NORTH CAROLINA REPORTS

VOLUME 221

This book is an exact photo-reproduction of the original Volume 221 of North Carolina Reports that was published in 1942.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1978

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS

VOL. 221

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1942

REPORTED BY

JOHN M. STRONG

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1942

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1942.

CHIEF JUSTICE:

WALTER P. STACY.

ASSOCIATE JUSTICES:

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WILLIAM A. DEVIN,
M. V. BARNHILL,
J. WALLACE WINBORNE,
A. A. F. SEAWELL,
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OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
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R. HUNT PARKER	Third	Roanoke Rapids.
CLAWSON L. WILLIAMS	Fourth	Sanford.
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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

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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.

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SAM J. ERVIN, JR.	Morganton.
HUBERT E. OLIVE	Lexington.
CLARENCE E. BLACKSTOCK	Asheville.

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N. A. SINCLAIR	Fayetteville.
HENRY A. GRADY	New Bern.
E. H. CRANMER	Southport.
G. V. COWPER	Kinston.

*Died 5 May, 1942.
†Died 3 April, 1942.

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EASTERN DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Edenton.
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ERNEST R. TYLER	Third	Roxobel.
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AVALON E. HALL	Seventeenth	Yadkinville.
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THOS. L. JOHNSON	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.
R. J. SCOTT	Twenty-first	Danbury.

*Died April, 1942. Succeeded by Banks D. Thomas.

SUPERIOR COURTS, SPRING TERM, 1942

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

Spring Term, 1942—Judge Williams.

Beaufort—Jan. 12* (2); Feb. 16† (2); Mar. 16* (A); April 6†; May 4† (2); June 22.
Camden—Mar. 9.
Chowan—Mar. 30; April 27†.
Currituck—Mar. 2.
Dare—May 25.
Gates—Mar. 23.
Hyde—May 18.
Pasquotank—Jan. 5†; Feb. 9† (2); Feb. 16* (A); Mar. 16†; May 4† (A) (2); June 1*; June 8† (2).
Perquimans—Jan. 12† (A); April 13.
Tyrrell—Feb. 2†; April 20.

SECOND JUDICIAL DISTRICT

Spring Term, 1942—Judge Frizzelle.

Edgecombe—Jan. 19; Mar. 2; Mar. 30† (2); June 1 (2).
Martin—Mar. 16 (2); April 13† (A) (2); June 15.
Nash—Jan. 26; Feb. 16† (2); Mar. 9; April 20† (2); May 25.
Washington—Jan. 5 (2); April 13†.
Wilson—Feb. 2*; Feb. 9†; May 11*; May 18†; June 22†.

THIRD JUDICIAL DISTRICT

Spring Term, 1942—Judge Stevens.

Bertie—Feb. 9; May 4 (2).
Halifax—Jan. 26 (2); Mar. 16† (2); April 27; June 1† (2).
Hertford—Feb. 23; April 13‡ (2).
Northampton—Mar. 30 (2).
Vance—Jan. 5*; Mar. 2*; Mar. 9†; June 15*; June 22†.
Warren—Jan. 12*; Jan. 19†; May 18*; May 25†.

FOURTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Harris.

Chatham—Jan. 12; Mar. 2†; Mar. 16†; May 11.
Harnett—Jan. 5*; Feb. 2† (2); Mar. 16* (A); Mar. 30† (A) (2); May 4†; May 18*; June 8† (2).
Johnston—Jan. 5† (A) (2); Feb. 9 (A); Feb. 16† (2); Mar. 2 (A); Mar. 9; April 13 (A); April 20† (2); June 22*.
Lee—Jan. 26† (A) (2); Mar. 23 (2).
Wayne—Jan. 19; Jan. 26†; Feb. 2† (A); Mar. 2† (A) (2); April 6; April 13†; April 20† (A); May 25; June 1†; June 8† (A).

FIFTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Burney.

Carteret—Mar. 9; June 8 (2).
Craven—Jan. 5*; Jan. 26† (3); April 6‡; May 11†; June 1*.
Greene—Feb. 23 (2); June 22.
Jones—Mar. 30.
Pamlico—April 27 (2).
Pitt—Jan. 12†; Jan. 19; Feb. 16†; Mar. 16† (2); April 13 (2); May 4† (A); May 18† (2).

SIXTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Nimocks.

Duplin—Jan. 5† (2); Jan. 26*; Mar. 9† (2); April 13† (2).
Lenoir—Jan. 19*; Feb. 16† (2); April 6; May 11† (2); June 8† (2); June 22*.
Onslow—Mar. 2; May 25* (2).
Sampson—Feb. 2 (2); Mar. 23† (2); April 27† (2); June 8† (A) (2).

SEVENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Carr.

Franklin—Jan. 12†; Feb. 2*; Mar. 16†; April 6*; April 20†.
Wake—Jan. 5*; Jan. 12† (A); Jan. 19† (2); Feb. 9† (3); Mar. 2* (2); Mar. 16† (A); Mar. 23†; April 6* (A); April 13†; April 20† (A); April 27†; May 4*; May 11† (3); June 1* (2); June 15† (2).

EIGHTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Thompson.

Brunswick—Jan. 19; April 6†; May 18.
Columbus—Jan. 26*; Feb. 2* (A); Feb. 16† (2); May 4*; June 15* (2).
New Hanover—Jan. 12*; Feb. 2† (2); Mar. 9†; Mar. 16*; April 13† (2); May 11*; May 25† (2); June 8*.
Pender—Jan. 5; Mar. 23†; April 27

NINTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Bone.

Bladen—Jan. 5; Mar. 16*; April 27†.
Cumberland—Jan. 12*; Feb. 9† (2); Mar. 2* (A); Mar. 9*; Mar. 23† (2); April 27* (A); May 4† (2); June 1*.
Hoke—Jan. 19; April 20.
Robeson—Jan. 12† (A) (2); Jan. 26* (2); Feb. 23† (2); Mar. 16* (A); April 6* (2); April 20† (A); May 4* (A) (2); May 18† (2); June 8†; June 15*.

TENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Parker.

Alamance—Jan. 26† (A); Feb. 23*; Mar. 30†; May 11* (A); May 25† (2).
Durham—Jan. 5*; Jan. 12† (2); Jan. 26† (A); Feb. 16*; Feb. 23† (A); Mar. 2† (2); Mar. 16† (A); Mar. 23*; Mar. 30* (A); April 6† (A (3); April 27† (2); May 18*; May 25† (A) (3); June 22*.
Granville—Feb. 2 (2); April 6 (2).
Orange—Mar. 16; May 11†; June 8; June 15†.
Person—Jan. 26; Feb. 2† (A); April 20.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Armstrong.

Ashe—April 13*; May 25† (2).
Alleghany—April 27.
Forsyth—Jan. 5; Jan. 12 (A); Jan. 12† (3); Feb. 2; Feb. 9 (A); Feb. 9† (3); Mar. 2; Mar. 9 (A); Mar. 9† (3); Mar. 30 (2); April 13† (A); April 20†; April 27† (A); May 4 (2); May 25† (A) (2); June 8; June 15 (A); June 15† (2).

TWELFTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Warlick.

Davidson—Jan. 26*; Feb. 16† (2); April 6† (A) (2); May 4*; May 25†; June 1† (A); June 22*.
Guilford—Dec. 29*; Jan. 5* (A); Jan. 5† (2); Jan. 19*; Feb. 2* (A); Feb. 2† (2); Feb. 16† (A) (2); Mar. 2* (2); Mar. 16† (2); Mar. 23* (A); Mar. 30† (2); April 13†(2); April 20* (A); April 27*; May 11† (2); May 18* (A); May 25* (A); June 1† (2); June 15*.

THIRTEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Rousseau.

Anson—Jan. 12*; Mar. 2†; April 13 (2); June 8†.
Moore—Jan. 19*; Feb. 9†; May 23† (A) (2); May 18*; May 25†.
Richmond—Jan. 5*; Feb. 2† (A); Mar. 16†; April 6*; May 25† (A); June 15†.
Scotland—Mar. 9; April 27†.
Stanly—Feb. 2†; Feb. 9† (A); Mar. 30; May 11†.
Union—Jan. 26*; Feb. 16† (2); Mar. 23†; May 4†.

FOURTEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Pless.

Gaston—Jan. 12*; Jan. 19† (2); Mar. 9* (A); Mar. 16† (2); April 20*; May 18† (A) (2); June 1*.
Mecklenburg—Jan. 5*; Jan. 5† (A) (2); Jan. 19* (A) (2); Jan. 19† (A) (2); Feb. 2† (3); Feb. 2† (A) (2); Feb. 16† (A) (2); Feb. 23*; Mar. 2† (2); Mar. 2† (A) (2); Mar. 16* (A) (2); Mar. 16† (A) (2); Mar. 30† (2); Mar. 30† (A) (2); April 13* (A); April 13†; April 20† (A); April 27† (2); April 27† (A) (2); May 11*; May 11† (A) (2); May 18† (2); May 25† (A) (2); June 8*; June 8† (A) (2); June 15†; June 22* (2).

FIFTEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Nettles.

Alexander—Feb. 2 (A) (2).
Cabarrus—Jan. 5 (2); Feb. 23†; Mar. 2† (A); April 20 (2); June 8† (2).
Iredell—Jan. 26 (2); Mar. 9†; May 18 (2).
Montgomery—Jan. 19*; April 6† (2).
Randolph—Jan. 26† (A) (2); Mar. 16† (2); Mar. 30*; June 22*.
Rowan—Feb. 9 (2); Mar. 2†; Mar. 9† (A); May 4 (2).

SIXTEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Alley.

Burke—Feb. 16; Mar. 9† (2); June 1 (3).
Caldwell—Jan. 5† (A) (2); Feb. 23 (2); May 4 (A); May 18† (2).
Catawba—Jan. 12† (2); Feb. 2 (2); April 6† (2); May 4† (2).
Cleveland—Jan. 5; Mar. 23 (2); May 18† (A) (2).
Lincoln—Jan. 19† (A) (2).
Watauga—April 20 (2); June 8† (A) (2).

SEVENTEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Clement.

Avery—April 6* (A); April 13†.
Davie—Mar. 16; May 25†.
Mitchell—Mar. 30 (2).
Wilkes—Jan. 12† (3); Mar. 2 (2); Mar. 16 (A); April 27† (2); June 1† (2).
Yadkin—Feb. 2 (3).

EIGHTEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Sink.

Henderson—Jan. 5† (2); Mar. 2 (2); April 27† (2); May 25† (2).
McDowell—Dec. 29*; Feb. 9† (2); June 8 (2).
Polk—Jan. 26 (2).
Rutherford—Feb. 23†; April 13† (2); May 11 (2); June 22† (2).
Transylvania—Mar. 30 (2).
Yancey—Jan. 19†; Mar. 16 (2).

NINETEENTH JUDICIAL DISTRICT

Spring Term, 1942—Judge Phillips.

Buncombe—Jan. 5† (2); Jan. 12 (A) (2); Jan. 19*; Jan. 26; Feb. 2† (2); Feb. 16*; Feb. 16 (A) (2); Mar. 2† (2); Mar. 16*; Mar. 16 (A) (2); Mar. 30† (2); April 13*; April 13 (A) (2),; April 27; May 4† (2); May 18*; May 18 (A) (2); June 1† (2); June 15*; June 15 (A) (2).
Madison—Feb. 23; Mar. 23; April 20; May 25; June 22.

TWENTIETH JUDICIAL DISTRICT

Spring Term, 1942—Judge Gwyn.

Cherokee—Jan. 19† (2); Mar. 30 (2); June 15† (2).
Clay—April 27.
Graham—Jan. 5† (A) (2); Mar. 16 (2); June 1† (2).
Haywood—Jan. 5† (2); Feb. 2 (2); May 4† (2).
Jackson—Feb. 16 (2); May 18† (2); June 8* (A).
Macon—April 13 (2).
Swain—Jan. 12† (A) (2); Mar. 2 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Spring Term, 1942—Judge Bobbitt.

Caswell—Mar. 16*; Mar. 23†.
Rockingham—Jan. 19* (2); Mar. 2†; Mar. 9*; April 13†; May 4† (2); May 18* (2); June 8† (2).
Stokes—Jan. 5* (A); Mar. 30*; April 6†; June 22*.
Surry—Jan. 5*; Jan. 12†; Feb. 9*; Feb. 16† (2); April 20*; April 27†; June 1†.

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

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

EASTERN DISTRICT

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

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

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

Wilson, third Monday after the fourth Monday in March and September. G. L. PARKER, Deputy Clerk.

Wilmington, fourth Monday after the fourth 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.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1942

ALBERT L. BUNKER AND N. J. MARTIN v. R. C. LLEWELLYN; WILLIAM SYDNOR, ADMINISTRATOR OF W. G. SYDNOR, DECEASED; MARTHA M. STONE, EXECUTRIX OF A. G. BOWMAN, DECEASED; W. F. CARTER; AND FRED FOLGER, ADMINISTRATOR OF A. D. FOLGER, DECEASED.

(Filed 25 February, 1942.)

1. Bills and Notes §§ 17a, 18a—

When parties primarily liable on a note pay the amount thereof to the payee bank, the transaction pays and extinguishes the note.

2. Bills and Notes § 18a—

Where two of several parties primarily liable on a note pay the amount thereof to the payee bank under an agreement that they are to have the rights of the bank to collect from the other makers, they may not hold such other makers liable as upon contract, since such other makers are not parties to the agreement with the bank, nor may they hold them upon the doctrine of subrogation, but may maintain an action against them only upon the doctrine of equitable contribution.

APPEAL by plaintiffs from *Johnson, Special Judge,* at November Special Term, 1941, of SURRY.

Civil action to recover on note, heard upon demurrer to complaint.

Plaintiffs in pertinent parts of their complaint allege that on 11 December, 1934, plaintiffs, together with A. D. Folger, R. C. Llewellyn, W. G. Sydnor, Martha M. Stone, executrix of A. G. Bowman, deceased, and W. F. Carter executed and delivered to the First National Bank,

Mount Airy, North Carolina, their promissory note, in words and figures set forth, in the sum of $5,600.00, payable one year after date.

"3. That by agreement of all of the signers of said note, and on account of an obligation of each of said signers, it was mutually agreed and understood and intended by all of the parties that the said note so signed by each of them was a joint and several obligation, and that they were all principals, and all equally liable, and were all to be bound equally and for the same period of time; that the note used was a blank form and there was not room for all of the makers to sign on the face of the note, and that some of them signed on the back, but as hereinbefore alleged, they were all principals to the said obligation, and it was expressly understood that each of the said signers became firmly and equally bound, jointly and severally, for the payment of the said note, as principals. . . .

"5. That the First National Bank of Mount Airy, the owner and holder of the said note, demanded payment . . . that the signers and makers . . . failing and neglecting to pay their prorate part or any part of said note, . . . plaintiffs, Albert L. Bunker and N. J. Martin, . . . took up the said note from the bank, under an express agreement at the time with the said bank . . . that their taking up the said note was not to constitute a payment and satisfaction of the said note; that under said agreement said Albert L. Bunker and N. J. Martin were to have the rights of said bank to collect from the other signers and makers of said note, and the transfer made by the said bank on said note was so intended.

"6. That the plaintiffs . . . allege that they are the owners of the said note, and that under the express agreement at the time the note was taken up at the bank, as hereinbefore alleged, . . . they are subrogated to the rights of the bank, as relates to the other signers and makers of the said note."

Upon these allegations, and others not pertinent to questions involved in considering demurrer, plaintiffs pray judgment against the defendants, jointly and severally, for stated sum.

Defendants William Sydnor, as administrator of W. G. Sydnor, deceased, and W. F. Carter demur to the complaint for that it appears upon the face thereof:

"First: That the plaintiffs have no legal capacity to maintain said action for that it is alleged in said complaint that the plaintiffs are assignees for collection only and therefore are not real parties in interest.

"Second: That the complaint does not state an action in contract, either expressed or implied, as between the parties plaintiff and defendant to this action.

"Third: That if the plaintiffs be found to be the real parties in interest and capable of maintaining said action for subrogation, the complaint does not state a cause of action for such relief, for that it appears from the pleading that all parties, plaintiffs and defendants, or those whose estates are parties through their personal representatives, were joint obligors upon the promissory note, jointly and severally obligated to its payment. That in law and equity subrogation may not be invoked between those who are primarily liable in the absence of an express agreement between the obligors to that effect.

"Fourth: That if the action sounds in contribution, there is a misjoinder of parties and causes of action for that the liability of each defendant would be several and not joint."

Upon hearing of said demurrer, judge of Superior Court, concluding "that the plaintiffs are the real parties in interest (that the complaint does not state a cause of action, either in contract or subrogation); but does state a cause of action (in equitable contribution) and there is no misjoinder of parties and causes," entered judgment overruling the demurrer and ordering that the case be tried as an action for equitable contribution.

Plaintiffs excepting to the several portions of the judgment in parentheses, appealed therefrom to the Supreme Court and assigned error.

Robt. A. Freeman and Burke & Burke for plaintiffs, appellants.
A. B. Carter and T. D. Bryson for defendants, appellees.

WINBORNE, J. In view of the fact that the demurrer is overruled on the ground that the complaint states a cause of action in equitable contribution, it may well be contended that in so far as the rulings adverse to plaintiffs are concerned this appeal is premature. But, be that as it may, a review of the rulings to which plaintiffs object fails to disclose error in the judgment rendered. (1) Whatever the agreement may have been between plaintiffs and the bank, on which plaintiffs undertake to state a cause of action, there is no allegation that the defendants, appellees, were parties thereto. (2) The allegation that plaintiffs satisfied the bank and took up the note under express agreement with it that "their taking up" the note was not to constitute a payment and satisfaction of it, but that they were to "have the rights of the bank to collect from the other signers and makers," may fairly raise the question as to whether the plaintiffs are the real parties in interest. The ruling that plaintiffs are the real parties in interest must be read in connection with ruling that the complaint states a cause of action for equitable contribution. But if plaintiffs be the owners of the note, the allegations are tantamount to saying that plaintiffs paid the bank and took up the note.

If so, plaintiffs and defendants being coprincipals and all equally liable on the note, such payment constitutes extinguishment of the note. *Sherwood v. Collier,* 14 N. C., 380; *Brown v. Long,* 36 N. C., 190; *Runyon v. Clark,* 49 N. C., 52; *Hanner v. Douglass,* 57 N. C., 262; *Davison v. Gregory,* 132 N. C., 389, 43 S. E., 916; *Bank v. Hotel Co.,* 147 N. C., 594, 61 S. E., 570; *Liverman v. Cahoon,* 156 N. C., 187, 72 S. E., 327; *Hoft v. Mohn,* 215 N. C., 397, 2 S. E. (2d), 23. In such event their remedy against the defendants, their coprincipals, would be in equitable contribution. *Moore v. Moore,* 11 N. C., 358; *Powell v. Matthis,* 26 N. C., 83; *Allen v. Wood,* 38 N. C., 386; *Adams v. Hayes,* 120 N. C., 383, 27 S. E., 47; *Petree v. Savage,* 171 N. C., 437, 88 S. E., 725; *Harvey v. Oettinger,* 194 N. C., 483, 140 S. E., 86. Subrogation would not lie. *Liles v. Rogers,* 113 N. C., 197, 18 S. E., 104; *Joyner v. Reflector Co.,* 176 N. C., 274, 97 S. E., 44; *Wallace v. Benner,* 200 N. C., 124, 156 S. E., 795.

The judgment below is

Affirmed.

WILLIE DODGE v. STATE HIGHWAY AND PUBLIC WORKS COMMISSION.

(Filed 25 February, 1942.)

1. Highways § 10a—Lowering of bridge is within latitude of highway easement, and canal owner may not recover for resulting damage.

Petitioner constructed a canal across a county highway and thereafter maintained the bridge constructed over the canal (C. S., 3795). The State Highway Commission, upon taking over the highway, constructed a new bridge, and later constructed a second new bridge which was some two and one-half inches lower than the first. Petitioner instituted this proceeding under C. S., 3846 (bb), as amended, to recover compensation upon his contention that the lowering of the bridge interfered with the use of the canal in floating his barge under the bridge. *Held:* The use of the canal by petitioner was permissive and subject to the easement for highway purposes, and therefore petitioner is not entitled to recover compensation.

2. Adverse Possession § 11—

The use of a canal running under a highway bridge will be deemed permissive, and therefore its continued use over a period of years will not confer an easement or limit the easement for highway purposes.

APPEAL by defendant from *Dixon, Special Judge,* at October Term, 1941, of TYRRELL.

This is a special proceeding in the nature of condemnation for assessment of compensation for alleged taking of property rights. C. S.,

3846(bb), as amended by Public Laws 1923, chapter 160, section 6, as amended by Public Laws 1931, chapter 145, section 23, as amended by Public Laws 1935, chapter 2, as amended by Public Laws 1937, chapter 42.

The petitioner is the owner of a tract of land consisting of 796 acres, and the owner of other lands as tenant in common with other heirs of his father, the late W. T. Dodge. All of said lands lie in Tyrrell County, just west of the State Highway leading from Fairfax in Hyde County to Columbia in Tyrrell County.

In 1923 the petitioner dug the Dodge Canal, extending from a point on the Alligator River in a northwestwardly direction to and across the aforesaid State Highway, which at the time of the construction of the canal was a part of the highway system of Tyrrell County.

The evidence of the petitioner discloses that he built and maintained a floating drawbridge across the canal for the use of the traveling public. That said drawbridge was used from the date of the construction of the canal until 1933, when the road was taken over by the respondent.

In 1933 the State Highway Commission built a new bridge, which the petitioner claims had a movable span. He admits, however, he never removed it during the period of its existence. In 1939 a new bridge was constructed, and the petitioner contends it was built on sills six inches smaller than those on which the 1933 bridge was built, and that the 1933 bridge had a rise of 2½ inches on either side; and therefore by reason of the lowering of the bridge he has been prevented the normal use of the canal in floating his barge to and from his premises to the Alligator River. The petitioner alleges and offered evidence tending to prove that in constructing the bridge in 1939 the respondent permitted dirt to be thrown in the canal under the bridge and, as a result, the canal did not properly drain the lands of the petitioner and he has sustained damages to his land and crops. The respondent offered evidence tending to show the contrary. The witnesses for the respondent testified that the 1939 bridge as constructed was flat, but on similar foundations, and was only 2½ inches lower than the 1933 bridge.

The petitioner did not own all the lands through which his canal was constructed. The lower end of the canal runs through the lands of the Richmond Cedar Works, which concern brought an action against the petitioner and his father, W. T. Dodge, in 1924. The petitioner introduced the judgment in that case, which judgment gave W. T. Dodge, his heirs and assigns, the perpetual right to drain the land then owned by W. T. Dodge through the canal, and the right from time to time to move his dredge to and fro through said canal. The judgment expressly prohibited the defendants from making any commercial use of the canal or

to carry on said dredge lumber, trees, merchandise or other produce, or anything in the nature of commerce.

The following issues were submitted to the jury:

"1. Did the plaintiff suffer damage to his crops by reason of the acts of the defendant, as alleged in the petition? Ans.: 'No.'

"2. If so, in what amount is plaintiff entitled to recover by reason of damage to his land and crops? Ans.: ——

"3. Did the plaintiff suffer damage to his canal rights by reason of the acts of the defendant, as alleged in the petition? Ans.: 'Yes.'

"4. In what amount is plaintiff entitled to recover by reason of said damage to his canal rights? Ans.: '$1,000.00.'

"5. Has the petitioner been benefited by the building of said bridge, if so, in what amount? Ans.: '$100.00.'"

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

D. D. Topping and H. S. Ward for petitioner, appellee.
Charles Ross and W. I. Halstead for respondent, appellant.

DENNY, J. The jury having answered the first issue in favor of the respondent, the question before this Court is to determine whether or not the petitioner has established any easement or right by having constructed this canal in 1923 which would entitle him to recover from the respondent, the public roads agency of the State, for an alleged interference with those rights. It was alleged in the petition that the petitioner had an agreement with the State Highway Commission to maintain a removable or drawbridge. However, this was denied by the respondent and no evidence offered to prove the existence of such a contract at the trial in this proceeding.

The statute, C. S., 3795, requires that every person who for the purpose of draining his lands, or for any other purpose, shall construct any ditch, drain or canal across a public road to keep at his own expense in good and sufficient repair all bridges that are or may be erected over which a public road may run. The petitioner unquestionably recognized this duty and performed it for some ten years. This road was a public highway when petitioner built his canal. In the case of *Shelby v. Power Co.*, 155 N. C., 196, 71 S. E., 218, *Brown, J.*, says: "It is well settled that, unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by non-user. *Commonwealth v. Morehead*, 4 Am. St., 601, and cases cited; 22 Am. and Eng., page 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses," cited and approved in the case of *Lenoir v. Crabtree*, 158 N. C., 357, 74 S. E., 105.

In *Hildebrand v. Telegraph Co.*, 219 N. C., 402, 14 S. E. (2d), 252, it is stated: "It may be conceded that the easement acquired by the State for a public highway is, under existing law, so extensive in nature and the control exercised by the Highway Commission is so inclusive in extent that the subservient estate in the land, from a practical standpoint, amounts to little more than the right of reverter, in the event the easement is abandoned." And again, on page 409 of the same opinion: "As we view it, the effect of this act is to give dominance to the easement acquired by the State. Under the terms thereof the Highway Commission has authority to control the uses to which the land embraced within the easement may be put. If it deems it wise or expedient so to do, in the interest of the traveling public, it may altogether exclude the imposition of any additional easement or burden."

In *Perry v. White*, 185 N. C., 79, 116 S. E., 84, this Court, speaking through *Clark, C. J.*, said: "Conceding that the ditch had existed and been kept up continuously for draining plaintiff's land for the past 30 years over the land of the defendant, the plaintiff would not have acquired the right of easement thereby. This user may have been permissive, and the law presumes that it was. Mere user for 30 years will not confer an easement unless it appears that it was adverse." See, also, *Darr v. Aluminum Co.*, 215 N. C., 768, 3 S. E. (2d), 434, and cases cited therein.

We do not think the petitioner has established any rights adverse to the easement of the respondent and its predecessor in title, the Board of Commissioners of Tyrrell County. We think the rights exercised by the petitioner have been permissive and not adverse, and the judgment of the court below is

Reversed.

CLOSS GIBBS AND J. H. JARVIS, AMERICAN AGRICULTURAL CHEMICAL COMPANY, MARTHA E. JACKSON, INDIVIDUALLY, AND AS EXECUTRIX OF THE WILL OF DR. C. C. JACKSON, DECEASED, v. G. H. WESTON & COMPANY, MRS. FANNIE DRURY, WALTER (W. H.) BENSON, AND S. O. JONES, SHERIFF OF HYDE COUNTY.

(Filed 25 February, 1942.)

1. Judgments § 5—

The statutory authorization of the entry of judgments by confession is in derogation of common right, and the statutes must be strictly construed. C. S., 623-625.

2. Same—Court must render judgment by confession upon duly verified statement, and mere filing and docketing statement is insufficient.

The filing of a verified statement and affidavit authorizing the entry of a judgment by confession is necessary to confer jurisdiction upon the

clerk to render such judgment, but the verified statement, in itself, even though recorded on the judgment docket, indexed and cross-indexed, is not effective as a judgment of the court, even though the clerk intend it to be so effective, the rendition of the judgment being the distinct office of the court apart from and in addition to the ministerial acts of filing and docketing.

3. Judgments § 19d—

The filing of a verified statement and affidavit authorizing the entry of judgment by confession, which is recorded on the judgment docket, indexed and cross-indexed by the clerk without entry of judgment thereon, is ineffective as against creditors whose judgments are subsequently docketed.

APPEAL of defendants, G. H. Weston & Company and Mrs. Fannie Drury, from *Frizzelle, J.*, at October Term, 1941, of HYDE. Affirmed.

On 18 June, 1929, W. H. Benson filed a verified statement before C. L. Bell, clerk of the Superior Court of Hyde County, confessing judgment and authorizing the entry of judgment in conformity therewith for $393.79, with interest from 5 September, 1925, which statement and affidavit was recorded in the judgment docket. There is added to the entry the following: "Reference is hereby made to Judgment Docket No. 10, page 315, Judgment No. 2977, for renewal judgment. This April 12, 1939. Wm. I. Cochran, CSC." On 1 April, 1939, the said W. H. Benson filed a similar verified statement and affidavit confessing judgment before William I. Cochran, clerk of the Superior Court of Hyde County, and authorizing judgment to be entered thereon, which affidavit and confession is recorded in Judgment Docket No. 10, at page 315, in the office of the clerk of the Superior Court of Hyde County, with notation: "Docketed April 12, 1939, at 2 P. M. No. 2977." The verified statement or confession of judgment refers to the confession of judgment rendered 18 June, 1929, by reference to the judgment docket, page of entry, and number of the purported judgment, and is for the same amount—$393.79 and interest from 5 September, 1925—as in the original confession of judgment; and the statement explains "that it is the intention of the defendant to continue said judgment in full force and effect from the date hereinafter set out." Following the statement and affidavit there is the notation: "Reference is hereby made to Judgment Docket No. 5, page 255."

There was nothing else done either by the defendant W. H. Benson or the clerk of the Superior Court with respect to either of these proceedings, and the clerk did not endorse on either of said statements the judgment of the court nor any judgment upon either of them on his judgment docket. But the trial judge found as a fact that in each of them "the said Clerks of the Superior Court in copying said statement, affidavit and confession of judgment verbatim in the judgment dockets

. . . meant and intended the same to be and operate in fact as a formal judgment of the Court thereon, and the same were duly cross-indexed in the judgment dockets of said Court." Upon the purported confession of judgment last mentioned execution was issued 26 August, 1941, returnable 25 October, 1941.

The plaintiffs herein, who had obtained various judgments subsequently to the foregoing proceedings and entry of the same upon the judgment docket, brought this action to restrain the sale of the lands under the execution and obtained a temporary restraining order. Upon the hearing thereupon the lower court made certain findings of fact and conclusions of law, holding that the confessions of judgment, while good between Benson and G. H. Weston & Co. and Mrs. Drury, were invalid and of no effect with regard to the plaintiffs and the judgments held by them, and that all the judgments of plaintiff were prior liens upon the property by reason of the fact that no judgment had been endorsed upon the verified statements authorizing entry of judgment by confession, and in point of law had not been rendered thereupon. The injunction was continued to the hearing.

From this judgment the defendants, G. H. Weston & Co. and Mrs. Fannie Drury, appealed assigning error.

O. L. Williams for plaintiff, appellee.
Carter & Carter and Geo. T. Davis for defendant, appellant.

SEAWELL, J. Chapter 12, art. 24, of the Consolidated Statutes (C. S., 623-625 inclusive), authorizes the entry of judgment by confession of the debtor evidenced by his written statement, duly verified, the contents of which must be substantially as set out in C. S., 624.

The verified statement is jurisdictional, both as to its filing and as to its contents. *Cline v. Cline,* 209 N. C., 531, 535, 183 S. E., 904; *Farmers Bank of Clayton v. McCullers,* 201 N. C., 440, 160 S. E., 494; *Smith v. Smith,* 117 N. C., 348, 23 S. E., 270; *Davidson v. Alexander,* 84 N. C., 621. Since the proceeding is in derogation of common right, the statute authorizing this form of judgment must be strictly construed. *Smith v. Smith, supra.*

A question has been raised here as to the sufficiency of the statement, which we do not find it necessary to consider as our decision turns upon a more serious defect.

It is settled in this jurisdiction that the mere filing and entry of a verified statement as required by the statute, although recorded on the judgment docket, and cross-indexed as judgments are, will not be effective as a judgment under the statute. *Farmers Bank of Clayton v. McCullers, supra.* The verified statement must be regarded as a means by which the

court acquires jurisdiction and authority and the information upon which it may render its judgment, and the intention of the clerk that it should have the effect of a judgment is of no significance.

The statute—C. S., 625—provides that "the statement and affidavit, with the judgment endorsed, thenceforth become the judgment roll." The rendition of judgment in a proceeding of this kind is a distinct office of the court, not to be confused with the ministerial acts of filing and docketing. *Farmers Bank of Clayton v. McCullers, supra; Williams v. Atwood,* 52 Ga., 585.

The failure to comply with the mandatory terms of the statute and especially the want of rendition of judgment upon the statement and affidavit of the defendant is not a mere irregularity, but constitutes a fatal defect, rendering the proceeding of no effect as against creditors whose judgments were subsequently docketed.

The appealing defendants have raised no question here with regard to the situation brought about between parties and privies to the attempted confession of judgment, and we expressly refrain from passing upon such a question.

The judgment is

Affirmed.

ELEANOR G. HILDEBRAND v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY.

(Filed 25 February, 1942.)

1. Eminent Domain § 26—

A judgment assessing compensation for the taking of land or an easement under eminent domain has the force and effect of a deed.

2. Highways § 10a—

The State Highway and Public Works Commission has been granted exclusive control over the State Highway System and may in its discretion authorize the use of a highway right of way by telephone and telegraph companies, and prescribe the manner and extent of such use, subject to the right of the owner of the servient estate to payment of compensation for the additional burden.

3. Eminent Domain § 26: Highways § 10a: Telephone and Telegraph Companies § 4—Use of land for telephone lines was embraced and included in decree awarding compensation for taking of easement for highway purposes in this case.

In a proceeding to assess compensation for the taking of a right of way for a State Highway, decree was entered awarding the landowner a specified sum as compensation for the use of the land by the "State Highway and Public Works Commission, its successors and assigns, for all

purposes for which the State Highway and Public Works Commission is authorized by law to subject such right of way." Thereafter the Highway Commission granted the defendant telephone company the right to place its poles on and string its wires over the highway right of way. *Held:* The Highway Commission had authority to grant such right to the telephone company, and therefore the decree in the eminent domain proceeding granted an easement which embraced the right of way of the telephone company and awarded compensation therefor, and the owner of the fee is not entitled to again recover compensation.

4. Judgments § 32—Judgment is binding upon the parties and their privies.

A decree awarding compensation for taking of an easement by the State Highway and Public Works Commission, its successors and assigns, for all purposes for which the Commission is authorized by law to subject such right of way, is binding upon the parties, and a telephone company granted the right by the State Highway and Public Works Commission to maintain its poles and lines along said right of way is in privity with the Commission and is entitled to invoke the decree as against the owner of the fee in her subsequent action against it to recover compensation for the additional burden.

APPEAL by defendant from *Gwyn, J.*, at July Term, 1941, of BUNCOMBE. Reversed.

Civil action to restrain the defendant from trespassing upon lands of plaintiff and to recover damages alleged to have been sustained by the wrongful construction by the defendant of a telephone line along and over plaintiff's land.

This case was here on a former appeal. *Hildebrand v. Telegraph Co.*, 219 N. C., 402, 14 S. E., 252. The material facts are there stated.

Plaintiff instituted an action against the State Highway & Public Works Commission to recover damages by way of compensation for the right of way taken by the defendant over and across her land for the establishment and maintenance of U. S. Highway No. 70-74. Judgment was entered therein at the September Term, 1938, Buncombe County Superior Court, awarding plaintiff $3,600.00 in full satisfaction and compensation "for said right of way and the past and future use thereof by the State Highway & Public Works Commission, its successors and assigns, for all purposes for which the State Highway & Public Works Commission is authorized by law to subject such right of way." This judgment was paid and the plaintiff received and accepted the compensation thus awarded.

In July, 1938, the State Highway & Public Works Commission entered into an agreement with the defendant under the terms of which it granted a license or privilege to the defendant to encroach upon the right of way by erecting and locating its poles at specific points thereon. The Highway Commission reserved the right to require the removal of or change in the location of said structures. The judgment in the con-

demnation proceedings and this contract were admitted in evidence and are now a part of the record.

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

"1. Did the plaintiff file a petition after the construction of the highways known as U. S. 70-74, Project 9026, for condemnation as provided by the Consolidated Statutes of North Carolina, to have assessed damages alleged to have been sustained by reason of such construction?

"A. Yes (by consent).

"2. Was judgment duly entered in said cause in favor of the plaintiff, for the sum of $3,600, in full satisfaction and compensation for the taking of said right of way, past and future use thereof by the Highway & Public Works Commission, its successors and assigns, for all purposes for which the State Highway & Public Works Commission is authorized by law to subject said right of way, which judgment was duly paid as alleged in the answer of defendant?

"A. Yes (by consent).

"3. Are all defendant's poles and wires on the right of way of the State Highway & Public Works Commission, as described and set forth in the judgment in the condemnation proceedings instituted by plaintiff against the State Highway & Public Works Commission?

"A. Yes (by consent).

"4. Did the State Highway & Public Works Commission, prior to the commencement of the building and erection of the telephone lines and poles by defendant, give and grant to defendant the right to install and erect said poles and lines within the right of way of the State Highway & Public Works Commission, insofar as the State Highway & Public Works Commission was by law authorized so to do?

"Answer: Yes (by consent).

"5. Was the plaintiff the owner of the fee in the land embraced within and subject to the State Highway right of way and adjoining land on the west side thereof, consisting of approximately 15 acres?

"Answer: Yes.

"6. What damages, if any, is plaintiff entitled to recover?

"Answer: $1,000.00."

From judgment thereon in favor of the plaintiff, defendant appealed.

Sanford W. Brown and J. W. Haynes for plaintiff, appellee.

J. G. Merrimon, S. B. Naff, Merrell Collier and Guthrie, Pierce & Blakeney for defendant, appellant.

BARNHILL, J. The judgment roll in the original condemnation proceedings in which a decree was entered condemning a right of way over and across plaintiff's lands for use as a public highway was excluded in

the original trial of this cause. The error in so doing was assigned as one of the reasons for remanding the case for a new trial. In the trial below this judgment roll was admitted and the decree therein is now before us for consideration. The jury by its verdict has found the essential facts in respect thereto.

This decree has the force and effect of a deed. *Buchanan v. Hedden,* 169 N. C., 222, 85 S. E., 417; *Finch v. Finch,* 131 N. C., 271.

Was the extent of the easement conveyed by said decree such as to include the right on the part of the Highway Commission to grant the defendant the permissive use of the right of way for the purpose for which it is now being used by it without additional compensation to the plaintiff, owner of the servient estate? The answer is decisive of this appeal.

The State Highway & Public Works Commission has been granted exclusive control over the State Highway system. Ch. 2, sec. 10 (b), Public Laws 1921, as amended. It has full authority to make proper and reasonable rules, regulations and ordinances for the placing or erection of telephone, telegraph or other poles within the right of way, and it may, at any time, require the removal of, change in, or relocation of any such poles. Ch. 160, sec. 1, Public Laws 1923. That said Commission may in its discretion authorize the use of the highway right of way by telephone and telegraph companies is not seriously debated. This authority, however, is subject to the right of the owner of the servient estate to payment for the additional burden. *Hildebrand v. Telegraph Co.,* 219 N. C., 402, 14 S. E., 252.

The decree in the original condemnation proceedings established and granted a right of way for use for highway purposes. This, however, is not the extent of the judgment. It grants a right of way to the Highway & Public Works Commission, its successors and assigns. It is for all purposes for which the State Highway & Public Works Commission is authorized by law to subject said right of way. This includes the privilege granted defendant.

The condemnation decree is conclusive and binding upon the parties to that action. The defendant, as "assignee" of the Highway Commission, by virtue of its privity, may assert the authority of the Highway Commission thereunder to permit it to encroach upon the highway without any payment of any additional sum to plaintiff. *Power Co. v. Power Co.,* 188 N. C., 128, 123 S. E., 310; *Garrett v. Kendrick,* 201 N. C., 388, 160 S. E., 349; *Southerland v. R. R.,* 148 N. C., 442, 62 S. E., 517; *Buchanan v. Hedden, supra; Coltrane v. Laughlin,* 157 N. C., 282, 72 S. E., 961; *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535; *Weeks v. McPhail,* 128 N. C., 130; 2 Black on Judgments, sec. 549; 2 Freeman on Judgments (5d), secs. 831-833.

Having the authority under the law to grant the permissive use of the highway right of way to telephone and telegraph companies, the State Highway & Public Works Commission executed its agreement granting this right to the defendant. The defendant is now exercising that privilege subject to the limitations and restrictions provided by law and incorporated in the agreement. The plaintiff has been compensated for this additional burden. She may not again recover.

The conclusion here reached is not in conflict with our opinion on the former appeal in this cause. We still adhere to the rationale of that decision. It is based upon the broad language of the judgment in the condemnation proceedings and the rights thereby acquired by the State Highway & Public Works Commission.

The defendant was entitled to judgment upon its motion to dismiss as of nonsuit.

Reversed.

THE BANK OF PILOT MOUNTAIN v. W. O. SNOW AND WIFE, ALZA SMITH SNOW; WESLEY JONES AND WIFE, CALLIE SMITH JONES; J. R. MARION AND WIFE, RHODA SMITH MARION; CARTER SAMUEL AND WIFE, LYDIA SMITH SAMUEL; ROY SMITH AND WIFE, DAISY SMITH; CLAYTON D. SMITH AND WIFE, BESSIE SMITH; KELLY CHRISTMAN AND WIFE, MYRTLE SMITH CHRISTMAN.

(Filed 25 February, 1942.)

1. Deeds § 13a—

A deed to a widow and the heirs of her body by her late husband creates an estate tail which is converted by C. S., 1734, into a fee simple absolute in the widow, and her children by her deceased husband take no interest in the land, C. S., 1739, not being applicable, since it applies only when no preceding estate is conveyed to the "ancestor" of the "heirs."

2. Appeal and Error § 29—

When appellant's brief fails to state any reason or argument and fails to cite any authority in support of an exception the exception will be deemed abandoned. Rule of Practice in the Supreme Court, No. 28.

APPEAL by the defendants from *Armstrong, J.*, at July Term, 1941, of SURRY.

This was an action by the plaintiff to remove a cloud created by the claims of the defendants from the title of the plaintiff to a certain tract of land "lying on the waters of the Yadkin River and Brier Branch" in Siloam Township, Surry County, fully described in deed dated 27 October, 1908, and recorded in Book 52, at page 182, in the office of the

Register of Deeds for Surry County. The facts were agreed upon and the cause submitted to the court for determination thereon. In summary they follow:

That all parties necessary for the determination of the cause are in court.

"That on the 27th day of October, 1908, W. W. Cornelius and wife, Carrie R. Cornelius, executed and delivered a certain deed to the lands described in the complaint, which deed was duly registered in Book 52, page 182. That the deed contains the following: 'This deed made this 27th day of October, 1908, by W. W. Cornelius and wife, Carrie R. Cornelius, of Forsyth County, and State of North Carolina, parties of the first part, to Rhoda E. Smith and her heirs begotten by J. B. Smith, of Forsyth County, and State of North Carolina, parties of the second part.' That the granting clause in said deed reads as follows: 'Witnesseth: That the parties of the first part, in consideration of the sum of $3,600.00 Thirty Six hundred no/100 Dollars, to them paid by the parties of the second part, the receipt of which is hereby acknowledged, have bargained and sold and by these presents do bargain, sell and convey to said parties of the second part and their heirs, all right, title, interest and estate parties of the first to a tract of land in Siloam Township, Surry County, North Carolina'; and the habendum clause is as follows: 'To have and to hold the aforesaid tract or lot of land and all privileges and appurtenances thereto belonging to the said parties of the second part, their heirs and assigns, to their only use and behoof forever.' That at the time of the execution and delivery of said deed J. B. Smith was dead and that the defendants mentioned in paragraph 2 of the answer were in esse and were children of Rhoda E. Smith, begotten by J. B. Smith.

"That on the 1st day of March, 1926, J. Ernest Smith and wife, Coetta Smith, and Rhoda E. Smith (widow) executed and delivered to O. E. Snow, Trustee for Bank of Pilot Mountain, a deed of trust securing a loan in amount of $3,104.62, which deed of trust is duly recorded in the office of the Register of Deeds, Surry County, in Book 102, at page 188, in which deed of trust is embraced the lands described in the complaint. That default was made in the payment of said indebtedness and O. E. Snow, Trustee, duly advertised and sold said property, the Bank of Pilot (Mountain) becoming the purchaser and deed was executed by Snow, Trustee, to Bank of Pilot (Mountain) for the lands described, which deed is recorded in office of the Register of Deeds in Book 128, at page 145. . . .

"Upon the foregoing agreed statement of facts the plaintiff contends that under this deed Rhoda E. Smith was the owner of the said tract of land in fee simple and by virtue of the deed of trust to O. E. Snow,

Trustee, and the sale of said lands by him and his deed to the Bank of Pilot Mountain that the Bank is now the owner of said land in fee simple. The defendants contend that Rhoda E. Smith and J. Ernest Smith and the defendants mentioned in paragraph 2 of the answer took title as tenants in common."

From judgment that the plaintiff, the Bank of Pilot Mountain, is the owner in fee of the *locus in quo* and that it recover the cost of the action the defendants appealed, assigning errors.

E. C. Bivens for plaintiff, appellee.
Folger & Folger and R. A. Freeman for defendants, appellants.

SCHENCK, J. The question posed by this appeal is: Did Rhoda E. Smith by the deed from W. W. Cornelius and wife, Carrie R. Cornelius, dated 27 October, 1908, and recorded in Book 52, at page 182, Record of Deeds for Surry County, take a fee simple title to the *locus in quo?* The answer is in the affirmative.

The pertinent words in the deed for construction are: "This deed made . . . by W. W. Cornelius and wife, Carrie R. Cornelius, . . . parties of the first part, to Rhoda E. Smith and her heirs begotten by J. B. Smith, . . . parties of the second part; Witnesseth: that the parties of the first part . . . have bargained and sold, and by these presents do bargain, sell and convey to said parties of the second part and their heirs all right, title, interest and estate (of the) parties of the first (part) to a tract of land in Siloam Township, Surry County, North Carolina."

We are of the opinion that the above quoted words at common law would have created a fee tail special estate in Rhoda E. Smith, but by reason of C. S., 1734, such estate is converted into a fee simple absolute. *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906; *Morehead v. Montague,* 200 N. C., 497, 157 S. E., 793; *Revis v. Murphy,* 172 N. C., 579, 90 S. E., 573.

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

There was allegation in an amended answer to the effect that the money of the deceased father of the defendant children was used to purchase the *locus in quo*, which allegation was stricken out upon motion of the plaintiff, over objection and exception of the defendants. While in their brief under "questions of law involved" the appellants propound the question whether his Honor erred in striking out the amended answer, they state no reason or argument and cite no authority in support of the exception. Therefore such exception is taken as abandoned. Rule 28, Rules of Practice in the Supreme Court. 213 N. C., 825.

The judgment of the Superior Court is

Affirmed.

ELLA I. DOUGHERTY v. EUGENE BYRD.

(Filed 25 February, 1942.)

Insane Persons § 12: Deeds § 2a—

In an action by the beneficiary of the estate of a deceased insane person to set aside a deed executed by the incompetent, the burden of proving mental incapacity at the time of the execution of the deed is on plaintiff, but the burden is on the grantee to prove that he had no knowledge of the grantor's insanity and that he paid adequate consideration for the deed.

APPEAL by defendant from *Hamilton, Special Judge,* at August Term, 1941, of BUNCOMBE.

Civil action to set aside a deed for mental incapacity and to cancel a sheriff's deed, for the reason that the property conveyed thereby was not subject to the lien of the judgment on which execution was issued and the power of sale exercised.

On or about 13 August, 1931, Frank E. Byrd purchased a tract of land from Mary D. and Carrie S. Maney and took title in his own name. The entire consideration for said lands was paid out of money belonging to his wife, Beulah Dougherty Byrd.

As a result of an automobile accident in 1934, Beulah Dougherty Byrd lost her mind and became completely demented and died in the State Hospital for the Insane at Morganton, N. C., about 20 November, 1938. Frank Byrd and his wife, Beulah Dougherty Byrd, had no children born of their marriage.

The plaintiff and her husband are the parents of Beulah Dougherty Byrd and her only heirs at law. The husband of the deceased has assigned all his rights, title and interest in and to the estate of Beulah Dougherty Byrd to the plaintiff herein.

There appears of record in the office of the Register of Deeds of Buncombe County, N. C., a deed purporting to have been made by Frank E. Byrd and wife, Beulah Dougherty Byrd, to Eugene Byrd, a brother of Frank E. Byrd, dated 21 January, 1935.

That on or about 5 May, 1938, this plaintiff, as guardian of her daughter, Beulah Dougherty Byrd, brought an action against the said Frank E. Byrd for the maintenance and support of his demented wife, and on 5 October, 1938, judgment was entered ordering the defendant Frank Byrd to convey the remainder of the Maney land after the purported conveyance to Eugene Byrd to the plaintiff for the use and benefit of Beulah Dougherty Byrd.

After the signing of the judgment on 5 October, 1938, Eugene Byrd purported to purchase an outstanding judgment against his brother, Frank E. Byrd, had the same assigned to a trustee and caused execution to be issued thereon, and on 16 September, 1939, took title to the property which Frank E. Byrd had been formerly ordered under a judgment of the Superior Court of Buncombe County to convey to the guardian of his wife, as above set forth.

The court submitted the following issues:

"1. Did Frank E. Byrd purchase the Maney land, as shown by recorded deed in Book 442, at page 227, with funds of his wife, Beulah Dougherty Byrd, and take title thereto in his own name as trustee of said wife, as alleged in the complaint? Ans.: 'Yes.'

"2. Was Beulah Dougherty Byrd mentally incompetent to make and execute a deed on January 21, 1935, as alleged in the complaint? Ans.: 'Yes.'

"3. If so, was the defendant, Eugene Byrd, ignorant of the fact of said mental incapacity? Ans.: 'No.'

"4. Did Beulah Dougherty Byrd receive any adequate consideration for the conveyance of the property by said deed dated January 21, 1935, to Eugene Byrd, the defendant? Ans.: 'No.'

"5. At the time of the execution of the said sheriff's deed had the property described therein been allocated by the court for the use and benefit of said Beulah Dougherty Byrd, as alleged in the complaint? Ans.: 'Yes, by consent.' "

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

Don C. Young and W. K. McLean for plaintiff.
J. W. Haynes for defendant.

DENNY, J. The 5th issue having been answered in the affirmative by consent, the only exceptions involved on this appeal are those as to the

burden of proof on the 3rd and 4th issues. The burden of proof on both those issues was upon the defendant. *Carawan v. Clark,* 219 N. C., 214, 13 S. E. (2d), 237: "Thus, in an action to rescind a contract, as here, for that the plaintiff was, at the time, mentally incompetent, the plaintiff must show insanity or mental incompetency at the time the contract was entered into. Upon such showing the contract will be annulled unless it is made to appear—the burden being on the defendant—that the defendant (1) was ignorant of the mental capacity; (2) had no notice thereof such as would put a reasonably prudent person upon inquiry; (3) paid a fair and full consideration; (4) took no unfair advantage of plaintiff; and (5) that the plaintiff has not restored and is not able to restore the consideration or to make adequate compensation therefor. *Wadford v. Gillette,* 193 N. C., 413, 137 S. E., 314, and cases cited. *Creekmore v. Baxter, supra* (121 N. C., 31); Story Eq. Jur., sec. 227; Adams Eq., 183."

His Honor's charge was in conformity with the decisions of this Court.

In the judgment of the court below we find

No error.

J. C. COX v. MYRTLE F. COX.

(Filed 25 February, 1942.)

1. Judgments § 22b—

The procedure to attack a judgment on the ground of extrinsic fraud is by independent action, and the proper procedure to attack a judgment on the ground that it is irregular is by motion in the cause.

2. Insane Persons § 14—

An insane person who has no general or testamentary guardian must defend by guardian *ad litem* appointed by the court, C. S., 451, and the provisions of the statute are mandatory and must be strictly observed.

3. Same: Judgments § 22g: Divorce § 20—Allegations held sufficient to support attack of judgment against incompetent for irregularity.

A decree of absolute divorce on the ground of two years separation was entered. Thereafter defendant made a motion in the cause to set aside the decree upon allegations that defendant was insane at the time the decree was entered and had been insane for some time prior thereto, and that no guardian *ad litem* was appointed to represent her. *Held:* The facts alleged are sufficient predicate for attack of the decree for irregularity, and therefore motion in the cause was the proper remedy, and the fact that the motion contained further allegations constituting a basis for attacking the decree for extrinsic fraud does not preclude defendant from following this procedure.

4. Judgments § 32—

Ordinarily, the doctrine of *res judicata* will not apply where the judgment is rendered on any grounds which do not involve the merits.

5. Same: Judgments § 22e—

The refusal of a motion to set aside a judgment because movant failed to allege a meritorious defense is not *res judicata* and will not bar a subsequent motion to set aside upon allegations disclosing a meritorious defense.

APPEAL by plaintiff from *Harris, J.,* in Raleigh, N. C., 26 September, 1941. From NASH. Affirmed.

At September Term, 1938, of Nash Superior Court, the plaintiff obtained a divorce, *a vinculo,* from the defendant on the ground of two years separation. Michie's N. C. Code, 1659 (a).

Subsequently, on 3 July, 1939, the attorney of the defendant filed a motion to set the decree aside, alleging that at the time the action for divorce was instituted and service of summons made upon the defendant she was insane, a fact well known to the plaintiff, and that she was not represented by a next friend or guardian *ad litem,* as required by law.

This motion came on to be heard before Judge Walter J. Bone at chambers in Nashville, 26 October, 1939, and was dismissed because of failure to allege that movant had a meritorious defense.

A next friend was appointed to represent the defendant in further proceedings, and a new motion was made to set aside the judgment, based on fraud and imposition on the court by the plaintiff in procuring the decree, well knowing that his wife was then insane and had been for some time, and further setting up the fact of her insanity and failure to have appointed any guardian *ad litem* to represent her in the proceeding. This motion alleges and presents facts which, if true, would constitute a meritorious defense.

The motion was heard before Harris, J., at September, 1941, Term of Nash Superior Court.

In addition to resisting the motion on the merits, the plaintiff pleaded that the matter in controversy on the motion had been judicially determined against the defendant by the order of Judge Bone dismissing the first motion, and had become *res judicata.* Numerous affidavits were introduced upon the hearing and much evidence taken. By consent of parties further hearing was had at Raleigh, Wake County, and judgment there signed and transmitted to Nash County.

After finding certain facts relative to the alleged insanity of the wife at the time the suit was instituted, and relating to the merits of the defense, Judge Harris rendered his judgment setting aside the decree of divorce, and the plaintiff appealed.

I. T. Valentine and Battle, Winslow & Merrell for plaintiff, appellant.
T. T. Thorne and Norman Gold for defendant, appellee.

SEAWELL, J. The defendant cannot, by motion in the cause, attack the decree of divorce for the extrinsic fraud alleged to have been practiced on the jurisdiction of the court. For that he must resort to an independent action. *Horne v. Edwards,* 215 N. C., 622, 3 S. E. (2d), 1; *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5. But this is immaterial since motion in the cause is the proper remedy against an irregular judgment, and the facts alleged are sufficient to warrant consideration of the judgment assailed in that aspect.

Our procedure requires certain means of protection to be afforded a person, *non sui juris,* or *non compos mentis,* when called to answer in court. C. S. 451, 483 (3). Some of them relate to service of process, and nonobservance may result in a void judgment; others relate to the protection to be afforded them by representation in the proceeding, and nonobservance may result in a judgment either void or merely irregular.

C. S., 451, requires that an insane person, having no general or testamentary guardian, shall defend by guardian *ad litem* and authorizes the court to appoint such guardian. It is said by the courts that the provisions of this statute should be strictly observed. *Ward v. Lowndes,* 96 N. C., 367, 2 S. E., 591. In *Moore v. Gidney,* 75 N. C., 34, 38, the provisions are said to be mandatory, and not directory only. "Those who venture to act in defiance of them must take the risk of their action being declared void or set aside."

In the present case service of summons was made on the defendant, the present movant. Applicable to the legal situation thus produced, *Justice Adams,* in writing the opinion of the Court in *Hood, Comr. of Banks, v. Holding,* 205 N. C., 451, 455, 171 S. E., 633, says: "The rule is substantially uniform that a judgment against an insane person not previously declared insane is not void but voidable," and "in such an instance relief may be administered when sought as between the parties by motion in the cause, or by an independent action." *Odom v. Riddick,* 104 N. C., 515, 10 S. E., 609; *Craddock v. Brinkley,* 177 N. C., 125, 98 S. E., 280; *Bank v. Duke,* 187 N. C., 386, 122 S. E., 1; *Clark v. Homes,* 189 N. C., 703, 128 S. E., 20; *Wadford v. Gillette,* 193 N. C., 413, 137 S. E., 314.

The former dismissal of a somewhat similar motion by Judge Bone cannot be relied upon by the plaintiff as constituting *res judicata.* Generally the doctrine of *res judicata* will not apply where the judgment is rendered on any grounds which do not involve the merits. 30 Am. Jur., Judgments, sec. 208. The first motion was dismissed for the reason that it contained no allegation that movant had a meritorious defense. *Duffer*

v. Brunson, 188 N. C., 789, 125 S. E., 619; *Harris v. Bennett,* 160 N. C., 339, 76 S. E., 217. There is no reason why this should estop defendant from making a second motion free from such technical defect. In the present motion there was an allegation respecting a meritorious defense stated with much particularity and sufficient, if found true, to support the allegation.

We think upon the record, the evidence and the findings of fact made by the trial judge, his judgment setting aside the decree of divorce should be sustained.

Affirmed.

STATE v. KATHERINE McFALLS, ADA SHEPHERD AND ELIZABETH SMITH (MARTIN).

(Filed 25 February, 1942.)

Larceny §§ 5, 8—Where goods are placed in defendant's possession by another, fact of recent possession, alone, does not justify conviction.

There was evidence tending to show that money which the State contended had been stolen was placed in defendant's cedar chest by another who gave defendant the keys while defendant was drunk, and that shortly thereafter defendant was arrested by officers of the law, who found the money in the cedar chest before defendant had an opportunity to open the chest or to know the money was there. *Held:* The recent possession was a relevant circumstance and, in connection with the other evidence in the case, was sufficient to be submitted to the jury upon the question of defendant's guilt of larceny, but an instruction to the effect that where possession of stolen property is so recent that defendant could not have gotten possession unless he had stolen it, there is a presumption justifying conviction unless defendant offers testimony in explanation raising a reasonable doubt of guilt, is erroneous as not being applicable to the facts in evidence and as placing too heavy a burden upon defendant.

APPEAL by defendant from *Nettles, J.,* at December Term, 1941, of BUNCOMBE.

Criminal prosecution tried upon indictment charging the defendant, in two counts, (1) with the larceny of $800 in money, the property of Sam Blanco, and (2) with receiving said money knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

The defendant lives in the City of Asheville, and two other women stay in her house. On the afternoon of 9 December, 1941, Sam Blanco took a taxi and went to the home of the defendant and engaged in drinking with all three of the occupants. While there he says he was relieved of his pocketbook containing $800 in money. One of the women testified

that the taxi driver took the money from Blanco's pocket and told her to lock it up; that she put it in a cedar chest and later gave the keys to the defendant; that the defendant was drunk at the time. They all went to the "Bon-Ton" and were there taken into custody. The officers found thirty-six $20 bills in the defendant's cedar chest.

Verdict: Guilty of larceny.

Judgment: Imprisonment in the State's Prison for a period of 20 months.

Defendant appeals, assigning errors.

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

McKinney & Killen for defendant.

STACY, C. J. The jury was instructed that in case of the recent possession of stolen property, "when the possession is so recent as to make it extremely probable that the holder is the thief, that is, where in the absence of explanation he could not reasonably have gotten possession unless he had stolen them himself, there is a presumption justifying, and in the absence of such explanation, perhaps requiring a conviction." (Exception.) "But in such case, if the testimony offered in explanation raises a reasonable doubt of guilt, defendant is entitled to an acquittal." (Exception.)

We think it must be held that the exceptions to these instructions are well interposed. *S. v. Cannon,* 218 N. C., 466, 11 S. E. (2d), 301. True, they are addressed to language taken from the case of *S. v. Anderson,* 162 N. C., 571, 77 S. E., 238, used in stating an extreme example, and on the facts here in evidence the instructions would seem to be inapplicable. *S. v. Lee,* 193 N. C., 321, 136 S. E., 877.

The evidence tends to show that the money was placed in the defendant's cedar chest without her immediate knowledge, at a time when she was drunk, and that it was removed by the officers before she had an opportunity to open the chest or to know it was there. This would seem to require that its presence in the defendant's cedar chest should be considered only as a relevant circumstance tending to show guilt, possible prearrangement, and, in connection with the other evidence in the case, sufficient to justify a conviction, if the jury should so find beyond a reasonable doubt. *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617.

The doctrine that there is, or may be, a presumption of guilt from the recent possession of stolen goods is one that should be kept in proper bounds or, in the language of *Lord Hale,* 2 Pleas of the Crown, 289, "It must be very warily pressed." *S. v. Ford,* 175 N. C., 797, 95 S. E., 154. In *S. v. Smith,* 24 N. C., 406, *Gaston, J.,* says "it applies *only* when this

possession is of a kind which manifests that the stolen goods have come to the possessor *by his own act* or, at all events, with his *undoubted concurrence*"; and, according to *Person, C. J.*, in *S. v. Graves*, 72 N. C., 485, it does not arise except when "the fact of guilt must be *self-evident* from the *bare fact* of stolen goods," and per *Hoke, J., in S. v. Anderson, supra*, it is only when "he could not have reasonably gotten possession unless he had stolen them himself." Finally, in *S. v. Lippard*, 183 N. C., 786, 111 S. E., 722, it is said that "in order to its proper application it must be 'manifest that the stolen goods have come to the possession by his own act or with his undoubted concurrence, and it must be so recent and under such circumstances as to give reasonable assurance that such possession could not have been obtained unless the holder is himself the thief.'"

Under the record evidence, it appears that the instructions complained of may have weighed too heavily against the defendant. *S. v. Gregory*, 203 N. C., 528, 166 S. E., 387. The case of *S. v. Baker*, 213 N. C., 524, 196 S. E., 829, is direct authority for holding them to be erroneous, as is also the case of *S. v. Harrington*, 176 N. C., 716, 96 S. E., 892.

New trial.

EMMA WHITEHURST JACOBS, WIDOW, ADDIE WHITEHURST COATS AND HUSBAND, R. F. COATS, AND FRANK WHITEHURST, v. G. C. JENNINGS.

(Filed 25 February, 1942.)

Easements § 5—Easement is limited to right of way existing at time of execution of instrument providing for continuance of the right of way.

In partition of lands it was provided that a cartway running through and beyond one of the tracts should remain as it then was, and that each of the parties should have the right to use same as a private way in going to and from his land. At the time of partition there was a gate at the highway, which had been removed at the time defendant acquired title to the servient tenement. Defendant erected two gates across the cartway, one at the highway and another at the other end of his lot where no gate had previously been erected. Plaintiffs instituted this action to enjoin defendant's interference with the use of the cartway. *Held:* Plaintiffs having bottomed their action upon the easement acquired in the partition proceedings, their rights were limited by the terms in which the right of way was therein designated in the absence of allegation and proof of some enlargement of or addition to the servitude therein created, and therefore defendant had the right to maintain the gate at the highway in the manner in which it was maintained at the time the easement was created notwithstanding that the gate had been subsequently removed, but upon the finding of the jury that defendant had unreasonably interfered with plaintiffs' use of the cartway, plaintiffs are entitled to the removal of the second gate erected where no gate had theretofore been maintained.

JACOBS *v.* JENNINGS.

APPEAL by defendant from *Dixon, Special Judge,* at October Term, 1941, of PASQUOTANK. New trial.

This was an action to enjoin interference with a right of way over defendant's land.

In 1908, in the partition of the lands of Elliott Whitehurst among his heirs, a private right of way or cartway over Lot No. 4 was given the owners of the other lots in the partition, and expressed in these words: "The cartway running from the Main Road westwardly through the woods shall be and remain as it now is to be used by each of the said parties as a private way, and each shall have the right to use same for going to and from their lands." The plaintiffs are heirs of Elliott Whitehurst and owners of Lots Nos. 2, 3 and 5 in the partition, and the defendant is the present owner of Lot No. 4. Lot No. 4 contains 13.13 acres, and lies immediately west of the highway. The cartway extends westwardly from the highway 1,100 feet across Lot No. 4 and for some distance beyond. At the time of the partition the cartway was about 12 feet wide, and there were gates at each end, one at the highway and one "down at the woods." Subsequently the gate at the highway was removed. Defendant has recently erected two gates across the cartway, one at the highway and the other at the west end of Lot No. 4 where no gate had previously been erected. Plaintiffs base their action on the easement granted in the partition proceeding as therein described, and allege that defendant has unreasonably and wrongfully interfered with their use of this cartway, and ask that he be enjoined from maintaining these gates.

Issues were submitted to the jury and answered as follows:

"1. At the time of defendant's acquisition of title to Lot No. 4, on July 24, 1924, was the cartway referred to in the pleadings maintained as an open cartway without gates or fences, as alleged in the complaint?

"Answer: 'Yes.'

"2. If not, did the defendant's erection of the gates referred to in the pleadings unreasonably interfere with plaintiffs' use of said right of way, as alleged in the complaint?

"Answer: 'Yes.'"

Judgment was rendered requiring defendant to remove from the cartway the gates and other barriers placed thereon by him. Defendant appealed, assigning errors.

J. H. LeRoy and McMullan & McMullan for plaintiffs, appellees.

J. W. Jennette and R. Clarence Dozier for defendant, appellant.

DEVIN, J. By virtue of the decree in a partition proceeding among the heirs of Elliott Whitehurst, in 1908, the plaintiffs acquired an easement

consisting of a right of way over Lot No. 4, now belonging to the defendant. This right of way or cartway was described as running westwardly from the highway, and was declared to be a private way for the use of the other parties to the partition proceedings, to whom lands were allotted, for going to and from their lands lying west of Lot No. 4, and it was also declared that the cartway "shall be and remain as it now is."

It was admitted that at the time of the partition there was a gate at the point where the cartway entered the highway, and that there was another gate at the woods. With the latter gate we are not concerned. It was also admitted that in 1940 the defendant erected a gate across the cartway at the entrance to the highway, about where the gate had previously stood, and also a second gate at the west end of Lot No. 4, where previously there had been no gate across the cartway.

The case was tried below upon the theory that if the plaintiffs could show that the maintenance of the gates erected by the defendant in 1940 constituted an unreasonable interference with plaintiffs' easement, they would be entitled to have them removed. 28 C. J. S., 781; 12 Am. Jur., 1011; 73 A. L. R., 778. See, also, *Alexander v. Autens*, 175 N. C., 720, 95 S. E., 850. This view was correct in so far as the case involved the second gate, but it left out of consideration the fact that the plaintiffs' easement was only to use the right of way as it was in 1908, and that in 1908 there was a gate across the cartway at the entrance to the highway, and that the defendant had a right to maintain the gate at the highway as it had been maintained in 1908. Unless the plaintiffs' easement has been enlarged in some way so as to create an additional servitude on Lot No. 4, they would not have the right to require the removal of the gate at the highway.

The plaintiffs having bottomed their action upon the easement acquired in the partition proceeding, their rights were limited by the terms in which the right of way was therein designated. Upon the finding of the jury that the maintenance of the gates unreasonably interfered with the use of the right of way, plaintiffs would be entitled to require the removal of the second or western gate, but this did not have the effect of divesting the defendant of the right to maintain a gate on his own land across the cartway at the place where a gate stood when the easement was created. Unless the plaintiffs can allege and prove in some proper way their right to a servitude upon defendant's land in addition to that imposed by the partition proceeding, the defendant would have the right to hold his land servient only to the cartway as it was in 1908, and subject to no greater burden. Nor would the finding that the gates had been removed in 1924, at the time of the execution of the deed of trust on Lot No. 4 under which defendant subsequently acquired title, be determinative of the defendant's rights.

The cause is remanded to the Superior Court for a new trial not inconsistent with this opinion. This disposition of the appeal renders unnecessary consideration of other exceptions noted at the trial.

New trial.

BURT L. OWNBEY v. PARKWAY PROPERTIES, INCORPORATED.

(Filed 25 February, 1942.)

Ejectment § 11—Complaint in ejectment need not allege defendant's source of title or attack any deed in defendant's chain of title.

In this action in ejectment, the complaint alleged that defendant claimed title as grantee in the trustee's deed after foreclosure of the property and that the power of sale became inoperative prior to foreclosure, C. S., 2589, 437 (3). Defendant demurred for that the complaint failed to allege that plaintiff had been in possession of the property at any time within the ten-year period prior to the foreclosure sale. *Held:* The demurrer should have been overruled, since plaintiff in ejectment is not required to allege either defendant's source of title or invalidity of any deed in defendant's chain of title, and defendant had no ground to complain that plaintiff properly elected to disclose by allegation his purpose to attack defendant's deed and his grounds therefor, the applicability of the statutes and the determination of the validity of the foreclosure deed not being presented by demurrer to the complaint.

APPEAL by plaintiff from *Nettles, J.*, at December Term, 1941, of BUNCOMBE. Reversed.

Civil action in ejectment to recover the possession of real property.

Plaintiff alleges ownership of a certain tract of land in Limestone Township, Buncombe County; his source of title; the execution by him of a deed of trust; the appointment of a substitute trustee; the foreclosure of the deed of trust; the purchase of said premises at the foreclosure by the defendant and the possession of the defendant under the foreclosure deed. He further alleges that the foreclosure of said deed of trust and the foreclosure deed executed pursuant thereto is void and of no effect for that the foreclosure was had and said deed was executed after the power of sale became inoperative, C. S., 2589, and that the defendant is in the wrongful possession of said land. He seeks judgment for the possession of the land described in the complaint.

The defendant demurs "for that it appears on the face of the complaint that plaintiff's cause of action is to have a trustee's foreclosure sale and deed adjudged void as being executed in violation of Consolidated Statutes, section 2589, and section 437, subsection 3, and said complaint fails to allege that the plaintiff has been in possession of the prop-

erty during said ten-year period or at any other time, and therein is insufficient to entitle the plaintiff to the relief under said statutes or otherwise."

When the cause came on to be heard on the demurrer the court below sustained the same and entered judgment accordingly. Plaintiff excepted and appealed.

Frank Walton for plaintiff, appellant.
Weaver & Miller for defendant, appellee.

BARNHILL, J. This being an action in ejectment it was not necessary for plaintiff to allege either defendant's source of title or the invalidity of any deed in its chain of title. Should the defendant at the hearing offer the foreclosure deed plaintiff would be privileged to attack it as invalid in law without prior allegation. *Ricks v. Brooks,* 179 N. C., 204, 102 S. E., 207; *Mobley v. Griffin,* 104 N. C. 112; *Jones v. Cohen,* 82 N. C., 75; *Fitzgerald v. Shelton,* 95 N. C., 519; *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 21; *Gibbs v. Higgins,* 215 N. C., 201. However, he has properly elected to disclose by allegation his purpose to attack and his grounds therefor. As to this defendant has no cause to complain.

Neither C. S., 2589, nor C. S., 437 (3), has any bearing upon the question here presented. Their applicability in determining the sufficiency of the attack by plaintiff upon the foreclosure deed is not now before us for decision. It follows that the cases cited by defendant are likewise not in point.

The complaint states a cause of action in ejectment. That the plaintiff alleges the invalidity of the deed upon which defendant relies as its source of title does not affect this conclusion. The demurrer should have been overruled.

Reversed.

MRS. JAMES MARTIN v. R. T. SPENCER.

(Filed 25 February, 1942.)

Trespass § 9—Evidence held sufficient to show forcible trespass and trespass to the person, rendering defendant liable for injuries proximately resulting.

Plaintiff's evidence tended to show that she and her 16-year-old brother were replacing some stakes which had been removed from what they thought to be the line between their father's property and the adjoining property of defendant, that defendant called to them in a loud, angry voice and then came over to them and began pulling up the stakes over

plaintiff's protest, that defendant continued to yell at plaintiff and her brother in a loud and menacing way, that defendant and plaintiff's brother engaged in an altercation, and that in consequence of all that transpired plaintiff fainted, and a month thereafter had a miscarriage. There was expert testimony that the fright occasioned by defendant's conduct could have produced the death of plaintiff's child. *Held:* Defendant's motion for judgment as of nonsuit was properly denied, since there was evidence of a forcible trespass and also trespass to the person of plaintiff, and therefore defendant may be held liable for the consequences of his wrongful act regardless of whether he had knowlege of plaintiff's *enceinte* condition.

APPEAL by defendant from *Armstrong, J.*, at October Term, 1941, of STOKES.

Civil action for willful trespass to the person.

The record discloses that on the morning of 29 May, 1941, the plaintiff and her 16-year-old brother were replacing some stakes which had been removed from what they thought to be the line between their father's property and the adjoining property of the defendant in the town of Lawsonville, N. C. The defendant, who lived across the road, called to the plaintiff and her brother, "in a loud, angry voice, . . . not to pull up the flowers, his little flowers, . . . that he would come over and show us how to drive stakes on his land," etc. He did come over to where the plaintiff and her brother were, followed by two of his sons, his wife and two daughters. He began to pull up the stakes and did pull up five or six of them. His face was red and drops of perspiration were on his forehead. He threatened to kill the plaintiff's brother. "He looked like a maniac, looked angry." Plaintiff says, "I told him not to come over there like that before me. I told him not to pull up those stakes. . . . He was raving as loud as he could yell. . . . His tone was loud, vicious, angry." (Cross-examination.) "It was not the breaking off of the stakes that made me faint; it was the way he acted and looked and yelled. . . . He didn't touch me, but I didn't know that he wouldn't. . . . He yelled at the top of his lungs and said he would show us how to drive up stakes and came towards us, and I took everything he said to be directed to me or my brother. . . . The tone was enough to be address towards me."

The defendant and plaintiff's brother engaged in an altercation—plaintiff's brother struck the defendant with one of the stakes as he was bending over to pull up the others, and the defendant had a limb in his hand—and in consequence of all that transpired the plaintiff fainted, "got sick, nervous," her husband picked her up in a crying and "jerky condition," took her to see a doctor, later carried her to a hospital, and within a month she had a miscarriage in her fourth month of pregnancy.

Doctors Akers and Morefield each testified that in his opinion the fright occasioned by the conduct of the defendant could have produced the death of plaintiff's child.

On these, the facts chiefly pertinent, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning as principal error the refusal of the court to grant the defendant's motion for judgment of nonsuit.

R. J. Scott and Dallas C. Kirby for plaintiff, appellee.
Petree & Petree and Glidewell & Glidewell for defendant, appellant.

STACY, C. J. The present case is controlled by the decision in *Kirby v. Stores Corp.*, 210 N. C., 808, 188 S. E., 625, under which it was tried, unless the absence of evidence to fix the defendant with knowledge of plaintiff's *enceinte* condition brings it within the principles announced in *Anthony v. Protective Union*, 206 N. C., 7, 173 S. E., 6. This single point of difference is not regarded as capitally important or of sufficient divergence to change the result. *May v. Tel. Co.*, 157 N. C., 416, 72 S. E., 1057. There is evidence of a forcible trespass and also trespass to the person of the plaintiff. 63 C. J., 891. Hence, the verdict and judgment will be upheld on authority of the *Kirby case*. "But if there may be a recovery for physical injuries resulting from fright wrongfully caused by the defendant, it would seem that an assault committed in the view of a woman whose presence is known, especially upon a member of her family, was an act of negligence towards the woman, a failure to exercise the due care towards her which the occasion and circumstances required, and was therefore a legal wrong against her which will support an action, if damage follows." 1 Cooley on Torts (3rd), p. 98.

The exceptions addressed to other phases of the trial, admission and exclusion of evidence and portions of the charge call for no elaboration. They are not sustained.

No error.

NORMAN L. FLIPPEN, EXECUTOR, v. R. A. LINDSEY ET AL.

(Filed 25 February, 1942.)

1. Bills and Notes § 26—Evidence aliunde held competent upon defenses of failure and want of consideration and bar of statute of limitations.

In this action by the personal representative of the deceased payee against husband and wife who signed a note on its face, defendants set up want of consideration as to them, failure of consideration and no adoption of the word "seal" set opposite their names, the bar of the three-

year statute of limitations, and the male defendant alleged that he signed the note as surety and not as principal, which was well known to the payee at the time. Defendants sought to introduce record evidence tending to show that the note was a part of a larger transaction, of which the payee had notice, involving a payment in part of the mortgage indebtedness of the father of the *feme* defendant and a transfer of the balance to his two daughters. *Held:* The record evidence was competent upon the defenses invoked.

2. Bills and Notes § 9c—

As against the payee or his personal representative it is competent to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety.

3. Limitations of Actions § 2e—

The three-year statute of limitations, C. S., 441, is applicable to sureties on sealed instruments as well as on instruments not under seal.

4. Evidence § 32—

While testimony as to personal transactions with the deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses is not precluded by the statute. C. S., 1795.

APPEAL by defendants from *Stevens, J.*, at November Term, 1941, of EDGECOMBE.

Civil action against R. A. Lindsey and Senora Wilson Lindsey, his wife, to recover on promissory note in words and figures as follows:

"$1,606.88 TARBORO, N. C.
July 1, 1929

Three years after date we promise to pay to the order of John B. Wood One Thousand, Six Hundred, Six and 88/100 Dollars with interest from date at six per centum per annum, payable annually. Value received.

R. A. LINDSEY (Seal)
SENORA WILSON LINDSEY (Seal)
R. L. BEALL (Seal)
WILLIE WILSON BEALL (Seal)"

Execution of the note is admitted by the defendants. They set up in defense, however, want of consideration as to them, failure of consideration and no adoption of the word "seal" set opposite their respective names. The defendant, R. A. Lindsey, also alleges that he signed the note as surety, and not as principal, which was well known to the payee at the time. Both defendants plead the three-year statute of limitations, C. S., 441. This action was instituted 31 May, 1940.

The defendants sought to show by record evidence that the note in suit was but a part of a larger transaction, of which John B. Wood had

notice, and that the only one who profited from the note in suit was Claude Wilson, father of the *feme* defendant. This evidence was excluded. Exception. The entire transaction involved a payment in part of Claude Wilson's mortgage indebtedness to the Tarboro Building & Loan Association and a transfer of the balance to his two daughters, Willie Wilson Beall and Senora Wilson Lindsey, signers of the note in suit.

There was a verdict for the plaintiff and judgment against the defendants, jointly and severally, from which they appeal, assigning errors.

H. H. Philips for plaintiff, appellee.
George M. Fountain for defendants, appellants.

STACY, C. J. We think the record evidence which tends to show the whole transaction, the relationship of the parties, their interests in the matter, and to fix the payee with notice thereof, is competent as bearing upon the defenses of want of consideration, failure of consideration, suretyship and the statute of limitations. *Barnes v. Crawford,* 201 N. C., 434, 160 S. E., 464.

It is permissible to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety. *Insurance Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606; *Davis v. Alexander,* 207 N. C., 417, 177 S. E., 417. The three-year statute of limitations, C. S., 441, is applicable to sureties on sealed instruments as well as on instruments not under seal. *Furr v. Trull,* 205 N. C., 417, 171 S. E., 641; *Redmond v. Pippen,* 113 N. C., 90, 18 S. E., 50; *Welfare v. Thompson,* 83 N. C., 276. See *Trust Co. v. Clifton,* 203 N. C., 483.

Of course, in an action by the personal representative of the payee in a note to enforce its collection, C. S., 1795, unless waived, would exclude evidence of personal transactions or communications between an interested party and the deceased. *Stocks v. Cannon,* 139 N. C., 60, 51 S. E., 802. The exclusion of the record evidence in the instant case, however, seems to have gone beyond the limitations of the "dead man's statute," C. S., 1795.

It appears that the defendants are entitled to a new trial. It is so ordered.

New trial.

GEORGE H. ISLEY v. MONROE WINFREY AND STANDARD OIL COMPANY OF NEW JERSEY, INCORPORATED.

(Filed 25 February, 1942.)

Bill of Discovery § 7—Indemnity policy and contract between parties held competent upon question of whether individual defendant was employee.

Plaintiff sued the corporate defendant upon allegations that its employee inflicted negligent injury in the course of his employment. The corporate defendant alleged that the individual defendant was an independent contractor and not an employee. Plaintiff alleged that the corporation had taken out a policy of insurance protecting it against liability for negligence of the individual defendant, and moved for inspection of the policy and the contract between defendants relating to the employment. *Held:* The granting of the motion was without error, since the writings may become relevant in the trial upon the question of the relationship between the parties.

APPEAL by defendant Standard Oil Company of New Jersey from *Blackstock, Special Judge,* at September Term, 1941, of ROCKINGHAM. Affirmed.

Hunter K. Penn and D. F. Mayberry for plaintiff, appellee.
J. C. Brown for defendant, appellant.

DEVIN, J. This case is here upon appeal from an order of the judge below requiring the production for inspection and copy, and for use at the trial, of certain papers in the possession of the defendant Standard Oil Co. The ruling complained of was predicated upon the pleadings in an action instituted by the plaintiff to recover damages for a personal injury due to the negligent operation of a motor truck driven by defendant Winfrey. It was alleged that defendant Winfrey was an employee of defendant Oil Company, and that he was acting at the time of the injury within the scope of his employment. Defendants denied negligence, and alleged that Winfrey was an independent contractor, and that the defendant Oil Company was in no way responsible for any act or omission on his part.

In view of these pleadings the plaintiff entered motion, under C. S., 1823 and 1824, supported by affidavit, alleging that the defendant Oil Company had in its possession a policy of liability insurance issued to it by the Fidelity and Casualty Company of New York protecting it from liability for negligence of Winfrey, and that defendant Oil Company also had in its possession the contract between the defendants relating to the employment of Winfrey, and plaintiff asked that these papers be produced for inspection and copy, and for use at the trial.

The propriety of the allowance of the motion for the production of the papers specified is supported by what was said in *Rivenbark v. Oil Corp.*, 217 N. C., 592, 8 S. E. (2), 919, where numerous pertinent authorities are cited. In that case, upon similar showing, the order of the trial judge, requiring production of liability insurance policy and related correspondence, was, on appeal, affirmed.

From the pleadings here it seems that the contract between the defendants and the policy of liability insurance called for may become relevant in the trial upon the question of the relationship between the defendants. *Davis v. Shipbuilding Co.*, 180 N. C., 74, 104 S. E., 82. Defendant's exception to the order, on the ground that the affidavit upon which the motion was based was insufficient, cannot be sustained.

Judgment affirmed.

SUSIE A. BUNTING v. P. L. SALSBURY AND SECURITY MUTUAL LIFE INSURANCE COMPANY.

(Filed 25 February, 1942.)

Evidence § 41—

Testimony of a witness on cross-examination as to a transaction between third persons occurring while the witness was not present, and testimony of another witness as to declarations made by his father, since deceased, that his father had paid the obligation in suit in full, *is held* incompetent as hearsay.

APPEAL by defendant P. L. Salsbury from *Dixon, Special Judge,* at November Term, 1941, of MARTIN.

These facts appear to be uncontroverted:

At the time of his death on 26 March, 1941, Mark L. Bunting carried with the defendant, Security Mutual Life Insurance Company, two policies of life insurance, each in the sum of $2,000, in which his wife was named beneficiary. These policies had been assigned as security for a stated indebtedness to the company, and for premiums advanced by defendant P. L. Salsbury, amounting to $1,153.83. Salsbury claims that the insured at the time of his death was indebted to him in the further sum of $781.39, balance due on certain notes, for payment of which he contends that said policies were also assigned.

Plaintiff alleges that in March, 1933, the defendant Salsbury and Mark L. Bunting "settled the amount"; that Bunting gave to Salsbury a crop lien and chattel mortgage in full settlement and satisfaction of all

amounts due or claimed to be due to Salsbury; and that later the crop lien and chattel mortgage was paid in full, and all matters and things were settled.

These contentions present the question at issue.

From judgment on adverse verdict defendant Salsbury appealed to the Supreme Court and assigns error.

Peel & Manning for plaintiff, appellee.
B. A. Critcher for defendant, appellant.

WINBORNE, J. Exceptive assignment to admission of incompetent evidence material to question at issue is well taken.

Upon the trial below the plaintiff's witness Joe Bunting, on cross-examination, answered as indicated to the following questions:

"Q. Mr. Bunting, it is alleged by the plaintiff, who is your mother in this action, that your father executed to P. L. Salsbury a crop lien in March, 1933, which was in settlement of an agreed amount that your father owed Mr. Salsbury?

"A. In full, it was.

"Q. Were you present?

"A. I was not present when he wrote the crop lien because my daddy did not have a crop. He went there when he was ill and fooled him in it and got him to sign it."

Defendant moved to strike out the above answers as not responsive. Motion overruled. Exception.

Plaintiff's witness Ernest Bunting testified: "The only thing I know is that he told me he had been paid in full." Objection. Question: "Who told you that?" Answer: "My father." Objection by defendant. Overruled. Exception.

The admission of this testimony is violative of the hearsay rule, under which, subject to well recognized exceptions, testimony as to what, or based upon what the witness had heard a third person say, is incompetent, and should have been excluded. *Grandin v. Triplett,* 173 N. C., 732, 92 S. E., 392; *Matthis v. Johnson,* 180 N. C., 130, 104 S. E., 366; *Chandler v. Marshall,* 189 N. C., 301, 126 S. E., 742; *Trust Co. v. Blackwelder,* 209 N. C., 252, 183 S. E., 271.

In *Matthis v. Johnson, supra, Walker, J.,* speaking to a similar question, used this language: "The testimony of K. A. Robinson was properly excluded, because he proposed to speak solely of a statement, not only of a third person, but of a person who had since died, which was made to him. This was hearsay and incompetent, it having none of those safeguards required by the law for the maintenance of truth."

New trial.

STATE v. WALTER BLUE.

(Filed 25 February, 1942.)

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 felony this will be done only when no error is apparent on the face of the record.

MOTION by State to docket and dismiss appeal.

Attorney-General McMullan for the State.
No counsel contra.

WINBORNE, J. At the regular December Criminal Term, 1941, of Superior Court of Buncombe County, the defendant, Walter Blue, was tried upon an indictment charging him with rape. There was verdict of guilty of rape as charged in the bill of indictment, upon which judgment of death as required by law was pronounced by the court.

From this judgment defendant gave notice of appeal to the Supreme Court. Appeal bond in the sum of $50 was adjudged sufficient, unless upon the proper showing defendant be permitted to appeal *in forma pauperis.* Defendant was allowed fifteen days in which to make and to serve statement of case on appeal, and the State was allowed statutory time thereafter to make and serve countercase or file exceptions. The Clerk certifies that no case on appeal has been filed in his office, and that "the time agreed upon by counsel for perfecting the appeal" has expired and the appeal has not been perfected, and says: "I have inquired of counsel for defendant and have been informed by him that he does not intend to perfect the appeal."

The Attorney-General moves to docket and dismiss the case under Rule 17 of the Rules of Practice in the Supreme Court. 213 N. C., 808.

In the absence of apparent error upon the face of the record, the motion is allowed. *S. v. Robinson,* 212 N. C., 536, 193 S. E., 701; *S. v. Baldwin,* 213 N. C., 648, 197 S. E., 142; *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507.

Judgment affirmed.

Appeal dismissed.

W. K. McLEAN, ADMINISTRATOR FOR THE ESTATE OF MACK RAMSEY, DECEASED, v. T. N. RAMSEY.

(Filed 25 February, 1942.)

Death § 4—

A complaint alleging a willful and felonious slaying states a cause of action for wrongful death, and a demurrer thereto on the ground that the complaint set up a purported action in negligence and failed to particularize with facts and circumstances supporting the general allegation of negligence, is properly overruled.

APPEAL by defendant from *Gwyn, J.*, at Chambers, 21 November, 1941. From MADISON. Affirmed.

Jones, Ward & Jones and Calvin R. Edney for plaintiff, appellee.
Roberts & Baley and John H. McElroy for defendant, appellant.

PER CURIAM. This case comes here on appeal of defendant from a judgment overruling a demurrer to the complaint as not stating a cause of action. The action is for recovery of damages for the unlawful killing of plaintiff's intestate. The gist of the demurrer is that the complaint sets up a purported action in negligence and does not particularize with facts and circumstances supporting the general allegation of negligence. But the complaint alleges a willful and felonious slaying, and therefore sets up a good cause of action.

The demurrer was properly overruled and the judgment is

Affirmed.

JONAH HENDERSON AND HIS WIFE, ETHEL HENDERSON, v. CARL R. STUART, TRUSTEE, ET AL.

(Filed 25 February, 1942.)

Husband and Wife § 12d—

The husband has the right, with the consent of the owner and holder of notes secured by deed of trust on the property, to use the proceeds of a fire insurance policy to pay a separate obligation of his, notwithstanding that the property was held by him and his wife by entireties and the policy had a mortgage clause in favor of the trustee.

APPEAL by plaintiffs from *Gwyn, J.*, at September Term, 1941, of MADISON.

Civil action for damages, alleging the foreclosure of a deed of trust after the indebtedness secured thereby had been paid. Plaintiffs contend that the proceeds from a certain fire insurance policy, to which policy a mortgage clause in favor of trustee was attached, were sufficient to pay said indebtedness, and that the owner and holder of the secured notes wrongfully permitted the coplaintiff, Jonah Henderson, to divert a portion of said funds to the payment of a personal debt to the Citizens Bank of Marshall, which bank was also by assignment the owner and holder of the secured notes. The land sold under the deed of trust had been conveyed to plaintiffs as tenants by the entirety.

The jury, upon a proper issue, found that the indebtedness secured by the deed of trust had not been paid at the time of foreclosure.

From judgment on verdict plaintiffs appeal to the Supreme Court and assign error.

James E. Rector for plaintiffs.

J. C. Ramsey, Roberts & Baley and John H. McElroy for defendants.

PER CURIAM. A careful perusal of the record and exceptions filed in this case do not show any reversible error. The obligation of the plaintiffs was joint and several and the coplaintiff, Jonah Henderson, had the right, with the consent and approval of the owner and holder of the secured notes, to divert a portion of the proceeds received from the fire insurance company to the payment of other indebtedness. *Turlington v. Lucas,* 186 N. C., 283, 119 S. E., 366; *Winchester-Simmons Co. v. Cutler,* 194 N. C., 698, 140 S. E., 622.

In the judgment of the court below we find

No error.

BOARD OF EDUCATION OF PERQUIMANS COUNTY v. WILLIAM HENRY DEITRICK AND F. N. THOMPSON.

(Filed 25 February, 1942.)

Torts § 4—In action against contractor for defective material, contractor is not entitled to joinder of materialman as joint tort-feasor.

In a suit against the contractor and the architect alleging failure to provide adequate ventilation in the foundation of the building constructed and the use of inferior and defective lumber and fraudulently concealing the defects from plaintiff, the contractor is not entitled to have the materialman joined as codefendant upon allegations that it furnished the lumber and in turn fraudulently concealed the nature and condition of the lumber, since there is no privity between plaintiff and the material-

man and the alleged tort of the materialman is an independent tort committed by it against the contractor, and it and the contractor are in no sense joint tort-feasors.

APPEAL by defendant Thompson from *Thompson, J.* From PERQUIMANS. Affirmed.

Defendant Thompson, a building contractor, entered into an agreement with plaintiff to construct a school building at Windfall in Perquimans County according to plans and specifications. Defendant Deitrick was the architect. Plaintiff alleges that defendants failed to provide adequate ventilation in the foundation of said building and used green, inferior and defective material in the construction of same, and that the defendants fraudulently concealed from plaintiff the failure to provide such ventilation and the use of such inferior and defective lumber and material. It seeks to recover damages therefor.

The defendant Thompson, answering, denied any fraudulent concealment and alleged in further defense that if green, inferior and defective lumber was used, it was purchased from Major & Loomis Company, which company in turn fraudulently concealed from the defendant the nature and condition of such lumber. He thereupon moved that Major & Loomis Company be made a party defendant and required to answer his cross action in respect thereto. The motion was denied and said defendant appealed.

McMullan & McMullan for plaintiff, appellee.
M. B. Simpson, Cochran & McCleneghan for defendant, appellant.

PER CURIAM. There is no privity between plaintiff and Major & Loomis Company. Any fraudulent concealment of the condition of the lumber sold by Major & Loomis Company to the defendant Thompson constitutes a wrong committed by it against Thompson. Plaintiff is not concerned therewith. The alleged wrong committed by the defendant Thompson, if committed at all, is an independent tort against the plaintiff. Major & Loomis Company did not participate therein. It is in no sense a joint tort-feasor. The motion was properly denied. *Hoover v. Indemnity Co.*, 202 N. C., 655, 163 S. E., 758; *Brown v. R. R. Co.*, 202 N. C., 256, 162 S. E., 613; *Bost v. Metcalfe*, 219 N. C., 607, 14 S. E., (2d), 648.

Affirmed.

E. C. CODY, G. W. CODY, HATTIE CODY, GLENN CODY, JOHN CODY, LONAZELLE BREWER, GURNEY BREWER, IRENE CODY, BY HER NEXT FRIEND, HATTIE CODY, v. WILL ENGLAND.

(Filed 4 March, 1942.)

1. Boundaries § 9f—

Where the county surveyor, instead of actually surveying the lines and boundaries of an entry, adopts a known natural object as the beginning corner, and merely plats on paper the lines and boundaries, designating in part courses and distances to stakes, the stake corners are to be located by measuring the distance by horizontal and not by surface measure.

2. Same—

The statutes do not prescribe the method to be used in measuring the lines in surveying an entry. C. S., 7565-7567.

3. Same—

A county surveyor is a public officer, and until the contrary is shown, it will be presumed that in making a survey of an entry on which a grant has issued, he acted in accordance with his legal duty to lay off and survey the lands covered thereby, but this presumption is rebuttable.

4. Same—

The presumption that in early surveys of entries on which State grants were issued, particularly in the mountain sections, surface measure was used, does not apply when it appears that no actual survey was made but that the distances were platted by a "paper survey."

5. Costs § 2a—

Where, in an action in ejectment and for damages for cutting of timber, defendant files answer denying plaintiffs' title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants and the only controversy was as to the location of the boundary between their respective grants. C. S., 1241.

6. Reference § 18—

Where, upon the trial in the Superior Court upon appeal from the referee, judgment is entered in the Superior Court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. C. S., 1244 (6).

APPEAL by plaintiffs and defendant from *Bobbitt, J.*, at September Term, 1941, of GRAHAM.

Civil action to recover land and for damages for alleged trespass, in which defendant files cross action for trespass.

Opinion on former appeal is reported in 216 N. C., 604; 5 S. E. (2d), 833. Basic contentions of parties are there set forth. Thereafter, order

of reference was entered at Spring Term, 1940, of the Superior Court of Graham County, and this appeal is from judgment on report of the referee.

Plaintiffs in their complaint allege ownership of a boundary of land in Graham County, North Carolina, comprising the descriptions in Grant No. 2275, issued 21 September, 1855, on State Survey No. 69, and in Grant No. 2684, issued 26 December, 1857, on entry No. 2335, of date 5 September, 1853, and allege that defendant has trespassed thereon, wrongfully and unlawfully cutting and removing timber therefrom, to their damage.

Defendant in his answer denies the allegations of the complaint, and, by way of further answer, avers that he is the owner and entitled to possession of a tract of land covered by Grant No. 2609, issued 17 December, 1857, on entry No. 4331, and that plaintiffs have trespassed thereon—wrongfully and unlawfully cutting and removing timber therefrom, to his damage.

Plaintiffs in reply filed admit that defendant is owner of the tract of land described in further answer when same is properly located according to its calls, courses and distances, but deny trespass thereon.

For convenience the referee, in the main, designates the lands by State survey or entry numbers rather than by grant numbers.

On the trial below it was, and is now, admitted by all parties that plaintiffs connect by proper chain of record title with the grants under which they claim as above stated, and that the controversy hinges upon their location. The referee finds the facts with relation to location, and it is stipulated by the parties that there is evidence to support his findings of fact.

Grant No. 2684, based on entry No. 2335, is for three hundred acres of land described as follows: "Beginning on a hickory, the southeast corner of William Davis' tract of land, and runs with the line of No. 72 East 160 poles to a beech, corner of said number; thence with the line of No. 74 South 300 poles to a stake; thence West 160 poles to a stake; thence North 300 poles to the Beginning."

Grant No. 2275, based on State Survey No. 69, is for one hundred thirty-nine acres land described as follows: "Beginning on a white oak and hickory in a hollow, the northeast corner of Tract No. 66, and runs East 138 poles to a hickory on a ridge, crossing the east fork at 80 poles; then South 162 poles to a stake; then West 138 poles to a stake, the southeast corner of No. 66; then North with the line of same to the Beginning."

It is admitted by all parties that the white oak and hickory indicated by the letter "F" on the map is the northwest and beginning corner of State Survey No. 69; that the point "E-1" as indicated on the map

(hickory gone, now stone) is the northeast corner of State Survey No. 69, the southwest corner of State Survey No. 72, and the beginning corner of entry No. 2335, and that a variation of three degrees and thirty minutes is required to properly run the line from "F" to the point "E-1."

And the referee finds that the southeast corner of State Survey No. 72 is the beech, now a stake in the cluster of white walnuts, as indicated on the court map by the letter "C," which beech the referee finds is also the second corner of entry No. 2335, and is reached by running from the point "E-1" south 87 degrees and thirty minutes east 168 poles by horizontal measure instead of "East 160 poles."

Now, with regard to the location of the remaining lines of entry No. 2335, the referee finds these pertinent facts: 1. The original State surveys, including those referred to in this action, were surveyed by horizontal measure. 2. While J. W. C. Piercy, the county surveyor, who certified to the plat and purported survey on which Grant No. 2684 issued, used surface measure as the method of measuring lines in surveying entries in Graham County, he did not actually survey the lines of entry No. 2335, and it is what is known as a "paper survey." In this connection the referee says, "I think it must be presumed, even though he did not make an actual survey, that surface measure was his method of measurement, and that such should govern," and he so finds. Plaintiffs except.

But recognizing that, as a matter of law, that in view of the fact that no actual survey of the entry on which the grant issued was originally made, and that the survey was a "paper survey," horizontal measure may be the correct method for measuring the remaining calls of this entry No. 2335, and to the end that the controversy may be settled, the referee makes alternate findings of fact pertaining thereto.

Thus, applying the surface measure method, the referee finds that running from the beech corner, found to be at the point "C," as indicated on the map, the location of remaining lines in succession would be: south two degrees west 299 poles and 7 links, surface measure, to the black oak, indicated on the map at the letter "K"; thence north 87 degrees 30 minutes west 160 poles to a point which would be slightly north of the letter "J," a sourwood, indicated on the court map; thence to the beginning. Plaintiffs except.

But, applying horizontal measure as the proper method for measuring the lines, the referee finds that, running from the beech corner, found to be at the point "C" as indicated on the map, the location of the remaining lines in succession would be: "South 2 degrees West 300 poles, horizontal measure, to the point indicated on the court map at the figure 6; thence North 87 degrees and 30 minutes West 160 poles, horizontal measure, to a point indicated on the court map at the figure 5, the termination of the Rogers line; thence to the point of beginning."

The referee further finds that the plaintiffs cut timber on the land lying west of the west line of entry No. 2335, located according to surface measurement and east of the west line of said entry located according to horizontal measurement, that is, east of the Rogers line, and are liable to defendant therefor. Plaintiffs except.

As to State Survey No. 69, Grant No. 2275: The referee finds that the southern boundary line, correctly located, runs from the point "M," as indicated on the court map, to the point "G"; that, therefore, from the northeast corner "E-1," admitted as above stated, the lines called for in the grant run: "South three degrees and 30 minutes East 162 poles to a point marked on the Court map by the letter 'M'; thence West to the point, formerly a Spanish Oak and Chestnut, indicated on the Court map by the letter 'G'; thence North three degrees and 55 minutes East 165 poles to the point of beginning."

The referee further finds that entry No. 4341, Grant No. 2609, under which defendant claims, was also a "paper survey," beginning at a point in the south boundary line of entry No. 69, 66 poles west of its southeast corner, and runs east with the south line of No. 69 to its southeast corner, indicated at "M"; thence extending that line east on the same degree until it strikes the west line of entry No. 2335 as located by the referee according to surface measurement; thence in a southeastern direction with the west line of entry No. 2335, as so located, and then various courses and distances indicated, to the southwest corner of entry No. 69, indicated by the letter "G" on the map, as found by the referee; thence with the south line of State Survey No. 69 to the place of beginning.

But the referee finds that if the court holds as a matter of law that horizontal measurement applies in locating entry No. 2335, the line of entry No. 4341 should be extended from the southeast corner of State Survey No. 69 east to the west line of entry No. 2335, as so located, that is, the Rogers line, and thence in a southeastern direction with it, and then various courses and distances to the beginning as above set forth.

The referee further finds that defendant, "under a *bona fide* belief, however, that he was within his own lines, cut timber belonging to plaintiffs in the small triangle indicated on the court map from 'M' to 'G' to 'V' to 'M,' of approximately one acre," north of the southern boundary line of State Survey No. 69, as located by the referee. For the value of timber so cut referee finds that defendant is indebted to plaintiffs.

Other findings of fact made by the referee are not material to this appeal.

Upon his findings of fact the referee concludes as matters of law: (1) That plaintiffs are the owners and entitled to possession of the land covered (a) by State Survey No. 69, Grant No. 2275, and (b) by entry

No. 2335, Grant No. 2684, except a portion conveyed to another, as each is located as shown in the findings of fact; (2) that plaintiffs are entitled to recover of defendant for the value of timber cut and removed by him from their land along the south line of State Survey No. 69; (3) that defendant is the owner and entitled to possession of the land covered by entry No. 4341, Grant No. 2609, located as shown in the findings of fact; and (4) that defendant is entitled to recover of plaintiffs the value of the timber cut and removed by them from the land lying between the locations of the west line of entry No. 2335, on the one hand, according to surface measurement, and on the other according to horizontal measurement.

Exceptions to certain findings of fact and conclusions of law as set forth in the referee's report were filed both by plaintiffs and by defendant, all of which were overruled by judge of Superior Court, and the findings of fact and conclusions of law, as made by the referee, were in all respects approved, adopted and confirmed.

In accordance therewith judgment was entered, in which costs were adjudged one-half against plaintiffs and one-half against defendant.

From judgment so rendered both plaintiffs and defendant appeal to Supreme Court and assign error.

R. L. Phillips and McKinley Edwards for plaintiffs, appellants.

R. B. Morphew, T. M. Jenkins and S. W. Black for defendant, appellant.

PLAINTIFFS' APPEAL.

WINBORNE, J. Decision here turns upon the answers to these two questions: First. Where the county surveyor, instead of actually surveying the lines and boundaries of an entry, adopts a known natural object as the beginning corner, and merely plats on paper the lines and boundaries, designating in part courses and distances to stakes, are the stake corners to be located by measuring the distance by surface measure or by horizontal measure? The answer is "by horizontal measure."

The statute in effect at the date of entry No. 2335, 5 September, 1853, in question here, provides that every county surveyor, upon receiving the copy of the entry and order of survey for any claim of lands, shall, as soon as may be, lay off and survey the same, agreeably to this act, and that no surveys shall be made without chain carriers, who shall be sworn to measure justly and truly, and to deliver a true account thereof to the surveyor, and who shall actually measure the land surveyed. Revised Statutes of North Carolina, 1836-7, chapter 42, section 14. See, also, Revised Code of North Carolina, 1854, chapter 42, section 12; C. S., sections 7565-7567; *Redmond v. Mullenax*, 113 N. C., 505, 18 S. E., 708;

Higdon v. Rice, 119 N. C., 623, 26 S. E., 256; *Lumber Co. v. Hutton,* 152 N. C., 537, 68 S. E., 2. But the statute does not prescribe the method to be used in measuring the lines in surveying an entry.

It is presumed, until the contrary is shown, that a public officer, as is a county surveyor (R. S., chapter 42, sections 4-6, Constitution of North Carolina, Art. VII, sec. 1), acts in compliance with his legal duty, and that his proceedings are regular. *Clifton v. Wynne,* 80 N. C., 145; *Neal v. Nelson,* 117 N. C., 393, 23 S. E., 428; *Gregg v. Comrs.,* 162 N. C., 479, 78 S. E., 301. Thus, where a county surveyor purports to act under an order of survey of an entry on which a grant has issued, it may be presumed that he acted in accordance with his legal duty to lay off and survey the lands covered thereby.

This, however, is a rebuttable presumption.

Furthermore, while there is authority in this State, *Duncan v. Hall,* 117 N. C., 443, 23 S. E., 362, and *Stack v. Pepper,* 119 N. C., 434, 25 S. E., 961, to the effect that there is a presumption, founded on custom sanctioned by judicial opinion, that surveyors used surface measure in the early surveys of entries on which grants were issued, particularly in the mountain sections, there is no factual basis for such presumption where it appears, as here, that no survey was made. The custom of a surveyor to use surface measure in surveying entries has no probative value in cases where no actual survey was made. In such event the rule of correct measurement must be applied. The authorities agree that horizontal measure is the correct and accurate method of measurement in the survey of land. 8 Am. Jur., 794, Boundaries, sec. 67; *Gilmer v. Young,* 122 N. C., 806, 29 S. E., 830; *McEwen v. Den,* 24 Howard, U. S., 242, 16 L. Ed., 672. Manifestly, a line platted on the plane of paper is horizontal.

The second question: Where, in an action to recover land and for trespass thereon by cutting timber, defendant in answer filed denies plaintiffs' title thereto, and files cross action averring that plaintiffs have trespassed on his land, to which plaintiffs in reply disclaim title to any of defendant's land, properly located, and deny trespass thereon, and it is found that plaintiffs' title is valid, and that defendant, though under *bona fide* belief that he was within his own lines, cut timber on a small portion of plaintiffs' land, and that plaintiffs have not cut any timber on defendant's land, are plaintiffs as a matter of law liable for any of the costs of the action? The answer is "No." C. S., 1241; *Moore v. Angel,* 116 N. C., 843, 21 S. E., 699; *Vanderbilt v. Johnson,* 141 N. C., 370, 54 S. E., 298; *Bryan v. Hodges,* 151 N. C., 413, 66 S. E., 345; *Swain v. Clemmons,* 175 N. C., 240, 95 S. E., 489; *In re Hurley,* 185 N. C., 422, 117 S. E., 545.

The statute, C. S., 1241, provides that costs shall be allowed of course to the plaintiff, upon a recovery, in an action for the recovery of real

property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial. This does not include compensation of referees. C. S., 1244 (6).

On the other hand it is provided that, unless plaintiff be entitled to costs in actions mentioned in C. S., 1241, costs shall be allowed as of course to the defendant.

In the present case the defendant by the denial in his answer put the title of the plaintiffs in issue. The issue is found in favor of plaintiffs. This entitles them to costs. It makes no difference, as was stated in *Swain v. Clemmons, supra,* that the defendant upon the trial below admitted plaintiffs' title to the lands covered by the grants under which they claim, and only controverted the location of some of the lines of those grants. The admission came too late for the purpose of saving the costs.

Other assignments of plaintiffs, given due consideration, fail to affect the decision here reached, that is, that plaintiffs are entitled to judgment (1) declaring them to be the owners and entitled to possession of the land covered by entry No. 2335, Grant 2684, on location shown in alternate finding of fact of the referee in applying horizontal measure, except the portion indicated in judgment rendered below; (2) striking out award of damages to defendant for value of timber cut by plaintiffs within the lines of said entry so located, and (3) for costs, exclusive of compensation to referee.

In these respects the judgment below against plaintiffs is

Reversed.

DEFENDANT'S APPEAL.

Upon the facts appearing in the record on this appeal, the challenge of defendant to that part of judgment below pertaining to costs is without merit. However, judgment will be corrected to conform to decision on plaintiffs' appeal.

Other assignments are untenable.

Affirmed.

EVELYN POLLARD v. WILLIAM POLLARD.

(Filed 4 March, 1942.)

1. Divorce § 13—

In an action for alimony without divorce, C. S., Supp. 1924, sec. 1667, plaintiff must meet the requirements of the statute for divorce from bed and board, and must allege with particularity the acts of the defendant

constituting the basis of the charge that he offered such indignities to her person as to render her condition intolerable, and allege that such acts were without adequate provocation on her part.

2. Same—

Where, in an action for alimony without divorce, the complaint fails to allege that the acts of defendant complained of were without adequate provocation on the part of plaintiff, the Supreme Court may sustain a demurrer *ore tenus* to the complaint.

3. Same—

Plaintiff is entitled to alimony without divorce if she can sustain by competent evidence either one of the grounds alleged, in this case that defendant offered such indignities to her person as to render her condition intolerable and her life burdensome, and that plaintiff was compelled to leave the house of defendant because of his failure to provide for her support and his cruel, contemptuous and inhuman treatment of her.

4. Same—Evidence in this action for alimony without divorce held insufficient to resist defendant's motion to nonsuit.

Evidence disclosing an estrangement in the marital relationship and the failure and refusal of the defendant to place his home in their joint names, as promised by him prior to the marriage, and his refusal to build up a joint savings account, and differences of opinion between them over certain other financial matters, is insufficient to show either indignities to the person of plaintiff or conduct constituting in law an abandonment by defendant, and defendant's motion to nonsuit in the wife's action for alimony without divorce based upon these two grounds should have been allowed.

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

This is a civil action for alimony and counsel fees without divorce.

Plaintiff alleges in her complaint that defendant, as an inducement for her to marry him, made certain definite agreements, promises and assurances in writing about the conditions under which she would be required to live. That the two grown daughters of the defendant would soon be in a position to make their own way, and that after the payment of certain expenses in connection with the education of Pat, one of the daughters, the house would then resolve itself into theirs and that whatever was his would be hers. Plaintiff sets out in her complaint the contents of the letter written to her prior to her marriage to the defendant.

Plaintiff further alleges in her complaint that since the marriage the defendant, by long series of acts, words and conduct, has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome; and that defendant has forced plaintiff by his cruel, contemptuous and inhuman treatment to leave the house of the defendant. That he has withheld support from her in accordance with his means and condition in life. That he refused to introduce her

as his wife for some months after the marriage. That she was required to go to a hospital for a very serious operation in the fall of 1939; that defendant requested her to give her maiden name in order that their marriage might not become known, and that he had his daughter accompany her to the hospital. Plaintiff alleges that defendant failed and declined to pay her hospital or medical expenses. That for many months after her marriage defendant failed to give her any money except a bare amount necessary to operate the house, and that until 1 April, 1940, did not give her any support except her actual household expenses. That on 1 April, 1940, the defendant gave her $25.00 per month from 1 January, 1940, as personal expenses, out of which she has been required to clothe herself and operate her own automobile which plaintiff purchased before her marriage.

Plaintiff alleges that after her return from the hospital the defendant's older daughter, who was then residing in New York, wrote a letter to the younger daughter which plaintiff read; that the letter cautioned the younger sister to watch her, that plaintiff was lazy and only wanted to be babied, and that as long as she could do the things she wanted to she was all right. That her sister should not do anything for plaintiff's mother, who was living in the home, because, after all, she was plaintiff's responsibility.

Defendant filed an answer denying any misconduct and alleging that the plaintiff voluntarily of her own free will and accord, and of her own determination, left defendant's home without any lawful reason or excuse and thereby abandoned the defendant.

Plaintiff offered testimony which she avers tended to prove the allegations in her complaint.

At the close of plaintiff's testimony, defendant moved for judgment of nonsuit. Motion overruled and defendant excepted.

Defendant offered evidence tending to show that plaintiff had received every consideration from the defendant; that he had made ample provision for her support and met all her demands except to transfer his property to her and request his children to leave his home.

At the close of defendant's evidence, defendant renewed the motion for judgment of nonsuit. Motion overruled and defendant excepted.

The court submitted the following issues:

"1. Did the defendant offer such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome? Answer: 'Yes.'

"2. Did the defendant abandon the plaintiff? Answer: 'Yes.'"

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

Williams & Cocke for plaintiff.
Smathers & Meekins for defendant.

DENNY, J. The defendant filed a demurrer *ore tenus* in this Court based on the failure of plaintiff to allege and set out specific acts of the defendant upon which she relies, with that particularity required by law, and upon the further ground that plaintiff does not allege the circumstances connected with the acts complained of, or allege facts in any manner showing that they were without adequate provocation upon her part.

Would this Court be justified in sustaining the demurrer *ore tenus?* We think so.

The plaintiff, in order to obtain affirmative relief under the provisions of C. S., Supp. 1924, sec. 1667, must meet the requisites of the statute for divorce from bed and board. She relies upon the allegations in her complaint as to indignities and abandonment.

In *Carnes v. Carnes,* 204 N. C., 636, 169 S. E., 222, it is said: "In an action by a wife against her husband for divorce from bed and board, she must not only set out with particularity the acts of cruelty on the part of the husband upon which she relies, but she is also required to aver, and consequently to prove, that such acts were without adequate provocation on her part. *Dowdy v. Dowdy,* 154 N. C., 556, 70 S. E., 917; *Martin v. Martin, supra* (130 N. C., 27, 40 S. E., 822); *O'Connor v. O'Connor,* 109 N. C., 139, 13 S. E., 887; *Jackson v. Jackson,* 105 N. C., 433, 11 S. E., 173; *White v. White,* 84 N. C., 340."

In *McManus v. McManus,* 191 N. C., 740, 133 S. E., 9, we find: "If the complaint does not allege sufficient facts to constitute a good cause of action under C. S., 1667, an order for temporary support and counsel fees, pending the trial of the issues, or a judgment requiring the husband to provide reasonable subsistence and counsel fees for the wife after the issues have been determined in her favor, is erroneous."

Nowhere does plaintiff allege in her complaint that the acts of the defendant were without adequate provocation on her part.

Regardless of the omission in the complaint referred to above, and granting that the allegations of the complaint are sufficient to justify the submission of the issues as to indignities and abandonment, was the evidence of the plaintiff sufficient to sustain the ruling of his Honor in overruling defendant's motion for judgment of nonsuit? We are of opinion it was not.

The plaintiff testified: "Up to the time I went to the hospital, Eva, Pat and I were good friends and got along all right. Up to that time Mr. Pollard was just as good to me as he could be." "I would say Eva and I got along amicably."

On 7 March, 1940, plaintiff wrote a letter to the daughter residing in New York. The letter was introduced in evidence and covers 18 pages of the record, and the following statements are made in the letter: "My reason for writing you this morning even before I start the usual Thursday routine, is to inform you that, thanks to your engineering, the marriage between your father and I is being terminated, finished in other words."

The plaintiff alleges failure of defendant to pay her hospital and medical bills, but in her letter to Pat she states: "I have spent the best part of a thousand dollars since last July, all my own money. I spent my own money because it was then I realized for the first time money was scarce around here as you remarked one day sitting back here on the hill and it was my last thought to load a heavier load onto him."

The letter further states: "I knew about the plans for your further schooling and the allowance of $25.00 per month—and I was satisfied and contented to have it continue as long as necessary (with your cooperation to get through as quickly as possible and get on your own), but I certainly am not going to be content to have you girls so disregardless of the fact that I am and have not been getting anything while you have been getting all—that don't include your Dad for the Lord knows he has nothing for himself, which is another thing to be ashamed of considering his income per month and he needs plenty because of long want."

Plaintiff in her letter points out the fact that she has been able to reduce the expenses in the house by reason of careful buying, and states that Mr. Pollard has been there every day and that his expenses have been included, then she states: "I have been pretty discouraged with his attitude for some little time which I lay entirely to the hard work outside here—it don't take a master mind to figure that out—while he isn't old—yet he isn't a young man either and being confined to a desk is far removed from digging and hauling like he has been doing—I say the grounds are too much for a man to look after properly or as he should or would like to if he is at all interested in it and takes the right pride in it. Maybe you never thought of all this when you urged him to buy this property." "It seems the most tragic thing and it is that two people's lives can be wrecked through the work of others—queer thing your Dad and I have yet to have the first real difference between us that could solely be charged to either of us—it's all come about mainly through you."

According to the testimony of the plaintiff, the defendant was good to her up until the time she went to the hospital, 14 September, 1939. He had made her the beneficiary of a $10,000.00 life insurance policy, and in case of his death it was to be paid to her in installments of $100.00

per month. She did not think the monthly payments were large enough, but no other agreement about the insurance was reached between them.

According to plaintiff's evidence, the defendant caused his checking account to be placed in his name and that of the plaintiff on 1 February, 1940. Plaintiff testified she never drew any funds from the joint account, but she offered no evidence to the effect that she was requested not to do so.

The evidence in this case discloses that from the time plaintiff took over the duties of the household that the defendant furnished her $25.00 per month for incidentals for the house, certain money for groceries, and that he paid the other bills by check. The plaintiff was given no personal allowance or pin money. However, beginning with May, 1940, defendant thereafter gave her $25.00 per month and gave her $100.00 covering the first four months of the year for that purpose.

Plaintiff further testified that "Along towards September, 1940, I asked him why he was so cold towards me, and he said that his feelings for me had changed, and that he no longer cared for me." "In July, 1940, I did have a conversation with him in which he mentioned a separation. He stopped in Buffalo and asked what I had decided, and told me that it was agreeable to him to call it quits. He followed that up by telephone conversation a few weeks later and told me to go ahead with separation and get it over, the quicker the better." "From the time of my conversation with him at the end of September, in which I tried to adjust things, he told me that he didn't care for me any more, that he had no feeling for me, and from then on there was no more physical relation between us as husband and wife. No, I did not do anything to discourage it." Plaintiff further testified that she slept with defendant every night until she left him. "In December, 1940, when I attempted again to try and straighten those matters out and get on a better working basis, and a better understanding between us, he told me again that he no longer cared for me and that he thought a separation was the best solution. Then, as a result of that, I did leave and brought this suit."

The record discloses that the matters to be straightened out between them related exclusively to the transfer of the house to her, living alone and the loss of affection on his part.

On cross-examination the plaintiff testified as follows: "I asked him to give me the home that he promised me before we were married. I did not demand that he give me that house. I asked him for the house he had promised me. I asked him to change the deed and make it to me, if that was the home he wanted. Yes, he did offer to make a deed to himself and me by the entirety, and his two daughters, so that if he died first I would get one-half of it. I asked Mr. Pollard to start a

savings account with me. Yes, and put all his savings in that account, and leave it so I would get it all if he died."

Question: "What other grounds have you except that he refused to make the property to you like you wanted it?" Answer: "Except the fact that he told me he no longer cared for me."

The plaintiff relies on two grounds for relief, to wit: Indignities to the person of the plaintiff, rendering her condition intolerable and her life burdensome and that by reason of defendant's failure to support and his cruel, contemptuous and inhuman treatment she was compelled to leave the house of the defendant. If either of those allegations are sustained by competent evidence the plaintiff is entitled to the relief sought.

McManus v. McManus, supra, at p. 743: "The failure, neglect or refusal of a husband to comply with promises made to his wife, whether made before or after marriage, with respect to property or property rights, although the wife was induced by such promises to marry him, or to return to her husband, after she had voluntarily left him, subsequent to the marriage, cannot be held to justify the wife in leaving her husband, or if she does leave him, because of such failure, neglect or refusal, to entitle her to relief under C. S., 1667. While the law recognizes and enforces the rights of a wife in and to her husband's property, both during his lifetime and after his death, and will compel the husband so long as he lives to support a faithful and deserving wife according to his means and condition in life, it will not encourage marriages based solely upon mercenary consideration. The interest of the State and of society in the status resulting from marriage is too vital to permit a husband or a wife to absolve himself or herself from the performance of duties incident to and arising out of the marriage relation, merely because of disappointment as to the pecuniary results of the marriage."

Dowdy v. Dowdy, 154 N. C., 556, 70 S. E., 719: "It is not claimed in this case that the defendant departed from his home and abandoned the plaintiff, but the averment is that the wife was compelled to leave the defendant on account of his cruel treatment. While this is in law an abandonment by the husband (*High v. Bailey,* 107 N. C., 70), yet, as a ground for divorce, it is dependent upon the establishment of the acts of cruelty which it is averred compelled plaintiff to leave her home, and of the further fact that such acts were not the consequence of any adequate provocation upon the plaintiff's part."

The evidence discloses an estrangement in the marital relationship, and differences of opinion between the plaintiff and defendant over certain financial matters and the conveyance of the home to the plaintiff. However, this evidence is not sufficient to sustain the allegations by the plaintiff that she was forced, by cruel, contemptuous and inhuman treatment to leave the house of the defendant.

A careful review of all the evidence in this case, considered in the light most favorable to the plaintiff, is insufficient to sustain the allegations as to indignities or abandonment. A consideration of the other exceptions is not necessary.

The motion for judgment as of nonsuit should have been sustained.

Reversed.

MRS. JAMES ERWIN WHICHARD, ADMINISTRATRIX OF THE ESTATE OF JAMES ERWIN WHICHARD, DECEASED, v. M. F. LIPE, TRADING AS LIPE MOTOR LINES, AND L. C. TILLEY.

(Filed 4 March, 1942.)

1. Automobiles § 24c—

Where, in an action against the owner of a truck upon the doctrine of *respondeat superior*, plaintiff elects to allege the identity of the employee driving the truck, and there is a total failure of proof in support of this allegation and no motion to amend, defendant's motion to nonsuit should be allowed.

2. Pleadings § 26a—

Proof without allegation is as unavailing as allegation without proof, and the two must correspond, and when proof materially departs from allegation there can be no recovery without an amendment.

SEAWELL, J., dissenting.

APPEAL by defendant from *Grady, Emergency Judge*, at March Term, 1941, of GUILFORD. Reversed.

Civil action to recover damages for wrongful death resulting from an alleged collision between an oil trailer tank truck being operated by plaintiff's deceased and a truck belonging to the defendant.

The oil truck being driven by Whichard, plaintiff's intestate, was found on the Fayetteville-Sanford highway in Harnett County. It had run into a culvert under the road causing the tank trailer to turn over on the cab. As a result it caught fire. Plaintiff's intestate was in the truck at the time and was burned to death. Another truck belonging to defendant was three or four hundred feet north of the burning truck headed in the same direction and parked on its right side. There was circumstantial evidence tending to show that the two trucks had come into collision by sideswiping.

The plaintiff alleges that the truck belonging to defendant was being operated at the time of the collision by one L. C. Tilley and she makes Tilley a defendant.

The defendant offered no evidence.

There was a verdict for plaintiff. From judgment thereon the defendant appealed.

Gold, McAnally & Gold for plaintiff, appellee.

Sapp, Sapp & Atkinson and Joseph L. Murphy for defendant, appellant.

BARNHILL, J. Plaintiff elected to allege that defendant Tilley (who was not served with summons) was operating defendant's truck at the time it allegedly collided with the truck occupied by plaintiff's intestate. *Expressio facit cessare tacitum.* There is no evidence tending to support this allegation. Plaintiff so understood and during the trial took the position that some agent of defendant was driving but declined to say which one. The court likewise so understood and more than once charged the jury "there is no evidence in this case as to who was operating the truck known as the Lipe truck." *Non constat* this variance was apparent almost from the beginning of the trial plaintiff made no motion to amend but elected to stand her ground upon the complaint as written.

"It has so often been said as to have grown into an axiom that proof without allegation is as unavailing as allegation without proof. There must, under the old or new system of pleading, be *allegata* and *probata*, and the two must correspond with each other. When the proof materially departs from the allegation, there can be no recovery without an amendment." *Talley v. Granite Quarries Co.*, 174 N. C., 445, 93 S. E., 995; *McKee v. Lineberger*, 69 N. C., 217; *Brittain v. Daniels*, 94 N. C., 781; *Faulk v. Thornton*, 108 N. C., 314; *Hunt v. Vanderbilt*, 115 N. C., 559; *Green v. Biggs*, 167 N. C., 417, 83 S. E., 553.

The plaintiff must make out her case *secundum allegata* and the court cannot take notice of any proof unless there be a corresponding allegation. *Brittain v. Daniels, supra; Faulk v. Thornton, supra; McCoy v. R. R.*, 142 N. C., 383.

Where there is a material variance between the allegation and the proof this defect may be taken advantage of by motion for judgment as of nonsuit, there being a total failure of proof to support the allegation. *S. v. Gibson*, 169 N. C., 318, 85 S. E., 7; *S. v. Harbert*, 185 N. C., 760, 118 S. E., 6; *S. v. Jackson*, 218 N. C., 373, 11 S. E. (2d), 149, and cases cited.

The plaintiff has failed to establish her cause of action as alleged. She requested no amendment. Hence, the motion for judgment as of nonsuit should have been allowed.

Defendant seriously contends that in any event the cause should be nonsuited for failure of proof. Some of us concur in this view for the

reason that we are of the opinion there is no proof of negligence or proximate cause. However, in view of the variance between the allegations and the evidence, which in itself requires a reversal on the ruling on the motion to nonsuit, we have concluded to refrain from a discussion or decision of this question. If plaintiff pursues her cause further then, upon a retrial, the testimony may present new and varying phases of fact. The trial judge should be free to rule thereon unrestrained by any decision by us upon the evidence as it appears on this record. Hence, the course followed in *Hunt v. Vanderbilt, supra,* is the safer and more impartial one to pursue in the disposition of this appeal.

Whether the plaintiff may now in this cause move in the court below for leave to amend under statute, C. S., 545, *et seq.,* is not now before us for decision. See *Shelton v. Davis,* 69 N. C., 324.

The judgment below is

Reversed.

SEAWELL, J., dissenting: Whatever may be its final decision, should this case come here again upon a similar state of facts, the Court has expressly declined to rule one way or the other as to whether there is any evidence in the record in support of plaintiff's claim. The decision dismissing the action by judgment of nonsuit rests solely on the suggested fact of variance between the allegation and proof with respect to the identity of defendant's servant or agent charged with the negligence alleged to have produced plaintiff's injury. To test the correctness of this ruling it must be conceded that there is at least some evidence in support of plaintiff's claim, whether we presently deal with it or not, since otherwise the reservation of opinion on this point would be meaningless.

I think it will not be contended that it was necessary for the plaintiff in stating his cause of action to allege the name or the identity of the driver of defendant's truck any more than it would be necessary for a pleader to name the engineer who caused injury by negligently operating a train. The fact that Tilley is named as a codefendant is of no significance on this point as far as Lipe, the other defendant, is concerned. But the plaintiff did name such servant and as the evidence apparently discloses he was not the man. This brings us to a consideration of the matter of variance and the rules which, as a matter of law, should be applied in this case. I think the main opinion has departed from established practice and from our own statutory law, which I regard as so imperative as to be compelling.

Upon the admission of the defendant Lipe, shown upon the trial, the jury might have inferred that another agent of the defendant, one Sullivan, was in charge of the car. According to the evidence Sullivan had power to employ an assistant.

True, there is a "total failure" of proof that Tilley was the man driving defendant's car, but not a total failure of proof with respect to plaintiff's cause of action, which, under the authorities addressed to the subject, and our own statute law, is necessary to justify dismissal as of nonsuit. The statutes which I shall presently quote are of application to civil cases, and are not to be confused with any statute of *jeofaile* (C. S., 4625) applicable to criminal indictments, although intended to accomplish similar reforms of common law practice. *S. v. Hedgecock,* 185 N. C., 714, 117 S. E., 47. Opinions in criminal cases involving variance are inapplicable.

It has been considered as axiomatic that a difference between the allegations of a complaint and the evidence adduced to support them does not constitute a material variance unless there is a substantial departure in the evidence from the *issues* upon which the cause of action depends. 49 C. J., 808. ". . . a substantial departure from the issue in the evidence adduced, . . . in some matter which in point of law is essential to the charge or claim." 21 R. C. L., 608, and cases cited; *Browning v. Berry,* 107 N. C., 231, 12 S. E., 195. It is not necessary to prove that which it was not essential to allege. *Cedar Falls Co. v. Wallace Bros.,* 83 N. C., 225; *Gallagher v. Gunn,* 16 Ga. App., 600, 85 S. E., 930; *Orr v. Dawson Telephone Co.,* 35 Ga. App., 560, 133 S. E., 924.

In many jurisdictions adequate statutes have been enacted to relieve against the harshness of the common law doctrine and practice with reference to this subject. *Olson v. Snake River Valley R. Co.,* 22 Wash., 139, 60 Pac., 156. Our own State has enacted laws defining variance, and provided a procedure when that question is raised quite different from that adopted in the present case. It leaves no room for the dismissal of a case for such a cause where there has not been a total failure of proof relating to the cause of action as above defined. Hitherto these statutes have been uniformly applied to situations like the present, and our own opinions upon that subject are explicit.

C. S., 552. Variance, material and immaterial.—"1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

"2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

C. S., 553. Total failure of proof.—"Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof."

These statutes divide the subject of variance into two classes—one of them is fatal when it is a total failure of proof; the other is material only when it has actually misled the adverse party to his prejudice in maintaining the action upon its merits. A close study of C. S., 553, does not sustain the view that the variance in this particular case may be classified thereunder as amounting to a total failure of proof, because the facts proved have a material relation to plaintiff's cause of action properly pleaded.

If, then, it is a variance as defined in C. S., 552, and even a material variance, it can be so only by virtue of the fact that it has "actually misled the adverse party to his prejudice in maintaining the action upon the merits." Conceding for argument that it is so, the remedy of the defendant is not for a motion under C. S., 567, for judgment as of nonsuit for failure of proof, or, in other words, a demurrer to the evidence. His remedy lies in C. S., 552, to be pursued in the manner this Court has prescribed.

For a variance between the allegations and the evidence under this statute defendant must make his objection in apt time. *Patterson v. Champion Lumber Co.*, 175 N. C., 90, 94 S. E., 692. And he must pursue the remedy prescribed, or the objection that there is a variance will be deemed immaterial. *Simmons v. Roper Lumber Co.*, 174 N. C., 220, 221, 93 S. E., 736.

Since the sole object is that the case shall be kept in court until it can be tried and decided upon its merits, it is incumbent upon the adverse party, who claims to have been misled, in this case the defendant, at the time the trial discloses the variance, to allege that fact and prove it "to the satisfaction of the court," showing wherein he was misled, whereupon the court will allow an amendment upon such terms as it may deem just—continuing the case if necessary. There is no presumption that he has been misled. That penalty must not include dismissal of the action or loss of substantial rights by either party. *Wright v. Teutonia Insurance Co.*, 138 N. C., 488, 496, 51 S. E., 55. Where the remedy provided in this section as interpreted by the Court is not pursued, the supposed variation will be deemed immaterial. *Simmons v. Roper Lumber Co., supra.*

The statute and the cited decisions make it clear that it is incumbent upon the defendant in the first instance to object because of the variance, point out the manner in which he has been misled; in brief, to make the objection and sustain it with proof satisfactory to the court; and not the

plaintiff's duty to make a motion for amendment until the court is satisfied that the defendant has been so misled. *Simmons v. Roper Lumber Co., supra;* McIntosh, N. C. Practice and Procedure, sec. 490, and cases cited.

In order to consider the matter under the most favorable view to the defendant allowable by the statute, I have conceded much. There are many cases in the books which, under our modern liberal practice, lead to the conclusion that the variance here is immaterial. *Dellinger v. Electric R. R.,* 160 N. C., 532, 539, 76 S. E., 494; *Brown v. Tel. Co.,* 169 N. C., 509, 86 S. E., 290. But we do not have to decide, as was the case at common law, whether the variance is material or immaterial, since the statute decides that question for us. It is immaterial unless the defendant both alleges and proves to the satisfaction of the court that he has been misled. C. S., 552.

Moreover, in the case at bar the defendant definitely waived the only remedy open to him, and the objection is cured by the verdict. McIntosh, *op. cit., supra,* sec. 491. As pointed out above, the motion for judgment as of nonsuit does not raise the question.

I have no room for the development of the subject here, but the necessity for the preservation of this procedure, as a decided reform in our system of judicature, will be apparent at once upon a reading of the cases cited. The purpose of our own and similar statutes is to prevent cases from being thrown out of court upon the technicalities so favored by the common law and to enable courts of justice, when once their jurisdiction has attached, to reach their objectives without frustration and without the added expense and vexation of being compelled to march out of court and back again upon a matter not vital or determinative of the controversy.

In my opinion, the judgment of the court below ought to stand.

STATE OF NORTH CAROLINA, ON RELATION OF WILLIAM ELDRIDGE HILL, v. ROY WADE PONDER AND JOHN PIRAM RICE.

(Filed 4 March, 1942.)

1. Counties § 7: Constitutional Law § 4d—

Ch. 341, Public-Local Laws of 1931, prescribing the method of electing a tax collector for Madison County, is constitutional and valid.

2. Constitutional Law § 4a—

The wisdom and propriety of statutes rests in the discretion of the General Assembly.

3. Counties § 7: Public Officers § 2—Majority of members of electing body constitutes a quorum, and majority of quorum has power to act.

The chairmen of four county boards were authorized to elect a county tax collector, ch. 341, Public-Local Laws of 1931. At a meeting held for the purpose of electing the county tax collector one of the four electing chairmen was disqualified by previous acceptance of another public office. Two of the three remaining chairmen voted for the re-election of the incumbent. *Held:* The three qualified chairmen constituted a quorum and two of the three constituted a majority thereof, and therefore the incumbent was duly elected to succeed himself.

4. Public Officers § 4c—

A public officer who accepts, qualifies and discharges the duties of another public office is thereafter disqualified to act or discharge any of the duties of the first public office.

5. Counties § 5—

The fact that the commissioners of a county are erroneously advised that the body charged with the duty of electing a county tax collector had failed to act, does not empower the county commissioners to elect the county tax collector, and the person elected by the duly appointed electing body, at a meeting duly held on the date fixed by statute, is entitled to the office as against the person named by the commissioners.

APPEAL by defendant Rice from *Nettles, J.*, at November Term, 1941, of MADISON. No error.

This was an action in the nature of *quo warranto* to determine the title to the office of tax manager or tax collector of Madison County.

The method of election to the office in question was prescribed by chap. 341, Public-Local Laws 1931. In accord with the provisions of this statute, and other public-local laws relating to Madison County, enacted at the 1931 session of the General Assembly (chap. 183 and chap. 343), the Chairman of the Board of County Commissioners, the Chairman of the Board of Education, the Chairman of the Sinking Fund Commission, and the Chairman of the County Highway Commission were required to meet on the first Monday in August, 1931, and biennially thereafter, and elect the tax manager or tax collector for the county for a term of two years. Originally chairmen of two other local boards were made members of this electing body, but it was decided by this Court that the acts creating the two boards last referred to were void and of no effect. *Brigman v. Baley*, 213 N. C., 119, 195 S. E., 617, and *Sams v. Comrs.*, 217 N. C., 284, 7 S. E. (2d), 540.

Pursuant to the statute, on the first Monday in August, 1941, being the 4th day of August, L. G. Buckner, Chairman of the Board of County Commissioners; Clyde Brown, Chairman of the Board of Education; F. E. Freeman, Chairman of the Sinking Fund Commission, and (W. J.) Bryan Teague, claiming to be Chairman of the County High-

way Commission, met for the purpose of electing the county tax collector. The defendant Ponder was the then incumbent of the office, having been elected by these chairmen in 1939. The right of Freeman to vote as a member of the electing body, by virtue of his chairmanship of the Sinking Fund Commission, was challenged on the alleged ground that he had qualified as school committeeman. Likewise the right of Teague to vote as Chairman of the County Highway Commission was challenged on the ground that he had previously qualified as Chairman of the County Board of Elections.

The relator Hill and the defendant Ponder, each, claims to have been elected on 4 August, 1941, to the office of tax collector in accord with the provisions of the statute. On the first Monday in September, 1941, the Board of County Commissioners, taking the view that there had been no valid election under chapter 341, and that there was a vacancy in the office, proceeded to elect the defendant Rice as tax collector.

Issues were submitted to the jury and answered as follows:

"1. Did F. E. Freeman, (W. J.) Bryan Teague, Clyde Brown, L. G. Buckner hold a meeting on the 4th day of August, 1941, for the purpose of electing a tax manager of Madison County? Answer: 'Yes.'

"2. At the time of said meeting was L. G. Buckner Chairman of the Board of County Commissioners of Madison County? Answer: 'Yes.'

"3. At the time of said meeting was Clyde Brown Chairman of the Board of Education of Madison County? Answer: 'Yes.'

"4. At the time of said meeting had Fred E. Freeman qualified and accepted the office of school committeeman for the Marshall District of Madison County? Answer: 'No.'

"5. At the time of said meeting had (W. J.) Bryan Teague qualified and was he acting as Chairman of the Board of Elections of Madison County? Answer: 'Yes.'

"6. At the time of said meeting was Fred E. Freeman Chairman of the Sinking Fund Commission of Madison County? Answer: 'Yes.'

"7. Was Roy Wade Ponder the acting tax manager of Madison County on August 4, 1941, at the time of the aforesaid meeting, and was Roy Wade Ponder acting tax manager of Madison County on the first day of September and at the time of the alleged election by the Board of County Commissioners of John Rice? Answer: 'Yes.'

"8. Was the plaintiff, William Eldridge Hill, duly elected to the office of tax collector or manager for Madison County on August 4, 1941, at a meeting of the Chairmen of the Board of County Commissioners, Board of Education, the Road Commission, and Sinking Fund Commission of Madison County? Answer: 'No.'

"9. Was the defendant Roy Wade Ponder duly elected to the office of tax collector or manager for Madison County on August 4, 1941, at a meeting of the Chairman of the Board of County Commissioners, Chair-

man of Board of Education, Chairman of the Road Commission, Chairman of the Sinking Fund Commission of Madison County? Answer: 'Yes.'

"10. Was the defendant John Rice appointed tax collector of Madison County by the Board of County Commissioners, and did he give bond and take oath of office? Answer: 'Yes.'"

Judgment was rendered on the verdict that defendant Ponder was duly elected tax collector or tax manager for Madison County, and entitled to the tax lists and records of the tax collector's office, and to receive the emoluments thereof; that the attempted election of defendant Rice by the Board of County Commissioners was without authority and of no effect; and that neither the relator Hill nor the defendant Rice was entitled to the office of tax collector or any interest therein.

The defendant Rice appealed.

Roberts & Baley for defendant Rice, appellant.
John H. McElroy and J. W. Haynes for defendant Ponder, appellee.

DEVIN, J. Objections on constitutional grounds to the validity of chapter 341, Public-Local Laws 1931, and to the machinery therein prescribed for the election of a tax collector for Madison County, were considered by this Court in *Freeman v. Comrs.,* 217 N. C., 209, 7 S. E. (2d), 354, and decided adversely to the appellant. The statutes creating a County Highway Commission and a Sinking Fund Commission for the county, as well as the statutory method ordained for the selection of a tax collector by the chairmen of these boards, together with the Chairman of the County Board of Education, and the Chairman of the Board of County Commissioners, acting *ex officio,* were held to be within the legislative power. *McGuinn v. High Point,* 219 N. C., 56, 13 S. E., (2d), 48; *Freeman v. Comrs., supra; S. v. Jennette,* 190 N. C., 96, 129 S. E., 184; *Comrs. v. Bank,* 181 N. C., 347, 107 S. E., 245; *Jones v. Comrs. of Madison County,* 137 N. C., 579, 50 S. E., 291. The wisdom and propriety of the statutes were matters resting in the discretion of the General Assembly. *Lutterloh v. Fayetteville,* 149 N. C., 65, 62 S. E., 758.

In *Freeman v. Comrs.,* supra, it was held that in accord with the provisions of chapter 341, Public-Local Laws 1931, the chairmen of the four designated local boards were clothed with the exclusive power and authority to elect the tax collector for Madison County. Objection is now raised, however, on the ground that it has been established that one of the four electing chairmen was disqualified, and that therefore no valid election was or could be held. Hence, it is contended there was a vacancy in the office of tax collector which it was the duty of the Board of County Commissioners to fill.

This presents the question whether the absence or disqualification of one of the chairmen constituting the electing body deprives the remaining members of the power to act. A careful consideration of the legislative provisions, in view of the facts established by the verdict, leads us to the conclusion that it does not. The statute provides that the "tax manager shall be elected biennially by the chairmen of said boards." By a similar provision in the statute relating to the office of auditor it was provided the latter should be elected "by a majority of the votes of the chairmen."

It was found by the jury that Buckner, Brown and Freeman were duly qualified chairmen of their respective boards, and that Teague, who had theretofore been chairman of the County Highway Commission was disqualified by his previous acceptance of another public office. He was not entitled to act or vote as a member of the electing body. Three of the four chairmen undoubtedly constituted a quorum, and two of the three were a majority thereof.

It is a fundamental rule of parliamentary procedure, applicable as well to municipal and electing boards, that a majority of the members of a body consisting of a definite number constitutes a quorum for the transaction of business (Art. I sec. 5, Cons. U. S., Jefferson's Manual, sec. 402), and it is equally well settled that a majority of the quorum has power to act. *Stanford v. Ellington,* 117 N. C., 158, 23 S. E., 250. This rule derives from the common law and is of universal application unless modified by statute or some controlling regulation or by-law in the particular instance. *Stanford v. Ellington, supra; Comrs. v. Trust* Co. 143 N. C., 110, 55 S. E., 442; *Cotton Mills v. Comrs.,* 108 N. C., 678, 13 S. E., 271; 37 Am. Jur., 671-673; 46 C. J., 1378-1380; 43 C. J., 502; 13 Am. Jur., 522. "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, etc., where not otherwise expressly provided." Jefferson's Manual, sec. 501.

It was established by the verdict that the defendant Ponder was duly elected at the meeting of the chairmen on 4 August, 1941. This was in accord with the uncontradicted evidence that three of the members of the electing body were duly qualified, present, and voting, and that defendant Ponder received a majority of the votes cast.

It was found by the jury that defendant Ponder was the incumbent of the office on 4 August, 1941, by virtue of his previous election. Whether, under C. S., 3205, in the absence of a valid election, he would have been entitled to hold over until his successor was elected and qualified need not be decided, since it was determined by the verdict and judgment that Ponder was duly elected 4 August, 1941, for another term of two years.

The fact that it was mistakenly reported to the County Commissioners that there was no election of a tax collector on 4 August, 1941, would not justify the election of defendant Rice, in view of the fact that two of the three qualified members of the electing body had voted for defendant Ponder at the meeting duly held on the date fixed by the statute.

The exceptions noted by appellant to the judge's charge cannot be sustained. The material facts were not controverted. The verdict and judgment are supported by the evidence, and must be upheld.

In the trial we find

No error.

F. E. FREEMAN, E. Y. PONDER, JACK PAYNE, GLENN RAMSEY, FOR THEMSELVES AND SUCH OTHER CITIZENS AND TAXPAYERS OF MADISON COUNTY AS MAY MAKE THEMSELVES PARTIES TO THIS ACTION, v. THE BOARD OF COUNTY COMMISSIONERS OF MADISON COUNTY.

(Filed 4 March, 1942.)

APPEAL by defendant from *Nettles, J.*, at Chambers, 4 October, 1941. From MADISON. Affirmed.

This was a taxpayers' suit to restrain the unlawful payment of public funds to John P. Rice, who, it was alleged, had been elected by defendant Board as tax collector of Madison County without authority of law. From an order holding the attempted election of Rice illegal and restraining defendant Board from paying the salary of the office to him, the defendant appealed.

John H. McElroy and J. W. Haynes for plaintiff, appellee.
Roberts & Baley for defendant, appellant.

DEVIN, J. The facts upon which the order appealed from was based are the same as those fully set out in *State ex rel. Hill v. Ponder and Rice, ante,* 58. In that case the title to the public office of tax collector of Madison County was directly in issue, and it was there adjudicated that Roy Wade Ponder was the duly elected tax collector in and for Madison County, and that the attempted election of John P. Rice by defendant Board was without authority and of no effect. Hence the order of the court below restraining defendant Board from making payment of public funds to John P. Rice as tax collector must be

Affirmed.

ROY J. BARGER v. M. & J. FINANCE CORPORATION, INC., AND ASHEVILLE NASH COMPANY.

(Filed 4 March, 1942.)

1. Infants § 5—

A minor may elect to disaffirm a contract relative to sale and purchase of personal property other than one authorized by statute or one for necessaries.

2. Same—Contract for purchase of car is not for necessity, and minor may disaffirm.

Evidence that the ownership of an automobile was advantageous to an infant and that he would not have been promoted in his job without an automobile available for his use, is insufficient to show that the automobile was necessary for him to earn a livelihood, and therefore the automobile is not among those necessaries for which a minor may be held liable, and upon his majority he may disaffirm the contract and sue to recover the part of the purchase price paid, possession of the car having been surrendered.

APPEAL by defendant Asheville Nash Company from *Olive, Special Judge,* at January Term, 1942, of BUNCOMBE.

Civil action to recover for moneys paid on contract during minority.

The plaintiff, being a minor, entered into a contract in the fall of 1939 for the purchase of a Graham-Paige automobile from the Asheville Nash Company for the sum of $275.00, and on which car plaintiff paid the defendant Asheville Nash Company $38.45. On 29 December, 1939, plaintiff traded the car to the above company for a Nash automobile. The plaintiff entered into a new contract and agreed to pay a difference of $257.00 for the Nash automobile. The paper was purchased by the M. & J. Finance Corporation, Inc., and plaintiff paid to that concern $116.50.

The plaintiff having become delinquent in his payments, the M. & J. Finance Corporation, Inc., on 14 October, 1940, instituted an action for the repossession of the Nash automobile and did repossess and retain the same. On 21 October, 1940, the plaintiff, having attained the age of 21 years, instituted this action before a justice of the peace in Buncombe County to recover the full amount paid to both defendants. Judgment was entered for plaintiff and defendants appealed to the Superior Court of said county.

Pending the trial of this action the case of *M. & J. Finance Corporation, Inc., v. Roy J. Barger* was tried and resulted in a verdict of $116.50 in favor of Roy J. Barger. The judgment was paid and the plaintiff herein took a voluntary nonsuit as to M. & J. Finance Corporation, Inc.

At the trial of this cause the plaintiff reduced his claim to only $38.45, having received from the M. & J. Finance Corporation, Inc., all the consideration paid on both automobiles except this amount.

By consent the jury answered the issues as to the execution of the contract by the plaintiff and the minority of plaintiff at the time of the execution of the contract in the affirmative. It was stipulated by counsel and admitted in evidence that if defendant was indebted to plaintiff in any sum it should be $38.45, and on an appropriate issue the jury returned a verdict in favor of plaintiff for that amount.

From the judgment entered on the issues the defendant appeals to the Supreme Court and assigns error.

Cecil C. Jackson for plaintiff.
Jordan & Horner for defendant.

DENNY, J. The exceptions pertinent to this appeal all relate to the refusal of the court to permit the introduction of evidence tending to show that the automobile purchased by the plaintiff was a necessary for him in his work and to earn a livelihood, and to the refusal of the court to submit to the jury the following issue: "Was the automobile a necessary for the plaintiff to enable him to hold his position and earn a livelihood?"

The general rule, and one consistently followed by this Court, is that a minor may elect to disaffirm a contract, relative to the sale or purchase of personal property, other than one authorized by statute or for necessaries. *Chandler v. Jones,* 172 N. C., 569, 90 S. E., 580; *Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261; *Collins v. Norfleet-Baggs,* 197 N. C., 659, 150 S. E., 177; *Acceptance Corp. v. Edwards,* 213 N. C., 736, 197 S. E., 613.

In the case of *Chandler v. Jones, supra,* the Court said, at p. 572: "The contract of an infant is voidable and not void, and it may be either ratified or disaffirmed, upon attaining majority, at the election of the infant. If the money is paid to an infant upon a contract, and it is consumed or wasted, the infant may recover the full amount due under the contract; but if the money is used for his benefit, and he has in hand property in which it has been invested, he cannot retain the property without allowing a just credit for the money paid to him; and if after becoming of age he continues to hold the property and uses it or disposes of it, this is evidence of a ratification. *Caffey v. McMichael,* 64 N. C., 508; *Skinner v. Maxwell,* 66 N. C., 48; *MacGreal v. Taylor,* 167 U. S., 688."

The question as to what are necessaries often arises.

In *Freeman v. Bridger,* 49 N. C., 1, *Pearson, J.,* speaking to the subject: "*Lord Coke* says, Co. Lit., 172a, 'It is agreed by all the books, that

an infant may bind himself to pay for his necessary meat, drink, apparel, physic and such *other* necessaries.' These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic) while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added, that it must appear that the articles were suitable to the infant's degree and estate." *Cole v. Wagner,* 197 N. C., 692, 150 S. E., 339.

In the case of *Morris Plan Co. v. Palmer, supra,* the Court, in considering the rights of an infant to disaffirm his contract relating to personal property, said at page 111: "This doctrine seems to be established. It is approved and maintained with practical unanimity, and while the infant's right to disaffirm his contract may sometimes be exercised to the injury of the other party, the right nevertheless exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. 1 Elliott on Contracts, sec. 302; 3 Page on Contracts, sec. 1593; *Dibble v. Jones,* 58 N. C., 389."

The evidence in the instant case tends to show that the ownership of an automobile was advantageous to the plaintiff and that he would not have been promoted without an automobile available for his use. Nevertheless it does not appear that an automobile was necessary for him to earn a livelihood. Hence we are of opinion and hold that an automobile is not among those necessaries for which a minor may be held liable.

In the judgment of the court below we find

No error.

C. B. COLEY ET AL. V. ATLANTIC COAST LINE R. R. ET AL.

(Filed 4 March, 1942.)

1. Master and Servant § 9—

Employees of a shop may sue to enjoin an arbitrary or fraudulent modification or delimitation of a collective bargaining agreement made for their benefit by and between the employer and the duly authorized representatives of their craft or class.

2. Master and Servant § 2—

The Brotherhood Railway Carmen of America, certified as the duly authorized representative of a craft or class of carmen, helpers and apprentices, has the power, by agreement with the Railroad Company, to create seniority rights for the employees it represents, and, by the same token, to modify these rights in good faith in the interest of the larger good, such agreements being within the scope of collective bargaining.

3. Same—Evidence held insufficient to show willfullness or maliciousness on part of bargaining agency in failing to act on employees' protest to supplemental agreement delimiting seniority rights.

A collective bargaining agreement, stipulating seniority rights, was reached by the Railroad Company and the Brotherhood which was the duly authorized bargaining agency of the employees. Thereafter a supplemental agreement, delimiting the prior agreement in respect to seniority rights, was entered into. Plaintiff employees instituted this suit against the Railroad Company and the lodge of the Brotherhood to restrain the supplementary agreement from being put into effect upon their contentions that the lodge, without the knowledge or connivance of the Railroad Company, acted fraudulently or arbitrarily in adopting the roster of seniority contained in the supplementary agreement. The only evidence of *mala fides* on the part of the lodge was its failure to hear the protests filed by plaintiffs, but this action was instituted less than thirty days after the filing of the protest before any action had been taken thereon. *Held:* The evidence is insufficient to show willful neglect or maliciousness on the part of the lodge necessary to sustain plaintiffs' cause of action, and therefore the temporary restraining order was properly dissolved.

BARNHILL, J., not sitting.

APPEAL by plaintiffs from *Stevens, J.,* at October-November Term, 1941, of WILSON.

Civil action by a number of employees of the Atlantic Coast Line Railroad Company for mandatory injunction to compel revision of seniority roster or to restrain defendants from putting into effect roster as published.

The controlling allegations and agreed facts follow:

1. On 25 June, 1938, the Brotherhood Railway Carmen of America, operating through the Railway Employees Department, American Federation of Labor, was certified by the National Mediation Board as the duly authorized representative of the craft or class of carmen, their helpers and apprentices, employees of the Atlantic Coast Line Railroad Company, for the purpose of the Railway Labor Act.

2. On 25 July, 1939, an agreement was reached in collective bargaining between the Brotherhood and the Railroad Company, fixing seniority of employees in the coach shop and freight car department of the company. This is generally referred to as the "Lauderman Agreement."

3. Thereafter, on 24 August, a supplemental agreement was entered into "for the purpose of formulating the method to be used in implementing the agreement of 25 July, 1939." Under this supplement, representatives of management and of the Brotherhood were to meet and prepare the seniority roster in conformity with the agreement between the parties as applicable to the shops at Rocky Mount, N. C. This was done between 24 August and 15 September.

4. On 25 September, 1939, a meeting was held in Rocky Mount for the purpose of reviewing the work that had been done, and "the roster as

prepared was approved by the authorized representatives of the Brotherhood" and was also approved by the Railroad Company.

5. On 1 October, 1939, the seniority roster as thus approved by the representatives of management and the Brotherhood was posted on the Bulletin Board as the official roster for the Emerson Shops at Rocky Mount, N. C.

6. It is alleged that the plaintiffs' rights have been violated in the preparation of the roster by adding seniority accumulated in the car department to seniority acquired in the coach shop department, and thus preferring employees with such accumulated seniority over the plaintiffs; that "all such unlawful and wrongful conduct on the part of the defendant Lodge was committed and done, so far as these plaintiffs know, without the connivance, knowledge, or permission of the defendant Railroad Company," and that the "Railroad Company, not knowing the evil intent and unlawful conduct of the defendant Lodge, accepted said wrongful revised seniority list in good faith and posted it upon the Bulletin Board in good faith, not knowing that the list had been improperly and unlawfully revised in violation of the contract of employment by the defendant Railroad Company and the men in its coach shop and freight car department."

7. Written protest was filed to the roster by the plaintiffs herein on 5 October. Between the date of the receipt of said protest and the institution of this action on 27 October, 1939, "no action was taken with respect thereto."

Preliminary injunction was granted and continued to the hearing. On the final hearing the restraining order was dissolved and the action dismissed as in case of nonsuit.

Plaintiffs appeal, assigning error.

B. H. Thomas and W. A. Lucas for plaintiffs, appellants.

F. S. Spruill for defendant Railroad Co., appellee.

Thomas W. Davis of counsel for defendant Railroad Co., appellee.

Hmous T. Valentine, Frank L. Mulholland, Clarence M. Mulholland and Willard H. McEwen for defendant lodge, appellee.

Mulholland, Robie & McEwen of counsel for defendant Lodge, appellee.

STACY, C. J. Conceding the complaint may be interpreted as alleging arbitrariness or fraud on the part of defendant Lodge and mistake on the part of the Railroad Company in adopting the roster in question, which the defendants say is entirely too liberal, the record is wanting in sufficiency to support the allegation. Without this, it would seem that the plaintiffs are remitted to a pursuit of their protest, through the proper

channels, or to an action for damages against their own spokesman. *Ryan v. N. Y. Cent. R. Co.*, 267 Mich., 202, 255 N. W., 365. See *Reilly v. Hogan*, decided by the New York Supreme Court 15 January, 1942, 9 Labor Relations Reporter, 629. Assuming the seniority rights of the plaintiffs were fixed by the "Lauderman Agreement," as they allege, the subsequent delimitation of this agreement and its modification by the "authorized representatives of the Brotherhood" and the Railroad Company would seem to be within the apparent scope of collective bargaining. *Aden v. L. & N. R. Co.*, 276 S. W., 511.

The allegation of *Mala fides* is directed only against the local lodge and not against the Railroad Company. The plaintiffs have refrained from charging the latter with any mischief or wrong-doing. The record is barren of any evidence tending to show bad faith on the part of the lodge. The nearest premise suggestive of such a conclusion is the failure to hear the protest filed by the plaintiffs. No facts are stated, however, and none appear of record, which would seem to give to this circumstance the character of willful neglect or maliciousness. Indeed, the plaintiffs brought suit in less than thirty days after filing their protest and before any action was taken thereon.

The plaintiffs have grounded their action on the "Lauderman Agreement." In this they are well advised. The contract was made for the benefit of the employees in the coach shop and freight car department. *James v. Dry Cleaning Co.*, 208 N. C., 412, 181 S. E., 341. It was arrived at in collective bargaining between the B.R.C. of A. and the Railroad Company. *Donovan v. Travers*, 285 Mass., 167, 188 N. W., 705. The Brotherhood had the power, by agreement with the Railroad Company, to create seniority rights for "the craft or class of carmen, their helpers and apprentices, employees of the Atlantic Coast Line Railroad Company." *Hartley v. Brotherhood of R. & S. S. Clerks*, 283 Mich., 201, 277 N. W., 885. By the same token, and in like manner, it had the power, in good faith, to modify these rights in the interest of the larger good. Annotation 117, A. L. R., 823. In an action, as here, by individual beneficiaries of the original contract to restrain any such modification, it is necessary to allege and to prove that the Brotherhood acted arbitrarily or in reckless disregard of the plaintiffs' rights. The present record falls short of the prerequisites in this respect. *Franklin v. Penn-Reading Shore Lines*, 122 N. J. Eq., 205, 193 Atl., 712.

The argument of the case covered a wide range of principles thought to be applicable, but the allegations of the complaint and the admitted facts reduce it to a narrow compass. On the record as presented, the correct result seems to have been reached. At least we cannot say that error has been shown. The judgment will be upheld.

Affirmed.

BARNHILL, J., not sitting.

STATE v. JESSE MANNING.

(Filed 4 March, 1942.)

1. Criminal Law § 33—

Where the trial court, in the absence of the jury, hears the testimony of the witnesses and of the defendant upon the question of whether the various confessions made by defendant were voluntary, and finds, upon supporting evidence, that the confessions were in fact voluntary, the admission of testimony of the confessions will not be held for error.

2. Criminal Law § 53d—

The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. C. S., 4640.

3. Homicide § 27h—

Where all the evidence tends to show that murder was committed in the perpetration of a robbery, the trial court is not required to submit to the jury the question of defendant's guilt of lesser degrees of the crime.

4. Criminal Law §§ 5c, 53c, 81c—Charge on burden of proving defense of insanity held not prejudicial when construed as a whole.

The court charged the jury that defendant's defense of insanity "must be clearly proven" by him, but in other portions of the charge repeatedly instructed the jury correctly that the burden of proving the defense was "to the satisfaction of the jury," or that the defendant "must satisfy the jury" upon the issue, and after the jury had retired recalled it and again correctly charged it upon the burden of proof. *Held:* Construing the charge as a whole it did not contain prejudicial error.

5. Criminal Law § 53h—

The charge of the court should be construed contextually.

APPEAL by defendant from *Burney, J.*, at August Term, 1941, of BERTIE.

Criminal prosecution tried upon indictment charging the defendant with feloniously and with malice aforethought killing Paul Best.

The State's evidence tends to show that on the morning of 8 July, 1941, Paul Best, an elderly man employed as a clerk in the store of H. P. Sewell, in the town of Windsor, was struck on the back of the head at the base of the skull by a hammer or other blunt instrument, and that as a result of the injury Best died some seven or eight hours later. The defendant was seen coming out of the store where Best was employed a short time before Best was found on the floor of the store in an unconscious condition. There was evidence that the cash register had been robbed, and the evidence tends to show that the murder was committed in the perpetration of this felony.

Defendant made numerous confessions, admitting that he killed the deceased, Paul Best, and that he robbed the cash register; but at the time of the trial he repudiated the confessions and contended they were involuntary.

Verdict: Guilty of the felony and murder in the first degree whereof the defendant stands charged in the bill of indictment.

Judgment: Death by asphyxiation. Defendant appeals, assigning errors.

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

Gillam & Spruill for defendant.

DENNY, J. The defendant's first exception is to the ruling of his Honor that the confessions of the defendant were voluntary. The court, in the absence of the jury, heard the testimony of the witnesses and the defendant on the question as to whether or not the various confessions of the defendant were voluntary. The court then found as a fact and held that the confessions of the defendant were free and voluntary.

In the case of *S. v. Fain,* 216 N. C., 157, 4 S. E. (2d), 319, *Stacy, C. J.,* said: "It is the established procedure with us that the competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603, and that the court's ruling thereon will not be disturbed, if supported by any competent evidence. *S. v. Moore,* 210 N. C., 686, 188 S. E., 421."

In *S. v. Andrew, supra, Pearson, C. J.,* said: " 'It is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make.' *S. v. Dick,* 60 N. C., 440. . . . What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court; so what evidence the judge should allow to be offered to him to establish these facts is a question of law. So whether there be any evidence tending to show that confessions were not made voluntarily is a question of law. But whether the evidence, if true, proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and, in case of a conflict of testimony, which witness should be believed by the court are questions of fact to be decided by the judge, and his decision cannot be reviewed in this Court, which is confined to questions of law." *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603.

No error has been made to appear in the admission of the confessions of the defendant in evidence.

The second and seventh exceptions are to the refusal of the court to charge the jury on the lesser degrees of the crime charged. It is well settled in this jurisdiction that where there is no evidence to sustain a verdict of guilty of a lesser offense than that charged in the bill of indictment, it is not incumbent upon the court to submit to the jury the question of defendant's guilt of lesser degrees of the crime charged. This rule applies to indictments for murder when all the evidence tends to show, as here, that such murder was committed in the perpetration of a felony.

In *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657, we find: "There was no error in not instructing more fully upon the question of the right to convict of a lesser offense, and there would have been no error in omitting any mention of such a right, since there is in the record no evidence to sustain a verdict of guilty of a lesser offense."

In *S. v. Cox,* 201 N. C., 357, 160 S. E., 358: "Where all the evidence at the trial of a criminal action, if believed by the jury, tends to show that the crime charged in the indiement was commited as alleged therein, and there is no evidence tending to show the commission of a crime of less degree, it is not error for the court to fail to instruct the jury that they may acquit the defendant of the crime charged in the indictment and convict him of a crime of less degree. See *S. v. Ratcliff,* 199 N. C., 9, 153 S. E., 605, where the statute, C. S., 4640, is construed and applied," cited and approved in *S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 431. See, also, *S. v. Kelly,* 216 N. C., 627, 6 S. E. (2d), 533, and *S. v. Godwin,* 216 N. C., 49, 3 S. E. (2d), 347.

The objections raised by these exceptions cannot be sustained.

The sixth exception is to the following statement in his Honor's charge: "To establish a defense on the ground of insanity, it must be clearly proven that at the time of the commission of the act the party accused was laboring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing or if he did know that he did not know he was doing wrong."

His Honor in his charge on the burden of proof, which rested upon the defendant on his plea of insanity, stated: "It must be clearly proven," instead of the usual expression, to wit: "It must be proven to the satisfaction of the jury," or "The defendant must satisfy the jury." However, the language used by his Honor is almost *verbatim* with that in 14 R. C. L., sec. 55, page 600, on this question.

In the charge, as to the burden of proof on the question of insanity, his Honor stated the burden several times in conformity with the decisions of this Court. After the jury had been out a short while, the court recalled the jury and said: "Gentlemen of the jury, I tried to

make it clear to you when I charged you upon insanity, but in the closing charge I feel that I did not make it clear and I want to further charge you." Thereupon the court charged the jury properly, in accordance with the decisions of this Court, on the burden of proof which rested upon the defendant on his plea of insanity.

It is well settled that the charge of the court should be considered contextually. *S. v. Smith,* 217 N. C., 591, 9 S. E. (2d), 9; *S. v. Henderson,* 218 N. C., 513, 11 S. E. (2d), 462; *S. v. Shepherd,* 220 N. C., 377, 17 S. E. (2d), 469, and other decisions too numerous to cite.

This exception cannot be sustained.

We have carefully examined the other exceptions and they cannot be sustained.

In the judgment of the court below we find

No error.

WALTER HAWKINS, NORA A. HAWKINS, D. C. ARRINGTON, ROSETTA ARRINGTON, DOLLIA ARRINGTON, STELLA ARRINGTON AND SABINA PERKINS v. THE FEDERAL LAND BANK OF COLUMBIA, SOUTH CAROLINA.

(Filed 4 March, 1942.)

1. Mortgages § 30f—Complaint held to allege cause of action for breach of agreement to reinstate loan upon tender of delinquencies by specified date.

Allegations that consent judgment of foreclosure was entered upon the *cestui's* agreement not to enforce the judgment until a specified date and to reinstate the loan upon payment of all delinquencies by that date, that plaintiff trustors made proper tender within the time specified, and that defendant *cestui* breached the agreement and had the lands sold under the consent judgment of foreclosure, *is held* to state a cause of action for breach of contract, and the granting of defendant's demurrer on the ground that the action was an attack of the consent judgment for intrinsic fraud by independent action is error.

2. Pleadings § 20—

A demurrer tests the sufficiency of the complaint to state a cause of action entitling plaintiff to any relief, and not its sufficiency to state a particular cause of action.

3. Tender § 1—

Allegations that plaintiffs were able, willing and ready to comply with the terms of the agreement, made tender to defendant of all items therein embraced, and that defendant failed to accept same, *is held* sufficient upon a liberal construction to allege a legal tender.

4. Pleadings § 20—

Upon demurrer a pleading will be liberally construed.

HAWKINS *v.* LAND BANK.

APPEAL by plaintiffs from *Johnson, Special Judge,* at October Term, 1941, of HALIFAX.

Plaintiffs alleged that in 1929 they executed a deed of trust to the defendant to secure a loan of $900; that upon delinquency in some of the payments due on the loan the defendant, in September, 1938, instituted an action to foreclose the deed of trust, but before the completion of the action the parties entered into a negotiation whereby it was agreed that upon payment of $87.00 by plaintiffs and consent by them to the judgment the defendant would refrain from enforcing the judgment until 1 November, 1939, and would, upon payment by the plaintiffs of all delinquencies, taxes, insurance and court costs before this date, reinstate the loan; that, relying on this agreement, plaintiffs consented to the judgment of foreclosure; that the plaintiffs "were able, willing and ready to comply" with the agreement "and made tender to the defendant of all the items mentioned in said agreement . . . before the 1st day of November, 1939, which was not accepted by the defendant"; but that the defendant fraudulently breached its agreement and had the lands sold under the consent judgment of foreclosure, the defendant becoming the purchaser. Wherefore plaintiffs sought damages and a cancellation of the commissioner's deed of the land to defendant, as well as other relief.

To this defendant demurred *ore tenus* for failure to state a cause of action, and the court sustained the demurrer. Plaintiffs appealed.

Keel & Keel for plaintiffs, appellants.
Wade H. Dickens for defendant, appellee.

SEAWELL, J. The case seems to have been tried in the court below upon the theory that the sole question involved was whether the judgment of foreclosure could be set aside because of fraud practiced by the present defendant in its procurement, and the judgment of the court seems to be based upon the principle that the fraud complained of, if it existed at all, was intrinsic and that therefore relief against the judgment of foreclosure could be had only by a motion in the cause rather than an independent action. Considered from the point of sufficiency in the pleading, fraud cannot be inferred from the bare facts set out in the complaint, if indeed it might be predicated upon the transactions alleged—a question as to which we are not called upon to decide. It is enough to say that there is no sufficient allegation of fraud.

But this does not dispose of the case since the plaintiff does plead facts which, if properly proved, might entitle him to damages for breach of contract, if by such breach the property which is the subject of the controversy and agreement has, by defendant's action and without fault of

the plaintiff, been so disposed of as to prevent his equity from attaching thereto. There might be other appropriate remedies if the property is still subject to this equity, however.

The disposition of defendant's demurrer involves a pure question of law, depending upon the sufficiency of the complaint to state a cause of action upon which the plaintiff might demand relief of whatsoever kind, and not the statement of a cause of action of a specified nature. *Jones v. Mial,* 79 N. C., 165, 168; *Knight v. Houghtalling,* 85 N. C., 17; *McNeill v. Hodges,* 105 N. C., 52, 11 S. E., 265; *Hendon v. North Carolina R. Co.,* 127 N. C., 110, 37 S. E., 155; *Staton v. Webb,* 137 N. C., 36, 49 S. E., 55; *Bolich v. Insurance Co.,* 206 N. C., 144, 173 S. E., 320; *Thomas v. R. R.,* 218 N. C., 292, 10 S. E. (2d), 722; *Dry v. Drainage Comrs.,* 218 N. C., 356, 359, 11 S. E. (2d), 143. We have nothing to do with the ability of the plaintiff to make good his challenge.

In the argument it was regarded as critical whether the plaintiff had sufficiently alleged tender of the items admittedly due at the time of the agreement upon which the consent order of foreclosure was made. The liberal construction accorded to pleadings under our code inclines us to answer this question in the affirmative. *Cotton Mills v. Mfg. Co.,* 218 N. C., 560, 11 S. E. (2d), 550.

The judgment sustaining the demurrer is overruled.

Reversed.

MARY LOU DANIEL v. NEW AMSTERDAM CASUALTY COMPANY.

(Filed 4 March, 1942.)

1. Insurance § 44a—

The policy of liability insurance in suit provided that insurer would not be liable for injuries resulting from defective workmanship after insured's work was "completed." A charge that "to complete" means to bring to a state of entirety or perfection, to do the work in a proper manner, *is held* erroneous as going too far and rendering the attempted restriction meaningless and unavailing.

2. Same—

The policy of liability insurance in suit provided that insurer would not be liable for injuries resulting from defective workmanship after insured's work was "completed." *Held:* While the term "completed" cannot be given a general definition of universal application, and the factual situation in each case must control, work cannot be regarded as completed so long as the workman has omitted or failed to perform some substantial requirement which the owner has a contractual right to demand.

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

DANIEL *v.* CASUALTY CO.

APPEAL by defendant from *Stevens, J.*, at October-November Term, 1941, of WILSON. New trial.

This suit was brought to recover from the Amsterdam Casualty Co. on a judgment obtained by the plaintiff against Marvin D. Etheridge, Trustee in Bankruptcy of the Alphin Plumbing and Heating Co., for damages sustained on 7 November, 1939, as the result of the negligence of the Alphin Plumbing and Heating Co. The latter was covered on this date by a liability policy issued by the present defendant, by the terms of which defendant agreed to pay any judgment obtained against the assured for bodily injuries suffered by accident while the policy was in force, subject to certain conditions, only one of which necessitates consideration here, *i.e.*, that the policy should not cover any accident "resulting from defective workmanship or material in connection with the contracting operations after the assured's work is completed."

On 29 August, 1939, Moses Daniel, husband of the plaintiff, made a contract with the Alphin Plumbing and Heating Co. to disconnect a hot water heater then in use in the Daniel home, having been installed by the Alphin Co., and to remodel it so it could be used as a stove or room heater. There was evidence introduced by plaintiff that the company had agreed to fix it so it would "be satisfactory in giving heat and be safe." In performing the job the plumbers sealed up the water jacket of the heater, but left some water inside. Moses B. Daniel paid for the work on 9 September, 1939, and installed the converted heater in a bedroom on 7 November. On 9 November, when a fire was lit in it, the heated water in the sealed water jacket turned to steam, expanded, and caused the heater to explode, seriously injuring the plaintiff. For these injuries plaintiff recovered judgment against the trustee in bankruptcy of the Alphin Plumbing and Heating Co., and it is on this judgment that plaintiff now sues the present defendant.

In the court below the defendant argued that the restrictive clause in its policy quoted above excused it from liability because the accident occurred after the job had been completed, in the ordinary sense of the word. The court, however, charged the jury on the issue of completeness as follows, relying on Webster's Unabridged Dictionary: "It means to bring to a state of entirety or perfection. To complete a piece of work means nothing more or less than to do the work in a proper manner, to finish it, so that the article or thing worked upon will do safely and properly that which it was intended for it to do."

From verdict and judgment in favor of plaintiff defendant appealed, assigning error.

Jones & Brassfield and Finch, Rand & Finch for defendant, appellant.
W. A. Lucas and Connor & Connor for plaintiff, appellee.

SEAWELL, J. After accepting liability in more general terms, the policy seeks to restrict the coverage to injuries sustained during the progress of the work—declining liability after "assured's work is completed." The controversy here is over the proper definition of the word "completed" as used in the policy to mark the time when liability ceases.

The majority of the Court are of the opinion that the charge to the jury at the trial goes too far, since the jury may have been led to infer that the job could never in fact and in law be considered as completed until an ideal state of perfection had been reached beyond that reasonably contemplated in the contract, which would make the attempted restriction meaningless and unavailing. But under the evidence in this case we are equally unable to adopt the view of the defendant that the work should be held completed as a matter of law.

We have no general definition of "completeness" or "completion" which would be of universal application and service. The factual situation in each case must control, but there are some outstanding considerations which may serve as a guide.

Completion is an independent fact which cannot be determined by the act or intention of a workman who may cease work regarding the job as completed, nor wholly by the conduct of the owner who without knowledge of the condition pays off before actual completion. It took a meeting of the minds to create the contract, and it should take a like meeting of the minds to discharge or abrogate it before substantial compliance with its terms. Without considering any termination of the contractual relation in this manner, as none is disclosed in the evidence, the contract itself is the most important factor bearing upon completion of the work.

We do not consider that the work is complete within the meaning of the insurance contract so long as the workman has omitted or altogether failed to perform some substantial requirement essential to its functioning, the performance of which the owner still has a contractual right to demand.

There is evidence here from which the jury might infer that by reason of the omission on the part of Alphin Plumbing and Heating Co. to do work essential to the functioning of the heater in the manner intended and called for in the contract, the work at the time plaintiff sustained her injury had never reached that condition of completeness that would render the restrictive clause in the policy operable.

The motion for judgment as of nonsuit was properly overruled.

But the instruction to the jury above noted must be held for error entitling the defendant to a

New trial.

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

THEODORE A. LIGHTNER, CLARENCE M. LIGHTNER, ALICE LIGHTNER HOPF, AND MARTHA LIGHTNER BOONE v. DANIEL F. BOONE, EXECUTOR AND TRUSTEE OF THE ESTATE OF FRANCES M. LIGHTNER, DECEASED,

and

THEODORE A. LIGHTNER, CLARENCE M. LIGHTNER, ALICE LIGHTNER HOPF, AND MARTHA LIGHTNER BOONE v. DANIEL F. BOONE, EXECUTOR AND TRUSTEE OF THE ESTATE OF CLARENCE A. LIGHTNER, DECEASED.

(Filed 18 March, 1942.)

1. Executors and Administrators § 31: Judgments § 18—

An action to surcharge the account of an executor is an action pending on the civil issue docket, and can be heard at chambers out of the county in which it is pending only by consent.

2. Same—

Where an action pending on the civil issue docket is, by consent, heard by the court at chambers out of the county, the judgment entered does not become effective until it is filed in the county in which the action is pending.

3. Appeal and Error § 10b—

Where an action pending on the civil issue docket is, by consent, heard by the court at chambers out of the county, the entries of appeal, including stipulation as to time in which case on appeal should be served, become operative as of the date the judgment is filed in the county in which the action is pending and not the date on which the judgment is announced by the court at chambers.

4. Appeal and Error §§ 10e, 18b—

Where, upon the hearing to settle case on appeal, the court, upon its erroneous holding that plaintiffs had failed to serve their case on appeal within the time allowed, strikes out the plaintiffs' case on appeal, the application of plaintiffs for a writ of *certiorari* is the proper procedure, and the writ will be allowed.

5. Reference § 14—

An exception to the referee's finding that a letter signed by plaintiffs and introduced in evidence constituted an agreement to pay defendant executor for legal services rendered in connection with the management of the estate and to arbitrate the amount to be paid, raises no issue of fact for the determination of the jury, but only a question of law for the court.

6. Reference § 13—

Held: Appellants failed to preserve their right to a jury trial upon their exceptions to the referee's findings. *Brown v. Clement Co.*, 217 N. C., 47.

7. Executors and Administrators § 29—

A letter written by the beneficiaries of an estate to the clerk of the Superior Court, stating that they approved of charges to be allowed by the clerk to compensate the executor for his services and to reimburse him for expenses, including counsel fees incurred in the course of the administration, does not constitute a promise by the beneficiaries to pay attorney fees for professional services rendered by the executor himself in the management of the estate.

8. Same—

An agreement by the beneficiaries of an estate to pay the executor additional compensation for legal services performed by him in the administration of the estate would be against public policy and void.

9. Same—

Disbursements for fees of counsel employed by the administrator or executor of an estate are allowable as necessary expenses against the estate when they are for services to the estate which are reasonably necessary and the amount is not excessive.

10. Same—

When a lawyer voluntarily becomes executor he assumes the office *cum onere*, and the exercise by him of his professional skill in the management of the estate does not entitle him to counsel fees, but his compensation is limited to the five per cent maximum allowed by statute. C. S., 157.

11. Same—

Where the will expressly stipulates the compensation to be allowed the executor, the executor, by qualifying, accepts such provision and is bound thereby even though the will stipulates compensation in a sum less than the five per cent maximum allowed by statute.

12. Same: Appeal and Error § 50—

Since an attorney qualifying as an executor is not entitled to compensation for legal services performed by him in the management of the estate, counsel fees of an attorney employed by him to defend his claim for such legal services, and also the costs in the Supreme Court on appeal, must be paid by him personally and they cannot be allowed against the estate, since attorney's fees may be allowed against the estate in an action to surcharge the executor's account only when the account is upheld.

APPEAL by plaintiffs from *Phillips, J.*, at Chambers in Rutherfordton, N. C., 26 September, 1941, as of August-September Term of POLK. Modified and affirmed.

Civil actions instituted by plaintiffs against Daniel F. Boone as executor and trustee of the estate of Frances M. Lightner, deceased, and as executor and trustee of the estate of Clarence A. Lightner, deceased, for an accounting.

The testator, Clarence A. Lightner, and the testatrix, Frances M. Lightner, were husband and wife; the defendant was a son-in-law and the plaintiffs are the children and devisees named in each of the wills.

The defendant duly qualified as executor of the will of Frances M. Lightner and as executor of the will of Clarence A. Lightner and entered into the discharge of his duties as executor of each of said estates. He filed a first annual account, which was approved. He filed a second annual account to which exceptions were filed. This account was not approved but was returned to the executor. He filed a third account which has not been approved. A citation was issued but when the same came on for hearing the defendant did not appear. Thereupon these two several actions were instituted 29 October, 1940.

In the Frances M. Lightner case plaintiffs allege that the estate is liquid; that the defendant has failed to properly and expeditiously administer the same; that he used dilatory tactics; that he has failed and refused to file a final account; that his account filed has not been approved; that he has refused to respond to citation issued by the clerk; that the defendant has departed the State; that he has on hand a large sum which can now be distributed in settlement of the estate and that such sum is in danger of dissipation. They pray that the defendant be required to make settlement of the estate and account for money and property received by him and that in the meantime a receiver be appointed to take over and administer the assets now in the hands of the executor.

The allegations contained in the complaint in the Clarence A. Lightner estate, with certain variations of fact, are substantially the same.

There was an order appointing a temporary receiver of each estate and when the notices to show cause came on to be heard before Bobbitt, J., at the November Term, 1940, it was ordered that upon the giving of bonds by the defendant the assets of each estate should be returned to the defendant. It was further ordered that the cause be referred to Robert S. McFarland as referee. To the order of reference both plaintiffs and defendant excepted.

On 6 May, 1939, plaintiffs delivered to the defendant a letter addressed to the clerk of the Superior Court of Polk County as follows:

"MR. ROBERT S. MCFARLAND,
Clerk Superior Court
Polk County, North Carolina
"DEAR SIR:

"This is to certify that we, the undersigned beneficiaries of Frances M. Lightner Estate, do hereby approve the allowance by you of certain charges made, or to be made, in the administration of the estate by Daniel F. Boone, the Executor and Trustee, for payment at this time, and it is our wish that you approve the payment of the legacy, commissions, traveling expenses; legal fees for services rendered or to be ren-

dered, such as the settlement of the stock assessments on the various bank stocks and Portage Silica Company stock, the ancillary administration in Detroit, Michigan, the handling of leases on the real estate, the voluminous amount of work connected with the Federal and State income and estate tax reports, auditor's fees, bookkeeping, secretarial work, postage, telegrams, etc., and all such expenses as in your opinion are adequate, including such attorney fees on the gross estate as in your opinion and in the opinion of competent attorneys are fair and reasonable.

Respectfully submitted,
THEODORE A. LIGHTNER,
MRS. ALICE LIGHTNER HOPF,
MRS. MARTHA LIGHTNER BOONE,
CLARENCE M. LIGHTNER,
(Dr. Clarence M. Lightner)"

This letter was filed 11/25/40.

On 22 September, 1939, the defendant as "attorney" filed petition in the Frances M. Lightner cause setting forth that he was appointed executor and trustee of the will of the testatrix; that he had filed his annual account; that he has performed, or will perform, legal services for the estate in transferring, selling, making reports on and keeping watch of the market value of approximately sixty different stocks; that he has engaged in considerable correspondence in respect thereto; that he has settled a bank assessment against the estate; that he has established two trust funds as required by the will, and that he has performed other legal services for the estate more fully set out in the petition. He prayed the allowance of an attorney's fee of $12,000, $6,000 to be paid immediately and the balance to be paid during the year 1940. The clerk entered an order allowing the fee to the defendant as attorney for the estate, as prayed. On appeal by the plaintiffs, Armstrong, J., at the January-February Term, 1940, concluded as a matter of law "that the provision made for the compensation of the executor and/or trustee in said will (of Frances M. Lightner) is determinative of the amount to which he (the defendant) is entitled in full for all services rendered by him in connection with the administration of said estate both as executor and/or trustee; that under said will the said executor and/or trustee is not entitled to any attorneys' fees, for himself, personally," and sustained the exception of plaintiffs to said order. The defendant did not except or appeal.

On 8 August, 1941, defendant, through his counsel, filed a petition addressed to the Clerk of the Superior Court of Polk County quoting the letter of plaintiffs dated 6 May, 1939, and petitioning the said clerk

to make an award to him for the legal services rendered the estate of Frances M. Lightner. This petition cites that a former order to the clerk allowed him a fee of $12,000 and sets forth the manner of payment as contained in the former order. It further recites legal services rendered by the defendant to the estate. These are somewhat similar to those recited in the former order and include others. He alleges further that the letter constitutes a contract and agreement to submit the matter to the clerk for determination. In this petition he prays "that he be awarded such attorney's fees in addition to those already awarded, which are fair and reasonable, and such expenses," etc. The plaintiffs answered, denying defendant's right to recover attorney fees and asserting the pendency of the action for an accounting in which the defendant had set up and alleged his right to attorney's fees under the purported contract. On 14 August, 1941, the clerk entered an order finding that $12,000 is a fair and reasonable fee for the legal services rendered by the defendant and that $6,000 of this sum had theretofore been awarded. The order awards an additional $6,000. While the order in its face recites that "the arbitrator finds" it is signed by the clerk as such. Plaintiffs excepted and appealed.

When these actions came on to be heard before the referee they were consolidated for hearing and judgment by consent of the parties. The referee stated an account finding that defendant had received in the Frances M. Lightner estate a total of $144,855.88 and that he received $40,457.33, upon which commissions are due, in the Clarence A. Lightner estate. He then fixes the commissions due the defendant under the terms of the will of Frances M. Lightner and the commissions due, under the statute, by Clarence A. Lightner estate, the total amount of commissions paid and the balance due.

The referee made the following findings which are pertinent to this appeal:

"(11). In the above expenditures is included an item of $6,000 attorney's fee, and to the allowance of this fee as a proper disbursement the plaintiffs object and except.

"(13). The Referee finds as a fact that there was a contract of arbitration between the plaintiffs and the defendant, and that an award has been made pursuant to said contract by the arbitrator in the sum of $6,000 in addition to a previous award of $6,000.

"(14). The Referee finds as a fact that the above allowance is reasonable and fair, and is a proper charge upon the distributive shares of the plaintiffs."

Thereupon, the referee concluded "that the estate (of Frances M. Lightner) is indebted to him (the defendant) for an additional attorney's fee of $6,000 under the award set forth in Finding of Fact No. 13."

The plaintiffs filed exceptions to the quoted findings of fact and conclusion and demanded a trial by jury.

When the consolidated cause came on to be heard in the court below it was agreed that all of the matters which could be heard by the judge should be continued to be heard at Rutherfordton, N. C., as of the October Term, 1941, of Polk.

Upon the hearing the judge below concluded that the exceptions of the plaintiffs raised only a question of law, that is, "whether or not the letter dated May 6, 1939, addressed to Robert S. McFarland, Clerk of the Superior Court, and signed by (plaintiffs) constitutes a contract to pay Daniel F. Boone for his services as attorney, and constitutes a contract to arbitrate the amount of the fee." It was thereupon adjudged that the only question presented is a question of law; that said letter constitutes a contract on the part of the beneficiaries who signed said letter to pay the said Daniel F. Boone and is an agreement to arbitrate the amount due. The court further adjudged that plaintiffs are not entitled to a trial by jury; that the award of the arbitrator is binding upon plaintiffs and constitutes a final determination of the amount due by them to the defendant as attorney's fees. Thereupon, the report of the referee, both as to findings of fact and conclusions of law, was affirmed; the payment of $6,000 as a credit upon attorney's fee allowed and theretofore deducted by defendant was approved; the defendant was authorized to pay himself an additional $6,000 as attorney's fees in accord with said former order and to issue his check to himself in payment of the balance due on commissions as found by the referee. The plaintiffs excepted and appealed.

Said order was filed in the Polk Superior Court, 26 September, 1941.

The plaintiffs served their case on appeal 24 October, 1941, and the defendant served his countercase, reserving his right to move to strike the case on appeal of plaintiffs for that it was not served within the 30 days allowed. When the cause came on to be heard before Phillips, J., for the purpose of settling the case on appeal the court found that the judgment was announced at Rutherfordton, N. C., 22 September, 1941; that plaintiffs were allowed 30 days in which to serve case on appeal and the case on appeal was served 24 October, 1941, more than 30 days thereafter. Order was thereupon entered striking the plaintiff's case on appeal.

The plaintiffs noted an exception and applied to this court for a writ of *certiorari,* which was granted. In response thereto the court below settled the case on appeal, which now appears in the record.

McCown & Arledge and Clarence O. Ridings for plaintiffs, appellants.
Fred M. Parrish and Hamrick & Hamrick for defendant, appellee.

BARNHILL, J. This is not an in chambers matter which could be heard by the judge anywhere in the district. It is a civil action pending on the civil issue docket of Polk County. It could be heard out of the county in which the cause was pending only by consent. Therefore the judgment entered did not become effective until it was filed in Polk County, 26 September, 1941. Likewise, the entries of appeal, including stipulation as to time within which case on appeal should be served, became operative as of that date. The case on appeal by plaintiffs was served in apt time. They followed the proper procedure in noting their exception to the order of the judge striking the same and applying for a writ of *certiorari*. The motion to dismiss is denied. *Chozen Confections, Inc., v. Johnson,* 220 N. C., 432.

We concur in the conclusion of the court below that the exceptions filed by plaintiffs raise no issue of fact to be submitted to a jury. Even so, plaintiffs have failed to preserve their right to a trial by jury. *Brown v. Clement Co.,* 217 N. C., 47, 6 S. E. (2d), 842.

The only exceptions to the findings of fact relate to the allowance of an attorney's fee to the defendant and are directed to the alleged error of the referee in his conclusion, sustained by the court below, that the allowance of $12,000 to the executor for legal services rendered by him was reasonable and proper and constitutes a charge upon the distributive shares of the plaintiffs in the estate of Frances M. Lightner. No exception relates to findings or conclusions in the Clarence A. Lightner estate. Hence, our further discussion relates only to the Frances M. Lightner estate.

The conclusion of the referee, as affirmed by the court below to which plaintiffs except, is based on the finding that the letter dated 6 May, 1939, constituted both a contract by plaintiffs to pay defendant for legal services rendered and an agreement to arbitrate the amount to be paid.

The language of the letter does not support this conclusion. By its terms plaintiffs approved the allowances made or to be made in the administration of the estate. The commissions referred to constitute the compensation paid the executor for his services rendered in settlement of the estate and the items of expense mentioned are expenses incurred or to be incurred during the course of the administration thereof. Both the commissions and the expenses, to the extent such expenses are reasonable and proper, are proper charges against the estate.

There is nothing in the letter indicating that defendant was being employed by plaintiffs or which authorizes his employment by the estate. Their mere approval of charges to be allowed by the clerk to compensate the executor for his services and to reimburse him for expenses, including counsel fees incurred in the course of the administration, in no sense constitutes a promise by plaintiffs to pay. Nor does it warrant the con-

clusion that they, to any extent, assumed personal responsibility for the payment thereof or agreed to become personally liable therefor.

The circumstances surrounding the signing of the letter support this view. Defendant went to plaintiff Dr. C. M. Lightner and explained that it was necessary to employ an attorney in connection with the settlement of the estate and that he would employ one unless he, the defendant, was acceptable to the heirs. Dr. Lightner, upon the representations made by the defendant, assented to the employment *by the estate.* Defendant then asserted that it was necessary for plaintiffs *to approve* his employment. "I drew up a rough copy (of a letter) showing what necessitated the employment of an attorney and setting forth the expense the estate would have to pay." Dr. Lightner suggested certain changes which resulted in the drafting of the letter. Defendant then went to the plaintiff Hopf, explained the necessity of employing an attorney to assist in the settlement and procured her signature. He followed the same course as to the other two plaintiffs. Thus nothing was said to plaintiffs to indicate that defendant understood that he was being employed by plaintiffs or that they would be held accountable for his fees.

The defendant first so interpreted the writing. While the letter was in his possession he petitioned the clerk for an allowance to him out of the assets of the estate to compensate him for legal services rendered and to be rendered by him to the estate. It was only after Armstrong, J., vacated the allowance made on this petition that he filed application "for an award" under the terms of the letter, asserting that the letter constitutes a contract by plaintiffs to pay his fee and to arbitrate the amount thereof.

Even if it be conceded, however, that the defendant's construction of the letter is correct, the court will not countenance the payment by a third party of additional compensation to an executor or administrator or other officer of the court in addition to that allowed by statute for services he is under obligation to render by virtue of his office or trust relationship. It is against public policy and would create an evil that has not and must not become a part of our accepted practice.

Since the allowance to the defendant cannot be sustained upon the theory that it was due by contract with the devisees, may it be sustained under the statute and under the rule which entitles an executor or administrator to credit as an expense of administration for sums expended in the payment of counsel fees reasonably and necessarily expended in the administration of the estate? This is answered by the order of Armstrong, J., which is supported by the authorities.

That reasonable fees paid counsel for advice and assistance in the management of the trust estate are allowable as a necessary expense is well established in this jurisdiction. *Hester v. Hester,* 38 N. C., 9;

Whitford v. Foy, 65 N. C., 265; *Young v. Kennedy,* 95 N. C., 265; *In re Will of Howell,* 204 N. C., 437, 168 S. E., 671, and cases cited.

"If an administrator employs counsel to assist him in his administration, the contract is personal, and is not a debt against the intestate's estate. The administrator must pay it, and if the disbursement is proper, it will be allowed him in the settlement of his account with his estate" as a necessary expense of administration. *Lindsay v. Darden,* 124 N. C., 307; *Kelly v. Odum,* 139 N. C., 278; *Devane v. Royal,* 52 N. C., 426. Such disbursements are granted upon the settlement of his account only if found to be (1) for services to the estate; (2) reasonably necessary and (3) not excessive.

When a lawyer voluntarily becomes executor he takes the office *cum onere,* and although he exercises his professional skill in conducting the estate he does not thereby entitle himself to compensation beyond the amount ordinarily allowed to an executor or an administrator. *In re Evans,* 62 Pac., 913, 53 L. R. A., 952.

"In the absence of statute, the general rule is that where a lawyer becomes executor or administrator, his compensation as such is in full for his services, although he exercises his professional skill therein; and even if he performs duties which he might properly have hired an attorney to perform, he is not entitled to attorneys' fees." 21 Am. Jur., 679; *Re Parker,* 49 A. L. R., 1025; Anno. 49 A. L. R., 1033, and 36 A. L. R., 748; *Jones v. Peabody,* 100 A. L. R., 64. The rule is one of public policy, grounded upon the principle that a trustee shall not place himself in a situation where his interests conflict with his duties as fiduciary. 21 Am. Jur., 679. It has been said that if an executor chooses to exercise his professional skill as a lawyer in the business of the estate, it must be considered a gratuity, and that to allow him to become his own client and charge for professional services would be holding out inducements for professional men to seek such representative places to increase their professional business which would lead to most pernicious results. *Willard v. Bassett,* 27 Ill., 37; 11 R. C. L., 231.

This is in accord with the statute and decision law of this State.

When the defendant qualified as executor he obligated himself to give the necessary time and attention to, and to use his best skill and ability in, the administration of the estate. He became an officer of the court subject to the supervision of the probate court to which he must account. "Neither the law nor the reason and justice of the thing lends any countenance to the idea that such offices shall be considered as sources of profit to the incumbent, or desirable on that account . . . every consideration of policy and right strongly impels the court to avoid any construction of the law which may lead to such a consequence." *Potter v. Stone,* 9 N. C., 30.

The statute, C. S., 157, vests the probate judge with authority to fix, within the maximum prescribed, the compensation of such officers for services rendered. *Green v. Barbee,* 84 N. C., 70; *Ellington v. Durfey,* 156 N. C., 253, 72 S. E., 194. The compensation thus fixed is for "the trouble and time expended in the management" of the estate. C. S., 157.

The maximum which may be allowed is five per cent. C. S., 157; *Potter v. Stone, supra; Overman v. Lanier,* 157 N. C., 544, 73 S. E., 192; *Thigpen v. Trust Co.,* 203 N. C., 291, 165 S. E., 720. The court may allow less but it cannot allow more. *Bond v. Turner,* 6 N. C., 331; *Green v. Barbee, supra.* Such commissions are in full for all services rendered and he cannot be allowed any additional sum for loss of time and personal services. *Schaw v. Schaw,* 1 N. C., 168; *Morris v. Morris,* 54 N. C., 326; *Parker v. Grant,* 91 N. C., 338; *In re Battle,* 158 N. C., 388, 74 S. E., 23. Such commissions are allowed as compensation for services rendered both because such services are rendered by the executor or administrator as appointee of the court and there are statutes expressly authorizing it.

Passing the well founded contention that the order of Armstrong, J., is *res judicata,* there is still a further impelling reason why the ruling of the court below cannot be sustained. The defendant qualified as executor under a will which expressly stipulates the compensation to be received by him. The testatrix stipulated what should be paid to the executor and he, knowing the terms, accepted probate and thereby acceded to what was offered as his compensation. Whether the bargain was good or bad the defendant, by qualifying, made it and must abide by it. Having qualified he must accept the provision made for him in the will and if he is now not content with it the law can afford him no remedy.

The great weight of authority is to the effect that if a will provides that a sum less than the statutory compensation shall be paid to the executor or trustee named therein, the fiduciary so designated has his choice of refusing the appointment or accepting it on the terms fixed by the testator, and if he accepts it, he is entitled to no other or greater compensation than the will allows. *Washington Loan & Tea Co. v. Convention of P. E. Church,* 293 Fed., 833, 34 A. L. R., 913; *McIntire v. McIntire,* 192 U. S., 116, 48 L. Ed., 369; Anno. 34 A. L. R., 918, 21 Am. Jur., 677.

The exceptions of the plaintiffs to the findings of fact and conclusion of law made by the referee must be sustained and the defendant must account for the $6,000 he has already paid to himself as counsel fees.

At the hearing below an order was entered allowing counsel for the defendant the sum of $4,000 as counsel fees for services rendered the

defendant in the defense of these actions. Plaintiff excepted. This exception must be sustained.

The decisions generally sustain the right of an executor or administrator to an allowance of attorneys' fees in a controversy over surcharging his account where the account is upheld, Anno., 101 A. L. R., 806, and deny it where the account is not upheld, Anno., 101 A. L. R., 807; 21 Am. Jur., 694.

A finding that the services rendered resulted in benefit to the estate is generally necessary to charge the estate with an expenditure for counsel fees. *Kelly v. Odum, supra.* The credit will not be allowed if the litigation was the result of his negligence or improper conduct and it is never allowed to one who has incurred the expense in defense of his own breach of duty. *Kelly v. Odum, supra; Overman v. Lanier, supra; Stonestreet v. Frost,* 123 N. C., 640.

Here, the defendant had notice that exceptions had been filed to his second annual account and that the clerk had not audited or approved it. He was cited but failed to appear at the hearing. After an attorney's fee was allowed him by the clerk the exception thereto by the plaintiffs was sustained by the judge, and yet he paid to himself out of the funds of the estate $6,000 which had thus been disallowed. When he was called to book by the institution of these actions he employed counsel to aid him in his attempt to retain the funds of the estate thus pocketed by him and to sustain an additional allowance of $6,000. His own contention that the fee is due by contract with the distributees refutes any suggestion that his defense in these actions is for the benefit of the estate. Hence, the services of his attorneys were purely personal to him. He must pay the bill.

The order entered by the court below allowing counsel fees to the attorneys for the defendant in this cause must be vacated. The judgment of the court sustaining the findings and conclusion of the referee and approving the allowance of $12,000 to the defendant for services rendered by him as attorney, of which $6,000 has been paid, is held for error. The judgment must be modified in accord with this opinion and the defendant must be required to account for the sum thus received by him.

The costs in this Court, as well as in the court below, will be taxed against the defendant individually and not against the estate.

Modified and affirmed.

PEOPLES BANK & TRUST COMPANY, GENERAL GUARDIAN OF W. L. GROOM, v. TAR RIVER LUMBER COMPANY.

(Filed 18 March, 1942.)

1. Appeal and Error § 37—

Where the court finds the facts by consent of the parties, its findings supported by competent evidence are as conclusive as if found by a jury, and are not subject to review on appeal.

2. Trial § 54—

Where the parties waive a jury trial and consent that the court hear the cause, the weight of the evidence is for the court, and each of its findings is conclusive if supported by competent evidence.

3. Limitation of Actions § 13—

C. S., 416, does not change the character and quality of an acknowledgment or promise necessary to repel the statutes of limitation except to require that the acknowledgment or promise be in writing and signed by the party to be charged.

4. Same—

In order to revive a debt which is barred by statutes of limitation, there must be an express unconditional promise to pay same, or a definite unqualified acknowledgment of same as a subsisting obligation from which the law will imply a promise to pay.

5. Same—

The law will imply a promise to pay a debt from an acknowledgment of the debt by the debtor as an existing obligation unless the acknowledgment is qualified.

6. Same—

A written acknowledgment or promise to pay a debt will bind a corporate debtor if the writing be signed in the name of, or in behalf of the corporate debtor by an authorized agent or officer.

7. Same—

In order for an acknowledgment or promise to pay a debt to repel the bar of statutes of limitation it must be made to the creditor himself or to an attorney or agent of the creditor acting on behalf of his principal.

8. Same—Evidence held sufficient to support finding that secretary-treasurer of corporation was without power to bind corporation by acknowledgment of debt so as to repel bar of statute.

This action involved a claim against the receiver of a corporation upon two notes executed by the corporation, which claim had been denied by the receiver on the ground that the notes were barred by statutes of limitation. Claimant, the holder of the notes, introduced in evidence two letters signed by the corporation by its secretary-treasurer, one to an officer of a bank, which enclosed a financial statement of the corporation which

listed the notes sued on as liabilities of the corporation and the other letter to a certified public accountant stating that one of the notes held by claimant was included in its liabilities as shown by books but "as to its value and time of payment we are unable to advise." *Held:* Even conceding that the letters, with accompanying financial statement, contained an unqualified acknowledgment of the debt as a subsisting obligation from which the law may imply a promise to pay, the evidence before the court as to the authority of the secretary-treasurer was sufficient to support the court's finding that the secretary-treasurer did not have power to bind the corporation by an acknowledgment, and its judgment disallowing claim on the notes because of the bar of the statutes of limitation, is affirmed.

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

APPEAL by Ida Baker Hanes, creditor of defendant, from *Carr, J.*, at October Term, 1941, of NASH.

Civil action in receivership heard upon claim of Ida Baker Hanes filed with and denied by receivers.

In the trial court, upon hearing on exceptions of Ida Baker Hanes to report of receivers of defendant, Tar River Lumber Company, filed at September Term, 1941, in which they decline to approve her claim, represented by two notes of defendant, for that same are barred by statutes of limitation, the parties stipulated that the judge should find all facts with the same effect as if determined by a jury and render judgment thereon.

Ida Baker Hanes offered in evidence these documents: 1. Two notes executed in name of Tar River Lumber Company, by W. L. Groom, president; one, dated 18 March, 1924, payable to Ida Baker Hanes for $5,000.00, two years after date, with interest at 6 per cent per annum, payable semiannually, and the other dated 4 August, 1926, payable to Howard E. Baker for $10,000.00 two years after date, with interest at 6 per cent per annum, payable semiannually, bearing on back this endorsement: "Pay to the order of Ida B. Hanes without recourse, First National Bank & Trust Company of Elmira, by O. N. Reynolds, V. P., as Executor of the estate of Howard E. Baker, deceased."

2. Two letters, signed in name of "Tar River Lumber Company by S. T. Anderson," purporting to be on letterhead stationery of "Tar River Lumber Company, Inc., Wholesale and Retail Dealers in Kiln Dried North Carolina Pine, Poplar and Oak," showing as officers: "W. L. Groom, Pres. and Gen. Mgr.; S. T. Anderson, Secy. and Treas.; W. T. Keeton, Vice-Pres."

The first letter, dated Rocky Mount, N. C., 18 February, 1939, addressed to "Mr. M. D. Thompson, c/o First National Bank & Trust Company, Elmira, N. Y.," reads as follows: "Complying with the request of Mr. I. T. Skeels, Assistant Vice-President, we beg to herewith

hand you copy of our annual financial statement as of Jan. 1st, 1939. If any explanation needed, we will be glad to give the best we can." Attached to and enclosed in this letter was a financial statement of all assets and liabilities of the Tar River Lumber Company as of 1 January, 1939, the only pertinent part being "Liabilities" listed as "notes payable to stockholders, W. L. Groom, $62,077.79; H. E. Baker, dec., $14,087.00, and Ida B. Hanes, $6,205.20," total "$82,369.99."

The other letter, dated Rocky Mount, N. C., 15 February, 1940, addressed to "Mr. George H. Wood, C. P. A., Pasadena, Calif.," reads as follows: "We acknowledge yours of February 7th with reference to $5,000.00 note held by Mrs. Ida B. Hanes. This note is included in our liabilities as shown by books. As to its value and time of payment, we are unable to advise. The writer does not feel you would be justified in considering income from this note for income tax returns."

The parties stipulated that on 18 February, 1939, the First National Bank & Trust Company of Elmira, N. Y., was "the financial agent of Mrs. Ida Baker Hanes, and also a creditor of Tar River Lumber Company, or its subsidiary, Swansboro Land & Lumber Company."

The receiver offered evidence tending to show substantially these facts:

The Tar River Lumber Company, originally a copartnership, composed of W. L. Groom, Howard E. Baker and J. H. Harris, was incorporated in 1908 by them and others, including Ida Baker Hanes, daughter of Howard E. Baker, and S. T. Anderson, who owned two shares. Groom was elected president; Baker, treasurer, and Anderson, secretary. Subsequently, upon death of Baker, the offices of secretary and treasurer were combined, and Anderson was elected. Under the by-laws of the corporation the president was empowered to exercise general supervision and direction over the affairs and all other officers of the corporation. The by-laws, pertaining to duties of secretary and of treasurer, further provided that the secretary "shall keep the proper books of account, and discharge such other duties as pertain to his office and as are prescribed by the board of directors." In recent years the board of directors was composed of W. L. Groom, now deceased, who for eight or ten years was in bad health, and whose general guardian instituted this action; W. T. Keaton, formerly of Elmira, New York, now of Florida; Mrs. K. J. Harris, of New York, and S. T. Anderson, of the office of company.

Anderson testified, in part, as follows: "How long Mr. Groom was in bad health is hard to say, but he was . . . 8 or 10 years. . . . As he went down I naturally took hold without authority. I paid the bills when I had the money. I collected the money and made sales to customers. As long as he could do it he handled as much of the general management of the business as he could. After he got so he couldn't, the burden fell on me. During 1939 and 1940 I was not absolutely in

complete charge. I can't carry dates very well, but I shouldn't say over a year and a half or maybe a year that he had been totally incapacitated. On February 15, 1940, Mr. Groom was not absolutely able to attend to his duties. For the last four or five years Mr. Groom hasn't been able to attend to a lot of things. It is hard for me to answer the question whether if on February 15, 1940, I was not for all general purposes the head of the business. I was there and he was sick. I was doing the best I could with it. Conditions were not as bad on February 18, 1939, as in 1940. I was there and so was he and what he could not do I tried to do . . . The directors met very seldom. Years ago we had stockholders and directors meetings once a year . . . we ran along several years without meeting . . . I think they met in the last two years. Mrs. Harris didn't come down to the meeting. She resigned as a director. I think Mr. Keaton was here. At the time the payment was made on my note and Mr. Groom's note was renewed (in 1939, he thinks) Mr. Groom and I were the active managers of the business. We didn't renew Mrs. Hanes' notes . . . I have never at any time signed a note for the corporation."

Anderson further testified that in February, 1939, the Swansboro Land & Lumber Company, of which Groom was largest stockholder, and in which the Harris family had stock but in which the Baker family had none, was indebted to both the Tar River Lumber Company and the First National Bank of Elmira, New York; that under an arrangement pertaining to timber contract between Tar River Lumber Company and Swansboro Land & Lumber Company, the former was to make certain payments to the bank; and that from then on frequent statements were submitted to the bank in connection with the indebtedness to it. The witness further testified that "at end of each year we made financial statements of the Tar River Lumber Company and perhaps the First National Bank of Elmira, New York, got copies of those statements"; and, further, that neither the president nor directors authorized him to acknowledge any of the corporation's indebtedness to other people; that in 1939 the corporation executed renewal notes for indebtedness to Groom and same were signed by Groom as president and by him as secretary, which he thinks was pursuant to a resolution of the board of directors; and that "the question of renewing Mrs. Hanes' notes was discussed between the president of the corporation and me, and Mr. Groom chose not to renew them."

Upon stipulations and admission in open court, and from documentary and oral evidence presented, the court finds pertinent facts substantially these: 1. Ida Baker Hanes is the holder of the two notes offered in evidence, on which interest has been credited to 18 September, 1930, and to 4 February, 1927, respectively. After the dates to which interest has been so credited, no payments have been made on either of the notes.

2. That "On February 18, 1939, S. T. Anderson, who was secretary-treasurer of Tar River Lumber Company, sent to M. D. Thompson, an officer of First National Bank & Trust Company, of Elmira, N. Y., a financial statement of Tar River Lumber Company, which listed said notes under the heading 'notes payable to stockholders.' The First National Bank & Trust Company of Elmira was the financial agent of Ida Baker Hanes, but was also a holder of stock in Tar River Lumber Company as collateral to loans and was the holder of notes of Swansboro Land & Lumber Company, a subsidiary corporation of Tar River Lumber Company, and was endeavoring to collect the notes of Swansboro Land & Lumber Company through payments by Tar River Lumber Company of the proceeds of timber owned by Swansboro Land & Lumber Company, which was being cut and sawed by Tar River Lumber Company. The letter of Anderson to the bank, and the financial statement which accompanied his letter, were not sent to the bank in connection with any business of Ida Baker Hanes.

3. That "On February 15, 1940, S. T. Anderson, secretary-treasurer, on behalf of Tar River Lumber Company, wrote to Geo. H. Wood, Pasadena, California, who is the personal auditor of Ida Baker Hanes, a letter," offered in evidence.

4. That "The by-laws of Tar River Company provide that its president shall be its active managing official.

5. That "The by-laws of Tar River Lumber Company define the duties of the secretary and the treasurer, but do not give either of said officers any authority to borrow money or pledge the credit of the corporation or to make or alter contracts of the corporation, and no such authority was given to Anderson by any resolution of the Board of Directors as he did not in fact exercise such authority.

6. That "There has been no unconditional acknowledgment in writing within the statutory period of the indebtedness of Tar River Lumber Company to Ida Baker Hanes on the notes referred to.

7. That "S. T. Anderson, as secretary and treasurer of said corporation, did not have power to bind the corporation by such an acknowledgment if the correspondence hereinabove set out should be construed as constituting such an acknowledgment."

Upon these findings of facts the court, being of opinion that the claim of Ida Baker Hanes is barred by the statutes of limitation, adjudged that it be disallowed as claim against the assets of the Tar River Lumber Company now or hereafter distributable by the receivers.

The claimant, Ida Baker Hanes, appeals to Supreme Court and assigns error.

S. L. Arrington for Ida Baker Hanes, appellant.
Battle, Winslow & Merrell for receivers, appellees.

WINBORNE, J. A jury trial having been waived, and the parties having consented that the judge find the facts, the findings of fact, supported by competent evidence, are as conclusive as if found by a jury, and are not subject to review by this Court. *Branton v. O'Briant,* 93 N. C., 99; *Roberts v. Ins. Co.,* 118 N. C., 429, 24 S. E., 780; *Matthews v. Fry,* 143 N. C., 384, 55 S. E., 787; *Cox v. Boyden,* 175 N. C., 368, 95 S. E., 548; *Tyer v. Lbr. Co.,* 188 N. C., 268, 124 S. E., 305; *Tinker v. Rice Motors,* 198 N. C., 73, 150 S. E., 701; *Brown v. Coal Co.,* 208 N. C., 50, 178 S. E., 858; *Schoenith, Inc., v. Mfg. Co.,* 220 N. C., 390, 17 S. E. (2d), 350; *Bangle v. Webb,* 220 N. C., 423, 17 S. E. (2d), 613.

Upon perusal of the evidence shown in the record on this appeal we are unable to say that there is no competent evidence to support each essential finding of fact. The weight of such evidence is for the judge, acting in lieu of jury, to determine.

The question, therefore, presented by appellant for decision is reduced to this: Do the letters, either or both, introduced in evidence by creditor, constitute an acknowledgment of the indebtedness sufficient to take the debt out of the operation of applicable statutes of limitation?

The statute, originally enacted in 1868, provides that "No acknowledgment or promise is evidence of a new or continuing contract from which the statutes of limitation run, unless it is contained in some writing signed by the party to be charged thereby . . ." C. S., 416, formerly CCP (1868), sec. 51, The Code of 1883, sec. 172, The Revisal 1905, sec. 371.

Apart from the requirement that the acknowledgment or promise should be "contained in some writing signed by the party to be charged," the statute, according to decisions on the subject, does not change the character and quality of the acknowledgment or promise theretofore required to repel the statutes of limitation. *Taylor v. Miller,* 113 N. C., 340, 18 S. E., 504; *Shoe Store Co. v. Wiseman,* 174 N. C., 716, 94 S. E., 452; *Phillips v. Giles,* 175 N. C., 409, 95 S. E., 772.

Decisions of this Court, both before and since the enactment of the statute, C. S., 416, pertinent to the true interpretation of the law as stated by *Hoke, J.,* in *Phillips v. Giles, supra,* are to the effect that in order to revive a debt which is barred by statutes of limitation there should be an express, unconditional promise to pay the same, or there should be a definite, unqualified acknowledgment of the debt as a subsisting obligation and from which the law will imply a promise to pay. *Mastin v. Waugh,* 19 N. C., 517; *Smith v. Leeper* 32 N. C., 86; *Simonton v. Clark,* 65 N. C., 525, 6 Am. Rep., 752. *Faison v. Bowden, Exr.,* 72 N. C., 405; *Taylor v. Miller, supra; Shoe Store Co. v. Wiseman, supra; Smith v. Gordon,* 204 N. C., 695, 169 S. E., 423, and numerous other cases.

Moreover, it is further declared in *Phillips v. Giles, supra,* that the principle generally prevailing on the subject, and required by the phraseology of the statute itself, C. S., 416, "clearly recognizes that either a promise to pay, or an acknowledgment of the debt as an existent obligation will suffice, unless there be something to qualify the express promise, or to repel that which the law would imply from the definite acknowledgment of the debt as a subsisting obligation."

An acknowledgment or a promise is, in the wording of the statute, required to be "contained in some writing signed by the party to be charged." It would be sufficient, however, if the party to be charged be a corporation, that the writing be signed in the name of or on behalf of the corporation by an authorized agent or officer.

Furthermore, in order to take the debt out of an applicable statute of limitations, an acknowledgment or a promise must be made to the creditor himself, *Thompson v. Gilreath,* 48 N. C., 494; *Parker v. Shuford,* 76 N. C., 219; *Faison v. Bowden, supra; Hussey v. Kirkman,* 95 N. C., 63, or to an attorney, or to an agent of the creditor acting on behalf of his principal. *Kirby v. Mills,* 78 N. C., 124; *Shaw v. Burney,* 86 N. C., 331; *Pope v. Andrews,* 90 N. C., 401.

Applying these principles to the facts as found by the court below, the claim of appellant is confronted with insurmountable obstacles in the way of escape from the operation of statutes of limitation.

In the first place, the letters contain no express, unconditional promise to pay the notes in question. Secondly, if the letters as expressed, with accompanying financial statement, if authorized, be sufficiently definite and explicit as to amount to an unqualified acknowledgment of the debt as a subsisting obligation, from which the law may imply a promise to pay, *Darling v. Brown,* 1 Canada, 360, relied upon by creditor, findings of fact as to authoritative communication are lacking. The court below finds as facts: (1) that even though the First National Bank & Trust Company of Elmira, New York, were the financial agent of creditor, it was also the holder of notes of Swansboro Land & Lumber Company, a subsidiary corporation of debtor, and that the financial statement was not sent to the bank in connection with any business of creditor, and that (2) even though the correspondence (letters) should be construed as constituting an acknowledgment, the secretary and treasurer, who signed the letters, did not have power to bind the corporation by an acknowledgment. The evidence offered is susceptible of such inference, and is sufficient to support the findings.

The judgment below is

Affirmed.

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

HORACE M. CHAMPION v. VANCE COUNTY BOARD OF HEALTH, S. B. ROGERS, CHAIRMAN; H. T. POWELL, E. M. ROLLINS, DR. R. T. UPCHURCH, DR. H. H. BASS, JR., AND DR. I. H. HOYLE, COMPOSING AND BEING THE VANCE COUNTY BOARD OF HEALTH; VANCE COUNTY, AND S. B. ROGERS, CHAIRMAN; W. W. GRISSON, E. L. FLEMING, W. P. PARRISH AND HENRY HIGHT, COMPOSING THE MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF VANCE COUNTY, AND THE NORTH CAROLINA STATE BOARD OF HEALTH.

(Filed 18 March, 1942.)

1. Mandamus § 1—

Mandamus will lie only to compel the performance of a clear legal duty at the instance of the party having a clear legal right to demand it.

2. Master and Servant § 53c—

The procedure for the enforcement of an award of the Industrial Commission when no appeal is taken therefrom is by filing a certified copy of the award in the Superior Court, whereupon said court shall render judgment in accordance therewith and notify the parties. Sec. 61 of the Compensation Act.

3. Same: Mandamus § 2c—

Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the Industrial Commission from which no appeal was taken will not lie until judgment on the award has been rendered by the Superior Court in accordance with the procedure outlined by the Compensation Act.

4. Mandamus § 2c—

In order to be entitled to *mandamus* to compel a municipal corporation, governmental agency or public officer to pay a claim, plaintiff must allege and prove that there are funds available with which to pay the claim.

5. Counties § 8b—

County boards of health are creatures of statute and have only such powers as are conferred upon them by the statutes, either expressly or by necessary implication, C. S., 7064-7075, and they are given no power to tax but derive funds with which to pay salaries and other expenditures required in carrying on the health program of the State, from the State or county, or both.

6. Same: Mandamus § 2c: Master and Servant § 53c—

In this suit for *mandamus* to compel the county board of education to pay an award rendered against it by the Industrial Commission, allegations disclosing that the county board of health operated on funds derived from the county and the State Board of Health, and that it had failed to include in its budget funds for the payment of the award, *are held* to negate the existence of funds available to the county board of health with which to pay the award, and therefore the granting of a writ of *mandamus* directing it to pay the award must be reversed.

CHAMPION *v.* BOARD OF HEALTH.

APPEAL by defendant Vance County Board of Health, and defendants named composing Vance County Board of Health, from *Harris, J.*, at October Civil Term, 1941, of VANCE.

Civil action in the nature of *mandamus*.

These are, in substance, the allegations set out in the complaint:

(1) That at time in question defendant Vance County Board of Health, duly constituted and composed of members as named in caption of this action, was a subsidiary of Vance County, whose Board of County Commissioners is composed of members, as named in the caption, and of North Carolina State Board of Health, carrying on the public health work of the State Board of Health in Vance County under direction and for benefit of said county and of State Board of Health.

(2) That on 2 April, 1937, plaintiff was employed by Vance County Board of Health as sanitary inspector in carrying on public health work, his salary being fixed and paid by said County Board of Health from funds derived from a tax levied by Vance County "for the purpose of health work" therein, and funds allocated by State Board of Health "for the purpose of carrying on the work of the State Board of Health in Vance County."

(3) That on 1 June, 1938, North Carolina Industrial Commission granted an award of compensation to plaintiff against Vance County Health Department for injuries received by him on 2 April, 1937, by accident arising out of and in the course of employment, for which award Vance County Board of Health is responsible.

(4) That no appeal from said award having been taken, and time therefor having expired, a certified transcript of the award was docketed in office of Clerk of Superior Court of Vance County, and demand made upon Vance County Board of Health, through Vance County Health Department, for payment of the award and same has been refused.

(5) That, although advised by North Carolina State Board of Health so to do, Vance County Board of Health, at time budget for fiscal year 1938-39 was made up for "work and salaries of the employees of the Vance County Board of Health, which consisted of the Vance County Health Department, and included the plaintiff, . . . failed and refused to include in the said budget funds for the payment of the said award. . . ."

(6) That defendants Vance County Board of Health, Vance County and North Carolina State Board of Health are jointly and severally liable for the said award, and it is their duty to pay and plaintiff is justly entitled to receive of them the full amount granted; and in failing to make payment thereof said "defendants are in disobedience of the law in such cases made and provided."

(7) That it is the duty of individuals constituting the Vance County Board of Health, the Board of County Commissioners of Vance County and the North Carolina State Board of Health to make provision for the immediate payment of said award.

Upon these allegations plaintiff prays: For a writ of *mandamus* directed to all defendants, commanding that they forthwith pay the award in full, and "take such legal steps as may be necessary to provide for the payment of said award," and for such other and further relief as the court may deem just and proper.

It is noted in the record that demurrers filed by defendants Board of County Commissioners of Vance County and North Carolina State Board of Health were sustained, and that same are not necessary to an understanding of this appeal.

Upon hearing at October Civil Term, 1941, it being made to appear that all members of Vance County Board of Health were personally served with summons in this action, and have filed no pleading, time for which has expired, the court finds, briefly stated, these facts:

1. That on 2 April, 1937, plaintiff suffered injury by accident, arising out of and within course of his employment by the Vance County Board of Health, for which award as described was granted by the North Carolina Industrial Commission.

2. That the award was duly docketed in office of Clerk of Superior Court of Vance County, and the Board of Health of said county has refused to pay same.

3. That the award is proper, that no appeal has been taken therefrom and that Vance County Board of Health is liable and responsible for and ought to pay the full payment thereof.

Thereupon the court adjudged that plaintiff is entitled to a writ of *mandamus* against the defendants, S. B. Rogers, Chairman; H. T. Powell, E. M. Rollins, Dr. R. T. Upchurch, Dr. H. H. Bass, Jr., and Dr. I. H. Hoyle, composing and being the Vance County Board of Health, commanding them to pay to plaintiff, or to his attorneys, on or before 10 November, 1941, the full sum of the said award, and ordered that such writ be served upon them by the sheriff of Vance County.

Said defendants appeal therefrom to Supreme Court and assign error.

Gholson & Gholson and Thomas Ruffin for plaintiff, appellee.
Irvine B. Watkins for defendants, appellants.

WINBORNE, J. It is well settled in this State that "*Mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the parties to be coerced must be

under legal obligation to perform the act sought to be enforced." *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *White v. Comrs. of Johnston County,* 217 N. C., 329, 7 S. E. (2d), 825, and cases there cited.

Applying these principles to the facts alleged in the complaint and found by the court, we are of opinion that plaintiff fails to show clear legal right to *mandamus.*

In the first place, it is not alleged and found as a fact that a judgment has been rendered on the award of the North Carolina Industrial Commission.

The rights and remedies granted under the North Carolina Workmen's Compensation Act to an employee where he and his employer, respectively, have accepted the provisions of the act to pay and accept compensation on account of personal injury or death by accident are exclusive, and exclude all other remedies. P. L. 1929, ch. 120, sec. 11. *Bright v. Motor Lines,* 212 N. C., 384, 193 S. E., 391; *Tscheiller v. Weaving Co.,* 214 N. C., 449, 199 S. E., 623.

And while under the Act an award of the Industrial Commission, if not reviewed in due time, sec. 58, or upon such review, sec. 59, is conclusive and binding as to all questions of fact, sec. 60, the procedure prescribed for the enforcement of the award, set forth in sec. 61, in so far as pertinent to case in hand, is that any party in interest may file in Superior Court of the county in which the injury occurred a certified copy of an award of the Commission unappealed from, whereupon said court shall render judgment in accordance therewith and notify the parties. It is further provided that such judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though judgment had been rendered in a suit duly heard and determined by said court. This is the only method prescribed for the enforcement of an award of the Industrial Commission.

Whether the rendition of such judgment by the Superior Court be mandatory, as appears to be the rule in the Commonwealth of Virginia, *Richmond Cedar Works v. Harper,* 129 Va., 481, 106 S. E., 516, and *Parrigen v. Long,* 145 Va., 637, 134 S. E., 562, or a judicial act, as the rule appears to be in the State of Illinois, *Fico v. Industrial Commission,* 353 Ill., 74, 186 N. E., 605, and in the Commonwealth of Massachusetts, *In re Employers Liability Assurance Corporation,* 215 Mass., 497, 102 N. E., 697, an award is not enforceable by execution or other process until judgment is entered thereon as provided and in the court designated in the Act. 71 C. J., 1425, Workmen's Compensation Act, sec. 1378. See, also, *Oren v. Swift & Co.,* 330 Mo., 869, 51 S. W. (2d), 59.

Mandamus as sought in this action may be considered the equivalent of execution, *Bear v. Comrs.,* 124 N. C., 204, 32 S. E., 558; *Withers v. Comrs.,* 163 N. C., 341, 79 S. E., 615; *Casualty Co. v. Comrs. of Saluda,*

214 N. C., 235, 199 S. E., 7; *Dry v. Drainage Comrs.*, 218 N. C., 356, 11 S. E. (2d), 143, and there must be a judgment upon which to predicate it.

In the second place the complaint negatives the existence of available funds with which to pay the award of compensation.

The failure to allege and prove that there are available funds to pay plaintiff's claim goes to the very root of this proceeding. Hence, if there are no funds available with which to pay plaintiff's award, a writ of *mandamus* would not issue to require the Board of Health to do an impossible act. See *Woodcock v. Board of Education* (Utah), 187 Pac., 181, 10 A. L. R., 181, wherein the Supreme Court of Utah, speaking to an analogous factual situation, expresses the principle in this manner: "While it is true that a public officer or board may by *mandamus* be coerced to pay a particular claim, yet it is also true that, in order to obtain a peremptory writ of mandate to require an officer or board to pay public funds, it must be alleged, and, if denied, proved, that such officer or board has funds with which to pay that particular claim. To that effect are all the authorities," citing cases.

The general rule is that county boards of health and other administrative agencies, being creatures of statute, have only such powers as are conferred upon them by statute, either expressly or by necessary implication. 25 Am. Jur., 289-293, in Health, secs. 5-11.

In this State the creation of county boards of health is authorized, and their powers and duties are defined and set forth by statute, secs. 7064 to 7075, as amended, parts of ch. 118 of the Consolidated Statutes of North Carolina which pertains to the administration of public health laws of the State. It is provided in C. S., 7065, that the county board of health shall have immediate care and responsibility of the health interest of the county, and make such rules and regulations, pay such bills and salary and impose such penalties as in their judgment may be necessary to protect and advance the public health, but that all expenditures, before being paid, shall be approved by the Board of County Commissioners. *Halford v. Senter et al.*, 169 N. C., 546, 86 S. E., 525. No power to tax is given. Nevertheless, the statute indicates that a county board of health is a subordinate governmental agency (referred to by *Hoke, J.*, in case of *Board of Health v. Comrs.*, 173 N. C., 250, 91 S. E., 1019, as a public *quasi*-corporation), which of necessity must derive funds either from the State or county, or both, with which to pay salaries or other expenditures required in carrying on the health program of the State.

Thus, while holding, as we do, that the required allegations in respect to available funds are lacking, it must be understood that we are not holding that a county board of health may not be required to put in

motion such legal machinery as it may have for obtaining, and to obtain from authorized sources funds with which to pay an award of compensation to its employee injured by accident arising out of and in the course of his employment. *Cf. Woodcock v. Board of Education, supra.* In this connection, while the question is not now presented, what is "employment," "employer," or "employee" within the meaning of the North Carolina Workmen's Compensation Act, P. L. 1929, ch. 120, sec. 2 (a) (b) and (c), may be of concern in determining future procedure.

For the reasons stated the judgment below is

Reversed.

MATTIE BYNUM v. THE FIDELITY BANK OF DURHAM, N. C., AND LEON W. POWELL, ADMINISTRATOR OF THE ESTATE OF JOANNA LEATHERS, DECEASED.

(Filed 18 March, 1942.)

1. Appeal and Error § 39—

A new trial will be granted only for prejudicial or harmful error.

2. Gifts § 4—

The essentials of a gift *causa mortis* are a gift made in expectancy of death to take effect only upon the death of the donor from the existing disorder, and delivery of the gift by the donor.

3. Same—Evidence held sufficient to be submitted to jury on question of donor's delivery of gift.

The evidence in this case tended to show that intestate called plaintiff to her bedside, directed plaintiff to get her pocketbook, which contained certain keys, and a tin box, that intestate put the keys in plaintiff's hands and told her not to let anyone else have them, that intestate, with the box resting on her lap, named the contents of the box and told plaintiff "everything in this box is yours and this key unlocks this box," instructed plaintiff "take the box and put it up" or "put it back in the closet," and told several witnesses that she had given plaintiff everything. *Held:* The evidence is sufficient to be submitted to the jury on the question of intestate's delivery of a savings account evidenced by a bank book contained in the tin box.

APPEAL by defendant Leon W. Powell, Administrator of the Estate of Joanna Leathers, deceased, from *Erwin, Special Judge,* at July-August Term, 1941, of DURHAM.

This case was before this Court on the question of proper pleadings at the Fall Term, 1940. *Bynum v. Bank, reported* in 219 N. C., 109, 12 S. E. (2d), 898.

Joanna Leathers, a widow, 70-odd years of age, died intestate in Durham County on 15 September, 1939. She had no lineal descendants.

She left surviving her certain collateral kin. Mattie Bynum, the plaintiff, wife of Will Bynum, is 43 years of age and was born to Zilphia Sears, a niece of Frank Leathers, in the home of Frank and Joanna Leathers. Two weeks after plaintiff's birth Zilphia Sears left her child with Frank and Joanna Leathers, who reared her. Plaintiff's name was changed to Mattie Leathers and she was grown before she knew that she was not the child of Frank and Joanna Leathers. She was supported and educated by them and treated by them as their child until her marriage in 1916. After plaintiff's marriage she and her husband went North to live. At the request of Frank Leathers she and her husband returned to Durham in 1931 and lived in the home of Frank and Joanna Leathers until the death of both of them. Frank Leathers died in February, 1932 and in his will he made certain provisions for the plaintiff and referred to her as his adopted daughter. The plaintiff, however, was never legally adopted by Frank and Joanna Leathers.

Prior to the death of Joanna Leathers she had a savings account in the Fidelity Bank of Durham, N. C., in the amount of approximately $10,000.00. This savings account was represented by Savings Bank Book No. 3375. The plaintiff claims these funds by reason of an alleged gift *causa mortis*. The defendant, Fidelity Bank of Durham, is merely a stakeholder and has no interest in this controversy.

Plaintiff introduced evidence tending to prove her allegations of a gift *causa mortis* of the funds held by the defendant, Fidelity Bank of Durham, represented by the Savings Bank Book No. 3375, issued by the bank to Joanna Leathers.

Defendant Leon W. Powell, administrator of the estate of Joanna Leathers, filed an answer and denied the material allegations of the complaint, and by way of further answer and defense, cross-complaint and cross-action, alleged the plaintiff was not entitled to any of the property belonging to the estate of Joanna Leathers; further alleging that the plaintiff wrongfully and unlawfully took possession of an automobile, household goods and kitchen furniture, jewelry, personal effects and other personal property of an alleged value of $2,000.00, owned by Joanna Leathers at the time of her death; and that if plaintiff obtained possession of any property of Joanna Leathers, deceased, it was by wrongful, coercive, improper and unlawful means and as a direct result of undue influence exerted by the said Mattie Bynum upon her.

The court submitted the following issues:

"1. Did the deceased, Joanna Leathers, during her lifetime give the savings bank deposit in controversy to the plaintiff, Mattie Bynum, as a gift *causa mortis,* as alleged in the complaint? Answer: 'Yes.'

"2. If so, was the alleged gift of such savings bank deposit procured by undue influence exercised upon the decedent, Joanna Leathers, by

the plaintiff, Mattie Bynum, as alleged in the answer? Answer: 'No.'

"3. Did the plaintiff, Mattie Bynum, convert to her own use household goods and wares belonging to the decedent, Joanna Leathers, as alleged in the answer? Answer: 'Yes.'

"4. If so, what was the market value of such household goods and wares at the time of such conversion? Answer: '$350.00.'"

From the judgment on verdict defendant Leon W. Powell, administrator of the estate of Joanna Leathers, deceased, appealed to the Supreme Court and assigns error.

Fred C. Owen, John D. McConnell and Victor S. Bryant for plaintiff.

Hedrick & Hall, C. V. Jones and R. M. Gantt for defendant Leon W. Powell, administrator.

DENNY, J. We have examined the exceptions to the admission of evidence. In some instances evidence of like import was admitted without objection. In other instances the evidence was not such as would likely affect materially the results of the trial. On the record as a whole these exceptions fail to point to prejudicial or harmful error. Neither can the exceptions to his Honor's charge be sustained.

The only serious question for our consideration is as to the sufficiency of the evidence on the question of delivery.

The essentials of a gift *causa mortis* are set forth in Mordecai's Law Lectures, Vol. 2, at p. 1285, as follows: "There are three essentials to such a gift: (1) The gift must be with the view to the donor's death; (2) it must be conditioned to take effect only upon the death of the donor by his existing disorder; (3) there must be a delivery of the subject of the donation."

The appellant concedes that the plaintiff offered sufficient evidence to meet the 1st and 2nd essential requirements to establish a gift *causa mortis*. Therefore we must consider the evidence offered to prove the 3rd essential requirement of a gift *causa mortis*, namely, the delivery of the alleged gift.

Mary Johnson testified that she was in the home of Joanna Leathers late in the afternoon the day before Joanna went to the hospital, where she died seven or eight days later. That Joanna told her she was going to the hospital. That while she was there Joanna called Mattie Bynum into the room and told her to sit down. That Joanna Leathers was propped up in bed. That Joanna Leathers said: "Mattie, I have something to tell you." Mattie said: "Yes, Ma'am," and Joanna said: "I have made up my mind to go to the hospital," and Mattie said: "You have, Mamma?" and Joanna said: "Yes, I am going, but I am not coming back the way I am going."

This witness further testified that Joanna Leathers then directed Mattie to get her pocketbook, which contained certain keys. That upon delivery of the pocketbook Joanna took out a bunch of keys and said, "Mattie, these are your keys, don't you give these keys to nobody, don't you let nobody have them." Mattie Bynum was instructed in the presence of the witness to get a tin lock box out of the closet in the room which Joanna Leathers then occupied. The box was placed on Joanna's lap and while the box was resting on her lap Joanna said: "Mattie, everything in this box is yours and this key unlocks this box and in this box it is that little box you sent to Pa, in that box is a little wooden box, the deed is in that, and in the box you sent to Pa, the big bank book and the little bank book is in there." The keys were placed in Mattie Bynum's hand by Joanna Leathers. Joanna still held the box on her lap when another neighbor, Estelle Cameron, came into the bedroom. Joanna told her of her plans to go to the hospital and stated that she had given Mattie her keys and that "Everything in that box is Mattie's." She then again described what was in the box. About that time Dr. Bowles rang the doorbell. According to this witness, Joanna said in a low tone, "Mattie, take the box and wrap it up and put it back in the closet."

Estelle Cameron testified that Joanna said: "Take the box and put it up."

Dr. F. N. Bowles testified that Joanna said on this particular occasion that she had decided she would go to the hospital and that "She wanted me to look after her and not to worry about my money, that she had given all of her things to Mattie and that Mattie would see that I got paid." That Mattie had some keys but that he did not see the box.

One of the leading cases in this State on the subject of gifts *causa mortis* is *Newman v. Bost,* 122 N. C., 524, 29 S. E., 848. In that case the donor gave the donee certain keys and said: "What is in this house is yours," and at another time "What property is in this house is yours." A bureau in which was found a life insurance policy after the death of the donor was present in the room when the keys were handed to the donee. The Court said in that opinion: "It being claimed and admitted that the life insurance policy was present in the bureau drawer in the room where it is claimed the gift was made, and being capable of actual manual delivery, we are of the opinion that the title to the insurance policy did not pass to the plaintiff, but remained the property of the intestate of the defendant. But we are of the opinion that the bureau and any other article of furniture, locked and unlocked by any of the keys given to the plaintiff, did pass and she became the owner thereof. This is upon the ground that while these articles were present, from their size and weight they were incapable of actual manual delivery,

and that the delivery of the keys was a constructive delivery of these articles, equivalent to an actual delivery if the articles had been capable of manual delivery." Also: "The safe and box, in *Thomas v. Lewis, supra* (37 Am. St. Reports, 878), were not present, so that the contents could not have been taken out and delivered to the donee by the donor. The ordinary use of a stand of bureaus is not for the purpose of holding and securing such things as a life insurance policy, though they may be often used for that purpose, while a safe and box deposited in the vault of a bank are. A bureau is an article of household furniture, used for domestic purposes, and generally belongs to the ladies' department of the household government, while the safe and box in *Thomas v. Lewis* are not. The bureau itself, mentioned in this case, was such property as would be valuable to the plaintiff."

As stated in the above case, a bureau drawer is not ordinarily used for the purpose of holding valuable papers, but small tin lock boxes are, in fact they are used primarily for that purpose. The delivery of a lock box and the keys thereto by a donor to a donee, together with a recital of the contents of the box and the statement that "Everything in this box is yours," would constitute delivery of the contents of the box, as required by the decisions of this Court. A discussion of the many cases cited in the very thorough and able briefs filed by the attorneys for the respective parties in this action we deem unnecessary. Whether or not there was a delivery by Joanna Leathers to Mattie Bynum of the Savings Bank Book No. 3375, issued by the Fidelity Bank of Durham to Joanna Leathers, which book was contained in the tin lock box, was a proper question to be submitted to the jury.

Again, in *Newman v. Bost, supra,* the Court in discussing a gift of certain furniture to the plaintiff, as a gift *inter vivos,* said: "The intention to give this property is shown by a number of witnesses and contradicted by none. The only debatable ground is as to the sufficiency of the delivery. But when we recall the express terms in which he repeatedly declared that it was hers; that he had bought it for her and had given it to her; that it was placed in her private chamber, her bedroom, where we must suppose that she had the entire use and control of the same, it would seem that this was sufficient to constitute a delivery. There was no evidence, that we remember, disputing these facts. But if there was, the jury have found for the plaintiff, upon sufficient evidence at least to go to the jury, as to this gift and its delivery." And "It is held that the law of delivery in this State is the same in gifts *inter vivos* and *causa mortis.*"

We think the plaintiff offered sufficient evidence on the question of the delivery of the keys to the lock box, the lock box and its contents to the plaintiff, to go to the jury on the question of the delivery of the

savings bank deposit in controversy, represented by a savings account book in the lock box. The jury found for the plaintiff as to the gift and its delivery. The other exceptions are not of sufficient merit to disturb the verdict of the lower court.

In the trial below we find

No error.

KATIE LEE DEMAI, ADMINISTRATRIX OF THE ESTATE OF JESSE B. LEE, SR., DECEASED, *v.* FLONNIE M. TART AND MRS. IONAH WILSON, EXECUTRIX OF JESSE F. WILSON, TRUSTEE, DECEASED.

(Filed 18 March, 1942.)

1. Limitation of Actions § 12a—

Notation of part payment entered on a note by the payee after the note has become barred by the statute of limitations is incompetent as a self-serving declaration; but such notation made prior to the bar of the statute is competent as a declaration against interest. However, entry of the date by the payee is no evidence that the notation was made prior to the bar of the statute, but such fact must be established by evidence *aliunde*, and in the absence of evidence *aliunde* it is insufficient as a matter of law.

2. Same—

Part payment operating to start the running of the statute of limitations anew against the right of action to foreclose a mortgage or deed of trust, C. S., 437 (3), is any payment on the debt secured by the instrument, and the action to foreclose is not barred within ten years from such payment notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note.

3. Limitation of Actions § 1—

Our statutes of limitation generally limit the time within which actions may be brought, and thus operate upon the remedy but do not destroy the right.

4. Same—

Trustor made part payment on one of the notes secured by the deed of trust, and an action to foreclose the deed of trust was instituted within ten years thereafter. *Held:* Although an action on the note not credited with part payment was barred, the debt evidenced thereby was not destroyed, and the proceeds of sale may be lawfully applied to the entire balance of the debt secured by the deed of trust, including that evidenced by the barred note.

APPEALS of plaintiff and defendant Flonnie M. Tart from *Grady, Emergency Judge,* at September-October Term, 1941, of HARNETT.

On 14 January, 1928, the defendant Tart executed to Jesse B. Lee, Sr., plaintiff's intestate, a deed of trust conveying the lands therein described in security for the payment of a debt of $2,000.00. The defendant at the same time executed to the plaintiff's intestate two promissory notes in the sum of $1,000.00 each, bearing interest from date, due respectively 13 April, 1928, and 15 December, 1928, which are recited in the deed of trust.

Alleging failure to pay the notes, and hence breach of the conditions of the trust, the plaintiff, administratrix of the mortgagee who had meantime died, brought this action to recover on the notes and foreclose the mortgage. Suit was instituted 6 March, 1941.

The defendants admitted the execution of the notes and mortgage, pleaded partial payment of the note due 13 April, 1928, and pleaded the statute of limitations on the note maturing 15 December, 1928.

The jury found with the defendants as to the note maturing 13 April, 1928, and no controversy respecting it is involved in the appeal.

On the note due 15 December, 1928, there appears the following entry of credit, in the handwriting of the now decedent payee: "Paid on this note $2.50 April 20, 1938."

Being of opinion that the endorsement was not sufficient, as there was no evidence *aliunde* to support it in any aspect, the judge gave the jury a peremptory instruction to find the issue relating to the bar of the statute in favor of defendants and denied recovery on the note. The form of the instruction is, *in hac vice*, immaterial. Upon instruction the jury found the action to foreclose the mortgage not barred by the statute of limitations. Judgment of foreclosure followed, with provision that the proceeds of sale be applied, as necessary, in satisfaction of the whole debt, including that evidenced by the $1,000.00 note barred by the statute. The amount due on this note, without application of the statute of limitations, was ascertained by the verdict.

The plaintiff appealed, assigning as error the instruction given to the jury to find that the note due 15 December, 1928, was barred by the statute, and refusal of recovery thereupon in the judgment, supporting these objections by formal exceptions to the instruction, to the refusal to set aside the verdict on the appropriate issue, and to the signing of the judgment which does not specifically decree recovery on the note.

Defendant Tart appealed, assigning as error the signing of the judgment authorizing the sale of the lands and the application of the proceeds to the barred note, or the debt evidenced thereby. The defendant remained in possession of the lands and was in such possession at the commencement of this action.

The appeals are more conveniently considered together.

J. A. McLeod for plaintiff.
I. R. Williams for defendant.

SEAWELL, J. The appeals of plaintiff and defendant present two main questions: (a) whether the note due 15 December, 1928, was barred by the statute of limitations as a matter of judicial determination, and (b) whether, upon foreclosure of the deed of trust, the proceeds of the sale may be lawfully applied to the debt evidenced by the barred note.

(1) The first question depends upon the effect of the purported credit endorsement on the note maturing 15 December, 1928.

Much the greater weight of authority of decided cases is to the effect that a credit endorsement in the handwriting of the payee made upon a promissory note is competent in evidence of the fact of the payment when supported by evidence *aliunde* that the endorsement was actually made before the bar of the statute fell. Anno., 59 A. L. R., 905. This is put upon the ground that the credit, by reason of the fact that it diminishes the amount due upon the note, is in the nature of a declaration against interest. *Goddard v. Williamson,* 72 Mo., 131; *Wilson v. Pope,* 37 Barb. (N. Y.), 321; *Williams v. Alexander,* 51 N. C., 137; *Addams v. Seitzinger,* 1 Watts & S. (N. Y.), 243. The holding is otherwise as to such an endorsement made after the bar of the statute has become complete, since the endorsement would be obviously in the category of a self-serving declaration. *Smith v. Simms,* 9 Ga., 418; *Young v. Alford,* 118 N. C., 215, 23 S. E., 973; *Bond v. Wilson,* 129 N. C., 387, 40 S. E., 182; *Concklin v. Pearson,* 30 S. C. L. (1 Rich.), 391. Our own Court has long been committed to the majority view. *Williams v. Alexander, supra; Woodhouse v. Simmons,* 73 N. C., 30; *Grant v. Burgwyn,* 84 N. C., 560; *White v. Beaman,* 85 N. C., 3; *Young v. Alford, supra; Bond v. Wilson, supra.* The fact that the entry itself bears date within the statutory period, without evidence *aliunde* that the endorsement was actually so made, is not accepted as evidence of the date of the endorsement. *Goddard v. Williamson, supra; Grant v. Burgwyn, supra; Mills v. Davis,* 113 N. Y., 243, 21 N. E., 68.

The credit of a relatively insignificant amount on a large obligation, close to the time at which the bar of the statute would become complete, is looked upon with suspicion, *Chambers v. Walker,* 38 S. C. L. (4 Rich.), 548; *Merchants & P. Nat'l Bank v. Hunt,* 113 S. C., 394, 102 S. E., 720, and presents a circumstance which challenges the soundness of the ruling. But it is still within the range of minor tolerances which are often the price of a rule intended to be of general service. Our courts, while agreeable to the admission of endorsements as evidence of payment, when supported by proper evidence *aliunde,* have not yet adopted the view that such evidence, when admitted, is given a presump-

tive effect in the sense that it is in law a *prima facie* establishment of the fact of payment; and the best considered cases in other jurisdictions regard it as a matter for the jury. *Brown v. Hutchings,* 14 Ark., 83; *Smith v. Simms, supra* (9 Ga., 418); *Wheeler v. Robinson,* 50 N. H., 303; *Ward v. Hoag,* 78 App. Div., 510, 79 N. Y. Supp., 706; *Mills v. Davis, supra* (113 N. Y., 243, 21 N. E., 68); *Young v. Alford, supra* (118 N. C., 215, 23 S. E., 973).

In the case at bar it is not necessary to pass upon the legal effect of the endorsement as evidence of payment, since there is in the record no evidence *aliunde* as to when the endorsement was made. The court below was therefore justified in holding as a matter of law that the note had been barred by the statute when the present action was instituted.

(2) Under C. S., 437 (3), an action for the foreclosure of a mortgage or deed of trust is barred unless begun "within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same." Of significance in the case at bar is the expression "within ten years after the last payment on the same."

It is admitted that on 21 March, 1931, a payment of $725.83 was made upon the note maturing 13 April, 1928, or at least within ten years from the maturity of the said note. Although this payment was allocated to one of the notes in a series of two evidencing the entire indebtedness, the language employed in the subsection above quoted—C. S., 437 (3)—must be held to refer to any payment on the debt secured by the deed of trust, without regard to its subdivision into notes suitable to the convenience or necessities of the parties. It is only when we seek the forum of enforcement that a distinction arises, and that relates to a distinction between causes of action rather than a difference in the nature of the secured debt.

Unlike the older statutes which created a rebuttable presumption of payment, our present statute limits the time within which actions may be brought and thus operates upon the remedy and not the right. The bar of the statute on a sealed promissory note—C. S., 437 (2)—is of that character, and while it takes away the forum for the enforcement of the note, it does not destroy the debt. See cases cited *infra.*

A mortgage or deed of trust which creates a lien upon lands and in effect sets them apart in a trust for the payment of a debt with suitable provisions for sale and application of the proceeds is a separable specific agreement and raises an obligation with respect to both the debt and the lands not comprehended in the promissory note given with respect to the same debt but is in addition thereto, and, in the absence of an agreement to the contrary, it is independently enforceable. *Capehart v. Dettrick,* 91 N. C., 344, 352; *Menzel v. Hinton,* 132 N. C., 660, 44 S. E.,

385. The equitable remedy of foreclosure and execution of the trust is still available, although the legal remedy of personal action on the note is barred. *Lewis v. McDowell,* 88 N. C., 261; *Capehart v. Dettrick, supra; Long v. Miller,* 93 N. C., 227; *Arrington v. Rowland,* 97 N. C., 127, 131, 1 S. E., 555; *Overman v. Jackson,* 104 N. C., 4, 8, 10 S. E., 87; *Woody v. Jones,* 113 N. C., 253, 18 S. E., 205; *Williams v. Kerr,* 113 N. C., 306, 18 S. E., 501; *Taylor v. Hunt,* 118 N. C., 168, 172, 24 S. E., 359; *Hedrick v. Byerly,* 119 N. C., 420, 25 S. E., 1020; *Menzel v. Hinton, supra; Jenkins v. Griffin,* 175 N. C., 184, 186, 95 S. E., 166. In *Menzel v. Hinton, supra,* the principle was applied to the power of sale, although action upon the mortgage might be barred. This resulted in the enactment of C. S., 2589, which prohibits the execution of the power of sale when a mortgage or deed of trust has become barred. *Spain v. Hines,* 214 N. C., 432, 434, 200 S. E., 25.

The exceptions disclose no error upon either the plaintiff's or the defendant's appeal.

No error.

H. A. PARRIS v. H. G. FISCHER & COMPANY.

(Filed 18 March, 1942.)

1. Damages § 1a—

In order to be entitled to compensatory damages plaintiff must show that the damages claimed were the natural and probable result of the acts complained of, and show the amount of loss with reasonable certainty, which rule applies in actions in tort as well as actions *ex contractu.*

2. Same—

Plaintiff gave his old therapeutic machine, which he contended was usable, in part payment of a new machine. The jury found that the new machine was worthless for the purpose for which it was sold. After plaintiff declined to make further payments, defendant, through its agent, repossessed the new machine in plaintiff's absence. *Held:* Plaintiff's evidence that he had several patients whom he was unable to treat and who left him, is insufficient to afford a basis for the award of substantial damages to plaintiff for deprivation of the use of his machine.

3. Same—

Evidence that defendant, through its agent, peaceably repossessed a therapeutic machine on which it had a lien from the office of plaintiff in his absence, without injury to person or property, is insufficient to support the recovery of substantial damages for the conduct of defendant's agent in removing the machine.

4. Damages § 7—

In proper instances punitive damages may be awarded where only nominal damages are recoverable.

5. Same—

Evidence that defendant's agent went to plaintiff's house at a time when plaintiff was absent, and upon being informed that plaintiff was out of town, stated that plaintiff would understand, entered plaintiff's office and repossessed a therapeutic machine on which defendant had a lien, and left a note advising plaintiff that he had waited to see him and that he had taken the machine, *is held* insufficient to show a willful and wanton disregard of plaintiff's rights necessary to support the submission of an issue as to punitive damages.

6. Appeal and Error § 39—

Where the verdict of the jury establishes that the acts complained of were committed by defendant's agent while acting in the scope of his employment, plaintiff's exception to the exclusion of certain letters tendered upon the issue, becomes immaterial.

APPEAL by plaintiff from *Parker, J.*, at October Term, 1941, of NORTHAMPTON. No error.

V. D. Strickland for plaintiff, appellant.
Eric Norfleet for defendant, appellee.

DEVIN, J. This case was here at Spring Term, 1941, and is reported in 219 N. C., 292, 13 S. E. (2d), 540. The decision on that appeal was confined to the question of service of process. The case comes to us now on plaintiff's appeal from an insufficient recovery.

Plaintiff alleged and offered evidence tending to show that he was induced by the false representations of defendant's agent to purchase a new short wave therapeutic machine for use in his practice as a physician, and to give in exchange and in part payment his own therapeutic machine valued at $60. For the balance of the purchase price he executed a conditional sales agreement constituting a lien on the machine purchased. He alleged that the new machine proved to be entirely worthless for his purposes, and he so notified the defendant and declined to make any payments thereon; that some time thereafter while plaintiff and other members of his household were absent the defendant's agent, acting within the scope of his authority, wrongfully entered plaintiff's office in the house where he lived and took therefrom the machine described in the conditional sales agreement.

Plaintiff alleged that on account of the deprivation of the use of his old machine, which he was induced to deliver to the defendant by false representations, as well as on account of the wrongful entry into his premises and removal of the machine purchased from defendant, he had been damaged in the sum of one thousand dollars. He further alleged that the conduct of defendant's agent, in the manner in which the machine was taken, was oppressive and characterized by wanton and

reckless disregard of plaintiff's rights, and that by reason thereof he was entitled to recover punitive damages.

It was established by the verdict that the machine purchased from defendant was worthless for the purposes for which it was sold, that the reasonable value of the plaintiff's old machine delivered to defendant was $60, and that defendant's agent, at the time of the removal of the machine from plaintiff's house, was acting within the scope of his employment. The trial court charged the jury that plaintiff was only entitled to recover nominal damages, which "might consist of $3 or $4," and declined to submit an issue as to punitive damages. The jury thereupon found that plaintiff was entitled to recover $60, the value of plaintiff's old machine, plus $4 nominal damages, and judgment was rendered accordingly.

The plaintiff assigns error in the ruling of the court below that he was only entitled to recover nominal damages, and in the court's refusal to submit an issue as to punitive damages.

We concur in the view of the trial judge that the evidence did not afford a substantial basis upon which the jury could award the plaintiff more than nominal damages for being deprived of the use of his machine. He was allowed the full value claimed therefor. It is a well settled rule that before liability for consequential damages can be imposed upon one who has breached his contract of warranty in the sale or exchange of personal property, it must be made to appear that the damages claimed are the natural and probable results of the breach, and such as can be ascertained with a reasonable degree of certainty. *Reiger v. Worth,* 127 N. C., 230, 37 S. E., 217; *Machine Co. v. Tobacco Co.,* 141 N. C., 284, 53 S. E., 885; *Sprout v. Ward,* 181 N. C., 372, 107 S. E., 214; *Brewington v. Loughran,* 183 N. C., 558, 112 S. E., 257; *Chesson v. Container Co.,* 215 N. C., 112, 1 S. E. (2d), 357. Both the amount and the cause of the loss must be shown with reasonable certainty. *Nance v. Tel. Co.,* 177 N. C., 313, 98 S. E., 838. The rule requiring reasonable certainty in the proof of damages applies in cases of tort. *Johnson v. R. R.,* 184 N. C., 101, 113 S. E., 606; *Bowen v. King,* 146 N. C., 385, 59 S. E., 1044; *Johnson v. R. R.,* 140 N. C., 574, 53 S. E., 362; *Sledge v. Reid,* 73 N. C., 440. The plaintiff's evidence that he had several patients whom he was unable to treat and who left him is insufficient to afford a basis for the award of substantial damages on this ground.

Nor is plaintiff in better position with respect to that phase of his action based on the conduct of defendant's agent in removing the machine from plaintiff's house. There was no evidence of any injury to person or property. No actual damages were suffered by reason of the entry into plaintiff's office and removal of the machine. No more than nominal damages were recoverable on this ground. But plaintiff insists

he was entitled to have an issue submitted to the jury as to punitive damages for the wrongful entry into his premises. The grounds upon which punitive damages may be allowed have been frequently stated by this Court. *Ford v. McAnally,* 182 N. C., 419, 109 S. E., 91; *Worthy v. Knight,* 210 N. C., 498, 187 S. E., 771; *Hairston v. Greyhound Corp.,* 220 N. C., 642.

Moreover the decisions of this Court and of courts in other jurisdictions support the view that in proper instances punitive damages may be awarded where only nominal damages are recoverable. *Worthy v. Knight, supra; Webb v. Tel. Co.,* 167 N. C., 483, 83 S. E., 568; *Saunders v. Gilbert,* 156 N. C., 463-469, 72 S. E., 610; *Purcell v. R. R.,* 108 N. C., 414, 12 S. E., 954; *Wardman-Justice Motors Co. v. Petrie,* 39 F. (2), 512, 69 A. L. R., 648; 33 A. L. R., 403; 81 A. L. R., 917; 15 Am. Jur., 707. However, an examination of the record in this case leads us to the conclusion that the plaintiff's evidence did not justify an award of punitive damages. It is true there was evidence tending to show that defendant's agent went to plaintiff's house at a time when he was absent, entered his office and repossessed the therapeutic machine on which defendant had a lien, leaving a note advising plaintiff that he had waited to see him, and that he had taken the machine. The only witness who was present testified that defendant's agent inquired where plaintiff was, stating he wished to see him. Being informed that plaintiff had gone to Rocky Mount, defendant's agent said plaintiff would understand what he was doing, and that he was leaving a note for him. Thereupon the machine was removed.

We are unable to find that this testimony constituted evidence of such a willful and wanton disregard of plaintiff's rights as to require the submission of an issue of punitive damages. Upon similar facts it was so held in *Narron v. Chevrolet Co.,* 205 N. C., 307, 171 S. E., 93. See, also, *Hinson v. Smith,* 118 N. C., 503, 24 S. E., 541.

Plaintiff's exception to the ruling of the court in declining to permit the introduction in evidence of certain letters becomes immaterial in view of the verdict that the machine was removed by defendant's agent, and that the agent was acting within the scope of his employment. The plaintiff recovered the value of his old machine which had been delivered to the defendant in part payment for the new machine purchased.

In the trial we find

No error.

C. O. STORY v. EDNA STORY.

(Filed 18 March, 1942.)

1. Parent and Child § 5—

The father is primarily liable for the support of his child both before and after divorce, even where the custody of the child is awarded to the mother.

2. Divorce § 16—

Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. C. S., 1664.

3. Same—

The inherent and statutory authority of the court to protect the interests and provide for the welfare of infants cannot be affected by agreement or consent judgment entered into by the child's parents in an action for divorce, and the court has jurisdiction to modify provisions for the support of a child of the marriage, even though such provisions are stipulated in a consent order entered in the divorce action.

4. Same: Judgments § 24—

In the husband's action for absolute divorce, an order was entered by consent awarding the custody of the child of the marriage and stipulating that the husband pay a certain amount monthly for the support of the wife and child, and that the cause be retained for further orders. Thereafter decree of absolute divorce was entered. *Held:* By the very terms of the agreement the court retained jurisdiction, and had authority, upon the wife's subsequent motion in the cause, to direct the husband to pay an increased amount for the support of the child alone.

5. Divorce § 16—

The Superior Court has jurisdiction under C. S., 1664, to modify an order for the support of a child of the marriage entered in the husband's action for absolute divorce, and may do so upon the wife's motion in the cause made subsequent to the rendition of the decree of absolute divorce, C. S., 1665 and 1667 not being applicable.

APPEAL by plaintiff from *Phillips, J.*, in Chambers at Rutherfordton, N. C., 26 September, 1941. From POLK. Affirmed.

Civil action for divorce heard on motion in the cause for an increased allowance for the support of an infant child of the marriage.

On 16 July, 1937, plaintiff instituted this action for divorce on the grounds of two years separation. In his complaint he alleged that one child was born of the marriage who was then in the custody of the defendant, and prayed the court that it, after due inquiry, "award the custody of said Mary Frances Story either to the plaintiff or the defend-

ant," etc., and that the court "award such allowance for the support of said child as to the court may seem just and right, and within the means of the plaintiff to pay." The defendant answered and joined in the prayer that the court award the custody and provide for the maintenance of said infant.

On 2 September, 1938, during the August Term, 1938, Polk Superior Court, Pless, J., entered an order by consent of the parties awarding the custody of said child to the defendant subject to certain stipulations therein contained and directed that the plaintiff pay into the office of the Clerk of the Superior Court of Polk County $25.00 per month to be paid by the clerk to the defendant "for the use and benefit, support and maintenance of herself and the offspring of the marriage of the parties, which said amount shall be in payment of all liability and responsibility of the plaintiff to the defendant for said purpose." On 3 September, 1938, during the same term, judgment of divorce absolute, on issues duly answered by the jury, was entered.

Thereafter plaintiff made a motion in the cause for a modification of said order. This motion was heard 9 April, 1941, and the order was modified so as to award part time custody of said child to plaintiff and permit him to visit the child during the periods it was in the custody of the mother.

On 11 August, 1941, defendant served notice on the plaintiff of a motion for further modification of said order. This motion came on to be heard before Phillips, J., 26 September, 1941, in chambers at Rutherfordton, N. C., at which time plaintiff likewise moved for a modification thereof. Upon the hearing of this motion the judge below, after finding certain facts, awarded the permanent custody of the child to the defendant and ordered that the plaintiff pay into the office of the Clerk of the Superior Court of Polk County, "for the use and benefit of said Mary Frances Story the sum of $35 per month." The plaintiff excepted and appealed.

Massenburg, McCown & Arledge for plaintiff, appellant.
C. O. Ridings and Wade B. Matheny for defendant, appellee.

BARNHILL, J. The only exception presented for consideration is the exception to the judgment. The plaintiff bottoms his assignment of error primarily upon the contention that the original order constituted a consent judgment of the parties and that by reason thereof it is not subject to modification by the court.

In the consideration of this assignment it must be noted in the beginning that the original order expressly provided that "this cause is retained for further orders upon proper notice." It must be further noted

that while the original order provided that the stipulated payments were to be made "for the use and benefit, support and maintenance" of the defendant and the child, the last order, from which the plaintiff appealed, provided for payment for the support of the child only.

The father is primarily liable for the support of his child both before and after divorce, even where the custody of the child is awarded to the mother, *Sanders v. Sanders,* 167 N. C., 319, 83 S. E., 490.

Upon the institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after the final decree of divorce. C. S., 1664; *Tyner v. Tyner,* 206 N. C., 776, 175 S. E., 144; *Sanders v. Sanders, supra.*

No agreement or contract between husband and wife will serve to deprive the court of its inherent as well as statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by separate agreement or by a consent judgment; *In re Albertson,* 205 N. C., 742, 172 S. E., 411; *Morris v. Patterson,* 180 N. C., 484, 105 S. E., 25; *Webster v. Webster,* 213 N. C., 135, 195 S. E., 362; but they cannot thus withdraw children of the marriage from the protective custody of the court. *In re Albertson, supra; Tyner v. Tyner, supra.* The child is not a party to such agreement and the parents cannot contract away the jurisdiction of the court which is always alert in the discharge of its duty toward its wards—the children of the State whose personal or property interests require protection. *Latta v. Trustees,* 213 N. C., 462, 196 S. E., 862. In such case the welfare of the child is the paramount consideration to which even parental love must yield, and the court will not suffer its authority in this regard to be either withdrawn or curtailed by any act of the parties.

Hence, even if we accept the contention of the plaintiff that the order constitutes a judgment by consent, the court below had full jurisdiction to hear the matter on the motion of the defendant and to make the order from which plaintiff appeals.

Furthermore, the plaintiff consented that the cause should be retained for further orders and decrees. He is bound by his own act. It does not now rest with him to challenge the authority of the court to modify the order in accord with the very terms of the agreement as thus expressed.

A careful reading of *Webster v. Webster, supra,* will disclose that the opinion in that case is not out of accord with our present conclusion. *Lentz v. Lentz,* 193 N. C., 742, 138 S. E., 12, in so far as it seems to conflict, is expressly overruled.

Plaintiff contends that the court was for a further reason without jurisdiction. He relies upon the language of C. S., 1665, and C. S.,

1667, as interpreted by this Court in *Silver v. Silver,* 220 N. C., 191, and the cases therein cited. This contention is without merit. This is not an action under C. S., 1667. The authority of the court below rests in the language of C. S., 1664. Plaintiff raised the issue in his complaint. The plenary jurisdiction of the court was thereby invoked and was properly exercised.

The judgment below is

Affirmed.

STATE v. ARTHUR PATTON, JR.

(Filed 18 March, 1942.)

1. Statutes § 9—

Objection on the ground that the warrant charged defendant with the violation of a statute which had been repealed is untenable when it appears that the statute upon which the warrant was drawn had been amended by an act which did not change the language defining the offense but only changed provisions relating to the counties in which the act should be applicable, and that the statute was applicable to the county in which defendant committed the acts proscribed both before and after its amendment. C. S., 4310, as amended by ch. 258, Public Laws 1941.

2. Fires § 4—

Evidence that the county in which defendant negligently or willfully started forest fires was in charge of the State Forest Service and that therefore C. S., 4310, as amended by ch. 258, Public Laws 1941, was applicable to the county, defendant having offered no evidence to the contrary, *is held* sufficient, and defendant's exception based upon the amendment of the statute cannot be sustained.

3. Criminal Law § 64—

While the trial judge has the discretionary power to change the sentence during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentence, since defendant's exercise of his right to appeal, C. S., 4650, should not prejudice him in any manner.

4. Criminal Law § 68b—

Defendant's consent to the terms upon which prayer for judgment is continued does not waive his right to appeal.

APPEAL by defendant from *Phillips, J.,* at September Term, 1941, of McDOWELL. Remanded.

The defendant was charged with willfully or negligently setting woods on fire, in violation of C. S., 4310, as amended by ch. 258, Public Laws 1941.

The jury returned verdict of guilty. The defendant moved to set aside verdict and for new trial. The motion was denied and defendant excepted. Thereupon the following proceedings were had: "The court said: 'Upon motion of the defendant and by his consent, prayer for judgment is continued for twelve months on condition defendant be of general good behaviour and that he pay into the office of the Clerk of the Superior Court a fine of $25.00 and costs. If it is made to appear to the court that the defendant has not been of general good behaviour and has violated any of the laws of the State, the Solicitor is directed to pray the judgment of the Court.' Counsel for defendant: 'May I make my appeal entries?' Thereupon Judge Phillips made the following statement: 'Strike the judgment out,' and dictated the following judgment: 'That the defendant be confined in the common jail of McDowell County for a term of ninety days,' and to which judgment the defendant promptly excepted and appealed to the Supreme Court of North Carolina."

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

Charles Hutchins for defendant.

DEVIN, J. The defendant assigns as error certain rulings of the court below relating to the admission of testimony, but upon examination we find the exceptions without substantial merit. The motion for judgment as of nonsuit was properly denied.

The statute for violation of which this defendant was convicted, C. S., 4310, was amended by ch. 258, Public Laws 1941, but the language defining the acts made unlawful, as charged in the warrant, was unchanged. The original statute applied only to McDowell and certain other counties. The amendment made the provisions of the act statewide, but applicable "only in those counties under the protection of the State Forest Service in its work of fire control." There was evidence tending to show that those in charge of the State Forest Service for the purpose of fire control were exercising their functions in the county within which fires were alleged to have been set out by the defendant, and that this case was investigated and prosecuted as a duty imposed upon this agency of the State in McDowell County. The defendant offered no evidence to the contrary. The exception based upon the amendment of the statute cannot be sustained.

However, it appears from the record that after the trial judge had imposed sentence that the prayer for judgment be continued on condition

that the defendant be of good behaviour and pay a fine of $25.00 and the costs, the defendant gave notice of appeal. Thereupon the judge ordered the previous judgment stricken out and imposed a sentence of ninety days in jail.

While undoubtedly the presiding judge had the power to change his judgment at any time during the term in his sound discretion (*S. v. Godwin,* 210 N. C., 447, 187 S. E., 560), yet it seems here, under the circumstances described in the record, the action of the judge was induced by the defendant's expression of his intention to appeal. This tended to impose a penalty upon the defendant's right of appeal and to affect the exercise of his right to do so. C. S., 4650; *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9; *S. v. Burgess,* 192 N. C., 668, 135 S. E., 771.

It may be noted that in the same statute wherein provision was made for the organization of this Court, in 1818, it was declared that appeals might be taken from the sentence or judgment of the Superior Court "in any cause of action, civil or criminal," thus establishing the policy, ever since adhered to, of unlimited right of appeal to the Supreme Court by any party aggrieved. This right ought not to be denied or abridged, nor should the attempt to exercise this right impose upon the defendant an additional penalty or the enlargement of his sentence. Doubtless the trial judge felt impelled to change the sentence by the fact that he understood the defendant had consented to the judgment first imposed. But the defendant's consent to the terms of the judgment did not constitute a waiver of his right of appeal for errors to be assigned. The defendant would have had the right to appeal even if he had pleaded guilty. In *S. v. Calcutt, supra,* the judgment, which was imposed after the defendant in that case had pleaded guilty, was held to affect his right of appeal and was stricken out for that reason. In the language of *Chief Justice Stacy,* "His appeal was allowed, and it is not to be supposed that any penalty was attached thereto or imposed as a result thereof."

In *Meaders v. The State,* 96 Ga., 299, where the sentence was increased upon the defendant's giving notice of appeal, the Court said: "As a general rule, the judgments of a court are within its breast until the end of the term, and a sentence may be amended at any time during the term and before execution has begun (citing authorities). But while the court had a right to change the sentence at the time he did, it was not proper to change it because counsel for the accused gave notice of an intention to move for a (new) trial. The presumption is that the sentence first imposed was in the opinion of the court a proper punishment for the offense, and no further reason for changing it appears from the record than that stated in the bill of exceptions."

In *Huff v. Huff,* 73 W. Va., 330, a provision in the judgment of the trial court that the defendant should be penalized in case application

for appeal should be made was held to unduly restrain the right of appeal. In *S. v. Pallotti,* 119 Conn., 70, the sentence was modified to conform to the previously expressed intention of the court. In *S. v. McLamb,* 203 N. C., 442, 166 S. E., 507, the sentence first imposed was increased during the term and after notice of appeal had been given, but the record in that case discloses that this was done on motion of the solicitor, upon notice to the defendant, and after the hearing of additional evidence as to the character of the defendant.

While in *Nichols v. U. S.,* 106 F., 672, upon facts similar to those in the case at bar, a different result obtained, the court there used this language: "The bill of exceptions does not show that the first sentence was set aside, and the second imposed, doubling the period of imprisonment, because the defendant had declared his intention of appealing the case. A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant."

We find no error in the trial, but for the reason stated we think the sentence imposed should be stricken out and the case should be remanded for resentence, and it is so ordered.

Remanded.

MRS. MAY EDNA CARLAND, FRANK LITTRELL, HOWARD LITTRELL, VIRGINIA WRIGHT, CARROLL LITTRELL, WINFRED KERLEE, BY HIS NEXT FRIEND, MAY EDNA CARLAND, v. CECIL ALLISON.

(Filed 18 March, 1942.)

1. Insane Persons § 12—

In an action to annul a deed on the ground that the grantor was mentally incompetent, plaintiffs may offer the deed in evidence in order to attack it.

2. Same—

In an action to annul a deed on the ground that the grantor was mentally incompetent, evidence of mental incapacity of the grantor alone is sufficient to defeat defendant's general motion to dismiss as of nonsuit.

3. Same—

Where the jury finds that the grantor was mentally incapable of executing the deed attacked, evidence of defendant's long association with the grantor will support a further finding that the defendant had notice of the incapacity, which raises a presumption of fraud.

4. Trial § 37—

The issues to be submitted to the jury are those raised by the pleadings and supported by the evidence.

5. Insane Persons § 12—

Where, in an action to annul a deed on the ground that grantor was mentally incompetent, defendant does not allege the amount of consideration paid or pray its recovery, it is not error for the court to refuse to submit an issue as to the amount of consideration paid, defendant being fully protected by order of the court retaining the cause for adjustment between the parties as to rents and refund of consideration.

6. Same—

In an action to annul a deed on the ground that the grantor was mentally incompetent, evidence of inadequacy of consideration is competent to be considered by the jury together with other facts and circumstances adduced by the evidence in passing upon the issue of fraud and undue influence, notwithstanding that the question of defendant's right to recover the consideration paid if the deed is canceled is reserved for later determination.

7. Same: Appeal and Error § 39—Charge construed as a whole held not to contain prejudicial error.

In this action to annul a deed on the ground that the grantor was mentally incompetent, the court charged the jury that the burden was upon plaintiff to show by the greater weight of the evidence that the grantor did not have mental capacity "to intelligently understand what he was doing." Immediately preceding this instruction the court defined "intelligent understanding" as embracing "mental capacity to understand what property he is disposing of, the person to whom he is conveying, the purpose for which the disposition is made, and the nature and consequence of his act." *Held:* Construing the charge as a whole it does not contain harmful or prejudicial error upon this point.

8. Insane Persons § 12—

Where, in an action to annul a deed, plaintiff offers evidence of the mental incapacity of the grantor at the time of the execution of the instrument, the burden rests upon defendant to show, in part, that he was ignorant of the mental incapacity and had no notice thereof such as would put a reasonable person upon inquiry; and that he paid a just and fair compensation and took no unfair advantage.

APPEAL by defendant from *Gwyn, J.,* at August Term, 1941, of BUNCOMBE. Affirmed.

Civil action to annul a deed of conveyance on the grounds of mental incapacity, fraud and undue influence.

On or about 21 September, 1934, E. J. Kerlee executed a deed for ten acres of land in or near Black Mountain to the defendant. Kerlee died in February, 1940, and this action was instituted by his heirs at law 17 April, 1940. Plaintiff offered evidence tending to show that Kerlee, the grantor, at the time of the execution of said deed, was about 86 years of age, was infirm physically and was mentally incompetent; that he was in close association with the defendant, and that the deed was without consideration, the two receipts produced by defendant being forgeries.

The defendant offered evidence contra to the effect that the grantor was mentally competent and alert and that $1,500.00, a fair value thereof, was paid for said land.

Appropriate issues were submitted to and answered by the jury in favor of the plaintiffs. From judgment thereon the defendant appealed.

W. W. Candler, Jones, Ward & Jones for plaintiffs, appellees.
J. W. Haynes for defendant, appellant.

BARNHILL, J. The defendant excepts for that the court permitted the plaintiffs to offer in evidence, for attack, the deed executed by Kerlee to him. This exception is without merit. The plaintiffs could not engage in shadow boxing. The validity of the deed was at issue and it was necessary for them to offer it for attack to have something at which to strike. This is the accepted practice. *Burton v. Peace,* 206 N. C., 99, 173 S. E., 4.

There was ample and persuasive evidence of the mental incompetency of the grantor. This alone would defeat defendant's general motion to dismiss as of nonsuit. A careful examination of the record leaves us with the impression that there was likewise sufficient evidence on the issue of fraud and undue influence to be submitted to the jury. The jury having found that the grantor was mentally incapable of executing a deed, defendant's association with him was such as to support a further finding that he had notice of the incapacity and when there is notice of incapacity fraud is presumed. *Sprinkle v. Wellborn,* 140 N. C., 163, 3 L. R. A. (N. S.), 174. Likewise, the inadequacy of consideration, when the inadequacy is such as to shock the moral sense and cause reasonable persons to say "he got it for nothing," is sufficient to support a finding of fraud. *Dorsett v. Mfg. Co.,* 131 N. C., 254; *Hodges v. Wilson,* 165 N. C., 323, 81 S. E., 340.

It was not error for the court to decline to tender the issue submitted by the defendant. The issues to be submitted to a jury are those raised by the pleadings and supported by evidence. Defendant did not allege the amount of consideration paid or pray its recovery. On the contrary, he insisted that the transaction was valid and that the deed should be sustained. His right, if any, to recover consideration paid did not arise until the jury first answered the issue as to incompetency of the grantor in favor of the plaintiff. In this respect the defendant was fully protected by the order of the court retaining the cause "so far as any adjustment may be concerned for a refund of purchase price in the event plaintiff wins the case, (and) for the purpose of adjusting any matter as to rent."

But the defendant insists that, as the court declined to submit an issue as to the amount of the purchase price, it was error for it to charge the jury that it might consider the conflicting evidence in respect to the amount of consideration in arriving at its answer to the issue of fraud and undue influence. His exception in this respect is without merit. While mere inadequacy of consideration alone, ordinarily, is not sufficient to invalidate a deed, *Eyre v. Potter,* 56 U. S., 42, 42 L. Ed., 592; *Hodges v. Wilson, supra,* the consideration paid is an important and material fact in a trial involving fraud and undue influence in procuring the execution of a deed. *McPhaul v. Walters,* 167 N. C., 182, 83 S. E., 321. Evidence in respect thereto may be considered by the jury in connection with other facts and circumstances offered in evidence. *McLeod v. Bullard,* 84 N. C., 516; *Hodges v. Wilson, supra; Lamb v. Perry,* 169 N. C., 436, 86 S. E., 179; *Gilliken v. Norcom,* 197 N. C., 8, 47 S. E., 433.

We come now to what is perhaps the defendant's most meritorious exception. The court, in the course of its charge, instructed the jury "if you should find from the evidence, and by its greater weight, the burden being upon the plaintiff, that E. J. Kerlee at the time of the execution and delivery of the deed referred to in the complaint did not have mental capacity to intelligently understand what he was engaged in doing, it would be your duty to answer the second issue which will be submitted to you in the affirmative, that is to say, 'Yes.'" The defendant insists that it is not essential to the validity of a deed that the grantor shall have mental capacity to "intelligently understand" what he was engaged in doing and that the instruction placed too light a burden upon the plaintiffs, to his prejudice.

If we give the term "intelligently understand" its strict technical definition it may well be contended that the test of the requisite mental capacity is not quite so favorable to the plaintiffs. It appears, however, that the court, in a paragraph preceding the quoted excerpt, explained its meaning as follows: "the mental competency required by the law is that the person executing the deed have an intelligent understanding of what he is engaged in doing. Such understanding embraces mental capacity to understand what property he is disposing of, the person to whom he is conveying, the purpose for which the disposition is made and the nature and consequence of his act." This is in accord with our decisions. *In re Thorp,* 150 N. C., 487, 64 S. E., 379; *Bost v. Bost,* 87 N. C., 477; *In re Staub's Will,* 172 N. C., 138, 90 S. E., 119; *In re Ross,* 182 N. C., 477, 109 S. E., 365; *In re Craven,* 169 N. C., 561, 86 S. E., 587. Instructions that the grantor must have sufficient intelligence to enable him to have a reasonable judgment of, *Lawrence v. Steel,* 66 N. C., 584, a clear understanding of, *In re Staub's Will, supra,* and to comprehend intelligently, *In re Craven, supra,* the kind and value of the prop-

erty, etc., have been approved. Hence, upon the record as a whole we are unable to say that the charge as given constitutes harmful or prejudicial error.

In cases of this kind when mental incapacity of the grantor is shown the burden rests upon defendant to show, in part, that he was ignorant of the mental incapacity and had no notice thereof such as would put a reasonable person upon inquiry; that he paid a just and fair consideration and that he took no unfair advantage. This the defendant has failed to do.

We have considered the other exceptive assignments of error and find in them no cause for disturbing the verdict. The defendant's right, if any, to the refund of the consideration paid, to be made a charge upon the land recovered, is not now presented. He is fully protected in this respect by the order of the judge below retaining the cause.

The judgment below is

Affirmed.

JARVIS COOPER ET AL. v. MRS. W. H. H. COOPER.

(Filed 18 March, 1942.)

1. Appeal and Error § 6b—

An exception to "rendering and signing the judgment" presents only the question whether error appears on the face of the record.

2. Estates § 9d—

A life tenant who has forfeited her estate by failing to redeem the land within one year after sale of the tax lien by the sheriff, C. S., 7982, cannot be permitted to avoid the forfeiture on the ground of the insufficiency of the description of the property on the tax list, since she herself listed the property for taxation and could not have been misled by any alleged insufficiency in the description. *Bryson v. McCoy*, 194 N. C., 91, cited and distinguished in that the present action does not involve the validity of the sheriff's deed.

3. Taxation § 26b—

It is impracticable to set out on the tax list a full description of all the property listed for taxes, and the description of property thereon is sufficient if it identifies the land with reasonable certainty so that no one having an interest therein is misled.

4. Constitutional Law §§ 4a, 6c—

The wisdom or impolicy of the law is not a judicial question but the duty of the courts is to declare the law as it is written.

SEAWELL, J., dissents.

PETITION by defendant to rehear this case, reported in 220 N. C., 490.

J. Henry LeRoy for petitioner.
R. Clarence Dozier for respondents.

STACY, C. J. The case was brought back for further consideration in connection with the alleged insufficiency of the description of the property on the tax list to warrant a valid sale by the sheriff for nonpayment of taxes.

The property in question is specifically described in the complaint, and the pertinent findings made "by agreement of all parties" follow:

"That this proceeding was instituted on the 18th day of October, 1940, by the plaintiffs, who are the heirs-at-law of W. H. H. Cooper, deceased, and the remaindermen of the property described in the complaint.

"That the defendant is the owner of the life estate in said property as widow of the said W. H. H. Cooper.

"That taxes for the year 1937, and for the years 1938, 1939 and 1940, at the time of the institution of this action, were not fully paid; that the Sheriff of Pasquotank County, on October 3, 1938, offered for sale at the courthouse door of said county the real estate described in the complaint for the nonpayment of 1937 taxes, the said notice of sale describing the real estate, along with several other parcels of land belonging to other parties, as follows: 'Mrs. W. H. H. Cooper, 4 lots, amount of tax $32.80.' That said land on the said 3rd day of October, 1938, was bought in by Pasquotank County; that the same was not redeemed until the 21st day of October, 1940."

It is alleged and admitted that the property was listed for taxes by the defendant. Under such listing she later paid the taxes on the property, including the taxes for 1940. She failed to redeem, however, within one year after the sale of the tax lien on 3 October, 1938. This is the gravamen of the plaintiffs' complaint and against which the statute inveighs.

The argument is now advanced that the listing was not sufficient to warrant a sale by the sheriff for the 1937 delinquent taxes, and for this reason, it is contended, the plaintiffs are not entitled to invoke the forfeiture of the statute, C. S., 7982.

There are several answers to the position.

In the first place, it seems to be an afterthought. The only exception appearing on the record is "in rendering and signing the judgment set out in the record." This presents only the question whether error appears on the face of the record. *Query v. Ins. Co.*, 218 N. C., 386, 11 S. E. (2d), 139; *Jones v. Griggs*, 219 N. C., 700, 14 S. E. (2d), 836.

Secondly, the listing of the property was done by the defendant, and she had full knowledge of the description and the property thereby intended to be designated. Her effort to redeem, after the year was made without suggestion of any defect in the listing, and the 1940 taxes were paid by her under the same conditions. A life tenant who lists real property for taxes and thereafter suffers same to be sold by reason of his neglect or refusal to pay the taxes on the property so listed, and fails to redeem within a year after sale of the tax lien by the sheriff, ought not be permitted to set the statute at naught, either wittingly or unwittingly, by the simple device of an inadequate listing. *Fulcher v. Fulcher,* 122 N. C., 101, 29 S. E., 91. Such was not the intention of the General Assembly. See *Nash v. Sutton,* 109 N. C., 550, 14 S. E., 77.

Thirdly, the operative finding on the instant record is, that "the sheriff of Pasquotank County, on October 3, 1938, offered for sale at the courthouse door of said county, the real estate described in the complaint," etc. This was so understood at the time of the original hearing, and the point now urged was treated as Lilliputian or inconsequential. And so it is on the record as presented. It is impracticable to set out on the tax list a full description of all property listed for taxes. Reasonable certainty is all that is required. *Stone v. Phillips,* 176 N. C., 457, 97 S. E., 375. "The designation of land is sufficient, if it affords reasonable means of identification, and does not positively mislead the owner." Cooley on Taxation, 407. Of course, the defendant will not be heard to say that she misled herself. *Fulcher v. Fulcher, supra.*

Moreover, it is provided by ch. 310, Public Laws 1939, sec. 1715 (j), in repetition of earlier statutes, that the sale of tax liens is not to be invalidated by immaterial irregularities, among which is listed, "any defect in the description upon any . . . tax list . . . *provided* such description be sufficiently definite to enable the collector, or any person interested, to determine what property is meant or intended by the description, and in such cases a defective or indefinite description . . . may be made definite by using a correct description in any tax foreclosure proceeding authorized by this Act, and any such correction shall have the same force and effect as if said description had been correct on the tax list." There is no contention here that anybody has been misled by the description. *Rexford v. Phillips,* 159 N. C., 213, 74 S. E., 337.

The case of *Bryson v. McCoy,* 194 N. C., 91, 138 S. E., 420, cited and relied upon by the defendant, is not in point. There the validity of the sheriff's deed was at issue, and not merely the sale of the tax lien.

To be sure, the materiality of any irregularity may invite controversy. So it has here. But on the point presently urged, the defendant could hardly expect to prevail, notwithstanding her case has been presented with much learning and manifest research.

Whether the plaintiffs will "gain any permanent advantage by standing on the full measure of their rights" is not for us to determine. Nor are we the judges of the wisdom or impolicy of the law. It is enough that the General Assembly has spoken on the subject. *Wells v. Wells*, 156 N. C., 246, 72 S. E., 311. The defendant complains both at the law and at the insistence of the plaintiffs, but these are matters belonging not to the courts. They are for others to decide. It is ours only to declare the law as we find it and to apply it to the facts in hand. *S. v. Whitehurst*, 212 N. C., 300, 193 S. E., 657. The suggestion that more is required than what appears here on the tax list and in the notice of sale finds no support in the decided cases, albeit the decision in *Bryson v. McCoy, supra,* is cited as authority for a contrary holding. That case, however, is readily distinguishable from this one. The difference has already been pointed out. The requirements and purposes of the two cases are dissimilar. The validity of the sheriff's deed is not in question here—only the failure to redeem within a year after the sale of the tax lien.

The other arguments made on behalf of the defendant are self-answerable.

Petition dismissed.

SEAWELL, J., dissents.

W. H. RAWLS v. MRS. W. P. BENNETT.

(Filed 18 March, 1942.)

1. Malicious Prosecution § 9—Evidence held to show probable cause as matter of law, and nonsuit should have been allowed.

Plaintiff, in a prior action against him for an accounting, made statements under oath upon adverse examination, which statements were sufficient to afford a person of ordinary caution reasonable ground to believe he was guilty of embezzlement, and constituted the basis of the prosecution of defendant for that crime. A verdict of acquittal was directed in the embezzlement prosecution, and plaintiff instituted this action for malicious prosecution. *Held:* The statements made by plaintiff on the adverse examination, introduced in evidence by defendant in the action for malicious prosecution, establish probable cause as a matter of law, and defendant's motion to nonsuit should have been allowed.

2. Malicious Prosecution § 3—

The question of probable cause is to be determined by the facts as they appeared to defendant at the time, and when plaintiff has made statements under oath which reasonably incite a strong suspicion of his guilt, upon which defendant relied in instigating the prosecution, plaintiff's explanation of the statements upon the trial of his action for malicious prosecution does not affect the question of probable cause.

3. Same—

When the facts are admitted or established, the question of probable cause is one of law for the court.

APPEAL by defendant from *Johnson, Special Judge,* at September Term, 1941, of HALIFAX.

Civil action to recover damages for an alleged malicious prosecution.

At the March Term, 1938, Pender Superior Court, the grand jury, upon information furnished by the defendant herein, made presentment against the plaintiff for embezzlement. Thereafter, at the October Term, 1938, upon evidence furnished by the defendant herein, the grand jury returned a true bill against the plaintiff for embezzlement.

At the October Term, 1939, the plaintiff was put on trial under the above mentioned indictment for embezzlement, and a directed verdict of "not guilty" was entered in the cause.

This action for malicious prosecution was instituted 7 December, 1939, and was tried at the September Term, 1941, Halifax Superior Court, resulting in verdict and judgment for plaintiff.

It is in evidence that the plaintiff was manager, secretary and treasurer, of the Rawls Motor Sales and Service, Inc., of Burgaw, N. C.; that the defendant, as administratrix and legatee of her husband's estate, had an interest in said company; that she caused a civil action to be instituted against the said W. H. Rawls for an accounting, alleging that she was unable to obtain any satisfactory information from him relative to the business and that he had departed for Roanoke Rapids, N. C., and abandoned the motor sales business in Burgaw.

In this civil action W. H. Rawls was examined adversely before the Clerk of the Superior Court of Halifax County and testified, under oath, *inter alia,* as follows: "Q. Did you deposit all monies received as an officer of the Rawls Motor Sales and Service, Inc., in this bank (First-Citizens Bank & Trust Company)? A. All except what was paid out in cash. Q. You then did not deposit all the funds of the corporation in the bank? A. No, sir. . . . Q. I am asking you how much did you collect from all accounts receivable after the sale of McMillan and Cameron chattel? A. Well, I may have collected from $75.00 to $100.00. . . . Q. Mr. Rawls, after this sale, you received $450.00 from Bruce Bannerman, did you not? A. Yes, sir. Q. And you signed the title Rawls Motor Sales & Service, Inc., by W. H. Rawls, Secretary, and received this money, did you not? A. Yes, I received the money. Q. Did you ever report this? A. No. Q. Did you ever report this to the officers of the company? A. No, sir. . . . Q. As a part of the down payment on this (new Plymouth) car, I am asking you did you not transfer as an officer of the Rawls Motor Sales & Service, Inc., a title to two repossessed cars? A. I don't remember how they were trans-

ferred. Q. You turned over to them two cars, though, didn't you? A. Yes. Q. And took title in your own name? A. Yes. . . . Q. Mr. Rawls, don't you know that Mr. Coburn, Dr. Johnson and Mrs. Bennett have written you and I have written you trying to get a financial statement covering your handling of this concern? A. Some lawyer wrote me—I reckon it was you. Q. And up to this date we have not been able to get a financial statement from you nor the information as to where the records of the company are now located? A. I told you where they were. Q. Well, you have today, but you haven't up to this time, have you? A. No."

Following this examination, Mrs. Bennett, upon advice of her counsel, had a conference with the solicitor of the Eighth Judicial District and was advised by him to submit a copy of the examination to the grand jury, which she did, with the sequence of events as above detailed.

Upon the trial of the criminal prosecution, the foregoing examination taken in the civil action was ruled incompetent, and a verdict of acquittal was thereupon directed.

The defendant appeals, presenting for review the refusal of the court to grant her motion for judgment of nonsuit.

Allsbrook & Benton and Clifton L. Moore for plaintiff, appellee.
C. C. Holmes and Dunn & Johnson for defendant, appellant.

STACY, C. J. The criminal prosecution of which the plaintiff here complains was the result of admissions made by the plaintiff in the civil action brought against him for an accounting in his capacity as manager, secretary and treasurer of Rawls Motor Sales and Service, Inc. The defendant, her counsel, the solicitor and the grand jury all acted upon the adverse examination in that suit. It afforded a reasonable ground for one of ordinary caution "to believe, or to entertain an honest and strong suspicion," that the plaintiff was guilty. *Stacey v. Emery,* 97 U. S., 642. In a very real sense, then, it may be said the plaintiff was the author of the indictment. At least, he furnished "probable cause" for it. *Dickerson v. Refining Co.,* 201 N. C., 90, 159 S. E., 446. This defeats the present action. *Wilkinson v. Wilkinson,* 159 N. C., 265, 74 S. E., 740.

It is true the plaintiff now undertakes to explain the admissions made by him in the adverse examination above mentioned, and did explain them to the satisfaction of the jury. But at the time of the institution of the criminal prosecution, which forms the basis of the present action, these admissions stood without explanation and were sufficient to excite, in a reasonable mind, just suspicion of the plaintiff's guilt. *Smith v. Deaver,* 49 N. C., 513. The conduct of the defendant is to be judged as of that time. The examination, as it then stood, unexplained, constituted

probable cause for the indictment. *Beale v. Roberson,* 29 N. C., 280. "It is accepted doctrine with us that, on facts admitted or established, the question of probable cause is one of law for the court"—*Hoke, J.,* in *Morgan v. Stewart,* 144 N. C., 424, 57 S. E., 149.

Judgment of nonsuit will accordingly be entered.

Reversed.

STATE v. CHARLIE SHAW.

(Filed 18 March, 1942.)

Criminal Law § 80—

When defendant fails to serve his statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss will be granted, but when the defendant has been convicted of a capital felony this will be done only after inspection of the record fails to disclose error.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

Attorney-General McMullan for the State.

PER CURIAM. The defendant, Charlie Shaw, was tried at September Term, 1941, of the Superior Court of Currituck County, before J. Paul Frizzelle, Judge, and a jury, upon two bills of indictment, the first charging burglary in the first degree and the second charging rape, which were consolidated for the purpose of trial, and defendant was found guilty on both charges—that is, of burglary in the first degree and of rape. The defendant was sentenced to death by asphyxiation.

From this judgment defendant appealed and was given sixty days in which to serve his case on appeal.

Defendant failed to serve the case on appeal or otherwise to perfect his appeal, and the time therefor having expired, the Attorney-General caused the record proper to be docketed in this Court with certificate of the Clerk of the Superior Court of Currituck County, setting forth the failure of the defendant to perfect his appeal and that no case on appeal had been filed in that court and that the time therefor had expired. The said clerk further certifies that he "has inquired of counsel for the defendant and has been informed by him that he does not intend to perfect the appeal."

Thereupon the Attorney-General moved that the defendant's appeal be dismissed.

We have carefully examined the record in the case as filed here and find no error therein. The motion is therefore allowed and the appeal

is dismissed, and the judgment of the court below is affirmed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed. Appeal dismissed.

STATE v. EULA CAGLE.

(Filed 18 March, 1942.)

Criminal Law § 63—

Defendant's plea of guilty of violating the prohibition laws is sufficient to support the court's finding that she had violated the terms of a suspended sentence theretofore entered for a prior similar offense, and the court may order the suspended sentence into effect upon motion of the solicitor made at any time during the period of probation.

APPEAL from *Nettles, J.,* at October Term, 1941, of HENDERSON.

The record on appeal shows (1) that defendant having pleaded "guilty to the crime of violation of prohibition law and possession of liquor for sale," Armstrong, Judge presiding at March Term, 1940, of Henderson County Superior Court, suspended a jail sentence imposed upon her therefor, and placed her on probation for a period of three years upon specified conditions, including these, that she "avoid persons and places of disreputable or harmful character" and that she "violate no State or Federal penal laws"; (2) that at October Term, 1940, of said court defendant pleaded guilty to violating the prohibition laws, and was sentenced by Bobbitt, Judge presiding, to a term in jail; and (3) that at October Term, 1941, upon motion, Nettles, Judge presiding, finding as facts that defendant had violated the "terms and provisions" of the "suspended sentence imposed at March Term, 1940," among others those named above, ordered the jail sentence into full force and effect and, in accordance therewith, ordered commitment of defendant.

Defendant appeals therefrom to Supreme Court and assigns error.

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

A. A. Rice and Arthur J. Redden for defendant.

PER CURIAM. The findings of fact, upon which the judgment from which appeal is taken is founded, are supported by sufficient evidence and are sufficient to support the judgment. See *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593.

Affirmed.

LENORIA MASSENGILL, BETTIE WORLEY, RENA PEEDIN, RUTH LITTLE, BLANCHE BRASWELL, IRENE SNIPES, JULIA BRASWELL, AZZIE BIZZEL, PRISSIE PARRISH, GEORGE B. WORLEY, JR., JAMES WORLEY, BETTIE WILLIAMS AND EARL WORLEY, DECEASED; AND APPIE WORLEY, DECEASED, v. D. B. OLIVER AND WIFE, MARY M. OLIVER.

(Filed 25 March, 1942.)

1. Mortgages § 24—

An action by the heirs of the mortgagors to set aside a conveyance of the equity of redemption by the mortgagors to the mortgagee is an action based upon fraud, and the fact that upon the introduction of the deed from the mortgagors to the mortgagee the law presumes fraud and casts upon the mortgagee the burden of proving the *bona fides* of the transaction, does not affect the character of the action as one grounded upon fraud.

2. Limitation of Actions § 2e—

An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee is an action based on fraud and must be instituted within three years from the discovery of the acts constituting the fraud. C. S., 441 (9), and the ten-year statute has no application.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at January Term, 1942, of JOHNSTON.

Civil action to set aside deed for fraud and for an accounting for rents.

Plaintiffs, heirs-at-law of George B. Worley, Sr., and his wife, Appie Worley, both of whom died after the matters of which complaint is made herein, instituted this action on 13 August, 1941, and in their complaint in substance allege:

1. That on 18 December, 1923, defendants, for consideration of $4,800 recited in deed, conveyed to George B. Worley, Sr., and wife, Appie Worley, two tracts of land in Johnston County, North Carolina, one containing thirty-six acres and the other three-fourths of an acre.

2. That on said date George B. Worley, Sr., and wife, Appie Worley, for purpose of securing the payment of the purchase price of said land, $4,800, on terms therein set out, executed a mortgage deed to defendant, D. B. Oliver, conveying therein the two tracts of land so conveyed to them, and another tract containing fifty and one-quarter acres, of value in excess of $3,500, and containing power of sale.

3. That on 21 January, 1932, though George B. Worley, Sr., and wife, Appie Worley, had by payments reduced the indebtedness due on

purchase price to less than $4,000, and while the relation of mortgagor and mortgagee existed between them as mortgagors and defendant D. B. Oliver, as mortgagee, the said defendant, "by persistence, oppression and other unlawful and fraudulent means" exerted by him upon them, procured a deed from them to him, conveying the three tracts of land described in the said mortgage deed, for the recited consideration of $4,000, when the balance due on indebtedness was much less than, and the reasonable value of the land more than double that amount, by reason of all of which the said deed is void.

4. That immediately upon the execution of the deed to him set forth in the preceding paragraph defendant, D. B. Oliver, went into, and has since remained in possession of said land, enjoying the rents and profits for which he, as mortgagee in possession, should account.

Defendants, in answer filed, while admitting the execution of the deeds and mortgage deed described in the complaint, (1) deny that George B. Worley, Sr., and wife, Appie Worley, made any payment on the purchase price of said land; (2) deny that the fifty and one-quarter-acre tract was worth amount alleged, and (3) deny all allegations of oppression, fraud or unfair means in procuring the deed from them. And defendants aver that, though George B. Worley, Sr., and wife had been in possession of said land for more than eight years at time when said deed was executed by them to defendant, D. B. Oliver, they had paid nothing on the purchase price and there were then due principal, interest, taxes and store account amounting to $7,469.91; that deed was executed by them "of their own free will and accord," in order to free themselves of the said indebtedness; that the deed was accepted by D. B. Oliver at request of George B. Worley; and that as consideration therefor all of said indebtedness and the mortgage deed were canceled.

Defendants further plead the three-year statute of limitation, C. S., 441 (9), in bar of any right of plaintiffs to recover in this action.

Upon the trial below plaintiffs offered in evidence the summons issued in this cause, the record of the deeds and the mortgage deed referred to in the pleadings, including a notation on the record of said mortgage showing cancellation thereof on 23 January, 1932, at time of recording of deed to defendant on said date, and rested. The court, being of opinion that the cause of action is barred by the three-year statute of limitation as pleaded by defendant, so adjudged and dismissed the action.

Plaintiffs appeal to Supreme Court and assign error.

Parker & Lee for plaintiffs, appellants.
G. A. Martin for defendants, appellees.

WINBORNE, J. To escape the bar of the statute of limitations, C. S., 441 (9), when pleaded, an action "for relief on the ground of fraud or

mistake" must have been commenced within three years from "the discovery by the aggrieved party of the facts constituting the fraud or mistake."

The exceptive assignment determinative of this appeal presents for decision only this question: Is this an action for relief on the ground of fraud? The decisions in this jurisdiction indicate an affirmative answer.

It is here a well settled principle that "where a mortgagee buys the equity of redemption of his mortgagor, the law presumes fraud, and the burden is upon the mortgagee to show the *bona fides* of the transaction," as expressed in *McLeod v. Bullard,* 84 N. C., 516, approved on rehearing in 86 N. C., 210, and repeated in principle in numerous later cases among which are: *Jones v. Pullen,* 115 N. C., 465, 20 S. E., 624; *Hall v. Lewis,* 118 N. C., 509, 24 S. E., 209; *Pritchard v. Smith,* 160 N. C., 79, 75 S. E., 803; *Cole v. Boyd,* 175 N. C., 555, 95 S. E., 778; *Jones v. Williams,* 176 N. C., 245, 96 S. E., 1036; *Harrelson v. Cox,* 207 N. C., 651, 178 S. E., 361.

In *Jones v. Pullen, supra, Shepherd, C. J.,* directing attention to the inflexible rule that where a mortgagee purchases, directly or indirectly, at his own sale, the mortgagor may elect to avoid the sale, and this without reference to its being fairly made, and for a reasonable price, "not because there is, but because there may be fraud," states: "If, however, the mortgagee with the power of sale deals directly with the mortgagor and purchases of him the equity of redemption, quite another principle applies. In such case there is, by reason of the trust relation, a presumption of fraud, but the mortgagee so purchasing may rebut the presumption by showing that the transaction was free from fraud or oppression and that the price was fair and reasonable. . . . If the presumption of fraud is rebutted, the plaintiff has no election to set aside the sale, and a court of equity will grant him no relief."

Thus, an action to set aside such transaction is grounded in fraud. The presumption arising upon a showing of the deed from the mortgagors to the mortgagee while that relation exists is merely a rule of evidence. And, even though the burden then shift to the mortgagee to show the *bona fides* of the transaction, the controversy still revolves around the question as to whether the transaction is fraudulent.

Other assignment need not be considered.

Affirmed.

JAMES BROWN, WILLIAM HENRY BROWN, DORA LEE HOLLAND, DAISY ANN HOLLAND, AND GEORGE H. C. HOLLAND, PETITIONERS, v. JAMES A. HOLLAND, JOE HOLLAND, MARTHA BROWN AND HENRIETTA BROWN, RESPONDENTS.

(Filed 25 March, 1942.)

Wills § 34c—

The will in question devised the *locus in quo* to testator's children for life with remainder to their lawful issue. *Held:* An illegitimate son of one of testator's daughters takes no interest in the land. The distinction between the use of the word "issue" and the word "heir" in such instances is pointed out.

APPEAL by petitioners from *Hamilton, Special Judge,* at November Term, 1941, of CRAVEN.

This is a special proceeding for the partition of lands devised in the last will and testament of John R. Holland, late of Craven County, N. C., and involves the interpretation of Item 7 in said will. At the hearing below, the petitioners and the respondents agreed that the case might be heard upon the complaint and the answer and the following agreed statement of facts:

"1. That the late John R. Holland, of Craven County, died on the — day of September, 1911, leaving a last will and testament, seized and in possession of a certain tract or parcel of land situate in No. 6 Township, Craven County, and containing by estimation 247 acres and described by metes and bounds in a deed from Edward M. Piver and wife to said John R. Holland, which deed is dated January 24, 1877, and recorded in Book 77 at page 574, Office of the Register of Deeds for Craven County.

"2. That under the said will, which will was admitted to probate on the 25th day of September, 1911, and recorded in Book of Wills H, at page 140, Item 7 reads as follows: 'I give and devise unto my children, Mary Eliza Holland, James Abram Holland, Georgianna Priscilla Holland, George Henry Clay Holland, David W. Holland, the lands described in the deed from Edward H. Piver and wife to John R. Holland, being dated January 24, 1877, and recorded in Book 77 at page 574, etc., to have and to hold in equal shares, for and during the term of their natural lives. In the event that any or all of the devisees above named die leaving lawful issue, I hereby give and devise their respective share to such issue in fee simple. In case any or all of said devisees die without lawful issue, I hereby give and devise their respective shares to the devisees herein named, then surviving in equal proportion in fee simple.'

"3. That David W. Holland died without leaving issue; that Mary Eliza Holland died, unmarried, leaving surviving her an illegitimate son, the defendant, Joe Holland; that Georgianna Priscilla Holland married one James Brown, and both she and her husband are now deceased and are survived by the plaintiffs, James Brown and William Brown and the defendants Henrietta Brown and Martha Brown; that there survives of the children of said John R. Holland only James A. Holland and the plaintiff, George H. C. Holland; that James A. Holland is unmarried and 48 years of age. That the said Joe Holland, the illegitimate child of Mary Eliza Holland, is 38 years of age at the time of the institution of this action."

Upon the foregoing statement of facts his Honor found that Joe Holland is the lawful issue of his mother, Mary Eliza Holland, and is entitled to the same interest in said lands as if he had been a legitimate child of the said Mary Eliza Holland, and that the interest of said Joe Holland in said lands is a one-fourth interest. Judgment was entered accordingly. To the conclusions of law and the signing of the judgment the petitioners excepted and appealed to the Supreme Court.

H. P. Whitehurst for plaintiffs.
C. R. Wheatley for defendants.

DENNY, J. Mary Eliza Holland held a life estate only in the lands described in the will of her father. If she died leaving lawful issue, such issue took that portion of the lands held by her for life, under the terms of the will, in fee simple. Does the term "issue" or "lawful issue" embrace an illegitimate child? The decisions of this Court do not so hold.

Black's Law Dictionary gives the construction of the word "issue" as follows: "The word 'issue' in a will is generally a word of limitation," citing *Ford v. McBrayer,* 171 N. C., 420, 88 S. E., 736, and other cases. "The word is commonly held to include only legitimate issue. *Page v. Roddie,* 92 Okla., 236, 218 Pac., 1092; *King v. Thissell,* 222 Mass., 140, 109 N. E., 880; *Hardesty v. Mitchell,* 302 Ill., 369, 134 N. E., 745, 24 A. L. R., 565; *Love v. Love,* 179 N. C., 115, 101 S. E., 562."

In the case of *Hardesty v. Mitchell, supra,* the Court said: "The words 'child or children,' when used in a statute, will or deed, mean legitimate child or children, and will never be extended, by implication, to embrace illegitimate children, unless such construction is necessary to carry into effect the manifest purpose of the legislature, testator or grantor (citing authorities). The term 'issue' is also restricted to legitimate issue, unless there is an express declaration to the contrary, or a necessary implication that illegitimate issue were intended to be included. *Marsh v. Field,* 297 Ill., 251, 130 N. E., 753."

The respondents rely on C. S., sec. 1654, and the cases of *Paul v. Willoughby,* 204 N. C., 595, 169 S. E., 226, and *Battle v. Shore,* 197 N. C., 449, 149 S. E., 590.

In *Paul v. Willoughby, supra,* the Court did not pass upon the term "issue" or "lawful issue," but construed the meaning of the terms "legal heirs of the body," "legal heirs" and "lawful heirs," and held these latter terms included an illegitimate child of the daughter of the devisor. In the case of *Battle v. Shore, supra,* Horace Battle and Harriet Battle were husband and wife. The land was devised by the husband to his wife for life and after her death to be equally divided between the heirs of Horace Battle, the devisor, and the heirs of Harriet Battle, the devisee. The devisor died leaving an illegitimate son, the devisee died leaving two illegitimate sons. Under the provisions of C. S., 1654, the sons of Harriet Battle took title to the land to the exclusion of the illegitimate son of Horace Battle.

The defendant Joe Holland, the illegitimate child of Mary Eliza Holland, under the provisions of C. S., 1654, is eligible to inherit from his mother, but he cannot take as the lawful issue of his mother under the terms of the will of his grandfather. Upon the death of Mary Eliza Holland she left no estate or interest in the devised lands which her illegitimate son could inherit from her. *Love v. Love, supra; Faison v. Odom,* 144 N. C., 107, 56 S. E., 793; *Whitfield v. Garris,* 134 N. C., 24, 42 S. E., 568; *Fairly v. Priest,* 56 N. C., 383.

The judgment of the court below is

Reversed.

MELVINA WINGLER AND MINDA C. LONG v. A. R. MILLER AND M. C. WINGLER, ADMINISTRATORS OF N. WINGLER, DECEASED, A. R. MILLER, INDIVIDUALLY, AND T. J. PEARSON AND HARRY PEARSON, SURETIES UPON ADMINISTRATORS' BOND.

(Filed 25 March, 1942.)

1. Pleadings § 16a—

The sustaining of a demurrer on the ground of misjoinder of parties and causes requires a dismissal of the action.

2. Same—Demurrer to cross action for misjoinder of parties and causes should have been sustained in this case and the cross action dismissed.

This action was instituted by the beneficiaries of an estate against the two administrators and the sureties on their bond, alleging that one of the administrators, M, had wrongfully obtained possession of and misapplied certain funds of the estate, under the pretense that the funds belonged to a partnership formerly existing between him and the decedent. M and the sureties on the administration bond filed joint answer denying that the fund referred to belonged to the estate; and M, alone, further

answering, set up a cross action against the plaintiffs and his coadministrator, alleging that the latter had been placed in charge of certain business of the former partnership, and had neglected and mismanaged same, and refused to account. M prayed that his coadministrator be enjoined from further operating the business, that a receiver be appointed therefor, and that his coadministrator be removed. It was further alleged in M's cross action that plaintiffs had conspired with the coadministrator to slander him by circulating false charges of misapplication of funds of the estate, and recovery was asked therefor. *Held:* Plaintiffs' demurrer on the ground of misjoinder of parties and causes of action was properly sustained, and that plaintiffs were entitled to have the cross action dismissed.

APPEAL by plaintiffs from *Rousseau, J.,* at October Term, 1941, of WILKES. Modified and affirmed.

Plaintiffs' demurrer to the cross-bill set up in the answer was sustained, but the court's order permitted the cross-bill to remain on the docket for the purpose of amendment. Plaintiffs excepted and appealed.

Ira T. Johnston and J. Allie Hayes for plaintiffs, appellants.

A. H. Casey, John R. Jones and Trivette & Holshouser for defendant A. R. Miller, appellee.

DEVIN, J. Plaintiffs assign error in the court's ruling upon their demurrer to the defendants' cross-bill. They contend that, instead of permitting it to remain on the docket, the cross-action should have been dismissed. To determine the correctness of the challenged ruling requires consideration of the pleadings in the cause. The material matters therein set out may be briefly stated as follows:

The plaintiffs, the heirs-at-law of N. Wingler, deceased, and the sole distributees of his estate, instituted their action against A. R. Miller and M. C. Wingler, the administrators of the estate, and the sureties on their administration bond. The gravamen of their complaint is the alleged misapplication of certain funds of the estate by defendant Miller under the pretense that the funds belonged to a partnership formerly existing between N. Wingler and defendant Miller. The plaintiffs alleged that there was in the possession of N. Wingler at the time of his death the sum of $6,395.57, of which one-half was, by consent of his coadministrator, paid to and received by defendant Miller as surviving partner. It was alleged that this money belonged to the estate and was not partnership funds. It was also alleged that all the debts of the estate had been paid, and that the plaintiffs as sole distributees were entitled to the entire amount of this fund. Plaintiffs further alleged that defendant Miller had fraudulently induced his coadministrator, M. C. Wingler, to join in the wrongful diversion of this fund, and that on account of this breach of trust defendant Miller should not be allowed commissions and should

be removed as administrator. Recovery was asked against the defendants Pearson, the sureties on the administration bond.

The defendant Miller, as administrator and individually, and the defendants Pearson as sureties on the administration bond, filed joint answer in which the allegations of wrongful conduct were denied, and it was alleged that the funds referred to were partnership funds, and that defendant Miller as surviving partner was entitled to one-half thereof. No objection was raised as to the propriety of plaintiffs' action. Further answering the defendant Miller, alone, "by way of new matter, cross-bill, and further defense," alleged that, pursuant to an agreement after the death of N. Wingler, defendant M. C. Wingler had been put in charge of the partnership mercantile business formerly conducted by N. Wingler and defendant Miller, but that defendant M. C. Wingler had neglected the business and engaged in drinking and gambling, and had refused to account. Thereupon as to M. C. Wingler defendant Miller prayed that he be enjoined from further operating the business, that a receiver be appointed to take charge of the goods and merchandise, and that M. C. Wingler be removed as administrator.

The defendant Miller further alleged in his cross-bill that the plaintiffs and the defendant M. C. Wingler had conspired together to slander and defame him by maliciously circulating the report that he had wrongfully and unlawfully taken the sum of four thousand dollars from the estate of N. Wingler, and that by reason of such defamation he had been damaged in the sum of twenty-five thousand dollars.

Separate prayers for relief were set out in the answer. The defendants Pearson prayed that plaintiffs take nothing by their action. The defendant Miller prayed, in addition, that M. C. Wingler be enjoined, that a receiver be appointed, that M. C. Wingler be removed as administrator, and that he recover of the plaintiffs and M. C. Wingler damages for slander.

The plaintiffs demurred to the defendants' cross-bill on the ground that there was a misjoinder of parties and causes of action, that the attempted cross-action for damages for conspiracy to defame was not proper or permissible to be set up in this action, and that the cross-bill did not state facts sufficient to constitute a cause of action for slander, in that no slanderous words were set out.

The court below entered an order that M. C. Wingler individually should be made a party defendant; that the demurrer be sustained; that the cross-bill of defendant Miller be retained on the docket, and that defendant Miller be allowed to file amended pleadings so as to make his cross-action more specific. Thirty days were allowed within which to amend. Plaintiffs' appeal relates to the concluding portions of this order.

While it was adjudged that the demurrer be sustained, it would seem, from that portion of the court's order permitting the cross-bill to be retained on the docket for the purpose of amendment, that the court failed to give effect to the demurrer interposed on the ground of misjoinder of parties and causes of action. It is well settled that the sustaining of a demurrer on that ground requires the dismissal of the action. *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Mills v. Bank,* 208 N. C., 674, 182 S. E., 336; *Ellis v. Brown,* 217 N. C., 787, 9 S. E. (2d), 467. Hence the judgment sustaining the demurrer, which was based on several grounds, including that of misjoinder of parties and causes of action, should have ordered the dismissal of the cross-action.

We think the plaintiffs were entitled to have their demurrer on this ground sustained. From an examination of the pleadings it appears that, in answer to the plaintiffs' complaint, setting forth a cause of action against him and another as administrators, and the sureties on their administration bond, the defendant Miller sought to maintain a cross-action, in his own name, as an individual and as surviving partner, against his codefendant and coadministrator M. C. Wingler, for wasting partnership goods, for an injunction, for the appointment of a receiver, and for his removal as administrator. In this the defendant Miller's codefendants Pearson had no interest and did not join. To his cross-action against M. C. Wingler the defendant Miller then joined an action against the plaintiffs Melvina Wingler and Minda C. Long and his co-defendant M. C. Wingler for conspiracy to defame him by slanderous charges.

It is apparent that there is both a misjoinder of causes of action and of parties. Different causes of action are attempted to be set up against different parties, not common to all. *Wilkesboro v. Jordan,* 212 N. C., 197, 193 S. E., 155; *Holland v. Whittington,* 215 N. C., 330, 1 S. E. (2d), 813; *Burleson v. Burleson,* 217 N. C., 336, 7 S. E. (2d), 706. The cross-bill is not for the settlement of the estate (*Robertson v. Robertson,* 215 N. C., 562, 2 S. E. (2d), 552), nor does it come within the rule stated in *Trust Co. v. Peirce,* 195 N. C., 717, 143 S. E., 524.

The fact that in his order sustaining the demurrer the court made M. C. Wingler in his individual capacity a party defendant does not help matters.

It follows that the plaintiffs were entitled to have the cross-action dismissed, and that it was error to order it retained on the docket. The judgment sustaining plaintiffs' demurrer to the cross-bill is affirmed, but the order should be modified, in accordance with this opinion, so as to direct the dismissal of the cross-action.

Modified and affirmed.

MRS. MAMIE V. GREER v. S. W. HAYES AND WIFE, LEILA B. HAYES.

(Filed 25 March, 1942.)

1. Boundaries § 5—

When plaintiff contends that the courses and distances called for in her deed should be run from an admitted or established corner with allowance for variations in the magnetic pole computed from the date of a former deed, it is the duty of the court to determine whether plaintiff's evidence is sufficient to invoke this exception to the general rule, and, if so, to charge the jury under what circumstances variations in the magnetic pole should be computed as of the date of the former deed and as to what variation should be allowed.

2. Boundaries § 1—

It is the duty of the trial court to instruct the jury as to what the true boundary line is, and it is the province of the jury to locate the line.

3. Boundaries § 5—Held: Plaintiff failed to show that she was entitled to have courses run with variation in magnetic pole computed as of date of former deed.

In this processioning proceeding plaintiff located only the beginning point by natural object and contended that the courses and distances therefrom should be run in accordance with her deed with allowance for variations in the magnetic pole computed as of the date of a prior deed, under her contention that the description in her deed was copied from the prior deed. Plaintiff failed to introduce evidence warranting an inference that the description in her deed was copied from the prior deed or that there was a contemporaneous survey at the time either deed was executed. *Held:* Plaintiff having failed to bring her case within any one of the exceptions to the general rule, the court should have charged that the courses and distances should be run in accordance with plaintiff's deed from the beginning point as located by the jury.

4. Boundaries § 10: Adverse Possession § 17—

In a processioning proceeding the burden is upon plaintiff to establish the true dividing line according to her paper title, and if defendants assert title by adverse possession to any part of plaintiff's land as so established, a separate issue as to adverse possession should be submitted with the burden on defendants to prove such title notwithstanding plaintiff's record title.

APPEAL by defendants from *Clement, J.*, at November-December Term, 1941, of CALDWELL. New trial.

Processioning proceeding to fix and determine the true boundary line between the lands of the plaintiff and the lands of the defendants.

There was a verdict in accord with the contentions of the plaintiff. From judgment on the verdict defendants appealed.

W. H. Strickland and J. T. Pritchett for plaintiff, appellee.
Hal B. Adams for defendants, appellants.

BARNHILL, J. This cause was here on a former appeal and is reported in 216 N. C., at page 396, where the facts are fully stated and the law of the case is discussed and decided.

Plaintiff in her petition alleges the true dividing line to be as follows: "Beginning on a large oak on the bank of Lower Creek, and runs North 17 degrees West 22 poles to a stake in Kent's line; then North 3¾ degrees West 109 poles and 17 links to a stake, R. J. Ervin's corner." She then relates this description to the Greer deed executed in 1901. She makes no allegation that the calls in the 1901 deed should be varied. Nor does she allege any fact or circumstance which would justify a variation thereof.

In the trial, however, she took the position that the beginning point—a large oak on the bank of Lower Creek—is at the point A on the court map; that the first and second calls in her deed and the sixth and seventh calls in an old deed executed in 1862 by S. P. Dula to Azor Shell added to the first line of another old deed executed in 1866 by Dula to Shell are the same lines and that by reason thereof, in establishing her line, the variations of the magnetic needle as of 1862 should be allowed.

The court below submitted the cause to the jury under a charge which permitted an answer to the issue upon the assumption that the line was first established in 1862. It instructed the jury: "Now the surveyors who went on the stand, all of them, testified that the proper variation to be allowed in the deed of 1862 was three and one-half degrees, and the surveyors who went on the stand testified that in running the deed of 1938, running the line by the old deed of 1862, that they made the variation of 3½ degrees, which they contend was the proper variation."

At no time, however, did the court instruct the jury as to whether this is or is not the proper variation to be allowed in locating plaintiff's line. Nor did it charge as to what variation, if any, should be considered. Hence, the court failed to instruct as to the proper rule to be followed by the jury in locating the line according to the courses and distances in plaintiff's deed but left it to the jury to decide "what is" as well as "where is" the true dividing line. *Greer v. Hayes*, 216 N. C., 396, 5 S. E. (2d), 169.

As a result the jury answered the issue as on the former appeal, allowing for the variation of the magnetic meridian since 1862. Admittedly the line as thus located is not in accord with the calls in the Greer deed, even when proper allowances are made for the variation of the magnetic meridian since 1901. On the contrary, there is a variance of 3½ degrees. This serves to shift the line easterly over on the property claimed by defendants.

As the plaintiff did not undertake to locate any natural object other than the beginning point and must rely on the courses and distances given in her deed, the indicated omission in the charge is material, *Greer v. Hayes, supra.*

It is the subject matter of one of defendants' exceptive assignments of error. The same question is presented in a different form by tendered prayers for instructions which the court below declined to give.

This identical question was considered and decided adversely to the plaintiff on the former appeal. It was there said "there is nothing to warrant an inference that the calls of the line were copied from or had reference to the Dula deed, or to justify the conclusion that the line is to be ascertained by such calls as of the date of that deed." We still adhere to that declaration which is the law of the case.

The first call in the Greer deed is for "a large black oak on the bank of Lower Creek; thence North 17 degrees West 22 poles to a stake in Kent's line." The calls in the Dula deed, alleged to be the same, are for "the mouth of Tan Yard Branch, Harper's corner; thence North 17 degrees West with Harper's line 22 poles to a stake in the bend of said branch, said Harper's corner." This line begins at a different call on the branch and ends in the bend of the branch. The Greer line extends in a northerly direction from the branch.

The second line in the Greer deed extends from the end of the first line (22 poles from the branch), "North 3¾ degrees West 109 poles and 17 links to a stake, R. J. Ervin's corner." The connecting line in the two Dula deeds, asserted to be the same, begins at a stake in the bend of the branch, Harper's corner, and runs thence 3¾ degrees West 8 poles to a stake (1st. deed); thence (beginning on a persimmon corner at Northeast corner of said Shell's tract in Harper's line) "North 3¾ degrees West with said line 101 poles and 17 links to a stake in said line or rock" (2nd. deed).

There is no evidence tending to show that there was a contemporaneous survey at the time either deed was executed. The acreage in plaintiff's deed is 32½. The acreage in the first Dula deed is 52 and in the second Dula deed is 40, making a total of 92. If the lines of the Dula deeds are surveyed in accord with the calls thereof such lines will not close unless one line is completely ignored.

Thus it affirmatively appears that "the intent of the parties as expressed in the instrument"—the Greer deed of 1901—does not permit the conclusion that the parties copied or intended to adopt the description, or any part thereof, contained in the Dula deeds.

Plaintiff has failed to bring her case within any one of the exceptions to the general rule which would permit such a clear deviation from the description contained in her muniment of title. The instru-

ment speaks for itself, *Bank v. Gaines,* 204 N. C., 278, 167 S. E., 856. The cause should be submitted to the jury under an instruction that upon the ascertainment of the true beginning point the line must be run and established from such point in accord with the courses and distances in the Greer deed as of 1901.

The defendants plead adverse possession but no issue on this plea was submitted to the jury. This, perhaps, was due to a misinterpretation of the opinion on the former appeal.

The burden is on plaintiff to show the true dividing line according to her paper title. If the defendants would vary the location thereof by virtue of their adverse possession of a part of the land embraced within her deed, the burden rests upon them and a separate issue in respect thereto should be submitted. They are bound by the line as established in accord with plaintiff's deed unless they can show that they have acquired title to a part of plaintiff's lands by adverse possession up to a known and visible boundary line. Upon such showing the line must be established as thus located by the defendants, *non constat* plaintiff's record title.

The court below erred in failing to instruct the jury as to what constitutes the true boundary line starting from the admitted or established beginning point as it may be located by the jury and in its refusal to give pertinent prayers for instructions tendered by the defendants.

The indicated error necessitates a

New trial.

STATE v. L. R. WELLS.

(Filed 25 March, 1942.)

1. Criminal Law § 81c—

An exception to the admission of evidence cannot be sustained when other evidence admitted without objection renders the evidence objected to harmless even if it be conceded that it was incompetent

2. Criminal Law § 53g—

Where defendant fails to object at the time to the court's statement of a contention of the State, based upon an argument of counsel for the State which was made without objection at the time, the exception to the statement of the contention is ordinarily waived.

3. Criminal Law § 81c—

Error must be harmful or prejudicial in order to entitle defendant to a new trial.

STATE *v.* WELLS.

APPEAL by defendant from *Phillips, J.*, at August Term, 1941, of POLK.

Criminal prosecution upon two indictments charging defendant with (1) conspiring with Arthur Suber, Cleveland Rice and Hattie Smith to burn the Tryon Colored Public School building, and (2) with procuring Arthur Suber, Cleveland Rice and Hattie Smith to set fire to and burn said building, by agreement consolidated for the purpose of trial and treated as two counts in the same bill of indictment.

A new trial was granted defendant on former appeal from sentence on jury verdict, 219 N. C., 354, 13 S. E. (2d), 613.

Verdict upon retrial: Guilty as charged.

Judgment: Confinement in State's Central Prison at hard labor, to wear stripes, for not less than five years nor more than seven years.

Defendant appeals to Supreme Court, and assigns error.

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

Charles F. Gold, Jr., and Bismarck Capps for defendant, appellant.

WINBORNE, J. Appellant, through his counsel, presses for error in the trial below in the main two assignments, neither of which, on this record, is tenable.

1. Exception is taken to testimony of Sheriff Hines, relating to a conversation with Arthur Suber, after the schoolhouse was burned, and while Suber was in jail and not in presence of defendant, in which the sheriff testifies that "I told Suber his story and Wells' didn't agree"; that Suber had told him that he and Wells did not see each other that night; that Wells told him that he saw Suber twice, and Suber replied, "Did he tell you that? . . . I wish you had brought him." Objection is directed particularly to the sentence "I told Suber his story and Wells' didn't agree." It is contended that this was an opinion, which was calculated to prejudice defendant before the jury. The court admitted the testimony for purpose of corroboration, and so instructed the jury.

In this connection a perusal of the record discloses that, without objection, Arthur Suber, as witness for State, testified: "I said I had not seen him. Wells give a written statement that he had seen me twice. I asked the Sheriff to bring Wells and Rice . . . and I would confront them and tell the whole thing." Furthermore, Amos Foster, who was with the sheriff, also as witness for State, stated: "We . . . brought him (Wells) to jail . . . and Arthur says to Wells, 'Professor, did you tell these gentlemen we saw each other on the evening the schoolhouse was burned that night?' He says, 'Yes' and hung his head," and then

Suber said, " 'Professor, you know we were not to have seen each other. You went ahead and told we did . . . I am going to tell the truth.' "

In the light of this testimony, admitted without objection, the statement of the sheriff, if erroneous at the time, was rendered harmless.

2. Exception is also taken to this portion of the charge: "The State insists and contends that two of the conspirators have been convicted and are now serving their time, and the State insists and contends that it is nothing but right and proper that all who participated should be served with the same spoon, and that they should all be convicted and that you should be satisfied from the evidence and beyond a reasonable doubt that not only were Suber and Rice two of the participants, but that Wells was the third, and that you should be satisfied from the evidence, beyond a reasonable doubt, and return a verdict as to his guilt."

It is urged that this statement of contention is an expression of opinion on the facts in violation of the statute, C. S., 564. The record shows that such contentions are attributable to counsel for the State in his argument to the jury. However, even though the argument may have been objectionable, the record fails to show that any objection was taken to it at the time it was made. Furthermore, no objection was made, at the time, to the statement of contention by the court. Ordinarily, as held by this Court, failure to so object constitutes waiver of right to object. Hence, if it be conceded that the statement of contention on such argument be susceptible of prejudicial inference, we are of opinion that the right of defendant to object thereto has been waived, and that the exception is not timely. Moreover, in this connection, it is seen that the witness Arthur Suber testified without objection that at a term of court in 1940 "I came in and pleaded guilty and am now in the penitentiary for this offense"; that Cleveland Rice also without objection stated, "I was tried and convicted for this same offense and am now serving time for it"; and that there was evidence that Hattie Smith pleaded guilty at a former trial. Thus it may be doubted that the contention as stated was harmful.

Other exceptions are without merit.

It is noted that in the face of his plea, supported by his testimony and other evidence, two juries have not accepted defendant's version of the facts. And on this record the defendant has failed to show prejudicial error in the trial below.

No error.

MRS. ESTELLE C. STEWART v. C. GUY STEWART.

(Filed 25 March, 1942.)

Automobiles § 18a—

Evidence tending to show that defendant was driving at a speed of 60 to 65 miles an hour and, in a sudden effort to avoid colliding with another automobile which had been backed into the highway and which was apparently not in motion at the time, drove off the road, causing the car to overturn, inflicting serious injury to plaintiff, a guest in the car, *is held* to require the submission of the case to the jury. Michie's N. C. Code, 2621 (288) (278).

APPEAL by plaintiff from *Grady, Emergency Judge,* at October Term, 1941, of HARNETT. Reversed.

This was an action to recover damages for a personal injury alleged to have been caused by the negligence of the defendant in the operation of an automobile. At the close of plaintiff's evidence motion for judgment of nonsuit was allowed, and plaintiff appealed.

Neill McK. Salmon for plaintiff, appellant.
Dupree & Strickland and I. R. Williams for defendant, appellee.

DEVIN, J. Plaintiff is the wife of the defendant. On the occasion alleged, about 8:30 p. m., she was a passenger in an automobile being driven by the defendant along the highway. She testified that the defendant, in a sudden effort to avoid collision with another automobile which had been backed into the highway, drove his automobile, in which plaintiff was riding, off the road and caused it to overturn, inflicting a serious personal injury. She further testified that defendant was driving at a speed of sixty to sixty-five miles per hour, and that his automobile headlights were defective. The automobile which had backed into the highway was about the middle of the highway and apparently was not in motion. The pavement was eighteen feet wide, with shoulders, and the road was straight.

The plaintiff's evidence, taken in the light most favorable for her, would seem to indicate that the defendant was driving his automobile at such a high rate of speed that he was unable to stop, or turn aside safely, within the distance he could observe objects on the road by the lights of his automobile. *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608; Michie's N. C. Code, secs. 2621 (288), 2621 (278).

Without discussing the evidence in detail, we think it was of sufficient probative force to require submission to the jury.

The judgment of nonsuit is

Reversed.

CORDELIA A. FELTS v. SHENANDOAH LIFE INSURANCE COMPANY, INC.

(Filed 25 March, 1942.)

1. **Insurance § 30a—Notice of disability during insured's lifetime held not required when insured is incapable of giving notice during period before death when notice was due to be given.**

The policy in suit provided that premiums due subsequent to disability would be waived upon proof of disability given insurer within one year from the inception of the disability, provided such disability had existed continuously for not less than six months and provided the premium due next after inception of disability had not been in default for more than six months. The policy further provided that proof of disability must be given during the lifetime of insured and during the period of disability as a condition precedent to liability for disability benefits, but that failure to give proof within the time required should not invalidate any claim if it should be shown not to have been reasonably possible to give such proof and that proof was given as soon as reasonably possible. The jury found that insured was wholly disabled for six months and four days prior to his death and that he was totally incapacitated from giving notice during the last four days of his life. *Held:* Under the terms of the policy and the facts disclosed, valid notice of disability could not be given before the disability had existed for six months, and, therefore, the policy had not lapsed by reason of the failure to pay the premium which fell due, under the terms of the policy, two months and nine days prior to the death of the insured.

2. **Same: Insurance § 13a—**

When the terms of a policy as to notice and proof of disability are ambiguous or conflicting, that construction or provision which will sustain liability will be adopted.

3. **Insurance § 34b—**

When insurer denies liability on the ground of forfeiture of the policy for nonpayment of premium it waives notice and proof of disability.

APPEAL by defendant from *Clement, J.*, at January Term, 1942, of WILKES.

Civil action to recover $1,000.00 alleged to be due plaintiff as beneficiary in a certain policy of insurance which was issued to James E. Felts by the defendant, 13 May, 1938.

Plaintiff alleges that James E. Felts died on 22 July, 1939, and that from and after 18 January, 1939, he was wholly and permanently disabled from performing any work or transacting any business; and further alleges that after the insured became permanently disabled to engage in any kind of work and before the annual premium for the year

1939 was due, notice of said disability was given to T. H. Settle, defendant's local agent, who resides in North Wilkesboro, Wilkes County, North Carolina.

The defendant alleges and contends that, under the terms of the policy issued to the insured, it was incumbent upon the insured, or his representative, to give due notice to the home office of the defendant of such disability and to make satisfactory proof thereof on forms which would be furnished by defendant on request of insured, and that said written forms were to be submitted within one year from the beginning of the total disability, provided such disability had continued for a period of not less than six consecutive months. Defendant further contends the policy lapsed for failure of the insured to pay the annual premium of $38.83 on 13 May, 1939.

It was admitted by plaintiff that the insured did not pay the second annual premium alleged to be due on the policy, 13 May, 1939.

The plaintiff and defendant offered evidence at the trial below.

The following issues were submitted to the jury:

"1. Did the defendant execute to James E. Felts the policy of insurance as described in plaintiff's complaint? Answer: 'Yes.'

"2. Was James E. Felts, the insured, permanently, continuously and wholly disabled by disease from pursuing any occupation for compensation or profit from January 18, 1939, until July 22, 1939? Answer: 'Yes.'

"3. Was James E. Felts, the insured, totally incapacitated from giving notice to the defendant of his disability from July 18, 1939, to July 22, 1939? Answer: 'Yes.'

"4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,000.00.' "

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

Whicker & Whicker for plaintiff.
John R. Jones for defendant.

DENNY, J. A copy of the insurance policy issued to James E. Felts was introduced in evidence at the trial below as well as Supplemental Contract issued in connection with and constituting a part of the Principal Contract.

We think all the exceptions of the defendant can be disposed of by a consideration of the pertinent parts of the insurance contract, which appear in the Supplemental Contract, as follows:

"Supplemental Contract issued in connection with the Company's Policy No. 125,659, on the life of James Evert Felts, which is the Principal Contract.

"If, before default in the payment of any premium under the Principal Contract and this Supplemental Contract, and before the sum insured or any installment thereof becomes payable, and prior to the anniversary date of the said Policy nearest to the fifty-fifth birthday of the Insured, said Insured has become physically and incurably disabled by disease or bodily injury, occurring and originating after the date of this Supplemental Contract or any reinstatement thereof, so that the Insured is and will be permanently, continuously and wholly prevented thereby from engaging in, participating in or performing not only the usual occupation of the insured, but also engaging in or participating in any other occupation whatsoever, or from performing work of any kind for compensation or profit of any kind whatsoever, and will be disabled for life, and satisfactory proof thereof, (on forms which will be furnished by the Company on request), is submitted within one year from the beginning of the total disability, provided such disability has existed continuously for not less than six consecutive months, (TOTAL DISABILITY OF SUCH DURATION BEING DEEMED TO BE PERMANENT ONLY FOR THE PURPOSE OF DETERMINING THE COMMENCEMENT OF LIABILITY HEREUNDER) the company agrees, subject to all conditions and limitations hereinafter contained:

"To waive the payment of each premium under said Policy and this Supplemental Contract, beginning with the premium the due date of which next succeeds the date of the receipt by the Company of satisfactory proof that the Insured is totally and permanently disabled.

"If the Insured is physically able to perform some one or more of the duties pertaining to his own, or to any other business, occupation or work for compensation or profit, he shall not be deemed totally disabled within the meaning and intent of the provisions hereof.

"Proof of claim, as outlined above, must be given to the Company during the lifetime of the Insured and during the period of disability, and is a condition precedent to the Insured being entitled to the disability benefits. Insanity or other total incapacity will not excuse the failure to file such proofs. Failure to give such proof within the time provided in this Supplemental Contract shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such proof and that proof was furnished as soon as it was reasonably possible.

"In event any premium on the Principal Contract or on this Supplemental Contract is in default not more than six months before total and permanent disability is established and it is shown that the disability began prior to the due date or prior to the expiration of the grace period of the premium in default, premiums falling due after such disability is established will be waived, provided the premium in default is paid by the Insured."

The jury found that the insured was permanently, continuously and wholly disabled by disease from pursuing any occupation for compensation or profit from 18 January, 1939, until 22 July, 1939.

The jury further found that the insured was totally incapacitated from giving notice to the defendant of his disability from 18 July, 1939, to 22 July, 1939.

Under the express terms of the policy, as stated above, the insured was required to submit notice to the defendant within one year from the beginning of the total disability, provided such disability had existed continuously for not less than six consecutive months. Such a notice was to be treated as a basis for the commencement of liability under the terms of the policy. The policy of insurance issued to the insured by the defendant provided for the waiver of premiums in the event of total and permanent disability of the insured. Under the terms of the policy, any notice as to the total and permanent disability of the insured given prior to 18 July, 1939, would not have established permanent and total disability in this case, for the reason that, under the evidence and the finding of the jury, disability had not existed for six consecutive months until that date.

It is true the policy states: "Proof of claim, as outlined above, must be given to the company during the lifetime of the Insured and during the period of disability, and is a condition precedent to the Insured being entitled to the disability benefits." Plaintiff is not asking for the disability benefits under this policy, but for the principal sum by reason of the death of the insured. Notice is not required during the lifetime of the insured for premiums in the event of total and permanent disability to be waived; provided the insured's total disability before death occurred not more than six months after the premium became due. Here total disability occurred before the premium in question fell due. There is, however, a further provision in that same paragraph of the policy, to wit: "Failure to give such proof within the time provided in this Supplemental Contract shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such proof and that proof was furnished as soon as it was reasonably possible."

Where there are apparently conflicting provisions in an insurance contract, or when the policy is ambiguously worded, the general rule of construction with respect thereto is that the one most favorable to the assured should be adopted. *Underwood v. State Life Ins. Co.*, 185 N. C., 538, 117 S. E., 790; *Bennett v. Provident Fire Ins. Co.*, 198 N. C., 174, 151 S. E., 98; *Conyard v. Life & Casualty Co.*, 204 N. C., 506, 166 S. E., 835; *Carter v. Conn. General Life Ins. Co.*, 208 N. C., 665, 182 S. E., 106; *Williams v. Greensboro Fire Ins. Co.*, 209 N. C., 765, 185 S. E., 21.

The only period in which the insured in the instant case could have given the required notice to establish total and permanent disability,

under the provisions of the policy, was from 18 July, 1939, to the date of his death, 22 July, 1939; and it has been established that during that period the insured was totally incapacitated from giving notice of his disability to the defendant.

The defendant contends that it did not receive notice of any disability on the part of the insured until after his death, and therefore the policy lapsed for failure to pay the premium, which it alleges fell due 13 May, 1939. The question of notice becomes immaterial since the defendant denies liability for the failure of the insured to pay the premium alleged to be due 13 May, 1939.

In the case of *Gorham v. Pacific Mutual Life Ins. Co.*, 214 N. C., 526, 200 S. E., 5, *Stacy, C. J.*, said: "It is generally held that 'failure to give notice or furnish proofs of loss, or defects in the notice and proofs, are waived by a denial of liability on other grounds,' the reason being that a denial of liability on other grounds is generally regarded as tantamount to saying payment would not have been made had notice been given, or proof of loss furnished, and the law is not disposed to require a vain thing. Cooley's Briefs on Ins., Vol. 7 (2d Ed.), 6019; *Guy v. Ins. Co.*, 207 N. C., 278, 176 S. E., 554; *Misskelley v. Ins. Co*, 205 N. C., 496, 171 N. C., 862; *Proffitt v. Ins. Co.*, 176 N. C., 680, 87 S. E., 635; *Mercantile Co. v. Ins. Co., ibid.*, 545, 87 S. E., 476; *Moore v. Accident Assurance Corp., supra* (173 N. C., 532, 92 S. E., 362); *Higson v. Ins. Co.*, 152 N. C., 206, 67 S. E., 509; *Gerringer v. Ins. Co.*, 133 N. C., 407, 45 S. E., 773; 14 R. C. L., 1349."

The defendant contends that the failure of the insured to pay the annual premium on 13 May, 1939, or within the grace period of 30 days thereafter, is material and of the essence of the contract, and that such failure involves an absolute forfeiture of the rights and benefits of the assured under the policy and that said policy, upon the failure to pay said premium as set forth above, became null and void. Such contention is untenable. The policy provides: "In event any premium on the Principal Contract or on this Supplemental Contract is in default not more than six months before total and permanent disability is established and it is shown that the disability began prior to the due date or prior to the expiration of the grace period of the premium in default, premiums falling due after such disability is established will be waived, provided the premium in default is paid by the Insured."

The total and permanent disability of the insured has been established as existing from 18 January, 1939, until the death of the insured, 22 July, 1939. We hold that the policy issued by the defendant to James E. Felts had not lapsed at the time of his death, 22 July, 1939.

The defendant, at the trial of this cause, did not show that it had complied with the requirements of C. S., 6465, as to the giving of notice

of premiums due, etc. However, the plaintiff does not need to invoke that statute in order to recover on the policy under consideration. The exceptive assignments of the defendant are without substantial merit.

In the trial below we find

No error.

STATE v. M. H. POTTER, JR.

(Filed 25 March, 1942.)

1. Criminal Law § 9—

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment, knowing at the time the person so aided has committed a felony. C. S., 4177.

2. Same—

The facts and circumstances adduced by the evidence in this case, construed in the light most favorable to the State, *are held* sufficient as to each essential element to sustain the conviction of appealing defendant as an accessory after the fact to the felony committed by the principal felon, the indictment and evidence against the principal felon being sufficient to sustain conviction of him of secret assault, C. S., 4213, and of assault resulting in serious injury, C. S., 4214.

APPEAL by defendant from *Nimocks, J.*, at December Term, 1941, of GREENE.

Criminal prosecution upon indictment charging defendant with being accessory after the fact to a malicious assault with a deadly weapon secretly committed by one Henry Ward with intent to kill, and resulting in serious injury.

The bill of indictment, deleting formalities, charges "that Henry Ward . . . on 14th July, 1941 . . . unlawfully, wilfully and feloniously, premeditatedly, deliberately and with malice aforethought did in and upon one Claude Sullivan, with a certain deadly weapon, to wit, a knife, secretly make an assault with intent to kill, and him, the said Claude Sullivan, unlawfully, wilfully, feloniously, premeditatedly, deliberately and with malice aforethought did stab, cut, wound and seriously injure in his back, . . ." and further charges "that on said day . . . M. H. Potter . . . well knowing the said Henry Ward to have done and committed the said felonious assault and felony in manner and form aforesaid . . . then and there, afterwards . . . unlawfully,

wilfully, feloniously, premeditatedly, deliberately and with malice aforethought, did him, the said Henry Ward, then and there receive, harbor, maintain, comfort, assist and transport away from the scene of the felony, for the purpose of enabling the said Henry Ward, avoid apprehensions. . . ."

Upon the call of the case in the Superior Court Henry Ward tendered a plea of guilty to secret assault with intent to kill. The defendant pleaded not guilty.

The State offered evidence tending to show in brief this narrative: On the morning of 14 July, 1941, about 5 o'clock, Claude Sullivan approached M. H. Potter, who was sitting in his car on street of Snow Hill, and after Potter had gotten out of his car and walked with Sullivan a short distance down the street they engaged in an argument about a horse and a mule. They agreed to go before the chief of police and have it settled. Thereupon they entered Potter's car, he on the left under the steering wheel, away from the sidewalk, and Sullivan on the right next to the sidewalk. Though Potter started his motor, they sat there in the car and talked for several minutes. Then "all of a sudden" Potter said to Sullivan "Get out of my car," and he did so, and appeared to turn in direction of his car parked near-by. As he did, Potter said, "I have got your team, and there ain't nothing you can do about it." Whereupon Sullivan turned and came back to the car, opened the door of it, and, leaning over with his head in the car and feet on pavement, reached with his hands as if he were going to pull Potter out. Henry Ward, a Negro employee of Potter, who had come across the street, was standing at the right rear fender of the car with an open knife in his hand. Then, as Sullivan was leaning against or in the car, as narrated by him, Potter's "expression changed and he got as white as a human can get," and "all of a sudden" Henry Ward, without saying anything, and of whose presence he, Sullivan, was unaware, stabbed Sullivan in the back with the knife. Sullivan cried out "he has killed me," or "he has cut me to death," as variously understood by men on the sidewalk near-by, and "went right down, kinder sideways" on both the running board and pavement. Ward raised his hand to strike with the knife a second time, but, upon being warned by some one near-by not to do it, backed off, and dared the near-by men to come toward him, and then, with knife in hand, got into the car with Potter, who drove away—as one witness stated, "the car left there pretty fast."

Around 7 o'clock that morning Potter, with a Negro man in his car, stopped at a filling station at Richland, forty-five miles away from Snow Hill, for service to his car. While there he procured for the Negro a ride to Jacksonville, North Carolina, with one Mr. Holt, who was a policeman of that town.

About 8 o'clock same morning when sheriff and chief of police went to home of Potter in Snow Hill, his automobile was parked around on cross street in driveway of his uncle. Upon being called out and asked about the Negro he had carried away, Potter denied that he had taken anyone away, denied that he had been out of town except two or three miles to a man to do some work for him, denied that Sullivan had been cut, and denied that he knew the name of the Negro who had cut Sullivan. But after being arrested and taken to the sheriff's office and there, after continuing his denials for an hour or more, he phoned for a bondsman and in talking over phone stated that he had been arrested because one of "his niggers," Henry Ward, had cut somebody, or stabbed a man, as differently expressed by witnesses. After this he admitted that Ward worked for him around his stables, that he had taken him around the corner to a truck and that just before he took him away he heard Sullivan say that he had been cut.

Later in the morning, around 11:30 o'clock, a patrolman arrested Ward while working at the stables of Potter at Marine base near Jacksonville.

Defendant offered no evidence.

Verdict: Guilty.

In entering judgment the court below found as a fact that the person assaulted, Claude Sullivan, was dangerously and seriously wounded as result of being stabbed with a knife by the defendant, Henry Ward, and proceeded to sentence both Henry Ward and the defendant Potter.

Judgment as to Potter: Confinement in the State's Prison at hard labor for not less than three, nor more than, five years.

Defendant Potter appeals to Supreme Court, and assigns error.

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

J. A. Jones and K. A. Pittman for defendant, appellant.

WINBORNE, J. One question of law is presented on this appeal: Considered in the light most favorable to the State is the evidence shown in the record sufficient to take the case to the jury on the offense charged against defendant M. H. Potter?

We are of opinion, and hold, that it is.

It is provided by statute in this State, C. S., 4177, that if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or for such felony whether the principal shall or shall not have been previously convicted, and punished as therein prescribed.

By the common law an accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts, or assists such other, the felon, or in any manner aids him to escape arrest or punishment. The same definition is applicable to modern statutes.

To constitute a person an accessory after the fact these essentials must appeal: (1) The felony must have been committed. (2) The accused must know that the felony has been committed by the person received, relieved or assisted. (3) The accessory must render assistance to the felon personally. 14 Am. Jur., 836-37, Criminal Law, secs. 102 and 103; 22 C. J. S., 165, 166, 167, Criminal Law, secs. 95, 96, 97; Clark & Marshall's Treatise on the Law of Crimes, 4th Ed. by Kearney, at p. 218, sec. 175; Wharton's Criminal Law, Vol. 1, p. 368, secs. 281-282.

It is stated in 14 Am. Jur., 837, Criminal Law, 103, that to be an accessory after the fact one need only aid the criminal to escape arrest and prosecution. It is said that "this rule, however, does not render one an accessory after the fact who, knowing that a crime has been committed, merely fails to give information thereof, nor will the act of a person having knowledge of facts concerning the commission of an offense in falsifying concerning his knowledge ordinarily render him an accessory after the fact. Where, however, the concealment of knowledge of the fact that a crime has been committed, or the giving of false testimony as to the facts is made for the purpose of giving some advantage to the perpetrator of the crime, not on account of fear, and for the fact of the advantage to the accused, the person rendering such aid is an accessory after the fact."

It is stated in 22 C. J. S., 167, Criminal Law, sec. 97, that "to constitute one an accessory after the fact the aid or assistance must have been rendered with the intention, and for the purpose of enabling the felon to escape detection, arrest or the like."

In the present case the bill of indictment is sufficiently comprehensive to charge Henry Ward with commission of a felony under either of two statutes, C. S., 4213, as to secret assault, and C. S., 4214, as to assault resulting in serious injury, and the evidence against him is full enough to support a conviction of him upon charge under either of these statutes.

Hence, applying the above principles of law, pertaining to accessory after the fact, to the case in hand, we are of opinion that the facts and circumstances in evidence pertinent to the charge against defendant Potter are amply sufficient to carry the case to the jury, and to support an adverse finding against him as to each of the essentials constituting the offense of accessory after the fact to the felony committed by Henry Ward.

In the judgment below, we find

No error.

STATE v. ALFRED CHAPMAN.

(Filed 25 March, 1942.)

1. Criminal Law § 47—Held: Crimes charged were of same class and were so connected in time and place as to permit consolidation of indictments for trial.

The evidence tended to show that defendant, a Negro, was walking through woods with a Negro girl and forced her to have sexual intercourse with him against her will, that on the same night, while defendant was still in company with the colored girl, he met a white girl in the company of two white boys, and that after an altercation with the white boys, they and the colored girl left the white girl with defendant and that he forced her to have sexual intercourse with him against her will. *Held:* The consolidation of the prosecutions for the purpose of trial was not error. C. S., 4622.

2. Criminal Law § 78d—

Defendant waives his exception to the refusal of his motion to nonsuit, made at the close of the State's evidence, by introducing evidence and failing to renew his motion at the close of all the evidence. C. S., 4643.

3. Criminal Law § 34a—

Held: The trial court properly refused to permit testimony of declarations made by defendant on the morning following the alleged crime unless defendant was going to testify in his own behalf, since such declarations were not a part of the *res gestæ* and therefore were incompetent as substantive evidence but would be competent only for the purpose of corroborating the testimony of defendant.

4. Criminal Law § 56—

A motion in arrest of judgment, based upon facts which defendant alleges did not come to his knowledge until after expiration of the trial term, cannot be allowed in the Supreme Court when there is no fatal defect appearing on the face of the record. Rules of Practice in the Supreme Court, No. 21.

APPEAL by defendant from *Burney, J.*, at January Term, 1942, of CRAVEN.

Criminal prosecution tried upon two bills of indictment charging the defendant with rape.

At the call of the cases for trial, the solicitor announced that the State would not ask for a verdict of rape, but would ask for a verdict of assault with intent to commit rape in each case. Thereupon the court, in its discretion, consolidated the two cases for trial.

The State offered evidence tending to show that on the night of 20 September, 1941, the defendant, a 38-year-old colored man, in company with one Fannie Simmons, a colored girl, went to the edge of the

city of New Bern under the pretense on the part of the defendant, that they were going to see a girl friend. After they had left the taxi in which they had been riding, the defendant took the Simmons girl on a road through the woods, still pretending to be in search of the friend's house. Fannie Simmons lived in Pamlico County and had arrived in New Bern that day. The prosecutrix testified that after she and defendant had gone along this road into the woods for some distance, the defendant made an improper proposal to her, and upon her refusal he struck her, first near her left eye, and again on the nose, and thereafter forced her to have sexual intercourse with him against her will.

On the same night, and while defendant was still with the colored girl, he met Louise Pate, a white girl, in the company of two white boys, and after having an altercation with the two white boys, Louise Pate, 16 years of age, testified that the boys and the colored girl left her with the defendant and that he forced her to have sexual intercourse with him against her will.

Verdict: "Guilty of an assault with intent to commit rape in each case."

Judgment: In case No. 466, that the defendant be confined in State Prison at Raleigh for a period of seven years, and in case No. 468 that the defendant be confined in the State Prison at Raleigh for a period of eight years. Sentence in No. 468 to begin at the expiration of the sentence in No. 466.

The defendant appeals, assigning errors.

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

Charles L. Abernethy, Jr., for defendant.

DENNY, J. The first exception is to the court finding as a fact that the two cases against defendant made one connected story and therefore consolidated the cases for the purpose of trial. The defendant contends that the consolidation was prejudicial.

The case of *S. v. Rice,* 202 N. C., 411, 163 S. E., 112, holds: "C. S., 4622, regulates the consolidation of criminal actions. This statute has been construed in many decisions of this Court. In *S. v. Combs,* 200 N. C., 671, 158 S. E., 252, it is written: 'The court is expressly authorized by statute in this State to order the consolidation for trial of two or more indictments in which the defendant or defendants are charged with crimes of the same class, which are so connected in time or place as that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others.' *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259; *S. v. Smith,* 201 N. C., 494; *S. v. Malpass,* 189 N. C.,

349, 127 S. E., 248. Moreover, it has been generally held that if separate offenses are charged in the same warrant or indictment, they are to be considered as separate counts. *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590."

This exception to the consolidation herein complained of cannot be sustained.

The second exception is to the refusal of the court to dismiss the bill or count alleging assault with intent to commit rape upon the body of Louise Pate, in that the testimony, as defendant contends, shows clearly that she voluntarily consented to have sexual intercourse with the defendant. The motion to dismiss was made at the close of the State's evidence. To the refusal of the court to dismiss, the defendant excepted.

The defendant then introduced evidence and the motion to dismiss at the close of all the evidence was not renewed, as required by C. S., 4643. *S. v. Helms,* 181 N. C., 566, 107 S. E., 228; *S. v. Hayes,* 187 N. C., 490, 122 S. E., 13; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299.

The second exception was waived by the introduction of evidence by the defendant and the failure to renew the motion to dismiss at the close of all the evidence.

The third exception is to the refusal of the court to permit one of the witnesses for the defendant to testify to statements made by the defendant on the morning following the alleged crime, unless it was understood that the defendant was to testify in his own behalf.

In *S. v. McNair,* 93 N. C., 628, the Court said: "It is settled by repeated adjudications, that declarations of a prisoner, made after the criminal act has been committed, in excuse or explanation, at his own instance, will not be received; and they are competent only when they accompany and constitute part of the *res gestæ.*" *S. v. Stubbs,* 108 N. C., 774, 13 S. E., 90; *S. v. Peterson,* 149 N. C., 533, 63 S. E., 87.

In view of the facts in the instant case, unless the evidence was to be offered in corroboration of the defendant's testimony, it was not admissible.

"Evidence may be both corroborative and substantive, and when such is the case, it should be admitted for both purposes, and it is error for the judge to limit it to its corroborative effect. But when evidence is *not substantive,* but only *corroborative* as in the case of previous statements of a witness, it is the duty of the trial judge, even without any request for special instructions, to see that the jury fully understand the use of the evidence, so that it may not operate on their minds as substantive proof of the facts in dispute." Lockhart, Handbook on Evidence, sec. 278, citing *Sprague v. Bond,* 113 N. C., 551, 18 S. E., 701, and *S. v. Parker,* 134 N. C., 209, 46 S. E., 511.

The defendant did testify in his own behalf and the corroborative testimony was properly admitted. The third exception cannot be sustained.

The fourth and fifth exceptions are to the refusal of the court to set aside the verdict and order a new trial.

The motion to set aside the verdict and grant a new trial was addressed to the discretion of the court, and its refusal to grant same is not reviewable on appeal. *S. v. Caper,* 215 N. C., 670, 2 S. E. (2d), 864; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657.

This disposes of all of defendant's exceptions. However, the defendant, through his counsel, makes a motion in the Supreme Court in arrest of judgment, based upon facts which he alleges came to the knowledge of the defendant after the expiration of the trial term.

Rule 21 of the Rules of Practice in the Supreme Court, 213 N. C., 821, provides: "Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. . . . No exception not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment."

There is no fatal defect appearing on the face of the record and the defendant's motion in arrest of judgment must be denied. *S. v. Brown, supra; S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 432; *S. v. McCollum,* 216 N. C., 737, 6 S. E. (2d), 503.

The evidence of the State and of the defendant is conflicting, sordid, and repulsive. Louise Pate, the 16-year-old white girl, admitted she had gone to these particular woods on the night of 20 September, 1941, for the purpose of having sexual intercourse with the two white boys who accompanied her to the premises. She further admitted that she had been having sexual intercourse with men since she was eleven years old. The defendant admitted that he had served one term of five years in the penitentiary and had served three terms on the roads. The defendant testified at the trial that he did have sexual intercourse with both Fannie Simmons and Louise Pate on the night of 20 September, 1941, but denied that such acts were against their will. All the evidence was submitted to the jury and the jury found the defendant guilty in both cases.

In the trial below, we find

No error.

STATE OF NORTH CAROLINA, ON RELATION OF J. T. LEDWELL, *v.* T. G. PROCTOR.

(Filed 25 March, 1942.)

1. Pleadings § 17—

A demurrer is properly overruled on the ground that the complaint fails to state a cause of action when the demurrer fails to point out any defect in the complaint which would entitle defendant to a dismissal.

2. Pleadings § 15—

A demurrer will be sustained if the complaint fails to allege each material ultimate fact comprising plaintiff's cause of action.

3. Elections § 16—

The machinery provided by C. S., ch. 97, as amended, for ascertaining and declaring the successful candidate in an election applies to all municipal elections.

4. Same—

The returns made by the precinct officials constitute but a preliminary step in ascertaining the results of an election, and such returns must be canvassed and declared by the board of canvassers as an essential part of the election machinery, which board, after judicially determining the results, must issue a certificate of election to the successful candidate upon which he may qualify and enter into the discharge of the duties of the office. C. S., 5985, 5986, 5991.

5. Same—

In canvassing the returns and judicially determining the results of an election, the board of elections has authority, judicial in its nature, to examine the returns and decide upon their correctness and sufficiency, and pass upon the legality of any disputed ballots, and to accept or reject them.

6. Same—

The declaration of the board of elections as to the results of an election and its certificate issued thereon, while *prima facie* correct, are not conclusive, and may be reviewed by the courts, but contesting candidates must first exhaust their remedies before the board of elections before resorting to the courts.

7. Quo Warranto § 2—

In an action in the nature of *quo warranto* to try title to a public office, a complaint which fails to allege that the returns of the precinct officials had been canvassed and the result of the election judicially determined by the board of elections and that it had issued its certificate, is fatally defective and a demurrer *ore tenus* will be allowed in the Supreme Court on appeal, since resort may not be had to the courts until after the machinery for the ascertainment of the results of the election has been exhausted.

APPEAL by defendant from *Burney, J.*, at September Term, 1941, of LEE. Demurrer sustained.

Civil action in the nature of a *quo warranto* to try title to the office of alderman of the town of Sanford for the two-year term from 1 July, 1941, to 30 June, 1943, heard on demurrer.

After alleging the necessary preliminary facts the plaintiff in his complaint further alleges that he and the defendant were candidates for alderman of the town of Sanford from the third ward and were voted upon in the general municipal election held 6 May, 1941, at which election the plaintiff received 186 and the defendant received 179 votes, all of which was shown and set out in the official returns and report of said election in said ward by the registrar and judges of election; that plaintiff received a majority of the legal votes cast in said election and was duly elected and is entitled to qualify as alderman from said ward for said term; that certain votes, 11 in number, were illegally cast for the defendant; and that defendant has wrongfully and unlawfully taken the oath and assumed the official duties and is acting in the official capacity of alderman from said ward and should be removed therefrom and the plaintiff declared to be the duly qualified elected alderman from said ward and entitled to the office and the fees and emoluments therefrom.

Upon said allegations plaintiff prays that he be declared the duly elected alderman for said term; that the defendant be ousted and that he, the plaintiff, recover of the defendant the emoluments received from said office.

The demurrer interposed in the court below was overruled and the defendant appealed.

K. R. Hoyle and J. G. Edwards for defendant, appellant.
D. E. McIver and Gavin, Jackson & Gavin for plaintiff, appellee.

BARNHILL, J. The demurrer interposed in the court below was properly overruled. It fails to point out any defect in the complaint which would entitle the defendant to a dismissal of the action.

In this Court the defendant interposed a demurrer *ore tenus* for that it appears upon the face of the complaint that it fails to state or set out a cause of action or to state or set out facts sufficient to constitute a cause of action. This demurrer was reduced to writing and points out in detail the alleged deficiencies in the complaint, in substance as follows; for that it is not alleged: (1) that the returns made by the registrar and judges of election were canvassed and the result determined and declared by the municipal board of elections and a certificate of elections issued to plaintiff or any other person; (2) that any canvass and determination of the result of such election made by the municipal board of elections was not correctly and legally done and performed; (3) that said board, in any respect, acted wrongfully or wantonly, arbitrarily, or unlawfully or otherwise than in good faith; (4) that a certificate of elec-

tion required by law was issued to relator or was not issued to defendant; (5) that upon a canvass by said board the result was not accurately, legally and correctly ascertained and declared, or that defendant was not declared to have received a majority of the votes; (6) that relator has presented himself for qualification or offered to take the oath of office and been denied such right or that he has presented a certificate of election and demanded the right to qualify; and (7) that the allegations that defendant "wrongfully and unlawfully" assumed and has "usurped" the office are not supported by requisite allegations of fact and constitute mere conclusions of the pleader.

May a contestant for public office maintain a civil action in the nature of *quo warranto* upon the mere allegation that he has received a majority of the votes cast as shown by the returns of the registrar and judges of election without further alleging that such returns have been canvassed and that upon such canvass it has been ascertained and declared that he is the duly elected candidate and that a certificate of election was thereupon issued to him? On the facts in this case we must answer in the negative.

That the pleader must allege all the material ultimate facts upon which his cause of action is based has become axiomatic. If all such facts are not alleged a demurrer will be sustained.

Our election law, Consolidated Statutes, ch. 97, as amended, provides certain machinery to be followed in ascertaining and declaring the successful candidate in an election. It is applicable to all municipal elections. Sec. 2, ch. 164, Public Laws 1929. See also sec. 42, ch. 164, Public Laws 1929, and *Phillips v. Slaughter,* 209 N. C., 543, 193 S. E., 897.

A certified statement of the results of an election in any ward or precinct must be signed by the registrar and judges of election and a copy thereof must be furnished to the board of canvassers. C. S., 5985, as amended by sec. 8, ch. 165, Public Laws 1933. Upon receipt of such returns the result of the election must be canvassed and declared by the said board, C. S., 5986, as amended by ch. 165, Public Laws 1933; after which the board must judicially determine the result and issue a certificate of election to the successful candidate. C. S., 5991, as amended by ch. 165, Public Laws 1933. It is then, and upon the certificate thus issued, the party elected may qualify and enter upon the discharge of the duties of the office to which he has been elected. *Cohoon v. Swain,* 216 N. C., 317, 5 S. E. (2d), 1.

In canvassing the returns and judicially determining the result the board of canvassers must pass upon the legality of any disputed ballots. *Burgin v. Board of Elections,* 214 N. C., 140, 198 S. E., 592.

It follows that the board of elections has authority, judicial in its nature, to examine the returns and decide upon their regularity, correctness and sufficiency, and to accept or reject them. *Gatling v. Boone,*

98 N. C., 573; *Barnett v. Midgett,* 151 N. C., 1, 65 S. E., 441. It constitutes an essential part of the machinery provided by statute for the ascertainment of the successful candidate in an election to which contesting candidates must first resort for the determination and declaration of the results of the election. The returns made by the registrars and judges of election merely constitute a preliminary step and such returns alone do not entitle the apparently successful candidate to the office.

While the declaration of the board of elections of the result of an election as judicially determined and the certificate issued thereon are not conclusive, they must be taken as *prima facie* correct. *Jones v. Flynt,* 159 N. C., 87, 74 S. E., 817; *S. v. Jackson,* 183 N. C., 695, 110 S. E., 593; *Cohoon v. Swain, supra.* "The declaration of election as contained in the certificate conclusively settles *prima facie* the right of the person so ascertained and declared to be elected to be inducted into, and exercise the duties of, the office. *Cohoon v. Swain, supra,* and cases cited. The law contemplates and intends generally that the result of an election as determined by the proper election officials shall stand and be effective until it shall be regularly contested and reversed or adjudged to be void by a tribunal having jurisdiction for that purpose and the certificate of election is not subject to attack except in a civil action in the nature of a *quo warranto* proceeding. *Cohoon v. Swain, supra,* and cases cited.

Non constat the declaration of the result and the issuance of a certificate by a board of elections is *prima facie* correct, it is not conclusive. Resort, in proper instance, may be had to the courts and the courts may examine and pass upon the correctness and sufficiency of the return and to settle and determine the true and lawful result of the election as it affects the right of the parties before the court. *Gatling v. Boone, supra; Harkrader v. Lawrence,* 190 N. C., 441, 130 S. E., 35, and cases cited. Even so, the court will not permit itself to be substituted for the board of elections in the first instance for the purpose of canvassing the returns from the precinct officials and declaring the results thereof. The contesting candidates must first use the machinery at hand before applying to the court for relief.

Here the relator does not allege that the returns of the precinct officials have been canvassed or that the result of the election has been judicially determined or that a certificate has been issued or that the board of election acted arbitrarily or in bad faith. Nor does he allege that upon such canvass it was judicially determined that he is the duly elected candidate or that he has received or is entitled to receive a certificate of election. On the contrary, plaintiff admits in his brief that there was no canvass. It follows that the complaint fails to state a good cause of action.

The demurrer *ore tenus* entered in this Court was well advised and must be sustained.

Demurrer sustained.

FLORENCE L. ADAMS v. Z. V. MURPHREY ET AL.

(Filed 25 March, 1942.)

Appeal and Error § 38—

The Supreme Court, one Justice not sitting, being evenly divided in opinion whether error was committed in permitting the jury to view defendant's bottling plant during the trial term some twenty months after plaintiff's alleged injury from drinking a bottled drink containing shattered glass, the judgment of the Superior Court is affirmed without becoming a precedent.

APPEAL by plaintiff from *Johnson, Special Judge,* at November Special Term, 1941, of PITT.

Civil action by ultimate consumer to recover of manufacturer or bottler damages resulting from drinking bottled beverage containing noxious substance.

On 7 March, 1939, the plaintiff purchased from a retail merchant in Parmele, N. C., a bottle of coca-cola which had been manufactured or bottled and placed on the market by the defendants. The plaintiff testified that as a result of swallowing shattered glass from the bottle of coca-cola she suffered personal injury and pain.

The defendants' plant is located in the city of Greenville, N. C. Over objection of plaintiff, the jury was allowed to inspect the plant of the defendants and to observe the "processes of operating the machinery." This was at the November Special Term, 1941, Pitt Superior Court.

From verdict and judgment for defendants, the plaintiff appeals, assigning errors.

Julius Brown for plaintiff, appellant.

J. B. James and Louis C. Skinner for defendants, appellees.

PER CURIAM. One member of the Court, *Schenck, J.,* not sitting, and the remaining six being evenly divided in opinion whether, in the circumstances, error was committed in allowing the jury to view the premises of the defendants and to observe the processes of operation, *Highway Com. v. Hartley,* 218 N. C., 438, 11 S. E. (2d), 314, the judgment of the Superior Court stands affirmed as the disposition of this appeal without becoming a precedent, accordant with the usual practice in such cases. *Outlaw v. Asheville,* 215 N. C., 790, 1 S. E. (2d), 559.

Affirmed.

A. F. SANDERS, ADMINISTRATOR OF LULA J. SANDERS, DECEASED, AND AS AN INDIVIDUAL, ET AL., v. THE TOWN OF SMITHFIELD.

(Filed 8 April, 1942.)

1. Judgments § 32—

A judgment that plaintiffs were not entitled to recover in tort for damages to their property abutting a street resulting from the closing of the street at a railroad grade crossing, upon the court's holding that the municipality had authority to close the street, does not bar a subsequent action to recover damages to the property upon the theory that the closing of the street constituted a "taking" of an easement appurtenant to the property, entitling plaintiffs to compensation.

2. Abatement and Revival § 14—

Where a street is closed at a railroad grade crossing, any right to recover damages resulting therefrom to abutting property, upon the theory that the closing of the street constituted a "taking" of an easement appurtenant to the property, accrues when the street is closed, and when this occurs during the lifetime of the owner of the property, the right of action accrues to the administrator and not to the heirs at law.

3. Municipal Corporations § 49—

A provision of the municipal charter involved in this case required that the question of compensation for property taken in connection with street improvements should be referred to arbitrators, with right of appeal to the Superior Court whether the charter precludes the owners of property abutting a street from maintaining an action in the Superior Court to recover damages to the property resulting from the closing of the street at a railroad grade crossing upon the theory that closing the street constituted a "taking" of an easement appurtenant to the property, *quære.*

4. Municipal Corporations § 28—

The owner of property abutting a street has, in addition to the right common with the general public to the use of the street, the right of access to and from his property, which constitutes an easement and property right peculiar to himself.

5. Same: Eminent Domain § 2—

The interference with the right of the owner of property abutting a street to access to and from his property is a "taking" for which compensation must be allowed, but the interference with such access must be direct, substantial and proximate, since if it results only in some inconvenience in compelling him to take a more circuitous route of access, it differs only in degree but not in kind from that sustained by the public generally, and is *damnum absque injuria.*

6. Same—Closing of street at crossing, resulting in mere inconvenience to owner of property abutting the street in getting to and from section on other side of tracks, is not a "taking."

Plaintiffs' evidence tended to show that they owned property abutting a street and that defendant municipality closed the street at a railroad grade crossing. Plaintiffs' evidence further tended to show that between

their property and the crossing there was a cross street leading to an underpass a short distance away which had been maintained by the municipality and used by the public for a period of three years. *Held:* Defendant municipality's motion to nonsuit at the close of plaintiffs' evidence was properly granted, since plaintiffs' evidence disclosed that the street in front of their property was open in both directions and that the territory on the other side of the railroad tracks was accessible, and that such access was merely more circuitous and inconvenient than prior to the closing of the street, or, in any event, plaintiffs failed to establish that their property was left in a *cul-de-sac* as a result of the closing of the street. *Hiatt v. Greensboro*, 201 N. C., 515, cited and distinguished.

APPEAL by plaintiffs from *Burney, J.*, at September Term, 1941, of JOHNSTON.

This action was brought by A. F. Sanders, administrator of the estate of Lula J. Sanders, in that capacity and in his individual right, and by the heirs at law, to recover damages for injury to property consequent upon the closing of a grade crossing at the intersection of a street in the town of Smithfield with the Atlantic Coast Line Railroad, during the life of the decedent. Before the elimination of the grade crossing, the street was continuous, that portion east of the railroad being known as Massey Street and that on the west side known as Johnson Street. The Sanders lot abuts on Massey Street in the vicinity of the intersection. The plaintiffs' evidence tends to show that an unpaved cross street, maintained by the municipality, and sufficient to accommodate general traffic, parallels the railroad at this point, intersecting Massey Street between that property and the railroad right of way. It affords access to the underpass a few blocks away and gives passage into and out of Massey Street beyond plaintiffs' lot, to which it is adjacent.

The grade crossing referred to was considered dangerous; the underpass was built in lieu thereof, and the crossing closed by the municipality pursuant to an agreement with the State Highway Commission and the Atlantic Coast Line Railroad Company.

There is a dwelling on the lot and a store building in which a mercantile business has been carried on and was being conducted at the time the grade crossing was closed.

The evidence tends to show that the property has diminished in value since the crossing was closed, and that trade in the store has been much reduced.

The defendant in its answer made the plea that all matters in controversy had been adjudicated in a former action, but introduced no evidence. Objection is further made that the plaintiffs have no right to maintain the present action, since the provisions of the city charter afford an exclusive remedy by arbitration, and appeal to the Superior Court. It is further contended that there is no taking of property in the legal sense for which compensation should be allowed.

On the conclusion of the plaintiffs' evidence, the defendant moved for judgment as of nonsuit, which was allowed, the defendant offering no evidence.

Plaintiffs appealed, assigning error.

Parker & Lee for plaintiffs, appellants.
Wellons & Wellons and Ward, Stancil & Ward for defendant, appellee.

SEAWELL, J. The controversy in this case is identical in factual situation with that presented in *Sanders v. R. R.*, 216 N. C., 312, 4 S. E. (2d), 902, in which the present defendant, the town of Smithfield, was a party; but there is a substantial difference in the parties and the kind of action now brought. In the former case the plaintiffs sought recovery against the railroad company and the city for the commission of a tort in obstructing the street upon which plaintiffs' property abuts, and thereby creating and maintaining a nuisance, to the detriment of the plaintiffs' easement in the street and consequent injury to the property. The case was viewed as an action sounding only in tort, predicated upon an *ultra vires* act of the municipality, and a demurrer to the complaint was sustained upon the ground best expressed by quoting from that case at p. 315:

"There is statutory authority for its action both under its charter provisions, ch. 424, Private Laws 1907, sec. 34; ch. 219, Private Laws 1911, sec. 25, and in the Public Law; C. S., 2787, subsec. 11. It has power 'to . . . close any street or alley that is now or may hereafter be opened . . . as it may deem best for the public welfare of the citizens of the city.' There is no allegation in the complaint that the town authorities in exercising this power acted arbitrarily or capriciously or that there was any abuse of discretion in the adoption of the resolution closing Massey Street. In so doing, the town was exercising a discretionary and legislative power as a governmental agency. In such cases the court can interfere only in instances of fraud or oppression constituting a manifest abuse of discretion. *Tate v. Greensboro*, 114 N. C., 410; *Hoyle v. Hickory*, 164 N. C., 79." The opinion concludes: "A governmental agency may take or appropriate private property for the public use. This power carries the corresponding duty to pay just compensation for the property taken. Whether the action of the town in surrendering its easement in the land of the defendant railroad company at the Massey Street crossing and in closing the street at the point constitutes a 'taking' of an interest in the property of plaintiffs, for which it must compensate the plaintiffs, is not here presented or discussed."

The defendant did not follow up its plea of *res judicata* by offering evidence; and indeed it would not have availed, since a different cause of

action is now presented. The plaintiffs now sue the city to recover compensation for the taking of their property by vacating or closing the street and interfering with an appurtenant easement of access, ingress and egress.

The defendant has raised no objection to the joinder of parties or the capacity in which they sue. Properly speaking, since the taking complained of took place, if at all, during the lifetime of Lula Sanders, compensation, if allowed, should go to the administrator. 18 Am. Jur., Eminent Domain, sec. 237. Her heirs at law are not presently concerned, but this is immaterial, in view of the disposition of the case.

(1) The defendant raises the question whether plaintiffs have a right to maintain their present action against the city for compensation for the taking of their property, contending that the remedy provided in the charter of the town, ch. 424, Private Laws 1907, sec. 34, is exclusive. This section requires that the question of compensation for property taken in connection with street improvement shall be referred to arbitrators, providing for their selection and for an appeal to the Superior Court in case either party is not satisfied with the award.

We are inclined to the view that it was the intention of the statute to provide an exclusive remedy, applicable to plaintiffs' cause of action, if any they have; but we prefer to rest decision on grounds which go to the merits of the controversy, *ut sit finis litis.*

(2) The defendant insists that no person can have, as a mere incident to the use of his property, a private proprietary right in the maintenance by the municipality of a condition admittedly involving serious danger to the public; and contends that the elimination of the grade crossing having been made, both ostensibly and in fact, under the necessary exercise of the city's police power, the consequent detriment to the plaintiffs' property is *damnum absque injuria,* citing *Martin v. Greensboro,* 193 N. C., 573, 137 S. E., 666; *Blackwelder v. Concord,* 205 N. C., 792, 172 S. E., 392; *Klingenberg v. Raleigh,* 212 N. C., 549, 194 S. E., 297; *Mosteller v. R. R.,* 220 N. C., 275, 17 S. E. (2d), 133. Counsel interprets *Sanders v. R. R., supra,* as decisive on this point.

In *Mosteller v. R. R., supra,* the plaintiffs sought an injunction upon the ground that the closing of an underpass near their abutting property was an *ultra vires* act on the part of the Highway Commission, and the pertinent observation of the Court in that case was addressed to the existence of the challenged power, and not to the question of compensation. Here no question is raised as to the power of the municipality to close the grade crossing, since it has it under the general law and by virtue of its charter, ch. 424, Private Laws 1907, *supra.*

True, it is generally recognized that a municipality is not liable for damages, when acting in good faith, in its governmental capacity, and in

the exercise of its police power. The elimination of a dangerous grade crossing on this principle may be near the categories, established in the course of decision, as to which it is held that rights pertaining to the use of property are not within the constitutional inhibition against taking without compensation, when it is done in good faith, in the necessary exercise of the police power. McQuillin, Municipal Corporations, 2d Ed., Vol. 4, § 1590 (1470). In this connection see *Chicago, B. & Q. R. Co. v. People ex rel. Grimwood,* 200 U. S., 561, 26 S. Ct., 341, 50 L. Ed., 596; *Armour & Co. v. N. Y., N. H. & H. Ry.,* 41 R. I., 361, 103 Atl., 1031. In view of the conclusion we have reached, it is unnecessary in this case, however, to extend the doctrine so far, or to pass upon the significance of the cases cited by the defendant in that regard.

(3) It is generally held that the owner of abutting property has a right in the street beyond that which is enjoyed by the general public, or by himself as a member of the public, and different in kind, since egress from and ingress to his own property is a necessity peculiar to himself. *Colvin v. Power Co.,* 199 N. C., 353, 154 S. E., 678; *Hiatt v. Greensboro,* 201 N. C., 515, 522, 160 S. E., 748; *Davis v. Alexander,* 202 N. C., 130, 162 S. E., 372; *Glenn v. Board of Education,* 210 N. C., 525, 187 S. E., 781; *Henderson v. Lexington,* 132 Ky., 390, 111 S. W., 318; 29 C. J. S., 910, sec. 105. The right is in the nature of an easement appurtenant to the property, and abridgment or destruction thereof by vacating or closing the street, resulting in depreciation of the value of the abutting property, may give rise to special damages compensable at law. *Brakken v. Mpls. & St. L. Ry.,* 29 Minn., 41, 11 N. W., 124; also cases cited *supra.*

Beyond acceptance of this fundamental principle, authorities differ as to practically every other phase of the subject under discussion. However, following the line of authorities considered commendable and controlling, it is settled law in this State that under such circumstances the interference with the easement, which is itself property, is considered, *pro tanto,* a "taking" of the property for which compensation must be allowed, rather than a tortious interference with the right. *Hiatt v. Greensboro, supra; Phillips v. Telegraph Co.,* 130 N. C., 513, 41 S. E., 1022; *Stamey v. Burnsville,* 189 N. C., 39, 126 S. E., 103.

But the application of the doctrine to particular situations has differed.

Where there is no actual encroachment on the property, but only the question of interference with the appurtenant easement, since the right itself springs out of and attaches to the use of a public facility, conservative opinion tends strongly to limit it to such reasonable recognition as will meet the exigencies involved in the owner's use of his property, and yet will not unduly restrict the government in functioning for the public convenience and necessity.

It is understood that absolute equality of convenience cannot be achieved, and those who take up their residence or purchase and occupy

property in proximity to public roads or streets do so with notice that they may be changed as demanded by the public interest. To justify recovery in such case, the damages must be direct, substantial and proximate, and not such as are attributable to mere inconvenience—such as being compelled to use a longer or more circuitous route in reaching the premises. McQuillin, *op. cit., supra,* § 1527 (1410). It is not enough that the vacation results merely in some inconvenience to his access, or compels a more circuitous route of access, or a diversion of traffic from the premises, or a consequent diminution in value. 18 Am. Jur., Eminent Domain, sec. 225. An inconvenience of that nature is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria. Buhl v. Fort Street Union Depot Co.,* 98 Mich., 596, 57 N. W., 829; see *Crowell v. Power Co.,* 200 N. C., 208, 156 S. E., 493; *Mosteller v. R. R., supra* (220 N. C., 275, 17 S. E. [2d], 133).

The nature of the easement in the street acquired by the abutting owner leads us to a further consideration of its physical extent under the circumstances of this case. How far along the street each way from the abutting property is it effective? It seems clear that the owner is not entitled to freeze the map, or demand compensation for municipal changes in the street, however remotely they occur.

Pertinent to the inquiry, we quote the following terse statement from an able and careful authority on the subject: "If the street directly in front of one's property is not vacated but the portion vacated is in another block, so that he may use an intersecting cross street, although perhaps it is not quite so short a way nor as convenient, it is almost universally held that he does not suffer such a special injury as entitles him to damages. And this is so notwithstanding the new route is less convenient or the diversion of travel depreciates the value of his property." McQuillin, *loc cit., supra.* See Lewis, Eminent Domain (3rd Ed.), § 203. "Damages may not ordinarily be recovered for the vacation or closing of a street in another block from that in which the complainant's property is located, or, in other words, beyond the next cross street." 18 Am. Jur., Eminent Domain, sec. 225; *Re Hull,* 163 Minn., 439, 204 N. W., 534, 205 N. W., 613, 49 A. L. R., 320; Annotations, 49 A. L. R., 361, 93 A. L. R., 644. We believe the principle thus expressed to be an adequate answer to our inquiry, and it meets our approval.

These authorities are in accord with those of our own State, holding that the mere imposition of an inconvenience of that character gives rise to no cause of action. *Crowell v. Power Co., supra; Mosteller v. R. R., supra.*

The plaintiffs rest their case upon the exceptional situation presented in *Hiatt v. Greensboro, supra* (201 N. C., 515, 160 S. E., 748), in which

case recovery was allowed on the ground that the closing of the street immediately adjacent to the abutting property had left it in a *cul-de-sac* without the possibility of continuous passage in front of it either way. In the opinion it is carefully pointed out that there was no street between plaintiff's property and the railroad. The decision is amply supported by authority—although there is much to the contrary—and we have no occasion to disturb it. It is in accord with the rule applied in many of the texts. "In those jurisdictions where the compelling of the taking of a more circuitous route is held not a special injury, a distinction has been drawn between an obstruction putting plaintiff's property in a *cul-de-sac* and one not so doing, there being an intersecting street between plaintiff's property and the obstruction, and it is held in the former class of cases that there is a special injury." McQuillin, *op. cit., supra,* § 1487 (1383). This is not at all out of harmony with the rule we apply in the case at bar. The language employed by the learned and careful justice who spoke for the Court in *Hiatt v. Greensboro, supra,* is reminiscent of the above passages from McQuillin and other authorities cited, in which the situation presented in the *Hiatt case, supra,* and that presented in the case under consideration are contrasted, and different conclusions drawn. There is no reason to believe that he was not advertent to the distinction between the two, or that the Court intended to extend the doctrine beyond the limitations here expressed.

Applying these principles to the facts before us, we find that plaintiffs' evidence—the defendant offered none—discloses that between their property and the railroad and closed crossing, the city has for three years maintained, and the public has for that period used, a street through which access may be had to the underpass a short distance away, and through it to the general system of streets on the other side of the railroad. Through this street traffic may pass continuously, both ways, by plaintiffs' property, into and out of Massey Street between that property and the railroad.

Plaintiffs are not in a position to complain that the evidence relating to the street was not submitted to the jury. As stated, it is plaintiffs' own evidence, was without material contradiction in its parts, and it tends to show the existence of such a street maintained by the municipality and used by the public for the period stated. It had no contrary significance which would justify its submission to the jury, and the plaintiffs are bound by it.

There is no issue here between parties who may assert conflicting claims to the *locus* occupied by the street. In an action of this kind, and in the relation these litigants have to the subject matter, upkeep of this street by the municipality and its use by the public for a period of three years under the conditions appearing in the evidence are sufficient to raise,

prima facie, a presumption that it is a public street. *Campbell v. Elkins,* 58 W. Va., 308, 52 S. E., 220; Elliott, Roads and Streets (4th Ed.), Vol. 1, §§ 167-169; 25 Am. Jur., Highways, sec. 48.

Moreover, the plaintiffs have alleged that their property has been placed in a *cul-de-sac* by the closing of the street at the crossing. Proof of this allegation is essential to recovery. Taken in its most favorable light for the plaintiff in this respect, the evidence does not tend to support the alleged cause of action. The judgment of the court below is

Affirmed.

ALONZO PLEASANTS v. J. OTIS BARNES AND C. WELDON BARNES.

(Filed 8 April, 1942.)

1. Landlord and Tenant § 1: Master and Servant § 1—

Plaintiff was a sharecropper on defendants' farm. The agreement between them made no provision in regard to plaintiff helping in pulling stumps or in doing extra work on the farm, but in response to defendants' request, plaintiff aided in pulling stumps from a field on the farm. *Held:* Plaintiff's work in helping to pull the stumps was incidental to the contract of renting, and in regard thereto the relationship between the parties was that of landlord and tenant and not that of master and servant.

2. Master and Servant § 18—

Ordinarily, a master is not liable for an injury to a servant attributable solely to the negligence of a fellow servant provided the master has exercised reasonable care in selecting servants who are competent and fit for the work in which they are engaged.

3. Same—

The presumption is that the master has used due care in selecting his servants, and the burden is upon an employee injured by the negligence of a fellow servant to show by the greater weight of the evidence that the fellow servant was incompetent and that the master employed or retained the fellow servant after knowledge, actual or constructive, of his incompetency.

4. Same—Evidence held to show that plaintiff's injury was result of negligence of fellow servant.

Plaintiff was a sharecropper on defendants' farm and was injured while engaged in pulling stumps in a field. Plaintiff's evidence tended to show that an employee of the defendants was driving a tractor and that he and plaintiff were pulling the stumps by wrapping a chain around a stump and pulling it up with the tractor, that they had successfully pulled a number of stumps by having plaintiff hold the end of the chain until the tractor had drawn it tight so that its links would lock, but that on the occasion causing plaintiff's injury the driver of the tractor, instead of tightening the chain gradually as he had been doing, did so suddenly so

that the chain did not lock but jerked plaintiff to the ground and hit him, causing the injury in suit. Plaintiff offered no evidence that the driver of the tractor was incompetent or that defendants hired or retained him with actual or constructive knowledge of any incompetency. *Held:* Even conceding that the relationship of master and servant existed between defendants and plaintiff, the evidence disclosed that the injury was caused by the negligence of a fellow servant, and failed to show any negligence on the part of defendants in hiring or retaining him.

5. Master and Servant § 15—

In order to hold the master liable for injuries to a servant on the ground that the master failed to provide a sufficient number of employees to do the work, the injured employee must show that the insufficiency of help was a proximate cause of the injury.

6. Master and Servant § 14a—

Plaintiff was engaged in helping pull stumps with a tractor and chain. The chain had no hook, but the stumps were pulled by wrapping the chain around the stump several times and locking the links by tightening the chain with the tractor while plaintiff held the other end of the chain. *Held:* In order to predicate liability on the part of the master in failing to provide a chain with a hook, plaintiff must show that chains with such hooks were in general and approved use in performing such work.

7. Master and Servant § 17—

Plaintiff was engaged in helping to pull stumps with a tractor and chain. Plaintiff's evidence disclosed that he objected to doing the work without more help and without a hook on the chain, but that he continued to work without any promise by defendants to repair the chain or furnish more help. *Held:* The relationship between the parties was not such as to obligate plaintiff to continue to work in the face of known danger, and therefore plaintiff assumed the risk incident thereto.

APPEAL by plaintiff from *Hamilton, Special Judge,* at November Term, 1941, of JOHNSTON.

Civil action to recover for injury allegedly resulting from actionable negligence.

Upon the trial below, plaintiff offered evidence tending to show these facts:

In November, 1939, plaintiff rented from defendants a farm in Johnston County, owned by them, for cultivation by him in year 1940, on "half shares, the old fashioned way," that is, plaintiff to "furnish labor and one half the guano" and receive half of the crops, and defendants to furnish "teams and tools" and receive the other half of the crops.

There was a field on this farm that had some stumps in it. In 1939 plaintiff had plowed and tended this field in tobacco, with the stumps there, and planned to plant it in corn in 1940. At the time the rental contract for 1940 was made nothing was said about pulling the stumps, nor was anything said about plaintiff doing extra work on the farm.

Pulling stumps was first mentioned on 8 March, 1940, when defendant, Weldon Barnes, came to plaintiff in the field where he was plowing, and told him that he wanted to pull some of the stumps and wanted plaintiff to help him next day. Plaintiff testified: "He just asked me to help . . . and I told him I would help him." Then, in response to this question, "Did you have any agreement with respect to what you were to get for it?" plaintiff testified, "No, sir, I didn't have any agreement." And on cross-examination stated: "Anybody ought to know that getting these stumps out would make it a much better field to plant, cultivate and tend."

Further, while on morning of 9 March, before leaving the place where stumps were being pulled, Barnes asked Bandy if he wanted to work all day, he said nothing to plaintiff.

On this morning defendant, Weldon Barnes, returned to the farm. Lorenzo Bandy, a colored man who worked for Barnes and drove tractor practically all the time, brought a Case tractor and also a chain which was about 30 feet in length and about 300 pounds in weight. Barnes said he had figured out a way to pull the stumps with the chain—the idea being, to wrap the chain around a stump two or three times and "run it under the chain that went out to the tractor" and to hold the end of the chain until it was tightened by the tractor. They went to work about 9 o'clock.

Regarding the work, plaintiff testified substantially as follows: Plaintiff told Barnes that, as the chain did not have a hook on it, he did not like to work with it. Barnes said nothing and "seemed to think it would be all right and he kept on pulling stumps." In pulling a stump, all of them, plaintiff, Barnes and Bandy, would wrap the chain around the stump and "run it under the chain that went out to the tractor and back." Barnes told plaintiff to hold one end of it "until it locked . . . tightened." Then Barnes would motion to Bandy to drive the tractor, and he would drive off. In this manner six or seven stumps were pulled while Barnes was there and no accident happened. Then he went away. Before he left plaintiff told him that the chain was too heavy for two to handle, but "he left and didn't say anything, just spoke to Lorenzo Bandy about quitting time." After Barnes had gone, plaintiff and Bandy hooked to a stump, that is, put the chain around the stump and fastened it just like they did when Barnes was there so that when the tractor pulled on the chain it would catch in the links and tighten. Plaintiff said: "I saw this being done all the morning until I got hurt." Then after the chain was wrapped around the stump two or three times and fastened, Bandy got in the tractor and started it voluntarily without any signal or direction from plaintiff. In plaintiff's words: "He snatched the tractor up right quick instead of easy, like he did, and jerked me

down on my hands . . . he jerked it and that threw me down on my hands . . . he gave me a snatch, the tractor did, and instead of the chain tightening it jerked me down on my hands . . . he didn't go against it easy like he had been going against it. He hit it hard and it caused the chain to slip right quick and jerked me down on my hands, and before I could get up, it hit my leg. It pulled the end of the chain, gave it a quick jerk." Plaintiff further stated, "I was standing holding the end of the chain, between the tractor and the stump, about five feet from the stump . . . about five feet from the chain . . . out to one side."

Plaintiff, in reply to question as to why he went ahead and pulled stumps with that chain after he had stated to Barnes that it ought to have a "different fastener" on it, said: "Well, it was late in the year, and I was kind of under obligation, I felt like, to him; he was furnishing me everything I was getting and I felt like I was under obligation to go ahead and pull the stumps."

G. F. Pleasants, seventeen-year-old son of, and witness for plaintiff, testified that, while at home during that same day, Mr. Otis Barnes came there, and, in conversation, "said that Weldon knew it was dangerous, because he had tried it on a plant bed not so long before this, and said if he had known he was going up there, he would not have let him gone; said he had tried it out on a plant bed and had liked to have killed four or five."

In his complaint, plaintiff in the main alleges, as acts of negligence, that defendants failed to furnish to plaintiff (1) safe and proper tools with which to work, to wit, a chain with proper hook or fastener, without which it was a dangerous and unsafe tool when used in the manner described, (2) a safe and suitable place to work in that he was required to stand near said chain and hold to end of same until it had been tightened around the stump while being drawn by a heavy and powerful tractor, (3) sufficient help or assistance for doing the work in the manner in which it was attempted to be done, and (4) a careful and prudent driver of the tractor for such particular work, all of which defendant knew, particularly from previous experience with a wire cable, or should have known by the exercise of reasonable care.

From judgment as of nonsuit entered at close of evidence for plaintiff, he appeals to Supreme Court and assigns error.

Albert Doub and Ward, Stancil & Ward for plaintiff, appellant.
I. W. Farmer and Abell & Shepard for defendants, appellees.

WINBORNE, J. When applicable principles of law are applied to the evidence in this case, taken in the light most favorable to plaintiff, we are of opinion and hold that judgment as of nonsuit was properly entered in court below.

Though the relation of landlord and tenant existed between defendants and plaintiff with respect to the cultivation of the farm, plaintiff brings this action upon the theory that, in the work of pulling stumps, in a field on the rented farm, in which he was engaged at the time of his injury, he was the servant of defendants, that is, that the relation between them, with respect thereto, was that of master and servant. While in the contract of renting no stipulation was made with regard to tenant helping in pulling stumps or doing extra work on the farm, the pulling of stumps, which would make a "better field to plant, cultivate and tend," may appropriately be considered a mere incident to the contract of renting, and, may not, in any view, alter the existent relation of landlord and tenant. Compare *S. v. Hoover*, 107 N. C., 795, 12 S. E., 451, and *S. v. Etheridge*, 169 N. C., 263, 84 S. E., 264, where it is held that a tenant or cropper is not the servant of the landlord, even though one of the terms or stipulation of the renting be that in addition to rent to be paid, the servant, whenever at leisure, and called upon by landlord, should work for landlord at certain wage per day.

But, be that as it may, if the correctness of plaintiff's theory be conceded, we are of opinion that, upon the record on this appeal, the evidence shows that his injury was proximately caused by the negligence of a fellow servant, Lorenzo Bandy, in the operation of the tractor, as described by plaintiff, for which the master is not liable. It is not controverted that Bandy, the driver of the tractor, was, at the time, a servant of defendants.

The generally accepted principle, unless otherwise provided by statute, as it is in this State in case of railroads, is that the master is not responsible for injury to a servant attributable solely to the negligence of a fellow servant, provided the master has exercised reasonable care in selecting servants who are competent and fitted for the work in which they are engaged. *Walters v. Lumber Co.*, 163 N. C., 536, 80 S. E., 49; *Page v. Sprunt*, 164 N. C., 364, 79 S. E., 619; *Shorter v. Cotton Mills*, 198 N. C., 27, 150 S. E., 499. However, the presumption is that the master has properly performed his duty in selecting his servants, and before responsibility for negligence of a servant, proximately causing injury to plaintiff, another servant, can be fixed on the master, it must be established by the greater weight of the evidence, the burden being on the plaintiff, that he has been injured by reason of carelessness or negligence due to the incompetency of the fellow servant, and that the master has been negligent in employing or retaining such incompetent servant, after knowledge of the fact, either actual or constructive. *Walters v. Lumber Co., supra; Shorter v. Cotton Mills, supra.*

In the present case evidence, tending to establish these factual requirements, is absent.

On the other hand, if it be conceded that there is evidence of insufficiency of help, there is no evidence from which it may be reasonably inferred that that contributed in any manner in proximately causing the injury to plaintiff. Moreover, if it be conceded that there is evidence that the absence of hook impaired the usefulness of the chain for pulling stumps, the purpose for which it was being used, there is no evidence that chains with such hooks are in general and approved use. All that plaintiff testifies is that he told defendants that he didn't like to use it without a hook.

Furthermore, it is apparent that plaintiff with full knowledge of available help, and of the character of chain, continued to work, without any promise of more help, or of repair to chain. Ordinarily, under such circumstances, he would assume the incident risk. The obligation arising under existent relation of landlord and tenant was not sufficient to cause him to continue work in face of a known danger. It is said in *S. v. Etheridge, supra,* that "a tenant and cropper are more independent of the landlord than is a servant, and neither owes him the duty of allegiance or of rendering service, as growing out of their relation to him."

The judgment below is

Affirmed.

ERNIE B. THOMPSON v. B. L. UMBERGER, JR., D. A. FINGER AND WIFE, ANNIE B. FINGER, KANNAPOLIS PUBLISHING COMPANY, A CORPORATION, E. J. SHARPE, LOVE NUSSMAN AND WIFE, GENEVA NUSSMAN, D. L. SIMMERSON AND G. H. HENDRIX, TRUSTEE.

(Filed 8 April, 1942.)

1. Easements § 1—

An alleyway is an easement constituting an interest in land, and in order to create such easement by deed or reservation contained in a deed, the description thereof must be sufficiently certain to permit the identification and location of the easement with reasonable certainty.

2. Boundaries § 3—

A latent ambiguity in a description may be aided by parol evidence to fit the description to the property, but a patent ambiguity may not be aided by parol.

3. Same—

A patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to ascertain the property referred to, and such ambiguity renders the description void for indefiniteness, since the courts cannot add or insert new language to give it effect.

4. Easements § 1—Description of easements in reservation contained in deed held patently ambiguous and void.

The description in a deed to a certain lot contained a reservation that the land was "sold subject to an agreement by the parties of the first part to the party of the second part that there is to be reserved a 10-foot alleyway from the front of a certain tract of land containing 240 feet, which tract of land is shown on the map. The said alleyway is to run to the back of said property and the owners are to have an alleyway running across the entire properties at the back." *Held:* The description of the easements is patently ambiguous and is ineffective either to impose a burden upon the land conveyed or to create an easement upon the lands reserved by the grantors.

APPEAL by plaintiff from *Blackstock, Special Judge,* at December Term, 1941, of CABARRUS. Affirmed.

Civil action to locate and establish two alleyways over and across lands of defendants.

Lucy A. Brown, *et al.,* owned a certain tract of land in south Kannapolis, Cabarrus County, being a part of Bergerberg, known as Midway. On 11 February, 1936, they conveyed a part thereof fronting 20.4 feet on the highway to A. Ray Kennerly. The lot conveyed consisted of parts of Lots Nos. 3 and 4 as shown on the map of the subdivision. Kennerly conveyed said lots to plaintiff, who now owns the same.

The deed to Kennerly contains the following:

"The above tract of land is sold subject to an agreement by the parties of the first part to the party of the second part that there is to be reserved a 10-foot alleyway from the front of a certain tract of land containing 240 feet, which tract of land is shown on the map. The said alleyway is to run to the back of said property and the owners are to have an alleyway running across the entire properties at the back."

The defendants severally have acquired title to and now own the remaining lots in said subdivision known as Midway.

The plaintiff, alleging that the original grantors did not establish and lay out or locate the alleyways referred to in the Kennerly deed, institutes this action for a decree of the court locating, establishing and laying out by metes and bounds said ways across the lands of defendants. In so doing he pleads the provision in the Kennerly deed as the basis of his action.

The defendants demurred for that the complaint does not state facts sufficient to constitute a cause of action in that no easement or right of way is granted through, over or across the lands of the defendants.

When the cause came on to be heard in the court below the demurrer was sustained and plaintiff appealed.

E. Johnston Irvin for plaintiff, appellant.
Hartsell & Hartsell for defendants, appellees.

BARNHILL, J. Is an alleyway reserved in the deed from Brown to Kennerly with sufficient definiteness to invoke the aid of a court of equity in locating and establishing the same? The answer is determinative.

An alleyway is in the nature of an easement. It constitutes an interest in land. It may be created by either of nine different methods. Mordecai Law Lectures, Vol. 1, pp. 464-471. One of these is by deed or reservation contained in a deed—the method here adopted.

The existence of the reservation depends upon the construction of the language in the deed. Plaintiff's case must be made out upon the terms of that instrument, and that which is uncertain cannot be made certain or its terms added to or altered by evidence *aliunde*.

When the easement—here a passageway—is created by deed, either by express grant or by reservation, the description thereof must not be so uncertain, vague and indefinite as to prevent identification with reasonable certainty. *Gruber v. Eubanks,* 197 N. C., 280, 148 S. E., 246, and cases cited.

If the description is so vague and indefinite that effect cannot be given the instrument without writing new, material language into it, then it is void and ineffectual either as a grant or as a reservation. Anno. 68 A. L. R., 15 (citing numerous N. C. cases).

The description must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. *Hodges v. Stewart,* 218 N. C., 290, 10 S. E. (2d), 723, and cases cited.

If an ambiguity in the description be latent and not patent, it will not be held to be void for uncertainty but parol evidence will be admitted to fit the description to the thing intended. *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176. The purpose of parol evidence, however, is to fit the description to the property—not to create a description. There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land. The expression of the intention of the parties to the deed must appear thereon. Parol evidence is resorted to merely to bring to light this intention—but never to create it. Anno. 68 A. L. R., 15.

If the ambiguity in the description in a deed is patent the attempted conveyance or reservation, as the case may be, is void for uncertainty. And a patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to derive therefrom the intention of the parties as to what land was to be conveyed. This type of ambiguity cannot be removed by parol evidence since that would necessitate inserting new language into the instrument which under the parol evidence rule is not permitted. Anno. 68 A. L. R., 12.

Applying these generally accepted principles it clearly appears that the ambiguity in the attempted reservation in the deed from Brown to Kennerly is patent. Upon reading the description it at once becomes apparent that something more must be added before the reader can determine what is meant by it.

Provision is attempted to be made for two easements: (1) A 10-foot alleyway "from the front" of a tract of land "containing 240 feet" and extending to the back of said property; and (2) "an alleyway running across the entire property at the back."

These alleys are to be reserved. When and by whom? As to the first, is a right conveyed or is a burden imposed? Is it to be imposed upon the land conveyed for the benefit of the remainder or is it to be located on the remainder for the use of the owner of the land conveyed? If upon the remainder is it to be to the north or to the south, in the middle or at the edge? *Dickens v. Barnes,* 79 N. C., 490. Is the tract of land "containing 240 feet" a tract made up of 240 square feet or is it 240 feet long or is it 240 feet deep? Which of the several defendants is to suffer its imposition on his lot?

As to the second, was its attempted reservation for the benefit of the grantors or the grantee? Apparently, "owners" refers to the grantors and they were attempting to reserve the right to cross the rear of plaintiff's lot. In this event plaintiff is not the party aggrieved. Even so, how wide was it to be? Was it to be on the extreme edge or merely near the back line?

As to neither alley is there anything in the language of the attempted reservation to which we may recur for an answer to any one of these questions. Nothing is definite, nothing is fixed. The court is requested, without directing aid from the description, to carve one 10-foot way out of a much larger tract and to fix the width and location of the other "at the back" of the whole.

We are not inadvertent to the contentions of the defendants that the language "is to be reserved" refers to a future act and in no event is sufficient to constitute a reservation presently made. Nor do we overlook the probable effect of our registration laws upon the rights of defendants. These questions require no discussion for the reason that we are of the opinion that the language used is inoperative. It is so vague and uncertain as to be insufficient either to impose a burden upon or to attach an easement to the land conveyed. *Smith v. Proctor,* 139 N. C., 314. It gives no beginning point and furnishes no means by which the location of the proposed way may be ascertained. *Hodges v. Stewart, supra.*

We concur in the conclusion of the court below that the complaint fails to state facts sufficient to constitute a cause of action.

Affirmed.

STATE v. TOM FIELDS.

(Filed 8 April, 1942.)

1. Indictment § 8—Charge of reckless driving, drunken driving, and assault with automobile may be joined as separate counts.

A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, C. S., 4622, and separate judgments may be entered upon the jury's verdict of guilty of reckless driving and assault, defendant's contention that the bill contains only one count or that the charge of reckless driving was merged with the charge of assault or the charge of manslaughter contained in a separate indictment consolidated for trial, being untenable.

2. Automobiles § 32—

In this prosecution for manslaughter growing out of the operation of an automobile, the charge of the court construed as a whole *is held* to have correctly defined culpable negligence necessary to establish involuntary manslaughter and to have properly distinguished it from the degree of negligence sufficient to impose liability in civil actions.

APPEAL by defendant from *Frizzelle, J.*, at September Term, 1941, of JONES. No error.

The defendant was convicted of manslaughter, of reckless driving, and of assault with a deadly weapon, growing out of the unlawful operation of an automobile on the highway.

The State's evidence tended to show that the defendant operated his automobile recklessly, while under the influence of intoxicating liquor, and in violation of other statutes relating to motor vehicles, and that as a result of culpable negligence on his part his automobile collided with another automobile on the highway causing the death of John Ed Moore, who was in the automobile with the defendant, and breaking the arm of Jack Baugus, the driver of the other automobile.

There was a verdict of guilty as to the three offenses named, and from judgment imposing consecutive sentences, the defendant appealed.

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

J. A. Jones and John D. Larkins, Jr., for defendant.

DEVIN, J. Two bills of indictment against the defendant, for offenses growing out of the same transaction, were consolidated for trial. One of these bills charged manslaughter, and the other bill charged the reck-

less driving of an automobile, the operation of an automobile on the highway while under the influence of intoxicating liquor, and assault with a deadly weapon, to wit, an automobile, upon the person of Jack Baugus. The jury convicted the defendant of manslaughter, of reckless driving, and assault, as charged, but acquitted him of driving while under the influence of intoxicating liquor.

The only assignments of error are with respect to the judge's charge to the jury. The defendant challenges the correctness of the court's instructions in two respects. First, that the bill charging violation of the motor vehicle laws and assault was submitted as containing three separate counts, and the jury was instructed to render verdict as to each count. The defendant contends the bill contained only one count, and that the allegations in the bill as to reckless driving and driving under the influence of liquor should be regarded merely as stating the acts of culpable negligence supporting the charge of assault with a deadly weapon.

We cannot concur in this view. There was no objection to the bill. It contained charges of separate and distinct violations of law, of the same class, and growing out of the same transaction. C. S., 4622. Judgments, predicated upon verdicts of guilty as to two of the charges in the bill, were properly imposed. *In re Black,* 162 N. C., 457, 78 S. E., 273; *S. v. Cathey,* 170 N. C., 794, 87 S. E., 532; *S. v. Mills,* 181 N. C., 530, 106 S. E., 677; *S. v. Lewis,* 185 N. C., 640, 116 S. E., 259; *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248; *S. v. Harvell,* 199 N. C., 599, 155 S. E., 257; *S. v. Smith,* 201 N. C., 494 (498), 160 S. E., 577. "The separate offenses charged in the same warrant or indictment are to be considered and treated as separate counts." *S. v. Jarrett,* 189 N. C., 516, 127 S. E., 590. Nor may it be held, under the facts shown by the record in this case, that the charge of reckless driving was merged in the charge of manslaughter or assault. *S. v. Midgett,* 214 N. C., 107, 198 S. E., 613, and cases there cited.

Second, as to the bill of indictment charging manslaughter, the defendant assigns error in the court's instructions as to the degree of negligence necessary to establish the criminal offense charged. He contends that, while the court in one portion of the charge properly defined the culpable negligence necessary to be found to establish involuntary manslaughter, in another portion of the charge the definition of negligence applicable only to civil actions was given, and that a new trial should be awarded on account of the conflicting instructions. *S. v. Starnes,* 220 N. C., 384.

An examination of the entire charge on this point, however, leaves us with the impression that the able judge who presided at the trial of this case instructed the jury in substantial accord with the decisions of this Court, and that the defendant has no just ground of complaint. A suc-

cinct and accurate definition of culpable negligence and of the distinction between the degree of negligence sufficient to impose liability in a civil action and that necessary to be shown in support of an indictment for involuntary manslaughter is given in *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. The exact language in which the law on this point was stated in that case was quoted with approval in *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6; *S. v. Durham,* 201 N. C., 724, 161 S. E., 398; *S. v. Huggins,* 214 N. C., 568, 199 S. E., 926. The distinction was also clearly drawn in *S. v. Cope,* 204 N. C., 28, 167 S. E., 456.

The charge of the court in the instant case was in line with expressions contained in these and other cases on this subject. *S. v. Tankersley,* 172 N. C., 955, 90 S. E., 781; *S. v. Jessup,* 183 N. C., 771, 111 S. E., 523; *S. v. Leonard,* 195 N. C., 242, 141 S. E., 736; *S. v. Satterfield,* 198 N. C., 682, 153 S. E., 155; *S. v. Agnew,* 202 N. C., 755, 164 S. E., 578; *S. v. Stansell,* 203 N. C., 69, 164 S. E., 580; *S. v. Harvell,* 204 N. C., 32, 167 S. E., 459; *S. v. Lancaster,* 208 N. C., 349, 180 S. E., 577.

In the trial we find

No error.

STATE v. NEWLAND LEFEVERS.

(Filed 8 April, 1942.)

Homicide § 22—

Where a defendant in a homicide prosecution offers evidence tending to show that he killed deceased in self-defense, evidence of the general reputation of deceased for violence is competent, but defendant is not entitled to show specific acts of violence of deceased unconnected with the homicide, and in cross-examination of a State's witness, the State's objection to an interrogation as to whether the witness did not know the deceased had "the general reputation of having held up and robbed a man with firearms" is properly sustained.

APPEAL by defendant from *Clement, J.,* at December Term, 1941, of BURKE. No error.

The defendant was charged with the murder of one Edwin Pitts. The jury returned verdict of guilty of manslaughter. From judgment imposing sentence, the defendant appealed.

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

C. E. Cowan and Mull & Patton for defendant.

DEVIN, J. Edwin Pitts was fatally stabbed by the defendant, following a brief altercation, on the floor of a dance hall at the Valdese swimming pool. The deceased was at the time unarmed. The defendant pleaded self-defense.

In line with this defense the defendant offered evidence tending to show that the deceased had the general reputation of being a violent and dangerous fighting man, and the State offered evidence in rebuttal. In the course of the cross-examination of a State's witness on this point the defendant asked the witness if he did not know that the deceased had the general reputation of having held up and robbed a man with firearms. Objection to this question by the State was sustained and the defendant excepted. The witness, if permitted to answer, would have replied, "Yes, in New York at one time he did that, I understand." The same question was asked of two other witnesses, with like result.

We find no error in the ruling of the court. *Edwards v. Price,* 162 N. C., 243, 78 S. E., 145. The proffered testimony related to a single instance of lawlessness on the part of the deceased, and its competency may not be held supported by the rule enunciated in *S. v. Turpin,* 77 N. C., 473. Where there is evidence tending to show that the defendant acted in self-defense, evidence of the general reputation of the deceased for violence may be admitted, but this rule does not render admissible evidence of specific acts of violence which have no connection with the homicide. *S. v. Hodgin,* 210 N. C., 371, 186 S. E., 495; *S. v. Melton,* 166 N. C., 442, 81 S. E., 602; *Smith v. State,* 197 Ala., 193; 121 A. L. R., 382; 26 Am. Jur., 394. "The rule allows a cross-examination as to reputation of a particular trait but not of particular acts." *S. v. Cathey,* 170 N. C., 794, 87 S. E., 532.

The only other assignment of error relates to the admission of the testimony of a witness that shortly before the homicide defendant was under the influence of liquor. Objection on this score cannot be sustained.

In the trial we find

No error.

JOHN YANCEY ET AL. v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION.

(Filed 8 April, 1942.)

1. Eminent Domain § 13—Upon present record petitioners held not entitled to interest on amount awarded for the taking of lands under eminent domain.

This proceeding was instituted to assess compensation for lands taken and easements imposed for the construction of a scenic highway or parkway and for damages to the remaining lands of petitioners. The issues

submitted were as to the compensation petitioners are entitled to recover and as to what special and general benefits, if any, have accrued to the remainder of petitioners' property. *Held:* The amount of compensation, the value of the special and general benefits, if any, allowable as an offset thereto, and the amount of damages, were all unliquidated at the time of the taking, and further, the issues were couched in the present tense and spoke as of the trial term, and therefore petitioners are not entitled as a matter of law to interest on the award of the jury from the date title passed to the time of the trial. Moreover, in this case it appeared that petitioners were permitted to harvest the fruit from the trees on the portion of the lands appropriated in fee for two years after title passed by condemnation, so that actual deprivation of possession was delayed beyond the date of appropriation. C. S., 2309.

2. Appeal and Error § 6b—Where there is no exception to the charge, appellants waive contention at variance with law as laid down therein.

In this proceeding to assess compensation for the taking of lands under eminent domain, petitioners requested an instruction that the jury should award interest on the verdict from the date of the taking, or, in the alternative, that the jury might add interest to the award in its discretion. The court refused to charge as requested, and instructed the jury that under the law petitioners were not entitled to interest. There was no exception to the charge or to the refusal to charge as requested, but petitioners excepted to the refusal of the court to sign judgment tendered which added interest to the award of the jury. *Held:* There being no exception to the charge, petitioners cannot complain of its effect, and cannot contend that they are entitled to interest on the award.

3. Judgments § 17b—

Judgment follows the verdict, and therefore when there is no exception to the trial and no motion to set aside the verdict, the refusal of the court to sign judgment tendered by petitioners awarding them interest on the verdict cannot be held for error.

4. Appeal and Error § 3a—

Where judgment is entered on the verdict as rendered upon petitioners' motion, whether petitioners are the parties aggrieved and entitled to appeal therefrom upon their contention that the judgment should have awarded interest on the verdict of the jury, *quære*, since the judgment was in their favor and entered on their own motion. C. S., 632.

SCHENCK and WINBORNE, JJ., took no part in the consideration or decision of this case.

APPEAL by petitioners from *Bone, J.*, at December Special Term, 1941, of MCDOWELL.

Special proceeding to recover compensation for lands taken and easements imposed in areas of Blue Ridge Parkway.

On 28 April, 1937, the State Highway & Public Works Commission, pursuant to the law as set out in section 3846 (bb), Michie's Code of 1939, appropriated certain lands and easements situate in McDowell and Mitchell counties, belonging to the petitioners, and conveyed same to the

United States Government for use in the construction of the Blue Ridge Parkway. The lands appropriated consisted of two tracts, used in the cultivation of orchards consisting of a large number of apple trees.

The petitioners harvested the apple crops on the lands for the years 1937 and 1938, but subsequently they have not had the fruit from any of the trees on the lands taken in fee simple.

Upon issues joined, the case was tried at the December Special Term, 1941, McDowell Superior Court, and resulted in the following verdict being rendered by the jury:

"1. What compensation, if any, are petitioners entitled to recover of the State Highway Commission on account of the lands taken in fee simple, the easements imposed, and the injury, if any, to the remainder of said lands by said taking? Answer: '$56,250.00.'

"2. What special and general benefits, if any, have accrued to the remainder of petitioners' property on account of the construction of the Parkway? Answer: 'None.'"

Upon the coming in of the verdict the petitioners tendered judgment for the amount named in the verdict, "with interest from April 28, 1937." The court declined to sign the judgment as tendered, because of the provision relating to interest (exception by petitioners), and then "on motion of . . . attorneys for the petitioners," entered judgment on the verdict as rendered.

The matter of interest had been the subject of debate before the jury. The petitioners requested the court to instruct the jury to award interest on the verdict from 28 April, 1937, or in the alternative, to instruct them that, in their discretion, they might add interest on the award from said date. Both of these requests were refused.

The court instructed the jury, "The amount of compensation . . . has not been ascertained even to this time, and will not be ascertained until your verdict; therefore, under the law, it does not bear interest."

There was no exception to the charge as given, and none to the refusal to charge as requested.

The petitioners appeal, assigning error in the court's refusal to allow interest on the verdict as a matter of right.

Proctor & Dameron and Ehringhaus & Ehringhaus for petitioners, appellants.

Charles Ross, Ernest A. Gardner, and D. F. Giles for Highway Commission, appellee.

STACY, C. J. The question for decision is whether the petitioners, in the circumstances here disclosed, are entitled, as a matter of law, to interest on the compensation fixed by the jury from the date of the original appropriation. The record points to a negative answer.

In the first place, it will be noted from the issue submitted to the jury that the verdict embraces not only indemnity for the lands taken and easements imposed, but also damages for injury to the remainder of the lands. *Highway Com. v. Hartley,* 218 N. C., 438, 11 S. E. (2d), 314; *Light Co. v. Moss,* 220 N. C., 200; *S. v. Lumber Co.,* 199 N. C., 199, 154 S. E., 72. Of course, the damages to the remainder of the lands were unliquidated at the time of the taking. *Bond v. Cotton Mills,* 166 N. C., 20, 81 S. E., 936. Then, too, the value of the lands taken was subject to be offset by general and special benefits, if any, accruing to the petitioners from the construction of the Parkway. *Wade v. Highway Com.,* 188 N. C., 210, 124 S. E., 193. These were likewise unliquidated at the time, as was also the claim of the petitioners for compensation. *R. R. v. Mfg. Co.,* 166 N. C., 168, 82 S. E., 5. Moreover, it will be observed the issues are couched in the present tense, and they speak as of the trial term.

Secondly, it appears that while the lands were appropriated on 28 April, 1937, by the filing of maps outlining the appropriated areas, etc., the petitioners were permitted to harvest the crops on the lands for the years 1937 and 1938. Thus, the actual surrender or deprivation of possession was delayed beyond the date of appropriation. *Durham v. Davis,* 171 N. C., 305, 88 S. E., 433.

Thirdly, there is no challenge to the validity of the trial, and none to the correctness of the verdict. The petitioners are content with what the jury has done and with the instructions given by the court. For present purposes, therefore, they are deemed to be correct. *Howell v. R. R.,* 186 N. C., 239, 119 S. E., 198; *Rawls v. R. R.,* 172 N. C., 211, 90 S. E., 116; *S. v. Johnson,* 193 N. C., 701, 138 S. E., 19. But the demand for interest after verdict is at variance with the judge's instruction to the jury to which no exception has been preserved. Thus, to concede the correctness of the charge would seem to forestall a denial of its effect. *In re Steele,* 220 N. C., 685; *Cameron v. McDonald,* 216 N. C., 712, 6 S. E. (2d), 497. Objections not insisted upon are waived. *Dixon v. Osborne,* 201 N. C., 489, 160 S. E., 579; *McDowell v. Kent,* 153 N. C., 555, 69 S. E., 626. Clearly, if the charge be correct, and it is not challenged, the petitioners have no ground for complaint. This singularizes the present case and differentiates it from others cited or examined.

Let us test it in another way. Supposing the jury had been instructed that although interest was not allowable as such, nevertheless they should take into consideration the intervening delay and fix the award accordingly. Obviously, under such a charge, the court would not be justified in adding interest to the award. *R. R. v. Mfg. Co., supra.* So, also, under a charge dealing with the subject and deemed to be correct, it is contrary to precedent for the court to add interest to the amount of the verdict. *Mfg. Co. v. McQueen,* 189 N. C., 311, 127 S. E., 246; *Harper*

v. R. R., 161 N. C., 451, 77 S. E., 415. There was no motion to set aside the verdict, and it is the practice with us that the judgment follows the verdict. *Davis v. Doggett*, 212 N. C., 589, 194 S. E., 288; *Parrish v. Hartman, ibid.*, 248, 193 S. E., 18; *Durham v. Davis, supra.* The verdict, which fixes the compensation as of the trial term, stands unimpeached.

Fourthly, it further appears that "on motion of . . . attorneys for the petitioners" judgment was entered on the verdict as rendered. The question arises whether the petitioners are the "parties aggrieved" within the purview of C. S., 632, by a judgment in their favor entered on their own motion. *Carruthers v. R. R.*, 218 N. C., 377, 11 S. E. (2d), 157; *McCullock v. R. R.*, 146 N. C., 316, 59 S. E., 882. If error, was it cured or invited? *Kelly v. Traction Co.*, 132 N. C., 368, 43 S. E., 923; *Buie v. Buie*, 24 N. C., 87. The unusuality of the situation would doubtless be conceded. *Hargett v. Lee*, 206 N. C., 536, 174 S. E., 498. The appellants are not asking for a new trial.

In reply to all this, however, the petitioners aver the fact is, that no interest was allowed in the court below; that it is entirely consistent to award it here, and that they are entitled to it as a matter of law. C. S., 2309; *Chatham v. Realty Co.*, 174 N. C., 671, 94 S. E., 447; *Bryant v. Lumber Co.*, 192 N. C., 607, 135 S. E., 531; *Perry v. Norton*, 182 N. C., 585, 109 S. E., 641; *S. A. L. Ry. v. U. S.*, 261 U. S., 299. Conceding the apparent force of the syllogism—though it may assume too much—we are still faced with the procedural precedents above cited. These have heretofore been regarded as controlling. *R. R. v. Mfg. Co., supra.*

Finally, we may say the case has been argued with much learning and manifest research, but it occurs to us that the question debated is foreclosed by the record. Hence, the result is an affirmance of the judgment rendered on the verdict.

Affirmed.

SCHENCK and WINBORNE, JJ., took no part in the consideration or decision of this case.

MANUFACTURERS AND JOBBERS FINANCE CORPORATION v. V. E. LANE AND B. R. PLESS, PARTNERS, TRADING AS P. & L. MOTOR COMPANY, AND LANE MOTOR SALES & SERVICE, INC.

(Filed 15 April, 1942.)

1. Receivers § 9—

Where a receiver has been appointed, the court has power to enter a supplementary order directing that books, checks, check stubs and other papers relating to the business be turned over to the receiver, since, if

such order was not included in the original order of receivership, the court has the discretionary power to make such auxiliary order at any time pending the litigation upon allegations warranting its exercise.

2. Pleadings § 10—Contention that plaintiff maintained and prosecuted action in bad faith to harass defendant cannot be set up as a counterclaim in the action.

Plaintiff instituted this action alleging that defendant had formed a dummy corporation to which he had transferred all his assets, including chattels on which plaintiff had liens, was collecting money on conditional sales contracts which he was wrongfully refusing to pay over to plaintiff, and was dissipating and jeopardizing the assets of the business. The ancillary remedies of claim and delivery and receivership were obtained. Defendant set up a counterclaim alleging want of good faith on the part of plaintiff in maintaining and prosecuting the action and the ancillary remedies and that such wrongful acts had damaged defendant in a large sum. *Held:* The counterclaim did not arise out of the transaction set out in the complaint and was not connected with the subject of plaintiff's action within the meaning of C. S., 521 (1), and therefore plaintiff's demurrer to the counterclaim was properly sustained. Moreover, as to whether the counterclaim was objectionable on the ground that it did not exist at the time of the commencement of plaintiff's action, *quœre.*

3. Same—

While the statute permitting the filing of counterclaims must be liberally construed, its reasonable restrictions must nevertheless be observed in the interest of orderly judicial investigation. C. S., 521.

4. Same—

A counterclaim in tort must arise out of the transaction set forth in the complaint or be connected with the subject of action therein alleged, which imports agreement between the subject matter of the action and the counterclaim, and not mere historical sequence.

5. Malicious Prosecution § 1—

Malicious prosecution is the wrongful institution or prosecution of an action or proceeding without probable cause, to the hurt and damage of the complainant.

6. Same—

The prosecution of the ancillary remedies of claim and delivery and receivership, maliciously and without probable cause, will support an action for malicious prosecution.

7. Process § 15—

An action for abuse of process is founded upon the use of valid, legal process for an ulterior purpose not proper in the regular prosecution of the proceeding.

8. Process § 15—Action for abuse of process will not lie when process is use for its regular and legitimate purpose.

Plaintiff instituted this action alleging that defendant had formed a dummy corporation to which he had transferred all his assets, including chattels on which plaintiff had liens, that defendant wrongfully refused to

turn over to plaintiff moneys collected on conditional sales contracts, and that defendant was dissipating and jeopardizing the assets of the business. Plaintiff obtained the ancillary remedies of claim and delivery and receivership. Defendant filed a counterclaim alleging that plaintiff was maintaining and prosecuting the action and ancillary remedies in bad faith, resulting in injury to defendant in a large sum. *Held:* The counterclaim does not state a cause of action for abuse of process, since the process was used in its regular and legitimate function in relation to the cause of action stated in the complaint.

9. Malicious Prosecution § 5—

Since an action for malicious prosecution cannot be maintained until the termination of the action upon which it is based, a cause of action for malicious prosecution cannot be set up as a counterclaim in the action upon which it is predicated.

10. Reference § 3—

While ordinarily a plea in bar must be first disposed of before the court can order a compulsory reference, the court has discretionary power in proper instances to order a compulsory reference notwithstanding the plea and determine the plea upon the general hearing.

11. Same—

A plea in bar precluding a compulsory reference is one which goes to the right of plaintiff to maintain his action, and a counterclaim sounding in tort to recover an unliquidated amount, which may prevent plaintiff's recovery of the sum demanded or of any sum because of a mere balancing of demands, does not bar plaintiff's right of action itself, and is not a plea in bar.

APPEAL by defendant, Lane Motor Sales & Service, Inc., from *Clement, J.*, at November Term, 1941, of CALDWELL.

The plaintiff brought this action against the defendants, at the same time suing out a proceeding of claim and delivery, alleging that the defendants are in possession of numerous motor cars in which it has an interest and to which it is entitled to the possession. It is alleged that in the course of plaintiff's dealing with the defendants, V. E. Lane and B. R. Pless, partners trading as P. & L. Motor Company, in the financing of automobile sales made by the partnership, the latter became liable to the plaintiff in a total of about $23,000 upon the contracts of sale so financed, and became indebted for still other amounts upon transactions occurring in the course of the business and upon collections of amounts due the plaintiff, which they refuse to pay. It is further alleged that V. E. Lane purchased the interest of B. R. Pless in the partnership, and agreed with the latter to pay the partnership debts, which arrangement the plaintiff had not accepted or approved. Plaintiff alleges that the necessities of its business demanded that it withdraw from further service to the P. & L. Motor Company, which, under its agreement it had the right to do; and thereupon the defendant Lane, with the intention of

hindering, delaying and defeating plaintiff in the collection of the debt due by the defendants and the customers with whom they dealt, and the recovery of its property, fraudulently formed a dummy corporation in which he holds all the shares except qualifying shares which are held by his wife and one of his employees, and that the said corporation is insolvent. It is alleged that the defendant Lane fraudulently transferred to this corporation and put into its possession all of the assets belonging to the partnership and all of his individual assets, and put it in possession of the motor cars above referred to; and that, based upon these assets, including those rightfully belonging to the plaintiff, the defendant Lane is endeavoring to sell stock in the newly formed corporation in a way that will jeopardize the rights of plaintiff in its property. It is alleged that the corporation is proceeding to collect money on the sales contracts due the plaintiff and which the plaintiff only has a right to collect, and wrongfully retains the same; that the corporation continues to deal with the property of the plaintiff as its own; and that said property is likely to deteriorate or to be destroyed unless relief is given to the plaintiff. On plaintiff's application a restraining order was issued, which was continued to the hearing of the cause.

The answer of the defendant Pless admits most of the plaintiff's allegations, alleges that upon the sale of his interest to Lane the latter assumed all debts and obligations of the partnership, and asks that his equities be protected in any judgment rendered in the case. He further asks for an accounting and joins the plaintiff in the request for a receiver.

The defendant Lane and the Lane Motor Sales & Service, Inc., answering, denied the material allegations of the complaint and set up a further defense and counterclaim based upon an alleged want of good faith on the part of the plaintiff in suing out and maintaining the present action and the ancillary remedies therein, which, in the pleading, is denominated a malicious abuse of process. Therein, after alleging that the sales contracts, which largely form the basis for the action, were void because usurious, and were the result of a conspiracy in which plaintiff participated, the defendant corporation states its counterclaim as follows: "That on account of the defendant's unlawful, wilful, wanton, and malicious abuse of process as hereinbefore alleged in suing out a writ of claim and delivery and a restraining order enjoining the operation of this defendant's business, and the plaintiff's efforts to enforce the alleged contracts, hereinbefore set forth, which were illegal and void because of the unlawful conspiracy entered into this answering defendant has been damaged in the amount of $100,000.00"; and demands recovery of this amount.

In the course of the proceeding, on motion of plaintiff and B. R. Pless, a receiver was appointed, and to this order the defendants excepted and

gave notice of appeal which was not perfected. Subsequently the plaintiff, conceiving that all of the property designated in this order had not been turned over to the receiver, applied to the court to have the specific property, including books, records, papers, stock books, canceled checks, check stubs, deposit books, and other papers concerning the operation of the business, turned over to the receiver, basing this request upon an allegation that the defendant had not theretofore turned them over on demand of the receiver. An order to this effect was made, and defendants excepted, and Lane Motor Sales & Service, Inc., appealed.

At November Term, 1941, of Caldwell Superior Court the plaintiff demurred *ore tenus* to the counterclaim of Lane Motor Sales & Service, Inc., set out in its separate answer as above stated, and the judge presiding sustained the demurrer, and the defendant, Lane Motor Sales & Service, Inc., excepted and appealed. At the same term the plaintiff and the defendant Pless made a motion for the appointment of a referee on the ground that the action involves the taking of a complicated account between plaintiff and defendants, and a reference was ordered. This order contains the following provision: "The Court has heretofore sustained demurrers to certain portions of the Lane Motor Sales & Service, Inc., pleadings, and said defendant has given notice of appeal to the Supreme Court. Therefore, the Referee is directed to delay the taking of testimony until such times as said appeals have been withdrawn or disposed of by the Supreme Court." The defendants excepted and Lane Motor Sales & Service, Inc., appealed. The defendant V. E. Lane excepted to these orders, but the record shows no entry of appeal on his part, and he files no brief in this Court, although apparently joining in some of the assignments of error.

There are three assignments of error in the record: (1) "enlarging the powers of the receiver" in the second order; (2) sustaining the demurrer to the counterclaim; (3) making the order of compulsory reference.

Eddy S. Merritt and C. W. Bagby for plaintiff, appellee.

W. H. Strickland for defendant, Lane Motor Sales & Service, Inc., appellant.

SEAWELL, J. The pleadings in this case themselves fill perhaps eighty of the ninety-one pages of the record. Space forbids detailed analysis, but the foregoing summary is sufficient for an understanding of this appeal and the grounds upon which decision is based.

(1) The exception to the order referred to by the defendant as enlarging the scope of the receivership cannot be sustained. The allegations of the complaint were sufficient to put it within the discretion of the court

to order the documents in question turned over to the receiver in the first place, if, indeed, the original order of the court did not include them; and the arm of the court is not shortened because the relief was not extended in the first instance. It is that sort of remedy which the court may apply at any time pending the litigation in dealing with an insolvent corporation where the facts warrant the exercise of the power. *Skinner v. Maxwell,* 66 N. C., 45; *Whitehead v. Hale,* 118 N. C., 601, 24 S. E., 360; *Witz, Biedler & Co. v. Gray,* 116 N. C., 48, 20 S. E., 1019; *Kelly v. McLamb,* 182 N. C., 158, 108 S. E., 435; *Bank v. Waggoner,* 185 N. C., 297, 117 S. E., 6; *Hurwitz v. Sand Co.,* 189 N. C., 1, 126 S. E., 171; C. S., 860.

(2) The plaintiff insists that the defendant has erroneously designated the subject of his counterclaim as abuse of process, whereas, as presented, it is in reality malicious prosecution. In an action for malicious prosecution, the offending proceeding must have terminated before complainant may bring his action. *Ludwick v. Penny,* 158 N. C., 104, 73 S. E., 228; *Brinkley v. Knight,* 163 N. C., 194, 79 S. E., 260. That limitation does not apply to an action for abuse of process. Since, of course, the pending action to which the counterclaim refers has obviously not terminated, the plaintiff contends that the counterclaim is not available to the defendant, and that the demurrer should be sustained on that ground.

But passing this for the moment, it has been questioned whether, regardless of these categories, the proposed counterclaim is not affected by further infirmities growing out of the time and occasion of its presentation—the circumstance that it had not accrued, in other words did not exist, at the commencement of plaintiff's action, and that it is not connected with the subject thereof within the meaning of the statute. C. S., 521; *Kramer v. Electric Co.,* 95 N. C., 277; *Phipps v. Wilson,* 125 N. C., 106, 34 S. E., 227; *Smith v. French,* 141 N. C., 1, 53 S. E., 435; *Sewing Machine Co. v. Burger,* 181 N. C., 241, 107 S. E., 14; *Godwin v. Kennedy,* 196 N. C., 244, 145 S. E., 229.

Down to *Smith v. French* (1906), *supra,* it was uniformly held that a counterclaim growing out of the institution and maintenance of the action in which it is interposed was objectionable as not having matured when plaintiff's action was commenced. *Phipps v. Wilson, supra. Smith v. French, supra,* adopted a contrary view, and the Court seemed to be conscious of establishing a new rule of general application in this regard. McIntosh, North Carolina Practice and Procedure, sec. 467. Query: whether *Wright v. Harris, infra,* and *Godwin v. Kennedy, supra,* has re-established the authority of *Phipps v. Wilson, supra,* and cases holding similarly.

To be available, however, such a counterclaim must, nevertheless, grow out of the transaction upon which plaintiff's action is based and be connected with that action within the meaning of the statute.

When the defendant's counterclaim lies in tort, the statute finds the test of eligibility in plaintiff's pleading. C. S., 521 (1). In the instant case the transaction set out in the complaint as the basis of plaintiff's action is not the same as that out of which the counterclaim arose—both time and circumstance negative that—and it is more than questionable whether defendant's alleged cause of action, as alleged, is sufficiently connected with the subject of plaintiff's action to come within the statute, however available it may be in an independent action. The circumstance that it grew out of plaintiff's action does not, *ipso facto,* establish such relation. The subject of plaintiff's action is certainly not the action itself or any remedy plaintiff may pursue, or the manner in which these proceedings are instituted or prosecuted. That subject matter is the default of defendant in retaining plaintiff's property, collecting and refusing to pay over its moneys, endangering its assets, and refusing to pay plaintiff's claim. The subject of the counterclaim as laid, however, does lie in the wrongful institution of plaintiff's action and the manner of its prosecution. The connection between the two is not that of substance but of historical sequence. There is, of course, a thread of sequence in the sense of the common expression, "One thing led to another," but there is no agreement between the subject matter of plaintiff's action and that of defendant's counterclaim in interest or substance or similarity of causes. *Weiner v. Style Shop,* 210 N. C., 705, 708, 188 S. E., 331. To be within the statute, we are persuaded that the connection must be more than incidental or casual—the subjects must be germane. Giving to the statute that liberal construction to which it is entitled, it is nevertheless true that the wider latitude given it as a substitute for the narrow and more technical practice of the common law brought with it certain dangers which necessitated a limitation on its scope. Counterclaims, as we know them, were born of the statute, and with the cowl of its restriction upon them. Proper regard for the orderliness of judicial investigation demands that its enabling features shall not be expanded at the expense of its reasonable restrictions. We think the statute was intended at least to eliminate mere recriminations between the parties and prevent the hearing from becoming a squabble or brawl.

"'The time has come,' the walrus said,
'To talk of many things;
Of ships and shoes and sealing wax,
Of cabbages and kings.'"

We find no such indecorum in defendant's well-written pleading, as suggested in Lewis Carroll's whimsy. But at the same time we do not find that substantial connection between defendant's counterclaim and

the subject of plaintiff's action which we think the statute requires to make it available here. If asserted at all, it must be by independent action.

Moreover, on a careful examination of the pleading, we are constrained to hold that the court below was correct in holding that defendant's counterclaim is, at most, a plea of malicious prosecution. It challenges the original proceeding, *ex stirpe,* as maliciously instituted and prosecuted, but it alleges no act of the plaintiffs in that proceeding which could, under proper legal definition, constitute abuse of process.

The gravamen of an action for malicious prosecution is the wrongful institution or prosecution of the action or proceeding without probable cause, to the hurt and damage of the complainant. In such case "a suit for malicious prosecution will lie where the plaintiff's property or business has been interfered with by the appointment of a receiver, the granting of an injunction, or by writ of *replevin.*" Cooley on Torts, 3d Ed., p. 348. The gist of an action for abuse of process is the improper use of the process after it has been issued. *Glidewell v. Murray-Lacy & Co.,* 124 Va., 563, 98 S. E., 665, 4 A. L. R., 225; 1 Am. Jur., Abuse of Process, § 34. "The distinctive nature of an action for abuse of process, as compared with an action for malicious prosecution, is that the former lies for the improper use of process after it has been issued, not for maliciously causing process to issue." 1 Am. Jur., Abuse of Process, § 3. In an action for abuse of process "Two elements are necessary: first, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding." Cooley on Torts, 3d Ed., p. 355; *R. R. v. Hardware Co.,* 143 N. C., 54, 59, 55 S. E., 422; *Jackson v. Telegraph Co.,* 139 N. C., 347, 356, 51 S. E., 1015. "The test as to whether there is an abuse of process is whether the process has been used to accomplish some end which is without the regular purview of the process, or which compels the party against whom it is used to do some collateral thing which he could not legally and regularly be compelled to do." 1 Am. Jur., Abuse of Process, § 6; Annotations, 80 A. L. R., 580. For illustrations of such abuse, see 1 Am. Jur., *ibid.,* § 11, *et seq.* In point is the comprehensive and clear analysis in *Ludwick v. Penny, supra* (158 N. C., 104, 73 S. E., 228), containing appropriate references to Judge Cooley's basic distinctions above noted. See, also, *Wright v. Harris,* 160 N. C., 543, 551, 552, 76 S. E., 489.

Defendant contends that it is an abuse of process to sue out and prosecute an action maliciously and without probable cause, and that may be, in consequence at least, morally true, although it would be more exact to term it an abuse of the courts. But the distinction is one of the law, and is sound in principle from an administrative point of view. There is no abuse of process where it is confined to its regular and legitimate function

in relation to the cause of action stated in the complaint. *Jackson v. Telegraph Co., supra; Wright v. Harris, supra; Jerome v. Shaw,* 172 N. C., 862, 90 S. E., 764; Annotations, 80 A. L. R., 580; 86 A. L. R., 398.

If the plaintiff has brought the action or instituted the process and prosecuted the same with malice and without probable cause, the complainant may have his full relief by an action for malicious prosecution.

As we have stated, the defendant has alleged that the plaintiff had an ulterior purpose in the institution and prosecution of the original action, but there is no allegation of any act done by the plaintiff which could be classified as abuse of process. Mere adjectival denunciation will not be sufficient. Facts must be alleged upon which the court could determine that the gravamen of his action is of that character.

We need not consider the question whether the counterclaim sufficiently states a cause of action for malicious prosecution, since such an action could not be brought until the termination of the present action, out of which it is said to arise.

(3) Conceiving its counterclaim to be a plea in bar of plaintiff's action, the defendant insists that the order of compulsory reference is invalid, because made over objection before that plea had been determined. *Bank v. Fidelity Co.,* 126 N. C., 320, 35 S. E., 588; *Graves v. Pritchett,* 207 N. C., 518, 177 S. E., 641.

The rule that a plea in bar should be disposed of before the case is heard on its merits is one of convenience and far from invariable. There are instances in which the court is justified, in its discretion, in hearing the plea along with the general evidence on the merits. *McAuley v. Sloan,* 173 N. C., 80, 91 S. E., 701. Generally speaking, however, the rule is as contended by the defendant.

But defendant's proposed counterclaim is not a plea in bar. It is a cross-action sounding in tort—the infliction of an injury for which defendant demands full compensation.

A plea in bar is one which goes to the plaintiff's right to maintain his action—not merely a plea which, in the course of the trial, may prevent his recovery of the sum demanded or any sum because of a mere balancing of demands. It bars or defeats the right of action itself. As expressed in *Jones v. Beaman,* 117 N. C., 259, 261, 23 S. E., 248, it is a plea "that denies the plaintiff's right to bring and maintain his action." *McAuley v. Sloan, supra; Bank v. Evans,* 191 N. C., 535, 132 S. E., 563. "The office of a plea in bar at law is to confess the right to sue; avoiding that by matter *dehors,* and giving the plaintiff an acknowledgment of his right, independent of the matter alleged in plea. *Flagg v. Bonnell,* 10 N. J. Eq., 82, 84. It is said in *Hurst v. Everett,* 91 N. C., 399, 403, that "A counterclaim includes every defense to the action, except a demurrer, *which does not amount to a plea in bar.* . . . In that

sense, a counterclaim is a cross action against the plaintiff, and in stating the cause of action it is governed and judged by the same rules which apply to the complaint: the facts alleged must be sufficient to constitute the cause of action, and the relief to which the defendant is entitled should be properly demanded. Pomeroy on Rem. and Rem. Rights; *Garrett v. Love,* 89 N. C., 205." A plea in bar is not asserted as a cause of action.

It is true that in *McDowell v. Tate,* 12 N. C., 249, it is held that one having an eligible demand equal to or greater than that of the plaintiff may plead it as a set-off, and such a plea is called a plea in bar. In *Derr v. Stubbs,* 83 N. C., 539, and in *McClenahan v. Cotten,* 83 N. C., 333, it is held that such a plea is still available under the Code. But its designation as a plea in bar may be understood from the following quotation from *Electric Co. v. Williams,* 123 N. C., 51, 53, 31 S. E., 288: "It originated in the Bankrupt Act of IV and V Anne, ch. 17, suggested, perhaps, by the *compensatio* of the civil law, but was given general application by the statutes of 2 George, II Chapter, 22, and 8 George, II Chapter, 24, which enact: 'That where there are mutual debts between the plaintiff and defendant, one debt may be set against the other, and either pleaded in bar or given in evidence upon the general issue at the trial, which shall operate as payment, and extinguish so much of the plaintiff's demand.' 3 Bl., 304. Payment extinguished the debt at the time of payment, while a set-off required mutual existing debts, and *operated as payment* only when pleaded and by judgment of the court."

The device is based on the fiction of payment, and the countervailing demand, in set-off, is limited to that function. The rule serves no economy, as do ordinary pleas in bar, since the validity of the opposing claims demanded, and in practice received, simultaneous investigation of the same kind. Moreover, there is no reason to continue this limited common law prototype of modern counterclaim, since the statute, C. S., 521, gives full relief by admitting demands of that character as counterclaims at their full value, which the common law did not. This, however, is not a matter of present concern.

A cross action for an unliquidated demand sounding in tort cannot be made the subject of set-off, and it is not so pleaded in the case at bar. The simple allegation that plaintiff's action is without foundation and malicious, or that there is an abuse of process, does not operate as a plea in bar.

The disposition of this appeal leaves the order of reference valid and standing without the vain requirement that the court should make it again.

There is

No error.

MARY GREENWOOD POOLE v. THE STATE BOARD OF COSMETIC ART EXAMINERS.

(Filed 15 April, 1942.)

1. Mandamus § 1—

Mandamus will lie only to compel the performance of a clear legal duty at the instance of the party having a clear legal right to demand it.

2. Mandamus § 2b—

Discretionary powers may not be controlled by *mandamus*.

3. Pleadings § 20—

In determining the sufficiency of the complaint as against a demurrer, the facts alleged will be taken as true.

4. Cosmetologist § 2: Mandamus § 2a—Duty of examiners to issue certificate, upon proper showing, to cosmetologist practicing at time regulatory act was passed, is mandatory and not discretionary.

The provision of sec. 20, ch. 179, Public Laws 1933, that a person who had been practicing cosmetic art in North Carolina and who was practicing such art at the time of the effective date of the statute, upon making proper affidavit and complying with the provisions of the act as to physical fitness and paying the required fee, "shall be issued a certificate of registration as a registered cosmetologist" prescribes a mandatory duty, and the board of examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit for *mandamus* alleging full compliance with the provisions of the statute in this respect and the refusal of the board to issue the certificate to plaintiff, is not demurrable.

APPEAL by plaintiff from *Carr, J.*, at February Term, 1942, of WAKE.

Civil action in nature of *mandamus*, heard upon demurrer to complaint.

Plaintiff in her complaint alleges in substance these facts:

(1) That prior to the enactment of the act to regulate the practice of cosmetic art in the State of North Carolina, Public Laws 1933, chapter 179, she "practiced as a cosmetologist for reward and pay . . . and was actually engaged in the practice of cosmetic art at the time of the effective date" of said act.

(2) That, in accordance with provisions of section 20 of the act that all persons, who have been practicing cosmetic art in North Carolina, and who were practicing such art at the time of the effective date of the act, upon making affidavit to that effect, and complying with provisions of the act as to physical fitness, and paying the required fee to the Board of Cosmetic Art Examiners, required by said Act as amended, Public Laws 1935, chapter 54; Public Laws 1941, chapter 234, are entitled to

certificate of registration as a registered cosmetologist, she applied in due time to the Board of Cosmetic Art Examiners for such a certificate.

(3) That pertaining to her application she filed with, and on forms prepared by the said Board of Examiners the "usual affidavits as to her competency and experience, tendered the application fee as required by the Board, and in all respects complied with the law pertaining to such matters," and that "the Board . . . unlawfully, arbitrarily, and without any just reason or excuse refused to grant the plaintiff her license as a registered cosmetologist to which she is justly entitled."

Upon these allegations plaintiff prays *mandamus,* and "for such other and further relief to which she may be entitled."

Defendants demur to complaint for that: (1) There is a misjoinder of parties defendant in that the individual defendants are not necessary or proper parties to the action, and (2) the complaint fails to state a cause of action in that it appears upon the face of it that the State Board of Cosmetic Art Examiners is a public board vested with *quasi*-judicial and discretionary powers in the issuance of license to applicants to practice cosmetology in this State.

Upon hearing below the court sustained the demurrer and dismissed the action.

Plaintiff appeals to the Supreme Court and assigns error.

Thomas W. Ruffin and Clem B. Holding for plaintiff, appellant.
Jones & Brassfield for defendant, appellee.

WINBORNE, J. It is well settled in this State that "*mandamus* lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the parties to be coerced must be under legal obligation to perform the act sought to be enforced." *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *White v. Comrs. of Johnston County,* 217 N. C., 329, 7 S. E. (2d), 825, and cases there cited. See, also, *Harris v. Board of Education,* 216 N. C., 147, 4 S. E. (2d), 328; *Champion v. Board of Health, ante,* 96. Discretionary powers may not be controlled by *mandamus. Harris v. Board of Education, supra.*

Admitting the facts alleged in the complaint in the present action, which we must do in testing the sufficiency of a complaint challenged by demurrer, *Ins. Co. v. McCraw,* 215 N. C., 105, 1 S. E. (2d), 369; *White v. Comrs. of Johnston County, supra,* and numerous other cases, does the plaintiff have a clear legal right to demand of defendants as, and constituting the Board of Cosmetic Art Examiners the issuance to her of a certificate of registration as a registered cosmetologist? If so, are defendants under legal duty to issue it? The answer to each question is "Yes."

The Act to regulate the practice of cosmetic art in the State of North Carolina, Public Laws 1933, chapter 179, section 13, as amended by section 2, chapter 54 of Public Laws 1935, creates a board to be known as a State Board of Cosmetic Art Examiners to consist of three members to be appointed by the Governor. Section 20 of the 1933 Act, pertinent to case in hand, prescribes that "The procedure for the registration of present practitioners of cosmetic art shall be as follows: (a) Every person who has been practicing cosmetic art in North Carolina and who is practicing such art at the time of the effective date of this act upon making an affidavit to that effect, and complying with the provisions of this Act as to physical fitness, and upon paying the required fee to the Board of Cosmetic Art Examiners shall be issued a certificate of registration as a registered cosmetologist." The provisions of this section are available only upon applications filed prior to 1 January, 1942. Public Laws 1941, chapter 235, section 3.

Manifestly, it was the intention of the Legislature to prescribe a method by which those persons, who were then engaged in the practice of cosmetic art, might obtain certificates of registration for continuing in such practice without meeting the qualifications prescribed for those who thereafter enter. As to a person of former class, it must be made to appear to the Board of Cosmetic Art Examiners before a certificate of registration will issue that such person (1) has been practicing cosmetic art in North Carolina, and was so engaged at the time of the effective date of the Act, and (2) has complied with the provisions of the Act as to physical fitness, and (3) has paid the required fee to the Board. When these three facts exist the language of the Act is that such person "shall be issued a certificate of registration as a registered cosmetologist." The word "shall" as here used is mandatory, *Battle v. Rocky Mount*, 156 N. C., 329, 72 S. E., 354; *Davis v. Board of Education*, 186 N. C., 227, 119 S. E., 372, and no discretion lies in the Board of Cosmetic Art Examiners. However, of necessity, such Board must find the facts with respect to these requirements.

Applying these principles to the facts alleged in the complaint in hand, which are admitted by the demurrer, the existence of each essential fact is alleged. Therefore, the complaint is not subject to demurrer. Nevertheless, defendants may by answer challenge existence of such facts.

As to parties, the record fails to show joinder as defendants the individuals composing the Board of Cosmetic Art Examiners. Hence, the portion of demurrer relating thereto is not considered.

The judgment below is

Reversed.

LEXIE SMITH v. CAPITAL COCA-COLA BOTTLING COMPANY.

(Filed 15 April, 1942.)

1. Appeal and Error § 38—

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, as to whether error was committed in refusing defendant's motion for judgment as of nonsuit and its prayer for a directed verdict, the rulings of the lower court will be permitted to stand without becoming precedents.

2. Evidence § 42f—

Where the material allegations of the complaint are denied in the answer, the admission of the complaint in evidence is error entitling defendant to a new trial.

3. Appeal and Error § 22—

When the case on appeal has been settled by agreement, it is subject to correction only in a like manner.

4. Same—

The transcript imports verity, and the Supreme Court is bound thereby.

APPEAL by defendant from *Thompson, J.*, at November Term, 1941, of WAKE.

Civil action by ultimate consumer to recover of manufacturer or bottler damages resulting from drinking bottled beverage containing noxious substance.

On 4 March, 1938, the plaintiff purchased from a retail merchant in Varina, N. C., a bottle of Coca-Cola which had been manufactured or bottled and placed on the market by the defendant. The plaintiff testified that upon drinking the Coca-Cola he became violently ill and suffered from burns in his mouth and throat. It is alleged that the Coca-Cola contained sodium carbonate, a deleterious substance.

It is recited in the agreed statement of case on appeal that the plaintiff offered in evidence, "the summons in this action, dated 13 June, 1935, and the complaint filed on the same day." Objection by defendant; overruled; exception.

At the close of plaintiff's evidence, the defendant moved for judgment of nonsuit, which was overruled, and prayed for a directed verdict, which was denied. The defendant offered no evidence.

Verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

Douglass & Douglass and Joyner & Yarborough for plaintiff, appellee.

A. J. Fletcher, Franklin T. Dupree, Jr., and Ehringhaus & Ehringhaus for defendant, appellant.

STACY, C. J. One member of the Court, *Schenck, J.*, not sitting, and the remaining six being evenly divided in opinion whether error appears in respect of the motion to nonsuit and the prayer for a directed verdict, these rulings are permitted to stand, accordant with the usual practice in such cases, without becoming precedents, and hence no recital of the evidence is deemed appropriate. *Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353.

There was error, however, in permitting the plaintiff to offer his complaint in evidence which entitles the defendant to a new trial. *Lupton v. Day*, 211 N. C., 443, 190 S. E., 722. The material allegations of the complaint were denied in the answer, and its admission in evidence was an inadvertence.

Plaintiff suggests an amendment to the record in this respect, pointing out that error seems apparent—the date of the summons patently so—and motion is lodged to this effect. The case having been settled by agreement is subject to correction only in like manner. *Gorham v. Ins. Co.*, 215 N. C., 195, 1 S. E. (2d), 569. The transcript imports verity, and we are bound by it. *S. v. Dee*, 214 N. C., 509, 199 S. E., 730.

The result is another hearing.

New trial.

CHARLES D. SANGER, JR., TRUSTEE, v. ROBERT LEE GATTIS.

(Filed 15 April, 1942.)

Trial § 47—

Evidence which is merely cumulative or corroborative of the evidence offered by the party at the trial is insufficient to invoke the discretionary power of the court to order a new trial for newly discovered evidence, and the granting of the motion will be held for error.

APPEAL by plaintiff from *Carr, J.*, at February Term, 1942, of WAKE.

Civil action by trustee in bankruptcy to remove cloud on title to lands belonging to the bankrupt.

Upon denial of title, the action was converted into one of ejectment, the case depending on an alleged mistake in the drafting of a deed in 1916 to the *locus in quo*.

The jury answered in favor of the plaintiff.

During the term and before judgment, the defendant made application for a new trial on the ground of newly discovered evidence. The motion was allowed, and plaintiff appeals.

W. C. Harris, Jr., for plaintiff, appellant.

John W. Hinsdale for defendant, appellee.

STACY, C. J. The only question for decision is whether the applicant for new trial on the ground of newly discovered evidence has made sufficient showing to invoke a discretionary ruling in his behalf. The record suggests a negative answer. *Bullock v. Williams,* 213 N. C., 320, 195 S. E., 791; *Crane v. Carswell,* 204 N. C., 571, 169 S. E., 160.

The "newly discovered evidence" fails to go to the heart of the case, to wit, the alleged mistake in drafting the deed of 22 June, 1916. It seems to be merely cumulative or corroborative of the evidence offered by the defendant at the trial. This was insufficient to invoke the aid of the court. *Stilley v. Planing Mills,* 161 N. C., 517, 77 S. E., 760. The order granting a new trial will be stricken out.

Error.

RALEIGH BUILDING CORPORATION v. P. B. RODGERS.

(Filed 15 April, 1942.)

Subscription § 2—

Defendant's subscription to stock in plaintiff corporation was conditioned upon the subscription by others of a stated number of shares. *Held:* In the absence of evidence that the stated number of shares had been subscribed prior to the institution of the action, or that defendant, at the time he made payments on his subscription, had knowledge of the fact that the specified number of shares had not been subscribed, defendant's motion for judgment as of nonsuit is properly granted.

APPEAL by plaintiff from *Carr, J.,* at January Term, 1942, of WAKE.

Civil action to recover upon conditional stock subscription.

Upon plaintiff resting its case motion for judgment as of nonsuit was allowed. Plaintiff appeals to Supreme Court and assigns error.

Paul F. Smith for plaintiff, appellant.
Briggs & West for defendant, appellee.

PER CURIAM. Upon the trial below evidence for plaintiff tended to show that the number of shares to be subscribed, upon which defendant's subscription was conditioned, had not been subscribed either when the corporation was organized in 1931, or on the date of the institution of this action. And on argument here counsel for plaintiff states that it is not contended that defendant, when in 1931 he made six payments on his subscription, had knowledge of the fact that the total subscription for stock was less than the specified number of shares.

In the light of these facts, the judgment below is

Affirmed.

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 29 April, 1942.)

1. Reference § 3—Allegations setting up defense that plaintiff is without legal capacity to maintain action is plea in bar.

Plaintiff instituted this action to obtain approval of the court of his final account as trustee. The administrator of a deceased beneficiary filed answer alleging that plaintiff was a successor trustee appointed by the clerk, and that the appointment was void for want of power in the clerk to make the appointment. *Held:* The answer set up a plea in bar of plaintiff's right to proceed with his action, and therefore it was error for the court to order a compulsory reference prior to the determination of the plea in bar.

2. Trusts § 12—Party having interest in proper accounting of trust estate may insist that estate be settled by duly appointed trustee.

Plaintiff instituted this action to obtain approval of the court of his final account as trustee. The administrator of a deceased beneficiary, who was entitled under the trust to the income from the estate for life, filed answer alleging that his intestate had not been paid all that was due him from the estate, and further, that plaintiff is without legal capacity to maintain the action. *Held:* Although the administrator had no interest in the *corpus* of the estate or in the final closing of the estate, he had standing in court to determine whether any part of the income due his intestate had not been paid, and therefore he could set up the plea in bar.

3. Trusts § 2—

Where the trustee appointed by will to administer an active trust dies, the clerk of the Superior Court is without authority to appoint a successor, since the clerk has no authority to administer an equity unless empowered to do so by statute, and C. S., 4023, authorizes the clerk to appoint a successor trustee only when the former trustee resigns, and C. S., 2583, is not applicable to an active trust.

4. Same—In proper instances court may validate appointment of trustee by clerk.

Upon the death of the trustee of an active trust created by will, the clerk of the Superior Court, in a special proceeding in which all beneficiaries of the trust were made parties, appointed a successor trustee at the instance of the ultimate beneficiaries. The successor trustee handled the trust for a number of years, making annual reports, and thereafter instituted this action seeking approval of his final account and his discharge. The administrator of a deceased beneficiary filed answer setting up that the clerk had no authority to appoint plaintiff trustee, and that plaintiff was without legal capacity to sue. *Held:* All parties in interest being before the court, the court need not dismiss the action, but may, in the exercise of its equitable jurisdiction, validate plaintiff's appointment *nunc pro tunc*, and order a compulsory reference of plaintiff's account.

CHESHIRE *v.* FIRST PRESBYTERIAN CHURCH.

APPEAL by defendant Hartshorn, Administrator, from *Carr, J.*, at January Term, 1942, of WAKE. Error and remanded.

Paul F. Smith for plaintiff, appellee.
James I. Mason for defendant, appellant.

DEVIN, J. This case was here at Fall Term, 1941, and is reported in 220 N. C., 393. On that appeal it was held that the demurrer, interposed by the defendant Hartshorn on the ground of the incapacity of plaintiff to sue and the absence of proper parties plaintiff, could not be sustained for the reason that the defects alleged did not appear on the face of the complaint. This defendant has now answered setting out the facts upon which these pleas are based, and the plaintiff has replied. The following pertinent facts appear from these pleadings.

Laura F. Cosby died in 1919, leaving a last will and testament wherein her executor was directed, after the payment of all debts, to convert the property remaining into money and hold and invest the same in interest bearing securities and pay the income to her brother, B. H. Cosby, during his natural life. After the death of B. H. Cosby the *corpus* of the fund was directed to be paid over to the Barium Springs Orphanage and the First Presbyterian Church of Raleigh for certain charitable purposes. W. N. Jones was named executor. In accord with the provisions of the will, W. N. Jones as executor collected the assets, paid the debts of the estate, invested the remainder, and in 1920 filed what he denominated a final account, wherein it was stated that the cash and securities, amounting to about eight thousand dollars, were "turned over to W. N. Jones, Trustee, under the will of Laura F. Cosby." W. N. Jones filed a number of accounts showing the investment and handling of the fund.

In 1928 W. N. Jones died and his executrix instituted a special proceeding before the clerk relative to this trust estate, to which proceeding the record shows B. H. Cosby was made party. In this proceeding the clerk made an order that William Bailey Jones be appointed trustee under the will of Laura F. Cosby to succeed W. N. Jones. William Bailey Jones filed two accounts of receipts, disbursements and investments of the fund, which were examined and approved by the clerk. In 1932 William Bailey Jones died, and thereafter another special proceeding was instituted to which B. H. Cosby was made party. In this proceeding the clerk, in 1933, made an order appointing the plaintiff Joseph B. Cheshire, Jr., trustee under the will of Laura F. Cosby, to succeed William Bailey Jones. It was alleged that plaintiff's appointment was made at the request of the ultimate beneficiaries, and that pursuant to this appointment the plaintiff undertook the handling, investment and reinvestment of the fund, paying the income derived therefrom to B. H. Cosby until

his death. The plaintiff made seven annual returns which were approved without objection.

On 14 November, 1940, B. H. Cosby died and the defendant Hartshorn qualified as administrator of his estate. Questions having arisen between the defendant administrator and the plaintiff relative to the plaintiff's dealings with this fund and the amount of income properly receivable by defendant's intestate, this action was instituted by the plaintiff for the purpose of obtaining the instructions of the court as to the settlement of the trust estate. The ultimate beneficiaries were made parties and answered admitting the allegations of the petition.

The defendant administrator in his answer alleged that under the facts set forth the clerk of the Superior Court had no power to appoint a trustee to exercise the trust set up in the will of Laura F. Cosby, and that the purported appointment of the plaintiff was void; that while the statute conferred upon the clerk power to appoint an administrator *c. t. a.* this was never done, and that this action by plaintiff Cheshire, claiming to sue as trustee under the will, cannot be maintained for the reason that there is a defect of parties plaintiff, and that the plaintiff has no legal capacity to sue. This answering defendant further alleged that his intestate did not receive the amount of income from the fund to which he was entitled, and denied the correctness of the plaintiff's accounts.

Upon examination of the pleadings, without determining defendant's pleas in bar, the court below made an order of reference, to which defendant Hartshorn in apt time excepted. The defendant assigns error in the ruling of the court for that pleas in bar had been set up in his answer, and that the court declined to rule thereon before making the order of reference. As the defendant's answer set up a defense which must be considered a plea in bar of plaintiff's right to proceed with his action, the defendant was entitled to have the court rule thereon before referring the entire case to a referee. *Preister v. Trust Co.,* 211 N. C., 51, 188 S. E., 622; *Bank v. Evans,* 191 N. C., 535, 132 S. E., 563.

It is apparent that defendant as administrator of B. H. Cosby, who was only entitled to receive during his life the income from the trust fund set up in the will, has no interest in the *corpus* of the fund or in the final closing of the trust estate, except to determine whether any part of the income therefrom due his intestate was not paid, and if so to collect the same as assets of the estate of B. H. Cosby. In that respect only is he interested in the settlement of the trust. However, the defendant's claim set forth in his answer that his intestate had not been paid all that was due him gives him standing in court, and requires that the fund be properly settled by some responsible authority, and that an action for that purpose should be by one having legal capacity to sue. He thus properly presents for determination the question whether the clerk of the

Superior Court had the power to make the appointment of the plaintiff as trustee under the will of Laura F. Cosby.

The supervision of trust estates peculiarly invokes the equitable jurisdiction of the courts, and where a trust has been created and for some cause there is no person to execute the trust and carry out its purposes, it then becomes the province of a court of equity to appoint a trustee. 1 Scott on Trusts, sec. 108; 3 Bogert Trusts & Trustees, sec. 532. It is also well settled in North Carolina that the clerk of the Superior Court is not vested with power affirmatively to administer an equity, except in those cases where it is specially conferred by statute. *High v. Pearce,* 220 N. C., 266; *In re Estate of Smith,* 200 N. C., 272, 156 S. E., 494; *Clark v. Peebles,* 120 N. C., 31, 26 S. E., 924. He has no inherent power in the exercise of equitable jurisdiction to appoint a trustee. The power to appoint a trustee given the clerk by C. S., 4023, is limited to cases where the former trustee has resigned, and the provisions of C. S., 2583, may not be held applicable to an active express trust such as that created under the will of Laura F. Cosby. *In re Estate of Smith, supra.* We find no statute which would authorize the clerk to make the appointment of a trustee under the circumstances of this case. It would seem therefore that the appointment of the plaintiff to administer the trust thus created was a matter for the Superior Court in the exercise of its equitable jurisdiction, and beyond the power of the clerk.

But it does not follow that the plaintiff should be treated as an intermeddler. His appointment was made at the request of the ultimate beneficiaries in a proceeding to which defendant's intestate and all other beneficiaries under the will were made parties. Pursuant to that appointment, presumed to be in all respects valid, he has handled the trust estate for eight years, making annual returns of his dealings therewith without question.

Since the appointment of a trustee was a matter for the Superior Court in term, and since all the parties are now before the court, and the subject matter of the action involves the supervision of a trust estate, the appointment of a trustee, and the closing of the trust, we see no reason why the Superior Court of Wake County in the exercise of its equitable jurisdiction may not now, *nunc pro tunc,* validate and give power to the previous appointment of the clerk, and authorize the settlement and closing of the trust in accord with the expressed will of Laura F. Cosby. *Roseman v. Roseman,* 127 N. C., 494, 37 S. E., 518; *Cody v. Hovey,* 219 N. C., 369, 14 S. E. (2d), 30; *Perry v. Bassenger,* 219 N. C., 838, 15 S. E. (2d), 365. This would leave open only the matter of accounting between defendant's intestate and the trustee, for which a reference would seem to be proper. If this be not done, then this action would have to stand dismissed.

Defendant's motion to strike plaintiff's further reply was properly denied. The cause is remanded to the Superior Court for proceeding not inconsistent with this opinion.

Error and remanded.

STATE v. CARRIE MAE RICHARDSON.

(Filed 29 April, 1942.)

Homicide § 29—Sentence for involuntary manslaughter is not limited to two years imprisonment.

The provision of C. S., 4201, as amended by ch. 249, Public Laws 1933, that the punishment for involuntary manslaughter shall be in the discretion of the court and that the defendant may be fined or imprisoned, or both, prescribes a "specific punishment," and therefore C. S., 4172, which limits the sentence for a *felony for which no* specific punishment is prescribed by statute, to two years imprisonment is not applicable, and a sentence of imprisonment in the State Prison for a term of seven years upon defendant's plea of guilty of involuntary manslaughter will be upheld, the punishment being in the sound discretion of the trial court, limited only by the prohibition against cruel and unusual punishment. Constitution of North Carolina, Art. I, sec. 14.

APPEAL by defendant from *Thompson, J.*, at October Term, 1941, of FRANKLIN.

Criminal prosecution upon an indictment charging the defendant with the felonious slaying of one Gladys Ruffin. The defendant, through her attorneys, tendered a plea of guilty of involuntary manslaughter, which plea was accepted by the State.

Judgment: Imprisonment in the State Prison for a term of seven years. The defendant appeals and assigns error.

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

Yarborough & Yarborough for defendant.

DENNY, J. The only exception is to the judgment of the court. The defendant contends that upon a plea of guilty of involuntary manslaughter, which plea was accepted by the State, the court was without authority to impose any judgment in excess of two years imprisonment in the State Prison, the offense of involuntary manslaughter not being an infamous crime, therefore the sentence of imprisonment for seven years in the State Prison is unlawful.

Is a provision in a criminal statute "that the punishment shall be in the discretion of the Court and the defendant may be fined or imprisoned or both," the prescribing of a "specific punishment" within the meaning of section 4172 of the Consolidated Statutes of North Carolina? The answer is in the affirmative. *S. v. Rippy,* 127 N. C., 516, 37 S. E., 148; *S. v. Swindell,* 189 N. C., 151, 126 S. E., 417.

In the case of *S. v. Dunn,* 208 N. C., 333, 180 S. E., 708, this Court passed upon the proviso added to C. S., 4201, of North Carolina, by chapter 249, Public Laws of 1933. In answer to the question: "Is the crime of involuntary manslaughter, as contained in the proviso of C. S., 4201, of the 1933 supplement to the North Carolina Code of 1931, a misdemeanor or a felony," *Justice Brogden* said: "The second question of law involves the amendment to C. S., 4201, of the Code of 1931. Said section, before the enactment of chapter 249 of the Laws of 1933, read as follows: 'If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State Prison for not less than four months nor more than twenty years.' Thereafter, on 10 April, 1933, the General Assembly enacted chapter 249, Public Laws of 1933, in the following words: 'Section 1. That section 4201 of Consolidated Statutes be and the same is hereby amended by adding a sentence to said section as follows: *"Provided, however,* that in cases of involuntary manslaughter, punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both."' The defendant contends that the proviso added by the Legislature was designed to make involuntary manslaughter a misdemeanor instead of a felony, and that, therefore, the recorder's court of Richmond County had jurisdiction, and hence no indictment could lie in the Superior Court. This contention, however, cannot be maintained for two reasons: First, it does not appear from the record that there is any recorder's court in Richmond County, or that such court had exclusive jurisdiction of misdemeanors. Second, the proviso did not purport to create a new crime, to wit, that of involuntary manslaughter. Chapter 249 states in plain English that it is designed as an amendment to C. S., 4201. Discussing the function of a proviso in *Supply Co. v. Eastern Star Home,* 163 N. C., 513, 79 S. E., 964, the Court declared: 'It has long been held that if a proviso in a statute be directly contrary to the purview of the statute, the proviso is good and not the purview, because the proviso speaks the later intention of the Legislature.' It is not thought that by enacting the proviso the Legislature intended to repeal the manslaughter statute and to set up in its stead involuntary manslaughter as a misdemeanor. Indeed, the Court is of opinion, and so holds, that the proviso was intended and designed to mitigate the punishment in cases of involuntary manslaughter, and to commit such punishment to the sound discretion of the trial judge."

We hold that the court below had the authority to impose the sentence entered pursuant to sec. 4201 of the Consolidated Statutes of North Carolina, as amended by chapter 249, Public Laws of 1933, and that under the provisions of this statute the question of punishment is left to the sound discretion of the court, limited only by the prohibition against cruel or unusual punishment in our Constitution, Art. I, sec. 14. *S. v. Swindell, supra.*

The judgment of the court below is

Affirmed.

RALPH THREATT, BY HIS NEXT FRIEND, A. R. THREATT, ET AL., v. RAILWAY EXPRESS AGENCY, INC.

(Filed 29 April, 1942.)

1. Automobiles § 8—

The drivers of vehicles along a city street are under mutual and reciprocal duty to exercise reasonable care under the circumstances arising from the exigencies of traffic.

2. Automobiles §§ 9d, 18a, 18c—Evidence held insufficient to support recovery by cyclist struck while standing in street astride bicycle.

Defendant's driver was operating a tractor truck consisting at the time of chassis and cab without trailer. On the rear were dual wheels, the outside tire of which projected beyond the line of travel of the front wheel, unprotected by fender. Plaintiff was standing in the street astride his bicycle waiting an opportunity to proceed with the traffic after the traffic light had turned green. Plaintiff testified to the effect that he was standing 3, 4 or 5 feet from the curb, waiting for the tractor, which was traveling very slowly, to pass him. The outside rear wheel of the tractor struck plaintiff's foot. The driver testified that he did not see anyone in the street when he passed the *locus*, and that when he backed the truck off plaintiff's foot the outside wheel was 6 feet 8 inches from the curb. *Held:* In the absence of evidence raising more than mere speculation whether the driver could have seen plaintiff's precarious position before the rear wheel struck him, defendant's motion to nonsuit should have been granted, if not upon the issue of negligence, then upon the issue of contributory negligence.

3. Negligence § 1a—

Negligence is doing other than, or failing to do, what a reasonably prudent person, similarly situated, would have done.

APPEAL by defendant from *Blackstock, Special Judge,* at November Special Term, 1941, of MECKLENBURG.

Civil action to recover damages for personal injuries sustained by plaintiff when his left foot was caught under the rear wheel of defendant's truck on a public street in the city of Charlotte.

Plaintiff was injured on 16 October, 1940. He was then 19 years of age and employed by the Western Union Telegraph Company as a messenger. He came out of the telegraph office on East Third Street on his way to lunch, got his bicycle which was parked in the rack in front of the office door, turned it around in the direction of Tryon Street which was some distance away, stopped for the red light to turn, and he says, "I waited for traffic to get on by and this truck, Railway Express truck, was coming from behind. It never did come to a standstill, it proceeded slowly, and I was waiting for it to get on by and the rear wheel struck my left foot, as I was standing there waiting for the traffic to proceed so I could go on. (Cross-examination) I was standing about 3 or 4 feet from the curb. . . . I was approximately this distance (indicating about 5 feet) from the curb."

The right rear tire of defendant's tractor, consisting of chassis and cab—it did not have trailer attached at the time—which struck the plaintiff's foot was on the outer dual wheel. It projected beyond the line of travel of the front wheel, and was unprotected by fender.

The driver of the chassis and cab testified that he stopped for the red light, with two cars standing in front of him; that the plaintiff had not entered the street when his cab passed the bicycle rack. "There was not anyone in the street in front of the Western Union door where that rack is when I passed the rack and came to a stop. . . . When I started up I caught his foot. . . . I stopped and looked back through my back glass. . . . I backed the truck off his foot. . . . I asked him how he got under the truck. He said he didn't know. . . . It measured 6 feet 8 inches from the curb to the outside of the dual wheel tire, the right hand rear tire, the one that caught the boy. . . . The bicycle rack was behind the truck when I got out."

The defendant moved for judgment of nonsuit at the close of plaintiff's evidence and again at the close of all the evidence. Overruled; exception.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From judgment on the verdict, the defendant appeals, assigning errors.

W. Vance Howard and Paul R. Ervin for plaintiff, appellee.
Cansler & Cansler for defendant, appellant.

STACY, C. J. The question before us is the sufficiency of the evidence to carry the case to the jury. The record suggests that the demurrer to the evidence should be sustained, if not upon the principal issue of liability, then upon the ground of contributory negligence. *Swainey v. Tea Co.*, 202 N. C., 272, 162 S. E., 557; *Miller v. Holland*, 196 N. C.,

739, 147 S. E., 8. *Cf. Wooten v. Smith,* 215 N. C., 48, 200 S. E., 921; *Hood v. Bottling Co.,* 192 N. C., 827, 135 S. E., 609. Both the driver of the truck and the plaintiff were charged with the mutual and reciprocal duty to exercise reasonable care under the circumstances arising from the exigencies of traffic in the street. *Moore v. R. R.,* 201 N. C., 26, 158 S. E., 556.

The allegation of negligence is, that the defendant drove its truck too near the plaintiff as he was standing in the street waiting for the traffic to pass or for the light to turn. The evidence could hardly be said to support the allegation. The defendant negatives any negligence, and the plaintiff makes out a case of contributory negligence. *Van Dyke v. Atlantic Greyhound Corp.,* 218 N. C., 283, 10 S. E. (2d), 727; *Tart v. R. R.,* 202 N. C., 52, 161 S. E., 720.

The plaintiff says the truck was moving "slowly, very slowly." He must have known, then, that he was close, very close, to it. But whether the truck was standing still or moving slowly when plaintiff came into the street with his bicycle, the jury was left to speculate on whether the driver of the truck could see the precarious position of the plaintiff before the rear wheel struck him. *Rountree v. Fountain,* 203 N. C., 381, 166 S. E., 329. Without this, the case must fail. *Mills v. Moore,* 219 N. C., 25, 12 S. E. (2d), 661. It is not enough that the driver of the truck saw the plaintiff in the street. He must have appreciated the danger in time to have avoided the injury in the exercise of reasonable prevision. *Wellons v. Sherrin,* 219 N. C., 476, 14 S. E. (2d), 426. Negligence is doing other than, or failing to do, what a reasonably prudent person, similarly situated, would have done. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353; *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358.

A careful perusal of the record engenders the conclusion that it is insufficient to support a recovery. The motion for judgment as in case of nonsuit should have been allowed. C. S., 567.

Reversed.

STATE v. ED. ISLEY.

(Filed 29 April, 1942.)

1. Rape § 3c—Paternity of prosecutrix' child is not in issue in prosecution for carnally knowing female child between ages of 12 and 16.

When prosecutrix testifies that defendant is the father of her child, but upon her own testimony the child could not have been conceived until after her 16th birthday, whether the State is entitled to exhibit the child to the jury in a prosecution of defendant for carnally knowing prosecutrix when

she was between the ages of 12 and 16, even for the purpose of corroborating her testimony as to illicit relations with defendant over a long period of time, or to impeach his denial of ever having had illicit relations with her, *quære.*

2. Rape § 3c—In prosecution for carnally knowing female between ages of 12 and 16, instruction failing to specify maximum age is error.

In a prosecution for carnally knowing a female child over the age of 12 and under the age of 16, an instruction specifying the minimum age of 12, but inadvertently failing to specify the maximum age of 16, must be held for reversible error, especially when the State's evidence tends to show a continuance of the illicit relations after prosecutrix passed her 16th birthday, notwithstanding that in other portions of the charge explaining the abstract law, the court gives correct instructions on this aspect of the case.

3. Criminal Law § 81c—

An erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated.

APPEAL by defendant from *Armstrong, J.,* at December Term, 1941, of ROCKINGHAM. New trial.

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

Sharp & Sharp for defendant, appellant.

SEAWELL, J. The defendant was indicted and convicted upon a charge of carnally knowing and abusing Mary Lee Lucas, a female child over the age of twelve and under the age of sixteen.

Upon the trial of this case the State was permitted, over the objection of the defendant, to exhibit to the jury the child of the prosecuting witness, of which she had testified the defendant was the father. Whether this was competent in a case of this kind, and upon the evidence before the court, may be seriously questioned. In our jurisdiction, as in most others, it is competent in bastardy cases where the issue is paternity, but that is not the issue here. The prosecuting witness detailed a story of illicit intercourse lasting through a considerable period. Under her testimony the child could not have been conceived until after she had become sixteen years of age. The State contends that it is at least corroborative of the fact of illicit relations, which is, in turn, corroborative of the prosecuting witness as to earlier relations, and that it also impeaches the defendant, who denied any such relations at any time; and that it therefore cannot be excluded under a general objection. *S. v. Corriher,* 196 N. C., 397, 145 S. E., 773; *S. v. Hawkins,* 214 N. C., 326, 199 S. E., 284. It is questionable whether it is corroborative at all of the prior act of carnal knowledge upon which conviction depends, or

whether such contradiction of defendant as it might afford is not merely collateral. It is retrospective, the connection is remote, the probative value at least none too apparent, and the danger to an unbiased consideration of the case appreciable. But, as the incident may not recur on a new trial, we refrain from passing upon it at this time.

In discharging the duties resting upon him under C. S., 564, the able presiding judge inadvertently instructed the jury as follows: "So, the Court instructs you, Gentlemen of the Jury, that if the State of North Carolina has satisfied you from evidence and beyond a reasonable doubt that on or about the 1st day of October, 1939, that the defendant, Ed. Isley, had sexual intercourse with the prosecuting witness, Mary Lee Lucas, as the Court has defined sexual intercourse to be, and further find from the evidence and beyond a reasonable doubt that at the time the defendant had sexual intercourse with her, if you do find beyond a reasonable doubt that he had sexual intercourse with her, that she was over 12 years of age, and further find from the evidence and beyond a reasonable doubt that at the time she had sexual intercourse with the defendant, if you find from the evidence and beyond a reasonable doubt that he had sexual intercourse with her, that she had never before had sexual intercourse with any other person, then he would be guilty as charged in this bill of indictment, and it would be your duty to return a verdict of guilty."

This, taken literally and applied to the evidence, would be tantamount to an instruction to convict, since it omitted reference to the maximum age limit, and there was no doubt that the female, subject of the instruction, was over twelve. It is true the judge correctly stated the law elsewhere in explaining the statute, and that there may be some doubt whether the obviously inadvertent statement was, in a practical sense, prejudicial.

The Attorney-General argues that, taking the charge contextually, there is no prejudicial error, since the jury was properly instructed on this point elsewhere. *In re Ross,* 182 N. C., 477, 109 S. E., 365; *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657; *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617; *S. v. Johnson,* 219 N. C., 757, 14 S. E. (2d), 792.

On the other hand, the defendant expresses a doubt as to the ability of the jury to retain and collate everything the judge has said. It is pointed out, also, that the instruction bearing upon the statute, correctly stating the maximum age—sixteen years—beyond which conviction could not be had, was more or less abstract, while that given near the close of the charge, in which that essential element of the crime was omitted, was more concretely directed to the evidence and the verdict the jury might render upon it, and was more likely to be heeded. An erroneous instruction is not cured by the fact that the law is correctly charged

elsewhere. *S. v. Morgan,* 136 N. C., 628, 48 S. E., 670; *Patterson v. Nichols,* 157 N. C., 406, 73 S. E., 202; *Grocery Co. v. Taylor,* 162 N. C., 307, 78 S. E., 276.

Considering the importance of the case and the impossibility of determining on which of the instructions the jury acted, we believe the ends of justice require that defendant have a new trial. It is so ordered.

New trial.

GEORGE McCRIMMON v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AND T. LACY WILLIAMS, ADMINISTRATOR OF JOHN VAUGHAN, DECEASED.

(Filed 29 April, 1942.)

Railroads § 9—Evidence held to disclose contributory negligence on part of driver barring recovery for crossing accident as matter of law.

Plaintiff's car was struck by a train running at excessive speed on the third track of a four-track crossing. Plaintiff was familiar with the crossing. The evidence, considered in the light most favorable to plaintiff, tended to show that as plaintiff approached the crossing he saw a freight train standing on the second track, which is a pass track, that plaintiff's view of the approaching train was obstructed by a building so that he could not see it until he was on the first track, which is an unloading track, that plaintiff did not see the approaching train until he was on the first or second track, and that when he saw its headlights, he speeded up in an attempt to cross ahead of the train. The distance from the center of the first track to the center of the third track is more than 30 feet. *Held:* The evidence discloses contributory negligence as a matter of law on the part of plaintiff, either in failing to look when he reached the first track, or, if he then saw the train, in failing to stop before reaching the third track when he had ample time and distance in which to stop.

APPEAL by plaintiff from *Thompson, J.,* at November Term, 1941, of FRANKLIN. Affirmed.

Civil action to recover damages for personal injuries sustained as a result of an automobile-train collision.

The main line tracks of the defendants extend in a north-south direction from Raleigh through Franklinton, N. C., to Henderson. Mason Street in Franklinton extends in an east-west direction and crosses defendants' tracks at grade. At this crossing there are four tracks. Going west the first is an unloading track; the second is a pass track; the third is the main line, and the fourth is a sidetrack. In the southwest corner there is a two-story brick building on the edge of Mason Street and within 7½ feet of the unloading track.

At about 1:30 a.m. on the morning of 26 December, 1939, plaintiff, accompanied by one Sylvester Rattley and Johnnie Henderson, returned

from an automobile trip to Henderson. He attempted to cross defendants' tracks at two other street crossings but found them blocked by a freight train. He then proceeded to Mason Street, turned to his left going east and attempted to cross. He stopped, looked and listened before reaching the unloading track. At that time the windows of his automobile were closed. He could not see to his right because his vision was blocked by the two-story building. He then proceeded to the unloading track. He saw the engine of the freight train standing on the second or pass track to his left and, looking to the right, he saw a train of the defendant approaching from the south. The testimony, considered in the light most favorable to him, tends to show that he did not and could not see the approaching train until his car was up on the unloading track. Seeing the train approaching he accelerated his speed and attempted to cross ahead of the train. The rear end of his car was struck by the train just before it cleared the main line track. As a result he suffered certain personal injuries. One of the passengers was killed and the other one sustained injuries.

There is evidence tending to show that the train was traveling about 60 miles per hour and that it gave no signal or warning of its approach. Plaintiff's evidence likewise tends to show that after his car was up on the unloading track he could see to the right as far as his vision would permit.

The distance from the center of the unloading track to the center of the main line track is more than 30 feet.

At the conclusion of all the evidence, on motion of the defendants, the court below entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

Lumpkin, Lumpkin & Jolly for plaintiff, appellant.
Murray Allen for defendants, appellees.

BARNHILL, J. The sole question presented on this appeal relates to the correctness of the ruling of the court below upon defendants' motion to dismiss as of nonsuit at the conclusion of all the evidence.

As to the immediate circumstances of the collision the plaintiff testified, "I was well out on the first track when I saw the headlight of the approaching train, but I could not tell which track it was coming on. . . . As soon as I saw the train coming I tried to get across before it hit me, but I did not have time. . . . When I first saw the headlight of the approaching train I was well out on the first track; was watching it out of the corner of my eye and trying to get across. . . . I was just starting off—by the time the train hit me I was up to about 12 or 15 miles. If I had stopped in the middle of the tracks I could have seen both ways two or three miles."

Plaintiff lived for several years within a few blocks of Mason Street crossing. He had passed over it both afoot and on automobiles. He knew the location of each track and its purpose. While he testified that he did not know upon which track the train was approaching, he did know that the first track was used for unloading and that the second or pass track was blocked by a freight train, the engine of which was near the crossing.

When he approached the railroad plaintiff knew he was entering a zone of danger. He had timely opportunity to see the approaching train and to stop before reaching the live track. He did see, and seeing, chose to attempt to cross ahead of the train—to "beat it across" while watching it approach out of the corner of his eye. He took his chance and lost.

Hence, the evidence, as it appears in the record before us, even when considered in the light most favorable to him, leads to the conclusion as a matter of law that plaintiff was contributorily negligent. The judgment of nonsuit is supported by pertinent decisions of this Court. *Godwin v. R. R.*, 220 N. C., 281, and cases cited; *Miller v. R. R.*, 220 N. C., 562; *Moore v. R. R.*, 201 N. C., 26, 158 S. E., 556; *Coleman v. R. R.*, 153 N. C., 322, 69 S. E., 251; *Quinn v. R. R.*, 213 N. C., 48, 195 S. E., 85.

We are not inadvertent to the fact that plaintiff first testified that he saw the train when he was on the first or second track. This will not aid him. If he looked and saw when he was on the first track he had ample time and distance within which to stop. If he did not look, after passing the building, until he reached the second track his looking was not timely. And even then he was more than 15 feet from the point at which his automobile was struck. *Godwin v. R. R.*, 202 N. C., 1, 161 S. E., 541.

The judgment below is

Affirmed.

THAD BASS, BY HIS NEXT FRIEND, WALTER H. BASS, v. R. HOVAN HOCUTT AND WIFE, HATTIE PEARL HOCUTT.

(Filed 29 April, 1942.)

1. Trial § 32—

When a party aptly tenders written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, in substance at least, is error.

2. Automobiles §§ 7, 18h—If minor's act in running from behind one car into path of defendant's car is sole cause of injury, he may not recover.

Plaintiff, a minor, was attempting to cross a highway from east to west, and was struck by the southbound car driven by the *feme* defendant. De-

fendants requested an instruction, supported by evidence, that if plaintiff suddenly ran out into the highway immediately behind a northbound car, and that this action on his part was the sole proximate cause of the injury, the jury should answer the issue of negligence in the negative. *Held:* The failure of the court to give the instruction either directly, or in substance in any part of the charge, is reversible error.

APPEAL by defendants from *Johnston, Special Judge,* at 5 January, 1942, Extra Term, of MECKLENBURG.

Civil action to recover for injuries allegedly resulting from actionable negligence.

Plaintiff alleges that on 20 January, 1941, while crossing Tuckaseegee Road from east to west, where Enderly Road intersects therewith, under circumstances described, he, a minor six years of age, was struck by an automobile owned by defendant, R. Hovan Hocutt, and used for family purposes, and negligently operated by his wife, defendant Hattie Pearl Hocutt, traveling in southerly direction on Tuckaseegee Road, in the manner specified—proximately resulting in injury to him.

Defendants deny the allegations of negligence and plead contributory negligence of plaintiff as the sole, or a contributing cause of his injury.

Upon the trial below the case was submitted to the jury upon issues as to negligence of defendant, contributory negligence of plaintiff, and damages.

From adverse verdict defendants appeal to Supreme Court, and assign error.

J. C. Newell for plaintiff, appellee.
W. C. Ginter and Robinson & Jones for defendants, appellants.

WINBORNE, J. Defendants upon trial below, in apt time, requested the court to charge the jury as follows: "1. If you find as facts from the evidence, and by its greater weight, that as the defendant, Mrs. Hocutt, approached the intersection of Enderly Road and Tuckaseegee Road, the plaintiff suddenly ran out into Tuckaseegee Road immediately behind an automobile passing in the opposite direction, and that this action on the part of the plaintiff was the sole proximate cause of his injury, you should answer the first issue, 'No.'"

We are of opinion that exception to the refusal to so charge is well taken. *Michaux v. Rubber Co.,* 190 N. C., 617, 130 S. E., 306; *Calhoun v. Highway Com.,* 208 N. C., 424, 181 S. E., 271, and cases cited. Compare *Newman v. Coach Co.,* 205 N. C., 26, 169 S. E., 808.

The established rule bearing upon the duty of the court with respect to request for instruction is succinctly stated in *Calhoun v. Highway Com., supra,* in this manner: "The prayer being properly presented, in

apt time, and containing a correct legal request, pertinent to the evidence and the issue in the case, it was error to refuse it. *Michaux v. Rubber Co.*, 190 N. C., 617, 130 S. E., 306. The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error."

In the present case evidence for plaintiff tends to show that he stood on the east side of the road while cars traveling in both directions passed, and that right after a car going north had passed he started out walking in the road and when almost across, was struck by the automobile operated by Mrs. Hocutt. Mrs. Hocutt, testifying for defendants, stated that she did not see the plaintiff until she had passed the car going north, and that immediately after that car passed plaintiff ran in front of her car. Defendants plead that the sole cause of the accident was the act of plaintiff in running across the road in front of the automobile. In the light of the evidence and the pleading the requested instruction is correct and should have been given, in substance at least. However, a reading of the charge fails to disclose that such was done.

As there must be a new trial for the error above pointed out, other assignments are not treated, as they may not recur upon another trial. Nevertheless, as to what constitutes business and residential districts, attention is called to subsections (a) and (d) of section 1 of chapter 275, Public Laws 1939, and to *Mitchell v. Melts*, 220 N. C., 793, 18 S. E. (2d), 406.

New trial.

M. L. PORTER v. VERNON D. NIVEN.

(Filed 29 April, 1942.)

Negligence § 4d—

Plaintiff was carrying two five-gallon cans of milk which he had sold defendant along a passageway in defendant's milk plant when one of the cans hit a churn, causing plaintiff to fall to his injury. Plaintiff's evidence was to the effect that the churn was about 2½ feet high and 2 feet in diameter, and that it was sitting about 14 inches in the passageway. Plaintiff testified there was plenty of light in the passageway. *Held:* Even conceding negligence, plaintiff's evidence discloses contributory negligence barring recovery as a matter of law.

APPEAL by plaintiff from *Pless, J.*, at March Term, 1942, of MECKLENBURG.

PORTER *v.* NIVEN.

Civil action to recover damages for personal injuries.

The plaintiff alleges that while delivering milk sold by him to the defendant, he was injured by reason of the negligence of defendant in not keeping the passageway of defendant's milk plant free of obstructions likely to injure plaintiff.

The plaintiff testified that he had been delivering milk to the defendant's milk plant for about 18 months. That the milk plant was housed in a building 20 by 30 feet, and that it had two entrances. That he used the front entrance, although he knew the rear entrance was the one where deliveries of milk were supposed to be made. That he had been told to deliver his milk at the back door but he had not done so more than a dozen times, because there was mud at the rear entrance and broken glass was allowed to lie around there. That the front passageway was about 6 feet wide and ran through the building a distance of 20 feet. That the passageway was not enclosed but certain machinery was located beside it. That there were two swinging screen doors at the entrance and the screen doors had slats across the bottom to a height of about 30 inches to protect the wire. That about 6:30 on the morning of the alleged injury, in March, 1940, the plaintiff went through the swinging doors, carrying a 5-gallon can of milk in each hand, each can with its contents weighing approximately 57 pounds. That he "bounced" the door open and stepped inside and as "I picked up speed and started to taking my regular stride, why, I fell to the pavement, to the cement. I went to the floor because the can hit the leg of the churn. . . . When the door was open, I'd say the churn was within a foot of the door. . . . The churn was on the right-hand side of the passageway as you go in, . . . the churn projected out into the passageway about a foot and a half. I'd say about that much in the passageway (indicating about 14 inches)." Plaintiff further testified that the room was painted white, the churn was painted white, and that light came in through the screen doors; that there were windows and doors through which the light came, and that "There was plenty of light in that room that morning. . . . When both those doors opened, they opened wide. When both those doors opened, I was looking in front of me. I did not see the churn."

At the close of plaintiff's evidence, the defendant moved to dismiss as of nonsuit. The motion was allowed and judgment so entered. Plaintiff appeals and assigns error.

Carswell & Ervin for plaintiff.
Robinson & Jones for defendant.

DENNY, J. We do not think the evidence, when considered in the light most favorable to plaintiff, is sufficient to justify the submission of the question of defendant's negligence to the jury. However, if the defend-

ant was negligent in the location of its churn, so as to cause it to occupy a portion of the passageway, the plaintiff offers no explanation for his not having seen the churn. His own evidence discloses that it was about 30 inches high and a foot and a half or two feet in diameter, and that he didn't dodge the churn because he didn't see it, and yet he testified "There was plenty of light for me to see."

In the case of *Hunt v. Meyers Co.*, 201 N. C., 636, 161 S. E., 74, cited by plaintiff, the evidence disclosed that the plaintiff went to the defendant's store to buy merchandise and was directed to the basement department, which was poorly lighted and dark, and that plaintiff caught her foot in and stumbled over a stool that had been left in the aisle.

The facts in the other cases relied on by plaintiff, *Monroe v. R. R.*, 151 N. C., 376, 66 S. E., 315; *Nicholson v. Express Co.*, 170 N. C., 68, 86 S. E., 786; and *Leavister v. Piano Co.*, 185 N. C., 152, 116 S. E., 405, are distinguishable.

In the instant case, apparently, the plaintiff pushed the screen door open with one of the milk cans which he was carrying, and simply took it for granted that there was no obstruction in the passageway, and failed to make any observation as to whether or not there was an obstruction in the passageway, when by his own testimony he could have seen the churn if he had looked.

It appears from the evidence offered by the plaintiff that he failed to take proper care and precaution for his own safety. *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598.

The judgment below is

Affirmed.

JOHN B. SPARROW, M. F. McKEEL, SR., M. F. McKEEL, JR., W. H. ELLSWORTH, B. B. ROSS, R. P. FOWLE, R. LEE STEWART, FLAVIUS ALLIGOOD, H. H. McLEAN, JOHN A. MAYO, S. R. FOWLE, SR., S. R. FOWLE, JR., A. T. JENNETTE, FRANK C. KUGLER, F. H. ROLLINS, HENRY JONES, B. G. MOSS, J. A. CRAWFORD, J. A. BOWEN, JAMES BOWEN, HENRY RUMLEY, HENRY HODGES, CARL SHELTON, COLON McLEAN, R. LEE STEWART, JR., JAMES M. WILLIAMS, TRUSTEES OF THE FIRST PRESBYTERIAN CHURCH OF WASHINGTON, NORTH CAROLINA, v. BEAUFORT COUNTY AND D. O. MOORE, R. O. TARKINGTON, T. H. WHITLEY, JR., W. R. ROBERSON AND L. D. MIDGETTE, AS THE BOARD OF COMMISSIONERS OF BEAUFORT COUNTY, NORTH CAROLINA.

(Filed 29 April, 1942.)

Taxation § 20—

Property owned by a church and rented by it for commercial purposes, and the rent used for religious purposes, is not exempt from taxation. Constitution of North Carolina, Art. V, sec. 5, ch. 310, Public Laws 1939.

SPARROW *v.* BEAUFORT COUNTY.

APPEAL by plaintiffs from *Williams, J.*, at February Term, 1942, of BEAUFORT. Affirmed.

This was a controversy without action, submitted on agreed statement of facts. The question at issue is the liability for *ad valorem* taxation of a store building owned by the Presbyterian Church of Washington, North Carolina. Plaintiffs, trustees of the church, contend that the property is exempted from taxation by ch. 310, Public Laws 1939, under authority of Art. V, sec. 5, of the Constitution.

From judgment that the property described was subject to taxation, plaintiffs appealed.

John A. Mayo for plaintiffs, appellants.
E. A. Daniel for defendants, appellees.

DEVIN, J. The parties to this controversy present the question of the liability of plaintiffs' property for taxation under an agreed statement of facts. From this statement it appears that the Presbyterian Church of Washington, North Carolina, acquired title to a certain lot of land under the will of Mary T. McCluer. The property was devised to the church for "the support of an Evangelist in this part of the State." Upon this lot has been erected a brick building, described as "located on Main Street, in Washington, North Carolina, and occupied as a department store by Whites Company, adjoining S. M. Mallison and others, which said store is used for commercial purposes." The property is rented for $250.00 per month. For the purpose of erecting the building plaintiffs, who are the trustees of the church, secured a loan of $15,000, and are repaying the loan in monthly installments of $200.00. After payment of fire insurance premiums the remainder of the rent is used for the support of an evangelist in this part of the State. As soon as the loan is retired the plaintiffs intend to maintain and support an evangelist for the full time to further the interest of the church. The defendant Board of County Commissioners has caused this property to be listed for taxation at the tax value of $16,500.

The ruling of the court below, holding that the property described is subject to *ad valorem* taxation, must be upheld under authority of *Odd Fellows v. Swain,* 217 N. C., 632, 9 S. E. (2d), 365; *Hospital v. Guilford County,* 218 N. C., 673, 12 S. E. (2d), 265; *Rockingham County v. Elon College,* 219 N. C., 342, 13 S. E. (2d), 618. The only constitutional basis for the exemption of real property from taxation is contained in Art. V, sec. 5, of the Constitution: "Property belonging to the State or to municipal corporations shall be exempt from taxation. The General Assembly may exempt cemeteries and property held for educational, scientific, literary, charitable or religious purposes." The second clause

of this section has been construed by this Court to mean that the permissive exemption from taxation is not perforce applicable to all property owned by educational, charitable or religious organizations, but only to property held for educational, charitable or religious purposes. The distinction is pointed out in *Harrison v. Guilford County,* 218 N. C., 718, 12 S. E. (2d), 269. The rationale of this construction of the language of the Constitution is succinctly expressed in *Odd Fellows v. Swain,* 217 N. C., 632, 9 S. E. (2d), 365, where it was said: "The power to grant exemption under authority of the second sentence of Art. V, sec. 5, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes there described. Property held for any of these purposes is supposed to be withdrawn from the competitive field of commercial activity, and hence it was not thought violative of the rule of equality or uniformity to permit its exemption for taxation while occupying this favored position. But when it is thrust into the business life of the community it loses its sheltered place, regardless of the character of its owner, for it is held for profit or gain. . . . It is not the character of the corporation or association owning the property which determines its status as respects the privilege of exemption, but the purpose for which it is held."

The judgment of the Superior Court is

Affirmed.

CHOZEN CONFECTIONS, INC., v. W. H. JOHNSON ET AL.

(Filed 29 April, 1942.)

1. Principal and Surety § 13—

The consignment agreement in suit provided that upon termination of the agreement, the consignee was to turn over to the consignor all goods and moneys then in his hands belonging to the consignor. Bond was executed to save the consignor harmless on the agreement. *Held:* Upon termination of the agreement, the liability of the sureties in regard to the turning over of the goods then in the hands of the consignee to the consignor cannot be made to depend upon whether such goods were in marketable condition.

2. Brokers and Factors § 4—

Upon consignment, the title to the goods remains in the consignor, and, upon the termination of the consignment agreement, whether the goods remaining in the hands of the consignee are merchantable or not does not affect title.

3. Same—

A provision in a consignment agreement that upon termination of the agreement the consignee was to turn over and deliver to the consignor all

goods and moneys belonging to the consignor then in the hands of the consignee, does not bind the consignee, upon termination of the agreement, to return or reship the goods, or pay for them, or be liable for their value if not surrendered in salable condition, but obligates the consignee to surrender possession of the goods and moneys then in his hands to the consignor.

4. Same—

A provision in a consignment agreement that the consignee, during the life of the agreement, might return goods within a specified time and receive credit therefor if the goods were in salable condition, does not affect or apply to a subsequent provision that upon termination of the agreement the consignee was to turn over and deliver to consignor all goods and moneys then in his hands belonging to the consignor.

5. Indemnity § 4—

The sureties have a right to stand on the terms of their contract, and are not bound by a statement signed by the principal admitting his liability.

APPEAL by defendants, W. H. Johnson and Lynn McIver, from *Hamilton, Special Judge,* at April Special Term, 1941, of MECKLENBURG.

Civil action to recover for merchandise shipped to defendant, W. H. Johnson, under consignment agreement and to hold the other defendants as sureties on indemnity bond.

The contract and indemnity bond bear date 11 August, 1938. The latter provides that W. H. Johnson, as principal, and Lynn McIver and others, as sureties, "agree to indemnify and save harmless Chozen Confections, Inc., . . . from any loss whatosever for goods and merchandise placed with and accepted by the principal, and all moneys coming into his hands by virtue of sale of said goods and merchandise." The contract provided that the bond should be given "for the faithful accounting of all moneys, goods, wares, or merchandise that may come into his (Johnson's) hands hereunder."

The plaintiff contends that the balance due for goods shipped and for which the bondsmen are liable is $367.83. Written notice of cancellation of the contract was given by plaintiff to defendant Johnson on 26 June, 1939.

It is in evidence that the defendant Johnson had on hand at the time of the cancellation some of plaintiff's goods. He says that he offered to return them. This is denied by the plaintiff. The jury was instructed that the defendants would be liable for the goods then on hand unless "Johnson offered to turn back to the plaintiff merchantable goods." Exception.

From verdict and judgment for the full amount claimed, the defendants, W. H. Johnson and his surety, Lynn McIver, appeal, assigning errors.

Frank H. Kennedy and Nathaniel G. Sims for plaintiff, appellee.
K. R. Hoyle for defendants, appellants.

STACY, C. J. This is the same case that has twice been before us on procedural questions, reported in 218 N. C., 500, 11 S. E. (2d), 472, and again in 220 N. C., 432, where some additional facts are set out, to which reference may be had to avoid repetition.

The consignment agreement provides that upon its termination (by written notice) "the party of the second part (Johnson) agrees to turn over and deliver to the party of the first part (Chozen Confections, Inc.) all goods, wares and merchandise, together with all moneys belonging to the party of the first part, then remaining in his hands under the terms of this agreement."

It is in evidence that the president of the plaintiff company went to see the defendant Johnson in Sanford a few days after the cancellation of the contract. The right to turn over the goods then on hand, and receive credit therefor, was made to depend on whether Johnson offered to "turn back to the plaintiff merchantable goods." As title to the goods was in the plaintiff and the contract at an end, it would seem the plaintiff might well have demanded of the defendant that he "turn over and deliver" to the plaintiff "all goods, wares and merchandise . . . then remaining in his hands," in accordance with the terms of the contract. At least the rights of the sureties ought not to depend on whether the defendant offered to turn back merchantable goods. They are not so circumscribed by the agreement. There was no hesitancy in demanding that Johnson turn over all moneys belonging to the plaintiff, including the sale price of the goods then on hand and unsold, which latter item was in excess of the provisions of the contract.

The defendant did not refuse to turn over, yield up, or surrender, the goods then remaining in his hands. His failure to turn back merchantable goods would not affect the title to the goods. They still belonged to the plaintiff. The agreement was to "turn over and deliver" the goods then on hand to the party of the first part, not to "return" them, or to "reship" them, nor yet to pay for them, or to be liable for their value, if not returned in salable condition. It appears from Johnson's testimony: "Part of the candy I tendered back is down there in an old building yet. . . . I did not use or sell any of the candy after that date." This provision is not to be confused with another clause in the agreement providing for the "return" of merchandise "in salable condition" to the plaintiff in Charlotte, on certain conditions, during the life of the agreement. The sureties have a right to stand on the terms of their contract. *Edgerton v. Taylor*, 184 N. C., 571, 115 S. E., 156; *Lumber Co. v. Lawson*, 195 N. C., 840, 143 S. E., 847.

It is true, the defendant Johnson signed a statement admitting his liability. This seems to have been done at the instance of the plaintiff and without a full knowledge of his rights. *Hotel Corp. v. Dixon,* 196 N. C., 265, 145 S. E., 244. It would not be binding on the sureties. *Ins. Co. v. Bonding Co.,* 162 N. C., 385, 78 S. E., 430; *Eason v. Sutton,* 20 N. C., 622.

There are other items in the account which the sureties are apparently entitled to question.

Another trial seems to be necessary. It is so ordered.

New trial.

MRS. LOUISE NORRELL MALLARD v. F. M. BOHANNON, INC., EMPLOYER, AND MARYLAND CASUALTY COMPANY, CARRIER.

(Filed 29 April, 1942.)

Master and Servant § 39c—

When the contract of employment is for services to be rendered exclusively outside this State and such services in fact are performed in their entirety outside its borders, our Workmen's Compensation Act has no application. Ch. 120, Public Laws 1929, as amended.

ON REHEARING.

Chas. J. Bloch and Roy L. Deal for plaintiff, appellee.

Hutchins & Parker, W. C. Ginter, and L. B. Carpenter for defendants, appellants.

BARNHILL, J. The merits of the controversy involved on this appeal were fully debated on the original hearing. See *Mallard v. Bohannon,* 220 N. C., 536, and dissenting opinion at p. 545. A majority of the Court are now of the opinion that the rationale of the dissenting opinion should prevail.

When the contract of employment is for services to be rendered exclusively outside the State of North Carolina and such services in fact are performed in their entirety elsewhere than in this State our Workmen's Compensation Act. ch. 120, Public Laws 1929, as amended, has no application.

Petition allowed.

LANCE WILLIAMS v. H. S. McLEAN AND LESLIE BULLARD.

(Filed 29 April, 1942.)

1. Appeal and Error § 43—

Petition to rehear is allowed in part in this case in order that the judgment as of nonsuit in respect to plaintiff's claim to the personal property involved may be set aside, it appearing that in the former decision of the Supreme Court which sustained the judgment as of nonsuit, only the question of the sufficiency of the evidence to support recovery of the real property was considered.

2. Evidence § 39—Parol agreement for purchase of personalty held not merged in written option which referred to realty alone.

Plaintiff contended that defendants entered into a parol agreement to purchase a certain 158-acre farm and to later convey the farm and certain farm machinery thereon to plaintiff for a stipulated price. It appeared that defendants thereafter gave plaintiff an option to purchase the farm less 13 acres, which option contained no reference to the personalty, and that plaintiff exercised the option with full knowledge of the facts. *Held:* While prior negotiations in regard to the realty were merged in the written option, the parol agreement for the purchase of the personalty was not, and plaintiff's evidence tending to show his purchase of the personalty, considered in the light most favorable to him, was sufficient to overrule defendants' motion to nonsuit on this aspect of the case.

BARNHILL, J., concurring.

STACY, C. J., dissenting.

WINBORNE and DENNY, JJ., concur in dissent.

PETITION to rehear case reported in 220 N. C., 504.

McKinnon & Seawell for petitioner.

F. D. Hackett, Jr., and McLean & Stacy for respondents.

DEVIN, J. Rehearing was allowed in order that the question of plaintiff's claim to certain personal property might be considered. The action was instituted primarily to establish a constructive trust in favor of plaintiff as to 13 acres of land, title to which had been conveyed to one of the defendants. Judgment of nonsuit was entered in the court below and affirmed in this Court (220 N. C., 504), on the ground that plaintiff's evidence failed to establish his cause of action. The debate here was confined to that question. In affirming the judgment of nonsuit the fact that plaintiff had also alleged and offered some evidence tending to show that he had purchased the personal property described, and that defendants had wrongfully removed the same, was not considered.

Upon consideration of the petition to rehear we adhere to our former decision that plaintiff's cause of action to establish a trust was not made

out, and that nonsuit on that phase of the case was properly entered. However, we think he was entitled to proceed on his allegations with reference to the personal property. While the amount involved is comparatively small, there is some evidence, taken in the light most favorable to him, tending to support his claim to this property. For the purpose of determining the question of plaintiff's right to recover the personal property described in his complaint, the judgment of nonsuit, in so far as it affects this phase of the case, only, is stricken out, and the case remanded to the Superior Court of Robeson County for further proceeding in accord with this opinion.

Petition allowed in part.

BARNHILL, J., concurring: It is true that when a contract is reduced to writing in its entirety it is binding upon the parties thereto and it cannot be enlarged, changed, modified, varied or contradicted by parol evidence. It is equally true that a contract not required to be in writing may be partly in parol and partly in writing. In which category does plaintiff's case fall? This is the real question presented by the petition to rehear. In my opinion it fits squarely within the second.

It clearly appears that plaintiff contracted to buy the land known as the Green Valley Dairy Farm and the personal property in the nature of the farm implements and equipment located thereon. Defendants suggested the scheme followed by them under which they purchased and took title to the farm. They then executed and delivered to plaintiff an option to buy the land less 13 acres which was omitted from the map they furnished. When plaintiff exercised the option, paid the consideration and took deed for the farm, less the 13 acres, with knowledge of the facts, he estopped himself from thereafter asserting a contrary agreement as to the land. But that relates to the real property only.

When plaintiff's agent paid the option money he inquired about the personal property and defendant McLean replied, "I don't know, we will go around to Les' (defendant Bullard) if he moved any of them, he has got them, we will be glad to take them back, they were in the trade. . . . I know the cooling system is there and the other ought to be and we will go down and see what Les has done with it." Plaintiff's agent, accompanied by McLean, then saw the defendant Bullard, who, speaking of the personal property, said, "I moved a piece or two of the personal property, and if it is all right with Mr. Williams I will be glad to take it back." Bullard then took him and showed him where he had moved plows, a tractor and other farming implements. There is other evidence to like effect.

At the time the option was exercised defendants were not present but were represented by counsel. At that time no reference was made to the

personal property. However, plaintiff shortly thereafter again made inquiry as to the personal effects and the defendants again acknowledged that some of the farming implements and equipment had been removed for safekeeping and promised to return same.

This and like evidence, in my opinion, negatives any contention that the parties intended that the option agreement should express the entire contract or that it should represent the sole memorial or integration thereof. All the evidence is *contra* such an intent. Hence, parol evidence to establish that part of the agreement which was not reduced to writing and which in law may rest in parol is permissible.

While defendants' evidence may paint quite a different picture the record before us requires a modification of the original opinion. The plaintiff is entitled to go to the jury on his claim to the personal property he alleges he purchased.

STACY, C. J., dissenting: The record supports no recovery.

The plaintiff alleges a contract to buy a farm consisting of 158 acres and certain personal property used in connection therewith. There is no allegation of any separate agreement in respect of the personal property. But one contract is alleged.

The entire understanding was reduced to writing on 18 May, 1940. It is in the form of an option executed by Leslie Bullard and wife to Lance Williams. The property described therein is "that certain tract of land containing 145 acres, more or less, in Lumberton Township, Robeson County, known as Green Valley Dairy Farm, as shown by attached map." There is no mention of any personal property in the option, and no allegation that it was omitted by fraud, imposture, mutual mistake or accident.

It is well-nigh axiomatic that no verbal agreement between the parties to a written contract made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. *Ins. Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606. The rule is, that "parol evidence will not be heard to contradict, add too, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound." *Ray v. Blackwell,* 94 N. C., 10.

Applying this principle to the facts in hand, it was said on the original hearing, "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. 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." There was, then, upon the execution of the option, no contract in respect of the personal property except that attached to the freehold. If the option excluded the difference between 145 and 158 acres, and we have held that it did, it likewise excluded the personal property not affixed to the soil. The written option is at variance with the idea of a trust. Optionor-optionee relationship differs from that of trustor-trustee, both in law and in fact. Hence, the rule which prohibits the introduction of parol testimony to vary, modify, or contradict the terms of a written instrument, would exclude the evidence now being considered by the Court. A single contract is alleged and the evidence shows but one. The case stands on a different footing so far as concerns the competency of evidence with the allegation of trustor-trustee relationship eliminated.

Plaintiff testifies: "I accepted the deed that was made in accordance with the option and paid the balance of the purchase price. . . . I had full knowledge of all the facts with reference to what that deed conveyed."

Nothing was said about any personal property at the time the option was exercised and the deed taken. The conversation centered around the alleged shortage of 13 acres of land.

The question then arises whether an optionee who exercises a written option and gets all that the option calls for, can later add to the terms of the writing by parol, and recover according to the alleged parol modification. We answered in the negative on the original hearing, and this is reaffirmed and stands in respect of the real estate. There is no plea of the statute of frauds. But the majority now answers in the affirmative so far as it affects the personal property. Thus, the holding is that the written word abides in so far as it refers to land, but may be added to in respect of personal property. This distinction has not heretofore been made in any case, and it is at variance with all the decisions on the subject. As early as *Etheridge v. Palin,* 72 N. C., 213, it was said: "Parol testimony is not admissible to add to a written contract." The Court was there speaking of a contract to sell both real estate and personal property, and the addition sought to be made was in respect of the personal property.

Moreover, there is no consideration for any additional recovery. The plaintiff has received all that the option called for at the price agreed upon. All that the parties agreed to was merged in the option, and this was exercised with full knowledge of the facts. To hold otherwise is to bulge the record in favor of the plaintiff.

Nor is this all. Since writing the above in answer to the theory advanced by the majority, a concurring opinion has been filed herein.

The same procedure was followed in the case of *Evans v. Rockingham Homes, Inc.*, 220 N. C., 253. Here, as there, the concurrence gives added significance to the dissent. If the plaintiff be estopped in respect of the land, why not also in respect of the personal property? As between the parties, there was but one transaction, one contract, one consideration, one price, one purchase, one sale. The statute of frauds is not involved. The estoppel is against the plaintiff. The character of the property has no bearing on the matter.

And now to reach for a harder blow, it appears that both deliverances of the majority proceed on premises alien to the record. There is neither allegation nor competent evidence to show that plaintiff "purchased the personal property described" from the defendants. The allegation is that the defendants purchased the property, both real and personal, *in solido*, and took title thereto in trust for the plaintiff, as witness the following from the complaint: "21. That defendants purchased the Green Valley Farm . . . for the use and benefit of the plaintiff and purchased the personal property located thereon for the same purposes, and defendants . . . now hold such title . . . as they hold to such property as trustee for the plaintiff." Evidence was offered to show the purchase of the farm, but the defendants came forward with a written agreement which contradicted the allegation and evidence of trusteeship. The plaintiff admitted the writing. Upon this showing, the case was nonsuited. We affirmed. The rehearing is limited to the personal property.

The initial difficulty with the position of the majority is, that it lacks allegation to support it. We have said as recently as *Whichard v. Lipe, ante*, 53, "The plaintiff must make out her case *secundum allegata* and the court cannot take notice of any proof unless there be a corresponding allegation." The rule is, *secundum allegata et probata, i.e.*, according to what is alleged and proved. "Recovery is to be had, if allowed at all, on the theory of the complaint, and not otherwise." *Balentine v. Gill*, 218 N. C., 496, 11 S. E. (2d), 456. Such was the law up to the present rehearing.

Secondly, it was originally said herein "the parties integrated their negotiations and agreements into the written memorial." This is now the law of the case. It is *res judicata*. It is in direct conflict with the suggestion in the concurrence that the agreement may be partly in parol. It likewise conflicts with the allegations of the complaint. So, notwithstanding the previous interpretation of the writing, which is reaffirmed as to the land, the present holding is, that the plaintiff may go to the jury on something pertaining to the personal property which is not alleged and is not competent to be shown. Again, we have some new law. *O'Briant v. Lee*, 214 N. C., 723, 200 S. E., 865. It is quite unusual for the Court to take contradictory positions in the same case.

Thirdly, there is no allegation that the plaintiff purchased any property of any kind, at any time, from the defendants. The action is to establish a parol trust as set out in the complaint. In this connection, it is worthy of note the plaintiff offered K. M. Biggs, president of Mansfield Mills, Inc., who testified that in the sale of the farm to Leslie Bullard the personal property was not included. "That did not include the personal property in connection with it, as I remember." The resolution of the corporation, which appears in the plaintiff's evidence, was to accept the offer of Leslie Bullard to purchase "the real estate belonging to the corporation known as the Dairy Farm, containing approximately 158 acres, with buildings situate thereon according to plat." Hence, taking either horn of the dilemma, the case fails.

Finally, if the agreement was to pay $14,000.00 for "that certain tract of land containing 145 acres . . . known as Green Valley Dairy Farm," and we have so interpreted the writing, what was to be paid for the personal property? The complaint is silent on the subject. It is difficult to perceive upon what theory the case is to be submitted to the jury. If it is to be submitted upon the allegation of a trust, as set out in the complaint, the plaintiff's own evidence shows that Bullard did not buy the personal property at all.

After all, the case is a simple one. The complaint alleges, and the plaintiff sought to establish, a parol trust. The evidence offered cuts the ground from under the plaintiff's alleged cause of action. The correct result was reached on the original hearing.

My vote is to dismiss the petition.

WINBORNE and DENNY, JJ., concur in dissent.

H. J. LEE v. F. T. HOFF AND MRS. F. T. HOFF.

(Filed 29 April, 1942.)

1. Process § 3—

An officer does not have the right to amend his return to a summons after the return is filed, but the court, under its discretionary power, in meritorious cases, may grant him leave to do so.

2. Same—Court has discretionary power to allow amendment of summons and return to correct error in middle initial of defendants.

This action was instituted against husband and wife on a note signed by them as makers. The names of defendants in the summons and return were correct except for the middle initial. *Held:* Upon the hearing of defendants' motion to dismiss for want of jurisdiction, the court had discretionary power to permit the officer to testify that in fact the summons

was served on defendants, and to permit plaintiff's motion to amend the summons and to correct the officer's return to show the correct names of defendants. C. S., 547.

3. Same: Limitation of Actions § 11c—When amendment of process does not substantially change nature of action and does not affect rights of third persons, the amendment relates back to commencement of action.

In an action against husband and wife on a note signed by them as makers, the court, in its discretion, permitted an amendment of the summons and return to correct the middle initial in the name of defendants. *Held:* Since the amendment did not change the nature of the action, and the rights of third parties are not involved, the amendment relates back to the commencement of the action, and the court correctly ruled that the original summons was sufficient to bring defendants into court and that no new sumomns was necessary.

APPEAL by defendants from *Carr, J.*, at February Term, 1942, of WAKE.

This is a civil action and the summons was issued on 20 December, 1941, and the defendants designated therein as "F. L. Hoff and Mrs. F. L. Hoff." At the time the summons was issued, the plaintiff made application for an extension of time to file complaint and stated in said application the nature and purpose of the action, to wit: "To collect a note due by defendants for $400.00 and interest from Dec. 21, 1931, given Commercial National Bank of Raleigh and now owned by plaintiff."

The additional facts pertinent to this appeal are set out in the judgment entered by the court below, as follows:

"This cause coming on to be heard before the undersigned Judge at the February Civil Term of the Wake County Superior Court upon the defendants' motion to dismiss which was made in a Special Appearance as appears in the record, the plaintiff having waived his rights to object to the hearing of the motion because of insufficient notice of the hearing and having asked permission of the Court to resist the motion and offer evidence in support of his contention the Court heard the motion and the plaintiff's evidence.

"The Deputy Sheriff, R. M. Saunders, who served the summons in this action, was sworn at the hearing as a witness and testified that he was the officer who served said summons; that the summons, entitled 'H. J. Lee *v.* F. L. Hoff and Mrs. F. L. Hoff,' which appears in the record was actually served on the defendants, F. T. Hoff and wife, Mrs. F. T. Hoff; that he made the return on the summons indicating that the same was served on F. L. Hoff and wife, Mrs. F. L. Hoff; that his return was incorrect and that in fact he did serve the summons on F. T. Hoff and wife, Mrs. F. T. Hoff. There was no evidence to the contrary.

"The Court, therefore, finds as a fact that the summons set out in the record was, on December 22, 1941, duly served by R. M. Saunders, a Deputy Sheriff of Wake County, on the defendants, F. T. Hoff and wife, Mrs. F. T. Hoff, by delivering a copy of said summons, a copy of the application of extension of time to file a complaint and a copy of the order extending the time for filing the complaint which appear in the record, to each of said defendants. The Court further finds as a fact that within the time allowed by the order extending time to file the complaint and on the 8th day of January, 1942, the plaintiff filed his complaint in this action in which the defendants were designated as Mrs. F. T. Hoff, F. T. Hoff.

"At the hearing the plaintiff moved that he be permitted, within the discretion of the Court, to amend the summons to conform with the complaint so as to show that the names of the defendants who were actually served with summons were F. T. Hoff and Mrs. F. T. Hoff, and further moved that the Court, within its discretion, permit him to amend the return of the Sheriff on said summons so as to show that the said summons was served on F. T. Hoff and Mrs. F. T. Hoff.

"The Court holds that the amendments requested by the plaintiff do not substantially change the nature of the cause of action, and that the plaintiff is entitled to have said amendments made and the Court, in its discretion, allows said amendments, and the Court denies the motion of the defendants, F. T. Hoff and Mrs. F. T. Hoff, to dismiss the action upon the grounds stated in their motion, and holds that said defendants are required to file answer to the complaint which was filed in connection with the summons that was served on the 22nd day of December, 1941, and that no new summons is necessary in this action to bring the defendants into Court. The defendants are allowed 30 days from the date of this judgment to file answer to the plaintiff's complaint.

"This February 12, 1942.

LEO CARR, Judge Presiding."

From the foregoing judgment the defendants appeal to the Supreme Court and assign error.

J. M. Templeton for plaintiff.
J. J. Fyne and Douglass & Douglass for defendants.

DENNY, J. The defendants were properly served but in the wrong name; and through counsel, they entered a special appearance and moved to dismiss the action for want of jurisdiction.

The first and second exceptions are to the action of the court in permitting, in its discretion, the deputy sheriff to testify on whom he

actually served the summons and to granting of the motion of the plaintiff to amend the summons to conform to the complaint so as to show that the names of the defendants who were actually served with summons were F. T. Hoff and Mrs. F. T. Hoff; and, to permit the return of the sheriff on said summons to be amended accordingly.

An officer does not have the right to amend his return to a summons after the return is filed, but the court, under its discretionary power, in meritorious cases may grant him leave to do so. *Luttrell v. Martin,* 112 N. C., 593, 17 S. E., 573; *Campbell v. Smith,* 115 N. C., 498, 20 S. E., 723; *Swain v. Burden,* 124 N. C., 16, 32 S. E., 319.

In the case of *Luttrell v. Martin, supra,* the Court said: "It is admitted that the summons had been served on the agent of the defendant corporation February 23, 1892, but the return of the Sheriff was unsigned, though indorsed in proper form on the summons. The Judge did not exceed his powers, but exercised them properly in permitting the Sheriff to sign the return *nunc pro tunc. Clark v. Hellen,* 23 N. C., 421; *Henderson v. Graham,* 84 N. C., 496; *Walters v. Moore,* 90 N. C., 41; *Williams v. Weaver,* 101 N. C., 1."

The decisions of our Court are in harmony with the general rule in this respect as set forth in 21 R. C. L., 1329, Process, sec. 77: "As the return of an officer is merely his answer touching what he is commanded to do by the writ, and as this answer is evidence, and generally the only admissible evidence, of the officer's proceedings, unless it is directly impeached, it ought to be true as well as certain, and if not true, the officer ought to be permitted on proper application to make it conform to the facts. Hence, it is laid down that the return may, in general, be amended so far as necessary to make the record properly exhibit the facts. As long as the return continues within the officer's control, he has full power to amend it as he thinks proper, if there are no intervening rights which will be affected; but after the return is filed it cannot be amended without leave of court, and, according to some decisions, notice to the adverse party. . . . Amendments of this description are not granted as a matter of right. The Court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment as may best tend to the furtherance of justice."

These exceptions cannot be sustained.

The other exceptions are to the conclusions of law that the original summons was sufficient to bring the defendants into court, and to the entering of the judgment as appears of record. These exceptions are likewise untenable.

The discretionary powers exercised by his Honor, in allowing the amendments and entering the judgment to which defendants except, were in accordance with the authority contained in C. S., sec. 547, and the decisions of this Court. *Lane v. R. R.,* 50 N. C., 25; *Henderson v.*

Graham, supra; Jackson v. McLean, 90 N. C., 64; *Bray v. Creekmore,* 109 N. C., 49, 13 S. E., 723; *Rosenbacher v. Martin,* 170 N. C., 236, 86 S. E., 785; *Fountain v. Pitt County,* 171 N. C., 113, 87 S. E., 990; *Gordon v. Pintsch Gas Co.,* 178 N. C., 435, 100 S. E., 878; *Clevenger v. Grover,* 212 N. C., 13, 193 S. E., 12.

Unquestionably the crux of this case is the answer as to when the amended summons became effective. Was it from the date of amendment or did it relate back to the commencement of the action? The authorities sustain the position that the amended summons relates back to the commencement of the action unless the amendment changes the cause of action or brings in new parties, in which event the amendment is effective only from the date it was granted.

In 21 R. C. L., 1331, Process, sec. 80, the effect of amendment is given as follows: "The amendment, even when made at a subsequent term, relates back to the original return and dates from it. As a general rule such an amendment will not be permitted to affect injuriously the rights of third persons which have attached in the meantime, and which were acquired on the faith of the verity of the original return. In case it will have this effect it will either be disallowed altogether, or it will be allowed an effect, as to them, only from the time it is made."

In the instant case, the rights of third parties are not involved.

37 Corpus Juris, p. 1063, Limitation of Acts, sec. 496: "Where an action is brought against a party in the wrong name or capacity, an amendment correcting such mistake does not introduce a new cause of action, and the statute of limitations runs only to the commencement of the suit, and not to the allowance of the amendment," citing *Fountain v. Pitt County, supra,* and further it is there said in sec. 506: "Where the substitution of parties defendant by amendment does not change the cause of action, the statute of limitations stops running as to the substituted defendant at the commencement of the action. If a new cause of action is set up by the amendment, the running of the statute is not suspended until the amendment."

50 Corpus Juris, p. 606, Process, sec. 359: "An amendment of process will ordinarily be deemed to relate back to the time of the commencement of the suit, validating all acts done under the process, although in some jurisdictions, a reservice of the process is required," citing *Calmes v. Lambert,* 153 N. C., 248, 69 S. E., 138, which opinion holds: "A summons issued to another county, but not attested by the seal of the Court of the county issuing it, as provided by Revisal, sec. 431, may have the defect removed by amendment on application to the proper tribunal, both as to original and final process, and the amendment, when made, will validate all acts done under the process, in so far as it affects the original parties to the suit or record," and further it is there said, in sec. 365, Amendable Defects: ". . . Defects not affecting the jurisdiction may be

amended, as, for example, by adding or correcting the signature of the officer, or by showing that he served process as a private individual, by alleging that other acts required by the statute were done in making service, by adding further specifications as to the copy delivered, by correcting the name of defendant, or including the names of defendants actually served," citing *Grady v. R. R.*, 116 N. C., 952, 21 S. E., 304.

In *Lane v. R. R., supra,* summons was issued against The Portsmouth and Roanoke Railroad Co., and served on a director of the Seaboard and Roanoke Railroad Co. Motion was to amend by striking out "The Portsmouth and Roanoke Railroad Co.," and substituting therefor "the Seaboard and Roanoke Railroad Co." The Court said: "In the present case, a summons was served upon the corporation in a wrong name, by service on one of the directors of the corporation. We cannot distinguish it in principle from process served on any other defendant in a wrong name. If the Court have power to amend in the latter case, as it undoubtedly has, we are unable to comprehend the force of the argument which would deprive it of power in the latter. When created, corporations become persons—bodies politic it is true—but still persons, and when the power of suing and the liability to be conferred and imposed under the same rules, regulations and restrictions which apply to natural persons, with such modifications only, as their peculiar nature makes necessary."

In the above case the court allowed the substitution of the correct name for the wrong name, and there was no defendant to give the court jurisdiction except the defendant corporation which had been served in the wrong name.

In *Jackson v. McLean, supra,* there was a special appearance and motion to dismiss on the ground that there was no return date fixed in the summons. The Court, in discussing the statute permitting amendments to pleadings, process or proceeding, said: "In regard to the amendment of process, that any defect or omission of a formal character, which would be waived or remedied by a general appearance or answer upon the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no protection withdrawn from the officer."

In the case of *Chancey v. R. R.*, 171 N. C., 756, 88 S. E., 346, there was a motion to dismiss for want of service. The court permitted an amendment to the original summons by striking out the word *railroad* and substituting *railway,* and made an order that an *alias* summons be issued and served upon the Norfolk and Western Railway. The Court said: "Allowing the amendment to the summons was a matter within the sound discretion of the judge. The summons had been served on the agent of the Norfolk and Western Railway. The original summons was directed to the Norfolk and Western Railroad. His Honor very properly allowed the amendment. As the Court ordered an *alias* summons,

no question of jurisdiction or venue arises now." In ordering an *alias*, the Court recognized the validity of the original process.

In the case of *Fountain v. Pitt County, supra,* the plaintiff brought his action on 18 April, 1912, against the board of commissioners of the county of Pitt. The defendant demurred on the ground that the statute provided that a county must "sue and be sued in the name of the County." Demurrer was overruled and the court directed Pitt County be made a party. Summons was issued for the county 18 May, 1914. On plaintiff's appeal the Court said: "Our statute in regard to amendments is very broad. 'The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleadings, process, or proceeding by adding or striking out the name of any party, *or by correcting a mistake in the name of a party, or a mistake in any other respect,* or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved.' The object of our present system of procedure is to try cases upon their merits, regardless of those technicalities which do not promote but defeat justice, at the same time preserving the substantial rights of parties. . . . But we put our decision on the broad ground that this was in effect, and from the beginning, an action against the county, and the misnaming of the defendant could not have misled the defendant as to the nature of the action or as to the party who was sued. Judge Daniels took the right view of the matter when he allowed the amendment. We do not think, though, that fresh process against the county was necessary to carry out that view. The original process had already been properly served and was sufficient to bring the county into court, and the amendment, as to the name, if necessary at all, was only so for the sake of conformity in process and pleadings."

The judgment below is

Affirmed.

JOHNNIE HENDERSON, BY HIS NEXT FRIEND, H. H. UTLEY (No. 457),
and
ANNIE GLENN RATTLEY, ADMINISTRATRIX OF SYLVESTER RATTLEY, DECEASED (No. 459), v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, AND T. LACY WILLIAMS, ADMINISTRATOR OF JOHN VAUGHAN, DECEASED.

(Filed 29 April, 1942.)

1. Negligence § 7—

The fact that the injury would not have occurred except for the negligent act of a responsible third party does not in itself exculpate defendant

from liability, but it is necessary that there be a total want of causal connection between defendant's negligence and the injury, or that the intervening negligence of the third party and the resultant injury could not have been reasonably anticipated by defendant.

2. Railroads § 9—

The driver of a car approaching a railroad grade crossing owes the duty to the passengers in his car to exercise due care under the circumstances, and the railroad company is under like duty, and the duty of each is reciprocal, interrelated, and immediate.

3. Same—In regard to liability to passengers in car, negligence of railroad company held not insulated by negligence of driver.

Two passengers in an automobile were injured in a crossing accident, one of them fatally. The surviving passenger and the administratrix of the deceased passenger instituted these actions against the railroad company. There was evidence tending to show negligence on the part of the driver of the car in failing to use due care in approaching the crossing, and negligence on the part of the railroad company in operating its train at an unlawful speed without signals or warning of its approach, over the crossing which was located in a populous town and which did not have automatic signals and at which no watchman was stationed at night. The accident occurred at night. *Held:* The railroad company's motion to nonsuit on the ground that the negligence of the driver of the car was intervening negligence insulating its negligence because the accident would not have occurred except for the negligence of the driver of the car, was properly overruled, since the negligence of the driver of the car could have been reasonably anticipated, and the negligence of the railroad company was active and continued up to the moment of impact.

4. Same: Automobiles § 20a—

Evidence in this case *held* not to disclose contributory negligence as a matter of law on part of passengers in a car in permitting the driver to approach and traverse a grade crossing in a negligent manner with the windows of the car up so as to interfere with hearing the approaching train, and in failing to see the train and advise the driver of its approach.

APPEALS by plaintiffs, respectively, from *Thompson, J.*, at November Term, 1941, of FRANKLIN. On both appeals, reversed.

The plaintiffs brought separate actions to recover damages for injuries sustained in a crossing collision through the alleged negligence of the defendants. They were, at the time, riding in an automobile owned and driven by George McCrimmon as his guests. For convenience, the cases were consolidated and tried together in the court below, and were argued together in this Court.

Pertinent evidence in behalf of the plaintiff is substantially as follows:

George McCrimmon testified that on the night of 26 December, 1939, he approached the Mason Street crossing of the Seaboard Air Line Railway in Franklinton, intending to use the same, driving his own automobile, and carrying Johnnie Henderson, one of the plaintiffs, and Sylvester Rattley, intestate of the plaintiff administratrix, who were

seated in the rear of the car. The street runs east and west, and the railroad north and south. McCrimmon approached from the west. There are four tracks here, including a sidetrack. There was a two-story building to the right, which obscured the view to the south, so that one could not see "around or over it" if within two or three feet from the sidetrack. Witness stopped his car, looked and listened and heard nothing, but saw a train standing still at the left, with headlights shining down the track to the right. He saw nothing to the south. He then started across, and when about as far as the first or second track he saw the headlights of the train coming from the south, tried his best to get away, but was struck before he could do so.

Witness looked both ways to see if any train was coming, and listened, and waited to see if the track was clear, but did not hear any whistle, bell or signal. Mason Street is a much used public street, running from the stop light down by the tracks across to the hotel. On this night there were no signals, gongs, bells or automatic device to give warning of an approaching train, and there was no watchman at the crossing. The railroad maintains a watchman at the crossing in the daytime but not at night.

Sylvester Rattley was instantly killed, and witness and the other occupant of the car were injured.

The train which struck the automobile was a passenger train, known as the Silver Meteor, a streamlined train pulled by a Diesel engine. Witness estimated its speed as sixty miles per hour.

H. F. Fuller corroborated McCrimmon as to the obstruction of view caused by buildings close to the track. One could see twenty-five or thirty yards to the south when within two or three feet of the track.

H. H. Utley testified that there were no gongs, bells or lights to warn of the approach of trains. A man would just have to rely on his view of approaching trains.

Nathan J. Winn testified that when one was within three or four feet of the track he might see down it thirty-five or forty yards, but that looking to the right one could scarcely see anywhere.

Johnnie Henderson, one of the plaintiffs, testified that he was riding in the back seat of McCrimmon's car. "We stopped at the railroad crossing and looked and there was a train on the side—left-hand side—we didn't see nothing on the right-hand side—we started and got about across the track and that is all I remember." Witness only saw the train when it hit. Neither witness nor Rattley asked McCrimmon not to drive across the track, and witness said nothing to McCrimmon about what he saw. The car windows were up in front and behind. It was a cold night.

Buck Edwards testified that there were four tracks on this crossing, built close together, almost alike, but after you got there you could tell

the main line. View to the south is obscured to one approaching from the west because of buildings built close to the track.

Plaintiffs introduced an ordinance of the town of Franklinton limiting the speed of trains within the corporate limits to fifteen miles per hour. The crossing is within the corporate limits.

There was other evidence relating to the foregoing conditions and to the nature and extent of plaintiffs' injuries.

On conclusion of plaintiffs' evidence defendants moved for judgment of nonsuit, which was declined, and defendants excepted. Defendants then put on evidence contradicting plaintiffs' evidence in particulars, together with a map and photograph of the locale of the accident. (Since the motion to nonsuit is equivalent to a demurrer to plaintiffs' evidence, detailed transcript is unnecessary.) At the conclusion of the evidence, defendants renewed the motion for judgment of nonsuit, which was allowed in both cases. Plaintiffs severally appealed, assigning error.

Charles P. Green for plaintiff Henderson, appellant.

Yarborough & Yarborough and John Kerr, Jr., for plaintiff Rattley, appellant.

Murray Allen for defendants, appellees.

SEAWELL, J. We are unable to agree that the evidence of plaintiffs, taken in its most favorable light, affords no inference of negligence on the part of defendants. *Brown v. R. R.*, 195 N. C., 699, 143 S. E., 536; *Smith v. Coach Co.*, 214 N. C., 314, 199 S. E., 90.

Carefully considering the defendants' contention that they are relieved from proximate connection with plaintiffs' injuries through the intervening negligence of McCrimmon, driver of the car in which they were guests, we have reached the conclusion that the negligence of the defendants, assuming the facts to be as presented on the record, is too directly involved in the result to be subject to that doctrine.

The defendants insist that their negligence, if any there was, would not have produced the injury to the plaintiffs without the negligence of McCrimmon; and therefore it stands insulated, leaving McCrimmon's intervening negligence the sole proximate cause. The converse of this statement is universally accepted as true, and is thus expressed in a leading case: "When several proximate causes contribute to an accident, and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes; but it cannot be attributed to a cause unless without its operation the accident would not have happened." *Ring v. City of Cohoes*, 77 N. Y., 83, 90. It took the combined activities of the railroad company and McCrimmon to bring their respective vehicles into the collision

inflicting the injury. The formula proposed by defendants would exonerate both of them with equal impartiality.

The condition suggested by defendants is found expressed in exceptional cases, usually involving primary passive negligence, not as in itself exculpatory, but as concomitant with other conditions which are the utter want of logical connection between the primary negligence and the injury, or the unforeseeability of the intervening act—that is, that it was wholly unpredictable that a disconnected negligence of a third person would take hold of the original negligence in that way and turn it into an instrument of injury. We have no such condition here.

Crossing accidents are *sui generis* in the field of negligence, bringing into sharp focus, in one spot, the reciprocal duties of those seeking to use the intersection, nonobservance of which may result in disaster. These duties are reciprocal, interrelated, and immediate; and, whatever the previous history of neglect, are concurrently in force and effect as soon as the zone of danger is created by simultaneous approach to the intersection.

McCrimmon owed to the guests in his car—and, indeed, to the defendants—the duty of due care in the use of the crossing, variously translated into details with which we are familiar. The railroad company owed to McCrimmon and to these plaintiffs certain duties—amongst them prudent operation as to lookout, signals, warning, speed. Hence, it is not difficult to discern in the situation before us an interdependence of events; how the acts of McCrimmon might be affected by the negligence of the defendants. For the same reason it is difficult to eliminate the influence of defendants' negligence—assuming them to have been negligent—as a persisting factor in producing the result.

No negligence is "insulated" so long as it plays a substantial and proximate part in the injury. Restatement of the Law, Torts, sec. 447. "In order to relieve the defendant of responsibility for the event, the intervening cause must be a superseding cause. It is a superseding cause if it so entirely supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury." Shearman & Redfield on Negligence (1941), Vol. 1, p. 101, sec. 38; *Gordon v. Bedard,* 265 Mass., 408, 164 N. E., 374; *Liberty Mutual Ins. Co. v. Great Northern Ry.,* 174 Minn., 466, 219 N. W., 755; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446.

The negligence imputed to the defendants by the evidence is the operation of the train at an unlawful rate of speed, over an unprotected street crossing in a populous town, without signals or warning of its approach. Assuming this to be true, it was active negligence down to the moment of impact on the McCrimmon car, and proximately effective at that time, at least inferably so. Similarly, the McCrimmon car was in movement disregarding precautions and prudent operation when struck. The

omitted acts were all relative to these movements. The default was concurrent. *Ring v. City of Cohoes, supra.* The legal effect of the active negligence of two independent agencies, simultaneously occurring, and inflicting injury upon a third person, is well understood. It is epitomized in Restatement of the Law, Torts, sec. 439: "If the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm does not protect the actor from liability."

As to two persons or agencies guilty of such negligence, the effect of "intervening" negligence of an independent intelligent agent, at least in a case of this kind, hinges upon the question of foreseeability. The principle is clearly and correctly stated in *Butner v. Spease,* 217 N. C., 82, 86, 89, 6 S. E. (2d), 808, as follows: "Nevertheless, conceding the speed of the Butner car to be in excess of 45 miles an hour, and therefore *prima facie* unlawful, it is manifest that its speed would have resulted in no injury but for the 'extraordinarily negligent' act of the defendant Spease —in the language of the Restatement of Torts, sec. 447. . . . The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury. *Newell v. Darnell* (209 N. C., 254, 183 S. E., 374); *Beach v. Patton* (208 N. C., 134, 179 S. E., 446); *Hinnant v. R. R.* (202 N. C., 489, 163 S. E., 555); *Balcum v. Johnson,* 177 N. C., 213, 98 S. E., 532. 'The test . . . is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected.' *Harton v. Tel. Co.,* 141 N. C., 455, 54 S. E., 299."

We cannot agree that the conduct of McCrimmon, as described in the evidence, was of such an extraordinary character as to be beyond the limits of foreseeability.

We have given careful consideration to the suggestion that plaintiffs were properly nonsuited because Henderson and Rattley permitted McCrimmon to approach and traverse the intersection negligently, with the windows of the car up, partly at least, interfering with the opportunity to hear, and that they gave McCrimmon no notice of a danger of which they should have been aware. We are of opinion they cannot be held for contributory negligence as a matter of law. The facts are for the jury. *Smith v. R. R.,* 200 N. C., 177, 156 S. E., 508; *Johnson v. R. R.,* 205 N. C., 127, 170 S. E., 120.

The judgments of nonsuit are reversed.

In No. 457, Reversed.

In No. 459, Reversed.

JAMES F. PACE v. CITY OF CHARLOTTE.

(Filed 29 April, 1942.)

Municipal Corporations § 14—

This action was instituted by a pedestrian who, while walking on crutches, was injured when one of his crutches went into a hole in the grassy strip between the sidewalk and the street, causing him to fall. There was evidence that the hole was 3 or 4 inches in diameter, partially filled with leaves and trash so that it was not observable. *Held:* The municipality's motion to nonsuit was properly granted.

APPEAL by plaintiff from *Pless, J.*, at February Term, 1942, of MECKLENBURG.

Civil action to recover damages for personal injuries sustained by plaintiff on a public street in the city of Charlotte.

The plaintiff is a one-legged man and walks on crutches. At about "dusk-dark" on the evening of 20 September, 1940, he was walking on the easterly sidewalk of North Graham Street with his right crutch and foot on the paved portion of the sidewalk and his left crutch on the grassy strip between the paved portion of the sidewalk and the curbing. His left crutch went into a hole in the grassy strip, and plaintiff was thrown out into the street and injured. He says, "My crutch went in the hole, and I went out in the road. I hurt my knee. My head hit the asphalt." The plaintiff lost no time from his work.

The hole was 3 or 4 inches in diameter, 15 or 18 inches deep, partially filled with leaves and trash, and grass had grown over it so that it was not observable. The city engineer on looking for it after the injury at first passed it without seeing it. It was too small for a man's foot, but large enough for a crutch.

From judgment of nonsuit entered at the close of plaintiff's evidence, he appeals, assigning error.

J. M. Scarborough for plaintiff, appellant.
Tillett & Campbell for defendant, appellee.

PER CURIAM. A careful perusal of the record leaves us with the impression that the judgment of nonsuit should be upheld. *Watkins v. Raleigh*, 214 N. C., 644, 200 S. E., 424; *Houston v. Monroe*, 213 N. C., 788, 197 S. E., 571; *Gettys v. Marion*, 218 N. C., 266, 10 S. E. (2d), 799.

Affirmed.

IN RE ESTATE OF DABNEY T. POINDEXTER, DECEASED; MARY P WATTS AND WILLIS SMITH, ADMINISTRATORS.
EX PARTE.

(Filed 6 May, 1942.)

1. Executors and Administrators § 21—

When there is a dispute as to the relative proportions due each distributee under the canons of descent, it is proper for the administrators to institute a proceeding, with notice to all interested parties, to obtain the advice of the court.

2. Descent and Distribution § 3—

Intestate died leaving him surviving two sisters and the descendants of three brothers and two sisters who predeceased him. *Held:* In the division of the personalty, the estate should be divided in seven equal parts, the surviving sisters each taking a part *per capita*, and the descendants of the deceased brothers and sisters taking the share of their ancestor *per stirpes*. C. S., 137 (5).

3. Constitutional Law § 6c—

It is the duty of the courts to apply the law as it is written.

APPEAL by certain respondents from *Harris, J.*, in Chambers, at Raleigh, N. C., 4 April, 1942. From WAKE. Affirmed.

Petition by administrators for advice and instruction.

Dabney T. Poindexter, formerly a resident of Wake County, died intestate 19 February, 1941. Petitioners Mary P. Watts and Willis Smith duly qualified as administrators and entered upon the administration of the decedent's estate as such. The administrators have in hand money and personal property of the value of more than $500,000.00. They are now ready and have been authorized by the clerk to distribute $140,000.00 thereof.

The intestate left surviving no widow or children or legal representative of deceased children. Two sisters survive. He also had three brothers and two sisters who predeceased him. Each brother and sister left lineal descendants surviving. Lula Poindexter Brown, a deceased sister, left surviving two children and four grandchildren by one son and two grandchildren by another son. R. N. Poindexter, a deceased brother, left surviving two daughters. John S. Poindexter, a brother, left surviving one son and two daughters. Hugh Poindexter, a deceased half-brother, left one son surviving and Betty P. Gills, a deceased half-sister, left surviving four daughters and one son.

Conflicting claims as to the fractional share due each distributee having arisen, the administrators filed this petition for advice and instruction as to the proper method of distribution. When the cause came

on to be heard in the court below judgment was entered directing that the personal estate to be distributed be divided into seven shares; that one share be allotted to each of the surviving sisters; that one share be allotted to the representatives of Lula Poindexter Brown; and one share to the representatives of each of the other deceased brothers and sisters. The judgment further provided that the children of a deceased child of a brother or sister should receive the share to which his parent would be entitled if living. The ratable portion of each distributee is set out in detail.

Certain of the nephews and nieces and grandnephews and grandnieces excepted and appealed.

Oscar Leach and John H. Anderson, Jr., for petitioners, appellees.

W. C. Harris, Jr., for certain defendants, appellees.

J. C. Little, Jr., for children of Lula Poindexter Brown, deceased, appellants.

J. L. Fountain for representatives of Betty P. Gills, deceased, appellants.

Killian Barwick for grandchildren of Lula Poindexter Brown, deceased, appellants.

BARNHILL, J. Petitioners have adopted the proper procedure for obtaining judicial direction as to the method of distribution of the personal estate of their intestate. *Bank v. Alexander,* 188 N. C., 667, 125 S. E., 385; *In re Estate of Mizzelle,* 213 N. C., 367, 196 S. E., 364.

When the personal estate of an intestate is to be distributed under the provisions of C. S., 137, subsection 5, among living sisters and the representatives of deceased brothers and sisters, is the distribution to be *per capita* or *per stirpes?* This is the question appellants present by their appeal.

The question is answered in part by the claimants. They all concede that as to the two surviving sisters the distribution is to be *per capita.* This is in accord with the decisions of this Court. *Ellis v. Harrison,* 140 N. C., 444; *In re Estate of Mizzelle, supra; Nixon v. Nixon,* 215 N. C., 377, 1 S. E. (2d), 825; *Skinner v. Wynne,* 55 N. C., 41; *Nelson v. Blue,* 63 N. C., 659.

The appellants contend, however, that the nephews and nieces are related in equal degree and that as to the five-sevenths of the estate to be shared by representatives of deceased brothers and sisters of the intestate the distribution should be *per capita* also and not *per stirpes.*

Hence, there is no dispute as to who takes. The controversy is as to the relative proportions due each distributee, other than the two sisters.

This contention cannot be sustained. It apparently is founded upon a misconception of the language of the statute. It is not sufficient that

these claimants are related to each other in equal degree. To take in their own right they must be among the nearest of kin of deceased. As two sisters survive this requirement is not fulfilled.

The pertinent statute (C. S., 137, subsection 5) is properly divisible into two parts: (1) The estate shall be distributed equally to every of the next of kin of the intestate who are in equal degree; and (2) if one who, if living, would be kin in equal degree with survivors, those who represent him shall take his share. *Skinner v. Wynne, supra; Ellis v. Harrison, supra; Nixon v. Nixon, supra.*

The second provision of the statute permitting representatives to take is only resorted to when it is necessary to bring the claimants to equality of position as next of kin. When it must be invoked to ascertain who are the distributees, then the distribution, as to those sharing in the estate by virtue thereof, is *per stirpes.* Each group representing a deceased next of kin is allowed to take the share of their ancestor which the ancestor would have taken if living, because, if living, he would be in equal degree with the surviving next of kin. The statute declares that his share must go to those who legally represent him. It is by virtue of that provision that appellants are entitled to share. *Moore v. Rankin,* 172 N. C., 599.

Blackstone (2 Com., 517) states the rule as follows: "If the next of kin of the intestate be three brothers, A, B and C, his effects are divided into three equal portions and distributed *per capita,* one to each; but if one of these brothers, A, had been dead, leaving three children, and another, B, leaving two, then the distribution must have been *per stirpes,* namely, one-third to A's three children, another third to B's two children and the remaining third to C, the surviving brother, yet if C had been also dead without issue, then A's and B's children, being all in equal degree to the intestate, would take in their own rights *per capita,* to wit, each of them one-fifth part." *Skinner v. Wynne, supra.*

Hence, the distribution is *per capita* among those who are next of kin in equal degree to the intestate and *per stirpes* among those who claim as representatives of deceased persons who, if living, would be next of kin in equal degree with the living.

To ascertain those who take we must first determine who are the surviving next of kin. Here they are the two sisters. Were there other brothers or sisters, who, if living, would share with the survivors? If so, did they leave legal representatives who can represent them and take their respective shares? In the instant case there were three brothers and two sisters, each leaving descendants surviving. This requires a division of the personal estate into seven parts to be distributed as provided in the judgment below.

Whether the Legislature did or did not intend to discriminate against large families is not our concern. The law is plain. *Lex scripta est.* We apply it as written.

The judgment below is in accord with the uniform decisions of this Court. It is

Affirmed.

A. B. COLE, EXECUTOR OF FANNIE L. STEELE, DECEASED, R. S. COLE AND MRS. HANNAH C. RANCKE, v. THE FARMERS BANK & TRUST COMPANY, A CORPORATION, AND LEAKE S. COVINGTON.

(Filed 6 May, 1942.)

1. Corporations § 8—

C. S., 1146, authorizing a compulsory audit of the books of a corporation upon written request signed by 25 per cent of its stockholders, applies to banking corporations, Michie's Code, 224 (j), since the statute embraces all domestic corporations organized for profit in which the beneficial interest and *pro rata* ownership are represented by shares of stock.

2. Judgments § 32—

The fact that an interlocutory motion of plaintiff stockholders for an audit of defendant corporation under C. S., 1146, was denied because request therefor was not signed by 25 per cent of its stockholders, does not estop them from thereafter moving for the same relief after the corporation had failed to act within the statutory time on another request for audit signed by more than 25 per cent of its stockholders.

3. Appeal and Error § 2—

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment.

4. Same—

In an action to restrain defendants from carrying through a sale of shares of stock of defendant corporation, defendants appealed from an interlocutory order allowing plaintiffs a compulsory audit of the corporation's books under C. S., 1146. Defendants did not object to a proper audit of the corporation's books, but objected to the provision of the order that the audit should be at the corporation's expense. *Held:* The appeal is fragmentary and premature, and it is dismissed.

APPEAL by defendants from *Phillips, J.*, at Chambers. From RICHMOND. Appeal dismissed.

The appeal is from an interlocutory order authorizing an audit of the books of the defendant bank. The order was entered in the above entitled cause pending in the Superior Court of Richmond County. The plain-

tiffs instituted the action to restrain defendants from carrying through the sale of certain shares of stock of the defendant bank, which sale in the manner proposed, it is alleged, will injuriously affect the interests of the plaintiffs, minority stockholders. Pending the action plaintiffs moved in accordance with C. S., 1146, for an audit of the books of defendant bank to be made at the expense of the bank. This was denied by Judge Pless, then presiding, on the ground that the request for the audit was not signed by twenty-five per cent of the stockholders, as required by the statute. Thereafter another request for an audit was served on defendants, signed by more than twenty-five per cent of all the stockholders of the bank, and, upon failure of the bank to commence the audit within the statutory period, motion upon notice was filed before Judge Phillips, resident judge, who allowed the motion, and ordered the audit to be made at the expense of the bank, as provided by C. S., 1146.

The defendants excepted to the order of Judge Phillips, and appealed to the Supreme Court.

John A. McRae and J. C. Sedberry for plaintiffs, appellees.
B. M. Covington and Fred W. Bynum for defendants, appellants.

DEVIN, J. The defendants base their objection to the order of Judge Phillips upon two grounds: first, that the statute, C. S., 1146, authorizing compulsory audit of the books of a private corporation, does not apply to banks, and, second, that the plaintiffs are bound by the ruling of Judge Pless denying their previous motion for an audit at the expense of the bank.

Neither of these objections can be sustained. The statute is primarily concerned with the protection of the rights of minority stockholders, and has reference to private corporations as distinguished from municipal, public, or *quasi* public corporations. It embraces all domestic corporations organized for profit in which the beneficial interests and pro rata ownership are represented by shares of stock, and is applicable as well to banks and trust companies organized under the laws of North Carolina as to other business or industrial corporations. *Rhodes v. Love,* 153 N. C., 468 (472), 69 S. E., 436. By sec. 87, ch. 4, Public Laws 1921 (Michie's Code, 224 [j]), it is provided that the laws relating to private corporations are applicable to banks, unless inconsistent with the business of banking.

The fact that Judge Pless ruled against the plaintiffs upon an application which did not meet the requirements of the statute cannot be held to estop the plaintiffs from thereafter moving upon another request with additional signers which did comply in all respects with the provisions of the statute. *Revis v. Ramsey,* 202 N. C., 815, 164 S. E., 358; *Cox*

v. Cox, ante, 19, 18 S. E. (2d), 713. Upon the facts found by Judge Phillips the order appealed from was properly entered.

It should be noted that the solvency and financial strength of the bank were in nowise questioned. Indeed the plaintiffs allege that the stock of the bank is worth $600 per share. The bank did not and does not now object to a proper and reasonable audit of its books at the instance of stockholders, but does object to being charged with the cost thereof.

While we have undertaken to dispose of the points raised by defendants' appeal, we think the case was improvidently brought to this Court. The appeal is fragmentary and premature. *Hinton v. Ins. Co.,* 116 N. C., 22, 21 S. E., 201. Defendants' right to review ultimately the ruling of the judge below is not denied, but to recognize the right of immediate appeal from an interlocutory order as to an incidental question, arising in the course of the litigation, is not in accord with approved appellate procedure. Well considered decisions of this Court hold that the progress of an action in the Superior Court should not be halted to determine collateral and incidental questions which can be given due consideration upon an appeal involving the merits of the cause. "As a rule, orders and judgments which are not final in their nature, but leave something more to be done with the case, are not immediately reviewable; the remedy is to note an exception at the time, to be considered on appeal from the final judgment." McIntosh Prac. & Proc., 773; *Brown v. Nimocks,* 126 N. C., 808, 36 S. E., 278; *Smith v. Miller,* 155 N. C., 242, 71 S. E., 353.

The order of a judge from which an appeal will lie, as provided by C. S., 638, must be one which affects a substantial right claimed in the action, or which in effect determines the matter. "If the order does not affect a substantial right of the appellant, his appeal therefrom to this Court will be dismissed." *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794. The rule is aptly stated in the first headnote in *Leak v. Covington,* 95 N. C., 193, as follows: "An appeal from an interlocutory order only lies when it affects some substantial right and will work an injury to the appellant if not corrected before an appeal from the final judgment." This Court has repeatedly declared it will not entertain fragmentary appeals. *Johnson v. Ins. Co.,* 215 N. C., 120, 1 S. E. (2d), 381; *Cement Co. v. Phillips,* 182 N. C., 437, 109 S. E., 257; *Leroy v. Saliba,* 182 N. C., 757, 108 S. E., 303; *Yates v. Ins. Co.,* 176 N. C., 401, 97 S. E., 212; *Joyner v. Reflector Co.,* 176 N. C., 274, 97 S. E., 44; *Smith v. Miller,* 155 N. C., 242, 71 S. E., 353; *Warren v. Stancill,* 117 N. C., 112, 23 S. E., 216; *Blackwell v. McCaine,* 105 N. C., 460, 11 S. E., 360. A fragmentary appeal is one which seeks to bring up only a part of the case, leaving other parts of it unsettled. *Johnson v. Ins. Co., supra; Hinton v. Ins. Co.,* 116 N. C., 22, 21 S. E., 201.

The question whether the Bank or the plaintiffs should be required to pay the expense of the audit ordered in the instant case was not one determinative of the action, nor did the order put in jeopardy any substantial right of the defendants which would necessitate an immediate appeal. We do not think defendants' exception to the order for an audit at their expense should be held sufficient to justify interruption of the progress of the cause for the purpose of enabling the defendants to prosecute an appeal to this Court to determine the propriety of the order. The allowance of fragmentary and premature appeals from interlocutory orders would encourage and facilitate delays, increase costs and multiply appeals.

Appeal dismissed.

STATE v. ARTHUR GIBSON.

(Filed 6 May, 1942.)

1. Indictment § 12—

After plea of not guilty is entered, a motion to quash the indictment can no longer be made as a matter of right, but is addressed to the discretion of the court, and the exercise of such discretion is not reviewable on appeal.

2. Rape § 4b—

Intent is not an element of the offense of carnally knowing or abusing a female child under the age of twelve years, C. S., 4204, and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied.

3. Indictment § 9—

Ordinarily, an indictment for a statutory offense which follows the language of the statute is sufficient.

4. Indictment § 10—

An indictment stipulating the name of prosecutrix as "Robinson" instead of "Rolison" *held* not fatally defective, the doctrine of *idem sonans* being applicable.

5. Witnesses § 4—

The competency of a five-year-old child to testify as a witness rests in the sound discretion of the trial court.

6. Same—

The fact that the trial court permitted a five-year-old child to testify as a witness, and held that another child, six years old, was incompetent, does not manifest abuse of discretion, but care and discernment.

7. Rape § 4d—

Evidence of defendant's guilt of carnally knowing a female child under the age of 12 *held* sufficient to be submitted to the jury.

8. Criminal Law § 79—

Defendant's exceptions should be set out in his brief and reason or argument stated and citation of authorities given under each exception, otherwise the exceptions will be taken as abandoned.

APPEAL by defendant from *Phillips, J.*, at January Term, 1942, of BUNCOMBE.

Criminal prosecution upon indictment charging defendant with feloniously ravishing and carnally knowing a female child six years of age. C. S., 4204.

Verdict: Guilty of rape as charged in the bill of indictment.

Judgment: Death by asphyxiation.

Defendant appeals to Supreme Court, and assigns error.

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

DeVere C. Lentz for defendant, appellant.

WINBORNE, J. Scrutinous consideration of each of the exceptions taken in behalf of defendant in trial below fails to show prejudicial error in the trial in Superior Court.

We advert to some of the exceptions.

The first is to the refusal of the court to grant motion to quash the bill of indictment, made by defendant after defendant had pleaded not guilty and after the jury had been selected and impaneled. The grounds upon which the motion is based are not stated in the record. Yet in brief of defendant, filed in this Court, it is stated that the bill of indictment should have had the word "intent" in it, and should have designated the alleged victim in her real name "Rolison" instead of "Robinson."

At the outset the motion for consideration as a matter of right was not made in time. Decisions of this Court are uniform in holding that a motion to quash the bill of indictment, if made after plea of not guilty is entered, is addressed to the discretion of the trial court. The exercise of such discretion is not reviewable on appeal. *S. v. Jones,* 88 N. C., 672; *S. v. Pace,* 159 N. C., 462, 74 S. E., 1018; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

In the next place "intent" is not an element of the offense for which defendant is indicted under C. S., 4204. Deleting impertinent words, this statute provides that "Every person . . . who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death." The bill of indictment sought to be quashed follows substantially the words of the statute as to essential

elements, and, hence, in conformance with the rule ordinarily applied in the decisions of this Court, meets the requirement of law. *S. v. Cole,* 202 N. C., 592, 163 S. E., 594; *S. v. Jackson,* 218 N. C., 373, 11 S. E. (2d), 149, and numerous other cases.

Lastly, if advantage of the alleged variance between the real name of the alleged victim, and that given in the bill of indictment, could be taken on motion to quash rather than upon motion to nonsuit as was done in *S. v. Whitley,* 208 N. C., 661, 182 S. E., 838, we are of opinion and hold that the doctrine of *idem sonans* applies. *S. v. Patterson,* 24 N. C., 346; *S. v. Hester,* 122 N. C., 1047, 29 S. E., 380; *S. v. Drakeford,* 162 N. C., 667, 78 S. E., 308; *S. v. Chambers,* 180 N. C., 705, 104 S. E., 670; *S. v. Whitley, supra; S. v. Dingle,* 209 N. C., 293, 183 S. E., 376; *S. v. Reynolds,* 212 N. C., 37, 192 S. E., 871. In fact the identity of person does not appear to have been questioned on the trial.

The second exception is to the refusal of the court to strike out the testimony of the alleged victim for that, because of her age, not quite six years, she was incompetent to testify.

The competency of a child to testify as a witness in a case is a matter resting in the sound discretion of the trial court. *S. v. Edwards,* 79 N. C., 648; *S. v. Merrick,* 172 N. C., 870, 90 S. E., 259; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Jackson,* 211 N. C., 203, 189 S. E., 502.

In the *Edwards case, supra, Reade, J.,* stated: "There being now no arbitrary rule as to age, and it being a question of capacity, and of moral and religious sensibility in any given case whether the witness is competent, it must of necessity be left mainly if not entirely to the discretion of the presiding judge. *S. v. Manuel,* 64 N. C., 601. It may be stated, however, that a child of tender years ought to be admitted with great caution; and where there is doubt it ought to be excluded. The formal answers to the usual question—who made you? what will become of you if you swear to a lie? and the like, are so easily taught, that much more ought to be required. The capacity of the child may be ascertained not only by examining it, but other persons who have had the care of it." This expression has been brought forward with approval in the *Satterfield* and *Jackson cases, supra.*

The fact that the court held another six-year-old girl to be incompetent to testify is urged as evidence of abuse of discretion in permitting the alleged victim to testify. Quite to the contrary, it manifests care and discernment.

Other assignments are likewise without merit.

It is noted that exceptions to refusal to nonsuit are not brought forward in defendant's brief. Nevertheless, the testimony of the child in support of the offense charged is positive and direct. Her testimony is

corroborated by the doctor who examined her, and by circumstances detailed by other witnesses. On the other hand, defendant, while admitting some of the circumstances shown by the State, denies commission of the offense. The trial resolved itself into a question of fact for the jury. And, as was said in *S. v. Jackson,* 211 N. C., 203, "It is a sordid story, and no useful purpose would be served by soiling the pages of our reports with a detailed recitation of the facts."

Attention is called to the fact that brief filed in behalf of defendant fails to comply with Rule 28 of the Rules of Practice in the Supreme Court, 213 N. C., 808. Where exceptions are not set out in appellant's brief, or where no reason or argument is stated or authority cited therein in support of exceptions, they will be taken as abandoned by him. A "pass brief" is disapproved. *Jones v. R. R.,* 164 N. C., 392, 80 S. E., 408.

In the judgment below, we find

No error.

W. C. CLARK v. CITY OF GREENVILLE.

(Filed 6 May, 1942.)

1. Evidence § 4—

The courts may take judicial notice of when the United States Census figures are available.

2. Taxation § 30—

In ascertaining the State license tax on businesses in accordance with the graduated scale based upon the population of the municipalities in which the business is operated, for the tax year beginning 1 July, 1940, the Commissioner of Revenue properly used the 1930 United States Census figures, since the 1940 figures were not available at the beginning of that tax year. Sec. 112, Revenue Act of 1939.

3. Municipal Corporations § 42—

When the Commissioner of Revenue properly uses the 1930 United States Census figures in ascertaining the license tax of a business in accordance with the population of the municipality in which the business is operated, the municipality is limited to a license tax not in excess of that levied by the State, and when the city levies a tax in excess of that amount, based upon its erroneous contention that the population as shown by the 1940 Census should be used, the taxpayer may recover the excess.

APPEAL by defendant from *Dixon, Special Judge,* at October Term, 1941, of PITT.

Civil action to recover an alleged overcharge for coal dealer's license tax.

The case was heard on facts agreed; a jury trial was waived, and the matter at issue submitted to the court for determination and adjudication.

In summary, the operative facts follow:

1. The plaintiff is now, and was at the time in question, a retail coal dealer in the city of Greenville, N. C.

2. The State Department of Revenue, pursuant to section 112 of the Revenue Act of 1939, levied and collected the sum of $25.00 from retail coal dealers in the city of Greenville as Schedule B license taxes for the year beginning 1 July, 1940, and ending 30 June, 1941. This tax was paid by the plaintiff.

3. The population of the city of Greenville was determined under the Fifteenth Census of the United States (Government 1930 census) to be (5,000 and) less than 10,000 inhabitants. It is agreed that on 1 July, 1940, the population of the city of Greenville, "as then determined by the Sixteenth Census of the United States (1940 census), was 12,961 inhabitants."

4. The city of Greenville levied a license tax of $50.00 on retail coal dealers for the year beginning 1 July, 1940, and ending 30 June, 1941.

5. The plaintiff paid the city license tax, under protest, and brings this action to recover one-half of it, or $25.00, as an illegal overcharge.

From judgment in favor of plaintiff, the defendant appeals, assigning error.

J. W. H. Roberts for plaintiff, appellee.
Harding & Lee for defendant, appellant.

STACY, C. J. It is provided by section 112 of the Revenue Act of 1939, that every person, firm or corporation engaged in the retail coal or coke business shall apply for and procure from the Commissioner of Revenue a State license, and shall pay for such license for each city or town in which such coal or coke is sold or delivered, as follows:

3. "In cities or towns of 5,000 and less than 10,000 population, $25.00."

4. "In cities or towns of 10,000 and less than 25,000 population, $50.00."

It is further provided that no county shall levy any license tax on the business taxed under this section, but cities and towns are permitted to levy "a license tax not in excess of that levied by the State."

Section 933 of the same act provides that it shall be the duty of the Commissioner of Revenue to construe all sections of the Revenue Act imposing license, franchise or other taxes; that his decisions shall be *prima facie* correct, and a protection to the officers and taxpayers affected thereby; that where the license tax is graduated according to population,

the population shall be the number of inhabitants as determined by the last census of the United States Government, with proviso in respect of cities and towns thereafter extending their limits, not now material.

While it appears from the agreed statement of facts that on 1 July, 1940, the population of the city of Greenville, "as then determined by the Sixteenth Census of the United States (1940 census), was 12,961," the fact is that the Sixteenth Census of the United States was not then available for the State—a fact of which we may take judicial notice, 20 Am. Jur., 112 and 113—and the Commissioner of Revenue in using the Fifteenth Census, the last available census, to ascertain the State tax was acting in accordance with the provisions of the statute. *Provision Co. v. Daves*, 190 N. C., 7, 128 S. E., 593. The amount of the State tax, as thus determined, was $25.00. This, then, limited the municipality to a license tax not in excess of that levied by the State. Hence, the correct result seems to have been reached.

Affirmed.

LULA S. CAMPBELL v. HENRY S. CAMPBELL.

(Filed 6 May, 1942.)

1. Adverse Possession § 9a—

A sheriff's deed at an execution sale under a judgment obtained against the nonresident owner by his wife to recover for maintenance and necessaries furnished by her to their minor children, in which action attachment was levied on the land, is at least color of title, the judgment not being void, C. S., 428.

2. Adverse Possession § 4c—

After abandonment, the wife's possession as purchaser at execution sale of a judgment obtained against the husband, is adverse to the husband, and her possession for the statutory period will bar him. C. S., 428.

3. Husband and Wife § 4d—

After abandonment, the wife may execute deed to her lands without the joinder of her husband. C. S., 2530.

APPEAL by defendant from *Johnston, Special Judge*, at February Term, 1942, of MECKLENBURG. No error.

This was an action to determine the title to land, the subject of a contract to convey. Plaintiff claims title under a deed executed by the sheriff pursuant to a judgment of the Superior Court, and adverse possession under the deed for more than seven years. There was evidence tending to show that plaintiff, a married woman, had been abandoned

by her husband. Defendant declined tender of deed, alleging invalidity of title. Upon issues submitted to the jury there was verdict for the plaintiff, and from judgment on the verdict defendant appealed.

McDougle & Ervin for plaintiff, appellee.
Morgan B. Gilreath for defendant, appellant.

DEVIN, J. The land which is the subject of this action originally belonged to plaintiff's husband, W. A. Campbell. It was established by the verdict that the plaintiff's husband abandoned her in 1921. In 1931 the plaintiff instituted an action against her husband to recover for maintenance and necessaries furnished their minor children, for which the husband was primarily obligated. Attachment was levied on the land of the husband, who was then a nonresident of the State. Recovery was had in that action, and judgment was rendered ordering the land sold to pay the judgment. The land was sold by the sheriff, bought by the plaintiff, and proper deed therefor executed and delivered to the plaintiff. Under this deed the plaintiff entered into possession of the land and has held the same adversely for more than seven years before the institution of the present action. These material facts were established by the verdict or admitted in the answer.

The judgment in the action between plaintiff and her husband was not void and the sheriff's deed was at least color of title which ripened by adverse possession for seven years into an indefeasible title. C. S., 428. After abandonment the wife's adverse possession for the statutory period would bar the husband. *Nichols v. York*, 219 N. C., 262, 13 S. E. (2d), 565.

The fact that the plaintiff's husband does not join in the deed now tendered to the defendant cannot avail as a defense to this action. That the plaintiff was abandoned by her husband has been determined by the verdict. Under C. S., 2530, a wife who has been abandoned by her husband has full authority to convey her real property without the assent of her husband. The constitutionality of this statute has been upheld in numerous decisions of this Court. *Hall v. Walker*, 118 N. C., 377, 24 S. E., 6; *Keys v. Tuten*, 199 N. C., 368, 154 S. E., 631; *Nichols v. York, supra.*

The defendant's exceptions to the judgment and to the judge's charge cannot be sustained.

In the trial we find

No error.

CITY OF CHARLOTTE v. MARGARET THURMOND KAVANAUGH, HEIR AT LAW OF MRS. DEWITT THURMOND CHATHAM; MECKLENBURG COUNTY; AND THURMOND CHATHAM AND DEWITT C. HANES, HEIRS AT LAW OF MARGARET THURMOND KAVANAUGH.

(Filed 6 May, 1942.)

1. Statutes § 10—

A general statute will not repeal a prior local statute unless it appears on the face of the general statute that such was the intent of the General Assembly, since otherwise the local statute will be construed as an exception to the general statute, and this notwithstanding a general repealing clause in the general statute.

2. Municipal Corporations § 30—

Ch. 251, Private Laws 1911, amending the charter of the city of Charlotte by providing that assessments for public improvements made under the act should not exceed the value of special benefits accruing to the property assessed or 20 per cent of the assessed valuation of the property, *held* not repealed by ch. 56, Public Laws 1915, granting municipalities power to make public improvements and providing the machinery therefor.

3. Statutes § 9: Municipal Corporations § 30—When prior act is never in force because not ratified, act purporting to amend it is nullity.

Ch. 394, Private Laws 1909, provided amendments to the charter of the city of Charlotte if ratified by the voters of the city. Among the amendments was a provision that assessments for public improvements should not exceed the value of the special benefits accruing to the property or 20 per cent of its assessed valuation. This act never became a part of the charter because it was not ratified. The charter was later amended by ch. 251, Private Laws 1911, which contained identical limitations on assessments. Ch. 135, Private Laws 1923, purported to amend the Act of 1909 by striking out the limitation of assessments to 20 per cent of the value of the property assessed. *Held:* The Act of 1923 does not have the effect of amending the Act of 1911, but is a nullity, since it purports to amend an act which was never in force.

4. Municipal Corporations § 30—Special act limiting assessments for improvements made thereunder held not to apply to improvements made pursuant to general law.

Plaintiff municipality proceeded to improve a section of one of its streets pursuant to ch. 56, Public Laws 1915. A local statute applicable to the city (ch. 251, Private Laws 1911) provided complete machinery for public improvements and stipulated that no assessments levied under its provisions should exceed the amount of special benefits to the property assessed or more than 20 per cent of its assessed valuation. *Held:* The two statutes can be construed *in pari materia*, and the limitation on assessments stipulated in the private act applies only to improvements made under its provisions, and does not apply to improvements made pursuant to the general law. *Flowers v. Charlotte*, 195 N. C., 599, cited and distinguished.

5. Municipal Corporations § 34: Limitation of Actions § 1b—

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. C. S., 420.

6. Limitation of Actions § 1b—

No statute of limitations runs against the sovereign unless it is expressly named therein.

7. Municipal Corporations § 34—

Liens for public improvements are distinguishable from taxes, since they are levied only against the property improved to defray the cost of the improvements while taxes are levied on all persons and property within the taxing unit to defray the governmental expenses of the unit, and since liens for improvements are *in rem* and can be enforced only against the specific property assessed, while taxes can be collected out of the personal property of the taxpayer.

8. Same—Liens for public improvements are barred after the ten-year period prescribed by ch. 331, Public Laws 1929.

An action to enforce the lien for public improvements, even though instituted under C. S., 7990, is barred after ten years from default in the payment of the assessments, or, if the assessments are payable in installments, each installment is barred aften ten years from default in payment of same unless the time for payment has been extended as provided by law, since the statute, prescribing the limitation, ch. 331, Public Laws 1929, expressly names municipalities. The distinction between an action to enforce the lien for public improvements and an action to foreclose a tax lien under C. S., 7990, to which no statute of limitations is applicable, is pointed out.

APPEAL by plaintiff and defendants from *Blackstock, Special Judge,* at February Term, 1942, of MECKLENBURG.

1. Civil action instituted under section 7990 of the Consolidated Statutes of North Carolina, for the purpose of foreclosing a lien of the city of Charlotte on defendants' land for a special assessment on account of local improvements to said land.

2. Pursuant to the provisions of chapter 56 of the Public Laws of 1915, the city of Charlotte opened a street, known as the Plaza, from Central Avenue to Commonwealth Avenue, and in accordance with the petition of the property owners assessed 100 per cent of the cost of the improvements, exclusive of so much of the cost thereof as was incurred at street intersections, etc., against the lots and parcels of land abutting directly on said improved street, at an equal rate per foot of such frontage. The defendants did not sign the petition for said improvements, neither did their predecessors in title. Under said proceeding, which was regular in form, the lot now owned by these defendants was

assessed a total of $874.38, as of December 18, 1929. The first installment in the sum of $87.52, together with interest in the sum of $52.46, or a total of $139.98, was paid on 5 October, 1931. The remaining nine installments in the sum of $87.43 each, or a total of $786.87, together with interest thereon, have not been paid.

3. The second installment of $87.43, with interest thereon, became due and payable more than ten years prior to the institution of this action, and the three and ten-year statutes of limitations were duly pleaded by the defendants.

4. In the year 1929, the assessed taxable value of the land which is involved in this action was $605.00.

5. Chapter 394 of the Private Laws of 1909, provided for an amendment to the charter of the city of Charlotte when same should be ratified by a majority of the voters of the city of Charlotte at a special election to be held for that purpose; section 85 of said act applied to special assessments on real estate in the same language as section 7 of chapter 251 of Private Laws of 1911, and contained the following language: "Provided, further, that no assessment against any piece of property improved as in this act provided, shall in any case exceed the amount of special benefit to or enhancement in value of said property by reason of said improvements, or 20 per cent of the assessed taxable value thereof; and where permanent street improvements shall be made, the property bearing such assessments shall not be so assessed again until after the expiration of ten years from the date of the last preceding assessment." The above amendment to the charter of the city of Charlotte was not ratified at the special election, and therefore said act never became a part of the charter of the city of Charlotte.

6. Chapter 251 of the Private Laws of 1911, amended the charter of the city of Charlotte, and section 7 thereof contains the identical provisions as to assessments on real estate, contained in the proposed charter, which was submitted to the voters of the city of Charlotte and rejected by them.

7. Chapter 135 of the Private Laws of 1923 is as follows: "Section 1. That section eighty-five of chapter three hundred and ninety-four of the Private Laws of one thousand nine hundred and nine, be amended by striking out in lines forty-four and forty-five the following: 'or twenty per cent of the assessed taxable value thereof.' Sec. 2. That all laws and clauses of laws in conflict with this act are hereby repealed. Sec. 3. That this act shall be in force from and after its ratification. Ratified this the 1st day of March, A.D. 1923."

Upon the foregoing facts his Honor concluded as a matter of law that the city of Charlotte had the right to proceed under chapter 56 of the Public Laws of 1915, in making local improvements and levying assess-

ments therefor, but that said act was subject to the provisions in the charter of the city of Charlotte, limiting any assessment to an amount not in excess of 20 per cent of the assessed taxable value of the defendants' property; that said provision in the charter of the city of Charlotte had not been repealed. That since the assessed value of the property of defendants in 1929 was $605.00 and 20 per cent thereof was $121.00; and since on 5 October, 1931, there was paid $139.98 on the assessment, and said amount exceeds 20 per cent of the assessed taxable value of the property, plus interest thereon to the date of payment, there is no further assessment lien against the property of the defendants; and that since this action was instituted under the provisions of section 7990 of the Consolidated Statutes of North Carolina, there is no statute of limitations barring the collection of any installment of an assessment, even though installment No. 2 became due and payable more than 10 years prior to the institution of this action.

From judgment entered on the foregoing conclusions of law, the plaintiff and defendants appeal and assign error.

Tillett & Campbell for plaintiff.

H. L. Taylor for defendants.

Chase Brenizer for Mutual B. & L. Association of Charlotte, N. C., amicus curiæ.

PLAINTIFF'S APPEAL.

DENNY, J. The exceptions of the plaintiff relate to the conclusion of law holding that the city of Charlotte did not have the right to proceed under chapter 56 of the Public Laws of 1915, in making local improvements and levying assessments without regard to chapter 251 of the Private Laws of 1911, which was an act to amend the charter of the city of Charlotte, and in section 7 thereof, there appears the following provision: "*Provided, further,* that no assessment against any piece of property improved as in this act provided, shall in any case exceed the amount of special benefit to or enhancement in value of said property by reason of said improvements, or twenty per cent of the assessed taxable value thereof."

We are of the opinion that neither the general act, chapter 56 of the Public Laws of 1915, nor the private act, chapter 135 of the Private Laws of 1923, repealed the charter provision under consideration. The private act was a nullity, since it purported to repeal a provision in a proposed charter for the city of Charlotte, which charter was never adopted, but, on the contrary, was rejected by the voters of the city of Charlotte in a special election for the adoption or rejection thereof.

The rule as to the effect of a subsequent general statute on a local statute is stated in *Felmet v. Commissioners,* 186 N. C., 251, 119 S. E., 353: "A local statute enacted for a particular municipality is intended to be exceptional and for the benefit of such municipality, and is not repealed by an enactment of a subsequent general law. *Rogers v. U. S.,* 185 U. S., 83; *Wilson v. Comrs.,* 183 N. C., 638; *Alexander v. Lowrance,* 182 N. C., 642; *Bramham v. Durham,* 171 N. C., 196; *S. v. Johnson,* 170 N. C., 688; *Cecil v. High Point,* 165 N. C., 431; *School Comrs. v. Aldermen,* 158 N. C., 197."

In *S. v. Johnson, supra,* the Court said: "The general law will not be so construed as to repeal an existing particular or special law, unless it is plainly manifest from the terms of the general law that such was the intention of the lawmaking body. A general later affirmative law does not abrogate an earlier special one by mere implication. Having already given its attention to the particular subject, and provided for it, the Legislature is reasonably presumed not to intend to alter the special provision by a subsequent general enactment, unless that intention is manifested in explicit language, or there be something which shows that the attention of the Legislature had been turned to the special act, and that the general one was intended to embrace the special cases within the previous one, or something in the nature of the general one making it unlikely that an exception was intended as regards the special act. The general statute is read as silently excluding from its operation the cases which have been provided for by the special one. The fact that the general act contains a clause repealing acts inconsistent with it does not diminish the force of this rule of construction. Endlich Int. Stat., 223, *et seq., Montford v. Allen,* 111 Ga., 18."

In the above case, as in the instant one, special reference is made to special and local laws, and section 2, chapter 56, Public Laws of 1915, states that the act shall not repeal any special or local law or affect any proceedings under any special or local law, for the making of street, sidewalk or other improvements, etc., but that the act shall apply to all municipalities and "shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided."

The question then arises as to whether or not they can be construed *in pari materia.* If they cannot, and the provisions are contradictory, and repugnant, the provisions of the charter must prevail.

An examination of chapter 251 of the Private Laws of 1911 discloses that said act amends the charter of the city of Charlotte by adopting a complete method for public improvements, and of the procedure to be

followed in connection therewith. It will be noted that in the proviso, which the court below held limited the plaintiff to an assessment not in excess of 20 per cent of the assessed taxable value at the time the assessment was made, there is a limitation: "That no assessment against a piece of property improved, *as in this act provided,* shall in any case exceed the amount of special benefit to or the enhancement in value of said property by reason of said improvements, or twenty per cent of the assessed value thereof."

The paving assessment under consideration in this action was not made pursuant to the provisions of the charter of the city of Charlotte, nor as therein provided; the entire proceedings were in pursuance of and in accordance with the authority contained in chapter 56 of the Public Laws of 1915. Section 4 of chapter 251, Private Laws 1911, authorizes the board of aldermen to lay out districts or sections of streets and sidewalks for permanent improvement and to assess the cost of such improvements as may be just and proper against the abutting property; provided, the persons owning the land abutting on such street or sidewalk or public alley, or the portion thereof to be improved, which is more than one-half of the frontage abutting on such street, sidewalk or public alley, shall in writing request said board to make such improvements. The act authorizes the board of aldermen to pave, without the consent of the property owners and without requiring the property owners to file any petition in connection therewith, certain streets named in the act, which streets traversed a substantial part of the business area of the city of Charlotte, including the main streets leading thereto; and to assess the entire cost of said improvements against the real estate abutting on the street or sidewalk so improved. It may have been this group of citizens and property owners that the proviso was intended to protect. At any rate, we think the limitation is confined to assessments made pursuant to the authority contained in the act itself, and does not limit the city when proceeding under an independent and alternative law enacted for the benefit of all the municipalities of the State.

The defendants insist that the case of *Flowers v. Charlotte,* 195 N. C., 599, 143 S. E., 142, is controlling. We do not think so. In that case the facts disclose that Louise Avenue was paved by the city of Charlotte, under the provisions of its charter in 1913, and the cost assessed 23 October, 1913. The lot in question was located at the northwest corner of Louise and Sunnyside Avenues. Sunnyside Avenue was paved under the provisions of chapter 56, Public Laws of 1915, and the cost assessed on 20 February, 1923. Another part of the proviso in the charter which we have under consideration was construed, to wit: "And where permanent street improvements shall be made the property bearing such assessment shall not be so assessed again until after the expiration of ten years

from the date of the last preceding assessment." This part of the proviso, unlike the one under consideration in the instant case, contains no limitation therein, but is general in its application. The court very properly held the provision binding upon the city of Charlotte, for the original assessment was made under the terms and conditions of its charter and chapter 56, Public Laws of 1915, under which the city acted in 1923, expressly provides, that: "It shall not . . . affect any proceedings under any special or local law, for the making of street, sidewalk or other improvements hereby authorized." The city having proceeded in 1913 under the terms of its charter, was bound thereby. In the instant case it did not so proceed, and plaintiff is not bound by the 20 per cent limitation in its charter.

DEFENDANTS' APPEAL.

The defendants' first exception has been disposed of in the consideration of plaintiff's appeal. The other exceptions of the defendants are without substantial merit, except No. 3, which is to the conclusion of law by his Honor: "That in view of the fact that this action was instituted under North Carolina Consolidated Statutes, section 7990, there is no statute of limitations barring the collection of any installment, even though one of said installments, being installment #2, in the amount of $87.43, with interest thereon, became due and payable more than ten years prior to the institution of the action."

Section 7990 of the Consolidated Statutes of North Carolina has been considered many times by this Court. In most of the decisions where a statute of limitations has been discussed in connection with this section, the action was for the collection of taxes. The decisions of this Court as to whether or not the three-year statute of limitations, the ten-year statute of limitations, or no statute of limitations at all applied, in actions to collect paving or other statutory assessments, have not been uniform.

These defendants plead the three-year and the ten-year statutes of limitations in this action. The defendants contend the three-year statute should apply and cite C. S., 420, as follows: "The limitations prescribed by law apply to civil actions brought in the name of the state, or for its benefit, in the same manner as to actions by or for the benefit of private parties," and *Tillery v. Whiteville Lumber Co.*, 172 N. C., 296, 90 S. E., 196. This statute has been considered by this Court a number of times, see *Furman v. Timberlake*, 93 N. C., 66; *Wilmington v. Cronly*, 122 N. C., 388, 30 S. E., 9; *Hospital v. Fountain*, 129 N. C., 90, 39 S. E., 734; *Threadgill v. Wadesboro*, 170 N. C., 641, 87 S. E., 521; *Tillery v. Lumber Co.*, 172 N. C., 296, 90 S. E., 196; and *Manning v. R. R.*, 188 N. C., 648, 125 S. E., 555. An examination of the above cases will

disclose that the three-year statute of limitations applies to the State, and political subdivisions thereof, in an action brought in the name of the State or for its benefit, or for the benefit of political subdivisions thereof, when the action is not brought in the capacity of its sovereignty. The instant action was brought by the city of Charlotte in its capacity of sovereignty. The case of *Morganton v. Avery*, 179 N. C., 551, 103 S. E., 138, is cited in support of the contention that the three-year statute of limitations applies. The case was decided before the enactment of section 1, chapter 331, of the Public Laws of 1929, and is not now in point.

Judge Clark said in the opinion in the case of *Wilmington v. Cronly, supra:* "The Court refused to permit the collection of unpaid taxes for any year more than ten years before the bringing of this action. This was error, as stated in the opinion in the defendant's appeal. *Jones v. Arrington*, 94 N. C., 541. No statute of limitations runs against the sovereign unless it is expressly named therein. This is immemorial law, based on reasons of public policy, which has been observed by all governments."

The principle laid down and oft repeated in our decisions that "No statute of limitations runs against the sovereign unless it is expressly named therein," is sound, and in the collection of taxes, levied as provided by law, this principle ought not to be abridged or proscribed. To adhere to this principle is an assurance to the citizens of the State who pay their taxes promptly, that they will not be penalized by the wiping out or remitting the taxes, cost and penalties of delinquent taxpayers.

Our Constitution, Art. V, sec. 3, provides: "The power of taxation shall be exercised in a just and equitable manner, and shall never be surrendered, suspended, or contracted away. Taxes on property shall be uniform as to each class of property taxed."

The General Assembly, pursuant to the provisions of the Constitution, has established the procedure for levying and collecting taxes, and when levied "The tax lien shall continue until the taxes, plus interest, penalties and costs, as allowed by law, have been fully paid." Sec. 1704, ch. 310, Public Laws 1939.

When an action is brought by the sovereign under section 7990 to collect a tax duly levied as provided by law, no statute of limitations applies. *New Hanover County v. Whiteman*, 190 N. C., 332, 129 S. E., 808; *Shale Products Co. v. Cement Co.*, 200 N. C., 226, 156 S. E., 777; *Wilkes County v. Forester*, 204 N. C., 163, 167 S. E., 691; *Logan v. Griffith*, 205 N. C., 580, 172 S. E., 348. However, the sovereign may elect to institute an action for the collection of taxes, under procedure such as was formerly authorized in C. S., 8037, and now by chapter 310, Public Laws of 1939, but in such actions the sovereign is required to

comply strictly with the terms of the statute if the remedy is effective. The law is succinctly stated by *Justice Brogden* in *Logan v. Griffith, supra,* as follows: "'Foreclosure' is the process provided for turning the lien into money. Whether such lien be a plain lien arising from the bare purchase at the sale or payment of taxes or such as may be evidenced by a certificate of sale executed by the proper officers, the sovereign may proceed under C. S., 7990, to foreclose the lien, in which event no statute of limitations is applicable. But even if the sovereign elects or chooses to foreclose the sale certificate, C. S., 8037, sets the time clock on eighteen months from the date of the certificate, and after the lapse of that period, the remedy is ineffective."

In considering questions involving the collection of assessments in drainage districts, assessments for local improvements by municipalities and the collection of taxes, apparently no particular effort has been made to distinguish assessments from taxes; this is probably due to the fact that many of the statutes refer to both and make no distinction between them.

Does the ten-year statute of limitations apply to assessments for local improvements, even though the action to enforce the lien is brought under C. S., 7990? As stated heretofore, our decisions are conflicting. The following cases have held that the ten-year statute of limitations does apply. *Schank v. Asheville,* 154 N. C., 40, 40 S. E., 681; *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368; *High Point v. Clinard,* 204 N. C., 149, 167 S. E., 690.

In the case of *Schank v. Asheville, supra,* the Court said: "The assessment and levy by the board of aldermen in this case had the effect of a judgment and lien." A judgment, unless renewed, is barred in ten years.

The case of *Statesville v. Jenkins,* 199 N. C., 159, 154 S. E., 15, construed a charter provision in the following language: "In which case the amounts due shall be and remain a lien on the lot or lots against which they are charged and assessed until fully paid," and held that the charter provision, coupled with the fact that chapter 331, subsection b, of section 1, of the Public Laws of 1929, failed to give a reasonable time to bring an action before said act became effective, made the statute of limitations inapplicable.

In the case of *Asheboro v. Morris et al.,* 212 N. C., 331, 193 S. E., 424, the original defendants did not answer, but the purchaser of the equity, subject to the lien, did file an answer and plead the three-year statute of limitations. Plaintiff's action was brought under C. S., 7990. In the opinion the Court repeated the principle heretofore discussed: "Statutes of limitations never apply to the sovereign, unless expressly named therein," and further stated, "Where the sovereign elects or chooses to proceed under C. S., 7990, no statute of limitations is applicable"; and cites *Logan v. Griffith, supra,* and *New Hanover County v. Whiteman, supra,*

both of which cases involved the collection of taxes. In that case, however, not having been pleaded, the applicability of the ten-year statute was not directly involved and the provisions of sec. 1, ch. 331, Public Laws of 1929, were not called to the attention of the Court. The effect of this statute on former decisions of this Court was not decided.

Since this Court has not heretofore made a distinction between taxes and assessments for local improvements when the action was brought under C. S., 7990, should we draw that distinction now? We think so. Taxes, distinguished from special assessments, are levied on all the persons and property or all the persons and property of a certain class in a particular state, county, city, town or other governmental or territorial division, for the purpose of defraying the public expenses of that governmental or territorial division. Assessments for local improvements are levied on the property specially benefited by a local improvement in proportion to the benefit, for the purpose of defraying the cost of the improvement. 19 R. C. L., Municipal Corporations, sec. 246, p. 947. All actions to collect assessments for local improvements are *in rem* and the sovereign cannot obtain a personal judgment in connection therewith, nor seize the personal property, nor subject other real estate of the owner of property so improved, to the payment of special assessments. The procedure is different in the collection of taxes. The tax list in the hands of the tax collector is equivalent to an execution and the tax collector, in lieu of selling real estate for the collection of taxes due thereon, may seize personal property belonging to the taxpayer and sell same, or so much thereof as may be necessary for the satisfaction of all taxes due by the taxpayer.

The right to levy assessments, in connection with local improvements, is given to municipalities by the General Assembly as a special grant of power, and is not included in their general power to tax. Unquestionably the General Assembly has the right to fix the procedure and prescribe the limitations under which specially granted powers shall be exercised.

Section 1, chapter 331, Public Laws of 1929, provides: "No statute of limitation, whether fixed by law especially referred to in this chapter or otherwise, shall bar the right of the municipality to enforce any remedy provided by law for the collection of unpaid assessments, whether for paving or other benefits, and whether such assessment is made under this chapter or under other general or specific acts, save from and after ten years from default in the payment thereof, or if payable in installments, ten years from the default in the payment of any installments. No penalties prescribed for failure to pay taxes shall apply to special assessments, but they shall bear interest at the rate of six per cent per annum only. In any action to foreclose a special assessment the costs shall be taxed as in any other civil action, and shall include an allowance for the commissioner appointed to make the sale, which shall not be more

than five per cent of the amount for which the land is sold, and one reasonable attorney's fee for the plaintiff. This section shall apply to all special assessments heretofore or hereafter levied, but shall not apply to any special assessment for the collection of which an action or proceeding has heretofore been instituted."

Here the municipalities, the sovereigns, are expressly named in the statute of limitations, and we think the General Assembly intended to bar all assessments for local improvements after ten years from default in the payment thereof, or, if payable in installments, in ten years from default of any installments, and we hold that the ten-year statute of limitations is applicable to assessments for local improvements and that the same are barred from and after ten years from default in the payment thereof, or, if payable in installments, ten years from default in the payment of each installment, unless the time for payment has been extended as provided by law.

The defendants' third exception is sustained, this cause is remanded and judgment will be entered in conformity with this opinion.

Plaintiff's appeal

Reversed.

Defendants' appeal

Error and remanded.

CAROLINA ANILINE & EXTRACT COMPANY, INC., v. W. W. RAY, TRADING AND DOING BUSINESS AS RAY CHEMICAL COMPANY.

(Filed 6 May, 1942.)

1. Unfair Competition § 1—

What constitutes fair and unfair competition cannot be defined by inflexible rule, but each case must be determined upon its particular facts to ascertain whether the acts complained of would likely deceive the public.

2. Same—

A party advertising that his products are identical with, or possess all the properties of, the products of a competitor, is guilty of unfair competition if his statements are untrue.

3. Same—

A party may be guilty of unfair competition, even though his trade name is not an infringement on the trade name of a competitor, and even though his product is equal or superior to the product of his competitor, if he takes advantage of the good will and business reputation of his competitor by unfair means.

4. Same—Evidence held for jury on question of whether defendant was guilty of unfair competition.

Plaintiff sold its plant to defendant, purchased new equipment and continued its business from another location. Thereafter, defendant wrote circular letters to plaintiff's customers stating that defendant was manufacturing products identical with plaintiff's products, and listing the trade names and prices of plaintiff's goods along with his own corresponding trade names, which were somewhat similar, and quoted lower prices. There was evidence that the products of plaintiff and defendant were not identical and that defendant's manufacturing equipment was open and not modern, while plaintiff's equipment was new, modern and enclosed. *Held:* In plaintiff's suit for injunction, the evidence should have been submitted to the jury to determine whether the goods of the parties were not identical, or whether defendant made use of plaintiff's good will and reputation, or of plaintiff's trade names to sell identical or even superior products, in either of which events plaintiff would be entitled to relief.

APPEAL from *Blackstock, Special Judge,* at November Term, 1941, of MECKLENBURG.

Civil action to recover damages and to restrain the defendant from engaging in unfair competition, in which a temporary restraining order was granted.

Prior to 27 February, 1941, the plaintiff was manufacturing and distributing certain chemical products. Pursuant to an agreement, dated 25 February, 1941, G. S. McCarty, N. G. Sixt, E. B. Wheeler, T. J. Marler and F. A. Tomalino obtained all the capital stock of the plaintiff and the plaintiff sold to the defendant all its real estate, equipment and the right to use all formulas then owned by the plaintiff except two.

On 27 February, 1941, plaintiff and defendant entered into an agreement under the terms of which defendant should manufacture, furnish and deliver to the plaintiff, at any time within sixty days from the date of the agreement, any of the products which were being offered for sale by plaintiff at the time of the agreement, such products to be manufactured or compounded according to formulas being used on 27 February, 1941, by the plaintiff. Plaintiff purchased new equipment and continued its business at another location.

The evidence discloses that from about 20 May to 26 May, 1941, the defendant wrote 29 letters to plaintiff's customers which, except for the materials described, were in the following form:

"May 21, 1941.

"LIBERTY HOSIERY MILLS, INC.,
LYERLY, GA.

"GENTLEMEN: March 1st, we purchased the plant, manufacturing equipment, and inventory of the Carolina Aniline & Extract Company. Since that time, we have been manufacturing for them, but their contract with us expired April 27, 1941.

"From now on we will try to get as much of the business as possible. We will manufacture identically the same products under our own trade names. We wish to quote below as follows:

Their Products	*Our Products*	*Their Price*	*Our Price*
Carosolv CL	Raycosolv CL	.10 lb Del.	.09 lb. Del.
Carocen K.Spec.	Raycopen K	.20 lb Del.	.18 lb. Del.

"We can assure you of uniform quality and immediate delivery, as our plant personnel has been kept intact and our raw material inventory has been doubled.

"If you are interested in cutting your processing costs, let us ship you a half drum of Raycosolv CL and a can of Raycopen K. If our material does not prove satisfactory in every respect, ship it back collect and we will cancel the invoice.

Yours very truly,
(Signed) HARRY H. SIMS
HARRY H. SIMS,
Ray Chemical Company."

Plaintiff alleges that the letters were false, deceptive and intended to deceive and did deceive plaintiff's customers and has caused the plaintiff great damage, both in loss of business and good will.

Plaintiff further alleges and offers evidence tending to show that when the defendant wrote the 29 letters to plaintiff's customers, the products which were being manufactured by the defendant were not identically the same products as those then being manufactured by the plaintiff, and that in the letters the defendant listed 26 of plaintiff's products which the defendant had never manufactured for the plaintiff.

Plaintiff alleges and offered evidence tending to prove that the equipment used by defendant was open and not modern, that plaintiff has new, modern, enclosed equipment and that in manufacturing its products, even when using the formulas previously used in the open equipment, that by reason of the different method and process used, a superior product is obtained; and offered evidence tending to show that in May, 1941, all the formulas, except one or two, used by plaintiff had been changed and were not the same as the formulas used by defendant at the time defendant was making products for plaintiff. Plaintiff also alleges that the trade names used by defendant are a corruption of plaintiff's trade names and confuse the public and the customers of plaintiff.

At the conclusion of plaintiff's evidence the defendant moved for judgment of nonsuit; motion was granted and judgment entered accordingly and the temporary restraining order dissolved. Plaintiff excepted and appealed to the Supreme Court and assigned error.

Carswell & Ervin for plaintiff.
Edward J. Hanson and Frank H. Kennedy for defendant.

DENNY, J. The question presented for our consideration is whether or not the court erred in granting defendant's motion for judgment as of nonsuit. We think the evidence, when construed in the light most favorable to the plaintiff, is sufficient to carry the case to the jury.

"Competition in trade is entirely proper and universal and a person has a right by fair and honest methods to extend his business into the vicinity of another, no matter what the effect on the business of the other, and a competitor will not be enjoined from a course of business causing injury only such as might result from keen competition, and any loss or damage caused by the mere use of words or marks which are *publici juris* in their primary sense is *damnum absque injuria* for which no action lies." 63 C. J., page 413, sec. 110.

It is often very difficult to draw a distinction between fair and unfair competition. "No inflexible rule can be laid down as to what conduct will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is a question of fact. . . . The universal test question is whether the public is likely to be deceived." 63 C. J., p. 414, sec. 112. This same authority further states, in the following sections: 109, p. 413: "Although plaintiff has no exclusive right in the goods themselves, such as a patent or a copyright, he may nevertheless enjoin defendant from representing either expressly or by deceptive artifice that his different article is the same as plaintiff's article." Sec. 111, p. 413: "It is immaterial, so far as plaintiff's right to relief is concerned, that defendant's goods are of equal or superior intrinsic merit as defendant has no right to make use of plaintiff's good will and reputation, or of plaintiff's advertising, to sell even a superior article, such conduct injuring plaintiff by depriving him of sales which he otherwise would have made." Sec. 113, p. 462: "The sending of false and misleading circulars, which would take away another's business by unfair means and deceive the public, will be enjoined. A person may freely advertise, where such is the fact, that his article possesses all the qualities of one made by a prior manufacturer, without being guilty of unfair competition."

It will be noted that in order to escape liability for unfair competition, statements made for the purpose of inducing a competitor's customers to purchase the advertiser's products by making the express statement that his products possess all the qualities of the products of another, the statement must be true, or the injured party will be entitled to relief.

In the case of *Vortex Mfg. Co. v. Ply-Rite Contracting Co.*, 33 Fed. (2d), 302, the Court held that while the defendant was infringing a patent, that the use of the trade name "Ply-Rite" by defendant was not

an infringement of plaintiff's trade-mark "Par-Lock," but that the manner in which defendant used these names was unfair competition. The Court said: "In support of its contention that defendants' practices have been unfair, plaintiff showed instances of defendants having gone to the contractor on a particular piece of work after the architect had specified 'Par-Lock,' and having arranged to have Ply-Rite substituted; or having gone to the very customers of the plaintiff and underbid the plaintiff on the particular job, with the result that plaintiff was compelled to reduce its price in order to obtain the contract; and of claiming orally and in writing that their material was fully equal to Par-Lock. There is, however, no proof that in any of these alleged instances did defendant actually attempt to palm off their product as that of the plaintiff, or did they ever induce the actual breach of a contract. However, these are only two of the various practices that are actionable as unfair competition. Today the law of unfair competition is plastic. The test is simple, and lies in the answer to the question: Has the plaintiff's legitimate business been damaged through acts of the defendants which a court of equity would consider unfair? The court feels that the evidence requires an affirmative answer to this question. Through the peculiarly intimate knowledge which defendants had acquired of plaintiff's process, they were able to make serious inroads upon plaintiff's business, and the manner in which they did it was not without its element of unfairness. Intent is a vital element in questions of this kind. Defendants knew that they used a cheaper grade of asphalt in their bond material than did plaintiff. By reason of this fact defendants could, and had a legal right to, quote a cheaper price, but they did not have a right in so doing to state, as they did, that their material and process was fully equal to that of Par-Lock, whose process they were in the act of infringing."

In the case of *Anheuser-Busch v. Budweiser Malt Products Corp.*, 287 Fed., p. 243, the Court said: "The fundamental question in cases of trade-mark or unfair competition—and 'in fact the common law of trade-marks is but a part of the broader law of unfair competition' (*Hanover Milling Co. v. Metcalf, supra*—240 U. S., 403)—is whether the public is being misled and deceived so that a defendant is in effect taking the advantage of the good will and business reputation that a complainant has built up through service or advertising or in any manner regarded as lawful and proper."

In the case of *Krueger v. Lundeen et als.*, 211 Ill. App., 320, defendants, former employees in the dental office of plaintiff for several years, opened up a dental office of their own across the street from their former employer, and contacted patients of their former employer and made representations to influence them to visit defendants and have their future dental work done by them. The Court said: "They were entitled to make every legitimate effort to further their own welfare and increase

their professional success and profit. Of course, in such a case as this, it is not the motive of the appellants that is important, as 'a wrongful motive cannot convert a legal act into an illegal one.' Nims on Unfair Competition, etc., p. 333. It is conduct which unfairly deprives another of that which belongs to him that is condemned and which gives the Court jurisdiction and justifies the injunction. The law does not allow ex-employees to make representations concerning and give out information about their former employer's business for the double purpose, first, of seducing patients from going back to the place of business of their former employer, and, second, of obtaining their former employer's customers and pecuniarily profiting thereby."

Unfair competition is not confined to the palming off by one competitor of his goods as the goods of another. The same wrongful result may be brought about by other means or practices. *International News Service v. Associated Press,* 63 U. S., L. Ed., 211, 300 Fed., 509. "Unfair competition in trade is not confined to the imitation of a trade-mark, but takes as many forms as the ingenuity of man can devise." *Benj. T. Crump Co. v. J. L. Lindsay, Inc.,* 130 Va., 144, 107 S. E., 679.

We do not wish to discuss the evidence in this case in detail. However, the defendant in his various letters to plaintiff's customers did state, "We will manufacture identically the same products under our own trade names," and then proceeded to list the name and price of plaintiff's goods along with his own goods and quoted a lower price. If the goods were not identical, the method pursued by the defendant constitutes unfair competition. The determination of that question is one for the jury.

Likewise, the jury may consider the evidence and determine whether or not the defendant made use of the plaintiff's good will and reputation, or of plaintiff's trade names, to sell an identical or even a superior product, thereby injuring plaintiff by depriving it of sales which it otherwise would have made.

The judgment of the court below is

Reversed.

J. H. HENLEY v. FLOYD H. HOLT ET AL.

(Filed 6 May, 1942.)

1. Trusts § 18c—

A party seeking to engraft a parol trust upon the legal title has, in accordance with the general rule as to the intensity of proof necessary to obtain relief against the apparent force and effect of a written instrument, the burden of establishing his alleged parol trust by evidence clear, strong and convincing.

2. Same—In action to engraft parol trust on deed from third person to defendant, the deed itself does not create presumption against plaintiff.

Plaintiff trustor alleged that he permitted the deed of trust to be foreclosed pursuant to an agreement with defendant that defendant would purchase at the sale, apply the value of the crops raised on the land to the debt, and reconvey to plaintiff when the debt was discharged. *Held:* An instruction to the effect that the jury might consider the "inadvertence" in failing to have a declaration of the trust inserted in the deed from the trustee to defendant, or in some written memorandum, and that the deed itself created a presumption against the existence of the trust, which plaintiff had the burden of overcoming by evidence clear, strong and convincing, places too heavy a burden upon plaintiff and entitles him to a new trial.

BARNHILL, J., dissenting.

DEVIN, J., joins in dissenting opinion.

APPEAL by plaintiff from *Johnson, Special Judge,* at September Term, 1941, of LEE.

Civil action to establish a parol trust in lands, tried upon the following issues:

"1. Did the defendants, Floyd H. Holt and wife, Mary Elizabeth Holt, take title to the lands in controversy impressed with a trust in favor of the plaintiff, as alleged in the complaint? Ans.: 'No.'

"2. If so, is the plaintiff estopped to assert the said trust, as alleged in the answer? ....."

From judgment on verdict, the plaintiff appeals, assigning errors.

K. R. Hoyle for plaintiff, appellant.

D. B. Teague and Varser, McIntyre & Henry for defendants, appellees.

STACY, C. J. This is the same case that was before us on plaintiff's appeal at the Fall Term, 1938, reported in 214 N. C., 384, 199 S. E., 383, where the facts are set out and to which reference may be had to avoid repetition.

The trial court properly instructed the jury that the plaintiff was required to establish the parol trust, upon which he relies, by evidence clear, strong and convincing. *Wilson v. Williams,* 215 N. C., 407, 2 S. E. (2d), 19; *Peterson v. Taylor,* 203 N. C., 673, 166 S. E., 800; *Gillespie v. Gillespie,* 187 N. C., 40, 120 S. E., 822; *Cunningham v. Long,* 186 N. C., 526, 120 S. E., 81; *Williams v. Honeycutt,* 176 N. C., 102, 96 S. E., 730; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; *Harding v. Long,* 103 N. C., 1, 9 S. E., 445; *Ely v. Early,* 94 N. C., 1. The general rule is, that in civil matters the burden of proof is usually carried by a preponderance of the evidence, or by its greater weight. In a number of cases, however, 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 on 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 on the ground of mutual mistake, or other similar cause, the evidence must be clear, strong and convincing. *Waste Co. v. Henderson Bros.*, 220 N. C., 438; *Williams v. B. & L. Asso.*, 207 N. C., 362, 177 S. E., 176; *Speas v. Bank*, 188 N. C., 524, 125 S. E., 398; *Montgomery v. Lewis*, 187 N. C., 577, 122 S. E., 374. So, here, the plaintiff has the laboring oar to establish the parol trust by evidence clear, strong and convincing.

In this connection, the jury's attention was directed to the following considerations:

1. "The security of land titles requires the adoption of this rule of evidence and it cannot be said to impose an undue hardship upon him who alleges the existence of the trust who by his own inadvertence has failed to have the declaration inserted in the deed or in some written memorandum so as to be able to furnish indisputable evidence."

2. "In passing upon the existence or non-existence of such agreement (the oral agreement set out in the complaint) . . . you have a right to consider that the deed does not contain any reference to the plaintiff Henley and does not contain any stipulation providing for his interest . . . that such deed is itself constructive notice. . . . You have a right to consider such registration as notice, together with the defendant's contention that if the plaintiff had considered himself the beneficiary of any such agreement he would have immediately inquired of Holt why the deed did not contain any reference to his contention that there was an agreement to hold the land for him," etc.

3. "In arriving at your verdict on the first issue, . . . and in considering whether or not such contract was subsisting, that is, outstanding, when the deed was made to Holt and wife, . . . you may consider . . . for whatever probative force it may have, the negotiations prior to foreclosure . . . whether the lines and boundaries were or were not definitely established . . . whether he abandoned his efforts to redeem and assented that the land should be sold," etc.

It thus appears that the failure to protest because the deed contained no reference to the oral agreement was used as a circumstance against the plaintiff, as was also the suggestion that the lines and boundaries had not been definitely established. And the failure to have the declaration inserted in the deed or in some written memorandum was characterized as an inadvertence. This, it would seem, was calculated to give the jury an erroneous impression of the plaintiff's position and of his rights. *Jones v. Waldroup*, 217 N. C., 178, 7 S. E. (2d), 366; *Hare v. Weil*, 213 N. C., 484, 196 S. E., 869.

The court also instructed the jury that as the deed from the land bank to Holt and wife was regular in form and contained no declaration of trust in favor of the plaintiff, "a presumption of fact arises by operation of law against the existence of a trust—where one holds title to property he is presumed to be the absolute owner"—and the plaintiff here has "the burden of overcoming this presumption and establishing the trust . . . by evidence that is clear, strong and convincing." This, taken in connection with the other quoted portions of the charge, presents a situation close akin to that appearing in the case of *Jones v. Waldroup, supra*, where it was said "the jury may have been led to believe that it was incumbent upon the plaintiff to overcome the evidence of the defendant as to her affirmative plea by preponderating proof without regard to any burden in that respect which the law of evidence placed upon the defendant." A similar observation may be made here. To characterize the failure to have the declaration of trust inserted in the deed, or in some written memorandum, as an inadvertence, and to say that the deed itself created a presumption against the existence of a trust, which the plaintiff was required to overcome by evidence clear, strong and convincing, was perhaps to disadvantage the plaintiff in his effort to establish the alleged trust by the requisite intensity of proof. Hence, considered in their entirety and contextually, it appears that the above instructions may have weighed too heavily against the plaintiff.

The defendants do not plead waiver or abandonment. *Aiken v. Ins. Co.*, 173 N. C., 400, 92 S. E., 184. Their plea of estoppel *in pais* relates to the alleged conduct of the plaintiff in allowing them to place valuable improvements on the land with the thought that the plaintiff had no further interest in the matter. *Wolfe v. Land Bank*, 219 N. C., 313, 13 S. E. (2d), 533.

A careful perusal of the record engenders the conclusion that the plaintiff is entitled to a new trial. It is so ordered.

New trial.

BARNHILL, J., dissenting: The plaintiff's cause has been twice submitted to a jury. Each jury has rejected his claim. In my opinion such error as appears in the record is not of sufficient materiality as to require that he be awarded a third trial. Hence, I vote for an affirmance.

DEVIN, J., joins in this opinion.

FRED CARTER, BY HIS NEXT FRIEND, F. O. CARTER, v. WAYNE BAILEY.

(Filed 6 May, 1942.)

Automobiles § 19—

Ordinarily, a gratuitous passenger is not entitled to recover for injuries sustained while attempting to get on the moving vehicle.

APPEAL by plaintiff from *Bone, J.*, at November Term, 1941, of COLUMBUS.

Civil action to recover for personal injuries allegedly received by plaintiff while in act of boarding a moving truck of defendant resulting from actionable negligence of employee of defendant. Defendant denies (1) authority of his employee to invite plaintiff to ride, and (2) negligence of his employee in operation of truck, and pleads contributory negligence of plaintiff.

From judgment as of nonsuit at close of all the evidence plaintiff appeals to Supreme Court and assigns error.

E. M. Toon and Varser, McIntyre & Henry for plaintiff, appellant.
A. B. Brady and Tucker & Proctor for defendant, appellee.

PER CURIAM. If it should be conceded that there is evidence of negligence, and of authority of the employee of defendant, *Hayes v. Creamery Co.*, 195 N. C., 113, 141 S. E., 340, plaintiff, by his own testimony, brings himself within the general applicable rule that passengers who are injured while attempting to get on or off a moving train cannot recover for injury. *Browne v. R. R.*, 108 N. C., 34, 12 S. E., 958; *Carter v. R. R.*, 165 N. C., 244, 81 S. E., 321; *Stamey v. R. R.*, 208 N. C., 668, 182 S. E., 130; *Wingate v. R. R.*, 220 N. C., 251, 17 S. E. (2d), 6.

Affirmed.

STATE v. WALTER SMITH.

(Filed 20 May, 1942.)

1. Criminal Law § 38b: Homicide § 23—

Where witnesses testify as to the accuracy of a diagram of the scene of the homicide, showing the location of natural objects and the position of witnesses and actors in the scene, the admission of the diagram in evidence for the purpose of illustrating or explaining the testimony of the witnesses

is not error, and objections thereto on the ground that the diagram was not made by the witnesses and that its admission was not properly restricted are untenable.

2. Criminal Law § 31g—

The competency of a witness to testify as an expert is not dependent upon which of the learned professions the witness is a member, but upon his skill in the matter at issue, which is a question of fact for the court, and its finding will not be disturbed when there is evidence to support it and there is no abuse of discretion.

3. Criminal Law § 81c: Homicide § 30—

Where, in a homicide prosecution, the cause of deceased's death is not seriously controverted, and there is competent medical expert testimony, upon proper hypothetical question, and nonexpert testimony, unobjected to, that deceased bled to death from a gunshot wound, the admission of testimony by a licensed embalmer, based upon his examination of the body of deceased, that deceased bled to death from the wound, cannot be held prejudicial.

4. Homicide §§ 3, 27c—

A charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held correct, since "aforethought" as so used does not connote premeditation and deliberation but the pre-existence of malice. C. S., 4200.

5. Criminal Law § 53h—

The charge of the court must be construed contextually.

6. Criminal Law § 81c: Homicide § 30—

A charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held for prejudicial error when in other portions of the charge the court repeatedly instructs the jury that defendant could not be found guilty of murder in the first degree without the jury's finding from the evidence beyond a reasonable doubt that the killing was done with premeditation and deliberation.

7. Homicide § 7a—

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

8. Homicide § 5—

Murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation, and is presumed from an intentional killing with a deadly weapon.

9. Homicide § 3—

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation, or in the perpetration of, or attempt to perpetrate, a felony.

10. Homicide § 10—

While the defense of intoxication to such a degree as to render defendant incapable of premeditation and deliberation need not be supported by separate plea, defendant should bring to the court's attention in some appropriate way his intention to rely on the defense.

11. Same—

The court's instruction upon the defense of intoxication rendering defendant incapable of premeditation and deliberation *held* not prejudicial to defendant, certainly in view of the fact that defendant failed to bring to the court's attention his intention to rely on this defense, and the fact that, while there was testimony that defendant had been drinking, there was no evidence that defendant was drunk.

12. Homicide §§ 27h, 30—

When in a prosecution for murder there is no evidence tending to establish the less degree of manslaughter, any instruction with regard to manslaughter is harmless, and defendant's exception to the charge upon the burden of overcoming the presumption of malice arising from the unlawful killing with a deadly weapon, is untenable.

13. Criminal Law § 81c—

A new trial will be awarded only for error which is prejudicial.

14. Homicide § 25—

Evidence of defendant's guilt of murder in the first degree *held* sufficient to overrule his motion to nonsuit.

APPEAL by defendant from *Harris, J.*, at January Criminal Term, 1942, of WAYNE. No error.

By proper indictment, the defendant was charged with the murder of Alfonzo Price, and thereupon at the January Criminal Term, 1942, of the Superior Court of Wayne County was convicted of murder in the first degree and sentenced to death.

The proceedings on the trial pertinent to this appeal may be summarized as follows:

Mrs. Gladys Price, widow of Alfonzo Price, testified that she lived about five miles from Goldsboro on the lands of Mrs. Thomas O'Berry, and had been living there with her husband and children for five years. The home is located on the east side of the Dudley Road, facing west.

She was at home on the night of 24 November, 1941, with her husband, who was then forty-six years old.

Witness had known Walter Smith for about four years. He came to the home on 24 November about 1:30 o'clock, carrying a shotgun, and stated that he was going rabbit hunting. Witness and a Mr. Holland were working on a brooder house. Smith called to Mr. Holland and said, "I am going rabbit hunting. I like rabbit." He came to the brooder house and sat down and kept talking about rabbit hunting, saying he liked rabbit and was going to kill him a rabbit.

Mr. Holland asked Smith if his gun was loaded, and Smith said, "Yes, his damn gun stayed loaded." He left after awhile, going down the road and entering his house.

Witness did not see him any more until he came to the Price house on the night of the homicide. At that time, witness was sitting with her husband near the fireplace, putting Ammonia-mercury on his sore hand. Smith hailed from the outside, and witness recognized his voice. Her little girl went to the door and Smith asked if her father was at home, and she told him "Yes." When the father had been told that Smith wanted to see him, he sent the little girl back and asked Smith to come in, which Smith declined to do, saying that he did not have time—just wanted to speak to Price.

Witness' husband then walked out into the yard, when Smith began to curse him and tell him that he had come to kill him; that he had "took every damn thing off him that he ever intended to take off him."

Witness immediately got up to go to the porch where they were, and she was in a step of the porch when the gun fired. When she came into view, her husband was standing at the corner of the porch, and Smith was standing about two steps off.

When Smith told her husband he was going to kill him, Price said to him, "Mr. Smith, please don't kill me." He said, "Please don't shoot me." Smith replied that he had come to kill him and that he wasn't going to take anything else off him. I stepped out on the porch and asked what was the trouble, and her husband told witness, "He shot my leg off." Smith was standing right where he shot him. He then backed off about three steps, blew the powder out of his gun and reloaded it.

Price was standing with his back toward Smith, holding his hands up, saying nothing. Witness went back into the house to get a lamp and when she returned, Smith was behind the oak tree. He stepped out from behind the tree, turned his gun upon witness, and told her not to come out, that it was nothing concerning her. Her husband was hollering and went on hollering. Smith turned his gun upon Price and told him not to holler again, that he would shoot his damn brains out. Price staggered from the porch to the tree, hopped or staggered. Witness could not tell how, since his leg was "shot clean off." The tree was nine or ten feet from the porch. Witness carried the lamp and set it down, and by the time she got it on the ground, her husband was leaning against the tree, standing on one leg, holding his hands up.

Her husband was beginning to fall, and fell over the tree roots. She reached to assist him, but Mr. Smith walked around the tree, threw the gun on her and told her not to put her hands on him. She told Smith not to tell her what to do, that she was doing everything she could for her husband, and asked him to please go home. He stood there a few moments, turned around and went down the road towards home.

Witness got something to cord the leg with and while doing so, found that it was shot off about the knee, about four or five inches below the

knee. "The front of his leg was just holding his foot. My husband had bled to death by the time Mr. Smith left there."

Witness stated that it looked like a bucket full of blood had been taken and poured around the tree where her husband was shot, and that he did not bleed any after he had fallen down. The blood extended from one-fourth to one-third around the tree where he staggered. Smith stayed about five minutes after he fired the gun. He was smoking a pipe at the time he shot him, and continued to smoke when he drew the gun on him the last time.

Smith appeared like he always had. He walked straight on down towards home, holding his gun to his side. He walked normally.

Witness stated that her four youngest children, herself and her husband were at home when Smith first came, but that after the father was shot, all four of the children left home, running back through the house to the next house, where the oldest daughter lived. She called to the children to come back and help as she tried to cord the leg. The oldest daughter came and the children went after Mr. Jones and Mr. Holland to tell them to come at once. Several of the neighbors came in a short while. By the time Holland got there, they had picked up Price and put him on the front porch, and when Mr. Holland came, they put him in the back seat of the car and carried him to the hospital at Goldsboro. "My husband died. I think he was dead before we put him in the car."

Previous to this time, Price was in good health; he was overseer at the O'Berry farm, and rented directly from Mr. O'Berry.

Witness knew of no dispute between Mr. Smith and her husband, except that one day Smith came by and told Price that he wanted help to dig potatoes—a mule and wagon and a man. Price told him he was sorry but he did not have anybody but himself, Bernice Jones and witness. He had to send barley to town by his son, and told Smith that as soon as the boy came back with the wagon, he would have the boy help to dig the potatoes. After Price got the barley off, Smith turned and said, "Well, I have done told you," and left.

After Smith left, Price told Bernice and his wife to go and help him, and they went where Mr. Smith was digging potatoes, and he said that he had help enough, such as witness was. Price then went across the field to help him. Mr. Smith told witness that he was not going to have anything else to do with her husband; that he had never been to him lately for accommodation but that he snapped him up.

Her husband's wound was examined by a doctor at the hospital, and the doctor pronounced him dead.

Witness then described the home and location of windows, porch and tree in the yard, and illustrated the location of various objects by the use of a diagram, to which she referred, and testified as to the accuracy of this diagram.

The defendant made sundry objections to the use of the diagram and the various references which the witness made thereto. These objections were overruled, and defendant excepted.

Mrs. J. S. Holland, witness for the State, testified, in substance, that she had known both Smith and Price and lived in the same vicinity; that she was sent for and went to the home of Mr. Price on 24 November, about 2:00 o'clock. On the way back in the afternoon, she stopped at the Smith house and saw Smith, who was sitting in the kitchen with his wife. Smith told witness it was a damn good thing she had come, because he was just about to wring the old woman's neck. After a little talk, Smith said, "I want you to look at the sun." He asked his wife what time it was, and she said it was 20 minutes past 4, and Smith said, "Well, in less than a year I will be electrocuted." Witness said, "Mr. Smith, you don't know what you are talking about," and he said, "Yes, I do." About five o'clock Smith came out and went to the barn for some corn to feed his hogs. He said, "I am going to feed these hogs the last damn time I ever intend to feed them." Witness saw Smith again the night of the homicide about six o'clock. He was with witness' husband on a car and conversed quite a bit. Witness thought he had had a drink. After he had shot Price, Smith came back and called Holland, witness' husband, and witness went to the door. Smith wanted Holland, and said, "I have shot Mr. Price and I want to see Mr. Holland." Said he had shot Price in the foot or leg, or somewhere, and added, "I should have shot him in the stomach or in the head; I should have shot him six months ago." Smith said, "I ought to have shot the black livered s. o. b. a long time ago." Smith wanted Holland to take him to town, but Holland declined, saying, "No, I am going to take Alfonzo, if you shot him, he needs help," and Mr. Smith said, "Well, I will walk."

Witness said that she went to get somebody to take Smith to town. When she got to the Price home, she saw blood at the tree, blood on the porch and doorsteps, blood everywhere he had bled, and where they had laid him on the porch, doorsteps and at the tree. Blood was around the roots of the tree on the side next to the house.

The last time she saw Smith at her home, she thought he was drinking a little.

J. S. Holland, witness for the State, testified that on 24 November, Smith came by Price's home, where witness was building a brooder, carrying a gun, stating that he liked rabbits and would like to have a young rabbit. Asked if his gun was loaded, he replied, "Yes, he never toted an unloaded gun." Witness said Smith looked like he may have had a drink or a nap, his eyes were red, but did not think he was under the influence of intoxicating beverage.

After witness had taken Smith home, he next saw him after the latter had shot Price—about eight o'clock. Smith came and called for witness. The Price children had come before that and told witness what had been done. When invited in, Smith said that he did not have time, that he had shot Mr. Price, "a black livered s. o. b. I ought to have killed him six months ago, and I want you to take me to town where I can get a doctor," and witness replied, "No, if you have shot Price, I will go to him first." Then Smith said, "Well, I will go on," and went toward town walking.

Witness told his wife to go to Mr. Mozingo's and tell Roy to take Smith to town and witness would take Alfonzo.

When witness got to Price's home, he was on the front porch, unconscious—there was much blood, some on the doorsteps and some on the porch, and all around the roots of the tree on the side next to the porch. He carried Price to the hospital. After the doctor had observed the body, it was taken to the funeral home. Witness left him at the hospital.

Smith had come to the Holland home on the preceding Sunday morning, driving his mule and buggy. Holland had borrowed some knives to butcher hogs with, and had two butcher knives and did not know whose they were, whether Mozingo's or Smith's. Mrs. Holland brought these knives out, and Smith said, "You will have to take the mule. I would not even attempt to meet a woman with two butcher knives." He appeared to have had a drink, but was not drunk. The knives were put in the buggy, and Smith insisted on Holland going home with him. On this occasion, Smith said that he would not be a free man by Christmas. Witness replied, "Mr. Walter, you don't know what you are talking about. You must have had one drink too many," and Smith said, "No, watch what I tell you, and see if I am not telling the truth." Smith told Holland that he would like to go to town with him Monday morning, and when Holland stopped by Monday morning, he found Smith feeding hogs; but finding that Mr. Price was going to town with Holland, Smith declined to go.

William Crumpler, a witness for the State, testified that on 24 November, he was living with the witness Holland on Mr. Thomas O'Berry's farm; that he saw Smith between Price's house and Smith's own home. Smith had a shotgun, and stopped. Witness asked, "Where in the world have you started with that shotgun?" and Smith replied, "I have started rabbit hunting, bird hunting, squirrel hunting, anything that I see to shoot, I am going to kill." Smith then asked who was at Mr. Price's, and was told that Mr. Holland was up there working on a brooder house, and Smith went on toward Price's. Witness saw Smith later feeding hogs and noticed some corn lying outside of the pen, and witness said to him, "Here is some corn you are wasting, lying out here in the road,"

and witness threw it into the pasture. Smith replied, "I don't care, I don't expect to feed the damn hogs any more anyhow." Witness saw Smith no more that day, but that night he heard the children hollering and saying, "Papa was shot"; so witness went to the house. When he got there they had laid Mr. Price on the porch and all around it looked like you had butchered two or three hogs, around the tree roots. Price was lying on the front porch.

On cross-examination, the witness stated that he had not got close enough to tell whether Smith was drunk; that Smith had drunk occasionally, and once in awhile would get under the influence. When he had seen him under the influence of whiskey, witness was just passing the road and Smith was hollering at his mule. He was drinking pretty heavy the way he acted.

Lena Mae Price, daughter of Alfonzo Price, testified that she was living with her father and mother at the date of the homicide, but was at the home of Bernice Jones. She went home upon being informed that her father was shot, and then went after Mr. Holland. While she was at the latter place, Smith came up and stated that he had shot Price and wanted Holland to take him to town. "He was cursing my father when he was there. Said he should have killed him six months ago and called him a black livered s. o. b."

When Smith asked Holland to take him to town and Holland had told him he would deal with him later, witness got in the car and went home.

When Holland arrived at the Price home, witness' father was lying on the front porch. They put him in the car and took him to the hospital. "There was blood on the roots of the tree towards the porch, and blood on the edge of the porch and on the doorsteps." Witness did not know of any previous trouble between them.

Isaac Jones, a witness for the State, testified that he lived on the O'Berry farm, and that about the middle of November, he heard Walter Smith say he was not going to have any more dealings with Mr. Price, because he felt like if he did there would be trouble. Witness stated on cross-examination that he had seen Smith when he was drinking—"in bad shape lots of times."

A. P. Precise, a deputy sheriff, witness for the State, testified as to finding Smith standing in the road, both hands up, with his hat in one hand, asking if witness would carry him to the sheriff's office. Precise asked Smith what reason he had for shooting Price, and Smith replied that he "shot him because he wanted to." On cross-examination, witness stated that Smith talked all right, except that he acted a little nervous. "I think Mr. Smith had had a drink; I think he was sober."

After witness brought Smith to town, he went back to the Smith home and found the gun, loaded, in the bedroom behind the door. It was a

single barrel shotgun, twelve gauge. Witness found an empty shell where the shooting took place.

Witness corroborated Mrs. Price as to the position of the parties when her husband was shot.

Carl Motley testified that he was a licensed embalmer, and had been for seventeen years, having taken a regular, prescribed course in embalming and attending an embalming school for one year. The court held that he was an expert embalmer. This witness proceeded to testify that Alfonzo Price had been brought to his funeral home; that he examined the body and prepared it for burial, and made an examination of it. It was covered with blood, and he had to clean it up before it was put in a casket. The witness stated that he had observed the wound and that it looked like he had been shot at close range, "the leg was broken and the skin was holding it. There was a lot of blood on it."

In his testimony, the witness stated that he had studied "the blood track of the human body," which was necessary to his profession; that he was not a physician and had never studied medicine.

Over the objection of the defendant, he was permitted to say that he had an opinion satisfactory to himself as to the cause of the death of Price; that the arteries were torn in two and there were no major arteries left there at all. He stated that, in his opinion, the deceased had bled to death from the wound in the leg. Exception was made to this testimony.

J. A. Whitley, deputy sheriff and witness for the State, testified that he saw the defendant at the jailhouse after having been brought there in the custody of A. P. Precise, deputy sheriff; that he had been informed of the homicide, but at the time did not know that Price was dead. That Smith freely and voluntarily proceeded to tell him about it. Whitley said, "Walter, what in the world is the matter," and Smith replied, "I shot a man." Smith got out and came in the jail. He stated to the witness that he shot Price and said he ought to have killed him six months ago; that he had started to shoot him right in the face, but did not, but said he wished he had. Witness said, "What in the world did you shoot him for?" and Smith stated that Price had borrowed some harness from him and had returned it in bad shape. He stated that "when Price came out, it made him so mad he could not help but shoot him." He asked that the sheriff be called so he might give bond. Witness stated that he could tell Smith had been drinking some, but that he would not call him a drunk man. That was between 8:30 and 9:00 o'clock. On cross-examination, he repeated that Smith had been drinking, but that he would not call him a drunk man. He walked all right and he talked all right.

Dr. H. D. Rose, a witness for the State, was qualified as a practicing physician, and gave his opinion, upon the hypothetical question embody-

ing the principal features of the evidence, that Price had died as a result of a gunshot wound in the leg.

The shotgun, empty shell and shell found in the gun in the home of the defendant, having been identified, were offered in evidence and admitted, over the objection of the defendant.

Recalled, Mrs. Price testified that Smith had told her that he had shot Price's leg off and to get a doctor and he would pay the expense. That was right after he had shot him.

Roy Precise, witness for the State, corroborated the testimony of Mrs. Price as to the particulars of the shooting. This witness used the same diagram in explanation of his further testimony that was used by Mrs. Price, to the accuracy of which he testified.

The record discloses that the diagram was offered for the purpose of illustrating and explaining the testimony of the witnesses, Roy Precise, Mrs. Price, and A. P. Precise. To the testimony referring to the diagram and to the introduction of the diagram, the defendant objected.

At the end of the State's evidence, the defendant offering none, the defendant moved for judgment as of nonsuit, which motion was overruled and defendant excepted.

Pertinent parts of the judge's charge to which exceptions are made are noted in the opinion.

Formal motions are made to the refusal to set aside the verdict of the jury and for a new trial and to the judgment as signed.

The defendant appealed, assigning errors, which preserved his exceptions.

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

J. Faison Thomson and N. W. Outlaw for defendant, appellant.

SEAWELL, J. The defendant's appeal challenges many features of the trial which resulted in his conviction of murder in the first degree and a sentence of death. All of the exceptions have been carefully considered. We discuss only those we think merit attention in a written opinion.

Exceptions were taken to the use in evidence of a diagram of the premises where the homicide occurred, drawn with reference to the main features of that happening, particularly the position of witnesses, actors in the scene, and objects mentioned in the testimony. The objection raised was upon the ground that the diagram was not made by the testifying witnesses and that the jury was not instructed at the time that it was used only to illustrate or explain the testimony. As to the latter contention, the record discloses that it was formally offered only for that purpose—a fact of which counsel seem to be inadvertent. As to the other

contention, the correctness of the diagram was attested by the witnesses using it, and this we deem to be sufficient for its admission, and use as the record shows to have been done in the case at bar. *Tankard v. R. R.*, 117 N. C., 558, 23 S. E., 86; *Arrowood v. R. R.*, 126 N. C., 629, 36 S. E., 151; *S. v. Harrison,* 145 N. C., 408, 59 S. E., 867; *S. v. Rogers,* 168 N. C., 112, 83 S. E., 161; *S. v. White,* 171 N. C., 785, 87 S. E., 984; *S. v. Spencer,* 176 N. C., 709, 97 S. E., 155; *S. v. Kee,* 186 N. C., 473, 119 S. E., 893; *Walters v. State,* 23 Ala. App., 434; *People v. Shearer,* 133 Cal., 154, 65 P., 295; *People v. Schultz,* 197 N. Y. S., 888.

Exception was made to the admission in evidence of the statement of Carl Motley that the deceased had bled to death from the wound in the leg. Motley was a licensed embalmer, who prepared the body for burial shortly after death.

The court held that Motley was an expert embalmer. He testified, substantially, that while he was not a physician and had never studied medicine, he had studied the "blood track of the human body," which was necessary to the profession of embalming. He described the condition of the body, stating that it was covered with blood; that the leg was broken "and the skin was holding it," and that there was a lot of blood on it. He testified that the arteries were cut in two, and that there were no major arteries left there at all. He was then permitted to say that, in his opinion, the man had bled to death as the result of the wound in his leg. The statement was near the category of a shorthand statement of an observed fact.

There was expert medical testimony to the same effect; and Mrs. Price testified, without objection, that her husband had bled to death before defendant left, and that he was dead when put into the car to be carried to Goldsboro.

The court may be justified in inferring that a physician, graduate of a reputable medical college, licensed, and for some time employed in practice, has the requisite amount of experience and is, therefore, qualified to give an opinion; and, ordinarily, where expert testimony is relied upon to show the cause of the death, men learned or skilled in the medical profession are called upon for an opinion. But we apprehend that the real test of the admissibility of such evidence, or rather the competency of the witness from whom it comes, does not rest upon the fact that he belongs to a certain profession to which opinion evidence of that character is necessarily confined, but upon a principle that must lie behind the competency of all opinion testimony—the fact that the witness has special experience in matters of the kind, and his conclusions may, therefore, be helpful to the less experienced jury.

The qualification of a witness to give an opinion as one skilled, or, as it is usually termed, an expert, depends on matters of fact and the ques-

tion is addressed to the trial judge, with opportunity to the objector to test the experience of the witness by appropriate examination. Regardless of the professional label, it is for the court to say whether the witness is qualified to testify as one skilled in the matter at issue, and his finding will not be disturbed when there is evidence to support it, and the discretion has not been abused. *S. v. Brewer,* 202 N. C., 187, 162 S. E., 363, 81 A. L. R., 1424; *Turner v. American Security & Tr. Co.,* 213 U. S., 257, 23 L. Ed., 788.

To what extent the experience of a professional embalmer, with a knowledge of the blood vessels of the human body and their functions, and with ocular evidence that they had been emptied of their life-sustaining content, might qualify him to testify that the deceased had bled to death through the severed arteries, we do not need to say. We are inclined to the opinion that the court might not infer such experience merely from the fact that he was an expert embalmer, but in this case we do not feel that it is necessary to pass upon that point.

We have the impression that there was never any serious controversy as to the manner in which Price came to his death, and are of opinion that upon the record, the pertinent exceptions do not disclose prejudicial or reversible error. *S. v. Inscore,* 219 N. C., 759.

The instructions to the jury embodied in the judge's charge are assailed in two respects.

In the course of his charge, the judge—with apparent inadvertence—instructed the jury as follows: ". . . Murder is the unlawful killing of a human being with malice aforethought. That is murder in the first degree."

This is the approved definition of murder prior to the enactment of C. S., 4200, dividing murder into first and second degrees, and providing that murder committed with premeditation and deliberation, etc., shall be murder in the first degree and punished with death, and "all other murder" shall be murder in the second degree and punished by imprisonment in the State's Prison.

The statute intended to select out of all murders denounced under the above definition those that were more heinous because committed with premeditation and deliberation, or in the perpetration or attempted perpetration of a felony, etc., as murder in the first degree, punishable with death, and leave other murders deemed less heinous as murder in the second degree, punished by imprisonment. *S. v. Cole,* 132 N. C., 1069, 1074, and 1075, 44 S. E., 391.

The defendant insists that the word "aforethought" used in this definition is not synonymous with "premeditated" and "deliberate," which is essential to first degree murder, and that it merely means "intentional," citing *S. v. Cole, supra.* As pointed out by the Attorney-General, "afore-

thought" is defined as "premeditated" (Century, Webster), and "premeditated" is defined as "deliberate."

In *S. v. Cole, supra,* the Court, in sustaining the statutory form of indictment, C. S., 4614, has this to say, *per Justice Connor:* "Whatever difference of opinion may have existed in regard to construction of Laws 1893, chapter 85, before or at the time of the decision of *Fuller's Case* [*S. v. Fuller,* 114 N. C., 885], it is now conceded that by the statute, the crime of murder in the second degree is as at common law, which is defined to be 'when a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the King's peace with malice aforethought, either express or implied.' Blk. Com., star p. 195."

It is clear, then, that the word "aforethought" cannot be held to import into the definition the element of premeditation or deliberation. Indeed, it is rather definitely indicated that it relates rather to the prior existence of the malice which motivates the murder than to a previously entertained purpose. Standing alone, it is inadequate to convey to the jury the necessity of finding premeditation and deliberation as an element of first degree murder.

The crime of murder in the first degree is distinguished by a mental process or psychological condition, none too easy of expression. *S. v. Cole, supra,* at pp. 1078, 1079. But where the content of words has been determined with more exactness by legal usage and stabilized by approved formula, they are to be understood and applied in this sense.

Subject to the reservation that there is no phase of the evidence which supports the theory of manslaughter, it was necessary that the jury have an understanding of the features which distinguish the three kinds of unlawful homicide: Manslaughter is the unlawful killing of another upon sudden passion, under legal provocation, without malice and without premeditation and deliberation; murder in the second degree is the unlawful killing of another with malice and without premeditation and deliberation, and is presumed from an intentional killing with a deadly weapon; murder in the first degree is the unlawful killing of another with malice and with premeditation and deliberation—or in the perpetration or attempt to perpetrate a felony.

The expression to which objection is made does not stand alone, and we feel that these distinctions were sufficiently made clear. The trial judge repeatedly instructed the jury that they could not find the defendant guilty of murder in the first degree without finding from the evidence, beyond a reasonable doubt, that the killing was done with premeditation and deliberation. This was accompanied with ample explanation and illustration, and the law was carefully applied to pertinent phases of the evidence, of which the record, unfortunately, is full. With due regard to the character and importance of this case, we feel that duty

requires us here, as in other similar cases, to apply the rule that the charge must be examined contextually and viewed as a whole to determine whether it is so prejudicial as to be condemned for reversible error. Having done so, we do not find that in this particular it justifies reversal. *S. v. Shepherd,* 220 N. C., 377; *Motor Co. v. Ins. Co.,* 220 N. C., 168; *S. v. Cash,* 219 N. C., 818, 15 S. E. (2d), 277; *S. v. Moore,* 197 N. C., 196, 197, 148 S. E., 29.

There was some evidence in the case tending to show that the defendant had been drinking some time prior to the homicide—none that he was drunk. But counsel stress the importance of defendant's condition at the time, as tending to show that by reason of drunkenness, he was incapable of forming or entertaining the deliberate purpose to kill. Specific objection is made because the jury was instructed that "intoxication cannot serve as an excuse for the offender" and that "intoxication, though voluntary, is to be considered by the jury in a prosecution for murder in the first degree, in which a premeditated design to cause death is essential, with reference to its effect upon the ability of the accused at the time to form and entertain such design, not because *per se* it either excuses or mitigates the crime, but because in connection with other facts, an absence of malice or premeditation may appear"; and further, because the jury was instructed "if it is shown that an offender charged with such crime is so drunk that he is utterly unable to form or entertain this essential purpose, he should not be convicted of murder in the first degree."

The instructions gave to the defendant all to which he was entitled, and perhaps more, since it is doubtful whether the evidence was sufficient to raise the question at all. It has been said that while this defense requires no separate plea, nevertheless, in some way it should be brought to the attention of the court that the defendant relies upon it. *S. v. Cureton, infra.* Doubtless, as a matter of precaution it was presented to the jury by the court *ex mero motu.*

Without taking up these exceptions in detail, we think it sufficient to refer to the very full discussion on the subject in the recent case of *S. v. Cureton,* 218 N. C., 491, 11 S. E. (2d), 469, in which similar objections were made and resolved against the defendant. Upon all the challenged features, the charge in the instant case very closely follows the law as laid down in this case. From the copious citations of authority from this State contained in the cited case, the historical development of the law may be followed. It may be that the rules applicable to drunkenness as a defense against crime in some of their aspects reflect the public policy rather than philosophical refinement, but they were correctly applied in the case at bar.

Exception is made to the instruction given the jury with respect to the burden resting upon the defendant in seeking to mitigate the offense from

murder in the second degree, a presumption of which arises out of intentional killing with a deadly weapon, to manslaughter. While we think the challenge to the instruction cannot be maintained upon principle, still, as we see it, there was no phase of the evidence available to the defendant upon which manslaughter might be predicated, and any instruction with regard to it was harmless. Apparently, the manslaughter view was presented as a matter of grace and not of necessity. At any rate, where the distinction was of moment, the court correctly charged that the presumption of malice and of murder in the second degree arises from intentional killing with a deadly weapon.

We do not mean to dismiss the objections presented to us as mere technicalities. That term is not infrequently applied to the honest and meticulous effort of the courts to apply the law, without judicial amendment, giving to the affected party its full benefit, even to the shade of a shadow. Where there is a doubt that this has been done, the vigilance of counsel makes for higher standards of trial. But our duty carries us beyond the mere detecting of isolated inaccuracies into a review of their possibilities or probable effect on the result. The defendant, we believe, has had a fair trial, without prejudicial error in the aspects covered by the exceptions.

The motion for judgment as of nonsuit was properly overruled.

We find

No error.

TROY H. PARRISH v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 May, 1942.)

1. Appeal and Error § 2—

An appeal will lie immediately from the denial of a motion made as a matter of right under C. S., 537, to strike certain paragraphs from the complaint on the ground of irrelevancy and redundancy. C. S., 638.

2. Pleadings § 29—

A motion to strike certain allegations from the complaint on the ground of irrelevancy and redundancy, made before filing answer or demurrer or obtaining an extension of time to plead, is made as a matter of right and is not addressed to the discretion of the court. C. S., 537.

3. Same—

Where a motion to strike is made as a matter of right, movant is entitled to have any irrelevant and redundant matter appearing in the allegations objected to stricken.

4. Same—

The test in determining the relevancy of an allegation is whether it fulfills its purpose of stating a fact which, considered with the other facts

alleged, tends, as an element thereof, to express the cause of action upon which relief is sought, while the purpose of evidence is to prove competent allegations, and therefore the rules concerning the relevancy of evidence are not pertinent in determining the relevancy of allegation except by way of analogy.

5. Same—

A motion to strike under C. S., 537, does not raise the question of the sufficiency of the complaint as a whole to state a cause of action, but such question can be raised only by demurrer. C. S., 511 (6).

6. Same—

Redundancy in a pleadings is the inclusion therein of anything unnecessary to "a plain and concise statement of the facts constituting a cause of action," C. S., 506 (2), such as unnecessary repetition, and the detailed statement of evidential matters.

7. Same—

In an action for negligence, the test in determining a motion to strike certain paragraphs or subdivisions of paragraphs from the complaint on the ground of irrelevancy and redundancy, is not whether the allegations objected to, standing alone, are sufficient to set forth negligence, but whether, when considered as parts of the whole complaint, they allege facts constituting elements of the cause of action.

8. Railroads § 7—

A railroad is under duty to maintain public crossings in a safe condition for the use of the traveling public.

9. Pleadings § 29—

In an action to recover for an accident at a grade crossing, defendant railroad company's motion to strike allegations as to the construction and condition of the crossing on the ground of irrelevancy and redundancy is properly refused.

10. Railroads § 9—

While the existence of standing cars, fences, buildings, etc., along the right of way, which obstruct the view of the crossing, is not in itself negligence, yet their existence to the knowledge of the railroad company places the duty upon it to take proper precautions to protect travelers who use the crossing and to warn them of the approach of trains.

11. Pleadings § 29—

In an action to recover for a crossing accident, defendant railroad company's motion to strike allegation of obstructions cutting off the view of approaching trains is properly denied, the allegation being neither irrelevant nor redundant.

12. Same—

In an action to recover for a crossing accident the fact that allegation setting forth the existence of obstructions, making the crossing a "blind crossing," is repeated in a subsequent paragraph setting forth the failure of defendant to warn users of the blind crossing of the approach of trains, although repetitive, is not sufficiently serious to constitute unnecessary repetition or redundancy, and defendant's motion to strike the prior paragraph is properly refused.

13. Railroads § 9: Negligence § 18—

In an action to recover for a crossing accident, the fact that the railroad company on the day after the accident moved freight cars which had been standing at the crossing at the time of the accident, is incompetent to show either negligence or an admission of negligence, since occurrences after the accident which do not aggravate plaintiff's injuries are not germane.

14. Pleadings § 29—

In an action to recover for a crossing accident, allegation that on the day after the accident the railroad company moved cars which had been standing at the crossing at the time of the accident, should be stricken out upon defendant's motion, since the allegation is irrelevant and is also redundant as being an allegation of evidence.

15. Railroads § 9: Negligence § 18—

In an action to recover for a crossing accident, the fact that after the accident, defendant railroad company disciplined certain of its employees who were operating the train is incompetent to show either negligence or an admission of negligence.

16. Pleadings § 29—

In an action to recover for a crossing accident, allegation that after the accident defendant railroad company disciplined certain of its employees who were operating the train should be stricken upon motion of the defendant, since the allegation is irrelevant and is also redundant as being an allegation of evidence.

17. Damages § 6—

Although a person who is not at fault in causing an injury is not under duty to aid the injured person, if he is at fault in causing the injury he is under duty to take all steps to mitigate the hurt, including the exercise of due diligence in getting the injured person to a hospital or in obtaining medical attention.

18. Pleadings § 29—

In an action to recover for a crossing accident an allegation of the complaint alleging that after the accident defendant permitted plaintiff to lie on its roadbed, unconscious, for nearly an hour, although it had a locomotive and train upon which it could have removed plaintiff to a near-by hospital maintained by it, is relevant upon the issue of damages if plaintiff should establish actionable negligence, and therefore defendant's motion to strike the allegation on the ground of irrelevancy and redundancy is properly denied.

APPEAL by defendant from *Dixon, Special Judge,* at September Term, 1941, of NASH.

This action was brought to recover damages for personal injuries sustained by plaintiff in a crossing collision in the city of Rocky Mount between an automobile operated by him and a train operated by defendant.

The defendant, before filing answer or demurrer or obtaining an extension of time to plead, moved to strike certain paragraphs of the complaint

as being "irrelevant, redundant and impertinent," specifically relying on C. S., 537.

The matter objectionable to the defendant was as follows:

(1) In support of his allegation of negligence in the maintenance and care of the crossing the plaintiff alleged (a) that there were three sets of tracks at this crossing, (b) that the crossing was "maintained with rough boards, large cinders or burnt coal, clinkers and dirt, and the railroad bed, beyond the end of the said boards . . . constructed and maintained of large cinders or burnt coal clinkers and coarse gravel and dirt and projecting railroad cross-ties," (c) that the view of the tracks was obstructed by a three-foot dirt bank, on which were a wire fence, several buildings, warehouses, etc., and a spur track occupied by twelve or fifteen freight cars, all of which made this a blind crossing, and (d) that the freight cars on the spur track were moved the day following the accident, this removal showing knowledge and an admission by the defendant of its negligence in thus obstructing the view at the crossing.

(2) In support of his allegation of negligence in the operation of the train involved in the collision, the plaintiff alleged (a) that certain of the employees who were operating the train were discharged, suspended, or reduced in rank following the accident, and (b) that the defendant permitted plaintiff to lie on its roadbed, unconscious, for nearly an hour, "although it had a locomotive and train upon which plaintiff could have been removed to a hospital maintained by defendant in the City of Rocky Mount."

The court struck the allegation as to the three sets of tracks, but denied the motion as to the remainder of the matter objected to.

From the order denying its motion to strike the above described paragraphs, the defendant excepted and appealed.

L. L. Davenport and T. T. Thorn for plaintiff, appellee.
F. S. Spruill for defendant, appellant. Thos. W. Davis of counsel.

SEAWELL, J. The plaintiff contends that it would be improper for the court to consider the relevancy of his allegations on the defendant's motion to strike, but that this can and should be postponed until plaintiff introduces evidence and defendant objects thereto. This position questions the propriety of the Court's considering the merits of defendant's appeal, which is to challenge the timeliness and propriety of the appeal itself. Certainly, if the appeal is not premature or unavailable, it must be decided here on its merits.

At the threshold of investigation we are met by C. S., 638, which sets forth the orders and judgments from which an appeal will lie: "An appeal may be taken from every judicial order or determination of a

judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial." Obviously, the only apparent basis on which the defendant could appeal here, if it can appeal at all, is that the order denying its motion to strike "affects a substantial right" which it claims in the action. Ordinarily, it is only under such circumstances that an appeal will lie from an order other than a final judgment. *Martin v. Flippin,* 101 N. C., 452, 8 S. E. 345; *Skinner v. Carter,* 108 N. C., 106, 12 S. E., 908; *Warren v. Stancill,* 117 N. C., 112, 23 S. E., 216; *Graded School Trustees v. Hinton,* 156 N. C., 586, 71 S. E., 1087.

But whether a substantial right of the appellant has been affected by the order in this case—whether he has been prejudiced sufficiently to warrant this Court in considering the merits of his appeal, *Pemberton v. Greensboro,* 205 N. C., 599, 172 S. E., 196—need not be considered now; for it has been held that when the motion on which the order is based is made as a matter of right and is not addressed to the court's discretion, upon its denial the movant may appeal immediately to the Supreme Court and have his motion decided there on its merits. *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794; *Poovey v. Hickory,* 210 N. C., 630, 188 S. E., 78. It may be that the rationale of this rule is that a substantial right is affected by the denial of a motion addressed to the right of the question rather than to the court's discretion. However this may be, the right to appeal immediately in such case seems to be firmly established. *Ellis v. Ellis,* 198 N. C., 767, 153 S. E., 449; *Bank v. Stewart,* 208 N. C., 139, 179 S. E., 463; *Scott v. Bryan,* 210 N. C., 478, 187 S. E., 756 (case decided on its merits); *Trust Co. v. Dunlop,* 214 N. C., 196, 198 S. E., 645; *Duke v. Children's Com.,* 214 N. C., 570, 199 S. E., 918; *Herndon v. Massey,* 217 N. C., 610, 8 S. E. (2d), 914.

The defendant's motion to strike in the instant case was specifically based on C. S., 537, which provides that "If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted . . ." A motion made under this statute and within its time limits is not addressed to the discretion of the court, but, as the statute indicates, is made as a matter of right. *Hosiery Mill v. Hosiery Mills, supra; Bank v. Atmore,* 200 N. C., 437, 157 S. E., 129; *Poovey v. Hickory, supra; Patterson v. R. R.,* 214 N. C., 38, 198 S. E., 364; *Herndon v. Massey, supra.* If the motion is made after answer or demurrer, or after an extension of time to plead is granted, then it becomes a matter of the

court's discretion, and appeal can only be had from the final judgment and upon exception duly taken. *Best v. Clyde,* 86 N. C., 4; *Hosiery Mill v. Hosiery Mills, supra; Insurance Co. v. Smathers,* 211 N. C., 373, 190 S. E., 484; *Fayetteville v. Spur Distributing Co.,* 216 N. C., 596, 5 S. E. (2d), 838. The defendant's motion, however, having been made in due time, according to the statute, was made as a matter of right, is therefore immediately appealable, and may and should be decided on its merits here. If any irrelevant or redundant matter appears in the allegations objected to, it should be stricken.

The relevancy of an allegation, like the relevancy of evidence, depends upon the purpose which the particular legal instrument is intended to fulfill. The purpose of an allegation in a complaint, broadly speaking, is to state a fact which, when considered with other facts, will constitute a cause of action. The purpose of evidence is to prove competent allegations. The relevancy of either depends upon its tendency to fulfill its purpose. The rules concerning the relevancy of evidence, although helpful in analogy, have no bearing on the relevancy of the allegations, for, strictly speaking, it is by the competent allegations that the relevancy of the evidence is to be judged—whether the evidence tends to prove facts properly alleged as a cause of action in the complaint. This makes the relevancy of the allegations the subject of independent inquiry, divorced, except by analogy, from the rules concerning the relevancy of evidence.

Looking at its purpose, an allegation is relevant which *tends,* as an element thereof, to express the cause of action on which relief is sought. (This seems to be the gist or common meeting ground of the numerous tests laid down by this Court.) *Hosiery Mill v. Hosiery Mills, supra; Ellis v. Ellis, supra; Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738; *Bank v. Stewart, supra.* (Some decisions merely use the analogy to rules of evidence, and determine relevancy by the competency of showing the matter in evidence.) *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396; *Patterson v. R. R., supra; Trust Co. v. Dunlop, supra; Duke v. Children's Com., supra.* Thus, in the instant case, even though the questioned allegations standing alone would be insufficient to set up negligence, or are not coupled with other allegations which would make up a cause of action, if they do amount to an element of the cause of action, they would be relevant, and should not be stricken—at least for irrelevancy. In applying such a test it is, of course, necessary to consider what elements go to make up a cause of action, but the inquiry is not one of the sufficiency of the complaint as a whole to state a cause of action. *Poovey v. Hickory, supra.* This question can only be raised by demurrer. C. S., 511 (6). The motion to strike does not raise it, and, as a practical matter, such a motion would not be made if there were no statement of a cause of action. Nevertheless, if the particular allega-

tion of negligence, as appearing upon the face of the pleading, cannot have any proximate relation to the injury complained of, it should be stricken as irrelevant.

Redundancy in pleading does not present quite the theoretical and technical problems posed by the subject of relevancy. It would seem to include anything which is unnecessary to "a plain and concise statement of the facts constituting a cause of action," C. S., 506 (2), such as unnecessary repetition, and the detailed statement of evidential matters, however relevant the latter may be when presented upon the trial. McIntosh, North Carolina Practice and Procedure, §§ 350, 371. (McIntosh considers evidential matters in a complaint as irrelevant. It would seem more accurate to class them as redundant, but this is probably only of academic interest.)

In applying these tests to the paragraphs of plaintiff's complaint objected to by the defendant, it must be remembered that although the objectionable paragraphs appear as subdivisions of two main paragraphs, one alleging negligence in the maintenance of the crossing, and the other alleging negligence in the operation of the train, still these main paragraphs are merely parts of the whole complaint, setting up injury to the plaintiff caused by defendant's negligence in the conduct of its railroad. This is the main issue, and the relevancy of the subdivisions must be considered from this standpoint—whether they have any relation to the injury of which the plaintiff complains.

(1) (b) Although, as pointed out by defendant in its brief, the condition of the crossing played no part in the accident as it is set out in the complaint, still it cannot be said that this allegation has no relevancy to the plaintiff's claim to recovery. A railroad must maintain public crossings in a safe condition for the use of the traveling public. *Raper v. R. R.*, 126 N. C., 563, 36 S. E., 115; *Pusey v. R. R.*, 181 N. C., 137, 106 S. E., 452; *Moore v. R. R.*, 201 N. C., 26, 158 S. E., 556; *Cashatt v. Brown*, 211 N. C., 367, 371, 190 S. E., 480. The manner of construction may very easily be negligent, and, although the allegation in the present complaint, standing alone, would not be sufficient to support an action for negligence in the maintenance and condition of the crossing, still it can and must be considered as a pertinent part of a complaint which would support such a cause of action, and as such is relevant. There is no sign of unnecessary repetition here, nor is it possible to say that the allegation is purely evidential, and thus redundant. The motion to strike this subparagraph was properly overruled.

(c) The allegations as to obstructions of the view were properly allowed to remain in the complaint. It is necessary, in stating a cause of action, to set forth the duty which the defendant owed the plaintiff, as well as the manner in which the violation of that duty proxi-

mately contributed to the plaintiff's injury. McIntosh, *op. cit., supra,* § 359. Here, the obstructions which made this a blind crossing are a vital element of one of defendant's duties to plaintiff. Obstructions in themselves have never been considered negligent, *Edwards v. R. R.,* 129 N. C., 78, 39 S. E., 730; *Childress v. Lake Erie, etc., R. R.,* 182 Ind., 251, 105 N. E., 467; *Ham v. Maine Cent. Ry.,* 121 Me., 171, 116 Atl., 261; but if they exist, and the railroad is aware of them, it is then incumbent on the railroad to take proper precautions to protect travelers who use the crossing and to warn them of the approach of trains. *Johnson v. R. R.,* 163 N. C., 431, 79 S. E., 690; *Jackson v. R. R.,* 181 N. C., 153, 106 S. E., 496; *Costin v. Power Co.,* 181 N. C., 196, 106 S. E., 568; *Johnson v. R. R.,* 205 N. C., 127, 170 S. E., 120; *Meacham v. R. R.,* 213 N. C., 609, 197 S. E., 189; *Coltrain v. R. R.,* 216 N. C., 263, 4 S. E. (2d), 853; Shearman & Redfield on Negligence (Rev. Ed.), Vol. 3, § 453; 52 C. J., 194, sec. 1784. This duty arises from the existence of obstructions to the view, and the failure to discharge it, resulting in injury to the plaintiff, may be a basis of plaintiff's claim to recovery. At any rate, we cannot say that the allegation of the blindness of the crossing, although not coupled in this particular paragraph with any of the other elements which are necessary to give such an allegation force, is irrelevant to the plaintiff's cause of action, or has no relation to his injury. It is very pertinent to the establishment of a duty which defendant owes to plaintiff.

The plaintiff is apparently aware of this, for in paragraph six of the complaint he alleges a failure to warn users of this blind crossing of the approach of trains, thus giving the bare allegation of obstructions a *raison d'etre,* and therein again sets forth the existence of these obstructions. Although this is repetitive, it is not of a sufficiently serious nature to be characterized as unnecessary repetition, or redundancy, entitling defendant to have the questioned paragraph stricken for that reason.

(d) The allegation that some of the obstructions of the view at the crossing—namely, the defendant's freight cars—were moved by the defendant after the accident, can have no relevancy, as we have analyzed the term, to plaintiff's cause of action. It does not set forth any element thereof, nor does the removal have any proximate relation to plaintiff's injury. In personal injury suits of this kind, occurrences *after* the accident which do not go to the enhancement or aggravation of plaintiff's injuries are clearly of no importance in setting forth the details of defendant's negligence by which plaintiff was injured. This paragraph should have been stricken as irrelevant. It is at best the pleading of evidence, and should therefore also be stricken as redundant. It might be wise to point out that in this State, as in most states, for motives of public policy, evidence of this character is not admissible to show either

negligence or an admission of negligence. *Lowe v. Elliott,* 109 N. C., 581, 14 S. E., 51; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Alabama Great So. Ry. v. Ensley Transfer & Supply,* 211 Ala., 298, 100 So., 342; Wigmore, Evidence (3d Ed.), Vol. 2, § 283; 45 C. J., 1232. Certainly, therefore, an allegation in this vein would not be proper.

(2) (a) Precisely those considerations which are determinative of the relevancy of the allegation just considered apply with equal force to the allegation that defendant, after the accident, disciplined certain of the employees who were operating its train. Although the defendant may have been negligent in a multitude of ways in the conduct of its railroad, it is hard to see how disciplining its employees after plaintiff had been injured could have been one of them. The allegation is clearly irrelevant. It also is at best the pleading of evidence and is therefore subject to striking for redundancy. Furthermore, evidence to this effect is inadmissible to show either that the employee was negligent, or that the employer thereby admitted the employee's negligence. *Southern Ry. v. Smith,* 223 Ala., 583, 137 So. 398; *Engel v. United Traction Co.,* 203 N. Y., 321, 96 N. E., 731; *N. Y. Polyclinic Med. School v. Mason-Seaman Transp. Co.,* 155 N. Y. S., 200. Defendant's motion to strike this paragraph should have been allowed.

(b) Although the allegation that defendant did not do all it could have to mitigate plaintiff's injuries does not have any direct bearing on the question to which it is subordinate—negligence of defendant in the operation of its train—still it is of importance on the question of damages if defendant is proven to have been negligent. Although there is no duty to aid others imperiled without the defendant's fault, but through his conduct, *Adams v. R. R.,* 125 N. C., 565, 34 S. E., 642; *Carey v. Davis,* 190 Iowa, 720, 180 N. W., 889, 12 A. L. R., 904; *Union Pac. Ry. v. Cappier,* 66 Kan., 649, 72 Pac., 281; *Fitzgerald v. C. & O. Ry.,* 116 W. Va., 239, 180 S. E., 766; 69 L. R. A., 513; Harper on Torts, § 80; yet if plaintiff is hurt through defendant's fault, defendant must take all steps necessary to mitigate the hurt, *Whitesides v. R. R.,* 128 N. C., 229, 38 S. E., 878; *No. Cent. Ry. v. State,* 29 Md., 420; Harper, *loc. cit., supra;* Restatement of the Law, Torts, sec. 322; 45 C. J., 842, sec. 257. Since, if it is shown that plaintiff was injured by defendant's negligence, it will be of importance to determine if it discharged this duty, it cannot be said that this allegation is irrelevant or redundant. It was properly allowed to remain by the court below.

The order of the court below will be modified in accordance with this opinion, and as so modified, affirmed.

Modified and affirmed.

STATE v. R. K. BROWN, FLETCHER R. YOW, ROBERT MYERS, AND R. H. CROTTS.

(Filed 20 May, 1942.)

1. Constitutional Law § 7: Nuisance § 6—

The authority of the General Assembly, in the exercise of the police power of the State, to define public nuisances is not limited to those which are predicated upon or facilitate the commission of open crime, but it may declare anything to be a nuisance which tends, in reasonable relationship, to adversely affect the public morals, health, safety, thrift or economy.

2. Gaming § 2c—

Betting upon a horse race is gambling, since a horse race is a "game," and since, even though as to the participants it may be a game of skill, as to outsiders who bet on the result it is a game of chance.

3. Same—

Betting on a horse race is an offense against the criminal law. C. S., 2142, 2143, 4430.

4. Nuisance § 6—

The maintenance of an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers are transmitted to race tracks outside the State, and through which wagers are paid off to successful bettors, constitutes a public nuisance. C. S., 3180.

5. Same: Criminal Law § 12—Maintenance of establishment in this State for commission of proscribed acts is a nuisance notwithstanding that acts are consummated outside the State.

The special verdict returned by the jury established that defendants maintained an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers were transmitted to race tracks outside the State, and through which wagers were paid off to successful bettors. *Held:* The fact that the wagering contracts were completed outside the State does not prevent the maintenance of such establishment from constituting a public nuisance proscribed by our laws, since the nuisance was maintained in this State notwithstanding that the formal "acceptance" of the bets may have been made at a race track in another State.

6. Nuisance § 6: Gaming § 1—

The fact that a defendant has a license under a municipal ordinance for the use of ticker service or other devices for receiving and imparting information concerning games and sporting events, is immaterial in a prosecution for maintaining a nuisance in facilitating betting on horse races.

7 Statutes § 8—

While a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress.

STATE *v.* BROWN.

APPEAL from *Grady, Emergency Judge,* at 1 December Regular Term, 1941, of GUILFORD. Affirmed.

Upon appeal from the municipal-county court of the city of Greensboro, the defendants were tried at the December Term, 1941, of Guilford Superior Court on a warrant charging them with maintaining a nuisance in the city of Greensboro, in that they "leased and used a building and premises therein and maintained an office for the purpose of unlawful gaming and gambling, and where unlawful gaming and gambling was continuously carried on, in the thickly populated business district of the city of Greensboro, North Carolina, and where a large number of people daily congregated for the purpose of unlawful gaming and gambling, by betting and wagering on horse races, and where they did unlawfully gamble by betting on the results of horse races, all of which was a menace to public morals and constituted a common nuisance to the public generally."

The jury rendered a special verdict, finding facts substantially as follows:

The defendant Brown, with the assistance of his employee Yow, operated a place of business in Greensboro, equipped with means of receiving and disseminating information with reference to horse racing by means of blackboard, megaphone or loudspeaker, teletype, sporting newspapers, especially those relating to horse racing, desks, and telephones. At this place Yow received, and then transmitted to his employer, Brown, at 222½ South Green Street, the main office or place of business, results of horse races run on courses outside of North Carolina, by means of connecting telephones. Both of said places were equipped and were designed and intended for the purpose of receiving offers of wagers on horse races held at various places outside North Carolina. The physical equipment could be used, and was used, to indicate and report the progress of races while being run, including an 80-foot blackboard in constant use during business hours for carrying information concerning the races. In the place at 222½ South Green Street, there was an auditorium with fifty seats and standing room for one hundred additional persons.

A ledger was kept by Brown, showing data with reference to "Transactions for Horse Wagers," with statement showing offers of wagers received by Brown from a customer through a period from 8 March, 1941, through 25 April, 1941.

The method of procedure, as disclosed by defendants' records, was that Brown received offers of wagers at the Greensboro place, which were transmitted to race tracks outside the State for "acceptance." If customers were successful, their winnings were transmitted by race track officials to defendants, and defendants paid off the wagers to customers.

The defendants Myers and Crotts were employees of Brown, assisting in carrying on the business.

Brown had a license from the city of Greensboro, under a taxing ordinance upon the use of ticker service or other device for receiving and imparting information concerning games and sporting events, including horse racing, for which he paid the city $300.00.

Upon this verdict, the presiding judge pronounced the defendants guilty as a matter of law upon the facts. C. S., 3180.

From a sentence of imprisonment, suspended upon conditions, the defendants appeal.

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

Shelley B. Caviness and Thomas Turner, Jr., for defendants, appellants.

SEAWELL, J. The labors of the Court have been lightened by the marked ability with which this case was argued on both sides and the full treatment, in the opposing briefs, of the subject involved.

We have to determine precisely the same question that was presented to the trial judge on the special verdict of the jury: Are the defendants guilty, under the law, upon the facts found in the special verdict? A careful consideration of the facts, pertinent law, and the arguments of counsel, leads us to the conclusion that the answer should be affirmative.

Nevertheless, the defendants have challenged the correctness of this view, as taken by the court below, with arguments which merit serious attention. Counsel contend that the activities carried on at Brown's place of business and participated in by the defendants were not within the purview of the statute for the following reasons: (a) Because the evil which, upon its face, the statute was intended to remedy is the facility which the maintenance of the premises affords for the commission of certain specified criminal acts; and as applied to the defendants, the criminal offense of gambling or betting on a game of chance; and they contend that betting on horse races is not such a criminal offense; (b) because, if betting on horse races should be held a criminal offense, *non constat* that the defendants are guilty, since the transaction was not at any time completed within this State, nor could be as the business was conducted, and such completion of the betting transaction, as they contend, is contemplated by the statute, and is necessary to the definition of nuisance denounced by it. The defendants further contend that the transactions described in the jury's findings are insufficient to constitute a public nuisance within the common law definition, and could not be so unless the acts of the customers in themselves constituted a crime out of which the nuisance might arise. They also point out that the operations on the premises were carried on without disorder or noise, and did not disturb the peace and quiet of the neighborhood.

Barring the catastrophe of war and the ideologies which engender it, which now overshadow our progress, civilization in English speaking countries has come a long way since the English view of sports, stressed by the defendants as receiving the tolerance of the law, was transplanted to this country. Cock fighting, bear baiting, and goose pulling have gone their way, and gambling at cards and wagering upon games of chance are no longer innocent sports. Defendants contend that betting on horse races is not yet under the ban of the law, although wagering contracts in connection therewith have been outlawed. C. S., 2142. They cite in support of this proposition a number of earlier cases in this State —*McKenzie v. Ashe,* 2 N. C., 502; *Moore v. Simpson,* 5 N. C., 34—and some from other jurisdictions. In reply to this, counsel for the State cite C. S., 2142, *supra,* and argue that the effect of this statute is to make such betting a criminal offense by declaring it to be unlawful, applying the doctrine asserted in *S. v. Pierce,* 123 N. C., 745, 747: "The doctrine is well settled that where the statute either makes an act unlawful or imposes a punishment for its commission, such act becomes a crime without any express declaration that it shall be a crime or of its grade." See, also, *S. v. Parker,* 91 N. C., 650; *S. v. Bloodworth,* 94 N. C., 918. It is pointed out that it was the intention of the statute to make betting on horse races a criminal offense, since such wagering contracts had already been outlawed and the denouncement of the wager as unlawful came in by amendment at a later time; and also, because section 2143 provides that no person shall be excused from giving testimony concerning such bets and wagers, but that such testimony given under compulsion "shall not be used against him in any criminal prosecution on account of such betting, wagering or staking."

Frequent attempts, some of them successful, to make pari mutuel betting on horse races lawful in certain parts of the State express, at least, the general view that the practice is a violation of the law.

In avoidance of C. S., 4430, which makes it a misdemeanor to "play at any game of chance at which any money, property, or thing of value is bet," or to bet thereon, defendants contend that if horse racing is a game at all, it is not one of chance, but one of skill, and cite *S. v. Gupton,* 30 N. C., 271, 273; *S. v. King,* 113 N. C., 631; and *S. v. Morgan,* 133 N. C., 743, all of which make a distinction between games of chance and games of skill, holding that the latter are not within the condemnation of the law. *S. v. Abbott,* 218 N. C., 470, 479, 480, 11 S. E. (2d), 539. But we apprehend that what is a game of skill to the participants might be only a game of chance to outsiders who bet on the result, since it is the skill of those engaged which decides the issue, and the person who lays the wager may have little information on that point.

We do not agree with the position taken by the defendants that it is essential to the nuisance defined by the statute that the acts of the cus-

tomers, which impart that quality to the premises and the business conducted there, should be violations of the criminal law, either generally speaking or under the terms of the statute. It is not necessary that the nuisance declared should have a nucleus of crime essential to its existence. While nuisance is frequently associated with criminal offenses, it is true, and may itself, either at common law or by statute, constitute a violation of the criminal law, as it does in the statute with which we are dealing, the law is not under the necessity of predicating one crime upon another to make valid its denunciation of an act which it denominates a nuisance. Nor will it fail of its purpose because the practices facilitated by the nuisance, so-called, are merely antisocial rather than criminal, and that through suppression of the evil devices of those who promote them, are made the subject of discouragement rather than punishment.

Persons whose conduct or whose enterprise is harmful to the public may be dealt with directly on the theory of nuisance, although the facilities they offer to social misconduct or acts contrary to public policy, or injurious to the welfare of the community, do not amount to open crime. Such a menace to the public welfare, whether directed toward the morals, health, safety, thrift or economy of the community, may afford a reasonable occasion for the exercise of the police power. The social necessity of inhibiting influences and practices detrimental to the public welfare in this sense has extended the theory of nuisance quite beyond the old categories, and has made it a more facile and effective instrument of government, by destroying the external aids, facilities and allurements which increase the offensive practices and multiply those that are engaged therein, and make their concentration an offense to the moral sense of the community where the nuisance exists. We think the present law is based upon this theory.

It is true that the Legislature cannot by mere fiat make that a nuisance which has none of the characteristics of nuisance and which has no tendency "to injure the public health, morals or interests." *First Avenue Coal & Lumber Co. v. Johnson,* 171 Ala., 470, 54 So., 598. But, in the exercise of the police power, it may make new definitions and categories within constitutional limitations, where the evil intended to be reached is noxious to the public welfare and the means employed have a reasonable relation to the result intended to be produced. *Calcutt v. McGeachy,* 213 N. C., 1, 195 S. E., 49.

Within these limitations, the authority of the Legislature to declare a thing to be a nuisance is well recognized. *Lawton v. Steele,* 152 U. S., 133, 38 L. Ed., 385; *Los Angeles County v. Spencer,* 126 Cal., 670, 59 Pa., 202, 385; *Fayetteville v. Distributing Co.,* 216 N. C., 596. Against such legislative action, no person has a vested interest in the common law; and the labels it provides do not necessarily carry with them into the statute common law definitions or implications. About the only

thing that must necessarily persist of the common law conception of nuisance is the noxious quality of the thing in the relation we have mentioned.

Therefore, while we are advertent to the fact that the statute places gambling in parallel construction with other practices that are unquestionably violations of the criminal law, we do not regard this as conclusive that such gambling must be a violation of the law to justify the validity of the statute. Perhaps, the matter we have to decide is not so much whether betting on a horse race is a criminal act as it is to decide whether the making of such a wager may be considered gambling within the meaning of the statute.

Gambling is defined in Century Dictionary: "To play at any game of chance for stakes; hence, in general, to risk money or anything of value on the issue of something involving chance or unknown contingencies (as to gamble on the result of a race; to gamble in stocks)." Gamble is there defined as "the staking or risking of money or anything of value on a matter of chance or uncertainty." Webster defines gamble: "To play or game for money or other stake, as at cards, dice, horce racing, etc." "Game: Sport of any kind."

There is no doubt in our minds that betting on a horse race is within these definitions.

The manner in which the appeal is couched, however, invites a decision upon the question whether betting on a horse race is a violation of the criminal law. That it was the intention, and is the effect, of legislation upon this subject to make it so, we have no doubt.

Reference has already been made to C. S., 2142, which declares such a wager unlawful, and the accompanying statute, C. S., 2143, seems to construe this as making it a violation of the criminal law. See, also, cases cited in this connection. But beyond these implications, we have to deal with C. S., 4430, which provides: "If any person play at any game of chance at which any money, property or other thing of value is bet, whether the same be in stake or not, both those who play and those who bet thereon shall be guilty of a misdemeanor."

As noted above, counsel for the defendants raise the question whether the sport of horse racing could be considered "a game" within the meaning of this statute, and defendants' connection with it, "gaming" or "gambling." The overwhelming weight of authority, following the meaning of terms as used in the criminal law, include horse racing in that category, and it seems to us upon sound reason. "The word 'game' is very comprehensive and embraces every contrivance or institution which has for its object to furnish sport, recreation, or amusement. Let a stake be laid on the chance of a game, and we have gaming." *In re Opinion of the Justices,* 73 N. H., 625; quoting definitions from Web-

ster's Dictionary and Century Dictionary. See *People v. Weithaff,* 51 Mich., 203. "Horce racing is a game, and the betting of money . . . on the result of horse racing is gaming." *Swigart v. People,* 50 Ill. App,, 181, 190. "Betting on a horse race is 'gaming' and, hence, a room, hall or house where betting on horse races is permitted is a 'gaming house.'" *Young v. State* (Tenn.), 121 S. W. (2d), 533, 534. "'Gaming' and 'gambling' in a criminal sense are synonymous." *S. v. Mint Vending Machine Co.,* 85 N. H., 22. "The terms 'gaming' and 'gambling' in the administration and interpretation of criminal laws are usually regarded as synonymous." *S. v. Shandlin,* 51 Wash., 35, 97 Pa., 769, 770. "Betting on races of any kind under pari mutuel scheme is 'gambling,' and places devoted to such betting are 'nuisances' under the statute." *Oak Downs v. Schmid* (Tex. Civ. App.), 95 S. W. (2d), 1040.

We are of the opinion that it is the effect of these laws to make betting on horse racing, or, in fact, on any other sort of race, an offense against the criminal law. The fact that the race itself is one of skill and endurance on the part of the jockey and his mount does not confer immunity upon those who wager on its result.

We have carefully examined the case of *Lescallet v. Commonwealth,* 89 Va., 878, 17 S. E., 546, extensively quoted in appellants' brief. We are unable to accept the reasoning in that case as sound, or follow its conclusions. The result in that case was based largely upon the ground that the betting transaction was not completed within the State of Virginia, which, as we understand it, embodies the argument of the defendants in the case at bar. Had the customers who placed the bets been indicted and convicted of gambling, a more serious question might be raised. We think, however, that the fact that the wager was laid here, and a customer notified of its acceptance, and received his winnings, if any, here, constitute sufficient facts to support the charge of maintaining a nuisance, notwithstanding that the formal "acceptance" of the bet appears by custom of the business to have been made at the race track in another state.

We do not regard the fact that the defendant Brown held a tax revenue license under the ordinance of the city of Greensboro, as set out in the statement of facts, material. Such an ordinance could not annul a State law or afford immunity for its violation.

We are reminded that a criminal statute must be strictly construed, and no doubt the statute under review comes within that rule; but in construing it, we must have some regard for the evil that was intended to be remedied, and give the law the force and effect it was intended to have in its incidence upon the defendants and their business. This we have tried to do.

There was no error in the trial in the court below, and the judgment is Affirmed.

PIEDMONT MEMORIAL HOSPITAL, INC., v. GUILFORD COUNTY; GEORGE L. STANSBURY, CHAIRMAN, J. W. BURKE, R. C. CAUSEY, JOE F. HOFFMAN, FLAKE SHAW, ALL CONSTITUTING THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY, NORTH CAROLINA; A. C. HUDSON, SUPERVISOR OF TAXATION FOR GUILFORD COUNTY; D. L. DONNELL, TAX COLLECTOR FOR GUILFORD COUNTY, NORTH CAROLINA; AND W. C. JOHNSON, TREASURER FOR GUILFORD COUNTY, NORTH CAROLINA.

(Filed 20 May, 1942.)

1. Constitutional Law § 4a—

The General Assembly has power to enact retroactive laws provided they do not impair the obligation of contracts or disturb vested rights, and this principal is applicable to matters of taxation.

2. Same: Constitutional Law § 3½—

While the General Assembly may enact curative statutes affecting pending litigation, it cannot, by stipulating that a statute be retroactive, annul or interfere with a final judgment of the courts.

3. Same: Taxation § 20—Final judgment that hospital was liable for taxes for particular year cannot be annulled by legislative act.

Plaintiff hospital instituted suit to recover *ad valorem* taxes for the year 1940, paid by it under protest. On appeal it was held that the hospital was liable for taxes for that year, and final judgment was entered in accordance therewith. Thereafter the hospital, upon the same agreed facts, instituted this suit to recover the same taxes, upon its contention that ch. 125, Public Laws 1941, exempted its property from taxation retroactively. Ch. 125, Public Laws 1941, amending sec. 600, ch. 310, Public Laws 1939, provided that real property used for hospital purposes by a nonprofit hospital whose entire revenue is devoted to hospital purposes should be exempt from taxation from the year 1936. *Held:* The Act of 1941, in so far as the status of plaintiff hospital for taxes for the year 1940 is concerned, is an attempt to annul the effect of a final judgment, and is unconstitutional and void.

4. Statutes § 7—

Statutes will be given prospective effect only unless a contrary intention is expressly declared or necessarily implied, and therefore when an act amends separate sections of a former statute and stipulates that one of the amendments should be retroactive, the other amendment will be construed to have prospective effect only.

5. Taxation § 20—

The amendment of sec. 602 (a), ch. 310, Public Laws 1939, which provides that the property of private hospitals shall not be exempt from taxation, by ch. 125, Public Laws 1941, which provides that sec. 602 (a) of the Act of 1939 should not apply to nonprofit hospitals, is prospective in effect and not retroactive.

6. Judgments § 32—

A final judgment is conclusive upon the parties whenever the same matters are at issue between them in a subsequent action, and the rights of the parties as established in the prior action cannot be annulled by a legislative declaration to the contrary.

7. Taxation § 38c—

Ch. 125, Public Laws 1941, exempting real property of nonprofit hospitals from taxation, contains no provision authorizing refunding of taxes theretofore paid by such hospitals nor machinery for the recovery of such taxes, and therefore a hospital which paid real property taxes for 1940 under protest and unsuccessfully sued for their recovery under sec. 936, ch. 158, Public Laws 1939, is not empowered by the Act of 1941 to maintain another suit for the recovery of the same taxes.

8. Constitutional Law § 6c—

Public policy is for the determination of the Legislature and the courts must give effect to the law as it is written.

9. Taxation § 20—

All property is subject to taxation unless exemption is authorized by the Constitution and laws of the State.

10. Taxation § 1—

Taxes must be imposed in a just and equitable manner and be uniform as to each class of property taxed.

APPEAL by plaintiff from *Warlick, J.*, at March Term, 1942, of GUILFORD. Affirmed.

This was a controversy without action to determine the liability of plaintiff's property for taxation for the year 1940. From judgment in favor of defendants on the facts agreed, the plaintiff appealed.

D. E. Hudgins for plaintiff, appellant.

B. L. Fentress, G. H. Jones, D. Newton Farnell, Jr., and H. C. Wilson for defendants, appellees.

DEVIN, J. A controversy without action between the same parties involving the liability for *ad valorem* taxation of plaintiff's real and personal property for the year 1940 was considered and determined by this Court in favor of the defendants at Fall Term, 1940. That case is reported in 218 N. C., 673, 12 S. E. (2d), 265, where the material facts are set out. It there appeared that in October, 1940, the plaintiff paid, under protest, the taxes claimed by defendants, and brought suit to recover the amount so paid, in accordance with the provisions of sec. 936, ch. 158, Public Laws 1939. It was decided by this Court in an opinion filed 20 December, 1940, that the plaintiff's claim for exemption from taxation under the Constitution and laws of the State could not be sus-

tained, and the right to recover the taxes which had been paid, except in particulars not now pertinent, was denied. That decision was a final determination of the questions presented on that appeal.

In the instant case, begun 18 March, 1942, another controversy without action is submitted upon the identical facts presented in the former case. Claim is again made for the refund, in part, of the *ad valorem* taxes for the year 1940 which had been paid by plaintiff in October, 1940. Defendants plead that plaintiff's claim for refund of taxes for 1940 has become *res judicata*. *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421.

But the plaintiff bases its claim in this case upon ch. 125, Public Laws 1941, and contends that the provisions contained in former statutes for the exemption of property held for charitable purposes have been enlarged so as to embrace the property of the plaintiff, and that by its terms the 1941 Act is made retroactive, including exemption from the payment of taxes for the year 1940. *Edwards v. Comrs.,* 183 N. C., 58, 110 S. E., 600. The Act of 1941 amends sec. 600, ch. 310, Public Laws 1939, by adding a new subsection, as follows: "(11) Real property actually used for hospital purposes, including homes for nurses employed by or in training in such hospitals, held for or owned by hospitals organized and operated as non-stock, non-profit charitable institutions, without profit to the members or their successors, notwithstanding that patients able to pay are charged for services rendered: Provided, all revenues or receipts of such hospitals shall be used, invested, or held for the purposes for which they are organized; and provided, further, that where hospital property is used partly for such hospital purposes and partly rented out for commercial and business purposes, then only such proportion of the value of such building and the land on which it is located shall be exempt from taxation as is actually used for such hospital purposes. The provisions of this section shall be effective as to taxes for the year one thousand nine hundred and thirty-six and subsequent years."

The amendment of 1941 also adds to sec. 602 (a) of the 1939 Act the following clause: "The provisions of this sub-section shall not apply to public hospitals or to hospitals organized and operated as non-stock, non-profit, charitable institutions, which, for the purpose of this Act, shall be deemed public hospitals: Provided, however, that nothing in this sub-section shall affect the liability of counties, cities, and towns to public hospitals, as herein defined, for services heretofore or hereafter rendered indigent patients or public charges and for which such counties, cities, or towns are or may be otherwise liable."

Plaintiff's counsel argues with much force that by these amendments the General Assembly has exercised the permissive power conferred by

Art. V, sec. 5, of the Constitution to exempt from taxation property held for charitable purposes, and has included within the enumerated exemptions property owned by hospitals organized and operated as non-stock, nonprofit charitable institutions, such as that of the plaintiff, and that the General Assembly has also amended sec. 602 (a) of the 1939 Act, which provided that private hospitals should not be exempt from taxation, by adding the clause that this provision should not apply to hospitals operated as non-stock, nonprofit charitable institutions, which the amendment declares to be public hospitals.

It is urged that under the facts agreed a portion at least of plaintiff's property comes within the designation of property "held for charitable purposes," and therefore it would have been within the power of the Legislature in 1939 to exempt it from taxation, and that, if the language of the 1939 Act was insufficient to accomplish that purpose, there is no constitutional inhibition upon legislative power subsequently to exempt it by an act retroactive in its effect. *Edwards v. Comrs., supra; Anderson v. Wilkins,* 142 N. C., 154, 55 S. E., 272.

It is a generally accepted principle of statutory construction that there is no constitutional limitation upon legislative power to enact retroactive laws which do not impair the obligation of contracts or disturb vested rights (*Bateman v. Sterrett,* 201 N. C., 59, 159 S. E., 14; *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313; *Lowe v. Harris,* 112 N. C., 472, 17 S. E., 539; *McFadden v. Evans-Snider-Buel Co.,* 185 U. S., 505; *Paramino Lumber Co. v. Marshall,* 309 U. S., 370), and this principle is applicable in matters of taxation (*Clark v. Gilchrist,* 243 N. Y., 173; *United Business Corp. v. Commissioner of Internal Revenue,* 290 U. S., 635; *Cooper v. U. S.,* 280 U. S., 409), but this may not be held to empower the Legislature to annul or interfere with judgments theretofore rendered (*Comrs. v. Blue,* 190 N. C., 638, 130 S. E., 743; *Morrison v. McDonald,* 113 N. C., 327, 18 S. E., 704), or compel the refunding of taxes judicially determined to have been lawfully collected (*Bailey v. Raleigh,* 130 N. C., 209, 41 S. E., 281), or change the result of prior litigation (*Edwards v. Comrs., supra* [60]), or give life to a deed declared void. *Booth v. Hairston,* 195 N. C., 8, 141 S. E., 480.

In *Clark v. Gilchrist,* 243 N. Y., 173, the New York Court of Appeals considered an appeal from the Supreme Court of that state, wherein the lower court had held stock dividends taxable as income. Pending the appeal the Legislature amended the statute so as to exclude stock dividends from the definition of income and made the act retroactive. In that case the court of appeals reversed the lower court on the strength of this amendment, holding that the retroactive feature of the act was no infraction of any constitutional limitation upon the power of the Legislature. To the same effect is the holding in *Wharton v. Greensboro,* 149

N. C., 62, 62 S. E., 740, where the power of the city to issue school bonds was denied for lack of legislative authority. While the case was still pending in the Superior Court after the first appeal the Legislature granted the authority to validate the bonds, and due effect was given to the act by this Court upon a second appeal. There are many cases in the books illustrating the power of the Legislature to enact curative statutes affecting pending litigation. Statutes relating to procedure or the rules of evidence, affecting pending litigation, are generally upheld.

While there is some conflict of judicial opinion as to the effect of an amendatory act applicable to a controversy in which final judgment has been entered, it is generally held that enabling statutes which attempt to cure defects in legislation relating to municipal corporations, enacted subsequent to judgments holding the defects fatal, are within the legislative power, usually in cases, however, where the court has not lost control over the previous judgment, and the cause is for some purpose still pending. *Hodges v. Snyder,* 45 S. D., 149, 25 A. L. R., 1128, affirmed on appeal in 261 U. S., 600.

But in the instant case we have a somewhat different situation. After a final judgment of the Court of last resort that the tax was properly levied, and that plaintiff's hospital property was subject to the tax, and recovery of the amount paid was denied, the Legislature amended the general statute by a provision attempting to extend the exemption to hospitals of the type of plaintiff's property for the tax year 1940. Thereafter a new suit was instituted to recover a portion of the same taxes, the subject of the previous litigation, on the same facts. This new suit was faced with a final judgment between the same parties, on the same facts, with respect to the same subject matter. Could the Act of 1941 give new life to a cause of action which had ceased to exist as the result of a final adverse judgment?

The decisions in this State tend to support the ruling of the court below that plaintiff was not entitled to recover. In *Morrison v. McDonald,* 113 N. C., 327, 18 S. E., 704, a similar question was considered by the Court. In that case judgment had been rendered for the plaintiff on the verdict of a jury in December, 1892. Under the existing statute, as interpreted by the courts, this judgment, being based on a verdict, could not be set aside for excusable neglect (The Code, sec. 274). The Legislature of 1893 amended the section by enlarging the power of the court to set aside judgments based on verdicts. The defendant in that case thereupon moved to set aside the judgment for excusable neglect. It was held, *Chief Justice Shepherd* speaking for the Court, that the Act of 1893 could not be given the effect of annulling a judgment of the Court, and that plaintiff's rights under the judgment could not be disturbed by subsequent legislation. In the opinion in that case the follow-

ing language was quoted from *Ratcliffe v. Anderson,* 31 Grat. (72 Va.), 105: "Both upon principle and authority, we conclude that the Legislature has no right, directly or indirectly, to annul, in whole or in part, a judgment or decree of a court already rendered, or to authorize the courts to reopen and rehear judgments and decrees, already final, by which the rights of the parties are finally adjudicated, fixed and vested; and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void."

In Black on Judgments, sec. 298, it is said: "While a statute may, indeed, declare what judgments shall in future be subject to be vacated, or when or how, or for what causes, it cannot apply retrospectively to judgments already rendered and which had become final and unalterable by the court before its passage. Such an act would be unconstitutional and void on two grounds; first, because it would unlawfully impair the fixed and vested rights of the successful litigant, and second, because it would be an unwarranted invasion of the province of the judicial department." Freeman on Judgments, sec. 204; Wade on Retroactive Laws, secs. 31, 32, 67; Cooley Cons. Lim., 8th Ed., 176. See cases cited in note to *Paramino Lumber Co. v. Marshall,* 309 U. S., 370, 84 L. Ed., p. 819. Amendatory legislation which affects past transactions upon which judicial decrees have been rendered is invalid. C. J. S., 298-301.

In *Bailey v. Raleigh,* 130 N. C., 209, 41 S. E., 281, the power of the Legislature to authorize the refund of taxes lawfully levied and paid was considered in relation to the following facts: The plaintiff's intestate, in accord with the statute then in force, paid to the city of Raleigh the license imposed on those carrying on the business of retail liquor dealers within one mile of the corporate limits of the city. The plaintiff's intestate operated outside and within one mile of the city limits. Subsequently, the Legislature passed a general Act (ch. 327, Public Laws 1901) requiring cities to refund privilege taxes collected from persons doing business outside their corporate limits. In a suit for the refund of those taxes, recovery was denied on the ground that it was not within the legislative power to require refund of taxes which had been lawfully levied and paid under existing law.

An examination of the Act of 1941 in relation to the previous litigation between the parties raises the implication that the retroactive provision therein, as it affects this case, should not fall within the rule as to curative statutes, but rather should be regarded as an attempt to annul the effect of a judgment previously rendered.

The Act of 1941 amends sec. 600 of the 1939 Act by the addition of a new subsection numbered eleven. This refers to real property held for hospital purposes and extends the statutory exemption to real property owned by hospitals organized and operated as non-stock, nonprofit chari-

table institutions. This subsection eleven was made retroactive. But the Act of 1941 does not purport to repeal the declaration in sec. 602 (a) that "Private hospitals shall not be exempt from property taxes." The amendment to this section recites that this provision shall not apply to hospitals operated as non-stock, nonprofit charitable institutions, which are declared to be public hospitals. This last amendment was not made retroactive. It is an established rule that statutes are to be construed as having only prospective effect, unless a contrary intention is expressly declared or necessarily implied. *Ashley v. Brown*, 198 N. C., 369, 151 S. E., 725; *Waddill v. Masten*, 172 N. C., 582, 90 S. E., 694; *Anderson v. Wilkins*, 142 N. C., 154, 55 S. E., 272.

The decision in the former case between the hospital and the county was grounded largely upon sec. 602 (a), which expressly eliminates private hospitals from statutory exemption. The conclusion was reached upon the facts then presented, identical with those now before us, that plaintiff's hospital was in contemplation of the taxing laws a private hospital. Thus the tax status of plaintiff's property under the facts agreed already had been judicially determined by this Court. The fact so established was conclusive between the parties as to 1940 taxes. *Current v. Webb*, 220 N. C., 425; *Harshaw v. Harshaw*, 220 N. C., 145. A legislative declaration to the contrary upon the same facts would, if given effect, annul a previous decision of the Court and constitute an invasion of the province of the judicial department. *Preveslin v. Developing Co.*, 112 Conn., 129, 70 A. L. R., 1426; 11 Am. Jur., 916.

Upon another ground we think the judgment below must be upheld. While under the Act of 1941 plaintiff seeks to obtain repayment of taxes paid in 1940, there is no provision in the new statute authorizing refunding of those taxes. Neither the right nor the machinery to implement it is granted. The new act does not authorize reopening the former case. The taxes sued for were paid in October, 1940. Suit to recover them was instituted under the only statute permitting such suit, and was decided against the plaintiff. Plaintiff's remedy for the refund of the same taxes has been exhausted. No other statute is available. The amounts paid have been covered into the treasury of Guilford County under a final judgment before the amendment of 1941 was enacted. The case for plaintiff's 1940 taxes has been closed. The question as to the effect of the statute upon plaintiff's tax liability for subsequent years is neither presented nor decided.

We are not unmindful of the value of modern hospitals to the community. Their equipment affords a means of rendering practical service to those who suffer, whether the service be rendered for compensation, or without reward. Those who have incorporated and are operating the Piedmont Memorial Hospital have made its facilities available to the

people of Guilford County. But regardless of these considerations it is the function of the courts to administer justice according to law. The unbroken rule is that all property, unless exemption is authorized by the Constitution and laws of the State, must bear its fair share of the burdens of taxation. That this burden shall be imposed in a just and equitable manner, and that taxes shall be uniform as to each class of property taxed, is a requirement of the Constitution, as well as the concern of all taxpayers.

The judgment of the Superior Court denying plaintiff's right to recover under the facts agreed must be

Affirmed.

A. S. KING v. IVY LEWIS AND WIFE, EVA KING LEWIS.

(Filed 20 May, 1942.)

1. Mortgages § 25—

Ordinarily, the acquisition by the mortgagee of an outstanding title, by purchase at a tax sale or at the foreclosure of a prior lien or otherwise, will be deemed for the benefit of himself and mortgagor, and the mortgagor will be permitted to redeem upon payment of the total of the debts.

2. Same—

Where a will directs that the land be sold and the proceeds of sale divided among the beneficiaries, and a beneficiary mortgages his interest prior to the sale by the executor, and the mortgagee purchases at the executor's sale, the mortgagor cannot contend that as to his share of the land the relationship of mortgagor and mortgagee continues to exist, since the executor's sale divests the beneficiaries of all interest in the land, legal or equitable, upon which the right of redemption can be predicated.

3. Wills § 46—

Where a will directs that certain lands be sold and the proceeds of sale divided among named beneficiaries, each beneficiary takes his interest subject to the provisions of the will and cannot convey or encumber same in any manner which would affect the absolute power of sale contained in the will, and upon sale by the executor the interest of each beneficiary in the land is divested and transferred to the proceeds of sale.

4. Same:. Mortgages § 2a—

Where a will directs that lands be sold and the proceeds be divided among named beneficiaries, and a beneficiary mortgages his interest prior to the sale by the executor, the mortgage is an equitable assignment to the extent of the indebtedness secured thereby of the mortgagor's share in the proceeds of sale, and this result is unaffected by the purchase of the land by the mortgagee at the executor's sale.

KING *v.* LEWIS.

APPEAL by defendants from *Bone, J.*, at October Term, 1941, of PENDER.

This is a civil action and the facts and contentions pertinent to this appeal are as follows:

Robert S. Atkinson, late of Pender County, N. C., died on the ..... day of February, 1936, leaving a last will and testament, which was duly admitted to probate in the office of the clerk of Superior Court in Pender County, on 14 February, 1936.

The 6th Item of said will provides as follows: "I direct my executor, hereinafter named, as soon after my death as is practicable, to sell my Sloop Point Farm (consisting of about 100 acres) and to divide the proceeds equally among the following, or to the children *per stirpes* of each as may die before the division of the proceeds from the sale above mentioned; Mrs. Ganell Stanley, Mrs. Eva Lewis, Mrs. Laura Hall, Mrs. Malba King, Miss Grace Atkinson, Miss Annie L. Atkinson, Miss Ruth Atkinson, Miss Kathrine Hall, Miss Daisy Atkinson."

On 31 January, 1938, Eva Lewis, one of the legatees of one-ninth of the proceeds from the sale of the real estate described in the above Item of said will, and her husband, Ivy Lewis, executed and delivered to A. S. King, plaintiff herein, a mortgage deed conveying to A. S. King a one-ninth interest in the land known as the "Sloop Point Plantation," to secure an indebtedness of $225.00, evidenced by a note executed and delivered by defendants to plaintiff of even date therewith, said note payable 1 November, 1938. The aforesaid mortgage was duly registered in the office of the register of deeds of Pender County.

The defendants paid to the plaintiff the sum of $50.00 on said note 1 October, 1938, no other payment has been made by defendants on the aforesaid indebtedness. Defendants admit they owe a balance to plaintiff of $184.00, together with interest at six per cent from 1 October, 1938, until paid.

The Wilmington Savings & Trust Co., of Wilmington, N. C., duly qualified as executor of the last will and testament of Robert S. Atkinson, on 14 February, 1936, and immediately entered upon the discharge of its duties as such, and was acting in such capacity on 19 February, 1940, when, in the exercise of the absolute power of sale contained in the 6th Item of the aforesaid will, said executor executed and delivered to Adrian S. King and wife, Hettie Mae King, a deed in fee simple for the Sloop Point Plantation, being the same property described in the mortgage deed referred to herein. Adrian S. King and wife, Hettie Mae King, paid a consideration of $1,500.00 for said property.

It is admitted that the interest of the defendant Eva Lewis in the proceeds from the sale of the aforesaid property is $166.67, which sum is now held in the office of the clerk of the Superior Court of Pender County, pending the outcome of this action.

The defendants filed an answer admitting all the material allegations in the complaint; but alleging that the relationship of mortgagor and mortgagee existed at the time plaintiff and his wife, Hettie Mae King, acquired the outstanding title to said land; and that, plaintiff holds title to said land as trustee for himself as mortgagee and for the defendants as mortgagors. Defendants further allege that they are entitled to redeem said land and to have their one-ninth interest in the same allotted to them in severalty; and also that they are entitled to an accounting of the income received from the property by the plaintiff and his wife, since 19 February, 1940.

Upon the foregoing facts and contentions set forth in the pleadings, his Honor rendered judgment on the pleadings, and held the plaintiff is entitled to receive the $166.67, which represents the interest of the defendant Eva Lewis in the proceeds from the sale of the land referred to in the pleadings, said sum to be applied by plaintiff as a credit on the note held by him against defendants and directed the clerk of the court to pay said fund to plaintiff, and further held the defendants are not entitled to the relief sought in their answer and denied the same.

From the judgment the defendants excepted and appealed to the Supreme Court, assigning error.

Clifton L. Moore for plaintiff.
Corbett & Johnson for defendants.

DENNY, J. The defendants insist that at the time the plaintiff and his wife, Hettie Mae King, acquired the title to the property under consideration, the relationship of mortgagor and mortgagee existed between the plaintiff and the defendants; consequently, the plaintiff, A. S. King, is a trustee for himself as mortgagee and the defendants as mortgagors. This position cannot be sustained. We are not inadvertent to the opinions of this Court, which hold that a mortgagor cannot buy a superior title or lien to that held by him; and hold it for his own benefit, but the act inures to the benefit of him for whom he holds as trustee. The defendants are relying on *Cauley v. Sutton,* 150 N. C., 327, 64 S. E., 3, in which the Court said: "The legal estate passes to the mortgagee, and he holds it, not only in trust for himself, but also for the mortgagor. *McLeod v. Bullard,* 86 N. C., 210-216; *Capehart v. Dettrick,* 91 N. C., 344. We have held that if he pays off an encumbrance or buys in an outstanding title superior to his own he cannot hold it for his own benefit, but the act inures to the benefit of him for whom he holds as trustee; and, further, 'if he buys at a sale made under a prior mortgage he does not acquire the title for his own personal benefit, but merely removes an encumbrance, and the charges of it as a prior lien, upon the property

itself; and this is so, because he cannot take advantage of his position to the injury of those whose interests are committed to his protection.' *Taylor v. Heggie*, 83 N. C., 244. The taxes assessed were a lien upon the land, and when the mortgagee bought at the sheriff's sale he purchased only an encumbrance, the cost of which he is entitled to have added to the debt secured by the mortgage, and it is therefore an additional lien upon the land. The mortgagee could have paid the taxes and acquired a lien upon the land to the extent of the amount so paid by him. The Code, sec. 3706 (Revisal, sec. 2858). He did not acquire the equitable estate of the mortgagor, which still exists, notwithstanding his purchase at the tax sale, and he cannot use his deed for the purpose of asserting any right in conflict with the mortgagor's equity of redemption."

In the foregoing opinion, as well as in the cases cited therein, the Court was considering the rights of a mortgagor where the mortgagee had obtained a superior title by a tax deed or by the purchase of the interest of his mortgagor at a sale to satisfy a prior encumbrance.

"It is very generally conceded that the holder of a mortgage is entitled for the protection of his interest to pay taxes assessed against the mortgaged premises in the event of failure by the mortgagor to discharge them, and that he has a right to add the sums so paid to the mortgage debt; however, all authorities agree that a mortgagee in possession cannot acquire a tax title which will prevail against the mortgagor or those claiming under him, and some courts hold that irrespective of possession a mortgagee cannot purchase the mortgaged property at a tax sale and thus acquire a title which will defeat the rights of the mortgagor, the act of purchasing at such a sale being deemed to be for the protection of the mortgage lien." 19 R. C. L., sec. 174, p. 397.

In the case of *Jones v. Warren*, 213 N. C., 730, 197 S. E., 599, a provision in a will, similar to that now under consideration, was construed. Prior to the exercise of the power in the will, Walter Warren, a beneficiary under the will, gave four deeds of trust on the real estate which the devisor had directed his executor to sell and to distribute the net balance to his children in accordance with the provisions of the will. After the deeds of trust had been executed and duly recorded, a judgment was docketed against the said Walter Warren. The opinion of the Court disposed of the questions involved in the following language: "We think the four deeds of trust before mentioned, which were duly recorded, from their language gave a lien on the real estate, and when sold and converted into money an equitable lien in their favor attached to same and the judgment purchased by the appellant Pollard was subject to the liens of said deeds of trust. . . . The judgment of the lower court should be sustained for the reason that the law, as interpreted by the courts of this

State and others, is to the effect that the deeds of trust given by Walter Warren constituted equitable assignments of his interest in the proceeds of the sale of the property described therein, and that the judgment creditors have no lien against the land." The Court cited *Ferebee v. Proctor,* 19 N. C., 439, in which *Ruffin, C. J.,* said: "If the will does not devise the land, but creates a power to sell it, then, upon the execution of the power, the purchaser is in under the will, as if his name had been inserted in it as a devisee. But, in the meantime, the land descends, and the estate is in the heir. The power is not the estate, but only an authority over it, and a legal capacity to convey it. These are elementary maxims. But it is supposed that the testator had disposed of this land by directing a sale of it absolutely, and a division of the proceeds, so as to turn it out and out, as it is called, into personalty; and that this defeated the descent. When sold, the estate of the heir will certainly be divested; but such a provision in the will is only the creation of a power; it is a disposition of the proceeds of the land, but not a disposition of the land itself; and that consequently descends. The doctrine of conversion is purely equitable. The law knows nothing of it. A court of equity, by considering that as done which ought to be done, deals with land ordered to be sold as if it were sold. But a court of law always looks upon land as land, and has regard only to the legal title, which is unaffected by any power, whether it be a naked one, or coupled with an interest, or a trust until the power be executed." *Speed v. Perry,* 167 N. C., 122, 83 S. E., 175.

The defendants, by executing the mortgage deed to the plaintiff herein, did not convey any title or interest in the real estate described therein that could be sold or conveyed thereunder which would in any way affect the absolute power of sale in the will of Robert S. Atkinson. The bare legal title to the one-ninth undivided interest in said land was held by Eva King Lewis and her husband Ivy Lewis, subject to the provisions of the aforesaid will; and their interest in the real estate involved was divested upon the execution of the power in the will, and was transferred to the proceeds from the sale of the land. The mortgage deed executed by these defendants is effective as an equitable assignment of the interest of the defendants to the extent of the indebtedness secured thereby, which is in excess of the pro rata part of the proceeds to which these defendants would otherwise be entitled. *Jones v. Warren, supra.*

The facts here are distinguishable from those in *Cauley v. Sutton, supra;* these defendants hold no title, legal or equitable, in the land involved which gives them the right of redemption.

The judgment of the court below is

Affirmed.

W. BLOUNT RODMAN, COMMISSIONER, v. Z. V. NORMAN.

(Filed 20 May, 1942.)

1. Taxation § 40c—C. S., 1744, may be invoked in action to enforce tax lien against land held by life tenant with contingent limitation over.

The land in question was held by a life tenant with contingent limitation over, the persons entitled to the remainder not being determinable until the death of the life tenant. The land was mortgaged by the life tenant and the mortgage was foreclosed upon default. *Held:* In an action to foreclose the lien for taxes against the land under C. S., 7990, in which the purchaser at the foreclosure sale, the life tenant and the known contingent remaindermen are made parties, the minor contingent remaindermen and those not *in esse*, and the unknown contingent remaindermen may be represented by guardian *ad litem* under C. S., 1744, and when the provisions of both statutes have been fully and accurately followed the purchaser at the commissioner's sale acquires the fee simple title.

2. Same: Judgments § 29—

In an action under C. S., 7990, to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation.

APPEAL by defendant from *Carr, J.*, at October Term, 1941, of WASHINGTON.

This action was heard upon an agreed statement of the facts, substantially as follows:

1. The late Mary J. Bateman was the owner of the land involved, and disposed of it by will duly admitted to record in Washington County, by devise in the following language: "I give subject to the life estate of my said husband the land divided to me by the commissioners who divided the lands of my late father, W. T. Freeman, to my two children, Henry L. and Lizzie E., said lands to be divided between said children as follows: the canal shall be the dividing line between them, Henry having all on the North of said canal, and Lizzie all on the South, the said Henry and Lizzie shall each have only a life estate in and to said lands so given to them and at their death the said lands so given to them shall respectively go to their living children or the issue of such as are dead, said issue representing their deceased parents, in the event there are no issues of the said Henry or the said Lizzie living at the death of their respective parents (that is, children or grandchildren) the said lands so given to each of said parties respectively for their lives shall go to their other brothers and sisters or the issue of such as are dead."

2. That Lizzie E. Bateman subsequently married Robert Bowen, and she and her husband executed a mortgage on the land involved, which was foreclosed by action in the Superior Court, in which foreclosure action the commissioner appointed by the court conveyed the interest in said land of Lizzie E. Bowen (née Bateman) to E. M. Brown.

3. That the said land was listed for taxation in Washington County in the name of Lizzie Bowen for the year 1931, and for subsequent years, including 1938, in the name of E. M. Brown. That the taxes levied by Washington County being in default from 1931 to 1938, both inclusive, action was instituted by Washington County against E. M. Brown *et al.*, in the Superior Court on 23 February, 1940, under C. S., 7990, for the foreclosure of the tax liens upon said land.

4. That the plaintiff in said action for the foreclosure of tax liens endeavored to ascertain the names of the children and grandchildren of Lizzie E. Bowen (née Bateman) and the children of her brothers and sisters in an effort to make them parties defendant to said action, and did make parties of such contingent remaindermen whose names could be ascertained. That the order of the clerk of the Superior Court directed that the published notice to the defendants "require that all other persons having or claiming an interest in said property take notice that this action has been commenced in the Superior Court for the foreclosure of said tax liens, and that the said notice so published duly contained the notice to unknown parties above referred to."

5. That Lizzie E. Bateman (subsequently Bowen, subsequently Passailaigne) had no sister, but had two brothers, both of whom, along with her, were made parties to the aforesaid foreclosure action, and that Lizzie E. Bateman and her two brothers each had two children or more who were made parties to said action.

6. That W. R. Gaylord was appointed guardian *ad litem* for all defendants known to be minors or incompetents, and as such guardian duly filed answer on 10 May, 1940; and subsequently W. R. Gaylord was appointed guardian *ad litem* for all unknown parties claiming an interest in the land involved, and for the unborn children of Lizzie E. Bateman Bowen, and her two brothers, and for these parties he duly filed answer on 5 February, 1941.

7. That pursuant to judgment of foreclosure, W. Blount Rodman, the commissioner therein appointed, duly offered said land for sale at public auction, and Z. V. Norman became the last and highest bidder for the same at the first sale, and at a second sale made after an upset bid had been made.

8. That the sale to Z. V. Norman was duly confirmed by the clerk of the Superior Court on 15 September, 1941, and approved by Carr, judge presiding over the October Term, 1941, of the Superior Court of Washington County.

9. That W. Blount Rodman, Commissioner, has tendered a deed to Z. V. Norman, sufficient in form to convey a fee simple title, and has demanded that he accept the same and pay the purchase price, but the said Z. V. Norman has declined to so do.

W. Blount Rodman and Margaret C. Johnson for plaintiff, appellee.
Z. V. Norman for defendant, appellant.

SCHENCK, J. It is the contention of the defendant that the court was without authority in the case of Washington County *v.* E. M. Brown *et al.,* to order the sale of the land involved on account of the interests of the contingent remaindermen; whereas on the other hand it is the contention of the plaintiff that any interest of the contingent remaindermen was brought under the authority of court by reason of the fact that any such remaindermen were made parties to the action of Washington County *v.* Brown *et al.,* the minors and incompetents among them being represented by a guardian *ad litem,* as well, also, as any unknown and unborn remaindermen; and, further, by such contingent remaindermen being represented by members of the same class among the adult defendants in said action.

This action was instituted under the provisions of C. S., 7990 and 1744, the former of which reads in part: "A lien upon real estate for taxes or assessments due thereon may be enforced by an action in the nature of an action to foreclose a mortgage, in which action the court shall order a sale of such real estate, or so much thereof as shall be necessary for that purpose, for the satisfaction of the amount adjudged to be due on such lien, together with interest, penalties, and costs allowed by law, and the costs of such action . . ."; and the latter of which reads in part: "In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale or mortgage of the property by a proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons *in esse* who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other civil actions, as provided by section 479, and service of summons upon nonresidents, or persons whose names and residences are unknown, by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being whose names and resi-

dence are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian *ad litem,* to represent such remainderman, upon whom summons shall be served as provided by law for other guardians *ad litem,* and it shall be the duty of such guardian *ad litem* to defend such actions, . . ."

From the agreed facts it appears that the two aforesaid statutes have been accurately and fully followed in this action, and that the statutes are applicable to said facts. While it is true we find no case in our reports where the sale of a contingent remainder has been made in the foreclosure of a tax lien, yet no valid reason is advanced why these two statutes cannot be invoked in the same action. In the instant case "a lien upon real estate for taxes . . . due thereon" is sought to "be enforced by an action" and "there is a vested interest in real estate and a contingent remainder over to persons who are not in being," and "the contingency has not yet happened which will determine who the remaindermen are," hence the provisions of both statutes have been met, and it would appear, therefore, that the judgment of the Superior Court should be affirmed.

It would further appear that the judgment of the Superior Court should likewise be affirmed for the reason that each class of contingent remaindermen created by the will of the late Mary J. Bateman was represented among the defendants actually served and answering. They include children and grandchildren of the life tenant, Lizzie E. Bateman, and the brothers of the life tenant (there was no sister) and the children of such brothers—all of these being *in esse* and first in remainder after the expiration of the life estate.

In *Lumber Co. v. Herrington,* 183 N. C., 85, 110 S. E., 656, it is said: ". . . the accepted doctrine is that a remainder to a class of children or more remote relatives, vests in right, but not in amount, in such of the objects of the bounty as are *in esse* and answer the description, 'subject to open and let in' any that may afterwards be born before the determination of the particular estate; and a sale may generally be authorized by the court where in case of a remainder to a class, those of the class who are *in esse* represent the others. In such case it is assumed that those who represent a particular class will protect the interest of all who have or may acquire an interest in the remainder." And in *Springs v. Scott,* 132 N. C., 548, 44 S. E., 116, it is said: "1. That without regard to the Act of 1903, the Court has power to order the sale of real estate limited to a tenant for life with remainder over to children or issue upon failure thereof, over to persons, all or some of whom are not *in esse,* when

one of the class being first in remainder after the expiration of the life estate is *in esse* and a party to the proceeding to represent the class, and that, upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons *in esse* or *in posse.*" In *Hines v. Williams,* 198 N. C., 420, 152 S. E., 39, land was sold at a tax foreclosure sale and the purchaser brought suit declining to take deed because, as he contended, the commissioner could not convey an indefeasible title. However, the Court held that although the land sold was subject to a life estate with contingent remainder over, involving the interests of children living and unborn, where the certificate was duly foreclosed, a guardian *ad litem* appointed for the infant defendants had filed an answer, and another guardian *ad litem* appointed to represent the unborn children and all persons who may have had an interest in the land had also filed answer, "it appears that the infant defendants and all persons having a vested or contingent interest in the land have had their day in court," and that therefore "they are bound by the judgment and that the deed conveys title in fee to the purchasers."

The judgment of the Superior Court is

Affirmed.

THE BOARD OF COMMISSIONERS FOR THE COUNTY OF WASHINGTON v. C. T. GAINES, J. C. KIRKMAN AND S. D. DAVIS.

(Filed 20 May, 1942.)

1. Taxation § 40c: Process § 5—

In service of process by publication, the process, or in a suit to foreclose the lien for taxes under C. S., 7990, the notice, must correctly name or describe the parties defendant served by the publication, C. S., 484 (7), in order for the court to acquire jurisdiction.

2. Same: Drainage Districts § 16—In suit to foreclose tax lien, publication which fails to denominate holders of drainage district bonds is insufficient to bring them into court.

Where, in an action to foreclose a tax lien under C. S., 7990, service of process on "bond holders, lien holders or other persons having or claiming some interest in the land" is had by publication, but the publication makes no reference to any drainage district, drainage assessment, liens or bonds or bondholders of any drainage district, the publication is insufficient to give the court jurisdiction of the holders of bonds of the drainage district in which the lands or any part of them lie, and the judgment therein cannot preclude the bondholders from exercising their remedy under prescribed conditions to have the drainage district levy additional assessments against the lands for the purpose of paying the drainage bonds. C. S., 5356.

3. Drainage Districts § 16—

Since drainage districts are political subdivisions of the State, all statutory remedies and provisions for, or securing payment of the bonds issued by a district under authority of law, which are in effect when the bonds are issued, become a part of the contract between the drainage district and the bondholders.

4. Same—

Sec. 1, ch. 504, Public Laws 1933 (Michie's Code, 5373 [g]), which provides that when drainage assessments against a particular piece of land are paid in full the land shall not be subject to further assessments, does not apply to bonds issued prior to the effective date of the statute, or affect the right of the holders of such bonds under prescribed conditions to require the levying and collection of special assessments for the purpose of paying the bonds. C. S., 5356.

APPEAL by defendants from *Frizzelle, J.*, 1 May, 1942. From WASHINGTON.

Controversy without action submitted upon agreed facts, which in so far as pertinent to decision on this appeal, are substantially these:

1. By written contract dated 16 March, 1942, "in consideration of sum of Five Hundred Dollars, and of the covenants and agreements hereinafter contained," plaintiff, as party of the first part, agreed to sell, and defendants, as parties of the second part, agreed to purchase, "if free and clear from all liens and encumbrances, by good and sufficient deed without warranty," all those tracts of land in Lees Mill and Plymouth Townships in Washington County, North Carolina, described in two certain recorded deeds, dated 18 July, 1941, from Z. V. Norman, Commissioner, to Washington County, "subject to a timber deed now held by defendants, for the sum of seven thousand dollars, cash, upon tender by the party of the first part of a good and proper deed for said land, or upon tender by the parties of the second part of the remaining unpaid portion of the purchase price to the party of the first part, on or before the 1st day of June, 1942." The agreement specifies that it is subject to a certain lease to the North Carolina Department of Agriculture, and further provides that (lettering interposed for convenience), "It is understood and agreed (a) that a part of said land lies in Beaufort County Drainage District No. 5 (Albemarle Drainage District) and a part . . . in Washington County Drainage District No. 5, and that heretofore said lands have been subject to drainage assessments of said districts, but the owners of said land, having defaulted in the payment of the taxes levied by Washington County, the tax liens of said county were foreclosed by suit in the Superior Court of Washington County, and Washington County became the purchaser. (b) That if the lien of the drainage assessments imposed by the drainage districts, existing July 18, 1941, were extinguished by foreclosure of the county tax liens and the said drainage districts are without

authority to re-assess said lands for the debts of the said drainage districts existing and outstanding at the time of the foreclosure sale and conveyances pursuant thereto, the parties of the second part are bound by these presents to accept deed for said lands and pay the purchase price. (c) But if the said foreclosure sale for county taxes did not extinguish the lien of the said drainage districts for the drainage assessments existing as aforesaid, or if the said drainage districts may hereafter re-assess the said lands for the indebtedness and obligations of the said drainage district existing as aforesaid, then the parties of the second part shall be released from their obligation to purchase said lands. (d) In such event Washington County agrees to refund to the parties of the second part the sum of Five Hundred Dollars, which has been paid for this contract. (e) But the parties of the second part may, at their option, waive the right to require said refund and require conveyance by Washington County of the said lands, subject to such drainage assessments as may exist against the same, and subject further to any further assessments as may thereafter be made against said lands for debts of said districts existing as aforesaid."

2. That the lands in question are in the main embraced within certain legally constituted drainage districts which have caused assessments to be levied for the payment of bonds issued by the districts for the purpose of excavating and constructing drainage canals therein; that "the last drainage assessment" in one district "was due the first Monday in September, 1937," and in another "was due on first Monday in September, 1939" (the dates of levy of assessments and of issuance of bonds not being stated in agreed case); and that "a substantial amount of the drainage assessments . . . particularly against the lands embraced in this controversy, for the payment of said bonded debt, has not been paid, and that likewise a substantial amount of the bonded debt of each district is still unpaid."

3. Plaintiffs have tendered to defendants "a deed or transfer covering said lands and has demanded the purchase price, but defendants have declined to accept said deed and pay the purchase price"—assigning as reasons therefor: (a) That plaintiff does not have title to said lands, free and clear from all liens and encumbrances; (b) that "said lands are subject to the liens of the deeds of trust set out in the complaints and to the drainage assessments levied thereon by the respective districts in which they lie"; and (c) that same "are subject to be re-assessed by the respective drainage districts in which they lie, on account of the indebtedness and obligations of said drainage districts existing and outstanding at the time of the foreclosure sale and conveyances pursuant thereto."

4. That the two deeds from Z. V. Norman, Commissioner, to Washington County, were executed pursuant to judgments in two civil actions,

Nos. 52 and 54, instituted by said county, under provisions of C. S., 7990, against Norfolk Southern Land Company, and others, to enforce lien of taxes levied for years 1930 to 1938, both inclusive, then delinquent, and for years 1939 and 1940, upon approximately 35,000 acres of land listed in the name of Norfolk Southern Land Company, which judgments direct that the Commissioner "sell said lands free and discharged of all liens and encumbrances of every nature, kind and description and all claims which defendants or any one hereafter claiming under them could assert, except the taxes to be assessed thereon for the fiscal year beginning July 1, 1941."

5. That in the complaints filed in the actions, to which reference is made in preceding paragraph, it is alleged, among other things, (a) that the defendants, Boards of Drainage Commissioners for certain named Drainage Districts, have or claim to have "certain drainage tax assessments" levied upon all or part of said land, which assessments are inferior to the liens and assessments of taxes due plaintiff, (b) "that there may be other persons having or claiming some interest in parts or in all of said lands," as expressed in case No. 54, and "as bondholders, lien holders or otherwise in said land," as expressed in case No. 52. These are the only denominations of bondholders appearing in the complaints.

6. That in each of the said tax foreclosure actions the only service of process as to holders of bonds of the drainage districts was by publication. Relative thereto, it appears in the affidavits, upon which orders of publication are based, "that there may be other necessary parties having or claiming an interest as bondholders, lien holders or otherwise in said lands, not disclosed by the public records of said county, the names and residences of whom are not known to the plaintiff." Upon that statement in the affidavits, the clerk ordered that notices of the pendency of the action should be served by publication, and that the notices should "require that any and all other persons not specifically named in the complaint having or claiming an interest as bondholders, lien-holders or otherwise in said land, shall appear and answer or demur to the complaint as herein provided." The notice as published is that, "defendants, Norfolk Southern Land Company" (and certain others, naming them), "and all other persons having or claiming any interest as bondholders, lien-holders or otherwise in the lands hereinafter referred to, will take notice," etc. And, while the lands referred to are described as being owned by Norfolk Southern Land Company, there is no reference to any drainage district, or to any drainage assessment liens, or to bonds or bondholders of any drainage district.

The court below, being of opinion that plaintiffs have authority to convey the lands in question to defendants "in fee simple, free and clear of all encumbrances and not subject to re-assessment by any of the drain-

age districts within which the said lands lie for the debts of said districts existing and outstanding at the time of the foreclosure sales and conveyances pursuant thereto," adjudged that defendants are bound and required to accept deed and to pay the purchase price therefor.

Defendants appeal therefrom to Supreme Court, and assign error.

Margaret C. Johnson and Norman & Rodman for plaintiff, appellee.
Carl L. Bailey for defendants, appellants.

WINBORNE, J. The question, sufficient for purposes of determining this appeal, is this: May plaintiffs, under the facts agreed, convey the lands in question, freed of liability to further assessment for purpose of raising funds with which to pay indebtedness of the drainage districts in which the lands lie? The answer is No.

A sufficient reason for such answer appears upon the face of the records in the foreclosure proceedings, Numbers 52 and 54, under which Washington County acquired title to said lands, that is, that the court did not acquire jurisdiction over the holders of the outstanding bonds of the drainage districts in which the lands lie, who have the statutory right, under prescribed conditions, C. S., 5356, *Bank v. Watt,* 207 N. C., 577, 178 S. E., 228; *Wilkinson v. Boomer,* 217 N. C., 217, 7 S. E. (2d), 491, to require the levying and collection of special assessments. Consequently, such bondholders are not bound by the judgments in those proceedings.

While in actions for foreclosure of mortgages on real estate, in the nature of which are tax foreclosure proceedings, under C. S., 7990, "if any party having an interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit," the court may order that service be made by publication of a notice of the action. C. S., 484, subsection 7. But, in accordance with the rule that notice to a party defendant is required in order to give the court jurisdiction, the process, here the notice, must correctly name the parties. This requirement is mandatory. 21 R. C. L., 1267, Process, section 7.

Applying this principle to the case in hand there is in the published notices no sufficient denomination of the bondholders sought to be served to apprise any holder of bonds of any of the districts involved that the actions affected lands in the districts which issued the bonds held by such bondholders. Hence, there is a failure of notice to them.

In this connection, it is a basic principle that the legislation by authority of which bonds of a municipal corporation or other political subdivision of the State are issued, and their payment provided for, becomes a constituent part of the contract with the bondholders. So the provi-

sions of the statutes regarding the issuance of drainage bonds, and the levying, assessing and collecting of assessments, as well as remedies generally existing for the enforcement of such assessments, in effect at the time the bonds are issued, become a part of the contract between the district and the bondholders. Jones on Bonds and Bond Securities, section 257, Vol. 1, page 590. *Wilkinson v. Boomer, supra.*

The plaintiffs here, as did the plaintiff in *Bank v. Watt, supra,* rely upon the provisions of section 1 of chapter 504, Public Laws 1933, Michie's North Carolina Code of 1939, section 5373 (g). In the *Watt case, supra,* which relates to drainage district bonds issued in 1913, the court, speaking thereto, said: "This act was passed in 1933, and is not deemed to affect the rights of the parties as disclosed by the record in the present case."

In the case at bar similar factual situation is apparent. Applying the provisions of C. S., 5354, as to maturity of bonds issued, and of C. S., 5360, as to maturity of installments of assessments, it is manifest, from facts agreed as to maturity of the last assessments, that the bonds of the drainage districts here referred to were issued prior to the enactment of the 1933 Act, for which reason, if for no other, the Act is not deemed to affect the rights of the holders of such bonds. *Bank v. Watt, supra.*

In view of the conclusions above, we deem it unnecessary to consider other points debated.

The judgment below is

Reversed.

R. KENNEDY HARRIS, RECEIVER OF PHILLIPS-BOLLING LUMBER COMPANY, v. D. B. HILLIARD AND R. G. HANCOCK.

(Filed 20 May, 1942.)

1. Receivers § 13—Receiver of partnership may maintain action existing in favor of partnership without allegation that partnership is insolvent.

Plaintiff, the receiver of a partnership, instituted this action upon allegations that defendant mortgagees foreclosed chattel mortgages executed by the partnership and purchased the partnership property through an agent at their own foreclosure sale. The receiver was authorized and directed by the court to bring the action. *Held:* The action was one which could have been maintained by the partners had a receiver not been appointed, and therefore the receiver can maintain the action without allegation of insolvency of the partnership, since a receiver may be appointed for reasons other than insolvency. C. S., 1208, 1209 (3), 860.

2. Chattel Mortgages § 20a: Mortgages § 35a—

A mortgagee cannot purchase at his own sale, either directly or indirectly through an agent, as a matter of public policy, and the mortgagor may attack the sale or sue for damages sustained by reason of the sale without allegation of fraud.

3. Same—

In this action to recover damages upon allegations that defendants mortgagees purchased the property at their own foreclosure sale through an agent, the evidence *is held* sufficient to be submitted to the jury on the question of whether the purchaser at the sale was a *bona fide* purchaser for value or whether she was an agent of defendant mortgagees and merely permitted the use of her name as purchaser for the convenience and benefit of defendants.

APPEAL by plaintiff from *Warlick, J.*, at February Term, 1942, of GUILFORD.

Civil action brought by R. Kennedy Harris, receiver of the Phillips-Bolling Lumber Company, a partnership, to recover of the defendants damages alleged to have been suffered by the partnership on account of the wrongful and unlawful foreclosure of certain personal property under two chattel mortgages executed by said partnership to the defendants.

The plaintiff was duly appointed receiver of Phillips-Bolling Lumber Company and was authorized and directed to bring this suit.

On 28 November, 1939, the Phillips-Bolling Lumber Company executed two chattel mortgages on all the machinery and physical equipment, including office furniture and fixtures, of the partnership to the defendants to indemnify the said defendants against loss by reason of having endorsed a note of the partnership of even date to the Chatham Bank, in the sum of $4,100.00.

It is admitted that on 28 October, 1940, there was due on the note secured by said chattel mortgages the sum of $3,400.00, and that by reason of default in the payment of said note, the chattel mortgages were foreclosed on 13 November, 1940, and Ruth S. Dixon became the last and highest bidder for said property. The plaintiff alleges that Ruth S. Dixon was the agent of the defendants, she being the wife of L. P. Dixon, the attorney who conducted the foreclosure sale for the defendants and one of the partners of Dixie Lumber Company. Plaintiff alleges that immediately after said foreclosure sale the defendants took possession of the property and used the same in their business, known as the Dixie Lumber Company, which was a partnership consisting of R. G. Hancock, D. B. Hilliard and L. P. Dixon. That two days after the foreclosure sale the defendants entered into negotiations for the sale of the property, which negotiations were consummated and bills of sale executed to the purchaser, D. B. Pegram, on 21 November, 1940, for a consideration of $6,800.00; and the entire consideration has been paid to the defendants. Plaintiff introduced in evidence the chattel mortgages and the bills of sale executed by R. G. Hancock, D. B. Hilliard, L. P. Dixon and Ruth S. Dixon, and an agreement executed by R. G. Hancock, D. B. Hilliard and

L. P. Dixon, trading as Dixie Lumber Company, to indemnify and save harmless D. B. Pegram from any claims, debts or liabilities arising from or out of notes, mortgages, etc., executed by Phillips-Bolling Lumber Company to certain creditors of said company.

The purchaser of the property, D. B. Pegram, testified that about the middle of November, 1940, he went to see Mr. Hancock, one of the defendants, and inquired as to whether or not he had purchased the foreclosed property of the Phillips-Bolling Lumber Company, and that Mr. Hancock informed him that he and Mr. Hilliard had purchased the property. Mr. Pegram testified further that he had never seen Mrs. Dixon and that the bills of sale had been delivered to him by Mr. Hilliard and Mr. Dixon.

Other evidence was offered as to the value of the property at the time of the aforesaid sale.

At the close of plaintiff's evidence, the defendants moved for judgment as of nonsuit, which was allowed. Plaintiff appeals and assigns error.

Hoyle & Hoyle for plaintiff.
C. L. Shuping and L. P. Dixon for defendants.

DENNY, J. His Honor, in ruling upon the motion for judgment as of nonsuit, said: "At the close of evidence for the plaintiff, on motion of the defendants for judgment as of nonsuit, the Court, in passing on the motion, and in the absence of an allegation in the complaint of insolvency of the partnership on complaint of the Receiver plaintiff; and in the absence of allegations relating to the issuable fact of fraud, and in the absence of any showing on the part of the plaintiff that the alleged purchaser at the mortgage sale was connected with the defendants to the extent that she represented the defendants by an act of agency or otherwise; and in view of the offering of the plaintiff of the contracts for the purchase and delivery of the property by Mr. Pegram, the Court is of the opinion and so holds that the plaintiff has failed to make out a case that entitles plaintiff to go to the jury, and thereupon grants the motion of the defendants for judgment as of nonsuit."

Is it necessary for the receiver in this action to allege insolvency of the Phillips-Bolling Lumber Company, in order to maintain the action? Under our statutes a receiver may be appointed for reasons other than insolvency. *Williams v. Gill, Receiver,* 122 N. C., 967, 29 S. E., 879.

In section 1208, C. S. of N. C., it is provided: "When a corporation becomes insolvent or suspends its ordinary business for want of funds, or is in imminent danger of insolvency, . . . a receiver may be appointed by the Court under the same regulations that are provided by law for the appointment of receivers in other cases."

Under section 1209, C. S. of N. C., a receiver has power and authority to—subsec. 3: "Institute suits for the recovery of any estate, property, damages, or demands existing in favor of the corporation."

Section 860, C. S. of N. C., authorizes the appointment of receivers and further provides that: "The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder."

The receiver in the instant case was expressly authorized and directed by the court to bring this action.

"Since a receiver is not clothed with any right to maintain an action, which the parties or the estate represented could not maintain, he must show a cause of action existing in such parties, enforceable by him, in his capacity as receiver, in their behalf; and if the allegations by the receiver of a corporation show a suit which could not be maintained by the corporation, it is sufficiently shown that the receiver is seeking to enforce the rights of creditors. Where the right to relief depends upon the existence of claims against the estate represented and the insolvency of such estate or the necessity of collecting the demand sued on in order to pay debts, those facts must be alleged, but where the right of action does not depend upon the existence of such facts they need not be alleged." 53 C. J., sec. 577, p. 356.

The partnership represented herein by the receiver, could have brought the action had a receiver not been appointed, and therefore, it is unnecessary, in view of the facts alleged, to further allege the insolvency of the partnership. The right to relief does not depend upon the insolvency of the partnership.

Must the receiver for the mortgagor, Phillips-Bolling Lumber Company, allege fraud in order to obtain relief against the mortgagees, who allegedly purchased the foreclosed property, through an agent, at their own sale? Our decisions do not so hold.

In an able opinion in the case of *Froneberger v. Lewis*, 79 N. C., 426, this subject is discussed and the earlier cases reviewed. The Court said: "Thus it will be seen that we have a train of decisions . . . all to the same effect, that a trustee cannot buy the trust property either directly or indirectly. And if he does so, he may be charged with the full value, or the sale may be declared void at the election of the *cestui que trust*, and this, without regard to the question of fraud, public policy forbidding it. . . . So that when a sale is made whether by himself or by an appointee of the Court or other person, it is his duty to see that the property is not sacrificed. . . . Not in one case in a thousand would a trustee who designs an advantage, take it straight by himself. He will contrive a confederate to sell, or a confederate to buy, and all the better if he can get the color of an order of Court."

According to our authorities, a mortgagee with power to sell, cannot directly or indirectly purchase at his own sale. This is not because there is, but because there may be, fraud. The act is one which is forbidden by public policy. In such case the mortgagor may elect to sue the mortgagee for the damages sustained by reason of said sale. *Brothers v. Brothers,* 42 N. C., 150; *Patton v. Thompson,* 55 N. C., 285; *Froneberger v. Lewis, supra; Bruner v. Threadgill,* 88 N. C., 361; *Gooch v. Vaughan,* 92 N. C., 610; *Gibson v. Barbour,* 100 N. C., 192, 6 S. E., 766; *Cole v. Stokes,* 113 N. C., 270, 18 S. E., 321; *Hayes v. Pace,* 162 N. C., 288, 78 S. E., 290; *Warren v. Susman,* 168 N. C., 457, 84 S. E., 760; *Burnett v. Supply Co.,* 180 N. C., 117, 104 S. E., 137; *Lockridge v. Smith,* 206 N. C., 174, 173 S. E., 36; *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288; *Smith v. Land Bank,* 213 N. C., 343, 196 S. E., 481; *Graham v. Floyd,* 214 N. C., 77, 197 S. E., 873; *Mills v. Building & Loan Assn.,* 216 N. C., 664, 6 S. E. (2d), 549.

In the fifth paragraph of the amended complaint, it is alleged: "The defendants through their attorney, L. P. Dixon, held a foreclosure sale and purchased the property covered by chattel mortgages aforesaid, at said sale, through their agent, Ruth S. Dixon, wife of L. P. Dixon aforesaid, and took title to said property in the name of said Ruth S. Dixon," and in the sixth paragraph of the amended complaint it is alleged: "That immediately after said foreclosure sale of the property covered by said chattel mortgages, the defendants took possession of said property and used the same in the prosecution of their business known as Dixie Lumber Company, and thereby converted said property to their own use; and said conversion was improper and unlawful." If these allegations can be sustained by competent evidence, they are sufficient to entitle the plaintiff to the relief sought.

We now come to the final questions: Were the facts disclosed by the evidence offered by the plaintiff sufficient to entitle the plaintiff to go to the jury on the question as to whether or not Ruth S. Dixon represented the defendants in the purchase and sale of the property foreclosed by the defendants? We think so. Was Ruth S. Dixon wife of L. P. Dixon, the attorney who conducted the foreclosure proceedings, and who was a member of the partnership known as Dixie Lumber Company, a *bona fide* purchaser for value? Did Ruth S. Dixon purchase the property as agent of the defendants, or did she merely permit the use of her name as purchaser for the convenience and benefit of the defendants? The plaintiff is entitled to have these questions considered and answered by a jury.

The judgment of the court below is

Reversed.

WADE W. MALLARD, A CITIZEN AND TAXPAYER OF JONES COUNTY, SUING FOR HIMSELF AND FOR AND IN BEHALF OF ALL OF THE TAXPAYERS RESIDING IN THE EASTERN CAROLINA REGIONAL HOUSING AUTHORITY, *v.* EASTERN CAROLINA REGIONAL HOUSING AUTHORITY, A PUBLIC BODY CORPORATE.

(Filed 20 May, 1942.)

1. Pleadings § 20—

A demurrer admits, for the purpose of testing the sufficiency of the complaint, the facts alleged therein and relevant inferences of fact necessarily deducible therefrom.

2. Same—

While upon demurrer the inquiry as to the sufficiency of the complaint is confined to the allegations contained therein, the court may nevertheless consider facts inferable from the facts alleged of which the court may take judicial notice.

3. Evidence § 2—

The courts will take judicial notice that specified counties of the State are contiguous and of the census of population of those counties.

4. Municipal Corporations § 1: Taxation § 19: Constitutional Law §§ 13, 16—Rural housing authority is municipal corporation created for public purpose, and its property is exempt from taxation.

Under the provisions of ch. 78, Public Laws 1941, which amended ch. 456, Public Laws 1935, as amended, publication of notice is not required for the creation of a rural housing authority, and a rural housing authority duly created thereunder is a municipal corporation created for a public purpose, and realty acquired by such authority is exempt from taxation, Art. V, sec. 5, and agreement of such authority giving priority in occupancy of its dwelling units to those landowners, or the tenants, sharecroppers or farm wage hands of such landowners, who convey property to the authority, provided that they come within the definition of families of low income as defined in sec. 2 (18) of the Act, is not an unlawful discrimination in favor of such class.

APPEAL by plaintiff from *Frizzelle, J.*, at Chambers, 28 March, 1942. From JONES.

Civil action to enjoin defendant from executing plan for regional housing project under Housing Authorities Law.

Plaintiff, residing, and engaged in farming operation within the area of the Eastern Carolina Regional Housing Authority, and a taxpayer of Jones County, brings this action for and on behalf of himself and other taxpayers similarly situated.

Plaintiff in his complaint alleges substantially these facts:

1. That on 15 April, 1941, pursuant to and in compliance and conformity with the provisions and procedure prescribed in the Housing

Authorities Law of North Carolina, chapter 456, Public Laws 1935, as amended by chapter 2 of Public Laws, Extra Session 1938, as amended by chapter 150, Public Laws 1939, as amended by chapter 78, Public Laws 1941, defendant Eastern Carolina Regional Housing Authority was organized and has received from the Secretary of State a certificate of incorporation as a regional housing authority comprising the areas of Bladen, Carteret, Craven, Duplin, Harnett, Jones, Johnston, Onslow, Pamlico, Pender, and Sampson Counties in the State of North Carolina.

2. That under a series of agreements which defendant has made with the United States Housing Authority, with the said counties and with certain farm owners, defendant purposes to erect within the area of said counties not more than 275 rural dwelling units, the cost of which is to be financed from proceeds of sale of serial coupon bonds of, and to be issued by defendant under authority of the said Housing Authorities Law, in principal amount not exceeding $605,000, bearing interest at rate of 3 per cent per annum and maturing within 60 years from date, 90 per cent of such bonds but not exceeding 90 per cent of the actual cost of development of the project, to be purchased by the United States Housing Authority, and the remaining 10 per cent sold to the public, and all to be liquidated through specified annual contributions of the United States Housing Authority and by rents and profits, for which purpose same are pledged.

3. That defendant purposes to accept or has accepted at nominal consideration deeds from owners of farm property, each for approximately one acre on which to erect a dwelling for occupancy by eligible farmers of low income, as defined and specified in said law, at small rental so long as owned by defendant or successor housing authority; that the grantor in such deeds retains option to repurchase at fair value the acre conveyed and the house erected thereon, and covenants to lease to the occupant sufficient land to permit operation of a farm, and agrees to destroy one insanitary dwelling on his farm or to use it for non-dwelling purposes.

4. That as an inducement to obtain annual contributions from the United States Housing Authority, defendant has represented to it that the properties acquired and to be acquired from proceeds of the sale of the bonds as hereinabove set forth are under the Constitution and laws of the State of North Carolina entitled to full tax exemption.

5. "That these proposed acts of the defendant are and will be illegal and invalid because:

"1. This proposed scheme of building houses in rural communities is in reality for the private purposes of certain landowners and tenants, in violation of the aforesaid Housing Authorities Law, as amended, and if authorized by that law, is in violation of the Constitution of the State, in that public moneys are being expended for private purposes;

"2. This property is not exempt from taxes within the meaning of Article V, section 5, of the Constitution, or as municipal property; and that the defendant Housing Authority is not a municipal corporation within the meaning of said Constitutional provisions;

"3. Certain low income families are given priority in the occupancy of these houses over other low income families, because they happen to be tenants of the farmers who are entering into agreements with the Housing Authority attached hereto, in violation of the Housing Authorities Law, being Chapter 456 of the Public Laws of 1935, as amended, and illegally and unlawfully discriminates in favor of these tenants, in violation of the State and Federal Constitutions;

"4. The demolition of the substandard houses by a farmer or local housing authority is not a clearance of slums within the meaning of the Housing Authorities Law of 1935, as amended.

"5. That the creation of said Housing Authority is illegal and invalid for the reason that no public hearing was held by the Board of Commissioners of any of the said Counties on the need and necessity for the creation of such Housing Authority and that this plaintiff and other taxpayers similarly situate had no opportunity to be heard upon the question of the need for the creation of said Housing Authority or upon the question as to whether housing conditions in said counties were such as to warrant the creation of said Authority, and that this unlawful action deprives this plaintiff and other taxpayers of their property rights without due process of law and is contrary to the State and Federal Constitutions."

6. That unless enjoined defendant will by engaging in this housing project cause irreparable damage to plaintiff and other taxpayers similarly situated in that the value of their property will decrease and their tax burdens increase.

Defendant demurs to the complaint for that it appears upon the face thereof that it does not state facts sufficient to constitute a cause of action.

Upon hearing of demurrer, the court below, being of opinion that same should be sustained, enters judgment in which it is recited that "Upon the complaint and exhibits attached thereto, the demurrer and admissions of counsel in open court, the court finds the following facts." The facts found are substantially those alleged in the complaint except in this respect: While there is no allegation to that effect, the court finds that the "counties comprising the local authority are contiguous and have a population in excess of 60,000."

Then the court, after reviewing the statutes constituting the Housing Authorities Law above referred to, and former decisions of this Court, *Wells v. Housing Authority of City of Wilmington*, 213 N. C., 744, 197

S. E., 693, and *Cox v. City of Kinston,* 217 N. C., 391, 8 S. E. (2d), 252, assigns as conclusion of law: (1) That the Eastern Carolina Regional Housing Authority has been duly incorporated as a body corporate and politic and is vested with all the powers conferred by the Housing Authorities Law of North Carolina, ch. 456 of Public Laws of 1935, as amended; (2) that no notice is required to be published in connection with, nor is same essential to the creation and establishment of a regional housing authority, citing *Cox v. Kinston, supra,* and, further, that the provisions of section 35 of chapter 78 of Public Laws of 1941 to the effect that in any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the regional housing authority, the regional housing authority, upon proof of the issuance of its certificate of incorporation by the Secretary of State, shall be conclusively deemed to have been established in accordance with the provisions of this act, bar any attack on the procedure. *Cox v. Kinston, supra;* (3) that while the scheme of rural housing and the program being carried out by the defendant differ in detail from those of an urban housing development, as was the case in *Wells v. Housing Authority, supra,* and there declared to be a public purpose, the objectives are the same, and that, therefore, the program of the Eastern Carolina Regional Housing Authority as outlined herein is a public purpose in the exercise of an essential governmental function under the police power in the elimination of insanitary dwelling units and the providing of sanitary homes that afford decent living conditions for families of low income, all of which are of public interest and promote the general welfare, citing *Wells v. Housing Authority, supra,* and *Benjamin v. Housing Authority of Darlington County,* 198 S. C., 79, 15 S. E. (2d), 737; (4) that the provisions of the agreements under which the Authority agrees that it will rent dwelling units only to families of low income and that priority in occupancy of the dwelling units will be given to the landowner or his tenant, sharecropper or farm wage hand, are valid and do not constitute an unlawful discrimination in favor of one class of tenants, noting that, as defined in section 2 (18) of chapter 78, Public Laws 1941, " 'Farmers of low income' shall mean persons or families who at the time of their admission to occupancy in a dwelling of the authority: (1) live under unsafe or insanitary housing conditions; (2) derive their principal income from operating or working upon a farm; and (3) had an aggregate average annual net income for the three years preceding their admission that was less than the amount that shall be determined by the authority to be necessary, within its area of operation, to enable them, without financial assistance, to obtain decent, safe and sanitary housing, without overcrowding," and, continuing, the Court cites the *Benjamin case, supra,* as pertinent to this ruling; and (5) that the Eastern Carolina Regional

Housing Authority is a municipal corporation and is an essential governmental function and public purpose and as such its properties are exempt from taxation, under the provisions of Article V, section 5, of the Constitution of North Carolina. *Wells v. Housing Authority, supra.*

Upon such conclusions the court sustains the demurrer. Plaintiff appeals to the Supreme Court, and assigns error.

John D. Larkins, Jr., for plaintiff, appellant.
D. L. Ward for defendant, appellee.

WINBORNE, J. "The office of a demurrer is to test the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of facts contained therein, and ordinarily relevant inferences of fact, necessarily deducible therefrom, are also admitted . . ." *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; *Merrell v. Stuart,* 220 N. C., 326, 17 S. E. (2d), 458. Hence, considering the sufficiency of a complaint, when tested by demurrer, the inquiry is confined to the allegations contained therein.

In the present case, however, the contiguous location of counties comprised within the authority covered by defendant is, in accordance with well settled principle, a fact of which the court will take judicial notice. *Laundry v. Underwood,* 220 N. C., 152, 16 S. E. (2d), 703. Likewise, the census of population of those counties is a matter of which the court will take judicial notice. *Clark v. Greenville, ante,* 255. Hence, in the light of the allegations of the complaint, those facts may be inferred.

Therefore, when the complaint here is considered, the allegations of facts are insufficient to state a cause of action.

The Housing Authorities Law, as originally enacted, chapter 456, Public Laws 1935, applied only "to cities and towns of the State having a population of more than fifteen thousand inhabitants." This was the limitation in effect when the opinion in the case of *Wells v. Housing Authority, supra,* was written.

Later the law was amended to apply to cities and towns of "more than five thousand inhabitants," Public Laws Extra Session 1938, chapter 2, section 14. This was the limitation in effect when the case of *Cox v. Kinston, supra,* was decided.

Thereafter, the Legislature, Public Laws 1941, chapter 78, amended the original act so as to make it apply alike to "urban and rural areas throughout the State," and provided among other things machinery for the creation and establishment of regional authorities comprising "two or more contiguous counties having an aggregate population of more than

sixty thousand inhabitants," with "the same functions, rights, powers, duties and limitations" within the area of its operation as are "provided for housing authorities created for cities."

In the light of the law, as so amended, the decisions in *Wells v. Housing Authority, supra,* and *Cox v. Kinston, supra,* where the underlying principles relating to the Housing Authorities Law of North Carolina are fully discussed, lend support to the reasons assigned by the court below for its ruling, and are controlling as to questions raised in the instant appeal. Moreover, in the case *Benjamin v. Housing Authority, supra,* the Supreme Court of South Carolina, in a well considered opinion by *Bonham, C. J.,* upholds a similar law applicable to rural communities. The reasoning and decision there are persuasive here. Further treatment of the subject would be repetitious.

The judgment below is

Affirmed.

THOMAS J. HILL, T. D. ALLEY, JOHN A. SUITS, A. C. SHERRILL, W. C. REYNOLDS, W. E. APPLE, R. B. FERRELL, M. A. MITCHELL, J. E. NEWMAN, J. M. HACKETT, A. G. GARRETT, W. B. KEARNS, T. R. COBLE, P. G. WILSON, W. G. RUDD, CHAS. M. COBLE, T. H. BAILEY, D. GRANT COBLE, C. C. TEAGUE, W. B. TRUITT, C. W. FOWLER, W. W. CLEMENT, W. F. BROWER, J. F. COBLE, A. M. HEMPHILL, W. M. DONNELL, H. L. SPRINKLE, J. W. WILKERSON, CITIZENS AND TAXPAYERS, FOR AND ON BEHALF OF GUILFORD COUNTY, v. GEORGE L. STANSBURY, JOE F. HOFFMAN, JR., J. W. BURKE, R. FLAKE SHAW, R. C. CAUSEY, AND W. CLARENCE JOHNSON.

No. 668.

THOMAS J. HILL, T. D. ALLEY, JOHN A. SUITS, A. C. SHERRILL, W. C. REYNOLDS, W. E. APPLE, R. B. FERRELL, M. A. MITCHELL, J. E. NEWMAN, J. M. HACKETT, A. G. GARRETT, W. B. KEARNS, T. R. COBLE, P. G. WILSON, W. G. RUDD, CHAS. M. COBLE, T. H. BAILEY, D. GRANT COBLE, C. C. TEAGUE, W. B. TRUITT, C. W. FOWLER, W. W. CLEMENT, W. F. BROWER, J. F. COBLE, A. M. HEMPHILL, W. M. DONNELL, H. L. SPRINKLE AND J. W. WILKERSON, CITIZENS AND TAXPAYERS OF GUILFORD COUNTY, v. GUILFORD COUNTY; J. W. BURKE, R. C. CAUSEY, JOE F. HOFFMAN, JR., AND R. FLAKE SHAW, AS MEMBERS, AND GEORGE L. STANSBURY, AS CHAIRMAN AND AS A MEMBER, OF THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY, W. C. JOHNSON, TREASURER OF GUILFORD COUNTY, AND WILLIS BOOTH, GUILFORD COUNTY ACCOUNTANT.

No. 669.

THOMAS J. HILL, T. D. ALLEY, JOHN A. SUITS, A. C. SHERRILL, W. C. REYNOLDS, W. E. APPLE, R. B. FERRELL, M. A. MITCHELL, J. E. NEWMAN, J. M. HACKETT, A. G. GARRETT, W. B. KEARNS, T. R. COBLE, P. G. WILSON, W. G. RUDD, CHAS. M. COBLE, T. H. BAILEY, D. GRANT COBLE, C. C. TEAGUE, W. B. TRUITT, C. W. FOWLER,

W. W. CLEMENT, W. F. BROWER, J. F. COBLE, A. M. HEMPHILL, W. M. DONNELL, H. L. SPRINKLE, J. W. WILKERSON, CITIZENS AND TAXPAYERS, FOR AND ON BEHALF OF GUILFORD COUNTY, v. GEORGE L. STANSBURY, JOE F. HOFFMAN, JR., J. W. BURKE, R. FLAKE SHAW AND R. C. CAUSEY.

No. 670.

(Filed 20 May, 1942.)

1. Appeal and Error § 2—

The denial of a motion to strike certain portions of a complaint on the ground of irrelevancy and redundancy, made under C. S., 537, before answer or demurrer, and before any extension of time to plead, is immediately appealable. C. S., 638.

2. Pleadings § 29—

A motion to strike certain portions of the complaint on the ground of irrelevancy and redundancy, when made before answer or demurrer or extension of time to answer, is not addressed to the discretion of the court but movant has the right to make the motion under the statute and the right to have the motion considered upon its merits and the portions of the complaint objected to stricken if they are irrelevant or redundant. C. S., 537.

3. Appeal and Error § 40b—

On appeal from the denial of a motion to strike made under C. S., 537, the duty rests upon the Supreme Court to sustain the objections which relate to any allegation which is clearly irrelevant or redundant within the meaning of the statute and to strike same from the pleading, but caution will be exercised not to put the lower court in trammels upon a doubtful matter when the competency of the allegations objected to may more clearly appear when the case is factually developed on the trial.

4. Pleadings § 22—

Where the trial court grants defendants' motion to strike certain allegations of the complaint, it may properly give plaintiffs permission to replead.

5. Pleadings § 29—Motion to strike certain allegations from the complaint held correctly denied.

These actions were instituted by taxpayers against certain county officers to recover sums allegedly received by them as salary and expenses to which they were not entitled, and against the county and its commissioners to restrain allegedly unlawful expenditure of public funds. *Held:* Defendants' motion to strike certain allegations from the complaint were properly denied, certain of the allegations not being merely vituperative in describing defendants' conduct, but being necessary to a complete statement of the cause of action, and as to other allegations the defendants were not materially prejudiced thereby and to strike same might unduly hamper plaintiffs in the development of the case.

APPEALS by defendants from *Warlick, J.*, at 5 January, 1942, Civil Term, of GUILFORD.

In each case: Affirmed.

York & Boyd, L. P. McLendon, and Andrew Joyner, Jr., for plaintiffs, appellees.

B. L. Fentress, D. Newton Farnell, Jr., Clifford Frazier, and King & King for defendants, appellants.

SEAWELL, J. The cases above numbered are all here on appeals of defendants from a denial, in part, of motions to strike from the complaint various items, ranging from whole paragraphs to fragmentary expressions, and even single words. The motions were made under C. S., 537, before answer or demurrer, and before any extension of time to plead was granted. The motions were made upon the theory that the matter objected to is irrelevant and prejudicial.

The cases were argued together in this Court, and for convenience, are so considered in the opinion.

All three of the cases are based on the commission of allegedly *ultra vires* acts on the part of the defendants, County Commissioners of Guilford County, and alleged misconduct in office of the said Commissioners and other officials named as defendants. The acts complained of consisted of the expenditure of large sums of money by the Commissioners without authority of law, of unauthorized commitments, appropriations, and other transactions involving loss to the public treasury and detriment to the taxpayers. Of some of the defendants involved, it is alleged that they received substantial sums by way of salary, per diem and expenses, to which they were not entitled by law and which constituted a part of the unlawful expenditures.

Two of the cases, Nos. 668 and 670, are for the recovery of money so unlawfully expended, the Commissioners allegedly having refused to take action in the matter. In No. 669, the plaintiffs, representing themselves to be taxpayers who, with others like situated, are likely to receive injury by the *ultra vires* acts of the defendant public officers in unlawful expenditure of the public funds and unauthorized transactions involving a large amount of money, have joined as defendants the County of Guilford, the members of the Board of County Commissioners, the County Treasurer, and the County Accountant. Plaintiffs seek an injunction against the allegedly wrongful and *ultra vires* acts.

The items to which defendants object are more than sixty in number. It is unnecessary and inexpedient to deal with them in detail. But, in view of the difference of opinion expressed on the point by opposing counsel, it might be best to begin by clarifying the principle on which appeals of this nature are reviewed here.

Some doubt has been expressed whether an order denying a motion to strike under C. S., 537, is immediately appealable. The question hinges upon whether such an order affects a substantial right of the disappointed

movant. C. S., 638. Otherwise, it would be his privilege, if he so desired, to note an exception and proceed with the trial. But it is apparent that if his relief is confined to a further objection when evidence is offered, he gets nothing which he would not have gotten without making a motion; whereas, the statute intends to give him something and to give it to him in time to be of service. Even the common law gave such protection to defending litigants and conserved the dignity and economy of court proceedings by confining the proceeding to justiciable issues. McIntosh, N. C. Practice and Procedure, p. 378.

However this may be, the established practice authorizes the appeal. *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794; *Ellis v. Ellis,* 198 N. C., 767, 153 S. E., 449; *Herndon v. Massey,* 217 N. C., 610, 88 S. E. (2d), 914; *Scott v. Bryan,* 210 N. C., 478, 187 S. E., 756.

Conceding the appealability of the order, it is contended by the plaintiffs that the matter rests entirely within the discretion of the court and that it is its policy to refrain from the exercise of its power under the statute as a court of review, citing *Pemberton v. Greensboro,* 203 N. C., 514; *Pemberton v. Greensboro,* 205 N. C., 599; *Hardy v. Dahl,* 209 N. C., 746; *Scott v. Bryan,* 210 N. C., 478; *Poorey v. Hickory,* 210 N. C., 630; and N. C. L. Rev., V. 19, p. 55. The emphasis is placed on the indisposition of the Court to "chart the course of the trial below"; but we find nothing in these cases to indicate that the Court has consciously created a rule which would return to the Superior Court a burden which under the statute properly rests upon it, so that the lower court may be forced to deal with its own appeal indirectly. But where the allegation is clearly irrelevant and may work harm to the movant, this Court has never said that it would not in a proper case give the relief denied in the court below in advance of his resort to his second line of defense, objection to the evidence. We understand the expressions used by the Court in these cases to be precautionary and expressive of the danger of putting the lower court in trammels upon a doubtful matter, when, as the case is factually developed on trial, the propriety of a challenged pleading might be vindicated, or its impropriety more clearly established. That attitude is fully justified by the obligation which rests upon us under the Code practice to treat the pleadings liberally. C. S., 535. *Lyon v. R. R.,* 165 N. C., 143, 81 S. E., 1; *Citizens Bank v. Gahagan,* 210 N. C., 464, 466, 187 S. E., 580. This view is aptly expressed in 49 C. J., at p. 720, sec. 1014, as follows: "No matter will be stricken out which upon any admissible theory is, or might possibly become, material to the cause of action or defense, either in itself or in connection with other averments and which on the trial the pleader would be entitled to prove." *Savage R. R. Co. v. Lust,* 196 N. Y. S., 296, 299.

It has been held by this Court, and we think with reason, that when the motion is made in apt time—that is, before pleading or an extension of time to plead—it is made as a matter of right, *Hosiery Mill v. Hosiery Mills, supra; Poovey v. Hickory,* 210 N. C., 630, 631; and when made later, it is then within the discretion of the Court. *Hensley v. Furniture Co.,* 164 N. C., 148, 80 S. E., 154; *Bowling v. Bank,* 209 N. C., 463, 184 S. E., 13; *Warren v. Joint Stock Land Bank,* 214 N. C., 206, 198 S. E., 624. We suppose that the question of right does not apply merely to the making of the motion, but to its consideration upon the merits; and while the power ought always to be exercised with caution, since its consequences are not always foreseeable, there is no doubt that upon a motion of this sort, made in apt time, it is our duty to strike from the complaint matter that is clearly irrelevant or redundant within the meaning of the statute.

Upon defendants' motion, Judge Warlick struck out a number of the allegations in the pleadings, principally allegations of law, which were inserted no doubt to preserve the continuity of the subjects dealt with, or by way of inducement, or to show the relation of defendants to the specific requirements of the law. In these instances he gave plaintiffs permission to replead—doubtless apprehensive that the deletions might make the pleading defective, or discerning some factual relation that might, with propriety, be substituted for the allegation of law. His judgment in that respect will not be disturbed.

The defendants strongly insist that some of the language describing their conduct, especially in No. 668 and No. 669, is unnecessarily vituperative. We do not believe that the epithets used as descriptive of defendants' conduct were intended in that light, or have that effect. In fact, they seem to have been necessary to a complete statement of the cause of action. *Old Fort v. Harmon,* 219 N. C., 245, 13 S. E. (2d), 426.

As to the items which the movants sought to have stricken out of the complaint in the several cases, we do not at this time see that they are materially prejudiced, and both in the individual instances and in the aggregate result, we perceive a possibility that the development of the case may be unduly hampered by injudicious pruning, especially of the drastic nature demanded by defendants. *Pemberton v. Greensboro,* 203 N. C., 514, 166 S. E., 396; *Pemberton v. Greensboro,* 205 N. C., 599, 172 S. E., 196; *Scott v. Bryan,* 210 N. C., 478, 482, 187 S. E., 756; *Rucker v. Snider Brothers, Inc.,* 211 N. C., 566, 567, 191 S. E., 6. There was no error in declining the motion with respect to these items.

In No. 668, Affirmed.

In No. 669, Affirmed.

In No. 670, Affirmed.

W. H. BROWN AND C. C. BROWN, TRADING AS C. C. BROWN PLUMBING & HEATING COMPANY, v. HOWARD R. WARD, T. JARVIS HARRIS AND WIFE, MAUDE HARRIS AND SUE-PHIL, INC., A CORPORATION.

(Filed 20 May, 1942.)

1. Appeal and Error § 29—

Exceptions not brought forward and discussed in appellant's brief are deemed abandoned. Rules of Practice in Supreme Court, No. 28.

2. Laborers' and Materialmen's Liens § 1—

The existence of a debt arising out of contract, due by the owner of the property, is a necessary predicate to the existence of a lien for labor and materials. C. S., 2433.

3. Landlord and Tenant § 1—

The mere existence of the relationship of lessor and lessee does not constitute lessee an agent of lessor.

4. Landlord and Tenant § 10—

In the absence of any agreement between the parties, there is no obligation on the part of lessor to pay lessee for improvements erected by lessee upon the demised premises, even though the improvements are annexed to the freehold and cannot be moved by lessee.

5. Same—

Lessors are not liable to a materialman who, under contract with the lessee, furnished materials for improvements which were annexed to the land and became a part of the realty, merely by reason of the fact that lessors took possession of the premises, with the improvements, upon the surrender of their tenant.

6. Laborers' and Materialmen's Liens § 1—Ordinarily, material furnisher under contract with lessee may not enforce lien against lessor.

Under the terms of the lease in suit, lessee agreed to construct a building on the premises, lessors reserving the right of inspection and approval. The lease stipulated that upon its expiration or upon the abandonment of the premises by lessee, all buildings should become the property of lessors free from any claim of lessee. Lessee constructed a building on the premises and thereafter abandoned his lease, and plaintiffs, the furnishers of labor and materials in the construction of the building, instituted this action to enforce the lien therefor against lessors. *Held:* In the absence of evidence that lessors knew or had reason to believe that plaintiffs were looking to them for payment and allowed them to proceed under that expectation without objection, plaintiffs may not enforce the lien against lessors, lessee not being an agent of lessors in making the improvements, and the mere fact that the improvements were made with knowledge on the part of lessors that the work was being done or materials furnished being insufficient predicate for the claim of lien.

APPEAL by plaintiffs from *Bone, J.*, at February Term, 1942, of CUMBERLAND. Affirmed.

Civil action to recover for labor and material furnished and to enforce lien therefor.

On 3 May, 1941, defendants Harris leased to defendant Ward certain land fronting on the new hard surface highway leading from the Fayetteville-Raeford Highway to the Fort Bragg Highway. The lease was for the period from the date thereof to 3 November, 1946, with privilege of renewal for an additional period of 5 years. The lease was in consideration of covenants and agreements on the part of Ward: (1) to pay $1,000 per annum rent; (2) to construct a building on said premises facing and adjacent to the Fort Bragg Highway in accord with plans and specifications to be furnished by him and to be inspected and approved by the lessors; and (3) in the event the lessee decided to build a building facing on the new hard surface highway he was to pay an additional sum of $500 from the date of the construction, in advance. There was also a stipulation in respect to the adjustment of taxes. It was further stipulated that after the expiration of the lease, or if the lease was abandoned by the lessee prior to its expiration, then all buildings or structures, together with sewerage, electrical attachments, etc., shall become the property of the lessors free from any claim or right of the lessee; that the lessee shall operate a recreational center; that the lessors should procure insurance and "if the building or buildings should be destroyed or rendered unfit for use by fire or other casualty, and the 'leasee' does not desire to rebuild the buildings as originally placed or approximately at the same cost, then in that event, this lease shall thereupon terminate, but the said 'leasee' shall have no privilege of rebuilding the buildings then the 'leasors' will pay the 'leasee' such sum as is collected by reason of the construction of said buildings, less such insurance premium or premiums as said 'leasors,' to be paid at such time as the 'leasee' has reconstructed the building."

The lessee entered into a contract with one Wilkinson for the construction of a building upon the premises. Wilkinson employed plaintiffs to furnish the material and to do the work required in connection with plumbing specified in the plans. At that time plaintiff did not know Ward. Thereafter, Ward confirmed the plumbing subcontract, authorized the work to be charged to him and from time to time procured plaintiffs to do additional work. The total charges for labor and material furnished by plaintiffs was $1,208.69, of which Ward paid $400. At no time did plaintiffs contact the defendant Harris or know that they were in anywise interested in the land or the construction of the building. Ward having failed to pay the balance due, plaintiffs filed a lien and instituted this action for the enforcement thereof.

The lessee abandoned the lease and vacated the premises before the expiration of the lease.

When the cause came on to be heard in the court below, at the conclusion of the evidence for the plaintiff on motion duly made, the court entered judgment as of nonsuit as to the defendants Harris. Plaintiffs excepted and appealed without proceeding to judgment against Ward.

Ellis & Nance for plaintiffs, appellants.
Rose & Lyon for defendants Harris, appellees.

BARNHILL, J. Appellants, in their brief, discuss only the exceptions directed to the alleged error of the court below in granting the motion to dismiss as of nonsuit and in signing judgment thereon. All other exceptions are deemed to be abandoned. Rule 28: *In re Beard,* 202 N. C., 661, 163 S. E., 748.

In asserting error in the judgment of nonsuit the plaintiffs pose this question: "Does the lease by its terms constitute the lessee an agent of the lessors for the purpose of improving the premises to the extent expressly provided in the lease?" The question concedes that it is upon this theory, if at all, they are entitled to recover.

The statute, C. S., 2433, is plain and unambiguous. "Every building built . . . shall be subject to a lien for the payment of all debts contracted for work done on the same, or materials furnished."

In order to create a lien in favor of a person who builds a house upon the land of another the circumstances must be such as to first create the relationship of debtor and creditor, and then it is for the debt that he has a lien. The lien does not exist without a contract. *Wilkie v. Bray,* 71 N. C., 205; *Lester v. Houston,* 101 N. C., 605; *Boone v. Chatfield,* 118 N. C., 916; *Weathers v. Borders,* 124 N. C., 610; *Weathers v. Cox,* 159 N. C., 575, 76 S. E., 7; *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, 90 S. E., 923; *Honeycutt v. Kenilworth Development Co.,* 199 N. C., 373, 154 S. E., 628; *Boykin v. Logan,* 203 N. C., 196, 165 S. E., 680.

"The law seems to be settled in this State that there must be a debt due from the owner of the property before there can be a lien. The debt is the principal, the basis, the foundation upon which the lien depends. The lien is but an incident, and cannot exist without the principal." *Baker v. Robbins,* 119 N. C., 289; *Bailey v. Rutjes,* 86 N. C., 517; *Boone v. Chatfield, supra.* And a debt contracted is a debt agreed to be paid. *Ball v. Paquin,* 140 N. C., 83; *Mfg. Co. v. Assurance Co.,* 161 N. C., 88, 86 S. E., 865; *Weathers v. Borders, supra; Baker v. Robbins, supra; Wilkie v. Bray, supra.*

The debt must be such as would entitle the claimant to a personal judgment for the amount due. *Weathers v. Borders, supra.*

Mere knowledge that work is being done or material furnished on one's property does not enable the person furnishing the labor or material to

obtain a lien. It takes something more than knowledge that work is being done on the property to create a lien. Hence, plaintiffs have no cause of action unless Ward was an agent of Harris for the purpose of incurring obligations for labor and material used in the construction of the building in question.

It is accepted law that the relationship of lessor and lessee is not that of principal and agent. The mere fact that Ward was lessee vested in him no authority to contract debts in behalf of or binding upon his lessors.

In the absence of any agreement between the parties there is no obligation on the part of the lessor to pay the lessee for improvements erected by the lessee upon the demised premises, though the improvements are such that by reason of their annexation to the freehold they become a part of the realty and cannot be moved by the lessee. 16 R. C. L., 794; *Pomeroy v. Lambeth,* 36 N. C., 65; 36 Am. Dec., 33; *Critcher v. Watson,* 146 N. C., 150, 125 A. S. R., 470; *Kutter v. Smither,* 2 Wall, 491, 17 L. Ed., 830. And, ordinarily, creditors of a tenant have no greater right to charge the land with the value of improvements made by the tenant than the tenant would have. 16 R. C. L., 795; *Pomeroy v. Lambeth, supra.*

Unless the lessors "were originally liable by reason of a contract of some sort, they cannot be made so because of their having resumed possession of the premises, with its improvements, upon the surrender of their tenant." *Bailey v. Rutjes, supra; Critcher v. Watson, supra.*

Does the contract of lease, by its terms, vest Ward with authority to bind the lessor by his contract for labor and material furnished in the erection of the building? The answer is no.

Under the terms of the contract the construction of the building was a part of the rental to be paid for the use of the premises—a part to be paid in advance. Primarily the building was to be erected for the use and benefit of the tenant. Harris assumed no obligation in respect thereto.

The property belonged to Harris subject to the terms of the lease. It was his privilege to reserve the right to approve the plans and specifications for new buildings to be erected on the premises by the lessee. In so doing he assumed no liability for the costs thereof.

Plaintiffs had no contract with Harris. They did the work under contract with Ward with the understanding that it was to be charged to him. If they were unwilling to do the work and furnish the material upon his credit and intended to look to the security provided by statute, ordinary prudence required that they exercise that degree of diligence which would enable them to ascertain the status of the title to the land upon which the building was to be erected and to obtain the approval or

procurement of the owners. Their loss must be attributed to their failure so to do.

The defendants Harris had leased the premises to Ward for five years and Ward had undertaken to have the improvements made which called for the use of the labor and material furnished by the plaintiffs. They were, therefore, absolutely without the power either to give or to withhold their sanction to its delivery and use and ought not to be required to pay for it, unless they knew, or had reason to believe, that the plaintiffs were looking to them for their pay and allowed them to proceed under that expectation without objection. The record is devoid of any evidence tending to show that plaintiffs knew the defendants Harris in the transaction or looked to them for pay or that said defendants permitted them to proceed under that expectation. Hence, there is no debt due by the defendants Harris to the plaintiff such as is necessary to support a claim of lien under the statute.

The judgment below is

Affirmed.

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

(Filed 20 May, 1942.)

1. Appeal and Error § 49a—

The decision of the Supreme Court becomes the law of the case both in the subsequent proceedings in the trial court and on subsequent appeal, and therefore when the Supreme Court reverses the corporate defendant's motion to nonsuit on the issue of *respondeat superior* and the evidence upon the second trial is substantially the same as upon the first, the Supreme Court will not review the question again upon a second appeal.

2. Master and Servant § 21c: Damages § 1a: Judgments § 32—

Where judgment for negligent injury is recovered against the servant, the verdict on the issue of damages is a verdict against the plaintiff as to all claims in excess of the amount awarded by the jury, and is the limit of any recovery against the master when he is sought to be held liable solely upon the doctrine of *respondeat superior*, and plaintiff cannot thereafter reopen or recanvass the question or assert that the recovery was upon a wrong basis or in an inadequate amount.

3. Judgments § 29—Judgment against servant does not conclude master, but is conclusive on plaintiff as to all claims of damage in excess of amount awarded against servant.

Where, in an action for negligent injury, nonsuit is erroneously allowed as against the master upon the doctrine of *respondeat superior*, and judg-

ment is obtained against the servant, upon the subsequent trial the judgment against the servant upon the issues of negligence, contributory negligence and damages is not *res judicata* as to the master and he is not concluded thereby, since he had no opportunity to be heard upon the issues, but since the master's liability is solely derivative, the verdict on the issue of damages is *res judicata* against the plaintiff as to all claims for damages in excess of the amount awarded by the jury, and the master is entitled to an instruction that in no event could the jury award damages against it in a sum in excess of the amount awarded against the servant.

4. Appeal and Error § 47b—In proper instances the Supreme Court, in its discretion, will order a partial new trial.

Where, in an action to recover for negligent injury the jury has twice answered the issue of negligence and contributory negligence in favor of plaintiff, but in the first trial the master's motion to nonsuit on the issue of *respondeat superior* was erroneously allowed, and in the second trial the court erroneously refused to limit the damages recoverable against the master to the amount theretofore awarded against the servant, the Supreme Court in its discretion may award a new trial only upon the issues determinative of the master's liability and permit the issues as to negligence and contributory negligence to stand.

APPEAL by defendant Gate City Life Insurance Company from *Sink, J.*, at September Term, 1941, of GUILFORD. Partial new trial.

Civil action to recover damages for wrongful death.

This case was here on former appeal, *Pinnix v. Griffin*, 219 N. C., 35, 12 S. E. (2d), 667. On the first trial, there was a judgment of nonsuit as to the corporate defendant entered at the conclusion of the evidence for the plaintiff and verdict and judgment against Griffin for $1,000. Plaintiff excepted to the judgment of nonsuit and appealed. The other facts are sufficiently stated in the opinion on the former appeal.

The nonsuit as to the corporate defendant having been reversed, the case again came on for trial when the following issues were submitted to the jury:

"1. Was the death of plaintiff's intestate caused by the negligence of the defendant C. D. Griffin, as alleged in the complaint?

"Answer: Yes.

"2. If so, was the said C. D. Griffin, at the time, acting as servant of the defendant, Gate City Life Insurance Company, within the scope of his employment as such?

"Answer: Yes.

"3. Did plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer?

"Answer: No.

"4. What damages, if any, is plaintiff entitled to recover?

"Answer: $5,000.00."

There was judgment on the verdict and the corporate defendant excepted and appealed.

C. L. Shuping for plaintiff, appellee.
R. M. Robinson for defendant Gate City Life Insurance Co., appellant.

BARNHILL, J. The decision by the Supreme Court on a prior appeal reversing the judgment of nonsuit constitutes the law of the case both in subsequent proceedings in the trial court and on a subsequent appeal. *Templeton v. Kelley,* 216 N. C., 487, 5 S. E. (2d), 555; *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517; *Wall v. Asheville,* 220 N. C., 38. As defendant concedes that plaintiff's evidence on the second trial was substantially the same as on the first trial its motion to dismiss as of nonsuit was properly overruled. We will not review on a second appeal questions which were discussed and decided on the first appeal. Defendant's remedy, if any, was by petition to rehear.

The defendant, in apt time, tendered in writing a prayer for instructions as follows:

"In respect to the issue as to damages, if you come to consider that issue, the Court charges you, as a matter of law, that in no event can you award damages in excess of the sum of $1,000.00."

The court declined to charge the jury as requested and the defendant excepted. This exception is the basis of the primary assignment of error on this appeal and presents this question: Can the master, under the doctrine of *respondeat superior,* be held in damages in an amount greater than that assessed against the servant, or is the verdict and judgment against the servant conclusive and binding upon the plaintiff?

The individual defendant and not the corporate defendant was the active tort feasor. While it is true the appellant on the finding of the jury was negligent in the sense that the act of the agent, as such, is the act of or is imputed to the principal, it is, strictly speaking, liable only under the doctrine of *respondeat superior.* This is established by the verdict. It must pay the damages inflicted by its servant while he was about his master's business and acting within the scope of his employment. The amount of these damages has been ascertained and fixed by a jury in an action to which plaintiff was a party. She did not appeal. May she now recover a much larger sum from the master?

This question has been decided, in principle, by this Court. We have held that the verdict and judgment against the plaintiff on the issue of negligence in an action against the servant is conclusive and bars a later action by the same plaintiff against the principal. This is the law when the master is not guilty of any independent or concurrent wrong but must be held, if at all, under the doctrine of *respondeat superior. Whitehurst v. Elks,* 212 N. C., 97, 192 S. E., 850; *Morrow v. R. R.,* 213 N. C., 127, 195 S. E., 383; *Hudson v. Oil Co.,* 215 N. C., 422, 2 S. E. (2d), 26; *Leary v. Land Bank,* 215 N. C., 501, 2 S. E. (2d), 570; *Lindsey v. Danville,* 46 Vt., 144, 15 R. C. L., 1027.

The applicable law is fully discussed and the authorities are gathered and cited in the well considered and comprehensive opinion in the *Leary case, supra.*

What is said in that and the other cases cited applies with equal force to the question presented on this appeal. The plaintiff can have but one satisfaction—payment of the damages caused by the wrongful act of Griffin. *Mfg. Co. v. Moore,* 144 N. C., 527. She cannot recover twice for the same wrong or, in other words, she cannot have two compensations for the same complete tort, but must abide the first recovery as her full satisfaction for the wrong. *Barcliff v. R. R.,* 176 N. C., 39, 96 S. E., 644. Nor may she now reopen and recanvass the question, or assert that the act of Griffin inflicted greater damage than she recovered in the former trial. With that verdict she was then content. As to her, it is *res judicata.* 31 C. J. S., 194; *Mfg. Co. v. Moore, supra.*

Neither will she be permitted to allege that the former recovery was upon a wrong basis or in an inadequate amount; for if there was any error to her prejudice in the trial of that case she should then have excepted and had it corrected by an appeal. It is now too late to raise the question, as the judgment forecloses and estops her as to all issues determined on that hearing.

"A judgment is an estoppel upon a party not only in so far as it decides a question adversely to his claim or contention in the suit in which it is rendered, but where it recognizes or sustains his theory or claim it estops him from afterward taking a different position" as against those entitled to plead the estoppel. 34 C. J., 907, sec. 1318.

But plaintiff argues, however, that the defendant was neither a party nor a privy to the former judgment rendered against the servant and, therefore, cannot take advantage of that judgment. This is the converse of the rule just stated. It has no application when the principal is liable only by reason of the master-servant relationship and the authorities cited in support are distinguishable.

"Though it involves an apparent violation of the doctrine of mutuality of estoppel, the rule is general and well settled that where the liability, if any, of a principal or master to a third person is purely derivative and dependent entirely upon the principle of *respondeat superior,* a judgment on the merits in favor of the agent or servant, or even a judgment against him, in so far as it fixes the maximum limit of liability, is *res judicata* in favor of the principal or master though he was not a party to the action." *Myer's Admx. v. Brown,* 250 Ky., 64, 61 S. W. (2d), 1052; *Blue Valley Creamery v. Cronimus,* 270 Ky., 496, 110 S. W. (2d), 286; Freeman on Judgments (5th Ed.), sec. 469, p. 1031; *Betcher v. McChesney,* 255 Pa., 394, 100 Atl., 124.

The strict rule that a judgment operates as *res judicata* only in regard to parties and privies is subject to an exception in favor of the master

whose liability is purely derivative and dependent entirely upon the doctrine of *respondeat superior. Leary v. Land Bank, supra,* and cases cited. *Good Health Dairy Products, Inc., v. Emery,* 112 A. L. R., 401; Anno. A. L. R., 404. The exception is only an exemplification of the broad rule by which one whose liability is wholly derivative may claim the benefit of a judgment in favor of him from whom his liability is derived. Freeman on Judgments (5th Ed.), p. 1031.

It is an obvious principle of justice that no man ought to be bound by a proceeding to which he is a stranger. *Gadsden v. Crafts,* 175 N. C., 358, 95 S. E., 610; 1 Greenleaf on Evidence, sec. 522-23. Hence, a judgment against the agent is not conclusive in an action against the principal. *Gadsden v. Crafts, supra.*

When the trial court sustained the motion of nonsuit as to the appellant in the first trial it had no connection with the subsequent proceedings of the court. It had no opportunity to be heard on the issues presented and its rights are not decided by the verdict. Therefore, it is not estopped by the judgment from undertaking to minimize the damages and to contest the amount to be awarded. *Watts v. Lefler,* 190 N. C., 722.

We conclude, therefore, that the original judgment, in so far as it fixes the maximum limit of liability is, as to plaintiff, conclusive and that the defendant is entitled to its day in court with full opportunity to defend on each of the pertinent issues raised by the pleadings. It follows that the court erred in declining to instruct the jury as prayed by defendant.

The first and third issues have been submitted to two juries, each of which answered them in favor of the plaintiff. We have held that the evidence on the first issue is sufficient to support the verdict. We can perceive no good reason why the plaintiff should again be put to trial thereon. Hence, the verdict on these issues must stand. On the second and fourth issues, which determine defendant's liability, there must be a new trial.

Partial new trial.

LILLIAN WYLDE MACMILLAN v. BRANCH BANKING & TRUST COMPANY, AS TRUSTEE, RICHARD CONROY AND THE UNBORN CHILDREN AND UNDETERMINED HEIRS AT LAW OF LILLIAN WYLDE MACMILLAN.

(Filed 20 May, 1942.)

1. Trusts § 9—Upon facts established, plaintiff held entitled to revoke voluntary trust.

Plaintiff executed a voluntary trust in personalty with direction that the income therefrom be paid to her for life and upon her death the trust estate be distributed to her surviving children, and in the event plaintiff should die without issue, the trust estate be paid to a named beneficiary

if living and if he were not then living then to plaintiff's heirs generally. Plaintiff has no children and executed an instrument in writing revoking the trust upon the payment of a specified sum to the only beneficiary of the remainder *in esse*, who consented to the revocation of the trust upon the payment to him of the amount agreed. *Held:* Under the provisions of C. S., 996, plaintiff is entitled to the revocation of the trust.

2. Same: Constitutional Law § 18—

The statute enabling the trustor of a voluntary trust to revoke the same as to contingent beneficiaries prior to the happening of the contingency does not affect vested rights and is constitutional. C. S., 996.

3. Trusts § 9: Courts § 14—

Where the trustor of a voluntary trust becomes a resident of this State, and the trustee is a North Carolina corporation, and the *situs* of the trust estate is in North Carolina, the rights of the parties in the premises, including the right of revocation, are governed by the law of this State.

4. Trusts § 9—

The waiver of the right of revocation by the trustor of a voluntary trust is without consideration and does not preclude trustor from exercising her right to revoke under C. S., 996.

APPEAL by defendant Bank & Trust Company from *Bone, J.*, at March Term, 1942, of CUMBERLAND. No error.

This was an action to validate the revocation of a voluntary trust agreement, in accordance with the provisions of C. S., 996, as amended.

Issues were submitted to the jury and answered as follows:

"1. Is the trust which the plaintiff is seeking to revoke, under the provisions contained in Consolidated Statutes, 996, a wholly voluntary trust created from the assets belonging wholly to the plaintiff and for which she received no consideration, as alleged in the complaint? Answer: 'Yes.'

"2. Has the plaintiff ever had, or does she now have, any children, either natural or adopted? Answer: 'No.'

"3. Are the plaintiff and Richard Conroy the only determined or determinable beneficiaries of this trust, as alleged in the complaint? Answer: 'Yes.'

"4. Is there an agreement between the plaintiff and the defendant, Richard Conroy, under the terms of which Richard Conroy agrees to the revocation of the trust, and the plaintiff agrees that he be paid $5,437.89 out of the trust funds, as alleged in the complaint? Answer: 'Yes.' "

From judgment on the verdict, declaring valid the revocation of the trust agreement, and authorizing and directing defendant Bank & Trust Company as trustee, after paying defendant Conroy the amount agreed, to deliver the trust estate to the plaintiff.

Defendant Bank & Trust Company appealed.

Shaw & Shaw and Edward B. Hope for plaintiff, appellee.

Connor & Connor, Finch, Rand & Finch, and Rose & Lyon for defendant Branch Banking & Trust Company, Trustee, appellant.

DEVIN, J. The only question presented by this appeal is whether the plaintiff had the power to revoke the grant contained in a voluntary trust agreement previously executed by her without consideration.

The North Carolina statute declaring the conditions under which a trust agreement may be revoked is C. S., 996, as amended by ch. 305, Public Laws 1929. From this we quote the following pertinent provision: "The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons *in esse* with a future contingent interest to some person or persons not *in esse* or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not *in esse* or not determined by a proper instrument to that effect. . . ."

The material facts shown by plaintiff's evidence were these: The plaintiff, whose maiden name was Lillian Wylde Fraser, formerly resided at Henley-on-Thames, England. In 1936 she voluntarily and without consideration executed a trust agreement creating a trust estate in personalty, designated as the Lillian Wylde Fraser trust, and subsequently, in 1937, in her then name of Lillian Wylde Maquisten, she executed an amended trust agreement, conveying to the Harris Trust & Savings Bank, an Illinois corporation, as trustee, the trust estate, consisting of intangibles and cash, in trust for the following purposes: to invest and reinvest the fund and pay the income therefrom to the plaintiff during her natural life, and upon her death distribute the trust estate to her surviving children. In the event the plaintiff should die without issue the trust estate was directed to be paid to the defendant Richard Conroy, a resident of the State of California, if he was then living, and, if not, to plaintiff's heirs general. In the instrument creating the trust the plaintiff reserved the right, upon notice to the named trustee, to appoint a successor trustee. In accord with this provision the plaintiff thereafter appointed the Title Guaranty & Trust Company of New York as successor trustee, and subsequently 2 January, 1942, appointed defendant Branch Banking & Trust Company, Trustee, and to this last named trustee all the assets of the trust estate were transferred. The plaintiff is now the wife of John Elliott MacMillan, and is a resident of Southern Pines in Moore County, North Carolina, and the Branch Banking & Trust Company is a North Carolina corporation with one of its places of business in Cumberland County, North Carolina, where the

entire *corpus* of the trust estate is now held. All the funds included in the trust were plaintiff's own property, inherited from her mother. Plaintiff has no children, natural or adopted. The plaintiff has executed an instrument in writing revoking the trust agreement and terminating the trust, the defendant Conroy having consented thereto upon the payment to him of the amount agreed.

It is apparent that by the facts shown in evidence, and established by the verdict, plaintiff has brought her case squarely within the provisions of the enabling statute. Having heretofore created a voluntary trust estate in personalty, for the use and benefit of herself with a future contingent interest in persons not *in esse* whose contingent interests are not determinable until the happening of a future event, the plaintiff has now in accord with the statute revoked the grant with the consent of the only other person now in being. *Durner v. Hood,* 207 N. C., 856, 175 S. E., 717; *MacRae v. Trust Co.,* 199 N. C., 714, 155 S. E., 614.

The constitutionality of the statute was upheld in *Stanback v. Bank,* 197 N. C., 292, 148 S. E., 313. Mere expectancies of future contingent interests provided for persons not *in esse* do not constitute vested rights such as would deprive the Legislature of the power to enact the statute authorizing revocation of a voluntary grant.

Since the plaintiff, who is the creator and life beneficiary of the trust, is a resident of North Carolina, and the trustee is a North Carolina corporation, and the *situs* of the trust estate is in North Carolina, the rights of the parties in the premises are governed by the law of the State in which the essential elements of the trust are located. *Hutchinson v. Ross,* 262 N. Y., 381, 187 N. E., 65, 89 A. L. R., 1007; *Wilmington Trust Co. v. Wilmington Trust Co.,* 24 Atl. (2d), 309.

While the trustor, in the amended trust agreement of 1937, waived right of revocation, this was without consideration, and did not preclude her from exercising her rights under the statute. The statute makes no distinction in this respect, and no limitation upon the right of the trustor under the conditions enumerated, except that it be exercised before the happening of the contingency upon which future estates would vest. The only living person to whom a future contingent interest was granted has expressly consented to the revocation. Doubtless the plaintiff, due to changed conditions incident to her marriage, deemed it proper to make a change in the provisions of the trust.

The only exception was to the judgment. The defendant, for the protection of the rights of persons not in being and for its own protection, brought this case here for an authoritative decision.

In the trial below we find

No error.

STATE v. W. J. MILLER.

(Filed 20 May, 1942.)

1. Assault § 12a—Defendant held entitled to have question of self-defense presented to the jury under evidence in this case.

The evidence, considered in the light most favorable to defendant, tended to show that defendant was an old man, in a weakened condition from a recent operation, that the prosecuting witness was a young, vigorous man weighing about 200 pounds, that in an affray in defendant's own dwelling and in his own yard defendant cut prosecuting witness in the face as witness was on defendant beating him, that the prosecuting witness walked away saying he would return and kill defendant, that defendant went into his home, procured a gun, waited on the front porch, and that as prosecuting witness with two companions approached the dwelling, cursing and making threats, defendant told them not to come any closer, and then, as they continued to approach in a threatening manner, shot and injured them while they were still 50 or 60 yards distant. *Held:* Defendant was entitled to have the question of self-defense submitted to the jury upon the evidence, and the court's charge to the effect that as a matter of law the plea of self-defense was not available to defendant upon the evidence tending to show the shooting by defendant of an unarmed man at a distance of 60 yards is error.

2. Same: Homicide § 11—

A defendant who quits the combat may invoke the right of self-defense upon the renewal of the affray even though he may have been at fault in bringing about the original difficulty.

3. Same—

A defendant may justify the use of a deadly weapon in self-defense when assaulted by a person of larger size or of greater strength, although such person may be unarmed.

4. Same—

A man dangerously assaulted, or menaced, in his own house is already at the wall and need not retreat.

APPEAL by defendant from *Bone, J.*, at January Term, 1942, of ROBESON. New trial.

The defendant was charged in the bill of indictment with a felonious assault upon Eugene Canady, wherein serious wounds were inflicted, with deadly weapons, to wit: a shotgun and a large knife, with intent to kill. He was acquitted of the felonious assault as charged in the bill, and convicted of an assault with a deadly weapon. From judgment of imprisonment predicated on the verdict the defendant appealed to the Supreme Court, assigning errors.

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

F. D. Hackett and L. J. Britt for defendant, appellant.

SCHENCK, J. The only assignments of error discussed in appellant's brief relate to the charge of the court, and since the defendant was acquitted of the felonious assault, it is left for us to consider the assignments only in so far as they relate to the offense of an assault with a deadly weapon.

The defendant makes the subject of exceptive assignments of error the following excerpt from his Honor's charge: "As I recall the evidence in this case, there is none tending to show that the prosecutor, Canady, was any closer than 60 yards to the defendant at the time of the shooting, and that there is no evidence that Canady had any weapon at the time. I, therefore, charge you that the defendant's plea of self-defense will not avail him in the matter of the shooting, and that, as a matter of law, on the evidence as shown here, that he was not justified on the ground of self-defense in doing the shooting." We are constrained to hold that these assignments should be sustained.

The charge was tantamount to an instruction that if the jury failed to convict the defendant of a felonious assault, they should under the evidence convict the defendant of an assault with a deadly weapon—in other words, directed a verdict of at least guilty of an assault with a deadly weapon, upon all of the evidence. This we think, and so hold, was error.

While all the evidence, that of the State and that of the defendant, tended to show that the prosecuting witness, Canady, was 50 or 60 yards from the defendant at the time he fired the gun, and, nothing else appearing, may have negatived any right to fire a gun at the witness by the defendant in self-defense; but there is further evidence in the record tending to show that the defendant was an old man, 70 years of age, and was weak and only recently had been released from the hospital where he had been treated for injuries received in an automobile wreck; and that the prosecuting witness, Canady, was a large, vigorous young man, 30 years of age and weighing 200 pounds; that a short time before the firing of the gun the witness had knocked the defendant down twice, the first time in defendant's own dwelling, and the second time with a scrub broom in defendant's own yard, and had gotten on top of the defendant and was beating him when defendant cut the witness in the face with a pocket knife, thereby causing the witness to release the defendant; that the prosecuting witness then walked away from the defendant, saying that he would return and kill the defendant, that the defendant then went into his own house (his home), procured his gun, sat on the porch, and while

there the prosecuting witness, in company with two other young and vigorous men, approached the defendant in a threatening attitude, cursing and saying that they would kill the d—— old grayheaded s. o. b., that the defendant, still sitting on his porch, told them not to come any closer to him, that they continued to advance, still threatening and cursing, until they were in 50 or 60 yards of the defendant, when the defendant fired the gun twice, the shot therefrom taking effect in the bodies of the prosecuting witness and his companions.

True, the evidence is conflicting, but when construed in the light most favorable to the defendant the foregoing constitutes a substantially correct interpretation thereof, and entitled the defendant to have his plea of self-defense to the charge of an assault with a deadly weapon passed upon by the jury without a practically peremptory instruction denying such plea. If the jury should have found that both the prosecuting witness and defendant had quitted the combat when the defendant cut the witness, and one went one direction and the other another, and the defendant went to his house (home) and got his gun and sat on the porch solely for the purpose of defending himself and his home, and there waited until the prosecuting witness, with two companions, approached him in a menacing manner, threatening to kill him, and that he warned the witness to come no further toward him and his home and witness continued to threaten and advance upon him, and then, and not until then, did he fire his gun, the defendant could not be held, as a matter of law, to have forfeited his right of self-defense by willingly re-entering the combat after it had been quitted, or to have used more force than was reasonably necessary or reasonably appeared to be necessary under the circumstances. He had a right to have the issue of his having quitted the combat and his willingly having re-entered it, as well as the issue of his having used excessive force, passed upon by the jury under proper instructions by the court.

An accused may show that he quitted the combat and was therefore entitled to invoke the right of self-defense, although he may have been at fault at bringing about the original difficulty, *S. v. Garland,* 138 N. C., 675, 50 S. E., 853, and likewise may justify the use of a deadly weapon in self-defense when assaulted by a person of larger size or of greater strength, although such person may be unarmed, *S. v. Koutro,* 210 N. C., 144, 185 S. E., 682, and a man dangerously assaulted, or menaced, in his own house is already at the wall and need not retreat. *S. v. Gentry,* 125 N. C., 733, 34 S. E., 706; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526.

The case at bar is somewhat like that of *S. v. Dixon* in 75 N. C., 275, where the defendant was in his own dwelling and had ordered the deceased out, but he returned and murderously assaulted the defendant advancing on him with a deadly weapon, when the defendant shot him

and killed him. The judge directed the jury to render a verdict of manslaughter. The Court in reversing the judge said it was not incumbent upon the defendant to flee. He was in fact already at the wall. He was in his own dwelling.

For the error indicated the defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA Ex REL. NORTH CAROLINA UTILITIES COMMISSION v. THE CITY OF KINSTON ET AL.

(Filed 20 May, 1942.)

1. Utilities Commission § 4—

The provision of C. S., 1097, that any party affected by an order of the Utilities Commissioner shall be entitled to appeal, and the provision of sec. 12, ch. 134, Public Laws 1933, that any party to a proceeding before the Commission may appeal to the Superior Court, necessarily mean to grant the right of appeal only to a party to the proceeding who has some right or interest to be protected which in some way is, or may be affected by the order of the Commission.

2. Same—

A railroad company filed petition with the Utilities Commission to discontinue certain intrastate trains. Certain cities, counties and a committee of the area affected were heard as protestants in opposition to the petition. No application to intervene and no order making them parties to the proceeding appear in the record. *Held:* Protestants are not entitled to appeal from the order of the Utilities Commission granting the petition, the record failing to disclose that they have any interest which is, or may be affected by the order of the Commission.

3. Appeal and Error § 3a—

A party who has no legal interest which is affected by the order or judgment objected to, may not appeal merely to see how the question may strike the Court.

4. Appeal and Error § 22—

The Supreme Court can judicially know only what appears of record.

APPEAL by Atlantic Coast Line Railroad Company from *Frizzelle, J.*, in Chambers at Nashville, 23 April, 1942. From EDGECOMBE.

Proceeding before The North Carolina Utilities Commission.

The record reveals that the Atlantic Coast Line Railroad Company filed a petition with The North Carolina Utilities Commission for permission to discontinue trains Nos. 38-37 and 36-39 between Rocky Mount and Kinston, and trains Nos. 33 and 34 and passenger service on trains Nos. 426 and 427 between Washington and Parmele. The petition, however, is not a part of the record.

It seems that certain protestants appeared and were heard in opposition to the petition. The protestants are named as the City of Kinston, the County of Lenoir, the City of Greenville, the County of Pitt, the East Carolina Chamber of Commerce, and the Four County Committee. However, no application to intervene and no order making them parties to the proceeding appear in the record.

By order of the Commission dated 22 May, 1941, the petition of the Railroad Company was allowed; provided satisfactory arrangements were made for "handling mail and express on the lines on which the removal of trains is authorized by this order."

Thereafter, on 26 May, 1941, the protestants, styling themselves "protestants of record in this proceeding, named and admitted as parties herein," filed exceptions to the order of the Commission, which were "overruled, disallowed and denied" by the Commission on 12 September, 1941.

Whereupon, the protestants, again styling themselves "parties of record who were made parties to this proceeding," gave notice of appeal, stating their grounds of appeal and setting out their exceptions and assignments of error. On 26 September, 1941, by direction of the Commission, "transcript of the record in the matter of application of Atlantic Coast Line Railroad Company to discontinue trains . . . Docket No. 2054," was transmitted to the clerk of the Superior Court of Edgecombe County.

On 20 March, 1942, the Railroad Company filed with the Commission its proposed arrangement for handling mail and express upon the discontinuance of the trains as authorized, and this was approved 4 April, 1942, and the Railroad Company so notified.

After notice, the protestants then moved before the judge of the Superior Court for an order "directing the petitioner, Atlantic Coast Line Railroad Company, to cease and desist from all efforts, plans or arrangements to carry into effect the provisions of the order issued by the North Carolina Utilities Commission on May 22, 1941."

A show-cause order was issued on this motion, returnable 23 April, 1942. Upon the hearing of the motion, the Railroad Company filed a counter motion to dismiss the motion filed by the protestants, to dismiss the order to show cause, and to dismiss the appeal from the order of the Utilities Commission upon the ground that the matter was not properly in the Superior Court.

The counter motion of the Railroad Company was denied and the motion of the protestants granted, and the respondent was ordered "not to discontinue the trains" enumerated in the order of the Utilities Commission, "until final judgment upon the issues in this cause in the Superior Court." The cause was set for trial as the first case at the June Term, 1942, Edgecombe Superior Court.

From this order, the Atlantic Coast Line Railroad Company appeals, assigning error.

Thomas W. Davis, Murray Allen, F. S. Spruill, and Gilliam & Bond for appellant Railroad Company.

Bailey, Lassiter & Wyatt, Thomas J. White, and George Fountain for defendants, appellees.

STACY, C. J. The question presented at the threshold of the case is whether the protestants are entitled to prosecute the appeal from the order of the Utilities Commission to the Superior Court. The protestants rely upon *Utilities Com. v. Coach Co.*, 216 N. C., 325, 4 S. E. (2d), 897; *S. c.*, 218 N. C., 233, 10 S. E. (2d), 824, for an affirmative answer. The Railroad Company cites *Corp. Com. v. R. R.*, 170 N. C., 560, 87 S. E., 785, as authority for a negative reply.

It is provided by C. S., 1097, that "From all decisions or determinations made by the Utilities Commissioner any party affected thereby shall be entitled to an appeal." And in sec. 12, ch. 134, Public Laws 1933, it is provided that "any party to said proceeding may appeal to the Superior Court." In *Corporation Commission v. R. R.*, 196 N. C., 190, 145 S. E., 19, it was said that for the purposes of appeal, "those who have no property or proprietary rights which are or may be affected by orders of the Commission, are not parties to the proceeding" within the meaning of the statute, "and have no right to appeal from such orders to the Superior Court."

This grant of the right of appeal to any party to the proceeding, or to any party affected by the order of the Utilities Commission, must necessarily mean to any party to the proceeding who has some right or interest to be protected which in some way is or may be affected by the order of the Commission. *Corp. Com. v. R. R.*, 197 N. C., 699, 150 S. E., 335; *Corp. Com. v. R. R.*, 196 N. C., 190, 145 S. E., 19; *S. v. R. R.*, 147 N. C., 483, 61 S. E., 271. Otherwise, an appeal could be taken simply to see "how it might strike the court." *Parker v. Bank*, 152 N. C., 253, 67 S. E., 492. The courts are not open to "parties" who have no interest to preserve. *In re Mitchell*, 220 N. C., 65, 16 S. E. (2d), 476; *Trust Co. v. Toney*, 215 N. C., 206, 1 S. E. (2d), 538; *Wade v. Sanders*, 70 N. C., 277. Here, the right of the protestants to prosecute the appeal from the order of the Commission to the Superior Court is not made manifest. Whatever interest they may have in the order is undisclosed. Hence, the motion to dismiss the appeal should have been allowed. This is a matter about which we can know judicially only what appears on the record. *S. v. DeJournette*, 214 N. C., 575, 199 S. E., 920. "We are not permitted to refer to matters not stated in the record, nor could the court

below or the jury consider them"—*Walker, J.*, in *S. v. R. R.*, 149 N. C., 470, 62 S. E., 755.

No comfort is afforded the protestants by the decision in *Utilities Com. v. Coach Co., supra.* Their status here is quite different from that of the Coach Company in the cited case. There, the Coach Company had a direct pecuniary interest to serve, and it was the party affected by the order of the Commission. Here, no such interest appears. The case is controlled by the decision in *Corp. Com. v. R. R., supra.*

Reversed.

CITY OF MONROE v. EFFIE NIVEN, ADMINISTRATRIX, VICTOR H. NIVEN AND WIFE, MRS. VICTOR H. NIVEN; VANDER E. NIVEN AND WIFE, MRS. VANDER E. NIVEN; BEATRICE M. WHITLEY AND HUSBAND, ... WHITLEY; BERTHA E. BLUE AND HUSBAND, REV. ..... BLUE; WILLIE B. NIVEN, THOMAS J. NIVEN, WALTER B. NIVEN, FIRST NATIONAL BANK, PEOPLES BUILDING & LOAN ASSOCIATION, AND THE COUNTY OF UNION.

(Filed 20 May, 1942.)

1. Judgments § 22h—

A void judgment is one which has a mere semblance but is lacking in some of the essential elements which would authorize the court to proceed to judgment.

2. Same—

A judgment *in personam* obtained without jurisdiction of defendant by service of process or voluntary appearance is absolutely void for want of jurisdiction, and may be disregarded and treated as a nullity at any time, everywhere.

3. Judgments § 22b—

Where the record shows service or appearance when in fact there had been none, the judgment is apparently regular though void in fact, and the proper remedy of the party affected to correct the record is by motion in the cause.

4. Judgments § 22h: Appearance § 2b—

A judgment which is void for want of service of process is not validated by a general appearance to move to vacate, since *ex nihilo nihil fit.*

5. Same—

A showing of a meritorious defense is not necessary to vacate a void judgment. However, want of service is a meritorious defense.

6. Same: Judgments § 22d—

Lapse of time will not bar the right to move to vacate a void judgment.

APPEAL by individual defendants from *Phillips, J.*, at October Term, 1941, of UNION. Reversed.

Motion in the cause to set aside judgment for want of service of process.

Plaintiff instituted this action in November, 1935, to foreclose tax lien upon certain land in the city of Monroe owned by the individual defendants. Summons was returned showing service on all defendants, although in fact it had been served only on the defendant Effie Niven, Administratrix. There was judgment of foreclosure, sale and decree of confirmation. Gordon Insurance & Investment Company became the purchaser.

On 6 September, 1941, the individual defendants issued and had served on the purchaser and the parties now claiming to be the owners of the property under the foreclosure sale, notice of motion to vacate the judgment for that no notice of said action or summons in said proceedings was ever served upon them. While apparently no notice was issued to the plaintiff, it appeared and filed answer to the motion.

When the cause came on to be heard before the clerk he found as a fact:

"1. That none of the defendants were personally served with summons with the exception of Effie Nivens, Administratrix.

"2. That Walter Nivens was a minor at the time of the original action was instituted, he having been born on September 15, 1915, and that over three years elapsed after he became of age before the filing of the motion in the cause.

"3. That the records show that all of the defendants were duly served with summons, the judgment authorized the sale, and the Court had jurisdiction of the subject matter.

"4. That Gordon Insurance & Investment Company purchased the property at the foreclosure sale as an innocent purchaser for value, without notice of any irregularity in the proceeding.

"5. That the Gordon Insurance & Investment Company sold the property to J. L. Brewer and that the defendants in this action are contending in the case of *Brewer v. Brewer*, now on file in this Court, that they are entitled to the property by virtue of a contract with the said J. L. Brewer.

"6. That the defendants have not shown that the original judgment in this cause affects injuriously their rights and that they have a meritorious defense or could make a meritorious defense.

"7. That approximately five years elapsed between the time of the original judgment was filed and the filing of the motion in the cause and that during that time the defendants knew that J. L. Brewer had purchased the property on September 29, 1936, went into possession of the

property, collected rents from the tenants on the premises for approximately 27 months and after his death the defendants allowed the Executor of J. L. Brewer to collect rents for approximately 22 months.

"8. That more than three years have elapsed since judgment confirming sale and delivery of deed to purchaser, Gordon Insurance & Investment Company."

Upon said findings of fact the clerk adjudged that the judgment is voidable and not void and denied the motion to vacate. On appeal the court below adopted the findings of fact and conclusions of law of the clerk and denied the motion to annul the judgment. Defendants excepted and appealed.

E. Osborne Ayscue and W. H. Rooker for appellees.
P. H. Bell for defendants, appellants.

BARNHILL, J. A void judgment is one which has a mere semblance but is lacking in some of the essential elements which would authorize the court to proceed to judgment. McIntosh P. & P., sec. 651, p. 734; *Harrell v. Welstead*, 206 N. C., 817, 175 S. E., 283.

Jurisdiction of the party, obtained by the court in some way allowed by law, is essential to enable the court to give a valid judgment against him. *Stancill v. Gay*, 92 N. C., 462; *Guerin v. Guerin*, 208 N. C., 457, 181 S. E., 274. When a court has no authority to act its acts are void. It is the service of process in some manner authorized by law that causes the jurisdiction of the court to attach to and give the court control of the party thus brought into court.

When a court of general jurisdiction undertakes to grant a judgment in an action where it has not acquired jurisdiction of the parties by voluntary appearance or the service of process the judgment is absolutely void and has no effect. It may, therefore, be disregarded and treated as a nullity everywhere. It is *coram non judice*. *Copper Co. v. Martin*, 70 N. C., 300; *Card v. Finch*, 142 N. C., 140; *Stancill v. Gay, supra; Guerin v. Guerin, supra; Dunn v. Wilson*, 210 N. C., 493, 187 S. E., 802; *Clark v. Homes*, 189 N. C., 703, 128 S. E., 20; *Harrell v. Welstead, supra; Johnson v. Whilden*, 171 N. C., 153, 88 S. E., 225; *Flowers v. King*, 145 N. C., 234; *Downing v. White*, 211 N. C., 40, 188 S. E., 815, and cases cited. This is so because it is against natural justice as well as fundamental right to take judgment against a man without giving him an opportunity to defend himself and his right of property.

Where the record shows service or appearance when in fact there had been none the judgment is apparently regular though void in fact and the party affected must take appropriate action to correct the record. *Doyle v. Brown*, 72 N. C., 393. This is by motion in the cause. *Harrell*

v. Welstead, supra; Davis v. Brigman, 204 N. C., 680, 169 S. E., 421; *Downing v. White, supra,* and cases cited; *Adams v. Cleve,* 218 N. C., 302, 10 S. E. (2d), 911; *Guerin v. Guerin, supra; Fowler v. Fowler,* 190 N. C., 536, 130 S. E., 315.

A general appearance to move to vacate a void judgment does not validate a judgment rendered without service of process. "A nullity is a nullity, and out of nothing nothing comes. *Ex nihilo nihil fit* is one maxim that admits of no exception." *Harrell v. Welstead, supra; Chemical Co. v. Turner,* 190 N. C., 471, 130 S. E., 154; *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175; *Michigan Central Railroad Co. v. Mix,* 278 U. S., 492; 73 L. Ed., 470; 15 R. C. L., 700.

No proof or suggestion of merit is required. *Flowers v. King, supra.* Even so, the want of service is the meritorious defense. *Adams v. Cleve, supra;* 15 R. C. L., p. 700, sec. 152; p. 692, sec. 144.

Nor are movants barred by the lapse of time. "The passage of time, however great, does not affect the validity of a judgment; it cannot render a void judgment valid." 31 Am. Jur., 66; Anno. 81 A. S. R., 559.

Hence, it follows that upon the facts found, to which appellees do not except, the court below erred in denying the motion of defendants. The judgment must be vacated of record.

The parties undertake to debate here the rights of the assignees of the purchasers at the foreclosure sale. It is asserted that the present owners are purchasers for value without notice and that as to them the judgment, being regular on its face, should stand.

These questions are not before us for discussion or decision. The motion is directed solely to the alleged invalidity of the judgment of foreclosure as against movants. This is all we decide. To what extent those who acquired paper title under the foreclosure judgment and the commissioner's deed are protected by the apparent regularity of the judgment is a question which must be reserved for another day and another action.

The judgment below is

Reversed.

STATE v. JOHN WILSON.

(Filed 20 May, 1942.)

Indictment and Warrant § 15—

The Superior Court, upon appeal from a municipal police court, has discretionary power to permit an amendment of the warrant.

APPEAL by defendant from *Phillips, J.,* at January Criminal Term, 1942, of BUNCOMBE. No error.

Defendant, on appeal from the police court of the city of Asheville, was tried and convicted upon a warrant charging the violation of the provisions of C. S., 4358. The warrant was amended before trial in the Superior Court. From judgment on the verdict defendant appealed.

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

I. C. Crawford for defendant, appellant.

PER CURIAM. A careful perusal of the record leaves us with the impression that there was ample evidence—direct and circumstantial—to support the verdict. The allowance of an amendment of the warrant after the cause reached the Superior Court was within the discretion of the court.

The defendant's assignments of error fail to point to any harmful or prejudicial error. Hence, the verdict and judgment must stand.

No error.

EDWIN McCROWELL v. SOUTHERN RAILWAY COMPANY AND R. H. SAMUEL.

(Filed 5 June, 1942.)

1. Negligence § 19b—

Under the common law, when the existence of contributory negligence on the part of plaintiff is the only inference which can be drawn from the evidence by reasonable minds, the court may grant defendant's motion to nonsuit.

2. Negligence § 17b—

Negligence, on the part of plaintiff or defendant, is a mixed question of law and fact, and when the factual element is determined by admission, or when only a single inference can be drawn from the evidence, taken in the light most favorable to plaintiff, the question is one of law for the court.

3. Master and Servant § 29—

Under the Federal Employer's Liability Act, contributory negligence does not bar recovery, but is to be taken into account on the *quantum* of damages.

4. Same—

The duty of the court, to give peremptory instructions on the issue of contributory negligence when but a single inference can be drawn from the evidence by reasonable minds, applies to an action brought under the Federal Employer's Liability Act.

5. Same—Evidence held to disclose contributory negligence on part of employee struck by train in freight yard.

Plaintiff's testimony tended to show that he was standing on or near one of the tracks in defendant's freight yard during the daytime in the discharge of his duties in interstate commerce, and was struck by a freight train which he failed to see. *Held:* The inference that plaintiff was guilty of contributory negligence being the only reasonable conclusion which can be drawn from all the evidence, the court properly instructed the jury that if they found by the greater weight of the evidence the facts to be as testified to by plaintiff they should answer the issue of contributory negligence in the affirmative.

6. Same—Instruction upon effect of contributory negligence in diminishing award of damages held without error.

In an action under the Federal Employer's Liability Act, an instruction to the effect that the jury should consider contributory negligence only upon the question of *quantum* of damages, so that if plaintiff and defendant were equally guilty of negligence proximately causing the injury, the award of damages should be reduced one-half, while if plaintiff were guilty of a greater degree of negligence, the *quantum* of damages should be reduced more than one-half, and conversely, that if defendant were guilty of a greater degree of negligence the damages should be diminished less than one-half, *is held* without error.

7. Master and Servant § 27—

A rule of a railroad company that when cars are pushed by an engine a trainman must be stationed on the front of the leading car, except when shifting or making up trains in the yards, which exception should not apply to extended movements in the yards, *is held* one for the protection of employees working in the yards.

8. Same—

Whether a safety rule regulating operation of trains had been abrogated, to the knowledge of plaintiff, in the type of train movement causing the injury in suit, *held* for the jury under the evidence.

9. Same—In this action under the Federal Employer's Liability Act, evidence of negligence on the part of defendant held sufficient.

Plaintiff, an employee of a railroad company, was injured while engaged in the duties of his employment in defendant's freight yard. Plaintiff's evidence tended to show that a crew was moving a train of thirty cars, pushed by the engine, from another yard into the yard in which plaintiff was working, to be left in the yard and "broken up" by another crew, that the engineer failed to blow his whistle before entering the yard as was customary, that employees working with plaintiff failed to give an emergency signal when they saw plaintiff's position of peril, that there was no trainman stationed on the lead car which struck him, with evidence of a rule of the company requiring a trainman to be so stationed and that the rule applied to a movement of cars of the type which caused plaintiff's injury. *Held:* The evidence is sufficient to be submitted to the jury upon the question of negligence on the part of the railroad company.

10. Master and Servant § 28—

A railroad employee injured while engaged in interstate commerce prior to the 1939 amendment to the Federal Employer's Liability Act, which

abrogated the doctrine of assumption of risk as applied to a fellow servant, is entitled, at least, to the application of the doctrine of assumption of risk as interpreted at the time of his injury.

11. Same—

Prior to the 1939 amendment to the Federal Employer's Liability Act, the doctrine of assumption of risk was not affected by whether the injury resulted from the negligence of a fellow servant or not, the general rule that an employee assumes only the usual or ordinary risks, and extraordinary risks only when he knows or has reasonable opportunity to know and appreciate them, being applicable, so that an employee did not assume cases of unusual or instant negligence on the part of a fellow employee.

12. Same—

In this action under the Federal Employer's Liability Act to recover for injuries sustained prior to the effective date of the 1939 amendment, plaintiff relied upon the violation by a fellow employee of a rule requiring a trainman to be placed on the front of the leading car when cars were pushed by an engine. *Held:* Plaintiff employee cannot be held to have assumed the risk of the violation of the safety rule by his fellow employees.

APPEAL by both plaintiff and defendant from *Armstrong, J.*, at February Term, 1942, of FORSYTH. Upon each appeal, no error.

This action is brought under the Federal Employer's Liability Act to recover damages for a personal injury which the plaintiff alleges he sustained through the negligence of the defendant while he was employed as a yard clerk and engaged in the duty of checking freight cars in defendant's yard in Winston-Salem. That the plaintiff was an employee, engaged in interstate commerce, is admitted.

Summarizing from the evidence the facts bearing upon the appeal, the following are pertinent:

There are two freight yards with which the evidence is concerned—the lower yard, some distance to the west, and the Salem yard, in which the accident occurred. The Salem yard and its vicinage are typical of the usual freight yard, with tracks laid out and connected by switches so as to facilitate operations necessary to the breaking up of incoming trains, distributing the cars which compose them to their proper places to be unloaded or rehandled, and the making up of outgoing trains, or reassembly of cars in their proper order therein. Parts of trains handled together have been referred to as "strings" or "cuts," and with engine attached, "trains." Looking across the yard, there are eleven of such tracks, in fairly close proximity to each other, exclusive of the outside passenger track. The "lead" line connecting with the main freight line or "feed" line makes a continuous passage through the yards and is known as the switching line, because the several tracks above mentioned

branch off from it or from other tracks with which it is connected. This "switching lead," sometimes called the freight main line, is used as the main line from the lower yard to the Salem yard. Coming from the lower yard, it is connected with track No. 1, and this, in turn, by switch with track No. 2. All of the tracks, except the passenger track just mentioned, converge into the main freight line or feed line to the east.

The switches were equipped with the usual targets, automatically moved when the switch is changed, so as to show by means of colors whether the switch is lined up to let traffic into the track.

On the day of the accident, a crew—designated as the 3 o'clock crew—was engaged in taking cars out of the track further east in the yard and bringing them westwardly into the scales track to be weighed, with a view to putting them somewhere else in the yard. This required plaintiff to be on hand and conveniently stationed in the yard to check these cars as they passed against a switch list with which he had been supplied. These cars would pass over the scales track to be weighed and the tonnage noted by the plaintiff. He had been informed by Samuel, the Yardmaster, that a cut of cars would come in from the lower yard some distance west from the Norfolk & Western connection, but he did not know when. Neither of these movements was scheduled for a particular time.

Plaintiff went into the yard to a point somewhere between tracks Nos. 2 and 3, prepared to check the cars handled by the 3 o'clock crew coming from the east. This train came in on the scales track, pulled by an engine, and plaintiff proceeded to check the cars as they passed. While so engaged, the train or cut of 30 cars, pushed by an engine and coming from the west, was let into the yard by the Yardmaster, Samuel, over a switch leading it into track No. 2, and proceeded on the latter track toward the train approaching in the opposite direction from the west, which plaintiff was checking. The string or cut of 30 cars coming from the west, and designated by the witnesses as a train, was pushed by an engine, and was in continuous movement from the lower yard to and into the Salem yard and until it came into contact with plaintiff.

At that time plaintiff was standing between tracks No. 2 and No. 3, or between the rails of track No. 2. His own testimony is to the effect that he was standing between tracks No. 2 and No. 3, and a little nearer track No. 2. He was busy with the checking of the cars in the train coming from the east and had his back to the train approaching from the west, when he was knocked down by the lead car, several cars passing over his leg and practically severing the foot above the ankle.

There is evidence tending to show that it was customary for the engineer to blow four blasts of a whistle before entering the Salem yard with such a train; and while the evidence is conflicting on this point, there is evidence tending to show that this signal was not given. There was no

head brakeman or other brakeman upon the lead car of the cut of 30 being pushed into the Salem yard. There were brakemen upon the train, one about half way its length and the other on the second car from the engine. The brakeman riding the car near the middle of the train had gotten down at some point near the switch to No. 2 track, and the remaining brakeman testified that from his position he could not see the plaintiff at the time the forward car struck him, nor could he see the engine which was pulling the train coming from the east. He states that his attention had been attracted by Mr. Samuel, Mr. Byrd and Mr. Baker—Mr. Byrd and Mr. Baker had gotten off the train—who were in conversation near the tracks, and that he finally got a signal which he calls a "wash-out" signal, or emergency signal, from a crew member of the other train, in consequence of which the train which hit plaintiff was signed down.

S. G. Hardister, fireman on the train operated by the 3 o'clock crew—that is, the train on the lead track headed west—saw the cut of 30 cars coming down-grade while his train was going up-grade, making steam. The 30 car cut was being shoved eastwardly into the yard and there was no brakeman or trainman on the front of the leading car. Hardister testified that he saw plaintiff a minute or two before the train struck him, but did not actually see it strike him, and that he was then standing between the rails of No. 2 track. At an exclamation from the engineer, "They've run over Eddie," Hardister jumped down off the train and pulled plaintiff clear of the track. This witness saw Mr. Wilkinson, a member of the 3 o'clock crew, trying to stop the train operated by the 4 o'clock crew by giving a "wash-out" or emergency signal. "The engineer and fireman of the 4 o'clock crew could not see the end of their train as it was being shoved into Salem yard because of thirty cars around a curve."

The plaintiff testified that there was much noise at that point in the yard; that the westward bound train was going up-grade and making steam, and that the eastbound train being pushed into the yard was going down-grade and coasting.

The plaintiff introduced certain rules from the Rule Book of the company, as follows:

Rule No. 103: "When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the front of the leading car."

"NOTE: The exception covers the making and breaking of trains only, and not extended movements within yards."

Rule No. 1311: "When a person or animal appears upon or so close to the track as to be in danger of being oblivious to the danger, he must immediately sound the alarm whistle; if, on approaching nearer, the

person or animal appears still unaware of the approach of the train and an accident is imminent, the engineer must use all means possible to warn the person or animal and to stop the train to avoid accident. If an inanimate obstruction is on or near the track, the train must be stopped before reaching it."

Rule No. 1321: "They must require forward brakemen to take proper positions on the train, whenever it is necessary."

Bearing upon these rules, the plaintiff offered the testimony of a number of experienced railway employees, some of them employees of the defendant of 19 or 20 years standing, who testified that they were familiar with Rule 103, and proceeded to interpret it according to its general understanding and usage among railway men. This evidence tended to show that the movement of the train by the 4 o'clock crew from the lower yard into the Salem yard and within the Salem yard was an "extended movement" within the rule. There is further testimony to the effect that such an extended movement ended only when the engine was uncoupled from the cars.

Further bearing upon the rule, the evidence tended to show that the 4 o'clock crew which brought this cut of cars in from the lower yard had no further duties with respect to it after placing the "cut" in its designated position in the yard; and that it would then be taken by a different crew and worked—that is, broken up, and the cars distributed or reassembled in other trains as might be convenient.

It was elicited from the plaintiff on cross-examination that he knew of the custom for the brakemen to dismount from the train some 40 or 50 feet after passing the switch point, but plaintiff did not regard that custom as applying to a movement of this kind. His testimony on this point is as follows:

"I knew all the operations of the yard and in and about the yard. It was not the custom on trains being pushed into Salem yard for the head brakeman, that is, the brakeman on the lead car, to get off of the car at the switch when the cut of cars entered Salem yard. The brakeman generally rode the car a little piece down into the tracks to see if everything was clear. By a little piece, I would mean 40 or 50 feet from the switch point. As to whether or not it was the custom for the head brakeman to get off the cars at from 40 to 50 feet from the switch as the cut of cars entered Salem yard, I would say it depends on how many cars there were in the cut. If it was a pretty long cut they would have to ride them down there and tie some hand brakes on the car. Thirty cars is a long cut. It was not the custom with respect to a cut of 30 cars for the head brakeman to get off 40 or 50 feet from the switch when the cut of cars entered Salem yard. I just finished saying, 'No, it was not at the switch, but it was the custom to get off 40 or 50 feet beyond

the switch.' That is the custom, according to what switch you are going to shove into. There is not one custom about one switch and another custom about another switch, unless the cut of cars has got air coupled on. This train had air connected up. The custom was when I got hurt for the head brakeman to get off 40 or 50 feet from the switch that the train was being shoved into if air was connected on the train. I knew that was the custom. That had been the custom up to the time I got hurt. It was the custom to my knowledge."

Plaintiff testified that at the time of his injury, he was standing between tracks Nos. 2 and 3, about 150 feet east of the switch from No. 1 track into No. 2 track, and that if there had been a brakeman on the lead car, he could have seen plaintiff.

The plaintiff testified that it was not customary to admit cars coming from the lower yard and the N. & W. connection to No. 2 and No. 1 tracks, since, generally, they were placed elsewhere, and that while the tracks in which they were usually placed were temporarily blocked by the advancing train in charge of the 3 o'clock crew, that these tracks would have been cleared in a few minutes when the train had gotten upon the scales track.

There was extended evidence with regard to the nature of plaintiff's injury and the necessity of two amputations below the knee.

Plaintiff took a voluntary nonsuit as to the defendant Samuel.

At the conclusion of the plaintiff's evidence, the defendant offering none, the defendant demurred to the evidence and moved for judgment as of nonsuit, which motion was overruled, and defendant excepted.

The plaintiff excepted to the following instructions given to the jury:

(1) "The Court instructs you that the testimony bearing upon this issue having come from the plaintiff and his witnesses, and as to whether or not he was contributorily negligent in bringing about his alleged injuries depends upon this testimony, if you find that the plaintiff himself has told the truth and you find by the greater weight of the evidence the facts to be as testified to by him, then the Court charges you as a matter of law that he was guilty of contributory negligence, and it would be your duty to answer the second issue submitted to you 'Yes.'"

(2) "In addition to the rules already given to you, the Court charges you that if you should find in answer to the second issue, which the Court has heretofore instructed you to answer 'Yes,' that the plaintiff by his own negligence contributed to his injury, then you would diminish the amount of damages you would otherwise award, if you come to this issue, according to the rule which the Court will now give you. Under the statutes it is not a question of majority of negligence, but rather one of proportion, and the damages are to be diminished in proportion to the amount of negligence attributable to the negligence of the plaintiff as

compared with the combined negligence of the plaintiff and the defendant, or to be more explicit, if you find from the evidence, as the Court has instructed you, and by its greater weight, that the plaintiff was guilty of contributory negligence, the Federal Employer's Liability Act provides that such contributory negligence is not to defeat a recovery altogether, but that damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, it being the purpose of the statute to abrogate the common law rule, completely exonerating the defendant from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the plaintiff. The rule in this class of cases being that if the employer and the employee are both guilty of negligence, then the damages which the plaintiff is entitled to recover are to be diminished in the same proportion that his negligence bears to the combined negligence of the employer and employee. To state it differently, if the plaintiff and the defendant should be found by you to be guilty of negligence in an equal degree, and that the negligence of both the defendant and the plaintiff contributed to the injury in an equal degree, the jury may reduce the damages one-half. Or, if it should be found that the employee was guilty of more negligence than the employer, then the damages should be diminished more than one-half. Or, if it should be found that the employee is guilty of less negligence than the employer, then the damages should not be reduced as much as one-half. In other words, the amount which the plaintiff may recover if the plaintiff has been guilty of negligence, is to bear the same ratio or proportion to the full amount of damages sustained as the negligence attributable to the defendant bears to the combined negligence of the defendant and the plaintiff."

The following issues were submitted to the jury and answered as indicated:

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

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: 'Yes.'

"3. Did the plaintiff assume the risk of his injury, as alleged in the answer? Answer: 'No.'

"4. What amount of damages, if any, is the plaintiff entitled to recover? Answer: '8,500.' "

From the judgment rendered upon the verdict, both plaintiff and defendant appealed, assigning error.

Elledge & Wells for plaintiff.

Womble, Carlyle, Martin & Sandridge for defendant.

SEAWELL, J. For an orderly consideration of the case, we may array the contentions of the parties on the two appeals substantially as follows:

Upon the facts as they appear, the defendant company contends that its demurrer to the evidence and motion for judgment as of nonsuit should have been allowed for a number of reasons. In the first place, it is contended that the evidence discloses no negligence on the part of defendant, since, as contended, safety rule No. 103 (see *supra*), upon which it is conceived plaintiff's case must wholly rest, does not apply to an employee such as plaintiff or to a movement of cars such as caused his injury; but, nevertheless, if it was meant so to apply, it had been abrogated by custom to plaintiff's knowledge. And that at any rate, the plaintiff assumed the risk resulting in his injury and that his action should have been dismissed on that ground. Pertinent to these contentions, the plaintiff advances a number of reasons why the defendant should be held for negligence. Amongst them are the violation of the rules—especially No. 103—established by the company for the safety of its employees; the failure of the engineer of the 4 o'clock crew to blow a warning signal when shoving a thirty car train into the yard; the failure of the 3 o'clock crew, especially the engineer, to give an emergency signal when he saw that the trains were approaching each other and when plaintiff's position of peril was discovered.

PLAINTIFF'S APPEAL.

The power of the court to declare the conduct of the plaintiff contributorily negligent as a matter of law when only that inference can be drawn from the evidence by reasonable minds has long been recognized by the courts of this State. *Neal v. R. R.*, 126 N. C., 634, 36 S. E., 117; *Hayes v. Western Union Telegraph Co.*, 211 N. C., 192, 193, 189 S. E., 499; *Godwin v. R. R.*, 220 N. C., 281. The rule is generally prevalent (see 38 Am. Jur., p. 1054, note 15), and we see nothing in the procedure offensive to a trial under the Federal Act.

Negligence is a mixed question of law and fact. *Nichols v. Fibre Co.*, 190 N. C., 1, 128 S. E., 471; *Trustees of Elon College v. Banking Co.*, 182 N. C., 298, 109 S. E., 6; *Jones v. American Warehouse Co.*, 138 N. C., 546, 51 S. E., 106. When the question is resolved by elimination of the element of fact, it becomes one of law. The factual element can be determined by admission, a finding by the jury, or application of the single inference test to the evidence, taken in the light most favorable to the plaintiff. *Reeves v. Staley*, 220 N. C., 573; *Luttrell v. Mineral Co.*, 220 N. C., 782.

The common law rule obtains in the state jurisdiction with respect to actions brought and tried under state laws, and in such an action the proximate contributory negligence of the plaintiff, however small the

contribution, will bar recovery, and justify the withdrawal of the case from the jury under the single inference rule when the evidence warrants it. The Federal Employer's Liability Act expressly departs from the common law rule and introduces a somewhat modified doctrine of comparative negligence under which contributory negligence is not a bar to recovery, but is taken into account on the *quantum* of damages. But it is still competent for the court, with due and proper consideration of the phases of the evidence bearing upon the point, to instruct the jury that if they find by the preponderance of the evidence the facts to be as the evidence tends to show, the conduct of the plaintiff would constitute contributory negligence and they should answer the pertinent issue accordingly. This is no more than a compliance with the duty of the court to apply the law to the evidence. The formula employed, if not offensive in other particulars, is not important. This exception of plaintiff cannot be sustained.

Plaintiff excepts to the instruction that the jury should take into consideration the contributory negligence of the plaintiff, if he should be found to be negligent, on the issue of damages, and diminish the award in proportion to the amount of negligence attributable to plaintiff. We assume that plaintiff excepted to this instruction in order to protect his position under the exception just considered. At any rate, the instruction given to the jury correctly applies the law under the Federal statute and in accordance with authoritative decisions. *Raines v. R. R.*, 169 N. C., 186, 85 S. E., 294; *St. Louis & S. F. R. Co. v. Brown*, 241 U. S., 223, 60 L. Ed., 936, Annotation 12 A. L. R., 705; *Moore v. R. R.*, 185 N. C., 189, 116 S. E., 409; *Moore v. Iron Works*, 183 N. C., 438, 111 S. E., 776; *Davis v. R. R.*, 175 N. C., 648, 96 S. E., 41; *Horton v. R. R.*, 157 N. C., 146, 72 S. E., 958; *Norfolk & etc. R. Co. v. Earnest*, 229 U. S., 114, 122, 57 L. Ed., 1096.

DEFENDANT'S APPEAL.

In addition to his other designations of negligence, the plaintiff points out that if Rule 103 had been observed, and a brakeman posted in a conspicuous position on the lead car, plaintiff's injury could have been obviated by a mere call from the brakeman—certainly by proper warning or signal either to the plaintiff or others engaged in operating the train.

Numerous experienced railroad men, amongst them a number of the defendant's employees, who had served for periods of time up to 20 years or more, during which the rule had remained unchanged, testified that according to common usage and understanding of railroad men, the rule applied to movements of cars such as that from which the plaintiff received his injury. Also it may be inferred from the evidence that the operation of this train was one continuous extended movement from the

lower yard into and within the Salem yard by which the train of thirty cars was pushed into the Salem yard and into a track designated by Yardmaster Samuel; and that the string of cars was to be left there to be broken up by switching movements by another crew. There is no contradiction to the testimony that the duties of the 4 o'clock crew, which handled the "cut" from the lower yard, ended when the cars were so placed, and that the train was then turned over to another crew.

We think the rule upon its face is addressed to dangers and to the prevention of injuries in an area of operation into which the public generally had little cause to intrude, but in which the employees are peculiarly liable to injury if the proper precautions are not taken. Certainly, the public has nothing to do with the movement of cars in a freight yard, whether an "extended movement" or a "switching movement." We are of the opinion that the rule properly applies to employees of the company whose safety may be imperiled by its nonobservance, and that the plaintiff was within its intended protection.

There is some confusion in the testimony with regard to the extent to which the rule was observed or whether it had been abrogated by custom. The evidence, however, does not justify the conclusion as a matter of law that the rule had been abrogated by custom as to this particular movement of the train, and to the knowledge of plaintiff, and this question was properly left to the jury. We think upon the whole record, there is ample evidence from which the negligence of the defendant might be inferred.

We turn to defendant's contention that whatever negligence there was was covered by assumption of the risk. However, with reference to the rule we have been discussing, it is to be noted that defendant seems to concede that an employee does not ordinarily assume the risk of the violation by a fellow employee of a rule designed for his protection. We discuss briefly the question raised as to how far the doctrine of assumption of risk applies to the negligence of a fellow employee. Frankly, we think the fact that the injury arose from the negligence of a fellow servant, if it did so arise, has little to do with the application of the doctrine of assumption of risk as the law existed before the 1939 amendment below noted. Negligence of a fellow employee did not bar assumption of risk, but it did not aid it. The applicable principle is made clear in *Reed v. Director General of Railroads*, 258 U. S., 92, 66 L. Ed., 480, in which the court interprets *Seaboard A. L. R. Co. v. Horton, infra*, and applies the rule as clarified:

"*Seaboard Air Line R. Co. v. Horton*—often followed—ruled that the Federal Employers' Liability Act did not wholly abolish the defense of assumption of risk as recognized and applied at common law. But the opinion distinctly states that the first section 'has the effect of abolishing

in this class of cases the common-law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff.' The Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S., 1, 49, 56 L. Ed., 327, 345, 38 L. R. A. (N. S.), 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875, declared that 'the rule of negligence of one employee, resulting in injury to another, was not to be attributed to their common employer, is displaced by a rule imposing upon the employer responsibility for such an injury, as was done at common law when the injured person was not an employee.' And in *Chicago, R. I. & P. R. Co. v. Ward,* 252 U. S., 18, 64 L. Ed., 430, 40 Sup. Ct. Rep. 275, we said: 'The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk.' See *New York C. & H. R. R. Co. v. Carr,* 238 U. S., 260, 59 L. Ed., 1298, 35 Sup. Ct. Rep. 780, 9 N. C. C. A. 1; *Chesapeake & O. R. Co. v. DeAtley,* 241 U. S., 310, 313, 60 L. Ed., 1016, 1019, 36 Sup. Ct. Rep. 564."

The theory upon which the Act is held to modify the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff is explained as follows: "To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad, while engaging in interstate commerce, shall be liable to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents, or employees of such carriers."

Plaintiff was injured 7 July, 1939. About a month later—on 11 August, 1939—the Act was amended by expressly providing that an employee within its terms was not to be deemed to have assumed the risk of injury by the negligence of officers, agents or employees of his employer, thus abrogating the doctrine of assumption of risk as applied to a fellow servant; but the plaintiff is at least entitled to the incidence of the law upon his case as commonly understood and interpreted at the time of his injury. As the law then stood, the defense of assumption of risk was available in an action involving negligence of a fellow servant, except as excluded expressly in the Act, assuming that the facts were sufficient to establish assumption of risk under the recognized rules pertaining to that doctrine. *Moore v. Chesapeake & O. R. Co.,* 291 U. S., 205, 78 L. Ed., 755; *Chicago G. W. R. Co. v. Schendel,* 267 U. S., 287, 69 L. Ed., 614; *Great Northern R. Co. v. Donaldson,* 246 U. S., 121, 62 L. Ed., 616; *Seaboard Air Line R. Co. v. Horton,* 239 U. S., 595, 60 L. Ed., 458.

In all these cases, the rule has been kept within the cardinal principle which limits the extent of the employee's undertaking under his contract

of employment;—that is, that he assumes only the ordinary risks of the employment, or those which are at the time obvious or known and appreciated.

This principle is aptly expressed in *Cobia v. R. R.*, 188 N. C., 487, 491: "By the common law, the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence, he does not assume until made aware of them, or until they become so obvious and immediately dangerous that an ordinarily prudent man would observe and appreciate them."

In this case (*Cobia v. R. R., supra*), there is an enlightening discussion of this whole subject, and *Chesapeake & Ohio Ry. v. DeAtley*, 241 U. S., 311, 60 L. Ed., 1016, where the principle is applied under the Employer's Liability Act, is quoted with approval: "An employee is not bound to exercise care to discover extraordinary dangers arising from the negligence of the employer or of those for whose conduct the employer is responsible, but may assume that the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them." *Seaboard Airline Railway v. Koenecke, Admr.*, 239 U. S., 352, 60 L. Ed., 324; *Railroad v. Mangan*, 278 F., 85.

In *Covington v. R. R.* (S. C.), 155 S. E., 438, the following definition of ordinary risk was quoted with approval from 39 C. J., 704, 705: "Risks and perils ordinarily incident to the employment are such as are to be expected from the particular character of the service in which the employee is engaged, and have generally been defined as those which remain after the master, or one rightly exercising the authority of the master, has exercised due care to prevent or avoid . . . which cannot be obviated or avoided by the exercise of due care on the part of the master." *Reed v. Director General, supra; Railroad v. Ward*, 252 U. S., 18, 64 L. Ed., 430; *Railroad v. DeAtley, supra.*

This agrees with the observation of the Court in *Hamilton v. R. R.*, 200 N. C., 543, 158 S. E., 75: "The servant does not assume extraordinary and unusual risks of the employment, and he does not assume the risks which would not have existed if the employer had fulfilled his contractual duty."

Further quoting from *Cobia v. R. R., supra:* "The negligence of fellow-servants is withdrawn from the class of assumed risks in cases of unusual and instant negligence, and under circumstances which afforded the injured employee no opportunity to know of the conditions or appreciate the attendant dangers. This doctrine of assumption of risk is based

upon knowledge or a fair and reasonable opportunity to know, and usually this knowledge and opportunity must 'come in time to be of use.'"

In *Batton v. R. R.*, 212 N. C., 256, 193 S. E., 674, we find: "Assumption of risk is founded upon knowledge of the employee, either actual or constructive, of the risks or hazards to be encountered in the performance of his duty, and his consent to take the chance of injury therefrom. It is based upon the contract of employment and is distinguished from contributory negligence, which is solely a matter of conduct."

Authoritative decisions under the act make it clear, we think, that the employee does not assume the risk of unusual or extraordinary negligence or negligence presenting an unpredictable emergency, or one where the danger involved is not obvious or not known and appreciated.

Since it is apparent that not all negligent acts of a fellow servant come within the category of assumed risk, we think it would be taking a somewhat complacent view of the law to hold that the violation of a rule which is intended for the safety of employees, and obviously necessary or highly important in that respect, might be classed as ordinary negligence, or that the manner of its happening, as pictured in the evidence, is consistent with the theory of assumption of risk as defined or explained in the cited cases.

We are of the opinion that the court below took the proper course in submitting the evidence to the jury, with appropriate instructions, and defendant's motion was properly overruled.

We find no error on either appeal.

On plaintiff's appeal,

No error.

On defendant's appeal,

No error.

BERTHA LOVE SIMMS AND HUSBAND, JAMES SIMMS, v. CLIFTON SAMPSON AND WIFE, BERT DIAL SAMPSON, ROSCOE SAMPSON AND WIFE, PATTIE SAMPSON; EMMA SAMPSON CLARK AND HUSBAND, BUD CLARK; MARY SAMPSON BREWER AND HUSBAND, JAMES BREWER; EULA MAE CHAVIS AND HUSBAND, GOLDON CHAVIS; FODIE BELL AND HUSBAND, CHARLIE BELL; JOHN SMITH AND WIFE, MRS. JOHN SMITH; ROB FRENCH AND WIFE, ROSA FRENCH; JOE FRENCH AND WIFE, LAURA FRENCH; DAN HALLOWAY, INCOMPETENT; ED FRENCH, SINGLE; BESSIE PITTMAN AND HUSBAND, JIM PITTMAN; CHARLES FRENCH AND WIFE, ——— FRENCH; JETTIE FRENCH AND HUSBAND, ——— FRENCH; LEE FRENCH AND WIFE, ROBIE FRENCH; BRADY FRENCH; MARGARET FRENCH PRATT AND HUSBAND, BOB PRATT; E. M. SMITH AND WIFE, SABRA J. SMITH;

NELSON SMITH AND WIFE, MRS. NELSON SMITH; JOSEPHINE SMITH, WIDOW; MILES A. SMITH AND WIFE, ADDIE SMITH; JAMES B. SMITH; MRS. JAMES B. SMITH; ROWLAND SMITH AND WIFE, MRS. ROWLAND SMITH; MARY C. SMITH AND HUSBAND, ED SMITH; SALLIE J. CHAVIS AND HUSBAND, BEDDIE CHAVIS; LULA WILKINS AND HUSBAND, GOVERNOR WILKINS; AGATHA THOMAS AND HUSBAND, CUB THOMAS; JESSIE BELLE MAYNOR AND HUSBAND, DOYLE MAYNOR; FRANK SMITH AND WIFE, EMMA JANE SMITH; ELIZA SMITH, SINGLE; JAMES W. SMITH AND WIFE, LELA SMITH; ROBERT SMITH AND WIFE, MRS. ROBERT SMITH; WINNIE F. CARTER AND HUSBAND, NATHAN CARTER; MARY E. CARTER, WIDOW; MARY ELIZA SMITH, INFANT; CALVIN COOLIDGE SMITH, INFANT; BERNICE SMITH, INFANT; LOTTIE SMITH BELL; W. B. BOWENS; RUFUS BOWENS AND WIFE, PEARLIE BOWENS; FANNIE REVELS AND HUSBAND, CARSON REVELS; ROSANNA HAMMONDS AND HUSBAND, PAXTON HAMMONDS; J. C. (CANT) SMITH AND WIFE, SALLIE SMITH; ALFRED SMITH AND WIFE, MRS. ALFRED SMITH; PENNIE HOLMES AND HUSBAND, IRA HOLMES; SANDY SMITH AND WIFE, WESSIE SMITH; MARY BELLE SMITH, WIDOW; CHARLES SMITH; MARGARET SMITH; MURIETTE SMITH; HENRY SMITH; HORACE SMITH; WHEATTY SMITH; CHESTER SMITH AND WIFE, MRS. CHESTER SMITH; MARY McLEAN AND HUSBAND, ARTHUR McLEAN; EVA MAYNOR, WIDOW; WALTER SMITH AND WIFE, CARRIE SMITH; LEE SMITH AND WIFE, LILLIE SMITH; SADIE McKAY AND HUSBAND, GASTON McKAY; MATTIE BELLE TABRON AND HUSBAND, HENRY TABRON; ALONZO CARTER, WIDOWER; WILL CARTER, WIDOWER; SUSIE CARTER LOCKLEAR AND HUSBAND, ———— LOCKLEAR; RUTH CARTER; WILTON CARTER; DAVID CARTER AND WIFE, EFFIE CARTER; JOHN PONE; DONNIE LOU PONE; MINNIE E. CARTER, WIDOW; NATHAN CARTER AND WIFE, WINNIE F. CARTER; COLDON A. CARTER AND WIFE, THELMA CARTER; WINSTON CARTER AND WIFE, BESSIE CARTER; PRENTICE CARTER, SINGLE; LENNON CARTER, SINGLE; CORRIE CHAVIS AND HUSBAND, WILL CHAVIS; CALLIE SMITH AND HUSBAND, ROWLAND SMITH; NOVELLA RAVELS, WIDOW; BESSIE BREWINGTON AND HUSBAND, JAMES BREWINGTON; MINERVA CARTER, WIDOW; LOCK CARTER AND WIFE, LOUISA CARTER; LENA CARTER HUNT AND HUSBAND, QUINNIE HUNT; FODIE BELL GRAHAM AND HUSBAND, BETHEL GRAHAM; HATTIE SAMPSON BELL AND HUSBAND, CHARLES BELL; AND ANY AND ALL OTHER HEIRS AT LAW OF NELSON SMITH AND WIFE, ELIZA SMITH, LATE OF ROBESON COUNTY, N. C., AND ANY AND ALL OTHER PERSONS WHO MAY CLAIM OR HAVE AN INTEREST IN AND TO THE LANDS OF NELSON SMITH.

(Filed 5 June, 1942.)

1. Judgments § 22g—

It is not required that movants show excusable neglect in order to be entitled to set aside a judgment on the ground of irregularity, C. S., 600, not being applicable.

2. Judgments §§ 17b, 22g—

Where answer is not filed the relief to which petitioners are entitled is limited to that demanded in and supported by allegations of the petition,

and respondents can be concluded thereby only to this extent, and when the judgment grants relief in excess thereof it is irregular and respondents are entitled to have it set aside. C. S., 606.

3. Same: Partition § 5—Decree of sale for partition held to grant relief in excess of that demanded and was irregular as to respondents who failed to file answer.

The petition in this partition proceeding alleged that the petitioners and respondents, some eighty-five in number, are tenants in common as heirs at law of the original owners of the land who died intestate. Some of respondents did not file answer. Judgment was entered to the effect that only a few of the parties had any interest in the land and that other parties, including respondents who failed to answer, had no interest therein. *Held:* The judgment was irregular and may be set aside upon motion aptly made by respondents who failed to answer, the interest of such respondents as set out in the petition being a sufficient showing of a meritorious defense.

4. Same—Motion to set aside verdict is not necessary to attack of judgment for irregularity when it is apparent that verdict was reached by consent of parties who filed pleadings and was not found by the jury.

The petition in this partition proceeding alleged that the original owners of the land died intestate leaving seven children, and that the parties, petitioners and respondents, some eighty-five in number, were tenants in common as heirs at law. Some of respondents did not file answer. Two respondents filed answer alleging that the original owners had only two children and that these respondents are entitled to a one-half interest as heirs at law of one of them (although the petition alleged other descendants of the ancestor under whom these respondents claim), and that they and the heirs of the other child of the original owners had been in adverse possession of the *locus in quo* for more than twenty years. Judgment was entered that each of the answering respondents was entitled to a one-fifth interest, that the heirs of the other child named by the answering respondents were entitled to a two-fifths interest, and that the heirs of a third child, named in the petition, were entitled to a one-fifth interest. No evidence was offered for the consideration of the jury. *Held:* It is apparent that the verdict was reached pursuant to the consent of the parties and that the jury was directed to answer the issues, and therefore, upon motion of the respondents who failed to answer to have the judgment set aside for irregularity, the contention that since there was no motion to set aside the verdict, the verdict would stand although the judgment should be set aside, and that the judgment would have to be re-entered in accordance with the verdict, is untenable.

5. Judgments § 22g—

A judgment will not be set aside for mere irregularity, but respondents must show a meritorious defense.

6. Infants § 14: Insane Persons § 15—

Where a guardian *ad litem* for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings, and files his answer the same day, the judgment is irregular and may be declared void or set aside. C. S., 451, 557.

7. Judgments § 22a: Partition § 5—

In an action to set aside a decree of sale for partition for irregularity the purchaser at the sale is a necessary party.

8. Same: Judicial Sales § 7—

An attorney of record in this proceeding to sell lands for partition purchased the property at the sale. Thereafter certain of respondents moved to set aside the decree of sale on the ground of irregularity. *Held:* The attorney of record cannot maintain that he is an innocent purchaser for value.

APPEAL by respondents, E. M. Smith, Nelson Smith, *et al.*, from *Williams, J.*, at October Term, 1941, of ROBESON.

1. This is a special proceedings instituted before the clerk of the Superior Court of Robeson County, on 19 April, 1940, for a partition for sale of certain lands.

2. The petitioners allege that about the year 1884 Nelson Smith and wife, Eliza Smith, died intestate in Robeson County, seized and possessed at the time of their death of a tract of land near the town of Lumberton, N. C., containing ten acres, more or less, said land being described by metes and bounds in the petition. The said Nelson Smith and wife, Eliza Smith, left them surviving as their sole heirs at law, seven children, all of whom are now dead, and who left them surviving the petitioners and respondents to this proceedings.

3. The petitioners, who claim with certain of the respondents under one of the seven children of Nelson Smith and wife, Eliza Smith, a one-seventh undivided interest in the lands described in the petition, made all persons interested parties respondent, setting forth in the petition and amended petition the respective interests of each, and caused them to be served with process, either personally or by publication.

4. The petitioners allege that Mary Smith, one of the seven children of Nelson Smith and wife, Eliza Smith, died many years ago and left surviving her as her only heir at law, John Smith; that John Smith left the State of North Carolina many years ago and his whereabouts is unknown.

5. Sadie McKay and her husband, J. S. McKay, and Eva Maynor filed an answer 14 May, 1940, and admitted all the material allegations in the petition, and further alleged that John Smith, the alleged son of Mary Smith, is dead or is by law presumed to be dead, and died intestate and without issue, and that the interest of these respondents in the lands described in the petition is therefore increased, as they inherit through him their proportion of his interest.

6. Walter Smith filed an answer, 13 July, 1940, identical in every respect to the answer filed by Sadie McKay *et al.*

7. On 7 May, 1940, Mary McLean and her husband filed an answer and admitted all the material allegations of the petition and alleged that they are of the opinion that John Smith, the alleged son of Mary Smith, is by law presumed to be dead, without issue; and, if that be true, that the interest of these respondents would be a one-thirtieth interest instead of a one-thirty-sixth interest. (The petition alleges Mary McLean is entitled to a one-forty-second interest in said lands.)

8. All the above answering respondents claim an interest in the lands described in the petition as heirs of Bill Smith, son of Nelson Smith and wife, Eliza Smith.

9. David Carter and Winston Carter filed an amended answer to the amended petition on 15 June, 1940. The amended petition, in paragraph 2, alleges that all the parties to this proceedings (approximately eighty-five in number), are tenants in common, are owners and in possession of the lands described in paragraph 1 of the petition. These respondents answer paragraph 2, as follows: "2. Answering article two of the petition, these answering defendants admit that Bertha Love Simms, and these answering defendants, together with Rob French, Joe French, Ed French, Bessie Pittman, Charles French, Lee French, and Grady French, are tenants in common, and are in possession of the lands set out and described in article one of the petition, and are the owners in fee simple thereof, and except as herein admitted, these answering defendants have no knowledge, information or belief as to the other matters and interests set out in article two in the petition, and, therefore, deny the same." Paragraph 5 of the amended petition is as follows: "That Nelson Smith and wife, Eliza Smith, died intestate during the year 1884 and left surviving them, as sole heirs at law, the following: Pattie Sampson; Mary Smith; Frances Smith French; James Smith; Hardy Smith; Bill Smith and Carolina Carter." All other answering respondents admit the allegations contained in paragraph 5 of the amended petition, but these respondents answer it as follows: "Answering article five of the petition, these answering defendants admit that Nelson Smith and wife, Eliza Smith, are dead, and left surviving them as their heirs at law, Frances Smith French and Carolina Carter, and that these answering defendants are lineal descendants of the said Carolina Carter, who was before her marriage Carolina Smith, and Frances Smith French, who was before her marriage Frances Smith, who is dead, and left surviving as her sole heirs at law, Rob French, Joe French, Ed French, Bessie Pittman, Bertha L. Simms, Charles French, Lee French, and Grady French, and, therefore, these answering defendants, together with the lineal descendants of Frances Smith French, are tenants in common and are in possession of and are the owners in fee simple of the lands set out and described in article one of the petition; and except as herein admitted, paragraph five is denied."

These respondents further allege: "(a) Bertha Love Simms, Rob French, Joe French, Ed French, Bessie Pittman, Charles French, Lee French, and Grady French, as a class, are the owners in fee simple of an undivided one-half interest in said lands. (b) That these answering defendants, David Carter and Winston Carter, as they are advised, informed and believe and so allege, are the owners in fee simple, as a class, of an undivided one-half interest in said lands, and except as herein admitted, these answering defendants say that they have no knowledge, information or belief as to the truth of the matters and things set out in article ten of the petition, other than herein admitted both in paragraph two and in this paragraph, and, therefore, deny the same."

10. It appears from the record that the moving respondents, the appellants herein, some 65 in number, whose interest, as they contend, was properly set forth in petitioners' pleadings, filed no answer or answers in this cause, being advised, some by the clerk of the court, some by the attorney for the petitioners, and some by another attorney, that such was unnecessary if the interest of each was properly set forth in the petition, and that in due time each would receive his or her distributive share in the same. No attorney was employed to represent these appellants until after the entry of the judgment which they seek to have set aside.

11. On 12 December, 1940, the attorney for the petitioners made application to his Honor, J. Paul Frizzelle, then holding the December Civil Term of Superior Court for Robeson County, to appoint a guardian *ad litem* to represent and protect the interest of five named respondents who were minors and Dan Halloway, incompetent, and all other minors or incompetents, claimants, known or unknown, born or unborn, in and to the premises described in the petition, alleging all of them to be without general or testamentary guardian, and further alleging that said parties had been duly served with summons in this proceedings. A guardian *ad litem* was appointed for said parties, who accepted the appointment, accepted service of summons, copy of the petition and the amended petition, and filed his answer the same day the application was made for his appointment.

12. On 12 December, 1940, the case was tried in the Superior Court of Robeson County. Issues were submitted to and answered by the jury as follows:

"1. What interest does the defendant, respondent, Dave Carter have in and to the lands described in the petition? Answer: 'An undivided one-fifth interest.'

"2. What interest does the defendant, respondent, Winston Carter have in and to the lands described in the petition? Answer: 'An undivided one-fifth interest.'

"3. What interest do the heirs of Bill Smith, as named in paragraph 6, Section F. of the petition, have in the lands described in the petition? Answer: 'An undivided one-fifth interest.'

"4. What interest do the heirs of Frances Smith French have in the lands described in the petition? Answer: 'An undivided two-fifths interest.'

"5. What interest do the other parties to the proceedings have in the lands described in the petition? Answer: 'None.'"

Judgment was entered in accordance with the verdict. The court found as a fact that an actual partition of the lands described in the petition could not be made without injury to the petitioners and respondents, and further found as a fact that it would be more advantageous to sell said land and appointed a commissioner to sell same at public auction, for cash, at the courthouse door of Robeson County, on 20 January, 1941, after advertising said lands as provided in the judgment.

13. On 14 December, 1940, W. S. Britt, attorney of record for David Carter and Winston Carter, purchased the interests of the said David and Winston Carter and received a deed therefor. Thereafter, pursuant to the order of court, the commissioner sold the land described in the amended petition on 20 January, 1941, when and where W. S. Britt became the last and highest bidder in the sum of $4,000.00.

14. Upon verified motion of appellants, his Honor, Q. K. Nimocks, Jr., Judge presiding, at chambers in the courthouse, Lumberton, N. C., on 27 January, 1941, signed an order directing the appellant, W. Osborne Lee, commissioner, and W. S. Britt, to show cause why the judgment heretofore entered in this cause should not be set aside. Order was returnable on 6 February, 1941, before the Judge presiding over the term of Superior Court for Robeson County beginning 3 February, 1941.

The hearing on said order to show cause was continued from time to time until the October Term, 1941, of the Superior Court of Robeson County. W. S. Britt, on 5 March, 1941, made a special appearance and moved to dismiss the motion filed in this cause to set aside the judgment against him, for the reason that he is not a party to the proceedings, and for the further reason that he is an innocent purchaser for value, and acquired his interest pursuant to the terms of said judgment.

Appellants moved to make W. S. Britt a party to the proceedings. This motion, and the motion to set aside the judgment rendered at the December Civil Term, 1940, were heard by his Honor, Clawson L. Williams, Judge holding courts in the Ninth Judicial District, October Term, 1941, of Robeson County. His Honor adjudged and decreed, in the discretion of the court, that both of said motions be denied and entered judgment accordingly; and, ratified and confirmed the former judgment and the proceedings pursuant thereto.

From the foregoing judgment, the respondents appeal to the Supreme Court and assign error.

W. Osborne Lee, W. S. Britt, and McKinnon & Seawell for petitioners, appellees.

Leslie J. Huntley, Jr., and Varser, McIntyre & Henry for respondents, appellants.

DENNY, J. If the judgment entered in this proceedings at the December Civil Term, 1940, of the Superior Court of Robeson County, is irregular, the motion to set it aside should have been allowed.

The appellees contend that the appellants are relying solely for relief upon the authority to set aside a judgment under the provisions of C. S., section 600; and that an application for relief thereunder is addressed to the sound discretion of the trial judge. *Bank v. Foote,* 77 N. C., 131; *Norton v. McLaurin,* 125 N. C., 185, 34 S. E., 269; *Dunn v. Jones,* 195 N. C., 354, 142 S. E., 320. It is further contended that the appellants were negligent in that they failed to employ counsel, and that the courts will come to the aid of a party who has been made the victim of the negligence of an attorney under contract; but not where the party failed to employ counsel and relied on the advice of court officials, attorneys of record in the case or other attorneys not employed by the party. We concede that it is unsafe practice for parties to a legal proceedings in court to fail to employ competent counsel to represent them. However, the facts as disclosed in this proceedings, in the record and briefs, make it unnecessary for the appellants to rely upon excusable neglect in order to obtain the relief sought. "Section 600 of the Consolidated Statutes, relating to mistake, surprise and excusable neglect, has no application to an irregular judgment." *Duffer v. Brunson,* 188 N. C., 789, 125 S. E., 619; *Becton v. Dunn,* 137 N. C., 559, 50 S. E., 289.

In the case of *Carter v. Rountree,* 109 N. C., 29, 13 S. E., 716, the Court said: "Judgments may be void, irregular or erroneous. A void judgment is one that has merely semblance, without some essential element or elements, as where the court purporting to render it has not jurisdiction. An irregular judgment is one entered contrary to the course of the court—contrary to the method of procedure and practice under it allowed by law in some material respect; as if the court gave judgment without the intervention of a jury in a case where the party complaining was entitled to a jury trial and did not waive his right to the same. *Vass v. Building Assn.,* 91 N. C., 55; *McKee v. Angel,* 90 N. C., 60. An erroneous judgment is one rendered contrary to law. The latter cannot be attacked collaterally at all, but it must remain and have effect until by appeal to a court of errors it shall be reversed or

modified. An irregular judgment may ordinarily and generally be set aside by a motion for the purpose in the action."

The appellees in the instant case contend that since the judgment followed the verdict and no motion has been made to set aside the verdict, if the judgment is set aside the verdict will still stand and judgment would have to be re-entered in accordance with the jury's finding. They further contend that the judgment recites the fact that a verdict was rendered which negatives any contention that the judgment was by default.

It seems to be the general rule that where no answer is filed the petitioner is limited to the relief demanded in the petition. But if the respondent answers, the court may grant any relief which is consistent and embraced within the issues raised by the pleadings. Where, however, respondent does not answer, but makes default, the relief granted to petitioner cannot exceed that which he has demanded and that necessarily incident thereto. A judgment by default in violation of this rule is irregular and erroneous. 33 C. J., Judgments, sec. 89, p. 1146, and again, in sec. 101, p. 1163: "In amount, as in other respects, a judgment must conform to, and be supported by, the pleadings and the proof. A judgment without proof for more than the amount admitted to be due cannot stand, and a judgment for less than the proof warrants is erroneous."

The petitioner, where no answer is filed, is prohibited by statute and the decisions of this Court from obtaining relief in excess of that demanded in the petition. Consolidated Statutes of North Carolina, sec. 606, provides: "The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue."

When respondents do not answer, they are concluded by the decree only so far as it is supported by the allegations in the petition, and if it gives relief in excess of or different from that which the petitioner is entitled to under the petition, it may be set aside. McIntosh N. C. Prac. & Proc., 714; *Jones v. Mial,* 82 N. C., 252; *Junge v. MacKnight,* 137 N. C., 285, 49 S. E., 474; *Currie v. Mining Co.,* 157 N. C., 209, 72 S. E., 980; *Land Bank v. Davis,* 215 N. C., 100, 1 S. E. (2d), 350.

A judgment is irregular which is entered on a verdict not bottomed on or supported by the pleadings. In this case no evidence was offered for the consideration of the jury. The verdict of the jury justifies but one conclusion. It is apparent that the answers to the issues were reached pursuant to the consent of those parties to be benefited thereby, rather than pursuant to proper allegations and supporting evidence. If this is not the fact, how then did the jury reach such a verdict? There are

approximately eighty-five parties to this proceedings. The petitioners and all the answering respondents, except David Carter and Winston Carter, allege or admit that all the parties to this proceedings are tenants in common, are owners and in possession of the lands described in the petition. David Carter and Winston Carter allege in their answer that Nelson Smith and wife, Eliza Smith, are dead and left surviving them only two heirs, to wit, Frances Smith French and Carolina Smith Carter; and that the heirs of Frances Smith French are seized and possessed of a one-half interest in the aforesaid lands, and that David and Winston Carter are seized and possessed of a one-half interest in said lands. These respondents further allege that they and the heirs of Frances Smith French have been in open, notorious, adverse and continuous possession of the lands described in the petition for more than twenty years, and plead the statute as a bar of any interest which the other respondents might have had in said lands.

The amended petition alleges that David Carter is entitled to a one-one-hundred-and-fortieth interest in said lands, and Winston Carter and others, as a class, are entitled to a one-thirty-fifth interest in said lands. The verdict of the jury is not supported by a single allegation in the amended petition or in the answers filed by the answering respondents. Why were issues not submitted on the cross action and the plea of title by adverse possession? Under the verdict of the jury, the heirs of Bill Smith are adjudged the owners of a one-fifth interest in said lands; whereas, in the answer of David and Winston Carter, it is alleged that Nelson Smith and wife, Eliza Smith, left only two heirs, to wit, Frances Smith French and Carolina Smith Carter. The amended petition sets forth with the same clarity the interests of the appellants herein, that it does the interest of the appellees, and since all the allegations in the pleadings were completely ignored by the jury, and no evidence was offered at the trial of this cause, unquestionably the jury was directed to answer the issues as they appear in the record.

The pleadings disclose that David Carter and Winston Carter are lineal descendants of Carolina Smith Carter, who is dead, leaving many other heirs who are parties to this proceedings. David and Winston Carter, under the verdict herein, are adjudged to be the owners of a one-fifth interest each in the lands in controversy. All the other heirs of Carolina Smith Carter are excluded by the verdict from any interest in said lands. The pleadings further disclose Pattie Sampson, James Smith and Hardy Smith, children of Nelson Smith and wife, Eliza Smith, are dead, but each of them left heirs who are parties to this proceedings. All the heirs of these three children of Nelson Smith and wife, Eliza Smith, are also excluded by the verdict from any interest in said lands.

No satisfactory explanation, other than that heretofore suggested, can be given for a verdict and judgment barring the appellants of their interest in the estate of Nelson Smith and wife, Eliza Smith.

The judgment entered herein is irregular, but a judgment will not be set aside for irregularity alone. This Court said, in *Duffer v. Brunson, supra:* "But mere irregularity is not sufficient to warrant an order setting aside the judgment. It is essential for the moving party to show not only that he has acted with reasonable promptness, but that he has a meritorious defense against the judgment. As suggested in *Harris v. Bennett,* 160 N. C., 339, 347, 'Unless the Court can now see reasonably that defendants had a good defense that would affect the judgment, why should it engage in the vain work of setting the judgment aside?' *Hill v. Hotel Co., ante,* 586; *Gough v. Bell,* 180 N. C., 268; *Rawls v. Henries,* 172 N. C., 216; *Glisson v. Glisson,* 153 N. C., 185." The allegations in the verified motion upon the *quantum* of interest of the appellants in the lands in controversy, which allegations are supported by the facts alleged in the amended petition, are sufficient to show a meritorious defense.

The appellants except to the irregular procedure incident to the appointment and acts of the guardian *ad litem.* The guardian *ad litem* was appointed the day the case was tried. He accepted service of summons, copies of the pleadings, and filed his answer the same day. No such haste is contemplated under the provisions of Consolidated Statutes of North Carolina, section 451. In the case of *Moore v. Gidney,* 75 N. C., 34, the Court said: "When infant defendants, in a civil action or special proceeding, have no general or testamentary guardian, before a guardian *ad litem* can be appointed, a summons must be served upon such infant, and a copy of the complaint also be served or filed according to law. After the guardian *ad litem* is thus appointed in a special proceeding, a copy of the complaint, with the summons, must be served on the guardian. All this does not give the court jurisdiction to proceed at once in the cause; for it is further provided, that not until after twenty days' notice of said summons and complaint, and after answer filed, can the Court proceed to final judgment and decree therein. . . . So careful is the law to guard the rights of infants, and to protect them against hasty, irregular and indiscreet judicial action. Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory, only. Those who venture to act in defiance of them, must take the risk of their action being declared void, or set aside." *Welch v. Welch,* 194 N. C., 633, 140 S. E., 436.

Upon filing an answer a case is not at issue until after the expiration of ten days. C. S. of North Carolina, sec. 557; *Cahoon v. Everton,* 187

N. C., 369, 121 S. E., 612. By consent of the parties, the provisions of the statute may be waived, but no such waiver appears here.

The only other exception we deem necessary to be considered is to the refusal of his Honor to make W. S. Britt, who holds a deed for the interests of David and Winston Carter in the lands in controversy and who purchased the said lands at the commissioner's sale, pursuant to the verdict and judgment rendered in this cause, a party.

W. S. Britt is a necessary party to this proceedings and the motion of appellants to make him a party should have been allowed, unless all the parties to the proceedings ratify the sale and agree that their respective interests shall be transferred to the proceeds from said sale. *Currie v. Mining Co., supra.* We do not agree, however, with the contention of W. S. Britt that he is an innocent purchaser for value and entitled to protection as such. An attorney of record in a proceedings in which an irregular judgment is entered, who purchases property pursuant to the terms of said judgment, is necessarily charged with knowledge of all the facts and circumstances incident thereto, and is not an innocent purchaser.

The judgment herein is irregular, the appellants have shown a meritorious defense, and the judgment below is

Reversed.

GEORGE TARRANT, BY HIS NEXT FRIEND, MRS. W. H. TARRANT v. PEPSI-COLA BOTTLING COMPANY AND CHRISTIAN-HARWARD FURNITURE COMPANY, TRADING AS ROGERS FURNITURE COMPANY.

(Filed 5 June, 1942.)

1. Trial § 22b—

Upon motion to nonsuit, defendant's evidence will not be considered except to explain or clarify plaintiff's evidence when it is not in conflict therewith. C. S., 567.

2. Automobiles § 9e—

A bicycle is a vehicle and is subject to provisions of the Motor Vehicle Act except those which by their nature can have no application. Public Laws 1937, ch. 407, sec. 2 (ff), as amended by Public Laws 1939, ch. 275, sec. 1 (b).

3. Automobiles § 8—

The operator of a motor vehicle, even in the absence of statutory requirement, is under duty to exercise ordinary care under the circumstances, which imports keeping his vehicle under control and the maintenance of reasonable vigilance and due regard for the exigencies of traffic.

4. Same—

The duty of the operators of motor vehicles to use due care under the circumstances is mutual, and each may assume that others will comply with this obligation.

5. Automobiles § 11—

An operator of a vehicle overtaking and passing another vehicle traveling in the same direction must keep at least two feet to the left of such other vehicle in passing, and not drive to the right again until he is safely clear of the vehicle passed. Public Laws 1937, ch. 407, sec. 111 (a).

6. Automobiles §§ 8, 11—

An operator of a parked truck must anticipate vehicles passing two feet to its left, and is negligent in opening the door of the truck out into the lane for passing traffic without ascertaining that such action will not affect other vehicles.

7. Automobiles § 9c—

The violation of the statutory requirements in overtaking and passing vehicles proceeding in the same direction, in following other vehicles more closely than is reasonable and prudent, or in driving at a greater rate of speed than is reasonable and prudent under the circumstances, is negligence *per se*. Public Laws 1937, ch. 407, secs. 111 (a), 114 (a), 103 (a).

8. Automobiles § 9b—

An operator of a motor vehicle shall not follow another vehicle traveling in the same direction more closely than is reasonable and prudent under the circumstances and conditions of traffic. Public Laws 1937, ch. 407, sec. 114 (a).

9. Automobiles § 12a—

The driver of a vehicle upon a highway shall not travel at a greater rate of speed than is reasonable and prudent under the circumstances. Public Laws 1937, ch. 407, sec. 103 (a).

10. Automobiles §§ 18c, 18d—In this action by cyclist, issues of concurrent negligence of defendants and contributory negligence of plaintiff held for jury.

Plaintiff's evidence tended to show that he was riding his bicycle on the right side of the street, that as he was about to pass a parked truck some fifty to eighty feet before reaching a street intersection, and while slowing up for a traffic light at the intersection, the left door of the truck was suddenly opened in his path of travel, that to avoid striking it he swerved to his left and was struck by the right front fender of a truck which was traveling in the same direction at a greater speed and overtaking him. There was evidence that the door of the truck swung open two and one-half feet beyond the body of the truck, and plaintiff testified that when he swerved to the left there was no vehicle directly to his left. *Held:* The evidence is sufficient to be submitted to the jury on the question of the concurrent negligence of the drivers of both trucks, the one in suddenly opening the door of his truck in the path of plaintiff's travel, and of the other in failing to keep a reasonable careful lookout for plaintiff and following plaintiff's bicycle more closely than was reasonable and proper under the circumstances and in driving at a greater rate of speed

than was reasonable and prudent under the conditions then existing, and *held further* the evidence fails to disclose contributory negligence as a matter of law on the part of the plaintiff.

11. Automobiles §§ 9c, 12a—

While speed in excess of statutory maximums set forth in subsection (b), sec. 103, ch. 407, Public Laws 1937, is only *prima facie* evidence that the speed is not reasonable or prudent, the violation of subsection (a) of said section, prescribing that a vehicle shall not be driven at a greater rate of speed than is reasonable and prudent under the circumstances, is negligence *per se*.

APPEAL by defendants from *Williams, J.*, at October Civil Term, 1941, of DURHAM.

Civil action to recover for personal injury allegedly sustained as result of joint and concurrent actionable negligence of defendants.

In the trial court these facts appeared:

On morning of 8 May, 1939, about 8:30 o'clock, plaintiff, who was then 18 years of age, was injured when the bicycle, which he was riding on trip to deliver a small package for King's Drug Store, by whom he was employed, came into collision with a truck of defendant, Christian-Harward Furniture Company, trading as Rogers Furniture Company, driven by its employee, George E. Parrish, in the course of his employment, as both were traveling west on Chapel Hill Street at a point east of the intersection of said street and Morris Street at, and east of Five Points and in the block between Morris Street and Roney Street in the city of Durham, North Carolina.

Chapel Hill Street runs in general direction of east and west, is hard-surfaced, and is forty feet wide. Morris Street runs in general north and south course. At the intersection of these streets traffic is controlled by stop lights located in center of Five Points.

At the time of said collision motor vehicles were parked on both north and south sides of Chapel Hill Street in said block. Among those parked on the north side, and headed west, was a truck of defendant, Pepsi-Cola Bottling Company, in charge of its employee, R. A. George, in the course of his employment. This truck, according to various estimates, was from ten to seventeen feet long and from five feet to eighty inches wide. Its cab was about two feet narrower than the main body. Its location was parallel with, and about three or four inches from the curbing at a point variously estimated to be fifty to eighty feet from Morris Street.

Plaintiff, as a witness, testified, briefly stated, as follows: That when on this morning he entered Chapel Hill Street from an alley he did not see any cars—though there was "some one down the street west," and "some activity" to his right, and east, down toward the post office; that he crossed over to the north side of the street and went down on his right

side; that he had both hands on the handlebars and both feet on the pedals; that the handlebars of his bicycle were about twelve inches wide and V-shaped; that after he passed the entrance to Roney Street, and had "got middleways of the block," he saw the Pepsi-Cola truck and another car parked on the right, or north side of the street; that the door of the truck was closed, and he did not see anybody in the cab, but that as he was passing two or three feet from, and to the left side of this truck, at a speed of 8 to 10 miles per hour, the driver of the truck suddenly opened the left door of the cab seven or eight feet in front of plaintiff; that in his estimate "there were 2½ feet of it jutting out from the body of the truck"; that in order to avoid running into the opened door, plaintiff cut his bicycle "suddenly" though not "directly" to his left, toward the center of the street; that he did not collide with the opened door but just as soon as he started to turn there, the front—the right front fender, of the Furniture Company's truck, also traveling west along Chapel Hill Street, hit the rear end of his bicycle and threw him to the ground under the bicycle—smashing it and injuring his leg; that he, plaintiff, did not see the Furniture Company's truck before it hit him; that he does not know how much space there was between the Pepsi-Cola truck and the Furniture Company's truck; that the Pepsi-Cola truck, the space between it and his bicycle and the width of his bicycle would not occupy more than ten feet of the space of the street on the north side; that while as he came down the street he had seen two or three cars some distance ahead, traveling west and facing the stop light, there was no motor vehicle to his left at the time he turned to avoid running into the door of the Pepsi-Cola truck; that while as to those cars he could not tell whether they were moving or standing still, there were none parked there waiting for stop light; that he had passed no vehicle except the Pepsi-Cola truck and was not at the time of passing it zigzagging his bicycle down a narrow lane formed by a line of automobiles; that he did not run into the side of the Furniture Company's truck; but, that if the door of the Pepsi-Cola truck had not been thrown open in his face, he would have kept a straight course, and "would never have been hit."

Defendants, each reserving exception to denial of their respective motions for judgment as in case of nonsuit, offered evidence.

R. A. George, as witness for Pepsi-Cola Bottling Company, testified in substance: That the collision between the bicycle of plaintiff and the Furniture Company's truck occurred not over three or four seconds after he had stopped the Pepsi-Cola truck and parked 75 to 80 feet from intersection of Chapel Hill and Morris Streets, and cut off his motor; that it occurred while he was still in the seat, looking ahead through the windshield, and before the door was opened; that it occurred about eight or ten feet in front of him when the Furniture Company truck overtook

plaintiff and had passed him about half way its length; that there the handlebars of the bicycle caught about the center of the truck, and the rear wheels of the truck ran over it; that the truck stopped after it hit him—"it run 12 or 14 feet"; that just before the plaintiff hit the truck, he was going down the street in a diagonal course, not direct, just a little to the left; that he saw the bicycle as it passed the front wheels of the Pepsi-Cola truck 2 or 3 feet to the left, he would estimate, and at that moment there was nothing, no other vehicle, to the left of the bicycle; that there was just a short distance between it and the Furniture Company's truck, the latter being "just slightly behind the bicycle"; that the bicycle was ahead of the truck, but not directly in front of it; that he did not see or hear any signal of the Furniture Company's truck; that the truck was traveling with more speed than the bicycle; that though there were automobiles down there in front of the truck, going in direction of stop light, "this truck was not jammed up against the car it was following"—there was a space between the truck and the next vehicle; and "all of the vehicles were moving"; that the bicycle was in the space north of the truck, and north of "that line of traffic."

George E. Parrish, as witness for defendant Furniture Company, testified substantially as follows: That going west on Chapel Hill Street, just as he passed Roney Street, 90 or 100 feet back of where the accident happened, he saw plaintiff's bicycle going in same direction, 10 or 15 feet in front and to the right; that his truck was traveling at rate of 10 to 15 miles per hour—a little faster than the bicycle, and overtook it in about 30 feet; that "having last seen the bicycle about sixty feet down the street going along behind the body of the truck," he proceeded on his way towards Five Points, and just as he got even with the Pepsi-Cola truck he heard "this noise, a rattling noise on the pavement," and stopped and went back to plaintiff, who was lying 2 or 3 "might be 3 to 8 feet" ahead of the left fender of the Pepsi-Cola truck; that plaintiff said "that he didn't see how it could be my fault; that the Pepsi-Cola truck was opening the door; that he dodged . . . and ran into the side of my truck"; that the distance between the right side of his truck and that of Pepsi-Cola truck was somewhere between 4½ and 5 feet; that his truck was not over a foot and a half from center line of street; that at time of the accident he was following in the line of traffic on way to the intersection, and had begun to slow down for the stop light, slowing up behind cars which were traveling slowly; that at least one car stopped but he thinks the light was in the act of changing from green to red at time he was slowing up behind the cars.

Then on cross-examination this witness further testified: "When I first saw George Tarrant he was traveling in a line of traffic. I was catching up with the line of traffic. I was not far behind . . . The bicycle was

somewhere in between me and the traffic . . . The bicycle was almost down to where the cars were when I was catching up with it." Then on being asked this question, "What was between you and the bicycle up to the time you got opposite the truck of the Pepsi-Cola Bottling Company?" he answered, "The line of traffic that I was following and the bicycle was almost together . . ." Then to this question, "The line of traffic was in front of you, wasn't it?" he answered, "Yes, the line of traffic was in front of me and the bicycle was somewhere along in there with the traffic . . ." and continuing, he said "The bicycle was with the line of traffic . . . the boy was riding down in front of me and along in a straight direction on his bicycle . . . he was traveling from 8 to 10 miles per hour and I was traveling anywhere from 10 to 15 miles per hour; my car ran 8 to 10 feet after the impact. I did not run into any car standing there. It was some feet back of the stopped cars. The cars in front of me at the time the impact took place were somewhere about 10 feet. It could have been a little more or a little less." And, continuing, on redirect examination, the witness said: "I was traveling at rate of 10 or 15 miles back up the street and I had applied my brakes to slow up behind the cars and I probably come to about 8 or 10 miles per hour speed at the time."

Defendant Furniture Company also introduced in evidence provisions of the City Code of the city of Durham pertaining to "Go," "Caution," and "Stop" traffic control signal, applicable to all vehicles, including bicycles, and permitting daytime parking on Chapel Hill Street.

Plaintiff in reply denied statement attributed to him by Parrish, except so much as related to the opening of door.

The acts of negligence alleged by plaintiff are substantially these:

1. That the agent, servant, and employee of defendant, Pepsi-Cola Bottling Company (a) negligently failed to keep a proper lookout for persons who were properly using Chapel Hill Street, and (b) negligently opened the door of the cab of said truck at a time when plaintiff was so near to said door that he was forced either to run into it or to swerve to the left of it in order to prevent colliding with it.

2. That the driver of the truck of defendant Christian-Harward Furniture Company was negligent in that he (a) failed to keep a proper distance between the truck driven by him and the bicycle on which plaintiff was riding, (b) failed to keep a proper lookout for the plaintiff as he was riding his bicycle ahead of the truck, and (c) was operating same at negligent rate of speed, under the circumstances.

3. That the said acts of negligence of each of defendants combined and concurred as the proximate cause of injury to plaintiff.

These issues were submitted and answered by the jury as indicated:

"1. Was the plaintiff injured by the negligence of the Pepsi-Cola Bottling Company, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff injured by the negligence of Christian-Harward Furniture Company, as alleged in the complaint? Answer: 'Yes.'

"3. Did the plaintiff, by his own negligence, contribute to and bring about his injury? Answer: 'No.'

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

From judgment in accordance therewith, each defendant appeals to Supreme Court and assigns error.

Fuller, Reade, Umstead & Fuller for plaintiff, appellee.

R. M. Gantt for defendant, appellant, Pepsi-Cola Bottling Company.

Hedrick & Hall and Allston Stubbs for defendant, appellant, Christian-Harward Furniture Company.

WINBORNE, J. The challenge of each defendant to the judgment below is directed (1) to the ruling of court in refusing to grant motion made at close of all the evidence for judgment as in case of nonsuit, C. S., 567, and (2) to portions of the charge.

In considering the first, "defendant's evidence unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with the plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff." *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598, and cases recently assembled in *Jeffries v. Powell, post*, 415.

When the evidence in the present record is so considered and taken in the light most favorable to plaintiff, we are of opinion that it is sufficient to take the case to the jury.

At the outset it is pertinent to note that for the purposes of the Motor Vehicle Act, effective in this State at the time of the accident in question, "bicycles" shall be deemed vehicles, and every rider of a bicycle upon a highway shall be subject to the provisions of the Act applicable to the driver of a vehicle, except those which by their nature can have no application. Public Laws 1937, chapter 407, section 2 (ff), as amended by Public Laws 1939, chapter 275, section 1 (b).

It is a general rule of law, even in the absence of statutory requirement, that the operator of a motor vehicle using the highways must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty, it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway. This duty requires that the operator be reasonably vigilant, and that he must anticipate and expect the presence of others. And, as between operators

so using the highways, the duty of care is mutual, and each may assume that others on the highway will comply with this obligation. 5 Am. Jur., Automobiles, sections 165, 166, 167, 168, and 169. See, also, *Murray v. R. R.*, 218 N. C., 392, 11 S. E. (2d), 326, and *Reeves v. Staley*, 220 N. C., 573, 18 S. E. (2d), 239.

Furthermore, the statute relating to operation of vehicles and rules of the road, Public Laws 1937, chapter 407, as amended, provides "that 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." Section 111, subsection (a).

In keeping with these principles and with this statute, the driver of the truck of the defendant Bottling Company was charged (1) with the duty of anticipating and expecting others to be using Chapel Hill Street, and (2) with knowledge that vehicles might lawfully pass at distance of not less than two feet from the left side of the truck. Hence, before opening the left door into the traveled portion of the street, it was his duty to exercise ordinary care to see that the door could be opened in reasonable safety to approaching traffic. 2 Blashfield Cyc. of Automobile Law and Practice, p. 617, section 1593, citing *Seiler v. Philadelphia Rapid Transit Co.* (Pa.), 169 Atl., 422.

The facts in the *Seiler case, supra,* are very similar to factual situation here. There the automobile door on the left side toward "the cartway" was open and the driver had one foot on the running board preparing to alight when a taxicab headed in the same direction struck the edge of the partly opened door and broke it from its hinges. The owner of the automobile sued to recover damages therefor. The Superior Court of Pennsylvania, on appeal thereto from municipal court, in denying recovery, said: "There was room on the street for the taxicab driver to have gone farther to the left, but he was on his right side of the cartway, and was not bound to anticipate the sudden opening of the car door by Seiler without taking precaution to look or listen before so doing. It was that unexpected action that caused the accident. Negligence must not be imputed to a failure to avoid this sudden opening of the door. The driver of the taxicab was in that portion of the street where he had a right to be, proceeding properly, and, undoubtedly, he would have passed the car without a mishap but for Seiler's unforeseen action . . . When one is about to alight from an automobile on the cartway side of the street, a duty is imposed upon him to exercise a reasonable and ordinary degree of care by looking or listening for approaching traffic." 2 Blashfield Cyc. of Automobile Law and Practice, section 1593.

The testimony of the plaintiff, in present case, if believed, tends to show that he was riding his bicycle at a moderate rate of speed, two to

three feet to the left of the parked truck, where he had a right to ride, and that he was keeping proper lookout when the door of the truck suddenly opened within seven or eight feet in front of him, and at a time when he could not stop his bicycle. This was sufficient as against defendant Bottling Company to take the case to the jury.

Now, as regards the defendant Furniture Company, not only the principles and statute above stated, but other provisions of the Motor Vehicle Law, Public Laws 1937, chapter 407, as amended, are pertinent: It is provided that "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, with regard for the safety of others and due regard to the speed of such vehicle and the traffic upon and condition of the highway," section 114, subsection (a).

It is also provided that "no person shall drive a vehicle on a highway at a greater rate of speed than is reasonable and prudent under conditions then existing." Section 103, subsection (a).

A violation of either of these statutory provisions or of the provisions of section 111, subsection (a), above quoted, would be negligence *per se,* and if injury proximately result therefrom, it would be actionable. *Williams v. Woodward,* 218 N. C., 305, 10 S. E. (2d), 913; *Murray v. R. R., supra; Reeves v. Staley, supra.*

Applying the above principles and statutory provisions to the evidence favorable to plaintiff in the present case, and bearing in mind that a bicycle is a vehicle within the language and meaning of the statute, it was the duty of the driver of the truck of defendant Furniture Company, in the exercise of ordinary care (1) to keep a reasonably careful lookout for plaintiff as he was riding his bicycle, a vehicle, along Chapel Hill Street; (2) to follow the bicycle no more closely than was reasonable and prudent, with regard for the safety of plaintiff, and with due regard to the speed of the bicycle and the traffic and condition then on the street; and (3) to drive his truck at no greater rate of speed than was reasonable and prudent under conditions then existing.

And the evidence, taken in light most favorable to plaintiff, is susceptible of inference that the driver of Furniture Company's truck failed to exercise ordinary care in each of these respects, and it is sufficient to require the submission of second issue.

It is contended by defendants that plaintiff was guilty of contributory negligence in these respects: (1) That he was violating the statute in passing on the right side of a line of moving traffic. As to this, there is evidence that there was no vehicle to his left when he turned to avoid striking the door of the parked truck. (2) That he failed to bring his bicycle to a stop in approaching the stop light at intersection of Chapel Hill and Morris Streets in violation of ordinance of the city of Durham. As to this, all the evidence tends to show that the accident occurred while

he was passing or just after he passed the parked truck of Bottling Company, and that that was parked from fifty to eighty feet, as variously estimated, from the intersection. It is apparent, therefore, that plaintiff had not reached a point where he was called upon to stop. Furthermore, his testimony is that the truck struck the rear of his bicycle before he caught up with traffic ahead, and that he did not run into the side of the truck. (3) That plaintiff suddenly changed the course of his bicycle without giving any signal of his intention so to do. In this respect, a bicycle, being a vehicle in the language and within the meaning of the statute, plaintiff had the right to assume and to act on the assumption that the operator of a vehicle following him, if any, would observe his statutory duty to exercise ordinary care as to keeping reasonable lookout, as to proper distance between such vehicle and the bicycle, and as to reasonable and prudent rate of speed. Moreover, he was acting in an emergency. Manifestly, there is no error in refusing to hold as a matter of law that plaintiff was guilty of contributory negligence.

Defendants except to that portion of the charge wherein the court instructed the jury "that if you find by the greater weight of the evidence, as I have defined that term, that the defendant, Christian-Harward Furniture Company, was operating its truck at a greater rate of speed than was reasonable and prudent under the circumstances then existing, that would be negligence *per se* . . ."

This instruction is based upon subsection (a) of section 103 of the Motor Vehicle Act, and not upon subsection (b) of that section. It is in the latter subsection that it is provided that any speed in excess of lawful speed limits therein specifically prescribed "shall be *prima facie* evidence that the speed is not reasonable or prudent and that it is unlawful." This rule of evidence is confined to violations of the speed limits there prescribed. Hence, the charge as given is in keeping with well settled rule in this State.

Consideration of the other exceptive assignments to portions of the charge in the light of the theory of the trial fails to reveal prejudicial error. The charge is in substantial compliance with legal requirements. Hence, no one of the exceptions thereto is cause for disturbing the judgment on the verdict of the jury.

The judgment is

Affirmed.

STATE v. W. H. SMITH, AVERY GUNTER, H. J. ELMORE, JR., H. B. LIPSCOMB, KELLY WATTS, J. R. BULL, C. R. WALLACE, OTIS KESSLER, RALPH BARTON, AND S. M. KEYSER.

(Filed 5 June, 1942.)

1. Conspiracy § 3—

If a number of parties conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common purpose and also such acts as are the natural and probable consequence of the unlawful enterprise even though these latter were not intended or contemplated as a part of the original undertaking.

2. Conspiracy § 6—

Evidence tending to show that defendants agreed and conspired forcibly to stop a truck on the highway, and that pursuant thereto defendants stopped the truck by shooting one of its tires, held up the driver and burned the truck, *is held* to support conviction of conspiracy feloniously to burn the truck, since each of the conspirators is liable for the method used to accomplish the common purpose and acts committed by any of them which are a natural and probable consequence of the unlawful enterprise even though such acts were not contemplated as a part of the original undertaking.

3. Same—Evidence of conspiracy feloniously to burn certain property held sufficient.

Where the State introduces in evidence a confession made by one of defendants that he conspired with the other defendants to forcibly stop a truck on the highway, and introduces other evidence tending to connect the other defendants with the agreement, and circumstantial evidence supporting the inference of a conspiracy to stop and burn the truck and that pursuant thereto defendants did actually stop the truck and burn it, and the court charges the jury to the effect that in order to sustain a conviction of defendants the jury must find beyond a reasonable doubt that defendants conspired to burn the truck, *held*, defendants' contention that there is a fatal variance between the indictment and proof or a total failure of proof in that the indictment charged a conspiracy to burn the truck while the evidence discloses that the agreement was to stop the truck, but not burn it, is untenable.

4. Trial § 31—

The use of the words "you want to find" in charging the jury as to the elements of the offense charged *held*, construing the charge as a whole, merely to place the burden on the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. C. S., 564.

5. Conspiracy § 6—

Confessions of guilt of the conspiracy charged were admitted against all defendants except one. *Held:* The circumstantial evidence of this defendant's guilt of conspiracy, outside the confessions, *held* to support his conviction.

6. Trial § 22a—

A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. C. S., 4643.

7. Conspiracy §§ 3, 5—

When a person enters into an unlawful conspiracy he is a party to every act which may be done by the other conspirators in furtherance of the common design, and the acts and declarations of each conspirator done or uttered in furtherance thereof are admissible in evidence against all.

8. Criminal Law § 33—

Where the court, in the absence of the jury, hears evidence as to the competency of a confession and admits same in evidence upon its finding that the confession was freely and voluntarily made, the court's ruling thereon will not be disturbed on appeal if supported by any competent evidence.

9. Criminal Law § 53g—Misstatement of the contentions of a party must be brought to the court's attention in apt time.

The State's evidence tended to show that defendants conspired to burn a truck on a highway and that pursuant thereto defendants stopped the truck by shooting a tire and then burned the truck. The court in stating the contentions of one defendant stated that he admitted that his possession of a pistol was "a little suspicious." The court in other portions of the charge stated that no one testified that the pistol found in this defendant's home was the pistol the truck driver saw, and the jury's attention was called to the fact that the pistol was found at defendant's home and not at the scene of the crime. *Held:* The statement of the contention cannot be held for reversible error when taken in its setting in view of the failure of defendant to call the inaccuracy to the court's attention in apt time.

10. Criminal Law § 53c—

A charge that the burden is on the State to satisfy the jury of the offense charged cannot be held for prejudicial error as misstating the *quantum* of proof necessary for a conviction when the court in the immediate preceding portion of the charge has instructed the jury that the burden is on the State to prove the fact of guilt beyond a reasonable doubt.

11. Criminal Law § 53h, 81c—

A charge must be construed contextually as a whole, and exceptions to isolated portions of the charge will not be sustained when the charge, so construed, is not prejudicial.

12. Criminal Law § 81c—

Where defendants have been convicted of three offenses of the same grade and the same sentence is imposed for all three, the sentences to run concurrently, if there is no error in the trial of one of them, exceptions relating to the trial of the others need not be considered. However, in this case the exceptions have been considered *seriatim* and none are sufficient to disclose prejudicial error.

APPEAL by defendants from *Rousseau, J.*, at September Term, 1941, of GUILFORD.

Criminal prosecutions tried upon indictments (1) charging the defendants, W. H. Smith, Avery Gunter, H. B. Lipscomb, J. R. Bull, Otis Kessler and six others, in one bill, with conspiracy feloniously to burn and with burning a certain Mack tractor and trailer, the property of G. and M. Motor Transportation Company of the value of $4,000 and a cargo of merchandise on said trailer at the time, the property of Larasista Corset Company and another, of the value of $8,534.16, (2) charging the above named defendants and five others, in a second bill, with the felonious burning of the tractor, trailer and cargo as described, and (3) charging the above named defendants and four others, in a third bill, with armed felonious robbery, from the drivers, of the tractor, trailer and cargo as described, all against the forms of the statutes in such cases made and provided and against the peace and dignity of the State.

Without objection, the indictments were consolidated and tried together as they all arose out of the same transaction, or series of transactions, leading to a single end. *S. v. Malpass,* 189 N. C., 349, 127 S. E., 248.

At the time in question a strike was in progress among the drivers of the G. and M. Motor Transportation Company of Statesville, N. C. The following are mentioned in the record as officers of the truck drivers' union: S. M. Keyser, head of the union; J. R. Bull, shop steward; W. H. Smith, dues collector. Under the leadership of these officers, the truck drivers were engaged in picketing the office of the company in Statesville, the purpose being to prevent the company from operating its trucks until the demands of the drivers were met or satisfied. The strike was only partially effective.

On Saturday night, 21 June, 1941, about 10:00 or 11:00 p.m., two drivers, Howard Brown and Bristol Ayers, left Statesville with a G. and M. tractor and trailer loaded with a cargo of merchandise destined for Providence, R. I. When they reached Mack's Place, about 4 miles from Winston-Salem, they stopped for a midnight lunch. Here, they saw about a dozen automobiles and observed a number of people, "some dressed like a truck driver would be." Ayers said to Brown, "Let's go, two of them are Harris drivers and they might call Charlotte and we might have trouble." On leaving Mack's Place, Ayers got in the sleeper and Brown was driving. They were stopped near Stokesdale, approximately one-half mile over the Guilford County line, about 1:15 a.m., held up with pistols by a number of men who were traveling in three automobiles. The tractor, trailer and cargo were taken from them, driven some distance and later set on fire and destroyed.

Howard Brown testified: "One car pulled up to the side of the trailer and shot down my left rear tractor outside tire. I stopped on the shoulder of the road. . . . They told us to get out and sit on the embankment. . . . There was a crowd there, in my opinion approximately ten. . . . I

saw two pistols. . . . We were then told to get in one of the cars. . . . I don't believe anything was said until we got to Stokesdale. . . . We turned around and came back and stopped in front of the tractor and trailer. . . . Two of the men got out and shot holes through the two tanks, and one struck a match and threw it in gasoline on the ground. It started blazing up and they came back and jumped in the car and started on up the road. There was some discussion about what was to be done with me and Ayers—where we were to be taken. . . . Someone said they had seen us at Mack's Place. . . . We were finally taken to the city limits of Greensboro. . . . They said to keep quiet; to tell that it was a Plymouth instead of a Ford; and they said the union would take care of us. . . . We were told not to tell that we recognized anyone. . . . These boys said for us to keep quiet and the union would take care of us. We agreed to do so." The witness said he did not tell the whole story at first and disclaimed recognizing anyone, because he "didn't want the union to find out about me telling it."

Bristol Ayers testified that he had talked with Smith and Gunter on several occasions during the time they were picketing the G. and M.; that the conversations centered around the strike and joining the union; that he did join the union three weeks before the truck was burned; that he is not a member now.

On 16 July, 1941, J. R. Bull, one of the defendants, signed a confession in writing, in which he stated that at the instance of Keyser, he and others went out "to stop this G. & M. Motor Company truck." Q. "Was anything said about shooting the tires or burning this truck?" A. "No, just stop it."

On being asked whether he joined in any conversation at the scene of the holdup, he answered, "No, nothing more than to say they shot the tires." Q. "Who told you to leave?" A. "They were at the back of the truck and said go ahead." Q. "Who told you to go ahead?" A. "Gunter or Smith said it. I went up the road and picked up the men." He named Smith, Gunter, Lipscomb, Kessler and others as being in the crowd that night. They left Charlotte in four automobiles and overtook the truck near Stokesdale.

The defendants, Lipscomb and Kessler, said the statement signed by Bull was true and that they wanted to sign it. The statement was admitted as against the defendants, Bull, Lipscomb and Kessler.

The driver of the truck testified that he recognized the defendant Smith at the scene of the holdup.

At about 6:00 or 6:30 p.m., 21 June, 1941, S. M. Keyser had four cars serviced at the Truckers' Terminal in Charlotte. One of them was Avery Gunter's car. The defendants, Gunter and Smith, were there at the time. An employee of the Terminal testified: "I put about 50

gallons in the four cars. . . . He (Keyser) simply said to me to fill up the four cars, and he would pay for the gas, and after he left not to tell anybody where he had gone."

It is in evidence that the defendant Gunter borrowed a pistol from E. R. Caldwell "sometime during the past year," which had a rusty spot on the side where the thumb rests. He had not returned it at the time of the trial. It was identified by the witness. When Gunter was arrested, the pistol was found in his house.

At the close of the State's evidence the defendants, and each of them, demurred and moved for judgment of nonsuit on each and every count in each and every bill of indictment. Overruled as to each and all of the above named defendants. Exceptions. The defendants offered no evidence.

(The actions were dismissed as to the defendants, H. J. Elmore, Jr., Kelly Watts, and Ralph Barton. Order of abatement was entered as to the defendant S. M. Keyser, who had died before the case was called for trial. Since the trial and pending the appeal, the defendant, C. R. Wallace, has died.)

Verdict: Guilty as to each defendant on each charge in each bill of indictment.

Judgments as to each defendant: Imprisonment in the State's Prison for a period of not less than 6 nor more than 9 years, (1) on the bill charging conspiracy, the same as to each defendant, (2) on the bill for burning the truck, to run concurrently with the sentence on the bill charging conspiracy, and the same as to each defendant, (3) on the bill charging armed robbery, to run concurrently with the sentence on the bill charging conspiracy.

The above named defendants appeal, assigning errors.

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

Wm. H. Abernethy and A. A. Tarlton for defendants.

STACY, C. J. The record contains 116 assignments of error based on 125 exceptions. Obviously they cannot be treated separately in an opinion without extending it to a "burdensome and intolerable length." *S. v. Lea,* 203 N. C., 13, 164 S. E., 737. However, none has been overlooked; all have been duly examined and considered. The principal reasons inducing our conclusions on the main exceptions follow:

I. The defendants challenge the sufficiency of the evidence to warrant a conviction on the indictment charging a conspiracy to burn the property as described, it appearing from the confessions, offered by the State, that the antecedent arrangement among the defendants was to "go out

and stop the truck," not to burn it. *S. v. Trammell,* 24 N. C., 379. This, they say, is binding on the prosecution, *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91, and constitutes a fatal variance between the indictment and the proof, or a total failure of proof. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Gibson,* 169 N. C., 318, 85 S. E., 7; 11 Am. Jur., 567.

There are two answers to the position.

In the first place, authority may be found for the holding that where there is a conspiracy to engage in an unlawful enterprise, *e.g.,* the forcible stopping of a truck on the highway, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any of the conspirators in the accomplishment of the purpose in which they are all engaged at the time. *S. v. McCahill,* 72 Iowa, 111; *S. v. Powell,* 168 N. C., 134, 83 S. E., 310. If many engage in an unlawful conspiracy, to be executed in a given manner, and some of them execute it in another manner, yet their act, though different in the manner, is the act of all who conspired. *S. v. Bell,* 205 N. C., 225, 171 S. E., 50; 1 Bishop on Crim. Law (9 Ed.), 465.

And the liability also extends to acts not intended or contemplated as a part of the original design, but which are a natural or probable consequence of the unlawful combination or undertaking. *S. v. Williams,* 216 N. C., 446, 5 S. E. (2d), 314; *S. v. Beal,* 199 N. C., p. 294, 154 S. E., 604; 1 Brill's Cyclopedia Crim. Law, 464. The general rule is, that if a number of persons combine or conspire to commit a crime, or to engage in an unlawful enterprise, each is responsible for all acts committed by the others in the execution of the common purpose which are a natural or probable consequence of the unlawful combination or undertaking, even though such acts are not intended or contemplated as a part of the original design. *S. v. Williams, supra; S. v. Powell, supra; S. v. Lea, supra; S. v. Stewart,* 189 N. C., 340, 127 S. E., 260. In the *McCahill case, supra,* it was held that where a large number of persons combined to drive employees from premises, and in carrying out the conspiracy, one committed a murder, the rest, who did not intend it, were also guilty. And in the *Bell case, supra,* where six persons were charged with conspiracy to burglarize a house, and a murder was committed by one of the conspirators in the attempted perpetration of the burglary, it was said that each and all of the conspirators were properly tried for the murder, albeit one of the defendants remained a distance from the scene of the crime.

Secondly, it appears from the charge of the court that the jury was required to find the conspiracy as laid in the indictment before a verdict of guilty could be rendered against the defendants, as witness the following: "The burden is on the State, under this bill of indictment, to satisfy

you gentlemen beyond a reasonable doubt that they conspired, that is, entered into a conspiracy to do what—an unlawful act, yes, to do an unlawful act, but you want to find, gentlemen, more than to do an unlawful act. You want to find that they conspired to burn the property." By this, the court intended to say, and did say, the State was required to prove the conspiracy as laid in the indictment. 15 C. J. S., 1137.

It is true, the defendants complain at the language, "you want to find," as an expression of opinion in violation of C. S., 564, but its significance, we apprehend, was to place upon the State the burden of proving the conspiracy as charged, and no more. There was evidence, outside of the confessions, to support the inference of a conspiracy as laid in the bill. This distinguishes it from the *Cohoon case, supra.*

II. The defendant Gunter insists that as the confessions were not admitted in evidence against him, his motion for judgment of nonsuit should be allowed under C. S., 4643. There is ample evidence to connect the defendant Gunter with the conspiracy. He had talked with Bristol Ayers on several occasions about the strike. He was at the Truckers' Terminal with his car on the evening of 21 June. Keyser and Smith were likewise there. Gunter's car was serviced with gas, and Keyser paid the bill. He had also borrowed a pistol from E. R. Caldwell some time prior thereto. Smith went from the Terminal to the scene of the holdup at the instance of Keyser, and the jury has concluded that Gunter was there under the same arrangement. The record supports the conclusion. On demurrer to the evidence, the court's inquiry is directed to its sufficiency to carry the case to the jury or to support a verdict, and not to its weight or to the credibility of the witnesses. *S. v. Rountree,* 181 N. C., 535, 106 S. E., 669. The jury alone are the triers of the facts. *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643. We are not permitted to weigh the evidence here. *S. v. Fain,* 106 N. C., 760, 11 S. E., 593.

One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. *S. v. Williams,* 216 N. C., 446, 5 S. E. (2d), 314. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. *S. v. Ritter,* 197 N. C., 113, 147 S. E., 733. "Everyone who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565; *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643.

III. The defendants, Bull, Lipscomb and Kessler, challenge the voluntariness of the Bull confession and its approval by Lipscomb and Kessler. The matter was the subject of inquiry before the court in the absence of the jury. The court found, upon competent evidence, that the statement, and its approval, had been made freely and voluntarily. It was thereupon admitted in evidence against the named defendants.

Speaking to the subject in *S. v. Moore,* 210 N. C., 686, 188 S. E., 421, it was said: "In this jurisdiction, the competency of a confession is a preliminary question for the trial court, *S. v. Andrew,* 61 N. C., 205, to be determined in the manner pointed out in *S. v. Whitener,* 191 N. C., 659, 132 S. E., 603. The court's ruling thereon will not be disturbed, if supported by any competent evidence. *S. v. Stefanoff,* 206 N. C., 443, 174 S. E., 411; *S. v. Christy,* 170 N. C., 772, 87 S. E., 499; *S. v. Page,* 127 N. C., 512, 37 S. E., 66; *S. v. Gosnell,* 208 N. C., 401, 181 S. E., 323."

IV. In reciting Gunter's contentions to the jury, particularly in respect of the pistol, the court used the following language: "He said it had a rusty place on it at the handle and the witness from Richmond County testified that Gunter got a pistol from him with a rusty place. He admits that would be a little suspicious, but he testified the witness from Richmond County said he let him have a pistol with a rusty place and the witness said he believed that was the pistol."

This excerpt forms the basis of one of defendant's exceptive assignments of error, and, standing alone, it may be subject to some criticism. It is to be noted, however, the court was stating the contentions of the defendant. Attention had previously been called to the evidence that Gunter had the pistol "at his house, not at the burning," and immediately the court continued, "that no one testified that was the pistol the truck driver saw, and he says that is the only evidence against him, and he says that ought not to satisfy you beyond a reasonable doubt," etc. Taken in its setting, and the fact that the inaccuracy was not called to the court's attention, it would seem that it could hardly be held for reversible error. *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601. An error in stating the contentions of a party should be called to the court's attention in time to afford an opportunity of correction, otherwise it may be regarded as waived or as a harmless inadvertence. *S. v. Whitehurst,* 202 N. C., 631, 163 S. E., 683; *S. v. Johnson,* 193 N. C., 701, 138 S. E., 19; *S. v. Barnhill,* 186 N. C., 446, 119 S. E., 894; *S. v. Baldwin,* 184 N. C., 789, 114 S. E., 837.

The defendants also point to the following instruction as erroneously stating the *quantum* of proof: "Now, gentlemen, the burden is on the State to satisfy you gentlemen that there was a conspiracy." The complaint directed against this instruction is that the "burden of satisfac-

tion" falls short of "beyond a reasonable doubt," the degree or intensity of proof required in a criminal prosecution. *S. v. Schoolfield,* 184 N. C., 721, 114 S. E., 466; *Williams v. B. & L. Asso.,* 207 N. C., 362, 177 S. E., 176; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398. It is true that in criminal cases, upon a plea of traverse, proof of the guilt of the accused is required to be "beyond a reasonable doubt." *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846. And if the court had said no more on the subject than is contained in this instruction, quite a serious question would have been presented. But as already noted, in paragraph I above, the degree of proof required of the State to establish the conspiracy was correctly stated as "beyond a reasonable doubt." The rule is, that exceptions to isolated portions of the charge will not be sustained, when considered contextually or as a whole, the charge correctly states the law. *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617; *S. v. Elmore,* 212 N. C., 531, 193 S. E., 713; *S. v. Walker,* 193 N. C., 489, 137 S. E., 429. "An exception of this sort must be considered in connection with the entire charge and is not to be determined by detaching clauses from their appropriate setting"—*Adams, J.,* in *S. v. Ellis,* 203 N. C., 836. The charge is to be considered contextually. *S. v. Lee,* 192 N. C., 225, 134 S. E., 458.

There are other exceptions to the charge, all of which may easily be resolved in favor of upholding the trial by the same formula of contextual consideration. This is the rule universally observed and followed in determining exceptions to the charge. *S. v. Johnson,* 219 N. C., 757, 14 S. E. (2d), 792. A detailed examination of these exceptions would only result in the restatement of familiar principles. They are not sustained.

V. We conclude that no reversible error has been shown in respect of the trial of any of the defendants on the bill charging a conspiracy. Hence, it is unnecessary to consider the exceptions addressed to the trial on the other bills as the judgments are the same on all the bills and they are made to run concurrently. *S. v. Beal, supra.* It may be added, however, that the exceptions have been considered *seriatim,* and none has been found of sufficient merit to warrant a disturbance of the result as to any of the defendants on any of the indictments. Indeed, the exceptions to the trial on the bills charging the actual burning and armed robbery are less meritorious than those above considered in respect of the charge of conspiracy.

It is observed that the prosecution involves no rights arising out of the relationship of employer and employee. Indeed, whether such relationship exists is not pertinent to the inquiry. The record reveals a plain case of armed robbery and willful destruction of property as the result of an unlawful conspiracy. A jury of the vicinage has found, upon

competent evidence, that the defendants herein are the guilty parties. They have no just grounds to complain at the conduct of the trial. They duly made their appeals to the jury and lost. The verdicts and judgments will be upheld.

No error.

CORRINE R. FREDERICK v. SOUTHERN FIDELITY MUTUAL INSURANCE COMPANY.

(Filed 5 June, 1942.)

1. Courts § 14—

An action to recover money paid under mutual mistake of fact is governed by the substantive law of the State in which the cause of action arose while the adjective or procedural law is to be determined by the laws of the state of the forum.

2. Money Received § 1—

The courts of South Carolina recognize the right of equitable relief to a party who has suffered injury or loss by reason of mutual mistake of fact.

3. Pleadings § 16b—

Where there is only one party, a demurrer for defect of parties can raise only the question of the plaintiff's right to sue in the capacity in which she states her cause of action.

4. Pleadings § 16a—Complaint held to state only one cause of action, and demurrer for misjoinder is bad.

A complaint alleging that plaintiff as executrix paid a claim against the estate out of funds which she and claimant mistakenly thought were a part of the assets of the estate, that in a suit by the party rightly entitled to the funds judgment was recovered and plaintiff individually was required to refund said moneys, the estate being insolvent, and that plaintiff is entitled to recover of the claimant the amount paid to him under the mutual mistake of fact, *is held* to state but one cause of action, and defendant's demurrer thereto on the ground of misjoinder of causes is properly overruled.

5. Money Received § 1: Executors and Administrators § 15e: Subrogation § 1—Complaint held to state cause of action in equitable subrogation.

Plaintiff alleged that defendant filed a claim against the estate of her testator to recover for loss sustained by defendant upon a fidelity bond executed for testator, that plaintiff, mistakenly thinking that funds in a certain bank deposit belonged to the estate of her testator, paid defendant's claim therefrom, that defendant knew the source of the payment, that there was a mutual mistake of fact in the belief that the said funds belonged to the estate, that thereafter the person rightfully entitled to said funds sued and recovered judgment therefor, that the estate being

solvent, plaintiff in her individual capacity was required to restore said funds, and that defendant's claim against the estate would not have been paid except for the alleged mutual mistake of fact, since there were insufficient funds belonging to the estate with which to pay defendant's claim. *Held:* Under the laws of South Carolina, in which the cause of action arose, the complaint states a cause of action for equitable subrogation in favor of plaintiff in her individual capacity, since it alleged that plaintiff paid defendant's claim from funds which the parties mutually thought belonged to the estate, and that plaintiff personally restored the funds to the person rightfully entitled thereto, and upon the facts alleged plaintiff was not a volunteer but was secondarily liable to the person rightfully entitled to the funds and no injustice will be done to defendant by requiring restitution.

6. Pleadings § 20—

Upon demurrer, the allegations of the complaint must be deemed true, and construed in the light most favorable to plaintiff.

APPEAL by defendant from judgment of *Williams, J.*, overruling demurrer at October Term, 1941, of DURHAM. Affirmed.

Hedrick & Hall for plaintiff, appellee.
Marshall T. Spears and C. O. Pearson for defendant, appellant.

SCHENCK, J. The allegations of the complaint, as amended, were substantially that the plaintiff on or about 15 September, 1938, was duly appointed and qualified as executrix of the estate of her late husband, N. J. Frederick, in the probate court of Richland County, South Carolina; that the defendant is a North Carolina corporation, engaged in writing fiduciary bonds, with its principal office in Durham, North Carolina; that soon after her qualification as such executrix, the plaintiff discovered a checking account in the Victory Savings Bank of Greenwood, South Carolina, in the amount of $3,030.87, in the name of N. J. Frederick, Attorney, which she was then advised and believed belonged to the estate of her testator; that after the discovery by the plaintiff of said checking account in the Victory Savings Bank, the defendant, Southern Fidelity Mutual Insurance Company, filed a claim with the plaintiff, as executrix as aforesaid, for $2,500.00 for indemnity against said estate by reason of the alleged payment of said amount on certain indemnity and/or surety bonds executed for said Frederick by said defendant; that at the time the defendant filed its claim with the plaintiff, as executrix as aforesaid, she understood that the estate of her testator, N. J. Frederick, had funds in hand, including the said $3,030.87, with which to pay, or partially pay, the claim filed by the defendant; that the defendant, at the time it filed its claim, also understood that the $3,030.87 was part of the funds constituting the personal estate of N. J.

Frederick; and also at said time the Victory Savings Bank understood that the said $3,030.87 belonged to the personal estate of said Frederick, and was subject to withdrawal by the plaintiff as executrix thereof; that the plaintiff, as executrix as aforesaid, recognized the claim of the defendant, Southern Fidelity Mutual Insurance Company, for $2,500.00, together with other claims filed against the estate of her testator, and in the course of the administration of the estate paid out of said sum of $3,030.87 to the defendant the sum of $1,025.00, which would have been the amount to which the defendant would have been entitled had the first mentioned sum belonged to said estate; that after the disbursement of the said $3,030.87, by the plaintiff, as executrix as aforesaid, in the course of the administration of said estate, the plaintiff was informed that said sum was not the personal fund of her testator, but belonged to the estate of the late C. H. S. Henderson, of which her testator, N. J. Frederick, was executor and had been held by him only in his fiduciary capacity, for which his estate was liable to the Bank of Greenwood as administrator *d. b. n., c. t. a.,* of the estate of C. H. S. Henderson, deceased; that the facts with respect to the ownership of said sum of $3,030.87, at the time of its disbursement, were not known to the plaintiff, either individually or as executrix, and were likewise unknown to the defendant, the Southern Fidelity Mutual Insurance Company, which received $1,025.00 of it, and to the Victory Savings Bank, which permitted the plaintiff, as executrix, to withdraw the same from its bank for the purpose of paying claims against the estate of N. J. Frederick, deceased; and that the sum of $1,025.00 was paid to the defendant "as a result of the *mutual mistake of fact* of this plaintiff, individually and as executrix, of the defendant, Southern Fidelity Mutual Insurance Company, and of the said Victory Savings Bank, . . . the said sum of $1,025.00 being in fact the property of the Bank of Greenwood as Administrator *d. b. n., c. t. a.,* of C. H. S. Henderson, deceased, and that said sum would not have been disbursed . . . but for the *mutual mistake of facts";* that the plaintiff was the wife of N. J. Frederick, deceased, who was a practicing attorney, but she knew nothing of his relationships with his clients and was ignorant of his personal and professional affairs; that subsequent to the disbursement by her, as executrix as aforesaid, of the said sum of $3,030.87, she discovered that said sum was a balance in the Bank of Greenwood belonging to the estate of C. H. S. Henderson, deceased, of which her late husband was executor, after he, the late N. J. Frederick, had taken large sums therefrom with which to purchase various properties for his own use; that after the discovery by her of the mistake she had made in disbursing funds not belonging to the estate of her testator, which mistake was participated in by the defendant, Southern Fidelity Mutual Insurance Company, she, as an individual and as

executrix, undertook to make restitution to the estate of C. H. S. Henderson of the funds which had been improperly used by N. J. Frederick, the late executor thereof, and as executrix of the said N. J. Frederick she obtained possession of properties acquired by him with funds belonging to the estate of his testator and returned them to the Bank of Greenwood, administrator *d. b. n., c. t. a.,* of the estate of C. H. S. Henderson, and after doing this there was still due said estate $3,660.50, and this plaintiff individually paid said sum to the said bank as administrator as aforesaid, "whereupon she was duly and legally individually subrogated to the rights of the Bank of Greenwood, administrator *d. b. n., c. t. a.,* of C. H. S. Henderson, deceased, which said subrogation is evidenced by an assignment of said claim of the Bank of Greenwood, administrator *d. b. n., c. t. a.,* of C. H. S. Henderson, deceased, against the said fund of $3,030.87, which embraced the sum of $1,025.00 erroneously received by the defendant, Southern Fidelity Mutual Insurance Company, and this plaintiff, individually, now holds a valid claim for the recovery from the defendant, Southern Fidelity Mutual Insurance Company, of said sum of $1,025.00"; that the estate of N. J. Frederick was insolvent, and but for the erroneous use of the said deposit of $3,030.87, which sum has been restored by the plaintiff in her individual capacity, the defendant would have received nothing on its claim against the estate of N. J. Frederick; that the disbursement of the said sum of $3,030.87, made by the plaintiff as executrix, having been made under a mistaken apprehension of the facts, and the said $1,025.00 having been received by the defendant under the mistaken impression that the $3,030.87, out of which it was paid, was available for the payment of the debts of N. J. Frederick, deceased, the defendant in a court of equity, should be required to return said sum of $1,025.00 to this plaintiff; that the Bank of Greenwood, as administrator *d. b. n., c. t. a.,* of the estate of C. H. S. Henderson, brought action in the Court of Common Pleas of Richland County, South Carolina, a court of competent jurisdiction, against the plaintiff, Corrine R. Frederick, individually and executrix, the Victory Savings Bank and others, seeking judgment against the plaintiff, individually and as executrix, and the Victory Savings Bank, on account of the use of the said fund of $3,030.87 in the administration of the estate of N. J. Frederick, in which action this plaintiff, Corrine R. Frederick, was required to reimburse the Bank of Greenwood, administrator as aforesaid, for the said sum of $3,030.87, which she "through mutual mistake . . . had erroneously used in the administration of the estate of N. J. Frederick, . . ."; that the plaintiff, Corrine R. Frederick, has made demand upon the defendant, Southern Fidelity Mutual Insurance Company, for restitution of the said $1,025.00, but said defendant has failed and refused to so reimburse the plaintiff. The plaintiff, Corrine R.

Frederick, prays in her complaint that the court, in its equitable jurisdiction, annul and set aside the payment of $1,025.00 made by her to the defendant, Southern Fidelity Mutual Insurance Company, and that the plaintiff have and recover of the defendant said sum.

The facts alleged having transpired in the State of South Carolina, the laws of that State are applicable to the action, except the adjective or procedural law involved, *Howard v. Howard,* 200 N. C., 574, 158 S. E., 101, and cases there cited.

The law of South Carolina recognizes the right of equitable relief to a party who has suffered injury or loss by reason of mutual mistake of fact. *Turner v. Washington Realty Company,* 128 S. C., 271, 122 S. E., 768; *Williams v. Muehlberger,* 165 S. C., 137, 163 S. E., 125. Mutual mistake of fact is clearly alleged in the complaint assailed by demurrer in the case at bar.

The defendant as a first ground of demurrer to the complaint contends that there is a defect of parties plaintiff therein. This contention is untenable for the reason that there is only one party plaintiff, and this ground of demurrer, if it presents any question at all, can only present the question as to whether the complaint states facts sufficient to constitute a cause of action for the plaintiff in her individual capacity, in which capacity she sues. This question will be discussed later.

The defendant as a second ground of demurrer to the complaint contends that several causes of action have been improperly joined therein. This contention is untenable for the reason that only one cause of action is alleged, or attempted to be alleged, namely: the right of the plaintiff, in her individual capacity, to recover for money paid out by her as executrix to the defendant, by reason of the mutual mistake of fact of herself, individually and as executrix, and of the defendant, and subsequently repaid by her individually to the rightful owner thereof.

The defendant as a third ground of demurrer to the complaint contends that it fails to state facts sufficient to constitute a cause of action for subrogation in the plaintiff, as an individual, of any cause of action existing against the defendant in favor of the Bank of Greenwood, as administrator *d. b. n., c. t. a.,* of the estate of C. H. S. Henderson—that some, at least, of the essential elements of the right of subrogation are lacking from the allegations of the complaint.

First, it cannot be gainsaid that a cause of action is alleged to have existed in favor of the Bank of Greenwood, as administrator *d. b. n., c. t. a.,* of the estate of C. H. S. Henderson against the defendant, the Southern Fidelity Mutual Insurance Company, since it is clearly alleged that funds belonging to it were wrongfully paid by the bank wherein they were deposited to the plaintiff as executrix of N. J. Frederick, and by the plaintiff, through mutual mistake, were paid to the defendant, and

that the defendant knew at the time of the payment to it of the source from which the payment was made.

Both defendant and plaintiff, in their respective briefs, cite *Dunn v. Chapman,* 149 S. C., 163, 146 S. E., 818, to sustain their adverse contentions as to whether the complaint does or does not state a good cause of action in the plaintiff individually bottomed on the right of subrogation in the plaintiff. The quotation from this case made in both briefs is as follows: ". . . the essential elements of the right of subrogation are: (1) That the party claiming it has paid the debt; (2) that he was not a volunteer, but had a direct interest in the discharge of the debt or lien; (3) that he was secondarily liable for the debt or for the discharge of the lien; (4) that no injustice will be done to the other party by the allowance of the equity."

Applying *seriatim* the essential elements enunciated in the rule as to the right of subrogation to the facts alleged in the complaint, we are first confronted with the question: Has the party claiming, the plaintiff in her individual capacity, paid the debt? The answer is in the affirmative, the allegation as to this fact being clear and without reservation. The second question posed is: Was the plaintiff not a volunteer, and did she have a direct interest in the discharge of the debt? The answer is again in the affirmative. If she had not paid the Bank of Greenwood, administrator *d. b. n., c. t. a.,* of the estate of C. H. S. Henderson, she, in her individual capacity, could have been compelled so to do, since the estate of her testator was insolvent and could not have been made to respond—the mistake under which the money was erroneously paid to the defendant being made by her in her capacity as executrix, in such capacity she was first liable, and was secondly liable in her individual capacity. The third question posed is: Was the plaintiff secondarily liable for the debt she paid? The answer is still in the affirmative. The primary liability for the debt was that of Corrine R. Frederick in her capacity as executrix of N. J. Frederick, the secondary liability for the debt was that of the plaintiff, Corrine R. Frederick, individually. The fourth question posed is: Would no injustice be done to the defendant, Southern Fidelity Mutual Insurance Company, by allowing the plaintiff, Corrine R. Frederick, the right of subrogation? The answer is definitely again in the affirmative. The defendant has, according to the allegations of the complaint, received, through mutual mistake of plaintiff and defendant, $1,025.00 from the executrix of an estate against which it had a claim, from funds which did not belong to said estate, and which the executrix in her personal capacity has been compelled to refund to its rightful owner. Certainly there will be no injustice done the defendant, who allegedly received the payment through mistake, by allowing the plaintiff who made the payment through the same alleged mistake, to recover of the defendant the payment so received and made.

We are of the opinion that the essential elements of the right of subrogation in the plaintiff have been alleged in the complaint, and since on demurrer such allegations must be deemed true, and construed in the light most favorable to the plaintiff, *Andrews v. Oil Co.*, 204 N. C., 268, 168 S. E., 228, we conclude that the judgment of the Superior Court overruling the demurrer should be affirmed. It is so ordered.

Affirmed.

VELLER JEFFRIES, ADMINISTRATRIX OF McKINLEY JEFFRIES, DECEASED, v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY,

and

RAYMOND BRANCH v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 5 June, 1942.)

1. Trial § 22b—

Upon motion to nonsuit, defendant's evidence will not be considered except to explain or clarify plaintiff's evidence when it is not in conflict therewith. C. S., 567.

2. Railroads § 9—

Evidence disclosing that the driver of a car in approaching a crossing could have seen defendant's train in ample time to have stopped, but drove upon the crossing to his injury without seeing the approaching train *is held* to show contributory negligence on the part of the driver barring recovery by him as a matter of law.

3. Railroads § 6—

A speed of sixty miles per hour on the part of a train traveling through a rural section, nothing else appearing, is not unlawful or negligent.

4. Railroads § 9: Automobiles § 21—Evidence held to show that negligence of driver was sole proximate cause of crossing accident, and precluded recovery by administratrix of guest.

Evidence disclosing that the driver of a car approached a railroad crossing in a rural section with which he was familiar at five to ten miles an hour, that his view of the approaching train was unobstructed for thirty or forty feet before reaching the live track, and that he drove upon the crossing without seeing the train, which struck the car, injuring the driver and killing a guest in the car, *is held* to disclose negligence on the part of the driver operating subsequent to any negligence on the part of the railroad company in failing to give warning by bell or whistle of the approach of its train, and therefore such negligence on the part of the driver insulated any negligence on the part of the railroad company in failing to give warning and constituted the sole proximate cause of the accident, precluding recovery against the railroad company by the administratrix of the guest.

5. Evidence § 5—

It is a matter of common knowledge that an automobile driven at a speed of five to ten miles an hour can be stopped almost instantly.

SEAWELL, J., dissents as to the nonsuit against the administratrix.

APPEAL by plaintiffs from *Thompson, J.*, at October Term, 1941, of WAKE.

Two civil actions to recover damages, in the first for wrongful death, C. S., 160-161, and in the second for personal injury, allegedly resulting from actionable negligence of defendants—consolidated by the court below for the purpose of trial.

The evidence tends to show these facts:

The plaintiff Raymond Branch sustained personal injury, and McKinley Jeffries, intestate of plaintiff Veller Jeffries, Administratrix, was killed on Sunday morning, 7 May, 1939, about 9 o'clock, when Branch's automobile in which they were riding was struck by a fast southbound passenger train of defendants at a crossing of a dirt road—"not a public road"—and the railroad track of defendants about one-quarter mile south of Millbrook Station, south of Wake Forest, and north of Raleigh, in the county of Wake. Branch was sitting on the left side of and operating the automobile, and Jeffries as the guest of Branch, was sitting on the right side. The railroad runs north and south. The automobile approached from the east.

The crossing is described by some of the witnesses for plaintiffs as being in a curve of the railroad, though no one of them was willing to venture an estimate of the extent of the curve. On the other hand, a civil engineer, witness for defendants, testified that there is actually a 45-minute curve, that is, the curve deflects about 8 inches to the right in every 100 feet and in a long segment "it picks up to where you can see a slight curve." Also, a witness for plaintiffs testified that standing on the track one could see as far as Millbrook station.

The dirt road leads from two houses, the homes of the father and uncle of plaintiff Branch, situated on the east side of the railroad—the former being "something like 300 feet therefrom"—to and across the railroad, and thence through the property and yard of O. A. Norwood to U. S. Highway #1, "not a quarter mile out there" west of the railroad. As described by plaintiff Branch, "It is not a public road, just a road for the outlet of the people . . . just a small road . . . the best path out."

The crossing was first put there about 30 years ago, but was taken out two or three years before Norwood bought the place, after which, according to testimony of father of plaintiff Branch, Norwood had a second one put in by the railroad section force, and had permitted the use of it for the last five or six years.

On each side of the main line track at the crossing there is a side or passing track—the main line being some higher than the sidetracks. Evidence for plaintiffs tends to show that the sidetrack on the east is 6 or 8 feet from the main line, but, according to the civil engineer, witness for defendants, there are actually 13 feet between the east sidetrack and the center line of the main track.

The dirt road as it leads from the Branch home to the crossing is described as being an S-curve beside the railroad. It starts at the bottom of the letter, runs east nearly to the railroad, then turns south in the general direction of the railroad, crosses a bridge, then veers to the left, and on up-hill curve to the right to the crossing, and straightens out about 30 or 40 feet from the track at the crossing. After passing the bridge and veering to the left there are an oak tree and some bushes standing on the right side of the road 42 feet from the main track of the railroad, according to evidence for plaintiffs, and by actual measurement 66 feet east of a point 65 feet north of the crossing, according to the civil engineer, witness for defendants. All the evidence tends to show that after passing this oak and the bushes in approaching the crossing from the east there was no other obstruction on the right or, as expressed by Deputy Sheriff Maynard, witness for plaintiffs, "no more bushes, no more anything except air toward Wake Forest."

Plaintiff Branch testified: "When I could first see by this tree and bushes we were something like 30 or 40 feet from the main line track." Yet he says, "When I got by the bushes toward Wake Forest I could see about 50 feet, I imagine, down the track." Also, there is testimony of three other witnesses, who made observations at the scene, who give various estimates of distances north of the crossing that the track was observable after passing the tree and bushes. But all hands agree that there is no obstruction on the right of the road between the tree and bushes and the railroad. Too, all agree that as one approaches the track view may be had farther down the track. The witness Deputy Sheriff Atkins testified: "When you pass the bushes you could see approximately 80 or 85 feet down the rails . . . when you got 20 feet of the track, I didn't measure it, but you could see a good distance from there, about 150 feet . . . when you are 10 feet from the track I don't think there is anything to keep you from seeing all the way down, because the right of way is open on both sides."

Furthermore, in the opinion of the father of plaintiff Branch: "You have to come near getting on the sidetrack before you can get a good view of the railroad. When you get on the sidetrack you have a pretty good view as far as the planer." That distance, according to the civil engineer, witness for defendants, is about 1,200 feet.

On the other hand, the civil engineer, witness for defendants, testified, that standing in the road at a point 50 feet from the crossing the full

view could be had of a man standing on the track north of the crossing at a distance of 850 feet by actual measurement, beyond which the person began to disappear from the feet up as he moved to the north, and at a distance of 25 feet from the track the station at Millbrook could be seen. This witness further testified that while sitting in his car in the road 50 feet east of the crossing, he observed the approach of both a freight and a passenger train from the north, and that he could see "right much of the top of the engine" at about 1,400 feet, "over half the engine" at about 1,200 feet, and "all the engine" at 925 feet north of the crossing.

Plaintiff Branch gives a narrative of the accident. On direct examination he testified: "The road . . . goes up a little knoll with bushes on both sides. I bears right and gets straight to go across the railroad and just as I get by these bushes and there you are on the track. I peeps around to see what was coming. I was listening all the time, too. I peeped around to see what was coming and there the train was and the train caught us right there. It knocked me unconscious and killed McKinley Jeffries. As I turned here and started up towards . . . the crossing, my back was exactly to the train . . . I guess I was driving about 5 or 10 miles an hour as I approached the crossing . . . in second gear . . . When I got by the tree I didn't see anything, no train in sight; neither did I hear one. I proceeded on the track and when I crossed the first sidetrack . . . I looked around, nothing coming from Raleigh, and when I peeps around McKinley, the train was there and nothing we could do . . . When I crossed the track next to main line, there was no train in sight at that time . . . It was Sunday when I had the wreck and it was Sunday when I remembered . . . I didn't know what happened to me, whether the train hit me or not." Then on cross-examination, in answer to question, "What kept you from seeing the train?" he said, "It hadn't got up there"; and then, in substance, that if the train was on the track it was out of sight, and it would be out of sight 75 feet down, "unless you were on the track—main line," and, continuing, "I can't remember seeing any train, only thing I know is they say the train hit us. The way it hit us it couldn't be running no slower than 70 miles. I didn't see it. That is what I told the Coroner when I was examined before him; told him I never had seen the train . . . that 'all that time I didn't hear any train, so when I got to the railroad I took right across and when I started across I don't know anything else. That is the last that I can remember.' I didn't hear anything and nothing to stop me. When I got to the track I took right on across . . . I didn't know a train had hit us until I came from the hospital . . . When I goes across the sidetrack I was looking towards Raleigh; I looks around north to see what was coming and nothing was coming."

Plaintiff Branch further testified: "As I started across the track no whistle was blowing and no bell was ringing. I had my glass down. I

was listening." His father testified that when the train passed that morning he was on his back porch and that "whistle didn't blow and the bell didn't ring." On the other hand, the engineer and fireman and others who were in the immediate neighborhood testified that the whistle blew for Millbrook and also for the crossing in question, and that the automatic bell was ringing and continued to ring until after the automobile was hit.

The father of plaintiff Branch, on being asked, "Your boy drove over that crossing every day?" answer, "No, sir, not every day. My son knew all about this crossing. I suppose he knew all about those bushes."

The fireman, as witness for defendants, testified: "I was in the fireman's seat box on the left side of the engine. . . . I saw the automobile, I suppose we were 1,500 feet from the crossing, before it went behind this bunch of trees coming up parallel with the track, and I saw it come around from behind a bunch of trees and I thought he was going to stop. He was running very slow . . . toward the railroad, and when he came up to the track I realized he was not going to stop, and I hollered to the engineer. Up to that time I had thought he was going to stop . . . the whistle was being blown at that very time . . . the engineer put on the brakes and emergency . . . there is nothing else an engineer can do under those circumstances." Then on cross-examination this witness stated that this train was on schedule of 60 miles per hour, that it was making schedule, and was on time.

The acts of negligence of defendants, as alleged by plaintiffs, in their complaint, briefly stated, are these: (1) The operation of the train at a negligent and dangerous rate of speed of approximately sixty miles per hour as it approached the crossing in question. (2) The failure to give any signal of the approach of the train, either by ringing of bell or blowing of whistle.

Defendants in answer filed deny plaintiffs' allegations of negligence and, for further answer and defense, aver as to death of Jeffries (1) the negligence of driver of the automobile, as sole proximate cause, and (2) the contributory negligence of Jeffries, in numerous specific respects, and as to Branch, his sole negligence and contributory negligence in respects specified.

Defendants, having reserved exception to refusal of the court to grant their motions for judgment as in case of nonsuit at the close of evidence for plaintiffs, renewed such motions at close of all the evidence. The motions were then allowed.

From judgments pursuant thereto, plaintiffs appeal to Supreme Court, and assign error.

Thos. W. Ruffin for plaintiff, appellant, Jeffries.
Ellis Nassif and Douglass & Douglass for plaintiff, appellant, Branch.
Murray Allen for defendants, appellees.

WINBORNE, J. In considering the challenge to the correctness of the ruling of the court below in sustaining motions of defendants, respectively, for judgments as of nonsuit at the close of all the evidence, C. S., 567, "defendant's evidence, unless favorable to the plaintiff, is not to be taken into consideration, except when not in conflict with the plaintiff's evidence, it may be used to explain or make clear that which has been offered by the plaintiff." *Harrison v. R. R.*, 194 N. C., 656, 140 S. E., 598; *Hare v. Weil*, 213 N. C., 489, 196 S. E., 848; *Sellars v. Bank*, 214 N. C., 300, 199 S. E., 266; *Crawford v. Crawford*, 214 N. C., 619, 200 S. E., 378; *Funeral Home v. Ins. Co.*, 216 N. C., 562, 5 S. E. (2d), 820; *Godwin v. R. R.*, 220 N. C., 281, 17 S. E. (2d), 137.

When the evidence in the present record, so considered, is taken in the light most favorable to each of the plaintiffs, we are of opinion that the court properly ruled that the evidence is insufficient to take either case to the jury.

In so far as the Branch appeal is concerned, the ruling of the court finds support in a long line of decisions recently reviewed in *Godwin v. R. R., supra; Miller v. R. R.*, 220 N. C., 562, 18 S. E. (2d), 232; *McCrimmon v. Powell, ante*, 216, 19 S. E. (2d), 880. When tested by the principles there applied, the evidence here plainly shows that plaintiff Branch, the driver of the automobile, was guilty of negligence which proximately, at least, contributed to his injury. He does not say that he could not have seen the train. He merely says that he did not. "This manifests negligence." *Tart v. R. R.*, 202 N. C., 52, 161 S. E., 720; *Eller v. R. R.*, 200 N. C., 527, 157 S. E., 800; *Bailey v. R. R.*, 196 N. C., 515, 146 S. E., 135; *Harrison v. R. R., supra.* "The law is not able to protect one who has eyes and will not see—ears and will not hear," *Stacy, C. J.*, in *Harrison v. R. R., supra.* Also in *Tart v. R. R., supra.*

Moreover, as related to the Jeffries case, there is nothing in the record from which it may be inferred that, at the time and place of the accident, in a rural section, the train of defendants was being operated at an unlawful or negligent rate of speed. Hence, if it be conceded that defendants were required to give a signal of the approach of its train at the crossing in question, and failed to do so, it is clear from the evidence that the negligence of Branch was such as to insulate negligence of defendants, and that his negligence was the sole proximate cause of the collision between his automobile and the train of defendants in which Jeffries lost his life. This conclusion is in keeping with well established

principle, and finds support in numerous cases in this State, among which are: *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361; *Hinnant v. R. R.,* 202 N. C., 493, 163 S. E., 555; *George v. R. R.,* 207 N. C., 457, 177 S. E., 324; *S. c.,* 210 N. C., 58, 185 S. E., 431; *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg,* 213 N. C., 41, 6 S. E. (2d), 808; *Murray v. R. R.,* 218 N. C., 392, 11 S. E. (2d), 326; *Chinnis v. R. R.,* 219 N. C., 528, 14 S. E. (2d), 500; *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239; and *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808.

As stated by *Devin, J.,* in the *Chinnis case, supra,* "Conceding that there was evidence of failure on the part of defendant to sound whistle or bell to give warning of the approach of the train to the crossing, it is clear that the active negligence of the driver of the automobile, subsequently operating, was the real efficient cause of the injury to plaintiff's intestate . . . The negligence of the driver of the automobile was patent. It intervened between the failure of the defendant to give warning of the approach of the train to the crossing and the injury to plaintiff's intestate, and it began to operate subsequent to any act of negligence on the part of defendant, and continued to operate to the instant of injury." Here, moreover, the driver of the automobile "knew all about this crossing," and, though there was nothing to obstruct his view, he drove his automobile, at speed of five to ten miles an hour, thirty or forty feet to and on the crossing in the face of a fast moving train without seeing it, which manifestly he could have seen in the exercise of due care. He was running his automobile into a known zone of danger, and he failed to see the obvious in broad daylight. Furthermore, at the rate of speed the automobile was being driven, it is a matter of common knowledge that Branch could have stopped it almost instantly. In such situation, even if it be conceded that the defendants were required to give a signal of this crossing and failed to do so, it is manifest that that would not have resulted in injury and death of Jeffries but for the subsequent gross negligence of the driver of the automobile, to which the collision must be attributed as the sole proximate cause. *Butner v. Spease, supra; Reeves v. Staley, supra.*

The judgments below are

Affirmed.

SEAWELL, J., dissents as to Jeffries.

CHAS. W. PRIDDY & COMPANY, INC., PETITIONER, v. MRS. MITTIE F. SANDERFORD, WIDOW; MRS. TINEY HAITHCOCK SADLER AND HUSBAND, LUTHER SADLER; MRS. BULAH HAITHCOCK THAXTON; MRS. LELLA HAITHCOCK STROUD AND HUSBAND, J. H. STROUD; MRS. SADIE HAITHCOCK YOUNG AND HUSBAND, ARLTON YOUNG, RESPONDENTS.

(Filed 5 June, 1942.)

1. Partition § 1a—

Tenants in common in land subject to a life estate are entitled to partition prior to the termination of the life estate, C. S., 3234, but they may not disturb the possession of the life tenant, or sell her interest except by her consent, C. S., 3235, the life tenant not being a tenant in common.

2. Wills § 31—

The object in construing a will is to arrive at the intention of testator.

3. Wills § 33c—

The law favors the early vesting of estates, and a devise will be held to vest at the death of testator unless the intent to postpone the vesting of the estate clearly and manifestly appears from the will beyond mere inference or construction.

4. Same—

A remainder will be held to vest as of the date of the death of the testator and not at the termination of the particular estate if it is subject to no condition precedent except the termination of the particular estate, and words describing the future event will be construed to relate merely to the time of the enjoyment of the remainder and not the time of its vesting.

5. Same—

As a general rule, where the remainder is to all persons of a specified class or their next of kin or lawful heirs or representatives, and not merely to specified persons of a class, the remainder vests in the members of the class as of the date of the death of testator.

6. Same—

A devise to testator's wife for life "and at her death I want this land to go to my children or their representatives" *is held* to vest the remainder in testator's children or their representatives as of the date of testator's death under the general rule, the words "or their representatives" being merely a term of inheritance to guard against a lapse.

7. Partition § 1a—

Where a tenant in common in lands subject to a life estate mortgages his interest, the purchaser at the foreclosure sale of the mortgage may maintain a proceeding for partition.

8. Partition § 1c—

In order to support a decree of sale for partition the court must find the facts required by C. S., 3233.

APPEAL by plaintiff from *Parker, J.*, at February Term, 1942, of GRANVILLE. Error and remanded.

Petition for sale for partition.

Peter Haithcock, a resident of Granville County, died testate, seized and possessed of certain land in said county. His will, in part, provides:

"I give and devise to my beloved wife, Mittie F. Haithcock, the tract of land on which I now reside during her natural life and at her death I want this land to go to my children or their representatives, except that part of the land on the northeast side of the road running from the Tarboro Road to Mt. Energy Road, which I give to my step son Henry Harrison, at the death of my wife."

He left surviving his widow, Mittie Haithcock, who later intermarried with W. G. Sanderford, and five children, to wit: Graham Haithcock and the defendants Tiney Haithcock Sadler, Bulah Haithcock Thaxton, Lella Haithcock Stroud, and Sadie H. Young, all of whom are still living.

Graham Haithcock conveyed his interest in the *locus in quo* by trust deed. The trust deed was foreclosed and plaintiff became the purchaser and is now the owner of said undivided interest. Thereafter, plaintiff instituted this proceeding before the clerk for sale for partition. The petition alleges the life interest of Mittie F. Sanderford, which has not yet terminated, but it does not clearly appear whether the plaintiff seeks to sell the fee, including the life estate, or merely the remainder subject thereto.

The clerk concluded that the children of the testator took only a contingent remainder under the will and that the plaintiff is not seized and possessed of such present interest in said land as would entitle him to a sale for partition. He thereupon dismissed the petition.

On appeal to the Superior Court the judge below found the facts and on the facts found he concluded that the interest of Graham Haithcock is contingent upon his surviving the life tenant; that the ultimate takers in the event he fails to survive are not parties to the action; and that:

"The Court is of the opinion that the takers of the remainder are to be determined as of the date of the death of the life tenant, Mrs. Mittie F. Sanderford, formerly Mrs. Peter Haithcock, and the termination of her life estate, and only those *in esse* as of that time are entitled to take, and the Court so adjudges. *Moseley v. Knott*, 212 N. C., 651."

Judgment was thereupon entered decreeing that plaintiff has no vested interest in said land; that such interest will become vested only in the

event Graham Haithcock survives the life tenant; and that the petition be denied with leave to plaintiff to renew its motion in the event said Graham Haithcock shall survive the life tenant. Plaintiff excepted and appealed.

D. P. McDuffie for petitioner, appellant.
No counsel for respondents, appellees.

BARNHILL, J. This appeal presents for decision two questions: (1) Is one of several tenants in common of real property which is subject to an outstanding life estate entitled to have a sale thereof for partition prior to the expiration of the life estate; and (2) are the children of the testator seized of a vested or a contingent remainder?

The first question is answered by statute. For the purpose of partition the tenants in common of a vested remainder are deemed to be seized and possessed thereof as if no life estate existed and the existence of the life estate is no bar to a proceedings for sale for partition. C. S., 3234. *Gillespie v. Allison,* 115 N. C., 542. See also *Baggett v. Jackson,* 160 N. C., 26, 76 S. E., 86. However, this shall not interfere with the possession of the life tenant during the existence of her estate. She is not a tenant in common with the plaintiff. While she may waive her rights and consent to the sale of her estate, C. S., 3235; *Sides v. Sides,* 178 N. C., 554, 101 S. E., 100, this may not be done, against her will, in a partition proceeding. *Ray v. Poole,* 187 N. C., 749, 123 S. E., 5.

In the construction of a will the object is to arrive at the intention of the testator and it is the policy of the law that a devise should take effect at the earliest possible moment that the language will permit. *McDonald v. Howe,* 178 N. C., 257, 100 S. E., 427. The law favors the early vesting of estates—it hastens the time when the ulterior limitation takes on a transmittible quality. Hence, the inclination is to construe legacies, and especially provisions for children, to be vested and transmittible if the will possibly admits of it; and they are most reluctantly held to be contingent. *Gill v. Weaver,* 21 N. C., 41.

The intent to postpone the vesting of the estate must be clear and manifest and not arise by mere inference or construction. 23 R. C. L., 524.

The remainder is vested, when, throughout its continuance, the remainderman and his heirs have the right to the immediate possession whenever and however the preceding estate is determined; or, in other words, a remainder is vested if, so long as it lasts, the only obstacle to the right of immediate possession by the remainderman is the existence of the preceding estate; or, again, a remainder is vested if it is subject to no condition precedent save the determination of the preceding estate. 23

R. C. L., 504. It is a fixed interest, to take effect in possession after a particular estate is spent. 23 R. C. L., 498; *Power Co. v. Haywood,* 186 N. C., 313, 119 S. E., 500.

Remainders will be deemed to vest at the death of the testator, when the will becomes operative, unless some later time for the vesting, as the termination of the particular estate or the time of the payment or distribution, is clearly expressed by the words of the will, or is necessarily implied therefrom; such is presumed to be the testator's intention unless the contrary appears. 23 R. C. L., 525.

Words of futurity, apparently importing a contingency, are often construed as contemplating a present devise of a remainder with right of enjoyment only after the future event. Where a particular estate is created by will, with a remainder over upon the happening of an event, the words descriptive of the event are construed as referring merely to the period when the enjoyment of the prior estate determines, and not as designed, in the absence of express words or a manifest intent to that effect, to postpone the vesting of the remainder over. Adverbs of time such as "when," "thereafter," "then," "after" and the like, and adverbial terms of time such as "at the death of" and "upon the death of" the life tenant in a devise of a remainder are construed to relate merely to the time of the enjoyment of the estate, and not to the time of the vesting in interest. They do not create a contingency, but merely denote the commencement of the remainder in point of enjoyment. *Rives v. Frizzle,* 43 N. C., 237; *Dixon v. Pender,* 188 N. C., 792, 125 S. E., 623; *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482; *Power Co. v. Haywood, supra; Devane v. Larkins,* 56 N. C., 377; *Elwood v. Plummer,* 78 N. C., 392; *Harris v. Russell,* 124 N. C., 547, 23 R. C. L., 526-27. See also Anno. L. R. A., 1918-E, 1098.

It is the general rule that, where the remainder is to all persons of a specified class or to their next of kin or lawful heirs or representatives, and not merely to specified persons of a class, they take a vested remainder. *Yarn Co. v. Dewstoe,* 192 N. C., 121, 133 S. E., 407; *Dixon v. Pender, supra; Jones v. Oliver,* 38 N. C., 369; *Jenkins v. Lambeth,* 172 N. C., 466, 90 S. E., 513; *Baugham v. Trust Co.,* 181 N. C., 406, 107 S. E., 431, 23 R. C. L., 523; 40 Cyc., 1481; and to ascertain who takes the roll must be called as of the effective date of the will—the date of the death of the testator. *Taylor v. Taylor,* 174 N. C., 537, 94 S. E., 7; *Dixon v. Pender, supra; Yarn Co. v. Dewstoe, supra; Gurley v. Wiggs,* 192 N. C., 726, 135 S. E., 858.

Here the devise is to the testator's children as a class and not to any particular group or limited number thereof. There is no language used which indicates an intention that the devise is to become effective at any

time other than the effective date of the will. The only circumstance which prevents the immediate enjoyment of the estate is the existence of the life estate.

The term "or their representatives" is a term of inheritance synonymous with "heirs" which guards against any lapse of legacy, 23 R. C. L., 538-39, and gives assurance that either the children or those who represent them shall have the enjoyment of the estate devised. It creates neither a contingency nor a limitation over, but denotes the inheritable quality of the estate in remainder. Hence, Graham Haithcock, at the death of the testator, became seized of a one-fifth interest in remainder in the *locus in quo*. It is so admitted in the answer. This interest passed to plaintiff under the foreclosure deed and is a sufficient interest to support the proceedings and entitle plaintiff to the relief prayed.

The court below, in rendering its decision, relied upon *Moseley v. Knott, supra*. That case is distinguishable. There the devise was to two daughters or the survivor for life with the remainder to the issue of both or either, but on failure of such issue at the death of the survivor of the two, to her "own lawful heirs." Neither life tenant left issue surviving. Clearly the interest of claimants was contingent and could not vest before the death of the life tenants, for not until then could it be determined that they would leave no issue surviving.

Before a decree of sale may be entered certain facts must be found. C. S., 3233; *Ledbetter v. Pinner*, 120 N. C., 455, 27 S. E., 123; *Vanderbilt v. Roberts*, 162 N. C., 273, 78 S. E., 156. Hence, the judgment entered must be vacated and the cause remanded for further proceeding.

Error and remanded.

C. M. SHEETS v. J. A. DILLON.

(Filed 5 June, 1942.)

1. Deeds § 16—

The servitude imposed by restrictive covenants in a deed is a species of incorporeal right which runs with the land and is binding upon *mesne* purchasers from the grantee, even though the restrictions are not inserted in subsequent deeds.

2. Property § 2—

Covenants restricting the use of property will be upheld when they are reasonable, are not contrary to public policy or in restraint of trade, and are not for the purpose of creating a monopoly.

3. Deeds § 16—

Covenants restricting the use of land are not impolitic, and the owner of land may insert any restrictive covenants he deems fit so long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated, and the party contending that by reason of conditions subsequently arising the enforcement of the restrictions would be inequitable and unjust, has the burden of proof.

4. Same—

Where a person owning a body of land sells a portion thereof by deed containing restrictive covenants, the restrictions will be deemed personal to the grantor and for the benefit of the land retained, and it is only when the land is subdivided and sold by deeds containing uniform restrictions in accord with a general scheme for the benefit of all within a specified area that the purchasers of lots therein may enforce the restrictive covenants *inter se*.

5. Same: Judgments § 29—Rights of owners of lots in subdivision to enforce restrictive covenants cannot be precluded in action to which they are not parties.

Where it appears that the owner of a subdivision has sold lots therein by deeds containing restrictive covenants and that all lots save one in the block in which the *locus in quo* is situate were sold subject to similar restrictions, equity will not decree that the restrictions are void in an action by a vendor against his purchaser when the owners of other lots in the development are not made parties, since their rights could not be precluded by the judgment.

APPEAL by defendant from *Warlick, J.*, at December Term, 1941, of FORSYTH. Error and remanded.

Action to compel specific performance of a contract of purchase and sale of real property.

Plaintiff, being the owner of lot No. 13, block 4, West Highlands No. 1, in Winston-Salem, N. C., contracted to sell the same to defendant "free and clear of . . . any and all restrictions as to the use of the property for building purposes, the said party of the second part anticipating and planning to use the said property for business purposes only, and no other." The defendant refused to comply for that one of plaintiff's predecessors in title, by covenant contained in a deed to the premises, restricted the use of said property to residential purposes.

The plaintiff thereupon instituted this action to compel defendant to comply. The defendant, answering, pleaded the restrictive covenant running with the land contained in one of the deeds in plaintiff's chain of title as a breach of the conditions of the contract. Plaintiff, replying, alleged that the said covenant was not inserted in said deed pursuant to any general plan or scheme of development in a manner to be binding upon the grantor and his other grantees; that even if it was so inserted,

conditions have so changed as to make it inequitable and unjust to now enforce it. He prays that the court decree that the covenant is now null and void and of no effect and that defendant be required to comply with his contract. He sets forth fully the facts upon which he bases this plea.

When the cause came on for hearing the parties waived trial by jury and agreed that the court should hear the evidence, find the facts, and render its judgment thereon.

After hearing the evidence, the court found the facts as follows:

"1. That prior to the development of the property in which the lot at the corner of First and Hawthorne Road, in the City of Winston-Salem, was developed one, P. H. Hanes, owned the property on both the north and south sides of First Street a considerable distance east and west thereof at Hawthorne Road; that he also owned all of the property on both sides of Hawthorne Road, to-wit, the east and west sides, and for a considerable distance therefrom, north and south; that he later formed a corporation known as the West End Development Company, in which he or the immediate members of his family owned all of the stock and transferred the title to all of the property near this intersection and for a considerable distance therefrom to said corporation; that they attempted to limit the development of most of the property sold by them in the block in which the property in question is located, by inserting a limitation or restriction in most of the deeds that the lot be used for residences only but conveyed one lot without this restriction and did not covenant that the land or lots retained would be so restricted; that to the east of this lot across Hawthorne Road it sold a large site to the Gulf Oil Company, to be used by them as a filling station and the said property is used as a filling station as of this date; that it sold to the Pure Oil Company a large lot immediately across First Street from this property for the purpose of erecting thereon a filling station and the said company did erect thereon a filling station and that the said filling station is now used as such; that catercornered across from the lot in question at the southeast corner of First Street and Hawthorne Road the West End Development Company erected a large block of stores which are now rented for grocery stores, drug stores, restaurants, barber shops and similar types of establishments; that after the death of the said P. H. Hanes, the West End Development Company's stock was inherited by the children of the said P. H. Hanes; that later the West End Development Company was dissolved and all of the real estate consisting of vast acreage and lots was transferred by the West End Development Company to a Trustee for the heirs of P. H. Hanes; that in recent years the said Trustee has erected and leased to the A. & P. Tea Company a large supermarket on a lot across First Street to the west of the lot in question and they have erected on the remainder of the lot and adjacent to the super-

market a large lot for parking space for the patrons of the said A. & P. Market; that later a filling station was erected for the use of the Standard Oil Company and rented to said Company or some person designated by said Company, and the filling station is now used for that purpose; that by reason of these sales and developments by P. H. Hanes or the closed corporation of P. H. Hanes, the West End Development Company, and/or the Trustees of the heirs of P. H. Hanes, the Court finds as a fact that there has been no general plan of development concerning the lot in question and by reason of the said failure of a general plan of development the restrictions contained in the deed to one of the plaintiff's predecessors in title restricting the use of the said property for residential purposes only, is null and void and of no effect.

"The Court further finds as a fact from the evidence adduced at the trial of this cause that even if a general plan of development was intended for the block in which the lot involved in this suit was located, great changes have occurred in the vicinity rendering the property wholly unfit for residential purposes; that a filling station has been built immediately across Hawthorne Road to the south of the lot and is now maintained by the Gulf Oil Company, as a super filling station, being used by hundreds of cars a day and from which emits the noises usually occurring around such a filling station; that a filling station has been built by the Pure Oil Company across First Street from the lot, to the south, and a large filling station is now maintained there and is used by a great number of patrons and from which emits noises incident to the operation of such a place of business; that very recently a filling station has been erected immediately to the west of the Pure Oil Company's station and across First Street to the south from the lot in question, used by the Standard Oil Company and this station is patronized by a large number of persons and from it emits noises incident to the operation of such a business; that catercornered off First and Hawthorne Streets, to the southeast from the lot in question is a large block of stores containing one or more grocery stores, a drug store, restaurant and similar places of business, which block of businesses extends entirely up Hawthorne Road to the south from the intersection of First Street for an entire block; that also located in this block is an additional drug store, grocery store, two super markets and a beauty parlor, all of which are patronized by a large number of people and from them emits the usual noises and odors incidental to the operation of such business places; that across First Street to the west of this lot has been erected a large super A. & P. Market, patronized by probably the largest number of patrons of any store in the City of Winston-Salem; that there is a large parking lot operated in connection with this business and there is a tremendous amount of parking on the streets by this lot and other places adjacent

thereto, by the patrons of this market; that emitting from this place of business are the noises of the traffic, odors, and other things incidental to the operation of the said business; that this lot juts out as a form into probably the busiest intersection in the City of Winston-Salem; that to the south of this intersection is the residential area known as Ardmore, in which live approximately 15,000 persons and by this intersection goes the traffic into the only two main entries or arteries of traffic into this large subdivision; that located to the north of this lot is a large Grammar School and the R. J. Reynolds High School, the largest high school in the City of Winston-Salem and across this intersection goes a large amount of the traffic headed towards the Mocksville Highway, to the southwest, and to the Country Club to the west, both leading to large residential areas and carrying a large amount of traffic; that by reason of this traffic on both sides of the said lot, it is highly undesirable as a residential lot; that the lot as a residential lot is worth less than the amount of the street assessments, to-wit, $1,300.00; that as a business lot it is worth more than $20,000; that by reason of the changes that have taken place in the area as to the establishment of business property and the tremendous increase of traffic on both streets, on both sides of this property, the lot in question has been rendered wholly unfit for residential purposes and the changes in the use of the property in the vicinity have been so radical as to destroy the essential objects and purposes of the agreement to use the said property for residential purposes only; that in fact the said property has become business property instead of residential property and it will be highly inequitable to enforce the residential restrictions on the use of this property; also by reason of the fundamental changes in the character of the community the residential restrictions in the deed from one of the plaintiff's grantors, which purports to run with the property, has made the restrictions unenforceable and it would be inequitable and unjust to attach the restrictions to the use of the said property."

It thereupon decreed "that the restrictions purporting to run with the land in a deed to one of the plaintiff's predecessors in title, limiting the use to residences only, is declared null and void and of no effect, and the defendant be, and is hereby required to accept a deed from the plaintiff to the property, and is directed to execute to the plaintiff a deed in fee simple to the farm in Stokes County to pay the stipulated down payment of $2,000.00 and to execute a note secured by a deed of trust under the terms of the contract for the remaining $18,000."

Defendant excepted and appealed.

Elledge & Wells for plaintiff, appellee.
Buford T. Henderson for defendant, appellant.

BARNHILL, J. 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. *Turner v. Glenn,* 220 N. C., 620, and cases cited; 14 Am. Jur., 608-09. Such right or interest reserved in a conveyance will be effective as against all who deraign title through the grantee, although the reservation is not expressed in subsequent deeds. 16 Am. Jur., 611.

The courts have generally sustained covenants restricting the use of property where reasonable, not contrary to public policy, not in restraint of trade and not for the purpose of creating a monopoly—and building restrictions have never been regarded as impolitic. So long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated such restrictions are valid. Subject to these limitations the court will enforce its restrictions and prohibitions to the same extent that it would lend judicial sanction to any other valid contractual relationship. 14 Am. Jur., 616. Hence, the restriction is not void *ab initio.* If conditions have arisen or circumstances have developed which make the enforcement thereof inequitable and unjust, 14 Am. Jur., 615, the burden of so showing rests upon him who seeks its annulment. Until he has so shown the restriction is binding and effective.

A person owning a body of land, and selling a portion thereof, may, for the benefit of his remaining land, impose upon the land granted any restrictions not against public policy that he sees fit. 7 R. C. L., 1114. In the absence of a general plan of subdivision, development and sale subject to restrictions, the restriction limiting the use of the portion sold is deemed to be personal to the grantor and for the benefit of the land retained. Ordinarily, it is only when the subdivided property is conveyed by deeds containing uniform restrictions in accord with a general scheme and for the benefit of all within a specified area that the other grantees of the owner of the original tract may enforce the restriction.

There is evidence here that the grantor or its successor still owns a part of the original tract. It also appears that all the lots, save one, in the block in which plaintiff's lot is located were sold subject to similar restrictions. Hence, there is some evidence that plaintiff acquired title under a general scheme or at least tending to show that other grantees of the original grantor may be interested in attempting to so prove. It follows that the original grantor is, and its other grantees may be, interested in the enforcement of the covenant plainiff seeks to annul.

The judgment herein is not conclusive as to any one other than plaintiff and defendant. Plaintiff's predecessor in title and those who may claim that the covenant was inserted pursuant to a general plan or scheme of development are not estopped from hereafter asserting their

rights thereunder. Under such circumstances equity will not require defendant to comply with his contract in direct violation of the stipulation that the property is to be conveyed free of restrictive covenants. If plaintiff desires to have this covenant invalidated and stricken from the deed of the original grantee, he must bring in the interested parties and give them a day in court.

We are not inadvertent to *Elrod v. Phillips,* 214 N. C., 472, 199 S. E., 722, relied on by plaintiff. We do not consider that it is controlling on the question here discussed and decided. See *Brenizer v. Stephens,* 220 N. C., 395, and *Turner v. Glenn, supra.*

Since the cause must be remanded for new parties and a further hearing, we refrain from a full discussion either of the evidence or of the law of the case.

Error and remanded.

GEORGE W. FERRELL v. DURHAM BANK & TRUST COMPANY (SUCCESSOR TO DURHAM LOAN & TRUST COMPANY) AND HOMELAND INVESTMENT COMPANY, INC.

(Filed 5 June, 1942.)

1. Easements § 2—

Where the owner of an estate uses one part of the land for the benefit of the other, which use is obvious and manifestly intended to be permanent, and is reasonably necessary to the fair enjoyment of that part of the land so benefited, and thereafter there is a severance of title, the purchaser of the dominant tenement acquires the easement by implication.

2. Same—Right to use party wall held to pass to purchaser of building by implication although deed did not include land upon which wall is situate.

The owner of a lot adjacent to a building purchased one-half of the land upon which the adjacent wall of the building was erected by deed stipulating that the wall should be and remain a party wall for the benefit of both parties, their heirs and assigns, and erected a building on his lot using the wall so purchased. Thereafter he executed deed of trust on his lot but the description did not include the strip of land purchased for the party wall. The deed of trust was foreclosed and the defendant acquired title to the lot by *mesne* conveyances. The original owner then conveyed the land upon which his half of party wall is located to plaintiff, who sued to recover rent for the use of the wall. *Held:* The deed of trust and the deed of the trustee to the purchaser at the foreclosure sale conveyed the easement for the use of the wall by implication of law, the easement being incident and appurtenant to the ownership of the lot, and title to the wall was charged with this easement, and the purchaser of the strip of land on which half the wall is located took same subject to this easement, since he could not acquire any title superior to that of his grantor.

FERRELL *v.* TRUST CO.

APPEAL by plaintiff from *Parker, J.*, at February Term, 1942, of DURHAM.

Civil action to recover rental for use of party wall.

The controversy relates to a party wall extending from south side of Chapel Hill Street in the city of Durham, North Carolina, between the Thomas Book Store and the Grand Central Garage buildings.

The uncontroverted facts with relation thereto are substantially these:

1. On 22 July, 1920, W. K. Dennis, under whom as common source of title both plaintiff and defendants claim, owned a lot of land in the city of Durham, situated on southeast corner of Chapel Hill and Corcoran Streets, that is (a) on south side of the former, (b) on east side of the latter street, (c) west of a lot of land then owned by George W. Watts, on which there was a building known as the Grand Central Garage, and (d) north of the center line of the north wall of the J. T. Christian Press building. The west line of the west wall of the Grand Central Garage building coincided with the east line of the said lot owned by Dennis.

2. On 22 July, 1920, W. K. Dennis, by deed from George W. Watts and wife, for the consideration of one thousand dollars, also acquired title to a strip of land eight inches wide on south side of Chapel Hill Street, and seventy-three or more feet deep, lying along and adjoining the east line of the Dennis lot, which is described in the above paragraph one, on which strip of land was then located the west half of the west wall of the Grand Central Garage building. The said deed, by which this strip was conveyed to Dennis, contained this covenant: "The wall now standing partly on the above described property to be and remain a party wall for the perpetual use and benefit of the respective parties to this deed, their heirs, assigns, successors and grantees, said property being conveyed subject to this condition, and this condition shall be construed to be a covenant running with the land."

3. The west half of the west wall of the Grand Central Garage building, so acquired by Dennis from Watts, became the east wall of the Thomas Book Store building erected on the Dennis lot described above in paragraph one.

4. Thereafter, on 8 January, 1933, W. K. Dennis and wife, for purpose of securing an indebtedness to Durham Loan & Trust Company, executed a deed of trust to F. L. Fuller, Jr., in which they conveyed by specific description the lot of land described in the above paragraph one, but said description did not include the strip of land acquired by Dennis from Watts which is described in the above paragraph two. The *habendum* in this deed of trust reads: "TO HAVE AND TO HOLD said land and all houses, buildings, improvements, fixtures, privileges and appurtenances thereon or thereto pertaining to him, said party of the second part, his heirs and assigns in fee."

5. Pursuant to foreclosure sale under the deed of trust from W. K. Dennis and wife, F. L. Fuller, Jr., Trustee, by deed dated 15 February, 1933, conveyed to defendant Durham Loan & Trust Company the land as therein described "to have and hold . . . together with all appurtenances thereon and thereto belonging," "in as full and ample manner" as he "is authorized and empowered to convey"; and by deed, dated 11 March, 1933, Durham Loan & Trust Company conveyed to defendant, Homeland Investment Company, Inc., the said land "to have and to hold . . . together with all privileges and appurtenances thereon and thereunto belonging . . ."

6. Thereafter, on 15 November, 1939, W. K. Dennis and wife conveyed to Security Finance Corporation of Durham, Inc., the strip of land, including the wall thereon as described, and under same covenant set forth in the above paragraph two, "to have and to hold . . . together with all privileges and appurtenances thereon and thereto belonging . . ."; and on 29 November, 1939, the Security Finance Corporation of Durham, Inc., in like manner conveyed same to plaintiff.

Plaintiff in his complaint alleges that the building at the southeast corner of Chapel Hill and Corcoran Streets "now owned by the Homeland Investment Company is fastened to the said party wall now owned by the plaintiff and has been fastened to and resting upon said party wall all of the time it has been owned by the said defendants, and that if it were not for the said party wall the said building of defendants could not remain standing and could not be used for any business or gainful purposes"; that defendants have had the use and benefit of said party wall since 11 March, 1933; and that, by reason thereof, plaintiff is entitled to "fair and reasonable compensation therefor," in the sum of thirty dollars per month, no part of which has been paid. Evidence for plaintiff tends to show that fifteen or sixteen dollars per month would be a fair rental.

While in answer thereto, defendants admit that the east wall of the Thomas Book Store building is the party wall, they deny right of plaintiff to recover anything, and, in further defense, aver, *inter alia,* that under the deed of trust executed by W. K. Dennis and wife to F. L. Fuller, Jr., Trustee, and *mesne* conveyed, all as stated in above uncontroverted facts, "the said Homeland Investment Company is now the owner and holder of said parcel of land, together with all privileges and appurtenances thereon and thereto belonging, in fee simple," and "has the right and privilege of using said party wall . . . without paying any rent therefor as a privilege and right appurtenant to its ownership of the lot commonly known as Thomas Book Store building."

Upon the trial below, at the close of evidence for plaintiff tending to show facts substantially as hereinabove set forth, the court sustained motion of defendants for judgment as in case of nonsuit.

From judgment in accordance therewith plaintiff appeals to Supreme Court, and assigns error.

J. Grover Lee and R. O. Everett for plaintiff, appellant.

W. W. Sledge and Fuller, Reade, Umstead & Fuller for defendants, appellees.

WINBORNE, J. In the light of the factual situation presented in the record on this appeal, the ruling of the trial court follows a principle of law well established in this and other jurisdictions.

It is a general rule of law that where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part. Jones on Easements, section 129; Washburn on Easements, 3rd Ed., p. 41; 17 Am. Jur., 945, Easements, section 33 *et seq;* 28 C. J. S., 687, Easements, section 30 *et seq; Carmon v. Dick,* 170 N. C., 305, 87 S. E., 224; *Meroney v. Cherokee Lodge,* 182 N. C., 739, 110 S. E., 89; *Henry v. Koch,* 80 Ky. Reports, 391; *Irvine v. McCreary,* 108 Ky., 495, 56 S. E., 966; *Stone v. Burchead* (Ky.), 169 S. W., 489; *Burling v. Leiter,* 272 Mich., 448, 262 N. W., 388, 100 A. L. R., 1312; *Bright v. Allan* (Pa.), 53 Atl., 251; *Malcolm v. Fuller* (Mass.), 25 N. E., 82. See, also, *Hair v. Downing,* 96 N. C., 172, 2 S. E., 520; *Bowling v. Burton,* 101 N. C., 176, 7 S. E., 701.

Notwithstanding the fundamental principle that a person cannot have an easement in his own land, "it is a well settled rule that where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which servitude, at the time of the severance, is in use and is reasonably necessary to the fair enjoyment of the other part of the estate, then upon a severance of the ownership, a grant of the right to continue such use arises by implication of law. . . . The underlying basis of the rule is that unless the contrary is provided, all privileges and appurtenances as are obviously incident and necessary to the fair enjoyment of the property granted substantially in the condition in which it is enjoyed by the grantor are included in the grant." 17 Am. Jur., 945; Easements, Implied, section 33.

There are three essentials to the creation of an easement by implication upon severance of title: (1) A separation of the title; (2) before the separation took place, the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; (3) the easement shall be necessary to the beneficial enjoyment of the land granted or retained. 17 Am. Jur., 948, Easements, section 34; *Carmon v. Dick, supra.*

In the *Carmon case, supra,* it is said: "An easement which is apparent and continuous, such as a drain or other artificial watercourse, a thing which is continuous in its service, and which does not require active intervention of the owner for its continuance, and can always be seen or known on careful inspection, will pass on the severance of two tenements as appurtenant, without the use of the word 'appurtenances'; but an easement which is not apparent and non-continuous, such as a right of way, which is enjoyed at intervals, leaving no visible sign, in the interim, of its existence, will not pass unless the grantor uses language sufficient to create the easement *de novo.*"

When tested by these principles, the facts in the present case present every essential element necessary to create in favor of F. L. Fuller, Jr., Trustee, and his assigns, under the deed of trust from W. K. Dennis and wife, an easement by implication of law in the wall on the strip of land retained by Dennis, and now owned by plaintiff: (1) Dennis had acquired the wall from Watts under covenant running with the title that it should "be and remain a party wall for the perpetual use and benefit of" them "their heirs, assigns, successors, and grantees." (2) This wall became the west wall and support of the Thomas Book Store building which Dennis erected on the adjoining lot. The title to the building and the wall was united in Dennis and, hence, in keeping with the principle that a person cannot have an easement in his own land, none existed in his favor. Yet the wall was apparently and obviously, and is actually a permanent part of the building, and, admittedly, necessary to the beneficial enjoyment of it. (3) Then when Dennis conveyed the land on which the building stood and retained the wall to which it was attached and the land on which the wall stood, he created the severance of title. Thereupon a right in the grantee to continue to use the wall as incident and appurtenant to the ownership of the building arose by implication of law from the fact that the wall actually existed as a part of the building. Title to the wall, which remained in Dennis, became charged with this easement. The plaintiff by *mesne* conveyance from Dennis acquired no greater right than Dennis had, that is, he took the title with the servitude upon it.

The cases of *Reid v. King,* 158 N. C., 85, 73 S. E., 816, and *George v. Smathers,* 198 N. C., 212, 151 S. E., 194, upon which plaintiff relies in the main, treat of principles pertinent to factual situations which differ from that involved in the present case, and, hence, may not be considered as conflicting with the results here.

The judgment below is

Affirmed.

A. L. CAULDER v. KIVETT MOTOR SALES, INC., AND R. A. PLUNKETT,
and
JULIA MARGARET CAULDER, BY HER NEXT FRIEND, A. L. CAULDER, v. KIVETT MOTOR SALES, INC., AND R. A. PLUNKETT.

(Filed 5 June, 1942.)

1. Automobiles §§ 7, 18a—Evidence of negligent operation of automobile held sufficient for jury.

Evidence that the driver of a car was traversing a highway in a thickly settled residential section having intersecting streets and a sign requiring speed to be reduced to 30 miles an hour, that he was driving 60 miles per hour during the daytime and struck a five-year-old child who had been walking along the edge of the pavement, his speed having been reduced to 45 miles an hour at the time of the impact, and there being no other traffic on the highway affecting the accident, *is held* sufficient to be submitted to the jury on the question of the negligent operation of the automobile.

2. Evidence § 42d: Principal and Agent § 7—

Testimony of a declaration of an automobile salesman that at the time of the accident he was driving the corporate defendant's car to demonstrate it to a prospective purchaser, which declaration was not made at the time of the injury or near enough to the transaction to constitute a part of the *res gestæ is held* incompetent and its admission constitutes prejudicial error.

3. Appeal and Error § 40e—

When, upon appeal from the refusal of defendants' motion to nonsuit, a new trial is awarded for error in the admission of some of plaintiffs' evidence, the sufficiency of the other evidence to repel the nonsuit need not be decided, since plaintiffs on another trial may offer other evidence in support of their cause of action.

BARNHILL, J., dissenting.

APPEAL by defendants from *Gwyn, J.*, at November Term, 1941, of ALAMANCE.

The two cases entitled as above were by consent tried together. Both actions were instituted to recover damages for injuries resulting from the operation of an automobile by the defendants. It was alleged that plaintiff Julia Margaret Caulder, five years of age, was struck by an automobile negligently driven by defendant Plunkett, and that she suffered a substantial personal injury. It was further alleged that defendant Plunkett was agent and employee of defendant Kivett Motor Sales, Inc., and acting at the time within the scope of his employment. A. L. Caulder, father of Julia Margaret Caulder, sued for the recovery of expenses incurred by him in the necessary treatment of his daughter's injuries.

Separate answers were filed by the defendants, each admitting that defendant Plunkett was the driver of the automobile on the occasion

alleged, but denying that he was in any wise negligent and denying that he was at the time acting within the scope of his employment by his co-defendant. It was not denied that defendant Plunkett was an automobile salesman, selling certain automobiles for the defendant Motor Sales, Inc., on commission.

Upon these allegations and the evidence offered in support thereof, separate issues as to each plaintiff were submitted to the jury, and answered in favor of the plaintiffs to the effect that the injuries complained of were caused by the negligence of defendant Plunkett, that he was not an independent contractor, and that he was at the time of the injuries the agent of defendant Motor Sales, Inc., acting within the scope of his employment. Damages were awarded both plaintiffs.

From judgments in accord with the verdicts, defendants appealed.

Thos. C. Carter and John H. Vernon for plaintiffs, appellees.

Long, Long & Barrett and H. J. Rhodes for defendant Kivett Motor Sales, Inc., appellant.

C. C. Barnhardt for defendant R. A. Plunkett, appellant.

APPEAL OF DEFENDANT PLUNKETT.

DEVIN, J. The principal assignment of error brought forward by this defendant is the denial of his motion for judgment of nonsuit. An examination of the record leads us to the conclusion that the evidence viewed in the light most favorable to the plaintiffs was of sufficient probative force to warrant its submission to the jury.

From this it appears that the plaintiff Julia Margaret Caulder, a child five years of age, while walking along the highway between Burlington and Graham, was struck by an automobile driven by defendant Plunkett, and seriously injured. At this point the paved highway passes through a thickly settled residential section. Intersecting streets cross the highway. A sign indicated that the speed of automobiles was required to be reduced to thirty miles per hour. The time was 10:20 a.m. The highway was straight. There was no other traffic at the moment. The plaintiff Julia Margaret Caulder had been to a filling station on the highway and was returning to her home near-by, walking along the edge of the pavement. Defendant was driving an automobile belonging to his codefendant, going in the same direction as the child, at the rate of sixty miles per hour. At the time she was struck the speed had been reduced to forty-five miles per hour. The horn was not sounded. Only the noise caused by application of brakes was heard immediately before the impact. The plaintiff was struck with such force as to throw her in the air. She fell on the side of the automobile and was carried a short distance and thrown off on the side of the road. The automobile traveled 140 feet after striking the plaintiff before coming to a stop.

While the defendant's evidence tended to show that the injury occurred in a somewhat different manner, and without negligence on the part of the defendant, we think there was some evidence of failure on his part to exercise due care under the circumstances, proximately resulting in injury to the plaintiffs. The defendant's motion for judgment of nonsuit was properly denied. The other exceptions noted by defendant Plunkett are without substantial merit. As to defendant Plunkett, in the trial we find

No error.

APPEAL OF DEFENDANT KIVETT MOTOR SALES, INC.

This defendant's motion for judgment of nonsuit was based upon additional grounds. It contended that the evidence was insufficient to show that the negligence of defendant Plunkett, driver of the offending automobile, was attributable to the defendant Motor Sales, Inc., upon the principle of *respondeat superior*. It is urged that the evidence did not warrant the finding that the driver was the agent and employee of this defendant, acting at the time within the scope of his employment. And it is further contended that certain evidence offered by plaintiffs for the purpose of showing this material fact was incompetent and prejudicial.

This defendant relies upon its exception to the ruling of the court in admitting in evidence, over objection, the testimony of a witness to the effect that the driver of the automobile stated, a short time after the accident, that at the time of the injury he was taking defendant's automobile to Graham to demonstrate it to a prospective purchaser. This declaration of the driver was not made at the time of the injury or near enough to the transaction to constitute a part of the *res gestæ*. It was the declaration of an agent or employee as to a past transaction offered for the purpose of showing that the employee was acting within the scope of his employment at the time of the injury. This evidence was incompetent and its admission prejudicial, necessitating a new trial. *Pinnix v. Griffin*, 219 N. C., 35, 12 S. E. (2d), 652; *Brown v. Montgomery Ward & Co.*, 217 N. C., 368, 8 S. E. (2d), 199; *Parrish v. Mfg. Co.*, 211 N. C., 7, 188 S. E., 817. *Hubbard v. R. R.*, 203 N. C., 675, 166 S. E., 802. While there was some other evidence tending to show that the driver was acting within the scope of his employment by this defendant, we need not decide the question of its sufficiency to carry the case to the jury, as there must be a new trial, and the plaintiffs on another trial may offer other evidence in support of their allegations. *Midgett v. Nelson*, 212 N. C., 41, 192 S. E., 854; *Morgan v. Benefit Society*, 167 N. C., 262, 83 S. E., 479.

For the reasons stated, we conclude that on the appeal of defendant Motor Sales, Inc., there must be a

New trial.

BARNHILL, J., dissenting: I am unable to concur in the view adopted by the majority. In my opinion the evidence for plaintiffs fails to disclose any actionable negligence on the part of the defendant Plunkett. While there is testimony as to excessive speed, this is in nowise related to the accident as a proximate cause thereof. Nor does the majority opinion attempt to point out wherein the evidence on this aspect of the case is sufficient to repel the motion to nonsuit.

The evidence for plaintiffs tends to show that the infant plaintiff was walking on the shoulder or dirt portion of the road and that Plunkett's car never left the hard surface. "He stayed on the hard surface and stopped on the hard surface." Neither of the two witnesses offered by plaintiffs actually saw the car and the child come in contact but looked the instant it happened. When they saw her "she was on the side of the car hanging to it . . . looked like she was right up on the front fender on the side of the door, the way it looked from where I was at." "He carried her a little bit through the air until she fell." She was knocked to the side and fell in the weeds some distance from the road. Thus, it appears that the witnesses testified that she was "on the side of the car" and not that "she fell on the side of the car."

If she had continued along the shoulder and Plunkett did continue on the hard surface as the plaintiffs' witnesses testified, no contact between her and Plunkett's car could have occurred. What caused the contact or in what manner it was brought about is not disclosed by the evidence for the plaintiffs. Under these circumstances we may not assume negligent conduct on the part of Plunkett proximately causing the injury.

Defendants' evidence does not aid the plaintiffs. On the contrary, it tends to fill in the hiatus in the evidence for the plaintiffs and to explain the unfortunate occurrence as an unavoidable accident in so far as Plunkett is concerned. The other defendant is liable, if at all, only under the doctrine of imputed negligence.

After the front of Plunkett's car had passed the child he felt something bump the side of his car. As he passed she was on the shoulder and he was on the hard surface. This is the testimony of the individual defendant. Another witness who was following on behind Plunkett on still another car actually saw what happened and described the occurrence as follows:

"I heard the cry of tires of a car and just as I did I saw this child dart from the side of the road and as it turned out the child hit Mr. Plunkett's car and was thrown back to the side of the ditch. . . . The first time I saw the child she appeared from the side of the road, not the curb but the shoulder onto the concrete. When she went from the shoulder onto the concrete the car was about one-third of the distance from the right-hand side of the middle of the road. I could not say if any part of the car had passed the child."

The statute, C. S., 567, provides that the ruling upon the motion for nonsuit made at the conclusion of the testimony is to be "upon a consideration of all the evidence." I doubt that we have ever given this provision of the statute the full force and effect intended by the Legislature. Even so, we have held that the testimony for defendants which tends to amplify or explain that offered by the plaintiffs is to be considered upon such a motion. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Hare v. Weil,* 213 N. C., 489; *Sellars v. Bank,* 214 N. C., 300, 199 S. E., 266; *Funeral Home v. Ins. Co.,* 216 N. C., 562, 5 S. E. (2d), 820.

In my opinion the motion first made should have been allowed. In any event, applying the rule just stated, the second motion made at the conclusion of all the evidence should have been sustained. The evidence offered by defendants neither contradicts nor impeaches the evidence for plaintiffs. It serves only to explain, if indeed any explanation is required. The evidence offered by plaintiffs fails to show actionable negligence. The evidence offered by defendants in explanation completely exculpates them.

For the reasons stated I vote for a reversal.

T. E. JOHNSON, TRADING AS T. E. JOHNSON & SONS, v. MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEWARK, NEW JERSEY.

(Filed 5 June, 1942.)

Brokers § 11—Broker's naming of three prospects when called upon to name or produce purchaser held insufficient compliance with contract.

The owner of realty agreed with a broker to sell to the broker's prospect at a stipulated price and pay a stipulated commission, and thereafter called upon the broker to name or produce the purchaser. In response thereto the broker wired the names of three prospects, some of whom he admitted were not purchasers, and out of them did not distinguish the purchaser. The owner then withdrew his offer. *Held:* The broker did not fulfill his contract and may not recover his commissions upon the contention that one of the parties named by him was ready, able and willing to purchase the property at the stipulated price.

APPEAL by plaintiff from *Armstrong, J.,* at January Term, 1942, of FORSYTH. Affirmed.

The defendant was the owner of valuable real estate in the city of Winston-Salem, known as the Gilmer Property, and entered into a contract with plaintiff wherein it was agreed that plaintiff should act as real estate broker, offering the property for sale at the price of $50,000.00,

and that if plaintiff secured a purchaser for the property at this price, he should receive as compensation 5 per cent of the purchase price.

Plaintiff complains that he fulfilled his contract by securing a purchaser, ready, willing and able to take title to the property and pay therefor the sum of $50,000.00—the agreed price—and submitted the name of the purchaser to the defendant, which thereupon withdrew its offer of sale, and has refused to comply with its contract or compensate defendant as agreed.

The defendant denies that plaintiff had produced a *bona fide* purchaser at all in compliance with the terms of the contract and, therefore, denies that it owed the plaintiff anything.

The contract was evidenced by a series of letters and telegrams, amongst which those most pertinent to decision are a letter of 20 December, 1940, by plaintiff to defendant, in which the plaintiff wrote to defendant that the offer for the property which he had secured would not hold good longer than 24 December, and the answering telegram from defendant, as follows:

"Newark NJ 1940 Dec. 24 PM 4 21

"T E Johnson
First National Bank Bldg Wn

will accept fifty thousand cash for Gilmer property if sale closed within thirty days. This property has frontage of 125 feet on Main Street and runs through to Church Street for distance of 208.70 feet. Company does not hold title to the north alley.

Mutual Benefit Life Insurance Co."

The defendant then wrote to plaintiff as follows:

"THE MUTUAL BENEFIT LIFE INSURANCE COMPANY
Newark, New Jersey

December 26, 1940.

"Mr. T. E. Johnson,
First National Bank Building,
Winston-Salem, North Carolina.

"Dear Mr. Johnson:

"In favor of the 20th instant, relative to the Gilmer property, our R. E. 3358, you advised us that in telephone conversation with your client, he stated that his offer of $50,000 for the same would 'stand good until December 24th but no longer.'

"We were enabled on the 24th instant to have our Directors give the matter of sale of the property consideration, and we confirm our telegram of the twenty-fourth to you, which read as follows:

" 'Will accept fifty thousand cash for Gilmer property if sale closed within thirty days. This property has frontage of 125 feet on Main Street and runs through to Church Street for distance of 203.70 feet. Company does not hold title to the north alley.'

"If you will give us the name of the purchaser, the amount to be paid at this time, and the date of the closing of the sale, we will have the contract for sale of the property prepared, and send same to you for approval.

Yours very truly,
ROBERT C. THOMSON,
Assistant Treasurer."

Plaintiff then testified:

"I communicated the acceptance of this offer as contained in this telegram of December 24, to Mr. Bert Bennett. I know that Mr. Bennett was ready, able and willing to comply with this offer—with the acceptance of this offer. As far as the Mutual Benefit Life Insurance Company was concerned, he was going to pay cash for it. Under the arrangements I had with Mr. Bennett, he was to pay the Mutual Benefit cash."

Thereupon plaintiff put in evidence the following telegram:

"CFA2 15 64 Ser-Wux Tdn *Newark NJ 3 33 6P*
1941 Jan 3 PM 4 03

"T E Johnson
First National Bank Bldg Wn

"We agreed to accept fifty thousand dollars cash for Gilmer property because you stated you had purchaser at that price stop In view of fact that you apparently have no purchaser who has made firm offer we rescind our offer to sell made in telegram December 24 and in letter December 26 stop This action is for our own protection and to avoid complications.

The Mutual Benefit Life Insurance Co."

Plaintiff, resuming, testified that he had no written contract with Bert Bennett to take the property, but had his word. He had a conversation over the telephone with Mr. Thomson, who represented the Insurance Company, but did not give the name of the prospective purchaser at the time. That he did not know which one of the parties they would

want the deed made to—Mackie and Bennett, or the Quality Oil Company, or Bert Bennett, since Bennett had business relations with Mackie, and was largely interested in the Oil Company. Also, plaintiff gave the three names in his wire message in order to prevent defendant's cutting in with its own prospects, whose names had been withheld from plaintiff. That he communicated the name of Bennett with the three names wired in response to defendant's request to name the purchaser.

T. C. Gough, a witness for plaintiff, testified that he knew of the transaction between plaintiff and Bennett with reference to this deal. Conversations between this witness and Bennett were excluded. Bennett had since died. Witness testified that Mr. Bennett had asked him to have made up an estimate of the operating expenses of the building, including taxes, heat, light, water, etc. The statement was put in evidence bearing ink figures in the handwriting of Mr. Bennett. Witness testified that the telegram of December 24, accepting Mr. Bennett's offer, was brought to him and delivered by him to Mr. Bennett. That he did not know about it until Mr. Bennett had told him "he was going to take it."

C. T. Lineback, an officer of the Wachovia Bank & Trust Company in the Commercial Loans Department, testified that Bennett made an application in December, 1940, for a loan of $30,000.00. Conversation between this witness and Bennett, since deceased, was excluded, over plaintiff's objection and exception. Witness would have stated that Bennett said he wanted the loan to pay the purchase price of the Gilmer Building, for which he was to pay $50,000.00. The loan was approved, but never negotiated. The court excluded the proposed testimony of this witness that Bennett said he could draw all of the money out of the company and pay in cash, but he did not want to hit the company that hard.

C. E. Fetter, a building contractor, testified that he inspected the Gilmer Building at Mr. Bennett's request in the latter part of November or December, 1940, and reported its condition to him.

At the conclusion of plaintiff's evidence, the defendant demurred to the evidence and made a motion for judgment as of nonsuit. The motion was allowed, and plaintiff appealed, assigning error.

Elledge & Wells for plaintiff, appellant.
Womble, Carlyle, Martin & Sandridge for defendant, appellee.

SEAWELL, J. Under the view taken by the court as to the principle sustaining the judgment of nonsuit, plaintiff's exception to the exclusion of evidence tending to show there was a *bona fide* commitment on the part of Bennett as purchaser of the property becomes immaterial. It is considered that it was the duty of plaintiff to make a full disclosure to the defendant in response to its request for the name of the purchaser;

Trust Co. v. Adams, 145 N. C., 161, 58 S. E., 1008—that it was required that he should produce a purchaser willing, ready and able to take and pay for the property. *Crowell v. Parker,* 171 N. C., 392, 88 S. E., 497; *Gerding v. Haskings,* 141 N. Y., 514, 36 N. E., 60; *McGavock v. Woodlief,* 20 Howard (U. S.), 221, 15 L. Ed., 884; *Kaercher v. Schee,* 189 Minn., 272, 249 N. W., 180, 88 A. L. R., 294; Am. Law Inst. Restatement, Agency, Vol. 2, pp. 1038-1041, sec. 445. Plaintiff's counsel refers us, also, to *Real Estate Co. v. Moser,* 175 N. C., 255, 95 S. E., 498; *Clark v. Lumber Co.,* 158 N. C., 139, 73 S. E., 793; *Aycock v. Bogue,* 182 N. C., 105, 108 S. E., 434; *Ingle v. Green,* 202 N. C., 122, 162 S. E., 476; *Harris v. Trust Co.,* 205 N. C., 530, 172 S. E., 177; *Veasey v. Carson* (Mass.), 58 N. E., 171, and to 8 Am. Jur., 1038-1039. These authorities are not thought to be at variance with the conclusion reached by the Court on the crucial point of performance of the contract as here discussed.

When called upon to name or produce the purchaser, which, according to his advice to defendant should have been shortly after December 24, at which time his offer to the "prospect" would have been accepted, plaintiff telegraphed the names of three prospects, some of whom he admitted were not purchasers, and out of them did not distinguish the purchaser. Whatever his reasons, the Court is of opinion that his performance in this respect was less than his contract required, and justified the defendant in withdrawing its offer.

The judgment of the court below is

Affirmed.

J. C. BLAKE, JR., v. WALKER ALLEN, R. C. SAWYER, AND R. L. COTTINGHAM.

(Filed 5 June, 1942.)

1. Appeal and Error § 37e—

Only those findings of fact which are supported by evidence are binding on appeal.

2. Sheriffs § 2—

A deputy sheriff is neither the agent, servant nor employee of the sheriff but is a public officer deputized to perform such ministerial duties as are prescribed and directed by law as the *alter ego* of the sheriff, and in the performance of such duties he does not act under the direction and discretion of the sheriff.

3. Same—

Under the maxim *delegatus non potest delegare* a deputy sheriff cannot delegate the duties of his office.

4. Process § 8—Service on nonresident sheriff may not be had by service on Commissioner of Revenue when car was being driven by person engaged by deputy.

The findings of fact by the court supported by the evidence tended to show that a deputy sheriff of the State of South Carolina was traveling through this State to return a prisoner to that State in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner. *Held:* The deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of Public Laws 1929, ch. 75, and therefore service of process on the sheriff by service on the Commissioner of Revenue under the provisions of the statute is void.

APPEAL by defendant Walker Allen from *Harris, J.*, at October Term, 1941, of CUMBERLAND.

Civil action to recover for injuries sustained in automobile collision resulting allegedly from actionable negligence of defendants.

Summons for defendant Walker Allen, duly issued by clerk of the Superior Court of Cumberland County, North Carolina, on 7 May, 1938, was served on 9 May, 1938, upon A. J. Maxwell, Commissioner of Revenue of North Carolina, under provisions of the statute, section 1 of chapter 75, Public Laws 1929; Michie's North Carolina Code of 1939, section 491 (a).

Defendant Allen upon special appearance moved the court to enter an order dismissing the action as against him for reasons stated to the effect that upon the facts of record he, Allen, is not amenable to process served in the manner here attempted, and that, therefore, the court has acquired no jurisdiction of his person.

The court below, in addition to finding facts as to manner in which summons was served, finds the following facts:

"2. The crossing accident alleged in the complaint is based upon an automobile accident occurring in North Carolina, on or about March 16, 1938, at the intersection of Highways Nos. 15 and 91. One of the automobiles involved in the accident belonged to the plaintiff, and the other automobile belonged to the defendant, R. C. Sawyer; and, at the time of the accident, was being driven by the defendant, R. L. Cottingham, both of the defendants being in the Sawyer automobile at the time of the accident.

"3. At the time of the accident, the defendant, Walker E. Allen, was a citizen and resident of Dillon County, South Carolina, and was the duly elected, qualified and acting Sheriff of Dillon County, South Carolina, and the defendant, R. C. Sawyer, was a Deputy Sheriff of Dillon County, S. C., duly qualified and acting as such, and under the said Walker E. Allen, Sheriff of Dillon County, South Carolina. The defendant, Robert L. Cottingham, was not a regular Deputy Sheriff of

Dillon County, South Carolina, but was an employee of Dillon County, South Carolina, and was acting for a particular purpose, to wit: the return of a prisoner from the State of Virginia to South Carolina.

"4. At the time of the accident, the defendant Sawyer and the defendant Cottingham were both citizens and residents of Dillon County, South Carolina; and the defendant, R. C. Sawyer, as a Deputy Sheriff of Dillon County, South Carolina, was on his way to the State of Virginia in pursuance of his authority as Deputy Sheriff under the said Walker E. Allen, Sheriff, and at the request of said Sheriff, and for and on behalf of said Sheriff, to obtain a prisoner for said Sheriff.

"5. That the said defendant, R. C. Sawyer, acting as Deputy Sheriff to the said Walker E. Allen, Sheriff, and with the knowledge and consent of said Walker E. Allen, Sheriff, and for the purpose of procuring for the said Sheriff the prisoner in Virginia, engaged the defendant, Robert L. Cottingham, to drive the automobile to Virginia, and to assist the said R. C. Sawyer as Deputy Sheriff in returning said prisoner to the said Walker E. Allen, Sheriff of Dillon County, South Carolina.

"6. That at the time of the accident, the said Robert L. Cottingham was operating said automobile for and on behalf of said Walker E. Allen, Sheriff, and R. C. Sawyer, Deputy Sheriff of Dillon County, South Carolina, in connection with the official business of said Sheriff and Deputy Sheriff, in securing said prisoner; that said automobile was owned by the defendant, R. C. Sawyer, and was being used by him at the time of said accident in his official capacity as Deputy Sheriff under said Walker E. Allen, Sheriff, and was being used in connection with the business of said Walker E. Allen, Sheriff; that the said Walker E. Allen owned no interest in said automobile."

Upon these findings of fact, and, being of opinion that the automobile involved in the accident was being operated under the provisions of the statutes so as to make the Commissioner of Revenue of the State of North Carolina the agent or attorney for the defendant Walker Allen, Sheriff of Dillon County, South Carolina, and that service of process upon the said Commissioner of Revenue, as agent or attorney for the said Walker Allen, Sheriff, as aforesaid, is valid, the court so adjudged, and entered order denying the motion of said Allen to dismiss the action as against him.

The record fails to show any evidence to support findings of fact (1) that defendant Sawyer, as deputy sheriff, with knowledge and consent of defendant Allen, Sheriff, engaged defendant Cottingham to drive the automobile to Virginia, or (2) that defendant "Cottingham was operating said automobile for and on behalf of said Walker Allen, Sheriff."

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

Ellis & Nance and Joyner & Yarborough for plaintiff, appellee.

Joe P. Lane, of Dillon, South Carolina, and Rose & Lyon for defendant Allen, appellant.

WINBORNE, J. The statute, under which plaintiff has attempted to bring defendant Walker Allen, resident and sheriff of Dillon County in the State of South Carolina, into court in this action, Public Laws 1929, ch. 75, is entitled: "An act to provide for service of process in civil suits upon non-resident owners and operators of motor vehicles in actions or proceedings growing out of accidents or collisions in which such motor vehicle owners or operators may be involved." Section 1 of the Act provides that in any action or proceeding against a nonresident "growing out of any accident or collision in which said non-resident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State," service may be obtained through the Commissioner of Revenue. *Smith v. Haughton,* 206 N. C., 587, 174 S. E., 506; *Wynn v. Robinson,* 216 N. C., 347, 4 S. E. (2d), 884; *Crabtree v. Sales Co.,* 217 N. C., 587, 9 S. E. (2d), 23.

Though at the time of the accident here involved, defendant Walker Allen was not operating, or riding in the automobile of defendant Sawyer, the question is whether the automobile was being operated by defendant Cottingham for defendant Allen, or under his control or direction, express or implied. Applying pertinent principles of law to those findings of fact, which are supported by evidence, and binding on appeal, *Crabtree v. Sales Co., supra,* this question must be answered in the negative.

This decision follows the general principle of law that a delegate cannot delegate, *delegatus non potest delegare,* that is, "the person to whom an office or duty is delegated cannot lawfully devolve the duty on another, unless he be expressly authorized so to do." Black's Law Dictionary, 3rd Ed.; *Shankland v. The Mayor of Washington,* 5 Peters, 390, 8 L. Ed., 166; 26 C. J. S., 978.

A deputy, as usually defined, is one who by appointment exercises an office in another's name. He must be one whose acts, done under color of office, are of equal force with those of the officer himself. 26 C. J. S., 978; *Piland v. Taylor,* 113 N. C., 1, 18 S. E., 70; *Styers v. Forsyth County,* 212 N. C., 558, 194 S. E., 305.

In 26 C. J. S., at page 978, it is said: "The position of 'deputy,' as the word implies, is that of a subordinate, and he has power to do every act which his principal might do, but 'a deputy may not make a deputy.'"

Under the law as declared in this State, particularly in the cases of *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826, and *Styers v. Forsyth*

County, supra, where the status of a deputy sheriff has been recently considered, the position of a deputy sheriff is a public office, the appointment to which delegates to the deputy authority to perform only ministerial duties imposed upon the sheriff, and in respect to these duties, as stated in the *Styers case, supra,* "he acts as vice principal or *alter ego* of the sheriff, for the sheriff 'and his deputy are, in contemplation of law, one person.' " In the *Borders case, supra,* it is stated that the duties to be performed and the ends to be accomplished are as prescribed and directed by law, and not in accordance with the direction and discretion of the sheriff. The deputy is neither the agent, servant, nor employee of the sheriff. In this connection *Stacy, C. J.,* speaking specifically thereto in the *Styers case, supra,* said: "It is true that in some of the cases a deputy is loosely spoken of as an 'employee of the sheriff,' or as an 'agent of the sheriff,' but the designation is inexact, and is not to be found in those cases dealing with his precise status."

Accordant with these principles, it follows that in the present case the automobile was being operated for defendant Sawyer, and under his control or direction in the performance of his duties as deputy sheriff, within the purview of the statute, Public Laws 1929, chapter 75, and not for defendant Allen, as sheriff. In respect to those duties Sawyer lacked authority expressly or impliedly to designate another to act in his stead for the sheriff.

The judgment below is

Reversed.

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF Z. SMITH REYNOLDS, DECEASED.

(Filed 5 June, 1942.)

Executors and Administrators § 18—Neither claimant nor estate may appeal from report of referees in proceeding under C. S., 99.

Where a claimant and the personal representative voluntarily execute a written agreement referring the claim to disinterested persons under C. S., 99, the referees are not required to decide the matter according to law, and their report is conclusive and neither party is entitled to appeal therefrom upon exceptions, there being no provision in the statute for appeal and, the proceeding being neither a civil action nor a special proceeding nor a judicial order, and neither C. S., 637, nor C. S., 638, is applicable.

APPEAL by claimant, Mrs. Mary K. Babcock, from *Clement, J.,* at November Term, 1941, of FORSYTH. Reversed.

This was a proceeding under C. S., 99, to determine the validity of a claim against the estate of Z. Smith Reynolds.

The administrator and the claimant, a sister of the intestate, entered into an agreement in writing to refer the matter in controversy to three disinterested persons who should "hear the evidence relating to said claim, and determine the justness thereof, and make their award in accordance with their finding, as provided in section 99 of the North Carolina Code of 1939." The referees chosen by the administrator and the claimant, acting under this agreement and in accord with the provisions of this statute, decided in favor of the claimant. Both the written agreement to refer and the report were filed in the clerk's office. The administrator filed exceptions to the report, and appealed to the Superior Court. The claimant moved to dismiss the appeal on the ground that there was no authority in law for such an appeal, and that the court was without jurisdiction. The motion was overruled and claimant excepted. Upon consideration of the report and exceptions thereto the court below sustained certain of the exceptions, reversed the decision of the referees, and rendered judgment against the validity of the claim.

The claimant, Mrs. Mary K. Babcock, appealed to this Court.

Womble, Carlyle, Martin & Sandridge for Mary K. Babcock, appellant.

Vaughn, Graham & Blackwell for Estate of Z. Smith Reynolds, deceased, appellee.

DEVIN, J. The matter in controversy between the claimant and the administrator of the estate of Z. Smith Reynolds was the justness of her claim for the return of money borrowed from her by the intestate, evidenced by a note. At the time of the loan the intestate was under the age of twenty-one years, and died before attaining his majority. The amount of the loan was retained and not returned by the intestate or by his administrator. For the determination of this controversy the parties agreed in writing to resort to the method prescribed by C. S., 99. The decision thus reached and duly reported was in favor of the claimant. The administrator, however, filed exceptions to the report and appealed to the Superior Court. Over objection of the claimant, the court below reviewed the report and reversed its conclusion.

The sole question presented by this appeal is whether the determination of a controversy, in accord with the provisions of this statute, is final and conclusive on the parties, or whether it is open to appeal under the ordinary rules pertaining to consent references in civil actions or to special proceedings begun before the clerk.

The statute, originally enacted in 1869, is as follows: "If the executor, administrator or collector doubts the justness of any claim so presented, he may enter into an agreement, in writing, with the claimant, to refer the matter in controversy, whether the same be of a legal or equitable

nature, to one or more disinterested persons, not exceeding three, whose proceedings shall be the same in all respects as if such reference had been ordered in an action. Such agreement to refer, and the award thereupon, shall be filed in the clerk's office where the letters were granted, and shall be a lawful voucher for the personal representative. The same may be impeached in any proceeding against the personal representative for fraud therein: Provided, that the right to refer claims under this section shall extend to claims in favor of the estate as well as those against it."

The purpose of this statute obviously was to empower the administrator to enter into an agreement in writing to submit to referees, rather than to the court, the validity of a disputed claim, the decision to be binding upon the estate as well as the claimant. Only those having a pecuniary interest in the estate may be heard to impeach the result for collusion or fraud. The statute thus provides a convenient and summary method of determining the validity of a claim against an estate. The proceeding is based upon the agreement of the parties. It is not an action, nor a consent reference under the Code. It lacks the ordinary incidents of a special proceeding which is begun before the clerk. There is neither in the statute nor in the agreement any provision or machinery for review or appeal. It is unlike C. S., 626, which provides for the submission to the court of a controversy without action, with right of appeal expressly conferred. It differs from the statutory procedure regulating arbitration and award under ch. 94, Public Laws 1927, which provides for the supervision of the court. No jurisdiction was conferred on the judge by C. S., 637, since this was neither a civil action nor a special proceeding. The right of appeal conferred by C. S., 638, is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. Neither the execution of the agreement nor the jurisdiction thereby given to the referees is controverted. The decision was within the terms of the submission.

The administrator and the claimant have formally stipulated to submit the matter in controversy to a tribunal of their own choosing. From its decision they reserved no right of appeal. The result can be impeached only for fraud. *Gardner v. Masters,* 56 N. C., 463; *Metcalf v. Guthrie,* 94 N. C., 447; *Millsaps v. Estes,* 137 N. C., 536 (539), 50 S. E., 227; *Williams v. Mfg. Co.,* 153 N. C., 7, 68 S. E., 902; *Nelson v. R. R.,* 157 N. C., 194, 72 S. E., 998; *Sprinkle v. Sprinkle,* 159 N. C., 81, 74 S. E., 739; *Farmer v. Wilson,* 202 N. C., 775, 164 S. E., 536; *District Columbia v. Bailey,* 171 U. S., 161; *U. S. v. Gleason,* 175 U. S., 588; *Whitcher v. Whitcher,* 49 N. H., 176 (180); 6 C. J. S., 265; 3 Am. Jur., 951.

In *Lassiter v. Upchurch,* 107 N. C., 411, 12 S. E., 63, the Court used this language: "However that may be in ordinary submission by parties

to arbitration, we think that section 1426 of The Code (now C. S., 99) was intended to create an expeditious and inexpensive mode by which controversies between executors, administrators, or collectors and claimants against the estates of testators and intestates may be settled and determined, and, fairly interpreted, the award of the referees, unless impeached for fraud and collusion, should have the effect, at least, to determine and put an end to the controversy, if not of a judgment in an action between the parties. Its effect, if unimpeached for fraud and collusion, is to determine and settle the validity or invalidity of the debt in a mode prescribed and authorized by law, and if not intended to put an end to the controversy involved, the statute is useless, but if it has this effect, then the award, when filed, whether for or against the administrator, is equivalent to a judgment, and can only be attacked for collusion and fraud."

The decision in *Lassiter v. Upchurch, supra,* was cited in *McLeod v. Graham,* 132 N. C., 473, 43 S. E., 935, as authority for holding that a judgment based upon the report of the referees under this statute could not be set aside for irregularity even to correct a mistake. See, also, *Ezzell v. Lumber Co.,* 130 N. C., 205, 41 S. E., 99; *Mayberry v. Mayberry,* 121 N. C., 248, 28 S. E., 349; *In re Shutt,* 214 N. C., 684, 200 S. E., 372.

The method of deciding a disputed claim prescribed by this section is a substitute for a proceeding in court, and depends for its conclusive effect, as to the question submitted, upon the voluntary agreement of the parties. By it a question material to the proper settlement of an estate is determined. The report of the decision is filed in the clerk's office, not for the purpose of permitting exception and appeal, but as establishing an item in the administrator's accounting. It is given the effect by the statute of constituting a lawful voucher in his hand.

The form in which the referees in this case, under C. S., 99, made their report, containing findings of fact and conclusions of law, would not authorize an appeal from their report to the Superior Court. In cases of arbitration it is well settled that the arbitrators chosen by the parties to determine a controversy as to a particular matter are not required to decide according to law. *Keener v. Goodson,* 89 N. C., 273; *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; *Millinery Co. v. Ins. Co.,* 160 N. C., 130 (140), 75 S. E., 944; 3 Am. Jur., 923; 112 A. L. R., 874.

The principle referred to in *Smith v. Kron,* 109 N. C., 103, 13 S. E., 839, is not controlling in a proceeding under C. S., 99. That was a case of arbitration entered into in actions already pending in the Superior Court, under agreement that the award should be made a rule of court. Upon similar situations were based the decisions in *Lusk v. Clayton,* 70 N. C., 184; *Hurdle v. Stallings,* 109 N. C., 6, 13 S. E., 720; *Wyatt v.*

R. R., 110 N. C., 245, 14 S. E., 683; *Patton v. Garrett*, 116 N. C., 847, 21 S. E., 679. In *Herndon v. Ins. Co.*, 110 N. C., 279, 14 S. E., 742, the question was whether the appraisers selected under the provisions of a fire insurance policy had reached a final agreement and delivered the award. The distinction between an arbitration in a pending suit, and one based entirely on the agreement of the parties is pointed out in McIntosh Prac. & Proc., sec. 537. Here the submission to the referees under this statute was without reservation, and was the method selected by the administrator and the claimant to decide a disputed question arising in the administration of an estate, and did not afford an avenue of approach to technical litigation originally sought to be voided.

We conclude that the decision of the referees under the statute invoked was binding upon the parties and was conclusive as to the validity of the claim. There was no suggestion of fraud or collusion. The payment of Mrs. Babcock's claim would constitute a proper disbursement from the assets of the estate, and the award a lawful voucher in the hands of the administrator.

The motion to dismiss the exceptions to the report and the appeal therefrom should have been allowed. The judgment of the Superior Court must be

Reversed.

HOWARD E. BREWER v. SOUTHERN RAILWAY COMPANY.

(Filed 5 June, 1942.)

1. Evidence § 28: Master and Servant § 27—Evidence of condition of plaintiff's shoe some time after accident, without more, held no evidence of condition of place plaintiff stood at time of accident.

Testimony of plaintiff that he saw paint on the bottom of his shoe some four months after the accident, and testimony of a witness that soon after the accident he saw paint on the heel of plaintiff's shoe, without evidence as to the condition of the shoe before the accident or evidence that care was taken to keep the shoe in the same condition it was in at the time of the accident, is no evidence that the platform or step on which plaintiff was standing at the time he slipped and fell to his injury had wet paint on it or any other foreign substance, and fails to sustain plaintiff's allegation, in his action under the Federal Employer's Liability Act, that defendant was negligent in permitting the step or platform on which plaintiff was required to work in the course of his duties in interstate commerce, to become covered with wet paint, dust, or other substance.

2. Master and Servant § 27—Evidence held not to sustain allegation that railroad car was equipped with defective brake.

In this action under the Federal Employer's Liability Act, plaintiff's evidence tended to show that the brake used was approved and in general

use and that in its operation it would turn to the left upon a slight pull. Plaintiff testified that when he slipped and fell from the brake step he caught the brake wheel, which turned to the left and thus failed to provide him with a stationary grip to prevent his fall. *Held:* Plaintiff's evidence fails to support his allegation that the brake in question was defective and is no evidence of negligence on the part of the employer in this respect.

APPEAL by plaintiff from judgment as in case of nonsuit, entered upon motion of defendant when the plaintiff had introduced his evidence and rested his case, C. S., 567, by *Armstrong, J.*, at January Term, 1942, of FORSYTH.

This is an action to recover damage for personal injury to an employee alleged to have been negligently caused by an employer engaged in interstate commerce brought under the provisions of "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," commonly known as the "Federal Employer's Liability Act." The plaintiff was employed as a yard brakeman by the defendant, and was injured by falling or being thrown from a brake platform or step on the end of a boxcar just after he had applied the brake thereon to render the position of the boxcar stationary.

The defendant is alleged to have been actionably negligent in two respects: first, that the brake platform or step upon which the plaintiff was compelled to stand while applying the brake had been recently painted and was wet and slippery and that there had been allowed to collect on this brake platform or step dust, lime, crushed rock, or similar substances, which caused the plaintiff's foot to slip and him to fall from the platform or step to the ground to his injury; and second, that the brake which the plaintiff was compelled to operate was defective in that it would turn to the left upon a slight pull, when it should have been so constructed as to remain in a fixed position.

The sole exceptive assignment of error in the record is ". . . that the court erred in dismissing this action as of nonsuit . . . for the reason that the evidence shows that the defendant was negligent in at least two respects, *i.e.*, a defective condition of the brake platform and a defective brake, which negligence proximately caused his injury."

J. Paul Stevens, Roy L. Deal, and J. M. Wells, Jr., for plaintiff, appellant.

Womble, Carlyle, Martin & Sandridge for defendant, appellee.

SCHENCK, J. The first allegation of actionable negligence on the part of the defendant, namely, that the defendant had negligently allowed wet paint, dust or similar substance, on the brake platform or step upon which plaintiff was compelled to stand to apply the brake of the boxcar,

which caused him to slip and fall to the ground to his injury, is not sustained by the evidence. The plaintiff's own testimony is insufficient to support this allegation. He testified: "I did not see any paint or dust on this brake step," that he made a statement as to how the accident occurred in which statement he said: "I do not know whether there was anything like grease or other foreign substance on the step, as I didn't examine it, and that is a fact"; that the car looked like it had been freshly painted, it was bright and shiny, "it was a new looking car, I don't know whether it was wet or not. I don't know even now that it was wet; . . . I didn't notice anything on the brake step. The only thing I know about dust and paint being on that brake step is what I found on my shoe when I saw that shoe about four months later; that is all I have to go by." The testimony of the plaintiff that he saw paint on the bottom of his shoe four months after the accident is not sufficient to bridge the hiatus in the proof. It is not shown when or how the paint got on the shoe. The condition of the shoe before the accident is not disclosed, and four months elapsed after the accident before the paint was noticed on the shoe, and it is not shown that in the meantime care was taken to keep the shoe in the same condition, or that the paint may have gotten on the shoe either before or after the accident. The testimony of the plaintiff's witness McCrowell to the effect that soon after the accident he "noticed a little streak of red paint on the heel of his (plaintiff's) shoe, and that was on the heel of his left shoe," is likewise insufficient to support the allegation, when considered either alone or in connection with the other evidence, since there is an absence of any evidence as to the condition of the shoe prior to the accident. The question of the defendant's actionable negligence is left in the realm of speculation and conjecture. *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan,* 271 U. S., 472, 70 Law. Ed., 1041.

The second allegation of actionable negligence on the part of the defendant, namely, that the defendant furnished and equipped the boxcar, from the brake platform or step of which the plaintiff fell, with a defective brake, which permitted the wheel of the brake to turn to the left upon a slight pull by the plaintiff, when it should have remained stationary, which caused the plaintiff to fall to the ground to his injury, is likewise unsupported by the evidence.

The plaintiff's own testimony discloses that the brake involved was a Minor Brake, and there is no evidence in the record that such a brake is not a brake in general and approved use, but to the contrary effect the plaintiff testified: "Any man who has been railroading for any length of time and doesn't know a Minor brake wouldn't be much of a man. We have to use that brake but I don't know whether it is in general use. Any railroad man knows a Minor brake. They come in contact

with them every day. I say that the railroad men here generally used it, but I wouldn't say the Company had it in general use. I testified at the preliminary examination that the Minor brake was in general use. I am not denying that fact."

The plaintiff, however, contends that the brake was defective because when he caught hold of the wheel thereof as he slipped and fell, the wheel turned to the left and let him down, instead of remaining fixed and furnishing him a stationary object to which to hold. The turning of the brake wheel to the left when the weight of the plaintiff was thrown on it cannot be held for evidence of defect in the brake when it is alleged in the complaint and admitted in the answer that on a Minor brake, such as is here involved and such as is in general and approved use, "a light pull to the left, after the brake had been set, would cause the wheel to turn to the left, partially releasing the brake." According to plaintiff's own allegation and testimony there was nothing unusual about the brake wheel on a Minor brake turning toward the left, it was designed so to function. The plaintiff testified: "The gradual release (of the brake) is accomplished by turning the wheel back, counter-clockwise. Turning it to the left gradually releases it. The wheel is what you turn. . . . The only way to release this brake gradually is to pull the wheel over to the left as you face the wheel."

The plaintiff describes how he came to fall in the following language: "When my foot slipped, my whole weight came right down on that brake wheel, pulling it to the left. I had the brake wheel at the top, and hold of it at the top with my right hand. The brake wheel gave away with me and turned. The brake wheel, in turning, came down as my body came down to where I could not hold it. I couldn't say whether it was at the bottom of the turn I couldn't hold it, but it come on down towards the bottom. I don't know at just what point I lost my grip. I testified at a preliminary examination before this trial that the brake wheel did not spin, and that is the truth."

In turning to the left the brake wheel was functioning in the manner and way it was designed to function, and in so doing instead of evidencing any defect in the mechanism it was evidencing proper design and construction.

We are constrained to hold that the ruling of his Honor in granting the defendant's motion for a judgment as in case of nonsuit when the plaintiff had introduced his evidence and rested his case was correct, and his judgment accordant therewith is, therefore,

Affirmed.

I. ORNOFF, TRADING AS DURHAM IRON & METAL COMPANY, v. CITY OF DURHAM AND R. A. SORRELL, TAX COLLECTOR FOR CITY OF DURHAM.

(Filed 5 June, 1942.)

1. Appeal and Error § 2—

An appeal from the refusal of a motion for judgment on the pleadings is fragmentary and premature and will be dismissed.

2. Pleadings § 20—

Upon demurrer *ore tenus* an objection to the refusal of the court to permit defendant to introduce evidence cannot be sustained, since only matters presented in the pleadings will be considered on demurrer.

3. Municipal Corporations § 37—

Under the municipal zoning ordinance in question, which provided that any nonconforming uses existing at the time of the passage of the ordinance might be continued, *it is held*, the municipal board of adjustment has no power to regulate nonconforming uses which existed at the time of the passage of the ordinance and therefore the provision of the ordinance granting the right of review by *certiorari* to the board of adjustment has no application to businesses falling within the proviso.

4. Same: Mandamus § 2a—

Where a zoning ordinance provides that any nonconforming use existing at the time of its passage may be continued, the duty of the municipal tax collector to issue a license to a nonconforming business existing at the time of the passage of the ordinance is purely ministerial and not discretionary or *quasi*-judicial, and *mandamus* will lie to compel the performance of such duty.

5. Mandamus § 2e—

Where a zoning ordinance provides that any nonconforming use existing at the time of its passage may be continued, the municipal board of adjustment has no jurisdiction over businesses coming within the proviso, and therefore when a person claiming to come within the proviso is denied license, the contention of the city that he cannot maintain suit for *mandamus* because of the existence of an adequate remedy at law by *certiorari* to the board of adjustment, is untenable.

6. Municipal Corporations § 37—

Where a municipal zoning ordinance provides that nonconforming uses existing at the time of the passage of the ordinance may be continued, and plaintiff, in a suit for *mandamus*, alleges that he and his predecessors were operating a junk business within the zone prior to the passage of the ordinance, and this allegation is denied in the municipality's answer, an issue of fact determinative of the rights of the parties is raised for the consideration of a jury.

APPEAL by defendants from *Parker, J.*, at February Term, 1942, of DURHAM. Affirmed.

This is an action to obtain the relief of *mandamus* and mandatory injunction, wherein the plaintiff seeks a decree directing the defendants to issue to him a license to conduct a junk business at 1004 and 1006 Roxboro Street in the city of Durham, and enjoining the defendants from interfering with the operation of such business, and the defendants demur *ore tenus* to the complaint and move for a judgment on the pleadings. The court overruled the demurrer and denied the motion, whereupon the defendants excepted and appealed to the Supreme Court, assigning errors.

Victor S. Bryant and John D. McConnell for plaintiff, appellee.
Claude V. Jones for defendants, appellants.

SCHENCK, J. It is alleged in the complaint that the plaintiff is a citizen and resident of Durham County, and that the corporate defendant is a municipal corporation and the individual defendant is the tax collector thereof; that on 8 May, 1941, the plaintiff tendered to the defendants $62.50 in payment of tax specified for the privilege of operating a junk business at 1004 and 1006 Roxboro Street in the city of Durham for the period between 1 June, 1941, through 31 May, 1942, which payment the defendants declined to accept and refused to issue to the plaintiff license to operate such business at such place and time, and based their refusal upon the theory that they were prohibited from issuing such license by a zoning ordinance adopted by the city of Durham on 16 May, 1926; it is further alleged in the complaint that a junk business has been continuously operated at 1004 and 1006 Roxboro Street in the city of Durham by the plaintiff and his predecessors in title of said premises since before March, 1925, prior to 16 May, 1926, when the ordinance which defendants invoke was adopted; and that said ordinance contains, *inter alia,* a provision as follows: "Any non-conforming use existing at the time of the passage of this ordinance may be continued."

The defendants' appeal in so far as it relates to their motion for judgment on the pleadings is fragmentary and premature and should be dismissed, since no appeal lies from a refusal of a judgment on the pleadings. The proper procedure upon such refusal is to bring forward an exception thereto for ruling upon appeal from a final judgment. *Johnson v. Insurance Co.,* 215 N. C., 120, 1 S. E. (2d), 381, and cases there cited.

The exception brought forward by the defendants that the court erred in sustaining plaintiff's objection to their introducing in evidence the ordinance adopted 16 May, 1926, by the city of Durham, cannot be sustained, since it is contrary to the uniform ruling of this Court that only matters presented in the pleadings will be considered on demurrer. *Besseliew v. Brown,* 177 N. C., 65, 97 S. E., 743, and cases there cited.

The defendants contend that the relief of *mandamus* and injunction sought by the plaintiff should be denied for the reason that the plaintiff

has an adequate remedy at law for the wrong which he alleges he has suffered—that if the plaintiff has wrongfully suffered by reason of the refusal of the defendants to grant him a license to conduct a junk business at the place involved, he has the right to apply for a *certiorari* from the Board of Adjustment established by virtue of Public Laws 1923, ch. 250, secs. 1 to 11, N. C. Code of 1939 (Michie), secs. 2776 (r) to 2776 (aa), to have the action of the defendants reviewed. Without deciding whether the public law referred to authorizes the city of Durham to enact an ordinance that would give to a board of adjustment the right to issue a *certiorari* to the tax collector and the governing board of the city of Durham to review their action in declining to grant the plaintiff a license to conduct a junk business at the place desired, we are of the opinion that the ordinance actually adopted by the city on 16 May, 1926 (made a part of the city's answer) fails to grant to the Board of Adjustment thereby established the right to issue such a *certiorari* in the case at bar. Nowhere in such zoning ordinance is the Board of Adjustment given the power to regulate nonconforming uses which existed at the time of the passage thereof, except to extend a nonconforming use of a building upon a lot occupied by such use or building at said time. Indeed, it is specifically provided in section 7 of such zoning ordinance that "any non-conforming use existing at the time of the passage of this ordinance may be continued."

The defendant R. A. Sorrell had no discretion to exercise or *quasi*-judicial duties to perform in connection with the issuance of a license to the plaintiff to do a junk business. His duties were purely ministerial. Such being the case, the right of *mandamus*, under the allegations of the complaint, did lie in the plaintiff. *Poole v. Board of Examiners, ante*, 199, 19 S. E. (2d), 635, and cases there cited.

The plaintiff contends that since the complaint alleges that his business has been in continuous existence since before the passage of the zoning ordinance, that he has tendered the amount of the privilege tax, that he has been refused a license, and that the zoning ordinance provides that "any non-conforming use existing at the time of the passage of this ordinance may be continued," he has alleged a clear legal right to demand a *mandamus* and mandatory injunction; the defendants contend that the plaintiff has an adequate remedy at law through appeal by *certiorari* to the Board of Adjustment and is therefore not entitled to seek equitable relief. Since we are of the opinion that the zoning ordinance passed by the governing board of the city of Durham fails to confer any jurisdiction upon the Board of Adjustment as to nonconforming uses existing at the time of the passage thereof, we conclude that his Honor was correct in overruling the demurrer *ore tenus*.

We also conclude that since it is alleged in the complaint that the plaintiff's junk business at 1004 and 1006 Roxboro Street in the city of

Durham was a "non-conforming use existing at the time of the passage of the ordinance," and that since such allegation is denied by the answers an issue of fact arises upon the pleadings. In truth, this issue is the gravamen of the case. If the junk business of the plaintiff existed at the place alleged at the time of the passage of the ordinance, it may, according to the plain provision of the ordinance, continue; if, on the other hand, it did not so exist at the time of its passage it may be prohibited. Whether it did or did not so exist at such time and place is a vital and determinative issue of fact upon which the parties had a right of trial by jury. N. C. Prac. & Proc. (McIntosh), p. 542.

The judgment of the Superior Court is

Affirmed.

STATE v. FANNIE MITCHELL.

(Filed 5 June, 1942.)

1. Criminal Law § 71—

There is no authority for granting an appeal *in forma pauperis* without proper supporting affidavit, either in a criminal prosecution or a civil action, and therefore a statement in the appeal entries that plaintiff is permitted to appeal as a pauper has no effect when defendant fails to file the jurisdictional affidavit or files an insufficient affidavit.

2. Same—

The amendment of C. S., 649, by ch. 89, Public Laws 1937, permitting correction of errors or omissions in the affidavit or certificate of counsel in pauper appeals at any time prior to the hearing of the argument of the case, applies only to appeals in civil actions and not to appeals in criminal prosecutions under C. S., 4651 and 4652.

3. Same—

The affidavit required for pauper appeals in criminal prosecutions, C. S., 4651, must be filed during the trial term or within ten days from the adjournment thereof, and must contain averments that defendant is wholly unable to give security for cost, that he is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith, and these requirements are mandatory and jurisdictional and are not subject to waiver.

4. Same—

Where the record on an appeal *in forma pauperis* in a criminal prosecution fails to contain an order allowing such appeal or affidavit sufficient to support such order, the Supreme Court must dismiss the appeal for want of jurisdiction upon motion of the Attorney-General, and omissions and defects cannot be cured by affidavits filed in the trial court more than ten days after the adjournment of the trial term.

STATE *v.* MITCHELL.

APPEAL by defendant from *Burgwyn, Special Judge,* at February Term, 1942, of ALAMANCE.

Criminal prosecution tried upon warrant charging the defendant with having "in her possession untax-paid whiskey for the purpose of sale."

Verdict: Guilty.

Judgment: Six months in jail.

The defendant gave notice of appeal, and the following appears among the entries: "The defendant is permitted to appeal as a pauper."

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

John J. Henderson for defendant.

STACY, C. J. Upon the call of the docket from the Tenth District, the district to which the case belongs, the Attorney-General lodged a motion to dismiss the appeal, on the ground that it is *in forma pauperis* without order allowing it, or affidavit sufficient to support such an order. This was met by counter-motion for *certiorari* to correct the record and to have the affidavit and order allowing the defendant to appeal *in forma pauperis* sent up by the clerk of the Superior Court of Alamance County.

The clerk has certified two affidavits, one dated 28 February, 1942, which omits to state that "the application is in good faith," and another attempting to cure this defect executed 16 May, 1942. The order signed by the assistant clerk allowing the defendant to appeal *in forma pauperis* is not dated, but it appears on the bottom of the certificate of counsel bearing date 28 February, 1942.

The notation in the appeal entries to the effect that "the defendant is permitted to appeal as a pauper," availeth naught without affidavit to support it, or in the face of an insufficient affidavit. *S. v. Martin,* 172 N. C., 977, 90 S. E., 502. The appeal entries are not signed by the judge.

There is no authority for granting an appeal *in forma pauperis* without proper supporting affidavit, either in a criminal prosecution or a civil action, *S. v. Moore,* 93 N. C., 500; *Lupton v. Hawkins,* 210 N. C., 658, 188 S. E., 110, nor are the mandatory and jurisdictional requirements of the statute subject to indulgences or waiver. *S. v. Holland,* 211 N. C., 284, 189 S. E., 761. This is not a harsh rule. It simply means that one who would avail himself of the benefits of the statute must comply with its terms. That is all.

It has been pointed out in a number of cases that the statutory requirements for prosecuting appeals *in forma pauperis* are different in criminal cases, C. S., 4651 and 4652, from what they are in civil actions. The latter are controlled by the provisions of C. S., 649, which statute was amended by ch. 89, Public Laws 1937, so as to permit corrections of

errors or omissions in the affidavit or certificate of counsel at any time prior to the hearing of the argument of the case on appeal, but this amendment, in terms, applies only to the section pertaining to appeals in civil actions.

The affidavit required by C. S., 4651, is to be filed during the trial term or within ten days from the adjournment thereof. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734; *S. c., ibid.,* 648; *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281.

It is not the policy of our law to deny to any litigant his right of appeal, but inasmuch as he has no new trial in the Supreme Court, but only questions of law are to be determined, when a defendant in a criminal prosecution is unable to give security for costs, he is reasonably required to make affidavit (1) that he is wholly unable to give security for the costs, (2) that he is advised by counsel he has reasonable cause for the appeal prayed, and (3) that the application is in good faith. *S. v. Marion,* 200 N. C., 715, 158 S. E., 406; *S. v. Moore, supra.* The requirements of the statute are mandatory, not directory, and unless complied with the appeal will be dismissed, not as a matter of discretion, but for want of jurisdiction. *S. v. Robinson,* 214 N. C., 365, 199 S. E., 270. Here, the requirements of the statute have not been met, and we have no discretion in the matter.

However, as was done in the *Holland case, supra,* and the *Stafford case, supra,* we have examined the record and find no reversible error. Hence, the result:

Judgment affirmed; appeal dismissed.

STATE v. M. N. ROGERS.

(Filed 5 June, 1942.)

Criminal Law § 63—Judgment ordering that suspended execution be put into effect must be supported by finding that some express condition upon which the execution was suspended has been violated.

In a prosecution for assault upon a female execution was suspended upon condition, *inter alia,* that defendant not permit any woman to reside on any farm controlled by him unless such woman dwelt with mentally competent male members of her family. *Held:* A finding to the effect that prosecutrix dwelt on defendant's farm after the entry of the judgment and that defendant frequently spent the day with her when no male member of her family was present, without a finding that she dwelt on the farm controlled by defendant without any mentally competent male members of her family, is insufficient to support the conclusion that defendant had violated this condition, and judgment that the execution be put into effect is erroneous.

STATE *v.* ROGERS.

APPEAL by defendant from *Warlick, J.,* at December Term, 1941, of FORSYTH.

Criminal action instituted in the municipal court of the city of Winston-Salem, on 25 July, 1941. Warrant charged that the defendant did "unlawfully and wilfully assault, beat and wound one Naomi Wheeler, a woman, she being over 18 years of age, to the great damage of the said Naomi Wheeler." The defendant pleaded guilty of the charge.

The following judgment was entered: "After hearing the evidence in this case, the defendant is adjudged guilty and sentenced to pay a fine of $15.00 and the costs, and is hereby sentenced to be imprisoned in the common jail of Forsyth County for a term of six (6) months, to be worked on the public road; execution against the person to issue on motion of the Solicitor, conditioned upon the defendant's being law-abiding and of good behavior for a period of five years; and conditioned further upon defendant having no woman (other than members of his own family) employed in his store or cafe or other place of business, where he is employed, or which he operates, and conditioned further that no woman be allowed to reside on any farm controlled by the defendant unless such woman dwell with mentally competent male members of her family."

On 26 November, 1941, a judgment was entered in the municipal court of the city of Winston-Salem, N. C., in this cause, the pertinent parts of which are as follows: "The Court finds as a fact that Naomi Wheeler was the prosecuting witness, in the case in which the judgment was entered against the defendant, and that she has lived with the defendant since said judgment was entered, that she had her clothes in the house of the defendant on the farm of the defendant, that she ate at the same place; the Court further finds that the judgment heretofore entered was written to prevent just such a situation as this and that the continued association of the defendant and the conduct of the defendant is in direct violation of said judgment; the Court further finds as a fact that defendant frequently spent the day on his farm with only Naomi Wheeler present, and when no male member of her family was present. It is, therefore, Ordered, Adjudged and Decreed by the Court and upon motion of the Solicitor that the defendant, M. N. Rogers, be confined to the common jail of Forsyth County for a period of six (6) months, to be assigned to the State Highway Commission."

Application for writ of *habeas corpus* was made 26 November, 1941.

Pursuant to a petition and writ of *certiorari,* this cause was heard before his Honor, Wilson Warlick, and the following judgment was entered: "This cause being heard before the undersigned Judge of the Superior Court for Forsyth County at the December, 1941, Term of the Court, on the application of the defendant, M. N. Rogers, for a writ of

certiorari; and it appearing to the Court that the findings of fact by the Municipal Court of the City of Winston-Salem, as set out in the judgment, support the conclusion of the Court that the petitioner, M. N. Rogers, violated the terms of the suspended sentence; It is, Therefore, Ordered, Adjudged and Decreed by the Court that the writ of *certiorari* is dismissed and that the judgment of the Municipal Court of the City of Winston-Salem is sustained and the action is remanded to the Municipal Court of the City of Winston-Salem for disposition in accordance with this judgment. It is Further Ordered that the writ of *habeas corpus* issued in connection herewith likewise be dismissed."

From the foregoing judgment, the defendant excepted and appealed to Supreme Court and assigns error.

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

Roy L. Deal, Fred S. Hutchins, and H. Bryce Parker for defendant.

DENNY, J. Do the findings of fact of the municipal court in the judgment of 26 November, 1941, support the conclusion of the court that the defendant violated the terms of the suspended sentence? We are of opinion they do not. Sentence was suspended "conditioned upon the defendant's being law-abiding and of good behavior for a period of five years; . . . and conditioned further that no woman be allowed to reside on any farm controlled by the defendant unless such woman dwell with mentally competent male members of her family."

While the court finds as facts, in the judgment entered 26 November, 1941, that Naomi Wheeler has lived with the defendant since said judgment was entered; that she had her clothes in the house of the defendant on the farm of the defendant, and that she ate at the same place; that the defendant frequently spent the day on his farm with only Naomi Wheeler present, and when no male member of her family was present; the court fails to find as a fact that the defendant has violated any law or that he has not been of good behavior. Neither does the court find as a fact that the defendant has allowed a woman to reside on any farm controlled by him and that said woman has not dwelt with mentally competent male members of her family.

To legally impose a sentence on account of the violation of a condition in a suspended judgment, the court must find as a fact that some expressed condition in the judgment has been violated. *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593.

The findings herein are lacking in essentials to show a violation of the conditions relied on in the judgment. Naomi Wheeler may have been residing on a farm controlled by the defendant and she may not have

dwelt on said farm with mentally competent male members of her family, but the court did not so find.

His Honor erred in sustaining the judgment of the municipal court of the city of Winston-Salem, and the judgment of the court below is

Reversed.

ZULA McGHEE CUTTS AND T. W. CUTTS, HER HUSBAND, v. EMMA P. McGHEE AND VIOLET H. McGHEE.

(Filed 5 June, 1942.)

1. Deeds § 6—

The owner of lands executed a deed of gift thereto and delivered same to the grantee. Some three and a half years thereafter he acknowledged the deed and filed same for registration. *Held:* The acknowledgment of the execution was not a re-execution of the deed, and the deed of gift not having been registered within two years of its execution is void, C. S., 3315, and may not be revived by curative act of the Legislature.

2. Statutes § 5e—

Curative acts of the Legislature cannot revive void instruments.

APPEAL by plaintiffs from *Stevens, J.*, at February Term, 1942, of GRANVILLE.

Civil action to assert title to certain real estate.

The facts pertinent to this appeal, and set forth in an agreed statement of facts, are substantially as follows: On 28 July, 1900, Marion J. McGhee executed a deed of gift, conveying to his wife, Emma P. McGhee, and her heirs, certain lands to be held by her during her marriage to him and as long as she remained a widow. Upon the death or marriage of the said Emma P. McGhee, said lands should go to her children. This deed was delivered to the grantee and held by her until 12 January, 1904, on which date, at the request of the grantor, the deed was delivered to him and he acknowledged the execution thereof before J. T. Britt, C. S. C., of Granville County, N. C., and filed the same for registration. After the deed was duly recorded, it was returned to Emma P. McGhee.

On 6 September, 1938, Marion J. McGhee and wife, Emma P. McGhee, executed a warranty deed to Violet H. McGhee, in her own right and as trustee. The grantors specifically reserved a life estate for and during the term of their joint lives and for the term of the natural life of the survivor. A two-thirds interest in the lands involved was conveyed to Violet H. McGhee in fee simple and one-third to her in trust for the benefit of Zula McGhee Cutts, née Zula Elizabeth McGhee. The deed recites the fact that the former deed was without consideration and

not recorded until nearly four years after its execution. The latter deed was duly acknowledged and filed for registration on 9 September, 1938, in the office of the register of deeds for Granville County, N. C.

Jury trial was waived and his Honor, upon the facts submitted, was requested to render judgment. His Honor held that the deed dated 28 July, 1900, filed for registration 12 January, 1904, is a deed of gift and void because the same was not recorded within two years after the making thereof. His Honor further held that the deed dated 6 September, 1938, from Marion J. McGhee and wife, Emma P. McGhee, to Violet H. McGhee, filed for registration as above set out, vests in Violet H. McGhee such title in the lands described in said deed as said deed purports and undertakes to convey. Judgment was entered accordingly. Plaintiffs except to the judgment and appeal to the Supreme Court and assign error.

Parham & Taylor for plaintiffs.
Royster & Royster for defendants.

DENNY, J. The deed of gift executed 28 July, 1900, was not registered within two years from its execution, as required by Consolidated Statutes of North Carolina, sec. 3315, and was void at the time of its registration, 12 January, 1904. Curative acts of the Legislature do not revive void instruments. *Booth v. Hairston,* 193 N. C., 278, 136 S. E., 879; *S. c.,* 195 N. C., 8, 141 S. E., 480; *Reeves v. Miller,* 209 N. C., 362, 183 S. E., 294; *Allen v. Allen,* 209 N. C., 744, 184 S. E., 485.

Acknowledgment of the execution of an instrument is not a re-execution of it.

His Honor's ruling in the court below was correct, and the judgment is Affirmed.

ELSIE E. BROOCKS AND HUSBAND, T. A. BROOCKS, v. CONSTANCE L. MUIRHEAD AND WILLIAM MUIRHEAD.

(Filed 5 June, 1942.)

Pleadings § 29—

Where defendants file answer denying material allegations of the complaint, the court is without authority, on plaintiffs' motion to strike out the answer as sham and irrelevant, C. S., 510, to hear evidence, find facts *contra* the allegations and denials of the answer, and thereupon strike said allegations and denials and grant plaintiffs' motion for judgment on the pleadings.

BROOCKS *v.* MUIRHEAD.

APPEAL from *Parker, J.*, at February Term, 1942, of DURHAM.

Hedrick & Hall for plaintiffs, appellees.
J. L. Morehead for defendants, appellants.

SEAWELL, J. This action was brought to have Elsie Broocks declared legally owner of an easement for ingress and egress upon a certain alleged alleyway upon which her premises are alleged to abut, to have defendants enjoined from obstructing the alleyway, and to have issued a mandatory injunction to compel the defendants to remove obstructions placed by them in the alleged alleyway opposite defendants' premises.

The plaintiffs filed their complaint, developed in much evidentiary detail, with many references to maps, deeds, and other documents, and with many exhibits appended relating to their title and to negotiations with the defendants during the controversy preceding the commencement of the action. The defendants answered the allegations of the complaint specifically, admitting some and denying others, particularly those with reference to the existence of the alleyway and plaintiffs' alleged right therein, which they denied both in the main answer and in the further defense.

The plaintiffs moved to strike out the answer as sham and irrelevant. C. S., 510. Upon this motion, the judge took evidence, and "the plaintiffs having offered evidence in support of the motion, to which evidence the defendants neither objected nor excepted," found facts in favor of plaintiff, *contra* the allegations and denials of the answer; and struck out about twenty paragraphs of the answer, generally described as "denying, or tending to deny, the existence of an alleyway." Upon this alteration in the answer, he gave judgment to the plaintiffs upon the pleadings, declaring the title of the *feme* plaintiff to the easement in the alleyway and granting her the injunctive relief prayed for in the complaint.

Upon an inspection of the record, the court is of opinion that the court below exceeded its authority in hearing evidence upon the merits upon plaintiffs' motion. The judgment is, therefore, set aside, and the cause is remanded to the lower court for further procedure.

Error and remanded.

R. W. ASKEW, ADMINISTRATOR OF THE ESTATE OF JAMES HOWARD ASKEW, DECEASED, v. CAROLINA COACH COMPANY AND E. C. MILLER.

(Filed 5 June, 1942.)

1. Trial § 29c—

A charge to the effect that, since plaintiff was relying on circumstantial evidence to prove actionable negligence, plaintiff had the burden of proving each fact constituting an essential link in the chain of circumstances beyond a reasonable doubt is erroneous and constitutes prejudicial error.

2. Appeal and Error § 39—

Conflicting instructions upon the burden of proof, one correct and the other erroneous, must be *held* for reversible error.

APPEAL by plaintiff from *Dixon, Special Judge,* at January Term, 1942, of ALAMANCE. New trial.

This was an action to recover damages for wrongful death of plaintiff's intestate, alleged to have been caused by the negligence of the defendants in the operation of a passenger bus on the highway.

The issue of negligence was answered by the jury in favor of the defendants, and from judgment on the verdict plaintiff appealed.

J. Elmer Long and Clarence Ross for plaintiff, appellant.
Sapp, Sapp & Atkinson for defendants, appellees.

DEVIN, J. The plaintiff's intestate died as the result of a collision between an automobile he was driving and a large passenger bus of the corporate defendant driven by defendant Miller. The plaintiff relied almost entirely on circumstantial evidence to establish actionable negligence on the part of the defendants.

In submitting this phase of the case to the jury, and referring to this type of evidence, the trial judge used this language: "These concurring and coincidental facts are arranged in combination by a mental process of reasoning and inferences, enlightened by common observation, experience, reason, and knowledge. Where presumption arises from a number of connected dependent facts each essential to the series must be proved beyond a reasonable doubt. Such evidence is like a chain in which no link must be missing or broken, which destroys its continuity." Plaintiff having duly excepted, assigns this instruction as error.

While the use of the phrase "beyond a reasonable doubt" in the instruction complained of was evidently an inadvertence on the part of the judge, it was none the less prejudicial to the plaintiff, and necessitates a new trial. True, in preceding portions of the charge the correct rule as to the *quantum* of proof required of the plaintiff on the first issue was

given to the jury, but the later expression carried the implication that with respect to the circumstantial evidence relied on by the plaintiff a higher degree of proof was necessary to establish his case. This was at least conflicting and confusing. *Young v. Comrs.*, 190 N. C., 845, 130 S. E., 833.

Whether the plaintiff's evidence was sufficient to warrant its submission to the jury is not presented on this appeal, and is not decided.

For the reason stated, there must be a

New trial.

JOHN B. LOVE, JR., v. POSTAL TELEGRAPH-CABLE COMPANY.

(Filed 5 June, 1942.)

1. Trespass § 1g—

The placing and maintenance by a telegraph company of its transmission lines on private lands constitutes a continuing trespass.

2. Easements § 4: Eminent Domain § 24: Telephone and Telegraph Companies § 4—

Where the owner of land seeks to recover permanent damages to his land by reason of the maintenance by a telegraph company of its transmission lines upon his lands, the awarding of permanent damages would be equivalent to the acquisition of an easement by condemnation.

3. Limitation of Actions § 6—

Where the owner of land seeks to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitations, C. S., 441 (3), the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement is not barred until defendant has been in continuous use thereof for a period of twenty years so as to acquire the right by prescription.

APPEAL by plaintiff from *Bone, J.*, at January Term, 1942, from BLADEN.

Civil action for trespass and for permanent damages.

In 1891 the defendant constructed its transmission lines along a trail or highway over lands in Bladen County, now owned by the plaintiff. In 1927, when the highway was widened, the defendant moved part of its transmission lines from the highway right of way, to the extent of 24 poles, over on the lands now occupied by the plaintiff.

This action was instituted 27 September, 1940, to recover for the original trespass and for permanent damages.

The defendant denied liability and pleaded the three-year statute of limitations, C. S., 441 (ss. 3).

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.
Rountree & Rountree for defendant, appellee.

STACY, C. J. The action for trespass is barred by the three-year statute of limitations, C. S., 441 (ss. 3). The applicable provision is that actions for continuing trespass upon real property shall be commenced within three years from the original trespass, *i.e.*, in the language of the statute: "When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter."

It was said in *Teeter v. Tel. Co.*, 172 N. C., 783, 90 S. E., 941, that an action such as the present is to be regarded as one for a continuing trespass within the meaning of the law. Hence, for damages incident to the original wrong, and for that alone, no recovery can be had after the lapse of three years. But the plaintiff also sues for permanent damages, which, on recovery and payment, so far as plaintiff is concerned, would confer on the defendant the right to maintain its line on plaintiff's land for an indefinite period with the right to enter thereon, when reasonably required, for "the planting, repairing, and preservation of its poles and other property." *Caveness v. R. R.*, 172 N. C., 305, 90 S. E., 244. In short, in its broader aspect, the suit is to recover for the value of an easement, which can pass to the defendant only by grant, condemnation or prescription—this last by adverse possession and continuous user for a period of twenty years. *Teeter v. Tel. Co., supra.*

In case of railroads, by C. S., 440, this period has been reduced to five years, but there being no such statute in respect of telegraph companies, the common-law period of twenty years is required. *Geer v. Water Co.*, 127 N. C., 349, 37 S. E., 474.

The awarding of permanent damages would be equivalent to the acquisition of an easement by condemnation. *Geer v. Water Co., supra; Query v. Tel. Co.*, 178 N. C., 639, 101 S. E., 390.

Viewing the action, then, not simply as one for the original trespass, but also to recover permanent damages as compensation for an easement, there was error in allowing the defendant's motion for judgment of nonsuit.

Reversed.

STATE v. JOHN S. BALDWIN.

(Filed 5 June, 1942.)

Criminal Law § 80—

When defendant, given leave to appeal *in forma pauperis*, fails to serve his case on appeal within the time allowed, the appeal will be dismissed on motion of the Attorney-General, but when defendant has been convicted of a capital felony this will be done only after a careful inspection of the record proper fails to disclose error.

MOTION by State to docket case, affirm judgment, and dismiss appeal.

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

PER CURIAM. The defendant, John S. Baldwin, was tried at January Term, 1942, of the Superior Court of Durham County, before R. Hunt Parker, Judge, and a jury, upon a bill of indictment charging the defendant with the murder of one Dr. Randolph Jones, Jr., which resulted in a conviction of murder in the first degree and sentence of death. From this judgment the defendant gave notice of appeal and obtained an order permitting him to appeal *in forma pauperis*.

The defendant has failed to serve or otherwise perfect his case on appeal, and, the time therefor having expired, the Attorney-General has caused the record proper to be docketed in this Court with certificate from the clerk of the Superior Court of Durham County, setting forth that no case on appeal has been filed in that court and that the time therefor has expired.

It is stated in the motion to dismiss that "The Attorney-General has been informed by counsel for the defendant that he has carefully examined the record of the trial in this case, and has been unable to find any error which would entitle the defendant to a new trial."

The Attorney-General moved to dismiss defendant's appeal under Rule 17—213 N. C., 815.

We have carefully examined the record filed in this case and find no error. The judgment of the court below is affirmed and the appeal is dismissed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455; *S. v. Baldwin,* 213 N. C., 648, 197 S. E., 156; *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507.

Judgment affirmed. Appeal dismissed.

N. W. BRIDGES, ON BEHALF OF HIMSELF AND ALL OTHER CITIZENS AND TAXPAYERS OF THE CITY OF CHARLOTTE, NORTH CAROLINA, v. CITY OF CHARLOTTE, A MUNICIPAL CORPORATION; L. L. LEDBETTER, TREASURER OF SAID CITY; BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF CHARLOTTE, A BODY CORPORATE; AND BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM.

(Filed 24 June, 1942.)

1. Schools § 8—

Ch. 562, Public Laws 1933, abolished special tax and special charter school districts as then constituted, and retained them solely as local administrative units of the State school system.

2. Same—

A city constituting a special charter school district prior to the enactment of ch. 562, Public Laws 1933, was stripped of its character as a municipality and its board of school commissioners abolished as an agency of the municipality in the operation of schools within the district, and by operation of the Act the municipality, in the discharge of this function, became an administrative agency of the State school system.

3. Taxation § 4—

The State is not a municipality within the meaning of the Constitution, and since a city or county, in the operation of public schools within its territory, is not a municipality but an administrative agency of the State, such administrative units, in imposing taxes necessary to the maintenance of public schools, is not required to submit the question to a vote, the limitations imposed by Art. VII, sec. 7, being applicable solely to municipalities.

4. Schools § 9—

The General Assembly is charged with the duty of providing a system of public schools by mandate of Art. IX of the State Constitution, and what is necessary to the maintenance of such system must be given that interpretation which is consonant with reasonable demands of social progress, and is a question within the exclusive province of the Legislature.

5. Same: State § 5a—

The expression of legislative policy that the Teachers' and State Employees' Retirement Act has a definite relation to the just and efficient administration of the public school system is conclusive, and a tax imposed by a city to raise funds with which to pay its contribution to the Retirement Fund for salaries of teachers paid or supplemented by it, as required by Public Laws 1941, ch. 25, sec. 8 (c), is for a purpose necessary to the maintenance of the public school system within its territory.

6. Schools §§ 8, 31—

Although an administrative unit of the State public school system is required by the statute to submit to its voters the question of supplementing State funds to conduct schools of higher standards and longer terms,

the provision for a vote is not in deference to Art. VII, sec. 7, and the establishment of such supplement in no wise affects the character of the unit as a State agency for the administration of the public school system.

7. Schools § 9—

The Constitution requires that a six months term of public school be maintained as a minimum, and places the duty upon the General Assembly to meet this requirement and confers authority upon it to determine the quality and extent of a system of public schools beyond this minimum which the State is able to provide.

8. State § 5a: Constitutional Law § 12—

Benefits received by State employees under the Retirement Fund are deferred payments of salary for services rendered, and therefore such payments do not offend Art. I, sec. 7, of the State Constitution.

9. Taxation § 4—

Where an administrative unit of the public school system has voted a tax to supplement State funds to maintain schools of higher standards within its territory, it is required to contribute to the State Retirement Fund for teachers whose salaries are paid or supplemented by it, ch. 25, sec. 8 (c), ch. 143, sec. 1, Public Laws 1941, and when the supplementary tax theretofore voted by it is insufficient to provide such contribution, the unit may impose a tax to raise funds for this purpose without submitting the question to a vote.

10. Same—

The charter provision of a city that the question of supplementing State funds for its public schools must be submitted to a vote, sec. 55 (4), ch. 366, Public-Local Laws 1939, does not require that when the city has assumed the burden of supplementing State funds a tax necessary to provide funds for contributions to the State Retirement Fund for salaries of teachers paid or supplemented by it should be submitted to a vote, the State Retirement Act not being in legal contemplation of the charter provision, and the charter provision being ineffective to prevent a levy required by the subsequent legislative mandate.

11. Taxation §§ 1, 5: State § 5a—

A tax imposed to raise moneys required by law to be paid to the State Employees' Retirement Fund is for a public purpose, as having a definite relation to the efficient operation of the public school system, and the Act provides benefits to thousands of teachers and employees of this State without discrimination, and therefore the tax does not offend Art. V, sec. 3, of the State Constitution.

12. Constitutional Law § 6b—

The courts should not declare an act of the General Assembly unconstitutional unless it is so beyond a reasonable doubt.

STACY, C. J., not sitting.

BARNHILL, J., concurring.

WINBORNE, J., joins in concurring opinion.

APPEAL by plaintiffs from *Olive, Special Judge,* 16 March, 1942. From MECKLENBURG. Affirmed.

This action was brought by plaintiffs, taxpayers of the city of Charlotte, against the defendants, in the several capacities indicated, to enjoin further levy and collection of local taxes for contribution to the State Retirement Fund under chapter 25, Public Laws of 1941, as amended by chapter 143, Public Laws of 1941, known as the Teachers' and State Employees' Retirement Act, and to restrain defendants from paying out taxes already levied and collected for that purpose.

The Board of Trustees Teachers' and State Employees' Retirement System was made a party to the action by consent, and was permitted to adopt the answer of its codefendants.

The Act referred to provides for a retirement fund for teachers in the public schools, a part of which is raised out of public funds and a part by deductions from teachers' salaries. By its terms, local administrative units which supplement the items of school expense and conduct schools of a higher standard or longer term than those afforded by State support for the eight months term are required to contribute proportionally to the State fund, and the taxing authorities therein are required to provide the necessary funds therefor. Pertinent sections are as follows:

"Each Board of Education of each county and each Board of Education of each city, and the employer in any department, agency or institution of the State, in which any teacher receives compensation from sources other than appropriations of the State of North Carolina shall deduct from the salaries of these teachers paid from sources other than State appropriations an amount equal to that deducted from the salaries of the teachers whose salaries are paid from State funds, and remit this amount to the State Retirement System. City Boards of Education and County Boards of Education in each and every county and city which has employees compensated from other than the State appropriation shall pay to the State Retirement System the same per centum of the salaries that the State of North Carolina pays: Provided, that for the purpose of enabling the County Boards of Education and the Board of Trustees of city administrative units to make such payment, the tax levying authorities in each such city or county administrative unit are hereby authorized, empowered and directed to provide the necessary funds therefor." Chapter 25, Public Laws of 1941, section 8, subsection (c).

Section 1, chapter 143, Public Laws of 1941, adds:

"Provided, that it shall be within the discretion of the County Board of Education in a county administrative unit and the Board of Trustees in a city administrative unit, with the approval of the tax levying authorities of such unit, to provide for the payment from local tax funds of any amount specified in subsection (c) of this section in excess of the

amount to be paid to the Retirement System on the basis of the State Salary Schedule and term. In case the salary is paid in part from State funds and in part from local funds, the local authorities shall not be relieved of providing and remitting the same per centum of the salary paid from local funds as is paid from State funds. In case the entire salary of any teacher, as defined in this Act, is paid from county or local funds, the county or city paying such salary shall provide and remit to the Retirement System the same per centum that would be required if the salary were provided by the State of North Carolina."

The Charlotte city schools were operated under special charter until the enactment of the School Machinery Act of 1933, chapter 252, Public Laws of 1933. Thereafter the Charlotte district was set up as a city administrative unit for the purpose of operating schools under that Act, and has since continued as such city administrative unit.

The School Machinery Act of 1933, pertinent features of which were re-enacted in 1935 and in 1939, contains the following provisions:

"That the county board of education in any county administrative unit and the board of trustees in any city administrative unit, with the approval of the tax levying authorities in said county or city administrative unit and the State School Commission, in order to operate the schools of a higher standard than those provided for by State support, but in no event to provide for a term of more than 180 days, may supplement any object or item of school expenditure: PROVIDED, that before making any levy for supplementing State budget allotments an election shall be held in each administrative unit to determine whether there shall be levied a tax to provide said supplemental funds, and to determine the maximum rate which may be levied therefor." Section 17.

Following the procedure laid down in the Act, the Charlotte City Administrative Unit, on 23 March, 1935, voted supplements to State support of the schools, fixing the maximum tax limit for that purpose at twenty-five cents on the one hundred dollar property valuation, and proceeded to conduct a nine months school term and to pay teachers' salaries.

The local school board filed its supplementary budget for the fiscal year beginning 1 July, 1941, providing for the expenditure of the entire special tax under the 25c levy for purposes other than the payment of the required sums to the Teachers' Retirement Fund, and requested that the sum budgeted in connection with the Retirement Fund, approximately $17,124.75, be raised from sources other than the 25c special school levy. The levy was made and the taxes partially collected, and the authorities concerned propose to proceed with the collection of the rest of the taxes and to make the required contribution to the State Retirement Fund, if not contrary to law.

The plaintiffs obtained a temporary restraining order, and on the hearing of the order to show cause before Olive, Special Judge, the injunction was dissolved and plaintiffs appealed.

Taliaferro & Clarkson for plaintiffs, appellants.

Tillett & Campbell, Attorney-General McMullan, and Assistant Attorney-General Patton for defendants, appellees.

SEAWELL, J. No exception was made in the court below to the manner in which this suit is constituted, or to want of capacity of some of the defendants, as sued, in relation to the subject matter of the action. No doubt the parties desired a decision more broadly dealing with the merits of the case, as voiced by the challenge to the constitutionality of the Retirement Act and its interpretation in connection with related statutes, particularly the tax limitation adopted by popular vote for supplements under the School Machinery Act. We review the case in that light.

But the joinder of parties defendant and the capacity in which they are sued suggest that plaintiffs considered themselves as dealing with an attempted exercise of authority by the city of Charlotte as a municipality and with the "Board of School Commissioners of the City of Charlotte," formerly an agency of the municipality, as a corporate body retaining the relation to the schools in that district given it in the special act of incorporation. That is not the case. The present situation will be much less confusing if we remember that the Charlotte School District, operating as a special charter district, came squarely within the revolutionary fiat of section 4, chapter 562, Public Laws of 1933: "All school districts, special tax, special charter or otherwise, as now constituted for school administration or for tax levying purposes, are hereby declared non-existent." Under the further provisions of this Act, the Charlotte district became a city administrative unit, and the trustees of the former district were retained only as the local administrative body of that unit, shorn of all administrative authority other than that which they get from the School Machinery Act. This concession was made to the governing body of the old district, no doubt, to cushion the shock of total liquidation and out of deference to the importance of the trusts that had been committed to them—the magnitude of the schools—and to conserve the experience and interest built up in administration. But here the old regime ended and the new dispensation began. The unit was now a part of the Public School System and henceforth an agency of the State. In this is found the principle upon which our decision must rest. Its application will be as brief as a full understanding of the subject will permit.

After careful study of the subject through many years prior to 1941, a Commission was appointed (H. R. 48, Public Laws of 1939), which made a thorough investigation and reported its findings and recommendations to the General Assembly of 1941, which thereupon enacted chapter 25, Public Laws of 1941, as amended by chapter 143, Public Laws of 1941, which is known as the "Teachers' and State Employees' Retirement Act." The purpose of that Act is to provide benefits on retirement for the teachers in the public school system of the State and for State employees. It is based not only upon the principle of justice to poorly paid State employees, but also upon the philosophy that a measure of freedom from apprehension of old age and disability will add to the immediate efficiency of those engaged in carrying on a work of first importance to society and the State. The fund for final distribution on retirement is contributed in part by the State from public funds, and in part by deductions from teachers' and employees' salaries. County administrative units and city administrative units which supplement State support of the eight months school term to secure schools of higher standard or longer term are required to contribute to the State Retirement Fund. The Act makes no provision for submitting the question of local taxation to popular vote.

The plaintiffs contend that the law is unconstitutional and invalid; that the expenditure required comes within the purview of Article VII, section 7, of the Constitution, prohibiting taxation by a municipality, except for a necessary expense, without submitting the question to a popular vote; that if the payment out of the Retirement Fund is not salary, the law is offensive to Article I, section 7, of the Constitution, which provides that no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; and that if in the nature of salary, it necessarily comes within the purview of the 1933 School Machinery Act as a part of the supplements heretofore approved by popular vote, subject to the 25c on the $100 limitation on the tax rate heretofore adopted. There is a further contention that the Act contravenes Article V, section 3, of the Constitution as being inequitably levied and not for a public purpose. We consider these objections as nearly in that order as convenience permits.

1. The Constitution of North Carolina recognizes that it is the duty of the State to establish and maintain "a general and uniform system of public schools, where tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." Constitution, Article IX, section 2. Under Article IX, section 3, the State is required to be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in the year.

For a long period of its history, the State performed this duty by proxy, maintaining the schools through the agency of the counties; and Article IX, section 3, of the Constitution, denounces as a criminal offense the failure of their tax levying bodies to comply with the requirement that the schools be maintained at least six months in the year.

The plea that the levy of such a tax by a county, without submission to popular vote, is prohibited by Article VII, section 7, of the Constitution, as not being for a necessary expense was raised and settled in *Collie v. Commissioners,* 145 N. C., 170, 59 S. E., 44, by the declaration that the requirement that the public schools be maintained is a mandate of a co-ordinate article of the Constitution of equal dignity and force, and must be obeyed; and that Article VII, section 7, had no relation by way of limitation on the taxing power exercised for that purpose. Three of the Justices of the great Court which decided this case, in separate concurring opinions, wrote their names upon this monument to our educational progress.

There was in the mind of the Court a clear comprehension of the functions and powers of the State and of the agencies set up to perform this duty, and there was no confusion at any time as to where the ultimate duty and power was seated; and none, we think, as to the consequences which must follow a delegation of this duty and power as a matter of convenience of administration to the agencies selected. Nor should there be any doubt today that maintenance of the public schools and the furnishing of those things which are reasonably essential to that end are within the mandatory provision of the Constitution, unaffected by the "necessary expense" provision contained in the municipal section of the Constitution.

The State is not a municipality within the meaning of the Constitution. It seems to us self-evident that it may perform the duties required of it by the Constitution, as well as exercise those powers not otherwise prohibited, without embarrassment by constitutional limitations expressly operating on municipalities alone. Const., Art. IX, secs. 2, 3; Const., Art. VII, sec. 7. The public school system, including all its units, is under the exclusive control of the State, organized and established as its instrumentality in discharging an obligation which has always been considered direct, primary and inevitable. When functioning within this sphere, the units of the public school system do not exercise derived powers such as are given to a municipality for local government, so general as to require appropriate limitations on their exercise; they express the immediate power of the State, as its agencies for the performance of a special mandatory duty resting upon it under the Constitution, and under its direct delegation.

This view is clearly expressed in *Frazier v. Commissioners,* 194 N. C., 49, 61, 138 S. E., 433, from which we quote:

"Schools established and maintained by a county, city, town, or other municipal corporation *under a special act of the General Assembly* are not necessarily included within the State system of public schools. It has, therefore, been uniformly and consistently held by this Court that Article VII, sec. 7, of the Constitution is applicable to bonds issued and taxes levied by a county, city, town, or other municipal corporation for this purpose . . . These decisions, however, are not determinative of the question here presented for decision. The Constitution of North Carolina does provide—and its provisions in that respect have been held mandatory—that the General Assembly shall provide by taxation and otherwise for a general and uniform system of public schools, wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one, Article IX, sec. 2; and that to accomplish this end, the State shall be divided into a convenient number of districts, in which one or more public schools shall be maintained at least six months in every year, Article IX, sec. 3. It cannot be too often emphasized that the controlling purpose of the people of North Carolina, as declared in their Constitution, is that a State system of public schools shall be established and maintained—a system of schools supported by the State, and providing for the education of the children of the State—and that ample power has been conferred upon the General Assembly to make this purpose effective . . . The counties of the State are authorized by this statute (County Finance Act) to issue bonds and notes for the erection of schoolhouses and for the purchase of land necessary for school purposes, and to levy taxes for the payment of the same, principal and interest, *not as municipal corporations,* organized primarily for purposes of local government, *but as administrative agencies of the State,* employed by the General Assembly to discharge the duty imposed upon it by the Constitution to provide a State system of public schools. The limitations of Article VII, sec. 7, are not applicable to bonds or notes issued by a county, as an administrative agency of the State, under authority conferred by the County Finance Act, for the purpose of erecting schoolhouses, and equipping same, or purchasing land necessary for school purposes. We, therefore, hold that the board of commissioners of any county in the State, upon compliance with the provisions of the County Finance Act, has authority and is empowered to issue bonds or notes of the county for the purpose of erecting and equipping schoolhouses and purchasing land necessary for school purposes, and to levy taxes for the payment of said bonds or notes, with interest on the same, without submitting the question as to whether said bonds or notes shall be issued or said taxes levied, in the first instance, to the voters of the county, where such schoolhouses are re-

quired for the establishment or maintenance of the State system of public schools in accordance with the provisions of the Constitution."

To the same effect are *Owens v. Wake County,* 195 N. C., 132, 136, 141 S. E., 546; *Lacy v. Bank,* 183 N. C., 373, 380, 111 S. E., 612; *Lovelace v. Pratt,* 187 N. C., 686, 689, 122 S. E., 661; *Tate v. Board of Education,* 192 N. C., 516, 520, 135 S. E., 336.

From these cases, as well as from the reasoning of the matter, we gather a clear impression that whatever may be the limitations on a municipality with respect to its ordinary government under Article VII, sec. 7, they do not apply to it as an authorized agency in connection with the public school system; and that they do not, in fact, apply to any agencies as school administrative bodies, some of which, indeed, have no municipal functions to becloud the issue. In many city administrative units, the boundaries of the unit do not coincide with the city limits.

Attention should be directed to the distinction drawn in the decisions between agencies created for administrative purposes within the public school system and charter districts incorporated by special acts of the Legislature and empowered to maintain and conduct schools independently of it, which do not proceed on the authority as it comes from the State, through Article IX of the Constitution. *Frazier v. Commissioners, supra; Owens v. Wake County, supra.* Such independently operating schools were abolished by chapter 562, Public Laws of 1933, sec. 4, along with all other taxing districts—doubtless with the intent to bring all such activities within the public school system, and to secure uniformity and equality of opportunity into the school effort throughout the State. The city administrative unit and the county administrative unit, administrational devices first adopted in this Act, are not allied to such specially incorporated schools. They are, as the name implies, units within the public school system—established agencies of the State to carry on the then existing functions of the public school system, and logical and convenient agencies for investment with further power and duties as might be found expedient or necessary.

The suggestion that the Retirement Plan and payments of benefits thereunder are intrinsically not necessary purposes for maintaining the public school system is no doubt advanced under the same contention that taxation and expenditure under the Retirement Act must necessarily come within the limitation of Article VII, sec. 7, of the Constitution—a proposition we are compelled to reject for the reasons above stated; but we have the implied suggestion that they do not have that relevancy to the purposes expressed in Article IX of the Constitution that would bring them within that authority.

The extent to which the measures provided in the Retirement Act may be auxiliary to the efficient administration of the public school

system and justified as a measure of justice for those engaged therein is primarily, and in this instance we think wholly, for the Legislature. The evidence before that body indicated that they are highly important and effective in improving, stabilizing and maintaining standards of service in an underpaid and overburdened profession, which is now sustained by high idealism and sacrifice as much as by the meager pay.

We understand that what courts appropriately refer to as the "mandate" of Article IX of the Constitution carries with it not merely the bare necessity of instructional service, but all facilities reasonably necessary to accomplish this main purpose. And in this respect the word "necessary" has long been regarded as a relative, not an exigent, term—certainly not one which may be used to drain the life and substance out of a project with which it is connected, but one which itself must accept an interpretation consonant with the reasonable demands of social progress. We do not differ with the General Assembly in its policy as expressed in this legislation, but we point out that the matter is exclusively within the province of that body. It is their verdict, embodied and expressed in the Act, that the Retirement Plan has a definite relation to the just and efficient administration of the public school system which brings it within the scope of constitutional authority. Under the mandatory provisions of the Retirement Act, the public policy thus expressed is applied to the entire public school system and its administration at the hands of every administrative unit within it. After all, it is difficult to see how any want of relevancy, even if it could be supposed to exist, would bring the subject within the purview of Article VII, sec. 7, of the Constitution.

It is true, as suggested, that the city administrative unit, under the provisions of the School Machinery Act, voluntarily undertook to supplement certain items of State expenditure and thereby undertook to conduct a school of higher standard and longer term than that provided by State support. But once having assumed the burden, albeit voluntarily, the unit did not thereby separate itself from the school system, or break the thread of constitutional authority, or exempt itself from the consequences of the burden it assumed, or the additional trusts imposed by law.

The provision in the School Machinery Act under which a local unit desiring to supplement State support for the schools is required to submit the question to a popular vote is not in deference to Article VII, sec. 7, of the Constitution. It is simply the legislative adoption of a similar method of control over extravagant expenditure *pro hac vice*. It does not affect the status of the administrative unit as an agency of the State. And when the burden is assumed, the Act under consideration not only confers authority, but is mandatory in its provisions that

the local administrative unit make its contribution to the State Retirement Fund, and that the taxing authorities therein provide the necessary funds. Chapter 25, Public Laws of 1941, sec. 8 (c); chapter 143, Public Laws of 1941, sec. 1.

The theory that the obligation of the Constitution extends no further than the six months school term, the minimum requirement expressed in Article IX, sec. 3, is unsound. The mandate is expressed in its simplest and most comprehensive form in sec. 2, without qualification or limitation, except that implied from the ability of the State to respond. The State does, from its ordinary revenues, support an eight months school term under the 1933 Act, without impeachment of exceeding its power. Indeed, the situation would remain unchanged if there were no constitutional requirement at all, since, without it, the duty of the State to educate its citizens has been recognized amongst intelligent and civilized peoples from antiquity. It is no doubt written into the fundamental law so that it may survive political indifference and so that the humblest citizen, speaking for himself and those in like right, may demand its performance. It is merely a question of transmitting authority to a lawfully designated agency, and of the quality and extent of the power so delegated.

2. The plaintiffs argue that unless the payment out of the Retirement Fund is in the nature of a salary, it is a gratuity and offensive to Article I, sec. 7, of the Constitution, which provides that no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services.

It is conceded by the plaintiffs that if payment from the fund is in the nature of salary or compensation for services rendered, it is at least not offensive to Art. I, sec. 7, of the Constitution.

We do not have to decide whether the cited section of the Constitution narrows its exception to payment for services currently rendered. The appellants are content to have the payments from the Retirement Fund, hypothetically, at least, regarded as deferred payments of salary. The appellees argue, and sustain the argument, we think, by convincing authority from jurisdictions where the question has been raised, that the benefits from the Retirement Fund may be so regarded. *Schieffelin v. Berry,* 217 App. Div., 451, 216 N. Y. Supp., 367; *People ex rel. Kroner v. Abbott,* 274 Ill., 380, 113 N. E., 696; *Cobbs v. Home Ins. Co.,* 18 Ala. Ap., 206, 91 So., 627; *Whitehead v. Davie,* 189 Cal., 715, 209 Pac., 1008; *Talbott v. Independent School District of Des Moines,* 230 Iowa, 949, 299 N. W., 556; *Retirement Board v. McGovern,* 316 Pa., 161, 174 Atl., 400.

3. It is conceded that the contribution of the unit to the State Retirement Fund might be paid out of local funds collected under the 25c levy

made to supplement State support if more convenient, but the taxes imposed under the 1941 Act are not subject to such limitation. There is no reference in either Act from which such an inference would be justified. Comparing the two laws, we find them widely separated in time and directed to substantially different subjects. If, as conceded by plaintiffs, the funds raised under authority of each of them are for generically similar purposes—operational in character—there is sufficient difference between them to justify the conclusion that the contributions required by the Retirement Act are not within the contemplation of the 1933 Act. The items then to be supplemented were definitely known and recognized, and were of a character totally different from the Retirement Fund contribution under the 1941 Act. So different is the latter, in fact, that it constitutes an entirely new feature of social and economic philosophy wrought into the public school system less than two years ago—in form, substance and effect unlike anything theretofore contemplated.

Moreover, the funds so collected are not supplemental in character and are not locally expended. They go into a general State fund, out of which payments are made irrespective of the source of origin.

We are likewise of the opinion that the contemplated levy is not limited or controlled by section 55 (4) of the City Charter—chapter 366, Public-Local Laws of 1939. The provision there is:

"The City Council of the City of Charlotte shall levy an annual tax for the support and maintenance of said public schools in the City of Charlotte in accordance with the Public Laws of the State of North Carolina as the same may now or hereafter be enacted and in any amount which is now or may hereafter be approved by a vote of the people of said city for said purposes."

We do not think that the subject dealt with in the Retirement Act of 1941 was within legal contemplation of this law. At most, it gives authority for further taxation in the support of schools as might be approved by a vote of the people, but does not prevent a levy under an appropriate State law, irrespective of the statute. We regard the point as settled adversely to appellants' contention by *Julian v. Ward,* 198 N. C., 480, 152 S. E., 401.

4. The challenge to the Retirement Act as contravening Article V, sec. 3, of the Constitution is not supported by argument or citation of authorities. Perhaps the inequalities which are pointed out by the appellants, and which we do not regard as inequities, may be corrected by further experience in the administration of the Act.

The contention that the Act does not comprehend a public purpose cannot be sustained. If the Retirement Plan has that relation to the public school system which the legislative policy supposes it to have, and

this can be reasonably discerned, giving the legislative body the "benefit of the doubt," if any, the Act is sufficiently invested with a public purpose and the tax is valid. It should not be declared unconstitutional unless it is so beyond reasonable doubt. *Hood, Comr. of Banks, v. Realty, Inc.*, 211 N. C., 582, 191 S. E., 410; *Glenn v. Board of Education*, 210 N. C., 525, 187 S. E., 781.

The Act includes thousands of teachers and employees of the State, as a class and without discrimination. If this is not sufficient to satisfy the "public purpose" requirement of the Constitution, the benefit they receive may be regarded as incidental. The benefit to the general public comes from a policy, widely approved, and adopted here, not without careful and exhaustive study, and with appreciation of its effect upon the entire citizenry, in the enhancement of the State's largest and most important enterprise, the conduct of the public schools. The relation of the Retirement Plan to the public school system has been fully discussed above, and the discussion will not be repeated here. It is sufficient to say that the expected improvement in standards of service, and the stabilization of teacher employment, are sufficient to constitute a public purpose, and justify the imposition of the tax.

We conclude that the Act is a constitutional and valid expression of the legislative will, both generally and in its application to the local administrative units with which it deals. The contribution to the State Retirement Fund required of the Charlotte City Administrative Unit is mandatory in character, does not require submission to popular vote, and is not affected by the maximum tax rate heretofore adopted by this unit in voting supplements to the schools or the suggested limitations of the city charter.

The acting defendants are in the exercise of lawful powers and are not subject to judicial restraint.

The judgment of the court below is

Affirmed.

STACY, C. J., not sitting.

BARNHILL, J., concurring: The majority opinion concludes that the Teachers' and State Employees' Retirement Act of 1941 is Constitutional and that the special levy of 2c by the tax-levying authorities of Charlotte to provide for the payment of the local employer's contribution to the retirement fund is valid. I concur. In so doing I wish to comment on the question of the validity of the tax.

Article IX, section 2, of the Constitution provides a floor, a minimum —not a maximum. *Frazier v. Comrs.*, 194 N. C., 49, 138 S. E., 433; *Taylor v. State Board of Education*, 206 N. C., 263, 173 S. E., 608;

Fuller v. Lockhart, 209 N. C., 61, 182 S. E., 73. It is the duty of the Legislature, under the mandate of the Constitution, to establish and maintain, within the means of the State, "a general and uniform system of public schools." The schools thus provided must be maintained for a minimum term of six months each year. Subject to this limitation the discretionary power to determine what is necessary and adequate and within the means of the State rests in the General Assembly. Any reasonable expense incurred to this end may be met by taxation without a vote of the people. *Evans v. Mecklenburg County,* 205 N. C., 560, 172 S. E., 323.

In the performance of this duty the Legislature enacted ch. 562, Public Laws 1933, providing for a State-wide, uniform system of public schools for a term of eight months. This act creates two types of local administrative units—county and city. The city unit, in respect to schools, has the same rights, powers and duties, and operates and is dealt with, as a county. Section 4, ch. 562, Public Laws 1933. The city as an administrative unit and the municipality as such are treated as separate entities.

Any local administrative agency, with the approval of the tax-levying authorities within the agency and the State School Commission, in order to operate schools of a higher standard than those provided by the State support, may supplement any object or item of school expenditure, including an extended term not exceeding a total of 180 days. The tax levy to provide the funds with which to supplement must first be approved by the electorate. The amount raised by taxation becomes a part of the total allotment for operational expenses and must be budgeted and approved by the State School Commission. Section 17. The funds of the unit, including the part raised by local taxation, is audited by the school authorities, section 20 (2), and are disbursed under the regulatory provisions of the statute.

Hence, it appears that the State supported school within the local administrative unit, as thus supplemented, does not, by virtue of the supplement, become a separate school entity. It remains an integrated part of the State School System. The discretion vested in the local authorities is the discretion to provide or not to provide higher standards, including an extended term. The "school of higher standards," once established, remains a part of the State-wide system under the general supervision of the State School Commission until the special levy is revoked or changed by an election. Section 17.

Having elected to supplement and to provide an extended term of higher standard the local unit "comes in" *cum onere.* It must bear its proportionate part of the burdens then existing or thereafter imposed upon the State system as a necessary part thereof.

Is the "Retirement System" created by ch. 25, Public Laws 1941, as amended by ch. 143, Public Laws 1941, an integral part of the State School System? The answer is yes.

The Retirement payment provided by this Act constitutes delayed compensation in consideration of services rendered. It is compensation for public services. Its purpose is to induce experienced and competent teachers to remain in service and thus promote the efficiency and effectiveness of the educational program. *S. v. Levitan,* 181 Wis., 326, 193 N. W., 499. The objective sought and the means adopted were within the legislative discretion of the General Assembly.

Any local administrative agency which has elected to supplement the State term under section 17 of the 1933 Act must comply with the provisions of the Retirement Act. The language of the 1941 statute is mandatory. ". . . each board of education of each city . . . in which any teacher receives compensation from sources other than appropriations of the State of North Carolina shall deduct from the salaries of these teachers paid from sources other than State appropriations an amount equal to that deducted from the salaries of the teachers whose salaries are paid from State funds, and remit this amount to the State Retirement System. City Boards of Education . . . in each . . . city which has employees compensated from other than the State appropriation shall pay to the State Retirement System the same per centum of the salaries that the State of North Carolina pays." Section 8, (1) (c), Public Laws 1941. The taxing authorities within the agency must provide the funds necessary to pay the local employer's contribution and "for the purpose of enabling . . . the Board of Trustees of city administrative units to make such payment, the tax levying authorities in each such city . . . unit are hereby authorized, empowered and directed to provide the necessary funds therefor." Section 8, (1) (c). Public funds ordinarily are raised by taxation and this language not only empowers the taxing authorities in the local units to levy the necessary tax but it compels it. In my opinion this is the only construction the language permits.

It was argued here that by ch. 143, Public Laws 1941, the local agency was granted discretionary authority to accept or reject the provisions of the Retirement Act. I do not so read this statute. It gives the local agency authority "with the approval of the tax levying authorities of such unit, to provide for the payment from local tax funds of any amount specified in subsection (c) of this section (section 8, [1] [c], ch. 25, Public Laws 1941), in excess of the amount to be paid to the Retirement System on the basis of the State Salary Schedule and term." In the event the local agency has sufficient funds derived from the levy under the 1933 Act with which to make its contribution without any additional

levy the agency, with the consent of the tax-levying authorities in the unit, may pay its contribution out of this fund without resorting to an additional levy. This, and nothing more, is the meaning of this amendatory provision.

It is well to note that this same Act provides that "in case the salary is paid in part from State funds and in part from local funds, the local authorities shall not be relieved of providing and remitting the same per centum of the salary paid from local funds as is paid from State funds. In case the entire salary of any teacher, as defined in this Act, is paid from . . . local funds, the . . . city paying such salary shall provide and remit to the Retirement System the same per centum that would be required if the salary were provided by the State of North Carolina." Here again the Legislature makes participation by the local agency which has supplemented the State term compulsory.

It follows that the tax levied for the purpose of enabling the Charlotte School District to comply with the requirements of section 8, (1) (c), of ch. 25, Public Laws 1941, is authorized by the Legislature. *Tate v. Board of Education,* 192 N. C., 516, 135 S. E., 336. It was levied for an administrative agency of the State School System established by the General Assembly pursuant to Article IX of the Constitution. *School Committee v. Taxpayers,* 202 N. C., 297, 162 S. E., 612; *Frazier v. Comrs., supra.* It was levied to meet a necessary part of the operational expenses of the State School System. *Greensboro v. Guilford County,* 209 N. C., 655, 184 S. E., 473. Under all our decisions the levy was a valid exercise of the taxing power of the State.

WINBORNE, J., joins in concurring opinion.

STATE v. WILLIAM DUDLEY PELLEY.

(Filed 24 June, 1942.)

1. Criminal Law § 63—

Where execution of sentence has been suspended or prayer for judgment continued, the court may, at any time during the period of probation, require defendant to appear before it by notice or, if necessary, by capias, to inquire into alleged violation of the conditions of probation, but it may not require defendant to so appear after the expiration of the period of probation.

2. Same—Time ceases to run against period of probation upon issuance of capias and does not run during period defendant absents himself and is fugitive from justice.

Defendant was convicted upon an indictment containing two counts. Execution of sentence on one count was suspended upon specified conditions for a period of five years and prayer for judgment was continued on the other count for a like period. Thereafter, upon alleged violation of conditions of probation, capias was issued, Michie's Code, 4665 (4), and *alias* capias subsequently served upon defendant out of the State before the expiration of the period of probation. Defendant refused to appear, and by *habeas corpus* and numerous appeals in his fight against extradition, delayed his appearance in court for hearing upon the alleged violation of conditions of probation beyond the period of probation. *Held:* Upon issuance of notice or service of capias the defendant was under duty to respond and appear, and time ceased to run against the period of probation during the period defendant absented himself from the State and was a fugitive from justice.

3. Same—

The power of the courts to suspend sentences and judgments upon conditions of probation and to put same into effect upon violation of the conditions is inherent in them under the common law and is not dependent upon statute.

4. Criminal Law § 62—

Where a statute prescribes that the punishment for its violation shall be a fine or imprisonment or both, the court is authorized to impose a fine and prison sentence, and when the court imposes the fine and suspends execution of the prison sentence, the judgment is not alternative, and the payment of the fine is not a full compliance with the judgment.

5. Criminal Law § 63—

Where a defendant accepts the conditions upon which execution of sentence is suspended and prayer for judgment continued and does not appeal from the judgment at the time of its entry, he may not thereafter challenge its validity.

6. Same—

"Good behavior" as used in suspending sentences or judgments means conduct conforming to the law.

7. Same—

Where judgment on one count and sentence on another count are suspended upon condition that defendant be and remain of good behavior, specific findings by the court that defendant had thereafter violated several criminal statutes of this State during the term of probation is sufficient to support the court's order that the suspended execution be put into effect and the entry of judgment upon the count upon which prayer for judgment was continued.

8. Same—

The hearing to determine whether defendant has violated the conditions of probation is not a trial for a new offense nor had for the purpose of punishing defendant for the offenses committed since the judgment was

entered, but is solely to determine whether defendant has violated the terms of the suspended judgment or execution and what punishment shall be imposed under the original judgment, and the court is not bound by the strict rules of evidence upon such hearing.

9. Same—

When, upon the hearing to determine whether defendant has violated the terms of a suspended judgment and execution, the finding of the court that defendant had violated the terms of probation is supported by ample competent evidence, the fact that the court also hears some incompetent evidence does not vitiate the court's findings.

10. Same—

Upon the hearing to determine whether a defendant has violated the terms upon which prayer for judgment has been continued or execution of sentence suspended, the findings of fact by the court and its judgment are in its sound discretion, and the exercise of such discretion is not reviewable on appeal when there is no evidence of abuse.

APPEAL by defendant from *Phillips, J.*, at January Term, 1942, of BUNCOMBE.

This is a criminal action and the facts pertinent to this appeal are as follows:

1. The defendant and Robert C. Summerville were convicted in the Superior Court of Buncombe County, North Carolina, on 22 January, 1935, on counts one and two of the bill of indictment under which they were tried. Said counts being as follows:

"First Count: The jurors for the State, upon their oath present that William Dudley Pelley, Robert C. Summerville, Don D. Kellogg and H. M. Hardwicke, late of the County of Buncombe, State of North Carolina, on or about the first day of April, 1932, and at divers other times before and after said date, with force and arms, at and in said County, did unlawfully, wilfully, knowingly, fraudulently and feloniously sell and cause to be sold, and offered for sale, and caused to be offered for sale, and solicited the sale and distribution of securities and stocks of Galahad Press, Incorporated, a corporation organized under the laws of the State of New York, with its principal place of business in Asheville, North Carolina, to divers persons, through advertisement and otherwise, in a periodical and magazine published, mailed and distributed in said State and County, entitled 'Liberation,' and by letters, circulars, etc., which said securities and stocks were not exempted by and not registered as provided in the provisions of chapter 149 of the Public Laws of North Carolina, enacted by the General Assembly of North Carolina, Session of 1927, and Chapter 71 A of the Consolidated Statutes of North Carolina and all acts amendatory thereof, without having first registered as a dealer and dealers, and salesman and salesmen in the office of the Corporation Commission and Commissioner of

North Carolina, as provided by Chapter 149 of the Public Laws of North Carolina, enacted by the General Assembly of North Carolina, Session 1927, and Chapter 71 A of the Consolidated Statutes of North Carolina and all acts amendatory thereof, against the form of the statute in such cases made and provided, and against the peace and dignity of the State.

"*Second Count:* The jurors for the State upon their oath further present that William Dudley Pelley, Robert C. Summerville, Don D. Kellogg and H. M. Hardwicke, late of the County of Buncombe, State of North Carolina, on or about the first day of April, 1932, and at divers other times before and after said date, with force and arms, at and in said County, did unlawfully, wilfully, knowingly and feloniously and for the purpose of selling securities and stocks of Galahad Press, Inc., a corporation organized under the laws of the State of New York, with its principal place of business in Asheville, North Carolina, in this State fraudulently represent to the purchaser and purchasers, and prospective purchaser and purchasers thereof, the amount of dividends, interest and earnings which such securities will yield, in a magazine, periodical and publication published, mailed and distributed in said County of Buncombe, State of North Carolina, entitled 'Liberation' which said false representations as aforesaid were to the effect that:

" 'It is a fact surpassing strange that those who have been most active in the financial and moral support of the work done by the Galahad Press, The League for the Liberation, and The Foundation for Christian Economics this past year, have suffered few losses of note.

" 'The work which is being done throughout the nation in promoting these wholesome christian principles, carries with it a sturdy, constructive vibration. The growth and prosperity of the Galahad Press this year when other publishing projects were losing or falling on every hand carries an esoteric significance not to be ignored.

" 'The first year of the Galahad Press closed on February 7. Starting on a cash capital of $40, it forged its way ahead at a time of continually falling markets and ruinous depression, gaining in volume of business month by month, until it had done $56,731.57 in amount of business for its first fiscal year.

" 'It printed and circulated nearly 150,000 copies of its publications and in connection with The League for the Liberation it disposed of 90,000 copies of the Weekly Liberation lessons. It paid out $22,372.83 in salaries to its workers and its item of postage alone reached $4,095.21. If its present rate of prosperity continues, it will meet its preferred stock dividend by its annual stockholders meeting-date in June.' . . .

" 'There remains in the treasury of The Galahad Press over $10,000 of preferred stock untouched by the volume of business transacted this

past year. This stock is valued at $10 per share and pays a 6 per cent cumulative dividend,'—when in truth and in fact the said Galahad Press, Inc., a corporation organized under the laws of the State of New York, was not in a prosperous condition and was not in a position to meet its preferred stock dividends, and its preferred stock was not paying 6% dividend, and those who had been most active in the financial support of the work done by The Galahad Press had suffered losses of note, and the disbursements had been much heavier than set forth in said representations and the said Galahad Press was in an insolvent and failing condition and had lost heavily during the time mentioned in said representations, against the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

2. By and with the consent of defendants, in open court expressed through counsel, prayer for judgment was continued until the regular term of the Superior Court for the trial of criminal cases, for Buncombe County, on 18 February, 1935, at which time the final judgment was to be entered.

3. On 18 February, 1935, the following judgment was entered:

". . . The judgment of the court is, as to both defendants, the judgment being individual, that the defendant Pelley be confined in State's Prison at Raleigh, at hard labor, for a period of not less than one, nor more than two years.

"The foregoing sentence of imprisonment is suspended for a period of five years, on the following conditions:

"1. That the defendant Pelley pay a fine of One Thousand ($1,000) Dollars and the costs of the case, which bill of cost has been approved by the Court as made up by the Clerk, and which, under the authority of the court is to include the total amount ordinarily for which the bill is made up by the Clerk, together with the exact amount which Buncombe County has heretofore paid out for the expenses of the jury during the thirteen days and the expenses of the official Court stenographer, it being the intent of the Court to reimburse fully the County for each amount expended by it.

"2. That the defendant be and remain continuously of good behavior.

"3. That he not publish and (or) distribute in the State of North Carolina any periodical which has to do with, or contains in it any statement relating to a stock sale transaction or any report of any corporation as to its financial value, or with the purpose of effecting a sale of stock in said corporation, without complying with the capital sales issues statute. . . .

"On Count No. 2, against the defendants Pelley and Summerville, prayer for judgment continued for five (5) years."

4. On 19 October, 1939, his Honor, Zeb V. Nettles, Judge presiding, October Term, Superior Court of Buncombe County, ordered capias to

issue in the case of State *v.* Pelley, and the defendant William D. Pelley to be placed under a $10,000.00 bond, to appear before the Judge of the Superior Court of Buncombe County, at the term of court beginning on the first Monday after the second Monday in November, 1939, "then and there to answer the charge of the State against William D. Pelley on an indictment for judgment upon conviction for felony."

5. Capias was issued and returned by the sheriff of Buncombe County, N. C., with the following entry thereon: "Received October 19, 1939. Due search made and defendant not to be found in Buncombe County or the State of North Carolina."

Efforts to locate the defendant were continued after the return of the capias issued 19 October, 1939, until the arrest of the defendant 10 February, 1940. The usual "Wanted" posters were distributed throughout the United States by the authorities in Buncombe County, stating Pelley was wanted by the sheriff's department and the courts of Buncombe County, North Carolina.

6. The defendant was arrested in Washington, D. C., 10 February, 1940, by the police authorities in the District of Columbia, upon a capias or *alias* capias issued out of the Superior Court of Buncombe County, N. C. The defendant refused to return to North Carolina, whereupon the Governor of North Carolina issued requisition papers to the proper official of the District of Columbia for the extradition of the defendant to this State.

7. The defendant applied for his release in a *habeas corpus* proceedings in the United States District Court for the District of Columbia, relief was denied by said court, appeal was taken to the United States Court of Appeals for the District of Columbia, and the decision of the lower court affirmed. Petition for writ of *certiorari* to the Supreme Court of the United States was denied. A motion to withhold the order denying petition for writ of *certiorari* to the Supreme Court of the United States, likewise, was denied. After the decision of the Supreme Court of the United States, denying motion to withhold the order denying petition for writ of *certiorari* to said Court, the defendant, as required by the original order of the United States District Court for the District of Columbia, returned to Buncombe County, N. C., in October, 1941, where he was taken into custody by the sheriff of Buncombe County on an *alias* capias 24 October, 1941. Defendant applied for a writ of *habeas corpus* 25 October, 1941. Bond was fixed and the defendant released. By consent of the State and the defendant, the hearing on its merits and the application for writ of *habeas corpus* were heard at the January Term, 1942, of the Superior Court of Buncombe County, when and where the application for a writ of *habeas corpus* was denied and the following judgment entered:

"This cause coming on to be heard and being heard before His Honor, F. Donald Phillips, Judge presiding over the regular January A.D., 1942 Criminal Term of the Superior Court of Buncombe County, State of North Carolina, upon motion of the Solicitor that the sentence hitherto imposed upon the defendant by His Honor, Wilson Warlick, Judge presiding at the regular February A.D. 1935 Term of the Superior Court of Buncombe County, be put into effect on the first count set forth in the bill of indictment herein and in said judgment, and also praying for judgment under the second count in said bill of indictment and in said judgment.

"The Court heard all the evidence and the argument of counsel in the presence of the defendant and his counsel, and the court finds as a fact that the pertinent evidence before the court in this hearing that the defendant has violated the terms of the suspended sentence under said Count No. 1 and did not remain of good behavior during the term of said suspended sentence and during the term of said suspended sentence has violated the following criminal laws of the State of North Carolina in force and effect during the term of said suspended sentence, as follows:

"(1) That the defendant wilfully, unlawfully, knowingly and deliberately stated, delivered and transmitted to the publisher and publishers of a newspaper and newspapers and periodical and periodicals for publication therein within the State of North Carolina false and libelous statements concerning a person, to-wit, Franklin D. Roosevelt, President of the United States of America, and did thereby secure the publication of the same, in violation of the provisions of Section 4229 of the Consolidated Statutes of North Carolina.

"(2) That the defendant during the term of said suspended sentence wilfully, unlawfully, knowingly and deliberately, with intent to sell and dispose of merchandise, service, books, pamphlets, periodicals, and other things, offered to the public for sale and distribution and with intent to increase the consumption thereof, and to induce the public to enter into obligations relating thereto, did make public, disseminate, circulate and place before the public, and cause to be made public, disseminated and circulated and placed before the public within the State of North Carolina in a newspaper and newspapers and other publications and in the form of books, notices, hand bills, circulars and pamphlets, an advertisement and advertisements regarding said merchandise, service and other things, which advertisement and advertisements contained assertions, representations and statements of fact which were untrue, deceptive and misleading, in violation of the provisions of Section 4290 of the Consolidated Statutes of North Carolina.

"(3) That the defendant wilfully, unlawfully, knowingly and deliberately during the term of said suspended sentence was guilty of contempt

of court and wilfully, unlawfully, knowingly and deliberately violated the provisions of Section 978, Subsection 7, of the Consolidated Statutes of North Carolina, by publishing and making public within the State of North Carolina grossly inaccurate reports of the proceedings in court about the trial of the defendant and other matters pending before said court, with respect to said defendant, with intent to misrepresent and to bring into contempt the said Court.

"(4) That the defendant wilfully, unlawfully, knowingly and deliberately during the term of said suspended sentence was guilty of violating Section 4180 of the Consolidated Statutes of North Carolina, and did wilfully, knowingly, unlawfully and deliberately within the State of North Carolina and during the term of said suspended sentence, organize and continue to organize, promote and foster a secret political and military organization, and do and cause to be done various acts and things in violation of the provisions of said statute of the kind and character prohibited and condemned by said statute.

"And the Court further finds as a fact from the pertinent evidence adduced at this hearing that during the term of said suspended sentence, to-wit, at the regular October Criminal Term, 1939, of the Superior Court of Buncombe County, on appropriate order of the Judge presiding over said court, a capias was issued out of said court for the defendant in this case; that the sheriff of Buncombe County by authority of said capias made diligent, continuous, thorough and prolonged search for the defendant in the County of Buncombe and in the State of North Carolina; and made substantially the following return on said capias: To November Term, 1939. Due search made and the defendant cannot be found within the County of Buncombe or the State of North Carolina; and the court further finds from the pertinent evidence in this case that the defendant continuously from about the first day of August, 1939, absented himself from the State of North Carolina, and thus designedly avoided the service of said capias, and intentionally kept himself without the jurisdiction of this court; that from time to time after the issuance of said capias numerous *alias* capiases were issued out of said court for the apprehension of the said defendant; none of which were served or executed for the reason that the defendant was absent from the State of North Carolina and his whereabouts could not be ascertained; that on the 10th day of February, 1940, and within the term of said suspended sentence, the defendant was found in the City of Washington and was taken into custody by lawful officers of the District of Columbia and City of Washington on a capias or *alias* capias issued out of the Superior Court of Buncombe County, North Carolina, and thereupon the defendant resisted the command of said capias and refused to return to the State of North Carolina and to the jurisdiction of this court and in pursuance of his refusal to return to the jurisdiction of this court

resisted extradition proceedings issued by the State of North Carolina and on *habeas corpus* proceedings sued out by him in the District of Columbia delayed his return to the State of North Carolina by appealing to the United States District Court for the District of Columbia, then to the United States Circuit Court of Appeals for the District of Columbia and then to the Supreme Court of the United States, and finally in obedience to the orders and decisions of said courts was forced to return to the State of North Carolina and to the jurisdiction of this court during the month of October, 1941, and then and there being represented by counsel and present in court himself this hearing was by consent of the defendant and his counsel and the State of North Carolina continued to this term of court, and the defendant gave bond in the sum of $10,000.00 for his appearance before this Court.

"The Court further finds as a fact that the defendant and his counsel were present in court at the time of the judgment entered by His Honor, Wilson Warlick, at the February A.D. 1935 Term of the Superior Court of Buncombe County, and consented to and acquiesced in said judgment, including said sentence and said prayer for judgment continued.

"It is, therefore, ordered and adjudged that the prison sentence imposed by His Honor, Wilson Warlick, at the February A.D. 1935 Term of the Superior Court of Buncombe County, confining the defendant to the State Prison at Raleigh at hard labor for a period of not less than one nor more than two years, be, and the same hereby is put into effect and the defendant is ordered into custody for the purpose of commencing the service of said sentence, and the Clerk of the Court is ordered to issue commitment to put the said prison sentence into effect.

"And the Solicitor at this term having also prayed for judgment under the second count in said bill of indictment and upon such prayer and upon such motion of the Solicitor, the judgment of the Court on the second count in said bill of indictment is that the defendant be confined in the State Central Prison at hard labor to wear stripes for a period of not less than two nor more than three years, this sentence to run concurrently with the sentence put into effect on the first count in said bill of indictment; and the defendant is ordered into custody for the purpose of commencing the service of said sentence on said second count, and the Clerk of this Court is ordered to issue commitment to put the said prison sentence on said count into effect.

F. DONALD PHILLIPS, Judge Presiding."

Defendant appealed to Supreme Court, assigning error.

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

Jordan & Horner, R. H. McNeill, and Paul R. Raper for defendant.

DENNY, J. The record contains 200 exceptive assignments of error. After a careful examination of each of them, we are of opinion that those numbered 1 through 182, 185 through 189, and 196 are without substantial merit. The remaining 12 may be disposed of by a consideration of the following questions: (1) Did the court have power to enter a judgment in this cause, at the January Term, 1942, of the Superior Court of Buncombe County? (2) Did the defendant violate the conditions of the judgment entered 18 February, 1935?

In the judgment entered against the defendant by the court, 18 February, 1935, the prison sentence entered on Count 1 was suspended for a period of five years upon certain conditions. On Count 2, under which the defendant had also been convicted, prayer for judgment was continued for five years.

Unquestionably if the court had made no effort to obtain custody of the defendant until after the expiration of five years from and after 18 February, 1935, the court would have been without authority to enter judgment. *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011; *S. v. Gooding,* 194 N. C., 271, 139 S. E., 436. However, at any time within five years after the entry of the judgment, upon alleged violation of the conditions upon which the judgment was suspended, the court had the right to require the defendant to appear before said court, by notice or by capias, if necessary, and inquire into the alleged violation of the conditions in said judgment, and, if found to be true, to put the suspended sentence into effect and to enter judgment on the second count, if in the sound discretion of the court the facts justified such action. *S. v. Shepherd,* 187 N. C., 609, 122 S. E., 467; *S. v. Phillips,* 185 N. C., 614, 115 S. E., 893; *S. v. Greer,* 173 N. C., 759, 92 S. E., 149.

Public Laws 1937, ch. 132, sec. 4 (N. C. Code, sec. 4665 [4]), provides: ". . . At any time during the period of probation or suspension of sentence, the court may issue a warrant and cause the defendant to be arrested for violating any of the conditions of probation or suspension of sentence. . . . Upon such arrest, with or without warrant, the court shall cause the defendant to be brought before it in or out of term and may revoke the probation or suspension of sentence, and shall proceed to deal with the case as if there had been no probation or suspension of sentence."

The above statute does not enlarge the power of our courts in respect to judgments of the character under consideration. The courts in this jurisdiction have exercised these powers through the years as a part of their inherent common law rights. *S. v. Hilton, supra; S. v. Everitt,* 164 N. C., 399, 79 S. E., 274.

Did the defendant, by absenting himself from the State of North Carolina from about 19 October, 1939, until October, 1941, prevent the

court from determining within the aforesaid five-year period, whether or not the conditions of the suspended judgment had been violated, thereby suspending the limitation of time for that period? We think so. The defendant was present in open court on 18 February, 1935, when the prison sentence was suspended and the prayer for judgment was continued, and accepted the conditions on which said sentence was suspended. Upon a violation or an alleged violation of said conditions, it was the duty of the defendant to respond to the notice of the court in order that the court might determine whether or not he had violated the conditions in said judgment. *S. v. Crook,* 115 N. C., 760, 20 S. E., 513; *S. v. Everitt, supra.* When the defendant departed the jurisdiction of the court, the time clock stopped and the proceedings thereafter are to be considered as having transpired within the five-year period.

Statutes of limitation do not run in favor of an accused person while he is a fugitive from justice. "The fact that the statute had begun to run in favor of accused before he fled from justice does not prevent his flight from operating as a suspension of the statute, and he cannot insist in such a case that the time of his absence shall be computed as a part of the statutory limitation." 16 C. J., p. 229, sec. 351.

"To constitute one a fugitive from justice from a given state it is essential that the person having been within the demanding state shall have left it and be within the jurisdiction of the state from which his return is demanded, and that the person shall have incurred guilt before he left the former state and while bodily present therein." 25 C. J., 257, sec. 12.

This defendant was arrested on 10 February, 1940, within five years from the entry of the original judgment herein, by the police authorities of the city of Washington, D. C., on a capias or *alias* capias issued out of the Superior Court of Buncombe County, N. C. The defendant cannot complain at the delay in entering the judgment from which he now appeals. The evidence discloses that defendant knew the authorities in Buncombe County wanted him for the alleged violation of the conditions of his suspended sentence, and he sought to remain beyond the jurisdiction of the court until after 18 February, 1940. After his arrest defendant refused to return to North Carolina. The Governor of North Carolina issued requisition papers to the proper official of the District of Columbia for the extradition of the defendant to this State.

The defendant applied for his release in *habeas corpus* proceedings in the United States District Court for the District of Columbia, relief was denied by said court, appeal was taken to the United States Court of Appeals for the District of Columbia, and the decision of the lower court affirmed. In this case, in which defendant resisted extradition to North Carolina, he was adjudged a fugitive from justice by the Federal Court. *Pelley v. Colpoys,* 122 Fed. (2d), 12. Petition for writ of *certiorari* to

the Supreme Court of the United States was denied. *Pelley v. Colpoys,* U. S. Sup. Court, 86 Law Ed., 69. The motion to withhold the order denying petition for writ of *certiorari* was denied. *Pelley v. Colpoys,* 86 U. S. (Law. Ed.), 87. After the decision of the Supreme Court of the United States, denying motion to withhold the order denying petition for writ of *certiorari* to said Court, the defendant, as required by the original order of the United States District Court for the District of Columbia, returned to Buncombe County, N. C., in October, 1941, where he was taken into custody by the sheriff of Buncombe County on an *alias* capias 24 October, 1941. Defendant applied for a writ of *habeas corpus* 25 October, 1941. Bond was fixed and the defendant released. By consent of the State and the defendant, the hearing on its merits and the application for writ of *habeas corpus* were heard at the January Term, 1942, of the Superior Court of Buncombe County.

The failure to enter judgment within the five-year period, prescribed in the original judgment, was not due to the lack of diligence on the part of the court, but was chargeable solely to the conduct of defendant. Therefore, we hold that the court had not lost jurisdiction of the defendant by reason of the lapse of time and that the court had power to enter judgment at January Term, 1942, of the Superior Court of Buncombe County.

The defendant contends that the original judgment in this cause was an alternative one and that he has fully complied with the terms thereof. Under the provisions of chapter 190, sec. 23, Public Laws 1925, as amended by chapter 149, sec. 23, Public Laws 1927 (section 3924 [w], N. C. Code of 1939), the statute under which the defendant was tried and convicted, the court was authorized to imprison a person convicted thereunder for not more than five years or impose a fine of not more than $1,000.00, or both. Therefore, the court was authorized to impose a fine and a prison sentence. The judgment herein is not objectionable in that respect. Surely in the light of the decisions of this Court, no one can seriously question the power of the court to suspend the prison sentence upon conditions to be observed by the defendant. In the case of *Myers v. Barnhardt,* 202 N. C., 49, 161 S. E., 715, *Stacy, C. J.,* said: "The practice of suspending judgments in criminal prosecutions, upon terms that are reasonable and just, or staying executions therein for a time, with the consent of the defendant, has so long prevailed in our courts of general jurisdiction that it may now be considered established, both by custom and judicial decision, as a part of the permissible procedure in such cases. *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011."

Likewise, the court had power to continue the prayer for judgment on the second count. In the case of *S. v. Ray,* 212 N. C., 748, 194 S. E.,

472, *Devin, J.*, said: "The power of the Superior Court to continue the prayer for judgment and to suspend the execution of a judgment, upon conditions, in proper cases and upon terms that are reasonable and just, and thereafter, upon determination that the conditions had been breached, to impose sentence and execute the judgment, has been upheld by this Court in numerous cases. *S. v. Hilton,* 151 N. C., 687, 65 S. E., 1011; *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Burnett,* 174 N. C., 796, 93 S. E., 473; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593; *S. v. Shepherd,* 187 N. C., 609, 122 S. E., 467; *S. v. Edwards,* 192 N. C., 321, 135 S. E., 37; *Berman v. U. S.,* 82 Law Ed. (U. S.), 212. The defendant, having pleaded guilty of a misdemeanor, and having consented, or, at least, offered no objection to the conditions upon which the prayer for judgment was continued, in the one instance, and the execution of sentence suspended in the other, is in no position now to complain. *S. v. Crook,* 115 N. C., 760, 20 S. E., 513." *S. v. Wilson,* 216 N. C., 130, 4 S. E. (2d), 440.

The defendant accepted the conditions upon which the prison sentence was suspended, and he has no right to challenge its validity now, not having appealed therefrom at the time of its entry. *S. v. Ray, supra; S. v. Henderson,* 207 N. C., 258, 176 S. E., 758.

Did the defendant, prior to 19 October, 1939, violate the conditions on which his prison sentence was suspended? One of the conditions on which the sentence was suspended for five years was: "That the defendant be and remain continuously of good behavior." What constitutes good behavior is defined in 15 Am. Jur., sec. 484, p. 138, as follows: "Good behavior means conduct conforming to the law." That definition is in accord with the interpretation of the meaning of "good behavior" by this Court. *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593.

In the judgment of the court entered in January, 1942, his Honor found the defendant had violated the terms of the suspended sentence and did not remain of good behavior during the term of said suspended sentence, and that the defendant had violated the following criminal laws of the State of North Carolina, in force and effect during the term of said suspended sentence, as follows: Sections 4229; 4290; 978, subsection 7; and 4180, of the Consolidated Statutes of North Carolina. These findings of fact appear in the judgment copied in the statement of facts in this case, together with the further finding of fact that the defendant absented himself from North Carolina continuously from about 1 August, 1939, until October, 1941.

The defendant insists that the court admitted incompetent evidence at the hearing, and therefore these findings of fact should not be sustained. His Honor, in determining whether or not the terms of the suspended judgment had been violated was not bound by the strict rules

of evidence required in a jury trial. This Court said, in *S. v. Greer, supra:* "When judgment is suspended in a criminal action upon good behavior, or other conditions, the proceedings to ascertain whether the terms have been complied with are addressed to the reasonable discretion of the judge of the court, and do not come within the jury's province. The findings of the judge, and his judgment upon them, are not reviewable upon appeal unless there is a manifest abuse of such discretion." *S. v. Hoggard,* 180 N. C., 678, 103 S. E., 891.

The evidence heard by the court, in a proceedings of this character, is not for the purpose of punishing the defendant for the offenses committed since judgment was suspended, or the prayer for judgment continued, but to determine what punishment shall be imposed under the original judgment for offenses for which he has been convicted. Defendant is not on trial for a new offense. *S. v. Everitt, supra.*

Certain testimony of this defendant before the Dies Committee was offered by the State, most of which was admitted without objection. That evidence, upon objection, was inadmissible by reason of the provisions of U. S. C. A., Title 28, sec. 634. However, a careful perusal of the testimony leads to the conclusion that sufficient competent evidence was introduced by the State in this hearing to sustain his Honor's findings of fact. These findings of fact and the judgment entered upon them were matters to be determined in the sound discretion of the court, and the exercise of that discretion, in the absence of gross abuse, cannot be reviewed here. *S. v. Everitt, supra; S. v. Greer, supra.* There is no evidence of an abuse of discretion by his Honor in this proceedings.

The judgment of the court below is

Affirmed.

ANDERSON COTTON MILLS, A CORPORATION, v. ROYAL MANUFACTURING COMPANY, A CORPORATION, W. G. ACKERMAN, DAVID JOSEPH AND IRA A. STONE.

(Filed 24 June, 1942.)

1. Brokers and Factors § 9—

Where a commission agent itself purchases the principal's goods, and commingles them with his own, the burden is upon the agent to identify the principal's goods upon demand, or if this is impossible because of a prior sale of the goods to a third person, the burden is upon the agent to show what proportion of the proceeds of sale was derived from the principal's goods.

2. Same—

Where the principal's evidence tends to show that defendant commission agent itself purchased the principal's goods, commingled them with its

own and sold them, and the agent fails to assume the burden of showing what proportion of the sale price was derived from the principal's goods, the agent may not object to the principal's evidence upon this aspect tending to show the value of the goods and the proportionate poundage of principal's goods in the commingled product, even though the results may not be strictly accurate, since the agent in such case runs the risk of a greater recovery by failing to introduce such evidence itself.

3. Appeal and Error § 37e—

The findings of fact by the trial court are conclusive when supported by competent evidence, and the Supreme Court may not ordinarily require the finding of additional facts unless they are specifically requested, and even when additional findings are requested the cause will not be remanded when such additional findings cannot alter the result and the matter is sufficiently covered by the findings actually made so far as necessary for final determination of the controversy.

4. Brokers and Factors § 9—

Where the court finds from the evidence under agreement of the parties that defendant commission agent itself purchased the principal's goods and sold same at a profit without disclosing the facts, the principal itself introducing in evidence the contract between the parties, and there is no finding that the agent obtained possession of the goods through fraud, the principal's rights are delimited by the findings, and it may not contend that defendant was a trespasser *ab initio*.

5. Brokers and Factors § 8—

Where a commission agent itself purchases the principal's goods, commingles them with its own and has the commingled goods processed and sells them at a profit, the agent, in the principal's action to recover the profit, is entitled to credit for the cost of processing the goods.

6. Principal and Agent § 6—

Ordinarily, when an agent makes a profit to himself by virtue of his position instead of promoting the interest of his principal, he is not entitled to compensation.

7. Brokers and Factors § 8—

When a selling agent itself purchases the principal's goods the sale is voidable, and the principal at his election may ratify or disaffirm it, whether injured by the transaction or not.

8. Same—

If the principal elects to disaffirm the purchase of the principal's goods by its selling agent, the principal is entitled to have his property back with damages, if any, or to have the value thereof with incidental damages, if any, consequent upon the wrongful transaction.

9. Same: Trusts § 15—

Where the purchasing agent itself buys the principal's goods and in turn sells to a *bona fide* purchaser, the principal, at his election, may hold the agent liable as a trustee *ex maleficio*, and make the agent account not only for the real value of the goods but also for any profit made by the agent on the resale.

10. Brokers and Factors §§ 8, 10—

Where the selling agent itself purchases the principal's goods and resells them at a profit, the principal, by electing to sue the agent to recover the profit does not impliedly ratify or condone the agent's wrong, and the agent is not entitled to commissions on the sale to himself, or the sale to the third person, since the sale by the agent to himself is against public policy and since the agent did not perform the conditions of the contract *in hoc modo* so as to entitle him to commissions under the contract.

11. Interest § 1—

Money due by contract, except money due on penal bonds, bears interest as a matter of law. C. S., 2309.

12. Same—

C. S., 2309, is not exclusive in prescribing instances in which interest is recoverable, and in proper instances interest may be recovered upon transactions not coming within the statute.

13. Interest § 1: Brokers and Factors § 9—

Where a commission agent itself purchases the principal's goods and resells them at a profit, without disclosing the facts, the principal may recover the secret profit upon the theory of liability created by public policy, which right is equitable in its nature and strictly is neither damages for the breach of contract nor recovery on an express or implied promise to pay, and the principal is not entitled to interest upon the recovery, C. S., 2309, not being applicable.

APPEAL from *Johnston, Special Judge,* at October, 1941, Special Term, of MECKLENBURG. The plaintiff and the defendant Royal Manufacturing Company appealed. Modified and affirmed.

The case was tried before Judge Johnston, upon consent of the parties, without a jury.

The evidence tends to show that the plaintiff and appealing defendant had entered into a contract, subsisting at the time of the alleged transactions, whereby defendant agreed to receive and sell as agent of the plaintiff all the cotton waste from plaintiff's mills. The waste was produced by the mills in large quantities, and was of various kinds, designated by technical or trade names. The defendant was to receive as compensation an agreed percentage of the sales price—in some instances 5%, and others 6%. The defendant at the time was a large operator in the sale of waste, handling the product from a great many mills in an aggregately large amount.

The evidence further tends to show that over a number of years the defendant had caused the plaintiff to ship such waste principally to River Mills at Greenville, S. C., a plant largely engaged in cleaning cotton waste by a process known as "willowing." The defendant caused plaintiff's waste to be commingled with the waste from other mills, some-

times as many as forty, and cleaned or willowed after such commingling, and then sold the product to various purchasers.

The defendant made return to the Anderson Mills upon the basis of its raw product; and it may be inferred from the evidence that the defendant itself became the actual purchaser and accounted to the plaintiff on that basis, retaining upon the transaction the sales commissions fixed by the contract and retaining the profits upon the transaction, without making a full disclosure to the plaintiff of the facts or that it had become the purchaser.

Upon discovery of these facts, the plaintiff brought this action for the recovery of the profits alleged to have been realized by the defendant's breach of trust, together with the commissions formerly paid to the defendant as commissions upon its sales.

In the development of the case, the defendant made numerous exceptions to the evidence, which, as necessity may require, will be considered in the opinion.

A motion for nonsuit made in behalf of the individual defendants was sustained.

Upon hearing the evidence, the judge made findings of fact and conclusions of law, and entered judgment thereon, as follows:

"FINDINGS OF FACT.

"1. That during the years 1933 to 1936, inclusive, the defendant, Royal Manufacturing Company, was commission agent to sell the entire output of the plaintiff's waste under a contract, the terms of which are contained in the letter of April 28, 1931, Exhibit B, attached to the complaint.

"2. That during the years 1935 and 1936, the defendant, Royal Manufacturing Company, instructed the plaintiff to ship to River Mills at Greenville, S. C., a total of 802123 pounds of waste of certain grades, and said waste was shipped and invoiced to Royal Manufacturing Company by Anderson at prices fixed by said defendant and designated in the shipping instructions, less commissions at the rates provided in the contract between the parties.

"3. On said shipments the plaintiff paid the defendant, Royal Manufacturing Company, commissions totaling $934.14.

"4. That without the knowledge or consent of the plaintiff the defendant, Royal Manufacturing Company, caused the waste so shipped to it at River Mills to be mixed with large quantities of waste from other sources and put through a process known as willowing and then sold the finished product as its own, making a profit thereon, in addition to the commission received by the defendant from the plaintiff, for which profits defendant has not accounted to its principal, the plaintiff.

"5. That the sales value of the plaintiff's waste shipped to River Mills during 1935-1936, based on the sales made by the defendant, Royal

Manufacturing Company, to its customers, was $27,485.46, and said defendant, Royal Manufacturing Company paid to the plaintiff therefor $15,432.37, less the commission mentioned in finding of fact # 3, and that, in addition to said commissions, the said defendant made a gross profit on said waste of $12,053.09.

"6. The defendant, Royal Manufacturing Company, had expenses in connection with said waste and the resale thereof totaling $5,567.94, leaving the said defendant a profit after deducting said expenses of $6,485.15.

"7. That the commissions allowable to the defendant, Royal Manufacturing Company, under the contract based on the final sales value of the waste as set out in finding of fact #5 would amount to $714.99 in addition to the commissions actually paid, as set out in finding of fact #3.

"8. The plaintiff had no knowledge that the Royal Manufacturing Company was purchasing said waste, nor that it was making a profit thereon in addition to the commissions paid to it under the terms of the contract until the Spring of 1939.

"9. This action was instituted on the 12th day of May, 1939.

"10. During the years 1933 and 1934, the plaintiff shipped to River Mills at Greenville, S. C., on instructions of the defendant, Royal Manufacturing Company, a total of 689,784 pounds of waste, and the plaintiff paid said defendant for selling said waste commissions totaling $573.19. That by reason of absence of records of the defendant it is impossible to ascertain what was done with said waste, or how much profit, if any, the defendant made thereon.

"11. That during the four years in which said contract was in effect, the corporate defendant instructed the plaintiff to ship certain grades of its waste to certain individuals in care of Vor. Dohlan Steamship Company, Charleston, S. C., giving such instructions as to all of the shipments of said nature referred to in the complaint.

"12. That from the records available, the plaintiff has been able to trace and show evidence of what became of only a part of said shipments, but from the ones traced the court finds that, in addition to commissions paid, the corporate defendant made a profit on said transactions of $675.35.

"13. That the individuals to whom the shipments referred to in the preceding paragraph were made were employees of the corporate defendant, and that the corporate defendant purchased said waste for its own account without the knowledge or consent of the plaintiff, and that the plaintiff had no knowledge that said defendant was purchasing said waste for its own account, or that it was making a profit thereon in addition to commissions until the Spring of 1939.

"14. That on the shipments to Charleston, S. C., in care of Von Dohlan Steamship Company, referred to in finding of fact #11, purchased by Royal Manufacturing Company for its own account without the knowledge of the plaintiff, the plaintiff paid said defendant commissions amounting to $637.86, of which amount the sum of $187.67 was commissions on the shipments which the plaintiff was able to trace, and to show that the defendant made a profit in addition to said commissions.

"15. On the 30th day of October, 1934, the plaintiff shipped to Bladenboro Cotton Mills, Bladenboro, N. C., 15,250 pounds of waste upon instructions of the defendant, Royal Manufacturing Company, and, in accordance with said instructions, invoiced Royal Manufacturing Company for said waste at the rate of $10.94 per cwt. Royal Manufacturing Company had actually sold said waste to Bladenboro Cotton Mills at $12 per cwt., and that the difference between the amount paid plaintiff on said waste, and the amount received by defendant, Royal Manufacturing Company, amounts to $161.65. In addition thereto the plaintiff paid said defendant for making said sale commissions amounting to $80.06. The plaintiff had no knowledge that said waste had been sold for more than $10.94 per cwt., until the Spring of 1939.

"16. That the plaintiff's cause of action is not barred by the statute of limitations.

"CONCLUSIONS OF LAW.

"1. That the relation of principal and agent existed between the plaintiff and the defendant during the years 1933-1936, inclusive.

"2. That the plaintiff is entitled to recover of the defendant the sum of $5,770.16, representing the profits made by the defendant, Royal Manufacturing Company, on the River Mills transactions for 1935-1936, in addition to commissions.

"3. That the plaintiff is entitled to recover of the defendant the sum of $675.35, representing profits made by the defendant on shipments to certain individuals in care of Von Dohlan Steamship Company, Charleston, S. C., in addition to commissions paid upon said transactions.

"4. That the plaintiff is entitled to recover of the defendant the sum of $161.65, representing profits on the Bladenboro transactions, in addition to commissions.

"5. That the plaintiff is not entitled to recover anything from the defendant, Royal Manufacturing Company, on account of commissions paid, nor on account of additional commissions allowed in arriving at the figure of $5,770.16 on the River Mills transactions, and is not entitled to recover anything on said River Mills transactions except as set out in conclusion of law #2.

A. HALL JOHNSTON,
Judge Presiding.

"JUDGMENT (of Johnston, J.).

"This cause coming on to be heard at the 1941 Extra Term of Mecklenburg County Superior Court, before His Honor, A. Hall Johnston, Judge Presiding, and being tried by the Judge without a jury, pursuant to agreement of the parties embodied in the order signed by His Honor, S. J. Ervin, Jr., appearing in the record, and the Court having heard the pleadings and the evidence, and having sustained motion for a nonsuit as to the individual defendants, and having made findings of fact and conclusions of law as between the plaintiff and the corporate defendant, Royal Manufacturing Company, which findings of fact and conclusions of law appear in the record, and it appearing to the Court that the plaintiff is entitled to a judgment against the defendant as hereinafter set out.

"It is thereupon ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant, Royal Manufacturing Company, the sum of $6,607.16, together with the costs of this action to be taxed by the Clerk.

"It is further ordered that an expert witness fee in the amount of $100.00 be allowed to A. F. Dichtenmueller, and an expert witness fee in the amount of $40.00 be allowed to W. F. Jackson to be taxed by the Clerk as a part of the costs of this action. This October 10, 1941.

A. HALL JOHNSTON,
Judge Presiding."

The plaintiff excepted to the refusal of the court to adopt certain findings of fact and conclusions of law with respect to the commissions of the defendant, an item of expense with respect to willowing the cotton waste, interest upon the money alleged to be owed by the defendant to plaintiff, and excepted to the conclusion of law #5 as above set out, relating to the same matters. The defendant filed numerous exceptions to the findings of fact and conclusions of law, which, as far as necessary, will be covered by the opinion.

Both plaintiff and defendant appealed, assigning error.

Jones & Burwell and Robinson & Jones for plaintiff.
Whitlock, Dockery & Shaw and Stewart & Moore for defendant.

SEAWELL, J. We endeavor to avoid repetition in the discussion of principles closely interrelated in considering the two appeals. For convenience, we discuss defendant's appeal first.

DEFENDANT'S APPEAL.

The defendant's objections to the evidence relate principally to the methods adopted by plaintiff in establishing the *quantum* of recovery for

the value of the goods sold by defendant under the agency, or the proportionate amount of recovery therefor.

We think, in the main, that these objections are rendered untenable, or at least made legally harmless to defendant, by reason of the findings of fact based upon competent evidence.

It might be inferred from the evidence, and it is so found, that the defendant attempted to become the purchaser of plaintiff's commodity in violation of the trust relation existing between them; and having supposed itself to have achieved that result, concealed from the plaintiff the profits made out of the transaction. In accomplishing this, it commingled plaintiff's waste with the waste of some forty other mills, or, in legal effect, with its own property. Both in view of the wrong committed and because the facts were within the peculiar knowledge of the defendant, the burden was upon it to identify plaintiff's goods on demand, or, since this was impossible, at least, as we conceive the law to be, to show what proportion of the proceeds of the sale less than the whole was due the plaintiff, or run the risk of a greater recovery. The defendant was not helpful in this respect, and plaintiff was forced to develop its case as best it could from defendant's records. It was content to demand only a proportionate part of the sales receipts or value of the product sold.

In this attempt, there were two lines of procedure: one based on the value of the waste from plaintiff's mills handled by the defendant, supplemented by evidence as to the value of the waste sold; and the other based on the proportionate poundage of plaintiff's waste in the commingled product. Perhaps, neither could be held as strictly accurate in results, since there was evidence that the value of waste was unstable and varied greatly with the kind. The objections, however, are more properly addressed to the effect of the evidence than to its competency.

The method adopted in the investigation afforded as near an approximation to reality as could be expected under the circumstances; and defendant having declined the burden of proof which we think rested upon it, in view of its breach of the duty to keep plaintiff's property separate from its own, has no cause to complain.

A careful review of the exceptions does not disclose any of sufficient merit to justify a new trial on defendant's appeal.

PLAINTIFF'S APPEAL.

We are bound by the findings of fact where there is competent legal evidence to support them, and ordinarily we cannot require the finding of additional facts or conclusions unless the appealing party has specifically requested the finding. In this case, we do not think the findings requested by the plaintiff could alter the result, as they are sufficiently

covered by those actually made in so far as might be necessary for final determination of the controversy.

However, the plaintiff's appeal brings up for review conclusion of law No. 5, which fails to award to plaintiff return of the commissions paid defendant for its purported sales which were, in fact, made to itself, and allows commissions on sale on the cleaned waste, the expenses of willowing, and denies to the plaintiff the item of interest demanded by it.

Plaintiff's recovery cannot exceed the legal effect of the findings made by the court.

It is strongly urged upon us that throughout the transaction the defendant's conduct was tortious and that its legal liabilities are those of a trespasser. Apparently, when the case was heard before, *Cotton Mills v. Manufacturing Co.*, 218 N. C., 560, 11 S. E. (2d), 550, the view presented by plaintiff would make the defendant a mere tort-feasor and trespasser from the beginning; and this Court understood the gravamen of the complaint to be that defendant obtained possession of the property through fraudulent devices with the purpose of committing the other wrongs subsequently practiced. Upon demurrer of the defendant, the Court sustained the complaint as properly presenting a cause of action in tort. That was the aspect of the case then presented. The trial, however, developed a contractual relation, in which the defendant was found to have departed from the duties imposed by his agency—in other words, committed breaches of trust in its contractual relation—and the findings of the court go no further.

Becoming, or attempting to become, the purchaser of its principal's goods and accounting only on that basis, it transpired that in carrying out this transaction, defendant further violated its duty as plaintiff's agent by commingling the plaintiff's goods with its own and selling it at a profit which it did not reveal.

We apprehend that the consequences and penalties which attend this conduct of the defendant are somewhat different from those which the law visits on one who, a trespasser *ab initio*, having never acquired the right to the possession of the property, but takes it, converts it to his own use, changes it into a different form, and sells the property thus altered. The more heinous nature of the civil offense, together with obvious necessity of public policy to prevent both the invasion of the possession and the conversion of the property, makes such an offender a trespasser *ab initio ad finem*. We think the cases cited in plaintiff's brief denying credit for expenses incurred in improving the property or converting it into a more valuable form have application to such a case. *Pine River Logging & Improvement Co. v. U. S.*, 186 U. S., 279, 46 L. Ed., 1164; *Wooden-Ware Co. v. U. S.*, 106 U. S., 432, 27 L. Ed., 401. It was for the owner, according to its own desire and judgment, to handle its property as it thought best.

In the case at bar, plaintiff was not injured by the cleaning or willowing of its waste in the hands of its agent—it constituted an improvement which produced a sale at a much higher price—and sale of the product was the prime purpose of the contract. The plaintiff now demands as its equitable right the payment to it of the secret profits realized on the purchase price of the improved property. To disallow the expenses of the willowing would, in our judgment, be the infliction of a naked penalty, for which we are unable to find precedent, and go beyond the rule which permits the principal to recover the profits of the agent's transaction.

Plaintiff, however, has raised a more serious question with regard to the allowance of commissions to the defendant on the sale of its waste. Speaking generally, when an agent, in a fiduciary relation, is guilty of disloyalty to his principal and when by virtue of his position he seeks to make profit to himself rather than promote the interest of his principal, he is not entitled to compensation. Mechem on Agency, sec. 1588; Restatement of the Laws, Agency, sec. 456.

It has been suggested that the allowance of commissions in the case at bar may be sustained because of an implied affirmance or ratification by the plaintiff through the institution of this suit and the relief demanded in it.

The effect of the rule that a selling agent cannot become the purchaser of his principal's property is to make such sale voidable by the principal, who may, at his election, ratify or disaffirm it, whether injured by the transaction or not. *Robertson v. Chapman,* 152 U. S., 673, 38 L. Ed., 592; *Gardner v. Ogden,* 22 N. Y., 327; *Tatsuno v. Kasai,* 70 Utah, 203, 259 P., 218, 62 A. L. R., 54, Annotation 62 A. L. R., 71. If the principal disaffirms the sale of the agent to himself, he is entitled to have his property back with the damages, if any, or to have the value thereof with incidental damages, if any, consequent upon the wrongful transaction. 2 Am. Jur., sec. 259.

But it is a recognized principle of law that the agent who thus violates his duty may be regarded—at the election of the principal—as trustee with respect to the property and its proceeds, and if he has transferred it to a *bona fide* purchaser, he may be made to account not only for its real value, but for any profit made by him on a resale. *Robertson v. Chapman, supra;* 2 Am. Jur., Agency, sec. 259; Am. Inst. Restatement, Agency, secs. 399 (d) and 400 (c).

It is more logical and nearer reality to say that the plaintiff has been compelled to accept the situation thrust upon it by defendant's wrong and, by election of remedies, to work out its equities to the best advantage. It does not thereby necessarily condone everything the defendant has done. Equity will follow these transactions and give to them their

proper significance and legal effect in applying the appropriate remedy when that remedy is pursued by the principal.

The rule which denies to the agent the right to purchase property of its principal which has been entrusted to him to sell to the best advantage, and thereafter to deal with it as his own, is firmly embedded in the law as an expression of public policy. The principle is said to be one of prevention, not remedial justice, which operates, however fair the transaction may have been, however free from every taint of moral wrong. *National Fire Ins. Co. v. Llewellyn,* 142 Okla., 272, 86 P., 792, 83 A. L. R., 1502; Am. L. Inst. Rest., Agency, sec. 389. However, in addition to this general rule of public policy, we think there is a reason of special application in the case at bar. To recover commissions the defendant must resort to its contract and to the performance of its conditions *in hoc modo,* and this defendant has not done. There is no compensation recoverable outside of the contract.

In selling to itself, the defendant attempted to act in the double capacity of agent and purchaser—a combination so incompatible and noxious to the fundamental rule of loyalty demanded of an agent to his principal, acting as a fiduciary, as to be intolerable to public policy. In selling plaintiff's waste to itself, the defendant must be considered as acting solely as purchaser and performing no compensable service for the plaintiff.

In the sale of the property thereafter, defendant did not purport to act as agent of the plaintiff, but sold to its own advantage and for its own profit. Defendant had become trustee of the property *de son tort,* a situation incompatible with a demand for commissions under the contract.

Conceding that in some instances a denial of commissions to a trustee may, under the circumstances of the case, become a matter of discretion with the trial court, we are of the opinion that here they were, as a matter of law, not recoverable and should not have been allowed.

Under C. S., 2309, all sums of money due by contract, except money due on penal bonds, bear interest as a matter of law. In *Bond v. Pickett Cotton Mills,* 166 N. C., 20, 81 S. E., 936, the law is said to apply to breaches of contract where the principal amount due can be ascertained "from the terms of the contract itself, or from evidence relative to the inquiry." This language is somewhat confusing as indicating that interest may be had as a matter of law for all breaches of contract, whether liquidated or not; but, at any rate, we do not believe that the law permitting the recovery in this case is altogether based on breach of contract. Any principle justifying recovery—whether recovery of secret profit or otherwise—is based on the theory of liability created by public policy, which superadds to the contract a right of an equitable nature which cannot be considered strictly damages for its breach or within its

express or implied promise to pay. It is a right growing out of the relationship created by the contract, rather than the contract itself, and the methods by which the amount of recovery is to be ascertained are not strictly those which apply to ordinary breaches of contract. The recovery of plaintiff in this case is not predicated on conversion of its property, or it would be limited to the damages immediately incident to the conversion, and, therefore, the demand made on the defendant by the commencement of the suit as fixing the date from which interest should be calculated is not of moment. *Lance v. Butler,* 135 N. C., 419, 47 S. E., 438.

Recovery of profits on transactions involving disloyalty of agents acting in fiduciary relations is commonly referred to the principle of constructive trusts—a trust arising *ex maleficio*—out of violation of the trust relation—and not subject to the incidents of contract. Bogert, Trusts and Trustees, sec. 543, p. 729; Underhill, Law of Trusts and Trustees, 9th Ed., p. 184, *et seq.;* Perry on Trusts, 11th Ed., sec. 206, p. 355, *et seq.;* Lewin on Trusts, p. 166. We quote from the last cited text: "The principle on which a court of equity elicits constructive trusts might be pursued with numerous other instances; as if a factor, agent . . . or other person in fiduciary positions acquire any pecuniary advantage to himself through the medium of his fiduciary character, he is accountable as a constructive trustee for those profits to his employer or other person whose interest he was bound to advance—but unless the money was originally that of his principal, it cannot be said to be his until a judgment or order has been obtained."

Recovery in instances of this kind is not a matter of exact measurement under the terms of the contract, but seems to be *sui generis,* and we are of the opinion that it does not come within the cited statute—C. S., 2309—so as to bear interest as a matter of law. We do not, of course, mean to say that interest is never recoverable except under the provisions of C. S., 2309, or that there are no conceivable instances in which interest might be recoverable in connection with the enforcement of a constructive trust; but upon the facts of this case, we approve the conclusion reached by the court below with respect to this item.

The defendant will not be allowed commissions on the sales transactions set out in the findings of fact; and plaintiff is entitled to recover commissions already paid to the defendant or retained by it. These may be computed by reference to the findings of fact.

The judgment of the court below will be modified in accordance with this opinion.

On plaintiff's appeal,

Modified and affirmed.

On defendant's appeal,

Affirmed.

MRS. BEULAH DILLON, ADMINISTRATRIX OF THE ESTATE OF HENRY LEE DILLON, v. CITY OF WINSTON-SALEM AND WINSTON-SALEM SOUTHBOUND RAILWAY COMPANY.

(Filed 24 June, 1942.)

1. Automobiles §§ 9c, 9f—

The violation of the statutory requirement that the operator of a motor vehicle traveling down grade on a highway shall not coast with the gears in neutral is negligence *per se*, and the pushing in of the clutch so as to permit the vehicle to coast down grade on a highway is a violation of the statute. Sec. 127, ch. 407, Public Laws 1937.

2. Automobiles § 9a—

The operator of a motor vehicle is under duty, irrespective of statutory requirement, to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances, which includes the duty to keep a reasonably careful lookout and to keep the vehicle under control.

3. Same: Automobiles § 12a—

The duty of the operator of a motor vehicle to keep same under control requires that at night he shall not travel at a speed in excess of that at which he is able to stop within the range of his lights.

4. Automobiles § 18a: Railroads § 11—Evidence held to show negligence on the part of driver constituting proximate cause of accident at dead-end street.

In this action by the administratrix of a passenger in an automobile, the driver of the car, as plaintiff's witness, testified without contradiction that he was traveling east and was coasting down grade with the clutch pushed in, that as he crossed a street intersection he was blinded by the street light, that he continued without slackening speed across the intersection 49.3 feet to defendant railroad company's sidetracks, that the tracks were elevated above the level of the street so that the impact caused him to lose control of the car, and that the car continued on for a distance of more than 50 feet and hit an elevated dirt embankment on the west side of a drainage ditch maintained on the west side of the main line tracks, which were in a slight cut. There was testimony to the effect that the car hit the embankment with such force as to imbed the front of the car and drive the motor back into the front seat compartment. *Held:* The evidence discloses as a matter of law negligence on the part of the driver constituting the proximate cause of the accident or, conceding that plaintiff's evidence disclosed negligence on the part of the railroad company and the city in the maintenance and condition of the sidetrack crossing and the blockading of the street and in the failure to maintain signs or warnings, one of the proximate causes of the accident.

5. Automobiles § 20b—

While negligence of the driver will not ordinarily be imputed to an occupant or passenger, when it appears that the passenger has or exercises control over the driver, the negligence of the driver is imputable to the passenger irrespective of the ownership of the automobile.

6. Same: Railroads § 11—

Where the uncontradicted evidence discloses that the passenger in an automobile got on the front seat and directed the driver in going to the house of the passenger's girl, it discloses that the passenger was in charge and directing the operation of the automobile so that the negligence of the driver in running the car into a railroad embankment at a dead-end street is imputable, as a matter of law, to the passenger.

7. Same: Automobiles § 21—

Where the negligence of the driver is imputed to the passenger, such negligence will bar recovery by the passenger's administratrix if such negligence was a proximate cause of the injury and death, and it is not necessary that it should have been the sole proximate cause.

APPEAL by plaintiff from *Armstrong, J.*, at 9 March, 1942, Term, of FORSYTH.

Civil action to recover for alleged wrongful death. C. S., 160-161.

Evidence offered by plaintiff and elicited from her witnesses in the trial court tends to show these pertinent facts:

Henry Lee Dillon, nineteen years of age, intestate of plaintiff, came to his death about 7:30 o'clock on Sunday night, 22 December, 1940, when the Ford automobile, 1931 coach, owned by the father of, and operated by Charles W. Cranford, in which Dillon, two other boys and a girl were riding, ran into a dirt bank located east of the end of the pavement on Devonshire Street and on west side of the main line tracks, and east of sidetracks of defendant Winston-Salem Southbound Railway Company, in the city of Winston-Salem, North Carolina. At that time the driver of the Ford, then fourteen years of age, but approaching his fifteenth birthday, 18 February, 1941, had a driver's license, obtained by him through misrepresentation of his age.

Devonshire Street originally appeared on plat of property of Winston-Salem Land and Investment Company, filed for record in March, 1892, and registered in register's office of Forsyth County, North Carolina. The plat covered land at, but then outside of the corporate limits of the city of Winston-Salem, subdivided into blocks and lots, and streets and alleys. As shown on this plat, Devonshire Street runs east and west and extends from Sunnyside Avenue on the west to Lexington Street on the east—intersecting Vargrave Street and Glendale Avenue, which run north and south. Glendale Avenue, as shown, is the first street west of Lexington Street, which runs in slightly northwest and southeast course. Sprague Street is shown as the first street north of, and parallel to Devonshire Street, and Goldfloss Street is the first south thereof and parallel thereto.

Between the years 1893 and 1906 the owners of said property sold and conveyed lots with reference to this plat—and Devonshire Street was during that period used as public way for traveling on foot, and by horse

and buggy and wagon. And, in 1906, defendant Winston-Salem Southbound Railway Company bought from the then owner, and with reference to said map, all the lots in the two blocks fronting on Devonshire Street west of Lexington Street and east of Glendale Avenue, except those representing two hundred fifty feet frontage on each side next to Glendale Avenue.

Thereafter, about 1909, defendant Railway Company constructed a railroad north and south across said subdivision and the land so purchased by it, and across Devonshire Street as represented on said plat. As so constructed the main line of the railroad cut across and below the former surface level of land covered by Devonshire Street, as so represented. The Railway Company also built a passenger and freight station on said property south of Devonshire Street as so represented, and west of its main line tracks. It also constructed and laid two sidetracks on said property, west of the station and across Devonshire Street as so represented. Access to the station was provided from Devonshire Street and over the sidetracks, and then south over a dirt service road located between the tracks of the main line, and the sidetracks. But no way was provided there for crossing the main line, and Devonshire came to a "dead-end" at that point.

Thereafter, in 1923, the territory along Devonshire Street, west of Lexington Street, including the land purchased by defendant Railway Company in 1906, as above stated, was taken into the corporate limits of defendant city. Thereupon, defendant city laid pavement and curbing on Devonshire Street, including that section east of east curb line of Glendale Avenue down to a point 1.7 or 1.8 feet west of the west sidetrack of defendant Railway Company, a distance of 332.9 feet. At that time, defendant Railway Company conveyed to defendant city a strip of land referred to as being fifty feet wide, along the west boundary of its land, purchased as above stated, extending from Sprague Street south to and across Devonshire Street to Goldfloss Street, on which defendant city constructed a street, which is referred to as the unnamed street. Traffic going east on Devonshire may turn to left there and reach Sprague Street on which there is an overhead bridge across the railroad, or may turn to right down the railroad toward Goldfloss Street. This pavement on Devonshire Street, thirty feet wide, extends across the intersection of that street and the unnamed street, and then on east for approximately 21.5 feet, that is, approximately 71.5 feet east of the west line of the strip of land so conveyed to defendant city by defendant Railway Company, and the same distance—71.5 feet—east of the west line of said intersection, and from end of this pavement, east across the sidetracks and the road leading into the railroad station, to the ditch where the Ford automobile ran into the embankment of ditch on west bank of main line tracks, the distance is 56.7 feet.

On the night of the accident here involved, there was a lighted street light located over, and approximately in the center of the paved area, and twenty-four feet east of the west line of intersection of Devonshire Street and the unnamed street, and 49.3 feet west of the west rail of the west sidetrack, that is, more than 100 feet west of the said ditch bank.

Devonshire Street, east from Glendale Avenue, is down hill to its intersection with the unnamed street. There "it flattens out," "levels out" and "is practically level." And between the intersection and the point of approach to sidetracks, the slope is slightly downward. From that point there is a dirt and cinder roadway over the sidetracks, down into the railroad yard. The dirt approach to sidetracks, overlapping the pavement irregularly but in the center beginning seven feet from the west rail, rises on eleven per cent grade. Over the tracks the road is "very nearly level," though slightly lower on east side.

The bank on the east side of main line tracks at the point in question is higher, and extends two feet above the level of the sidetracks.

Charles W. Cranford, as witness for plaintiff, testified substantially as follows: That on night of 22 December, 1940, he was driving his father's Ford coach; that three boys, including Henry Lee (Pete) Dillon, whom he did not then know, joined him in northern section of Winston-Salem; that they "picked up a girl," and then rode through the city to Southside "to see some young ladies"; that Dillon said that "he had a girl friend out there he wanted to go see"; that he, Dillon, directed the course of the automobile, and they stopped at intersection of Glendale Avenue and Devonshire Street, and Dillon exchanged seats and got on front seat; that he, the driver, had not been there before, and, in his words, "Pete told me to let him get up in front so that he could show me where he wanted to go"; that then they started east on Devonshire Street; that the street looked like a straight, through street; that there were street lights over "on the old Lexington Highway," and coming down Devonshire at night it looked like a dark block in between; that he pushed the clutch in and the car was out of gear all the way—coasting down hill; that he, Cranford, "did not know that the railroad crossed there"; that the street light at intersection with the unnamed street, using his words, "caused a glare on the windshield and blinded me, looking into the dark"; that the first time he observed that the pavement ended there was when, as he said, "We hit the railroad-spur tracks . . . traveling approximately twenty-five or thirty miles an hour"; that, again quoting, "When I hit the railroad track, I lost control of the car . . . It threw me through the top, and I had no control of it . . . my car stopped against the bank, below the spur tracks"; and that the lights and brakes on his car were in good condition.

The witness, continuing upon cross-examination as to light blinding him, said: "I don't remember where my car was when the glare of the

street light blinded me. It was approximately around the street light somewhere, close to the street light, as I was going towards the street light . . . Before I got to that street light, the glare of it blinded me. I did not make an effort to stop the car at the time. I kept on driving, although I was blinded at the time by the glare of the street light." Then, again, "The cause of this accident was not altogether being blinded by that light. There was nothing to prevent me from stopping my car . . . I didn't try to stop because you could see on the side of the street. I was blinded and couldn't see straight ahead . . . I didn't stop my car or make an effort to stop, but just went on in the darkness, not being able to see a thing, and not seeing a thing until after the car stopped."

Then continuing, on cross-examination, regarding directions by Dillon, the witness testified: "He got on the front seat because he was directing me where to go. He directed me where to go as I started on Devonshire Street . . . He did not tell me where the girl friend lived . . . He just told me where to turn from time to time as we went cut in that direction. He had given me directions . . . before he got on the front seat . . . He was directing me which way to go and I was going under his direction, and driving the car as he told me to drive . . . going the way he told me to go. He knew exactly how I was driving the car"; and also said: "I do not know in which direction Pete was looking at or immediately before the accident."

This witness further testified that "just before the time we hit the spur tracks, somebody hollered something, I don't know what." And, again, "Just before we hit the tracks someone told me that we were approaching a dead-end street . . . I did not know they were telling me it was a dead-end street. They just hollered, hollered for the dead-end street. I don't know who it was."

This witness and others testified that "there was no barricade or sign or anything to show that the street ended like it did"; and that there had been a barrier on the bank at the ditch but that the plank had been knocked down, leaving only the posts. There is evidence that of the occupants of the Ford another was killed, and all others seriously injured.

The newspaperman, Harvey Dinkins, who reached the scene of the accident soon after it happened, testified: That the front of the car was completely mashed in against and embedded in the dirt embankment beyond the ditch—driven into the soil of the ditch bank; that "the motor was driven back into the front seat compartment" and "against the front seat"; that "the car was almost a total and complete wreck"; that he surveyed the whole surroundings; and that, from the intersection, after he got under the street light there looking straight ahead, he could see the bank of the main line railroad cut, and could also see the spur tracks.

The acts of negligence charged by plaintiff against defendants, briefly stated, are these: (1) That defendant Railway Company unlawfully

and negligently obstructed the uninterrupted passage of traffic on Devonshire Street at point where its tracks cross same, and that defendant city failed and neglected to prevent said Railway Company from so doing; (2) that defendant Railway Company failed to provide and maintain for traffic a proper and safe crossing at point where Devonshire Street crosses its tracks, and that defendant city failed to require the Railway Company to make such provision and maintenance; (3) that defendant Railway Company failed to erect "any signs, warning, blinkers or other signals" to indicate where "it claimed that its property began and the rights of the public to travel thereon ended," so as to warn any person about to trespass thereon; (4) that defendant city "erected and maintained a light at the intersection of Devonshire Street and the unnamed street leading to Sprague Street in such manner as to blind a traveler or obscure the view of a person proceeding on Devonshire Street toward the intersection"; (5) that both defendants (A) "failed to keep in good repair and safe condition for travel that part of the crossing at Devonshire Street which was actually open," in that (a) the west rail of the west sidetrack was placed nine inches above the level of the street, (b) the said crossing was permitted to so slope towards the east "as to make it invisible and unsafe and dangerous for travel," (c) the ditch east of the sidetracks, into which automobile in question was wrecked, was not eliminated by the laying of a culvert, or otherwise, and (d) there was no "clear and visible warning of the existence of said ditch"; (B) "failed to erect any warning, signals, signs, barricades, blinkers, or other devices to warn or notify the public or any person traveling east on Devonshire Street of the existence of a railroad crossing or of any of the conditions" there; (C) created and maintained such conditions as alleged at the point of the accident as amounted to an invitation to the traveling public, including plaintiff's intestate, to use and travel on Devonshire Street east of Glendale Avenue upon the assumption that it was "an open, continuous and unbroken street" until too late for "plaintiff's intestate in the exercise of ordinary care to avoid and to extricate himself from the danger in which he had been placed by the wrongful conduct of the defendants"; and (D) failed to correct such dangerous conditions after they had notice of their existence.

Defendants, in separate answers filed, deny the allegations of negligence as set out in the complaint, and, by way of further defense, summarily stated, plead that negligence of Charles W. Cranford, fourteen years of age, in operating the automobile, on joint enterprise, under direction of plaintiff's intestate, (1) at unlawful and reckless rate of speed, (2) without having and keeping same under control, (3) without keeping a proper lookout, (4) carelessly and heedlessly, in a willful and wanton disregard of the rights and safety of others, (5) without due caution and circumspection and at a speed so as to endanger or be likely

to endanger persons riding therein, and (6) in violation of the Motor Vehicles Laws of the State of North Carolina, is the sole proximate cause, or, at least, a contributing cause of the death of plaintiff's intestate; and that such negligence is imputable to plaintiff's intestate; but that if defendants or either of them were negligent in any of the respects alleged, such negligence is insulated by that of Charles W. Cranford, operator of the automobile.

At the close of evidence offered by plaintiff, each of defendants demurred thereto and moved for judgment as of nonsuit under C. S., 567. The motions were allowed—and in accordance therewith judgment was entered.

Plaintiff appeals to Supreme Court and assigns error.

Elledge & Wells and Ratcliff, Hudson & Ferrell for plaintiff, appellant.

Fred M. Parrish and Craige & Craige for defendant Winston-Salem Southbound Railway Company, appellee.

Womble, Carlyle, Martin & Sandridge for City of Winston-Salem, appellee.

WINBORNE, J. While there are other assignments of error on this appeal, only that which challenges the correctness of the judgment as of nonsuit requires consideration. And, as to that, we agree with lower court.

If it be conceded that there is sufficient evidence, as against either or both defendants, to require the submission of an issue or issues of negligence, we are of opinion that the evidence, offered by plaintiff, clearly establishes that the driver, in the operation of the automobile in which intestate was riding when fatally injured, is, upon his own statement, guilty of negligence, which, as a matter of law, if not insulating any negligence of defendants, under principle enunciated in *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808; *Chinnis v. R. R.,* 219 N. C., 528, 14 S. E. (2d), 500; *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239; *Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; and *Jeffries v. Powell, ante,* 415, at least proximately contributed to the injury and death of intestate, *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237; *Lee v. R. R.,* 212 N. C., 340, 193 S. E., 395; *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608; *Sibbit v. Transit Co.,* 220 N. C., 702, 18 S. E. (2d), 203, and that the negligence of the driver is imputable to intestate who was directing the operator of the automobile.

It is provided by statute in this State that "The driver of a motor vehicle when traveling upon a down grade on any highway shall not coast with the gears of such vehicle in neutral." Public Laws 1937,

ch. 407, sec. 127. The violation of such statute is negligence *per se,* and, if injury to the violator proximately result therefrom, it would bar his right to recover therefor.

Furthermore, it is a general rule of law, even in the absence of statutory requirement, 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 a reasonably careful lookout and to keep same under such control at night as to be able to stop within the range of his lights. *Weston v. R. R., supra; Lee v. R. R., supra; Beck v. Hooks, supra; Sibbit v. Transit Co., supra.*

In *Weston v. R. R., supra,* speaking to a factual situation somewhat similar to that here, this Court said: "The general rule under such circumstances is thus stated in Huddy on Automobiles, 7 Ed., 1924, sec. 296. 'It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions . . . If the lights on the automobile would disclose obstructions only ten yards away it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance. If the lights on the machine would disclose objects further away than ten yards, and the driver failed to see the object in time, then he would be conclusively presumed to be guilty of negligence, because it was his duty to see what could have been seen'" This principle has been brought forward and applied in *Lee v. R. R., supra; Beck v. Hooks, supra;* and *Sibbit v. Transit Co., supra,* and held applicable to factual situation in *Clarke v. Martin,* 217 N. C., 440, 8 S. E. (2d), 230.

And in *Beck v. Hooks, supra,* the rule is stated in this way:

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

Applying this principle to the evidence in case in hand, it affirmatively appears: (1) That the driver of the automobile, by pushing the clutch in, had thrown the car out of gear, and was permitting it to coast down hill. This was negligence *per se.* (2) That the driver was blinded by the glare of the street light. If as he says he was blinded as he "was going towards the street light," it occurred more than 49.3 feet before he reached the sidetracks—that being the distance from the light to the sidetracks; and it occurred more than one hundred feet from the ditch bank. Yet he continued to drive blindly, and made no effort to slacken the speed at which he was traveling, or to stop as the circumstances required. Such conduct is negligence. Moreover, paraphrasing in part the words of *Stacy, C. J.,* in *Powers v. Sternberg, supra,* there are a few physical facts here which speak louder than words. The force with which the automobile ran into the dirt embankment, "with its attendant destruction and death, establishes the negligence of the driver of the car as the proximate cause," or at least a proximate cause, of the injury and death of intestate.

Also, the principle prevails in this State that negligence on the part of the driver of an automobile will not, as a rule, be imputed to another occupant or passenger unless such occupant is the owner of it, or has some control over the driver. *Hunt v. R. R.,* 170 N. C., 442, 87 S. E., 210, and numerous other cases.

This principle recognizes that where it appears that the passenger has or exercises control over the driver, negligence of the driver is imputable to the passenger. See *Williams v. Blue,* 173 N. C., 452, 92 S. E., 270, where the Court said: "Ownership of an automobile is not essential to charge one with responsibility for its operation . . . One in charge of operation of a motor vehicle, although he is neither the owner nor the person actually operating it, is nevertheless liable for injury sustained by third persons by reason of its negligent operation, as the person actually operating the vehicle will be deemed his servant irrespective of whether he employed him or not. 28 Cyc., p. 40."

Applying this principle to the present case the undisputed testimony of the driver is susceptible of only one meaning, and that is, on the trip in question the intestate of plaintiff was in charge, and directing the operation of the automobile. Under such circumstances the negligence of the driver is imputed to him.

It is sufficient to defeat recovery if the negligence of the driver, imputed to intestate of plaintiff, was a proximate cause of the injury and death of the intestate. It need not be the sole proximate cause.

Consideration of other exceptions fails to reveal cause for disturbing the rulings of trial court.

The judgment below is

Affirmed.

MRS. KATE BRYAN DUFFY, WIDOW, AND FRANCIS STRINGER DUFFY AND WIFE, SHIRLEY AVERY DUFFY, AND FRANCIS STRINGER DUFFY BY KATE BRYAN DUFFY, HIS NEXT FRIEND, *v.* HENRY BRYAN DUFFY AND WIFE, HELEN JOHNSON DUFFY, THE UNBORN CHILD OR CHILDREN OF FRANCIS STRINGER DUFFY, THE FUTURE WIFE OR WIVES OF FRANCIS STRINGER DUFFY, AND JOHN BRYAN LONDON, TRUSTEE.

(Filed 24 June, 1942.)

1. Executors and Administrators § 24: Trusts § 11—Trust may not be modified by consent of beneficiaries in esse to the detriment of contingent beneficiaries not in esse.

Husband and wife executed a trust agreement which provided that as far as the income would allow certain benefits be paid monthly to their son, and if he should marry, to his wife and to each child born to the marriage, with further provision that upon his death, his widow, if she should survive him, should receive the amount theretofore paid to them both, unless there were also surviving children, in which event she should get one-half and the children one-half, with further provision that if he left only children him surviving, the trust should be dissolved and the children receive all the property. The male trustor died leaving a will referring to the trust agreement and directing that it should be put into effect upon the death of his wife. The *feme* trustor, their son and their son's wife instituted this action against the trustees and the guardian *ad litem* for any unborn children of the son and for his future wife or wives, seeking to annul the trust agreement and the portion of the trustor's will relating thereto, and to substitute therefor a judgment of the court which was consented to by all the parties except the guardian *ad litem*, which judgment set up a trust with like provisions except that it provided no payment to the son's wife during his life and in the event of his prior death stipulated that she should receive only one-half the amount provided for in the trust agreement, and failed to make any provision for payment for the benefit of the son's children during the son's lifetime. *Held:* Since the provisions of the judgment are in certain respects definitely less favorable to the unborn children and the wife, or future wife or widow of the principal beneficiary, the signing of the judgment is error, and the mere fact that the present wife of the son is a party to the action and acquiesced in the settlement cannot affect the rights of any future wife or widow of the said son.

2. Executors and Administrators § 24—

The family settlement doctrine is not applicable to an active trust in which special duties are imposed upon the trustee, including the disbursements of the income for an indefinite time to indefinite beneficiaries upon indefinite contingencies.

3. Trusts § 11—

While equity has the power to modify a trust to preserve it from destruction, it does not have the power to destroy the trust or defeat the purpose of the donor or trustor.

APPEAL by the defendant guardian *ad litem* of the unborn children and of the future wives of Francis Stringer Duffy, Jr., from *Burney, J.*, at April Term, 1942, of CRAVEN.

This is an action for a declaratory judgment nullifying a deed of trust executed 12 July, 1932, by the late Francis Stringer Duffy and his wife (one of the plaintiffs), Kate Bryan Duffy, to Henry Bryan Duffy and John Bryan London, and a portion of the will of the late Francis Stringer Duffy. Contemporaneous with the execution of the deed of trust the grantors therein executed separate individual wills, which said wills referred to and made said deed of trust a part thereof.

Francis Stringer Duffy is dead and his said will is duly registered, and no caveat is filed thereto. The deed of trust has not been recorded or delivered. It is the purpose of this action to nullify this deed of trust and the will of Francis Stringer Duffy in so far as it makes the said deed of trust a part thereof.

The principle purpose of the deed of trust is to preserve in the hands of the grantees, Henry Bryan Duffy and John Bryan London, as trustees, for the use and benefit of one of the two children of the grantors, namely, Francis Stringer Duffy, Jr., practically one-half of their joint estates, after the expiration of life estates therein provided, to be administered as in said deed of trust provided. The deed of trust provides, *inter alia*, that "During the period of this trust, beginning within ten days after the filing of this deed and trust agreement, Francis S. Duffy, Jr., is to be allowed the sum of $100.00 per month, but that not more than $25.00 of the said amount can be paid to him in any one week and that the said Francis S. Duffy, Jr., shall not be permitted to borrow or have advanced from the said trust estate over and above the amounts herein provided. However, if our son Francis S. Duffy, Jr., should marry, then these Trustees are to pay an additional amount, not to exceed $50.00 a month, to the wife of Francis S. Duffy, Jr., in like manner as paid to Francis S. Duffy, Jr., provided, however, that if the estate is not able to pay the entire amount, the full amount shall be paid first to Francis S. Duffy, Jr., and then any remaining amounts that the estate is able to pay is to be paid over to his wife. It is contemplated, however, that the part of the estate belonging to Francis S. Duffy, Jr., under this trust agreement shall be amply able to take care of him and his wife. Should there be born issue of any wedlock of Francis S. Duffy, Jr., then these trustees are to add the minimum sum of $15.00 a month for each child. All these amounts are payable from the earnings of this trust estate and in the event the estate fails to earn the amounts set out herein, the Trustees are to pay over whatever it earns.

"It is provided, however, that there should be reserved from the trust estate a sufficient amount and set aside and placed on savings or in some

form of insurance or with some reliable trust company (at intervals) sufficient to provide the expense of educating the said children; and any such issue of any wedlock of Francis S. Duffy, Jr., shall be given the same consideration as the other grandchildren of the grantors herein and the trust estate shall continue for the spouse and issue of Francis S. Duffy, Jr. Upon the death of Francis S. Duffy, Jr., should he be survived by a widow, the trustees are to continue the benefits of this trust for the said widow of Francis S. Duffy, Jr., for her life and she shall receive the same amounts from said trust as received by Francis S. Duffy, Jr., under this trust agreement during her life. And if there are issue of any wedlock of Francis S. Duffy, Jr., the benefits of this trust are to go to the said widow and the children of Francis S. Duffy, Jr., as heretofore set out in this instrument; provided, that if Francis S. Duffy, Jr., die without leaving issue from his marriage, then at the death of the said widow, the trust estate automatically dissolves, and the property of the said trust estate goes to Henry Bryan Duffy and his heirs in fee simple.

"In the event of there being issue of the wedlock of Francis S. Duffy, Jr., upon the death of the widow of the said Francis S. Duffy, Jr., then this trust estate will be automatically dissolved and the property of the said trust estate will go, share and share alike, to the heirs of Francis S. Duffy, Jr., being the issue of his wedlock."

The will of the late Francis Stringer Duffy provides, *inter alia,* that "My beloved wife, Kate Bryan Duffy, contemporaneous with the making of this last will and testament, has made a last will and testament for herself, and we have as co-grantors also executed a trust agreement contemporaneously with the said wills, which said deed and trust agreement is deposited in the office of Abernethy & Abernethy, Attorneys at law, New Bern, North Carolina, and it is my will and desire and also the desire of my wife that this deed and trust agreement shall not be put in force and effect and recorded until after the death of Kate Bryan Duffy and myself. But if my beloved wife, Kate Bryan Duffy, has died prior to the probate of my will, it is my wish and I hereby direct my executors to have the said deed and trust agreement filed and the same become operative immediately and the said deed and trust agreement contains specific instructions to my executors herein named not inconsistent with this last will and testament.

"However, it is provided that if my beloved wife, Kate Bryan Duffy, survives me and the care and management of the affairs of my youngest son, Francis S. Duffy, Jr., shall become too burdensome for her, then she shall have the right to direct Abernethy & Abernethy, Attorneys at Law, New Bern, North Carolina, to record the said deed and trust agreement, which shall immediately go into full force and effect and my

executors herein named, who are also grantees under that instrument, shall immediately assume possession of the property conveyed and undertake the duties therein imposed, it being the purpose of my will that so long as my beloved wife, Kate Bryan Duffy, wish, she shall be in control and possession of my personal property and real estate."

The cause came on for hearing before Burney, J. John W. Beaman was appointed guardian *ad litem* of any unborn child or children of Francis Stringer Duffy, Jr., and of any future wife or wives of Francis Stringer Duffy, Jr. All parties thereto waived trial by jury and agreed that the court might find the facts, reach conclusions of law and enter judgment in accord therewith. None of the defendants, except the guardian *ad litem* of the unborn children and future wives of Francis Stringer Duffy, Jr., filed answer.

It is alleged in the complaint and not denied by the defendants, except the guardian *ad litem,* that all the parties in interest had entered into an agreement which they desired and sought the aid of the court to effectuate; that said agreement provided that the deed of trust executed by the late Francis Stringer Duffy and his wife, Kate Bryan Duffy, of the first part, to Henry Bryan Duffy and John Bryan London, as trustees for Francis Stringer Duffy, Jr., of the second part, dated 12 July, 1932, be annulled, by the consent of all concerned, and that the Superior Court decree the trust agreement void and of no effect; and that practically one-half of the property, real and personal, of the late Francis Stringer Duffy and of his wife, Kate Bryan Duffy, after the life estate of the said Kate Bryan Duffy therein reserved, should be held in fee simple by Henry Bryan Duffy; and that practically one-half of said property, after the life estate of Kate Bryan Duffy therein preserved, should be held by Henry Bryan Duffy in trust for Francis Stringer Duffy, Jr., and that the said trustee "shall pay and distribute the net proceeds of such income (from the property so conveyed in trust) in monthly installments as nearly as practical, as follows: subject to the proviso hereinafter contained, the whole thereof to Francis Stringer Duffy, Jr., during the lifetime of said Francis Stringer Duffy, Jr., and then to the nearest kin of said Francis Stringer Duffy, Jr.; provided, if said Francis Stringer Duffy, Jr., die without issue him surviving, leaving a widow, then said trustee shall pay one-half of the whole of said net income to the nearest kin of said Francis Stringer Duffy, Jr., and the other one-half thereof, to said widow for the term of her natural life, and upon her death the same shall be paid to the nearest kin of said Francis Stringer Duffy, Jr. This settlement upon said widow is made in consideration of her marriage to Francis Stringer Duffy, Jr., and in consideration of such marriage only."

John W. Beaman, guardian *ad litem* of the unborn children and future wives of Francis Stringer Duffy, Jr., answering the allegations

of the complaint relative to an agreement among the parties in interest, avers: "these defendants enter a plea of general denial. And in connection with plaintiffs' allegations therein contained, these defendants say and allege that the agreement offered by plaintiffs does not abide with the true intent and purposes of the trustors and devisors as set out and described in the Trust Agreement and wills set out in the complaint, for that the trust property, or income therefrom, is diverted to other persons and purposes to the exclusion of these answering defendants and thus defeats the manifest intent of the said trustors. That these defendants are not benefited by the agreement submitted by the plaintiffs as there is no consideration offered or presented to them for the relinquishment of their rights under the said deed of trust agreement."

The court entered judgment in which it found that all parties were properly served with summons and that only the guardian *ad litem* has filed answer, that all parties are properly before the court, either in person, by next friend or guardian *ad litem,* and that the court has jurisdiction of the subject matter, and that it is agreed by all parties that the court may find the facts and render judgment; it is further found "that the interest of all concerned will be materially promoted by annulling the trust agreement executed by and between Francis Stringer Duffy and wife, Kate Bryan Duffy, of the first part, and Henry Bryan Duffy and John Bryan London of the second part, dated July 12, 1932.

"Second: That Francis Stringer Duffy, Sr., died August 5, 1935; that his widow, Kate Bryan Duffy, and their two children, Henry Bryan Duffy and Francis Stringer Duffy, Jr., and their respective wives, and Henry Bryan Duffy and John Bryan London, as trustees, and Kate Bryan Duffy as next friend of said Francis Stringer Duffy, Jr., being all persons now in being who have an interest in the property herein involved, have agreed upon a division and settlement of said property . . ."; and adjudged that the trust agreement of 12 July, 1932, be annulled, and "decreed void and of no effect"; and that Henry Bryan Duffy, subject to certain charges specified, shall have and hold in fee simple practically one-half of the estate, real and personal, of his parents, the late Francis Stringer Duffy and Kate Bryan Duffy; and that subject to certain charges therein mentioned, practically one-half of the said estate of the said late Francis Stringer Duffy and Kate Bryan Duffy, shall "vest in said Henry Bryan Duffy, to have and to hold the same to him and his successors in trust for the uses and purposes and with the power, authority and discretion hereinafter set forth, that is to say; said trustee shall receive, hold and manage said properties, receive all rents, profits, and income of every nature due the trust estate, convert, mortgage, sell, assign, alter, re-invest and otherwise deal with said properties and additions thereto as he in his discretion shall deem to be for the

best interest of said Francis Stringer Duffy, Jr., and other beneficiaries hereinafter named, and out of the income received therefrom said trustee shall pay all taxes accruing on said properties, keep the buildings thereon insured against loss by fire, pay the costs of repairs and upkeep and all expenses of administration of such trust, including reasonable compensation paid by said trustee to such person as he may employ to collect rents from tenants of said properties and in addition thereto five per centum of the gross income of said trust estate to be retained by him as compensation for his services as trustee, and then he shall pay and distribute the net proceeds of such income in monthly installments as nearly as practicable, as follows: subject to the proviso hereinafter contained, the whole thereof to Francis Stringer Duffy, Jr., during the lifetime of said Francis Stringer Duffy, Jr., and then to the nearest kin of said Francis Stringer Duffy, Jr.; provided, if said Francis Stringer Duffy, Jr., die without issue him surviving, leaving a widow, then said trustee shall pay one-half of the whole of said net income to the nearest kin of said Francis Stringer Duffy, Jr., and the other one-half thereof to said widow for the term of her natural life, and upon her death the same shall be paid to the nearest kin of said Francis Stringer Duffy, Jr. This settlement upon said widow is made in consideration of her marriage to Francis Stringer Duffy, Jr., and in consideration of such marriage only."

From the judgment entered John W. Beaman, guardian *ad litem* for the unborn child or children of Francis Stringer Duffy, Jr., and for the future wife or wives of Francis Stringer Duffy, Jr., appealed to the Supreme Court, assigning as error "the judgment signed by the court."

R. A. Nunn for plaintiffs, appellees.

L. T. Grantham and W. B. R. Guion for defendants H. B. Duffy and wife, and J. B. London, trustees, appellees.

John W. Beaman, guardian ad litem, appellant, in propria persona.

SCHENCK, J. We are constrained to hold that the judgment entered by the Superior Court is in error, for the reason that the provisions made for the future wife or wives of Francis Stringer Duffy, Jr., as well as the provisions made for the unborn child or children of the said Francis Stringer Duffy, Jr., by the deed of trust and the will of the late Francis Stringer Duffy, are more liberal than the provisions made for the said wife or wives or for the said child or children in the trust agreement alleged to have been entered into by the interested parties in being and in said judgment.

The deed of trust, made a part of the will of the late Francis Stringer Duffy, sought to be annulled, in so far as it makes provisions for any

wife or widow of Francis Stringer Duffy, Jr., is practically to the effect that $50.00 per month from income of the property in the trust created thereby is to be paid to any wife he may have; and in the event any wife of the said Francis Stringer Duffy, Jr., shall survive him, and there be no surviving children, she shall receive the total benefits of the trust that he would have received had he lived (at least $100.00 per month); and if she survives him and there be likewise surviving children then she is to receive one-half of the benefits and such surviving children are to receive one-half thereof; whereas the alleged agreement and the judgment in so far as they relate to provisions for any wife or widow of Francis Stringer Duffy, Jr., are practically to the effect that the whole of the income from the property in the trust created is to be paid to Francis Stringer Duffy, Jr., during his life to the exclusion of any wife; and if the said Francis Stringer Duffy, Jr., should die, leaving a widow and no issue, such widow would receive only one-half of the income from said property during her life, instead of the whole thereof. The provisions of the judgment for any wife or widow of Francis Stringer Duffy, Jr., are definitely less liberal than such provisions in the deed of trust, and cannot be construed to be for the best interest of such wife or widow.

Likewise the deed of trust sought to be annulled in so far as it makes provisions for any unborn child or children of Francis Stringer Duffy, Jr., is practically to the effect that $15.00 per month is to be paid to each child that may be born, from the income of the property in the trust created, and in addition thereto a sufficient amount is to be set aside from said income to educate such child; and in the event of the death of Francis Stringer Duffy, Jr., leaving a widow and children, such children are to receive one-half of the income; and in the event of the death of Francis Stringer Duffy, Jr., without leaving a widow but leaving children, the trust is to be dissolved and such children are to receive all the property therein; whereas the only provision made in the judgment for such unborn children is that upon the death of Francis Stringer Duffy, Jr., without leaving a widow, the property in the trust is to go to the nearest of kin, who would, of course, be his children, if any surviving. The provisions of the judgment for any unborn child or children of Francis Stringer Duffy, Jr., are different and in some respects less liberal than such provisions in the deed of trust, and cannot, upon the whole, be construed for the best interest of such child or children.

The mere fact that the present wife of Francis Stringer Duffy, Jr., Shirley Avery Duffy, is a party plaintiff to this action and has acquiesced in the settlement agreement alleged in the complaint and in the judgment entered below, cannot effect the rights of any future wife or widow of the said Francis Stringer Duffy, Jr., represented along with

others by the guardian *ad litem,* in the property in the trust created by the deed of trust sought to be annulled.

The family settlement doctrine is not applicable in this action, since the trust which is sought to be annulled is an active one wherein special duties are imposed upon the trustee, including the disbursements of the income from the trust estate for an indefinite time, to indefinite recipients and upon indefinite contingencies. *Deal v. Trust Co.,* 218 N. C., 483, 11 S. E. (2d), 464, and cases there cited.

To uphold the judgment of the Superior Court annulling the deed of trust as incorporated in the will of the late Francis Stringer Duffy would be to deny to the grantors therein the right to freely dispose of their property according to their wishes. While ordinarily a court of equity has the power to do what is necessary to be done to preserve a trust from destruction, and in the exercise of that power may, under certain unusual circumstances, modify the terms of the trust to that end, such court has not the power to defeat and destroy the trust. *Cutter v. Trust Co.,* 213 N. C., 686, 197 S. E., 542. This power to modify the terms of the trust when necessary to preserve it should not be exercised to destroy the trust or defeat the purpose of the donor or grantor thereof. *Penick v. Bank,* 218 N. C., 686, 12 S. E. (2d), 253.

The judgment of the Superior Court is

Reversed.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF THE WILL OF CARL W. HARRIS, DECEASED; AND WACHOVIA BANK AND TRUST COMPANY, TRUSTEE, v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA.

(Filed 24 June, 1942.)

1. Taxation § 18—

An inheritance tax is a tax upon the transmission of property from the dead to the living by legacy, devise, or intestate succession, and the tax is not laid upon the property itself but upon the right to acquire it by descent or testamentary gift.

2. Taxation § 28—When policy is issued to beneficiary who retains all rights and liabilities thereunder, proceeds of policy, upon death of insured, are not subject to inheritance taxes.

Where an insurance policy is issued to the wife upon the life of her husband, and the husband assumes no contractual relation in respect thereto, but the wife has the sole right to borrow against the policy, change the beneficiary, and has the right to the proceeds of the policy vested in her or her estate, *held:* Upon the death of the husband the State is not entitled to collect an inheritance tax upon the proceeds of

the policy even though the husband during his lifetime voluntarily paid all premiums, since the statute, Art. I, sec. 11, ch. 127, Public Laws 1937, contemplates as the basis for the tax a shifting of economic benefit from the dead to the living, and the husband had no legal interest in, or ownership of, or power of appointment under the policy, and therefore no interest which terminated at his death, and there was no "transfer" as defined in sec. 1 of the Act upon which the tax could operate.

3. Same—

Where the wife procures a policy of insurance upon the life of her husband, the policy being issued on her application and all rights and liabilities thereunder being retained by her, upon the husband's death the proceeds of the policy are not subject to a tax under the provisions of sec. 11, ch. 127, Public Laws 1937, as a gift *inter vivos* to take effect at or after death, even though the husband during his life voluntarily paid all premiums, since he did not procure the issuance of the policy and each payment of premium constituted a completed gift.

4. Same—

Sec. 11, ch. 127, Public Laws 1937, cannot be construed to impose a separate and independent excise tax upon the receipt of the proceeds of life insurance policies when such policies are issued to the beneficiary who retains all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies when they are issued to the insured or insured retains the right to change the beneficiary or some other incidents of ownership, since this section must be construed as a part of the whole act, and when so construed, no such intent appears from its language.

5. Same: Taxation § 1—

Sec. 11, ch. 127, Public Laws 1937, cannot be construed as imposing an excise tax upon the receipt of proceeds of life insurance policies issued to the beneficiary who retains all rights and liabilities thereunder, in addition to imposing an inheritance tax on the proceeds of policies issued to the insured or in which he retains some incidents of ownership, since such excise tax would have to be computed in accordance with graduated scale on the basis of the amount of insurance together with the value of the estate or the legacy or the distributive share, and thus would produce inequality in the levying of such excise tax in contravention of Art. V, sec. 3, of the State Constitution.

DEVIN, J., not sitting.

APPEAL by plaintiff from *Armstrong, J.*, at January Term, 1942, of FORSYTH. Reversed.

Civil action to recover taxes paid under protest.

From 1934 until his death in 1937 Carl W. Harris was a resident of Forsyth County, N. C. In 1934 and 1935, certain policies of life insurance, aggregating $201,000 in face value, on his life, were issued to his wife, Mrs. Annie Meador Harris. Mrs. Harris signed the applications for and procured the issuance of the policies. Mr. Harris consented to take the physical examination, answer questions in respect thereto and

signed the other papers required of the person insured in the procurement of the insurance. The policies were payable to Mrs. Harris and Mr. Harris assumed no contractual relation in respect thereto. By reason of the provisions of the policies and of the riders attached to them at issuance, all property rights, benefits and advantages, such as the right to change the beneficiary, the right to borrow against the policy, the right to surrender the policy for its cash value, and the right to the proceeds if the beneficiary predeceased the insured were vested in Mrs. Harris or her estate, instead of Mr. Harris. While he was not under obligation so to do Mr. Harris, either directly or indirectly, paid all premiums due upon the policies.

On 3 December, 1937, Mrs. Harris created a trust whereby the proceeds of the policies were made payable to the plaintiff trustee. On or about 18 December, 1937, Mr. Harris died leaving his wife, Mrs. Annie Meador Harris, as principal beneficiary of his estate.

Under the asserted authority of Article I, ch. 127, Public Laws 1937, and particularly section 11 thereof, the defendant computed death taxes due the State of North Carolina by adding the amount of the insurance proceeds received by Mrs. Harris, less the statutory exemption of $20,000, to the value of the net estate of her husband distributable to Mrs. Harris, and by measuring the taxes by the base thus ascertained. The plaintiff, as executor, demanded of the trustee the sum assessed to be remitted to the defendant. The trustee paid the same under protest and the plaintiff, as executor, in turn paid same to the defendant under protest. In substance these are the facts alleged in the complaint.

Thereafter, in due time, plaintiffs brought this action to recover the taxes with interest. The defendant demurred to the complaint on the grounds that it does not state a cause of action. The demurrer was sustained and plaintiffs excepted and appealed.

Vaughn & Blackwell and Ratcliff, Hudson & Ferrell for plaintiffs, appellants.

Attorney-General McMullan and Assistant Attorneys-General Bruton and Adams for defendant, appellee.

BARNHILL, J. Is the tax assessed against the proceeds of the life insurance policies procured by Mrs. Harris upon the life of her husband an inheritance or succession tax or is it an excise tax imposed upon the proceeds of life insurance independent of the Inheritance Tax Law? Is it a valid tax either as a succession tax or as an independent excise tax? These are the questions presented on this appeal.

The plaintiffs take the position that the tax was assessed and collected as an inheritance or a succession tax under Article I, ch. 127, Public

Laws 1937, and that as such it is invalid and uncollectible. In this view we concur.

An inheritance tax is laid on the transfer or passing of estates or property by legacy, devise or intestate succession; it is not a tax on the property itself, but on the right to acquire it by descent or testamentary gift. *Magoun v. Bank,* 170 U. S., 283, 42 L. Ed., 1037; *Minot v. Winthrop,* 162 Mass., 113, 26 L. R. A., 259; *S. v. Alston,* 94 Tenn., 674, 28 L. R. A., 178; *Hagood v. Doughton,* 195 N. C., 811, 143 S. E., 841.

Adams, J., discussing the subject in the *Hagood case, supra,* says:

" 'Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor). Property chargeable with the tax is called a succession.' Hanson's Death Duties, 40 . . . the tax is a burden imposed by government upon gifts, legacies, inheritances, and successions, whether of real or personal property passing to certain persons by will, by intestate law, or by any deed or instrument made *inter vivos,* intended to take effect at or after the death of the grantor. The tax is not imposed upon the property in the ordinary sense of the term but upon the right to dispose of it or to receive it—upon its transmission by will or descent. *United States v. Perkins,* 163 U. S., 625, 41 L. Ed., 287."

Taxes of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. *Knowlton v. Moore,* 178 U. S., 41, 44 L. Ed., 969; *Hagood v. Doughton, supra.* It is well settled that an inheritance tax is an excise tax upon the privilege of receiving property from a decedent by reason of his death. *Martin v. Storrs,* 277 Ky., 199; *Werthan v. McCabe,* 164 Tenn., 61, 51 S. E. (2d), 840.

The pertinent statute, Article I, ch. 127, Public Laws 1937, imposes a tax upon the transfer of property; (a) by will or intestacy; (b) by *inter vivos* transfer in contemplation of or intended to take effect in possession or enjoyment at or after death; (c) by a contingency operating at death, and (d) by power of appointment. Section 1. It is expressly provided that a failure to exercise a power of appointment shall constitute a transfer within the meaning of the act. Section 5. Then to make assurance doubly sure it is provided in section 11 that the proceeds of all life insurance policies payable at or after the death of the insured and whether payable to the estate of the insured or to a beneficiary or beneficiaries named in the policy shall be taxable at the rates provided for in this article, subject to the exemptions in section 2.

Provision is then made to allow the beneficiary credit for such premiums as were paid by him.

Clearly then under the express terms of the statute something must pass to the living from the dead. There must be some shifting of economic benefits from the dead to the living. This means, when applied to insurance policies, that the person whose life was insured must have some legal interest, some incident of ownership, which passed to the living, or some power of appointment (such as the power to change the beneficiary) which terminated at his death. There must be a "transfer" as defined in section 1, upon which the tax operates. Thus it is written in the statute.

When the property passes through a failure to exercise a power of appointment or other incident of control or disposition of the benefit, termination of the power of control at the time of the death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax. *Chase National Bank v. U. S.,* 278 U. S., 327, 73 L. Ed., 405.

It is upon this theory that such taxes are upheld. But here, Mrs. Harris was more than a beneficiary as that term is used in insurance policies. Having an insurable interest in her husband's life, she procured the insurance. She was the contracting party and the beneficial owner of the policies. Harris possessed no power of control or appointment or any incident of transferable ownership. He had no right to change the beneficiary, no right to secure a loan on the policies, no right of assignment, no right of surrender. He was under no duty to pay the premiums. In no sense was he the contracting party. His death effected no "transfer" as defined in the act.

The thing taxed is the privilege of transferring and it is essential that there shall be a transfer, within the meaning of the statute, from decedent to the beneficiary by reason of death. There must be a transfer of something before there can be a tax upon its transfer and where the decedent had no interest in or control over the policy which could be transferred by his death its proceeds are not subject to our Inheritance Tax Law. See *Chase National Bank v. U. S., supra; Bingham v. U. S.,* 296 U. S., 211, 80 L. Ed., 160 (1935); *Industrial Trust Co. v. U. S.,* 296 U. S., 221, 80 L. Ed., 192 (1935); *Walker v. U. S.,* 83 F. (2d), 103 (C. C. A. 8, 1936); *Helburn v. Ballard,* 85 F. (2d), 613 (C. C. A. 6, 1936); *Grandin v. Heiner,* 44 F. (2d), 141 (C. C. A. 3, 1930); amended 56 F. (2d), 1008 (C. C. A. 3, 1932); cert. den. 286 U. S., 56 (1932); *Cook v. Commissioner,* 66 F. (2d), 995 (C. C. A. 3, 1933); cert. den. 291 U. S., 660; *Pennsylvania Co. v. Commissioner,* 79 F. (2d), 295

(C. C. A. 3, 1935); cert. den. 296 U. S., 651; *Chase National Bank v. U. S.*, 28 Fed. Sup., 947; *In Re McGrath's Estate,* 191 Wash., 496, 71 Pac. (2d), 395; *Werthan v. McCabe, supra; Dept. of Revenue v. Lanham's Executors,* 278 Ky., 419, 128 S. W. (2d), 936; *DeLeuil's Executors v. Dept. of Revenue,* 278 Ky., 424, 128 S. W. (2d), 938; *Wyeth v. Crooks,* 33 F. (2d), 1018 (D. C. Mo. 1928); *Robinson v. U. S.*, 12 F. Sup., 550.

Nor did Harris, by the issuance of the policies, adopt a substitute for a testamentary disposition of any part of his property. As he did not procure their issuance he has adopted no substitute method of transfer. Hence, there was no *inter vivos* gift such as is contemplated by the statute. The payment of each premium constituted a completed gift. These the defendant does not seek to tax.

In the absence of clear language to that effect we will not assume that the Legislature intended to levy a succession or inheritance tax against property over which the deceased had no control and possessed no incident of ownership. Such is not the intent and purpose of the act. The language is expressly *contra.*

The payment was made pursuant to and in fulfillment of a contract, the consideration for which had been paid by or on behalf of Mrs. Harris. Whether the receipt thereof or the death of the deceased is a taxable event for that it brought about an accretion to the wealth of Mrs. Harris we need not now decide. Suffice it to say that the tax was unauthorized by statute. Its levy is an attempt to compel plaintiff to pay a tax on property passing in some manner from the deceased to Mrs. Harris, when, in fact, no property passed by will or under our intestate laws or by the exercise or failure to exercise any power of appointment. Nor did it pass by virtue of any contingency over which deceased had any control.

But the Attorney-General contends that section 11 lays a tax on the receipt of insurance by the beneficiary and is not laid on any "transfer" from the decedent; that it is not conditioned on any transfer or the retention by the deceased of any incidents of ownership. It is, he says, an independent excise tax laid upon the receipt of the proceeds of life insurance policies; the receipt is a taxable event and nothing more is required.

This section must be so construed in relation to other words and provisions of the statute as to carry out the intent of the Legislature. To proceed otherwise would do violence to generally accepted rules of interpretation. No such intent appears from the language of the statute and this interpretation is not permissible.

The proceeds of insurance policies payable to the estate have always been considered a part of the estate, taxable as such—and properly so.

We may not assume that the Legislature intended to withdraw this substantial part of many estates from the Inheritance Tax Law. If not, then to hold as contended by the Attorney-General would be to give section 11 a twofold purpose and effect. It imposes an inheritance tax upon the proceeds of policies payable to the estate and upon the proceeds of policies payable to beneficiaries wherein the insured retains the right to change the beneficiary or other power of appointment, the right to assign, the right to borrow, the right to surrender or other incident of ownership; and it is an independent excise tax when and if the person whose life is insured has no such incident of ownership and no power of appointment. This interpretation is not warranted by the language used. The section is a part of the whole. It must be so construed. We, therefore, cannot concur in this view.

Even so, the section cannot be upheld as an independent excise tax on the right to receive the benefits of the policies. As such it would offend against the uniformity provision of the Constitution. Article V, section 3, Constitution of North Carolina. It is inseparably woven into the Act. The proceeds of the policies become a part of the estate for the purpose of taxation. The taxes are to be paid in accord with the schedule and at the rates set forth in the Act. The proceeds are to be added to the other distributive share of the recipient in the estate of the deceased. The executor or administrator is required to report the fund as a part of the estate and is made liable for the payment of the sum assessed. It is thus that the defendant has interpreted and applied its provisions.

It follows that the rate of taxation depends not upon the amount of insurance but upon the amount of insurance plus the value of such other property as may be received from the estate. As the rate is graduated, one taxpayer is held to one rate while another pays at an entirely different and higher rate on the same amount of insurance. The tax to be paid is to be determined by the size of the estate or of the legacy or distributive share. This produces an inequality and lack of uniformity of taxation. *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701; *Anderson v. City of Asheville,* 194 N. C., 117, 138 S. E., 715; *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000; *Worth v. R. R.,* 89 N. C., 291.

For the reasons stated the judgment below is

Reversed.

DEVIN, J., not sitting.

CHARLIE FULK v. BROWER ADKINS.

(Filed 26 February, 1942.)

APPEAL by defendant from *Johnson, Special Judge,* at November Term, 1941, of SURRY. No error.

Frank Freeman and Robt. A. Freeman for plaintiff, appellee.

D. L. Hiatt, Folger & Folger, and E. C. Bivens for defendant, appellant.

PER CURIAM. This was action to recover damages for assault and battery. The plaintiff testified the defendant struck him on the head with a stick or board, and that the wound inflicted required the services of a physician. The jury found in favor of the plaintiff and assessed his damages at $500.

An examination of the record leads to the conclusion that the case was fairly tried, and that there was no prejudicial error in the ruling of the trial judge sufficient to warrant setting aside the verdict and judgment. The result will be upheld.

No error.

WRENNIE C. ELMORE v. GENERAL AMUSEMENTS ET AL.

(Filed 4 March, 1942.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants from *Johnson, Special Judge,* at September-October Term, 1941, of HALIFAX.

Proceeding under Workmen's Compensation Act to determine liability of defendants to plaintiff, employee.

From order awarding compensation and fixing the amount, the defendants appealed to the Superior Court of Halifax County where the award of the Industrial Commission was approved and confirmed. From this judgment, the defendants appeal, assigning errors.

Long & Crew and McMullan & McMullan for plaintiff, appellee.

H. B. Foster and King & King for defendants, appellants.

PER CURIAM. One member of the Court, *Schenck, J.*, not sitting, and the remaining six being evenly divided in opinion whether the case should be affirmed or remanded for more specific findings of fact, the judgment of the Superior Court stands affirmed as the disposition of this appeal without becoming a precedent, accordant with the usual practice in such cases. *Outlaw v. Asheville,* 215 N. C., 790, 1 S. E. (2d), 559.

Affirmed.

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 4 March, 1942.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by plaintiff and by defendant copartnership from *Bone, J.*, at December Special Term, 1941, of McDOWELL. Affirmed.

Civil action to recover damages for personal injuries resulting from an automobile-truck collision in which the defendant copartnership alleges a counterclaim against plaintiff and a cross action against defendant McDowell Furniture Company for property damages sustained as a result of the said collision. (See *Smith v. Furniture Co.,* 220 N. C., 155.)

The court, on motions made at the conclusion of the evidence, entered judgment of nonsuit both as against plaintiff and as against defendant copartnership on its counterclaim and cross action. Plaintiff and defendant copartnership excepted and appealed.

G. F. Washburn and Paul J. Story for plaintiff, appellant.

George A. Shuford for defendant McDowell Furniture Company, appellee.

Proctor & Dameron for defendants, J. H. L. Miller and Fred C. Morris, partners, trading as Builders Supply Company, appellees and appellants.

PER CURIAM. One member of the Court, *Schenck, J.*, not sitting, and the remaining six being evenly divided in opinion, the judgment of the Superior Court is affirmed in accord with the usual practice in such

cases, and stands as the decision in this case without becoming a precedent. *Howard v. Coach Co.*, 216 N. C., 799, 4 S. E. (2d), 449; *Pafford v. Construction Co.*, 218 N. C., 782, 11 S. E. (2d), 548.

Affirmed.

C. CARLTON CANNON, ADMINISTRATOR OF THE ESTATE OF JOHN CLAUDE SMITH, DECEASED, v. J. WINFIELD CREW, JR., TRUSTEE, AND J. W. CREW.

(Filed 18 March, 1942.)

APPEAL by defendant from *Johnson, Special Judge,* at September Term, 1941, of HALIFAX. No error.

This was an action to restrain a foreclosure sale. Plaintiff alleged that the debt secured, originally $3,000, had been reduced to $1,400, and offered to pay that amount. Defendants contended the amount was $2,800. The verdict was in favor of plaintiff that the debt was only $1,400 and interest. From judgment on the verdict defendants appealed.

Allsbrook & Benton for plaintiff, appellee.

E. L. Travis and W. Lunsford Crew for defendants, appellants.

PER CURIAM. An issue of fact was raised by the pleadings which the jury has answered in favor of the plaintiff. An examination of the record leads us to the conclusion that defendants' assignments of error are without substantial merit, and that the result should not be disturbed.

No error.

STATE v. MYRTLE NORDAN.

(Filed 18 March, 1942.)

APPEAL by defendant from *Harris, J.,* at September Term, 1941, of HARNETT.

Criminal prosecution upon a warrant charging a violation of the prohibition laws.

The evidence in this case discloses that the husband of the defendant swore out a search warrant against his wife, and, using this warrant, officers went to the home of the defendant and found her pouring whisky through a hole in the floor. Upon a search of the premises, seven one-half gallon jars of contraband liquor were found.

Verdict: Guilty as charged in the warrant of having whisky in her possession for the purpose of sale.

Judgment: Imprisonment in the county jail for six months, to be hired out by county commissioners. The defendant appealed, assigning errors.

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

J. R. Young for defendant.

PER CURIAM. The several assignments of error shown in the record on appeal are without sufficient merit to disturb the verdict below.

In the trial below, we find

No error.

WILLIAM PETERSON v. ALPHONSO McLAMB AND WIFE, EUTHA McLAMB.

(Filed 8 April, 1942.)

1. Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

2. Appeal and Error § 3b—

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. Rule 37.

APPEAL by plaintiff from *Carr, J.*, at September Term, 1941, of SAMPSON.

Jno. B. Williams, Jr., and P. D. Herring for plaintiff, appellant.

E. J. Wellons for defendants, appellees.

PER CURIAM. Plaintiff appealed from a judgment of the Superior Court holding that upon the facts found by the referee the plaintiff was not entitled to recover. This Court being evenly divided in opinion as to the correctness of this ruling, *Justice Schenck* not sitting, the judgment of the Superior Court is affirmed, without becoming a precedent.

The death of the plaintiff pending appeal having been suggested, upon her motion Eva L. Peterson, administratrix, is made party plaintiff in lieu of William Peterson, the decedent. Rule 37.

Judgment affirmed.

CHAPMAN LUMBER COMPANY, A CORPORATION, AND BASHFORD PLUMBING AND HEATING COMPANY, A PARTNERSHIP, v. KENNETH RAY BENFIELD AND WIFE, MARGARET ELIZABETH BENFIELD, W. H. YARBOROUGH, JR., TRUSTEE, AND T. B. MOSELEY.

(Filed 15 April, 1942.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants T. B. Moseley and W. H. Yarborough, Jr., Trustee, from *Johnson, Special Judge,* at November Term, 1941, of WAKE. Affirmed.

Special proceedings under C. S., 2593, to determine the order of priority of liens upon and the ownership of a fund held by the clerk of the Superior Court.

Ehringhaus & Ehringhaus for plaintiffs, appellees.
Joyner & Yarborough for defendants, appellants.

PER CURIAM. Is plaintiffs' claim, in its present form, of such nature as to create a lien upon the specific fund in the hands of the clerk? The court below answered in favor of the plaintiff. As to the correctness of this ruling this Court (*Schenck, J.,* not sitting) is evenly divided in opinion. Hence, the judgment of the Superior Court is affirmed in accord with the usual practice in such cases, and stands as the decision in this case without becoming a precedent. *Howard v. Coach Co.,* 216 N. C., 799, 4 S. E. (2d), 449; *Pafford v. Construction Co.,* 218 N. C., 782, 11 S. E. (2d), 548.

Affirmed.

MRS. JANIE WHITEHEAD v. CITY OF CHARLOTTE.

(Filed 6 May, 1942.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendant from *Burgwyn, Special Judge,* at 13 October, 1941, Extra Term, of MECKLENBURG. Affirmed.

B. F. Wellons and J. A. McRae for plaintiff, appellee.
Tillett & Campbell for defendant, appellant.

PER CURIAM. The plaintiff sued for the recovery of damages for an injury alleged to have been sustained through the negligence of defendant in permitting a defect in the street to remain unrepaired and in a dangerous condition. The plaintiff recovered a verdict, and from the ensuing judgment the defendant appealed. Upon consideration of the appeal the Court was evenly divided—three to three—*Justice Schenck* not sitting. Therefore, the judgment of the court below stands affirmed, and this decision does not become a precedent. *Smith v. Bottling Co., ante,* 202, 19 S. E. (2d), 250; *Adams v. Murphrey, ante,* 165, 19 S. E. (2d), 250; *Seay v. Ins. Co.,* 213 N. C., 660, 197 S. E., 151.

Affirmed.

SARA K. RUDICH v. NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY.

(Filed 6 May, 1942.)

APPEAL by plaintiff from *Phillips, J.,* at October Term, 1941, of MECKLENBURG. Affirmed.

Elbert E. Foster and Uhlman S. Alexander for plaintiff.
Cansler & Cansler for defendant.

PER CURIAM. This was an action to recover the double indemnity provided in two identical policies of insurance issued by defendant upon the life of the insured. At the close of plaintiff's evidence motion for judgment of nonsuit was allowed and plaintiff appealed.

Under the terms of the policy double indemnity was payable in case of death due to "bodily injury effected solely through external, violent and accidental means," and in case "death occurred within ninety days after the date of such injury and as a direct result thereof, independently of any other cause." The policy did not cover death resulting directly or indirectly from "any bodily or mental disease or infirmity."

From an examination of the evidence offered at the trial, by which the plaintiff sought to establish the defendant's liability under the quoted provisions of the policies, we are left with the impression that the evidence was insufficient to require submission to the jury, and that the judgment of nonsuit was properly entered.

Judgment affirmed.

A. F. SALLEY v. FAYETTEVILLE COCA-COLA BOTTLING COMPANY, INC.

(Filed 20 May, 1942.)

APPEAL by defendant from *Bone, J.*, at February Term, 1942, of CUMBERLAND.

Ellis & Nance for plaintiff, appellee.
Rose & Lyon for defendant, appellant.

PER CURIAM. This is an action for recovery of damages for an injury alleged to have been sustained by reason of a deleterious substance in a soft drink bottled by defendant.

Upon examination of the record, and after giving due consideration to the arguments of counsel, we find no sufficient cause to disturb the result of the trial. No new principles are involved, and the case is disposed of without opinion. We find

No error.

MRS. KATHLEEN MAY SUITER (WIDOW) AND MARY JOSEPHINE SUITER (DAUGHTER) OF JOSEPH E. SUITER (DECEASED), v. SWIFT & COMPANY FERTILIZER WORKS (EMPLOYER), AND SECURITY MUTUAL CASUALTY COMPANY (CARRIER).

(Filed 5 June, 1942.)

Appeal and Error § 38—

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent.

APPEAL by defendants from *Johnson, Special Judge,* at October Term, 1941, of HALIFAX.

Long & Crew and McMullan & McMullan for plaintiffs, appellees.
Hughes, Little & Seawell and Allsbrook & Benton for defendants, appellants.

PER CURIAM. The appeal was from a judgment of the Superior Court affirming an award made to the plaintiffs by the North Carolina Industrial Commission as compensation under the Workmen's Compensation Act for the death of Joseph E. Suiter.

The defendants admitted the employment, but claimed that Suiter was an independent contractor and, moreover, if an employee within the terms of the Act, that he was not at the time of his death engaged in the duties of such employment.

Upon the hearing of the matter, the Court divided three to three, *Justice Schenck* not sitting.

Under the Rule of Court, the judgment of the court below stands affirmed, and this decision does not become a precedent.

Affirmed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

State v. Williams, 220 N. C., 445. Petition for *certiorari* granted March 30, 1942.

In re Steele, 220 N. C., 685. Petition for *certiorari* denied May 25, 1942.

STATUTES RELATING TO RULES OF COURT

C. S., 1421. *Power to make rules of Court.* The Justices of the Supreme Court shall prescribe and establish from time to time rules of practice for that Court, and also for the Superior Courts. The clerk shall certify to the judges of the Superior Court the rules of practice for such court, to be entered on the records thereof in each county.

(In Calvert v. Carstarphen, 133 N. C., 25, Clark, C. J., delivering the opinion of the Court, it was said: "The rules of the Supreme Court are mandatory, not directory. Walker v. Scott, 102 N. C., 487; Wiseman v. *Commissioners*, 104 N. C., 330; Edwards v. Henderson, 109 N. C., 83. As the Constitution, Art. I, sec. 8, provides that 'The legislative, executive, and **Supreme Judicial Powers** of the Government ought to be forever separate and distinct from each other,' the General Assembly can enact no rules of practice ond procedure for this Court, which are prescribed solely by our Rules of Court. Herndon v. Ins. Co., 111 N. C., 384; 18 L. R. A., 547; *Horton* v. Green, 104 N. C., 400; Rencher v. Anderson, 93 N. C., 105. The practice and procedure in the courts below the Supreme Court are prescribed by the Legislature, as authorized by the Constitution, Art. IV, sec. 12 (S. v. Edwards, 110 N. C., 511), except that, as to such lower courts, when the Legislature fails to provide the practice and procedure in any particular, this Court can do so. The Code, sec. 961; Barnes v. *Easton*, 98 N. C., 116; Cheek v. Watson, 90 N. C., 302.")

See, also, S. v. Crowder, 195-335; Womble v. Gin Co., 194-577; Cooper v. Comrs., 184-615; Cox v. Lbr. Co., 177-227; Phillips v. Jr. Order, 175-133; S. v. Goodlake, 166-434; Porter v. Lbr. Co., 164-396.

C. S., 1421 (a). *Supreme Court to prescribe rules. Rules to conform to law.* The Supreme Court is hereby vested with the power to prescribe from time to time the modes of making and filing proceedings, actions, and pleadings, and of entering orders and judgments and recording the same, and to prescribe and regulate the practice on appeals to the Supreme Court, and in the trial of actions in the Superior Court, and before referees: *Provided*, no rule or regulation so adopted shall be in conflict with this law or any of the provisions of the Consolidated Statutes of 1919. Such rules as may be adopted by the Supreme Court shall be printed and distributed by the Secretary of State as are the Reports of the Supreme Court.

RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

REVISED AND APPROVED SPRING TERM, 1942

(Annotated by W. P. Stacy and Emery B. Denny.)

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RULES

[Rules 1, 2, 3, 3 (A), 3 (B), 3 (C), Obsolete.]

4. Appeals—How Docketed.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

APPEALS STATUTORY AND ALLOWED ONLY FROM FINAL JUDGMENTS OR ORDERS AFFECTING SUBSTANTIAL RIGHTS.—*Caudle v. Morris,* 158—594; *Moore v. Hinnant,* 87—505; *Merrill v. Merrill,* 92—657; *Lutz v. Cline,* 89—186; *S. v. Keeter,* 80—472.

DISMISSED IF ONLY MOOT QUESTION PRESENTED.—*Rousseau v. Bullis,* 201—12, 158 S. E., 553; *Kistler v. R. R.,* 164—365.

5. Appeals—When Heard.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term fourteen days before entering upon the call of the docket of the district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee file a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed fourteen days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil case from the First, Second, Third, Eighteenth, Nineteenth, Twentieth, and Twenty-first districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

See C. S., 629 *et seq.,* and annotations thereunder.

RULE SALUTARY AND MANDATORY.—*Pruitt v. Wood,* 199—788; *S. v. Harris,* 199—377; *Covington v. Hosiery Mills,* 195—478; *S. v. Surety Co.,* 192—52; *Stone v. Ledbetter,* 191—777; *Trust Co. v. Parks,* 191—263; *S. v. Farmer,* 188—243; *Walker v. Scott,* 102—487.

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PRACTICE IN REGARD TO DOCKETING APPEALS SUMMARIZED.—*Porter v. R. R.,* 106—478.

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ABANDONMENT OF APPEAL.—*Pruitt v. Wood,* 199—788; *Jordan v. Simmons,* 175—537; *Avery v. Pritchard,* 93—266.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED.—*Pentuff v. Park,* 195—609.

6. Appeals—Criminal Actions.

Appeals in criminal cases, docketed fourteen days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Eleventh District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

See C. S., 4647 *et seq.,* and annotations thereunder.

DOCKETING SAME AS CIVIL CASES.—*S. v. O'Kelly,* 88—609.

DISMISSED IF DEFENDANT FLEES OR IS "IN THE WOODS."—*S. v. Devane,* 166—281; *S. v. Keebler,* 145—560; *S. v. Jacobs,* 107—772.

NO APPEAL EXCEPT FROM FINAL JUDGMENT.—*S. v. Nash,* 97—514; *S. v. Hazel,* 95—623.

(1) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by section 647, Consolidated Statutes, the appeal will be dismissed.

FAILURE OF SURETY TO JUSTIFY.—*S. v. Wagner,* 91—521.

(2) *Pauper Appeals.* See Rule 22.

STATUTORY REQUIREMENTS COMPULSORY AND JURISDICTIONAL.—*S. v. Marion,* 200—715, 158 S. E., 406; *S. v. Smith,* 152—842.

DIFFERENT IN CIVIL AND CRIMINAL CASES.—C. S., 649 and 4651; *S. v. Gatewood,* 125—694.

IN CIVIL PAUPER CASES.—*Honeycutt v. Watkins,* 151—652.

(3) *When Appeal Abates.* See Rule 37.

(4) *Appeal Dismissed If Transcript Not Printed or Mimeographed.* See Rule 24.

MUST DOCKET RECORD.—*S. v. Moore,* 210—459, 187 S. E., 586; *S. v. Farmer,* 188—243; *S. v. Johnson,* 183—730; *S. v. Trull,* 169—363.

7. Call of Judicial Districts.

Appeals from the several districts will be called for hearing in the following order:

From the First, Twentieth, and Twenty-first Districts, the first week of the term.

From the Second and Nineteenth Districts, the second week of the term.

From the Third and Eighteenth Districts, the fourth week of the term.

From the Fourth and Seventeenth Districts, the fifth week of the term.

From the Fifth and Sixteenth Districts, the seventh week of the term.

From the Sixth and Fifteenth Districts, the eighth week of the term.

From the Seventh District, the tenth week of the term.

From the Fourteenth District, the eleventh week of the term.

From the Eighth and Thirteenth Districts, the thirteenth week of the term.

From the Ninth and Twelfth Districts, the fourteenth week of the term.

From the Tenth and Eleventh Districts, the sixteenth week of the term.

In making up the calendar for the two districts allotted to the same week, the appeals will be docketed in the order in which they are received by the clerk, but only those from the district first named will be called on

Tuesday of the week to which the district is allotted, and those from the district last named will not be called before Wednesday of said week, but appeals from the district last named must nevertheless be docketed not later than 14 days preceding the call for the week.

S. v. Edwards, 205—443, 171 S. E., 608; *Carroll v. Mfg. Co.,* 180—660.

8. End of Docket.

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Eleventh District, and each cause, in its order tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. Call of Docket.

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

NO DAILY CALENDAR.—*Pruitt v. Wood,* 199—788; *Lunsford v. Alexander,* 162—528.

10. Submission on Printed Arguments.

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Ninth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

(NOTE.—A compliance with this rule does not require a formal motion, but merely the filing with the printed record and briefs an agreement signed by counsel for both sides, that the case may be considered without oral argument.)

NECESSITY OF BRIEF.—*Mills v. Guaranty Co.*, 136—255.

11. Briefs Not Received After Argument.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. Briefs Regarded as Personal Appearance.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

OPPOSITION TO CONTINUANCE.—*Dibbrell v. Ins. Co.*, 109—314.

13. When Case May Be Heard Out of Order.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the Calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

TITLE TO PUBLIC OFFICE.—*Caldwell v. Wilson*, 121—423.

14. When Cases May Be Heard Together.

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. Appeal Dismissed If Not Prosecuted.

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of the appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

RULE MANDATORY.—*Wiseman v. Commissioners,* 104—330.

SUPERIOR COURT MAY ADJUDGE APPEAL ABANDONED.—*Pentuff v. Park,* 195—609.

16. Motion to Dismiss Appeal—When Made.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

DISMISSAL OF APPEAL.—*Winchester v. Brotherhood of R. R. Trainmen,* 203—735, 167 S. E., 49; *Pruitt v. Wood,* 199—788; *Martin v. Chambers,* 116—673; *Wiseman v. Commissioners,* 104—330.

BURDEN ON APPELLANT TO SHOW DILIGENCE.—*S. v. Goldston,* 201—89, 158 S. E., 926; *Simmons v. Andrews,* 106—201.

17. Appeal Dismissed for Failure to Docket in Time.

If the appellant in a civil action, or the defendant in a criminal prosecution, shall fail to bring up and file a transcript of the record fourteen days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause: *Provided,* that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee,

before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

(NOTE.—Motion made under this rule is not effectual if filed after appeal has been docketed, although appeal was docketed after time required by Rule 5.)

LACHES OF APPELLANT.—*Brock v. Ellis,* 193—540; *Baker v. Hare,* 192—788; *Rogers v. Asheville,* 182—596; *Carroll v. Mfg. Co.,* 180—660; *Johnson v. Covington,* 178—658; *Cox v. Lumber Co.,* 177—227; *Murphy v. Electric Co.,* 174—782; *McNeill v. R. R.,* 173—730.

LACHES OF APPELLEE.—*S. v. Wescott,* 220—439, 17 S. E. (2d), 507; *S. v. Flynn,* 217—345, 7 S. E. (2d), 700; *S. v. Moore,* 210—686, 188 S. E., 421; *Mitchell v. Melton,* 178—87; *McLean v. McDonald,* 175—418; *Gupton v. Sledge,* 161—214; *Barbee v. Green,* 91—158.

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Smith, 199—463; *Roberts v. Bus Co.,* 198—779; *Wallace v. Salisbury,* 147—58; *Walker v. Scott,* 102—487.

APPELLEE MAY PROCEED IN SUPERIOR COURT.—*Pentuff v. Park,* 195—609.

18. Appeal Docketed and Dismissed Not to Be Reinstated Until Appellant Has Paid Costs.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

As to costs on appeal, see C. S., 1256 *et seq.,* and also C. S., 646 *et seq.*

Pruitt v. Wood, 199—788.

19. Transcripts.

(1) *What to Contain and How Arranged.* In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the trancript, affidavits, orders, and other processes and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part

of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

See C. S., 643, 644, and 645.

IMPERFECT OR INCOMPLETE TRANSCRIPT.—*Messich v. Hickory,* 211—531, 191 S. E., 43; *Ins. Co. v. Bullard,* 207—652, 178 S. E., 113; *S. v. Simmerson,* 202—583, 163 S. E., 571; *Parks v. Seagraves,* 203—647, 166 S. E., 747; *Waters v. Waters,* 199—667; *Schwarberg v. Howard,* 199—126; *S. v. McDraughon,* 168—131; *Hobbs v. Cashwell,* 158—597; *Cressler v. Asheville,* 138—482; *Sigman v. R. R.,* 135—181; *Wiley v. Mining Co.,* 117—489; *Jones v. Hoggard,* 107—349.

ORGANIZATION OF COURT MUST APPEAR ON TRANSCRIPT.—*Brown v. Johnson,* 207—807, 178 S. E., 570; *S. v. May,* 118—1204.

ENTRY OF APPEAL MUST APPEAR ON RECORD.—*Walton v. McKesson,* 101—428; *R. R. v. Brunswick County,* 198—549; *Mfg. Co. v. Simmons,* 97—89.

TRANSCRIPT MUST SHOW JURISDICTION AND BEFORE WHOM CASE TRIED.—*Spence v. Tapscott,* 92—576; *S. v. Butts,* 91—524.

FAILURE TO INDEX.—*Milwood v. Cotton Mills,* 215—519, 2 S. E. (2d), 560; *Redding v. Dunn,* 185—311; *Kearnes v. Gray,* 173—717; *Sigman v. R. R.,* 135—181.

PURPOSE OF RULE.—*Waldo v. Wilson,* 177—461.

(2) *Two Appeals.* When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the trancript. The judge of the Superior Court shall determine the part of the costs of making the trancript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

TWO RECORDS UNNECESSARY.—*Pope v. Lumber Co.,* 162—208; *Hagaman v. Bernhardt,* 162—381.

WHEN TWO RECORDS ARE NECESSARY.—*Osborne v. Canton* and *Kingsland v. Mackey,* 219—139, 13 S. E. (2d), 265.

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be

abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

APPEAL FROM JUDGMENT ONLY.—*Casualty Co. v. Green,* 200—535, 157 S. E., 797; *Owens v. Hines,* 178—325; *Hoke v. Whisnant,* 174—658; *Ullery v. Guthrie,* 148—418; *Wilson v. Lumber Co.,* 131—163.

ERROR ON FACE OF RECORD PROPER.—*Rogers v. Bank,* 108—574.

RULE MANDATORY.—*Baker v. Clayton,* 202—741, 164 S. E., 233; *Thresher Co. v. Thomas,* 170—680; *Wheeler v. Cole,* 164—378; *Pegram v. Hester,* 152—765; *Davis v. Wall,* 142—450; *Hicks v. Kenan,* 139—337; *Sigman v. R. R.,* 135—181; *Brinkley v. Smith,* 130—224.

EXCEPTIONS MUST BE SPECIFIC.—*Rawls v. Lupton,* 193—428; *McKinnon v. Morrison,* 104—354; *Harrison v. Dill,* 169—542; *Boyer v. Jarrell,* 180—479.

HOW ASSIGNMENTS MADE.—*Harrell v. White,* 208—409, 181 S. E., 268; *Jenkins v. Castelloe,* 208—406, 181 S. E., 266; *Cecil v. Lumber Co.,* 197—81; *Rawls v. Lupton,* 193—428; *Merritt v. R. R.,* 169—244; *Porter v. Lumber Co.,* 164—396; *Jones v. R. R.,* 153—420; *McDowell v. Kent,* 153—555; *Smith v. Mfg. Co.,* 151—261; *Thompson v. R. R.,* 147—413.

EXCEPTIVE ASSIGNMENTS OF ERROR, AND NONE OTHER, CONSIDERED.—*Hobbs v. Hobbs,* 218—468, 11 S. E. (2d), 311; *S. v. Oliver,* 213—386, 196 S. E., 325; *Hancock v. Wilson,* 211—129, 189 S. E., 631; *S. v. Anderson,* 208—771, 182 S. E., 643; *In re Beard,* 202—661, 163 S. E., 748; *Rawls v. Lupton,* 193—428; *S. v. Freeze,* 170—710.

COURT WILL NOT MAKE VOYAGE OF DISCOVERY THROUGH RECORD.—*Cecil v. Lumber Co.,* 197—81.

DISMISSED FOR FAILURE TO FOLLOW RULE.—*Merritt v. Dick,* 169—244.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED.—*Taylor v. Plummer,* 105—56.

(4) *Evidence to Be Stated in Narrative Form.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case 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 other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

STENOGRAPHER'S NOTES INSUFFICIENT.—*Rhoades v. Asheville,* 220—443, 17 S. E. (2d), 500; *Casey v. R. R.,* 198—432; *Rogers v. Asheville,* 182—596; *Brewer v. Mfg. Co.,* 161—211; *Skipper v. Lumber Co.,* 158—322; *Bucken v. R. R.,* 157—443; *Cressler v. Asheville,* 138—483.

RULE MANDATORY.—*Pruitt v. Wood,* 199—788; *Carter v. Bryant,* 199—704; *Bank v. Fries,* 162—516.

PAUPER APPEALS.—*Skipper v. Lumber Co.,* 158—322.

(5) *Unnecessary Portions of Transcript—How Taxed.* The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(6) *Transcripts in Pauper Appeals.* See Rule 22.

(7) *Maps.* Nine copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

FILING COPIES OF PLAT.—*Stephens v. McDonald,* 132—135.

PRINTING EXHIBITS.—*Hicks v. Royal,* 122—405; *Fleming v. McPhail,* 121—183.

(8) *Appeal Bond.* See Rule 6 (1).

See C. S., 646 *et seq.* and 1256 *et seq.*

Pruitt v. Wood, 199—788.

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) *Insufficient Transcript.* If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of the district, or the end of the docket, or continued as the Court may deem proper.

Pruitt v. Wood, 199—788.

20. Pleadings.

(1) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

Plott v. Construction Co., 198—782.

(2) *When Containing More Than One Cause of Action.* Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

PROPER JOINDER MUST APPEAR ON FACE OF PLEADING OR FROM FACTS ALLEGED.—*Vollers Co. v. Todd,* 212—677, 194 S. E., 84; *Lykes v. Grove,* 201—254, 159 S. E., 360; *Mfg. Co. v. Barrett,* 96—36; *Allen v. Jackson,* 86—321.

(3) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

SCANDALOUS, IMPERTINENT, AND IRRELEVANT MATTER STRICKEN OUT.—*Hosiery Mill v. Hosiery Mills,* 198—596; *Ellis v. Ellis,* 198—767; *Mitchell v. Brown,* 88—156; *Powell v. Cobb,* 56—1.

(4) *Amendments.* The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

See C. S., 547 and 1414, and annotations thereunder.

AMENDMENT NOT ALLOWED TO GIVE LIFE TO A LIFELESS PROCEEDING.—*Hunt v. State,* 201—37, 158 S. E., 703.

21. Exceptions. (See, also, Rule 19 [3]).

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exceptions not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes, but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

See C. S., 570 and 590, and annotations thereunder.

MUST BE CLEARLY STATED.—*Smith v. Supply Co.,* 214—406, 199 S. E., 392; *S. v. Bittings,* 206—798, 175 S. E., 299; *Myrose v. Swain,* 172—223; *Rogers v. Jones,* 172—156; *Carter v. Reaves,* 167—131; *Spruce Co. v. Hunnicutt,* 166—202; *Thompson v. R. R.,* 147—412.

DUTY OF ATTORNEY.—*S. v. Hendricks,* 207—873, 178 S. E., 557; *McLeod v. Gooch,* 162—122; *Allred v. Kirkman,* 160—392; *Worley v. Logging Co.,* 157—490.

JUDGE'S CHARGE.—*S. v. Rhinehart,* 209—150, 183 S. E., 388; *S. v. Jones,* 182—781; *Bank v. Pack,* 178—388.

RULE MANDATORY.—*In re Bailey,* 180—30; *Thresher Co. v. Thomas,* 170—680; *Hoggs v. Cashwell,* 158—597.

CORROBORATIVE AND CONTRADICTORY EVIDENCE.—*S. v. Johnson,* 218—604, 12 S. E. (2d), 278; *Singleton v. Roebuck,* 178—201;

Medlin v. Board of Education, 167—239; *Cooper v. R. R.,* 163—150; *Crisco v. Yow,* 153—434; *Tise v. Thomasville,* 151—282; *Hill v. Bean,* 150—436; *Liles v. Lumber Co.,* 142—39; *Westfeldt v. Adams,* 135—591.

MOTION IN ARREST OF JUDGMENT.—*S. v. Chapman,* 221—157, 19 S. E. (2d), 250; *S. v. Jones,* 218—734, 12 S. E. (2d), 292.

22. Printing Transcripts. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file nine legible typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, nine legible typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided receipted statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

NUMBER OF COPIES MANDATORY IN PAUPER APPEALS.—*Pruitt v. Wood,* 199—788; *Trust Co. v. Miller,* 191—787; *Fisher v. Toxaway Co.,* 171—547; *Estes v. Rash,* 170—341.

FAILURE TO COMPLY WITH RULE WORKS ABANDONMENT OF THE ASSIGNMENTS OF ERROR.—*Wishon v. Weaving Co.,* 220—420, 17 S. E. (2d), 509; *S. v. Hopkins,* 217—324, 7 S. E. (2d), 566; *S. v. Hooker,* 207—648, 178 S. E., 75.

23. How Printed.

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to

the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement made by the clerk, dismiss the appeal.

NECESSITY OF RULE.—*Lumber Co. v. Privette,* 179—1; *Howard v. Tel. Co.,* 170—495; *Barnes v. Crawford,* 119—127.

24. Appeal Dismissed If Transcript Not Printed or Mimeographed.

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rules as to printing are not complied with, other than pauper appeals.

RULE MANDATORY.—*Pruitt v. Wood,* 199—788; *S. v. Charles,* 161—286; *Truelove v. Norris,* 152—755; *Stroud v. Tel. Co.,* 133—253; *Dunn v. Underwood,* 116—525.

25. Mimeographed Records and Briefs.

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk and marshal of this Court, the cost of such copies not to exceed $1.10 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, and to index the mimeographed transcripts and mail copies promptly to counsel. The Marshal shall carefully read and correct the

proof of all the mimeographed work. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

26. Cost of Printing and Mimeographing Transcripts and Briefs to Be Recovered.

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed: *Provided,* receipted statement of such cost is given the clerk before the case is decided. In pauper appeals the actual cost of preparing typewritten copies of the transcript of appeal and of the brief shall be allowed the appellant, not to exceed twenty-five cents per page, and not to exceed sixty pages for transcript and twenty pages for brief.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

See C. S., 1256.

EXCESSIVE COSTS.—*R. R. v. Privette,* 179—1; *Waldo v. Wilson,* 177—461; *Brown v. Harding,* 172—835; *Hardy v. Ins. Co.,* 167—569; *Overman v. Lanier,* 157—544; *Brazille v. Barytes Co.,* 157—454; *Yow v. Hamilton,* 136—357; *Roberts v. Lewald,* 108—405.

27. Briefs.

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authorities may be cited, if discovered after brief is filed, by furnishing list to opposing counsel and handing memorandum of same to the Marshal to be placed by him with the papers in the case, but counsel will not be permitted to consume time on the argument in the citation of additional authorities.

MUST BE PRINTED OR MIMEOGRAPHED.—*Bradshaw v. Stansberry,* 164—356.

FAILURE TO FILE.—*S. v. Robinson,* 214—365, 199 S. E., 270; *S. v. Kinyon,* 210—294, 186 S. E., 368; *Theiling v. Wilson,* 203—809, 167 S. E., 32; *Commissioners v. Dickson,* 190—330; *S. v. Dawkins,* 190—443.

27½. Statement of the Questions Involved.

The first page of appellant's brief, other than formal matters appearing thereon, shall be used exclusively for a succinct statement of the question or questions involved on the appeal. Such statement should not ordinarily exceed fifteen lines, and should never exceed one page. This will then be followed on the next page by a recital of the facts and the argument as required by the other rules. In case of disagreement as to the exact question or questions presented for determination, the appellee may submit a counter-statement, using the first page of appellee's brief for this purpose. But no counter-statement need be made unless appellee thinks appellant's statement is inaccurate, or that it does not present the points for decision in a proper light.

The statement of the questions involved or presented by the appeal, is designed to enable the Court, as well as counsel, to obtain an immediate view and grasp of the nature of the controversy; and a failure to comply with this rule may result in a dismissal of the appeal.

FAILURE TO COMPLY.—*Caldwell v. R. R.,* 218—63, 10 S. E. (2d), 680; *Lumber Co. v. Latham,* 199—820; *Pruitt v. Wood,* 199—788.

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception

that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignment of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on the second Saturday preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

FAILURE TO FILE IN TIME.—*S. v. Sturdivant,* 220—535, 17 S. E. (2d), 661; *S. v. Hadley,* 213—427, 196 S. E., 361; *Wolf v. Galloway,* 211—361, 190 S. E., 213; *In re Bailey,* 180—30; *Phillips v. Junior Order,* 175—133; *Rosamond v. McPherson,* 156—593.

EXCEPTIONS NOT BROUGHT FORWARD.—*S. v. Abernethy,* 220—226, 17 S. E. (2d), 25; *S. v. Miller,* 219—514, 14 S. E. (2d), 522; *Rose v. Bank,* 217—600, 9 S. E. (2d), 2; *S. v. Howie,* 213—782, 197 S. E., 611; *S. v. Lea,* 203—13, 164 S. E., 737; *In re Fuller,* 189—509; *S. v. Godette,* 188—497; *In re Westfeldt,* 188—702; *Byrd v. Southerland,* 186—384; *S. v. Bryson,* 173—803; *Campbell v. Sigmon,* 170—348; *Watkins v. Lawson,* 166—216; *S. v. Smith,* 164—475.

BRIEF LIMITED TO EXCEPTIVE ASSIGNMENTS OF ERROR.—*S. v. Exum,* 213—16, 195 S. E., 7; *Coon v. R. R.,* 171—759; *Rawls v. Lupton,* 193—428.

EXCEPTIONS NOT DISCUSSED DEEMED ABANDONED.—*Bank v. Snow,* 221—14, 18 S. E. (2d), 711; *S. v. Howley,* 220—113, 16 S. E. (2d), 705; *Maynard v. Holder,* 219—470, 14 S. E. (2d), 415; *In re Beard,* 202—661, 163 S. E., 748; *Gray v. Cartwright,* 174—49.

PRACTICE IN REGARD TO EXCEPTIONS SUMMARIZED.—*Taylor v. Plummer,* 105—56.

PAUPER APPEALS.—*S. v. Hopkins,* 217—324, 7 S. E. (2d), 566; *Covington v. Hosiery Mills,* 195—478; *Estes v. Rash,* 170—341.

"PASS BRIEFS" DISAPPROVED.—*Jones v. R. R.,* 164—392.

29. Appellee's Brief.

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Saturday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

APPELLEE'S BRIEF DISMISSED.—*Phillips v. Junior Order,* 175—133.

30. Arguments.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. Reargruments.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

MAY ORDER REARGUMENT.—*Fleming v. R. R.,* 132—714; *Lenoir v. Mining Co.,* 104—490.

32. Agreements of Counsel.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

VERBAL AGREEMENTS INEFFECTUAL IF DENIED.—*Rogers v. Asheville,* 182—596; *McNeill v. R. R.,* 173—729; *S. v. Black,* 162—637; *Mirror Co. v. Casualty Co.,* 157—29; *Graham v. Edwards,* 114—229.

33. Appearances.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein. Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. Certiorari.

(1) *When Applied For.* Generally, the writ of *certiorari,* as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) *How Applied For.* The writs of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

See C. S., 630, and annotations thereunder.

WHEN APPLICATIONS SHOULD BE MADE.—*Pruitt v. Wood,* 199—788; *S. v. Harris,* 199—377; *S. v. Crowder,* 195—335; *Pentuff v. Park,* 195—609; *Baker v. Hare,* 192—788; *S. v. Ledbetter,*

191—777; *Finch v. Commissioners,* 190—154; *Hardy v. Heath,* 188—271; *S. v. Farmer,* 188—243; *S. v. Dalton,* 185—606; *S. v. Butner,* 185—731; *Cox v. Lumber Co.,* 177—227; *McNeill v. R. R.,* 173—729; *Todd v. Mackie,* 160—352.

WITHIN COURT'S DISCRETION.—*Pruitt v. Wood,* 199—788; *Womble v. Gin Co.,* 194—577; *Waller v. Dudley,* 193—354; *S. v. Surety Co.,* 192—52; *Trust Co. v. Parks,* 191—263; *S. v. Butner,* 185—731; *Mimms v. R. R.,* 183—436; *S. v. Johnson,* 183—731.

MUST DOCKET TRANSCRIPT.—*Hinnant v. Ins. Co.,* 204—306, 168 S. E., 199; *S. v. Freeman,* 114—872; *Brock v. Ellis,* 193—540; *Baker v. Hare,* 192—789; *Hardy v. Heath,* 188—271; *S. v. Farmer,* 188—243; *Motor Co. v. Reep,* 186—509; *S. v. Dalton,* 185—606; *S. v. Butner,* 185—731; *S. v. Johnson,* 183—730; *Lindley v. Knights of Honor,* 172—818; *Murphy v. Electric Co.,* 174—782; *Trans. Co. v. Lumber Co.,* 168—60; *Caudle v. Morris,* 158—594; *Critz v. Sparger,* 121—283.

APPLICANT MUST NEGATIVE LACHES AND SHOW MERIT.—*S. v. Moore,* 210—686, 188 S. E., 421; *S. v. Angel,* 194—715; *S. v. Farmer,* 188—243.

35. Additional Issues.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issue shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. Motions.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

ONLY WRITTEN MOTIONS CONSIDERED.—*McCoy v. Lassiter,* 94—131.

37. Abatement and Revivor.

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on

motion, be admitted to become parties to the action, and thereupon the appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

Redden v. Toms, 211—312, 190 S. E., 490; *Bank v. Toxey,* 210—470, 187 S. E., 553; *Myers v. Foreman,* 202—246, 162 S. E., 549.

38. Certification of Decisions.

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Con. Stats., sec. 1417. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

See C. S., 1413 and 1417.

39. Judgment and Minute Dockets.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and

on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

40. Clerk and Commissioners.

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk of such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval endorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. Librarian.

(1) *Reports by Him.* The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) *Books Taken Out.* No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the

President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. Court's Opinions.

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause seven typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. Executions.

(1) *Teste of Executions.* When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

See C. S., 663 *et seq.*

44. Petition to Rehear.

(1) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

See C. S., 1419, and annotations thereunder.

RULE MANDATORY.—*Cooper v. Commissioners,* 184—615.

FILING AND DOCKETING.—*McGeorge v. Nicola,* 173—733; *Byrd v. Gilliam,* 123—63.

NOT ALLOWED AFTER TIME FOR FILING HAS EXPIRED.—*Cooper v. Commissioners,* 184—615.

NOT ALLOWED IN CRIMINAL CASES.—*S. v. Council,* 129—511.

(2) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject matter and have not been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

FAILURE TO FILE CERTIFICATES.—*Teeter v. Express Co.,* 172—620.

(3) *Two Copies to Be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however,* that when there have been three dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event

it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) *Justices to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

(5) *New Briefs to Be Filed.* There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(7) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a

petition for a hearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

See C. S., 1419, and annotations thereunder.

WHEN REHEARING ALLOWED.—*Minnis v. Sharpe,* 203—110, 164 S. E., 625; *Battle v. Mercer,* 188—116; *S. v. Martin,* 188—119; *Greene v. Lyles,* 187—598; *Weston v. Lumber Co.,* 168—98; *Weisel v. Cobb,* 122—67; *Mullen v. Canal Co.,* 115—16; *Haywood v. Davis,* 81—8.

NOT ALLOWED IN CRIMINAL CASES.—*S. v. Council,* 129—511; *S. v. Jones,* 69—16.

REHEARING MATTER OF DISCRETION.—*Moore v. Harkins,* 179—525.

REHEARING BY MEANS OF SECOND APPEAL NOT ALLOWED.—*Strunks v. R. R.,* 188—567; *Ray v. Veneer Co.,* 188—414; *R. R. v. Story,* 187—184; *LaRoque v. Kennedy,* 161—459; *Hospital v. R. R.,* 157—460.

NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE IN CIVIL CASES.—*Moore v. Todwell,* 194—186; *Smith v. Moore,* 150—158; *Black v. Black,* 111—301.

COSTS TAXED AGAINST MOVENT.—*Herndon v. R. R.,* 121—498.

REQUIREMENTS STATED.—*S. v. Casey,* 201—620; *Johnson v. R. R.,* 163—431.

MOTION IN SUPERIOR COURT AFTER AFFIRMANCE ON APPEAL.—*Allen v. Gooding,* 174—271.

NEWLY DISCOVERED EVIDENCE NOT CONSIDERED IN CRIMINAL CASES.—*S. v. Griffin,* 190—133; *S. v. Lilliston,* 141—857.

COURT CAN CORRECT AN INADVERTENCE IN FORMER DECISION.—*Cotton Co. v. Henrietta Mills,* 219—279, 13 S. E. (2d), 557.

45. Sittings of the Court.

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a.m. to 2 p.m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it.

46. Citation of Reports.

Inasmuch as all the volumes of Reports prior to the 63rd 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:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N.C. Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
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	"
" Equity	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i.e., the original*) paging, except 20 N. C., which is repaged throughout, without marginal paging.

47. Court Reconvened.

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

RULES OF PRACTICE

IN THE

NORTH CAROLINA SUPERIOR COURTS

REVISED AND ADOPTED BY THE JUSTICES OF THE SUPREME COURT

RULES

1. Entries on Records.

No entry shall be made on the records of the Superior Courts (the summons docket excepted) by any other person than the clerk, his regular deputy, or some person so directed by the presiding judge or the judge himself.

2. Surety on Prosecution Bond and Bail.

No person who is bail in any action or proceeding, either civil or criminal, or who is surety for the prosecution of any suit, or upon appeal from a justice of the peace, or is surety in any undertaking to be affected by the result of the trial of the action, shall appear as counsel or attorney in the same cause. And it shall be the duty of the clerks of the several Superior Courts to state, on the docket for the court, the names of the bail, if any, and surety for the prosecution in each case, or upon appeal from a justice of the peace. All prosecution bonds for any suit must be justified before the clerk of the Superior Court in a sum double the amount of the bond, and the justification must show that the surety is a resident of North Carolina, and must also show the county wherein the surety resides.

3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

S. v. Raper, 203—489, 166 S. E., 314; *In re Will of McDonald,* 202—842, 163 S. E., 700.

4. Examination of Witnesses.

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a wit-

ness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

S. v. Banks, 204—233, 167 S. E., 851.

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

In re Will of McDonald, 202—842, 163 S. E., 700; *In re Will of Brown,* 194—583; *In re Peterson,* 136—13; *Cheek v. Watson,* 90—302.

7. Issues.

Issues shall be made up as provided and directed in the Con. Stats., sec. 584.

8. Judgments.

Judgments shall be docketed as provided and directed in Con. Stats., secs. 613 and 614.

9. Transcript of Judgment.

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached

and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a substitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

PAGE

Summons—date 1
Complaint—first cause of action 2
Complaint—second cause of action 3
Affidavit of attachment 4

and so on to the end.

12. Transcript on Appeal—When Sent Up.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Con. Stats., sec. 645.

13. Reports of Clerks and Commissioners.

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth

the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinion as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. Recordari.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas,* if prayed for as required by C. S., sec. 630. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. Judgment—When to Require Bonds to Be Filed.

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging

to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. Next Friend—How Appointed.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

In re Will of Roediger, 209—470, 184 S. E., 74.

17. Guardians Ad Litem—How Appointed.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. Cases Put at Foot of Docket.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. When Opinion Is Certified.

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Con. Stats., sec. 4656.

20. Calendar.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end

of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. Cases Set for a Day Certain.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. Calendar Under Control of Court.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. Nonjury Cases.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

Harris v. Board of Education, 217—281, 7 S. E. (2d), 538.

24. Appeals from Justices of the Peace.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. On Consent Continuance—Judgment for Costs.

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. Time to File Pleadings—How Computed.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. Counsel Not Sent for.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. Criminal Dockets.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting of jurors or witnesses in behalf of the State.

29. Civil and Criminal Dockets—What to Contain.

Clerks will be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. Books.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR.

ARTICLE I.

FUNCTIONS.

SECTION 1. *Purpose.* The North Carolina State Bar shall foster the following purposes, namely:

To cultivate and advance the science of jurisprudence;

To promote reform in the law and in judicial procedure;

To facilitate the administration of justice;

To uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession;

To encourage higher and better education for membership in the profession;

To promote a spirit of cordiality and brotherhood among the members of the Bar; and

To perform all duties imposed by law.

SECTION 2. *Division of Work.* To facilitate the work for the accomplishment of the above enumerated purposes, the Council may, from time to time, classify such work under appropriate sections and committees of The North Carolina State Bar.

SECTION 3. *Coöperation With Local Bar Association Committees.* The sections and committees so appointed may secure the coöperation of like sections and committees of The North Carolina Bar Association and all local Bar Associations of the State.

SECTION 4. *Organization of Local Bar Associations.* The Council shall encourage and foster the organization of local Bar Associations.

SECTION 5. *Annual Program.* The Council shall provide a suitable program for each annual meeting of The North Carolina State Bar.

SECTION 6. *Reports Made to Annual Meeting.* The reports of the several sections and committees, with their recommendations, shall be delivered to the Secretary of The North Carolina State Bar at least thirty days before the annual meeting. Such reports, together with any reports from special committees that the Council desires to present to the annual meeting, may be printed and sent to each member of The North Carolina State Bar at least twenty days before such meeting. Nothing herein shall preclude any section, committee or the Council from presenting a report or recommendation that has not been so printed and mailed.

ARTICLE II.

MEMBERSHIP—ANNUAL MEMBERSHIP FEES.

SECTION 1. *Register of Members.* The Secretary-Treasurer shall keep a register for the enrollment of members of The North Carolina State Bar. In appropriate places therein entries shall be made showing the address of each member, date of registration and class of membership, date of transfer from one class to another, if any, date and period of suspension, if any, and such other useful data which the Council may from time to time require.

Every member shall register by signing a registration card, which in substance shall require, until the future order of the Council, the member to furnish the following information:

1. Name and address.
2. Date.
3. Date passed examination to practice in North Carolina.
4. Date and place sworn in as an attorney.
5. Date and place of birth. If not born in the United States, when and where naturalized.
6. Whether admitted to United States District Court, United States Circuit Court of Appeals, or United States Supreme Court.
7. Membership, if any, in bar associations, giving name of each.
8. Whether suspended or disbarred, and if so, when and where, and when readmitted.

SECTION 2. *Annual Membership Fees, When Due.* The annual membership fee for an active member shall be $5.00.

Said membership fee shall be paid to the Secretary-Treasurer for the year 1933 on or before the 1st day of January, 1934, and for the year 1934, on or before the 1st day of July, 1934, and on or before the 1st day of July, of each year thereafter.

No part of said membership fees shall be apportioned to fractional parts of the year, and no part of the membership fees shall be rebated by reason of death, resignation, suspension or disbarment.

Written notice of failure to pay annual membership fees shall be sent to a member at his last known business address by the Secretary of the State Bar. Upon payment of delinquent fees by any member, his name shall be certified to the clerk of the Superior Court of the county of his residence.

SECTION 3. All members who claim to be inactive shall file a duly verified petition with the Secretary addressed to the Council setting forth fully:

1. Date of admission to the Bar and place of residence from which admitted.

2. The practice, times and places.

3. Present occupation or work engaged in and residence.

4. Grounds upon which applicant desires classification.

5. That applicant is at the time of filing petition a member in good standing having paid all fees required and without any charges undisposed of against him.

6. Any further matters pertinent to the petition.

SECTION 4. The Council may in its discretion order the petitioner to be placed on the inactive list of membership on the records of the Secretary and may in its discretion revoke such order at any time.

ARTICLE III.

SECTION 1. *Election of Officers.* The officers of The North Carolina State Bar, in addition to the Councillors, shall consist of a President, a first Vice-President, a second Vice-President, and Secretary-Treasurer. The Secretary-Treasurer shall receive a salary fixed by the Council; other officers shall serve without compensation, except per diem allowance fixed by the statute.

The first President and Vice-President shall be elected by the Councillors from the active members of The North Carolina State Bar.

At each annual meeting of The North Carolina State Bar the active members present shall elect a President and two Vice-Presidents who shall hold office until their successors are elected and qualified. The Secretary-Treasurer shall be elected by the Council annually. No officer elected by the Council or by The North Carolina State Bar need be a member of the Council. All such officers shall be the officers of the Council with the same titles.

ARTICLE IV.

DUTIES OF OFFICERS.

SECTION 1. *Absence or Inability of President.* In the absence or inability of the President at any meeting of The North Carolina State Bar or the Council, one of the Vice-Presidents shall act in his place. In the event neither is present, the Council shall select one of its members to preside during such meeting.

In all other matters, if the President absents himself from the State, or for any reason is unable to perform his duties as President, the first Vice-President shall perform the duties of President and likewise in his absence the second Vice-President shall act. In the event of the inability of either to perform the duties of President, the Council may select one of their members to act until such absence or inability is removed.

SECTION 2. *Duties of Secretary-Treasurer.* The Secretary-Treasurer shall attend all meetings of the Council and of The North Carolina State Bar, and shall record the proceedings of all such meetings. He shall, with the President or one of the Vice-Presidents, execute all contracts ordered by the Council. He shall have custody of the seal of The North Carolina State Bar, and shall affix it to all documents executed on behalf of the Council or certified as emanating from the Council. He shall take charge of all funds paid into The North Carolina State Bar and deposit them in some bank selected by the Council; he shall cause books of accounts to be kept, which shall be the property of The North Carolina State Bar and which shall be open to the inspection of any officer, committee or member of The North Carolina State Bar during usual business hours. At each January meeting of the Council, the Secretary-Treasurer shall make a full report of receipts and disbursements since the previous annual report, together with a list of all outstanding obligations of The North Carolina State Bar. The books of account shall be audited as of December 31st of each year and the Secretary shall publish same in the annual reports as referred to above. He shall perform such other duties as may be imposed upon him, and shall give bond for the faithful performance of his duties in an amount to be fixed by the Council with surety to be approved by the Council.

ARTICLE V.

MEETINGS OF THE NORTH CAROLINA STATE BAR.

SECTION 1. *Annual Meetings.* The annual meetings of The North Carolina State Bar, beginning with the year 1937, shall be held in the city of Raleigh, on the fourth Friday in October.

SECTION 2. *Special Meetings.* Special meetings of The North Carolina State Bar may be called upon thirty days' notice, as follows:

(a) By the Secretary, upon direction of the Council.

(b) By the Secretary, upon the call addressed to the Council, of not less than twenty-five per cent of the active members of The North Carolina State Bar.

At special meetings no subjects shall be dealt with other than those specified in the notice.

SECTION 3. *Notice of Meetings.* Notice of all meetings shall be given by publication in such newspapers of general circulation as the Council may select, or, in the discretion of the Council, by mailing notice to the Secretary of the several district bars or to the individual active members of The North Carolina State Bar.

SECTION 4. *Quorum.* At all annual and special meetings of The North Carolina State Bar, ten per cent of the active members of The

North Carolina State Bar shall constitute a quorum, but there shall be no voting by proxy.

SECTION 5. *Parliamentary Rules.* Proceedings at any meeting of The North Carolina State Bar shall be governed by "Roberts' Rules of Order."

ARTICLE VI.

MEETINGS OF THE COUNCIL.

SECTION 1. *Regular Meetings.* Regular meetings of the Council shall be held on the first Friday after the second Monday in each of the months of January, April and July in the city of Raleigh; and on the day before the annual meeting of The North Carolina State Bar, in the place of such meeting. The hour of meeting shall in each case be at 10 o'clock a.m. Any regular meeting may be adjourned from time to time as a majority of members present may determine.

SECTION 2. *Special Meetings.* The President in his discretion may call special meetings of the Council. Upon written request of eight Councillors, filed with the Secretary-Treasurer requesting the President to call a special meeting of the Council, the Secretary shall, within five days thereafter, call such special meeting. The date fixed for such meeting shall not be less than five days nor more than ten days from the date of such call.

SECTION 3. *Notice of Called Special Meetings.* Notice of called special meetings shall be signed by the Secretary. The notice shall set forth the day and hour of the meeting and the place for holding the same. Any business may be presented for consideration at such special meeting. Such notice must be given to each Councillor unless waived by him. A written waiver signed by any Councillor shall be equivalent to notice as herein provided. Notice to Councillors not waiving as aforesaid shall be in writing and may be communicated by telegraph, or by letter through the United States mail in the usual course, addressed to each of said Councillors at his law office address. Notice by telegraph shall be filed with the telegraph carrier for transmission at least three days, and notice by mail shall be deposited in the United States post office at least five days, before the day fixed for the special meeting.

SECTION 4. *Quorum at Meeting of Council.* At meetings of the Council the presence of ten Councillors shall constitute a quorum.

SECTION 5. *Standing Committees of the Council.* The standing committees of the Council shall consist of:

a. An Executive Committee of five Councillors, elected by the Council, and the President and Secretary-Treasurer.

It shall be the duty of the Executive Committee to perform such duties as the Council shall designate, including, however, the auditing of the books and records of the Secretary-Treasurer at each regular meeting of the Council.

b. Committee on Legal Ethics and Professional Conduct of five Councillors elected by the Council.

It shall be the duty of the Committee on Legal Ethics and Professional Conduct to study canons of ethics and professional conduct and make such recommendations from time to time to the Council as it may deem proper and necessary; study and determine such questions as may arise as to the meaning and application of the canons of ethics and rules of professional conduct, and advise members of the State Bar upon request in respect thereto, and perform such other duties in connection with the canons of ethics and rules of professional conduct as it may be requested to perform by the Council of The North Carolina State Bar.

c. Committee on Grievances of five Councillors elected by the Council.

It shall be the duty of the Committee on Grievances to investigate and study all complaints which may be made against members of the State Bar. The committee may include in its investigations all matters which may come to its attention with reference to the member complained of. Its recommendation to the Council shall be in writing, and, if the action recommended be other than dismissal of the complaint, it shall state the facts and circumstances which have come to its attention in connection with the complaint, and shall state that a ten days' written notice by registered mail to his last known address has been given to the attorney, permitting him to be heard on affidavit, except in those cases where he has been convicted or confessed his guilt in open court, or the charges have been duly proven in a civil action. If the recommendation of the Grievance Committee is for dismissal of the charges, the report shall be private. It shall not be necessary to examine witnesses, but the committee shall have authority to require affidavits or other statements in sufficient form and substance to satisfy it as to the probable truth of the charges contained in the complaint.

d. Committee on Legislation and Law Reform of five Councillors elected by the Council.

It shall be the duty of the Committee on Legislation and Law Reform to examine proposed changes in the law; to examine and propose changes in the law and judicial procedure; to promote the simplification of law and procedure; and perform such other duties in connection with the improvement of law and procedure as may from time to time be requested by the Council or The North Carolina State Bar.

The Committee on Legislation and Law Reform shall not appear before committees of the Legislature, except upon the approval of the Council, nor shall it make specific endorsements of changes in the laws or of new laws except with the consent of the Council.

e. Committee on Unauthorized Practice of not less than three Councillors elected by the Council.

f. Committee on Membership of not less than three Councillors elected by the Council.

ARTICLE VII.

OFFICE OF THE NORTH CAROLINA STATE BAR.

SECTION 1. *Office.* Until otherwise ordered by the Council, the office of The North Carolina State Bar shall be maintained in the city of Raleigh at such place as may be designated by the Council.

ARTICLE VIII.

BOARD OF LAW EXAMINERS.

SECTION 1. *Election.* At the first meeting of the Council, it shall elect as members of the Board of Law Examiners, two members of the State Bar to serve for a term of one year from July 1, 1933; and two members of the State Bar to serve for a term of two years from July 1, 1933; and two members of the State Bar to serve for a term of three years from July 1, 1933.

The Council, at its regular meeting, in April of each year, beginning in 1934, shall elect two members of the Board of Law Examiners to take office on the 1st day of July of the year in which they are elected and such members shall serve for a term of three years, or until their successors are elected and qualified.

Beginning with the year 1935 and every third year thereafter the Council shall elect 3 members for a term of three years or until their successors are elected and qualified.

No member of the Council shall be a member of the Board of Law Examiners, and no member of the Board of Law Examiners shall be a member of the Council.

SECTION 2. *Examination of Applicants for License.* All applicants for admission to the Bar shall first obtain a certificate or license from the Board of Law Examiners in accordance with the rules and regulations of that Board.

SECTION 3. *Admission to Practice.* Upon receiving license to practice law from the Board of Law Examiners, the applicant shall be admitted to the practice thereof by taking the oath in the manner and form now provided by law.

SECTION 4. *Approval of Rules and Regulations of Board of Law Examiners.* The Council shall, as soon as possible, after the presentation to it of rules and regulations for admission to the Bar, approve or disapprove such rules and regulations. The rules and regulations approved shall immediately be certified to the Supreme Court. Such rules and regulations as may not be approved by the Council shall be the subject of further study and action, and for the purpose of study, the Council and Board of Law Examiners may sit in joint session. No action, however, shall be taken by the joint meeting, but each shall act separately, and no rule or regulation shall be certified to the Supreme Court until approved by the Council.

ARTICLE IX.

DISCIPLINE AND DISBARMENT OF ATTORNEYS.

SECTION 1. Upon the receipt of the report of the Grievance Committee, and its recommendations, the Council will determine at a regular meeting, its course in reference to the matters recommended by the Grievance Committee and shall adopt, modify, reject, or remand the said report to the Grievance Committee for further investigation, but no judgment shall be entered against any accused attorney except after a hearing has been had thereon, as provided in chapter 210, Public Laws, 1933, and herein.

SECTION 2. In case the Council decides to direct a hearing upon the matters, or any of them, so reported by the Grievance Committee, the following procedure shall be followed:

(a) A verified written statement, in separate paragraphs, shall be formulated by the Council, or under its directions, showing the nature and substance of all the charges preferred against the party against whom the same have been filed, or lodged, or included in the report of the Committee on Grievances. Such statement shall also contain a notice of the time and place for a hearing thereon, in the county where the respondent resides, and the respondent shall be entitled to receive two copies of said statement and notice, at least thirty days prior to the time designated for such hearing. Service of said statement and notice shall be made by the sheriff of the county in which said respondent resides, by delivering to the said respondent two copies of said statement and notice, and the Secretary of the Council shall pay to such sheriff for such service such fees as are allowed such sheriff for service of summons in civil actions.

(b) The Council shall name and designate a committee of three Councillors who shall sit at such hearing and preside over the proceedings had thereat, and remove the hearing as provided in chapter 210, Public Laws, 1933.

(c) The respondent, within said period of thirty days, may file answer to the charges set out in the said statement and notice, which shall be accompanied by two copies thereof, and the said answer and copies thereof shall, within said period, be filed in the office of the Secretary of the Council. Every material allegation of the verified statement not controverted by an answer or to which no answer is made is, for the purpose of the action, taken as true and the trial committee may consider the facts therein contained as conceded and no other proof of the same shall be necessary.

(d) At such hearing, and throughout the pendency of such charges, the respondent shall be entitled to counsel; to have process to secure and compel the attendance of witnesses, the production of papers and books, documents and, upon request, the same shall be issued as prescribed in chapter 210, Public Laws, 1933. All process officers in the State of North Carolina shall be required to serve the same, and for such service shall receive fees allowed in their respective jurisdictions for the service of subpœnas issued by the Superior Courts.

(e) At said hearing, or hearings, a complete stenographic report of all testimony shall be had and the original and one copy of said testimony shall be filed with the Secretary of the Council.

(f) The cost of stenographic services for such trial shall be paid by the Council upon bills rendered and approved as other expenses of the Council, and shall be taxed as a part of the costs, as provided in chapter 210, Public Laws, 1933.

(g) At said hearing, or hearings, before said Committee, respondent shall have the right to produce in his behalf all competent evidence and to testify in person in respect to the matters and things set out in said statement and notice.

(h) Counsel shall have the right to submit oral argument and written briefs under the direction of the said committee, and to present such arguments as may now be presented in the trial of civil actions in the Superior Court.

(i) After hearing all the evidence and considering the same, the said committee shall file its report, stating its findings of fact and making its conclusions thereon as to discipline or disbarment, or as to the innocence of the respondent. Said report in duplicate shall be filed with the Secretary of the Council and shall stand for hearing at the next regular meeting of the Council, but the Council shall have power to continue the hearing to specified dates.

(j) When the said committee shall formulate its report, a copy thereof shall be sent, by registered mail, to the respondent, and the said respondent shall file his exceptions thereto within ten days from the receipt of the copy of said report. If the respondent shall desire further time

he may apply to the President of The North Carolina State Bar for an extension of time in which to file exceptions to said report. The President of The North Carolina State Bar is hereby authorized to grant such extension as will meet the ends of justice, having due regard to the right of the respondent to have a full and ample opportunity to present his defense and that it is to the interest of the public that such matters be speedily concluded. The respondent shall file his exceptions within the time herein provided or within the said extended time.

If the respondent shall fail to file any exceptions to said report, then the Council will proceed thereon *ex parte*.

(k) Said Council shall consider said report at a regular meeting and shall determine upon the record of the said hearing, which shall consist of the said statement and notice served on the respondent, his answer, if any, the testimony taken by the said committee, its report, recommendations, and the briefs of counsel filed before said committee, if any, and when the same is considered by the Council, the said respondent shall be entitled to be heard by the Council in person or through counsel, before determination, but no testimony or evidence will be taken by the Council and none heard other than such as is contained in the record filed by the committee which conducted the hearings.

(l) Any evidence, discovered after the report of the committee hearing the matter has been filed with the Council, may be the subject of a motion before the Council at any time before final judgment to remand the said report to the committee, to the end that the said committee may hear said newly discovered evidence. Such motion, and the proof with respect thereto, shall be made and heard under the rules now applicable to motions for new trials in the Superior Court for newly discovered evidence in civil actions, and if the said report is remanded to said committee to hear said newly discovered evidence, then the same shall be heard by said committee, subject to its competency, and such other evidence as may be corroborative or contradictory thereof, may also be submitted, and the said committee shall include said newly discovered evidence in its report and shall make such further findings and recommendations as it may deem proper in the light of all the evidence. Notice of such motion shall be given to opposing counsel at least ten days before said motion is to be heard.

(m) Upon such record, after hearing the argument thereon, the Council shall render its judgment as authorized in chapter 210, Public Laws, 1933, and amendments thereto, at a regular meeting, notice of which meeting shall be given the respondent, who shall have the right to be present in person or through counsel.

(n) From any judgment of suspension from the practice, or disbarment, the said respondent may appeal, as provided in chapter 210,

Public Laws, 1933, and notice of such appeal shall be sufficiently given the said Council, if given orally, when said judgment is rendered at a meeting of said Council, or by service of written notice of the same on the Secretary-Treasurer thereof, within fifteen days from the rendition of said judgment by said Council, which fifteen days shall begin to run from the final adjournment of the meeting of said Council at which said judgment was rendered. A copy of said judgment duly certified by the Secretary-Treasurer shall be forthwith mailed to the respondent by registered letter, with return receipt requested.

(o) The record on appeal to the Superior Court shall consist of the statement and notice and answer, if any, and the transcript of the evidence, and the findings of fact and recommendations of the committee, and the findings and conclusions of the Council thereon, as well as the exceptions, if any, filed to the report of said committee by the respondent, and the judgment of the Council thereon and the assignments of error therein, as contended for by the respondent.

(p) The Secretary-Treasurer shall certify the evidence in question-and-answer form as taken at the hearing, to the Superior Court, on appeal, which appeal shall be sent to the Clerk of the Superior Court in the county of the residence of the respondent.

(q) Whenever charges shall have been preferred against any member of the Bar, and the Council shall have directed a hearing upon the charges, it shall also designate a member or members of the Bar to prosecute said charges in such hearings as may be held, including hearing upon appeals in the Superior and Supreme Courts. The Council may allow the counsel performing such services such compensation as it may deem proper.

(r) In the case of persons charged with an offense cognizable by the Council, or any committee thereof, a complete record of the proceedings and evidence taken before the Council or any committee thereof shall be made and preserved in the office of the Secretary-Treasurer and the Secretary-Treasurer shall see that such record is had and preserved according to the orders of the Council.

The Council may, upon sufficient cause shown, and with the consent of the person charged, cause the said record to be expunged and destroyed.

(s) Final judgment of suspension from the practice or disbarment by the Council shall be certified by the Secretary-Treasurer to the Superior Court of the county wherein the respondent resides, and also to the Supreme Court of North Carolina. If the judgment of the Council shall be that the respondent be privately reprimanded, the Council shall formulate the reprimand and shall appoint one of its members to read and deliver the same and shall name the time and

place for delivery thereof. The Secretary shall spread upon his minutes as a final judgment of the Council, the order of private reprimand, the name of the member of the Council to deliver the same, and the time and place therefor.

(t) Whenever any attorney has been deprived of his license under the provisions of chapter 210, Public Laws, 1933, and amendments thereto, the Council, in its discretion, may restore said license upon due notice being given and hearing had and satisfactory evidence produced of proper reformation of the licentiate before restoration.

(u) Due notice of motion before said Council to restore such license shall, in so far as it relates to the Council, be had by serving a written notice upon the Secretary-Treasurer of the Council by delivery of two copies thereof at least forty days prior to the hearing on said motion. In lieu of service the said Secretary-Treasurer may, in his discretion, accept service of said notice. Notice by publication shall also be made by applicant in a newspaper published in the county in which applicant resides once a week for four successive weeks.

(v) All hearings to restore licenses shall be had by the Council which shall make its findings and declare its conclusions thereon and enter its judgment upon the same. If, as result of said hearing, the Council decides to restore said license, a copy of its judgment restoring the same shall be certified to the Superior Court of the county wherein the said licentiate resides, and if he then resides in a county other than the county where the judgment disbarring said licentiate has been recorded, then a copy shall be certified to the Superior Court in said county where said judgment of disbarment has been recorded, and a certified copy thereof shall be delivered to the Supreme Court, to the end that the same may be recorded in its minutes, and when so recorded the judgment of the Council restoring said license shall have full force and effect throughout the State.

(w) The cost of any proceedings for the restoration of license shall be paid by the person making application therefor.

SECTION 3. All hearings on any complaint before the committee appointed by the council to hear the same, shall be public, and if possible, shall be held in the courthouse.

ARTICLE X.

CANONS OF ETHICS AND RULES OF PROFESSIONAL CONDUCT.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

1. THE DUTY OF THE LAWYER TO THE COURTS.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

2. THE SELECTION OF JUDGES.

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selections of Judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the Bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

3. ATTEMPTS TO EXERT PERSONAL INFLUENCE ON THE COURT.

Marked attention and unusual hospitality on the part of a lawyer to a Judge, uncalled for by the personal relations of the parties, subject both the Judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the Judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a Judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due the Judge's station, is the only proper foundation for cordial, personal and official relations between Bench and Bar.

4. WHEN COUNSEL FOR AN INDIGENT PRISONER.

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

5. THE DEFENSE OR PROSECUTION OF THOSE ACCUSED OF CRIME.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

6. ADVERSE INFLUENCES AND CONFLICTING INTERESTS.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

7. PROFESSIONAL COLLEAGUES AND CONFLICTS OF OPINION.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the employment of another lawyer, are unworthy of those who should be brethren at the Bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

8. ADVISING UPON THE MERITS OF A CLIENT'S CAUSE.

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mistakes of juries and errors of Courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

9. NEGOTIATIONS WITH OPPOSITE PARTY.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

10. ACQUIRING INTEREST IN LITIGATION.

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

11. DEALING WITH TRUST PROPERTY.

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him.

12. FIXING THE AMOUNT OF THE FEE.

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

13. CONTINGENT FEES.

A contract for a contingent fee, where sanctioned by law, should be reasonable under all the circumstances of the case, including the risk and uncertainty of the compensation, but should always be subject to the supervision of a court, as to its reasonableness.

14. SUING A CLIENT FOR A FEE.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

15. HOW FAR A LAWYER MAY GO IN SUPPORTING A CLIENT'S CAUSE.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

16. RESTRAINING CLIENTS FROM IMPROPRIETIES.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards Courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

17. ILL-FEELING AND PERSONALITIES BETWEEN ADVOCATES.

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

18. TREATMENT OF WITNESSES AND LITIGANTS.

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

19. APPEARANCE OF LAWYER AS WITNESS FOR HIS CLIENT.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

20. NEWSPAPER DISCUSSION OF PENDING LITIGATION.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

21. PUNCTUALITY AND EXPEDITION.

It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

22. CANDOR AND FAIRNESS.

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument

to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the Court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the Judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of justice.

23. ATTITUDE TOWARD JURY.

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the Court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

24. RIGHT OF LAWYER TO CONTROL THE INCIDENTS OF THE TRIAL.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

25. TAKING TECHNICAL ADVANTAGE OF OPPOSITE COUNSEL; AGREEMENTS WITH HIM.

A lawyer should not ignore known customs or practice of the Bar or of a particular Court, even when the law permits, without giving timely

notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of Court.

26. PROFESSIONAL ADVOCACY OTHER THAN BEFORE COURTS.

A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

27. ADVERTISING, DIRECT OR INDIRECT.

The customary use of simple professional cards is permissible. Publication in approved law lists and legal directories, in a manner consistent with the standard of conduct imposed by these Canons, of brief biographical data is permissible. This may include only a statement of the lawyer's name and the names of his professional associates, addresses, telephone numbers, cable addresses, special branches of the profession practiced, date and place of birth and admission to the Bar, schools attended with dates of graduation and degrees received, public offices and posts of honor held, Bar and other Association memberships and, with their consent, the names of clients regularly represented. This does not permit solicitation of professional employment by circulars, or advertisements, or by personal communications or interviews not warranted by personal relations. It is unprofessional to endeavor to procure professional employment through touters of any kind. Indirect advertisements for professional employment, such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.

28. STIRRING UP LITIGATION, DIRECTLY OR THROUGH AGENTS.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unpro-

fessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit or collect judgment, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital *attachés* or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof, to the end that the offender may be disbarred.

29. UPHOLDING THE HONOR OF THE PROFESSION.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the Bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.

30. JUSTIFIABLE AND UNJUSTIFIABLE LITIGATIONS.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the Court as to the legal merits of his client's claim. His appearance in Court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

31. RESPONSIBILITY FOR LITIGATION.

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline

employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, what cases he will contest in Court for defendants. The responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

32. THE LAWYER'S DUTY IN ITS LAST ANALYSIS.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

33. PARTNERSHIPS—NAMES.

Partnerships among lawyers for the practice of their profession are very common and are not to be condemned. In the formation of partnerships and the use of partnership names care should be taken not to violate any law, custom, or rule of court locally applicable. Where partnerships are formed between lawyers who are not all admitted to practice in the courts of the State, care should be taken to avoid any misleading name or representation which would create a false impression as to the professional position or privileges of the member not locally admitted. In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. In the selection and use of a firm name, no false, misleading, assumed or trade name should be used. The

continued use of the name of a deceased or former partner, when permissible by local custom, is not unethical, but care should be taken that no imposition or deception is practiced through this use. When a member of the firm, on becoming a judge, is precluded from practicing law, his name should not be continued in the firm name.

Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.

34. DIVISION OF FEES.

No division of fees for legal services is proper, except with another lawyer, based upon a division of service or responsibility.

35. INTERMEDIARIES.

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client. Charitable societies rendering aid to the indigents are not deemed such intermediaries.

A lawyer may accept employment from any organization, such as an association, club or trade organization, to render legal services in any matter in which the organization, as an entity, is interested, but this employment should not include the rendering of legal services to the members of such an organization in respect to their individual affairs.

36. RETIREMENT FROM JUDICIAL POSITION OR PUBLIC EMPLOYMENT.

A lawyer should not accept employment as an advocate in any matter upon the merits of which he has previously acted in a judicial capacity.

A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ.

37. CONFIDENCES OF A CLIENT.

It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage

of the client, without his knowledge and consent, and even though there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

38. COMPENSATION, COMMISSIONS AND REBATES.

A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure.

39. NEWSPAPERS.

A lawyer may with propriety write articles for publications in which he gives information upon the law; but he should not accept employment from such publications to advise inquirers in respect to their individual rights.

40. DISCOVERY OF IMPOSITION AND DECEPTION.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

41. EXPENSES.

A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

42. APPROVED LAW LISTS.

It shall be improper for a lawyer to permit his name to be published after January 1, 1939, in a law list that is not approved by the American Bar Association.

43. WITHDRAWAL FROM EMPLOYMENT AS ATTORNEY OR COUNSEL.

The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire or consent

of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of his case, or if he persists over the attorney's remonstrance in presenting frivolous defenses, or if he deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively. Sundry other instances may arise in which withdrawal is to be justified. Upon withdrawing from a case after a retainer has been paid, the attorney should refund such part of the retainer as has not been clearly earned.

44. SPECIALISTS.

The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles.

45. NOTICE OF SPECIALIZED LEGAL SERVICE.

Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper.

46. AIDING THE UNAUTHORIZED PRACTICE OF LAW.

No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

A

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become a partner of any judge of any court inferior to the Superior Court, to practice his profession in the court of any such judge, during the existence of such copartnership.

B

It shall be deemed unethical and unprofessional for a member of The North Carolina State Bar, who is now or who may hereafter become

a partner of a solicitor or prosecuting attorney of any court of the State of North Carolina, to practice his profession in any criminal court of such solicitor or prosecuting attorney.

C

It shall be deemed unethical and unprofessional for any attorney who is, or has been, a prosecuting officer in any court inferior to the Supreme Court, or in any Federal Court, to accept professional employment in any matter of a civil or criminal nature growing out of any matter or thing which is or may have been in any way connected with the office of such prosecuting officer during his incumbency.

D

It shall be deemed unethical for any Judge or Solicitor of any criminal court inferior to the Superior Court to appear in any criminal proceeding, whether for the defendant or for the State, in other Courts of his county having criminal jurisdiction, whether concurrent with, inferior to or superior to the criminal jurisdiction of the Court over which he shall preside, or over which he shall be the prosecuting officer, except that this Canon shall not apply to Mayors of Incorporated Towns having like jurisdiction in criminal matters as a Justice of the Peace, except that such Mayors shall not appear in any criminal matters arising within his jurisdiction. *Provided further,* that nothing in this Canon is intended to preclude the Solicitor of any Recorder's Court or County Court from appearing in the Superior Court upon request of the District Solicitor.

E

It shall be deemed unethical and unprofessional for any attorney to represent any defendant in any criminal action where such attorney or member of his family has personally signed an appearance bond with or without compensation, or wherein he has acted as agent or officer for, or is financially interested in, any person, firm, or corporation in executing such bond.

F

That it appearing to the Council that the United States Government has called for competitive bidding from lawyers to do abstract work and that upon the request of the Government lawyers have submitted competitive bids for such work—and the question having been raised as to whether such bidding is ethical—NOW, therefore, be it resolved that it is the sense of this Council that hereafter any competitive bidding for any legal work is deemed to be unethical.

ARTICLE XI.

FILING PAPERS WITH AND SERVING THE NORTH CAROLINA STATE BAR.

SECTION 1. *When Papers Are Filed Under These Rules and Regulations.* Whenever in these rules and regulations there is a requirement that petitions, notices or other documents be filed with or served on The North Carolina State Bar, or the Council, the same shall be filed with or served on the Secretary of The North Carolina State Bar.

ARTICLE XII.

SECTION 1. *Seal.* The North Carolina State Bar shall have a seal round in shape and having the words and figures, "THE NORTH CAROLINA STATE BAR—JULY 1, 1933," with the word "SEAL" in the center. The seal shall remain in the custody of the Secretary-Treasurer at the office of The North Carolina State Bar, unless otherwise ordered by the Council.

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

ADOPTED BY THE BOARD OF LAW EXAMINERS AND APPROVED BY THE COUNCIL OF THE NORTH CAROLINA STATE BAR

1. *Effective Date of These Rules.* Except as otherwise provided herein, the rules of the Supreme Court as contained in 200 N. C., 813, shall govern application for admission to the practice of law at the examinations to be held in August, 1935, and January, 1936; thereafter the following rules shall govern, provided that, when the going into effect of any of the following rules is postponed, the approximate corresponding rules of the Supreme Court shall in the meantime control.

2. *Compliance Necessary.* Subject to the provisions of the foregoing paragraph, no person shall hereafter be admitted to the practice of law in North Carolina until and unless he has complied with these rules and the laws of the State.

3. *Definitions.* The terms "board" and "secretary" as herein used refer, respectively, to the Board of Law Examiners of North Carolina and the Secretary of the same. Masculine pronouns shall be deemed to include the female.

4. *Applications.* Every person desiring to be admitted to the practice of law in North Carolina shall file an application with the Secretary not later than the 15th day of June prior to the next bar examination. This application shall contain such information as is called for by the blanks approved by the Board, and shall be accompanied by the fee required by Rule 18, and by such evidence of good moral character, certificates of general and legal education, and other credentials as applicant relies upon to show compliance with these rules. All applications, proofs, and certificates shall be made upon blanks furnished by the Secretary. As soon as possible after June 15 of each year the Secretary shall make public the list of applicants.

5. *Citizenship, Character, Age, Residence.* Each applicant at the time of filing his application, must be a citizen of the United States, a person of good moral character, and must have been, for the twelve months next preceding the filing of his application, a citizen and resident of North Carolina, or must have been a nonresident student, for one scholastic year next preceding the filing of his application, in an approved North Carolina law school who has the intention, in good faith, of becoming a citizen and resident of North Carolina within six months after

filing his application, in which latter event license shall not actually issue to him until and unless within this six-months' period he has become a citizen and resident of North Carolina, and has satisfied the Chairman of the Board to that effect. He must be at least 21 years of age at the time of filing his application, or of such an age that he will become 21 within twelve months next after filing his application, provided that no license shall actually issue to any person until he has reached the age of 21.

6. *Moral Character of Applicant.* No applicant shall be licensed upon examination or by comity until and unless he has been found by the Board to be of good moral character. Each applicant shall furnish certificates of good moral character from four responsible persons, at least two of whom shall be members of The North Carolina State Bar, practicing in the Supreme Court, provided that in exceptional and meritorious cases the Board may accept, in lieu of certificates from North Carolina practitioners, certificates from two attorneys of another State who are members of the Bar of the highest court in that State, and who accompany their certificates with proof to that effect.

Any person whose application for admission to the practice of law, either by examination or comity, has been denied on account of the lack of good moral character shall thereafter be ineligible to take the examination or have his credentials considered for two years.

7. *Law Students to Register.* No one shall be permitted to take the examination to be held in August, 1936, and thereafter, unless he shall have previously registered with the Secretary as a law student, provided that all persons who have begun the study of law prior to June 15, 1936, shall be allowed to that date to register. In determining whether or not an applicant to take an examination has complied with Rules 9, 10, and 11, no time spent in legal study prior to sixty days before the date of his registration will be counted, except that students registering on and prior to June 15, 1936, shall be given credit for the entire time of their legal study prior to their respective dates of registration. Registration shall be upon blanks prescribed by the Board and shall be accompanied by the certificate of the dean of that approved law school in which the applicant has matriculated, or of that lawyer under whose instruction the applicant proposes to study (who must at the time have been a licensed practitioner in North Carolina for five years), corroborating the fact in the application of which such dean or lawyer has personal knowledge, and giving to the Board such information and such pledges of intention to be governed by these rules in the instruction of the applicant as the Board shall require. Registration papers shall be accompanied by the registration fee of one dollar required by Rule 18. Upon receipt of the registration papers, corroborating certificates, and the registration fee, the Secre-

tary shall acknowledge the same and shall make entry upon his records to that effect. Whenever a registered law student changes his home address, or changes the school in which, or the lawyer under whom, he is studying, or whenever he shall abandon the study of law, he shall notify the Secretary of that fact within sixty days thereafter. Where a person applying to take the examination to be held in August, 1936, or an examination to be held thereafter shall have begun and pursued his legal studies outside of North Carolina and shall have failed to register as required above, deferred registration may, in exceptional and meritorious cases, be permitted by the Board.

From time to time during the period of the student's study the Board may require reports from him or the law school in which, or the lawyer under whom, he is studying concerning the kind and character of work he is doing and training he is receiving, and, if upon such investigation the Board is of the opinion that the work he is doing or the training he is receiving does not constitute a compliance with these rules, it may refuse to allow him credit for such work, or it may take such other action as seems to it appropriate.

8. *General Education.* (a) Each person seeking to take the examination which is to be held in August, 1938, or any examination held thereafter, must, prior to taking such examination, have received a standard four-year high school education or its equivalent. This may be evidenced by the certificate of the principal of the high school last attended, if applicant is a graduate of a four-year high school fully accredited at the time of graduation by the North Carolina State Department of Education. Otherwise, the Board shall ascertain whether or not the applicant has complied with this rule by such investigations and examinations as shall satisfy it.

The Board of Law Examiners will, within the meaning of Rule 8 (a), deem an applicant to have the equivalent of a standard four-year high-school education who has a diploma from a high school of any State accredited by the Department of Education of such State as a standard high school or who has been accepted as a first-year student in a senior college in any State accredited by the Department of Education of that State, or who has completed the first two years of study in a junior college of any State accredited by the Department of Education of that State, or has a diploma from a preparatory school recognized as a standard preparatory school of the grade of a standard high school by the Department of Education of the State where located.

(b) Each applicant, to take the examination to be held in August, 1940, and thereafter, must, prior to beginning the study of law, have completed, at a standard college, an amount of academic work equal to one-half of the work required for a bachelor's degree at the university

of the State in which the college is located. With this application he shall file a certificate from such college furnishing all information that the Board shall require. If such person has not taken the above described amount of college work, or for any reason cannot furnish a certificate of such work, he may request an examination upon his general education, whereupon the Board itself or through some agency designated by it, shall examine him. If upon such examination, the Board is satisfied that his general education is sufficient to qualify the applicant to practice law, the Board may find that he has met the requirements of this rule as to general education.

If a person applying to take the examination to be held in August, 1940, or an examination to be held thereafter, cannot qualify under the above-stated provisions of this rule, the Board shall allow him to take the examination and be admitted if he has previously been accepted by an approved law school as a *special* student, *if at such school he has complied with either Rule 9 (a) or Rule 9 (b)*, and if he presents a certificate to that effect by the dean of that school.

9. *Legal Education.* Each person applying to take the examination in August, 1942, or thereafter, must have studied law for three years, all of which study must have been completed within a period of six years. During that period, he must either (a) have studied as a minimum requirement, all of the required subjects and any five of the optional subjects listed in Rule 13, or (b) he must have graduated from an approved law school.

A person shall be deemed to have complied with this rule if at the time of filing his application he presents the certificate of the dean of an approved law school that he (the applicant) will complete the course of study required for graduation from that school during the current summer session conducted by that school. No license shall be issued, however, until the dean certifies that the applicant has satisfactorily completed that course of study and has graduated, provided that no review work in preparation for the bar examination shall have constituted any part of the summer's course of study.

A person shall be deemed to have graduated from an approved law school for the purposes of these rules, if he has complied with all of the requirements for graduation therefrom except those relating to pre-legal education and if he was originally admitted to the law school as a special student and not as a candidate for a law degree.

10. *Evidence of Legal Education.* Compliance with Rule 9 must be evidenced (a) by the certificate of the dean of an approved law school that the applicant has studied law in that school for three years and that he has passed examinations given by the faculty on all the required subjects and on five of the optional subjects listed in Rule 13, or that he

has graduated from that law school; or (b) by the affidavit of a member of The North Carolina State Bar engaged in active practice of law, who has been a licensed practitioner in North Carolina for five years prior to the beginning of instruction, that the applicant has studied law under his personal instruction for three years and that he has passed written examinations given by him on all the required subjects and on five of the optional subjects listed in Rule 13; which affidavit shall be made on the form prescribed by the Board of Law Examiners, and the originals of which written examinations, and the answers thereto shall be attached to such affidavit; or (c) by a combination of such certificates showing that the aggregate total of the applicant's study in an approved law school or schools and under a lawyer or lawyers has equaled three years, and that he has passed written examinations on all the required subjects and on five of the optional subjects listed in Rule 13; and no certificate showing study outside of an approved law school for less than six consecutive months will be considered. Persons who have studied law outside of North Carolina will not be allowed credit for the time spent in such study, except to the extent that the same has been pursued in an approved law school.

11. *Years of Study Defined.* A year of study, within the meaning of Rule 9, shall consist of a minimum of either (a) thirty weeks, excluding vacations but including examinations, embracing an average of twelve hours of classroom work each week, and an average of two hours' preparation required for each hour of recitation, spent in a law school approved by the Board; or (b) forty-five weeks, exclusive of vacations embracing an aggregate of ten hundred and eighty hours during this period devoted to study, recitations, and examinations, and with final examinations in each subject of at least two hours' duration, spent under the personal instruction of a member of The North Carolina State Bar who, at the beginning of his instruction of the applicant, has been a licensed practitioner in North Carolina for five years.

Study in the summer session of any law school approved by the Board shall count for the same part as a year's study, within the meaning of this rule, as it is counted toward graduation under the regulations of that school.

12. *Approved Law Schools.* The law schools maintained by the University of North Carolina, Duke University, and Wake Forest College are hereby approved; other law schools will be approved if and when they satisfy the Board that their standards, work, and equipment are substantially the equivalent of those of one or the other of the above-mentioned law schools. The Board may, from time to time, withdraw approval from law schools previously approved, if and when it determines that they do not conform to the foregoing requirements.

13. *Examinations.* Beginning with the examination to be held in August, 1936, there shall be held one examination each year of those applying to be admitted to practice law in North Carolina; it shall be held in the City of Raleigh and shall commence on the first Tuesday in August at 10 a.m. No person other than one applying for admission by comity will be admitted to the practice of law until and unless he has been found by the Board to have duly passed an examination given in accordance with this rule, the Board being hereby vested with the authority to determine what shall constitute the passing of an examination. The examinations to be given in August, 1942, and thereafter, will deal with the following required and optional subjects: *Required:* Agency, Business Associations (including corporations, partnerships, joint stock companies and business trusts), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Equity, Evidence, Legal Ethics, Negotiable Instruments, Personal Property, Real Property, Security Transactions (including mortgages, security deeds of trust, trust receipts, pledges, conditional sales, guaranty and suretyship), Torts, and Wills and Administration. *Optional:* Administrative Law, Conflict of Laws, Debtor's Estates (including bankruptcy, receiverships, assignments for the benefit of creditors, compositions and state reorganization and insolvency statutes), Domestic Relations, Federal Jurisdiction and Procedure, Future Interests, Insurance, Labor Law, Municipal Corporations, Public Utilities, *Quasi*-Contracts, Sales, Taxation, Trade Regulation, and Trusts.

"Applicants will be expected to answer all of the questions relating to the required subjects and those relating to any five of the optional subjects."

13 (a). For the purpose of meeting such emergencies as may arise during the present war, the Board may allow such applicants as are qualified to take any regular examination, but who are members of the armed forces, to take the examinations of this Board at or about the same time and during the same or about the same periods through proctors authorized by the Board at or near the stations where the applicants may be located. Any applicant taking an examination under this amendment shall be required to pay any added expense attached to such examination and the Board may consider the papers submitted by the applicant at such meeting as it may deem proper. For the purposes of effectuating this rule the Secretary is authorized to waive the requirements as to time of filing application. This rule is adopted for the purpose of meeting the emergency created by the present war.

14. *Protest.* Any person may protest the right of any applicant to be admitted to the practice of law either by examination or as a matter of comity. Such protest shall be made in writing, signed by the person

making the protest, and bearing his home and business address, and shall be filed with the Secretary of the Board not later than July 15 previous to the date on which the next succeeding examination is to be held. The Secretary shall immediately notify the applicant of the protest and of the charges therein made; and the applicant may thereupon withdraw as a candidate for admission to the practice of law at that examination; but, in case his withdrawal in writing is not received by the Secretary by noon of the Saturday preceding the examination, he shall not be allowed thereafter to withdraw, and the person making the protest and the applicant in question shall appear before the Board at 10 o'clock a.m. of the Monday preceding the examination, whereupon the Board shall proceed forthwith to hear the matter and to make such disposition thereof as in its judgment seems just and in accordance with these rules and with the laws of North Carolina. The protest shall not be made public unless and until the final disposition of the matter has been determined adversely to the interest of the applicant.

15. *Certificates Not Conclusive.* Certificates furnished by an applicant shall not be conclusive upon the Board as to the facts therein stated; it shall make such investigation as it sees fit into the character of an applicant and the facts relating to the question as to whether or not he has complied with these rules; and if it desires, it may require the applicant to appear in person before it, or before some person designated by it, at or before the time of the examination which the applicant is seeking to take, for the purpose of eliciting from him additional information. All information furnished to the Board by an applicant, and all answers and questions upon blanks furnished by the Board, shall be deemed material.

16. *Effect of Disbarment.* No one who has been disbarred to practice law in this or any other State, or by any Federal Court, and whose sentence of disbarment has not been rescinded, and whose license to practice law has not been restored, shall be allowed to stand any examination held after the adoption of these rules, nor shall he be admitted to practice law in this State by comity or otherwise.

17. *Comity.* Any person duly licensed to practice law in another State may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the State in which he was licensed upon the applicant's furnishing to the Board a certificate from a member of the court of last resort of such State that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law before the Courts of said State and the Courts of the Federal Government, or as a full-time teacher in a law school approved by the Board, for five years or more, is in good professional standing, with no charges undisposed of against him as to professional conduct, and is of good moral character and a

proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such State, practicing in the court of last resort, and two persons who are not attorneys, as to the applicant's good moral character, whose signatures shall be attested by the clerk of the court; and upon the applicant's satisfying the Board that he has complied with the provisions of Rule 5 relating to citizenship and residence in North Carolina.

Applicants for admission to practice law under this rule shall be required to deposit with the Secretary of the Board the same amount required of applicants who stand the examination, and they shall be required to file with the Secretary on or before the 15th day of June of the year in which they desire to be admitted all of the certificates and other documents required by these rules. In addition to all other fees required by these rules, each applicant for admission under this rule shall deposit with the Secretary the sum of $50.00 to be used as the Board may direct for investigation or otherwise. If the fee charged comity applicants in such states or jurisdiction from which the applicant files shall be in excess of the total amount chargeable under the rules of this Board, then an amount equal to the charges fixed to be paid by comity applicants applying from this State in such foreign states or jurisdiction shall be paid to this Board. No license shall be issued to any applicant for admission under this rule except at the time of the annual examination of applicants after the filing of applications as required by Rule 4, and after determination of any protest that may be filed under Rule 14: *Provided,* that the Board may, when in session at any other time, grant an interim permission to such applicant to practice law until license shall be issued or declined: *Provided further,* that such applicant must have previously complied with all the requirements of this rule.

18. *Fees.* (a) Each person registering in accordance with Rule 7 shall, at the time of registering, pay to the Secretary one dollar; and the money derived from the payment of registration fees shall be used to defray the expenses of administering Rule 7 and the other expenses of the Board.

(b) All applicants to take examinations held after the adoption of these rules shall pay to the Secretary a filing fee of one dollar and fifty cents, and shall deposit with him an additional sum of twenty-two dollars, of which last named sum two dollars shall be considered a deposit to pay for license if issued. Any applicant who shall fail to pass the examination shall receive a refund of twelve dollars from said twenty-two dollars so deposited.

19. *Issuance of License.* Upon compliance with these rules the Secretary shall issue to each successful applicant a license to practice law in North Carolina, the same to be in such form as may be prescribed by the Board.

NORTH CAROLINA—WAKE COUNTY.

I, Edward L. Cannon, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing Rules and Regulations of The North Carolina State Bar have been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular meeting held on July 17, 1942, unanimously adopt said rules and regulations.

Given under my hand and the seal of The North Carolina State Bar, this the 7th day of August, 1942.

EDWARD L. CANNON, *Secretary,*
The North Carolina State Bar.

[The North Carolina State Bar
Seal
July 1, 1933.]

After examining the foregoing Rules and Regulations of The North Carolina State Bar, it is my opinion that the same complies with a permissible interpretation of Chapter 210, Public Laws 1933, and amendments thereto.

This the 1st day of September, 1942.

MICHAEL SCHENCK,
Associate Justice.

Upon the foregoing certificate, it is ordered that the foregoing Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 1st day of September, 1942.

DENNY, J.,
For the Court.

CONDENSED CATALOG OF NORTH CAROLINA SUPREME COURT LIBRARY

Scope of Catalog.

This catalog is intended as a guide to the textbooks, law reviews, and State and Federal reports and codes, not as a detailed inventory of the Library's accessions. In the interest of conciseness and economy, general and semi-legal works ordinarily not consulted in legal briefing and research, and the following, have been omitted from specific listing:

General (Webster's, Century, etc.) and technical (*A New Technical Dictionary,* Bouvier's *Law Dictionary,* Black's *Law Dictionary,* etc.) dictionaries and words and phrases, law-finding aids (Hicks' *Materials and Methods of Legal Research,* Beardsley's *Legal Bibliography and the Use of Law Books,* etc.), quotation search manuals (Bartlett's *Familiar Quotations, Cyclopedia of Quotations,* etc.), general (*Encyclopedia Britannica, New International,* etc.), and non-legal (*Encyclopedia of the Social Sciences,* etc.) encyclopedias, as well as legal encyclopedias (*Corpus Juris, American Jurisprudence,* etc.), legal digests, both general (*American Digest System*) and special (*Southeastern Digest, Pub. Utilities Reports Digest,* etc.) as well as foreign digests (*English and Empire Digest*), foreign reports (English, Scotch, Irish, Canadian, etc.), session laws (North Carolina—complete from 1715, and scattered old and all recent ones from other states), bar reports (complete for N. C., American Bar Association, and incomplete for other states), and Attorney-General reports (U. S., N. C., etc., substantially complete).

Location of Books.

At the beginning of each topical grouping of titles is indicated the location of these books in the Library to assist those searching without the aid of a librarian. Most textbooks are found in the northeast corner of the Library.

Index to Catalog.

Cross references at the beginning of topical headings, where helpful, list other related topics where additional material may be found under related subjects. Following is a list of topics covered, with page references:

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Abstracts (see Real Property).

Accounting (in northeast corner of Library).

Graham and Katz—*Accounting in Law Practice* (2d Ed.) 1938
Davis—*Legal Accounting and Court Auditing* 1928
Dodge—*Estate Administration and Accounting* 1940

Administrative Law (in northeast corner of Library).

Chamberlain *et al.*—*The Judicial Function in Federal Administrative Agencies* 1942
Dickenson—*Administrative Justice and Supremacy of Law* 1937
Dykstra—*Textbook on Government in Business* 1939
Frankfurter—*The Public and Its Government* 1939
Frankfurter and Dickenson—*Cases in Administrative Law* 1932
Freund—*Cases on Administrative Law* 1928
Freund—*Administrative Powers Over Persons and Property* 1928
Freund *et al.*—*Growth of American Administrative Law* 1923
Field—*Civil Service Law* 1939
Goodnow—*Comparative Administrative Law* 1893
Hart—*An Introduction to Administrative Law* 1940
Kirsh—*Trade Associations in Law and Business* 1938
Landis—*Administrative Process* 1941
Pike and Fischer—*Federal Administrative Law* 1942
Pound—*Administrative Law* 1942
Rohlfing—*Business and Government* 1938
Stephens—*Administrative Tribunals and Rules of Evidence* 1933
Stone—*Public Control of Business* 1940
Von Baur—*Federal Administrative Law* 1942
Uhler—*Review of Administrative Acts* 1942

Administrators (see Wills, Executors, and Administrators).

Admiralty (in northeast corner of Library).

Arnould—*Law of Marine Insurance* (9th Ed.) 1914
Benedict—*American Admiralty* (5th Ed.) 1925
Conkling—*U. S. Admiralty* (2d Ed.) 1857
Desty—*Manual of Law of Shipping and Admiralty* 1879
Hughes—*Handbook on Admiralty Law* 1901
Parsons—*Treatise on Law of Shipping and Admiralty* 1869
Parsons—*Treatise on Law of Marine Insurance* 1868
Smith—*Admiralty Law and Procedure* (3d Ed.) 1885

Agency (in northeast corner of Library).

American Law Institute—*Restatement of Agency* 1933
Anson—*Contracts and Law of Agency* (3d Amer. Ed.) 1924
Clark and Skyles—*Treatise on Law of Agency* 1905

Agency—*Continued.*

Ewell—*Treatise on Law of Principal and Agent* 1879
Mechem—*Treatise on Law of Agency* (2d Ed.) 1914
Reinhard—*Treatise on Law of Agency* 1902
Ross—*Principal and Agent* (49 Law Library) 1858
Story—*Commentaries on Law of Agency* (9th Ed.) 1882
Thompson—*Liabilities of Agents of Corporations* 1880
Tiffany—*Handbook on Law of Principal and Agent* 1903
Wharton—*Commentaries on Law of Agents and Agency* 1876

Air, Radio (in northeast corner of Library).

Berry—*Communications by Air and Radio* 1937
Hotchkiss—*Aviation Law* 1938
Lupton—*Civil Aviation Law* 1933
Marchetti—*Law of Stage, Screen and Radio* 1936
Socolow—*Law of Radio Broadcasting* 1931
Wenneman—*Law of Municipal Airports* 1931

Arbitration and Award (in northeast corner of Library).

Billings—*Treatise on Law of Awards* (51 Law Library) 1846
Caldwell—*Treatise on Law of Arbitration* 1822
Kellor—*Arbitration in Action* 1941
Morse—*Law of Arbitration and Award* 1872
Sturges—*Treatise on Commercial Arbitrations and Awards* 1930
Watson—*Treatise on Law of Arbitration and Award* (59 Law Library) 1848

Associations (in northeast corner of Library).

Endlich—*Law of Building Associations* (2d Ed.) 1895
Evans and Stokdyk—*Law of Co-operative Marketing* 1937
Hanna—*Law of Co-operative Marketing* 1931
Kirsh—*Trade Associations in Law and Business* 1939
Norwood—*Federal Trade and Price Law* 1939
Rohlfing—*Business and Government* 1938
Sundheim—*Building and Loan Associations* 1933
Thompson—*Treatise on Building and Loan Associations* (2d Ed.) 1899
Thornton & Blackledge—*Building and Loan Associations* 1898
Toulmin—*Trade Agreements and Anti-Trust Laws* 1937
Wrightington—*Law of Unincorporated Associations* 1916

Attachment (in northeast corner of Library).

Drake—*Treatise on Law of Attachments* (5th Ed.) 1878
Kneeland—*Treatise on Law of Attachments* 1885
Locke—*Law of Foreign Attachments* 1853

Attachment—*Continued.*

Rood—*Law of Garnishment*.....1896
Shinn—*Treatise on Law of Attachment and Garnishment*.....1896
Waples—*Treatise on Attachment and Garnishment*.....1885

Attorneys (in office).

Archer—*Ethical Obligations of the Lawyer*.....1910
Bradway—*The Bar and Public Relations*.....1934
Brown—*Lawyers and the Promotion of Justice*.....1938
Reed—*The Training for the Public Profession of Law*.....1921
Thornton—*Attorneys at Law*.....1914
Weeks—*Treatise on Attorneys and Counsellors at Law*.....1878

Automobiles (in northeast corner of Library).

Anderson—*An Automobile Accident Suit*.....1934
Appleman—*Automobile Liability Insurance*.....1938
Babbitt—*Motor Vehicle Law*.....1933
Babbitt—*The Law Applied to Motor Vehicles*.....1923
Berry—*The Law of Automobiles* (7th Ed.).....1935
Blashfield—*Cyclopedia of Automobile Law* (Perm. Ed.).....1935
Clevenger—*Automobile Trials*.....1935
Huddy—*Cyclopedia of Automobile Law* (9th Ed.).....1931
Malcolm—*Automobile Guest Law*.....1937
Simpson—*The Law Relating to Automobile Insurance*.....1929
Sunderlin—*Automobile Insurance*.....1929
Schwartz—*Trial of Automobile Accident Cases*.....1928
Vartanian—*Law of Automobiles in North Carolina*.....1938

Bailments (in northeast corner of Library, under "Pers. Property," "Carriers").

Dobie—*Handbook on Bailment and Carriers*.....1914
Hale—*Bailments and Carriers*.....1896
Jones—*Law of Bailments*.....1836
Lawson—*Bailments*.....1895
Schouler—*Treatise on Bailments and Carriers* (2d Ed.).....1887
Story—*Law of Bailments* (9th Ed.).....1878
Van Zile—*Bailments and Carriers* (2d Ed.).....1908

Banks and Banking (in northeast corner of Library).

Banking Laws (Federal).....1930
Bolles—*Banks and Their Depositors*.....1887
Brady—*Federal Banking Laws*.....1930
Braver—*Liquidation of Financial Institutions*.....1936
Carmalier—*Digest of Personal Finance Laws*.....1932
Hubachek—*Annotations on Small Loan Laws*.....1938

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Magee—*Law of National and State Banks* (2d Ed.) 1913
Michie—*Treatise on Law of Banks and Banking* 1931
Morse—*Treatise on Law of Banks and Banking* (6th Ed.) 1928
O'Connor—*The Law of National Banking* 1941
Patton—*Digest of Banking Law Opinions* 1941
Paine—*Bank Laws of State of New York* 1885
Perley—*Law of Interest* 1893
Tiffany—*Handbook of Law of Banks and Banking* 1912
Tyler—*Treatise on Law of Usury* 1873
Webb—*Law of Usury* 1899
Zollman—*Banks and Banking* (Perm. Ed.) 1936

Bankruptcy (in northeast corner of Library).

Bigelow—*Law of Fraudulent Conveyances* 1911
Black—*Treatise on Law of Bankruptcy* (3d Ed.) 1922
Brandenburg—*Law of Bankruptcy* (3d Ed.) 1903
Browne—*Federal Bankruptcy Practice* 1933
Bump—*Law and Practice of Bankruptcy* (11th Ed.) 1898
Bump—*Fraudulent Conveyances* (4th Ed.) 1896
Collier—*Bankruptcy Act of 1928* (14th Ed.) 1940
Dryer—*Supreme Court Bankruptcy Law* 1937
Eden—*Bankruptcy Practice* (34, 35 Law Library) 1841
Finletter—*Principles of Corporate Reorganization* 1936
Fixel—*False Financial Statements* 1934
Gerdes—*Corporate Reorganization* 1936
Glenn—*Liquidation* 1935
Glenn—*Law of Fraudulent Conveyances* 1940
Johnson—*Bankruptcy Regulations* 1936
Loveland—*Law of Proceedings* (2d Ed.) 1904
Menin and Herzog—*Bankruptcy Forms* 1936
Moore—*Fraudulent Conveyances* 1908
Remington—*Treatise on Bankruptcy Law* (3d Ed., with Supplements) 1925
Wait—*Fraudulent Conveyances* (3d Ed.) 1897

Bonds and Stocks (in northeast corner of Library).

Black—*Stock Exchange, Stock Brokers, and Customers* 1940
Christy—*The Transfer of Stock* 1940
Cowan—*Manual of Securities Laws* 1923
Hoffman and Wood—*Taxation of Federal and Municipal Bonds* 1927
Jones—*The Law of Bonds and Bond Securities* 1935
Jones—*Corporate Bonds and Mortgages* 1907

Bonds and Stocks—*Continued.*

Meyer—*The Law of Brokers and Stock Exchanges*.....1936
MacClelland and Fisher—*The Law of Corporate Mortgage Bond Issues*.....1939
Quindry—*Bonds and Bond Holders*.....1934
Warren—*Margin Customers*.....1941

Carriers (in northeast corner of Library).

Angell—*Treatise on Law of Carriers* (5th Ed.).....1877
Baldwin—*American Railroad Law*.....1904
Beale & Wyman—*Railroad Rate Regulation*.....1906
Booth—*Law of Street Railways*.....1892
Calvert—*Regulation of Commerce Under Federal Constitution*..1907
Dobie—*Handbook on Law of Bailments and Carriers*.....1914
Doherty—*Liability of Railroads to Interstate Employees*.....1911
Elliott—*Treatise on Law of Railroads* (3d Ed.).....1921
Fetter—*Treatise on Carriers of Passengers*.....1907
Hale—*Law of Bailments and Carriers*.....1896
Hutchinson—*Law of Carriers* (3d Ed.).....1906
Lawson—*Bailments*.....1895
Moore—*Treatise on Law of Carriers* (2d Ed.).....1914
Pierce—*Treatise on Law of Railroads*.....1881
Porter—*Law of Bills of Lading*.....1891
Redfield—*Law of Railways* (5th Ed.).....1873
Roberts—*Injuries to Interstate Employees* (2d Ed.).....1929
Schouler—*Treatise on Law of Bailments and Carriers* (2d Ed.).....1887
Thompson—*Law of Carriers of Passengers*.....1880
Thornton—*Federal Employers' Liability Act* (3d Ed.).....1916
Van Doren—*The Law of Shipment*.....1932
Watkins—*Shippers and Carriers* (4th Ed.).....1930
Wood—*Treatise on Law of Railroads* (2d Ed.).....1894

Codes and Compilations (located in alcove by elevator, south side of Library).

Alabama—*Code*, 10 vols., Perm. Ed., annotated.....1940
Alaska—*Compiled Laws*.....1933
Arizona—*Code*, 6 vols., Perm. Ed., annotated.....1939
Arkansas—*Pope's Digest*, 2 vols., annotated, with '42 Supp.....1937
California—*Deering's Codes, General Laws, Constitution*, 11 vols., Perm. Ed., annotated.....1937-41
Canal Zone—*Code*, 1 vol., annotated.....1934
Colorado—*Statutes*, 5 vols., Perm. Ed., annotated.....1935
Connecticut—*General Statutes*, 3 vols., with '39 Cum. Supp.....1930

Codes and Compilations—*Continued.*

Delaware—*Code,* 1 vol. 1935
District of Columbia—*Code,* 2 vols., annotated, Perm. Ed. 1940
Florida—*General Laws,* 1 vol. 1941
Georgia—*Code,* 1 vol. 1933
Hawaii—*Laws,* 1 vol. 1935
Idaho—*Code,* 4 vols., annotated, with '40 Supp. 1932
Illinois—*Statutes,* 1 vol., Bar Ed. 1941
Indiana—*Baldwin's Statutes,* 1 vol., annotated, Perm. Ed. 1934
Iowa—*Code,* 1 vol. 1939
Kansas—*General Statutes,* 1 vol., annotated, with '41 Supp. 1939
Kentucky—*Revised Statutes,* 1 vol. 1942
Kentucky—*Carroll's Statutes,* 1 vol., annotated, Perm. Ed. 1936
Louisiana—*General Statutes,* 6 vols., annotated, Perm. Ed. 1939
Louisiana—*Louisiana Code of Practice,* 1 vol., annotated, Perm. Ed. 1939
Maine—*Revised Statutes,* 1. vol. 1930
Maryland—*Code,* 2 vols., annotated 1939
Massachusetts—*General Laws,* 3 vols. 1932
Michigan—*Compiled Laws,* 4 vols., with '40 Supp. 1929
Minnesota—*Statutes,* 2 vols., annotated 1942
Mississippi—*Code,* 2 vols., annotated, with '38 Supp. 1930
Missouri—*Revised Statutes,* 3 vols. 1939
Montana—*Code,* 5 vols., annotated, with '39 Supp. 1935
Nebraska—*Compiled Statutes,* 1 vol., annotated, with '41 Supp. 1929
Nevada—*Compiled Laws,* 8 vols., annotated, with '41 Supp. 1929
New Hampshire—*Public Laws,* 2 vols. 1926
New Jersey—*Revised Statutes,* 5 vols., with '40 Supp. 1937
New Mexico—*Statutes,* 1 vol., annotated, with '38 Supp. 1929
New York—*Laws* (Thompson), 5 vols., with '41 Supp. 1939
North Carolina—*Code,* 1 vol., annotated, with '41 Supp. 1939
North Dakota—*Supp. to Compiled Laws,* 1 vol., annotated 1925
Ohio—*Throckmorton's Code,* 1 vol., annotated 1940
Oklahoma—*Official Statutes,* 1 vol., Perm. Ed. 1941
Oregon—*Compiled Laws,* 10 vols., annotated, Perm. Ed. 1940
Pennsylvania—*Purdon's Statutes,* 1 vol. 1936
Rhode Island—*General Laws,* 2 vols., annotated 1938
South Carolina—*Code,* 5 vols., annotated 1942
South Dakota—*Code,* 4 vols., annotated 1939
Tennessee—*Williams' Tennessee Code,* 6 vols., annotated, Perm. Ed. 1934
Texas—*Statutes,* 1 vol., with '42 Supp. 1936
United States—*Code,* 4 vols. 1940

Codes and Compilations—*Continued.*

United States—*U. S. Code, Annotated,* 62 vols., Perm. Ed.
United States—*Fed. Code, Annotated,* 16 vols., Perm. Ed.
Utah—*Statutes,* 1 vol., annotated, with '39 Supp. 1933
Vermont—*Public Laws,* 1 vol. 1933
Virginia—*Code,* 1 vol., annotated 1942
Washington—*Remington Revised Statutes,* 12 vols., annotated, Perm. Ed., with '41 Supp. 1932
West Virginia—*Code,* 1 vol., annotated, with '41 Supp. 1937
Wisconsin—*Statutes,* 1 vol. 1941
Wyoming—*Statutes,* 1 vol., with '40 Supp. 1931
England—*Halsbury's Laws of England,* 31 vols., annotated, with '39 Cumulative Supp. (Located north side of Library, west of office.) 1907-17

NOTE: The above are the most recent codes in the Library. Many of the older codes, compilations and revisions are also available. When available, if funds permit it, the most recent codes of all adjoining states are procured and all codes kept within eight years of the current law, the session laws for the period not covered being available in the Library.

Combinations, Trade Practices (in northeast corner of Library).

Consumers' Institute—*Consumers' Credit and Its Uses* 1938
Dernberg—*Trade Mark Protection and Unfair Trading* 1936
Eddy—*Law of Combinations* 1901
Finch—*Federal Anti-Trust Decisions* 1907
Grether—*Price Control* 1939
Hodges—*Anti-Trust Act and the Supreme Court* 1941
Joyce—*Monopolies* 1911
Nims—*Unfair Competition and Trade-Marks* (3d Ed.) 1929
Norwood—*Trade Practices and Price Control* 1938
Packel—*Co-operatives: Organization and Operation* 1940
Pingrey—*Extraordinary Industrial and Interstate Contracts* 1905
Shale—*Decrees and Judgments in Federal Anti-Trust Cases* 1913
Spelling—*Treatise on Trusts and Monopolies* 1893
Thornton—*Combinations in Restraint of Trade* (2d Ed.) 1928
Toulmin—*Combinations in Restraint of Trade* 1928
Weigel—*The Fair Trade Acts* 1938

Conflict of Laws (in northeast corner of Library).

Am. Law Institute—*Restatement* 1934
Bailey—*Conflict of Judicial Decisions* 1888
Beale—*Conflict of Laws* 1935
Dicey—*Conflict of Laws* 1932
Goodrich—*Handbook on Conflict of Laws* 1927

Conflict of Laws—*Continued.*

Jacobs—*Treatise on Law of Domicile* 1887
Kennan—*Residence and Domicile* 1934
Minor—*Conflict of Laws* 1901
Story—*Commentaries on Conflict of Laws* (8th Ed.) 1883
Sturnburg—*Conflict of Laws* 1937
Waples—*Law of Debtor and Creditor* 1898
Wharton—*Treatise on Conflict of Laws* (3d Ed.) 1905

Constitutional Law (in northeast corner of Library).

Adams—*Origin of English Constitution* 1912
Association Am. Law Schools—*Selected Essays* 1938
Beck—*Constitution of the United States* 1941
Black—*American Constitutional Law* (2d Ed.) 1897
Black—*Constitutional Prohibitions* 1887
Bloom—*History of the Formation of the Union Under Constitution* 1935
Brannan—*Fourteenth Amendment* 1901
Burdick—*The Law of the American Constitution* 1922
Calvert—*Regulation of Commerce Under Federal Constitution* 1907
Calvert—*The Constitution and The Courts* 1924
Clark—*The Rise of the New Federalism* 1938
Cooley—*Constitutional Limitations* (8th Ed.) 1927
Corwin—*Commerce Power vs. States' Rights* 1936
Corwin—*Constitutional Revolution Ltd.* 1941
Dicey—*Law of The Constitution* 1920
Farrand—*Framing of The Constitution* 1913
Field—*The Effect of an Unconstitutional Statute* 1935
Frankfurter—*The Commerce Clause* 1937
Freund—*The Police Power* 1904
Foster—*Commentaries on Constitution* 1895
Fuller—*The Act to Regulate Commerce* 1915
Gavit—*The Commerce Clause* 1932
Gerstenberg—*American Constitutional Law* 1937
Hare—*American Constitutional Law* 1889
Hendrick—*Bulwark of the Republic* 1937
Jamison—*Constitutional Conventions* 1873
Long—*Cases on Constitutional Law* 1926
Ludlow—*The American Constitution* 1941
MacBain—*The Living Constitution* 1939
Madison—*Journal of Constitutional Convention* 1836
McGehee—*Due Process of Law* 1906
Miller—*Constitution of United States* 1891
Mott—*Due Process of Law* 1926

Constitutional Law—*Continued.*

New York Constitutional Commission Digest of State Constitutions 1915
New York Constitutional Convention—*All State Constitutions* 1938
Ordronaux—*Constitutional Legislation of the U. S.* 1891
Orfield—*Amending the Constitution* 1941
Phelps—*Federal Control of Interstate Corporations* 1911
Pierce—*Manual of U. S. Constitution, Annotated* 1938
Potter—*Treatise on Statutes* 1871
Prentice—*Police Powers* 1894
Richardson—*The Federalist Analyzed* 1899
Scott—*The Federalist* 1894
Sedgwick—*Statutory and Constitutional Law* 1857
Sheppard—*Constitutional Textbook* 1865
Stimson—*Federal and State Constitutions* 1908
Stimson—*The American Constitution* 1908
Story—*Commentaries on Constitution* 1833
Sutherland—*Notes on United States Constitution* 1904
Taylor—*Origin and Growth of English Constitution* 1904
Taylor—*Due Process of Law* 1917
Thorpe—*Constitutional History of United States* 1901
Tiedeman—*State and Federal Control of Property* 1900
Tucker—*Constitution of United States* 1899
Twiss—*Lawyers and the Constitution* 1942
Van Holst—*Constitutional History of United States* 1885
Wade and Phillips—*Constitutional Law* 1933
Warren—*Congress, The Constitution and the Supreme Court* 1925
Warsoff—*Equality and the Law* 1938
Watson—*Constitution of United States* 1910
Willis—*Constitutional Law* 1936
Willoughby—*Constitutional Law of United States* 1929
Wise—*Citizenship* 1905

Contracts (in northeast corner of Library).

American Law Institute—*Restatement* 1934
Addison—*Law of Contracts* (8th Ed.) 1888
Anson—*Law of Contracts* (4th Amer. Ed.) 1924
Anson—*English Law of Contract* (2d Amer. Ed.) 1907
Batten—*Specific Performance of Contracts* (67 Law Library) 1850
Beach—*Modern Law of Contracts* 1897
Bigelow—*Law of Fraud* 1877
Bishop—*Commentaries on Law of Contracts* 1887
Black—*Rescission of Contracts and Cancellation of Written Instruments* (2d Ed.) 1929

Contracts—*Continued.*

Browne—*Statute of Frauds* (5th Ed.) 1895
Chitty—*Law of Contracts* (11th Amer. Ed.) 1874
Clark—*Law of Contracts* (2d Ed.) 1904
Comyn—*Law of Contracts and Promises* 1835
Elliott—*Commentaries on Law of Contracts* 1913
Federal Law of Contracts (West Co.) 1934
Fry—*Specific Performance of Contracts* (5th Ed.) 1911
Graske—*Law of Government Defense Contracts* 1941
Greenhood—*Doctrine of Public Policy on Contracts* 1886
Hare—*Law of Contracts* 1887
Harris—*Contracts of Married Women* 1887
James—*Law of Option Contracts* 1916
Jones—*Commercial and Trade Contracts* 1886
Keener—*Cases on Law of Quasi-Contracts* 1888
Kelly—*Contracts of Married Women* 1882
Kerr—*Law of Fraud and Mistake* 1877
Lawson—*Contracts of Carriers* 1880
Lawson—*American Law of Contracts* 1893
MacElroy—*Impossibility of Performance* 1941
McIntosh—*Cases on Law of Contracts* (2d Ed.) 1915
Metcalf—*Principles of Law of Contracts* 1874
Page—*Encyclopedia of Law of Contracts* (2d Ed., with 1929 Supp.) 1920
Parsons—*Law of Contracts* (9th Ed.) 1904
Pollock—*Principles of Contract* 1881
Pomeroy—*Specific Performance of Contracts* (3d Ed.) 1926
Pothier—*Law of Obligations* (2d Amer. Ed.) 1839
Ray—*Contractual Limitations* 1892
Reed—*Law of Statute of Frauds* 1884
Shealey—*Law of Government Contracts* 1938
Smith—*Law of Contracts* (56 Law Library) 1847
Smith—*Law of Frauds* 1907
Trotter—*Law of Contracts During and After the War* 1940
Van Hacke—*N. C. Law of Contracts* 1934
Wald—*Pollock on Contracts* (3d Amer. Ed.) 1906
Webber—*Effect of War on Contracts* 1940
Wharton—*Law of Contracts* 1882
West Pub. Co.—*Federal Law of Contracts* 1934
Williston—*Law of Contracts* 1938

Corporations (in northeast corner of Library).

Anderson—*Limitation of Corporate Entity* 1931
Angell and Ames—*Law of Private Corporations* (11th Ed.) 1882

Corporations—*Continued.*

Ballantine—*Manual of Corporation Law*.....1930
Beach—*Commentaries on Law of Private Corporations*.....1891
Beale—*Law of Foreign Corporations*.....1904
Berle and Means—*The Modern Corporation and Private Property*.....1933
Black—*Stock Exchanges, Stock Brokers and Customers*.....1940
Clark—*Handbook on Law of Private Corporations*.....1887
Clark and Marshall—*Law of Private Corporations*.....1901
Cook—*Treatise on Stock and Stockholders* (3d Ed.).....1894
Cook—*Treatise on Law of Corporations* (8th Ed.).....1923
Christy—*The Transfer of Stock*.....1940
Cumming, Gilbert & Woodward—*Annotated Corporation Laws of All the States*.....1894
Elliott—*Law of Private Corporations*.....1897
Fletcher—*Cyclopedia of Law of Private Corporations*, 1917, with Supp.....1942
Foote and Everett—*Law of Incorporated Companies*.....1893
Fuller—*Law of Mexican Commercial Corporations*.....1911
Green—*Treatise on Doctrine of Ultra Vires*.....1875
Harvey—*Rights of Minority Stock and Security Holders*.....1929
Hirschl—*Combinations, Consolidation and Succession of Corporations*.....1896
Jones—*Treatise on Law of Railroad and Other Corporate Securities*.....1879
Jones—*Treatise on Law of Corporate Bonds and Mortgages* (2d Ed.).....1890
Lowell—*Transfer of Stock in Private Corporations*.....1884
MacClelland and Fisher—*The Law of Corporate Mortgage Bonds*.....1939
Machen—*Treatise on Modern Law of Corporations*.....1908
Mann—*Treatise on Law of Foreign Business Corporations in N. Y.*.....1906
Meyer—*The Law of Stock Broker and Stock Exchanges*.....1936
Morawetz—*Treatise on Law of Private Corporations* (2d Ed.) 1886
Murfree—*Law of Foreign Corporations*.....1893
Noyes—*Law of Intercorporate Relations* (2d Ed.).....1909
Pond—*Law of Public Utilities*.....1913
Potter—*Treatise on Law of Corporations*.....1879
Pou-Bailey-Pou—*North Carolina Code*.....1922
Powell—*Parent and Subsidiary Corporations*.....1931
Purdy—*Treatise on Private Corporations*.....1905
Reese—*True Doctrine of Ultra Vires*.....1897

Corporations—*Continued.*

Reno—*Treatise on Law of Non-Residents and Foreign Corporations* 1892
Short—*Law of Railway Bonds and Mortgages* 1897
Smith—*Law of Private Companies* 1899
Spelling—*Law of Private Corporations* 1892
Thompson—*Liability of Directors and Other Officers and Agents of Corporation* 1880
Thompson—*Liability of Stockholders* 1879
Thompson—*Commentaries on Law of Corporations* (3d Ed.) 1927
Tracy—*Corporate Foreclosure, Receiverships and Reorganizations* 1929
Vartanian—*Law of Corporations in North Carolina* 1929
Wait—*Treatise on Insolvent Corporations* 1888
Waterman—*Treatise on Law of Corporations* 1888
Womack—*Law of Private Corporations* 1904
Wyman—*Public Service Corporations* 1911

Criminal Law (in northeast corner of Library).

Abbott—*Criminal Trial Practice* 1939
Abbott—*Trial Brief in Criminal Cases* 1892
Alexander—*Law of Arrests* 1932
Ames—*Forgery Cases* 1901
Archbold—*Criminal Practice, Evidence and Pleadings* 1934
Atwell—*Federal Criminal Law* 1929
Best—*Crime and Criminal Law in United States* 1930
Bishop—*New Criminal Procedure* (8th Ed.) 1913
Bishop—*Criminal Law* (9th Ed.) 1923
Bishop—*Commentaries on Statutory Crimes* 1873
Brill—*Cyclopedia of Criminal Law* 1922
Browne—*Elements of Criminal Law* 1892
Bucknill—*Criminal Lunacy* (82 Law Library) 1856
Buswell—*Law of Insanity* 1885
Carr—*Insanity in Criminal Cases* 1890
Chitty—*Treatise on Criminal Law* 1841
Church—*Writ of Habeas Corpus* 1884
Clark and Marshall—*Crimes* (4th Ed.) 1940
Clark—*Handbook on Criminal Law* (2d Ed.) 1902
Curtis—*The Law of Arson* 1936
East—*Pleas of the Crown* 1803
Ferri—*Criminal Sociology* 1917
Goebels—*Felony and Misdemeanor* 1937
Grant—*Science for the Prosecution* 1941
Hale—*Pleas of the Crown* 1778

Criminal Law—*Continued.*

Haynes—*Criminology* 1935
Housel and Walser—*Defending and Prosecuting Fed. Crim. Cases* 1938
Hawkins—*Pleas of the Crown* 1824
Healy—*Criminal Science Monograph* 1917
Healy—*The Individual Delinquent* 1918
Horrigan & Thompson—*Cases on Law of Self-Defense* 1874
Heard—*Criminal Pleading* 1879
Hurd—*Writ of Habeas Corpus* (2d Ed.) 1876
Jerome—*North Carolina Criminal Code* (Perm. 5th Ed.) 1934
Johnson *et al.*—*Digest of Laws of Prostitution and Sex Offenses* 1942
Joyce—*Treatise on Law of Indictments* 1908
Kerr—*Law of Homicide* 1891
Lawson—*Insanity as Defense to Crime* 1884
McClain—*Treatise on Criminal Law* 1897
Mikell—*Cases on Criminal Law* 1915
Moore—*Treatise on Extradition* 1891
Morris—*Criminology* 1938
Orfield—*Criminal Appeals in America* 1939
Parmelee—*Criminology* 1919
Rapalje—*Treatise on Law of Larceny* 1892
Rankin—*When Civil Law Fails* 1939
Roscoe—*Digest of Law of Evidence on Criminal Cases* (8th Amer. Ed.) 1888
Russell—*Treatise on Crimes and Misdemeanors* (9th Amer. Ed.) 1877
Salielles—*The Individualization of Punishment* 1913
Smoot—*Law of Insanity* 1929
Spear—*Law of Extradition* 1884
Stephen—*Criminal Law* (27 Law Library) 1840
Stimson—*Conflicts of Criminal Law* 1939
Underhill—*Law of Criminal Evidence* (3d Ed.) 1923
Voorhees—*Law of Arrest* 1904
Warren—*Homicide* 1938
Weir—*Criminology* 1940
Weihofen—*Insanity as a Defense in Criminal Law* 1933
Wharton—*Law of Homicide* (3d Ed.) 1907
Wharton—*Precedents of Indictments* (3d Ed.) 1871
Wharton—*Criminal Law*, Perm. Ed. 1932
Wharton—*Treatise on Criminal Pleading* (9th Ed.) 1889
Wharton—*Criminal Evidence* (Perm. Ed.) 1935

Criminal Law—*Continued.*

Wharton and Stille—*Medical Jurisprudence* 1905
Williams—*Flexible Participation Lotteries* 1938
Wills—*Law of Circumstantial Evidence* 1896
Wright—*Law of Criminal Conspiracies* 1887

Damages (in northeast corner of Library).

Hale—*Handbook on Law of Damages* 1896
Harris—*Damages by Corporations* 1892
Joyce—*Treatise on Damages* 1903
McCormick—*Damages* 1935
Parmele—*Damage Verdicts* 1927
Sedgwick—*Treatise on Measure of Damages* (9th Ed.) 1912
Sedgwick—*American and English Cases on Measure of Damages* 1878
Sutherland—*Treatise on Law of Damages* (4th Ed.) 1916
Wood—*Mayne on Damages* 1880

Deeds (see Real Property).

Domestic Relations (in northeast corner of Library).

Bishop—*Law of Marriage and Divorce* (5th Ed.) 1873
Bishop—*New Commentaries on Marriage, Divorce, and Separation* 1891
Browne—*Elements of Law of Domestic Relations* 1883
Browne—*Law of Divorce and Alimony* 1890
Cord—*Legal and Equitable Rights of Married Women,* (2d Ed.) 1885
Eversley—*Law of Domestic Relations* (2d Ed.) 1896
Harris—*Contracts of Married Women* 1887
Keezer—*Law of Marriage and Divorce* (2d Ed.) 1923
Kelly—*Contracts of Married Women* 1882
Lindey—*Separation Agreements* 1937
Long—*Domestic Relations* 1923
May—*Marriage Laws and Decisions* 1929
Madden—*Domestic Relations* 1931
Nelson—*Treatise on Law of Divorce* 1895
Poynton—*Divorce and Marriage* (13 Law Library) 1836
Peck—*Domestic Relations* 1930
Reeve—*Law of Husband and Wife* (4th Ed.) 1888
Richmond and Hill—*Marriage and the State* 1929
Rodgers—*Treatise on Law of Domestic Relations* 1899
Rood—*Matrimonial Shoals (Causes of Divorce)* 1939
Schouler—*Law of Marriage, Divorce, Separation and Domestic Relations* (6th Ed.) 1921

Domestic Relations—*Continued.*

Shelfard—*Divorce and Marriage* (33 Law Library) 1841
Tiffany—*Law of Persons and Domestic Relations* (2d Ed.) 1909
Tyler—*Commentaries on the Law of Infancy* (2d Ed.) 1882
Vernier—*American Family Laws* 1938
Vreeland—*Validity of Foreign Divorces* 1938

Easements (see Real Property, northeast corner of Library).

Gale and Whatley—*Treatise on Law of Easements* 1840
Gale—*Easements* (11th Ed.) 1932
Jones—*Treatise on Law of Easements* 1898
Washburn—*American Law of Easements and Servitudes* (3d Ed.) 1873

Ejectments (see Real Property, northeast corner of Library).

Adams—*Ejectment* 1830
Newell—*Treatise on Action of Ejectment* 1892
Tyler—*Treatise on Remedy by Ejectment* 1874

Electricity and Engineering (in northeast corner of Library).

Allen—*Telegraph Cases* 1873
Croswell—*Law Relating to Electricity* 1895
Curtis—*Law of Electricity* 1915
Gray—*Treatise on Communication by Telegraph* 1885
Jones—*Law of Telegraph and Telephone Companies* (2d Ed.) 1916
Joyce—*Treatise on Electric Law* (2d Ed.) 1907
Keasbey—*Law of Electric Wires* (2d Ed.) 1900
Knowles—*Law Relating to Electricity* 1911
Morrill—*American Electrical Cases* 1894
Sadler—*Legal Aspects of Engineering* 1940
Scott and Jarnagin—*Law of Telegraphs* 1868
Simpson—*Law for Engineers and Architects* 1937
Thompson—*The Law of Electricity* 1891
Wait—*Engineering and Architectural Jurisprudence* 1897

Eminent Domain (in northeast corner of Library).

Bonbright—*Valuation of Property* 1939
Lewis—*Law of Eminent Domain* (3d Ed.) 1909
Mills—*Law of Eminent Domain* (2d Ed.) 1888
Nichols—*Power of Eminent Domain* 1909
Orgel—*Valuation Under Eminent Domain* 1936
Randolph—*Law of Eminent Domain* 1894

English Law (located in north side of Library to west of the office).

Blackstone—*Commentaries* (Cooley, 4th Ed.) 1898
Blackstone—*Commentaries* (Chitty) 1848

English Law—*Continued.*

Blackstone—*Commentaries* (Lewis) 1902
Blackstone—*Commentaries* (Sharswood) 1873
Blackstone—*Commentaries with Am. Notes by Gavit* 1941
Brett—*Commentaries on Present Law of England* 1890
Coke—*Commentary upon Littleton* 1853
Coke—*Institutes, edited by Thomas* 1836
East—*Pleas of the Crown* 1803
Hale—*History of English Law* 1716
Hale—*Pleas of the Crown* 1778
Halsbury—*Laws of England* (31 vols., with '39 Cum. Supp.) 1917
Hawkins—*Pleas of the Crown* 1824
Holdsworth—*History of the English Law* 1926
Jackson—*The Machinery of Justice in England* 1940
Jenks—*Short History of English Law* 1913
Maitland & Montague—*Sketch of English History* 1915
Maitland—*Domesday Book and Beyond* 1897
Plucknett—*Concise History of English Law* 1839
Pollock & Maitland—*History of English Law* 1895
Pound—*Readings on History of Common Law* 1921
Reeves—*History of English Law* 1787
Spence—*Equitable Jurisdiction in Court of Chancery* 1846
Wigmore—*Panorama World's Legal Systems* 1928

Equity (in northeast corner of Library).

Adams—*Doctrine of Equity* (7th Ed.) 1881
Adams—*Doctrine of Equity* (69 Law Library) 1850
Babbitt—*Federal Judicial Code and Equity Rules* 1925
Beach—*Commentaries on Modern Equity Jurisprudence* 1892
Beach—*Treatise on Modern Equity Practice* 1894
Bigelow—*Treatise on Law of Estoppel* (6th Ed.) 1913
Bigelow—*Law of Fraud* 1877
Bispham—*Principles of Equity* (10th Ed.) 1929
Black—*Rescission and Cancellation of Contracts* (2d Ed.) 1929
Cooper—*Treatise of Pleading on Equity Side of High Court of Chan.* 1809
Curtis—*Equity Precedents* 1850
Ewart—*Exposition of Principles of Estoppel* 1900
Eaton—*Handbook of Equity Jurisprudence* 1901
Fetter—*Handbook of Equity Jurisprudence* 1895
Fry—*Specific Performance of Contracts* (5th Ed.) 1911
Goldsmith—*Doctrine of Equity* (40 Law Library) 1843
Hare & Wallace—*Leading Cases in Equity* 1852
Herman—*Estoppel and Res Judicata* 1886

Equity—*Continued.*

Heythuysen—*The Equity Draughtsman* 1861
Kerr—*Law of Fraud and Mistake* 1877
Lawrence—*Equity Jurisprudence* 1929
Pomeroy—*Specific Performance of Contracts* (3d Ed.) 1926
Pomeroy—*Treatise on Equity Jurisprudence* (5th Ed.) 1941
Sheldon—*The Law of Subrogation* 1893
Shipman—*Law of Equity Pleadings* 1897
Smith—*Equitable Remedies of Creditors* 1899
Smith—*Manual of Equity Jurisprudence* 1871
Spence—*Equitable Jurisdiction of Court of Chancery* 1846
Story—*Commentaries on Equity Jurisprudence* (14th Ed.) 1918
Walsh—*Equity* 1930
White and Tudor—*Leading Cases in Equity* 1877
Whiteworth—*Equity Precedents* (62 Law Library) 1848

Estoppel (in northeast corner of Library, under "Equity").

Bigelow—*Treatise on Law of Estoppel* (6th Ed.) 1913
Ewart—*Exposition of Principles of Estoppel* 1900
Herman—*Estoppel and Res Judicata* 1886

Evidence (in northeast corner of Library).

Abbott—*Rules of Evidence* (2d Ed.) 1900
Abbott—*Trial Evidence* (4th Ed.) 1931
Appleton—*Rules of Evidence* (91 Law Library) 1859
Bentham—*Rationale of Judicial Evidence* 1827
Bradner—*Rules of Evidence* 1895
Browne—*Treatise on Parol Evidence* 1893
Best—*Principles of Law of Evidence* (8th Ed.) 1893
Chamberlayne—*Treatise on Modern Law of Evidence* 1911
Chamberlayne—*Trial Evidence* 1936
Elliott—*Treatise on Law of Evidence* 1904
Fisk—*Law of Proof* 1928
Greenleaf—*Treatise on Law of Evidence* (16th Ed.) 1899
Harris—*Treatise on Law of Identification* 1892
Harvard—*Selected Essays on Law of Evidence* 1935
Herzog—*Camera, Take the Stand* 1940
Hubback—*Evidence of Succession* (47 & 48 Law Library) 1845
Jones—*Commentaries on Law of Evidence in Civil Cases* (2d Ed.) 1926
Jones—*The Law of Evidence in Civil Cases* (3d Ed.) 1938
Kennedy—*Trial Evidence* 1906
Lawson—*Law of Presumptive Evidence* (2d Ed.) 1899
Lawson—*Law of Expert and Opinion Evidence* (2d Ed.) 1900
Lockhart—*N. C. Handbook of Evidence* (2d Ed.) 1931

Evidence—*Continued.*

McKelvey—*Handbook on Law of Evidence* (2d Ed.) 1907
Moore—*Treatise on Facts of Evidence* 1908
Osborn—*Questioned Documents* (2d Ed.) 1929
Osborn—*The Problem of Proof* 1926
Phillips—*Treatise on Law of Evidence* (2d Ed.) 1843
Phillips—*Famous Cases of Circumstantial Evidence* 1904
Rapalje—*Treatise on Law of Witnesses* 1887
Rice—*General Principles of Law of Evidence* 1892
Rogers—*Law of Expert Testimony* (3d Ed.) 1941
Scott—*Photographic Evidence* 1942
Spencer—*Photography Today* 1939
Starkie—*Treatise on Law of Evidence* (4th Ed.) 1876
Stephen—*Digest of Law of Evidence* (4th Ed.) 1886
Stern—*Getting the Evidence* 1936
Taylor—*Treatise on Law of Evidence* (9th Ed.) 1897
Weeks—*Treatise on Law of Depositions* 1880
Wellman—*Art of Cross Examination* 1937
Wharton—*Commentaries on Law of Evidence* 1877
Wigmore—*Principles of Judicial Proof* (2d Ed.) 1931
Wigmore—*The Science of Judicial Proof* 1937
Wigmore—*Treatise on Anglo-American System of Evidence* (Perm. 3d Ed.) 1940
Wigmore—*Treatise on System of Evidence at Common Law* 1904
Wills—*Principles of Circumstantial Evidence* (6th Ed.) 1912
Wood—*Practice Evidence* 1886
Zinnell—*Forgeries—Handwriting* 1931

Executions (see "Judgments," in northeast corner of Library).

Executors (see Wills, Executors and Administrators).

Croswell—*Law of Executors and Administrators* 1897
Herman—*Executors* 1876
Schouler—*Law of Wills, Executors and Administrators* (6th Ed.) 1923
Schouler—*Treatise on Law of Executors and Administrators,* (3d Ed.) 1901
Toller—*Law of Executors and Administrators* (2d Ed.) 1806
Williams—*Law of Executors and Administration* 1921

Extraordinary Remedies (in northeast corner of Library).

Beach—*Commentaries on Injunctions* 1895
Church—*Writ of Habeas Corpus* 1884
Dangel—*Contempt* 1939
Edwards—*Law of Referees* 1860
Ferris—*Law of Extraordinary Remedies* 1926

Extraordinary Remedies—*Continued.*

Fiero—*Special Proceedings* 1887
Heard—*Shortt's Extraordinary Remedies* 1889
High—*Treatise on Law of Injunction* (4th Ed.) 1905
Hurd—*Writ of Habeas Corpus* (2d Ed.) 1876
Joyce—*Treatise on Law of Injunctions* 1909
Lewis & Spelling—*Law Governing Injunctions* 1926
Moses—*Law of Mandamus* 1867
Oswald—*Contempt of Court* (3d Ed.) 1911
Rapalje—*Treatise on Contempt* 1884
Scott—*Habeas Corpus* 1923
Spelling—*Treatise on Injunctions* (2d Ed.) 1901
Sullivan—*Contempt by Publication* 1940
Tapping—*Writ of Mandamus in England* 1853

Federal (see, also, specific topics as Codes, Reports, Labor, Contracts, Criminal Law, Interstate Commerce, etc. Federal section is the northwest corner of the Library).

Amdur—*Copyright Law and Practice* 1936
April—*Guide to Federal Appellate Procedure* 1936
Babbitt—*Judicial Code and Equity Rules* 1925
Bates—*Federal Equity Practice* 1901
Bump—*Federal Procedure* 1881
Chamberlain *et al.*—*The Judicial Function in Fed. Administrative Agencies* 1942
Commerce Clearing House—*Fed. Rules of Civil Procedure, Ann.* 1938
Ebenstein—*The Law of Public Housing* 1940
Foster—*Federal Practice* 1920
Futrell—*History of American Customs Jurisdiction* 1941
Honold—*Supreme Court Law, Cumulative Parts* 1933
Hopkins—*Judicial Equity Rules, Anno.* 1922
Hopkins—*Judicial Code* 1911
Housel and Walser—*Defending and Prosecuting Federal Crim. Cases* 1938
Hughes—*Federal Practice—Cumulative Parts* 1940
Hughes—*Federal Procedure* 1913
Gibson—*Aliens and The Law* 1940
Graske—*Federal Reference Manual—Cumulative Parts* 1939
Kansas—*U. S. Immigration, Exclusion, Deportation and Citizenship* 1940
Miller—*Foundation Guide on Social Security* 1936
Montgomery—*Manual of Fed. Jurisdiction and Procedure* (3d Ed.) 1927

Federal—*Continued.*

Munson—*Military Law and Court Martial Procedure* 1941
Robertson and Kirkman—*Jurisdiction Supreme Court* 1936
Robinson—*Patman Guide Book* 1940
Rose—*Federal Jurisdiction and Procedure* 1938
Schiller—*Military Law and Defense Legislation* 1941
Shafter—*Musical Copyright* 1932
Simpkins—*Federal Practice* 1941
Street—*Federal Equity Practice* 1909
Taylor—*Jurisdiction and Procedure U. S. Supreme Court* 1905
Thorpe and Ellis—*Federal Securities Manual* 1933
Toulmin—*The Law of Foods, Drugs and Cosmetics* 1942
U. S. Government—*U. S. Manual* 1942
U. S. Military Academy—*Constitutional Powers and Limitations in Military Law* 1941
Von Bauer—*Federal Administrative Law* 1942
Walker—*Patents* (6th Ed.) 1929
Wolters—*Martial Law and Its Administration* 1930

Forms (in northeast corner of Library.)

Abbott—*Collection of Forms* 1867
Archbold—*Collection of Forms and Entries in Courts of King's Bench* 1828
Birdseye—*Abbott's Clerks and Conveyances, etc.* 1911
Busbee—*N. C. Justice and Form Book* 1886
Cutter—*Legal and Business Forms* (2d Ed.) 1927
Douglas—*Forms, N. C.* 1941
Dunlap—*Book of Forms* (2d Ed.) 1845
Eaton—*Book of Practical Forms* (2d Ed.) 1867
Hayes—*Concise Conveyances* (4th Ed.) 1882
Jones—*Annotated Legal Forms* (8th Ed.) 1930
Nichols—*Cyclopedia of Legal Forms* 1937
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Pell—*Forms of Pleading and Practice in North Carolina* 1912
Simms—*Manual of Law and Forms* (8th Ed.) 1924
Winslow—*Forms of Pleading and Practice* 1934

Highways, Streets (in northeast corner of Library).

Angell—*Highways* 1886
Cook—*Manual of Highway Laws* 1870
Elliott—*Roads and Streets* 1926
Michie—*N. C. Highway, Motor Vehicle Laws* 1937

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Beach—*Commentaries on Law of Injunctions* 1895
High—*Treatise on Law of Injunctions* (4th Ed.) 1905
Joyce—*Treatise on Law Relating to Injunctions* 1909
Lewis & Spelling—*Law Governing Injunctions* 1926
Spelling—*Treatise on Injunctions and Other Extraordinary Remedies* (2d Ed.) 1901

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Angell—*Law of Fire and Life Insurance* (2d Ed.) 1855
Appleman—*Automobile Liability Insurance* 1938
Appleman—*Insurance Law* (Perm. Ed.) 1941
Arnould—*Law of Marine Insurance* (9th Ed.) 1914
Bacon—*Treatise on Law of Benefit Societies and Life Ins.* (3d Ed.) 1904
Beach—*Commentaries on Law of Insurance* 1895
Black—*Rescission and Cancellation of Contracts* (2d Ed.) 1929
Bliss—*Law of Life Insurance* (2d Ed.) 1874
Biddle—*Treatise on Law of Insurance* 1893
Carnahan—*Conflict of Laws and Life Insurance Contracts* 1942
Clement—*Digest of Fire Insurance Decisions* 1893
Clement—*Fire Insurance* 1903
Cooley—*Briefs on Law Insurance* (2d Ed.) 1927
Couch—*Cyclopedia of Insurance Law* 1930
Crawford and Harlan—*Group Insurance* 1936
Ellis—*Insurance and Annuities* (4 Law Library) 1834
Fox—*Warranty in Fire Insurance Contracts* 1883
Frost—*Treatise on Guaranty Insurance* 1909
Hardy—*Fraternal Society Law* 1907
Joyce—*Law of Insurance of Every Kind* (2d Ed.) 1917
Joyce—*Marine, Fire, Life, Accident Insurance* 1897
Kerr—*Law of Insurance* 1902
May—*Law of Insurance* (4th Ed.) 1900
Niblack—*Law of Voluntary Societies* 1894
Ostrander—*Treatise on Law of Fire Ins.* (2d Ed.) 1897
Parsons—*Law of Marine Insurance* 1868
Phillips—*Treatise on Law of Insurance* (5th Ed.) 1867
Richards—*Law of Insurance* 1932
Sunderlin—*Automobile Insurance* 1929
Wood—*Treatise on Law of Fire Insurance* 1878
Vance—*Handbook on Law of Insurance* (2d Ed.) 1930

International Law (located with Federal texts in aisle case near northwest corner of Library).

Davis—*Treatise on International Law* 1901
Glenn—*Handbook on International Law* 1895
Hawley—*Law of International Extradition* 1895
Moore—*Digest of International Law* 1906
Naval War College—*International Law Documents* 1940
Phillimore—*Commentaries on International Law* (73, 78, and 85 Law Library) 1854
Stringham—*International Patent Law* 1935
Taylor—*Treatise on International Public Law* 1901
Westlake—*Private International Law* (91 Law Library) 1859
Wildman—*Institutes of International Law* (69 and 70 Law Library) 1850
Wilson—*Handbook on International Law* 1910
Woolsey—*International Law* (2d Ed.) 1867

Interstate Commerce (in northeast corner of Library).

Beale and Wyman—*Railroad Rate Regulation* 1906
Calvert—*Regulation of Commerce Under Federal Constitution* 1907
Cooke—*Commerce Clause of Federal Constitution* 1908
Freund—*The Police Power* 1904
Fuller—*The Act to Regulate Commerce* 1915
Gavit—*The Commerce Clause* 1932
Judson—*Law of Interstate Commerce* 1912
Hamlin—*Act to Regulate Commerce* 1907
Lewis—*Federal Power Over Commerce* 1892
Miller—*The Legislative Evolution of Interstate Commerce* 1930
Nelson—*Law Relating to Interstate Commerce Commission* 1908
Patterson—*United States and The States Under the Constitution* 1888
Porter—*The Law of Bills of Lading* 1891
Prentice—*Police Powers Under Law of Necessity* 1894
Prentice—*Commerce Clause of The Federal Constitution* 1898
Reeder—*Validity of Rate Regulations* 1914
Roberts—*Federal Liabilities of Carriers* (2d Ed.) 1929
Rorer—*American Interstate Law* 1893
Russell—*Police Power of the State* 1900
Smith—*Some Phases of Fair Value and Interstate Rates* 1931
Snyder—*Supplement to Snyder's Interstate Commerce Act* 1906
Stickney—*State Contract of Trade and Commerce* 1897
Tiedeman—*Treatise on Limitations of Police Power of the U. S.* 1896

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Tiedeman—*Treatise on State and Federal Control of Persons and Property* 1900
Watkins—*Shippers and Carriers* (4th Ed.) 1930

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Anderson—*Actions on Declaratory Judgments* 1940
Black—*Treatise on Law of Judgments* (2d Ed.) 1902
Bingham—*Law and Practice of Judgments* 1836
Borchard—*Declaratory Judgments* 1941
Freeman—*Treatise on Law of Judgments* (5th Ed.) 1925
Gilbert—*Law of Executions* 1758
Harman—*Treatise on Law of Executions* 1876
Rorer—*Treatise on Law of Judicial Sales* 1878

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Buford—*On the Wagner Act* 1941
Cogley—*Law of Strikes, Lockouts and Labor Organizations* 1894
Cooke—*Law of Trade and Labor Combinations* 1898
Dangel—*Labor Unions* 1941
Foester—*Employees Ownership in U. S.* 1929
Groat—*Attitude of American Courts in Labor Cases* 1911
Lien—*Labor Law and Relations* 1941
Martin—*Treatise on Labor Unions* 1910
Oakes—*Organized Labor and Industrial Conflicts* 1927
Princeton Press—*The Labor Banking Movement in U. S.* 1929
Rector and Rinckhoff—*N. L. R. A.* 1940
Reed—*Law of Labor Relations* 1942
Rotwein—*On Labor Law* 1939
Swayzee—*Contempt of Court in Labor Injunction Cases* 1935
Teller—*Labor Disputes and Collective Bargaining* 1940
Witte—*Government in Labor Disputes* 1932

Legal History and Jurisprudence (located in the main office of the Library).

Alfange—*The Supreme Court and The National Will* 1937
Alley—*Random Thoughts and Musings of a Mountaineer* 1941
Andrews—*Commentaries on the Law of the United States* 1908
Becker—*Declaration of Independence* 1922
Bizzell—*Judicial Interpretation of Political Theory* 1941
Bodenheimer—*Jurisprudence* 1940
Boorstein—*The Mysterious Science of the Law* 1941
Boyer—*Max Steuer* 1932
Broom—*Legal Maxims* 1939
Broom—*Commentaries on Common Law* 1856

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Cardoza—*The Growth of The Law* 1924
Cardoza—*The Nature of the Judicial Process* 1921
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Cardoza—*Law of Literature* 1931
Carr—*The Supreme Court and Judicial Review* 1942
Carter—*Law, Its Origin and Growth* 1907
Chamberlain—*There Is No Truce* (Life of T. M. Osborne) 1935
Coke—*Commentary on Littleton* 1853
Cooper—*Institutes of Justinian* 1852
Domat—*Civil Law in National Order* 1861
Duncan—*The Strangest Cases on Record* 1940
Fishback—*Manual of Elementary Law* 1896
Frank—*Law and the Modern Mind* 1936
Frankfurter—*Business of the Supreme Court* 1928
Gurvitch—*Sociology of Law* 1942
Hale—*History of Common Law* 1716
Hare & Wallace—*Decisions of American Courts* 1847
Harris—*The Judicial Powers of U. S.* 1940
Hexner—*Studies in Legal Terminology* 1941
Holland—*Elements of Jurisprudence* 1937
Holmes-Pollock—*Letters* 1941
Hutcheson—*Judgment Intuitive* 1938
Jackson—*Struggle for Judicial Supremacy* 1941
Keeton—*Elementary Principles of Jurisprudence* 1930
Kent—*Commentaries on American Law* (13th Ed.) 1884
Lummus—*The Trial Judge* 1938
Mangum—*The Legal Status of the Negro* 1940
Minor—*Institutes of Common and Statute Law* (4th Ed.) 1891
Mordecai—*Law Lectures* (2d Ed.) 1916
Moschzisker—*Judicial Review of Legislation* 1938
Pound—*Organization of the Courts* 1940
Pound—*The Formative Era of American Law* 1941
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Reed—*American Law Studies* 1882
Reeves—*History of English Law* 1787
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Rosenwald Foundation—*Philosophy of Law—Creeds* 1941
Sanders—*Institutes of Justinian* 1876
Saunders—*Civil Code* (La.) *Lectures* 1925
Seligman—*Encyclopedia of the Social Sciences* 1941
Smith—*Selection of Leading Cases* (9th Ed.) 1888

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Stone—*Clarence Darrow for the Defense* 1942
Strong—*Everyday Law* 1907
Thornton—*Attorneys At Law* 1914
Tucker—*Commentaries on the Laws of Virginia* 1821
Walker—*Introduction to American Law* 1900
Walsh—*History Anglo-American Law* 1932
Walton—*Civil Law in Spain* (8th Ed.) 1882
Warner—*Judges and Law Reform* 1936
Wharton—*Law Lexicon* 1938
Wharton—*Legal Maxims* 1878
White—*Law in the Scriptures* 1935
White—*Law in Shakespeare* 1935
White—*Legal Traditions and Other Papers* 1927
Williston—*Life and The Law* 1940

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Am. Bar Ass'n Journal ..... Complete
American Judicature Society Journal ..... Complete
Am. Political Science Review ..... Vol. 31 (1937) to date
Boston U. Law Review ..... Vol. 4 (1924) to date
Brooklyn U. Law Review ..... Complete
California Law Review ..... Vol. 12 (1923) to date
Central Law Journal ..... Complete
Chicago-Kent Law Review ..... Complete
Chicago University Law Review ..... Complete
Cincinnati Law Review ..... Complete
Columbia Law Review ..... Complete
Cornell Law Quarterly ..... Complete
Criminal Law and Criminology, Journal of ..... Vol. 12 (1921) to date
Criminal Psycho-Pathology, Journal of ..... Complete
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Harvard Law Review ..... Complete
Illinois Law Review ..... Vol. 18 (1923) to date
Index to Legal Periodicals (Wilson) ..... Complete
Iowa Law Review ..... Complete
Law and Contemporary Problems ..... Complete
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Legal Periodical Digest, 1928 to date ..... Complete
Louisiana Law Review ..... Complete
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North Carolina Historical Review ..... Complete
North Carolina Law Review ..... Complete
Oregon Law Review ..... Complete
Pennsylvania Law Review (Am. Law Register ..... Complete
Popular Government ..... Complete
Southern California Law Review ..... Complete
Tax Magazine ..... Vol. 10 (1932) to date
Texas Law Review ..... Complete
U. S. (New York) *Law Review* ..... Incomplete
Virginia Law Review ..... Complete
West Virginia Law Quarterly ..... Vol. 26 (1919) to date
Wisconsin Law Review ..... Complete
Yale Law Journal ..... Vol. 25 (1915) to date

Liens (in northeast corner of Library. See, also, "Real Property," "Personal Property," "Mortgages").

Alexander—*Lien Laws of Southeastern States* 1909
Boisot—*Treatise on Mechanics' Liens* 1897
Kneeland—*Treatise on Mechanics' Liens* 1882
Mordecai—*Mechanics' Liens in North Carolina* 1897
Phillips—*Law of Mechanics' Liens* (3d Ed.) 1893

Master and Servant (in northeast corner of Library. See, also, "Workmen's Compensation," "Negligence").

Bailey—*Law of Personal Injuries* (2d Ed.) 1912
Dresser—*Employers' Liability Acts* 1902
Kent—*Index Digest of Fed. Safety Act Decisions* 1910
Labatt—*Commentaries on Law of Master & Servant* 1913
McKinney—*Treatise on Law of Fellow-Servants* 1890
Moll—*Treatise on Law of Independent Contractor and Employees' Liability* 1910
Reno—*Treatise on Law of Employees' Liability Acts* 1896
Richey—*Federal Employers' Liability Safety Appliance Acts* (2d Ed.) 1916
Roberts—*Injuries to Interstate Employees on Railroads* 1915
Roberts—*Federal Liabilities of Carriers* (2d Ed.) 1929
Smith—*Law of Master and Servant* (75 Law Library) 1852

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Thornton—*Treatise on Federal Employers' Liability and Safety Appliance Acts* (3d Ed.) 1913
Tiffany—*Death by Wrongful Act* 1893
Wood—*Treatise on Law of Master and Servant* 1877

Medical Jurisprudence, Science (in northeast corner of Library).

Burtt—*Legal Psychology* 1940
Buswell—*Law of Insanity* 1885
English—*Anatomy and Allied Sciences for Lawyers* 1941
Flint—*Handbook of Physiology* 1905
Gelber—*Medico-Legal Textbook* 1938
Glaister—*Medical Jurisprudence and Toxocology* 1934
Gonzales—*Legal Medicine and Toxocology* 1937
Grant—*Science for the Prosecution* 1941
Gray—*Attorneys Textbook of Medicine* (2d Ed.) 1940
Gray—*Anatomy* 1905
Herzog—*Medical Jurisprudence* 1931
Lawson—*Cases on Insanity as a Defense to Crime* 1884
Lucas—*Forensic Chemistry* 1937
Maloy—*Legal Anatomy and Surgery* 1930
Maloy—*Medical Dictionary for Lawyers* 1942
Maloy—*Nervous and Mental Diseases* 1935
Reed and Emerson—*Relations Between Injury and Disease* 1938
Robinson—*The New People's Physician* 1942
Smoot—*Law of Insanity* 1929
Weihofen—*Insanity as a Defense in Criminal Law* 1933
Wharton and Stille—*Medical Jurisprudence* (5th Ed.) 1905

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Beale—*Law of Innkeepers and Hotels* (under "Public Utilities") 1906
Bowker—*American Book Prices—Current* (in Office) 1941
Dooley—*Index to Proceedings of State and Nat'l Bar Ass'n Proceedings* (with "N. C. Bar Reports") 1942
Ingham—*The Law of Animals* (under "Personal Property") 1900
MacMurtie—*North Carolina Imprints Prior to 1800* (in Office) 1923
N. C. Historical Society—*Guide to Manuscript Collection* (in Office) 1942
Perley—*Mortuary Law* (under "Wills, Executors and Administrators") 1896

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Alexander—*Lien Laws of Southeastern States* 1909
Am. Law Institute—*Restatement (Security)* 1941

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Boisot—*Treatise on Mechanics' Liens* 1897
Cobbey—*Treatise on Law of Chattel Mortgages* 1893
Coote—*Law of Mortgages* (18 & 86 Law Library) 1837
Fisher—*Law of Mortgages* (84 Law Library) 1857
Herman—*Treatise on Chattel Mortgages* 1879
Jones—*Treatise on Law of Mortgages* (8th Ed.) 1928
Jones—*Chattel Mortgages and Conditional Sales* (Perm. Ed.) 1933
Kneeland—*Treatise on Mechanics' Liens* 1882
Mordecai—*Mechanics' Liens in North Carolina* 1897
Pierce—*Fraudulent Mortgages of Merchandise* 1884
Phillips—*Law of Mechanics' Liens* (3d Ed.) 1893
Pingrey—*Law of Mortgages of Real Property* 1893
Tracy—*Corporate Foreclosures* 1929
Wiltsie—*Mortgages and Foreclosures* (Perm. Ed.) 1940

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Abbott—*Treatise on Municipal Corporations* 1905
Baker—*The Legal Aspects of Zoning* 1927
Bassett—*Zoning* 1940
Beach—*Commentaries on Public Corporations* 1893
Clute—*Modern Municipal Corporations* 1920
Cooley—*Law of Municipal Corporations* 1914
Dillon—*Commentaries on Law of Mun. Corp.* (5th Ed.) 1911
Dillon—*Law of Municipal Bonds* 1876
Elliott—*Law of Roads and Streets* (4th Ed.) 1926
Elliott—*Municipal Corporations* 1940
Harris—*Law Governing Municipal Bonds* 1902
Ingersoll—*Handbook on Law of Public Corporations* 1904
Jones—*Negligence of Municipal Corporations* 1892
MacMorran—*Law Relating to Sewers* 1904
Mathews—*Municipal Charters* 1914
McBain—*Law and Practice of Municipal Home Rule* 1916
McQuillin—*Law of Municipal Corporations* (Perm. Ed.) 1940
McQuillin—*Law of Municipal Ordinances* 1904
Metzenbaum—*Law of Zoning* 1930
Morrill—*Municipal Corporations and Highways* 1887
Pomeroy—*Municipal Law* (2d Ed.) 1883
Smith—*Modern Law of Municipal Corporations* 1903
White—*Negligence of Municipal Corporations* 1920
Willcock—*Law of Municipal Corp.* (14 Law Library) 1836
Williams—*Liability of Municipal Corporations for Torts* 1903

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Barrows—*Handbook on Law of Negligence* 1900
Beach—*Law of Contributory Negligence* (3d Ed.) 1899
Beven—*Negligence in Law* (3d Ed.) 1908
Buswell—*Civil Liability for Personal Injuries* 1893
Clark—*Street Railway Accident Law* (2d Ed.) 1904
Deering—*Law of Negligence* 1886
Green—*The Rationale of Proximate Cause* 1927
Jacobs—*The Law of Accidents* 1937
Jones—*Negligence of Municipal Corporations* 1892
Leavitt—*Law of Negligence of New York* 1895
Nellis—*Street Railway Accident Law* 1904
Patterson—*Railway Accident Law* 1886
Peck—*Doctrine of Proximate Cause* 1914
Ray—*Negligence of Imposed Duties* 1895
Schwartz—*Cross Examination in Personal Injury Actions* 1935
Street—*Foundation of Legal Liability* 1906
Shearman & Redfield—*Treatise on Law of Negligence* (Perm. Ed.) 1941
Thompson—*Commentaries on Law of Negligence* 1901
Turner—*Negligence with Food and Drink* 1933
Watson—*Law of Damages for Personal Injuries* 1901
Wharton—*Treatise on Law of Negligence* 1874
White—*Law of Personal Injuries on Railroads* 1909
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Whitaker—*Smith's Treatise on Law of Negligence* 1886
Webb—*Law of Passenger and Freight Elevators* 1896

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Bigelow—*Law of Bills, Notes and Checks* (3d Ed.) 1928
Brannan—*Negotiable Instruments Law Ann.* (5th Ed.) 1939
Byles—*Bills of Exchange Ann.* (8th Ed.) 1891
Calvert—*Daniel on Negotiable Instruments* 1913
Chalmers—*Bills of Exchange* (10th Ed.) 1932
Colebrooke—*Law of Collateral Securities* 1883
Crawford—*Negotiable Instruments Law* 1908
Daniel—*Law of Negotiable Instruments* (6th Ed.) 1913
Eaton & Gilbert—*Treatise on Commercial Paper* 1903
Edwards—*Treatise on Bills of Exchange* (3d Ed.) 1882
Huffcut—*Law of Negotiable Instruments* 1898
Joyce—*Law of Defenses to Commercial Paper* (2d Ed.) 1924
Landis—*Negotiable Instruments* 1941
Mordecai—*Negotiable Instruments Law in North Carolina* 1899
Norton—*Law of Bills and Notes* (4th Ed.) 1914
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Selover—*Negotiable Instrument Law* (2d Ed.) 1910
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Tiedeman—*Treatise on Law of Commercial Paper* 1889
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Cushing—*Law and Practice of Legislative Assemblies* 1907
Rice—*Parliamentary Rules* 1925
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Bates—*Law of Partnership* 1888
Cary—*Law of Partnership* (5 Law Library) 1834
George—*Handbook on Law of Partnership* 1897
Gilmore—*Handbook on Law of Partnership* 1811
Lindley—*Law of Partnership* (10th Ed.) 1935
Parsons—*Principles of Partnership* 1889
Pothier—*Contract of Partnership* (73 Law Library) 1854
Ross—*Cases on Partnership* (49 & 89 Law Library) 1858
Rowley—*Modern Law of Partnership* 1916
Story—*Commentaries on Law of Partnership* 1841
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Coryton—*Law of Letters Patents* (77 Law Library) 1855
Norman—*Law of Patents* (79 Law Library) 1853
Perpigna—*French Law of Patents* (4 Law Library) 1834
Walker—*Treatise on Law of Patents* (6th Ed.) 1929

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Biddle—*Law of Warranties in Sale of Chattels* 1884
Brown—*Personal Property* 1936
Darlington—*Law of Personal Property* 1891
Ingham—*Law of Animals* 1900
Schouler—*Law of Personal Property* (5th Ed.) 1918
Williams—*Law of Personal Property* (18th Ed.) 1925
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Abbott—*Brief Upon Pleadings in Civil Actions*.....1904
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Archbold—*Criminal Practice and Pleadings* (8th Ed.).....1880
Angell—*Treatise on Limitations of Actions at Law*.....1854
Bailey—*Law of Jurisdiction*.....1899
Bailey—*The Onus Probandi*.....1886
Baylies—*Trial Practice or Rules of Practice*.....1885
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Beach—*Modern Equity Practice*.....1892
Bennett—*Treatise on Law of Lis Pendens*.....1887
Black—*Treatise on Law of Judgments* (2d Ed.).....1902
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Boone—*Pleading Under The Codes*.....1885
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Carmody—*Pleading and Practice in New York* (Perm. Ed.).....1930
Chitty—*Treatise on Parties to Actions*.....1833
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Fitman—*Trial Procedure*.....1894
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Jerome—*North Carolina Civil Procedure* 1928
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Lawson—*Rights, Remedies and Practice, Treatise on American Law* 1889
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Sackett—*Instructions and Requests for Instructions in Jury Trials* (2d Ed.) 1888
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Stephen—*Principles of Pleading* (9th Amer. Ed.) 1867
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Thompson—*Treatise on Law of Trials* 1889
Thompson & Merriam—*Treatise on Organization, Custody and Conduct of Juries* 1882
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Tillinghast—*Treatise on Statute of Limitations* 1829
Vanfleet—*Law of Collateral Attack on Judicial Proceedings* 1892
Wade—*Treatise on Law of Notice* 1878
Wait—*Treatise on Actions and Defenses* 1877
Waples—*Treatise on Proceedings in Rem* 1882
Waterman—*Treatise on Law of Set-off, Recoupment and Counterclaim* 1869
Weis—*How to Try a Case* 1930
Wells—*Res Adjudicata and Stare Decisis* 1879
Wharton—*Treatise on Criminal Practice and Pleadings* (9th Ed.) 1889
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Wood—*Treatise on Limitations of Actions* 1893

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MacGovern—*Alcohol Under State Liquor Laws* 1936
McFadden—*Law of Prohibition* 1925
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Anderson—*Sheriffs, Coroners and Constables* 1941
Brightly—*Leading Cases on Law of Elections* 1871
Constantineau—*Public Officers and the De Facto Doctrine* 1910
Hamilton and Mort—*The Law and Public Education* 1941
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Allnatt—*Law of Partition* 1894
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McAdam—*Landlord and Tenant* (4th Ed.) 1936
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Malone—*Treatise on Real Property Trials* 1883
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Bishop—*Treatise on Insolvent Debtors* (2d Ed.) 1884
Burrill—*Law of Voluntary Assignments* (6th Ed.) 1894
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American and English Annotated Cases—complete (in southeast alcove).
American and English Railroad Cases—complete (in storage office).
American Decisions—complete (in southeast alcove).
American Law Reports Annotated—complete to date (in north side of Library, west end).
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American State Reports—complete (in southeast alcove).
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English Ruling Cases—complete (in north side of Library just west of office).
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Public Utilities Reports—complete to date, with texts (northeast corner of Library).

Reports, State and Federal (in row of double cases down center of Library).

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California—*Reports; Appellate Reports.*
Colorado—*Reports; Court of Appeals Reports.*
Connecticut—*Reports.*
Delaware—*Reports; Chancery Reports.*
District of Columbia—*Appeal Cases.*
Florida—*Reports.*
Georgia—*Reports; Appeal Reports.*
Hawaii—*Reports.*

Reports, State and Federal—*Continued.*

Idaho—*Reports.*
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Indiana—*Reports; Appellate Court Reports.*
Iowa—*Reports.*
Kansas—*Reports; Appeals Reports.*
Kentucky—*Reports; Opinions.*
Louisiana—*Reports; Annual Reports.*
Maine—*Reports.*
Maryland—*Reports.*
Massachusetts—*Reports.*
Michigan—*Reports.*
Minnesota—*Reports.*
Mississippi—*Reports.*
Missouri—*Reports; Appeal Reports.*
Montana—*Reports.*
National Reporter System—*Atlantic, N. Y. Supplement, Northeastern, Northwestern, Pacific, Southeastern, Southern, Southwestern* (with Shepard *Citations* to each of these).
Nebraska—*Reports.*
Nevada—*Reports.*
New Hampshire—*Reports.*
New Jersey—*Law Reports; Equity Reports.*
New Mexico—*Reports.*
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North Carolina—*Reports.*
North Dakota—*Reports* (also *Dakota Reports*).
Ohio—*Reports; Appellate Reports; State Reports.*
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Pennsylvania—*State Reports; Superior Court Reports.*
Puerto Rico—*Reports.*
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Benjamin—*Treatise on Law of Sale of Personal Property* (7th Ed.) 1899
Blackburn—*Contract of Sale* (57 Law Library) 1847
Burdick—*Law of Sales of Personal Property* 1897
Estrich—*Law of Installment Sales* 1926
Hilliard—*Law of Sales of Personal Property* 1860
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Langdell—*Cases on Sales of Real Property* 1872
Mariash—*Treatise on Law of Sales* 1930
Meachem—*Law of Sale of Personal Property* 1901
Story—*Treatise on Law of Sales of Personal Property* (4th Ed.) 1871
Sugden—*Sales of Estates* (3 Law Library) 1834
Tiedeman—*Treatise on Law of Sales of Personal Property* 1891
Travis—*Commentaries on Law of Sales* 1892
Vold—*Sales* 1931
Wait—*Sales* 1938
Williston—*Law of Sales of Goods at Common Law* (2d Ed.) 1924
Williams—*Vendor and Purchaser* 1936

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Black—*Construction and Interpretation of Laws* 1896
Bishop—*Commentaries on Written Laws and Their Interpretation* 1882
Crawford—*Statutory Interpretation* 1940
Craies—*Statute Law* 1936
Endlich—*Commentary on Interpretation of Statutes* 1888
Freund—*Standards of American Legislation* 1917
Horack—*Cases and Materials on Legislation* 1940
Sutherland—*Statutes and Statutory Construction* (2d Ed.) 1904
Wade—*Retroactive Laws* 1880

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Arant—*Suretyship* 1931
Baylies—*Treatise on Sureties and Guarantors* 1881

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Brandt—*Law of Suretyship and Guaranty* (3d Ed.) 1905
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Pingrey—*Treatise on Law of Suretyship and Guaranty* 1901
Pittman—*Law of Principal and Surety* (40 Law Library) 1843
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Stearns—*Law of Suretyship* (3d Ed.) 1922
Theobald—*Law of Principal and Surety* (1 Law Library) 1834
Rowlatt—*Principal and Suretyship* (3d Ed.) 1936

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Barton & Browning—*Fed. Income and Estate Tax Laws* 1929
Black—*Tax Titles* 1888
Bonbright—*On Valuation of Property* 1939
Burroughs—*Treatise on Law of Taxation* 1877
Clark—*Inheritance and Estate Taxes on Life Insurance* 1935
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Cooley—*Treatise on the Law of Taxation* 1924
Desty—*American Law of Taxation* 1884
Dos Passos—*Law of Collateral and Direct Inheritance, etc., Taxes* 1895
Gleason & Otis—*Treatise on Law of Inheritance Taxation* (4th Ed.) 1925
Gray—*Limitations of Taxing Power* 1906
Harris—*Gift Taxation in U. S.* 1941
Hamilton—*Law of Taxation by Assessments* 1907
Hoffman—*Taxation of Federal, State, and Municipal Bonds* 1927
Howard—*Principles of Public Finance* 1940
Hughes—*Federal Social Security Tax* 1941
Jacoby—*Retail Sales Taxation* 1939
Judson—*Treatise on the Power of Taxation* (3d Ed.) 1917
Kidder—*State Inheritance Tax and Taxability of Trusts* 1934
Lee—*Minimizing Taxes* 1931
Miller—*Foundation Guide to Social Security* 1936
Page & Jones—*Treatise on Taxation by Local and Special Assessments* 1909
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Robinson—*Saving Taxes in Drafting Wills and Trusts* 1933
Ross—*Inheritance Taxation* 1912
Seligman—*Essays in Taxation* 1931
Studenski—*Taxation and Public Policy* 1936
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American Law Institute—*Restatement* 1938
Addison—*Treatise on Wrongs and Their Remedies* (6th Ed.) 1887
Bigelow—*The Law of Torts* (8th Ed.) 1907
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Bishop—*Commentaries on Non-Contract Law* 1889
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Folkard—*Starkel on Slander and Libel* (4th Ed.) 1877
Garrett—*Law of Nuisances* 1890
Gatley—*Libel and Slander* 1938
Hale—*Handbook on Law of Torts* 1896
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American Law Institute—*Restatement of the Law* 1936
Beach—*Commentaries on Law of Trusts and Trustees* 1897
Bogert—*Trusts and Trustees* 1935
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Sears—*Trust Estates as Business Companies* 1921
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Zollman—*American Law of Charities* 1924

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Angell—*Treatise on Law of Watercourses* (7th Ed.) 1877
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Gould—*Treatise on Law of Waters* (3d Ed.) 1900
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Weil—*Water Rights* 1911
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ADVERSE POSSESSION.

§ 4e. Adverse Possession by Husband or Wife.

After abandonment, the wife's possession as purchaser at execution sale of a judgment obtained against the husband is adverse to the husband, and her possession for the statutory period will bar him. C. S., 428. *Campbell v. Campbell*, 257.

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§ 2. Judgments Appealable.

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. *Cole v. Trust Co.*, 249.

In an action to restrain defendants from carrying through a sale of shares of stock of defendant corporation, defendants appealed from an interlocutory order allowing plaintiffs a compulsory audit of the corporation's books under C. S., 1146. Defendants did not object to a proper audit of the corporation's books, but objected to the provision of the order that the audit should be at the corporation's expense. *Held:* The appeal is fragmentary and premature, and it is dismissed. *Ibid.*

An appeal will lie immediately from the denial of a motion made as a matter of right under C. S., 537, to strike certain paragraphs from the complaint on the ground of irrelevancy and redundancy. C. S., 638. *Parrish v. R. R.*, 292; *Hill v. Stansbury*, 339.

An appeal from the refusal of a motion for judgment on the pleadings is fragmentary and premature and will be dismissed. *Ornoff v. Durham*, 457.

§ 3a. Parties Who May Appeal.

Where judgment is entered on the verdict as rendered upon petitioners' motion, whether petitioners are the parties aggrieved and entitled to appeal therefrom upon their contention that the judgment should have awarded interest on the verdict of the jury, *quære*, since the judgment was in their favor and entered on their own motion. C. S., 632. *Yancey v. Highway Com.*, 185.

A party who has no legal interest which is affected by the order or judgment objected to, may not appeal merely to see how the question may strike the Court. *Utilities Com. v. Kinston*, 359.

§ 3b. Death and Substitution of Parties.

When a party dies pending appeal, his administratrix will be substituted as a party upon motion. *Peterson v. McLamb*, 538.

§ 6b. Form and Sufficiency of Exceptions.

An exception to "rendering and signing the judgment" presents only the question whether error appears on the face of the record. *Cooper v. Cooper*, 124.

In this proceeding to assess compensation for the taking of lands under eminent domain, petitioners requested an instruction that the jury should award interest on the verdict from the date of the taking, or, in the alterna-

tive, that the jury might add interest to the award in its discretion. The court refused to charge as requested, and instructed the jury that under the law petitioners were not entitled to interest. There was no exception to the charge or to the refusal to charge as requested, but petitioners excepted to the refusal of the court to sign judgment tendered which added interest to the award of the jury. *Held:* There being no exception to the charge, petitioners cannot complain of its effect, and cannot contend that they are entitled to interest on the award. *Yancey v. Highway Com.*, 185.

§ 10b. Time for Service of Statement of Case on Appeal.

Where an action pending on the civil issue docket is, by consent, heard by the court at chambers out of the county, the entries of appeal, including stipulation as to time in which case on appeal should be served, become operative as of the date the judgment is filed in the county in which the action is pending and not the date on which the judgment is announced by the court at chambers. *Lightner v. Boone*, 78.

§ 10e. Settlement of Case on Appeal.

Upon hearing to settle case on appeal, the court may not strike out the case on appeal and dismiss appeal. *Lightner v. Boone*, 78.

§ 18b. Certiorari to Bring Case Up for Review.

Where, upon the hearing to settle case on appeal, the court, upon its erroneous holding that plaintiffs had failed to serve their case on appeal within the time allowed, strikes out the plaintiffs' case on appeal, the application of plaintiffs for a writ of *certiorari* is the proper procedure, and the writ will be allowed. *Lightner v. Boone*, 78.

§ 22. Conclusiveness and Effect of Record.

The transcript imports verity, and the Supreme Court is bound thereby. *Smith v. Bottling Co.*, 202.

When the case on appeal has been settled by agreement, it is subject to correction only in a like manner. *Ibid.*

The Supreme Court can judicially know only what appears of record. *Utilities Com. v. Kinston*, 359.

§ 29. Abandonment of Exceptions by Failure to Discuss in Briefs.

When appellant's brief fails to state any reason or argument and fails to cite any authority in support of an exception, the exception will be deemed abandoned. Rules of Practice in the Supreme Court, No. 28. *Bank v. Snow*, 14.

Exceptions not brought forward and discussed in appellant's brief are deemed abandoned. Rules of Practice in Supreme Court, No. 28. *Brown v. Ward*, 344.

§ 37e. Review of Findings of Fact.

Where the court finds the facts by consent of the parties, its findings supported by competent evidence are as conclusive as if found by a jury, and are not subject to review on appeal. *Trust Co. v. Lumber Co.*, 89.

Only those findings of fact which are supported by evidence are binding on appeal. *Blake v. Allen*, 445.

The findings of fact by the trial court are conclusive when supported by competent evidence, and the Supreme Court may not ordinarily require the finding of additional facts unless they are specifically requested, and even when additional findings are requested the cause will not be remanded when

such additional findings cannot alter the result and the matter is sufficiently covered by the findings actually made so far as necessary for final determination of the controversy. *Cotton Mills v. Mfg. Co.*, 500.

§ 38. Presumptions and Burden of Showing Error.

The Supreme Court, one Justice not sitting, being evenly divided in opinion whether error was committed in permitting the jury to view defendant's bottling plant during the trial term some twenty months after plaintiff's alleged injury from drinking a bottled drink containing shattered glass, the judgment of the Superior Court is affirmed without becoming a precedent. *Adams v. Murphrey*, 165.

Where the Supreme Court is evenly divided in opinion, one Justice not sitting, as to whether error was committed in refusing defendant's motion for judgment as of nonsuit and its prayer for a directed verdict, the rulings of the lower court will be permitted to stand without becoming precedents. *Smith v. Bottling Co.*, 202.

When the Supreme Court is evenly divided in opinion, one Justice not sitting, the judgment of the lower court will be affirmed without becoming a precedent. *Elmore v. General Amusements*, 535; *Smith v. Furniture Co.*, 536; *Peterson v. McLamb*, 538; *Lumber Co. v. Benfield*, 539; *Whitehead v. Charlotte*, 539; *Suiter v. Swift & Co.*, 541.

§ 39. Harmless and Prejudicial Error.

A new trial will be granted only for prejudicial or harmful error. *Bynum v. Bank*, 101.

Charge construed as a whole *held* not to contain prejudicial error. *Carland v. Allison*, 120.

Conflicting instructions upon the burden of proof, one correct and the other erroneous, must be *held* for reversible error. *Askew v. Coach Co.*, 468.

§ 40b. Review of Orders on Motions to Strike.

On appeal from the denial of a motion to strike made under C. S., 537, the duty rests upon the Supreme Court to sustain the objections which relate to any allegation which is clearly irrelevant or redundant within the meaning of the statute and to strike same from the pleading, but caution will be exercised not to put the lower court in trammels upon a doubtful matter when the competency of the allegations objected to may more clearly appear when the case is factually developed on the trial. *Hill v. Stansbury*, 339.

§ 40e. Review of Judgments on Motion to Nonsuit.

When, upon appeal from the refusal of defendants' motion to nonsuit, a new trial is awarded for error in the admission of some of plaintiffs' evidence, the sufficiency of the other evidence to repel the nonsuit need not be decided, since plaintiffs on another trial may offer other evidence in support of their cause of action. *Caulder v. Motor Sales*, 437.

§ 41. Questions Necessary to Determination of Appeal.

Where the verdict of the jury establishes that the acts complained of were committed by defendant's agent while acting in the scope of his employment, plaintiff's exception to the exclusion of certain letters tendered upon the issue, becomes immaterial. *Parris v. Fischer & Co.*, 110.

§ 43. Determination of Petitions to Rehear.

Petition to rehear allowed in this case. *Mallard v. Bohannon, Inc.*, 227.

Petition to rehear is allowed in part in this case in order that the judgment

APPEAL AND ERROR—*Continued.*

as of nonsuit in respect to plaintiff's claim to the personal property involved may be set aside, it appearing that in the former decision of the Supreme Court which sustained the judgment as of nonsuit, only the question of the sufficiency of the evidence to support recovery of the real property was considered. *Williams v. McLean*, 228.

§ 47b. Partial New Trial.

Where, in an action to recover for negligent injury the jury has twice answered the issue of negligence and contributory negligence in favor of plaintiff, but in the first trial the master's motion to nonsuit on the issue of *respondeat superior* was erroneously allowed, and in the second trial the court erroneously refused to limit the damages recoverable against the master to the amount theretofore awarded against the servant, the Supreme Court in its discretion may award a new trial only upon the issues determinative of the master's liability and permit the issues as to negligence and contributory negligence to stand. *Pinnix v. Griffin*, 348.

§ 49a. Law of the Case.

The decision of the Supreme Court becomes the law of the case both in the subsequent proceedings in the trial court and on subsequent appeal, and therefore when the Supreme Court reverses the corporate defendant's motion to nonsuit on the issue of *respondeat superior* and the evidence upon the second trial is substantially the same as upon the first, the Supreme Court will not review the question again upon a second appeal. *Pinnix v. Griffin*, 348.

§ 50. Costs.

In action to surcharge account of executor to disallow counsel fees by executor to himself, costs in Supreme Court will be charged against executor personally and may not be allowed against estate. *Lightner v. Boone*, 78.

APPEARANCE.

§ 2b. Effect of General Appearance.

A judgment which is void for want of service of process is not validated by a general appearance to move to vacate, since *ex nihilo nihil fit*. *Monroe v. Niven*, 362.

ASSAULT.

§ 12a. Self-Defense.

Defendant *held* entitled to have question of self-defense presented to the jury under evidence in this case. *S. v. Miller*, 356.

AUTOMOBILES.

III. Operation and Law of the Road

7. Pedestrians. Bass v. Hocutt, 218; Caulder v. Motor Sales, 437.
8. Due Care in Operation in General. Threatt v. Express Agency, 211; Tarrant v. Bottling Co., 390; Dillon v. Winston-Salem, 512.
9b. Distance Between Vehicles Traveling in Same Direction. Tarrant v. Bottling Co., 390.
9c. Safety Statutes and Ordinances in General. Tarrant v. Bottling Co., 390; Dillon v. Winston-Salem, 512.
9e. Bicycles. Threatt v. Express Agency, 211; *Tarrant v. Bottling Co.*, 390.
9f. Coasting on Highway. Dillon v. Winston-Salem, 512.
11. Passing Vehicles Traveling in Same Direction. Tarrant v. Bottling Co., 390.
12a. Speed in General. Tarrant v. Bottling Co., 390; Dillon v. Winston-Salem, 512.
18a. Negligence and Proximate Cause. Stewart v. Stewart, 147; Threatt v. Express Agency, 211; Bass v. Ho-

cutt, 218; Tarrant v. Bottling Co., 390; Caulder v. Motor Sales, 437; Dillon v. Winston-Salem, 512.
18c. Contributory Negligence. Threatt v. Express Agency, 211; Tarrant v. Bottling Co., 390.
18d. Concurring and Intervening Negligence. Tarrant v. Bottling Co., 390.

IV. Guests and Passengers

20a. Contributory Negligence of. Henderson v. Powell, 239; Carter v. Bailey, 278.
20b. Negligence Imputed to Passenger. Dillon v. Winston-Salem, 512.
21. Persons Liable to Guest or Passenger. Henderson v. Powell, 239; Jeffries v. Powell, 415; Dillon v. Winston-Salem, 512.

V. Liability of Owner for Driver's Negligence

24c. Sufficiency of Evidence Upon Issue of Respondeat Superior. Whichard v. Lipe, 53.

VII. Criminal Responsibility

32f. Instructions in Manslaughter Prosecution. S. v. Fields, 182.

§ 7. Pedestrians.

If minor's act in running from behind one car into path of defendant's car is sole cause of injury, he may not recover. *Bass v. Hocutt*, 218.

Evidence of negligence of driver in striking five-year-old child who was walking on edge of pavement *held* for jury. *Caulder v. Motor Sales*, 437.

§ 8. Due Care in Operation in General.

The drivers of vehicles along a city street are under mutual and reciprocal duty to exercise reasonable care under the circumstances arising from the exigencies of traffic. *Threatt v. Express Agency*, 211; *Tarrant v. Bottling Co.*, 390.

And each may assume that others will comply with this obligation. *Tarrant v. Bottling Co.*, 390.

The operator of a motor vehicle, even in the absence of statutory requirement, is under duty to exercise ordinary care under the circumstances, which imports keeping his vehicle under control and the maintenance of reasonable vigilance and due regard for the exigencies of traffic. *Ibid.*

The operator of a motor vehicle is under duty, irrespective of statutory requirement, to exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances, which includes the duty to keep a reasonably careful lookout and to keep the vehicle under control. *Dillon v. Winston-Salem*, 512.

§ 9b. Distance Between Vehicles Traveling in Same Direction.

An operator of a motor vehicle shall not follow another vehicle traveling in the same direction more closely than is reasonable and prudent under the circumstances and conditions of traffic. Public Laws 1937, ch. 407, sec. 114 (a). *Tarrant v. Bottling Co.*, 390.

§ 9c. Safety Statutes and Ordinances in General.

The violation of the statutory requirements in overtaking and passing vehicles proceeding in the same direction, in following other vehicles more closely than is reasonable and prudent, or in driving at a greater rate of speed than is reasonable and prudent under the circumstances, is negligence *per se*. Public Laws 1937, ch. 407, secs. 111 (a), 114 (a), 103 (a). *Tarrant v. Bottling Co.*, 390.

The violation of statute prohibiting coasting of auto on highway is negligence *per se*. *Dillon v. Winston-Salem*, 512.

§ 9e. Bicycles.

Evidence *held* insufficient to support recovery by cyclist struck while standing in street astride bicycle. *Threatt v. Express Agency*, 211.

AUTOMOBILES—*Continued.*

A bicycle is a vehicle and is subject to provisions of the Motor Vehicle Act except those which by their nature can have no application. Public Laws 1937, ch. 407, sec. 2 (ff), as amended by Public Laws 1939, ch. 275, sec. 1 (b). *Tarrant v. Bottling Co.*, 390.

Evidence of concurrent negligence of truck drivers *held* sufficient in this action by cyclist. *Ibid.*

§ 9f. Coasting on Highway.

The violation of the statutory requirement that the operator of a motor vehicle traveling down grade on a highway shall not coast with the gears in neutral is negligence *per se*, and the pushing in of the clutch so as to permit the vehicle to coast down grade on a highway is a violation of the statute. Sec. 127, ch. 407, Public Laws 1937. *Dillon v. Winston-Salem*, 512.

§ 11. Passing Vehicles Traveling in Same Direction.

An operator of a vehicle overtaking and passing another vehicle traveling in the same direction must keep at least two feet to the left of such other vehicle in passing, and not drive to the right again until he is safely clear of the vehicle passed. Public Laws 1937, ch. 407, sec. 111 (a). *Tarrant v. Bottling Co.*, 390.

An operator of a parked truck must anticipate vehicles passing two feet to its left, and is negligent in opening the door of the truck out into the lane for passing traffic without ascertaining that such action will not affect other vehicles. *Ibid.*

§ 12a. Speed in General.

The driver of a vehicle upon a highway shall not travel at a greater rate of speed than is reasonable and prudent under the circumstances. Public Laws 1937, ch. 407, sec. 103 (a). *Tarrant v. Bottling Co.*, 390.

While speed in excess of statutory maximums set forth in subsection (b), sec. 103, ch. 407, Public Laws 1937, is only *prima facie* evidence that the speed is not reasonable or prudent, the violation of subsection (a) of said section, prescribing that a vehicle shall not be driven at a greater rate of speed than is reasonable and prudent under the circumstances, is negligence *per se*. *Ibid.*

The duty of the operator of a motor vehicle to keep same under control requires that at night he shall not travel at a speed in excess of that at which he is able to stop within the range of his lights. *Dillon v. Winston-Salem*, 512.

§ 18a. Negligence and Proximate Cause.

Evidence tending to show that defendant was driving at a speed of 60 to 65 miles an hour and, in a sudden effort to avoid colliding with another automobile which had been backed into the highway and which was apparently not in motion at the time, drove off the road, causing the car to overturn, inflicting serious injury to plaintiff, a guest in the car, *is held* to require the submission of the case to the jury. Michie's N. C. Code, 2621 (288) (278). *Stewart v. Stewart*, 147.

Evidence *held* insufficient to support recovery by cyclist struck while standing in street astride bicycle. *Threatt v. Express Agency*, 211.

Plaintiff, a minor, was attempting to cross a highway from east to west, and was struck by the southbound car driven by the *feme* defendant. Defendants requested an instruction, supported by evidence, that if plaintiff suddenly ran out into the highway immediately behind a northbound car, and that this action on his part was the sole proximate cause of the injury, the jury should answer the issue of negligence in the negative. *Held:* The failure of the court

to give the instruction either directly, or in substance in any part of the charge, is reversible error. *Bass v. Hocutt*, 218.

Evidence of negligence on part of truck driver in opening door into lane for passing traffic *held* sufficient. *Tarrant v. Bottling Co.*, 390.

Evidence of negligence on part of truck driver in traveling too fast under circumstances and in following vehicle too close under conditions of traffic *held* sufficient. *Ibid.*

Evidence that the driver of a car was traversing a highway in a thickly settled residential section having intersecting streets and a sign requiring speed to be reduced to 30 miles an hour, that he was driving 60 miles per hour during the daytime and struck a five-year-old child who had been walking along the edge of the pavement, his speed having been reduced to 45 miles an hour at the time of the impact, and there being no other traffic on the highway affecting the accident, *is held* sufficient to be submitted to the jury on the question of the negligent operation of the automobile. *Caulder v. Motor Sales*, 437.

Evidence *held* to show, as matter of law, that negligence of driver, who hit railroad embankment at dead-end street, was at least one of proximate causes of accident, and since driver's negligence was imputed to passenger, passenger's administratrix could not recover of city or railroad company. *Dillon v. Winston-Salem*, 512.

§ 18c. Contributory Negligence.

Plaintiff was struck by rear wheel of slowly moving truck while he was standing in street astride his bicycle. *Held:* In the absence of evidence raising more than mere speculation whether the driver could have seen plaintiff's precarious position before the rear wheel struck him, defendant's motion to nonsuit should have been granted, if not upon the issue of negligence, then upon the issue of contributory negligence. *Threatt v. Express Agency*, 211.

Evidence *held* not to disclose contributory negligence as matter of law on part of cyclist struck by overtaking vehicle after he had turned to left to avoid open door of parked truck. *Tarrant v. Bottling Co.*, 390.

§ 18d. Concurring and Intervening Negligence.

Evidence of concurring negligence on part of operator of parked truck in opening door into lane for passing traffic, causing cyclist to turn to left, and on part of operator of overhauling truck in traveling too fast and following cyclist too close, *held* sufficient. *Tarrant v. Bottling Co.*, 390.

§ 20a. Contributory Negligence of Guest or Passenger.

Evidence in this case *held* not to disclose contributory negligence as a matter of law on part of passengers in a car in permitting the driver to approach and traverse a grade crossing in a negligent manner with the windows of the car up so as to interfere with hearing the approaching train, and in failing to see the train and advise the driver of its approach. *Henderson v. Powell*, 239.

Ordinarily, a gratuitous passenger is not entitled to recover for injuries sustained while attempting to get on the moving vehicle. *Carter v. Bailey*, 278.

§ 20b. Negligence Imputed to Guest or Passenger.

While negligence of the driver will not ordinarily be imputed to an occupant or passenger, when it appears that the passenger has or exercises control over the driver, the negligence of the driver is imputable to the passenger irrespective of the ownership of the automobile. *Dillon v. Winston-Salem*, 512.

AUTOMOBILES—*Continued.*

Where the uncontradicted evidence discloses that the passenger in an automobile got on the front seat and directed the driver in going to the house of the passenger's girl, it discloses that the passenger was in charge and directing the operation of the automobile so that the negligence of the driver in running the car into a railroad embankment at a dead-end street is imputable, as a matter of law, to the passenger. *Ibid.*

§ 21. Persons Liable to Guests or Passengers.

The driver of a car approaching a railroad grade crossing owes the duty to the passengers in his car to exercise due care under the circumstances, and the railroad company is under like duty, and the duty of each is reciprocal, interrelated, and immediate. *Henderson v. Powell*, 239.

Evidence *held* to show that negligence of driver was sole proximate cause of crossing accident, and precluded recovery by administratrix of guest against railroad. *Jeffries v. Powell*, 415.

Where the negligence of the driver is imputed to the passenger, such negligence will bar recovery by the passenger's administratrix if such negligence was a proximate cause of the injury and death, and it is not necessary that it should have been the sole proximate cause. *Dillon v. Winston-Salem*, 512.

§ 24c. Sufficiency of Evidence and Nonsuit Upon Issue of Respondeat Superior.

Where, in an action against the owner of a truck upon the doctrine of *respondeat superior*, plaintiff elects to allege the identity of the employee driving the truck, and there is a total failure of proof in support of this allegation and no motion to amend, defendant's motion to nonsuit should be allowed. *Whichard v. Lipe*, 53.

§ 32f. Instructions in Manslaughter Prosecutions.

In this prosecution for manslaughter growing out of the operation of an automobile, the charge of the court construed as a whole *is held* to have correctly defined culpable negligence necessary to establish involuntary manslaughter and to have properly distinguished it from the degree of negligence sufficient to impose liability in civil actions. *S. v. Fields*, 182.

BILL OF DISCOVERY.

§ 7. Nature and Scope of Remedy for Inspection and Production of Writings.

Plaintiff sued the corporate defendant upon allegations that its employee inflicted negligent injury in the course of his employment. The corporate defendant alleged that the individual defendant was an independent contractor and not an employee. Plaintiff alleged that the corporation had taken out a policy of insurance protecting it against liability for negligence of the individual defendant, and moved for inspection of the policy and the contract between defendants relating to the employment. *Held:* The granting of the motion was without error, since the writings may become relevant in the trial upon the question of the relationship between the parties. *Isley v. Winfrey*, 33.

BILLS AND NOTES.

§ 9c. Endorsers and Sureties.

As against the payee or his personal representative it is competent to show by evidence *aliunde* that one, ostensibly a joint promisor or obligor, is in fact a surety. *Flippen v. Lindsey*, 30.

BILLS AND NOTES—*Continued.*

§ 17a. Payment and Discharge in General.

When parties primarily liable on a note pay the amount thereof to the payee bank, the transaction pays and extinguishes the note. *Bunker v. Llewellyn*, 1.

§ 18a. Rights of Parties Primarily Liable Inter Se Upon Payment.

Where two of several parties primarily liable on a note pay the amount thereof to the payee bank under an agreement that they are to have the rights of the bank to collect from the other makers, they may not hold such other makers liable as upon contract, since such other makers are not parties to the agreement with the bank, nor may they hold them upon the doctrine of subrogation, but may maintain an action against them only upon the doctrine of equitable contribution. *Bunker v. Llewellyn*, 1.

§ 26. Competency and Relevancy of Evidence in Actions on Notes.

Evidence *aliunde held* competent upon defenses of failure and want of consideration and bar of statute of limitations. *Flippen v. Lindsey*, 30.

BOUNDARIES.

§ 1. General Rules in Locating Boundaries.

It is the duty of the trial court to instruct the jury as to what the true boundary line is, and it is the province of the jury to locate the line. *Greer v. Hayes*, 141.

§ 3. Definiteness of Description and Admissibility of Parol Evidence.

A latent ambiguity in a description may be aided by parol evidence to fit the description to the property, but a patent ambiguity may not be aided by parol. *Thompson v. Umberger*, 178.

A patent ambiguity is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances referred to in the instrument, is unable to ascertain the property referred to, and such ambiguity renders the description void for indefiniteness, since the courts cannot add or insert new language to give it effect. *Ibid.*

§ 5. Allowance for Variations in Magnetic Pole.

When plaintiff contends that the courses and distances called for in her deed should be run from an admitted or established corner with allowance for variations in the magnetic pole computed from the date of a former deed, it is the duty of the court to determine whether plaintiff's evidence is sufficient to invoke this exception to the general rule, and, if so, to charge the jury under what circumstances variations in the magnetic pole should be computed as of the date of the former deed and as to what variation should be allowed. *Greer v. Hayes*, 141.

In this processioning proceeding plaintiff located only the beginning point by natural object and contended that the courses and distances therefrom should be run in accordance with her deed with allowance for variations in the magnetic pole computed as of the date of a prior deed, under her contention that the description in her deed was copied from the prior deed. Plaintiff failed to introduce evidence warranting an inference that the description in her deed was copied from the prior deed or that there was a contemporaneous survey at the time either deed was executed. *Held:* Plaintiff having failed

to bring her case within any one of the exceptions to the general rule, the court should have charged that the courses and distances should be run in accordance with plaintiff's deed from the beginning point as located by the jury. *Ibid.*

§ 9f. State Surveys.

Where the county surveyor, instead of actually surveying the lines and boundaries of an entry, adopts a known natural object as the beginning corner, and merely plats on paper the lines and boundaries, designating in part courses and distances to stakes, the stake corners are to be located by measuring the distance by horizontal and not by surface measure. *Cody v. England*, 40.

The statutes do not prescribe the method to be used in measuring the lines in surveying an entry. C. S., 7565-7567. *Ibid.*

A county surveyor is a public officer, and until the contrary is shown, it will be presumed that in making a survey of an entry on which a grant has issued, he acted in accordance with his legal duty to lay off and survey the lands covered thereby, but this presumption is rebuttable. *Ibid.*

The presumption that in early surveys of entries on which State grants were issued, particularly in the mountain sections, surface measure was used, does not apply when it appears that no actual survey was made but that the distances were platted by a "paper survey." *Ibid.*

§ 10. Issues and Burden of Proof in Processioning Proceedings.

In a processioning proceeding the burden is upon plaintiff to establish the true dividing line according to her paper title, and if defendants assert title by adverse possession to any part of plaintiff's land as so established, a separate issue as to adverse possession should be submitted with the burden on defendants to prove such title notwithstanding plaintiff's record title. *Greer v. Hayes*, 141.

BROKERS AND FACTORS.

§ 4. Title and Possession of Property.

Upon consignment, the title to the goods remains in the consignor, and, upon the termination of the consignment agreement, whether the goods remaining in the hands of the consignee are merchantable or not does not affect title. *Chozen Confections, Inc., v. Johnson*, 224.

A provision in a consignment agreement that upon termination of the agreement the consignee was to turn over and deliver to the consignor all goods and moneys belonging to the consignor then in the hands of the consignee, does not bind the consignee, upon termination of the agreement, to return or reship the goods, or pay for them, or be liable for their value if not surrendered in salable condition, but obligates the consignee to surrender possession of the goods and moneys then in his hands to the consignor. *Ibid.*

A provision in a consignment agreement that the consignee, during the life of the agreement, might return goods within a specified time and receive credit therefor if the goods were in salable condition, does not affect or apply to a subsequent provision that upon termination of the agreement the consignee was to turn over and deliver to consignor all goods and moneys then in his hands belonging to the consignor. *Ibid.*

§ 8. Duties and Liabilities to Principal in Sale of Goods.

Where a commission agent itself purchases the principal's goods, commingles them with its own and has the commingled goods processed and sells them at

a profit, the agent, in the principal's action to recover the profit, is entitled to credit for the cost of processing the goods. *Cotton Mills v. Mfg. Co.*, 500.

When a selling agent itself purchases the principal's goods the sale is voidable, and the principal at his election may ratify or disaffirm it, whether injured by the transaction or not. *Ibid.*

If the principal elects to disaffirm the purchase of the principal's goods by its selling agent, the principal is entitled to have his property back with damages, if any, or to have the value thereof with incidental damages, if any, consequent upon the wrongful transaction. *Ibid.*

Where the purchasing agent itself buys the principal's goods and in turn sells to a *bona fide* purchaser, the principal, at his election, may hold the agent liable as a trustee *ex maleficio*, and make the agent account not only for the real value of the goods but also for any profit made by the agent on the resale. *Ibid.*

Where a commission agent itself purchases the principal's goods and resells them at a profit, without disclosing the facts, the principal may recover the secret profit upon the theory of liability created by public policy, which right is equitable in its nature and strictly is neither damages for the breach of contract nor recovery on an express or implied promise to pay, and the principal is not entitled to interest upon the recovery, C. S., 2309, not being applicable. *Ibid.*

§ 9. Actions for Breach of Duty to Principal.

Where a commission agent itself purchases the principal's goods, and commingles them with his own, the burden is upon the agent to identify the principal's goods upon demand, or if this is impossible because of a prior sale of goods to a third person, the burden is upon the agent to show what proportion of the proceeds of sale was derived from the principal's goods. *Cotton Mills v. Mfg. Co.*, 500.

Where the principal's evidence tends to show that defendant commission agent itself purchased the principal's goods, commingled them with its own and sold them, and the agent fails to assume the burden of showing what proportion of the sale price was derived from the principal's goods, the agent may not object to the principal's evidence upon this aspect tending to show the value of the goods and the proportionate poundage of principal's goods in the commingled product, even though the results may not be strictly accurate, since the agent in such case runs the risk of a greater recovery by failing to introduce such evidence itself. *Ibid.*

Where the court finds from the evidence under agreement of the parties that defendant commission agent itself purchased the principal's goods and sold same at a profit without disclosing the facts, the principal itself introducing in evidence the contract between the parties, and there is no finding that the agent obtained possession of the goods through fraud, the principal's rights are delimited by the findings, and it may not contend that defendant was a trespasser *ab initio*. *Ibid.*

§ 10. Right to Commissions Where Sale Is Completed.

Where the selling agent itself purchases the principal's goods and resells them at a profit, the principal, by electing to sue the agent to recover the profit does not impliedly ratify or condone the agent's wrong, and the agent is not entitled to commissions on the sale to himself, or the sale to the third person, since the sale by the agent to himself is against public policy and since the agent did not perform the conditions of the contract *in hoc modo* so as to entitle him to commissions under the contract. *Cotton Mills v. Mfg. Co.*, 500.

BROKERS AND FACTORS—*Continued.*

§ 11. Right to Commissions Where Sale Is Not Completed.

The owner of realty agreed with a broker to sell to the broker's prospect at a stipulated price and pay a stipulated commission, and thereafter called upon the broker to name or produce the purchaser. In response thereto the broker wired the names of three prospects, some of whom he admitted were not purchasers, and out of them did not distinguish the purchaser. The owner then withdrew his offer. *Held:* The broker did not fulfill his contract and may not recover his commissions upon the contention that one of the parties named by him was ready, able and willing to purchase the property at the stipulated price. *Johnson v. Ins. Co.*, 441.

CHATTEL MORTGAGES.

§ 20a. Purchase at Sale by Mortgagee.

A mortgagee cannot purchase at his own sale, either directly or indirectly through an agent, as a matter of public policy, and the mortgagor may attack the sale or sue for damages sustained by reason of the sale without allegation of fraud. *Harris v. Hilliard*, 329.

In this action to recover damages upon allegations that defendants mortgagees purchased the property at their own foreclosure sale through an agent, the evidence *is held* sufficient to be submitted to the jury on the question of whether the purchaser at the sale was a *bona fide* purchaser for value or whether she was an agent of defendant mortgagees and merely permitted the use of her name as purchaser for the convenience and benefit of defendants. *Ibid.*

CONSPIRACY.

§ 3. Nature and Elements of the Crime.

If a number of parties conspire or agree to engage in an unlawful enterprise, each is liable for acts committed by any of them in furtherance of the common design and the manner or means used in executing the common purpose and also such acts as are the natural and probable consequence of the unlawful enterprise even though these latter were not intended or contemplated as a part of the original undertaking. *S. v. Smith*, 400.

§ 5. Competency of Evidence.

When a person enters into an unlawful conspiracy he is a party to every act which may be done by the other conspirators in furtherance of the common design, and the acts and declarations of each conspirator done or uttered in furtherance thereof are admissible in evidence against all. *S. v. Smith*, 400.

§ 6. Sufficiency of Evidence.

Evidence tending to show that defendants agreed and conspired forcibly to stop a truck on the highway, and that pursuant thereto defendants stopped the truck by shooting one of its tires, held up the driver and burned the truck, *is held* to support conviction of conspiracy feloniously to burn the truck, since each of the conspirators is liable for the method used to accomplish the common purpose and acts committed by any of them which are a natural and probable consequence of the unlawful enterprise even though such acts were not contemplated as a part of the original undertaking. *S. v. Smith*, 400.

Where the State introduces in evidence a confession made by one of defendants that he conspired with the other defendants to forcibly stop a truck on the highway, and introduces other evidence tending to connect the other

CONSPIRACY—*Continued.*

defendants with the agreement, and circumstantial evidence supporting the inference of a conspiracy to stop and burn the truck and that pursuant thereto defendants did actually stop the truck and burn it, and the court charges the jury to the effect that in order to sustain a conviction of defendants the jury must find beyond a reasonable doubt that defendants conspired to burn the truck, *held*, defendants' contention that there is a fatal variance between the indictment and proof or a total failure of proof in that the indictment charged a conspiracy to burn the truck while the evidence discloses that the agreement was to stop the truck, but not burn it, is untenable. *Ibid.*

Confessions of guilt of the conspiracy charged were admitted against all defendants except one. *Held:* The circumstantial evidence of this defendant's guilt of conspiracy, outside the confessions, *held* to support his conviction. *Ibid.*

CONSTITUTIONAL LAW.

§ 3½. Separation of Powers.

While the General Assembly may enact curative statutes affecting pending litigation, it cannot, by stipulating that a statute be retroactive, annul or interfere with a final judgment of the courts. *Hospital v. Guilford County*, 308.

§ 4a. Legislative Power in General.

The wisdom and propriety of statutes rests in the discretion of the General Assembly. *Hill v. Ponder*, 58; *Cooper v. Cooper*, 124.

The General Assembly has power to enact retroactive laws provided they do not impair the obligation of contracts or disturb vested rights, and this principal is applicable to matters of taxation. *Hospital v. Guilford County*, 308.

General Assembly cannot disturb rights of parties under final judgment of courts. *Ibid.*

Curative acts of the Legislature cannot revive void instruments. *Cutts v. McGhee*, 465.

§ 4d. Legislative Power in Regard to Counties, Cities, and Other Municipal Corporations.

Ch. 341, Public-Local Laws of 1931, prescribing the method of electing a tax collector for Madison County, is constitutional and valid. *Hill v. Ponder*, 58.

§ 6b. Power and Duty to Determine Constitutionality of Statutes.

The courts should not declare an act of the General Assembly unconstitutional unless it is so beyond a reasonable doubt. *Bridges v. Charlotte*, 472.

§ 6c. Duty of Courts to Construe Statutes.

The wisdom or impolicy of the law is not a judicial question but the duty of the courts is to declare the law as it is written. *Cooper v. Cooper*, 124; *Hospital v. Guilford County*, 308.

It is the duty of the courts to apply the law as it is written. *In re Estate of Poindexter*, 246.

§ 7. Scope of State Police Power in General.

The authority of the General Assembly, in the exercise of the police power of the State, to define public nuisances is not limited to those which are

CONSTITUTIONAL LAW—*Continued*

predicated upon or facilitate the commission of open crime, but it may declare anything to be a nuisance which tends, in reasonable relationship, to adversely affect the public morals, health, safety, thrift or economy. *S. v. Brown*, 301.

§ 12. Exclusive Emoluments and Privileges.

Benefits received by State employees under the Retirement Fund are deferred payments of salary for services rendered, and therefore such payments do not offend Art. I, sec. 7, of the State Constitution. *Bridges v. Charlotte*, 472.

§ 13. Equal Protection, Application, and Enforcement of Laws.

An agreement of a rural housing authority giving priority in occupancy of its dwelling units to those landowners, or the tenants, sharecroppers or farm wage hands of such landowners, who convey property to the authority, provided that they come within the definition of families of low income as defined in sec. 2 (18) of the Act, is not an unlawful discrimination in favor of such class. *Mallard v. Housing Authority*, 334.

The provisions for the distribution of benefits from the State Employees' Retirement Fund are not discriminatory. *Bridges v. Charlotte*, 472.

§ 16. Due Process of Law.

Creation of rural housing authority does not violate due process clause. *Mallard v. Housing Authority*, 334.

§ 18. Disturbing Vested Rights.

The General Assembly cannot affect vested rights by *ex post facto* laws. *Hospital v. Guilford County*, 308.

The statute enabling the trustor of a voluntary trust to revoke the same as to contingent beneficiaries prior to the happening of the contingency does not affect vested rights and is constitutional. C. S., 996. *MacMillan v. Trust Co.*, 352.

§ 20. Nature and Extent of Mandate Against Impairing Obligations of Contract.

The General Assembly has the power to enact retroactive laws provided they do not impair obligation of contracts. *Hospital v. Guilford County*, 308.

CORPORATIONS.

§ 8. Rights and Remedies of Stockholders.

C. S., 1146, authorizing a compulsory audit of the books of a corporation upon written request signed by 25 per cent of its stockholders, applies to banking corporations, Michie's Code, 224 (j), since the statute embraces all domestic corporations organized for profit in which the beneficial interest and *pro rata* ownership are represented by shares of stock. *Cole v. Trust Co.*, 249.

COSMETOLOGISTS.

§ 2. Licensing and Regulation.

Duty of examiners to issue certificate, upon proper showing, to cosmetologist practicing at time regulatory act was passed, is mandatory and not discretionary. *Poole v. Board of Examiners*, 199.

COSTS.

(Compensation of Referee see Reference.)

§ 2a. Successful Party.

Where, in an action in ejectment and for damages for cutting of timber, defendant files answer denying plaintiffs' title to the land in dispute, and verdict is entered in favor of plaintiffs, plaintiffs, as a matter of law, are not liable for any of the costs notwithstanding that upon the trial each party admitted the title of the other within the boundaries of their respective grants and the only controversy was as to the location of the boundary between their respective grants. C. S., 1241. *Cody v. England*, 40.

COUNTIES.

§ 5. County Commissioners.

The fact that the commissioners of a county are erroneously advised that the body charged with the duty of electing a county tax collector had failed to act, does not empower the county commissioners to elect the county tax collector, and the person elected by the duly appointed electing body, at a meeting duly held on the date fixed by statute, is entitled to the office as against the person named by the commissioners. *Hill v. Ponder*, 58.

§ 7. County Tax Collectors.

Ch. 341, Public-Local Laws of 1931, prescribing the method of electing a tax collector for Madison County, is constitutional and valid. *Hill v. Ponder*, 58.

The chairman of four county boards were authorized to elect a county tax collector, ch. 341, Public-Local Laws of 1931. At a meeting held for the purpose of electing the county tax collector one of the four electing chairmen was disqualified by previous acceptance of another public office. Two of the three remaining chairmen voted for the re-election of the incumbent. *Held:* The three qualified chairmen constituted a quorum and two of the three constituted a majority thereof, and therefore the incumbent was duly elected to succeed himself. *Ibid.*

§ 8b. County Physicians and Boards of Health.

County boards of health are creatures of statute and have only such powers as are conferred upon them by the statutes, either expressly or by necessary implication, C. S., 7064-7075, and they are given no power to tax but derive funds with which to pay salaries and other expenditures required in carrying on the health program of the State, from the State or county, or both. *Champion v. Board of Health*, 96.

COURTS.

§ 14. Actions Ex Contractu.

Where trustor becomes resident of this State and trustee is a North Carolina corporation, and trust property is in this State, our laws, including statutory provision for revocation of voluntary trusts. *MacMillan v. Trust Co.*, 352.

An action to recover money paid under mutual mistake of fact is governed by the substantive law of the State in which the cause of action arose while the adjective or procedural law is to be determined by the laws of the state of the forum. *Frederick v. Ins. Co.*, 409.

CRIMINAL LAW.

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81c. Harmless and Prejudicial Error. S. v. Wells, 144; S. v. Smith, 278; S. v. Manning, 70; S. v. Isley, 213; S. v. Smith, 400.

§ 5c. Evidence and Burden of Proving Mental Incapacity.

Charge that defense of insanity "must be clearly proven" by defendant *held* not prejudicial in view of repeated correct instructions in other portions of charge. *S. v. Manning*, 70.

§ 9. Accessories After the Fact.

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment, knowing at the time the person so aided has committed a felony. C. S., 4177. *S. v. Potter*, 153.

The facts and circumstances adduced by the evidence in this case, construed in the light most favorable to the State, *are held* sufficient as to each essential element to sustain the conviction of appealing defendant as an accessory after the fact to the felony committed by the principal felon, the indictment and evidence against the principal felon being sufficient to sustain conviction of him of secret assault, C. S., 4213, and of assault resulting in serious injury, C. S., 4214. *Ibid.*

§ 12. Jurisdiction: Place of Crime.

Maintenance of establishment in this State for commission of proscribed acts is a nuisance notwithstanding that acts are consummated outside the State. *S. v. Brown*, 301.

§ 31g. Qualification of Experts.

The competency of a witness to testify as an expert is not dependent upon which of the learned professions the witness is a member, but upon his skill in the matter at issue, which is a question of fact for the court, and its finding will not be disturbed when there is evidence to support it and there is no abuse of discretion. *S. v. Smith*, 278.

CRIMINAL LAW—*Continued.*

§ 33. Confessions.

Where the trial court, in the absence of the jury, hears the testimony of the witnesses and of the defendant upon the question of whether the various confessions made by defendant were voluntary, and finds, upon supporting evidence, that the confessions were in fact voluntary, the admission of testimony of the confessions will not be held for error. *S. v. Manning*, 70; *S. v. Smith*, 400.

§ 34a. Declarations.

Held: The trial court properly refused to permit testimony of declarations made by defendant on the morning following the alleged crime unless defendant was going to testify in his own behalf, since such declarations were not a part of the *res gestæ* and therefore were incompetent as substantive evidence but would be competent only for the purpose of corroborating the testimony of defendant. *S. v. Chapman*, 157.

§ 38b. Diagrams.

Where witnesses testify as to the accuracy of a diagram of the scene of the homicide, showing the location of natural objects and the position of witnesses and actors in the scene, the admission of the diagram in evidence for the purpose of illustrating or explaining the testimony of the witnesses is not error, and objections thereto on the ground that the diagram was not made by the witnesses and that its admission was not properly restricted are untenable. *S. v. Smith*, 278.

§ 47. Consolidation of Indictments for Trial.

Held: Crimes charged were of same class and were so connected in time and place as to permit consolidation of indictments for trial. *S. v. Chapman*, 157.

§ 52b. Nonsuit.

A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. *S. v. Smith*, 400.

§ 53c. Charge on Burden of Proof.

The court charged the jury that defendant's defense of insanity "must be clearly proven" by him, but in other portions of the charge repeatedly instructed the jury correctly that the burden of proving the defense was "to the satisfaction of the jury," or that the defendant "must satisfy the jury" upon the issue, and after the jury had retired recalled it and again correctly charged it upon the burden of proof. *Held:* Construing the charge as a whole it did not contain prejudicial error. *S. v. Manning*, 70.

A charge that the burden is on the State to satisfy the jury of the offense charged cannot be held for prejudicial error as misstating the *quantum* of proof necessary for a conviction when the court in the immediate preceding portion of the charge has instructed the jury that the burden is on the State to prove the fact of guilt beyond a reasonable doubt. *S. v. Smith*, 400.

§ 53d. Charge on Less Degrees of Crime.

The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees. *S. v. Manning*, 70.

CRIMINAL LAW—*Continued.*

§ 53c. Expression of Opinion by Court on Evidence.

The use of the words "you want to find" in charging the jury as to the elements of the offense charged *held*, construing the charge as a whole, merely to place the burden on the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. C. S., 564. *S. v. Smith*, 400.

§ 53g. Statement of Contentions and Objections Thereto.

Where defendant fails to object at the time to the court's statement of a contention of the State, based upon an argument of counsel for the State which was made without objection at the time, the exception to the statement of the contention is ordinarily waived. *S. v. Wells*, 144.

Misstatement of the contentions of a party must be brought to the court's attention in apt time. *S. v. Smith*, 400.

§ 53h. Construction of Instructions.

The charge of the court should be construed contextually. *S. v. Manning*, 70; *S. v. Smith*, 278; *S. v. Smith*, 400.

§ 56. Motion for Arrest of Judgment.

A motion in arrest of judgment, based upon facts which defendant alleges did not come to his knowledge until after expiration of the trial term, cannot be allowed in the Supreme Court when there is no fatal defect appearing on the face of the record. Rules of Practice in the Supreme Court, No. 21. *S. v. Chapman*, 157.

§ 61e. Severity of Sentence.

Provision of statute that punishment shall be in discretion of court and that defendant may be fined or imprisoned, prescribes a "specific punishment," and therefore C. S., 4172, is not applicable and punishment is not limited to two years imprisonment. *S. v. Richardson*, 209.

§ 62. Conditional and Alternative Judgments.

Where a statute prescribes that the punishment for its violation shall be a fine or imprisonment or both, the court is authorized to impose a fine and prison sentence, and when the court imposes the fine and suspends execution of the prison sentence, the judgment is not alternative, and the payment of the fine is not a full compliance with the judgment. *S. v. Pelley*, 487.

§ 63. Suspended Judgments and Executions.

Defendant's plea of guilty of violating the prohibition laws is sufficient to support the court's finding that she had violated the terms of a suspended sentence theretofore entered for a prior similar offense, and the court may order the suspended sentence into effect upon motion of the solicitor made at any time during the period of probation. *S. v. Cagle*, 131.

Judgment ordering that suspended execution be put into effect must be supported by finding that some express condition upon which the execution was suspended has been violated. *S. v. Rogers*, 462.

Where execution of sentence has been suspended or prayer for judgment continued, the court may, at any time during the period of probation, require defendant to appear before it by notice or, if necessary, by capias, to inquire into alleged violation of the conditions of probation, but it may not require defendant to so appear after the expiration of the period of probation. *S. v. Pelley*, 487.

CRIMINAL LAW—*Continued.*

Time ceases to run against period of probation upon issuance of *capias* and does not run during period defendant absents himself and is fugitive from justice. *Ibid.*

The power of the courts to suspend sentences and judgments upon conditions of probation and to put same into effect upon violation of the conditions is inherent in them under the common law and is not dependent upon statute. *Ibid.*

Where a defendant accepts the conditions upon which execution of sentence is suspended and prayer for judgment continued and does not appeal from the judgment at the time of its entry, he may not thereafter challenge its validity. *Ibid.*

"Good behavior" as used in suspending sentences or judgments means conduct conforming to the law. *Ibid.*

Where judgment on one count and sentence on another count are suspended upon condition that defendant be and remain of good behavior, specific findings by the court that defendant had thereafter violated several criminal statutes of this State during the term of probation is sufficient to support the court's order that the suspended execution be put into effect and the entry of judgment upon the count upon which prayer for judgment was continued. *Ibid.*

The hearing to determine whether defendant has violated the conditions of probation is not a trial for a new offense nor had for the purpose of punishing defendant for the offenses committed since the judgment was entered, but is solely to determine whether defendant has violated the terms of the suspended judgment or execution and what punishment shall be imposed under the original judgment, and the court is not bound by the strict rules of evidence upon such hearing. *Ibid.*

When, upon the hearing to determine whether defendant has violated the terms of a suspended judgment and execution, the finding of the court that defendant had violated the terms of probation is supported by ample competent evidence, the fact that the court also hears some incompetent evidence does not vitiate the court's findings. *Ibid.*

Upon the hearing to determine whether a defendant has violated the terms upon which prayer for judgment has been continued or execution of sentence suspended, the findings of fact by the court and its judgment are in its sound discretion, and the exercise of such discretion is not reviewable on appeal when there is no evidence of abuse. *Ibid.*

§ 64. Alteration of Sentence During Trial Term.

While the trial judge has the discretionary power to change the sentence during the term, where it appears of record that after prayer for judgment was continued, with defendant's consent, upon specified terms, the court, upon learning of defendant's intention to appeal, struck that judgment out and imposed a jail sentence, the cause will be remanded for resentence, since defendant's exercise of his right to appeal, C. S., 4650, should not prejudice him in any manner. *S. v. Patton*, 117.

§ 68b. Right of Defendant to Appeal.

Defendant's consent to the terms upon which prayer for judgment is continued does not waive his right to appeal. *S. v. Patton*, 117.

Court may not impose heavier sentence, even during term, because of learning that defendant intended to appeal, since exercise of right of appeal should not prejudice defendant in any way. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 71. Pauper Appeals.

There is no authority for granting an appeal *in forma pauperis* without proper supporting affidavit, either in a criminal prosecution or a civil action, and therefore a statement in the appeal entries that plaintiff is permitted to appeal as a pauper has no effect when defendant fails to file the jurisdictional affidavit or files an insufficient affidavit. *S. v. Mitchell*, 460.

The amendment of C. S., 649, by ch. 89, Public Laws 1937, permitting correction of errors or omissions in the affidavit or certificate of counsel in pauper appeals at any time prior to the hearing of the argument of the case, applies only to appeals in civil actions and not to appeals in criminal prosecutions under C. S., 4651 and 4652. *Ibid.*

The affidavit required for pauper appeals in criminal prosecutions, C. S., 4651, must be filed during the trial term or within ten days from the adjournment thereof, and must contain averments that defendant is wholly unable to give security for cost, that he is advised by counsel that he has reasonable cause for the appeal prayed, and that the application is in good faith, and these requirements are mandatory and jurisdictional and are not subject to waiver. *Ibid.*

Where the record on appeal *in forma pauperis* in a criminal prosecution fails to contain an order allowing such appeal or affidavit sufficient to support such order, the Supreme Court must dismiss the appeal for want of jurisdiction upon motion of the Attorney-General, and omissions and defects cannot be cured by affidavits filed in the trial court more than ten days after the adjournment of the trial term. *Ibid.*

§ 78b. Exceptions and Assignments of Error.

Where defendant fails to object at the time to the court's statement of a contention of the State, based upon an argument of counsel for the State which was made without objection at the time, the exception to the statement of the contention is ordinarily waived. *S. v. Wells*, 144.

Defendant waives his exception to the refusal of his motion to nonsuit, made at the close of the State's evidence, by introducing evidence and failing to renew his motion at the close of all the evidence. C. S., 4643. *S. v. Chapman*, 157.

§ 79. Briefs.

Defendant's exceptions should be set out in his brief and reason or argument stated and citation of authorities given under each exception, otherwise the exceptions will be taken as abandoned. *S. v. Gibson*, 252.

§ 80. Prosecution and Dismissal of Appeals.

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 felony this will be done only when no error is apparent on the face of the record. *S. v. Blue*, 36.

When defendant fails to serve his statement of case on appeal within the time allowed, the motion of the Attorney-General to docket and dismiss will be granted, but when the defendant has been convicted of a capital felony this will be done only after inspection of the record fails to disclose error. *S. v. Shaw*, 130.

When defendant, given leave to appeal *in forma pauperis*, fails to serve his case on appeal within the time allowed, the appeal will be dismissed on motion

CRIMINAL LAW—*Continued.*

of the Attorney-General, but when defendant has been convicted of a capital felony this will be done only after a careful inspection of the record proper fails to disclose error. *S. v. Baldwin*, 471.

§ 81c. Harmless and Prejudicial Error.

Error must be harmful or prejudicial in order to entitle defendant to a new trial. *S. v. Wells*, 144; *S. v. Smith*, 278.

Charge on burden of proving defense of insanity *held* not prejudicial when construed as a whole. *S. v. Manning*, 70.

An exception to the admission of evidence cannot be sustained when other evidence admitted without objection renders the evidence objected to harmless even if it be conceded that it was incompetent. *S. v. Wells*, 144.

An erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated. *S. v. Isley*, 213.

Where, in a homicide prosecution, the cause of deceased's death is not seriously controverted, and there is competent medical expert testimony, upon proper hypothetical question, and nonexpert testimony, unobjected to, that deceased bled to death from a gunshot wound, the admission of testimony by a licensed embalmer, based upon his examination of the body of deceased, that deceased bled to death from the wound, cannot be held prejudicial. *S. v. Smith*, 278.

A charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held for prejudicial error when in other portions of the charge the court repeatedly instructs the jury that defendant could not be found guilty of murder in the first degree without the jury's finding from the evidence beyond a reasonable doubt that the killing was done with premeditation and deliberation. *Ibid.*

A charge must be construed contextually as a whole, and exceptions to isolated portions of the charge will not be sustained when the charge, so construed, is not prejudicial. *S. v. Wells*, 144; *S. v. Smith*, 278; *S. v. Smith*, 400.

Where defendants have been convicted of three offenses of the same grade and the same sentence is imposed for all three, the sentences to run concurrently, if there is no error in the trial of one of them, exceptions relating to the trial of the others need not be considered. However, in this case the exceptions have been considered *seriatim* and none are sufficient to disclose prejudicial error. *S. v. Smith*, 400.

DAMAGES.

§ 1a. Compensatory Damages in General.

In order to be entitled to compensatory damages plaintiff must show that the damages claimed were the natural and probable result of the acts complained of, and show the amount of loss with reasonable certainty, which rule applies in actions in tort as well as actions *ex contractu*. *Parris v. Fischer & Co.*, 110.

Plaintiff gave his old therapeutic machine, which he contended was usable, in part payment of a new machine. The jury found that the new machine was worthless for the purpose for which it was sold. After plaintiff declined to make further payments, defendant, through its agent, repossessed the new machine in plaintiff's absence. *Held:* Plaintiff's evidence that he had several patients whom he was unable to treat and who left him, is insufficient to

afford a basis for the award of substantial damages to plaintiff for deprivation of the use of his machine. *Ibid.*

Evidence that defendant, through its agent, peaceably repossessed a therapeutic machine on which it had a lien from the office of plaintiff in his absence, without injury to person or property, is insufficient to support the recovery of substantial damages for the conduct of defendant's agent in removing the machine. *Ibid.*

Only one recovery may be had for single injury, and verdict on issue of damages against servant is a verdict against plaintiff for all claims in excess of amount awarded by jury, and is the limit of recovery against the master when sought to be held solely on principle of *respondeat superior*. *Pinnix v. Griffin*, 348.

§ 6. Aggravation and Mitigation of Damages.

Although a person who is not at fault in causing an injury is not under duty to aid the injured person, if he is at fault in causing the injury he is under duty to take all steps to mitigate the hurt, including the exercise of due diligence in getting the injured person to a hospital or in obtaining medical attention. *Parrish v. R. R.*, 292.

§ 7. Punitive Damages.

In proper instances punitive damages may be awarded where only nominal damages are recoverable. *Parris v. Fischer & Co.*, 110.

Evidence that defendant's agent went to plaintiff's house at a time when plaintiff was absent, and upon being informed that plaintiff was out of town, stated that plaintiff would understand, entered plaintiff's office and repossessed a therapeutic machine on which defendant had a lien, and left a note advising plaintiff that he had waited to see him and that he had taken the machine, *is held* insufficient to show a willful and wanton disregard of plaintiff's rights necessary to support the submission of an issue as to punitive damages. *Ibid.*

DEATH.

§ 6. Pleadings in Actions for Wrongful Death.

A complaint alleging a willful and felonious slaying states a cause of action for wrongful death, and a demurrer thereto on the ground that the complaint set up a purported action in negligence and failed to particularize with facts and circumstances supporting the general allegation of negligence, is properly overruled. *McLean v. Ramsey*, 37.

DEEDS.

§ 2a. Competency of Grantor.

In an action by the beneficiary of the estate of a deceased insane person to set aside a deed executed by the incompetent, the burden of proving mental incapacity at the time of the execution of the deed is on plaintiff, but the burden is on the grantee to prove that he had no knowledge of the grantor's insanity and that he paid adequate consideration for the deed. *Dougherty v. Byrd*, 17.

§ 6. Deeds of Gift.

The owner of lands executed a deed of gift thereto and delivered same to the grantee. Some three and a half years thereafter he acknowledged the deed and filed same for registration. *Held:* The acknowledgment of the execution

DEEDS—*Continued.*

was not a re-execution of the deed, and the deed of gift not having been registered within two years of its execution is void, C. S., 3315, and may not be revived by curative act of the Legislature. *Cutts v. McGhee*, 465.

§ 13a. Estates and Interests Created.

A deed to a widow and the heirs of her body by her late husband creates an estate tail which is converted by C. S., 1734, into a fee simple absolute in the widow, and her children by her deceased husband take no interest in the land, C. S., 1739, not being applicable, since it applies only when no preceding estate is conveyed to the "ancestor" of the "heirs." *Bank v. Snow*, 14.

§ 16. Restrictive Covenants.

The servitude imposed by restrictive covenants in a deed is a species of incorporeal right which runs with the land and is binding upon *mesne* purchasers from the grantee, even though the restrictions are not inserted in subsequent deeds. *Sheets v. Dillon*, 426.

Covenants restricting the use of land are not impolitic, and the owner of land may insert any restrictive covenants he deems fit so long as the beneficial enjoyment of the estate is not materially impaired and the public good and interest are not violated, and the party contending that by reason of conditions subsequently arising the enforcement of the restrictions would be inequitable and unjust has the burden of proof. *Ibid.*

Where a person owning a body of land sells a portion thereof by deed containing restrictive covenants, the restrictions will be deemed personal to the grantor and for the benefit of the land retained, and it is only when the land is subdivided and sold by deeds containing uniform restrictions in accord with a general scheme for the benefit of all within a specified area that the purchasers of lots therein may enforce the restrictive covenants *inter se*. *Ibid.*

Where it appears that the owner of a subdivision has sold lots therein by deeds containing restrictive covenants and that all lots save one in the block in which the *locus in quo* is situate were sold subject to similar restrictions, equity will not decree that the restrictions are void in an action by a vendor against his purchaser when the owners of other lots in the development are not made parties, since their rights could not be precluded by the judgment. *Ibid.*

DESCENT AND DISTRIBUTION.

§ 10a. Collateral Heirs.

Intestate died leaving him surviving two sisters and the descendants of three brothers and two sisters who predeceased him, *Held:* In the division of the personalty, the estate should be divided in seven equal parts, the surviving sisters each taking a part *per capita*, and the descendants of the deceased brothers and sisters taking the share of their ancestor *per stirpes*. C. S., 137 (5). *In re Estate of Poindexter*, 246.

DIVORCE.

§ 13. Alimony Without Divorce.

In an action for alimony without divorce, C. S., 1667, plaintiff must meet the requirements of the statute for divorce from bed and board, and must allege with particularity the acts of the defendant constituting the basis of the charge that he offered such indignities to her person as to render her condition intolerable, and allege that such acts were without adequate provocation on her part. *Pollard v. Pollard*, 46.

Where, in an action for alimony without divorce, the complaint fails to allege that the acts of defendant complained of were without adequate provocation on the part of plaintiff, the Supreme Court may sustain a demurrer *ore tenus* to the complaint. *Ibid.*

Plaintiff is entitled to alimony without divorce if she can sustain by competent evidence either one of the grounds alleged, in this case that defendant offered such indignities to her person as to render her condition intolerable and her life burdensome, and that plaintiff was compelled to leave the house of defendant because of his failure to provide for her support and his cruel, contemptuous and inhuman treatment of her. *Ibid.*

Evidence disclosing an estrangement in the marital relationship and the failure and refusal of the defendant to place his home in their joint names, as promised by him prior to the marriage, and his refusal to build up a joint savings account, and differences of opinion between them over certain other financial matters, is insufficient to show either indignities to the person of plaintiff or conduct constituting in law an abandonment by defendant, and defendant's motion to nonsuit in the wife's action for alimony without divorce based upon these two grounds should have been allowed. *Ibid.*

§ 16. Jurisdiction of Court to Award Custody and Provide for Support of Child of Marriage.

Upon institution of a divorce action the court acquires jurisdiction over any child born of the marriage and may hear and determine questions both as to the custody and as to the maintenance of such child either before or after final decree of divorce. C. S., 1664. *Story v. Story*, 114.

The inherent and statutory authority of the court to protect the interests and provide for the welfare of infants cannot be affected by agreement or consent judgment entered into by the child's parents in an action for divorce, and the court has jurisdiction to modify provisions for the support of a child of the marriage, even though such provisions are stipulated in a consent order entered in the divorce action. *Ibid.*

In the husband's action for absolute divorce, an order was entered by consent awarding the custody of the child of the marriage and stipulating that the husband pay a certain amount monthly for the support of the wife and child, and that the cause be retained for further orders. Thereafter decree of absolute divorce was entered. *Held:* By the very terms of the agreement the court retained jurisdiction, and had authority, upon the wife's subsequent motion in the cause, to direct the husband to pay an increased amount for the support of the child alone. *Ibid.*

The Superior Court has jurisdiction under C. S., 1664, to modify an order for the support of a child of the marriage entered in the husband's action for absolute divorce, and may do so upon the wife's motion in the cause made subsequent to the rendition of the decree of absolute divorce, C. S., 1665 and 1667 not being applicable. *Ibid.*

§ 20. Validity and Attack of Domestic Decrees.

A decree of absolute divorce on the ground of two years separation was entered. Thereafter defendant made a motion in the cause to set aside the decree upon allegations that defendant was insane at the time the decree was entered and had been insane for some time prior thereto, and that no guardian *ad litem* was appointed to represent her. *Held:* The facts alleged are sufficient predicate for attack of the decree for irregularity, and therefore motion in the cause was the proper remedy, and the fact that the motion contained further allegations constituting a basis for attacking the decree for extrinsic fraud does not preclude defendant from following this procedure. *Cox v. Cox*, 19.

DRAINAGE DISTRICTS.

§ 16. Rights and Remedies of Bondholders.

In suit to foreclose tax lien, publication which fails to denominate holders of drainage district bonds is insufficient to bring them into court. *Comrs. of Washington v. Gaines*, 324.

Since drainage districts are political subdivisions of the State, all statutory remedies and provisions for, or securing payment of the bonds issued by a district under authority of law, which are in effect when the bonds are issued, become a part of the contract between the drainage district and the bondholders. *Ibid.*

Sec. 1, ch. 504, Public Laws 1933 (Michie's Code, 5373 [g]), which provides that when drainage assessments against a particular piece of land are paid in full the land shall not be subject to further assessments, does not apply to bonds issued prior to the effective date of the statute, or affect the right of the holders of such bonds under prescribed conditions to require the levying and collection of special assessments for the purpose of paying the bonds. C. S., 5356. *Ibid.*

EASEMENTS.

§ 1. Creation by Deed or by Reservation in Deed.

An alleyway is an easement constituting an interest in land, and in order to create such easement by deed or reservation contained in a deed, the description thereof must be sufficiently certain to permit the identification and location of the easement with reasonable certainty. *Thompson v. Umberger*, 178.

The description in a deed to a certain lot contained a reservation that the land was "sold subject to an agreement by the parties of the first part to the party of the second part that there is to be reserved a 10-foot alleyway from the front of a certain tract of land containing 240 feet, which tract of land is shown on the map. The said alleyway is to run to the back of said property and the owners are to have an alleyway running across the entire properties at the back." *Held:* The description of the easements is patently ambiguous and is ineffective either to impose a burden upon the land conveyed or to create an easement upon the lands reserved by the grantors. *Ibid.*

§ 2. Creation by Implication.

Where the owner of an estate uses one part of the land for the benefit of the other, which use is obvious and manifestly intended to be permanent, and is reasonably necessary to the fair enjoyment of that part of the land so benefited, and thereafter there is a severance of title, the purchaser of the dominant tenement acquires the easement by implication. *Ferrell v. Trust Co.*, 432.

Right to use party wall *held* to pass to purchaser of building by implication although deed did not include land upon which wall is situate. *Ibid.*

§ 4. Acquisition of Easement by Payment of Permanent Damages.

Where the owner of land seeks to recover permanent damages to his land by reason of the maintenance by a telegraph company of its transmission lines upon his lands, the awarding of permanent damages would be equivalent to the acquisition of an easement by condemnation. *Love v. Tel. Co.*, 469.

§ 5. Extent of Right.

In partition of lands it was provided that a cartway running through and beyond one of the tracts should remain as it then was, and that each of the parties should have the right to use same as a private way in going to and

EASEMENTS—*Continued.*

from his land. *Held:* The extent of the easement was governed by the easement as it existed at the time of partition, and gates could be maintained by servient tenant to same extent, but no more, than they existed at time of partition. *Jacobs v. Jennings*, 24.

EJECTMENT.

§ 11. Complaint.

In this action in ejectment, the complaint alleged that defendant claimed title as grantee in the trustee's deed after foreclosure of the property and that the power of sale became inoperative prior to foreclosure, C. S., 2589, 437 (3). Defendant demurred for that the complaint failed to allege that plaintiff had been in possession of the property at any time within the ten-year period prior to the foreclosure sale. *Held:* The demurrer should have been overruled, since plaintiff in ejectment is not required to allege either defendant's source of title or invalidity of any deed in defendant's chain of title, and defendant had no ground to complain that plaintiff properly elected to disclose by allegation his purpose to attack defendant's deed and his grounds therefor, the applicability of the statutes and the determination of the validity of the foreclosure deed not being presented by demurrer to the complaint. *Ownbey v. Parkway Properties*, 27.

ELECTIONS.

§ 16. Canvassing and Proclamation of Results.

The machinery provided by C. S., ch. 97, as amended, for ascertaining and declaring the successful candidate in an election applies to all municipal elections. *Ledwell v. Proctor*, 161.

The returns made by the precinct officials constitute but a preliminary step in ascertaining the results of an election, and such returns must be canvassed and declared by the board of canvassers as an essential part of the election machinery, which board, after judicially determining the results, must issue a certificate of election to the successful candidate upon which he may qualify and enter into the discharge of the duties of the office. C. S., 5985, 5986, 5991. *Ibid.*

In canvassing the returns and judicially determining the results of an election, the board of elections has authority, judicial in its nature, to examine the returns and decide upon their correctness and sufficiency, and pass upon the legality of any disputed ballots, and to accept or reject them. *Ibid.*

The declaration of the board of elections as to the results of an election and its certificate issued thereon, while *prima facie* correct, are not conclusive, and may be reviewed by the courts, but contesting candidates must first exhaust their remedies before the board of elections before resorting to the courts. *Ibid.*

EMINENT DOMAIN.

§ 2. Acts Constituting "Taking" of Property.

The interference with the right of owner of property abutting a street to access to and from his property is a "taking" for which compensation must be allowed, but the interference with such access must be direct, substantial and proximate, since if it results only in some inconvenience in compelling him to take a more circuitous route of access, it differs only in degree but not in kind from that sustained by the public generally, and is *damnum absque injuria*. *Sanders v. Smithfield*, 166.

EMINENT DOMAIN—*Continued.*

Closing of street at crossing, resulting in mere inconvenience to owner of property abutting the street in getting to and from section on other side of tracks, but not placing property in *cul-de-sac*, is not a "taking." *Ibid.*

§ 13. Right to Interest on Award of Compensation.

Upon present record petitioners *held* not entitled to interest on amount awarded for the taking of lands under eminent domain. *Yancey v. Highway Com.*, 185.

§ 24. Effect of Verdict in Actions for Damages.

The awarding of permanent damages in action to recover for maintenance of transmission line on plaintiff's land would be equivalent to acquisition of easement by defendant by condemnation. *Love v. Tel. Co.*, 469.

§ 26. Nature and Extent of Title and Rights Acquired.

A judgment assessing compensation for the taking of land or an easement under eminent domain has the force and effect of a deed, and decree in this condemnation of land for highway *held* to embrace use of land for telephone line. *Hildebrand v. Tel. Co.*, 10.

ESTATES.

§ 9d. Forfeiture of Life Estate for Nonpayment of Taxes.

A life tenant who has forfeited her estate by failing to redeem the land within one year after sale of the tax lien by the sheriff, C. S., 7982, cannot be permitted to avoid the forfeiture on the ground of the insufficiency of the description of the property on the tax list, since she herself listed the property for taxation and could not have been misled by any alleged insufficiency in the description. *Bryson v. McCoy*, 194 N. C., 91, cited and distinguished in that the present action does not involve the validity of the sheriff's deed. *Cooper v. Cooper*, 124.

EVIDENCE.

§ 2. Judicial Notice of Political, Legislative, and Executive Acts of This State.

The courts will take judicial notice that specified counties of the State are contiguous and of the census of population of those counties. *Mallard v. Housing Authority*, 334.

§ 4. Judicial Notice of Judicial, Legislative, and Executive Acts of Federal Government.

The courts may take judicial notice of when the United States Census figures are available. *Clark v. Greenville*, 255.

The courts will take judicial notice of census of counties of the State. *Mallard v. Housing Authority*, 334.

§ 5. Judicial Notice of Facts Within Common Knowledge.

It is a matter of common knowledge that an automobile driven at a speed of five to ten miles an hour can be stopped almost instantly. *Jeffries v. Powell*, 415.

§ 28. Circumstantial Evidence. (Charge on burden of proof when plaintiff relies on circumstantial evidence see Trial § 39c.)

Evidence of condition of plaintiff's shoe some time after accident, without more, *held* no evidence of condition of place plaintiff stood at time of accident. *Brewer v. R. R.*, 453.

EVIDENCE—*Continued.*

§ 32. Transactions or Communications With Decedent.

While testimony as to personal transactions with the deceased payee of a note would be incompetent to establish defenses to the note over the objection of the personal representative of the payee, record evidence tending to establish such defenses is not precluded by the statute. C. S., 1795. *Flippen v. Lindsey*, 30.

§ 39. Parol Evidence Affecting Writings.

Plaintiff contended that defendants entered into a parol agreement to purchase a certain 158-acre farm and to later convey the farm and certain farm machinery thereon to plaintiff for a stipulated price. It appeared that defendants thereafter gave plaintiff an option to purchase the farm less 13 acres, which option contained no reference to the personalty, and that plaintiff exercised the option with full knowledge of the facts. *Held:* While prior negotiations in regard to the realty were merged in the written option, the parol agreement for the purchase of the personalty was not, and plaintiff's evidence tending to show his purchase of the personalty, considered in the light most favorable to him, was sufficient to overrule defendants' motion to nonsuit on this aspect of the case. *Williams v. McLean*, 228.

§ 41. Hearsay Evidence in General.

Testimony of a witness on cross-examination as to a transaction between third persons occurring while the witness was not present, and testimony of another witness as to declarations made by his father, since deceased, that his father had paid the obligation in suit in full, *is held* incompetent as hearsay. *Bunting v. Salsbury*, 34.

§ 42d. Admissions or Declarations by Agents.

Testimony of a declaration of an automobile salesman that at the time of the accident he was driving the corporate defendant's car to demonstrate it to a prospective purchaser, which declaration was not made at the time of the injury or near enough to the transaction to constitute a part of the *res gestæ is held* incompetent and its admission constitutes prejudicial error. *Caulder v. Motor Sales*, 437.

§ 42f. Admissions in Pleadings.

Where the material allegations of the complaint are denied in the answer, the admission of the complaint in evidence is error entitling defendant to a new trial. *Smith v. Bottling Co.*, 202.

EXECUTORS AND ADMINISTRATORS.

§ 15. Claims Arising From Individual Payment of Obligations of Estate.

Executrix paying claim out of funds she mistakenly thought belonged to estate, and thereafter having to personally restore funds, may recover from claimant. *Frederick v. Ins. Co.*, 409.

§ 18. Reference of Claim to Disinterested Persons.

Where a claimant and the personal representative voluntarily execute a written agreement referring the claim to disinterested persons under C. S., 99, the referees are not required to decide the matter according to law, and their report is conclusive and neither party is entitled to appeal therefrom upon exceptions, there being no provision in the statute for appeal and, the proceeding being neither a civil action nor a special proceeding nor a judicial order neither C. S., 637, nor C. S., 638, is applicable. *In re Estate of Reynolds*, 449.

EXECUTORS AND ADMINISTRATORS—*Continued.*

§ 22. Actions to Obtain Advice of Court in Distribution of Estate.

When there is a dispute as to the relative proportions due each distributee under the canons of descent, it is proper for the administrators to institute a proceeding with notice to all interested parties to obtain the advice of the court. *In re Estate of Poindexter*, 246.

§ 24. Family Settlement Doctrine.

Trust may not be modified by consent of beneficiaries *in esse* to the detriment of contingent beneficiaries not *in esse*. *Duffy v. Duffy*, 521. Family settlement doctrine does not apply to active trusts. *Ibid.*

§ 29. Costs, Commissions, and Attorneys' Fees.

Lawyer voluntarily becoming executor may not recover for professional services rendered estate in addition to compensation as executor. *Lightner v. Boone*, 78. Nor may beneficiaries agree to pay such additional charge. *Ibid.*

A letter written by the beneficiaries of an estate to the clerk of the Superior Court, stating that they approved of charges to be allowed by the clerk to compensate the executor for his services and to reimburse him for expenses, including counsel fees incurred in the course of the administration, does not constitute a promise by the beneficiaries to pay attorney fees for professional services rendered by the executor himself in the management of the estate. *Ibid.*

Disbursements for fees of counsel employed by the administrator or executor of an estate are allowable as necessary expenses against the estate when they are for services to the estate which are reasonably necessary and the amount is not excessive. *Ibid.*

Where the will expressly stipulates the compensation to be allowed the executor, the executor, by qualifying, accepts such provision and is bound thereby even though the will stipulates compensation in a sum less than the five per cent maximum allowed by statute. *Ibid.*

Since an attorney qualifying as an executor is not entitled to compensation for legal services performed by him in the management of the estate, counsel fees of an attorney employed by him to defend his claim for such legal services, and also the costs in the Supreme Court on appeal, must be paid by him personally and they cannot be allowed against the estate, since attorney's fees may be allowed against the estate in an action to surcharge the executor's account only when the account is upheld. *Ibid.*

§ 31. Actions to Surcharge and Falsify Account.

An action to surcharge the account of an executor is an action pending on the civil issue docket, and can be heard at chambers out of the county in which it is pending only by consent. *Lightner v. Boone*, 78.

FIRES.

§ 4. Prosecutions for Willfully or Negligently Starting Forest Fires.

Evidence that the county in which defendant negligently or willfully started forest fires was in charge of the State Forest Service and that therefore C. S., 4310, as amended by ch. 258, Public Laws 1941, was applicable to the county, defendant having offered no evidence to the contrary, *is held* sufficient, and defendant's exception based upon the amendment of the statute cannot be sustained. *S. v. Patton*, 117.

GAMING.

§ 1. Nature and Elements of Offense in General.

The fact that a defendant has a license under a municipal ordinance for the use of ticker service or other devices for receiving and imparting information concerning games and sporting events, is immaterial in a prosecution for maintaining a nuisance in facilitating betting on horse races. *S. v. Brown*, 301.

§ 2c. Horse Racing and Betting.

Betting on a horse race is an offense against the criminal law. C. S., 2142, 2143, 4430. *S. v. Brown*, 301.

Betting upon a horse race is gambling, since a horse race is a "game," and since, even though as to the participants it may be a game of skill, as to outsiders who bet on the result it is a game of chance. *Ibid.*

GIFTS.

§ 4. Gifts Causa Mortis.

The essentials of a gift *causa mortis* are a gift made in expectancy of death to take effect only upon the death of the donor from the existing disorder, and delivery of the gift by the donor. *Bynum v. Bank*, 101.

The evidence in this case tended to show that intestate called plaintiff to her bedside, directed plaintiff to get her pocketbook, which contained certain keys, and a tin box, that intestate put the keys in plaintiff's hands and told her not to let anyone else have them, that intestate, with the box resting on her lap, named the contents of the box and told plaintiff "everything in this box is yours and this key unlocks this box," instructed plaintiff "take the box and put it up" or "put it back in the closet," and told several witnesses that she had given plaintiff everything. *Held:* The evidence is sufficient to be submitted to the jury on the question of intestate's delivery of a savings account evidenced by a bank book contained in the tin box. *Ibid.*

HIGHWAYS.

§ 10a. Nature and Extent of Highway Right of Way.

Petitioner constructed a canal across a county highway and thereafter maintained the bridge constructed over the canal (C. S., 3795). The State Highway Commission, upon taking over the highway, constructed a new bridge, and later constructed a second new bridge which was some two and one-half inches lower than the first. Petitioner instituted this proceeding under C. S., 3846 (bb), as amended, to recover compensation upon his contention that the lowering of the bridge interfered with the use of the canal in floating his barge under the bridge. *Held:* The use of the canal by petitioner was permissive and subject to the easement for highway purposes, and therefore petitioner is not entitled to recover compensation. *Dodge v. Highway Com.*, 4.

The State Highway and Public Works Commission has been granted exclusive control over the State Highway System and may in its discretion authorize the use of a highway right of way by telephone and telegraph companies, and prescribe the manner and extent of such use, subject to the right of the owner of the servient estate to payment of compensation for the additional burden, but in this case, use of land for telephone line was embraced in decree of condemnation for highway purposes, and no further compensation therefore was recoverable. *Hildebrand v. Tel. Co.*, 8.

HOMICIDE.

§ 3. Definition of Murder in First Degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation, or in the perpetration of, or attempt to perpetrate, a felony. *S. v. Smith*, 278.

§ 5. Definition of Murder in Second Degree.

Murder in the second degree is the unlawful killing of a human being with malice and without premeditation and deliberation, and is presumed from an intentional killing with a deadly weapon. *S. v. Smith*, 278.

§ 7a. Definition of Manslaughter.

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *S. v. Smith*, 278.

§ 10. Mental Capacity and Drunkenness.

While the defense of intoxication to such a degree as to render defendant incapable of premeditation and deliberation need not be supported by separate plea, defendant should bring to the court's attention in some appropriate way his intention to rely on the defense. *S. v. Smith*, 278.

§ 11. Self-Defense.

A defendant who quits the combat may invoke the right of self-defense upon the renewal of the affray even though he may have been at fault in bringing about the original difficulty. *S. v. Miller*, 356.

A defendant may justify the use of a deadly weapon in self-defense when assaulted by a person of larger size or of greater strength, although such person may be unarmed. *Ibid.*

A man dangerously assaulted, or menaced, in his own house is already at the wall and need not retreat. *Ibid.*

§ 22. Evidence Competent on Issue of Self-Defense.

Where a defendant in a homicide prosecution offers evidence tending to show that he killed deceased in self-defense, evidence of the general reputation of deceased for violence is competent, but defendant is not entitled to show specific acts of violence of deceased unconnected with the homicide, and in cross-examination of a State's witness, the State's objection to an interrogation as to whether the witness did not know the deceased had "the general reputation of having held up and robbed a man with firearms" is properly sustained. *S. v. LeFevers*, 184.

§ 23. Demonstrative Evidence: Diagrams.

Where witnesses testify as to the accuracy of a diagram of the scene of the homicide, showing the location of natural objects and the position of witnesses and actors in the scene, the admission of the diagram in evidence for the purpose of illustrating or explaining the testimony of the witnesses is not error, and objections thereto on the ground that the diagram was not made by the witnesses and that its admission was not properly restricted are untenable. *S. v. Smith*, 278.

§ 25. Sufficiency of Evidence and Nonsuit.

Evidence of defendant's guilt of murder in the first degree *held* sufficient to overrule his motion to nonsuit. *S. v. Smith*, 278.

HOMICIDE—*Continued.*

§ 27c. Instructions on Murder in First Degree.

A charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held correct, since "aforethought" as so used does not connote premeditation and deliberation but the pre-existence of malice. C. S., 4200. *S. v. Smith*, 278.

§ 27f. Instructions on Defenses.

The court's instruction upon the defense of intoxication rendering defendant incapable of premeditation and deliberation *held* not prejudicial to defendant, certainly in view of the fact that defendant failed to bring to the court's attention his intention to rely on this defense, and the fact that, while there was testimony that defendant had been drinking, there was no evidence that defendant was drunk. *S. v. Smith*, 278.

§ 27h. Charge on Less Degrees of Crime.

Where all the evidence tends to show that murder was committed in the perpetration of a robbery, the trial court is not required to submit to the jury the question of defendant's guilt of lesser degrees of the crime. *S. v. Manning*, 70.

When there is no evidence of defendant's guilt of manslaughter, the court need not submit question to jury. *S. v. Smith*, 278.

§ 29. Judgment and Sentence.

The provision of C. S., 4201, as amended by ch. 249, Public Laws 1933, that the punishment for involuntary manslaughter shall be in the discretion of the court and that the defendant may be fined or imprisoned, or both, prescribes a "specific punishment," and therefore C. S., 4172, which limits the sentence for a felony for which no specific punishment is prescribed by statute, to two years imprisonment is not applicable, and a sentence of imprisonment in the State Prison for a term of seven years upon defendant's plea of guilty of involuntary manslaughter will be upheld, the punishment being in the sound discretion of the trial court, limited only by the prohibition against cruel and unusual punishment. Constitution of North Carolina, Art. I, sec. 14. *S. v. Richardson*, 209.

§ 30. Appeal and Review of Homicide Prosecutions.

Where, in a homicide prosecution, the cause of deceased's death is not seriously controverted, and there is competent medical expert testimony upon propr hypothetical question, and nonexpert testimony, unobjected to, that deceased bled to death from a gunshot wound, the admission of testimony by a licensed embalmer, based upon his examination of the body of deceased, that deceased bled to death from the wound, cannot be held prejudicial. *S. v. Smith*, 278.

A charge that murder in the first degree is the unlawful killing of a human being with malice aforethought cannot be held for prejudicial error when in other portions of the charge the court repeatedly instructs the jury that defendant could not be found guilty of murder in the first degree without the jury's finding from the evidence beyond a reasonable doubt that the killing was done with premeditation and deliberation. *Ibid.*

When in a prosecution for murder there is no evidence tending to establish the less degree of manslaughter, any instruction with regard to manslaughter is harmless, and defendant's exception to the charge upon the burden of overcoming the presumption of malice arising from the unlawful killing with a deadly weapon, is untenable. *Ibid.*

HUSBAND AND WIFE.

§ 4d. Abandoned Wife as Free Trader.

After abandonment, the wife may execute deed to her lands without the joinder of her husband. C. S., 2530. *Campbell v. Campbell*, 257.

§ 12d. Usufruct of Lands Held by Entireties.

The husband has the right, with the consent of the owner and holder of notes secured by deed of trust on the property, to use the proceeds of a fire insurance policy to pay a separate obligation of his, notwithstanding that the property was held by him and his wife by entireties and the policy had a mortgage clause in favor of the trustee. *Henderson v. Stuart*, 37.

INDEMNITY.

§ 4. Rights and Remedies of Persons Indemnified.

The consignment agreement in suit provided that upon termination of the agreement, the consignee was to turn over to the consignor all goods and moneys then in his hands belonging to the consignor. Bond was executed to save the consignor harmless on the agreement. *Held:* Upon termination of the agreement, the liability of the sureties in regard to the turning over of the goods then in the hands of the consignee to the consignor cannot be made to depend upon whether such goods were in marketable condition. *Chozen Confections, Inc., v. Johnson*, 224.

The sureties have a right to stand on the terms of their contract, and are not bound by a statement signed by the principal admitting his liability. *Ibid.*

INDICTMENT AND WARRANT.

§ 8. Joinder and Severance of Counts.

A charge of reckless driving, of operating an automobile on the highway while under the influence of intoxicating liquor and of assault with an automobile may be properly joined in one indictment as separate counts charging distinct offenses of the same class growing out of the same transaction, C. S., 4622, and separate judgments may be entered upon the jury's verdict of guilty of reckless driving and assault, defendant's contention that the bill contains only one count or that the charge of reckless driving was merged with the charge of assault or the charge of manslaughter contained in a separate indictment consolidated for trial, being untenable. *S. v. Fields*, 182.

INDICTMENT.

§ 9. Charge of Crime.

Ordinarily, an indictment for a statutory offense which follows the language of the statute is sufficient. *S. v. Gibson*, 252.

§ 10. Identification of Person Charged or Prosecutrix.

An indictment stipulating the name of prosecutrix as "Robinson" instead of "Rolison" *held* not fatally defective, the doctrine of *idem sonans* being applicable. *S. v. Gibson*, 252.

§ 12. Time of Making Motion to Quash.

After plea of not guilty is entered, a motion to quash the indictment can no longer be made as a matter of right, but is addressed to the discretion of the court, and the exercise of such discretion is not reviewable on appeal. *S. v. Gibson*, 252.

INDICTMENT AND WARRANT.

§ 15. Amendment.

The Superior Court, upon appeal from a municipal police court, has discretionary power to permit an amendment of the warrant. *S. v. Wilson*, 365.

INFANTS.

§ 5. Affirmance and Disaffirmance of Contracts.

A minor may elect to disaffirm a contract relative to sale and purchase of personal property other than one authorized by statute or one for necessaries. *Barger v. Finance Corp.*, 64.

Evidence that the ownership of an automobile was advantageous to an infant and that he would not have been promoted in his job without an automobile available for his use, is insufficient to show that the automobile was necessary for him to earn a livelihood, and therefore the automobile is not among those necessaries for which a minor may be held liable, and upon his majority he may disaffirm the contract and sue to recover the part of the purchase price paid, possession of the car having been surrendered. *Ibid.*

§ 14. Duties and Liabilities of Guardians Ad Litem.

Where a guardian *ad litem* for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings, and files his answer the same day, the judgment is irregular and may be declared void or set aside. C. S., 451, 557. *Simms v. Sampson*, 379.

INSANE PERSONS.

§ 12. Attack and Setting Aside of Deeds.

In an action by the beneficiary of the estate of a deceased insane person to set aside a deed executed by the incompetent, the burden of proving mental incapacity at the time of the execution of the deed is on plaintiff, but the burden is on the grantee to prove that he had no knowledge of the grantor's insanity and that he paid adequate consideration for the deed. *Dougherty v. Byrd*, 17; *Carland v. Allison*, 120.

In an action to annul a deed on the ground that the grantor was mentally incompetent, plaintiffs may offer the deed in evidence in order to attack it. *Carland v. Allison*, 120.

In an action to annul a deed on the ground that the grantor was mentally incompetent, evidence of mental incapacity of the grantor alone is sufficient to defeat defendant's general motion to dismiss as of nonsuit. *Ibid.*

Where the jury finds that the grantor was mentally incapable of executing the deed attacked, evidence of defendant's long association with the grantor will support a further finding that the defendant had notice of the incapacity, which raises a presumption of fraud. *Ibid.*

Where, in an action to annul a deed on the ground that grantor was mentally incompetent, defendant does not allege the amount of consideration paid or pray its recovery, it is not error for the court to refuse to submit an issue as to the amount of consideration paid, defendant being fully protected by order of the court retaining the cause for adjustment between the parties as to rents and refund of consideration. *Ibid.*

In an action to annul a deed on the ground that the grantor was mentally incompetent, evidence of inadequacy of consideration is competent to be considered by the jury together with other facts and circumstances adduced by the evidence in passing upon the issue of fraud and undue influence, notwithstanding that the question of defendant's right to recover the consideration paid if the deed is canceled is reserved for later determination. *Ibid.*

INSANE PERSONS—*Continued.*

In this action to annul a deed on the ground that the grantor was mentally incompetent, the court charged the jury that the burden was upon plaintiff to show by the greater weight of the evidence that the grantor did not have mental capacity "to intelligently understand what he was doing." Immediately preceding this instruction the court defined "intelligent understanding" as embracing "mental capacity to understand what property he is disposing of, the person to whom he is conveying, the purpose for which the disposition is made, and the nature and consequence of his act." *Held:* Construing the charge as a whole it does not contain harmful or prejudicial error upon this point. *Ibid.*

§ 15. Representation of Incompetent by Guardian Ad Litem.

An insane person who has no general or testamentary guardian must defend by guardian *ad litem* appointed by the court, C. S., 451, and the provisions of the statute are mandatory and must be strictly observed, and judgment rendered without appointment of guardian *ad litem* is irregular. *Cox v. Cox*, 19.

Where a guardian *ad litem* for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings, and files his answer the same day, the judgment is irregular and may be declared void or set aside. C. S., 451, 557. *Simms v. Sampson*, 379.

INSURANCE.

§ 13a. Construction of Policies in General.

Policy will be construed most strongly against insurer, and when provisions are ambiguous or conflicting that construction or provision which will sustain liability will be adopted. *Felts v. Ins. Co.*, 148.

§ 30a. Forfeiture of Policy for Nonpayment of Premiums in General.

Under facts of this case, policy providing for waiver of premiums for disability was not forfeited for failure to pay premium due last before death of insured, it appearing that insured was wholly disabled for six months and four days prior to his death, and that he was totally incapacitated from giving notice of disability during last four days of his life during which policy stipulated notice be given. *Felts v. Ins. Co.*, 148.

§ 34b. Notice and Proof of Disability.

When the terms of a policy as to notice and proof of disability are ambiguous or conflicting, that construction or provision which will sustain liability will be adopted. *Felts v. Ins. Co.*, 148.

Notice of disability during insured's lifetime *held* not required when insured is incapable of giving notice during period before death when notice was due to be given. *Ibid.*

When insurer denies liability on the ground of forfeiture of the policy for nonpayment of premium it waives notice and proof of disability. *Ibid.*

§ 44a. Provisions Limiting Liability or Constituting Conditions Precedent Thereto in Liability Policies.

The policy of liability insurance in suit provided that insurer would not be liable for injuries resulting from defective workmanship after insured's work was "completed." A charge that "to complete" means to bring to a state of entirety or perfection, to do the work in a proper manner, *is held* erroneous as going too far and rendering the attempted restriction meaningless and unavailing. *Daniel v. Casualty Co.*, 75.

INSURANCE—*Continued.*

The policy of liability insurance in suit provided that insurer would not be liable for injuries resulting from defective workmanship after insured's work was "completed." *Held:* While the term "completed" cannot be given a general definition of universal application, and the factual situation in each case must control, work cannot be regarded as completed so long as the workman has omitted or failed to perform some substantial requirement which the owner has a contractual right to demand. *Ibid.*

INTEREST.

§ 1. Items Drawing Interest.

Money due by contract, except money due on penal bonds, bears interest as a matter of law. C. S., 2309. *Cotton Mills v. Mfg. Co.*, 500.

C. S., 2309, is not exclusive in prescribing instances in which interest is recoverable, and in proper instances interest may be recovered upon transactions not coming within the statute. *Ibid.*

When selling agent itself buys principal's goods and resells them at profit, principal, in action to recover secret profit, is not entitled to interest on recovery. *Ibid.*

JUDGMENTS.

II. Judgments by Confession
5. Nature and Essentials. Gibbs v. Weston & Co., 7.
VI. Judgment on Trial of Issues or Hearing of Motions
17b. Conformity to Verdict and Pleadings. Yancey v. Highway Com., 185; Simms v. Sampson, 379.
18. Time and Place of Rendition. Lightner v. Boone, 78.
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19d. Docketing and Priorities. Gibbs v. Weston & Co., 7.
VIII. Validity, Attack and Modification
22a. Parties in Attack on Judgments. Simms v. Sampson, 379.
22b. Procedure to Attack. Cox v. Cox, 19; Monroe v. Niven, 362.
22d. Time Within Which Attack Must be Made. Monroe v. Niven, 362.
22g. Attack for Irregularity. Cox v. Cox, 19; Simms v. Sampson, 379.
22h. Void Judgments. Monroe v. Niven, 362.
24. Modification. Story v. Story, 114.
IX. Conclusiveness and Estoppel
29. Parties Concluded. Rodman v. Norman, 320; Pinnix v. Griffin, 348; Sheets v. Dillon, 426.
32. Operation of Judgments as Bar to Subsequent Action in General. Hildebrand v. Tel. Co., 10; Cox v. Cox, 19; Sanders v. Smithfield, 166; Cole v. Trust Co., 249; Hospital v. Guilford County, 308; Pinnix v. Griffin, 348.

§ 5. Nature and Essentials of Judgments by Confession.

The statutory authorization of the entry of judgments by confession is in derogation of common right, and the statutes must be strictly construed. *Gibbs v. Weston & Co.*, 7.

The filing of a verified statement and affidavit authorizing the entry of a judgment by confession is necessary to confer jurisdiction upon the clerk to render such judgment, but the verified statement, in itself, even though recorded on the judgment docket, indexed and cross indexed, is not effective as a judgment of the court, even though the clerk intend it to be so effective, the rendition of the judgment being the distinct office of the court apart from and in addition to the ministerial acts of filing and docketing. *Ibid.*

§ 17b. Conformity to Verdict and Pleadings.

Judgment follows the verdict, and therefore when there is no exception to the trial and no motion to set aside the verdict, the refusal of the court to sign judgment tendered by petitioners awarding them interest on the verdict cannot be held for error. *Yancey v. Highway Com.*, 185.

Motion to set aside verdict is not necessary to attack of judgment for irregularity when it is apparent that verdict was reached by consent of parties who filed pleadings and was not found by the jury. *Simms v. Sampson*, 379.

JUDGMENTS—*Continued.*

When answer is not filed the relief to which petitioners are entitled is limited to that demanded in and supported by allegations of the petition, and judgment in excess thereof is irregular. *Simms v. Sampson*, 379.

§ 18. Time and Place of Rendition.

Where an action pending on the civil issue docket is, by consent, heard by the court at chambers out of the county, the judgment entered does not become effective until it is filed in the county in which the action is pending. *Lightner v. Boone*, 78.

§ 19d. Docketing and Priorities.

The filing of a verified statement and affidavit authorizing the entry of judgment by confession, which is recorded on the judgment docket, indexed and cross indexed by the clerk without entry of judgment thereon, is ineffective as against creditors whose judgments are subsequently docketed. *Gibbs v. Weston & Co.*, 7.

§ 22a. Parties in Attack of Judgments.

In an action to set aside a decree of sale for partition for irregularity the purchaser at the sale is a necessary party. *Simms v. Sampson*, 379.

§ 22b. Procedure to Attack Judgments.

The procedure to attack a judgment on the ground of extrinsic fraud is by independent action, and the proper procedure to attack a judgment on the ground that it is irregular is by motion in the cause. *Cox v. Cox*, 19.

Where the record shows service or appearance when in fact there had been none, the judgment is apparently regular though void in fact, and the proper remedy of the party affected to correct the record is by motion in the cause. *Monroe v. Niven*, 362.

§ 22d. Time Within Which Attack Must Be Made.

Lapse of time will not bar the right to move to vacate a void judgment. *Monroe v. Niven*, 362.

§ 22g. Attack for Irregularity.

Allegations that defendant was insane at time of service of summons and that no guardian *ad litem* was appointed to represent her is sufficient predicate to attack judgment for irregularity. *Cox v. Cox*, 19.

It is not required that movants show excusable neglect in order to be entitled to set aside a judgment on the ground of irregularity, C. S., 600, not being applicable. *Simms v. Sampson*, 379.

Where answer is not filed the relief to which petitioners are entitled is limited to that demanded in and supported by allegations of the petition, and respondents can be concluded thereby only to this extent, and when the judgment grants relief in excess thereof it is irregular and respondents are entitled to have it set aside. C. S., 606. *Ibid.*

Decree of sale for partition *held* to grant relief in excess of that demanded and was irregular as to respondents who failed to file answer. *Ibid.*

Motion to set aside verdict is not necessary to attack of judgment for irregularity by respondents who failed to file answer when it is apparent that verdict was reached by consent of petitioners and answering respondents and was not found by jury. *Ibid.*

A judgment will not be set aside for mere irregularity, but respondents must show a meritorious defense. *Ibid.*

JUDGMENTS—*Continued.*

§ 22h. Void Judgments.

A void judgment is one which has a mere semblance but is lacking in some of the essential elements which would authorize the court to proceed to judgment. *Monroe v. Niven*, 362.

A judgment *in personam* obtained without jurisdiction of defendant by service of process or voluntary appearance is absolutely void for want of jurisdiction, and may be disregarded and treated as a nullity at any time, everywhere. *Ibid.*

A judgment which is void for want of service of process is not validated by a general appearance to move to vacate, since *ex nihilo nihil fit. Ibid.*

A showing of a meritorious defense is not necessary to vacate a void judgment. However, want of service is a meritorious defense. *Ibid.*

§ 24. Modification.

In the husband's action for absolute divorce, an order was entered by consent awarding the custody of the child of the marriage and stipulating that the husband pay a certain amount monthly for the support of the wife and child, and that the cause be retained for further orders. Thereafter decree of absolute divorce was entered. *Held:* By the very terms of the agreement the court retained jurisdiction, and had authority, upon the wife's subsequent motion in the cause, to direct the husband to pay an increased amount for the support of the child alone. *Story v. Story*, 114.

§ 29. Parties Concluded.

In an action under C. S., 7990, to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. *Rodman v. Norman*, 320.

Judgment against servant does not conclude master, but is conclusive on plaintiff as to all claims of damage in excess of amount awarded against servant. *Pinnix v. Griffin*, 348.

Rights of owners of lots in subdivision to enforce restrictive covenants cannot be precluded in action to which they are not parties. *Sheets v. Dillon*, 426.

§ 32. Operation of Judgment as Bar to Subsequent Action in General.

A decree awarding compensation for taking of an easement by the State Highway and Public Works Commission, its successors and assigns, for all purposes for which the Commission is authorized by law to subject such right of way, is binding upon the parties, and a telephone company granted the right by the State Highway and Public Works Commission to maintain its poles and lines along said right of way is in privity with the Commission and is entitled to invoke the decree as against the owner of the fee in her subsequent action against it to recover compensation for the additional burden. *Hildebrand v. Tel. Co.*, 10.

Ordinarily, the doctrine of *res judicata* will not apply where the judgment is rendered on any grounds which do not involve the merits. *Cox v. Cox*, 19.

The refusal of a motion to set aside a judgment because movant failed to allege a meritorious defense is not *res judicata* and will not bar a subsequent motion to set aside upon allegations disclosing a meritorious defense. *Ibid.*

A judgment that plaintiffs were not entitled to recover in tort for damages to their property abutting a street resulting from the closing of the street at a railroad grade crossing, upon the court's holding that the municipality had

JUDGMENTS—*Continued.*

authority to close the street, does not bar a subsequent action to recover damages to the property upon the theory that the closing of the street constituted a "taking" of an easement appurtenant to the property, entitling plaintiffs to compensation. *Sanders v. Smithfield*, 166.

The fact that an interlocutory motion of plaintiff stockholders for an audit of defendant corporation under C. S., 1146, was denied because request therefor was not signed by 25 per cent of its stockholders, does not estop them from thereafter moving for the same relief after the corporation had failed to act within the statutory time on another request for audit signed by more than 25 per cent of its stockholders. *Cole v. Trust Co.*, 249.

A final judgment is conclusive upon the parties whenever the same matters are at issue between them in a subsequent action, and the rights of the parties as established in the prior action cannot be annulled by a legislative declaration to the contrary. *Hospital v. Guilford County*, 308.

Where judgment for negligent injury is recovered against the servant, the verdict on the issue of damages is a verdict against the plaintiff as to all claims in excess of the amount awarded by the jury, and is the limit of any recovery against the master when he is sought to be held liable solely upon the doctrine of *respondeat superior*, and plaintiff cannot thereafter reopen or recanvass the question or assert that the recovery was upon a wrong basis or in an inadequate amount. *Pinnix v. Griffin*, 348.

JUDICIAL SALES.

§ 6. Validity and Attack.

Purchaser at sale is necessary party upon attack of decree of sale for partition. *Simms v. Sampson*, 379.

Decree of sale for partition *held* to grant relief in excess of that demanded and was irregular as to respondents who failed to file answer. *Ibid.*

§ 7. Title and Rights of Purchaser.

An attorney of record in this proceeding to sell lands for partition purchased the property at the sale. Thereafter certain of respondents moved to set aside the decree of sale on the ground of irregularity. *Held:* The attorney of record cannot maintain that he is an innocent purchaser for value. *Simms v. Sampson*, 379.

LABORERS' AND MATERIALMEN'S LIENS.

§ 1. Nature and Grounds in General.

The existence of a debt arising out of contract, due by the owner of the property, is a necessary predicate to the existence of a lien for labor and materials. C. S., 2433. *Brown v. Ward*, 344.

Ordinarily, material furnisher under contract with lessee may not enforce lien against lessor. *Ibid.*

LANDLORD AND TENANT.

§ 1. The Relationship.

Sharecropper helping in pulling stumps from field of the farm is tenant and not employee in respect to the work. *Pleasants v. Barnes*, 173.

The mere existence of the relationship of lessor and lessee does not constitute lessee an agent of lessor. *Brown v. Ward*, 344.

LANDLORD AND TENANT—*Continued.*

§ 10. Repairs and Improvements.

In the absence of any agreement between the parties, there is no obligation on the part of lessor to pay lessee for improvements erected by lessee upon the demised premises, even though the improvements are annexed to the freehold and cannot be moved by lessee. *Brown v. Ward*,. 344.

Lessors are not liable to a materialman who, under contract with the lessee, furnished materials for improvements which were annexed to the land and became a part of the realty, merely by reason of the fact that lessors took possession of the premises, with the improvements, upon the surrender of their tenant. *Ibid.*

LARCENY.

§ 5. Presumptions and Burden of Proof.

Where there is evidence that property was placed in defendant's possession by another and that defendant did not know it at the time and was arrested before she had opportunity to find it in her constructive possession, such recent possession, while competent circumstance, is insufficient to raise presumption warranting conviction in itself. *S. v. McFalls*, 22.

§ 8. Instructions.

There was evidence that property which had been stolen was placed in defendant's possession by another and that defendant was arrested before she had an opportunity to discover it in her constructive possession. *Held:* An instruction to the effect that where possession of stolen property is so recent that defendant could not have gotten possession unless he had stolen it, there is a presumption justifying conviction unless defendant offers testimony in explanation raising a reasonable doubt of guilt, is erroneous as not being applicable to the facts in evidence and as placing too heavy a burden upon defendant. *S. v. McFalls*, 22.

LIMITATION OF ACTIONS.

§ 1a. Nature and Construction of Statutes of Limitation in General.

Our statutes of limitation generally limit the time within which actions may be brought, and thus operate upon the remedy but do not destroy the right. *Demai v. Tart*, 106.

Trustor made part payment on one of the notes secured by the deed of trust, and an action to foreclose the deed of trust was instituted within ten years thereafter. *Held:* Although an action on the note not credited with part payment was barred, the debt evidenced thereby was not destroyed, and the proceeds of sale may be lawfully applied to the entire balance of the debt secured by the deed of trust, including that evidenced by the barred note. *Ibid.*

§ 1b. Applicability to Sovereign.

No statute of limitations runs against the sovereign unless it is expressly named therein. *Charlotte v. Kavanaugh*, 259.

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. C. S., 420. *Ibid.*

Liens for public improvements are barred after the ten-year period prescribed by ch. 331, Public Laws 1929. *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

§ 2e. Actions Barred in Three Years.

The three-year statute of limitations, C. S., 441, is applicable to sureties on sealed instruments as well as on instruments not under seal. *Flippen v. Lindsey*, 30.

An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee is an action based on fraud and must be instituted within three years from the discovery of the acts constituting the fraud, C. S., 441 (9), and the ten-year statute has no application. *Massengill v. Oliver*, 132.

§ 6. Continuing and Separable Trespass.

Where the owner of land seeks to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitations, C. S., 441 (3), the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement is not barred until defendant has been in continuous use thereof for a period of twenty years so as to acquire the right by prescription. *Love v. Tel. Co.*, 469.

§ 11c. Commencement of Action—Amendments.

In an action against husband and wife on a note signed by them as makers, the court, in its discretion, permitted an amendment of the summons and return to correct the middle initial in the name of defendants. *Held:* Since the amendment did not change the nature of the action, and the rights of third parties are not involved, the amendment relates back to the commencement of the action, and the court correctly ruled that the original summons was sufficient to bring defendants into court and that no new summons was necessary. *Lee v. Hoff*, 233.

§ 12a. Part Payment.

Notation of part payment entered on a note by the payee after the note has become barred by the statute of limitations is incompetent as a self-serving declaration; but such notation made prior to the bar of the statute is competent as a declaration against interest. However, entry of the date by the payee is no evidence that the notation was made prior to the bar of the statute, but such fact must be established by evidence *aliunde*, and in the absence of evidence *aliunde* it is insufficient as a matter of law. *Demai v. Tart*, 106.

Part payment operating to start the running of the statute of limitations anew against the right of action to foreclose a mortgage or deed of trust, C. S., 437 (3), is any payment on the debt secured by the instrument, and the action to foreclose is not barred within ten years from such payment notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note. *Ibid.*

§ 13. New Promise.

C. S., 416, does not change the character and quality of an acknowledgment or promise necessary to repel the statute of limitation except to require that the acknowledgment or promise be in writing and signed by the party to be charged. *Trust Co. v. Lumber Co.*, 89.

In order to revive a debt which is barred by statutes of limitation, there must be an express unconditional promise to pay same, or a definite unqualified acknowledgment of same as a subsisting obligation from which the law will imply a promise to pay. *Ibid.*

LIMITATION OF ACTIONS—*Continued.*

The law will imply a promise to pay a debt from an acknowledgment of the debt by the debtor as an existing obligation unless the acknowledgment is qualified. *Ibid.*

A written acknowledgment or promise to pay a debt will bind a corporate debtor if the writing be signed in the name of, or in behalf of the corporate debtor by an authorized agent or officer. *Ibid.*

In order for an acknowledgment or promise to pay a debt to repel the bar of statutes of limitation it must be made to the creditor himself or to an attorney or agent of the creditor acting on behalf of his principal. *Ibid.*

Evidence *held* sufficient to support finding that secretary-treasurer of corporation was without power to bind corporation by acknowledgment of debt so as to repel bar of statute. *Ibid.*

MALICIOUS PROSECUTION.

§ 1. Nature and Essentials of Cause of Action.

Malicious prosecution is the wrongful institution or prosecution of an action or proceeding without probable cause, to the hurt and damage of the complainant. *Finance Corp. v. Lane*, 189.

The prosecution of the ancillary remedies of claim and delivery and receivership, maliciously and without probable cause, will support an action for malicious prosecution. *Ibid.*

§ 3. Probable Cause.

The question of probable cause is to be determined by the facts as they appeared to defendant at the time, and when plaintiff has made statements under oath which reasonably incite a strong suspicion of his guilt, upon which defendant relied in instigating the prosecution, plaintiff's explanation of the statements upon the trial of his action for malicious prosecution does not affect the question of probable cause. *Rawls v. Bennett*, 127.

When the facts are admitted or established, the question of probable cause is one of law for the court. *Ibid.*

§ 5. Termination of Prosecution.

Since an action for malicious prosecution cannot be maintained until the termination of the action upon which it is based, a cause of action for malicious prosecution cannot be set up as a counterclaim in the action upon which it is predicated. *Finance Corp. v. Lane*, 189.

§ 9. Sufficiency of Evidence and Nonsuit.

Plaintiff, in a prior action against him for an accounting, made statements under oath upon adverse examination, which statements were sufficient to afford a person of ordinary caution reasonable ground to believe he was guilty of embezzlement, and constituted the basis of the prosecution of defendant for that crime. A verdict of acquittal was directed in the embezzlement prosecution, and plaintiff instituted this action for malicious prosecution. *Held:* The statements made by plaintiff on the adverse examination, introduced in evidence by defendant in the action for malicious prosecution, establish probable cause as a matter of law, and defendant's motion to nonsuit should have been allowed. *Rawls v. Bennett*, 127.

MANDAMUS.

§ 1. Nature and Grounds of Writ in General.

Mandamus will lie only to compel the performance of a clear legal duty at the instance of the party having a clear legal right to demand it. *Champion v. Board of Health*, 96; *Poole v. Board of Examiners*, 199.

§ 2a. Ministerial or Legal Duty.

The provision of sec. 20, ch. 179, Public Laws 1933, that a person who had been practicing cosmetic art in North Carolina and who was practicing such art at the time of the effective date of the statute, upon making proper affidavit and complying with the provisions of the act as to physical fitness and paying the required fee, "shall be issued a certificate of registration as a registered cosmetologist" prescribes a mandatory duty, and the board of examiners has no discretionary power to refuse to issue the certificate in such instance, and therefore a complaint in suit for *mandamus* alleging full compliance with the provisions of the statute in this respect and the refusal of the board to issue the certificate to plaintiff, is not demurrable. *Poole v. Board of Examiners*, 199.

Where a zoning ordinance provides that any nonconforming use existing at the time of its passage may be continued, the duty of the municipal tax collector to issue a license to a nonconforming business existing at the time of the passage of the ordinance is purely ministerial and not discretionary or *quasi*-judicial, and *mandamus* will lie to compel the performance of such duty. *Ornoff v. Durham*, 457.

§ 2b. Discretionary Duty.

Discretionary powers may not be controlled by *mandamus*. *Poole v. Board of Examiners*, 199.

§ 2c. To Compel Payment of Claim Against County, City, or Other Municipal Corporation.

In order to be entitled to *mandamus* to compel a municipal corporation, governmental agency or public officer to pay a claim, plaintiff must allege and prove that there are funds available with which to pay the claim. *Champion v. Board of Health*, 96.

Mandamus to compel payment of claim is substitute for execution, and therefore writ will not lie unless execution against individual would issue. *Ibid.*

In this suit for *mandamus* to compel the county board of education to pay an award rendered against it by the Industrial Commission, allegations disclosing that the county board of health operated on funds derived from the county and the State Board of Health, and that it had failed to include in its budget funds for the payment of the award, *are held* to negate the existence of funds available to the county board of health with which to pay the award, and therefore the granting of a writ of *mandamus* directing it to pay the award must be reversed. *Ibid.*

§ 2e. Adequate Remedy at Law.

Where a zoning ordinance provides that any nonconforming use existing at the time of its passage may be continued, the municipal board of adjustment has no jurisdiction over businesses coming within the proviso, and therefore when a person claiming to come within the proviso is denied license, the contention of the city that he cannot maintain suit for *mandamus* because of the existence of an adequate remedy at law by *certiorari* to the board of adjustment, is untenable. *Ornoff v. Durham*, 457.

MASTER AND SERVANT.

I. The Relationship
1. Creation and Existence. Pleasants v. Barnes, 173.
2. Contracts of Employment. Coley v. R. R., 66.

III. Employers Liability for Injuries to Employee
14a. Tools, Machinery, and Appliances. Pleasants v. Barnes, 173.
15. Methods of Work, Rules and Orders. Pleasants v. Barnes, 173.
17. Assumption of Risk. Pleasants v. Barnes, 173.
18. Negligence of Fellow Servant. Pleasants v. Barnes, 173.

IV. Liability for Injuries to Third Persons
21c. Nature and Extent of Master's Liability. Pinnix v. Griffin, 348.

V. Federal Employers' Liability Act
27. Negligence of Railroad. McCrowell v. R. R., 366; Brewer v. R. R., 453.
28. Assumption of Risk. McCrowell v. R. R., 366.
29. Contributory Negligence of Employee. McCrowell v. R. R., 366.

VII. Workmen's Compensation Act
39c. Application to Injuries Received Outside State. Mallard v. Bohannon, 227.
53c. Enforcing Payment of Award. Champion v. Board of Health, 96.

§ 1. The Relationship.

Plaintiff was a sharecropper on defendants' farm. The agreement between them made no provision in regard to plaintiff helping in pulling stumps or in doing extra work on the farm, but in response to defendants' request, plaintiff aided in pulling stumps from a field on the farm. *Held:* Plaintiff's work in helping to pull the stumps was incidental to the contract of renting, and in regard thereto the relationship between the parties was that of landlord and tenant and not that of master and servant. *Pleasants v. Barnes*, 173.

§ 2. Contracts of Employment.

Employees of a shop may sue to enjoin an arbitrary or fraudulent modification or delimitation of a collective bargaining agreement made for their benefit by and between the employer and the duly authorized representatives of their craft or class. *Coley v. R. R.*, 66.

The Brotherhood Railway Carmen of America, certified as the duly authorized representative of a craft or class of carmen, helpers and apprentices, has the power, by agreement with the Railroad Company, to create seniority rights for the employees it represents, and, by the same token, to modify these rights in good faith in the interest of the larger good, such agreements being within the scope of collective bargaining. *Ibid.*

Evidence *held* insufficient to show willfullness or maliciousness on part of bargaining agency in failing to act on employees' protest to supplemental agreement delimiting seniority rights. *Ibid.*

§ 14a. Tools, Machinery, and Appliances.

Plaintiff was engaged in helping pull stumps with a tractor and chain. The chain had no hook, but the stumps were pulled by wrapping the chain around the stump several times and locking the links by tightening the chain with the tractor while plaintiff held the other end of the chain. *Held:* In order to predicate liability on the part of the master in failing to provide a chain with a hook, plaintiff must show that chains with such hooks were in general and approved use in performing such work. *Pleasants v. Barnes*, 173.

§ 15. Methods of Work, Sufficient Help, Rules and Orders.

In order to hold the master liable for injuries to a servant on the ground that the master failed to provide a sufficient number of employees to do the work, the injured employee must show that the insufficiency of help was a proximate cause of the injury. *Pleasants v. Barnes*, 173.

§ 17. Assumption of Risk in Actions at Common Law.

Plaintiff was engaged in helping to pull stumps with a tractor and chain. Plaintiff's evidence disclosed that he objected to doing the work without more

help and without a hook on the chain, but that he continued to work without any promise by defendants to repair the chain or furnish more help. *Held:* The relationship between the parties was not such as to obligate plaintiff to continue to work in the face of known danger, and therefore plaintiff assumed the risk incident thereto. *Pleasants v. Barnes*, 173.

§ 18. Negligence of Fellow Servant.

Ordinarily, a master is not liable for an injury to a servant attributable solely to the negligence of a fellow servant provided the master has exercised reasonable care in selecting servants who are competent and fit for the work in which they are engaged. *Pleasants v. Barnes*, 173.

The presumption is that the master has used due care in selecting his servants, and the burden is upon an employee injured by the negligence of a fellow servant to show by the greater weight of the evidence that the fellow servant was incompetent and that the master employed or retained the fellow servant after knowledge, actual or constructive, of his incompetency. *Ibid.*

Plaintiff was helping pull stumps with a tractor and chain. The evidence *is held* to disclose that plaintiff's injury was the result of negligence of his fellow servant, the tractor operator. *Ibid.*

§ 21c. Nature and Extent of Master's Liability of Negligence of Servant.

Damages may not be recovered against master in amount larger than damages theretofore awarded by jury against the servant. *Pinnix v. Griffin*, 348.

§ 27. Negligence of Railroad Employer.

A rule of a railroad company that when cars are pushed by an engine a trainman must be stationed on the front of the leading car, except when shifting or making up trains in the yards, which exception should not apply to extended movements in the yards, *is held* one for the protection of employees working in the yards. *McCrowell v. R. R.*, 366.

Whether a safety rule regulating operation of trains had been abrogated, to the knowledge of plaintiff, in the type of train movement causing the injury in suit, *held* for the jury under the evidence. *Ibid.*

In this action under the Federal Employer's Liability Act, evidence of negligence on the part of defendant *held* sufficient. *Ibid.*

Testimony of plaintiff that he saw paint on the bottom of his shoe some four months after the accident, and testimony of a witness that soon after the accident he saw paint on the heel of plaintiff's shoe, without evidence as to the condition of the shoe before the accident or evidence that care was taken to keep the shoe in the same condition it was in at the time of the accident, is no evidence that the platform or step on which plaintiff was standing at the time he slipped and fell to his injury had wet paint on it or any other foreign substance, and fails to sustain plaintiff's allegation, in his action under the Federal Employer's Liability Act, that defendant was negligent in permitting the step or platform on which plaintiff was required to work in the course of his duties in interstate commerce, to become covered with wet paint, dust or other substance. *Brewer v. R. R.*, 453.

In this action under the Federal Employer's Liability Act, plaintiff's evidence tended to show that the brake used was approved and in general use and that in its operation it would turn to the left upon a slight pull. Plaintiff testified that when he slipped and fell from the brake step he caught the brake wheel, which turned to the left and thus failed to provide him with a stationary grip to prevent his fall. *Held:* Plaintiff's evidence fails to support his allegation

that the brake in question was defective and is no evidence of negligence on the part of the employer in this respect. *Ibid.*

§ 28. Assumption of Risk Under Federal Employer's Liability Act.

A railroad employee injured while engaged in interstate commerce prior to the 1939 amendment to the Federal Employer's Liability Act, which abrogated the doctrine of assumption of risk as applied to a fellow servant, is entitled, at least, to the application of the doctrine of assumption of risk as interpreted at the time of his injury. *McCrowell v. R. R.*, 366.

Prior to the 1939 amendment to the Federal Employer's Liability Act, the doctrine of assumption of risk was not affected by whether the injury resulted from the negligence of a fellow servant or not, the general rule that an employee assumes only the usual or ordinary risks, and extraordinary risks only when he knows or has reasonable opportunity to know and appreciate them, being applicable, so that an employee did not assume cases of unusual or instant negligence on the part of a fellow employee. *Ibid.*

In this action under the Federal Employer's Liability Act to recover for injuries sustained prior to the effective date of the 1939 amendment, plaintiff relied upon the violation by a fellow employee of a rule requiring a trainman to be placed on the front of the leading car when cars were pushed by an engine. *Held:* Plaintiff employee cannot be held to have assumed the risk of the violation of the safety rule by his fellow employees. *Ibid.*

§ 29. Contributory Negligence of Employee in Actions Under Federal Employer's Liability Act.

Under the Federal Employer's Liability Act, contributory negligence does not bar recovery, but is to be taken into account on the *quantum* of damages. *McCrowell v. R. R.*, 366.

The duty of the court, to give peremptory instructions on the issue of contributory negligence when but a single inference can be drawn from the evidence by reasonable minds, applies to an action brought under the Federal Employer's Liability Act. *Ibid.*

Evidence *held* to disclose contributory negligence on part of employee struck by train in freight yard during daytime. *Ibid.*

In an action under the Federal Employer's Liability Act, an instruction to the effect that the jury should consider contributory negligence only upon the question of *quantum* of damages, so that if plaintiff and defendant were equally guilty of negligence proximately causing the injury, the award of damages should be reduced one-half, while if plaintiff were guilty of a greater degree of negligence, the *quantum* of damages should be reduced more than one-half, and conversely, that if defendant were guilty of a greater degree of negligence the damages should be diminished less than one-half, *is held* without error. *Ibid.*

§ 39c. Application of Compensation Act to Injuries Received Outside State.

When the contract of employment is for services to be rendered exclusively outside this State and such services in fact are performed in their entirety outside its borders, our Workmen's Compensation Act has no application. Ch. 120, Public Laws 1929, as amended. *Mallard v. Bohannon*, 227.

§ 53c. Enforcing Payment of Award.

The procedure for the enforcement of an award of the Industrial Commission when no appeal is taken therefrom is by filing a certified copy of the award in the Superior Court, whereupon said court shall render judgment in

MASTER AND SERVANT—*Continued.*

accordance therewith and notify the parties. Sec. 61 of the Compensation Act. *Champion v. Board of Health*, 96.

Mandamus to compel a municipal corporation, governmental agency or public officer to pay a claim is equivalent to execution, and therefore a suit to compel a county board of health to pay an award rendered against it by the Industrial Commission from which no appeal was taken will not lie until judgment on the award has been rendered by the Superior Court in accordance with the procedure outlined by the Compensation Act. *Ibid.*

MONEY RECEIVED.

§ 1. Nature and Essentials of Cause of Action.

The courts of South Carolina recognize the right of equitable relief to a party who has suffered injury or loss by reason of mutual mistake of fact. *Frederick v. Ins. Co.*, 409.

Complaint *held* to allege cause of action in favor of executrix against creditor who was paid claim out of moneys which parties thought belonged to estate, but which executrix had to personally refund to rightful owner. *Ibid.*

MORTGAGES.

§ 2a. Equitable Mortgages.

Where a will directs that lands be sold and the proceeds be divided among named beneficiaries, and a beneficiary mortgages his interest prior to the sale by the executor, the mortgage is an equitable assignment to the extent of the indebtedness secured thereby of the mortgagor's share in the proceeds of sale, and this result is unaffected by the purchase of the land by the mortgagee at the executor's sale. *King v. Lewis*, 315.

§ 25. Acquisition of Outstanding Title by Mortgagee.

Ordinarily, the acquisition by the mortgagee of an outstanding title, by purchase at a tax sale or at the foreclosure of a prior lien or otherwise, will be deemed for the benefit of himself and mortgagor, and the mortgagor will be permitted to redeem upon payment of the total of the debts. *King v. Lewis*, 315.

Where a will directs that the land be sold and the proceeds of sale divided among the beneficiaries, and a beneficiary mortgages his interest prior to the sale by the executor, and the mortgagee purchases at the executor's sale, the mortgagor cannot contend that as to his share of the land the relationship of mortgagor and mortgagee continues to exist, since the executor's sale divests the beneficiaries of all interest in the land, legal or equitable, upon which the right of redemption can be predicated. *Ibid.*

§ 30f. Agreements to Delay Foreclosure or Permit Mortgagors to Reinstate Loan.

Allegations that consent judgment of foreclosure was entered upon the *cestui's* agreement not to enforce the judgment until a specified date and to reinstate the loan upon payment of all delinquencies by that date, that plaintiff trustors made proper tender within the time specified, and that defendant *cestui* breached the agreement and had the lands sold under the consent judgment of foreclosure, *is held* to state a cause of action for breach of contract, and the granting of defendant's demurrer on the ground that the action was an attack of the consent judgment for intrinsic fraud by independent action is error. *Hawkins v. Land Bank*, 73.

MORTGAGES—*Continued.*

§ 24. Transfer of Equity of Redemption to Mortgagee or Cestui.

An action by the heirs of the mortgagors to set aside a conveyance of the equity of redemption by the mortgagors to the mortgagee is an action based upon fraud, and the fact that upon the introduction of the deed from the mortgagors to the mortgagee the law presumes fraud and casts upon the mortgagee the burden of proving the *bona fides* of the transaction, does not affect the character of the action as one grounded upon fraud. *Massengill v. Oliver*, 132.

§ 35a. Right of Mortgagee to Bid in Property.

A mortgagee cannot purchase at his own sale either directly or indirectly. *Harris v. Hilliard*, 329.

§ 37. Disposition of Proceeds of Sale.

Trustor made part payment on one of the notes secured by the deed of trust, and an action to foreclose the deed of trust was instituted within ten years thereafter. *Held:* Although an action on the note not credited with part payment was barred, the debt evidenced thereby was not destroyed, and the proceeds of sale may be lawfully applied to the entire balance of the debt secured by the deed of trust, including that evidenced by the barred note. *Demai v. Tart*, 106.

MUNICIPAL CORPORATIONS.

§ 2. Creation.

Under the provisions of ch. 78, Public Laws 1941, which amended ch. 456, Public Laws 1935, as amended, publication of notice is not required for the creation of a rural housing authority, and a rural housing authority duly created thereunder is a municipal corporation created for a public purpose. *Mallard v. Housing Authority*, 334.

§ 14. Defects or Obstructions in Sidewalks.

This action was instituted by a pedestrian who, while walking on crutches, was injured when one of his crutches went into a hole in the grassy strip between the sidewalk and the street, causing him to fall. There was evidence that the hole was 3 or 4 inches in diameter, partially filled with leaves and trash so that it was not observable. *Held:* The municipality's motion to nonsuit was properly granted. *Pace v. Charlotte*, 245.

§ 28. Rights of Public and Adjacent Property Owner in Streets.

The owner of property abutting a street has, in addition to the right common with the general public to the use of the street, the right of access to and from his property, which constitutes an easement and property right peculiar to himself, and he may recover compensation for closing of one end of street so that his property is left in *cul-de-sac*, but may not recover for mere inconvenience in making access more circuitous. *Sanders v. Smithfield*, 166.

§ 30. Power to Make Improvements and Limitations Thereon.

Ch. 251, Private Laws 1911, amending the charter of the city of Charlotte by providing that assessments for public improvements made under the act should not exceed the value of special benefits accruing to the property assessed or 20 per cent of the assessed valuation of the property, *held* not repealed by ch. 56, Public Laws 1915, granting municipalities power to make public improvements and providing the machinery therefor. *Charlotte v. Kavanaugh*, 259.

Ch. 394, Private Laws 1909, provided amendments to the charter of the city of Charlotte if ratified by the voters of the city. Among the amendments was

MUNICIPAL CORPORATIONS—*Continued.*

a provision that assessments for public improvements should not exceed the value of the special benefits accruing to the property or 20 per cent of its assessed valuation. This act never became a part of the charter because it was not ratified. The charter was later amended by ch. 251, Private Laws 1911, which contained identical limitations on assessments. Ch. 135, Private Laws 1923, purported to amend the Act of 1909 by striking out the limitation of assessments to 20 per cent of the value of the property assessed. *Held:* The Act of 1923 does not have the effect of amending the Act of 1911, but is a nullity, since it purports to amend an act which was never in force. *Ibid.*

Special act limiting assessments for improvements made thereunder *held* not to apply to improvements made pursuant to general law. *Ibid.*

§ 34. Enforcement of Liens and Limitations.

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. C. S., 420. *Charlotte v. Kavanaugh*, 259.

Liens for public improvements are distinguishable from taxes, since they are levied only against the property improved to defray the cost of the improvements while taxes are levied on all persons and property within the taxing unit to defray the governmental expenses of the unit, and since liens for improvements are *in rem* and can be enforced only against the specific property assessed, while taxes can be collected out of the personal property of the taxpayer. *Ibid.*

An action to enforce the lien for public improvements, even though instituted under C. S., 7990, is barred after ten years from default in the payment of the assessments, or, if the assessments are payable in installments, each installment is barred after ten years from default in payment of same unless the time for payment has been extended as provided by law, since the statute, prescribing the limitation, ch. 331, Public Laws 1929, expressly names municipalities. *Ibid.*

§ 37. Zoning Ordinances.

Under the municipal zoning ordinance in question, which provided that any nonconforming uses existing at the time of the passage of the ordinance might be continued, *it is held*, the municipal board of adjustment has no power to regulate nonconforming uses which existed at the time of the passage of the ordinance and therefore the provision of the ordinance granting the right of review by *certiorari* to the board of adjustment has no application to businesses falling within the proviso. *Ornoff v. Durham*, 457.

Where a zoning ordinance provides that any nonconforming use existing at the time of its passage may be continued, the duty of the municipal tax collector to issue a license to a nonconforming business existing at the time of the passage of the ordinance is purely ministerial and not discretionary or *quasi*-judicial, and *mandamus* will lie to compel the performance of such duty. *Ibid.*

Where a municipal zoning ordinance provides that nonconforming uses existing at the time of the passage of the ordinance may be continued, and plaintiff, in a suit for *mandamus*, alleges that he and his predecessors were operating a junk business within the zone prior to the passage of the ordinance, and this allegation is denied in the municipality's answer, an issue of fact determinative of the rights of the parties is raised for the consideration of a jury. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

§ 42. Levy and Collection of Taxes. (Constitutional requirements and restrictions see Taxation.)

When the Commissioner of Revenue properly uses the 1930 United States Census figures in ascertaining the license tax of a business in accordance with the population of the municipality in which the business is operated, the municipality is limited to a license tax not in excess of that levied by the State, and when the city levies a tax in excess of that amount, based upon its erroneous contention that the population as shown by the 1940 Census should be used, the taxpayer may recover the excess. *Clark v. Greenville*, 255.

§ 46. Conditions Precedent to Actions Against Municipalities.

A provision of a municipal charter requiring that the question of compensation for property taken in connection with street improvement should be referred to arbitrators, with right of appeal to the Superior Court, sets forth an exclusive remedy, and precludes the owners of property abutting a street from maintaining an action in the Superior Court to recover damages to the property resulting from the closing of the street at a railroad grade crossing upon the theory that closing the street constituted a "taking" of an easement appurtenant to the property. *Sanders v. Smithfield*, 166.

NEGLIGENCE.

§ 1a. Definition of Negligence.

Negligence is doing other than, or failing to do, what a reasonably prudent person, similarly situated, would have done. *Threatt v. Express Agency*, 211.

§ 4d. Liability of Owner or Proprietor to Invitees.

Plaintiff was carrying two five-gallon cans of milk which he had sold defendant along a passageway in defendant's milk plant when one of the cans hit a churn, causing plaintiff to fall to his injury. Plaintiff's evidence was to the effect that the churn was about 2½ feet high and 2 feet in diameter, and that it was sitting about 14 inches in the passageway. Plaintiff testified there was plenty of light in the passageway. *Held:* Even conceding negligence, plaintiff's evidence discloses contributory negligence barring recovery as a matter of law. *Porter v. Niven*, 220.

§ 7. Intervening Negligence.

The fact that the injury would not have occurred except for the negligent act of a responsible third party does not in itself exculpate defendant from liability, but it is necessary that there be a total want of causal connection between defendant's negligence and the injury, or that the intervening negligence of the third party and the resultant injury could not have been reasonably anticipated by defendant. *Henderson v. Powell*, 239.

§ 17b. Questions of Law and of Fact.

Negligence, on the part of plaintiff or defendant, is a mixed question of law and fact, and when the factual element is determined by admission, or when only a single inference can be drawn from the evidence, taken in the light most favorable to plaintiff, the question is one of law for the court. *McCrowell v. R. R.*, 366.

§ 18. Competency and Relevancy of Evidence of Negligence.

In an action to recover for a crossing accident, the fact that the railroad company on the day after the accident moved freight cars which had been standing at the crossing at the time of the accident, is incompetent to show either negligence or an admission of negligence, since occurrences after the

NEGLIGENCE—*Continued.*

accident which do not aggravate plaintiff's injuries are not germane. *Parrish v. R. R.*, 292.

In an action to recover for a crossing accident, the fact that after the accident, defendant railroad company disciplined certain of its employees who were operating the train is incompetent to show either negligence or an admission of negligence. *Ibid.*

§ 19b. Nonsuit on Ground of Contributory Negligence.

Under the common law when the existence of contributory negligence on the part of plaintiff is the only inference which can be drawn from the evidence by reasonable minds, the court may grant defendant's motion to nonsuit. *McCrowell v. R. R.*, 366.

NUISANCES.

§ 6. Acts Constituting Public Nuisances.

The authority of the General Assembly, in the exercise of the police power of the State, to define public nuisances is not limited to those which are predicated upon or facilitate the commission of open crime, but it may declare anything to be a nuisance which tends, in reasonable relationship, to adversely affect the public morals, health, safety, thift or economy. *S. v. Brown*, 301.

The maintenance of an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers are transmitted to race tracks outside the State, and through which wagers are paid off to successful bettors, constitutes a public nuisance. C. S., 3180. *Ibid.*

The special verdict returned by the jury established that defendants maintained an establishment with ticker tape and other paraphernalia to facilitate the making of wagers on horse races, and in which offers to lay wagers were transmitted to race tracks outside the State, and through which wagers were paid off to successful bettors. *Held:* The fact that the wagering contracts were completed outside the State does not prevent the maintenance of such establishment from constituting a public nuisance proscribed by our laws, since the nuisance was maintained in this State notwithstanding that the formal "acceptance" of the bets may have been made at a race track in another State. *Ibid.*

The fact that a defendant has a license under a municipal ordinance for the use of ticker service or other devices for receiving and imparting information concerning games and sporting events, is immaterial in a prosecution for maintaining a nuisance in facilitating betting on horse races. *Ibid.*

PARENT AND CHILD.

§ 5. Support and Maintenance of Child. (Jurisdiction of court to require maintenance in divorce action see Divorce.)

The father is primarily liable for the support of his child both before and after divorce, even where the custody of the child is awarded to the mother. *Story v. Story*, 114.

PARTITION.

§ 1a. Right to Partition.

Tenants in common in land subject to a life estate are entitled to partition prior to the termination of the life estate, C. S., 3234, but they may not disturb the possession of the life tenant, or sell her interest except by her consent, C. S., 3235, the life tenant not being a tenant in common. *Priddy & Co. v. Sanderford*, 422.

PARTITION—*Continued.*

Where a tenant in common in lands subject to a life estate mortgages his interest, the purchaser at the foreclosure sale of the mortgage may maintain a proceeding for partition. *Ibid.*

§ 1c. Sale for Partition.

In order to support decree of sale for partition the court must find the facts required by C. S., 3233. *Priddy & Co. v. Sanderford*, 422.

§ 5. Attack of Decrees.

The petition in this partition proceeding alleged that the petitioners and respondents, some eighty-five in number, are tenants in common as heirs at law of the original owners of the land who died intestate. Some of respondents did not file answer. Judgment was entered to the effect that only a few of the parties had any interest in the land and that other parties, including respondents who failed to answer, had no interest therein. *Held:* The judgment was irregular and may be set aside upon motion aptly made by respondents who failed to answer, the interest of such respondents as set out in the petition being a sufficient showing of a meritorious defense. *Simms v. Sampson*, 379.

Purchaser at sale is necessary party upon attack of decree. *Ibid.*

But when purchaser is attorney of record he may not maintain that he was innocent purchaser for value. *Ibid.*

PLEADINGS.

§ 10. Counterclaims, Set-Offs, and Cross Complaints.

Contention that plaintiff maintained and prosecuted action in bad faith to harass defendant cannot be set up as a counterclaim in the action. *Finance Corp. v. Lane*, 189.

While the statute permitting the filing of counterclaims must be liberally construed, its reasonable restrictions must nevertheless be observed in the interest of orderly judicial investigation. C. S., 521. *Ibid.*

A counterclaim in tort must arise out of the transaction set forth in the complaint or be connected with the subject of action therein alleged, which imports agreement between the subject matter of the action and the counterclaim, and not mere historical sequence. *Ibid.*

§ 15. Demurrer for Failure of Complaint to State Cause.

A demurrer will be sustained if the complaint fails to allege each material ultimate fact comprising plaintiff's cause of action. *Ledwell v. Proctor*, 161.

§ 16a. Demurrer for Misjoinder of Parties and Causes.

The sustaining of a demurrer on the ground of misjoinder of parties and causes requires a dismissal of the action. *Wingler v. Miller*, 137.

Demurrer to cross action for misjoinder of parties and causes should have been sustained in this case and the cross action dismissed. *Ibid.*

A complaint alleging that plaintiff as executrix paid a claim against the estate out of funds which she and claimant mistakenly thought were a part of the assets of the estate, that in a suit by the party rightly entitled to the funds judgment was recovered and plaintiff individually was required to refund said moneys, the estate being insolvent, and that plaintiff is entitled to recover of the claimant the amount paid to him under the mutual mistake of fact, *is held* to state but one cause of action, and defendant's demurrer thereto on the ground of misjoinder of causes is properly overruled. *Frederick v. Ins. Co.*, 409.

PLEADINGS—*Continued.*

§ 16b. Demurrer for Want of Capacity of Plaintiff to Sue.

Where there is only one party, a demurrer for defect of parties can raise only the question of the plaintiff's right to sue in the capacity in which she states her cause of action. *Frederick v. Ins. Co.*, 409.

§ 17. Statement of Grounds, Form and Requisites.

A demurrer is properly overruled on the ground that the complaint fails to state a cause of action when the demurrer fails to point out any defect in the complaint which would entitle defendant to a dismissal. *Ledwell v. Proctor*, 161.

§ 20. Office and Effect of Demurrer.

A demurrer tests the sufficiency of the complaint to state a cause of action entitling plaintiff to any relief, and not its sufficiency to state a particular cause of action. *Hawkins v. Land Bank*, 73.

Upon demurrer a pleading will be liberally construed. *Ibid.*

In determining the sufficiency of the complaint as against a demurrer, the facts alleged will be taken as true. *Poole v. Board of Examiners*, 199.

A demurrer admits, for the purpose of testing the sufficiency of the complaint, the facts alleged therein and relevant inferences of fact necessarily deducible therefrom. *Mallard v. Housing Authority*, 334.

While upon demurrer the inquiry as to the sufficiency of the complaint is confined to the allegations contained therein, the court may nevertheless consider facts inferable from the facts alleged of which the court may take judicial notice. *Ibid.*

Upon demurrer *ore tenus* an objection to the refusal of the court to permit defendant to introduce evidence cannot be sustained, since only matters presented in the pleadings will be considered on demurrer. *Ornoff v. Durham*, 457.

§ 22. Amendment by Trial Court.

Where the trial court grants defendants' motion to strike certain allegations of the complaint, it may properly give plaintiffs permission to replead. *Hill v. Stansbury*, 339.

§ 26a. Variance Between Allegation and Proof.

Proof without allegation is as unavailing as allegation without proof, and the two must correspond, and when proof materially departs from allegation there can be no recovery without an amendment. *Whichard v. Lipe*, 53.

§ 29. Motions to Strike. (Right to appeal from denial of motion see Appeal and Error § 2.)

A motion to strike certain allegations from the complaint on the ground of irrelevancy and redundancy, made before filing answer or demurrer or obtaining an extension of time to plead, is made as a matter of right and is not addressed to the discretion of the court. C. S., 537. *Parrish v. R. R.*, 292.

Where a motion to strike is made as a matter of right, movant is entitled to have any irrelevant and redundant matter appearing in the allegations objected to stricken. *Ibid.*

The test in determining the relevancy of an allegation is whether it fulfills its purpose of stating a fact which, considered with the other facts alleged, tends, as an element thereof, to express the cause of action upon which relief is sought, while the purpose of evidence is to prove competent allegations, and therefore the rules concerning the relevancy of evidence are not pertinent in determining the relevancy of allegation except by way of analogy. *Ibid.*

PLEADINGS—*Continued.*

A motion to strike under C. S., 537, does not raise the question of the sufficiency of the complaint as a whole to state a cause of action, but such question can be raised only by demurrer. C. S., 511 (6). *Ibid.*

Redundancy in a pleadings is the inclusion therein of anything unnecessary to "a plain and concise statement of the facts constituting a cause of action," C. S., 506 (2), such as unnecessary repetition, and the detailed statement of evidential matters. *Ibid.*

In an action for negligence, the test in determining a motion to strike certain paragraphs or subdivisions of paragraphs from the complaint on the ground of irrelevancy and redundancy, is not whether the allegations objected to, standing alone, are sufficient to set forth negligence, but whether, when considered as parts of the whole complaint, they allege facts constituting elements of the cause of action. *Ibid.*

In an action to recover for an accident at a grade crossing, defendant railroad company's motion to strike allegations as to the construction and condition of the crossing on the ground of irrelevancy and redundancy is properly refused. *Ibid.*

In an action to recover for a crossing accident, defendant railroad company's motion to strike allegation of obstructions cutting off the view of approaching trains is properly denied, the allegation being neither irrelevant nor redundant. *Ibid.*

In an action to recover for a crossing accident the fact that allegation setting forth the existence of obstructions, making the crossing a "blind crossing," is repeated in a subsequent paragraph setting forth the failure of defendant to warn users of the blind crossing of the approach of trains, although repetitive, is not sufficiently serious to constitute unnecessary repetition or redundancy, and defendant's motion to strike the prior paragraph is properly refused. *Ibid.*

In an action to recover for a crossing accident, allegation that on the day after the accident the railroad company moved cars which had been standing at the crossing at the time of the accident, should be stricken out upon defendant's motion, since the allegation is irrelevant and is also redundant as being an allegation of evidence. *Ibid.*

In an action to recover for a crossing accident, allegation that after the accident defendant railroad company disciplined certain of its employees who were operating the train should be stricken upon motion of the defendant, since the allegation is irrelevant and is also redundant as being an allegation of evidence. *Ibid.*

In an action to recover for a crossing accident an allegation of the complaint alleging that after the accident defendant permitted plaintiff to lie on its roadbed, unconscious, for nearly an hour, although it had a locomotive and train upon which it could have removed plaintiff to a near-by hospital maintained by it, is relevant upon the issue of damages if plaintiff should establish actionable negligence, and therefore defendant's motion to strike the allegation on the ground of irrelevancy and redundancy is properly denied. *Ibid.*

A motion to strike certain portions of the complaint on the ground of irrelevancy and redundancy, when made before answer or demurrer or extension of time to answer, is not addressed to the discretion of the court but movant has the right to make the motion under the statute and the right to have the motion considered upon its merits and the portions of the complaint objected to stricken if they are irrelevant or redundant. C. S., 537. *Hill v. Stansbury*, 339.

These actions were instituted by taxpayers against certain county officers to recover sums allegedly received by them as salary and expenses to which they

PLEADINGS—*Continued.*

were not entitled, and against the county and its commissioners to restrain allegedly unlawful expenditure of public funds. *Held:* Defendants' motion to strike certain allegations from the complaint were properly denied, certain of the allegations not being merely vituperative in describing defendants' conduct, but being necessary to a complete statement of the cause of action, and as to other allegations the defendants were not materially prejudiced thereby and to strike same might unduly hamper plaintiffs in the development of the case. *Ibid.*

Where defendants file answer denying material allegations of the complaint, the court is without authority, on plaintiffs' motion to strike out the answer as sham and irrelevant, C. S., 510, to hear evidence, find facts *contra* the allegations and denials of the answer, and thereupon strike said allegations and denials and grant plaintiffs' motion for judgment on the pleadings. *Broocks v. Muirhead*, 466.

PRINCIPAL AND AGENT.

§ 7. Evidence and Proof of Agency.

Testimony of a declaration of an automobile salesman that at the time of the accident he was driving the corporate defendant's car to demonstrate it to a prospective purchaser, which declaration was not made at the time of the injury or near enough to the transaction to constitute a part of the *res gestæ is held* incompetent and its admission constitutes prejudicial error. *Caulder v. Motor Sales*, 437.

PROCESS.

§ 3. Defective Process and Amendment.

An officer does not have the right to amend his return to a summons after the return is filed, but the court, under its discretionary power, in meritorious cases, may grant him leave to do so. *Lee v. Hoff*, 233.

This action was instituted against husband and wife on a note signed by them as makers. The names of defendants in the summons and return were correct except for the middle initial. *Held:* Upon the hearing of defendants' motion to dismiss for want of jurisdiction, the court had discretionary power to permit the officer to testify that in fact the summons was served on defendants, and to permit plaintiff's motion to amend the summons and to correct the officer's return to show the correct names of defendants. C. S., 547. *Ibid.*

When amendment of process does not substantially change nature of action and does not affect rights of third persons, the amendment relates back to commencement of action. *Ibid.*

§ 5. Service by Publication.

In service of process by publication, the process, or in a suit to foreclose the lien for taxes under C. S., 7990, the notice must correctly name or describe the parties defendant served by the publication, C. S., 484 (7), in order for the court to acquire jurisdiction. *Comrs. of Washington v. Gaines*, 324.

§ 8. Service on Nonresident Auto Owners.

The findings of fact by the court supported by the evidence tended to show that a deputy sheriff of the State of South Carolina was traveling through this State to return a prisoner to that State in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner. *Held:* The deputy sheriff was without authority to designate another

PROCESS—*Continued.*

to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of Public Laws 1929, ch. 75, and therefore service of process on the sheriff by service on the Commissioner of Revenue under the provisions of the statute is void. *Blake v. Allen*, 445.

§ 15. Abuse of Process.

An action for abuse of process is founded upon the use of valid, legal process for an ulterior purpose not proper in the regular prosecution of the proceeding. *Finance Corp. v. Lane*, 189.

Action for abuse of process will not lie when process is used for its regular and legitimate purpose. *Ibid.*

Allegations that plaintiff instituted and prosecuted action and ancillary remedies of claim and delivery and receivership, in bad faith, resulting in injury to defendant in large sum, does not state counterclaim for abuse of process. *Ibid.*

PROPERTY.

§ 2. Contractual Restrictions Upon Use.

Covenants restricting the use of property will be upheld when they are reasonable, are not contrary to public policy or in restraint of trade, and are not for the purpose of creating a monopoly. *Sheets v. Dillon*, 426.

PUBLIC OFFICERS.

§ 2. Appointment and Election. (General elections see Elections.)

Majority of members of electing body constitutes a quorum, and majority of quorum has power to act. *Hill v. Ponder*, 58.

§ 4c. Effect of Public Officer Accepting Second Office.

A public officer who accepts, qualifies and discharges the duties of another public office is thereafter disqualified to act or discharge any of the duties of the first public office. *Hill v. Ponder*, 58.

QUO WARRANTO.

§ 2. Quo Warranto Proceedings.

In an action in the nature of *quo warranto* to try title to a public office, a complaint which fails to allege that the returns of the precinct officials had been canvassed and the result of the election judicially determined by the board of elections and that it had issued its certificate, is fatally defective and a demurrer *ore tenus* will be allowed in the Supreme Court on appeal, since resort may not be had to the courts until after the machinery for the ascertainment of the results of the election has been exhausted. *Ledwell v. Proctor*, 161.

RAILROADS.

§ 6. Speed Restrictions.

A speed of sixty miles per hour on the part of a train traveling through a rural section, nothing else appearing, is not unlawful or negligent. *Jeffries v. Powell*, 415.

§ 7. Maintenance and Condition of Crossings.

A railroad is under duty to maintain public crossings in a safe condition for the use of the traveling public. *Parrish v. R. R.*, 292.

RAILROADS—*Continued.*

While the existence of standing cars, fences, buildings, etc., along the right of way, which obstruct the view of the crossing, is not in itself negligence, yet their existence to the knowledge of the railroad company places the duty upon it to take proper precautions to protect travelers who use the crossing and to warn them of the approach of trains. *Ibid.*

In an action to recover for a crossing accident, the fact that the railroad company on the day after the accident moved freight cars which had been standing at the crossing at the time of the accident, is incompetent to show either negligence or an admission of negligence, since occurrences after the accident which do not aggravate plaintiff's injuries are not germane. *Ibid.*

§ 9. Accidents at Crossings.

Evidence *held* to disclose contributory negligence on part of driver barring recovery by him for crossing accident as matter of law. *McCrimmon v. Powell*, 216.

The driver of a car approaching a railroad grade crossing owes the duty to the passengers in his car to exercise due care under the circumstances, and the railroad company is under like duty, and the duty of each is reciprocal, interrelated, and immediate. *Henderson v. Powell*, 239.

In regard to liability to passengers in car, negligence of railroad company *held* not insulated by negligence of driver. *Ibid.*

Evidence in this case *held* not to disclose contributory negligence as a matter of law on part of passengers in a car in permitting the driver to approach and traverse a grade crossing in a negligent manner with the windows of the car up so as to interfere with hearing the approaching train, and in failing to see the train and advise the driver of its approach. *Ibid.*

In an action to recover for a crossing accident, the fact that after the accident, defendant railroad company disciplined certain of its employees who were operating the train is incompetent to show either negligence or an admission of negligence. *Parrish v. R. R.*, 292.

Evidence disclosing that the driver of a car in approaching a crossing could have seen defendant's train in ample time to have stopped, but drove upon the crossing to his injury without seeing the approaching train *is held* to show contributory negligence on the part of the driver barring recovery by him as a matter of law. *Jeffries v. Powell*, 415.

Evidence *held* to show that negligence of driver was sole proximate cause of crossing accident, and precluded recovery by administratrix of guest. *Ibid.*

§ 11. Accidents at Dead-End Streets.

Evidence *held* to show that negligence on part of driver was proximate cause of accident when car struck embankment at dead-end street, and further that such negligence was imputed to plaintiff's intestate, who was a passenger in the car, since intestate was directing driver. *Dillon v. Winston-Salem*, 512.

RAPE.

§ 3c. Competency and Relevancy of Evidence in Prosecutions for Carnal Knowledge of Female Child Between Ages of 12 and 16.

When prosecutrix testifies that defendant is the father of her child, but upon her own testimony the child could not have been conceived until after her 16th birthday, whether the State is entitled to exhibit the child to the jury in a prosecution of defendant for carnally knowing prosecutrix when she was between the ages of 12 and 16, even for the purpose of corroborating her testi-

RAPE—*Continued.*

mony as to illicit relations with defendant over a long period of time, or to impeach his denial of ever having had illicit relations with her, *quære*. *S. v. Isley*, 213.

§ 3e. Instructions in Prosecutions for Carnal Knowledge of Female Child Between Ages of 12 and 16.

In a prosecution for carnally knowing a female child over the age of 12 and under the age of 16, an instruction specifying the minimum age of 12, but inadvertently failing to specify the maximum age of 16, must be held for reversible error, especially when the State's evidence tends to show a continuance of the illicit relations after prosecutrix passed her 16th birthday, notwithstanding that in other portions of the charge explaining the abstract law, the court gives correct instructions on this aspect of the case. *S. v. Isley*, 213.

§ 4b. Indictment for Carnally Knowing Female Child Under 12.

Intent is not an element of the offense of carnally knowing or abusing a female child under the age of twelve years, C. S., 4204, and a motion to quash an indictment therefor on the ground that it failed to allege "intent" is properly denied. *S. v. Gibson*, 252.

§ 4d. Sufficiency of Evidence and Nonsuit in Prosecution for Carnally Knowing Female Child Under 12.

Evidence of defendant's guilt of carnally knowing a female child under the age of 12 *held* sufficient to be submitted to the jury. *S. v. Gibson*, 252.

RECEIVERS.

§ 13. Actions by Receiver.

Plaintiff, the receiver of a partnership, instituted this action upon allegations that defendant mortgagees foreclosed chattel mortgages executed by the partnership and purchased the partnership property through an agent at their own foreclosure sale. The receiver was authorized and directed by the court to bring the action. *Held:* The action was one which could have been maintained by the partners had a receiver not been appointed, and therefore the receiver can maintain the action without allegation of insolvency of the partnership, since a receiver may be appointed for reasons other than insolvency. C. S., 1208, 1209 (3), 860. *Harris v. Hilliard*, 329.

§ 9. Title and Possession of Property.

Where a receiver has been appointed, the court has power to enter a supplementary order directing that books, checks, check stubs and other papers relating to the business be turned over to the receiver, since, if such order was not included in the original order of receivership, the court has the discretionary power to make such auxiliary order at any time pending the litigation upon allegations warranting its exercise. *Finance Corp. v. Lane*, 189.

REFERENCE.

§ 3. Pleas in Bar.

While ordinarily a plea in bar must be first disposed of before the court can order a compulsory reference, the court has discretionary power in proper instances to order a compulsory reference notwithstanding the plea and determine the plea upon the general hearing. *Finance Corp. v. Lane*, 189.

REFERENCE—*Continued.*

A plea in bar precluding a compulsory reference is one which goes to the right of plaintiff to maintain his action, and a counterclaim sounding in tort to recover an unliquidated amount, which may prevent plaintiff's recovery of the sum demanded or of any sum because of a mere balancing of demands, does not bar plaintiff's right of action itself, and is not a plea in bar. *Ibid.*

Plaintiff instituted this action to obtain approval of the court of his final account as trustee. The administrator of a deceased beneficiary filed answer alleging that plaintiff was a successor trustee appointed by the clerk, and that the appointment was void for want of power in the clerk to make the appointment. *Held:* The answer set up a plea in bar of plaintiff's right to proceed with his action, and therefore it was error for the court to order a compulsory reference prior to the determination of the plea in bar. *Cheshire v. First Presbyterian Church*, 205.

§ 13. Right to Jury Trial Upon Exceptions.

Held: Appellants failed to preserve their right to a jury trial upon their exceptions to the referee's findings. *Brown v. Clement Co.*, 217 N. C., 47.

§ 14. Questions of Law and of Fact.

An exception to the referee's finding that a letter signed by plaintiffs and introduced in evidence constituted an agreement to pay defendant executor for legal services rendered in connection with the management of the estate and to arbitrate the amount to be paid, raises no issue of fact for the determination of the jury, but only a question of law for the court. *Lightner v. Boone*, 78.

§ 20. Taxing of Costs.

Where, upon the trial in the Superior Court upon appeal from the referee, judgment is entered in the Superior Court in favor of plaintiffs, entitling plaintiffs to recover costs in the trial, such recovery does not include compensation of the referee. C. S., 1244 (6). *Cody v. England*, 40.

SCHOOLS.

§ 8. District Boards and Officers.

Ch. 562, Public Laws 1933, abolished special tax and special charter school districts as then constituted, and retained them solely as local administrative units of the State school system. *Bridges v. Charlotte*, 472.

A city constituting a special charter school district prior to the enactment of ch. 562, Public Laws 1933, was stripped of its character as a municipality and its board of school commissioners abolished as an agency of the municipality in the operation of schools within the district, and by operation of the Act the municipality, in the discharge of this function, became an administrative agency of the State school system. *Ibid.*

The establishment of a supplement to State school funds in no wise affects the character of the unit as a State administrative agency. *Ibid.*

§ 9. Duty and Authority to Maintain Schools in General.

The General Assembly is charged with the duty of providing a system of public schools by mandate of Art. IX of the State Constitution, and what is necessary to the maintenance of such system must be given that interpretation which is consonant with reasonable demands of social progress, and is a question within the exclusive province of the Legislature. *Bridges v. Charlotte*, 472.

SCHOOLS—*Continued.*

State Employees Retirement Act has definite relation to efficient operation of schools and is for purpose necessary to maintenance of public school system. *Ibid.*

The Constitution requires that a six months term of public school be maintained as a minimum, and places the duty upon the General Assembly to meet this requirement and confers authority upon it to determine the quality and extent of a system of public schools beyond this minimum which the State is able to provide. *Ibid.*

§ 31. Supplemental Levies.

Although an administrative unit of the State public school system is required by the statute to submit to its voters the question of supplementing State funds to conduct schools of higher standards and longer terms, the provision for a vote is not in deference to Art. VII, sec. 7, and the establishment of such supplement in no wise affects the character of the unit as a State agency for the administration of the public school system. *Bridges v. Charlotte*, 472.

The expression of legislative policy that the Teachers' and State Employees' Retirement Act has a definite relation to the just and efficient administration of the public school system is conclusive, and a tax imposed by a city to raise funds with which to pay its contribution to the Retirement Fund for salaries of teachers paid or supplemented by it, as required by Public Laws 1941, ch. 25, sec. 8 (c), is for a purpose necessary to the maintenance of the public school system within its territory. *Ibid.*

SHERIFFS.

§ 2. Deputies Sheriff.

A deputy sheriff is neither the agent, servant nor employee of the sheriff but is a public officer deputized to perform such ministerial duties as are prescribed and directed by law as the *alter ego* of the sheriff, and in the performance of such duties he does not act under the direction and discretion of the sheriff. *Blake v. Allen*, 445.

Under the maxim *delegatus non potest delegare* a deputy sheriff cannot delegate the duties of his office. *Ibid.*

STATE.

§ 5a. Validity of State Employees' Retirement Act.

The expression of legislative policy that the Teachers' and State Employees' Retirement Act has a definite relation to the just and efficient administration of the public school system is conclusive, and a tax imposed by a city to raise funds with which to pay its contribution to the Retirement Fund for salaries of teachers paid or supplemented by it, as required by Public Laws 1941, ch. 25, sec. 8 (c), is for a purpose necessary to the maintenance of the public school system within its territry. *Bridges v. Charlotte*, 472.

A tax imposed to raise moneys required by law to be paid to the State Employees' Retirement Fund is for a public purpose and the Act provides benefits to thousands of teachers and employees of this State without discrimination, and therefore the tax does not offend Art. V, sec. 3, of the State Constitution. *Ibid.*

Benefits received by State employees under the Retirement Fund are deferred payments of salary for services rendered, and therefore such payments do not offend Art. I, sec. 7, of the State Constitution. *Ibid.*

STATUTES.

§ 5c. Curative Acts.

Curative acts of Legislature cannot revive void instruments. *Cutts v. McGhee*, 465.

§ 7. Effective Date.

Statutes will be given prospective effect only unless a contrary intention is expressly declared or necessarily implied, and therefore when an act amends separate sections of a former statute and stipulates that one of the amendments should be retroactive, the other amendment will be construed to have prospective effect only. *Hospital v. Guilford County*, 308.

§ 8. Construction of Criminal Statutes.

While a criminal statute must be strictly construed, the courts must nevertheless construe it with regard to the evil which it is intended to suppress. *S. v. Brown*, 301.

§ 9. Repeal by Enactment.

Objection on the ground that the warrant charged defendant with the violation of a statute which had been repealed is untenable when it appears that the statute upon which the warrant was drawn had been amended by an act which did not change the language defining the offense but only changed provisions relating to the counties in which the act should be applicable, and that the statute was applicable to the county in which defendant committed the acts proscribed both before and after its amendment. C. S., 4310, as amended by ch. 258, Public Laws 1941. *S. v. Patton*, 117.

When prior act is never in force because not ratified, act purporting to amend it is nullity. *Charlotte v. Kavanaugh*, 259.

§ 10. Repeal by Implication and Construction.

A general statute will not repeal a prior local statute unless it appears on the face of the general statute that such was the intent of the General Assembly, since otherwise the local statute will be construed as an exception to the general statute, and this notwithstanding a general repealing clause in the general statute. *Charlotte v. Kavanaugh*, 259.

SUBROGATION.

§ 1. Nature and Essentials of Right of Action.

Plaintiff alleged that defendant filed a claim against the estate of her testator to recover for loss sustained by defendant upon a fidelity bond executed for testator, that plaintiff, mistakenly thinking that funds in a certain bank deposit belonged to the estate of her testator, paid defendant's claim therefrom, that defendant knew the source of the payment, that there was a mutual mistake of fact in the belief that the said funds belonged to the estate, that thereafter the person rightfully entitled to said funds sued and recovered judgment therefor, that the estate being solvent, plaintiff in her individual capacity was required to restore said funds, and that defendant's claim against the estate would not have been paid except for the alleged mutual mistake of fact, since there were insufficient funds belonging to the estate with which to pay defendant's claim. *Held:* Under the laws of South Carolina, in which the cause of action arose, the complaint states a cause of action for equitable subrogation in favor of plaintiff in her individual capacity, since it alleged that plaintiff paid defendant's claim from funds which the parties mutually thought belonged to the estate, and that plaintiff personally restored the funds to the

SUBROGATION—*Continued.*

person rightfully entitled thereto, and upon the facts alleged plaintiff was not a volunteer but was secondarily liable to the person rightfully entitled to the funds and no injustice will be done to defendant by requiring restitution. *Frederick v. Ins. Co.*, 409.

SUBSCRIPTIONS.

§ 2. Enforcement of Subscriptions.

Defendant's subscription to stock in plaintiff corporation was conditioned upon the subscription by others of a stated number of shares. *Held:* In the absence of evidence that the stated number of shares had been subscribed prior to the institution of the action, or that defendant, at the time he made payments on his subscription, had knowledge of the fact that the specified number of shares had not been subscribed, defendant's motion for judgment as of nonsuit is properly granted. *Building Corp. v. Rodgers*, 204.

TAXATION.

§ 1. Uniform Rule and Discrimination.

Taxes must be imposed in a just and equitable manner and be uniform as to each class of property taxed. *Hospital v. Guilford County*, 308.

Taxes must be levied with equality on all within the class. *Trust Co. v. Maxwell, Comr.*, 528.

§ 4. Necessity for Vote.

The State is not a municipality within the meaning of the Constitution, and since a city or county, in the operation of public schools within its territory, is not a municipality but an administrative agency of the State, such administrative units, in imposing taxes necessary to the maintenance of public schools, is not required to submit the question to a vote, the limitations imposed by Art. VII, sec. 7, being applicable solely to municipalities. *Bridges v. Charlotte*, 472.

Although an administrative unit of the State public school system is required by the statute to submit to its voters the question of supplementing State funds to conduct schools of higher standards and longer terms, the provision for a vote is not in deference to Art. VII, sec. 7, and the establishment of such supplement in no wise affects the character of the unit as a State agency for the administration of the public school sytem. *Ibid.*

Where an administrative unit of the public school system has voted a tax to supplement State funds to maintain schools of higher standards within its territory, it is required to contribute to the State Retirement Fund for teachers whose salaries are paid or supplemented by it, ch. 25, sec. 8 (c), ch. 143, sec. 1, Public Laws 1941, and when the supplementary tax theretofore voted by it is insufficient to provide such contribution, the unit may impose a tax to raise funds for this purpose without submitting the question to a vote. *Ibid.*

The charter provision of a city that the question of supplementing State funds for its public schools must be submitted to a vote, sec. 55 (4), ch. 366, Public-Local Laws 1939, does not require that when the city has assumed the burden of supplementing State funds a tax necessary to provide funds for contributions to the State Retirement Fund for salaries of teachers paid or supplemented by it should be submitted to a vote, the State Retirement Act not being in legal contemplation of the charter provision, and the charter provision being ineffective to prevent a levy required by the subsequent legislative mandate. *Ibid.*

TAXATION—*Continued.*

§ 5. Public Purpose.

A tax imposed by a city in its capacity as an administrative agency of the public school system to raise funds required by law to be paid to the State Employees' Retirement Fund for the salaries of teachers paid or supplemented by it is for a public purpose. *Bridges v. Charlotte*, 472.

§ 18. Inheritance and Estate Taxes.

An inheritance tax is a tax upon the transmission of property from the dead to the living by legacy, devise, or intestate succession, and the tax is not laid upon the property itself but upon the right to acquire it by descent or testamentary gift. *Trust Co. v. Maxwell, Comr.*, 528.

§ 19. Exemption of Property of State and Political Subdivisions from Taxation.

Rural housing authority is municipal corporation created for public purpose, and its property is exempt from taxation. *Mallard v. Housing Authority*, 334.

§ 20. Exemption of Property of Educational, Charitable, and Religious Organizations from Taxation.

Property owned by a church and rented by it for commercial purposes, and the rent used for religious purposes, is not exempt from taxation. Constitution of North Carolina, Art. V, sec. 5, ch. 310, Public Laws 1939. *Sparrow v. Beaufort County*, 222.

Plaintiff hospital instituted suit to recover *ad valorem* taxes for the year 1940, paid by it under protest. On appeal it was held that the hospital was liable for taxes for that year, and final judgment was entered in accordance therewith. Thereafter the hospital, upon the same agreed facts, instituted this suit to recover the same taxes, upon its contention that ch. 125, Public Laws 1941, exempted its property from taxation retroactively. Ch. 125, Public Laws 1941, amending sec. 600, ch. 310, Public Laws 1939, provided that real property used for hospital purposes by a nonprofit hospital whose entire revenue is devoted to hospital purposes should be exempt from taxation from the year 1936. *Held:* The Act of 1941, in so far as the status of plaintiff hospital for taxes for the year 1940 is concerned, is an attempt to annul the effect of a final judgment, and is unconstitutional and void. *Hospital v. Guilford County*, 308.

The amendment of sec. 602 (a), ch. 310, Public Laws 1939, which provides that the property of private hospitals shall not be exempt from taxation, by ch. 125, Public Laws 1941, which provides that sec. 602 (a) of the Act of 1939 should not apply to nonprofit hospitals, is prospective in effect and not retroactive. *Ibid.*

All property is subject to taxation unless exemption is authorized by the Constitution and laws of the State. *Ibid.*

§ 26b. Listing of Realty for Taxation.

It is impracticable to set out on the tax list a full description of all the property listed for taxes, and the description of property thereon is sufficient if it identifies the land with reasonable certainty so that no one having an interest therein is misled. *Cooper v. Cooper*, 124.

§ 28. Levy and Assessment of Inheritance Taxes.

When policy is issued to beneficiary, who retains all rights and liabilities thereunder, proceeds of policy, upon death of insured, are not subject to inheritance taxes; such tax cannot be upheld as being upon gift *inter vivos*

TAXATION—*Continued.*

in contemplation of death, nor as independent excise tax imposed by statute upon receipt of proceeds of life policy. *Trust Co. v. Maxwell, Comr.*, 528.

§ 30. Levy and Assessment of License and Franchise Taxes.

In ascertaining the State license tax on businesses in accordance with the graduated scale based upon the population of the municipalities in which the business is operated, for the tax year beginning 1 July, 1940, the Commissioner of Revenue properly used the 1930 United States Census figures, since the 1940 figures were not available at the beginning of that tax year. Sec. 112, Revenue Act of 1939. *Clark v. Greenville*, 255.

§ 38c. Action to Recover Taxes Paid Under Protest.

Ch. 125, Public Laws 1941, exempting real property of nonprofit hospitals from taxation, contains no provision authorizing refunding of taxes theretofore paid by such hospitals nor machinery for the recovery of such taxes, and therefore a hospital which paid real property taxes for 1940 under protest and unsuccessfully sued for their recovery under sec. 936, ch. 158, Public Laws 1939, is not empowered by the Act of 1941 to maintain another suit for the recovery of the same taxes. *Hospital v. Guilford County*, 308.

§ 40c. Foreclosure of Tax Liens.

The land in question was held by a life tenant with contingent limitation over, the persons entitled to the remainder not being determinable until the death of the life tenant. The land was mortgaged by the life tenant and the mortgage was foreclosed upon default. *Held:* In an action to foreclose the lien for taxes against the land C. S., 7990, in which the purchaser at the foreclosure sale, the life tenant and the known contingent remaindermen are made parties, the minor contingent remaindermen and those not *in esse*, and the unknown contingent remaindermen may be represented by guardian *ad litem* under C. S., 1744, and when the provisions of both statutes have been fully and accurately followed the purchaser at the commissioner's sale acquires the fee simple title. *Rodman v. Norman*, 320.

In an action under C. S., 7990, to enforce the lien for taxes against lands affected by a contingent limitation over, in which each class of contingent remaindermen is represented by defendants actually served and answering, the judgment is binding upon all contingent remaindermen by class representation. *Ibid.*

In service of process by publication, the process, or in a suit to foreclose the lien for taxes under C. S., 7990, and notice, must correctly name or describe the parties defendant served by the publication. C. S., 484 (7), in order for the court to acquire jurisdiction. *Comrs. of Washington v. Gaines*, 324.

In suit to foreclose tax lien, publication which fails to denominate holders of drainage district bonds is insufficient to bring them into court. *Ibid.*

When record in foreclosure of tax lien shows service on all owners, but in fact no service was had on administratrix of one deceased owner, she may move in the cause at any time thereafter and have foreclosure set aside. *Monroe v. Niven*, 362.

TELEPHONE AND TELEGRAPH COMPANIES.

§ 4. Rights of Way.

Use of land for telephone lines was embraced and included in decree awarding compensation for taking of easement for highway purposes in this case. *Hildebrand v. Tel. Co.*, 10.

TELEPHONE AND TELEGRAPH COMPANIES—*Continued.*

Awarding of permanent damages for maintenance of telegraph line on plaintiff's land would be equivalent to acquisition of easement by condemnation; action therefor would not be barred until easement had been acquired by adverse possession. *Love v. Tel. Co.*, 469.

TENDER.

§ 1. Transactions Constituting Tender.

Allegations that plaintiffs were able, willing and ready to comply with the terms of the agreement, made tender to defendant of all items therein embraced, and that defendant failed to accept same, *is held* sufficient upon a liberal construction to allege a legal tender. *Hawkins v. Land Bank*, 73.

TORTS.

§ 4. Determination of Whether Tort Is Joint Tort.

In a suit against the contractor and the architect alleging failure to provide adequate ventilation in the foundation of the building constructed and the use of inferior and defective lumber and fraudulently concealing the defects from plaintiff, the contractor is not entitled to have the materialman joined as codefendant upon allegations that it furnished the lumber and in turn fraudulently concealed the nature and condition of the lumber, since there is no privity between plaintiff and the materialman and the alleged tort of the materialman is an independent tort committed by it against the contractor, and it and the contractor are in no sense joint tort-feasors. *Board of Education v. Deitrick*, 38.

TRESPASS.

§ 1g. Continuing Trespass. (Limitation of actions for, see Limitation of Actions § 6.)

The placing and maintenance by a telegraph company of its transmission lines on private lands constitutes a continuing trespass. *Love v. Tel. Co.*, 469.

§ 8. Trespass to the Person and Forcible Trespass.

Evidence that defendant came over to where plaintiff and her brother were attempting to set stakes at dividing line of properties, abused them in loud, angry voice, began pulling up stakes, engaged in fight with plaintiff's brother, causing plaintiff to faint and have miscarriage, *held* sufficient to show forcible trespass and trespass to person, rendering defendant liable for consequent damage regardless of whether he had knowledge of plaintiff's *enceinte* condition. *Martin v. Spencer*, 28.

TRIAL.

§ 22a. Office and Effect of Motion to Nonsuit.

A demurrer to the evidence presents only the question of the sufficiency of the evidence to carry the case to the jury, the weight and credibility of the evidence being for the jury and not the court. C. S., 567. *S. v. Smith*, 400.

§ 22b. Consideration of Evidence on Motion to Nonsuit.

Upon motion to nonsuit, defendant's evidence will not be considered except to explain or clarify plaintiff's evidence when it is not in conflict therewith. C. S., 567. *Tarrant v. Bottling Co.*, 390; *Jeffries v. Powell*, 415.

TRIAL—*Continued.*

§ 24. Sufficiency of Evidence to Overrule Nonsuit.

Where, in action against defendant based upon *respondeat superior*, plaintiff alleges the identity of the driver of the truck, but fails to offer evidence that person named was driving at time of accident, nonsuit for total failure of proof in support of the allegation is proper. *Whichard v. Lipe*, 53.

§ 29c. Charge on Burden of Proof.

A charge to the effect that, since plaintiff was relying on circumstantial evidence to prove actionable negligence, plaintiff had the burden of proving each fact constituting an essential link in the chain of circumstances beyond a reasonable doubt is erroneous and constitutes prejudicial error. *Askew v. Coach Co.*, 463.

§ 31. Expression of Opinion by Court on Evidence.

The use of the words "you want to find" in charging the jury as to the elements of the offense charged *held*, construing the charge as a whole, merely to place the burden on the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. C. S., 564. *S. v. Smith*, 400.

§ 32. Requests for Instructions.

When a party aptly tenders written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, in substance at least, is error. *Bass v. Hocutt*, 218.

§ 37. Form and Sufficiency of Issues.

The issues to be submitted to the jury are those raised by the pleadings and supported by the evidence. *Carland v. Allison*, 120.

§ 47. Motions for New Trial for Newly Discovered Evidence.

Evidence which is merely cumulative or corroborative of the evidence offered by the party at the trial is insufficient to invoke the discretionary power of the court to order a new trial for newly discovered evidence, and the granting of the motion will be held for error. *Sanger v. Gattis*, 203.

§ 54. Findings of Fact by Court by Agreement.

Where the parties waive a jury trial and consent that the court hear the cause, the weight of the evidence is for the court, and each of its findings is conclusive if supported by competent evidence. *Trust Co. v. Lumber Co.*, 89.

TRUSTS.

§ 2. Appointment and Tenure of Trustee.

Where the trustee appointed by will to administer an active trust dies, the clerk of the Superior Court is without authority to appoint a successor, since the clerk has no authority to administer an equity unless empowered to do so by statute, and C. S., 4023, authorizes the clerk to appoint a successor trustee only when the former trustee resigns, and C. S., 2583, is not applicable to an active trust. *Cheshire v. First Presbyterian Church*, 205.

In proper instances court may validate appointment of trustee by clerk. *Ibid.*

§ 9. Revocation of Trusts.

Plaintiff executed a voluntary trust in personalty with direction that the income therefrom be paid to her for life and upon her death the trust estate

TRUSTS—*Continued.*

be distributed to her surviving children, and in the event plaintiff should die without issue, the trust estate be paid to a named beneficiary if living and if he were not then living then to plaintiff's heirs generally. Plaintiff has no children and executed an instrument in writing revoking the trust upon the payment of a specified sum to the only beneficiary of the remainder *in esse*, who consented to the revocation of the trust upon the payment to him of the amount agreed. *Held:* Under the provisions of C. S., 996, plaintiff is entitled to the revocation of the trust. *MacMillan v. Trust Co.*, 352.

The statute enabling the trustor of a voluntary trust to revoke the same as to contingent beneficiaries prior to the happening of the contingency does not affect vested rights and is constitutional. C. S., 996. *Ibid.*

Where the trustor of a voluntary trust becomes a resident of this State, and the trustee is a North Carolina corporation, and the *situs* of the trust estate is in North Carolina, the rights of the parties in the premises, including the right of revocation, are governed by the law of this State. *Ibid.*

The waiver of the right of revocation by the trustor of a voluntary trust is without consideration and does not preclude trustor from exercising her right to revoke under C. S., 996. *Ibid.*

§ 11. Modification of Trusts.

Trust may not be modified by consent of beneficiaries *in esse* to the detriment of contingent beneficiaries not *in esse*. *Duffy v. Duffy*, 521.

While equity has the power to modify a trust to preserve it from destruction, it does not have the power to destroy the trust or defeat the purpose of the donor or trustor. *Ibid.*

§ 12. Accounting, Settlement, and Compensation of Trustee.

Plaintiff instituted this action to obtain approval of the court of his final account as trustee. The administrator of a deceased beneficiary, who was entitled under the trust to the income from the estate for life, filed answer alleging that his intestate had not been paid all that was due him from the estate, and further, that plaintiff is without legal capacity to maintain the action. *Held:* Although the administrator had no interest in the *corpus* of the estate or in the final closing of the estate, he had standing in court to determine whether any part of the income due his intestate had not been paid, and therefore he could set up the plea in bar. *Cheshire v. First Presbyterian Church*, 205.

§ 15. Acts and Transactions Creating Resulting and Constructive Trusts.

Where the purchasing agent itself buys the principal's goods and in turn sells to a *bona fide* purchaser, the principal, at his election, may hold the agent liable as a trustee *ex maleficio*, and make the agent account not only for the real value of the goods but also for any profit made by the agent on the resale. *Cotton Mills v. Mfg. Co.*, 500.

§ 18c. Burden of Proving Parol Trust.

A party seeking to engraft a parol trust upon the legal title has, in accordance with the general rule as to the intensity of proof necessary to obtain relief against the apparent force and effect of a written instrument, the burden of establishing his alleged parol trust by evidence clear, strong and convincing. *Henley v. Holt*, 274.

Plaintiff trustor alleged that he permitted the deed of trust to be foreclosed pursuant to an agreement with defendant that defendant would purchase at the sale, apply the value of the crops raised on the land to the debt, and

TRUSTS—*Continued.*

reconvey to plaintiff when the debt was discharged. *Held:* An instruction to the effect that the jury might consider the "inadvertence" in failing to have a declaration of the trust inserted in the deed from the trustee to defendant, or in some written memorandum, and that the deed itself created a presumption against the existence of the trust, which plaintiff had the burden of overcoming by evidence clear, strong and convincing, places too heavy a burden upon plaintiff and entitles him to a new trial. *Ibid.*

UNFAIR COMPETITION.

§ 1. Acts Constituting Unfair Competition.

What constitutes fair and unfair competition cannot be defined by inflexible rule, but each case must be determined upon its particular facts to ascertain whether the acts complained of would likely deceive the public. *Extract Co. v. Ray*, 269.

A party advertising that his products are identical with, or possess all the properties of, the products of a competitor, is guilty of unfair competition if his statements are untrue. *Ibid.*

A party may be guilty of unfair competition, even though his trade name is not an infringement on the trade name of a competitor, and even though his product is equal or superior to the product of his competitor, if he takes advantage of the good will and business reputation of his competitor by unfair means. *Ibid.*

Evidence *held* for jury on question of whether defendant, in writing letters to plaintiff's customers stating that defendant manufactured identical products, was guilty of unfair competition. *Ibid.*

UTILITIES COMMISSION.

§ 4. Appeals from Utilities Commission.

The provision of C. S., 1097, that any party affected by an order of the Utilities Commissioner shall be entitled to appeal, and the provision of sec. 12, ch. 134, Public Laws 1933, that any party to a proceeding before the Commission may appeal to the Superior Court, necessarily mean to grant the right of appeal only to a party to the proceeding who has some right or interest to be protected which in some way is, or may be affected by the order of the Commission. *Utilities Com. v. Kinston*, 359.

A railroad company filed petition with the Utilities Commission to discontinue certain intrastate trains. Certain cities, counties and a committee of the area affected were heard as protestants in opposition to the petition. No application to intervene and no order making them parties to the proceeding appear in the record. *Held:* Protestants are not entitled to appeal from the order of the Utilities Commission granting the petition, the record failing to disclose that they have any interest which is, or may be affected by the order of the Commission. *Ibid.*

WILLS.

§ 31. General Rules of Construction.

The object in construing a will is to arrive at the intention of testator. *Priddy & Co. v. Sanderford*, 422.

§ 33a. Estates and Interests Created.

C. S., 1739, is not applicable when a preceding estate is given the "ancestor," and an estate to A and the heirs of her body by her husband, H, creates a fee tail converted into a fee simple absolute in A. *Bank v. Snow*, 14.

WILLS—*Continued.*

§ 33c. Vested and Contingent Interests.

The law favors the early vesting of estates, and a devise will be held to vest at the death of testator unless the intent to postpone the vesting of the estate clearly and manifestly appears from the will beyond mere inference or construction. *Priddy & Co. v. Sanderford*, 422.

A remainder will be held to vest as of the date of the death of the testator and not at the termination of the particular estate if it is subject to no condition precedent except the termination of the particular estate, and words describing the future event will be construed to relate merely to the time of the enjoyment of the remainder and not the time of its vesting. *Ibid.*

As a general rule, where the remainder is to all persons of a specified class or their next of kin or lawful heirs or representatives, and not merely to specified persons of a class, the remainder vests in the members of the class as of the date of the death of testator. *Ibid.*

A devise to testator's wife for life "and at her death I want this land to go to my children or their representatives" *is held* to vest the remainder in testator's children or their representatives as of the date of testator's death under the general rule, the words "or their representatives" being merely a term of inheritance to guard against a lapse. *Ibid.*

§ 34c. Designation of Devisees and Legatees.

The will in question devised the *locus in quo* to testator's children for life with remainder to their lawful issue. *Held:* An illegitimate son of one of testator's daughters takes no interest in the land. The distinction between the use of the word "issue" and the word "heir" in such instances is pointed out. *Brown v. Holland*, 135.

§ 46. Nature of Title and Rights of Devisees, Legatees, and Heirs.

Where a will directs that certain lands be sold and the proceeds of sale divided among named beneficiaries, each beneficiary takes his interest subject to the provisions of the will and cannot convey or encumber same in any manner which would affect the absolute power of sale contained in the will, and upon sale by the executor the interest of each beneficiary in the land is divested and transferred to the proceeds of sale. *King v. Lewis*, 315.

Where a will directs that lands be sold and the proceeds be divided among named beneficiaries, and a beneficiary mortgages his interest prior to the sale by the executor, the mortgage is an equitable assignment to the extent of the indebtedness secured thereby of the mortgagor's share in the proceeds of sale, and this result is unaffected by the purchase of the land by the mortgagee at the executor's sale. *Ibid.*

WITNESSES.

§ 4. Competency of Witnesses: Age.

The competency of a five-year-old child to testify as a witness rests in the sound discretion of the trial court. *S. v. Gibson*, 252.

The fact that the trial court permitted a five-year-old child to testify as a witness, and held that another child, six years old, was incompetent, does not manifest abuse of discretion, but care and discernment. *Ibid.*

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

99. Neither claimant nor estate may appeal from report of referees in proceeding under this section. *In re Estate of Reynolds*, 449.

137 (5). When intestate dies leaving surviving brothers and descendants of brothers who predeceased him, surviving brothers take their share of personalty *per capita* and descendants of deceased brothers take their parts *per stirpes*. *In re Estate of Poindexter*, 246.

157. When lawyer becomes executor, exercise of his professional skill does not entitle him to compensation in addition to commissions fixed by statute. *Lightner v. Boone*, 78.

416. Evidence *held* sufficient to support finding that secretary-treasurer of corporation was without power to bind corporation by acknowledgment of debt so as to repel bar of statute. *Trust Co. v. Lumber Co.*, 89.

420. Does not apply to action by city to enforce assessment liens for public improvements. *Charlotte v. Kavanaugh*, 259.

428. After abandonment, sheriff's deed at execution sale of judgment obtained by wife for support of children is color of title, and her possession thereunder is adverse to husband. *Campbell v. Campbell*, 257.

437 (3). Payment on any note starts statute to running anew against right to foreclose, and fact that other notes upon which no payment was made become barred is immaterial. *Demai v. Tart*, 106.

441. Is applicable to sureties on sealed instruments as well as on instruments not under seal. *Flippen v. Lindsey*, 30.

441 (3). Maintenance of telegraph lines on plaintiff's land is continuing trespass, and action therefor is barred in three years, but action for permanent damages is not barred until right to maintain easement is acquired by adverse possession. *Love v. Tel. Co.*, 469.

441 (9). Action by heirs of mortgagors to set aside conveyance of equity of redemption by mortgagors to mortgagees is based on fraud, and three- and not ten-year statute applies. *Massengill v. Oliver*, 132.

451. Provision of statute that insane person having no general or testamentary guardian must defend by guardian *ad litem* is mandatory, and allegations, upon motion to set aside judgment, that defendant was insane and no guardian *ad litem* was appointed are sufficient to show irregularity. *Cox v. Cox*, 19.

451, 557. Guardian *ad litem* may not file answer on day of his appointment. *Simms v. Sampson*, 379.

484 (7). Process must correctly name or describe defendants served by publication in order to bring them into court. *Comrs. of Washington v. Gaines*, 324.

491. Service on nonresident sheriff may not be had by service on Commissioner of Revenue when car was being driven by person engaged by deputy. *Blake v. Allen*, 445.

510. Upon motion to strike answer as sham and irrelevant, court may not hear evidence, find facts *contra* allegations of answer, and thereupon strike such allegations. *Broocks v. Muirhead*, 466.

CONSOLIDATED STATUTES—*Continued.*

SEC.

521. Contention that plaintiff maintained and prosecuted action in bad faith to harass defendant cannot be set up as counterclaim in the action. *Finance Corp. v. Lane*, 189.

537. Motion to strike, made before filing answer or demurrer or extension of time to plead, is made as matter of right, and movant is entitled to have all irrelevant and redundant matter stricken out. *Parrish v. R. R.*, 292; *Hill v. Stansbury*, 339.

547. Court has discretionary power to allow amendment of summons and return to correct error in middle initial of defendant. *Lee v. Hoff*, 233.

564. Use of words "you want to find," when construed contextually with other portions of charge, *held* not expression of opinion or intimation to jury that they should so find. *S. v. Smith*, 400. In prosecution for carnally knowing female between ages of 12 and 16, instruction failing to specify maximum age is error. *S. v. Isley*, 213.

567. Upon motion to nonsuit, defendant's evidence will not be considered except to explain or clarify plaintiff's evidence when it is not in conflict therewith. *Tarrant v. Bottling Co.*, 390; *Jeffries v. Powell*, 415.

600. It is not required that movants show excusable neglect to set aside judgment for irregularity, this statute not being applicable. *Simms v. Sampson*, 379.

606. When answer is not filed, relief to which petitioners are entitled is limited to that demanded in and supported by allegations of petition, and judgment in excess thereof is irregular. *Simms v. Sampson*, 379.

623. 625. Court must render judgment by confession upon duly verified statement, and mere filing and docketing statement is insufficient. *Gibbs v. Weston & Co.*, 7.

632. Where judgment is entered on verdict upon petitioners' motion, whether petitioners are parties aggrieved and entitled to appeal upon their contention that judgment should have awarded interest, *quære*. *Yancey v. Highway Com.*, 185.

638. Denial of motion to strike, when made as matter of right, is immediately appealable. *Parrish v. R. R.*, 292; *Hill v. Stansbury*, 339.

996. Under facts established, plaintiff *held* entitled to revoke voluntary trust. *MacMillan v. Trust Co.*, 352. Waiver of right to revoke is without consideration and ineffective. *Ibid.*

1097. Protestants to order of Utilities Commission allowing discontinuance of certain intrastate trains, who do not appear of record as parties, have no right to appeal to Superior Court. *Utilities Com. v. Kinston*, 359.

1146. Applies to banking corporations, C. S., 224 (j), as well as other private corporations. *Cole v. Trust Co.*, 249.

1208, 1209 (3), 860. Receiver may be appointed for reasons other than insolvency; receiver of partnership may maintain action existing in favor of partnership without allegation that partnership is insolvent. *Harris v. Hilliard*, 329.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1241. Successful plaintiffs in ejectment are not liable for any costs when answer denies title, notwithstanding that upon trial only controversy is as to location of boundary between lands of parties. *Cody v. England*, 40.

1244 (6). Recovery of costs in Superior Court does not include compensation of referee. *Cody v. England*, 40.

1664. Upon institution of divorce action court acquires jurisdiction over any child of the marriage and may determine custody and support of child before or after final decree of divorce, and may thereafter modify order for child's support, C. S., 1665, 1667, not being applicable. *Story v. Story*, 114.

1667. Allegation of estrangement in marital relationship and failure and refusal of husband to make financial settlements in accordance with agreement made prior to marriage, *held* insufficient to support action for alimony without divorce. *Pollard v. Pollard*, 46.

1734. Deed to widow and heirs of her body by her late husband creates estate tail converted into fee by statute, C. S., 1739, having no application. *Bank v. Snow*, 14.

1795. Record evidence relating to transaction with decedent does not come within statute. *Flippen v. Lindsey*, 30.

2142, 2143, 4430. Betting on a horse race is an offense against the criminal law. *S. v. Brown*, 301.

2309. When selling agent itself purchases principal's goods and resells them at profit, principal, in action to recover secret profit, is not entitled to interest on recovery. *Cotton Mills v. Mfg. Co.*, 500. Upon present record, petitioners *held* not entitled to interest on amount awarded for the taking of lands under eminent domain. *Yancey v. Highway Com.*, 185.

2433. Ordinarily, material furnisher under contract with lessee may not enforce lien against lessor. *Brown v. Ward*, 344.

2530. After abandonment, the wife is free trader. *Campbell v. Campbell*, 257.

2589, 437 (3). When mortgagor institutes action in ejectment, alleging that defendant claimed as grantee in trustee's deed and that power of sale became inoperative prior to sale, demurrer for that complaint failed to allege that mortgagor had been in possession within ten years prior to sale, is bad, since complaint in ejectment need not attack any deed in defendant's chain of title. *Ownbey v. Parkway Properties*, 27.

2621 (187) (ff). Bicycle is subject to Motor Vehicle Law. *Tarrant v. Bottling Co.*, 390.

2621 (288) (a). Violation of provision that driver shall not exceed speed which is reasonable and proper under circumstances is negligence *per se*. *Tarrant v. Bottling Co.*, 390.

2621 (288) (278). Evidence that defendant was driving 60 to 65 miles per hour and, in sudden effort to avoid striking car which had been backed into highway, but was not in motion at time, drove off road injuring passenger, *held* to take case to jury. *Stewart v. Stewart*, 147.

2621 (296) (a). Violation of requirements in passing vehicles traveling in same direction is negligence *per se*. *Tarrant v. Bottling Co.*, 390.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2621 (299) (a). Violation of provision that vehicle shall not follow too closely behind vehicle traveling in same direction is negligence *per se*. *Tarrant v. Bottling Co.*, 390.

2621 (312). Pushing in clutch so as to permit vehicle to coast down grade is violation of this section and is negligence *per se*. *Dillon v. Winston-Salem*, 512.

3180. Maintenance of establishment to facilitate betting on horse races is a public nuisance. *S. v. Brown*, 301.

3233. In order to support decree of sale for partition the court must find the facts required by statute. *Priddy & Co. v. Sanderford*, 422.

3234, 3235. Tenants in common in land subject to life estate are entitled to partition, but may not disturb possession of life tenant except by her consent. *Priddy & Co. v. Sanderford*, 422.

3315. Deed of gift is void if not registered within two years from execution, and acknowledgment is not re-execution. *Cutts v. McGhee*, 465.

3846 (bb), 3795. Lowering of bridge is within latitude of highway easement, and canal owner may not recover for resulting damage. *Dodge v. Highway Com.*, 4.

4023. Clerk has no authority to appoint successor to deceased trustee of active trust, this statute applying only when trustee dies, and C. S., 2583, not being applicable to active trusts. *Cheshire v. Presbyterian Church*, 205.

4172. When statute prescribes that punishment shall be in discretion of court and that defendant may be fined or imprisoned, or both, it prescribes "specific punishment" and this statute is not applicable. *S. v. Richardson*, 209.

4177. Evidence *held* sufficient to sustain conviction of defendant as accessory after the fact, the evidence against principal felon being sufficient to sustain conviction of him of secret assault, C. S., 4213, and of assault resulting in serious injury, C. S., 4214. *S. v. Potter*, 153.

4200. Charge that murder in first degree is unlawful killing of human with malice aforethought is error, since "aforethought" as so used does not connote premeditation and deliberation. *S. v. Smith*, 278.

4201. As amended. Sentence for involuntary manslaughter is not limited to two years imprisonment. *S. v. Richardson*, 209.

4204. Intent is not element of offense of carnally knowing or abusing female child under 12. *S. v. Gibson*, 252.

4310. As amended. Amendment did not change nature of offense, and contention that since indictment charged offense prior to amendment the statute under which defendant was charged had been repealed, is untenable. *S. v. Patton*, 117. Statute *held* applicable to county in which defendant was charged and evidence *held* sufficient to support conviction. *Ibid.*

4622. Charge of reckless driving, drunken driving, and assault with automobile may be joined as separate counts. *S. v. Fields*, 182. When crimes charged are of same class and are connected in time and place consolidation of indictments for trial is proper. *S. v. Chapman*, 157.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4640. Trial court need not charge jury on question of guilt of lesser degrees of crime when there is no evidence of guilt of lesser degrees. *S. v. Manning*, 70.

4643. Demurrer to evidence presents sole question of sufficiency of evidence to carry case to jury. *S. v. Smith*, 400. Defendant waives exception to refusal of motion to nonsuit by failing to renew motion at close of all evidence. *S. v. Chapman*, 157.

4650. Court may not impose heavier sentence upon learning of defendant's intention to appeal, even though prayer for judgment was continued with defendant's consent. *S. v. Patton*, 117.

4651., 4652. C. S., 649, as amended, permitted amendment of affidavits in appeals *in forma pauperis* applies only to civil actions and not to criminal prosecutions. *S. v. Mitchell*, 460.

4665 (4). Time ceases to run against period of probation upon issuance of *capias* and does not run during time defendant absents himself and is fugitive from justice. *S. v. Pelley*, 487.

5259 (20). Duty of cosmetic art examiners to issue certificate, upon proper showing, to cosmetologist practicing at time regulatory act was passed, is mandatory and not discretionary. *Poole v. Board of Examiners*, 199.

5356. In proper instances, holders of drainage district bonds may have drainage district levy additional assessments, and C. S., 5373 (g), does not apply to bonds issued prior to its effective date. *Comrs. of Washington v. Gaines*, 324.

5913, *et seq.* Are applicable to municipal elections. *Ledwell v. Proctor*, 161.

5985, 5986, 5991. Complaint in action of *quo warranto* which fails to allege that returns of precinct officials had been canvassed or that board of elections had canvassed results and issued certificate *held* demurrable, since resort may not be had to courts until machinery for ascertainment of results has been exhausted. *Ledwell v. Proctor*, 161.

7064-7075. *Mandamus* will not lie against county board of health to compel payment of award rendered against it by Industrial Commission. *Champion v. Board of Health*, 96.

7565-7567. Statutes do not prescribe method to be used in measuring lines, and presumption surface measure was used does not apply when it appears that no actual survey was made, but that distances were platted by a "paper survey." *Cody v. England*, 40.

7880 (11). When policy is issued to beneficiary who retains all rights and liabilities thereunder, proceeds of policy, upon death of insured, are not subject to inheritance taxes, even though insured voluntarily paid premiums. *Trust Co. v. Maxwell, Comr.*, 528.

7982. Life tenant who has forfeited estate by failing to redeem within one year after sale of tax lien by sheriff cannot avoid forfeiture on ground of insufficiency of description of property on tax list. *Cooper v. Cooper*, 124.

7990. C. S., 1744, may be invoked in action to enforce tax lien against land held by life tenant with contingent limitation over. *Rodman v. Norman*, 320. Notice which fails to denominate holders of drainage dis-

CONSOLIDATED STATUTES—*Continued.*

SEC.

trict bonds is insufficient to bring them into court or preclude their right of additional assessment. *Comrs. of Washington v. Gaines*, 324. Liens for public improvements are barred after ten-year period prescribed by ch. 331, Public Laws 1929. *Charlotte v. Kavanaugh*, 259.

8081 (qqq). *Mandamus* will not lie to enforce payment of award when it has not been docketed as judgment. *Champion v. Board of Health*, 96.

8081 (rr). When contract of employment is for services to be rendered exclusively outside this State and such services are performed in their entirety outside its borders, our Compensation Act does not apply. *Mallard v. Bohannon, Inc.*, 227.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 7. Benefits from State Employees' Retirement Fund are deferred payments of salary for services rendered, and do not violate this section. *Bridges v. Charlotte*, 472.

I, sec. 14. When statute prescribes punishment in sound discretion of court, court is limited only by prohibition against cruel and unusual punishment. *S. v. Richardson*, 209.

V, sec. 3. If sec. 11, ch. 127, Public Laws 1937, were construed to levy excise tax upon receipt of proceeds of life insurance policy when policy was issued to beneficiary, who retained all rights and liabilities thereunder, in addition to inheritance tax when policy was issued to insured, such construction would violate this section of Constitution, since amount of such excise tax would be computed on graduated scale in accordance with value of insured's estate. *Trust Co. v. Maxwell, Comr.*, 528. Tax for amount required by law to be paid into Retirement Fund by city on salaries of teachers paid or supplemented by it does not violate this section. *Bridges v. Charlotte*, 472.

V, sec. 5. Property owned by a church and rented by it for commercial purposes is not exempt from taxation. *Sparrow v. Beaufort County*, 222. All property is subject to taxation unless exemption is authorized by Constitution and laws of the State. *Hospital v. Guilford County*, 308. When final judgment has been entered that hospital is liable for taxes for certain year, rights of parties cannot be altered by retroactive statute. *Ibid.* Realty acquired by rural housing authority is exempt from taxation. *Mallard v. Housing Authority*, 334.

VII, sec. 7. State is not municipality within meaning of this section, and therefore city, as administrative unit in State school system, need not submit tax for operation of schools to vote. *Bridges v. Charlotte*, 472.

IX. Imposes duty on General Assembly to provide for minimum term, and confers authority on it to provide schools in excess of minimum which the State can afford. *Bridges v. Charlotte*, 472.