three tracts; and then, after "excepting from the above" certain mineral interest, these words appear: "We hereby convey all our mineral interest in the hereinafter described lands: . . . also the tract on Indian Camp Branch known as the Hamlin tract."

9. Proceeding in Superior Court of Macon County, N. C., before Sam L. Rogers, clerk, entitled "J. T. Berry *v.* Lola K. Corbin and Annie A. Corbin," in which J. T. Berry, in verified petition filed 31 May, 1893, sets forth as follows: "That Lola K. Corbin, one of the above named defendants, is a minor child now of the age 20 years and 7 months, May 5, 1893. That Annie A. Corbin, the other defendant above named, is now the age 11 years and 8 days, May 23, 1893. That the defendants above named are without a mother living, their mother Modenia Corbin died October 27, 1885. That John T. Berry, the petitioner above named, is their reputed father; that the defendants are without guardian and are now and have been for three years past living and making their home with your petitioner, John T. Berry.

"That the defendants above named have personal estate worth about $100.00, consisting of one mare and colt, two head of cattle, ten sheep. That they have an interest only in the real estate inherited through their mother Modenia Corbin from the estate of John Corbin, deceased, valued at about $50.00." Upon these allegations he prays "that the relation of John T. Berry, the petitioner herein, and the said Lola K. Corbin and Annie A. Corbin may be that of parent and children and that an order be made forthwith establishing the relation of parent and child during the life of such children with all the duties, powers and rights belonging to the relationship of parent and children, and that said children herein named be hereafter known and changed from Lola K. Corbin and Annie A. Corbin to Lola K. Berry and Annie A. Berry"; also the order of Sam L. Rogers, clerk, entered upon the petition on 31 May, 1893, in which, after finding "that Lola K and Annie A. Corbin are minors without parents living and without guardian and that John T. Berry provided them a home . . . and is the proper person to have custody of them," it is adjudged, "that letters of adoption be, and the same are hereby granted to the said John T. Berry, petitioner, to the effect forthwith to establish the relation of parent and child between the petitioner John T. Berry and Lola K. Corbin and Annie A. Corbin, the defendants, for the life of such children, who hereafter by authority of this decree shall be known and called by the names Lola K. Berry and Annie A. Berry and the relationship of parent and child are hereby established with the duties, powers and rights belonging thereto in the same manner and to the same extent such children would have been entitled to if such children had been actual children of the said John T. Berry, the petitioner."

10. Deed from Annie Berry Moore and husband, J. L. Moore, to plaintiff, dated 18 May, 1935, registered 25 May, 1935, for all the right, title and interest of Annie Berry Moore as child of J. T. Berry.

Plaintiff further offered evidence tending to show that Nancy Jane Haskett and N. J. Haskett were one and the same person; also that Andy Haskett and A. C. Haskett were one and the same—and that in 1934 John T. Berry died intestate, survived by plaintiff and Annie Berry Moore, née Annie Berry, to whom said adoption proceedings relate.

Plaintiff, then, for the purpose of showing that she and defendants Cary claim under a common source of title, and that deed under which said defendants claim is subsequent in date and registration to that of plaintiff, offered in evidence record of deed from Andy Haskett and wife to Francis C. Cary, dated 13 June, 1938, registered 14 June, 1938, for all the mineral interest and mining privileges in certain tract of land described in certain deed from Andy Haskett and wife to Ellis C. Soper, dated 22 May, 1937, registered 27 August, 1937, and "known also as the B. E. Hamlin land . . . consisting of 135 acres in the Ellijay watershed," which latter deed, is said in the former deed, to be void because of certain defaults of grantee there described by reference.

Plaintiff, further, for the purpose of showing that she and defendants Soper claim under a common source of title, and that deed under which said defendants claim is subsequent in date and registration to that of plaintiff offered in evidence record of deed from Andy Haskett and wife to Ellis C. Soper, dated and registered as set forth in preceding paragraph, for all of the mineral interest together with mining privileges in a certain tract of land specifically described containing 99 acres, more or less, "and being known as the old B. E. Hamlin tract."

Further, plaintiff, for purpose of showing severance of surface from the mineral, offered in evidence records of certain other deeds covering the land in question.

Defendants admitted in open court that the grants and the deeds from David P. Ammons to Byron E. Hamlin, from T. B. Higdon, sheriff, to W. H. Haskett, and from A. C. Haskett and wife to J. T. Berry, dated 8 August, 1908, hereinabove numbered 7, offered in evidence, cover the land described in the complaint. "But it is not admitted that any deed depending for description on the following or like words 'and also the tract of land on Indian Camp Branch, known as the Hamlin tract' include or cover the lands in controversy."

The testimony of J. H. Stockton, an attorney, as witness for plaintiff, tends to show that an examination of the deed records of Macon County as to conveyances of Hamlin tracts to A. C. Haskett discloses that the property described in the deed from T. B. Higdon, sheriff, to W. H. Haskett, "sold for taxes of Hamlin," is the only record that "conveyed any Hamlin property to W. H. Haskett in Macon County," and that the only deed to A. C. Haskett was "this one for the Hamlin tract . . . the same land plaintiff introduced in the chain of title from Hasketts to

John T. Berry," who "got all of that property from A. C. Haskett." He further testifies, "That deed from Hasketts to Berry calls for the Hamlin tract on Indian Camp Branch, in the deed from Andy Haskett . . . calls for the Hamlin tract on Indian Camp Branch. That is the J. T. Berry property."

The court surveyor, James M. Denman, as witness for plaintiff, also testified: "I made a search of the index for a deed into A. C. Haskett; I found just one . . . that is on the cross-index of deeds." This witness further testified that, ". . . about two acres of the 136 acres called for in that deed lies on the watershed of Indian Camp Branch."

Plaintiff, as witness for herself, testified in part: "My mother was Modenia Corbin. I am 67 years old, and remember when my mother died. I was 13 years old. I had a sister named Annie Lee . . . four years old at the death of my mother . . . I knew J. T. Berry. His full name was John Terrell Berry. He was reputed to be my father. After my mother died we lived with Grandfather and Grandmother Corbin. I remember about the time the adoption proceeding read in evidence was had. I was 20 years old and was living with Grandmother and Grandpa Berry. Father moved us over there and we stayed a year or two. When I speak of father, I mean J. T. Berry."

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

Gray & Christopher, Edwards & Leatherwood, and J. H. Stockton for plaintiff, appellant.

T. D. Bryson, Jr., and R. L. Phillips for defendants, appellees.

WINBORNE, J. The pivotal question presented on this appeal is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to take the case to the jury. We think so.

While the record does not indicate the respects in which the court below deemed the evidence to be insufficient, counsel for the plaintiff and for defendants Cary in their briefs and in oral argument in this Court debate three questions:

(1) The evidence tending to show that both plaintiff and defendants claim under A. C. Haskett, and that deeds from him under which plaintiff claims are older in date and in point of registration than those under which defendants claim, are defendants precluded from denying the title of A. C. Haskett, if it be conceded that evidence offered by plaintiff tends to show a void deed—that from Higdon, sheriff, to W. H. Haskett—in the chain of title under which the evidence also tends to show A. C. Haskett derived title?

(2) Is the description set out in the deed from Andy Haskett and wife to J. T. Berry, dated 15 December, 1925, as stated in paragraph 8 of foregoing statement of case, sufficiently definite to admit of parol proof to identify the land?

(3) Do the proceedings by which John T. Berry undertook to adopt the plaintiff and her sister, Annie, constitute a valid adoption?

We are of opinion, and hold, that each question is properly answerable in the affirmative.

(1) While in an action to recover land the general rule is that plaintiff must rely upon the strength of his own title, and not upon the weakness of that of defendant, *Love v. Gates,* 20 N. C., 498; *Newlin v. Osborne,* 47 N. C., 164; *Spivey v. Jones,* 82 N. C., 179; *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209, there is in this State a well settled exception to this rule. It is that whenever in an action to recover land "both parties claim title under the same person, neither of them can deny his right, and then, as between them, the elder is the better title and must prevail," as aptly stated by *Battle, J.,* in *Gilliam v. Bird,* 30 N. C., 280. This exception has been so often applied that it was termed an "inflexible rule" as early as the decisions in *Gilliam v. Bird, supra,* and in *Christenbury v. King,* 85 N. C., 230. The following are some of the cases in which it has been treated: *Murphy v. Barnett* (1813), 6 N. C., 251; 1 Carolina Law Repository, 105—(4 N. C., 14); *Ives v. Sawyer,* 20 N. C., 179; *Love v. Gates, supra; Gilliam v. Bird, supra; Johnson v. Watts,* 46 N. C., 228; *Feimster v. McRorie,* 46 N. C., 548; *Newlin v. Osborne, supra; Register v. Rowell,* 48 N. C., 312; *Taylor v. Gooch,* 48 N. C., 467; *Whissenhunt v. Jones,* 78 N. C., 361; *Caldwell v. Neely,* 81 N. C., 114; *Christenbury v. King, supra; Ryan v. Martin,* 91 N. C., 464; *Ferebee v. Hinton,* 102 N. C., 99, 8 S. E., 922; *Bonds v. Smith,* 106 N. C., 553, 11 S. E., 322; *Collins v. Swanson,* 121 N. C., 67, 28 S. E., 65; *Campbell v. Everhart,* 139 N. C., 503, 52 S. E., 201; *Steadman v. Steadman,* 143 N. C., 345, 55 S. E., 784; *Warren v. Williford,* 148 N. C., 474, 62 S. E., 697; *McCoy v. Lumber Co.,* 149 N. C., 1, 62 S. E., 699; *Sample v. Lumber Co.,* 150 N. C., 161, 63 S. E., 731; *Bryan v. Hodges,* 151 N. C., 413, 66 S. E., 345; *Foy v. Lumber Co.,* 152 N. C., 595, 68 S. E., 6; *Bowen v. Perkins,* 154 N. C., 449, 70 S. E., 843; *Person v. Roberts,* 159 N. C., 168, 74 S. E., 322; *Power Co. v. Taylor,* 196 N. C., 55, 144 S. E., 545; *Biggs v. Oxendine,* 207 N. C., 601, 178 S. E., 216; *Vance v. Pritchard,* 213 N. C., 552, 197 S. E., 182; *Keen v. Parker, supra.* See, also, Anno. 7 A. L. R., 860.

When, however, the defendant can show that the true title is in a third person, paramount to that of the common source under whom the plaintiff and defendant both claim, and that the defendant has acquired this paramount title, he is not precluded from showing this fact. This is

termed an exception to the above exception to the general rule. See *Love v. Gates, supra; Copeland v. Sauls,* 46 N. C., 70; *Johnson v. Watts, supra; Thomas v. Kelly,* 46 N. C., 375; *Feimster v. McRorie, supra; Newlin v. Osborne, supra; Whissenhunt v. Jones, supra; Caldwell v. Neely, supra; Ray v. Gardner,* 82 N. C., 146; *Spivey v. Jones, supra; Christenbury v. King, supra; Ryan v. Martin, supra; Bonds v. Smith, supra; Warren v. Williford, supra; Sample v. Lumber Co., supra; Bowen v. Perkins, supra; Van Gilder v. Bullen,* 159 N. C., 291, 74 S. E., 1059.

On the other hand, while defendant can defend by showing that he has a better title in himself than that of the plaintiff, derived from the person from whom they both claim or from some other person who had such better title, he is not at liberty to show a better title outstanding in a third person. *Love v. Gates, supra; Newlin v. Osborne, supra; Thomas v. Kelly, supra; Register v. Rowell, supra; Whissenhunt v. Jones, supra; Caldwell v. Neely, supra; Ray v. Gardner, supra.*

But counsel for defendants, in brief filed here, contend that there is confusion in the decisions regarding the common source rule—one line calling it an estoppel, while another describes it as a "rule of convenience." A perusal of the decisions, however, fails to reveal material difference in the principle.

While in many of the decisions on the subject the words "estopped" and "estoppel" are found, they are merely short terms of the principle as enunciated by *Battle, J.,* speaking for the Court in *Johnson v. Watts, supra,* in this manner: "The defendant, in a case like the present, can defend himself only by showing that he has a better title in himself than that of the plaintiff's lessor, derived either from the person from whom they both claim, or from some other person who had a better title."

Furthermore, it is seen that the decisions are in accord in holding that the rule is not a case strictly of estoppel. *Johnson v. Watts, supra; Thomas v. Kelly, supra; Feimster v. McRorie, supra; Newlin v. Osborne, supra; Christenbury v. King, supra; Ryan v. Martin, supra; McCoy v. Lumber Co., supra; Bryan v. Hodges, supra; Van Gilder v. Bullen, supra; Howell v. Shaw,* 183 N. C., 460, 112 S. E., 38.

And whether the rule be referred to as (1) "one founded on convenience," as in *Johnson v. Watts, supra; Thomas v. Kelly, supra; Feimster v. McRorie, supra; Register v. Rowell, supra, Worsley v. Johnson,* 50 N. C., 72; and *Ryan v. Martin, supra;* or (2) "one provided in justice and convenience," as in *Christenbury v. King, supra;* or (3) "adopted originally for convenience," as in *Bonds v. Smith, supra;* or (4) "a rule established for the convenience of the parties in actions of this character," as in *McCoy v. Lumber Co., supra;* or (5) "a rule of practice which has become a rule of law adopted by the courts," as in *Newlin v. Osborne, supra;* or (6) "well settled rule of practice, sometimes called estoppel on

defendant to deny the title of the common source," as in *Warren v. Williford, supra;* or (7) "a mere rule of practice and convenience," as in *Bryan v. Hodges, supra,* and *Howell v. Shaw, supra;* or (8) that "it is in the nature and had the practical force and effect of an estoppel," as in *Ryan v. Martin, supra;* or (9) "a well settled rule of evidence founded on justice and convenience," as in *Bowen v. Perkins, supra,* there is unanimity in all the decisions as to the just and practical purpose, and inflexible effect of the rule.

It is observed that in the case of *Newlin v. Osborne, supra,* the Court, through *Pearson, J.,* after affirming the rule that in ejectment (now an action to recover land) plaintiff must recover upon the strength of his own title, approves the exception and states its purpose with the explanation that it "is a rule of practice which has become a rule of law adopted by the courts for the purpose of aiding the administration of justice in dispensing with the necessity of requiring the plaintiff to prove the original grant and *mesne* conveyances (which in many cases it was out of his power to do) upon proof that the defendant claimed under the same person."

Again, in *Ryan v. Martin, supra, Merrimon, J.,* expressed similar thought in this manner: "The conclusion thus established between the parties is not strictly and technically an estoppel, but it is in the nature of and has the practical force of an estoppel. This rule is founded in justice and convenience and its purpose is to prevent the necessity on the part of the plaintiff in cases like this, of proving title out of the state and a good title in the person under whom he claims, when the opposing party claims the same property under the same person. If the defendant has the same source of title as the plaintiff, and no other, wherefore need the plaintiff go beyond that as to the defendant? Such an inquiry would be idle."

In the present case plaintiff, without debating the question of the validity of the sheriff's deed to W. H. Haskett, under which the evidence tends to show that A. C. Haskett, whom the evidence also tends to show is a common grantor of plaintiff and of defendants, derived title, relies upon the common source rule as hereinabove outlined. On the other hand, defendants, while not controverting the rule, contend that the sheriff's deed is void, and that, having offered it in evidence, plaintiff shows by her own evidence the title to be in a third person, and that that fact appearing from her evidence, the common source rule does not apply, and, hence, plaintiff must recover, if at all, under the general rule, upon the strength of her record title, or by some other approved method of proof. The authorities, however, fail to support this contention. The cases of *Murphy v. Barnett, supra,* and *Feimster v. McRorie, supra,* are directly in point, and are of contrary view.

The facts in *Murphy v. Barnett, supra,* are these: T. Dixon, being seized of land in question, agreed to sell it to W. Dixon, to which end he executed a power of attorney to C. Dixon, who as attorney in fact for T. Dixon, and at the request of W. Dixon, who had contracted to sell the land to Thos. Barnett, executed a deed to Thos. Barnett, who, after a judgment had been taken against him, executed a deed to his son, the defendant. Later, plaintiff purchased at sheriff's sale under *fieri facias* issued upon said judgment. On the trial defendant contended that "it appeared from plaintiff's own showing that the legal title to the land was in T. Dixon; for, although he had empowered C. Dixon to execute a deed to W. Dixon, he had not empowered him to execute it to Thos. Barnett; and, therefore, the power not having been executed, the title remained in T. Dixon." The court below ruled that, "situated as defendant was, he could not be permitted to insist that Thos. Barnett had not title, for it appeared in evidence that he himself had accepted a deed for the land from Thos. Barnett, and had entered and claimed title under the deed; that, therefore, he was estopped from denying the title in Thos. Barnett."

This Court, speaking through *Taylor, C. J.,* said: "We think the decision of this case rests upon a plain principle of law; and that as both parties claim directly from Thos. Barnett, they are privies in estate and it is not competent for either, as such, to deny his title. The defendant has accepted a deed from him, which admits the title and estops him from denying it afterwards."

In *Feimster v. McRorie, supra, Battle, J.,* states: "We understand the defendant's counsel to admit the general rule, that when parties in an action of ejectment claim under the same person, neither can deny the title of him under whom they both claim. But they contend that the rule . . . does not apply where the plaintiff's lessor shows himself that the title is in a third person." And, continuing, "The . . . objection . . . is unsustained by principle and opposed by authority. In *Murphy v. Barnett,* 6 N. C., 251 (*S. c.,* 4 N. C., 14), which is the first reported case in which the doctrine was judicially settled, this very objection was raised and overruled."

(2) The decisions of this Court generally recognize the principle that a deed conveying land within the meaning of the statute of frauds must contain a description of the land, the subject matter of the deed, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the deed refers. But where the language used is patently ambiguous, parol evidence is not admissible to aid the description. Yet, when the terms used in the deed leave it uncertain what property is intended to be embraced in it, parol evidence is admissible to fit the description to the land. Such evidence cannot, however, be used to enlarge the scope of the descriptive words. The deed itself must point to the source from which evidence *aliunde* to make the description

complete is to be sought. *Self Help Corp. v. Brinkley,* 215 N. C., 615, 2 S. E. (2d), 889. See, also, *Craven County v. Parker,* 194 N. C., 561, 140 S. E., 155; *Comrs. of Beaufort v. Rowland, ante,* 24, 16 S. E. (2d), 401. Compare with *Johnston County v. Stewart,* 217 N. C., 334, 7 S. E. (2d), 708.

Descriptions such as these have been held to be sufficiently definite to admit of parol proof to identify the land: "3 tracts of land, the home place, the Lynn place, and the Leonard Greeson place, containing 400 acres, be the same more or less," *Smith v. Low,* 24 N. C., 457; "my house and lot in the town of Jefferson, N. C.," *Carson v. Ray,* 52 N. C., 609; "her house and lot north of Kinston," *Phillips v. Hooker,* 62 N. C., 193; "a tract of land in said County of Guilford on the waters of 'Stinking Quarter,' adjoining the lands.....of which Brown died seized and possessed," *Brown v. Coble,* 76 N. C., 391; "one tract of 193 acres, more or less, it being the interest in two shares adjoining the lands of James Barnes, Eli Robbins, and others," *Farmer v. Batts,* 83 N. C., 387; "my interest in the Lenoir lands owned by myself and J. W. Transean," *Thornburg v. Masten,* 88 N. C., 293; and "one-half the remainder of my farm, including the home whereon I now live," *Bell v. Couch,* 132 N. C., 346, 43 S. E., 911; "home place," *Lewis v. Murray,* 177 N. C., 17, 97 S. E., 750; "my farm," *Sessoms v. Bazemore,* 180 N. C., 102, 104 S. E., 70. See, also, *Euliss v. McAdams,* 108 N. C., 507, 13 S. E., 162, the first headnote of which epitomizes the decision in this manner: "Designating land by the name it is called is a sufficient description to enable its location to be determined by parol proof." See *Perry v. Scott,* 109 N. C., 374, 14 S. E., 294; *Hinton v. Moore,* 139 N. C., 44, 51 S. E., 787; *Bateman v. Hopkins,* 157 N. C., 470, 73 S. E., 133; *Gaylord v. McCoy,* 158 N. C., 325, 74 S. E., 321; *Norton v. Smith,* 179 N. C., 553, 103 S. E., 14.

Under these principles and following these precedents, the description in the present case is sufficiently definite to admit of parol proof. The descriptive words may be fairly interpreted as meaning a tract of land in Macon County on Indian Camp Branch in which the grantors owned mineral interest and known as the Hamlin tract. Further, in this connection the parol evidence admitted is sufficient to take the case to the jury on this question.

(3) The record of the adoption proceeding by which, on petition of J. T. Berry filed 31 May, 1893, letters of adoption for plaintiff and her sister, Annie, were granted to J. T. Berry, appears to be in conformity with the provisions of the statute then in effect relating to adoption of minor children. Code 1883, chapter 1, as amended by Laws of 1885, chapter 390. The oral testimony of plaintiff does not appear to be in conflict with the facts set forth in the petition and found by the court.

The judgment of nonsuit is

Reversed.

STATE v. CHARLES L. ABERNETHY, JR.

(Filed 29 October, 1941.)

1. Elections § 22—Interfering with duty of election officials to keep official ballots is offense notwithstanding that ballots are not subject to larceny.

The indictments charged defendant with conspiracy to, and with actual interference with, the duties of election officials by receiving ballots knowing them to be official primary ballots and thereby depriving the local board of elections of the use and lawful possession of the ballots. Defendant moved to quash on the ground that ballots are not subject of larceny. *Held:* The gravamen of the offense in each bill of indictment is the receipt by the defendant of official ballots with the knowledge that he had no legal right to them and that they should be in the possession of the county board of elections, and the motion to quash was properly denied, larceny of the ballots not being an element of the offense.

2. Same—

It is the duty of the county board of elections to keep in its possession official ballots until delivery to the local officials, C. S., 6028, 6037, and therefore an indictment charging defendant with receiving official ballots prior to the election knowing that he had no legal right to them is sufficient to charge an interference with the duties of the election officials, C. S., 4185 (3), and defendant's motion to quash on the ground that the indictment failed to state the manner in which defendant interfered with the duties of the election officials was properly denied. C. S., 4623.

3. Conspiracy § 4—

It is not required that an indictment charging that defendant and others conspired to commit the offense should name the coconspirator or conspirators.

4. Elections § 22: Conspiracy § 6—

In a prosecution for conspiring to interfere with the duties of election officials by obtaining official ballots prior to the election, testimony of declarations made by defendant that he had received the ballots from a friend but that he would not tell or "rat" on his friend, is sufficient, it not being required that the State show an actual agreement between the conspirators, it being sufficient if the State show facts and circumstances from which an actual or implied understanding or agreement between the conspirators to commit the unlawful act may be inferred.

5. Criminal Law § 34a—

Admissions and declarations of the defendant are competent against him in a criminal prosecution.

6. Elections § 22—

Testimony of declarations made by defendant tending to show that defendant received into his possession official ballots from a confederate, which had been wrongfully taken from the possession of the chairman of the County Board of Elections, and which were by law due to be kept in

the custody of that official, is sufficient to be submitted to the jury on a charge of interfering with the duties of the election officials, C. S., 4185 (3). The evidence further tended to show that defendant received the ballots for the purpose of evading the election laws by marking the ballots and giving them to voters to place in the ballot boxes under a system of "chain voting."

7. Conspiracy § 3: Criminal Law § 11—

A conspiracy at common law was a misdemeanor, and remains a misdemeanor in this jurisdiction unless made a felony by statute, and in this State a conspiracy to commit a felony is a felony and a conspiracy to commit a misdemeanor is a misdemeanor.

8. Same—

The offense of interfering with the performance of any duty imposed by law on election officials, C. S., 4185 (3), is a misdemeanor, there being no statutory provision that it should constitute a felony or that the punishment therefor should be imprisonment in the State Prison, C. S., 4171, and a conspiracy to commit the offense is therefore a misdemeanor, since a conspiracy to commit an offense cannot be graver than the offense itself.

9. Criminal Law § 51—

In a prosecution for conspiracy to commit a misdemeanor it is not error for the trial court to interrupt argument of counsel for the defendant that defendant was charged with a felony carrying with it severe punishment and to instruct the jury that the offense charged is not a felony but a misdemeanor.

10. Criminal Law § 79—

Defendant's brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. Rules of Practice in the Supreme Court, No. 28.

APPEAL by defendant from *Nimocks, J.,* at April Term, 1941, of WAYNE. No error.

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

M. W. Outlaw and J. A. Jones for defendant, appellant.

SCHENCK, J. The defendant was convicted and sentenced upon two bills of indictment charging him with (1) conspiring with certain persons unknown to the State to interfere with, hinder, delay and obstruct the county and precinct primary election officials of Craven and Wayne counties in the proper execution of the duties required of them by law in connection with the primary election on 25 May, 1940, and (2) with the actual interference with the duties of county and precinct election officials in the primary election of 25 May, 1940, by receiving and distributing a lot of democratic primary ballots or tickets, prepared for use in said primary election, which ballots or tickets had been wrongfully

removed from the custody of the County Board of Elections of Craven County, thereby depriving the said board and the precinct election officials of said county, of the use and control of said ballots or tickets in said primary election.

The defendant's demurrer to the evidence on the bill of indictment charging him with the receiving of stolen property knowing it to have been stolen was sustained, and the bills of indictments charging the conspiracy to and the actual interference with the election officials are alone left for consideration. The first question presented in the appellant's brief is whether the court erred in refusing to grant the defendant's motion to quash the remaining two bills of indictment for the reason that the ballots or tickets were not the subject of larceny.

The defendant contends that these two remaining bills of indictment should have been quashed because they are predicated upon the receipt of ballots which were not the subject of larceny. The crimes charged in the bills of indictment are conspiracy to interfere, and actually interfering, with the duties of the election officials of Craven and Wayne counties. The essential element of the offense charged is the interference with the duties of election officials of Craven and Wayne counties by receiving official ballots prepared for use in the primary, knowing them to be official primary ballots, and distributing them before the day of election, thereby depriving the local board of elections of the use and lawful possession of these ballots. Such is made a misdemeanor by C. S., 4185, subsection 3. The bills of indictment are not predicated upon the ballots or tickets having been stolen from the chairman of the board of elections. The fact that they were stolen is not the gravamen of the offense charged. The gravamen of such offense in both bills of indictment is the receiving of official democratic primary ballots or tickets prepared for use in the primary election "well knowing at the time said ballots or tickets were official Democratic Primary ballots or tickets for use in said Primary, and that he had no legal right to them, and due to be in the possession of the County Board of Elections of Craven County, . . . and that said ballots or tickets had been wrongfully removed from the custody and possession of the County Board of Elections."

The assignment as error of the denial of the motion to quash the bills of indictment for the reason that the ballots or tickets therein mentioned were not the subjects of larceny cannot be sustained.

The defendant further contends that the bill of indictment charging interference with election officials should have been quashed for the reason that it does not charge the manner in which the election officials were interfered with, hindered or delayed in the performance of their official duties. This bill of indictment charges a violation of the Corrupt Practice Act, C. S., 4185, subsection 3. This statute makes it unlawful

for any person to ". . . interfere in any manner with the performance of any duty imposed by law upon any election officer or member of any election or canvassing board." Among other things charged is the act of receiving a lot of official ballots, knowing them to be official ballots "and that he had no legal right to them, and due to be in the possession of the County Board of Elections." This is a specific charge of an interference with the duties of election officials imposed by C. S., 6020, 6028, and 6037. All of these statutes provide that the official ballots are to be printed and delivered to and kept in the possession of the County Board of Elections until delivered to the local officials. The charge of the receipt by the defendant of such official ballots, knowing that he had no legal right to them, amounts to a charge of interference with the duty of the County Board of Elections to safely keep the ballots until time for delivery to the registrars.

We are of the opinion that the provisions of C. S., 4623, have been met, and that the contention of the defendant that the motion to quash the bill of indictment should have been sustained because it failed to charge the manner in which the election officials were interfered with is untenable.

It is further contended that the bill of indictment charging conspiracy should have been quashed for the reason that it does not name the co-conspirator or conspirators. The question here presented has been definitely answered against the appellant by this Court. *S. v. Lewis,* 142 N. C., 626, 55 S. E., 600.

The defendant, under proper exceptive assignments of error, presents the contention that his motion to dismiss the action lodged when the State had produced its evidence and rested its case and renewed after all the evidence in the case was concluded (C. S., 4643) should have been sustained.

As to the charge of conspiracy to interfere with the primary election officials there is sufficient evidence to establish the defendant's participation in such a conspiracy, and this evidence relates directly to the defendant's own actions and statements, and tends to show what part the defendant played in the formation of the conspiracy. W. A. Lucas, chairman of the State Board of Elections, testified that the defendant stated to him, in response to the question as to where the defendant had gotten the ballots in his possession, "Mr. Lucas, the crowd down there is after me and I have a friend whose secretary is a good friend of the secretary of the Chamber of Commerce. She heard some plans that were being made by my political enemies. My friend got the ballots and gave them to me and told me that he could have gotten the whole 14,000 if he had wanted them. He then said that it was his intentions to come to Wilson to discuss the matter with me. I asked Mr. Abernethy again where he

got the ballots and he said, Well, I am not going to turn up my friend, but I do want to see you and talk with you, and I said, All right, I will be glad to see you." This evidence tends to establish the acts and conduct of others as well as of the defendant himself in the formation of a conspiracy to violate the election law.

The testimony of other witnesses is also to the same effect, namely, that the defendant told them that a friend had obtained the ballots for him to help him in his plan, but that he would not "rat" on his friend and divulge his name. This testimony links the defendant with "his friend" in an unlawful agreement, or conspiracy to interfere with the duties of election officials, namely, to unlawfully remove from the possession of the chairman of the County Board of Elections official ballots, which by law the chairman is required to keep, and to unlawfully use and distribute the same, thereby hindering and obstructing the chairman and the local officials in their duties of keeping, counting, and distributing them before the election is called.

"It is not necessary to constitute the offense that the parties should have come together and agreed in express terms to unite for a common object. A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense. . . . The evidence supporting a conspiracy is generally circumstantial; it is not necessary to prove any direct act, or even any meeting of the conspirators, as the fact of conspiracy may be collected from the collateral circumstances of each case. It is for the court to say whether or not such connection has been sufficiently shown, but when that is done, the doctrine applies that each party is an agent for all the others, so that an act done by one, in furthering the unlawful design, is the act of all, and a declaration made by one, at the time, is evidence against all." *S. v. Connor,* 179 N. C., 752, 103 S. E., 79.

The evidence relied upon by the State to establish the conspiracy consists largely, if not entirely, of declarations made by the defendant to the State's witnesses. It is settled in this jurisdiction that admissions and declarations of a defendant are competent against him in a criminal prosecution.

On the charge of interference with the duties of election officials the State introduced evidence tending to show that the defendant received into his possession official ballots from a confederate, which had been wrongfully taken from the chairman of the Board of Elections, and that by law were due to be kept in the custody of that official. This amounted to a violation of C. S., 4185, subsection 3, which prohibits interference with the possession of any tickets by those entitled to the possession thereof. Other specific duties required by law which the evidence tends to show were interfered with are those imposed by the aforementioned

C. S., 6020, 6028, and 6037. These statutes make it mandatory that the official ballots be printed and delivered to and kept by the County Board of Elections until delivered to the local registrars.

Further evidence presented by the State against the defendant to take the case to the jury, is that tending to show for what purpose the defendant held the official ballots and the unlawful plan which he attempted to carry out. His plan for evasion of the election laws by improper use of the official ballots unfolds in his own language, if the testimony of the witness Ricks is to be believed. Ricks testified as follows in regard to the statement made to him by the defendant: " 'How do you intend to use these ballots?' He said, 'My workers will be given official ballots marked as I want them marked, and when they haul these voters into the polls, they will each one be given a marked ballot, official ballot, and when they go in to vote they will get an official ballot from the poll holder and go in the booth and take the marked ballot out of their pocket and place the blank ballot in their pocket and then deposit the marked ballot in the ballot box.' He said, 'You see, by doing this I will have a revolving fund—every time I give out a ballot I will get one back.' He said, 'Would you like to have a few?' I said, 'Yes,' and he pulled out nine and handed to me." Evidence tending to show that the defendant made statements similar in part to other witnesses than Ricks appears elsewhere in the record.

We are of the opinion, and so hold, that the defendant's motion to dismiss the action upon his demurrer to the evidence was properly overruled.

The appellant urges in his brief for error the action of the court in interrupting counsel for the defendant, when arguing to the jury that the conspiracy with which the defendant was charged was a felony carrying with it severe punishment, to state that such conspiracy was not a felony but a misdemeanor. In this we see no error. Conspiracy at common law was a misdemeanor, and remains so in North Carolina today except in such cases where made a felony by statute. *S. v. Jackson,* 82 N. C., 565; *S. v. Turner,* 119 N. C., 841, 25 S. E., 810. There is no statute expressly providing that a conspiracy to interfere with election officials in the performance of their official duties is a felony, or providing imprisonment in the State's Prison therefor, thereby bringing it under the provision of C. S., 4171. None of the statutes covering specific types of conspiracy and setting out the punishment for each offense provide that a conspiracy to commit a misdemeanor shall be a felony. In truth, it would be an anomaly to provide that a conspiracy to do a certain thing or to commit a certain act should be a more grave offense than the actual doing of the thing or commission of the act. The consensus of our decisions is that a conspiracy to commit a felony is a

felony and a conspiracy to commit a misdemeanor is a misdemeanor.

The record contains nineteen assignments of error. While none of these is designated in the appellant's brief by number with reference to the printed pages of the transcript, and no authorities relied on are classified under such assignments, as required by Rule 28, Rules of Practice in the Supreme Court, 213 N. C., 825, we have nevertheless examined each one of these assignments and find them without merit.

From the record it appears that the defendant has been fairly tried by a jury of his peers, under the instructions of a judge free from prejudicial error, and that the issue of his guilt or innocence has been answered against him. The verdict supports the judgment.

No error.

HENRY ELLIOTT MOORE, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL PROPERTY OWNERS AND TAXPAYERS OF THE COUNTY OF SAMPSON, AND ALL OTHER PERSONS HAVING OR CLAIMING TO HAVE AN INTEREST IN THE SUBJECT MATTER OF THIS ACTION, v. SAMPSON COUNTY.

(Filed 29 October, 1941.)

Taxation § 25—

N. C. Code, 7971 (111), providing for the quadrennial revaluation of property for taxation beginning with the year 1941 was amended by ch. 282, Public Laws 1941, and under the amendment the commissioners of a county are authorized to defer the revaluation due to be made in the year 1941 to the year 1942, or to any year prior to the revaluation due to be made in the year 1945.

APPEAL by plaintiff from *Carr, J.*, at August Term, 1941, of SAMPSON. Affirmed.

The complaint of plaintiff is as follows:

"1. That the plaintiff is a citizen and resident of Sampson County, North Carolina, and is the owner of certain real and personal property located within the boundaries of said county and subject to *ad valorem* taxes duly levied and assessed by said county.

"2. That the defendant is a body politic and corporate of the State of North Carolina, and as such is authorized, directed and empowered to levy *ad valorem* taxes against real and personal property subject to taxation, located within its boundaries.

"3. That the Board of Commissioners of the County of Sampson, at a regular meeting duly held on 4 August, 1941, duly adopted the following resolution or municipal ordinance:

" 'WHEREAS, chapter two hundred eighty-two of the Public Laws of one thousand nine hundred and forty-one provides that the Boards of

County Commissioners of the various counties of the State may, in their discretion, defer or postpone the revaluation and reassessment of real property in the year one thousand nine hundred and forty-one, and that all proceedings and actions heretofore taken by said Board of County Commissioners in any county in the State as to postponement are in all respects ratified, validated and confirmed; and

" 'WHEREAS, the Board of Commissioners of the County of Sampson, in its discretion, deferred or postponed the revaluation and reassessment of real property in said county for the year one thousand nine hundred and forty-one; and

" 'WHEREAS, real property in said county has not been revalued since the year one thousand nine hundred and thirty-three, and the Board of Commissioners of said county has ascertained and hereby determines that values of real property generally throughout said county have materially changed since said revaluation, and especially during the year one thousand nine hundred and forty-one; and

" 'WHEREAS, the Board of Commissioners of said county has made a careful study of the values of real property in said county, subject to taxation, and has ascertained and hereby determines that real property generally throughout said county is not valued and assessed at a true, fair, and uniform value in money, and that the values of real property generally listed and assessed for *ad valorem* tax purposes are inequitable and disproportionate, and do not represent the true values in money of said property; and said Board of Commissioners has further ascertained and hereby determines that a revaluation of real property in said county in the year one thousand nine hundred forty-two is necessary and desirable in order properly and fairly to value said property in accordance with the true values thereof in money:

" 'NOW, THEREFORE, BE IT RESOLVED by the Board of Commissioners of the County of Sampson that in the year one thousand nine hundred and forty-two all property in the County of Sampson, real and personal, subject to taxation, shall be revalued and reassessed for *ad valorem* tax purposes by horizontal increase or reduction, or by actual appraisal thereof, or both, as may be determined by said Board of Commissioners.'

"4. That the plaintiff and all other property owners and taxpayers of said County of Sampson have a common or general interest in the determination of the validity of said resolution or municipal ordinance, and in the declaration of the rights and status of the parties under said resolution or municipal ordinance, and said property owners and taxpayers consist of many persons who are so numerous that it is impracticable to bring them all before the court; that the plaintiff has been authorized and permitted by the court to prosecute this action in his own

behalf and for the benefit and in behalf of all other property owners and taxpayers of the County of Sampson, and all other persons having or claiming to have an interest in the subject matter of this controversy.

"5. That a controversy exists between the plaintiff and defendant concerning their respective rights and status under said resolution or municipal ordinance; that the plaintiff, in behalf of himself and all other property owners and taxpayers of the County of Sampson, and all other persons having or claiming to have an interest in the subject matter of this controversy adverse to the defendant, contend that the said resolution or municipal ordinance is invalid for that said defendant does not have the legal right to revalue and reassess in the year 1942, the real and personal property in said County of Sampson subject to taxation; that the defendant contends that said resolution or municipal ordinance is valid in all respects, and that it has the legal right to revalue and reassess such property in said County of Sampson in the year 1942.

"6. That the rights and status of the plaintiff, as a property owner and taxpayer of said County of Sampson, and the rights and status of all other property owners and taxpayers of said County of Sampson, will be affected by said resolution or municipal ordinance and by the revaluation of real and personal property within said County of Sampson, and it is desirable that the validity of said resolution or municipal ordinance be determined and that the parties to this action receive a declaration of rights and status under said resolution or municipal ordinance.

"WHEREFORE, the plaintiff prays the Court as follows: (1) For a determination of the validity of said resolution or municipal ordinance; (2) For a declaration of the rights and status of the plaintiff and defendant in respect to said resolution or municipal ordinance; (3) For such other relief as to the Court may seem just and proper."

The defendant, in answer to the complaint, admits all the allegations, and says: "WHEREFORE, the defendant prays the Court as follows: (1) For a determination of the validity of said resolution or municipal ordinance; (2) For a declaration of the rights and status of the plaintiff and defendant in respect to said resolution or municipal ordinance; (3) For such other and further relief as to the Court may seem just and proper."

The judgment of the court below is as follows: "This cause coming on to be heard and being heard by consent of the parties, before his Honor, Leo Carr, Judge Superior Court, at the time and place stipulated by the parties for the hearing; and it appearing to the Court that no issues of fact are raised by the pleadings and that the parties waive a trial by jury; and it further appearing satisfactorily to the Court, and the Court finds as a fact, that the allegations contained in the complaint are true, and the plaintiff having moved for a judgment upon the pleadings

declaring invalid the resolution or municipal ordinance referred to in the pleadings; and the Court being of the opinion, after a careful examination of said pleadings and after full argument by counsel for both plaintiff and defendant, that said resolution or municipal ordinance is in all respects valid, and that the defendant, Sampson County, has the legal right to revalue and reassess in the year 1942, all real and personal property in said county, subject to taxation: It is, thereupon, Ordered, Considered and Adjudged that the resolution or municipal ordinance duly adopted by the Board of Commissioners of the County of Sampson at a regular meeting duly held on 4 August, 1941, directing a revaluation and reassessment in the year 1942, of all property in the County of Sampson, real and personal, subject to taxation, is valid in all respects, and that said County of Sampson has the legal right to revalue and reassess, in the year 1942, all property in the County of Sampson, real and personal, subject to taxation, for *ad valorem* tax purposes. It is further Considered, Ordered and Adjudged, in the discretion of the Court, that the cost of this action be taxed against the defendant. Done at Clinton, N. C., the 15th day of August, 1941. Leo Carr, Judge Superior Court."

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

P. G. Crumpler for plaintiff.
Algernon L. Butler for defendant.

CLARKSON, J. This is a civil action instituted under the Declaratory Judgment Act. N. C. Code, 1939 (Michie), secs. 628 (a) and 628 (b). On the admitted facts in this case, did the Board of Commissioners of Sampson County, N. C., have the right, in its discretion, to order a revaluation and reassessment of property in said county for the year 1942? We think so.

N. C. Code, *supra,* sec. 7971 (111), is as follows: "Listing and assessing in quadrennial years. In one thousand nine hundred and forty-one, and quadrennially thereafter, all property, real and personal, subject to taxation, shall be listed and assessed for *ad valorem* tax purposes. Provided, that in one thousand nine hundred and forty-one, and quadrennially thereafter, the county board of commissioners may determine whether real property in the respective counties and townships shall be revalued by horizontal increase or reduction or by actual appraisal thereof, or both. Where the horizontal method is used, the provisions of the next succeeding section shall also apply."

Section 7971 (111), standing alone, the contention of plaintiff would be correct: "That the Legislature intended to vest County Boards of

Commissioners with authority to revalue and reassess property only in the quadrennial years of 1941, 1945, and so on."

The above section was amended by Public Laws of 1941, ch. 282, by adding the following: "Provided, that the boards of county commissioners of the various counties of the State may, in their discretion, defer or postpone the revaluation and reassessment of real property required herein in the year one thousand nine hundred and forty-one, and all proceedings and actions heretofore taken by said board of county commissioners in any county in the State as to postponement, or as to increases or reductions or by actual appraisal thereof, are hereby in all respects ratified, validated, and confirmed. Any such board of county commissioners may, in its discretion, defer or postpone any such revaluation, reassessment, or reappraisal for the years one thousand nine hundred and forty-two and one thousand nine hundred and forty-three."

We think the proviso changes materially the Act above quoted; it says: "Provided, that the boards of county commissioners of the various counties of the State may, in their discretion, *defer or postpone* the revaluation and reassessment of real property," etc. If the General Assembly had intended to abolish the revaluation in 1941, it would no doubt have used language to that effect. The language used "defer or postpone" did not mean abolish. The Act did not say defer or postpone until 1945. The proviso further says: "May, in its discretion, defer or postpone any such revaluation, reassessment or reappraisal for the years one thousand nine hundred and forty-two and one thousand nine hundred and forty-three." Thus, the proviso, we think, left it to the discretion of the board of county commissioners of any county in the State to *defer or postpone* the exercise of the power to the succeeding years prior to 1945. This intent is further evidenced by the fact that the General Assembly did not say that the revaluation and reassessment was deferred or postponed to quadrennial years, 4 years that expired in 1945. We think that the position here taken was clearly the intent of the General Assembly by virtue of the 1941 amendment to C. S., 7971 (111). We so hold.

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

Affirmed.

J. P. DAVENPORT v. PITT COUNTY DRAINAGE DISTRICT No. 2.

(Filed 29 October, 1941.)

1. Drainage Districts § 3: Limitation of Actions § 6—

Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of the plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, states a cause of action for continuing trespass, and the right of action for damages to crops for all the years is barred after the lapse of three years from the original trespass. C. S., 441 (3).

2. Trespass § 1e—

A wrongful or negligent flooding or ponding water on the lands of another constitutes a trespass upon the lands.

3. Drainage Districts § 2—

A drainage district is a corporation, and as any other corporation, public or private, cannot be bound by the acts of its officials or agents acting separately or individually. C. S., 1290.

4. Same—

The burden is upon plaintiff alleging a contract with a drainage district to establish the validity of the alleged contract, and a contract signed by the drainage commissioners is incompetent against the district in the absence of any evidence of formal corporate action authorizing its execution.

5. Same—

A drainage district, being a *quasi*-public corporation created for the public benefit, is without power to contract with an individual landowner within the district as to the manner in which the ditches and canals should be cut and maintained, since it cannot give special or particular rights to one landowner not enjoyed by all landowners similarly situated in the district, or contract in any manner which would interfere with the performance of its duties to the public generally, and such contract is void and its breach cannot be made the basis of a suit against the district.

APPEAL by plaintiff from *Carr, J.*, at May Term, 1941, of PITT. Affirmed.

The defendant is a drainage district created and existing under and by virtue of ch. 442, Public Laws 1909, and ch. 67, Public Laws 1911, and acts amendatory thereof (N. C. Code of 1939 [Michie], secs. 5312, *et seq.*), and the plaintiff is a landowner in such district.

The complaint alleges that the plaintiff suffered damages by reason of the negligent construction of a canal and by the breach of a continuing contract between the defendant and plaintiff wherein the defendant

agreed to cut and maintain a lateral ditch to properly drain plaintiff's lands and to open the mouth of said canal and keep it open, all of which resulted in the plaintiff's lands being flooded, soaked and sogged and his crops being injured.

The answer denies the allegations of negligence and of breach of contract, and pleads the ten and three-year statutes of limitations in bar of any recovery by the plaintiff.

When the plaintiff had introduced his evidence and rested his case the defendant moved for a judgment as in case of nonsuit (C. S., 567). This motion was allowed as to "all causes of action set up in the complaint, except plaintiff's action for damages to his crops occurring within the three-year period next preceding the commencement of this action." At the conclusion of all the evidence the defendant renewed its motion for judgment as in case of nonsuit of action for damages to crops, which motion was allowed, and from judgment nonsuiting and dismissing the action plaintiff appealed, assigning errors.

J. B. James and Julius Brown for plaintiff, appellant.

F. M. Wooten, F. M. Wooten, Jr., and Albion Dunn for defendant, appellee.

SCHENCK, J. Since the plaintiff took no exception to the court's ruling at the close of his evidence sustaining defendant's motion for judgment as of nonsuit for "all causes of action set up in the complaint, except plaintiff's action for damages to his crops occurring within the three-year period next preceding the commencement of the action," and since the plaintiff testified, "I am not claiming any damages for 1939 and 1937," and since the action was commenced 28 February, 1940, we are concerned only with the alleged causes of action in so far as they relate to damages to plaintiff's crops in 1938.

We will first consider the action based upon the alleged negligence of the defendant. The negligence alleged, of which there is any evidence, is the failure to cause the canal to follow the channel of Grindle's Creek, as originally planned, and the stopping of the canal on the lands of the plaintiff, and the failure to keep the mouth of the canal properly cleared out, thereby causing the water to overflow and pond upon the lands of the plaintiff resulting in damages to his crops.

According to plaintiff's own testimony, this overflow and ponding of water on his land commenced immediately after the canal was finished in 1923, and continued practically every year following through 1936, and occurred again in 1938, but did not occur in 1939.

The defendant pleads the three-year statute of limitations as a bar to any recovery for damages alleged to have occurred in 1938. Any

wrongful or negligent flooding and ponding of water on the plaintiff's lands was a trespass on his real property which originated in 1923 and continued on through 1938, and any cause of action resulting from such a continuing trespass accrued in 1923, and was therefore barred in 1940 when this action was commenced.

When a trespass on real property is a continuing one, an action therefor shall be commenced within three years from the original trespass, and not thereafter. C. S., 441 (3).

"If we view the negligence or wrongful conduct complained of as a continuing omission of duty toward the plaintiff in permitting the logs, laps, and trestles to remain in the condition described, and a source of probable injury to plaintiff's land by causing obstructions in the river and consequent overflow, in order to repel the bar of the statute of limitations it must affirmatively appear from the evidence that these conditions were under control of the defendant, and the breach of duty with reference thereto had taken place some time within the period of three years preceding the injury. C. S., 441. The law will not permit recovery for negligence which has become *a fait accompli* at a remote time not within the statutory period, although injury may result from it within the period of limitation." *Hooper v. Lumber Co.,* 215 N. C., 308, 1 S. E. (2d), 818.

We therefore conclude that his Honor's holding that any cause of action bottomed upon the alleged negligence of the defendant was barred by the statute of limitations was correct.

Any cause of action bottomed upon an alleged breach of contract by the defendant is likewise untenable for the reason that the contract alleged was not properly proven and, even if it had been so proven, it is *ultra vires* and void. The alleged contract, dated in September, 1928, and signed by the three drainage district commissioners and the plaintiff, after reciting a deviation in the construction of the canal from the channel of the old creek as originally planned, which deprived the plaintiff's lands of proper drainage, and the failure to keep the mouth of the canal free from rubbish and obstruction, which caused the water to overflow and pond upon the plaintiff's lands, resulting in damages to his crops, provides that:

"Now, therefore, the above named commissioners of Pitt County Drainage District No. 2 hereby covenant, contract and agree to cut and maintain said lateral ditch along the lines of the old creek run, of sufficient size and length to properly drain the above lands into the main canal; and do further covenant, contract and agree to properly and adequately have opened the mouth of the canal and to properly keep open the same.

"And the said J. P. Davenport, owner of said land, in consideration of the above, and upon the performance of the same, does release said Pitt County Drainage District No. 2 from any and all liability to date to him by reason of said canal in (not) having been cut to follow in general the run of the old creek, and for permitting the mouth of said canal, as cut, to remain obstructed."

It will be noted that it nowhere appears in the record that the foregoing alleged contract was ever authorized by the defendant corporation. All the evidence tends to prove is that the instrument was signed by the drainage commissioners. There is no evidence of any direction or authorization of such action at a formal meeting of the governing authority of the corporation. "The members of a corporation cannot, separately and individually, give their consent in such manner as to bind it as a collective body, for, in such case, it is not the body that acts; and this is no less the doctrine of the common than of the Roman Civil Law." *Duke v. Markham,* 105 N. C., 131, 10 S. E., 1017; *Everett v. Staton,* 192 N. C., 216, 134 S. E., 492. "As a rule authorized meetings are prerequisite to corporate action based upon deliberate conference and intelligent discussion of proposed measures. 7 R. C. L., 941; 15 C. J., 460; 43 C. J., 497; *P. & F. R. Ry. Co. v. Comrs. of Anderson County,* 16 Kan., 302; *Kirkland v. State,* 86 Fla., 84. The principle applies to corporations generally, and by the express terms of our statute, as stated above, every county is a corporate body. C. S., 1290; *Duke v. Markham,* 105 N. C., 131; *Hill v. R. R.,* 143 N. C., 539; *Everett v. Staton,* 192 N. C., 216." *O'Neal v. Wake County,* 196 N. C., 184, 145 S. E., 28. The burden of establishing the validity of the alleged contract in the case at bar rested upon the plaintiff and in the absence of any evidence of formal corporate action authorizing its execution it was not only invalid but incompetent as evidence.

Furthermore, even though the absence of evidence of the alleged contract having been authorized by formal corporate action be overlooked, the contract by its very terms is plainly *ultra vires* and therefore void. The statute, sec. 19, ch. 442, Public Laws 1909 (N. C. Code of 1939 [Michie], sec. 5337), provides that the Board of Drainage Commissioners when appointed shall have the right "to hold property and convey the same, to sue and be sued, and shall possess such other powers as usually pertain to corporations." Being a *quasi*-public corporation, created for the "public benefit"; the powers usually pertaining to such corporations would not authorize a drainage district to enter into a contract that would give special or particular rights or claims to one landowner in the drainage district that is not enjoyed by all landowners similarly situated. "Corporations for public objects, to which large powers are given to enable them to accommodate the public and upon which public duties

are imposed for the benefit of the community, are generally held to be disabled to do any act which would amount to a renunciation of their duty to the public or which would directly and necessarily disable them from performing it." Am. Jur., Corporations, par. 805, p. 819.

Being of opinion against the plaintiff on both causes of action alleged, we affirm the judgment, as in no view of the facts, giving the plaintiff the most favorable construction of the evidence, can he recover.

Affirmed.

WALTER R. TEAGUE, AND ALL OTHERS, HEIRS AT LAW OF J. B. GRAHAM, DECEASED, WHO MAY DESIRE TO COME IN AND NAME THEMSELVES PARTIES, v. MAX C. WILSON, ADMINISTRATOR OF THE ESTATE OF J. B. GRAHAM, DECEASED.

(Filed 29 October, 1941.)

1. **Evidence § 41: Lost or Destroyed Instruments § 2—**

Testimony of an illiterate witness as to the contents of the instrument in question as gathered by the witness from the reading of the instrument by another is hearsay and is incompetent to prove the contents of the alleged lost instrument.

2. **Descent and Distribution § 8—Evidence held insufficient to show written acknowledgment of paternity required by California statute in order for illegitimate child to inherit from its father.**

Plaintiff, the illegitimate son of intestate, who died domiciled in California, instituted this action to establish his right to inherit as an heir of his father under the provisions of a California statute giving such right of inheritance if the father acknowledged paternity in writing. The only competent evidence as to the contents of the alleged lost writing acknowledging paternity was the testimony of a witness that he was present when plaintiff's father signed a note which he said was for plaintiff's mother "to go to pay for the boy." *Held:* The testimony is insufficient to show that the acknowledgment of paternity appeared in the writing itself as required by the California statute, Probate Code, sec. 255, and judgment as of nonsuit should have been entered.

APPEAL by defendant from *Sink, J.*, at May Term, 1941, of CALDWELL. Reversed.

Plaintiff, claiming an interest in the estate of J. B. Graham, filed petition asserting that he was the legal heir of R. S. Graham, son of J. B. Graham, and was therefore entitled to the share of R. S. Graham in the distribution of the estate. R. S. Graham died in 1940 pending the settlement of the estate of J. B. Graham.

Plaintiff alleged that he was the illegitimate son of R. S. Graham and Alice Teague; that he was born in 1898; that subsequently R. S. Graham

became a citizen and resident of California, and died domiciled in that state, leaving no widow or issue other than the plaintiff; that R. S. Graham, in his lifetime, acknowledged, in writing, in the presence of a competent witness, that he was the father of plaintiff, and thus constituted plaintiff his legal heir in accordance with the laws of California.

The material allegations of the petition were denied by the defendant. There was verdict for plaintiff, and from judgment thereon defendant appealed.

Townsend & Townsend for plaintiff, appellee.

B. F. Williams, G. W. Klutz, Max C. Wilson, and Hal B. Adams for defendant, appellant.

DEVIN, J. Passing over questions of parties and procedure, we think the defendant's motion for judgment of nonsuit, entered in apt time, should have been allowed, for lack of competent evidence to support the allegations in plaintiff's petition.

The plaintiff was born out of wedlock in Caldwell County, North Carolina, in 1898. His mother, still living in that county, is Alice Teague. There was evidence tending to show that R. S. Graham was his father, and that shortly after the birth of plaintiff R. S. Graham removed to and became a resident of the State of California, where he died domiciled. In order to establish his claim that he was the legal heir of R. S. Graham, plaintiff relied upon a statute of the State of California, section 255 of the Probate Code, which provides as follows: "Every illegitimate child is an heir of its mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father; and inherits his or her estate in whole or in part, as the case may be, in the same manner as if born in lawful wedlock." *Estate of Loyd,* 170 Cal., 85.

Plaintiff sought to show that R. S. Graham, shortly after plaintiff's birth, gave to Alice Teague a note for $30 which contained an acknowledgment in writing of his paternity. The note was not produced, and plaintiff offered evidence that the paper had been lost and could not after due diligence be found. Whether the evidence on this point was sufficient to lay the foundation for the introduction of secondary evidence need not be determined (Lockhart on Ev., sec. 24; *Justice v. Luther,* 94 N. C., 793, 20 Am. Jur., 394), as the parol evidence offered as to the contents of the paper was insufficient to establish plaintiff's claim under the California statute.

Plaintiff offered the testimony of Alice Teague, who could not read or write. She testified she heard one Harmon Smith read what was in the note "that Robert Graham was paying for his son Walter Teague."

This evidence, to which objection and exception were duly noted, was hearsay and incompetent. Smith did not testify. "Evidence, oral or written, is called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *King v. Bynum,* 137 N. C., 491, 49 S. E., 955; *S. v. Blakeney,* 194 N. C., 651, 140 S. E., 433; *Greene v. Carroll,* 205 N. C., 459 (462), 171 S. E., 627; 20 Am. Jur., 403.

Plaintiff offered another witness, Shell, who also could not read or write, who testified that forty-two years ago he saw R. S. Graham and Smith sign a note which Graham said "was for Alice Teague. . . . He wanted Mr. Smith to sign this note for Alice Teague to go to pay for the boy." There was no other evidence of the contents of the paper.

In *Blythe v. Ayres,* 95 Cal., 532, it was said that the statute did not require the acknowledgment be in any precise or set form of words. However, the consensus of judicial opinion is to the effect that it must appear from the writing itself, or from competent evidence of its contents when lost, that there was a clear and unequivocal acknowledgment in writing of the paternity of the illegitimate child by the father. L. R. A. 1916 E, 659; 7 Am. Jur., 664; 7 C. J., 950; 10 C. J. S., 54.

The evidence offered by plaintiff falls short of the requirements of the California statute necessary to constitute him the heir of his putative father, and the motion for judgment of nonsuit should have been allowed.

Reversed.

MRS. ELSIE HIGGINS v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 29 October, 1941.)

1. Insurance § 38—

Evidence that the car in which insured was riding was forced off the highway by another car passing it on a curve, that after being forced off the highway it skidded on the shoulder of the road, struck a ditch and skidded on, against, over, and across a driveway bridge, that when it struck the ditch insured was thrown against the door which flew open, and that he fell out and was caught under the car and dragged 100 to 130 feet causing fatal injury, *is held* sufficient to show an accident to the automobile and that insured fell from the automobile as a proximate result thereof.

2. Insurance § 39—

Evidence that prior to the accident the automobile was in good condition and that immediately after the accident a door was warped so that it would not shut easily, the door stop broken, the glass of the door

cracked, and a fender dented and one of the running boards damaged *is held* competent upon the issue of whether the accident caused visible injury to the vehicle as required for recovery in the policy of accident insurance in suit, and was sufficient to be submitted to the jury upon that issue. *Sanderlin v. Ins. Co.*, 214 N. C., 362, cited and distinguished.

APPEAL by defendant from *Sink, J.*, at February-March Term, 1941, of CALDWELL. No error.

Civil action to recover the death benefit under a limited accident policy.

The defendant issued and delivered to Fonies C. Higgins its limit Industrial Travel and Pedestrian policy in which plaintiff was named beneficiary. Under the terms of the policy defendant agreed to pay plaintiff, beneficiary named in the policy, the sum of $1,000.00 for the loss of the life of the insured, if such loss of life should be caused "by collision of or by any accident to any . . . private motor-driven automobile . . . inside of which the insured is riding or driving . . . provided that . . . there shall be some external or visible injury to and on the said vehicle of the collision or accident . . . and provided that the collision or accident must occur on a public highway."

On 17 September, 1939, the insured, while a passenger on an automobile, fell out of the car, receiving injuries from which he died the next day. Whereupon this action was instituted.

The jury answered the issues submitted in favor of the plaintiff. From judgment thereon defendant appealed.

Townsend & Townsend for plaintiff, appellee.
Pritchett & Strickland for defendant, appellant.

BARNHILL, J. It is admitted in the answer that the insured was, on the day he received fatal injuries, a passenger on an automobile being driven on a highway near Wilkesboro; that he fell out of the automobile and the vehicle ran over him and dragged him some distance; that the insured died the next day; and that the policy at the time was in full force and effect.

Hence, to recover on the policy plaintiff must show that the insured fell from the automobile as a proximate result of a collision of or an accident to the vehicle on which he was a passenger and that such collision or accident caused some external or visible injury to the vehicle other than to the tires thereof.

As the driver of the automobile was proceeding around an "S" curve, another car, going at a high rate of speed and approaching from the rear, attempted to pass. In so doing it crowded or forced the vehicle on

which the insured was riding off the main portion of the highway. It skidded sidewise on the shoulder of the road, struck a ditch or gully and skidded on, against, over, and across a driveway bridge. When the car struck the ditch the insured was thrown against the door, which flew open, and he fell out and was caught under the car and dragged 100 to 130 feet before the automobile finally came to rest. That this constitutes an accident to the automobile is not seriously controverted.

Did the accident produce or cause any external visible injury to the vehicle? This the defendant denies and upon the issue thus raised it bases its primary defense.

The answer must be in the affirmative. The evidence, when viewed in the light most favorable to the plaintiff, tends to show that prior to the accident the automobile was in good condition. There were no dents or marks on it. The glass was not broken and the doors were in proper condition. Immediately after the accident it was discovered that the door was warped or bent to such an extent that it would not shut easily. The door stop or check was broken. The glass in the door was cracked all the way down. About 3 inches of the circle part of the fender had been bent back. There were dents in the right fender, the right rear rim was dented in several places, and the running board was damaged.

No one actually saw the fenders dented or the glass broken or the other damage done to the car. However, that such external visible injuries were not in existence just prior to the accident and were discovered shortly thereafter permits and perhaps commands the inference that they resulted from the accident. Certainly the evidence was such as to require its submission to the jury and it is sufficient to sustain the verdict. *Sanderlin v. Ins. Co.,* 214 N. C., 362, 199 S. E., 275, upon which defendant relies, is factually distinguishable.

The exceptions to the rulings of the court upon the admissibility of the testimony offered cannot be sustained. Evidence tending to show that the automobile had no visible sign of injury prior to the accident, together with evidence of such signs shortly thereafter, was competent on one of the issuable facts involved. And, incidentally, one of the witnesses for defendant testified in respect thereto.

We have examined the other exceptive assignments of error and find in them no sufficient cause for disturbing the verdict.

No error.

MILDRED E. ROBBINS, EMPLOYEE, v. BOSSONG HOSIERY MILLS, INC., EMPLOYER; AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER.

(Filed 29 October, 1941.)

1. Master and Servant § 40d—

A fall is in itself an unusual and unforeseen occurrence constituting an "accident" within the meaning of the Workmen's Compensation Act, and evidence of any unusual or untoward condition or occurrence causing the fall is not required.

2. Master and Servant § 40e—

Evidence that an employee, while reaching up to a rack in the course of her employment, for some undisclosed reason lost her balance and fell, is sufficient to sustain the finding of the Industrial Commission that the accident arose out of the employment.

3. Same—

Where the cause of an accident is unexplained but the accident is a natural and probable result of a risk of the employment, the finding of the Industrial Commission that the accident arose out of the employment will be sustained; but where the cause of the accident is known and such cause is independent of, unrelated to, and apart from the employment, and results from a hazard to which others are equally exposed, compensation will not be allowed.

APPEAL by plaintiff from *Clement, J.*, at March Term, 1941, of RANDOLPH. Reversed.

Claim for compensation under the Workmen's Compensation Act, ch. 120, Public Laws 1929, as amended.

The individual Commissioner allowed compensation. The Full Commission affirmed. On appeal the court below, being of the opinion "that there is no sufficient or competent evidence upon which the finding of fact that the plaintiff sustained an injury by accident arising out of her employment can be sustained," entered judgment reversing the order of the Commission and dismissing the action. Claimant excepted and appealed.

Ferree & Beal for plaintiff, appellant.
Sapp, Sapp & Atkinson for defendants, appellees.

BARNHILL, J. Claimant was employed by defendant Bossong Hosiery Mills, Inc., as a topper. On 18 October, 1934, she returned to her place of employment just prior to the time her shift was required to relieve the night shift, went to her bench and began to perform necessary duties preliminary to the starting of her machine. She was "loose coursing"

or making lines on hose. There is a stand or rack upon which she was required to keep her work material and to hang the hose. This rack was elevated and apparently over the machine. The hose are hung on the rack and in order for claimant to do her work it was necessary for her to take them down, "loose course" them and then put them back. In so doing she fell and received serious injuries.

Her fall is thus described by an eyewitness: "I saw her walk up there to this rack where they hang this work and she just walked up there and she put her hands up like that, I don't know whether she had work in them or what, or whether she was getting work, and then I saw her go backwards like that . . . looked to me like she walked up to the rack, about as high as that lamp, and it looked like she reached up to get work or put it on the machine, and the next thing I knew she was falling . . . at the time she had her bone (an instrument used in her work) in her hand."

That claimant was acting in the course of her employment is conceded. That the fall constituted an accident cannot be controverted. While defendant insists that there is no evidence of any unusual or untoward condition or occurrence that caused the fall, this is not essential. The fall was the unusual, unforeseen occurrence which is the "accident" within the meaning of the act. The injury was the result.

Did the accident arise out of the employment? On this record this is the decisive question. It was upon a negative answer thereto that the court based its judgment.

The meaning of the term "out of" as used in the Workmen's Compensation Act has been frequently discussed and defined by this Court. Mere repetition would serve no good purpose. *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266; *Harden v. Furniture Co.*, 199 N. C., 733, 155 S. E., 728; *Plemmons v. White's Service, Inc.*, 213 N. C., 148, 195 S. E., 370; *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, 196 S. E., 342.

When claimant was injured she was engaged in performing one of the duties of her employment. When she reached up to the rack, for some undisclosed reason she lost her balance and fell. There is no evidence tending to show that the fall was caused by a hazard to which the workman would have been exposed apart from the employment or from a hazard common to others. It had its origin in a risk connected with the employment. Hence, we are unable to say that the Commission was not justified in concluding that it was connected with and flowed from the employment as a rational consequence.

The decisions in somewhat similar cases may be divided into two distinct groups. One group is represented by *Maley v. Furniture Co.*, 214 N. C., 589, 200 S. E., 438, and *Morgan v. Cloth Mills*, 207 N. C., 317,

177 S. E., 165. In the *Maley case, supra,* the employee suffered an injury to his arm and in the *Morgan case, supra,* he slipped and fell while in the course of his employment. In each case the cause of the injury was in doubt. No other sufficient explanation appearing, we held in each case that the conclusion that the injury arose out of the employment was permissible and should be sustained.

The other group is represented by the cases cited and relied on by defendant. In each of those cases it affirmatively appears that the cause of the accident was either physical infirmity or external force or violence, in nowise connected with or related to the employment, and that it arose out of a hazard common to others. In *Neely v. Statesville,* 212 N. C., 365, 193 S. E., 664, it was heart failure. In *Buchanan v. Highway Commission,* 217 N. C., 173, 7 S. E. (2d), 382, claimant when at work was periodically blind and dizzy. In *Plemmons v. White's Service, Inc., supra,* he was bitten by a dog. In *Whitley v. Highway Commission,* 201 N. C., 539, 160 S. E., 827, he was accidentally shot by a hunter; and in *Bain v. Mfg. Co.,* 203 N. C., 466, 166 S. E., 301, he was injured by a stray bullet.

The logic of these decisions is this: where the employee, while about his work, suffers an injury in the ordinary course of the employment, the cause of which is unexplained but which is a natural and probable result of a risk thereof, and the Commission finds from all the attendant facts and circumstances that the injury arose out of the employment, an award will be sustained. If, however, the cause is known and is independent of, unrelated to, and apart from the employment—the result of a hazard to which others are equally exposed—compensation will not be allowed. Herein lies the distinction which is bottomed upon the rule of liberal construction.

The judgment below is

Reversed.

STATE v. HILLIARD PENRY.

(Filed 29 October, 1941.)

Intoxicating Liquor § 9d: Criminal Law § 52b—Circumstantial evidence raising mere suspicion of guilt held insufficient to be submitted to the jury.

Evidence that empty jars smelling of liquor were found in defendant's house and that in a field some 200 yards from defendant's house on land belonging to another, traversed by two or three paths used by persons in the neighborhood generally, were found 52 pints of whiskey concealed, is insufficient to be submitted to the jury on the question of defendant's

possession of intoxicating liquor, either actual or constructive, the circumstances disclosed by the evidence being such as to excite suspicion but being insufficient to exclude the rational conclusion that some other person may have been the guilty party.

APPEAL by defendant from *Clement, J.*, at March Term, 1941, of RANDOLPH. Reversed.

The defendant was charged with the possession of intoxicating liquor for the purpose of sale. There was verdict of guilty, and from judgment imposing sentence in accord therewith, the defendant appealed.

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

Ferree & Beal for defendant.

DEVIN, J. An examination of the evidence upon which the State relied for conviction leads us to the conclusion that the defendant's motion for judgment of nonsuit, interposed at the close of the State's evidence, should have been allowed.

The testimony offered by the State tended to show that upon a search of defendant's house no intoxicating liquor was discovered. Only the smell of liquor remained in some empty jars. In a field some 200 yards from defendant's home and on land belonging to another were found fifty-two pints of whiskey concealed. There were a number of houses near this spot, several of them nearer than defendant's, and three paths traversed the vicinity. It was testified that down below the defendant's home, near an old house, were found some footprints that led in the direction of the field. By whom the tracks were made did not appear. In the language of the State's witness, "Folks live all around this place and two or three paths through there."

The State's case fails at the first hurdle. Evidence is lacking to show possession of intoxicating liquor, either actual or constructive, on the part of the defendant. The circumstances may have been such as to excite suspicion, but the evidence adduced does not exclude the rational conclusion that some other person may have been the guilty party. *S. v. Prince,* 182 N. C., 788, 108 S. E., 330; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. English,* 214 N. C., 564, 199 S. E., 920; *S. v. Shu,* 218 N. C., 387, 11 S. E., 155.

The judgment is

Reversed.

STATE v. H. A. GOODMAN.

(Filed 29 October, 1941.)

Gaming § 5: Criminal Law § 52b—Circumstantial evidence raising mere suspicion of guilt held insufficient to be submitted to the jury.

Evidence that officers of the law entered defendant's house and found defendant and others seated at a table with poker chips in front of them, that one of the men had playing cards in his hand, and that numerous packs of playing cards were found in the room, although raising a suspicion of defendant's guilt, is insufficient to establish that a game of chance upon which money or other thing of value was bet was being played or had been played, and nonsuit should have been entered upon the charges of maintaining a gaming house and gambling.

APPEAL by defendant from *Clement, J.*, at April Term, 1941, of CABARRUS.

The defendant was charged in a bill of indictment with maintaining a gaming house and gambling tables wherein and whereon gambling was permitted and games of chance were played, and in a warrant from the county recorder's court with gambling, by engaging in and betting on a game of chance, namely, cards. The two charges were consolidated for the purpose of trial, and a verdict of guilty rendered on both charges. From judgments of imprisonment on each charge the defendant appealed, assigning error.

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

L. T. Hartsell, Sr., and Walter H. Woodson for defendant, appellant.

SCHENCK, J. When the State had produced its evidence and rested its case, the defendant moved to dismiss the action and for a judgment of nonsuit. C. S., 4643. This motion was refused, and the defendant excepted, introduced no evidence, and upon an adverse verdict appealed to the Supreme Court.

We are constrained to sustain the assignment of error predicated upon his Honor's refusal of the defendant's motion to dismiss and for judgment of nonsuit.

The most the State's evidence tended to prove is that the defendant lived in a house in No. 5 Township of Cabarrus County, that the State's witnesses, the sheriff, the deputy sheriff and patrolmen went to said house late Sunday night, that the shades were down and the lights were burning, and they heard "one fellow say he couldn't win with two aces," that they entered the house from the rear and went into a room in which

were the defendant and others, that the defendant was sitting at a round table with a "big pile of poker chips in front of him" and that another man sitting at the table "had playing cards in his hand" and "had several poker chips in front of him," that they found a wooden box on the floor directly behind the defendant which contained thirteen packs of playing cards, and in another room of the house they found two or three other packs of cards.

This evidence may create a suspicion of the defendant's guilt, or it may be sufficient to establish the actual fact that the defendant was preparing for a game of poker, but it is insufficient to support a finding that a game of chance was actually in process of being played, or had been played, upon which money or other thing of value was bet, which was requisite to the submission of the case to the jury.

The judgment of the Superior Court is

Reversed.

LAURA WINGATE v. ATLANTIC & NORTH CAROLINA RAILROAD COMPANY, INCORPORATED.

(Filed 29 October, 1941.)

Carriers § 21c—

The general rule is that a passenger who is injured while alighting from a moving train may not recover for such injury.

APPEAL by plaintiff from *Thompson, J.*, at February Term, 1941, of LENOIR.

Thos. J. White for plaintiff, appellant.
Allen & Allen for defendant, appellee.

PER CURIAM. Plaintiff's action was for damages for personal injury caused by a fall from defendant's train. She testified that when she stepped off the train the train was moving, and that caused her to fall. The general rule is that a passenger who is injured while alighting from a moving train may not recover for such injury. *Stamey v. R. R.*, 208 N. C., 668, 182 S. E., 130. Upon the authority of this case and the decisions there quoted, we conclude that the judgment of nonsuit was properly entered.

Affirmed.

STATE v. QUILLER JOHNSON.

(Filed 29 October, 1941.)

1. Intoxicating Liquor § 9d—

Testimony of two witnesses, only one of whom had been promised immunity, that they had bought liquor from defendant, *is held* sufficient to be submitted to the jury upon the charges of possession of liquor for the purpose of sale and illegal sale of liquor.

2. Criminal Law § 41i—

A promise of immunity to a witness for the State goes only to his credibility and not to his competency.

3. Criminal Law § 81c—

Where there are two counts of equal gravity in the bill of indictment, and the jury returns a general verdict of guilty on both counts, the verdict on either of them, if valid, supports the judgment.

APPEAL by defendant from *Clement, J.*, and a jury, at Regular Mixed Term, May, 1941, of IREDELL. No error.

The defendant was indicted on two counts for the illegal sale of liquor. (1) That he had whiskey in his possession for the purpose of sale; (2) that he sold liquor. The jury returned a verdict of "Guilty as charged in the bill of indictment." The court below pronounced judgment on the verdict. The defendant made several exceptions and assignments of error and appealed to the Supreme Court.

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

Hugh G. Mitchell for defendant.

PER CURIAM. The defendant introduced no evidence. At the close of the State's evidence, the defendant made a motion for judgment as of nonsuit. C. S., 4643. The court below overruled this motion, and in this we can see no error.

L. F. Bumgarner testified, in part: "I have been to the place before; one night about 11:30 the defendant brought a pint of liquor out to the car. I paid him 75c for it. That was about two weeks before Cannon bought the half gallon." This witness was not promised immunity.

Clyde C. Cannon testified, in part: "At the time I was arrested before I had a conversation with Mr. Collier, I knew that the man from whom I had bought the liquor before was Quiller Johnson. The person that I bought the liquor from on November 30th sold it to me in the same apartment building where I had previously on two occasions bought

liquor from Quiller Johnson. I told Mr. Collier the name of the person from whom I had bought the liquor following his promise not to prosecute me. (Cross-examination) Mr. Collier told me that he would not prosecute me if I told him whom I bought the liquor from. As a result of his promise I told him that I bought the liquor from Quiller Johnson. The room in which I bought the liquor was located at the lower end of the apartment house."

It will be noted that Cannon, to whom the immunity was promised, was not prosecuted. See *S. v. Luquire,* 191 N. C., 479. A promise of immunity to a witness for the State goes only to his credibility and not to his competency. A motion for a new trial is ordinarily in the discretion of the court.

There were two counts in the bill of indictment and a general verdict on both counts, the verdict on any one, if valid, supports the judgment. *S. v. Epps,* 213 N. C., 709 (713).

On the record we find

No error.

NANCY CARROLL EVANS, BY HER NEXT FRIEND, CLAUDE L. EVANS, v. JACK ELLIOTT, ROCKINGHAM HOMES, INCORPORATED, EDNA MILLS CORPORATION, AND ROBERT OLIVER.

(Filed 5 November, 1941.)

1. Master and Servant § 4a—

The contract in this case under which the contractor agreed to install plumbing in certain specified dwellings at a stipulated sum per house, *is held* to create the relationship of principal and independent contractor as a matter of law.

2. Master and Servant § 22—Liability of principal for injuries to third persons in performance of work by an independent contractor.

In order for the principal to be liable to third persons injured in the performance of work by an independent contractor it is not required that the work involve major hazards within the rule of the principal's liability to employees of the independent contractor, but the principal is liable to third persons not only if the work is inherently and intrinsically dangerous, but also if the injuries result from dangerous conditions inherently created in the ordinary progress of the work, as distinguished from dangers collaterally created by the negligence of the contractor, from which, under the circumstances of each particular case, injury to the public may be reasonably foreseen unless due precautions are taken.

3. Same—

Whether conditions naturally created in the progress of the work are such as to create a hazard to the public unless precautions are taken, is affected to a large extent by the surrounding circumstances and the conditions under which the work is to be done, since a condition which ordinarily might not be hazardous might become so when existing in a thickly populated section in which many children live.

4. Same—Conditions created in performance of work held hazardous under the circumstances, placing duty on principal to see that due precautions were taken.

The builder of a house agreed with the purchaser to have certain plumbing installed and contracted with another to do the plumbing work, and in the performance of the work a ditch for the sewer line was dug and a part of the ditch was left open between two houses in a thickly populated district in which many children lived and played. Plaintiff was about four years old and lived in the house adjacent to the ditch, and fell or was pushed from the porch of her residence into the ditch, resulting in serious injury. *Held:* Under the circumstances, the performance of the work created a condition of inherent danger, and injury to children in the neighborhood could have been reasonably anticipated unless proper precautions were taken, and therefore the fact that the work was performed by an independent contractor does not absolve the principal from liability.

5. Same—

The duty of a principal to see that proper precautions are taken to avoid likelihood of injury to the public from conditions inherently created in the performance of work by an independent contractor, is a duty owed to the public, and therefore whether the person injured is a licensee or trespasser, although germane in ascertaining the liability of the owner of the premises, is immaterial in determining the liability of the principal.

6. Same—

The duty of a principal to see that proper precautions are taken to avoid likelihood of injury to the public from conditions created in the performance of work by an independent contractor is a nondelegable duty imposed by law upon the principal, and he is directly liable to the person injured as a result of his negligent failure to perform such duty, and may be held responsible notwithstanding that nonsuit is taken as to the contractor.

7. Same—

Where the evidence shows the contract of employment created the relationship of principal and independent contractor as a matter of law, it is error for the court to submit an issue as to whether that relationship existed, and charge in effect that the relationship of principal and independent contractor would not exist if defendant failed to establish that the work did not fall within the exceptions to the general rule of nonliability.

8. Same—

Where the evidence establishes that the relationship of principal and independent contractor existed as a matter of law, and the principal is

sought to be held liable upon an exception to the general rule of non-liability, it is error for the court to charge the jury upon the theory of the principal's liability as an employer upon the doctrine of *respondeat superior.*

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

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

CLARKSON, J., concurring.

APPEAL by defendant, Rockingham Homes, Inc., from *Warlick, J.,* at March Term, 1941, of ROCKINGHAM. New trial.

The plaintiff sued by her next friend to recover for injuries sustained through the alleged negligence of the defendants. During the trial, the plaintiff took a voluntary nonsuit as to the defendants, Elliott and Oliver. Motion for judgment as of involuntary nonsuit as to the Edna Mills Corporation was allowed on demurrer to the evidence at the conclusion of plaintiff's evidence.

The alleged negligence consisted in digging or causing to be dug, and leaving unprotected and unguarded, a deep sewer ditch leading across the sidewalk of Way Street in a very thickly settled mill village section, which ditch led to and past the porch of the Oliver house and in close proximity thereto. The ditch itself was some three and one-half feet deep, and the drop from the floor of the porch to the bottom of the ditch was eight or ten feet. A large number of children were known to form a part of the population and to frequent the neighborhood premises, visiting and playing in and about the houses and on the Oliver premises contiguous to the ditch. The Evans children and Oliver children had been exchanging visits for some time. The plaintiff, a girl child about four years of age, playing upon the Oliver porch with other children, either fell or was pushed off the porch into the ditch, falling some ten feet into the bottom thereof. Her head struck the "bell" joint of the iron sewer pipe which had been installed and left exposed at the bottom of the excavation. She sustained a fractured skull, received a deep gash over the forehead which injured the eye, and, as the evidence tended to show, was seriously and permanently injured.

The defendant admitted knowledge of the fact that the section was thickly populated, with children residing therein, and that the plaintiff either fell or was pushed into the ditch and received injuries therefrom, but denied its liability or responsibility for the opening of the ditch and plaintiff's injury. Defendant alleged that at the time of plaintiff's injury, it had sold the Oliver house to its then occupants under a contract which required the defendant to "install in said building a sewer line and fixtures," and in pursuance thereof contended that it engaged Jack Elliott (its codefendant), trading as Reidsville Plumbing Company, as an independent contractor to do that job, and concludes that it is

relieved thereby from any responsibility for the manner in which he prosecuted the work, and from all liability for plaintiff's injury.

The plaintiff's evidence with respect to the populous and much frequented character of the neighborhood, and other conditions about the Oliver house, and of the conditions brought about by Elliott and existing in and about the premises at the time of the injury, and of the circumstances of the injury, substantially followed the complaint and tended to show negligence on the part of Elliott as the proximate cause of the injury. It also tended to show that the ditch remained open and unprotected for approximately three weeks, and that this condition was in plain view of defendant's office windows, and that officers of the defendant passed the premises frequently and knew or could have known of these conditions. It further tended to show that an officer or officers of the defendant came upon the premises at least twice for the purpose, as defendant contended, of inspection.

In evidence also was the written contract between defendant and Jack Elliott with reference to this work, which was as follows (substituting the Oliver premises for those named in the writing):

"November 4, 1938

"I agree to install plumbing in five dwellings on West Market Street and Piedmont Street for the sum of $70.00 per house or a total of $350.00 for all labor. Rockingham Homes, Inc., to furnish all necessary material and will pay for any taps required. All work to be done in a workmanlike manner, payment to be made upon satisfactory completion of the job.

"ROCKINGHAM HOMES, INC.
E. J. ELLIOT W. B. PIPKIN,
Sec. & Treas."

The following issues were submitted to the jury:

1. Was E. J. (Jack) Elliott, alleged in the pleadings to be trading as the Reidsville Plumbing Co., an independent contractor on the work to be done, and done, on the home of Robert Oliver on Way Street in the City of Reidsville?

2. Was the plaintiff injured by the negligence of the defendant, Rockingham Homes, Incorporated, as alleged in the complaint?

3. What amount, if anything, is the plaintiff entitled to recover of the defendant, Rockingham Homes, Incorporated?

Upon these issues the judge, *inter alia,* instructed the jury as follows:

"Now, gentlemen of the jury, this paper writing which was offered in evidence and which reads as follows, being defendant's Exhibit No. E, dated November 4, 1938: (see contract set out above) is, and I instruct

you as a matter of law, the creation of a relationship which would make E. J. Elliott, trading as Reidsville Plumbing Company, as alleged in the answer, an independent contractor, and if the defendant, Rockingham Homes, Incorporated, has satisfied you from the evidence and by its greater weight, under the instructions just previously given, that the work to be done there was not of such a type as to lead to the creation of a nuisance, or the maintenance of the open ditch was not of such type as would cause harm and injury and damage to another, and has satisfied you from the evidence and by its greater weight that the exceptions that I will give to you presently under the rules do not apply, then I instruct you, if you are so satisfied, that you will answer that first issue YES. Otherwise, if you are not so satisfied, you will answer it NO."

"So, therefore, gentlemen of the jury, if you find from the evidence and by its greater weight that Jack Elliott, under this issue, one, was an independent contractor and that as such he was not permitting any condition to arise there which of itself would be dangerous in the way of creating a nuisance, or otherwise, or which would come within the exceptions set out, if you are so satisfied or satisfied by the greater weight of the evidence, you would answer the first question YES. If, however, you are not so satisfied, you would answer it NO. If you answer the first question YES, under these instructions, then it would not be necessary for you to answer the remaining questions; that would be an end to the controversy, for you would then have found that he was an independent contractor, that he and he only would be responsible for any alleged negligence which might proximately result in the injury charged in this case and Rockingham Homes, Incorporated, would not be responsible."

He further instructed the jury, in the event they should answer the first issue NO, they should apply the law relating to master and servant and liability of the master for the servant's negligence, which he explained.

The jury answered all the issues favorably to the plaintiff, and from the judgment which ensued, the defendant appealed, assigning error.

Glidewell & Glidewell and Sapp, Sapp & Atkinson for defendant, appellant.

P. T. Stiers and Hobgood & Ward for plaintiff, appellee.

SEAWELL, J. Assuming the contract between appellant and its co-defendant to be as it appears in defendant's evidence, meagre as it is, we think it must be construed as constituting Elliott an independent contractor. The existence of such a contract, however, was a matter to be proved by defendant. The offices of the jury might be called on in this

respect, whether by separate issue or on appropriate instruction, but the jury could not be allowed to interpret its legal effect. *Drake v. Asheville,* 194 N. C., 6, 138 S. E., 343.

But this does not work a complete exoneration of the appealing defendant. Without going into an unnecessary analysis of the terms in which the instructions to the jury were actually couched, it is sufficient to say that the court was justified, under the evidence, in instructing the jury upon the exceptions to the general rule that the employer of an independent contractor is not liable for negligence arising in the progress of the work. Whether we consider the evidence as tending to show that the work, under the circumstances of this case, involved an inherent danger, or whether it tended to show that under the contract it might reasonably have been foreseen that the work, which was ordinarily accomplished without danger, when adequate precautions are taken, might, in its progress, give rise to conditions of danger when such precautions are omitted, the defendant was not entitled to have the case withdrawn from the jury on either aspect.

The conditions under which an employer is held liable for negligence notwithstanding the employment of an independent contractor, are well understood. These exceptions to the general rule are comprehensively expressed in 27 Am. Jur., pp. 515, 516: "It is well settled that one who orders work to be executed, from which in the natural course of things, injurious consequences must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see that necessary steps are taken to prevent the mischief, and such person cannot relieve himself of his responsibility by employing someone else, whether the contractor employed to do the work from which the danger arises or some third person, to do what is necessary to prevent the work from becoming wrongful. This rule is sufficiently comprehensive to embrace, not only work which, from its descriptions, is 'inherently' or 'intrinsically dangerous,' but also work which will, in the ordinary course of events, occasion injury to others if certain precautions are omitted, but which may, as a general rule, be executed with safety if those precautions are adopted."

This is almost the identical language employed in *Bower v. Peate,* 1 Q. B. Div. (1875-6), 321, and quoted in full with approval in *Davis v. Summerfield,* 133 N. C., 325, 328, 329, 45 S. E., 654, 655, and again in *Cole v. Durham,* 176 N. C., 289, 298, 97 S. E., 33, 37.

The courts have found no rule of universal application by which they may abstractly draw a line of classification in every case between work which is inherently dangerous and that which is not. The subject must not be confused with concepts of hazardous employment, usually involving a high degree of danger, since here we are dealing with danger which

manifests itself to the general public. It is not essential, to come under the rule, that the work should involve a major hazard. It is sufficient if there is a recognizable and substantial danger inherent in the work, as distinguished from a danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger. This concept is aptly expressed in a leading case as follows: "If the work itself creates the danger or injury, then the ultimate superior or proprietor is liable to the person injured by a failure to properly guard or protect the work, even though the work is entrusted to an independent contractor." *Downey v. Lowe,* 48 N. Y. S., 207.

Our own Court expresses it: "The liability of the employer rests upon the ground that mischievous consequences will arise from the work to be done unless precautionary measures are adopted, and the duty to see that these precautionary measures are adopted rests upon the employer, and he cannot escape liability by entrusting this duty to another as an 'independent contractor' to perform." *Thomas v. Lumber Co.,* 153 N. C., 351, 69 S. E., 275; *S. Louis & S. F. R. Co. v. Maddern,* 77 Kan., 80, 93 Pac., 586; *Cameron Mills and Elevator Co. v. Anderson,* 98 Tex., 156, 81 S. W., 282.

To come under the second condition of liability it is only necessary that the work which, as a general rule may be carried out with safety if certain precautions are observed, will likely cause injury if these precautions are omitted. *Richardson v. Consolidated Light,* 90 Vt., 552, 99 Atl., 241; *Johnson v. J. I. Case Threshing Machine Co.,* 193 Mo. App., 198, 182 S. E., 1089.

Such negligence is, of course, affected by the condition of foreseeability, which is necessary to fix the defendant with liability, but the rule of reasonable prudence forbids that one should escape liability for the consequences of his act on the ground that he could not foresee such consequences in photographic detail. The usual rules apply in such cases, and it is only necessary that he might reasonably see that some similar result might follow as a consequence of his act. *Lancaster v. Greyhound Corp.,* 219 N. C., 679, 688, 14 S. E. (2d), 820, 826; *Hunter v. R. R.,* 152 N. C., 682, 68 S. E., 237; *Washburn v. Laclede Gas Light Co.,* 202 Mo. App., 102, 115, 214 S. W., 410, 414.

The contractor may, of course, be liable for the same want of due care in not taking the necessary precautions, for the omission of which the employer becomes liable; but as to the employer, the liability is direct, and not derivative, since public policy fixes him with a nondelegable duty to see that the precautions are taken.

In applying these principles to the case at bar, we cannot divest the work of its surrounding circumstances as disclosed by the evidence—

consider that the contractor was simply digging a ditch, and leave it at that. The facts as they appear in evidence are that the defendant, in compliance with its contract with Oliver, caused this excavation or ditch to be made. It was something like a yard wide and approximately three and one-half feet deep, with an iron pipe at the bottom. The excavation was made alongside and contiguous to the porch of an inhabited house, and in a thickly populated area, much frequented both by children and adults. Considering the physical conditions, its location and the surrounding circumstances, it was of a character which might well be considered dangerous to those lawfully using the premises or being within the zone affected by the defendant's nondelegable duty to see that precautions were taken to avoid or eliminate the danger.

To get the whole picture, we must understand that the conditions under which the work is to be done, within the contemplation of the parties, the known circumstances which attend it, enter importantly into the question whether it is hazardous—that is, whether it involves an appreciable and foreseeable danger to the workers employed or to the public generally, against which suitable precautions must be taken. *Young v. Lumber Co.*, 147 N. C., 26, 60 S. E., 654; *Hunter v. R. R., supra; Cole v. Durham*, 176 N. C., 289, 97 S. E., 33; annotations, 23 A. L. R., 1084; 76 A. L. R., 1258. And it must be observed, too, that the liability of the employer is not affected by the fact that these precautions are usually taken or that the independent contractor explicitly agrees to provide them. Annotations, 65 L. R. A., 37.

Known conditions under which the contract must be carried out, the time, place, and circumstances attending the work, may unquestionably affect its character as hazardous or nonhazardous. For instance, the ordinary erection of a building has, under the circumstances of the particular case, been held to be a nonhazardous work, *Looker v. Gulf Coast Fair*, 203 Ala., 42, 81 So., 832; *Boomer v. Wilbur*, 176 Mass., 482, 57 N. E., 1004, 53 L. R. A., 172, yet if the contract call for the construction, in a populous city, of a steel skyscraper, flush with the sidewalk, where beams weighing tons are lifted and swung into position by powerful derricks, the construction of such a building would scarcely be considered as involving no danger to the public. *Earl v. Reid*, 21 Ont. L. Rep., 545 (these citations are from pertinent text, 27 Am. Jur., 522). Cutting and removing a tree in the midst of a forest would probably not rank as a hazardous work. But the cutting and removal of a large tree in close proximity to dwellings and in an area traversed by many people, would probably be sufficiently hazardous as to require precautions with which we are all familiar. *Young v. Lumber Co.*, 147 N. C., 26, 60 S. E., 654. So to dig a drain ditch in a pasture, far from human habitation, certainly would not be considered dangerous; but an excavation

of that character a yard wide and three and one-half feet deep, in a thickly populated area, where many persons have and exercise the right to be, is, we think, if left without adequate precautions, too obviously dangerous to be debatable.

The duty of appellant to those who might lawfully be within the zone of danger created by the failure to use due precautions is not subject to the limitations applying to the duty of the owner of the premises, for the appellant was not such owner under the stipulation found in the record. We therefore omit any discussion of the status of the injured child as licensee, invitee or trespasser. The duty which the appellant owed was to any member of the general public who might lawfully be at the place of danger and suffer injury therefrom.

The voluntary nonsuit taken as to the codefendant, Elliott, left the cause of action as to the appealing defendant unaffected. That would be so in any case, since the plaintiff was not required to bring action against both tort-feasors, even though their negligence might have been joint or concurrent. In the case at bar, however, the negligence of appellant, if it is found negligent, is not imputed, but is original and independent as a violation of duty which the policy of the law makes nondelegable.

But we think the able trial judge fell into error in his presentation to the jury of the principles governing liability of the employer of an independent contractor, and the application of these principles to the facts. It was error to instruct the jury that in order to have the first issue answered in the affirmative, the burden was upon the defendant to show that the work did not fall within the exceptions above mentioned. Such proof was not relevant to the issue. Furthermore, the confusion thus produced vitiated the instruction on the second issue. Indeed, we think it was error to instruct the jury on the relation of master and servant, and negligence which might be imputed to defendant on that theory, and upon the principle of agency or *respondeat superior,* a relation which, as the evidence now stands, did not exist.

For this error the appellant is entitled to a new trial, and it is so ordered.

New trial.

STACY, C. J., concurring in part and dissenting in part: Two propositions are announced by the majority, (1) that Elliott was an independent contractor, and (2) that the work done was "too obviously dangerous to be debatable." With the first I agree. With the second I disagree, if by "obviously dangerous" is meant inherently dangerous.

It is to be remembered that Elliott, the independent contractor, Oliver, the owner of the house, and the Edna Mills Corporation are no longer in the case. They were let out by judgments of nonsuit.

The Rockingham Homes, Inc., sold the house and lot in question to Oliver and agreed to "install in the residence situated on the above numbered lot bath fixtures, including a bathtub, a lavatory and a commode in the bathroom, and a kitchen sink and 30 gallon hot water tank in the kitchen." Jack Elliott, trading as Reidsville Plumbing Company, was engaged to do the work, and the terms of his agreement are in writing. They are clear and speak for themselves. *Brock v. Porter, ante,* 28. The ascertainment of their meaning and effect is for the court, and not for the jury. *Drake v. Asheville,* 194 N. C., 6, 138 S. E., 343; *Patton v. Lumber Co.,* 179 N. C., 103, 101 S. E., 613; *Young v. Jeffreys,* 20 N. C., 357. Under the contract, Elliott agreed to do the work as an independent contractor. *Young v. Lumber Co.,* 147 N. C., 26, 60 S. E., 654.

Now, in respect of the character of the work to be done, it appears that the Oliver house is situate in the Edna Mills district, a thickly populated area of the city of Reidsville; that a number of children reside in the neighborhood; that there are three children in the Oliver home and four in the Evans home, who live just across the street; that these children visit and play together; that other children in the neighborhood visit the Oliver children; that in all there are 25 or 30 children in the vicinity, and that these facts were known to the defendant.

It further appears that Elliott entered upon his work in January, 1939, two or three weeks prior to plaintiff's injury; that he dug a ditch, 2½, 3 or 3½ feet deep and 2 feet wide from Way Street to the Oliver house and extending under the house to the bathroom for the purpose of laying a pipe and connecting with the city sewer line; that the ditch ran along the south end of the porch, which was about 2½ feet from the ground; that there was no railing or banister at this end of the porch; that a section of pipe was lying in or protruding from under the house and into the ditch with a rim or "bell" at the end of it; that the work was stopped temporarily because of excessive rains, and water in the ditch, which prohibited proper leading of the joints; that during this time the ditch was covered from the street to a point "a little by the porch, a little by the corner" some 12 or 14 inches; that this left an uncovered space beside the porch "between two and three feet long and about two feet wide"; and that it is not customary, in work of this kind, to "cover a ditch inside the property."

It further appears, by admission in defendant's answer, "that the minor plaintiff either fell or was pushed into the ditch"—that is, into the open space at the south end of the porch, and was injured. There is no other evidence as to how the injury occurred. The record is silent on whether she fell from the porch or reached the opening over the embankment from the south.

On this record, then, the question arises whether the plumbing called for in the contract was so inherently dangerous as to render the defendant jointly liable with the independent contractor for failure properly to safeguard the work while in progress. None of the authorities cited in the majority opinion sustains an affirmative answer. On the contrary, they point in the opposite direction.

The installation of plumbing in a private dwelling is not regarded as especially hazardous. Certainly, the plumbing provided for in the contract with Elliott did not require the performance of work "intrinsically or inherently dangerous, however skillfully and carefully performed." *Davis v. Summerfield,* 133 N. C., 325, 45 S. E., 654; *Dunlap v. R. R.,* 167 N. C., 669, 83 S. E., 703.

The rule of responsibility in respect of "intrinsically dangerous" work is based on the unusual hazard which inheres in the performance of the contract, and not from any collateral negligence of the contractor. *Bibb v. R. R.,* 87 Va., 711. Mere liability to injury is not the test, as injury may result in any kind of work where it is carelessly done, albeit with proper care it is not especially hazardous. *Vogh v. Geer,* 171 N. C., 672, 88 S. E., 874. The word "dangerous" means attendant with risk; perilous; something which in itself is unsafe. *Scales v. Lewellyn,* 172 N. C., 494, 40 S. E., 521.

The act of negligence here relied upon was the failure of the workmen properly to cover the ditch in question during the delay occasioned by the rains. This was Elliott's negligence, if negligence at all, and not that of the defendant. The delay was not within the contemplation of the parties. Elliott's negligence in this respect, if such it were, was collateral to the contract. It certainly was not inherent in the work in the sense this term is used to import original liability or a duty in connection with the work which may not be delegated to an independent contractor. *Cole v. Durham,* 176 N. C., 289, 97 S. E., 33.

The case of *Fink v. Missouri Furnace Co.,* 82 Mo., 276, 52 Am. Rep., 376, is much like this one. There it was held that a person employing a contractor to haul sand was not liable for his negligence in so digging the sand as to form a dangerous bank which caved in and injured a young child. In that case, as here, it appeared "that there were quite a number of houses in the vicinity of said lot which were occupied by families with a number of children."

Likewise, in *Frassi v. McDonald,* 122 Cal., 400, 55 Pac., 139, 772, it was held that the owner of a building in process of erection, entrusting to an independent contractor the work of laying pipes in the street, connecting with the building, was not liable for the negligence of the contractor in tearing up the sidewalk in the prosecution of his work, and leaving it in such condition as to be dangerous to persons passing by.

The whole subject is fully discussed in *Davis v. Summerfield, supra; Denny v. Burlington,* 155 N. C., 33, 70 S. E., 1085; *Thomas v Lumber Co.,* 153 N. C., 351, 69 S. E., 275; *Hopper v. Ordway,* 157 N. C., 125, 72 S. E., 839; *Drake v. Asheville, supra; Teague v. R. R.,* 212 N. C., 33, 192 S. E., 846; *Hudson v. Oil Co.,* 215 N. C., 422, 2 S. E. (2d), 26. See, also, exhaustive note in 76 Am. St. Rep., 382, and annotations in 18 A. L. R., 801, where the authorities from all over the country are collected. This latter annotation follows two cases in the same Report wherein it is held:

1. "The owner of a building in process of construction by an independent contractor is not liable for injury to a pedestrian on the adjoining street by a hot rivet which falls when thrown from one workman to another as a method of doing the work, where a protective cover had been placed over the sidewalk, since the workman's act was not a necessary detail of the work so as to render it inherently dangerous and charge the owner with liability." *Smith v. Bank,* 135 Tenn., 398, 186 S. W., 465, 18 A. L. R., 788.

2. "The removal of a sign from a building standing flush with the sidewalk is not so inherently dangerous that the property owner cannot relieve himself from liability for injury negligently inflicted by workmen upon persons passing along the street, by letting the work to an independent contractor." *Press v. Penny,* 242 Mo., 98, 145 S. W., 458, 18 A. L. R., 794.

Simply stated, the rule is this: If the thing contracted to be done involves, as a direct consequence, a danger which the owner of the premises is bound by law to avoid, or to provide against, then the delegation of the work to an independent contractor will not relieve from liability for consequences proximately resulting from negligence in its performance. But where the work is not inherently dangerous, and the matter complained of is purely collateral to the work contracted to be done, and is entirely the result of the negligence or wrongful acts of the contractor or his workmen, the rule is that the employer is not liable. *Robbins v. Chicago,* 4 Wall., 657, 18 L. Ed., 427.

Perhaps it should be observed that we are not now concerned with the liability of a municipal corporation, where the independent contractor acts only under authority of the city council, *King v. R. R.,* 66 N. Y., 181, or where the safety of a street or sidewalk is involved. *Bailey v. Winston-Salem,* 157 N. C., 252, 72 S. E., 966; *Carrick v. Power Co.,* 157 N. C., 378, 72 S. E., 1065. Such cases call for the application of other principles.

The building of a house, which includes the installation of plumbing, is not regarded as a dangerous undertaking, *Drake v. Asheville, supra,* yet in the instant case it is said the work done under the Elliott contract,

which only calls for the installation of plumbing in the ordinary manner, is "too obviously dangerous to be debatable." This goes a bow-shot farther than anything in the books.

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

CLARKSON, J., concurring in the main opinion: I agree that a ditch two feet wide and three and a half feet deep, with a large sewer pipe at the bottom, and at the very edge of a porch on which children are accustomed to play is both "obviously" and "inherently" dangerous; and both because of its character and its location comes within the sound policy of the law which requires even the employer of an independent contractor to see to it that due care is observed and proper precautions taken to prevent injury—as a nondelegable duty. The contract between defendant and Oliver expressly called for the making of this excavation, and the contract in pursuance of it between the defendant and Elliott requires it. Elliott certainly was not expected to burrow underground to lay the sewer pipe. Rockingham Homes, Inc., knew in advance what had to be done, inspected it at different times during construction. The work was done within a few yards of the defendant's main office, and its manager walked by it every day. Whatever danger existed was in the work itself and not in any unusual way it was performed. The contractor could only have avoided the injury by taking certain precautions which it was not only his duty to take, but the duty of the defendant Rockingham Homes, Inc., to see taken.

The propriety of basing the rule on a definite working principle rather than leaving it to the court on an arbitrary appraisal of the degree of danger involved became apparent long ago, and that principle is exemplified in the texts and authorities cited in the opinion. It takes no extra or unusual risk, peril, or hazard to constitute danger. Danger is defined in Century, Webster, as "exposure to harm or injury." This is sufficient to raise the duty. And was there danger? I am not swerved in my thinking by any sympathy for this child, the unfortunate victim of this harmless excavation. But the occurrence itself, and its manner—plunging head-first into an open ditch and fracturing her skull upon its cast-iron bottom—is the most eloquent testimony of intrinsic danger. And it is legitimate evidence. Surely it should not require a similar sacrifice of a dozen children to prove it so.

I think the law applicable to this case is aptly expressed in the authorities cited in the main opinion, in which I concur.

S. E. HIGH, ADMINISTRATOR OF JOHN A. PEARCE, DECEASED, v. THOMAS PEARCE, ANNIE PEARCE, ET AL.

(Filed 5 November, 1941.)

1. Dower § 8a—

Proceedings for the allotment of dower must be brought in the county in which deceased was domiciled at the time of his death.

2. Same—C. S., 74, relating to sale of lands to make assets, does not affect jurisdiction of proceedings to allot dower by metes and bounds.

Deceased died seized of lands lying in two counties. An administrator was appointed in the county of his residence. The administrator instituted proceedings in the other county to sell lands to make assets. C. S., 74. The widow appeared therein asking that the lands be sold subject to dower and averring that she would later institute proceedings for the allotment of dower by metes and bounds. The clerk, with the widow's consent, ordered that the widow's dower be allotted and that the remaining lands be sold to make assets, and a sheriff and jury from that county went into the county of deceased's residence and allotted dower by metes and bounds. *Held:* Not only was the allotment of dower by the sheriff and the jury from the other county invalid, but the clerk of such other county was without authority to enter the order for the allotment of dower notwithstanding he had jurisdiction of the proceedings to sell lands to make assets, and might have ordered the lands sold subject to dower, the only provisions of C. S., 74, giving the clerk jurisdiction in regard to dower in lands outside his county being where the widow consents that the lands be sold clear of dower and that a certain part of the proceeds of sale be set apart to her in commutation of dower.

3. Clerks of Court § 3—

The clerk of the Superior Court has only that jurisdiction, both as to subject matter and the territory in which it may be exercised, which is conferred upon him by statute, and his order affecting lands in another county is void in the absence of express statutory authority.

4. Courts § 1a—

Jurisdiction over the subject matter may not be conferred upon a court by consent, and therefore when a clerk of a Superior Court enters an order affecting lands in another county without statutory authority, the order is void notwithstanding that respondent appeared and consented that the clerk might hear the proceedings and enter the order.

5. Judgments § 22h—

An order entered by a court without jurisdiction of the subject matter is void *ab initio* and may be treated as a nullity, anywhere, and at any time.

6. Estoppel § 6a—Fact that party sets up prior void order as defense does not preclude him from thereafter attacking the void order.

Deceased died intestate seized of land lying in two counties. The lands lying in the county of his domicile were encumbered. Proceedings were

instituted in the county other than that of his domicile to sell the lands to make assets, C. S., 74, and in that proceeding it was ordered that the widow's dower be allotted in the home place and that the remaining lands of deceased should be sold. Prior to the date of sale the mortgagee foreclosed the mortgage. In the purchaser's action in ejectment the widow set up the defense that her dower had been allotted in the lands. *Held:* The futile attempt of the widow to set up her dower in the ejectment action did not result in disadvantage to the administrator or to the purchaser at the foreclosure sale, and does not estop the widow from thereafter moving in the cause that the allotment of dower be set aside on the ground that it was void for want of jurisdiction.

WINBORNE, J., concurring in result.

STACY, C. J., and BARNHILL, J., join in concurring opinion.

APPEAL by Annie Pearce, widow, petitioner, from *Williams, J.*, Resident Judge, Fourth Judicial District. Judgment signed 15 March, 1941, at Chambers.

John A. Pearce died a resident of Wilson County, owning lands in both Johnston and Wilson counties. Altogether he owned around eighty-five acres, about fifty-three acres of which lay in Wilson County. The Wilson County lands were encumbered by a first mortgage to the Federal Land Bank of Columbia for about $4,500, and by a second mortgage to the Bank of Lucama for $250.

S. E. High, Sr., cashier of the Lucama Bank, qualified as administrator of Pearce and filed a petition in Johnston County to make assets to pay debts of the administration. In this petition he described three tracts of land, two of them lying in Johnston County and one lying in Wilson County. In his petition he sets up the aforementioned encumbrances on the Wilson County land, and also alleges that Annie Pearce, the widow of John A. Pearce, and a party to the proceeding, had a dower right in the lands of the decedent.

Annie Pearce admitted the allegations of the petition and did not resist the sale of the lands, but she asserted that she had a dower right in them and the right to have her dower allotted to her by metes and bounds. She therefore asked that the lands be sold subject to her dower and signified her intention of having the same allotted to her at a subsequent time by a proper proceeding instituted by herself. Upon this the clerk of the Superior Court of Johnston County ordered that her dower be allotted to her, reciting the admissions and allegations in the petition of a special proceeding, and that all persons having an interest had been made parties to such proceeding. He thereupon issued a "writ of dower" to the sheriff of Johnston County, who thereunder summoned three jurors, citizens and residents of Johnston County, to make the allotment; they proceeded to Wilson County, where the jurors allotted to Annie Pearce five acres of land, including the home but excluding parts of the curtilage.

Report of this allotment was made to the clerk of the Superior Court of Johnston County, and the clerk thereupon confirmed the allotment. No certification of the proceeding was made to Wilson County.

An order was then made to sell the lands of the decedent, both in Johnston and Wilson counties, and a sale thereof was advertised.

Meanwhile, prior to the sale day, S. E. High, Sr., it is alleged, foreclosed the Lucama Bank mortgage of $250 on all of the Wilson County lands, including the part allotted to the widow for dower, and S. E. High, Jr., son of the administrator, became the purchaser at the price of $275. On a subsequent proceeding brought by S. E. High, Jr., Annie Pearce was ejected from the land.

Thereafter, at the public sale, under the order of the clerk, only the two tracts of land in Johnston County were sold, and here again S. E. High, Jr., became the purchaser, at the price of $250.

On 5 January, 1940, Annie Pearce filed a petition and motion before the clerk of the Superior Court of Johnston County, asking that the allotment of dower under this proceeding be set aside as fraudulent, and void as a matter of law.

In her supporting petition she sets up that the administrator, S. E. High, Sr., was cashier of the Bank of Lucama, which held a second mortgage on the Wilson County lands; that his close friends were summoned on the jury which allotted the dower; that he brought about the sale of the Wilson County lands, some fifty acres, upon the Bank of Lucama mortgage after the lands had been advertised under the order of court, and that his son, S. E. High, Jr., became purchaser at the price of $275; that at the judicial sale of the Johnston County lands S. E. High, Jr., again became purchaser at the price of $250, thus acquiring all of the lands, worth at least $6,000, subject to the Land Bank mortgage, for $525.

She alleges that she had never assented to the allotment of dower in the Johnston County proceeding, but, on the contrary, specifically demanded that the lands be sold subject to dower, to the end that she might have the same allotted in a proper proceeding in a court of competent jurisdiction. She therefore contends in her petition that all the proceedings taken before the clerk of the Superior Court relative to the allotment of dower, as well as the steps taken therein in Wilson County by the sheriff of Johnston and the Johnston County jury making the allotment, were void for want of jurisdiction, and asks that the various orders, writs of dower, allotment and confirmation be set aside in order that she may proceed, as provided by law, to have her dower allotted.

The respondents, S. E. High and S. E. High, Jr., answer, denying any fraud or bad faith; they contend that the allotment of dower was in accordance with the statute, and valid, and was had and done with con-

sent of movant through her counsel; that the purchase price of the lands was determined by open sale; that the dower allotted to the widow was worth at least $1,250; and, by way of further defense, set up that movant is estopped by reason of the fact that she nowhere in the proceedings took any appeal, that she accepted and occupied the allotted dower, and especially that she set up dower in the proceeding brought by S. E. High, Jr., in which she was ejected from the premises.

The clerk denied the motion to set aside the allotment of dower, and, upon appeal, his order was affirmed by Williams, J., at chambers in Smithfield. From this judgment Annie Pearce appealed.

A. M. Noble for petitioner, appellant.

G. A. Martin and W. J. Hooks for S. E. High, Jr., and S. E. High, administrator, appellees.

SEAWELL, J. In the instant case, it does not appear that the experience of the widow with the law was a happy one. Entitled to a dower of one-third in value of around eighty-five acres of land, partly in Wilson and partly in Johnston counties, she was allotted five acres out of the Wilson County tract of thirty-three acres, which tract was sufficient in value under the appraisal of the Land Bank to justify a loan of about $4,500. In addition to this mortgage there was an additional mortgage to the Bank of Lucama of $250, under which this tract of land was sold by S. E. High, Sr., who was cashier of the bank, as well as administrator of the estate, and which was purchased by S. E. High, Jr., at a price which netted only $144, leaving "no equity" for the widow, although in the present proceeding the respondents aver that the small part allotted to the widow as dower was worth $1,250. The widow protests that she is not in the hands of her friends, but in the hands of those moving to the restriction or extinction of her dower in all the lands. After the sale under the Lucama Bank mortgage, the other lands of the decedent in Johnston County were sold and S. E. High, Jr., became the purchaser at $250, thus, as the movant contends, making S. E. High, Jr., the owner of the entire tract of land for $525, including the equities of the widow in a substantial margin of value, and putting him in a position to clear the Land Bank mortgage on easy payments.

We think more consideration might have been given to the widow, and indeed to the statute itself, in view of the beneficence which instigated the institution of dower, to have allotted her dower in other lands of which she could not be stripped so easily. However this may be, upon a consideration of the record we must eliminate the question of fraud as not supported thereby.

The real question upon which decision must rest is that of jurisdiction: Were acts of the clerk of the Superior Court of Johnston County, in allotting dower to the widow in lands situate in Wilson County, void for want of jurisdiction?

A proceeding for the allotment of dower is within the exclusive jurisdiction of the clerk of the Superior Court, except where it may come within the equity jurisdiction of the Superior Court proper, which jurisdiction still persists in appropriate cases despite the statute. *Efland v. Efland,* 96 N. C., 488, 1 S. E., 858. From early times it has been consistently held by this Court that a dower proceeding must be brought in the county of the residence of the decedent, which in this instance is Wilson County, where also the administrator qualified and filed his bond, and where the lands out of which movant's dower was allotted were situated. *Howell v. Parker,* 136 N. C., 373, 375, 48 S. E., 762, 763; *Askew v. Bynum,* 81 N. C., 350. The respondent in this case insists that this rule is changed by C. S., 74, relating to sale of the lands of a decedent to make assets to pay debts.

This section does deal with dower as a situation likely to be met with in a proceeding of that kind. It provides that where the lands are sold clear of the dower interest by consent of the widow, a certain part of the proceeds of the sale shall be set apart to her in commutation of dower, but it makes no provision for allotment of dower by metes and bounds. On the contrary, it provides that "nothing herein contained shall be construed to deprive the widow from claiming her dower by metes and bounds in her husband's land." The statute does not provide that such an allotment may be made as incidental to the proceeding to sell the lands to make assets nor does it directly or inferentially provide that the jurisdiction and allotment of dower shall be coincidental with that which the statute creates as a matter of convenience with respect to the proceeding to sell the lands. In its silence in this respect it contemplates that the proceeding for dower shall be had in accordance with law in the proper jurisdiction. Indeed, the proceeding to sell the lands does not necessarily involve any allotment of dower, since the land may be sold subject to dower. "An administrator's sale to pay unsecured debts does not affect the widow's dower, and a purchaser is put upon notice of these rights by the rule of *caveat emptor.*" 17 Am. Jur., 744. In her answer to the petition to sell the lands, the widow asserted her right to dower by metes and bounds, and asked that the land be sold subject to that dower in order that she might have it allotted to her according to law in a court of proper jurisdiction. We think she had that right. *Howell v. Parker, supra.* In this respect the proceeding before the clerk of the Superior Court of Johnston County was *coram non judice* and was void for want of jurisdiction. *Howell v. Parker, supra.*

We come now to consider the contention of respondent that Annie Pearce, through her attorney, gave consent to the procedure. If, indeed, she did so, it was ineffectual to confer jurisdiction. Since 1868 the clerk of the court has had no power except that which is given him by statute. Where judicial power or jurisdiction has been conferred upon him, his court is one of limited jurisdiction, both as to subject matter and the territory in which it may be exercised. *McCauley v. McCauley,* 122 N. C., 288, 292, 30 S. E., 344, 345. He has no more general jurisdiction of dower than he has of administration, the appointment of guardians, or any of the other proceedings, all of which are specially committed to his charge by statute to be exercised within the confines of his own county. An attempt, therefore, to extend his judicial acts beyond this limit in the absence of statutory authority raises a question not merely of venue, but of jurisdiction, both as to subject matter and territorial limits. It is well understood that consent will not give jurisdiction where the court has none of the subject matter. *Reaves v. Mill Co.,* 216 N. C., 462, 465, 5 S. E. (2d), 305, 306; *Hardware Co. v. Burtner,* 199 N. C., 743, 155 S. E., 733; *Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315; *Cary v. Allegood,* 121 N. C., 54, 28 S. E., 61; *Springer v. Shavender,* 118 N. C., 33, 23 S. E., 976.

Jurisdiction has been defined as "the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment," McIntosh, Practice and Procedure, sec. 5; *Patterson v. Freeman,* 132 N. C., 357, 43 S. E., 905; *Williams v. Williams,* 188 N. C., 728, 125 S. E., 482; "the right to adjudicate concerning the subject matter in a given case," 14 Am. Jur., p. 363; 21 C. J. S., p. 30.

Properly speaking, there can be no jurisdiction of the person where there is none of the subject matter, although the converse might indeed, and often does, occur. Where there is no jurisdiction of the subject matter the whole proceeding is void *ab initio* and may be treated as a nullity anywhere, at any time, and for any purpose. *Clark v. Homes.* 189 N. C., 703, 128 S. E., 20; *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716. Obviously, summons is ineffectual to bring a person into such a court; and if he comes voluntarily, it has no more effect than if he had walked into an empty hall. For this reason a discussion of that matter does not seem essential to a decision in the present case.

In view of the want of jurisdiction in the clerk, it is unnecessary to discuss the fact that the attempted allotment of dower was made in Wilson County by a sheriff and jury from Johnston County, which would in itself be sufficient to render it invalid. In order to avoid resumption of the proceeding by a court without authority, it is necessary to place decision on the broader principle.

On the question of estoppel, we do not think that the respondents have made a sufficient showing. Neither the administrator, S. E. High, nor the purchaser of the Wilson County property, S. E. High, Jr., was disadvantaged by the futile attempt made by Annie Pearce in the ejectment proceeding to assert her right of dower as against a title arising out of a mortgage in which she had released or conveyed that right. The plaintiff in that case won out, ejected the claimant, and honors became easy.

We conclude that the right of dower is still outstanding in petitioner, Annie Pearce, and the judgment of the court below to the contrary is

Reversed.

WINBORNE, J., concurring in result: Is the order of clerk of Superior Court of Johnston County for allotment of dower void? This is the decisive question on this appeal. If it be voidable, the judgment from which appeal is taken should be affirmed. But if it be void, the judgment should be reversed.

The only assignment of error in the record is based upon exception "to the signing and entering of the judgment." There is no exception to any specific finding of fact. The facts found in the judgment, if nothing else appeared upon the face of the record, would support the judgment. *Query v. Ins. Co.,* 218 N. C., 386, 11 S. E. (2d), 139; *Keel v. Trust Co.,* 219 N. C., 259, 13 S. E. (2d), 428.

However, looking beyond the judgment, it appears upon the face of the record proper, as admitted facts, that John A. Pearce, a resident of Wilson County, died seized of three tracts of land—one situated wholly in Wilson County, another wholly in Johnston County, and the third partly on each side of the dividing line between the two counties; that the administrator, appointed in Wilson County, instituted this proceeding in Johnston County, to sell the said three tracts of land to create assets to pay debts of the estate, to which proceeding the widow and heirs at law of intestate are parties; that, although Annie Pearce, the widow of John A. Pearce, through her attorney, David Isear, answering petition in said proceeding, asserted her right and election "to have her dower interest in said lands allotted by metes and bounds" which she would "perfect in apt time by a special proceeding for that purpose and in accordance with the statutes," her attorney consented to the allotment thereof in this proceeding—a fact which the court finds she agreed to "through her attorney, David Isear"; that the clerk of Superior Court of Johnston County, finding that Annie Pearce is entitled to dower, entered an order commanding the sheriff of said county to summon a jury, to allot and set apart to her, "according to law, her dower in the lands of her late husband—said lands being definitely described in the petition in this cause"; that pursuant thereto the sheriff selected a jury

of three, residents of Johnston County, who went over into Wilson County and allotted dower "around and including the old home place dwellings"—the report not designating in which county the home place is situated; and that no exceptions thereto were filed and the report was confirmed.

The judge below further finds that thereafter the widow "went into possession of the lands allotted to her as her dower"; and that later in an action instituted by the purchaser at the foreclosure of a mortgage deed, in which she joined, for possession of the tract of land in which her dower had been so allotted in this proceeding, the widow, through her attorneys, Wellons & Poole, filed a verified answer in which she "alleged that she was the owner and entitled to possession of the lands which were allotted to her as her dower and that said allotment was duly made pursuant to the order of the clerk of the Superior Court of Johnston County"; and that on trial judgment was rendered declaring title to said land to be in said purchaser, which judgment is pleaded here as an estoppel.

The judge below, being of opinion that the allotment of dower is valid, and that the widow is estopped to deny the validity of same, denied her motion and petition in the cause to set aside the allotment of dower.

Under these facts, is the order for allotment of dower as entered void? This Court said in *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7, quoting from Freeman on Judgments (4 Ed., p. 176) that: " 'If a judgment is void, it must be from one or more of the following causes: (1) want of jurisdiction over the subject matter; (2) want of jurisdiction over the parties to the action, or some of them; or (3) want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class, it acts in excess of jurisdiction.' " And, continuing in same case, it is said: " 'When we speak of "jurisdiction of the subject matter," we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle.' " Black on Judgments, Vol. 1 (2d Ed.), p. 271.

In the light of these principles, it does not appear to be controverted that the court acquired jurisdiction over the parties, nor does it appear to be as to the subject matter of the proceeding in so far as the purpose is to sell the lands to create assets to pay debts. C. S., 74, as amended by ch. 43 of Public Laws 1935. However, it is contended, and we think properly so, that the further provisions of C. S., 74, as amended by ch. 55 of Public Laws 1923, give jurisdiction as to dower only to the extent of providing for the interest of the widow in the event dower be sold, but that the proviso "that nothing herein contained shall be con-

strued to deprive the widow from claiming her dower by metes and bounds in her husband's land" leaves the jurisdiction of the subject matter of the allotment of dower "by metes and bounds" as is otherwise provided by statute. The rationale of such other statutes, and decisions of this Court construing them, tend to indicate that there should be only one proceeding for the allotment of dower, whether it is a dower proceeding or a proceeding for partition of land, in which widow is entitled to dower, C. S., 3226, and that proceeding in the county where "the dwelling house in which her husband usually resided" is situated. Consolidated Statutes, sections 4100, 4105, and 4106. *Askew v. Bynum,* 81 N. C., 350; *Howell v. Parker,* 136 N. C., 373, 48 S. E., 762; *Harrington v. Harrington,* 142 N. C., 517, 55 S. E., 409; *Vannoy v. Green,* 206 N. C., 77, 173 S. E., 277. See, also, *Seaman v. Seaman,* 129 N. C., 293, 40 S. E., 41; *Baggett v. Jackson,* 160 N. C., 26, 76 S. E., 86; *Dudley v. Tyson,* 167 N. C., 67, 82 S. E., 1025.

Hence, when the court, that is, the clerk of Superior Court of a county other than that wherein "the dwelling house in which her husband usually resided" is situated, assumes to order allotment of dower of a widow entitled thereto, it not only lacks "legal power to pass upon and decide the particular contention which the judgment assumes to settle" but "acts in excess of jurisdiction."

In this connection it may be noted that, in this State, dower and the provisions for the allotment thereof are wholly statutory. *Howell v. Parker, supra; Vannoy v. Green, supra.* It is also pertinent to note that in Revised Statutes of North Carolina (1837), ch. 121, sec. 2, and Revised Code of North Carolina (1854), ch. 118, sec. 3, it was provided that any widow, having claim to dower, might file her petition in the county or Superior Court of the county "where her husband shall have usually dwelt" praying that her dower might be allotted to her. But this provision as to the county in which the petition might be filed has not appeared in subsequent codifications. Yet provisions of pertinent statutes, relating to dower and to allotment of dower, tend to indicate legislative intent that petition for dower should be filed only in Superior Court of such county.

The statute, C. S., 4100, provides that a widow, entitled thereto, shall be endowed of one-third in value of all the lands, tenements and hereditaments whereof her husband was seized and possessed at any time during coverture, in which third part shall be included "the dwelling house in which her husband usually resided." This section further provides that the jury summoned for the purpose of assigning dower to a widow shall not be restricted to assign the same in every separate and distinct tract of land, but may allow her dower in one or more tracts, having a due regard to the interests of the heirs as well as the rights of the widow.

It is further provided therein that this section shall not be construed so as to compel the jury selected to allot dower to allot the dwelling house in which the husband usually resided, when the widow shall request that the same be allotted in other property.

Other statutes provide that the widow may apply for the assignment of dower by petition in the Superior Court, C. S., 4105, and that if dower be adjudged, it shall be assigned by a jury of three persons, qualified to act as jurors, who shall be summoned by the sheriff to meet on the premises, or some part thereof, and, after being sworn, shall proceed to allot and set apart to the widow her dower in said premises according to law and make report to the clerk of Superior Court. C. S., 4106. Moreover, when the husband dies seized and possessed of lands in any other county than that in which petition for dower is filed, the last section further provides a method by which the jury in such county, charged with the duty of assigning dower, shall be informed of the value of the lands lying in the other counties, to the end that this value may be considered in determining the dower to be allotted.

For these reasons, I concur in result of decision in this Court that judgment below be reversed.

STACY, C. J., and BARNHILL, J., join in this opinion.

R. D. MOSTELLER, CONNELLY WILLIAMS AND WIFE, WILMA WILLIAMS, E. A. WARLICK AND WIFE, LETTIE WARLICK, B. A. BERRY AND WIFE, DONNIE BERRY, AND MRS. KELLY ICARD AND MRS. R. B. MORGAN v. SOUTHERN RAILWAY COMPANY.

(Filed 5 November, 1941.)

1. Highways § 13—

Where the State Highway Commission, in the interest of public safety, builds an overpass and relocates a short section of the road in order to cut out dangerous curves and an inadequate underpass, and thereafter tears up the section of old road lying on one side of the underpass, the short section of old road is not a highway abandoned by the State Highway Commission which remains open and in general use by the public within the purview of ch. 302, Public Laws 1933, Michie's Code, 3838 (b), and does not become a neighborhood public road.

2. Same—

The statute providing that highways abandoned by the State Highway Commission become neighborhood public roads merely fixes the status of such roads as public roads and does not invest any private easement in owners of property abutting the abandoned road, their right to the continued use of such road being the same as that of the public generally.

3. Highways § 18—The right of owners of property abutting abandoned road to have road kept open for access to new road is based upon necessity.

Where a highway has been relocated and a short section of the old road abandoned by the State Highway Commission, the right of the owners of property abutting the abandoned road to continue to use the same is limited to an easement by necessity for the purpose of ingress and egress to the new road, and when only one end of the abandoned road is discontinued and obstructed so that ingress and egress is afforded from the other end, owners of property abutting the old road are not entitled to an easement by necessity and may not restrain the closing of the one end of the old road merely for their convenience as against the right of the owner of the fee in the land to the full enjoyment of his land after the necessity of an easement for a public way no longer exists.

4. Highways § 1c—

Where the State Highway Commission, in the interest of public safety, builds an overpass and relocates a highway to cut out dangerous curves and an inadequate underpass, it has the authority to order the underpass closed, if not by authority expressly conferred in ch. 46, sec. 1, Public Laws 1927, then in the exercise of the police power by an appropriate agency of the State.

5. Railroads § 2—Owners of property abutting abandoned highway held not entitled to restrain railroad from closing abandoned underpass.

The State Highway Commission, in the interest of public safety, relocated a section of highway to cut out dangerous curves and an inadequate underpass. Plaintiffs, the owners of property abutting the old road, had access to the new road over the section of the old road kept open, but the Highway Commission tore up the section of the old road lying on the other side of the underpass and ordered the railroad company to close the underpass. Plaintiffs instituted this action for a permanent injunction to restrain the railroad company from complying with the order to close the underpass. *Held:* Plaintiffs do not have an easement by necessity and are not entitled to have the underpass kept open merely for their greater convenience in reaching the new road, and there being no contention that the old highway had been in use for sufficient length of time to give them an easement by prescription in its continued use, the temporary restraining order entered in the cause was properly dissolved.

6. Injunctions § 11—

In an action for permanent injunction, the temporary restraining order is properly dissolved upon the hearing of the motion to show cause when it is made to appear that plaintiffs are not entitled to the relief sought, but it is error to dismiss the action, and the taxing of costs against plaintiffs at that time is at least premature, since the action can be properly dismissed only at term.

APPEAL by plaintiffs from *Warlick, J.*, at June Term, 1941, of BURKE. Affirmed.

This is an action for a permanent injunction to prevent defendants from closing an underpass and obstructing a road which, as plaintiffs

contend, they have the present right to use. The facts, as summarized from the record, appear to be as follows:

About twelve years ago the highway from Connelly Springs to Icard crossed defendant's railroad at grade a short distance west of the underpass which is the subject of the present controversy. The State Highway Commission, which succeeded the Burke County highway commissioners in control of this highway, eliminated the grade crossing by relocating the highway along the north side of the railway and through the present underpass to the south side a little west of the post office and school in that village. The underpass was made through a fill, the tracks being supported on a creosoted timber trestle work. Its upkeep is stated to be about $225 a year.

While the highway was thus located, the plaintiffs, or some of them, purchased and built adjacent to the highway, many of them near the eastern end of this section in the vicinity of the underpass.

Recently the Highway Commission, after surveys and investigation in which it was ascertained that the underpass was inadequate and that a section of the highway through it had dangerous curves, decided to relocate the road, to close the underpass, and to route the highway so as to cross the railroad on an overhead bridge a short distance from the old grade crossing, in lieu of the underpass, thus taking out the dangerous curves in its vicinity, straightening the highway, and eliminating the expense of upkeep of the underpass. Accordingly a map was prepared showing the relocated road in its relation to the existing highway, upon which map was indicated the closing of the underpass, the building of the overhead bridge across the tracks, and, in detail, the route of the proposed relocation. This map was posted at the courthouse door in Morganton, as required by statute, and is in the evidence. No protest was made to the proposed changes, either by the county commissioners or any other person, and the Highway Commission proceeded to put into effect the changes indicated. The road was relocated, the overhead bridge constructed, the new highway finished, and the routing completed. Thereupon the Highway Commission discontinued and tore up that portion of the highway on the south side leading from the underpass to the relocated highway, blocking the same and rendering it unavailable for passage, and removing a bridge across a stream upon the discontinued portion. Thereupon the Highway Commission notified the defendant to close the underpass. This defendant undertook to do, and while the work was in progress and partially completed, the plaintiffs brought this action to permanently enjoin defendant from closing the underpass and obtained a temporary restraining order. Upon the hearing of the order

to show cause, the judge dissolved the restraining order, dismissed the action, and taxed plaintiffs with the costs. The plaintiffs appealed, assigning error.

O. L. Horton and Mull & Patton for plaintiffs, appellants.

W. T. Joyner, S. J. Ervin, Sr., Harry L. Riddle, Jr., and Clyde R. Hoey for defendant, appellee.

SEAWELL, J. The plaintiffs rely on alternative propositions, either of which, they contend, puts the defendant in the wrong: (1) That the relocation of the highway constituted an abandonment by the Highway Commission of the discontinued portion of the old road, which, as they contend, automatically, under C. S., 3838 (b) (Michie's Code, 1939), gave it the status of a neighborhood public road, which defendant had no right to obstruct; (2) that there had been a complete official abandonment or vacation of the road, in which case, as persons who had purchased and built adjacent thereto on the faith of its permanent existence, they had, severally, acquired an easement—not only in the road, but in the underpass as a part of it—with the enjoyment of which defendant cannot lawfully interfere.

1. Chapter 302, Public Laws of 1933, C. S., 3838 (b) (Michie's Code, 1939), as amended, provides that "all those portions of the public road system of the State, which have not been taken over and placed under maintenance, or which have been abandoned by the State Highway Commission, *but which remain open and in general use by the public* . . . are hereby declared to be neighborhood public roads, and they shall be subject to all the provisions of this section with respect to the alteration, extension, or discontinuance thereof," etc. (Italics supplied.) We are of opinion that short sections of roads, discontinued by the Highway Commission in the interest of public safety and closed to travel, are not within the reasonable definition of abandoned highways remaining open and in general use, and are not within the contemplation of the statute.

Of course it was not the purpose of this statute, where it applies, to give any private easement in the further use of an abandoned road, but only to continue the status as a public road. On this phase of the case, none of the plaintiffs could claim a greater right than that which belongs to the general public. If the Highway Commission had the power not only to substitute one section of the road for another but to close the abandoned section, a subject which we discuss more fully below, it is clear that in this respect plaintiffs do not have a justiciable grievance.

2. The case presents no question of easement in the abandoned road by prescription under the common law, because the requisite twenty

years user is lacking. It is at least doubtful whether such an easement could be acquired over defendant's right of way by prescription under any circumstances. C. S., 434; Michie's Code, 1939. But plaintiffs, in this aspect of their argument at least, rest their case upon the theory that there had been a complete official abandonment of the road, leaving to them the right to its continued use as persons who had purchased and built adjacent to it on the faith of its permanent existence, citing amongst other authorities *Davis v. Alexander,* 202 N. C., 130, 162 S. E., 372, and *Long v. Melton,* 218 N. C., 94, 10 S. E. (2d), 699.

In *Davis v. Alexander, supra,* the facts showed continuous use of the road over Alexander's premises for more than fifty years, and the decision might well have turned on the acquisition of a prescriptive right at common law. The case, however, may be considered as supporting the view held by the plaintiff where the factual situation admits of its application. In *Long v. Melton, supra,* the same principle is applied with some variation as to the extent of the persisting right of user in the vacated road.

The reasoning upon which such a right is predicated, the source from which, where recognized, it is said to be derived, leads us to consider the propriety of reasonable limitations upon its exercise. It would be strange if a temporary public servitude, imposed *in invitum,* on the lands of the owner, and terminating before the prescription period had expired, could serve to take from the owner and give to another a private easement in his land which even the sovereign cannot take without compensation. At most, such a right, when recognized, must be in the nature of a continuation, *ex necessitate,* of the original servitude, and must be confined to the exigency of egress and ingress; and since it is in derogation of private right, it must be limited by due consideration for the owner of the soil who was not a party to any commitment made to a purchaser along the highway and did nothing to instigate his faith in its permanence. Those entitled to the continued use of an abandoned or vacated public road on such a principle are obviously not entitled to have the whole road throughout its length left to them in its original unimpaired condition, on the basis of mere convenience in reaching objectives formerly more accessible. *Crowell v. Power Co.,* 200 N. C., 208, 156 S. E., 493. In that case the plaintiff was nonsuited on a similar plea.

Ancient doctrines pertaining to roads of the horse and buggy days, when those roads were for the most part trails through the woods and fields, must be applied to modern conditions with caution and sound discrimination. Once, "ingress and egress" were practically all such a road afforded, and there is logic in the thought that it is all of such a doctrine which should survive. Today roads have been multiplied and

expanded into such luxurious proportions that the expression, "once a road, always a road"—if we attach to it the significance given it by plaintiffs—will give to the abutting owner in a vacated road, if he takes all of it, an easement wholly beyond his necessities and not within the reasonable application of the doctrine.

The trend of judicial decision where this doctrine is recognized is decidedly toward confining such a right to the necessity of egress and ingress. *Blanding v. Las Vegas,* 52 Nev., 52, 280 Pac., 644, 68 A. L. R., 1273; *Kinnear Mfg. Co. v. Beatty,* 65 Oh. St., 264, 62 N. E., 341; *Davis Colliery Co. v. Harding,* 83 W. Va., 609, 98 S. E., 815. Here the entire road leading past plaintiffs' premises has been left in its original condition, connecting with the relocated highway, which reaches the objectives they seek with nothing more than an added inconvenience which we do not think sufficient to constitute or support a cause of action. *Crowell v. Power Co., supra.*

Ins. Co. v. Carolina Beach, 216 N. C., 778, 7 S. E. (2d), 13, is not applicable to the facts of this case. There plaintiffs purchased with reference to a map showing streets, and it has long been held that in that event the municipality cannot close such streets to the use of abutting owners. The doctrine, so far as we know, has not been applied to alterations or changes in public roads forming a part of the highway system. *Cameron v. Highway Com.,* 188 N. C., 84, 123 S. E., 465.

3. The action of the Highway Commission in ordering the underpass closed is challenged on the ground that the statute gives no express authority to discontinue an underpass once established. C. S., 3846 (y) (Michie's Code, 1939), confers upon the Highway Commission the power to eliminate grade crossings. Chapter 74, Public Laws of 1929, attempted to give such express power with regard to the elimination of inadequate underpasses and the substitution of other adequate facilities. It attempted to do so, however, by amendment to the 1921 law, which had already been amended by chapter 277, Public Laws of 1925, and it may be said, at least, that the amendment so intended is difficult to allocate. We think, however, that such a power must be implied, if not, indeed, expressly covered, in the language used in chapter 46, Public Laws of 1927, section 1, which authorizes the Highway Commission not only to abandon roads where advisable, but upon relocation, to substitute one section for another. The validity of the authority thus conferred is upheld in *Parker v. Highway Commission,* 195 N. C., 783, 787, 143 S. E., 871, 874. We think also that the power intended to be conveyed in this section may well be supported as an exercise of the police power of the State through an appropriate agency—*R. R. v. Goldsboro,* 155 N. C., 356, 71 S. E., 514—should it become necessary to invoke that doctrine.

Roads are laid out, built, and maintained primarily for the public convenience; but apart from the economies they promote, there is no more imperative consideration in their construction and maintenance than the public safety. From the testimony and inspection of the map which is in evidence, it appears that dangerous curves existed near the underpass which is pronounced "inadequate," and apparently in the approaches thereto. We believe the closing of the underpass under the facts of this case to be within the general powers committed to the Highway Commission under the cited laws. To state the point concisely, the Highway Commission had the right to speak and the defendant the duty to obey. Conceding that the Highway Commission had the right to substitute another section of road for that leading through and beyond the underpass, that power undoubtedly has been exercised and the elimination of the road renders the underpass useless and unavailable to the plaintiffs, either as members of the general public or as persons claiming an easement therein, however derived. The closing of the underpass under such circumstances is but a resumption on the part of the defendant of the control and use of its own property which invades no right of the plaintiffs.

4. It was proper to dismiss or dissolve the restraining order, but the dismissal of the action upon the hearing of the order to show cause is not approved by decisions relating to the present practice. *Cox v. Kinston,* 217 N. C., 391, 399, 8 S. E. (2d), 252, 258; *Bynum v. Powe,* 97 N. C., 374, 2 S. E., 170. Motions of that kind should be heard at term. Taxing of the plaintiffs with costs was therefore at least premature. In this respect the judgment must be modified. In other respects it is

Affirmed.

MRS. W. H. GODWIN v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 5 November, 1941.)

1. Negligence §§ 17a, 19b—

Nonsuit on the ground of contributory negligence should not be granted upon defendant's evidence since defendant has the burden of proof on the issue and the credibility of its evidence would be for the jury, but nonsuit is properly entered when plaintiff's own evidence establishes contributory negligence constituting a proximate cause of the injury, since in such event plaintiff proves himself out of court.

2. Negligence §§ 11, 19b—

In order to sustain nonsuit on the ground of contributory negligence it is not necessary that plaintiff's own evidence establish contributory

negligence constituting the sole proximate cause of the injury, it being sufficient if plaintiff's evidence discloses contributory negligence constituting one of the proximate causes, the term contributory negligence *ex vi termini* implying negligence on the part of defendant.

3. Negligence § 17b—

Where the conclusion that plaintiff was guilty of contributory negligence constituting one of the proximate causes of the injury is the only reasonable inference that can be drawn from plaintiff's own evidence, such evidence, *pro hoc vice*, partakes of the nature of admissions and reduces the case to a question of law for the court, and defendant's demurrer to the evidence is properly sustained. C. S., 567.

4. Railroads § 9—

In approaching a grade crossing, both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing.

5. Same—

A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury.

6. Trial § 22a—

A motion to nonsuit questions the sufficiency of the evidence to carry the case to the jury and to support a recovery, which is always a question of law to be determined by the court. C. S., 567.

7. Railroads § 9—Plaintiff's own evidence held to establish, as a matter of law, contributory negligence constituting a proximate cause of crossing accident.

Plaintiff, traveling east, was struck by defendant's regular northbound train at about noon on a clear day at a crossing a short distance from plaintiff's residence in a municipality. Plaintiff testified that she was familiar with the crossing and knew the schedule of defendant's trains, that she stopped about nine feet from the first track, looked to the south and did not see a train, and then started across at a slow speed and was struck on the third track by the northbound train, which she did not see until "it was right on me." There was evidence that, approaching the crossing, the view of the track to the south was limited to a block and a half by obstructions on the right of way, but a witness for plaintiff testified that in traversing the crossing from the west the view of a motorist was unobstructed after reaching the first track, and that there was a distance of about twenty-four feet from the west rail of the first track to the west rail of the third track. *Held:* Plaintiff's own evidence establishes, as a matter of law, contributory negligence constituting a proximate cause of the accident.

APPEAL by defendant from *Nimocks, J.*, at May Term, 1941, of HARNETT.

Civil action to recover for personal injuries and property damage alleged to have been caused by the negligence of the defendant.

The record discloses that on 27 April, 1940, the plaintiff and her niece were riding in plaintiff's Chevrolet sedan when it was struck by defendant's train at a street crossing in the town of Dunn, resulting in serious personal injuries to the plaintiff and damage to her automobile.

The plaintiff lives at the corner of West Divine Street and Railroad Avenue, within a very short distance of the crossing where the accident occurred. Divine Street crosses the railroad tracks at right angles, and Railroad Avenue runs parallel to the tracks and between plaintiff's residence and the railroad. Plaintiff was familiar with the train schedules and knew the regular northbound fast passenger train No. 80 ran through the town every day about noon. She is 45 years of age and has lived there for more than ten years. Approaching the Divine Street triple-track-crossing from the west in the direction plaintiff was coming and looking from the "stop sign" erected by the railroad to the south, the direction in which the train was coming, the view is clear for a distance of a block and a half. In this second block are two section houses and a water tank on defendant's right of way, which obstructed plaintiff's view beyond the first section house. This first section house is 350 feet according to plaintiff's evidence, and by actual measurement, 446 feet from the south side of Divine Street. The water tank is 815 feet from Divine Street.

Plaintiff testified that when she got to the "stop sign," she stopped, looked to the south "and the coast was clear and I didn't see any train whatever." She then "pulled up nearly to the crossing" so that she could see past the warehouse on her left "and looked back to the right and I didn't see any train," didn't hear any bell or whistle signal, "and I proceeded on slowly and approached the track as slow as I could, and when I got on the track or just about across, the train came steaming around . . . at a terrific rate of speed, 45 or 50 miles an hour. . . . It was right on me before I knew it . . . before I had time to do anything. . . . The train was almost to the switch when I first saw it. . . . The engine was in about 20 feet. . . . There was a crash and that is the last I knew." (Cross-examination): "At the time of the accident, it was broad open daylight, about noon. . . . I knew train No. 80 ran through there every day about that time. . . . It was a clear, sunny day. . . . I did hear the whistle blow but it was right on me, just a short distance from me when it blew. . . . I could not have heard the noise two blocks away. . . . I have been driving an automobile about 14 years. . . . From the point where I stopped the second time, you cannot see as far as the water tank. . . . I stopped my car about 9 feet from the (spur) track. . . . I drove about 20 feet, while the train went at least 350 feet."

Plaintiff's witness, O. R. Pearce, testified that it is "about 24 feet from the west rail of the spur track to the west rail of the northbound track. Continuing east from the spur track, when you get to the next railroad track, which is the southbound track, and look to your right you will have a straight angle then from every way and you can see as far as you can look. Looking from any point on the extreme west of the right of way until one gets past the southbound track and between the southbound track and the northbound track, a person can see a train just as far as they can see, looking either north or south. After you get on the spur track, a person going east across the Divine Street crossing and until the time they got on the northbound track on which No. 80 was running on the 27th day of April, 1940, could have seen a train down the south any way you looked at any of the crossings. This applies to any of the crossings in the town of Dunn."

The engineer testified that he had just passed Main Street crossing and Pearsall Street crossing in the town of Dunn, and as he approached Divine Street crossing he had slowed down to 20 or 25 miles an hour, with the engine bell ringing; that he stopped after the accident in about three car lengths; that the bell was then ringing, and that had he been running 45 to 50 miles an hour he could not have stopped in so short a distance.

These central facts were amplified by other witnesses and additional testimony, and there was evidence from the defendant in contradiction of plaintiff's testimony, but the foregoing will suffice for the disposition which we think must be made of the case.

The defendant demurred to the evidence and asked for a directed verdict on the issue of contributory negligence. Both requests were denied. Exceptions.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of the plaintiff. From judgment thereon, the defendant appeals, assigning errors.

J. R. Young and D. C. Wilson for plaintiff, appellee.

Thomas W. Davis and Rose & Lyon for defendant railroad, appellant.

STACY, C. J. The question for decision is whether the plaintiff's contributory negligence is such as to bar a recovery. The pertinent authorities would seem to suggest an affirmative answer. *Temple v. Hawkins, ante,* 26; *Hampton v. Hawkins,* 219 N. C., 205, 13 S. E. (2d), 227; *Pitt v. R. R.,* 203 N. C., 279, 166 S. E., 67; *Godwin v. R. R.,* 202 N. C., 1, 161 S. E., 541; *Batchelor v. R. R.,* 196 N. C., 84, 144 S. E., 542; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Elder v. R. R., ibid.,* 617, 140 S. E., 298; *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307;

Davis v. R. R., 187 N. C., 147, 120 S. E., 827; *Wright v. R. R.*, 155 N. C., 325, 71 S. E., 306; *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 251; *Mesic v. R. R.*, 120 N. C., 489, 26 S. E., 633; *Rigler v. R. R.*, 94 N. C., 604.

It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them. *Battle v. Cleave*, 179 N. C., 112, 101 S. E., 555; *Wright v. R. R., supra; Beck v. Hooks*, 218 N. C., 105, 10 S. E. (2d), 608. The plaintiff thus proves himself out of court. *Horne v. R. R.*, 170 N. C., 645, 87 S. E., 523. It need not appear that his negligence was the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant. *Absher v. Raleigh*, 211 N. C., 567, 190 S. E., 897. It is enough if it contribute to the injury. *Wright v. Grocery Co.*, 210 N. C., 462, 187 S. E., 564. The very term "contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury. *Fulcher v. Lumber Co.*, 191 N. C., 408, 132 S. E., 9. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the injury. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672.

The reason the defendant's evidence is not to be considered on a motion of this kind, unless favorable to the plaintiff and except for explanatory purposes when not in conflict with plaintiff's evidence, *Harrison v. R. R.*, 194 N. C., 657, 140 S. E., 598, is that the burden of showing contributory negligence rests with the defendant. Nevertheless, when it appears from the plaintiff's own evidence that he was contributorily negligent, which *pro hoc vice* partakes of the nature of admissions, it is proper to dismiss the action as in case of nonsuit. *Davis v. R. R., supra*, and cases there cited. In other words, while the defendant has the burden of proof on the issue of contributory negligence, and the credibility of his evidence would be for the jury, the plaintiff may relieve him of the onus by his own evidence and thus reduce the case to a question of law for the court. *Hayes v. Tel. Co.*, 211 N. C., 192, 189 S. E., 499. What is negligence is a question of law, and, when the facts are admitted or established, the court declares whether negligence exists and whether it is the proximate cause of the injury, or one of them. *Pearson v. Stores Corp.*, 219 N. C., 717; *Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326; *Dunnevant v. R. R.*, 167 N. C., 232, 83 S. E., 347; *Mitchell v. R. R.*, 153 N. C., 116, 68 S. E., 1059; *Strickland v. R. R.*, 150 N. C., 4, 63 S. E., 161. Such is the case presented by the instant record.

The reciprocal duties and obligations of trainmen and travelers on approaching a public crossing were considered in *Moore v. R. R.*, 201

N. C., 26, 158 S. E., 556. There it was said: "When approaching a public crossing the employees in charge of a train and a traveler upon the highway are charged with the mutual and reciprocal duty of exercising due care to avoid inflicting or receiving injury, due care being such as a prudent person would exercise under the circumstances at the particular time and place. 'Both parties are charged with the mutual duty of keeping a careful lookout for danger and the degree of diligence to be used on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring to perform his duty.' *Improvement Co. v. Stead,* 95 U. S., 161, 24 Law Ed., 403, cited in *Cooper v. R. R.,* 140 N. C., 209. On reaching the crossing and before attempting to go upon it, a traveler must use his sense of sight and hearing—must look and listen for approaching trains if not prevented from doing so by the fault of the railroad company; and this he should do before entering the zone of danger. *Johnson v. R. R.,* 163 N. C., 431; *Holton v. R. R.,* 188 N. C., 277; *Butner v. R. R.,* 199 N. C., 695. This, as we understand it, is the prevailing rule. At any rate it is observed and has often been applied by this Court."

In the application of this rule it is recognized that "a railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence, and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence and will be so declared by the court." *Coleman v. R. R., supra; Carruthers v. R. R.,* 215 N. C., 675, 2 S. E. (2d), 878. We have said that a traveler has the right to expect timely warning, *Norton v. R. R.,* 122 N. C., 910, 29 S. E., 886, but the failure to give such warning would not justify the traveler in relying upon such failure or in assuming that no train was approaching. It is still his duty to keep a proper lookout. *Harrison v. R. R., supra; Holton v. R. R., supra.* "A traveler on the highway, before crossing a railroad track, as a general rule, is required to look and listen to ascertain whether a train is approaching; and the mere omission of the trainmen to give the ordinary or statutory signals will not relieve him of this duty." Fourth headnote, *Cooper v. R. R.,* 140 N. C., 209, 52 S. E., 932.

The same rule was declared in *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690, where *Walker, J.,* speaking for the Court, used the following language: "On reaching a railroad crossing, and before attempting to go upon the track, a traveler must use his sense of sight and of hearing to the best of his ability under the existing and surrounding circumstances—he must look and listen in both directions for approaching trains, if not prevented from doing so by the fault of the railroad company, and if he has time to do so; and this should be done before he has taken a position exposing him to peril or has come within the zone of danger, this being required so that his precaution may be effective."

In actions involving negligence and contributory negligence, it is often difficult to determine whether the case is one for the jury or one exclusively for the court. *Meacham v. R. R.*, 213 N. C., 609, 197 S. E., 189. This has led to the suggestion that two lines of decisions are to be found on the subject. *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800. It is conceded on all hands, however, that a motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and to support a recovery. The question thus presented by demurrer, whether interposed at the close of plaintiff's evidence, or "upon consideration of all the evidence," C. S., 567, is to be decided by the court as a matter of law, and not by the jury as an issue of fact. Whether the evidence is such as to carry the case to the jury is always for the court to determine. A demurrer raises only questions of law.

The case lends itself to much writing, but in the end it all comes to this: Plaintiff testifies that she was familiar with the crossing; that she knew the schedule of defendant's trains; that she stopped the second time about nine feet from the spur track, looked in the direction the train was coming and did not see it—not that she could not see it, but that she did not see it—and then proceeded slowly towards the crossing without seeing or hearing the train until "it was right on me." It thus appears, from her own testimony, that she started her car and drove a distance of at least 20 feet across two tracks and onto a third in front of an on-coming train which she knew was due to pass about that time and which she should have seen in the exercise of reasonable care. This was negligence on her part which contributed to the injury. *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720.

It results, therefore, that the motion for judgment of nonsuit should have been allowed.

Reversed.

CAROLINA MINERAL COMPANY v. G. ELLIS YOUNG.

(Filed 5 November, 1941.)

1. Partition § 1a—

As a general rule, the existence of a lease on property held by tenants in common does not preclude partition, and this rule applies even though one tenant is the lessee when actual partition may be had, since in such event the lessor-tenant would not be deprived of his right to his proportionate part of the rents under the lease.

2. Partition § 2—

A tenant in common is entitled to partition as a matter of right, but such right is not inalienable and may be qualified, defeated, or postponed by agreement between the parties, express or implied, or lost or suspended

through estoppel when there are contractual obligations between the parties inconsistent with partition or which would render partition inequitable.

3. Partition § 1c—Lessee-tenant held not entitled to sale of mineral interest for partition upon the facts of this case.

Tenants in common owning a mineral interest in land, leased same. Thereafter the lessee bought the interest of one of the tenants and later instituted this proceeding to have the mineral interest sold for partition. *Held:* The lessor-tenant could not protect his rights under the lease unless he bought at the partition sale, and therefore the lessee-tenant is estopped to demand sale for partition prior to the expiration of the lease, since such relief would destroy the lessor-tenant's property right growing out of the lease and guaranteed by it. In this case it further appeared that the lessee-tenant claimed surface rights necessary to the recovery of minerals, which surface rights it would not sell, so that upon a sale only it could acquire the uncontested right to mine the mineral interest.

4. Evidence § 5—

The courts cannot take judicial notice that mineral interests in lands are by their nature indivisible.

5. Partition § 1c—

In order for the court to decree sale of mineral interests for partition, petitioner must make it appear that actual partition cannot be had without injury or that sale for partition would be for the best interest of the tenants in common, and the mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale for partition. C. S., 3237.

APPEAL by defendant from *Sink, J.*, at July Term, 1941, of MITCHELL. Reversed.

The plaintiff, alleging that actual partition could not be made, brought this proceeding under C. S., 3237 (Michie's Code, 1939), to have certain mineral interests, which it holds in common with defendant, sold for division of proceeds. Defendant admitted the common ownership, but denied the right of plaintiff to present partition as sought, upon the ground that plaintiff, before purchase of an interest in the property, had entered into a lease contract with defendant and his cotenant in which it had agreed to mine the property for twenty-six years and to pay defendant and his co-owner a specified royalty during this period, by which, along with other provisions of the contract inconsistent with the present proceeding, plaintiff is estopped to request a sale of the interests.

Plaintiff and defendant also joined issue with respect to surface rights necessary to recovery of the minerals, which plaintiff claimed to own exclusively and declared in its petition were "not for sale."

The clerk, deciding that the petition and answer raised issues for the jury, transferred the proceeding to the civil issue docket without objec-

tion of either party. The matter came on for hearing before Judge Sink, who heard the matter by consent without the intervention of a jury.

On the hearing, the lease contract between the parties was introduced in evidence on behalf of the defendant. The plaintiff introduced no evidence upon the question whether actual partition could be made.

The judge made an order for the sale of the property and division of the proceeds, without adjudicating the controversy between the parties as to the character of the surface rights claimed by plaintiff and the opposing rights of the defendant. As to the necessity of sale instead of division, the order finds merely ". . . that the mineral interest is incapable of actual division, and that the petitioner is entitled to have a partition of the mineral interest in said tract of land by way of sale."

The defendant excepted and appealed. He grounds his case here on four allegations of error with respect to the judgment: (1) that the plaintiff was estopped from seeking a sale of the lands for partition by the terms of its lease; (2) that the order of sale was not within the power of the court because there was no allegation, evidence, or finding of fact that "a partition sale in this case would be for the best interests of the tenants in common" as required by statute; (3) that the judge failed to determine the controversy between the parties respecting the surface rights claimed by plaintiff, thus tacitly affirming plaintiff's claim, practically closing the market against buyers at the sale; and (4) (on demurrer *ore tenus* in this Court) "that said petition fails to state facts sufficient to constitute an action for that there are no allegations meeting the requirements of C. S., 3237."

Watson & Fouts for plaintiff, appellee.

W. C. Berry, Charles Hutchins, and Anglin & Randolph for defendant, appellant.

SEAWELL, J. Ordinarily, the existence of a lease on lands held in common ownership will not prevent partition at the instance of a cotenant. 2 Tiffany, Real Property (3d Ed., 1939), 317, and cases cited. And this is true although one of the cotenants is lessee (Tiffany, *loc. cit., supra*), at least where actual division of the property is the relief sought. *Buhrmeister v. Buhrmeister,* 10 Cal. App., 392, 102 Pac., 221; *Hunt v. Hazelton,* 5 N. H., 216. *Contra: Cannon v. Lomax,* 29 S. C., 369, 7 S. E., 529. Where there is partition in kind, the ascertainment and allotment to the lessor-cotenant of his share in severalty leaves him the owner of the land and entitled to demand and receive his proportionate rent as before. But where the lessee buys in as cotenant and seeks a sale of the land for the purpose of dividing the proceeds, the rights of

the parties are subject to radical change and the authorities are divided. See (allowing sale) *Hill v. Reno,* 112 Ill., 154; *Peterman v. Kingsley,* 140 Wis., 666, 123 N. W., 137; (denying sale) *McIntire v. Midwest Theatres Co.,* 88 Colo., 559, 298 Pac., 959; *Arnold v. Arnold et al.,* 308 Ill., 365, 139 N. E., 592. Many decisions which support merely the general statement that a lease is no obstacle to partition are based upon the extent to which constructive possession through a lessee satisfies the common law prerequisites of possession and common ownership in parties to a partition suit. Where thus limited, these cases are not apt authority on the question before us. 4 Thompson, Real Property (Perm. Ed., 1940), sec. 1992, n. 88; 2 Tiffany, Real Property (3d Ed., 1939), 317, n. 14.

The matter is one of first impression here, and we think it is our duty and privilege to adopt that construction of the law which we find most consonant with the principles of justice and equity.

Although there is authority for the view that partition by sale of lands could formerly be made under the equitable jurisdiction of the courts, 17 Am. & Eng. Enc. Law, 785; *Wolfe v. Galloway,* 211 N. C., 361, 190 S. E., 213, statutes authorizing such sale have been regarded as innovations upon the common law and in derogation thereof. 2 Tiffany, Real Property (3d Ed., 1939), 325; 17 Am. & Eng. Enc. Law, 785; *Hale v. Thacker,* 12 S. E. (2d), 524 (W. Va.). In this State statutory relief of that sort apparently derives from the statute of 1812, chapter 847, Laws of North Carolina, Potter, Vol. 2, the preamble of which indicates both the origin and nature of the relief as follows: "Whereas doubts exist as to the power of courts of equity to order a sale of real estate in cases of partition, where an equal and advantageous division cannot be made. *Be it enacted,* &c.," and there follows the grant of the power. That a sale of the land may bring about a train of incidents unknown to the common law remedy of actual partition is obvious, and that some of these should be equitable in their nature seems only to be expected.

There is a unanimity of opinion and decision that partition is a matter of right. *Holmes v. Holmes,* 55 N. C., 334; *Haddock v. Stocks,* 167 N. C., 70, 83 S. E., 9; *Foster v. Williams,* 182 N. C., 632, 109 S. E., 834; *Barber v. Barber,* 195 N. C., 711, 143 S. E., 469. Unquestionably that is true, at this time, whether the cotenant seeks to have the land partitioned in kind or by sale, where the conditions antecedent to the exercise of the right exist. 17 Am. & Eng. Enc. Law, 786; 20 R. C. L., 774. But this right is not inalienable. *McIntire v. Midwest Theatres Co., supra.* Its exercise may be qualified, defeated, or postponed by agreement between the parties, express or implied, *Chadwick v. Blades,* 210 N. C., 609, 188 S. E., 198; Note, 15 N. C. L. Rev., 279 (1937); *Henderson v. Henderson,* 136 Iowa, 564, 114 N. W., 178; *Eberts v.*

Fisher, 54 Mich., 294, 20 N. W., 80; *Coleman v. Coleman,* 19 Pa. St., 100, 57 Am. Dec., 641; *Latshaw's Appeal,* 122 Pa., 142, 15 Atl., 676, and we think it follows that it may be lost or suspended through estoppel where the contractual obligations between the petitioner and his cotenant are manifestly inconsistent with partition, especially by sale of the land, and where such a sale would destroy a property right growing out of the lease and guaranteed by it.

The contract between the petitioner and its cotenant, defendant in the case at bar, was made before petitioner bought into cotenancy and still subsists, having some three years to run. By the terms of the lease-contract the Mineral Company, this petitioner, guaranteed to the defendant a specified royalty for the taking of minerals for a fixed term of years. If the property is sold, the defendant can protect himself in the continued enjoyment of this right only by purchase of the property. This he may, or may not, be in a position to do. In this situation the plaintiff advises the court and notifies prospective purchasers that he is in the exclusive ownership of essential surface rights, which are "not for sale." This claim being left undetermined by the court below, the market is closed to all purchasers, except perhaps those who are willing to buy either a lawsuit or a property interest the value of which depends not only upon the ordinary exigencies of mining, but upon the benevolence of the plaintiff as well.

McIntire v. Midwest Theatres Co., supra, is basically on all fours with the instant case, and there the Court says: ". . . the simple fact is that there is nothing inalienable about this right of partition. A tenant in common may contract it away and this company has unquestionably done so. It agreed to pay McIntire $265 a month (rental) until May, 1932. It secured those payments by a mortgage on the leased premises. It now seeks by the simple expedient of partition, to release that mortgage and evade those payments, unless McIntire purchase at the sale. Of course, it cannot thus escape its obligation or force McIntire into additional expenditures to protect his contract." That no mortgage secured the plaintiff's obligations in the case at bar is immaterial and does not justify our holding differently here.

In *Arnold v. Arnold et al., supra,* where partition by sale at the instance of a lessee-cotenant was denied as failing adequately to protect vested rights under the lease, the Court says: "It has been said in general terms that an adult tenant in common has an absolute right to partition (citing cases); but it has been in cases where there was neither an equitable nor legal objection to the exercise of the right, and partition was in accordance with the principles governing courts of equity. Wherever any interest inconsistent with partition has been involved, the general rule has always been qualified by the statement that equity will

not award partition at the suit of one in violation of his own agreement, or in violation of a condition or restriction imposed upon the estate by one from whom he claims, or where partition would be contrary to equitable principles. Partition will not be awarded in a court of equity, where there has been an agreement either not to partition, or where the agreement is such that it is necessary to secure the fulfillment of the agreement that there should not be a partition. Such an agreement may be verbal, if it has been acted upon, and it need not be expressed, but will be readily implied, and enforced, if necessary to the protection of the parties. (Citing cases.)" The existence of the lease in the instant case is both a legal and an equitable objection to the exercise of "the right of partition" by sale.

Whether there might have been partition in kind of the mineral interests in question would depend upon the finding of the court below based upon proper allegations and proof. Although this Court is aware of the frequent indivisible nature of mineral interests (20 R. C. L., 775), it is not an established fact of which we may take judicial notice in all cases; and even if we might, the requirements of the statute governing the division of mineral interests would not be satisfied. C. S., 3237, authorizes an order of sale only where actual partition cannot be had without injury, or "where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold"; and strict compliance with the terms of the statute is necessary to the "right of partition" by sale. The physical difficulty of division is only a circumstance for the consideration of the court. The record in this case discloses neither allegation, proof, nor finding, either that a sale would be for the best interests of the parties or that an actual division could not be made "without injury." The express requirements of the statute may not be implied from the mere conclusion that "the mineral interest is incapable of actual division," and the order of sale based thereon is unwarranted. *Wolfe v. Galloway, supra; Hale v. Thacker, supra; Morrison v. Holcomb,* 14 S. E. (2d), 262 (W. Va.).

In view of the decision reached, we find it unnecessary to consider the other exceptions.

The judgment of the court below is

Reversed.

N. A. MORRIS v. CLIFFORD B. HOLSHOUSER, TRADING AND DOING BUSINESS AS WEST INNES NEWS.

(Filed 5 November, 1941.)

1. Constitutional Law § 4a—

The power of the General Assembly is limited only by the restraints imposed upon it by the Constitution of North Carolina or by the Constitution of the United States.

2. Constitutional Law § 6b—

The courts will not declare a statute void on the ground that it is violative of a constitutional limitation unless it so appears beyond a reasonable doubt.

3. Constitutional Law § 15a—

Freedom to contract is both a liberty and a property right within the protection of the due process clauses of the Federal and State Constitutions. Fifth and Fourteenth Amendments to the Constitution of the United States; Constitution of North Carolina, Art. I, sec. 17.

4. Same—

Freedom of contract is a qualified and not an absolute right, and the State, in the exercise of its police power, may impose restrictive regulations in the interest of the public welfare.

5. Constitutional Law §§ 7, 15a—

Ch. 410, Public Laws 1935, as amended, providing that an employee's assignment of wages to be earned in the future should not be binding upon the employer unless accepted by him in writing was enacted not only to relieve the employer of unnecessary responsibility but also to restrain the purchase of unearned wages of employees at a discount, and the statute is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the State.

6. Constitutional Law § 7—

The police power of the State is not confined to the suppression of what is disorderly or insanitary, but also extends to matters for the promotion of the public welfare.

7. Constitutional Law § 13—

The fact that ch. 410, Public Laws 1935, as amended, permits an employer, at his election, to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in private business may exercise his own pleasure as to the parties with whom he will deal.

8. Constitutional Law § 20—

Ch. 410, Public Laws 1935, as amended, when applied to contracts executed after its effective date cannot be held unconstitutional as impairing the obligations of contracts.

APPEAL by plaintiff from *Alley, J.*, at September Term, 1941, of ROWAN. Affirmed.

This was an action to recover $27.50 alleged to be due plaintiff by reason of a sale or assignment to him of the wages of one of defendant's employees.

The action was instituted in the court of a justice of the peace, and upon appeal to the Superior Court was heard upon an agreed statement of facts. From this it appears that one of defendant's employees executed a power of attorney to one Rickman to sell his wages due and to become due in the sum of $27.50; that under this authority plaintiff purchased the employee's wages in that sum which was paid to the employee less a commission of $2.50; that upon presentation of notice of assignment, with copy of the power of attorney, the defendant refused to pay plaintiff, on the ground that the assignment was for wages unearned at the time of the assignment, and that the assignment not having been accepted by him he was not liable therefor, under the provisions of ch. 410, Public Laws 1935, as amended. The plaintiff contended that this statute was unconstitutional and was not available as a defense. It was conceded that if this Act is valid plaintiff's action against the defendant could not be maintained.

Upon the facts agreed the court rendered judgment for the defendant, holding that the Act in question was a valid exercise of legislative power. Plaintiff appealed.

R. Lee Wright for plaintiff, appellant.
No counsel for defendant.

DEVIN, J. The plaintiff's appeal presents the question of the constitutionality of chapter 410, Public Laws 1935, as amended, which we quote as follows:

"No employer of labor shall be responsible for any assignment of wages to be earned in the future, executed by an employee, unless and until such assignment of wages is accepted by the employer in a written agreement to pay same."

The right of an assignee to sue in his own name upon an assignment of wages already earned by the employee and due by the employer was upheld in *Rickman v. Holshouser*, 217 N. C., 377, 8 S. E. (2d), 199. In that case the question of the effect of an assignment of wages to be earned in the future, under the statute quoted, was not presented or considered. In the case at bar the defendant refused to pay to the plaintiff the amount of wages assigned upon the ground that the wages had not been earned at the time of the assignment, and that the assignment had not been accepted by him. He staked his defense upon the

express provisions of the quoted statute. The plaintiff's admission that the assignment covered wages to be earned in the future, and that it had not been accepted by the defendant employer, would relieve the defendant of responsibility therefor, unless the Act can be overthrown because of conflict with some provision of the State or Federal Constitution.

It is fundamental that the power of the General Assembly is limited only by the restraints imposed upon it by the Constitution of North Carolina or by the Constitution of the United States, and when it undertakes to exercise its power in the enactment of a statute, the validity of which is attacked, the courts will not adjudge the statute void on the ground that it is violative of a constitutional limitation unless it so appears beyond a reasonable doubt. "If there is any reasonable doubt as to the validity of the statute, such doubt will be resolved in favor of the validity of the statute." *S. v. Brockwell,* 209 N. C., 209, 183 S. E., 378. In the language of *Justice Holmes* in *Tyson v. Benton,* 273 U. S., at page 446, "I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state."

The plaintiff challenges the validity of the statute in question upon the ground that it has the effect of depriving him of a property right without due process of law in violation of the constitutional guaranties contained in the Fifth and Fourteenth Amendments to the Constitution of the United States, and that for the same reason the statute offends Art. I, sec. 17, of the Constitution of North Carolina. His contention is that his liberty of contract is so restricted by the statute as to constitute a deprivation of a constitutional right, in that he is not permitted to contract for the purchase of the assignment of an employee's wages to be earned in the future, enforceable against the employer, unless he secures the written acceptance of the employer and his agreement to pay therefor.

The privilege of contracting is both a liberty and a property right. *Furniture Co. v. Armour,* 345 Ill., 160. The right to contract is recognized as being within the protection of the Fifth and Fourteenth Amendments to the Constitution of the United States, *Bayside Fish Flour Co. v. Gentry,* 297 U. S., 422, 147 Cal., 649; *West Coast Hotel Co. v. Parrish,* 300 U. S., 379; *Highland v. Russell Car & Snow Plow Co.,* 279 U. S., 253; 11 Am. Jur., 1154, 1156; and protected by state constitutions. *McGuire v. Railway,* 131 Iowa, 340. "It has been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution." *Chicago B. & Q. R. Co. v. McGuire,* 219 U. S., 549. "Included in the right of personal liberty and the right of

private property—partaking of the nature of each—is the right to make contracts for the acquisition of property." *Coppage v. Kansas,* 236 U. S., 1. "The freedom of the right to contract has been universally considered as guaranteed to every citizen." *Stephens v. Hicks,* 156 N. C., 239, 72 S. E., 313.

But freedom of contract is a qualified and not an absolute right. The guaranty of liberty does not withdraw the right of legislative supervision, or deny the power to provide restrictive safeguards and reasonable regulations. *Chicago B. & Q. R. Co. v. McGuire, supra.* Liberty of contract is not violated by legislation, operating as a deterrent, which restricts dealings which may become the subject of contract. "A statute does not become unconstitutional merely because it has created a condition of affairs which renders the making of a related contract, lawful in itself, ineffective." *Bayside Fish Flour Co. v. Gentry, supra.*

Undoubtedly the right to make contracts is subject to the power of the Legislature to impose restrictive regulations for the general welfare in matters affected with a public interest, and to prevent practices in business which are deemed harmful. Generally, the right to contract may be regulated as to form, evidence, and validity as to third persons. *Chicago B. & Q. R. Co. v. McGuire, supra.* In *Alaska Packers Asso. v. Industrial Com.,* 294 U. S., 532, it was said: "Legislation otherwise within the scope of acknowledged state power, not unreasonably or arbitrarily exercised, cannot be condemned because it curtails the power of the individual to contract."

The legislative power to impose reasonable restrictions upon the right of contract, deemed conducive to the public good, particularly as to contracts growing out of the relationship of employer and employee, has been upheld by the courts in numerous cases. *West Coast Hotel Co. v. Parrish,* 300 U. S., 377 (minimum wages for women); *U. S. v. Darby Lumber Co.,* 85 Law. Ed. (Adv.), 395 (Fair Labor Standards Act); *Patterson v. The Eudora,* 190 U. S., 169 (forbidding payment of seamen's wages in advance); *N. Y. Central R. Co. v. White,* 243 U. S., 188 (Workman's Compensation Laws); *Virginian Ry. Co. v. System Federation,* 300 U. S., 515 (Railway Labor Act); *Knoxville Iron Co. v. Harbison,* 183 U. S., 13 (requiring redemption in cash of store orders issued in payment for services); *McLean v. Arkansas,* 211 U. S., 539 (regulating the basis of payment to coal miners). Legislative acts regulating contracts of insurance (*Midkiff v. Ins. Co.,* 197 N. C., 139, 147 S. E., 812), and trade dealings under the North Carolina Fair Trade Act (*Lilly & Co. v. Saunders,* 216 N. C., 163, 4 S. E. [2d], 528), were held by this Court not to violate constitutional guaranties.

In many states statutes have been enacted imposing conditions upon the validity of assignments of wages to be earned in the future. These

statutes have been generally upheld as a valid exercise of the police power of the State. 5 C. J., 870; 6 C. J. S., 1067; 4 Am. Jur., 262; 37 A. L. R., 872 (Annotation); *McCallum v. Simplex Elec. Co.,* 197 Mass., 388; *Hellar v. Lutz,* 254 Mo., 704; *Fay v. Bankers' Surety Co.,* 125 Minn., 211; *Thompson v. Erie R. Co.,* 207 N. Y., 171; *West v. Jefferson Mills Co.,* 147 Tenn., 100; *Wright v. Balt. & Ohio R. Co.,* 146 Md., 66; *Cleveland C. C. & St. R. Co. v. Marshall,* 182 Ind., 280; *National Finance Co. v. Citizens Loan & Savings Co.,* 184 Ga., 619.

The particular question, here presented, of the power of the Legislature to impose restrictions upon the assignment of unearned wages was considered by the Supreme Court of the United States in *Mutual Loan Co. v. Martell,* 222 U. S., 225, where a Massachusetts statute was upheld. It was there decided that restrictions similar to those in the North Carolina statute, rendering the assignment invalid unless accepted in writing by the employer, did not deprive the assignee of due process of law or the equal protection of the laws. This was based upon the broad governmental power of the state. The Court said: "In a sense, the police power is but another name for the power of government; and a contention that a particular exercise of it offends the due process clause of the Constitution is apt to be very intangible to a precise consideration and answer. Certain general principles, however, must be taken for granted. It is certainly the province of the state, by its legislature, to adopt such policy as to it seems best. There are constitutional limitations, of course, but these allow a very comprehensive range of judgment. And within that range the Massachusetts statute can be justified. . . . But if we consider the Massachusetts statute strictly as a limitation upon the power of contract, it still must be held valid." In *Bacon v. Walker,* 204 U. S., 311, it was said that the police power was not confined to the suppression of what is disorderly or insanitary, but "extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of the people."

That the statute inferentially permits the employer to signify his agreement to pay the wages to the assignee of his employee, if he chooses to do so, does not of itself constitute such a discrimination as would invalidate the Act, for unless restrained by some legislative prohibition one engaged in private business may exercise his own pleasure as to the parties with whom he will deal. *Green v. Victor Talking Machine Co.,* 24 F. (2d), 378; *Fed. Trade Com. v. Raymond Bros.-Clarke Co.,* 263 U. S., 565; *McNeill v. Hall, ante,* 73, 16 S. E. (2d), 456. Nor does the statute tend to impair the obligation of a contract. *Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Nash v. Comrs. of St. Pauls,* 211 N. C., 301, 190 S. E., 475.

Statutes enacted for the purpose of imposing wholesome and reasonable regulations upon the relationship of employer and employee, and to prevent practices deemed injurious to those engaged in labor and its employment, are generally held to be with the police power of the State. *S. v. Lawrence,* 213 N. C., 674, 197 S. E., 586; *McGuire v. Railway,* 131 Iowa, 340. Obviously the statute we are now considering was enacted to restrict, as having harmful tendencies, the sale or assignment, for a substantial commission, of wages to be earned in the future. The end in view, we may assume, was not only to relieve the employer of unnecessary responsibility, but also to restrain the activities of those who, like the plaintiff, were engaged in the business of buying at a discount the unearned wages of employees.

For the reasons stated, we conclude that ch. 410, Public Laws 1935, as amended, does not contravene any constitutional inhibition, and that it was a valid exercise of legislative power. As the case was made to turn upon the validity of the statute, it follows that the judgment of the Superior Court must be

Affirmed.

TOWN OF ASHEBORO v. JOHN MILLER.

(Filed 5 November, 1941.)

1. Appeal and Error § 40a—

A finding of fact which is in reality a mere conclusion based on another finding of fact, which in turn is not supported by the evidence, cannot be sustained.

2. Process § 12—

Summons in question *held* not an *alias* summons. *Mintz v. Frink,* 217 N. C., 101.

3. Appearance § 2b—

Where a defendant appears and files answer he waives all defects and irregularities in service of summons. C. S., 490.

4. Process § 12—

If there has been a discontinuance of the action by failure to duly issue *alias* summons, defendant must take advantage thereof by motion to abate before he files answer.

5. Municipal Corporations § 34—

Allegations in this action to enforce a lien for public improvements *held* to constitute the action one to foreclose the original lien under C. S., 7990, notwithstanding that a purported *alias* summons was issued 91 days after the institution of the action, C. S., 480, as permitted in an action instituted under C. S., 8037, since the nature of an action is determined by the alle-

gations of the complaint and not by the time the purported *alias* summons was issued.

6. Same—

In an action by a municipality to enforce a lien for public improvements, objection by defendant that plaintiff failed to introduce in evidence the petition for improvements signed by the owners of a majority of the lineal feet frontage abutting the improvements is untenable when the original resolution of the city introduced in evidence recites a proper petition and that it was duly certified by the clerk, C. S., 2707, since if such finding was erroneous, the remedy for correction was by appeal. C. S., 2714.

7. Municipal Corporations § 31—

A petition for public improvements, although a prerequisite, is not jurisdictional.

8. Municipal Corporations § 33—

Proceedings for the levy of assessments for public improvements are presumed regular and the assessment roll is *prima facie* evidence of the validity of the assessments and the regularity of the proceedings, and the burden is upon the party attacking the assessments to prove irregularity.

9. Municipal Corporations § 31—

It appeared that notice of hearing on the confirmation of the assessment roll was not published, but that on the date set for the hearing the municipal board met and adopted the required resolution in amplified form, fixed the time and place for hearing of objections, and that notice of the hearing on the second date set was duly published, that the hearing was duly had on that date, necessary corrections made, and the assessment roll as corrected duly approved and confirmed. *Held:* The fact that notice of hearing on the first date set was not published was rendered immaterial, C. S., 2712, 2713.

10. Municipal Corporations § 34—

In an action to enforce a lien for public improvements, a defendant who had notice and ample opportunity to be heard and to appeal from the order confirming the assessment roll, cannot impeach the validity of the ordinance or of the assessment for any alleged irregularities which are not jurisdictional.

APPEAL by plaintiff from *Clement, J.,* at March Term, 1941, of RANDOLPH. Reversed.

Civil action to foreclose street assessment lien.

The parties waived trial by jury and agreed that the court should hear the evidence, find the facts, and render judgment thereon.

The court, after hearing the evidence, found the facts as fully set out in the judgment rendered. Upon the facts found it adjudged "that the plaintiff take nothing by its action and that the same be dismissed," etc. The plaintiff excepted and appealed.

L. T. Hammond for plaintiff, appellant.

Don A. Walser for defendant, appellee.

BARNHILL, J. The defendant makes the contention (1) that this is a proceeding under C. S., 8037, and that it is barred for the reason that it was not instituted within 18 months after the sale and issuance of tax sale certificate; and (2) that there are fatal defects in the original proceedings under which the assessment was made.

The court below in part found:

"5. That the Clerk of the Superior Court of Randolph County having issued an *alias* summons 91 days after the institution of the action, contrary to the provisions of C. S., 480, unless said *alias* summons was issued in cases of tax suits brought under the provisions of C. S., 8037, the plaintiff, by the issuance of said summons brought itself under C. S., 8037.

"6. That this is an action brought to foreclose a certificate of a tax sale for the year 1925, and sold on June 2, 1930, under C. S., 8037, and amendments."

Finding number 6 is, in fact, a conclusion based on finding number 5. It cannot be sustained. The summons to which reference is made is not an *alias*. *Mintz v. Frink,* 217 N. C., 101, 6 S. E. (2d), 804. The service thereof brought the defendant into court. When he appeared and answered he thereby waived all prior defects and irregularities. C. S., 490. *Rector v. Logging Co.,* 179 N. C., 59, 101 S. E., 502, and cases cited; *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1; *Mills v. Hansel,* 168 N. C., 651, 85 S. E., 17; *Ashford v. Davis,* 185 N. C., 89, 116 S. E., 62; *Burton v. Smith,* 191 N. C., 599, 132 S. E., 605; *McCollum v. Stack,* 188 N. C., 462, 124 S. E., 864; *Reel v. Boyd,* 195 N. C., 273, 141 S. E., 891; *Abbitt v. Gregory,* 195 N. C., 203, 141 S. E., 587.

If the original action as instituted by the summons theretofore issued (which does not appear of record) was subject to abatement for failure to issue an *alias* in apt time, motion to abate should have been made before answer.

The nature of the action is to be determined by the allegations of the complaint and not by the time the summons, purporting to be an *alias,* was issued.

There is no allegation of the issuance of a certificate of sale and no demand for the enforcement thereof. Nor is there any evidence tending to show that any such certificate was ever issued. It simply appears that the sovereign which held the lien sold as provided by statute. There were no bidders and it was compelled to bid in the property. Having failed to obtain the money due by the short cut method of sale it proceeded to foreclose the original lien under C. S., 7990. The language of the complaint permits no other conclusion. We so decided on a substantially identical complaint in *Asheboro v. Morris,* 212 N. C., 331, 193 S. E., 424.

Neither the evidence offered nor the facts found sustain the contention that the proceedings culminating in the assessment were in any respect fatally defective.

No petition of property owners was offered in evidence (finding number 9). It does not appear, however, that none was filed. On the contrary, the original resolution adopted by the town board recites the petition, that it was certified by the clerk, C. S., 2707, and that it was signed by a majority of property owners representing a majority of all the lineal feet frontage abutting on that part of the streets to be improved.

While the petition is a prerequisite it is not jurisdictional. If the finding by the board was erroneous it should have been corrected by appeal. C. S., 2714. *Schank v. Asheville,* 154 N. C., 40, 69 S. E., 681. Furthermore, there is a presumption in favor of the regularity of a proceeding under which public improvements, authorized by the General Assembly, have been made. *Gallimore v. Thomasville,* 191 N. C., 648, 132 S. E., 657, and the assessment roll is *prima facie* evidence of a valid assessment and of the regularity and correctness of all prior proceedings. *Anderson v. Albemarle,* 182 N. C., 434, 109 S. E., 262; McQuillen, Mun. Corp., sec. 2117. In the absence of any showing to the contrary assessments are presumed valid and he who attacks their validity has the burden of establishing the contrary. *Justice v. Asheville,* 161 N. C., 62, 76 S. E., 822; *Anderson v. Albemarle, supra.*

But the defendant insists that it is made to appear that although the board, on 23 July, 1925, adopted a resolution fixing the time for property owners to appear and be heard on the confirmation of the assessment roll, C. S., 2712, no notice of such hearing was ever published.

While it is so found, there are other facts appearing of record which render this defect immaterial. The day fixed in the resolution for the hearing was 13 August, 1925. The board again met on 13 August, 1925, adopted the required resolution in amplified form, C. S., 2712, fixed the time and place for hearing "allegations and objections" and ordered notice thereof to be published. It then adjourned until 31 August, 1925, at 8 p.m., the time fixed for the hearing. C. S., 2713. Notice was duly published and the hearing was had, at which hearing persons interested were heard, necessary corrections were made, and the assessment roll, as corrected, was approved and confirmed. C. S., 2713. Due entry upon the minutes was made.

This assessment was made in 1925. The defendant, after due notice and after being given ample opportunity to be heard and to appeal from any adverse ruling, C. S., 2714, failed to avail himself of the opportunity thus afforded. He has had his day in court. He cannot now be heard to impeach the validity of the ordinance or of the assessment for alleged

irregularities in the proceeding which, if admitted, are not jurisdictional. *Murphy v. Greensboro,* 190 N. C., 268, 129 S. E., 614.

The evidence offered and the facts found entitle plaintiff to the relief demanded. It follows, therefore, that the judgment below must be

Reversed.

L. M. BURRIS v. GROVER CREECH ET AL.

(Filed 5 November, 1941.)

1. Nuisance § 3—

Allegations and evidence to the effect that defendant erected a solid sheet metal fence seven feet high on his land, which shut out the light, air, and view from plaintiff's house on the adjoining property, and that the fence was of no beneficial use to defendant, but was erected and maintained solely for the purpose of annoying plaintiff, *is held* sufficient to take the case to the jury and to warrant an abatement of the nuisance under authority of *Barger v. Barringer,* 151 N. C., 433.

2. Nuisance § 4—

Where plaintiff establishes a cause of action to abate a "spite fence," but fails to show any personal pecuniary loss sustained by him up to the time of the institution of the action, plaintiff is not entitled to recover damages notwithstanding evidence that the value of his property was depreciated by the erection of the fence, since such depreciation in value would be obviated by the abatement of the nuisance and would be germane only if defendant acquired a permanent easement for the maintenance of the fence.

3. Damages § 7—

Where plaintiff establishes that defendant erected a "spite fence," entitling plaintiff to have the nuisance abated, but fails to prove any actual pecuniary damage to himself resulting up to the time of the institution of the action, the submission of an issue of punitive damages is error.

APPEAL by defendant, Grover Creech, from *Clement, J.,* at June Term, 1941, of CABARRUS.

Civil action to recover damages for an alleged malicious injury and to abate a nuisance.

The defendants, as tenants by the entirety, own a corner lot in the city of Concord which fronts on Buffalo Street and runs along Anne Street about 128 feet. There is a storehouse on the front of the lot extending back about forty feet and the rest of the lot is vacant.

The plaintiff and his wife, as tenants by the entirety, own an adjoining lot which fronts on Buffalo Street and runs back about the same distance as defendants' lot. There is a storehouse on the front of this

lot and a tenant dwelling house in the rear with a driveway from Buffalo Street to the dwelling house.

The vacant portion of defendants' lot lies between Anne Street and the dwelling house on the rear of plaintiff's lot. This dwelling house is 20 or 21½ feet from the dividing line of the two properties.

In February, 1941, the defendant, Grover Creech, erected along the dividing line and extending from the rear of his storehouse to the end of his lot, a solid sheet metal fence approximately 72 feet long and 7 feet high, which shuts out the light, air and view of plaintiff's house and causes the sunlight, at certain hours of the day, to be reflected on plaintiff's house to the annoyance and inconvenience of the occupants. On the allegations of the complaint, the plaintiff characterizes it as a "spite fence."

There is evidence tending to show ill will or anger on the part of Grover Creech toward the plaintiff, and that he erected the fence in question for the sole purpose of injuring his neighbor. The defendant testified that he built the fence to keep garbage trucks and trespassers from going across his land.

The plaintiff offered evidence tending to show that the market value of his property has been adversely affected from $300 to $600 by the erection of the fence.

Plaintiff's tenant testified that she paid a monthly rent of $15 before the erection of the fence and that she has continued to pay the same amount of rent since its erection.

The jury returned the following verdict:

"1. Was the sheet metal fence referred to in the pleadings erected by the defendant, Grover Creech, out of malice and for the sole purpose of injuring the plaintiff in the use of his property? Answer: 'Yes.'

"2. What amount, if any, of actual damages is the plaintiff entitled to recover of the defendant, Grover Creech? Answer: '$258.00.'

"3. What amount, if any, of punitive damages is the plaintiff entitled to recover of the defendant, Grover Creech? Answer: '$465.00.'"

From judgment on the verdict that plaintiff recover the damages assessed, the defendant appeals, assigning errors.

R. Furman James for plaintiff, appellee.
Hartsell & Hartsell for defendants, appellants.

STACY, C. J. The law as it pertains to a "spite fence" was thoroughly pounded and hammered by this Court in *Barger v. Barringer*, 151 N. C., 433, 66 S. E., 439. Nothing can be added to the discussion there had by *Brown* and *Hoke, JJ.*, the one speaking for the majority, the other for the minority. The subject was exhausted in that debate. The case was

later distinguished in *Bell v. Danzer,* 187 N. C., 224, 121 S. E., 448. See 22 Am. Jur., 546; 11 R. C. L., 877; *Hornsby v. Smith,* 13 S. E. (2d), 20, 113 A. L. R., 684.

Without undertaking to thrash over old straw, or "to beat the same old brush with the same old stick to run out the same old rabbit for another chase," as the late *Justice Brogden* would say, *Meece v. Com. Credit Co.,* 201 N. C., 139, 159 S. E., 17, perhaps it is enough to observe that the present facts appear to be sufficient to carry the case to the jury on the first issue under authority of the Barger decision, and to warrant an abatement of the nuisance. The complaint follows the definition of a "spite fence," *i.e.,* that it is of no beneficial use to the owners and was erected and is maintained by them solely for the purpose of annoying the plaintiff. 22 Am. Jur., 546.

The answers to the second and third issues are not supported by the record. There is no evidence that the plaintiff has suffered any pecuniary loss or personal discomfort, albeit his tenant may have been annoyed or inconvenienced. True, there is testimony to the effect that the market value of plaintiff's property has been affected by the fence in question, but this is on the theory of a permanent easement. An abatement of the nuisance would alleviate the damage, and no intervening loss has been established. Moreover, plaintiff's wife, as one of the tenants by the entirety, would be a desirable, if not a necessary party, where an easement is to pass on the payment of permanent damages. *Hooker v. R. R.,* 156 N. C., 155, 72 S. E., 210.

It is not thought the case is one in which punitive damages should be awarded. *Worthy v. Knight,* 210 N. C., 498, 187 S. E., 771; 22 Am. Jur., 548.

It results, therefore, that the second and third issues will be stricken out and an order of abatement entered on the answer to the first issue. Judgment accordingly.

Error and remanded.

RUTH SUTTON CAULEY v. GENERAL AMERICAN LIFE INSURANCE COMPANY.

(Filed 5 November, 1941.)

1. Appeal and Error § 39: Trial § 16—

The trial court inadvertently admitted hearsay evidence which was very material to the controversy. The court later withdrew the evidence and instructed the jury not to consider it. *Held:* Upon the entire record the inadvertence cannot be held for prejudicial and reversible error.

2. Insurance § 30—

That the payee of a check changed the name of the bank upon which the check was drawn without authority, resulting in the wrongful debit of insured's account by the bank so that the check given in payment of premium was wrongfully dishonored, *held* a permissible inference from the evidence and to sustain the verdict of the jury in favor of plaintiff beneficiary.

APPEAL by defendant from *Thompson, J.*, at June Term, 1941, of LENOIR.

Civil action to recover on a certificate of group insurance.

From verdict and judgment for plaintiff, the defendant appeals, assigning errors.

J. A. Jones for plaintiff, appellee.
Smith, Wharton & Jordan for defendant, appellant.

STACY, C. J. This is the same case that was before us on plaintiff's appeal at the Spring Term, 1941, reported in 219 N. C., 398, where the facts are set out and to which reference may be had to avoid repetition.

In accordance with the former opinion, the issue on the second trial was whether the premium check of $21.38 had been wrongfully dishonored. The jury found that it had, and there is evidence to support the finding.

The plaintiff testified that the check of $5.25 which diminished the account below the amount of insured's check and caused its dishonor was changed from the printed form, "Branch Banking & Trust Company," on which it was written, to "First-Citizens Bank & Trust Company"; that this change was made in pencil; that there was a noticeable difference between the handwriting in which the check was originally written and the changed part—"the check was made out and signed by my husband, and this change in the check was in another handwriting. . . . The change that had been made was much fresher in appearance. . . . The name of First-Citizens Bank & Trust Company, as it appeared in the check, appeared to be much fresher than the body of the check. . . . I mean the name of the First-Citizens Bank & Trust Company as it appeared to be much fresher than the body of the check."

The teller of the bank testified that the payee of this $5.25 check came into the bank and asked if Mr. Cauley's check for this amount was good. After calling upstairs to the bookkeeper, the teller informed him that it was. Thereupon, the payee went over to a desk or table and returned in "two, three, or four minutes" and presented the check duly

endorsed. "I could not say what he did while he was at that table because I was waiting on another customer . . . he had his back turned to me."

The most serious exception appearing on the record is the one presented in connection with the testimony of plaintiff's brother who was allowed to say the payee of this $5.25 check admitted to him in the presence of the bank teller that he had made the change from "Branch Banking & Trust Company" to "First-Citizens Bank & Trust Company" without any authority. True, this evidence was later stricken out and the jury was instructed not to consider it, but difficulty arises in assigning it to its proper place. Was it such a slip as could be cured by withdrawing the evidence, or was it a fatal inadvertence? *Hyatt v. McCoy,* 194 N. C., 760, 140 S. E., 807; *Parrott v. R. R.,* 140 N. C., 546, 53 S. E., 432. While not altogether free from difficulty, *In re Will of Yelverton,* 198 N. C., 746, 153 S. E., 319, a careful perusal of the entire record leaves us with the impression that the ruling should be sustained. *Gold v. Kiker,* 218 N. C., 204, 10 S. E. (2d), 650.

On the evidence which was allowed to remain in the case the jury found that Cauley's bank account was wrongfully debited with the amount of this $5.25 check, and that, therefore, the premium check was wrongfully dishonored. The inference is a permissible one. Hence, the verdict and judgment will be upheld.

No error.

T. C. CROW, ADMINISTRATOR OF E. B. MCCULLEN, v. CECIL D. MCCULLEN, EDNA MCCULLEN MCCOLMAN AND LILLIE O. MCCULLEN.

(Filed 5 November, 1941.)

1. Judgments § 18—

A judgment signed out of term and out of the county by consent, when docketed, becomes a judgment as of the trial term.

2. Trial § 47—

The judgment in this action was signed out of term and out of the county by consent. Thereafter at the next succeeding civil term the court granted defendant's motion to set aside the judgment for newly discovered evidence. *Held:* Upon the docketing of the judgment it became a judgment as of the trial term and in the absence of agreement preserving the right to move to set aside the judgment at a subsequent term, the trial court was without power to grant the motion.

APPEAL by plaintiff from *Thompson, J.,* at March Term, 1941, of DUPLIN.

This is an action to recover money alleged by the plaintiff administrator to belong to the estate of his intestate and to be wrongfully withheld by the defendants.

The case was heard at the January Term, 1941, of Duplin, at which time a jury trial was waived and an agreement entered that the judge might find the facts and render judgment out of term and out of the county.

On 11 February, 1941, the judge signed judgment in favor of the plaintiff, which was properly docketed in Duplin County on 14 February, 1941. On 24 February, 1941, the defendants filed with the clerk of the Superior Court of Duplin County notice of appeal to the Supreme Court dated 21 February, 1941, notice of which appeal was given to the plaintiff by the clerk on 24 February, 1941. At the March Term, 1941, of Duplin County, upon motion of defendants' counsel, the judge entered a judgment setting aside, for newly discovered evidence, the judgment theretofore rendered by him in favor of the plaintiff. To the later judgment the plaintiff excepted and appealed to the Supreme Court.

Butler & Butler and A. W. Byrd for plaintiff, appellant.

J. Faison Thomson and Rivers D. Johnson for defendants, appellees.

SCHENCK, J. We are constrained to hold that the judge erred in entering the judgment setting aside for newly discovered evidence the judgment theretofore entered by him in favor of the plaintiff.

The judgment signed 11 February, 1941, and docketed 14 February, 1941, was signed out of term and out of the county by consent of the parties, but when docketed it became a judgment as of the January Term, 1941. The January Term, 1941, expired 20 January, 1941. In the absence of any preservation by agreement of the right to move to set aside the judgment at a subsequent term, the judge was without authority to vacate the judgment after the term at which it had been rendered had expired. *Bisanar v. Suttlemyre,* 193 N. C., 711, 138 S. E., 1; *Acceptance Corp. v. Jones,* 203 N. C., 523, 166 S. E., 504; *Hinnant v. Ins. Co.,* 204 N. C., 307, 168 S. E., 199.

"It is well settled under our practice that a motion to set aside a verdict and grant a new trial upon the ground of newly discovered evidence must be made and determined at the same term at which the trial is had. . . . The reasons why verdicts should not be set aside at subsequent terms, whether because against the weight of the evidence or for newly discovered testimony, is because hearing and determining such motions involve recollection by the trial judge of the testimony, the demeanor of the witnesses, and other incidents of the trial, which are not so strongly impressed upon the memory of a judge that he may safely

act upon them after adjournment. *Knowles v. Savage,* 140 N. C., 374." *Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760.

The judgment of the Superior Court setting aside for newly discovered evidence the judgment theretofore entered is

Reversed.

LEE MILLER, WIDOW OF FRANK MILLER, DECEASED (EMPLOYEE), v. A. CLARENCE CAUDLE, TRADING AS CAUDLE TRUCKING COMPANY (EMPLOYER), AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY.

(Filed 19 November, 1941.)

1. Master and Servant § 45b—Evidence held to sustain finding that quarry operations were incidental to trucking business and that policy covered blacksmith engaged in duties related to both businesses.

The policy in suit was issued to an employer engaged in commercial trucking operations. The policy declaration listed as the work places of insured the address of the trucking business "and elsewhere in the State of North Carolina," and stipulated the employees covered as "truckmen . . . blacksmiths . . ." The evidence before the Industrial Commission tended to show that the employer hauled sand, gravel, and other materials in the prosecution of his business, and that later he leased streams and a local quarry from which he got sand and gravel for his customers, that the deceased employee was a blacksmith, that his duties included the repair of quarry machinery and the sharpening of picks and truck equipment, and that he was fatally injured by an accident arising out of and in the course of his employment. Defendant insurer contended that it was not given notice that the employer was engaged in quarrying and that the insurance rate covering such operations was higher than that charged in the policy. The policy provided for adjustment of premium at the end of the year. *Held:* The evidence is sufficient to sustain the finding of the Industrial Commission that the quarry operations were incidental to the trucking business and that the policy covered the deceased employee.

2. Same—

If the language of a policy of Workmen's Compensation insurance is ambiguous, the uncertainty and doubt will be resolved in favor of insured and the policy construed against insurer who selected its language.

3. Master and Servant § 55b—

The jurisdiction of the courts upon appeal from an award of the Industrial Commission is limited to matters of law and legal inference, and the findings of fact of the Industrial Commission when supported by competent evidence are conclusive.

APPEAL by defendant, American Mutual Liability Insurance Company, from *Bone, J.*, at 16 June, 1941, Civil Term, of WAKE. Affirmed.

The hearing Commissioner rendered the following opinion: "When this case was called for hearing counsel for the plaintiff and both defendants agreed and the Commission so finds as a fact that plaintiff's deceased sustained an injury by accident on August 29, 1940, which arose out of and in the course of his employment; that death resulted from said injury by accident on the same date, and that at the time of plaintiff's deceased's injury by accident his average weekly wage was in an amount which would only entitle the plaintiff's deceased to recover, if any compensation is awarded, the minimum amount allowed under the Act, or $7.00 per week."

The hearing Commissioner sets forth the evidence: "The standard workmen's compensation policy of the American Mutual Liability Insurance Company, issued to A. Clarence Caudle, trading as Caudle Trucking Company, in an endorsement dated March 9, 1940, and covering the period from March 9, 1940, to March 9, 1941, includes the following classifications of operations as being covered by said workmen's compensation policy: 'Truckmen N. O. C.—including drivers, chauffeurs, and their helpers; stablemen; garagemen; blacksmiths; repairmen; riggers—(Storage Warehouse employees to be separately rated).' From the evidence and by its greater weight the Commission makes the following additional Findings of Fact:

"A. That both the plaintiff's deceased and the defendant employer, A. Clarence Caudle, trading as Caudle Trucking Company, are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act; and defendant employer regularly employing more than five persons, and that the American Mutual Liability Insurance Company of Boston, was the carrier for the defendant employer at the time plaintiff's deceased sustained his injury by accident on August 29, 1940, which resulted in his death on the same date.

"B. That at the time of his injury by accident on August 29, 1940, and subsequent death on the same date, plaintiff's deceased, Frank Miller, was a regular employee of the defendant employer, A. Clarence Caudle, trading as Caudle Trucking Company.

"C. That the plaintiff, Lee Miller, was the legal wife of the deceased employee, Frank Miller, at the time of his accident and subsequent death, and that the said Lee Miller and her husband, the deceased employee, Frank Miller, were living together at the time of his injury by accident hereinbefore mentioned.

"D. That the deceased employee, Frank Miller, at the time of his injury by accident and death on August 29, 1940, had no children, and

that there was no one either wholly or partially dependent upon him for support at this time with the exception of his wife, Lee Miller, the plaintiff in this case.

"From the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

"1. That Frank Miller, plaintiff's deceased, was a regular employee of the defendant employer, A. Clarence Caudle, trading as Caudle Trucking Company, at the time of his injury by accident and death on August 29, 1940.

"2. That both plaintiff's deceased and the defendant employer are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act, it having been found as a fact that the defendant employer had more than five regular employees at the time plaintiff's deceased sustained his injury by accident.

"3. The only question at issue or in serious controversy at this said hearing was whether or not the Workmen's Compensation Insurance Policy issued by the defendant carrier, the American Mutual Liability Insurance Company of Boston, covered and included the deceased employee, Frank Miller, at the time of his injury by accident and death on August 29, 1940.

"The defendant carrier contended that said policy did not cover the quarry operations of A. Clarence Caudle, trading as Caudle Trucking Company, and that inasmuch as the deceased employee was a regular employee at the quarry and not of the trucking operations that said compensation policy did not cover him at the time of his injury and death. It is true that the defendant employer, A. Clarence Caudle, did not notify the defendant carrier that he was conducting a rock quarry business in connection with his trucking business, however, from the evidence all of this defendant employer's business was conducted together; all of the men were kept on the same pay roll, and the truck drivers occasionally did some work around the quarry. The compensation policy does specifically include the classification of blacksmith, and the plaintiff's deceased was the only blacksmith working for the defendant employer at the time of said employee's injury and death. Although undoubtedly the principal part of his blacksmith work was in connection with the quarry operations, there is specific evidence that he repaired the picks and shovels used in the regular trucking operations. The standard workmen's compensation policy issued by the American Mutual Liability Insurance Company for the employer, A. Clarence Caudle, trading as Caudle Trucking Company, was in effect and the premium had been paid. Therefore, from all of the evidence, the Commission concludes as a matter of law that the said workmen's compensation policy designated as defendant Caudle's Exhibit A, did cover the deceased employee, Frank

Miller, in his regular work, that of a blacksmith, at the time of said employee's injury and death. *Johnson v. Asheville Hosiery Co.,* I. C. 41, 1929. *Holt v. Oak Ridge Military Institute,* 3 I. C. 270, 1932. *Kenan v. Duplin Motor Co., et al.,* 203 N. C., 108.

"4. That Lee Miller, widow of the deceased employee, Frank Miller, is entitled to be paid compensation by the defendant carrier, the American Mutual Liability Insurance Company, in the amount of $7.00 per week for a period of 350 weeks.

"Award: Let an award issue conforming to the foregoing conclusions of law. The defendant carrier, the American Mutual Liability Insurance Company, will pay funeral benefits for plaintiff's deceased not to exceed the sum of $200.00.

"The defendant, the American Mutual Liability Insurance Company as carrier for the defendant employer will pay all hearing costs. The defendant will also pay all medical and hospital bills for services rendered the plaintiff's deceased as the result of his injury by accident on August 29, 1940, when approved by the Commission. Pat Kimzey, Commissioner."

Notice of formal award was duly given. Application for review was duly given by the American Mutual Liability Insurance Company, defendant. Notice of review was duly given.

Opinion for the Full Commission by T. A. Wilson, Chairman, filed 28 April, 1941—Docket 9882: "This case came on for review before the Full Commission at Raleigh, North Carolina, April 17, 1941, upon appeal of the defendant, American Mutual Liability Insurance Company, in apt time from the award of Commissioner Kimzey awarding compensation to the plaintiff. Appearances: Plaintiff: Sam J. Morris, Raleigh. Defendants: Thos. W. Ruffin, Attorney, Raleigh, N. C., appearing on behalf of the employer, Caudle. A. W. Sapp, Attorney, Greensboro, N. C., appearing on behalf of the carrier, American Mutual Liability Insurance Company.

"The defendant compensation insurance carrier, the American Mutual Liability Insurance Company, contends that the compensation policy issued to A. Clarence Caudle, trading as Caudle Trucking Company, did not cover the employment in which the plaintiff's deceased, Frank Miller, was engaged at the time he was injured, August 29, 1940. The defendant carrier contends that the policy covered the trucking business, and that said Caudle was engaged in quarrying, which was not covered by the policy. The evidence discloses that the policy in question was introduced and covers: 'Truckmen N. O. C.—including Drivers, Chauffeurs and their helpers; Stablemen; Garagemen; *Blacksmiths;* Repairmen; Riggers.—(Storage Warehouse employees to be separately rated.)'

"The further evidence discloses that the said Caudle was engaged in the trucking business, hauling sand and gravel and owned or operated approximately 14 trucks in this business; that to supply the demand of his customers he rented or leased the rights of several streams as a source of supply for sand and gravel; that subsequent to the purchase of the compensation policy in question said Caudle purchased or leased a quarry to further supply the demand for gravel; that one truck was kept in the quarry at all times, and at times he used four or five trucks in the quarry in hauling out the gravel. It appears that the deceased worked as a blacksmith, one of the classifications listed in the policy, both in repairing the truck equipment and that of the quarry. There is no evidence of the defendant employer employing any other blacksmith than the deceased.

"The Full Commission affirms the Findings of Fact of the Hearing Commissioner. The Full Commission makes the following additional Findings of Fact:

"1. That the deceased was employed as a blacksmith, which is one of the classifications covered by the compensation policy of the defendant carrier, American Mutual Liability Insurance Co.

"2. That the operation of the quarry was incident and appurtenant to the regular business of A. Clarence Caudle, trading as Caudle Trucking Company, in carrying on his trucking business, which included the operation of a steam shovel, renting of branches by the month, hauling stone, unloading steel, cement, and contract hauling 'under a shovel.'

"3. That the defendant employer maintained one truck in the quarry at all times and often as many as four or five trucks would be used in the quarry in hauling out gravel.

"4. That the blacksmith was required to repair the picks, mattocks, shovels, pitchforks, and other tools used in the regular course of the defendant employer's business.

"As to quarrying carrying a different classification and insurance rate, the compensation policy issued by the defendant carrier carries the following clause in Condition A—Basis of Premium: 'At the end of the policy period the actual amount of the remuneration earned by employees during such period shall be exhibited to the Company, as provided in condition C hereof, and the earned premium adjusted in accordance therewith at the rates and under the condition herein specified. If the earned premium, thus computed, is greater than the advance premium paid, this employer shall immediately pay the additional amount to the Company, if less, the Company shall return to this employer the unearned portion, but in any event the Company shall retain the minimum premium stated in said declaration. . . .'

"Section 73 of the Compensation Law provides that all rates charged by all carriers of insurance 'shall be fair, reasonable and adequate,' and

that said rates shall be 'approved by the Commissioner of Insurance.' Thus, it is apparent that every provision is made to protect the interests of the carrier as to the collection of insurance premium.

"The Full Commission feels that the instant case clearly comes within the decision of *Kenan v. Motor Co.,* 203 N. C., 108, and in many ways is an even stronger case, for the deceased was a blacksmith and was so engaged at the time of his injury, and blacksmithing is one of the classifications covered in the policy. In the *Kenan case, supra,* the Court said: ' "If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed." *Walker, J.,* in *Bray v. Ins. Co.,* 139 N. C., at p. 393; *Allgood v. Ins. Co.,* 186 N. C., at pp. 420-421.'

"The Full Commission having affirmed the Findings of Fact of the Hearing Commissioner and found additional facts, now affirms and adopts as its own the Conclusions of Law and the Award of the Hearing Commissioner. The defendants will pay the additional costs of the hearing before the Full Commission. T. A. Wilson, Chairman. Examined and approved by: Buren Jurney, Pat Kimzey, Commissioners."

Notice of formal award was duly given. Appeal was duly made by American Mutual Liability Insurance Company to the Superior Court.

The following judgment was rendered by the Superior Court: "This is an appeal by the defendant, American Mutual Liability Insurance Company, from the decision and award of the North Carolina Industrial Commission in favor of plaintiff against both defendants, the matter having been regularly calendared for hearing at this term now comes on to be heard. After considering the record certified to this Court by the North Carolina Industrial Commission, and the argument of counsel, the Court is of the opinion that there is evidence to support the Commission's findings of fact and that the decision of the said Commission is not founded upon error of law. It is, therefore, by the Court, Ordered, Adjudged and Decreed that the award and decision of the North Carolina Industrial Commission be and the same is hereby affirmed. Walter J. Bone, Judge Presiding."

To the above judgment defendants excepted and assigned error as follows:

"1. For that the Judge of the Superior Court found that the findings of fact, conclusions of law and award of the North Carolina Industrial Commission should in all respects be affirmed, which is defendant's Exception #1.

"2. For that the Judge of the Superior Court did not find that the findings of fact, conclusions of law and award of the North Carolina Industrial Commission were not supported by the evidence contrary to the law arising thereon, and for that the Court failed and refused to set aside the findings of fact and conclusions of law and enter a judgment dismissing the award, which is defendant's Exception #2.

"3. For that the Judge entered the judgment as appears of record, which is defendant's Exception #3."

Sam J. Morris for Lee Miller, widow of Frank Miller.

Thos. W. Ruffin for defendant A. Clarence Caudle, trading as Caudle Trucking Company.

Sapp, Sapp & Atkinson for defendant American Mutual Liability Insurance Company.

CLARKSON, J. The only question involved in this controversy is whether or not the Workmen's Compensation Insurance Policy issued by the defendant carrier, the American Mutual Liability Insurance Company, of Boston, Mass., covered and included the deceased employee, Frank Miller, a blacksmith, at the time of his injury by accident and death on 29 August, 1940? We think the employee, Frank Miller, deceased, was covered by the Compensation Insurance policy.

This is an action brought by plaintiff, widow of Frank Miller, deceased, under the N. C. Workmen's Compensation Act, in which she seeks compensation for the death of her husband for "injury by accident arising out of and in the course of the employment." N. C. Code, 1939 (Michie), part section 8081 (f).

The hearing Commissioner set forth, which was confirmed by the Full Commission: "Finds as a fact that plaintiff's deceased sustained an injury by accident on August 29, 1940, which arose out of and in the course of his employment; that death resulted from said injury by accident on the same date."

It is admitted that the American Mutual Liability Insurance Company, one of the defendants, issued to A. Clarence Caudle, trading as Caudle Trucking Company, the other defendant, a standard Workmen's Compensation Policy, covering the period from 9 March, 1940, to 9 March, 1941. The premium of $323.40 was paid on the policy. The injury by accident causing the death of Frank Miller, occurred on 29 August, 1940, during the life of the policy.

The controversy between the parties narrows itself down mainly to one question: Did the insurance policy include the deceased employee, a blacksmith? The plaintiff contends that it did; the defendant Caudle, trading as Caudle Trucking Company, contends that it did. The defend-

ant, American Mutual Liability Insurance Company, contends it did not. The Industrial Commission found that it did. Was there sufficient competent evidence to sustain this finding?

In the policy declaration is the following: "Locations of all factories, shops, yards, buildings, premises, *or other work places* of this employer, by Town or City, with Street and Number: 3020 Hillsboro St., Wake County, Raleigh, N. C., *and elsewhere in the State of North Carolina.*" (Italics ours.)

Then is set forth those who are covered by the policy: "Truckmen, N. O. C.—including Drivers, Chauffeurs and their Helpers; Stablemen; Garagemen; *Blacksmiths;* Repairmen; Riggers.—(Storage Warehouse employees to be separately rated.)"

The Industrial Commission found: "The evidence further discloses that the said Caudle was engaged in the trucking business, hauling sand and gravel and owned or operated approximately 14 trucks in this business; that to supply the demand of his customers he rented or leased the rights of several streams as a source of supply for sand and gravel; that subsequent to the purchase of the compensation policy in question said Caudle purchased or leased a quarry to further supply the demand for gravel; that one truck was kept in the quarry at all times, and at times he used four or five trucks in the quarry in hauling out the gravel. It appears from the evidence that the deceased worked as a blacksmith, one of the classifications listed in the policy, both in repairing the truck equipment and that of the quarry. There is no evidence of the defendant employer employing any other blacksmith than the deceased. . . ."

The Industrial Commission found the further facts:

"1. That the deceased was employed as a blacksmith, which is one of the classifications covered by the compensation policy of the defendant carrier, American Mutual Liability Insurance Company.

"2. That the operation of the quarry was incident and appurtenant to the regular business of A. Clarence Caudle, trading as Caudle Trucking Company, in carrying on his trucking business, which included the operation of a steam shovel, renting of branches by the month, hauling stone, unloading steel, cement, and contract hauling 'under a shovel.'

"3. That the defendant employer maintained one truck in the quarry at all times and often as many as four or five trucks would be used in the quarry in hauling out gravel.

"4. That the blacksmith was required to repair the picks, mattocks, shovels, pitchforks, and other tools used in the regular course of the defendant employer's business."

The declaration says: "Or other work places of this employer," and states "3020 Hillsboro Street, Raleigh, N. C., and elsewhere in the State of North Carolina." The Industrial Commission found "That the oper-

ation of the quarry was incident and appurtenant to the regular business" of defendant Caudle. There are other findings of fact by the Industrial Commission not necessary to be repeated to sustain the award.

It is contended by defendant Insurance Company that the quarry operation was subsequent to the issuing of the Insurance Policy, and a higher rate of premium exists for quarry coverage, and that on the entire record the policy did not cover the quarry operation and the judgment should be rendered dismissing the award. We cannot so hold, from the findings of fact of the Commission before set forth.

In A. Clarence Caudle's testimony is the following: "Q. In your policy you classified truck driving, repairmen, helpers, garagemen, and blacksmiths? Ans.: Yes, sir. Q. Now, what kind of business were you engaged in at the time you took this policy out? Ans.: Well, my business has been, as I tried to explain it to Mr. Heston (agent for the Insurance Company) at the time that I bought this policy, consists of contract hauling. Probably I'll put three or four trucks under a shovel, or I'll— Q. Under the shovel, explain that? A. I mean a steam shovel. Then I rent branches by the month; I have about three or four that consist of hauling stone, unloading steel, cement, I explained to him at the time I taken my policy out; they tell me that I am covered. A. Consists of hauling stone, branch gravel, sand, unloading steel, cement, limestone, contract hauling under a shoveling; I presume that is about all it covered. Q. Was the deceased a blacksmith? Ans.: Yes, sir, we have to have a blacksmith. We have picks, mattocks, shovels, pitchforks, all in our line of work. Q. Did he work on the tools in your regular line of work? Ans.: Yes, sir. Q. Did he work on tools not connected specifically to your pit or quarry, as they call it? Ans.: Sharpened any kind of tools which we might have which consisted of shovels, picks, and mattocks, and also steel; that is about all the work we did have for a blacksmith."

In *Blassingame v. Asbestos Co.,* 217 N. C., 223 (233), it is written: "In *Johnson v. Hosiery Co.,* 199 N. C., 38 (40), this Court said: 'It is generally held by the courts that the various Compensation Acts of the Union should be liberally construed to the end that the benefits thereof should not be denied upon technical, narrow, and strict interpretation.' We see nothing prejudicial to defendants. In II Schneider, Workmen's Compensation Law (2d Ed.), part sec. 554, at pp. 2002-3, we find: 'Courts may not interfere with the findings of fact, made by the Industrial Commission, when these are supported by evidence, even though it may be thought there be error.' 'The rule . . . is well settled to the effect that, if in any reasonable view of the evidence it will support, either directly or indirectly, or by fair inference, the findings made by the Commission, then they must be regarded as conclusive'

(citing a wealth of authorities). Courts cannot demand the same precision in the finding of Commission as otherwise might be if the members were required to be learned in the law." *Graham v. Wall, ante,* 84 (88).

In *Bray v. Ins. Co.,* 139 N. C., 390 (393), *Walker, J.,* for the Court, said: "If the clause in question is ambiguously worded, so that there is any uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. *Grabbs v. Ins. Co.,* 125 N. C., 389."

The Insurance Company cites provisions of the policy, to sustain its contention, as follows: "All business operations, including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following divisions as are undertaken by this Employer. 1. All industrial operations upon the premises. 2. All office forces. 3. All repairs or alterations to premises. 4. Specially rated operations on the premises. 5. Operations not on the premises." It will be noted that this says "Operations not on the premises." "The foregoing enumeration and description of employees includes all persons employed in the service of this employer in connection with the business operations above described to whom remuneration of any nature in consideration of service is paid." "VI. This agreement shall apply to such injuries so sustained by reason of the business operations described in said declarations which, for the purpose of this insurance, shall include all operations necessary, incident, or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with, or in relation to, such work places." It will be noted that this does not confine the "work places." It says "or elsewhere in connection with or in relation to, such work places."

Construing these and the previous provisions of the policy as before recited, we do not think that a fair and reasonable construction of the entire policy would justify the contention of defendant Insurance Company. If the language of the policy is not clear, but ambiguous, and there is uncertainty as to its right interpretation, the doubt is resolved against the Insurance Company.

We think the cases cited by the Insurance Company, *Burnett v. Paint Co.,* 216 N. C., 204, and *Paulson v. Industrial Accident Commission*

(Cal.), 112 Pa., 108, 2m 710, distinguishable from the present action, in the light of the language of the insurance policy and the facts found by the Industrial Commission. We here are not a fact-finding body, as we have said before. If we were, we might sometimes reach a different conclusion. If there is any competent evidence to support the findings of fact made by the Industrial Commission, we are bound by those findings. The findings of fact of the Industrial Commission contain also other reasons other than what we have set forth, why the award should be sustained. Under section 60 of the Compensation Act, the award of the Commission is "conclusive and binding as to all questions of fact." *Chambers v. Oil Co.*, 199 N. C., 28 (32).

We think this case is governed by *Kenan v. Motor Co.*, 203 N. C., 108. The able argument and brief of defendant Insurance Company is persuasive but not convincing.

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

Affirmed.

WILLIAM L. ALLISON, TRADING AS STATESVILLE MANUFACTURING COMPANY, v. THOMAS H. STEELE AND WIFE, GRACE BATES STEELE, AND J. M. LYLES,

and

WILLIAM L. ALLISON, AN INDIVIDUAL TRADING AS THE STATESVILLE MANUFACTURING COMPANY, v. THOMAS H. STEELE AND WIFE, GRACE B. STEELE, AND J. M. LYLES.

(Filed 19 November, 1941.)

1. **Frauds, Statute of, § 1—**

The purpose of the statute of frauds is to prevent fraud upon individuals charged with participation in transactions coming within its purview, and not to render the parol contracts prescribed void as against public policy, and therefore the defense of a statute of frauds must be properly invoked by the parties seeking its protection.

2. **Frauds, Statute of, § 6: Trial § 29b—Defense of statute of frauds may not be raised by exception to charge when defendants did not object to parol evidence.**

Defendants denied the contract declared on, offered evidence that they did not enter into the contract, but did not object to plaintiff's parol evidence in support of the contract alleged. In making up the case on appeal, defendants excepted to the charge for that the court failed to charge the law relative to the statute of frauds, C. S., 564, and contended on appeal that plaintiff's evidence disclosed a contract to answer for the debt or default of another. *Held:* Defendants' exception to the charge cannot be sustained, the court having had no notice that defendants would rely upon the statute, and defendants having waived the defense of the statute by failing to properly present such defense.

3. Husband and Wife § 4c—

In this action seeking to hold husband and wife liable upon the husband's alleged agreement to be responsible for materials furnished a contractor for improvements made upon their land, there was no evidence that the wife consented and procured her husband to make the contract, and therefore the wife's motion to nonsuit should have been allowed.

4. Same: Trial § 38—

Plaintiff sought to hold husband and wife liable upon an alleged agreement to be responsible for materials furnished a contractor for improvements upon their land. There was no evidence that the wife procured her husband to make the contract but the sole issue upon the question of liability was whether the husband, with the consent and procurement of the wife, entered into the alleged agreement. *Held:* The issue presented an inseparable proposition entitling the husband to a new trial to determine the question of his sole liability.

5. Justices of the Peace § 3—

Where materials of a value in excess of two hundred dollars are furnished under an entire and indivisible contract, and the material furnisher institutes suit in a justice's court to recover for part of the materials furnished and also institutes suit in the Superior Court on the same cause of action, defendants' motion to dismiss the action instituted in the justice's court for want of jurisdiction should be allowed, since plaintiff may not split up his cause of action for jurisdictional purposes and try it piecemeal in both courts.

IN BOTH CASES, the defendants, Thomas H. Steele and Grace B. Steele, appealed from *Clement, J.*, at May Term, 1941, of IREDELL.

Case No. 380 was begun before a justice of the peace, and from a judgment against the defendants was appealed to the Superior Court of Iredell County. Case No. 381 was pending in Iredell County Superior Court when trial was reached, and both cases were heard together. The demands grew out of the same transaction, the evidence was the same, as were, for the most part, the objections and exceptions taken upon the trial. Those exceptions which are exclusive to the particular case will be hereafter noted where pertinent to decision.

These suits were brought to recover an amount alleged to be due to the plaintiff by the defendants upon a contract under which certain materials were furnished to defendant, J. M. Lyles, a contractor, for use in making improvements upon certain property belonging to the defendants, Steele. The claims and contentions of the parties are more fully set forth in the record in Case No. 381, and for a better understanding of all the matters involved, we consider it first.

No. 381. This case was begun by summons in the Superior Court, 23 October, 1940. It appeared that a materialman's lien was filed 9 May, 1940. The plaintiff complains that some time prior to 5 July, 1939, a contract was entered into between the defendants, J. M. Lyles

and Thomas H. Steele, and the plaintiff, in which Thomas H. Steele, acting for and in behalf of himself and wife, Grace B. Steele, "agreed with the plaintiff's employees that they (Steele and wife) would be responsible for any material furnished for the erection of a house" on certain property; and that in consequence of "said understanding and assurance by the defendant, Thomas H. Steele," the plaintiff furnished the required material to the amount of $2,212.12, all of which was used on the lot described, and demanded recovery of the said sum and that a lien therefor be declared upon the property.

The defendants denied the contract and averred that J. M. Lyles was a general contractor to make the improvements on the land described and furnish material at his own expense, and that they had no obligation with regard to it except to pay J. M. Lyles the money agreed to be paid under his contract with the defendants. The defendants further allege that credit was extended not to them but to J. M. Lyles upon his own proper promise to pay for the materials. It is further alleged in the answer and further defense that the defendants Steele had made no further payments to J. M. Lyles on the contract between them and Lyles after having received notice of the claim of the plaintiff against Lyles; and that there was a balance due said general contractor for his creditors, sufficient to pay about one-half of the claims for materials furnished the said Lyles, which balance the defendants "are ready and willing to pay." The defendants also alleged in their further defense that there was pending in the Superior Court of Iredell County at the institution of this suit an action by the plaintiff against the defendants upon the same alleged contract and cause of action, and asked that the action be dismissed.

Plaintiff's evidence tended to show that Jim Gray, an employee and agent of the plaintiff, had a conversation with Thomas H. Steele, prior to the furnishing of the materials pursuant to instructions from Mr. Lowrance, a manager for Allison. It was in regard to furnishing Mr. Lyles materials to erect houses on Steele's lot in Queens Court, and witness asked Mr. Steele how it was to be financed, as they did not know Mr. Lyles. In the witness' own words: "I saw Mr. Steele at his home on Davie Ave. We sat in the living room and I asked him about these jobs Mr. Lyles was going to build for him; told him we didn't know anything about Mr. Lyles and I came to find out how it was going to be financed. Mr. Steele told me that he never started a job until he got his commitment on it and his money in the bank and he stood behind that bank and the materialmen and would see that no one would lose at all, to go ahead and sell Mr. Lyles, it would be all right, and he would see that he would pay. I reported to Mr. Lowrance that Mr. Steele told me that it would be perfectly all right, that he would see that the bills were paid." The witness further stated that Lyles had told him he was

building houses for Mr. Steele and wanted some materials, but did not say he had any contract.

From time to time bills were made against Lyles and were shown to Steele and then given to Lyles for payment. The bills for materials were all left with Lyles. In August, September, and October witness presented bills to Lyles and asked him to pay them, and received the reply that he had not yet got his money from Mr. Steele. He testified that Steele had never made any payment.

Fred Lowrance stated that he went to see Mr. Steele and asked him to give a note or pay for the materials and received the reply that as soon as the attorneys would close up the loan, he would pay the bills. Hazel Taylor testified that she was the bookkeeper and made entries with regard to the jobs. The first entry on the "single house" was, "July 28, 1939, J. M. Lyles, No. 500." This is the improvement involved in No. 380, appeal from the justice of the peace.

The entry showed the first item furnished on Job No. 5246, involved in the case begun in the Superior Court and now being considered, was on 5 August, 1939, and the last on 10 November, 1939. She was permitted to say, over objection, that the amount due on this job was $2,212.12. This witness stated that the bills were never passed on to Mr. Steele, to her knowledge. She further testified that the account was carried on the books of the company as "J. M. Lyles, Thomas H. Steele Job." Thomas Steele's name was not on the ledger sheet. The book account was in the name of "J. M. Lyles, City."

The defendant, Thomas H. Steele, testified in substance that he had a contract with Lyles for the construction of two houses—No. 500, and No. 5246—as a general contract under which Lyles was to furnish all of the labor and material at the price specified for construction at his own expense. He denied that he had ever had any conversation with Mr. Gray in which he advised the latter that he would see that Mr. Lyles paid for materials—"I never made any such statement. I agreed in no way or sense to pay for materials which Lyles bought."

Witness said that he had a conversation with Mr. Lowrance in the latter part of April, 1940, which simply concerned where Mr. Lyles was, if he was coming back, and if anything had been heard of him. No demand was made on him for materials which had been furnished to Lyles, nor was he informed that the Statesville Manufacturing Company was looking to him for payment. Lowrance did ask him if he still owed Lyles anything under the contract, and defendant told him the amount which was still due Lyles, and that he was ready to settle at any time Lyles was "ready to close the case." Witness further stated that no employee of the Statesville Manufacturing Company had ever delivered a bill or statement to him for materials used by Lyles, and that no material had been delivered to him personally.

Defendants further introduced billhead of Statesville Manufacturing Company dated 1 November, 1939, showing an account stated against J. M. Lyles alone for the material sold to him for the Steele jobs. Defendants also introduced ledger sheet of Statesville Manufacturing Company for the purpose of showing that the account was carried against Lyles alone and credit extended to him. There was introduced also in behalf of defendants a letter of the plaintiff to Lyles dated 25 July, 1939, in which the plaintiff offered to furnish the material for the duplex house to be erected on defendant's property for the sum of $1,420.64, delivered to the job.

Plaintiff in rebuttal introduced summons in the action before G. I. Anderson, justice of the peace, issued 7 October, 1939, brought by Allison against these defendants and J. M. Lyles, asking for $175.00 for materials furnished on Lot No. 3 of Queen's Court.

The defendants, at the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, moved for judgment as of nonsuit and renewed their motion to dismiss the action because of the pendency of another suit upon the same cause of action. The following issues were submitted to the jury:

"1. Did Thomas H. Steele, with the consent and procurement of the codefendant, Grace B. Steele, contract and agree with the plaintiff that he would pay for the material used in Job 5246? Answer: 'Yes.'

"2. If so, in what amount are the defendants indebted to the plaintiff? Answer: '$2,212.12.'"

To the submission of each of these issues the defendants excepted. (Exception No. 8, Record, p. 18.)

The defendants excepted to the failure of the court to comply with C. S., 564, in the following respect: "That the Court failed to instruct the jury, in substance, that if it should find that the agreement of Thomas H. Steele, if there was an agreement, with the plaintiff, did not create an original obligation, was collateral and superadded to the obligation of Lyles to pay, he remaining liable, and was not in writing, then the agreement would not be enforceable by reason of the statute of frauds, and that the first issue should be answered NO." (Exception No. 9, Record, p. 30.)

Defendants further lodge two exceptions to the failure to instruct the jury with regard to the first issue above quoted and the evidence relating to the same, that is, (a) "what facts it must find from the evidence, explaining the law thereon, in order to find that the materials furnished by the plaintiff were contracted for with the 'consent and procurement' of the defendant, Grace B. Steele," and (b) "that the court failed to instruct the jury in substance, that under the evidence in this case, as a matter of law, it could not find as a fact that the materials furnished

by the plaintiff were contracted for with the 'consent and procurement of the defendant, Grace B. Steele.' "

Defendants protected the exceptions taken during the course of the trial by formal exceptions to the refusal to set aside the verdict for errors of law, and to the signing of the judgment.

No. 380. This case began by summons before a justice of the peace and was for the recovery of $175.00 with interest alleged to be due by reason of a contract between plaintiff and defendants, Thomas H. Steele and Grace B. Steele and J. M. Lyles, by virtue of which it is claimed materials were furnished for improvements on property owned by the Steeles, being done by Lyles, upon the promise of defendants Steele to see that payment was made. As the case was heard conjointly with the case later brought in the Superior Court, the evidence as to the contract was identical, and exceptions taken on the trial are, for the most part, the same.

Scott & Collier for plaintiff, appellee.

Raymer & Raymer for defendants Thomas H. Steele and wife, Grace B. Steele, appellants.

SEAWELL, J. *No. 381.* In this case, as above noted, plaintiff brought suit in the Superior Court of Iredell County to recover of the defendants $2,212.12, which he claimed to be due him for material furnished on one of the jobs included in the improvements made upon defendants' property. Under the alleged contract between plaintiff and defendants, it will be noted that defendants denied that they had made any such contract, and set up that Lyles was an independent contractor who had agreed to make the improvements at a set price, including the furnishing of all material, and that the debt, if any, was his.

The evidence in regard to the contract is fully set out above, and will not be repeated here.

Upon the evidence, the defendants conceive themselves entitled to recognition by the court and consideration by the jury of the statute of frauds as it relates to a promise to answer for the debt, default or miscarriage of another, which they contend the contract to be, according to plaintiff's evidence, if indeed there was any contract at all. In this respect they urge as prejudicial error that the judge did not distinguish the evidence applying to this phase of the case and apply the law thereto.

No doubt the evidence we find in the record would require serious consideration from that point of view, both in the trial court and here, and would have demanded an application of the law to the facts in appropriate instructions to the jury if the question had been properly raised.

If the force and effect of the statute were to vitiate all contracts required by it to be in writing, but which are found to be in parol, and to render them unenforceable, *virtute legis,* simply, as is sometimes the case with contracts made void because in contravention of public policy, the law itself, without entreaty by the interested party, might stay the hand of the court, where the contract, either by virtue of its lack of ambiguity or of a determination to that effect by a jury, falls within the statute. But the purpose of the statute is to prevent fraud upon individuals charged with participation in transactions coming within its purview, and not upon the public at large. The question, therefore, must be raised and the statute invoked by the party who seeks to defend under it, and not *suo sponte* by the court. If, then, it is the office of the person charged with a promise to raise the question of its invalidity under the statute, the court, if it is to charge the jury concerning the statute, must have timely notice during the trial of his intention to rely upon it. *Henry v. Hilliard,* 155 N. C., 372, 71 S. E., 439; 25 R. C. L., 692, n. 9. Otherwise his conduct may have the effect of waiving the statute, that being his privilege. *Henry v. Hilliard, supra; McGowen v. West,* 7 Mo., 569, 38 Am. Dec., 468; *Moore Lumber Corp. v. Walker,* 110 Va., 775, 67 S. E., 374; see, also, *Draper v. Wilson,* 143 Wis., 510, 128 N. W., 66.

There was nothing said about the statute here until defendants came to note their exceptions to the charge, which, under our liberal practice, is permitted to be done long after the trial in making up the case on appeal. It is then, however, too late to apprise the court of an intention to rely upon the statute of frauds, and, indeed, an attempt to do so in this manner is ineffectual. *Cozart v. Land Co.,* 113 N. C., 294, 18 S. E., 337; *Ogburn v. Booker,* 197 N. C., 687, 150 S. E., 330; *Render v. Lillard,* 61 Okla., 206, 160 Pac., 705; *Moore Lumber Corp. v. Walker, supra.*

In *Henry v. Hilliard, supra,* the court summarized the methods by which one charged with such a promise may invoke the statute. "The party to be charged may simply deny the contract alleged, or deny it and set up a different contract, and avail himself of the statute, without pleading it, by objecting to the evidence; or he may admit the contract and plead the statute; and in either case the contract cannot be enforced." This has been approved in *Balentine v. Gill,* 218 N. C., 496, 500, 11 S. E. (2d), 456, 458. If the list is not, indeed, comprehensive in its application to all possible situations, it seems clear, at least, that the procedure adopted by defendants is insufficient for the purpose. They did not plead the statute, and, while denying the contract, they did not follow this up by objection to the parol evidence offered to prove it.

Where the defendant relies upon a denial of the contract and objection to the evidence by which it is sought to be proved, he merely brings the plaintiff to an *impasse,* because by the rules of evidence he is not permitted to show by parol a contract which the law requires to be in writing, *Holler v. Richards,* 102 N. C., 545, 9 S. E., 460; *Browning v. Berry,* 107 N. C., 231, 235, 12 S. E., 195, 196; *Jordan v. Furnace Co.,* 126 N. C., 143, 35 S. E., 247; *Luton v. Badham,* 127 N. C., 96, 37 S. E., 143—unless, indeed, that contract has been written and lost or destroyed, or is otherwise rendered unavailable, *Gwynn v. Setzer,* 48 N. C., 382; *Chair Co. v. Crawford,* 193 N. C., 531, 137 S. E., 577. The rule that a denial of the contract will raise the question of the statute of frauds only where the complaint shows the contract to be in writing, while very general, does not seem to obtain here. *Jordan v. Furnace Co., supra.*

But there are errors brought up by defendants' exceptions which cannot be overlooked. We find no evidence that would bind the *feme* defendant by the promise or contract upon which the plaintiff sues. The defendants not only objected to the submission of the issue as to the liability of Mrs. Steele, but further strengthened their position by exceptions to omissions in the charge of any proper application of the law to the evidence respecting her liability if there should be any evidence to support it.

As to Grace B. Steele, the motion for judgment as of nonsuit should have been allowed. As to Thomas H. Steele, the objectionable issue presents an inseparable proposition, and defendants' objection to its submission is good. The defendant is entitled to an issue which will determine his liability without the involvement of any other person as procurer where there is no evidence to support it. *Coltrane v. Laughlin,* 157 N. C., 282, 72 S. E., 961; *Clinard v. Kernersville,* 217 N. C., 686, 688, 9 S. E. (2d), 381, 382. For this error, he is entitled to a new trial.

No. 380. There are exceptions applicable to this case alone, and one which goes to its root—based upon refusal of the motion to dismiss it for want of jurisdiction in the justice's court to entertain it. This refers to the inability of plaintiff to split up his cause of action for materials furnished under one indivisible contract so that, at his convenience, the items might be divided and suits prosecuted and judgments obtained on them separately. Whatever may be the rights of a defendant who has suffered such an action to go to judgment before a justice of the peace, without appeal, and to what extent a judgment so obtained may affect a suit subsequently brought on the same contract as *res adjudicata, Jarrett v. Self,* 90 N. C., 478, we need not discuss upon this appeal. Defendants furnished sufficient record evidence to show the bringing of another action in the Superior Court for materials furnished on the same contract, and the fact is admitted in the brief. In fact, both

cases were tried together. The plaintiff has no more right to split up his cause of action and try one part in the justice's court and one part in the Superior Court than he has to try it piecemeal in the magistrate's court. The motion to dismiss the action brought before the justice of the peace for lack of jurisdiction should have been allowed. *Boyle v. Robbins,* 71 N. C., 130; *Jarrett v. Self, supra; McPhail v. Johnson,* 109 N. C., 571, 13 S. E., 799. It is unnecessary to consider other exceptions in the record.

In No. 381,

As to Grace B. Steele, Reversed.

As to Thomas H. Steele, New Trial.

In No. 380, on defendants' motion to dismiss for want of jurisdiction, Reversed.

ZEB MERRELL v. CARL R. STUART.

(Filed 19 November, 1941.)

1. Pleadings § 20—

Upon demurrer, the allegations of fact contained in the complaint and relevant inferences of fact necessarily deducible therefrom must be taken as true.

2. Champerty § 1: Contracts § 7b—Contract between layman and attorney under which layman agrees to procure evidence for prosecution of action for third party for percentage of recovery held champertous and void.

The facts alleged in the complaint were to the effect that plaintiff, a layman, went to defendant, an attorney, and disclosed that he had knowledge of a cause of action existing in favor of a third person against the administrator of the estate of such third person's putative father to recover a portion of the estate, that the parties agreed that defendant should be attorney in such action, that plaintiff should make investigations and procure witnesses, and should receive as compensation for his services one-fourth of any recovery, and that thereafter plaintiff caused such third person to employ defendant upon contingent fee. *Held:* The contract alleged is champertous and void as being against public policy, and defendant's demurrer to the complaint was properly sustained.

3. Same—Courts will not aid recovery based on champertous contract.

Where an attorney procures judgment for his client and holds the contingent fee, the champertor seeking to recover from the attorney the amount agreed upon as compensation for his services under the champertous contract may not contend that even though the champertous contract is void the attorney nevertheless holds that part of the recovery in trust for him, since under the maxim *ex turpi contractu non oritur actio* the law will not aid him in any recovery, the question of the attorney's

right to that part of the recovery agreed to be paid the champertor being a matter between the attorney and his client, who is not a party to the action.

APPEAL by plaintiff from *Gwyn, J.*, at regular August Term, 1941, of MADISON.

Civil action to recover on contract, heard upon demurrer to complaint.

Plaintiff in his complaint alleges that he and defendant are residents of Madison County, North Carolina; that defendant is an attorney at law engaged in the practice of his profession in said county; that prior to 1 December, 1938, one Charley Chandler, a native and former resident of Madison County, died domiciled in Kentucky, leaving an estate of the value of about $100,000; that "Charley Chandler was the putative father of a daughter born out of wedlock, whom he recognized and regarded as his child, and for whom he had contracted and agreed to make suitable provision out of his estate"; that during his residence in North Carolina prior to moving to Kentucky, said Charley Chandler was a neighbor and friend of plaintiff, and plaintiff had some general knowledge of his plans and promises to provide for his said daughter; that upon the death of Chandler others laid claim to all of his property and refused to share it with his daughter, who was compelled to sue for same.

Plaintiff further alleges:

"7. That plaintiff conferred with defendant in regard to instituting and prosecuting proper legal action to recover from the estate of Charley Chandler, and from those who had taken possession of all of his property, the share thereof which he had promised and agreed to give to his said daughter; and thereupon it was mutually agreed by and between plaintiff and defendant that the defendant would handle such legal action and for his professional services should receive one-fourth part of the amount recovered plus his actual expenses and that the plaintiff for his services in conducting the necessary and indispensable investigations to discover the facts and the names and whereabouts of witnesses and other services required in the preparation of said action for trial should receive one-fourth part of the amount recovered, less his share of expenses advanced and paid out by the defendant.

"8. That in pursuance of said agreement between plaintiff and defendant, and at the special instance, request, and solicitation of the defendant, plaintiff caused the daughter of the said Charley Chandler to call at the office of the defendant in Marshall and to sign the contract prepared by defendant authorizing and directing the institution and prosecution of said legal action and agreeing to pay one-half of the amount recovered therein as full compensation and settlement for services rendered therein by plaintiff and defendant.

"9. That more than a quarter of a century elapsed between the date of the birth of his said daughter and the date of the death of Charley Chandler, during most or all of which time he was absent from the State of North Carolina and residing in the State of Kentucky, and during which time many of the witnesses who knew of his promise and agreement to provide for his said daughter had died or moved away from Madison County, and it was therefore necessary for plaintiff to conduct an extended search and inquiry, to spend much time in travel and to question a large number of people in different sections of the country, and to make two or three trips to the State of Kentucky, in order to discover the facts upon which the defendant could rely in conducting said legal proceedings and prosecute the same to a successful issue, and plaintiff's said services represented the major part of all services rendered in said action and were reasonably worth, and plaintiff earned and was justly entitled to receive one-fourth part of the amount recovered in said action."

The plaintiff further alleges that upon the trial in Kentucky the daughter of Charley Chandler recovered judgment against his estate for $10,000, and later compromised it for $9,000, which defendant received "in his capacity as an attorney and in trust for the daughter of Charley Chandler and this plaintiff, and for himself, according to the respective rights and interests of each . . . under the aforesaid contracts," and is indebted to plaintiff in the sum of $2,250.00, less $50.00 allowance for expense and advancements made.

Defendant in apt time demurred to complaint for that it fails to state a cause of action: (1) In that the contract alleged is contrary to good morals and the public policy of this State, and is illegal and void under the laws of North Carolina. (2) In that it appears upon the face of the complaint "that the services alleged to have been rendered were voluntary upon the part of the plaintiff, that the plaintiff had no interest in the matters in litigation, and that any acts plaintiff alleges he may have done in furtherance of said litigation or assistance to either of the parties thereto was champertous, and that if plaintiff rendered any of the services alleged in the complaint such services were in the nature of maintenance, and that the plaintiff cannot recover for such services if any he rendered."

The court below, upon hearing had by consent at chambers in the courthouse at Asheville, North Carolina, sustained the demurrer.

Plaintiff appeals to the Supreme Court and assigns error.

Jas. E. Rector for plaintiff, appellant.
Smathers & Meekins for defendant, appellee.

WINBORNE, J. That the complaint is subject to successful attack by demurrer, we are in accord with the court below.

At the outset it is appropriate to note that the common law offenses of champerty and maintenance have been considered and condemned in this State, notably in these cases: *Martin v. Amos* (1851), 35 N. C., 201; *Barnes v. Strong,* 54 N. C., 100; *Munday v. Whissenhunt,* 90 N. C., 458. Compare *Smith v. Hartsell,* 150 N. C., 71, 63 S. E., 172.

A review of these cases is deemed pertinent.

In *Martin v. Amos, supra,* the Court held that a bond executed by defendants for payment of $200 to plaintiffs conditioned that plaintiffs "break the will" of a deceased person of whom defendants were widow and next of kin, "or if they failed to break the will, should pay all the costs of the suit that shall be brought," is void on the ground of maintenance and being against public justice. *Nash, J.,* speaking for the Court, said: "The object of all laws is to repress vice and to promote the general welfare of the State; and no one can be assisted by the law in enforcing demands founded on a breach or violation of its principles. Hence springs the maxim of common law *'ex turpi contractu non oritur actio.'* It is the public good that allows a contract to be impeached for the illegality of the consideration . . . A defendant therefore . . . may . . . prove that the consideration upon which it was given is illegal, as being immoral or contrary to public policy. Among the latter the most prominent are contracts affecting the course of justice. They are the most prominent because every individual in the community is interested in the pure and upright administration of the laws," and, continuing, "Maintenance is an offense against public justice, and is defined by Justice Blackstone 4 Com., 134, to be 'an officious intermeddling in a suit that no way belongs to one by maintaining or assisting either party, with money or otherwise, to prosecute or defend it . . . Champerty is a species of maintenance being a bargain with a plaintiff or defendant to divide the subject in dispute, if they prevail, whereupon the champertor is to carry on the suit at his own expense.' All contracts, then, founded upon either or both of these offenses are absolutely void. In this case . . . there was an officious intermeddling by plaintiffs in a suit that no way concerned them, and assisting the obligors with money in carrying on a suit to be commenced. Such a contract is immoral and illegal, and a court of law cannot lend its aid to enforce it."

In *Barnes v. Strong, supra,* there was involved a contract between a father and son, made during the pendency of a suit against the father, whereby the son agreed to defend the suit for the father, in consideration of receiving a part of the property in controversy, in case of success. The Court held the contract to be within the prohibition of the common law against champerty and hence void. *Battle, J.,* writing for the

Court, said: "Maintenance in a court of justice is 'where one officiously intermeddles in a suit depending in any such court which no way belongs to him, by assisting either party with money, or otherwise, in the prosecution or defense of any such suit.' 1 Hawk. P. C., ch. 27, Tit. Maintenance. 'Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it.' *Ibid.*, Tit. Champerty.

"These offenses are of the same nature, the latter being an aggravated species of the former." And, continuing, it is said that from the authorities on the subject, champerty is an offense at common law, and prevails in this State, being retained under the common law statute in 1 Rev. Stat., chapter 22 (now C. S., 970). The Court further cited the case of *Lathrop v. Bank,* 9 Metcalf, 489, in which the Supreme Judicial Court of Massachusetts stated: "Maintenance and champerty . . . are deemed illegal, not from the consideration that all the expenses of the litigation are to be borne by a stranger, but in reference to the evils resulting from officious intermeddling, and upholding another's litigation by personal services as well as money."

In *Munday v. Whissenhunt, supra, Merrimon, J.,* writing for the Court, said: "One Jones had brought his action in the Superior Court of Alexander County against the testator of the defendants, to recover a tract of land. The plaintiff in this action was in no way a party to or interested in that suit. He was a stranger to it, and not related to the defendant therein. He was not a lawyer, but a layman, and not authorized to manage or defend suits for other people in courts of justice. Nevertheless, he entered into a contract, the substance of which was that the plaintiff in this case should aid the defendant in the action mentioned, in defending and managing his case, and receive as compensation for his services in that respect one-half of the land in controversy, or one half its value, if the defendant should secure it, or if the suit should be compromised, then one-half of whatever might be realized or saved by such compromise; and if the defendant should entirely fail of success, the plaintiff was in that case to get nothing for his services. This comes clearly within the meaning of maintenance and champerty. It was not the business of the plaintiff to advise about and manage law suits, and he had no authority to do so. He interfered in a litigation that in no way concerned him, and engaged to help one of the parties to it (the defendant), exactly how, does not appear, but in some effective way, and to receive as pay for his services one-half of whatever advantage might be realized by his employer. This is precisely what the law forbids. It does not tolerate or permit such interference. If the plaintiff might so interfere in the case referred to, he may do so in any case, and to any extent. If he may do so, every other person may do likewise; and it is

easy to see that the result would be that all manner of combinations and conspiracies would be brought about to prevent and stifle justice, sometimes in one way and sometimes in another. It is a wise, wholesome and necessary provision of the law, justified by the experience of ages, that men shall not interfere in lawsuits in which they have no interest, to help one party or the other in consideration of a part of the fruits of litigation. Such contracts are not only invalid, but it is indictable at the common law to so interfere."

On the other hand, in *Smith v. Hartsell, supra,* the Court, in opinion by *Hoke, J.,* held that an agreement of a party to give aid in the prosecution of a suit in the determination of which he has an actual interest is not invalid for maintenance or champerty. But it is said that: "This position in no way conflicts with the decision of this Court in *Munday v. Whissenhunt,* 90 N. C., 458."

Furthermore, the policy of the law in this State as to contracts in contravention of good morals or of the public policy of the State is further exemplified in *Pierce v. Cobb,* 161 N. C., 300, 77 S. E., 350, and in *Waggoner v. Publishing Co.,* 190 N. C., 829, 130 S. E., 609. In the former, in holding certain notes void, payment of which was conditioned upon certain divorce being obtained in a court of competent jurisdiction, the Court, through *Walker, J.,* said: "No contract which is against good morals or the public policy of the State will be enforced by its courts. If the consideration upon which it is based is illegal, the courts will leave the parties where it found them, and will lend their aid to neither of the parties. The law will give no sanction to a transaction which involves the violation of its principles, nor will it afford a remedy to compel either of the parties to perform its obligation . . . When parties are *in pari delicto* in respect to an illegal contract, and one obtains advantage over the other, a court will not grant relief"; and in the *Waggoner case, Stacy, C. J.,* speaking to the subject, uses this language: "It is undoubtedly the law that whatever contravenes sound morality, or is *contra bonos mores,* vitiates any contract and renders void any engagement founded upon it. *'Ex turpi contractu actio non oritur'* was the maxim of the common law and it is still good today. No action can be maintained on an immoral or iniquitous contract. *Munday v. Whissenhunt,* 90 N. C., 458. The courts will not paddle in muddy water, but in such cases the parties are remitted to their own folly."

Moreover, the courts generally hold that a contract between an attorney at law and a layman whereby the layman, in consideration of a share of the attorney's fee, or something else of value, undertakes (1) to procure the employment of the attorney by a third person to prosecute contemplated litigation, or (2) to furnish evidence to an attorney, who is employed in existing or contemplated litigation, is champertous and con-

trary to public policy. 14 C. J. S., 369, C. & M., sec. 28; *Langdon v. Conlin,* 67 Neb., 243, 93 N. W., 389, 60 L. R. A., 429, 10 Am. St. Rep., 643, 2 Ann. Cases, 834; *Holland v. Sheehan,* 108 Minn., 362, 122 N. W., 1, 23 L. R. A. (N. S.), 510, 17 Ann. Cases, 687; *Johnson v. Higgins* (Del.), 7 Boyce, 548, 108 A., 647; *Carey v. Gossom,* 204 Mo. App., 695, 218 N. W., 917; *Brown v. Durham* (Okla.), 53 P. (2d), 551; *Duteau v. Dresbach* (Wash.), 194 P., 547, 16 A. L. R., 1430.

In *Langdon v. Conlin, supra,* a case strikingly similar to that at bar, this headnote epitomizes holding of Supreme Court of Nebraska in this language: "A contract between an attorney and one who is not such an attorney, by which the latter agrees to procure employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after the procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy and void."

Also, in *Holland v. Sheehan, supra,* it is held by the Minnesota Supreme Court that, "A contract between a layman and a lawyer, by which the former undertakes and agrees in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void."

And in *Duteau v. Dresbach, supra,* the Supreme Court of the State of Washington, holds that "A contract by a layman with an attorney who has taken a case on a contingent fee, to seek out the witnesses and keep in touch with them and assist in every way possible to obtain a judgment, for a share in the fee, is void as against public policy."

Furthermore, there is a well defined rule that an agreement by a layman, who is a stranger in interest or relationship, to carry on the prosecution of a suit for a share in the recovery is champertous and void. This is true whether strictly conforming to the definition of champerty or not. 10 Am. Jur., 561, C. & M., 15 and 16. See, also, Annotations 16 A. L. R., 1433.

Besides, an agreement by a person without prior interest in a claim or controversy becomes champertous or contrary to public policy when it contemplates litigation and, for a share of the recovery, calls for procurement of evidence essential to success. 14 C. J. S., 356, C & M., sec. 23.

On the other hand, a contract of employment simply to secure information concerning a case or to ascertain the testimony available for a fixed compensation is generally held not to be in contravention of public policy, and under such circumstances it is immaterial whether the person employed be an attorney at law, a professional detective, or a mere layman. See Annotations 16 A. L. R., 1433, at 1435. See, also, *Mfg. Co. v. Bank,* 145 N. C., 319, 59 S. E., 72.

In the present action, accepting as true the allegations of fact contained in the complaint, and relevant inferences of fact, necessarily deducible therefrom, as we must do in testing by demurrer thereto the sufficiency of the complaint to state a cause of action, *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Toler v. French,* 213 N. C., 360, 196 S. E., 32; *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369; *Parks v. Princeton,* 217 N. C., 361, 8 S. E. (2d), 217, this is the case: Plaintiff, a layman, friend and former neighbor of Charley Chandler, knowing that Chandler, formerly a resident of Madison County, North Carolina, and putative father of a "daughter born out of wedlock" more than a quarter of century before, for whom he had agreed to make provision out of his estate, had died in Kentucky, leaving a large estate there which was then claimed by others, who refused to share it with her, and having "some general knowledge" of Chandler's plans and promises in that respect, conferred with defendant, an attorney at law, in regard to a suit by the daughter to recover a share of the estate of Chandler. Whereupon, plaintiff and defendant agreed among themselves that defendant would be the lawyer in the case, and that plaintiff would get up the evidence "required in the preparation of said action for trial," and each would receive a fourth of the recovery. And then, pursuant to that agreement, plaintiff, "at the special instance, request and solicitation of defendant," "caused the daughter of Chandler to call at the office of defendant" and "to sign the contract, prepared by defendant, authorizing and directing the institution and prosecution of such legal action" and agreeing to pay one-half of the amount recovered thereon "as compensation for services rendered by defendant and by plaintiff."

Such a contract between a layman and an attorney at law, in the light of the principles hereinabove stated, is contrary to public policy and void, and will not support a cause of action in this State.

However, it is contended by plaintiff in brief filed in this Court that defendant, by virtue of his office as attorney at law, obtained and holds in trust the one-fourth of the amount recovered in the suit in Kentucky, now claimed by plaintiff. Even so, under the facts as alleged, plaintiff may not profit thereby. This is a matter for the consideration of the daughter of Charley Chandler, in whose behalf the recovery was obtained. She is not now before the Court, and her right, if any, to said fund is not now presented.

The judgment below is

Affirmed.

ALBERT V. MEDLIN v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

(Filed 19 November, 1941.)

1. Insurance § 34a—

An insured, even though permanently disabled, is not totally disabled within the meaning of a disability clause in a life insurance policy if he is able to engage with reasonable continuity in his usual occupation or in any occupation that he is physically and mentally qualified to perform substantially the reasonable and essential duties incident thereto.

2. Insurance § 34e—Insured's own evidence held to show that he was not totally disabled within meaning of disability insurance.

In this action by insured to compel insurer to continue to pay him disability benefits under the provisions of the policy of insurance in suit, insured's own evidence, considered in the light most favorable to him, *is held* to show that notwithstanding insured's admitted permanent disability during the period in question, insured performed executive and supervisory duties in connection with his fireworks and trucking businesses, that his activities resulted in substantial profit and amounted to a great deal more than "odd jobs of a comparatively trifling nature" and therefore insured was not totally disabled within the terms of the disability clause in suit, and insurer's motion to nonsuit should have been allowed.

APPEAL by defendant from *Pless, J.*, at February Term, 1941, of WAKE.

On 6 November, 1922, the defendant issued to the plaintiff a life insurance policy for $4,000.00, containing, *inter alia,* the following provision: "If the Insured, after payment of premiums for at least one full year, shall, before attaining the age of sixty years and provided all past due premiums have been duly paid and this Policy is in full force and effect, furnish due proof to the Company at its Home Office either (a) that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, or (b) . . . The Company will, during the continuance of such diability, waive payment of each premium as it becomes due, commencing with the first premium due after approval of said due proof. . . . The Company will, during the continuance of such disability, pay to the Insured a monthly income at the rate of ten dollars for each one thousand dollars of the face amount of this Policy."

The defendant waived the premiums due on and paid the plaintiff the permanent and total disability benefits provided by the policy from 1932 to 1 January, 1939, when it notified plaintiff that it would no longer

waive premiums or pay benefits. Whereupon, the plaintiff instituted this action against the defendant to compel the further waiver of premiums and a continuation of the payment of the disability benefits.

The cause was submitted to a jury upon the following issues: "Has the plaintiff, since January 1st, 1939, been totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit and from following any gainful occupation? 2. What amount, if any, is the plaintiff entitled to recover of the defendant?"

The jury answered the first issue "Yes," and the second issue "Payment in full, with interest." There was an agreement between the parties that in the event the first issue should be answered in the affirmative the second issue should be answered as it was answered, and in the event the first issue should be answered in the negative the second issue should be answered nothing. There was no controversy as to the amount involved, the sole question being as to whether the plaintiff was entitled to recover any amount whatsoever.

From a judgment for the plaintiff predicated upon the verdict and the agreement the defendant appealed, assigning errors.

Bunn & Arendell for plaintiff, appellee.
Pou & Emanuel and Louis W. Dawson for defendant, appellant.

SCHENCK, J. The sole question presented by the exceptive assignments of error is as to whether the court erred in refusing to allow the defendant's motion to dismiss the action or for judgment as in case of nonsuit duly lodged when the plaintiff had introduced his evidence and rested his case and renewed when all the evidence on both sides was in. C. S., 567.

The question presented involves the interpretation of and the application to the evidence in the case of the clause in the policy which reads: "that he (the insured) has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation."

The appellant admits in its brief that there is evidence of the insured's being "permanently disabled" but denies that there is evidence of his being totally disabled, its brief reading as follows: "It may be frankly conceded at the outset that no attempt was made to controvert the plaintiff's testimony as to his physical condition; but the defendant contended that whether or not the alleged physical disability did exist, the plaintiff's own evidence and that of his witnesses demonstrated conclusively that

the plaintiff was not only not prevented from performing work for gain or profit, but that he did in fact regularly perform such work and did engage in various gainful businesses; and therefore that he was not entitled to any recovery under said disability provisions."

So that the question ultimately left for us is was there sufficient evidence to be submitted to the jury upon the issue of the insured's (the plaintiff) being totally disabled so that he is, and will be, wholly prevented from performing any work for compensation, gain or profit, and from following any gainful occupation.

The testimony of the plaintiff himself when construed in the light most favorable to him tends to show that in 1919, while a traveling shoe salesman, he conceived the idea of a fireworks business as a side line, and that he opened up a fireworks stand on the side of the highway; that in 1922 he extended this business by engaging in the wholesale of fireworks under the trade name of Dixie Fireworks Company; that the plaintiff married in 1925; that he continued his shoe sale business and his fireworks business from 1922 till 1929; that in 1929 he discovered his eyesight was failing and gave up his shoe sale business; that he bought a local insurance business in Zebulon and operated it at a loss for a year and a half and sold it out; that in 1932 he filed a claim with the defendant company alleging total and permanent disability, and commencing in May, 1933, the company paid him disability benefits through December, 1938, when it ceased such payments; that the fireworks business increased from year to year, that he did not attend to the office work, as this was done by Mrs. Medlin, that he "directed the employees around there and told them what to do," and that he "hired and fired people around the Dixie Fireworks Company," that both he and his wife signed the checks for the business, that the employees were paid by him and Mrs. Medlin, and she and he, who owned the business, shared in the profits; that he does his banking with the Peoples Bank & Trust Company, and from year to year he has given financial statements to it, and negotiated with it about borrowing money and that he and his wife signed the notes given to the bank; that in 1935 his wife and he serviced stands on a 50-50 basis, that is, they supplied the merchandise and shared the profits equally with the persons operating the stands; that his business on this basis continued to grow, "so much so that I engaged lobbyists in the 1937 Legislature to oppose fireworks bills," and that he came to Raleigh and made a personal appearance before the committee in opposition to the fireworks bills; in 1937 he signed a radio contract with WPTF, and gave a check for $100.00 for radio advertising, that either he or his wife signed radio contracts with Rocky Mount and Charlotte; that in 1937 he went north for several weeks in connection with the sale of fireworks and opened stands for the sale thereof in Washington and

southern Maryland; there the salesman, Mr. Tayman, sold the goods on commission basis and "at the close of the season he brings the money in and gives it to Mrs. Medlin while I am there, I don't leave Maryland and Washington until that season is ended, and we have settled with Mr. Tayman; and that business is in the name of the Dixie Fireworks Company of Zebulon"; that he got in touch with Mr. Tayman and put in a little place at Cottage City, Maryland, in 1936 or 1937; that he was also up there at Cottage City, Maryland, in 1938, and in 1938 he went to both New York and Boston to see fireworks companies; "in 1938 we shipped some fireworks out of Zebulon into other States, into Ohio principally. The way I got orders from way up there was they sent samples, Philip knew these people and that was Philip Seigelof's business. . . . Philip Seigelof is an Italian; I think I first met him at Havre de Grace, Maryland. I am not sure whether this was in 1937 or 1938. He was introduced to me as a fireworks manufacturer. . . . Up until the time I met Seigelof all we did was to job fireworks; we bought them and sold them; and when I met Seigelof I got the idea of having fireworks manufactured at Zebulon on our place of business. . . . After he had been there awhile I built a number of small one-room houses to accommodate the manufacturing for Seigelof, these were built on my property in or near Zebulon. . . . Mr. Pierce was an employee of Dixie Fireworks Company, and he had orders from me and Mrs. Medlin to get whatever Seigelof needed, and it was charged to him, and the Dixie Fireworks paid for it. . . . The arrangement with Mr. Seigelof continued until his death. I helped manufacture or helped finance that manufacturing business. I am familiar with the catalogues. About the material that went in there, Mrs. Medlin stuck them things on the page and Mr. Pierce did most of the writing; and I knew that most of it was going in. Mrs. Medlin and I both told him what to write. In the catalogue it reads: 'We are the largest distributors of fireworks in the entire South.' I think we are the largest distributor of fireworks in the entire South. . . . In addition to that we imported fireworks from China"; that in 1938 he had a warehouse on the Washington-Baltimore Boulevard at Cottage City, Maryland, and he spent two or three weeks there around the 4th of July season 1938, that he purchased a license for the business there which was paid for by him and was issued in his name; that he has been "up there," Cottage City, Maryland, in 1939, and every year since for about three weeks during the 4th of July season, and paid licenses to carry on the fireworks business, that he was finally required to pay both wholesale and retail license to Cottage City; in 1939 he signed a contract with the National Fireworks Company of Boston in the name of the Dixie Fireworks Company for $2,254.00 worth of fireworks; that in 1940 he came to Raleigh and rented a room

and displayed an advertisement in the lobby of the Sir Walter Hotel and negotiated unsuccessfully for fireworks business incident to the State Fair, and repeated this experience in 1941; that in 1935 he signed a financial statement to the bank showing his net worth to be $26,875.00, in 1936 he signed a similar statement showing his net worth to be $28,700.00, in 1938 he signed a similar statement showing his net worth to be $37,073.82, and in 1939 he signed a similar statement showing his net worth to be $46,365.25; that he submitted all of these statements to the bank from time to time when he was trying to borrow money from it, and that they were correct.

The testimony of Mrs. Medlin, the wife of the plaintiff, is practically to the same effect as that of her husband, except she states "I am the operating head or manager of the business (fireworks business). . . . Mr. Medlin is not physically able to do any work or assume any responsibilities. The only thing that he does with this fireworks business is he signs some checks, either Mr. Pierce or I will write those checks out and he signs them and he answers the telephone sometimes. Mr. Medlin's presence is not necessary at Zebulon for the operation of the Dixie Fireworks Company, because it has been run when he wasn't there for three months at a time. When he goes to Hot Springs the office is not closed up, it is open and the business goes on exactly like it does when he is there. . . . The fireworks season lasts two months out of each year, that includes the 4th of July and Christmas."

There being ample evidence of the plaintiff's permanent disability, the ultimate question confronting us is reduced to whether the testimony of the plaintiff himself negatives his allegation and contention that he is, and will be, wholly prevented from performing any work for compensation, gain or profit, and from following any gainful occupation.

This Court has frequently construed total and permanent disability clauses in life insurance policies to mean that the insured cannot recover disability benefits if he is able to engage with reasonable continuity in his usual occupation or in any occupation that he is physically and mentally qualified to perform substantially the reasonable and essential duties incident thereto. This rule of law has been given application to the extent of denying benefits to an insured who, though suffering from a severe disability, continues to work at a gainful occupation.

In *Thigpen v. Ins. Co.*, 204 N. C., 551, 168 S. E., 845, the widow of a farmer and the beneficiary under an insurance policy held by her husband, containing a waiver of premium and disability benefit clause to the effect that if the insured should furnish proof that "he has been wholly and continuously disabled by bodily injuries or disease other than mental, and will be permanently, continuously and wholly prevented thereby from pursuing any occupation whatsoever for remuneration or

profit," such waiver and benefits would accrue, instituted suit against the company issuing the policy, alleging that she had furnished proof that the insured prior to his death was so disabled and that the waiver of premiums and the payment of the disability benefits had been refused. The evidence as to whether the insured was wholly disabled was conflicting, except it was not controverted that he had received $40.00 per month as a court crier up to the time of his death. In upholding a judgment of nonsuit this Court said: "The ultimate question is whether the infirmities and disabilities of the insured wholly prevented him 'from pursuing any occupation whatsoever for remuneration or profit.' Must such a question be submitted to a jury, or, upon admitted facts, is it a question of law for the court? Ordinarily, such questions must be submitted to a jury; but in the case at bar it is admitted that from January till June, a few days prior to his death, the insured received $40.00 per month as compensation for his services as court crier for the county court of Pitt County. It is true that physicians and many other prominent citizens of the community testified that the insured was neither physically nor mentally capable of discharging such duties. Nevertheless it is beyond question that the services of the court crier were satisfactory to the public authorities, because they actually paid him his monthly stipend of $40.00."

In *Boozer v. Assurance Society,* 206 N. C., 848, 175 S. E., 175, we find the following: "Conceding that there was evidence at the trial tending to show that plaintiff suffered a permanent disability from disease, while he was insured by the defendant, and before he had attained the age of 60 years, we must hold that there was no evidence tending to show that the disability was total. All the evidence shows that plaintiff was able to perform and did perform the duties of his employment up to and including the day of his discharge, which terminated his insurance. For this reason there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. See *Thigpen v. Ins. Co.,* 204 N. C., 551, 168 S. E., 845."

The principle that an insurance company is liable to an insured under policies of insurance containing disability provisions similar to the policy in suit only if the insured becomes both permanently and totally disabled to pursue any occupation for compensation or profit has been enunciated in many cases in this jurisdiction. See *Hill v. Insurance Co.,* 207 N. C., 166, 176 S. E., 269; *Whiteside v. Assurance Society,* 209 N. C., 536, 183 S. E., 754; *Lee v. Assurance Society,* 211 N. C., 182, 189 S. E., 626.

The evidence of the plaintiff not only fails to show that the insured in the case at bar was wholly disabled to pursue any occupation for gain or profit but shows affirmatively that he, together with his wife, operated

and conducted a very successful business, a business that was his "idea" and which was well on the way of development when he was married, and which continued to grow by such leaps and bounds that the plaintiff was able after being forced by the failure of his eyesight in 1929 to give up his "regular line," the shoe sale business, to make a livelihood for his family and himself out of the former "side line," the fireworks business, and to increase his net worth thereby from 1935 to 1939 from $26,875.00 to $46,365.25, nearly $20,000.00.

We do not concur in the contention of the appellee's brief that such services as the evidence tends to show the plaintiff rendered to the fireworks business or such things as the plaintiff did therefor were mere "odd jobs of a comparatively trifling nature," which would not preclude recovery, as was the case in *Leonard v. Insurance Co.*, 212 N. C., 151, 193 S. E., 166; *Smith v. Assurance Society,* 205 N. C., 387, 171 S. E., 346.

The services the plaintiff rendered and the things he did were executive in their nature, but nonetheless material and essential for the very existence of the business. One cannot read the record without being impressed with the business acumen, even genius, the plaintiff displayed in his conception, organization and operation of the fireworks business. Handicapped, as he doubtless was by his faulty eyesight and physical infirmities, he nevertheless kept a constant and careful supervision of the business, being continuously on the lookout to extend and increase its volume, making trips and negotiating contracts and looking after the financing and successfully upbuilding of the business to a point where it furnished a livelihood for himself and wife and children, and provided employment for many others, and withal increasing his net worth nearly $20,000.00 in five years. Such services, attended with such results, cannot be properly designated as "odd jobs of a comparatively trifling nature."

The case at bar is distinguishable from *Guy v. Insurance Co.*, 206 N. C., 118, 172 S. E., 885, wherein an involuntary nonsuit was reversed, in that the plaintiff in the *Guy case, supra,* was a farmer, accustomed to doing farm labor, and the evidence tended to show that while he could no longer do farm labor, he could nevertheless "direct his business of farming for compensation and profit"—the holding being in effect that since the evidence tended to show that the plaintiff could no longer perform the farm labor, which he was accustomed to perform, although he could direct his business of farming for compensation and profit, that an involuntary nonsuit was erroneously entered. In the case at bar the plaintiff was not a laborer, but an executive, the originator, organizer and operator of the business, and his own testimony tends to show that he has continuously remained the executive head of the business and has

continuously performed the services that he rendered the business from its incipiency. The fact that the plaintiff was unable to perform physical labor for the business, which the evidence fails to reveal he ever performed, did not disable him from performing the work he had been accustomed to perform for the business, executive service, for compensation and gain.

We have omitted to comment upon the evidence relating to the hauling and trucking business of the plaintiff for the reason that the fireworks business is by all of the evidence the principal source of occupation and income of the plaintiff. However, it appears that the plaintiff's activities with relation to this business were proportionately as great and as essential as they were in behalf of the fireworks business—executive and supervisory in their nature.

We reach the conclusion that the testimony of the plaintiff himself and his other evidence, when construed in the light most favorable to him, giving him the benefit of every reasonable inference and intendment to be drawn therefrom, while it tends to establish the plaintiff's permanent disability, it negatives his allegation and contention that he has been, since 1 January, 1939, and will remain totally disabled, so that he will be wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, and that, therefore, the motion of the defendant for a judgment as in case of nonsuit should have been allowed. The case is remanded that judgment may be entered accordant with this opinion.

Reversed.

BROCK BARKLEY, ADMINISTRATOR OF JOHN M. PRIVETTE, DECEASED, v. J. L. THOMAS AND C. B. HELMS.

(Filed 19 November, 1941.)

1. Appeal and Error § 37e—

Where the parties waive a jury trial and agree that the court should hear and determine the entire controversy, the findings of fact made by the court, supported by competent evidence, are as binding and conclusive as the verdict of a jury.

2. Executors and Administrators § 13b—

A petition for the sale of lands to make assets to pay debts of the estate must set forth the amount of debts outstanding against the estate, the value of the personal estate and the application thereof, a description of all the legal and equitable real estate of the decedent with the estimated value thereof, and the names, ages, and residences, if known, of the devisees and heirs at law, C. S., 79, and further the devisees and heirs at law must be made parties to the proceedings, C. S., 80.

3. Same—

An administrator cannot maintain an action against his intestate's grantee to declare the estate conveyed forfeited upon the contention that the grantee had breached the condition subsequent in the deed, and that sale of the land was necessary to pay debts of the estate, the heirs at law not being parties and the requirements of a petition to sell lands to make assets not being set forth.

4. Deeds § 14b—

An absolute deed followed by stipulation that the sole consideration for the conveyance is the agreement of the parties of the second part to support and take care of the party of the first part for the remainder of his life, with provision that if the parties of the second part fail or refuse to do so then the conveyance should become null and void, creates a fee upon condition subsequent.

5. Same—

The breach of the condition subsequent contained in a deed entitles the grantor during his life, or his heirs after his death, to bring suit for the land or to declare the estate forfeited, but does not entitle the administrator to bring such suit, C. S., 159, not being applicable.

6. Same—Evidence held sufficient to support finding that grantees did not breach condition subsequent.

Findings to the effect that defendants were grantees in a deed containing a condition subsequent that the grantees should support and take care of grantor for the remainder of his life, that the grantees gave the grantor a home until they were advised that he should be cared for in a sanatorium, that he was admitted by the sanatorium as a person unable to pay, that thereafter the grantees paid for his laundry and furnished personal necessities until his death from tuberculosis, that prior to his death the sanatorium was advised of the conveyance but made no effort to have the conveyance canceled during the grantor's lifetime and did not bill grantees for the grantor's maintenance, and that the grantor never requested a reconveyance and made no effort to have the deed canceled, *is held* sufficient to support the court's finding that the grantees did not breach the condition subsequent.

APPEAL by plaintiff from *Johnston, Special Judge,* at 28 July, 1941, Special Term, of MECKLENBURG. Affirmed.

This is a civil action brought by plaintiff, administrator of John M. Privette, against defendants to have a certain deed made by John M. Privette, who died intestate, on 26 August, 1940, set aside and declared null and void.

On 18 March, 1937, a deed was made by John M. Privette to defendants, who agreed to support him the balance of his life—on failure the deed to become null and void. The plaintiff contends that the conditions of the deed were breached and John M. Privette was put in the Mecklenburg Sanatorium, where he died indebted to the Sanatorium in the sum of $1,324.40. "Wherefore, plaintiff prays judgment that the

deed set out in paragraph 4 be set aside and declared null and void to the end that said property may be sold to make assets and for judgment against the defendants for the amount of the rents and profits less any sums expended by the defendants for the care and support of the said John M. Privette."

The defendants denied that they had breached their contract and that the deed was null and void. They allege that they are absolute owners of the real estate conveyed by the deed in fee simple. The defendants further demur *ore tenus* to the complaint.

The judgment of the court below was as follows: "This cause coming on to be heard before the undersigned, at which time a jury trial was waived and the entire matter submitted to the court to determine the rights of the parties; after hearing the pleadings and the evidence offered by both parties the court finds the following facts: That J. M. Privette was a man of some years of age, having a son and daughter, both of whom are living in some western state. He had no other kinsmen in North Carolina; that he was the owner of some real estate on the Statesville Road, near the City of Charlotte, worth anywhere from $650.00 to $1,000.00; that on the 18th day of March, 1937, he conveyed this property to the defendants, Thomas and Helms, by an absolute deed with the following in the face of the deed:

" 'The sole consideration of this conveyance is the agreement of the parties of the second part to give the party of the first part a home with said parties of the second part and support and take care of the said party of the first part for and during the remainder of his natural life, and should they, the said parties of the second part, hereafter refuse or fail to carry out or perform said agreement, then this conveyance shall thereupon become null and void and the party of the first part is entitled in any such event to the immediate possession and use of said property, but due the parties of the second part reasonable compensation for all expenditures and services rendered theretofore on account of this conveyance, less the amount of the worth of the use of said property while in the possession of the said parties of the second part.'

"That immediately thereafter the said Privette went into the home of the defendants, Thomas and Helms, Thomas being a widower, and Mrs. Helms being his daughter, all living in one household; that the said Privette remained in said home until about the middle of April, 1938, when it was noticed that he was coughing a great deal, not resting well at night, etc., and upon advice of friends, Mrs. Helms took him to the Mecklenburg Sanatorium, the same being a public institution run by the County of Mecklenburg for the treatment of tuberculosis, and under the supervision of Dr. Seay. When Dr. Seay examined the said Privette, he found that he was suffering from a far advanced case of tuberculosis,

and advised that for his own health and the health of the public that the said Privette should be committed to said hospital, and there remain for treatment. He further advised that all members of the Thomas and Helms household, having been exposed to the sputum of the said Privette, should be examined and see whether or not they had contracted tuberculosis; that thereupon, about the 14th day of April, 1938, the said Privette entered said Sanatorium and remained there until August 26, 1940, when he died as a result of tuberculosis, the sanatorium being unable to arrest the ravages of the disease.

"That when Privette entered the hospital the superintendent in charge of the said hospital was advised that he was without means, and thereupon agreed to take him in to the hospital without pay, but did state that he thought that his friends should pay his laundry bill, which would amount to approximately one dollar per month; that thereafter, and prior to the death of the said Privette, the court being unable to find the exact date, the sanatorium was advised of the conveyance hereinbefore mentioned, but no effort was made on the part of the sanatorium, and no effort was made on the part of the said Privette, to have said conveyance canceled, during the lifetime of the said Privette, and the court is unable to find that Privette ever did request that the property be reconveyed to him or that there had been a failure in consideration.

"The court further finds as a fact that the defendants herein were never forwarded any bills by the sanatorium for any amount other than the laundry bill of the said Privette, and the court further finds that such necessities as a set of false teeth, some pajamas and other things that the said Privette needed personally were furnished to him by the defendants when requested either by Privette or by the hospital, and that the defendants paid such bills as were rendered to them by the sanatorium.

"As above stated, the said Privette died on or about August 26, 1940, in the sanatorium, and thereafter, to wit: upon March 7, 1941, Brock Barkley was duly appointed administrator of his estate by the clerk of the Superior Court of Mecklenburg County and the sanatorium filed with him its bill for $1,323.40, the same being a charge of $1.50 per day for the time that the said Privette was in the said sanatorium, plus certain X-rays and other incidents necessary to his treatment; that no such bill was ever rendered to the defendants during the life of the said Privette.

"The court further finds as a fact that the said Privette was carrying certain insurance in a fraternal order, which insurance had been allowed to lapse, and the defendants paid the back dues to reinstate said insurance, and kept the payments of the same up until his death, which amounted to $....., as shown by the receipts produced by the defendant

Thomas, and as a result thereof, enough money was received from said insurance to properly and decently bury the remains of the said Privette without expense to Mecklenburg County or anybody else.

"Upon these facts the court is of the opinion and so holds that the plaintiff is not entitled to recover, and the action is dismissed. This 8th day of August, 1941. A. Hall Johnston, Judge presiding."

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

James L. DeLaney for plaintiff.
Thaddeus A. Adams for defendants.

CLARKSON, J. In the record is the following: "A jury trial was waived and the entire matter submitted to the court to determine the rights of the parties."

In *Blackburn v. Woodmen of the World,* 219 N. C., 602 (606), we find: "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."

We think, on the facts found by the court below, there being competent evidence to sustain them, that there is no error in the judgment. The property in controversy is real estate. If there was a forfeiture the property would descend to the heirs at law of John M. Privette. To sell land to make assets to pay debts, the method is set out in the statutes as follows:

N. C. Code, 1939 (Michie), sec. 79: "The petition, which must be verified by the oath of the applicant, shall set forth, as far as can be ascertained: 1. The amount of debts outstanding against the estate. 2. The value of the personal estate, and the application thereof. 3. A description of all the legal and equitable real estate of the decedent, with the estimated value of the respective portions or lots. 4. The names, ages and residences, if known, of the devisees and heirs at law of the decedent."

Section 80, in part: "No order to sell real estate shall be granted till the heirs or devisees of the decedent have been made parties to the proceeding, by service of summons, either personally or by publication, as required by law," etc.

In *Neighbors v. Evans,* 210 N. C., 550 (553), is the following: "In *McNeill v. McBryde,* 112 N. C., 408 (411-12), it is said: 'We think, however, that the petition is deficient in that it does not comply with section 1437 of the Code (now C. S., 79), which requires that it shall set forth "the value of the personal estate and the application thereof."

It simply states that the personal estate "is wholly insufficient to pay his (intestate's) debts and the costs and charges of administration." The purpose of the statute, in requiring the particulars therein mentioned to be stated in the petition, was to enable the court to see whether a sale was necessary; but the present allegation wholly fails to give any such information. It is important that the requirements of the statute should be observed, and we must sustain the demurrer upon this ground. *Shields v. McDowell,* 82 N. C., 137.'" *Watson v. Peterson,* 216 N. C., 343 (345).

The provision in the deed was a condition subsequent. *Helms v. Helms,* 135 N. C., 164—rehearing 137 N. C., 206. At page 207, we find: "Then follow the words, if inserted, 'If he fails to support, this deed is to be void.' These are apt words to create a condition subsequent. If no title was to pass, then there was no necessity for declaring that the deed should be void." At pp. 208-9, it is written: "We find in 13 Cyc., 689, the law laid down as held by the Supreme Court of the United States as late as 1878: 'If the condition subsequent is broken, that did not *ipso facto* produce a reverter of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime and after his death by those in privity of blood with him. In the meantime, only the right of action subsisted and that could not be conveyed so as to vest the right to sue in a stranger.' *Rush v. R. R.,* 97 U. S., 613; 1 Jones on Conveyances, 728; *Nicoll v. Railroad, supra* (12 N. Y., 121), where the question is discussed and decided. But where a fee simple without a reservation of rents is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone. It has been said that such possibilities were assignable in equity, but those were interests of a very different character. Chancellor Kent says: 'A court of equity will never lend its aid to divest an estate for the breach of a condition subsequent.' Kent Com., 130."

In *Brittain v. Taylor,* 168 N. C., 271 (273), it is stated: "The stipulation in the deed for support and maintenance is not like those found in the cases to which the learned counsel for defendant has referred in his brief and argument, such as *Helms v. Helms,* 135 N. C., 164; *McCardle v. Kennedy,* 92 Ga., 198 (44 Am. St., 85); and *Pownal v. Taylor,* 10 Leigh, 172 (34 Am. Dec., 725), where the stipulation merely for support and maintenance of the grantor, or someone else, with no words of strict condition or forfeiture was held to be nothing more than a covenant, for the breach of which damages could be recovered, and constituted a charge upon the land. But this provision is not of that kind, for it expressly

stated in the deed that if the grantee failed to comply with the requirement of support and maintenance, the deed should be 'null and void.' This is a condition subsequent by its very terms, and also according to the authorities. . . . (p. 273). The language of the deed under consideration leaves no doubt as to what the parties intended. It is plain, intelligible, and explicit. The grantor conveyed the estate upon the condition that she should be supported, and provided, in order to coerce its performance, that if the grantor failed to do so the deed should be void and of no effect, which means no more or less than the estate should cease in the grantee and revest in her; for if the deed becomes void, the grantee can no longer take under it, and the estate cannot be in abeyance, it must vest in the grantor. . . . (pp. 276-7). It is unquestionably true that not only the grantor, during his life, but his heirs, or privies in blood, after his death, may take advantage of the breach of a condition subsequent, and bring suit for the land or to declare the estate forfeited. Sheppard's Touchstone, 125; Tiedeman on Real Property, sec. 207; *Den ex Dem. Southard v. Central R. Co.,* 26 N. J. L., 21; *Hooper v. Cummings,* 45 Me., 359; *Avelyn v. Ward,* 1 Vesey, Sr., 422; 4 Kent Comm., 127; 2 Cruise Digest, ch. 2, sec. 49. *Ruch v. Rock Island,* 97 U. S., at p. 696, held that 'If the conditions subsequent were broken, it did not *ipso facto* produce a reversion of the title. The estate continued in full force until the proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime and after his death by those in privity of blood with him.' . . . (p. 277). It is not necessary to decide whether anyone other than the grantor and his heirs can take advantage of a forfeiture arising from the breach of a condition subsequent, as the plaintiffs in this case are the heirs of the grantor, Margaret Taylor." *Huntley v. McBrayer,* 169 N. C., 75.

The only question on this aspect: Was there sufficient evidence to show a violation of the condition subsequent? We think not. The court below found the facts on competent evidence. "The sanatorium was advised of the conveyance hereinbefore mentioned, but no effort was made on the part of the sanatorium, and no effort was made on the part of the said Privette, to have said conveyance canceled, during the lifetime of the said Privette, and the court is unable to find that Privette ever did request that the property be reconveyed to him or that there had been a failure in consideration."

C. S., sec. 159, is not applicable under the record facts in this case.

On the entire record we think the facts found by the court below on competent evidence supports the judgment rendered.

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

Affirmed.

W. A. RAYNOR AND H. T. BARTHOLOMEW, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND TAXPAYERS OF THE TOWN OF LOUISBURG, v. THE COMMISSIONERS FOR THE TOWN OF LOUISBURG, W. C. WEBB, MAYOR OF SAID TOWN, AND T. K. STOCKARD, CLERK OF SAID TOWN.

(Filed 19 November, 1941.)

1. Municipal Corporations § 19a—Specifications in belated advertisement for bids and results therefrom held not to meet statutory requirement of competitive bidding.

Plaintiffs restrained commissioners of a municipality from proceeding further under a contract for machinery for its water and power systems on the ground that the commissioners had failed to submit the contract for competitive bidding after due advertisement as required by statute. After temporary order was issued the municipality advertised for bids for parts of machinery manufactured by a particular manufacturer and for diesel engines of a specified horsepower to replace diesel engines of the same manufacturer, as a unit, and specified that bids should state the trade-in allowance for the diesel engines replaced. *Held:* The specifications in the advertisement for bids unnecessarily discouraged the submission of bids for the two new diesel engines which might have been furnished separately by other manufacturers or dealers if the specifications had invited instead of discouraged competitive bidding, and under the circumstances, the belated advertisement, resulting in the submission of only one bid by the manufacturer to whom the contract had been given, and that at the contract price, does not cure any want of authority on the part of the commissioners to enter into the contract.

2. Same—

Ch. 305, Public Laws 1903, does not authorize the town of Louisburg to contract for machinery for its water and sewer system and electric light plant in a sum in excess of $1,000 without submitting the same to competitive bidding after due advertisement. C. S., 1316 (a), 2830.

3. Same—

The requirements of C. S., 1316 (a), 2830, that municipal contracts for expenditures in excess of $1,000 must be submitted to competitive bidding after due advertisement are mandatory, and a contract made in contravention of the statutory requirements is *ultra vires* and void.

4. Same—

The statutory provision that a municipality may let a contract for expenditures in excess of $1,000 without advertisement "in cases of special emergency" constitutes an exception to the general rule, and the commissioners of a municipality may not declare an emergency where none exists and thus defeat the provisions of the law, nor is such finding by the municipal board upon competent evidence conclusive on the courts, but the courts may review the evidence and determine whether an emergency as contemplated by the statute does in fact exist.

5. Same—

The meaning of the word "emergency" within the statutory exception to the rule requiring municipal contracts for expenditures in excess of $1,000 to be submitted to competitive bidding after due advertisement, is not susceptible to precise definition and each case must, to some extent, stand upon its own bottom, but in any event the term connotes an immediate and present condition and not one which may or may not arise in the future or one that is apt to arise or may be expected to arise.

6. Same—Evidence held to show that no emergency existed which would relieve municipality of duty to advertise for bids for municipal power machinery.

Evidence tending to show that the engines used in a municipal water, sewer and power system had been in use for a number of years so that some of them needed replacement and others needed repairs, that a breakdown of one or more engines might result in a failure of the water supply, and that because of the national emergency these conditions were accentuated and the securing of machinery or materials for repairs and replacement was becoming more and more difficult, *is held* insufficient to show "an emergency" such as to relieve the municipality of the requirement of submitting the contract to competitive bidding after due advertisement, since the statute requires advertisement only for one week, it not being made to appear that a successful bidder could not be required to proceed with dispatch in making the required replacements.

7. Taxation § 3b—

Where the expenditure for replacements of machinery for a municipal water and power system are to be paid solely out of the revenues thereof, the hypothesis that the diversion of profits of the systems for this purpose would decrease the amount of profits paid into the general fund and therefore incidentally require an increase in the municipal tax rate is of no significance upon the constitutional limitation upon the increase in the public debt without a vote.

APPEAL by plaintiffs from *Carr, J.*, at Chambers, June, 1941. From FRANKLIN.

Yarborough & Yarborough for plaintiffs, appellants.
Malone & Malone for defendants, appellees.

SEAWELL, J. The plaintiffs, taxpayers of the town of Louisburg, brought this action in behalf of themselves and other taxpayers and citizens to enjoin the defendants, commissioners of the town, from proceeding further under an allegedly *ultra vires* contract with a manufacturer and dealer in diesel engines which the commissioners proposed to buy for use in the municipally owned power plant. The plaintiffs obtained a temporary restraining order, and upon the hearing of the order to show cause, the judge dissolved the injunction. The plaintiffs appealed.

The plaintiffs contend that defendants had no authority to enter into the contract, and that the attempt to do so was void because their action was and is in contravention of C. S., 1316 (a) and 2830 (Michie's Code, 1939), and in violation of the restrictions thereby imposed. C. S., 1316 (a) and 2830 require municipal contracts necessitating the expenditure of $1,000 or more to be submitted to competitive bidding upon one week's advertisement, except in case of "special emergency involving the health and safety of the people or their property."

The defendants admit that they entered into a contract with Fairbanks, Morse and Company to furnish and install certain machinery, including two diesel engines of large horsepower, and to repair and replace parts of machinery furnished by Fairbanks, Morse and Company already in use in the municipally owned power plant, at a price in excess of $40,000, without advertising or submitting the contract to competitive bidding, but they claim such action to be a valid exercise of authority for several reasons; first, that the contract is for replacement of machinery and parts made only by Fairbanks, Morse and Company, and that no other maker or dealer would or consistently could enter into such competitive bidding if advertised; and second, that the transaction falls within the exception to the statutory restriction on the power to contract because of the existence of a "special emergency" within the meaning of the statute. These are the principal contentions; but they further contend that such authority is given them by chapter 305, Private Laws of 1903, and that, at any rate, an advertisement calling for competitive bids and the response thereto by Fairbanks, Morse and Company, all taking place while the restraining order was in force, were curative of any want of authority theretofore existing.

Considering these propositions in somewhat reverse order, we do not regard the advertisement and its results as curing any want of authority on the part of the commissioners to enter into the contract if they had none theretofore, although it was evidently intended to cure the contract made with Fairbanks, Morse and Company, and, on account of the specifications, could scarcely be considered as inviting competition. It was in the following form:

"Bids on Diesel Engines and Equipment

"Sealed bids will be received by the Town of Louisburg, North Carolina, until 5 P.M. May 16, 1941, at the City Clerk's office, for the furnishing and installing of Diesel engines and equipment as follows:

"Two, 225 HP, slow-speed, heavy-duty, Diesel Engine Generating Units, to replace two present 150. HP Fairbanks, Morse semi-Diesel Generating Units, utilizing the existing foundations, and for the change-over of

"One, Fairbanks, Morse 360 HP, Type YVA, Generating Unit, change-over consisting of replacement of heads, cylinders, pistons, connecting rods, bearings, and other miscellaneous working parts, as covered by specifications.

"In submitting bids, trade-in allowance for the two 150 HP Units which are being replaced must be stated.

"The Town proposes to buy this equipment delivered and installed complete, and financed on a basis of a minimum of 72 monthly payments, payable from the net revenues of the light and water departments only, first payment to be made 30 days after completion of installation and acceptance by the town.

"Specifications covering this work are available from the office of the City Clerk.

"The Town of Louisburg reserves the right to reject any and all bids.

"T. K. STOCKARD,
"Town Clerk, Louisburg, N. C."

There was, in fact, no *bona fide* bid in response to this advertisement. Since Fairbanks, Morse and Company, the only concern submitting a bid, declared therein that it was relying upon the original contract, naming the old contract price.

The contention that advertising and competition might be dispensed with on the ground that the required machinery could be furnished only by Fairbanks, Morse and Company is not tenable. The contract could not be considered as one entirely of repair and replacement of parts. It involved furnishing anew two large and powerful diesel engines, the price of which must have constituted the greater part of the large expenditure, and which, no doubt, if the specifications had permitted, might have been furnished by other manufacturers and dealers. These specifications, however, and we do not think by reason of necessity, were framed so as to discourage open competitive bidding.

From an examination of chapter 305, Private Laws of 1903, authorizing the town of Louisburg to issue bonds for the purpose of establishing a system of waterworks and sewage and an electric light plant, it is clear that such statute can in no way affect the present controversy.

Except where the power is legitimately exercised within the limits of the exception therein provided, C. S., 1316 (a) and 2830 (Michie's Code, 1939), prohibiting a municipality from making a contract the estimated cost of which amounts to or exceeds $1,000, unless proposals for the same shall have been invited by advertisement in the manner required by the statute, must be considered mandatory, and a contract made in contravention of its terms is *ultra vires* and void. The exception applies "in cases of special emergency involving the health or safety of the

people or their property." McQuillen, 2nd Ed., Vol. 3, secs. 904-1379. "The requirement of competitive bidding in the letting of municipal contracts is uniformly construed as mandatory and jurisdictional, and nonobservance will render the contract void and unenforceable." McQuillen, *op. cit.*, sec. 1287, pp. 859-860; *Realty Co. v. Charlotte,* 198 N. C., 564, 150 S. E., 665.

The governing board of a municipality cannot declare an emergency where none exists and thus defeat the provisions of a law. While we may treat their determination with some degree of liberality respecting the conditions supposedly giving rise to the emergency, the board does not possess a legal discretion in the matter and its findings are not beyond review. 44 C. J., 102; *Mallon v. Kansas City Water Works,* 144 Mo. App., 104, 128 S. W., 764. Judicial opinion differs somewhat as to the consideration which should be given the declaration of municipal authorities that an emergency exists and the manner in which the evidence upon which the findings are made may be reviewed. *Los Angeles Dredging Co. v. Long Beach,* 210 Cal., 348, 291 Pac., 839; *Continental Construction Co. v. Lawrence,* 297 Mass., 513, 9 N. E. (2d), 550. The city council or aldermanic body, by whatever name called, is not a court whose findings of fact are binding upon appellate courts where there is evidence to support them. *Moore v. Lambeth,* 207 N. C., 23, 175 S. E., 714.

Administrative boards, although necessarily called upon to find facts upon which they base their action, are not usually immune from review of their conclusions, although there may be some evidence to support them, unless the law of their creation or some supplemental statute makes them so. Familiar instances of such statutory provision may be found in the Workmen's Compensation Act, chapter 120, Public Laws 1929, section 60 (C. S., 8081 [ppp], Michie's Code), and the Unemployment Compensation Act, chapter 1, Extra Session, 1936, section 11, and amendments (C. S., 8052 [11] [m], Michie's Code).

It is generally held that where the statute does not in terms confer authority on the municipal council to declare an emergency, but only creates an exception to the prescribed mode of contracting, predicating the power of the council on the existence of the emergency as a fact, the court may review the findings as to the existence of the emergency and declare that no emergency exists. *Continental Construction Co. v. Lawrence, supra,* 111 A. L. R., 699; *Merrill v. Lowell,* 236 Mass., 463, 128 N. E., 862; *Green v. Ogan,* 60 Wash., 309, 114 Pac., 457; *Tobin v. Sundance,* 45 Wyo., 219, 17 P. (2d), 666. It has been held that the declaration that an emergency exists, in a resolution preliminary to the making of a contract, is *prima facie* evidence of the existence of the emergency and places the burden upon the party attacking the declara-

tion. *Los Angeles Dredging Co. v. Long Beach, supra; Morgan v. Long Beach,* 57 Cal. App., 134, 207 Pac., 53. To the contrary is *Continental Construction Co. v. Lawrence, supra:* "Nor do we think that such a declaration has any presumptive or evidential force in establishing the existence in fact of an emergency." In *Moore v. Lambeth, supra,* upon the issue there joined, it was held that the burden was upon those who claim to exercise the power under the exception to establish the facts upon which the asserted power is based. "One who claims the benefit of an exception in the statute has the burden of showing that he comes within the exception," citing a number of North Carolina cases sustaining the rule.

The restriction placed upon contracts of municipalities is of the gravest importance to citizens and taxpayers, and the policy represented by the statute is no doubt the outcome of experience. In preservation of the purpose of the statute and because the power sought to be exercised is in relaxation of the restriction and found in an exception which bases it upon the existence of special facts, we do not think that the simple resolution declaring an emergency should be invested with any presumptive effect. *Moore v. Lambeth, supra.* But decision of this point is not essential to decision in this case, since, reviewing all the evidence, we do not find that it discloses an emergency within the contemplation of the statute.

While perhaps a precise definition of "emergency" as fulfilling the requirements of the statute is not possible, and each case must, to some extent, stand upon its own bottom, we hold that the emergency which would relieve the town council of the duty of advertising for competitive bids must be present, immediate, and existing, and not a condition which may or may not arise in the future or one that is about to arise or may be expected to arise.

The evidence before the hearing judge does not seem to have gone much further than to show that the town was operating its water, sewage and power system with four engines, some of which were old and needed replacement, while others not so long in use needed repairs. Some of this machinery was said to have passed the age at which replacements are ordinarily made. It was suggested that the town was growing and that demands upon the power plant would increase. As against this condition, it was pointed out that if there should be a breakdown of one or more engines in the plant, sufficient protection would not be afforded the citizens in the furnishing of water for consumption and sewage and against fires. The evidence also tended to show that because of the national emergency existing with respect to the public defense, not only were these conditions accentuated, but it was becoming, and would become more difficult to secure proper machinery or material for repair and replacement.

As against this, it should be noted that the advertisement required by the statute is simply for one week, and there seems to be no reason why a successful bidder might not have been required to proceed with dispatch in making the desired replacements.

Speaking to this situation, it is said in *Safford v. City of Lowell,* 255 Mass., 220, 151 N. E., 111: "It would be to misuse language to describe the condition which existed April 15th, as a 'special emergency involving the health or safety of the people or their property.' Without attempting an exact or all-inclusive definition, it is manifest that the language does not apply to a condition which may clearly be foreseen in abundant time to take remedial action before serious damage to the health or to the safety of person or property is likely to occur. Without doubt, lack of foresight and failure to take proper precaution to meet contingencies which any prudent person would anticipate might occasion a condition which would jeopardize public health and safety, and to which the words of the statute would be applicable. It would be remarkable, however, if the legislators used them to describe such a situation. It is not to be supposed that they intended to make it possible for municipal officers to avoid advertising for bids for public work by merely delaying to take action to meet conditions which they can foresee until danger to public health and safety has become so great that the slight further delay caused by advertising will entail public calamity. No such imminent danger of calamity existed here." *Tobin v. Sundance, supra,* 84 A. L. R., 902; McQuillen, *op. cit., supra,* sec. 1295; Dillon, Municipal Corporations, 5th Ed., Vol. 2, sec. 802. We conclude that the evidence, as it stood before the judge hearing the order to show cause, was not sufficient to bring the commissioners within the exception upon which they rely, and the attempted exercise of power in making the contract was *ultra vires* and void.

We do not feel that it is necessary at this time to deal with the constitutional question which the plaintiffs desire to present. We do not, however, think that the fact, if it is a fact, that the tax rate in the town will be incidentally increased by withdrawal of a certain part of the income of the power plant and water system heretofore applied in relief of current expenses is of significance in that respect.

Upon examination of the whole evidence before the hearing judge, we are of opinion that the injunction should have been continued to the hearing. The order dissolving the injunction is therefore

Reversed.

W. A. WYNNE v. JOSEPH L. CONRAD.

(Filed 19 November, 1941.)

1. Venue § 3: Courts § 2c—

Venue is not jurisdictional and may be waived, and therefore when a defendant does not press his motion to remove to the county of his residence he waives his rights thereunder, and the Superior Court in which the action was instituted retains jurisdiction, and may hear and determine the controversy.

2. Courts § 2c—

Where a cause in any manner comes before the judge of the Superior Court after a motion made before the clerk, the judge acquires jurisdiction to determine the entire controversy and is not required to remand the cause to the clerk for the determination of the motion made before him. C. S., 637.

3. Same—Fact that motion to remove is made and remains undisposed of does not deprive court in which action is instituted of jurisdiction.

Plaintiff instituted this action on notes secured by a chattel mortgage and obtained claim and delivery upon the chattels. The sheriff's return under the claim and delivery was that he had seized chattels which were of little worth and had turned same over to plaintiff for want of an undertaking by defendant. Thereafter defendant moved for change of venue as a matter of right to the county of his residence but waived his right to removal by failing to press his motion. Some four and one-half years thereafter the judge of the Superior Court at term placed the cause on the calendar for trial or for dismissal for failure of plaintiff to prosecute same, and upon call of the case dismissed same as of nonsuit for failure of plaintiff to appear. *Held:* The judge of the Superior Court had jurisdiction of the cause and power to render the judgment of dismissal. C. S., 637.

4. Judgments § 22b—

The remedy to correct an erroneous judgment is by appeal; and the remedy against an irregular judgment is by motion in the cause made within a reasonable time.

5. Judgments § 22g—

An irregular judgment is one rendered contrary to the course and practice of the court.

6. Judgments § 22i—

An erroneous judgment is one rendered contrary to law.

7. Judgments § 22d—Motion to set aside judgment made some five years after rendition of the judgment held barred by laches.

Plaintiff instituted this action in the Superior Court. Defendant was served with summons but before answering filed motion to remove to the county of his residence as a matter of right, but did not press his motion

and same was never heard or disposed of. Some four and one-half years later the judge of the Superior Court at term placed the cause on the calendar and dismissed the action as of nonsuit for failure of plaintiff to appear and prosecute same, without giving plaintiff actual notice. Some five years after the rendition of the judgment dismissing the action, plaintiff moved to set aside the judgment. *Held:* The judgment of dismissal was not void, since the court had jurisdiction of the parties and the subject matter, and plaintiff, by failing to take any action until more than five years after the rendition of the judgment, is estopped by his laches and is not entitled to have the judgment set aside.

8. Equity § 2—

"Laches" is negligence consisting in omission of something which a party might do and might reasonably be expected to do towards vindication or enforcement of his rights.

APPEAL by defendant from *Bone, J.*, at Second March Term, 1935, of WAKE. Reversed.

The following judgment was rendered in the court below: "This cause coming on to be heard and being heard before Honorable Walter J. Bone, Judge, upon motion of J. G. Mills, attorney for plaintiff, to set aside the judgment of nonsuit rendered herein at the Second March Term, 1935, the defendant being represented by J. L. Morehead, attorney, and it appears upon examination of the record and the affidavit filed herein, and after hearing and argument of the attorneys for the plaintiff and the defendant, that this action was instituted by issuing summons and filing complaint on the 29th day of September, 1930, and the summons, with a copy of the complaint, were served on the defendant on the 30th day of September, 1930, and that on the 30th day of October, 1930, the defendant filed a motion in writing with the Clerk to remove, as a matter of right, the action to Durham County for trial, which motion was never heard and determined. Upon the institution of this action the plaintiff caused a writ of claim and delivery to be issued for the possession of the personal property described in the chattel mortgage given to secure the payment of the notes sued on in this action and the Sheriff of Durham County returned: 'Nothing to be found except a few worthless articles.' At the Second March Term, 1935, the Court, upon its own motion, dismissed the action as of nonsuit, without actual notice to the plaintiff, and the plaintiff, upon being advised of said judgment on January 22, 1941, immediately served notice on the defendant and his attorney that he would move to set aside said judgment. The motion was heard at the April Term, 1941, and at the request of the attorney for the defendant for permission to file brief it was agreed by the parties in open Court that the Court could take the motion under advisement and render its decision at a later term. It further appears that this action was instituted by the plaintiff to recover of the defendant

a balance due on notes given the plaintiff by the defendant, and that the plaintiff has a meritorious cause of action, and that the motion should be allowed. It Is, Therefore, Ordered, Adjudged and Decreed that the Judgment of nonsuit rendered in this action at the Second March Term, 1935, be and the same is hereby set aside and the Clerk is directed, upon notice to the parties, to hear and pass upon the Motion to Remove. Walter J. Bone, Judge."

To the ruling of the court and to the signing of the foregoing judgment the defendant, in apt time, and in open court, excepted, assigned error, and appealed to the Supreme Court.

J. G. Mills for plaintiff.
J. L. Morehead for defendant.

CLARKSON, J. The question involved: Did the court err in entering the order that the judgment of nonsuit rendered in this action at the Second March Term, 1935, be set aside? We think so.

This action was instituted 29 September, 1930. The provisional or ancillary remedy of claim and delivery was taken out for certain personal property by reason of a chattel mortgage held by plaintiff to secure the indebtedness of defendant. The complaint was filed the same day. The defendant lived in Durham County, N. C., and the summons was served on the defendant on 30 September, 1930, and certain property taken under the claim and delivery proceedings. The return of the sheriff, in part, is as follows: "Certain parts of telephone apparatus, consisting of telephones, switchboard, parts, such as nuts, bolts, parts of switchboard, frames, etc., all of which is in very bad condition, and almost worthless. The switchboard and about two hundred telephones are in Victoria, Va. And after holding the said property for three days, no defendant's undertaking being filed with me, I delivered the said property to the plaintiff on his undertaking."

The prayer of the complaint, in part: "(a) That he be given judgment against the defendant for the sum of $2,744.76, with interest thereon at the rate of six per cent per annum from the 2nd day of August, 1930, until paid. (b) For the possession of the property described in said chattel mortgage and that he be permitted to sell the said personal property in accordance with the terms and conditions of said chattel mortgage."

On 29 October, 1930, the defendant, before answer, filed a motion to remove the action (N. C. Code, 1939 [Michie], sec. 470) to Durham County and notice to plaintiff and his attorney was filed but was unsigned by defendant's attorney, and no time was set for the hearing in the notice. The record discloses: "And thereafter, at a regular term of the Superior Court of Wake County, duly and regularly begun and held

for the County of Wake, at a time and place required by law, to wit: at the Courthouse in Raleigh, on the first Monday after the first Monday in March, 1935, and before Honorable F. A. Daniels, Judge, duly commissioned, authorized and empowered to hold said Court, the following proceedings were had: The action was regularly calendared, to be tried or dismissed, for failure to prosecute, and thereupon the plaintiff having been called and failing to appear, the following Judgment was signed: 'Second March Term, 1935—Judgment—This cause coming on to be heard, and the plaintiff having been called and failing to appear, it is Ordered that the action be dismissed as of nonsuit, and that the plaintiff do pay the costs of this action to be taxed by the clerk. F. A. Daniels, Judge Presiding.' "

On 27 May, 1941, plaintiff, through his attorney, gave notice to the defendant and his attorney of motion to reopen the case, setting forth that "plaintiff and his attorney first learned of the judgment dismissing the action on January 22, 1941."

The plaintiff filed an affidavit, setting forth, among other things: "The plaintiff, desirous of helping the defendant, did not insist upon pressing his suit against the defendant and waited until January, 1941, and not having heard from the defendant he proceeded to take measures to prosecute said action, but much to his surprise he found that a judgment of nonsuit had been entered therein at the Second March Term, 1935, without actual notice to him. That the defendant is indebted to him in the sum of $2,748.00, with six per cent interest from December 1, 1929, this indebtedness being evidenced by notes, which are now, and have been since their execution, in the possession of and owned by the plaintiff: That as soon as he learned that said judgment had been entered, he caused notice to be served on the defendant and his attorney of this motion to set aside said judgment."

In *Clark v. Homes,* 189 N. C., 703 (710), it is decided by this Court: "Venue is not *jurisdictional* and may be waived, *and cannot be tested by demurrer, but by motion in the cause* (citing authorities). Venue now is not *jurisdictional* and may be *waived* (citing authorities). Venue cannot be jurisdictional and it may always be waived," citing authorities.

The court had jurisdiction of the action. Defendant filed an unsigned notice of the hearing to remove and at no time pressed his motion to remove—he thereby waived same. *Shaffer v. Bank,* 201 N. C., 415 (418). Plaintiff did not press his action. Nothing was done in the action from 30 October, 1930, when the motion was made, until March Term, 1935, and the record discloses that the judgment of nonsuit above set forth was rendered.

The clerk could not pass upon the value of the property seized in claim and delivery proceedings and turned over to plaintiff. This was a fact to be determined by a jury.

N. C. Code, *supra,* sec. 637, reads: "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." *Hall v. Artis,* 186 N. C., 105. The record imports verity.

In *Hill v. Hotel Co.,* 188 N. C., 586 (589), we find: "As we understand the defendant it insists that a judgment by default and inquiry should have been entered by the clerk and the cause should then have been transferred to the Superior Court docket for the award of damages. The position assumes, we take it, that the clerk had the exclusive power to render such judgment and that the case when heard was not properly before the judge. When the Legislature empowered clerks to enter judgment by default and inquiry as indicated in the sections referred to, it no doubt intended thereby to expedite litigation. This provision was in the nature of an enabling act and we apprehend was never intended to deprive the Superior Court in term of its jurisdiction to render judgments by default final or by default and inquiry, and it cannot reasonably be construed as effective for such purpose. . . . A judgment by default and inquiry admits that the plaintiff has a cause of action and is entitled to nominal damages, but the burden of proving any damages beyond such as are nominal still rests upon the plaintiffs. *Osborn v. Leach,* 133 N. C., 428, 432; *Stockton v. Mining Co.,* 144 N. C., 595, 600. Though the cause of action be admitted, the damages must be determined by the jury, and for this purpose the case must go to the trial docket. In *Brown v. Rhinehart,* 112 N. C., 772, 776, *McRae, J.,* said: 'We think the case was properly placed upon the civil docket, although no issues had been joined, for not only issues of fact joined upon the pleadings, but also all other matters for hearing before the judge at a regular term of the court, are to be put upon this docket.' The case before us was put upon the civil issue docket and remained there more than fifteen months, and was then put upon the calendar and duly called for trial. The contention that the case should be treated as if before the clerk and not before the judge, cannot, therefore, be upheld."

A judgment may be valid, irregular, erroneous, or void. In *Finger v. Smith,* 191 N. C., 818 (819-20), it is written: "An irregular judgment is one rendered contrary to the course and practice of the court, as for example, at an improper time; or against an infant without a guardian; or by the court on an issue determinable by the jury; or where a plea in bar is undisposed of; or where the debt sued on has not

matured; and in other similar cases (citing authorities). An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles, as where, judgment is given for one party when it should have been given for another; or where the pleadings require several issues and only one is submitted; or where the undenied allegations of the complaint are not sufficient to warrant a recovery; and in other cases involving a mistake of law (citing authorities). A judgment may be regular and at the same time erroneous; that is, it is not irregular because it may happen to be erroneous. Error does not necessarily constitute irregularity or necessarily enter into it (citing authorities). A void judgment is one that has semblance but lacks some essential element, as jurisdiction or service of process. *McKee v. Angel,* 90 N. C., 60; *Duffer v. Brunson, supra* (188 N. C., 789). If a judgment is irregular the remedy is by a motion in the cause made within a reasonable time; if erroneous, the remedy is by appeal. *Spillman v. Williams, supra* (91 N. C., 482); *May v. Lumber Co., supra* (119 N. C., 96); *Henderson v. Moore,* 125 N. C., 383."

In the present action the judgment is not void. There was service of process and jurisdiction. If the judgment was erroneous it was necessary for plaintiff to appeal. This was not done. If the judgment was irregular a motion in the cause, made within a reasonable time, is the proper remedy. It was the duty of the plaintiff to prosecute the action, it was his duty to see that there was no unreasonable delay; it was his duty to give to his suit in court that amount of attention which a man of ordinary prudence gives to his important business. "The least that can be expected of a person having a suit in court is that he shall give it that amount of attention which a man of ordinary prudence usually gives to his important business." *Rodman, J.,* in *Sluder v. Rollins,* 76 N. C., 271 (272). "When a man has a case in court the best thing he can do is to attend to it." *Clark, C. J.,* in *Pepper v. Clegg,* 132 N. C., 312 (316).

The plaintiff in this case, for over ten years, allowed his suit to remain in the court without action, and for over five years after nonsuit. He now makes this motion. We can find no statute that authorizes the setting aside of a judgment after such a length of time. We think the principle of laches is applicable. "Estoppel by laches" is failure to do something which should be done or to enforce right at proper time. *Hutchinson v. Kenney,* 27 F. (2d), 254. A bill in equity will be dismissed, where long and gross negligence of plaintiffs in seeking relief is unexplained by sufficient equitable reasons and circumstances. *Taylor v. Holmes,* 14 F., 498, affirmed (1888), 8 C. Ct., 1192, 127 U. S., 489, 32 L. Ed., 179.

"Laches" is negligence consisting in omission of something which a party might do and might reasonably be expected to do towards vindication or enforcement of his rights, being generally a synonym of "remissness," "dilatoriness," "unreasonable or unexcused delay," the opposite of "vigilance," and means a want of activity and diligence in making a claim or moving for the enforcement of a right, particularly in equity, which will afford ground for presuming against it or for refusing relief where that is discretionary with the court, but laches presupposes, not only lapse of time, but also the existence of circumstances which render negligence imputable. *Alexander v. Cedar Works,* 177 N. C., 536.

The plaintiff's leniency with defendant was commendable, but he started a lawsuit and should not have waited for over ten years to see what had happened to it. Neither a court of law or equity can relieve him of the result of such unreasonable delay.

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

Reversed.

W. BLOUNT RODMAN, ADMINISTRATOR OF J. A. STILLMAN, DECEASED, v. ELOISE STILLMAN, PHILIP A. STILLMAN, JOSEPH J. STILLMAN, WILLIAM A. STILLMAN, W. MERCER STILLMAN, GILBERT STILLMAN, WASHINGTON EDWARD STILLMAN, CONSTANCE STILLMAN, SARAH A. SPRUILL, V. H. KELLUM, TRUSTEE, AND M. GRACE WOODHOUSE, SADIE CHESSON STILLMAN, GUARDIAN AD LITEM FOR JEAN STILLMAN, WALTER STILLMAN, JACK STILLMAN, JAMES STILLMAN, SELMA STILLMAN, THELMA STILLMAN AND JOHN STILLMAN, A MINOR; AND WALTER STILLMAN.

(Filed 19 November, 1941.)

1. Judgments § 39—

An action on a judgment may be commenced at any time within ten years from the date of its rendition. C. S., 437 (1).

2. Executors and Administrators § 18—

Where an administrator, knowing that his appointment is at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigates and ascertains that the judgment has not been paid, and thereafter institutes proceedings to sell the lands of intestate to make assets to pay the judgment, claim on the judgment has been filed and admitted by the administrator within the meaning of C. S., 412.

3. Limitation of Actions § 10—When judgment debtor dies within 10 years of rendition of judgment and administrator is appointed within 10 years of death, claim on judgment filed within one year of appointment is not barred.

A judgment debtor died some two years after the rendition of the judgment and letters of administration upon his estate were issued some seven years after his death. Within one year of the appointment of the administrator the judgment creditors filed claim on the judgment and the administrator admitted same within the meaning of C. S., 412, and instituted this proceeding to sell the lands of his intestate to make assets to pay the judgment. *Held:* The judgment creditor having died within ten years from the rendition of the judgment, C. S., 437 (1), and the administrator having been appointed within ten years of the death of the judgment debtor, and claim on the judgment having been filed and admitted by the administrator and proceeding to sell lands instituted within one year of his appointment, the proceeding is not barred, C. S., 412. Since C. S., 412, relates to claims on judgments and the status of a judgment is fixed and determined by law, whether claim on a judgment must be filed with the administrator, *quære.*

4. Executors and Administrators § 13d—

In a proceeding to sell lands to make assets to pay a valid claim upon a judgment rendered against intestate prior to his death, decree for the sale of lands renders moot the question of whether the lien of a prior mortgage on the lands should have been canceled since C. S., 93, provides the order of payment of debts against the estate, and there being no question of priorities presented.

APPEAL by petitioner and by defendants other than Sarah A. Spruill, V. H. Kellum, Trustee, and M. Grace Woodhouse, from *Stevens, J.,* at July Term, 1941, of WASHINGTON.

Special proceeding to sell land to make assets to pay debts.

The clerk of Superior Court, pursuant to hearing before him, found facts which were adopted by judge of Superior Court on appeal from clerk, as follows:

(1) At a regular term of the Superior Court of Washington County, which convened on 20 October, 1930, in an action entitled "Clyde M. McCallum and E. Leigh Winslow, trading as Plymouth Wholesale Company, as plaintiffs, *v.* J. A. Stillman, as defendant," judgment was rendered on 25 October, 1930, in favor of plaintiffs and against defendant for the sum of $341.24, together with interest and costs, on which judgment J. A. Stillman paid only the sum of $75 on 1 May, 1931.

(2) J. A. Stillman died on 25 June, 1933, possessed of some personal property, which has been consumed by and disposed of in support of his widow and children, and seized of the land sought to be sold in this proceeding.

(3) Letters of administration upon the estate of J. A. Stillman were duly issued to W. Blount Rodman on 15 March, 1940.

(4) On 15 March, 1940, the said judgment of Plymouth Wholesale Company was presented to the administrator as a claim against the estate for payment. Following investigation of all the facts pertaining thereto and after interviewing Mrs. Eloise Stillman, the widow, and ascertaining all that could be learned about said judgment, the administrator determined and, on said date, admitted that same, less credit above stated, is a valid claim against the said estate, and thereafter on 18 October, 1940, instituted this proceeding to sell land to pay debts of the estate of J. A. Stillman, including said judgment.

The widow and heirs at law of J. A. Stillman, in their answer filed 31 October, 1940, pleaded laches and the ten-year statute of limitations in bar of said judgment both as a debt of the estate and as a lien on land sought to be sold.

Upon the facts found, the clerk being of opinion that said judgment is a debt of the estate of J. A. Stillman, and, from the date of its rendition, a lien on the lands of J. A. Stillman, and is not barred by the statute of limitations, either as a debt or as to its lien, so adjudged, and, as prayed, ordered the land sold subject to the dower of defendant, Mrs. Eloise Stillman, widow of J. A. Stillman, to be allotted in this proceeding.

The record further shows that on petition filed it is also alleged that, though no claim therefor has been presented to or filed with the administrator, there are of record in office of register of deeds of Washington County, (1) a mortgage deed from J. A. Stillman and wife to Sarah A. Spruill, registered 24 October, 1930, and (2) a deed of trust from J. A. Stillman to V. H. Kellum, Trustee, for benefit of M. Grace Woodhouse, dated 8 October, 1932, registered 20 October, 1932, each purporting to convey the land or a part of the land described in the petition as security for indebtedness (1) due Sarah A. Spruill, and (2) due M. Grace Woodhouse as described in said mortgage deed and said deed of trust, respectively; and it is alleged on information and belief that each has been paid and should, therefore, be canceled. In this connection Sarah A. Spruill, V. H. Kellum, Trustee, and M. Grace Woodhouse are defendants, but file no answer.

Defendant Eloise Stillman in answer filed asserts ownership of the mortgage deed given to Sarah A. Spruill, to which petitioner in reply pleads ten-year statute of limitations.

Upon facts found as to the mortgage deed, and in default of answer by V. H. Kellum, Trustee, and M. Grace Woodhouse, as to deed of trust, clerk orders each canceled.

The evidence offered by petitioner upon which the finding of fact numbered 4 hereinabove rests comes from the testimony of W. Blount Rodman, briefly stated, as follows: That he qualified as administrator of J. A. Stillman at the instance and solicitation of the attorney for Clyde McCallum and E. Leigh Winslow, judgment creditors; that the attorney

advised him that the reason for his interest was that no personal representative had qualified and it was necessary for the estate to be administered in order that creditors might make collection; that he qualified in order to settle the estate in all respects as provided by law; that after qualifying as administrator, in the forenoon of 15 March, 1940, he with his attorney went in the afternoon to the home and store of Mrs. Eloise Stillman, the widow; that they took with them memorandum showing the existence of the uncanceled deed of trust and mortgage deed hereinabove described, and of the judgment in favor of Clyde McCallum and E. Leigh Winslow against J. A. Stillman; that as to the judgment, Mrs. Eloise Stillman stated that she knew of its existence and of the fact that it had not been paid, except for $75 paid thereon 1 May, 1931; that she assigned as one of the reasons for its nonpayment the fact that she had heard from some source that the judgment creditors had gone into bankruptcy, and, therefore, did not think it would have to be paid; that the matter of her borrowing money with which to pay the judgment was discussed between her, the administrator, and his attorney—the latter insisting that she employ an attorney to represent and advise her as to her rights in the matter; and that following his investigation, he, the administrator, admitted the judgment as a claim against the estate of J. A. Stillman and a lien upon his land, on 15 March, 1940.

Defendant offered no evidence.

Upon appeal from the clerk of the Superior Court by all of the defendants other than Sarah A. Spruill, V. H. Kellum, Trustee, and M. Grace Woodhouse, Stevens, Judge presiding at July Term, 1941, of Superior Court of Washington County, finding all the facts to be as found by the clerk, "except that it is found that the lien of the judgment therein set out expired 10 years from the rendition of said judgment, although same is a good and valid claim against the estate of J. A. Stillman," affirmed the judgment of the clerk, except as to the lien of the judgment therein set out, and ordered the case to be remanded to the clerk to the end that sale of land be completed before and confirmed by him.

Petitioner excepts to that portion of the judgment finding as a fact and adjudging that the judgment therein referred to is not a lien on the lands of J. A. Stillman, and appeals to Supreme Court.

Defendants other than Sarah A. Spruill, V. H. Kellum, Trustee, and M. Grace Woodhouse, except to the judgment and to each and every finding of fact and conclusion of law therein, other than the finding that the judgment in question is not a lien upon the lands left by J. A. Stillman, and appeal to the Supreme Court.

W. L. Whitley for appellants.

Carl L. Bailey for W. Blount Rodman, appellee upon defendants' appeal, and appellant upon petitioner's appeal.

DEFENDANTS' APPEAL.

WINBORNE, J. This is the sole question presented on this appeal: Where a judgment debtor dies within ten years after the rendition of the judgment, and administrator, who is appointed within ten years of the death of such debtor, knowing that his appointment to administer the estate is at the instance and solicitation of the judgment creditors so that creditors might make collection, and with memorandum of the judgment in hand, immediately investigates and ascertains that the judgment has not been paid and admits it as a debt against the estate, and then within one year after his appointment institutes a proceeding to sell land of intestate to make assets to pay debts of the estate, specifically including the judgment, is the claim filed and admitted within the meaning of the statute, C. S., 412, so as to prevent bar by the statute of limitations?

The decisions of this Court support an affirmative answer. See *Woodlief v. Bragg,* 108 N. C., 571, 13 S. E., 211; *Harris v. Davenport,* 132 N. C., 697, 44 S. E., 406; and also *Turner v. Shuffler,* 108 N. C., 642, 13 S. E., 243; *Stonestreet v. Frost,* 123 N. C., 640, 31 S. E., 836; *Hinton v. Pritchard,* 126 N. C., 8, 35 S. E., 127; *Justice v. Gallert,* 131 N. C., 393, 42 S. E., 850; *Horne Corp. v. Creech,* 205 N. C., 55, 169 S. E., 794.

In this connection it is provided by statute that an action "upon a judgment or decree of any court of the United States, or of any State or territory thereof," may be commenced within ten years "from the date of its rendition . . ." C. S., 437 (1), formerly Revisal, 391; Code, 152; C. C. P., sec. 14, and it has been uniformly held in this State that a cause of action on a judgment accrues from the date of its rendition. *McDonald v. Dickson,* 85 N. C., 248.

On the other hand, it is also provided by statute that, "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letter testamentary or of administration, provided the letters are issued within ten years after the death of such person." C. S., 412, formerly Revisal, 367; Code, 164; C. C. P., 43.

And the same statute further provides that, "If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent it being barred . . ."

While in *Woodlief v. Bragg, supra,* it is not expressly found that the administrator admitted the claim, *Clark, J.,* after quoting pertinent portions of the statute, Code, 164 (now C. S., 412), states: "We do not hold that reception of claim by the administrator, without objection, is *per se* an admission of its correctness, but here not only the claim was filed in

proper time and no objection was made, but the administrator files the petition to obtain assets to pay it. This is strong proof that he did not deny its correctness but 'admitted' it—certainly it is so in the absence of any proof whatever to the contrary."

In *Harris v. Davenport, supra,* in opinion by *Montgomery, J.,* this Court said: "The action of the administrator creditor in commencing the proceeding to sell the land of the intestate to pay his debts was equivalent to the filing with himself of his claim and his admitting the same to be due, and falls under the provisions of section 164 of The Code. In such a case the statute of limitations ceases to run either in favor of the personal representative or the heirs at law."

In *Horne Corp. v. Creech, supra,* it is said that, "A claimant cannot compel an administrator 'to string the claims,' but if the validity of the claim is expressly recognized or admitted, this will constitute a filing." To same effect is *Stonestreet v. Frost, supra.*

Notice to the personal representative is the prime purpose of the statute. *Hinton v. Pritchard, supra.*

In fact, it is noted that counsel for defendants, in contending that the statute, C. S., 412, does not apply to claims based on judgments, say: "It was not necessary to file the judgment with him as a claim for the reason that its status had already been fixed and determined by the judgment of the court, and we respectfully insist that the mere fact that he has attempted to recognize it in his petition filed in this proceeding does not and cannot change the law."

There is force in the argument as to there being no necessity of filing claim based on a judgment. But, as this Court holds that the statute relates to claims on judgments, *Stonestreet v. Frost, supra,* the reasoning rather supports the contention of petitioner that there has been sufficient filing.

The judgment below is

Affirmed.

PLAINTIFF'S APPEAL.

Holding as we do on defendants' appeal that, upon the facts presented, the judgment of Clyde McCallum and E. Leigh Winslow, partners trading as Plymouth Wholesale Company, against J. A. Stillman is a valid claim against the estate entitled to be paid out of the proceeds of sale of land ordered in this proceeding to be sold for purpose of creating assets with which to pay debts of J. A. Stillman, and the order of payment being provided by statute, C. S., 93, and no question as to priorities being presented, the question of lien has become moot in so far as parties to this proceeding are concerned.

Hence, the petitioner's appeal is

Dismissed.

CARL W. McCARTHA, ADMINISTRATOR OF THE ESTATE OF EFFIE MEACHAM McCARTHA, DECEASED, v. COLONIAL ICE COMPANY, AND H. V. JOHNSON AND MARK JOHNSON, PARTNERS, TRADING AS H. V. JOHNSON & SON.

(Filed 19 November, 1941.)

1. Principal and Agent § 3: Master and Servant § 22b—Acts of agents held done in scope of employment by one principal alone although agents were employed as to other matters by another principal.

This action was instituted against an ice company and a partnership to recover for wrongful death. Under the terms of the contract between defendants it appeared that a definite portion of the premises of the ice company was leased to the partnership which was engaged in the coal business, that the employees were paid by the partnership for work done around the coal yard, and were paid by the ice company for delivering coal, that the ice company had exclusive right to deliver all coal, which it did in its trucks, but that the partnership maintained one truck for use exclusively in unloading and storing coal on the premises, and that each party agreed not to engage in the business of the other. It appeared that the office manager and an office employee were also paid by both principals and that upon the occasion in suit the office manager directed the use of the partnership's truck in making a delivery of coal to a customer. *Held:* Under the terms of the agreement between the parties, the office manager, in directing the delivery of the coal and the truck driver and his helper in making the delivery, were acting solely in the course of their employment by the ice company, and therefore the ice company was solely liable for the wrongful death resulting from the negligent operation of the truck.

2. Appeal and Error § 39—

Two separate concerns had common employees. In this action for wrongful death resulting from the negligent operation of a truck, the sole contention of each of the employers was that the other was solely or primarily liable, negligence in the operation of the truck not being controverted and it being admitted that plaintiff's intestate was without fault. *Held:* Any error on the part of the court in stating that defendant employers admitted that intestate's death was caused by negligence and that she was without fault, and in its instructions that intestate's death was due to the negligence of one or both of the employers, cannot be held prejudicial.

3. Principal and Agent § 3: Master and Servant § 22b—

An ice company and a partnership had common employees. The contract between them stipulated that the ice company should make all deliveries of coal sold by the partnership and that the ice company should not be responsible for any loss or damage to the partnership for death or personal injury sustained by the employees or customers of the partnership in the operation of its coal business. Plaintiff's intestate was killed by the negligent operation of a truck while delivering coal. *Held:* The clause exempting the ice company from liability for damage for death or

personal injuries sustained by the partnership's employees or customers in the operation of the coal business is immaterial on the question of the ice company's liability for the wrongful death, since no liability therefor is imposed upon the partnership.

4. Same—

Where separate concerns have common employees but the contract between them definitely delineates the business of each and provides that each should pay the employees for work done in the performance of its separate business, each principal is liable for the wrongful acts of the employees in the prosecution of its business and cannot be bound by the acts of the employees while engaged in the business of the other.

5. Appeal and Error § 39—

The language in which the court stated its peremptory instructions to the jury, although not in the approved form, *held* not to constitute reversible error under the circumstances of this case.

APPEAL by defendant Colonial Ice Company from *Grady, Emergency Judge,* at May Term, 1941, of GASTON. No error.

Plaintiff's action was for the recovery of damages for the wrongful death of his intestate, alleged to have been caused by the negligence of the defendants Colonial Ice Company and H. V. Johnson and Mark Johnson, trading as Johnson & Son. The defendants filed separate answers, each denying the allegations of negligence, and each setting up, as between themselves, pleas of primary and secondary liability, and contribution.

There was evidence on the part of the plaintiff tending to show that the defendant Ice Company was engaged in the manufacture and sale of ice, and that the defendants Johnson & Son were engaged in the business of selling coal in Gastonia, both using the premises owned by the Ice Company, a definite portion of the premises being leased to Johnson & Son; that the operations of these parties with relation to each other were conducted under the terms of a written contract, which was offered in evidence. This contract, dated 1 July, 1940, provided, among other things, that the Ice Company should "have the exclusive right to deliver, upon the terms hereinafter set out, all such coal as may be sold by Johnson & Son in Gastonia," at a certain price per ton to be paid to the Ice Company by Johnson & Son. It appeared that the Ice Company owned and operated a number of motor trucks for the purpose of delivering this coal.

It was further provided in the contract: "6. Johnson & Son shall pay Colonial (Ice Company) the actual cost of any and all labor used and other expense incurred in unloading and storing coal on said premises pursuant to the terms of this contract. For use in the unloading and storing of coal on said premises Johnson & Son shall furnish one motor truck with a driver therefor, but said motor truck shall not be used in

making any delivery of coal from said premises." "13. If it should be found desirable that one or more of Colonial's office employees, including the manager, at its Gastonia plant, assist Johnson & Son in the sale of coal or the keeping of records, Colonial shall designate the person or persons to do such work, and Johnson & Son shall pay Colonial $100 per month, to be applied on the salary or salaries of such person or persons."

Each party agreed not to engage in the business of the other. It was further provided that "Colonial shall in no way be responsible for any loss or damage to Johnson & Son resulting from fire, theft, tornado or other cause, or for death or personal injury which may be sustained by those employees, agents or customers in the operation of said coal business."

There was evidence that A. L. Suddeth, manager, and Mrs. Campbell, office employee of the Ice Company, were the persons designated by the Ice Company to assist Johnson & Son in the sale of coal and keeping records, as provided in the 13th clause of the contract. Suddeth testified that he was manager of the Ice Company, and that he was also designated to manage the coal business of Johnson & Son.

It appeared in evidence that the plaintiff McCartha had ordered two tons of coal to be delivered at his home in Gastonia on 9 August, 1940; that the Ice Company had none of its trucks available for the delivery of this coal at the time; that Suddeth thereupon gave instructions for the use for this purpose of the Johnson motor truck referred to in the contract, and designated two employees to deliver the coal to the plaintiff. These employees, so directed to deliver the coal, had been hired by Suddeth and were paid by Johnson & Son to do work in the coal yard, and were paid by the Ice Company when delivering coal. These two employees loaded the truck and drove to the plaintiff's home for the purpose of delivering the coal. In attempting to do so, the truck was backed into the driveway, which inclined sharply downward toward the rear of the lot, and, as result of negligence on the part of the employees in the use and operation of the truck, the loaded truck plunged backward and struck and killed Mrs. McCartha, the plaintiff's intestate, who was present to direct the placing of the coal. It appeared that the emergency brakes on the truck were defective, though the foot brakes were in order. It was shown that one of the employees on the truck had gotten out to have Mrs. McCartha sign the coal ticket, and the other employee had gotten out for some other purpose just before the truck rolled downward with fatal result.

The defendants offered no evidence.

The following issues were submitted to the jury:

"1. Was the death of Mrs. Effie Meacham McCartha caused by the negligence of the defendants, or either one of them, as alleged in the complaint?

"2. If so, what amount of damages, if any, is the plaintiff entitled to recover of the defendants, or either one of them?

"3. Was the death of Mrs. McCartha due to the joint and concurring negligence of the defendants, Colonial Ice Company, and H. V. Johnson and Mark Johnson, copartners, trading as H. V. Johnson & Son, as alleged in the complaint?

"4. Was the death of Mrs. McCartha due solely to the negligence of the defendant, Colonial Ice Company?

"5. Was the death of Mrs. McCartha due solely to the negligence of the defendants, H. V. Johnson & Son?

"6. Was the negligence of the defendant, Colonial Ice Company, primary, and that of H. V. Johnson secondary?

"7. Was the negligence of the defendants, H. V. Johnson & Son, primary, and that of the Colonial Ice Company secondary?"

The court instructed the jury to answer the 1st issue "Yes," the 3rd issue "No," the 4th issue "Yes," the 5th issue "No," and that the 6th and 7th issues need not be answered. To each of these instructions appellant duly noted exception.

The court charged the jury fully on the second issue, the issue of damages, and stated the evidence relating thereto. Exception was noted to a portion of the charge on this issue.

The jury answered the issues in favor of the plaintiff and against the defendant Colonial Ice Company, and found that the death of plaintiff's intestate was due solely to the negligence of the Ice Company, and not to the negligence of Johnson & Son. The issue of damages was answered in the sum of $10,000.

Ernest R. Warren and John G. Carpenter for plaintiff, appellee.

P. W. Garland and Gover & Covington for defendant, Colonial Ice Company, appellant.

Cherry & Hollowell, Stewart & Moore, and J. Laurence Jones for defendant, H. V. Johnson & Son.

DEVIN, J. The only evidence in the case was that offered by the plaintiff. From this the court below was of the opinion that there was no controversy about the fact that the death of plaintiff's intestate was caused by the negligent operation of the coal laden motor truck, and that the only question was as to who was legally responsible for the operation of the truck, the Colonial Ice Company or Johnson & Son, or both.

The court was also of the opinion that the question of responsibility was to be determined by the terms of the contract between these defendants wherein their relationship to each other and to the transaction was defined. The court was further of the opinion that under the terms of

the contract the defendant Ice Company was given and exercised the exclusive right to deliver all coal sold by Johnson & Son in Gastonia; that while A. L. Suddeth, the manager of the Ice Company, was also manager for Johnson & Son, his duties as representing the latter, as defined and limited by the contract, were to assist Johnson & Son in the sale of coal and in keeping the records; and that in the delivery of coal he represented the Ice Company alone; and that, if, in any view, he could be regarded as the agent of Johnson & Son in attempting to deliver coal by the use of the Johnson truck, he was acting in violation of the express terms of section six of the contract, and thus was outside the scope of any agency or employment by Johnson & Son. Hence, the court below reached the conclusion that under the uncontradicted evidence the defendant Ice Company was solely responsible for the operations in respect to the delivery of coal to the plaintiff, and liable for the negligence of those employed, at the time, by the Ice Company to make the delivery, and that the unfortunate result was in no way attributable to negligence on the part of Johnson & Son. In accord with this view the court gave peremptory instructions to the jury upon the appropriate issues submitted relating to the liability of the parties for the wrongful death of plaintiff's intestate.

After careful consideration of the record, we are of opinion that the learned judge who presided over the trial of this cause below has properly interpreted the relationship of the parties to the transaction complained of, and that he has reached the correct conclusion that the death of plaintiff's intestate was due to negligence attributable to the defendant Ice Company, alone.

It is apparent from the terms of the contract between the defendants that the defendant Ice Company was given the exclusive right to deliver the coal sold by Johnson & Son in Gastonia, at a stipulated price per ton. It was constituted an independent contractor and had exclusive control of the manner and method of delivery. The employees on the coal yard were paid by Johnson & Son for their work on the premises, and by the Ice Company for work in delivering coal. A part of the salaries of the manager and the clerk was paid by Johnson & Son for assisting in the sale of coal and keeping records, but in all other respects and for all other purposes these were the employees of the Ice Company. While the truck used on the occasion of the fatal injury to plaintiff's intestate belonged to Johnson & Son, its use was directed by Mr. Suddeth and Mrs. Campbell for the purpose of delivering coal. The delivery of the coal was a duty which devolved upon them as employees of the Ice Company. It would seem to follow, therefore, that in directing the use of this truck and in attempting to deliver the coal to the premises of the plaintiff therein, they were acting within the scope of their employment by the

Ice Company, and not as agents for Johnson & Son. Negligence of the employees in the use and operation of the truck on this occasion, for this purpose, proximately causing the death of plaintiff's intestate, was attributable to the Ice Company under the principle of *respondeat superior*.

The appellant noted exception to the following statement by the trial judge in his charge to the jury: "It is admitted, gentlemen—not in the pleadings, but it has been admitted by all counsel in their argument to you—that Mrs. McCartha's death was caused by the negligence of somebody; in other words, that she, herself, was without fault." No objection was made at the time, but later, after the conclusion of the charge, upon his attention being called to this portion of his charge, the judge caused a statement to be entered in the record to the effect that "the only admission made by the defendant Colonial Ice Company or its counsel, either of record or during the trial or in the argument to the jury, was in substance that the death of Mrs. McCartha was due to no fault or negligence on her own part, but was due to the fault of some other person."

However, neither the reference by the judge to what he construed to be admissions in the argument that Mrs. McCartha's death was caused by the negligence of somebody, nor his instructions to the jury that the death of plaintiff's intestate was due to the negligence of one or both of the defendants, can be held prejudicial, since it was admitted that she was without fault, and the negligent operation of the truck was not controverted. The evidence was all one way.

The provision in the contract that the "Colonial (Ice Company) shall in no way be responsible for any loss or damage to Johnson & Son resulting from fire, theft, tornado or other cause, or for death or personal injuries which may be sustained by their employees or customers in the operation of said coal business," is not material to this controversy, since the clause exempts the Ice Company from responsibility to Johnson & Son for loss or damage resulting from the causes enumerated, and no loss or damage has been suffered by, nor has any liability been imposed, upon Johnson & Son. This clause alone may not be held to exempt the Ice Company from liability for a tort causing injury to a third person, for which it alone was liable, or to impose liability, primary or secondary, upon Johnson & Son therefor.

It appears here, as not infrequently happens, that the same persons were agents of, and paid by, two different principals. This sometimes causes confusion where circumstances arise which produce conflicting loyalties. But here the line is clearly marked. The duties and authority of the agents and the consequent liability of the two principals for their acts are defined by a written contract which all parties agree was in force at the time and applicable to the circumstances out of which plaintiff's action arose. The agents acted severally for each principal.

There was no conflict. It is a sound principle in the law of agency that where an agent by an agreement of all parties is employed by two principals and acts severally for each he cannot bind one principal in the separate business of the other.

The exception to the charge of the court on the issue of damages cannot be sustained. The charge seems to have stated the rule for the admeasurement of damages for wrongful death in substantial accord with the established precedents.

While the trial judge did not state his peremptory instructions to the jury, consequent upon his expressed opinion of the law applicable to the facts of the case, in the form approved by this Court, this may not, under the circumstances of this case, be held for error requiring a new trial. The distinction is pointed out in McIntosh Prac. & Proc., 632. Since the trial judge was correct in his view of the law, the manner in which he expressed it, while not approved, would not warrant that the case be remanded merely for the restatement of substantially the same instructions in different language.

The appellant's assignments of error relating to the submission of issues, and to the rulings of the court on the admission of testimony are without substantial merit. No prejudicial effect upon the result is apparent.

We conclude that in the trial there was

No error.

PAGE SUPPLY COMPANY v. E. W. HORTON AND S. M. HORTON.

(Filed 19 November, 1941.)

1. Trial § 43—

A judge is without authority to set aside answers made by the jury to certain of the issues, answer the issues himself, and render judgment on the verdict as amended.

2. Judgments § 17b—Judgment must conform to the verdict.

It appeared that the court, acting upon its belief that the answers of the jury to the third and fifth issues were contrary to the evidence, intended to strike out the answers to these issues but inadvertently directed that the answers to the third and fourth issues should be stricken out, and rendered judgment upon the verdict as amended. *Held:* If the court was under the apprehension that the answers to the remaining issues, after striking out the third and fifth issues, entitled plaintiff to judgment, the court failed to strike out the answers to the third and fifth issues, and the judgment rendered is not in conformity with the answers to the issues and cannot be sustained.

3. Trial § 45—

Since a judgment *non obstante veredicto* is in effect merely a belated judgment on the pleadings, a judgment for plaintiff cannot be sustained upon the theory of its being a judgment *non obstante veredicto* when defendants' answer denies a material fact essential to support recovery by plaintiff.

APPEAL by defendants from *Bone, J.*, at May Term, 1941, of WAKE.

This is an action on an alleged combination promissory note, crop lien and chattel mortgage, wherein the ancillary remedy of claim and delivery was invoked by the plaintiff to sell certain personal property of the defendants. The amount alleged to be due the plaintiff by the defendants is $607.39, with interest from 16 April, 1940, the date of the alleged execution of the note, crop lien and chattel mortgage. The $607.39 is alleged to have been due on indebtednesses existing prior to the execution of the note and lien.

Both defendants admit the signing of the note, crop lien and chattel mortgage, but E. W. Horton averred that at the time he signed the instruments they related only to advances and contained no provision as to indebtednesses existing prior to the execution thereof.

The plaintiff, by amendment to its complaint, further alleges that it paid the balance due on a retained title contract on an automobile of E. W. Horton and took an assignment of all rights under such contract in order that the claim and delivery by which such automobile had been taken might be a first lien thereon. This allegation is denied for the lack of information.

The issues submitted to and the answers made by the jury were as follows:

"1. Did the defendants execute the crop lien and note referred to in the complaint and sued upon in this action? Answer: 'Yes.'

"2. If so, was the provision securing a note for old indebtedness in the sum of $607.39 placed in said paper after its execution by the defendant, E. W. Horton? Answer: 'No.'

"3. What is the balance due by the defendant, E. W. Horton, if anything, on the crop lien and note referred to in the complaint? Answer: '$75.91, and interest.'

"4. In what amount, if any, is defendant, E. W. Horton, indebted to plaintiff by virtue of conditional sales contract dated November 7, 1939, covering an automobile? Answer: '$51.75.'

"5. What is the balance due by the defendant, S. M. Horton, if anything, on the crop lien and note referred to in the complaint? Answer: '$49.16, and interest.'

"6. What was the value of the crops seized under the writ of claim and delivery at the time of the seizure? Answer: '$59.05.'

"7. What was the value of the cow and automobile seized under the writ of claim and delivery at the time of their seizure? Answer: '$250.00.'

"8. What was the value of the mules and other personal property seized under the writ of claim and delivery at the time of its seizure? Answer: '$225.00.'

"9. What were the costs incident to the sale? Answer: '$58.25.'"

His Honor entered the following judgment: "This cause came on to be heard before the undersigned Judge presiding, and a jury duly chosen and impaneled and issues were submitted to and answered by the jury as appears in the record. Issues 3 and 4 were formal ones and the jury was instructed that their answers to these issues would depend upon their answers to the first two. The jury answered issues 3 and 4 contrary to all the evidence in the case and therefore the Court is of the opinion that the verdict upon the third and fourth issues should be set aside. The jury having answered the first issue YES, and the second issue NO, the Court is of the opinion that it follows as a matter of law that the plaintiff is entitled to recover of both defendants the sum of $607.39, with interest, subject, however, to a credit on account of the net value of the personal property seized under the writ of claim and delivery.

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

"1. That the verdict upon the third and fourth issues be and the same is hereby set aside and that the verdict on all the remaining issues be undisturbed and allowed to stand.

"2. That the plaintiff recover of the defendants, E. W. Horton and S. M. Horton, the sum of $607.39, with interest thereon from the 16th day of April, 1940, until paid, subject, however, to a credit as of November 23, 1940, of the sum of $424.05, which is the net value of the personal property seized under a writ of claim and delivery, as found by the jury, after deducting the costs incident to the sale and the amount of the prior lien upon the automobile.

"3. That the costs of this action be taxed against the defendants.

WALTER J. BONE,
Judge Presiding."

Neither the evidence nor the charge in the trial below appears in the record. However, there does appear therein the following: *"Statement and Explanation.* Although the judgment states that the third and fourth issues are set aside, it was the intention of the Court to set aside those two issues which related to the balance due by defendant, E. W. Horton and defendant, S. M. Horton, on the crop lien and note referred to in the complaint and the Court did not intend to set aside the issue which related to the amount of the indebtedness of defendant, E. W. Horton, on the conditional sales contract covering an automobile. It

will be seen by reference to the issues that the third and fifth issues are the ones which related to the indebtedness of the defendants upon the crop lien and note. As the Court now recalls, the judgment was dictated to the Court Reporter by the Court, and after same was transcribed it was read by the Court before it was signed. Therefore, the Court is unable to state exactly how it happened that the judgment states that the third and fourth issues were set aside unless the Court through inadvertence failed to properly relate its thoughts and decision to the numerical identification of the issues.

"This August 9, 1941.

WALTER J. BONE,
Judge Presiding."

From the judgment entered the defendants appealed, assigning error.

Bunn & Arendell for plaintiff, appellee.
E. D. Flowers for defendants, appellants.

SCHENCK, J. If the judge intended to set aside the answers made by the jury to the third and fifth issues, answer them himself, and render judgment on the verdict as amended, he was without authority so to do. *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32, and cases there cited. If he intended merely to strike out the answers to the third and fifth issues and to hold as a matter of law that they were surplusage and that the plaintiff was entitled to judgment upon the remaining portion of the verdict, he failed to do this, since the judgment ordered, adjudged and decreed: "1. That the verdict upon the third and fourth issues be and the same is hereby set aside and that the verdict on all the remaining issues be undisturbed and allowed to stand." The judgment as entered is not supported by the verdict as rendered or as the verdict is stated therein to be modified by the court, hence the judgment cannot be sustained. "There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings." *Durham v. Davis,* 171 N. C., 305, 88 S. E., 433; *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641, and cases there cited.

The judgment cannot be sustained upon the theory of its being entered *non obstante veredicto,* in view of the defendants' answer to the allegation that they executed a note for $607.39, which is: "That the allegations contained in paragraph 3 are untrue and are, therefore, denied, and defendants specifically deny that they were indebted to the plaintiff in the sum of $607.39 on April 16, 1940, and specifically deny that they executed or delivered to the plaintiff any note on or about said date. . . ." A judgment *non obstante veredicto* is merely a belated judgment on the pleadings. *Buick Co. v. Rhodes,* 215 N. C., 595, 2 S. E. (2d), 699, and cases there cited.

The result of this case is just one of the unavoidable casualties of the circuit apt to occur to the most circumspect judge.

For the error assigned the case must be remanded for a new trial.

Error.

STATE v. AMBROSE SHEPHERD.

(Filed 19 November, 1941.)

1. Criminal Law § 41e—

A character witness for defendant may not be questioned on cross-examination as to particular acts of misconduct of defendant and may not be questioned as to the general reputation of defendant for particular vices for the purpose of impeaching the character of defendant, but he may be questioned on cross-examination as to the general reputation of defendant for particular vices for the purpose of testing the witness' knowledge of defendant's general reputation and to impeach the credibility of the witness.

2. Criminal Law § 48b—

Where questions asked upon cross-examination of a character witness for defendant are competent for the purpose of impeaching the witness but not for the purpose of impeaching the character of the defendant, defendant must request that the testimony be so limited, and in the absence of such request a general objection and exception to the testimony cannot be sustained.

3. Criminal Law § 38a—

Upon the admission of a photograph of the scene of the crime in evidence the witness stated that the car in the photograph was not located as was deceased's car at the time of the homicide. The court instructed the jury to disregard the automobile as shown in the photograph and properly limited the use of the photograph to the purpose of explaining the testimony of witnesses. *Held:* Defendant's exception to the admission of the photograph in evidence is untenable.

4. Criminal Law § 81c—

Where the charge of the court is without error when considered contextually, defendant's exceptions to isolated parts thereof cannot be sustained.

5. Homicide §§ 12, 27f—Evidence held not to present question of defendant's right to kill in defense of his wife.

The evidence tended to show that after an assault made upon defendant by deceased in front of defendant's house, defendant went into his house and left the place of danger, that defendant's wife remained outside trying to persuade deceased to leave, that thereafter defendant returned from the house with a pistol, and upon deceased's renewing the assault, shot and killed deceased. There was no evidence that deceased had assaulted

or threatened defendant's wife and no evidence of any fact or circumstance which would cause a person of reasonable prudence to apprehend that she was in danger. *Held:* Defendant's exceptions to the charge on the ground that the court failed to instruct the jury as to his right to kill in defense of his wife, is untenable.

APPEAL by defendant from *Sink, J.*, at August Term, 1941, of WILKES. No error.

Criminal action tried on indictment charging the defendant with the murder of one George Johnson.

The defendant lives in the Reddies River section of Wilkes County. His home is on an elevation above the road. Steps lead from the porch to his house to a walkway which extends to the road. There are steps leading from the end of the walkway down to the road level. He and the deceased had been friends for many years. On 14 June, 1941, deceased drove up in front of defendant's home and called or signaled to him. The defendant went to the car of the deceased and talked to him through the window of the car. The deceased then stopped the motor, stated that he had come there to whip the defendant, and that he was going to do so; got out of his car, went around to the defendant, pulled his hat down over his face, took his glasses off, threw them into the grass, and struck the defendant in the face. He then picked up two stones about the size of a man's fist and continued to threaten to whip the defendant, who left and went into the house. The defendant's wife and a lady who was present undertook to persuade the deceased to leave. The defendant then came out of the house with a pistol, went down the walkway onto the steps leading to the road. The deceased picked up two more rocks and started towards him, whereupon the defendant shot deceased several times, inflicting wounds from which he died. As described by the defendant, "I suppose he was as far from me as from here to that table, and he came right on to me. I shot him. I shot him until he fell; I wouldn't say how many times I shot."

The solicitor having announced at the beginning of the trial that he would not seek a verdict of guilty of murder in the first degree, the cause was submitted on the charge of murder in the second degree or manslaughter, and the jury returned a verdict of "guilty of manslaughter." From judgment thereon the defendant appealed.

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

Trivett & Holshouser and Hayes & Hayes for defendant, appellant.

BARNHILL, J. The defendant offered a number of witnesses for the purpose of establishing his general reputation. On cross-examination the solicitor questioned these witnesses with reference to the defendant's

general reputation for certain vices, particularly as to whether the defendant did not have the general reputation of getting drunk and mistreating his family and as to whether he did not have the general reputation of having been indicted on numerous occasions. Most of these questions were answered in the negative or the witnesses professed no knowledge thereof. Others were answered in the affirmative. Later the court, being under the apprehension that under *S. v. Shinn,* 209 N. C., 22, 182 S. E., 721, this evidence was incompetent, withdrew it and instructed the jury not to consider the same.

The defendant's exceptions directed to the admission of this testimony cannot be sustained. The court incorrectly interpreted the opinion in the *Shinn case, supra.* The evidence was competent in the first instance.

While it is true that character witnesses may not be cross-examined as to specific acts of misconduct of the defendant, *S. v. Shinn, supra,* he may be questioned as to the general reputation of the defendant as to particular vices or virtues. *Edwards v. Price,* 162 N. C., 243, 78 S. E., 145; *Davis v. Long,* 189 N. C., 129, 126 S. E., 321; *S. v. Nance,* 195 N. C., 47, 141 S. E., 468; *S. v. Colson,* 193 N. C., 236, 136 S. E., 730; *S. v. Lefevers,* 216 N. C., 494, 5 S. E. (2d), 55. Such evidence is competent for the purpose of testing the knowledge of the witness concerning the general reputation about which he has testified and to impeach his testimony. That is, it goes to the credibility of the witness and is competent for that purpose only. *S. v. Holly,* 155 N. C., 485, 71 S. E., 450; *S. v. Lefevers, supra.* Upon request the court should so limit it. However, upon general objection only, without request that it be restricted to the use for which it is competent, the general objection and exception is not tenable. *S. v. Tuttle,* 207 N. C., 649, 178 S. E., 76, and cases cited; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284.

The exceptions directed to the alleged error of the court in permitting the introduction and use of a photograph of the house, porch and walk are without merit. This photograph shows a car standing in the road. The witness stated that the car was not located as was that of the deceased at the time of the homicide but that otherwise it correctly represented the premises in question. The court charged the jury to disregard the automobile as shown in the photograph and clearly limited the use of the photograph in accord with our decisions. *S. v. Mitchem,* 188 N. C., 608, 125 S. E., 190, and cases cited; *S. v. Holland,* 216 N. C., 610, 6 S. E. (2d), 217; *S. v. Perry,* 212 N. C., 533, 193 S. E., 727; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Miller,* 219 N. C., 514, 14 S. E. (2d), 522.

The court correctly defined malice. Likewise, its instructions upon the crime of manslaughter, *S. v. Jordan,* 216 N. C., 356, 5 S. E. (2d), 156, and cases cited; *S. v. Koutro,* 210 N. C., 144, 185 S. E., 682, and

as to the consideration to be given the testimony of an interested witness, *S. v. Holland, supra,* when considered contextually, were in substantial accord with the decisions of this Court. Exceptions to isolated parts thereof cannot be sustained.

The defendant complains that the court's instructions on his plea of self-defense were inadequate and erroneous and failed to give him the full benefit of this defense. Exceptions based on this contention are without merit. When the evidence is analyzed it appears that the defendant, after the first difficulty, retired to a place of safety. He thereafter armed himself with a pistol, returned to the road where the deceased was and, upon a renewal of the difficulty, immediately shot and killed the deceased. He seeks to justify his conduct upon the theory that he returned to protect his wife. The record fails to disclose any evidence to sustain this theory. His wife was there undertaking to persuade the deceased to leave. No assault had been committed upon her, no threat had been made against her and no fact or circumstance appears which would cause a person of reasonable prudence to apprehend that she was in danger. On the defendant's own statement, as he outlines the occurrence, the charge on his plea of self-defense was more favorable to him than he had a right to demand.

That the difficulty occurred in front of his home and the deceased instigated it are mitigating circumstances which the court, judging from the sentence imposed, took into full consideration in pronouncing sentence.

We have examined the other exceptive assignments of error appearing in the record. They fail to disclose any sufficient cause for disturbing the judgment below.

No error.

FRED G. HINSON v. C. L. DAVIS, ADMINISTRATOR OF A. W. DAVIS.

(Filed 19 November, 1941.)

1. Master and Servant § 44—

Under the North Carolina Workmen's Compensation Act the insurance carrier who has paid compensation to an injured employee for which the employer was liable under the Act may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, sec. 11, ch. 120, Public Laws 1929, as amended, Michie's Code, 8081 (r), but the rights and liabilities of such third person are in nowise affected by the Act.

2. Same—Accord between employer and third person does not bar insurance carrier from bringing action in name of employee against such third person.

A collision between a bus and a car caused the death of the driver of the car and injury to the driver of the bus. The insurance carrier paid compensation to the driver of the bus for which the bus driver's employer was liable under the Workmen's Compensation Act, and instituted this action in the name of the employee against the administrator of the estate of the driver of the car. Thereafter the employer paid the administrator a certain sum in full settlement for the death of intestate. The administrator set up this accord as a bar in the action instituted by the insurance carrier in the name of the employee. *Held:* The insurance carrier having been subrogated to the right to maintain the action, the employer cannot affect this right by any act to which the insurance carrier is not a party, and the accord to which neither the employee or the insurance carrier were parties cannot bar their right of action.

3. Subrogation § 2—

Where a party has become subrogated to a particular right the subrogor cannot thereafter, to the detriment of the subrogee, modify or waive the subrogated right.

4. Compromise and Settlement § 2—

A settlement by which the employer pays the administrator of the third party an agreed sum in satisfaction for alleged wrongful death resulting from a collision between intestate's car and a bus driven by the employee is not an accord and satisfaction between the employee and the compensation insurance carrier as against the administrator, the employee and the compensation insurance carrier not being parties to the accord.

APPEAL by defendant from *Olive, Special Judge,* at September Term, 1941, of MECKLENBURG.

This is an action to recover damages for personal injuries alleged to have been negligently inflicted upon the plaintiff by the defendant's intestate.

The plaintiff was the driver of a bus of the Akers Motor Lines, Inc., and the defendant's intestate was the driver of his own automobile. It is alleged in the complaint that the defendant's intestate negligently drove his automobile to his left side of the highway, when meeting the bus driven by the plaintiff, which caused a collision between the two vehicles resulting in personal injury to the plaintiff. The answer denies the allegation of negligence and pleads the contributory negligence of the plaintiff.

The amended answer, in bar of the plaintiff's right to recover in this action, alleges:

"1. That subsequent to the institution of this action, to wit: on the 4th day of January, 1941, the plaintiff's employer, Akers Motor Lines, Inc., for a valuable consideration made, or caused to be made, a settlement

with the defendant, by the terms of which the plaintiff's employer, Akers Motor Lines, Inc., paid, or caused to be paid, to the defendant damages for the wrongful death of defendant's intestate caused by the negligence of the plaintiff, and the plaintiff's employer, Akers Motor Lines, Inc., at the time and place and on the occasion mentioned in the complaint, and that as a part of said settlement, and in consideration of the sum of money paid to the defendant by or for the plaintiff's employer, Akers Motor Lines, Inc., the defendant duly executed and delivered to or for the plaintiff's employer, Akers Motor Lines, Inc., a full and complete release of any and all claims of the defendant against the plaintiff's employer, Akers Motor Lines, Inc., for damages for the wrongful death of defendant's intestate.

"2. That defendant is advised and believes, and upon such advice and belief alleges, that the settlement referred to in the paragraph next preceding constituted a complete accord, settlement and satisfaction of any and all claims of Akers Motor Lines, Inc., and any person, firm or corporation, including the United States Casualty Company, claiming by, through or under Akers Motor Lines, Inc., and constitutes a bar to any recovery by the plaintiff for or on behalf of Akers Motor Lines, Inc., or its insurance carrier, the United States Casualty Company.

"3. That all of the aforesaid matters and things are hereby specially pleaded in bar of any recovery by, for or on behalf of, Akers Motor Lines, Inc., or its insurance carrier, the United States Casualty Company."

The plaintiff moved the court to strike "paragraphs 1, 2 and 3 of defendant's further answer and defense of the defendant's amended answer. That he was not a party to and did not have any knowledge of any settlement made by his employer with the defendant. That even if such a settlement had in fact been made, it could have no effect on this defendant (plaintiff), and is not material, to the trial of the issues involved in this action."

The motion of the plaintiff was allowed, and to the order striking out the paragraphs of the amended answer mentioned, the defendant excepted and appealed to the Supreme Court, assigning error.

J. Laurence Jones and R. Hoyle Smathers for plaintiff, appellee.
Helms & Mulliss for defendant, appellant.

SCHENCK, J. It should be noted in the outset that the action is not instituted in behalf of or in the interest of the plaintiff's employer, Akers Motor Lines, Inc., nor will it in any wise profit thereby. The action is instituted in the name of Hinson, the employee, by the insurance carrier, the United States Casualty Company, which has paid

compensation to the injured employee for which the employer was liable, as is authorized by sec. 11, ch. 120, Public Laws 1929; sec. 1, ch. 449, Public Laws 1933 (N. C. Code of 1939 [Michie], sec. 8081 [r]). The right to so institute the action having accrued to the insurance carrier when it paid the compensation to the employee for which the employer was liable, the employer could not by any act to which the carrier was not a party, disturb or interfere with such right.

The defendant is in no wise affected by the North Carolina Workmen's Compensation Act, ch. 120, Public Laws 1929, and acts amendatory thereof (N. C. Code of 1939 [Michie], secs. 8081 [h], *et seq.*) He is an outsider and a third party, and is given no rights and is relieved of no liability thereby.

The statute does, however, give certain rights to the employer, the insurance carrier and the employee. Among these being that "when any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative. . . ."

It is admitted that the United States Casualty Company has accepted the liability of the Akers Motor Lines, Inc., employer of the plaintiff, and is paying plaintiff compensation under an award of the North Carolina Industrial Commission. The casualty company is therefore subrogated to all the rights existing in favor of the employer against defendant, a third party and stranger to the Compensation Act, including the right to "commence an action in his own name and/or in the name of the injured employee or personal representative for damages on account of such injury or death." This subrogated right in the insurance carrier could not by any act of the employer be altered or changed. Any modification or waiver of rights under subrogation to be effectual must be made by the subrogee and not by the subrogor. The subrogor loses the rights, the subrogee gains them, and when gained by the latter they are beyond the power of the former to modify or waive.

"Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon the same account." 3rd Blackstone 15, 1 Amer. Jur., Accord and Satisfaction, par. 1. In the case at bar the party alleged to be the party injuring is the same as the party alleged to be the party injuring in the accord set up in the assailed answer, but the alleged party injured in the former and the alleged party injured in the latter is entirely different. Any "accord, settlement and satisfaction" between the employer, Akers Motor Lines, Inc., and the defendant, was an act to which the plaintiff was an

entire stranger and affected no rights to which the United States Casualty Company, by virtue of the statute, had been subrogated, and could not be properly pleaded as a defense to an action by the plaintiff in behalf of himself or of the casualty company against the defendant. Therefore the order striking out the further answer setting up such a plea was proper.

Affirmed.

STATE v. FRANK STARNES.

(Filed 19 November, 1941.)

1. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. C. S., 4200.

2. Homicide § 5—

Murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation.

3. Criminal Law § 81c—

Conflicting instructions upon a material point, one correct and the other incorrect, must be held for prejudicial and reversible error, since the jury, which must take the law from the court, is not supposed to know which is the correct instruction and it must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect.

4. Homicide § 30—

In a homicide prosecution an instruction that murder in the first degree is the unlawful killing of a human being without justification in law, which, plus malice, constitutes murder in the second degree, must be held for reversible error notwithstanding that the court thereafter correctly defined murder in the first degree and murder in the second degree, since the charge contains conflicting instructions upon a material point.

5. Criminal Law § 77d—

Where no exceptions are filed to defendant's statement of case on appeal and it becomes in due time a part of the record, the Supreme Court is bound thereby, and when the charge as set forth therein contains conflicting instructions upon a material point, defendant's exception thereto must be sustained regardless of whether the judge's language was incorrectly transcribed or whether the error was due to a *lapsus linguæ*.

6. Criminal Law § 83: Constitutional Law § 33—

Where defendant has been granted a new trial for error in the charge appearing of record and upon appeal from a second conviction the record discloses a kindred error in the charge upon the second trial, a new trial must nevertheless be awarded upon the second appeal, since no person may be deprived of life or liberty except by the law of the land. Constitution of North Carolina, Art. I, sec. 17.

STATE *v.* STARNES.

APPEAL by defendant from *Sink, J.*, at 7 April, 1941, Special Criminal Term, of MECKLENBURG.

Criminal prosecution upon indictment charging defendant with murder of Anna Harris.

A brief résumé of the testimony given on former trial, not materially different from that upon the trial to which this appeal relates, is set out in opinion on former appeal as reported in 218 N. C., 539, 11 S. E. (2d), 553. Hence, no useful purpose will be served by repeating it here.

The case on appeal shows that, beginning the charge, the court told the jury that defendant stands indicted upon a bill of indictment charging the capital offense of murder; that the State contends that the testimony should satisfy the jury beyond a reasonable doubt (1) "that it is murder in the first degree as that will subsequently be defined to you"; (2) "that should you fail to so find, that you should find him guilty of murder in the second degree, as that will be defined to you"; and (3) "that should you fail in that, you should find him guilty of manslaughter, as that will be defined"; that to this indictment and to these contentions defendant pleads not guilty, and contends "that from you he should receive a verdict of not guilty"; and that "there are four verdicts involved . . ." Then, after stating, "I am of the opinion and have practiced explaining to a jury at the outset of my charge the nature of the offense named in the bill of indictment, certainly so in a major felony such as this," the court continued by saying: "Murder in the first degree is the unlawful slaying of a human being, that is, a slaying without justification in law, not arising out of an accident, but in contravention of the statutes. That, plus malice, makes murder in the second degree; an unlawful killing, plus malice, makes murder in the second degree."

Defendant excepts to that portion last quoted.

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.

Brock Barkley for defendant, appellant.

WINBORNE, J. For error assigned to the charge as above indicated, there must be a new trial.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. C. S., 4200. *S. v. Benson,* 183 N. C., 795, 111 S. E., 809; *S. v. Steele,* 190 N. C., 506, 130

S. E., 308; *S. v. Payne,* 213 N. C., 719, 197 S. E., 753; *S. v. Bowser,* 214 N. C., 249, 199 S. E., 31; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284, and numerous other cases.

Murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation. *S. v. Benson, supra.*

Applying these definitions to the portions of the charge to which exception is taken as shown in the foregoing statement of the case, neither murder in the first degree nor murder in the second degree is correctly defined there. This is conceded by the Attorney-General for the State. But it is pointed out, and justly so, that the court, continuing in the charge, correctly defined both first and second degree murder, and explained the elements constituting each offense. Upon that the State contends that the charge taken as a whole may not be held for error. However, in this connection, the decisions of this Court uniformly hold that when there are conflicting instructions to the jury upon a material point, the one correct and the other incorrect, a new trial must be granted as the jury, which must take the law from the court, is not supposed to know which is the correct instruction. We must assume in such cases, in passing upon appropriate exception, that the jury, in coming to a verdict, was influenced by that portion of the charge which is incorrect. *Tillett v. R. R.,* 115 N. C., 662, 20 S. E., 480; *Williams v. Haid,* 118 N. C., 481, 24 S. E., 217; *Edwards v. R. R.,* 132 N. C., 99, 43 S. E., 585; *S. v. Falkner,* 182 N. C., 793, 108 S. E., 756; *S. v. Waldroop,* 193 N. C., 12, 135 S. E., 165; *Hubbard v. R. R.,* 203 N. C., 675, 166 S. E., 802; *S. v. Mosley,* 213 N. C., 304, 195 S. E., 830; *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530; *Templeton v. Kelley,* 217 N. C., 164, 7 S. E. (2d), 380.

In the case at bar, what is murder in the first degree, and what is murder in the second degree, within the purview of the law, are material points and essential to proper guidance for the jury.

However, we deem it fair to the learned judge who presided in the trial below to say that no exceptions were filed to the case on appeal as served by defendant, and hence it was not settled by the judge. Therefore, the case on appeal, as served, became in due time a part of the record on appeal. Under these circumstances it may have been that the language used by the court was misunderstood, and that, hence, the charge as reported is not as given, yet we are bound by the record. *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732; *S. v. Griggs,* 197 N. C., 352, 148 S. E., 547; *S. v. Stansberry,* 197 N. C., 350, 148 S. E., 546; *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868; *S. v. Miller,* 214 N. C., 317, 199 S. E., 89; *S. v. Dee,* 214 N. C., 509, 199 S. E., 730.

On the other hand, if the charge be a *lapsus linguæ,* it is, nevertheless, error—"one of those casualties which, now and then, befalls the most

circumspect in the trial of causes on the circuit," *Stacy, C. J.*, in *S. v. Kline,* 190 N. C., 177, 129 S. E., 417; *S. v. Allen,* 190 N. C., 498, 130 S. E., 163; *Cogdill v. Hardwood Co., supra; S. v. Griggs, supra; S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *S. v. Stiwinter, supra.* See, also, *S. v. Starnes, supra.*

Other exceptive assignments are not considered.

Even though on the appeal from former judgment upon similar verdict a new trial was granted for cause kindred to that assigned on this appeal, defendant is entitled to go before another jury, for no person ought to be deprived of his life or liberty but by the law of the land. Constitution of North Carolina, Art. I, sec. 17.

New trial.

STATE v. L. F. MCALHANEY, ARTHUR WORLEY, BARNEY RENTZ, JACK JAMES, AND DAN HITCHCOCK.

(Filed 19 November, 1941.)

1. States § 1: Indians § 1—

As a result of the Treaty of Peace with England the territory embraced within the thirteen states, together with land not previously granted, passed to these States subject to the possessory rights of the Indians over the land which they occupied.

2. Indians § 1—

Notwithstanding the guardianship relation existing between the Federal Government and the Indians, Indians residing in North Carolina are citizens of this State and remain subject to its laws.

3. Indians § 4: Courts § 9—

Our courts have jurisdiction of a prosecution of a white man for assault upon an Indian committed upon an Indian reservation, which jurisdiction is not ousted by the enactment of sec. 213, Title 25, U. S. C. A., since the Federal Act does not give the Federal Government exclusive jurisdiction, and could not interfere with the exercise of the police powers of the State.

APPEAL by defendant from *Bobbitt, J.*, at July Term, 1941, of SWAIN. No error.

Criminal prosecution under bill of indictment which charges that the defendant McAlhaney *et al.* did unlawfully, willfully and feloniously: (1) conspire to kidnap one Tom King; (2) kidnap one Tom King; (3) conspire to commit a felonious assault upon one Tom King; and (4) commit a felonious assault as defined in C. S., 4214, upon one Tom King.

When the cause came on for trial, at the conclusion of the evidence, it appearing that defendant McAlhaney is a white person and Tom King,

the party alleged to have been kidnaped and assaulted, is an Indian, and that the alleged assault occurred within the bounds of the Cherokee Indian Reservation, the defendant prayed the court to charge the jury as follows:

"The court charges the jury that, even though it should find beyond a reasonable doubt that the defendants, or any of them, committed the acts alleged in the bill of indictment, yet if the jury should further find that said acts were committed on the lands embraced in what is known as the Cherokee Indian Reservation and should further find that the person, namely Tom King, upon whom the assault was alleged to have been made and who was alleged to have been kidnaped and against whom the conspiracies were alleged to have been entered into, was a Cherokee Indian and a member of the Indian Band located on said Reservation, then the court charges you that this court would not have jurisdiction of the offenses, and you should, therefore, return a verdict of not guilty as to all the defendants." The court declined to give the prayer as requested and defendant McAlhaney excepted.

The jury returned a verdict of "Not Guilty" upon the first, second, and third counts, and upon the fourth count "Guilty of an assault, causing serious damage." From judgment upon the verdict the defendant McAlhaney appealed.

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

Jones, Ward & Jones and Baxter Jones for L. F. McAlhaney, appellant.

BARNHILL, J. The defendant relies solely upon his exceptive assignment of error based on the refusal of the court to instruct the jury as prayed. In so doing he concedes that, ordinarily, the criminal laws of the State are applicable to offenses committed within the Indian Reservation. *S. v. Adams,* 213 N. C., 243, 195 S. E., 822. He contends, however, that the Federal Government, by the enactment of sec. 213, Title 25, U. S. C. A., has assumed jurisdiction of all felonious assaults committed by white persons upon Indians within the Indian country and that this jurisdiction once assumed is exclusive, depriving the State courts of any jurisdiction to try white persons charged with a felonious assault within the Cherokee Reservation. This contention cannot be sustained.

After the colonies had achieved independence the thirteen states which then came into being succeeded under the Treaty of Peace to the rights of England in this territory. The result of this was that the sovereignty of the territory embraced within the several states, together with the

land not previously granted, passed to these States subject to the possessory rights of the Indians over the land which they occupied. *Fletcher v. Peck,* 6 Cranch, 87, 3 L. Ed., 162; *Worcester v. Georgia,* 6 Pet., 515, 8 L. Ed., 483; *Eu-che-lah v. Welsh,* 10 N. C., 155; *United States v. Wright,* 53 Fed. (2d), 300; *Eu-che-lah v. Welsh, supra.*

While the Federal Government has supervised their contracts, educated their children and made generous provisions for their support under the guardianship relation existing between the Federal Government and the Indians they remain subject to the laws of North Carolina.

"They (the Cherokee Indians in North Carolina) are citizens of that State and bound by its laws." *Eastern Cherokee Indians v. United States,* 117 U. S., 288, 29 L. Ed., 880; *Cherokee Nation v. Georgia,* 5 Pet., 1; *Worcester v. Georgia, supra; United States v. Boyd,* 68 Fed., 577; *United States v. Swain County,* 46 Fed. (2d), 99.

Unless expressly excepted, our laws apply equally to all persons, irrespective of race, and all persons within the State are subject to its criminal laws and are within the jurisdiction of its courts. Particularly is this so as to citizens of the State. *S. v. Ta-cha-na-tah,* 64 N. C., 614; *S. v. Wolf,* 145 N. C., 441; *Eastern Cherokee Indians v. United States, supra; United States v. Wright, supra; S. v. Adams, supra; Utah Power & Light Co. v. United States,* 243 U. S., 389, 61 L. Ed., 791; *United States v. McBratney,* 104 U. S., 621.

The fact that the eastern band of Indians had surrendered the right to their tribal land, had separated themselves from their tribe and had become subject to the laws of the State of North Carolina did not destroy the right or the duty of the guardianship on the part of the Federal Government. This right of guardianship, however, relates primarily to property rights and economic welfare. *United States v. Wright, supra.*

Criminal statutes relating to Indians, enacted by The Congress in furtherance of the guardianship relation the Federal Government undertakes to maintain towards Indians, are not exclusive. "Clearly no Act of Congress in their behalf would be valid which interfered with the exercise of the police powers of the State. In such a situation a law to be sustained must have relation to the purpose for which the Federal Government exercises guardianship and protection over a people subject to the laws of one of the States, *i.e.,* it must have reasonable relation to their economic welfare." *United States v. Wright, supra.*

We conclude, therefore, that the enactment by The Congress of U. S. C. A., Title 25, sec. 213, was not the exercise of a power vested exclusively in the Federal Government and creates no such conflict as would oust the jurisdiction of the State courts.

In the trial below we find

No error.

SCHOENITH, INC., v. ADRIAN X-RAY MANUFACTURING COMPANY, A CORPORATION, AND M. B. ADRIAN, TRADING AS ADRIAN X-RAY MANUFACTURING COMPANY.

(Filed 19 November, 1941.)

1. Appeal and Error § 37e—

Upon defendant's motion, made on special appearance, to set aside service of summons and to dismiss the action, the court's findings are conclusive when supported by competent evidence even though there is conflict in the affidavit testimony.

2. Process § 6d—

Defendant is a nonresident corporation without property in this State and is not licensed to do business and does not maintain a process agent here. Summons was served on its director who came to this State for the purpose of servicing a machine which it had sold plaintiff. The director made the trip to this State after its obligations to service the machine under the contract of sale had expired. *Held:* The visit of the director to this State upon the evidence was an "isolated act" or an act of "trivial business" insufficient to bring the corporation within this State for the purpose of service of summons, and order setting aside the service was proper.

APPEAL by plaintiff from *Armstrong, J.*, at May Extra Term, 1941, of MECKLENBURG. Affirmed.

Motion, made on special appearance, to quash the summons herein and to invalidate the attempted service thereof.

Defendant, a Wisconsin corporation, sold to the plaintiff, a North Carolina corporation with its principal place of business in Charlotte, North Carolina, an X-ray industrial machine. By written contract it agreed to install the machine and to allow the plaintiff a thirty-day trial period; to guarantee complete satisfaction and to accept the return of the machine if not satisfactory; to guarantee the unit for a period of twelve months against mechanical defect; to supply replacement parts within the guaranty period and to give assistance in the training and instruction of operators. The machine was installed and inspections and repairs were made during the contract period. After the contract period a director of the defendant, upon the solicitation and at the request of plaintiff, came to North Carolina to service the machine. While in the State, service of summons herein was had upon him as a director of the defendant corporation. Thereupon, defendant, through its counsel, on special appearance, moved to vacate service of summons.

When the motion came on to be heard the court below found the facts and upon the facts found entered its order invalidating and setting aside service of summons and dismissing the action. Plaintiff excepted and appealed.

Nathaniel G. Sims and Frank H. Kennedy for plaintiff, appellant.
Gover & Covington and Hugh L. Lobdell for defendant, appellee.

BARNHILL, J. In the judgment entered these specific findings appear: that the X-ray Shoe Fitters, Inc., operating under the trade name of Adrian X-ray Manufacturing Company, is a Wisconsin corporation; that it is not licensed to do business in North Carolina; that it has no place of business in North Carolina; that it has no process agent in the State, and at the time of the attempted service herein it had no property within the State; that M. B. Adrian, upon whom service of summons was attempted, came to North Carolina at the request of the plaintiff for the sole purpose of repairing said machine; that at said time there was no other representative of said corporation in North Carolina; that the only acts done by said Adrian on said trip to North Carolina were in connection with making repairs to said machine and that said Adrian was temporarily in North Carolina at the time of said attempted service; that under the written contract defendant was not obligated to service or repair the machine and that the guarantee period had expired at the time service of summons was attempted; that the installation and repairing of said machine was incident to the sale thereof in interstate commerce; that the servicing or repairing of the machine by Adrian was an isolated act and that at the time of the attempted service defendant was not present in North Carolina and was not doing business in North Carolina and that the acts done by the corporation in North Carolina prior to and at the time of said attempted service were not of such substantial nature as to bring said corporation within the State.

While the affidavit testimony was conflicting there was sufficient competent evidence offered to support the facts found by the court below. They are, therefore, conclusive and not subject to review. *Parris v. Fischer & Co.*, 219 N. C., 292, 13 S. E., 540; *Brown v. Coal Co.*, 208 N. C., 50.

The conclusions drawn therefrom are supported by the authorities.

Soliciting orders to be approved at the home office for merchandise to be shipped in interstate commerce is not doing business within the State. *Plott v. Michael*, 214 N. C., 665, 200 S. E., 429; *People's Tobacco Co. v. American Tobacco Co.*, 246 U. S., 79, 62 L. Ed., 587, 101 A. L. R., 133 (note).

Upon the facts found the defendant was not in the State in the person of its director at the time of the attempted service of summons. Even if we concede that compliance by defendant with its contract provisions would constitute "doing business" within the State, its obligations under the contract had expired. The visit of its director to the State thereafter at the request of plaintiff to service the machine constitutes an

"isolated act" or an act of "trivial business" which was insufficient to bring the corporation within the State for the purpose of service of summons. *Parris v. Fischer & Co., supra,* 23 Am. Jur., 353, 20 C. J. S., 155; *People's Tobacco Co. v. American Tobacco Co., supra; York Mfg. Co. v. Colley,* 247 U. S., 21, 62 L. Ed., 963; *Consolidated Textile Corp. v. Gregory,* 289 U. S., 85, 77 L. Ed., 1047; *Rosenberg Bros. & Co. v. Curtis Brown Co.,* 260 U. S., 516, 67 L. Ed., 372; *Cannon v. Time, Inc.,* 115 Fed. (2d), 423; *Truck Parts, Inc., v. Briggs Clarifier Co.,* 25 Fed., Supp., 602; *Merriman v. Martindale-Hubbell, Inc.,* 36 Fed. Supp., 182.

The judgment below is

Affirmed.

STATE v. EVERETTE CLARKE.

(Filed 19 November, 1941.)

Bastards § 3—

Willfulness is an essential element of the offense defined by ch. 228, Public Laws 1933, and a warrant failing to allege that defendant's failure or refusal to support his illegitimate child was willful fails to charge an offense under the statute and cannot support a conviction.

APPEAL by defendant from *Warlick, J.,* at June Term, 1941, of CATAWBA. Error and remanded.

The defendant was charged with violation of ch. 228, Public Laws 1933, as amended, relating to the support of illegitimate children. The warrant upon which defendant was tried charged "that Everette Clarke on or about the 22nd day of May, 1939, in Catawba County, Hickory Township, City of Hickory, did unlawfully and willfully beget upon the body of Mildred Cody a child, now four months of age, same being an illegitimate child, and has failed, neglected and refused to provide adequate support of said child, against the statute in such case made and provided, and against the peace and dignity of the State."

The verdict upon issues submitted was against the defendant, and from judgment imposing sentence predicated thereon defendant appealed.

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

W. H. Strickland for defendant, appellant.

DEVIN, J. The statute under which the defendant was tried provides that, "Any parent who willfully neglects or who refuses to support and

maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided."

Willfulness is one of the essential elements of the offense. This must be charged in the warrant, *S. v. Cook,* 207 N. C., 261, 176 S. E., 757; *S. v. Spillman,* 210 N. C., 271, 186 S. E., 322. Its omission is not cured by C. S., 4623, *S. v. Tyson,* 208 N. C., 231, 180 S. E., 85, or by amendment after verdict, *S. v. Tarlton,* 208 N. C., 734, 182 S. E., 481; *S. v. McLamb,* 214 N. C., 322, 199 S. E., 81.

The record in this case is not sufficient to support the judgment.

As the warrant fails to charge an offense under the statute, questions relating to the interpretation of other provisions of the statute are not presented or decided.

Error and remanded.

JOSEPH B. CHESHIRE, JR., TRUSTEE UNDER THE WILL OF LAURA F. COSBY, v. FIRST PRESBYTERIAN CHURCH OF RALEIGH; PRESBYTERIAN ORPHANS' HOME, AND EDWIN F. HARTSHORN, ADMINISTRATOR OF B. H. COSBY.

(Filed 19 November, 1941.)

1. Pleadings § 20—

A demurrer admits the facts alleged in the complaint.

2. Same: Executors and Administrators § 26—When incapacity of plaintiff to sue does not appear from complaint, demurrer on this ground is bad.

This action was instituted by a trustee alleging the termination of the trust and praying that his final account be settled under orders of the court and that he be discharged. Plaintiff alleged that he was the duly appointed, qualified and acting trustee under the will. The administrator of one of the beneficiaries named in the will filed demurrer contending that the plaintiff did not have the capacity to sue in that the will appointed an executor and contained no authority for the appointment of a trustee. *Held:* Since the word "duly" means according to legal requirements, and the demurrer admitted plaintiff's allegation that he was the duly appointed, qualified and acting trustee, the question of the capacity of the plaintiff to sue cannot be raised by demurrer, no defect or incapacity of plaintiff to sue appearing upon the face of the complaint. C. S., 517.

APPEAL by plaintiff from *Bone, J.,* at June Term, 1941, of WAKE. Reversed.

This was an action instituted by plaintiff as trustee under the will of Laura F. Cosby for settlement of the estate. The defendant Hartshorn, administrator of B. H. Cosby, one of the beneficiaries named in the will, filed demurrer on the ground that the plaintiff did not have legal capacity

to sue, and that there was a defect of parties plaintiff. The demurrer also raised the question of jurisdiction, and the sufficiency of the facts alleged to constitute a cause of action. The other defendants, who are ultimate beneficiaries, did not join in the demurrer.

The demurrer was sustained, and plaintiff appealed.

Paul F. Smith for plaintiff, appellant.
James I. Mason for defendant, appellee.

DEVIN, J. The plaintiff alleged in his complaint that "he is the duly appointed, qualified and acting trustee under the will of Laura F. Cosby, deceased." A copy of the will, dated 3 March, 1917, was attached. From this it appeared that the testatrix appointed W. N. Jones executor, and that a trust was created for the benefit of B. H. Cosby during his natural life. B. H. Cosby died 14 November, 1940, and defendant Hartshorn is administrator of his estate.

It was further alleged that the plaintiff "and his predecessors as trustee, namely, William Bailey Jones and W. N. Jones, have filed annual accounts of their transactions as trustee" in the Superior Court and the accounts have been approved; that the trust created by the will terminated upon the death of B. H. Cosby, and the plaintiff as trustee is filing his final account, with prayer that it be settled under orders of the court, and that he be discharged.

The demurrer challenges the sufficiency of the proceeding, principally, upon the ground that the plaintiff does not have capacity to sue, and that there is a defect of parties plaintiff. This is based upon the view that it appears from the will, a copy of which is attached to the complaint, that an executor was named, and that if the executor has died, or is incapable of acting, an administrator *cum testamento annexo* should have been appointed to carry out the provisions of the will, and that no authority appears for the appointment of a trustee.

But the complaint alleges that plaintiff is "the duly appointed, qualified and acting trustee." The demurrer admits that fact. *Adams v. Cleve,* 218 N. C., 302, 10 S. E. (2d), 911. The word "duly" has a definite significance in the language of the law. It means "according to legal requirements." Black's Law Dictionary. It "implies the existence of every fact essential to perfect regularity of procedure." 19 C. J., 833. "The word 'duly' means in a proper way, or regularly, or according to law." *Robertson v. Perkins,* 129 U. S., 233.

No defect of parties plaintiff or incapacity to sue appears on the face of the complaint. Hence, the objection must be taken by answer. C. S., 517; *Lunn v. Shermer,* 93 N. C., 164; *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545; *S. v. Gant,* 201 N. C., 211, 159 S. E., 427. The demurrer

on the ground that the complaint did not state facts sufficient to constitute a cause of action, or that the court did not have jurisdiction, cannot be sustained.

Several interesting questions were debated on the argument and discussed in the briefs, but these are not raised by the demurrer, and properly should be presented by pleadings wherein all the facts may be made to appear, and plenary judgment rendered thereon.

The judgment sustaining the demurrer is

Reversed.

MRS. MARY H. BRENIZER AND HUSBAND, ADDISON B. BRENIZER, v. GEORGE STEPHENS ET AL.

(Filed 26 November, 1941.)

1. Deeds § 16—

When restrictive covenants are inserted in deeds from the owner of a subdivision in accordance with a general plan of development and improvement of the property for residential purposes, the owners of property therein by deeds from the original owner or by *mesne* conveyances from him may enforce the restrictions against another owner of property within the development.

2. Same—Encroachment of business upon property adjacent to subdivision does not affect enforceability of restrictive covenants inter se by owners of property within the subdivision.

When restrictions are inserted in deeds from the owner of a real estate subdivision in accordance with a general plan of development of the property for residential purposes, and there has been no violation of the covenants by owners of property therein, the fact that property abutting the subdivision has been developed for business purposes, resulting in the property within the subdivision adjacent thereto becoming more valuable for commercial purposes and less valuable for residential purposes, does not entitle the owner of such adjacent property within the subdivision to have the restrictions declared inequitable and unenforceable as to him, since to relieve him of the restrictions would damage the remaining property owners within the subdivision who had bought and improved their respective lots in reliance on the restrictions formulated in accordance with the general plan of development. *Elrod v. Phillips*, 214 N. C., 472, and *Bass v. Hunter*, 216 N. C., 505, cited and distinguished in that in those cases it did not appear from the facts agreed that the restrictions in those cases were made pursuant to a general plan of development and improvement.

APPEAL by plaintiffs from *Alley, J.*, at April Term, 1941, of MECKLENBURG. Affirmed.

This proceeding was brought by plaintiff to have removed certain restrictions upon the use of her property occurring in her own deed and

mesne conveyances under which she holds, principally those requiring it to be used for residential purposes. She alleges such an encroachment of business in the neighborhood and adjacent area as to have destroyed or defeated the purpose of the restrictions and render their further observance or enforcement without object, oppressive, and inequitable. In this she is opposed by owners of other property, contiguous, adjacent, and neighboring that of the plaintiff, and held under substantially identical restrictions, uniform in the area described in the pleadings, in which the owners derived their title from a common source, with which the restrictions originated.

The suit was brought against certain named persons owning property within the area and "any other persons who may claim any interest in any of the lots shown upon the map recorded in Book 230, p. 128, in the Mecklenburg County, North Carolina, Registry," that being a map of the development containing plaintiff's lot, and the lots of numerous others held under deeds containing similar restrictions. When the case came on for hearing, many such persons, some seventy-five or more, had become parties defendant.

The facts may be summarized: Some time in the year 1911 the defendant, George Stephens, owned a large part of the area included in the map above referred to, and the Stephens Company, a corporation, of which George Stephens was president and manager, owned the rest. Together the holdings form an extensive area, known as "Blocks Nos. 7 and 9 of Myers Park," at present occupying the territory bounded by Providence Road, Hermitage Road, Granville Road, and Hopedale Avenue. The blocks are separated by Queens Road. This area was subdivided into numerous lots fronting on the streets named, and many of them were sold and are now owned or occupied by a great number of persons, including the defendants.

Intending to provide a section to be used exclusively for residential purposes, and thereby add to the ease, security and comfort of those who bought for that purpose, as well as to make the development more attractive to purchasers, the promoters, George Stephens and the Stephens Company, sold these lots and conveyed by deeds which, without exception, contain restrictions that they should be used only for residential purposes, and defendants and other owners and occupants, either directly or through *mesne* conveyances, hold their lots upon this condition, and assert that they bought with regard to the security and protection afforded them by similar restrictions in all other deeds to property within the area.

Plaintiff's lot is located on the corner of Block 7, where Hopedale Avenue, Queens Road, and Providence Road come together—at the apex of the block.

The evidence discloses that opposite the block, along the other side of Providence Road, a very considerable business development has taken place, including a miniature golf course, store, soda shop, beauty parlor, automobile service station, Sinclair filling station, meat market, grocery stores, and other business establishments, including a considerable quota of filling stations. Within the territory described as Blocks 7 and 9, Myers Park, including the property of plaintiffs and defendants, that being the territory restricted to residential use, there has been no violation of the restrictions imposed in the deeds, and none of the property has been used for other than residential purposes.

The plaintiffs claim that the business development along Providence Road, outside of the area, has destroyed the purpose of the restriction to residential use, and furnishes equitable ground for its annulment.

On the hearing the trial judge intimated that he would not hear testimony or evidence with regard to business developments outside the area protected by the restrictions in the deeds, and across Providence Road. On this intimation, the plaintiffs submitted to nonsuit and appealed.

Taliaferro & Clarkson for plaintiffs, appellants.

Cochran & McCleneghan, Whitlock, Dockery & Shaw, and Cansler & Cansler for defendants, appellees.

SEAWELL, J. The plaintiffs have raised some fundamental questions as to the rights of certain defendants to enforce the restrictions in the deeds, whether the covenants are personal, or run with the lands, and as to the separate consideration of the several subdivisions in Myers Park. The exigencies of decision do not require their discussion since there are defendants in the action whose legal and property interests are involved in the controversy and will be affected by the judgment rendered.

Applicable to the situation disclosed by the evidence, the general law is succinctly stated in 26 C. J. S., 548, 549, sec. 167: "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created. The doctrine does not depend on whether the covenant is to be construed as running with the land." Similar statements are found in Tiffany, Real Property, 3rd Ed., Vol. 3, p. 501, sec. 867, and Thompson, Real Property, Perm. Ed., Vol. 7, pp. 49, 88, secs. 3567, 3605.

The law so stated is recognized in practically all of the United States, and is the law of this State. *Johnston v. Garrett,* 190 N. C., 835, 130

S. E., 835; *Franklin v. Realty Co.,* 202 N. C., 212, 217, 162 S. E., 199, 201. This is not disputed in the present case, nor is it denied that Block 7 in the Myers Park development, where plaintiff's lot is located, is a development of the kind and character to which the law applies and that the territory is uniformly covered by deeds containing, amongst other covenants, restrictions that the property shall be used only for residential purposes. The question for decision is whether evidence of business changes and developments along Providence Road, outside of the covenanted area, when none have occurred within the area, is available to plaintiffs in support of their demand that the restrictions in their deed be removed or declared inoperative because of radical changes affecting the property, which have defeated the purpose of the restrictions and rendered their enforcement inequitable.

The plaintiff bases her cause of action entirely on changes of condition along Providence Road outside of the Myers Park subdivision in which she, and others who have been made parties, own lots affected with the restriction, universal in that area, that these lots shall be used only for residential purposes. The exception to the exclusion of evidence of these business developments, of various kinds, on Providence Road outside of the covenanted area being under review, the right of plaintiff to rely on the facts so shown in her demand for equitable relief should be considered. If she could not do so, the evidence is irrelevant, and its exclusion proper.

The unmistakable weight of authority in this country answers this question in the negative, 26 C. J. S., 576, sec. 171, and cases cited, and that had been the interpretation of opinion in this State, see *McLeskey v. Heinlein,* 200 N. C., 290, 156 S. E., 489, and *Franklin v. Realty Co.,* 202 N. C., 212, 162 S. E., 199; but plaintiffs contend that *Elrod v. Phillips,* 214 N. C., 472, 199 S. E., 722, and *Bass v. Hunter,* 216 N. C., 505, 5 S. E. (2d), 558, have established a contrary holding. The defendants, however, point out that both of these cases were "friendly suits," in which both plaintiff and defendant were interested in the removal of the restrictions, and that all of the facts were not brought out as they would have been had the suit been adversary in fact as it was in form.

Indeed, on analysis of the facts presented to the lower court, and to this Court on appeal, in both cases, we find conspicuously absent from the facts agreed the essential conditions on which restrictions of this kind are enforced in favor of owners who are not parties or privies to the deed—the requirement that the deeds and restrictions therein are made in pursuance of a general plan of development and improvement—so as to give rise to a mutuality of covenant and consideration, or to create mutual negative equitable easements, or at least to give other

owners in the covenanted area a legal or equitable right to the enforcement of the restrictions in the deeds of other owners. In fact, in neither of the cases does it appear that restrictions of the kind were general throughout the territory, or, indeed, that they were found elsewhere than in the deeds from which they were sought to be removed or those of the immediate parties to the suit. The Court is presumed to have rendered its opinion upon these facts, and the cases are distinguishable from the case at bar in essential factual situation. Taking into consideration the finding of fact to which in each case the Court was bound, we do not think they were intended to commit the Court to the view presented by plaintiffs in a case of this kind. However that may be, the Court does not feel constrained to depart from its previous holdings in this respect, and ignore the great weight of authority, which, upon well considered reasoning, establishes the contrary rule, and adopt one which would be the beginning of the end of the security afforded home-builders in similar residential developments, becoming so necessary to modern living, and almost universally protected by law.

It is generally held that the encroachment of business and changes due thereto, in order to undo the force and vitality of the restrictions, must take place within the covenanted area. *McLeskey v. Heinlein, supra,* at 293, S. E., at 491; *Franklin v. Realty Co., supra; Continental Oil Co. v. Fennemore,* 38 Ariz., 277, 299 Pac., 132; *Bickell v. Moraio,* 117 Conn., 176, 167 Atl., 722; *Cuneo v. Chicago Title and Trust Co.,* 337 Ill., 589, 169 N. E., 760; *Drexel State Bank of Chicago v. O'Donnell,* 344 Ill., 173, 176 N. E., 348; *Moreton v. Palmer Co.,* 230 Mich., 409, 203 N. W., 116; *Wineman Realty Co. v. Pelavin,* 267 Mich., 594, 255 N. W., 393; *Pierce v. St. Louis Union Trust Co.,* 311 Mo., 262, 278 S. W., 398; *Rombauer v. Compton Heights Christian Church,* 328 Mo., 1, 40 S. W. (2d), 545; *Humphreys v. Ibach,* 110 N. J. Eq., 647, 160 Atl., 531. There authorities are all apposite to the point presented, and are typical of scores of others that might be cited in support of the proposition laid down. We feel disposed to quote freely from some of them which express the rule in language as adequate as any at our command.

Dealing with the same situation, the Supreme Court of Michigan, in *Moreton v. Palmer Co., supra,* at 413, N. W., at 117:

"But aside from and beyond that issue, those owning property in a restricted residential district or neighborhood, and especially those who have their homes there, and been led to buy or build in such locality by reason of restrictive covenants running with the land imposed upon the street, block or subdivision in which they have purchased, are entitled to protection against prohibited invasion regardless of how close business may crowd around them on unrestricted property, provided the original plan for a residential district has not been departed from in the re-

stricted district, street or block, and the restrictive requirements have been generally enforced, or accepted and complied with by purchasers. . . . The case falls well within that class where it is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings, free from inroads by those who attempt to invade restricted residential districts and exploit them under some specious claim that others have violated the restrictions, or business necessities nullified them."

And in *Wineman Realty Co. v. Pelavin, supra,* at 599, N. W., at 395:

"The contention of defendants that the property could be used more profitably for business purposes does not impress us. While it is claimed that it would be far better were property on some main thoroughfares no longer restricted for residential purposes, nevertheless those who have purchased property and otherwise acted in reliance upon the restrictions have property rights that cannot be overlooked. Plaintiffs show that the value of their property would be unfavorably affected by such a violation of their rights. Restrictions generally observed will not be lifted because of business inroads around the subdivision."

In *Greer v. Bernstein,* 246 Ky., 286, 54 S. W. (2d), 927, dealing with changed conditions outside the subdivision involved, it is said: "However, such alterations and changes cannot be said to have such a fundamental effect as to entitle defendant to rely on this defense, even if it could be made available when the changes relied on were erected and constructed only on property adjacent to the development but not upon any part of it."

And in *Rombauer v. Compton Heights Christian Church, supra,* the same view is taken: "If no radical change in the condition and use of the restricted property occurs, the circumstances that there have been changes in the territory surrounding the covenanted area will not of itself be sufficient to destroy the restrictions. *Pierce v. St. Louis Union Trust Co., supra,* 311 Mo. loc. cit., 295, *et seq.,* 278 S. W. loc. cit. 408."

In rejecting as ineffective similar evidence of business developments in adjacent territory, the New Jersey Court, in *Humphreys v. Ibach, supra,* said: "Complainant relies on evidence of the increase in traffic on Cedar Lane and the growth in the number of stores and similar business establishments on this street east and west of the tract in question and even directly opposite it. Business on Palisades Avenue has also been proved. No business establishments, however, upon the tract which is the subject of this controversy have been shown, but it appears that 19 dwelling houses have been erected on the tract on Francis Street within the last few years on the faith of these restrictive covenants and in the belief of their owners that their property would not be depreciated for dwelling purposes by the encroachment of business within the restricted area."

To the same effect is *Heitkemper v. Schmeer,* 146 Ore., 304, 29 P. (2d), 540: "The fact that the character of the territory surrounding this restricted district has changed does not affect the question of the enforcement of the restriction within such district."

The plaintiffs, in their brief, point out that the lot from which they seek to remove the restrictions may be sold for $25,000 as business property, but as residential property it is worth much less. We think the observation of the Court in *Cuneo v. Chicago Title & Trust Co., supra,* rejecting such argument, is pertinent:

"While changes have taken place on Sheridan Road, and appellants' property abutting on that street would doubtless be more valuable as commercial property than as residence property, yet equity cannot, on that ground alone, abrogate and set aside restrictions on the use of that property which have been made for the benefit of other property which has not been so changed. While it may be a financial hardship upon appellants to enforce the single-dwelling restrictions on their lots, yet it must be borne in mind that these restrictions were in the deeds which they took to the property, and are made for the benefit of all of the lots on Castlewood Terrace."

See, also, *Drexel State Bank of Chicago v. O'Donnell, supra.*

The whole matter is well summed up in *Rombauer v. Compton Heights Christian Church, supra,* from which we quote further:

"Neither is it true that because a small part of a restricted district, lying along the edge or at the threshold thereof, is forced to bear the brunt of attack from outside commercial expansion, and as a result is impaired in value for the use prescribed by the restrictions—in these circumstances we say it is not true that the restrictions will be abated as to the part so affected because of the hardship visited upon that particular land as compared with the sheltered portions of the district. *Thompson v. Langan,* 172 Mo. App., 64, 83, 154 S. W., 808, 813; *Benzing v. Harmon,* 219 Mich., 532, 189 N. W., 69. The very purpose of the restrictions is to protect the property in the covenanted area from such invasions, *Trustees of Columbia College v. Thacher,* 87 N. Y., 311, 319, 41 Am. Rep., 365; and if the restrictions are of substantial value to the covenantees, equity may enforce them though serious injury result to the servient estate, *Batchelor v. Hinkle,* 210 N. Y. loc. cit., 251, 104 N. E. loc. cit. 631."

We are of opinion that the proposed evidence of business changes along Providence Road outside the covenanted area is not legally sufficient to support plaintiffs' demand for removal of the restrictions protecting the residential development, and since plaintiffs' case is based entirely on such evidence, nonsuit was proper.

Affirmed.

W. S. BAILEY ET AL. v. J. D. HAYMAN.

(Filed 26 November, 1941.)

1. Partition § 5d—

Upon defendant's plea of sole seizin in this proceeding for partition, the controversy should have been submitted to the jury upon the question of cotenancy upon the pleadings and evidence, and the submission of the issue as to defendant's sole seizin was not necessary, but the charge of the court that the two issues should be considered together and that the burden was upon the plaintiff to satisfy the jury that defendant is not sole seized and that the parties are tenants in common, while resulting in some inexactness of phrase relative to the burden of proof because of the submission of both issues, would seem not to constitute reversible error.

2. Trial §§ 6, 31—

C. S., 564, proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the trial or in its instructions to the jury.

3. Trial § 31—

The court is proscribed from intimating an opinion upon the weight and credibility of the evidence in the manner of stating the contentions of the parties as well as in other portions of the charge, and in this case the warmth and vigor of the court's statement of the contentions of defendant *is held* to constitute an expression of opinion by the court entitling plaintiffs to a new trial.

CLARKSON, J., concurring.

SEAWELL, J., concurring in result.

APPEAL by plaintiffs from *Stevens, J.*, at May Term, 1941, of DARE. New trial.

Petition for partition here on appeal at the Fall Term, 1940. See *Bailey v. Hayman,* 218 N. C., 175, 10 S. E. (2d), 667. The plaintiffs filed a petition for the sale of certain lands for partition, alleging that they, with defendant Hayman, were "the owners in fee, tenants in common, and in possession" of the lands described, setting out the alleged interests of the several parties. The defendant, answering, denied the allegation of cotenancy and of plaintiffs' ownership, alleging that he "is the owner of in fee simple, and in the sole possession" of the lands described. Defendant further pleaded that plaintiffs were barred of recovery, by reason of certain legal proceedings to which they and the defendant were parties with respect to the lands sought to be partitioned. Upon this joinder of issues, the proceeding was transferred to the civil issue docket.

At the May Term, 1939, of Dare Superior Court, the cause was referred to Hon. W. D. Pruden, who heard the matters in controversy,

and duly made his report, finding adversely to defendant's claim. The defendant filed pertinent exceptions, and the cause was heard before *Stevens, J.*, and a jury, at May Term, 1941, of Dare Superior Court.

Both plaintiffs and defendant introduced fairly voluminous documentary evidence and oral testimony in support of their contentions, consisting of deeds, judgment rolls, a will, and oral testimony and relating to establishment of boundaries, genealogy of families and devolution of title.

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

"1. Is the defendant solely seized and the owner and entitled to the possession of the lands described in the complaint, as alleged in the answer?

"Yes.

"2. Are the plaintiffs and the defendants tenants in common of the lands described in the complaint, as alleged in the complaint?

"No."

From judgment on the verdict plaintiffs appealed.

Martin Kellogg, Jr., R. B. Bridgers, and Worth & Horner for plaintiffs, appellants.

J. H. LeRoy and McMullan & McMullan for defendant, appellee.

BARNHILL, J. Upon the issues submitted the court instructed the jury as follows:

"These issues go hand in hand and I see no reason to talk about them severally and every reason to talk about them, one in conjunction with the other." "The burden of these two issues is upon the plaintiffs to satisfy you that the defendant is not sole seized of this property, and to satisfy you that they are tenants in common with the defendant in this tract of land contended for in this action along with the plaintiffs."

While the second issue, under the pleadings and evidence, is the one that should be submitted to the jury, and while the submission of two issues may have resulted in some inexactness of phrase relative to the burden of proof, it would seem that the charge, taken in its entirety upon the subject, should not be held for reversible error.

Be that as it may, the charge contains inadvertent expressions of opinion which entitle the plaintiff to a new trial. C. S., 564; *S. v. Rhinehart,* 209 N. C., 150, 183 S. E., 388; *Carruthers v. R. R.,* 215 N. C., 675, 2 S. E. (2d), 878.

The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of the statute. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345. The following expressions appear in the recitation of the defendant's contention: "The defendant contends that . . . it is humanly impossible, as a matter of common knowledge,

that any portion of the lands . . . should have been known in 1925 as the Richardson tract . . . that this conclusion is induced, if not compelled, by the circumstances surrounding the execution of the Markham deed . . . also unequivocally appears from the evidence offered both by the plaintiffs and the defendant . . . the evidence discloses no earthly reason why any portion . . . should have been known . . . as the Richardson tract . . . the evidence whereby it is sought to locate the so-called Richardson tract . . . proceeds wholly, or almost wholly, from interested parties . . . being either plaintiffs or close relatives of the plaintiffs . . . Defendant contends that Adam Etheridge is the arch conspirator in this scheme to wrest from him lands he justly owns . . . that Adam's actions speak louder than Adam's words, and that this suit . . . represents no more nor less than another attempt on his part to wrest from Hattie Dough, or the defendant as her successor in title, lands to which neither he nor his coplaintiffs have any just or even colorable title . . . that it makes no difference whether the Warren A. Dough referred to in these deeds was or was not the husband of Abi Dough, since from the mere fact that he was her husband, it would not follow that her heirs and his heirs were the same—there being no evidence to show in this case that either Abi Dough or Warren A. Dough, her husband, was not married more than once."

These expressions, in their warmth and vigor, though stated in the form of contentions, were calculated to impress the jury with the strength of the defendant's position and the weakness of the plaintiffs'. "There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct." *Bank v. McArthur,* 168 N. C., 48, 84 S. E., 39. It can make no difference in what way or when the opinion of the judge is conveyed to the jury, whether directly or indirectly, or by the general tone and tenor of the trial. The statute forbids an intimation of his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. "Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury." *Withers v. Lane,* 144 N. C., 184, 56 S. E., 855.

For the reasons stated there must be a

New trial.

CLARKSON, J., concurring: I concur in the conclusion on the sole ground that there was error in the charge on the burden of proof, which is a substantial right.

It will be noted that the issue, unobjected to, was: "Is the defendant solely," etc.

In *Alexander v. Gibbon,* 118 N. C., 796 (798), we find: "It is admitted, as claimed by defendant, that when sole seizin is pleaded, in a proceeding among tenants in common for partition, it becomes substantially an action of ejectment. *Huneycutt v. Brooks,* 116 N. C., 788. And it then becomes subject to the rules of law applicable to trials in actions of ejectment—that plaintiffs must recover by the strength of their own title, and not on the weakness of defendant's title."

The following issues were submitted:

"1. Is the defendant solely seized and the owner and entitled to the possession of the lands described in the complaint, as alleged in the answer?

"2. Are the plaintiffs and the defendant tenants in common of the lands described in the complaint, as alleged in the complaint?"

Upon these issues the trial court instructed the jury: "These issues go hand in hand and I see no reason to talk about them severally and every reason to talk about them, one in conjunction with the other. . . . The burden of these two issues is upon the plaintiffs to satisfy you that the defendant is not sole seized of this property, and to satisfy you that they are tenants in common with the defendant in this tract of land contended for in this action along with the plaintiffs."

The instruction placing the burden upon the plaintiffs to disprove defendant's title on the first issue is contrary to accepted doctrine. Ordinarily the burden is upon the party asserting an affirmative plea to establish it by proof. *Hunt v. Eure,* 189 N. C., 482, 489, 127 S. E., 593; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. This is true when the defendant in a partition proceeding pleads sole seizin and sole ownership. The defendant's counsel suggests that his answer may be regarded as merely a plea of *non tenent insimul,* or a simple denial of the cotenancy; and since the burden was upon the plaintiffs to establish their contention in that respect, and that issue was answered against them, the error, if any, in the instruction on the other issue is harmless. However, while an issue as to the title is not necessarily raised in a partition proceeding, it is raised by a plea of sole seizin, and the subsequent incidents of the trial are those of an action in ejectment. *Purvis v. Wilson,* 50 N. C., 22; *Coltrane v. Laughlin,* 157 N. C., 282, 72 S. E., 961; *Alexander v. Gibbon,* 118 N. C., 796, 24 S. E., 748; *Cox v. Lumber Co.,* 124 N. C., 78, 32 S. E., 381. In such case, upon an issue framed upon defendant's claim of title, and evidence thereupon, the burden of the issue is upon him. *McKeel v. Holloman,* 163 N. C., 132, 79 S. E., 445; *Lester v. Howard,* 173 N. C., 83, 91 S. E., 698.

The court below gave the contentions for both plaintiffs and defendant, which were unobjected to by all of the parties—therefore not subject to exception.

In *Albritton v. Albritton,* 210 N. C., 111 (115), it is said: "An objection to a statement of a contention must be made promptly in order to give the court an opportunity to make correction, and if not so made, such objection will be considered as waived. *S. v. Sinodis,* 189 N. C., 565 (571)."

The language used by the court below as to the contentions, both pro and con, is usually gleaned from the arguments made before the jury by the litigants on both sides. The repetition by the judge had no undue influence on the jury and should not be held for error, especially when unobjected to at the time. Any other view makes a judge a figure-head.

I think that the contentions in the charge of the court below, made by the able and learned judge, when read as a whole and not disjointedly, are not grounds for a new trial. To sustain this position the main opinion cites *S. v. Hart* (1923), 186 N. C., 582. That case was decided by a three-to-two decision. I wrote one of the dissenting opinions then, and I am of the same opinion now. I said, at p. 604: "It has been often said by this Court, but I repeat it again: 'Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right.' *In re Ross,* 182 N. C., 477; *Burris v. Litaker,* 181 N. C., 376; *Wilson v. Lumber Co., ante,* 56."

I concur in the conclusion of the court, but not in the opinion for the reasons given.

SEAWELL, J., concurring in result: I concur in the result reached in this case, but only on the ground stated in the opinion of *Mr. Justice Clarkson.* The objection to the remarks of the judge in stating the contentions of the parties is well within the established policy of the court requiring such matters to be called to the attention of the court at the time. The incident is governed by *Bryant v. Reedy,* 214 N. C., 748, 200 S. E., 896; *Rooks v. Bruce,* 213 N. C., 58, 195 S. E., 26; *Sorrells v. Decker,* 212 N. C., 251, 193 S. E., 14; *Noland Co. v. Jones,* 211 N. C., 462, 190 S. E., 720; *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601; *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166; *McMahan v. Carolina Spruce Co.,* 180 N. C., 636, 105 S. E., 439; *Sears v. R. R.,* 178 N. C., 285, 100 S. E., 433; *Alexander v. Cedar Works,* 177 N. C., 137, 98 S. E., 312; *Nevins v. Hughes,* 168 N. C., 477, 84 S. E., 769. It cannot, with propriety, be magnified to fit into the exception to the rule created by *S. v. Love,* 187 N. C., 32, 121 S. E., 20, in which *Justice Hoke* justifies the exception only upon the ground that there was a serious misstatement of the evidence in a capital case. It is not a mere rule of fairness to

the trial court, which alone ought to justify it. It is a rule which, properly applied, prevents the frustration of judicial proceedings and promotes justice. Without it, the tendency to explore the statement of the contentions of the parties for possible error will dig up more snakes than we have time to kill.

As to the instruction to the jury on the burden of proof on defendant's issue of sole ownership and sole seizin, the main opinion observes: ". . . while the submission of two issues may have resulted in some inexactness of phrase relative to the burden of proof, it would seem that the charge, taken in its entirety upon the subject, should not be held for reversible error." Should this case come back here on the same issues and similar instruction, I will be interested in knowing the reasons upon which this optimism is based.

ALICE E. A. HATCHER v. CHARLES F. ALLEN.

(Filed 26 November, 1941.)

1. Husband and Wife § 12b—Husband may not procure foreclosure of land held by entirety and acquire title at sale adverse to wife.

Allegations to the effect that plaintiff and defendant, while husband and wife, had certain land conveyed to them as tenants by entirety, that they executed deeds of trust thereon, and that the husband, who collected rents from the lands, purposely allowed the deeds of trust to become in default in order to acquire the lands by purchase at foreclosure, that the deeds of trust on the property were foreclosed and the lands bought in by a third person acting for the husband, which third person thereafter conveyed to the husband, states a cause of action in favor of the wife to have the court declare that the husband still holds the title in trust for both of them, the rule that a tenant in common cannot inequitably acquire an outstanding title as against his cotenants being applicable with even greater reason to tenants by the entirety.

2. Same: Reference § 1—

When a husband inequitably acquires title at foreclosure of property formerly held by him and his wife as tenants by the entirety, the wife's right to have him declared a trustee is not dependent upon her payment of part of the original purchase price for the land, and therefore the action does not require a reference upon her evidence of checks and receipts introduced for the purpose of showing that she paid part of the purchase price.

3. Reference § 3—

When it is apparent on the face of the pleadings that plaintiff's cause of action is not barred, defendant's plea of the statute of limitations cannot be asserted by plaintiff as a plea in bar preventing a compulsory reference.

4. Husband and Wife §§ 12b, 12c—

An estate by entirety is not terminated by acts of the parties constituting grounds for absolute divorce, and therefore the husband's allegations that the wife abandoned him and committed other acts causing their separation and ultimate divorce is no defense to the wife's action to have him declared a trustee upon allegations that he purposely permitted deeds of trust on the lands held by them by entirety to become in default in order to acquire the title by purchase at the foreclosure sale. In the present case the allegedly fraudulent foreclosure sale took place prior to the granting of the decree for absolute divorce, so that the estate by entirety was not changed into a tenancy in common until after the sale.

APPEAL by plaintiff from *Nettles, J.*, at September Term, 1941, of GASTON. Reversed.

Plaintiff and defendant, while husband and wife, purchased certain real property described in the complaint. Deed thereto was made to them as tenants by entirety. Thereafter, during coverture, they executed deeds in trust thereon to secure money borrowed. The property was sold in March, 1939, under the power of sale contained in the deeds of trust and purchased at the sale by one John L. Carson, who reconveyed to the defendant. Plaintiff and defendant were divorced in August, 1939.

The plaintiff alleges that she contributed $1,687.00 toward the payment of the purchase price of $3,000.00; that the defendant received all rent from the property and purposely permitted default so as to procure sale to enable him to purchase and oust the plaintiff of her interest; that the sale was not held in good faith but through the connivance of the defendant to enable him to acquire plaintiff's interest therein; and that defendant, through a third party, purchased at the sale.

When the cause came on for trial plaintiff undertook to prove the payment by her of a part of the purchase price. In so doing she produced 30 or 40 checks and receipts for identification. The court then being of the opinion that the trial would require the examination of a long account, withdrew a juror, directed a mistrial and entered an order of compulsory reference. The plaintiff excepted and appealed.

J. L. Hamme for plaintiff, appellant.
No counsel for defendant, appellee.

BARNHILL, J. It is with considerable difficulty that we cull out of the complaint the material allegations which tend to show the cause of action upon which plaintiff relies. It may be that we have not done so with complete accuracy. In any event, it appears there are but two real issues of fact involved.

It appears to be alleged, by inference, that plaintiff was one of the grantors in the deeds of trust referred to in the complaint. At the time

she was a tenant by entirety. When she joined in the mortgage she conveyed her interest therein in trust upon the conditions stipulated. Hence, it becomes immaterial as to what part, if any, of the purchase price she paid. The question is, has she been ousted of her title by a valid foreclosure sale so as to vest title in defendant to her exclusion?

While it is true that the decree of divorce severed the estate by entirety and, if the estate had not theretofore been destroyed, the plaintiff and defendant thereupon became tenants in common, *McKinnon v. Caulk,* 167 N. C., 411, 83 S. E., 559, the foreclosure was had prior to the entry of the decree of divorce. The estate by entirety had not then been converted into one of tenancy in common.

Upon the questions presented, as between tenants by entirety, there seems to be a paucity of authority. Even so, the principles of law controlling the conduct and acts of cotenants one toward the other apply with even greater reason to tenants by entirety. We may look, therefore, to the law of cotenancy under like circumstances.

If a cotenant willfully or negligently permits a mortgage lien upon common property to become in default to the end that he may acquire title at a foreclosure sale to the exclusion of his cotenants his purchase at the foreclosure is for the use and benefit of all.

"Where a cotenant acquires title from a sale under a deed of trust made by all the cotenants, for a debt binding all, and the sale is caused by his failure to pay his share of the debt, he cannot, under his right so derived, hold the land against his cotenants. It is obvious that if a cotenant causes the common property to be sold under a deed of trust or a mortgage or other lien, for the purpose of purchasing for his own benefit the outstanding title thus created, he is guilty of a breach of trust which precludes him from taking advantage of such title as against the other cotenants." 7 R. C. L., 860, sec. 53.

"The fact that a cotenant allows premises to be sold, and afterwards acquires the title, based upon such sale, by purchase, is evidence of bad faith on his part." 62 C. J., 441; *Peabody v. Burri,* 99 N. E., 690 (Ill.). One tenant in common will not be permitted to acquire title to the common property inequitably solely for his own benefit or to the exclusion of his cotenants." *Gentry v. Gentry,* 187 N. C., 29; *McLawhorn v. Harris,* 156 N. C., 107; 37 L. R. A. (N. S.), 831; 62 C. J., 456; 14 Am. Jur., 120.

If a cotenant purchases, either directly or indirectly, at a foreclosure sale under a mortgage or deed of trust binding on all the cotenants his purchase inures to the benefit of his cotenants and he will be regarded as holder for his cotenants. 62 C. J., 463; 14 Am. Jur., 123, 125.

Where a tenant in common purchases an outstanding title, it is presumed to have been done for the common benefit, and as a general rule

purchase or extinguishment of an outstanding title, encumbrance or claim by one tenant in common inures to the benefit of his cotenants at their option. However, such a purchase is not void, but the purchasing tenant is ordinarily regarded as holding the title or interest acquired in trust for all of the cotenants who must elect within a reasonable time to avail themselves thereof. 62 C. J., 456, and cases cited.

Where the purchase by a third person was only nominal, he merely acting as agent for one of the cotenants, a deed to him will be considered as a matter of form merely and a conveyance from him to his principal will come under the well settled rule that if one cotenant purchases an outstanding title, and claims under it the common property as against the others, if they contest it his claim will not be allowed, because it must be presumed that each, as to the common interest, acts for all. 7 R. C. L., 867; 62 C. J., 456; 14 Am. Jur., 126; *Gearhart v. Gearhart,* 6 A. L. R., 291; *Tanney v. Tanney,* 28 Atl., 287. That is to say, if one cotenant purchases, either directly or indirectly, at a foreclosure sale he cannot, by his own act, thus sever the cotenancy.

Conversely, if a third person, without collusion, purchases the common property at a sale for the debt of all, and afterwards conveys the title to one of the former cotenants, such cotenant will take a good title as against his cotenants. The sale thus made in good faith destroys the tenancy in common and each cotenant thereafter is free to purchase in his own behalf. *Jackson v. Baird,* 148 N. C., 29; *McLawhorn v. Harris,* 156 N. C., 107, 72 S. E., 211; *Everhart v. Adderton,* 175 N. C., 403, 95 S. E., 614; 7 R. C. L., 867; 62 C. J., 465; 14 Am. Jur., 126. The termination of the cotenancy by the sale in good faith to a third party, under a foreclosure, not brought about or caused by willful or intentional default by one of the cotenants, leaves each former cotenant free to purchase from the one who thus acquired title.

For the law in respect to the duty of a cotenant to apply rents received to the payment of a proper charge against the common property to prevent a sale of the land see *Peabody v. Burri, supra,* and 62 C. J., 445.

At the time of the sale the husband was in possession, as such, under the tenancy by entirety with the right to the usufruct of the land. Equity will not permit him to acquire title to the property under the circumstances alleged by plaintiff, to her exclusion. If plaintiff can establish her allegations that the defendant, being in possession of the property and collecting the rents therefrom, purposely defaulted so as to bring about a foreclosure under which he acquired title, or that the defendant, through the medium of a third party, purchased at the foreclosure sale, he still holds the property in trust for the original cotenants. The determination of these issues requires no reference.

While the plaintiff relies upon the plea of the statute of limitations by defendant to defeat the order of reference, it is quite apparent upon the

face of the pleadings that this plea is without merit. The alleged fraudulent or fictitious sale was had in March, 1939. This action was instituted 15 May, 1941. Three years had not elapsed.

In his answer the defendant admits that he may have been able to pay the installments maturing under the mortgage but asserts that he was not called on to do so by reason of the plaintiff's conduct in abandoning him and her other conduct which caused the separation and ultimate divorce. He alleges that such conduct relieved him of any and all obligations to the plaintiff. This does not constitute a defense. The existence of an estate by entirety is not dependent upon the good conduct of the respective tenants and it is not destroyed by the bad conduct of either. "It is not an implied condition, annexed to an estate by entirety, that each of the grantees shall remain faithful to the obligations of the married state, and shall not cause the dissolution of the marital relation upon which the estate depends; and the disregarding of such obligation, resulting in a divorce, does not, therefore, terminate the interest of the guilty spouse in the land held by the entireties." 13 R. C. L., 1123; *Stelz v. Shreck,* 128 N. Y., 263, 28 N. E., 510; 13 L. R. A., 325.

It may not be amiss for the plaintiff to apply to the court below for leave to amend or redraft her complaint.

The judgment below is

Reversed.

STATE v. A. STORY BATSON.

(Filed 26 November, 1941.)

1. Barratry § 1—

The common law offense of barratry obtains in this State, since it has never been the subject of legislation in North Carolina and is not repugnant nor inconsistent with our form of government. C. S., 970.

2. Same: Criminal Law § 1b: Indictment § 22—

An attempt to commit barratry is an offense in this State and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common law offense of barratry. C. S., 4640.

3. Barratry § 2—

An indictment charging that defendant is a common barrator and that he on specific dates and at other times willfully, unlawfully and intentionally stirred up and excited divers controversies and suits, is sufficient to charge the common law offense of barratry, and following paragraphs of the indictment each setting out a specific act of barratry as separate

"counts" merely designates the separate acts which taken collectively constitute the offense, and defendant's motion to quash on the ground that the indictment alleges as separate counts single acts of barratry, is untenable.

4. Same—

Evidence tending to show that defendant went unsolicited to numerous persons and urged them to institute separate suits under an agreement that defendant was to be paid from recoveries therein *is held* sufficient to be submitted to the jury upon the question of defendant's guilt of attempt to commit barratry.

5. Criminal Law § 1b—

The elements of an attempt to commit an offense is, first, an intent to commit the offense and second, a direct, ineffectual act done towards its commission.

6. Barratry § 2: Criminal Law § 29b—

Upon an indictment charging defendant with barratry in stirring up suits by particular persons named, evidence that defendant had urged others not named to enter suits in other cases is competent for the purpose of showing intent, motive and *scienter*.

7. Criminal Law § 77d—

The record imports verity and the Supreme Court is bound thereby.

8. Criminal Law § 61a—

The judgment in this case when read in the light of the record *is held* to clearly sentence the defendant upon the verdict of the jury and not upon defendant's admission that he had theretofore served time, and defendant's contention of ambiguity is untenable.

9. Same: Criminal Law § 83—

Even if a judgment is ambiguous, the defendant would be entitled only to have the case remanded for proper judgment and not to a dismissal of the action.

APPEAL by defendant from *Parker, J.*, at May Term, 1941, of NEW HANOVER.

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

Herbert McClammy for defendant, appellant.

SCHENCK, J. The defendant appeals from a conviction of and sentence for an attempt to commit barratry.

The crime of barratry seems to have had its origin in maritime law, but subsequently, "common barratry is the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise." 4th Blackstone, p. 134. "Barratry, or as it is

designated, common barratry, is the crime or offense of frequently stirring up suits and quarrels between individuals, either at law or otherwise. . . . It is an offense at common law, . . . A barrator, or common barrator, is a common mover, exciter, or maintainer of suits and quarrels, either in courts of justice or elsewhere in the country." 9 C. J. S., p. 1546. "The term 'barratry' has been applied independently of statute to one soliciting a large number of claims of the same nature, and charging a fee for his services in connection with the claim contingent on the amount recovered." 10 Amer. Jur., Champerty and Maintenance, par. 3, p. 551.

"Persons who indulge in barratry are described in Blackstone, Vol. 4, p. 135, as 'these pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors and officiously interfering in other men's quarrels:' and barratry is elsewhere described as 'the trafficking and merchandising in quarrels; the huckstering in litigious discord.' Bouvier's Law. Dict., Rawle's 3d Ed." *McCloskey v. Tobin,* 252 U. S., 107, 64 Law Ed., 481.

Barratry is an offense at common law. 4th Blackstone, *supra;* 9 C. J. S., *supra;* 10 Amer. Jur., *supra.*

Barratry being a common law offense, and having never been the subject of legislation in North Carolina, and not being destructive nor repugnant to, nor inconsistent with, the form of government of the State, is in full force therein. C. S., 970; *S. v. Hampton,* 210 N. C., 283, 186 S. E., 251.

"The attempt to commit a crime is an indictable offense at common law." *S. v. Colvin,* 90 N. C., 717; Wharton's Criminal Law, Vol. 1 (12th Ed.), sec. 212, p. 281. "Whenever there is a criminal intent to commit a felony . . . and some act is done amounting to an attempt to accomplish the purpose without doing it, the perpetrator is indictable as for misdemeanor. Wharton's Criminal Law, sec. 2696." *S. v. Jordan,* 75 N. C., 27.

"Upon the trial of an indictment the prisoner may be convicted of the crime charged therein, or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." C. S., 4640.

From the foregoing it appears that the defendant could be properly tried and convicted in North Carolina of the offense of an attempt to commit barratry upon an indictment charging the common law offense of barratry.

The defendant, however, assails the bill of indictment upon which he was convicted by motion to quash. The overruling of this motion is made the subject of an exceptive assignment of error. The bill charges "that A. Story Batson, late of New Hanover County, is a common

barrator; that on or about the 26th day of July, 1939, and on other times and days during the years 1939 and 1940, and particularly on July 26, 1939; August 1, 1939; August 12, 1939; and December 23, 1939, in the County of New Hanover, the said A. Story Batson did willfully, unlawfully, and with a mean and selfish intent stir up and excite divers quarrels, strifes, suits, and controversies, among the honest and quiet citizens of this State; that the said A. Story Batson was and yet is a common barrator, stirring up, moving and procuring strifes, quarrels, suits and controversies among the people, to the common nuisance of all the people, all contrary to the common law and against the peace and dignity of the State; and that, in particular, the said defendant did commit the following specific acts of barratry:" then follow five paragraphs denominated Count I, Count II, Count III, Count IV, and Count V, in each of which counts it is charged that the defendant sought out a certain individual and urged the bringing of a suit by such individual and agreed that the consideration to be received by the defendant for assistance to be rendered in such suit would be paid from the collection made by virtue thereof.

What the defendant denominates in his brief as the "preamble" of the bill sufficiently charges the offense of barratry, and the "counts" which follow, while helpful as making the bill more specific, were by no means necessary. Each of these counts does not purport to charge in itself a separate offense, but simply to designate the separate acts of the defendant, which, taken collectively, constitute the offense of barratry. "The offense does not consist in being a barrator simply, but a common barrator, and there can be no conviction for a single offense. It is certain that at common law two acts are requisite, and probably as many as three. . . . It (indictment) need not, as a general rule, set forth the particular acts constituting the offense charged; and it has been held sufficient to merely charge accused generally as a common barrator, for the reason that the offense does not consist of the acts themselves but of the practice or habit of inciting trouble." 9 C. J. S., pp. 1547-8. We are of the opinion, and so hold, that the motion to quash was properly overruled.

The defendant also urges on his appeal the error assigned to the court's refusal to sustain his demurrer to the evidence, duly lodged under C. S., 4643. This assignment presents the question as to whether there is any evidence of the offense of an attempt to commit barratry.

In speaking of the subject of an attempt to commit a crime being a crime, *Hoke, J.,* writes: "It is said that an unlawful attempt is compounded of two elements: First, the intent to commit it, and, second, a direct, ineffectual act done toward its commission." *S. v. Addor,* 183 N. C., 687, 110 S. E., 650.

The intent to commit the crime of barratry is sufficiently evidenced by the testimony in this case given by the persons named in the bill which tends to show that the defendant went, unsolicited, to see each of these five persons named in the five respective "counts" in the indictment and urged each of them to institute separate suits, and offered to assist these persons in the conduct of such suits, and to receive his compensation from the collection made therein; together with the testimony of other witnesses to the effect that the defendant had urged them to enter suits in other cases, properly admitted for the purpose of showing intent, motive and *scienter, S. v. Smoak,* 213 N. C., 79, 195 S. E., 72, as well also as the letterhead used in the business of the defendant which reads, in part: "We specialize in Murder, Robbery, Divorce, Criminal, Civil, Commercial"; and especially the testimony of the witness Marshall, an attorney, which is, in part: "Mr. Batson stated in my presence and in the presence of Mr. W. A. Simon, Jr., that he had over a hundred cases then pending in the courts of Eastern North Carolina. Mr. Simon and I both expressed surprise at this and asked him the nature of the cases. Batson replied that they were mostly civil cases that he had investigated and had 'worked up.' We asked him what connection he had with these cases and he replied in effect as follows: 'Well, you lawyers know that it is not "nice" for lawyers to solicit business. When I hear of an accident I go to the injured parties and get their stories and shape it up, as I know what is required in such cases, and talk to them about the possibility of recovering some damages. Generally these folks do not know a lawyer and they ask me to recommend a good lawyer. Of course, I work along with the lawyers who work along with me and naturally I suggest to them the name of some lawyer that will co-operate with me. I then go to see the lawyer and get a contract of employment and the people sign it and then (go) in to see the lawyer. My contract is made with the lawyer and my fee is contingent upon recovery in the case.' "

This evidence is also sufficient to establish the overt acts done toward the commission of the crime of barratry, necessary to constitute the offense of an attempt to commit barratry, if the actual crime was not consummated.

We are of the opinion, and so hold, that the demurrer to the evidence was properly overruled.

We have examined the exceptive assignments of error relating to the court's rulings upon the admission of evidence and the charge to the jury and find no novel questions of law and no reversible or prejudicial error therein. While it may be unfortunate that the evidence is transcribed in a rather meager fashion and the charge is not given in full, owing, as stated in the record, to the court reporter being stricken seriously ill at the conclusion of the trial, still the rule with us is that

the record imports verity, and we are bound thereby, and *a fortiori* it appears that "This is the *agreed* statement of the above case on appeal to the Supreme Court of N. C."

The defendant assigns as error the judgment pronounced, which reads: "It appearing to the Court from the admission of A. S. Batson, the defendant, that he has heretofore served time, the judgment of the Court is that the defendant, A. S. Batson, be confined in the common jail of New Hanover County for a term of eight (8) months and assigned to work the roads under the direction of the State Highway and Public Works Commission."

The defendant contends that it is not clear whether the court sentenced the defendant to confinement because of an admission that he had served time, or for an attempt to commit barratry, and the sentence "carries an ambiguity," and entitles the defendant to a dismissal of the action. We do not concur in this contention. When the judgment is read in the light of the record we think it is clear that the defendant was sentenced upon a conviction of an attempt to commit barratry. Even if the judgment was ambiguous the most that the defendant could successfully ask would be to have the case remanded for proper judgment—and not for a dismissal of the action.

On the record we find

No error.

STATE v. OSCAR EDWARD PARKER.

(Filed 26 November, 1941.)

1. Criminal Law § 17—

A plea of *nolo contendere* is equivalent to a plea of guilty in so far as it gives the court the power to punish, and the court may impose sentence thereon as upon a plea of guilty.

2. Larceny § 10—

A sentence of defendant to be confined in the common jail of the county for a period of 12 months, and assigned to work the public roads, upon defendant's plea of *nolo contendere* to a charge of stealing an automobile of the value of $325.00, is not excessive. C. S., 4249, 4251.

3. Automobiles § 29—

A sentence of defendant to be confined in the county jail for a term of six months, to be assigned to work on the public roads, upon defendant's plea of *nolo contendere* to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. C. S., 2621 (286) (325), 4506.

4. Constitutional Law § 32—

Where a statute fixes no maximum period of imprisonment as punishment for its violation, a sentence of imprisonment for less than two years cannot be held cruel and unreasonable.

5. Criminal Law § 70—

The question of the amount to be fixed for bond pending appeal is largely in the discretion of the court below. C. S., 4653.

APPEAL by defendant from *Parker, J.*, at June Criminal Term, 1941, of NEW HANOVER. Affirmed.

There is a statement of case on appeal, which it is not necessary to set forth in full. We quote in part: "The defendant was indicted under a warrant issued on the 4th day of April, 1941, for the violation of the law, by operating a motor vehicle, to wit, an automobile truck, upon the public highways in North Carolina under the influence of intoxicating liquor or narcotic drugs, and by carrying a concealed weapon upon his person while off his premises, a deadly weapon, to wit, a pistol, and was found guilty before the Recorder and appealed from the judgment rendered, to the Superior Court, having been sentenced thirty days in jail, to be assigned to the roads by the Recorder, and in addition thereto, at the same term of the Court, to wit, the May Term of the Superior Court, the defendant was indicted under a bill of indictment, found by the Grand Jury at said May Term of Court, held in the County of New Hanover, at the May Term, 1941, for the larceny of a Chevrolet automobile truck, of the value of $325.00."

The judgment sets forth the facts, as follows: (#1672) "The defendant, Oscar Edward Parker, entered a plea of *nolo contendere,* which plea the State accepts, of larceny of an automobile. In June, 1936, the defendant pleaded guilty to the larceny of an automobile, and by this Judge who is now presiding was given a sentence of 12 months on the roads, suspended for two years. In May, 1938, he was convicted of the reckless driving of an automobile, and fined and ordered to make restitution. In August, 1939, he was convicted of disorderly conduct and resisting an officer, and given 30 days on the County Farm, by the Recorder's Court. He appealed, and at the May Term, 1940, in the Superior Court, on this charge, he was fined $10.00 and costs; since the case in this Court he has been arrested for a violation of the criminal law in Brunswick County. The Judgment of the Court is that the defendant be confined in the common jail of New Hanover for a period of twelve months, and assigned to work the public roads, under the direction of the State Highway and Public Works Commission. (#1671) The defendant, Oscar Edward Parker, entered a plea of *nolo contendere* to the operation of an automobile while intoxicated. The Judgment of the Court is that

the defendant Oscar Edward Parker be confined in the common jail of New Hanover County for a term of six months, and be assigned to work the public roads under the direction of the State Highway and Public Works Commission. It is ordered that this road sentence begin at the expiration of the road sentence imposed in case #1672."

Defendant excepted, assigned errors, as set forth below, and appealed to the Supreme Court.

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

Herbert McClammy for defendant.

CLARKSON, J. The following are the exceptions and assignments of error made by defendant: "The defendant says that his Honor erred in his judgment in sentencing the defendant to work on the public highway of North Carolina for a period of six months, as set forth in Exception No. 1. His Honor erred in sentencing the defendant to work for a period of twelve months for temporary use of an automobile when no damage or misconduct, except the use of the automobile, as set forth in Exception No. 2." Neither one can be sustained.

The defendant entered a plea of *nolo contendere* (1) for the larceny of an automobile, for which he was sentenced for twelve months; (2) to the operation of an automobile while intoxicated, for which he was sentenced six months. As set forth in the judgment, the defendant was an old offender of the laws of his State for many serious offenses, but mercy was shown him by the same judge who sentenced him in this case. The defendant in the two cases entered a plea of *nolo contendere.*

In *S. v. Burnett,* 174 N. C., 796 (797), is the following: "A plea of *nolo contendere,* which is still allowed in some courts, is regarded by some writers as a *quasi*-confession of guilt. Whether that be true or not, it is equivalent to a plea of guilty in so far as it gives the court the power to punish. It seems to be universally held that when the plea is accepted by the court, sentence is imposed as upon a plea of guilty. *Com. v. Ingersoll,* 145 Mass., 381; 12 Cyc., 354." *In re Stiers,* 204 N. C., 48 (50).

In *S. v. Wilson,* 218 N. C., 769 (774), it is written: "The court below did not exceed the limit of the statute. Within the limit of the statute the court is given the discretion to fix the punishment. We see no abuse of the discretion. As said in *S. v. Swindell,* 189 N. C., 151 (155): 'Though the punishment is great, the protection due to society is greater. The hope is to amend the offender, to deprive him of the opportunity to do future mischief, and, above all, an example to deter others.' " The value of the truck stolen was $325.00.

N. C. Code, 1939 (Michie), section 4249, is as follows: "All distinctions between petit and grand larceny, where the same has had the benefit of clergy, are abolished; and the offense of felonious stealing, where no other punishment shall be specifically prescribed therefor by statute, shall be punished as petit larceny is: Provided, that in cases of much aggravation, or of hardened offenders, the court may, in its discretion, sentence the offender to the state's prison for a period not exceeding ten years."

Section 4251: "The larceny of property, or the receiving of stolen goods knowing them to be stolen, of the value of not more than twenty dollars, is hereby declared a misdemeanor and the punishment therefor shall be in the discretion of the court," etc.

Sec. 2621 (286): "It shall be unlawful and punishable, as provided in section 2621 (325), for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this state."

Sec. 2621 (325): "Every person who is convicted of violation of section 2621 (286), relating to habitual users of narcotic drugs or driving while under the influence of intoxicating liquor or narcotic drugs, shall be punished by imprisonment in the county or municipal jail for not less than thirty days nor more than one year, or by fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by both such fine and imprisonment. On a second or subsequent conviction for the same offense he shall be punished by imprisonment for not more than two years or fined not more than one thousand dollars ($1,000.00), or by both fine and imprisonment, in the discretion of the court."

Sec. 4506: "Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this act for a period of not more than twelve months nor less than ninety days."

It is well settled that when no time is fixed by the statute, an imprisonment for two years will not be held cruel and unusual. *S. v. Driver,* 78 N. C., 423; *S. v. Miller,* 94 N. C., 904; *S. v. Farrington,* 141 N. C., 844 (845).

The defendant contends "That the judgment in this case for the operation of an automobile while under the influence of liquor, is void, for

the reason that the statute fixes the penalty of a fine of Fifty ($50.00) Dollars and the surrender of his license, and denying the defendant the right to drive an automobile for a period of twelve (12) months." We cannot so hold.

The judgment of the court below imposes an imprisonment of six months. The above statute allows this—it says "Shall be fined not less than Fifty ($50.00) Dollars or imprisoned not less than thirty (30) days." Section 4173 prescribes punishment for misdemeanors.

The defendant contends that the bail fixed by the trial judge pending appeal was excessive. This Court, in the case of *S. v. Bradsher,* 189 N. C., 401 (404), discussing the question of a defendant's right to bail pending appeal to the Supreme Court, said: "Defendant, T. C. Bradsher, having been convicted of a misdemeanor, appealed from the judgment of the court. The court was required by statute to allow him bail, pending the appeal. C. S., 4653. But for this statute, the allowance of bail to defendant, after conviction, would have been in the sound discretion of the court. After conviction, there is no constitutional right to bail. Article I, section 14, of the Constitution of North Carolina, in so far as it guarantees, by implication, the right to bail does not apply. 3 R. C. L., p. 15; 6 C. J., 966."

The question of bond on appeal is largely in the discretion of the court below, and we can see no abuse of discretion on the facts of record in this action.

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

Affirmed.

FURMAN WISHON v. GASTONIA WEAVING COMPANY.

(Filed 26 November, 1941.)

1. Master and Servant § 9—

Plaintiff instituted this suit to recover the difference between the amount of wages paid and the amount claimed to be due by plaintiff under the terms of a contract between the employer and the labor union recognized by it as sole bargaining agent. The agreement alleged stipulated that it was between the employer and employees paid on an hourly or piecework basis. *Held:* It appearing upon the face of the complaint that plaintiff was employed on a weekly basis, defendant's demurrer to the complaint was properly sustained.

2. Appeal and Error § 20—

In pauper appeals it is required that the nine typewritten copies of the transcript and brief which appellant is permitted to file must be legible. Rule of Practice of the Supreme Court No. 22.

APPEAL by plaintiff from *Nettles, J.*, at July-August Civil Term, 1941, of GASTON.

Civil action to recover wages allegedly due on written contract.

In amended complaint appearing in the record plaintiff alleges:

That defendant is a North Carolina corporation maintaining an office and manufacturing plant in Gastonia, in Gaston County, North Carolina.

"2. That a sufficient amount of the manufactured products of the defendant corporation entered interstate commerce to place same and its employees under the National Labor Relations Acts of the Congress of the United States, during the period of employment as hereinafter alleged.

"3. That during the year commencing May 16th, 1938, and ending one year thereafter, the plaintiff and defendant, for himself and all other employees of the Gastonia Weaving Company were working said plant under a written contract, copy of which is hereto attached and made a part hereof as fully as if fully written herein, same having been duly signed by Ben Reis, president, and attested by its secretary, on or about the 12th day of May, 1938. That said contract was executed and delivered and was duly published in the *Gastonia Daily Gazette* on the 5th day of May, 1938.

"4. That work was commenced under said contract on the 16th day of May, 1938, and the defendant did willfully, wantonly and maliciously and with a purpose of oppressing this plaintiff placed him on a job paying $9 weekly less than he drew beforehand, while employees who were his juniors in time of employment held jobs paying $25 weekly in violation of the conditions of said contract and did persistently refuse in any manner to comply with the terms thereof for reasons as aforesaid during the period of 51 weeks, covered by said contract, thereby damaging this plaintiff in the sum of $383 in actual damages for wages due him under said contract, fraudulently withheld as aforesaid.

"5. That by reason of the willful, wanton, malicious and oppressive manner of so withholding his wages and refusing to consider the terms and conditions of said contract, the defendant should be taxed punitive damages in the full sum of one thousand dollars.

"6. That plaintiff is informed, believes, and so avers, that said contract comes under the protection of the National Fair Labor Standards Act of the Congress of the United States and that under said statutes he is entitled to collect a penalty in a sum equal to the wages wrongfully and unlawfully withheld as aforesaid as well as an additional penalty of attorneys' fees necessary in collecting said indebtedness."

The written contract referred to and made a part of the third paragraph of and attached to complaint bearing date 4 May, 1938, purport-

ing to be between Gastonia Weaving Company, a corporation organized under the laws of North Carolina, with principal office and place of business in Gastonia, in Gaston County, North Carolina, and "Co-operative Fellowship Club of Gastonia, North Carolina, and representative of the employees at the Gastonia Weaving Company," reads in pertinent parts as follows:

"That the above named parties mutually covenant and agree each with the other as follows: (1) The Gastonia Weaving Company does hereby recognize the Co-operative Fellowship Club as the bargaining agent for all of its employees engaged in the productive department and paid on an hourly or piecework basis, excluding clerical forces, supervisory forces and watchmen. (2) That it will be the policy of the company during the life of this agreement to comply with the National Labor Relations Act. (3) That the wage rates in effect at the plant of the Gastonia Weaving Company on February 28, 1938, will be continued during the effective period hereof. (4) Hours of labor shall be eight hours per day and forty hours per week. Any employee working in excess of eight hours in any one day or in excess of forty hours in any one week shall be paid time and one-half for all such overtime; but no employee shall be paid both daily and weekly for the same hours worked. (5) It is understood that in all cases of promotion of employees and increase or decrease in the number of employees, length of service and ability shall prevail. (6) Should difficulties arise between the Gastonia Weaving Company and any of its employees as to the meaning and application of any provision of this agreement, or should any employee feel that he has been treated unjustly, he or his representative or representatives may take up his grievances with his immediate superior, who will give them prompt attention; failing satisfactory explanation or settlement, he or they may appeal to the president of the company or his representative and failing satisfactory explanation or settlement, then in such event such dissatisfied employee or his representative shall have the right to have his grievances arbitrated in the following manner: (specifically set out). (7) The management of the plant, the direction of the working forces and the right to hire, suspend or discharge are vested exclusively in the Gastonia Weaving Company. (8) . . . (9) It is agreed by both parties hereto that those on the pay roll of February 28th, 1938, including those temporarily absent because of illness or otherwise and excluding those that have since been discharged or quit for cause shall govern with reference to seniority in hiring or tenure of employment. (10) This agreement shall become effective as of May, 1938, and remain in full force and effect for a period of one year thereafter."

Defendant demurs to complaint for that it does not state facts sufficient to constitute a cause of action *inter alia* in that "(b) By the terms

of said contract which constitutes the basis of the plaintiff's action, it is made to appear that said contract applied solely and exclusively for 'employees engaged in the production department and paid on an hourly or piecework basis,' and it does not appear from the face of said complaint that plaintiff was employed in the production department of said plant or was to be paid on an hourly or piecework basis, but it does appear from the face of said complaint that plaintiff was employed on a weekly basis. . . . (d) The said contract purports to be made between the Co-operative Fellowship Club and the defendant herein. The complaint does not recite that the Co-operative Fellowship Club is an incorporated body but does import itself to be an unincorporated labor union and being such does not establish contractual relations between the defendant and individual members of an unincorporated labor union so as to sustain an action thereon by the individual members thereof against this defendant."

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

J. L. Hamme for plaintiff, appellant.
Cherry & Hollowell for defendant, appellee.

WINBORNE, J. It appearing from the alleged agreement upon which the action is based that Co-operative Fellowship Club is designated the bargaining agent for all the employees of defendant paid on an hourly or piecework basis, and that plaintiff was employed on weekly basis, the demurrer was properly sustained.

Attention is called to Rule 22 of the Rules of Practice of the Supreme Court, 213 N. C., 808, which provides that in pauper appeals "nine legible" typewritten copies of transcript and brief may be filed. This is mandatory. *Pruitt v. Wood,* 199 N. C., 788, 155 S. E., 924.

Affirmed.

SARA MARGARET BANGLE v. CLEVE WEBB, JOHN BAXTER HILLIARD, AND GENERAL MOTORS SALES CORPORATION.

(Filed 26 November, 1941.)

1. Process § 4b—

Findings, supported by evidence, that defendant is a nonresident and was served with summons in this action while he was in this State solely for the purpose of testifying at the coroner's inquest in obedience to a

subpœna from the coroner, and that the action was based on matters which arose before his entrance into this State under the subpœna, support the court's order vacating the purported service of summons. Sec. 4, ch. 217, Public Laws 1937.

2. Appeal and Error § 37c—

The court's findings, supported by evidence, that defendant is a nonresident and was served with summons while he was in this State solely for the purpose of testifying at the coroner's inquest, *are held* conclusive notwithstanding testimony tending to support a contrary view.

APPEAL by plaintiff from *Armstrong, J.*, at May Term, 1941, of MECKLENBURG. Affirmed.

Motion to vacate purported service of summons upon defendant Cleve Webb. Service upon this defendant was sought in an action to recover damages for a personal injury to plaintiff alleged to have been caused 14 September, 1940, by the negligence of Webb and others. Personal service of summons and complaint was had on defendant Webb in Mecklenburg County, 24 January, 1941. Defendant Webb objected to the service and protested that he was not amenable to service, for the reason that he was a resident of the State of Georgia and had come into North Carolina solely in obedience to a subpœna or summons from the coroner of Mecklenburg County to attend and testify at an inquest then being held. He later entered special appearance and moved to vacate the purported service of process and for dismissal of the action as to him.

The court below, after considering the affidavits filed by both plaintiff and defendant Webb, found the facts to be that defendant Webb was at the time of the institution of the action and at all times since and now is a resident and citizen of the State of Georgia, and a nonresident of North Carolina; that at the time process was attempted to be served on him he had come into North Carolina in obedience to a summons from the coroner of Mecklenburg County directing him to attend and testify as a witness at the inquest then being held in connection with the death of Miss Blondine Current; that in obedience to the coroner's summons he arrived in Mecklenburg County at the hour set for the inquest, was called, sworn and testified as a witness; that immediately after the conclusion of the inquest he left Mecklenburg County and returned to his home in the State of Georgia; that he neither had nor transacted any other business in North Carolina; that the matters in connection with which service was sought upon him arose before his entrance into North Carolina under the summons; that he had not been arrested upon any charge growing out of the death of Blondine Current and did not come into North Carolina in obedience to any warrant.

Upon the facts found the court adjudged that the motion of defendant Cleve Webb be allowed, and that the purported service on him of summons and complaint be vacated, and that the action as to him be dismissed.

The plaintiff appealed.

Uhlman S. Alexander, G. T. Carswell, and Joe W. Ervin for plaintiff, appellant.

Helms & Mulliss for defendant, appellee.

DEVIN, J. The facts found by the court below are sufficient to support the ruling that the attempted service of process upon defendant Cleve Webb was invalid. Upon these facts the judgment vacating service and dismissing the action as to him must be upheld, as being in accord with the provisions of the statute, which we quote as follows:

"If a person comes into this State in obedience to a summons directing him to attend and testify in this State he shall not, while in this State pursuant to such summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under the summons." Sec. 4, ch. 217, Public Laws 1937; Michie's N. C. Code, sec. 1808 (4).

While there was testimony tending to support a contrary view, an examination of the record discloses that the findings of fact by the court below are supported by competent evidence, and, hence, must be held conclusive and not subject to review. *Schoenith, Inc., v. Manufacturing Co., ante,* 390; *Parris v. Fischer & Co.,* 219 N. C., 292, 13 S. E. (2d), 540.

Affirmed.

D. R. CURRENT, ADMINISTRATOR OF THE ESTATE OF BLONDINE CURRENT, v. CLEVE WEBB, GENERAL MOTORS SALES CORPORATION, AND JOHN BAXTER HILLIARD.

(Filed 26 November, 1941.)

1. Judgments § 30—

A judgment determining the existence of a material fact in controversy is conclusive upon the parties and their privies as to such fact whenever it is material in a subsequent action between them, regardless of whether the subject matter of the action is the same or not.

2. Same—

The doctrine of *res judicata* applies regardless of whether the prior judgment was rendered by the same court or was rendered by the Superior Court of another county.

3. Judgments § 29—

A judgment *in rem* is conclusive not only upon the parties and their privies but, under the maxim *res judicata pro veritate accipitur*, is also conclusive upon those having an interest in the subject matter.

4. Judgments §§ 29, 30—Judgment that defendant is nonresident and under sec. 4, ch. 217, Public Laws 1937, was exempt from service, held conclusive in a subsequent action by another party injured in same collision.

In an action against the driver of a car upon whom service of summons was had while he was in the State in obedience to a summons from a coroner to testify at an inquest, motion to vacate the service was allowed upon the court's finding from the evidence that defendant is a nonresident and that therefore he was exempt from service of process in connection with matters which arose before his entrance into the State in obedience to the coroner's summons. Sec. 4, ch. 217, Public Laws 1937. In a subsequent action arising out of the same collision, brought in another county of this State by the administrator of a party killed in the collision, service was had upon the defendant at the same time and in the same manner. *Held:* The prior adjudication that defendant is a nonresident and was exempt from service under the statute is in the nature of a judgment *in rem* and is *res judicata* as to the status and residence of the defendant, and is binding upon the administrator under the maxim *res judicata pro veritate accipitur*, and the holding of the court in the second action upon substantially the same evidence that defendant is a resident of this State and that the service of summons on him was valid must be reversed on appeal even though supported by evidence.

5. Judgments § 35—When appeals from separate judgments are heard together and first judgment is conclusive upon parties in second action, Supreme Court will apply doctrine of res judicata.

In a suit in which defendant was served with summons while in this State in obedience to a coroner's summons, motion to set aside the service was granted upon the court's adjudication that defendant is a nonresident and was exempt from the service of process under the provisions of sec. 4, ch. 217, Public Laws 1937, which judgment was affirmed on appeal. In another action growing out of the same collision instituted in another county, the court found upon substantially identical evidence that defendant is a resident of this State and that the service of process in the same manner and at the same time was valid. The defendant failed to call to the court's attention the prior adjudication that he is a nonresident. Both appeals were argued together in the Supreme Court. *Held:* In the appeal in the second action the Supreme Court will apply the doctrine of *res judicata* in determining all factors presented by the record, it not being required that the previous adjudication should have been formally pleaded at this stage of the proceeding.

APPEAL by defendant Cleve Webb from *Nettles, J.*, at August Term, 1941, of GASTON. Reversed.

Motion to vacate purported service of summons upon defendant Cleve Webb. From judgment denying the motion, defendant Webb appealed.

H. B. Gaston and Cherry & Hollowell for plaintiff, appellee.
Helms & Mulliss for defendant Cleve Webb, appellant.

DEVIN, J. This appeal presents the question of the validity of the service of process upon defendant Cleve Webb, the same person referred to in *Bangle v. Webb, ante,* 423, where, upon substantially the same evidence, a ruling as to his amenability to service under the same circumstances was considered and determined.

These two cases are companion cases and were argued together in this Court. They arose out of the same transaction. Both plaintiff's intestate and the plaintiff in the *Bangle case, supra,* were injured at the same time and place, while passengers in an automobile driven by defendant Webb. The same acts of negligence on the part of Webb and others are alleged. In each case damages are sought against the same defendants for the same tort. Both the motions for quashal of the purported service of summons on defendant Webb, and the facts underlying, are practically identical in the two cases. The service in both cases was made by the same officer at the same time.

In the *Bangle case, supra,* substantially the same evidence as in the instant case was presented to Judge Armstrong, who found the facts to be that at the time of the attempted service of process on defendant Webb he was a resident of the State of Georgia and had come into North Carolina in obedience to a summons from the coroner of Mecklenburg to attend and testify at an inquest, and that therefore under the statute (sec. 4, ch. 217, Public Laws 1937) he was exempt from service of process in connection with matters which arose before his entrance into the State under the summons. Judge Armstrong adjudged that the purported service was invalid and dismissed the action as to defendant Webb. This judgment was entered 29 May, 1941, and upon appeal has been affirmed by this Court.

Subsequently, at the August Term, 1941, of Gaston Superior Court, from substantially the same evidence, Judge Nettles found the facts to be that the defendant Cleve Webb was a resident of North Carolina at the time of service of process, and that he was not exempt from service under the statute referred to. Judgment was entered accordingly holding the service valid.

Thus it appears that at the time Judge Nettles made his ruling there was a previous judgment of the Superior Court, now affirmed on appeal, declaring that service on defendant Cleve Webb at the same time and place and under identical circumstances, growing out of the same transaction, was invalid because he was a nonresident of North Carolina and had come into the State in obedience to a subpœna to testify as a witness.

We are constrained to hold that while there was evidence tending to support the ruling of Judge Nettles, the facts determined by the previous

judgment in the *Bangle case, supra,* had become *res judicata.* The status and residence of the defendant Cleve Webb had become judicially established. His exemption from service of process, at the time and place attempted, had been determined by a competent court. *Harshaw v. Harshaw, ante,* 145. The application of the rule that a judgment determining the existence of a fact is conclusive upon parties and privies is not necessarily precluded by showing that the judgment was rendered by a court in another county, or that the parties are not in all respects identical. "There is no doubt that a final judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies, whenever the existence of that fact is again in issue between them, not only when the subject matter is the same, but when the point comes incidentally in question in relation to a different matter, in the same or any other court." 2 Freeman on Judgments, sec. 670. "It is not necessary that precisely the same parties were plaintiffs and defendants in the two suits; provided the same subject in controversy, between two or more of the parties, plaintiffs and defendants in the two suits respectively, has been in the former suit directly in issue, and decided." *S. v. Continental Coal Co.,* 117 W. Va., 447, 186 S. E., 119; *Wright v. Schick,* 134 Ohio St., 193, 121 A. L. R., 890; 30 Am. Jur., 955; *Bank v. McCaskill,* 174 N. C., 362, 93 S. E., 905; *Bank v. Comrs.,* 116 N. C., 339, 21 S. E., 410; *Leary v. Land Bank,* 215 N. C., 501, 2 S. E. (2d), 570.

The judgment in the *Bangle case, supra,* was rendered upon the same preliminary motion as in this case. This motion squarely presented for adjudication the status of defendant Webb, whether a resident of Georgia or of North Carolina, whether exempt from the service of process under the statute, or not. Thus the judgment was in the nature of a judgment *in rem,* by a court having jurisdiction not only of the parties and of the cause of action, but also of the *res*—the power and duty to determine the particular fact presented for adjudication. This fact the court conclusively established in that case. Its judgment as to that fact was binding upon the parties to that suit and upon all those having an interest in the subject matter of the motion, under the maxim *res judicata pro veritate accipitur.* Herman on Estoppel and Res Judicata, ch. 5; *Tart v. Western Maryland R. Co.,* 289 U. S., 620 (624).

While the previous adjudication in the *Bangle case, supra,* of the question raised by the motion in this case does not appear to have been called to the attention of the court below, both cases have been brought to this Court and are now before us, and the proper disposition of the appeal requires consideration of all the determinative factors presented by the record. The propriety of this view, in this case, further appears from the fact that two able judges of the Superior Court have reached

different conclusions as to the validity of the purported service on defendant Webb, from substantially the same evidence. It was not required, at this stage of the proceedings and upon a motion to vacate purported service of process, that a previous adjudication of the determinative fact of defendant's exemption from service under the statute should have been formally pleaded. *Krekeler v. Ritter,* 62 N. Y., 372, 88 A. L. R., 577.

We are of opinion that the previous judgment established the status of defendant Webb as a nonresident and exempt from service under the statute, and that this must be held controlling upon the subsequent ruling upon the same question.

It follows that the judgment of Judge Nettles must be

Reversed.

HECTOR LITTLE v. MRS. LUCY SHORES.

(Filed 26 November, 1941.)

1. Limitation of Actions § 12a—Each payment made upon an account current fixes a new terminus quo from which the statute starts to run anew as to all items not barred at the time of payment.

Each payment made upon a current account starts the running of the statute of limitations anew as to all items not barred at the time of payment, and therefore when there have been successive payments within three years prior to the institution of action and the first such payment is made before any item of the account is barred, none of the items is barred, and an instruction that all items entered more than three years prior to the last payment are barred is erroneous. Furthermore, in this case, plaintiff offered evidence sufficient to be submitted to the jury that the account sued upon is an account stated and not an account current.

2. Account Stated § 1—

An account becomes an account stated when a balance is struck and agreed upon as correct after examination, but express examination or agreement is not necessary. It may be implied by failure to object to the account within a reasonable time after the other party calculates the amount due and submits his statement of the account, or by part payment and promise to pay the balance, or by acknowledgment of its receipt and promise to pay the balance shown to be due.

APPEAL by plaintiff from *Pless, Jr., J.,* at September Term, 1941, of RICHMOND. New trial.

Civil action to recover balance due on account for buttermilk sold and delivered.

In July, 1934, plaintiff began to furnish to defendant buttermilk and continued to do so to and including 3 July, 1938, at which time he dis-

continued delivery thereof. Defendant made intermittent payments during the period of delivery, the last being made 16 May, 1938. After plaintiff ceased to make delivery defendant made six payments of $5.00 each, the first being on 12 November, 1938, and the last being in January, 1940. The balance due, after crediting all payments, is $185.63. This action was instituted 10 September, 1940.

The defendant pleaded the three-year statute of limitations, contending that all items of the account created prior to January, 1937, three years next preceding the last payment, are barred.

The plaintiff offered evidence tending to show that each month he rendered the defendant an account showing the total amount then due and tending further to show that after he ceased delivering buttermilk he continued to carry her accounts each month; that she made payments thereon and told him that "she wished she had the money to pay me every cent . . . if she had the money she would pay every dime of it, after she stopped getting the milk."

Counsel for the defendant admitted that as he was unable to produce his witnesses he was making no attack on the amount of the account but was relying solely on his plea of the statute, C. S., 441 (1).

Upon the issue submitted the court instructed the jury as follows:

"The Court instructs you, gentlemen of the jury, that it appears from the itemized statement of account between the parties filed, that the last payment on this account was in January, 1940, the suit having been started in September, 1940, and the Court instructs you in accordance with a decision in the Supreme Court in 205 North Carolina Report that the plaintiff cannot recover for buttermilk sold and delivered to Mrs. Shores, prior to January, 1937.

"Now, the parties have made the tabulation and it is agreed that the amount of buttermilk from January, 1937, on up to date comes to one hundred and four dollars and fifty cents. The defendant is remitting any credits made after January, 1937, and upon that concession made by the defendant the Court instructs you that if you believe all the evidence that the plaintiff would be entitled to recover of the defendant the sum of one hundred and four dollars and fifty cents, with interest."

The jury answered the issue $104.50. From judgment thereon the plaintiff appealed.

McLeod & Webb for plaintiff, appellant.
J. C. Sedberry for defendant, appellee.

BARNHILL, J. Each payment made on the account stopped the running of the statute of limitations against all prior items then within date, and the payment made in November, 1938—the first payment made

after the last delivery of milk—fixed a new *terminus a quo* for the beginning of the running of the statute of limitations as to all items of the account which had been kept in date by payments theretofore made.

"So a partial payment, though the evidence need not be in writing, being an act and not a mere declaration, revives the liability because it is deemed a recognition of it and an assumption anew of the balance due." *Hewlett v. Schenck,* 82 N. C., 234; *Phillips v. Penland,* 196 N. C., 425, 147 S. E., 731; *Wood v. Wood,* 186 N. C., 559, 120 S. E., 194. The payment is an acknowledgment of the debt and its effect is to stop the running of the statute of limitations against all items not then barred, and to fix a new *terminus a quo* from which the statute starts to run anew. *Supply Co. v. Banks,* 205 N. C., 343, 171 S. E., 358; *Supply Co. v. Dowd,* 146 N. C., 191.

The court below, undertaking to apply the rule stated in the *Banks case, supra,* used the last payment made as the criterion for determining the date upon which the statute of limitations began to run. This overlooks the fact that in the *Banks case, supra,* the payment noted was the first payment made within the three years next preceding the institution of the action. As a result, no effect is given to any payment other than the last.

Following the *Banks case, supra,* the payment of 12 November, 1938, is the true criterion.

Furthermore, the plaintiff offered evidence sufficient to be submitted to the jury tending to show that the account sued upon is an account stated.

To constitute a stated account there must be a balance struck and agreed upon as correct after examination and adjustment of the account. However, express examination or assent need not be shown—it may be implied from the circumstances. 1 C. J. S., 707.

An account becomes stated and binding on both parties if after examination the parties sought to be charged unqualifiedly approves of it and expresses his intention to pay it. *Ray v. Kings Estate,* 179 Pac., 821. The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due, *Duerr v. Sloan,* 181 Pac., 407, 1 C. J. S., 711, or makes a part payment and promises to pay the balance. 1 C. J. S., 712.

"It is accepted law in this jurisdiction that when an account is rendered and accepted, or when so rendered there is no protest or objection to its correctness within a reasonable time, such acceptance or failure to so object creates a new contract to pay the amount due. *Gooch v. Vaughan,* 92 N. C., 611; *Copland v. Telegraph Co.,* 136 N. C., 11, 48

S. E., 501; *Davis v. Stephenson,* 149 N. C., 113, 62 S. E., 900; *Richardson v. Satterwhite,* 203 N. C., 113, 164 S. E., 845." *Savage v. Currin,* 207 N. C., 222, 176 S. E., 569.

The charge must be held for error prejudicial to the plaintiff.

New trial.

CHOZEN CONFECTIONS, INC., v. W. H. JOHNSON, E. V. NEAL, LYNN McIVER, AND T. N. HOLMES.

(Filed 26 November, 1941.)

1. Appeal and Error § 10e—

Where appellant serves his statement of case on appeal, C. S., 643, and appellee returns same with objections and appellant requests the judge to fix a time and place for settling the case, all within the time allowed by the court or by statute, it is the duty of the judge to settle the case on appeal and the judge may not strike appellant's statement of case on appeal from the record upon appellee's motion on the ground that appellant's statement of case was insufficient to meet the requirements of the statute and the rules of practice of the court.

2. Appeal and Error § 18b—

Where the trial court at the time and place fixed for settlement of case on appeal fails to settle the case and erroneously grants appellee's motion that appellant's case should be struck from the record, the Supreme Court will grant appellant's motion for *certiorari* to the end that the judge, after notice, may settle the case, C. S., 644, since appellant's failure to perfect the appeal is due to error of the court and not to any fault or neglect of appellant or his agent.

APPEAL by defendants W. H. Johnson and Lynn McIver from *Hamilton, Special Judge,* at 31 March, 1941, Extra Term of MECKLENBURG, heard upon petition of appellants for *certiorari.*

Civil action to recover on bond of defendant Johnson as principal and his codefendants as sureties for goods allegedly delivered to said Johnson under contract of consignment for which account has not been made. See former appeal, 218 N. C., 500, 11 S. E. (2d), 472, where judgment of lower court, denying motion of defendants to set aside judgment by default final, was reversed.

Thereafter the cause was tried at 31 March, 1941, Extra Term of Superior Court of Mecklenburg County before Hamilton, Special Judge, presiding, and a jury, and, the jury having answered the issues in favor of plaintiff and against defendants, judgment in accordance therewith was rendered on 9 April, 1941.

Whereupon, defendants Johnson and McIver in open court gave notice of appeal therefrom, and appealed to Supreme Court, and were allowed ninety days in which to make up and serve statement of case on appeal, and plaintiff was allowed "thirty days after the time of such service" in which to serve countercase or exceptions thereto. The court adjourned on Saturday, 12 April, 1941.

Defendants made, and on 8 July, 1941, within the said time allowed, served upon plaintiff through its counsel their case on appeal and filed same in office of clerk of Superior Court of said county. Thereafter, on 19 July, 1941, plaintiff filed a motion "to strike the defendants' statement of case on appeal for that the same is so incomplete that same cannot be corrected, and adds nothing to the record for review by the Supreme Court," and, reserving its rights under such motion, filed written objection, containing thirty-one exceptions to said statement of case on appeal, and same was served on 21 July, 1941, within the time allowed. Thereupon, on 24 July, 1941, appellants notified the judge of the disagreement and requested that a time and place for settling the case be fixed. Subsequently, the judged fixed 11 August, 1941, at designated office in Morehead City, North Carolina, as time and place for hearing. At that time and place the judge, finding facts substantially as hereinabove set forth, and finding other facts as to alleged deficiencies in the statement of case on appeal as served by said defendants, and being of opinion that as served said statement of case on appeal fails to conform to statutory requirements, C. S., 643, and to the rules and practices of the court, allowed the motion of plaintiff to strike, and ordered struck from the file in the action and from the transcript for the Supreme Court the statement of case on appeal as so served by appellants. Exception.

Appellants, having in due time docketed record proper in Supreme Court, moved for *certiorari,* to end that case on appeal be settled by the judge.

John H. Small, Jr., for plaintiff, appellee.
K. R. Hoyle for defendants, appellants.

WINBORNE, J. Upon the facts appearing upon the face of the record, pertinent statutes and decisions of this Court indicate error in the order of the court below striking the statement of case on appeal as served by appellants. C. S., 643, 644; *Hodges v. Lassiter,* 94 N. C., 294; *Transportation Co. v. Lumber Co.,* 168 N. C., 60, 84 S. E., 54; *S. v. Moore,* 210 N. C., 686, 188 S. E., 421.

The statute, C. S., 643, provides that appellant shall cause to be prepared a concise statement of case on appeal and prescribes what it shall embody, and that a copy shall be served on respondent, appellee, within

time given by statute or extended by order of court. It further provides that within time given in like manner respondent shall return the copy with his approval or with specific amendments endorsed or attached. If the case be approved by respondent, it shall be filed with the clerk as a part of the record. If not returned with objections within the time prescribed, or allowed by the court, the case served shall be deemed approved. *Carter v. Bryant,* 199 N. C., 704, 155 S. E., 602. But the provisions of C. S., 644, specify that if the case on appeal be returned by the respondent, with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If, however, appellant delays longer than fifteen days, unless time be enlarged by agreement after respondent serves his countercase or exceptions, to make such request, and delays for such period to mail the case and countercase or exceptions to the judge, the exceptions filed by respondent shall be allowed, or the countercase served by him shall constitute the case on appeal. In this connection it is held in *Chauncey v. Chauncey,* 153 N. C., 12, 68 S. E., 906, that the effect of the above limitation is to substitute "fifteen days" in lieu of "immediately" as the time in which appellant, after receipt of respondent's exceptions or countercase, can make his request of the judge.

If the request be made by appellant, the statute further provides that "the judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district . . .," and "at the time and place stated, the judge shall settle and sign the case . . ." However, "if the judge has left the district before the notice of disagreement he may settle the case without returning to the district."

In the present case appellants served a statement of case on appeal within the ninety days allowed therefor by order of court. Thereupon, not electing to permit by lapse of time the case as served to become the case on appeal, as was done in *Sloan v. Assurance Society,* 169 N. C., 257, 85 S. E., 216; *Layton v. Godwin,* 186 N. C., 312, 119 S. E., 495; and *Carter v. Bryant, supra,* appellee filed and served objections thereto. Thereupon appellant had the right to request the judge to settle the case, and having complied with the provisions of the statute as to requesting the judge to fix time and place for that purpose and forwarding to him the case on appeal and objections so filed, it became the duty of the judge to fix a time and place for settling the case on appeal, and, at that time and place to settle and sign the case. The failure of the judge to settle the case on appeal instead of dismissing that served by appellants is error.

"A party is entitled to a writ of *certiorari* when, and only when, the failure to perfect the appeal is due to some error or act of the court or its officers, and not to any fault or neglect of the party or his agent."

Womble v. Gin Co., 194 N. C., 577, 140 S. E., 230; *S. v. Angel,* 194 N. C., 715, 140 S. E., 727; *S. v. Moore, supra.*

Under this principle, appellants in the present case appear to be entitled to *certiorari* to the end that the judge, after notice of time and place fixed therefor as provided in the statute, may now "settle the case." *Chauncey v. Chauncey, supra.*

Certiorari allowed.

JAMES WHITLEY ET AL. V. VARA McIVER ET AL.

(Filed 26 November, 1941.)

Wills § 33c—Will held not to devise defeasible fees but to provide limitations by way of substitution if devisees did not survive testatrix.

The will in question devised the *locus in quo* in fee to four beneficiaries as tenants in common, but provided that "in case of the death of either of them leaving a child or children, I give and devise" the portion of the ancestor to his child or children, and further provided that "if either of them should die without child or children I give and devise" his or their share to the survivor or survivors. *Held:* The fact that the words "I give and devise" are repeated after each contingency discloses testatrix' intent that each successive limitation was to be in substitution of the one immediately preceding with a view of guarding against a failure by lapse, and not to create defeasible fees with contingent limitation over, and each of the four devisees who survives testatrix take a one-fourth interest in fee.

APPEAL by defendants from *Hamilton, Special Judge,* at October Term, 1941, of WAYNE.

Controversy without action submitted on agreed statement of facts.

The plaintiffs, being under contract to convey to the *feme* defendant their one-fourth undivided interest in four tracts of land situate in Wayne County, duly executed and tendered deed therefor sufficient in form to invest the *feme* 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 carry out her agreement to buy or 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 properties in question, gave judgment for the plaintiffs, accordant with the terms of the submission, from which the defendants appeal, assigning error.

Paul B. Edmundson and Royall, Gosney & Smith for plaintiffs, appellees.

Fred P. Parker, Jr., for defendants, appellants.

STACY, C. J. On the hearing, the question in difference was made to turn on the construction of the following item in the will of Helen Murphy, late of Wayne County, this State:

"Fourth: I give and devise all of my real property, which shall include that which has not been divided, in fee simple to J. Bruce Pate, Georgia Taylor, Vara McIver, and James Whitley, in equal proportions thereof one-fourth each, but in case of the death of either of them leaving a child or children, I give and devise that portion thereof, its or their ancestor would have taken if living to it or them in fee simple; that if either of them should die without leaving a child or children I give and devise it or their portion or portions therein to the survivor or survivors or to the child or children of the survivor or survivors."

It is conceded that if James Whitley takes a fee simple to the one-fourth undivided interest in the lands thus devised to him, the deed tendered is sufficient, and the correct judgment has been entered, but the *feme* defendant questions the devise as vesting in James Whitley a fee-simple estate.

It will be observed that in the beginning of the devise, the testatrix uses words of inheritance. "I give and devise all my real property . . . in fee simple" to the four named beneficiaries "in equal proportions thereof of one-fourth each." This is the language of the law usually employed to denote a devise in fee simple. Had the will stopped here, there would be no question as to the estate devised. But the testatrix added a further limitation which has occasioned the present controversy.

This limitation, however, is by way of substitution, with a view to guarding against a failure by lapse, and is not after the similitude of a remainder or an executory devise. *McCullough v. Fenton,* 65 Pa., 418. The child or children, survivor or survivors, should they take at all, would take directly from the testatrix, by immediate purchase, and not by descent or as remaindermen. *Burden v. Lipsitz,* 166 N. C., 523, 82 S. E., 863. The words "I give and devise" are repeated after each contingency, and the portion given is what the original devisee "would have taken if living."

The intention of the testatrix was that a one-fourth undivided interest in the lands should go to James Whitley in fee simple if he survived the testatrix, and if not, it was to go to his child or children, if any, and if he left no child or children, it was to go to the survivor or survivors of the original devisee or their children. Upon the happening of the contingency stated, each succeeding limitation was to be in substitution of the one immediately preceding. *Early v. Tayloe,* 219 N. C., 363, 13 S. E. (2d), 609. The vesting in any event was to take effect and become absolute at the death of the testatrix. *Neubert v. Colwell,* 219 Pa., 248, 68 Atl., 673.

As James Whitley survived the testatrix, he takes the interest devised to him in fee simple. *Westfeldt v. Reynolds,* 191 N. C., 802, 133 S. E., 168; *Goode v. Hearne,* 180 N. C., 475, 105 S. E., 5.

The result is an affirmance of the judgment below.

Affirmed.

STATE v. NATHAN TURNER.

(Filed 26 November, 1941.)

1. Intoxicating Liquor § 9d—

Circumstantial evidence *held* sufficient to show defendant's possession of intoxicating liquor for the purpose of sale.

2. Constitutional Law § 26—

Since a recorder's court has final jurisdiction of a prosecution for possession of intoxicating liquor for the purpose of sale, a defendant may be tried therein upon a warrant and, upon appeal, may be tried in the Superior Court upon the original warrant.

APPEAL by defendant from *Pless, J.,* at August Term, 1941, of MOORE.

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

W. R. Clegg for defendant, appellant.

SEAWELL, J. The defendant was tried and convicted in recorder's court upon a warrant charging the possession of seven pints of bonded liquor for the purpose of sale. He appealed to Superior Court, where he was again convicted and sentenced to serve upon the public roads for a period of two years, from which judgment he appeals. The case comes here upon defendant's demurrer to the evidence and motion for judgment as of nonsuit. Also, in this Court, he challenges the jurisdiction of the Superior Court because he was not tried under an indictment there found.

The evidence discloses that the officers went to defendant's premises about eleven o'clock at night, finding two women seated in a waiting automobile, and seeing two men, each with a dollar bill in his hand, in defendant's living quarters. Defendant was proceeding from an outhouse in the direction of his living quarters; and at the onset of the officers, he threw a package, later found to contain two pint bottles of whisky, into an old car. The waiting men fled through the window. Five more unsealed pints of liquor were found hidden in a bed in the outhouse. This evidence, unaided by any statutory presumption, was sufficient to show

both the possession and its purpose. *S. v. Langley,* 209 N. C., 178, 183 S. E., 526; *S. v. Elder,* 217 N. C., 111, 6 S. E. (2d), 840.

The recorder's court had final jurisdiction of the case; trial therein was properly had upon the warrant; and on appeal to the Superior Court, the defendant was properly tried on the original warrant. *S. v. Saleeby,* 183 N. C., 740, 110 S. E., 844; *S. v. Samia,* 218 N. C., 307, 10 S. E. (2d), 916; chapter 277, sec. 30, Public Laws of 1919; chapter 110, sec. 6, Public Laws of 1921; C. S., 1571 (Michie's Code, 1939). We find

No error.

CONTINENTAL WASTE COMPANY v. HENDERSON BROTHERS.

(Filed 26 November, 1941.)

Reformation of Instruments § 8—Clear, strong and convincing proof is required of party seeking reformation of written instrument.

Plaintiff declared on a written contract under which defendant agreed to deliver certain processed goods. Defendants admitted the execution of the contract and only partial performance, but alleged that they were to make full deliveries only if they could purchase unprocessed goods at a stipulated price, and that the proviso for this contingency was omitted from the written contract by mutual mistake of the parties. *Held:* Defendants' defense contemplates reformation of the instrument, and defendants have the burden of establishing the defense by clear, strong and convincing proof, and an instruction that the burden was on defendants to prove mutual mistake of the parties by the greater weight of the evidence is error.

APPEAL by plaintiff from *Johnston, Special Judge,* at July Special Term, 1941, of MECKLENBURG.

Civil action to recover for failure to deliver cotton baling ties as per written contract.

Defendants admitted execution of the contract and partial performance thereunder, but alleged that full deliveries were to be contingent upon the price of raw materials or unworked ties, *i.e.,* full deliveries of riveted and whole ties were not to be made "unless the defendants could obtain unworked ties at $7.50 per ton, and long ties at $15.00 per ton," and that this provision was omitted from the written memorandum by the mutual mistake of the parties.

Upon issue thus raised, the court instructed the jury that the burden was on the defendants to establish the mutual mistake of the parties by the greater weight of the evidence. Exception.

From verdict and judgment for the defendants, the plaintiff appeals, assigning errors.

Brock Barkley for plaintiff, appellant.
McRae & McRae for defendants, appellees.

STACY, C. J. What *quantum* of proof is required to reform a written instrument on the ground of the mutual mistake of the parties? The law answers "clear, strong and convincing." *Johnson v. Johnson,* 172 N. C., 530, 90 S. E., 516.

It is true that ordinarily in civil matters the burden of proof is carried by a preponderance of the evidence, or by its greater weight, albeit in a number of cases, as where, for example, it is proposed to correct a mistake in a deed or other writing, to restore a lost deed, to convert a deed absolute on its face into a mortgage, to engraft a parol trust upon a legal estate, to impeach the probate of a married woman's deed, to establish a special or local custom, and generally to obtain relief against the apparent force and effect of a written instrument upon the ground of mutual mistake, or other similar cause, the evidence must be clear, strong and convincing. *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Lloyd v. Speight,* 195 N. C., 179, 141 S. E., 574; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Montgomery v. Lewis,* 187 N. C., 577, 122 S. E., 374; *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636; *Lamb v. Perry,* 169 N. C., 436, 86 S. E., 179; *Glenn v. Glenn,* 169 N. C., 729, 86 S. E., 622; *Penland v. Ingle,* 138 N. C., 456, 50 S. E., 850; *Williams v. Building and Loan Asso.,* 207 N. C., 362, 177 S. E., 176.

The defense set up in the instant case falls in this special class, and the burden is on the defendants to establish it by evidence clear, strong and convincing. *Williams v. Ins. Co.,* 209 N. C., 765, 185 S. E., 21. There was error, therefore, in the instruction to the jury that the burden of the defense would be met by the greater weight of the evidence, for which a new trial must be awarded. *Hubbard & Co. v. Horne,* 203 N. C., 205, 165 S. E., 347.

New trial.

STATE v. ROLAND WESCOTT.

(Filed 26 November, 1941.)

1. Criminal Law § 73a—

The preparation and settlement of cases on appeal belong to the parties and to the judge of the Superior Court, C. S., 643, 644, and while a stenographic report of the trial may be of great assistance, the stenographic notes of the reporter are not conclusive, and the inability of the reporter to transcribe his notes due to continued illness does not excuse defendant from making out and serving his statement of case on appeal within the time allowed.

2. Criminal Law § 76—

Motion for *certiorari* based upon the fact that the court reporter was unable to transcribe his notes because of continued illness, *denied* for failure to negative laches and to show merit.

3. Criminal Law § 80—

When defendant fails to make out and serve statement of case on appeal within the time allowed the motion of the Attorney-General to docket and dismiss will be granted.

APPLICATION by defendant for *certiorari,* and motion by State to docket and dismiss appeal.

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

W. R. Rhodes, Jr., for defendant.

STACY, C. J. At the May Criminal Term, 1941, New Hanover Superior Court, the defendant herein, Rowland Wescott, was tried upon indictment charging him with the murder of one Mildred Lee, which resulted in a conviction of murder in the first degree, and sentence of death as the law commands on such verdicts.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed to appeal *in forma pauperis* and was granted 60 days from 17 May, 1941, to make out and serve his statement of case on appeal, and the solicitor was given 45 days thereafter to prepare and serve exceptions or countercase.

Due to the serious and continued illness of the substitute court reporter who took the evidence in the case, the solicitor agreed to extend defendant's time for serving case on appeal to 1 October, 1941, and later for the same reason the time was again extended to 15 October.

The defendant then on 18 October applied to this Court for a writ of *certiorari* "to the end that the defendant and his attorney be furnished with a complete transcript of the evidence taken in this case, in order that his statement of case on appeal may be properly made, and that the defendant may preserve his rights on appeal."

The application was denied, because it failed to negative laches and to show merit. *S. v. Angel,* 194 N. C., 715, 140 S. E., 727; *S. v. Moore,* 210 N. C., 686, 188 S. E., 421. The preparation and settlement of cases on appeal belong to the parties and to the judge of the Superior Court. C. S., 643 and 644; *Chozen Confections, Inc., v. Johnson, ante,* 430. In days agone, there were few, if any, court reporters, and the benefit of a stenographic report of the trial was usually not obtainable in preparing and settling cases on appeal. Moreover, "the stenographer's notes

are not the compelling and supreme authority as to what transpired during the trial." *Rogers v. Asheville,* 182 N. C., 596, 109 S. E., 865. The stenographic notes of the reporter may be of great assistance in preparing and settling cases on appeal, but they are not conclusive. *Cressler v. Asheville,* 138 N. C., 482, 51 S. E., 53. Indeed, in the instant case, there is no assurance that the assistant court reporter will ever be able to transcribe his notes of the trial. The contrary is suggested, and the time for serving statement of case on appeal has expired. *S. v. Moore, supra.*

Thereafter at the call of the district to which the case belongs, motion was made by the State to docket and dismiss under Rule 17. This motion must be allowed. *S. v. Moore, supra; S. v. Morrow, post,* 441.

Certiorari disallowed.

Judgment affirmed. Appeal dismissed.

STATE v. LUTHER MORROW.

(Filed 26 November, 1941.)

Criminal Law § 80—

When defendant files no appeal bond or order allowing him to appeal *in forma pauperis,* and fails to make up and serve his statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss under Rule 17 will be granted, but when defendant has been convicted of a capital crime this will be done only after an inspection of the record proper fails to disclose error.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.

STACY, C. J. At the October Term, 1941, Union Superior Court, the defendant herein, Luther Morrow, was tried upon indictment charging him with the murder of his wife, Lottie Belle Morrow, which resulted in a conviction of "Murder in the First Degree," and sentence of death as the law commands on such verdicts.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed thirty days from 17 October, 1941, to make up and serve his statement of case on appeal, and the solicitor was given twenty days thereafter to prepare and serve exceptions or countercase. The clerk certifies that no appeal bond, no order allow-

ing the defendant to appeal *in forma pauperis,* and no case on appeal has been filed in his office; that the time for perfecting the appeal has expired, and that he has been informed by defendant's counsel "that he does not intend to perfect the appeal, but desires this record, together with the transcript of the evidence and the charge of the court, forwarded to the Supreme Court in order that the record may be reviewed before the case is dismissed."

In the absence of any apparent error, which the record now before us fails to disclose, the motion of the Attorney-General to docket and dismiss under Rule 17 will be allowed. *S. v. Page,* 217 N. C., 288, 7 S. E. (2d), 559; *S. v. Moore,* 216 N. C., 543, 5 S. E. (2d), 719; *S. v. Williams,* 216 N. C., 740, 6 S. E. (2d), 492; *S. v. Stovall,* 214 N. C., 695, 200 S. E., 426; *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed. Appeal dismissed.

QUEEN CITY COACH COMPANY v. CHATTANOOGA MEDICINE COMPANY.

(Filed 26 November, 1941.)

Process § 8—

Service of summons on nonresident defendant was had by service on the Commissioner of Revenue under the provisions of ch. 75, Public Laws 1929. The order of the court denying defendant's motion to vacate the service *is affirmed* on authority of *Wynn v. Robinson,* 216 N. C., 347.

APPEAL by defendant from *Ervin, Special Judge,* at June Term, 1941, of MECKLENBURG.

Civil action to recover property damage alleged to have been caused by the negligence of the defendant when the automobile driven by defendant's salesman crashed into plaintiff's bus on Highway No. 74, between Wadesboro and Rockingham about 10:00 p.m., 16 December, 1939.

Service of summons was had upon the Commissioner of Revenue of North Carolina, as agent of the nonresident defendant, Chattanooga Medicine Company, under ch. 75, Public Laws 1929.

The defendant entered a special appearance and moved to vacate the attempted service of process and to dismiss for want of jurisdiction.

Touching the operation of the automobile in question, the court found, *inter alia,* that the automobile was owned and operated by C. D. Moss, Jr., a salesman in the employ of the defendant; that he was traveling through his territory, advertising the defendant's wares, and was on his

way, with the defendant's permission, to appear in court in Nashville, Tennessee, on a matter personal to himself; that at the time of the collision "the said C. D. Moss, Jr., was engaged in the course of his employment with the defendant in advertising and undertaking to sell the products of the defendant and in promoting the defendant's business and was at such time operating his automobile on a North Carolina public highway for the defendant under the general control and direction of the defendant."

On the facts found, the motion to dismiss, made upon special appearance, was denied, and the defendant allowed time to answer or demur to the complaint. Defendant appeals, assigning errors.

Guthrie, Pierce & Blakeney for plaintiff, appellee.
J. Laurence Jones for defendant, appellant.

PER CURIAM. Affirmed on authority of *Wynn v. Robinson,* 216 N. C., 347, 4 S. E. (2d), 884.

Affirmed.

L. L. RHOADES AND WIFE, MITTIE RHOADES, v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION.

(Filed 26 November, 1941.)

Appeal and Error § 20—

Appellant's statement became the case on appeal by stipulation of the parties. One of appellant's exceptions was to the refusal of the court to grant motion for judgment as of nonsuit. The appeal is dismissed for that all the evidence is set out in the case on appeal in mass in form of questions and answers, and not in narrative form as required by Rule 19 (4).

APPEAL by defendant from *Bobbitt, J.,* at April Term, 1941, of BUNCOMBE.

Civil action for recovery for water damage allegedly resulting from actionable negligence.

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

H. Kenneth Lee for plaintiffs, appellees.
Philip C. Cocke, Jr., for defendant, appellant.

PER CURIAM. It appears in record on this appeal that the case on appeal, as served by appellant, by stipulation of counsel for parties to

the action, constitutes the case on appeal, and that, in the case on appeal as so constituted, all the evidence is set out printed in mass in form of questions and answers, and not in narrative form as required by Rule 19 (4) of the Rules of Practice in the Supreme Court, 213 N. C., 808.

It further appears that one of the assignments of error is to the refusal of the court to grant motion for judgment as of nonsuit.

The rule provides that "if the case on appeal is settled by agreement of counsel, or the statement of the appellant becomes the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed."

In accordance therewith, and under authority of *Pruitt v. Wood,* 199 N. C., 788, 155 S. E., 924, to which attention is called, the appeal is

Dismissed.

L. O. LINEBERGER v. COLONIAL ICE COMPANY, INC.; ADAMS ICE & COAL CO., INC.; MONTBELL ICE & FUEL CO., INC.; CHERRYVILLE ICE & FUEL CO., INC., AND MRS. T. V. LINEBERGER, MRS. C. C. CROWELL, MRS. W. S. LANDER, MRS. D. C. LEONARD, JR., MRS. BRYAN DELLINGER AND BRYAN DELLINGER, A PARTNERSHIP, TRADING UNDER THE FIRM NAME OF LINCOLNTON ICE & FUEL CO., AND R. H. ADAMS, PERSONALLY.

(Filed 26 November, 1941.)

Conspiracy § 8: Monopolies § 2—

A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, and defendants' demurrer thereto should have been sustained, C. S., 2559, *et seq.*, not being applicable.

APPEAL by defendants from *Nettles, J.,* at July-August Term, 1941, of GASTON. Reversed.

Civil action to recover damages resulting from an alleged unlawful combination in restraint of trade.

Plaintiff alleges that he is or has been engaged in the retail ice business in Gaston County; that defendants are engaged in the manufacture of ice for sale in the same territory; that his contract with the Colonial Ice Company, under which he obtained ice at wholesale for sale at retail, having expired, the defendants conspired and agreed not to sell ice to the plaintiff; that by reason of such unlawful combination he is unable to obtain ice economically and at a price which will enable him to conduct his business at a profit; and that as a result thereof his business has been ruined and destroyed.

The defendants demurred to the complaint for that it does not state facts sufficient to constitute a cause of action. In their demurrer they set out with particularity wherein the complaint is deficient.

When the cause came on to be heard the judge below overruled the demurrer and the defendants excepted and appealed.

W. H. Sanders and S. J. Durham for plaintiff, appellee.

Cherry & Hollowell for Colonial Ice Co., Inc.; H. B. Gaston for Montbell Ice & Fuel Co., Inc.; O. F. Mason, Jr., for Adams Ice & Coal Co., Inc., and R. H. Adams, personally; and G. B. Mason for Cherryville Ice & Fuel Co., Inc., and Lincolnton Ice & Fuel Co., appellants.

PER CURIAM. This action involves a controversy of a private nature between plaintiff and the defendants. No public interest is involved. Hence, C. S., 2559, *et seq.*, have no application. *McNeill v. Hall, ante,* 73, and *Rice v. Asheville Ice Co.,* 204 N. C., 768, 169 S. E., 707, are controlling. The judgment below is

Reversed.

STATE v. O. B. WILLIAMS AND LILLIE SHAVER HENDRIX.

(Filed 10 December, 1941.)

1. Bigamy § 1—

At common law and under statute, Michie's N. C. Code, 4342, bigamy is an offense against society rather than against the lawful spouse of the offender.

2. Criminal Law § 81c—

An exception to the admission of certain testimony cannot be sustained when testimony of the same import is thereafter or theretofore admitted without objection.

3. Bigamy § 2—

Under the provisions of Michie's N. C. Code, 4342, a defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place.

4. Divorce § 19: Constitutional Law § 23—

A divorce obtained in another state against a resident of this State upon service by publication, without personal appearance, does not come within the protection of the full faith and credit clause of the Federal Constitution. Art. IV, sec. 1.

5. Same—

A divorce obtained in another state against a resident of this State upon personal service in this State of process issued by the court of such other state, without personal appearance, does not come within the protection of the full faith and credit clause of the Federal Constitution. Art. IV, sec. 1.

6. Bigamy § 2—

In this prosecution of defendants for bigamy the court's statement of the contentions of the State that defendants cohabited here as man and wife, that each had a living spouse in this State at the time of their purported second marriage in another state, that each obtained a decree of divorce in such state based upon substituted service, and went to such other state not to establish a *bona fide* residence but to take advantage of the laws of that state and obtain a divorce through fraud upon its court, and that neither of the divorce decrees were valid, *is held* without error.

7. Appearance § 2a—

In an action instituted in a court of another state, a promise of the resident defendant written on a post card mailed to plaintiff's attorney that defendant would sign "original appearance" upon "receipt" does not constitute a general appearance.

8. Process § 4—

Personal service by the sheriff of a county of this State of process issued by a court of another state is a nullity and void.

9. Bigamy § 2—

Defendants, each having a spouse living in this State, went to Nevada, where each obtained a decree of divorce based upon constructive service, and immediately after obtaining the decrees, married and returned to this State and cohabited as man and wife. *Held:* Defendants' belief that their respective divorce decrees were valid and would be recognized in North Carolina is no defense to a prosecution for bigamy. Michie's N. C. Code, 4342.

10. Bigamy § 2: Divorce § 19—Our courts will not recognize decrees of divorce rendered by court of another state upon constructive service.

Defendants, each having spouses living in this State, went to Nevada and after residing there for a period of six weeks instituted divorce actions against their respective spouses, employing the same attorney, who, as a notary public, took verification of the complaints and the affidavits of residence in that state, and the affidavits of service of process in the divorce actions by publication. The decrees of divorce, based upon constructive service, were rendered upon the finding by the court, without the aid of a jury, of the existence of facts entitling defendants to absolute divorce under its laws. Immediately after the rendition of the divorce decrees, defendants married in that state and then returned to this State and cohabited here as man and wife. *Held:* Our courts do not recognize the validity of the divorce decrees, and such decrees are not a defense to a prosecution of defendants for bigamy.

BARNHILL, J., concurring.

STACY, C. J., and WINBORNE, J., join in concurring opinion.

STATE *v.* WILLIAMS.

APPEAL by defendants from *Sink, J.,* and a jury, at February-March Term, 1941, of CALDWELL. No error.

The following bill of indictment was sent to the grand jury, who returned a true bill:

"The jurors of the State, upon their oath, present: That O. B. Williams and Lillie Shaver Hendrix, late of the County of Caldwell, on the 4th 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, unlawfully, wilfully and feloniously did get married to each other in the City of Las Vegas in the State of Nevada, and thereafter returned to the State of North Carolina and did live together and cohabit together in the said State of North Carolina and in Caldwell County, the said O. B. Williams having a living wife, one Mrs. O. B. Williams, living in Caldwell County, North Carolina, at the time of his said marriage to Lillie Shaver Hendrix and the said Lillie Shaver Hendrix having a living husband, one Tom Hendrix, living in Caldwell County, North Carolina, at the time of her marriage to the said O. B. Williams, against the form of the statute in such case made and provided and against the peace and dignity of the State. L. S. Spurling, Solicitor. Returned a True Bill, A. S. Nelson, Foreman Grand Jury."

The defendants entered a plea of "Not guilty." Upon the trial the jury returned the verdict: "Upon their oaths, say that said O. B. Williams and Lillie Shaver Hendrix are guilty as charged in the Bill of Indictment."

The State's evidence: Mrs. Carrie Williams (Mrs. O. B. Williams) testified: "That she was a Wyke before her marriage; that she now lives about four miles east of Granite Falls, Caldwell County, North Carolina; that she married O. B. Williams on May 30, 1916, in Caldwell County; that she and Williams lived together as husband and wife between 23 and 24 years, or until about May 7, 1940; that they had reared a family of four children; that they had not lived together since May 7, 1940; that she had not brought any action for divorce against O. B. Williams." Cross-examination: "I happen to have a paper that the Sheriff served on me here. I read it."

Tom (Thos. George) Hendrix testified: "I live in this county. I was married to Lillie Shaver Hendrix about twenty years ago. We lived as husband and wife at Saw Mills in this county until May, 1940. We have not lived together since that time. I have brought no divorce proceedings against my wife." Cross-examination: Witness admits his signature on a card. The card is as follows: Address side: "I. S. Thompson, Attorney-at-Law Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada." Reverse side: "Dear Sir: Upon receipt of the original appearance, I will sign same. (signed) Thomas Hendrix."

The State introduced a Certificate of Marriage, by the county recorder, David Farnsworth, dated 8 October, 1940, between the defendants in Clark County, Nevada: "State of Nevada, County of Clark, ss. This is to Certify That the undersigned, C. H. Sloan, did, on the 4th day of October, A.D. 1940, join in lawful wedlock O. B. Williams of Las Vegas, State of Nevada, and Lillie Esther Shaver of Las Vegas, State of Nevada, with their mutual consent in the presence of Mrs. Jack Pembroke and Mrs. Charles H. Sloan, who were witnesses. C. H. Sloan, Baptist Minister. Mrs. Jack Pembroke, Mrs. Charles H. Sloan, witnesses. Recorded at the request of C. H. Sloan. Filed Oct. 8, 1940. David Farnsworth, County Recorder." This was duly authenticated.

I. M. Vance, witness for the State, testified, in part: "I have seen Mr. Williams and Mrs. Hendrix there at their home. . . . I have seen them together about eight months. I couldn't say that they cook and eat at their home. They live there."

T. A. Thompson testified, in part: "I live in Pineola, Avery County. I know Mr. Williams and have known him since some time in February. I met them in Pineola Baptist Church. Q. Do you know whether they are living together and have been living together for some time in Pineola as husband and wife? Ans.: Yes. Q. Have they? Ans.: Yes. To the best of my knowledge they have lived together since about August or September, I wouldn't say exactly."

R. G. Buchanan testified, in part: "I live in Pineola, Avery County. I know the two defendants, Mr. Williams and the woman, and have known them for about eight months. They live in Pineola as man and wife. (Cross-examination.) I have known them something like six or eight months. I have been to their home twice. I have known their general reputation since they have been in the community, and it is good."

The State rested. Motion by defendants for judgment of nonsuit. Motion overruled. Exception by defendants.

Defendants' evidence: Exemplified copy of the divorce proceedings from the Eighth Judicial District of the Court of the State of Nevada in and for Clark County in an action entitled "Lillie Esther Hendrix *v.* Thomas George Hendrix." The complaint alleges:

"The plaintiff complains of the defendant and for cause of action alleges:

"I. That on June 27th, 1920, in Icard, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been and are now wife and husband.

"II. That plaintiff is now and has been a resident of the State of Nevada for a period of more than six weeks immediately preceding the commencement of this action; she has been and now is, a resident of the County of Clark, State of Nevada.

"III. That there is no issue of said marriage.

"IV. That the defendant has willfully neglected for the period of over one year immediately preceding the commencement of this action to provide plaintiff with the common necessities of life, although having the ability to do so; that such neglect was and is not the result of poverty on the part of the defendant, which he could not avoid by ordinary industry.

"For a second and separate cause of action against the defendant, plaintiff alleges:

"V. That the allegations set forth in paragraphs I, II and III, of plaintiff's first cause of action are true and are hereby made a part of this cause of action.

"VI. That during the term of said marriage, the defendant has been guilty of extreme mental cruelty toward this plaintiff by his words, actions and conduct; and plaintiff therefore alleges, that during the term of said married life the defendant has been guilty of extreme cruelty toward the plaintiff.

"Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties to the status of single persons. I. S. Thompson, Attorney for plaintiff." Subscribed and sworn to before I. S. Thompson, Notary Public, seal attached on 26 June, 1940.

"In the Eighth Judicial District Court of the State of Nevada in and for Clark County. No. 10651. Lillie Esther Hendrix, plaintiff, *vs.* Thomas George Hendrix, defendant—Affidavit for Publication of Summons. Filed July 22, 1940. Lloyd S. Payne, Clerk, By Helen Scott, Deputy." The affidavit, among other things, says: "That the defendant, Thomas George Hendrix, resides outside the State of Nevada, to-wit, at 391 Fuller Street, Akron, Ohio, and that he is not now and cannot be found in the State of Nevada and that defendant's present place of residence is 391 Fuller Street, Akron, Ohio." Subscribed and sworn to before I. S. Thompson, Notary Public, seal attached 20 July, 1940.

"In the Eighth Judicial District Court of the State of Nevada in and for Clark County. No. 10651. Lillie Esther Hendrix, plaintiff, *vs.* Thomas George Hendrix, defendant—Order Directing Publication of Summons. Filed July 22, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy Clerk." Then is set forth the Order, signed by Roger Foley, District Judge—Summons be by publication: "On motion of I. S. Thompson, attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant, Thomas George Hendrix, by publication thereof in the Las Vegas Evening Review Journal, a newspaper published in the City of Las Vegas, County of Clark, State of Nevada, hereby designated as the newspaper most likely to give

notice to said defendant; that said publication be made for a period of four weeks and at least once a week during said time. And it further in like manner satisfactorily appearing to me that the residence of said defendant is known as 391 Fuller Street, Akron, Ohio, and that his post office address is 391 Fuller Street, Akron, Ohio; it is ordered and directed that a copy of the summons and complaint in this suit be deposited in the United States Post Office at the City of Las Vegas, County of Clark, State of Nevada, postpaid, directed to said defendant at his said post office address. Dated this 22 day of July, 1940."

"In the Eighth Judicial District Court of the State of Nevada in and for Clark County. Lillie Esther Hendrix, plaintiff, *vs.* Thomas George Hendrix, defendant—Summons." Then is set forth the summons, duly signed, dated 26 June, 1940. "Returned and filed October 4, 1940. Lloyd S. Payne, Clerk, Dolores Yturri, Deputy. I. S. Thompson, Attorney for Plaintiff, Rooms 5 & 6 Griffith Bldg., Las Vegas, Nevada—13-1575. Sheriff's Return. Received at Sheriff's Office, Summit County, July 24th, 9:19 A.M., 1940." "Affidavit of Mailing Copy of Summons and Complaint—Filed Oct. 4, 1940. Lloyd S. Payne, Clerk. By Dolores Yturri, Deputy."

Affidavit made by George W. Thompson (same last name as the attorney), setting forth the publication and the mailing of the copy of Summons and Complaint, to Akron, Ohio. "Subscribed and sworn to before me, this 10th day of August, 1940. I. S. Thompson, Notary Public. (Attorney in the case.)"

Affidavit of foreman of newspaper: "That the attached was continuously published in said newspaper for a period of five weeks from August 7, 1940, to Sept. 4th, 1940, inclusive, being the issues of said newspaper was regularly issued and circulated on each of the dates above named."

"In the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. No. 10651—Lillie Esther Hendrix, plaintiff, *vs.* Thomas George Hendrix, defendant. Decree of Divorce. Filed October 4, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy.

"The above entitled cause coming on regularly for hearing this day, in open Court, before the Honorable Roger Foley, Judge of said Court, presiding; Present Lillie Esther Hendrix, plaintiff, in person and by her attorney, I. S. Thompson, the defendant not appearing and the Court having before it all the files, pleadings and papers in the action and being fully advised in the premises, finds that this action has been regularly commenced; and that the plaintiff is now and has been a *bona fide* resident of the County of Clark, State of Nevada for more than six weeks immediately preceding the commencement of this action; that the defendant has been duly and regularly served with summons in this

action in the manner prescribed by law and the order of this Court; that after the order was made directing the publication of the summons, the plaintiff used every effort to locate the defendant in order to serve the summons upon him personally but was unable to do so because of his dodging service; that the service of summons was made by publication in The Las Vegas Evening Review Journal, for a period of four weeks and at least once a week during said time; and the default of the defendant has been duly entered for failure to answer plaintiff's complaint within the time allowed by law; and the defendant not having appeared for trial of said action either in person or by attorney and that the Court has complete jurisdiction of the matter both as to the subject matter and the parties to the action. Now, Therefore, after hearing the witnesses sworn and examined in open Court and the said cause having been submitted and the Court being fully advised in the premises and having fully considered all the evidence in the case, finds that all the averments contained in plaintiff's complaint are true as therein alleged; that the plaintiff, Lillie Esther Hendrix, is without fault in the premises, and is entitled to a Decree of Divorce from the defendant, Thomas George Hendrix, on the grounds of his willful neglect and extreme cruelty toward the plaintiff. It is, Therefore, Ordered, Adjudged and Decreed that a contract of marriage now existing between the plaintiff, Lillie Esther Hendrix, and the defendant, Thomas George Hendrix, be and the same is hereby dissolved, set aside and forever held at naught; and that the said parties are absolutely divorced and released from any and all marital obligations each to the other, and are hereby restored to the status of single persons. Done in open Court, this 4th day of October, 1940. Roger Foley, Dist. Judge."

Then comes the Judgment Roll. Then the "Praecipe for Default," signed by I. S. Thompson, attorney for plaintiff. Then the "Default Judgment": "Witness my hand and seal of said Court, this 4th day of October, A.D. 1940. Lloyd S. Payne, Clerk, by Dolores Yturri, Dtp. Clerk. Seal."

Affidavit as to residence of plaintiff, in part: "That on said last named date Lillie Esther Hendrix, the plaintiff above named, came there to live, rented a room and is still living there; that said Lillie Esther Hendrix was present every day, at said place, from the date she came there, May 15, 1940, up to and including June 26, 1940. Lillie Roesselet. Subscribed to and sworn before me, this 16th day of September, 1940. I. S. Thompson, Notary Public. Seal. Filed October 4, 1940. Lloyd S. Payne, Clerk, by Helen Scott, Deputy."

Affidavit of plaintiff "Of non military service of defendant—filed Oct. 4, 1940, signed Lillie Esther Hendrix. Subscribed and sworn to before me, this 1st day of October, 1940. I. S. Thompson, Notary Public—Seal."

Then comes the testimony of plaintiff before Roger Foley, District Judge, confirming what she had sworn to in her Complaint and as to her residence. "Q. Where do you reside? Ans.: Las Vegas, Nevada. Q. Las Vegas, Clark County, Nevada? Ans.: Yes. Q. You filed your complaint on June 26, 1940; had you resided here a full six weeks prior to that time? Ans.: Yes. Q. When did you come to Clark County, Nevada? Ans.: May 15, 1940."

O. B. Williams was called as a witness for plaintiff: (By Mr. Thompson) "Q. Where were you living on the 15th day of May, 1940? Ans.: At the Alamo Court, Las Vegas. Q. When did you first see her at that Court? Ans.: May 15, 1940. Q. So that she lived there at that Alamo Court until the day she filed her complaint? Ans.: Yes, sir. Q. You saw her every day? Ans.: Yes, sir."

Defendants' Exhibit No. 2. (Exemplified copy of the divorce proceedings in the Eighth Judicial District Court of the State of Nevada, in and for Clark County, and that certain action entitled: Otis Baxter Williams *v.* Carrie Ora Williams): "In the Eighth Judicial District Court of the State of Nevada in and for Clark County. No. 10650. Otis Baxter Williams, plaintiff, *vs.* Carrie Ora Williams, defendant. Complaint. Filed June 26, 1940. Lloyd S. Payne, Clerk, by Tilla Cronick, Deputy. The plaintiff complains of the defendant and for cause of action alleges:

"1. That in the month of November, 1916, in Granite Falls, State of North Carolina, the plaintiff and the defendant intermarried and ever since have been, and are now, husband and wife.

"2. That the plaintiff is now and has been a resident of the State of Nevada for the period of more than six weeks immediately preceding the commencement of this action.

"That for more than six weeks immediately preceding the commencement of this action he has been, and is now, a resident of the County of Clark, State of Nevada.

"3. That during the term of said marriage the defendant has been guilty of extreme cruelty toward this plaintiff, by her words, actions and conduct;

"And plaintiff, therefore, alleges that during the term of said married life the defendant has been guilty of extreme cruelty toward this plaintiff.

"Wherefore, plaintiff prays judgment against the defendant dissolving the bonds of matrimony now existing between the plaintiff and the defendant, and restoring said parties to the status of single persons. I. S. Thompson, Attorney for plaintiff." Subscribed and sworn to before I. S. Thompson, Notary Public, 26 June, 1940.

Then follows: (a) Affidavit for Publication of Summons, filed 18 July, 1940, subscribed and sworn to 16 July, 1940, before I. S. Thomp-

son, Notary Public, seal attached; (b) Order Directing Publication, signed by Roger Foley, District Judge, dated 18 July, 1940; (c) Summons, dated 26 June, 1940; (d) Affidavit of Sheriff.

"Sheriff's Return: State of Nevada, County of Clark—ss. I, J. F. Parlier, the duly elected, qualified and acting Sheriff of said County and State, (error) do hereby certify and return that I received the within summons on the 18th day of July, A.D., 1940, and that I personally served the same upon the within named defendant, Mrs. O. B. Williams, on the 22nd day of July, A.D., 1940, at Granite Falls, County of Caldwell, North Carolina, by then and there delivering to her, the said defendant, personally a copy of said summons attached to a certified copy of the complaint in the within entitled action. Dated this 22nd day of July, A.D., 1940. J. F. Parlier, Sheriff Caldwell County, State of North Carolina." Certificate as to being sheriff, by clerk Superior Court of Caldwell County, N. C.

(e) Decree of Divorce, signed by Roger Foley, District Judge, 26 August, 1940; (f) then comes Judgment Roll; (g) Praecipe for Default; (h) Default, and certain certificates. Defendants rest.

At the close of all the evidence the defendants and each of them renewed their motion for judgment as of nonsuit. Motion overruled as to each defendant, and the defendants and each of them excepted.

The judgment of the court below is as follows: "Upon the verdict as rendered by the jury, the judgment of the court as to the male defendant, O. B. Williams, is that the said male defendant be confined in the State Prison at Raleigh, North Carolina, for not less than three nor more than ten years, and be assigned to hard labor as provided by law. As to the female defendant, Lillie Shaver Hendrix, the judgment of the court is that she be confined in the State Prison at Raleigh, North Carolina, for not less than three nor more than five years and assigned to perform such labor as provided for women prisoners by law."

Upon the coming in of the verdict the defendants and each of them, in apt time, moved that the court set the verdict aside as being against the greater weight of the evidence and the law in the case, and for errors assigned and to be assigned. Motion denied in each case as to each defendant, and the defendants and each of them excepted, and assigned error. To the judgment of the court defendants and each of them excepted, assigned error and appealed to the Supreme Court. The defendants made other exceptions and assignments of error and appealed to the Supreme Court. The material ones will be set forth in the opinion.

The record of exemplification introduced by defendants is not set forth in proper order; therefore the facts, as we have set them forth, follow the order of the exemplification.

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

Pritchett & Strickland and George Hovey for defendants.

CLARKSON, J. At the close of the State's evidence, and at the conclusion of all the evidence, the defendants made motion in the court below for judgment of nonsuit. N. C. Code, 1939 (Michie), sec. 4643. The court below overruled these motions and in this we can see no error.

The defendants are indicted under N. C. Code, *supra,* sec. 4342, which is as follows: "If any person being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the State's Prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past; and shall not have been known by such person to have been living within that time; nor to any person who at the time of said second marriage shall have been lawfully divorced from the bond of the first marriage; nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

At common law, the second marriage was always void and from the earliest history of England polygamy has been treated as an offense against society. It is considered as a crime against the marital relation rather than against the wife. Bigamy and polygamy are likewise crimes by the laws of all civilized and Christian countries.

Mr. Justice Waite said: "From that day (the date of the enactment of the bigamy statute in Virginia, 12 Hening's Stat. 691), to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." *Reynolds v. United States,* 98 U. S., 145 (165), 25 L. Ed., 244.

The defendants' exception and assignment of error to the following question and answer, elicited from the State's witness, T. A. Thompson,

cannot be sustained: "Q. Do you know whether they are living together and have been living together for some time in Pineola as husband and wife? Ans.: Yes. Q. Have they? Ans.: Yes."

R. G. Buchanan, a witness for the State, later testified: "I live in Pineola, Avery County. I know the two defendants, Mr. Williams and the woman, and have known them for about eight months. They live in Pineola as man and wife. (Cross-examination.) I have known them something like six or eight months. I have been to their home twice. I have known their general reputation since they have been in the community, and it is good." There was no exception or assignment of error made by defendants to this later testimony. In fact, the defendants cross-examined the witness. This evidence was plenary to be submitted to the jury under the bill of indictment that defendants were living together in Avery County, North Carolina, as man and wife. They were tried in Caldwell County, North Carolina, but the statute, sec. 4342, *supra,* permits this.

In *Shelton v. R. R.,* 193 N. C., 670 (674), it is written: "It is thoroughly established in this State that if incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been given in other parts of the examination without objection, the benefit of the exception is ordinarily lost. *Smith v. R. R.,* 163 N. C., 143; *Tillett v. R. R.,* 166 N. C., 515; *Beaver v. Fetter,* 176 N. C., 334; *Marshall v. Tel. Co.,* 181 N. C., 410." *S. v. Hudson,* 218 N. C., 219 (230).

The defendants contend that they are protected under the proviso to 4342, *supra:* "Nothing contained in this section shall extend to any person marrying a second time . . . nor to any person who at the time of said second marriage shall have been lawfully divorced from the bond of the first marriage."

The defendants contend that the question involved is: "Can the courts of North Carolina sustain a conviction upon an indictment charging bigamous cohabitation under Consolidated Statutes, N. C. Code, section 4342, when the evidence shows that both of the defendants have been legally and properly divorced under the laws of a sister State?" We do not think from this record that the defendants can make the contention in this jurisdiction.

As to defendant O. B. Williams: The evidence is to the effect that defendant O. B. Williams was married to Carrie Ora (Wyke) Williams on 30 May, 1916, in Caldwell County, N. C.; that they lived together as husband and wife between 23 and 24 years, or until about 7 May, 1940. That they had reared a family of four children. That she had not brought any action for divorce against him. That she lives about four miles east of Granite Falls, Caldwell County, N. C. On 26 June, 1940, O. B. Williams brought an action against Carrie Ora Williams,

in Clark County, Nevada. The complaint alleges that they were married in Granite Falls, N. C., in the month of November, 1916, and are now husband and wife. That for a period of more than six weeks immediately preceding the commencement of this action, he has been and now is a resident of Clark County, Nevada. He alleges that his wife during the time of their marriage has been guilty of extreme cruelty towards him, by her words, actions and conduct. The plaintiff in that action prays judgment against the defendant dissolving the bonds of matrimony existing between them and restoring said parties to the status of single persons. This complaint was filed by I. S. Thompson, attorney. It was subscribed and sworn to before I. S. Thompson, a notary public, on 26 June, 1940, who attached his seal. The affidavit of Publication of Summons was filed on 18 July, 1940. It was subscribed and sworn to before I. S. Thompson on 16 July, 1940, who attached his seal of office. The Order Directing Publication of Summons was made by Roger Foley, District Judge, on 18 July, 1940. The Summons issued by the clerk was dated 26 June, 1940. Below was written "I. S. Thompson, Atty. for plaintiff." Summons Returned and filed 22 August, 1940. The Order for Publication of Summons and Complaint by Roger Foley, District Judge (1) by publication for a period of four weeks, (2) on defendant in North Carolina by mailing.

The following affidavit was filed: "I received the within summons on the 18th day of July, A.D., 1940, and that I personally served the same upon the within named defendant, Mrs. O. B. Williams, on the 22nd day of July, A.D., 1940, at Granite Falls, County of Caldwell, North Carolina, by then and there delivering to her, the said defendant, personally, a copy of said summons attached to a certified copy of the complaint in the within entitled action. Dated this 22nd day of July, A.D., 1940. J. F. Parlier, Sheriff Caldwell County, State of North Carolina." Affidavit of Parlier, dated 22 July, 1940, as to service of summons before F. H. Hoover, clerk Superior Court of above State and county. Decree on 26 August, 1940, by Roger Foley, District Judge—the same practically as the decree of divorce heretofore set out in full which was granted Lillie Esther Hendrix. The only difference was to fit the facts as to the method of service. This action was numbered 10650.

Then comes the Judgment Roll, Praecipe for Default, signed by I. S. Thompson, attorney for plaintiff. Then Default Order, signed by the clerk, on 26 August, 1940. Then certain certificates, not material.

As to defendant Lillie Shaver Hendrix: The evidence is to the effect that defendant, Lillie Shaver Hendrix, was married to George Thomas Hendrix about 20 years ago (time of trial February-March Term, 1941), and lived in Caldwell County, N. C., as husband and wife until May, 1940. That he brought no action for divorce against her. That Lillie

Shaver Hendrix (action entitled Lillie Esther Hendrix), as plaintiff, brought an action against George Thomas Hendrix on 26 June, 1940, in Clark County, Nevada. The complaint alleges that they were married on 27 June, 1920, in Icard, N. C., and are now husband and wife. That for a period of more than six weeks immediately preceding the commencement of this action, she has been and is now a resident of Clark County, Nevada. She alleges that her husband willfully neglected, for over a year immediately preceding the action, to provide her with the common necessities of life, though able to do so, and has been guilty of extreme mental cruelty towards her by words, action and conduct, and during the term of their married life has been guilty of extreme cruelty towards her. The plaintiff prayed judgment against the defendant dissolving the bonds of matrimony existing between them, restoring said parties to the status of single persons. It was subscribed and sworn to before I. S. Thompson, a notary public, on 26 June, 1940, who attached his seal. He was also her attorney.

The affidavit for Publication of Summons was filed 22 July, 1940, subscribed and sworn to on 20 July, 1940, before I. S. Thompson, notary public, attaching seal. The Order Directing Publication of Summons was made by Roger Foley, District Judge. The Summons issued by the clerk was dated 26 June, 1940, and below was written "I. S. Thompson, Attorney for plaintiff." Affidavit of Mailing Copy of Complaint to defendant at Akron, Ohio, setting forth certain facts, was signed by Geo. W. Thompson (the last name the same as the attorney), not a party to the action, and subscribed and sworn to 10 August, 1940, before I. S. Thompson, notary public, attaching seal. Order Directing Publication of Summons was made by Roger Foley, 22 July, 1940, and also service on defendant at Akron, Ohio—which was never served.

Decree of Divorce was filed 4 October, 1940, by Roger Foley, District Judge. Then comes Judgment Roll; Praecipe for Default, signed by I. S. Thompson, attorney for plaintiff; then Default Order, signed by the clerk, 4 October, 1940. Then Affidavit of Lillie Roesselet, dated 16 September, 1940, as to plaintiff's residence from 15 May, 1940, up to and including 26 June, 1940. This was subscribed and sworn to 16 September, 1940, before I. S. Thompson, notary public, attaching seal, attorney for plaintiff, and also testimony of O. B. Williams as to her residence. Then affidavit of nonmilitary service of defendant, filed 4 October, 1940, signed by plaintiff and subscribed and sworn to before I. S. Thompson, notary public, seal attached. This action was numbered 10651.

In North Carolina the law is somewhat drastic, as it should be, in granting an absolute divorce. N. C. Code, *supra*, sec. 1659, is as follows: "Marriage may be dissolved and the parties thereto divorced from the

bonds of matrimony, on application of the party injured, made as by law provided, in the following cases: 1. If the husband or wife commit adultery," etc.

Section 1659 (a) is as follows: "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. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce." There are other provisions not necessary to set forth.

Section 1661 provides that the affidavit filed with the complaint must state: "That the facts set forth in the complaint are true to the best of affiant's knowledge and belief, and that the said complaint is not made out of levity or by collusion between husband and wife; and if for divorce, not for the mere purpose of being freed and separated from each other, but in sincerity and truth for the causes mentioned in the complaint. The plaintiff shall also set forth in such affidavit, either that the facts set forth in complaint, as grounds for divorce, have existed to his or her knowledge at least six months prior to the filing of the complaint, and that complainant has been a resident of the State for one year next preceding the filing of the complaint," etc.

If these allegations above are not shown, the court has no jurisdiction. In *Holloman v. Holloman,* 127 N. C., 15 (16), it is said: "That requirement is for the good of the public at large, and not for the convenience or benefit of the parties to the action. The affidavit was intended to prevent bad faith and collusion on the part of the parties to the action, and is an indispensable part of the complaint and application and, if it is wanting, there is no jurisdiction in the court." *Woodruff v. Woodruff,* 215 N. C., 685 (689).

In this State a jury must pass on the facts. N. C. Code, *supra,* sec. 1662, is as follows: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact."

In 27 Corpus Juris Secundum, p. 1295, the following is stated: "Where plaintiff only is domiciled in the state of the forum, and has obtained a decree of divorce for a cause recognized as valid in such state, after constructive service of process on defendant, according to the course

and practice of the court, a court of another state will recognize the decree when required to do so by a statute of that state; but it is not obliged to do so by the full faith and credit clause of the Federal Constitution except where, as shown *infra* this section, the matrimonial domicile is in the state where the decree is rendered. Even though a court of another state is not required by constitution or statute to recognize and give effect to the decree, it may do so as a matter of comity and in some states will do so unless there is some good and valid reason to the contrary; but in a few states the courts require the presence of certain conditions before they will extend recognition; and in other states recognition is refused," citing many authorities. *Pridgen v. Pridgen,* 203 N. C., 533.

In 27 C. J. S., sec. 333, at pp. 1296-7, we find: "Where, however, the state of plaintiff's domicile is not also the matrimonial domicile, a decree of divorce based on substituted service and without personal service on, or appearance by, defendant, although enforceable in the jurisdiction where rendered, is not entitled to obligatory recognition or enforcement in other states or in the District of Columbia in virtue of the full faith and credit clause of the Federal Constitution, although the courts of other states or of the District of Columbia are not prevented from recognizing such decrees on principles of comity if they see fit, and will do so, as a rule, unless contrary to public policy or to good morals, but they are not bound to do so, and the courts of some states do not."

The sole question arising under Article IV, section 1, of the Federal Constitution in this case is whether a divorce granted in the State where the plaintiff alone is domiciled is entitled to full faith and credit when the defendant is only served with process constructively and makes no appearance in the action. This question is answered in the negative by the celebrated case of *Haddock v. Haddock,* 201 U. S., 562, 26 Sup. Ct., 525, 50 L. Ed., 867, justly recognized as a landmark in the law of foreign divorces.

The divorces obtained by the defendants in actions in Nevada against North Carolina citizens, with service by publication in one case and personal service outside the State in the other, clearly come within the scope of the decision in *Haddock v. Haddock, supra,* and recognition is not required by the Federal Constitution.

The carefully prepared brief of defendants cites cases in other jurisdictions that differ from the well-settled law in this State. The most recent of our cases is *Tyson v. Tyson,* 219 N. C., 617 (618-19), which says: "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* (21 N. C., 568). 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* (95 U. S., 714, 24 L. Ed., 565). 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* (21 N. C., 568); *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* (203 N. C., 533, 539)."

The defendants excepted and assigned error to the following portion of the charge of the court—a contention, but correct in principle: "The State contends that these defendants each had a spouse living in the State of North Carolina. That the male defendant has a wife living, and had at the time of the second marriage or purported marriage contract. That the *feme* defendant, the female defendant, had at that time a living husband in the State of North Carolina. That no service was had upon either of them that in law was binding upon the persons residing in Caldwell County, North Carolina, that is, Mrs. O. B. Williams and Mr. Hendrix. That neither of these persons, to wit, Mrs. Williams and Mr. Hendrix, personally or by attorney, made any appearance in the courts of Nevada and, therefore, the entire proceedings in the State of Nevada was void. That they went to the State of Nevada not to establish a *bona fide* residence, but solely for the purpose of taking advantage of the laws of that state and obtain a divorce through fraud upon that court."

The court charged the law fully, as laid down in *Pridgen v. Pridgen, supra,* 203 N. C., 533 (539), also *S. v. Herron, supra,* 175 N. C., 754. In these cases many authorities are cited to sustain the charge in the court below.

In regard to the postal card, the court charged as follows (which we think correct): "The defendants offered a card in evidence, and with respect to that card the court charges you, gentlemen of the jury, that the card indicated or agreed to do certain things, but the card within itself, in law, does not constitute a personal appearance. If the husband of Mrs. Hendrix had done what the card purports that he would do if the

papers were sent to him, that would have constituted a personal appearance, but by promising to make a personal appearance by attorney does not constitute one. It takes more than that. . . . It takes more than a promise to make an appearance or accept service or to constitute service. There must be a carrying out of that promise." After reciting the facts: "Whereupon, the court charges you as a matter of law that the purported or attempted service of the sheriff of Caldwell County upon the defendant's wife, Mrs. Williams, of the pleadings and papers to this State from the State of Nevada had no effect in law, because the sheriff has no authority to serve them, and the fact that he did so amounted to nullity, which means nothing. Therefore, she was not brought into the State of Nevada by virtue of the attempted service, and the court so instructs you."

This Court has held that a *bona fide* belief in the invalidity of a first marriage is not a defense to a prosecution for bigamy when in fact the marriage was valid and subsisting. *S. v. Robbins,* 28 N. C., 23, *supra.* There seems to be no reason why a defendant's belief that a former marriage has been dissolved when in fact it has not been under the laws of this State should be any more efficacious as a defense. It is submitted, therefore, that the rule established in *Irby v. Wilson,* 21 N. C., 568, that foreign *ex parte* divorces will not be recognized in this State applies in criminal cases to the same extent that it applies in civil cases.

We think the charge correct from the facts appearing of record. Most of the exceptions and assignments of error are to the charge of the court below, none of them can be sustained from the view of the well-settled law we take in this case. None constitute prejudicial or reversible error.

The record discloses that defendant O. B. Williams left his wife, with whom he had been married and lived as husband and wife for some twenty-three years and had reared a family of four children, in Caldwell County, N. C., on 7 May, 1940. On 26 June, 1940, a little over a month later, a summons and complaint were filed, signed by him, in the Eighth Judicial District Court of Clark County, Nevada (Otis Baxter Williams *vs.* Carrie Ora Williams), alleging that he was a resident for more than six weeks immediately preceding the commencement of the action of said county and state. The complaint alleged as a cause for divorce against the defendant "extreme cruelty," etc. This complaint was filed by I. S. Thompson, attorney for O. B. Williams, plaintiff. Thompson was also notary public and it was subscribed and sworn to before him. Affidavit of publication was subscribed and sworn to before I. S. Thompson, who was attorney and notary public. No personal service on defendant, Carrie Ora Williams, or appearance by her was made. The sheriff of Caldwell County, N. C., delivered a summons and

complaint on 18 July, 1940. Decree of divorce signed by Roger Foley, District Judge, signed 26 August, 1940, finds certain facts and grants the divorce without a jury finding the facts. On 4 October, 1940, O. B. Williams married Lillie Esther Hendrix in Clark County, Nevada. They returned almost immediately after the marriage and lived together as husband and wife in Avery County, North Carolina, near Lenoir, North Carolina.

The record discloses that defendant Lillie Shaver Hendrix was married to Thomas George Hendrix about twenty years and they lived together as husband and wife until May, 1940. On 26 June, 1940, a little more than a month after leaving her husband, she had a summons issued and filed a complaint against him in the Eighth Judicial District Court of Clark County, Nevada, entitled Lillie Esther Hendrix *vs.* Thomas George Hendrix, alleging that she was a resident for more than six weeks immediately preceding the commencement of the action and was a resident of said county and state; alleging cause for divorce that her said husband had "willfully neglected to provide for her," etc., and "extreme mental cruelty." This complaint was filed by I. S. Thompson, her attorney. Thompson was also a notary public and it was subscribed and sworn to before him as notary public. Affidavit of publication was subscribed and sworn to before her attorney, and as notary public. No personal service on defendant, George Thomas Hendrix, or appearance by him. The postal card introduced in evidence was no acceptance of service or appearance. The summons was published in a local paper once a week for four weeks. Decree of divorce signed by Roger Foley, District Judge, 4 October, 1940, finds certain facts and grants the divorce without a jury finding the facts. On the same day, 4 October, 1940, she married O. B. Williams in Clark County, Nevada. They came almost immediately after the marriage to North Carolina, and lived together as husband and wife in Avery County, near Lenoir, North Carolina. They employed the same attorney, filed summons and complaint on the same day, and immediately married on the day the decree of divorce was granted Lillie Shaver Hendrix. O. B. Williams had obtained a decree of divorce a short time before, he was represented by the same attorney and the decrees of divorce were granted by the same court. The actions were numbered 10650 and 10651. The record discloses not only no personal service, as required by the decisions of this Court, but all the evidence indicates collusion between the defendants, and bad faith in attempting to secure decrees of divorce, contrary to the laws of this State.

For the reasons given, we see no prejudicial or reversible error in the trial in the court below.

No error.

BARNHILL, J., concurring: When the State offered evidence tending to show the first marriage of each of the defendants; that the wife of the defendant Williams and the husband of the defendant Hendrix are each still living; the second contracts of marriage and subsequent cohabitation of the defendants within this State it made out a *prima facie* case which, nothing else appearing, would require a verdict of guilty. That each of the defendants had been divorced was a fact to be proven in defense. *S. v. Norman,* 13 N. C., 222; *S. v. Melton,* 120 N. C., 591; *S. v. Herron,* 175 N. C., 754, 94 S. E., 698; *Thompson v. S.,* 20 Ala., 12; *Com. v. Bolich,* 18 Pa. Co. Ct., 401. Hence the question here presented is this: Have the defendants presented evidence of a valid defense?

The decrees of divorce relied upon by defendants were obtained in the State of Nevada on constructive service. The court rendering the judgments had no jurisdiction of the person of the respective defendants therein. *Arrington v. Arrington,* 102 N. C., 491, and 127 N. C., 190; *Harris v. Harris,* 115 N. C., 587; *Pridgen v. Pridgen,* 203 N. C., 533, 166 S. E., 591; *Tyson v. Tyson,* 219 N. C., 617; *Thompson v. S., supra; Bell v. Bell,* 181 U. S., 175, 45 L. Ed., 804.

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 service. *Tyson v. Tyson, supra.*

Judgments of divorce rendered by the foreign state are not protected by the full faith and credit clause (Art. IV, sec. 1) of the Federal Constitution. The mere domicile within the state of one party to the marriage does not give the courts of the state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action. *Haddock v. Haddock,* 201 U. S., 562, 50 L. Ed., 867; *S. v. Herron, supra; Thompson v. S., supra.* They are subject to attack for want of jurisdiction of the rendering court over the person of the defendant named therein. *Thompson v. Whitman,* 85 U. S., 897; *Haddock v. Haddock, supra; S. v. Herron, supra.*

That the marriage of the defendants was consummated in another state is immaterial. "If any person, being married, shall contract a marriage with any other person, outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy." C. S., 4342; *S. v. Moon,* 178 N. C., 715, 100 S. E., 614; *S. v. Herron, supra.*

It follows that under our law the defendants failed to establish a divorce or second marriage effective as a valid defense to the prosecution. The divorce decrees, being rendered upon constructive service, were without force or effect within this State. Their subsequent marriage, had it been contracted in this State, was bigamous. Cohabitation thereunder within this State constituted a bigamous cohabitation.

For the reasons stated I agree that the judgment below should be affirmed.

STACY, C. J., and WINBORNE, J., join in this opinion.

MINNIE KINLEY BROADHURST AND J. N. WRIGHT v. BLYTHE BROTHERS COMPANY, A. H. GUION & COMPANY, CITY OF HIGH POINT, AND SOUTHERN RAILWAY COMPANY.

(Filed 10 December, 1941.)

1. Negligence § 22—

The correct rule for the admeasurement of damages for negligent injury to real property is the difference in the market value of the property before and after the injury.

2. Same—Whether building could have been repaired after injury is germane in determining value of property after the injury.

Plaintiffs' building was damaged by a cave-in resulting from alleged negligence in excavation work along an adjacent street. Plaintiffs did not repair the building, but tore it down. *Held:* Evidence of the practicability of repairing the building was properly admitted for the purpose of aiding the jury in determining the reasonableness of the opinion of witnesses as to the market value of the property before and after the damage, and the court properly instructed the jury that if they found by the greater weight of the evidence that the building could have been repaired, they should take such fact in consideration in determining the market value after the injury.

3. Highways § 20—

Plaintiffs' building was damaged by a cave-in resulting from alleged negligence in excavation work incident to the construction of a highway overpass. *Held:* Plaintiffs were not relegated to a claim for damages against the Highway Commission as for a taking of their property under Michie's N. C. Code, 3846 (bb), and the demurrer of the contractor for the Highway Commission in plaintiffs' action in tort was properly overruled.

4. Same—

A contractor performing work under a contract with the State Highway Commission is liable for injuries proximately caused by its negligence in the performance of the work.

5. Same—Evidence of negligence of contractor in performance of work under contract with Highway Commission held sufficient for jury.

Under an agreement between a city and the State Highway Commission to eliminate a grade crossing on a State highway within the city by the construction of a railroad underpass and a bridge over the tracks, the contractor for the Commission contracted to shore up the sides of the excavation required to lower the grade of the railroad tracks and to build the highway bridge. Plaintiffs' building was damaged by a cave-in resulting from alleged negligence in the excavation work. Plaintiffs' evidence of negligence on the part of the contractor for the Highway Commission tended to show that the contractor was given notice of the character and type of the soil on the bank of the excavation adjoining plaintiffs' building and that water mains would be encountered in the progress of the work, that the contractor failed to provide adequate shoring, placed and operated pile driving machinery of great weight on the street near plaintiffs' building, resulting in the separation of large water mains under the street and the flooding of the subsoil, that following a cave-in this defendant diverted surface waters from the street into the excavation, which water, augmented by a large rainfall, undermined the soil and caused the cave-in resulting in the damage in suit. *Held:* The evidence viewed in the light most favorable to plaintiff was sufficient to show negligent breach of duty which this defendant owed abutting property owners, resulting in damage to plaintiffs, and its motion to nonsuit was properly overruled.

6. Municipal Corporations § 12—

In authorizing a construction project to eliminate a grade crossing in the interest of public safety a municipality acts in its governmental capacity and is not liable for incidental damage to abutting property owners except for negligence in the manner of doing the work which is attributable to the city.

7. Municipal Corporations § 14—Evidence held insufficient to show negligence attributable to city in performance of work authorized by city in exercise of governmental function.

Under an agreement between defendant city and the State Highway Commission to eliminate a grade crossing on a State highway within the city by the construction of a railroad underpass and a bridge over the tracks, the city undertook to make the necessary excavation for the lowering of the grade of the railroad tracks, and employed a contractor to do its part of the work. After the excavation was completed but before the contractor for the Highway Commission had constructed the retaining walls and the overhead bridge, there was a cave-in causing damage to plaintiffs' building. There was evidence that operations by the contractor for the Highway Commission broke water mains under the street, flooding the subsoil. The jury found that the contractor for the city was not guilty of negligence in performing the excavation work. Plaintiffs' allegations of negligence on the part of the city were that it delayed in repairing the water mains, failed to repair cracks in the street, and failed to give notice of the nature and extent of the excavation, and failed to take proper precautions to protect plaintiffs' property. *Held:* The city, in the exercise of a governmental function, was not required to foresee and guard against negligence of its independent contractor working under the

supervision of the State Highway Commission, or in any event its liability therefor would be secondary to the liability of its contractor, and in the absence of evidence that it failed to exercise reasonable diligence in repairing its mains, or that its failure to properly repair the cracks in the street was a contributing cause of the damage, the city's motion to nonsuit should have been allowed.

APPEAL by plaintiffs, and by defendants A. H. Guion & Company and the city of High Point, from *Pless, J.*, at January Term, 1941, of GUILFORD.

This was an action to recover damages for an injury to plaintiffs' building in the city of High Point, alleged to have been caused by the negligence of the defendants Blythe Brothers Company, A. H. Guion & Company, the city of High Point, and the Southern Railway Company, incident to excavations adjoining plaintiffs' property made for the purpose of constructing a railroad underpass and an overhead concrete bridge in the city.

The facts alleged in the complaint were substantially these: The city of High Point and the North Carolina State Highway and Public Works Commission, in coöperation with the Southern Railway Company, had entered into an agreement for the elimination of grade crossings in the city by lowering the grade of the tracks of the Railway Company. At the point where Main Street (one of the principal thoroughfares of the city and a State Highway) crosses the railroad the grade of the railroad was to be lowered some 28 feet, and over this cut a concrete bridge was to be constructed as a part of Main Street to carry the traffic of that street and the State Highway. The general direction of Main Street is north and south. The plaintiffs' property, a two-story brick building, was located on the northwest corner of Main and Broad streets, fronting 27 feet on Main Street, and extending westward along Broad Street 100 feet. Broad Street intersected Main Street at right angles, and its southern line adjoined and paralleled the railroad right of way. In carrying out the agreement as to the crossing at Main Street, the city of High Point undertook to do the excavating necessary for lowering the tracks, and contracted with defendant Blythe Brothers Company to do this work. The State Highway Commission employed A. H. Guion & Company to construct a permanent concrete bridge and to erect the retaining walls along the sides of the excavation. The north bank of the cut, west of Main Street, was immediately south of Broad Street, and across this last named street stood plaintiffs' building. At the time Guion & Company began the work for which it had contracted with the Highway Commission, in 1938, Blythe Brothers Company had practically completed the excavation. Under the surface of Broad Street the city of High Point had laid a 24-inch water main and this connected

with a 12-inch main at the intersection of this street with Main Street. North of plaintiffs' building the entire block was covered by business buildings, constituting enormous pressure on the land. The type of soil revealed by the cut as underlying Broad Street and plaintiffs' building was red clay for one and a half feet, underneath which was a stratum of water bearing sand. Notice of the nature of the soil was given defendant Guion & Company and its attention was called to the surrounding conditions. In beginning its work of erecting the bridge defendant Guion & Company took no steps to relieve the pressure on the north bank of the cut just south of plaintiffs' building, while heavy piling was driven in the cut in the line of Main Street at a point near plaintiffs' property. The pile driver, weighing 52,000 pounds, together with hoisting machinery, was placed on the asphalt surface of Broad Street, just over the junction of the water mains, and the effect of the driving was such as to jar the soil under Broad Street and plaintiffs' building. In August, 1938, this caused the unjointing of the water mains, and as a result the water poured through the subsoil into the cut, carrying a slide or cave-in of earth and loosening the foundation of the street and building. Broad Street was blocked off by defendant Guion & Company, and the surface water thereon was diverted and caused to flow into the cut. In November, 1938, due to diverted water, augmented by heavy rainfall, loosening the underlying stratum, a heavy land slide and cave-in from the north bank into the cut occurred, carrying away a part of the street and several sections of the 24-inch water main. As a consequence, plaintiffs' building was caused to settle and crack, the entire south wall was caused to move laterally several inches, and the plaintiffs' building became unsafe and unfit for use, so much so that the building was rendered practically worthless, and it became necessary to have it torn down.

The pertinent allegations of negligence imputed to the defendants were that no shoring or bracing was done to prevent slides or cave-ins along the north side of the deep cut, and that after the slide of August, 1938, nothing was done to repair or prevent further slides, although the defendants knew or should have known of the danger to plaintiffs' building; that defendants knew the type of soil involved and took no precautions to prevent slides; that the pile driving was done without due precaution to prevent injury. The allegations applicable to the city of High Point were that the city failed to inspect, repair and relocate its water mains, failed to repair cracks which appeared in the pavement of Broad Street, and failed to take precautions to protect plaintiffs' property.

The defendants, severally, denied the allegations of negligence and denied that plaintiffs' injury proximately resulted therefrom. The city of High Point denied liability for any injury to plaintiffs' property on

the further ground that in authorizing the lowering of the grade of the railroad track and the construction of the bridge, it was acting in its governmental capacity in the public interest; and that the construction of the bridge was done by Guion & Company under contract and supervision of the State Highway Commission, and that the city was not liable for injury resulting from the negligence of the contractor.

At the conclusion of plaintiffs' evidence motion for judgment of nonsuit as to defendant Southern Railway Company was allowed. No exception was preserved as to this ruling.

Both defendants Guion & Company and the city of High Point demurred *ore tenus* on the ground that plaintiffs' exclusive remedy was under sec. 3846 (bb), Michie's Code, and that the injury complained of occurred while work was being carried on by agents and servants of the State Highway Commission. Both defendants also in apt time moved for judgments of nonsuit. Both demurrers were overruled and the motions for nonsuit denied, and defendants Guion & Company and the city of High Point excepted.

The following issues were submitted to the jury and answered as follows:

"1. Was the plaintiffs' property damaged by the negligence of the City of High Point in removing lateral support from the lands and building of the plaintiffs without proper notice, as alleged in the complaint? Answer: 'No.'

"2. Was the plaintiffs' property damaged by the negligence of the defendants, or either of them, as alleged in the complaint? Answer: 'Yes. (A) Blythe Bros. Co.: Yes. (B) A. H. Guion & Co.: Yes. (C) City of High Point: Yes.'

"3. If so, did the plaintiffs by their own negligence contribute to their injury? Answer: 'No.'

"4. If so, was such injury and damage caused by the primary and active negligence of: Answer: '(A) Blythe Bros. Co.: Yes. (B) A. H. Guion & Co.: Yes. (C) City of High Point: Yes.'

"5. What amount of damages are the plaintiffs entitled to recover? Answer: '$2,225.00.'"

The court set aside the verdict as to Blythe Brothers & Company on the ground that this defendant was entitled to peremptory instructions in its favor. No exception was preserved to this ruling. Plaintiffs' motion to set aside the verdict on the fifth issue was denied. Judgment on the verdict as to defendant Guion & Company and the city of High Point was signed, and plaintiffs excepted and appealed on the issue of damages. Defendants Guion & Company and city of High Point appealed, assigning as error the court's overruling their demurrers and motions for nonsuit.

Lovelace & Kirkman for plaintiffs.
Frazier & Frazier for defendant A. H. Guion & Company.
Grover H. Jones for defendant City of High Point.

PLAINTIFFS' APPEAL.

DEVIN, J. Plaintiffs' appeal involves only the rulings of the court relating to the issue of damages. They excepted to the admission of certain evidence as to the repair of the damaged building, and also to the charge of the court on this point, and to the refusal of the court to state their contentions in the form requested. An examination of the record, however, leads us to the conclusion that the evidence, to which objection was noted, for the purpose for which the court in the charge limited it, was competent. Plaintiffs' contentions were substantially stated in the general charge, and we find no error in the instructions given, which would warrant a new trial.

The court gave the jury the correct rule for the admeasurement of damages—the difference between the market value of the property before and after the injury—and was careful to instruct them that evidence as to the practicability of repairing the plaintiffs' building, instead of removing it entirely, was for the purpose of aiding the jury in determining the reasonableness of the opinion expressed by the witnesses as to the market value of the property and the difference in market value before and after the injury. *Farrall v. Garage Co.*, 179 N. C., 389, 102 S. E., 617; *Construction Co. v. R. R.*, 185 N. C., 43, 116 S. E., 3. The court also instructed the jury that if they found by the greater weight of the evidence that the building could have been repaired, and hence would have been of more value than if torn down, this should be taken into consideration in determining the market value after the injury.

On plaintiffs' appeal,

No error.

APPEAL OF DEFENDANT A. H. GUION & COMPANY.

This appealing defendant assigns as error the overruling of its demurrer, which was based upon the ground that plaintiffs' remedy was under section 3846 (bb), Michie's Code, and upon the further ground that, under its contract as servant and agent of the State Highway and Public Works Commission, the immunity of the State extended to and relieved it of liability for injuries incident to the work.

The demurrer was properly overruled. The plaintiffs, for remedy for the injury alleged, were not relegated to a claim for damages against the Highway Commission as for a taking of their property; nor is a contractor, though working under contract with the Highway Commission, relieved of liability for injuries proximately caused by its negli-

gence. *Hughes v. Lassiter,* 193 N. C., 651, 137 S. E., 806; *Evans v. Construction Co.,* 194 N. C., 31, 138 S. E., 411; *Gold v. Kiker,* 216 N. C., 511, 5 S. E. (2d), 548; *Cavarnos-Wright Co. v. Blythe Bros. Co.,* 217 N. C., 583, 8 S. E. (2d), 924; *Thompson Caldwell Construction Co. v. Young,* 294 Fed., 145. The holding in *Wilkins v. Burton, ante,* 13, has no application to the question here presented.

Also, we think the defendant's motion for judgment of nonsuit was properly denied. The evidence, taken in the light most favorable to the plaintiffs, in accord with the established rule, was sufficient to carry the case to the jury. There was some evidence tending to support the allegations of the complaint that failure on the part of this defendant to exercise due care in the performance of the duty which it owed to the abutting property owners, proximately contributed to the injury complained of.

The contract between the Highway Commission and this defendant required the latter, in addition to the construction of the street and concrete bridge at the Main Street crossing, to construct the retaining walls of the excavation, "including all necessary shoring." The contract contained these further provisions: "The contractor's attention is called to the fact that the excavation for some portions of the bridges and retaining walls will endanger the foundation of adjoining structures and that he will be required to conduct his work in such a manner that they will not be weakened with resulting damage to the structures. . . . The contractor's attention is further called to the fact that he will be held responsible for all damage to adjoining private and public property growing out of his operations." The contractor was also obligated to furnish and place all temporary shoring required for the safe performance of his operations, and the contractor's attention was specifically called to the fact that water mains would be encountered during the construction of the project, and he was enjoined to conduct his operations so as not to damage or interrupt the service. There was also evidence tending to show that this defendant had been notified of the character and type of the soil on the slope of the north side of the excavation and under Broad Street, adjoining plaintiffs' building. The plaintiffs' evidence further tended to show that, notwithstanding this notice and knowledge of these facts, this defendant failed to provide adequate shoring required for the prevention of earth slides, and placed pile driving machinery of enormous weight flat on the asphalt paving of the street and proceeded to carry on the pounding and jarring of a 52,000-pound hammer immediately above the junction of two large water mains, causing their separation and flooding the subsoil; that later this machinery was placed on adequate platform; that following the slide or cave-ins in August, 1938, due to the disconnection of the water mains,

defendant diverted water on Broad Street, and that this water, augmented by a large rainfall, in November, 1938, poured down the bank and further undermined the street and plaintiffs' building, and caused a large cave-in and the breaking of several sections of the water mains, rendering plaintiffs' building unsafe and unfit for use.

We think there was evidence tending to show a negligent breach of the duty which this defendant owed to an abutting owner, proximately causing injury, and that there was no error in submitting the case to the jury. *Smith v. Phillips,* 213 N. C., 339, 196 S. E., 305; *Bonapart v. Nissen,* 198 N. C., 180, 157 S. E., 94; *Davis v. Summerfield,* 131 N. C., 352, 42 S. E., 818; 50 A. L. R., 499; *Jamison v. Myrtle Lodge,* 158 Iowa, 264; *Bohrer v. Dienhart Harness Co.,* 19 Ind. App., 489.

On defendant Guion & Company's appeal,

No error.

APPEAL OF DEFENDANT CITY OF HIGH POINT.

A consideration of the record in this case leads us to the conclusion that the motion for judgment of nonsuit as to the city of High Point should have been allowed. The city, in the commendable effort in cooperation with the State Highway Commission and the Southern Railway Company, to eliminate grade crossings in the city, entered into an agreement by which it undertook to have the necessary excavating done for the lowering of the grade of the railroad track at the Main Street crossing, and employed Blythe Brothers Company to do this work. Blythe Brothers Company performed their contract, made the necessary excavations and completed the principal part of their work before defendant Guion & Company began the construction of the bridge and retaining walls. Blythe Brothers Company, under the ruling of the court below, has been absolved from liability, so far as this appeal is concerned. The verdict and judgment establishing that the injury to plaintiffs' property was caused by the negligence of Guion & Company has been upheld. Guion & Company was under contract with the State Highway Commission to construct the bridge and the retaining walls and in the course of that employment did the things with respect to which negligence was charged. Thus, the operations complained of were not being carried on by the city, nor by its servants or agents, but by the contractor employed and acting under the supervision of the State Highway Commission. The Highway Commission had authority under the statute to construct the bridge over the railroad tracks on a State Highway. *Mosteller v. R. R., ante,* 275.

It must be borne in mind that in authorizing these operations, looking to the elimination of grade crossings and the lessening of the hazards of traffic, in grading its streets and building a bridge for a public thorough-

fare, the city was acting in its governmental capacity and was not liable for incidental damage to abutting property, *Dorsey v. Henderson,* 148 N. C., 423, 62 S. E., 547; *Parks-Belk Co. v. Concord,* 194 N. C., 134, 138 S. E., 599; *Calhoun v. Highway Com.,* 208 N. C., 424, 181 S. E., 271; *Broome v. Charlotte,* 208 N. C., 729, 182 S. E., 325; *Jenkins v. Henderson,* 214 N. C., 244, 199 S. E., 37; *Sanders v. R. R.,* 216 N. C., 312, 4 S. E. (2d), 902, unless negligence in the manner of doing the work can be attributed to the city. *Hoyle v. Hickory,* 167 N. C., 619, 83 S. E., 738; *Yowmans v. Hendersonville,* 175 N. C., 574, 96 S. E., 45; 6 McQuillin Mun. Corp. (2nd Ed.), secs. 2779, 2805.

The acts of negligence alleged in the complaint, chiefly applicable to this defendant, were delay in repairing the water mains; failure to relocate the main on Broad Street; failure to repair the cracks in the street, and take precautions to protect plaintiffs' property; failure to give notice of the nature and extent of the excavation. It will be noted that the jury in answer to the first issue absolved this defendant of the imputation of negligence with respect to the removal of lateral support from plaintiffs' building without proper notice.

In none of the particulars mentioned does the evidence support the allegations of the complaint. The disconnection of the water mains was repaired without undue delay, and, where sections of the main on Broad Street were displaced, the water system was rearranged with reasonable diligence. No liability can be imputed to the city on this ground. *Parks-Belk Co. v. Concord, supra.* The cracks in the street were alleged to have been inadequately repaired, but no injury appears to have been caused to plaintiffs' property by reason thereof. The case involves no question of liability of the city to a traveler for failure to properly maintain its streets. There is no evidence of negligent omission to perform any duty owed the plaintiffs, under the allegations here, for which it may be held liable. To hold that the city, in the exercise of its governmental functions for the public welfare, was under obligation to foresee and guard against the negligence of an independent agency, working under the supervision of the State Highway Commission, would be to impose a greater burden on the city than the law requires. In any event its liability for failure, after notice, to guard against dangerous conditions due to the negligence of another would be secondary to that of the other. *Gregg v. Wilmington,* 155 N. C., 18, 70 S. E., 1070; *Guthrie v. Durham,* 168 N. C., 573, 84 S. E., 859. The evidence discloses no ground upon which liability *ex delicto* can be imposed upon the city of High Point for the injury to plaintiffs' building, and the motion for judgment of nonsuit should have been allowed.

On appeal of defendant city of High Point,

Reversed.

W. N. HARRISS v. W. D. HUGHES, TRUSTEE, GEORGE H. HOWELL, TRUSTEE, MEARES HARRISS, FRANCES L. HARRISS, AND THE CITY OF WILMINGTON AND COUNTY OF NEW HANOVER.

(Filed 10 December, 1941.)

1. Mortgages § 33—

Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the Superior Court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. Michie's N. C. Code, 598, 637.

2. Same: Judgments § 24—Court may modify interlocutory consent judgment for sale of land to order resale and appoint substitute commissioners.

By consent judgment it was ordered that a commissioner selected by agreement should sell the property to satisfy the debt secured by deed of trust, and that the cause should be retained for further orders relative to a resale by the commissioner. The commissioner sold the property in accordance with the order, but reported that the last and highest bid was less than the value of the property and recommended a resale. *Held:* The consent judgment was interlocutory, and the judge of the Superior Court had authority, without consent of the parties, to order a resale, and upon its finding that the commissioner appointed in the consent order was related to one of the trustors, to appoint substitute commissioners to conduct the second sale.

3. Notice § 3—

When a party appears at the time and place set for the hearing of a motion in the cause in response to notice served on him, he waives objection that he was not given due notice of the hearing.

4. Mortgages § 33—

When the court orders a resale of property sold under foreclosure, the order should require notice of the resale to be published in a newspaper once a week for four successive weeks, and when the order requires such publication once a week for two successive weeks the order will be modified upon appeal.

APPEAL by plaintiff from *Bone, J.*, at July Term, 1941, of NEW HANOVER. Modified and affirmed.

At the December Civil Term of the Superior Court of New Hanover County there was a consent judgment entered before his Honor, Clawson L. Williams, Judge presiding. The decree is in part: "It is further Ordered, Considered and Adjudged by the Court that if the said Commis-

sioner (George H. Howell) should advertise the lands and premises described in the deed of trust from W. N. Harriss and wife, Frances L. Harriss, to George H. Howell, Trustee, for sale, he shall advertise the same at the Court House door and three other public places in the County of New Hanover for thirty days prior to the date of sale and for once a week for four successive weeks in a newspaper published in the City of Wilmington, stating the time, terms and condition of said sale, and that the said Commissioner shall sell the said lands and premises under the circumstances herein set forth at public auction, to the highest bidder, for cash, at the Court House door of New Hanover County at the time and place so to be mentioned in the advertisement of sale for cash; and said Commissioner shall thereafter report his acts and doings under this judgment to the Clerk of the Superior Court who is hereby authorized and empowered, in the event that the bid so made by the purchaser at such sale so made by the Commissioner is not raised in conformity with the provisions of the Statute in such case made and provided, to enter a valid and binding order confirming such sale, and that upon a confirmation by the Clerk under such circumstances the purchaser shall obtain a good and fee simple title to the lands and premises described in said deed of trust. It is further Ordered, Adjudged and Decreed by the Court, by consent, that this cause is retained only for such other and further orders as the Court may determine should be made relative to a re-sale by the Commissioner and the confirmation of the sale by the Clerk."

George H. Howell was, by consent, appointed commissioner to make the sale. The report of the commissioner to the clerk shows, among other things: "That there was a small attendance at said sale, limited, in fact, to the said bidder and two others, the latter presumably spectators; that, in view of the present increased demand for real estate for housing purposes; that by reason of the fine location of said land and premises; and because, in the opinion of your Commissioner, the intrinsic value of the property far exceeds the said bid (the present tax value being $5,510.00. Last year being $6,000.00), and as I am informed, a loan of $6,000.00 was heretofore made with a mortgage on said property as sole security, the ends of justice will be best subserved by a resale of said land and premises, and your Commissioner so recommends. All of which is respectfully submitted, this the 5th day of June, 1941."

The clerk signed a judgment, as follows: "This cause coming on to be heard before the undersigned Clerk of the Superior Court upon the Report of the Commissioner heretofore appointed to make sale of the lands and premises referred to in the judgment heretofore entered, and it appearing to the Court that the Commissioner recommends that the sale be not confirmed upon the ground that the property did not bring its fair value, and the Court having made its own investigation and

finds as a fact that the property sold by the Commissioner did not bring its fair market value at said sale; and the Court being of the opinion that the said sale is in every respect a Judicial sale and so rules as a matter of law. It is therefore, Ordered, Adjudged and Decreed by the Court that the Commissioner heretofore appointed in this cause be, and he is hereby directed to immediately re-advertise and resell the property referred to in the judgment aforesaid in conformity with law, and that the sale heretofore made by the Commissioner be not confirmed. This the 1st day of July, A.D., 1941. T. A. Henderson, Clerk Superior Court."

To the foregoing judgment and ruling of law the defendant, W. D. Hughes, Trustee, excepted and gave notice of appeal in open court.

The supplemental judgment of the clerk is as follows: "In the above cause the undersigned makes the following findings of fact, and makes and includes same as part of the attached original judgment:

"1. That under a Judgment entered by the Honorable Clawson L. Williams, at the December Civil Term, 1940, of the Superior Court of New Hanover County, George H. Howell was appointed Commissioner to sell the lands and premises according to the terms and conditions of said Judgment.

"2. That the said George H. Howell did offer for sale and did sell on June 2, 1941, to the highest bidder for cash, the said lands and premises at and for the sum of Four Thousand Thirty-one and 40/100 ($4,031.40) Dollars, all being done according to the terms and conditions of said Judgment.

"3. That more than ten (10) days have elapsed since the date of the sale, June 3, 1941, and the bid has not yet been raised.

"This the 3rd day of July, 1941. T. A. Henderson, Clerk Superior Court."

And thereupon, on 7 July, 1941, the clerk of the Superior Court transmitted to Judge W. J. Bone the papers in the cause with the following letter: (not necessary to be set forth).

On 19 July, W. D. Hughes, Trustee, served notice on all the interested parties, as follows: "Take notice that the undersigned will on Friday morning, July 25, A.D., 1941, at 9:30 o'clock A.M., appear before and apply to the Honorable Walter J. Bone, Judge holding the Courts of the Eighth Judicial District, at the Superior Court, New Hanover County, for an Order or judgment confirming the sale of the lands and premises belonging to the Plaintiff, W. N. Harriss, and one of the defendants, Frances L. Harriss. The said sale having been made by George H. Howell, Commissioner, on the 3rd day of June, 1941, and no objections and no raise in bid having been made within 10 days of said sale," etc.

On 11 July, Judge Bone, in the Superior Court, entered a judgment, in part, as follows: "Upon consideration of the appeal the Court is of

the opinion that, notwithstanding the provision to the contrary in the decree of foreclosure, the Superior Court Judge having appointed a commissioner to make the sale the question of the confirmation of said sale is one which must be considered and passed upon by the Judge delegated to the Clerk even by consent. The Court, therefore, is further of the opinion that the Clerk had no jurisdiction to determine the matter or to make the order of resale. No motion has been made before the undersigned for a confirmation of said sale or for a resale under the provisions of C. S., 598. It is therefore, Ordered that the Order of Resale heretofore made by the Clerk be and the same is hereby set aside and declared null and void. This the 11th day of July, 1941."

At the July Term, 1941, the following order or judgment was rendered: "This cause comes on to be heard before the undersigned Judge holding the Courts of the Eighth Judicial District, upon motion of the defendant W. D. Hughes, Trustee, for confirmation of the sale held by the Commissioner on June 3rd, 1941. Notice of said motion was caused by the defendant to be served on George H. Howell, Trustee; Frances L. Harriss, W. N. Harriss; Hargrove Bellamy, Mayor of the City of Wilmington, and Addison Hewett, Chairman of the Board of County Commissioners of New Hanover County. No notice was served on any of the other parties. The motion was heard in the Superior Court Room of New Hanover County on Friday, July 25th, 1941, at 9:30 A.M., and at said hearing the defendant W. D. Hughes, and his counsel, A. A. Lennon; the plaintiff W. N. Harriss and his attorney E. K. Bryan; and the Commissioner, George H. Howell, were present. A regular Criminal Term of Superior Court of New Hanover County convened on Monday, July 21st, 1941, with the undersigned Judge presiding, and said term had not adjourned at the time of the hearing of this motion. Hon. E. K. Bryan, Attorney for the Plaintiff, announced that he is making a special appearance and moving to dismiss the motion on the ground that no proper notice of said motion has been served upon him or his client, and that the Court has not jurisdiction to hear the motion. The said motion of plaintiff's attorney is denied, and plaintiff excepts. Statement of said counsel that he was making a special appearance was made after the Court had heard affidavits read by defendant's counsel and testimony of the Commissioner, and after the Court had intimated that it would order a re-sale; however, up to that point plaintiff's counsel had not been called upon for any statement, and it had not become necessary for him to make any. After considering the matter upon the affidavits filed, and after hearing the sworn testimony of the Commissioner, in addition to his report, the Court is of the opinion that the sale ought not to be confirmed, and that a resale should be ordered. The Commissioner stated to the Court, in open Court, that at the time his name was put in the consent judgment as Commissioner he had no

knowledge that same was being done; that he is related to the plaintiff and that he feels embarrassed by reason of such relationship in acting as Commissioner, and would like to be relieved of further duties in the matter. It is now, Therefore, by the Court, Ordered, Adjudged and Decreed that a re-sale of the property described in the complaint, and in controversy in this action, be had, and that George H. Howell, a Commissioner heretofore appointed under the terms of said consent judgment be, and he is hereby, relieved of further duty, and in his place and stead Joseph W. Ruark and E. J. Prevatte are hereby appointed as Commissioners to make said re-sale, they being found by the Court to be fit and competent Commissioners for said purpose. It is Further Ordered and Adjudged, that said re-sale be held on the 15th day of August, 1941, at twelve o'clock, noon, at the Third Street Court House Door, in the City of Wilmington, New Hanover County, North Carolina, and that prior to the date of the re-sale the Commissioners are hereby directed to post a notice of said re-sale at said Court House Door and at three other places in the City of Wilmington; that they cause to be published a notice of said re-sale in the Wilmington *Star-News,* a newspaper published in New Hanover County, once a week for two weeks, and further that said Commissioners shall cause to be printed and distributed a reasonable number (the number to be left to the discretion of the Commissioners) of handbills, giving notice of the time and place of said re-sale, and further that said Commissioners shall report their proceedings to the Court for confirmation. Walter J. Bone, Superior Court Judge."

To the foregoing order or judgment the plaintiff and Meares Harriss excepted, assigned error, and appealed to the Supreme Court.

E. K. Bryan for plaintiff.
No counsel for defendants.

CLARKSON, J. The plaintiff contends that the question presented is: "Under the Statutes of North Carolina, was the Judge vested with jurisdiction to hear this matter when not calendared for hearing at the July Criminal Term, 1941, of the Superior Court of New Hanover County?" We think so, under the facts and circumstances of this action.

The second assignment of error challenges the correctness of the ruling of the court in changing a consent decree, without first obtaining the consent of all interested parties thereto, and without its being done at a regular term when the case was calendared. Neither of these contentions can be sustained.

The original consent judgment, when the case was in the Superior Court, required the clerk to do certain things, but it went further and stated: "It is further Ordered, Adjudged and Decreed by the Court, by consent, that this cause is retained only for such other and further orders

as the Court may determine should be made relative to a re-sale by the Commissioner and the confirmation of the sale by the Clerk."

In the opinion of the commissioner, after reciting the facts in his report, it is said: "The ends of justice will best be preserved by a re-sale of said land and premises, and your Commissioner so recommends." Upon this report, the clerk ordered the property to be readvertised and sold, "the sale heretofore made by the Commissioner, be not confirmed."

N. C. Code, 1939 (Michie), sec. 598, in part, is as follows: "Sales made by receivers or commissioners appointed by the superior court, unless governed by the provisions of Consolidated Statutes, section two thousand five hundred and ninety-one, as amended, may after ten days from the date of sale, in the absence of objection or raise in bid, be confirmed, or in case of objection or raise in bid, re-sales may be ordered, without notice, in chambers in any county in the judicial district, in which the proceedings are pending, by the resident judge or the judge holding the courts of said district; but this shall not diminish the power of the court in term time to act in such matters as now provided by law where no order has been made under this section."

Section 637: "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." *Hall v. Artis,* 186 N. C., 105; *Wynne v. Conrad, ante,* 355.

We think that the consent decree, liberally construed, gives the court supervisory power in the matter.

In *Hales v. Land Exchange,* 219 N. C., 651 (651-2), it is written: "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."

In *Coburn v. Comrs., supra,* it is held: When a consent judgment reserves the cause for further orders, the court may thereafter modify the order or judgment as conditions be made to appear, to make such change or modification in conformity with justice and the legal rights of the parties.

The appealing plaintiff says that he was not given proper notice. We think the facts set forth in the order or judgment of the court below

showed a waiver. The consent decree says that the commissioner (George H. Howell) "Shall advertise the same at the Court House door and three other public places in the County of New Hanover for thirty days prior to the date of sale and for once a week for four successive weeks in a newspaper published in the City of Wilmington," etc.

The order or judgment appealed from says: "The Commissioner stated to the Court, in open Court, that at the time his name was put in the consent judgment as Commissioner he had no knowledge that same was being done; that he is related to the plaintiff and that he feels embarrassed by reason of such relationship in acting as Commissioner, and would like to be relieved of further duties in the matter." On this statement, the court below relieved Mr. Howell of further duty in the matter, "And in his place and stead Joseph W. Ruark and E. J. Prevatte are hereby appointed as Commissioners to make said re-sale, they being found by the Court to be fit and competent Commissioners for said purpose."

The order only requires publication once a week for two weeks in a newspaper. We think it should give thirty days, etc., as required in the consent decree and four successive weeks in the newspaper.

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

Modified and affirmed.

ROBERT E. CATO AND WIFE, MARGARET E. CATO, v. HOSPITAL CARE ASSOCIATION, INC.

(Filed 10 December, 1941.)

1. Appeal and Error § 38—

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

2. Insurance § 41—

When insured introduces the certificate of insurance, offers evidence that the policy was kept in force by payment of premiums and that insured had filed claim for loss covered by the insurance, insured establishes a *prima facie* case and insurer has the burden of proving defenses relied on by it.

3. Insurance § 31c—Policy will not be forfeited for misrepresentations in application filled out by insurer's agent when insured has no knowledge thereof and was unable to read application.

Insured testified that she correctly answered the only two questions asked her by insurer's soliciting agent, that the agent filled out the application, that she signed same without reading it because eye trouble pre-

vented her from reading, and that at the time she was wearing dark glasses. The jury found, upon competent sustaining evidence, that the agent inserted in the application answers to certain questions without the knowledge of insured. *Held:* Insurer may not assert the falsity of such answers in the application as misrepresentations entitling it to a forfeiture of the policy.

APPEAL by defendant from *Ervin, Jr., Special Judge,* and a jury, at Extra 3 March Civil Term, 1941, of MECKLENBURG. No error.

This was a civil action originally tried before G. W. Denny, justice of the peace, Charlotte Township, Mecklenburg County, N. C., on 19 December, 1939. Defendant appealed to the Superior Court of Mecklenburg County. The action was tried before S. J. Ervin, Jr., Special Judge, and a jury, at the Extra 3 March Civil Term, 1941, of the Superior Court of Mecklenburg County. The case proceeded to trial before the judge and a jury which was duly selected and impaneled.

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

"1. Was the plaintiff, at the time of making application for the certificate in suit, subject to any medical or physical condition which could require medical or surgical treatment? Ans.: 'No.'

"2. If so, did the plaintiff fully and fairly disclose all the facts in regard thereto to the defendant's agent, at the time the application was made? Ans.: .....

"3. Had the plaintiff, before making application for the certificate in suit, consulted a doctor, or received medical or surgical treatment from a doctor, for illness or injury? Ans.: 'Yes.'

"4. If so, did the plaintiff fully and fairly disclose all the facts in regard thereto to the defendant's agent at the time the application was made? Ans.: 'Yes.'

"5. Did the plaintiff, at the time of making application for the certificate in suit, have any abnormality of the eyes or ears? Ans.: 'Yes.'

"6. If so, did the plaintiff fully and fairly disclose all the facts in regard thereto, to the defendant's agent, at the time the application was made? Ans.: 'Yes.'

"7. Did the plaintiff, at the time of making application for the certificate in suit, have any physical deformity, infirmity or disability? Ans.: 'No.'

"8. If so, did the plaintiff fully and fairly disclose all the facts in regard thereto to the defendant's agent at the time the application was made? Ans.: .....

"9. Did the plaintiff, before applying for the certificate in suit, ever have rheumatism, tuberculosis, heart disease, disease of the kidneys, cancer, syphilis, nervous disorder, arthritis, mental disability, ulcers,

abscesses, wounds, varicose veins, epilepsy, diabetes, or disease of the bones? Ans.: 'No.'

"10. Was the plaintiff, at the time of applying for the certificate in suit, in good health? Ans.: 'Yes.'

"11. If not, did the plaintiff fully and fairly disclose all the facts in regard thereto to the defendant's agent at the time the application was made? Ans.: .....

"12. Were the statements in plaintiff's application for the certificate in suit relating to the matters mentioned in Issues 1, 3, 5, 7, 9, and 10, inserted in said application by the defendant's agent without the knowledge of the plaintiff? Ans.: 'Yes.'

"13. Was the plaintiff prevented from reading her application for the certificate in suit and from having the same read to her by the fraud of the defendant's agent? Ans.: 'No.'"

The following judgment was rendered by the court below:

"This cause coming on to be heard before the undersigned presiding Judge and the jury, upon the issues appearing in the record; and it appearing to the Court that the defendant has judicially admitted, in open Court, that the defendant issued to the plaintiffs the Certificate of Insurance (dated February 21, 1939) offered in evidence by the plaintiffs as Plaintiffs' Exhibit # 2; and it further appearing to the Court that the plaintiffs have judicially admitted, in open Court, that the plaintiff, Margaret E. Cato, signed an application for said Certificate of Insurance dated February 21, 1939, in words and figures as appears in the paper writing marked Defendant's Exhibit No. 1; and it further appearing to the Court that the plaintiffs and the defendant have judicially admitted, in open Court, that on or about May 23, 1939, the plaintiff, Margaret E. Cato, was admitted to a hospital and that she thereafter received medical and surgical attention and hospital treatment, and that she is entitled to recover of the defendant the sum of $109.00 in the event, and only in the event the defendant is liable to her upon the Certificate of Insurance in controversy, which the defendant expressly denies; and it further appearing to the Court that the defendant has judicially admitted, in open Court, that the plaintiff, Margaret E. Cato, furnished the defendant written proof of her said treatment and claim, on or about June 1, 1939, and that on or about June 1, 1939, the defendant refused to pay said claim and denied liability therefor, upon the contention that the plaintiff, Margaret E. Cato, had made false statements with reference to material matters in her application for said certificate, and that the defendant was not liable upon said certificate by reason thereof; and it further appearing to the Court that the parties have judicially admitted, in open Court, that on or about the said first day of June, 1939, the defendant tendered to the plaintiffs the sum of $9.00, being the amount of premiums paid by the plaintiffs to the

defendant upon the certificate in suit, and demanded that the plaintiffs surrender said certificate for cancellation; and it further appearing to the Court that the plaintiffs refused to accept said tender of said sum and refused to surrender said certificate to the defendant for cancellation, the plaintiffs insisting that said certificate was valid and binding obligation on the part of the defendant, and that the defendant was liable to the plaintiff, Margaret E. Cato, thereupon—which the defendant denied; and it further appearing to the Court, and the Court finding as a fact, that the jury have returned the verdict which appears in the record; and it further appearing to the Court, and the Court finding as a fact, that upon the return of said verdict the defendant moved for judgment in favor of the defendant, upon the authority of the case of *Inman v. The Woodmen of the World,* 211 N. C., 179, and *Equitable Life Assurance Society of the United States v. Ashby,* 215 N. C., 280; and the Court being of the opinion that said motion should be denied and that judgment should be rendered herein in favor of the plaintiff, Margaret E. Cato, upon the authority of the case of *Cox v. Assurance Society,* 209 N. C., 782, and upon the authority of Williston on Contracts (Rev. Ed.), Vol. III, Sec. 751:

"Now, Therefore, it is hereby Considered, Ordered and Adjudged by the Court herein, as follows:

"1. That the plaintiff, Margaret E. Cato, do have and recover judgment of the defendant, Hospital Care Association, Incorporated, for the sum of $109.00, together with interest on said sum from the first day of June, 1939, until paid, and the costs of this action, to be taxed by the Clerk of this Court;

"2. That the prayer of the defendant for cancellation of the Certificate of Insurance in suit be, and the same is hereby denied. S. J. Ervin, Jr., Judge Presiding."

The defendant made certain exceptions and assignments of error and appealed to the Supreme Court. They, with the necessary facts, will be set forth in the opinion.

John Newitt for plaintiffs.
John T. Manning for defendant.

CLARKSON, J. The defendant appellant contends that the lower court committed error by not rendering judgment on the verdict for the defendant appellant and by signing the judgment. We cannot so hold on the record.

The charge of the court below is not in the record, and it is well settled in this jurisdiction that it is assumed that the court below charged the law applicable to the facts. *Maynard v. Holder,* 219 N. C., 470 (471).

The evidence is to the effect that the agent of the defendant went to the home of plaintiffs, on 21 February, 1939, and applications for certificates of membership were signed by plaintiffs and afterwards sent by the agent to defendant company and policies were issued. The action is brought on this certificate or policy. Plaintiffs paid the agent $4.50 at the time of the application, a quarterly payment on the policy. The service was hospital care. While the policy was in force the plaintiff, Margaret E. Cato, was operated on for appendicitis. The hospital and surgical bills totaled $109.00, for which plaintiffs instituted this action, after defendant had denied liability.

It was contended by defendant that the *feme* plaintiff answered certain questions in the application or certificate falsely, which were material to the validity of the policy. The *feme* plaintiff denied this. She testified that she at the time the certificate was signed, wore dark glasses and she could not see real good. "I am not able to read fine print—I can't even read normal print. . . . I will be 59 years old my next birthday. . . . I have ten living children and one dead. The hospital did furnish service to me during the time of my appendicitis operation. The Hospital Care Association has never furnished me any hospital service. . . . He (the agent) asked me had I had a doctor in the last six months and I told him no, I had not had a doctor in a year. He asked me if I thought I was in good health. I said I thought I was as far as my age would permit. I will be 59 my next birthday. He did not read anything else or ask me any other questions that I can recollect. I was not able to read the paper which I signed. (The Court): You say he asked you just two questions, one was whether you had had a doctor in the last six months? Ans.: Yes, sir. (The Court): And the other was whether you were in good health? Ans.: Yes. (The Court): And you told him that you had not had a doctor in the last six months and that you were in good health for your age? Ans.: Yes, sir. . . . Q. Mrs. Cato, look at that and see if that is your signature (handing witness a paper writing, Defendant's Exhibit 2). Ans.: You go ask him, I can't see what that word says. Please ask him, will you? I recall signing the application that night. Q. Did you ask Mr. Ritch to read this over to you? Ans.: No, I trusted him. Q. Did you ask any of your children to read it over to you? Ans.: No, I trusted Mr. Ritch. I just took his word for it and signed the paper. Q. And you did not know whether the answers to these questions were right or wrong? Ans.: I didn't even know there was any questions to be asked, only the two he asked me. I knew he asked me two?"

The insurance certificate, or application, was introduced in evidence by plaintiff Margaret E. Cato, the beneficiary. The premium was paid and the certificate was in force at the time of the need for hospitaliza-

tion. The medical and hospital bill was for $109.00. The plaintiffs had filed proper proof and the defendant had denied liability, a *prima facie* case was made out against defendant.

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., 477 (480)." *Creech v. Woodmen of the World,* 211 N. C., 658 (660); *Blackburn v. Woodmen of the World,* 219 N. C., 602 (606).

In *Cox v. Assurance Society,* 209 N. C., 778 (782), this Court said: "It is a well settled principle in this jurisdiction that an insurance company cannot avoid liability on a policy issued by it by reason of any facts which were known to it at the time the policy was delivered, and that any knowledge of an agent or representative, while acting in the scope of the powers entrusted to him, will, in the absence of fraud or collusion between the insured and the agent or representative, be imputed to the company, though the policy contains a stipulation to the contrary. *Follette v. Accident Assn.,* 110 N. C., 377; *Fishblate v. Fidelity Co.,* 140 N. C., 589; *Short v. Ins. Co.,* 194 N. C., 649; *Laughinghouse v. Ins. Co.,* 200 N. C., 434; *Colson v. Assurance Co.,* 207 N. C., 581; *Barnes v. Assurance Society,* 204 N. C., 800, and cases there cited." *Peebles v. Guano Co.,* 77 N. C., 233 (237); *Alpha Mills v. Engine Co.,* 116 N. C., 797; Williston on Contracts (Rev. Ed.), Vol. III, sec. 751, *supra.*

The answers to certain issues in favor of plaintiffs fully support the judgment. On the verdict we think the judgment correct.

The defendant's agent, as was found by the jury (and there was competent evidence to sustain the finding), inserted in the certificate or application certain answers to questions, without the knowledge of plaintiff. The defendant may not now assert the falsity of the answers. *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Currie v. Malloy,* 185 N. C., 206; *Lunn v. Shermer,* 93 N. C., 164.

The cases of *Inman v. Woodmen of the World,* 211 N. C., 179, and *Assurance Society v. Ashby,* 215 N. C., 280, are not applicable to the facts in the present action.

This contract and loss occurred before the Hospital Insurance Act of 1941, ch. 338.

For the reasons given, we find no prejudicial or reversible error on the record.

No error.

ERNEST COY HILL BY HIS NEXT FRIEND, COY HILL, v. L. O. MOSELEY AND WIFE, SALLIE MOSELEY.

(Filed 10 December, 1941.)

1. Animals § 3—

One who keeps on his premises a domestic animal of known vicious propensity is responsible in law to another whom he has wrongfully exposed to danger of attack by such animal, and who has been injured thereby.

2. Same—

The evidence, considered in the light most favorable to plaintiff, tended to show that defendants kept a bull which they had reason to know was vicious, that plaintiff was employed by defendants and was told by his superior to drive the cows out of the lot to the pasture, and that when plaintiff entered the lot he was attacked and seriously injured by the bull. *Held:* The evidence was sufficient to be submitted to the jury on the question of liability.

3. Same—

While evidence of an animal's reputation is incompetent to show, directly, vicious propensity of the animal, such evidence is competent to show knowledge on the part of the owner that the animal was vicious and to corroborate the testimony of witnesses who have sworn to the fact of viciousness.

4. Same—

In order to establish the vicious character of a domestic animal it is not required that the animal should have previously inflicted actual injury upon a person, but it is sufficient if it is made to appear that the animal had theretofore attacked persons and that injury was prevented only by prompt resort to counter measures.

5. Same—

The vicious propensity of an animal must be unequivocal, but it is not required that the animal be malicious, since the propensity is vicious if it tends to harm, whether manifested in play or in anger.

STACY, C. J., concurring in result.

WINBORNE, J., joins in concurring opinion.

APPEAL by defendants from *Thompson, J.*, at May Term, 1941, of LENOIR.

This action was brought by the plaintiff to recover damages for an injury sustained through the attack of a vicious bull harbored or kept by defendants on the premises where plaintiff was required to work. The alleged negligence consisted in exposing plaintiff to attack by the animal whose vicious propensities were known, or should have been known, to defendants but of which plaintiff was unaware.

The evidence, taken in the light most favorable to plaintiff, tends to show that defendants owned a farm as tenants by entirety, and thereon conducted farming operations and a dairy and owned a herd of cattle, among them the Guernsey bull whose conduct gave rise to this action.

Plaintiff, a lad of thirteen years, living on the Moseley farm, had been employed by Moseley previously, and on the day before had been assisting in baling oats. Moseley told him to return next day, which he did, and was then told by Moseley to help the milkman, Lee Garris, whereupon plaintiff reported to Garris and asked him "what was his job." Garris told him the first thing was to put the cows out of the lot into the pasture, and to drive them out of the lot. The lot contained the bull and forty or fifty cows and opened through a gate into a lane which led to the pasture a quarter of a mile away. The plaintiff entered the lot to open the gate and drive the herd through, as he was told to do, with the following result: "I heard something behind me and looked and he was about as close to me as from me to where the Judge is sitting, about 1½ yards; he was coming about as fast as he could, I guess, charging."

"I started to run as quick as I could but he caught me and struck me in the lower part of my back. He picked me up and sorter tossed me in the air and then he caught me and shook me. I was all tangled up on his head and he shook me off and then he began sorter rolling me toward the fence on the ground."

"It felt like he knocked me a right good little ways, but I don't reckon it was over two or three yards. When he hit me first he caught me before I hit the ground and I fell on his head. He pushed and rolled me on the ground about 25 or 30 yards; he rolled me about to the fence and I began screaming for help as soon as I saw him coming and Mr. Glover and Lee Garris came running and I was about to the fence when he stopped and backed off; I tried to run and fell down and began hobbling to the fence and when I got the gate Mr. Glover lifted me over and took me to the car. Mr. Glover and Mr. Garris did not go in the lot while he was attacking me."

Testimony as to the vicious disposition of the bull came principally from those who had been tenants on the farm and who had observed his habits. One who had previously handled the bull for defendants testified that he was dangerous, that he had had to jump the fence to get out of the way when the bull tried to attack him, that he had been compelled to use a pitchfork on him to make him move off, and that Mr. Moseley saw how he had to handle him. Mrs. Moseley told him to kill the bull rather than let the animal hurt him.

There was further testimony from former tenants on the farm that the bull was "mean and bad" both by reputation and in fact, and that

"he would fight you"; that on one occasion a bulldog had to be put after him to protect a man plowing in the field; that one tenant deemed it necessary to stand guard while his wife did the family washing; that the bull had attacked a tenant house and torn away the steps, "hooked the garden posts off and hooked the chimney, and you could feel the jar of it in the sitting room and then he went around to the front room and started to go in there and I went around to the end room and Mrs. Wells told me to shoot him and I shot him." The load was No. 6 shot and did no serious damage.

Witnesses testified that they had told Mr. and Mrs. Moseley of the dangerous character of the animal, and asked that he be kept up.

There was evidence of the nature and extent of plaintiff's injuries, medical and surgical experts pronouncing it permanent.

The defendants, in apt time, made motions for judgment as of nonsuit, for the denial of which they excepted. Issues having been answered in favor of plaintiff, judgment was rendered thereon, and defendants excepted and appealed, assigning errors.

J. A. Jones for plaintiff, appellee.
Sutton & Greene for defendants, appellants.

SEAWELL, J. One who keeps on his premises a domestic animal of known vicious propensity is responsible in law to another whom he has wrongfully exposed to danger of attack by such animal, and who has been injured thereby. *Harris v. Fisher,* 115 N. C., 318, 20 S. E., 461; Harper, The Law of Torts (1933), sec. 175; 2 Cooley, The Law of Torts (4th Ed., 1932), sec. 267; 2 Am. Jur., sec. 63.

Under most authorities, injuries to persons by domestic animals whose vicious propensities are known to the keeper are classified as strict torts without reference to the principles governing negligence cases. Harper, Torts, sec. 171, p. 358; 1 Hale's P. C., 439, Part I, c. 33. "If notice of viciousness is present the owner of animals is liable irrespective of negligence or care on his part in keeping the animal . . ." Harper, Torts, sec. 171, p. 359. Strict liability obtains under this doctrine although the invasion of interest is unintended and nonnegligent. But we do not wish to become involved in a doctrinal discussion of distinctions which may lose their aptness according to the circumstances of the particular case when not involved on the record before us. Hence, we need not now discuss or decide the extent to which this doctrine is applied in this State. See *Banks v. Maxwell,* 205 N. C., 233, 171 S. E., 70; and *Rector v. Coal Co.,* 192 N. C., 804, 136 S. E., 113. In the instant case a distinction may be drawn from the fact that the animal

was under proper confinement and plaintiff was sent into the enclosure and exposed to the danger by defendants' servant in charge.

The great and affectionately remembered *Brogden,* in his classic opinion in *Banks v. Maxwell, supra,* lays down the requisites establishing liability as follows: ". . . a person injured by a domestic animal, in order to recover damages, must show two essential facts: (1) 'The animal inflicting the injury must be dangerous, vicious, mischievous or ferocious, or one termed in law as possessing a vicious propensity.' (2) 'The owner must have actual or constructive knowledge of the vicious propensity, character and habits of the animal.'" Applicable to the case at bar, we may add that the injury must have been brought about by the breach of some duty owed the plaintiff by the defendant. *Lander v. Shannon, et ux.,* 148 Wash., 93, 268 Pac., 145.

In *Judge Brogden's* opinion our attention is called to the fact that in cases like this the conditions of liability remain substantially as they were under the Mosaic law; it must be made known to the owner that the bull was "wont to push with his horn in time past." We may take it that the bull, after these trivial four thousand years, is much the same. But the product of artificial bodies like courts is not stabilized by ancestral genes, and the law has undergone some refinements which the able argument of counsel for defense compel us to notice. They relate to the development of plaintiff's case in the lower court.

Defendants have excepted to the admission of evidence relating to the animal's reputation. It is true that such evidence is generally held incompetent to show, directly, the vicious propensity. *Fowler v. Helck,* 278 Ky., 361, 128 S. W. (2d), 564; 3 C. J. S., Animals, sec. 175, p. 1276; 2 Am. Jur., Animals, sec. 82. It is nevertheless competent and admissible in two aspects: to show *scienter* or knowledge thereof on the part of the owner or keeper; and to corroborate the testimony of those who have sworn to the fact of viciousness. *McCullar v. Williams,* 217 Ala., 278, 116 So., 137; *Davis v. Mene,* 52 Cal. App., 368, 198 Pac., 840; 2 Wigmore, Evidence (3d Ed., 1940), sec. 251, and see also 5 Wigmore, *op. cit.,* sec. 1621, and cases cited; 3 C. J. S., Animals, sec. 175, p. 1277.

Standing on *Banks v. Maxwell, supra,* and the interpretation of bovine conduct there presented, the defendants point out that there is no evidence the Moseley bull ever injured anyone by a "push with his horn" or otherwise. This would seem to be a valid argument under early cases, in which that doctrine is expressed in the statement "that every dog is entitled to one bite" or "one worry." Harper, Torts, sec. 172, p. 361. But the doctrine no longer obtains; *Fowler v. Helck, supra;* Restatement, Torts (1938), sec. 509, comment g.—certainly not in this State. *Banks v. Maxwell, supra; Cockerham v. Nixon,* 33 N. C., 269. Under the modern view trial courts undertake to judge of the vicious

propensities of animals by their behavior, although it may fall short of actual injury. 2 Cooley, Torts (4th Ed., 1932), sec. 266, p. 54, and cases cited. Under that rule we can scarcely put it to the credit of the Moseley bull that prompt coördination of presence of mind and absence of body sometimes saved his keeper from disaster, or that, on separate occasions, the timely intervention of a bulldog, pitchfork, and shotgun saved his record from graver demerit. Those who knew him best feared him most. Where he held court, his human acquaintances made no plea to the jurisdiction, but promptly sought a change of venue.

The evidence of vicious propensity must be unequivocal. But we are not required to explore the psychology of the bull—if he has any—to determine whether his intentions are amiable or malicious. The propensity is vicious if it tends to harm, whether manifested in play or in anger, or in some outbreak of untrained nature which, from want of better understanding, must remain unclassified. 2 Am. Jur., Animals, sec. 48, p. 730. Counsel for plaintiff insists the evidence tends to show that the Moseley bull, on occasion, went somewhat beyond the legitimate expression of buoyancy accorded to his kind as normal and innocent in the former opinion of the Court. With this we are inclined to agree.

Careful examination of the evidence in detail seems to indicate that all the essentials to establish liability on the part of the defendants are present. The weight to be given the evidence was a matter for the jury.

We find

No error.

STACY, C. J., concurring in result: The jury has found upon competent evidence and under a charge free from reversible error, notwithstanding some inexactness, that the plaintiff was injured by the negligence of the defendants as alleged in the complaint and that he himself was not contributorily negligent. This is as far as we are required to go in upholding the judgment on the present record, and in my opinion, it is as far as we ought to go. Such was the theory of the trial, and it accords with our previous decisions on the subject. *Banks v. Maxwell,* 205 N. C., 233, 171 S. E., 70; *Rector v. Coal Co.,* 192 N. C., 804, 136 S. E., 113; *Hallyburton v. Fair Assn.,* 119 N. C., 526, 26 S. E., 114. There is a difference between keeping domestic animals and wild beasts, or beasts which are naturally vicious. *S. v. Smith,* 156 N. C., 628, 72 S. E., 321; *Buckle v. Holmes,* 2 K. B., 125, 54 A. L. R., 89; 2 Am. Jur., 724, *et seq.*

WINBORNE, J., joins in this opinion.

JARVIS COOPER, MILES COOPER, MARIE COOPER, MARGARET COOPER, WILLIAM COOPER, W. L. COOPER, C. M. COOPER, J. C. COOPER, C. D. COOPER, MARY COOPER THOMPSON, MRS. ZENAS JENNINGS, MRS. JOSEPH TUTTLE, MRS. MARY EVANS, MRS. CLARA B. COOPER, MRS. LUTHER THOMPSON AND THE E. L. COOPER HEIRS, v. MRS. W. H. H. COOPER.

(Filed 10 December, 1941.)

Estates § 9d—

Where a life tenant has permitted the lands to be sold for nonpayment of taxes and has failed to redeem same within one year of sale, the remaindermen are entitled to have the life estate declared forfeited in their suit thereafter instituted, C. S., 7982, and the fact that after the institution of the suit the life tenant pays the taxes, interest and penalties, does not affect the forfeiture.

SEAWELL, J., dissenting.

APPEAL by plaintiffs from *Burgwyn, Special Judge,* at May Term, 1941, of PASQUOTANK.

Civil action to declare life estate forfeited—C. S., 7982.

The court below, "by agreement of all parties concerned," finds facts substantially these:

Defendant owned a life estate, and plaintiffs the remainder in certain land in Elizabeth City, North Carolina, which was sold on 3 October, 1938, by sheriff of Pasquotank County for nonpayment of taxes due said county for the year 1937, at which sale said county became the purchaser thereof, and the sheriff issued tax sale certificate to the county. This action was instituted on 18 October, 1940. Thereafter, on 21 October, 1940, defendant, the life tenant, paid said taxes, interest and penalties. Suit to foreclose the tax sale certificate has not been instituted.

Upon these facts, the court entered judgment dismissing the action at cost of plaintiffs, who appeal to Supreme Court and assign error.

R. Clarence Dozier for plaintiffs, appellants.
J. Henry LeRoy for defendant, appellee.

WINBORNE, J. The decision in this case is controlled by that in *Sibley v. Townsend,* 206 N. C., 648, 175 S. E., 107, where the Court, through *Clarkson, J.,* speaking to the identical question of law presented on this appeal, quotes the statute, C. S., 7982, and declares: "It is contended by plaintiff that the estate of the life tenant is not forfeited in the land until the tax sale certificate is foreclosed by court and the land sold by commissioner. We cannot so hold. The statute, *supra,* in clear

language, says, 'If any tenant for life of real estate shall suffer the same to be sold for taxes by reason of his neglect or refusal to pay the taxes thereon, and shall fail to redeem same within one year after such sale, he shall thereby forfeit his life estate to the remainderman or reversioner' "; and in concluding the opinion, it is said: "In some cases this may be a hard rule, but it is the law as written and we must adhere to it."

In accordance therewith, the judgment below is

Reversed.

SEAWELL, J., dissenting: If, in the development of our jurisprudence, we are compelled to proceed on the ratchet principle, we need to go no further. We stop with *Sibley v. Townsend,* 206 N. C., 648, 175 S. E., 107, although that case admittedly discusses no equities, is inadvertent to the fact that there may be equities involved and that the statute penalizing the life tenant by loss of his estate on failure to pay taxes or to redeem the land was a remedy applied to an evil that no longer exists, and looks alone to the forfeiture law without any reference to such changes in the taxing laws as compels the court to regard the new complex of laws as existing with reference of one part to another—in other words, to be read *in pari materia.* Upon examination, we shall find that we are not confronted by a harsh law, but with a harsh interpretation of the law.

Amongst the inquiries leading to a solution of the problem presented to the court, it is helpful to ask when, under this law, a termination of the life estate in favor of the remainderman takes place. Does it take place automatically when the conditions of default transpire, leaving to the court only the formality of adjudication? Does the sheriff's sale for delinquent taxes and the expiration of one year without redemption by the life tenant confer upon the remainderman an indefeasible right to have the forfeiture declared?

Forfeiture of personal property under penal statutes in aid of the enforcement of criminal law has been held to operate on the title from the commission of the act giving rise to the forfeiture, and judgments declaring such forfeiture will relate back to that time so as to anticipate or prevent any change in the status of the property which might defeat the statute. *Henderson's Distilled Spirits v. One Hundred Barrels Distilled Spirits,* 14 Wall. (U. S.), 44, 20 L. Ed., 815; *U. S. v. Stowell,* 133 U. S., 1, 33 L. Ed., 555, 10 S. Ct., 244; *Fontaine v. Phoenix Ins. Co.,* 11 Johns. (N. Y.), 293. This is referable to a public policy which does not prevail in the case of private forfeitures or forfeitures which private persons may enforce. Defaults leading to forfeitures of the character made possible by the statute under review give to those who are privileged to enforce them only an inchoate right, 21 C. J., 971;

Johnson v. Pettit, 1 Cinc. Super, 25; *Berry v. Berry,* 16 N. S., 66; *Gear v. Bullerdick,* 34 Ill., 74, and this may be waived, *Galloway v. Battaglia,* 133 Ark., 441, 202 S. W., 836; *King v. Mims,* 7 Dana (Ky.), 267; *Purton v. Watson,* 2 N. Y. S., 661; *Chaffee v. Foster,* 52 Oh. St., 358, 39 N. E., 947. There is no divestiture of a life tenant's title or estate until the final judgment of a court of competent jurisdiction, and the termination of the life estate in favor of the remainderman occurs at that time without relation back.

I think it must follow from this that the mere fact of sale by the sheriff for failure or neglect to pay the taxes and the expiration of a year without redemption by the life tenant may not, in every case, create in the remainderman an unequivocal and indefeasible right to the forfeiture. If there are equitable considerations involved upon which the jurisdiction of the court may attach it should not be slow to find them. Thompson, Real Property, Vol. 5, p. 287: "Forfeitures are not favored in law, and courts eagerly seize hold of any circumstance by which they may be defeated, and where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made." *Citizens' Bank v. Grigsby,* 170 Miss., 655, 155 So., 195; *Giles v. Austin,* 62 N. Y., 486.

In those states having similar laws nonpayment of taxes by a tenant for life or years, through which the remainder is endangered, is regarded as a species of waste. *Magness v. Harris,* 80 Ark., 583, 586, 98 S. W., 362, 363; *Clark v. Middlesworth,* 82 Ind., 240, 249, 250; *Thayer v. Shorey,* 287 Mass., 76, 191 N. E., 435, 94 A. L. R., 307. Waste—that is, ordinary waste—may be repaired, and when so repaired a court of equity will not decree a forfeiture. Whether or not I am justified in applying this analogy, I am convinced that changed conditions in the law, resulting in a different orientation of the parties to the subject matter, and their relations to each other, should lead the court to a similar conclusion.

C. S., 7982 (Michie's Code, 1939), appeared as part of chapter 71, Public Laws of 1879, the then current act to provide for the "Levy and Collection of Taxes." The proceeding then was more nearly *in rem* and sale of the land by the sheriff had a significance it does not have under the present laws. If redemption was not made within one year from the sale, the purchaser, on compliance with certain conditions, *extra curiam,* was entitled to a deed. Section 39. This provision, with which section 54 (containing the forfeiture provision) must be read *in materia,* remained substantially unchanged until the enactment of the 1927 tax foreclosure act, which was the law at the time of the alleged forfeiture, chapter 221, Public Laws of 1927, and amendments: C. S., 8037 (Michie's Code, 1935), but which has been superseded by the 1939

tax collection act, chapter 310, Public Laws of 1939; C. S., 7971 (209), *et seq.* (Michie's Code, 1939). This later law is far more lenient with respect to redemption, because the first sale by the sheriff has no more significance than to put the purchaser in the position of a lienor as represented by his certificate of sale, which he must enforce, as in the case of mortgage, by a foreclosure of the equity of redemption. The imminence of injury to the remainderman by "disherison" or loss of his estate through operation of the first sale has been almost altogether removed, since, to secure foreclosure, the purchaser must institute and carry to conclusion a suit in which all interested persons must be made parties and notified, and thereby the period of redemption for the life tenant and others interested is necessarily greatly enlarged. It is not, therefore, unreasonable that the rigor of a forfeiture should also be alleviated. Otherwise, we would be in danger of an attempt to enforce the forfeiture after the exigencies to which it was originally intended to apply have long been removed. The wide difference between the significance and consequence of the sheriff's sale under the former law, to which the forfeiture act, C. S., 7982, obviously relates, is sufficient seriously to challenge the present applicability of that law as contended for by the plaintiffs. Since laws must be interpreted with a view to the evil they are intended to remedy, we must either rationalize it by adaptation to existing procedure or adopt the contention of defendant, *"cessante ratione, cessat ipsa lex."*

Under a similar statute which allowed the life tenant one year and the remainderman two years to redeem from the sheriff's sale, the Arkansas Court held that where the lands were not redeemed by the life tenant during the first year, and the remaindermen did not thereupon redeem and assert a forfeiture, but permitted the life tenant to redeem, this constituted a waiver of the forfeiture by the remaindermen. *Galloway v. Battaglia, supra.* I think there is little doubt that if under the old law the life tenant, after having permitted the sale and the year to pass without redemption, had procured the purchaser of the land to permit him to redeem it by paying the tax, the remainderman having made no effort to do so, equity would prevent the forfeiture. Whether this is correct or not, the redemption of the land in this case occurred well within the time given for such redemption under the new foreclosure law, and it is an act which inures to the benefit of the remainderman who, while accepting its benefits and without any circumstances of hardship, injury or damage, seeks to enforce a forfeiture.

The remaining question is the applicability to the present case of *Sibley v. Townsend, supra,* and *Bryan v. Bryan,* 206 N. C., 464, 174 S. E., 269, cited therein. *Bryan v. Bryan, supra,* merely reiterates the former holdings that payment of the taxes by the remainderman is not a

condition antecedent to bringing suit. A vital distinction may be made between *Sibley v. Townsend, supra,* and the case at bar because of the different factual situation. In the case at bar the defendant, in apt time, that is to say, before any date at which the lands might be stripped from her as well as the plaintiffs, repaired her fault and paid the tax. In *Sibley v. Townsend, supra,* the life tenant not only did not repair the fault, but was not even concerned in the case. It was between a creditor of the life tenant and the remainderman. Thus, it is seen that the question before the Court in the instant case—*i.e.,* whether payment of the taxes by the life tenant before foreclosure of the tax certificate but more than one year after the tax sale will amount to redemption sufficient to satisfy the statute—did not arise and could not have been considered by the Court in that case.

For these reasons I think the Court is justified in applying equitable principles to the case and deny the forfeiture. Otherwise, it is my opinion that the statute should be held *functus officio; cessantes ratione, cessat quoque lex.*

CORA STANBACK v. WINSTON MUTUAL LIFE INSURANCE COMPANY.

(Filed 10 December, 1941.)

1. Insurance § 13a—

A contract of insurance will be construed from its four corners to ascertain and give effect to the intention of the parties as expressed in the language used, and its clear and unambiguous terms must be given their plain, ordinary and popular sense.

2. Insurance § 36e—

Construing the contract of insurance in suit from its four corners, *it is held* that a limitation set forth in a subsequent part of the policy limiting insurer's liability to one-fourth the amount otherwise due if insured should die from pneumonia within twelve months from the date of the policy, applied to a prior provision that insurer should be liable only for one-half the amount of the policy if insured should die during the first six months the policy was in effect, and upon insured's death from pneumonia within six months from the date of the policy, insurer is liable only for one-eighth the face amount of the policy.

3. Insurance § 13a—

While rules of punctuation may be used in construing an insurance contract to assist in determining the intent of the parties, the punctuation or absence of punctuation cannot control its construction as against the plain meaning of the instrument.

STANBACK *v.* INSURANCE CO.

APPEAL by defendant from *Phillips, J.,* at May Term, 1941, of RICHMOND.

Civil action to recover on policy of life insurance.

The parties having agreed in the court below that the trial judge should hear the case, find the facts and state conclusions of law, "without the intervention of a jury," these facts are presented.

(1) On 30 September, 1940, defendant Winston Mutual Life Insurance Company issued to Sandy Stanback, the insured, 27 years of age at his next birthday, its policy of life insurance No. 29298, effective at noon on said date, and in which his mother, Cora Stanback, plaintiff herein, is beneficiary. In the policy the Insurance Company agreed, "subject to the terms and conditions below and in the following pages hereof, each of which is hereby made a part of this contract and binding on every person entitled to claim hereunder, to pay . . . the amount stipulated in the schedule below, except as is otherwise provided on this and the following pages, to the beneficiary . . . of the insured . . ."

The schedule above referred to relates, first to "insurance if the insured is ten years of age or over," in which event the "ultimate amount of insurance" is stated to be "$300.00"; and second to "amount of insurance if the insured is under ten years of age." Then, after provisions not pertinent here, these paragraphs follow:

"Preliminary Provision: If, after this policy takes effect, death should occur during the first six months and the insured is ten years of age next birthday or over, no greater amount than one-half of the insurance provided herein shall be paid as a death benefit; if the age of the insured at date of this policy is less than ten years next birthday, the amount payable will be according to the Infantile Table above, except as is provided on the following pages.

"The conditions, privileges, benefits and the concessions to policy holders, and any endorsement either printed or written as made by the Company on any of the following pages are a part of this contract as fully as if recited over the signature hereto affixed."

Then on the next page entitled "PRIVILEGES AND CONDITIONS," is this paragraph: "4. Limitations. If the death of the Insured occurs during the first twelve months from date of this policy resulting directly or indirectly from . . . pneumonia, . . . (naming other diseases not pertinent here), one-fourth of the amount will be paid which would be payable under the policy conditions for death resulting from any other natural cause, unless settlement be made under paragraph (a) below; or if the death of the Insured occurs during the first nine months from date of this policy, resulting from pregnancy, childbirth or miscarriage, if legally married, one-fourth of the amount will be paid which would be payable under the policy conditions for

death resulting from any other natural cause. In the case of death of the Insured, resulting directly or indirectly from injury sustained while in the act of violating any Federal, State or Municipal law, or as a punishment therefor, or the culpable or intentional act or negligence of the Insured or Beneficiary hereunder, the liability of this Company shall be limited to an amount not in excess of premiums paid hereon. Military and naval service or any occupation incident thereto in time of war is a risk not assumed under this policy, and if the Insured shall enter or be engaged in any military or naval service or any occupation incident thereto in time of war, and shall die while engaged in or as a result of such service, the liability of the Company under this policy shall be limited to the amount of the full legal reserve to the credit of this policy or to one-fifth of the amount payable hereunder, whichever amount is the greater, unless the Insured shall, within one calendar month from entering upon such service, secure a written permit therefor, to be signed by the President, Vice-President, or Secretary of the Company. An extra premium shall be charged for such permit to be fixed by the Company. Self-destruction within two years from the date hereof, whether the Insured be sane or insane, is not a risk assumed by the Company but in such event the Company will return the premiums actually paid hereon. (a) If the Insured, within two years prior to the date of this policy, has been rejected for insurance by this or any other company, order, or association or has been affected by any complaint or condition necessitating the attention of a physician, or had, during said period, any pulmonary disease, chronic bronchitis, pneumonia, cancer, disease of the heart, blood vessels, liver, or kidney, and death should occur within two years from date hereof, the maximum liability of the Company will not exceed the premiums paid, unless reference to such rejection, or medical attention or treatment, or complaint or condition, or ailment within the two years prior to the date of the policy, is endorsed on this policy by the Company. (b) No benefits will be payable hereunder for death resulting directly or indirectly from the drinking of intoxicating liquor, or drunkenness, immorality, childbirth if unmarried, or venereal disease or as a result directly or indirectly, of an altercation or fight, provoked or unprovoked, or while breaking the law or resisting an officer, or arrest, it being understood and agreed that death resulting from the foregoing causes or any one of them, directly or indirectly, is a risk not covered by this policy; the Company's maximum liability hereunder for any such death, therefore, shall not exceed the premiums paid. Except as is otherwise provided herein, all premiums paid, shall be forfeited to the Company in the event this policy shall become void."

Then on last page this appears: "SPECIAL NOTICE AND PRIVILEGE. The Insured is requested to examine carefully the terms and conditions of this Policy, and if its terms are not satisfactory, or if its conditions are not accepted and agreed to, the Policy may be surrendered for cancellation within one week after its date, at the office of the Company in the District where this Policy is delivered and all premiums paid hereon will be returned to the Insured. If not so returned, the Policyholder shall be deemed to have accepted this Policy and to have agreed to be bound by its terms and conditions. The acceptance of this Policy shall be taken as evidence by the Company that it has been applied for, read, understood, and its terms and conditions agreed to and accepted by the Insured."

(2) Sandy Stanback died as result of pneumonia on 11 February, 1941, within six months from the date of the execution of the policy of insurance, at which time he was "over the age of ten years" and the policy—being in full force and effect—had been in effect less than six months.

(3) On 1 March, 1941, defendant tendered its check for $37.50 to plaintiff, as beneficiary, in full payment for the benefits under said policy, and plaintiff refused the tender.

Upon these facts, the court, being of that opinion, held that under the terms of the policy, "the beneficiary named therein is entitled to receive one-half of the full benefit of the insurance provided therein," rendered judgment in favor of plaintiff and against defendant for $150.00, with interest and costs.

Defendant appeals therefrom to Supreme Court and assigns error.

Jones & Jones for plaintiff, appellee.
McLeod & Webb for defendant, appellant.

WINBORNE, J. Appellant concedes that if the insured had died within six months from the time the policy took effect, as result of any other natural cause than those enumerated in paragraph "4. Limitations," the beneficiary would be entitled to recover one-half of the "ultimate amount of insurance specified in the policy," that is, $150. But it contends that since the insured died of pneumonia within such period of six months—pneumonia being one of the causes of death named in said paragraph 4, the beneficiary would be entitled to receive only one-fourth of the amount of $150, which would be payable under the policy for death resulting from any other natural cause, that is, only the sum of $37.50.

We think this is the correct interpretation of the policy.

"An insurance policy is only a contract, and is interpreted by the rules of interpretation applicable to other written contracts, and the

intention of the parties is the object to be attained," *Varser, J.*, in *McCain v. Ins. Co.*, 190 N. C., 549, 130 S. E., 186. See, also, *Crowell v. Ins. Co.*, 169 N. C., 35, 85 S. E., 37; *Powers v. Ins. Co.*, 186 N. C., 336, 119 S. E., 481.

In the *Powers case, supra, Adams, J.*, speaking for the Court, said, "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense." See, also, *Bray v. Ins. Co.*, 139 N. C., 390, 51 S. E., 922.

"In determining the intention of the parties to an insurance policy, the policy should be considered and construed as a whole, and if it can reasonably be done, that construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions." 29 Am. Jur., 176, Insurance, 160. In other words, the policy should be taken by its four corners and considered as a whole. *Penn v. Ins. Co.*, 160 N. C., 400, 76 S. E., 262.

Applying these principles, the policy in this case has a clear meaning. If the concluding clause of the "Preliminary Provision," reading "except as is provided on the following pages," relates to amounts payable only in instances where the insured at date of the policy is less than ten years of age at next birthday, "the terms and conditions . . . on the following pages . . .," to which the contract is stated to be subject, particularly the "limitations" in paragraph 4, would have no tangible meaning, and would be nullified. Indeed, it would be strained ruling to hold, as a proper interpretation, that the parties intended to contract with relation to death of a child less than ten years of age (a) "from pregnancy, childbirth or miscarriage, if legally married," or (b) while in act of violating any Federal, State or Municipal law, or as a punishment therefor, or (c) while engaged in military or naval service in time of war.

On the other hand, if the clause be interpreted to relate to all that precedes it in the paragraph entitled "Preliminary Provision," each clause of paragraph 4 "limitations" might reasonably have a subject to which it would apply. Manifestly, when the policy is read as a whole, such is its clear meaning and the patent intention of the parties.

But it is contended by appellee that the first two clauses of the "Preliminary Provision" being separated by a semicolon, each is complete in itself. It is further contended that, hence, the exception being separated from the latter of the two by a comma, qualifies the latter only, and, when tested by the ordinary rules of English grammar, or legal construction, cannot under any circumstances be construed to limit or

modify the first clause. However, in this connection it is the law in this State that although the rules of punctuation may be used to assist in determining the intent of the parties, punctuation or the absence of punctuation in a contract or deed is ineffective to control its construction as against the plain meaning of the instrument. *Bunn v. Wells,* 94 N. C., 67; *Redmond v. Comrs.,* 106 N. C., 122, 10 S. E., 845; *Real Estate Co. v. Bland,* 152 N. C., 225, 67 S. E., 483; 3 A. L. R., 1062, Annotations I and III on "Punctuation as affecting construction of contract."

In accordance with this opinion, the judgment below is

Reversed.

ECONOMY PUMPS, INC., v. F. W. WOOLWORTH COMPANY.

(Filed 10 December, 1941.)

1. Master and Servant § 4a—

A contract under which a plumber contracts to install certain fixtures in accord with plans and specifications furnished by the owner, and the owner agrees to pay the cost of labor and materials plus a percentage of the cost as compensation to the plumber, the work to be performed by the employees of the plumber, establishes the relationship of principal and independent contractor between the parties.

2. Same—

Where the owner agrees to pay the cost of labor and materials used in the project plus a fixed percentage of such cost as compensation to the contractor, the fact that the basis of the contractor's compensation is the cost of materials and labor instead of a fixed sum does not have the effect of converting the status of the contractor from an independent contractor to an employee.

3. Same—

Since the owner is directly interested in the cost of materials used by a contractor under a contract obligating the owner to pay the cost plus a percentage of the cost as compensation to the contractor, the owner's inquiry concerning and its objection to the amount charged for certain materials used in the project is not evidence of any supervision or control over the manner and method of doing the work.

4. Same—

An independent contractor is not converted into an employee by reason of the fact that the owner or proprietor reserves the right to have its architect or agent supervise the work to the extent of seeing that it is done pursuant to the terms of the contract.

5. Same: Laborers' and Materialmen's Liens § 1: Election of Remedies § 5—

Where a material furnisher elects to file notice of lien on the theory that the material was furnished to a subcontractor, he is estopped under the doctrine of election of remedies from thereafter asserting that such material was sold directly to the owner.

6. Laborers' and Materialmen's Liens § 5a—

In order for a material furnisher to hold the owner liable he must show that the owner was notified by him or by the contractor of his claim before the owner completed payment to the contractor. C. S., 2439, 2440.

7. Laborers' and Materialmen's Liens § 5b—

Notice to the owner of a materialman's claim must specify the material furnished, the time it was furnished, and the amount due and unpaid, so as to put the owner on notice that such an amount is demanded.

8. Same—

Where the owner of a building lets a contract on a cost plus basis, materialmen's invoices submitted to the owner from time to time so that the owner might check the cost of material and compute the percentage due the contractor, are insufficient to constitute statutory notice of a materialman's claim for materials.

9. Same—

Where the owner of a building lets a contract on a cost plus basis, statements made by the contractor to the owner of the cost of labor and materials used, submitted for the purpose of disclosing the amount due by the owner to the contractor, are insufficient to constitute the statutory notice of the claim of a material furnisher, since the owner would be liable to the contractor for materials furnished only in the event the contractor had paid for such materials and therefore the contractor's statements would tend to lead the owner to believe that the materials had been paid for rather than that any amount was due the material furnisher.

APPEAL by plaintiff from *Grady, Emergency Judge,* at March Term, 1941, of GUILFORD. Affirmed.

Civil action to recover the purchase price of a duplex sewage pump furnished by plaintiff to Economy Plumbing & Heating Company to be installed in building leased by defendant.

On or about 1 November, 1938, defendant entered into what is commonly known as a cost plus contract with the Economy Plumbing & Heating Company of Greensboro for the installation of a sewage pump and cast iron sump in a building in Greensboro occupied by it under a leasehold agreement. Under the contract, which was to be performed in accord with plans and specifications, defendant agreed to reimburse the contractor for material purchased and in addition to pay him a sum equal to 10 per cent of the cost of all materials furnished and 15 per cent of the labor cost. The contractor purchased from plaintiff the duplex

pump described in the complaint for use in fulfillment of the contract and installed the same. After the completion of the contract the contractor furnished the defendant a statement showing the labor employed and the material purchased and the cost thereof and the commissions due, the total of which was $1,481.55. The defendant paid the total thus shown to be due and took from the contractor an affidavit and release in which it is recited "that all bills for labor, material and fixtures going into said work have been fully paid for and that no claim of lien has been filed by anyone and no one is entitled to file a claim of lien against said premises on account of my connection therewith." The affidavit and release were not offered in evidence but are referred to by plaintiff in its brief and its existence is recognized, it being attached to the answer as a part thereof.

The contractor not having paid plaintiff for the material furnished by it, plaintiff instituted this action against the defendant after settlement with the contractor, alleging that it has filed a lien in the office of the clerk of the Superior Court of Guilford County.

When the cause came on for trial, the court below, at the conclusion of the evidence for plaintiff and on motion of the defendant, entered judgment dismissing the action as of nonsuit. Plaintiff excepted and appealed.

Thomas Turner, Jr., for plaintiff, appellant.

Smith, Wharton & Jordan and Arthur O. Cooke for defendant, appellee.

BARNHILL, J. Plaintiff seeks to recover on either one of two theories: (1) that the Economy Plumbing & Heating Company was a subcontractor, that defendant had notice that plaintiff had not been paid for the material furnished by it prior to the settlement with the contractor and notwithstanding such notice failed to retain a sufficient part of the contract price to pay for same; and (2) that the Economy Plumbing & Heating Company was an agent or employee and not an independent contractor, that when it purchased material from the plaintiff it did so on behalf of defendant and that defendant is liable for the purchase price thereof.

The plumbing contractor, under the contract between it and the defendant, was an independent contractor and not an agent. It was engaged in an independent business or calling requiring special knowledge, skill and training. Anno. 19 A. L. R., 243. It furnished its own employees. It purchased the material necessary for compliance with the contract and installed the same in accord with plans and specifications furnished and received in compensation a lump sum upon a cost

plus basis. *Evans v. Rockingham Homes, Inc., ante,* 253; *Beach v. McLean,* 219 N. C., 521, 14 S. E. (2d), 515; *Hexamer v. Webb,* 101 N. Y., 377, 4 N. E., 755; Anno. 19 A. L. R., 1282, *et seq.;* Anno. 55 A. L. R., 293; Anno. 19 A. L. R., 227, *et seq.*

"We may take judicial notice that the arrangement of paying the cost plus a percentage, as a contract price for a completed job is growing in favor, and is becoming a common plan adopted by contractors in place of a lump sum payment . . . The change is only in the method of computing payment. There is no change in the relation of the parties from that which exists where the payment is a lump sum. The manner of computing payment for the completed job is not controlling; a change in this regard does not convert an independent contractor into an employee." *Carleton v. Foundry & Machine Products Co.,* 19 A. L. R., 1141 (Mich.).

The cost of the material was the basis of the compensation. The owner, therefore, was directly affected by any charge therefor. Its inquiry concerning and its objection to the charge for plaintiff's pump is not evidence of any supervision or control over the manner and method of doing the work so as to show that the plumbing contractor was an employee and not an independent contractor. Nor was the conduct of defendant's construction engineer such as to change the relationship.

When a contractor has undertaken to do a piece of work, according to plans and specifications furnished, and within the meaning of the definitions referred to, this relation of independent contractor is not affected or changed because the right is reserved for the engineer, architect or agent of the owner or proprietor to supervise the work to the extent of seeing that the same is done pursuant to the terms of the contract. *Johnson v. R. R.,* 157 N. C., 382, 72 S. E., 1057.

Furthermore, where a claimant elects to file notice of a lien on the theory that material was furnished to a subcontractor he is estopped under the doctrine of election of remedies from thereafter asserting that such material was sold direct to the owner. *Lumber Co. v. Perry,* 212 N. C., 713, 194 S. E., 475.

In *Lumber Co. v. Motor Co.,* 192 N. C., 377, 135 S. E., 115, and in *Construction Co. v. Holding Corp.,* 207 N. C., 1, relied on by plaintiff, the facts are essentially different. Neither is in point or controlling.

While it is true that when a contractor furnishes a list of laborers and materialmen to whom he is indebted, the owner must retain a sufficient part of the contract price to satisfy such claims, *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 597; *Building Supplies Co. v. Hospital Co.,* 176 N. C., 87, 97 S. E., 146; *Perry v. Swanner,* 150 N. C., 141, 63 S. E., 611; *Pinkston v. Young,* 104 N. C., 102, the burden is on plaintiff to show that such notice was so given by the contractor or that the

owner was notified directly by him. There is no lien until and unless the statutory notice either under C. S., 2439, or under C. S., 2440, has been given. *Pinkston v. Young, supra.*

Such notice or itemized statement must be filed in detail specifying the material furnished or labor performed and the time thereof. It must further show the amount due and unpaid so as to put the owner on notice that such amount is demanded. *Construction Co. v. Journal,* 198 N. C., 273, 151 S. E., 631, and cases cited; *Hardware House v. Percival,* 203 N. C., 6, 164 S. E., 334. Neither invoices furnished under the contract nor statements made by the contractor to enable him to procure what is due, nor mere knowledge of the owner of the existence of the debt is sufficient to charge him with liability. *Clark v. Edwards,* 119 N. C., 115; *Building Supplies Co. v. Hospital Co., supra; Hardware House v. Percival, supra.*

Applying these principles, it clearly appears that the plaintiff failed to give the owner the required notice of its claim so as to impose liability. Invoices were submitted from time to time so that the defendant might check the cost of material and compute the percentage to the Economy Plumbing & Heating Company. These invoices were not intended as notice of a claim due and were not sufficient for that purpose. They were not "an itemized statement of the amount owing for material furnished" rendered for the purpose of giving notice of a claim for material.

The statement rendered by the contractor, upon which plaintiff relies, was in connection with the work and for the purpose of disclosing the total lump sum due under the contract. As the contractor was entitled to pay for material furnished and for commissions thereon only in the event he had paid therefor this statement tends to show that the material had been paid for rather than that there was any outstanding account for material furnished. It fails to disclose that any amount is due the plaintiff or any other person furnishing material or performing labor in connection with the contract.

The plaintiff sold and delivered to the plumbing contractor the pump which is the subject matter of this action. Credit was extended to him and it has failed to offer any evidence tending to show that the owner received any statutory notice of its claim prior to the time the owner made full settlement with the contractor. The judgment of nonsuit was properly entered.

Affirmed.

LANCE WILLIAMS v. H. S. McLEAN AND LESLIE BULLARD.

(Filed 10 December, 1941.)

1. Trusts § 15—Party may not assert constructive trust when preliminary parol negotiations constituting basis of action are varied and merged in subsequent written agreement with which defendants comply.

Plaintiff's evidence tended to show that he entered into a parol agreement with defendants under which they were to purchase, as his agent, a 158-acre tract of land for a stipulated sum, that in order not to disclose the purpose for which the land was bought, title was taken in the name of one of defendants, that defendants thereafter conveyed plaintiff 145 acres of the said tract at the agreed price but retained title to 13 acres thereof. Plaintiff sought to engraft a parol trust in his favor upon the 13 acres. It appeared of record that after title had been taken in the name of one of defendants, defendants gave plaintiff a written option to purchase at the agreed price 145 acres, with map attached accurately describing the 145 acres by metes and bounds, and that plaintiff, with full knowledge of the facts, accepted the option, entered into possession and later accepted deed for the 145 acres and paid the balance of the purchase price. *Held:* The prior oral negotiations were merged in the written option, and plaintiff's acceptance of the option and deed precludes him from asserting a constructive trust against the 13 acres retained by defendants.

2. Contracts § 12: Evidence § 39—

Preliminary parol negotiations are varied by and merged in a subsequent written agreement between the parties, not only as a rule of evidence but also as a matter of substantive law.

3. Money Received § 1—

A party paying money with full knowledge of all the facts may not recover it.

APPEAL by plaintiff from *Thompson, J.*, at May Term, 1941, of ROBESON. Affirmed.

This was an action to establish a parol trust as to 13 acres of land, the legal title to which was held by defendant Bullard.

It was alleged that the plaintiff had constituted defendants his agents to purchase for him a tract of 158 acres of land at the price of $14,000; that it was agreed between the parties, for certain reasons, that one of defendants should take title to the land and then convey to plaintiff; that pursuant to this agreement defendant Bullard took title to the land in his own name, and later conveyed to the plaintiff only 145 acres for the full consideration, wrongfully retaining 13 acres. The plaintiff prayed that defendants be declared trustees for his benefit as to the 13 acres of land. The defendants, on the other hand, alleged that defendant Bullard purchased the land himself, and later gave plaintiff a written option to

purchase 145 acres, accurately described, for the price of $14,000; that plaintiff paid $2,000 for the option and some time later accepted deed for the 145 acres and paid the balance of the purchase price, with full knowledge of all the facts. Defendants alleged that the transaction was one of purchase and sale, freed from any circumstances sufficient to raise the implication of a trust.

At the conclusion of the plaintiff's evidence, motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

McKinnon & Seawell for plaintiff, appellant.
F. D. Hackett and McLean & Stacy for defendants, appellees.

DEVIN, J. The plaintiff sought to establish a constructive trust in his favor as to 13 acres of land, based upon the theory that he had constituted the defendants his agents to purchase for him 158 acres of land at an agreed price, and that the defendants purchased the land, taking title in the name of one of them, but wrongfully withheld 13 acres of the land and only conveyed to him 145 acres for the stipulated price.

Without undertaking to discuss the applicability of the doctrine of parol trusts (*Lefkowitz v. Silver,* 182 N. C., 339, 109 S. E., 56; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775), we think the plaintiff's case must fail for the reason that when the oral negotiations and agreements were reduced to writing the option described 145 acres of land as the subject of the contract, and with full knowledge of all the facts the plaintiff paid the purchase price and accepted deed for the 145 acres. There was no allegation of fraud or mistake. It was aptly said by *Justice Frankfurter* in the recent case of *City of Indianapolis v. Chase National Bank,* 86 Law. Ed. (Adv.), 27: "As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record."

It appears from the evidence of the plaintiff that desiring to purchase a farm in Robeson County for the purpose of raising hogs, he entered into negotiations with the defendants, the defendant Bullard being a dealer in real estate and the defendant McLean a real estate broker. A tract containing 158 acres, at the price of $14,000, was selected, and it was agreed, in order to obviate possible objection on account of the purpose for which the land was to be used, that one of the defendants should purchase the land in his own name and reconvey to the plaintiff. Plaintiff agreed he would pay the purchase price regardless of the amount at which the defendants could buy the land. The defendants effected purchase of the land for $12,000 and title was taken in the name of defendant Bullard. A few days thereafter the defendants presented a written

option to the plaintiff's representative offering to convey 145 acres of the land for $14,000, with map attached accurately describing the 145 acres by metes and bounds. The land thus described extended from Lumber River on the south to the Wishart Road. North of the Wishart Road lay 13 acres of the land purchased by defendant Bullard and not included in the option or described on the map. The option was dated 18 May, 1941, and recited that upon payment of $2,000 plaintiff would be given until 15 June to pay the balance, $12,000, and obtain deed for the land shown on the map. Plaintiff accepted the option, paid the $2,000, and entered into possession of the land. On 15 June, 1940, deed for 145 acres was tendered to and accepted by the plaintiff, and the balance of $12,000 was paid in cash. Thereafter plaintiff instituted this action.

From the facts shown by the record it appears that, while oral negotiations between the parties relative to the purchase of the land extended over several days, when the written option was executed by defendants and accepted by plaintiff and the $2,000 paid therefor, the option covered only 145 acres of the land. The number of acres was definitely designated in the writing and described on an accompanying map.

Thus it seems the parties integrated their negotiations and agreements into the written memorial embodying an unequivocal offer to sell a certain number of acres of land on definite terms. This written designation of the terms of the contract was executed by the defendants and accepted by the plaintiff. It is established, not only as a rule of evidence, but also as one of substantive law, that matters resting in parol leading up to the execution of a written contract are considered merged in the written instrument. 2 Williston on Contracts, secs. 613-632. "All such agreements are considered as varied by and merged in the written contract." *Overall Co. v. Hollister Co.*, 186 N. C., 208, 119 S. E., 1; *Ray v. Blackwell*, 94 N. C., 10; *Carlton v. Oil Co.*, 206 N. C., 117, 172 S. E., 883; *Winstead v. Mfg. Co.*, 207 N. C., 114, 176 S. E., 292; 12 Am. Jur., 756. The writing is conclusive as to the terms of the bargain. 2 Restatement Law of Contracts, sec. 447. Plaintiff's claim that the relationship of trustor and trustee was constituted is not borne out by the testimony.

While the plaintiff complains of the manner in which the defendants dealt with him, it should be noted that before any money was paid he had knowledge that only 145 acres would be conveyed to him, and with this knowledge he accepted the written option and paid the agreed price for that number of acres. It is a well recognized rule that money paid with full knowledge of all the facts may not be recovered back. *Brummitt v. McGuire*, 107 N. C., 351, 12 S. E., 191. Here, the plaintiff, by his acceptance of the written memorial of the contract set out in the

option and his subsequent completion of the transaction in accord therewith, indicated his acquiescence in the terms of the contract as therein expressed.

We think the trial judge has correctly ruled that the evidence offered is insufficient to sustain plaintiff's action. The judgment of nonsuit is Affirmed.

WHITEHEAD & ANDERSON, INCORPORATED, TRADING AS LUMBERTON TOBACCO REDRYING COMPANY, AND LUMBER MUTUAL CASUALTY INSURANCE COMPANY OF NEW YORK v. H. G. BRANCH, TRADING AS BRANCH TRANSFER COMPANY, AND BENJAMIN A. JOLLEY.

(Filed 10 December, 1941.)

1. Death § 3—

A right of action for wrongful death rests exclusively upon statute, C. S., 160, and the suit must be begun and prosecuted in strict accordance with the statutory provisions.

2. Death § 5: Master and Servant § 44—Insurance carrier cannot maintain action for wrongful death of employee in its own name.

Since the North Carolina Workmen's Compensation Act expressly provides that the subrogated right of action against the third person tort-feasor in favor of the insurance carrier paying compensation for which the employer is liable, must be maintained in the name of the injured employee or his personal representative, ch. 449, Public Laws 1933, the Act does not change or modify the requirement of C. S., 160, that an action for wrongful death must be maintained by the administrator of the deceased, and the insurance carrier cannot maintain the action for wrongful death in its own name against the third person tort-feasor.

3. Master and Servant § 44—

Under the amendment of the Workmen's Compensation Act by ch. 449, Public Laws 1933, an injured employee may pursue his remedies against the employer under the Act and also maintain action against the third person whose tortious act caused his injury.

4. Same: Death § 5—Suit for wrongful death of employee, instituted by employer and insurance carrier held properly dismissed.

An employee was fatally injured in an accident caused by the negligence of a third person. The employee's administrator recovered judgment in an action for wrongful death against such third person. Thereafter the employer and the insurance carrier, which had paid the compensation to the dependents of the employee, instituted this action in their own names against the third person tort-feasor to recover for the wrongful death. *Held:* Defendant's motion to dismiss was properly allowed, notwithstanding that the administrator's action was instituted within six months from date of death, since defendants, having paid the judgment

for wrongful death obtained by the administrator, were relieved of all further liability on said cause of action either to the administrator or to those claiming a subrogated right to recover therefor under the provisions of the Compensation Act.

APPEAL by plaintiffs from *Parker, J.*, at October Term, 1941, of ROBESON. Affirmed.

Plaintiffs, employer and insurance carrier, respectively, instituted action against the defendants as independent tort-feasors to recover damages for the wrongful death of Bonnie Taylor, an employee. It was alleged that plaintiff insurer had paid the compensation awarded under the Workmen's Compensation Act for the injury and death of the employee.

Upon the facts set out in the pleadings, the defendants moved to dismiss the action on the ground that the action, being for damages for wrongful death, could be brought only by the administrator of Bonnie Taylor, and that the plaintiffs had no legal capacity to maintain the suit. The trial judge allowed the motion, being of opinion that under C. S., 160, the plaintiffs alone could not maintain the action. From judgment dismissing the action, plaintiffs appealed.

Jones & Smathers and Johnson & Timberlake for plaintiffs, appellants.

Dameron & Young and McLean & Stacy for defendant, appellee.

DEVIN, J. The single question presented by this appeal is whether the insurance carrier and the employer, under the Workmen's Compensation Act, may maintain an action in their own names, alone, against an independent tort-feasor for the wrongful death of an employee where compensation has been paid or liability therefor assumed by the insurance carrier. Must the suit be brought by the administrator of the employee whose death is alleged to have been caused by the negligence of third parties?

The facts pertinent to this question are not controverted. Bonnie Taylor, an employee of plaintiff Whitehead & Anderson, received a fatal injury by accident arising out of and in the course of his employment. Compensation was awarded to his dependents by the Industrial Commission, under the Workmen's Compensation Act, and this was paid by the employer's insurance carrier. The administrator of the deceased employee brought suit against the defendants for damages for the wrongful death of his intestate, and recovered a judgment therefor in the Superior Court, which judgment the defendants have paid in full. The present action, in the names of the insurance carrier and the employer was instituted within six months after the death of Bonnie Taylor.

The following provision is contained in the Workmen's Compensation Act (ch. 449, Public Laws 1933; Michie's Code, sec. 8081 [r]): "When any employer is insured against liability for compensation with any insurance carrier, and such insurance carrier shall have paid any compensation for which the employer is liable or shall have assumed the liability of the employer therefor, it shall be subrogated to all rights and duties of the employer, and may enforce any such rights in the name of the injured employee or his personal representative." It was said in *Thompson v. R. R.,* 216 N. C., 554, 6 S. E. (2d), 38, referring to this statute, that the rights and remedies granted by the Act to an employee to secure compensation for an injury by accident, as against his employer, were exclusive, but that the provision making the remedy exclusive did not appear in the clause relating to suits against third persons. This statement of the law was cited with approval in *Mack v. Marshall Field & Co.,* 217 N. C., 55, 6 S. E. (2d), 889.

The right to recover damages for the death of a human being caused by the wrongful or negligent act of another did not exist at common law, and is altogether governed by statute. The right of action in this State is conferred by C. S., 160, and the suit must be begun and prosecuted in strict accordance with the provisions of this statute. *Tieffenbrun v. Flannery,* 198 N. C., 397, 151 S. E., 857; *Brown v. R. R.,* 202 N. C., 256, 162 S. E., 613. There is nothing in the North Carolina Workmen's Compensation Act which has the effect of amending or changing this established rule when recovery is sought against an independent tort-feasor for the wrongful death of an employee subject to the provisions of the Act. Ch. 120, Public Laws 1929; ch. 449, Public Laws 1933. The reference in the statute to the right of subrogation accruing to the insurance carrier upon payment of the compensation awarded is coupled with the designation that the enforcement of such right be in the name of the injured employee or his personal representative.

The plaintiff Insurance Company relies upon *Ætna Ins. Co. v. Moses,* 287 U. S., 530, where it was held, in a case arising under the District of Columbia Compensation Act, that, in accord with the applicable provisions of the statute in force in that jurisdiction as well as the general principles of subrogation, the payment of compensation under that Act operated as a complete transfer and assignment to the employer or his insurance carrier of the right of recovery for wrongful death of the employee, and that this would authorize the employer to maintain suit against the tort-feasor without joining the administrator. But the statute applicable to the District of Columbia and referred to in that case (U. S. C. title 33, sec. 933, and ch. 612, 45 St. at L., 600) required an election by the employee either to claim compensation under the Act, or to recover damages against the third person, and provided that accept-

ance of compensation should operate as an assignment to the employer of right to recover damages against the third person. The right of action by subrogation accorded the employer under this statute was available to the insurance carrier who had paid the compensation. *Ætna Ins. Co. v. Moses, supra.* But the insurer alone could not bring an action against the third party. *Globe Indemnity Co. v. Atlantic Lighterage Corp.,* 271 N. Y., 234. See, also, *Doleman v. Levine,* 295 U. S., 221.

It will be noted that the provision in the North Carolina Workmen's Compensation Act requiring an election as to remedies by the injured employee, contained in the Act of 1929, was eliminated by the amendment of 1933. The injured employee may in accordance with the Act pursue remedies against the employer under the Act, and also maintain action against the third party whose tortious act caused his injury. *Sayles v. Loftis,* 217 N. C., 674, 9 S. E. (2d), 393.

In the case at bar it appears that compensation under the Workmen's Compensation Act was obtained for the benefit of the dependents of the employee, and that his administrator also instituted action for damages for the wrongful death of the employee against the defendants as independent tort-feasors, and obtained judgment therefor, and the judgment has been paid by the defendants. The defendants, by the payment of the judgment in that suit, secured complete acquittance from their liability for the negligence which caused the death of Bonnie Taylor. Thus the administrator, who alone is authorized under C. S., 160, to maintain action against the defendants, has exercised in full his right and duty in this instance, and no right or chose in action remains capable of assignment by any act of his, or by virtue of the statute, or upon general principles of subrogation. It is obvious that the circumstances of this case do not admit of an interpretation which would regard the payment of the compensation awarded dependents of the deceased employee as constituting an assignment by operation of law of the right of action, capable of enforcement by the assignee against the third party, for wrongful death of the employee, when by valid judgment the personal representative of the deceased employee is estopped to maintain action against such third party.

The fact that the administrator of the deceased employee instituted action for wrongful death against the defendants within the six months' period mentioned in the statute may not be held to the prejudice of the defendants, who have been compelled by the adversary suit of the administrator to pay the damages adjudged for the death of the deceased employee caused by their negligence. Compensation for the tort of which they have been adjudged guilty, has been paid in full. They are entitled to be relieved of further suit for the same cause, whether insti-

tuted by the administrator, or by one claiming to be subrogated to his rights, either directly or through the employer. The employer is named as one of the parties plaintiff in this action, but it has no interest in the action, having paid nothing, nor suffered injury.

For these reasons, we conclude that the judgment of the Superior Court must be

Affirmed.

FLOYD KING v. L. R. POWELL, JR., ET AL., RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY; ROCKINGHAM RAILROAD COMPANY; AND ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 10 December, 1941.)

1. Appeal and Error § 39—

Where the jury establishes plaintiff's execution of a release relieving appealing defendant of liability, any error in the charge on the issue of negligence cannot be held prejudicial.

2. Torts § 9a—

A release from liability executed by the plaintiff to one joint tort-feasor releases all.

3. Torts § 4—*Plaintiff's evidence held sufficient to show that defendants were joint tort-feasors.*

The tracks of two railroad companies crossed at grade. When the crossing was in use by one railroad, its signalman by leavers in a block house switched red lights and a derailer on the tracks of the other railroad. Plaintiff's evidence tended to show that he was an employee of such other railroad and was riding with other employees and a foreman on a motor car, that as the car approached the intersection the light turned red and the foreman slowed or stopped the car, that the lights then turned green and the foreman proceeded but that just as the car reached the derailer the lights suddenly turned red again and the derailer was thrown back on the track making it impossible to stop the car before striking the derailer, resulting in the injury in suit. *Held:* Plaintiff's evidence considered in the light most favorable to him, supports his conclusion that defendant railroad companies were joint tort-feasors.

4. Appeal and Error § 6b—

Where appellant presents no exceptive assignment of error to the failure of the jury to answer two of the issues, any error of the court in failing to require the jury to complete its verdict is not presented for review.

APPEAL by plaintiff from *Pless, J.*, at July Term, 1941, of RICHMOND. Affirmed.

Civil action to recover damages resulting from alleged negligence of the defendant *et al.*

The tracks of the defendant Rockingham Railroad Company cross the tracks of the Seaboard Air Line Railroad Company at grade west of Rockingham. Certain signal lights and other safety devices are maintained on each branch of the intersection. These safety devices are operated by means of levers located in a block house. The lights are green at all times on the Seaboard except when the intersection is in use by the defendant. When the intersection is in use by the defendant Rockingham Railroad Company one of its employees operates the levers so as to turn the lights on the Seaboard red and to throw derailers on its tracks. After said defendant's train passes the same employee resets the safety devices so that the lights are green and the derailers are off on the Seaboard.

On the day in question, the section foreman of the Seaboard, operating a rail motor car used for the purpose of transporting employees, tools, etc., approached the crossing at a time when the safety devices were so set that red lights were displayed on the Seaboard and the derailers were on the "T" iron so as to block any approaching train or car.

The evidence offered by the plaintiff tends to show that after the motor car slowed or stopped for the red light the light turned green and the derailer was thrown off the track; that the section foreman then proceeded and just before he reached the point of the location of the derailer, the light suddenly turned red again and the derailer was thrown back on the track or "T" iron at a time and in a manner which made it impossible for the motor car to be stopped before striking the derailer. The evidence offered by the defendant Rockingham Railroad Company tends to show that as the motor car approached the light was red and the derailer was set; that it did not again turn green before the accident and that the section foreman, well knowing that he was under positive orders to stop until the light turned green, nevertheless proceeded against the red light and drove the motor car on and against the derailer, thereby causing the wreck and resulting injuries to the plaintiff.

Both the Seaboard Air Line Railroad Company and the defendant pleaded in defense a release of the Seaboard Air Line Railroad signed by the plaintiff in consideration of a sum paid by it.

The plaintiff, in reply, pleaded fraud and undue influence in the procurement thereof.

When the cause came on to be heard, it appearing that the action as against the Seaboard Air Line Railroad Company was not instituted within two years as required by the Federal Employers' Liability Act, judgment of nonsuit was entered as to the Seaboard. There was also a judgment of nonsuit as to the Atlantic Coast Line Railroad Company. As to the defendant, Rockingham Railroad Company, appropriate issues

were submitted. The jury answered the first issue as to the negligence of the defendant, "No." The third issue and the answer thereto is as follows:

"3. Did the plaintiff execute a release as alleged in the answer?

"Answer: Yes. (By consent.)"

The other issues were unanswered.

Upon the verdict as thus returned by the jury the court entered judgment for the defendant and the plaintiff excepted and appealed.

Jones & Jones for plaintiff, appellant.
Fred W. Bynum for defendant, appellee.

BARNHILL, J. Conceding error in the charge on the first issue, the judgment must stand. The answer to the third issue bars plaintiff's right to recover upon the principle that the release of one joint tort-feasor releases all. *Holland v. Utilities Co.*, 208 N. C., 289, 180 S. E., 592; *Howard v. Plumbing Co.*, 154 N. C., 224, 70 S. E., 285; *Sircey v. Hans Rees' Sons*, 155 N. C., 296, 71 S. E., 310; *Slade v. Sherrod*, 175 N. C., 346, 95 S. E., 557; *Braswell v. Morrow*, 195 N. C., 127, 141 S. E., 489; *Massey v. Public Service Co.*, 196 N. C., 299, 145 S. E., 561.

The plaintiff alleges that the Seaboard and the Rockingham Railroad Company were joint tort-feasors. The evidence, when considered in the light most favorable to the plaintiff, tends to so show. Otherwise it tends to exculpate the Rockingham Railroad Company and it establishes conclusively that if this defendant was not negligent the employee of the Seaboard, the section foreman, was. Hence, the plaintiff, having executed a release of the Seaboard, thereby released this defendant.

Just why this verdict was accepted and recorded by the judge without any objection on the part of the plaintiff for failure to require answers to the fourth and fifth issues, which are bottomed on plaintiff's allegations of fraud and undue influence, does not appear. Nevertheless, the fact remains that this is the verdict before us and the plaintiff presents no exceptive assignment of error in respect to any issue other than the first. He complaineth not that the judge failed to require an answer to either the fourth or fifth issue. As to that, upon this record, he is apparently content.

It follows that the judgment below must be

Affirmed.

P. R. MILLER AND WIFE, MATTIE MILLER, v. O. D. GRIMSLEY AND WIFE, PRUDE GRIMSLEY.

(Filed 10 December, 1941.)

1. Pleadings § 12—

Where no service of answer is made upon plaintiffs they are under no compulsion to file a reply even though the answer sets up a counterclaim, since the law denies the counterclaim for them. C. S., 524.

2. Pleadings § 13—

Plaintiffs may file a reply to new matter appearing in the answer by way of counterclaim, but by express provision of statute the allegations of the reply must not be inconsistent with the complaint. C. S., 525.

3. Same—

Plaintiffs' complaint admitted defendants owned certain timber within the boundaries of their land because of a reservation in the deed from defendants to plaintiffs. After answer, plaintiffs filed a reply alleging that the reservation of timber rights was void for vagueness of description. *Held:* Portions of the reply attacking the validity of the reservation were properly stricken upon defendants' motion, since such allegations were inconsistent with the complaint.

APPEAL by plaintiffs from *Thompson, J.*, at May Term, 1941, of ROBESON. Affirmed.

Caswell P. Britt, T. A. McNeill, and George T. Deans for plaintiffs, appellants.

L. J. Britt and McLean & Stacy for defendants, appellees.

SEAWELL, J. The plaintiffs brought this action to have themselves declared the owners and entitled to the possession of certain lands upon which they allege the defendants have wrongfully entered, and to have the defendants permanently enjoined from cutting and removing timber therefrom, and for recovery of $35.00 damages which they claim has already been inflicted by defendants' trespass. In their complaint they set out a description of the land in controversy, admitting that there is an exception of "one corner of said tract containing about one acre, the same being reserved to the defendants for the purpose of preserving the timber thereon and the same being from the beginning corner in the edge of Ashpole Swamp, and also being the corner of D. M. Rogers' estate, and runs across said tract of land herein referred to, to what is known as Marl-bed, which is located just South about 100 yards West of run of Ashpole Swamp," which the complaint alleges "represents all the right, title, and interest" which the defendants have in the land.

The answer denied the material allegations of the complaint and set up a deed, under which plaintiffs claim, containing the following reservation: "O. D. Grimsley hereby reserves timbers from Marl-bed to beginning corner." In a further answer defendants repeat their claim of title to the timber on the reservation above set out, and deny that they have cut timber anywhere else on the land. They demand judgment that they are the owners of the timber.

Replying, the plaintiffs, denying material allegations in the answer, attack the reservation made in the deed as being insufficient for any purpose because of its vagueness of description, and assert title thereto in paragraphs 5, 6, and 7, reading as follows:

"5. That said sentence and language attempts to reserve an indefinite and undetermined quantity or amount of timber, and does not specify any particular kind, quality or size of timber, nor does said language specify any particularly described tract of land or amount of land upon which to locate said timber, nor is any particular time for removal thereof stated; and said language is so vague, indefinite and uncertain that any timbers so attempted to be reserved cannot be known or ascertained, and such attempt to so reserve timber is void for uncertainty.

"6. That said language is vague and indefinite and the lands referred to in said attempt to reserve timber is not described with sufficient particularity and certainty to admit of its true location, in that it only refers to a Marl-bed and 'beginning corner' without fixing any boundaries or any acreage, and without referring to any natural or fixed objects or anything extrinsic by which the land could or can be located and made certain, and such attempted reservation is therefore void for uncertainty.

"7. That plaintiffs' deed was made and executed by defendants May 12, 1920, and if said attempted reservation is valid, which is denied, then the defendants are entitled only to such trees as were large enough to be sawmill or saw stock timber at the time of the execution of said deed on May 12, 1920."

Defendants moved to strike the above paragraphs from the answer because the claims made therein "are in direct conflict and contradictory" to the complaint. At the May Term, 1940, Judge Thompson, over objection, struck out these paragraphs of the reply and plaintiffs excepted and appealed.

It was admitted upon the hearing here that no service of defendants' answer had been made upon the plaintiffs.

Under our present system of pleading plaintiffs were under no compulsion to file a reply to the answer, whether it be regarded as setting up a counterclaim as plaintiffs contend, or otherwise. No service of answer having been made upon them or their attorney or attorneys of record, the law denies the counterclaim for them. C. S., 524; *Simon*

v. Masters, 192 N. C., 731, 135 S. E., 861; *Fishblate v. Fidelity Co.,* 140 N. C., 589, 594, 53 S. E., 354; *Williams v. Hutton,* 164 N. C., 216, 80 S. E., 257; *Smith v. Bruton,* 137 N. C., 79, 49 S. E., 64. It was proper for them to reply, if they saw fit, to new matter appearing by way of counterclaim, denying the same or alleging "any new matter not inconsistent with the complaint" constituting a defense thereto. C. S., 525. But, from the very language of the statute, the reply must not be inconsistent with the complaint. *Berry v. Lumber Co.,* 183 N. C., 384, 386, 111 S. E., 707.

In the case at bar plaintiffs admit in the complaint that defendants own certain timber within the boundaries of the land they claim, because of a reservation in the deed under which they claim. In the reply they attempt to dispute this claim, basing the attack on the vagueness of description. With the ground of attack we do not, at present, deal; but only with the procedure. Plaintiffs could not amend their complaint by recasting the cause of action in the reply, through the introduction of substantially inconsistent matter.

The order striking out the designated parts of the reply is

Affirmed.

HUGH MACRAE & COMPANY, INC., v. RICHARD A. SHEW AND WIFE, IDALORA W. SHEW.

(Filed 10 December, 1941.)

1. Appeal and Error § 37e—

Where there is sufficient competent evidence to support the findings of fact by the court, exceptions to such findings are untenable.

2. Injunctions § 11—

Where, upon a hearing of an order to show cause why the temporary restraining order should not be continued to the hearing, the court finds facts supporting its conclusions of law that plaintiffs are entitled to the relief sought, its order continuing the temporary injunction to the hearing is without error.

3. Same: Courts § 1a—

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court is without jurisdiction to adjudicate the merits of the controversy, nor may such jurisdiction be conferred by consent of the parties, and it is error for the court to grant plaintiffs a permanent injunction and tax defendants with costs.

4. Courts § 1b—

Objection to the jurisdiction may be made at any stage of the proceeding, even in the Supreme Court upon appeal.

APPEAL by defendants from *Burney, J.*, at Chambers in Wilmington, 5 April, 1941. From NEW HANOVER.

Rountree & Rountree and Harriss Newman for plaintiff, appellee.
J. A. Jones for defendants, appellants.

SCHENCK, J. This is an action to enjoin the defendants from building, constructing or maintaining a street, road or avenue over Lot 811, in a subdivision of land known as Magnolia Place, Cul-de-Sac Section, in alleged violation of restrictions in the deed from the plaintiff to the grantor of the defendants.

The plaintiff subdivided a tract of land into lots, which it sold to purchasers for building purposes. The lot involved faced a cul-de-sac leading off from State Highway No. 74, between Wilmington and Wrightsville. The deed from the plaintiff conveying this lot to the defendants' grantor contained, among other restrictions, the following: "2. The property shall be used for residential purposes only; . . ." Deeds from the plaintiff to other grantees for other lots fronting on the same cul-de-sac contained similar restrictions. The plaintiff still owns yet other lots fronting on the cul-de-sac.

The defendants own a tract of 18 acres of land south of and contiguous to said Magnolia Place, Cul-de-Sac Section. The defendants purchased and took title from one Donnell, who had taken title thereto from the plaintiff, said Lot No. 811, in Magnolia Place, Cul-de-Sac Section. The deed from Donnell to the defendants contained no restrictions.

The defendants admit their intention to construct and have actually begun the construction of a street or roadway through said Lot No. 811, thereby connecting his 18-acre tract to the end of the cul-de-sac and over the cul-de-sac to the State Highway No. 74.

The question posed by the pleadings, evidence and admissions is: Is the construction and maintenance of a road, street or highway over said Lot No. 811 a violation of the restrictions contained in the deed conveying the lot from the plaintiff to Donnell, and, if so, were such restrictions covenants running with the land, and therefore binding upon the defendants, who claim through Donnell by deed which contains no such restrictions? And, further, if such restrictions are binding upon the defendants, do they exist for the protection of the plaintiff, who still owns some lots in the subdivision, so as to enable it to maintain an action to prevent their violation, or do they exist only for the protection of those who have acquired other lots in the subdivision by deeds containing similar restrictions, and who are not parties to this action?

The cause came on for hearing before his Honor at chambers, in Wilmington, out of term, upon an order to show cause why a temporary

restraining order should not be made permanent, and he found the facts practically as alleged in the complaint, and concluded as a matter of law that the plaintiff was entitled to the relief sought, and entered judgment that the defendants be permanently enjoined from constructing, building or maintaining a road, street or highway over said Lot No. 811, and directing that the defendants restore the said lot to its original condition and remove its tractors and other implements therefrom, and that the defendants pay the costs of the action.

Since there was sufficient competent evidence to support the findings of fact by the court, the exceptions to such findings are untenable, and since those facts sustain the conclusions of law reached by the court there was no error in the continuing of the temporary restraining order theretofore entered by Burgwyn, J., to the hearing.

But his Honor did more than that; he entered a judgment final in its nature, adjudging the merits of the controversy, in favor of the plaintiff, and taxed the defendants with costs. In so doing he exceeded his jurisdiction. "The judge hearing the order to show cause why the injunction should not be continued to the hearing had no jurisdiction to hear and determine the controversy on the merits, and his findings of fact and conclusions of law were but instruments of decision in the matter before him." *Patterson v. Hosiery Mills,* 214 N. C., 806, 200 S. E., 861. "When the judge below grants or refuses an injunction, he does so upon the evidence presented, and the only question is whether the order should be made, dissolved, or continued; he cannot go further and determine the final rights of the parties, which must be reserved for the final trial of the action." N. C. Prac. & Proc. (McIntosh), par. 876, p. 994, and cases there cited.

It is but just to the learned judge who heard the case to state that it appears in the record that counsel for the parties agreed that the court might "either make the temporary restraining order permanent or dissolve it at this hearing." However, since the judgment entered was beyond the jurisdiction of the judge sitting at chambers, such jurisdiction could not be conferred by agreement, and objection to the jurisdiction may be made at any stage of a proceeding, even in the Supreme Court, as has been done in the case at bar by appellants' third assignment of error. N. C. Prac. & Proc. (McIntosh), par. 6, p. 7, *Cary v. Allegood,* 121 N. C., 54, 28 S. E., 61.

The result is that the judgment must be modified so as to extend no further than to continue the restraining order to the hearing, and to leave the payment of the cost to the party finally cast.

The cause is remanded for judgment in accord with this opinion.

Modified and affirmed.

STATE v. LINWOOD W. EURELL.

(Filed 10 December, 1941.)

1. Bailment § 1—

One who receives money for safe keeping is not an agent, consignee, clerk, employee or servant, but is a bailee if under the agreement of the parties he is to return the identical money received, and is a debtor if he is to use the money and return its equivalent on demand.

2. Embezzlement § 1: Statutes § 8—

The crime of embezzlement is purely statutory and the statute creating the offense must be strictly construed and only those classes of persons therein defined as coming within its purview can be guilty of the offense.

3. Same—

The fact that ch. 31, Public Laws 1941, amended C. S., 4268, by adding "bailee" to the classes of persons who might fall within the condemnation of the embezzlement statute constitutes a legislative declaration that theretofore a bailee was not included in the definition of classes of persons defined by the statute.

4. Same—

A "bailee" or "debtor" may not be prosecuted for embezzlement under C. S., 4268, prior to the amendment of 1941, since neither a "bailee" nor "debtor" is included in the classes of persons defined by the statute prior to the amendment.

APPEAL by defendant from *Olive, J.*, at June Term, 1941, of ROBESON. Reversed.

Criminal prosecution on bill of indictment charging the crime of embezzlement.

The defendant operates a cafe and small grocery. The prosecuting witness was his customer. In 1936 she left with the defendant about $37.00, which she later consumed in trade. Thereafter, over a period of several years, she left with him small amounts to keep for her. The total amount thus deposited with the defendant amounted to $203.00. In November, 1940, at her request, the defendant executed and delivered to her a paper writing as follows:

"November 11, 1940, received of Lessie Carr, money to keep, $203.00.
Signed L. W. EURELL."

Thereafter, she demanded of him the return of the money due. Upon her demand for the money due he failed to pay the same, claiming, according to her testimony, that he had invested it in a truck. Thereupon this prosecution was instituted, it being charged in the bill of in-

dictment that the defendant was "the agent, consignee, clerk, employee and servant of Lessie Carr" and as such had embezzled the money thus entrusted to him. The cause was tried upon the theory that the contract the evidence for the State tended to establish constituted the defendant an agent.

The jury returned a verdict of "guilty as charged." From judgment thereon the defendant appealed.

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

David M. Britt and McKinnon & Seawell for defendant, appellant.

BARNHILL, J. One who receives money for safekeeping is not an agent, consignee, clerk, employee or servant. He is a bailee if under the agreement of the parties he is to return the identical money received, and debtor if he is to use the money and return its equivalent on demand. Neither "bailee" nor "debtor" was included in our embezzlement statute, C. S., 4268, prior to 1941.

An interesting and comprehensive history of the embezzlement statute is contained in the opinion of *Stacy, C. J.*, in *S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657. Its meaning and its applicability only to the classes of persons therein named is fully discussed. It is there said "the embezzlement statute begins by defining the classes of persons who may fall within its condemnation, or who may commit the statutory crime of embezzlement, and as it is a penal statute, creating a new offense, it cannot be extended by construction to persons not within the classes designated. 2 Bishop, Crim. Law., sec. 331. In other words, if the statute be so worded as not to include the defendant, his office, or his status, an indictment thereunder will not lie against him." *S. v. Keith,* 126 N. C., 1114; *Calkins v. S.,* 18 Ohio S., 366; 98 Am. Decision, 121. Further discussion is unnecessary.

That the General Assembly, by ch. 31, Public Laws 1941, added "bailee" to the classes of persons embraced in the statute constitutes a legislative declaration that it was not intended that "agent, consignee, servant or employee" should include a bailee.

The motion for judgment as of nonsuit should have been allowed.

Reversed.

BESSIE CUMMINGS v. QUEEN CITY COACH COMPANY.

(Filed 10 December, 1941.)

Trial § 29b—Charge held for prejudicial error in referring to evidence which had not been introduced upon the trial.

Plaintiff did not introduce in evidence any bill for hospital expenses nor any evidence that she had received any such bill, or had paid or is obligated to pay a bill for hospital expenses in any specific amount. The court charged the jury that plaintiff offered evidence that she had received a bill for doctors and medical services in the sum of $118.00 and that she contended that she had had to pay such bill. *Held:* The charge of the court referring to matters which had not been introduced in evidence and concerning which defendant was afforded no opportunity to cross-examine witnesses, must be held for prejudicial error.

APPEAL by defendant from *Phillips, J.,* at May Term, 1941, of RICHMOND.

This is an action for personal injury and property damage alleged to have resulted from a collision between the plaintiff's automobile and the defendant's bus caused by the negligence of the defendant. The issues of negligence and damage were answered in favor of the plaintiff, and from judgment predicated on the verdict the defendant appealed, assigning errors.

A. A. Reaves and Jones & Jones for plaintiff, appellee.
Oates, Quillin & McRae and Fred W. Bynum for defendant, appellant.

SCHENCK, J. We think, and so hold, that the demurrer to the evidence, C. S., 567, was properly overruled.

The court charged the jury that "the plaintiff further offered evidence which tends to show . . . that as a result of such injuries she was forced to go to the hospital in Wadesboro and stay there approximately twenty-four hours and then stayed in the Hamlet hospital for seven days and that she has received a bill for doctors and medical services in the sum of $118.00 for treatment of her injuries." And later the court in its charge said: "The plaintiff insists and contends . . . that she has been forced to stay in institutions, hospitals, and received medical care to the extent that she had a bill for $118.00 for hospital treatment and medical treatment and nursing."

Both of these excerpts from the charge are made the bases for exceptive assignments of error and we are constrained to sustain such assignments, since it nowhere appears in the record that any hospital bill was introduced in evidence, or that the plaintiff ever received a bill for $118.00 for hospital and medical services, or for any other amount. The

most that the record tends to show is that the hospital sent out a bill, in an unnamed amount, there being no evidence that the plaintiff ever received such a bill, or ever paid such a bill, or is in anywise obligated to pay such a bill.

The only reference in the evidence, remotely or otherwise, to a hospital bill appears on page 46 of the record, in the cross-examination of the defendant's witness, Dr. W. D. James, as follows:

"Q. I ask you if you recognize that (handing paper to witness) as being the bill sent out by your hospital? A. Yes, sir, that is our paper; I never saw it before it went out. I don't know a thing about the bill being sent out; I didn't give orders for it to be sent out but it is the routine."

This is neither evidence of a bill for $118.00, nor is it evidence that the plaintiff received any bill, or paid or is obligated to pay a bill for any specific amount.

Barnhill, J., in *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473, where the court in its charge referred to the "Biblical records" as tending to establish the age of the prosecutrix, writes: "But the State insists that this clause, when considered contextually, constitutes nothing more than a statement of a contention by the State. Even so, it is prejudicial. The record fails to disclose that any birth record entered in a family Bible was identified and offered in evidence. Thus the charge, in part, is based on evidence which had not been introduced and concerning which the defendant was afforded no opportunity to cross-examine the witnesses. By this action of the court evidence material to the issue was placed before the jury without opportunity to answer it or in any way to meet it. This constitutes prejudicial error. *S. v. Love,* 187 N. C., 32, 121 S. E., 20; *Smith v. Hosiery Mill,* 212 N. C., 661, 194 S. E., 83." See, also, *Howell v. Harris, ante,* 198, 16 S. E. (2d), 829.

For the error assigned there must be a

New trial.

GLENN PURCELL v. KINNIE WILLIAMS, CARRIE R. CURRIE, WIDOW OF THE LATE TUCKER C. CURRIE, AND TUCKER ROTHROCK CURRIE, MINOR, AND CARRIE R. CURRIE, HIS GUARDIAN.

(Filed 10 December, 1941.)

1. Adverse Possession § 19—

Evidence that the person under whom plaintiff claims held hostile and exclusive possession of the *locus in quo* under known and visible lines and boundaries over a period of 50 years prior to his death *held* sufficient to be submitted to the jury, and the granting of defendants' motion for nonsuit was error.

2. Adverse Possession § 14—

Where a person acquires title to a parcel of land by adverse possession, such title is the legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. C. S., 432.

APPEAL by plaintiff from *Olive, Special Judge,* at March Term, 1941, of MOORE. Reversed.

This was an action to recover possession of fifty acres of land alleged to be wrongfully withheld by the defendants. Plaintiff claimed as heir of one Jim McNeill, who, it was contended, had acquired title to the land by adverse possession extending over a period of fifty years prior to his death in 1918. Defendants denied plaintiff's title, and alleged title in themselves. It was not denied that plaintiff is heir of Jim McNeill. At the close of plaintiff's evidence motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

Seawell & Seawell for plaintiff, appellant.
Moseley G. Boyette for defendants, appellees.

DEVIN, J. Considering the evidence in the light most favorable to the plaintiff, as we are required to do on a motion for nonsuit, we are constrained to hold that the judgment of nonsuit was improvidently entered, and that the case should have been submitted to the jury.

As the case must go back for further proceedings, we refrain from discussing the evidence other than to say that there was evidence on the part of the plaintiff tending to show that about 1873 Jim McNeill built on the land the home in which he lived continuously thereafter for more than forty-five years; that he had exclusive possession of the land, listed it for taxation, built out-houses, barns and stables, and farmed the land in the usual way until his death in 1918; that there were ten to fifteen acres of open land which he cultivated, and some use was made of the wooded land also; that the house and a portion of the land were enclosed by fence; that the land was known as the Jim McNeill land, and testimony was offered that his possession of the land was under known and visible lines and boundaries. This would seem to afford evidence of adverse possession for the statutory period, under the rule laid down in *Locklear v. Savage,* 159 N. C., 236, 74 S. E., 347, and *Owens v. Lumber Co.,* 210 N. C., 504, 187 S. E., 804; C. S., 430.

There was also evidence tending to show that Jim McNeill died in 1918, and that thereafter the land was occupied by tenants not adverse to plaintiff's title, until 1935, when the defendants entered. Suit was instituted in 1939. If it be established that the title of Jim McNeill at the time of his death had ripened by adverse possession for more than

twenty years, it follows that occupancy of the land thereafter would be presumed to have been in subordination to the legal title, unless held adversely to such title for the statutory period. C. S., 432; *Johnston v. Pate,* 83 N. C., 110; *Bland v. Beasley,* 145 N. C., 168, 58 S. E., 993; *Stewart v. McCormick,* 161 N. C., 625, 77 S. E., 761; *Berry v. Coppersmith,* 212 N. C., 50, 193 S. E., 3.

While we do not deem it necessary to consider *seratim* the exceptions noted by plaintiff to the court's rulings on the admission of testimony, it may be well to observe that evidence properly adduced as to the character and extent of the possession of Jim McNeill and of those who occupied the land after his death would seem to be unobjectionable. Upon this appeal only the plaintiff's evidence is before us for consideration. Upon another trial defendants' evidence may show the facts to be different. That will be a matter to be determined by the jury.

Upon the record before us we conclude that the judgment of nonsuit must be

Reversed.

IN RE WILL OF LOTTIE C. TAYLOR.

(Filed 10 December, 1941.)

1. Wills § 3—

A paper writing cannot be construed as a will unless it discloses the intent of the writer that the paper itself should operate as a disposition of her property to take effect after death.

2. Same—

The paper writing admitted to probate in common form was a letter written by testatrix to her father and sisters in which she expressed her desire that her husband should have her property, stated an intent to execute a will effecting that purpose if she was able to contact a lawyer, and requested them to give him her property in the event she died before making testamentary disposition thereof. *Held:* The paper writing fails to disclose the *animus testandi* necessary to constitute a valid will.

APPEAL by caveators from *Hamilton, Special Judge,* at April Term, 1941, of BLADEN. New trial.

Issue of *devisavit vel non* raised by a caveat to a paper writing propounded as the last will and testament of Lottie C. Taylor.

The clerk of the Superior Court of Bladen County, on application of John F. Taylor, admitted to probate in common form the following paper writing:

"ELIZABETHTOWN, N. C.
December 24, 1938

"PAPA AND SISTERS:

"I am I think sane at this minute but how long it will last I dont know. I may do something, but while I can please give John my land. He had to do and be with me so much I feel he should have what I have for he has been a dear good man and husband to me. This will be a surprise to him. If I last til I can see a lawyer I will will it to him but if not I know you all will give it to him for me.

"Love to each of you and thank you for enduring me.

LOTTIE C. TAYLOR."

Thereafter, the sisters of the testatrix appeared and filed a caveat. Thereupon the cause was transferred to the civil issue docket. When the cause came on to be heard in the court below the usual issues were submitted. The court in its charge instructed the jury that if they believed the evidence and found the facts to be as the testimony tended to show they should answer each issue "yes." The jury answered the issues accordingly. From judgment thereon the caveators appealed.

Oliver Carter and Clark & Clark for caveators, appellants.
Varser, McIntyre & Henry for propounder, appellee.

BARNHILL, J. To constitute a paper writing a last will and testament it must express a genuine present and not merely a future testamentary intent. The character of the instrument and the circumstances under which it was executed must disclose an act of testamentary disposition. *Spencer v. Spencer,* 163 N. C., 83, 79 S. E., 291.

The *animus testandi* required is more than an intent to execute a will. It is the intent to presently devise by the paper writing being then executed and that such writing shall have the full force and effect of a will. *In re Bennett,* 180 N. C., 5, 103 S. E., 917; *In re Johnson,* 181 N. C., 303, 106 S. E., 841. It is not sufficient that the writer express a present intent to thereafter make a will. It must appear from the language used that it was the writer's intent that the paper itself should operate as a disposition of her property to take effect after death. *In re Johnson, supra; In re Bennett, supra; Spencer v. Spencer, supra; In re Estate of C. B. Richardson,* 94 Cal., 63; Gardner on Wills, 1st Ed., pp. 36-43.

"The object of the law is that there may be no doubt as to the intention of the supposed testator to make his last will and testament, and as to the fact of his having done so by the particular writing offered for probate, thereby identifying it as the true and only document defining

his intention to will his estate and his purpose as to how it should be disposed of after his death. The two intentions to make a will and to dispose of his estate in the manner described in the paper writing in question must concur and coexist." *In re Bennett, supra.*

Applying these principles it appears that the paper writing propounded fails to measure up to the requirements of a valid will. Its effect is: (1) to express a desire that her husband shall have her property; (2) an intent to execute a will effecting that purpose if she is able to contact a lawyer; and (3) a request directed to her heirs apparent that they give the property to her husband in the event she dies before making testamentary disposition thereof. No part of the language used is dispository in character. On the contrary, it negatives a present intent to devise. Hence, *In re Bennett, supra,* and *In re Johnson, supra,* are directly in point and are controlling.

The court erred in its instruction to the jury and in not instructing as requested by the caveators.

New trial.

WACHOVIA BANK & TRUST COMPANY ET AL. v. FLORA HEYMANN.

(Filed 10 December, 1941.)

Wills § 33f—Devise of life estate with power of disposition by act inter vivos empowers devisee to mortgage property.

Testator devised certain property to one of his sons for life with remainder to the "children of his body absolutely in fee forever," and by codicil, which ratified and confirmed the will except as changed thereby, gave the devisee "full power to sell or dispose" of the property devised "and receive the proceeds thereof." *Held:* The power of disposition granted in the codicil empowered the devisee to sell or dispose of the property in any manner except by will, which power included the power to mortgage as well as the power to convey by deed.

DEVIN, J., took no part in the consideration and decision of this case.

APPEAL by defendant from *Johnston, Special Judge,* at November Term, 1941, of BUNCOMBE.

Controversy without action submitted on agreed statement of facts.

The plaintiff, being under contract to convey to the defendant a lot of land in the city of Asheville, duly executed and tendered deed therefor 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 declines to accept the deed and refuses to carry out her agreement to buy or to make payment of the purchase price on the ground 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 lot in question, gave judgment for the plaintiffs, accordant with the terms of submission, from which the defendant appeals, assigning error.

Parker, Bernard & Parker for Wachovia Bank & Trust Co., plaintiff, appellee.

J. G. Merrimon for Asheville Mission Hospital, plaintiff, appellee.

J. A. Patla for defendant, appellant.

STACY, C. J. On the hearing, the question in difference was made to turn on whether Frank A. Mears acquired the right to sell and convey the property in fee simple and also the right to mortgage it under the following clause, as enlarged by the codicil, in the will of G. Augustus Mears, late of Buncombe County, this State:

"Sixth: I give and devise to my son, Frank A. Mears, that certain house and lot situate on the west side of South Main St. in the City of Asheville, N. C., now occupied as a garage, for and during his natural life, and at his death to the children of his body absolutely in fee forever."

In a codicil, the testator ratified and confirmed his will except as changed thereby, and among other things, provided:

"I further modify my last will and testament in this respect. That is, each of my said sons may or shall have full power to sell or dispose of any or all of the property in this will devised to them in fee and receive the proceeds thereof as to them seems best or proper."

Plaintiff acquired title under foreclosure of deed of trust given by Frank A. Mears and wife to Haywood Parker, Trustee, to secure an indebtedness of $12,000 due to a third party.

It was held in *Smith v. Mears,* 218 N. C., 193, 10 S. E. (2d), 659, in construing this same codicil, that it had the effect of annexing as appurtenant to the life estate, originally created by the will, the power of sale or disposition in the life tenants. *Herring v. Williams,* 153 N. C., 231, 69 S. E., 140; *Parks v. Robinson,* 138 N. C., 269, 50 S. E., 649. This being so, the only additional question now presented is whether the power of sale or disposition given in the codicil includes the power to mortgage. The trial court answered in the affirmative, and we approve. *Ferrell v. Ins. Co.,* 211 N. C., 423, 190 S. E., 746.

It will be observed that the testator ratified and confirmed his will in the codicil, except as changed thereby, and to the power of sale or disposition he added the expression, "and receive the proceeds thereof as to them seems best or proper." This appended clause would seem to contemplate a sale or disposition by act *inter vivos* of any kind in further-

ance of the benefit intended to be conferred on the devisees, including a conditional sale by mortgage or deed of trust. *Hicks v. Ward,* 107 N. C., 392, 12 S. E., 318. See Annotations, 92 A. L. R., 882; 21 R. C. L., 780.

The result is an affirmance of the judgment below.

Affirmed.

DEVIN, J., took no part in the consideration and decision of this case.

STATE OF NORTH CAROLINA BY HARRY McMULLAN, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA, UPON THE RELATION OF ROMULUS A. HEDGPETH, V. W. R. ALLEN, A. P. PAGE AND W. W. DAVIS, COMMISSIONERS, AND E. M. JOHNSON, MAYOR OF THE TOWN OF LUMBERTON, AND JOHN RHODES BARNES.

(Filed 10 December, 1941.)

1. Pleadings § 20—

A demurrer on the ground that the complaint fails to state a cause of action admits the facts alleged in the complaint.

2. Same—

Upon demurrer the allegations of the complaint will be liberally construed in favor of the pleader.

3. Quo Warranto § 2—

A complaint alleging that plaintiff was a candidate for town commissioner and received a plurality of the votes cast in the primary, that in the following general election he received eight votes for said office and that no votes were cast for any other person, and that thereafter the commissioners, over plaintiff's protest, passed a resolution ousting plaintiff, states a cause of action and defendants' demurrer is properly overruled, no ground upon which plaintiff could have been legally ousted appearing from the complaint.

4. Public Officers § 6—

Even if the election of a public officer to succeed himself is for any reason void, such officer would hold over until his successor is elected and qualified.

5. Quo Warranto § 1—

The proper procedure to try title to public office is by action in the nature of *quo warranto.*

APPEAL by defendants from *Olive, Special Judge,* at August Term, 1941, of ROBESON. Affirmed.

This was an action in the nature of *quo warranto* to try the title to the office of commissioner of the town of Lumberton, North Carolina.

Defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendants appealed.

Varser, McIntyre & Henry for plaintiff Hedgpeth, appellee.
F. D. Hackett for defendant Barnes, appellant.

DEVIN, J. The demurrer challenges the sufficiency of the complaint to state a cause of action on the ground that it does not affirmatively appear therein that the plaintiff is entitled to the office of commissioner of the town of Lumberton, or that he was wrongfully ousted therefrom.

It is a familiar rule that in the consideration of a demurrer, on the ground here interposed, the facts alleged in the complaint will be deemed admitted, and the allegations will be construed liberally in favor of the pleader. *Adams v. Cleve,* 218 N. C., 302, 10 S. E. (2d), 911. The facts alleged in the complaint are substantially these: The plaintiff was a member of the board of town commissioners of Lumberton for the third ward, having been elected in May, 1939, for a term of two years. In accord with the applicable provisions of the town charter (ch. 343, Private Laws 1907) a primary was held the last Tuesday in April, 1941, to nominate candidates for commissioner, and in said primary the plaintiff was a candidate and received a plurality of the votes cast for commissioner in the third ward. On the first Monday in May (5 May) following, in accord with the charter, an election for mayor and commissioner was duly held, and the plaintiff received eight votes for said office and no votes were cast *contra.* Thereafter, on 13 June, 1941, a resolution was adopted by the board of commissioners, over the protest of the plaintiff, declaring the defendant Barnes commissioner of the third ward, and thereby ousting the plaintiff. It further appeared from the complaint that on 1 May, 1941, the board of commissioners had attempted, over the objection of the plaintiff, to call another primary for the selection of a candidate for commissioner of the third ward, to be held 8 May, but it is alleged the charter contains no provision for a second primary, and that the date attempted to be set for the second primary was subsequent to the date of the general election wherein the plaintiff had been duly elected. The charter provides that the term of a town commissioner shall be two years and until his successor is elected and qualified. C. S., 3205.

For the purposes of the demurrer the facts alleged must be taken to be true. Hence, it appears that the plaintiff was duly elected to the office he claims on 5 May, 1941, and that though he received only eight votes, there were no votes for any other person, and that, if for any reason, which does not appear, the election was void, he would hold over

until his successor was elected and qualified. There was no vacancy, such as contemplated in the charter, which would empower the board to elect a successor. The complaint does not show any ground upon which the plaintiff could have been legally ousted.

Procedure by action in the nature of *quo warranto* would seem to be the proper method to determine the title to the office in controversy. *Ellison v. Raleigh,* 89 N. C., 125; *Harkrader v. Lawrence,* 190 N. C., 441, 130 S. E., 35; *Osborne v. Canton,* 219 N. C., 139, 13 S. E. (2d), 265.

The judgment overruling the demurrer is

Affirmed.

STATE v. BRADIE (BUSTER) FLOYD.

(Filed 10 December, 1941.)

1. Homicide § 27b: Criminal Law § 53c—Charge held for error in placing burden on defendant to prove his innocence.

In this homicide prosecution the court charged the jury that it might return a verdict of guilty of each of the three degrees of homicide, "or not guilty, as you may find the facts to be beyond a reasonable doubt." *Held:* The charge placed the burden upon defendant to prove his innocence beyond a reasonable doubt, and the charge must be held for prejudicial error notwithstanding that in other portions of the charge the court correctly instructed the jury upon the presumption of innocence and that the burden was on the State to prove defendant guilty beyond a reasonable doubt.

2. Criminal Law § 81c—

Where the court gives conflicting instructions on the burden of proof, one correct and the other erroneous, a new trial must be awarded, since it must be assumed on appeal that the jury was influenced by the incorrect portion of the charge.

APPEAL by defendant from *Williams, J.,* at April Term, 1941, of ROBESON.

Criminal prosecution upon indictment charging defendant with the murder of one Ollie Floyd.

Plea: Not guilty.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals therefrom and assigns error.

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

T. A. McNeill and George T. Deans for defendant, appellant.

WINBORNE, J. Assignment of error is well taken by defendant to the following portion of the charge given by the court to the jury on the trial below: "Now, in this case, gentlemen, I charge you, you may return a verdict of guilty of murder in the first degree, guilty of murder in the second degree, guilty of manslaughter, or not guilty, as you may find the facts to be beyond a reasonable doubt, applying thereto the law as contained in the instructions of the court," and repeated in substance near the close of the charge.

See *S. v. Patterson,* 212 N. C., 659, 194 S. E., 283, upon authority of which decision is here rested.

The instruction in the *Patterson case, supra,* is the same as that challenged here. There the Court, referring to quoted portion of the charge, said: ". . . the jury was instructed by the court that they could not return a verdict of 'Not guilty' unless they were satisfied beyond a reasonable doubt that he is not guilty. There was error in the instruction, and although the court had properly instructed the jury on other portions of its charge with respect to the burden of proof, we think in view of all the evidence in this case, this error was prejudicial to the defendant." So it is in the present case. The court in other portion of the charge correctly instructed the jury that defendant comes into court presumed to be innocent of the offense charged and that presumption goes with him throughout the trial and remains with him until the State produces evidence which satisfies the jury beyond a reasonable doubt of his guilt. Even so, we must assume in such case, in passing upon appropriate exception, that the jury, in coming to a verdict, was influenced by that portion of the charge which is incorrect. *S. v. Starnes, ante,* 384, and cases there cited.

No doubt the error is just "one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit," *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. See, also, *S. v. Starnes, supra.*

Nevertheless, it is error, for which defendant is entitled to a

New trial.

STATE v. FERRELL BEACHUM.

(Filed 10 December, 1941.)

1. Homicide § 16—Intentional killing with deadly weapon raises presumption of malice constituting crime murder in second degree.

Where an intentional slaying of a human being with a deadly weapon is admitted or adduced by the evidence, nothing else appearing, the law presumes malice, constituting the offense murder in the second degree,

and the burden is then upon defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the grade of the offense from murder in the second degree to manslaughter, or to excuse it altogether on the plea of self-defense.

2. Homicide § 27h—

Where the State introduces evidence that in a fight between defendant and deceased, defendant stabbed deceased with a knife, inflicting mortal injury, the court correctly submits to the jury the question of defendant's guilt of murder in the second degree under the presumption arising from an intentional killing with a deadly weapon, notwithstanding defendant's plea of self-defense.

3. Homicide § 31—

Where the jury returns a verdict of guilty of manslaughter, defendant has no just cause to complain that the court submitted to the jury the question of his guilt of murder in the second degree.

4. Criminal Law § 53f—

Exceptions to the refusal of the court to give special instructions requested are untenable when the court gives in substance all special instructions requested in so far as they are applicable to the evidence.

APPEAL by defendant from *Carr, J.*, at August Term, 1941, of SAMPSON. No error.

Indictment for murder. The State only asked for verdict of guilty of murder in second degree or manslaughter. The defendant pleaded self-defense. The verdict of the jury was guilty of manslaughter. From judgment imposing sentence the defendant appealed.

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

E. A. Hightower for defendant, appellant.

DEVIN, J. The defendant's principal assignment of error is predicated upon the refusal of the court below to charge the jury, as requested, that in no aspect of the testimony could the defendant be convicted of a higher offense than manslaughter. He contends that, while the verdict was manslaughter, the court's submission of the question of second degree murder, under the circumstances, was prejudicial.

The evidence pertinent to the matters involved in this appeal may be concisely stated as follows: The defendant and several companions were in an automobile being driven on a road leading to Godwin's Lake, about eleven o'clock at night. The deceased, a soldier from Fort Bragg, and two other soldiers were in an automobile following, the deceased driving. A previous altercation had occurred between occupants of the two cars. The automobile in which defendant was riding was driven off the road

and an attempt was made to turn it around, apparently to avoid being followed. The automobile of the deceased was then driven so as to block this movement. The defendant and another man got out of the first car, and the deceased and another soldier named Banks got out of the second car. Banks testified he was knocked down and became momentarily unconscious. When he regained his senses he saw deceased and defendant fighting. In the course of the encounter the defendant stabbed the deceased with a knife. The blade of the knife penetrated the heart, causing death. The defendant testified that he got out of the car to remove an obstruction so as to permit the car's being turned, and that while attempting to do so he was assaulted by two, knocked down and beaten with a stick, and that he struck in self-defense. Banks denied striking the defendant until after the deceased had been fatally stabbed.

Uniformly, since the crime of murder was by statute divided into two degrees, it has been held that the intentional slaying of a human being with a deadly weapon implies malice and, nothing else appearing, constitutes murder in the second degree, and that when this implication is raised by requisite proof or admission, it then becomes incumbent upon the defendant to show to the satisfaction of the jury, from all the evidence, facts and circumstances sufficient to reduce the grade of the offense from murder in the second degree to manslaughter, or to excuse it altogether on the plea of self-defense. *S. v. Fuller,* 114 N. C., 885, 19 S. E., 797; *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387; *S. v. Robinson,* 213 N. C., 273, 199 S. E., 163; *S. v. Sheek,* 219 N. C., 811, 15 S. E. (2d), 282. The ruling of the court below on this point, in accord with these principles, must be upheld. Furthermore, since the verdict was guilty of manslaughter, which the State's evidence fully warranted, we think the defendant has no just ground of complaint. *S. v. Blackwell,* 162 N. C., 672, 77 S. E., 1089.

Exceptions were also noted to the refusal of the court to charge the jury in accordance with numerous other prayers for instructions requested by defendant. However, upon examination of the charge as given, we find that these prayers, in so far as applicable, were substantially stated in a charge comprehensive and free from error. There was no exception to the charge as given.

In the trial we find

No error.

STATE v. CLAUDE HAYWORTH, ARCHIE FOWLER, AND HARFORD SMITH.

(Filed 10 December, 1941.)

Courts § 2a—

Where, at the time of issuance of *recordari* and *supersedeas*, defendants had already perfected their appeals from the judgment of the municipal court, the revocation of the writs by the judge of the Superior Court on the ground that they had been improvidently granted and that no harm could come to defendants from their revocation, is without error.

APPEAL by defendants from *Johnston, Special Judge,* at September Term, 1941, of GUILFORD.

Criminal prosecutions tried in the municipal court of the city of High Point on warrants charging the defendants with conspiracy to violate the prohibition laws and with violations of the prohibition laws. For convenience the cases were consolidated and tried together. From verdicts of guilty and judgments thereon, the defendants appealed to the Superior Court of Guilford County. They also applied for writs of *recordari* and *supersedeas,* which were granted, and later stricken out.

From the order revoking the writs of *recordari* and *supersedeas,* the defendants appeal, assigning errors.

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

C. R. McIver, Jr., for defendants.

PER CURIAM. It appears that at the time the writs of *recordari* and *supersedeas* were issued "to the end that the said action may be sent on for trial in the Superior Court of said County," the defendants had already perfected their appeals from the judgments rendered against them in the municipal court, and the said causes were then pending in the Superior Court of Guilford County for trial *de novo.* Hence, the judge concluded that the writs of *recordari* and *supersedeas* had been improvidently granted, and that no harm could come to the defendants from their revocation. The conclusion is supported by the record.

Affirmed.

STATE v. ROBERT STURDIVANT.

(Filed 10 December, 1941.)

Criminal Law § 80—

An appeal will be dismissed upon motion of the Attorney-General for failure of defendant to file a brief, Rule of Practice in the Supreme Court No. 28, but when defendant has been convicted of a capital felony this will be done only after a careful examination of the record fails to disclose material defect.

MOTION by State to dismiss appeal for failure to file brief.

Defendant was tried before *Burney, J.*, at the September Term, 1941, Superior Court of Bladen County, on bill of indictment charging him with the capital felony of murder of one Ida Mae Sturdivant. There was a verdict of guilty of murder in the first degree. Thereupon judgment that defendant suffer the penalty of death by asyphixiation, as provided by law, was entered. Defendant excepted and appealed.

Attorney-General McMullan for the State.

PER CURIAM. Defendant, having been permitted to appeal *in forma pauperis,* docketed in this Court typewritten record and case on appeal but he failed to file a brief. Thereupon the Attorney-General moved to dismiss under Rule No. 28. *In re Bailey,* 180 N. C., 30, 103 S. E., 896; *Comrs. v. Dickson,* 190 N. C., 330, 129 S. E., 814.

As is the custom with us in criminal causes involving the death penalty, before acting upon the motion of the Attorney-General, we have carefully examined the record. No material defect appears therein. We have likewise considered the exceptions appearing in the case on appeal. They are without merit. The motion to dismiss is allowed.

Judgment affirmed.

Appeal dismissed.

STATE v. BRANTLEY MOORE.

(Filed 10 December, 1941.)

Bastards § 3—

A warrant which fails to allege that defendant's failure or refusal to support his illegitimate child was willful does not charge the offense defined by ch. 228, Public Laws 1933, and cannot support a conviction.

APPEAL by defendant from *Parker, J.*, at April Term, 1941, of COLUMBUS. Error and remanded.

The defendant was charged with violation of ch. 228, Public Laws 1933, as amended, relating to the support of illegitimate children. The amended warrant charged that he "failed, refused and neglected to support and maintain said bastard child." Upon adverse verdict the defendant was sentenced to six months in jail. He appeals, assigning errors.

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

Clayton C. Holmes for defendant, appellant.

PER CURIAM. The warrant in this case, as it appears in the record, is in substantially the same form as that considered by this Court in *S. v. Clarke, ante,* 392. It fails to allege that the neglect or refusal to support the illegitimate child was willful. Apparently the careful judge who presided over the trial of this case understood that the word "willful" had been by amendment in apt time inserted in the warrant, as he correctly charged the jury in that view. However, on the record before us the omission was not supplied. Hence, under authority of *S. v. Clarke, supra,* the warrant must be held insufficient to support the judgment.

Error and remanded.

MRS. LOUISE NORRELL MALLARD v. F. M. BOHANNON, INC., EMPLOYER; AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 7 January, 1942.)

1. Master and Servant § 55d—

Where there is sufficient competent evidence to sustain a finding of the Industrial Commission, the admission of other evidence, even if incompetent, cannot be held prejudicial, since a finding supported by sufficient competent evidence is conclusive.

2. Same—

Under the Workmen's Compensation Act the Industrial Commission is given the duty and the exclusive authority to find facts relative to controverted claims, and, with the exception of jurisdictional facts, its findings supported by competent evidence are conclusive and binding upon the courts.

3. Master and Servant §§ 39c, 52b—

Where claimant establishes the jurisdictional facts that the contract of employment was made in this State, that the employer's place of business is in this State, and that the residence of the employee is within this State, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the State and thus bring themselves within the proviso of the Act. Michie's N. C. Code, 8081 (rr).

4. Master and Servant § 39c—

Whether a contract of employment is expressly for service exclusively outside the State is a question of fact for the determination of the Industrial Commission.

5. Same—Evidence held sufficient to support finding that contract of employment was not expressly for service exclusively outside the State.

The deceased employee was killed in an accident arising out of and in the course of his employment as a salesman in another state. Claimant introduced evidence that the contract of employment was made in this State, that the employer's place of business is herein, and that the employee was a resident of this State. The employer and the insurance carrier denied liability on the ground that the employment was expressly for service exclusively outside the State. The employer's assistant salesmanager testified that, subject to the approval of the home office, he could have changed the employee's territory at any time to North Carolina. *Held:* The testimony of the assistant salesmanager was competent and is sufficient to support the finding of the Industrial Commission that the contract of employment was not expressly for service exclusively outside the State and the award of compensation is upheld.

DEVIN, J., concurring.

BARNHILL, J., dissenting.

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

APPEAL by defendants from *Warlick, J.,* at September Term, 1941, of FORSYTH. Affirmed.

The hearing Commissioner, T. A. Wilson, Chairman, heard the evidence, found the facts and made an award to plaintiff. Upon application for review from the hearing Commissioner, the Full Commission rendered the following opinion and order:

"*Opinion for the Full Commission by Pat Kimzey, Commissioner.*

"This cause was reviewed by the Full Commission on April 16, 1941.

"Appearances: Charles J. Bloch, Attorney, 614-18 Georgia Casualty Building, Macon, Ga., for plaintiff. W. C. Ginter, Attorney, Charlotte, N. C., for defendants.

"This case came on for review and was heard by the Full Commission at Raleigh, North Carolina, on April 16, 1941.

"The Full Commission has carefully considered the briefs filed and the able arguments made by counsel for both plaintiff and defendants, and after so doing the Full Commission adopts as its own and in all

respects approves and affirms the findings of fact of Hearing Commissioner Wilson and makes the following additional

"*Findings of Fact:* A. That plaintiff's deceased sustained an injury by accident arising out of and in the course of his employment with the defendant employer resulting in his death while he was employed elsewhere than in the State of North Carolina. B. That the contract of employment of plaintiff's deceased and defendant employer was made in the State of North Carolina, and that the defendant employer's place of business is in the State of North Carolina. The Full Commission adopts as its own and in all respects approves and affirms the conclusions of law of the Hearing Commissioner and in addition thereto makes the following:

"*Conclusions of Law:*

"1. Section 36 (8081 [rr]) of the North Carolina Workmen's Compensation Act reads, in part, as follows: 'Where an accident happens while the employee is employed elsewhere than in this State which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; provided his contract of employment was not expressly for service exclusively outside of the State.'

"The only question in this case which is seriously controverted is whether or not the contract of employment of plaintiff's deceased was expressly for service exclusively outside of the State of North Carolina. The defendants contend that said contract of employment was expressly for service exclusively outside of the State; while the plaintiff contends that said contract was not expressly for service exclusively outside the State.

"The evidence adduced at the hearing tends to show that the plaintiff's deceased had worked exclusively outside the State of North Carolina since he had been employed by the defendant employer. This evidence further tends to show that plaintiff's deceased was originally employed to perform work which had been previously performed by another employee who worked exclusively outside the State of North Carolina. However, in the opinion of the Full Commission the fact that an employee worked exclusively outside the State of North Carolina, or that he filled the position which had previously been occupied by a person working exclusively outside the State of North Carolina, is not the test as to whether or not the North Carolina Industrial Commission has jurisdiction in cases of this nature. The clause pertaining to this matter as included in Section 36 is clear and reads as follows: '. . . provided his contract of employment was not expressly for service exclusively outside of the State.'

"The evidence adduced at the hearing, elicited from a defendants' witness, the sales manager for the defendant employer, tends to show that plaintiff's deceased was employed verbally to work for the defendant employer and that for the time being he was assigned to territory outside of the State of North Carolina, but that being a resident of North Carolina he was looking forward to performing that same type of work in the State of North Carolina, and had even gone so far as to state that he would like to work in North Carolina, and the defendant employer, through its Sales Manager, had at least intimated and implied to said plaintiff's deceased that he would be assigned a North Carolina territory when a vacancy occurred. Therefore, it appears from the evidence, meager though it may be, that the contract of employment between plaintiff's deceased and the defendant employer was not expressly for service exclusively outside the State of North Carolina.

"The defendants contend that this evidence is not competent, basing their contentions undoubtedly on paragraph 1795 of the North Carolina Code of 1939. However, in the case at bar this testimony was elicited from a witness for the defendants and was adverse to the interest of said defendants. Therefore, it is the opinion of the Full Commission that said testimony in the manner and form and under the circumstances it was adduced is competent. However, this appears to be more or less an academic question in this case if Section 36 of the Workmen's Compensation Act is closely examined.

"It is a well-established rule that, generally speaking, the burden is on the plaintiff to show by the preponderance of the evidence that he is entitled to compensation under the provisions of the Act. However, in reading Section 36, it is noticed that the requirements that the contract of employment was made in this State, the employer's place of business is in this State, and the residence of the employee is in this State are all affirmative requirements, and that therefore, the burden is placed upon the plaintiff to show that those requirements are met if the North Carolina Industrial Commission is to have jurisdiction in said case. However, the phrase or clause immediately following the affirmative requirements has the following verbiage: '. . . Provided his contract of employment was not expressly for service exclusively outside of the State.'

"This appears, therefore, to be a negative requirement following the affirmative provisions and it is the opinion of the Full Commission that the burden of showing by the greater weight of evidence that the contract of employment was not expressly for service exclusively outside the State of North Carolina would rest on the defendants, and therefore, that even if the record was absolutely silent as to this last negative phrase, that the plaintiff would be entitled to compensation if he had

met all of the affirmative provisions in this section. This thought and reasoning is at least implied in the case of *Reaves v. Mill Company*, 216 N. C., 462, in which *Justice Seawell* in writing the majority opinion states as follows:

" 'The North Carolina Workmen's Compensation Act, Chapter 120, Sec. 36, Public Laws of 1929, provides: "Where an accident happens while the employee is employed elsewhere than in this State, which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation if the contract of employment was made in this State, if the employer's place of business is in this State, and if the residence of the employee is in this State; . . ." In so far as it depends upon the statute alone, the jurisdiction of the Industrial Commission attaches only (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. All these circumstances must combine to give the jurisdiction.'

"It is noted that *Justice Seawell* in enumerating these jurisdictional provisions does not mention anything concerning the negative provisions in reference as to whether or not the contract of employment was not expressly for services exclusively outside the State. *Justice Clarkson* dissenting in the same case above quotes uses in connection with the conditions which would give the North Carolina Industrial Commission jurisdiction practically the same language as *Justice Seawell* on page 467 of N. C. 216.

"The defendants contend and cite the case of *Wilson v. Clement Co.*, 207 N. C., 541, as authority for their contentions that the hearing Commissioner should be reversed. The Full Commission can see very little, if any, connection between the two cases. The defendants further cite *Reaves v. Mill Co.*, 216 N. C., 462, as authority to support the contention that the North Carolina Industrial Commission does not have jurisdiction in the case at bar. This case does involve jurisdictional questions, but the Full Commission was reversed on entirely different conditions than those which arise in the case at bar. Therefore, the Full Commission concludes as a matter of law that the contract of employment of plaintiff's deceased was made in the State of North Carolina; that the employer's place of business was in the State of North Carolina; that the residence of the employee was in the State of North Carolina, and that said contract of employment was not expressly for service exclusively outside the State of North Carolina.

"Counsel for the plaintiff appearing before the Full Commission made a verbal motion that the plaintiff's attorney's fees for appearing before the Full Commission be taxed as a part of the costs against the defend-

ants under the provisions of Section 62 of the Workmen's Compensation Act. The Full Commission is of the opinion that the question of whether or not plaintiff's deceased in the case at bar was expressly employed to work exclusively outside the State of North Carolina is a debatable one, and the question is one which under the same circumstances of this case has neither been decided by the Full Commission nor the Courts of North Carolina and, therefore, that the defendants should not be penalized by asking that said case be reviewed by the Full Commission. Therefore, plaintiff's motion that the attorney's fees for appearing before the Full Commission be taxed as a part of the costs against the defendants is denied.

"*Award:* The Full Commission adopts as its own and in all respects approves and affirms the award of hearing Commissioner Wilson. The defendants will pay all hearing costs. Pat Kimzey, Commissioner. Examined and approved: T. A. Wilson, Chairman, Buren Jurney, Commissioner—4/29/41. Certified copy: J. S. Massenburg, Secretary."

"An appeal having been taken in the above entitled cause by the defendants, through their attorney, W. C. Ginter, the case having been heard by the North Carolina Industrial Commission, and in pursuance of the certificate of J. S. Massenburg, Secretary of the North Carolina Industrial Commission, under date of June 2, 1941, said defendants hereby file the said certificate and attached transcript of evidence and complete record in accordance with the statute, and request that the same be docketed for trial in the Superior Court of Forsyth County in accordance with the law. This the 4th day of June, 1941. F. M. Bohannon, Inc., and Maryland Casualty Company. By: W. C. Ginter, Attorney for Defendants."

The judgment of the Superior Court is as follows: "This cause being heard in due course, at the September 1941 Term of the Court, on the appeal of the defendants from an Award of the North Carolina Industrial Commission in favor of the Claimant, Mrs. Louise Norrell Mallard, and after hearing arguments of counsel for the Claimant and of counsel for the defendant insurance carrier, and the Court being of the opinion that the award of the North Carolina Industrial Commission in favor of the Claimant should be in all respects affirmed: It is, Therefore, Ordered, Adjudged and Decreed that the award of the North Carolina Industrial Commission is in all respects affirmed, said award being that the defendants pay to the Claimant, Mrs. Louise Norrell Mallard, compensation at the rate of $18.00 per week, beginning as of September 26, 1940, and continuing until $6,000 is paid, less $200.00 burial expense, which shall be paid to the proper parties and that the defendants pay the medical expenses, if any were incurred, and the costs of the hearing before the North Carolina Industrial Commission. It is Further Or-

dered that the costs of this appeal be taxed against the defendants. Wilson Warlick, Judge Presiding."

To the foregoing judgment and the signing of the same, the defendants, and each of them, in open court, excepted, assigned error, and appealed to the Supreme Court of North Carolina.

Hall & Bloch and Roy L. Deal for plaintiff.

W. C. Ginter, H. Bryce Parker, and L. B. Carpenter for defendants.

CLARKSON, J. The defendants excepted and assigned as error: "That the Court erred in its findings of fact and conclusions of law in signing the judgment, as appears of record." We cannot so hold.

The other exceptions and assignments of error, as to the incompetency of evidence, cannot be sustained. If error, it was not prejudicial. There was sufficient competent evidence to sustain the finding of the Industrial Commission and the conclusions of law we think are correct.

In *Buchanan v. Highway Com.*, 217 N. C., 173 (174-5), *Devin, J.*, for the Court, says: "Under the North Carolina Workmen's Compensation Act, dealing with the matter of compensation for injuries due to the hazards of industry, both the duty and the exclusive authority to find the facts relative to controverted claims are vested in the Industrial Commission, and it is provided by section 60 of the Act that upon review the award of the Commission shall be conclusive and binding as to all questions of fact. In accord with this statutory provision it has been uniformly held by this Court that, when supported by competent evidence, the findings of fact by the Industrial Commission are conclusive on appeal, and are not subject to review by the Superior Court or the Supreme Court. . . . (citing authorities). The only exception to this rule is where the jurisdiction of the Industrial Commission is challenged. . . . (citing authorities). The powers of the Superior Court with reference to appeals from the Industrial Commission are pointed out in *Tindall v. Furniture Co.*, 216 N. C., 306" (citing authorities).

Section 36 of the Workmen's Compensation Act (Consolidated Statutes, 8081 [rr]), provides: "Where an accident happens while the employee is employed elsewhere than in this State, which would entitle him or his dependents to compensation if it had happened in this State, the employee or his dependents shall be entitled to compensation, (a) if the contract of employment was made in this State, (b) if the employer's place of business is in this State, and (c) if the residence of the employee is in this State; *provided his contract of employment* was not expressly for service exclusively outside of the State." (Letters inserted—italics ours.)

As is admitted in the second paragraph on page 2 of appellants' brief, the three conditions set forth in Section 36 above quoted are met by

claimant in this case: (a) the contract of employment was made in North Carolina; (b) the employer's place of business is in North Carolina; and (c) the residence of the employee was in North Carolina.

In *Reaves v. Mill Co.,* 216 N. C., 462 (465), this Court stated: "In so far as it depends upon the statute alone, the jurisdiction of the Industrial Commission attaches only (a) if the contract of employment was made in this State; (b) if the employer's place of business is in this State; and (c) if the residence of the employee is in this State. All these circumstances must combine to give the jurisdiction." *Brooks v. Carolina Rim & Wheel Co.,* 213 N. C., 518.

In 71 Corpus Juris, sec. 724, in part, at p. 960, it is said: "Where the Act extends the jurisdiction of the Commission to injuries suffered outside the State under a contract of employment made in the State, unless the contract otherwise provides, the Commission has jurisdiction of an injury incurred outside the State where the contract of employment was made in the State and it appears that there was acceptance of the terms of the Act by the parties."

The finding of the Industrial Commission that from the competent evidence the plaintiff was entitled to recover, bring up, we think, the only serious question.

The proviso to the Act is: "Provided his contract of employment was not *expressly* for service *exclusively* outside of the State." The burden is on the defendants to bring themselves within the proviso.

In *S. v. Davis,* 214 N. C., 787 (793), it is written: "It has long been settled in this State that although the burden of establishing the *corpus delicti* is upon the State, when defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matter is upon the defendant. *S. v. Arnold,* 35 N. C., 184; *S. v. McNair,* 93 N. C., 628; *S. v. Buchanan,* 130 N. C., 660; *S. v. Smith,* 157 N. C., 578. In discussing this phase of the law in *S. v. Connor,* 142 N. C., 700, *Hoke, J.,* says: 'It is well established that when a statute creates a substantive criminal offense, the description of the same being complete and definite, and by a subsequent clause, either in the same or some other section, or by another statute, a certain case or class of cases is withdrawn or excepted from its provisions, these excepted cases need not be negatived in the indictment, nor is proof required to be made in the first instance on the part of the prosecution. . . . In such circumstances, a defendant charged with the crime who seeks protection by reason of the exception, has the burden of proving that he comes within the same. *S. v. Heaton,* 81 N. C., 543; *S. v. Goulden,* 134 N. C., 743,' " citing many authorities. *S. v. Carpenter,* 215 N. C., 635 (639).

In *Haywood v. Ins. Co.*, 218 N. C., 736, we find: "The defendant's denial placed the burden on the plaintiff to prove his case by the greater weight of the evidence, and it was error for the trial judge to direct a verdict in favor of the plaintiff without leaving it to the jury to determine the credibility of the testimony. McIntosh, Practice & Procedure, 632. 'A familiar principle of practice forbids a directed instruction in favor of the party upon whom rests the burden of proof,'" citing many authorities.

In *Jones v. Waldroup,* 217 N. C., 178 (189), it is said: "But the burden is upon one who asserts an affirmative plea to establish it by appropriate proof. *Benner v. Phipps, supra* (214 N. C., 14); *Everett v. Mortgage Co., supra* (214 N. C., 778); *Mitchell v. Whitlock,* 121 N. C., 166, 28 S. E., 292; *Mayo v. Jones,* 78 N. C., 402."

The determination of the question of fact, whether "his contract of employment was not *expressly* for service *exclusively* outside of the State," was for the Industrial Commission—the fact-finding body.

Plaintiff's deceased, E. L. Mallard, was an employee of defendant, F. M. Bohannon, Inc. Its place of business was in North Carolina. E. L. Mallard and his wife had their domicile in North Carolina, and the contract of employment, which was oral, was made in North Carolina. F. M. Bohannon, Inc., had accepted the provisions of the Compensation Act and the Maryland Casualty Company was the carrier. Mallard met his death on 26 September, 1940, as the result of an accident arising out of and in the course of his employment. This made out a *prima facie* case. It was for the Industrial Commission to determine whether the defendants' evidence rebutted the *prima facie* case.

T. R. Thornton, then assistant sales manager, now sales manager of F. M. Bohannon, Inc., employed Mallard. He was a witness for defendants and testified: "Q. Mr. Thornton, the territory assigned to him (Mallard) was South Georgia and parts of North Florida? Ans.: Yes, sir. Q. He was subject to change of territory at any time the company decided it was to the company's best interest to change him, wasn't he? Ans.: Yes, sir. . . . Q. And he was subject to change of territory at any time that the F. M. Bohannon Company, Inc., or you as Mr. Mallard's superior officer, decided it was to the best interest of the company to change his territory? Ans.: Yes, sir. . . . I am Sales Manager for everything we have. I travel all the states we work." Thornton could have placed Mallard in North Carolina. F. M. Bohannon, Inc., had employees in North Carolina whose duties were similar to those of Mallard. Thornton testified further: "Q. You'd have the right to tell Mr. Mallard you wanted him to go to North Carolina or Virginia, subject to the home office's approval? Ans.: With the permission of the home office, yes, sir."

The inference is permissible that the home office would do what Thornton recommended, as he had employed Mallard and was high in authority. We think all this evidence competent on the question involved in the proviso. The Commission had sufficient competent evidence to find the facts, this is not our province to weigh and determine the facts. There are different statutes in different states and the decisions, on that account, can be of little help. In order to avoid liability, under the facts of this case, the insurance carrier would have had to prove that Mallard's contract of employment was *expressly* for services *exclusively* outside the State. The evidence is sufficient to support a contrary conclusion. It is shown by the evidence that under the contract of employment, the employer could have moved plaintiff's deceased, E. L. Mallard, at any time to any place in Thornton's territory, which territory embraced the State of North Carolina.

The arguments and briefs of the litigants were able and thorough, and covered every aspect of the case; but on the record we think the judgment of the court below should be

Affirmed.

DEVIN, J., concurring: It was admitted that the injury by accident resulting in the death of Mallard arose out of and in the course of his employment by the defendant, and that the contract for his employment was made in North Carolina, and that the place of business of the employer and the residence of the employee were also in this State. Hence, the award of compensation under the Workmen's Compensation Act must be upheld, unless the defendants can invoke the protection of the proviso under sec. 36 of the Act: "Provided his contract of employment was not expressly for services exclusively outside of the State." As to this the burden of proof was on the defendant. Unless they can show that the evidence in support of their contention is all one way, and that there are no permissible inferences of fact to the contrary, the findings of the Industrial Commission must be held conclusive, and judgment below affirmed. While the evidence tends to show that Mallard was assigned territory outside of the State, and that he was there employed continuously until his death, it also appears that under the oral contract of employment the territory assigned could be changed at any time, if the defendant employer saw fit, and that without changing the terms of the contract he could have been placed in North Carolina. Hence, it would seem that the contract of employment was "not expressly for services exclusively outside of the State."

BARNHILL, J., dissenting: Ordinarily, a State statute has no extra-territorial application or effect. Sec. 36 of ch. 120, Public Laws 1929,

was included in the Act to meet this limitation in so far as it applies to employees working both within and without the State, and so as to permit compensation when such employee is injured while engaged in work in another state. That is, this provision was inserted for the protection of North Carolina employees who are injured while engaged in the performance of their duties elsewhere than in this State. It does not protect employees whose duties are performed entirely outside the bounds of North Carolina.

The injured employee, or in case of death, his dependents, must show that the injury or death is compensable under the terms of the Act. When the employee is about his master's business elsewhere than in this State injury or death is not compensable unless the employment "was not expressly for services exclusively outside of the State." The proviso is not negative. It imposes a condition, the section as a whole constituting an exception to the general rule and stipulating the conditions upon which compensation is payable. Hence, the Commission erred in its conclusion that the burden was on defendants and that "even if the record was silent as to this last negative phrase, that the plaintiff would be entitled to compensation if he had met all of the affirmative provisions of this section."

When it was made to appear that (1) the contract of employment was made in this State; (2) the employer's place of business is in this State; and (3) the residence of the employee is in this State, the conditions upon which the jurisdiction of the Industrial Commission depends were met. *Reaves v. Mill Co.*, 216 N. C., 462, 5 S. E. (2d), 305. These and other jurisdictional facts are admitted. Whether the death of the employee is compensable then became an issue of fact for the Commission to decide. On this record the answer depends upon a preliminary finding as to whether the contract of employment was or was not expressly for services exclusively outside the State.

On this issue the Commission found "that the plaintiff's deceased sustained an injury by accident arising out of and in the course of his employment with the defendant Employer, resulting in his death, while he was employed elsewhere than in the State of North Carolina."

Upon this finding it made the further finding as a conclusion of law that:

"The evidence adduced at the hearing tends to show that the plaintiff's deceased had worked exclusively outside the State of North Carolina since he had been employed by the defendant employer. This evidence further tends to show that plaintiff's deceased was originally employed to perform work which had been previously performed by another employee who worked exclusively outside the State of North Carolina. However, in the opinion of the Full Commission the fact that an employee worked exclusively outside the State of North Carolina is not the

test as to whether or not the North Carolina Industrial Commission has jurisdiction in cases of this nature. The clause pertaining to this matter as included in Section 36 is clear and reads as follows: (Quoting the proviso in said section.)

"The evidence adduced at the hearing, elicitated from a defendant's witness, the sales manager for the defendant employer, tends to show that plaintiff's deceased was employed verbally to work for the defendant employer and that for the time being he was assigned to territory outside of the State of North Carolina, but that being a resident of North Carolina he was looking forward to performing that same type of work in the State of North Carolina, and had even gone so far as to state that he would like to work in North Carolina, and the defendant employer, through its Sales Manager, had at least intimated and implied to said plaintiff's deceased that he would be assigned a North Carolina territory when a vacancy occurred. Therefore, it appears from the evidence, meager though it may be, that the contract of employment between plaintiff's deceased and the defendant employer was not expressly for service exclusively outside the State of North Carolina."

The circumstances under which plaintiff's deceased was employed are clear. The sales agent of defendant who was assigned certain territory in south Georgia and northern Florida died. Mallard, a resident of North Carolina, was then living in Georgia and unemployed. The sales manager of the defendant, on the solicitation of others, contacted him and, after obtaining the approval of the home office, employed him.

The terms of the contract of employment are simple and unambiguous. Mallard was to be assigned to the same territory in south Georgia and north Florida formerly worked by the deceased agent. He was to sell defendant's products within that territory and was to be paid upon a salary and commission basis. He sought and obtained employment—not as a general employee but as an agent or representative within specific limited territory.

Neither the fact "that he was looking forward to performing the same type of work in the State of North Carolina and had even gone so far as to state that he would like to work in North Carolina" nor the fact that the sales manager—his superior officer—"had intimated and implied that he would be assigned to North Carolina territory in the event of a vacancy" tends to modify the contract. They not only make it appear that it was not "written in the bond" that he was subject to transfer at will without notice, but emphasize and compel the conclusion that it was expressly agreed that he was to work exclusively within the territory assigned. Else why hope for or seek the promise of a transfer in the future?

The statement of the sales manager that he could transfer Mallard to other territory in the event of a vacancy and provided the home office

consented merely constitutes his interpretation of his rights under the contract. He does not say that such condition was imposed at the time of the hiring or that the employee assented thereto. No change could be made except by and with the consent of the home office and then only in the event of a vacancy. These were, under his statement, conditions precedent to a transfer.

Thus the contract was expressly for services *exclusively outside* of the State of North Carolina.

Having been assigned definite territory elsewhere he was not a North Carolina employee. *Dunville v. Industrial Commission,* 279 N. W., 695 (Wis.); *Sherk v. Dept. of Labor & Industries,* 65 Pac. (2d), 1269 (Wash.); *Lutz v. State Workers Ins. Fund,* 188 Atl., 364 (Pa.); *Sou. Underwriters v. Gallagher,* 136 S. W. (2d), 590 (Tex.). Under the terms of the contract he had no authority to go elsewhere than in the territory assigned to sell defendant's products and he could not have done so without invading the right of some other agent and causing defendant to breach its contract with the agent to whom such other territory had been assigned.

No particular or rule-of-thumb expression is required to make a contract "expressly" for services outside North Carolina. All that is necessary is for it to be made to appear from the terms of the contract that it was mutually understood and agreed that the employee's duties were to be performed in their entirety elsewhere than in this State.

Under the contract of employment the deceased was a local agent. *Navy Gas & Supply Co. v. Schoech,* 98 Pac. (2d), 860 (Cal.); *White Co. v. Farley & Co.,* 292 S. W., 472 (Ky.); 52 A. L. R., 541; *Lutz v. State Workers Ins. Fund, supra.* His authority as such was limited by and his duties were to be performed exclusively within specified territory located entirely outside this State. He could act for and in behalf of his employer within the scope of his authority only in south Georgia and north Florida. Thus, his agency was circumscribed by territorial limitations. Outside the area assigned to him he had no duties to perform or no right to act as agent in furtherance of defendant's business. Hence, it affirmatively appears that the employment was *expressly* for services exclusively outside the State. *Lederer Specialty Co. v. Chapman,* 152 N. E., 872 (Ind.). See also *Martin v. Kennecott Copper Corp.,* 252 Fed., 207; *Dunville v. Industrial Commission, supra; Sherk v. Dept. of Labor & Industries, supra; Lutz v. State Workers Ins. Fund, supra; Sou. Underwriters v. Gallagher, supra.*

In the *Chapman case, supra,* the facts are substantially the same. There the Court said "this contract assigning Georgia territory was, by its express terms, to be performed in its entirety without the State of Indiana and in the State of Georgia."

The General Assembly was without authority to legislate in respect to this employee and it is apparent to my mind that it did not undertake to do so. "There is no doubt that a contract made within the State of New York for services to be performed wholly in a sister State is wholly without the police power of the State of New York and does not give a right to compensation under our Workmen's Compensation Law." *Perlis v. Lederer,* 178 N. Y. Supp., 449; *Post v. Burger & Gohlke,* 216 N. Y., 544, 111 N. E., 351; *Smith v. Heine Safety Boiler Co.,* 224 N. Y., 9, 119 N. E., 878.

The Court should take judicial notice of whatever is or ought to be generally known within the limits of their jurisdiction. *S. v. Vick,* 213 N. C., 235, 195 S. E., 779, 15 R. C. L., 1057. Applying this principle, we know that, in this day of complex business conducted by large corporations engaged in the business of selling merchandise to wholesalers and retailers over extended territory, such territory is divided into districts in charge of district sales managers; that such districts are still again subdivided into smaller sections or territories to each of which is assigned a salesman; and that each salesman works only within the territory assigned to him to the exclusion of others. His authority as agent begins and ends at the boundary line of his territory. This is true particularly when compensation is in whole or in part on a commission basis.

When the contract under consideration is viewed in the light of these known prevailing customs and conditions under and in contemplation of which it was made we, in my opinion, cannot come to any conclusion other than that the claimant has failed to bring herself within the provisions of Section 36 of the Workmen's Compensation Act.

The case comes to this: claimant's deceased was employed to represent defendant as its local sales agent in designated territory wholly outside North Carolina. He worked within that territory exclusively until his death—a period of approximately three years. He could not be transferred to other territory by his superior except by the express permission of the home office and then only in the event of a vacancy. He was working on a salary and commission basis. Soon after entering upon his employment he expressed a desire to be transferred to North Carolina. His superior officer intimated that he would give his request consideration in the event of a vacancy. The Commission concluded that this "desire" and "intimation" so modified the contract as to subject the employee to transfer at will—thus constituting him a North Carolina employee. The Superior Court affirmed and the majority opinion approves. I am compelled to disagree. In my opinion we should reverse.

Even if we concede that the contract and the evidence offered present a question of fact the cause should be remanded.

The Commission states that it considered the evidence very meager. Upon this evidence it reached its conclusion under the apprehension that the burden was on the defendant. It should be required to review its findings and conclusions under correct principles of law as to the burden of proof. In that event, in all probability, it would find the "meager" evidence wholly insufficient to support an award.

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

MRS. EUDORA VIRGINIA TOCCI AND HUSBAND, GEORGE TOCCI, v. MRS. J. NOWFALL AND HUSBAND, JOHN NOWFALL.

(Filed 7 January, 1942.)

1. Trusts § 6—

A deed executed by a trustee which holds the naked legal title with the sole power to convey and which has no interest in the property other than the power of disposition, will operate as an exercise of the power notwithstanding that the trustee's deed does not recite that it is a "trustee" and makes no reference to the power, since the execution of the warranty deed, which would otherwise be ineffective, is sufficient *indicium* of the trustee's intent to exercise the power.

2. Same—

A deed will operate as an exercise of a power of disposition notwithstanding its failure on its face to indicate the existence of such power when the intention of the grantor to exercise the power can be inferred from the circumstances surrounding the transaction, or even from matters *in pais*.

3. Same—

A corporation was conveyed certain lands as trustee with naked power of disposition. The description in the deed referred to a registered map. The corporation had no other interest in the property. It conveyed one of the lots included in the *locus in quo* by deed which did not designate its capacity as that of "trustee" and which made no reference to the power, but which included in its description a reference to the registered map. *Held:* The corporation's deed constitutes an exercise of the power of disposition.

4. Same—

The rule that a deed executed by a trustee having a naked power of disposition and no other interest in the property, will operate as an exercise of the power of disposition notwithstanding the failure of the deed to designate the grantor as "trustee" prevails not only as between the parties but also as to those holding by *mesne* conveyances from the grantee, since the trustee's deed is effective as a conveyance of title and not merely as an estoppel.

5. Registration § 2—

The indexing of an instrument is an essential part of its registration, but the function of the index is to point to the book and page where the recorded instrument may be found, and it is the instrument itself, thus pointed out, which gives the notice. C. S., 3309.

6. Same—

An index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found.

7. Same: Trusts § 6—Exercise of power of disposition held good under registration laws notwithstanding that index failed to designate that the grantor's capacity was that of trustee.

A trustee having a naked power of disposition and no other interest in the property, executed deed which failed to designate that its capacity was that of trustee. The deed was indexed and cross-indexed in its corporate name without indication that it was a trustee, but reference to the deed would have disclosed that the property conveyed was the same which had been conveyed to the corporation in trust, there being a reference in the description to the same registered map to which reference was made in the deed to the corporation. *Held:* The index of the deed was sufficient to put a reasonable examiner upon inquiry which would have disclosed that the corporation was conveying property held by it in trust, and therefore the registration of the deed was sufficient, and the holder of the land by *mesne* conveyances from the grantee therein has title as against a subsequent purchaser from the corporation of the same lot notwithstanding that the subsequent purchaser's deed from the corporation properly designated the corporation a "trustee" and was so indexed.

STACY, C. J., dissenting.

BARNHILL and WINBORNE, JJ., concur in dissent.

APPEAL by plaintiffs from *Hamilton, Special Judge,* at March Term, 1941, of MECKLENBURG.

The Industrial Realty Company, a North Carolina corporation, was granted a charter on 15 December, 1924, and amongst other things had power to engage generally in the real estate business. Some time thereafter in a deed filed for registration on 15 May, 1925, G. A. Marsh and wife conveyed to "Industrial Realty Company, a Corporation, as Trustee," a large number of lots, including the lot which is the subject of this controversy. The *habendum* clause and succeeding clause are as follows:

"TO HAVE AND TO HOLD the aforesaid lots of land, together with all the privileges and appurtenances thereunto belonging, to the party of the second part, as trustee, its successors and assigns, upon the trusts and for the uses and purposes following and none other, that is to say:

"The party of the second part shall have, and is hereby granted the power, in its own name, to dispose of all or any part of the said lots from time to time hereafter, and to execute and deliver to purchasers good and sufficient deed, with full covenants and warranties; . . ."

Thereafter, by deed filed for record 5 September, 1925, Industrial Realty Company conveyed the *locus in quo* to T. A. Ratcliffe and wife. In this deed the word "trustee" does not appear, and it is not executed or acknowledged as trustee, but it contains full covenants and warranties and purports to convey the lot in fee simple. It is not contended that Industrial Realty Company had any interest in or title to the lot other than that passed by the Marsh deed. Plaintiffs acquired the lot by *mesne* conveyances and are now the owners thereof in fee simple, subject only to the claim of the defendants as involved in this litigation.

Thereafter, by deed recorded 26 May, 1926, the Industrial Realty Company, notwithstanding the previous conveyance of the lot to Ratcliffe and wife, again conveyed the same lot to Mrs. J. Nowfall, the defendant. In this deed the word "trustee" appears after the name of "Industrial Realty Company," and there is a reference to the lot as being the same lot conveyed by G. A. Marsh and wife by deed duly recorded. This deed contained full warranties, was executed "Industrial Realty Company, Trustees," and so acknowledged.

In the latter part of 1940, the plaintiffs, attempting to borrow money to build on the lot, discovered for the first time that defendant, Mrs. Nowfall, claimed the lot. Both plaintiffs and defendant have paid taxes on the lot since 1926. Neither has been in occupancy.

Plaintiffs brought this action under C. S., 1745, to quiet title to the property and remove the cloud cast upon it by the claim of defendants. The matter was heard before Special Judge Hamilton at March Extra Term of Mecklenburg Superior Court, and from a judgment of nonsuit plaintiffs appealed. The exception is to the signing and entry of the judgment of nonsuit, and no other question is involved in the appeal.

Taliaferro & Clarkson for plaintiffs, appellants.
James L. DeLaney for defendants, appellees.

SEAWELL, J. The question before the Court is clear cut: Was the conveyance by Industrial Realty Company to T. A. Ratcliffe and wife effectual in conveying the title to the lot in controversy, notwithstanding the omission of the word "trustee" in any part of it, as against the subsequent deed made by the corporation to Mrs. Nowfall for the same lot, executed and acknowledged as "trustee"? Strictly speaking, the only question is as to the validity and effectiveness of the deed to Ratcliffe and wife in passing title to the property.

On the various phases of the underlying subject—that is, the exercise of the power contained in a will or deed—much has been written. The tendency to get away from the more technical rules, which would in many instances destroy the attempted execution of the power, and apply

more liberal rules which would sustain it, has been constant and marked. This tendency is noted with approval in *Matthews v. Griffin,* 187 N. C., 599, 601, 122 S. E., 465, 466, in which *Justice Hoke,* speaking for the Court, says: "While some of the earlier decisions were more strict in their requirements that in order to the validity of instruments executed by persons having a power of appointment, express reference to the power should be made, a more liberal rule prevails in the later and authoritative cases on the subject, and it is now generally accepted that the question is largely one of intent, and the instrument will be upheld as a valid execution of the power where, on its entire perusal, the intent to exercise the power can be plainly inferred, and that pertinent facts *in pais* may be resorted to in aid of such interpretation. . . ." In *Blagge v. Miles,* 1 Story, 426, Fed. Cas. No. 1,479, *Judge Story* lays down the following rules as comprehending a sufficient execution of the power: "Three classes of cases have been held to be sufficient demonstrations of an intended execution of power: (1) Where there has been some reference in the will or other instrument to the power; (2) or a reference to the property which is the subject on which it is to be executed; (3) or where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual or a mere nullity—in other words, it would have no operation, except as an execution of the power." This is adopted by our Court in *Carraway v. Moseley,* 152 N. C., 351, 67 S. E., 765, *in ipsissimis verbis,* and numerous authorities are cited in support of the position. In *Henriott v. Cood,* 153 Ky., 418, 155 S. W., 761, in which the foregoing opinion of *Judge Story* is quoted, the Court, speaking directly to the point at issue, said: "It is insisted that the deed of 1876 from Dr. Bullitt and Mrs. Bate to Mrs. Cood was ineffectual, because it did not name Dr. Bullitt as trustee, and there being nothing in the deed to indicate that it was made in the execution of the power vested in him under the deed of 1867. The deed from Dr. Bullitt to Mrs. Cood makes no mention of the power of sale, or of the capacity in which Dr. Bullitt executed the deed. This, however, is not necessary, since the rule that if the instrument executed would be ineffectual or a mere nullity, except it be an execution of the power, then it is a good execution of the power."

There is a sufficient reference in plaintiff's deed to identify the property as that covered by the power, since in the Marsh deed to the Industrial Realty Company it is described by reference to the recorded map of Westview, and as "Lots 1 through 13 inclusive, in Block 2"; and the deed of the company to Ratcliffe describes the lot as "Being Lot No. 4 of Block No. 2, Westview, a map of which is duly recorded in Map Book 3, page 171, in the office of the Register of Deeds for Mecklenburg County."

Authorities seem to be in agreement that where the donee of the power has no interest in the property conveyed, and the deed would otherwise

be ineffectual, it will operate as an execution of the power. This comes under the third rule laid down by *Judge Story* in *Blagge v. Miles, supra,* and the principle has been repeatedly approved in leading cases here and elsewhere.

In *Exum v. Baker,* 118 N. C., 545, 24 S. E., 351, a commissioner omitted the word "commissioner" after his name in the execution of a deed, although that word appeared in the body of the instrument. But decision does not turn upon the presence of this word in the instrument. Said the Court: "When the donee of a power to sell has an interest of his own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction is that he intends to convey only what he might rightfully convey without the power. *Towles v. Fisher,* 77 N. C., 437, and the authorities cited by counsel in that case. 4 Kent, 334, 335. When, however, the donee has no interest in the subject of the conveyance, but only a naked power, as in the case before us, then the intent apparent upon the face of the instrument to sell would be deemed a sufficient reference to the power to make the instrument an execution of it, as the words of the instrument could not be otherwise satisfied. *Siler v. Ward,* 4 N. C., 161."

The reference to "intent apparent upon the face of the instrument to sell" is explained by reference to 1 Sugden on Powers, 460, quoted by *Brown, J.,* in the opinion of the Court in *Kirkman v. Wadsworth,* 137 N. C., 453, 49 S. E., 962, as follows: "An intent apparent upon the face of the instrument to dispose of all of the estate is deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not be otherwise satisfied." This is expressed in *Bank Commissioner v. Theatres, Inc.,* 210 N. C., 346, 348, 186 S. E., 345, 346, as follows: "The intent to convey in exercise of the power is manifest from the execution of a deed in fee simple with full covenants of warranty." *Matthews v. Griffin, supra,* is cited and quoted with approval.

In *Kirkman v. Wadsworth, supra, Brown, J.,* speaking for the Court, says: "Caroline Merkell has no interest or estate whatever in the property conveyed to Mitchell, except what was given her in the deed creating the power. Having no estate whatever in herself that can satisfy the terms of that deed, when she and her husband and trustee executed it, for a valuable consideration in fee and with full warranty, she manifested a most unmistakable purpose to convey under the power given her, and to its full extent."

The nub of the matter is struck by the comprehensive statement in Tiedeman on Real Property, p. 569: "The courts have of late years so far relaxed the rule as to construe the instrument to be, by necessary intendment, a good execution of the power, if it cannot operate in any

other way, notwithstanding the deed or will purports to dispose only of individual property of the donee." Of course, if the deed had any internal reference to a power, or representative capacity of the grantor, or was signed as "trustee," it would not "purport to dispose only of individual property of the donee"—that is, the grantor of the property, and the reference is obviously to a deed where all these *indicia* of the execution of a power are absent, adopting the common sense view that the conveyance was by virtue of the only power the grantee had to make it, and could operate in no other way.

In all of the cited cases, and hundreds of others of similar import, the point at issue is whether the conveyance under review was actually made in execution of the power where nothing on its face indicated the existence of such power. The determination of that question has been referred to the intent of the grantor in numerous cases which we recognize as controlling, *Taylor v. Eatman,* 92 N. C., 601; *Exum v. Baker, supra; Denson v. Creamery,* 191 N. C., 198, 203, 131 S. E., 581, 583; *Thomas v. Wright,* 66 S. W., 993, 23 Ky. L. Rep., 2183; *Henriott v. Cood, supra; McCormick v. Security Trust Co.,* 184 Ky., 25, 211 S. W., 196; *Greenway v. White,* 196 Ky., 745, 246 S. W., 137; Tiffany, Law of Real Property, 3rd Ed., sec. 699, and it is uniformly held that such intent may be inferred from the circumstances surrounding the transaction, 31 Cyc., 1122; *Johnston v. Knight,* 117 N. C., 122, 23 S. E., 92; *Kirkman v. Wadsworth, supra; Thomas v. Wright, supra,* and even from matters *in pais, Matthews v. Griffin, supra.* As early as 1790, *Judge Seawell,* speaking for the Court in *Hendricks v. Mendenhall,* 4 N. C., 371, 374, gave the following expression to this principle: ". . . though the *form* of executing may not suggest the execution of a power, yet the *purpose* of the act done can only be explained by resorting to the power; and the maxim is, that it is immaterial whether the intention be collected from the *words* used or the *acts* done. *Quia non refert aut quis intentionem suam declaret, verbis, aut rebus ipsis vel factis.*" There are two circumstances here which point inevitably to the intention to execute the power conferred in the Marsh deed: the lot was the same, by reference in the deed itself, as that conveyed in the Marsh deed creating the power; and the Industrial Realty Company had no interest in it, but only the naked power to convey. We think the conclusion is inescapable that the Ratcliffe deed was made in the intended execution of the power theretofore conferred, and we are of opinion that justice does not require us to defeat that purpose by the interposition of technicalities long ago discarded.

The suggestion that a deed of this kind is good only *inter partes* is contrary to the decisions here and elsewhere dealing with the subject. Also, in the very full discussion of the force and effectiveness of deeds

in execution of powers and naked trusts, we find no instance in which a deed of this character has been so restricted. Uniformly they are given an equal rank with other valid conveyances of title and are protected as a muniment of title in the hands of one who holds by *mesne* conveyances therefrom. In *Kirkman v. Wadsworth, supra,* the suit was between parties who, as here, held by *mesne* conveyances from a common source. A similar situation is found in *Taylor v. Eatman, supra; Exum v. Baker, supra; Carraway v. Moseley, supra;* so in *Henriott v. Cood, supra;* and in *Blagge v. Miles, supra.* The conveyance does not work by estoppel but by conveyance of the title and there is nothing about such a deed *per se* that would prevent the effective transmission of the title so acquired to other holders.

We must therefore assume that the objection advanced relates solely to the theory that the deed, because of the mode of its execution, is not capable of being registered so that the index may show that it was executed as the act of a trustee. See cases *supra.*

There was no suggestion in the oral argument or in the briefs which have been filed with us that the deed of Industrial Realty Company to T. A. Ratcliffe and wife might not be capable of registration so as to give notice, although a valid exercise of the power contained in the Marsh deed. Obviously a deed sufficient to convey title is sufficient to give notice of that fact when registered according to its tenor and in strict compliance with the indexing statute. It has been suggested, however, that the Court might notice this criticism, *sua sponte,* under the exception to the judgment.

The suggestion assigns to the index more than its proper function and burden, and deprives the instruments to which it points of any significance as to the notice they are legally supposed to convey. Incidentally, it may be noted that most of the cited cases from this jurisdiction arose long after our recording acts and indexing acts were in force; C. S., 3309, 3560, 3561. The question presented might have been raised a dozen times here and scores of times in other jurisdictions if it had been thought worthy of consideration. But the suggestion must be rejected on more positive grounds.

There is no law requiring that the cross index shall show the capacity in which the grantor acted in the making or execution of a deed. The statute—C. S., 3561—requires simply that the index "shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees," etc. There is no question here that the names of the grantors and grantees in the deed of Industrial Realty Company to T. A. Ratcliffe were not indexed fully as they appear in the deed.

Our Court has held that the indexing is an essential part of the registration: *Fowle v. Ham,* 176 N. C., 12, 96 S. E., 639; *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352; but it has never been held, of

course, that it is all of it. The function of the index is to point to the book and page where the recorded deed may be found: *Thomas v. Wayne County,* 214 Mich., 72, 182 N. W., 417; *Bishop v. Schneider,* 46 Mo., 472; *Green v. Garrington,* 16 Oh. St., 549; *Maxwell v. Stuart,* 99 Tenn., 409, 42 S. W., 34. It is the instrument itself, thus pointed out, which gives the notice (C. S., 3309); and that notice includes all that reasonable inquiry may disclose; *Dorman v. Goodman, supra.* And it is constructive notice thereof, whether an intending purchaser sees fit to resort to the record or to ignore it.

While, as we have seen, there is no question here that the names of grantors and grantees in the deed of Industrial Realty Company to Ratcliffe or in the other deeds involved, are not given in the cross index exactly as they are given in the deeds, we cite the following cases which express the rational view this Court has taken of the purpose and proper use of the index and the obligation it places upon subsequent purchasers or intending purchasers.

In *West v. Jackson,* 198 N. C., 693, 153 S. E., 257, the questioned deed was indexed as to the grantors, "Jesse Hinton and wife." Nora Hinton, who held with Jesse the estate by the entirety, was not named. We note that the statute (C. S., 3561) requires that the index "shall state in full the names of all the parties, whether grantors, grantees, vendors, vendees, obligors or obligees," etc.

The Court said, "The record in the case at bar discloses that the name of the wife, Nora Hinton, actually appeared in the deed from Lee and wife to Jesse Hinton and wife, Nora Hinton. In abstracting the title of Nora Hinton the first inquiry would necessarily be, where did Nora Hinton get the land? The record would have disclosed that Nora Hinton and her husband, Jesse Hinton, were tenants by the entirety. The records would have further disclosed that Jesse Hinton and wife had executed a deed of trust to Clifford, trustee." The principle followed is made clear by the quotation from *Ely v. Norman,* 175 N. C., 294, 95 S. E., 543: ". . . an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found."

Similarly, in *Ins. Co. v. Forbes,* 203 N. C., 252, 165 S. E., 699, the questioned registration showed that the deed was indexed and cross-indexed, "Tucker, S. D., *et ux.,* to F. J. Forbes, trustee." The deed was held sufficient under the rule of reasonable notice and inquiry laid down in *West v. Jackson, supra,* although the land belonged to Emma J. Tucker and she had subsequently conveyed it.

In the instant case, any reasonable search, with the aid of the existing index, would have disclosed the deeds constituting the title of Mrs. Tocci

down to its source, through the identical description of the property conveyed and the index names of grantors and grantees.

It is suggested that *Dorman v. Goodman, supra; Woodley v. Gregory,* 205 N. C., 280, 171 S. E., 65; and *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494, in some way support the theory that the deed of Industrial Realty Company to Ratcliffe and wife could not be indexed so as to give notice. They do not support the position; in fact, none of them is related to the subject. In *Dorman v. Goodman, supra,* the name of the grantor was indexed under the name of "J. L. Crowell" instead of "J. Frank Crowell," who was the real grantor. Upon that same index there were more than one hundred deeds properly indexed under the name of J. L. Crowell.

In *Woodley v. Gregory, supra,* reviewing registration under a family index (C. S., 3561), the grantees were indexed as "Adams, Lugenia, *et al.,*" and in the subsequent deeds the grantors were indexed as "Adams, Lugenia, widow, *et als.,*" whereas Lugenia had only an estate for life and Della Adams Gregory had the fee simple. The name of "Della Adams Gregory" appeared nowhere at all, either in this index or under the family name "Gregory."

In *Eaton v. Doub, supra,* the deed had not been registered or recorded at all in point of fact, and no attempt had been made to do so.

The cases refer specifically to the omission of the name of the grantor or grantee from the index, or to the general proposition that an unregistered deed is not notice to a subsequent purchaser—a proposition which no one questions.

We have been referring, of course, to the deed of the Industrial Realty Company to T. A. Ratcliffe and wife. As to Mrs. Tocci's deed from Ratcliffe, it is not contended that the registration of this deed is not sufficient to give notice to subsequent purchasers.

In innumerable wills and deeds power to convey land has been given without the attachment to the name of the donee of any words indicating an official or representative capacity, and they have been executed as simply and informally as they have been given. The rule contended for would destroy them all as effective executions of the power, notwithstanding the abundantly established rule to the contrary. We cannot strike down rules respecting the alienation of property which have been built up through more than one generation in the hope that the consequences will be confined to the instant case.

The making of the second deed to the same property was either an inadvertence on the part of the grantor or a fraud. In either event we see no reason in morals or in law why we should depart from long established principles to aid or confirm the transaction. The defendant, by proper investigation of the title as it appears upon the record, might have saved herself from loss and the plaintiff from expense.

Upon the record and admission, and upon the evidence, in which there is no material discrepancy, the appellant, Mrs. Tocci, holds the lot by valid *mesne* conveyances from T. A. Ratcliffe and wife, and is the owner thereof in fee, and is entitled to have the claim of Mrs. Nowfall, who claims under a deed subsequently executed and subsequently recorded, removed as a cloud upon the title.

The judgment of the court below to the contrary effect is

Reversed.

STACY, C. J., dissenting: We have here, on admitted facts, the question whether defendants' deed is a cloud on plaintiffs' title. The answer is to be found, not alone in the execution of a power as between the parties (which is not mooted), but also in the application of our registration laws.

In plaintiffs' paper chain of title is a deed executed by "Industrial Realty Company." It is admitted that the Industrial Realty Company held title as trustee, and not otherwise. The defendants are purchasers for value, and claim title to the same property under a deed executed by "Industrial Realty Company, Trustee." Both deeds are registered, but it is impossible for the deed under which plaintiffs claim to be indexed and cross-indexed so as to prefer it over the defendants' deed. *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352; *Woodley v. Gregory,* 205 N. C., 280, 171 S. E., 65. It is now the settled law of this jurisdiction that the proper indexing and cross-indexing of instruments required to be registered is an essential part of their registration. C. S., 3561; *Story v. Slade,* 199 N. C., 596, 155 S. E., 256; *Bank v. Harrington,* 193 N. C., 625, 137 S. E., 712; *Fowle v. Ham,* 176 N. C., 12, 96 S. E., 639; *Ely v. Norman,* 175 N. C., 294, 95 S. E., 543.

The plaintiffs then claim under an unregistered deed so far as the defendants are concerned. *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494. The defendants claim under a registered deed. It follows, therefore, that the defendants have the better title.

The general index of Mecklenburg County shows a large number of deeds executed by the Industrial Realty Company, some in its individual capacity (the deed under which plaintiffs claim is so indexed), others as trustee (defendants' deed is so indexed). Under the decision in *Dorman v. Goodman, supra,* the plaintiffs are not entitled to recover.

It is true the case was decided below on the insufficiency of the Ratcliffe deed to convey the property in question, and the correctness of the judgment has been pressed upon us with confidence and conviction. Outside authorities are cited to sustain it. It is pointed out that had the trustee held an individual interest in the property, then according to our own decisions, its deed to plaintiffs' predecessor in title would have con-

veyed only such interest. *Matthews v. Griffin,* 187 N. C., 599, 122 S. E., 465; *Carraway v. Moseley,* 152 N. C., 351, 67 S. E., 765.

The novelty of the case in our Reports must be conceded. Never before has a corporate trustee sold the same property to two persons and executed to one a deed in its individual capacity and to the other a deed as trustee. It is admitted on all hands that the defendants' deed is in the proper form.

The cases cited in the opinion of the majority deal with matters arising out of controversies between the parties or their privies. None forecloses the right of a purchaser for value who holds under a properly registered deed. The contrary conclusional characterizations, which in themselves usually invite scrutiny, find no support in the decided cases. Of course, an unregistered deed may be good as between the parties. But an unregistered deed availeth naught as against creditors and purchasers for value. C. S., 3309; *Glass v. Shoe Co.,* 212 N. C., 70, 192 S. E., 899.

The question of registration was not reached in the court below because unnecessary under the view which then prevailed, but this is not delimiting on the appellate Court. The question is presented by the record. The defendants claim title to the lot in question "by virtue of a good and valid conveyance," and they have offered evidence to sustain it, including an exhibit which shows the pertinent pages of the general index to the registry of the county.

It is broadly stated by the majority, "there is no law requiring that the cross-index shall show the capacity in which the grantor acted in the making or execution of a deed." The rule is, that where one has both an estate in and a power over property, the capacity in which he acts in making a deed will determine, not only the effect of the deed, but also the title and name of the grantor. *Matthews v. Griffin, supra.* Hence, the indexing and cross-indexing in "the names of all the parties" would include "the capacity in which the grantor acted" in a trustee's deed to make the registration complete. Here, Mrs. Nowfall holds under such a deed, and at the time she purchased the property there was nothing on the general index to indicate a prior sale of the same property by the "Industrial Realty Company, a Corporation, as Trustee," the only capacity in which it was authorized to sell.

It is further suggested in the opinion of the majority that "a deed sufficient to convey title is sufficient to give notice of that fact when registered according to its tenor and in strict compliance with the indexing statute." The conclusion is a *non sequitur,* and is at variance with what was said in *The Dorman Case.* The fact that pertinent matters *in pais* may be resorted to in ascertaining the intention to execute a power seems to have been overlooked for the moment. *Matthews v. Griffin, supra.*

To be sure, a deed sufficient to convey the trust property would be good as against the creditors of the Realty Company, not because the indexing and cross-indexing of such a deed perforce gives notice, but for the very simple reason that at no time has the property been liable to be taken for the debts of the Industrial Realty Company. This reasoning, however, is not applicable to a purchaser for value. In no previous case has the question here presented found its way to the appellate Court. The pertinent authorities, however, settle the principle upon which it should be decided.

It is stated by the majority that the defendant's position is not supported by *The Dorman, The Woodley,* and *The Eaton Cases,* and the observation is made, "in fact, none of them is related to the subject." Maybe not, maybe they have changed their relations since they were decided, but it was upon the principles announced in these cases and faith in their maintenance that the defendant parted with her money, and she is now asking that we stand by them. "Parties have the right to act upon the decisions of this Court in acquiring titles"—*Walker, J.,* in *Jones v. Williams,* 155 N. C., 179, at p. 190. See, also, *Hill v. R. R.,* 143 N. C., 539, at p. 573. The doctrine of *stare decisis* still obtains in the law as it pertains to the subject of real property, *Whitley v. Arenson,* 219 N. C., 121, regardless of how it may have fared recently in other matters. See *Board of Health v. Comrs. of Nash, ante,* 140; *Evans v. Rockingham Homes, Inc., ante,* 253; *Mosteller v. R. R., ante,* 275. In some respects the instant case is not unlike *Realty Corp. v. Fisher,* 216 N. C., 197, 4 S. E. (2d), 518. It remains to be seen whether it will be as short lived. *Bailey v. Hayman,* 218 N. C., 175, 10 S. E. (2d), 667.

After some reference to "the common sense view . . . the rational view," etc., the Court's logic then runs into this dilemma: "The making of the second deed to the same property was either an inadvertence on the part of the grantor or a fraud. In either event we see no reason in morals or in law why we should depart from long established principles to aid or confirm the transaction." Why the self-sufficing animadversions if not in an effort to defend a position felt to be weak? There seems to be some discrepancy between the Court's action and its rhetoric so far as Mrs. Nowfall is concerned. She is the only one that has lost anything, and the transaction is allowed to stand as to her. The Realty Company is in no position to make good its warranty, so she loses.

The whole case is simply this: If the Ratcliffe deed, under which the plaintiffs claim, is sufficient to convey the property and the indexing and cross-indexing of this deed suffices to give notice, the plaintiffs are entitled to recover. On the other hand, if the indexing and cross-indexing of this Ratcliffe deed is not sufficient to give notice, the defendants are entitled to recover. "As between two grantees, the one who

first registered his deed, though the later in date of execution, obtains the title, provided he is a purchaser for value." *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636; *Threlkeld v. Land Co.,* 198 N. C., 186, 151 S. E., 99.

In a matter of this kind, when one of two purchasers for value must lose, the only way out is for the Court to hew to the line and let the chips fall wherever they may. Mrs. Nowfall has an impeccable title; Mrs. Tocci has not. The judgment below should be affirmed.

BARNHILL and WINBORNE, JJ., concur in dissent.

A. B. MILLER v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 7 January, 1942.)

1. Railroads § 9—

Where all the evidence tends to show that plaintiff started his car and drove a distance of eight or ten feet onto the crossing in front of an oncoming train, and that his view of the train was unobstructed for a distance of half a mile before it reached the crossing, the evidence discloses contributory negligence constituting a proximate cause of injury as a matter of law.

2. Same—

The existence of signs and poles along the right of way of a railroad company is immaterial when the evidence discloses that they did not obstruct plaintiff's vision from where his car was stopped before he entered upon the crossing.

3. Same—

The fact that automatic signals at a railroad grade crossing were not working at the time of the accident is immaterial on the issue of plaintiff's contributory negligence in entering onto the crossing in front of a train which he should have seen approaching when the evidence discloses that plaintiff knew the signals were not working and did not rely upon them, but looked in both directions before starting upon the crossing.

CLARKSON, J., dissenting.

APPEAL by defendants from *Bone, J.,* at February Term, 1941, of DAVIDSON.

Civil action to recover for personal injuries and property damage alleged to have been caused by the negligence of the defendant, Southern Railway Company.

The record discloses that on the morning of 20 March, 1940, the plaintiff's automobile collided with defendant's passenger train at "West End

Crossing," a paved, double-tracked, grade crossing in the town of Thomasville, and inflicted serious personal injuries on the plaintiff and demolished his automobile.

The plaintiff had driven from his home, a distance of about eleven miles, and was on his way to the plant of the Columbia Panel Company, where he worked. It was a little after 7:00 a.m. He says: "I had been using this crossing once or twice a day, five to six days a week for about six months, and was familiar with it."

As the plaintiff approached the crossing he observed that it was blocked by a freight train on the second or northbound track—the one farthest from him. He stopped about eight or ten feet from the first rail of the southbound track—the one nearest to him—and to the right and abreast of another car which had also stopped at the crossing. The automatic signals were not functioning that morning. Plaintiff stood there three or four minutes. Presently, the crew of the freight train cut it in two and pulled the front part up, clearing the crossing. A car and a truck came across from the opposite side. Plaintiff says, "as soon as the truck cleared the crossing and ceased to obstruct my view towards the depot, I looked to my left in the direction of the depot and listened, and I looked to my right and listened before starting. My engine stopped while I was parked at the intersection. I started my engine at the time the truck came over the tracks and came on by me. I put my car in low gear and did not change it. I did not see the moving passenger train which struck me. The front end of my car was across the first rail of the first track when it hit me. The front wheels were about half way between the first rail and the second rail. . . . At the time I was parked at the intersection and up to the time of the collision, I did not hear any train whistle or bell. I did not see or hear any moving passenger train."

Plaintiff's witness, E. E. Perdue, testified that "When the freight train on the second track was cut in two and pulled up, a car crossed from the south side, that is the opposite side from where I was sitting, and then a big truck came through. That is when I saw the train approaching on the first or southbound track. I saw the freight train on the northbound track cut in two. I do not know what became of the man who cut it in two. I did not see anyone left on foot at the crossing when the train was cut in two. . . . I saw the passenger train coming south on the first track. He looked to me like he was going to hit the truck. The truck cleared the track and I heard the crash between the plaintiff, Miller's automobile, and the train. This was a passenger train going south. . . . In my opinion this train was running at a speed of 45 to 50 miles an hour. . . . (Cross-examination): It is something like a half mile or more from the freight depot

in Thomasville down to the West End Crossing. The railway tracks from the depot to the crossing are absolutely straight. West Main Street parallels the railway tracks all the way from the railroad depot to West End Crossing. Both the tracks and the street run in an easterly to westerly direction and they run along for a half mile side by side. . . . I stood there in my car some five minutes. Shortly after I had stopped Mr. Miller, the plaintiff, also pulled up to the intersection and stopped. . . . If the whistle blew I did not hear it. . . . I don't think those lights were flashing at the time. . . . When the freight train opened up on the second track a truck came through from the south side or opposite side of the crossing and came on across. I saw the truck. Mr. Miller, the plaintiff, had to see it if he was looking. I looked up and looked toward the freight depot and saw the passenger train coming. I thought it was going to hit the truck. It was the same train that hit Mr. Miller. Q. And the view of that train all the way back to the station was a half mile or more? A. Yes, half a mile. I cut my eyes back on the track and Miller had pulled up on the track. It happened so quick I could not tell whether Miller hit the cylinder of the engine or the engine hit him. Anyway, I did not get hit. I sat there and let the train go by."

These central facts were amplified by other witnesses and additional testimony, but the foregoing will suffice for the disposition which we think must be made of the case.

The defendant moved for judgment of nonsuit at the close of plaintiff's evidence, which was overruled. Exception. The defendant offered no evidence.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From judgment thereon, the defendant appeals, assigning as error the refusal of the court to sustain its motion for judgment of nonsuit.

J. Allen Austin and Phillips & Bower for plaintiff, appellee.

W. T. Joyner, Linn & Linn, Don A. Walser, and D. L. Pickard for defendants, appellants.

STACY, C. J. Conceding negligence on the part of the defendant in the operation of its train, as the jury has found, the question occurs whether plaintiff's contributory negligence is such as to bar a recovery. We had occasion to review the pertinent authorities in the recent case of *Godwin v. R. R., ante,* 281. From what is said there, it would seem that an affirmative answer should be given here.

It is established by all the evidence that the plaintiff started his car and drove a distance of eight or ten feet onto the crossing in front of an

oncoming train, which he should have seen in the exercise of reasonable care. This was negligence on his part which contributed to the injury. *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720.

The plaintiff does not say that he could not see the train—for Perdue who was similarly situated saw it—he only says that he did not see it and that he heard no signal of its approach. Nor does the plaintiff say there was anything to keep him from seeing the train or that there was anything to obstruct his view from where he was sitting in his car. His testimony is, that he looked in the direction the train was coming and listened and did not see or hear it. He assigns no reason for not seeing it, and the record affords none, other than his own want of due care.

The evidence in respect of the signs and poles on the right of way is not material to the inquiry. They did not obstruct the plaintiff's vision from where his car was stopped while he was waiting at the crossing. Nor does the failure of the automatic signals to function save the case from nonsuit. The plaintiff knew the signals were not working and was therefore put on guard that he could not rely upon them. And he did not rely upon them. He says that he looked in both directions and listened before starting upon the crossing. Hence, according to his own testimony, he failed to see the obvious. It was said in *Powers v. Sternberg*, 213 N. C., 41, 195 S. E., 88, that where every appearance indicated the plaintiff was running into a zone of danger which he should have seen, and which others similarly situated did see, if he did not, the plaintiff is barred from recovery.

The cases of *Oldham v. R. R.*, 210 N. C., 642, 188 S. E., 106; *Finch v. R. R.*, 195 N. C., 190, 141 S. E., 550; and *Shepard v. R. R.*, 166 N. C., 539, 82 S. E., 872, cited and relied upon by the plaintiff, are distinguishable by reason of different fact situations. In the *Finch case, supra,* which arose out of an injury at this same crossing, the traveler was waiting on the opposite side of the crossing, and the parted freight train there, which was on the track nearest him, obscured his vision so that he could not see the approaching passenger train, which was on the second track from him. Moreover, in the *Finch case, supra,* there was evidence that one of the crew of the freight train signaled the motorist to cross. Here, the facts are quite different. Likewise, in both the *Oldham* and *Shepard cases, supra,* there were extenuating circumstances which prevented the plaintiffs from seeing the approaching trains.

The result here is controlled by the line of decisions of which *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; and *Godwin v. R. R., supra,* may be cited as illustrative. We are content to rest our conclusion on what is said in these cases.

The demurrer to the evidence was well interposed.

Reversed.

CLARKSON, J., dissenting: The usual issues were submitted to the jury: Negligence, contributory negligence, and damages. All were answered in favor of plaintiff. The defendant introduced no evidence and did not make an exception to the charge of the court below, as it was so able and fair to the litigants. The defendant relies solely on the plea of contributory negligence.

The evidence as to the negligence of defendant was to the effect (1) that the passenger train that struck plaintiff was running through the town of Thomasville at a speed of 50 miles an hour, contrary to the ordinance of the town (which did not permit the operation to exceed 30 miles an hour). It was running about 73½ feet per second, 733⅓ feet in 10 seconds. Even assuming that the track was straight for half a mile from the crossing, at the speed the train was traveling, it covered this distance from the point where defendant claims it could have been seen to the point of impact in about 36 seconds—barely half a minute. During this half minute plaintiff was engaged in looking down the other end of the track and in starting his car. This is not the conduct of a negligent man. On the contrary, it is the normal and prudent conduct of a reasonable person.

The conduct of defendant was negligence *per se*. *Ledbetter v. English*, 166 N. C., 125, and other authorities too numerous to mention. (2) There was plenary evidence that the train did not ring its bell or blow its whistle. (3) On the second track, 27 feet from the first track, was a freight train or a shifter. This train was cut in two to let the traffic cross the railroad, but no flagman directed the traffic. (4) At this crossing was an automatic electric signaling device. It is admitted that "Since about May, 1926, there have been two automatic signaling devices at said crossing, each of which rests on a block of concrete, oval in shape, about 4 feet long, 3 feet wide, and about 2½ feet high, rounded off on the top, painted with alternating stripes of black and white, three or four inches wide, and located about the center of the width of the drive over the tracks known as West End Crossing. That the one on the north side was located about 3 feet north from the north rail of the southbound track, and the one on the south, about 3 feet south from the south rail of the northbound track. That each of the blocks form the base for an automatic electric signaling device, consisting of two red electric lights, designed and intended to cast two beams of red lights from the railroad, and a large automatic bell, or gong which is designed to sound a very audible alarm, which can be heard for several hundred feet. That they were designed and so arranged as to be thrown into operation by the moving train itself, upon the train approaching within about 800 feet of the crossing, and to continue their operation until the engine has cleared the crossing and automatically throw them out of

operation. That their purpose and use had always been to give the public timely warning of approaching trains. That when their lights were not burning, and their bells were not ringing, their purpose and use were always to indicate to the traveling public that no moving trains or cars were approaching dangerously near the crossing." This electric signaling device did not operate at the time of the injury, to give warning to plaintiff.

The setting: The plaintiff lived in the country, about 11 miles from Thomasville, but worked at the Columbia Panel Company in Thomasville. He went to and from work in his automobile, and on 20 March, 1940, he had several of his neighbors in the car going to work. After putting them out (except Stevens, who was riding in the back seat), plaintiff testified: "Then I came on down West Main Street to the West End Crossing. When I arrived at the crossing there was a train present, a freight or a shifter, I could not say which. It was headed east on the second or northbound track and towards the Thomasville depot. The crew cut the train in two and pulled the front part of it up, clearing the crossing. When I arrived at this crossing I stopped because of this freight train across the tracks. I stopped within 6 or 8 feet of the first rail of the track nearest to me, which is the southbound track. Q. Are there some automatic signal devices there? Ans.: Yes. Q. When you arrived, were they or were they not functioning? Ans.: No, sir. Q. How long did you stay there? Ans.: I would say some 3 or 4 minutes. M. S. Stevens was in the car with me and on the back seat. These automatic signal devices were not functioning at any time that I was parked there. They were not working. After the freight train was cut in two a car and a truck came across from the opposite side, or south side to the north side, where I was parked. As I recall the truck was a tractor and a trailer, a truck with a high body. I saw Mr. Perdue parked to my left in his automobile at the intersection. I also saw Hal Harris there. When I started to move my car across the intersection the truck had crossed and was starting into the highway. It did not obstruct my view to the east toward the depot. I had been using this crossing once or twice a day, five to six days a week for about six months, and was familiar with it. On March 20, 1940, I did not have any knowledge as to the condition of the automatic signals at this crossing. As soon as the truck cleared the crossing and ceased to obstruct my view towards the depot, I looked to my left in the direction of the depot and listened, and I looked to my right and listened before starting. My engine stopped while I was parked at the intersection. I started my engine at the time the truck came over the tracks and pulled on by me. I put my car in low gear and did not change it. I did not see the moving passenger train which struck me. The front end of my car was

across the first rail of the first track when I was hit. The front wheels were about half way between the first rail and the second rail. . . . My automobile was struck at the front door on the left hand side. . . . At the time I was parked at the intersection and up to the time of the collision I did not hear any train whistle or bells. I did not see or hear any moving passenger train. I looked to my left towards the freight depot and listened, and I looked to my right towards Lexington and listened before I started. I saw another freight train coming from the direction of Lexington on the second track, some 2,000 feet behind the freight train that was stopped cut in two at the crossing. I saw that train approaching. It was 1,000 to 1,500 feet, possibly 2,000 feet away, I could not tell exactly. It was moving very slowly. . . . There were some sign boards in the northeast corner at the intersection of West Main Street and West End Crossing. I measured the signs. The one next to the road (West Main Street) is 30 inches by 4 feet, and had on it the words 'Drink, Drive and Regret.' The other sign was 4 feet by 2½ feet with white and black stripes and a reflector in the middle. The sign was about 2½ feet from the ground and the two signs were about 20 or 22 inches apart. In looking back to your left from where we were parked at the crossing, *those signs were setting in the way, in the view of the crossing, so that you could not see as far up the track as you could. There were also telephone poles along the track, the poles being about 50 feet apart.* The poles are dodged along. There was some box cars parked on the side track to the north of and parallel to the railroad. These cars were around 700 to 800 feet up the tracks towards the depot. I drove by these cars that morning and observed them. It was about 700 or 800 feet from the end of the box cars to the crossing. There was a whistle post about 25 steps below the box cars. . . . When I examined my car 8 or 9 weeks after the accident, it was still locked in low gear. I then tried to get it out of low gear and it could not be done. *After the man cut the freight train standing on the second track in two,* I never did see him any more. He was the only man I saw. *I did not see anybody out there giving any signals not to cross the crossing.* The condition of my eyesight on March 20th, 1940, was good. I have stepped the distance between the first rail of the southbound track and the margin of West Main Street. The distance between the two is 27 feet."

Plaintiff's health was good prior to the collision. His injuries consisted of 5 or 6 broken ribs, a blow in the left jaw, knocking out two lower teeth, a mashed foot (right foot), hip, back and shoulders bruised. He was unconscious for 48 hours. "I have not worked any since because I could not stand it." The doctor, hospital and drug bills, on account of the accident, amounted to arount $172.00. . . . I am not through with the Doctor yet." The question of contributory negligence was for the jury.

In *Harton v. Telephone Co.*, 141 N. C., 455 (465), *Hoke, J.*, says: "We think it the more correct rule that, except in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the jury to determine."

This rule has been adopted by this Court ever since. In *Hinnant v. R. R.*, 202 N. C., 489 (493), *Brogden, J.*, said: "Courts generally are committed to the proposition that if the facts are admitted and so clear that 'there can be no two opinions among men of fair minds,' or that 'only one inference may be drawn from them,' it is the duty of the court to declare whether a given act or series of acts is the proximate cause of the injury. Otherwise the question must be submitted to a jury. *Harton v. Telephone Co.*, 141 N. C., 455, 54 S. E., 299; *Taylor v. Stewart*, 172 N. C., 203, 80 S. E., 134; *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1."

The evidence indicates that the defendant was grossly negligent in running its train through the town 45 to 50 miles an hour, contrary to the town ordinance, which was not over 30 miles an hour. This conduct was negligence *per se:* giving no signal by ringing the bell or blowing the whistle; cutting the freight train in two on the second track, 27 feet from the first track, thus inviting the traffic to cross the public highway, which crossed the railroad tracks. In having safety signals not functioning to give warning to the traffic that a train was coming, defendant lulled the crossing traffic into a sense of security that the way was clear to go forward. Defendant's negligence in cutting the train in two invited the traffic to cross. The traffic coming toward him, a car and truck to which was attached a trailer. At the very point the view on one approach of the train was obstructed to some extent and the other view of the oncoming train could not be discovered to some extent by obstructions. This was some evidence that it obstructed plaintiff's view of the oncoming train, although he had looked and listened. The train came from plaintiff's left, on which side Perdue's car was waiting to cross the track. With another car between a driver and a train traveling so fast that it was in view only half a minute, it is difficult to see how the driver could be considered negligent in not seeing the train. The twelve jurors agreed unanimously that he was not negligent and, in my opinion, this Court goes too far when it says no fair-minded man could say plaintiff was not negligent. All the facts taken together indicate that plaintiff used due care. The train approached at so high a rate of speed that it struck plaintiff after he had started and had put his machine in low gear to cross. It hit him like a shot out of a gun. Under these facts and circumstances, it was a question for the jury and not for this Court to determine on the question of contributory negligence. It is only when facts admitted are so clear that only one inference can be drawn from

them and there can be no two opinions among men of fair minds, that this Court and not a jury will determine the rights of the parties.

I think the cases cited in the main opinion, and chiefly *Harrison v. R. R.*, 194 N. C., 656, and *Godwin v. R. R., ante*, 281, and other cases, are not applicable. Those were ordinary crossing cases, with no invitation to cross by breaking the cars in two and no dead electric signal—both of which plaintiff had a right to rely on. Plaintiff saw that the signal was dead for the shifting freight train, but since the signals were installed primarily to protect the public as to through trains, he could reasonably infer that the signals would give him warning as to any through train. This they did not do.

Hoke, J., in *Shepard v. R. R.*, 166 N. C., 539, at p. 544, quotes from *Cooper v. R. R.*, 140 N. C., 209 (221), which he wrote for the Court, in which is laid down certain rules as to travelers approaching a railroad crossing, as follows: "'Rule 7. There may be certain qualifying facts and conditions which so complicate the question of contributory negligence that it becomes one for the jury, even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by a watchman and the traveler enters on the crossing reasonably relying upon the assurance of safety.' These rules and the one last mentioned as being more particularly applicable to the questions presented on this appeal have been frequently upheld and applied in decisions of our Court, notably in the recent case of *Johnson v. R. R.*, 163 N. C., 431; *Fann v. R. R.*, 155 N. C., 136; *Wolfe v. R. R.*, 154 N. C., 569; *Farris v. R. R.*, 151 N. C., 483. It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but, 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances of each particular case, and so is usually a question for the jury.' *Alexander v. R. R.*, 112 N. C., 720; *Judson v. R. R.*, 158 N. Y., 597; *Malott v. Hawkins*, 159 Ind., 127-134; 3 Elliott on Railroads (2nd Ed.), sec. 1095, Note 147; 33 Cyc., pp. 1010, 1011-1020."

In *Oldham v. R. R.*, 210 N. C., 642 (643), we find: "Does the plaintiff's alleged contributory negligence bar a recovery as a matter of law? The answer is 'No.' *Lincoln v. R. R.*, 207 N. C., 787, 178 S. E., 601. The issue was for the twelve. . . . The pertinent principle was stated by *Hoke, J.*, in *Shepard v. R. R.*, 166 N. C., 539, 82 S. E., 872, quoting from 33 Cyc., 1028, as follows: 'Where a railroad company maintains a flagman, gates, or other signal or warning at a railroad crossing, whether voluntarily or by law or custom, the public generally has a right to presume that these safeguards will be reasonably maintained and attended, and in the absence of knowledge to the contrary,

the fact that the gates are open, or automatic bells not ringing, or that the flagman is absent from his post or, if present, is not giving a warning of danger, is an assurance of safety and an implied invitation to cross upon which a traveler familiar with the crossing may rely and act within reasonable limits, on the presumption that it is safe for him to go on the crossing. The extent to which a traveler may rely on such assurance is a question of fact, and while ordinarily the same degree of care and vigilance is not required of a traveler under such circumstances as otherwise, he has no right to rely exclusively upon such circumstances, nor will such presumption or assurance excuse the traveler from using every reasonable precaution that an ordinary prudent man would use under like circumstances. Such facts as the absence or presence of a flagman, or that the gates are open, or that the automatic bells are ringing or not ringing, are merely facts to be considered in determining whether the traveler exercises that degree of care required in attempting to cross.' The same rule was also applied in the case of *Parker v. R. R.*, 181 N. C., 95, 106 S. E., 755; *Barber v. R. R.*, 193 N. C., 691, 138 S. E., 17; and *Johnson v. R. R.*, 163 N. C., 431, 79 S. E., 690. The negligence of the defendants is not seriously disputed. The watchman was 'out of pocket' as plaintiff approached the crossing. If he had been attentively on duty at that time, the injury might not have occurred. *Shepard v. R. R., supra; Finch v. R. R.*, 195 N. C., 190, 141 S. E., 550."

The case of *Barber v. R. R.*, 193 N. C., 691, is directly in point, there the facts were left to the jury. The facts there were: "Plaintiff, coming down East Market Street, near Settle Street crossing, slowed up his car, waiting for a long freight train, about 70 cars, to pass, going south, which was making the usual roaring noise, and for everything to get clear. Before he turned from East Market Street into Settle Street, he looked, glanced back, and could see some 75 yards. As he started to turn he looked for the watchman—could see through the glass, the whole street was clear. Leaned over and looked south down railroad track to the left—the track was clear, could see down some 60 yards. When he proceeded to cross Settle Street he was running about 5 miles an hour. Just as he got up on the first track, he heard a danger signal of several sharp blasts of the whistle of the train coming from the south, and about the time he saw the watchman coming half-running from the opposite side of Settle Street, that he had started to cross, hollering 'Stop.' He stopped as quick as he could, reversed his car, and backed back about four feet, and while moving back the passenger train struck the front end of the car. The car was knocked about 60 feet. The Fillman boy was killed, plaintiff was seriously injured, and the car torn to pieces. The watchman's shanty was knocked off its foundation by the automobile, which was knocked about 60 feet." This case cites the

Shepard case, supra, which quotes from 22 Cyc., *supra,* and a wealth of other authorities.

Finch v. R. R., 195 N. C., 190, is similar to the present case and at the same crossing. At p. 201, the Court says: "In the charge heretofore quoted, the court below said: 'There may be certain qualifying facts and conditions which so complicated the question of contributory negligence that it becomes one for the jury, *even though there has been a failure to look or listen, and a traveler may, in exceptional instances, be relieved of these duties altogether, as when gates are open or signals given by a watchman and the traveler enters on the crossing* reasonably relying on the assurance of safety.'"

The *Barber case, supra,* and numerous other cases are cited to the effect that the question of contributory negligence was for the jury. In *Finch v. R. R., supra,* we said, at p. 199: "In *Harrison v. R. R.,* 194 N. C., p. 656, the facts were different from the present action." In the *Finch case, supra,* the jury returned a verdict of $140,000. A new trial was granted on a different ground from that here considered.

The evidence must be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment and inference to be drawn therefrom. Where there is conflicting evidence as to the proximate cause of the injury, the case is for the jury. *Barrier v. Thomas and Howard Co.,* 205 N. C., 427; *Godfrey v. Coach Co.,* 201 N. C., 264.

This crossing has been before this Court before. *Finch v. R. R., supra.* In that case also a freight train was parted to let the traffic through, and the intestate without looking drove his car through the opening thus made only to meet his death. On appeal by the defendant this Court said the case was for the jury. At a companion crossing further north in Thomasville, where there were also some obstructions, the plaintiff suffered injury and this Court affirmed the recovery. *Loflin v. R. R.,* 210 N. C., 404. Later, as a better safeguard to the traveling public in this busy city, at the crossing involved in this case, the defendants installed modern automatic electric signals for the safety of the traveling public. Railroads are required to maintain and attend these automatic signals when installed; otherwise, they become the opposite of a safety device; they become invitations to injury and death. Wherever a crossing accident occurs and the automatic signals are not functioning, a motion for nonsuit, I think, should be denied except in the clearest case of contributory negligence. This is not such a case. One ought not to invite and then not bear the responsibility of his invitation, except only as to those whose conduct is or borders clearly upon the lack of due care. Due care, on the issue of contributory negligence under the facts here, is for the jury and not this Court to determine.

DR. B. E. REEVES, ADMINISTRATOR OF OLIVE C. JONES, DECEASED, v. F. M. STALEY AND C. B. YATES.

(Filed 7 January, 1942.)

1. Death § 7—

In an action for wrongful death plaintiff must show 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 that such negligent breach of duty was the proximate cause of the injury which caused death.

2. Negligence § 5—

The proximate cause of an injury is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

3. Negligence § 17b—

What is negligence is a question of law, and when the facts are admitted or established it is for the court to say whether negligence exists, and, if so, whether it constitutes a proximate cause.

4. Negligence § 19a—

A nonsuit on the issue of negligence is proper when all the evidence, taken in the light most favorable to plaintiff, fails to show any actionable negligence on the part of the defendant, or when it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person.

5. Negligence § 7—

Intervening negligence will insulate the original negligence if the original wrongdoer could not reasonably foresee the intervening act and resultant injury, since in that event the sequence of events is broken by a new and independent cause.

6. Automobiles § 8—

The operator of a motor vehicle is under duty, independent of statutory requirements, to exercise that degree of care which an ordinarily prudent man would exercise under similar circumstances.

7. Same—

Ordinary care in the operation of a motor vehicle requires the operator to keep same under control, and to keep a reasonably careful lookout so as to avoid collision with people and vehicles upon the highway.

8. Automobiles § 18a—

A motorist is not under duty to anticipate negligence on the part of others but, in the absence of anything which gives or should give notice to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety.

9. Automobiles § 12e—

The failure of a motorist, traveling upon a servient highway, to stop in obedience to signs erected by the Highway Commission before entering an intersection with a dominant highway, as required by statute, sec. 120, ch. 407, Public Laws 1937, is not negligence or contributory negligence *per se*, but is a fact to be considered with other facts and circumstances adduced by the evidence in passing upon the question.

10. Automobiles § 18d—Evidence held to show that negligence of driver of car was sole proximate cause of collision, and insulated any negligence on the part of the driver of the truck.

All the evidence tended to show that the car in which plaintiff's intestate was riding was being driven upon a servient highway and entered an intersection with a dominant highway without slackening speed, and collided with a truck which was being driven along the dominant highway in approximately the opposite direction. All the evidence further tended to show that the Highway Commission had erected a "stop" and "junction" sign along the servient highway and that the view of the truck was clear and unobstructed from the servient highway. The driver of the car testified by deposition that he did not see the truck and did not know whether he struck a truck or automobile, and that he saw a sign but could not discover what was on it although other witnesses testified that the "stop" and "junction" signs were in plain view, and an occupant of the car testified that he saw and read them. Plaintiff introduced evidence that the truck was operated under a franchise for transporting express and was traveling in excess of 35 miles per hour. *Held:* The failure of the driver of the car to stop before entering the intersection was evidence of negligence which, considered with the evidence that he failed to see the truck although it was obvious and should have been seen by him, established negligence as a matter of law, which negligence the driver of the truck could not have reasonably foreseen, and therefore the negligence of the driver of the car was an intervening independent act insulating any negligence on the part of the truck driver, since the speed of the truck in excess of 35 miles per hour, made *prima facie* evidence that such speed is unlawful by sec. 103, ch. 407, Public Laws 1937, would not have resulted in injury but for the intervening negligence of the driver of the car.

11. Automobiles § 12e—

The driver of a motor vehicle along a dominant highway who has knowledge that stop and warning signs have been erected along the servient highway, and knows that his vehicle is in plain view of a motorist traveling along the servient highway, is entitled to assume up until the moment of impact, and to act on the assumption in the absence of anything which gives or should give notice to the contrary, that the driver upon the servient highway will obey the law and stop before entering the intersection.

12. Automobiles § 21—

Where the negligence of the driver of the car in which a guest is riding is the sole proximate cause of the injury insulating any negligence on the part of the driver of the other vehicle involved in the collision, the guest, or in case of her fatal injury, her administrator, is not entitled to recover of the driver of the other car or his superior.

APPEAL by plaintiff from *Warlick, J.*, at July Civil Term, 1941, of ASHE.

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

These facts appear to be uncontroverted: Plaintiff's intestate, Olive C. Jones, came to her death in the forenoon of 8 July, 1939, at intersection of U. S. Highway No. 421 and State Highway No. 16, at Miller's Creek, North Carolina, in a collision between a Ford sedan, owned and operated by Elijah Sexton in which he, she and four others, two men and two boys, were riding—she on the front seat with driver, and the others on rear seat, traveling southeasterly on State Highway No. 16 from the town of Jefferson toward the town of North Wilkesboro, and a motor express truck owned by defendant, C. B. Yates, operated under franchise for purpose of transporting express, traveling northwesterly on U. S. Highway No. 421, from North Wilkesboro toward the town of Boone and driven by defendant, F. M. Staley, a duly authorized and empowered agent and employee of his codefendant, acting at the time in the scope of his employment and in the furtherance of the business of his principal. As U. S. Highway No. 421, for a distance of 1,500 feet, approaches the point where State Highway No. 16 intersects with it at Miller's Creek, it runs straight on a north 47 degrees west course, veering slightly to south of that course after it passes the point of intersection. As State Highway 16 approaches the said point of intersection it runs south slightly to the east, but before reaching the intersection the road changes to a southeast course at a greater degree than the course of U. S. Highway 421 and runs straight to the intersection with the latter highway, and enters same on a slightly acute angle. As between the two highways, U. S. Highway 421 is the dominant, and State Highway 16, the subservient road. On the latter there are Stop and Junction signs, erected by State Highway Commission on the right-hand side of one traveling from the north toward the intersection.

Plaintiff in his complaint alleges that while the automobile in which his intestate was riding was being operated in a proper and lawful manner, on its right-hand side of the center line of the highway, and after it had entered and traversed this intersection of said highways, it was run into head-on by the transfer truck.

Plaintiff further alleges in substance as acts of negligence of defendants proximately causing the collision and resultant death to his intestate, that defendant Staley, agent and employee of his codefendant, unlawfully, negligently, and recklessly operated the transfer truck (a) at an excessive and unlawful rate of speed, at least sixty miles an hour, and so as to render it unmanageable; (b) to the left of the center line of the highway; (c) in a reckless and indifferent manner, without due care and circumspection, or proper regard for the lives and safety of others,

and so as to endanger the lives and property of others upon the highway; and (d) in failing (1) to apply the brakes thereon and to check its speed, (2) to keep a proper lookout upon approaching the intersection beyond which the collision occurred, (3) to yield the right of way to the automobile which had entered and traversed the intersection before it was run into by the truck, and (4) to yield to the automobile its right to one-half of the thirty-six feet wide hard surfaced portion of the highway.

Defendants, in their answer, deny these allegations of the complaint, and, as further defense, and by way of new matter, make substantially these averments: (1) That defendant Staley was driving the truck in question at a slow, lawful, and reasonable rate of speed, entirely upon his right-hand side of U. S. Highway 421, when Elijah Sexton, operating the car in which intestate was riding, and traveling on State Highway 16, without any warning or signal, and without stopping as required by law, or even slowing the unlawful speed of sixty-five to seventy miles per hour at which said car was moving as it approached the intersection of said highways, unlawfully, carelessly, and recklessly drove the car into the intersection directly in front, and in the path of the truck, in willful and wanton disregard of the rights and safety, and so as to endanger the person and property of others, thereby solely and proximately causing the collision. (2) That plaintiff's intestate, riding on the front seat with Elijah Sexton, in a position to see, understand, and appreciate the reckless and negligent manner in which he was operating his car, and the circumstances confronting him, was contributorily negligent in failing to warn him.

Plaintiff, in reply, denies that Elijah Sexton was negligent in any manner, as averred by defendant, but alleges that if he were negligent, such negligence only concurred with that of defendants, as alleged, in proximately causing the collision and resultant death of intestate.

Upon the trial below, plaintiff offered pertinent testimony of various witnesses, as follows: Lundy Pierce testified that, while he runs a filling station on the northeast side of U. S. Highway No. 421, he was standing on the south shoulder of the hard surface, about 40 or 50 feet from the point of the accident. He describes the occurrence in this manner: "The first thing I knew Mr. Staley blew his horn. . . . When I first saw him he was on the right-hand side of the center of the highway No. 421, leading toward Boone. When he blew his horn, I looked around, and he threw up his hand, and by that time I noticed a car coming into the intersection . . . the car Sexton was driving, coming in from 16. Staley was coming up on his side of the road and here comes the automobile on into the intersection. When they saw they were going to hit, Staley cut to the left and the car cut to the right, . . . this made them both cutting in the same direction when they

hit . . . at the end of the hard surface . . . partly on both sides of the center line. When they struck the truck bounced up and the car turned back around headed directly west. The truck turned sideways and bounced up and came back down . . . on the back end of the automobile and knocked the automobile up the road 75 or 80 feet from where they hit. The truck turned around. . . . It was lying across the road on the left side of the center of No. 421. . . . It may have been partly on both sides of the center. . . . Staley's truck was a mixed load of stuff, feed and grain. In my opinion he was not driving over 35 miles an hour. I saw the other car approaching the intersection, and in my opinion there wasn't much difference in the rate of speed they were driving. Both traveling about 35 miles an hour. If any difference the car . . . was running faster than the truck. . . . Both cars were badly damaged. . . . There were no cars parked in front of the filling station that would obstruct the view of a party coming from North Wilkesboro going toward West Jefferson, in either direction."

Then, on cross-examination, Pierce continued: ". . . There was a Stop sign on 16 below my filling station as you come into 421 from West Jefferson. Said sign has letters in black about seven inches high with yellow background and says STOP, and . . . was in plain view of any person driving a car from Jefferson to the intersection and there was also a sign right above and on Highway 16 just before you enter the intersection facing the driver coming from toward Jefferson with the word 'JUNCTION' . . . letters . . . 7 inches . . . in plain view of any person coming from toward West Jefferson. . . . Staley blew his horn before he entered the intersection. . . . He was not looking off of the road at the time he blew his horn. . . . The truck was lying on its side after the wreck. . . . I didn't hear the party driving the Sexton car blow the horn before he entered the intersection. I think I could have heard it. The Sexton car did not check up in entering the highway. . . . It didn't stop until it hit the truck. I saw the car just as it was entering the intersection . . . and just a moment before they hit. The front end of the car ran against the front side of the truck and the truck careened around. . . . There is a section of the intersection that is not paved. There is nothing to obstruct the view of the sign 'JUNCTION,' or signboard, of a car driven from West Jefferson into the . . . intersection. . . . There is nothing to prevent a driver of such car from seeing a car coming from toward North Wilkesboro. You could see about 1,200 or 1,500 feet from toward North Wilkesboro to the intersection.

Robert Byers, testifying, said: "I was standing east of the intersection. . . . Lundy Pierce . . . and I were standing about five

or six feet apart. I saw the truck coming. . . . He was making between 30 and 35 miles an hour. I did not see the car coming into the intersection. I didn't see it until after the wreck occurred. I saw the signs where the cars hit. They were about the middle of the road. . . . When I first saw the truck it was coming on its right-hand side of the main thoroughfare, No. 421. . . . On the Jefferson road beyond the intersection there is a big yellow sign with black letters saying 'STOP,' . . . a little closer to the intersection there was a sign on the right side saying 'JUNCTION.' The signs were there the day the wreck occurred. The last time I saw the truck before I heard the collision it was on the right of the center of the National Highway coming . . . to Boone . . . I saw some marks on the road where the cars ran together. They were about the center of Highway No. 421, a little more of them on the left-hand side."

Carlyle Ingle, State Highway Patrolman, who arrived on the scene after the collision, observed marks on the road. He testified: "They started near the end of the concrete on No. 421. . . . The first scratch marks appeared near the center of the road, looking like at the point of impact . . . and led to the left to the truck. . . . From the appearance of the car, it had a definite collision with something on the left-hand side of its front. . . . There was a Stop sign before reaching the intersection on Highway No. 16, which comes from Jefferson, erected by the State Highway Commission. It was plainly visible. . . . U. S. 421 was the dominant road. There is no rule of the road or regulation requiring a man on 421 to stop there. There was a requirement that one coming along No. 16 should stop before entering the intersection. The front wheels of the truck were damaged. . . . The best I remember the right front one was knocked back and the axle bent and the spring broken. The front end of the truck and the left front end of the car were damaged. As the truck spun around the side of it hit the back of the car."

R. C. Davis testified: "I was in the car . . . Elijah Sexton was driving . . . to Winston-Salem. . . . Mrs. Jones was in the car. . . . I know that she was riding . . . as a guest. I had been over the road one time before the wreck happened. We were going into the intersection . . . and were making probably 35 miles per hour. We had already gotten across the center of the road making the turn to go into Wilkesboro. We heard the truck blow. Of course it was done right now; we was over the mark, over the center of the highway when the truck hit us. . . . We were on the right-hand side of the center of the highway going into Wilkesboro when it happened. We were making the turn to go into North Wilkesboro when the truck hit us. . . . When the truck struck us it was going anywhere

from 45 to 50 miles an hour. . . . I remember seeing a small sign up on the bank while approaching the intersection. I couldn't say whether Mr. Sexton, who was driving the car, slacked his speed any when he came into the intersection. . . . He was going around 35 miles an hour. He didn't stop before entering the intersection." Then, on cross-examination, the witness continued: "The sign I was telling . . . about is on the road coming in from Jefferson . . . on the right side, setting up on the bank. On the sign are letters in black saying 'STOP.' The sign was not in plain view of a person driving from No. 16 into the intersection. It was grown up in weeds and set up on the bank. I did not see it plain. I was along there about ten days before that and it was there then. There was a sign in plain view of a person driving in from Jefferson saying 'JUNCTION.'

"I was riding in the back seat in the middle. My father was on my left and the two little boys on the right . . . four people in the back seat. The woman who was killed was riding in the front seat . . . on the side next to the Stop sign and . . . the Junction sign, . . . right-hand side going toward North Wilkesboro. . . . There was nothing to obstruct the view of the driver from the junction sign before entering the highway. When I first saw the truck it was right close to us and I heard the horn blow. It was probably 30 or 40 feet away. I don't know where it was traveling when I first saw it, but it was over on the left-hand side when it hit us. I cannot say for sure just where the truck was when I first saw it because it was done so quickly. I wouldn't say that the truck wasn't on its right side of the road when I first saw it."

Elijah Sexton, by deposition, testified: "I owned the 1937 Ford two-door sedan . . . car I was driving. . . . Just prior to the time I entered the intersection I cannot say just how fast I was driving, but I had never driven over 40 miles an hour that morning. I do not know whether I slowed down any in approaching the intersection. I cannot recall anything about whether I slowed down or blew my horn. I recall seeing a sign below the intersection but I don't know what kind of sign it was. I could not discover what was on the sign. I don't remember whether I stopped prior to entering the intersection. The wreck happened at the intersection or close to it. I do not recall who I had the wreck with. I don't remember whether it was a truck or automobile. . . . I never did see it, but they said it was a truck. I don't remember seeing it. You could see down the highway toward North Wilkesboro quite a distance. I had never been over the road before. I did not know there was an intersection there. I do not know how fast I was going at the time I entered it. I do not recall blowing my horn. At the time of the collision I was knocked unconscious. That is all I

can say. . . . I do not remember anyone in the car making a remark about entering the intersection or asking me to slow down. I do not remember any of the parties warning me about the intersection or to slow down, or making any sign of alarm. . . . The truck was coming from Wilkesboro. I was going toward Wilkesboro."

On cross-examination, Sexton further testified: "The brakes and general state of repair of my car was good. . . . She (Mrs. Jones) was riding in my car as a guest. She had no control or management whatsoever over my automobile. . . . I was not drinking. . . . I had been driving my car at a lawful rate of speed and in a careful manner up to the time the collision occurred. I saw a sign at or near the intersection but I couldn't read it because bushes were grown up around it. . . . The cars were traveling in opposite directions and meeting each other when they ran together. . . . The surface of the road was dry and the day clear. . . . If there was a Stop sign at the intersection the fellow on the Boone Highway had the right of way."

Defendants, reserving exception to denial of their motion for judgment as in case of nonsuit, offered testimony of Fred M. Staley and Weldon McCoy. Staley gave this narrative: "On July 8, 1939, . . . I was going to Boone, traveling west . . . on National Highway No. 421. I know where the State road from Jefferson intersects with No. 421 near Miller's Creek. The wreck was just beyond the center of the intersection. I was operating my car on the right-hand side of U. S. 421 when it occurred. The Ford car came out of the mouth of No. 16, with which road I am familiar. Northwest of the intersection on the right side of No. 16 there was a Stop sign and also a Junction sign. . . . Immediately prior to the impact my truck was on the right of the center line of the hard surfaced portion of the highway. I was driving 20 or 25 miles an hour. In my opinion the car driven by Mr. Sexton was traveling between 50 and 60 miles an hour. The right front headlight and fender and wheel of my truck were stricken. The left front fender and headlight of Mr. Sexton's car came in contact with my truck. When the automobiles collided they both turned southwestwardly and the truck turned on west of No. 421 and came to rest on its side due south of the intersection. The Ford stopped . . . on its right side. My truck entered the intersection first. I had taken my foot off the gas and put it on the brake immediately before entering the intersection. When I saw he was coming on in I hit the brakes immediately. I mean by hitting the brakes, I pumped the brakes . . . hydraulic brakes. I had them on hard enough by the time the crash occurred. Mr. Sexton . . . did not sound his horn or do anything or slow down the speed of the automobile before entering the inter-

section. My truck was in plain view when he came up to the intersection for several hundred feet. You can see from 300 to 450 feet from where 16 enters the intersection. . . . My truck had never been on my left of the center line of the highway before the cars came together."

Weldon McCoy testified: "I was staying at Myers Filling Station which is right in Miller's Creek on left side of the National Highway going to Boone. At the time of the wreck I was standing on the side of the road the filling station is on and up next to Wilkesboro. I saw Fred Staley operating his truck. . . . Immediately before the wreck his truck was on his right side. I saw the wreck. I saw the car driven by Elijah Sexton; it was coming out of 16 from West Jefferson. No. 16 does not cross No. 421, it enters it. At time of the wreck there was a sign on No. 16 down some distance from the intersection with the word 'STOP' on it. There was also a junction sign before you come into the intersection. I saw the car driven by Sexton before it entered the intersection. It did not stop or slow its speed from the sign until it entered the intersection. . . . In my opinion the Sexton car was traveling 55 or 60 miles an hour. The truck was making 25 or 30 miles an hour before it entered, before he put on the brakes. The truck driver put on his brakes and had just about stopped when the car and truck hit. The left-hand fender and light on the car struck the right-hand side of the truck. When the car came into the intersection he tried to turn . . . to the right. It looked like he tried to beat the truck out and go around and when he turned to the right his left-hand fender struck and that turned the car to the right. . . . I said the car was on its right side of the road and the truck on its right side when the car hit the truck. The cars came together on the right-hand side going toward Boone."

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

Bowie & Bowie for plaintiff, appellant.

Ira T. Johnston, Hayes & Hayes, and Trivette & Holshouser for defendants, appellees.

WINBORNE, J. When the evidence is considered in the light most favorable to plaintiff, we are of opinion that the case comes within the principles enunciated in *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; and *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808, and is insufficient to require that an issue of negligence be submitted to the jury. It is manifest that Elijah Sexton was negligent and that his negligence insulated negligence, if any,

of defendants, and was the sole proximate cause of the collision. This conclusion finds support in *Harton v. Telephone Co.*, 146 N. C., 429, 59 S. E., 1022; *Lineberry v. R. R.*, 187 N. C., 786, 123 S. E., 1; *Thompson v. R. R.*, 195 N. C., 663, 143 S. E., 186; *Craver v. Cotton Mills*, 196 N. C., 330, 145 S. E., 570; *Boyd v. R. R.*, 200 N. C., 324, 156 S. E., 507; *Hinnant v. R. R.*, 202 N. C., 489, 163 S. E., 555; *Baker v. R. R.*, 205 N. C., 329, 171 S. E., 342; *Newell v. Darnell*, 209 N. C., 254, 183 S. E., 374; *Smith v. Sink, supra; Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326.

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., supra; Mills v. Moore*, 219 N. C., 25, 12 S. E. (2d), 661; *White v. Chappell*, 219 N. C., 652, 14 S. E. (2d), 843, and cases cited.

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." *Hoke, J.*, in *Hicks v. Mfg. Co.*, 138 N. C., 319, 50 S. E., 703; *Russell v. R. R.*, 118 N. C., 1098, 24 S. E., 512; *Clinard v. Electric Co.*, 192 N. C., 736, 136 S. E., 1; *Murray v. R. R., supra.*

In *Lineberry v. R. R., supra, Clarkson, J.*, said: "It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the Court will declare whether an act was the proximate cause of the injury or not." Again in *Russell v. R. R., supra*, it is stated that "Where the facts are undisputed and but a single inference can be drawn from them, it is the exclusive duty of the court to determine whether an injury has been caused by the negligence of one or the concurrent negligence of both of the parties."

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit, "1. When all the evidence taken in the light most favorable to the plaintiff, fails to show any actionable negligence on the part of the defendant . . . 2. When it clearly appears from the evidence that the injury complained of was

independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person . . .," *Smith v. Sink, supra,* and cases cited. See, also, *Boyd v. R. R., supra; Powers v. Sternberg, supra; Butner v. Spease, supra; Murray v. R. R., supra.*

"Foreseeability is the test of whether the intervening act is such a new, independent and efficient cause as to insulate the original negligent act. That is to say, if the original wrongdoer could reasonably foresee the intervening act and resultant injury, that the sequence of events is not broken by a new and independent cause, and in such event the original wrongdoer remains liable," *Brogden, J.,* in *Hinnant v. R. R., supra. Harton v. Telephone Co., supra; Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446; *Butner v. Spease, supra; Murray v. R. R., supra.*

Too, it is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highways. 5 Am. Jur., Automobiles, sections 165, 166, 167.

However, a motorist is not under a duty of anticipating negligence on the part of others, but in the absence of anything which gives or should give notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety. 45 C. J., 705; *Shirley v. Ayers,* 201 N. C., 51, 158 S. E., 840. See, also, *Cory v. Cory,* 205 N. C., 205, 170 S. E., 629; *Jones v. Bagwell,* 207 N. C., 378, 177 S. E., 170; *Hancock v. Wilson,* 211 N. C., 129, 189 S. E., 631; *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539; *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707; *Butner v. Spease, supra.*

Furthermore, it is provided by chapter 407, Public Laws 1937, section 120, that the State Highway Commission, with reference to State Highways, is authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, "and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. That no failure so to stop, however, shall be considered contributory negligence *per se* in any action at law for injury to 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."

In *Sebastian v. Motor Lines, supra,* regarding the statute, it is held, "as a necessary corollary or as the rationale of the statute," that where the party charged is a defendant in any such action the failure so to stop is not to be considered negligence *per se,* but only evidence thereof to be considered with other facts in the case in determining whether the defendant in such action is guilty of negligence." In like manner and for the same reason, the principle may be extended to anyone who violates the statute.

It is provided in section 103 of chapter 407 of 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; that where no special hazard exists a speed of thirty-five miles per hour for motor vehicles designed, equipped for, or engaged in transporting property shall be lawful; but any speed in excess of that limit shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful; but that the provisions of the section shall not be construed to relieve the plaintiff in any civil action from the burden of proving negligence upon the part of the defendant as the proximate cause of an accident.

Applying these principles to the evidence in the case in hand, it was unlawful for Elijah Sexton, the driver of the Ford sedan in which plaintiff's intestate was riding, to fail to stop, in obedience to the stop sign, erected by the State Highway Commission on State Highway No. 16, before attempting to enter U. S. Highway No. 421, the dominant highway, and his failure so to do is evidence of negligence to be considered with other facts in the case in determining whether he was guilty of negligence. When so considered the evidence of his conduct makes him guilty of negligence as a matter of law. While the "Stop" and "Junction" signs, as testified to by other witnesses for plaintiff, were "in plain view" of, or "plainly visible" to any person traveling on Highway No. 16 toward the entrance into Highway No. 421, and while another, R. C. Davis, riding in the Ford sedan with Sexton, saw those signs, and saw the black letters "Stop," and while a sign was seen by Sexton, he admits that he approached the point of the wreck without being able to recall that he slackened his speed, which he recalled had not been over forty miles per hour that morning, and wrecked his car in collision with the truck without seeing the truck, when there was nothing to prevent him from seeing it. All the evidence for plaintiff, as well as for the defendant, shows that, in approaching the point where Highway No. 16 enters Highway No. 421, there was nothing to obstruct the truck from Sexton's view. Yet, he admits that he "never did see" the truck and does not know whether he struck a truck or an automobile. Further, the evidence shows that every appearance indicates that Sexton was running

his Ford into a zone of danger which he should have seen and which others, similarly situated, did see, if he did not, and that he failed to see the obvious. Such negligence, if the sole proximate cause of injury or death, will bar recovery, and this extends even to a guest. *Powers v. Sternberg, supra,* and *Miller v. R. R., ante,* 562.

The defendant Staley, who was acquainted with the conditions on State Highway No. 16, but operating the truck upon the dominant highway, was under no duty to anticipate that Sexton, in approaching the intersection, the truck being in plain view, would fail to stop as required by the statute; and in the absence of anything which gave or should give notice to the contrary, he was entitled to assume and to act on the assumption, even to the last moment, that Sexton would not only exercise ordinary care for his own safety as well as those riding in his car, but would act in obedience to the statute, and stop before entering the dominant highway. The evidence points to the emergency caused by the failure of Sexton to stop. Such a situation was not reasonably foreseeable by Staley. All the evidence further shows that Staley was operating the truck on his right-hand side of the dominant highway immediately before the collision.

It is contended by the plaintiff, however, that there is evidence tending to show that the speed of the truck was in excess of thirty-five miles an hour, and, therefore, *prima facie* unlawful. Even so, it is manifest from the evidence that its speed would have resulted in no injury but for the negligent act of Sexton. Hence, the proximate cause of the collision must be attributed to the gross and palpable negligence of Sexton, as in *Butner v. Spease, supra.*

The judgment below is

Affirmed.

THE FEDERAL LAND BANK OF BALTIMORE v. LEVI S. GARMAN AND SARAH E. GARMAN.

(Filed 7 January, 1942.)

1. Constitutional Law § 23—

A judgment by confession entered upon a warrant of attorney in a court of another state in accordance with the laws of such state comes within the protection of the Full Faith and Credit Clause of the Federal Constitution, Art. IV, sec. 1, and must be recognized in this State even though rendered without service of process or appearance other than that pursuant to the warrant itself.

2. Judgments § 5—Judgment by confession on warrant of attorney held entered by prothonotary in compliance with laws of State of Pennsylvania.

Plaintiff's record evidence disclosed that the order granting leave to plaintiff "to enter judgment by confession" specified that it was by virtue of the warrant of attorney and that the judgment was entered by the prothonotary on the note executed by defendants "with warrant of attorney." *Held:* Defendants' contention that the court vested plaintiff with authority to enter judgment by confession against defendants is untenable, since the record evidence discloses that the judgment was entered by the prothonotary in strict accord with the warrant of attorney and in compliance with the requirements for the rendition of such judgments in the State of Pennsylvania.

3. Judgments § 40—In suit on deficiency judgment rendered in another state, the validity of the foreclosure may not be attacked.

In an action instituted in the State of Pennsylvania to recover a deficiency judgment on a mortgage note executed in 1918, judgment by confession was rendered therein upon a warrant of attorney in compliance with its laws. Plaintiff instituted this action here upon the Pennsylvania judgment. *Held:* The judgment must be given full force and effect under the provision of the Federal Constitution, and defendants' contention that the foreclosure of the mortgage was irregular and that the land was sold to plaintiff at an unconscionable price cannot be considered, since such contentions are precluded by the deficiency judgment sued on.

4. Mortgages § 39f—

Under the laws of the State of Pennsylvania, the mere inadequacy of the purchase price at the foreclosure sale of a mortgage does not entitle the mortgagors to upset the foreclosure after the sheriff's deed to the purchaser has been acknowledged, delivered and recorded.

5. Judgments § 40—Where foreign judgment sued on has been stricken out in that State as to one defendant, judgment against such defendant may not be obtained thereon in this State.

This action was instituted on a deficiency judgment rendered by a court in the State of Pennsylvania. Subsequent to the judgment of our Superior Court in favor of plaintiff, the *feme* mortgagor had the judgment of the State of Pennsylvania stricken from the record in that state pursuant to its laws permitting a married woman to open up a judgment against her to show that she signed the instrument upon which the judgment is based as surety. *Held:* It would be manifestly unjust to affirm the judgment against the *feme* defendant upon a judgment of the State of Pennsylvania which had been stricken out as to her in that state, and the Supreme Court on appeal will grant the *feme* defendant a new trial.

APPEAL by defendants from *Carr, J.*, at April Term, 1941, of GRANVILLE.

Civil action to recover on judgment alleged to have been entered in the Court of Common Pleas of York County, Pennsylvania.

It appears uncontroverted that on 22 March, 1918, defendants executed an amortization first mortgage note in the sum of $6,000, payable

to the Federal Land Bank of Baltimore "on an amortization plan and in accordance with amortization tables provided by the Federal Farm Loan Board" in the manner and form set out. In this note it is provided that "if any default be made in any of such payments, or in case of failure to comply with any of the requirements or covenants contained in the mortgage given by the makers to secure the payment of this note, then at the election of the holder . . . the principal sum hereof and all accrued interest thereon shall at once become due and payable, including a collection fee of five per cent, and costs, and immediately upon such defalcation and maturity I hereby authorize any prothonotary or attorney of any court of record in Pennsylvania or elsewhere to confess judgment against me therefor, with costs of suit, release of errors, and with five per cent additional for collection fees . . ." The note further provides that it is secured by first mortgage of even date therewith on real estate in York County, Pennsylvania. Such mortgage was effected. And though the defendants collaterally attacked the proceedings, the mortgage was foreclosed under order of court and the lands were sold, under writ of *levari facias,* to plaintiff at the price of $1,000.00, from which costs and expenses were deducted, leaving the net amount of $697 to be credited on the note.

Plaintiff, in its complaint, alleges that on 17 January, 1938, judgment in its favor, and against defendants, was rendered and duly filed and enrolled in the Court of Common Pleas in and for the County of York, State of Pennsylvania, for $6,538.67, all of which with interest is due and owing to plaintiff by defendants after demand upon them and payment refused.

Each of defendants in separate answer filed admits demand and refusal to pay, but denies all other material allegations of the complaint.

Defendants aver as defense that plaintiff knew the addresses of defendants, and of George S. Garman, to whom defendants had deeded land in question on 15 November, 1926, and who had assumed payment of indebtedness to the Land Bank, and had for a period of several years made regular payments to said bank; that in the foreclosure proceeding there was failure to comply with quoted statute of the State of Pennsylvania as to service of *scire facias sur* mortgage; that, notwithstanding, no service of the *scire facias sur* mortgage was made upon these defendants or George S. Garman, the sheriff proceeded with the foreclosure of said land, and on 13 February, 1936, on a writ of *levari facias* sold said land to plaintiff for the unconscionable sum of $1,000.00 and conveyed same to him by deed dated 24 February, 1936, which sale the defendants upon information aver "To be unlawful, invalid, and a fraud" upon them, and "hence void and of no effect," and, therefore, no deficiency judgment could be established or sustained upon which to base judgment;

and that in the proceeding for deficiency judgment there is failure to comply with the authority given in the note in that no prothonotary or attorney of any court of record therein authorized to confess judgment has done so, and, hence, judgment entered constitutes a fraud on rights of defendants. Defendant Sarah Edith Garman avers that the judgment sued on in this action is invalid as to her for that she, a married woman, signed the note on which the judgment was obtained as an accommodation maker thereof, or surety for her husband, and without receiving before or at the time any value or consideration therefor.

In the trial court plaintiff offered in evidence: (1) An exemplified copy from the records and proceedings enrolled in the Court of Common Pleas in and for the County of York, State of Pennsylvania, No. 238, January Term, 1938, under caption "The Federal Land Bank of Baltimore v. Levi S. Garman and Sarah Edith Garman, his wife," (a) of the amortization first mortgage note dated 22 March, 1918, signed by defendants herein payable to the plaintiff herein for $6,000 hereinabove described, and containing the provisions hereinabove set forth, with notation "mortgage foreclosed 12-7-35, see suit of the Federal Land Bank of Baltimore v. Levi S. Garman," and on back of note endorsement of dates and amounts of payments; (b) of affidavit of treasurer of, and on behalf of Federal Land Bank of Baltimore, filed and entered 17 January, 1938, in said action No. 238 above described, in which it is set forth "that the attached amortization first mortgage note, containing a warrant of attorney to confess judgment was duly executed and delivered by Levi S. Garman and Sarah Edith Garman, whose names are signed thereto; that the mortgage given as security for the aforementioned amortization first mortgage has been foreclosed, and it is now the desire of the Federal Land Bank of Baltimore to enter judgment by confession against Levi S. Garman and Sarah Edith Garman, by the virtue of the power of attorney in said note, in order to collect a deficiency of $6,538.67, now due and payable according to law"; "that the amount of said deficiency has been computed according to law as follows: . . . (itemized—including credit of net proceeds of sale of land); and that the debtors are, at the present time, still living"; (c) of an order signed by President-Judge reading as follows: "And now, January 17, 1938, upon motion of J. T. Atkins, attorney for the plaintiff, the court grants leave to the plaintiff to enter judgment by confession in the sum of Six Thousand Five Hundred Thirty Eight Dollars and Sixty Seven Cents ($6,538.67), the amount set forth in the foregoing affidavit in favor of the Federal Land Bank of Baltimore and against Levi S. Garman and Sarah Edith Garman, his wife, by virtue of the warrant of attorney in the instrument attached hereto"; (d) of entry of "judgment in favor of the plaintiff for the sum of Six Thousand Five Hundred Thirty Eight

Dollars and Sixty Seven Cents ($6,538.67) debt on note dated March 22, 1918, with warrant of attorney payable as conditioned in said note with cost of suit, release of errors, exemption, inquisition, condemnation, stay of execution and right of appeal waived with five per cent collection fees. Filed and entered January 17, 1938. Harry P. Peeling, Prothonotary"; and (e) of judgment cross index entries. Exception. (2) Purdon's Pennsylvania Statutes, Civil & Eq. Rem. & Procedure 12, Section 739, pertaining to entry of judgments by confession under warrant of attorney. (3) Rule 146 of the Rules of the Court of Common Pleas of York County, Pennsylvania, requiring leave of court to be obtained to enter judgment when the warrant of attorney is ten years old and under twenty. Exception.

On the other hand, on the trial below defendants testified to the effect: That they, who on 22 March, 1918, were residing and have since resided in Oxford, Granville County, North Carolina, defendant Sarah Edith Garman never having resided in the State of Pennsylvania, received no notice (1) of any proceeding for the foreclosure in Pennsylvania of the mortgage executed by them on 22 March, 1918, to the Federal Land Bank of Baltimore as security for note of $6,000 payable to said bank, or (2) of any suit in courts of Pennsylvania against them in 1938, or at any other time, to recover of them any amount alleged to be due on the said note; and that defendant Sarah Edith Garman owned no interest in the land conveyed by the mortgage given to the bank, and, derived no benefit from the borrowed money secured thereby.

Defendant further offered exemplified copy, from the records of proceedings in the Court of Common Pleas, York County, Pennsylvania, in an action No. 105, entitled "The Federal Land Bank of Baltimore v. Levi S. Garman and Sarah Edith Garman, his wife, original mortgagors, George S. Garman and Carrie M. Garman, real owners," January Term, 1936, (1) of affidavit of assistant treasurer of, and on behalf of Federal Land Bank of Baltimore, filed in prothonotary's office, 18 December, 1935, in which it is set forth that said bank is mortgagee and obligee in a certain mortgage and amortization note, dated 22 March, 1918, executed, acknowledged, and delivered by Levi S. Garman and Sarah Edith Garman, his wife, as original mortgagors and obligors to the Federal Land Bank of Baltimore to secure the payment of Six Thousand ($6,000) Dollars on a tract . . . of land in York County . . .; the balance due . . . on account of the said mortgage deed . . . (itemized-totalling) "$6,270.06; that the whole of the said debt has been declared due and payable by reason of default of mortgagors or obligors and their heirs and assigns, in payment of . . . (installments 1931-1935 listed), in failing to pay the taxes on the mortgaged premises for 1934-1935, and in failing to maintain insurance on the mortgaged prem-

ises as required by the terms and conditions of the aforesaid mortgage and of the note secured thereby . . ."; that the affiant has been unable "to ascertain that there are any other persons interested in said real estate except those above mentioned, and, . . . and that the real owners are George S. Garman and Carrie M. Garman, his wife, Reisterstown, Maryland"; (2) of *praecipe* by attorney for the Land Bank for "writ of *scire facias* returnable the first Monday of January, 1936, *sur* mortgage given by Levi S. Garman and Sarah Edith Garman, his wife, to the Federal Land Bank of Baltimore, dated March 22, 1918," copy of which is attached, and alleging facts substantially as set forth in the last foregoing affidavit, and that "plaintiff further avers that the said Levi S. Garman and Sarah Edith Garman, his wife, by their deed dated November 15, 1926, . . . sold and conveyed the said property to George S. Garman and Carrie M. Garman, who are the present owners of said land, who have continued the defaults hereinbefore declared"; (3) of *scire facias sur* mortgage, dated 18 December, 1935, commanding the sheriff to "make known to the said Levi S. Garman and Sarah Edith Garman, his wife, original mortgagors, and George S. Garman and Carrie M. Garman, real owners, that they" appear before "our Judges at York, at our Court of Common Pleas . . . on the first Monday of January, A.D. 1936, . . . to show . . . why the said premises . . . should not be seized and taken in execution, and sold to satisfy the debt and interest aforesaid . . .," to which as to said original mortgagors and said real owners the sheriff shows "my return is *nihil habet*"; (4) of judgment of P. J. at January Term (13 January), 1936, in which after reciting service of writ of *scire facias sur* mortgage upon tenant in possession of property, and return of sheriff *"nihil habet"* as above stated, and that no appearance has been entered and no affidavit of defense filed, judgment by default upon motion therefor was entered in said action in favor of the plaintiff and against the defendants "for want of an appearance and for want of an affidavit of defense" in the sum of $6,270.06, and attorney's fee and commissions, and "the court orders that the plaintiff shall have execution by the *levari facias* directed to the proper officer"; (5) of *levari facias* issued 14 January, 1936, in the name of President-Judge by Prothonotary to sheriff of York County; and (6) of answer of sheriff on *levari facias* showing sale of real estate 15 February, 1936, to the Federal Land Bank of Baltimore for $1,000, from which cost amounting to $303 is deducted, leaving a net of $697.

Upon evidence so offered by plaintiff and by defendants the court submitted this issue: "In what amount, if any, are defendants, Levi S. Garman and Sarah E. Garman, indebted to the plaintiffs?"

The court charged in substance that if the plaintiff has satisfied the jury by the greater weight of the evidence, the burden being upon the

plaintiff, that the judgment, referred to on the exemplified copy of the certified record from the Court of Common Pleas of the County of York, Pennsylvania, was rendered in said court on 17 January, 1938, then it would be the duty of the jury to answer the issue $6,538.67, with interest thereon from 17 January, 1938, until paid. In accordance therewith the jury returned verdict.

From judgment thereon defendants appeal to the Supreme Court and assign error.

Pending appeal, defendants file motion for new trial on account of newly discovered evidence.

Parham & Taylor for plaintiff, appellees.
Irvin B. Watkins and Royster & Royster for defendants, appellants.

WINBORNE, J. The record on this appeal upon careful consideration leads us to the conclusion that the judgment in suit is a valid judgment of the court of common pleas of the State of Pennsylvania, and entitled in the courts of this State to be given such faith and credit as it has by law or usage in the State in which it was pronounced. U. S. Constitution, Art. IV, sec. 1, *Bonnett-Brown Corp. v. Coble,* 195 N. C., 491, 142 S. E., 772, and cases cited.

The *Bonnett-Brown case, supra,* relates to a judgment of the municipal court of Chicago, in the State of Illinois, entered by confession on warrant of attorney, and is directly applicable to the case in hand. There the Court quotes with approval from 40 A. L. R., 441, Ann., this statement of law: "It is established, practically without dissent, that the fact that a judgment of a court of another state was entered under a warrant of attorney to confess judgment executed contemporaneously with the principal obligation, and without service of process or appearance other than that pursuant to the warrant itself, does not take it out of the full faith and credit provision of the Federal Constitution, or disentitle it to the recognition and effect accorded to other judgments of sister states, when asserted as the basis of an action or defense. And this is true whether or not such judgments of that kind are permitted in the state in which the judgment of the sister state is asserted." See, also, 89 A. L. R., 1503, Ann.

That being the settled law, pertinent to case in hand, it is appropriate to see what is the law of Pennsylvania on the subject.

Purdon's Pennsylvania Statutes, Section 739, Title 12, relating to confession of judgment on notes, provides that: "It shall be the duty of the prothonotary of any court of record, within this commonwealth, on the application of any person, being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing, in which judg-

ment is confessed, or containing a warrant for an attorney at law, or other person to confess judgment, to enter judgment against the person or persons who executed the same, for the amount which from the face of the instrument may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court and in term time; and the defendant shall not be compelled to pay any costs, or fee to the plaintiff's attorney, when the judgment is entered on any instrument of writing as aforesaid. (1806, Feb. 24, P. L. 334, 4 Sm. L. 270, Sec. 28)."

The Supreme Court of Pennsylvania, speaking in opinion by *Duncan, J.*, rendered September, 1821, in the case *Helvete v. Rapp*, 7 Sergeant & Rawles Rep., 22 Pa., 305, in regard to judgment by confession entered 17 May, 1815, under this act, had this to say: "The evident and sole intention of the Legislature in conferring the power of entering a judgment on the judgment bond without the intervention of an attorney was, to exempt the obligor from the payment of costs to an attorney. This act was passed on 24 February, 1806. . . . There being no literal form directed, and no precedent to guide the Prothonotaries in the exercise of this new duty, each has adopted his own mode; they are as various as their faces, and many of them scarcely present feature to inform a purchaser or designate a judgment; but here is a substantial entry of a judgment bond, containing all that is necessary to give information. It is entered on the docket in the form of an action, as a judgment bond, the names of the parties, the amount due, the date and time of the writing. It states the entry of a judgment bond, and seal of the defendant; the judgment bond is filed of record, entered the 17th May, 1815. What is entered? A judgment on the judgment bond filed. No man could be deceived by this mode of entry, for however inartificial it may be, however defective in the technical words of a judgment, none who called for information could be led into error; the docket entry gave full information. It might have been more formal, but still it is the entry of a judgment entered by the Prothonotary, who was authorized to make the entry."

Also, in case of *The Commonwealth against Conard, et al.*, 1 Rawles Rep., 33 Pa., 249, this headnote epitomizes pertinent portion of the opinion of the Supreme Court: "A prothonotary complies, substantially, with the directions of the Act of assembly of the 24th of February, 1806, when, in entering judgment on a bond with warrant of attorney, upon

the application of the party, he enters on his docket the names of the obligor and obligee, in the form of an action, as parties, the date of the bond and warrant of attorney, the penal sum, the real debt, the time of entering judgment, and the date of the judgment on the margin of the record."

And in the case of *Whitney v. Hopkins,* 135 Pa., 246, 19 A., 1075, *Williams, J.,* writing for the Supreme Court, it is said: "The prothonotary of the court of common pleas is merely the clerk of the court. He has no authority, *virtute officii,* to act as the clerk, agent, or attorney of any person . . . As an individual, he may be authorized to act for another in the same manner that any other person may be; and, when so authorized, his powers are derived from the instrument under which he acts, and not from his office . . . To justify him in acting for suitors, an express authority must be shown, coming either from the person to be affected by his acts, or from an act of the General Assembly. By the Act of 24th February, 1806, it was made the duty of the prothonotary of any court of record within the commonwealth, on the application of the holder, to enter judgment on any note, bond, or other instrument of writing in which judgment is confessed by the maker, or which contains a warrant of attorney for an attorney at law or other person to appear and confess judgment thereon."

Furthermore, the Supreme Court of Pennsylvania states that, "It is settled that every judgment entered on a specialty, with warrant of attorney to confess judgment, must follow strictly the authority conferred by the warrant. The attorney who executes the warrant cannot change its terms or enlarge its scope." *In re Claghorn's Estate* (Pa.), 37 A., 918.

Moreover, the rules of the courts of the Nineteenth Judicial District, comprising the County of York, Pennsylvania, adopted 1 December, 1937, provide: "Rule 146. If a warrant of attorney to enter judgment be above ten years old and under twenty, the Court in term time, or a Judge thereof, in vacation, must be moved for leave to enter judgment, which motion must be grounded on an affidavit setting forth that the money is unpaid and the party living, but if the warrant be above 20 years old, there must be a rule to show cause served upon the party, if he be within the State."

When tested by these principles the facts shown in the record disclose strict compliance with the requirements for a valid judgment in the State of Pennsylvania. Defendants contend, however, that the record shows that, in the order granting leave to enter judgment, the court vested the plaintiff with authority to enter judgment by confession against defendants. Yet, the order granting leave to plaintiff to have judgment by confession specifies "by virtue of the warrant of attorney in the instru-

ment attached hereto." And the judgment as entered shows there the prothonotary entered it "on note dated March 22, 1918, with warrant of attorney." Hence, there is no deviation from the strict provision of the warrant set out in the note, which authorizes any prothonotary to confess judgment.

It is worthy of note here that the New York Court of Appeals in case of *Teel v. Yost* (1891), 128 N. Y., 387, 13 L. R. A., 796, 28 N. E., 353, in affirming judgment of New York Court in action upon a judgment confessed in 1878 by the prothonotary of the court of common pleas of Pennsylvania, after quoting from the cases of *Helvete v. Rapp, supra,* and *Commonwealth v. Conard, supra,* uses this language: "These clear and explicit announcements by the highest courts of the State, of the force and effect given to such judgments in that State, are entitled to the highest respect, and cannot, without ignoring the requirements of comity and propriety prevailing among sister states, be disregarded by the courts of other States . . ."

Defendants further contend that there is irregularity in the foreclosure proceeding, and that the land was sold to plaintiff at an unconscionable price. In this connection, it is noted that the *levari facias sur* mortgage, under which the sale was had, was authorized in a judgment entered by the court of common pleas of York County, and that the land was sold 15 February, 1936, and conveyed 24 February, 1936, by the sheriff to plaintiff. There is no direct evidence as to the insufficiency of the price paid. But, in any event, these are matters collateral and anterior to entry of judgment in question and relate to the merits of the subject matter, as to which inquiry is precluded in suit on such judgment. *Miller v. Leach,* 95 N. C., 229; *Bonnett-Brown Corp. v. Coble, supra.*

However, if there were evidence in the record to support the allegation of plaintiff that the sheriff, under the writ of *levari facias,* sold the land to plaintiff for an unconscionable price, the decisions of the courts of Pennsylvania show that: (1) Where, following a sheriff's sale, there has been an acknowledgment, delivery and recording of sheriff's deed, a rule to set aside the sale is, in the absence of fraud, too late. *Fenton v. Joki,* 294 Pa., 309, 144 A., 136, citing *Lengert v. Chaninel,* 208 Pa., 229, 57 A., 561, 101 Am. St. R., 931; (2) the "presumption" as stated in *Plummer v. Wilson* (Pa.), 185 A., 311, "is that at a public sale the price received is the highest and best obtainable"; (3) mere inadequacy of price, without more, is not a sufficient ground for setting aside a judicial sale, *Schekter v. Katler,* 95 Pa. Superior Ct., 226; *Fenton v. Joki, supra; Plummer v. Wilson, supra;* and (4) the setting aside of judicial sales is a subject peculiarly in the discretion of the trial court, and its action will not be reversed except in a clear case of abuse of that discretion, *Schekter v. Katler, supra,* and cases cited; also *Fenton v. Joki, supra.*

Furthermore, in the case of *Plummer v. Wilson, supra,* the Court states that the unsupported statement that the value of the property sold is greater than the price received at the sale, does not disclose any fact upon which a court could find either that the sale was not properly conducted, or that the price received was not then the fair market value.

Now, with regard to motion of defendant, Sarah Edith Garman, for a new trial upon the ground of newly discovered evidence:

After the rendition of the judgment of April Term, 1941, of Granville Superior Court, from which appeal is taken, it appears from copy of proceedings, duly authenticated and attached to the motion for new trial, that on 4 April, 1941, defendant, Sarah Edith Garman, moved in the court of common pleas of York County, Pennsylvania, in the original cause No. 238, in which judgment by confession was entered, for a rule upon plaintiff to show cause why the judgment so entered should not be opened and she be permitted to make a defense, upon the ground that the loan, evidenced by the bond on which judgment was confessed, was made to her husband, and that "pursuant to requirements of the plaintiff" she joined in the execution of the mortgage and mortgage bond, but received none of the proceeds of the loan, and, hence, under sec. 2 of the Act of 8 June, 1893, P. L. 344, 48 P. S., sec. 32, the judgment is void and should be stricken from the record; that on 26 July, 1941, after notice to plaintiff, the rule was made absolute and the judgment opened as to her so that she might "be let into a defense"; and that, on 11 November, 1941, the matter coming before a jury and the jury having returned a verdict in her favor, the court "ordered and decreed on said verdict . . . that said judgment to No. 238, January Term, 1938, as respects Sarah Edith Garman, defendant, be stricken from the record."

Again, we look to pertinent statute and application of it by the courts in the State of Pennsylvania. We find that the statutes of Pennsylvania pertaining to "substantive rights of married women" provide among other things that "she may not become an accommodation endorser or maker, guarantor, or surety for another." Act of 8 June, 1893, P. L. 344, sec. 2. Purdon's Pa. Statutes, 1936, Title 48, sec. 32.

The courts of Pennsylvania hold that a judgment, on a note, admittedly executed by a married woman, having been confessed by attorney under warrant therein contained, is presumed to be valid. *Ponevyezh B. & L. Assn. v. Shandelman,* Pa., 170 A., 340, and cases cited.

At the time of rendition of the judgment in the present action, defendant, Sarah Edith Garman, having admitted the execution of the note on which the judgment in suit was based, the latter stood as a valid judgment against her. Yet, in Pennsylvania, a married woman may move in the cause for order to open the judgment and to permit her to interpose as defense the presence of circumstances which would relieve her of

liability under the provisions of the Act of 8 June, 1893, *supra, Harris v. Reinhard,* Pa., 30 A., 510, *Ponevyezh B. & L. Assn. v. Shandelman, supra; McKean v. Enburg,* 188 A., 835. See, also, *Vineland National B. & T. Co. v. Kotok,* Pa., 195 A., 750. An order granting such permission will not be reversed on appeal. *Harris v. Reinhard, supra.* And where evidence offered, the burden being upon her, is sufficient to show such circumstances, an order satisfying the judgment will be sustained. *McKean v. Enburg, supra.*

The original judgment of the court of common pleas of York County, Pennsylvania, as to Sarah Edith Garman having been stricken from the record after the rendition of the judgment thereon in this State, it would be manifestly unjust to affirm the judgment in this State. Hence, in the discretion of the Court the motion for a new trial as to her is granted. *Carson v. Dellinger,* 90 N. C., 226; *Chrisco v. Yow,* 153 N. C., 434, 69 S. E., 422.

As to defendant Levi S. Garman, judgment is

Affirmed.

As to defendant Sarah Edith Garman,

New trial.

C. L. HAMMOND v. ECKERD'S OF ASHEVILLE, INC.

(Filed 7 January, 1942.)

1. Master and Servant § 21b: Principal and Agent § 10a—

In determining the liability of a principal or master for injury to third persons, the intent of the agent or servant to benefit the employer or protect his property is not relevant, the criteria being whether the agent or servant inflicted the injury while acting in the course of his employment or scope of his authority, express or implied, in which event the superior is liable for malicious injury, including false arrest, imprisonment, and slander, as well as injuries negligently inflicted.

2. Same—Evidence held to show that acts of clerk in causing arrest and search of customer and in accusing customer of theft were outside the scope of his authority, express or implied.

Plaintiff's evidence tended to show that plaintiff was a customer in defendant's store, that after purchasing merchandise and while leaving the store he heard the tobacco clerk repeatedly call "wait a minute," that he did not think the clerk was speaking to him and left the store, that the clerk followed him outside the store and, by asserting that plaintiff had stolen two cigars, caused a policeman to arrest and search plaintiff while he was standing on the sidewalk. *Held:* The act of the clerk in pursuing plaintiff out of the store after the supposed theft had been completed, and in causing the arrest and search of plaintiff, was outside

the scope of the clerk's authority, express or implied, and judgment as of nonsuit was properly entered upon motion of the employer in an action against it for assault, false arrest and slander.

SEAWELL, J., dissenting.

CLARKSON, J., concurs in dissent.

APPEAL by plaintiff from *Johnston, Special Judge,* at Special March Term, 1941, of BUNCOMBE.

Civil action to recover for alleged assault, false arrest, and slander.

In the pleadings it is admitted that defendant is a corporation, existing under the laws of the State of North Carolina, with its principal office and place of business in the city of Asheville, in Buncombe County, in said State, where it conducts a general drug business on Patton Avenue; and that on 5 July, 1940, Richard E. Young, Jr., who is "the son of Richard E. Young, who is the sole manager of defendant corporation in so far as the conduct and operation of its business in said city . . . is concerned," "was in the employ of the defendant."

Plaintiff, further in his complaint, makes substantially these allegations: (1) That Richard E. Young, Jr., is a duly qualified agent, servant and employee of defendant, and "at times . . . hereinafter complained of was the clerk in charge of the cigar and tobacco counter in the defendant's drug store, and was at said times acting within the scope of his employment and in the furtherance of his master's business; (2) that on 5 July, 1940, as he, the plaintiff, "was in the act of leaving the store of defendant" which he had entered for the purpose of purchasing certain medicine, as was his custom over a period of years, Richard E. Young, Jr., "agent, servant and employee of defendant" as "clerk in charge of the cigar and tobacco counter in the defendant's drug store," "called out to him in a loud and angry tone of voice, ordering this plaintiff to halt and return and put down the cigars which the said Richard E. Young, Jr., . . . accused this plaintiff of having stolen from the cigar counter"; (3) that though plaintiff heard the words of said Richard E. Young, Jr., knowing that he was innocent of any guilt in connection with the larceny of defendant's property, continuing on his way, proceeded out of the store in the direction of the sidewalk on north side of Patton Avenue, but before reaching the sidewalk—"defendant, through its said agent, servant and employee" rudely seized this plaintiff's arm and stopped him, within the well lighted front areaway of defendant's storeroom, and thereupon directly accused the plaintiff of stealing two cigars from the defendant's cigar counter; (4) that plaintiff, still knowing and realizing his innocence, "advised Richard E. Young, Jr., . . . that he had not stolen any of the defendant's property and shook loose the restraining arm of the said Richard E. Young, Jr., and proceeded on and out of the store," and, when he was immediately in front of and

across the street from Imperial Theatre, he heard someone, whom he believes to be Richard E. Young, Jr., cry out to a policeman "Stop that man, he has stolen cigars from Eckerd's"; (5) that pursuant thereto, "a police officer of the city of Asheville stopped plaintiff, and in just a moment" said "Richard E. Young, Jr., came upon the scene" and "demanded that the officer search this plaintiff . . . because plaintiff had stolen two cigars from the defendant"; (6) that after admonishing said Young, Jr., to be certain of his accusation, and after said Young, Jr., had reasserted that he was certain and had again demanded the search, "the said police officer subjected this plaintiff to a humiliating, embarrassing and entirely unnecessary search, and as a result of said search found no cigars of any nature or character whatsoever on the person, or in the clothing of this plaintiff"; (7) and that as a result plaintiff has suffered injury and damage in manner and amount set forth.

Defendant, in answer filed, denies the material allegations of the complaint, and as further defenses, *inter alia,* avers an express denial (1) that Richard E. Young, Jr., or any other person, while in the employ of defendant, and while acting within the scope of his or her authority, made any statements malicious or with any feeling to or about the said plaintiff; or (2) that this defendant, or anyone acting in its behalf, arrested plaintiff or caused him to be arrested. Defendant further avers (a) that such detention of plaintiff, as there may have been, was caused by an officer attached to the police department of the city of Asheville, for whose acts defendant is nowise liable; and (b) that such acts and statements of the said R. E. Young, Jr., of, toward, about and concerning plaintiff were contrary to defendant's policy and positive instruction, to wit, never to accuse or cause the arrest of any person on a charge of theft in or about defendant's retail establishment, and that such acts and statements of said Young, as alleged in this complaint, were and are outside the scope of his authority.

In the trial court, plaintiff as a witness for himself, describes the occurrence in this manner: "I was in their store in Asheville on July 5, 1940, . . . to purchase medicine . . . I bought and paid for the medicine . . . After I purchased the medicine and it was delivered to me, along with the cash register slip, I came out of the store. Before I got on the sidewalk I heard somebody say, 'Wait a minute.' It was the clerk behind the cigar counter who said that to me. . . . When that young man said that to me, I did not wait, but went on down the street. I did not stop because I did not think he was speaking to me. As I came out I heard another voice behind me say, 'Wait a minute.' It was the man behind the counter, that young man over there that I just identified (R. E. Young, Jr.). I did not wait at that moment, as I just explained to you, but continued to walk on. Just before I did

stop, the police said, 'You are wanted in the drug store' . . . Well, I stopped and then the young man from the drug store said to put back the cigars that I had taken . . . I am talking about that young man who was the person behind the counter . . . I said to him that I had not taken any cigars off the counter. The young man said to put back the cigars that I had taken off the counter. He said, 'a couple of cigars,' and I said that I had not taken any and that I didn't even smoke cigars. He said, 'Oh, yes, you have.' He said that the cigar box was on the counter near where I was standing and that I did take them. Then the police asked him if he was sure that I had taken the cigars. The young man said, 'Yes, go ahead and search him.' I was then searched. This took place I guess about ten or twenty feet maybe from the drug company—from its entrance. I was on the street. I was across the street from the picture show on the same side of the drug store. It was about 9:10 o'clock at night. Lights were on in the store windows along the street. People were standing out in front of the drug company . . . After I had been searched by the policeman with Mr. Young's assistance, they did not find any cigars on me. I had not taken any cigars . . . the policeman was in uniform . . . I was acquainted with one of the clerks in there . . . He was on duty that night . . . He had nothing to do and took no part in this occurrence on the sidewalk. After the occurrence on the sidewalk, this young man over there (indicating R. E. Young, Jr.) wanted to shake hands with me . . . He said that he was sorry that he had made a mistake and begged my pardon."

Then, on cross-examination, plaintiff further testified: "I went to the store about ten minutes past nine. Was in there about three minutes . . . I went in the front of the store. I got the medicine about middleways of the store. The cigar stand is up at the front. I spoke with the man that I got the medicine from, Mr. Weidle, but nobody else . . . This young man (indicating Mr. Young, Jr.) was the one who was selling cigars . . . I have seen him more times than one at the cigar stand. He sells cigars there behind the cigar stand. When I started out I walked by the cigar stand. After I passed I heard him speak. He asked me to wait a minute. I did not stop. I went out and he called again and asked me to wait. I stepped on the outside and went west towards Pritchard Park. Then I heard him speaking again, asking me to stop. The policeman spoke to me first before I stopped. I had heard it before, but I did not stop and did not pay any attention to it. It was the same voice that I heard inside the store. It was the same voice as I come out and the same voice as I got outside. The policeman told me that somebody wanted to speak to me. That was what called my attention to it. When the policeman spoke to me . . .

I turned and saw that he was the one . . . He also told me that the box was full as I passed and that after I passed there were two cigars gone. Yes, I told him that he could search me . . . When he said that he was sorry he made this mistake, he shook hands with me . . . each of us went his way. I went home. I cannot say whether he went to the store or not. I did not know anybody else on the street besides the policeman . . . Outside of the boy who came from the drug store, I did not see anybody speak to the policeman. Nobody else spoke to this boy who was selling the cigars except myself and the policeman. . . . I have told everything that happened there . . . My sister was the first person I told about having this talk on the street with this boy."

The police officer, John E. Cutsill, also as witness for plaintiff, testified: "I was going east on Patton Avenue and walking by the drug store. I noticed a man running (as later corrected—'walking pretty fast') out of the drug store and one of the clerks come out behind him, hollering at him, asking him to stop. I finally stopped the man myself. The clerk (indicating Young, Jr.) said that this man had picked up two cigars . . . The clerk said that he had a couple of his cigars and I asked him if he was sure that he had them, and he said 'Yes,' and I went ahead and searched him and I didn't find them. At that time I was in uniform."

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

H. Kenneth Lee for plaintiff, appellant.
Chas. G. Lee, Jr., for defendant, appellee.

WINBORNE, J. This is the question for decision: Was Richard E. Young, Jr., in pursuing plaintiff as he left the Asheville store of defendant, and, while upon a public street, in charging him with larceny of two cigars from the cigar stand in the store, and in causing him to be searched by a city police officer, acting within the line of his duty and exercising the functions of his employment as clerk at the said cigar stand?

In keeping with old principles, about which much has been written, the answer is "No."

The principle is well established that when the relationship of master and servant exists the master is liable for the acts of his servant, whether negligent or malicious, which result in injury to third persons when the "servant is acting within the line of his duty and exercising the functions of his employment." *Roberts v. R. R.*, 143 N. C., 176, 55 S. E., 509, 8 L. R. A. (N. S.), 298, 10 Ann. Cas., 375; *Willis v. R. R.*, 120 N. C.,

508, 26 S. E., 784; *Daniel v. R. R.,* 136 N. C., 517, 48 S. E., 816, 67 L. R. A., 455, 1 Ann. Cas., 718; *Sawyer v. R. R.,* 142 N. C., 1, 54 S. E., 793, 115 Am. St. Rep., 716, 9 Ann. Cas., 440; *Marlowe v. Bland,* 154 N. C., 140, 69 S. E., 752, 47 L. R. A. (N. S.), 1116; *Cotton v. Fisheries Products Co.,* 177 N. C., 56, 97 S. E., 712; *Kelly v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32; *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446; *Lamm v. Charles Stores Co.,* 201 N. C., 134, 159 S. E., 444, 77 A. L. R., 923; *Robertson v. Power Co.,* 204 N. C., 359, 168 S. E., 415; *Parrish v. Mfg. Co.,* 211 N. C., 7, 188 S. E., 817; *Snow v. DeButts,* 212 N. C., 120, 193 S. E., 224; *West v. Woolworth Co.,* 215 N. C., 211, 1 S. E. (2d), 546; *D'Armour v. Hardware Co.,* 217 N. C., 568, 9 S. E. (2d), 12. In *Lamm v. Charles Stores Co., supra, Brogden, J.,* groups the lines of cases involving liability, and nonliability.

"The simple test," as stated in *Sawyer v. R. R., supra,* quoting from Wood on Master and Servant, section 307, "is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express or positive orders." *Roberts v. R. R., supra; Cooper v. R. R.,* 170 N. C., 490, 87 S. E., 322; *Dickerson v. Refining Co., supra.*

The liability of the master does not depend upon the motive of the servant, such as his intent to benefit the employer or to protect his property, but upon the question whether in the performance of the act which gave rise to the injury the servant was, at the time, engaged in the service of his employer. *Kelly v. Shoe Co., supra; Dickerson v. Refining Co., supra.*

In *Daniel v. R. R., supra,* a case in which plaintiff was arrested and searched for money which agent of defendant suspected he had stolen, *Walker, J.,* stated that the general rule is that "when an agency is created for a specified purpose or in order to transact particular business, the agent's authority, by implication, embraces the appropriate means and power to accomplish the desired end. He has not only the authority which is expressly given but such as is necessarily implied from the nature of the employment . . . A servant entrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied in the nature of the service, but when the property has been taken from his custody or stolen and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection.

This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency and cannot possibly be brought within the limits of implied authority of the agent."

And in *Willis v. R. R., supra,* the Court also quoting from Wood on Master and Servant, 546, appropriately said: " 'In the absence of express orders to do an act, in order to render the master liable, the act must not only be the one that pertains to the business, but must also be fairly within the scope of the authority conferred by the employment.' " And, *Faircloth, J.,* writing for the Court, continues: "For illustration, a clerk to sell goods suspects that goods have been stolen and causes an arrest to be made. The master is not liable for the imprisonment or for the assault, because the arrest was an act which the clerk had no authority to do for the master, either express or implied." This is quoted with approval in *Daniel v. R. R., supra,* and in *Parrish v. Mfg. Co., supra.*

The general principle that a master or principal is not liable for the tortious act of his servant or agent unless the act be done by an authority, either express or implied, given him for that purpose by the master, applies to action for false arrest or imprisonment. 35 A. L. R., 645. Annotation (b).

The principle also extends to actions for slander when the defamatory words are uttered by the express authority of the master or within the course and scope of the agent's employment. *Cotton v. Fisheries Products Co., supra; Sawyer v. Gilmer's,* 189 N. C., 7, 126 S. E., 183; *Oates v. Bank,* 205 N. C., 14, 169 S. E., 869; *Vincent v. Powell,* 215 N. C., 336, 1 S. E. (2d), 826. Yet, in connection therewith, *Hoke, J.,* writing in the case of *Cotton v. Fisheries Products Co., supra,* observes that: "Owing to the facility and thoughtless way that such words are not infrequently used by employees, they should not perhaps be imputed to the company as readily as in more deliberate circumstances—that is, they should not be so readily considered as being within the scope of an agent's employment; but the basic principle is recognized and may be applicable, whenever, as stated, the slander has been expressly authorized by the company, or when the defamatory words have been used in the course of the agent's employment and authority for their utterance may be fairly and reasonably inferred," citing authorities.

Applying these principles to the case in hand, it is manifest that the employment of Richard E. Young, Jr., carried no implied authority to go out of the store and prefer charges against, and cause the search of a third party, as attributed to him. It is admitted in the pleadings that his father, Richard E. Young, was at the time the sole manager of the defendant's store. Where he was, the evidence fails to disclose. If

another had control of the store, the record is silent. On the other hand, the evidence tends only to show that Richard, Jr., was employed as a mere clerk behind the cigar stand, and that he sold cigars. Furthermore, if the custody of the cigars were under his control and, if his suspicion had been well founded, the cigars had already been stolen, and passed from his possession and out of the store. Under such circumstances the defamatory language used and the acts committed, while outside the store, and on the street, are clearly without the scope of his employment, and cannot possibly be brought within the limits of implied authority of an agent.

The judgment below is

Affirmed.

SEAWELL, J., dissenting: As to the rule that an employer is liable for the negligent or malicious conduct of an employee acting within the scope of his authority there is no room for disagreement. But as to how far the rule of *respondeat superior* may be extended to cover nonnegligent torts of the employee is a question that has afforded room for differences of opinion. The relation between the tortious act and the scope of employment may not always be so clearly seen; and yet I know of no class of cases in which the injury is more worthy of redress, where liability exists, since it is apt to be inflicted under circumstances of oppression and aggravation which ordinarily do not exist.

To my thinking the sole question involved in this case is whether the conduct of Young, employee, may reasonably be attributed to the protection of his employer's property from theft or to a vindication of the law and punishment of a thief. *Daniel v. R. R.*, 136 N. C., 517, 48 S. E., 816; *Lamm v. Charles Stores Co.*, 201 N. C., 134, 159 S. E., 444; *Long v. Eagle Store Co.*, 214 N. C., 146, 198 S. E., 573. If the former, the case should have been submitted to the jury; if the latter, nonsuit was proper. If there was a doubt, it was one which the jury alone could resolve.

In my opinion, the whole transaction was susceptible to the inference that Young acted throughout in a reasonable, though mistaken, intent to protect the property from theft or to recover it from the thief. The plaintiff was a customer in defendant's store. The employee was a salesman in the store in charge of the cigar counter and charged with the duty of making sales of cigars therefrom. He was in charge of the merchandise so offered for sale, at least to the extent of protecting his employer's property from theft. It cannot be supposed that an attempt to protect the property and to recover the same immediately from the thief and prevent his escaping with it was outside of his line of duty. It was in the attempted performance of this duty he made the accusation

of theft against the plaintiff and caused him to be detained for search and actually searched in a public place immediately outside the store by a policeman.

Decision here is made to turn upon *Daniel v. R. R., supra.* In that case the plaintiff was arrested upon a telephone call made by an employee of the railroad from Greenville to Kinston, and at a hotel in Kinston the plaintiff was arrested because of a supposed theft of money in Greenville. The case was decided on the principle announced by *Blackburn, J.,* in *Allen v. R. R.,* L. R., 6 Q. B., 65: "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is *no implied authority* in a person having the custody of property to take such steps as he thinks fit *to punish* a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property; it is done merely for the purpose of vindicating justice."

The same distinction is made in *Lamm v. Charles Stores Co., supra,* where the arrest was made at the instance of an employee three months after the supposed theft. In *Long v. Eagle Store Co., supra,* where the factual situation was practically identical with that in the case at bar (the detention and search of the plaintiff in that case was outside the store), the Court said: "But in this case we do not have to go that far in order to attach liability to his employer for the conduct of Senter. The arrest of the plaintiff at the instance of defendant's assistant manager, and a search of his person for an article just acquired and still in his possession, in the immediate presence and at the instance of Senter, must be regarded as one continuous transaction, insulated by neither time nor circumstance from a valid inference which the jury might draw that the conduct of the assistant manager was directed, mistakenly as it proved, to the immediate protection of his employer's property against theft and its recovery from the thief, and that his action was well within the scope of his authority. *Kelly v. Shoe Co.,* 190 N. C., 406, 130 S. E., 32; *Berry v. R. R.,* 155 N. C., 287, 71 S. E., 322; *Brockwell v. Telegraph Co.,* 205 N. C., 474, 171 S. E., 784."

In the case at bar the employee was in hot pursuit of the supposed thief. He had practically raised a hue and cry. His avowed purpose was to recover the property, and both his accusation of theft and the detention at his instance by an officer of the law were within that purpose and therefore within the scope of his employment and in the mistaken exercise of what appeared to be an immediate duty.

A few seconds time and a few feet of space did not destroy the integrality and continuity of the transaction. The mantle of authority, if

he ever had it, did not drop from his shoulders *eo instanti* when he raced across the threshold of the store. The accusation of theft and the detention and search of the plaintiff were within the *res gestæ*.

The case should have gone to the jury.

CLARKSON, J., concurs in dissent.

R. R. MILLER AND WIFE, LOUISE MILLER; E. L. MILLER, JR., AND WIFE, MARION K. MILLER; AND DELIA M. ZIMMERMAN v. MARY RUTH TEER AND HUSBAND, H. O. TEER.

(Filed 7 January, 1942.)

1. Deeds § 13a—

An unlimited conveyance of the beneficial use of property carries with it the *corpus* and, in proper cases, may be regarded as a conveyance in fee.

2. Same: Easements § 1—Consent judgment held to convey only easement for ingress and egress and not the fee.

Plaintiffs and defendants own adjoining buildings. A portion or strip of defendants' building, adjacent to plaintiffs' building, is occupied by a stairway. The parties' predecessors in title after controversy as to the ownership of this strip, there being a lappage in their respective deeds, entered into a consent judgment which stipulated that each party owned the land not covered by the lappage and that the stairway leading to the second floor of both buildings should remain for the joint and common use and unobstructed enjoyment of both parties, and further that the said contested strip and the stairway therein should be used only for ingress and egress by the said parties. *Held:* The consent judgment does not purport to, and does not have the effect of, conveying the fee in said strip of land, but only an easement for ingress and egress, and did not constitute the parties to the judgment tenants in common in the fee in the described portion or strip of land.

3. Boundaries § 1—

The location upon the land of the boundary line called for in a deed is for the determination of the jury, and the Supreme Court upon appeal has no power to determine the conflicting contentions of the parties as to the location of such line. Further, in this case plaintiffs announced in open court that they made no claim of title to the *locus in quo*.

4. Easements § 8—

While perhaps an easement constituting an interest in land may not be released by parol except upon the principle of estoppel, such easement may be abandoned.

5. Same—

In order to effect an abandonment of an easement there must be an intention to relinquish the interest accompanied by acts and conduct which are positive, unequivocal and inconsistent with the assertion of the easement and which indicate and prove the intent to abandon.

6. Same—

Since intent is an essential element of abandonment of an easement, the question of abandonment is necessarily for the jury.

7. Same—

The owner of the dominant tenement, having an easement over the servient tenement to use a passageway and stairway between the buildings on the respective properties for ingress and egress, expressed an intent to abandon his easement to obviate future litigation, and bricked up and plastered the doorway in his building which gave access to the stairway. *Held:* His acts were unequivocal and inconsistent with the assertion of the easement and sustain the finding of the jury that he had abandoned same.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at Pine Crest, in Craven County, 18 August, 1941. From DURHAM.

The plaintiffs and the defendants, respectively, are the owners of adjoining properties on East Main Street in the city of Durham, on which commercial buildings were erected and have existed since many years prior to 1902. Between the two buildings there is a narrow area or strip, some sixty-five feet in length and a few feet wide, the subject of controversy. It contains a stairway, built close to the brick walls of plaintiffs' building and leading up to the second floors of both buildings, and an interior "plastered wall" along the other side of the stairway, extending from the basement of defendants' building to the second floor. This narrow strip between the buildings is referred to as a "passageway" and was formerly used by both plaintiffs and defendants for purposes of ingress and egress in connection with both buildings and for access to the second floors. Suitable doors opened from plaintiffs' building upon the hall to which the stairway gave access.

Early controversies arose with respect to the ownership and use of this "passageway" or "strip," caused, in part at least, by the fact that there was, apparently, an overlappage in the descriptions contained in some of the title deeds under which the respective properties were held.

This action was begun by plaintiff to secure judicial determination of their rights, and for a judgment requiring the defendants to open up the passageway, which plaintiffs contend they have wrongfully closed, and to permit its use by plaintiffs, and to recover damages accrued to plaintiffs while they were denied its use. Defendants deny that plaintiffs' predecessors in title ever had, or that plaintiffs now have, any fee simple interest in the passageway, and aver that such easement in its use as

their predecessors in title formerly had and exercised was tolled, abandoned, and extinguished by the former owners, did not pass to plaintiffs, and cannot now be revived.

A brief history of the derivation and succession of title, and litigation respecting the *locus in quo* is necessary to an understanding of our decision, and the application of the law to the facts. For convenience of reference we will sometimes refer to the plaintiffs' property as the Massey lot, or Massey building, and the defendants' property as the Barbee building, or Barbee lot.

Plaintiffs derive their title by *mesne* conveyances from Rufus Massey, who owned that property prior to 1902, and defendants derive theirs by *mesne* conveyances from W. R. Barbee and wife, Virginia Barbee, who owned the Barbee lot prior to that date. But both plaintiffs and defendants claim under R. H. Wright—the plaintiffs by inheritance and the defendants by deed—who appears as *mesne* grantor in both chains of title. It is upon the conduct and accompanying explanatory declarations of R. H. Wright while he was in the management of both properties that defendants rely as an abandonment of the easement in the passageway, which easement he then held as owner of the dominant tenement, the Massey property.

R. H. Wright acquired the Barbee property 22 July, 1911, by deed from W. R. Barbee and wife, Virginia Barbee. The description in this deed calls for the brick wall of the Massey building as the boundary on that side covering the contested area. It provides that the transfer is "subject to all rights of Rufus Massey in the use of the stairway between his building and the building on the lot above described."

On 21 June, 1917, Wright conveyed the property, by the same description and with the same provisions, to Mary Ruth Wright, now Teer, and one of the defendants, for life with remainders. The interest in remainder is represented by the other defendants. Mary Ruth Wright was the daughter of a deceased brother of R. H. Wright, reared in the household of the grantor, and the consideration is love and affection. Wright continued in the management of the property for his niece down to the time of his death.

Rufus Massey died 21 June, 1919, and on 20 January, 1920, his heirs at law conveyed the Massey lot to Gregory Sales Corporation by a description, which, on the side next the Barbee lot, calls for "Massey's line," which plaintiffs claim covers part, at least, of the contested area, and at least the stairway. It contains the following exception to the warranty:

". . . And the parties of the first part do not warrant and defend the title to a strip of land beginning at a point at the property line on the south side of Main Street and the outer edge of the western wall of

the Massey building on Main Street, and running thence with the property line on Main Street north 54 degs. 52′ West 4.35 feet to a point; thence South 36 degs. 30′ West parallel with the outer edge of Massey's said western wall 65 feet 8¼ inches to a point; thence south 53 degs. 34′ east 4.35 feet to the outer edge of the western wall of the Massey building on Main Street; thence North 36 degs. 30′ East 65 feet 8¼ inches to the beginning."

This is a description of the area in controversy.

On 30 January, 1920, the Gregory Sales Corporation conveyed the property to R. H. Wright by the same description and with the same exception to the warranty.

Wright died 4 March, 1929, and, upon a family agreement and division amongst his heirs at law and distributees settling his estate, quitclaim deeds were exchanged and the Massey property went into the hands of the plaintiffs and the Barbee or Teer property was confirmed to defendants.

Before the death of Rufus Massey and while W. R. Barbee and wife still held their property, Massey brought certain actions against the Barbees with regard to the passageway, and the judgments and judgment rolls in these cases were put in evidence and pleaded in estoppel of the present suit. In view of the decision in this case, it appears essential to refer to only one of them in detail.

In 1902 Rufus Massey sued W. R. Barbee and Virginia Barbee with respect to the passageway now in dispute, and a consent judgment was entered as follows:

"North Carolina
Durham County

Superior Court
March Term, 1902.

"Rufus Massey
v.
W. R. Barbee and Virginia Barbee, his wife.

JUDGMENT

"This cause coming on to be heard before His Honor, Walter H. Neal, Judge Presiding, it is ordered and adjudged, both plaintiff and defendants in open court, through their counsel, consenting thereto, that the defendants are the owners of the lot, the eastern boundary of which is the line 'D to E' ('plastered wall') of the plot hereto attached projected to 'D' in front and to 'E' in the dotted line 'L-M' in rear of said lot which said dotted line is adjudged to be the southern boundary of defendants' lot, and that the plaintiff is the owner of the lot, the western boundary of which is described by the line 'H to M' 'brick wall' of the plot hereto

attached. Said defendants are entitled to hold and possess the lot herein adjudged to belong to them, and the plaintiff is entitled to hold and possess the lot herein adjudged to belong to him, respectively in fee simple; and it is further ordered and adjudged that there shall be built in the basement under the storehouse of said defendants on their lot as indicated on said plot a partition wall to be constructed of wood, brick or other material as the said parties to this action may agree upon, and that the said partition wall shall be built along said dotted lines marked on blueprint 'B-C' that said partition wall and a front and rear door thereto shall be built and maintained at the equal and joint expense of the parties hereto, their heirs and assigns.

"It is further ordered that the said basement hall between the lines marked on said plot designated as 'brick wall' and the said dotted lines 'B-C' shall be for the joint and common use and unobstructed enjoyment of the said Rufus Massey, his heirs, assigns and tenants, and of the said W. R. and Virginia Barbee, their heirs, assigns and tenants.

"It is further ordered that the space between the line 'D-E' and the 'brick wall,' which is now used as a stairway, shall and remain for the joint and common use and unobstructed enjoyment of the said plaintiff, Rufus Massey, his heirs, assigns and tenants, and the defendants, W. R. and Virginia Barbee, their heirs, assigns and tenants.

"It is further ordered and adjudged that the said stairway shall be repaired at the joint and common expense of the parties hereto, their heirs and assigns.

"It is further ordered that the basement hall aforesaid and the portion of said lot between the line 'D-E' and the line marked 'brick wall,' the stairway aforesaid, in said plot shall be used only for ingress and egress by said plaintiff, his heirs and assigns and tenants, and the said defendants and their heirs, assigns and tenants, to and from their respective buildings.

"It is further ordered and adjudged that the plaintiff and defendants pay their respective costs in this action incurred to be taxed by the Clerk of this Court.

"It is further ordered that the Clerk of this Court have this judgment and attached plot registered in the office of the Register of Deeds of Durham County.

(Signed) WALTER H. NEAL,
Judge Presiding."

Thereafter Massey sued again, alleging, in substance, that the owners of the Barbee building were violating the terms of this consent judgment by putting the passageway to uses not authorized by it. From an adverse judgment Massey appealed to the Supreme Court, which affirmed the

judgment below. The opinion is reported in 138 N. C., 84, 50 S. E., 567. On page 85 of this report will be found a map of the *locus in quo* practically identical with the one used in the case at bar, and reference is made to it here.

The plaintiffs here contend that the effect of this judgment is to create between them and the defendants a common tenancy in fee to the passageway.

In support of their contention that the easement for ingress and egress through the passageway, which is referred to in plaintiffs' pleading as being "through defendants' property," was abandoned and extinguished by the former owner, the defendants introduced evidence tending to show that during his ownership and occupancy of the Massey building and lot, and while he was managing the adjoining Barbee or Teer building for his niece, to whom he had conveyed it, R. H. Wright remodeled the Massey building, converting the building into a hotel except for a store on the first floor. He made an entrance to the hotel on Church Street. He caused the doors of this building giving access to the "passageway" and stairway to be taken out, and the apertures to be filled up solidly with brick. On the interior he had these places plastered over, the baseboards and trim run across, and painted. Relative to this, John H. Gibson, witness for defendants, testified:

"With reference to this passageway we have been talking about, if I understand it, where it is located in that wall. Where the sandwich shop is, you know there is a stairway. When we fixed that building there were some openings in that wall, doors. Mr. Wright came down there one morning and told me, he says, 'John, I want you to have those holes stopped up in that wall up there.' I said, 'What do you want to stop them up for?' He said, 'Well, I believe I will brick them up.'

"I went down in the basement and told the foreman in charge to get some brickmason up there and stop up them holes; couldn't stop it up right then because we were putting in a wall. I closed up the doorway with brick. Mr. Wright told me he wanted to close them up to get rid of all future lawsuits. I remember him saying that. I don't know why he said that. He hit the stick on the floor. The entrances were from Mrs. Teer's building into the old Massey building, but we didn't have anything to do with anything except that wall. After they put the brick in we plastered over them."

Upon the facts before him, the trial judge made findings of fact and concluded that the defendants were owners of the disputed area, and that Massey and his successors in title had only an easement in the passageway for ingress and egress in connection with the Massey building. He further concluded that such easement had been abandoned and extinguished by R. H. Wright, then owner of the dominant tenement, and

was not revived in plaintiffs. From the judgment in accordance with the findings of fact, the plaintiffs appealed, assigning error.

R. O. Everett for plaintiffs, appellants.
S. C. Chambers and W. P. Farthing for defendants, appellees.

SEAWELL, J. In this appeal plaintiffs rely, for the most part, on the consent judgment of 1903, above set out in full, as determining the rights of the parties relative to the passageway in dispute.

First, they contend that the effect of the judgment is to create a fee simple ownership in the parties plaintiff and defendant in that suit, as tenants in common of the whole strip, which is now outstanding in the present litigant parties as successors in title. Although we get the impression from the findings of fact that the case was not tried on that theory in the court below—the plaintiff there insisting only to be let into the enjoyment of an easement—we have considered this point of view with care and think the contention untenable.

It is conceded that an unlimited conveyance of the beneficial use of property carries with it the *corpus* and, in proper cases, may be regarded as a conveyance in fee. *Burcham v. Burcham,* 219 N. C., 357, 359, 13 S. E. (2d), 615; *Schwren v. Falls,* 170 N. C., 251, 87 S. E., 49; 19 Am. Jur., 484, sec. 24. But the consent judgment does not purport to do this, or if it does, the language used is insufficient to accomplish the result. Taking the judgment as a whole, the use with which it is concerned, and which it purports to preserve and protect, is limited to ingress and egress in connection with access to the two buildings between which the passageway is located—a very limited use of property which could be, and as shown by the evidence actually was, used in other practical ways.

It is true the consent judgment, in positive terms, declares the Barbees to be the owners in fee of their own building, and Massey to be the owner in fee of his building, as to both of which facts there had been no dispute. But silence on that point with respect to the disputed area could not by inference, or we may say negatively, confer title to it upon either party. Standing alone it must be construed as dealing only with the question of easement.

We believe this to be consistent with the view taken of this judgment in *Massey v. Barbee,* 138 N. C., 84, 87, 89, 50 S. E., 567, and the construction put on this document by the court below was correct.

The plaintiffs insist that the deed made by the defendants to Dolian Harris, Trustee, to facilitate the division of the Wright property in accordance with the family agreement, conveys the Massey property under a description which covers the *locus in quo.* It calls for the

Massey line. The defendants as strongly insist that the real Massey line referred to in that deed is the brick wall of the Massey building, for which the deeds in their chain of title call, and this would not cover any part of the disputed area. In this connection it must be kept in mind that this Court, dealing only with matters of law, has not the power with which the court below was vested in dealing with such a question. It is a jury question and a jury has spoken.

Also on this point the trial judge found as a fact that counsel for plaintiffs in open court announced that "the plaintiffs were not seeking and made no claim to the title, ownership, or possession of said strip of land," referring to the *locus in quo,* but only sought to be let into the enjoyment of the easement.

That Rufus Massey had, or acquired by the consent judgment, an easement in the use of the stairway and halls for ingress and egress to and from his building is not questioned. Perhaps an easement of this sort, acquired as this was, could not be made the subject of parol release, except upon the principle of estoppel, since it is an interest in lands within the statute of frauds. *Combs v. Brickhouse,* 201 N. C., 366, 160 S. E., 355.

But such easement may be abandoned or extinguished by unequivocal acts *in pais* inconsistent with further assertion of any rights under it. *Combs v. Brickhouse, supra;* Tiffany, Real Property, 3rd Ed., Vol. 3, sec. 825; 15 C. J., p. 1253, sec. 73; 19 C. J., p. 940, sec. 148; 17 Am. Jur., p. 1026, sec. 142. The standard by which the adequacy of such conduct may be measured may be found in *Furniture Co. v. Cole,* 207 N. C., 840, 846, 178 S. E., 579: "The pertinent decisions in this State are to the effect that an abandonment may be express or implied. Discussing the subject in *Banks v. Banks,* 77 N. C., 186, this Court said: 'To constitute an abandonment or renunciation of claim there must be acts and conduct, positive, unequivocal, and inconsistent with their claim of title. Nor will mere lapse of time or other delay in asserting his claim unaccompanied by acts clearly inconsistent with his rights, amount to a waiver or abandonment.' See, also, *Faw v. Whittington,* 72 N. C., 321; *Aiken v. Ins. Co.,* 173 N. C., 400, 92 S. E., 184; *R. R. v. McGuire,* 171 N. C., 277, 88 S. E., 337. The *McGuire case, supra,* states the principle as follows: 'This brings us to consider the essential elements of an abandonment. It includes both the intention to abandon and the external act by which such intention is carried into effect. There must be a concurrence of the intention with the actual relinquishment of the property. It is well settled that to constitute an abandonment or renunciation of a claim to property there must be acts and conduct, positive, unequivocal, and inconsistent with the claim of title.'" And speaking to the same point, we quote Jones on Easements, section 851: "To make

out a voluntary abandonment of an easement the proof must go to this extent, as declared by *Chief Justice Shaw:* 'First, that the acts relied on were voluntarily done by the owner of the dominant tenement, or by his express authority; secondly, that such party was the owner of the inheritance, and had authority to bind the estate by his grant or release; and thirdly, that the acts are of so decisive a character, as to indicate and prove his intent to abandon the easement.' "

Necessarily the question of abandonment under such circumstances is one for the jury. *McArthur v. Morgan,* 49 Conn., 347; *Russell v. Davis,* 38 Conn., 562; *Holmes v. Jones,* 80 Ga., 659, 7 S. E., 168. It is largely a matter of intention, and while a declaration of such intention will not effect an abandonment, it may be considered in connection with other facts, as, for instance, the acts of the dominant owner, upon the question of intent. *Snell v. Levitt,* 110 N. Y., 595, 18 N. E., 370; 17 Am. Jur., p. 1027. It is clear that R. H. Wright, owner of the dominant tenement and manager of the property he had conveyed to his niece in consideration of love and affection, preferred to abandon the easement rather than have her subjected to a renewal of the lawsuits likely to grow out of its exercise, if fallen into the hands of unfriendly or inconsiderate owners, and in this light, his act in closing and bricking up the openings in the wall giving access to the stairway could scarcely be more unequivocal, or a more complete abandonment of his easement.

It is, of course, impossible, within the limits of this opinion, to make a detailed analysis of the voluminous and painstaking findings of fact upon which the trial judge based his conclusions. It is sufficient to say that careful examination warrants the conclusion that the findings are based on competent evidence.

We find no error, and the judgment is

Affirmed.

THE CITY OF RALEIGH, A MUNICIPAL CORPORATION, v. T. E. HATCHER AND MABEL STONE HATCHER, HIS WIFE; JOHN NORWOOD; AMERICAN OIL COMPANY, A CORPORATION; AND COUNTY OF WAKE.

(Filed 7 January, 1942.)

1. Pleadings § 19—

The right to demur on the ground of want of jurisdiction or for failure of the complaint to state a cause of action cannot be waived, but objection on either of these two grounds may be taken by demurrer *ore tenus* at any time, even in the Supreme Court on appeal. C. S., 511 (6), 518.

2. Eminent Domain § 6—Municipality has power to condemn land to widen State Highway within its limits.

A petition by a municipality to condemn land upon allegations that the land sought to be condemned was necessary to widen a part of a State Highway within the city limits, which project had been approved by an ordinance for the acquisition of such land under an agreement with the State Highway Commission providing that the city should secure and dedicate the right of way and the Highway Commission should perform the construction work, *is held* to state a cause of action, since the city is given express authority by statute to condemn land for such purpose. C. S., 2791, 2792, 2792 (a), 3846 (ff).

3. Constitutional Law § 6c—

The wisdom or impolicy of legislation is not a judicial question, and the courts may not say what the law ought to be, but may only declare what the law is.

4. Eminent Domain § 1b—

When land is condemned for a public purpose the owner is entitled to just compensation and has a right to have damages assessed by a jury in a fair and impartial trial.

APPEAL by defendants T. E. Hatcher and wife, Mabel Stone Hatcher; John Norwood and American Oil Company, respondents, from *Thompson, J.*, at September Term, 1941, of WAKE. Affirmed.

This is a special proceeding brought by petitioner, instituted before the clerk of the Superior Court of Wake County, N. C., by plaintiff, a municipal corporation, against the defendants, T. E. Hatcher and wife, Mabel Stone Hatcher, who own in fee simple title to certain lots in the city of Raleigh, N. C., and others who have an interest in the same, to condemn said lots for street purposes.

The defendants filed answers. In the answer of T. E. Hatcher and Mabel Stone Hatcher is the following: "Answering paragraph 10, these defendants admit that the plaintiff is unable to acquire title to the property of these defendants without resorting to condemnation proceedings. It is denied that these defendants are unwilling to sell their property to the plaintiff, provided plaintiff pays to these defendants its present fair value. . . . That the plaintiff, the city of Raleigh, has been unable to acquire title to the property of these defendants for the sole reason that it is unwilling to pay the defendants its present fair value. Wherefore, having fully answered petition filed herein, these defendants pray the Court in the event condemnation of their property is ordered that they be paid its present value and that the costs in this action be taxed against the plaintiff."

John Norwood and American Oil Company in their answer say, in part: "That these defendants do not have sufficient knowledge or information to form a belief as to the allegations of paragraph 7 of the com-

plaint, and, therefore, deny the same; and in this connection the defendants allege that, as affirmatively appears from the resolution, Exhibits A and B, and from the allegations of paragraph 7 itself, the plaintiff is seeking to condemn certain property not for its own purposes but for those of the State Highway Commission, and that, therefore, the plaintiff does not have a right to proceed under C. S., 2791; and that, furthermore, even if the plaintiff would have a right to proceed, it affirmatively appears from the complaint that the plaintiff has failed to follow the provisions of law relating to condemnation. . . . That the defendant, John Norwood, is the agent of American Oil Company in Wake County and that said station has a value to this defendant, over and above the profits made thereat, since the station is well located and is an advertisement and a creator of good will for other business of this defendant in Wake County; that by reason of the facts hereinabove set forth, the interest of this defendant in said property (even leaving out of account the good will and advertising value) has a present market value of at least the sum of $6,000.00, and that the value of this defendant's interest to this defendant himself (because of the advertising and good will value) is at least the sum of $8,000.00. . . . Wherefore, these defendants pray: 1. That this proceeding be dismissed at the cost of plaintiff. 2. That if the proceeding be not dismissed, the plaintiff be required to pay the defendant, John Norwood, the value of his interest in the property described in paragraph 3 of the complaint. 3. That the interest of the defendant, John Norwood, in said property be fixed at at least the sum of $6,000.00, and that the defendant, John Norwood, recover said amount from plaintiff. 4. That, if the defendant, John Norwood, be not permitted to recover from the plaintiff, then said defendant, John Norwood, recover from the defendants, T. E. Hatcher and wife, Mabel Stone Hatcher, the sum of $8,000.00, and that said recovery be a lien upon such compensation as the city may be required to pay for said property." For an understanding of the case the answers need not be set forth in full.

The petitioner presented an Order to Condemn said land before the clerk of the Superior Court of Wake County, N. C., who refused to sign same, whereupon the petitioner excepted and appealed to the Superior Court.

The order of the court below is as follows: "This cause coming on to be heard and having been heard on appeal from the Clerk of the Superior Court before His Honor, C. E. Thompson, Judge Presiding, and it appearing to the Court that the respondents and all of them having filed answers, and that the respondents, John Norwood and American Oil Company, demurred to the petitioner's petition as fully set out in the seventh paragraph of their Answer; that the respondents, T. E. Hatcher and Mabel Stone Hatcher, by and through their attorney, demurred

ore tenus at the hearing on the ground that the petition filed did not state a cause of action; and the Court being of the opinion that the petition filed herein states a cause of action: Now, Therefore, It is Ordered, Adjudged and Decreed that the demurrer of the respondents be, and the same is hereby overruled and dismissed; and It is Further Ordered that said proceedings be remanded to the Clerk of the Superior Court, and that he be, and he is hereby ordered to proceed therewith as provided by law. This 25th day of September, 1941. C. E. Thompson, Judge Presiding."

To the foregoing order overruling demurrers of the respondents and remanding the cause to the clerk of the Superior Court, the respondents, T. E. Hatcher and wife, Mabel Stone Hatcher, John Norwood and American Oil Company, excepted, assigned error and appealed to the Supreme Court. The other material matters will be set forth in the opinion.

Wilbur H. Royster for petitioner, City of Raleigh.

T. Lacy Williams for respondents, T. E. and Mabel Stone Hatcher.

Royall, Gosney & Smith for respondents, John Norwood and American Oil Company.

CLARKSON, J. The question involved: Did his Honor err in overruling respondents' demurrers *ore tenus* to petitioner's petition for failure to state a cause of action? We think not.

N. C. Code, 1939 (Michie), sec. 511, is as follows: "The defendant may demur to the complaint when it appears upon the face thereof, either that: . . . (6) The complaint does not state facts sufficient to constitute a cause of action."

Section 518: "If objection is not taken either by demurrer or answer the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action."

As to the two exceptions mentioned in this section there can be no waiver, and objections may be made at any time. *Johnson v. Finch,* 93 N. C., 205 (208); *Halstead v. Mullen,* 93 N. C., 252 (255); *Gurganus v. McLawhorn,* 212 N. C., 397. The want of jurisdiction and the failure of the complaint to state facts sufficient to constitute a cause of action cannot be waived and may be taken advantage of at any time even in the Supreme Court. This can be done by demurrer, in writing or *ore tenus. Tucker v. Baker,* 86 N. C., 1; *Clements v. Rogers,* 91 N. C., 63 (64); *Hunter v. Yarborough,* 92 N. C., 68 (70); *Knowles v. R. R.,* 102 N. C., 59 (62).

The petitioner contends that respondents demur solely "Upon the ground that it affirmatively appears upon the face of the petition that

the State Highway Commission and not the City of Raleigh is the proper plaintiff, for that the plaintiff in paragraph No. 7 of its Petition deems it necessary 'to widen U. S. Highway #64 to the City Limits of Raleigh from the junction of Tarboro Street and U. S. Highway #64 to the City Limits,' and nowhere in petitioner's petition does it allege that it brings this condemnation proceeding to widen a street; and respondents further demur on the grounds that the City Ordinance or Resolution, adopted October 9, 1940, made 'Exhibit A' of petitioner's petition, nowhere sets out that U. S. Highway #64 is a Street in the City of Raleigh, and the City has no right to widen an United States Highway or State Highway under the power of Eminent Domain."

The petition sets forth: "7. That pursuant to the powers granted municipalities, Public Laws of 1917, Chapter 136, Sub-Chapter 4, Sec. 1 (C. S., Sec. 2791), corporate plaintiff deeming it necessary and for the best interest of the public to widen U. S. Highway No. 64 within the City limits of Raleigh from the junction of Tarboro Street and U. S. Highway No. 64 to the city limits by securing and dedicating the right of way necessary for such widening, duly and in good faith enacted and adopted an Ordinance for said purpose on October 9, 1940, a copy of which ordinance is hereto attached, marked Exhibit A, and made a part of this complaint as if set out in full; and that said ordinance authorized and directed the Mayor and City Clerk to execute on the part of the City such agreements as are necessary to carry out the intent and purpose of said ordinance, a copy of said ordinance being hereto attached and marked Exhibit B."

The ordinance sets forth, in part: *"Whereas,* that part of said highway which now enters the limits of the city is narrow and congested, and is considered unsafe and hazardous for the traffic at the present time, and will, when said additional roadway is constructed, be totally inadequate to serve the increased traffic, and *Whereas,* the said State Highway and Public Works Commission has indicated its willingness to continue the widening and construction of said highway within the city limits, from the city limits to the junction of the Poole Road and U. S. Highway No. 64, provided the City will furnish a right of way; now, therefore, *Be It Resolved By the Board of Commissioners of the City of Raleigh:* 1. That the City will, in consideration of the construction and widening of U. S. Highway No. 64 by the State Highway and Public Works Commission, secure and dedicate the right of way necessary to comply with plans to be approved by the State Highway and Public Works Commission, within the limits of the city, from the junction of Tarboro St. and U. S. Highway No. 64 to the City Limits, the said right of way to be secured and dedicated under the authority given by Section 2791 of the Consolidated Statutes, and Article V, Section 1,

Sub-sections (1) (z) and Article XV, Section 1 of the City Charter. 2. That the securing and dedication of said right of way as herein provided for be, and the same is hereby declared to be a public purpose, and for the best interests of the City of Raleigh."

The ordinance passed on 9 October, 1940, sets forth, in part: "*Whereas,* the City has attempted to negotiate with other owners of property within the area to be secured for said right of way, and has made offers for said property which the City deems reasonable and proper, which offers have been refused by the said property owners," etc.

N. C. Code, *supra,* sec. 2791, is as follows: "When in the opinion of the governing body of any city, or other board, commission, or department of the government of such city having and exercising or desiring to have and exercise the management and control of the streets, water, electric light, power, gas, sewerage or drainage systems, or other public utilities, parks, playgrounds, cemeteries, wharves, or markets, open-air or enclosed, which are or may by law be owned and operated or hereafter acquired by such city or by a separate association, corporation, or other organization on behalf and for the benefit of such city, any land, right of way, water right, privilege, or easement, either within or outside the city, shall be necessary for the purpose of opening, establishing, building, widening, extending, enlarging, maintaining, or operating any such streets, parks, playgrounds, cemetery, water, electric light, power, gas, sewerage or drainage systems, wharves, or other public utility so owned, operated, and maintained by or on behalf of any such city, such governing body, board, commission, or department of government of such city may purchase such land, right of way, water right, privilege, or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon."

Section 2792: "If such governing body, board, commission or department of the government of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, or for a site for city hall purposes, condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, board, commission, or department of government of such city of the land necessary for such purpose shall be conclusive."

Section 2792 (a): "It is the intention of this law that the powers herein granted to cities for the purpose of improving their streets and improving their drainage and sewer conditions shall be in addition and supplementary to those powers granted in their charter, and in any case in which the provisions of this law are in conflict with the provisions of any local statute or charter, then the governing body of any such

municipality may in its discretion proceed in accordance with the provisions of such local statute or charter, or, as an alternative method of procedure, in accordance with the provisions of this law."

Section 3846 (ff): "When any portion of the state highway system shall run through any city or town and it shall be found necessary to connect the state highway system with improved streets of such city or town as may be designated as part of such system, the state highway commission shall build such connecting links, the same to be uniform in dimensions and materials with such state highway; Provided, however, that whenever any city or town may desire to widen its streets which may be traversed by the state highway, the state highway commission may make such arrangements with said city or town in connection with the construction of said road as, in its discretion, may seem wise and just under all the facts and circumstances in connection therewith: Provided further, that such city or town shall save the state highway commission harmless from any claims for damage arising from the construction of said road through such city or town and including claims for right of way, change of grade line, and interference with public-service structures. And the state highway commission may require such city or town to cause to be laid all water, sewer, gas or other pipe lines or conduits, together with all necessary house or lot connections or services to the curb line of such road or street to be constructed," etc.

We think the petition of plaintiff sets forth the facts fully to entitle it to condemn the land in controversy. From the above statutes the city of Raleigh, N. C., had the power and authority to condemn this land, which is wholly within its limits, for a street. It was discretionary with it, and we see no abuse of this discretion. The fact that the State Highway and Public Works Commission has indicated a willingness to aid in the construction of the street within the city limits and relieve the city, is for its benefit and in no way abridges plaintiff's power and authority to condemn the land. In fact, section 3846 (ff), *supra*, gives the power and authority.

In *Shute v. Monroe*, 187 N. C., 676 (683), it is written: "The Anglo-Saxon holds no material thing dearer than the ownership of land; his home is termed his 'castle.' Although there is nothing in the Constitution of North Carolina that expressly prohibits the taking of private property for public use without compensation (the clause in the United States Constitution to that effect applies only to acts by the United States and not to the government of the State), yet the principle is so grounded in natural equity and justice that it is a part of the fundamental law of this State that private property cannot be taken for public use without just compensation. *Johnston v. Rankin*, 70 N. C., 555. In the instant case the statute of the city of Monroe provides the

method, and this must ordinarily be followed. The Legislature has granted this power, and we can only follow the mandate in the manner and way set forth in the act. *Long v. Rockingham, ante,* 204." *Reed v. Highway Com.,* 209 N. C., 648 (654); *Ivester v. Winston-Salem,* 215 N. C., 1 (5).

In the *Reed case, supra,* at p. 655, speaking to the subject, we find: "Wisdom or impolicy of legislation is not judicial question, *Sidney Spitzer & Co. v. Comrs. of Franklin County,* 188 N. C., 30. Policy of legislation for the people, not courts. *Bond v. Town of Tarboro,* 193 N. C., 248. Courts do not say what law ought to be, but only declare what it is. *S. v. Revis,* 193 N. C., 192."

Plaintiff had the power and authority to condemn this land for street purposes. The land is taken for a public purpose, therefore the city must pay "just compensation" to the owners. As the parties could not agree upon a price, defendants are entitled to a fair and impartial trial by jury, sometimes termed the Palladium of our civil right, to assess the "just compensation" to be paid.

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

Affirmed.

ALAN TURNER AND GREENSBORO COLLEGE ALUMNÆ ASSOCIATION, INC., v. MRS. MINNIE H. GLENN; J. V. FULTON AND WIFE, KATE KELLY FULTON; LAURA P. HODGIN AND HUSBAND, S. A. HODGIN; PURVIS H. BEESON; C. R. WHARTON; L. C. PENRY AND WIFE, MARTHA J. PENRY; AND A. K. MOORE, RECEIVER OF A. K. MOORE REALTY COMPANY.

(Filed 7 January, 1942.)

1. Deeds § 16—

The fact that the use of property contiguous to a residential subdivision has changed from residential to business purposes does not affect the enforceability of restrictive covenants within the subdivision.

2. Registration § 2—

No notice, however full and formal, will take the place of registration.

3. Deeds § 16: Frauds, Statute of, § 9—

The servitude imposed by restrictive covenants is a species of incorporeal right constituting an interest in land within the purview of the statute of frauds, and a restrictive covenant may not rest in parol.

4. Deeds § 16: Registration § 1—

Restrictive covenants must be registered in order to be binding upon subsequent purchasers, and therefore advertisements published in local papers tending to show a general scheme of development of a subdivision are incompetent to establish restrictive covenants.

5. Deeds § 16: Frauds, Statute of, § 9—

Since restrictive covenants may not rest in parol, oral statements by officers of the corporate owner of a subdivision tending to show a general scheme of development are incompetent to establish restrictive covenants.

6. Deeds § 16: Registration § 2—

Reference in a deed to a map of the subdivision incorporates such a map for a more particular description, but does not bind the owner to sell lots therein in accordance with the scheme of development laid down on the map, and therefore such reference is ineffective as notice to subsequent purchasers that the land is subject to restrictive covenants and does not impose such restrictions upon land purchased by them.

7. Registration § 2—

A purchaser is charged with notice of the contents of every recorded instrument constituting a link in his chain of title and is put on notice of any fact or circumstance affecting his title which any of such instruments would reasonably disclose.

8. Same—

A subsequent purchaser is chargeable with notice of restrictive covenants only if a deed constituting a link in his chain of title sets them forth or refers to a recorded instrument which sufficiently describes them, but he is not required to investigate collateral conveyances of any of his predecessors in title. However, in the instant case investigation of collateral conveyances would have failed to give notice of covenants restricting the use of lots in the vicinity to residential purposes.

9. Deeds § 16: Registration § 2—Reference in deed to "usual restrictions" held insufficient to impose restrictions to use for residential purposes.

Plaintiffs severally acquired titles to lots in a subdivision by purchase at foreclosure of deeds of trust executed by the developer of the property. The deeds of trust respectively stipulated that the lot embraced therein was subject to "customary restrictions" and "usual restrictions" imposed by the developer in conveyances in that section of the subdivision. There was no other reference in any deed constituting a link in plaintiffs' respective chains of title to restrictive covenants. *Held:* The references are insufficient to give notice of restrictive covenants limiting the use of the property to residential purposes, and plaintiffs acquired title free from any restrictions.

10. Same—In instant case, investigation of collateral conveyances of developer would not have given notice of restrictive covenants.

Instruments in plaintiffs' respective chains of title stipulated that the lot conveyed was subject to usual or customary restrictions placed by the developer on property similarly situated in the subdivision. *Held:* Even if plaintiffs were charged with notice of restrictive covenants in collateral conveyances by the developer, in the instant case investigation of such collateral conveyances would not give reasonable notice of covenants restricting the use of the property to residential purposes, since owners of lots adjacent to plaintiffs' lots had purchased at foreclosure of a purchase money deed of trust executed by the developer which contained no restrictions, and their lots had been zoned by the municipality for business purposes and were then in use for such purposes.

11. Deeds § 16: Estoppel § 9—

An officer and salesman of the corporate developer of a subdivision who is without authority to make conveyance, with or without restrictive covenants and who later individually acquires a lot in the subdivision free from restrictive covenants, is not estopped to deny the existence of such restrictions as to his lot as against owners of other lots in the subdivision whose deeds contain no stipulation binding the developer to insert like restrictions in deeds to other property in the subdivision.

CLARKSON, J., dissents.

SEAWELL, J., concurring in result.

APPEAL by plaintiffs from *Pless, Jr., J.*, at April Civil Term, 1941, of GUILFORD. Reversed.

This action was instituted by plaintiffs to obtain a decree that plaintiffs own certain property in the subdivision known as Sunset Hills in Greensboro free and clear of any restrictive covenants and to remove the cloud upon their title to such property caused by the claims of other property owners within the subdivision that such restrictions exist. The defendants, answering, deny the material allegations of the complaint and allege, by way of cross action, that Sunset Hills was developed under a general uniform plan or scheme under which restrictive covenants were imposed upon all of the lots within the subdivision and praying that plaintiffs be required by order of court to observe and abide by such restrictive covenants uniformly adopted under said plan. They further allege that the plaintiff Turner, by his conduct and representations as an officer and sales agent of the original corporate owner, is estopped to assert the absence of restrictive covenants.

In 1924 A. K. Moore Realty Company purchased a tract of unimproved land containing 214 acres, located in the western part of Greensboro, for the purpose of development and sale. It laid out streets, sidewalks and public parks and subdivided the land into 596 lots. Some of the streets and sidewalks were paved and water, sewer and gas mains were installed. The development was divided into five sections. A map thereof showing all 5 sections and indicating the location of streets, the size and number of the lots and like information was prepared. This map was recorded 29 March, 1926. Later, maps of each of the several 5 sections were prepared and such sectional maps were recorded in the office of the register of deeds of Guilford County in 1935. The subdivision was known and designated as Sunset Hills.

Plaintiff Turner owns Lots Nos. 4 and 5 in Block 1, Section 1, and plaintiff Greensboro College Alumnæ Association, Inc., owns Lot No. 6 in said block and section. These lots face on Madison Avenue and are located near the easterly bounds of said subdivision nearest Greensboro. The defendants severally own lots in said development adjacent to or in the vicinity of the lots owned by plaintiff. They are made parties

defendant individually and as a class representing all other property owners in said subdivision holding deeds containing restrictive covenants.

The Realty Company sold and conveyed a large number of the lots within the development "subject to certain restrictions as to the use thereof, running with said land by whomsoever owned until May 1st., 1949; said restrictions, which are expressly assented to by the purchaser in accepting this deed, being as follows, to-wit:" The restrictions which follow are 10 in number and relate to the location of the residences upon the property, the kind and type of building that may be erected, the minimum cost thereof, and the like, including a restriction against alienation to persons of Negro descent and limiting the use of property to residential purposes.

The Realty Company executed a purchase money mortgage on said tract of land. Said mortgage was foreclosed and all lots which had not theretofore been released were sold free of any restrictive covenant. These lots, approximately 100 in number, are scattered throughout the development.

In 1929 said company executed a trust deed conveying a number of lots in said subdivision. This trust deed was foreclosed and the lots therein conveyed were sold free of restriction. These include Lot No. 10 in Block 3, Section 1, diagonally across Madison Avenue from the property of plaintiffs. This lot is now being used for business purposes, the building being erected in 1935. It also included Lot No. 20, Block 2, Section 1, directly across Aycock Street from Lot No. 4 owned by plaintiff Turner. This lot is now owned by defendant Wharton.

In 1930 said company executed a trust deed conveying 17 lots as security for an indebtedness. This trust deed, which included no restrictive covenants, was foreclosed and the property was conveyed without restriction. The lots thus conveyed included Lot No. 7, Block 1, Section 1, adjoining the lot owned by plaintiff Alumnæ Association. This lot was acquired by *mesne* conveyances by one Beeson in 1934 and he has erected a business structure thereon.

In 1927 said company executed a trust deed on Lot No. 4, Block 1, Section 1. This trust deed was foreclosed and said lot was purchased by plaintiff Turner in 1936. The trust deed and the deed to Turner contained the following: "The above described property is conveyed subject to all outstanding and unpaid taxes and assessments and subject also to the usual restrictions of the use and reservations placed by A. K. Moore Realty Company on property similarly situated in Sunset Hills."

In 1927 said company also executed a mortgage on Lot No. 5, Block 1, Section 1. This mortgage was likewise foreclosed and said lot was purchased by plaintiff Turner in 1936. The deed of trust and the deed to Turner contained the following: "Subject to customary restrictions of

the use and reservations reserved by A. K. Moore Realty Company in the conveyances of lots fronting Madison Avenue in Block 1, Section 1, Sunset Hills."

In 1927 said company likewise executed a mortgage on Lot No. 6, Block 1, Section 1. This mortgage was foreclosed and the lot was purchased by plaintiff Alumnæ Association in 1935. The deed of trust and the deed to the Alumnæ Association contained the same stipulation which was incorporated in the deed to Lot No. 5.

When the cause came on to be heard in the court below issues were submitted to and answered by the jury in favor of defendants. The first issue was as to whether Sunset Hills was developed pursuant to a general plan under which restrictive conveyances were inserted in deeds to purchasers. The second issue and the answer thereto was as follows:

"2. If so, were the lots of the plaintiffs described in the complaint made subject to restrictive covenants by A. K. Moore Realty Company?

"Answer: Yes."

The jury further found that no substantial radical and fundamental changes have taken place in the subdivision which would render the lots in the immediate neighborhood unsuitable for residential purposes and that plaintiff Turner is estopped to assert a right to the unrestricted use of said lots.

From judgment on the verdict plaintiffs appealed.

Hoyle & Hoyle and Frazier & Frazier for plaintiffs, appellants.

C. R. Wharton and Andrew Joyner, Jr., for defendants, appellees.

BARNHILL, J. Plaintiffs' contention that there have been radical changes in the immediate neighborhood such as would render their property unsuitable for residential purposes by reason of the development of a subdivision north of and across the street from their property as a business settlement is answered adversely to them by *Brenizer v. Stephens, ante,* 395. The court properly excluded any evidence in respect thereto.

Whether restrictive covenants were inserted in deeds executed by the land company for lots located within the subdivision as a part of a general scheme and for the benefit of all is seriously debated. This question might give us serious concern were it necessary to decide the same. However, on this record, we may confine our consideration to the decision of one question: Are the lots owned by plaintiffs located in Sunset Hills subject to restrictive covenants which prohibit their use for business purposes? This question must be answered in the negative.

The Connor Act, C. S., 3309, is firmly imbedded in our law. Its wisdom has clearly demonstrated itself in the certainty and security of titles in this State which the public has enjoyed since its enactment. It

is necessary in the progress of society, under modern conditions, that there be one place where purchasers may look and find the status of title to land. Hence, in applying this act it has become axiomatic with us that "no notice, however full and formal, will take the place of registration." *Austin v. Staten,* 126 N. C., 783; *Fertilizer Co. v. Lane,* 173 N. C., 184, 91 S. E., 953; *Wood v. Lewey,* 153 N. C., 401, 69 S. E., 268; *Harris v. Lumber Co.,* 147 N. C., 631; *Blalock v. Strain,* 122 N. C., 283; *Buchanan v. Clark,* 164 N. C., 56, 80 S. E., 424; *Blacknall v. Hancock,* 182 N. C., 369, 109 S. E., 72; *Davis v. Robinson,* 189 N. C., 589, 127 S. E., 697; *Lanier v. Lumber Co.,* 177 N. C., 200, 98 S. E., 593; *McClure v. Crow,* 196 N. C., 657, 146 S. E., 713; *Smith v. Turnage-Winslow Co.,* 212 N. C., 310, 193 S. E., 685.

The servitude imposed by restrictive covenants is a species of incorporeal right. It restrains the owner of the servient estate from making certain use of his property. It is an interest in land, conveyance of which is within the statute of frauds. Such restraint may not be effectively imposed except by deed or other writing duly registered. *Davis v. Robinson, supra; Hall v. Misenheimer,* 137 N. C., 183; *Drake v. Howell,* 133 N. C., 162.

Where land is laid out in lots, some of which were conveyed by deeds containing uniform restrictions, the grantor agreeing orally as a part of the consideration for the purchases to impose a similar restriction in each subsequent deed made for the remaining lots, such oral agreement constitutes a contract for the sale of an interest in land, and is not enforceable in equity in the absence of some note or memorandum thereof signed by the party to be charged. *Sprague v. Kimball,* 213 Mass., 380, 100 N. E., 622, 45 L. R. A. (N. S.), 962. Restrictive covenants cannot be established by parol evidence or otherwise save by a recordable instrument containing adequate words so unequivocally evincing the party's intention to limit the free use of the land that its ascertainment is not dependent on inference, implication or doubtful construction. Thompson, Real Property, Vol. 7, p. 64; *Holliday v. Sphar,* 282 Ky., 45, 89 S. W. (2d), 327.

A purchaser is chargeable with notice of the existence of the restriction only if a proper search of the public records would have revealed it and it is conclusively presumed that he examined each recorded deed or instrument in his line of title and to know its contents. *Acer v. Westcott,* 46 N. Y., 384, 7 Am. Rep., 355; *Columbia College v. Thacher,* 87 N. Y., 311, 41 Am. Rep., 365; *McPherson v. Rollins,* 107 N. H., 362, 14 N. E., 411; Thompson, Real Property, Vol. 7, p. 106. If the restrictive covenant is contained in a separate instrument or rests in parol and not in a deed in the chain of title and is not referred to in such deed a purchaser, under our registration law, has no constructive notice of it.

It follows that evidence admitted by the court as to oral statements made by officers of the Realty Company and as to advertisements published in local papers tending to show a general scheme of development of Sunset Hills was incompetent. It has no bearing upon the question presented.

In so holding we are not inadvertent to decisions in other jurisdictions *contra*. The distinction rests in the provisions of the Connor Act.

A deed which makes reference to a map or plat incorporates such plat for the purpose of more particular description but does not bind the seller, nothing else appearing, to abide by the scheme of division laid down on that map. The purchaser has no right to understand or believe from such reference that the grantor will in his future conveyances abide by such plan of division. See *Snyder v. Heath*, 185 N. C., 362, 117 S. E., 294, and *Thomas v. Rogers*, 191 N. C., 736, 133 S. E., 18.

No covenant that the owner will not sell its land except in parcels delineated upon a map of record and with reference to which certain lots have been sold is implied by the making of such map and the sale of certain lots shown thereon, and the right of the owner to dispose of unsold portions of his lots singly or in bulk or by subdividing them into smaller parcels and selling them in such parcels is complete. *Herold v. Columbia Investment & Real Estate Co.*, 14 L. R. A. (N. S.), 1067, 67 Atl., 607, 16 Am. Cas., 580. See also Anno., 57 A. L. R., 764. Such covenants cannot be implied from the mere making and filing of the map showing the different subdivisions, or by selling lots in conformity therewith. *Farquharson v. Scoble*, 38 Cal. App., 680, 177 Pac., 310, 14 L. R. A. (N. S.), 1067; *Gardner v. Moffitt*, 95 A. L. R., 452.

Hence, it follows that any reference to the maps of record contained in the deeds to plaintiffs or in deeds in their line of title was not sufficient to give notice of the alleged restrictions or to impose such restrictions upon the land purchased by them.

The Realty Company admittedly took title to the property free of restriction. No deed in the chain of title to either of the lots owned by plaintiff sets forth any particular restrictions or reservations and no reference is made to any other instrument of record which sufficiently discloses what are the "customary restrictions in conveyances of lots fronting Madison Avenue in Block 1, Section 1, Sunset Hills," or what are the "usual restrictions of the use and reservations placed by A. K. Moore Realty Company on property similarly situated in Sunset Hills." Notwithstanding the general provision in the deeds of the plaintiffs they took without notice of any restrictions or reservations such as would be binding on them.

As stated, it is the duty of a purchaser of land to examine every recorded deed or instrument in his line of title and he is conclusively

presumed to know the contents of such instruments and is put on notice of any fact or circumstance effecting his title which either of such instruments reasonably discloses. He is not, however, required to examine collateral conveyances of other property by any one of his predecessors in title. Even if we should so hold, the record discloses that a reasonable investigation of such collateral conveyances would fail to give sufficient evidence of the alleged restrictive covenants.

In such an investigation an abstractor would naturally look to the conveyances of other property in the immediate vicinity, and particularly to conveyances of property in Block 1, Section 1, facing on Madison Avenue, for information. Such investigation would disclose that Lot No. 7 in Block 1, Section 1, facing on Madison Avenue adjacent to and east of the lots in controversy, and Lot No. 20 in Block 1, Section 2, facing on Madison Avenue across Aycock Street immediately west of such lots, and Lot No. 10 in Block 1, Section 3, diagonally across Madison Avenue, were all conveyed without restriction; that Lots Nos. 7 and 10 were actually in use as business property and that no lot in Block 1, Section 1, facing on Madison Avenue, was conveyed subject to any specific restriction. Thus it would appear that all lots fronting Madison Avenue in Block 1, Section 1, as well as adjacent property, was conveyed without restrictive reservation. Still further investigation would disclose that this particular property had been zoned by the city of Greensboro for business purposes.

Hence, the court erred in declining to charge the jury as prayed by the plaintiffs, as follows: "Gentlemen of the jury, the court instructs you that, if you find the facts to be as testified to by the witnesses and as disclosed from the record evidence, it will be your duty to answer the second issue 'No.'"

We have given full consideration to the plea of estoppel entered by the defendants. Plaintiff Turner, as an officer and salesman of the Realty Company, was without authority to make conveyance with or without restrictive covenants. The defendants accepted deeds containing no stipulation binding the Realty Company to insert like provisions in deeds to other property in the subdivision. Their titles rest in the record. We are constrained, therefore, to hold that there is no sufficient evidence to sustain the plea.

The plaintiffs are entitled to a decree adjudging that they are the owners of the property described in the complaint free and clear of any restrictions against the use thereof for business purposes.

Reversed.

CLARKSON, J., dissents.

SEAWELL, J., concurring in result: I concur, reluctantly, with the result reached in this case, upon other grounds. But I am not entirely in accord with what is said in the main opinion with regard to the Connor Act—C. S., 3309—as an exclusive instrument of proof in showing the existence of a general uniform plan or scheme in the development of property for residential purposes. I do not regard it as necessary to decision, and I think we should reserve the liberty to deal with the facts and legal principles as they may arise in future cases.

VICTOR S. BRYANT, EXECUTOR OF THE ESTATE OF MRS. AMANDA C. SMITH, DECEASED, v. MINNIE S. SHIELDS AND HUSBAND, IRA W. SHIELDS; DAISY E. BEASLEY AND HUSBAND, J. I. BEASLEY; MAMIE R. SUITT AND HUSBAND, F. L. SUITT.

(Filed 7 January, 1942.)

1. Deeds § 11—

Ancient, technical rules as to the effect of and importance to be given the several parts of a deed will not be strictly applied when to do so would defeat the obvious intention of the parties as gathered from the instrument as a whole.

2. Same—

The cardinal rule in the construction of a deed is to ascertain and give effect to the intent of the parties as gathered from the language of the instrument construed as a whole, but recognized canons of construction and settled rules of law may not be disregarded.

3. Same—

As a rule, where clauses in a deed are repugnant, the first in order will be given effect and the latter will be rejected.

4. Deeds § 13a—

The *habendum* in a deed cannot introduce one who is a stranger to the premises to take as grantee except by way of remainder, since ordinarily the *habendum* relates to the *quantum* of the estate while the premises and the granting clauses designate the grantee and the thing granted.

5. Same: Husband and Wife § 11—Deed failing to name wife in premises or granting clause, but naming her only in habendum does not create estate by entireties.

The deed in question named the husband in the premises, and in the granting clause conveyed to him and his heirs and acknowledged the receipt of consideration from him, but in the *habendum* named the husband and wife and their heirs. *Held:* The instrument considered as a whole does not disclose an intention to create an estate by entireties, and further, such construction would be at variance with the rule that a

stranger to the premises cannot be introduced in the *habendum* to take as grantee except by way of remainder, which rule of construction has not been abrogated or modified. *Midgett v. Brooks*, 34 N. C., 145, cited and distinguished.

6. Judgments § 32—

A final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter.

7. Judgments § 33d—

Where the widow in proceedings for allotment of dower in which the executor and heirs-at-law are made parties, describes a particular tract of land which she avers was owned by her husband in fee simple, and asks that her dower be allotted therein, and her dower is assigned as prayed, and allotment confirmed by proper decree, the widow, and after her death her executor, is estopped from asserting that the tract of land was owned by entireties and that she acquired title by survivorship, the doctrine of *res judicata* being applicable to proceedings for allotment of dower.

APPEAL by plaintiff from *Frizzelle, J.*, at April-May Term, 1941, of DURHAM. Affirmed.

This was an action to determine the title to a certain lot of land on Main Street, in the city of Durham.

Amanda C. Smith, plaintiff's testatrix, was the wife of John W. Smith. Plaintiff alleged that by deed of C. G. Ross an estate by the entireties in the lot described was created, and that upon the death of John W. Smith title to the lot vested in Amanda C. Smith by survivorship. The material parts of the deed are as follows:

"This deed, made this the 16th day of May, 1899, by C. G. Ross and wife, Nannie E. Ross, of Durham County and State of North Carolina, of the first part, to John W. Smith of Durham County and State of ....., of the second part:

"Witnesseth, that said C. G. Ross and wife, Nannie E. Ross, in consideration of Twelve Hundred and Fifty Dollars to them paid by John W. Smith, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do hereby bargain, sell and convey to said John W. Smith and his heirs and assigns, a certain tract or parcel of land in Durham County, State of North Carolina, adjoining the lands of Dr. A. G. Carr, F. C. Geer and others, bounded as follows, viz.: (Here follows description of the lot.)

"To have and to Hold the aforesaid tract or parcel of land, and all appurtenances thereunto belonging to the said John W. Smith and wife, Amanda C. Smith, and their heirs and assigns, to their only use and behoof forever."

John W. Smith died 6 December, 1923. It appeared in evidence that in February, 1924, the executors and trustees under the will of John W.

Smith instituted action asking the advice of the court as to their duty with respect to the real property of which John W. Smith died seized. Amanda C. Smith was made party to this action and filed no answer. Judgment was rendered as prayed. In August, 1924, Amanda C. Smith, who had dissented from the will, filed petition for the allotment of her dower as widow of John W. Smith in the lands of which he died seized. She alleged that he was owner in fee of several parcels of real property, which she described, including the lot now claimed by the plaintiff. The executors and heirs of John W. Smith were made parties. Judgment was rendered according to her petition, and the dower allotted to her included the lot in question. The dower allotment was duly confirmed by the decree of the court.

In March, 1925, in the action instituted February, 1924, hereinbefore referred to, motion was made by these defendants, who are the heirs of John W. Smith, for the discharge of the executors and trustees under the will of John W. Smith and for the conveyance to the defendants of the real property of John W. Smith. Amanda C. Smith was served with notice of the motion and filed answer admitting that she had taken dower in the lands of John W. Smith. Judgment was rendered in accordance with defendants' motion, and the executors and trustees were directed to convey to the defendants all the real property of John W. Smith, subject to the dower interest therein of Amanda C. Smith. Deed was executed as directed.

In 1929, Amanda C. Smith instituted action against these defendants, alleging that she was life tenant in the real property allotted to her as dower, and asking that defendants, remaindermen, be required to compensate her for improvements put on this property. She also asked for a sale of the lands. Defendants' demurrer was overruled and defendants appealed to the Supreme Court. The Supreme Court held she was not entitled to recover for improvements, as they were voluntarily made "and she knew she had only a life estate," but held she could maintain action for sale of the property for reinvestment, upon proper showing. *Smith v. Suitt,* 199 N. C., 5, 153 S. E., 602. Subsequently Amanda C. Smith took a nonsuit in that action.

Amanda C. Smith died 5 March, 1939. In November, 1939, plaintiff, executor of her last will and testament, instituted this action claiming that she had acquired title in fee to this lot by survivorship, under the Ross deed. Defendants denied that Amanda C. Smith took any title under this deed, except right of dower, and further alleged that Amanda C. Smith and her executor were estopped by the judgments referred to.

Judgment of nonsuit was entered by the trial judge, who based his ruling upon both grounds set up in the answer.

Plaintiff appealed.

Marshall T. Spears and John D. McConnell for plaintiff, appellant.
Basil M. Watkins for defendants, appellees.

DEVIN, J. The court below ruled that plaintiff's action to establish title to the lot in question could not be maintained for two reasons, (1) because the deed to John W. Smith, upon which plaintiff based his claim, did not create an estate by the entireties so as to vest the title in Amanda C. Smith, the survivor, and (2) because in any event Amanda C. Smith was estopped by judgment from claiming title in fee. Plaintiff's appeal challenges the correctness of the court's ruling on both grounds.

1. The characteristics of an estate by the entireties were defined by Blackstone as follows: "If an estate in fee be given to a man and his wife they are neither properly joint tenants nor tenants in common; for the husband and wife being considered one person in law they cannot take the estate by moieties, but both are seized of the entirety *per tout et non per my,* the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain in the survivor." 2 Bl., 182. The incidents of this anomalous estate were discussed by *Walker, J.,* in *Moore v. Trust Co.,* 178 N. C., 118, 100 S. E., 269.

Did the Ross deed create an estate by the entireties in John W. Smith and Amanda C. Smith, his wife? The premises and the conveying clause of the deed designate the grantee as John W. Smith. The payment of the consideration by John W. Smith is acknowledged, and the conveyance is to John W. Smith and his heirs. In the *habendum* clause these words appear, "to the said John W. Smith and wife, Amanda C. Smith, and their heirs."

It may be observed that the technical rules anciently devised for the construction of the several parts of a deed are not to be strictly applied if to do so would defeat the obvious intention of the grantor. The principle is also established that for the purpose of ascertaining the intent of the maker all parts of the deed should be considered, but in doing so recognized canons of construction and settled rules of law may not be disregarded. *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356; *Williamson v. Cox,* 218 N. C., 177, 10 S. E. (2d), 662.

It was said by *Adams, J.,* in *Benton v. Lumber Co.,* 195 N. C., 363, 142 S. E., 229, that the entire deed must be considered and such construction of particular clauses adopted as will effectuate the intention of the parties, and that if terms are contradictory the first in order will be given effect to the exclusion of the last. "As a rule if there are repugnant clauses in a deed the first will control and the last will be rejected." *Boyd v. Campbell, supra; Seawell v. Hall,* 185 N. C., 80, 116 S. E., 189; 12 Am. Jur., 566; *Wilkins v. Norman,* 139 N. C., 40, 51 S. E., 797.

The usual office of the *habendum* in a deed is to define the extent of the ownership in the thing granted to be held and enjoyed by the grantee (26 C. J. S., 200, 431); to lessen, enlarge, explain, or qualify the estate granted in the premises (*Seawell v. Hall, supra*); but not to contradict or be repugnant to the estate granted therein (*Bryan v. Eason,* 147 N. C., 284, 61 S. E., 71), though the *habendum* clause may control if it clearly appears the grantor so intended. *Seawell v. Hall, supra;* 84 A. L. R., 1050.

Ordinarily the *habendum* clause relates to the *quantum* of the estate, while the premises and the granting clauses designate the grantee and the thing granted. "The granting clause is the very essence of the contract," 16 Am. Jur., 567. Hence, where the name of the grantee, the thing granted, and the *quantum* of the estate are clearly defined in the granting clause, the *habendum* clause is not essential to the validity of the deed, and in case of repugnancy is to be rejected, unless it appears from the four corners of the deed that it was the intention of the parties that it should control. 84 A. L. R., 1054; 111 A. L. R., 1078.

In *Hafner v. Irwin,* 20 N. C., 570, the deed construed named one party as grantee, and in the *habendum* another party was named as trustee to effectuate the purposes expressed in the deed. It was held that the naming of a new grantee in the *habendum* could only be upheld "provided the estate given by the *habendum* to the new grantee was not immediate, but by way of remainder." It was also said: "But it (the *habendum*) cannot perform the office of divesting an estate already vested by the deed, for it is void if repugnant to the estate granted in the premises." This statement of the law was cited and applied in *Blackwell v. Blackwell,* 124 N. C., 269, 32 S. E., 676. The distinction was stated by *Ashe, J.,* in *Blair v. Osborne,* 84 N. C., 417, where it was held that one not named in the premises may, nevertheless, take an estate in remainder by limitation in the *habendum;* "that the *habendum* shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder." This language was quoted with approval by *Connor, J.,* in *Condor v. Secrest,* 149 N. C., 201, 62 S. E., 921.

In *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79, it was decided that, in order to effectuate the intention of the grantor, the qualification or lessening of the estate by provisions in the *habendum* limiting it to a life estate, with remainder over to the children of the grantee, should be upheld. And in *Acker v. Pridgen,* 158 N. C., 337, 74 S. E., 335, it was said: "While a stranger to a deed cannot be introduced in the *habendum* clause to take as grantee, he can take in remainder by way of limitation when by construction of the entire instrument it appears that the intention of the parties is given effect." That a new party may be

named as grantee in the *habendum* who may take by way of limitation has been declared in numerous decisions. *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 503; *Brown v. Brown,* 168 N. C., 4, 84 S. E., 25; *Williams v. Williams,* 175 N. C., 160, 95 S. E., 157; *Johnson v. Lee,* 187 N. C., 753, 122 S. E., 839; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547. But that is not the question here. By the Ross deed John W. Smith was alone designated as grantee in the premises and in the conveying clause. In the *habendum* an additional person "a stranger to the premises" was for the first time introduced, not to take by way of remainder, but as an original grantee of a present interest.

While the undoubted trend of modern adjudication is to discard the artificial importance given certain clauses in deeds, and to adhere to the cardinal principle that a deed must be construed in its entirety in order to ascertain the intention of the parties (*Jefferson v. Jefferson,* 219 N. C., 333, 13 S. E. (2d), 745; *Midgett v. Meekins,* 160 N. C., 42, 75 S. E., 728; *Triplett v. Williams, supra*), the particular rule of construction applied in the cases cited has not been abrogated or modified so as to permit the interpretation which the plaintiff seeks to place upon the deed under which he claims.

From an examination of the several parts of the Ross deed, and consideration of the manner and form in which the conveyance was expressed, we are unable to find that it was the intention of the parties that an estate by the entireties should be thereby created. There was no evidence of mutual mistake, or mistake of the draftsman in drawing the deed under which plaintiff claims, nor was there allegation of other equitable ground upon which the action could be maintained.

The plaintiff cites *Midgett v. Brooks,* 34 N. C., 145. The point decided there was whether a covenant appearing only in the *habendum* clause should be given effect. It was held that while the words of covenant were out of place they should be given their legal effect, and the court said: "It is the office of the premises to specify the parties to the deed and the thing created; if, however, the name of the grantee appears for the first time in the *habendum,* it is sufficient." The correctness of the holding in that case is not controverted, but it is not to be held controlling in a case where the grantee is named in the premises and in the conveying clause, and a different grantee is introduced in the *habendum.*

The plaintiff cites, also, *McLeod v. Tarrant,* 39 S. C., 271, 17 S. E., 773. In that case the deed in the premises named the husband as grantee but without words of inheritance, and in the *habendum* and again in the warranty clause the husband and his wife and their heirs were named. It was held that the premises gave the husband only a life estate, but that through the *habendum* and warranty clauses an estate in fee was

conveyed to the husband and wife, creating an estate by the entireties. It may be interesting to note that *Chief Justice McIver* dissented, and in his opinion cited *Blair v. Osborne,* 84 N. C., 417, and quoted therefrom the sentence, "The *habendum* in a deed shall never introduce one who is a stranger to the premises to take as grantee, but he may take by way of remainder."

2. The defendants' second line of defense seems equally unassailable. The question of plaintiff's title to the lot described has become *res judicata.* He is estopped by the judgments set out in the record, which have been duly pleaded. Amanda C. Smith, plaintiff's testatrix, following the death of her husband, instituted proceeding for the allotment of dower in the lands of which he died seized. In her petition she described the parcels of real property of which he was owner in fee simple, including the very lot in question, and asked that her dower be allotted therefrom. These defendants, the only heirs at law, and the executors of John W. Smith, were made parties. The cause proceeded to judgment and her dower was assigned as prayed. Together, with several other parcels of real property, the lot in question was allotted to her as dower. The allotment was confirmed by proper decree, and Amanda C. Smith entered into possession of this lot as part of her dower, and so continued until her death some fifteen years later. The court had jurisdiction of the parties and of the subject matter. Its decree, rendered on the merits, was binding upon her and her successor in title. Her right of dower in the lot depended upon the title of John W. Smith which was adjudicated in that proceeding. It is fundamental that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to parties and privies, in all other actions involving the same matter. 30 Am. Jur., 908; 34 C. J., 742; *Gay v. Stancell,* 76 N. C., 369; *Bruton v. Light Co.,* 217 N. C., 1, 6 S. E. (2d), 822; *Jefferson v. Sales Corp., ante,* 76; *Harshaw v. Harshaw, ante,* 145; *Current v. Webb, ante,* 425.

It is well settled that the doctrine of *res judicata* is applicable to a proceeding under the statute for the allotment of dower. *Gay v. Stancell, supra; Stocks v. Stocks,* 179 N. C., 285, 102 S. E., 306. As the right of dower depended on the title of the husband, the judgment was conclusive between the parties, and the widow is estopped from setting up title to herself in land embraced in the proceeding and allotted to her as dower. *Sigmon v. Hawn,* 86 N. C., 310; *Boyd v. Redd,* 118 N. C., 680, 24 S. E., 356.

The record in this case shows there were other actions and proceedings between Amanda C. Smith and the heirs and personal representatives of John W. Smith relative to the lands of which he died seized, including the lot in question, wherein the title of the defendants, his heirs, was

admitted or was not denied. It may not be out of place to observe that while Amanda C. Smith took dower in the lot in question, and made no other claim during her lifetime, presumably the plaintiff in the exercise of his trust relationship as executor, upon examination of the Ross deed, deemed it his duty to obtain judicial determination of the question raised by the language of that instrument.

For the reasons herein fully set out, we conclude that the trial judge has ruled correctly, and that the judgment of the Superior Court must be

Affirmed.

JAMES W. PEOPLES AS ADMINISTRATOR OF THE ESTATE OF HOWARD S. PEOPLES, DECEASED, V. S. PORTER FULK, TRADING AS INDEPENDENT BUS LINES.

(Filed 7 January, 1942.)

1. Pleadings § 26c—

When the complaint fails to allege that defendant's bus was stopped on the highway in such a manner as to leave insufficient space for the passage of cars on the remaining available portion of the hard surface, plaintiff's argument in the Supreme Court in regard to the space left for travel is unavailing.

2. Automobiles § 18a—

Plaintiff's contention that the driver of defendant's bus was guilty of negligence in stopping the bus across an intersecting highway for the purpose of taking on a passenger is untenable when the evidence discloses that no vehicle or person involved in the accident was using or attempting to use the intersecting highway, resulting in a complete want of proof that the stopping of the bus across the intersecting highway had any causal connection with the collision.

3. Automobiles § 14—

Starting and stopping on a highway in accordance with the exigencies of the occasion is an incident to the right of travel, and the word "park" and the words "leave standing" as used in sec. 123 (a), ch. 407, Public Laws 1937, are modified by the words of the statute "whether attended or unattended" so that they are synonymous, and neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the travel.

4. Same—

The stopping of a bus on the hard surface of a highway outside of a business or residential district for the purpose of taking on a passenger is not parking or leaving the vehicle standing within the meaning of the terms as used in sec. 123 (a), ch. 407, Public Laws 1937.

5. Same—

Where a witness for plaintiff, whose testimony is uncontradicted, testifies that when the collision occurred all lights on defendant's bus went out, testimony of other witnesses for plaintiff, who arrived later, that at that time there were no lights on the bus, has no probative force upon the question of whether the rear lights of the bus were burning at the time of the collision.

6. Automobiles § 18d—Evidence held to establish intervening negligence on part of driver of car insulating as a matter of law any negligence on part of bus operator in failing to have rear light burning.

Defendant's bus stopped on the hard surface of the highway to take on a passenger. Its rear bumper was about even with the rear bumper of a car standing on the other side of the highway with its left wheels some four feet on the hard surface. Plaintiff's intestate was standing to the rear of the car. The driver of a car headed in the same direction as the bus and approaching from the rear, in attempting to go between the bus and the other car, hit the bus, the other car, and intestate, inflicting mortal injury. Plaintiff contended that there was no rear light burning on the bus and that the accident occurred early on a misty morning when visibility was poor. The driver of the car testified that he did not see the bus until he was within a car length of it, that he was traveling from 30 to 40 miles per hour, that his front lights were in good condition, and an eyewitness testified that the manner of his approach was such that he apprehended that an accident would occur and took to the bank and got behind a telephone pole. *Held:* Even conceding that there was conflicting evidence as to whether the rear light on the bus was burning, any negligence in this respect was insulated as a matter of law by the negligence of the driver of the car, since defendant could not have reasonably anticipated that anyone would operate his car in such manner as to bring about the collision as delineated on the record.

7. Evidence § 42c—Statement of defendant held not to constitute admission of liability.

The fact that the owner of the bus involved in the collision in suit went to the house where intestate was then lying in a critical condition from injuries received in the accident, and stated in talking to other persons there in the hearing of intestate's mother that he was going to get a better bus and would pay for any damage he did, does not constitute an admission of liability on his part, since the statement was not made to intestate or to anyone in a representative capacity, and since the statement did not amount to an admission of liability, but only that defendant was willing to pay damages for which he was responsible.

CLARKSON, J., concurring in result.

APPEAL by plaintiff from *Olive, Special Judge,* at the September Term, 1941, of FORSYTH. Affirmed.

This is a civil action to recover damages for wrongful death resulting from alleged negligence of defendant. The cause was originally tried in the Forsyth County Court and was heard in the court below on appeal upon assignments of error.

On 21 December, 1938, at about 6:35 a.m., an agent of defendant was operating one of his passenger buses westwardly on Polo Road near Winston-Salem. He stopped the bus at the intersection of a side road to pick up a passenger. At the time the bus stopped it was entirely on the hard surface portion of the highway on its right-hand side. At the time the bus stopped there was an automobile belonging to one Ransome standing on the opposite side of the road headed in the opposite direction with its right-hand wheels approximately in the drain ditch and its left-hand wheels about 4 inches on the pavement—the pavement being 18 or 20 feet wide. The rear bumpers of the bus and of the car were opposite each other. Before the passenger could get aboard and take her seat, one Morris, approaching from the rear of the bus, ran into the bus, struck the car and hit the deceased who was standing in the rear of the Ransome car, inflicting injuries which caused death. The Morris car then proceeded down the road a minimum of 50 yards before it was stopped.

When the cause came on to be tried in the Forsyth County Court the judge, at the conclusion of the evidence for the plaintiff and on motion of the defendant, entered judgment dismissing the action as of nonsuit. The court below, on appeal, affirmed and the plaintiff appealed.

William H. Boyer and Richmond Rucker for plaintiff, appellant.
Manly, Hendren & Womble and I. E. Carlyle for defendant, appellee.

BARNHILL, J. There are only two assignments of error presented for consideration. The first is directed to alleged error of the court below in overruling an exception of the plaintiff to the exclusion of certain evidence. The second is directed to the alleged error of the court in overruling plaintiff's exception to the action of the county court in sustaining the motion for judgment of nonsuit and in entering judgment of nonsuit.

While there was some argument here in respect to the space between the bus and the Ransome car, there is no allegation in the complaint that the defendant was negligent in that it stopped its bus in such manner as to leave an insufficient space between it and the Ransome car to permit other cars to pass. The plaintiff alleges that defendant was negligent in that (1) it parked and stopped the bus on the hard surface portion of the highway in violation of the statutes of this State; (2) it stopped its bus across an intersecting highway for the purpose of taking on a passenger; and (3) it failed to have a rear light on a dark and foggy morning when in the exercise of ordinary care it should have done so.

If it be conceded that it was an act of negligence for the defendant to stop its bus to take on a passenger at the intersection of a side road, such negligence was in nowise related to or productive of the subsequent collision. Morris was not turning or attempting to turn into the side

road. There is no causal relation between such alleged negligence and the collision.

The temporary stop of the bus on the hard surface portion of the highway to take on a passenger did not constitute a violation of sec. 123 (a), ch. 407, Public Laws 1937, which provides that "no person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway."

The clause "whether attended or unattended" limits the meaning of the word "park" as well as of "leave standing." The two terms, as thus limited, are synonymous. A vehicle which is left standing is parked and a vehicle which is parked is left standing. Neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the "travel."

"Park" or "leave standing" means something more than a mere temporary or momentary stop on the road for a necessary purpose. *S. v. Carter,* 205 N. C., 761, 172 S. E., 415; *Stallings v. Transport Co.,* 210 N. C., 201, 185 S. E., 643, 42 C. J., 614, 2 Blashfield Cyc. Auto L. & P., 332, and cases cited; *Billingsley v. McCormich Transfer Co.,* 228 N. W., 424 (N. D.); *Axelson v. Jardine,* 223 N. W., 32 (N. D.); *Dare v. Bass,* 224 Pac., 646; *Kastler v. Tures,* 210 N. W., 415 (Wis.); *Henry v. S. Liebovitz & Sons,* 167 Atl., 304 (Pa.); *American Co. of Ark. v. Baker,* 60 S. W. (2d), 572 (Ark.); *Dolfosse v. Oil Co.,* 230 N. W., 31 (Wis.). Starting and stopping are as much an essential part of travel on a motor vehicle as is "motion." Stopping for different causes, and according to the exigencies of the occasion, is a natural part of the "travel." The right to stop when the occasion demands is incident to the right to travel. *Fulton v. Chouteau County Farmers Co.,* 32 Pac. (2d), 1025; *Morton v. Mooney,* 33 Pac. (2d), 262.

The remaining allegation of negligence is as to the failure of the defendant to have a rear light on his bus. The evidence as to this is conflicting, if indeed the evidence of the witness Morris may be deemed to have any probative force. While he testified that he did not see any rear light and that he thought he could have seen it had there been one, he also testified that he did not see the bus until he was within one car length of it and that his "mind was kind of in a blank and all I could do was just go through there and I didn't know hardly what happened—I didn't see anyone when I went through—I don't remember what I did." See *Johnson & Sons v. R. R.,* 214 N. C., 484, 199 S. E., 704. The only other eyewitness testified that there was a light burning on the rear of the bus and that the inside lights were on. This witness testified—and his testimony is uncontradicted—that when the Morris car hit the bus

all lights on the bus went out. Consequently, testimony of other witnesses, who arrived later, that at that time there were no lights on the bus has no probative force.

In view of this testimony as to rear lights, in the light of all the facts and circumstances, was it error for the court to enter judgment as of nonsuit? We must answer in the negative.

The witness Morris who was operating the car which struck the deceased approached the bus from the rear. His front lights were in good condition. He was traveling at from 30 to 40 miles per hour. He did not see the bus until he was within a car length of it. He cut his car first to the right and then to the left and attempted to go through the space between the bus and the Ransome car. He struck the bus and the Ransome car and hit the deceased who was standing on the shoulder of the road at the rear of the Ransome car and knocked him ten feet. In so doing he did considerable damage to his own car. One fender was pressed back against the front tire, puncturing it, and yet he went a space of from 50 to 68 yards before he was able to stop his car. His manner of approach was such that the other eyewitness apprehended that an accident would occur and he took to the bank and got behind a telephone pole. Morris did not testify that the headlights on the Ransome car in anywise interfered with his vision. Nor did he say that the headlights on his car would not enable him to see the bus had he been looking before he got within a car length thereof.

To hold that the defendant owed the duty to the plaintiff's intestate to foresee that a third person would operate a car in such manner and to bring about a collision such as is delineated on this record would not only "practically stretch foresight into omniscience," *Gant v. Gant,* 197 N. C., 164, 148 S. E., 134; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 146, but would, in effect, require the anticipation of "whatsoever shall come to pass." "We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such farseeing and all-inclusive duty." *Beach v. Patton, supra.*

We conclude that the facts in this case bring it squarely within the opinions of this Court in *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Beach v. Patton, supra,* and *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88. The latter case is particularly in point.

The cases cited and relied upon by plaintiff, represented by *Montgomery v. Blades,* 218 N. C., 680, 12 S. E. (2d), 217; *Page v. McLamb,* 215 N. C., 789, 3 S. E. (2d), 275; and *Clarke v. Martin,* 215 N. C., 405, 2 S. E. (2d), 10, are factually distinguishable.

Plaintiff offered testimony tending to show that after the accident the defendant went to the home of the deceased and was there talking to other persons in the room in the hearing of the mother of the deceased and that he then said: "He was going to put on a better bus—he said

he would pay for the damage he done and he was going to put a better bus on that line and went on to tell how he was going to run it. I can't tell just all what." The plaintiff contends that this evidence tends to show an admission of liability by the defendant and that its exclusion was erroneous. We cannot so hold.

In the first place the statement was not made to the deceased or to anyone standing in a representative capacity. It was made generally in the presence of and to others who were at the same time visiting at the home of the deceased who was then in a critical condition by reason of his injuries. Secondly, the statement is not an admission of liability or of negligent conduct. The defendant merely said he was willing to pay for whatever damage he had done. The record fails to disclose that he is not still willing so to do, if and when it shall be determined that he is responsible for any damage or injury.

The court below properly overruled the exceptions of the plaintiff duly entered at the trial in the Forsyth County Court.

Affirmed.

CLARKSON, J., concurring in result: I concur in the result, but I do not agree with the reasonings in the main opinion in many respects.

I think there is no causal relation between the alleged negligence of the defendant and the injury sustained by plaintiff's intestate. The law is well-settled that the negligence relied on must be the proximate or one of the proximate causes of the injury complained of.

It will be noted that N. C. Code, 1939 (Michie), section 2621 (308), has as to stopping on a highway a double provision (1) "No person shall park (2) or leave standing any vehicle attended or unattended, upon the paved or improved or main traveled portion of any highway outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway." The proviso reads as follows: "In no event shall any person park or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than 15 feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for the free passage of other vehicles thereon nor unless a clear view of such vehicle may be obtained from a distance of 200 feet in both directions upon such highway." The other proviso is not material to the facts in this case nor does (c) which is applicable to cripple vehicles.

In the main opinion the proviso is not inserted. It permits a person to "park" or leave standing any vehicle whether "attended or unattended," but 15 feet upon the main traveled portion shall be left for free passage of other vehicles.

In *S. v. Carter,* 205 N. C., 761 (763), it is stated: "This word is in general use, with reference to motor driven vehicles, it means the permitting of such vehicle to remain standing on a public highway or street, while not in use. 42 C. J., 613. C. S., 2621 (66)." *Stallings v. Transport Co.,* 210 N. C., 200 (203).

In Vol. 2 Cyc., Automobile Law and Practice, sec. 1192, pp. 326-7, it is written: "In several jurisdictions there are statutes providing that no vehicle shall be parked or left standing on the highway in such manner that there shall not be a space of a specified number of feet for the passage of other vehicles. A failure to leave the required unobstructed passage way constitutes negligence, unless the stopping is due to some unavoidable mishap, such as an accident wrecking the car, where, if the owner of the car is using due diligence to procure its removal, the statute does not apply. A statute requiring a driver stopping on the highway to leave a required number of feet for passage for other vehicles, is applicable where an automobile collided with a parked truck, although no other car was passing," citing a wealth of authorities. *Smithwick v. Pine Co.,* 200 N. C., 519.

A clear analysis of a statute in all respects identical with our own, except that, where impracticable to stop entirely on the shoulder, it required a space of 10 feet instead of 15 feet to be left open and unobstructed, will be found in *Fontaine v. Charas* (N. H.), 181 A., 417, 418, where the Court said: "The record is clear to the effect that it was 'practicable' for the defendant to have driven his car off of 'the paved or improved or main traveled portion' of the highway at the place where the accident occurred. It also appears to be conceded that his car was not disabled prior to the collision, and that the accident did not occur in a business or residence district. It does not appear, however, how long his car was stationary before the accident. From this lack of evidence the defendant contends that there is no evidence of 'parking.' Were 'parking the only act prohibited, it might be necessary to attempt a definition of that rather loose word as it is used in the statute, but since it is illegal not only to 'park' but also to 'leave standing,' we are of the opinion that the defendant's act of stopping where he did is sufficient to invoke the statute. To 'park' may imply halting a vehicle for some appreciable length of time, but there is no such connotation to be drawn from the words to 'leave standing any vehicle, whether attended or unattended.' We believe that by the use of this phrase the Legislature intended to make illegal any voluntary stopping of the vehicle on the highway for any length of time, be that length of time long or short, except, of course, such stops as the exigencies of traffic may require. It therefore follows that the defendant was guilty of a violation of the statute in stopping on the traveled part of the highway when he could

have driven off to the side, and it becomes unnecessary to consider the view which could have been obtained of his car or the clear space available for passage by it."

In 2 Cyc. Automobile Law and Practice, *supra*, the vast majority of the decisions are contrary to the meaning of "park" or "leave standing" set forth in the main opinion. In fact, the construction given in the main opinion would practically wipe out a statute made for safety on the highways.

PATRICK M. HAIRSTON v. ATLANTIC GREYHOUND CORPORATION.

(Filed 7 January, 1942.)

1. Trial § 31—Charge held for error as containing expression of opinion that amount paid defendant for release was inadequate.

In this action for tortious injury defendant set up a release executed by plaintiff in consideration of the sum of $55, which sum defendant contended was adequate compensation for the injury. The court in instructing the jury upon the question of nominal damages charged that nominal damages might consist of stipulated sums of from $1 to $50, or even $100. The court had theretofore charged the jury that it might consider the inadequacy of the sum paid for the release upon the issue of fraud in its procurement. *Held:* The statement that $55 or $100 should be considered mere nominal damages amounted to an expression of opinion that the amount paid for the release was inadequate, and constitutes error entitling defendant to a new trial.

2. Damages § 1—

Nominal damages are some trifling sum awarded in recognition of defendant's invasion of some legal right of plaintiff which results in no actual injury or pecuniary loss, and when all the evidence discloses actual injury and pecuniary loss there is no necessity for an instruction as to nominal damages.

3. Torts § 8c—Evidence held not to establish ratification of release as matter of law.

The evidence disclosed that the consideration of the release executed by plaintiff was $55, of which $25 was paid the doctor and $15 was paid the attorney representing plaintiff at the time. There was evidence tending to show plaintiff's ignorance, the condition of his attorney at that time, and the oppressive manner and language of those who procured the release. *Held:* Considering plaintiff's evidence in the light most favorable to him, the fact that plaintiff accepted and spent the $15 which came to him out of the sum paid for the release does not establish ratification of the release as a matter of law, but the issue was correctly submitted to the jury.

4. Damages § 7—

Where an injury is maliciously or fraudulently inflicted or is accompanied by insult or wanton disregard of plaintiff's rights, the jury may, if they deem it proper to do so, award punitive damages in addition to compensatory damages.

5. Same—

A corporation is liable for punitive as well as compensatory damages upon the principle of *respondeat superior* when the injury is inflicted in a manner which would justify such an award, by a servant or agent acting within the scope of his employment and in the furtherance of the master's business.

6. Same—

In addition to its liability for punitive damages upon the principle of *respondeat superior*, a corporation may be liable for punitive damages if the injury results from breach of duty directly owing from the corporation to the injured person growing out of the relationship between them, such is the duty of a common carrier to protect a passenger from assault from any source, especially a malicious or wanton assault committed by its employee while on duty.

7. Carriers § 21a—

A common carrier owes a high degree of duty to a passenger to protect him from assault from any source and is liable for a malicious or wanton assault committed on a passenger by an employee while on duty, whether the employee's acts are within the line of his employment or not.

8. Damages § 11—

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

APPEAL by defendant from *Rousseau, J.*, at June Term, 1941, of FORSYTH. New trial.

This was an action to recover damages for an assault upon the plaintiff while a passenger in defendant's bus station. The assault was committed by one of defendant's employees by burning defendant's feet with gasoline.

The plaintiff, a Negro, was in defendant's bus station, at night, waiting for a bus upon which he intended to become a passenger. While he was asleep the defendant's porter and attendant on duty in the colored waiting room poured gasoline on plaintiff's feet and set them on fire, causing substantial injury. The material facts were admitted in the answer. The defendant's principal defense was a release executed upon the payment of $55. The release was attacked for fraud. Ratification was alleged in defendant's rejoinder.

Issues addressed to the execution of the release, fraud in its procurement, and ratification, as well as issues relating to the commission of the act causing the injury, and damages, both compensatory and puni-

tive, were submitted to the jury and answered in favor of the plaintiff. Compensatory damages in the sum of $500 and punitive damages in the sum of $1,000 were awarded.

From judgment on the verdict, defendant appealed.

J. Erle McMichael and Andrew Joyner, Jr., for plaintiff, appellee.
Ratcliff, Hudson & Ferrell for defendant, appellant.

DEVIN, J. The defendant assigns as error the following excerpt from the trial judge's charge to the jury: "Nominal damages, gentlemen, are construed to be, say $1.00, $10.00, $15.00, $50.00—some nominal damages, and if you reach this issue and you find he is not damaged more than what is a nominal sum of money, you are to answer this, then, in a nominal sum of money unless you find that the sum of $55.00 paid to him and his lawyer and his doctor is a full, just and complete settlement already. . . . The defendant says, therefore, on this issue you ought not to allow any amount of nominal damages, because the defendant says it has already paid the plaintiff $55.00, which is nominal damages as the court instructed you, regarded usually as $1.00, $10.00, $15.00, $25.00 or $50.00, maybe $100.00, as nominal damages."

The vice of this instruction consists not so much in its effect upon the issue of damages, as to which it might be deemed harmless in view of the verdict of the jury, but we think it was prejudicial on the issues relating to the release set up in the answer upon which the case largely hinged. The court had instructed the jury that they might consider on the issue of fraud the inadequacy of the sum of money paid for the release. The amount paid in settlement was admitted to have been $55.00. This amount the defendant contended was an adequate compensation for the injury plaintiff sustained. Hence, the statement by the presiding judge that $55 or $100 should be considered as mere nominal damages was tantamount to an expression of opinion that the amount paid was inadequate.

The court's statement of the rule as to nominal damages was inexact. Nominal damages, consisting of some trifling amount, are those recoverable where some legal right has been invaded but no actual loss or substantial injury has been sustained. Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation. They have been described as "a peg on which to hang the costs." *Hutton v. Cook,* 173 N. C., 496, 92 S. E., 355; 15 Am. Jur., 390. "What is meant by nominal damages is a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage." *Wolfe v. Montgomery Ward & Co.,* 211 N. C., 295, 189 S. E., 722. In view of the evidence, the necessity for an instruction as to nominal damages does not appear.

Defendant contends its motion for judgment of nonsuit should have been allowed on the ground that plaintiff's evidence showed ratification of the settlement by the acceptance and spending of $15 cash which came to him out of the $55 paid for the release. It was admitted that of the consideration for the release, $25 was paid the doctor and $15 was paid to the attorney engaged to represent plaintiff at that time.

We cannot concur in this view. Taking the plaintiff's testimony in the light most favorable for him, and considering the evidence tending to show plaintiff's ignorance, the condition of his attorney at that time, the oppressive manner and language of those who procured the release and paid him the $15, we are unable to say that plaintiff "has proved himself out of court." *Hayes v. Tel. Co.*, 211 N. C., 192, 189 S. E., 499. We think the question of ratification under all the circumstances was one for the jury. *Butler v. Fertilizer Works*, 193 N. C., 632, 137 S. E., 813; *Hayes v. R. R.*, 143 N. C., 125, 55 S. E., 437.

The defendant excepted to the submission of the issue as to punitive damages, on the ground that the corporation should not be held liable for punitive damages for the assault upon the plaintiff, committed by its servant, since the act was outside the scope of the servant's employment and not in furtherance of defendant's business.

The general rule in this jurisdiction is that, in addition to compensatory damages, designed to compensate for the injury or loss sustained, punitive damages or smart money may be awarded by the jury, if they deem proper to do so, when they find that the tortious conduct complained of involves elements of malice, fraud, insult, or wanton and reckless disregard of the plaintiff's rights. *Roth v. News Co.*, 217 N. C., 13, 6 S. E. (2d), 882; *Tripp v. Tobacco Co.*, 193 N. C., 614, 137 S. E., 871; *Ford v. McAnally*, 182 N. C., 419, 109 S. E., 91; 15 Am. Jur., 710; 25 C. J. S., 715. It is equally well settled that liability for punitive damages may be imposed upon a corporation or other principal when the injury is inflicted in a manner which would justify such an award, and the servant or agent causing the injury is acting within the scope of his employment and in the furtherance of the master's business. *Picklesimer v. R. R.*, 194 N. C., 40, 138 S. E., 340; *Robinson v. McAlhaney*, 214 N. C., 180, 198 S. E., 647. There the liability for punitive as well as compensatory damages is referable to the principle of *respondeat superior*.

There are cases, however, where the award of punitive damages has been upheld for injuries resulting from breach of duty directly owing from the corporation to the injured person, growing out of the relationship between them, and this principle has been applied to cases of assaults by employees of common carriers committed upon passengers. This principle was stated and applied by *Hoke, J.*, in the case of *Clark*

v. Bland, 181 N. C., 110, 106 S. E., 491. In that case the plaintiff Clark went to a railroad station intending to become a passenger, and, while waiting for the train, was called to one side by the assistant station agent and assaulted for reporting him for selling whisky. The assault occurred either on or near the railroad premises. An instruction by the trial court that punitive damages might be awarded by the jury, in their discretion, was upheld. The Court said: "It is now fully recognized that corporations may be held liable for the malicious and willful as well as negligent torts of their agents and employees, when committed in the course of and scope of their employment, and also for injuries inflicted in breach of some duty owing directly from the company to the injured person, growing out of the conditions existent between them, an instance of this last rule of liability being not infrequently presented from the relationship of carrier and passenger."

The Court in that case further said: "The jury, under a correct charge, having accepted the view that the relationship of carrier and passenger existed between plaintiff and defendant company, the authorities are very generally to the effect that the corporation is held to a high degree of care in protecting plaintiff from violence and insult, and may be held liable for injuries inflicted in breach of this duty on the part of their employees, and of others, also, which it could have prevented in the reasonable and proper performance of their duty (citing authorities). And these and many other cases in this jurisdiction hold that when such injuries are inflicted willfully and of malice or under circumstances of insult, rudeness, and oppression, punitive damages may be awarded in the discretion of the jury" (citing authorities).

The Court distinguished the *Clark case, supra,* from *Stewart v. Lumber Co.,* 146 N. C., 47, 59 S. E., 545, and from *Lake Shore R. R. v. Prentice,* 147 U. S., 101, and quoted from *Sawyer v. R. R.,* 142 N. C., 1, 54 S. E., 793, as follows: "The distinction adverted to is pointed out in *Sawyer's case,* 142 N. C., 1, as follows: 'According to the varying facts of different cases, the question of fixing responsibility on corporations by reason of the tortious acts of their servants and agents is sometimes made to depend exclusively on their relationship as agents or employees of the company, and sometimes the facts present an additional element and involve some independent duty which the corporations may owe directly to the injured or complaining party.' "

"In our case," continues the opinion of *Justice Hoke* in the *Clark case, supra,* "this additional element is present, the suit being for a breach of duty growing out of the relationship of carrier and passenger, and by an agent of the company charged in part with performance of the duty of protection and care of plaintiff, and in such case the authorities in this jurisdiction uphold the award of punitive damages where, as stated, the

wrong is done willfully and under circumstances of insult, rudeness, or oppression. . . . And so here it was proper to submit the question of punitive damages to the jury on evidence tending to show an unlawful and malicious assault on plaintiff, who was on the premises of defendant as a passenger, and by an agent or assistant agent of the company, who was charged in part with the duty of the protection due plaintiff from the company as its passenger."

We quote also from an opinion by *Walker, J.*, speaking for the Court in *Lanier v. Pullman Co.*, 180 N. C., 406, 105 S. E., 21, as follows: "Passengers do not contract merely for accommodation and transportation from one point to another; the contract includes assurance of good treatment and against personal rudeness and every wanton interference with their persons, either by the carrier or his agents employed in the management of the railroad train or other conveyance. In respect to such treatment of passengers, not merely officers, but the crew, are agents of the carriers. It is among the implied provisions of the contract between passengers and a railroad company that the latter has employed suitable servants to run its trains, who will accord proper treatment to them; and a violation of this implied duty or contract is actionable in favor of the passenger injured by its breach, although the act of the servant was willful and malicious, as in the case of a malicious assault upon a passenger, committed by any of the train hands, whether within the line of his employment or not. The duty of the carrier towards a passenger is contractual, and, among other implied obligations, is that of protecting a passenger from insults or assaults by other passengers or by their own servants."

To the same effect is the holding in *White v. R. R.*, 115 N. C., 631, 20 S. E., 191, and *Williams v. R. R.*, 144 N. C., 498, 57 S. E., 216. See, also, *Seawell v. R. R.*, 132 N. C., 856, 44 S. E., 610.

In *Hutchinson v. R. R.*, 140 N. C., 123, 52 S. E., 263, it was said: "The authorities are plenary that the passenger is entitled to recover punitive damages for insult or mistreatment on the part of any employee of the common carrier." In *Williams v. Gill*, 122 N. C., 967, 29 S. E., 879, it was said: "Indeed, where the relation of carrier and passenger exists, the conduct of the employee of the carrier in inflicting violence on the passenger, though the act be outside of the scope of his authority or even wilful and malicious, subjects the carrier to liability in damages just as fully as if the carrier had encouraged the commission of the act."

In 10 Am. Jur., 263, referring to the liability of common carriers for assaults on passengers by employees, it is said: "This liability extends not only to cases where the assault was in the line of the employee's duty, but also to those where the act was merely that of an individual and entirely disconnected with the performance of the agent's duties."

And in 13 C. J. S., 1280, on the same point, discussing the liability of carriers for assaults on passengers committed by its employees, it is said: ". . . the carrier is liable, irrespective, according to some cases (citing, among other cases, *Clark v. Bland, supra*), of whether the servant, in performing the act complained of, was acting for the carrier or for his own purposes, . . . or was within the scope of his employment."

Unquestionably the general rule, established by the decisions of courts in this and other jurisdictions, is that the liability of corporations for damages, both compensatory and punitive, for injuries due to wrongful acts of servants, ordinarily, may only be imposed when the relationship of master and servant is shown to exist at the time and in respect to the very transaction out of which the injury arose. *Liverman v. Cline,* 212 N. C., 43, 192 S. E., 849; *Snow v. DeButts,* 212 N. C., 120, 193 S. E., 224; *Smith v. Duke University,* 219 N. C., 628, 12 S. E. (2d), 643.

But, as pointed out in the cases cited, a distinction is to be noted in the application of this rule to cases where it appears that a duty directly owing from the master to the injured person grows out of the relationship of carrier and passenger. Since the carrier owes a high duty to a passenger to protect him from assault from any source, a malicious or wanton assault committed on a passenger by an employee while on duty, whether within the line of his employment or not, constitutes a breach of duty directly imposing liability. It may be noted that in *Snow v. DeButts, supra,* the plaintiff, who was alleged to have been assaulted by an agent of the railroad company, was not a passenger.

In accord with the principle stated in the authorities from which we have quoted, the submission of the issue as to punitive damages may not be held for error. Hence, evidence of the financial condition of the defendant was competent. *Bryant v. Reedy,* 214 N. C., 748, 200 S. E., 896; *Roth v. News Co., supra.*

While there must be a new trial for the error pointed out in the court's instructions to the jury, we have deemed it proper to decide other pertinent questions presented by the appeal.

New trial.

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

(Filed 7 January, 1942.)

1. Automobiles § 20a—

A guest may be guilty of primary negligence barring recovery as a matter of law in accepting the hospitality of a driver whom he knows to be habitually careless and reckless and addicted to driving at excessive speed without keeping a proper lookout.

2. Same: Husband and wife § 6—

A wife, who is a guest in her husband's car is under the same duty to exercise due care for her own safety as any other guest.

3. Same—Evidence held to disclose primary negligence on part of guest barring recovery against driver as matter of law.

Plaintiff was the wife of defendant. She testified that she knew he habitually drove in a reckless manner and at a high rate of speed without keeping a proper lookout; that he habitually ignored any protest or remonstrance that she made; that the accident in suit occurred after several days travel on a long journey during which she repeatedly remonstrated with him; and that the accident in suit was proximately caused by his negligence. *Held:* Her evidence discloses acts of primary negligence in becoming a guest in his car and in failing to abandon the journey on any of the numerous opportunities she had to do so after his continued recklessness became apparent, which negligence contributed to her own injury and precludes recovery as a matter of law.

APPEAL by defendant from *Burgwyn, Special Judge,* at August Term, 1941, of ORANGE. Reversed.

Civil action to recover damages for personal injuries resulting from alleged negligence of the defendant.

Plaintiff is the wife of the defendant. They live in Columbus, Ohio. On the night of 14 August, 1937, they started on a pleasure trip which was to extend through North Carolina to Washington, D. C., to Philadelphia and thence back to Columbus. They were traveling on an automobile owned and operated by the defendant. On 17 August, in or near the village of Efland, North Carolina, defendant's automobile collided with an automobile being operated by one Murray. As a result plaintiff received certain physical injuries.

Plaintiff offered evidence tending to show that the collision was proximately caused by the negligent manner in which the defendant was operating his automobile. She testified that he was at the time driving from 60 to 70 miles per hour and that he was not looking and did not see the other car until she called it to his attention.

She further testified that on Saturday night they drove from Columbus to Cincinnati, during which time she made strenuous remonstrance concerning his manner of driving; that they drove only about 25 miles on Sunday and that during Monday and Tuesday up until the time of the wreck he was driving in such a reckless manner that she remonstrated with him repeatedly; that his only reply was that so long as he was driving the automobile he was going to drive it to suit himself; that on most of the trip they drove from 60 to 70 miles per hour and on one occasion he raced with another car. She likewise testified that whenever he is driving he always looks at the scenery instead of at the road; that his manner of driving generally is such that when he is driving she has

to protest every day out of three hundred and sixty-five in a year and that when she protested he would always reply that when he was driving he would drive to suit himself.

Issues were submitted to and answered by the jury in favor of the plaintiff. From judgment thereon defendant appealed.

Bonner D. Sawyer and George M. Austin for plaintiff, appellee.
Cooper & Sanders and Graham & Eskridge for defendant, appellant.

BARNHILL, J. Is a guest passenger on an automobile guilty of such negligence as will bar recovery for injuries received as a result of the negligence of the driver when it appears that she knew, before becoming a passenger, that the driver was in the habit of operating his automobile in a reckless manner at an excessive speed and without keeping a proper lookout? This is the decisive question presented by this record and, in this jurisdiction, it is one of first impression. That such conduct on the part of a passenger would warrant an affirmative answer to the issue of contributory negligence was held in *Taylor v. Caudle,* 210 N. C., 60, 185 S. E., 446. However, in that case the evidence was conflicting requiring its submission to the jury. The exact question here presented was not discussed or decided.

This Court has held also that under given circumstances it becomes the duty of the passenger to protest and remonstrate, and, if feasible, to quit the journey, and that his failure so to do is evidence of contributory negligence. These cases, represented by *King v. Pope,* 202 N. C., 554, 163 S. E., 447; *Norfleet v. Hall,* 204 N. C., 573, 169 S. E., 143; *York v. York,* 212 N. C., 695, 194 S. E., 486, are not directly in point. In none was it made to appear that the passenger began the journey with knowledge that the driver was prone to operate an automobile in a negligent or reckless manner.

Hence, we must look to the reason of the thing and arrive at a logical conclusion under well recognized principles of law applicable in negligence cases, aided as we may be by pertinent decisions in other jurisdictions. In so doing there are cases in this and other jurisdictions which may be considered by way of analogy.

Where the owner of an automobile hires or lends it to another, knowing that the latter is an incompetent, careless or reckless driver and likely to cause injury to others in its use, the owner is liable for injuries caused by the borrower's negligence, on the ground of his personal negligence in entrusting the automobile to one who he knows is apt to cause injury to another in its use. *Rush v. McDonnell,* 214 Ala., 47, 106 So., 175.

Liability in such cases depends on common law principles, upon the ownership of the automobile, the incompetency of the bailee to whom its

operation is entrusted to operate it properly and safely, the owner's timely knowledge of such incompetence, and injury to a third person resulting proximately from the incompetence of the bailee. *Rush v. McDonnell, supra.*

The owner must not let or loan his automobile to a person known to him to be an incompetent, careless or reckless driver; *Taylor v. Caudle, supra; Cook v. Stedman,* 210 N. C., 345, 186 S. E., 317; *People v. Ingersoll,* 222 N. W., 765 (Mich.); Anno. 36 A. L. R., 1148, 68 A. L. R., 1013, and 100 A. L. R., 923; *Priestly v. Skoures,* 100 A. L. R., 916 (Kan.); 42 C. J., 1078; 2 Blashfield Cyc. Auto L. & P., 1332; or given to habitual and excessive use of intoxicants; *Taylor v. Caudle, supra; Crowell v. Duncan,* 145 Va., 489, 134 S. E., 576; an immature infant, *Tyree v. Tudor,* 183 N. C., 340, 111 S. E., 714, 68 A. L. R., 1014; *Rush v. McDonnell, supra; Paschall v. Sharp,* 110 So., 387 (Ala.); *Perry v. Simeone,* 239 Pac., 1056 (Cal.); *Naudzius v. Lahr,* 74 A. L. R., 1189 (Mich.); Anno. 36 A. L. R., 1150, and 100 A. L. R., 926; or an unlicensed driver; Anno. 36 A. L. R., 1152, 68 A. L. R., 1015, and 100 A. L. R., 926. He does so at his own peril and is liable for any resulting injury or damage.

He is not held liable under the doctrine of imputed negligence but for his independent and wrongful breach of duty in entrusting his automobile to one who he knows or should know is likely to cause injury.

Thus it appears that it is generally accepted law that had plaintiff owned the automobile on which she was a passenger on the day she was injured and permitted defendant to operate it under the circumstances admitted by her, she would have been liable for any injury inflicted upon any passenger thereon or upon any other third party.

Here, plaintiff became a guest upon the automobile of defendant, knowing at the time that he habitually drives in a reckless manner at a high rate of speed without keeping a proper lookout and that he would ignore any protest or remonstrance she might make, and then failed to abandon the journey and return home on any one of the numerous occasions she had opportunity so to do after his continued recklessness became apparent. The analogous conclusion that she thereby committed a primary act of negligence conclusively evidencing a want of due care for her own safety contributing to her own injury seems to us to be inescapable.

That this is the necessary result of such conduct is sustained by the authorities in other jurisdictions. Some treat it under the doctrine of assumption of risk and some as contributory negligence. (See *Taylor v. Caudle, supra,* where it is treated as contributory negligence.) By whatever name it may be called, the consensus of opinion expressed in these authorities is to the effect that one who voluntarily places himself

in a position of peril known to him fails to exercise ordinary care for his own safety and thereby commits an act of continuing negligence which will bar any right of recovery for injuries resulting from such peril.

A guest, entering an automobile, assumes the dangers incident to the known incompetency, inexperience and driving habits of the driver. 4 Blashfield, 331, and cases cited in notes. It is the general rule that a guest or passenger in an automobile takes the host with his defects of skill and judgment and his known habits and eccentricities in driving. 4 Blashfield, 197.

"When a guest enters an automobile with the knowledge that the driver is incompetent or inexperienced . . . he takes the chances of an accident, and, in case an accident occurs arising from such known incompetency, inexperience, or recklessness, he cannot recover against the driver; for in such case he assumes the risk of the accident by inciting the driver's predisposition to operate the vehicle in an irresponsible manner." 4 Blashfield, 333, and cases cited. So, if a guest, with knowledge of the defective condition of the car and appreciation of the hazards involved, voluntarily assents to ride therein, he will be precluded from recovery for injuries in an accident resulting from the defects of which he has then been cognizant. 4 Blashfield, 336; *Cline v. Prunty,* 152 S. E., 201 (W. Va.); *Pawhowski v. Eskafski,* 244 N. W., 611 (Wis.); *Knipfer v. Shaw,* 246 N. W., 328 (Wis.).

The guest cannot acquiesce in negligent driving and retain a right to recover against the driver for resulting injuries therefrom. 4 Blashfield, 194-195; *Lorance v. Smith,* 138 So., 871 (La.); *Royer v. Saecker,* 234 N. W., 742 (Wis.). The basis for charging the passenger with negligence in such case is simply that of his own personal negligence in thus relying entirely and blindly upon the driver's care. *Russel v. Bayne,* 163 S. E., 290 (Ga.); *Lambert v. Railway Co.,* 134 N. E., 340 (Mass.); *Heyde v. Patten,* 39 S. W. (2d), 813.

A wife, riding in an automobile with her husband, cannot, by reason of her spouse's presence, abandon precautions and blindly entrust all care for her safety to the driver, but is under an obligation not substantially different from that of anyone else, not so circumstanced, to exercise ordinary care for her own safety and to warn the driver of danger. 4 Blashfield, 198, and cases cited.

On entering an automobile, a guest assumes the dangers incident to the known inexperience or incapacity of the driver. *Maybee v. Maybee,* 11 Pac. (2d), 973; *Cleary v. Eckart,* 210 N. W., 267 (Wis.); 51 A. L. R., 576; *Thomas v. Steppert,* 228 N. W., 513 (Wis.); *Morgan Hill Paving Co. v. Farmville,* 119 So., 610 (Ala.); *Krueger v. Krueger,* 222 N. W., 784 (Wis.); *Daggett v. Lacey,* 9 Pac. (2d), 257.

In the *Maybee case, supra,* in which it appeared that the driver was nearsighted to the knowledge of the daughter, a passenger, the Court says: "She was herself an experienced driver and is charged with knowledge of the dangers and risks incident to a nearsighted driver without glasses driving at a high rate of speed. She cannot ignore such obvious dangers or entrust her safety absolutely to the driver under such circumstances. Because of her acquiescence and consent to be driven under these circumstances, she herself participated in the negligence which caused the injury, and she is, therefore, barred from recovery."

"A father who had frequently accepted an invitation to ride with an adult daughter in her automobile accepted whatever risk attended the degree of proficiency as a driver which the daughter possessed. . . . Guests who accept the hospitality of the driver of an automobile accept whatever risk attends the degree of proficiency of such driver and his usual and customary habits of driving with which they are familiar." *Kelly v. Gagnon,* 236 N. W., 160 (Neb.); *Olson v. Hermansen,* 220 N. W., 203, 61 A. L. R., 1243.

"She knew what her husband's experience in driving the car had been. She was perfectly familiar with his habits of driving. They had driven much of the time on gravel highways. She accepted his skill and experience as a driver. If the accident happened because of his lack of skill and experience in managing the car in gravel, then the consequences of such lack of skill and experience was assumed by her on the trip." *Fontaine v. Fontaine,* 238 N. W., 410 (Wis.).

In *Besserman v. Hines,* 219 Ill. App., 606, plaintiff's intestate became a passenger on a small automobile with two other passengers and the driver, all of whom were under the influence of intoxicants. The car was struck by a train and deceased was killed. In denying recovery the Court said: "While, ordinarily, the negligence of the driver of a vehicle cannot be imputed to a passenger therein, yet, from the facts in this case, all the men in this coupe were guilty of negligence in permitting themselves to ride therein under the conditions and in the manner mentioned."

"The conduct of the plaintiff in riding and in continuing to ride in an automobile when he must have known that the driver was intoxicated established independent negligence upon the plaintiff's part, apart from the driver's negligence, barring the right of recovery." *Lynn v. Goodwin,* 148 Pac., 927 (Cal.); *Wayson v. Rainier Taxi Co.,* 239 Pac., 559 (Wash.); *Mann v. Harmone,* 8 S. E. (2d), 549 (Ga.); Berry on Automobiles (4th Ed.), 529. This rule applies to a passenger for hire as well as to a gratuitous guest. *Wayson v. Taxi Co., supra,* and cases cited.

Finally, in *Bourestom v. Bourestom,* 285 N. W., 426, which was an action by a wife against her husband for damages in which the facts were substantially the same, the Court said:

"The term 'assumption of risk' has caused some difficulty and perhaps a happier phrase might be coined, but it is conveniently used in referring to the duty of the host not to increase the hazard assumed by the guest when entering the car, and the responsibility of the guest to refuse hospitality if he knows of careless habits or fixed defects which make the host an unsafe driver. The guest who voluntarily takes a chance on known dangers in preference to renouncing the benefits of the relationship which he creates by entering the car, must himself bear the consequences when he is injured by reason of a known danger. *Switzer v. Weince,* Wis., 1939, 284 N. W., 509. . . . She voluntarily entered into the host-guest relationship and accepted the benefits to be derived therefrom, knowing of that danger, and she had, therefore, consented to assume the risk of her husband's known habit. Her protests on the evening of the accident were unavailing to relieve her from her assumption of the risk known to her when she entered the car. Having accepted the hospitality proffered by her husband, she cannot complain of the consequences. *Markovich v. Schlafke,* Wis., 1939, 284 N. W., 516."

The court below erred in overruling defendant's motion for judgment as of nonsuit.

Reversed.

WILLIAM S. GARRETT v. MORRIS STADIEM; IDA B. STADIEM AND ABE STADIEM, AS GUARDIANS FOR MORRIS STADIEM, INCOMPETENT.

(Filed 7 January, 1942.)

1. Mortgages § 9—Deed of trust in this case is construed as a matter of law to cover only $450 note and not $970 note recited in premises.

The deed of trust in suit in the premises recited a note for $970, but immediately after the description recited that the instrument was given to secure the *cestui* from loss from becoming surety on the note of the trustors in the amount of $450 and that should the trustors fail to pay said note then the deed of trust should become due and payable, followed by stipulations in the *habendum* that if the trustors fail to pay interest on "said note" as it became due or principal and interest at maturity of "said note" the trustee should foreclose upon demand of the *cestui,* etc. *Held:* The instrument is sufficiently unambiguous to be capable of legal construction without the aid of parol explanation, and its legal effect is to secure the $450 item to which all provisions as to default and foreclosure expressly relate, and upon foreclosure the trustee is without authority to apply the proceeds of sale to the $970 item.

2. Mortgages § 37—Where trustee is without authority to apply proceeds of sale to particular note, his payment thereof subjects him to liability regardless of whether its execution was procured by fraud.

This action was instituted by trustors against the trustee to compel an accounting. As a matter of legal construction the effect of the instrument was to secure the *cestui* from loss by reason of his signing as surety a $450 note executed by trustors, and did not cover a $970 note recited in the premises. *Held:* Since the trustee had no authority to apply the proceeds of sale to the satisfaction of the $970 note, whether testimony by the male trustor tending to show that the execution of the $970 note was procured by fraud is incompetent under C. S., 1795, need not be considered, since upon the facts, its admission, if error, would be harmless.

3. Appeal and Error § 39—

Since a new trial will be awarded only for prejudicial error, the admission of evidence, even if incompetent, does not entitle appellant to a new trial if the rights of the parties would not be altered had such evidence been excluded.

4. Limitation of Actions § 9—

In this action by a trustor to compel an accounting of the proceeds of sale by a trustee, the question of the statute of limitations was properly submitted to the jury under authority of *Efird v. Sikes*, 206 N. C., 560.

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

APPEAL by defendant from *Pless, J.*, at 14 April, 1941, Civil Term, of GUILFORD. No error.

Franklin S. Clark for plaintiff, appellee.
Stern & Stern for defendant, appellant.

SEAWELL, J. While there were charges of fraud and collusion against the defendant in connection with the procurement and execution of the notes and deed of trust which are the subject of controversy in this action, the case as developed amounted merely to an action against Morris Stadiem, trustee in the deed of trust below copied, for the proceeds of a foreclosure sale of the real estate therein described.

The instrument is as follows:

"THIS INDENTURE, made and entered into this 23rd day of July, A.D., 1921, by and between W. S. Garrett and Sarah Garrett, his wife, of Guilford County, State of North Carolina, parties of the first part, Morris Stadiem, Trustee, of Guilford County, in said State, party of the second part, and A. Schiffman, of Guilford County, in said State, party of the third part:

"WITNESSETH, For that whereas the said parties of the first part are indebted to the said party of the third part in the sum of Nine Hundred Seventy Dollars, for which the said parties of the first part have

executed and delivered to said party of the third part, as aforesaid, one note of even date herewith in said sum of Nine Hundred Seventy Dollars, payable as follows, to-wit: $970.00 on the 23rd day of July, 1930, with interest thereon from date till paid, at the rate of six per centum per annum, payable semi-annually; and it has been agreed that the payment of said debt shall be secured by the conveyance of the land hereinafter described.

"NOW, THEREFORE, in consideration of the premises and for the purpose aforesaid, and for the sum of one dollar to the party of the first part paid by the party of the second part aforesaid, said W. S. Garrett and wife, Sarah Garrett, have bargained, sold, given, granted, and conveyed, and by these presents do bargain, sell, give, grant and convey to said Morris Stadiem, Trustee, his heirs and assigns, a certain tract of land lying and being in Guilford County and the State of North Carolina, in Morehead Township, and more particularly described as follows:

"BEGINNING at a stake on the south side of West McCullo*gh* St., said stake being 75 feet east of the southeast intersection of South Ashe and West McCulloch Sts.; running thence southwardly about parallel with South Ashe St. about 60 feet to a stake; thence eastwardly about parallel with West McCullo*gh* St. 123 feet to a stake; thence northwardly parallel with 1st line about 60 feet to a stake on South margin of West McCullo*gh* St.; thence west along south side of McCullo*gh* St. 123 feet to the beginning.

"This deed of trust is given to secure the said A. Schiffman from any loss from becoming surety on a note to the State Industrial Bank for the said W. S. Garrett and Sarah Garrett in the amount of $450.00. Should the parties of the first part fail to pay off said note to the State Industrial Bank as same shall become due, then in such case this deed of trust shall become due and payable.

(Written in ink):

"Foreclosed & deeded 10/21/30 to Harry W. Schiffman See Book Page 656 Page 469

"Witness

"TO HAVE AND TO HOLD said land and premises, with all the rights, privileges, and appurtenances thereunto belonging to him, said party of the second part, his heirs and assigns, forever, upon the trust and for the uses and purposes following and none other, that is to say:

"If the said parties of the first part shall fail or neglect to pay interest on said note as the same may hereafter become due, or both principal and interest at maturity of the said note, or any part of either, or any note or bond given in renewal in whole or in part therefor, or any amount expended for insurance or taxes as herein provided, then on application of said party of the third part, his assignee, or other person who may be

entitled to the moneys due thereon, it shall be lawful for, and the duty of, the said party of the second part, to advertise said land in some newspaper published in said County of Guilford at least once a week for four successive weeks; or if there be no newspaper published in said county, then in three or more public places in the county aforesaid, for thirty days, therein appointing a day and place of sale, and at such time and place to expose said lands at public sale to the highest bidder for cash, and upon such sale to convey title to the purchaser.

"And the said party of the second part, first retaining (out of the proceeds of such sale) five per centum commissions on the sale of the whole of said land sold, as a compensation for making such sale, shall apply so much of the residue as may be necessary to pay off and discharge said indebtedness and all interest then accrued and due thereon, and all sums expended for taxes and insurance as herein provided, together with all necessary expenses of advertising and selling; and shall pay the surplus, if any remain, to said parties of the first part.

"It is understood and agreed between the parties to this deed, that the parties of the first part shall pay all taxes within the time prescribed by law, and shall keep the buildings on the said premises insured in some reliable insurance company having an agency in the said County of Guilford in the sum of Nine Hundred Seventy Dollars, which said policies shall be payable to the party of the third part, as his interest may appear, and deposited with Trustee to be applied, in case of loss, as far as it may extend to the satisfaction of this trust. And if the parties of the first part shall fail to pay said taxes or to insure said buildings for ten hours the party of the third part or the trustees shall be at liberty to pay said taxes or effect such insurance, and the amount so expended shall be deemed principal money, bearing six per centum interest per annum, and be payable when the next installment of interest becomes due.

"It is further stipulated and agreed, That any statement of facts or recital by said Trustee in his deed in relation to the nonpayment of the money secured to be paid, the amount due, the advertisement, sale, receipt of the money, and the execution of the deed to the purchaser shall be received as *prima facie* evidence of such fact.

"And it is stipulated and agreed, That if said parties of the first part shall pay off said note and interest, and discharge fully the trusts herein declared before such sale, or the same shall be done by a sale of part of said lands, then so much of said land as may not have been sold and are not required to meet any of said trusts shall be reconveyed to said parties of the first part or the title thereto vested in them according to the provisions of law.

"And the said W. S. Garrett and Sarah Garrett, parties of the first part, do covenant to and agree with said party of the second part, his

heirs and assigns; That they are the owner and seized of said premises in fee simple; That they have the right to convey the same; That the same are free from any encumbrances whatsoever; That they will forever warrant and defend the title to the same from the lawful claims of all persons whomsoever; and that they will execute such further deed or deeds as may be necessary or proper to carry out the true intent and purpose of this trust.

"IN TESTIMONY WHEREOF, The said parties of the first part do hereto subscribe their respective names and affix their several seals the day and year first above written.

"W. S. GARRETT (SEAL)"
"SARAH GARRETT (SEAL)"

The contention of the plaintiff was that the deed of trust was given only to indemnify Schiffman against loss upon a $450 note for a loan obtained from the State Industrial Bank, upon which he was surety.

There was evidence tending to show that Schiffman had taken charge of the mortgaged property immediately after the execution of the mortgage or deed of trust and had collected sufficient rents therefrom to pay off the $450 note and interest prior to the foreclosure. Nevertheless, Stadiem foreclosed under the power of attorney in the deed of trust and executed a deed to Harry W. Schiffman, son of A. Schiffman, and received from him upwards of $1,000 upon the purchase price.

Upon the trial the plaintiff, Garrett, was permitted to testify over the objection of the defendant as to various transactions had between him and A. Schiffman, now deceased, leading up to the execution of the deed of trust, and following its execution. This testimony tended to show that fraud had been practiced upon Garrett in the making and execution of the deed of trust and in connection with a $970 item included therein. He denied ever having executed such a note and stated that he received no money upon it. To this and testimony of like character on the part of Garrett, the defendant duly excepted.

The defendant in his answer pleaded the bar of the statute of limitations (C. S., 441 [1]). As to this the plaintiff denied any knowledge of the fact that his land had been sold or that the defendant, Morris Stadiem, had received any money upon the purchase price or that he had in any way been notified that his property had changed hands until shortly before the beginning of this action, when he discovered persons upon his lot measuring it for purposes of building thereon. There is evidence tending to show that he had been paying taxes continuously down to that time.

The plaintiff's action, as developed on the trial, came down to an action against the defendant, trustee under the deed of trust, for an

accounting for the proceeds of the foreclosure sale. The plaintiff introduced no evidence from which an inference of conspiracy or concerted action on the part of defendant with others could be drawn. There was no evidence of partnership between defendant and those connected with the transaction, but, on the contrary, evidence on the part of defendant that such relation did not exist. But there is plenary evidence of fraud in the initial transactions leading to the making of the note for $970 and its inclusion in the deed of trust. The testimony of plaintiff, with regard to the transactions between him and A. Schiffman, now deceased, is challenged by defendant's exceptions as incompetent under C. S., 1795—the law familiarly referred to as "the dead man's statute." The multiplicity of new situations arising under this statute is proverbial. The present complex seems to be novel, at least in its factual aspects.

The incompetency of the plaintiff to testify as to transactions between himself and the deceased, Schiffman, if it exists, must be predicated upon the assumption that Morris Stadiem, Trustee under the deed of trust, derived his "title or interest from, through or under" Schiffman, and furthermore that it is this interest which is attacked. Upon that point there may be a difference of opinion, which it may not be necessary to settle for the purpose of decision.

An inspection of the deed of trust convinces us that it is sufficiently unambiguous as to be capable of legal construction without the aid of parol explanation. *Drake v. Asheville,* 194 N. C., 6, 9, 138 S. E., 343; *Gay v. R. R.,* 148 N. C., 336, 62 S. E., 436. The deed on its face merely purports to secure the $450 item, expressing its purpose as follows:

"This deed of trust is given to secure the said A. Schiffman from any loss for becoming surety on a note to the State Industrial Bank for the said W. S. Garrett and Sarah Garrett in the amount of $450.00. Should the parties of the first part fail to pay off said note to the State Industrial Bank as same shall become due, then in such case this deed of trust shall become due and payable."

All provisions for default and foreclosure expressly relate to this note, and we would not be warranted, by mere implication, in extending them to cover a further note of $970 mentioned in the recitals.

Since, upon its face, the note referred to was made to indemnify the surety on the Industrial Bank indebtedness of Garrett against loss, it is consistent that the note named in the recital was of the same character, especially since there is no provision made in the instrument relating to its default. The testimony of the plaintiff, Garrett, as to transactions between himself and Schiffman relating to this subject, if objectionable, were therefore harmless.

The facts disclosed by the evidence justified submission to the jury the question of the bar of the statute. C. S., 441 (1); *Efird v. Sikes*, 206 N. C., 560, 174 S. E., 513.

We do not feel justified in disturbing the result of the trial.

No error.

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

STATE v. PAUL A. MILLER.

(Filed 7 January, 1942.)

1. Automobiles § 29—

Evidence *held* sufficient to support conviction of defendant on charge of drunken driving. C. S., 4506, as amended by Public Laws 1925, ch. 283; Public Laws 1927, ch. 230, sec. 1.

2. Negligence § 23—

Culpable negligence means something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequence or heedless indifference to the safety and rights of others.

3. Same—

The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional, or if the violation is inadvertent but is accompanied by a heedless disregard of probable consequences of a dangerous nature which could have been reasonably anticipated under the circumstances.

4. Criminal Law §§ 32a, 52b—

While circumstantial evidence is a recognized instrumentality in the ascertainment of truth, in order to sustain a conviction it must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt and exclude any other reasonable hypothesis.

5. Automobiles § 32e—Evidence held to leave in conjecture question of whether violation of safety statute was proximate cause of death.

The State's evidence tended to show that defendant was operating his automobile while under the influence of intoxicating liquor, that his wife, who was riding in the front seat of the car with him, was also drunk, and that she was later found in the street near the curb with a fractured skull, which injury caused her death. The State's evidence further tended to show that although defendant's car was dilapidated, the right front door opened and closed all right, but a witness for defendant testified that the door was sprung and was hard to close so that it would catch tightly. There was further evidence for the State tending to show that at the scene where the wife was found there were tracks indicating that a car

had run over the curb, across a space reserved for sidewalk, and back into the street. Defendant testified that his wife attempted to jump out of the car, that he took both hands off the steering wheel in a futile effort to catch her, and at this time temporarily lost control of the car. There was evidence for defendant that when seen shortly before the accident he was not driving recklessly, and that prior thereto, while the car was stationary, his wife fell out of the car, or got out and fell on the sidewalk, without serious injury, and that defendant picked her up from where she lay and put her back in the car. *Held:* Whether the fatal injury to the wife was the proximate result of defendant's driving while under the influence of intoxicating liquor in violation of statute rests in mere speculation and conjecture upon the evidence considered in the light most favorable to the State, and defendant's motion to nonsuit upon the charge of manslaughter should have been allowed.

APPEAL by defendant from *Rousseau, J.,* at 5 May, 1941, Term, of FORSYTH.

Three criminal prosecutions upon (1) indictment charging defendant with crime of manslaughter of one Ruby Odessa Miller with deadly weapon, to wit, an automobile; (2) warrant charging defendant with crime of reckless driving of motor vehicle upon public highway; and (3) warrant charging defendant with operating motor vehicle on public highway while under the influence of intoxicating liquor, consolidated for the purpose of trial, to each of which defendant pleaded "Not guilty."

Upon the trial below the State offered evidence tending to show a narrative of facts leading up to and surrounding the death of Ruby Odessa Miller, wife of defendant, as same pertain to the offenses with which defendant is charged, substantially as follows: On the night of 5 April, 1941, about seven o'clock, Ruby Miller, wife of defendant, was found by Sergeant Mitchell of the State Highway Patrol, lying "face-foremost" unconscious on pavement on Broad Street, south of Salem Creek, in Winston-Salem, her feet "about twelve inches from the west curb and her head . . . something like three and a half feet" therefrom. She was lying in a pool of blood. She was admitted to hospital at seven o'clock and died in less than two hours thereafter, as result of "fractured skull with internal injuries to her brain."

An autopsy disclosed a fracture of the skull that extended from behind one ear across the top of the skull to behind the other ear. The temporal muscles on the left side of her head were full of hemorrhage. The brain showed severe damage. Externally there were various bruises and abrasions, some on the back of her hand, some on her knees, and some on her left hip.

On the afternoon of said date, Saturday, defendant, accompanied by his wife, his father and mother, a little boy, and one Luther Oxendine, having driven to Winston-Salem in his 1933 model V-8 Ford, parked at Sorrell's Warehouse around three o'clock, and all agreed to meet there at

six o'clock to "go back home." Defendant and his wife came to the meeting place ten or fifteen minutes after the others had arrived. It appeared that "he was drinking," though not drunk. "She seemed to be pretty high." As they came up she "was kind of staggering," and he "kind of holding her hand." While the others did not get in the car, defendant, his wife and Oxendine did do so—he driving, she sitting "in the middle" and Oxendine "on the outside." Oxendine testified: That they "come on out and hit First Street"; that defendant "was driving all right then," "but going down the hill from First to Brookstown" he "was going a little fast, and she was drunk and singing and laughing"; that as he, Oxendine, "told" defendant, "Paul, you had better not drive so fast coming down here," the wife of defendant said, "Don't drive so fast then—you might hurt somebody"; that while defendant "was driving fast" and "it wasn't reckless," he, Oxendine, was frightened, and decided to get out, because, in his language, "I knew if the law stopped us they would get us"; that upon Oxendine's request to stop and to let him out, defendant "put on the brakes" and Oxendine "pulled up the emergency brakes," and then "the car kind of ran over or against the side of the curb," attracting attention of W. R. Middleton, who was near-by; that Oxendine got out at the corner of First and Brookstown Streets around quarter to seven o'clock, and as he started to close the door, or slam it, defendant's wife "went over on the door." What followed immediately is detailed in testimony of W. R. Middleton, tending to show that he saw a man get out of a car, which the evidence tends to show was the car of defendant, slam the door and walk west on First Street, and next he saw a woman there "right across the sidewalk"; that she "seemed to be helpless" and "looked to be lifeless"; that a man got out of the car, "attempted to lift her back in" it; that when he got "her up a few inches, he stumbled and dropped her," but "succeeded in getting her back in the car"; and "got the door closed"; that then "she told him to leave her alone"; that then he started up First Street, which is steep there; that Middleton "did not see anything about that car while it was there, or as it left, to indicate any reckless driving," and, in his opinion, "when defendant turned south on Broad Street, he was making around thirty or thirty-five miles an hour."

Other testimony, offered by the State, tends to show that the scene of the above incident is approximately a mile and a half from the point where the wife of defendant was found on the street; and that about a block south of this point on Broad Street the car of defendant was seen traveling south with the door hanging open. The witness, Mrs. Gunter, testified: "It looked as if he might be trying to shut the door and going to turn around. He wasn't driving very fast. It looked like he might be going to make a complete turn or semi-circle. . . . He was driv-

ing slowly. . . . I think we were the only car going north and that was the only car I saw going south."

The State's evidence further tends to show that at the time patrolman drove up to where wife of defendant lay in the street, there was no other car or person there, but that in about five minutes afterward defendant came up driving a 1933 Ford coach, headed north, and parked on opposite side of street, and came over and identified the woman, but what he said was excluded; that he told the officers, who had gathered on the scene, "what had happened there" and "that he was driving the car sitting there"; (The officer, on cross-examination, would have testified that defendant said, "My wife jumped out of my car. I did all I could to prevent her jumping." Upon objection this was excluded. Exception.) and that defendant appeared to be under influence of some intoxicant, and the officer placed him under arrest.

The State's evidence further tended to show that it had rained some that afternoon and the street was wet or damp; that there were car tracks, indicating that, at a point just beyond the bridge on Broad Street, where there is no sidewalk, a car apparently traveling south had run a circular route across the space reserved for a sidewalk, on to "grassy bank" some ten feet from the curb, and then back into the street to the left of the pool of blood, in which wife of defendant was found.

The State's evidence further tended to show that the car in which defendant was riding was "old and shabby"—"a ram-shackle Ford" without brakes; that the door which, when opened, swings back two-thirds of the way, according to testimony of officers, opened and closed all right—nothing out of ordinary. But, on the contrary, according to witness Oxendine, the door where he got out "was hard to close," "looked like it had been bent up," "no glass" in it, and, further quoting him, "on that day I know that the car door was sprung . . . after it is once closed, it is hard to open, and if it is opened, it will fly open with a big noise."

On the other hand, defendant testified: That his wife "started to get out," after Oxendine had "started up the street," and fell down on the sidewalk; that he opened the door, went around, picked her up and put her in the car and shut the door; and then went around and "got under the wheel." Using his language, "I started on home . . . down Broad Street . . . toward the bottom of Broad, driving along about twenty-five miles an hour. Just before I got to the bridge, Ruby said she was going to jump out. I say, 'Honey, I wouldn't do that if I was you.' On the other side of the bridge, I looked over toward the Duke Power Company's plant. I heard the door crack and I looked around and Ruby was starting to jump out. I turned loose of the steering

wheel and tried to catch her, but I couldn't reach her. She said she was going to jump out . . . After she jumped out of the car . . . no faster than I was driving, I didn't think she was hurt very much. I went up to the next street to turn around and come back to get her. I come back and Mr. Mitchell was there. I got out and went over there and Mr. Mitchell said, 'I wouldn't touch her if I was you.' I says, 'I can't help it, it is my wife. She jumped out of the car.' I asked if he had called an ambulance and he said he had had it done."

On cross-examination defendant further testified: "I was trying to grab at my wife when we went over the bridge at Salem Creek and did not have my hands on the steering wheel, and don't know where it went. I was trying to catch her. I was so excited at that time I didn't know whether my car went up over the curb and come back in the road. She did not say to me . . . to stop and let her out . . . I did not tell the officers that my car went over the curb . . . I went up to the next street, turned and came back . . . to get her. There were cars coming down the street and I had to wait until they passed before I made my turn. I did not pass any cars but Mrs. Gunter's coming down that street before I came back . . . I wasn't running over twenty-five miles an hour when my wife jumped out of the car . . . My wife did not catch on the door when she jumped. She just leaped right out. I didn't stop right then because I was so excited and no faster than I was driving, I didn't think she was hurt much and I would go up and turn around and come back and get her."

Defendant further offered testimony tending to show that his wife was in highly nervous state and that on previous occasions she had threatened to jump out of cars in which she was riding.

Defendant further offered testimony tending to show that the right front door of defendant's car, which opened backward, would not open from the inside; no latch on inside; that "you would have to go around . . . or reach through the window and open it from the outside"; and that the door was closed "from the place Oxendine got out until she opened it and jumped out."

At the close of evidence for the State motion for judgment as in case of nonsuit as to the charge of reckless driving was allowed.

Verdict as to manslaughter: Guilty. Judgment: Confinement in State's Prison for a term of not less than four nor more than seven years, and assigned to such labor as is provided by law.

Verdict as to operating motor vehicle upon the highway while under the influence of intoxicating liquor: Guilty. Judgment: (a) Confinement in the common jail of Forsyth County for a period of two years, and assigned to work on the public highways under the control and supervision of the State Highway and Public Works Commission; (b)

surrender of his driver's license to the clerk of Superior Court; and (c) deprival of privilege of operating a motor vehicle upon the public highways for a period of two years.

Defendant appeals therefrom and assigns error.

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

J. F. Motsinger and E. M. Whitman for defendant, appellant.

WINBORNE, J. Defendant challenges the judgment rendered in court below mainly upon the ground that the evidence, when taken in the light most favorable to the State, is insufficient to support either of the verdicts upon which it rests. While, after due consideration of exceptions pertaining thereto, we are of opinion that the evidence supports the verdict on the charge of operating a motor vehicle upon public highway while under the influence of intoxicating liquor, we are equally convinced that, accordant with applicable principles of law, well established in this State, the evidence, even when considered favorably alone to the State, leaves the proximate cause of the fatal injuries to deceased in a state of conjecture and speculation. *S. v. Cope,* 204 N. C., 28, 167 S. E., 456, and cases cited. In that case it is said that culpable negligence in the law of crimes is something more than actionable negligence in the law of torts. It is such recklessness or carelessness proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. It may be in an intentional, willful or wanton violation of a statute or ordinance for the protection of human life or limb which proximately results in injury or death. Or it may be in an inadvertent violation of a prohibitory statute or ordinance accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or a heedless indifference to the safety of others, if injury or death proximately ensue.

While it is true as contended by the State that there is evidence that defendant at the time his wife was injured was violating the statute by which any person who shall, while intoxicated or under the influence of intoxicating liquors, operate a motor vehicle upon any public highway or street of any town in this State, shall be guilty of a misdemeanor. C. S., 4506, as amended by Public Laws 1925, chapter 283; Public Laws 1927, chapter 230, sec. 1. Yet, the State is forced to rely upon circumstances as to whether the violation of that statute proximately caused the fractured skull from which wife of defendant died. In this connection: "It is true that circumstantial evidence is not only a recog-

nized and accepted instrumentality in the ascertainment of truth, but also in many cases, quite essential to its establishment. . . . However, the rule is, that when the State relies upon circumstantial evidence for a conviction, the circumstances and evidence must be such as to produce in the mind of the jurors a moral certainty of the defendant's guilt, and exclude any other reasonable hypothesis." *S. v. Stiwinter,* 211 N. C., 278, 189 S. E., 868, and cases cited. See, also, *S. v. Madden,* 212 N. C., 56, 192 S. E., 859, where *Barnhill, J.,* fully discusses the subject. See, also, 23 C. J. S., 149, 150, 153.

Applying this principle to the evidence in hand, many theories consistent with logic and equally reasonable may be advanced as to what caused the wife of defendant to leave the car, which leaving, irrespective of how it may have occurred, manifestly inflicted the injuries which resulted in her death.

Conceding that the injuries were inflicted in leaving the car in some manner, it could be argued that if she were "drunk," "helpless" or "lifeless," she may have fallen "over on the door," which, if in a sprung condition, may not have been securely fastened, and might have opened, causing her to fall out of the car; or that, if drunk or if sober, she were leaning against the door, it might, because of its sprung condition, or for other unaccountable reason, have opened, and caused her to fall out; or that, there being no glass in the door, she may have put her hand through the door, taken hold of the handle to steady herself, and unintentionally turned it and caused the door to open; or that, under this last situation, she might have intentionally turned the handle and caused the door to open; or that, with her arm hanging on outside of door against the handle, the handle turned and the door opened; or that she deliberately opened the door and attempted to jump out and fell, or jumped and was thrown to the ground; or that, if the automobile tracks on outside of road were made by defendant's car, the car for lack of control, or for other cause, suddenly swerved in making the circular course, and threw her against the door, causing it to open; or that on such course, the car struck a bump and threw her through the glassless door. These theories, and many others which are conceivable, unless that of intentional jumping from the car be accepted, are based upon assumed facts, and are purely speculative and conjectural. A conviction, under such circumstances, runs counter to rights of defendant, and must not stand.

The judgment on verdict of guilty as to manslaughter is

Reversed.

The judgment on verdict of guilty as to operating motor vehicle on public highway, while under influence of intoxicating liquor, is

Affirmed.

LOUIS H. PINK, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF NATIONAL SURETY COMPANY, v. JOHN R. HANBY.

(Filed 7 January, 1942.)

1. Receivers § 13: Parties § 1: Constitutional Law § 23—Statutory receiver may maintain action outside the state of his appointment.

The statutory receiver of insolvent insurance companies who, upon the insolvency of a company chartered by his state, is ordered by the court of such state, by virtue of his office, to take possession and liquidate the property and business of the company, may maintain a suit in this State upon a chose in action constituting an asset of the company, since, although a receiver deriving his authority solely by the appointment of a court of another state has no extraterritorial powers, the statutory receiver acquires his powers by operation of the laws of such other state, which must be recognized under the full faith and credit clause of the Federal Constitution.

2. Principal and Surety § 14—

Where the application for a surety bond stipulates that in consideration of the execution of the bond by the surety the principal agrees to indemnify the surety for all loss, including counsel fees, which the surety may sustain in consequence of having executed the bond, a complaint alleging that the surety had paid counsel fees in a stipulated sum necessary to the defense of an action upon the bond, states a cause of action in favor of the surety against the principal.

3. Same—

The principal's averment that he had executed deed of trust on real property in satisfaction of the right of the surety to indemnity for loss sustained by reason of the execution of the bond is unavailing when the surety alleges that it released the deed of trust solely to enable the principal to raise money to effect a compromise settlement with the obligee in the bond and that there was no intention to release the principal from his contractual obligation to indemnify the surety for loss sustained by the surety by reason of execution of the bond.

4. Pleadings § 22—

A motion to be allowed to file amended answer is addressed to the discretion of the trial court, and its refusal of the request will not be disturbed in the absence of abuse of discretion.

APPEAL by defendant from *Parker, J.*, at March Term, 1941, of NEW HANOVER. Affirmed.

This is an action brought by the plaintiff to recover of the defendant the sum of $3,750.00, which the plaintiff alleges was paid to Isaac C. Wright, an attorney, under the terms and provisions of a written application alleged to have been signed by the defendant in consideration of the National Surety Company's signing a bond for the defendant Hanby.

The suit was instituted on 1 April, 1937, and complaint in the action filed on the same date. The answer was filed 22 April, 1937.

The judgment of the court below is as follows: "At a term of Superior Court of New Hanover County, held on the 3rd day of March, 1941, at Wilmington—Present: Honorable R. Hunt Parker, Judge Presiding. This cause coming on to be heard, and being heard upon motion of the defendant to be allowed to withdraw the answer heretofore filed in this case and to file a demurrer *ore tenus* upon the grounds that the complaint did not state a cause of action, and the Court having denied the defendant's motion to withdraw the answer and having considered the complaint and the aforesaid demurrer, and having heard argument of counsel, and being of the opinion that the complaint does state a cause of action: It is Therefore, Ordered and Adjudged that the aforesaid demurrer by the defendant be and the same is hereby overruled. And this cause is retained for further orders. R. Hunt Parker, Judge Presiding." To the foregoing judgment, defendant excepted and assigned error: "That the Court erred in signing the judgment of R. Hunt Parker, Judge, appearing in the record." The facts necessary for the determination of this controversy will be set forth in the opinion.

Stevens & Burgwin for plaintiff.
E. K. Bryan for defendant.

CLARKSON, J. The questions for decision: (1) Is plaintiff legally entitled to maintain the action? (2) Do the allegations of the complaint state a cause of action against the defendant? We think both of these questions must be answered in the affirmative.

The complaint alleges, in part: "That George S. Van Schaick, Superintendent of Insurance of the State of New York, and his successors in office, were authorized and directed by order of the Supreme Court of the State of New York in and for the County of New York, dated June 1, 1934, to take possession of the property and to liquidate the business of National Surety Company pursuant to Article XI of the Insurance Law of the State of New York and were vested with title to all of the property, contracts and rights of action of said National Surety Company, and were directed to deal with the property and business of said National Surety Company in their own names as Superintendent of Insurance of the State of New York. That Louis H. Pink is the present duly qualified Superintendent of Insurance of the State of New York, and the successor to George S. Van Schaick, as Superintendent of Insurance of the State of New York, and as Liquidator of National Surety Company."

The contention made by defendant, that the plaintiff had no standing in the court to sue, cannot be sustained.

The matter was decided in a Texas case, fully sustained by authorities from the U. S. Court—*State v. Texas et al. v. Louis H. Pink, Statutory Liquidator of National Surety Co.,* 124 S. W. (2d), 981, the Supreme Court of Texas overruled a contention that the very Liquidator involved in the case at bar was without authority or capacity to prosecute an appeal, saying at p. 987: "We are aware of the general rule that an administrator appointed in one state cannot sue in another, and an ordinary equity receiver appointed by a state court has no extraterritorial powers (36 Tex. Jur. P., 291, sec. 149; *Relf v. Rundle,* 103 U. S., 222, 26 L. Ed., 337), but such rule cannot be applied here so as to deny the New York receiver or liquidator the right to appeal this case for the reason that, as already stated, the New York receiver or liquidator, who was a New York public official, did not derive his powers, authority and title from the decrees of the appointive court, but from the laws of the state which created or chartered this corporation. This Surety Company was created by the laws of New York, and therefore all pertinent laws of the State become a part of its charter. When it came into this State, it brought its charter with it. Necessarily a corporation must act through agents, and since the State of New York created this corporation, it had the lawful right to say, by statute, who such agents should be. In this regard, that State had the right to say who such agents should be, both while this corporation was a solvent and going concern, and after it had been declared insolvent and was in process of liquidation. Likewise, the creative State had the right to define who should become the legal owner of this corporation's property when it became insolvent and passed into the hands of the New York Insurance Commissioner for liquidation of the winding up of its affairs. For us to refuse to recognize the New York Insurance Commissioner as a party to this suit under the facts of this record would be to deny full faith and credit to the statutes and judicial decrees of the State of New York. Finally and simply stated, we think that under the facts of this record, the New York Insurance Commissioner was, in fact, this corporation itself for all purposes of winding up its affairs. He was, and is, the legal owner of all of its properties. It must, therefore, follow that he was a party to this suit in the District Court, and had the right to appeal this case. *Relf v. Rundle,* 103 U. S., 222, 26 L. Ed., 337; *Bernheimer v. Converse,* 206 U. S., 516, 51 L. Ed., 1163; *Converse v. Hamilton,* 224 U. S., 243, 56 L. Ed., 749; *Clark v. Willard,* 292 U. S., 112, 78 L. Ed., 1167."

In *Converse v. Hamilton,* 224 U. S., 243, 56 L. Ed., 749, the Wisconsin Court held that a Minnesota statutory successor could not sue in Wisconsin. The United States Supreme Court reversed that decision on the ground that Wisconsin had denied full faith and credit to the Minnesota statutes and proceedings, and, in so doing, the Supreme Court

used the following language, at pp. 256-7: "It is true that an ordinary chancery receiver is a mere arm of the court appointing him, is invested with no estate in the property committed to his charge, and is clothed with no power to exercise his official duties in other jurisdictions. *Booth v. Clark,* 17 How., 322, 15 L. Ed., 164; *Hale v. Allison,* 188 U. S., 56, 47 L. Ed., 380, 23 Sup. Ct. Rep., 244; *Great Western Min. & Mfg. Co. v. Harris,* 198 U. S., 561, 49 L. Ed., 1163, 25 Sup. Ct. Rep., 770. But here the receiver was not merely an ordinary chancery receiver, but much more. By the proceedings in the sequestration suit, had conformably to the laws of Minnesota he became *quasi* assignee and representative of the creditors, was invested with their rights of action against the stockholders, and was charged with the enforcement of those rights in the court of that state and elsewhere. So, when he invoked the aid of the Wisconsin court, the case presented was, in substance, that of a trustee, clothed with adequate title for the occasion, seeking to enforce, for the benefit of his *cestuis que trustent,* a right of action, transitory in character, against one who was liable contractually and severally, if at all."

We think the case of *Van Kempen v. Latham,* 195 N. C., 389, and 201 N. C., 505, does not militate against the view we take in this action.

The allegations of the complaint state a cause of action. We only set forth extracts: "That on or about the 18th day of December, 1924, the defendant made written application to the National Surety Company for the execution of a bond in the penal sum of $45,000.00, running to the Internal Revenue Department, which proposed bond is known and designated as Tax Abatement Bond, which said written application provided, in part: 'That in consideration of the execution of said bond of the company, we hereby jointly and severally covenant with the company, its successors and assigns. . . . that the undersigned will at all times indemnify and keep indemnified the company and hold and save it harmless from and against any and all damages, loss, costs, charges, and expenses of whatsoever kind or nature, including counsel and attorneys' fees which the company shall or may at any time sustain or incur by reason or in consequence of having executed the bond herein applied for. . . . That said counsel fees of $3,750.00 paid to the said Isaac C. Wright, attorney, were necessarily incurred by the National Surety Company, in liquidation, in order to protect said estate and the said sum represented a fair, just and reasonable compensation for the services rendered by the said Isaac C. Wright, attorney, as aforesaid, and that the said payment represents an expense incurred by the said company by reason of the execution of the bond hereinabove referred to, and that plaintiff is advised, believes, and so alleges that by virtue of the terms and provisions of said bond and of the application of the defendant, upon which said bond was issued, the defendant is liable to the plaintiff

for said sum of $3,750.00 in order that plaintiff may be reimbursed in full for said item of expense incurred by it, as aforesaid. That while demand has been made by the plaintiff upon the defendant, the defendant has failed and refused to pay the same or any part thereof and the whole of said sum, with interest from the 26th day of May, 1936, is now due and owing by the defendant to the plaintiff." The bond signed by defendant included "Counsel and attorney's fees."

The defendant in his brief takes the position: "That the satisfaction of the deed of trust alleged in the complaint was a satisfaction of the liability sued for and that, therefore, the plaintiff cannot maintain the present action." Upon this point we set forth the allegations of Articles 7 and 9 of the complaint:

"Article 7, alleges that at the time of the execution of the bond the defendant and his wife executed to E. K. Bryan, Trustee, a deed of trust on certain real estate situated in New Hanover County in order to secure the National Surety Company from liability on account of the execution of said bond."

"Article 9, of the complaint alleges that when a settlement was reached between the defendant and the United States Government, brought about by the service rendered by Isaac C. Wright, that it became necessary that the National Surety Company release the real estate conveyed in said deed of trust in order that the defendant, Hanby, might raise the money necessary to settle his liability to the Government as agreed upon, said settlement being for an amount substantially less than the claim originally filed by the Government and for which the bond was liable, and that in order to effect said settlement the National Surety Company did release said real estate from the operation of said deed of trust." May we say it is apparent this was done for the purpose of effecting a settlement inuring to the benefit of both the National Surety Company and the defendant, Hanby, and its effect, from the allegations, was not to release the defendant, Hanby, from his contractual obligation contained in his application for the bond, under the terms of which he undertook to hold the National Surety Company harmless from any and all liability thereunder.

The allegations show that the arrangement was for the benefit of defendant and there was no intention to release him from his contractual obligation. See *Grace v. Strickland,* 188 N. C., 369.

The contention of defendant that there was error in the court below in the refusal to allow him to file an amended answer to the complaint, cannot be sustained. This is largely in the discretion of the court below and on the record there appears no abuse of discretion.

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

Affirmed.

VANNIE GLENN v. GATE CITY LIFE INSURANCE COMPANY.

(Filed 7 January, 1942.)

1. Insurance § 38—

A policy providing for weekly benefits for sickness so long as the policyholder remains totally disabled is a policy of general coverage for disability from sickness and will be construed to effectuate its primary purpose to provide such benefits, and subsequent subordinate limitations will be strictly construed against insurer, since they limit the scope and purpose for which the policy was taken out.

2. Same—

A provision in a health policy that benefits thereunder would be paid only when insured has been confined to his or her bed or house for seven consecutive days describes the character and extent of illness covered, rather than a limitation upon insured's conduct.

3. Same—Evidence held to show that insured was confined to home within intent and spirit of limitation in health policy.

The policy in suit provided weekly benefits for sickness so long as insured remained totally disabled, but by later subordinate condition provided that weekly benefits for sickness would be paid only when insured had been confined to his bed or home for seven consecutive days. The action was submitted to the court by agreement, and the court found, upon supporting evidence, that after losing his job because of poor eyesight, insured stayed at home from worry some five or six weeks, but that since such time he had not been so confined, but had continued to be totally disabled. *Held:* The facts do not disclose such failure to meet the conditions of the policy as to confinement as would preclude recovery.

4. Same—Disease of eye is "sickness" within meaning of health policy.

This action on a policy providing for weekly benefits for sickness so long as insured should remain totally disabled was submitted to the court under agreement of the parties. *Held:* Evidence that insured's eyesight had been practically destroyed by disease or a complication of diseases sustains the court's finding that disease of the eye is sickness within the terms of the policy and that as a result of said sickness insured is totally disabled, since the word "sick" means "affected with disease."

APPEAL by defendant from *Rousseau, J.*, at June Term, 1941, of FORSYTH. Affirmed.

This is an action wherein the plaintiff seeks to recover weekly sick benefits under two health, accident and life insurance policies issued to him by the defendant on 23 December, 1918, and on 18 August, 1919, respectively, and wherein defendant seeks to avoid liability upon the ground that the plaintiff was not sick as contemplated by the provisions of the policies.

The policies provide that the defendant will pay to the plaintiff "weekly sick and accident benefits named in schedule below (Section A) . . . Section A. Weekly sick and accident benefits—$5.00. (Note: $5.00 in one policy and $2.00 in the other) . . . Full amount of weekly sick and accident benefits will be paid from date of this policy. The weekly benefits under this policy are not limited to any number of weeks, but covers fifty-two weeks in any one year or will be paid as long as the policy holder remains totally disabled. . . . After this policy has been in force five full years from the date hereof the weekly sick . . . benefits . . . shown in Section A . . . above, will be increased 20% and will remain so as long as this policy continues in force. . . . Additional conditions and agreements . . . 2nd. Weekly benefits for sickness will only be paid when the insured has been confined to his or her bed or house for seven consecutive days."

There are various other provisions and conditions as to the payment of premiums by the insured and the giving of notice to the company of sickness and disability, but these have no application to the case at bar since it is admitted or stipulated that all premiums due were paid and that the policies were in full force and effect at the time of the trial, and that the defendant had timely knowledge of the disability of the plaintiff and all notices or proofs of claim required of the insured to the company were waived. This action involves claims only for sick benefits, there being no allegation of or contention for accident benefits.

The following appears in the record: "Counsel for the plaintiff and counsel for the defendant dispensed with the intervention of the jury and consented and agreed that the presiding judge might hear and find all facts and conclusions of law and render its verdict."

His Honor found, *inter alia,* as facts: "That on 23 May, 1939, the plaintiff, who had been employed for a number of years by the Brown-Williamson Tobacco Company at its Winston-Salem plant, was discharged because of such a degree of blindness that he could not perform the duties incident to his work. That thereafter, the plaintiff was confined in his home for some five or six weeks, by reason of worry due to the loss of his eyes and his inability to work, but since the said five or six weeks immediately following 23 May, 1939, the plaintiff has not been confined to his bed or house. That the plaintiff was not attended by a doctor during the five or six weeks of his confinement to his bed or home, or at any time at his bedside. There is no evidence that the condition of the plaintiff's eyes was such as to require the actual attendance of a physician at his bedside during any of the time that he was confined to his bed or house. . . . The Court further finds that the diseases of the eyes is sickness within the terms of the policy, and that the disability of the plaintiff, which prevents him from performing any occupation, is

the result of said sickness, and that the plaintiff is totally disabled from performing or pursuing any work of a gainful character, due to the diseased condition of his eyes."

His Honor concluded as a matter of law, and adjudged, that the plaintiff recover of the defendant $6.00 per week on one policy, and $2.40 per week on the other policy, from 30 May, 1939, till the date of trial, 110 weeks, and interest on each weekly payment due. From this judgment the defendant appealed, assigning errors.

Elledge & Wells for plaintiff, appellee.
Ingle, Rucker & Ingle for defendant, appellant.

SCHENCK, J. The appellant's first and second assignments of error are to the court's refusal to grant its motion lodged when the plaintiff had introduced his evidence and rested his case and renewed when all the evidence was in for a judgment as in case of nonsuit (C. S., 567). These assignments of error cannot be sustained, since the evidence supports the findings of fact and these findings sustain the conclusions of law reached by the court.

The third assignment of error brought forward by the appellant is to the refusal of the court to enter judgment as tendered by the defendant. This assignment is likewise untenable since the judgment tendered was one of dismissal of the action and the facts found were of a contrary import.

The fourth assignment of error brought forward by the appellant is to the court's "refusing to find as a fact that there was no evidence that the condition of the plaintiff's eyes has at any time impaired his general health." It is upon this assignment of error that the appellant bottoms his principal argument for a reversal.

By the policies in suit the defendant agreed to pay the plaintiff weekly sick benefits—this is an unqualified agreement unless limited by the "additional conditions and agreements" subsequently set out in the policies; in other words, the policies are policies of general coverage, unless by the aforesaid subsequent conditions and agreements they are converted into policies of limited coverage.

The subsequent condition and agreement which the defendant contends converts the policies in suit from general to limited coverage is the one which reads: "Weekly benefits for sickness will only be paid when the insured has been confined to his or her bed or house for seven consecutive days."

His Honor found that "the plaintiff was confined in his home for some five or six weeks, by reason of worry due to the loss of his eyes

and his inability to work, but since the said five or six weeks immediately following May 23, 1939, the plaintiff has not been confined to his bed or house."

It is the contention of the defendant that this finding of fact is in conflict with the subsequent finding of fact that "the diseases of the eyes is sickness within the terms of the policy, and that the disability of the plaintiff, which prevents him from performing any occupation is the result of said sickness," and that such findings do not sustain the conclusion of law that the plaintiff is entitled to recover under the policies from the defendant.

In view of the fact that the evidence discloses that the plaintiff was, and "remains totally disabled" from diseases of the eyes, we do not concur in the contention of the defendant. The plaintiff took out the policies in suit that he might be paid weekly benefits in the event of sickness. This was the principal object of the contract and the protection for which the insured paid the premiums, and any subordinate conditions and agreements in the policies should be strictly construed against the insurer, since they limit the scope and the very purpose for which the policies were taken out. We are of the opinion that the fact that the evidence tends to show, and the finding of fact is to the effect, that "the plaintiff was confined to his home for some five or six weeks, by reason of worry due to loss of his eyes and his inability to work," but since said time he has not been so confined and has not been attended by a physician, is not such a departure from the contract, or such a falling short of its provisions, as to destroy the insured's protection under the policies.

The purpose of the provision relative to the insured's being confined to his bed or house was to describe the character and extent of his illness, rather than to prescribe a limitation upon his conduct. To give the provision relative to the insured's confinement to his bed or his house the construction urged by the defendant would be to so magnify the letter as to practically nullify the principal object of the policies. "Not of the letter, but of the spirit: for the letter killeth but the spirit giveth life." 2 Corinthians 3:6. *Thompson v. Accident Assn.*, 209 N. C., 678, 184 S. E., 695; *Duke v. Assurance Corp.*, 212 N. C., 682, 194 S. E., 91.

The defendant argues that blindness is not such sickness as is contemplated by the policies and therefore plaintiff should not recover. The defendant contracted to pay the plaintiff "weekly sick . . . benefits" . . . "as long as the policy-holder remains totally disabled." Dr. W. P. Speas, an admitted eye expert, testified for the plaintiff: "He (the plaintiff) has a *complication of diseases.* He has an optic atrophy. An optic atrophy is a condition in which the eye nerve is dead, or approaching that. He has an absolute optic atrophy as near as I can tell from my experience and observation. He also has a high degree of myopia, or near sightedness, a very high degree of that, which precludes

his being able to see anything of any size any considerable distance. He has a scar of the cornea. It is supposed to be clear like glass. He has a scarring there which, if everything else were normal, would cut down his vision. At one time when he was there I felt he had increased tension in the left eye. He has this *complication of diseases* any one of which would affect his vision. It is a permanent condition, absolutely. I last saw Vannie (the plaintiff) on the 24th day of this month. His condition is not improved over when I first saw him. The effect of the *disease* of the optic nerve that I have named is that it prevents it from functioning. The optic nerve carries impulses of sight back to the brain, and it stops that function entirely, optic atrophy does. . . . He could not possibly have useful vision in view of what I have seen in his eyes. In my opinion, it will not become better."

Webster's New International Dictionary (1935) says: "Sick" means "affected with disease," and gives "disease" as a synonym of "sickness." Therefore it would seem that his Honor was supported in finding from Dr. Speas' testimony that "the diseases of the eyes is sickness within the terms of the policy, and that the disability of the plaintiff, . . . is the result of said sickness, and that the plaintiff is totally disabled from performing or pursuing any work of a gainful character, due to the diseased condition of his eyes."

The testimony of Dr. Speas, as well as the findings of fact of the court, is in the present tense, "he *has* a complication of diseases," "the diseases of the eye *is* sickness," that the disability "*is* the result" of said sickness, which supports the findings of fact and conclusions of law to the effect that the plaintiff was not only sick on 23 May, 1939, but was still sick at the time of the trial, and was therefore entitled to recover sick benefits from the beginning of his sick disability 23 May, 1939, until the time of trial, 110 weeks.

The judgment of the Superior Court is

Affirmed.

MOSES GRIMES v. CICERO GUION, AMELIA GUION AND BUDDIE GUION.

(Filed 7 January, 1942.)

Vendor and Purchaser § 7: Registration § 4b—Parol contract to convey is unavailing as against purchaser under registered deed from vendor or her heirs.

Defendant alleged that she went into possession of the land, paid taxes and made improvements under a parol agreement with the owner that if the owner should fail to return and repay the taxes and pay for the improvements defendant should have the land in fee, and that plaintiff,

seeking to recover possession of the land by virtue of a duly registered deed from the heirs of the vendor, took with knowledge of the terms of the agreement and that defendant was in possession thereunder. *Held:* The parol agreement is ineffectual as against plaintiff notwithstanding his knowledge, since no notice, however full and formal, will supply notice by registration, C. S., 3309, and the answer neither sets up a defense to plaintiff's action nor alleges facts entitling defendant to reimbursement for taxes and improvements before recovery of possession by plaintiff. *Vann v. Newsom*, 110 N. C., 122, cited and distinguished in that plaintiff is not the vendor, but the purchaser from the heirs of the vendor under a duly recorded deed. *Spence v. Pottery Co.*, 185 N. C., 218, cited and distinguished in that defendant in the instant case did not set up a parol trust recognized and enforceable in this State.

APPEAL by defendant, Amelia Guion, from *Thompson, J.*, at May Term, 1941, of ROBESON.

Civil action to recover land and rents therefor and damages for waste committed thereon.

Plaintiff in his complaint *inter alia* alleges that he is the owner, and entitled to possession of a certain tract of land in Robeson County described in a certain deed from L. E. Whaley and wife to Cornelia Merrick Smith, and in a certain deed from Simon Peter Dunham and others, to plaintiff.

Defendant, Amelia Guion, in her answer denies the above allegation of plaintiff and, as further defense, makes substantially these averments: That during the year 1928 Cornelia Merrick Smith, then a resident of Waterbury, Connecticut, owner of the land described in the complaint, which was unimproved and which was then being foreclosed for non-payment of taxes due to the county, coming to Robeson County for the purpose of attempting to save said land from foreclosure, came to this defendant, who was then living in St. Pauls, North Carolina, and proposed that if this defendant would advance to her $40 in cash and pay off the taxes in default, she would agree to put this defendant in possession of the lands, let her hold possession thereof, clear and develop same, improve it and pay the annual taxes, and if she, the said Cornelia Merrick Smith, failed to return during her lifetime and repay the advances made in money, repay the taxes and pay for the improvements placed upon the land by this defendant, this defendant should have the lands in fee simple; that this defendant accepted the proposal, paid to Cornelia Merrick Smith the sum of $40 in cash and immediately entered into possession of the lands under the terms of the agreement, paid the taxes then in default, paid the annual taxes thereafter assessed against the land, amounting in all to $103.07, and proceeded to clear and cultivate twenty acres of land, rebuild the dwelling house, built tenant house, stables, chicken house, tobacco barn, rebuilt another tobacco barn, ditched and drained the land, and made other improvements thereon, the total

value of which amounts to at least the sum of $1,500; that Cornelia Merrick Smith failed to return and repay to this defendant the advances made in cash, the taxes paid and the value of the improvements put upon the land pursuant to the agreement, and has since died; that a short time after her death, Simon Peter Dunham, Ambrose Dunham and Jennie Munn, claiming to be her heirs at law, attempted to convey the title to said lands to the plaintiff by purported deed dated 11 March, 1940, and filed for registration 23 March, 1940, and recorded in the registry of Robeson County, which deed and the registration thereof are referred to for purposes of attack; that this defendant was in full, open, and notorious possession of said land under known and visible lines and boundaries, and plaintiff and those under whom he claims, at time of delivery and registration of said purported deed, had full knowledge of her equities and knew that she was in possession of said land under the terms of said agreement; that, therefore, plaintiff is not a purchaser for value without notice; that this defendant is "an ignorant colored woman, without education" and, relying upon said agreement to convey title to her, she has spent the earnings and hard labor of herself and her children, for many years, in paying taxes upon these lands, clearing and improving same, placing buildings thereon, ditching and draining the land, and is entitled to have this trust enforced upon the same, and to have the plaintiff, who accepted deed with full knowledge of defendant's equities, and of the fact that she was in possession of said land by virtue of said agreement, declared trustee for her benefit, or if the trust agreement specifically pleaded is not enforceable, then to recover the money expended and the value of the improvements upon the said land and to be reimbursed for the money expended and for the betterments placed upon the land before the plaintiff is entitled to possession.

Plaintiff demurs *ore tenus* to the further defense set forth in the answer of Amelia Guion. The demurrer is sustained.

The defendant appeals therefrom, and assigns error.

F. D. Hackett for plaintiff, appellee.
L. J. Britt and McLean & Stacy for defendant, appellant.

WINBORNE, J. The ruling of the court in sustaining demurrer *ore tenus* to the further defense set up by defendant, Amelia Guion, finds support in the case of *Wood v. Tinsley,* 138 N. C., 507, 51 S. E., 59, upon authority of which judgment below must be affirmed. The decision there is epitomized in the headnote: "Since the Connor Act (Laws 1885, ch. 147), one who goes into possession of land under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he

is repaid the amount expended for the purchase-money and improvements as against a purchaser for value from the vendor, holding under a duly registered deed, though the purchaser had notice of the contract." See, also, *Smith v. Fuller,* 152 N. C., 7, 67 S. E., 261; *Wood v. Lewey,* 153 N. C., 401, 69 S. E., 268; and *Eaton v. Doub,* 190 N. C., 14, 128 S. E., 494.

The Connor Act, 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."

The Court, in *Wood v. Tinsley, supra,* speaking of that Act, said: "The purpose of the statute was to enable purchasers to rely with safety upon the examination of the records, and act upon the assurance that, as against all persons claiming under the 'donor, bargainor, or lessor,' what did not appear did not exist. That hardships would come to some in applying the rigid statutory rule was well known and duly considered . . . The change in our registration laws was demanded by the distressing uncertainty into which the title to land had fallen in this State . . . If the defendant has sustained an injury by the conduct of the person with whom he made a parol contract, which should have been in writing and recorded, it is to be regretted, but it is not the fault of the law. Its protective provisions are clear and explicit. To permit him to disregard it at the expense of the plaintiff, who has obeyed it, would be to seriously impair the value of the statute and return to many of the evils which its enactment sought to remove."

In *Wood v. Lewey, supra,* plaintiff relying solely upon the fact that defendants had notice of his prior unacknowledged and unregistered deed, the Court said that the proposition is too well settled against him to admit of debate, for no notice, however full and formal, can supply notice by registration as required by the statute. Revisal, 980, now C. S., 3309.

The present case is distinguishable from the two lines of cases relied upon by defendant appellant. First: The line to which *Vann v. Newsom,* 110 N. C., 122, 14 S. E., 519, and others of similar import belong, where the Court holds that the vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements until the latter has been repaid the purchase money and compensated for betterments. See, also, *Ballard v. Boyette,* 171 N. C., 24, 86 S. E., 175, where *Allen, J.,* states that: "While the doctrine of enforcing a parol contract to convey land upon the ground of part performance does not prevail in this State, it is well settled that the owner of land who has entered into a contract of this character cannot repudiate

the contract and retain the benefits which he has received under it, whether in the form of money paid upon the purchase price or upon the enhanced value of the land by reason of improvements."

In the case in hand the plaintiff is not the vendor with whom the defendant contracted, but is a purchaser from the heirs of the vendor and has and asserts a duly recorded deed, which is attacked only upon the ground that plaintiff took it with notice of defendant's verbal contract with and consequent equities against the parol vendor and, hence, is not a purchaser for value without notice. This principle is inapplicable here.

Second: The line to which *Spence v. Pottery Co.*, 185 N. C., 218, 117 S. E., 32, belongs, wherein the Court holds that "There are certain parol trusts, and those created by operation of law, dealing with interest in land which are fully recognized in this jurisdiction. And . . . those resting in parol, or not evidenced by any writing, may be enforced against the holder of the legal title unless it appear that such holder or someone under whom he claims has acquired his title for a fair and reasonable price and without notice of the trust." In the present case no such trust is averred.

Though the defense attempted to be set up by defendant portrays her as the victim of a grievous wrong which engenders indignation and invokes sympathy, it states no cause of action against plaintiff. There is no averment that he has either assumed, or broken any obligation to her. Rather, the averments indicate that he has acted within the registration laws as written.

The judgment is

Affirmed.

JESSE W. JACKSON v. W. N. PARKS.

(Filed 7 January, 1942.)

1. Appeal and Error § 39—

A new trial will be awarded on exception to the admission or exclusion of evidence only in the event appellant makes it appear that error which is prejudicial was committed by the trial court.

2. Evidence § 41—

Hearsay evidence may be defined as evidence without the safeguards of having the declarant under oath and subject to cross-examination, and written as well as parol evidence may be objectionable as hearsay.

3. Same: Process § 16—

In an action for abuse of process, based upon defendant's acts in having the plaintiff wrongfully confined in an insane asylum, a letter written to plaintiff by one in authority in plaintiff's church, stating in substance that plaintiff's confinement was unjust and had destroyed plaintiff's usefulness and possibility of obtaining employment in further ministerial work in the church, is hearsay and highly prejudicial, and entitles defendant to a new trial.

4. Appeal and Error § 47b—

Where there has been no prejudicial error committed in the trial of one of plaintiff's causes of action, but as to the other cause of action prejudicial error is made to appear in the admission of evidence, the Supreme Court, in its discretion, may grant a partial new trial.

APPEAL by defendant from *Williams, J.*, and a jury, at January-February Term, 1941, of WAYNE. No error, in part. New trial, in part.

This case was here on appeal by plaintiff from a judgment of nonsuit. The judgment was reversed. The material facts are set forth in that opinion. It was also decided in the opinion that the plea of the statute of limitations was not available to defendant on plaintiff's causes of action. 216 N. C., 329. The issues indicate the controversy. The issues submitted to the jury, and their answers thereto, were as follows:

"1. Did the defendant cause the plaintiff to be prosecuted for larceny in the court of H. H. Brown, Justice of the Peace, on October 16, 1935, as alleged in the complaint? Ans.: 'Yes.'

"2. If so, was said prosecution without probable cause? Ans.: 'Yes.'

"3. If so, was said prosecution malicious? Ans.: 'Yes.'

"4. What compensatory damage, if any, is plaintiff entitled to recover therefor? Ans.: '$1,000.00.'

"5. What punitive damage, if any, is plaintiff entitled to recover? Ans.: '$1,000.00.'

"6. Did the defendant unlawfully and maliciously procure plaintiff's confinement in the State Hospital for the Insane at Goldsboro on January 9, 1936, as alleged in the complaint? Ans.: 'Yes.'

"7. If so, what amount of compensatory damage, if any, is plaintiff entitled to recover? Ans.: '$1,000.00.'

"8. What punitive damages, if any, is plaintiff entitled to recover? Ans.: '$1,000.00.'

"9. Did the defendant unlawfully and maliciously procure said plaintiff's confinement in the State Hospital for the Insane at Goldsboro on January 9, 1937, as alleged in the complaint? Ans.: 'Yes.'

"10. If so, what amount of compensatory damage, if any, is plaintiff entitled to recover? Ans.: '$5,000.00.'

"11. What punitive damage, if any, is plaintiff entitled to recover? Ans.: '$5,000.00.'

"12. Is plaintiff's alleged cause of action for malicious prosecution barred by the statute of limitation? Ans.: 'No.'

"13. Is plaintiff's alleged cause of action for alleged malicious confinement in the Hospital for the Insane on January 9, 1936, barred by the one year statute of limitation? Ans.: 'No.'

"14. Is plaintiff's alleged cause of action for the alleged malicious confinement in the State Hospital for the Insane on January 9th, 1937, barred by the one year statute of limitation? Ans.: 'No.'"

The court below rendered judgment on the verdict. There were numerous exceptions and assignments of error made by defendant. Only those necessary for the decision of the action and the necessary facts will be set forth in the opinion.

George B. Greene, Matt H. Allen, Scott B. Berkeley, and Kenneth C. Royall for plaintiff.

Fred B. Parker, Jr., Paul B. Edmundson, J. Faison Thomson, J. A. Jones, and John G. Dawson for defendant.

CLARKSON, J. It appears from the record, on the issues submitted on the different causes of action, that wide latitude was allowed by the court below to the plaintiff in his testimony and that of his witnesses. Defendant, in apt time, objected, moved in certain cases to strike out answers, and duly made exceptions and assignments of error to the admissions and exclusions of certain evidence. The allegations of plaintiff were denied by defendant. The defendant's evidence contradicted the material evidence of plaintiff. On the question of compensatory and punitive damages, on the charge of larceny found by the jury to be without probable cause and malicious, we are of the opinion, taking the record as a whole—the evidence pro and con—that the exceptions and assignments of error made by defendant cannot be held for prejudicial or reversible error. Some of the questions and answers appear to be harmless, others are close to the danger line. In the judgment of the court below on this aspect, we think there is no error. On all the other issues, we think there was error and that there should be a new trial.

One of the many exceptions and assignments of error made by the defendant was to the introduction of a letter by plaintiff, which is as follows:

"THE CAROLINA CONFERENCE OF SEVENTH DAY ADVENTISTS,
CHARLOTTE, N. C.

September 30, 1936.

"Mr. J. W. Jackson,
Rt. 2, Box 1154,
LaGrange, North Carolina.

"Dear Brother Jackson: I was very sorry to learn last fall about how unjustly you were confined to the asylum for a time. Your being sent to the asylum was, and is a direct blow against your influence as an elder in our colored church at LaGrange. There is no question but that the opportunity of your ever securing further ministerial work in our conference has suffered a definite set-back by your being sent to the asylum; in fact your being sent to the asylum has cut you out of any chance of securing employment as a minister in the Carolina Conference because when your name goes before the committee, the committee simply could not see light in employing a man who was once in the asylum. Your influence as an elder and as a minister has been destroyed to a large extent by this unjust treatment that you suffered. This thing will always be against your work as an elder, and it has deprived you of the possibility of obtaining employment as a worker in this conference.

Yours sincerely,

J. L. SHULER, President."

The defendant, in his exception and assignment of error, says: "The admission of a letter, plaintiff's Exhibit 6, purporting to have been addressed to the plaintiff by J. L. Shuler. This letter is the grossest hearsay with a consequent conclusion based upon hearsay and offered as an expression of condolence to the plaintiff. It was harmful to the defendant in the minds of the jury, and it seems impossible to escape the thought that it was highly prejudicial to the defendant's case."

We are of the opinion that this evidence was highly prejudicial to defendant on the issues as to plaintiff's confinement in the State Hospital for the Insane, and was calculated to create such feeling by the jury that it induced them to render the verdict on these issues. As to the issues relative to plaintiff's confinement in the asylum, the letter features the unjust confinement in the asylum. The letter speaks for itself. It was hearsay. It sets forth facts unsworn to: "How *unjustly* you were confined in the asylum for a time." The harmful effect: "A *direct blow* against your influence." "No question but that the *opportunity* of your ever securing further *ministerial work* in our Conference has suffered a definite set-back." "In fact your being sent to the asylum has *cut you out* of any chance of *securing employment* as a minister." "Your influence as an *elder* and as a minister has been destroyed to a large extent

by this *unjust* treatment that you suffered. This thing will always be *against your work as an elder,* and it has *deprived* you of the *possibility of obtaining employment* as a worker in this Conference." This letter was signed by one in authority in plaintiff's church and in substance says plaintiff's being sent to the asylum has destroyed his usefulness and the possibility of his obtaining employment. This letter was not under oath and the signer was not subject to cross-examination; was not even put on the stand as a witness when the letter was offered. As it was highly prejudicial to defendant and lacking the customary safeguards thrown around admissible evidence, its admission was error.

In 20 American Jurisprudence, Vol. 20, pp. 400-401, "Hearsay Evidence," we find: "Sec. 451. Hearsay has been defined as evidence which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person. Such a definition is sufficient for the most part to represent the meaning and implications of the term. It is important, however, to observe that hearsay is not limited to oral testimony. A writing may be hearsay, and its admissibility as evidence may be dependent upon exceptions to the hearsay rule." Sec. 452: "Hearsay evidence is inadmissible according to the general rule. Various reasons have been assigned for requiring the exclusion of this kind of testimony. The real basis for the exclusion, however, appears to lie in the fact that hearsay testimony is not subject to the tests which can ordinarily be applied for the ascertainment of the truth of testimony. It is said that a statement by hearsay is one made without the sanction of an oath and without the declarant being under a responsibility to answer for the crime of perjury in making a willful falsification."

Shuler's conclusions, even if he had been a witness, were based on hearsay. From time immemorial this type of evidence has been held incompetent.

In *S. v. Kluttz,* 206 N. C., 726 (728), citing numerous authorities, this Court said: "Evidence is termed hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness from whom the information is sought; and such evidence, with certain recognized exceptions not presently applicable, is uniformly held to be incompetent, the declarant not having spoken under the sanction of an oath and not having submitted to cross-examination."

It is well settled in this jurisdiction that a partial new trial on issues has been granted by this Court.

In *Lumber Co. v. Branch,* 158 N. C., 251 (253), speaking to the subject, it is said: "It is settled beyond controversy that it is entirely discretionary with the Court, Superior or Supreme, whether it will grant

a partial new trial. It will generally do so when the error, or reason for the new trial, is confined to one issue, which is entirely separable from the others and it is perfectly clear that there is no danger of complication. *Benton v. Collins,* 125 N. C., 83; *Rowe v. Lumber Co.,* 133 N. C., 433." *Whedbee v. Ruffin,* 191 N. C., 257 (259); *Will of Bergeron,* 196 N. C., 649 (652); *Lumber Co. v. Power Co.,* 206 N. C., 515 (522).

For the reasons given, on the 1st, 2nd, 3rd, 4th, 5th, and 12th issues we find no error. A new trial is granted on the other issues.

No error, in part.

New trial, in part.

IN THE MATTER OF ELDON STEELE.

(Filed 7 January, 1942.)

1. Habeas Corpus § 8—

As no appeal lies from a judgment rendered on return of writ of *habeas corpus,* except in cases involving the custody and care of children, a review is permissible by *certiorari.*

2. Justices of the Peace § 1—

The office of justice of the peace is provided for and vouchsafed in the Constitution. Art. IV, sec. 2.

3. Justices of the Peace § 7: Constitutional Law § 33—

Since a defendant in a criminal prosecution before a justice of the peace has a right to demand a jury trial, C. S., 4627, and the right to appeal to the Superior Court and have the whole matter heard therein *de novo,* C. S., 4647, the fact that the justice's compensation is fixed upon a fee basis, which he will receive only in the event of conviction, ch. 342, Public-Local Laws 1933, as amended by ch. 358, Public-Local Laws 1935, does not result in depriving the defendant of trial under due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

4. Justices of the Peace § 7: Criminal Law § 65: Habeas Corpus § 2—

Even conceding the disqualification of a justice of the peace because of the fee system, the judgment of such justice in a criminal prosecution would be voidable and not void, and therefore such judgment would stand until its invalidity is declared in a proper proceeding for that purpose, and it cannot be collaterally attacked or challenged on *habeas corpus.*

5. Same—

Defendant pleaded guilty in a prosecution before a justice of the peace. Thereafter, while serving sentence, he filed petition for writ of *habeas corpus* on the ground that the justice trying him was disqualified because

of the fee system. *Held:* Even conceding the disqualification of the justice, the judgment was not void but was voidable, and the failure of defendant to raise objection at the trial constitutes a waiver and estops him from thereafter urging the point as a defect in the proceeding, and the writ of *habeas corpus* should have been dismissed.

6. Constitutional Law § 26—

As a general rule, subject to certain exceptions, a defendant may waive a constitutional as well as a statutory provision made for his benefit.

7. Criminal Law § 65—

An objection which goes only to the correctness of a judgment, and not to its validity will be taken as waived if not seasonably interposed.

8. Same—

A judgment regularly entered by a court having jurisdiction and authority to act in the premises, from which no appeal is taken, operates as an estoppel, even though the judgment may be erroneous in law, since an erroneous judgment can be corrected only by appeal or *certiorari*.

APPLICATION by Attorney-General on behalf of the State for *certiorari* to review judgment of *Hamilton, Special Judge,* rendered 28 April, 1941, in the Superior Court of BLADEN, on return to writ of *habeas corpus* in which Eldon Steele, held in prison camp under commitment from a justice of peace, was discharged from custody, it being found upon the hearing that the accused was held under a void judgment.

The facts are these:

1. On 14 April, 1941, in Rockingham Township, Richmond County, upon affidavit duly filed before John H. Yates, justice of the peace, a warrant was issued for Eldon Steele charging him with public drunkenness and disorderly conduct.

2. The accused appeared before the said John H. Yates, justice of the peace, and pleaded guilty to the charge contained in the warrant. The court thereupon adjudged that the defendant be imprisoned in the county jail for a term of thirty days and assigned to work upon the public roads.

3. Thereafter, on 28 April, while serving his sentence, the defendant filed petition for writ of *habeas corpus* before the judge holding the Superior Court of Bladen County, alleging that his imprisonment under commitment from a justice of the peace was violative of his constitutional rights and void.

4. At the hearing on return to the writ of *habeas corpus,* it was adjudged that "the proceedings and judgment in the trial before John H. Yates, justice of the peace, of Eldon Steele, were unconstitutional and void." Whereupon it was ordered that the prisoner be discharged from custody.

5. On 3 June following, the Attorney-General, acting for and on behalf of the State, applied for a writ of *certiorari,* alleging error in the

judgment ordering the prisoner released from custody. The application was allowed and the writ accordingly issued.

Attorney-General McMullan and Assistants Attorney-General Bruton and Patton for the State, petitioner.

Albion Dunn for N. C. Association of Magistrates, amicus curiæ.

Thomas L. Parsons and George S. Steele, Jr., for Eldon Steele, respondent.

James MacClamroch for N. C. Bar Association, amicus curiæ.

STACY, C. J. We have here a challenge to a part of the judicial system of the State. As no appeal lies from a judgment rendered on return to writ of *habeas corpus*, except in cases involving the care and custody of children, a review is permissible by *certiorari*, which has been issued in the instant case. *In re Holley*, 154 N. C., 163, 69 S. E., 872; *In re Croom*, 175 N. C., 455, 95 S. E., 903; *S. v. Phillips*, 185 N. C., 614, 115 S. E., 893; *In re Veasey*, 196 N. C., 662, 146 S. E., 599; *In re Adams*, 218 N. C., 379, 11 S. E. (2d), 163.

The order releasing the prisoner from custody is grounded on the assumption that no justice of peace, under the fee system obtaining in this jurisdiction, and particularly in Richmond County, can meet the constitutional requirement of "due process" and render a valid judgment against the accused in a criminal proceeding. Specifically the holding is, that the justice of the peace who heard the case was disqualified because of his pecuniary interest in convicting the defendant and for this reason his judgment is void. The thought prevailed at the hearing on return to the writ of *habeas corpus* that the ruling is impelled by the decision in *Tumey v. Ohio*, 273 U. S., 210, 50 A. L. R., 1243. We take a different view of the matter.

In the first place, it will be noted that the challenge is to the fee system set up by statute and not to the office of justice of the peace, which, with us, is constitutional. *Rhyne v. Lipscombe*, 122 N. C., 650, 29 S. E., 57. The "courts of justices of the peace" are mentioned as among the repositories of the State's judicial power. "The judicial power of the State shall be vested in . . . courts of justices of the peace, . . ." Const., Art. IV, sec. 2. The office, then, as such, is not under attack. It is vouchsafed in the Constitution. *Jones v. Oil Co.*, 202 N. C., 328, 162 S. E., 741.

It is provided by ch. 342, Public-Local Laws 1933, as amended by ch. 358, Public-Local Laws 1935, that "upon conviction of any person in a Justice of the Peace or Mayor's Court in Richmond County there shall be taxed against the defendant . . . a fee of two dollars ($2.00) for the use and benefit of the trial justice. . . . If the defendant is sentenced to jail to be assigned to the roads . . . the

county shall pay one-half the fees hereinbefore set forth. . . . *Provided,* that the county shall not be liable for or pay to any justice of the peace . . . a sum in excess of five dollars per month." So that in the instant case the fee of the justice of the peace amounted to not more than $1.00. Had the defendant paid the costs, it would have been $2.00. The trial justice is entitled to no compensation in case of an acquittal.

The respondent's application to the judge of the Superior Court for writ of *habeas corpus* is bottomed on the decision in the *Tumey case, supra.* There, the defendant was tried by the mayor of the village of North College Hill, Ohio, on a warrant charging him with possessing intoxicating liquor in violation of the Ohio statute. At the threshold of the case, the defendant moved for a dismissal because of the disqualification of the mayor to try him under the due-process clause of the *Fourteenth Amendment.* The mayor denied the motion, proceeded to trial, convicted the defendant, fined him $100, and ordered that he be imprisoned until the fine and costs were paid. The mayor's fee in case of conviction was $12.00; and in addition thereto the village over which he presided, then in need of finances, was to receive one-half of the fine imposed. The mayor and the village both profited in substantial amounts from the running of "the liquor court," as it was popularly called. In case of acquittal, the mayor received no compensation. Under the Ohio law, the trial of the defendant was before the mayor without a jury, without opportunity for retrial, and with a review confined to questions of law. Out of these circumstances came the pronouncement: "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." To like effect is the decision in *S. v. Hartley,* 193 N. C., 304, 136 S. E., 868.

The facts in the instant case are quite different from those appearing in the *Tumey case, supra.* Here, the defendant, without any preliminary challenge, entered a plea of guilty. He did not demand a jury trial, as he might have done. C. S., 4627. Nor did he ask the justice of the peace to hold the balance "nice, clear and true" between him and the State. Even so, he still had the right to appeal to the Superior Court of the county. *S. v. McKnight,* 210 N. C., 57, 185 S. E., 437. Hence, it appears that in no event was the defendant required to submit to the judgment of the justice of the peace as a final determination of his rights. *S. v. Warren,* 113 N. C., 683, 18 S. E., 498. Had he entered a plea of not guilty, or if he did not feel justified in entering a plea of traverse, had he remained silent, he could have appealed from the judgment entered and the whole matter would have been heard in the Superior Court *de novo. S. v. Koonce,* 108 N. C., 752, 12 S. E., 1032. "In

all cases of appeal," from the sentence of the justice to the Superior Court of the county, "the trial shall be anew, without prejudice from the former proceedings." C. S., 4647. These facts take the present case out of the doctrine announced in the *Tumey case, supra,* and the authorities so hold. *Brooks v. Town of Potomac,* 149 Va., 427, 141 S. E., 249; *Tari v. State,* 117 Ohio St., 481, 159 N. E., 594, 57 A. L. R., 284, and cases cited.

Moreover, even if the disqualification of the trial justice be conceded, by the clear weight of authority the effect would be to render his judgment voidable, and not void. *Tari v. State, supra.* See *White v. Lane,* 153 N. C., 14, 68 S. E., 895. A void judgment is a nullity, and may be ignored or disregarded, vacated on motion or attacked on *habeas corpus. Casey v. Barker,* 219 N. C., 465, 14 S. E. (2d), 429. But a voidable judgment has all the ordinary consequences of a legal judgment until its invalidity is declared in a proper proceeding for the purpose, and it may not be attacked collaterally or challenged on *habeas corpus. Craddock v. Brinkley,* 177 N. C., 125, 98 S. E., 280; Note, Ann. Cas., 1914 B, 82; 15 R. C. L., 839.

There is also authority for the position that in the absence of some controlling constitutional or statutory provision, a failure to raise objection at the trial, when the party complaining had full knowledge of the existence of the disqualification, constitutes a waiver and estops him from thereafter urging the point as a defect in the proceeding. *Bryant v. State,* 146 Miss., 533, 112 So., 675; *Washington Fire Ins. Co. v. Hogan,* 139 Ark., 130, 213 S. W., 7, 5 A. L. R., 1585, and annotation.

It is further the rule with us that an objection which goes only to the correctness of a judgment, and not to its validity, will be taken as waived if not seasonably interposed. *Mfg. Co. v. Building Co.,* 177 N. C., 103, 97 S. E., 718; *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629. "Moreover, it is the general rule, subject to certain exceptions, that a defendant may waive a constitutional as well as a statutory provision made for his benefit. Sedgwick Stat. and Const. Law, p. 111. And this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." *Cameron v. McDonald,* 216 N. C., 712, 6 S. E. (2d), 497.

A judgment regularly entered by a court having jurisdiction and authority to act in the premises, from which no appeal is taken, operates as an estoppel on the parties, though the judgment may be erroneous in law. *Cameron v. McDonald, supra.* "An erroneous judgment should be corrected by appeal or *certiorari.*" *Ellis v. Ellis,* 190 N. C., 418, 130 S. E., 7.

It results, therefore, that the prisoner was lawfully in custody. The writ of *habeas corpus* should have been dismissed.

Reversed.

RAY B. LUCAS, SUPERINTENDENT OF THE INSURANCE DEPARTMENT OF THE STATE OF MISSOURI, v. W. B. BARROW.

(Filed 7 January, 1942.)

Evidence § 39—

Where, in an action involving the rights of the parties under an insurance agency contract, it appears that the contract was in writing and that the practice of the agent in remitting for premiums collected "was by agreement with the company," the admission of parol evidence as to the terms of the written agreement must be held for reversible error when the contract is not in the record.

APPEAL by plaintiff from *Bone, J.*, at March Term, 1941, of FRANKLIN.

Civil action to recover for (1) insurance premiums collected and (2) return commissions on canceled policies of insurance.

For the purposes of this appeal these facts appear to be uncontroverted: On 12 August, 1936, Manufacturing Lumbermen's Underwriters, with its principal place of business in Kansas City, Missouri, a reciprocal insurance exchange engaged in writing insurance on property against fire and kindred hazards, operating by an agent, Rankin & Benedict Underwriting Company, entered into a written agreement with defendant, copy of which is alleged to be attached to and made a part of amended complaint, though not set out in the record, by which defendant became its agent to solicit such insurance in Franklin County, North Carolina, and for his services in writing and servicing policies for the entire period for which they were written he should receive a certain commission.

On 12 November, 1936, the Superintendent of the Insurance Department of the State of Missouri by virtue of the provisions of sec. 5947, Revised Statutes of Missouri, 1929, instituted a proceeding No. 450,304 in the Circuit Court of Jackson County at Kansas City, Missouri, against the Manufacturing Lumbermen's Underwriters, by reason of its insolvency, for the purpose of enjoining it from the further prosecution of its business and for dissolution of the corporation. On that date an injunction was issued prohibiting it and all persons connected with it from the further prosecution of its business, and, R. E. O'Malley, Superintendent of the Insurance Department of Missouri, was placed in temporary charge of its affairs.

On 1 April, 1937, the Manufacturing Lumbermen's Underwriters was adjudged in said proceeding to be insolvent, permanently enjoined from the further conduct and prosecution of its business, and ordered dis-

solved, and its assets "vested in fee simple in R. E. O'Malley, Superintendent of the Insurance Department of the State of Missouri, and his successors in office, subject to the further orders, judgment and decrees" of the said Circuit Court.

On 5 January, 1939, the said Circuit Court ordered "that the claims and debts of the Manufacturing Lumbermen's Underwriters be ranked for priority as follows: (1) Expenses of liquidation, (2) all taxes, (3) claims for losses upon contracts of insurance and re-insurance entered into by the Manufacturing Lumbermen's Underwriters, and (4) all other debts and claims allowed against the Manufacturing Lumbermen's Underwriters, specifically stating that this class includes return premiums due policyholders for policies canceled before their expiration date."

On 15 January, 1939, Ray B. Lucas, the then Superintendent of the Insurance Department of Missouri, and now the plaintiff in this action, was substituted as plaintiff in said proceeding and placed in charge of the affairs and vested with title to the assets of the said underwriters in liquidation.

Plaintiff alleges and offered evidence tending to show that between the dates of 12 August, 1936, the date of the agreement between defendant and Manufacturing Lumbermen's Underwriters, and 12 November, 1936, defendant collected on policies written by him under said agreement premiums amounting to $522.52, for which he has not remitted; and that for return commissions on canceled policies defendant is due to pay to underwriters $109.94, making a total of $632.46 due by him, to which plaintiff Ray B. Lucas, Superintendent of the Insurance Department of the State of Missouri, by virtue of the order of the Circuit Court of Jackson County, in said case, is entitled to receive, after demand and payment refused.

Defendant, in answer to original and amended complaints, denies that plaintiff is entitled to collect from him a *pro rata* share of the commissions on return premiums on policies issued by him in said underwriters, and canceled before expiration by reason of its insolvency.

Further, in answer to amended complaint, while admitting refusal to pay to plaintiff the sum of $522.52 for premiums collected, defendant avers, by way of set-off and counterclaim, (a) that on 12 August, 1936, he became the local agent for Manufacturing Lumbermen's Underwriters under the terms of the contract shown as Exhibit B in the amended complaint (though not included in the record); (b) that pursuant to agreements between him and the policyholders named in plaintiff's Exhibit A (which purports to be a list of policies on which premiums are unpaid and as to which plaintiff claims return premiums), whereby defendant agreed to keep said policyholders insured for certain stated, fixed periods, defendant, as agent for said underwriters, issued policies

in said underwriters to said policyholders; (c) that on 12 November, 1936, the underwriters became insolvent and ceased to function, and a wholesale cancellation of said policies issued by defendant occurred; (d) that defendant, in accordance with his contract and agreement with said policyholders to keep said policyholders insured for stated periods, took up the worthless policies with the underwriters and issued in substitution therefor, at his own expense, equivalent insurance in other companies, and, except in cases where the policies were not available for delivery to defendant, he received the original policy from each policyholder and forwarded same to the underwriters; and (e) that thereafter defendant demanded of the underwriters that he be reimbursed for the amount so expended by him in furnishing other insurance to his said policyholders, which amount so expended and advanced by him still remains due and unpaid as stated in the counterclaim in defendant's original answer.

In the original answer, defendant, by way of set-off and counterclaim, avers that, all policies of insurance which had been written by him as agent of the Manufacturing Lumbermen's Underwriters having been suddenly renounced and set at nought by termination of its business in defendant's territory, he, from his own funds and resources, made good the obligation of the underwriters to the holders of such policies by repayment to them, on behalf of the underwriters, the unearned premiums on their respective policies accruing to them upon such cancellation of their policies; that the repayment by defendant to such policyholders was made either in cash or by furnishing to them the same or equivalent insurance protection in other companies; that the amount thus expended by defendant on behalf of the underwriters is $947.21, which remains unpaid after demand.

Defendant further avers that his practice in regard to remittance to the underwriters for premiums collected by him "was by agreement with said company" to the effect that any amount expended by him for return premiums paid to policyholders could be and were deducted from the amounts due by him to said underwriters for premiums collected. Upon these averments defendant prays that plaintiff take nothing and that he recover of plaintiff the sum of $947.21, as set out in counterclaim in the original answer.

Motion of plaintiff to strike out from the further answer to the amended complaint the allegation appearing in paragraph above designated (d) was denied, and plaintiff excepted.

Upon the trial below, defendant offered evidence tending to show that Exhibit B to the amended complaint is an agency agreement between him and the Manufacturing Lumbermen's Underwriters of Kansas City, Missouri, of date 12 August, 1936.

Further, under objection and exception by plaintiff, defendant offered testimony with respect to taking up from policyholders the canceled policies and issuing new policies and crediting the policyholders with unearned premiums on said canceled policies, and as to the practice between him and the underwriters regarding payment by it to him for return premiums advanced.

This issue was submitted to the jury: "What amount, if any, is plaintiff entitled to recover of defendants?"

Upon this issue the court instructed that if the jury believe the evidence of the plaintiff offered in the form of a deposition, and believe and found to be as a fact that defendant has paid out $947.21 on unearned premiums on policies of the underwriters, canceled due to its liquidation and insolvency, as testified to by defendant, the jury should answer the issue "Nothing"; but if the jury should believe the evidence of plaintiff, and not believe the evidence of defendant as testified to by him, the answer should be "$522.52." Exception. The issue was answered "Nothing."

From judgment in accordance therewith plaintiff appeals to Supreme Court and assigns error.

G. M. Beam for plaintiff, appellant.
John F. Matthews and Charles P. Green for defendant, appellee.

WINBORNE, J. It appears from the record that the agency agreement between Manufacturing Lumbermen's Underwriters of date 12 August, 1936, is in writing. It further appears from answer of defendant that the practice in regard to his remitting for premiums collected "was by agreement with the company." Thus it would seem that "the practice" is controlled by agreement, and the only agreement, as the record now stands, is the written agreement of 12 August, 1936, which is not before us. Hence, upon the present record, we are constrained to hold that there is error in the admission of the oral testimony of defendant to which exception is taken by plaintiff. Accordingly, there must be a

New trial.

MRS. VIRGINIA L. GASSAWAY, WIDOW, AND BETTY JANE GASSAWAY, ADOPTED DAUGHTER, DEPENDENTS OF HARRY C. GASSAWAY, DECEASED, v. GASSAWAY & OWEN, INCORPORATED, EMPLOYER, AND HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER.

(Filed 7 January, 1942.)

1. Master and Servant § 39e—

An executive officer, in his capacity as such, is not an employee within the meaning of the Workmen's Compensation Act, but is an employee within the coverage of the Act while engaged in manual labor or work of an ordinary employee when performed by him as a part of his duties.

2. Same—

The fact that an executive officer performs desultory, disconnected and infrequent acts of manual labor is insufficient to constitute him an employee within the coverage of the Compensation Act, nor is the mere fact of injury while performing such labor sufficient, but it must be made to appear that the performance of such labor was a part of his duties.

3. Evidence § 42b—

Testimony as to declarations made two days and one day before declarant made a trip on which he was fatally injured is incompetent to show declarant's purpose in making the trip, since the statements, not having been made at the time of and not being immediately connected with the actual departure, are not a part of the *res gestæ*.

4. Death § 7—

Declarant was fatally injured in an automobile accident. *Held:* Declarations made by him the night before and two days before undertaking the journey are not admissible as dying declarations. C. S., 160.

5. Master and Servant § 39e—

The fact that an executive officer is injured during his working hours raises no inference that at the time of the injury he was acting in the discharge of his duties as an employee rather than as an executive.

6. Same—

Ch. 150, Public Laws 1935, amending sec. 14 (b) of the Compensation Act, which provides that proof that the employer obtained insurance and filed claim should be *prima facie* evidence that the employer and employee have elected to be bound by the Act does not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive.

7. Master and Servant § 40e—

Evidence that an executive officer, during his working hours, was injured in an automobile accident while driving a car furnished him by the corporation, which he used for business and pleasure, without competent evidence that he was then engaged in duties pertaining to his em-

ployment, is insufficient to show that the injury was a natural and probable result of a risk incident to the employment and arose out of and in the course of his work as an employee.

8. Master and Servant § 39e—

The evidence tended to show that an executive officer of a company engaged in the contracting business was fatally injured in an automobile accident. Claimant's evidence raised surmises or inferences that at the time of the accident the officer was on his way to another city to negotiate a contract, to give estimates of costs, to fix prices, and to bind the company by contract. *Held:* The inferences are to the effect that the officer was engaged in his duties as an executive and not in the discharge of duties of an ordinary employee or workman.

APPEAL by defendants from *Clement, J.*, at October Term, 1941, of FORSYTH. Reversed.

Claim for compensation under the Workmen's Compensation Act.

The defendant Gassaway & Owen, Inc., is a close corporation. The deceased and Owen were the principal stockholders, a third party owning only a nominal amount. Gassaway was president and Owen was vice-president and secretary. Gassaway, claimant's intestate, "looked at prospective work, making estimates, figuring bids and doing some of the actual construction work supervising some of the actual construction work." The corporation provided an automobile for his use and one for the use of Owen.

On Saturday, 29 June, 1940, the deceased, upon being called by telephone by an employee, went to the office, talked with the employee, and at about 12:30 p.m. left on the company automobile furnished him, telling the employee that he would meet him back there at 5 o'clock. At about 1 p.m., he was involved in an automobile wreck on the Winston-Salem-High Point road about one-half mile beyond the intersection of the High Point and Kernersville road. He sustained injuries which resulted in death.

Claim for compensation was filed and an award was made. Upon appeal to the Superior Court the award was affirmed and the defendants appealed.

Ratcliff, Hudson & Ferrell for plaintiffs, appellees.
Sapp, Sapp & Atkinson for defendants, appellants.

BARNHILL, J. The Workmen's Compensation Act was designed and intended for the relief of injured workmen and employees earning a "weekly wage" and not for salaried executives. "The title and theory of the Act import the idea of compensation for workmen and their dependents." *Hodges v. Mortgage Co.*, 201 N. C., 701, 161 S. E., 220;

Roberts v. Coal Co., 210 N. C., 17, 185 S. E., 438. Executive officers of a corporation are not, as such, its employees in the ordinary sense of the word and as it is used in this act." *Hodges v. Mortgage Co., supra.* "When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not an employee within the meaning of the statutory definition." *Higgins v. Shirt Co.*, 149 Atl., 147; *Hodges v. Mortgage Co., supra.*

This is conceded by claimants. They contend, however, that the deceased at times performed the duties of an employee and that at the time of his death he was so engaged. Hence, under the terms of the Act and pertinent decisions of this Court his dependents are entitled to compensation.

We adhere to the dual capacity doctrine under which executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. *Hodges v. Mortgage Co., supra; Nissen v. Winston-Salem*, 206 N. C., 888, 175 S. E., 310. It is upon this doctrine the claimants rely.

To come within this doctrine it is not sufficient to show that an executive officer sustained injuries while performing manual or mechanical labor which was no part of his duties. *Hodges v. Mortgage Co., supra.* Nor are desultory, disconnected, infrequent acts of manual labor performed by an executive sufficient to classify him as a workman when so engaged. *Nissen v. Winston-Salem, supra.* The test is, was he at the time of his injury, as a part of his duties, engaged in performing ordinary, detail, mechanical or manual labor or other ordinary duties of a workman? *Nissen v. Winston-Salem, supra; Hodges v. Mortgage Co., supra; Hunter v. Auto Co.*, 204 N. C., 723, 169 S. E., 648.

Thus it is that the record presents two material questions for decision. (1) Is there sufficient competent evidence in the record to show that deceased received injuries resulting in death while engaged in the performance of any duty owing the defendant Gassaway & Owen either as an executive or as an employee, and if so, (2) was he then engaged as an employee rather than as an executive?

Claimants rely on statements made by deceased, prior to his alleged departure for High Point to obtain a contract, to show that at the time of his death he was engaged in his work as an employee of defendant Gassaway & Owen.

On the Friday night prior to the accident deceased stated to one Stewart, an employee of the Highway Commission, that "he had some work practically sewed up in High Point and he would beat it over and get it, and get it done so that he would be in position to bid on my work."

A foster daughter overheard this telephone conversation and testified that the deceased said he would meet him in High Point the next day, or that he would see him. Mrs. Gassaway, who also heard the conversation, testified that it was about highway work and that Gassaway said "you know I am hard up and need that job, and I need it bad and if I can keep this other firm off of the High Point job I think I can get it, I will try and see in High Point tomorrow," no definite date, time. One Melvin testified that on the Thursday before deceased talked with him and stated that he said "he was trying to get a job at High Point . . . and he was going to High Point some time that week though he didn't say when, and see about a job he felt sure he could get."

These statements were not made at the time of and were not immediately connected with the actual departure. They were no part of the *res gestæ,* and were inadmissible. *Plyler v. Charlotte Country Club,* 214 N. C., 453, 199 S. E., 622; *Molloy v. Transit Co.,* 335 Ill., 164, 166 N. E., 630; *Foster v. Shepherd,* 258 Ill., 164, 101 N. E., 411, 45 L. R. A. (N. S.), 167; *Laboratory Company v. Industrial Com.,* 113 A. L. R., 264, Anno. 113 A. L. R., 268. Nor were they admissible as dying declarations under C. S., 160.

To be admissible as a part of the *res gestæ* it must be made to appear that the statement was made at the time of the starting of the journey, as to the purpose or destination of the trip he is then about to make. It must be connected with the act of departure. Anno. 13 A. L. R., 273-275. When not so made they constitute no part of the *res gestæ* and are inadmissible. Anno. 113 A. L. R., 281.

The corporation furnished deceased an automobile which he used for business purposes in contacting prospective customers, figuring contracts and attempting to get work for the corporation. He kept the automobile at his home and also used it for pleasure.

This automobile was furnished deceased as president of the corporation. The accident was during his working hours as an executive. No inference that he was engaged as an employee rather than as an executive is permissible. As his work, as an employee, was only incidental to his employment as an executive the contrary inference is more logical. Furthermore, the cause of death—an automobile collision—is known. The burden was on plaintiff and *Robbins v. Hosiery Mills, ante,* 246, is not in point. That decision applies only when the employee suffers an injury resulting in death while about his master's business and claimant is unable to offer proof explaining the cause of such injury. It must appear further that the injury was a natural and probable result of a risk incident to the employment.

Ch. 150, Public Laws 1935, which amends sec. 14 (b) of the original Act, is quoted in the opinion of the Commission and relied upon by it as

tending to show *prima facie* that the claimant was an employee. It has no bearing on the question presented. That section merely facilitates proof that the employer and its employees are subject to the terms of the Workmen's Compensation Act. Proof that the employer obtained insurance and a claim was filed is, under the provisions of this section, *prima facie* evidence that the employer and the employee have elected to be bound by the Act.

It follows that claimants have failed to offer any competent evidence tending to show that the death of deceased arose out of and in the course of his work as an employee.

Even if we concede, however, that such death occurred at a time when deceased was acting for the corporation, still the award cannot be sustained. The corporation was engaged in highway and general construction work. The deceased was its president, its chief executive officer. The evidence gives rise to certain surmises. Treating these surmises as legitimate inferences, the president was on his way to High Point to negotiate a contract, to give estimates of costs, to fix prices and to bind the company by contract. In so doing he was the *alter ego,* the voice and the brains of the corporation. Manifestly such business does not lie within the field of the duties of an ordinary employee or workman. They pertain exclusively to the functions of an executive.

Jones v. Trust Co., 206 N. C., 214, 173 S. E., 595, is not in point. There Jones was acting under express orders of a superior. Here the deceased was the superior acting on his own initiative as the chief executive officer of the corporation.

The judgment below is

Reversed.

HUBERT HARRIS, BY HIS NEXT FRIEND, JOHN HARRIS, v. WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY ET AL.

(Filed 7 January, 1942.)

1. Negligence § 4f—

A railroad freight car standing on a commercial siding is not an attractive nuisance.

2. Same—Those in charge of freight car standing on commercial siding are not under duty to safeguard it to prevent injury to children playing thereon.

Plaintiff, a twelve-year-old boy, was injured while playing with other children on an open railroad car used for the transportation of steel when the heavy door or gate attached to the end of the car fell on him. Plaintiff alleged negligence in failing to have the car attended and in failing

to have the door or gate of the car laid flat upon the surface of the car, when defendants knew or should have known that children were accustomed to play thereon. *Held:* Defendants' demurrer was properly sustained, since defendants were not under duty to have the car attended or to keep the door flat upon the car as a protection to plaintiff and his playmates.

3. Same: Pleadings § 20—

In an action to recover for injuries sustained when a door or gate of an open railroad car fell upon plaintiff, allegation that defendants negligently left the door in an upright or vertical position without being fastened or supported as it was the duty of defendants to do, is but a conclusion of the pleader from the facts alleged, and is not admitted by demurrer.

SEAWELL, J., dissents.

APPEAL by plaintiff from *Olive, Special Judge,* at May Term, 1941, of FORSYTH.

Civil action to recover for an alleged negligent injury.

The complaint in substance alleges:

1. That the defendant railway company left standing on its sidetrack, situate on the property of the Salem Steel Company, "a certain empty and open railroad car used for the purpose of holding and transporting long pieces of steel; that said open car remained upon the said sidetrack of defendants, and near a well traveled path and children's playground, for a number of days without being watched, supervised, or attended by defendants or anyone for them, when defendants and each of them knew or should have known that children of tender and immature years were and would be attracted to said empty and open car for the purpose of climbing in and playing thereon, and that defendants, and each of them, knew that children did climb upon and swing to said car from a certain derrick belonging to defendants or one of them."

2. That on Sunday afternoon, 24 September, 1939, about 4:00 p.m., the plaintiff, a boy twelve years of age, together with a number of companions, "were attracted to said car, did climb upon and into same, as they were accustomed to do, . . . when a heavy steel door or gate attached to one end of said open and empty railroad car, which door or gate had been negligently left by defendants, their agents and employees, standing in an upright and vertical position without being fastened or supported as it was the duty of defendants and each of them to do, fell upon the person of the plaintiff," and injured him.

3. That defendants, and each of them, "were negligent in leaving and allowing to stand unattended upon the sidetracks, as hereinbefore described, the open car, when they knew, or should have known, that children of tender and immature years were attracted to said car or similar cars and were accustomed to playing thereon, and that defendants and

each of them were especially negligent in leaving or allowing their servants and/or employees to leave standing in an upright and vertical position without being supported or fastened the heavy steel door or gate, as hereinbefore described, when they knew or should have known that same would fall upon and seriously injure children. . . . That ordinarily the said heavy steel door, . . . was laid flat upon the surface of the railway car, . . . in order to avoid its falling and injuring persons in and around said railroad car," and that such negligence was the proximate cause of plaintiff's injury.

Wherefore, plaintiff prays, etc.

The defendants interposed demurrers on the ground that the complaint does not state facts sufficient to constitute a cause of action and fails to allege any breach of duty on the part of the defendants.

From order sustaining the demurrers, the plaintiff appeals, assigning errors.

Buford T. Henderson, E. M. Whitman, and J. F. Motsinger for plaintiff, appellant.

Craige & Craige for defendant Railway Company, appellee.

Ira Julian for defendant Steel Company, appellee.

STACY, C. J. The question for decision is whether an open and empty railroad car, standing unattended on a commercial sidetrack where children are accustomed to play, is such an attractive nuisance as to import liability for failure to safeguard it against injury to a twelve-year-old boy while playing thereon on a Sunday afternoon. In sustaining the demurrers, the trial court answered in the negative, and we approve.

The negligence alleged is, that the defendants left the car in question unattended, *i.e.*, "without being watched, supervised, or attended by defendants or anyone for them," when they knew or should have known that children were accustomed to play thereon. It could hardly be held for law that every empty freight car which is allowed to stand for several days on a sidetrack, in the vicinity where children are wont to play, should be attended by a watchman. This would be to place it in the category of a playground. The defendants are not so engaged.

The allegation that the defendants negligently left the door or gate of the car in an upright and vertical position without being fastened or supported as it was the duty of the defendants to do, is but a conclusion of the pleader on the facts alleged, and is not admitted by the demurrers. *Leonard v. Maxwell, Comr.*, 216 N. C., 89, 3 S. E. (2d), 316; *Andrews v. R. R.*, 200 N. C., 483, 157 S. E., 431; *Ballinger v. Thomas*, 195 N. C., 517, 142 S. E., 761. The fact that the door or gate was ordinarily laid flat upon the surface of the car, as plaintiff further alleges, did not

impose upon the defendants the duty to keep it so as a protection to the plaintiff and his playmates.

The authorities are in support of the judgment below. *Rogers v. Alton R. Co.,* 288 Ill. App., 462, 6 N. E. (2d), 244; *L. & N. Ry. Co. v. Ray,* 124 Tenn., 16, 134 S. W., 858; *Colby v. Chicago Junct. Ry. Co.,* 216 Ill. App., 315, cited in 36 A. L. R., 256; *Smith v. Hines,* 212 Ky., 30, 278 S. W., 142, 45 A. L. R., 980.

The pronouncements in the last cited case follow:

1. A standing freight car is not a dangerous piece of machinery such as to bring it within the attractive nuisance class.

2. A railroad company is not liable for injury to a child which falls from a railroad car standing in its yard in a populous portion of a city, because there are handholds on the car which permit children to climb to the top of it, and the company, with knowledge of the custom of children to play on the cars, takes no precaution to safeguard them or warn them of the danger of so doing.

The case of *Christiansen v. Los Angeles & S. L. R. Co.,* 77 Utah, 85, 291 Pac., 926, cited and relied upon by plaintiff, is not at variance with the authorities above cited. There, a freight car was left on a grade without application of hand brakes, or blocks placed under the wheels, and it ran away down the grade and injured the plaintiff who was trying to rescue his child from the moving car. Quite a different fact situation from the one here presented.

In *Twist v. Winona & St. P. R. Co.,* 39 Minn., 164, 12 Am. St. Rep., 626, 39 N. W., 402, *Mitchell, J.,* speaking to the subject, said: "To the irrepressible spirit of curiosity and intermeddling of the average boy, there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves."

The demurrers were properly sustained.

Affirmed.

SEAWELL, J., dissents.

THOMAS G. SIBBITT v. R. & W. TRANSIT COMPANY.

(Filed 7 January, 1942.)

Automobiles §§ 14, 18c—Evidence held to disclose contributory negligence as matter of law in colliding with rear of truck standing upon highway.

Plaintiff's evidence tended to show that he was driving at night along a highway covered with smoke from fires along its side and that he collided with the rear of an oil truck which was headed in the same direction and which had been stopped on the highway without rear lights. *Held:* Even conceding negligence on the part of defendant, Michie's N. C. Code, 2621 (278) (d), plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, either in driving at a speed in excess of that at which he could stop within the distance to which his lights would disclose the existence of obstructions, or, if he could have seen the oil truck in time to have avoided a collision, in failing to do so.

STACY, C. J., dissenting.

DEVIN, J., concurs in dissent.

APPEAL by plaintiff from *Harris, J.*, at October Term, 1941, of ROBESON.

This was an action by the plaintiff to recover damages for personal injury alleged to have been proximately caused by the negligence of the defendant. The defendant denied that it was negligent, and also entered the alternative plea of contributory negligence in bar of recovery. At the close of all the evidence the court sustained the motion of the defendant for a judgment as in case of nonsuit (C. S., 567), and from judgment accordant with such ruling the plaintiff appealed, assigning error.

John S. Butler and McLean & Stacy for plaintiff, appellant.
Oates, Quillin & MacRae for defendant, appellee.

SCHENCK, J. Viewing the evidence in the light most favorable to the plaintiff, it tends to show that on the night of 23 February, 1941, about 7:45 o'clock, the plaintiff was driving an automobile on State Highway No. 74, from Wilmington to Whiteville, and that at the same time the defendant's oil truck was being driven in the same direction on the same highway; that as the plaintiff was proceeding on his journey, about half way between Wananish and Lake Waccamaw, and driving about 50 or 55 miles per hour, he saw some smoke, blankets of smoke across the highway coming from fires on the side thereof, and put on his brakes and came to a speed of approximately 30 or 40 miles per hour, then proceeded about 50 or 60 yards in the smoke, when he saw a light flare

on his left side of the highway and realized that the "smoke was a solid wall," and at the same time he saw the light he likewise saw the "rear of an oil tanker," and he immediately applied his brakes, but his automobile collided with the rear of the tanker, causing serious personal injury to him; that the oil tanker was stopped on the highway and there were no lights burning on the rear thereof at the time of the collision; that when the plaintiff saw the light flare on his left side of the highway he got the impression that it was a light from another car approaching from the opposite direction, but he afterwards learned that the light he saw flare was a spotlight on the oil tanker.

We are of the opinion, and so hold, that the judgment as in case of nonsuit was properly entered.

Conceding that the defendant was negligent in stopping its oil tanker on the highway with no rear lights, Michie's N. C. Code, 2621 (278) (d), still we think the evidence discloses contributory negligence on the part of the plaintiff which bars recovery.

In its last analysis this case poses the question of the duty of an automobile driver, operating his automobile in the nighttime with his vision obscured by smoke in the highway from fires on the side thereof. If this smoke rendered it impossible for the plaintiff to see the defendant's oil tanker in time to stop his automobile at the rate of speed at which he was operating it soon enough to avoid the collision, there was a failure to exercise due care on the part of the plaintiff in operating his automobile at such a rate of speed. If the plaintiff saw, or by the exercise of due care could have seen, the oil tanker in time to stop his automobile soon enough to avoid the collision and failed to do so, there was likewise a failure to exercise due care on his part. The plaintiff, according to his own testimony, was guilty of contributory negligence either in failing to drive within the radius of his lights, that is, a speed at which he could stop within the distance to which his lights would disclose the existence of obstructions, or in failing to see the oil tanker in time to avoid the collision. It makes no difference which horn of the dilemma the plaintiff takes, his cause of action is defeated by his own negligence. *Lee v. R. R.*, 212 N. C., 340, 193 S. E., 395; *Weston v. R. R.*, 194 N. C., 210, 139 S. E., 237; *Hughes v. Luther*, 189 N. C., 841, 128 S. E., 145.

"It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions. . . . If the lights would disclose the existence of obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the

machine would disclose objects farther away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen." Huddy on Automobiles, 7 Ed., 1924, sec. 396.

The judgment of the Superior Court is

Affirmed.

STACY, C. J., dissenting: The evidence of contributory negligence on the instant record is not so clear as to bar a recovery as a matter of law. The action arises out of a smoky situation and the facts are of a similar hue. This makes it a matter for the twelve.

There is no difference in principle between this case and *Meacham v. R. R.*, 213 N. C., 609, 197 S. E., 189, where the plaintiff's vision was obscured by fog or mist.

The issue of contributory negligence is ordinarily for the jury, *Lincoln v. R. R.*, 207 N. C., 787, 178 S. E., 601, and it is only when the plaintiff "proves himself out of court," *Elder v. R. R.*, 194 N. C., 617, 140 S. E., 298, that it becomes exclusively a question of law. *Godwin v. R. R., ante,* 281.

When did the plaintiff lose the right to assume that others would observe the law of the road? *Sebastian v. Motor Lines,* 213 N. C., 770, 197 S. E., 539. This is the crux of the case.

My vote is for a reversal of the judgment of nonsuit.

DEVIN, J., concurs in dissent.

NANCY PACK, ADMINISTRATRIX OF WALTER PACK, v. T. C. AUMAN AND KELLY RUSSELL.

(Filed 7 January, 1942.)

1. Automobiles §§ 7, 18a—Evidence held insufficient to show that pedestrian was walking on left of highway when struck by projection from side of truck.

Plaintiff's evidence tended to show that plaintiff's intestate was found lying in a ditch about three and one-half feet from the paved portion of the highway with a fatal wound in his abdomen which could have been caused by a heavy blow from a board. The evidence further tended to show that the driver of a truck along the highway thought he had struck something, reported the matter to the chief of police, that they went back to the scene of the accident and found a piece of broken board there, about the center of the highway, which apparently matched and fitted

into one of the boards lying loose on the floor of the truck. *Held:* The evidence leaves in mere speculation and conjecture as to what part of the truck struck intestate, if it be conceded that he was struck by the truck, and where intestate was at the time of the impact and how long he had been there and whether he had complied with Michie's N. C. Code, 2621 (320) (d), and therefore the evidence fails to sustain plaintiff's allegation that his intestate was walking along the edge of the highway on his left side at the place provided by law and was struck by a board projecting from the truck, and defendants' motion to nonsuit was properly allowed for failure of plaintiff to establish negligence proximately causing the fatal injury.

2. Negligence § 17a—

Neither negligence nor proximate cause is presumed from the mere fact of injury.

APPEAL by plaintiff from *Armstrong, J.*, at February Term, 1941, of MOORE. Affirmed.

McKinnon & Seawell for plaintiff, appellant.
S. R. Hoyle for defendants, appellees.

SCHENCK, J. This is an action to recover damage for the wrongful death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendants in the operation of a motor truck upon the State Highway leading from Aberdeen to Raeford. It is alleged that the plaintiff's intestate was walking on his left side of the highway in the direction of Raeford and was meeting the truck of the defendants being driven on its right side of the highway in the direction of Aberdeen, and "7. That as said truck was about to pass Walter Pack, plaintiff's intestate, a board, plank, scantling or part of the truck which was extending from the said truck, struck the said Walter Pack, knocked him down and inflicted a serious injury from which injury Walter Pack died within twenty-four hours thereafter. 8. That the injury to plaintiff's intestate and the death which resulted therefrom, were proximately and solely caused by the negligence of defendants in that defendants unlawfully, carelessly and negligently operated or caused to be operated the said truck in such a manner as to cause, allow, or permit a board, plank, scantling or some part of the truck to extend out from the truck in such a manner as to strike plaintiff's intestate who was at the time walking along the edge of the highway at the place provided by law for him to walk and who was acting in a careful and prudent manner. 9. That the injury to plaintiff's intestate and the death resulting therefrom were solely and proximately caused by the negligence of the defendants in that they operated or caused or allowed to be operated the said truck in a careless and negligent manner so that the truck or some part thereof

or an object extending or protruding therefrom struck, injured and killed plaintiff's intestate." These constitute all of the allegations of negligence made by the plaintiff, there being none of the failure to keep a proper lookout or to give proper warning signal or of any defect in the mechanism of the truck.

The evidence, when construed most favorably to the plaintiff, tends to show that the plaintiff's intestate was found about 7 o'clock p.m., on 8 November, 1939, fatally wounded, in a ditch about 3½ feet off the paved portion of the highway, his head being probably two feet from the pavement; that he was taken to the hospital where he died the following day, without making, so far as the record discloses, any statement; that the driver of the truck, the defendant Russell, drove on about two blocks into Aberdeen and reported to Chief of Police Beck that "he had hit somebody up on the highway"; that Beck went with Russell immediately to the scene of the accident and found a piece of board there, about the center of the highway, it was broken at an angle, with the short side 2½ feet and the long side 3½ feet in length, it was a twelve-inch board; that Beck compared the piece of board found on the highway to a piece of board found on the truck and the two pieces apparently matched, fit together; that Russell said that "he never did see anybody but he thought he felt the truck hit something"; that there were at least one or more other pieces of lumber on the truck and the truck had been used to haul gravel and these pieces of lumber were used to set up against the standards to hold the gravel; that the truck was empty and there was nothing to keep the lumber from bouncing about, it not being tied or nailed down to the flat floor of the truck; that there were three standards on each side of the truck; that the highway in both directions from the scene of the accident was straight and with an unobstructed view for many yards; the deceased when taken to the hospital had a very severe bruise and wound on the lower part of his abdomen on his right side, and a rent in his abdominal wall about three inches long and in this opening was a loop of the bowels which had been torn from its attachment, this wound caused his death, and the wound was caused by an external injury, "a rather heavy blow" from "something with an edge on it . . . It could have been caused by a flat board."

It will be noted that no one saw, or at least no one testified as to, the impact of the defendants' truck with the plaintiff's intestate. That no one saw or testified that the intestate was "walking along the edge of the highway at the place provided by law for him to walk." Where on the highway he was walking, if he were walking on the highway, is left entirely to conjecture and surmise, whether on the hard surface of the road or on the shoulder thereof; what part of the truck struck him, if

he were struck by the truck, is likewise left to conjecture and surmise; no one saw, or testified, that the board, plank, scantling or some part of the truck extended out from the truck in such a manner as to strike the intestate.

If it be conceded that the plaintiff's intestate was injured and killed upon the highway by being struck by the defendants' truck, or by a board or piece of lumber on said truck, in the absence of any evidence of where on the highway the intestate was at the time of being stricken, or of when he got on the highway, or of how long he had been on the highway before being stricken, the plaintiff's case must fail. The mere fact that he was injured and killed does not constitute evidence that his injury and death were proximately caused by the negligence of the defendants. *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661, and cases there cited.

The conclusion that the intestate was walking on his left side of the highway and failed to yield the right of way to the defendants' truck meeting him on its right side of the highway, as he was required to do (Michie's N. C. Code, 2621 [320] [d]), is as logical from the evidence adduced, as the conclusion that part of the truck or a board thereon extended from the truck and struck the intestate while on the shoulder of the highway. Either conclusion is merely a conjecture and surmise, one as plausible and probable as the other, but neither is supported by the evidence.

Changing the word "alley" to that of "highway," the language of *Adams, J.,* in *Rountree v. Fountain,* 203 N. C., 381, 166 S. E., 329, expresses accurately the law applicable to this case. He writes: "Had he (the plaintiff's intestate) 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. *Henry v. R. R., ante,* 277; *Austin v. R. R.,* 197 N. C., 319." See, also, *Mills v. Moore, supra.*

Entertaining the view we have expressed upon the evidence, it becomes supererogatory to discuss the phase of the case relating to an alleged release of the defendants by the plaintiff.

The judgment of the Superior Court is

Affirmed.

JARROT K. PARRISH v. S. H. HEWITT.

(Filed 7 January, 1942.)

1. Forgery § 4—

Since forgery is the fraudulent making or altering of an instrument to the prejudice of another man's rights, a warrant charging that the payee of a check endorsed same and received the proceeds does not charge the crime of forgery, notwithstanding allegations that the endorsement was felonious and unlawful and that the payee failed to account to the prosecuting witness.

2. Malicious Prosecution § 2—

A warrant charging that the payee of a check unlawfully, willfully, and feloniously endorsed same and received the proceeds without the knowledge of the prosecuting witness and without accounting to him, does not charge any crime known to the law in this State, and therefore cannot be made the basis of an action for malicious prosecution, since malicious prosecution must be founded upon legal process maintained maliciously and without probable cause.

3. Same—

Plaintiff alleged that he was held to the Superior Court and imprisoned upon a warrant issued by a justice of the peace, and that the bill of indictment based on the charge in the warrant was returned not a true bill. *Held:* The warrant failing to charge a crime, plaintiff cannot contend that the bill of indictment will support his action for malicious prosecution, since it was not alleged, and could not have been alleged, that plaintiff was imprisoned by virtue of the bill of indictment which was returned not a true bill.

4. False Imprisonment § 1—

False imprisonment is the deprivation of one's liberty without legal process.

APPEAL by plaintiff from *Hamilton, Special Judge,* at April Term, 1941, of BLADEN.

This was an action for malicious prosecution and false imprisonment. The court sustained a demurrer *ore tenus* to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action in so far as malicious prosecution was alleged or attempted to be alleged, but allowed the case to proceed upon the allegations of false imprisonment and at the conclusion of the plaintiff's evidence sustained the defendant's motion for a judgment as in case of nonsuit.

The judgment of involuntary nonsuit was evidently entered upon the theory that the action was barred by the statute of limitation, since the

action was commenced on 8 April, 1940, and both the allegations and evidence were to the effect that the imprisonment of the plaintiff occurred on 3 January, 1939, for an act of the plaintiff which was alleged to have taken place on 29 September, 1938, and C. S., 443 (3), provides that an action for false imprisonment can only be commenced within one year. No exception is preserved to the action of the court in allowing the motion for involuntary nonsuit on the alleged cause of action for false imprisonment, and the appellant states in his brief that the "plaintiff wishes to prosecute this appeal only on the proposition that the complaint stated a cause of action for malicious prosecution and that his Honor erred in sustaining a demurrer to said complaint."

McKinnon & Seawell for plaintiff, appellant.
S. B. Frink and Robert J. Hester for defendant, appellee.

SCHENCK, J. The sole question posed by this appeal is: Does the complaint state facts sufficient to constitute a cause of action for malicious prosecution?

The pertinent allegations of the complaint are "(5). That on or about the 29th day of November, 1938, the defendant swore out before L. H. Phelps, a Justice of the Peace in Brunswick County, a warrant, charging this plaintiff as follows: 'that at and in the said County of Brunswick, Lockwood Folly Township, on or about the 29th day of September, 1938, Jarrot K. Parrish, did unlawfully, willfully and feloniously endorse a check made to him without his knowledge or consent and receive the money for said check and failed to account to him for the funds received for the check, contrary to the form of the statute and against the peace and dignity of the State'"; that thereupon the defendant caused said warrant to be delivered to him, who in turn caused it to be delivered to the sheriff of Bladen County, and the plaintiff was brought to trial before the justice of the peace and bound to the Superior Court and imprisoned thereupon; that subsequently a bill of indictment based upon said warrant was returned by the grand jury "not a true bill"; and the plaintiff was released.

The warrant alleged to have been procured for the arrest and imprisonment of the plaintiff by the defendant falls far short of charging forgery which the appellant suggests in his brief it charged or sought to charge. Forgery in criminal law is "The falsely making or materially altering, with intent to defraud, any writing which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability." 2 Bish. Crim. Law, par. 523, Black's Law Dictionary (2d Ed.). "Blackstone defines it as 'the fraudulent making or alteration of a writing to the prejudice of another man's right.' (4 Bl., 247.)" *S. v. Lamb,* 198

N. C., 423, 152 S. E., 154. The warrant and affidavit must be construed together, and an inspection thereof will disclose that no crime known to the law of this State was charged in the affidavit, and therefore the warrant issued by the justice of the peace and upon which the plaintiff was imprisoned was void. *Young v. Hardwood Co.,* 200 N. C., 310, 156 S. E., 501.

Since the warrant upon which the plaintiff was imprisoned was void, an action for malicious prosecution will not lie, as "malicious prosecution is for a prosecution founded upon legal process, but maintained maliciously and without probable cause." *Rhodes v. Collins,* 198 N. C., 23, 150 S. E., 492. An action for malicious prosecution "presupposes valid process." *Allen v. Greenlee,* 13 N. C., 370.

It may be conceded that there are allegations in the complaint of malice and of absence of probable cause, but there is no allegation of a valid process. The process alleged is invalid and void.

The argument advanced in the appellant's brief that "in the instant case the cause of action for malicious prosecution does not depend alone on the warrant, but a cause of action is alleged based on the bill of indictment in the Superior Court" is untenable, for the reason that it is alleged that the plaintiff was imprisoned and held to the Superior Court upon the warrant, and that "the Solicitor of the 8th Judicial District caused a bill to be presented to the Grand Jury based on the charge and warrant made and sworn out by the defendant and the Grand Jury after its investigation promptly returned 'not a true bill.'" Even if it be conceded that there are allegations that the defendant maliciously and without probable cause procured the bill of indictment to be presented to the grand jury, it is not alleged, and it is obvious that it could not be alleged, that the plaintiff was, or could have been, imprisoned by virtue of a bill of indictment which was returned "not a true bill."

It is unfortunate for the plaintiff that he deferred the commencement of his alleged cause of action for false imprisonment until it was barred by the lapse of time, since "false imprisonment is based upon deprivation of one's liberty without legal process." *Rhodes v. Collins, supra.*

We conclude that his Honor's judgment sustaining the demurrer *ore tenus* was correct, and it is therefore

Affirmed.

MRS. A. B. BUTLER v. R. B. GANTT ET AL.

(Filed 7 January, 1942.)

Trial § 43—Where verdict is not inconsistent and is sufficient to support judgment, the trial court may not require jury to revise its verdict.

In this action for negligent injury the jury answered the issues of negligence and contributory negligence in the affirmative and awarded damages. There was no suggestion from the jury of any misunderstanding on its part, but the court gave additional instructions and ordered the jury to retire and revise its verdict as it saw fit. The jury revised its verdict by answering the issue of contributory negligence in the negative. *Held:* There was nothing essentially inconsistent with the verdict as originally rendered (the finding of contributory negligence eliminating the award of damages as a matter of law), and the court was without power to require the jury to revise it, and a new trial is awarded upon authority of *Allen v. Yarborough*, 201 N. C., 568.

APPEAL by defendants from *Pless, J.*, at June Term, 1941, of GUILFORD.

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

On 15 July, 1940, the plaintiff descended the stairway of the Arcade Building in the city of High Point, which was then owned and maintained by the defendants, and was seriously injured when she stepped upon some "slick and slippery substance" on the tile floor at the entrance of the stairway and fell. In August thereafter, the plaintiff brought suit to recover damages alleged to have been caused by the negligence of the defendants. At the trial the jury first returned the following verdict:

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

"2. Did the plaintiff, by her own negligence contribute to her injury? Answer: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$4,000.00.' "

When the jury returned to the jury box, and the issues were handed to the court by an officer, the court instructed the jury as follows:

"The Court: Gentlemen, you have answered the first issue Yes and the second issue Yes, and then assessed damages. The Court instructed you if you should find by the greater weight of the evidence, the burden being on the defendants as to that particular issue, that the plaintiff, Mrs. Butler, was guilty of contributory negligence as I have defined that to you, that is that she was guilty of negligence and that that negligence was the proximate cause or one of the proximate causes of her injury

which combined and concurred and co-operated with the negligence of the defendants to produce the injury, that she could not recover. Upon that finding you cannot award damages. I will let you gentlemen retire and revise your verdict as you may see fit."

To the foregoing instruction and to the action of the court in instructing the jury to revise its verdict, the defendants in apt time objected and excepted.

The jury retired and returned a "second verdict," with the first and third issues unchanged and the second issue answered "No." Exception by defendants.

From judgment on the "second verdict," the defendants appeal, assigning errors.

Gold, McAnally & Gold and Herbert S. Falk for plaintiff, appellee.
M. W. Nash and Frazier & Frazier for defendants, appellants.

STACY, C. J. There appears to be no material difference in what transpired in the instant case relative to the verdict and what appeared in the case of *Allen v. Yarborough,* 201 N. C., 568, 160 S. E., 833, where a new trial was ordered. Here, the jury was instructed to retire and "revise" its verdict. This revised verdict is mentioned three times in the transcript as the "second verdict."

There was nothing essentially inconsistent in the "first verdict." *Crane v. Carswell,* 203 N. C., 555, 166 S. E., 746. *Cf. Wood v. Jones,* 198 N. C., 356, 151 S. E., 732. And no suggestion came from the jury of any misunderstanding on its part. The decision in *Allen v. Yarborough, supra,* is controlling.

New trial.

STATE v. ALEX D. WILLIS
and
STATE v. M. J. HORNE.

(Filed 7 January, 1942.)

Prostitution § 3—

Defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his taxi with motor running, and carrying soldiers. The evidence of the character of the scene and the other circumstantial evidence *is held* sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution, and supports a verdict of guilty. C. S., 4358 (4).

STATE *v.* WILLIS and STATE *v.* HORNE.

APPEAL by defendants from *Parker, J.*, at September Term, 1941, of ROBESON.

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

Ellis & Nance for defendants, appellants.

SEAWELL, J. The defendants, whose cases were consolidated for trial, were convicted on charges that they "did take, transport and agree to take and transport persons to places or to other persons, with knowledge or reasonable cause to know the purpose of such taking or transporting was prostitution or assignation." C. S., 4358 (4).

Witness McQueen, crossing a blackjack thicket on his lands, came upon a recently cleared area of one-fourth an acre or less, on the edge of which had been pitched a large army tent. A car containing five or six women was seen parked in the bushes. McQueen quickly left to report his findings to officers, with whom he returned that evening for further investigation.

The officers testified that they traveled over two miles from Fayetteville, following a "dim dirt road," and turned into an old road leading into the thicket. After parking their car, they walked in the direction from which came the sound of music and the voices and laughter of men and women. As they approached the clearing, a taxi "cranked up" and rushed away; two girls ran out of the woods, jumped into a car in which other girls were waiting, and sped off down the old road. Here, the defendants were found, each under the wheel of his taxi, motor running, and carrying soldiers.

In the woods next to the clearing were found several mattresses and blankets. Other details of the evidence showing the character of the place are too indecent to print. It is sufficient to say that the evidence showed it to be a brothel or place of assignation and prostitution of the vilest sort. There was no evidence that the place afforded any other attraction for the visitation of men, but its popularity was attested by the many footprints of both men and women.

That the place was one where prostitution was carried on is freely admitted by counsel for defendants; he claims, however, that the foregoing evidence raises but a suspicion against the defendants as to the violation of the statute. The State contends that a legitimate inference may be drawn that the defendants knew their destination and brought their passengers to this place for the purpose of engaging in prostitution.

We are unable to say that no inferences of the guilt of the defendants may be drawn from the facts presented in evidence. *S. v. Mann,* 219 N. C., 212, 13 S. E. (2d), 247.

No error.

MARGARET RHEW TILLMAN ET AL. v. LOU BETTIE O'BRIANT ET AL.

(Filed 7 January, 1942.)

Wills § 34c—

An item of a will directing that certain realty be sold "and the proceeds divided equally between" the children of a deceased daughter (seven in number), the only daughter of another deceased daughter by name, and another, who was treated by testator as his foster son, *is held* to require the division of the proceeds among the beneficiaries *per capita* and not *per stirpes* under the general rule that an equal division among designated legatees means a *per capita* distribution, unless a contrary intent appear.

APPEAL by defendants from *Grady, Emergency Judge,* at October Term, 1941, of PERSON.

Civil action for construction of will.

From judgment for plaintiffs, the defendants appeal, assigning error.

Graham & Eskridge for plaintiffs, appellees.

Burns & Burns for defendants, Lou Bettie O'Briant and Hubert O'Briant, appellants.

STACY, C. J. On the hearing, the question in difference was made to depend on the construction of the following clause in the will of W. D. Yarboro, late of Person County, this State:

"Item 3. I direct that my 'Will Clayton Place' . . . shall be sold and the proceeds divided equally between Maggie Rhew's children and Lou Bettie O'Briant and Dewey Yarboro."

The case states that Maggie Rhew was a deceased daughter of the testator; the plaintiffs in interest are her seven children. Lou Bettie O'Briant is the only daughter of another deceased daughter of the testator; and Dewey Yarboro was treated as his foster son. Dewey Yarboro has assigned all of his interest to Lou Bettie O'Briant.

The "Will Clayton Place" has been sold, and the question for decision is whether the proceeds arising therefrom shall be divided *per capita* or *per stirpes* under Item 3 above. The trial court answered *per capita,* and we approve.

The pertinent authorities are assembled in *Burton v. Cahill,* 192 N. C., 505, 135 S. E., 332, and *Ex parte Brogden,* 180 N. C., 157, 104 S. E., 177, and we are content to rest our present decision on what was said in these cases.

The general rule is, that an equal division among designated legatees means a *per capita* distribution, unless a contrary intent appear. *Ex*

parte Brogden, supra; Waller v. Forsythe, 62 N. C., 353; *Harris v. Philpot,* 40 N. C., 324; and *Bryant v. Scott,* 21 N. C., 155.

The bequest here is to Maggie Rhew's seven children and two others, the words "Maggie Rhew's children" being descriptive of the first seven of the nine named legatees. *Ex parte Brogden, supra.* This is the meaning usually ascribed to such language, and as said by *Clark, C. J.,* in *Leggett v. Simpson,* 176 N. C., 3, 96 S. E., 638: "There is nothing in the will which impairs the usual rule of construction that where a devise is to a class collectively, and not by name to various devisees in the class, all the members of the class take *per capita* and not *per stirpes.*"

Affirmed.

NEALY RUSS v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 January, 1942.)

1. **Courts § 13—**

In an action to recover for negligent injury inflicted in another state the rights and duties of the parties are governed by the *lex loci,* and matters of procedure by the *lex fori.*

2. **Railroads § 10—Evidence held to show contributory negligence as matter of law on part of plaintiff struck by train while sitting on crosstie.**

Plaintiff's evidence tended to show that he sat on the end of a crosstie and fell asleep with his elbows on his knees and his head bent forward, and that he was struck and injured by defendants' train. The accident occurred in the State of Virginia. *Held:* There being nothing to indicate plaintiff's obliviousness or that he would not heed the warning of the train's approach, the engineer had the right to assume up to the moment of impact that plaintiff would use his faculties for his own protection and avoid injury, thus excluding the applicability of the doctrine of last clear chance, and establishing contributory negligence barring recovery as a matter of law, and nonsuit was properly granted, contributory negligence and the doctrine of last clear chance both being parts of the Virginia law.

APPEAL by plaintiff from *Hamilton, Special Judge,* at April Term, 1941, of BLADEN.

Civil action to recover for an alleged negligent injury.

The plaintiff is a resident of Bladen County and was employed at a logging camp near Suffolk, Va. On Saturday evening, 21 September, 1940, he went to Suffolk with another fellow, and after staying out all night they started back to camp on Sunday morning, walking down the railroad track of the defendant. Plaintiff testifies: "He (the other fellow) stopped by the side of the road a minute, and I stopped and sat

down on the end of a crosstie to wait (for him) and fell asleep." The plaintiff was facing away from the track, "with elbows on knees and head bent forward." Continuing, he says: "It was around nine-thirty or ten o'clock Sunday morning, a perfectly clear day. . . . The track was straight as far as I could see. I was sitting on the end of the track and the train was coming to my right. (Cross-examination.) I was about a mile and a half or two miles south of Suffolk, out in the country, when the accident happened. . . . I was sitting on the end of one of the crossties. . . . The next thing I knew I was in a hospital in Suffolk, where I stayed 17 days. . . . There was a good foot path along the side of the track. I had been along it before."

Elijah Rhodes testified that he was a passenger in the colored coach of the train that struck the plaintiff; that the whistle blew two or three times, "two or three minutes," prior to the time the train applied its brakes. "About the time the train was blowing I felt the train give a quick stop like it had thrown the brakes on. Then the train stopped quick. . . . The man was lying about the second car away from the engine on the right of way."

There was other evidence tending to show the extent of plaintiff's injury and his good character.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

H. H. Clark and Edward B. Clark for plaintiff, appellant.
Thos. W. Davis and McLean & Stacy for defendant, appellee.

STACY, C. J. The rights and duties of the parties are to be measured by the law of Virginia. *Harrison v. R. R.*, 168 N. C., 382, 84 S. E., 519. Matters of procedure are controlled by the law of the forum. *Wise v. Hollowell*, 205 N. C., 286, 171 S. E., 82. In other words, the *lex loci* furnishes the standard of conduct; the *lex fori* the method and manner of trial. *Clodfelter v. Wells*, 212 N. C., 823, 195 S. E., 11. The one is substantive; the other procedural. "The actionable quality of the defendant's conduct in inflicting injury upon the plaintiff must be determined by the law of the place where the injury was done. . . . The law of the forum governs as to matters affecting the remedy," etc. *Howard v. Howard*, 200 N. C., 574, 158 S. E., 101.

Contributory negligence and the doctrine of the "last clear chance" are both parts of the Virginia law. *Hawkins v. Brickhouse*, 172 Va., 1; *Barnes v. Ashworth*, 154 Va., 218.

The plaintiff's own evidence, under the law of the forum, makes out a clear case of contributory negligence, *Lemings v. R. R.*, 211 N. C., 499, 191 S. E., 39, excludes the applicability of the "last clear chance,"

Reep v. R. R., 210 N. C., 285, 186 S. E., 318, and bars a recovery. It shows that the plaintiff was sitting on the end of a crosstie with his elbows on his knees and his head bent forward. Even if the engineer could or should have seen the plaintiff, there was nothing to indicate his obliviousness or that he would not heed the warning of the train's approach. *Redmon v. R. R.*, 195 N. C., 764, 143 S. E., 829. No doubt the engineer did see the plaintiff and assumed, as he had the right to do up to the very moment of the impact, that he would use his faculties for his own protection and leave the track in time to avoid injury. *Davis v. R. R.*, 187 N. C., 147, 120 S. E., 827.

It is contended that in Virginia, unlike the requirement here, the engineer was under no duty to keep a lookout for the plaintiff in the circumstances described by the record. *N. & W. Ry. v. Stegall's Admrs.*, 105 Va., 538. However this may be, in any event the judgment of nonsuit was correctly entered.

Affirmed.

EMMETT FRANKLIN CULBRETH ET AL. v. W. C. CAISON ET AL.

(Filed 7 January, 1942.)

1. **Wills § 34a—Will held to devise only life estate to devisees with remainder to their children.**

After devising certain specific property, by a second item testator devised the remainder of his real estate (which included the *locus in quo*) to his children, and by a third item devised the specific property in controversy to his children for life with remainder to their children, with provision that if any child should die without issue, his share should go to his living brothers and sisters or the living children of any deceased brother or sister, *per stirpes*. *Held:* Although the second item, standing alone, is sufficient to devise the fee to testator's children, an intent to convey an estate of less dignity as to the property specifically set out in item three appears from the language of such item, C. S., 4162, and therefore as to the lands described in item three the children of testator took only a life estate, and, upon actual partition of the lands among testator's children, a deed of trust executed by one of them on the lands allotted to him could convey only a life estate in such property as security and, after such devisee's death, his children are entitled to the lands as against the purchasers by *mesne* conveyances from the purchaser at the foreclosure of the instrument executed by the life tenant.

2. **Wills § 33f—Held: Power of disposition was restricted to conveyance to other children of testator and limited to conveyance of life estate.**

Testator devised the *locus in quo* to his children for life with remainder to their children with power of disposition to each child to convey his share to any one or more of testator's children in fee simple, but

stipulated that a child purchasing the share of another should hold the land purchased for life with remainder in fee to his children. *Held:* The power of disposition restricted to conveyance to other children of testator, standing alone, would enable each child to convey to the other children in fee, but the restricted power of disposition, which was annexed to a life estate, was further limited to the conveyance of a life estate with remainder to the grantee's children, and therefore a child purchasing the share of another child took by such conveyance only a life estate.

3. Wills § 31—

The cardinal consideration in the interpretation of wills is to ascertain and give effect to the intent of testator.

APPEAL by defendants from *Hamilton, Special Judge,* at June Term, 1941, of SAMPSON.

Civil action in ejectment.

The case was heard on facts agreed; a jury trial was waived, and the matters at issue were submitted to the court for final determination and adjudication.

The title and right to possession of two tracts of land—a 49-acre tract and a 50-acre tract (mentioned in the record as "the 100-acre tract")—are at issue. The plaintiffs claim title under the will of their grandfather, Thomas Neill Culbreth, who died in 1903. The plaintiffs are the children of L. L. Culbreth, who died intestate in 1937.

The defendants claim under foreclosure in 1932 of indemnity deed of trust given by L. L. Culbreth and wife to M. T. Britt, Trustee, and subsequent *mesne* conveyances.

From judgment for the plaintiffs, the defendants appeal, assigning error.

Howard H. Hubbard for plaintiffs, appellees.
W. H. Fisher and J. Abner Barker for defendants, appellants.

STACY, C. J. On the hearing, the case was made to turn on the construction of the following items in the will of Thomas Neill Culbreth, late of Sampson County, this State:

"Item 1. I give and devise to my beloved children by my first wife to wit: Amelia W. Underwood, L. L. Culbreth, Anna A. Culbreth, Rosa B. Martin, Mary Ellen Owen, Willie E. Culbreth, my one half interest in the home tract commonly called the Owenville tract, upon which I now reside containing about 300 acres. I give this tract to these children exclusively because it was originally purchased with the money of their mother.

"Item 2. I give and devise all the remainder of my real estate wherever located to all my children share and share alike. My said children namely by my first wife are set out in Item one, and James Benton

Culbreth, my child by my present wife, is to share equally with my other children in all my property except that set out in the first item.

"Item 3. I give and devise to all my children, share and share alike my lands near Bethel Church in Sampson County, known as the Cornelius Culbreth place, which includes also the original Cornelius Culbreth lands bought from O. P. White, containing about 600 acres, to hold to each one of them in equal parts for the lifetime of each one and when each one of my said children shall die his or her share in this tract of land shall descend and become the property of said dead child's child or children or issue of children. But if there shall be no living child or living issue of such child, then the share of such dead child shall pass to the living brothers and sisters of such dead child or living children of any deceased brother or sister. And the inheritance devolution under this item shall be *per stirpes,* not *per capita.* But each one of my said children shall have full right and power to convey their share to any other one or more of my said children in fee simple, but such purchasing child or children shall hold the part of his tract so purchased for life with remainder in fee to the children of said purchaser subject to the same principle of inheritance and devolution hereinbefore set out."

The property here in controversy is a part of the "Cornelius Culbreth place," specifically mentioned by the testator in Item 3 of his will. It is to be noted that the language of Item 2 is also broad enough to cover it. But more of this anon.

Following the death of the testator and the probate of his will, a special proceeding was duly instituted by his children for partition in kind of the lands devised to them. In this proceeding, L. L. Culbreth, one of the sons of the testator and father of the plaintiffs, was allotted a 49-acre tract, which is a part of "the 100-acre tract" in controversy, and Amelia Underwood, one of the daughters of the testator, was allotted a 50-acre tract, which goes to make up the other part of "the 100-acre tract" in controversy.

Thereafter, on 5 February, 1905, Amelia Underwood sold to her brother, L. L. Culbreth, the 50-acre tract which had been allotted to her, and she and her husband executed deed therefor sufficient in form to convey a fee simple with full covenants of title and warranty.

In 1929, L. L. Culbreth and wife executed a deed of trust on both tracts—now regarded as a single tract of 100 acres—to secure a loan of $1,200 from the Atlantic Life Insurance Company. At the same time, L. L. Culbreth and wife executed a second deed of trust on the same property to indemnify The Britt Corporation against any loss by reason of its guaranty of the notes held by the Insurance Company. This indemnity deed of trust was foreclosed in 1932, and the defendants claim under *mesne* conveyances from the purchaser at the foreclosure sale.

Two questions, then, arise on the record:

First. What estate did L. L. Culbreth take in the 49-acre tract allotted to him under the provisions of his father's will? The trial court answered "a life estate," and we approve.

It is true that had the testator stopped at the end of the second item in his will, the devise therein of all the remainder of his real estate to his children would have been in fee simple. 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, 169 S. E., 417. Here, it does appear from Item 3 of the will, that, in respect of the "Cornelius Culbreth place," the testator intended to convey an estate of less dignity than a fee simple. *Roberts v. Saunders,* 192 N. C., 191, 134 S. E., 451. That is to say, in this item of the will the testator devises the property in question to his children for life with restricted power of disposal and remainder to their children. *Hampton v. West,* 212 N. C., 315, 193 S. E., 290. This takes the "Cornelius Culbreth place" out of the provisions of Item 2 of the will, and specifically limits the devises therein to the provisions of Item 3 of the will. *Shuford v. Brady,* 169 N. C., 224, 85 S. E., 303. The decision in *Barco v. Owens,* 212 N. C., 30, 192 S. E., 862, cited and relied upon by defendants, is not at variance with the position here taken. The provisions of the will there under consideration are quite different from the ones here presented for construction.

It follows, therefore, that in respect of the 49-acre tract allotted to L. L. Culbreth under the provisions of his father's will, only a life estate was vested in the first taker, and that the indemnity deed of trust under which the defendants claim, conveyed no more than this life estate.

Second. What estate did L. L. Culbreth acquire in the 50-acre tract under the deed from his sister? The trial court answered "a life estate," and we cannot say there is error in the ruling.

Much of what is said in answer to the question first above propounded applies with equal pertinency here. The two are measurable by the same standards. While Amelia Underwood took only a life estate in the 50-acre tract allotted to her under the provisions of her father's will, the devise is coupled with the power to convey to one or more of her brothers or sisters in fee simple, but it is further provided that such purchasing brother or sister shall hold the land so purchased for life with remainder in fee to his or her children. Had the testator stopped after annexing to the life estate the restricted power of disposal, no doubt a conveyance in fee could have been made in pursuance of such power. *Smith v.*

Mears, 218 N. C., 193, 10 S. E. (2d), 659; *Chewning v. Mason,* 158 N. C., 578, 74 S. E., 357. But immediately the testator added that "such purchasing child or children shall hold the part . . . so purchased for life with remainder in fee to the children of said purchaser," etc. This, then, clearly shows that it was not the intention of the testator to annex to the life estate an unlimited power to sell in fee simple. It is to be noted that this limited power of disposal is annexed to a life estate, and not to an indefinite or general devise. *Smith v. Mears, supra.* The testator's use of the words "descend" and "inheritance devolution" and their repetition in slightly different form may appear to be somewhat pedantic, nevertheless his intent is not especially difficult of discernment. After all, this is the real quest in the interpretation of wills. *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356.

The correct result seems to have been reached in the court below.

Affirmed.

UNITED STATES FIDELITY & GUARANTY COMPANY v. P. & F. MOTOR EXPRESS, INC.

(Filed 7 January, 1942.)

1. Damages § 1—

The measure of damages for injury to personal property is the difference between the market value immediately before the injury and the market value immediately after the injury.

2. Damages § 11—

The cost of repairing an automobile after collision, although the amount of recovery is not limited to such cost, is some evidence to guide the jury in determining the difference in the market value of the automobile before and after the injury.

3. Same—

While an estimate of the cost of repairing an automobile may not be as convincing as the actual cost of repairs made, the difference relates to the weight rather than to the competency, and testimony by a qualified witness as to his estimate of the cost of repairs is competent.

4. Trial § 19—

The weight of evidence is for the jury; the admissibility of evidence is for the court.

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

BARNHILL, J., dissents.

APPEAL by defendant from *Hamilton, Special Judge,* at March Term, 1941, of MECKLENBURG.

This is an action to recover damages for injury to the Chevrolet automobile of the plaintiff resulting from a collision with the motor truck of the defendant, alleged to have been negligently caused by the defendant. The issues of negligence and of damage were answered in favor of the plaintiff, and from judgment predicated on the verdict the defendant appealed, assigning error.

J. Laurence Jones for plaintiff, appellee.
Gover & Covington and Hugh L. Lobdell for defendant, appellant.

SCHENCK, J. The sole exception appearing in the record is to the court's excluding certain testimony relative to the measure of damage. The following appears:

"L. G. Kelly, witness for the plaintiff, testified:

"I am foreman of the repair shop of City Chevrolet Company. I examined the automobile owned by United States Fidelity & Guaranty Company which was damaged in an accident on November 16, 1940, and made an estimate of the cost of repairing that car. The left rear door was bent, left rear quarter panel was bent, the left lower cowl was bent, the left door lock pillar was bent, the front door was bent, the left front fender and left rear fender were bent, the headlight rim and reflector were damaged, the left running board moulding was damaged, the right front wheel was bent and the front end was out of line. The left side would have to be repainted and refinished.

"Cross Examination.

"Q. Mr. Kelly, what did you estimate it would cost to repair the plaintiff's automobile?

"Plaintiff objects on ground that measure of damages is difference in value of the automobile before and after the collision. Sustained.

"Defendant excepts. This is defendant's

"Exception No. 1.

"If permitted to do so, the witness would have answered $82.56."

This exception poses the question: Is evidence of an estimate of the cost of repairing an injured automobile competent upon the issue of the measure of damage thereto?

It is a well settled rule with us, and in other jurisdictions, that the measure of damage for injury to personal property is the difference between the market value of the property immediately before the injury and the market value immediately after the injury. *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., 647, 135 S. E., 791.

The authorities are in conflict upon whether the cost of repairing injured property is competent evidence of the difference between the market value before and after the injury. The authorities which have been brought to our attention are cases in which the repairs have been actually made and the amount paid therefor was sought to be shown in order to establish the difference in market value, and in these cases we find the weight of authority in favor of the admissibility of such evidence. However, in the case at bar the evidence offered was not of the actual cost paid for repairing, but of an estimate of the cost thereof. The estimate sought to be shown was that of the "foreman of the repair shop of the City Chevrolet Company," who "examined the automobile . . . which was damaged . . . and made an estimate of the cost of repairing that car." While evidence of such an estimate of the cost of repairs might not be as convincing as evidence of the cost of the actual repairs, we think this difference relates to the weight thereof rather than to its competency—and the weight of evidence is for the jury, while the admissibility of evidence is for the court. This thought was evidently in the mind of *Justice Allen* when he wrote: "The correct and safe rule is the difference between the value of the machine before and after its injury, and in estimating this difference it is proper for the jury to consider the cost and expenses of repairs . . ." *Farrall v. Garage Co.*, 179 N. C., 389, 102 S. E., 617.

While the recovery would by no means be limited to the amount of the cost of repairing the automobile, we are of the opinion that such cost would be some evidence to guide the jury in determining the difference in the market value of the automobile before and after the injury thereto.

The distinction between the proof of and the measure of damages is clearly made in *Hughes v. Wells,* 79 Atl., 1035 (N. J.); *Maurer v. Simon,* 133 Atl., 79 (N. J.); *Smith v. Ryan,* 158 Atl., 822 (N. J.). "Evidence of the reasonable value of repairs to a damaged automobile, to show the difference in its value before and after it was injured is admissible." *Baldwin v. Mittry,* 102 P. (2d), 643 (Idaho). "Evidence of the cost of repairs of the automobile was admissible as proof of the difference between the value of the automobile before the accident and after it occurred. This difference was the measure of damages that the plaintiff was entitled to recover." *Kiely v. Ragali,* 106 Atl., 502 (Conn.).

"While the general rule is that the measure of damages in respect of an injured automobile is the difference in its value immediately before and immediately after the injury, this measure may be established by showing the reasonable cost of necessary repairs to restore it to its previous condition." 5 Amer. Jur., Automobiles, par. 749, p. 906.

"In determining the depreciation in value of a motor vehicle as the result of an injury, the jury may take into consideration the reasonable

cost of the repairs made necessary thereby, and the reasonable market value of the vehicle as repaired." 42 C. J., par. 1177, p. 1297.

In excluding the evidence indicated there was error for which there must be a

New trial.

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

BARNHILL, J., dissents.

STATE v. GENERAL WILLIAMS.

(Filed 7 January, 1942.)

Criminal Law § 54c—

Where the jury has rendered a verdict of not guilty the defendant is entitled to be discharged, and the trial court is without power to resubmit the case to the jury.

APPEAL by defendant from *Grady, Emergency Judge,* at October Criminal Term, 1941, of PERSON. Reversed.

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

Lunsford & Burke for defendant.

PER CURIAM. The record discloses that: "His Honor instructed the Clerk to take the verdict. Whereupon, the Clerk asked: 'Gentlemen, how do you find the defendant, guilty as charged or not guilty?' The foreman, answering for the jury, declared, 'Not guilty.' The Clerk then asked: 'So say you all?' And the jurors answered 'Yes.'"

Thereafter the trial judge resubmitted the case to the jury, who returned a verdict of guilty. The verdict of not guilty entitled the defendant to be discharged.

Reversed.

MASSACHUSETTS BONDING & INSURANCE COMPANY v. HENRY KNOX, LOTTIE KNOX, CABARRUS COUNTY BUILDING, LOAN & SAVINGS ASSOCIATION, T. J. HENDRIX AND G. H. HENDRIX, ADMINISTRATOR C. T. A. OF THE ESTATE OF JOHN M. HENDRIX, OLA HENDRIX AND HUSBAND, G. H. HENDRIX, J. W. HINSON AND WIFE, NETTIE HINSON, G. H. HENDRIX, TRUSTEE, B. W. BLACKWELDER, TRUSTEE, C. M. IRVIN, JR., AND WIFE, PEARL M. IRVIN, AND ROBERT H. IRVIN, TRUSTEE.

(Filed 23 January, 1942.)

1. Lis Pendens § 1—

The sole object of *lis pendens* is to keep the subject of action *in custodia legis* and to give notice to subsequent purchasers.

2. Same—

Lis pendens and registration each have the purpose of giving constructive notice by record, and the statutes, C. S., 501, 3309, must be construed *in pari materia*, and while the *lis pendens* statutes do not affect the registration laws, the converse is not true.

3. Registration § 2—

A duly recorded instrument gives notice of all matters which would be discovered by reasonable inquiry.

4. Same—

A recorded mortgage or deed of trust gives notice not only of the existence of the lien but also the remedies accruing to the holder in the event of default, and when the instrument is upon its face in default a prudent examiner is put upon inquiry as to whether the debt has been kept in date by payment and whether the lienholder is pursuing either of the remedies of foreclosure under the power of sale or foreclosure by suit.

5. Same: Lis Pendens § 1—Lis pendens statutes are not applicable to suits to foreclose duly registered mortgages or deeds of trust.

This action was instituted to foreclose a duly registered deed of trust in which the trustee and the *cestuis* and the owner of the equity of redemption by *mesne* conveyances, were made parties. While the action was pending the owner of the equity sold the property. *Held:* The duly registered deed of trust was constructive notice, not only of the lien, but also of the pendency of the foreclosure suit, since it would have been discovered by a prudent examiner, and therefore notice of the suit under C. S., 501, by indexing and cross-indexing same in the *lis pendens* docket was not required.

6. Same: Limitation of Actions § 11c—When foreclosure is instituted within time, subsequent purchasers with notice cannot assert bar of statute.

Suit to foreclose a duly registered deed of trust was instituted prior to the bar of the statute, C. S., 437, against the trustee, the *cestuis* and the assigns of the *cestuis*. While the suit was pending, the assigns of the *cestuis* sold the property, and upon discovering the transfer, plaintiff had

the purchasers made parties. At the time they were made parties the ten-year period prescribed by statute had expired. *Held:* The purchasers during the pendency of the foreclosure suit were chargeable with notice thereof and acquired only that interest which their grantors then had, and therefore they cannot assert the bar of the statute.

CLARKSON, J., dissents.

STACY, C. J., concurring.

DEVIN, J., dissenting.

SEAWELL, J., dissenting.

APPEAL by defendants from *Ervin, Special Judge,* at December Term, 1940, of CABARRUS. Affirmed.

Civil action to foreclose a trust deed on real property.

On 10 May, 1927, defendants Henry Knox and wife, Lottie Knox, executed a deed of trust on certain land located in Cabarrus County to secure a note payable on or before 10 May, 1928. Thereafter, the note secured by the deed of trust was duly acquired by the plaintiff. The last payment on the note was made on 10 January, 1930.

On 20 November, 1930, Knox and wife executed a second deed of trust on the same land to J. E. Hendrix, Trustee, which deed of trust was foreclosed in 1933. The defendant Ola G. Hendrix purchased at the foreclosure sale and it was conveyed to her by the trustee. On 24 April, 1936, she and her husband, G. H. Hendrix, conveyed the property to G. W. Hinson and wife, Nettie Hinson.

The note held by plaintiff being in default, it made demand upon the trustee in the deed of trust securing the same to foreclose. The trustee having expressed an unwillingness to act, plaintiff instituted this action on 10 November, 1937, making all parties of record, including the trustee, parties defendant. No separate notice of *lis pendens* was filed.

On 9 April, 1939, while said action was pending, the defendants J. W. Hinson and wife conveyed the land to C. M. Irvin, Jr., and wife, Pearl M. Irvin, and on the same date the said Irvins executed a deed of trust to Robert H. Irvin, Trustee. At the time the defendants Irvin purchased said land they had no actual knowledge of the pendency of the suit or of the deed of trust sued upon. The plaintiff, having discovered these subsequent conveyances, on 13 September, 1940, obtained an order making C. M. Irvin, Jr., and wife, Pearl M. Irvin, and Robert H. Irvin, Trustee, parties defendant to this action. They answered pleading the 10-year statute of limitations. The defendants Knox having failed to answer, judgment by default final as to them was entered at the August Term, 1940, Superior Court of Cabarrus.

The matter came on to be heard before Irvin, Special Judge, at the December Term, 1940, Cabarrus Superior Court, and was there heard by consent of parties without the intervention of a jury. The judge

having found the facts substantially as herein stated, entered judgment in favor of the plaintiff, modifying the amount demanded in accord with admissions. The decree entered appointed a commissioner to make sale and decreed foreclosure. The defendants, other than Knox and wife, excepted and appealed.

J. F. Flowers for plaintiff, appellee.
Hartsell & Hartsell and Robert H. Irvin for defendants, appellants.

BARNHILL, J. When an action is instituted to foreclose a duly registered deed of trust, must notice of the proceedings be cross-indexed as required by C. S., 501, so as to protect the mortgage creditor against subsequent purchasers from the mortgagor or his assigns who are parties to the action? We answer in the negative.

The law of *lis pendens* stems back to the Roman law where the rule was "a thing concerning which there is a controversy is prohibited during suit, from being alienated." The same rule was formulated and adopted by Lord Bacon, thereafter becoming firmly fixed in the English law, inherited by us as a part of the common law. It is founded on the maxim *pendente lite nihil innovetur* and under the common law the bill of complaint, or the cross complaint, as the case may be, is the *lis pendens*. Now, however, with us, to be effectual it must be indexed and cross-indexed as required by C. S., 501.

The sole object of *lis pendens* is to keep the subject in controversy within the power of the court until final decree and to make it possible for courts to execute their judgments. It gives notice of a claim of which otherwise a prospective purchaser would be ignorant. All property which is the subject matter of suit under the doctrine of *lis pendens* is *res litigiosa* and is *in custodia legis*.

Prior to the adoption of our registration law it applied in all cases in which title to or an interest in property was asserted and the suit itself constituted the requisite notice. Now, to be effectual, the action must be indexed and cross-indexed as required by C. S., 501. When so indexed, pending the suit, it operates in the nature of a recorded lien of which all must take notice.

The Connor Act, C. S., 3309, amended or modified the common law *lis pendens* rule as it applies in this State. It provides a new and different method or means of giving constructive notice of deeds, mortgages and other instruments affecting title to land. Under it registration notice is a substitute for the common law *lis pendens* notice. The wisdom of this act has been demonstrated. At the time of its enactment ascertainment of claim to land was difficult and titles were in a state near to chaos. It brought about certainty and security in that it pro-

vided one place and one place only where purchasers may look to find the status of titles to land. *Davis v. Robinson,* 189 N. C., 589. It is upon this record, under this act, that examiners and purchasers have come to rely.

"It is often said by the courts that *lis pendens* does not affect the recording or registry laws. This is true. *Lis pendens* does not affect the recording laws in the same sense that it does not affect other positive legislative enactments . . . But while *lis pendens* may not modify the recording or registry laws, the converse of the proposition is not true. The application of the recording laws in cases where the rule *lis pendens* is applied modify the results of the application of that rule . . . The recording or failure to record instruments under which parties have sought to acquire interests in the subject matter of litigation, either *ante litem* or *post litem,* becomes quite material when we come to consider how those rights or supposed rights are affected by *lis pendens.*" Bennett, Lis Pendens, pp. 338-40; *McCutchens v. Miller,* 31 Miss., 83.

The effect of *lis pendens* and the effect of registration are in their nature the same thing. They are only different examples of instances of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. Each serves its purpose in proper instances. They are each record notices.

Hence, the law of *lis pendens* and the statute requiring the registration of instruments affecting title to real property must be construed *in pari materia.* Otherwise, the one would be destructive of the other.

When so construed the rule *lis pendens* applies in actions to set aside deeds or other instruments for fraud, to establish a constructive or resulting trust, to require specific performance, to correct a deed for mutual mistake and in like cases where there is no record notice and where otherwise a prospective purchaser would be ignorant of the claim. That is, *lis pendens* notice is required when the claim is *contra* or in derogation of the record.

Under our registration law, C. S., 3309, the object of registration is to give notice and when an instrument is registered it is sufficient to put a careful and prudent examiner upon inquiry. The record is notice of all matters which would be discovered by reasonable inquiry. *Dorman v. Goodman,* 213 N. C., 406, 196 S. E., 352. The date of registration controls the title as against purchasers, *Sills v. Ford,* 171 N. C., 733, 88 S. E., 636. The holder of the registered instrument is protected against all subsequent conveyances and no other notice is required.

A registered mortgage or deed of trust gives notice to a prudent examiner not only of the existence of the lien thus created but of the remedies accruing to the holder in the event of default, which are primarily (1) sale under the power contained in the instrument, if any; and (2)

sale by foreclosure proceedings. When an examiner finds a mortgage of record foreclosure of which is apparently barred the questions immediately arise: (1) has the mortgage debt been kept in date by payments; (2) has the power of sale, if any, been exercised; and (3) has the mortgagee exercised or is he exercising his right to foreclose, thus suspending the statute of limitations?

If a deed is registered a subsequent purchaser has notice. *Threlkeld v. Land Co.,* 198 N. C., 186, 151 S. E., 99. "It is only a duly registered mortgage that will affect the subsequent purchaser with notice." *Todd v. Outlaw,* 79 N. C., 234.

"The law has appointed a place where mortgages must be registered in order for notice to purchasers and if there be no registry the purchaser is not held to constructive notice by any other means. The registration in such a case, it is said, is the only thing that can operate as constructive notice." Bennett, Lis Pendens, p. 340; *McCutchens v. Miller, supra.*

"The record of an unsatisfied mortgage is sufficient to put a third person upon inquiry, and whatever puts a person upon inquiry is in equity notice to him of all the facts which such inquiry would have disclosed. *Bowles v. Chauncey,* 8 Conn., 389. One who purchases premises covered by an undischarged mortgage cannot claim to be a purchaser without notice of the equities of the mortgagee . . . and inquiry of the mortgagee would have elicited the information that the mortgage was still in force as between the original parties." *Collins v. Davis,* 132 N. C., 106; *Boxheimer v. Gunn,* 24 Mich., 272; Jones on Mortgages, 927.

Speaking to the subject in *Jones v. Williams,* 155 N. C., 179, 71 S. E., 222, this Court, quoting from *Bishop of Winchester v. Paine,* 11 Vesey, 194-201, said "he who purchases during the pendency of the suit, is bound by the decree that may be made against the person from whom he derives the title; the litigating parties are exempted from the necessity of taking any notice of a title so acquired; as to them it is as if no such title existed, otherwise suits would be interminable, or, which would be the same in effect, it would be the pleasure of one party at what period the suit should be determined."

Here, at the time the Irvins purchased the deed of trust was on record. Upon its face it was in default. They were put on notice that the rights existing in the holder of the lien to foreclose for satisfaction of the debt had accrued. This notice would demand that a prudent examiner investigate further to ascertain whether the debt had been kept in date by payment and whether the lienholder was pursuing either of the remedies available, and it was the duty of the Irvins to be vigilant, take care of their interests and make such further investigation as the circumstances

demanded. This clearly required that they ascertain whether foreclosure proceedings were pending. This information was readily available either from the civil issue docket or from the trustee in the deed of trust.

Correctly interpreted, the pending action is not one affecting the title to real property as contemplated by C. S., 500. The plaintiff is merely seeking to enforce a right acquired at the time the mortgage was executed and recorded. All subsequent parties dealing with the subject matter were put on notice from registration and not from the institution of the action. The Irvins are not necessary parties to the action. When admitted as parties they could only prosecute or defend in the shoes of their grantors. The Court will not permit any new question to arise in the cause as a consequence of such a purchase. Bennett, Lis Pendens, 217.

A foreclosure sale under mortgage, whether held under the power or under an order of court, is either valid or invalid. If valid, the purchaser gets a good title which relates back to the date of the registration. As the proceeding is regular and no attack is made thereon any sale ordered by the court would be valid.

To hold otherwise to a material extent nullifies the registration law. It is but to say that registration is notice until and unless a foreclosure action is instituted. Upon such happening it then ceased to be notice and a purchaser acquires a good title as against the mortgage unless the foreclosure proceeding is properly indexed as required by C. S., 501.

To state it differently, an unregistered mortgage is good as between the parties. If the mortgage of plaintiff was unrecorded but this proceeding was duly indexed and cross-indexed on the *lis pendens* docket, such record would not constitute constructive notice of the mortgage and plaintiff's rights. Bennett, Lis Pendens, 340. Any other conclusion would overrule a long line of our decisions in which it has been held consistently that registration is the one and only means of giving notice of an instrument affecting title to real estate. *Turner v. Glenn, ante,* 620, and cases cited.

The pertinent statute of limitations is against *an action to foreclose* a mortgage or deed of trust. The action, once instituted within the 10-year period against all parties having any record interest in the land, suspends the running of the statute of limitations. Neither the parties to the action nor anyone claiming under them can thereafter successfully plead such statute in bar of plaintiff's right to foreclose. It is accepted law that a payment, however small, will suspend the statute as to all subsequent purchasers. *A fortiori,* a solemn suit duly instituted against all record owners will have like effect.

The suit having been instituted before the bar of the statute the mortgage is still alive. Hence, it gives binding constructive notice which is completely effective against all purchasers of the land from the time of the recording.

It seems to be an accepted rule that a purchaser cannot acquire a greater interest than the grantor possesses. Here the grantor owned only the equity of redemption. The Irvins claim under the deed and through no other source. To establish any right they must first establish the privity of contract. At the time they received deed for the premises the foreclosure proceedings was pending. The equity of redemption was in the process of foreclosure. The statute of limitations was thereby suspended. As they claim no greater interest than that owned by the grantor they are bound by the foreclosure proceedings and cannot plead the statute of limitations, which is nonexistent in respect to this particular action, by virtue of the fact that the suit was instituted in due time.

Otherwise, a purchaser of a tax sales certificate instituting foreclosure action, to obtain protection against subsequent purchasers, must first have the action cross-indexed. This would be equally true as to a claimant undertaking to enforce a materialman's or laborer's lien. Such is not the purpose of the law. We have so held in respect to attachment proceedings. *Pierce v. Mallard,* 197 N. C., 679, 150 S. E., 342.

The judgment below is

Affirmed.

CLARKSON, J., dissents.

STACY, C. J., concurring: The period prescribed for the commencement of an action to foreclose a mortgage or deed of trust, where the mortgagor or grantor has been in possession of the property, is "within ten years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within ten years after the last payment on the same." C. S., 437. Hence, upon the institution of an action to foreclose within the statutory period, the statute of limitations ceases to run either in favor of the defendants or against the plaintiff. *Harris v. Davenport,* 132 N. C., 697, 44 S. E., 406. "It may therefore be taken as well settled that a judgment in an action *in rem* or one to foreclose a mortgage binds not only the parties actually litigating and their privies, but also all others claiming or deriving title under them by a transfer *pendente lite.* The filing a formal *lis pendens* is not required for the application of this recognized principle when the suit is brought in the county where the land is situated." *Jones v. Williams,* 155 N. C., 179, 71 S. E., 222. The cross-indexing statute, C. S., 501, applies only where the entry of *lis pendens* is required. "Any party to an action desiring to claim the benefit of a notice of *lis pendens* . . . shall cause such notice to be cross-indexed," etc.

The above statement from *Jones v. Williams, supra,* is determinative of the instant case. A careful examiner, when he finds upon the registry an uncanceled mortgage or deed of trust, which still lacks the quality of presumptive compliance or payment arising from the expiration of fifteen years, C. S., 2594, is put on notice of whatever a reasonable inquiry would disclose. *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949; *Collins v. Davis,* 132 N. C., 106, 43 S. E., 579. "A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests." *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498. The vital matter of notice here is what flows from the registered and uncanceled deed of trust, the lien of which the plaintiff is seeking to enforce. If the *lis pendens* statute, C. S., 500, has no application to an action of foreclosure when brought in the county where the land lies, and we have so held in a number of cases, it follows as a necessary corollary that the cross-indexing statute is equally inapplicable.

In the Code of Civil Procedure (1868), sec. 90, this section contained the provision, "and if the action be for the foreclosure of a mortgage, such notice must be filed twenty days before judgment, and must contain the date of the mortgage, the parties thereto, and the time and place of recording the same." The same provision appears in the Code of 1883, sec. 229, and the Revisal of 1905, sec. 460. But the provision was not brought forward in the Consolidated Statutes of 1919, having been repealed by ch. 106, Public Laws 1917, and the General Assembly evidently concluding that it was no longer appropriate in view of C. S., 3311, requiring the registration of deeds of trust and mortgages "in the county where the land lies," and declaring the effect of such registration. *Threlkeld v. Land Co.,* 198 N. C., 186, 151 S. E., 99. It was in the statute, however, when *Jones v. Williams, supra,* was decided. See 34 Am. Jur., 382.

There is no debate as to the meaning of the language used in C. S., 501. We all agree it is so plain "that he may run that readeth it." The divergence of opinion arises over its applicability. The lien of a deed of trust, or mortgage, is not destroyed by the institution of an action to foreclose it.

The dissentient expressions herein rather enfeeble the decision in *Tocci v. Nowfall, ante,* 550, and give added significance to the prophecy contained in the dissent in that case.

DEVIN, J., dissenting: The only question raised by this appeal is the application of the *lis pendens* statutes (C. S., 500-504). The pertinent provisions of these statutes are as follows:

"In action affecting the title to real property, the plaintiff, at or any time after the time of filing the complaint, . . . may file with the clerk of each County in which the property is situated a notice of the pending of the action, containing the names of the parties, the object of the action, and the description of the property in that County affected thereby" (C. S., 500). "Any party to an action desiring to claim the benefit of a notice of *lis pendens,* whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him to be called Record of Lis Pendens, which index shall contain the names of the parties of the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said land" (C. S., 501).

"From the cross-indexing of the notice of *lis pendens* only is the pendency of the action notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made party to the action. For the purpose of this section an action is pending from the time of cross-indexing the notice" (C. S., 502).

The provision as to cross-indexing of notice of *lis pendens,* originally applicable to Buncombe County only, was made State-wide by ch. 31, Public Laws 1919. These statutes are clear and explicit and do not admit of construction contrary to the manifest legislative intent.

It is admitted that at the time of the conveyance to the defendants Irvin in 1939 they had no knowledge whatever of the pendency of the action, or actual knowledge of the deed of trust under which the land is now sought to be sold.

In the majority opinion the decision is made to turn upon the fact that the deed of trust executed in 1927 by Knox and wife was duly recorded, and that by virtue of the registration statutes constructive notice was thereby given to subsequent purchasers. Unquestionably the defendants Irvin, who purchased the land in 1939, and who hold the title of the mortgagors, took with constructive notice of the deed of trust. Though they did not know it, the law fixed them with notice that a deed of trust had been given on this land in 1927. But what notice did they have that a suit to sell the land under this deed of trust had been instituted? The fact that defendants had available means of ascertaining that a twelve-year-old deed of trust remained uncanceled on the record should not be construed as notice that a suit had been instituted thereunder to sell the land upon allegations of failure to pay the debt secured.

A search of the records in the office of the register of deeds would not have revealed the pendency of a suit involving the title to the land. A search of the records in the clerk's office would have been equally futile, since the pendency of the action did not appear cross-indexed on the *lis pendens* docket in that office. A searcher of titles is now no longer required to examine the multitudinous files of civil actions to determine whether an action affecting the title of the land has been instituted. The statute was intended to facilitate the examination of titles and to afford a convenient means of giving notice of suit, and to guard against the consequences of transfers of title pending the action. In this case the plaintiff, apparently, realized the effect of its failure to file notice of *lis pendens,* for after it learned of the deed to defendants Irvin, it had them made parties to the action. But as to them the statute of limitations had run. While it would be unfortunate for the plaintiff to hold this action barred, it must be remembered that defendants are innocent purchasers for value without notice of the suit. Presumably, if the statute had been observed by the plaintiff, the defendants would not have purchased, and this controversy would not have arisen. The defendants Irvin do not contest the validity of the deed of trust from Knox to the plaintiff. They do not deny constructive notice of its existence. They base their defense on the admitted fact that in good faith they bought the land for full value and without notice of the suit to foreclose. They contend that in the absence of notice of *lis pendens* they were entitled to a day in court when served with summons, and that they had a right when given notice and made parties in 1940 to interpose any defense at that time available. I do not think the fact of registration of the deed of trust in 1927 should render inapplicable the plain provisions of the statute that, in actions affecting the title to real property, from the cross-indexing of the notice of *lis pendens* only is the pendency of the action notice to purchasers of the property. No notice of the suit appearing on the *lis pendens* docket in the clerk's office and defendants having no other notice, actual or constructive, that a suit had been instituted, as to them there was no suit, and hence when made parties by summons served in 1940 they had the right to set up the defense of the statute of limitations. This is in accord with the explicit language of the North Carolina statutes which, in my opinion, are controlling upon the facts of this case.

I cannot agree that the *lis pendens* statutes do not cover an action to foreclose a deed of trust on land. A suit for foreclosure is an "action affecting the title to real property." Its purpose is to sell the land, to transfer the title, to take the title out of one party and put it in another. The prayer for relief is that the land be sold and the title conveyed to the purchaser. 34 Am. Jur., 382; 38 C. J., 33; *Horney v. Price,* 189 N. C., 820, 128 S. E., 321.

The only authority cited in support of the opinion on this point is *Pierce v. Mallard,* 197 N. C., 679, 150 S. E., 342. In that case it was held that proceedings in attachment were not required to be docketed on the record of *lis pendens.* But this decision was based expressly on the ground that the statutes refer to an action affecting the title to real property. The Court said: "A warrant of attachment is not an action 'affecting the title to real property.' The warrant of attachment is not an action, but is ancillary and auxiliary to the action. . . . As said, the warrant of attachment is not an action affecting the title to the real property. The title of the owner of the land is not brought into dispute. The attachment merely seizes the property and holds it *in custodia legis* until the final determination of the action or until the property is released pending the action, when seized without proper cause. All the notice anyone is entitled to in cases where warrants of attachment are issued, is such as is contained in C. S., 807, *supra.*"

It seems to me clear that the words "action affecting the title to real property," *ex vi termini,* by force of the unambiguous language employed, necessarily include an action to sell land under the power contained in a deed of trust. To exclude foreclosure suits from the coverage of the statutes would seem to restrict their provisions contrary to the intention of the lawmaking power.

It may be noted that the statute originally contained specific reference to actions to foreclose mortgages (Rev., 460), and required that notice of *lis pendens* in those cases be filed twenty days before judgment. This limitation was stricken out by ch. 106, Public Laws 1917, and foreclosure suits placed on the same footing as other actions affecting the title to real property.

Jones v. Williams, 155 N. C., 179, 71 S. E., 222, cited in the opinion, was decided in 1911, before the enactment of the *lis pendens* statute now in force. At that time the filing of the complaint describing the land, the title to which was to be affected by the suit, was regarded as sufficient notice of the pendency of the suit. Since then the unequivocal language of the statute has declared, "From the cross-indexing of the notice of *lis pendens only* is the pendency of the action notice to a purchaser or incumbrancer of the property affected thereby."

While a purchaser cannot acquire a greater interest than his grantor possesses, in many instances sanctioned by the law a purchaser in good faith for value and without notice has a different standing from that of his grantor, and is freed from restrictions and limitations otherwise applying, and may avail himself of defenses not open to his grantor. C. S., 1009; *Bank v. Mackorell,* 195 N. C., 741, 143 S. E., 518; *Spence v. Pottery Co.,* 185 N. C., 218, 117 S. E., 13; *Cox v. Wall,* 132 N. C., 730, 44 S. E., 635. Nor do I agree that harmful consequences might

flow from the application of a plainly worded statute, the observance of which is both convenient and simple. Tax foreclosures and mechanics' liens are not affected. In the one case, notice is presumed, and in the other the lien is recorded in the clerk's office. 34 Am. Jur., 383.

I think there was error in the ruling of the court below.

SEAWELL, J., dissenting: If the subject dealt with in this decision were not so important I would content myself with a simple dissent, without discussion, but I think that it operates to destroy the force and effect of a progressive and salutary law, upon which those who have the duty of investigating and abstracting titles, and the profession generally, have been accustomed to rely, and who are now turned back to the uncertainty and difficulties of a blind search.

Succinctly stated, the holding is that statutes requiring notice of *lis pendens* to be filed and properly cross-indexed in a *lis pendens* docket do not apply to a suit to foreclose a mortgage.

The principal reasons assigned may be summarized: that a foreclosure suit is not an "action affecting the title to land"; that the registration of the instrument is sufficient notice of the pendency of an action to foreclose it; that because of the notice by registration of the mortgage or other instrument, the statute must be construed as applying only to actions brought to enforce equities in land incapable of registration, such as parol trusts, cancellation or correction of instruments for fraud or mistake, and the like; and that the suit brings the property *in custodia legis.*

As will be observed, these reasons do not rest upon any ground peculiar to our statute, but are necessarily predicated of all similar statutes wherever found. Similar statutes in a great number of the United States are practically identical in verbiage with our own, but none of the theories above suggested has been accepted by these courts or by the text writers on the subject. We stand alone.

Since, under C. S., 502, an action shall not be deemed to have been begun against any person not a party to the suit until the notice of *lis pendens* required by the statute has been cross-indexed, it becomes, as I insist, a simple question whether a foreclosure suit is an action affecting the title to property. This, it seems to me, is hardly arguable. At any rate, it has been uniformly so considered. See cases cited below. If so, I think it should be recognized that the Legislature in the exercise of a legitimate power has substituted this mode of notice for all others which might be suggested as theretofore efficient and has applied it to the class of cases we are now considering.

The situation is simply this. When these defendants were brought into the case, the mortgage sued upon by plaintiff had become subject

to the bar of the statute of limitations, which they then pleaded. *Stancill v. Spain,* 133 N. C., 76, 45 S. E., 466. This brings up the question dealt with in the main opinion: What did they get by their *mesne* title from the mortgagor?

Our law requiring the registration of mortgages dates back to the Act of 1829; it is now section 3311 of the Consolidated Statutes. Its purpose was to prevent frauds and to apprise purchasers and creditors of the *existence and nature of the encumbrance. Starke v. Etheridge,* 71 N. C., 240, 244. It has never before been suggested that it had any other purpose. It is, of itself, however, notice of the existence of the lien effective only as long as the lien is alive. *Cowen v. Withrow,* 112 N. C., 736, 740, 17 S. E., 575, 576; *Collins v. Davis,* 132 N. C., 106, 43 S. E., 579; *Bank v. Sauls,* 183 N. C., 165, 170, 110 S. E., 865, 867.

But the purchaser, either from the mortgagor directly or by *mesne* conveyances ensuing upon a sale under a valid second mortgage, as we find here, acquires more than the bare right to pay off the debt and remove the encumbrances—he gets the equitable title of the mortgagor, which, upon the termination of the trust created by the senior mortgage other than by foreclosure, becomes the legal title. The term, "equity of redemption," as now used, refers to such equitable estate. "A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment or performance. A 'mortgage' does not invest the mortgagee with an absolute and indefeasible title. The equitable title, called the 'equity of redemption,' remains in the mortgagor. . . . There is no difference in legal effect between a mortgage with a power of sale and a deed of trust executed to secure a debt. . . . Both are securities for a debt. Both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized or sold under judicial process. . . ." Words and Phrases, Perm. Ed., Vol. 15, p. 80; *Brecht v. Law Union & Crown Ins. Co.,* 153 F. 452, 455; *Ladd v. Johnson,* 32 Ore., 195, 200, 49 Pac., 756; *Hawkins v. Stiles,* 158 S. W., 1011, 1024 (Tex. Civ. App.); *Walker v. King,* 44 Vt., 601, 612; *Grant v. Cumberland Valley Cement Co.,* 58 W. Va., 162, 52 S. E., 36.

Those jurisdictions which regard mortgages and deeds of trust as mere liens on the land to secure debts, where that is their purpose, without undue regard to the niceties anciently prevailing when forfeiture rendered absolute the legal title conveyed in the trust, prefer to regard the legal estate as still subsisting in the mortgagor, subject to the lien. *Seals v. Chadwick* (Del.), 2 Pennewill, 381, 45 Atl., 718; *Messer v. American Eagle Fire Ins. Co.,* 227 Ky., 3, 12 S. W. (2d), 358; *Logan County v.*

McKinley-Lanning Loan & Trust Co., 70 Neb., 406, 101 N. W., 991; *Higgs v. McDuffie,* 81 Ore., 256, 158 Pac., 953; *Navassa Guano Co. v. Richardson,* 266 S. C., 401, 2 S. E. (2d), 307.

That the term, "equity of redemption," as referring to the equitable title of the mortgagor, is so regarded in our State there can be no doubt. *Hemphill v. Ross,* 66 N. C., 477; *Fraser v. Bean,* 96 N. C., 327, 2 S. E., 159; *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210; *Layton v. Byrd,* 198 N. C., 466, 152 S. E., 161.

The conveyance of the encumbered lands by the mortgagor, or trustor, or title obtained through *mesne* conveyances, confers upon the assignee all the rights, with respect to the lands conveyed, which the original mortgagor had, including the right to make legal or equitable defenses against foreclosure which would be available to the mortgagor. He has, therefore, the right to rely upon the statute of limitations against such mortgage in the same way and to the same extent as the original mortgagor. *Stancill v. Spain,* 133 N. C., 76, 45 S. E., 466. If available, it will have the effect of destroying the lien and terminating the trust, in which case his equitable title will draw to it the legal title, as it would have done had he been the original mortgagor.

Nothing else appearing, the statute was available here because as to the Irvins, appellants, action was not brought until they were made parties to the suit, which was admittedly more than ten years after the last payment on the mortgage. The plaintiff is therefore relegated to such other protection as it may have against the claim of innocent purchase without notice.

There is none in contemplation of the present situation, except the institution of a foreclosure action in apt time against those who are at the time concerned with the title or lien, and the filing of a notice of *lis pendens* as to all others who may become purchasers *pendente lite.*

There can be no question as to the fact that statutory *lis pendens* substitutes its provisions for the common law wherever it applies. *Badger v. Daniel,* 77 N. C., 251; *Todd v. Outlaw,* 79 N. C., 240; *Collingwood v. Brown,* 106 N. C., 362, 368, 10 S. E., 868, 870. Such a statute—now C. S., 500—has been on our books for a sufficient length of time to be often reviewed by the courts, and its effect on the common law doctrine fully explained. This statute, as it stood before the 1919 amendment, requires the filing of a notice of *lis pendens* and provides that, "In action affecting the title to real property, the plaintiff, at or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing

the names of the parties, the object of the action, and the description of the property in that county affected thereby."

Thereafter the pendency of an action was no longer sufficient to bind the purchaser of lands in controversy where they lay in another county (because of the want of *notice* of *lis pendens* in that county). However, even under this statute an action pending in the county where the land lies, in which appear the names of the parties to the suit, the object of the action, and a description of the property to be affected was notice of *lis pendens* in that county, only because such a suit, with its pertinent disclosures, was a sufficient compliance with the *lis pendens* statute, and no further notice of *lis pendens* was required. *Badger v. Daniel, supra; Todd v. Outlaw, supra; Culbreth v. Hall,* 159 N. C., 588, 75 S. E., 1096; *Lamm v. Lamm,* 163 N. C., 71, 79 S. E., 290; *Dalrymple v. Cole,* 170 N. C., 102, 86 S. E., 988; *ibid.,* 181 N. C., 285, 107 S. E., 4; *Collingwood v. Brown, supra.*

C. S., 501 (sec. 464 of the Revisal, as amended by ch. 31, Public Laws of 1919; see Michie's Code, 1939), provides as follows:

"Any party to an action desiring to claim the benefit of a notice of *lis pendens,* whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called Record of Lis Pendens, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action."

C. S., 502 (sec. 462 of the Revisal, as amended by the compilers of the Consolidated Statutes), provides:

"From the cross-indexing of the notice of *lis pendens* only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice."

It will be noted that the radical changes effected in the law are those requiring cross-indexing of a notice of *lis pendens* and making such notice effectual only from the date of the filing and further providing that as to any party, and for the purposes of the section, "an action is pending from the time of cross-indexing the notice."

Since these changes were made in the law, several cases touching the subject have been reported, but the factual situation in all of them escaped the statute—in *Brinson v. Lacy,* 195 N. C., 394, 142 S. E., 317, and *Dalrymple v. Cole, supra,* because the transfer of title took place before this change in the law; in *Threlkeld v. Malcragson Land Co.,* 198 N. C., 186, 151 S. E., 99, because action was upon a note, not the mortgage securing it, and therefore did not affect the title to land; and in *Pierce v. Mallard,* 197 N. C., 679, 150 S. E., 342, because the action involved attachment and the land was taken *in custodia legis* and was subject, upon recovery by plaintiff, to a lien superior to that of other judgments taken after the effective date of the attachment. Perhaps the real basis of decision in that case, from our present viewpoint, should be that the judgment docket upon which the attachment is noted (see C. S., 807) is required to be cross-indexed (C. S., 613, 952 [4]).

In the case at bar the point is squarely presented. It is my opinion that the pending action itself did not constitute notice of *lis pendens* at the time of the purchase by appellants because the plain wording of the statute—C. S., 501, 502—requires cross-indexing of the notice to give it that effect and neither the summons docket of the Superior Court nor the civil issue docket, to which cases are transferred after the pleadings have been filed and the issues joined, is required to be cross-indexed, and in practice they are not so indexed. C. S., 952 (3).

There is no question that the requirement of notice of *lis pendens* applies to foreclosure suits. Ordinarily, the pendency of a suit to foreclose a mortgage on lands is sufficient notice of *lis pendens* to affect purchasers *pendente lite* with notice and bind them by the judgment in the case. But this is only true where statutes requiring notice of *lis pendens* regarding interest in lands have not been enacted. Where such statutes exist, as they do in our State, such a foreclosure suit comes within its provisions as would a suit asserting any other interest in the lands. Jones, Mortgages, Vol. 3, 8th Ed., p. 1799; *McKinney v. Sutphin,* 196 N. C., 318, 145 S. E., 621. "Applications of the doctrine accordingly occur in connection with actions of ejectment as well as in connection with equitable proceedings, such as suits to foreclose a mortgage or enforce any other lien." Tiffany, Real Property, 3rd Ed., sec. 1295.

I think this branch of the subject is sufficiently dealt with in the terse statement made in Wiltsie on Mortgage Foreclosure, 5th Ed., Vol. 1, sec. 464, directed pointedly to foreclosure suits: "Where a notice of *lis pendens* is required by statute its object is to give constructive notice of the pendency of the suit to all parties dealing with the defendant in regard to the land, the title to or possession of which is to be affected by the suit, and to bind them by the judgment in the same manner as though they had originally been made parties to the action. Where a

notice is not filed as required by the statute, the judgment of foreclosure and the sales thereunder are not operative as against persons who, without notice and pending the suit, succeed to the title or interest in the property of a party to the action." To the same effect is Jones, Mortgages, *loc. cit., supra; Jones v. Williams,* 155 N. C., 179, 71 S. E., 222; *Threlkeld v. Malcragson Land Co.,* 198 N. C., 186, 190, 151 S. E., 99, 101; *Broom v. Armstrong,* 137 U. S., 266, 34 L. Ed., 428; 34 Am. Jur., 377.

Jones v. Williams, supra, follows the *lis pendens* statute as it then existed and as it modified the common law, although the action was for mortgage foreclosure. It proceeded on authority of the cited cases, including *Collingwood v. Brown, supra,* and the rationale of decision was the same as in the cases cited in its support—that the pleadings themselves were a compliance with the statute. It is clear from the reservation thus made that the pendency of the suit was not good as it had been at common law, in a county other than that in which the proceeding was brought, notwithstanding that registration had been made in that county.

The theory that *Jones v. Williams, supra,* intended to withdraw such cases from the operation of the *lis pendens* statute falls to pieces when we observe that the statute then being considered expressly and *eo nomine* recognized mortgage foreclosure suits as being within the category of actions affecting the title to land. Rev., sec. 460. The statute was subsequently changed only with regard to the additional data required when the subject of the action was mortgage foreclosure.

I cannot accept the suggestion that the statutes of *lis pendens* apply only to equities in real estate incapable of registration, such as parol trusts, correction of instruments because of fraud or mistake, and the like, or that the registration acts are sufficient to give notice of a pending suit. The main opinion, in support of this proposition, quotes certain statements from Bennett on Lis Pendens, but, I think inadvertently, misses the paragraph that explains them. At most, these quotations only go to the effect of the common law doctrine of *lis pendens* upon registration laws and the fact that it does not affect them. For instance, if the law requires an instrument to be registered, the filing of *lis pendens* will not take its place. The one is a rule established by the court to make the judgment effective; the other is positive law. But I do not gather anywhere from this work that registration has any effect as a substitution for *lis pendens.* On the contrary, and here is the paragraph to which I have referred.

"Where the property involved is contained in an unregistered mortgage, which by the statutes of the State is required to be registered before becoming effective as against *bona fide* purchasers and creditors,

the filing of the bill to establish such unregistered mortgage will not constitute constructive notice *lis pendens* to such subsequent purchaser or creditor. In such cases the courts give force to the registry laws and hold the superior equity in the *pendente lite* purchaser or creditor, because the law has appointed a place where mortgages must be registered in order to be notice to purchasers, and if there be no registry there the purchaser is not held to constructive notice [of the mortgage] by any other means."

There is a further expression in the main opinion somewhat as follows: "The effect of *lis pendens* and the effect of registration are in their nature the same thing. They are only different examples of instances of the operation of the rule of constructive notice. One is simply a record in one place and the other is a record in another place. . . . They are each record notices." This is taken verbatim from *Jones v. McNarrin,* 68 Me., 334, 339. In that case the opinion adds: "A purchaser must consult both places of record for light and information." It is interesting to note that in that case the suit was to enforce a recorded lien and the case in effect holds that registration will not take the place of a notice of *lis pendens.* The registration was referred to only because of the fact that an ambiguous description existed both upon the record and in the pending suit.

We must concede to the Legislature the purpose, as we certainly must the right, to prescribe the mode in which notice of *lis pendens* may be given in actions "affecting the title to real property," in the enactment of these statutes, C. S., 500, 501, 502, which have, step by step, entirely relieved the harshness of the common law rule by providing a convenient place where the notice may be found, thus substituting certainty for the admitted confusion and harshness of the common law.

The contention that the notice required by the statute of *lis pendens* is not necessary in foreclosure suits is altogether inconsistent with the decisions of this Court. Wherever these decisions have dealt with foreclosure suits they have recognized the necessity of the notice required by the *lis pendens* statute, and that the statute is substituted for the common law rule. *Todd v. Outlaw, supra; Dancy v. Duncan,* 96 N. C., 111, 1 S. E., 455; *Jones v. Williams, supra.* This distinction is noted and upheld in *Collingwood v. Brown, supra,* in which *Justice Shepherd,* speaking for the Court, and commenting on *Todd v. Outlaw, supra,* and defining the effect of the *lis pendens* statute (and incidentally the function of registration) holds that the statute is paramount:

"We are of the opinion, however, that, as to real property there is but one rule of *lis pendens* in North Carolina, and that the provisions of The Code (sec. 229) (now C. S., 500) are a substitute for the common-law rule. When the Court held, in the cases cited, that it was not necessary to file a

formal notice of *lis pendens* when the action was pending in the county in which the land was situated, we do not understand that it intimated that two rules of *lis pendens,* varying in their extent and operation, prevailed in this State.

"As *Bynum, J.,* in *Todd v. Outlaw, supra,* very justly remarks: 'It would seem that the purpose of our statute was to assimilate the law of *lis pendens* to the registration laws and the docketing of judgments, and to produce consistency and certainty in the doctrine of constructive notice.' This consistency can be secured by holding, as we do, that where the action is brought in the county where the land is situated, and the pleadings contain 'the names of the parties, the object of the action, and the description of the property to be affected in that county,' that this is a substantial compliance with The Code, sec. 229, as to the filing of notice, and puts in operation all of the provisions of the statute. . . .

"Again, it is hardly probable, in view of the legislation in England and many of the United States, dictated by the demands of public convenience and necessity and commerce, that this important statute was only to apply in those rare instances where suits affecting real property were brought in counties in which the land was not situated.

"The rule of *lis pendens* is often regarded as harsh in its operations, but it is universally admitted to be based upon public policy imperatively demanded by a necessity which can be met and overcome in no other manner. Freeman on Judgments, 191. Where, however, its rigors may be softened, and at the same time its advantages preserved, it is the duty of the Legislature to act, as it has done in this State, for the protection of purchasers and subsequent incumbrances."

Since *Todd v. Outlaw, supra; Dancy v. Duncan, supra;* and *Jones v. Williams, supra,* regarded actions affecting the title to real estate, including foreclosure suits, as completely subject to the law requiring statutory notice of *lis pendens* as the law then stood, it seems to me that the conclusion is inescapable that when the statute was amended by C. S., 501 and 502, requiring the cross-indexing of the notice of *lis pendens* in a separate *lis pendens* docket, compliance with that statute is still necessary to bind a *bona fide* purchaser *pendente lite.* Formerly the pleadings disclosed the threefold requirements of the statute as notice—a statement of the names of the parties, a description of the land, and the purpose of the action—and only by virtue of these facts did it serve as notice. The additional requirement is that such notice shall be cross-indexed in a separate *lis pendens* docket and the consequence annexed in the statute is plainly that if this is not done the *bona fide* purchaser will not be bound by the judgment.

The mere fact that property is in litigation through a foreclosure suit or in any other way does not take it *in custodia legis;* nor does either the

common law or statutory doctrine of *lis pendens* so regard it. The term is of technical significance, applicable only where in some appropriate proceeding the property in question has been seized or taken by the court, as in attachment, levy under execution, receivership, and the like. It has no application to the principle of *lis pendens*. Wiltsie, *op. cit., supra,* p. 754, sec. 449.

I may say that there is no principle better established than that under the common law *lis pendens* operated altogether *ex proprio vigore* and without external aid. It was an arbitrary rule established by the courts as a mere device to keep the subject of the action *in statu quo* until final judgment. While the weight of authority is decidedly to the effect that no theory of notice is involved in the doctrine of *lis pendens* at the common law, if the doctrine was ever based upon any theory of notice, such notice was never supposed to have been given from any source other than the mere pendency of the action and because of an antiquated and outmoded assumption that "all the inhabitants of the realm are supposed to pay attention to and be familiar with what is going on in courts of justice." *Fox v. Reeder,* 28 Oh. St., 181; 34 Am. Jur., 363, sec. 3 and notes. Speaking of the notice of *lis pendens* afforded from the pendency of the action, Thompson, Real Property (1940), sec. 4508 (4237), says: "The cases generally hold that the rule of *lis pendens* is a harsh and oppressive one when given operation against a *bona fide* purchaser without notice. One relying on the rule must understand that his claim is *strictissimi juris.*" The statutory *lis pendens,* together with the 1919 amendment to the law is calculated to relieve this harshness and to give the intending purchaser a more reasonable notice, since it does not require him to explore the jungle of litigation in the clerk's office without the guidance afforded by a proper index. But whatever the reason, it is our business to interpret, not to write the law.

Action was commenced against the Irvins, appellants, only when they were made parties to the suit. C. S., 404, 475; *Hatch v. R. R.,* 183 N. C., 617, 112 S. E., 529; *Jones v. Vanstory,* 200 N. C., 582, 157 S. E., 867. By that time the statute of limitations had run against the mortgage, and it was adequately pleaded. Since the pendency of the suit falls short of compliance with the statute in the essential of cross-indexing, and was therefore not constructive notice, and since appellants had no actual notice of the pendency of the suit and were *bona fide* purchasers, the bar of the statute was not repelled. In law they are innocent purchasers without notice.

These laws requiring notice of *lis pendens* and requiring these notices to be properly cross-indexed in a *lis pendens* docket are remedial in their nature. Even if it be conceded—and I do not concede it—that the registration of an instrument had the prophetic power to point out the

existence of a lawsuit not yet begun, it was still within the power of the Legislature to provide a more reasonable notice more appropriate to the progress and to the crowded business transactions and multiplied litigation of the modern age, and their attempt to do so should be sustained by the court in the spirit accorded the beginning of such a reform as expressed in *Todd v. Outlaw, supra.* The act as heretofore understood took an intolerable burden from those whose duty it is to investigate and abstract titles and who have become familiar with the aid given by the *lis pendens* docket and I doubt if they will welcome a return to the old condition.

But if the Legislature should see fit again to deal with a frustrated statute, I do not know what clearer language it might use to express its purpose.

There was no reason why the plaintiff in this action should not have observed the simple requirements of the statute, and I think the judgment should be reversed.

C. H. LEARY, ADMINISTRATOR OF C. B. COOPER, DECEASED, v. NORFOLK SOUTHERN BUS CORPORATION,
and
N. P. McDUFFIE v. NORFOLK SOUTHERN BUS CORPORATION.

(Filed 23 January, 1942.)

Automobiles §§ 14, 18h—Stopping of bus on highway to permit passenger to alight is not violation of parking statute.

The stopping of a bus upon the paved portion of a highway, outside of a business or residential district, for the purpose of permitting a passenger to alight, is not parking or leaving the vehicle standing within the purview of sec. 123, ch. 407, Public Laws 1937, even though the shoulders of the highway at the scene are of sufficient width to permit the bus to be stopped thereon, and an instruction to the effect that stopping the bus on the highway for such purpose is a violation of this statute, constituting negligence *per se*, must be held for reversible error when the matter relates to one of plaintiff's primary allegations of negligence.

DEVIN and SEAWELL, JJ., dissent.

CLARKSON, J., dissenting.

APPEAL by defendant from *Stevens, J.,* at April Term, 1941, of TYRRELL. New trial.

Civil action instituted by N. P. McDuffie to recover damages for personal injuries resulting from an automobile collision and civil action instituted by C. H. Leary, Administrator, for the wrongful death of his

intestate resulting from the same accident. At the time of the trial the two actions were consolidated for trial by order of the judge.

On the night of 14 October, 1938, plaintiff McDuffie and his father-in-law, C. B. Cooper, plaintiff Leary's intestate, left Columbia, North Carolina, to visit friends at Creswell. They left on the return trip about 10 p.m., entering the highway about 200 yards behind defendant's bus. McDuffie, who was driving, followed the bus for 5 or 6 miles, driving at a speed of about 40 miles per hour. Upon reaching a straight stretch of road McDuffie cut his automobile to the left for the purpose of passing the bus. He saw a car approaching from the opposite direction. Thereupon he cut his car back to the right and collided with the rear end of defendant's bus. At the time, the bus was in the act of stopping or had stopped for the purpose of permitting a passenger to alight. As a result of the collision Cooper was killed and McDuffie received certain personal injuries and his automobile was damaged.

Plaintiffs allege that the defendant was negligent in that: (1) it permitted its bus to be operated by an unskilled and incompetent driver; (2) it failed to have installed on its bus a proper rear view mirror or other like device; (3) its driver operated its bus without keeping a proper lookout or exercising due care to ascertain the proximity of automobiles approaching from the rear; (4) it failed to denote its intention to stop said bus upon said highway by giving proper hand and arm or adequate mechanical signal; and (5) it permitted its bus to be parked or left standing upon the paved or improved or main traveled portion of the highway when it was practicable to park the same off of the said portion of said highway.

When the cause came on to be tried appropriate issues were submitted to and answered by the jury in favor of the plaintiffs. From judgment thereon defendant appealed.

S. S. Woodley and McMullan & McMullan for plaintiffs, appellees.

Fred E. Martin, R. Clarence Dozier, and Ehringhaus & Ehringhaus for defendant, appellant.

BARNHILL, J. One of the primary allegations of negligence is that the defendant parked or left its bus standing upon the paved or improved or main traveled portion of the highway in violation of sec. 123 (a), ch. 407, Public Laws 1937. The evidence in respect thereto tended to show that the driver of the defendant's bus was in the act of stopping or had stopped the bus on the improved or paved portion of the highway for the purpose of permitting a passenger to alight, and that the shoulder of the road was of sufficient width to permit the driver to drive off of the hard surface before stopping. The only conflict in

the evidence in this particular was as to whether the bus had actually stopped, the evidence of the plaintiff tending to show that it had stopped, and that it did so suddenly.

On this aspect of the case the court charged as follows: "Plaintiff contends that defendant parked its bus on the paved portion of the highway where it had no scheduled stop. There is a section of the statute which covers that also, sec. 2621 (308):" It then read to the jury sec. 123 (a), ch. 407, Public Laws 1937, which is Michie's Code of 1939, sec. 2621 (308). It then stated plaintiff's contentions in respect thereto including the statement: "Plaintiffs contend that defendant parked its bus on the paved portion of the highway. That is one of the elements plaintiffs are depending upon in each of the cases as to negligence." It then stated plaintiffs' contentions on this allegation and charged further: "There is some debate as to what is meant by parking on a highway upon the paved or improved or main traveled portion of any highway outside a business district.

"If you find from the evidence and by its greater weight in this case that the defendant, through its driver, did stop its bus, all of the same being on the paved portion of the highway, and that at the same time there was space enough on the shoulder or entrance to a road right at this point that it was practicable to park in and not park on the paved portion of the highway, and that a reasonably prudent man, as I have defined that term for you, would not have stopped on the highway, that is, the paved portion, but would have pulled onto the shoulder or the part of the road adjoining the pavement, which according to plaintiff's contention was 10 or 11 feet wide, then that, under the law, would amount to negligence, as the court conceives it to be." This was followed by an instruction that "the violation of a statute designed for the safety of people (other than the section related to speed) using roads and highways of this State, the violation of such statute is negligence *per se.*"

It clearly appears from the evidence offered and the quoted portion of the charge that the court below conceived it to be a violation of sec. 123 (a) of the 1937 Act if the defendant stopped its bus on the paved portion of the highway, under the circumstances outlined, for the purpose of permitting a passenger to alight. That is, the court held, in effect, that "park" and "leave standing" are synonymous with "stop."

The defendant's exceptive assignments of error challenging the correctness of the quoted excerpts from the charge present this question: Is the stopping of a motor vehicle upon the paved or improved or main traveled portion of a highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway, when such stopping is for the purpose of permitting a passenger to alight, a viola-

tion of section 123, ch. 407, Public Laws 1937, constituting negligence *per se?* The answer is no.

This question was discussed and decided in *Peoples v. Fulk, ante,* 635. Supplementing what was there said we may add that the temporary stopping of an automobile on the proper side of the highway for a necessary purpose is not unlawful. *S. v. Carter,* 205 N. C., 761, 172 S. E., 415; *Stallings v. Transport Co.,* 210 N. C., 201, 185 S. E., 643; 42 C. J., 614; 2 Blashfield Cyc. Auto L. & P., 332, and cases cited; *Billingsley v. McCormich Transfer Co.,* 228 N. W., 424 (N. D.); *Alexon v. Jardine,* 223 N. W., 32 (N. D.); *Dare v. Bass,* 224 Pac., 646. Accordingly, it has been held that the stopping of a service truck on the highway to hitch on to a wrecked car, *Kastler v. Toures,* 210 N. W., 415 (Wis.), or to detach a tow chain, *Henry v. Liebovitz & Sons,* 167 Atl., 304 (Pa.), reasonable backward or forward movement of a vehicle engaged in ordinary use of the highway, with allowance of time required in changing direction, *Henry v. Liebovitz & Sons, supra,* stopping momentarily to permit a person to board the vehicle, *Peoples v. Fulk, supra, American Co. of Arkansas v. Baker,* 60 S. W. (2d), 572 (Ark.), or stopping to make a delivery, where there is ample room to pass, *Delfosse v. Oil Co.,* 230 N. W., 31 (Wis.), does not constitute a violation of statutes such as the one under consideration. See also 2 Blashfield, *supra,* 332-33.

In many instances such temporary stops are required by statute (ch. 407, Public Laws 1937, sections 105, 117, 119, 120, 128, and 134) and to hold otherwise would mean that a motorist who stops at a through street or to permit a pedestrian to pass in safety or for traffic to clear before making a left-hand turn or to yield the right of way to a train at a railroad crossing or to permit a passenger to get on or to alight from the vehicle must first drive off of the hard surface on to the shoulder of the road. The language used in the statute is not such as to justify this conclusion.

The charge of the court on this aspect of the case dealt with one of the plaintiffs' primary allegations of negligence. Defendant admitted its bus was stopped with all four wheels on the pavement to permit a passenger to alight. The court instructed the jury that this was an act of negligence *per se.* Such charge was erroneous and prejudicial.

On the question of contributory negligence of plaintiff McDuffie see *McNair v. Kilmer & Co.,* 210 N. C., 65, 185 S. E., 481; *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145.

As the questions presented by the other exceptive assignments of error may not again arise we refrain from discussion thereof.

New trial.

DEVIN and SEAWELL, JJ., dissent.

CLARKSON, J., dissenting: From the main opinion I dissent. I give the facts and the law in the case fully.

These are two actions brought by plaintiffs against defendant for actionable negligence, alleging damage. They were consolidated for trial without objection.

In the McDuffie case the issues and answers thereto were as follows:

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

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Ans.: 'No.'

"3. What property damage is plaintiff entitled to recover? Ans.: '$400.00.'

"4. What damage is plaintiff entitled to recover for and on account of injuries to his person? Ans.: '$200.00.'"

In the Leary case the issues and answers thereto were:

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

"2. If so, what damage is plaintiff entitled to recover? Ans.: '$7,500.'"

I think the issues correct from the pleadings and evidence adduced on the trial. In the McDuffie case the defendant denied negligence and set up the plea of contributory negligence. In the Leary case (a guest in the car) the defendant denied negligence and set up the plea of "joint adventure" and contributory negligence. There was no evidence to support the plea in the Leary case, and, therefore, no issues as to "joint adventure" or contributory negligence on these aspects were submitted to the jury.

In the Leary case the allegations in the complaint as to negligence are as follows: "That as plaintiff is informed, believes and avers, the death of his intestate, C. B. Cooper, was proximately caused by the negligence of the defendant, acting by and through its agent, servant or employee, viz.: the driver of said bus, in that the defendant, notwithstanding that at the time it well knew, or in the exercise of ordinary care ought to have known, that the width of the paved, improved or main traveled highway leading from Creswell to Columbia, and particularly that portion thereof at the point of said impact, was only 16 feet, that the shoulders at said point were in good condition and sufficiently wide to enable said bus to park or remain standing thereon, and that the car in which plaintiff's intestate was riding was at the time proceeding in the same direction closely in the rear of said bus, did nevertheless: (1) wrongfully, carelessly and negligently permit said bus at said time to be operated by an unskilled and incompetent driver; (2) wrongfully, carelessly and negligently operate said bus without having attached thereto a properly

adjusted rear view mirror, or other like device, in good condition; (3) wrongfully, carelessly and negligently operate said bus without keeping a proper lookout, or exercising due care to ascertain the proximity of automobiles approaching from the rear; (4) wrongfully, carelessly and negligently fail to denote its intention to stop said bus upon said highway at or near said point, either by hand or arm signal, or by any approved mechanical or electrical device, or otherwise; (5) wrongfully, carelessly and negligently park said bus or leave same standing upon the paved or improved or main traveled portion of said highway, outside of a business or residence district, and at a point where it had no schedule stop, notwithstanding that, as the defendant well knew or should have known in the exercise of ordinary care, it was practicable to park said bus or leave same standing off of the paved, improved or main traveled portion of said highway, and notwithstanding further, as the said defendant well knew, or should have known in the exercise of ordinary care, that, when said bus was so parked or left standing, a clear and unobstructed width of only about 8 feet or less upon the paved, improved or main traveled portion of said highway, opposite such parked or standing bus, was left for the free passage of other vehicles thereon." That the prayer for damages is set forth. These allegations in the complaint are denied by the defendant and the pleas of "joint adventure" and contributory negligence are set up.

In the McDuffie case the allegations in the complaint as to negligence are as follows: "That plaintiff's injuries to property and person were proximately caused by the negligence of the defendant, acting by and through its agent, servant and employee, viz.:" and contain the same allegations as in the Leary case. These allegations are denied by defendant and the plea of contributory negligence is set up.

Evidence of Plaintiff: The plaintiff N. P. McDuffie testified, in part: "My wife gave birth to a child on the 12th. As I recall the 15th day of October, 1938, it was a Saturday. I was staying in Columbia with my father-in-law, C. B. Cooper, who lived there. My car was a 1938 Ford Coach, and I left Columbia at approximately 8 p.m., for the purpose of visiting some friends in Creswell. . . . My father-in-law, Mr. Cooper, went with me in the car. I invited him to go on the trip. He had no interest in the car. It was my car and Mr. Cooper had no business in Creswell. We reached Creswell about 8:00, maybe 8:20, we left shortly after 8:00. I saw my friends and stayed in Creswell something over an hour. At that time I was out on the street talking to my friends. I pulled out in my car about 200 yards behind the bus. We were both going toward Columbia and I was driving behind the bus. When I reached the main highway I pulled up to approximately 100 yards behind the bus and trailed at that approximate distance between

5 and 6 miles. There is a long curve coming from Creswell to Columbia, and I trailed the bus at an approximate distance of 100 yards until we had passed the curve. I was running around 40 miles an hour. After passing the curve we came into a straight-away which is approximately 2 or 3 miles long. After entering the straight-away I attempted to pass the bus. In order to pass I pulled up behind the bus and blew my horn and started by and noticed car lights ahead and pulled back. I didn't see the car lights until I turned out to my left because before then the bus cut off the view. The bus was quite a lot wider than my car. While I was following the bus I was driving on my right side within 4 or 5 or 6 inches of the outer edge of the pavement. When I pulled out to the left and saw a car coming it was approximately 300 yards from me. I couldn't tell accurately. I turned back because I was meeting this car and didn't figure I had time to pass. I thought it was dangerous to be passing the bus. I pulled my car again to the right-hand side behind the bus and was approximately 20 or 25 yards therefrom. I saw the pavement between me and the bus. I had slowed down when I pulled back. Of course, to pass I had speeded up a little bit but had slowed down to approximately 40 miles an hour. I intended to pull back to the left, but did not have time before that bus stopped right in front of me and I plunged right into it. It stopped suddenly. I applied my brakes to the extent that they had to be unlocked. They were jammed. There was nothing else I could do to avoid the bus after it stopped suddenly. I didn't have time to do anything. I hit the bus right in the rear end. It threw me forward and I hit the steering wheel and tore the steering wheel down. Both knees were jammed. It knocked the switch off and I had ribs broken. I hit the steering wheel and under the dash. My mouth hit something but I don't know just where. Three ribs were broken and I was cut over the knees, and my lip was cut through and I had three front teeth knocked loose. I still have the teeth and one of them is loose now. I was confined in bed for about two weeks. . . . I was incapacitated for work about six weeks. I was drawing $45.00 a week and expenses at that time. My car was doubled up, the entire front end of it was mashed back. I could not operate it in town that night. The car was worth $500.00 less immediately following the injury than it was immediately preceding the injury. It was about six months old and in excellent condition. Before I attempted to pass the bus I blew my horn three times at least. That was before I fell back on the other side. After I fell back on the other side I applied my brakes until they were locked. The paved surface of that road is approximately 16 feet wide. The shoulders are 10 or 11 feet wide and they were in good condition on that night. There is more shoulder space at the point where the bus stopped than it is ordinarily because of a lane that leads

into the highway at that point and he had at least twice that much. It was in good condition. The bus stopped with all wheels on the paved road. The driver of the bus did not give any signal of his intention to stop. I was on the lookout with reference to the bus and the conditions ahead of me. When the collision came it threw Mr. Cooper forward and his head hit the panel above the windshield and some part of him broke that side. The windshield was in two pieces. I was not rendered entirely unconscious but Mr. Cooper was at the time. . . . Mr. Cooper went with me on a pleasure trip. It was a pleasure trip for both of us. . . . I don't know who put the liquor in the automobile. There was a broken bottle and there was a full pint that had never been broken. When I say broken I mean the seal of the bottle had been broken. I don't know about the pieces of the bottle but I gave Mr. Cooper the money to buy the full pint with, for my wife. The nurse had told me to get it. He bought it at Columbia before we left to go to Creswell; it was Five Crown whiskey. I know about the pint bottle but I don't know about the one-half pint. . . . I blew my horn three times. The bus did not slacken its speed and I never did get abreast the bus. I was 25 or 30 yards behind the bus at all times. I pulled back again behind the bus suddenly and applied my brakes immediately when I saw him stop. . . . When I pulled to my right side again I would say I was the length of the bus from it, behind it. That is when I first pulled back into the line of traffic. At the time the bus stopped I would say I was 20 or 25 feet back of it. My brakes were in good condition. I had had them tightened in Creswell that afternoon. . . . I took one drink that afternoon about 3:00 and I had not taken any since. . . . (Re-direct) The pint of whiskey in the car was purchased for my wife. . . . I did not know the other whiskey was in the car and had never seen it before in my life. My brother-in-law used the car that afternoon. I know that they had been drinking to some extent that afternoon but I did not drink with them. The drink I took about 3:00 in the afternoon was not a big one and it did not put me under the influence of liquor. It was wore off by night and I had had my supper. I left from Mr. Cooper's. When I attempted to pass this bus and turned back it came to a stop almost immediately. I was 20 or 25 feet from it when I saw it was going to stop. When it started to stop I started to pull back and then is when I started applying brakes. I turned out and saw this car coming and when I looked around I saw the bus stop and I pulled back. That was after I got back on the right side. . . . (Re-called) I said that when I was passing as I pulled up to the bus I sounded my horn at least three times. I did not ever get abreast the bus. I said I was 25 or 30 feet when I started pulling back. I cannot say exactly how far I was when I first pulled out and

prior to that time I had sounded my horn three times. The bus did nothing in answer to my signal and so far as I know it did not hear the signal. I was not drinking that night when I left here. I did not take a drink between the time I left Columbia and the time I was hurt and Mr. Cooper did not take a drink."

Dr. C. S. Chaplin testified, in part: "I treated Mr. Cooper. He stayed in my hospital. . . . He had a fractured skull, two ribs broken in the right side and he developed paralysis of his right side and intestines and later developed pneumonia and died. The paralysis proceeded from the skull injury. The skull injury was received from a blow. Prior to that night Mr. Cooper was in good health." There was corroborative evidence to sustain plaintiff's testimony.

Evidence for Defendant: C. V. Stevenson testified, in part: "I am employed by the Norfolk Southern Bus Corporation. I was so employed on the 15th day of October, 1938. I was making the run from Williamston to Columbia. I am a regular bus operator and had been operating buses for three years. I started on January 15, 1935. Since that time I have worked continuously at that occupation. I remember October 15, 1938, at the time my bus was struck by an automobile. That night I was driving bus #36. . . . I have tested that bus to ascertain for myself within what is the shortest distance it can be stopped going at the rate of 40 miles an hour and at the rate of speed just using air brakes and not the emergency brakes it takes 111 feet to stop it. I have not tested it with the emergency brake. At the rate of 30 miles per hour the shortest distance the bus can be stopped by the use of the air brakes and not the emergency brakes is 93 feet. The use of the emergency brake makes it stop much more quickly. That bus weighs 14,300 lbs. I took the bus on the night of October 15, 1938, from Williamston, leaving there about 8:50 or maybe it was 8:45, I don't know exactly. I went to Creswell and left there going toward Columbia. On the way from Creswell to Columbia I stopped my bus at or near Travis station to put a passenger off. That night I had only one passenger. I was making a rate of speed prior to the time I stopped of between 35 and 40 miles an hour. I had a passenger to put off in that neighborhood and I got a signal from the pull cord. When I got the signal I turned the lights on and asked him where he wanted to get off and he said, 'Down at the cross-roads.' I then started braking my bus—I had a pretty good way to go to the station. You start applying air brakes—you don't put them on all of a sudden. I had gone after starting to stop probably 100 or 125 feet, or maybe 150 feet, when I was struck by the automobile. I was making a gradual stop. There is a mechanical device on that bus to indicate to the vehicle at the back that it is stopping. When you put your foot on the brake it automatically lights

up your stop lights. There are two of them and they are about 4 or 5 inches in diameter and have 'STOP' written across the glass in them and it is red. I know those lights were working that night because they were working before the wreck and after the wreck. I had checked them in Williamston. I did not hear a horn before I stopped and did not see this automobile at all. I looked in the back of the bus but did not see it. The bus was equipped with rear vision mirrors. It has one inside and also one on the outside. I was around the curve a good way. I don't know exactly how far. Mr. McDuffie crashed into the rear end of my bus. The bus had not come to a dead stop at the time. . . . After the collision I got out of the bus and went back to the car. Both of the occupants were sitting in the car and I had to sort of pull one of the doors open. I tried to talk to them, tried to get them out as soon as I could. Neither of them said anything to me. They did not say anything to me or in my presence. I think they got them in cars and got them away as soon as they could. I assisted in getting them out. I smelled whiskey. I was on the right side, Mr. McDuffie's side, and the rest of them were on the other side. There was whiskey in the car and Mr. Postum, the Chief of Police, took that out. My bus was on the right-hand side of the highway when the car struck me. I had not gotten off the concrete. I meant that my bus went 125 to 150 yards after the signal was given me to stop. Note 125 to 150 feet. . . . That was no regular scheduled bus stop. We don't have any regular stops; we stop and pick up people up and down the road as they come out of the house we stop and pick them up. I have never read our franchise." There was evidence on the part of defendant corroborating Stevenson and that McDuffie was under the influence of whisky. "I observed while we were there talking with him and he was under the influence of whisky or intoxicants."

Julius S. Postum testified, in part: "I saw the stop lights on the bus and saw the lettering on the bulbs. Coming from the rear in a car at night in my judgment the lettering could be distinguished or read about 50 feet. To the best of my knowledge they are around 2 inch lenses. I am talking about my vision."

The evidence on the part of plaintiff was to the effect that he was the owner and driver of a 1938 Model Ford Coach, with his father-in-law, C. B. Cooper, as a guest. He was going home with his father-in-law to Columbia, N. C., after visiting friends in Creswell, N. C. The defendant's bus was leaving Creswell going towards Columbia. He pulled out behind and was driving his car about 200 yards behind the bus and then trailed it for 5 or 6 miles, 100 yards behind the bus, until a curve was passed. He then, for 2 or 3 miles had a straight way and attempted to pass the bus. In order to pass he pulled up behind the

bus, blew his horn and started by, but noticed a car light ahead coming in his direction and pulled back. He did not see the car light until he turned to his left as the bus cut off his view, the bus was considerably wider than his car. He turned back, as he figured he did not have time to pass, as he thought it was dangerous to pass the bus. He pulled his car to the right-hand side about 20 or 25 yards behind the bus. He saw the pavement between his car and the bus and he slowed down when he pulled back—he had speeded up a little but slowed down to about 40 miles an hour. He intended to pull back to the left and in his exact language: "Did not have time before that bus stopped right in front of me and I plunged right into it. It stopped suddenly. I applied my brakes to the extent that they had to be unlocked. They were jammed. There was nothing else I could do to avoid the bus after it stopped suddenly, I didn't have time to do anything. I hit the bus right in the rear end. It threw me forward and I hit the steering wheel and tore the steering wheel down. Both knees were jammed. It knocked the switch off and I had ribs broken. . . . The bus stopped with all wheels on the paved road. . . . The driver of the bus did not give any signal of his intention of stopping. I was on the lookout with reference to the bus and the conditions ahead of me."

I think this evidence sufficient to be submitted to the jury. The evidence on the part of defendant, in the material aspects, contradicted that of plaintiff, but this is for the jury and not us to determine.

The plaintiffs rely chiefly upon the actionable negligence established in the following particulars as alleged in the complaint: "(1) The negligence of the defendant in stopping its bus, at night, with all four wheels on the pavement surface of the highway only 16 feet in width, notwithstanding the good condition and amplitude of the shoulders, in violation of C. S., 2621 (308), or in violation, as the jury was empowered to find, of its common law duty to exercise due care. (2) The negligence of the defendant in suddenly stopping its bus upon the highway, at night, without first ascertaining that the stop could be made in safety, and without signaling its intention to do so, *in violation of C. S., 2621 (301),* and in further violation, as the jury was empowered to find, of its common law duty to exercise due care." The main opinion refers to but does not set forth the statute on the subject, which is as follows: N. C. Code, 1939 (Michie), sec. 2621 (308), has, as to stopping on a highway, a double provision: "(1) No person shall park (2) or *leave standing any vehicle whether attended or unattended,* upon the paved or improved or main traveled portion of any highway outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway." The proviso reads as follows: *"In no event shall any person park*

or leave standing any vehicle, whether attended or unattended, upon any highway unless a clear and unobstructed width of not less than fifteen feet upon the main traveled portion of said highway opposite such standing vehicle shall be left for free passage of other vehicles thereon, nor unless a clear view of such vehicle may be obtained from a distance of two hundred feet in both directions upon such highway." The other proviso is not material to the facts in this case, nor does (c) which is applicable to crippled vehicles. (Italics mine.)

The main opinion repeals the provisions of this law. It will be noted that the above statute uses the language "outside of a business or residence district." In fact, the decision in the main opinion is not applicable, the stopping was not in a "business or residence district." The word "park" is not appropriate to the facts here.

In *S. v. Carter,* 205 N. C., 761 (763), it is stated: "This word is in general use, with reference to motor driven vehicles, it means the permitting of such vehicles to remain standing on a public highway or street, while not in use. 42 C. J., 613; C. S., 2621 (66)." *Stallings v. Transport Co.,* 210 N. C., 201 (203).

The whole statute is construed in *Lambert v. Caronna,* 206 N. C., 616. At p. 620, it is said: "The court below charged the law fully set forth under (a) *supra.* Defendant contends that the court below omitted to charge the law under (c). We see no error in the exclusion of (c) in the charge. The entire evidence of defendant was that he had a 'flat tire,' a 'puncture.' The tire was deflated and it was necessary for him to stop, in so doing, he should have complied with the rule of the road (a), *supra,* the evidence in no way brought him under the provisions of (c). No one testified the Pontiac was disabled in any manner except by a flat tire, or that it could not have been stopped so as to leave fifteen unobstructed feet for the passage of the Chrysler. The defense below was that 15 or more feet were in fact left clear on the hard surface. But this defense the jury ignored by the verdict." The main opinion overrules the statute and this decision.

In Vol. 2, Cyc. Automobile Law and Practice, sec. 1192, pp. 326-7, it is written: "In several jurisdictions there are statutes providing that no vehicle shall be parked or left standing on the highway in such manner that there shall not be a space of a specific number of feet for the passage of other vehicles. *A failure to leave the required unobstructed passage way constitutes negligence, unless the stopping is due to some unavoidable mishap, such as an accident wrecking the car,* where, if the owner of the car is using due diligence to procure its removal, the statute does not apply. *A statute requiring a driver stopping on the highway to leave a required number of feet for passage for other vehicles is applicable where an automobile collided with a parked truck,* although no other car

was passing," citing a wealth of authorities (italics mine). *Smithwick v. Pine Co.*, 200 N. C., 519.

A clear analysis of a statute in all respects identical with our own, except that, where impracticable to stop entirely on the shoulder, it required a space of 10 feet instead of 15 feet to be left open and unobstructed, will be found in *Fontaine v. Charas* (N. H.), 181 Atl. Rep., 417 (418), where the Court said: "The record is clear to the effect that it was 'practicable' for the defendant to have driven his car off of 'the paved or improved or main traveled portion' of the highway at the place where the accident occurred. It also appears to be conceded that his car was not disabled prior to the collision, and that the accident did not occur in a business or residence district. It does not appear, however, how long his car was stationary before the accident. From this lack of evidence the defendant contends that there is no evidence of 'parking.' Were 'parking' the only act prohibited, it might be necessary to attempt a definition of that rather loose word as it is used in the statute, but since it is illegal not only to 'park' but also to 'leave standing,' we are of the opinion that the defendant's act of stopping where he did is sufficient to invoke the statute. To 'park' may imply halting a vehicle for some appreciable length of time, but there is no such connotation to be drawn from the words to 'leave standing any vehicle, whether attended or unattended.' We believe that by the use of this phrase the Legislature intended to make illegal any voluntary stopping of a vehicle on the highway for any length of time, be that length of time long or short, except, of course, such stops as the exigencies of traffic may require. It therefore follows that the defendant was guilty of a violation of the statute in stopping on the traveled part of the highway when he could have driven off to the side, and it becomes unnecessary to consider the view which could have been obtained of his car or the clear space available for passage by it."

The law is settled that the negligence relied on must be the proximate cause of the injury. In *Burke v. Coach Co.*, 198 N. C., 8 (13), the rule is laid down as follows: "There is no evidence as to how the injury occurred, and the mere fact of the injury is in itself ordinarily no evidence of negligence. 'The breach of a statute is negligence *per se*, but there must be a causal connection between the disregard of the statute and the injury inflicted.' *Ledbetter v. English*, 166 N. C., 125, 81 S. E., 1066. Again it has been held in *Chancey v. R. R.*, 174 N. C., 351, 93 S. E., 834, that 'the rule was recently stated to be, that however negligent a party is, if his act stands in no causal relation to the injury, it is not actionable.' "

The authorities from this State so clearly support the plaintiffs' position as to render unnecessary a citation of authority from other juris-

dictions. *Williams v. Express Lines,* 198 N. C., 193; *Stovall v. Ragland,* 211 N. C., 536; *Cole v. Koontz,* 214 N. C., 188, and cases cited; *Smith v. Coach Co.,* 214 N. C., 314; *Clarke v. Martin,* 215 N. C., 405; *Holland v. Strader,* 216 N. C., 436; *Christopher v. Fair Assn.,* 216 N. C., 795; *Bechtler v. Bracken,* 218 N. C., 515.

The foregoing cases, variously, deal with each of the questions considered here, negligence, contributory negligence, and proximate cause. Indeed, no authority is necessary for the proposition that the violation of a statute, designed for the promotion of public safety, constitutes negligence *per se,* and that the question of proximate cause, as in every case where the minds of men might disagree (*Harton v. Telephone Co.,* 141 N. C., 455), is for the jury. Indeed, while the instant case seems to find support from each and all of the cases cited, *supra,* they are practically on "all-fours" with *Smith v. Coach Co.,* 214 N. C., 314, wherein each of the questions here presented was resolved in favor of the plaintiffs. Furthermore, in the Leary case it will be noticed that the only contributory negligence pleaded is such as is imputable to the intestate Cooper as a joint adventurer with McDuffie—a theory of the case which has not been sustained. He was a guest in the car driven by McDuffie. To bar his recovery the negligence of McDuffie must be the sole proximate cause of the injury.

In *Holland v. Strader, supra, Devin, J.,* for the Court held (headnote): "Evidence that defendant stopped his car suddenly without giving the warning signal required by statute, and that the car in which plaintiff was riding as a guest, traveling on the highway in the same direction behind defendant's car, collided with the rear of defendant's car, causing the injury in suit, is held sufficient to be submitted to the jury on the issue of defendant's negligence, notwithstanding defendant's evidence that the cars were in a long line of traffic going to a football game and that the negligence of the driver of the car in which plaintiff was riding in failing to keep a proper lookout and control over the car, and in following too closely behind defendant's car, was the sole proximate cause of the injury, the conflicting contentions raising a question of fact for the determination of the jury." At p. 438, it is said: "According to the uniform decisions of this Court, the violation of a statute imposing a rule of conduct in the operation of a motor vehicle and enacted in the interest of safety has been held to constitute negligence *per se,* but before the person claiming damages for injury sustained can be permitted to recover he must show a causal connection between the injury received and the disregard of the statutory mandate. This has been the established rule in North Carolina," citing authorities. *Bechtler v. Bracken, supra.*

Other authorities are to the effect that, in the absence of statutory prohibition, defendant's negligence in stopping the bus with all four wheels on the pavement, under the conditions and circumstances appearing of record, was for the determination of the jury. *D'Allesandero v. Bechtol,* 104 Fed., 845 (847).

Nor can it be reasonably contended that the negligence thus established bore no causal relation to the injuries sustained by plaintiffs. *Smithwick v. Pine Co., supra; Lambert v. Caronna, supra; Bechtler v. Bracken, supra; Fontaine v. Charles, supra;* and other cases cited *supra,* upon the question of negligence. *Lancaster v. Greyhound Corp.,* 219 N. C., 679.

N. C. Code, *supra,* sec. 2621 (296), is as follows: "(a) The driver of any such vehicle overtaking another vehicle proceeding in the same direction shall pass at least two feet to the left thereof, and shall not again drive to the right side of the highway until *safely* clear of such overtaken vehicle. (b) The driver of an overtaking motor vehicle not within a business or residence district, as herein defined, shall give audible warning with his horn or other warning device before passing or attempting to pass a vehicle proceeding in the same direction."

On the second aspect I quote the following statute in N. C. Code, *supra,* sec. 2621 (301): "Signals on starting, stopping or turning. (a) The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety, and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement, shall give a signal as required in this section, plainly visible to the driver of such other vehicle, of the intention to make such movement. (b) The signal herein required shall be given by means of the hand and arm in the manner herein specified 'or by any approved mechanical or electrical device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible, both to the front and rear, the signal shall be given by a device of a type which has been approved by the department.' Whenever the signal is given the driver shall indicate his intention to start, stop or turn by extending the hand and arm from and beyond the left side of the vehicle as hereinafter set forth. Left turn—hand and arm horizontal, forefinger pointing. Right turn—hand and arm pointed upward. Stop—hand and arm pointed downward. All signals to be given from left side of vehicle during last fifty feet traveled."

One driving an automobile upon a public highway is required by provision of this section to give specific signals before stopping or turning thereon, and the failure of one so driving to give the signal required

by statute is negligence, and when the proximate cause of injury, damages may be recovered therefor by the one injured. Headnote, *Murphy v. Asheville-Knoxville Coach Co.*, 200 N. C., 92 (93); *Mason v. Johnson*, 215 N. C., 95.

In 3-4 Huddy Cyc. of Automobile Law (9 Ed., 1931), sec. 145, pp. 245-6, we find: "Statutes and municipal ordinances in many cases require the driver of a motor vehicle to indicate his intention of bringing his car to a stop; and a violation of such a regulation may form a basis for a charge of negligence. Even in the absence of such a regulation, a driver is not relieved of the duty to use some care in respect to traffic in the rear; and whether the failure to give a signal to the rear is or is not negligence depends on the circumstances of the case, and usually is a question of fact for the jury. A signal that a forward vehicle is to stop should not be given unless the driver actually does so." *Murphy case, supra*, p. 103.

The evidence was to the effect that the driver of the car in the rear of the bus complied with the statute. As to negligence, the burden of this issue was on the plaintiffs.

As to contributory negligence of McDuffie, the burden of this issue was on the defendant, and we think it was a fact for the jury to determine. Postum, a witness for defendant, testified that the stop lights on the rear of the bus "could be distinguished or read about 50 feet." The plaintiff testified that "the driver of the bus did not give any signal of his intention to stop." From the authorities cited, I think the plaintiffs' evidence amply sufficient to justify the court below in overruling defendant's motion for judgment as in case of nonsuit.

I have examined the North Carolina cases cited by defendant and think they are distinguishable from the facts in the present action. If the New Jersey case cited by defendant is in point (*Hochberger v. Wood, Inc.*, 124 N. J. L., 518), and perhaps other cases not in this jurisdiction, we must abide by our own statute and decisions on the subject.

It is so well settled by numerous authorities, that I quote none, that as all the evidence showed that C. B. Cooper was a guest in the car of N. P. McDuffie, therefore he was not guilty of contributory negligence. The main opinion wipes out a statutory law made for the protection of the public.

Taking the charge as a whole, and not disconnectedly and disjointedly, we think the court below charged the law applicable to the facts in the case. On the first aspect, the statute is in clear language. Sec. 2621 (308), *supra*. It may be noted that the material allegation in the complaint was as to the negligence of the bus driver in "stopping suddenly, without giving warning." The issue submitted, and answered "Yes" by the jury, is "Was the plaintiff injured by the negligence of the

defendant, *as alleged in the complaint?*" The jury answered both aspects in favor of plaintiff.

The defendant was operating its bus, weighing 14,300 pounds, at night on a perfectly straight highway, at 35 to 40 miles per hour, on a paved road 16 feet wide at the place of the collision. The shoulders at that place were 10 or 11 feet wide and in good condition. A passenger in the bus gave the signal to stop, and in the exercise of due care and in accordance with the statute the driver could have complied with the statute and given the driver of the car in the rear notice of his intention to stop. This he did not do. He could have left a clear and unobstructed width on the main traveled portion of the highway at least 15 feet opposite the bus, in accordance with the statute and in the exercise of due care. He did not do this. He stopped suddenly on the paved portion of the highway, without giving any signal of his intention so to do, or leave space as is required by the statute. The driver of the car in the rear, to avoid the impact, applied his brakes to such a degree that they had to be unlocked; but he hit the bus in the rear and the collision killed a guest in the car and seriously injured the driver of the car. The evidence was to the effect that the driver of the car was using due care and obedient to the law of the road—the defendant was not. It is of utmost importance to the traveling public on the highways that the statutes governing the rule of the road be strictly observed to avoid accident. These rules, when carefully observed by drivers of automobiles and large buses and heavy motor vehicles carrying freight, make for safety on the highways. The law in regard to the highways represent the experience of years, made to be observed to avoid accidents and should not be repealed, as is done in the main opinion. The facts were found by the jury in accordance with the version given by the driver of the automobile, on the record there was no prejudicial or reversible error. For the reasons given, I dissent from the main opinion.

JOHN D. BIGGS (LATER SUCCEEDED BY JUDSON C. JONES), RECEIVER OF COMMERCIAL NATIONAL BANK OF HIGH POINT, NORTH CAROLINA, v. ROBERT G. LASSITER.

(Filed 23 January, 1942.)

1. Appeal and Error § 37c—

The findings of fact by the referee, which are supported by competent evidence and approved and adopted by the Superior Court, are not reviewable in the Supreme Court.

2. Receivers § 12d—

The receiver sold the assets of insolvent to a corporation subject to mortgages and other liens against same, and took in part payment of the purchase price stock of the purchasing corporation, and distributed the shares of stock *pro rata* among the creditors of insolvent, all under orders of court. *Held:* The transaction was not a reorganization of insolvent, and acceptance of stock by the payee of a note executed by insolvent does not discharge the note, but entitles the receiver and the endorser on the note only to a credit thereon to the value of the stock at the time of its receipt by the payee.

3. Pledges § 2b—

The maker of a note assigned a judgment in its favor to the payee as security. The judgment was sold under order of court and purchased by the payee. The payee thereafter realized upon the judgment an amount in excess of the sale price. *Held:* The note was properly credited with the sale price and not the amount realized by the payee upon the judgment, and, since the bidding at the sale was open to all and the sale was under order of court, the endorser on the note cannot assert C. S., 2593 (d) as a defense to his liability, the statute, by the express language of its proviso, not being applicable.

4. Reference § 11—

Where the findings of fact by the referee are supported by competent evidence and sustain the conclusions of law and are sufficient for a complete adjudication of the rights of the parties, it is not error for the trial court to refuse to recommit the case to the referee.

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

APPEAL by defendant from *Pless, J.*, at June Civil Term, 1941, of GUILFORD. Affirmed.

Agreed Statement of Case on Appeal: "This was an action originally instituted by John D. Biggs, Receiver of The Commercial National Bank of High Point, North Carolina, in which Judson C. Jones, who thereafter succeeded said Biggs as Receiver of said bank, was substituted as plaintiff, to recover a judgment against the defendant by reason of his endorsement of the promissory notes of R. G. Lassiter & Company, payable to the order of said bank, described in the complaint in this cause. The contentions of the parties are set out in the pleadings. After numerous continuances the case came on for trial before his Honor, Zeb V. Nettles, Judge presiding at the October, 1940, Civil Term of Superior Court, whereupon, the defendant in open court, waived any plea of the statutes of limitations which might arise upon the facts of this case and moved for a reference. This motion was granted, over objection by the plaintiff, and the Court entered an order referring the case to Hon. Robert Moseley. Thereafter, after several continuances, the case was heard by the Referee and, after briefs had been filed by both parties, the Referee made his report which is set out in full herein.

Following the filing by the defendant of exceptions to the Report of the Referee and a motion to re-commit, the case came on for hearing before his Honor, J. Will Pless, Jr., Judge presiding at the June, 1941, Civil Term of Superior Court, and after a hearing thereon the Court denied the motion to re-commit, overruled the defendant's exceptions to the Report of the Referee, approved and adopted said Report as the findings of fact and conclusions of law of the Court and entered judgment in favor of the plaintiff as set out in the record, from which the defendant appealed."

The referee's findings of fact and conclusions of law are as follows:

"1. On November 30, 1931, Robert G. Lassiter and Company, as principal, and the defendant, Robert G. Lassiter, as endorser, for value received, executed and delivered to the Commercial National Bank of High Point, North Carolina, a promissory note in the sum of $44,509.08, due January 29, 1932, with interest from maturity, at the rate of six per cent per annum.

"2. On December 4, 1931, Robert G. Lassiter and Company, as principal, and the defendant, Robert G. Lassiter, as endorser, for value received, executed and delivered to the Commercial National Bank of High Point, North Carolina, three promissory notes in the sum of $25,000.00 each, two of these notes being due February 2, 1932, and the other being due February 21, 1932, all bearing interest from maturity at the rate of six per cent per annum.

"3. On December 12, 1932, the sum of $151.93 was paid on the note in the sum of $44,509.08 described in paragraph 1 of these Findings of Fact.

"4. On June 19, 1933, Robert G. Lassiter and Company executed and delivered to John D. Biggs, Receiver of the Commercial National Bank of High Point, North Carolina, an assignment of a judgment for the sum of $246,890.00 and costs which had been taken by Robert G. Lassiter and Company against the City of Lake Worth, Florida, on February 6, 1931, this assignment being made to secure the payment of the indebtedness of Robert G. Lassiter and Company to the Commercial National Bank of High Point, North Carolina. As of May 1, 1933, the balance on the judgment, including interest due to that date, was $211,571.68.

"5. On or about September 9, 1933, a bill in equity was filed in the United States District Court for the Middle District of North Carolina in a suit entitled 'John D. Biggs, Receiver of Commercial National Bank of High Point, North Carolina, and Consolidated Indemnity & Insurance Company *v.* Robert G. Lassiter & Company,' wherein it was alleged that Robert G. Lassiter & Company was indebted to the Commercial National Bank of High Point, North Carolina, exclusive of interest,

in the following amounts: a. $44,357.15 on the note described in paragraph 1 of these Findings of Fact ($44,509.08 less payment of $151.93); b. $75,000.00 on the three notes described in paragraph 2 of the Findings of Fact; making a total of $119,357.15 on the four notes described above. (Another note in the principal sum of $6,207.65, on which the bill alleged a balance of $3,500.00 to be due, is not involved in this action.)

"6. The bill in equity also alleged: 'That as security for the indebtedness above referred to, the defendant, Robert G. Lassiter & Company, heretofore transferred and assigned to the plaintiff, John D. Biggs, Receiver of Commercial National Bank of High Point, North Carolina, a judgment in the face amount of $246,890.00, which had been recovered by Robert G. Lassiter & Company against the City of Lake Worth, Florida, on the 6th day of February, 1931, in the United States District Court for the Southern District of Florida; that said judgment is now totally uncollectible; and that the plaintiffs are informed and believe and, upon such information and belief, allege that the value thereof is not in excess of ten per cent thereof.'

"7. Robert G. Lassiter & Company filed an answer to the Bill of Equity wherein all of the allegations of the bill were admitted.

"8. On September 9, 1933, the Honorable Johnson J. Hayes, Judge of the United States District Court for the Middle District of North Carolina, appointed B. H. Griffin and J. S. Duncan permanent receivers of Robert G. Lassiter & Company. And on September 14, 1933, the Honorable I. M. Meekins, Judge of the United States District Court for the Eastern District of North Carolina, appointed the same persons as ancillary receivers for Robert G. Lassiter & Company.

"9. On November 6, 1933, the Guilford Construction Company wrote a letter to Messrs. J. S. Duncan and B. H. Griffin, Receivers of Robert G. Lassiter & Company, in which it offered to purchase all of the assets of Robert G. Lassiter & Company and to pay therefor: a. $7,500 (represented by a four-month note), and b. $10,000 shares of no par value common stock of Guilford Construction Company (these shares representing all of the capital stock of the Company). The offer provided that the assets so purchased: 'Would be accepted by Guilford Construction Company subject to such mortgages and other liens as may be against the same; but Guilford Construction Company would not assume any such mortgages or liens and would not assume any other indebtedness or obligation of Robert G. Lassiter & Company.' Thereafter the Guilford Construction Company amended its proposal by offering to increase the principal sum of the proposed note from $7,500.00 to $10,000.00.

"10. On December 5, 1933, the Honorable Johnson J. Hayes, United States District Judge for the Middle District of North Carolina, made an order directing the receivers of Robert G. Lassiter & Company to sell

and convey the assets of the company to Guilford Construction Company for the consideration named in that Company's proposal as amended, as set out in paragraph 9 of these Findings of Fact, and this order provided—'That the assets so conveyed to Guilford Construction Company shall be conveyed subject to such mortgages and other liens as may be against the same, Guilford Construction Company not, however, to assume any of such mortgages or liens, or any other indebtedness or obligations of Robert G. Lassiter & Company.' On November 23, 1933, Judge Meekins made a substantially similar order.

"11. Before the conveyance of the assets of Robert G. Lassiter & Company was made to the Guilford Construction Company, the latter company again amended its proposal by offering, instead of the proposed $10,000.00 note, $6,100.00 in cash and a note for $3,900.00, and by providing that the 10,000 shares of no par value stock should be issued to three trustees, to be named by the court, who should, at a specified time, 'Make a ratable distribution of said stock among the creditors holding claims against Robert G. Lassiter Company, as approved by the Master,' with the provision, however, that the trustees should not distribute fractional shares but should sell such shares and distribute the proceeds among those entitled thereto. Thereupon the receivers of Robert G. Lassiter & Company recommended to the court that they be authorized to proceed with the sale of the assets of the company to the Guilford Construction Company.

"12. On April 14, 1934, the Honorable Johnson J. Hayes, United States District Judge for the Middle District of North Carolina, by an order made that day and subsequently amended, authorized the receivers of Robert G. Lassiter and Company to sell and deliver to the Guilford Construction Company, for the consideration offered, all of the property of Robert G. Lassiter & Company. The two orders together provided that this property should be sold—'Subject to such mortgages, liens or other encumbrances as may be against the same, but without requiring the Guilford Construction Company in any manner to assume any mortgages or liens or other indebtedness against Robert G. Lassiter & Company.'—and, with respect to the 10,000 shares of no par value capital stock, that this stock should be issued to temporary trustees who should later deliver it to permanent trustees and that 'The said permanent trustees should hold the said stock for the benefit of the creditors of Robert G. Lassiter & Company, whose claims have now been or will be ascertained and, as soon as practicable to distribute said stock among the creditors of Robert G. Lassiter & Company whose claims have finally been allowed,' subject to the provision for the trustees' holding and subsequently selling fractional shares.

"13. In the ancillary suit Judge Meekins made orders providing for the sale of the assets of Robert G. Lassiter & Company to the Guilford Construction Company upon the same terms and conditions as were set out in the orders of Judge Hayes hereinbefore referred to.

"14. Subsequently all of the assets of Robert G. Lassiter & Company were sold to Guilford Construction Company pursuant to the orders made directing such sale, and the Guilford Construction Company became the owner of such assets subject to any valid claims against the same.

"15. M. B. Simpson was appointed Special Master to report to the court the outstanding liabilities of Robert G. Lassiter & Company, and on July 31, 1934, he made his report in which he found that the company was indebted to the Commercial National Bank of High Point, North Carolina, in the amount of $119,357.15. On or about September 7, 1934, an order was made by the court confirming the report of the Special Master.

"16. Pursuant to the provisions of the order authorizing the sale of the property of Robert G. Lassiter & Company to the Guilford Construction Company, there was issued to John D. Biggs, Receiver of the Commercial National Bank of High Point, North Carolina, 1,193 shares of the capital stock of Guilford Construction Company.

"17. The plaintiff, in his request for findings of fact, asked that the Referee find that the value of the 1,193 shares of stock issued to John D. Biggs, Receiver of the Commercial National Bank of High Point, North Carolina, was $2,982.50.

"18. In an equity suit in the United States District Court for the Middle District of North Carolina entitled, 'John D. Biggs, Receiver of The Commercial National Bank of High Point, North Carolina, *v.* The Guilford Construction Company, Odell Hardware Company and J. C. Harmon, Jr.,' the Honorable Johnson J. Hayes, Judge of the United States District Court for the Middle District of North Carolina, by an order dated July 10, 1939, confirmed the sale of the judgment of Robert G. Lassiter & Company against the City of Lake Worth, Florida, to John D. Biggs, Receiver of the Commercial National Bank of High Point, North Carolina, for the sum of $75,000.00. The plaintiff admits that the notes sued upon should be credited with this sum of $75,000.00.

"19. Judson C. Jones is the present Receiver of the Commercial National Bank of High Point, North Carolina.

"20. The defendant has waived any plea of any statute of limitations which might arise upon the facts in this cause.

"21. Counsel for both the plaintiff and the defendant agreed that the Commercial National Bank of High Point, North Carolina, had received

usurious interests on the notes sued upon in this action but that the only effect of the usurious interest charges should be to strip the notes of interest.

"Conclusions of Law:

"1. The stock of the Guilford Construction Company which was issued to and received by John D. Biggs, Receiver of the Commercial National Bank of High Point, North Carolina, was issued to him and received by him only as a dividend upon the bank's claim, to be credited, at the value of the stock, upon the notes of Robert G. Lassiter & Company, endorsed by Robert G. Lassiter, and did not constitute a satisfaction or discharge of these notes so as to release Robert G. Lassiter as endorser.

"2. Counsel for the plaintiff and counsel for the defendant having stipulated that the note for $44,509.08 and the three notes for $25,000 each had been executed by Robert G. Lassiter & Company, as principal, and Robert G. Lassiter, as endorser, and delivered to the Commercial National Bank of High Point, North Carolina, any defense based upon the statute of limitations having been waived, the burden was on the defendant to establish the value of the stock of the Guilford Construction Company issued to John D. Biggs, Receiver of the Commercial National Bank of High Point, North Carolina.

"3. The defendant having introduced no evidence as to the value of this stock, but the plaintiff having admitted such value to the extent of $2,982.50, the defendant is entitled to a credit therefor in the amount of $2,982.50.

"4. The defendant is entitled to a credit with respect to the judgment against the City of Lake Worth, Florida, only in the amount of the sale price of said judgment, namely, $75,000.00.

"5. The defendant, Robert G. Lassiter, is indebted to the plaintiff, Judson C. Jones, Receiver of the Commercial National Bank of High Point, North Carolina, in the sum of $41,374.65, this being the principal sum of the four notes sued on ($119,509.08), less a credit in the amount of $151.93 representing a payment made December 12, 1932, less a credit in the amount of $2,982.50 representing the value of the 1,193 shares of stock of the Guilford Construction Company, and less a credit in the amount of $75,000.00 representing the sale price of the judgment against the City of Lake Worth.

Respectfully submitted,

ROBERT MOSELEY, Referee."

Certain exceptions were filed by defendant to the report of the referee, and a motion was made to recommit. The judgment of the court below is as follows:

"This cause coming on to be heard and being heard by the Honorable J. Will Pless, Jr., Judge Superior Court of Guilford County, upon the

Report of Robert Moseley, Referee, the exceptions that have been filed to said report by the defendant, Robert G. Lassiter, and the motion by the defendant, Robert G. Lassiter, to recommit to the Referee herein the report to make inquiry and findings set forth in said motion to recommit, and being heard,

"It is Thereupon, Considered, Ordered and Adjudged:

"1. That the aforesaid motion of the defendant to recommit to the Referee be, and the same is hereby denied.

"2. That said exceptions be, and the same are hereby overruled, and that the Report of the Referee be, and the same is hereby in all respects confirmed, approved and adopted by the Court as the findings of fact and conclusions of law of this Court, and that the plaintiff, Judson C. Jones, Receiver of the Commercial National Bank of High Point, North Carolina, have and recover of the defendant, Robert G. Lassiter, the sum of $41,374.65.

"3. That the defendant, Robert G. Lassiter, be taxed with the costs of this action, including the sum of $80.20 heretofore paid the Court Reporter by the Referee from the sum of $200.00 heretofore deposited with him by the plaintiff and by the defendant in equal amounts, and that the balance of said deposit in the sum of $119.80 be retained by the Referee and credited by him on the sum of $750.00, which is hereby allowed to him as compensation for his services as Referee, and that the balance of said compensation in the sum of $630.00 be taxed against the defendant in the costs herein; and that the Referee shall not refund to the plaintiff the sum of $100.00 heretofore deposited by him with the Referee.

"And it further appearing to the Court and the Court finding as facts that on July 19, 1938, the summons and complaint herein were duly and personally served on the defendant by the Sheriff of Wake County; that on July 18, 1938, a warrant of attachment was duly issued in this action, together with summons to Southern Aggregates Corporation, garnishee, and notice to it of levy under said warrant of attachment; that said warrant of attachment was duly and personally served on said defendant, Robert G. Lassiter, and that the same, together with said summons to garnishee and said notice of levy were duly served on said Southern Aggregates Corporation by the Sheriff of Wake County on July 19, 1938, levying upon all shares of stock in Southern Aggregates Corporation owned by said defendant, Robert G. Lassiter, or in which he has any interest; that in response to said process and upon examination under oath in this cause the Secretary-Treasurer of Southern Aggregates Corporation disclosed that said defendant, Robert G. Lassiter, was then record owner of 522.46 shares of stock in the Southern Aggregates Corporation subject to an attachment in a suit in the Superior Court of

Rowan County, North Carolina, for approximately $20,000 entitled: 'Harris Granite Quarries Company *v.* Robert G. Lassiter,' and subject to an assignment of 200 shares thereof to Horace Haworth and Leon S. Brassfield, Trustees, and that in addition thereto said defendant claimed to be the owner of an additional 101.27 shares of said stock deposited by him with B. W. Parham, Trustee; that since said examination of said attachment in the above entitled suit in the Superior Court of Rowan County, North Carolina, has been vacated and the defendant, Robert G. Lassiter, has been adjudged to be the owner of said additional 101.27 shares of stock by a judgment entered in the United States District Court for the Middle District of North Carolina, on October 9, 1939, in a suit entitled 'Security National Bank of Greensboro, North Carolina, *et al.*, *v.* Southern Aggregates Corporation, and Robert G. Lassiter, *et al.*, Intervening Stockholders,' from which there was no appeal.

"It is, Thereupon, Further Considered, Ordered and Adjudged that by virtue of the aforesaid attachment proceedings the plaintiff has a lien on the aforesaid 522.46 shares of stock in Southern Aggregates Corporation subject to the aforesaid assignment of 200 shares thereof and that the plaintiff has a lien on the aforesaid 101.27 shares of stock in Southern Aggregates Corporation, and that execution issued for the sale of the stock attached and levied upon as aforesaid, or so much thereof as is necessary to satisfy this judgment, and if the same is not sufficient to satisfy this judgment, then that execution issue for the sale of any other property of the defendant in this State to satisfy this judgment. This the 6th day of June, 1941. J. Will Pless, Jr., Judge Presiding."

To the signing of the judgment the defendant excepted and assigned error. Other exceptions and assignments of error were made by defendant. They and the necessary facts will be set forth in the opinion.

John S. Cansler and R. M. Robinson for plaintiff.
David J. Mays and George C. Green for defendant.

CLARKSON, J. In the present case we think the referee found the facts on the competent evidence and made his conclusions of law based on the facts found. The court below held "That said exceptions be, and the same are hereby overruled, and that the Report of the Referee be, and the same is hereby in all respects confirmed, approved and adopted by the Court as the findings of fact and conclusions of law in this Court."

In *Kenney v. Hotel Co.*, 194 N. C., 44 (45-6), it is written: "It is settled by all the decisions on the subject, with none to the contrary, that the findings of fact, made by a referee and approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.*, 177 N. C., 60. Likewise, where

the judge, upon hearing and considering exceptions to a referee's report, makes different or additional findings of fact, they afford no ground for exception on appeal, unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to said findings. *S. v. Jackson,* 183 N. C., 695, and cases there cited." *Usry v. Suit,* 91 N. C., 406; *Wilkinson v. Coppersmith,* 218 N. C., 173.

On the record, as set forth below, defendant's contentions cannot be sustained. (1) "Defendant's contention is that the distribution of 1,193 shares of the stock of Guilford Construction Company to the Receiver of Commercial National Bank of High Point, North Carolina, was in full payment of the indebtedness of Robert G. Lassiter & Company, and its surety, the appellee herein." This contention is based on the testimony of George R. Poole, an auditor, who was employed by the Receiver of Robert G. Lassiter & Co., in connection with the plan whereby the stock of the Guilford Construction Company was issued to the various creditors. Also on the testimony of Herman Wolff, who was employed by the Receivers of Robt. G. Lassiter & Company and as assistant secretary and treasurer of that company. He summarized as to the distribution of the stock, as follows: *"I would say* the creditors were to take the stock in full settlement of their claims, and let the Guilford Construction Company operate as a going concern, and then they would participate in any profits or any money made by the Guilford Construction Company through its operation." This was practically the testimony of George R. Poole. This testimony was duly objected to when offered. If competent, its credibility and weight was for the Referee to determine. It was more of a conclusion, based on generalities.

The report of the Receivers for Robert G. Lassiter & Company to Judge Johnson J. Hayes, Judge of the District Court of the U. S., for the Middle District of North Carolina, is to the effect that they advised the Court "That if the Company is liquidated at the present time that there would be very little, if anything, left for creditors." This report, the offer of the Guilford Construction Company to purchase the assets of Robert G. Lassiter & Company, and the orders of the Court, directing the sale, all provided for the sale of the assets of Robert G. Lassiter & Company to the Guilford Construction Company *subject to such mortgages and other liens as might be against the same.*

The exact language: "It is further Considered, Ordered and Decreed that the assets so conveyed to Guilford Construction Company shall be conveyed subject to such mortgages and other liens as may be against the same, Guilford Construction Company not, however, to assume any of such mortgages or liens, or any other indebtedness or obligations of Robert G. Lassiter & Company."

This very matter has been heretofore adjudicated in the case of *Guilford Construction Company, et al., v. Biggs, Receiver,* 102 Federal Reporter (2nd), 46 (47). The decision is by *Parker, Circuit Judge,* and is so well stated that we quote, as follows: "The principal contention of appellants is that the receipt of the stock in the Guilford Construction Company by the receiver of the bank extinguished his claim, and that thereupon the judgment which had been assigned as collateral security thereto was freed of the lien of the assignment. We see no basis, however, for this contention. There was no reorganization of Lassiter & Company but merely a transfer of its assets of stock, made in the thought that the creditors would receive more through ownership thereof than through a liquidation of the assets in the receivership. As this was an equity and not a bankruptcy receivership, secured creditors were entitled to participate in dividends derived from the free assets on the basis of the face amount of their claims, and not on the basis of the amount thereof reduced by the value of their securities, subject only to the limitation that they should not collect from all sources more than the amount of their claims. *Rierson v. Hanson,* 211 N. C., 203, 189 S. E., 502; *Merchants Nat. Bank v. Flippin,* 158 N. C., 334, 74 S. E., 100; *Merrill v. National Bank,* 173 U. S., 131, 19 S. Ct., 360, 43 L. Ed., 640. No surrender of securities can be inferred, therefore, from the acceptance of the stock dividend on the basis of the face of the claim. There is no presumption that the stock dividend was accepted in extinguishment of the debt, but the presumption is to the contrary (*Cf. Jefferson Standard Life Ins. Co. v. Lightsey,* 4 Cir. 49 F. 2d 586; 1 Am. Jur., 223, 224), and no evidence whatever that anyone intended that it should be so accepted. On the contrary, there is evidence that the judgment which the receiver of the bank held by assignment as collateral security was supposed to be worth at the time around $25,000; and it is unreasonable that he would have surrendered this security in order to receive stock worth about one-tenth that amount, or that anyone would have suggested that he do so. The assets, as has been noted, were transferred subject to existing liens and mortgages; and there is nothing to indicate an intention that these were to be extinguished upon the contemplated distribution of stock to which their holders would become entitled or that the holders were to be accorded their rights under the distribution only upon surrender of these securities. As to the value of the stock distributed to the receiver and credited upon the claim of the bank, there is nothing in the record which would justify our disturbing the finding of the District Judge with regard thereto."

From the record it appears that the United States District Judge, for the Middle District of North Carolina, the United States Circuit Court of Appeals for the Fourth Circuit, the Referee in the instant case, and

the trial judge in the instant case have all held upon competent evidence that receipt of the stock did not discharge or extinguish the notes herein sued on.

(2) The defendant contends: "That the purchase by the Receiver of Commercial National Bank of High Point, North Carolina, of the collateral of Robt. G. Lassiter & Company held by him amounted to the payment and discharge of the primary obligations for which said collateral was held as security." From the evidence, we cannot so hold.

The defendant, to sustain his contention, cites N. C. Code, 1939 (Michie), section 2593 (d): "Right of mortgagee to prove in deficiency suits reasonable value of property by way of defense," etc., Also *Va. Trust Co. v. Dunlop,* 214 N. C., 196, and other cases, but they are distinguishable from the case at bar.

In the present action the judgment was sold under an order of court for the sum of $75,000, the court below, we think, properly held that this was the amount that should be credited on the indebtedness herein sued on as respects said collateral. At the time the judgment was sold at public auction, under order of court, the city of Lake Worth, Florida, the judgment debtor, was in bankruptcy in the District Court of the United States for the Southern District of Florida. After the purchase of said judgment the plaintiff filed in said bankruptcy proceeding a claim for the balance due thereon in the sum of $195,876.34 and thereafter bonds were issued to him in payment of said claim. Over objection of plaintiff the defendant proved by the plaintiff that he sold these bonds at different times from May 1, 1940, to July 9, 1940, about a year after his purchase of said judgment, for the sum of $108,450.59, and the defendant contends that he is entitled to credit on the notes in that amount rather than in the sum of $75,000 allowed as a credit by the court. We cannot so hold. Plaintiff later was able to realize more on the purchase, but the bidding was open to all and plaintiff purchased for $75,000.00, under an Order of Court. We cannot deal with the moral aspect, if any, but can consider only the legal rights.

The proviso to section 2593 (d), *supra,* is as follows: "Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

In *Loan Corp. v. Trust Co.,* 210 N. C., 29 (32), affirmed by the Supreme Court of the United States, 300 U. S., 124, this Court said: "It does not apply to a sale made under an order, judgment or decree in an action to foreclose a mortgage or deed of trust, or similar instrument."

The Act applies when the land is sold under power of sale, and this provision was held constitutional in the above cited case. The court

below refused to recommit and approved and adopted the findings of fact and conclusions of law of the Referee as the findings of fact and conclusions of law of the court below. In this we can see no error.

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

Affirmed.

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

STATE v. ALONZO JOHNSON.

(Filed 23 January, 1942.)

1. Criminal Law § 52b—

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State and it is entitled to all reasonable inferences therefrom.

2. Same—

Upon motion to nonsuit, the province of the court is limited to determining whether there is any sufficient evidence to be submitted to the jury, the weight of the evidence being the exclusive province of the jury. C. S., 4643.

3. Prostitution § 5c—

Evidence tending to show that defendant accosted two soldiers, stated that he knew there were women in a near-by house, that the soldiers could go in if they wanted to, and that he "ought to have 50c for his trouble," with testimony of one of the soldiers that he went into the house designated and had sexual intercourse with a girl therein, *is held* sufficient to be submitted to the jury upon the question of defendant's guilt of aiding and abetting in prostitution and assignation.

4. Prostitution § 5b—

Testimony of a witness that she had seen defendant take men in his taxi out to a particular house, which the evidence showed was a bawdy house, *is held* competent as corroborative evidence in this prosecution for aiding and abetting in prostitution, the probative force of the evidence being for the jury.

5. Criminal Law § 8b—

A charge to the effect that a person cannot be convicted as an aider and abettor notwithstanding his presence and intention to aid, encourage or assist the actual perpetrator, unless such intention is in some manner communicated to the actual perpetrator, *is held* without error.

6. Prostitution § 5a: Indictment and Warrant § 9—

A warrant alleging that defendant on a particular day in the designated county "did unlawfully, and willfully aid and abet in prostitution and assignation contrary to the form of the statute and against the peace and dignity of the State" follows the language of the statute, C. S., 4358 (7), and is sufficient to charge the offense therein proscribed.

7. Indictment and Warrant § 17—

Where a warrant is sufficient in law to charge the offense, it is incumbent upon defendant, if he desires further information, to request a bill of particulars. N. C. Code, 4613.

WINBORNE, J., dissenting.

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

APPEAL by defendant from *Parker, J.*, and a jury, at August Criminal Term, 1941, of ROBESON. No error.

The criminal charge against defendant is set forth in the following warrant:

"Recorder's Warrant—No. 5715.
State of North Carolina
Robeson County—Recorder's Warrant.

Joseph A. Perry, being duly sworn, complains and says that at and in said County, Lumberton Township, on or about the 9th day of August, 1941, Alonzo Johnson did unlawfully and wilfully aid and abet in prostitution and assignation contrary to the form of the statute and against the peace and dignity of the State. Joseph A. Perry. Sworn to and subscribed before me this 9th day of August, 1941. Robert Weinstein, Solicitor." Defendant pleaded "Not guilty."

Defendant was tried on the above warrant and convicted in the recorder's court and found guilty. From the sentence imposed, he appealed to the Superior Court, where he pleaded "Not guilty." He was then tried by a jury and found guilty. The defendant made several exceptions and assignments of error and appealed to the Supreme Court. The material ones and necessary facts will be set forth in the opinion.

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

L. J. Britt, T. A. McNeill, and Caswell P. Britt for defendant.

CLARKSON, J. At the close of the State's evidence and at the conclusion of all the evidence, the defendant in the court below made motions for judgment of nonsuit. N. C. Code, 1939 (Michie), sec. 4643. The court overruled these motions and in this we can see no error.

In *S. v. Mann*, 219 N. C., 212 (214), is the following: " '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 inference 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."

The evidence on the part of the State is to the effect that two soldiers stationed at Fort Bragg, on 9 August, arrived at Lumberton from Fort Bragg about 8:00 o'clock p.m. About 12:00 or 1:00 o'clock they were parked across the street from the Airport Service Station. Sergeant Joseph A. Perry, one of the soldiers, testified, in part: "There was a house over there, I didn't know what house it was, we just turned around there; we were turning around to come back to Lumberton. I had never been to that house before. When we were in front of the house across the road from the airport station we saw Johnson. This airport station is on the Charlotte Road. Johnson was in his car. He came around to us and asked if we were M. P.'s (Military Police) and we told him No; he said if we wanted some women he would take us to Dreamland, and we told him we were not interested. He said 'Wait a minute,' and he went into a house about 30 feet from where we were turning around and knocked on the door, and he talked to someone. I couldn't tell whether it was a man or a woman. He came back out. He said, 'There are some women in there, you can go in there if you want to; you ought to give me 50c for my trouble.' Neither of us soldiers got out of our car then and went in the house, about five minutes later. About five minutes later John Doyle went in the house. After Johnson had this conversation with us he went back to his car. . . . I had never seen Johnson before that night. I don't know where Dreamland Service Station is, never heard of it. I do not know anything else about it."

John T. Doyle, the other soldier, testified, in part: "We went back to that same house Johnson had gone in and stopped, and I went in the house; there were girls in there; I only saw one, I guess she was an Indian girl. When I got in there I talked with her; I went to bed with her and had sexual intercourse with her; I paid the girl. That was the same house Johnson had told us we could go in. Perry was in his car while I was in the house having sexual intercourse with this girl."

Rebecca Jacobs testified, in part: "Q. State whether or not you have ever seen Johnson in his taxi carry any men out to that house? Ans.: I saw him sometimes, a few times, couple of times."

We think this evidence of Rebecca Jacobs competent to corroborate Doyle; the probative force was for the jury.

The defendant denied the charge and proved a good reputation; the probative force of the evidence was for the jury to decide.

There were no exceptions to the charge of the court, it was clear and able, covering the law applicable to the facts. The court charged, in part: "In order for one to aid and abet the commission of a crime, he must do something that will indicate, encourage or assist the actual perpetrator in its commission. Mere presence, even with the intention of assisting, cannot be said to have incited, encouraged or aided the perpetrator unless the intention to assist was in some way communicated to him. A person aids when, being present at the time and place, he does some act to render aid to the actual perpetration of the crime, though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or who either commands, advises, instigates or encourages another to commit a crime. A person who, by being present, by word or conduct, incites another to commit a criminal act or one who so far participates in the commission of the offense as to be present to the knowledge of the person actually committing the crime for the purpose of assisting, if necessary." *S. v. Hoffman,* 199 N. C., 328 (333).

In 2 C. J., p. 1024, Aider and Abettor is defined as follows: "One who advises, counsels, procures, or encourages another to commit a crime, whether personally present or not at the time and place of the commission of the offense; any person who is present at the commission of a trespass, encouraging or exciting the same by words, gestures, looks, or signs, or who in any way or by any means countenances and approves the same." *S. v. Hart,* 186 N. C., 582; *S. v. Dail,* 191 N. C., 234; *S. v. Tyndall,* 192 N. C., 559; *S. v. Baldwin,* 193 N. C., 566.

The statute, N. C. Code, *supra,* sec. 4357, reads: "The term 'prostitution' shall be construed to include the offering or receiving of the body for sexual intercourse for hire, and shall also be construed to include the offering or receiving of the body for indiscriminate sexual intercourse without hire. The term 'assignation' shall be construed to include the making of any appointment or engagement for prostitution or any act in furtherance of such appointment or engagement."

Section 4358: "It shall be unlawful: (7) To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever."

The warrant was drawn in the language of the statute and is sufficient in law. *S. v. Stanton,* 23 N. C., 424; *S. v. Crews,* 128 N. C., 581; *S. v. Leeper,* 146 N. C., 655; *S. v. Carpenter,* 173 N. C., 767; *S. v. Maslin,* 195 N. C., 537.

In *S. v. Abbott,* 218 N. C., 470 (476), speaking to the subject, it is written: "In *S. v. George,* 93 N. C., 567 (570), *Ashe, J.,* for the Court, said: 'The indictment strictly follows the words of the statute, and that

is laid down in all the authorities as the true and safe rule. It is true there are some few exceptions, but we do not think they embrace this case.' *S. v. Leeper, supra; S. v. Puckett,* 211 N. C., 66 (73)."

"If the defendants desired further information, the statute provides that they could have a bill of particulars. Revisal, sec. 3244 (N. C. Code, 1939 [Michie], sec. 4613). *S. v. Pickett,* 118 N. C., 1233." *S. v. Leeper, supra,* at p. 661.

In *S. v. Puckett, supra,* we find: "In *S. v. Wilson,* 121 N. C., 650 (655), it is said: 'Besides, duplicity is ground only for a motion to quash. Being cured by the verdict, it cannot be used as ground for a motion in arrest of judgment. Whar. Cr. P. L. and Pr., secs. 255, 760.' 16 C. J., p. 1258, sec. 2791."

The sufficiency of a warrant for aiding and abetting prostitution, using the language employed in the warrant in the instant case, has been decided in the case of *S. v. Waggoner,* 207 N. C., 306, and adversely to the defendant. One of the counts in the warrant on which the defendant was convicted in that case charged that he "did aid and abet in prostitution and assignation, against the statute in such case made and provided, and against the peace and dignity of the State." This language is almost identical with that contained in the warrant in the instant case. There was a motion below to quash the warrant, which was overruled. The Supreme Court found no error, and it is stated at p. 307, that: "The warrant was drafted in accordance with the provisions of C. S., 4358."

None of defendant's exceptions and assignments of error can be sustained, for the reasons given. The General Assembly has made aiding and abetting in prostitution a crime. The defendant has had a fair and impartial trial and has been convicted by a jury of his country. In law we find

No error.

WINBORNE, J., dissenting: The Constitution of North Carolina declares that in all criminal prosecutions every man has the right to be informed of the accusation against him, and that no person shall be put to answer any charge except by indictment, presentment, or impeachment. Art. I, sections 11 and 12. An accused has the right to be informed of the specific accusation against him, and to be tried accordingly. Hence, the motion in arrest of judgment, aptly made by defendant, but not referred to in the majority opinion, is meritorious, in my opinion, and should be allowed for that the warrant is fatally defective. "The indictment should set forth the facts constituting the aiding and abetting." Joyce on Indictments, 2d Ed., page 392, section 356. The warrant here merely charges that defendant did "aid and abet in prosti-

tution and assignation." It fails to state *wherein* defendant aided and abetted. Without a description of the acts constituting the aiding and abetting, the warrant is defective. For example, larceny is a crime, but no one would contend that a bill charging larceny, without a description of the thing stolen, would be good.

Let us then see the situation in hand. It is noted that the Legislature, in the act "for the repression of prostitution," Public Laws 1919, ch. 215, now C. S., 4357, *et seq.*, has undertaken in six paragraphs to minutely define numerous acts as substantive offenses, in the main—specific acts pertaining to aiding and abetting prostitution or assignation. And then it sets forth the all-inclusive section, which reads: "7. To engage in prostitution or assignation, or to aid or abet prostitution or assignation by any means whatsoever." It is especially noted that this section does not merely say "to aid or abet prostitution or assignation," as charged in the warrant, but there are added the descriptive words "by any means whatsoever," thereby covering a multitude of acts. Thus, by proper construction, it is manifest that the Legislature intended that these superadded words should be given a meaning, and catch all other acts of aiding and abetting prostitution or assignation.

Such general clause, following the particular and specific clauses, must be confined to things of the same kind. Levi's Southerlands Statutory Construction, Vol. 2, 2d Ed., sec. 422 (268), p. 814. Therefore, in order to determine whether any offense be committed, it is essential that for the words of the statute "by any means whatsoever" to be given force and effect, there must be stated in the warrant the acts and circumstances of the particular charge, so that the court can see as a matter of law that a crime is charged, *S. v. Phelps,* 65 N. C., 450; *S. v. Finch,* 218 N. C., 511; 11 S. E. (2d), 547, and the defendant be apprised of the particular offense charged against him, a right guaranteed to him by the Constitution of North Carolina, Art. I, secs. 11 and 12.

If the warrant had been drawn to cover an offense falling within one of the sections of the statute defining substantive offenses, decisions of this Court would require that the charge in the warrant should describe the offense in the language of the statute. Otherwise, the warrant would be defective. Should, then, there be no description where an alleged aider and abettor be charged? Manifestly, the Legislature, in using the words "by any means whatsoever," did not so intend.

But it is asserted in the majority opinion that this question has been decided in *S. v. Waggoner,* 207 N. C., 306, 176 S. E., 566, contrary to contention of defendant. However, an examination of the record shows that, while it is true that the third count in the warrant there is the same as that here, each of the first two counts described offenses within the statutory descriptions of substantive offenses. Therefore, the war-

rant was not subject to motion to quash. And there was conviction on the second count. Hence, motion in arrest of judgment was not in order. Thus, the question here is not settled there.

Furthermore, the challenge to the warrant is not answered by simply saying that the "warrant was drawn in the language of the statute and is sufficient in law." While it is a general rule prevailing in this and other jurisdictions that an indictment for a statutory offense is sufficient if the offense be charged in the words of the statute, *S. v. Jackson,* 218 N. C., 373, 11 S. E. (2d), 149, the rule is without application where the words of the statute do not in themselves inform the accused of the specific offense of which he is accused so as to enable him to prepare his defense or plead his conviction or acquittal as a bar to further prosecution for the same offense, as where the statute characterizes the offense in mere general or generic terms, or does not sufficiently define the crime or set forth all of its essential elements. In such situation the statutory words must be supplemented by other allegations which so plainly, intelligibly and explicitly set forth every essential element of the offense as to leave no doubt in the mind of the accused and the court as to the offense intended to be charged. 27 Am. Jur., 662; Ind. and Inf., sec. 103; 50 C. J., 810—Prostitution, 25; *S. v. Liles,* 78 N. C., 496; *S. v. Bragg,* 86 N. C., 687; *S. v. Deal,* 92 N. C., 802; *S. v. Watkins,* 101 N. C., 702, 8 S. E., 346; *S. v. Whedbee,* 152 N. C., 770, 67 S. E., 60; *S. v. Ballangee,* 191 N. C., 700, 132 S. E., 795; *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393; *S. v. Cole,* 202 N. C., 592, 163 S. E., 594; *U. S. v. Cruikshank,* 92 U. S., 542, 23 L. Ed., 588, 2 Otto. (S. Ct.), 542; *U. S. v. Simmons,* 96 U. S., 360, 24 L. Ed., 819; *U. S. v. Carll,* 105 U. S., 661; *U. S. v. Hess,* 124 U. S., 483, 31 L. Ed., 516, 8 S. Ct., 571; *Evans v. U. S.,* 153 U. S., 584, 38 L. Ed., 830, 14 S Ct., 934; *Keck v. U. S.,* 172 U. S., 434, 43 L. Ed., 505, 19 S. Ct., 254; *Armour Packing Co. v. U. S.,* 209 U. S., 56, 52 L. Ed., 681, 28 S. Ct., 428

In 50 C. J., 810, Prostitution, sec. 25, speaking of prosecutions under that subject, it is stated: "As in other criminal prosecutions the indictment must state the offense with sufficient definiteness and certainty as fully to apprise accused of the charge against him. While it is ordinarily sufficient to charge a statutory offense in the language of the statute, this rule is subject to the qualification that, where a more particular statement of facts is necessary to charge the offense with such certainty, as will apprise the accused of the offense imputed to him, it must be made; and where the statute denounces the offense in generic terms, the indictment must go further in stating the offense than by merely using the language of the statute, and state the acts or facts falling within the general terms on which it is intended to rely for conviction."

This Court, in *S. v. Watkins,* 101 N. C., 702, 8 S. E., 346, in opinion by *Merrimon, J.,* uses this language: "It is sufficient and proper, ordinarily, to charge statutory offenses in the words, or substantially the words, of the statute creating them, and especially is this so when the statute defines the offenses in words that have a technical or precise meaning, such as in themselves imply the offense, or the character and quality of the act or acts, or things that constitute it, or an essential part or essential parts of it. . . . This is so because the court can in such cases see and determine that an offense is charged in the indictment, and the accused will have such information in respect to it as will enable him to understand it, and make preparation for his defense, and as will enable him to plead former acquittal or conviction in case of subsequent prosecution. . . . It is otherwise, however, when the words of the statute are not precise, but are uncertain or indefinite in their meaning, implying a multiplicity and variety of acts or things which may or may not constitute the offense in whole or in part. In such cases it is necessary to charge the facts that give specific character and significance to the acts charged to have been done, and as designated, with reasonable certainty in the statute cited, . . . in order that the court may see that the offense is charged and the accused may prepare for his defense . . . The act should be so specified and charged as to show that they mean what the statute intends . . . The court must see that the offense is charged, and it and not the pleader must determine that the acts done constitute the offense denounced by the statute. . . ."

And in *S. v. Cole, supra,* the Court, speaking through *Adams, J.,* states: "As a rule it is enough to charge a statutory offense in the words of the statute. But this is not always true. It is sometimes necessary not only to pursue the technical language of the statute but to set forth the facts and circumstances which go to make up the offense. . . . In all criminal prosecutions every man has the right to be informed of the accusation against him; and the accusation must be definite. . . . 'Every indictment is a compound of law and fact and must be so drawn that the court can, upon its inspection, be able to see the alleged crime,' *S. v. Hathcock,* 29 N. C., 52. This is essential to a valid judgment. In explanation of the principle, *Ruffin, C. J.,* used this significant language in *S. v. Stanton,* 23 N. C., 424, 'Thus a statute may be so inaccurately penned that its language does not express the whole meaning the Legislature had; and by construction its sense is extended beyond its words. In such a case the indictment must contain such averments of other facts, not expressly mentioned in the statute, as will bring the case within the true meaning of the statute; that is, the indictment must contain such words as ought to have been used in the statute if the Legislature had correctly expressed therein their precise meaning. In

S. v. Johnson, 12 N. C., 360, for example, it was held that, besides charging in the words of the act that the prisoner, being on board the vessel, concealed a slave therein, the indictment should have charged a connection between the prisoner and the vessel as that he was a mariner belonging to her; because that was the true construction of the act. So, where a statute uses a generic term, it may be necessary to state in the indictment the particular species in connection with which the crime was charged.' " And, after stating that similarly the principle was applied in *S. v. Farmer,* 104 N. C., 887, 10 S. E., 563, *Adams, J.,* continues, "These decisions exemplify the rule that an indictment may follow the language of the statute when the statute defines the offense and contains all that is essential to constitute the crime and to inform the accused of its nature; but if a particular clause in a statute does not set forth all the essential elements of the specified act intended to be punished, such elements must be charged in the bill," citing authorities.

The Supreme Court of the United States, in *U. S. v. Simmons, supra,* uses this language: "Where the offense is purely statutory . . . it is 'as a general rule sufficient in the indictment to charge the defendant with acts coming fully within statutory description, in the substantial words of the statute, without any further expansion of the matter' . . . But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to the subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

And, further, in *U. S. v. Hess, supra,* following the Cruikshank, Simmons, and similar cases, these headnotes epitomize the decisions of the Court: "(1) In an indictment all material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective . . . (3) The language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged. (4) Such particulars are matters of substance and not of form, and their omission is not aided or cured by the verdict."

Furthermore, even though under the statute, C. S., 4623, a warrant or indictment shall be deemed sufficient in form if it express the charge against defendant in a plain, intelligible and explicit manner, and it is not to be held defective by reason of any informality or refinement if the matter appearing therein be sufficient to enable the court to proceed to

judgment, this Court, in the case of *S. v. Ballangee, supra,* after referring to opinions in *S. v. Moses,* 13 N. C., 452, and *S. v. Gallimore,* 24 N. C., 372, stated: "In each of these cases it was said in substance that the statute does not supply the omission of a distinct averment of any fact or circumstance which is an essential constituent of the offense charged. Every crime consists of acts done or omitted, and it is not sufficient to charge a defendant generally with the commission of a particular offense (unless the form of the indictment is prescribed by statute), but all the essential facts and circumstances must be set forth," citing cases.

Moreover, defect in a warrant or bill of indictment is not cured by the statute which enables the defendant to call for a bill of particulars. C. S., 4613. This section applies only when further information not required to be set out in the indictment is desirable. The "particulars" authorized are not a part of the indictment. Request for bill of particulars is addressed to discretion of the court. A bill of particulars therefore will not supply any matter which the indictment must contain. *S. v. Long,* 143 N. C., 670, 57 S. E., 349; *S. v. Deal, supra; S. v. Cole, supra.*

For these reasons my vote is for reversal of ruling below on motion in arrest of judgment.

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

ROBERT LUTTRELL, BY HIS NEXT FRIEND, G. W. BUTLER, v. CAROLINA MINERAL COMPANY.
and
A. L. LUTTRELL v. CAROLINA MINERAL COMPANY.

(Filed 23 January, 1942.)

1. Negligence § 1a—

In order to recover in a negligent injury action plaintiff must show failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury.

2. Negligence § 5—

Proximate cause is that cause which produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed.

3. Negligence § 19a—

Nonsuit is properly entered upon the issue of negligence if plaintiff's evidence fails to establish that defendant was guilty of negligence proximately causing the injury, or if plaintiff's evidence establishes that the injury was independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person.

4. Negligence § 17b—

What is negligence is a question of law, and when the facts are admitted or established, the question of negligence, as well as proximate cause, is for the determination of the court.

5. Negligence § 3—

Persons having possession and control over dangerous substances, such as dynamite and other explosives, are under duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others.

6. Negligence § 4f—

Persons storing explosives on their property, although they have a legal right to do so, are required to exercise care commensurate with the danger, and when the presence of children on the premises can be reasonably anticipated, must exercise care in storing same to prevent injury to them, a greater degree of care being required in respect to children of very tender years than in regard to children of maturer years who themselves may appreciate the attendant danger.

7. Same—Evidence held insufficient as matter of law to charge defendant with actual or implied knowledge that children frequented premises.

Evidence that plaintiff and other children were in the habit of playing around defendant's building on Sunday and that some of them on a few occasions had gone into the building, with evidence that on one occasion defendant's manager came to the premises on Sunday when boys were playing outside the building, is insufficient as a matter of law to charge defendant with knowledge, actual or implied, that children were in the habit of playing in the building, and therefore defendant was not negligent in failing to anticipate invasion of the building by children who had no right to enter.

8. Same—When explosives are taken and carried away from building by children capable of understanding wrongful nature of their act, any negligence in storing same is not proximate cause of subsequent injury.

These actions based on negligence, one instituted by a boy almost thirteen years old and the other by the boy's father, were consolidated for trial. The evidence tended to show that several boys, including plaintiff, entered defendant's building on Sunday and took dynamite caps out of a tin box on an elevated shelf of a cupboard in the rear of the third floor, that the boys divided the caps among them, and took them away with them, that on the following morning plaintiff was attempting to get the contents of a cap out by picking in it with a pin and that the cap exploded, resulting in the injury in suit. The evidence further tended to show that plaintiff was at least average size and intelligent for his age, and plaintiff testified to the effect that he was familiar with dynamite caps and had knowledge of their dangerous nature although he did not

know that a cap would explode when picked with a pin, and that he knew it was wrong to take property of others and appropriate it to his own use, but did not think of it on the occasion in question. *Held:* Even conceding negligence on the part of defendant in the manner of storing dynamite caps under the circumstances adduced by the evidence, such negligence was not the proximate cause of the injury, since it was insulated by the intervening wrongful act of plaintiff himself, and neither plaintiff is entitled to recover.

CLARKSON, J., not sitting.

APPEAL by plaintiffs from *Sink, J.*, at July Term, 1941, of MITCHELL.

Two civil actions to recover damages, in the first for personal injury to Robert Luttrell, a minor, and in the second for loss to A. L. Luttrell of services of his son, Robert Luttrell, allegedly resulting from actionable negligence of defendant—consolidated by consent in court below for purpose of trial.

It appears to be uncontroverted that Robert Luttrell, having attained the age of 12 years on 7 October, 1939, suffered injury as the result of the explosion of a dynamite cap, which had been taken by him and his companions on the day before, that is, Sunday afternoon, 21 July, 1940, from a building used by defendant in connection with its mining operations, known as the McKinney Mine, in Mitchell County, North Carolina; that this building, three stories high, is located on a mountain side, approximately 50 feet from a public road—the top story being on a level, or nearly so, with the road; that there is a chute in said building, extending from a point several feet above the ground below the first floor diagonally to the top floor; and that defendant kept dynamite caps in the building for use in connection with its mining operations.

The plaintiffs in their respective complaints allege in part: (1) That agents of defendants, knowing, (1) that dynamite caps were "highly attractive to children," and "extremely dangerous to life and limb when possessed or played with by them," (2) "that large numbers of children including the plaintiff attracted by said mine and building and operations habitually and customarily frequented and played upon the grounds immediately around said mine and building," and (3) "that such children pursuing their childish impulses would likely enter said building and take into their possession some of the shiny and attractive dynamite caps," "negligently, carelessly, recklessly and in utter disregard of the rights and safety of plaintiff, left dynamite caps, which it was utilizing in its said business, loose in said building and plainly exposed to view, and at the same time negligently and carelessly left and permitted the doors and other vents and openings of said building to be and remain unlocked and unfastened so as to permit children to easily enter said building," and that plaintiff and his companions, so attracted to the place, and in accordance with their custom to congregate at said mine

and building for play, and being ignorant of dangerous nature of dynamite caps, and pursuing "the childish instinct natural to children of such tender age," entered said building and one of them seeing "some shiny and attractive dynamite caps plainly exposed to view in said building, took several of them into his possession and divided the same among his playmates including this plaintiff," and that thereafter the plaintiff, while playing with one of said dynamite caps caused same to explode, and to seriously and permanently injure the plaintiff."

Defendant, in answering the complaints, denies the allegations of negligence, and pleads trespass and contributory negligence of Robert Luttrell.

Evidence for plaintiffs in the trial court tends to show these facts:

On Sunday afternoon, 21 July, 1940, Robert Luttrell, accompanied by four other boys, Ed Hice, age 13 years, Charlie Grindstaff, age 11 years, Tommy Burnett and Jack Burnett, returning from Sunday school at Black Mountain Church, went to the premises of the McKinney Mine to play. While there Charlie, Tommy, Ed, and Robert entered the building by way of the chute. Jack did not enter it. Robert testified: "We all went up the chute, one right over the other. We crawled up the chute, on our hands and knees, holding to the side. There were a lot of cracks in the wall and rafters sticking out, and we would stick our toes in the cracks and climb on up." He further testified: "The lower end of the chute is about six or seven feet, maybe eight feet, off the ground, down where the stuff is put in the truck. . . . We climbed up the muck pile and stepped over . . . on to the chute. The end of the chute stuck out . . . We went from the bottom of the chute up to the first floor level. Then we were confronted with an upright partition . . . I climbed over . . . After we got inside we saw a whole big lot of something like tar paper and machinery. We saw something looked like wheels or belt, I believe it was a belt, rolled up, and . . . some machinery." Charlie Grindstaff and Tommy Burnett reached the top floor first, got the dynamite caps and a coil of fuse, and on meeting Ed and Robert after they reached that floor, quoting Robert, "one of them said, 'We have got some caps' . . . I knew they meant dynamite caps. . . . They gave me the caps." According to Ed, they also said: "We have got some dynamite caps and we will have some guns."

In this connection Charlie Grindstaff testified: "Tommy Burnett was with me when I got the caps. Tommy got the fuse . . . There was a cupboard in the old building . . . in the extreme end of the room. I don't know how far it was from where we got off the chute back to where we got the caps out of the cupboard. About as far as from here to the back end of the courthouse. . . . When I got up

on that third floor I walked back . . . length of the room to the cupboard. The door to the cupboard was not closed . . . The cupboard is 3½ or 4 feet above the floor level. I had to reach up a little bit, I think, to get to the shelf. . . . The dynamite caps were on the shelf in the cupboard. . . . I saw the little tin box, the lid was not on the box. . . . The fuse was on the shelf above where the caps were . . . We did not go straight back to the cupboard after we got off the chute . . . By the time we went to the cupboard and got back, Robert and Ed had got on the floor . . . where we were . . . Bobby Luttrell was a kind of leader among the boys when he would come down here. I gave him all the caps to divide. I gave them to him on top of the chute, right after I had come back from the cupboard. What I did was to go straight up to the cupboard and get the dynamite caps and fuse and come back down . . . All the caps I got were in the cupboard." Then the boys crawled out through a little door on the side of the building, and "After that . . . crawled on down the muck pile and went on down there . . . drifted on toward the road . . . down the road," and cut the fuse into pieces, and divided the caps and pieces of fuse—Robert getting three and Jack Burnett giving him two.

Robert testified that he put the caps and fuse in his pocket, and went home. Charlie went with him and spent the night, and in his bedroom the next morning before breakfast, failing "to scratch out the contents" of one of them, with a burned match, because it was too blunt, he tried a pin, and the cap exploded, "a big b-o-o-m," causing his injury. Right after this two dynamite caps with fuses inserted therein were found in Robert's bed. He testified: "I don't know how the fuses got in the caps . . . maybe I put them in there but I don't remember . . . when I got the caps they did not have any fuse in them. . . . I don't remember putting fuse in the caps but I guess I must have, but I don't remember. I guess the piece of fuse does fit right into the cap shell, the fuse is about as big as the hole."

Plaintiff further offered evidence tending to show that prior to 21 July, 1940, (1) That dynamite caps had been seen in the building by both Ed Hice and Charlie Grindstaff. Ed Hice testified: "I had seen them on an old belt that was there and in that little cupboard of a thing and scattered around in it. I had seen some over in the floor. I had seen some loose on the shelf, out of the little tin box. The best I can remember the tin box was a kind of red. The box was open. I could see caps in it. It was about six months before this had happened that I had seen them, and had noticed them before that."

Charlie Grindstaff testified: "I had seen dynamite caps in that building before . . . I don't know how long before this time in July that I had seen them on the belt. I saw one or two caps lying around on the

floor and on the belt . . . in the same room where the caps were when we entered in July. . . . I don't believe I saw any caps anywhere that day only on the shelf . . . on the side of the shelf in a box. I could see them standing on the floor. I took about 9 or 10 in my possession."

Plaintiff further offered testimony regarding the children playing around the building. Robert Luttrell testified: "Prior to July 21, the date I was hurt, I had played at this building, . . . several times before, and before that I had worked there too, picking out mica . . . children were in the habit before that time of playing there . . . around the tipple and up on the muck pile . . . just a mountain of muck that you could walk on . . . right close to the building and you could walk up a great big old pile of muck . . . There was a way you could walk up the muck and get on the inside of the building or on the side of the building. I walked up there . . . we played there most every Sunday, this was Sunday afternoon . . . I have never been in this building before on Sunday, but we had played around on the muck pile and around there. I had not been in it before . . . It was on Sunday that I had played around it. I don't know whether any other day or not, I can't remember the days. I had never been in the building before that time."

Ed Hice testified: "We had played at the place before. I do not know how many times we had played there, but I guess we had played there for almost a year. We would play there on Sundays because we all had to work through the week."

Also, Charlie Grindstaff testified: "I had been in the building once before. That was on Sunday. I had never been in the building except on Sunday, nor any other boy so far as I know."

Plaintiff further offered evidence tending to show that the doors of the building were not kept locked, and that there were other ways to enter it than by the chute; that while the mine was in operation, nobody was there that day, nor was any work being done that day; that Mr. Burdett Thomas is the manager in charge of the work and of the building, and that on one Sunday when Ed Hice and other boys were playing at the building, Mr. Thomas came to the mine. Ed testified: "We were on top of the big muck pile when he came up. We were not in the building . . . It was on Sunday. When I saw him he was in the big road that comes right up over the dump. He rode up in the car and backed and parked. He got out of the car, . . . went out to the mine, and we just kept on playing. I don't know who was with him . . . he was not working that day."

Evidence for plaintiff further tended to show these facts: Robert Luttrell, who was born and has resided in Chicago, has during several

summers visited his grandmother and step-grandfather at their home in the neighborhood of McKinney Mine and on the road that runs by that mine, and was on such a visit at the time of his injury; prior thereto he had attended the public schools in Chicago since he was old enough to go to school, and was in the seventh grade at the time. He had not made the honor roll all through the school course—did not make it a great deal of the time—missed it lots of times. His grades were not always above the average. Two or three times he had taken part in dramatics and plays in school. In one he had taken the part of Alexander the Great, and knew who were such characters in history as Napoleon, Joan of Arc, Theodore Roosevelt, and "people like that," and, according to Charlie Grindstaff, "when he would come down here," he "was kind of leader among the boys." His height at the time of the trial was sixty-seven inches. He had had experience in shooting firecrackers, and knew they exploded. He had shot 22 long shells in a 22 rifle. He had been hunting with a man who had a gun and shot shells. He had played around the mines "with the boys" for several years when he was down here. His grandparents resided "right in the mining section," there being three or four mines right close to the McKinney Mine—where dynamite and dynamite caps were used. He had heard dynamite shooting all around in that community, and knew that he should run, and did run, when he heard the man holler "Fire in the hole." He knew what a dynamite cap is, and that it would explode when fuse is attached to it and lighted—but, he says, he did not know that picking into a cap with a pin would cause it to explode. He testified that the dynamite caps he had were the same kind that Ed Hice shot two Sundays before—he and others having stated that Ed, or some one of the boys with him two Sundays before, had gotten from the building in question a dynamite cap, and had shot it with a "b-o-o-m." He also testified: "I knew that they (the caps) belonged to the people that owned the property in the mill building. I knew they were not mine . . . Yes, I am old enough to know that it was wrong to take property that belongs to somebody else and appropriate it to my own use, but I hadn't thought about it."

From judgment as of nonsuit at close of plaintiff's evidence, plaintiffs appeal to Supreme Court and assign error.

George L. Greene and George M. Pritchard for plaintiffs, appellants.
Smathers & Meekins and W. C. Berry for defendant, appellee.

WINBORNE, J. Considering the evidence on this appeal in the light most favorable to plaintiffs, and giving to them the benefit of every rea-

sonable inference therefrom, we find no error in the judgment below—the challenge to the correctness of which constitutes in the main the debate on the appeal.

The question: Is there evidence of actionable negligence sufficient to take the case to the jury?

In an action for recovery of damages for injury resulting from actionable negligence the plaintiff must show: (1) 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 the plaintiff under the circumstances in which they were placed; and (2) 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 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,* 219 N. C., 25, 12 S. E. (2d), 661; *Mitchell v. Melts, post,* 793. See, also, *Stephens v. Lumber Co.,* 191 N. C., 23, 131 S. E., 314.

If the evidence failed to establish either one of the essential elements of actionable negligence, the judgment of nonsuit must be affirmed. *Mitchell v. Melts, supra.*

Also, 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." *Hoke, J.,* in *Hicks v. Mfg. Co.,* 138 N. C., 319, 50 S. E., 703; *Russell v. R. R.,* 118 N. C., 1098, 24 S. E., 512; *Clinard v. Electric Co.,* 192 N. C., 736, 136 S. E., 1; *Murray v. R. R., supra; Reeves v. Staley, ante,* 573.

In *Lineberry v. R. R.,* 187 N. C., 786, 123 S. E., 1, *Clarkson, J.,* said: "It is well settled that where the facts are all admitted, and only one inference may be drawn from them, the court will declare whether an act was the proximate cause of the injury or not."

Furthermore, it is proper in negligence cases to sustain a demurrer to the evidence and enter judgment as of nonsuit, "1. When all the evidence taken in the light most favorable to the plaintiff, fails to show any actionable negligence on the part of the defendant . . . 2. When it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect, or default of an outside agency or responsible third person . . ." *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108, and cases cited. See, also, *Boyd v. R. R.,* 200 N. C., 324, 156 S. E., 507; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808; *Murray v. R. R., supra.*

"The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others upon coming in contact with them. The degree of care must be commensurate with the dangerous character of the article." *Mattson v. R. R.,* 95 Minn., 477, 70 L. R. A., 503, approved in *Brittingham v. Stadiem,* 151 N. C., 299, 66 S. E., 128; *Wood v. McCabe,* 151 N. C., 457, 66 S. E., 433, and to like effect in *Barnett v. Mills,* 167 N. C., 576, 83 S. E., 826; *Krachanake v. Mfg. Co.,* 175 N. C., 435, 95 S. E., 851; *Stephens v. Lumber Co., supra.*

Though the extent of the precautions which a reasonably prudent person would take to avoid injury in the case of a child is affected by the child's appreciation of the danger incident to the handling of explosives, and hence, liability may exist in the case of a child of tender years which would not exist in the case of a child of more mature years, it is well settled that one who keeps or uses explosives owes a duty, especially to young children who cannot be expected to know and appreciate the danger, to exercise care commensurate with the danger to prevent injury to children who may have access to, or come in contact with, explosives. Thus it has been broadly stated that it is a breach of duty to leave or to store explosives accessible to children who are lawfully on the premises—or whose presence there should be anticipated. 22 Amer. Jur., 139. See, also, Annotations in 43 A. L. R., 435, 49 A. L. R., 160, and 100 A. L. R., 452.

In the present case there is no allegation or evidence of the existence of any relation between Robert Luttrell and defendant, out of which any peculiar duty arose with respect to conditions in the building where the dynamite caps were stored, as would be in the case of master and servant. The dynamite caps were used by defendant as a legitimate agency in the prosecution of the lawful business of mining in the mountains of Mitchell County. They were stored in a tin box on an elevated shelf of a cupboard placed in the rear of the third floor of a mountain side building in use by defendant in carrying on its mining business, except on Sundays. The defendant had the right to store dynamite caps in such building on its own land. But in view of the explosive nature of dynamite caps it owed a duty to children, who might lawfully go into the building where the dynamite caps were stored, or whom it might reasonably anticipate would do so, to exercise commensurate care in protecting them from exposure to dangers incident to the dynamite caps when improperly handled. Hence, if defendant knew, or was charged with implied knowledge, that children were in the habit of playing in and around the building, the question as to whether it had properly safeguarded the dynamite caps would ordinarily be a question for the jury. But where the evi-

dence shows that defendant had no actual knowledge that children were in the habit of playing around the building, and where the evidence fails to show that children so habitually played in and around the building, as to charge defendant with knowledge of their usual presence on the premises, it is not charged with duty of anticipating that children would trespass upon its premises, and take and carry away dynamite caps.

While in the case in hand there is evidence that plaintiff and other children were in the habit of playing around the building on Sundays, and that some of them on a few occasions had gone into the building, the evidence is insufficient to show that defendant had actual or implied knowledge of such habit. The only evidence is that when on one Sunday the manager in charge of the work and of the building came to the mine Ed Hice and other boys were on the dump pile on the outside of the building. This is insufficient, as a matter of law, to charge defendant with knowledge that children were in the habit of playing there. Therefore, defendant is not negligent in failing to anticipate invasion of its building by children, who had no right to enter. And, while the place from which the dynamite caps were taken indicates caution and circumspection in storing them, it is immaterial whether defendant had properly safeguarded them.

But if it be conceded that there is evidence of negligence on the part of defendant in storing dynamite caps in the manner and under the circumstances shown in the evidence, was such negligence the proximate cause of the injury to plaintiff, Robert Luttrell?

The answer is "No," as in *Stephens v. Lumber Co., supra.*

The injury to plaintiff here, as there, did not occur in defendant's building, while he and the other boys were in the act of taking the dynamite caps here, powder there, but here it occurred after plaintiff had carried them down the road for division with the others, and had divided them, and after he had carried a part of them home and kept them all night, and not then until he undertook to remove the contents of one of them by picking in it with a pin. The explosion of the cap was not caused by any act of omission or commission of defendant. Too, it was the explosion of the cap and not its presence in the defendant's building, or in the manner in which it was stored, that caused the injury. If the cap had remained in the box on the shelf of the cupboard in the back of the building on the third floor, where defendant had stored it, and where defendant reasonably contemplated it would remain, no harm would have come to plaintiff. Further, if plaintiff, Robert Luttrell, had been an adult, no contention could or would be made that his injury was caused by act of defendant, or that defendant is liable to him therefor. His injury was due to his own wrongful act in taking and carrying away the dynamite caps, and to his own carelessness in picking

into the cap with a pin. Hence, if defendant were negligent in storing the dynamite caps in the building, the connection between such act on the part of defendant and the injury to plaintiff was broken by an intervening cause, to wit, the act of plaintiff. Therefore, unless it can be held that the plaintiff, Robert Luttrell, by reason of his age, cannot be held in law responsible for his acts in taking the dynamite cap and exploding it, plaintiffs' contention that the negligence of defendant, if such be conceded, was the proximate cause of the injury to Robert Luttrell, cannot be sustained.

While Robert Luttrell says that he did not know that a dynamite cap would explode when its contents were picked with a pin, the evidence manifests his knowledge of the dangerous nature of dynamite caps, and his familiarity with their use. Furthermore, the evidence shows him to be at least of average size and intelligence for a boy of his age—not quite thirteen years. The evidence shows him to be of such age and intelligence as to know and understand that the dynamite caps did not belong to him, and, even though he says that he did not think of it at the time, he admits that he knew it was wrong to take property of others, and to appropriate it to his own use.

"Notwithstanding the fact that the person injured is a child, nevertheless, to impose liability, defendant's act must have been the proximate cause of the injury. So where explosives are wrongfully carried away from the place in which they are stored, by children capable of understanding the wrongful nature of their act, the negligence in keeping or storing cannot be regarded as the proximate cause of a subsequent injury to the child or other children by their use, where defendant has done nothing to invite or provoke the act of the child and there is nothing in the circumstances which would cause it to be foreseen. 25 C. J., 187," quoted in *Stephens v. Lumber Co., supra,* where cases are cited. Such is the case in hand.

Other assignments are found to be without merit.

The judgment below is

Affirmed.

CLARKSON, J., not sitting.

MRS. ROBERT L. MITCHELL, JR., ADMINISTRATRIX OF ROBERT L. MITCHELL, JR., DECEASED, v. LAWRENCE MELTS AND FLORENCE MELTS, T/a MELTS BAKERY AND S. W. HENDRIX.

(Filed 23 January, 1942.)

1. Death § 7—

In an action for wrongful death based upon negligence plaintiff must show 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 that such negligent breach of duty was the proximate cause of the injury which caused death.

2. Negligence § 5—

The proximate cause of an injury is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed.

3. Trial § 24—

In order to resist nonsuit, plaintiff must offer legal evidence tending to establish every material fact necessary to support a verdict, and evidence which leaves any one of them in mere speculation or conjecture is insufficient.

4. Negligence § 19a—

In negligence actions, nonsuit must be sustained if plaintiff's evidence fails to establish either negligence or proximate cause.

5. Negligence § 17b: Trial § 19—

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

6. Automobiles § 12d—

In determining whether the scene of an accident in a municipality is in a residential or business district or neither, the character of the property along an intersecting street, although within 300 feet of the accident, should not be considered, since such property is not "contiguous" thereto.

7. Same—

In determining whether the scene of an accident is in a residential or business district or neither, ordinarily, only the character of the property fronting on both sides of the street in the particular block in which the accident occurs can be considered, since the character of the property fronting on one block may be entirely different from that fronting upon the adjoining block.

8. Same—

Uncontradicted testimony that only two business buildings front on the street in the block in which the accident occurred and that both of them together comprise not more than 40 feet frontage, establishes as a matter of law that the *locus in quo* is not a business district as defined by statute. Public Laws 1939, ch. 275, sec. 1 (a).

9. Same—

Where the evidence establishes that the scene of the accident was not in a business district as defined by statute, and there is no evidence that defendants' vehicle was being driven in excess of 20 miles an hour, whether the accident occurred in a residential district as defined by Public Laws 1939, ch. 275, sec. 1 (d), is immaterial, since such speed does not violate the statutory restriction. Public Laws 1937, ch. 407, sec. 103.

10. Automobiles § 18f—

Testimony that defendants' vehicle was traveling at least 20 miles an hour but less than 30, that the witness did not know how much more than 20 miles, that his estimate was guesswork, and that he could not say how much more than 20 miles an hour the vehicle was traveling, amounts to no more than that the speed of the car was 20 miles an hour, since if the witness does not know how much the car was exceeding a speed of 20 miles an hour the jury should not be permitted to hazard a guess on his testimony.

11. Automobiles § 17—

The mere fact of the skidding of an automobile does not in itself establish negligence, the doctrine of *res ipsa loquitur* being inapplicable.

12. Negligence § 17a—

Negligence is not to be presumed from the mere fact of injury.

13. Automobiles § 18g—Failure to see pedestrian does not establish negligence in absence of evidence that driver could or should have seen him.

Plaintiff's evidence tended to show that defendants' truck was being operated about 20 miles an hour in a municipality outside of a business district, and hit intestate as he was crossing the street, and that the driver of the truck failed to see intestate before striking him. *Held:* In the absence of evidence as to when intestate got on the street, how long he had been on the street before he was struck, and where he was or what he was doing just before he was struck, defendants' motion to nonsuit was properly allowed, since the evidence fails to establish excessive speed, and the fact that the driver did not see intestate is insufficient to establish negligence in the absence of evidence that intestate was in a position where the driver of the truck could or should have seen him.

APPEAL by plaintiff from *Pless, J.,* at 19 May, 1941, Civil Term, of GUILFORD.

Civil action to recover for alleged wrongful death. C. S., 160-161.

Plaintiff, in her complaint, alleges: (1) That at about 7:40 p.m. on 26 September, 1940, her intestate, Robert L. Mitchell, Jr., while in the act of crossing Walker Avenue in the city of Greensboro, North Carolina, from south to north, and when he had gotten nearly across, he was stricken and fatally injured by a Dodge truck, owned by defendants Lawrence Melts and Florence Melts, partners, trading as Melts Bakery, operated by defendant S. W. Hendrix, traveling westwardly along Walker Avenue, while he, said Hendrix, agent and chauffeur of said partners trading as aforesaid, was "in the prosecution of their business and acting

within the scope of his authority," as the proximate result of the negligence of said Hendrix, in that he drove said Dodge truck upon the highway, (a) carelessly and heedlessly, in willful and wanton disregard of the rights or safety of others and without due caution and circumspection and at a rate of speed and in a manner so as to endanger the life of intestate of plaintiff and other persons on the highway, in violation of law; (b) at a speed greater than was reasonable and prudent under the conditions existing at the time in violation of the statute, Michie's Code, 1939, sec. 2621 (288); (c) though he saw, or ought to have seen, plaintiff's intestate crossing Walker Avenue, he failed (1) to give him any warning of the approach of said truck by sounding a horn or other device, and (2) to exercise proper precaution upon observing the intestate upon the street, in violation of the statute, Michie's Code, 1939, sec. 2621 (320); and (d) failed (1) to keep a proper lookout for intestate, and (2) to exercise reasonable care to avoid striking him after seeing him crossing the street.

Defendants deny plaintiff's allegations of negligence against them, and plead negligence of intestate in bar of plaintiff's right to recover herein.

In the trial court evidence for plaintiff tends to show substantially these facts: On 26 September, 1940, about 7:40 p.m., Robert L. Mitchell, Jr., intestate of plaintiff, while going from south side to north side of Walker Avenue, west of its intersection with Spring Street and the Cape Fear and Yadkin Valley Railroad, in the city of Greensboro, North Carolina, was stricken by a truck of defendant Florence Melts, trading as Melts Bakery, and operated by defendant S. W. Hendrix, as agent, and on business of said bakery, traveling west on the north, or its right-hand side of Walker Avenue.

Walker Avenue runs in general direction of east and west. It is thirty-two feet wide and is straight for several hundred feet. Spring Street runs in general direction of north and south. The Cape Fear and Yadkin Valley Railroad track crosses said intersection on diagonal course from southeast corner of the intersection to northwest corner thereof. Edgeworth Street is the next street to the east, and Cedar Street is next to, west of, and paralleling Spring Street, and crossing Walker Avenue. The blocks are approximately three hundred feet. There are stop signs on Spring Street, both north and south of Walker Avenue. There is a red caution light on Walker Avenue, about the middle and over the intersection, that flashes red on Spring Street, but "it is not a stop and go sign." Whether the avenue is marked with "pedestrian aisle," the evidence fails to disclose. On the north side of the avenue, west of the railroad right of way, and about one hundred to one hundred fifty feet therefrom, there is located the Ivory Store with a series of lights on what is known as a canopy, which give "a very bright light."

Regarding the *situs* of the accident: The witness Jas. P. Patten, who was sitting facing southeast in the front room of his home, which fronts north, on the southwest corner of Walker Avenue and Spring Street, testified, that "hearing brakes" he threw back the curtain and shade and "just at the split second" saw the car traveling westward hit intestate; that at that time intestate was approximately ten feet from the west rail of the railroad track, and five feet from the north curb of Walker Avenue; that though he "would not be exactly sure" he would say that the car went "approximately thirty-five feet before it came to a stop"; and that the body fell, near the curb, about fifteen feet beyond the car.

On the other hand, the witness L. G. Edwards, who, traveling south on Spring Street, had stopped for the traffic, including the truck, to go by, testified: "I will say it is around fifty or fifty-five feet west of the west curb line of Spring Street where the impact occurred," and the body was lying in the street about twelve or fifteen feet in front of the truck.

The witness, M. S. Robinson, city traffic officer, testified, that he arrived after the accident had happened and the body removed; that on the north side of the center of Walker Avenue, well on the right proceeding west, and beginning at about the west rail of the railroad, at a point approximately in line with the west curb of Spring Street, if extended across Walker Avenue, there were light parallel skid marks west for twenty feet, then a break with no such marks for about the same distance, then heavy parallel skid marks for nine feet, then at the length of a car, fifteen feet further, a little closer to the curb than the skid marks, water had leaked from the radiator, and fifteen feet further on, over toward and still closer to the curb was a blood spot where the body had come to rest; that the total distance from where the marks started to the water spot was sixty-four feet, and to the blood spot seventy-nine feet; that the right-hand skid marks, going west, were parallel to and within seven feet of the north curb; and that he found no marks of any other kind made by this truck, other than those described.

There was evidence tending to show that the right headlight of the truck was broken and that the radiator and grill work of it were pushed in, and that the right shoulder, hip and back of intestate were struck; and that "his right arm was crushed to a pulp, . . . he had internal injuries . . . the back of his head and right side of his temple . . . hurt . . . the right side of his head was crushed." He died four hours later.

Regarding question as to whether the accident occurred in a business or in a residential district: The witness Robinson, traffic officer, described the conditions in detail, in substance, as follows: (1) As to Walker Avenue: (a) On the north side and within one hundred fifty feet west of the intersection, there is no business house except the Ivory

Store and a vacant store, the two having total frontage of not more than forty feet. The Ivory Store is from one hundred to one hundred fifty feet west of the railroad right of way. From it and the vacant store west it is residential, and on the same side, east of the intersection and within one hundred fifty feet therefrom there are three business places, an antique shop, a store and a garage, fronting sixty to seventy feet and from there on to Edgeworth Street about 200 feet it is vacant or residential. (b) On the south side and within one hundred fifty feet west of the intersection "there is nothing except residences . . . about equally spaced"; and on same side east of the intersection, beginning thirty or forty feet from the intersection, there are the McClamroch building, a feed store with frontage of about forty feet, and a little service station—if is "solidly business property."

(2) As to Spring Street: (a) On the east side north of the intersection after passing business building which faces on the north side of Walker Avenue and runs back seventy-five feet, it is residential for the remainder of the distance of one hundred fifty feet. On same side south of the intersection there is no place of business or business establishment within one hundred fifty feet from the fifty or sixty feet frontage occupied by the Worth Distributing Company. (b) On the west side north of the intersection only about twenty feet of one hundred fifty feet adjacent thereto is used for business and the rest is residential; and on the same side south of the intersection, it is "purely residential all of the way."

Summarizing, this witness said: "You asked me, after I have gone over all the approaching intersecting streets at this point, from every angle of it within one hundred fifty feet of this intersection, it is more residential in each direction than business. In every direction it would be more than fifty per cent residential." Then, on re-direct examination, the witness states: "Beginning at a point twenty feet west of the railroad and extending back eastward three hundred feet there are no residences facing Walker Avenue. Within that three hundred feet . . . there are four business dwellings on the north side and three on the south side . . . McClamroch, Smith Company, the feed store and the service station. In that area you have just directed there are as many or as much as seventy-five per cent of the places occupied by business dwellings."

Regarding speed of truck: The witness L. G. Edwards, as above stated, traveling in an automobile south along Spring Street, testified: "As I came to the intersection of the two streets I pulled up to Walker Avenue and stopped for the traffic to go by. I saw Melts Bakery truck pass and just as it passed I heard the impact. I do not recall that I heard a horn blow. I was close enough to hear . . . Of course they do

blow, and I did not pay any attention if it blew. . . . As the . . . truck passed in front of me, I was on the side view of it and it is somewhat guesswork . . . say it was going about twenty miles or more an hour. It was not going over thirty, and I think between twenty and thirty would be about right." Then, continuing, on cross-examination, "If I had to fix a speed that conformed to my best opinion . . . the speed of the . . . truck when it crossed that intersection . . . well, it is like I said, Mr. Boren, it was a side view. I was sitting on the side where it was going to the right in front of me and it looked like as it dashed by that it was about twenty or maybe a little more . . . I don't know about that . . . it was not over thirty, but I do think it was twenty. I think it was going at least twenty miles an hour, and don't think it was going over thirty . . . I will not say because, honestly, I don't know. I had a side view of it . . . I do think it was going twenty and may have been going a little more." Then, on re-direct examination, "I think it was going as much as twenty, and don't think it was going thirty . . . between twenty and thirty, I would say."

As to traffic conditions: While the witness Edwards testified that he stopped on Spring Street to let traffic proceeding east and west along Walker Avenue go by, the witness E. L. Robbins testified that he was in his automobile about at intersection of Cedar Street and Walker Avenue, a block three hundred feet west of where the accident happened, traveling east on the avenue; that there was no car immediately ahead of him at the time and the road was pretty clear; and that the first thing he noticed was when he heard the impact and saw the headlights go out; that his car and the truck were the only two vehicles in the block; that he did not hear any horn blow; that he would not say that it did not blow, that he does not remember hearing it; that it was dark enough to have lights on automobile, "and the cars traveling on Walker Avenue did have all lights on."

The witness J. W. Gaither, arriving after the accident, testified: "I did not pay any particular attention to the front end of the truck other than the right headlight was out."

The plaintiff, Mrs. Mitchell, testified that, at the hospital that night, defendant Hendrix, in presence of defendant Florence Melts, told her "he was sorry that he had hit him but he said he did not see him until he hit him."

Further, the witness R. M. Brooks testified that, at hospital, Mrs. Melts said, "I am sorry it happened . . . what was he doing in the street?" and asked Hendrix if he saw him, and he said: "No, I am very sorry it happened. I did not see him until I had run into him." (This testimony was admitted only as against defendants Florence Melts and S. W. Hendrix.)

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

Frazier & Frazier for plaintiff, appellant.
Hines & Boren for defendant, appellee.

WINBORNE, J. When the evidence shown in the record, portraying the factual situation surrounding the death of plaintiff's intestate, is taken in the light most favorable to plaintiff, and giving to him the benefit of every reasonable inference therefrom, we are of opinion that plaintiff fails to show actionable negligence.

In an action for recovery of damages for wrongful death resulting from 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 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,* 219 N. C., 25, 12 S. E. (2d), 661, and cases cited. *White v. Chappell,* 219 N. C., 652, 14 S. E. (2d), 843; *Reeves v. Staley, ante,* 573.

There must be legal evidence of every material fact necessary to support a 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; *Rountree v. Fountain,* 203 N. C., 381, 166 S. E., 329; *Allman v. R. R.,* 203 N. C., 660, 166 S. E., 891; *Cummings v. R. R.,* 217 N. C., 127, 6 S. E. (2d), 837; *Mercer v. Powell,* 218 N. C., 642, 12 S. E. (2d), 227; *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661.

If the evidence fail 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. *Mills v. Moore, supra.*

At the outset: Is there evidence in instant case that defendant's truck was being operated in violation of the speed limit? The answer to this question is dependent upon whether the accident occurred in a business district or in a residential district.

A business district as defined in subsection (a) of section 1 of chapter 275, Public Laws 1939, is "The territory contiguous to a highway where seventy-five per cent or more of the frontage thereon in a distance of three hundred (300) feet or more is occupied by buildings in use for business purposes."

A residential district, as defined in subsection (d) of said section of said Act is "The territory contiguous to a highway not comprising a business district, where seventy-five per cent or more of the frontage thereon for a distance of three hundred (300) feet or more is mainly occupied by dwellings, or by dwellings and buildings in use for business purposes."

"Contiguous," as defined by Webster, means "in actual contact; touching; also, near, though not in contact; neighboring; adjoining; near in succession." Hence, the phrase "territory contiguous to a highway," as used in the statutes above, simply means the land lying along and adjoining and on either one or both sides of a highway. Manifestly, however, as so used, the term does not include the adjoining land covered by a crossing highway. Thus, that part of a highway comprising an intersection may not properly be considered in applying the statute to any given locality. To be a business district at least seventy-five per cent of the frontage of the territory contiguous to a highway in a distance of three hundred feet must be occupied by buildings in use for business purposes. Public Laws 1939, chapter 275, section 1 (a). To be a residential district two things must concur: (1) The territory contiguous to a highway must not comprise a business district as defined by the statute. (2) At least seventy-five per cent of the frontage of the territory contiguous to the highway for a distance of three hundred feet or more must be mainly occupied by dwellings, or by dwellings and buildings in use for business purposes. Public Laws 1939, chapter 275, section 1 (d).

The question then arises as to how the three hundred feet referred to in the statutes shall be measured. Pertinent to situation in hand, as cities and towns are usually laid off into streets and blocks, and as intersections are not within the purview of the statutes, the particular blocks contiguous to the street on which an accident occurs may be said to properly comprise the territorial limits within which to measure the three hundred feet specified in the statute. Certainly a proper admeasurement including a street intersection would be improper. It is conceivable, and in observation it is a fact, often, that the frontage in one block may be wholly occupied by buildings in use for business purposes, while in the very next block the whole frontage may be occupied by dwellings, or by dwellings and buildings in use for business purposes, or not occupied at all.

In the present case the accident admittedly having occurred on Walker Avenue west of its intersection with Spring Street, we are of opinion and hold that the occupancy of the territory in the blocks contiguous to that particular section of that avenue affords the answer to the question as to whether the accident occurred in a business district, or in a residential district, or in neither. Whatever may be the occupancy of the frontage contiguous to that section of Walker Avenue east of the intersection with Spring Street, or of those sections of Spring Street north and south of the intersection is impertinent to the inquiry.

The evidence is undisputed that all of the frontage, in the blocks or territory contiguous to that part of Walker Avenue west of the intersection where the accident occurred, is residential, except that on the north side occupied by the Ivory Store and the vacant store, not more than forty feet in all. Unquestionably a business district as defined by the statute does not exist there, and we so hold as a matter of law. Whether the evidence pertaining to residential occupancy is sufficient for a finding that a residential district, as defined by the statute, exists there, is immaterial in view of the evidence as to the speed of the truck.

It is provided in section 103 of chapter 407 of Public Laws 1937, that no person shall drive a vehicle on a highway at a greater rate of speed than is reasonable and prudent under the conditions then existing; that where no special hazard exists the speed of twenty miles per hour in any business district or twenty-five miles an hour in any residential district shall be lawful.

Here, there is no evidence that the truck was being operated in violation of this statute.

While the witness Edwards testified that the speed of the truck was at least twenty miles per hour and not over thirty miles, his testimony, taken in the light most favorable to plaintiff, amounts to no more than in his opinion it was twenty miles per hour. He was unwilling to venture an opinion as to how much more than twenty, and how much less than thirty the speed was, and frankly stated that "it is somewhat guesswork," and that "honestly" he does not know. If he does not know, a jury will not be permitted to hazard a guess on his testimony—which is all the evidence on the question. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Johnson v. R. R.*, 214 N. C., 484, 199 S. E., 704.

Furthermore, the mere fact of the skidding of an automobile is not of itself such evidence of negligence in the operation of an automobile as to render the owner liable for an injury in consequence thereof. Skidding itself does not imply negligence. The doctrine of *res ipsa loquitur* in such cases does not apply. *Springs v. Doll*, 197 N. C., 240, 148 S. E., 251. See, also, *Butner v. Whitlow*, 201 N. C., 749, 161 S. E., 389; *Waller v. Hipp*, 208 N. C., 117, 179 S. E., 428; *Clodfelter v. Wells*, 212

N. C., 823, 195 S. E., 11; *Williams v. Thomas,* 219 N. C., 727, 14 S. E. (2d), 797.

Negligence is not to be presumed from the mere fact of injury or that the intestate was killed. *Mills v. Moore, supra,* and cases cited. See, also, *Pack v. Auman, ante,* 704.

Moreover, in the present case there is no evidence as to when the intestate got on the street, as to how long he had been on the street before being stricken, or where he was or what he was doing just before being stricken. The testimony is that the driver of the truck did not see him. Under such circumstances, it would be speculative to hold that this evidence is sufficient to show that the intestate was in a position where the driver of the truck could or should have seen him. *Pack v. Auman, supra.*

In the *Pack case, supra, Schenck, J.,* speaking for the Court, uses this language: "In the absence of any evidence of where on the highway the intestate was at the time of being stricken, or of when he got on the highway, or of how long he had been on the highway before being stricken, the plaintiff's case must fail. The mere fact that he was injured and killed does not constitute evidence that his injury and death were proximately caused by the negligence of the defendants. *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661, and cases there cited."

To like effect is the decision in *Pace v. Transport Co.,* 216 N. C., 804, 5 S. E. (2d), 547. There, though the evidence is not stated, the factual situation on public highway shown in the record on appeal is not materially different from that here. Judgment as of nonsuit was affirmed in this Court in *per curiam* opinion.

The judgment below is

Affirmed.

LAKE D. SHORE, BY HER NEXT FRIEND, DORA B. WELBORN, v. P. M. SHORE.

(Filed 23 January, 1942.)

1. Divorce §§ 2a, 13—

In the wife's action for alimony without divorce under C. S., 1667, the husband cannot set up a cross action for divorce, since such cross action would defeat the wife's action at the threshold of the case, and the statute, by expressly providing the defenses which may be pleaded by the husband in such action, excludes all defenses not specified under the maxim *expressio facit cessare tacitum.*

2. Appeal and Error § 47b—

In this action by a wife for alimony without divorce under C. S., 1667, the husband was erroneously permitted to set up a cross action for divorce. *Held:* Since it cannot be determined that a partial new trial would not result in prejudice, a new trial is ordered.

SEAWELL, J., dissenting.

APPEAL by plaintiff from *Ervin, Special Judge,* at May Term, 1941, of DAVIDSON.

Civil action for alimony without divorce.

The facts, necessary to a decision, follow:

1. At the instance of the defendant and on affidavit filed by him 19 May, 1936, the plaintiff was adjudged insane and committed to the State Hospital at Morganton, where she stayed at intervals until 8 June, 1938, when she was released as "improved."

2. The plaintiff and defendant then went to the home of plaintiff's parents where they lived as man and wife until 29 August, 1938, when they separated under the terms of a written agreement and the defendant went to Thomasville to live, leaving the plaintiff at the home of her parents.

3. This action was instituted 18 April, 1941, for alimony without divorce. An order was entered in the cause at the April Term, 1941, requiring the defendant to pay the plaintiff $35 per month as reasonable subsistence for herself and infant son until the issues in the case could be submitted to a jury.

4. Thereafter, on 14 May, 1941, the defendant filed answer, pleaded the 1938 deed of separation in bar of plaintiff's right to recover, and set up a cross action for divorce on the ground of two years separation.

5. When the case was called for trial at the May Term, 1941, the plaintiff first interposed a demurrer to the cross action and moved to dismiss the defendant's counterclaim. Overruled; exception.

The jury returned the following verdict:

"1. Were the plaintiff and the defendant married to each other, as alleged in the complaint? Answer: 'Yes'—by consent.

"2. Has the defendant separated himself from his wife, the plaintiff, and failed to provide her with the necessary subsistence according to his means and condition in life, as alleged in the complaint? Answer: 'Yes.'

"3. Did the plaintiff, on August 29th, 1938, have sufficient mental capacity to execute the Deed of Separation in controversy? Answer: 'No.'

"4. Was the execution of the Deed of Separation in controversy procured by duress practiced upon the plaintiff by the defendant? Answer: 'No.'

"5. Has the defendant been a resident of North Carolina for at least one year next preceding the institution of this action, as alleged in the answer? Answer: 'Yes.'

"6. Have the plaintiff and the defendant lived separate and apart from each other for at least two years next preceding the institution of this action, as alleged in the answer? Answer: 'Yes.'

"7. Did the defendant wilfully abandon the plaintiff without providing adequate support for her, as alleged in the complaint? Answer: 'No.'"

Judgment on the verdict (1) granting the defendant an absolute divorce, (2) relieving him from any further payments to the plaintiff under the previous order for subsistence, and (3) increasing slightly the allowance for the minor child, from which the plaintiff appeals, assigning errors.

J. F. Spruill for plaintiff, appellant.
Carl C. Wilson and Phillips & Bower for defendant, appellee.

STACY, C. J. The first question for decision is whether a husband can set up a cross action for divorce in a proceeding brought by his wife under C. S., 1667, for alimony without divorce. The decisions and provisions of the statute point to a negative answer.

We have held that this section, C. S., 1667, "only applies to independent suits for alimony," and may not be used by the wife as the basis of a cross action in a suit for divorce instituted by the husband. *Silver v. Silver, ante,* 191; *Dawson v. Dawson,* 211 N. C., 453, 190 S. E., 749; *Adams v. Adams,* 212 N. C., 373, 193 S. E., 274; *Skittletharpe v. Skittletharpe,* 130 N. C., 72, 40 S. E., 851; *Reeves v. Reeves,* 82 N. C., 348.

It was said in *Hooper v. Hooper,* 164 N. C., 1, 80 S. E., 64, "The statute is one solely for support." It provides a remedy for an abandoned wife to obtain support from the estate or earnings of her husband. "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence, . . . the wife may institute an action in the Superior Court," etc. In *Skittletharpe v. Skittletharpe, supra,* the "defendant's reasons and excuses for separating from his wife" were declared to be irrelevant and immaterial to the inquiry. True, this was said prior to the amendment of 1923 (ch. 52, Public Laws 1923), making it "competent for the husband to plead the adultery of the wife in bar of her right to such alimony." *Price v. Price,* 188 N. C., 640, 125 S. E., 264. Later, in *Hooper v. Hooper, supra,* it was pointed out that in respect of an unfaithful wife, "the defendant may have his remedy in an action for divorce, and as the judgment in this proceeding is not final, he could then move to modify or set it aside."

To permit the husband to set up a cross action for divorce in a proceeding brought by his wife under C. S., 1667, for alimony without divorce, would be to defeat the plaintiff's cause of action at the threshold of the case and remit the parties to whatever rights they may have under the cross action. If the wife is not allowed to cross complain against her husband for alimony without divorce in the husband's suit for divorce, because of the terms of the statute, and we have so held in a number of cases, by the same token the husband should not be allowed to cross complain against his wife for divorce in her action for alimony without divorce. The plaintiff's action is grounded on the existence of the marriage tie, and presupposes its continuance. The defendant's cross action admits its existence, and seeks to dissolve it. The issues are contradictory and the remedies inconsistent. See *Lykes v. Grove,* 201 N. C., 254, 159 S. E., 360. Moreover, it would seem that in a matter of this kind, the parties should be afforded a modicum of equality in treatment, and the statute apparently so provides: "Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony." *Expressio facit cessare tacitum. Reeves v. Reeves, supra.*

It is true that in an action for divorce, either absolute or from bed and board, it is permissible to set up a cross action for divorce, if accompanied by the requisite affidavit, etc. *Cook v. Cook,* 159 N. C., 46, 74 S. E., 639. But this is by virtue of other statutes, C. S., 519 and 522. *Smith v. French,* 141 N. C., 1, 53 S. E., 435. Here we are dealing with an act of Assembly complete within itself, which is not to be set at naught by the simple device of pleading.

In the light of the verdict, which may not be amended by setting aside a part of the issues and allowing the others to stand with assurance that no prejudice will result therefrom, *Bundy v. Sutton,* 207 N. C., 422, 177 S. E., 420; *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32, the thought has prevailed that a new trial should be ordered. Judgment accordingly.

New trial.

SEAWELL, J., dissenting: Plaintiff's objection to defendant's cross action cannot be taken by demurrer *ore tenus* when the cause comes on for trial, since the objection does not go to the statement of a cause of action or the jurisdiction of the court. C. S., 518; *Baker v. Garris,* 108 N. C., 219, 225, 13 S. E., 2; *Poovey v. Hickory,* 210 N. C., 630, 631, 188 S. E., 78; *Gurganus v. McLawhorn,* 212 N. C., 397, 183 S. E., 844. That question is therefore not properly before us, but under our liberal practice, and quite within the limits of our statute on procedure, the cross action should be entertained. C. S., 519, 521.

I am unable to find room for the Skittletharpian philosophy in the modern laws relating to the marital relations and their consequences, which in my judgment make a better "approach to reality." In fact, separation under a deed in which the wife releases her marital rights has always been considered a good defense against an action for support. C. S., 1659 (a), makes such a separation, continuing for two years, a ground for absolute divorce. I can see no reason why a state of facts which would be a sufficient answer to the suit of the wife may not be pleaded as a cross action, nor where the law itself erects them into a ground for divorce. Nor do I see why the rights of the wife or any security which the statute ought to afford are invaded.

Of the cases cited in the main opinion only the recently decided case of *Silver v. Silver, ante,* 191, supports the main opinion, and the decision in that case is frankly based on *Adams v. Adams,* 212 N. C., 373, 193 S. E., 274, and *Dawson v. Dawson,* 211 N. C., 453, 190 S. E., 749, in neither of which was the question raised.

The defendant, however, was certainly not entitled to recover in this action upon the issues decided, nor was the plaintiff. The answers to two issues respecting the conduct of the husband in separating himself from his wife are repugnant and show a confused state of mind on the part of the jury on that subject, and should not be determinative of the controversy. I think judgment should rest upon a clear and understanding deliverance by the jury on the questions at issue, and not upon what might be termed the mechanics of the trial.

The cause should be heard *de novo.*

MRS. R. J. WILLIAMS v. MRS. CATHERINE (D. C.) WILLIAMS AND HUSBAND, D. C. WILLIAMS (ORIGINAL PARTIES DEFENDANT), AND ENOS T. EDWARDS, TRUSTEE (ADDITIONAL PARTY DEFENDANT).

(Filed 23 January, 1942.)

1. Fraud § 5: Cancellation of Instruments § 2—It is duty of party signing instrument to ascertain its contents unless prevented from doing so by fraud.

Plaintiff mortgagee's evidence tended to show that defendant mortgagor promised to obtain a new loan and turn over the proceeds to plaintiff in partial satisfaction of her debt, and execute notes and a second mortgage for the balance, plaintiff to release her mortgage so that the new loan could be obtained, that the agent acting for plaintiff in the transaction brought a "creditor's agreement" to plaintiff's house, stated he was in a hurry, and that the paper would have to be signed in order to obtain the refinancing loan, and that plaintiff instructed her daughter to sign the paper, and herself signed it with her mark, and further that the agent

did not read same and plaintiff made her mark without requesting that the instrument be read to her. *Held:* The evidence is insufficient to be submitted to the jury upon plaintiff's contention that her execution of the agreement was obtained by fraudulent misrepresentations as to what she was signing, or plaintiff's contention that she signed same through her own mistake, since a party will be held bound by his signature unless he shows that he was willfully misled or misinformed as to the contents of the instrument or that they were kept from him in fraudulent opposition to his request.

2. Cancellation of Instruments § 2: Fraud § 3—

Ordinarily, an unfulfilled promise cannot be made the basis of an action for fraud, but when the promisor, at the time of making the promise, has a present intent not to fulfill same when the time for performance arrives, so that the promise constitutes a misrepresentation of a subsisting fact, such promise will support an action for fraud when made with the intention that it should be acted upon and is acted upon to the promisee's injury.

3. Same—Evidence held insufficient to show that at time of making promise the promisor had present intent not to fulfill same.

Plaintiff mortgagee's evidence tended to show that defendant mortgagor promised to obtain a new loan and turn over the proceeds to plaintiff in partial satisfaction of her debt, and execute notes and a second mortgage for the balance, plaintiff to release her mortgage so that the new loan could be obtained. In closing out the new loan plaintiff executed a "creditor's agreement" constituting a complete discharge of the debt and containing an agreement by plaintiff to accept in full satisfaction of the debt proceeds of the loan and not to take any further notes, secured or unsecured. It did not appear that defendant had any knowledge of the existence or contents of the "creditor's agreement," and plaintiff contended she executed same without knowing its contents. The first indication of an unwillingness on the part of defendant to execute the second mortgage occurred after the new deed of trust had been signed, the check cashed, and the original notes and mortgage canceled. *Held:* In plaintiff's action attacking the "creditor's agreement" for fraud, the evidence is insufficient to be submitted to the jury upon plaintiff's contention that defendant's execution of the "creditor's agreement" was obtained by fraudulent promises to execute notes and a second mortgage for the balance of the debt, since there is no evidence to sustain an inference that defendant did not intend, at the time she made it, to perform her promise to execute the notes and second mortgage when the time for performance arrived, mere proof of nonperformance being insufficient to establish the necessary fraudulent intent.

4. Mortgages § 28—

Where the *cestui* executes without fraudulent inducement an instrument in which she agrees to the cancellation of the deed of trust, she may not thereafter contend that the trustee was without authority to cancel the deed of trust, since she cannot complain that the trustee did that which she herself had agreed to.

5. Same—

Possession of the papers by the trustee raises a presumption of his authority to cancel the deed of trust of record. C. S., 2594.

6. Cancellation of Instruments § 9—

In an action to set aside an instrument for fraud, plaintiff may not assert mutual mistake or want of consideration for the execution of the instrument unless such matter is specifically pleaded, since a party demanding equitable relief must specifically allege the facts upon which his remedy is predicated.

APPEAL by plaintiff from *Ervin, Special Judge,* at 9 June, 1941, Extra Civil Term, of MECKLENBURG. Affirmed.

Plaintiff alleged, in substance, that she was the holder of a deed of trust, a first lien, on certain lands which had been sold to the *feme* defendant by plaintiff in August, 1938, for $3,750—$250 in cash and the balance in secured notes; that upon delinquency in the first payment on the notes secured by this deed of trust, it was suggested by the *feme* defendant that she apply to the Federal Land Bank for a loan to be secured by a deed of trust on these lands, and that the proceeds from this loan be applied to the payment of the debt due the plaintiff, the balance to be paid by notes secured by a second deed of trust; that this was agreed to and such loan was obtained in the amount of $1,800, which sum, less expenses, amounted to $1,729.50, and was paid to the plaintiff, at which time plaintiff, relying on defendant's promise to execute notes for the balance and a second deed of trust securing them, relinquished possession of the notes and first deed of trust which she held so that they could be canceled and thus make the deed of trust held by the Land Bank a first lien on the land; and that before the loan from the Land Bank was consummated the plaintiff had signed, upon defendant's representation to her that it was necessary for the completion of the loan, a paper the contents of which she was unaware, being illiterate.

The paper which plaintiff signed proved to be a release or discharge by her of the debt which defendant had owed her, and further contained an agreement to accept in full satisfaction of the debt the proceeds of the loan, not to take any further notes, secured or unsecured, for the debt discharged or the balance remaining after payment on the debt of the proceeds from the Land Bank loan, and to cancel and mark paid "all instruments, papers, and records representing, evidencing and securing all indebtedness and obligations" owed to plaintiff by defendant. This is commonly known as a "creditor's agreement" or "scaledown agreement."

It was further alleged that plaintiff's signature on the release was obtained through the fraud and misrepresentation of the defendants, Mrs. D. C. Williams and husband, and that the cancellation of the notes and deed of trust by the defendant Edwards, trustee, was done without authority, in that the cancellation was directed to be done only on the express condition that the *feme* defendant would first execute notes and second deed of trust for the balance due.

At the close of all the evidence, defendants renewed their motion for judgment as of involuntary nonsuit, which was granted, and judgment given accordingly. From this judgment plaintiff appeals.

Henry L. Strickland and W. C. Davis for plaintiff, appellant.
G. T. Carswell and Joe W. Ervin for defendants, appellees.

SEAWELL, J. The main point at issue is whether there was evidence sufficient to submit to the jury on the question of fraud or misrepresentation practiced on the plaintiff by the *feme* defendant in obtaining plaintiff's signature to the "creditor's agreement" which was introduced in evidence.

If this signature was properly obtained, the case as to the defendants is disposed of, for the paper contains an agreement to do all those things from which plaintiff now seeks to be relieved—to discharge the debt of defendant and to cancel paper evidences thereof, and not to take notes or a second lien for the balance due.

Plaintiff contends that the evidence is susceptible of the inference either that through defendant's misrepresentations as to what plaintiff was signing, or through plaintiff's own mistake, her signature was obtained on the paper; or that through defendant's fraudulent inducements and promises to execute notes and a second mortgage, plaintiff was induced to sign the paper.

As to the first contention, all that the evidence shows is that Brown Bowlin, who, as may be inferred from the evidence, acted as plaintiff's agent throughout the transaction between plaintiff and defendant, brought the paper out to Mrs. R. J. Williams' home and "said it would have to be signed before they could do anything with the Federal loan" (quoting from Mrs. R. J. Williams' testimony at the trial); that Bowlin was evidently in a hurry and told the plaintiff's daughter "to hurry up and sign it—that he had to go back" (quoting from testimony of Eunice Williams, plaintiff's daughter); that Mrs. Williams, the plaintiff, who could neither read nor write, told her daughter to sign the paper, and herself signed it with her mark, and at no time asked that the paper be read to her or its contents explained; that Bowlin himself, who we assume had been acting as her agent throughout the transactions, did not read the paper, nor ask the person from whom he got it (it is not clear from the evidence who this was) to explain its contents to him. There is no evidence whatever of any attempt on the part of anyone to keep the contents or significance of the paper from the plaintiff or to deceive her with respect thereto.

In this State it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he

was willfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained. *Dellinger v. Gillespie,* 118 N. C., 737, 24 S. E., 538; *Griffin v. Lumber Co.,* 140 N. C., 514, 519, *et seq.,* 53 S. E., 307, 309; *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Furst v. Merritt,* 190 N. C., 397, 402, 130 S. E., 40, 43; *Breece v. Oil Co.,* 211 N. C., 211, 189 S. E., 498. If unable to read or write, he must ask that the paper be read to him or its meaning explained. *School Committee v. Kesler,* 67 N. C., 443. This the plaintiff or her agent did not do, according to the evidence, although they were not deprived of the opportunity therefor. This being true, plaintiff's first contention is untenable.

As to plaintiff's second contention—that concerning defendant's allegedly fraudulent promise to execute notes and a second deed of trust as an inducement to sign—the evidence reveals that Mrs. Williams, defendant, agreed to execute these notes and security, and that Mrs. Williams, plaintiff, at all times relied on this promise; that in the negotiations with Mr. McDougle, the attorney representing the Land Bank, the promise of the defendant to execute a second deed of trust was fully discussed, and defendant said nothing to indicate that she did not intend to keep her promise; that McDougle told all the parties concerned, excepting Mrs. R. J. Williams but including Bowlin, plaintiff's agent, and Enos Edwards, trustee under the first deed of trust, that a second mortgage was contrary to the bank's rules, and that if one was executed it should be done "unbeknown to him" or to the bank, and should not be recorded; but nowhere does it appear that he stated that a second mortgage could not be had, nor does it appear that Mrs. D. C. Williams, defendant, had any knowledge of the existence or contents of the paper writing—the release—which Bowlin took to Mrs. R. J. Williams, plaintiff, to sign. It also appears in the evidence that Bowlin instructed Edwards, the trustee, to draw up the notes and second deed of trust for the balance due against the advice of Edwards, although Edwards at that time had no knowledge of the paper writing signed or to be signed by plaintiff. The first indication of an unwillingness on defendant's part to execute the notes and second deed of trust, as promised, appears, according to the evidence, *after* the paper had been signed, the check cashed, and the original notes and deed of trust canceled.

It is generally held, and is the law in this State, that mere unfulfilled promises cannot be made the basis for an action of fraud. *Trust Co. v. Yelverton,* 185 N. C., 314, 117 S. E., 299; *Shoffner v. Thompson,* 197 N. C., 664, 150 S. E., 195; Annotations, 51 A. L. R., 49; 68 A. L. R., 636; 91 A. L. R., 1296; 23 Am. Jur., Fraud and Deceit, sec. 38, and cases cited. If, however, a promise is made fraudulently—that is, with

no intention to carry it out, thus being a misrepresentation of a material fact, the state of the promisor's mind, and with intention that it shall be acted upon, and it is acted upon to the promisee's injury—then, it will sustain an action based on fraud and misrepresentation, *Howard v. Howe* (C. C. A. 7th), 61 F. (2d), 577; *Cerny v. Paxton, etc., Co.*, 78 Neb., 134, 110 N. W., 882; *Blake v. Blackley*, 109 N. C., 257, 13 S. E., 786; *Massey v. Alston*, 173 N. C., 215, 91 S. E., 964; *Trust Co. v. Yelverton, supra; Erskine v. Motors Co.*, 185 N. C., 479, 491, 117 S. E., 706, 712; *McNair v. Finance Co.*, 191 N. C., 710, 133 S. E., 85; *Clark v. Laurel Park Estates*, 196 N. C., 624, 146 S. E., 584; Annotations, 51 A. L. R., 63; 68 A. L. R., 637; 91 A. L. R., 1297; 23 Am. Jur., Fraud and Deceit, sec. 106, and cases cited, and the plaintiff will be entitled to legal or equitable relief, *Hill v. Gettys*, 135 N. C., 373, 47 S. E., 449; *Massey v. Alston, supra; Erskine v. Motors Co., supra*, at 494, S. E. at 713. But here, after a careful and minute examination of the evidence we can find nothing to indicate or warrant the inference that defendant did not intend, at the time she made it, to perform her promise when time for performance arrived. Mere proof of nonperformance is not sufficient to establish the necessary fraudulent intent. *Maguire v. Maguire*, 171 Minn., 492, 214 N. W., 666; Annotations, 51 A. L. R., 163; 68 A. L. R., 648; 91 A. L. R., 1306.

Plaintiff's further allegation that the cancellation of the notes and first deed of trust by the trustee, Edwards, was without authority, is thus disposed of; for if plaintiff's signature to the release was not obtained through fraud, of which there is no evidence as the case now stands, she had agreed in that instrument to "mark paid, cancel and satisfy all instruments, papers and records evidencing and securing any and all indebtedness and obligations of and claims and liens against" defendant or against the property offered by defendant as security for the Land Bank loan. If she, through the trustee, inadvertently did that which she had agreed to do, she cannot now complain. If this, however, were not enough as a ratification of the trustee's unauthorized act, still, it is nowhere shown that the act was unauthorized. The evidence is indeed so sparse on the point of authorization that we can only presume, from his possession of the papers, that his acts were with authority. C. S., 2594 (Michie's Code, 1939).

It has been suggested that the plaintiff might have shown a mutual mistake between herself and defendant in the execution of the "creditor's agreement," or that there might be a failure or lack of consideration for its execution, but the state of the pleadings and of the evidence is not such as to permit or warrant our consideration of these questions. *Buchanan v. Harrington*, 141 N. C., 39, 53 S. E., 478.

The judgment as of involuntary nonsuit was proper, and is

Affirmed.

STATE v. MOSES LEVY.

(Filed 23 January, 1942.)

1. Bills and Notes § 10g—

In a prosecution for issuing a worthless check, an instruction to the effect that if the jury should find from the evidence beyond a reasonable doubt that defendant issued the described checks knowing at the time of delivering them that he did not have sufficient funds on deposit in or credit with the drawee bank with which to pay same on presentation, he would be guilty, *is held* without error, since such charge follows the statute, ch. 62, Public Laws 1927, Michie's Code, 4283 (a), and correctly places the burden on the State to prove each essential element of the offense beyond a reasonable doubt.

2. Same—

The gravamen of the offense proscribed by ch. 62, Public Laws 1927, is the putting into circulation worthless commercial paper to the public detriment, and not that of the individual payee.

3. Same—

The fact that the maker of a check delivers it to the payee under an agreement not to deposit same until a specified future date does not entitle the maker to a verdict of not guilty in a prosecution for issuing a worthless check when at the time of issuing same the maker knew he did not have sufficient funds in or credit with the depository with which to pay same upon presentation.

4. Same—

Where a warrant alleges each essential element of the offense of issuing a worthless check, the addition of the words "with intent to cheat and defraud" the payee, will be treated as surplusage.

5. Constitutional Law § 32—

Upon defendant's conviction upon two warrants charging the issuance of worthless checks, a sentence of two years imprisonment on the first warrant and one year imprisonment on the second, the sentences to run consecutively, cannot be held excessive, cruel or unusual, since the sentences were within the limits prescribed by the statute.

APPEAL by defendant from *Burney, J.*, at June Term, 1941, of DURHAM.

The defendant was tried upon appeals from the recorder's court of Durham in two cases, upon one warrant charging a violation of ch. 62, Public Laws 1927 (N. C. Code of 1939 [Michie], sec. 4283 [a]), in that on 7 October, 1940, he "did willfully, maliciously and unlawfully give to R. & S. Packing Company one check drawn on the Mechanics & Farmers Bank of Durham, N. C., for the sum of $53.95, knowing at the time that he, the said Moses Levy, did not have sufficient funds on deposits or

credits with said bank with which to pay the said check, with intent to cheat and defraud the R. & S. Packing Company," and upon another similar warrant charging the giving a similar check for $69.15 for a similar purpose on 14 October, 1940. The cases were consolidated for the purpose of trial.

The following appears in the record: "The defendant admitted, in open court, that at the time he issued the two checks he did not have money or credit with the Mechanics & Farmers Bank of Durham sufficient to take care of said checks." The wife of the defendant, as a witness in his behalf, testified: "Mr. Levy told Mr. Bunch (the agent of the R. & S. Packing Company, payee on the check, to whom the check was delivered, and referring to the $53.95 check) to hold the check until the following Saturday after the check was given, and that Mr. Levy did not have the money in the bank," and referring to the check for $69.15, that "Mr. Bunch came in and (I) heard Mr. Levy tell him that he did not have any money in the bank and to hold that check until the following Saturday." The defendant did not testify in his own behalf.

The following excerpts from the charge are made the bases for exceptive assignments of error: (1) "And so I charge you, Gentlemen, that if you find, from the evidence beyond a reasonable doubt, that the defendant, Moses Levy, has drawn, made, uttered or issued and delivered to the R. & S. Packing Company his check drawn on the Mechanics & Farmers Bank for the sum of $53.95 dated October 7, 1940, and that he knew at the time of making, drawing, uttering, issuing and delivering such check that he did not have sufficient funds on deposit in or credit with such bank with which to pay the same on presentation, if you find these to be the facts beyond a reasonable doubt, then I charge you that the defendant would be guilty of giving a worthless check as contemplated by the statute, and if you so find, it will be your duty to render a verdict of guilty as charged in the first warrant; if you fail to so find, it would be your duty to render a verdict of not guilty," and (2) a similar charge as to the second check for $69.15, and (3) "The Court instructs you finally that if you find from the evidence, you are satisfied from it not beyond a reasonable doubt nor by the greater weight of the evidence, but are simply satisfied, that the defendant entered into an agreement with Mr. Bunch at the time he gave him the checks, either or both of them, that he agreed to hold the checks and not to deposit them, then it would be your duty to return a verdict of not guilty in both cases."

Upon a verdict of guilty upon both warrants the court entered judgment that the defendant be imprisoned for two years on the first warrant and one year upon the second, sentences to run consecutively.

From the judgment the defendant appealed, assigning errors.

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

Henry Bane and S. C. Brawley for defendant, appellant.

SCHENCK, J. The pertinent portion of the statute (ch. 62, Public Laws 1927), upon which the warrants were drawn reads:

"An act to prevent the giving of worthless checks.

"Whereas, the common practice of giving checks, drafts, and bills of exchange, without first providing funds in or credits with the depository on which the same are drawn, to pay and satisfy the same, tends to create the circulation of worthless paper, overdrafts, bad banking, and check kiting, and a mischief to trade and commerce; and it being the purpose of this act to remedy this evil,

"The General Assembly of North Carolina do enact:

"Section 1. It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

. . . . . .

"Sec. 4. That chapter fourteen of the Public Laws of nineteen hundred and twenty-five be and the same is hereby repealed."

We are of the opinion, and so hold, that the exceptions urged against the first and second excerpts from the charge assigned as error cannot be sustained. The charge is substantially in the language of the statute and the burden of establishing the essential elements of the offense beyond a reasonable doubt was properly placed upon the State.

The exception urged against the third excerpt from the charge cannot be held for prejudicial error for the reason that it is favorable to the defendant. If it be conceded that the defendant "entered into an agreement with Mr. Bunch at the time he gave him the checks, either or both of them, that he agreed to hold the checks and not deposit them," this would not entitle the defendant to a verdict of not guilty if he issued the checks on a bank where he knew he did not have sufficient funds on deposit in or credit with such bank with which to pay the same upon presentation.

The gravamen of the offense against which the statute inveighs as appears from the preamble thereof, is the giving of checks, drafts and bills of exchange, without first providing funds in or credits with the depository to pay the same, thereby causing mischief to trade and commerce by putting in circulation worthless paper—an offense against the

public, *S. v. Yarboro,* 194 N. C., 498, 140 S. E., 216, as distinguished from the former act (ch. 14, Public Laws 1925), now repealed, which was enacted, primarily at least, for the protection of an individual, the payee. If the checks were issued by the defendant, the fact that he had an agreement with the person to whom they were delivered not to deposit them "until the following Saturday," would not exculpate him from having issued checks on the bank knowing at the time he did not have sufficient funds on deposit in or credit with such bank with which to pay the same upon presentation. "The offense consists, not in presently obtaining something of value by deceit, but in putting in circulation worthless commercial paper which will ultimately result in financial loss." *S. v. Yarboro, supra.*

The words "with intent to cheat and defraud the R. & S. Packing Company" used in the warrants were surplusage.

The assignment of error that the sentences imposed were excessive, cruel and unusual cannot be sustained, since they are within the limits prescribed by the statute. *S. v. Brackett,* 218 N. C., 369, 11 S. E. (2d), 146.

On the record we find

No error.

ELVYN G. HAMILTON v. ATLANTIC GREYHOUND CORPORATION.

(Filed 23 January, 1942.)

Process § 6g—

In this action by a nonresident plaintiff against a nonresident bus corporation, doing business in this State, to recover for personal injuries alleged to have been sustained through negligence of defendant occurring in the State of Virginia, service of process upon the process agent appointed by the defendant under C. S., 1137, *is held* ineffective upon authority of *King v. Motor Lines,* 219 N. C., 223, and the action should have been dismissed.

APPEAL by defendant from *Rousseau, J.,* at May Civil Term, 1941, of ASHE.

Fred S. Hutchins and H. Bryce Parker for defendant, appellant.
Bowie & Bowie for plaintiff, appellee.

PER CURIAM. This is an action brought by the plaintiff, a resident of the State of New York, against the defendant, a Virginia corporation,

doing business in this State, to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant occurring in the State of Virginia. Service of process was made upon the process agent appointed by the defendant under C. S., 1137.

The majority of the Court are of the opinion that the court below acquired no jurisdiction of the defendant under such service; *King v. Motor Lines,* 219 N. C., 223, 13 S. E. (2d), 233; and that the question is properly raised on defendant's objection to the jurisdiction. The action must therefore be dismissed. It is not deemed necessary to decide the other questions involved.

Judgment of the court below is

Reversed.

FLORENCE WIGGINS AND HUSBAND, J. R. WIGGINS, v. ROBERT LUCAS, GUS Z. LANCASTER AND PLANTERS COTTON OIL AND FERTILIZER COMPANY.

(Filed 17 September, 1941.)

APPEAL by plaintiffs, Florence Wiggins and husband, J. R. Wiggins, from *Harris, J.,* at April Term, 1941, of EDGECOMBE. No error.

Keel & Keel for plaintiffs, appellants.
Chas. C. Pierce for defendants, appellees.
J. L. Simmons for defendant Lancaster.

PER CURIAM. The plaintiffs in this action, as landlords of the defendant Lucas, brought action to recover an amount alleged to be due for rents and advances alleged to have been made in the cultivation of the crop, and, in enforcement of the landlord's lien, sued out a proceeding of claim and delivery for portions of the crop alleged to be in the possession of defendant and his codefendants. The defendant Lucas denied that there was anything due on plaintiffs' claim, and set up a counterclaim for damages sustained through plaintiffs' breach of the rental contract, in not furnishing fertilizers, and facilities for producing and conserving the crop. Appropriate issues were submitted to the jury, which were answered favorably to defendant's contention, judgment thereupon ensued, and plaintiffs appealed.

The case presents no novel propositions of law, the discussion of which in an extended opinion might be helpful, and it is sufficient to say that careful examination discloses no reason why the result of the trial should be disturbed. We find

No error.

MISS MARTHA JONES v. GREAT ATLANTIC & PACIFIC TEA COMPANY.

(Filed 24 September, 1941.)

APPEAL by plaintiff from *Bobbitt, J.*, at May Term, 1941, of BUNCOMBE. Affirmed.

Don C. Young for plaintiff, appellant.
Williams & Cocke for defendant, appellee.

PER CURIAM. Plaintiff instituted her action to recover damages for personal injury due to a fall in the defendant's store. This, she alleged, was due to an accumulation of oil or grease on the floor. At the conclusion of all the evidence defendant renewed its motion for judgment of nonsuit, and this was allowed, and judgment rendered dismissing the action. Plaintiff appealed.

An examination of the plaintiff's evidence, as shown by the record, leads us to the conclusion that its probative force does not measure up to that held sufficient to go to the jury in *Anderson v. Amusement Co.*, 213 N. C., 130, 195 S. E., 386, but that the case is rather governed by the decision in *Pratt v. Tea Co.*, 218 N. C., 732, 12 S. E. (2d), 242.

The judgment of nonsuit is

Affirmed.

S. W. BLALOCK, EMPLOYEE, v. TENNESSEE MINERAL PRODUCTS CORP., AND/OR UNITED FELDSPAR CORP., EMPLOYER; LUMBER MUTUAL CASUALTY INSURANCE CO., AND/OR AMERICAN MUTUAL LIABILITY INSURANCE CO., CARRIER.

(Filed 15 October, 1941.)

APPEAL by defendants, Tennessee Mineral Products Corporation and Lumber Mutual Casualty Insurance Company, from *Sink, J.*, at August Term, 1941, of MITCHELL. Affirmed.

Briggs & Atkins for plaintiff, appellee.
J. Laurence Jones and R. Hoyle Smathers for defendants, Tennessee Mineral Products Corporation and Lumber Mutual Casualty Insurance Company of New York, appellants.
Helms & Mulliss for American Mutual Liability Insurance Company.

PER CURIAM. This is a proceeding before the Industrial Commission against the employer, the Tennessee Mineral Products Corporation, and insurance carriers, for an award because of the contraction of an occupational disease—silicosis—while in the employment of the defendant corporation and engaged in the mining of feldspar. *Inter alia,* it involves questions of timely notice and independent contract. There was evidence to support the findings of fact by the Commission, upon which the liability of the defendants is declared, and we find no error in the conclusions of law, or in the judgment of the court below in affirming the award. *Blevins v. Teer, ante,* 135; *Beach v. McLean,* 219 N. C., 521, 14 S. E. (2d), 515.

The judgment is

Affirmed.

J. C. CRUSE ET AL. v. PEARLMAN'S R. R. SALVAGE CO.

(Filed 15 October, 1941.)

APPEAL by plaintiffs from *Johnston, Special Judge,* at March Special Term, 1941, of BUNCOMBE.

Civil action to recover damages for alleged breach of contract in the sale, delivery and installation of a heatrola.

Upon denial of liability and issues joined, the jury returned a verdict in favor of defendant. From judgment thereon the plaintiffs appeal, assigning as error the failure of the court, in charging the jury, to declare and explain the law arising upon the evidence in the case as required by C. S., 564.

Irwin Monk and Ford & Lee for plaintiffs, appellants.

Joseph A. Patla for defendant, appellee.

PER CURIAM. The appellants' assignment of error is not sustained by the record. Hence, the verdict and judgment will be upheld.

No error.

MRS. JETTIE C. RITCHIE v. ATLANTIC GREYHOUND CORPORATION AND POWELL HODGE.

(Filed 26 November, 1941.)

APPEAL by plaintiff from *Hamilton, Special Judge,* at 31 March, 1941, Extra Term, of MECKLENBURG.

Civil action to recover for personal injury.

Plaintiff in her complaint alleges that, while as a passenger in the act of boarding a bus of corporate defendant for transportation to Charlotte, she was injured as the proximate result of the negligence of defendants in closing the door of the bus. Defendants in answer filed deny the material allegations of the complaint, and plead contributory negligence of plaintiff.

In the trial court the case was submitted to the jury upon issues as to negligence, contributory negligence, and damages. The jury for its verdict answered the issue as to negligence of defendants in the negative. From judgment thereon in favor of defendants, plaintiff appeals to Supreme Court and assigns error.

T. L. Kirkpatrick, Fred D. Caldwell, and Louis J. Hunter for plaintiff, appellant.

Robinson & Jones for defendant, appellee.

PER CURIAM. Careful consideration of exceptive assignments brought forward in brief of plaintiff fails to reveal error. Hence, the judgment below is

Affirmed.

LEROY HAYES v. BRIDGER CORPORATION AND BANK OF BLADENBORO.

(Filed 10 December, 1941.)

APPEAL by plaintiff from *Hamilton, Special Judge,* at April Term, 1941, of BLADEN.

Civil action to recover for alleged rents and profits from, and waste committed upon certain lands mortgaged by plaintiff and his wife to defendant Bridger Corporation, and by it foreclosed.

The record on appeal discloses these pertinent facts: On 19 April, 1938, referee, who was appointed by order of reference entered at January Term, 1936, filed report, setting out specific findings of fact and conclusions of law, to which plaintiff filed exceptions.

At April Term, 1939, Hamilton, Special Judge, presiding, finding the facts to be as found by the referee, and concluding (a) that plaintiff is not entitled to jury trial upon exceptions filed, (b) that there was no fraud in any of the transactions of which plaintiff complains, (c) that plaintiff is entitled to recover nothing of defendants, and (d) that defendant corporation is entitled to recover nothing of the plaintiff, signed judgment accordingly, from which plaintiff gave notice of appeal to Supreme Court, but did not perfect his appeal, and same was docketed and dismissed under Rule 17 of Rules of Practice in Supreme Court. (213 N. C., 808.)

Plaintiff filed motion to set aside said judgment entered at April Term, 1939, as "irregular, null and void" in that Hamilton, Special Judge, after that term of court had adjourned and while at Morehead City, North Carolina, out of the district, by letter to the clerk, undertook to withhold the entry of said judgment. This motion was heard at April Term, 1941, before Hamilton, Special Judge, again presiding, who "upon consideration of the record, the evidence taken before the referee . . . and the exceptions thereto filed by the plaintiff, and the motion of the plaintiff to set aside the judgment," held "that the judgment . . . was and is correct and proper," and thereupon denied and dismissed motion of plaintiff.

Plaintiff appeals therefrom to Supreme Court and assigns error.

A. M. Moore for plaintiff, appellant.
Varser, McIntyre & Henry for defendants, appellees.

PER CURIAM. Careful perusal of the record fails to show error in the judgment from which appeal is taken. The rules of practice in such case are too well settled to make repetition here necessary.

Affirmed.

STATE v. C. E. McDANIELS.

(Filed 10 December, 1941.)

APPEAL by defendant from *Burney, J.*, at May Criminal Term, 1941, of ROBESON. No error.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Patton for the State.
F. D. Hackett for defendant, appellant.

PER CURIAM. The defendant McDaniels was indicted and convicted of disposing of and selling to one Follette certain personal property, upon which he had executed a chattel mortgage then in force, for the purpose of defrauding the mortgagee. From the judgment of imprisonment at hard labor, the defendant appealed.

A careful examination of the exceptions and assignments of error leads to the conclusion that no error was committed on the trial, and we so find.

No error.

J. D. PARKER v. CLARENCE L. SMITH AND FAULK CARTER, CO-PARTNERS TRADING UNDER THE NAME OF ABERDEEN TOBACCO WAREHOUSE, THESSALY MANNING AND ROBERT PHILLIPS.

(Filed 7 January, 1942.)

APPEAL by defendants, Thessaly Manning and Robert Phillips, from *Olive, Special Judge,* at March Term, 1941, of MOORE.

Johnson & McCluer and U. L. Spence for plaintiff, appellee.

J. H. Scott for defendants, Thessaly Manning and Robert Phillips, appellants.

PER CURIAM. Thessaly Manning and Robert Phillips appealed from an order of the judge holding March Term, 1941, of Moore Superior Court, setting aside a separate judgment against the plaintiff obtained by default on their counterclaims to plaintiff's cause of action, on the ground of excusable neglect. C. S., 600.

Upon a careful examination of the record we are of opinion the matter was within the jurisdiction of the court and in accordance with recognized procedure. The appeal discloses no sufficient reasons why the order setting aside the default judgment should be disturbed, and it is

Affirmed.

J. O. SMITH v. AMERICAN DISCOUNT COMPANY.

(Filed 7 January, 1942.)

APPEAL by plaintiff from *Olive, Special Judge,* at May Term, 1941, of FORSYTH.

Buford T. Henderson for plaintiff, appellant.

Elledge & Wells for defendant, appellee.

PER CURIAM. This was an action to recover damage for breach of an alleged contract to obtain an insurance policy on an automobile which was wrecked. When the plaintiff had introduced his evidence and rested his case the defendant moved for a judgment as in case of nonsuit, C. S., 567, which motion was allowed, and from judgment accordant therewith the plaintiff appealed, assigning errors.

We have examined the evidence and are of the opinion that it fails to establish the authority, or the apparent authority, of the agent of the defendant, who is alleged to have made it, to make the alleged contract for the defendant, and are further of the opinion that the evidence relied upon fails to establish a contract sufficiently definite to admit of interpretation or binding force.

The judgment of the Superior Court is

Affirmed.

DISPOSITION OF APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Laughter v. Powell, 219 N. C., 689. Petition for *certiorari* denied October 2, 1941.

ANNOUNCEMENT OF THE DEATH OF ASSOCIATE JUSTICE HERIOT CLARKSON

Associate Justice Heriot Clarkson died at the home of his son in Charlotte, N. C., on Tuesday, 27 January, 1942, at 3:00 p.m. The Supreme Court was then in recess. That afternoon the Justices of the Supreme Court made the following expression:

"In the death of Associate Justice Heriot Clarkson a great loss has come to the Supreme Court and the State at large. The feeling of the members of the Court is one of profound sorrow and regret. We shall miss his ever intense loyalty and friendship. His work will live in his opinions for the Court, and his life in the affections of his fellow citizens. Truly a great public servant has fallen. We desire to express our sympathy for his bereaved family and the people of North Carolina whom he served with conscientious devotion and untiring zeal."

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Warrant of Attorney—Judgment by confession on warrant of attorney entered in Pennsylvania must be given full faith and credit here see *Land Bank v. Garman*, 585.

Waters and Watercourses—Contract of landowner to furnish water to adjacent premises see *Brock v. Porter*, 28; condemnation of right to divert waters of stream for power project see *Light Co. v. Moss*, 200; flooding or ponding waters on lands of another is a trespass see *Davenport v. Drainage District*, 237; action against drainage district for flooding of plaintiff's land see *Davenport v. Drainage District*, 237; city does not have right to divert waters of stream into water system as against rights of lower riparian owner see *Pernell v. Henderson*, 79.

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Worthless Checks—Debt for property obtained by worthless checks is not discharged by bankruptcy see *Growers Exchange, Inc., v. Hartman*, 30; prosecution for issuing worthless checks see *S. v. Levy*, 812.

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ANALYTICAL INDEX.

ABATEMENT AND REVIVAL.

§ 6. Procedure to Raise Question of Pendency of Prior Action.

When pendency of prior action between parties does not appear from complaint plea of abatement cannot be raised by demurrer. *Lockman v. Lockman*, 95.

ACCOUNT STATED.

§ 1. Nature and Essentials.

An account becomes an account stated when a balance is struck and agreed upon as correct after examination, but express examination or agreement is not necessary. It may be implied by failure to object to the account within a reasonable time after the other party calculates the amount due and submits his statement of the account, or by part payment and promise to pay the balance, or by acknowledgment of its receipt and promise to pay the balance shown to be due. *Little v. Shores*, 429.

ADVERSE POSSESSION.

§ 14. Title and Rights Acquired.

Where a person acquires title to a parcel of land by adverse possession, such title is the legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. C. S., 432. *Purcell v. Williams*, 522.

§ 19. Sufficiency of Evidence, Nonsuit and Directed Verdict.

Evidence that the person under whom plaintiff claims held hostile and exclusive possession of the *locus in quo* under known and visible lines and boundaries over a period of 50 years prior to his death *held* sufficient to be submitted to the jury, and the granting of defendants' motion for nonsuit was error. *Purcell v. Williams*, 522.

AGRICULTURE.

§ 1a. Landlord's Lien for Rents.

A landlord's lien for rent is superior to all other liens and attaches to the crops raised upon the land by the tenant and entitles the landlord to possession of the crops for the purpose of the lien until the rents are paid, C. S., 2355, and, when it is not required that the lease be in writing, a note for the rent executed by the tenant constitutes mere evidence of the contract. *Rhodes v. Fertilizer Co.*, 21.

§ 2. Crop Mortgage Liens for Advancements.

An agricultural lien for advances, when in writing, takes priority over all other liens except the laborer's and landlord's liens, to the extent of advances made thereunder. C. S., 2488. *Rhodes v. Fertilizer Co.*, 21.

An agricultural lien for advances executed by the landlord attaches to all the crops grown on the lands embraced within the lien and constitutes a transfer and assignment of the landlord's lien for rents on the crops grown by his tenant on such lands, and the lienee is not required to see that the supplies advanced are used upon the farm or by any particular tenant, and his rights

AGRICULTURE—*Continued.*

as assignee of the landlord's lien for rents may not be defeated by proof that the tenant failed to receive any part of the advances made under the contract. *Ibid.*

§ 4b. Priority Between Lien for Advancement and Other Liens and Claims.

Assignee of landlord's lien for rent has priority over assignee of note executed by tenant for rent. *Rhodes v. Fertilizer Co.*, 21.

ANIMALS.

§ 3. Liability of Owner for Personal Injuries Inflicted by Domestic Animal.

One who keeps on his premises a domestic animal of known vicious propensity is responsible in law to another whom he has wrongfully exposed to danger of attack by such animal, and who has been injured thereby. *Hill v. Moseley*, 485.

The evidence, considered in the light most favorable to plaintiff, tended to show that defendants kept a bull which they had reason to know was vicious, that plaintiff was employed by defendants and was told by his superior to drive the cows out of the lot to the pasture, and that when plaintiff entered the lot he was attacked and seriously injured by the bull. *Held:* The evidence was sufficient to be submitted to the jury on the question of liability. *Ibid.*

While evidence of an animal's reputation is incompetent to show, directly, vicious propensity of the animal, such evidence is competent to show knowledge on the part of the owner that the animal was vicious and to corroborate the testimony of witnesses who have sworn to the fact of viciousness. *Ibid.*

In order to establish the vicious character of a domestic animal it is not required that the animal should have previously inflicted actual injury upon a person, but it is sufficient if it is made to appear that the animal had theretofore attacked persons and that injury was prevented only by prompt resort to counter measures. *Ibid.*

The vicious propensity of an animal must be unequivocal, but it is not required that the animal be malicious, since the propensity is vicious if it tends to harm, whether manifested in play or in anger. *Ibid.*

APPEAL AND ERROR.

I. Nature and Grounds of Appellate Jurisdiction

3a. Parties Who May Appeal. In re Mitchell, 65.

II. Presentation and Preservation of Grounds of Review

6b. Necessity for Objections and Exceptions. King v. Powell, 511.

III. Requisites and Proceedings for Appeal

10e. Settlement of Case on Appeal. Laundry v. Underwood, 152, Chozen Confections v. Johnson, 432.

18b. Grounds for Writ of Certiorari. Chozen Confections v. Johnson, 432.

VI. The Record

20. Form and Requisites of Transcript. Wishon v. Weaving Co., 420; Rhoades v. Asheville, 443.

IX. Dismissal of Appeals

30h. Dismissal for Want of Parties in Interest. In re Mitchell, 65.

XI. Review

37e. Review of Findings of Fact. Asheboro v. Miller, 298; Barkley v. Thomas, 341; Schoenith, Inc., v. Mfg. Co., 390; Bangle v. Webb, 423; MacRae & Co. v. Shew, 516; Biggs v. Lassiter, 761.

38. Presumptions and Burden of Showing Error. Growers Exchange v. Hartman, 30; Cato v. Hospital Care Assn., 479.

39. Harmless and Prejudicial Error. Barrett v. Williams, 32; Jackson v. Parks, 680; Cauley v. Ins. Co., 304; Edwards v. Junior Order, 41; Motor Co. v. Ins. Co., 168; Light Co. v. Moss, 200; Light Co. v. Carringer, 57; McCartha v. Ice Co., 367; King v. Powell, 511; Garrett v. Stadiem, 654.

41. Questions Necessary to Determination of Appeal. Walker v. Packing Co., 158.

47a. New Trial in Supreme Court for Newly Discovered Evidence. Land Bank v. Garman, 585.

47b. Partial New Trial. Jackson v. Parks, 680; Shore v. Shore, 802.

49a. Law of the Case. Wall v. Asheville, 38.

APPEAL AND ERROR—*Continued.*

§ 3a. Parties Who May Appeal.

Unemployment Compensation Commission is not real party in interest on appeal to Superior Court and may not appeal to Supreme Court from judgment denying unemployment compensation. *In re Mitchell*, 65.

§ 6b. Necessity for Objections and Exceptions.

Where appellant presents no exceptive assignment of error to the failure of the jury to answer two of the issues, any error of the court in failing to require the jury to complete its verdict is not presented for review. *King v. Powell*, 511.

§ 10e. Settlement of Case on Appeal.

Upon the hearing to settle case on appeal upon the date set out of term and out of the district, the court found that the nonresident had theretofore made a general appearance and that the appeal was thereby rendered moot. *Held:* The power of the court was limited to settlement of case on appeal, C. S., 644, and the court was without power to find that the nonresident had made a general appearance and to dismiss the appeal as moot. *Laundry v. Underwood*, 152.

Where appellant serves his statement of case on appeal, C. S., 643, and appellee returns same with objections and appellant requests the judge to fix a time and place for settling the case, all within the time allowed by the court or by statute, it is the duty of the judge to settle the case on appeal and the judge may not strike appellant's statement of case on appeal from the record upon appellee's motion on the ground that appellant's statement of case was insufficient to meet the requirements of the statute and the rules of practice of the court. *Chozen Confections, Inc., v. Johnson*, 432.

§ 18b. Grounds for Writ of Certiorari.

Where the trial court at the time and place fixed for settlement of case on appeal fails to settle the case and erroneously grants appellee's motion that appellant's case should be struck from the record, the Supreme Court will grant appellant's motion for *certiorari* to the end that the judge, after notice, may settle the case, C. S., 644, since appellant's failure to perfect the appeal is due to error of the court and not to any fault or neglect of appellant or his agent. *Chozen Confections, Inc., v. Johnson*, 432.

§ 20. Form and Requisites of Transcript.

In pauper appeals it is required that the nine typewritten copies of the transcript and brief which appellant is permitted to file must be legible. Rule of Practice of the Supreme Court No. 22. *Wishon v. Weaving Co.*, 420.

Appellant's statement became the case on appeal by stipulation of the parties. One of appellant's exceptions was to the refusal of the court to grant motion for judgment as of nonsuit. The appeal is dismissed for that all the evidence is set out in the case on appeal in mass in form of questions and answers, and not in narrative form as required by Rule 19 (4). *Rhoades v. Asheville*, 443.

§ 30h. Dismissal for Want of Parties.

Where the real party in interest does not appeal from judgment in favor of an adverse party, the judgment of the court below becomes *res judicata* as to all justiciable issues presented, and there being nothing for determination on the appeal of a formal party, the appeal will be dismissed. *In re Mitchell*, 65.

APPEAL AND ERROR—*Continued.*

§ 37e. Review of Findings of Fact.

A finding of fact which is in reality a mere conclusion based on another finding of fact, which in turn is not supported by the evidence, cannot be sustained. *Asheboro v. Miller*, 298.

Where the parties waive a jury trial and agree that the court should hear and determine the entire controversy, the findings of fact made by the court, supported by competent evidence, are as binding and conclusive as the verdict of a jury. *Barkley v. Thomas*, 341.

Upon defendant's motion, made on special appearance, to set aside service of summons and to dismiss the action, the court's findings are conclusive when supported by competent evidence even though there is conflict in the affidavit testimony. *Schoenith, Inc., v. Mfg. Co.*, 390.

The court's findings, supported by evidence, that defendant is a nonresident and was served with summons while he was in this State solely for the purpose of testifying at the coroner's inquest, *are held* conclusive notwithstanding testimony tending to support a contrary view. *Bangle v. Webb*, 423.

Where there is sufficient competent evidence to support the findings of fact by the court, exceptions to such findings are untenable. *MacRae & Co. v. Shew*, 516.

The findings of fact by the referee, which are supported by competent evidence and approved and adopted by the Superior Court, are not reviewable in the Supreme Court. *Biggs v. Lassiter*, 761.

§ 38. Presumptions and Burden of Showing Error.

When the judge's charge is not in the record it will be presumed that the court correctly instructed the jury on every principle of law applicable to the facts in evidence. *Growers Exchange, Inc., v. Hartman*, 30; *Cato v. Hospital Care Assn.*, 479.

§ 39. Harmless and Prejudicial Error.

A new trial will be granted only for practical errors which result in harm, and when it conclusively appears upon the facts appearing of record that appellants are not entitled to the relief sought, a new trial will not be awarded for mere technical error. *Barrett v. Williams*, 32; *Jackson v. Parks*, 680.

When court withdraws incompetent evidence and instructs jury not to consider it, its admission cannot ordinarily be held for prejudicial error. *Cauley v. Ins. Co.*, 304.

Ordinarily, appellant's exception to the admission of evidence, even if incompetent, cannot be sustained when it appears that other witnesses testified to the same import without objection, since in such instance the testimony objected to is rendered harmless. *Edwards v. Junior Order*, 41; *Motor Co. v. Ins. Co.*, 168.

In this condemnation proceeding the trial court erroneously admitted upon the issue of damages evidence relating to the benefits accruing to petitioner from the taking and the value of respondents' lands when considered as units of petitioner's power project. *Held:* The error in the admission of the evidence was not cured by a correct statement in the charge of the rule for the admeasurement of compensation, when the court in other portions of the charge emphasized the error by modifying petitioner's prayers for instructions to read that benefits accruing to petitioner *by reason of its expenditures* should not be considered. *Light Co. v. Moss*, 200.

Where the court, in ruling upon the admissibility of evidence in a proceeding to assess compensation for an easement for a transmission line, stated that the taking of the easement did not affect the value of the remaining lands of respondent, such error is not cured by subsequent admission of evidence relat-

ing to the depreciation in value of the remaining lands, it not appearing of record that the court ever undertook to correct the impression its erroneous remarks must have left upon the minds of the jurors. *Light Co. v. Carringer*, 57.

In this proceeding to assess compensation for the taking of an easement for a transmission line the court, in ruling upon the admissibility of evidence, made a statement constituting an expression of opinion that the lands outside the bounds of the easement were not adversely affected. *Held:* The charge of the court, when considered in connection with the erroneous statements, did not cure the error, but was subject to the interpretation that compensation should be limited to the land within the limits of the easement acquired, and in any event the remarks constituted an expression of opinion in violation of C. S., 564, entitling respondent to a new trial. *Ibid.*

Where, in an action on a policy of collision insurance, nonsuit is properly entered as to the dealer for want of evidence that the dealer had a lien on the automobile, defendant insurer's exception to the admission of parol evidence as to the alleged conditional sales contract between plaintiff dealer and plaintiff purchaser becomes immaterial. *Motor Co. v. Ins. Co.*, 168.

Two separate concerns had common employees. In this action for wrongful death resulting from the negligent operation of a truck, the sole contention of each of the employers was that the other was solely or primarily liable, negligence in the operation of the truck not being controverted and it being admitted that plaintiff's intestate was without fault. *Held:* Any error on the part of the court in stating that defendant employers admitted that intestate's death was caused by negligence and that she was without fault, and in its instructions that intestate's death was due to the negligence of one or both of the employers, cannot be held prejudicial. *McCartha v. Ice Co.*, 367.

The language in which the court stated its peremptory instructions to the jury, although not in the approved form, *held* not to constitute reversible error under the circumstances of this case. *Ibid.*

Where the jury establishes plaintiff's execution of a release relieving appealing defendant of liability, any error in the charge on the issue of negligence cannot be held prejudicial. *King v. Powell*, 511.

Since a new trial will be awarded only for prejudicial error, the admission of evidence, even if incompetent, does not entitle appellant to a new trial if the rights of the parties would not be altered had such evidence been excluded. *Garrett v. Stadiem*, 654.

§ 41. Questions Necessary to Determination of Appeal.

When it is determined on appeal that nonsuit should have been allowed on plaintiff's cause of action sounding in tort, defendant's assignment of error addressed to the refusal of the court to require plaintiff to elect between tort and contract is eliminated. *Walker v. Packing Co.*, 158.

§ 47a. New Trial in Supreme Court for Newly Discovered Evidence.

This action was instituted on a deficiency judgment rendered by a court in the State of Pennsylvania. Subsequent to the judgment of our Superior Court in favor of plaintiff, the *feme* mortgagor had the judgment of the State of Pennsylvania stricken from the record in that state pursuant to its laws permitting a married woman to open up a judgment against her to show that she signed the instrument upon which the judgment is based as surety. *Held:* It would be manifestly unjust to affirm the judgment against the *feme* defendant upon a judgment of the State of Pennsylvania which had been stricken out as to her in that state, and the Supreme Court on appeal will grant the *feme* defendant a new trial. *Land Bank v. Garman*, 585.

APPEAL AND ERROR—*Continued.*

§ 47b. Partial New Trial.

Where there has been no prejudicial error committed in the trial of one of plaintiff's causes of action, but as to the other cause of action prejudicial error is made to appear in the admission of evidence, the Supreme Court, in its discretion, may grant a partial new trial. *Jackson v. Parks*, 680.

In this action by a wife for alimony without divorce under C. S., 1667, the husband was erroneously permitted to set up a cross action for divorce. *Held:* Since it cannot be determined that a partial new trial would not result in prejudice, a new trial is ordered. *Shore v. Shore*, 802.

§ 49a. Law of the Case.

Where, upon a former appeal, it is determined by the Supreme Court that the questions of negligence and contributory negligence were for the determination of the jury upon the evidence and that the judgment of nonsuit should be reversed, the decision becomes the law of the case and upon defendant's appeal from subsequent judgment in plaintiff's favor the Supreme Court cannot consider defendant's contention that its motion for judgment as of nonsuit should have been allowed upon the second trial. *Wall v. Asheville*, 38.

APPEARANCE.

§ 2a. What Constitutes General Appearance.

In an action instituted in a court of another state, a promise of the resident defendant written on a post card mailed to plaintiff's attorney that defendant would sign "original appearance" upon "receipt" does not constitute a general appearance. *S. v. Williams*, 445.

§ 2b. Effect of General Appearance.

Where a defendant appears and files answer he waives all defects and irregularities in service of summons. C. S., 490. *Asheboro v. Miller*, 298.

ASSIGNMENTS.

§ 1. Rights and Interests Assignable.

Statute providing that employee's assignment of wages to be earned in the future shall not be binding upon employer unless accepted by him in writing is valid. *Morris v. Holshouser*, 293.

AUTOMOBILES.

II. Sale, Title and Warranties
4. Title and Certificate of Title. Motor Co. v. Ins. Co., 168.

III. Operation and Law of the Road
7. Pedestrians. Absher v. Miller, 197; Pack v. Auman, 704; Mitchell v. Melts, 793.
8. Due Care in Operation in General. Reeves v. Staley, 573.
12d. Business and Residential Districts. Mitchell v. Melts, 793.
12e. Intersections. Reeves v. Staley, 573.
14. Stopping, Parking and Parking Lights. Peoples v. Fulk, 635; Leary v. Bus Corp., 745; Sibbitt v. Transit Co., 702.
17. Skidding. Mitchell v. Melts, 793.
18a. Negligence and Proximate Cause. Peoples v. Fulk, 635; Pack v. Auman, 704; Mitchell v. Melts, 793.
18c. Contributory Negligence. Sibbitt v. Transit Co., 702; Absher v. Miller, 197.
18d. Concurrent and Intervening Negligence. Reeves v. Staley, 573; Peoples v. Fulk, 635.
18f. Evidence as to Speed. Mitchell v. Melts, 793.
18h. Instructions. Leary v. Bus Corp., 745.

IV. Guest and Passengers
20a. Negligence of Contributory Negligence of Guest. Bogen v. Bogen, 648.
21. Parties Liable to Guest. Reeves v. Staley, 573.

V. Liability of Owner for Driver's Negligence
24b. Scope of Employment. Riddle v. Whisnant, 131; Smith v. Moore, 165.

VII. Criminal Responsibility
29. Drunken Driving. S. v. Parker, 416; S. v. Miller, 660.
32e. Sufficiency of Evidence and Nonsuit in Manslaughter Prosecutions. S. v. Miller, 660.

AUTOMOBILES—*Continued.*

§ 4. Title and Certificate of Title.

A certificate of title issued by the Department of Revenue some two months after the date in question is some evidence of title on the date in question when there is other evidence that application for the certificate was filled out by the dealer's bookkeeper two months prior to its date of issuance and that the certificate dated title as of that date and not the date of issuance. *Motor Co. v. Ins. Co.*, 168.

§ 7. Pedestrians.

Whether eight-year-old-boy was guilty of contributory negligence in running in front of defendant's automobile *held* for jury. *Absher v. Miller*, 197.

Where evidence leaves in speculation or conjecture where pedestrian was when struck, how long he had been there, and his actions immediately before and at moment of impact, the evidence fails to establish negligence on part of motorist striking him. *Pack v. Auman*, 704; *Mitchell v. Melts*, 793.

§ 8. Due Care in Operation of Autos in General.

The operator of a motor vehicle is under duty, independent of statutory requirements, to exercise that degree of care which an ordinarily prudent man would exercise under similar circumstances. *Reeves v. Staley*, 573.

Ordinary care in the operation of a motor vehicle requires the operator to keep same under control, and to keep a reasonably careful lookout so as to avoid collision with people and vehicles upon the highway. *Ibid.*

A motorist is not under duty to anticipate negligence on the part of others but, in the absence of anything which gives or should give notice to the contrary, is entitled to assume, and to act on the assumption, that others will exercise ordinary care for their own safety. *Ibid.*

§ 12d. Business and Residential Districts.

In determining whether the scene of an accident in a municipality is in a residential or business district or neither, the character of the property along an intersecting street, although within 300 feet of the accident, should not be considered, since such property is not "contiguous" thereto. *Mitchell v. Melts*, 793.

In determining whether the scene of an accident is in a residential or business district or neither, ordinarily, only the character of the property fronting on both sides of the street in the particular block in which the accident occurs can be considered, since the character of the property fronting on one block may be entirely different from that fronting upon the adjoining block. *Ibid.*

Uncontradicted testimony that only two business buildings front on the street in the block in which the accident occurred and that both of them together comprise not more than 40 feet frontage, establishes as a matter of law that the *locus in quo* is not a business district as defined by statute. Public Laws 1939, ch. 275, sec. 1 (a). *Ibid.*

Where the evidence establishes that the scene of the accident was not in a business district as defined by statute, and there is no evidence that defendants' vehicle was being driven in excess of 20 miles an hour, whether the accident occurred in a residential district as defined by Public Laws 1939, ch. 275, sec. 1 (d), is immaterial, since such speed does not violate the statutory restriction. Public Laws 1937, ch. 407, sec. 103. *Ibid.*

§ 12e. Intersections.

The failure of a motorist, traveling upon a servient highway, to stop in obedience to signs erected by the Highway Commission before entering an

intersection with a dominant highway, as required by statute, sec. 120, ch. 407, Public Laws 1937, is not negligence or contributory negligence *per se*, but is a fact to be considered with other facts and circumstances adduced by the evidence in passing upon the question. *Reeves v. Staley*, 573.

The driver of a motor vehicle along a dominant highway who has knowledge that stop and warning signs have been erected along the servient highway, and knows that his vehicle is in plain view of a motorist traveling along the servient highway, is entitled to assume up until the moment of impact, and to act on the assumption in the absence of anything which gives or should give notice to the contrary, that the driver upon the servient highway will obey the law and stop before entering the intersection. *Ibid.*

§ 14. Stopping, Parking, and Parking Lights.

Starting and stopping on a highway in accordance with the exigencies of the occasion is an incident to the right of travel, and the word "park" and the words "leave standing" as used in sec. 123 (a), ch. 407, Public Laws 1937, are modified by the words of the statute "whether attended or unattended" so that they are synonymous, and neither term includes a mere temporary stop for a necessary purpose when there is no intent to break the continuity of the travel. *Peoples v. Fulk*, 635.

The stopping of a bus on the hard surface of a highway outside of a business or residential district for the purpose of taking on a passenger is not parking or leaving the vehicle standing within the meaning of the terms as used in sec. 123 (a), ch. 407, Public Laws 1937. *Ibid.*

The stopping of a bus upon the paved portion of a highway, outside of a business or residential district, for the purpose of permitting a passenger to alight, is not parking or leaving the vehicle standing within the purview of sec. 123, ch. 407, Public Laws 1937, even though the shoulders of the highway at the scene are of sufficient width to permit the bus to be stopped thereon, and an instruction to the effect that stopping the bus on the highway for such purpose is a violation of this statute, constituting negligence *per se*, must be held for reversible error when the matter relates to one of plaintiff's primary allegations of negligence. *Leary v. Bus Corp.*, 745.

Where a witness, whose testimony is uncontradicted, testifies that when the collision occurred all lights on defendant's bus went out, testimony of other witnesses, who arrived later, that at that time there were no lights on the bus, has no probative force upon the question of whether the rear lights of the bus were burning at the time of the collision. *Peoples v. Fulk*, 635.

Plaintiff's evidence tended to show that he was driving at night along a highway covered with smoke from fires along its side and that he collided with the rear of an oil truck which was headed in the same direction and which had been stopped on the highway without rear lights. *Held:* Even conceding negligence on the part of defendant, Michie's N. C. Code, 2621 (278) (d), plaintiff's evidence discloses contributory negligence barring recovery as a matter of law, either in driving at a speed in excess of that at which he could stop within the distance to which his lights would disclose the existence of obstructions, or, if he could have seen the oil truck in time to have avoided a collision, in failing to do so. *Sibbitt v. Transit Co.*, 702.

§ 17. Skidding.

The mere fact of the skidding of an automobile does not in itself establish negligence, the doctrine of *res ipsa loquitur* being inapplicable. *Mitchell v. Melts*, 793.

AUTOMOBILES—*Continued.*

§ 18a. Negligence and Proximate Cause.

Plaintiff's contention that the driver of defendant's bus was guilty of negligence in stopping the bus across an intersecting highway for the purpose of taking on a passenger is untenable when the evidence discloses that no vehicle or person involved in the accident was using or attempting to use the intersecting highway, resulting in a complete want of proof that the stopping of the bus across the intersecting highway had any causal connection with the collision. *Peoples v. Fulk*, 635.

Evidence which leaves in mere speculation and conjecture as to where intestate was at the time of the impact and how long he had been there and whether he had complied with C. S., 2621 (320) (d), fails to sustain plaintiff's allegation that his intestate was walking along the edge of the highway on his left side at the place provided by law and was struck by a board projecting from the truck, and defendants' motion to nonsuit was properly allowed for failure of plaintiff to establish negligence proximately causing the fatal injury. *Pack v. Auman*, 704.

Plaintiff's evidence tended to show that defendants' truck was being operated about 20 miles an hour in a municipality outside of a business district, and hit intestate as he was crossing the street, and that the driver of the truck failed to see intestate before striking him. *Held:* In the absence of evidence as to when intestate got on the street, how long he had been on the street before he was struck, and where he was or what he was doing just before he was struck, defendants' motion to nonsuit was properly allowed, since the evidence fails to establish excessive speed, and the fact that the driver did not see intestate is insufficient to establish negligence in the absence of evidence that intestate was in a position where the driver of the truck could or should have seen him. *Mitchell v. Melts*, 793.

§ 18c. Contributory Negligence.

Whether eight-year-old boy was guilty of contributory negligence in running in front of defendants' car *held* for jury. *Absher v. Miller*, 197.

Evidence *held* to disclose contributory negligence as matter of law in colliding with rear of truck standing upon highway. *Sibbitt v. Transit Co.*, 702.

§ 18d. Concurrent and Intervening negligence.

Evidence that driver of car upon servient highway did or should have seen warning and stop signs but drove into intersection without slackening speed and hit truck traveling along dominant highway, which he could have seen but failed to see, *is held* to disclose original negligence insulating as matter of law any negligence on part of truck driver in exceeding speed limit. *Reeves v. Staley*, 573.

Evidence of manner in which defendant drove his car in approaching bus, which had stopped on highway to take on passenger, *held* to establish negligence which could not have been reasonably foreseen, and therefore such negligence constituted intervening negligence insulating as matter of law any negligence in failing to have rear light on bus burning. *Peoples v. Fulk*, 635.

§ 18f. Evidence as to Speed.

Testimony that defendants' vehicle was traveling at least 20 miles an hour but less than 30, that the witness did not know how much more than 20 miles, that his estimate was guesswork, and that he could not say how much more than 20 miles an hour the vehicle was traveling, amounts to no more than that the speed of the car was 20 miles an hour, since if the witness does not

know how much the car was exceeding a speed of 20 miles an hour the jury should not be permitted to hazard a guess on his testimony. *Mitchell v. Melts*, 793.

§ 18h. Instructions.

Charge that stopping bus on hard surface to permit passenger to alight constituted "parking" on highway in violation of statute, making such violation negligence *per se*, *held* erroneous and prejudicial. *Leary v. Bus Corp*, 745.

§ 20a. Negligence or Contributory Negligence of Guest or Passenger.

A guest may be guilty of primary negligence barring recovery as a matter of law in accepting the hospitality of a driver whom he knows to be habitually careless and reckless and addicted to driving at excessive speed without keeping a proper lookout. *Bogen v. Bogen*, 648.

Plaintiff was the wife of defendant. She testified that she knew he habitually drove in a reckless manner and at a high rate of speed without keeping a proper lookout; that he habitually ignored any protest or remonstrance that she made; that the accident in suit occurred after several days travel on a long journey during which she repeatedly remonstrated with him; and that the accident in suit was proximately caused by his negligence. *Held:* Her evidence discloses acts of primary negligence in becoming a guest in his car and in failing to abandon the journey on any of the numerous opportunities she had to do so after his continued recklessness became apparent, which negligence contributed to her own injury and precludes recovery as a matter of law. *Ibid.*

§ 21. Parties Liable to Guests or Passengers.

Where the negligence of the driver of the car in which a guest is riding is the sole proximate cause of the injury insulating any negligence on the part of the driver of the other vehicle involved in the collision, the guest, or in case of her fatal injury, her administrator, is not entitled to recover of the driver of the other car or his superior. *Reeves v. Staley*, 573.

§ 24b. Scope of Employment and Furtherance of Master's Business.

Evidence tending to show that the driver of the car was employed in a garage, that the employer permitted the employee to take his car for use of the employee in driving to his home Saturday night and in returning to work Monday morning, that the employee, in response to questioning by the employer, stated that he would get another car if he had to make a trip on Sunday, and that the accident in suit occurred while the employee was driving the car on Sunday on a personal errand, *is held* insufficient to be submitted to the jury upon the doctrine of *respondeat superior*. *Riddle v. Whisnant*, 131.

Evidence *held* to show that accident occurred while salesman and prospect were engaged in purely social activities, and not in course of salesman's employment in demonstrating car. *Smith v. Moore*, 165.

§ 29. Drunken Driving.

A sentence of defendant to be confined in the county jail for a term of six months, to be assigned to work on the public roads, upon defendant's plea of *nolo contendere* to a warrant charging him with the operation of an automobile upon the public highways while under the influence of intoxicating liquor, is not excessive. C. S., 2621 (286) (325), 4506. *S. v. Parker*, 416.

AUTOMOBILES—*Continued.*

Evidence *held* sufficient to support conviction of defendant on charge of drunken driving. C. S., 4506, as amended by Public Laws 1925, ch. 283; Public Laws 1927, ch. 230, sec. 1. *S. v. Miller*, 660.

§ 32e. Sufficiency of Evidence and Nonsuit.

Evidence *held* insufficient to show causal connection between defendant's driving while under influence of intoxicating liquor and death of occupant of car who left it while it was moving, and therefore evidence was insufficient to support conviction of manslaughter. *S. v. Miller*, 660.

BAILMENT.

§ 1. Nature and Essentials of Relationship.

One who receives money for safe keeping is not an agent, consignee, clerk, employee or servant, but is a bailee if under the agreement of the parties he is to return the identical money received, and is a debtor if he is to use the money and return its equivalent on demand. *S. v. Eurell*, 519.

BANKRUPTCY.

§ 9. Debts Discharged.

The balance of a debt after crediting payments and agreement by the parties as to the amount then due is not discharged by the debtor's bankruptcy when it is determined by the jury that the original debt was for property obtained through fraud by means of giving worthless checks. *Growers Exchange v. Hartman*, 30.

BARRATRY.

§ 1. Nature and Elements of the Offense.

The common law offense of barratry obtains in this State, since it has never been the subject of legislation in North Carolina and is not repugnant nor inconsistent with our form of government. C. S., 970. *S. v. Batson*, 411.

An attempt to commit barratry is an offense in this State and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common law offense of barratry. C. S., 4640. *Ibid.*

§ 2. Prosecution and Punishment.

An indictment charging that defendant is a common barrator and that he on specific dates and at other times willfully, unlawfully and intentionally stirred up and excited divers controversies and suits, is sufficient to charge the common law offense of barratry, and following paragraphs of the indictment each setting out a specific act of barratry as separate "counts" merely designates the separate acts which taken collectively constitute the offense, and defendant's motion to quash on the ground that the indictment alleges as separate counts single acts of barratry, is untenable. *S. v. Batson*, 411.

Evidence tending to show that defendant went unsolicited to numerous persons and urged them to institute separate suits under an agreement that defendant was to be paid from recoveries therein *is held* sufficient to be submitted to the jury upon the question of defendant's guilt of attempt to commit barratry. *Ibid.*

BARRATRY—*Continued.*

Upon an indictment charging defendant with barratry in stirring up suits by particular persons named, evidence that defendant had urged others not named to enter suits in other cases is competent for the purpose of showing intent, motive and *scienter*. *Ibid.*

BASTARDS.

§ 3. Warrant and Indictment for Failure to Support.

Willfulness is an essential element of the offense defined by ch. 228, Public Laws 1933, and a warrant failing to allege that defendant's failure or refusal to support his illegitimate child was willful fails to charge an offense under the statute and cannot support a conviction. *S. v. Clarke*, 392; *S. v. Moore*, 535.

BETTERMENTS.

§ 1. Nature and Requisites in General.

One of petitioners for betterments admitted that he had notice of the condition of the record title, under which respondents later obtained judgment for the land, some ten years prior to respondents' recovery, and further admitted that all of the improvements placed upon the land by petitioner would exhaust themselves within a period of five years, so that it appeared that at the time of respondents' recovery the value of the land had not been increased by reason of improvements placed thereon by petitioners under a *bona fide* belief that they held the true title. *Held:* Petitioners not being entitled to betterments, an error of the court in directing a verdict in respondents' favor upon the issue of estoppel by record is harmless. C. S., 699, 701. *Barrett v. Williams*, 32.

BIGAMY.

§ 1. Nature and Elements of the Crime.

At common law and under statute, Michie's N. C. Code, 4342, bigamy is an offense against society rather than against the lawful spouse of the offender. *S. v. Williams*, 445.

§ 2. Prosecution and Punishment.

Under the provisions of Michie's N. C. Code, 4342, a defendant may be prosecuted for bigamy in the county in which he is apprehended, and it is not required that the prosecution be instituted in the county in which the bigamous cohabitation takes place. *S. v. Williams*, 445.

In this prosecution of defendants for bigamy the court's statement of the contentions of the State that defendants cohabited here as man and wife, that each had a living spouse in this State at the time of their purported second marriage in another state, that each obtained a decree of divorce in such state based upon substituted service, and went to such other state not to establish a *bona fide* residence but to take advantage of the laws of that state and obtain a divorce through fraud upon its court, and that neither of the divorce decrees were valid, *is held* without error. *Ibid.*

Defendants, each having a spouse living in this State, went to Nevada, where each obtained a decree of divorce based upon constructive service, and immediately after obtaining the decrees, married and returned to this State and cohabited as man and wife. *Held:* Defendants' belief that their respective

BIGAMY—*Continued.*

divorce decrees were valid and would be recognized in North Carolina is no defense to a prosecution for bigamy. Michie's N. C. Code, 4342. *Ibid.*

BILLS AND NOTES.

§ 10g. Criminal Liability for Issuing Worthless Checks.

In a prosecution for issuing a worthless check, an instruction to the effect that if the jury should find from the evidence beyond a reasonable doubt that defendant issued the described checks knowing at the time of delivering them that he did not have sufficient funds on deposit in or credit with the drawee bank with which to pay same on presentation, *is held* without error, since such charge follows the statute, ch. 62, Public Laws 1927, Michie's Code, 4283 (a), and correctly places the burden on the State to prove each essential element of the offense beyond a reasonable doubt. *S. v. Levy*, 812.

The gravamen of the offense proscribed by ch. 62, Public Laws 1927, is the putting into circulation worthless commercial paper to the public detriment, and not that of the individual payee. *Ibid.*

The fact that the maker of a check delivers it to the payee under an agreement not to deposit same until a specified future date does not entitle the maker to a verdict of not guilty in a prosecution for issuing a worthless check when at the time of issuing same the maker knew he did not have sufficient funds in or credit with the depository with which to pay same upon presentation. *Ibid.*

Where a warrant alleges each essential element of the offense of issuing a worthless check, the addition of the words "with intent to cheat and defraud" the payee, will be treated as surplusage. *Ibid.*

BOUNDARIES.

§ 1. General Rules in Ascertainment of Boundaries.

The location upon the land of the boundary line called for in a deed is for the determination of the jury, and the Supreme Court upon appeal has no power to determine the conflicting contentions of the parties as to the location of such line. Further, in this case plaintiffs announced in open court that they made no claim of title to the *locus in quo*. *Miller v. Teer*, 605.

§ 3. Definiteness of Description and Admissibility of Parol Evidence.

A deed, to be valid under the statute of frauds, must contain a description of the land either certain in itself or capable of being made certain by resort to matters *aliunde* to which the description refers. *Stewart v. Cary*, 214.

Parol evidence is not admissible to aid a description which is patently ambiguous. *Ibid.*

When the description of a deed is insufficient within itself to describe the land intended to be conveyed with certainty but refers to matters *aliunde* from which the description can be made certain, parol evidence is competent to fit the description to the land, but such parol evidence cannot be used to enlarge the scope of the descriptive words. *Ibid.*

A description of the land conveyed as "the tract of land on Indian Camp Branch, known as the Hamlin tract," and referring to the sheriff's deed selling the land for taxes owed by the said Hamlin, *is held* sufficient to be aided by parol, and evidence that plaintiff's predecessor in title had acquired only one tract of land which had formerly belonged to Hamlin is sufficient to be submitted to the jury. *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS.

§ 2. For Fraud.

Evidence *held* insufficient to show that plaintiff was prevented from ascertaining contents of instrument by fraud, or that defendant, in making promise to induce its execution at that time intended not to fulfill same, and therefore nonsuit in action to cancel instrument was properly allowed. *Williams v. Williams*, 806.

§ 9. Pleadings.

In an action to set aside an instrument for fraud, plaintiff may not assert mutual mistake or want of consideration for the execution of the instrument unless such matter is specifically pleaded, since a party demanding equitable relief must specifically allege the facts upon which his remedy is predicated. *Williams v. Williams*, 806.

CARRIERS.

§ 6. Accommodations.

An instruction that if defendant carrier declined to give plaintiff a seat in its bus because plaintiff is a Negro, to answer the issue of willfulness and maliciousness in plaintiff's favor, *is held* erroneous, since such refusal under certain circumstances might be actuated by protective or benevolent impulses rather than by malice. *Harris v. Coach Co.*, 67.

§ 21a. Degree of Care in Respect to Passengers in General.

A common carrier owes a high degree of duty to a passenger to protect him from assault from any source and is liable for a malicious or wanton assault committed on a passenger by an employee while on duty, whether the employee's acts are within the line of his employment or not. *Hairston v. Greyhound Corp.*, 642.

§ 21c. Injuries to Passengers in Boarding or Alighting.

The general rule is that a passenger who is injured while alighting from a moving train may not recover for such injury. *Wingate v. R. R.*, 251.

CHAMPERTY.

§ 1. Contracts Void as Champertous.

Contract between layman and attorney under which layman agrees to procure evidence for prosecution of action for third party for percentage of recovery *held* champertous and void. *Merrell v. Stuart*, 326.

§ 2. Civil Rights and Liabilities Under Champertous Contracts.

Where an attorney procures judgment for his client and holds the contingent fee, the champertor seeking to recover from the attorney the amount agreed upon as compensation for his services under the champertous contract may not contend that even though the champertous contract is void the attorney nevertheless holds that part of the recovery in trust for him, since under the maxim *ex turpi contractu non oritur actio* the law will not aid him in any recovery, the question of the attorney's right to that part of the recovery agreed to be paid the champertor being a matter between the attorney and his client, who is not a party to the action. *Merrell v. Stuart*, 326.

CHATTEL MORTGAGES AND CONDITIONAL SALES.

§ 1. Requisites and Validity.

A note signed by the purchaser to the dealer in which the purchaser agrees to pay a stipulated sum monthly for twelve months cannot be construed as a lien or mortgage in itself. *Motor Co. v. Ins. Co.*, 168.

CLERKS OF COURT.

§ 3. Jurisdiction in General.

The clerk of the Superior Court has only that jurisdiction, both as to subject matter and the territory in which it may be exercised, which is conferred upon him by statute, and his order affecting lands in another county is void in the absence of express statutory authority. *High v. Pearce*, 266.

COMPROMISE AND SETTLEMENT.

§ 2. Operation and Effect of Agreement.

A settlement by which the employer pays the administrator of the third party an agreed sum in satisfaction for alleged wrongful death resulting from a collision between intestate's car and a bus driven by the employee is not an accord and satisfaction between the employee and the compensation insurance carrier as against the administrator, the employee and the compensation insurance carrier not being parties to the accord. *Hinson v. Davis*, 380.

CONSPIRACY.

§ 1. Acts Constituting Conspiracy and Civil Liability Therefor.

A conspiracy is an agreement to do an unlawful act or to do a lawful act in an unlawful manner, and therefore an agreement between retailers not to buy from wholesalers selling to competing retailer is not actionable in absence of malice, fraud or coercion. *McNeill v. Hall*, 73.

A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, and defendants' demurrer thereto should have been sustained, C. S., 2559, *et seq.*, not being applicable. *Lineberger v. Ice Co.*, 444.

§ 3. Nature and Elements of the Crime.

A conspiracy to commit a felony is a felony; a conspiracy to commit a misdemeanor is a misdemeanor. *S. v. Abernethy*, 226.

§ 4. Indictment.

It is not required that an indictment charging that defendant and others conspired to commit the offense should name the coconspirator or conspirators. *S. v. Abernethy*, 226.

§ 6. Sufficiency of Evidence and Nonsuit.

In a prosecution for conspiring to interfere with the duties of election officials by obtaining official ballots prior to the election, testimony of declarations made by defendant that he had received the ballots from a friend but that he would not tell or "rat" on his friend, is sufficient, it not being required that the State show an actual agreement between the conspirators, it being sufficient if the State show facts and circumstances from which an actual or implied understanding or agreement between the conspirators to commit the unlawful act may be inferred. *S. v. Abernethy*, 226.

CONSTITUTIONAL LAW.

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3c. Waiver of Constitutional Provisions. In re Steele, 685.
III. Governmental Branches and Powers
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7. In General. Morris v. Holshouser, 293.
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IX. Full Faith and Credit to Judicial Proceedings of Other States
23. Nature and Scope of Mandate in General. Bullington v. Angel, 18; Lockman v. Lockman, 95; S. v. Williams, 445; Land Bank v. Garman, 585; Pink v. Hanby, 667.
X. Interstate Commerce
25b. Congressional Regulation of Interstate Commerce. Crompton v. Baker, 52.
XI. Constitutional Guarantees in Trial of Persons Accused of Crime
26. Necessity of Indictment of Presentment. S. v. Turner, 437.
32. Cruel and Unusual Punishment. S. v. Parker, 416; S. v. Levy, 812.
33. Due Process of Law in Conviction. S. v. Starnes, 384; In re Steele, 685.

§ 3c. Waiver of Constitutional Provisions.

As a general rule, subject to certain exceptions, a defendant may waive a constitutional as well as a statutory provision made for his benefit. *In re Steele*, 685.

§ 4a. Legislative Power in General.

The power of the General Assembly is limited only by the restraints imposed upon it by the Constitution of North Carolina or by the Constitution of the United States. *Morris v. Holshouser*, 293.

§ 6b. Power and Duty of Courts to Determine Constitutionality of Statutes.

The courts will not declare a statute void on the ground that it is violative of a constitutional limitation unless it so appears beyond a reasonable doubt. *Morris v. Holshouser*, 293.

§ 6c. Duty of Courts to Construe Statutes.

The wisdom or impolicy of legislation is not a judicial question, and the courts may not say what the law ought to be, but may only declare what the law is. *Raleigh v. Hatcher*, 613; *Hart v. Gregory*, 180.

§ 7. Scope of State Police Power.

The police power of the State is not confined to the suppression of what is disorderly or insanitary, but also extends to matters for the promotion of the public welfare. *Morris v. Holshouser*, 293.

Ch. 410, Public Laws 1935, as amended, providing that an employee's assignment of wages to be earned in the future should not be binding upon the employer unless accepted by him in writing was enacted not only to relieve the employer of unnecessary responsibility but also to restrain the purchase of unearned wages of employees at a discount, and the statute is a regulation of contracts growing out of the relationship of employer and employee imposed for the general welfare and is a valid exercise of the police power of the State. *Ibid.*

§ 13. Equal Protection, Application and Enforcement of Laws.

The fact that ch. 410, Public Laws 1935, as amended, permits an employer, at his election, to accept an assignment of unearned wages executed by his employee does not in itself constitute an unconstitutional discrimination, since in the absence of legislative restraint, one engaged in private business may exercise his own pleasure as to the parties with whom he will deal. *Morris v. Holshouser*, 293.

CONSTITUTIONAL LAW—*Continued.*

§ 15a. Nature and Scope of Due Process Clause.

Freedom to contract is both a liberty and a property right within the protection of the due process clauses of the Federal and State Constitutions. Fifth and Fourteenth Amendments to the Constitution of the United States; Constitution of North Carolina, Art. I, sec. 17. *Morris v. Holshouser*, 293.

Freedom of contract is a qualified and not an absolute right, and the State, in the exercise of its police power, may impose restrictive regulations in the interest of the public welfare. *Ibid.*

Statute providing that employee's assignment of unearned wages shall not be binding upon employer unless accepted by him in writing is regulation imposed for general welfare, and is valid. *Ibid.*

§ 19. Due Process of Law—Change of Remedies and Procedure.

Ch. 352, Public Laws 1941, amending ch. 120, Public Laws of 1929, and providing that when an employer fails or neglects to keep in effect a policy of compensation insurance and fails to qualify as a self-insurer, claimant may institute a civil action for all compensation as may be awarded by the Industrial Commission and granting claimant in such action the ancillary remedies of attachment and receivership affects procedure only and does not disturb any vested rights. *Byrd v. Johnson*, 184.

§ 20. Nature and Scope of Mandate Against Impairing Obligations of Contract.

Ch. 410, Public Laws 1935, as amended, when applied to contracts executed after its effective date cannot be held unconstitutional as impairing the obligations of contracts. *Morris v. Holshouser*, 293.

§ 23. Full Faith and Credit to Judgments, Judicial Proceedings, and Laws of Other States.

Denial of deficiency judgment on notes executed in another state does not impinge full faith and credit clause. *Bullington v. Angel*, 18.

Decree for alimony is final judgment within protection of full faith and credit clause as to installments due when court rendering judgment is without power to modify order as to such installments. *Lockman v. Lockman*, 95.

An action on such decree, entered after absolute divorce, may be maintained here notwithstanding that our courts are without power to award alimony after absolute divorce. *Ibid.*

A divorce obtained in another state against a resident of this State upon service by publication, or upon personal service in this State of process issued by court of such other state, without personal appearance, does not come within the protection of the full faith and credit clause of the Federal Constitution. Art. IV, sec. 1. *S. v. Williams*, 445.

A judgment by confession entered upon a warrant of attorney in a court of another state in accordance with the laws of such state comes within the protection of the full faith and credit clause of the Federal Constitution, Art. IV, sec. 1, and must be recognized in this State even though rendered without service of process or appearance other than that pursuant to the warrant itself. *Land Bank v. Garman*, 585.

Statutory receiver of insurance companies, who is ordered to take over assets of insolvent company by virtue of his office, derives his authority by operation of the laws of the state of his appointment, which authority must be recognized here under the full faith and credit clause. *Pink v. Hanby*, 667.

CONSTITUTIONAL LAW—*Continued.*

§ 25b. Congressional Regulation of Interstate Commerce.

The power of Congress to regulate interstate commerce includes the power to prescribe rules by which this commerce shall be governed, not only to the extent of aiding and protecting such commerce but also in prohibiting it, and Federal Fair Labor Standards Act is constitutional exercise of Congressional power. *Crompton v. Baker*, 52.

§ 26. Necessity of Indictment or Presentment.

Since a recorder's court has final jurisdiction of a prosecution for possession of intoxicating liquor for the purpose of sale, a defendant may be tried therein upon a warrant and, upon appeal, may be tried in the Superior Court upon the original warrant. *S. v. Turner*, 437.

§ 32. Cruel and Unusual Punishment.

Where a statute fixes no maximum period of imprisonment as punishment for its violation, a sentence of imprisonment for less than two years cannot be held cruel and unreasonable. *S. v. Parker*, 416.

Upon defendant's conviction upon two warrants charging the issuance of worthless checks, a sentence of two years imprisonment on the first warrant and one year imprisonment on the second, the sentences to run consecutively, cannot be held excessive, cruel or unusual, since the sentences were within the limits prescribed by the statute. *S. v. Levy*, 812.

§ 33. Due Process of Law.

Where defendant has been granted a new trial for error in the charge appearing of record and upon appeal from a second conviction the record discloses a kindred error in the charge upon the second trial, a new trial must nevertheless be awarded upon the second appeal, since no person may be deprived of life or liberty except by the law of the land. Constitution of North Carolina, Art. I, sec. 17. *S. v. Starnes*, 384.

Since a defendant in a criminal prosecution before a justice of the peace has a right to demand a jury trial, C. S., 4627, and the right to appeal to the Superior Court and have the whole matter heard therein *de novo*, C. S., 4647, the fact that the justice's compensation is fixed upon a fee basis, which he will receive only in the event of conviction, ch. 342, Public-Local Laws 1933, as amended by ch. 358, Public-Local Laws 1935, does not result in depriving the defendant of trial under due process of law in violation of the Fourteenth Amendment of the Federal Constitution. *In re Steele*, 685.

CONTRACTS.

§ 8. General Rules of Construction.

Where a written contract is submitted to the court for construction, the agreement made by the parties as expressed in the language used must be given effect. *Brock v. Porter*, 28.

§ 11a. Construction of Terms and Conditions in General.

Under terms of contract in suit, plaintiff's obligation to furnish water to adjacent premises was not limited to one dwelling. *Brock v. Porter*, 28.

§ 12. Modification and Merger of Agreements.

Preliminary parol negotiations are varied by and merged in a subsequent written agreement between the parties, not only as a rule of evidence but also as a matter of substantive law. *Williams v. McLean*, 504.

COURTS.

§ 1a. Jurisdiction of Courts in General.

In invoking the jurisdiction of a court, the parties are entitled to the aid of any statute, without specifically naming it, under which such jurisdiction may be exercised, provided substantial compliance has been made with its terms in presenting the controversy. *Board of Health v. Comrs. of Nash*, 140.

Jurisdiction over the subject matter may not be conferred upon a court by consent, and therefore when a clerk of a Superior Court enters an order affecting lands in another county without statutory authority, the order is void notwithstanding that respondent appeared and consented that the clerk might hear the proceedings and enter the order. *High v. Pearce*, 266.

Jurisdiction over the subject matter may not be conferred by consent of parties. *MacRae & Co. v. Shaw*, 516.

§ 1b. Objections to Jurisdiction.

Objection to the jurisdiction may be made at any stage of the proceeding, even in the Supreme Court upon appeal. *MacRae & Co. v. Shaw*, 516.

§ 2a. Appeal, Review, and Jurisdiction of Superior Courts of Causes from County, Municipal, and Recorders' Courts.

Order for subsistence without divorce was entered in general county court and docketed in Superior Court. C. S., 1667. Thereafter county court was abolished and plaintiff instituted proceeding in Superior Court to enforce payment of alimony. Defendant entered a special appearance and demurred to jurisdiction of Superior Court. *Held:* Upon the docketing of the judgment in the Superior Court, it acquired jurisdiction of the cause, and defendant's demurrer to the jurisdiction was properly overruled, C. S., 1608 (dd). Whether the provisions of ch. 69, Public-Local Laws of 1941, or the order of the general county court transferring pending actions to the Superior Court, are sufficient to effect the transfer need not be considered. *Brooks v. Brooks*, 16.

Where, at the time of issuance of *recordari* and *supersedeas*, defendants had already perfected their appeals from the judgment of the municipal court, the revocation of the writs by the judge of the Superior Court on the ground that they had been improvidently granted and that no harm could come to defendants from their revocation, is without error. *S. v. Haywortb*, 534.

§ 2c. Jurisdiction of Superior Court on Appeal from Clerk.

Where a cause in any manner comes before the judge of the Superior Court after a motion made before the clerk, the judge acquires jurisdiction to determine the entire controversy and is not required to remand the cause to the clerk for the determination of the motion made before him. C. S., 637. *Wynne v. Conrad*, 355; *Harriss v. Hughes*, 473.

§ 3. Jurisdiction After Orders or Judgments of Another Superior Court Judge.

This action involved conflicting claims of a sheriff, who had accepted checks in payment of taxes, and the University in unclaimed funds in hands of bank receiver. *Held:* Prior orders that sheriff was entitled to payment out of the funds were interlocutory, and further, were not binding on University, which had no notice and was not party, and therefore another judge had jurisdiction at later term to hear and determine controversy. *Corporation Com. v. Bank*, 48.

COURTS—*Continued.*

§ 9. Jurisdiction of State and Federal Courts.

Our courts have jurisdiction of a prosecution of a white man for assault upon an Indian committed upon an Indian reservation, which jurisdiction is not ousted by the enactment of sec. 213, Title 25, U. S. C. A., since the Federal Act does not give the Federal Government exclusive jurisdiction, and could not interfere with the exercise of the police powers of the State. *S. v. McAlhaney*, 387.

§ 13. What Law Governs: Negligence Actions.

In an action to recover for negligent injury inflicted in another state the rights and duties of the parties are governed by the *lex loci*, and matters of procedure by the *lex fori*. *Russ v. R. R.*, 715.

§ 14. What Law Governs: Actions Ex Contractu.

This action was instituted to recover a deficiency judgment on notes secured by a deed of trust executed in the State of Virginia on real estate situate in Virginia. Defendant demurred on the ground that the complaint failed to state a cause of action for that it appeared upon the face of the complaint that the action was to recover a deficiency judgment for the balance of the purchase price of realty on notes executed subsequent to the effective date of ch. 36, Public Laws 1933, Michie's Code, 2593 (f). *Held:* Judgment sustaining the demurrer does not impinge the Full Faith and Credit Clause of the Federal Constitution or violate the general doctrine that a contract will be construed in accordance with the laws of the state wherein it is executed, since the statute operates upon the adjective law and not the substantive law and procedural matters are governed by the *lex fori*. *Bullington v. Angel*, 18.

CRIMINAL LAW.

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83. Determination and Disposition of Cause. S. v. Starnes, 384; S. v. Batson, 411.

CRIMINAL LAW—*Continued.*

§ 1b. Attempts.

The elements of an attempt to commit an offense is, first, an intent to commit the offense and second, a direct, ineffectual act done towards its commission. *S. v. Batson*, 411.

§ 8b. Aiders and Abettors.

A charge to the effect that a person cannot be convicted as an aider and abettor notwithstanding his presence and intention to aid, encourage or assist the actual perpetrator, unless such intention is in some manner communicated to the actual perpetrator, *is held* without error. *S. v. Johnson*, 773.

§ 11. Felonies and Misdemeanors.

A conspiracy at common law was a misdemeanor, and remains a misdemeanor in this jurisdiction unless made a felony by statute. *S. v. Abernethy*, 226.

A conspiracy to commit a misdemeanor is a misdemeanor; a conspiracy to commit a felony is a felony. *Ibid.*

§ 17. Plea of Nolo Contendere.

A plea of *nolo contendere* is equivalent to a plea of guilty in so far as it gives the court the power to punish, and the court may impose sentence thereon as upon a plea of guilty. *S. v. Parker*, 416.

§ 29b. Evidence of Guilt of Offenses Other Than Offense Charged.

Upon an indictment charging defendant with barratry in stirring up suits by particular persons named, evidence that defendant had urged others not named to enter suits in other cases is competent for the purpose of showing intent, motive and *scienter*. *S. v. Batson*, 411.

§ 38a. Photographs.

Upon the admission of a photograph of the scene of the crime in evidence the witness stated that the car in the photograph was not located as was deceased's car at the time of the homicide. The court instructed the jury to disregard the automobile as shown in the photograph and properly limited the use of the photograph to the purpose of explaining the testimony of witnesses. *Held:* Defendant's exception to the admission of the photograph in evidence is untenable. *S. v. Shepherd*, 377.

§ 40. Character Evidence of Defendant.

A character witness for defendant may not be questioned on cross-examination as to particular acts of misconduct of defendant and may not be questioned as to the general reputation of defendant for particular vices for the purpose of impeaching the character of defendant, but he may be questioned on cross-examination as to the general reputation of defendant for particular vices for the purpose of testing the witness' knowledge of defendant's general reputation and to impeach the credibility of the witness. *S. v. Shepherd*, 377.

§ 41a. Examination of Witnesses.

The trial court has discretionary power to permit State to ask its witness leading question. *S. v. Thomas*, 34.

§ 41d. Impeaching Witnesses.

Counsel may ask witness as to defendant's reputation for particular vices for purpose of testing witness' knowledge and to impeach credibility of witness. *S. v. Thomas*, 34.

CRIMINAL LAW—*Continued.*

§ 41i. Credibility of Witnesses.

A promise of immunity to a witness for the State goes only to his credibility and not to his competency. *S. v. Johnson*, 252.

§ 48b. Evidence Competent for Restricted Purpose.

Where questions asked upon cross-examination of a character witness for defendant are competent for the purpose of impeaching the witness but not for the purpose of impeaching the character of the defendant, defendant must request that the testimony be so limited, and in the absence of such request a general objection and exception to the testimony cannot be sustained. *S. v. Shepherd*, 377.

§ 51. Argument and Conduct of Counsel.

While counsel for a defendant in a criminal prosecution is entitled to argue to the jury the whole case, as well of law as of fact, C. S., 203, it is the duty of the court in the exercise of its discretionary control over the conduct of the trial, to interfere when the remarks of counsel are not warranted by the evidence and are calculated to mislead or prejudice the jury, and the court may do so by checking the argument or by making correction in its charge. *S. v. Howley*, 113.

In a prosecution for conspiracy to commit a misdemeanor it is not error for the trial court to interrupt argument of counsel for the defendant that defendant was charged with a felony carrying with it severe punishment and to instruct the jury that the offense charged is not a felony but a misdemeanor. *S. v. Abernethy*, 226.

§ 52b. Sufficiency of Evidence and Nonsuit.

While circumstantial evidence is a recognized instrumentality in the ascertainment of truth, in order to sustain a conviction it must be such as to produce in the minds of the jurors a moral certainty of defendant's guilt and exclude any other reasonable hypothesis. *S. v. Penry*, 248; *S. v. Goodman*, 250; *S. v. Miller*, 660.

Upon motion to nonsuit, the evidence must be considered in the light most favorable to the State and it is entitled to all reasonable inferences therefrom. *S. v. Johnson*, 773.

Upon motion to nonsuit, the province of the court is limited to determining whether there is any sufficient evidence to be submitted to the jury, the weight of the evidence being the exclusive province of the jury. C. S., 4643. *Ibid.*

§ 53c. Charge on Burden of Proof.

Charge *held* for error in placing burden on defendant to prove his innocence. *S. v. Floyd*, 530.

§ 53e. Expression of Opinion by Court in Charge.

Charge correcting remarks of counsel outside scope of evidence *held* not erroneous as expression of opinion by court. *S. v. Howley*, 113.

§ 53f. Requests for Instructions.

Exceptions to the refusal of the court to give special instructions requested are untenable when the court gives in substance all special instructions requested in so far as they are applicable to the evidence. *S. v. Beachum*, 531.

CRIMINAL LAW—*Continued.*

§ 54c. Rendition and Acceptance of Verdict and Power of Court to Require Jury to Reconsider.

Where the jury has rendered a verdict of not guilty the defendant is entitled to be discharged, and the trial court is without power to resubmit the case to the jury. *S. v. Williams*, 724.

§ 61a. Form and Requisites of Judgments.

The judgment in this case when read in the light of the record *is held* to clearly sentence the defendant upon the verdict of the jury and not upon defendant's admission that he had theretofore served time, and defendant's contention of ambiguity is untenable. *S. v. Batson*, 411.

§ 65. Validity and Attack of Judgments in Criminal Prosecutions.

Even conceding the disqualification of a justice of the peace because of the fee system, the judgment of such justice in a criminal prosecution would be voidable and not void, and therefore such judgment would stand until its invalidity is declared in a proper proceeding for that purpose, and it cannot be collaterally attacked or challenged on *habeas corpus*. *In re Steele*, 685.

Defendant pleaded guilty in a prosecution before a justice of the peace. Thereafter, while serving sentence, he filed petition for writ of *habeas corpus* on the ground that the justice trying him was disqualified because of the fee system. *Held:* Even conceding the disqualification of the justice, the judgment was not void but was voidable, and the failure of defendant to raise objection at the trial constitutes a waiver and estops him from thereafter urging the point as a defect in the proceeding, and the writ of *habeas corpus* should have been dismissed. *Ibid.*

An objection which goes only to the correctness of a judgment, and not to its validity, will be taken as waived if not seasonably interposed. *Ibid.*

A judgment regularly entered by a court having jurisdiction and authority to act in the premises, from which no appeal is taken, operates as an estoppel, even though the judgment may be erroneous in law, since an erroneous judgment can be corrected only by appeal or *certiorari*. *Ibid.*

§ 70. Appeal Bonds.

The question of the amount to be fixed for bond pending appeal is largely in the discretion of the court below. C. S., 4653. *S. v. Parker*, 416.

§ 73a. Making Out and Serving Statement of Case on Appeal.

The preparation and settlement of cases on appeal belong to the parties and to the judge of the Superior Court, C. S., 643, 644, and while a stenographic report of the trial may be of great assistance, the stenographic notes of the reporter are not conclusive, and the inability of the reporter to transcribe his notes due to continued illness does not excuse defendant from making out and serving his statement of case on appeal within the time allowed. *S. v. Wescott*, 439.

§ 76. Certiorari.

Motion for *certiorari* based upon the fact that the court reporter was unable to transcribe his notes because of continued illness, *denied* for failure to negative laches and to show merit. *S. v. Wescott*, 439.

§ 77d. Conclusiveness and Effect of Record.

Where no exceptions are filed to defendant's statement of case on appeal and it becomes in due time a part of the record, the Supreme Court is bound

thereby, and when the charge as set forth therein contains conflicting instructions upon a material point, defendant's exception thereto must be sustained regardless of whether the judge's language was incorrectly transcribed or whether the error was due to a *lapsus linguæ*. *S. v. Starnes*, 384.

The record imports verity and the Supreme Court is bound thereby. *S. v. Batson*, 411.

§ 79. Briefs.

An exceptive assignment of error will be deemed abandoned when no reason or argument is advanced and no authority cited in support thereof in the brief. *S. v. Howley*, 113.

Defendant's brief should designate the assignments of error discussed by number with reference to the printed pages of the transcript, and authorities relied on should be classified under each of the assignments. Rules of Practice in the Supreme Court, No. 28. *S. v. Abernethy*, 226.

§ 80. Prosecution of Appeals and Dismissal.

Where a defendant fails to file a brief on appeal, the motion of the Attorney-General to docket and dismiss will be allowed, Rule of Practice in the Supreme Court No. 28, but when the appeal is from the conviction of a capital felony this will be done only after an inspection of the record fails to disclose any error. *S. v. Peele*, 83; *S. v. Sturdivant*, 535.

When defendant fails to make out and serve statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss will be granted. *S. v. Wescott*, 439.

When defendant files no appeal bond or order allowing him to appeal *in forma pauperis*, and fails to make up and serve his statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss under Rule 17 will be granted, but when defendant has been convicted of a capital crime this will be done only after an inspection of the record proper fails to disclose error. *S. v. Morrow*, 441.

§ 81c. Harmless and Prejudicial Error.

Where there are two counts of equal gravity in the bill of indictment, and the jury returns a general verdict of guilty on both counts, the verdict on either of them, if valid, supports the judgment. *S. v. Johnson*, 252.

When it does not appear what the answer of the witness would have been had he been permitted to testify, appellant's objection to the exclusion of the testimony cannot be sustained. *S. v. Thomas*, 34.

An exception to the admission of certain testimony cannot be sustained when testimony of the same import is thereafter or theretofore admitted without objection. *S. v. Williams*, 445.

The trial court has the discretionary power to permit the State to ask its witness a leading question, and when the testimony so elicited is competent and defendant is not prejudiced thereby, his exception will not be sustained. *S. v. Thomas*, 34.

Where the charge of the court is without error when considered contextually, defendant's exceptions to isolated parts thereof cannot be sustained. *S. v. Shepherd*, 377.

Conflicting instructions upon a material point, one correct and the other incorrect, must be held for prejudicial and reversible error, since the jury, which must take the law from the court, is not supposed to know which is the

CRIMINAL LAW—*Continued.*

correct instruction and it must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect. *S. v. Starnes*, 384; *S. v. Floyd*, 530.

Where the jury returns a verdict of guilty of manslaughter, defendant has no just cause to complain that the court submitted to the jury the question of his guilt of murder in the second degree. *S. v. Beachum*, 531.

§ 83. Determination and Disposition of Cause.

A new trial must be awarded on appeal for prejudicial error appearing of record regardless of how many times the cause has been tried. *S. v. Starnes*, 384.

Even if a judgment is ambiguous, the defendant would be entitled only to have the case remanded for proper judgment and not to a dismissal of the action. *S. v. Batson*, 411.

DAMAGES.

§ 1a. Compensatory Damages.

The measure of damages for injury to personal property is the difference between the market value immediately before the injury and the market value immediately after the injury. *Guaranty Co. v. Motor Express*, 721; *Broadhurst v. Blythe Bros. Co.*, 464.

The cost of repairing an automobile after collision, although the amount of recovery is not limited to such cost, is some evidence to guide the jury in determining the difference in the market value of the automobile before and after the injury. *Guaranty Co. v. Motor Express*, 721.

While an estimate of the cost of repairing an automobile may not be as convincing as the actual cost of repairs made, the difference relates to the weight rather than to the competency, and testimony by a qualified witness as to his estimate of the cost of repairs is competent. *Ibid.*

Whether building could have been repaired after injury is germane in determining value of property after injury. *Broadhurst v. Blythe Bros. Co.*, 464.

§ 1b. Nominal Damages.

Nominal damages are some trifling sum awarded in recognition of defendant's invasion of some legal right of plaintiff which results in no actual injury or pecuniary loss, and when the evidence discloses actual injury and pecuniary loss there is no necessity for an instruction as to nominal damages. *Hairston v. Greyhound Corp.*, 642.

§ 7. Grounds and Basis for Recovery of Punitive Damages.

An instruction to the effect that if the jury found that defendant acted willfully and maliciously in committing the wrong that then it was in the discretion of the jury as to the amount that it would fix as punitive damages, is error, since the finding of willfulness and malice does not in itself entitle plaintiff to recover punitive or exemplary damages, but both the awarding of punitive damages and the amount to be allowed, if any, rests in the sound discretion of the jury. *Harris v. Coach Co.*, 67.

Where plaintiff establishes that defendant erected a "spite fence," entitling plaintiff to have the nuisance abated, but fails to prove any actual pecuniary damage to himself resulting up to the time of the institution of the action, the submission of an issue of punitive damages is error. *Burris v. Creech*, 302.

DAMAGES—*Continued.*

Where an injury is maliciously or fraudulently inflicted or is accompanied by insult or wanton disregard of plaintiff's rights, the jury may, if they deem it proper to do so, award punitive damages in addition to compensatory damages. *Hairston v. Greyhound Corp.*, 642.

A corporation is liable for punitive as well as compensatory damages upon the principle of *respondeat superior* when the injury is inflicted in a manner which would justify such an award, by a servant or agent acting within the scope of his employment and in the furtherance of the master's business. *Ibid.*

In addition to its liability for punitive damages upon the principle of *respondeat superior*, a corporation may be liable for punitive damages if the injury results from breach of duty directly owing from the corporation to the injured person growing out of the relationship between them, such is the duty of a common carrier to protect a passenger from assault from any source, especially a malicious or wanton assault committed by its employee while on duty. *Ibid.*

Evidence of the financial condition of defendant is competent upon the issue of punitive damages. *Ibid.*

DEATH.

§ 3. Nature and Grounds of Action for Wrongful Death.

A right of action for wrongful death rests exclusively upon statute, C. S., 160, and the suit must be begun and prosecuted in strict accordance with the statutory provisions. *Whitehead & Anderson, Inc., v. Branch*, 507.

In an action for wrongful death plaintiff must show 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 that such negligent breach of duty was the proximate cause of the injury which caused death. *Reeves v. Staley*, 573; *Mitchell v. Melts*, 793.

§ 5. Parties Who May Sue for Wrongful Death.

Since the North Carolina Workmen's Compensation Act expressly provides that the subrogated right of action against the third person tort-feasor in favor of the insurance carrier paying compensation for which the employer is liable, must be maintained in the name of the injured employee or his personal representative, ch. 449, Public Laws 1933, the Act does not change or modify the requirement of C. S., 160, that an action for wrongful death must be maintained by the administrator of the deceased, and the insurance carrier cannot maintain the action for wrongful death in its own name against the third person tort-feasor. *Whitehead & Anderson, Inc., v. Branch*, 507.

§ 7. Dying Declarations.

Declarant was fatally injured in an automobile accident. *Held:* Declarations made by him the night before and two days before undertaking the journey are not admissible as dying declarations. C. S., 160. *Gassaway v. Gassaway & Owen, Inc.*, 694.

DECLARATORY JUDGMENT ACT.

§ 2a. Subject of Action.

The Superior Court has jurisdiction of a controversy without action between the board of health of a county and the county commissioners, C. S., 626, in

which the facts agreed present the question of the legal duties of the respective boards in regard to the appointment of a county health officer, which duties, according to how the controversy is determined, might be the subject of *mandamus*, notwithstanding that the provisions of the Declaratory Judgment Act, ch. 102, Public Laws 1931, are not specifically referred to. *Board of Health v. Comrs. of Nash*, 140.

DEEDS.

(Ascertainment of boundaries see Boundaries.)

§ 11. General Rules of Construction.

Ancient, technical rules as to the effect of and importance to be given the several parts of a deed will not be strictly applied when to do so would defeat the obvious intention of the parties as gathered from the instrument as a whole. *Bryant v. Shields*, 628.

The cardinal rule in the construction of a deed is to ascertain and give effect to the intent of the parties as gathered from the language of the instrument construed as a whole, but recognized canons of construction and settled rules of law may not be disregarded. *Ibid.*

As a rule, where clauses in a deed are repugnant, the first in order will be given effect and the latter will be rejected. *Ibid.*

§ 13a. Estates and Interests Created by Construction of Instrument.

An unlimited conveyance of the beneficial use of property carries with it the *corpus* and, in proper cases, may be regarded as a conveyance in fee. *Miller v. Teer*, 605.

Consent judgment *held* to convey only easement in *locus in quo* for ingress and egress, and not unlimited use, and therefore did not convey fee. *Ibid.*

The *habendum* in a deed cannot introduce one who is a stranger to the premises to take as grantee except by way of remainder, since ordinarily the *habendum* relates to the *quantum* of the estate while the premises and the granting clauses designate the grantee and the thing granted. *Bryant v. Shields*, 628.

Deed failing to name wife in premises or granting clause, but naming her only in *habendum* does not create estate by entireties. *Ibid.*

§ 14b. Condition Subsequent.

An absolute deed followed by stipulation that the sole consideration for the conveyance is the agreement of the parties of the second part to support and take care of the party of the first part for the remainder of his life, with provision that if the parties of the second part fail or refuse to do so then the conveyance should become null and void, creates a fee upon condition subsequent. *Barkley v. Thomas*, 341.

The breach of the condition subsequent contained in a deed entitles the grantor during his life, or his heirs after his death, to bring suit for the land or to declare the estate forfeited, but does not entitle the administrator to bring such suit, C. S., 159, not being applicable. *Ibid.*

Evidence *held* sufficient to support finding that grantees did not breach condition subsequent. *Ibid.*

§ 16. Restrictive Covenants.

When restrictive covenants are inserted in deeds from the owner of a subdivision in accordance with a general plan of development and improvement

of the property for residential purposes, the owners of property therein by deeds from the original owner or by *mesne* conveyances from him may enforce the restrictions against another owner of property within the development. *Brenizer v. Stephens*, 395.

Encroachment of business upon property adjacent to subdivision does not affect enforceability of restrictive covenants *inter se* by owners of property within the subdivision. *Brenizer v. Stephens*, 395; *Turner v. Glenn*, 620.

Restrictive covenants may not rest in parol and are not binding upon subsequent purchasers unless they have notice thereof by record, and therefore when existence of covenants is not disclosed by record except by collateral conveyances of predecessor in title, purchaser is not bound by them. *Turner v. Glenn*, 620.

An officer and salesman of the corporate developer of a subdivision who is without authority to make conveyance, with or without restrictive covenants and who later individually acquires a lot in the subdivision free from restrictive covenants, is not estopped to deny the existence of such restrictions as to his lot as against owners of other lots in the subdivision whose deeds contain no stipulation binding the developer to insert like restrictions in deeds to other property in the subdivision. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 8. Right of Illegitimate Children to Inherit.

Evidence *held* insufficient to show written acknowledgment of paternity required by California statute in order for illegitimate child to inherit from its father. *Teague v. Wilson*, 241.

DIVORCE.

§ 2a. Divorce on Grounds of Separation.

In wife's suit for alimony without divorce, husband may not set up cross action for divorce on ground of two years separation. *Shore v. Shore*, 802.

§ 5. Pleadings and Verification.

In the husband's action for divorce *a vinculo*, the wife's answer setting up a cross action must be verified under C. S., 1661, as a jurisdictional prerequisite, and when the answer is not so verified the granting of permanent alimony is erroneous. *Silver v. Silver*, 191.

§ 11. Alimony Pendente Lite.

In the husband's action for divorce *a vinculo*, the wife's answer denying the allegations stating the husband's grounds for divorce and alleging that the husband had abandoned defendant and the child of the marriage is sufficient to sustain defendant's prayer for alimony *pendente lite* and plaintiff's demurrer thereto on the ground that the cross action did not contain a prayer for divorce *a mensa* is properly overruled. *Silver v. Silver*, 191.

§ 12. Alimony Upon Divorce from Bed and Board.

Permanent alimony under C. S., 1665, may be allowed only upon decree for divorce *a mensa*, and is erroneously granted in the wife's cross action in which divorce *a mensa* is neither prayed nor decreed. *Silver v. Silver*, 191.

DIVORCE—*Continued.*

§ 13. Alimony Without Divorce.

Alimony without divorce under C. S., 1667, may be granted only in an independent suit and cannot be granted upon the wife's cross action filed in the husband's action for divorce. *Silver v. Silver*, 191.

In the wife's action for alimony without divorce under C. S., 1667, the husband cannot set up a cross action for divorce, since such cross action would defeat the wife's action at the threshold of the case, and the statute, by expressly providing the defenses which may be pleaded by the husband in such action, excludes all defenses not specified under the maxim *expressio facit cessare tacitum*. *Shore v. Shore*, 802.

§ 14. Enforcing Payment of Alimony.

Action may be maintained on judgment of another state decreeing absolute divorce and alimony to enforce payment of alimony accrued. *Lockman v. Lockman*, 95.

§ 19. Validity of Decrees of Other States Based Upon Substituted Service.

A divorce obtained in another state against a resident of this State upon service of publication, or upon personal service in this State of process issued by court of such other state, without personal appearance, does not come within the protection of the Full Faith and Credit Clause of the Federal Constitution, and will not be recognized here. *S. v. Williams*, 445.

DOWER.

§ 8a. Proceedings for Allotment.

Proceedings for the allotment of dower must be brought in the county in which deceased was domiciled at the time of his death. *High v. Pearce*, 266.

C. S., 74, relating to sale of lands to make assets, does not affect jurisdiction of proceedings to allot dower by metes and bounds, and when proceedings for sale of lands to make assets is instituted in county other than county of deceased husband's domicile and widow appears therein and demands allotment of dower by metes and bounds, the clerk of the court of such county has no jurisdiction to order the allotment of dower by commissioners appointed by him. *High v. Pearce*, 266.

DRAINAGE DISTRICTS.

§ 2b. Officers and Agents.

A drainage district is a corporation, and as any other corporation, public or private, cannot be bound by the acts of its officials or agents acting separately or individually. C. S., 1290. *Davenport v. Drainage District*, 237.

§ 2c. Contracts.

The burden is upon plaintiff alleging a contract with a drainage district to establish the validity of the alleged contract, and a contract signed by the drainage commissioners is incompetent against the district in the absence of any evidence of formal corporate action authorizing its execution. *Davenport v. Drainage District*, 237.

A drainage district, being a *quasi*-public corporation created for the public benefit, is without power to contract with an individual landowner within the district as to the manner in which the ditches and canals should be cut and maintained, since it cannot give special or particular rights to one land-

DRAINAGE DISTRICTS—*Continued.*

owner not enjoyed by all landowners similarly situated in the district, or contract in any manner which would interfere with the performance of its duties to the public generally, and such contract is void and its breach cannot be made the basis of a suit against the district. *Ibid.*

§ 3. Maintenance and Negligent Injury to Lands.

Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of the plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, states a cause of action for continuing trespass, and the right of action for damages to crops for all the years is barred after the lapse of three years from the original trespass. C. S., 441 (3). *Davenport v. Drainage District*, 237.

EASEMENTS.

§ 1. Creation and Establishment by Conveyance.

Consent judgment *held* to convey only easement for ingress and egress and not the fee. *Miller v. Teer*, 605.

§ 8. Abandonment of Easements.

While perhaps an easement constituting an interest in land may not be released by parol except upon the principle of estoppel, such easement may be abandoned. *Miller v. Teer*, 605.

In order to effect an abandonment of an easement there must be an intention to relinquish the interest accompanied by acts and conduct which are positive, unequivocal and inconsistent with the assertion of the easement and which indicate and prove the intent to abandon. *Ibid.*

Since intent is an essential element of abandonment of an easement, the question of abandonment is necessarily for the jury. *Ibid.*

The owner of the dominant tenement, having an easement over the servient tenement to use a passageway and stairway between the buildings on the respective properties for ingress and egress, expressed intent to abandon his easement to obviate future litigation, and bricked up and plastered the doorway in his building which gave access to the stairway. *Held:* His acts were unequivocal and inconsistent with the assertion of the easement and sustain the finding of the jury that he had abandoned same. *Ibid.*

EJECTMENT.

§ 9b. Common Source of Title.

While in an action for the recovery of real property, plaintiff must rely upon the strength of his own title, and not upon the weakness of that of defendant, plaintiff may show that he and defendant claim under a common source of title and that plaintiff has a better title from that source. *Stewart v. Cary*, 214.

When in an action for the recovery of real property plaintiff shows that he and defendant claim under a common source of title, defendant may show title in a third person paramount to that of the common source only if defendant shows that he has acquired this paramount title, but he cannot defend by showing a better title outstanding in a third person. *Ibid.*

EJECTMENT—*Continued.*

The rule that when plaintiff in an action for recovery of real property establishes a common source of title under which both he and defendant claim, defendant will not be permitted to deny the title of the common source is not strictly an estoppel but an inflexible rule of law, and while the decisions variously refer to it as an estoppel, or a rule of convenience or of evidence, our courts have consistently applied the rule without deviation or confusion of principle. *Ibid.*

Common source rule applies notwithstanding that plaintiff establishes void deed in chain of title prior to the common source. *Ibid.*

§ 15. Sufficiency of Evidence.

In this action for recovery of real property, one of the links in plaintiff's chain of title depended upon the validity of adoption proceedings under which plaintiff's predecessor in title inherited the land from the parent by adoption. *Held:* The record of the adoption proceeding introduced in evidence was sufficient to show that the adoption was in conformity with the statutory procedure then in effect. Code of 1883, ch. 1, as amended by Laws of 1885, ch. 390. *Stewart v. Cary*, 214.

ELECTION OF REMEDIES.

§ 5. Between Remedies Ex Contractu.

Where a material furnisher elects to file notice of lien on the theory that the material was furnished to a subcontractor, he is estopped under the doctrine of election of remedies from thereafter asserting that such material was sold directly to the owner. *Pumps, Inc., v. Woolworth Co.*, 499.

ELECTIONS.

§ 22. Offenses Against the Elective Franchise.

The indictments charged defendant with conspiracy to, and with actual interference with, the duties of election officials by receiving ballots knowing them to be official primary ballots and thereby depriving the local board of elections of the use and lawful possession of the ballots. Defendant moved to quash on the ground that ballots are not subject of larceny. *Held:* The gravamen of the offense in each bill of indictment is the receipt by the defendant of official ballots with the knowledge that he had no legal right to them and that they should be in the possession of the county board of elections, and the motion to quash was properly denied, larceny of the ballots not being an element of the offense. *S. v. Abernethy*, 226.

It is the duty of the county board of elections to keep in its possession official ballots until delivery to the local officials, C. S., 6028, 6037, and therefore an indictment charging defendant with receiving official ballots prior to the election knowing that he had no legal right to them is sufficient to charge an interference with the duties of the election officials, C. S., 4185 (3), and defendant's motion to quash on the ground that the indictment failed to state the manner in which defendant interfered with the duties of the election officials was properly denied. C. S., 4623. *Ibid.*

In a prosecution for conspiring to interfere with the duties of election officials by obtaining official ballots prior to the election, testimony of declarations made by defendant that he had received the ballots from a friend but that he would not tell or "rat" on his friend, is sufficient, it not being required that the State show an actual agreement between conspirators, it being

ELECTIONS—*Continued.*

sufficient if the State show facts and circumstances from which an actual or implied understanding or agreement between the conspirators to commit the unlawful act may be inferred. *Ibid.*

Testimony of declarations made by defendant tending to show that defendant received into his possession official ballots from a confederate which had been wrongfully taken from the possession of the chairman of the County Board of Elections, and which were by law due to be kept in the custody of that official, is sufficient to be submitted to the jury on a charge of interfering with the duties of the election officials. *Ibid.*

The offense of interfering with the performance of any duty imposed by law on election officials, C. S., 4185 (3), is a misdemeanor, there being no statutory provision that it should constitute a felony or that the punishment therefor should be imprisonment in the State Prison, C. S., 4171, and a conspiracy to commit the offense is therefore a misdemeanor, since a conspiracy to commit an offense cannot be graver than the offense itself. *Ibid.*

EMBEZZLEMENT.

§ 1. Nature and Essentials of Crime.

The crime of embezzlement is purely statutory and the statute creating the offense must be strictly construed and only those classes of persons therein defined as coming within its purview can be guilty of the offense. *S. v. Eurell*, 519.

The fact that ch. 31, Public Laws 1941, amended C. S., 4268, by adding "bailee" to the classes of persons who might fall within the condemnation of the embezzlement statute constitutes a legislative declaration that theretofore a bailee was not included in the definition of classes of persons defined by the statute. *Ibid.*

A "bailee" or "debtor" may not be prosecuted for embezzlement under C. S., 4268, prior to the amendment of 1941, since neither a "bailee" nor "debtor" is included in the classes of persons defined by the statute prior to the amendment. *Ibid.*

EMINENT DOMAIN.

§ 1b. Necessity for Compensation.

When land is condemned for a public purpose the owner is entitled to just compensation and has a right to have damages assessed by a jury in a fair and impartial trial. *Raleigh v. Hatcher*, 613.

§ 6. Delegation of Power to State Agencies and Political Subdivisions.

A petition by a municipality to condemn land upon allegations that the land sought to be condemned was necessary to widen a part of a State Highway within the city limits, which project had been approved by an ordinance for the acquisition of such land under an agreement with the State Highway Commission providing that the city should secure and dedicate the right of way and the Highway Commission should perform the construction work, *is held* to state a cause of action, since the city is given express authority by statute to condemn land for such purpose. C. S., 2791, 2792, 2792 (a), 3846 (ff). *Raleigh v. Hatcher*, 613.

§ 7. Delegation of Power to Public Utilities.

A power company may maintain proceedings against riparian owners to condemn the right to divert the waters of a stream when such diversion is an integral part of its hydroelectric project. *Light Co. v. Moss*, 200.

EMINENT DOMAIN—*Continued.*

§ 8. Amount of Compensation in General.

In awarding compensation for an easement, due consideration is to be given to the fact that after the easement is taken the fee remains in the owner burdened by the uses for which the easement is acquired. *Light Co. v. Carringer*, 57.

The measure of permanent damages for an easement over land acquired by condemnation is the difference in the fair market value of the land as a whole immediately before, and its impaired market value immediately after the taking. *Ibid.*

§ 9. Measure of Compensation for Lands or Rights Taken.

The measure of compensation to be paid for the taking of land or any interest therein is the market value of the property, which is the price it will bring when offered for sale by one who desires, but is not obligated to sell, and is bought by one desiring to buy, but not under the necessity of purchasing. *Light Co. v. Moss*, 200.

In determining the market value of property, consideration need not be confined to its condition and use at the time of the taking, but the uses to which the property may be applied or for which it is reasonably adaptable, to the extent that such potential uses affect its value at the time of the taking, may be considered. *Ibid.*

In order for evidence of potential uses of land to be competent, such uses must be so immediately probable as to affect the present market value of the land. *Ibid.*

In assessing compensation for land taken, neither the value of the land as an integral part of the taker's project, nor the taker's necessity of having the land as a part of its project should be considered. *Ibid.*

Held: Court erred in admitting evidence relating to benefits accruing to petitioner from the taking and in charging the jury thereon. *Ibid.*

§ 10. Damages for Injury to Contiguous Lands.

Since the measure of damages for an easement acquired by condemnation is the difference between the fair market value of the lands immediately before and immediately after the taking, depreciation in value, if any, of the tract of land outside the bounds of the easement is an element of the damages recoverable, and whether the imposition of the easement is detrimental to the remaining lands is essentially a question of fact for the determination of the jury. *Light Co. v. Carringer*, 57.

Error of court in stating that owner was not entitled to damages for injury to contiguous lands resulting from taking of easement for transmission line *held* not cured by subsequent admission of evidence relating to injury to contiguous land or by charge which did not specifically correct the error. *Ibid.*

EQUITY.

§ 2. Laches.

"Laches" is negligence consisting in omission of something which a party might do and might reasonably be expected to do towards vindication or enforcement of his rights. *Wynne v. Conrad*, 355.

ESTATES.

§ 9d. Forfeiture of Life Estates for Nonpayment of Taxes.

Where a life tenant has permitted the lands to be sold for nonpayment of taxes and has failed to redeem same within one year of sale, the remaindermen are entitled to have the life estate declared forfeited in their suit thereafter instituted, C. S., 7982, and the fact that after the institution of the suit the life tenant pays the taxes, interest and penalties, does not affect the forfeiture. *Cooper v. Cooper*, 490.

ESTOPPEL.

§ 3. Estoppel by Record.

Fact that party sets up prior void order as defense does not preclude him from thereafter attacking the void order. *High v. Pearce*, 266.

§ 6d. Estoppel by Conduct.

In order to constitute equitable estoppel, person sought to be charged must have had knowledge of facts. *Barrow v. Barrow*, 70.

§ 10. Parties Estopped.

An officer and salesman of the corporate developer of a subdivision who is without authority to make conveyance, with or without restrictive covenants and who later individually acquires a lot in the subdivision free from restrictive covenants, is not estopped to deny the existence of such restrictions as to his lot as against owners of other lots in the subdivision whose deeds contain no stipulation binding the developer to insert like restrictions in deeds to other property in the subdivision. *Turner v. Glenn*, 620.

EVIDENCE.

§ 1. Judicial Notice.

The courts will take judicial notice of the political subdivisions of the State and will note the judicial districts in which the respective counties lie. *Laundry v. Underwood*, 152.

Courts cannot take judcial notice that mineral interest in lands is by its nature indivisible. *Mineral Co. v. Young*, 287.

§ 22. Cross-Examination.

In this action on a policy of automobile collision insurance, insurer defended solely on the ground that plaintiff insured was not the owner of the car. *Held:* Cross-examination of insured as to the previous ownership of the car and previous wrecks involving the car and previous cancellations of insurance thereon was not germane to the controversy and was properly excluded, the rule that a party has the absolute right to cross-examine an adverse witness being limited to matters testified to in the examination-in-chief which are germane to the controversy. *Motor Co. v. Ins. Co.*, 168.

§ 29. Evidence at Former Trial or Proceedings.

In a civil action for assault and battery against the wrongdoer and his alleged principal, testimony as to what the individual defendant swore to in narrating the occurrence upon a previous prosecution against him for assault is competent against him individually, but is incompetent as substantive evidence against the principal. *Howell v. Harris*, 198.

EVIDENCE—*Continued.*

§ 32. Transactions or Communications With Decedent.

A party, as witness in his own behalf, may not testify against the administrator of a deceased person as to transactions with the deceased which are essential or material in establishing liability against the estate. C. S., 1795. *Davis v. Pearson*, 163.

In this action against an administrator to recover for personal injuries, defendant filed answer alleging that at the time of the accident causing injury to plaintiff and death of intestate, plaintiff and not intestate was driving the car. *Held:* Plaintiff's testimony that he was unable to drive a car and that at the time of the accident he and one other person were in the car, when taken in connection with other evidence tending to show that intestate was such other person and customarily drove the car, is within the prohibition of C. S., 1795, as being of a transaction with a deceased person material in establishing liability on the part of the estate. *Ibid.*

§ 39. Parol Evidence Affecting Writings.

Preliminary parol negotiations are varied by and merged in a subsequent written agreement between the parties, not only as a rule of evidence but also as a matter of substantive law. *Williams v. McLean*, 504.

Where, in an action involving the rights of the parties under an insurance agency contract, it appears that the contract was in writing and that the practice of the agent in remitting for premiums collected "was by agreement with the company," the admission of parol evidence as to the terms of the written agreement must be held for reversible error when the contract is not in the record. *Lucas v. Barrow*, 690.

§ 41. Hearsay Evidence in General.

Testimony of an illiterate witness as to the contents of the instrument in question as gathered by the witness from the reading of the instrument by another is hearsay and is incompetent to prove the contents of the alleged lost instrument. *Teague v. Wilson*, 241.

Hearsay evidence may be defined as evidence without the safeguards of having the declarant under oath and subject to cross-examination, and written as well as parol evidence may be objectionable as hearsay. *Jackson v. Parks*, 680.

In an action for abuse of process, based upon defendant's acts in having the plaintiff wrongfully confined in an insane asylum, a letter written to plaintiff by one in authority in plaintiff's church, stating in substance that plaintiff's confinement was unjust and had destroyed plaintiff's usefulness and possibility of obtaining employment in further ministerial work in the church, is hearsay and highly prejudicial, and entitles defendant to a new trial. *Ibid.*

§ 42b. Res Gestæ.

Testimony as to declarations made two days and one day before declarant made a trip on which he was fatally injured is incompetent to show declarant's purpose in making the trip, since the statements, not having been made at the time of and not being immediately connected with the actual departure, are not a part of the *res gestæ*. *Gassaway v. Gassaway & Owen, Inc.*, 694.

§ 42c. Admissions by Parties or Others Interested in Event.

The fact that the owner of the bus involved in the collision in suit went to the house where intestate was then lying in a critical condition from injuries received in the accident, and stated in talking to other persons there in the hearing of intestate's mother that he was going to get a better bus and would

EVIDENCE—*Continued.*

pay for any damage he did, does not constitute an admission of liability on his part, since the statement was not made to intestate or to anyone in a representative capacity, and since the statement did not amount to an admission of liability, but only that defendant was willing to pay damages for which he was responsible. *Peoples v. Fulk*, 635.

§ 42d. Admissions and Declarations by Agents.

Narration of occurrence by agent in former prosecution against him for assault *held* competent against agent in subsequent civil action, but as to principal it was hearsay and incompetent as substantive evidence to prove agency or scope of authority. *Howell v. Harris*, 198.

§ 46. Subjects of Opinion Evidence by Nonexperts.

Nonexpert witness may testify as to insured's inability to follow gainful occupation. *Edwards v. Junior Order*, 41.

EXECUTORS AND ADMINISTRATORS.

§ 2b. Appointment of Administrator for Nonresident Dying in this State.

Evidence *held* to sustain finding that nonresidents died intestate in North Carolina leaving *bona notabilia* here. *In re Administration of Franks*, 176.

C. S., 65 (a), merely provides that a debtor owing the sum of $300 or less to an estate for which no administrator has been appointed may relieve himself of such debt by paying the amount thereof to the clerk of the Superior Court and the statute does not have the effect of fixing the sum of $300.00 as *bona notabilia* in determining jurisdiction of the clerk to appoint an administrator for a person not domiciled in this State who dies leaving assets herein. *Ibid.*

§ 13a. Nature and Grounds of Remedy of Selling Lands to Make Assets.

An administrator cannot maintain an action against his intestate's grantee to declare the estate conveyed forfeited upon the contention that the grantee had breached the condition subsequent in the deed, and that sale of the land was necessary to pay debts of the estate, the heirs at law not being parties and the requirements of a petition to sell lands to make assets not being set forth. *Barkley v. Thomas*, 341.

§ 13b. Application for Order to Sell Lands to Make Assets.

A petition for the sale of lands to make assets to pay debts of the estate must set forth the amount of debts outstanding against the estate, the value of the personal estate and the application thereof, a description of all the legal and equitable real estate of the decedent with the estimated value thereof, and the names, ages, and residences, if known, of the devisees and heirs at law, C. S., 79, and further the devisees and heirs at law must be made parties to the proceedings, C. S., 80. *Barkley v. Thomas*, 341.

§ 16. Priorities.

Priorities in payment of debts are fixed by statute, and therefore when it is determined that note secured by deed of trust constituted valid claim, whether lien of deed of trust was erroneously canceled becomes moot. *Rodman v. Stillman*, 361.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 17. Filing of Claim.

Where an administrator, knowing that his appointment is at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigates and ascertains that the judgment has not been paid, and thereafter institutes proceedings to sell the lands of intestate to make assets to pay the judgment, claim on the judgment has been filed and admitted by the administrator within the meaning of C. S., 412. *Rodman v. Stillman*, 361.

§ 26. Final Account and Settlement.

This action was instituted by a trustee alleging the termination of the trust and praying that his final account be settled under orders of the court and that he be discharged. Plaintiff alleged that he was the duly appointed, qualified and acting trustee under the will. The administrator of one of the beneficiaries named in the will filed demurrer contending that the plaintiff did not have the capacity to sue in that the will appointed an executor and contained no authority for the appointment of a trustee. *Held:* Since the word "duly" means according to legal requirements, and the demurrer admitted plaintiff's allegation that he was the duly appointed, qualified and acting trustee, the question of the capacity of the plaintiff to sue cannot be raised by demurrer, no defect or incapacity of plaintiff to sue appearing upon the face of the complaint. C. S., 517. *Cheshire v. First Presbyterian Church*, 393.

FALSE IMPRISONMENT.

§ 1. Nature and Essentials of Right of Action.

False imprisonment is the deprivation of one's liberty without legal process. *Parrish v. Hewitt*, 708.

FALSE PRETENSE.

§ 1. Nature and Elements of the Crime.

The offense of false pretense is a misrepresentation by a writing, words or acts of a subsisting fact which is calculated to deceive, which does deceive and is intended to deceive, by means of which one man obtains value from another without compensation. *S. v. Howley*, 113.

In a prosecution for false pretense it is not necessary that the party deceived should have relied solely upon the misrepresentation, it being sufficient if the misrepresentation is material and is a proximate and immediate inducement to the execution of the contract or transaction in question. *Ibid.*

§ 2. Prosecution and Punishment.

An indictment charging that defendants knowingly and falsely represented to a bank that all bills for materials and labor used in the renovation of their building had been fully paid, that upon such representations defendants obtained a loan from the bank in a specified sum secured by a mortgage on the building, whereas in truth defendants then owed money for labor and materials, and that by means of such false pretense defendants knowingly and designedly obtained from the bank the specified sum of money with intent then and there to defraud, *is held* sufficient to charge the offense of false pretense defined by C. S., 4277. *S. v. Howley*, 113.

In a prosecution for obtaining a mortgage loan by misrepresenting that bills for all labor and materials for the renovation of the building on the premises had been paid, such misrepresentation is material in view of the statutory

liens of laborers and materials furnishers, C. S., 2433, and the fact that the mortgagee had the property appraised and obtained an attorney's certificate of title does not show that the mortgagee did not rely upon the misrepresentation, there being no notice of any unpaid bills for labor and materials on file of public record and there being testimony of the president of the mortgagee that it relied upon the misrepresentation. *Ibid.*

FOOD.

§ 4. Nature and Grounds of Liability of Manufacturer to Consumer.

The basis of liability of a manufacturer to a consumer for foreign deleterious substance in prepared articles is negligence and not implied warranty, and the doctrine of *res ipsa loquitur* does not apply. *Caudle v. Tobacco Co.*, 105.

§ 6b. Competency and Relevancy of Evidence in Consumer's Action for Harmful, Deleterious Substances.

Plaintiff's witness testified to the effect that within two months of plaintiff's injury, the witness found a foreign substance in a plug of tobacco manufactured by defendant. *Held:* It was competent for the witness to further testify that the foreign substance looked like a rat's claw or squirrel's foot, and objection on the ground that the description was opinion evidence from an unqualified witness, is untenable. *Caudle v. Tobacco Co.*, 105.

§ 6c. Sufficiency of Evidence in Consumer's Action for Harmful, Deleterious Substance in Food.

Plaintiff's evidence tended to show that she suffered serious personal injury when she bit down on a piece of chewing tobacco which contained a fishhook, that the tobacco was manufactured by defendant and purchased through a retailer. Plaintiff also offered a witness who testified that within two months of the time of plaintiff's injury, he was taking a chew of the same brand of tobacco manufactured by defendant and discovered therein a foreign substance which appeared to be a rat's claw or squirrel's foot. *Held:* The evidence is sufficient to take the case to the jury upon the issue of negligence. *Caudle v. Tobacco Co.*, 105.

§ 7. Liability of Manufacturer to Consumer for Condition and Preservation of Food.

Plaintiff's evidence tended to show that he was a retailer and bought lard from defendant, that he took a bucket of the lard home for personal use, that the lard was rancid and smelled like carrion, that he was injured when he ate biscuits made of the lard, that when the biscuits were opend the "odor knocked you down." *Held:* Defendant's motion to nonsuit on the cause of action sounding in tort should have been allowed, if not upon the issue of negligence for want of evidence as to how the lard was manufactured or what caused it to be bad or when it became rancid, then upon the issue of contributory negligence. *Walker v. Packing Co.*, 158.

§ 16. Liability of Manufacturer to Retailer—Condition and Preservation of Food.

Evidence that a retailer bought lard from a manufacturer, that the lard, although white and smooth on top in the container buckets, was rancid and spoiled underneath, *is held* sufficient to support a recovery on a cause of action for breach of implied warranty to the extent of the amount paid for the lard. *Walker v. Packing Co.*, 158.

FORGERY.

§ 2. Indictment and Warrant.

Since forgery is the fraudulent making or altering of an instrument to the prejudice of another man's rights, a warrant charging that the payee of a check endorsed same and received the proceeds does not charge the crime of forgery, notwithstanding allegations that the endorsement was felonious and unlawful and that the payee failed to account to the prosecuting witness. *Parrish v. Hewitt*, 708.

FRAUD.

§ 3. Past or Subsisting Fact.

Ordinarily, an unfulfilled promise cannot be made the basis of an action for fraud, but when the promisor, at the time of making the promise, has a present intent not to fulfill same when the time for performance arrives, so that the promise constitutes a misrepresentation of a subsisting fact, such promise will support an action for fraud when made with the intention that it should be acted upon and is acted upon to the promisee's injury. *Williams v. Williams*, 806.

Evidence *held* insufficient to show that at time of making promise the promisor had present intent not to fulfill same. *Ibid.*

§ 5. Reliance on Misrepresentation and Deception.

It is duty of party signing instrument to ascertain its contents unless prevented from doing so by fraud. *Williams v. Williams*, 806.

§ 7. Waiver and Abandonment of Fraud.

The mere fact that a creditor accepts part payment to be credited on the debt and agrees as to the balance then due does not preclude him from thereafter asserting that the original debt was for property obtained by fraud effected by means of worthless checks given the creditor by the debtor, the acceptance of part payment and the agreement as to the balance due not constituting a novation. *Growers Exchange v. Hartman*, 30.

FRAUDS, STATUTE OF.

§ 1. Purpose and Operation of Statutes of Fraud in General.

The purpose of the statute of frauds is to prevent fraud upon individuals charged with participation in transactions coming within its purview, and not to render the parol contracts prescribed void as against public policy, and therefore the defense of a statute of frauds must be properly invoked by the parties seeking its protection. *Allison v. Steele*, 318.

§ 2a. Sufficiency of Writing.

A deed, to be valid under the statute of frauds, must contain a description of the land either certain in itself or capable of being made certain by resort to matters *aliunde* to which the description refers. *Stewart v. Cary*, 214.

§ 3. Pleading and Invoking Defense of Statute.

Defendants denied the contract declared on, offered evidence that they did not enter into the contract, but did not object to plaintiff's parol evidence in support of the contract alleged. In making up the case on appeal, defendants excepted to the charge for that the court failed to charge the law relative to the statute of frauds, C. S., 564, and contended on appeal that plaintiff's evidence disclosed a contract to answer for the debt or default of another.

FRAUDS, STATUTE OF—*Continued.*

Held: Defendants' exception to the charge cannot be sustained, the court having had no notice that defendants would rely upon the statute, and defendants having waived the defense of the statute by failing to properly present such defense. *Allison v. Steele*, 318.

§ 9. Contracts Affecting Realty.

Easement is interest in land, and therefore may not be released by parol, except upon principle of estoppel, but may be abandoned. *Miller v. Teer*, 605.

The servitude imposed by restrictive covenants is a species of incorporeal right constituting an interest in land within the purview of the statute of frauds, and a restrictive covenant may not rest in parol. *Turner v. Glenn*, 620.

Since restrictive covenants may not rest in parol, oral statements by officers of the corporate owner of a subdivision tending to show a general scheme of development are incompetent to establish restrictive covenants. *Ibid.*

GAMING.

§ 5. Sufficiency of Evidence and Nonsuit.

Evidence that officers of the law entered defendant's house and found defendant and others seated at a table with poker chips in front of them, that one of the men had playing cards in his hand, and that numerous packs of playing cards were found in the room, although raising a suspicion of defendant's guilt, is insufficient to establish that a game of chance upon which money or other thing of value was bet was being played or had been played, and nonsuit should have been entered upon the charges of maintaining a gaming house and gambling. *S. v. Goodman*, 250.

GRAND JURY.

§ 1. Qualification and Selection of Grand Jurors.

Ch. 189, Public-Local Laws 1937, providing that the Board of County Commissioners of Wilson County shall select grand jurors in the county "in the manner prescribed by law," merely empowers the Board of Commissioners to draw grand juries in the manner prescribed by the general law, C. S., 2333, and does not alter the method of election, challenge, discharge, etc., and there being no provision in the Constitution prescribing or proscribing any particular method of selection, the Act is a valid exercise of legislative power. *S. v. Peacock*, 63.

HABEAS CORPUS.

§ 2. To Obtain Freedom from Unlawful Restraint.

Even conceding the disqualification of a justice of the peace because of the fee system, the judgment of such justice in a criminal prosecution would be voidable and not void, and therefore such judgment would stand until its invalidity is declared in a proper proceeding for that purpose, and it cannot be collaterally attacked or challenged on *habeas corpus*. *In re Steele*, 685.

Further, the objection was waived by failure to assert same at the trial. *Ibid.*

§ 8. Review.

As no appeal lies from a judgment rendered on return of writ of *habeas corpus*, except in cases involving the custody and care of children, a review is permissible by *certiorari*. *In re Steele*, 685.

HIGHWAYS.

§ 1d. Power of Highway Commission to Relocate and Abandon Highways.

Where the State Highway Commission, in the interest of public safety, builds an overpass and relocates a highway to cut out dangerous curves and an inadequate underpass, it has the authority to order the underpass closed, if not by authority expressly conferred in ch. 46, sec. 1, Public Laws 1927, then in the exercise of the police power by an appropriate agency of the State. *Mosteller v. R. R.*, 275.

§ 2. Individual Liability of Officers and Agents of Highway Commission.

State highway engineer may not be held liable for negligence in failing to remove obstruction unless he acts corruptly or maliciously or is guilty of wanton negligence. *Wilkins v. Burton*, 13.

§ 12b. Rights of Owners Along Abandoned Road to Ingress and Egress to New Road.

The statute providing that highways abandoned by the State Highway Commission become neighborhood public roads merely fixes the status of such roads as public roads and does not invest any private easement in owners of property abutting the abandoned road, their right to the continued use of such road being the same as that of the public generally. *Mosteller v. R. R.*, 275.

The right of owners of property abutting abandoned road to have road kept open for access to new road is based upon necessity. *Ibid.*

When one end of abandoned road is kept open for ingress and egress to new road, property owners along abandoned road have no right to insist that other end of abandoned road also be kept open for their convenience. *Ibid.*

§ 13. Neighborhood Public Roads.

Where the State Highway Commission, in the interest of public safety, builds an overpass and relocates a short section of the road in order to cut out dangerous curves and an inadequate underpass, and thereafter tears up the section of old road lying on one side of the underpass, the short section of old road is not a highway abandoned by the State Highway Commission which remains open and in general use by the public within the purview of ch. 302, Public Laws 1933, Michie's Code, 3838 (b), and does not become a neighborhood public road. *Mosteller v. R. R.*, 275.

§ 20. Negligent Injury to Property in Constructing Highways.

Plaintiffs' building was damaged by a cave-in resulting from alleged negligence in excavation work incident to the construction of a highway overpass. *Held:* Plaintiffs were not relegated to a claim for damages against the Highway Commission as for a taking of their property under Michie's N. C. Code, 3846 (bb), and the demurrer of the contractor for the Highway Commission in plaintiffs' action in tort was properly overruled. *Broadhurst v. Blythe Bros. Co.*, 464.

A contractor performing work under a contract with the State Highway Commission is liable for injuries proximately caused by its negligence in the performance of the work. *Ibid.*

Evidence of negligence of contractor of State Highway Commission in performing contract calling for excavating and shoring up of sides of cut for railroad underpass, resulting in cave-in damaging plaintiff's building, *held* sufficient for jury. *Ibid.*

HOMICIDE.

§ 3. Murder in the First Degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. C. S., 4200. *S. v. Starnes*, 384.

§ 5. Murder in the Second Degree.

Murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation. *S. v. Starnes*, 384.

§ 11. Self-Defense.

Defendant's evidence was to the effect that he and his wife and son went to live in the household of his father-in-law until defendant should be able to get a job, his father-in-law having given permission, that after a stay of several weeks he got into an argument with his mother-in-law, who sent for two of her sons, that in the controversy which ensued defendant stated he didn't want any trouble and would leave in five minutes, that before his wife could get his clothes his brothers-in-law assaulted him, and that in the ensuing fight he killed one of them. *Held:* Defendant was entitled to have the court charge the jury on his evidence upon his right of self-defense in case of assault while he was in a place where he had a right to be. *S. v. Absher*, 126.

§ 12. Defense of Others.

Evidence *held* not to present defendant's right to kill in defense of his wife. *S. v. Shepherd*, 377.

§ 16. Presumptions and Burden of Proof.

Where an intentional slaying of a human being with a deadly weapon is admitted or adduced by the evidence, nothing else appearing, the law presumes malice, constituting the offense murder in the second degree, and the burden is then upon defendant to show to the satisfaction of the jury facts and circumstances sufficient to reduce the grade of the offense from murder in the second degree to manslaughter, or to excuse it altogether on the plea of self-defense. *S. v. Beachum*, 531.

§ 18a. Dying Declarations.

The dying declaration of the deceased *held* properly admitted in evidence upon authority of *S. v. Jordan*, 216 N. C., 356. *S. v. Thomas*, 34.

Where a dying declaration is admitted in evidence and the defendant seeks to attack the credibility of the deceased, the State's objection to a question as to the general reputation of the deceased for truth and veracity is properly sustained. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of murder in the second degree *held* sufficient. *S. v. Thomas*, 34.

Where the State introduces evidence that in a fight between defendant and deceased, defendant stabbed deceased with a knife, inflicting mortal injury, the court correctly submits to the jury the question of defendant's guilt of murder in the second degree under the presumption arising from an intentional killing with a deadly weapon, notwithstanding defendant's plea of self-defense. *S. v. Beachum*, 531.

§ 27b. Charge on Presumptions and Burden of Proof.

In this homicide prosecution the court charged the jury that it might return a verdict of guilty of each of the three degrees of homicide, "or not guilty, as

HOMICIDE—*Continued.*

you may find the facts to be beyond a reasonable doubt." *Held:* The charge placed the burden upon defendant to prove his innocence beyond a reasonable doubt, and the charge must be held for prejudicial error notwithstanding that in other portions of the charge the court correctly instructed the jury upon the presumption of innocence and that the burden was on the State to prove defendant guilty beyond a reasonable doubt. *S. v. Floyd*, 530.

§ 27f. Charge on Right of Self-Defense or Defense of Others.

Evidence *held* to require instruction on right of self-defense when defendant is assaulted where he has a right to be, and a charge limiting the jury solely to the theory that *eo instante* defendant was ordered to leave he became a trespasser and had no right to resist the force used in ejecting him, is erroneous. *S. v. Absher*, 126.

Evidence *held* not to present question of defendant's right to kill in defense of his wife, and therefore failure of court to charge law thereon was not error. *S. v. Shepherd*, 377.

§ 27h. Form and Sufficiency of Instructions on Degrees of Crime.

Where the State introduces evidence that in a fight between defendant and deceased, defendant stabbed deceased with a knife, inflicting mortal injury, the court correctly submits to the jury the question of defendant's guilt of murder in the second degree under the presumption arising from an intentional killing with a deadly weapon, notwithstanding defendant's plea of self-defense. *S. v. Beachum*, 531.

§ 30. Appeal and Review.

In a homicide prosecution an instruction that murder in the first degree is the unlawful killing of a human being without justification in law, which, plus malice, constitutes murder in the second degree, must be held for reversible error notwithstanding that the court thereafter correctly defined murder in the first degree and murder in the second degree, since the charge contains conflicting instructions upon a material point. *S. v. Starnes*, 384.

Conflicting instructions on burden of proof must be held for prejudicial error. *S. v. Floyd*, 530.

Where the jury returns a verdict of guilty of manslaughter, defendant has no just cause to complain that the court submitted to the jury the question of his guilt of murder in the second degree. *S. v. Beachum*, 531.

HUSBAND AND WIFE.

§ 4c. Liability of One Spouse on Contract With Third Person Executed by the Other.

In this action seeking to hold husband and wife liable upon the husband's alleged agreement to be responsible for materials furnished a contractor for improvements made upon their land, there was no evidence that the wife consented and procured her husband to make the contract, and therefore the wife's motion to nonsuit should have been allowed. *Allison v. Steele*, 318.

§ 6. Liability for Negligent Injury to Spouse.

A wife, who is a guest in her husband's car, is under the same duty to exercise due care for her own safety as any other guest. *Bogen v. Bogen*, 648.

§ 11. Creation of Estates by Entireties.

Deed failing to name wife in premises or granting clause, but naming her only in *habendum* does not create estate by entireties. *Bryant v. Shields*, 628.

HUSBAND AND WIFE—*Continued.*

§ 12b. Acquisition of Outstanding Title by Tenant by Entireties Adverse to Cotenant.

Husband may not procure foreclosure of land held by entirety and acquire title at sale adverse to wife. *Hatcher v. Allen*, 407.

When husband inequitably acquires title at foreclosure of lands formerly held by entireties, the wife's right to have him declared a trustee is not dependent upon her having paid a part of the original purchase price. *Ibid.*

An estate by entirety is not terminated by acts of the parties constituting grounds for absolute divorce, and therefore the husband's allegations that the wife abandoned him and committed other acts causing their separation and ultimate divorce is no defense to the wife's action to have him declared a trustee upon allegations that he purposely permitted deeds of trust on the lands held by them by entirety to become in default in order to acquire the title by purchase at the foreclosure sale. In the present case the allegedly fraudulent foreclosure sale took place prior to the granting of the decree for absolute divorce, so that the estate by entirety was not changed into a tenancy in common until after the sale. *Ibid.*

INDIANS.

§ 1. Status and Rights in General.

As a result of the Treaty of Peace with England the territory embraced within the thirteen states, together with land not previously granted, passed to these States subject to the possessory rights of the Indians over the land which they occupied. *S. v. McAlhaney*, 387.

Notwithstanding the guardianship relation existing between the Federal Government and the Indians, Indians residing in North Carolina are citizens of this State and remain subject to its laws. *Ibid.*

§ 4. Jurisdiction and Punishment for Crime.

Our courts have jurisdiction of a prosecution of a white man for assault upon an Indian committed upon an Indian reservation, which jurisdiction is not ousted by the enactment of sec. 213, Title 25, U. S. C. A., since the Federal Act does not give the Federal Government exclusive jurisdiction, and could not interfere with the exercise of the police powers of the State. *S. v. McAlhaney*, 387.

INDICTMENT AND WARRANT.

§ 2. Duly Constituted Grand Jury.

Defendant's motion to quash on the ground that the grand jury returning the bill of indictment was selected under the provision of ch. 189, Public-Local Laws 1937, should have been overruled, since a party litigant does not have the right to select jurors, but only to challenge or reject them, and the Act relates only to procedure and not to the number or qualifications of jurors or to the composition of the grand jury. C. S., 2335. *S. v. Peacock*, 63.

§ 9. Charge of Crime.

An indictment is sufficient if it expresses the charge against defendant in a plain, intelligent and explicit manner, and contains sufficient matter to enable the court to proceed to judgment, and defendants' motion to quash will not be allowed for any informality or refinement. C. S., 4623. *S. v. Howley*, 113.

An indictment for a statutory crime must set forth all the facts and circumstances essential to bring the case within the statutory definition of the offense. *Ibid.*

INDICTMENT AND WARRANT—*Continued.*

A warrant alleging that defendant on a particular day in the designated county "did unlawfully, and willfully aid and abet in prostitution and assignation contrary to the form of the statute and against the peace and dignity of the State" follows the language of the statute, C. S., 4358 (7), and is sufficient to charge the offense therein proscribed. *S. v. Johnson*, 773.

§ 17. Bill of Particulars.

Where a warrant is sufficient in law to charge the offense, it is incumbent upon defendant, if he desires further information, to request a bill of particulars. N. C. Code, 4613. *S. v. Johnson*, 773.

§ 22. Sufficiency of Indictment to Support Conviction of Less Degrees of Crime Charged.

An attempt to commit barratry is an offense in this State and a defendant may be convicted of an attempt to commit the offense upon an indictment charging the common law offense of barratry. C. S., 4640. *S. v. Batson*, 411.

INJUNCTIONS.

§ 11. Continuance, Modification, and Dissolution of Temporary Orders.

In an action for permanent injunction, the temporary restraining order is properly dissolved upon the hearing of the motion to show cause when it is made to appear that plaintiffs are not entitled to the relief sought, but it is error to dismiss the action, and the taxing of costs against plaintiffs at that time is at least premature, since the action can be properly dismissed only at term. *Mosteller v. R. R.*, 275.

Where, upon a hearing of an order to show cause why the temporary restraining order should not be continued to the hearing, the court finds facts supporting its conclusions of law that plaintiffs are entitled to the relief sought, its order continuing the temporary injunction to the hearing is without error. *MacRae & Co. v. Shew*, 516.

Upon the hearing of an order to show cause why a temporary restraining order should not be continued to the hearing, the court is without jurisdiction to adjudicate the merits of the controversy, nor may such jurisdiction be conferred by consent of the parties, and it is error for the court to grant plaintiffs a permanent injunction and tax defendants with costs. *Ibid.*

INSURANCE.

IV. The Contract in General
13a. General Rules of Construction. Stanback v. Ins. Co., 494.
VI. Life Insurance
30c. Evidence and Proof of Payment of Premiums. Cauley v. Ins. Co., 304.
31c. Avoidance of Policy for Misrepresentation or Fraud. Cato v. Hospital Care Assn., 479.
34. Disability Clauses.
a. Construction and Operation in General. Edwards v. Junior Order, 41; Medlin v. Ins. Co., 334.
b. Notice and Proof of Disability and Waiver of Notice. Edwards v. Junior Order, 41.
c. Competency and Sufficiency of Evidence of Disability. Edwards v. Junior Order, 41; Medlin v. Ins. Co., 334.
36e. Amount Due Upon Death of Insured. Stanback v. Ins. Co., 494.
VII. Accident and Health Insurance and Double Indemnity Clauses
38. Construction of Policies as to Risks Covered. Fletcher v. Trust Co., 148; Higgins v. Ins. Co., 243; Glenn v. Ins. Co., 672.
39. Provisions Limiting Liability on Accident Policies. Higgins v. Ins. Co., 243.
41b. Burden of Proof in Actions on Policies. Cato v. Hospital Care Assn., 479.
VIII. Liability and Collision Insurance
44b. Sole Ownership of Car Under Collision Policy. Motor Co. v. Ins. Co., 168.
48. Rights of Person Injured Against Liability Insurer. Sears v. Casualty Co., 9.

§ 18a. General Rules of Construction of Policies.

A contract of insurance will be construed from its four corners to ascertain and give effect to the intention of the parties as expressed in the language used, and its clear and unambiguous terms must be given their plain, ordinary and popular sense. *Stanback v. Ins. Co.*, 494.

While rules of punctuation may be used in construing an insurance contract to assist in determining the intent of the parties, the punctuation or absence of punctuation cannot control its construction as against the plain meaning of the instrument. *Ibid.*

§ 30c. Evidence and Proof of Payment.

That the payee of a check changed the name of the bank upon which the check was drawn without authority, resulting in the wrongful debit of insured's account by the bank so that the check given in payment of premium was wrongfully dishonored, *held* a permissible inference from the evidence and to sustain the verdict of the jury in favor of plaintiff beneficiary. *Cauley v. Ins. Co.*, 304.

§ 31c. Avoidance of Policy for Misrepresentations or Fraud.

Policy will not be forfeited for misrepresentations in application filled out by insurer's agent when insured has no knowledge thereof and was unable to read application. *Cato v. Hospital Care Assn.*, 479.

§ 34a. Construction and Operation of Disability Clauses.

Total permanent disability as used in disability clauses in life insurance policies means permanent disability rendering insured unable to perform with reasonable continuity the duties of his usual occupation or of any other occupation he is reasonably qualified physically and mentally, under all the circumstances, to pursue, and insured's ability to do odd jobs of comparatively trifling nature does not preclude recovery. *Edwards v. Junior Order*, 41.

An insured, even though permanently disabled, is not totally disabled within the meaning of a disability clause in a life insurance policy if he is able to engage with reasonable continuity in his usual occupation or in any occupation that he is physically and mentally qualified to perform substantially the reasonable and essential duties incident thereto. *Medlin v. Ins. Co.*, 334.

§ 34b. Notice and Proof of Disability and Waiver of Notice.

Insurer's denial of total and permanent disability is a waiver of the condition of the policy requiring proof of disability, since such denial is equivalent to a declaration by insurer that it will not pay though proof be furnished, and therefore insurer's objection to the evidence introduced by insured relating to proof of claim is immaterial. In this case insured testified without objection that he had filed proof of claim on blanks sent to him by insurer prior to the institution of the action. *Edwards v. Junior Order*, 41.

§ 34e. Competency and Sufficiency of Evidence of Disability.

Plaintiff insured introduced evidence that he suffered serious physical injuries in an accident, which he contended resulted in permanent total disability, that his life work was that of a farmer, but that he had worked for a tobacco warehouse for a short time before the accident. Insured also testified that his injuries incapacitated him for work at the warehouse, and there was no evidence to the contrary. *Held:* Nonexpert opinion evidence based upon personal observation of the witnesses that insured at no time since his injury

had been able to do with reasonable regularity the essential duties of a farmer, is competent, and insurer's objection thereto on the ground that the testimony related to only one occupation when the evidence discloses that the insured had two occupations, is untenable. *Edwards v. Junior Order*, 41.

Insured alleged total permanent disability resulting from an accident. *Held:* It was competent for insured to offer evidence, in addition to evidence of the disability pleaded, that he also had heart disease in order to show that he could not in a reasonable time equip himself to follow other similar occupations. *Ibid.*

In this action by insured to compel insurer to continue to pay him disability benefits under the provisions of the policy of insurance in suit, insured's own evidence, considered in the light most favorable to him, *is held* to show that notwithstanding insured's admitted permanent disability during the period in question, insured performed executive and supervisory duties in connection with his fireworks and trucking businesses, that his activities resulted in substantial profit and amounted to a great deal more than "odd jobs of a comparatively trifling nature," and therefore insured was not totally disabled within the terms of the disability clause in suit, and insurer's motion to nonsuit should have been allowed. *Medlin v. Ins. Co.*, 334.

§ 36e. Amount Due Upon Death of Insured.

Construing the contract of insurance in suit from its four corners, *it is held* that a limitation set forth in a subsequent part of the policy limiting insurer's liability to one-fourth the amount otherwise due if insured should die from pneumonia within twelve months from the date of the policy, applied to a prior provision that insurer should be liable only for one-half the amount of the policy if insured should die during the first six months the policy was in effect, and upon insured's death from pneumonia within six months from the date of the policy, insurer is liable only for one-eighth the face amount of the policy. *Stanback v. Ins. Co.*, 494.

§ 38. Construction of Policies of Accident, Health and Double Indemnity as to Risks Covered.

In construing double indemnity clauses in life policies, the terms "accidental death" and "death by external accidental means" are not synonymous, since the second term connotes not only that death be unforeseen and unexpected, but also that the means motivating or causing death be unusual, unforeseen, and fortuitous. *Fletcher v. Trust Co.*, 148.

A spinal anesthesia was administered insured preparatory to a gall bladder operation. The anesthetic affected the respiratory system and caused death. *Held:* Even though the death was accidental in that it was unforeseen and unexpected, the cause of death was the administration of the anesthetic, which was not accidental but was voluntarily authorized and intentionally given, and therefore the death was not caused by "external accidental means" within the terms of the policy in suit. *Ibid.*

A spinal anesthesia was administered insured preparatory to a gall bladder operation. Shortly thereafter insured's respiratory system was adversely affected, and, in the excitement caused by the sudden emergency, insured's head was lowered although the proper treatment would have been to raise the head in such circumstances. *Held:* Even conceding that the lowering of the head was accidental and produced death, the act of lowering the head left no

visible contusion or wound on the exterior part of insured's body, prescribed as a prerequisite to the recovery of double indemnity in the policy in suit. *Ibid.*

Evidence that the car in which insured was riding was forced off the highway by another car passing it on a curve, that after being forced off the highway it skidded on the shoulder of the road, struck a ditch and skidded on, against, over, and across a driveway bridge, that when it struck the ditch insured was thrown against the door which flew open, and that he fell out and was caught under the car and dragged 100 to 130 feet causing fatal injury, *is held* sufficient to show an accident to the automobile and that insured fell from the automobile as a proximate result thereof. *Higgins v. Ins. Co.*, 243.

A policy providing for weekly benefits for sickness so long as the policyholder remains totally disabled is a policy of general coverage for disability from sickness and will be construed to effectuate its primary purpose to provide such benefits, and subsequent subordinate limitations will be strictly construed against insurer, since they limit the scope and purpose for which the policy was taken out. *Glenn v. Ins. Co.*, 672.

A provision in a health policy that benefits thereunder would be paid only when insured has been confined to his or her bed or house for seven consecutive days describes the character and extent of illness covered, rather than a limitation upon insured's conduct. *Ibid.*

The policy in suit provided weekly benefits for sickness so long as insured remained totally disabled, but by later subordinate condition provided that weekly benefits for sickness would be paid only when insured had been confined to his bed or home for seven consecutive days. The action was submitted to the court by agreement, and the court found, upon supporting evidence, that after losing his job because of poor eyesight, insured stayed at home from worry some five or six weeks, but that since such time he had not been so confined, but had continued to be totally disabled. *Held:* The facts do not disclose such failure to meet the conditions of the policy as to confinement as would preclude recovery. *Ibid.*

This action on a policy providing for weekly benefits for sickness so long as insured should remain totally disabled was submitted to the court under agreement of the parties. *Held:* Evidence that insured's eyesight had been practically destroyed by disease or a complication of diseases sustains the court's finding that disease of the eye is sickness within the terms of the policy and that as a result of said sickness insured is totally disabled, since the word "sick" means "affected with disease." *Ibid.*

§ 39. Provisions Limiting Liability on Accident Policies and Conditions Precedent Thereto.

Evidence that prior to the accident the automobile was in good condition and that immediately after the accident a door was warped so that it would not shut easily, the door stop broken, the glass of the door cracked, and a fender dented and one of the running boards damaged *is held* competent upon the issue of whether the accident caused visible injury to the vehicle as required for recovery in the policy of accident insurance in suit, and was sufficient to be submitted to the jury upon that issue. *Sanderlin v. Ins. Co.*, 214 N. C., 362, cited and distinguished. *Higgins v. Ins. Co.*, 243.

§ 41b. Burden of Proof in Actions on Policies.

When insured introduces the certificate of insurance, offers evidence that the policy was kept in force by payment of premiums and that insured had

INSURANCE—*Continued.*

filed claim for loss covered by the insurance, insured establishes a *prima facie* case and insurer has the burden of proving defenses relied on by it. *Cato v. Hospital Care Assn.*, 479.

§ 44b. Sole Ownership of Car Under Collision Policy.

A certificate of title issued by the Department of Revenue some two months after the date in question is some evidence of title on the date in question when there is other evidence that application for the certificate was filled out by the dealer's bookkeeper two months prior to its date of issuance and that the certificate dated title as of that date and not the date of issuance. *Motor Co. v. Ins. Co.*, 168.

Charge *held* to sufficiently present insurer's defense that insured was not owner of car, and instruction that insurer admitted policy was in force was not error when charge is construed as a whole. *Ibid.*

§ 48. Rights of Person Injured or Damaged as Against Liability Insurer.

A party injured by the negligent operation of an automobile covered by a liability insurance contract can have no greater right against insurer under the contract than that of insured, and his rights are perforce limited by the terms and conditions of the policy. *Sears v. Casualty Co.*, 9.

Injured third party may not recover against insurer in liability policy, even under Virginia statute, when insured is not liable. *Ibid.*

INTOXICATING LIQUOR.

§ 8. Forfeitures.

An instruction that if the jury should find by the greater weight of the evidence that petitioner, the owner of a car seized while being used in the unlawful transportation of intoxicating liquor, aided her husband in attempting flight to avoid arrest, to answer in the affirmative the issue of petitioner's knowledge that the car was being used for the transportation of liquor, is error when petitioner testifies that she did not know her husband was transporting liquor and that she thought the sheriff was pursuing them to serve a capias on her husband for a past offense, there being no evidence inconsistent with such belief on the part of petitioner, and the credibility of petitioner's testimony being for the jury. *S. v. Ayres*, 161.

§ 9d. Sufficiency of Evidence and Nonsuit.

Evidence that empty jars smelling of liquor were found in defendant's house and that in a field some 200 yards from defendant's house on land belonging to another, traversed by two or three paths used by persons in the neighborhood generally, were found 52 pints of whiskey concealed, is insufficient to be submitted to the jury on the question of defendant's possession of intoxicating liquor, either actual or constructive, the circumstances disclosed by the evidence being such as to excite suspicion but being insufficient to exclude the rational conclusion that some other person may have been the guilty party. *S. v. Penry*, 248.

Testimony of two witnesses, only one of whom had been promised immunity, that they had bought liquor from defendant, *is held* sufficient to be submitted to the jury upon the charges of possession of liquor for the purpose of sale and illegal sale of liquor. *S. v. Johnson*, 252.

Circumstantial evidence *held* sufficient to show defendant's possession of intoxicating liquor for the purpose of sale. *S. v. Turner*, 437.

JUDGMENTS.

II. Judgments by Confession
5. Nature and Essentials. Land Bank v. Garman, 585.
VI. On Trial of Issues
17b. Conformity to Verdict and Pleadings, Supply Co. v. Horton, 373.
18. Time and Place of Rendition. Laundry v. Underwood, 152; Crow v. McCullen, 306.
VII. Docketing and Lien
21. Life of Lien. Lupton v. Edmundson, 188.
VIII. Validity and Attack
22b. Procedure to Attack. Wynne v. Conrad, 355; High v. Pearce, 266.
22d. Time During Which Attack May be Made. Wynne v. Conrad, 355.
22e. Setting Aside for Surprise and Excusable Neglect. Godwin v. Brickhouse, 40.
22g. Irregular Judgments. Wynne v. Conrad, 355.
22i. Erroneous Judgments. Wynne v. Conrad, 355.
24. Modification and Correction. Harriss v. Hughes, 473.
IX. Conclusiveness of Adjudication and Operation as Bar to Subsequent Action
29. Parties Concluded. Corp. Com. v. Bank, 48; Riddick v. Davis, 120; Current v. Webb, 425.
32. Operation of Judgments as Bar to Subsequent Action. Jefferson v. Sales Corp., 76; Current v. Webb, 425; Harshaw v. Harshaw, 145; Bryant v. Shields, 628.
35. Plea of Bar, Hearings and Determination. Current v. Webb, 425.
XII. Actions on Judgments
39. Actions on Domestic Judgments. Rodman v. Stillman, 361.
40. Actions on Foreign Judgments. Lockman v. Lockman, 95; Land Bank v. Garman, 585.

§ 5. Nature and Essentials of Judgments by Confession.

Plaintiff's record evidence disclosed that the order granting leave to plaintiff "to enter judgment by confession" specified that it was by virtue of the warrant of attorney and that the judgment was entered by the prothonotary on the note executed by defendants "with warrant of attorney." *Held:* Defendants' contention that the court vested plaintiff with authority to enter judgment by confession against defendants is untenable, since the record evidence discloses that the judgment was entered by the prothonotary in strict accord with the warrant of attorney and in compliance with the requirements for the rendition of such judgments in the State of Pennsylvania. *Land Bank v. Garman*, 585.

§ 17b. Conformity to Verdict and Pleadings.

It appeared that the court, acting upon its belief that the answers of the jury to the third and fifth issues were contrary to the evidence, intended to strike out the answers to these issues but inadvertently directed that the answers to the third and fourth issues should be stricken out, and rendered judgment upon the verdict as amended. *Held:* If the court was under the apprehension that the answers to the remaining issues, after striking out the third and fifth issues, entitled plaintiff to judgment, the court failed to strike out the answers to the third and fifth issues, and the judgment rendered is not in conformity with the answers to the issues and cannot be sustained. *Supply Co. v. Horton*, 373.

§ 18. Time and Place of Rendition.

Court may not make order substantially affecting rights of parties out of term and outside the district except by consent or unless authorized by statute. *Laundry v. Underwood*, 152.

A judgment signed out of term and out of the county by consent, when docketed, becomes a judgment as of the trial term. *Crow v. McCullen*, 306.

§ 21. Life of Lien of Judgment.

The life of the lien of a judgment is ten years from the date of its rendition in the Superior Court, C. S., 614, and an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the

statute is not interrupted at any time or in any manner by order restraining any proceeding on the judgment. *Lupton v. Edmundson*, 188.

The issuance of an execution does not prolong the life of the lien of a judgment. *Ibid.*

An action to enforce the lien of a judgment by condemning the land of the judgment debtor to be sold is not an action upon a judgment within the purview of C. S., 437 (1), prescribing the limitation of 10 years for an action on a judgment, but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the ten-year period prescribed by C. S., 614. *Ibid.*

§ 22b. Procedure to Attack Judgments.

The remedy to correct an erroneous judgment is by appeal; and the remedy against an irregular judgment is by motion in the cause made within a reasonable time. *Wynne v. Conrad*, 355.

An order entered by a court without jurisdiction of the subject matter is void *ab initio* and may be treated as a nullity, anywhere, and at any time. *High v. Pearce*, 266.

§ 22d. Time During Which Attack May Be Made.

After action had been pending some four years, during which defendant's motion to remove as a matter of right remained undisposed of, cause was calendared without notice to plaintiff and nonsuit entered for failure to prosecute. *Held:* Even conceding judgment was irregular, plaintiff's motion to set aside, made some five years after rendition, is barred by laches, notwithstanding that defendant procured inaction on part of plaintiff by promising to pay. *Wynne v. Conrad*, 355.

§ 22e. Setting Aside for Surprise and Excusable Neglect.

Where the trial court sets aside a judgment by default and inquiry rendered in defendant's favor upon his counterclaim for want of a reply thereto upon the court's finding, supported by evidence, that neither plaintiffs nor their counsel have been guilty of neglect, the order setting aside the default judgment will be upheld when it appears that the facts alleged in the complaint, if believed, constitute a meritorious defense, notwithstanding that the trial court failed to make specific finding to that effect. *Godwin v. Brickhouse*, 40.

§ 22g. Irregular Judgments.

An irregular judgment is one rendered contrary to the course and practice of the court. *Wynne v. Conrad*, 355.

§ 22i. Erroneous Judgments.

An erroneous judgment is one rendered contrary to law. *Wynne v. Conrad*, 355.

§ 24. Modification and Correction.

By consent judgment it was ordered that a commissioner selected by agreement should sell the property to satisfy the debt secured by deed of trust, and that the cause should be retained for further orders relative to a resale by the commissioner. The commissioner sold the property in accordance with the order, but reported that the last and highest bid was less than the value of the property and recommended a resale. *Held:* The consent judgment was interlocutory, and the judge of the Superior Court had authority, without

consent of the parties, to order a resale, and upon its finding that the commissioner appointed in the consent order was related to one of the trustors, to appoint substitute commissioners to conduct the second sale. *Harriss v. Hughes*, 473.

§ 29. Parties Concluded.

An order was entered directing the receiver of an insolvent bank to pay petitioner's claim out of any unclaimed funds in hand belonging to the receivership. The University of North Carolina, which later claimed all unclaimed funds in the hands of the receiver, was not given notice of the petition or of the order. *Held:* Ordinarily, only parties and privies are bound by a judgment, and the order is not *res judicata* as to the University. *Corp Com. v. Bank*, 48.

When trustors are not made parties to action by purchaser at foreclosure sale to obtain authority for infant trustee to sell, troustors are not bound by judgment rendered therein. *Riddick v. Davis*, 120.

A judgment *in rem* is conclusive not only upon the parties and their privies but, under the maxim *res judicata pro veritate accipitur*, is also conclusive upon those having an interest in the subject matter. *Current v. Webb*, 425.

Judgment that defendant is nonresident and under sec. 4, ch. 217, Public Laws 1937, was exempt from service, held conclusive in a subsequent action by another party injured in same collision. *Ibid.*

§ 32. Operation of Judgments as Bar to Subsequent Action in General.

A judgment is a bar to a subsequent action between the parties and their privies as to all issuable matters contained in the pleadings, and also as to those material and relevant matters within the scope of the pleadings which the parties, in the exercise of due diligence, could, and should, have brought forward, but the estoppel does not embrace matters which might have been brought into the litigation, but which, in fact, were neither joined nor embraced in the pleadings. *Jefferson v. Sales Corp.*, 76.

The doctrine of *res judicata* applies regardless of whether the prior judgment was rendered by the same court or was rendered by the Superior Court of another county. *Current v. Webb*, 425.

A final judgment judicially determining a particular fact involved is conclusive upon the parties or their privies as to such fact in any subsequent proceeding, whether involving the same subject matter or not, when such fact is again in issue between them. *Harshaw v. Harshaw*, 145.

A judgment determining the existence of a material fact in controversy is conclusive upon the parties and their privies as to such fact whenever it is material in a subsequent action between them, regardless of whether the subject matter of the action is the same or not. *Current v. Webb*, 425.

A final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter. *Bryant v. Shields*, 628.

Where the widow in proceedings for allotment of dower in which the executor and heirs-at-law are made parties, describes a particular tract of land which she avers was owned by her husband in fee simple, and asks that her dower be allotted therein, and her dower is assigned as prayed, and allotment confirmed by proper decree, the widow, and after her death her executor, is estopped from asserting that the tract of land was owned by entireties and that she acquired title by survivorship, the doctrine of *res judicata* being applicable to proceedings for allotment of dower. *Ibid.*

JUDGMENTS—*Continued.*

§ 35. Plea of Bar, Hearings and Determination.

When appeals from separate judgments are heard together and first judgment is conclusive upon parties in second action, Supreme Court will apply doctrine of *res judicata*. *Current v. Webb*, 425.

§ 39. Actions on Domestic Judgments. (Limitation of action on judgment against administrator of judgment debtor see Limitation of Action § 10.)

An action on a judgment may be commenced at any time within ten years from the date of its rendition. C. S.. 437 (1). *Rodman v. Stillman*, 361.

§ 40. Actions on Foreign Judgments.

Action may be maintained on foreign decree for alimony as to installments due when court rendering decree is without power to modify it as to accrued installments. *Lockman v. Lockman*, 95.

Prayer that foreign judgment sued on be adopted as judgment of our court to same extent as though originally entered here, *held* not demurrable, since relief to which party is entitled is determined by allegations and not prayer for relief. *Ibid.*

A judgment by confession entered upon a warrant of attorney in a court of another state in accordance with the laws of such state comes within the protection of the Full Faith and Credit Clause of the Federal Constitution, Art. IV, sec. 1, and must be recognized in this State even though rendered without service of process or appearance other than that pursuant to the warrant itself. *Land Bank v. Garman*, 585.

In an action instituted in the State of Pennsylvania to recover a deficiency judgment on a mortgage note executed in 1918, judgment by confession was rendered therein upon a warrant of attorney in compliance with its laws. Plaintiff instituted this action here upon the Pennsylvania judgment. *Held:* The judgment must be given full force and effect under the provision of the Federal Constitution, and defendants' contention that the foreclosure of the mortgage was irregular and that the land was sold to plaintiff at an unconscionable price cannot be considered, since such contentions are precluded by the deficiency judgment sued on. *Ibid.*

This action was instituted on a deficiency judgment rendered by a court in the State of Pennsylvania. Subsequent to the judgment of our Superior Court in favor of plaintff, the *feme* mortgagor had the judgment of the State of Pennsylvania stricken from the record in that state pursuant to its laws permitting a married woman to open up a judgment against her to show that she signed the instrument upon which the judgment is based as surety. *Held:* It would be manifestly unjust to affirm the judgment against the *feme* defendant upon a judgment of the State of Pennsylvania which had been stricken out as to her in that state, and the Supreme Court on appeal will grant the *feme* defendant a new trial. *Ibid.*

JUSTICES OF THE PEACE.

§ 1. Nature of Office.

The office of justice of the peace is provided for and vouchsafed in the Constitution. Art. IV, sec. 2. *In re Steele*, 685.

JUSTICES OF THE PEACE—*Continued.*

§ 3. Civil Jurisdiction.

Where materials of a value in excess of two hundred dollars are furnished under an entire and indivisible contract, and the material furnisher institutes suit in a justice's court to recover for part of the materials furnished and also institutes suit in the Superior Court on the same cause of action, defendants' motion to dismiss the action instituted in the justice's court for want of jurisdiction should be allowed, since plaintiff may not split up his cause of action for jurisdictional purposes and try it piecemeal in both courts. *Allison v. Steele*, 318.

§ 7. Jurisdiction and Qualification in Criminal Proceedings.

Since a defendant in a criminal prosecution before a justice of the peace has a right to demand a jury trial, C. S., 4627, and the right to appeal to the Superior Court and have the whole matter heard therein *de novo*, C. S., 4647, the fact that the justice's compensation is fixed upon a fee basis, which he will receive only in the event of conviction, ch. 342, Public-Local Laws 1933, as amended by ch. 358, Public-Local Laws 1935, does not result in depriving the defendant of trial under due process of law in violation of the Fourteenth Amendment of the Federal Constitution. *In re Steele*, 685.

Even conceding the disqualification of a justice of the peace because of the fee system, the judgment of such justice in a criminal prosecution would be voidable and not void, and therefore such judgment would stand until its invalidity is declared in a proper proceeding for that purpose, and it cannot be collaterally attacked or challenged on *habeas corpus*. *Ibid.*

Defendant pleaded guilty in a prosecution before a justice of the peace. Thereafter, while serving sentence, he filed petition for writ of *habeas corpus* on the ground that the justice trying him was disqualified because of the fee system. *Held:* Even conceding the disqualification of the justice, the judgment was not void but was voidable, and the failure of defendant to raise objection at the trial constitutes a waiver and estops him from thereafter urging the point as a defect in the proceeding, and the writ of *habeas corpus* should have been dismissed. *Ibid.*

LABORERS' AND MATERIALMEN'S LIENS.

§ 5a. Notice and Filing of Claim.

In order for a material furnisher to hold the owner liable he must show that the owner was notified by him or by the contractor of his claim before the owner completed payment to the contractor. C. S., 2439, 2440. *Pumps, Inc., v. Woolworth Co.*, 499.

§ 5b. Form and Requisites of Notice.

Notice to the owner of a materialman's claim must specify the material furnished, the time it was furnished, and the amount due and unpaid, so as to put the owner on notice that such an amount is demanded. *Pumps, Inc., v. Woolworth Co.*, 499.

Where the owner of a building lets a contract on a cost plus basis, materialmen's invoices submitted to the owner from time to time so that the owner might check the cost of material and compute the percentage due the contractor, are insufficient to constitute statutory notice of a materialman's claim for such materials. *Ibid.*

LABORERS' AND MATERIALMEN'S LIENS—*Continued.*

Where the owner of a building lets a contract on a cost plus basis, statements made by the contractor to the owner of the cost of labor and materials used, submitted for the purpose of disclosing the amount due by the owner to the contractor, are insufficient to constitute the statutory notice of the claim of a material furnisher, since the owner would be liable to the contractor for materials furnished only in the event the contractor had paid for such materials and therefore the contractor's statements would tend to lead the owner to believe that the materials had been paid for rather than that any amount was due the material furnisher. *Ibid.*

§ 6. Claims Against Owner Directly.

Where a material furnisher elects to file notice of lien on the theory that the material was furnished to a subcontractor, he is estopped under the doctrine of election of remedies from thereafter asserting that such material was sold directly to the owner. *Pumps, Inc., v. Woolworth Co.*, 499.

LANDLORD AND TENANT.

§ 11. Liability of Landlord for Injuries from Unsafe or Defective Conditions.

Evidence that defendant landlord maintained a shelter or roof extending from the front wall of his building, that at one end of the building the projection was 68 inches from the ground, that plaintiff struck his head against the shelter or roof while walking on a clear sunshiny day, with conflicting evidence as to whether the projection extended over a portion of the sidewalk, *is held* to take the case to the jury upon the theory of the landlord's liability to injured third persons when he knowingly demises the premises in a state of nuisance or authorizes a wrong. *Childress v. Lawrence*, 195.

LARCENY.

§ 10. Punishment.

A sentence of defendant to be confined in the common jail of the county for a period of 12 months, and assigned to work the public roads, upon defendant's plea of *nolo contendere* to a charge of stealing an automobile of the value of $325.00, is not excessive. C. S., 4249, 4251. *S. v. Parker*, 416.

LIBEL AND SLANDER.

§ 2. Words Actionable Per Se.

A statement inferring that an innocent woman was guilty of incontinence and that her children are illegitimate is libelous. C. S., 2432. *Harshaw v. Harshaw*, 145.

§ 5. Publication.

The filing of answers in the Superior Court constitutes a publication of defamatory statements contained therein. *Harshaw v. Harshaw*, 145.

§ 7c. Absolute Privilege.

As a general rule, pleadings are privileged when pertinent and relevant to the subject under judicial inquiry, however false and malicious the defamatory statements may be. *Harshaw v. Harshaw*, 145.

When libelous matter alleged in answer is not available as defense because of estoppel by judgment, such matter is not privileged. *Ibid.*

LIMITATION OF ACTIONS.

§ 6. Continuing and Separable Trespass.

Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of the plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, states a cause of action for continuing trespass, and the right of action for damages to crops for all the years is barred after the lapse of three years from the original trespass. C. S., 441 (3). *Davenport v. Drainage District*, 237.

§ 9. Fiduciary Relationships as Affecting Running of Statute.

In this action by a trustor to compel an accounting of the proceeds of sale by a trustee, the question of the statute of limitations was properly submitted to the jury under authority of *Efird v. Sikes*, 206 N. C., 560. *Garrett v. Stadiem*, 654.

§ 10. Death and Administration.

When judgment debtor dies within 10 years of rendition of judgment and administrator is appointed within 10 years of death, claim on judgment filed within one year of appointment is not barred. *Rodman v. Stillman*, 361.

§ 11c. Institution of Action—Subsequent Parties.

Suit to foreclose a duly registered deed of trust was instituted prior to the bar of the statute, C. S., 437, against the trustee, the *cestuis* and the assigns of the *cestuis*. While the suit was pending, the assigns of the *cestuis* sold the property, and upon discovering the transfer, plaintiff had the purchasers made parties. At the time they were made parties the ten-year period prescribed by statute had expired. *Held:* The purchasers during the pendency of the foreclosure suit were chargeable with notice thereof and acquired only that interest which their grantors then had, and therefore they cannot assert the bar of the statute. *Ins. Co. v. Knox*, 725.

§ 12a. Effect of Part Payment.

Each payment made upon a current account starts the running of the statute of limitations anew as to all items not barred at the time of payment, and therefore when there have been successive payments within three years prior to the institution of action and the first such payment is made before any item of the account is barred. none of the items is barred, and an instruction that all items entered more than three years prior to the last payment are barred is erroneous. Furthermore, in this case, plaintiff offered evidence sufficient to be submitted to the jury that the account sued upon is an account stated and not an account current. *Little v. Shores*, 429.

LIS PENDENS

§ 1. Nature, Application and Effect of Statutes.

The sole object of *lis pendens* is to keep the subject of action *in custodia legis* and to give notice to subsequent purchasers. *Ins. Co. v. Knox*, 725.

Lis pendens and registration each have the purpose of giving constructive notice by record, and the statutes, C. S., 501, 3309, must be construed *in pari materia*, and while the *lis pendens* statutes do not affect the registration laws, the converse is not true. *Ibid.*

Lis pendens statutes are not applicable to suits to foreclose duly registered mortgages or deeds of trust. *Ibid.*

LOST OR DESTROYED INSTRUMENTS.

§ 2. Competency of Evidence to Establish.

Testimony of an illiterate witness as to the contents of the instrument in question as gathered by the witness from the reading of the instrument by another is hearsay and is incompetent to prove the contents of the alleged lost instrument. *Teague v. Wilson*, 241.

MALICIOUS PROSECUTION.

§ 2. Valid Process.

A warrant charging that the payee of a check unlawfully, willfully, and feloniously endorsed same and received the proceeds without the knowledge of the prosecuting witness and without accounting to him, does not charge any crime known to the law in this State, and therefore cannot be made the basis of an action for malicious prosecution, since malicious prosecution must be founded upon legal process maintained maliciously and without probable cause. *Parrish v. Hewitt*, 708.

Plaintiff alleged that he was held to the Superior Court and imprisoned upon a warrant issued by a justice of the peace, and that the bill of indictment based on the charge in the warrant was returned not a true bill. *Held:* The warrant failing to charge a crime, plaintiff cannot contend that the bill of indictment will support his action for malicious prosecution, since it was not alleged, and could not have been alleged, that plaintiff was imprisoned by virtue of the bill of indictment which was returned not a true bill. *Ibid.*

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MASTER AND SERVANT—*Continued.*

§ 4a. Distinction Between Employees and Independent Contractors.

An independent contractor is one who contracts to do a piece of work according to his own judgment and methods with the right to employ and direct the action of his workmen, and who is responsible to his principal solely as to the results of the work. *Graham v. Wall*, 84.

The contract in this case under which the contractor agreed to install plumbing in certain specified dwellings at a stipulated sum per house, *is held* to create the relationship of principal and independent contractor as a matter of law. *Evans v. Rockingham Homes*, 253.

A contract under which a plumber contracts to install certain fixtures in accord with plans and specifications furnished by the owner, and the owner agrees to pay the cost of labor and materials plus a percentage of the cost as compensation to the plumber, the work to be performed by the employees of the plumber, establishes the relationship of principal and independent contractor between the parties. *Pumps, Inc., v. Woolworth Co.*, 499.

Where the owner agrees to pay the cost of labor and materials used in the project plus a fixed percentage of such cost as compensation to the contractor, the fact that the basis of the contractor's compensation is the cost of materials and labor instead of a fixed sum does not have the effect of converting the status of the contractor from an independent contractor to an employee. *Ibid.*

Since the owner is directly interested in the cost of materials used by a contractor under a contract obligating the owner to pay the cost plus a percentage of the cost as compensation to the contractor, the owner's inquiry concerning and its objection to the amount charged for certain materials used in the project is not evidence of any supervision or control over the manner and method of doing the work. *Ibid.*

An independent contractor is not converted into an employee by reason of the fact that the owner or proprietor reserves the right to have its architect or agent supervise the work to the extent of seeing that it is done pursuant to the terms of the contract. *Ibid.*

§ 9. Wages and Remuneration.

Plaintiff instituted this suit to recover the difference between the amount of wages paid and the amount claimed to be due by plaintiff under the terms of a contract between the employer and the labor union recognized by it as sole bargaining agent. The agreement alleged stipulated that it was between the employer and employees paid on an hourly or piecework basis. *Held:* It appearing upon the face of the complaint that plaintiff was employed on a weekly basis, defendant's demurrer to the complaint was properly sustained. *Wishon v. Weaving Co.*, 420.

§ 14b. Simple Tools.

Plaintiff was injured when his hand came into contact with blades of an electric sausage grinder he was operating in the course of his employment. Plaintiff's evidence was to the effect that he had had no previous experience with an electric machine and that he was not furnished a mallet with which to push the meat through if the meat did not feed through by itself. *Held:* The evidence, though contradicted by defendant's evidence, precludes a nonsuit upon the simple tool doctrine relied on by defendant. *Lee v. Roberson*, 61.

§ 19. Contributory Negligence of Employee.

Where it is admitted that defendant employer had a sufficient number of employees to bring him under the Workmen's Compensation Act, but that

he had elected not to do so, the defense of contributory negligence is properly excluded. Michie's Code, 8081 (v). *Lee v. Roberson*, 61.

§ 21b. Course of Employment: Scope of Authority.

In order for the doctrine of *respondeat superior* to apply it must be made to appear that the relationship of master and servant existed between the wrongdoer and the person sought to be charged, and that the particular act in which the employee was engaged at the time was within the scope of his employment and was being performed in furtherance of his master's business, and proof of general employment alone is not sufficient. *Smith v. Moore*, 165.

In determining the liability of a principal or master for injury to third persons, the intent of the agent or servant to benefit the employer or protect his property is not relevant, the criteria being whether the agent or servant inflicted the injury while acting in the course of his employment or scope of his authority, express or implied, in which event the superior is liable for malicious injury, including false arrest, imprisonment, and slander, as well as injuries negligently inflicted. *Hammond v. Eckerd's*, 596.

Store owner *held* not liable for slander or false arrest of customer caused by clerk, who followed customer outside store after goods were supposed to have been stolen, since clerk's actions were in vindication of law and not in furtherance of master's business. *Ibid.*

§ 22a. Liability of Principal for Injuries in Performance of Work by Independent Contractor.

In order for the principal to be liable to third persons injured in the performance of work by an independent contractor it is not required that the work involve major hazards within the rule of the principal's liability to employees of the independent contractor, but the principal is liable to third persons not only if the work is inherently and intrinsically dangerous, but also if the injuries result from dangerous conditions inherently created in the ordinary progress of the work, as distinguished from dangers collaterally created by the negligence of the contractor, from which, under the circumstances of each particular case, injury to the public may be reasonably foreseen unless due precautions are taken. *Evans v. Rockingham Homes*, 253.

Whether conditions naturally created in the progress of the work are such as to create a hazard to the public unless precautions are taken, is affected to a large extent by the surrounding circumstances and the conditions under which the work is to be done, since a condition which ordinarily might not be hazardous might become so when existing in a thickly populated section in which many children live. *Ibid.*

Principal *held* liable for injuries to child received when she fell into ditch which had been dug and left open by independent contractor in thickly populated district. *Ibid.*

The duty of a principal to see that proper precautions are taken to avoid likelihood of injury to the public from conditions inherently created in the performance of work by an independent contractor, is a duty owed to the public, and therefore whether the person injured is a licensee or trespasser, although germane in ascertaining the liability of the owner of the premises, is immaterial in determining the liability of the principal. *Ibid.*

The duty of a principal to see that proper precautions are taken to avoid likelihood of injury to the public from conditions created in the performance of work by an independent contractor is a nondelegable duty imposed by law

upon the principal, and he is directly liable to the person injured as a result of his negligent failure to perform such duty, and may be held responsible notwithstanding that nonsuit is taken as to the contractor. *Ibid.*

Where the evidence shows the contract of employment created the relationship of principal and independent contractor as a matter of law, it is error for the court to submit an issue as to whether that relationship existed, and charge in effect that the relationship of principal and independent contractor would not exist if defendant failed to establish that the work did not fall within the exceptions to the general rule of nonliability. *Ibid.*

Where the evidence establishes that the relationship of principal and independent contractor existed as a matter of law, and the principal is sought to be held liable upon an exception to the general rule of nonliability, it is error for the court to charge the jury upon the theory of the principal's liability as an employer upon the doctrine of *respondeat superior*. *Ibid.*

§ 22b. Liability When Same Employees Are Employed by Two Employers.

An ice company and a coal company had common employees, but the business of each was well defined, and they agreed that each should not be liable for loss to the other for death or injuries to the employees or customers of the other. A customer was injured by negligence of employees in delivering coal. The ice company had exclusive right to deliver coal. *Held:* The ice company was solely responsible. *McCartha v. Ice Co.*, 367.

§ 39b. Independent Contractors as Affecting Rights Under Compensation Act.

Evidence held sufficient to support finding that claimant's superior was foreman and not independent contractor, and that therefore claimant was employee of main contractor within purview of Workmen's Compensation Act. *Graham v. Wall*, 84.

§ 39c. Applicability to Accidents Occurring Outside State.

Where claimant established that residence of employee was in this State, contract was made here, and that employer's place of business is in North Carolina, burden is on defendants to show that contract of employment was for services exclusively outside of State, and evidence in this case *held* sufficient to meet burden. *Mallard v. Bohannon*, 536.

§ 39e. Executives as "Employees" Within Coverage of Act.

An executive officer, in his capacity as such, is not an employee within the meaning of the Workmen's Compensation Act, but is an employee within the coverage of the Act while engaged in manual labor or work of an ordinary employee when performed by him as a part of his duties. *Gassaway v. Gassaway & Owen, Inc.*, 694.

The fact that an executive officer performs desultory, disconnected and infrequent acts of manual labor is insufficient to constitute him an employee within the coverage of the Compensation Act, nor is the mere fact of injury while performing such labor sufficient, but it must be made to appear that the performance of such labor was a part of his duties. *Ibid.*

The fact that an executive officer is injured during his working hours raises no inference that at the time of the injury he was acting in the discharge of his duties as an employee rather than as an executive. *Ibid.*

Ch. 150, Public Laws 1935, amending sec. 14 (b) of the Compensation Act, which provides that proof that the employer obtained insurance and filed claim should be *prima facie* evidence that the employer and employee have

elected to be bound by the Act does not have the effect of raising a presumption that an executive officer injured in the course of his duties was at the time engaged in the duties of an employee rather than those of an executive. *Ibid.*

The evidence tended to show that an executive officer of a company engaged in the contracting business was fatally injured in an automobile accident. Claimant's evidence raised surmises or inferences that at the time of the accident the officer was on his way to another city to negotiate a contract, to give estimates of costs, to fix prices, and to bind the company by contract. *Held:* The inferences are to the effect that the officer was engaged in his duties as an executive and not in the discharge of duties of an ordinary employee or workman. *Ibid.*

§ 40b. Diseases.

Award of compensation for silicosis upheld. *Blalock v. Mineral Products Co.*, 817.

§ 40d. Whether Injury Results from "Accident."

A fall is in itself an unusual and unforeseen occurrence constituting an "accident" within the meaning of the Workmen's Compensation Act, and evidence of any unusual or untoward condition or occurrence causing the fall is not required. *Robbins v. Hosiery Mills*, 246.

§ 40e. Whether Accident "Arises Out of the Employment."

Evidence that an employee, while reaching up to a rack in the course of her employment, for some undisclosed reason lost her balance and fell, is sufficient to sustain the finding of the Industrial Commission that the accident arose out of the employment. *Robbins v. Hosiery Mills*, 246.

Where the cause of an accident is unexplained but the accident is a natural and probable result of a risk of the employment, the finding of the Industrial Commission that the accident arose out of the employment will be sustained; but where the cause of the accident is known and such cause is independent of, unrelated to, and apart from the employment, and results from a hazard to which others are equally exposed, compensation will not be allowed. *Ibid.*

Evidence that an executive officer, during his working hours, was injured in an automobile accident while driving a car furnished him by the corporation, which he used for business and pleasure, without competent evidence that he was then engaged in duties pertaining to his employment, is insufficient to show that the injury was a natural and probable result of a risk incident to the employment and arose out of and in the course of his work as an employee. *Gassaway v. Gassaway & Owen, Inc.*, 694.

§ 40g. Causal Connection Between Accident and Injury.

In this proceeding before the Industrial Commission plaintiff's evidence was to the effect that he felt a sharp pain while carrying a heavy load in the course of his employment. There was expert opinion evidence that claimant has tuberculosis of the spine and arthritis of the lumbar spine, that the arthritis had existed prior to the accident, with no opinion as to the inception of the tuberculosis, with further medical expert testimony that the conditions were not the result of an accident, although they might have been aggravated by a quick jerk or definite strain. *Held:* The finding of the Industrial Commission upon the evidence that claimant did not sustain his injury as a result of an accident occurring in the course of ihs employment is conclusive. *Blevins v. Teer*, 135.

MASTER AND SERVANT—*Continued.*

§ 44. Rights of Employer, Insurer and Employee Against Third Person Tort-Feasor.

Under the North Carolina Workmen's Compensation Act the insurance carrier who has paid compensation to an injured employee for which the employer was liable under the Act may maintain an action against a third person upon allegations that the negligence of such third person caused the injury, sec. 11, ch. 120, Public Laws 1929, as amended, Michie's Code, 8081 (r), but the rights and liabilities of such third person are in nowise affected by the Act. *Hinson v. Davis*, 380.

Accord between employer and third person does not bar insurance carrier from bringing action in name of employee against such third person. *Ibid.*

Under the amendment of the Workmen's Compensation Act by ch. 449, Public Laws 1933, an injured employee may pursue his remedies against the employer under the Act and also maintain action against the third person whose tortious act caused his injury. *Whitehead & Anderson, Inc., v. Branch*, 507.

An employee was fatally injured in an accident caused by the negligence of a third person. The employee's administrator recovered judgment in an action for wrongful death against such third person. Thereafter the employer and the insurance carrier, which had paid the compensation to the dependents of the employee, instituted this action in their own names against the third person tort-feasor to recover for the wrongful death. *Held:* Defendant's motion to dismiss was properly allowed, since, notwithstanding that the administrator's action was instituted within six months from date of death, defendants, having paid the judgment for wrongful death obtained by the administrator, were relieved of all further liability on said cause of action, either to the administrator or to those claiming a subrogated right to recover therefor under the provisions of the Compensation Act. *Ibid.*

§ 45b. Employees and Risks Covered by Compensation Insurance Policies.

If the language of a policy of Workmen's Compensation insurance is ambiguous, the uncertainty and doubt will be resolved in favor of insured and the policy construed against insurer who selected its language. *Miller v. Caudle*, 308.

Evidence held to sustain finding that quarry operations were incidental to trucking business and that policy covered blacksmith engaged in duties related to both businesses. *Ibid.*

§ 52b. Evidence and Burden of Proof in Hearing Before Commission.

Where claimant establishes the jurisdictional facts that the contract of employment was made in this State, that the employer's place of business is in this State, and that the residence of the employee is within this State, the burden is upon the employer and the insurance carrier to show that the contract of employment was expressly for service exclusively outside the State and thus bring themselves within the proviso of the Act. Michie's N. C. Code, 8081 (rr). *Mallard v. Bohannon*, 536.

§ 53c. Enforcing Payment of Award When Employer Fails to Keep Policy of Compensation Insurance in Effect.

Claimants instituted this civil action alleging that the Industrial Commission had awarded them compensation in a stipulated sum, that defendant employer had failed and neglected to keep in effect a policy of compensation insurance and had failed to qualify as a self-insurer, and that defendant was

disposing of and removing all his property from the State. Plaintiff prayed that a writ of attachment issue against defendant's property. It appeared that the award of the Industrial Commission was entered 24 March, 1941. *Held:* The provisions of ch. 352, Public Laws 1941, in force from its ratification on 15 March, 1941, are available to claimants, and defendant's exception to the refusal of the court to vacate the writ of attachment theretofore issued in the cause is without error. *Byrd v. Johnson*, 184.

§ 55d. Review of Awards of Industrial Commission.

The findings of fact of the Industrial Commission, when supported by competent evidence, are conclusive upon the courts on appeal. *Graham v. Wall*, 84.

The jurisdiction of the Superior Court on appeal from the Industrial Commission is limited to questions of law or legal inference, the findings of fact of the Industrial Commission being conclusive. *Blevins v. Teer*, 135; *Miller v. Caudle*, 308; *Blalock v. Mineral Products Co.*, 817.

Under the Workmen's Compensation Act the Industrial Commission is given the duty and the exclusive authority to find facts relative to controverted claims, and, with the exception of jurisdictional facts, its findings supported by competent evidence are conclusive and binding upon the courts. *Mallard v. Bohannan*, 536.

Where there is sufficient competent evidence to sustain a finding of the Industrial Commission, the admission of other evidence, even if incompetent, cannot be held prejudicial, since a finding supported by sufficient competent evidence is conclusive. *Ibid.*

§ 55g. Determination and Disposition of Appeals from Industrial Commission.

The Superior Court has no discretionary power to remand the cause to the Industrial Commission for further or more complete findings of fact when the award of the Commission is supported by findings of fact made upon competent evidence. *Blevins v. Teer*, 135.

§ 57. Businesses Subject to Unemployment Compensation Act.

Where a partnership and a later formed corporation are controlled by the same parties but the businesses are wholly unrelated and are kept separate and distinct as to location, finance and employment, and the work required of the employees of the two concerns are not of the same character, the two concerns do not constitute a single employing unit, and, neither concern having in its employ as many as eight employees, neither is subject to the Unemployment Compensation Act. *In re Mitchell*, 65.

§ 62. Appeal from Unemployment Compensation Commission.

The Unemployment Compensation Commission is not entitled to appeal from judgment of the Superior Court, entered in a proceeding by an employee for compensation, that defendant employer does not come within the purview of the Compensation Act, and that therefore claimant is not entitled to Unemployment Compensation Insurance. If the Commission desires to have the liability of the employer for unemployment compensation contributions judicially determined on its contentions that the employer and another concern controlled by the same interests constituted but a single employing unit, it must follow the procedure prescribed by sec. 8 (m), ch. 27, Public Laws 1939. *In re Mitchell*, 65.

MORTGAGES.

§ 2a. Equitable Mortgages.

When a debtor conveys land to a creditor by a deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and the creditor agrees to reconvey upon the payment of the debt, the transaction is a mortgage, but if, under the terms of the agreement, the debtor does not obligate himself to pay the debt and take a reconveyance, the transaction does not constitute a mortgage unless the debt continues to exist after the execution of the deed and the parties intend the deed to be security for the debt, and the party asserting that the deed constitutes an equitable mortgage must establish the intention that the deed should constitute security for the debt by proof of facts and circumstances *de hors* the deed inconsistent with the idea of an absolute conveyance. *Ferguson v. Blanchard*, 1.

Deed from trustors to *cestui* with contemporaneous contract by *cestui* to reconvey *held* not mortgage as matter of law, the deed of trust being canceled and trustors not being under duty to pay debt and take reconveyance; and evidence supported finding of referee that parties did not intend transaction as security for debt. *Ibid.*

§ 9. Parties and Debts Secured.

Deed of trust in this case is construed as a matter of law to cover only $450 note and not $970 note recited in premises. *Garrett v. Stadiem*, 654.

§ 24. Transfer of Equity to Mortgagee or Cestui.

The relationship between the trustor and the *cestui que trust* is not such as to render an absolute conveyance of the land by the trustor to the *cestui que trust* after default in the payment of the notes secured by the deed of trust, presumptively fraudulent in law. *Ferguson v. Blanchard*, 1.

§ 28. Form, Methods and Validity of Cancellation.

Where the *cestui* executes without fraudulent inducement an instrument in which she agrees to the cancellation of the deed of trust, she may not thereafter contend that the trustee was without authority to cancel the deed of trust, since she cannot complain that the trustee did that which she herself had agreed to. *Williams v. Williams*, 806.

Possession of the papers by the trustee raises a presumption of his authority to cancel the deed of trust of record. C. S., 2594. *Ibid.*

§ 30a. Right to Foreclose and Defenses in General.

Judgment for trustor in action to enjoin confirmation of foreclosure of purchase money mortgage on ground that trustor was entitled to credits on mortgage notes for services rendered does not bar subsequent action to enjoin foreclosure on ground that trustor was entitled to credit for shortage in acreage of land sold. *Jefferson v. Sales Corp.*, 76.

§ 31b. Parties to Foreclosure by Action.

A proceeding under C. S., 994, to obtain a "decree" of the court directing an infant trustee to convey the property to the purchaser at the foreclosure sale is an action in the nature of an equitable proceeding to foreclose the deed of trust, and, in the light of the history of the enactment and the doctrine that equity will not deprive a party of his property without a hearing, together with the statutory provisions relating to parties, C. S., 446, 456, 460, and the rule that all parties having an interest in the equity of redemption should be

MASTER AND SERVANT—*Continued.*

§ 63. Validity and Construction of Fair Labor Standards Act in General.

Fair Labor Standards Act is valid exercise of congressional power over interstate commerce. *Crompton v. Baker*, 52.

Act must be liberally construed. *Ibid.*

§ 64. Businesses Subject to Fair Labor Standards Act.

Employer processing goods for intrastate commerce and other goods for sale in interstate commerce is subject to Fair Labor Standards Act. *Crompton v. Baker*, 52.

§ 65. Employees Within Coverage of Fair Labor Standards Act.

Defendant employer, in the regular course of his business, slaughtered animals and sold meat products to wholesale dealers within the State, and also obtained grease from the offal of the animals by cooking in vats or tanks, and sold the tank grease and green hides to dealers who shipped same out of the State with knowledge on the part of the defendant that these products would be transported in interstate commerce. Plaintiff employee was employed as night watchman and night engineer and, in the course of his duties, fired the furnace, maintained the heat under the grease tanks, cooked the products, checked the hides and kept up the refrigeration as well as counted and checked-in the animals received during the night. *Held:* The facts disclosed by the record, considered in the light most favorable to the plaintiff, discloses that he was an employee within coverage of Fair Labor Standards Act. *Crompton v. Baker*, 52.

Claimant was employed as a night watchman at a lumber mill producing goods for interstate commerce. The evidence was contradictory as to whether he was required to keep water in the boilers as a part of the regular duties of his employment. *Held:* An ordinary night watchman is not an employee engaged in the production of goods for interstate commerce within the coverage of the Federal Fair Labor Standards Act and the court did not commit error in charging the jury that the burden was on claimant to prove by the greater weight of the evidence that he put water in the boilers in addition to his regular duties as night watchman in order for him to be entitled to the benefits of the Act. 29 U. S. C. A., sec. 203 (j), sec. 3 (j). *Hart v. Gregory*, 180.

MONEY RECEIVED.

§ 1. Nature and Essentials of Right of Action.

A party paying money with full knowledge of all the facts may not recover it. *Williams v. McLean*, 504.

MONOPOLIES.

§ 2. Agreements and Combinations Unlawful.

A complaint alleging that defendants conspired and agreed not to sell plaintiff ice, and that as a result thereof plaintiff's business was ruined, fails to state a cause of action, and defendants' demurrer thereto should have been sustained, C. S., 2559, *et seq.*, not being applicable. *Lineberger v. Ice Co.*, 444. See, also, *McNeill v. Hall*, 73.

MORTGAGES—*Continued.*

parties to a proceeding for foreclosure, *it is held* that the trustors are necessary parties to an action instituted by the purchaser at the foreclosure sale to obtain authority for the infant trustee to execute deed. *Riddick v. Davis*, 120.

§ 33. Resales.

Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the Superior Court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. Michie's N. C. Code, 598, 637. *Harriss v. Hughes*, 473.

When the court orders a resale of property sold under foreclosure, the order should require notice of the resale to be published in a newspaper once a week for four successive weeks, and when the order requires such publication once a week for two successive weeks the order will be modified upon appeal. *Ibid.*

§ 36. Deficiency and Personal Liability.

Ch. 36, Public Laws 1933, Michie's Code, 2593 (f), providing that the mortgagee or trustee or holder of notes for balance of the purchase price of real property, executed after the effective date of the statute, "shall not be entitled to a deficiency judgment" operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the statute applies to all such deficiency judgments, including those predicated upon notes secured by mortgages or deeds of trust executed in another state upon realty lying therein. *Bullington v. Angel*, 18.

Deficiency judgment obtained in Pennsylvania on warrant of attorney must be given full faith and credit by our courts. *Land Bank v. Garman*, 585.

§ 37. Disposition of Proceeds and Liability of Trustee.

This action was instituted by trustors against the trustee to compel an accounting. As a matter of legal construction the effect of the instrument was to secure the *cestui* from loss by reason of his signing as surety a $450 note executed by trustors, and did not cover a $970 note recited in the premises. *Held:* Since the trustee had no authority to apply the proceeds of sale to the satisfaction of the $970 note, whether testimony by the male trustor tending to show that the execution of the $970 note was procured by fraud is incompetent under C. S., 1795, need not be considered, since upon the facts, its admission, if error, would be harmless. *Garrett v. Stadiem*, 654.

§ 39f. Actions to Set Aside Foreclosure.

Where the trustors are not made parties to an action by the purchaser at the foreclosure sale to obtain authority for the infant trustee to execute deed, they are not bound by the decree directing the infant to execute deed, and their equity of redemption is not extinguished thereby and they may redeem the land as against the purchaser at the sale or the transferee of the purchaser. *Riddick v. Davis*, 120.

Under the laws of the State of Pennsylvania, the mere inadequacy of the purchase price at the foreclosure sale of a mortgage does not entitle the mortgagors to upset the foreclosure after the sheriff's deed to the purchaser has been acknowledged, delivered and recorded. *Land Bank v. Garman*, 585.

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31. Petition, Hearings and Preliminary Procedure. Asheboro v. Miller, 298.
33. Validity of, Objections to, and Appeal from Assessments. Asheboro v. Miller, 298.
34. Nature of Lien, Priorities and Enforcement. Asheboro v. Miller, 298.

§ 3. Territorial Extent and Annexation.

Proviso in statute for annexation of new territory by municipality that annexed territory should not be subject to taxation unless afforded municipal improvements *held* unconstitutional, but proviso further *held* separable from remainder of statute, and statute, with proviso, deleted, is constitutional. *Banks v. Raleigh*, 35.

§ 12. Exercise of Governmental and Corporate Powers.

In authorizing a construction project to eliminate a grade crossing in the interest of public safety a municipality acts in its governmental capacity and is not liable for incidental damage to abutting property owners except for negligence in the manner of doing the work which is attributable to the city. *Broadhurst v. Blythe Bros. Co.*, 464.

§ 14. Defects or Obstructions in Streets.

Under an agreement between defendant city and the State Highway Commission to eliminate a grade crossing on a State highway within the city by the construction of a railroad underpass and a bridge over the tracks, the city undertook to make the necessary excavation for the lowering of the grade of the railroad tracks, and employed a contractor to do its part of the work. After the excavation was completed but before the contractor for the Highway Commission had constructed the retaining walls and the overhead bridge, there was a cave-in causing damage to plaintiffs' building. *Held:* The city, in the exercise of a governmental function, was not required to foresee and guard against negligence of its independent contractor working under the supervision of the State Highway Commission, or in any event its liability therefor would be secondary to the liability of its contractor, and in the absence of evidence that it failed to exercise reasonable diligence in repairing its mains, or that its failure to properly repair the cracks in the street was a contributing cause of the damage, the city's motion to nonsuit should have been allowed. *Broadhurst v. Blythe Bros. Co.*, 464.

§ 16. Injuries to Land by Sewer System.

A lower riparian owner may maintain an action against a municipality to recover damages resulting from the pollution of the stream by the municipality, notwithstanding that the nuisance had been discontinued prior to the action, the remedies of the lower riparian owner not being restricted to a suit for the abatement of the nuisance or an action for damages for the taking of a permanent easement. *Pernell v. Henderson*, 79.

§ 18a. Dams and Municipal Water Systems.

A municipal corporation does not have the right to divert the waters of a stream into its water system for the domestic use of its inhabitants as against lower riparian owners. *Pernell v. Henderson*, 79.

MUNICIPAL CORPORATIONS—*Continued.*

§ 19a. Advertisement and Competitive Bidding as Prerequisites to Letting of Municipal Contracts.

Specifications in belated advertisement for bids and results therefrom held not to meet statutory requirement of competitive bidding. *Raynor v. Comrs. of Louisburg*, 348.

Ch. 305, Public Laws 1903, does not authorize the town of Louisburg, to contract for machinery for its water and sewer system and electric light plant in a sum in excess of $1,000 without submitting the same to competitive bidding after due advertisement. C. S., 1316 (a), 2830. *Ibid.*

The requirements of C. S., 1316 (a), 2830, that municipal contracts for expenditures in excess of $1,000 must be submitted to competitive bidding after due advertisement are mandatory, and a contract made in contravention of the statutory requirements is *ultra vires* and void. *Ibid.*

The statutory provision that a municipality may let a contract for expenditures in excess of $1,000 without advertisement "in cases of special emergency" constitutes an exception to the general rule, and the commissioners of a municipality may not declare an emergency where none exists and thus defeat the provisions of the law, nor is such finding by the municipal board upon competent evidence conclusive on the courts, but the courts may review the evidence and determine whether an emergency as contemplated by the statute does in fact exist. *Ibid.*

The meaning of the word "emergency" within the statutory exception to the rule requiring municipal contracts for expenditures in excess of $1,000 to be submitted to competitive bidding after due advertisement, is not susceptible to precise definition and each case must, to some extent, stand upon its own bottom, but in any event the term connotes an immediate and present condition and not one which may or may not arise in the future or one that is apt to arise or may be expected to arise. *Ibid.*

Evidence held to show that no emergency existed which would relieve municipality of duty to advertise for bids for municipal power machinery. *Ibid.*

§ 31. Petition, Hearings and Preliminary Procedure for Public Improvements.

A petition for public improvements, although a prerequisite, is not jurisdictional. *Asheboro v. Miller*, 298.

It appeared that notice of hearing on the confirmation of the assessment roll was not published, but that on the date set for the hearing the municipal board met and adopted the required resolution in amplified form, fixed the time and place for hearing of objections, and that notice of the hearing on the second date set was duly published, that the hearing was duly had on that date, necessary corrections made, and the assessment roll as corrected duly approved and confirmed. *Held:* The fact that notice of hearing on the first date set was not published was rendered immaterial, C. S., 2712, 2713. *Ibid.*

§ 33. Validity of, Objections to, and Appeal from Assessments.

Proceedings for the levy of assessments for public improvements are presumed regular and the assessment roll is *prima facie* evidence of the validity of the assessments and the regularity of the proceedings, and the burden is upon the party attacking the assessments to prove irregularity. *Asheboro v. Miller*, 298.

§ 34. Nature of Lien, Priorities and Enforcement.

In an action to enforce a lien for public improvements, a defendant who had notice and ample opportunity to be heard and to appeal from the order con-

MUNICIPAL CORPORATIONS—*Continued.*

firming the assessment roll, cannot impeach the validity of the ordinance or of the assessment for any alleged irregularities which are not jurisdictional. *Asheboro v. Miller*, 298.

Allegations in this action to enforce a lien for public improvements *held* to constitute the action one to foreclose the original lien under C. S., 7990, notwithstanding that a purported *alias* summons was issued 91 days after the institution of the action, C. S., 480, as permitted in an action instituted under C. S., 8037, since the nature of an action is determined by the allegations of the complaint and not by the time the purported *alias* summons was issued. *Ibid.*

In an action by a municipality to enforce a lien for public improvements, objection by defendant that plaintiff failed to introduce in evidence the petition for improvements signed by the owners of a majority of the lineal feet frontage abutting the improvements is untenable when the original resolution of the city introduced in evidence recites a proper petition and that it was duly certified by the clerk, C. S., 2707, since if such finding was erroneous, the remedy for correction was by appeal. C. S., 2714. *Ibid.*

NEGLIGENCE.

I. Acts and Omissions Constituting Negligence
1a. In General. Reeves v. Staley, 573; Luttrell v. Mineral Co., 782; Mitchell v. Melts, 793.
3. Dangerous Substances and instrumentalities. Luttrell v. Mineral Co., 782.
4f. Attractive Nuisances. Harris v. R. R., 698; Luttrell v. Mineral Co., 782.

II. Proximate Cause
5. Definition. Reeves v. Staley, 573; Luttrell v. Mineral Co., 782; Mitchell v. Melts, 793.
7. Intervening Negligence. Reeves v. Staley, 573; Luttrell v. Mineral Co., 782.

III. Contributory Negligence
11. In General. Godwin v. R. R., 281.
12. Contributory Negligence of Minors. Absher v. Miller, 197.

IV. Actions
17a. Presumptions and Burden of Proof. Pack v. Auman, 704; Mitchell v. Melts, 793; Luttrell v. Mineral Co., 782; Reeves v. Staley, 573.
17b. Questions of Law and of Fact. Godwin v. R. R., 281; Reeves v. Staley, 573; Luttrell v. Mineral Co., 782; Mitchell v. Melts, 793.
19a. Nonsuit or Issue of Negligence. Reeves v. Staley, 573; Luttrell v. Mineral Co., 782; Mitchell v. Melts, 793.
19b. Nonsuit on Ground of Contributory Negligence. Godwin v. R. R., 281.
21. Issues and Verdict. Butler v. Gantt 711.

V. Criminal or Culpable Negligence
23. Definition. S. v. Miller, 660.

§ 1a. Acts and Omissions Constituting Negligence in General.

In order to recover in a negligent injury action plaintiff must show failure on the part of defendant to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, and that such negligent breach of duty was the proximate cause of the injury. *Reeves v. Staley*, 573; *Luttrell v. Mineral Co.*, 782; *Mitchell v. Melts*, 793.

§ 3. Dangerous Substances and Instrumentalities.

Persons having possession and control over dangerous substances, such as dynamite and other explosives, are under duty to use a high degree of care commensurate with the dangerous character of the article to prevent injury to others. *Luttrell v. Mineral Co.*, 782.

§ 4f. Attractive Nuisances.

A railroad freight car standing on a commercial siding is not an attractive nuisance. *Harris v. R. R.*, 698.

Plaintiff, a twelve-year-old boy, was injured while playing with other children on an open railroad car used for the transportation of steel when the

heavy door or gate attached to the end of the car fell on him. Plaintiff alleged negligence in failing to have the car attended and in failing to have the door or gate of the car laid flat upon the surface of the car, when defendants knew or should have known that children were accustomed to play thereon. *Held:* Defendants' demurrer was properly sustained, since defendants were not under duty to have the car attended or to keep the door flat upon the car as a protection to plaintiff and his playmates. *Ibid.*

Persons storing explosives on their property, although they have a legal right to do so, are required to exercise care commensurate with the danger, and when the presence of children on the premises can be reasonably anticipated, must exercise care in storing same to prevent injury to them, a greater degree of care being required in respect to children of very tender years than in regard to children of maturer years who themselves may appreciate the attendant danger. *Luttrell v. Mineral Co.*, 782.

Evidence that plaintiff and other children were in the habit of playing around defendant's building on Sunday and that some of them on a few occasions had gone into the building, with evidence that on one occasion defendant's manager came to the premises on Sunday when boys were playing outside the building, is insufficient as a matter of law to charge defendant with knowledge, actual or implied, that children were in the habit of playing in the building, and therefore defendant was not negligent in failing to anticipate invasion of the building by children who had no right to enter. *Ibid.*

When explosives are taken and carried away from building by children capable of understanding wrongful nature of their act, any negligence in storing same is not proximate cause of subsequent injury. *Ibid.*

§ 5. Definition of Proximate Cause.

The proximate cause of an injury is that cause which produces the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under all the facts as they existed. *Reeves v. Staley*, 573; *Luttrell v. Mineral Co.*, 782; *Mitchell v. Melts*, 793.

§ 7. Intervening Negligence.

Intervening negligence will insulate the original negligence if the original wrongdoer could not reasonably foresee the intervening act and resultant injury, since in that event the sequence of events is broken by a new and independent cause. *Reeves v. Staley*, 573.

In action by father to recover for injuries sustained by son from explosion of dynamite cap, wrongful act of son in taking caps from defendant's building to his home *held* to insulate any negligence of defendant in storing same. *Luttrell v. Mineral Co.*, 782.

§ 11. Contributory Negligence in General.

Contributory negligence need not be sole proximate cause of injury, but will bar recovery if it is one of proximate causes. *Godwin v. R. R.*, 281.

§ 12. Contributory Negligence of Minors.

Eight-year-old boy *held* not incapable of contributory negligence as matter of law, and upon evidence that he was a bright boy, whether he was guilty of contributory negligence in running in front of defendant's car was for jury. *Absher v. Miller*, 197.

NEGLIGENCE—*Continued.*

§ 17a. Presumptions and Burden of Proof.

Neither negligence nor proximate cause is presumed from the mere fact of injury. *Pack v. Auman*, 704; *Mitchell v. Melts*, 793.

Burden is on plaintiff to prove negligence and proximate cause. *Luttrell v. Mineral Co.*, 782; *Reeves v. Staley*, 573; *Mitchell v. Melts*, 793.

§ 17b. Questions of Law and of Fact.

Where the conclusion that plaintiff was guilty of contributory negligence constituting one of the proximate causes of the injury is the only reasonable inference that can be drawn from plaintiff's own evidence, such evidence, *pro hoc vice*, partakes of the nature of admissions and reduces the case to a question of law for the court, and defendant's demurrer to the evidence is properly sustained. C. S., 567. *Godwin v. R. R.*, 281.

What is negligence is a question of law, and when the facts are admitted or established it is for the court to say whether negligence exists, and, if so, whether it constitutes a proximate cause. *Reeves v. Staley*, 573; *Luttrell v. Mineral Co.*, 782.

Whether there is enough evidence to support a material issue is a question of law. *Mitchell v. Melts*, 793.

§ 19a. Nonsuit on Issue of Negligence.

A nonsuit on the issue of negligence is proper when all the evidence, taken in the light most favorable to plaintiff, fails to show any actionable negligence on the part of the defendant, or when it clearly appears from the evidence that the injury complained of was independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person. *Reeves v. Staley*, 573.

Nonsuit is properly entered upon the issue of negligence if plaintiff's evidence fails to establish that defendant was guilty of negligence proximately causing the injury, or if plaintiff's evidence establishes that the injury was independently and proximately produced by the wrongful act, neglect or default of an outside agency or responsible third person. *Luttrell v. Mineral Co.*, 782.

In negligence actions, nonsuit must be sustained if plaintiff's evidence fails to establish either negligence or proximate cause. *Mitchell v. Melts*, 793.

§ 19b. Nonsuit on Ground of Contributory Negligence.

Nonsuit on the ground of contributory negligence should not be granted upon defendant's evidence since defendant has the burden of proof on the issue and the credibility of its evidence would be for the jury, but nonsuit is properly entered when plaintiff's own evidence establishes contributory negligence constituting a proximate cause of the injury, since in such event plaintiff proves himself out of court. *Godwin v. R. R.*, 281.

It is not required that plaintiff's evidence establish contributory negligence constituting sole proximate cause of accident, it being sufficient if it establishes contributory negligence constituting one of proximate cause. *Ibid.*

§ 21. Issues and Verdict.

Affirmative answers to issues of negligence and contributory negligence, and awarding of damages is not essentially inconsistent verdict, and court's requiring jury to reconsider is error entitling defendant appellant to new trial. *Butler v. Gantt*, 711.

NEGLIGENCE—*Continued.*

§ 23. Definition of Culpable Negligence.

Culpable negligence means something more than actionable negligence in the law of torts, and is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequence or heedless indifference to the safety and rights of others. *S. v. Miller*, 660.

The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is willful, wanton, or intentional, or if the violation is inadvertent but is accompanied by a heedless disregard of probable consequences of a dangerous nature which could have been reasonably anticipated under the circumstances. *Ibid.*

NOTICE.

§ 3. Waiver of Notice.

When a party appears at the time and place set for the hearing of a motion in the cause in response to notice served on him, he waives objection that he was not given due notice of the hearing. *Harriss v. Hughes*, 473.

NOVATION.

§ 1. Transactions Constituting Novation.

In order for the acceptance of part payment and an agreement as to the balance due to constitute a novation, the transaction must have been so intended by the parties, and in the absence of evidence that it was so intended it will not have the effect of changing the nature of the original obligation or of depriving the creditor of the remedies available. *Growers Exchange v. Hartman*, 30.

NUISANCE.

§ 3. Air, Light and Water.

Allegations and evidence to the effect that defendant erected a solid sheet metal fence seven feet high on his land, which shut out the light, air, and view from plaintiff's house on the adjoining property, and that the fence was of no beneficial use to defendant, but was erected and maintained solely for the purpose of annoying plaintiff, *is held* sufficient to take the case to the jury and to warrant an abatement of the nuisance under authority of *Barger v. Barringer*, 151 N. C., 433. *Burris v. Creech*, 302.

§ 4. Actions.

Where plaintiff establishes a cause of action to abate a "spite fence," but fails to show any personal pecuniary loss sustained by him up to the time of the institution of the action, plaintiff is not entitled to recover damages notwithstanding evidence that the value of his property was depreciated by the erection of the fence, since such depreciation in value would be obviated by the abatement of the nuisance and would be germane only if defendant acquired a permanent easement for the maintenance of the fence. *Burris v. Creech*, 302.

PARTITION.

§ 1a. Right to Partition in General.

As a general rule, the existence of a lease on property held by tenants in common does not preclude partition, and this rule applies even though one

PARTITION—*Continued.*

tenant is the lessee when actual partition may be had, since in such event the lessor-tenant would not be deprived of his right to his proportionate part of the rents under the lease. *Mineral Co. v. Young*, 287.

A tenant in common is entitled to partition as a matter of right, but such right is not inalienable and may be qualified, defeated, or postponed by agreement between the parties, express or implied, or lost or suspended through estoppel when there are contractual obligations between the parties inconsistent with partition or which would render partition inequitable. *Ibid.*

§ 1c. Sale for Partition.

Lessee-tenant held not entitled to sale of mineral interest for partition upon the facts of this case. *Mineral Co. v. Young*, 287.

In order for the court to decree sale of mineral interests for partition, petitioner must make it appear that actual partition cannot be had without injury or that sale for partition would be for the best interest of the tenants in common, and the mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale for partition. C. S., 3237. *Ibid.*

§ 5d. Issues and Instructions in Action for Partition.

Upon defendant's plea of sole seizin in this proceeding for partition, the controversy should have been submitted to the jury upon the question of cotenancy upon the pleadings and evidence, and the submission of the issue as to defendant's sole seizin was not necessary, but the charge of the court that the two issues should be considered together and that the burden was upon the plaintiff to satisfy the jury that defendant is not sole seized and that the parties are tenants in common, while resulting in some inexactness of phrase relative to the burden of proof because of the submission of both issues, would seem not to constitute reversible error. *Bailey v. Hayman*, 402.

PLEADINGS.

§ 5. Prayer for Relief.

Prayer for relief is not necessary part of complaint, and relief will be determined by allegations and not the prayer. *Lockman v. Lockman*, 95.

§ 12. Nature and Necessity of Reply.

Where no service of answer is made upon plaintiffs they are under no compulsion to file a reply even though the answer sets up a counterclaim, since the law denies the counterclaim for them. C. S., 524. *Miller v. Grimsley*, 514.

§ 13. Form and Contents of Reply.

Plaintiffs may file a reply to new matter appearing in the answer by way of counterclaim, but by express provision of statute the allegations of the reply must not be inconsistent with the complaint. C. S., 525. *Miller v. Grimsley*, 514.

Plaintiffs' complaint admitted defendants owned certain timber within the boundaries of their land because of a reservation in the deed from defendants to plaintiffs. After answer, plaintiffs filed a reply alleging that the reservation of timber rights was void for vagueness of description. *Held:* Portions of the reply attacking the validity of the reservation were properly stricken upon defendants' motion, since such allegations were inconsistent with the complaint. *Ibid.*

PLEADINGS—*Continued.*

§ 18. Defects Appearing on Face of Complaint and "Speaking Demurrers."

When complaint alleges that plaintiff is the "duly appointed, qualified and acting trustee" under the will, demurrer in his action to have court approve final account, entered on the ground that plaintiff did not have legal capacity to sue for that the will appointed an executor and contained no authority for the appointment of a trustee, is bad, since the demurrer admits the allegation that plaintiff is the duly appointed trustee. *Cheshire v. First Presbyterian Church*, 393.

§ 19. Time of Filing Demurrer and Waiver of Right to Demur.

The right to demur on the ground of want of jurisdiction or for failure of the complaint to state a cause of action cannot be waived, but objection on either of these two grounds may be taken by demurrer *ore tenus* at any time, even in the Supreme Court on appeal. C. S., 511 (6), 518. *Raleigh v. Hatcher*, 613.

§ 20. Office and Effect of Demurrer.

Upon demurrer, the allegations of fact contained in the complaint and relevant inferences of fact necessarily deducible therefrom must be taken as true. *Merrell v. Stuart*, 326; *Cheshire v. First Presbyterian Church*, 393; *Hedgpeth v. Allen*, 528.

Upon demurrer the allegations of the complaint will be liberally construed in favor of the pleader. *Hedgpeth v. Allen*, 528.

In an action to recover for injuries sustained when a door or gate of an open railroad car fell upon plaintiff, allegation that defendants negligently left the door in an upright or vertical position without being fastened or supported as it was the duty of defendants to do, is but a conclusion of the pleader from the facts alleged, and is not admitted by demurrer. *Harris v. R. R.*, 698.

§ 22. Amendment at Trial Term.

A motion to be allowed to file amended answer is addressed to the discretion of the trial court, and its refusal of the request will not be disturbed in the absence of abuse of discretion. *Pink v. Hanby*, 667.

§ 26a. Variance Between Allegation and Proof in General.

An action is governed by the pleadings, and when the proof does not sustain the cause alleged nonsuit must be granted. *Rose v. Patterson*, 60.

§ 26c. Proof Without Allegation.

When the complaint fails to allege that defendant's bus was stopped on the highway in such a manner as to leave insufficient space for the passage of cars on the remaining available portion of the hard surface, plaintiff's argument in the Supreme Court in regard to the space left for travel is unavailing. *Peoples v. Fulk*, 635.

PLEDGES.

§ 2b. Sale of Security.

The maker of a note assigned a judgment in its favor to the payee as security. The judgment was sold under order of court and purchased by the payee. The payee thereafter realized upon the judgment an amount in excess of the sale price. *Held:* The note was properly credited with the sale price and not the amount realized by the payee upon the judgment, and, since the

PLEDGES—*Continued.*

bidding at the sale was open to all and the sale was under order of court, the endorser on the note cannot assert C. S., 2593 (d) as a defense to his liability, the statute, by the express language of its proviso, not being applicable. ***Biggs v. Lassiter,*** 761.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

This action was instituted for alleged assault and battery committed by the individual defendant while acting in his capacity of ticket agent for defendant carrier. *Held:* Testimony as to what the individual defendant swore to in narrating the occurrence in a previous prosecution for assault is hearsay and is incompetent against the corporate defendant as substantive evidence to prove the fact of agency, the scope of authority, or that the alleged agent was acting for his principal at the time. *Howell v. Harris,* 198.

§ 10a. Principal's Liability for Wrongful Acts of Agent in General.

In determining the liability of a principal or master for injury to third persons, the intent of the agent or servant to benefit the employer or protect his property is not relevant, the criteria being whether the agent or servant inflicted the injury while acting in the course of his employment or scope of his authority, express or implied, in which event the superior is liable for malicious injury, including false arrest, imprisonment, and slander, as well as injuries negligently inflicted. *Hammond v. Eckerd's,* 596.

§ 10c. Liability When Same Agent Is Employed by Two Principals.

Where separate concerns have common employees but the contract between them definitely delineates the business of each and provides that each should pay the employees for work done in the performance of its separate business, each principal is liable for the wrongful acts of the employees in the prosecution of its business and cannot be bound by the acts of the employees while engaged in the business of the other. *McCartha v. Ice Co.,* 367.

Acts of agents held done in scope of employment by one principal alone although agents were employed as to other matters by another principal. *Ibid.*

An ice company and a partnership had common employees. The contract between them stipulated that the ice company should make all deliveries of coal sold by the partnership and that the ice company should not be responsible for any loss or damage to the partnership for death or personal injury sustained by the employees or customers of the partnership in the operation of its coal business. Plaintiff's intestate was killed by the negligent operation of a truck while delivering coal. *Held:* The clause exempting the ice company from liability for damage for death or personal injuries sustained by the partnership's employees or customers in the operation of the coal business is immaterial on the question of the ice company's liability for the wrongful death, since no liability therefor is imposed upon the partnership. *Ibid.*

§ 12. Ratification and Estoppel.

This action was instituted to recover damages for trespass for the cutting and removal of timber. Defendant claimed he bought the timber from plaintiff's son and that plaintiff was estopped to deny the authority of the son to sell same. Defendant's evidence on the issue of estoppel tending to show that plaintiff left his family and did not return to the community except for one or two short visits, that his oldest son took over and looked after the place,

PRINCIPAL AND AGENT—*Continued.*

and for a number of years cut wood from the *locus in quo* and sold same. The evidence further tended to show that plaintiff had no knowledge that his son was cutting and selling wood or timber, and there was no evidence that plaintiff expressly authorized his son to cut and sell wood or timber. *Held:* The evidence is insufficient to bring the case within the doctrine of equitable estoppel or the doctrine that a person who, by words or conduct, represents or permits it to be represented that another is his agent, will be estopped to deny the fact of agency as against third persons acting in reliance on the misrepresentations. *Barrow v. Barrow*, 70.

PRINCIPAL AND SURETY.

§ 14. Remedies of Surety Against Principal.

Where the application for a surety bond stipulates that in consideration of the execution of the bond by the surety the principal agrees to indemnify the surety for all loss, including counsel fees, which the surety may sustain in consequence of having executed the bond, a complaint alleging that the surety had paid counsel fees in a stipulated sum necessary to the defense of an action upon the bond, states a cause of action in favor of the surety against the principal. *Pink v. Hanby*, 667.

The principal's averment that he had executed deed of trust on real property in satisfaction of the right of the surety to indemnity for loss sustained by reason of the execution of the bond is unavailing when the surety alleges that it released the deed of trust solely to enable the principal to raise money to effect a compromise settlement with the obligee in the bond, and that there was no intention to release the principal from his contractual obligation to indemnify the surety for loss sustained by the surety by reason of execution of the bond. *Ibid.*

PROCESS.

§ 4a. Personal Service on Resident Individuals.

Personal service by the sheriff of a county of this State of process issued by a court of another state is a nullity and void. *S. v. Williams*, 445.

§ 4b. Service on Nonresident Individuals While Within State.

Findings, supported by evidence, that defendant is a nonresident and was served with summons in this action while he was in this State solely for the purpose of testifying at the coroner's inquest in obedience to a subpœna from the coroner, and that the action was based on matters which arose before his entrance into this State under the subpœna, support the court's order vacating the purported service of summons. Sec. 4, ch. 217, Public Laws 1937. *Bangle v. Webb*, 423.

§ 6f. Service on Officer or Agent of Foreign Corporation Within the State.

Defendant is a nonresident corporation without property in this State and is not licensed to do business and does not maintain a process agent here. Summons was served on its director who came to this State for the purpose of servicing a machine which it had sold plaintiff. The director made the trip to this State after its obligations to service the machine under the contract of sale had expired. *Held:* The visit of the director to this State upon the evidence was an "isolated act" or an act of "trivial business" insufficient to bring the corporation within this State for the purpose of service of summons, and order setting aside the service was proper. *Schoenith, Inc., v. Mfg. Co.*, 390.

PROCESS—*Continued.*

§ 6g. Service on Foreign Motor Carriers.

In this action by a nonresident plaintiff against a nonresident bus corporation, doing business in this State, to recover for personal injuries alleged to have been sustained through negligence of defendant occurring in the State of Virginia, service of process upon the process agent appointed by the defendant under C. S., 1137, *is held* ineffective upon authority of *King v. Motor Lines*, 219 N. C., 223, and the action should have been dismissed. *Hamilton v. Greyhound Corp.*, 815.

§ 8. Service on Nonresident Auto Owners.

Service of summons on nonresident defendant was had by service on the Commissioner of Revenue under the provisions of ch. 75, Public Laws 1929. The order of the court denying defendant's motion to vacate the service *is affirmed* on authority of *Wynn v. Robinson*, 216 N. C., 347. *Coach Co. v. Medicine Co.*, 442.

§ 12. Alias and Pluries Summonses and Discontinuance.

Summons in question *held* not an *alias* summons. *Mintz v. Frink*, 217 N. C., 101. *Asheboro v. Miller*, 298.

If there has been a discontinuance of the action by failure to duly issue *alias* summons, defendant must take advantage thereof by motion to abate before he files answer. *Ibid.*

§ 16. Actions for Abuse of Process.

In an action for abuse of process, based upon defendant's acts in having the plaintiff wrongfully confined in an insane asylum, a letter written to plaintiff by one in authority in plaintiff's church, stating in substance that plaintiff's confinement was unjust and had destroyed plaintiff's usefulness and possibility of obtaining employment in further ministerial work in the church, is hearsay and highly prejudicial, and entitles defendant to a new trial. *Jackson v. Parks*, 680.

PROSTITUTION.

§ 5a. Warrant and Indictment.

A warrant alleging that defendant on a particular day in the designated county "did unlawfully, and willfully aid and abet in prostitution and assignation contrary to the form of the statute and against the peace and dignity of the State" follows the language of the statute, C. S., 4358 (7), and is sufficient to charge the offense therein proscribed. *S. v. Johnson*, 773.

§ 5b. Competency and Relevancy of Evidence in Prosecution for Prostitution.

Testimony of a witness that she had seen defendant take men in his taxi out to a particular house, which the evidence showed was a bawdy house, *is held* competent as corroborative evidence in this prosecution for aiding and abetting in prostitution, the probative force of the evidence being for the jury. *S. v. Johnson*, 773.

§ 5c. Sufficiency of Evidence and Nonsuit.

Defendants, taxi drivers, were apprehended in a clearing in the woods, each under the wheel of his taxi with motor running, and carrying soldiers. The evidence of the character of the scene and the other circumstantial evidence

PROSTITUTION—*Continued.*

is held sufficient to support the inference that defendants knew their destination and brought their passengers to the place for the purpose of engaging in prostitution, and supports a verdict of guilty. C. S., 4358 (4). *S. v. Willis*, 712.

Evidence tending to show that defendant accosted two soldiers, stated that he knew there were women in a near-by house, that the soldiers could go in if they wanted to, and that he "ought to have 50c for his trouble," with testimony of one of the soldiers that he went into the house designated and had sexual intercourse with a girl therein, *is held* sufficient to be submitted to the jury upon the question of defendant's guilt of aiding and abetting in prostitution and assignation. *S. v. Johnson*, 773.

PUBLIC OFFICERS.

§ 6. Tenue.

Even if the election of a public officer to succeed himself is for any reason void, such officer would hold over until his successor is elected and qualified. *Hedgpeth v. Allen*, 528.

§ 8. Civil Liability to Individuals.

A public officer may not be held individually liable for breach of an official or governmental duty involving the exercise of discretion unless he acts corruptly or maliciously, and he may not be held liable for breach of a ministerial duty imposed for the public benefit unless the statute imposing such duty provides for such liability. *Wilkins v. Burton*, 13.

QUO WARRANTO.

§ 1. Nature and Grounds of Remedy.

The proper procedure to try title to public office is by action in the nature of *quo warranto*. *Hedgpeth v. Allen*, 528.

§ 2. Proceedings.

A complaint alleging that plaintiff was a candidate for town commissioner and received a plurality of the votes cast in the primary, that in the following general election he received eight votes for said office and that no votes were cast for any other person, and that thereafter the commissioners, over plaintiff's protest, passed a resolution ousting plaintiff, states a cause of action and defendants' demurrer is properly overruled, no ground upon which plaintiff could have been legally ousted appearing from the complaint. *Hedgpeth v. Allen*, 528.

RAILROADS.

§ 2b. Underpass and Overpass.

Owners of property abutting abandoned highway held not entitled to restrain railroad from closing abandoned underpass in conformity with order of State Highway Commission. *Mosteller v. R. R.*, 275.

§ 9. Accidents at Crossings.

The evidence tended to show the plaintiff drove truck on crossing when he saw train leaving station some 1,500 feet away, that the truck stalled, and that plaintiff remained therein trying to start truck until too late to extricate himself from position of peril. There was evidence that the engineer failed

to give warning of train's approach to crossing. *Held:* The doctrine of last clear chance is inapplicable, since the engineer had a right to assume up to the moment of collision that plaintiff could and would leave truck in time to save himself, and failure to give warning does not militate against this position. *Temple v. Hawkins*, 26.

In approaching a grade crossing, both the trainmen and travelers upon the highway are under reciprocal duty to keep a proper lookout and exercise that degree of care which a reasonably prudent person would exercise under the circumstances to avoid an accident at the crossing. *Godwin v. R. R.*, 281.

A railroad company is under duty to give travelers timely warning of the approach of its train to a public crossing, but its failure to do so does not relieve a traveler of his duty to exercise due care for his own safety, and the failure of a traveler to exercise such care bars recovery when such failure is a proximate cause of the injury. *Ibid.*

Plaintiff's own evidence held to establish, as a matter of law, contributory negligence constituting a proximate cause of crossing accident. *Ibid.*

Where all the evidence tends to show that plaintiff started his car and drove a distance of eight or ten feet onto the crossing in front of an oncoming train, and that his view of the train was unobstructed for a distance of half a mile before it reached the crossing, the evidence discloses contributory negligence constituting a proximate cause of injury as a matter of law. *Miller v. R. R.*, 562.

The existence of signs and poles along the right of way of a railroad company is immaterial when the evidence discloses that they did not obstruct plaintiff's vision from where his car stopped before he entered upon the crossing. *Ibid.*

The fact that automatic signals at a railroad grade crossing were not working at the time of the accident is immaterial on the issue of plaintiff's contributory negligence in entering onto the crossing in front of a train which he should have seen approaching, when the evidence discloses that plaintiff knew the signals were not working and did not rely upon them, but looked in both directions before starting upon the crossing. *Ibid.*

§ 10. Injuries to Persons on or Near Track.

Plaintiff's evidence tended to show that he sat on the end of a crosstie and fell asleep with his elbows on his knees and his head bent forward, and that he was struck and injured by defendants' train. The accident occurred in the State of Virginia. *Held:* There being nothing to indicate plaintiff's obliviousness or that he would not heed the warning of the train's approach, the engineer had the right to assume up to the moment of impact that plaintiff would use his faculties for his own protection and avoid injury, thus excluding the applicability of the doctrine of last clear chance, and establishing contributory negligence barring recovery as a matter of law, and nonsuit was properly granted, contributory negligence and the doctrine of last clear chance both being parts of the Virginia law. *Russ v. R. R.*, 715.

RECEIVERS.

§ 13. Actions by Receiver.

The statutory receiver of insolvent insurance companies who, upon the insolvency of a company chartered by his state, is ordered by the court of such state, by virtue of his office, to take possession and liquidate the property and business of the company, may maintain a suit in this State upon a chose in action constituting an asset of the company, since, although a receiver deriving

his authority solely by the appointment of a court of another state has no extraterritorial powers, the statutory receiver acquires his powers by operation of the laws of such other state, which must be recognized under the Full Faith and Credit Clause of the Federal Constitution. *Pink v. Hanby*, 667.

§ 12d. Payment and Discharge of Claims.

The receiver sold the assets of insolvent to a corporation subject to mortgages and other liens against same, and took in part payment of the purchase price stock of the purchasing corporation, and distributed the shares of stock *pro rata* among the creditors of insolvent, all under orders of court. *Held:* The transaction was not a reorganization of insolvent, and acceptance of stock by the payee of a note executed by insolvent does not discharge the note, but entitles the receiver and the endorser on the note only to a credit thereon to the value of the stock at the time of its receipt by the payee. *Biggs v. Lassiter*, 761.

REFERENCE.

§ 1. Actions Referable.

When a husband inequitably acquires title at foreclosure of property formerly held by him and his wife as tenants by the entirety, the wife's right to have him declared a trustee is not dependent upon her payment of part of the original purchase price for the land, and therefore the action does not require a reference upon her evidence of checks and receipts introduced for the purpose of showing that she paid part of the purchase price. *Hatcher v. Allen*, 407.

§ 3. Pleas in Bar.

When it is apparent on the face of the pleadings that plaintiff's cause of action is not barred, defendant's plea of the statute of limitations cannot be asserted by plaintiff as a plea in bar preventing a compulsory reference. *Hatcher v. Allen*, 407.

§ 11. Remand to Referee.

Where the findings of fact by the referee are supported by competent evidence and sustain the conclusions of law and are sufficient for a complete adjudication of the rights of the parties, it is not error for the trial court to refuse to recommit the case to the referee. *Biggs v. Lassiter*, 761.

REFORMATION OF INSTRUMENTS.

§ 8. Burden of Proof.

Plaintiff declared on a written contract under which defendant agreed to deliver certain processed goods. Defendants admitted the execution of the contract and only partial performance, but alleged that they were to make full deliveries only if they could purchase unprocessed goods at a stipulated price, and that the proviso for this contingency was omitted from the written contract by mutual mistake of the parties. *Held:* Defendants' defense contemplates reformation of the instrument, and defendants have the burden of establishing the defense by clear, strong and convincing proof, and an instruction that the burden was on defendants to prove mutual mistake of the parties by the greater weight of the evidence is error. *Waste Co. v. Henderson Brothers*, 438.

REGISTRATION.

§ 1. Instruments Required to Be Registered.

Restrictive covenants must be registered in order to be binding upon subsequent purchasers, and therefore advertisements published in local papers tending to show a general scheme of development of a subdivision are incompetent to establish restrictive covenants. *Turner v. Glenn*, 620.

§ 2. Requisites, Sufficiency and Effect of Registration.

The indexing of an instrument is an essential part of its registration, but the function of the index is to point to the book and page where the recorded instrument may be found, and it is the instrument itself, thus pointed out, which gives the notice. C. S., 3309. *Tocci v. Nowfall*, 550.

An index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found. *Ibid.*

No notice, however full and formal, will take the place of registration. *Turner v. Glenn*, 620; *Grimes v. Guion*, 676.

A duly recorded instrument gives notice of all matters which would be discovered by reasonable inquiry. *Ins. Co. v. Knox*, 725.

Deed executed by trustee having naked power of disposition *held* good under registration laws as against subsequent purchaser notwithstanding that deed was executed and indexed under corporate name of grantee without indication that it was trustee. *Tocci v. Nowfall*, 550.

A purchaser is charged with notice of the contents of every recorded instrument constituting a link in his chain of title and is put on notice of any fact or circumstance affecting his title which any of such instruments would reasonably disclose. *Turner v. Glenn*, 620.

A recorded mortgage or deed of trust gives notice not only of the existence of the lien but also the remedies accruing to the holder in the event of default, and when the instrument is upon its face in default a prudent examiner is put upon inquiry as to whether the debt has been kept in date by payment and whether the lienholder is pursuing either of the remedies of foreclosure under the power of sale or foreclosure by suit. *Ins. Co. v. Knox*, 725.

Reference in a deed to a map of the subdivision incorporates such a map for a more particular description, but does not bind the owner to sell lots therein in accordance with the scheme of development laid down on the map, and therefore such reference is ineffective as notice to subsequent purchasers that the land is subject to restrictive covenants and does not impose such restrictions upon land purchased by them. *Turner v. Glenn*, 620.

A subsequent purchaser is chargeable with notice of restrictive covenants only if a deed constituting a link in his chain of title sets them forth or refers to a recorded instrument which sufficiently describes them, but he is not required to investigate collateral conveyances of any of his predecessors in title. However, in the instant case investigation of collateral conveyances would have failed to give notice of covenants restricting the use of lots in the vicinity to residential purposes. *Ibid.*

Reference in deed to "usual restrictions" held insufficient to impose restrictions to use for residential purposes. *Ibid.*

In instant case, investigation of collateral conveyances of developer would not have given notice of restrictive covenants. *Ibid.*

This action was instituted to foreclose a duly registered deed of trust in which the trustee and the *cestuis* and the owner of the equity of redemption by *mesne* conveyances, were made parties. While the action was pending the

REGISTRATION—*Continued.*

owner of the equity sold the property. *Held:* The duly registered deed of trust was constructive notice, not only of the lien, but also of the pendency of the foreclosure suit, since it would have been discovered by a prudent examiner, and therefore notice of the suit under C. S., 501, by indexing and cross-indexing same in the *lis pendens* docket was not required. *Ins. Co. v. Knox*, 725.

§ 4b. Rights of Parties Under Unregistered Instrument as Against Purchasers for Value.

Parol contract to convey is unavailing as against purchaser under registered deed from vendor or her heirs. *Grimes v. Guion*, 676.

REMOVAL OF CAUSES.

§ 4a. Determination of Whether Controversy Is Separable.

In determining the question of separability, the allegations of the complaint control, and when the complaint states a cause of action against defendants as joint tort-feasors the motion of the nonresident defendant to remove to the Federal Court on the ground of diversity of citizenship and separable controversy must be denied. *Smith v. Furniture Co.*, 155.

Complaint alleging that plaintiff was blinded by blanket of fog forming in street from one of defendants' steam pipes, that agent of other defendants was operating a car from opposite direction in negligent manner, and that as result of being blinded and negligent operation of other car a collision occurred, resulting in injury to plaintiff *held* to state cause against defendants as joint tort-feasors, and motion to remove on ground of separable controversy and diversity of citizenship was properly denied. *Ibid.*

STATES.

§ 4a. State Lands.

As a result of the Treaty of Peace with England the territory embraced within the thirteen states, together with land not previously granted, passed to these states subject to the possessory rights of the Indians over the land which they occupied. *S. v. McAlhaney*, 387.

STATUTES.

§ 2. Constitutional Inhibition Against Passage of Special, Private or Local Acts.

Chapters 6 and 193, Public Laws 1941, which by their terms apply only to one county, are local statutes. *Board of Health v. Comrs. of Nash*, 140.

Art. II, sec. 29, of the Constitution of North Carolina is remedial in its nature and was intended not only to free the Legislature of petty detail, but also to require uniform and coördinated action under general laws in regard to the matters therein stipulated which are related to the welfare of the people of the whole State, and the application of the section should not be denied on any unsubstantial distinction which would defeat its purpose. *Ibid.*

Acts applicable to only one county which provide that county commissioners should approve election of health officer, held void. *Ibid.*

§ 5a. General Rules of Construction.

It is the duty of the courts to construe the law as written. *Hart v. Gregory*, 180; *Raleigh v. Hatcher*, 613.

STATUTES—*Continued.*

§ 5b. Construction in Regard to Constitutionality.

Unconstitutional proviso in statute for annexation of additional territory by municipality that taxes should not be levied or collected in annexed territory unless it were afforded comparable improvements *held* separable from rest of act, so that statute, with unconstitutional part deleted, stands as valid. *Banks v. Raleigh*, 35.

Courts will not declare statute unconstitutional unless it is clearly so. *Morris v. Holshouser*, 293.

§ 7. Prospective and Retroactive Effect.

Ch. 352, Public Laws 1941, giving an employee the right to enforce an award by civil action and making certain ancillary remedies available to him when the employer fails to keep in effect a policy of compensation insurance, must be given retroactive as well as prospective effect. *Byrd v. Johnson*, 184.

§ 8. Construction of Penal Statutes.

Penal statutes must be strictly construed. *S. v. Eurell*, 519.

SUBROGATION.

§ 2. Operation, Enforcement and Effect.

Where a party has become subrogated to a particular right the subrogor cannot thereafter, to the detriment of the subrogee, modify or waive the subrogated right. *Hinson v. Davis*, 380.

TAXATION.

§ 1. Uniform Rule.

Proviso that annexed territory should not be subject to taxation if improvements and services were not afforded it held void as violating rule of uniformity in taxation. *Banks v. Raleigh*, 35.

§ 3b. Constitutional Limitation on Increase in Public Indebtedness.

Where the expenditure for replacements of machinery for a municipal water and power system are to be paid solely out of the revenues thereof, the hypothesis that the diversion of profits of the systems for this purpose would decrease the amount of profits paid into the general fund and therefore incidentally require an increase in the municipal tax rate is of no significance upon the constitutional limitation upon the increase in the public debt without a vote. *Raynor v. Comrs. of Louisburg*, 348.

§ 25. Valuation and Revaluation of Realty.

N. C. Code, 7971 (111), providing for the quadrennial revaluation of property for taxation beginning with the year 1941 was amended by ch. 282, Public Laws 1941, and under the amendment the commissioners of a county are authorized to defer the revaluation due to be made in the year 1941 to the year 1942, or to any year prior to the revaluation due to be made in the year 1945. *Moore v. Sampson County*, 232.

§ 40b. Foreclosure of Tax Certificates.

C. S., 8037, as rewritten in sec. 4 of ch. 221, Public Laws 1927, requires that in a tax foreclosure suit a description of the real estate, which is in fact and law sufficient, shall be set out in the published notice. *Comrs. of Beaufort v. Rowland*, 24.

TAXATION—*Continued.*

§ 42. Tax Deeds and Titles.

Description of land in tax foreclosure *held* insufficient and tax deed to county was void and it was not entitled to enforce contract to purchase. *Comrs. of Beaufort v. Rowland*, 24.

TORTS.

§ 4. Determination of Whether Tort Is Joint or Separable.

In law the term "joint tort-feasors" includes those who commit separate wrongs without concert of action or unity of purpose, when the separate wrongs are concurrent as to time and place and unite in setting in operation a single, dangerous and destructive force which produces a single and indivisible injury, and plaintiff may consistently and properly join such joint tort-feasors as defendants in one action. *Smith v. Furniture Co.*, 155.

The tracks of two railroad companies crossed at grade. When the crossing was in use by one railroad, its signalman by levers in a block house switched red lights and a derailer on the tracks of the other railroad. Plaintiff's evidence tended to show that he was an employee of such other railroad and was riding with other employees and a foreman on a motor car, that as the car approached the intersection the light turned red and the foreman slowed or stopped the car, that the lights then turned green and the foreman proceeded, but that just as the car reached the derailer the lights suddenly turned red again and the derailer was thrown back on the track making it impossible to stop the car before striking the derailer, resulting in the injury in suit. *Held:* Plaintiff's evidence, considered in the light most favorable to him, supports his conclusion that defendant railroad companies were joint tort-feasors. *King v. Powell*, 511.

§ 8c. Acceptance of Benefits and Ratification of Release.

The evidence disclosed that the consideration of the release executed by plaintiff was $55, of which $25 was paid the doctor and $15 was paid the attorney representing plaintiff at the time. There was evidence tending to show plaintiff's ignorance, the condition of his attorney at that time, and the oppressive manner and language of those who procured the release. *Held:* Considering plaintiff's evidence in the light most favorable to him, the fact that plaintiff accepted and spent the $15 which came to him out of the sum paid for the release does not establish ratification of the release as a matter of law, but the issue was correctly submitted to the jury. *Hairston v. Greyhound Corp.*, 642.

§ 9. Effect of Release from Liability on Co-Joint Tort-Feasors.

A release from liability executed by the plaintiff to one joint tort-feasor releases all. *King v. Powell*, 511.

TRESPASS.

(Limitation of actions for, see Limitation of Actions § 6.)

§ 1e. Trespass by Discharge or Ponding of Water.

A wrongful or negligent flooding or ponding water on the lands of another constitutes a trespass upon the lands. *Davenport v. Drainage District*, 237.

TRIAL.

II. Order, Conduct and Course of Trial
6. Expression of Opinion by Court on Evidence During Conduct of Trial. Light Co. v. Carringer, 57.
16. Withdrawal of Evidence. Cauley v. Ins. Co., 304.
IV. Province of Court and Jury
19. In Regard to Evidence. Guaranty Co. v. Motor Express, 721; Mitchell v. Melts, 793.
V. Nonsuit
22a. Office and Effect of Motion to Nonsuit. Godwin v. R. R., 281.
22b. Consideration of Evidence on Motion to Nonsuit. Edwards v. Junior Order, 41; Riddle v. Whisnant, 131.
23. Contradictions and Discrepancies in Evidence. Edwards v. Junior Order, 41; Childress v. Lawrence, 195.
24. Sufficiency of Evidence. Rose v. Patterson, 60; Mitchell v. Melts, 793.
VII. Instructions
29b. Statement of Evidence and Explanation of Law Arising Thereon. Howell v. Harris, 198; Light Co. v. Moss, 200; Allison v. Steele, 318; Cummings v. Coach Co., 521.
31. Expression of Opinion by Court on Evidence. Bailey v. Hayman, 402; Hairston v. Greyhound Corp., 642.
32. Request for Instructions. Motor Co. v. Ins. Co., 168.
36. Construction of Instruction. Motor Co. v. Ins. Co., 168.
VIII. Issues and Verdict
38. Conformity of Issues to Pleadings and Evidence. Allison v. Steele, 318.
43. Acceptance or Rejection of Verdict by Court. Supply Co. v. Horton, 373; Butler v. Gantt, 711.
X. Motions after Verdict
45. Motions for Judgment Non Obstante Veredicto. Supply Co. v. Horton, 373.
47. Motions for New Trial for Newly Discovered Evidence. Crow v. McCullen, 306.

§ 6. Expression of Opinion by Court During Conduct of Trial.

In this proceeding to assess compensation for the taking of an easement over respondent's land for a high voltage transmission line, the court in ruling upon the admissibility of evidence stated that the steel towers on the land and the power lines running over the land did not affect the value of the land outside the easement. *Held:* The remarks of the court constituted a determination, as a matter of law, of an issue of fact within the province of the jury in violation of C. S., 564. *Light Co. v. Carringer*, 57.

§ 16. Withdrawal of Evidence.

The trial court inadvertently admitted hearsay evidence which was very material to the controversy. The court later withdrew the evidence and instructed the jury not to consider it. *Held:* Upon the entire record the inadvertence cannot be held for prejudicial and reversible error. *Cauley v. Ins. Co.*, 304.

§ 19. Province of Court and Jury in Regard to Evidence.

The weight of evidence is for the jury; the admissibility of evidence is for the court. *Guaranty Co. v. Motor Express*, 721.

Whether there is enough evidence to support a material issue is a question of law. *Mitchell v. Melts*, 793.

§ 22a. Office and Effect of Motion to Nonsuit or Demurrer to Evidence.

A motion to nonsuit questions the sufficiency of the evidence to carry the case to the jury and to support a recovery, which is always a question of law to be determined by the court. C. S., 567. *Godwin v. R. R.*, 281.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, the evidence tending to support plaintiff's cause of action is to be considered in the light most favorable to plaintiff, and he is entitled to every reasonable intendment thereon and every reasonable inference therefrom. C. S., 567. *Edwards v. Junior Order*, 41; *Riddle v. Whisnant*, 131.

TRIAL—*Continued.*

§ 23. Contradictions and Discrepancies in Evidence as Affecting Nonsuit.

The fact that there are discrepancies and contradictions in plaintiff's evidence does not justify the granting of defendant's motion to nonsuit, the credibility of the evidence being for the jury. *Edwards v. Junior Order*, 41; *Childress v. Lawrence*, 195.

§ 24. Sufficiency of Evidence to Overrule Nonsuit.

Pleadings control the action, and when complaint alleges enrichment of devisee at expense of creditor but proof tends to show, at most, *devistavit*, nonsuit is proper. *Rose v. Patterson*, 60.

In order to resist nonsuit, plaintiff must offer legal evidence tending to establish every material fact necessary to support a verdict, and evidence which leaves any one of them in mere speculation or conjecture is insufficient. *Mitchell v. Melts*, 793.

§ 29b. Statement of Evidence and Explanation of Law Arising Thereon.

The trial court correctly withdrew hearsay evidence upon the question of agency, but inadvertently charged the jury that plaintiff contended that such evidence should satisfy the jury that the alleged agent was about the corporate defendant's business. *Held:* The action of the court in placing before the jury evidence material to the issue, which had been excluded, without opportunity on the part of the corporate defendant to answer it or in any way meet it, necessitates a new trial. *Howell v. Harris*, 198.

An opinion must be read in connection with the facts of the particular case it decides, and therefore in reading a decision to the jury the trial court must exercise great caution to ascertain that the language used in the decision is a statement of the general law applicable to the facts in the case at issue, and should call the jury's attention to any dissimilarity in the facts in order to apply the general statement of the law to the evidence in the case at issue. *Light Co. v. Moss*, 200.

When defense of statute of frauds is not properly invoked by defendant, he may not object to charge on ground that evidence disclosed contract to answer for debt of another and that court failed to charge law relative to statute of frauds. *Allison v. Steele*, 318.

Plaintiff did not introduce in evidence any bill for hospital expenses nor any evidence that she had received any such bill, or had paid or is obligated to pay a bill for hospital expenses in any specific amount. The court charged the jury that plaintiff offered evidence that she had received a bill for doctors and medical services in the sum of $118 and that she contended that she had had to pay such bill. *Held:* The charge of the court referring to matters which had not been introduced in evidence and concerning which defendant was afforded no opportunity to cross-examine witnesses, must be held for prejudicial error. *Cummings v. Coach Co.*, 521.

§ 31. Expression of Opinion on Evidence in Charge.

C. S., 564, proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the trial or in its instructions to the jury. *Bailey v. Hayman*, 402.

The court is proscribed from intimating an opinion upon the weight and credibility of the evidence in the manner of stating the contentions of the parties as well as in other portions of the charge, and in this case the warmth and vigor of the court's statement of the contentions of defendant *is held* to constitute an expression of opinion by the court entitling plaintiffs to a new trial. *Ibid.*

TRIAL—*Continued.*

In this action for tortious injury defendant set up a release executed by plaintiff in consideration of the sum of $55, which sum defendant contended was adequate compensation for the injury. The court in instructing the jury upon the question of nominal damages charged that nominal damages might consist of stipulated sums of from $1 to $50, or even $100. The court had theretofore charged the jury that it might consider the inadequacy of the sum paid for the release upon the issue of fraud in its procurement. *Held:* The statement that $55 or $100 should be considered mere nominal damages amounted to an expression of opinion that the amount paid for the release was inadequate, and constitutes error entitling defendant to a new trial. *Hairston v. Greyhound Corp.*, 642.

§ 32. Requests for Instructions.

If a party desires more specific instructions or fuller definitions of words or phrases used in the charge he must aptly tender prayer for special instructions. *Motor Co. v. Ins. Co.*, 168.

§ 36. Construction of Instructions.

A charge will be construed contextually as a whole, and appellant's exception to an isolated portion of the charge cannot be sustained when such portion read contextually with the rest of the charge is not prejudicial. *Motor Co. v. Ins. Co.*, 168.

§ 38. Conformity of Issues to Pleadings and Evidence.

Plaintiff sought to hold husband and wife liable upon an alleged agreement to be responsible for materials furnished a contractor for improvements upon their land. There was no evidence that the wife procured her husband to make the contract, but the sole issue upon the question of liability was whether the husband, with the consent and procurement of the wife, entered into the alleged agreement. *Held:* The issue presented an inseparable proposition entitling the husband to a new trial to determine the question of his sole liability. *Allison v. Steele*, 318.

§ 43. Acceptance or Rejection of Verdict by Court.

A judge is without authority to set aside answers made by the jury to certain of the issues, answer the issues himself, and render judgment on the verdict as amended. *Supply Co. v. Horton*, 373.

Affirmative answers to issues of negligence and contributory negligence, and awarding of damages, is not essentially inconsistent verdict, and court's requiring jury to reconsider is error entitling defendant appellant to new trial. *Butler v. Gantt*, 711.

§ 45. Motions for Judgment Non Obstante Veredicto.

Since a judgment *non obstante veredicto* is in effect merely a belated judgment on the pleadings, a judgment for plaintiff cannot be sustained upon the theory of its being a judgment *non obstante veredicto* when defendants' answer denies a material fact essential to support recovery by plaintiff. *Supply Co. v. Horton*, 373.

§ 47. Motions for New Trial for Newly Discovered Evidence.

The judgment in this action was signed out of term and out of the county by consent. Thereafter at the next succeeding civil term the court granted defendant's motion to set aside the judgment for newly discovered evidence.

TRIAL—*Continued.*

Held: Upon the docketing of the judgment it became a judgment as of the trial term, and in the absence of agreement preserving the right to move to set aside the judgment at a subsequent term, the trial court was without power to grant the motion. *Crow v. McCullen*, 306.

TRUSTS.

§ 6. Execution of Deed by Trustee.

Conveyance by trustee which has mere naked legal title and no other interest in land will operate as exercise of its power of disposition notwithstanding deed fails to indicate its capacity is that of trustee. *Tocci v. Nowfall*, 550.

The rule that a deed executed by a trustee having a naked power of disposition and no other interest in the property, will operate as an exercise of the power of disposition notwithstanding the failure of the deed to designate the grantor as "trustee" prevails not only as between the parties but also as to those holding by *mesne* conveyances from the grantee, since the trustee's deed is effective as a conveyance of title and not merely as an estoppel. *Ibid.*

Exercise of power of disposition held good under registration laws notwithstanding that index failed to designate that the grantor's capacity was that of trustee. *Ibid.*

§ 15. Creation and Enforcement of Constructive and Resulting Trusts.

Party may not assert constructive trust when preliminary parol negotiations constituting basis of action are varied and merged in subsequent written agreement with which defendants comply. *Williams v. McLean*, 504.

USURY.

§ 2. Contracts and Transactions Usurious.

An action to recover alleged usurious interest paid cannot be maintained upon evidence disclosing that the transaction alleged was not a loan but was a sale with deferred payment secured by conditional sale contract. C. S., 2306. *Hendrix v. Cadillac Co.*, 84.

VENDOR AND PURCHASER.

§ 24b. Remedies of Purchaser as Against Vendor's Grantee.

Defendant alleged that she went into possession of the land, paid taxes and made improvements under a parol agreement with the owner that if the owner should fail to return and repay the taxes and pay for the improvements defendant should have the land in fee, and that plaintiff, seeking to recover possession of the land by virtue of a duly registered deed from the heirs of the vendor, took with knowledge of the terms of the agreement and that defendant was in possession thereunder. *Held:* The parol agreement is ineffectual as against plaintiff notwithstanding his knowledge, since no notice, however full and formal, will supply notice by registration, C. S., 3309, and the answer neither sets up a defense to plaintiff's action nor alleges facts entitling defendant to reimbursement for taxes and improvements before recovery of possssion by plaintiff. *Grimes v. Guion*, 676.

§ 26. Actions to Recover for Shortage in Acreage.

In this action to recover the proportionate part of the purchase price of land for deficiency in acreage arising out of the fact that a third party had

VENDOR AND PURCHASER—*Continued.*

superior title to a part of the land described in the deed to plaintiffs, the refusal of the trial court to submit an issue of estoppel by conduct was not error, there being no sufficient evidence that plaintiffs knew the true boundaries when they accepted the deed, nor was the court's refusal to submit an issue of mutual mistake erroneous, there being neither allegation nor evidence of mutual mistake. *Jefferson v. Sales Corp.*, 76.

VENUE.

§ 1a. Residence of Parties.

In an action for negligent injury, the court's finding, upon conflicting evidence, that the residence of plaintiff is in the county in which the action is instituted, the finding supported by sufficient competent evidence is binding upon appeal, and defendant's exception to the refusal of his motion to remove cannot be sustained. *Jones v. Elks*, 39.

§ 1b. Actions Against Executors and Administrators.

In an action against an executrix and legatee upon allegations of personal enrichment at the expense of creditors, defendant's motion to remove to county of her qualification is properly denied, notwithstanding that plaintiff's proof tends to show, at most, *devastavit*, since the action is governed by the pleadings. *Rose v. Patterson*, 60.

§ 2a. Actions Involving Realty.

A complaint alleging that defendant entered upon the land of plaintiff and cut and removed therefrom a specified amount of timber and praying that plaintiff recover the value of the timber wrongfully cut and removed states a transitory cause of action, and defendant's motion to remove from the county of plaintiff's residence to the county wherein the land is situate, is properly denied. C. S., 463 (1). *Bunting v. Henderson*, 194.

§ 3. Objections to Venue and Waiver.

Venue is not jurisdictional and may be waived, and therefore when a defendant does not press his motion to remove to the county of his residence he waives his rights thereunder, and the Superior Court in which the action was instituted retains jurisdiction, and may hear and determine the controversy. *Wynne v. Conrad*, 355.

WATERS AND WATERCOURSES.

§ 3. Diversion of Waters of Stream.

A municipal corporation, impounding waters of a private stream and diverting same into its municipal water system does not do so in the character of riparian owner, since the individual citizens of the municipality do not have such riparian rights and therefore the municipality as a political unit does not have them, and the municipality may not defend an action by a lower riparian owner for the diversion and diminishing of the flow of the stream on the ground that it has the right to divert the waters for domestic purposes, even to the extent of taking the entire flow. *Pernell v. Henderson*, 79.

In an action by a lower riparian owner against a municipal corporation for diversion of the waters of a stream into its municipal water system, the failure of the complaint to allege the quantity or percentage of the water diverted and the quantity remaining in the stream is not a fatal defect. *Ibid.*

WILLS.

§ 3. Testamentary Intent.

A paper writing cannot be construed as a will unless it discloses the intent of the writer that the paper itself should operate as a disposition of her property to take effect after death. *In re Will of Taylor*, 524.

The paper writing admitted to probate in common form was a letter written by testatrix to her father and sisters in which she expressed her desire that her husband should have her property, stated an intent to execute a will effecting that purpose if she was able to contact a lawyer, and requested them to give him her property in the event she died before making testamentary disposition thereof. *Held:* The paper writing fails to disclose an *animus testandi* necessary to constitute a valid will. *Ibid.*

§ 31. General Rules of Construction.

The cardinal consideration in the interpretation of wills is to ascertain and give effect to the intent of testator. *Culbreth v. Caison*, 717.

§ 33c. Vested and Contingent Interests and Defeasible Fees.

The will in question devised the *locus in quo* in fee to four beneficiaries as tenants in common, but provided that "in case of the death of either of them leaving a child or children, I give and devise" the portion of the ancestor to his child or children, and further provided that "if either of them should die without child or children I give and devise" his or their share to the survivor or survivors. *Held:* The fact that the words "I give and devise" are repeated after each contingency discloses testatrix' intent that each successive limitation was to be in substitution of the one immediately preceding with a view of guarding against a failure by lapse, and not to create defeasible fees with contingent limitation over, and each of the four devisees who survives testatrix take a one-fourth interest in fee. *Whitley v. McIver*, 435.

§ 33f. Devises with Power of Disposition.

Testator devised certain property to one of his sons for life with remainder to the "children of his body absolutely in fee forever," and by codicil, which ratified and confirmed the will except as changed thereby, gave the devisee "full power to sell or dispose" of the property devised "and receive the proceeds thereof." *Held:* The power of disposition granted in the codicil empowered the devisee to sell or dispose of the property in any manner except by will, which power included the power to mortgage as well as the power to convey by deed. *Trust Co. v. Heymann*, 526.

Held: Power of disposition was restricted to conveyance to other children of testator and limited to conveyance of life estate. *Culbreth v. Caison*, 717.

§ 34a. Determination of Whether Devise Is for Life or in Fee.

Will held to devise only life estate to devisees with remainder to their children. *Culbreth v. Caison*, 717.

§ 34c. Designation of Devisees and Legatees and Their Respective Shares.

An item of a will directing that certain realty be sold "and the proceeds divided equally between" the children of a deceased daughter (seven in number), the only daughter of another deceased daughter by name, and another, who was treated by testator as his foster son, *is held* to require the division of the proceeds among the beneficiaries *per capita* and not *per stirpes* under the general rule that an equal division among designated legatees means a *per capita* distribution, unless a contrary intent appear. *Tillman v. O'Briant*, 714.

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

65 (a). Does not have effect of fixing sum of $300 as *bona notabilia* in determining jurisdiction of clerk to appoint administrator for non-resident dying in this State. *In re Administration of Franks*, 176.

74. Does not affect jurisdiction of proceedings to allot dower by metes and bounds, and clerk of court before whom proceedings under this section are instituted does not have jurisdiction to allot dower in the county of deceased's domicile. *High v. Pearce*, 266.

79, 80. Administrator cannot maintain action against intestate's grantee to declare estate conveyed forfeited for breach of condition subsequent. *Barkley v. Thomas*, 341.

160. Declarations made by deceased, respectively, the night before and two days before undertaking fatal trip held incompetent. *Gassaway v. Gassaway & Owen, Inc.*, 694.

203. While counsel may argue law and facts to jury, remarks not warranted by evidence are properly suppressed by court. *S. v. Howley*, 113.

276 (d). Warrant failing to charge that failure to support illegitimate child was willful is fatally defective. *S. v. Clarke*, 392; *S. v. Moore*, 535.

412, 437 (1). When judgment debtor dies within 10 years of rendition of judgment and administrator is appointed within 10 years of death, claim on judgment filed within one year of appointment is not barred. *Rodman v. Stillman*, 361. Claim on judgment held "filed" within meaning of C. S., 412. *Ibid.*

432. When title is acquired by adverse possession such title is legal title, and occupancy thereafter will be presumed in subordination thereto. *Purcell v. Williams*, 522.

437. When foreclosure is instituted within time, subsequent purchasers with notice cannot assert bar of statute. *Ins. Co. v. Knox*, 725.

441 (3). Action for damages for flooding of lands by construction of canal is for continuing trespass and is barred after three years from original trespass. *Davenport v. Drainage District*, 257.

463 (1). Action to recover value of timber cut and removed does not involve title to realty. *Bunting v. Henderson*, 194.

490. General appearance waives all defects and irregularities in service of summons. *Asheboro v. Miller*, 298.

511 (6), 518. Right to demur on ground of want of jurisdiction and failure of complaint to state cause of action cannot be waived. *Raleigh v. Hatcher*, 613.

517. When incapacity of plaintiff to sue does not appear from complaint, demurrer on this ground is bad. *Cheshire v. First Presbyterian Church*, 392.

CONSOLIDATED STATUTES—*Continued.*

SEC.

524. When answer is not served on plaintiffs they are not required to file reply even though answer sets up counterclaim, since the law denies counterclaim for them. *Miller v. Grimsley*, 514.

525. Allegations of reply must not be inconsistent with those of complaint. *Miller v. Grimsley*, 514.

564. Court is proscribed from expressing opinion on evidence in course and conduct of trial as well as in charge. *Bailey v. Hayman*, 402. Warmth and vigor of statement of defendant's contentions held to amount to expression of opinion. *Ibid.* Failure of court to charge law relative to statute of frauds is not error when defense of statute is not properly presented. *Allison v. Steele*, 318. Statement of court that erection of steel towers for transmission line did not affect value of remaining land held error. *Light Co. v. Carringer*, 57.

567. On motion to nonsuit evidence is to be considered in light most favorable to plaintiff. *Edwards v. Junior Order*, 41; *Riddle v. Whisnant*, 131. Sufficiency of evidence is question of law. *Godwin v. R. R.*, 282. When conclusion that plaintiff was guilty of contributory negligence is only reasonable inference that can be drawn from evidence, nonsuit is proper. *Ibid.*

598, 637. Court may order resale of property under foreclosure at chambers while holding criminal term in the county. *Harriss v. Hughes*, 473.

614, 437 (1). Action to enforce judgment lien by condemning land to be sold is barred when sale cannot be concluded within ten-year period, and C. S., 437 (1), does not have effect of continuing time. *Lupton v. Edmundson*, 188.

626, 628 (a). Superior Court has jurisdiction of controversy without action between county board of health and county commissioners to determine respective duties in regard to appointment of health officer notwithstanding that provisions of Declaratory Judgment Act are not specifically referred to. *Board of Health v. Comrs. of Nash*, 140.

637. Fact that motion to remove is made and remains undisposed of does not deprive court in which action is instituted of jurisdiction. *Wynne v. Conrad*, 355.

643. Upon hearing to settle case on appeal court cannot strike appellant's statement of case from record on ground that it is insufficient. *Chozen Confection, Inc., v. Johnson*, 432.

643, 644. Preparation and settlement of case on appeal belong to parties and judge, and inability of reporter to transcribe notes because of illness does not excuse appellant from making out and serving statement within time allowed. *S. v. Wescott*, 439.

644. Upon hearing to settle case on appeal, court's jurisdiction is limited to that purpose and it cannot dismiss appeal as moot. *Laundry, Inc., v. Underwood*, 152.

699, 701. When at time of recovery of land the value thereof had not been increased by improvements placed thereon under *bona fide* belief of

CONSOLIDATED STATUTES—*Continued.*

SEC.

ownership, petitioner is not entitled to improvements. *Barrett v. Williams*, 32.

970. Common law offense of barratry obtains in this State. *S. v. Batson*, 411.

994. Trustors are necessary parties to action by purchaser at foreclosure to obtain authority for infant trustee to execute deed. *Riddick v. Davis*, 120.

1137. In action by nonresident plaintiff against nonresident bus corporation, involving accident occurring in another state, service of process on process agent appointed by defendant under this section held ineffective. *Hamilton v. Greyhound Corp.*, 815.

1290. Drainage district is a corporation and cannot be bound by acts of its officials acting individually. *Davenport v. Drainage District*, 237.

1316 (a). Ch. 305, Public Laws 1903, does not authorize town of Louisburg to contract for machinery for its water and sewer system and electric light plant without submitting same to competitive bidding after due advertisement, and evidence held to show no emergency relieving city of duty to advertise for bids. *Raynor v. Comrs. of Louisburg*, 348.

1608 (dd), 1667. When judgment awarding alimony entered by the county court is docketed in the Superior Court, the Superior Court acquires jurisdiction to enforce decree, and fact that subsequent to rendering decree county court was abolished is immaterial. *Brooks v. Brooks*, 16.

1661. Answer in wife's cross-action must be verified as jurisdiction prerequisite. *Silver v. Silver*, 191.

1665. Permanent alimony may be allowed only upon decree for divorce *a mensa*, and is erroneously allowed in wife's cross-action in which divorce *a mensa* is neither prayed nor decreed. *Silver v. Silver*, 191.

1667. Alimony without divorce may be granted only in independent suit and not in wife's cross-action. *Silver v. Silver*, 191. In wife's action for alimony without divorce, husband cannot set up cross-action for divorce. *Shore v. Shore*, 802.

1795. In action against estate for intestate's negligent driving, testimony of plaintiff tending to establish that intestate and not plaintiff was driving at time of fatal accident held incompetent. *Davis v. Pearson*, 163.

1808 (4). Findings, supported by evidence, that defendant is a nonresident and was served while in this State solely to testify at coroner's inquest supports order vacating purported service. *Bangle v. Webb*, 423. Finding is conclusive in another action growing out of same collision. *Current v. Webb*, 425.

2306. Does not apply when transaction is a sale and not a loan. *Hendrix v. Cadillac Co.*, 84.

2333. Act providing that county commissioners should select grand jury in conformity with this section held valid. *S. v. Peacock*, 63.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2432. Statement inferring that innocent woman was guilty of incontinence is libelous, and when statement is made in answer, but is not available as defense, statement is not privileged. *Harshaw v. Harshaw*, 145.

2439, 2440. Materialman must give notice to owner before owner completes payment to contractor, and when contract is on cost plus basis invoices submitted to the owner are not notice. *Pumps, Inc., v. Woolworth Co.*, 499.

2488, 2355. Assignee of landlord's lien for rent has priority over assignee of note executed by tenant for rent. *Rhodes v. Fertilizer Co.*, 21.

2559, *et seq.* Are not applicable to agreement not to sell ice to plaintiff, resulting in ruining his business. *Lineberger v. Ice Co.*, 444.

2593 (d). When collateral for notes is sold by judicial sale and purchased by pledgee this section has no application. *Biggs v. Lassiter*, 761.

2593 (f). Denial of deficiency judgment on notes executed in another state does not impinge full faith and credit clause. *Bullington v. Angel*, 18.

2594. Possession of papers by trustee raises presumption of his authority to cancel the deed of trust of record. *Williams v. Williams*, 806.

2621 (b) (3). Evidence held to show that negligence of driver of car was sole proximate cause of accident, insulating any negligence on part of driver of truck. *Reeves v. Staley*, 573.

2621 (187) (a). In determining whether *locus* is in business or residential district or neither, only the block in which the accident occurred, without consideration of character of property along intersecting streets, is germane. *Mitchell v. Melts*, 793.

2621 (230) (d). Evidence held insufficient to show that pedestrian was walking on left of highway when struck by projection from side of truck. *Pack v. Auman*, 704.

2621 (278) (d). Even conceding negligence of defendant in stopping on highway without rear lights burning, the evidence discloses contributory negligence as matter of law on part of plaintiff colliding with rear of truck. *Sibbitt v. Transit Co.*, 702.

2621 (285), 4506. Sentence of confinement in county jail for six months to be assigned to work roads upon plea of nolo contendere to charge of drunken driving held not excessive. *S. v. Parker*, 416.

2621 (308). Stopping of bus on hard surface of highway outside of business or residential district for purpose of taking on passenger is not "parking" or "leaving the vehicle standing." *Peoples v. Fulk*, 635. Stopping of bus on highway to permit passenger to alight is not violation of this section. *Leary v. Bus Corp.*, 745.

2707, 2714. When city's resolution recites filing of proper petition, remedy, if such finding is erroneous, is by appeal, and defect of want of proper resolution cannot be set up as defense to action on lien. *Asheboro v. Miller*, 298.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2712, 2713. When notice of second hearing on confirmation of assessment roll is duly given, fact that notice of hearing on first date set for hearing was not published is rendered immaterial. *Asheboro v. Miller*, 298.

2791, 2792, 2792 (a), 3846 (ff). Municipality has power to condemn land to widen State highway within its limits. *Raleigh v. Hatcher*, 613.

3237. In order for court to order sale for partition, petitioner must make it appear that actual partition cannot be had. *Mineral Co. v. Young*, 288.

3309. Parol contract to convey held unavailing as against purchaser under registered deed from heirs of vendor. *Grimes v. Guion*, 676. Exercise of power of disposition held good under registration laws notwithstanding that index failed to designate that grantor's capacity was that of trustee. *Tocci v. Nowfall*, 550.

3309, 501. *Lis pendens* statutes are not applicable to suits to foreclose duly registered mortgages or deeds of trust. *Ins. Co. v. Knox*, 725.

3838 (b). Where Highway Commission deletes underpass and tears up section of road lying on one side of underpass, it does not become neighborhood public road. *Mosteller v. R. R.*, 275.

3846 (bb). Owner of building damaged by cave-in adjacent to excavation for underpass is not relegated to claim in eminent domain, but may maintain action for damages. *Broadhurst v. Blythe Bros. Co.*, 464.

3846 (el). State Highway Commission has power to relocate highway to delete dangerous underpass and to order old underpass closed. *Mosteller v. R. R.*, 275.

4162. Will held to devise only life estate to devisees with remainder to their children, intent to convey less estate than fee being apparent. *Culbreth v. Caison*, 717.

4171. Conspiracy to commit misdemeanor is a misdemeanor; conspiracy to commit a felony is a felony. *S. v. Abernethy*, 226.

4185 (3). 6028, 6037. Interfering with duty of election officials to keep official ballots is offense notwithstanding that ballots are not subject to larceny, and evidence held sufficient to support conviction of conspiracy to commit offense. *S. v. Abernethy*, 226. Offense is misdemeanor. *Ibid.*

4200. Charge that murder in first degree is an unlawful killing of human being without justification held inadvertence requiring new trial. *S. v. Starnes*, 384.

4249, 4251. Sentence of confinement in county jail for 12 months to be assigned to work roads upon plea of *nolo contendere* to charge of stealing automobile of the value of $325, held not excessive. S. v. Parker, 416.

4268. Prior to amendment of ch. 31, Public Laws of 1941, neither "debtor" nor "bailee" came within purview of embezzlement statute. *S. v. Eurell*, 519.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4283 (a). Fact that maker delivers check to payee under an agreement not to deposit it until specified date is not a defense to prosecution under this section. *S. v. Levy*, 812.

4342. Divorce obtained in another state upon substituted service against resident of this State is no defense to prosecution for bigamy upon second marriage. *S. v. Williams*, 445.

4358 (4). Circumstantial evidence of defendant's guilt of aiding and abetting in prostitution held sufficient for jury. *S. v. Willis*, 712.

4358 (7). Warrant charging that defendant "did unlawfully, and willfully aid and abet in prostitution contrary to form of statute" held sufficient. *S. v. Johnson*, 773.

4506. Evidence held sufficient to support conviction of drunken driving, but not of manslaughter, since evidence of causal connection between death and drunken driving was insufficient. *S. v. Miller*, 660.

4623, 4185 (3). Indictment held sufficient to charge conspiracy to violate corrupt practices act. *S. v. Abernethy*, 226.

4623, 4277. Indictment charging that defendants knowingly and falsely represented that there were no laborers' and materialmen's liens on property in order to obtain loan sufficiently charges false pretense. *S. v. Howley*, 113.

4640. Defendant may be convicted of attempt to commit barratry upon indictment charging the offense. *S. v. Batson*, 411.

4643. Upon motion to nonsuit court is limited to determination of whether there is any sufficient evidence for the jury, the weight of the evidence being in the exclusive province of the jury. *S. v. Johnson*, 773.

4647, 4627. Since defendant has right to demand jury trial in justice's court, and trial in Superior Court on appeal is *de novo*, fee system of compensation of justices (ch. 342, Public-Local Laws 1933, ch. 358, Public-Local Laws 1935) does not result in depriving defendant of due process of law. *In re Steele*, 685.

4653. Question of amount to be fixed for bond pending appeal is largely in discretion of trial court. *S. v. Parker*, 416.

6558 (a). Is constitutional and valid. *Morris v. Holshouser*, 293.

7067. Acts applicable to only one county which provide that county commissioners should approve election of health officer, held void. *Board of Health v. Comrs. of Nash*, 140.

7971 (111). Under amendment by ch. 282, Public Laws of 1941, county commissioners may defer revaluation for 1941 to any year prior to 1945. *Moore v. Sampson County*, 232.

7982. Life tenant permitting land to be sold for taxes and failing to redeem in one year, forfeits estate, and fact that after institution of suit by remaindermen life tenant pays taxes, interest and penalties does not affect forfeiture. *Cooper v. Cooper*, 490.

CONSOLIDATED STATUTES—*Continued.*

SEC.

7990, 8037. Allegations held to constitute action one to foreclose original lien under C. S., 2779. *Asheboro v. Miller*, 298.

8037. Description of land in tax foreclosure held insufficient in absence of evidence *aliunde* tending to identify land. *Comrs. of Beaufort v. Rowland*, 24.

8052. Unemployment Compensation Commission is not entitled to appeal from judgment that claimant does not come within purview of the Act. *In re Mitchell*, 65.

8081 (i) (f). A fall is in itself an "accident." *Robbins v. Hosiery Mills*, 246.

8081 (r). Accord between employer and third person does not bar insurance carrier from bringing action in name of employee against such third person. *Hinson v. Davis*, 380.

8081 (r), 160. Insurance carrier cannot maintain action for wrongful death of employee in its own name. *Whitehead & Anderson, Inc., v. Branch*, 507.

8081(u). Does not have effect of raising presumption that an executive officer injured in the course of his duties was at the time engaged in duties of employee rather than those of executive. *Gassaway v. Gassaway & Owen, Inc.*, 694.

8081 (v). Where it is admitted that defendant had sufficient number of employees to bring him within Compensation Act but had elected not to do so, defense of contributory negligence is properly excluded. *Lee v. Roberson*, 61.

8081 (aa). Evidence held sufficient to support finding that claimant's superior was a foreman and not an independent contractor. *Graham v. Wall*, 84.

8081(rr). When claimant shows that contract of employment was made here, that employer's place of business and his residence are in this State, burden is on employer to show that contract was for services exclusively outside of State, and evidence held sufficient to support finding that contract was not expressly for services exclusively outside of State. *Mallard v. Bohannon*, 536.

8081 (ppp). When Commission finds upon supporting evidence that claimant did not sustain injury as result of accident, finding is conclusive and Superior Court may not remand cause for additional findings. *Blevins v. Teer*, 135.

8081 (www). Ch. 352, Public Laws 1941, is available to enforce payment of award although proceedings for compensation were instituted prior to effective date of amendment. *Byrd v. Johnson*, 184.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 17. Freedom to contract is both liberty and property right within protection of this section. *Morris v. Holshouser*, 293. But statute providing that assignment of wages to be earned must be accepted in writing by employer is constitutional regulation of right to contract. *Ibid.* Fee system of compensation of justices of the peace does not result in depriving defendant in criminal prosecution of due process of law. *In re Steele*, 685. Defendant must be given new trial as often as error is committed. *S. v. Starnes*, 384.

II, sec. 29. Acts applicable to one county only, which provide that county commissioners should approve election of health officer, held void. *Board of Health v. Comrs. of Nash*, 140.

IV, sec. 2. Office of justice of the peace is constitutional. *In re Steele*, 685.

V, sec. 3. Proviso that annexed territory should not be subject to taxation if improvements and services comparable with other sections of the city were not afforded held unconstitutional. *Banks v. Raleigh*, 35.

CONSTITUTION OF THE UNITED STATES, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

IV, sec. 1. Decree for alimony rendered by court of another state comes within protection of full faith and credit clause as to installments accrued when court rendering decree is without power to modify it as to accrued installments. *Lockman v. Lockman*, 95. Denial of deficiency judgment on notes executed in another state does not impinge full faith and credit clause. *Bullington v. Angel*, 18. Divorce obtained in another state upon substituted service against resident of this State does not come within protection of full faith and credit clause. *S. v. Williams*, 445. Judgment by confession on warrant of attorney, entered in accordance with laws of Pennsylvania, must be given effect here. *Land Bank v. Garman*, 585.

Vth Amendment. Freedom to contract is both liberty and property right within protection of due process clause. *Morris v. Holshouser*, 293. But statute providing that assignment of wages to be earned must be accepted in writing by employer is constitutional regulation of right to contract. *Ibid.* Fee system of compensation of justices of the peace does not result in depriving defendant in criminal prosecution of due process of law. *In re Steele*, 685.