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NORTH CAROLINA REPORTS
VOL. 222

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1942

SPRING TERM, 1943

REPORTED BY

JOSEPH B. CHESHIRE

RALEIGH
BYNUM PRINTING COMPANY
PRINTERS TO THE SUPREME COURT
1943

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2 " "	"	24	"	1 " Eq.	"	54	"
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5 " "	"	27	"	4 " "	"	57	"
6 " "	"	28	"	5 " "	"	58	"
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				Phillips Law	"	61	"
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The opinions published in the first six volumes of the reports were written by the "Court of Conference" and the Supreme Court prior to 1819.

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

JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1942—SPRING TERM, 1943.

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ASSOCIATE JUSTICES:

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J. WALLACE WINBORNE,
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* On leave, U. S. Army, Acting Assistant Attorney-General, H. J. Rhodes.
† On leave, U. S. Army, Acting Reporter, Joseph B. Cheshire.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

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

SPECIAL JUDGES

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

WESTERN DIVISION

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

SPECIAL JUDGES

Sam J. Ervin, Jr.	Morganton.
Hubert E. Olive	Lexington.
Clarence E. Blackstock	Asheville.

EMERGENCY JUDGES

Henry A. Grady	New Bern.
G. V. Cowper	Kinston.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
CHESTER R. MORRIS	First	Currituck.
DONNELL GILLIAM	Second	Tarboro.
ERNEST R. TYLER	Third	Roxobel.
W. JACK HOOKS	Fourth	Kenly.
D. M. CLARK	Fifth	Greenville.
J. ABNER BARKER	Sixth	Roseboro.
WILLIAM Y. BICKETT	Seventh	Raleigh.
CLIFTON L. MOORE	Eighth	Burgaw.
F. ERTEL CARLYLE	Ninth	Lumberton.
WILLIAM H. MURDOCK	Tenth	Durham.

WESTERN DIVISION

J. ERLE MCMICHAEL	Eleventh	Winston-Salem.
J. LEE WILSON	Twelfth	Lexington.
EDWARD H. GIBSON	Thirteenth	Laurinburg.
JOHN G. CARPENTER	Fourteenth	Gastonia.
CHARLES L. COGGIN	Fifteenth	Salisbury.
L. SPURGEON SPURLING	Sixteenth	Lenoir.
AVALON E. HALL	Seventeenth	Yadkinville.
C. O. RIDINGS	Eighteenth	Forest City.
JAMES S. HOWELL	Nineteenth	Asheville.
JOHN M. QUEEN	Twentieth	Waynesville.
R. J. SCOTT	Twenty-first	Danbury.

SUPERIOR COURTS, FALL 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

Fall Term, 1942—Judge Parker.

Beaufort—Sept. 21* (A); Sept. 28†; Oct. 12†; Nov. 9* (A); Dec. 7†.
Camden—Oct. 5.
Chowan—Sept. 14; Nov. 30.
Currituck—July 20†; Sept. 7.
Dare—Oct. 26.
Gates—Nov. 23.
Hyde—Aug. 17†; Oct. 19.
Pasquotank—Sept. 21†; Oct. 12† (A) (2); Nov. 9†; Oct. 16*.
Perquimans—Nov. 2.
Tyrrell—Oct. 5 (A).

SECOND JUDICIAL DISTRICT

Fall Term, 1942—Judge Williams.

Edgecombe—Sept. 14; Oct. 19; Nov. 16† (2).
Martin—Sept. 21 (2); Nov. 23† (A) (2); Dec. 14.
Nash—Aug. 31; Sept. 21† (A) (2); Oct. 12†; Nov. 30*; Dec. 7†.
Washington—July 13; Oct. 26†.
Wilson—Sept. 7; Oct. 5†; Nov. 2† (2); Dec. 7 (A).

THIRD JUDICIAL DISTRICT

Fall Term, 1942—Judge Frizzelle.

Bertie—Aug. 31 (2); Nov. 16 (2).
Halifax—Aug. 17 (2); Oct. 5† (A) (2); Oct. 26* (A); Nov. 30 (2).
Hertford—Aug. 3; Oct. 19 (2).
Northampton—Aug. 3 (A); Nov. 2 (2).
Vance—Oct. 5*; Oct. 12†.
Warren—Sept. 21*; Sept. 28†.

FOURTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Stevens.

Chatham—Aug. 3† (2); Oct. 26.
Harnett—Sept. 7* (A); Sept. 21†; Oct. 5† (A) (2); Nov. 16* (2).
Johnston—Aug. 17*; Sept. 28† (2); Oct. 19 (A); Nov. 9†; Nov. 16† (A); Dec. 14 (2).
Lee—July 20; Sept. 14†; Sept. 21† (A); Nov. 2.
Wayne—Aug. 24; Aug. 31† (2); Oct. 12† (2); Nov. 30 (2).

FIFTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Harris.

Carteret—Oct. 19; Dec. 7†.
Craven—Sept. 7*; Oct. 5† (2); Nov. 23† (2).
Greene—Dec. 7 (A); Dec. 14 (2).
Jones—Aug. 17†; Sept. 21; Dec. 7 (A).
Pamlico—Nov. 9 (2).
Pitt—Aug. 24†; Aug. 31; Sept. 14† Sept. 28†; Oct. 26†; Nov. 2; Nov. 23† (A).

SIXTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Burney.

Duplin—July 27*; Aug. 31† (2); Oct. 5*; Dec. 7† (2).
Lenoir—Aug. 24; Sept. 28†; Oct. 19; Nov. 9† (2); Dec. 14 (A).
Onslow—July 20†; Oct. 12; Nov. 23† (2).
Sampson—Aug. 10 (2); Sept. 14† (2); Oct. 26† (2).

SEVENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Nimocks.

Franklin—Sept. 14†; Oct. 12*; Nov. 9† (2).
Wake—July 13*; Sept. 7*; Sept. 14* (A); Sept. 21† (2); Oct. 12* (A); Oct. 19† (3); Nov. 9* (A); Nov. 16† (A); Nov. 23† (2); Dec. 7* (2); Dec. 21†.

EIGHTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Carr.

Brunswick—Sept. 14; Sept. 21†.
Columbus—July 13†; Oct. 5†; Oct. 12*; Nov. 30†; Dec. 7† (A); Dec. 21*.
New Hanover—July 27*; Aug. 24†; Aug. 31*; Oct. 19† (2); Nov. 9*; Nov. 16; Dec. 7† (2).
Pender—July 20†; Sept. 28; Nov. 2†.

NINTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Thompson.

Bladen—Aug. 10† Sept. 21*.
Cumberland—Aug. 31*; Sept. 28† (2); Oct. 12* (A); Oct. 26† (2); Nov. 23* (2).
Hoke—Aug. 3†; Aug. 24; Nov. 16.
Robeson—July 13† (2); Aug. 17*; Aug. 31† (A); Sept. 7* (2); Sept. 28* (A); Oct. 12† (2); Oct. 26* (A); Nov. 9*; Nov. 16† (A); Dec. 7† (2); Dec. 21*.

TENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Bone.

Alamance—Aug. 3†; Aug. 17*; Sept. 7† (2); Nov. 16† (A) (2); Nov. 30*.
Durham—July 20*; Aug. 3† (A) (2); Sept. 7* (A) (2); Sept. 21† (3); Oct. 12*; Oct. 19† (A) (2); Nov. 2† (2); Dec. 7*.
Granville—July 27; Oct. 26†; Nov. 16 (2).
Orange—Aug. 24; Aug. 31†; Oct. 5†; Dec. 14.
Person—Aug. 10; Oct. 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Bobbitt.

Ashe—July 27† (2); Oct. 26*.
Alleghany—Oct. 5.
Forsyth—July 13 (2); Sept. 7 (2); Sept. 21† (2); Oct. 5† (A); Oct. 12 (2); Oct. 26† (A); Nov. 2†; Nov. 9 (2); Nov. 23† (2); Dec. 7 (2).

TWELFTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Armstrong.

Davidson—Aug. 24*; Sept. 14†; Sept. 21† (A); Oct. 5† (A) (2); Nov. 23 (2).
Guilford—July 13*; July 20*; Aug. 3*; Aug. 10† (2); Aug. 31† (2); Sept. 14* (A); Sept. 21† (A) (2); Sept. 21* (2); Oct. 5† (2); Oct. 19*; Oct. 26*; Nov. 2* (2); Nov 2† (A) (2); Nov. 16*; Nov. 23† (A) (2); Dec. 7*; Dec. 14*; Dec. 21*.

THIRTEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Warlick.

Anson—Sept. 14†; Sept. 28*; Nov. 16†.
Moore—Aug. 17*; Sept. 21†; Sept. 28 (A); Dec. 14†.
Richmond—July 20†; July 27*; Sept. 7†; Oct. 5*; Nov. 9†.
Scotland—Aug. 10; Nov. 2†; Nov. 30 (2).
Stanly—July 13; Sept. 7† (A) (2); Oct. 12†; Nov. 23.
Union—Aug. 3*; Aug. 24† (2); Oct. 19† (2).

FOURTEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Rousseau.

Gaston—July 27*; Aug. 3† (2); Sept. 14* (A); Sept. 21† (2); Oct. 26*; Nov. 2† (A); Nov. 30* (A); Dec. 7 (2).
Mecklenburg—July 13* (2); Aug. 3* (A) (2); Aug. 17* (2); Aug. 31*; Sept. 7† (2); Sept. 7† (A) (2); Sept. 21† (A) (2); Sept. 21* (A) (2); Oct. 5*; Oct. 5† (A) (2); Oct. 12† (2); Oct. 19† (A) (2); Nov. 2† (A) (2); Nov. 2† (2); Nov. 16*; Nov. 16† (A) (2); Nov. 23† (2); Nov. 30† (A) (2); Dec. 7* (A) (2); Dec. 14† (A); Dec. 21†.

FIFTEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Pless.

Alexander—Aug. 31 (A) (2).
Cabarrus—Aug. 24*; Aug. 31†; Oct. 19 (2); Nov. 16† (A); Dec. 7† (A).
Iredell—Aug. 3 (2); Nov. 9 (2).
Montgomery—July 13; Sept. 28†; Oct. 5; Nov. 2†.
Randolph—July 20† (2); Sept. 7*; Oct. 26† (A) (2); Dec. 7 (2).
Rowan—Sept. 14 (2); Oct. 12†; Oct. 19† (A); Nov. 23 (2).

SIXTEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Nettles.

Burke—Aug. 10 (2); Sept. 28† (3); Dec. 14 (2).
Caldwell—Aug. 24 (2); Oct. 5† (A) (2); Nov. 30 (2).
Catawba—July 6 (2); Sept. 7† (2); Oct. 5† (A) (2); Nov. 16*; Nov. 23†; Dec. 7† (A).
Cleveland—July 27 (2); Sept. 14† (A) (2); Nov. 2 (2).
Lincoln—July 20; Oct. 19† (2).
Watauga—Sept. 21.

SEVENTEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Alley.

Avery—July 6 (2); Oct. 19*; Oct. 26†.
Davie—Aug. 31; Dec. 7†.
Mitchell—July 27† (2); Sept. 21 (2).
Wilkes—Aug. 10 (2); Oct. 5† (2); Dec. 14 (2).
Yadkin—Aug. 24*; Nov. 23† (2).

EIGHTEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Clement.

Henderson—Oct. 12 (2); Nov. 23† (2).
McDowell—July 13† (2); Sept. 7 (2).
Polk—Aug. 24 (2).
Rutherford—Sept. 28† (2); Nov. 9 (2).
Transylvania—July 27 (2); Dec. 7 (2).
Yancey—Aug. 10 (2); Oct. 26† (2).

NINETEENTH JUDICIAL DISTRICT

Fall Term, 1942—Judge Sink.

Buncombe—July 13† (2); July 20 (A) (2); July 27*; Aug. 3; Aug. 10† (2); Aug. 24*; Aug. 24 (A) (2); Sept. 7† (2); Sept. 21*; Sept. 21 (A) (2); Oct. 5† (2); Oct. 19*; Oct. 19 (A) (2); Nov. 2; Nov. 9† (2); Nov. 23*; Nov. 23 (A) (2); Dec. 7† (2); Dec. 21*; Dec. 21 (A) (2).
Madison—Aug. 31; Sept. 28; Oct. 26; Nov. 30; Dec. 28.

TWENTIETH JUDICIAL DISTRICT

Fall Term, 1942—Judge Phillips.

Cherokee—Aug. 10 (2); Nov. 9 (2).
Clay—Oct. 5.
Graham—Sept. 7 (2).
Haywood—July 13 (2); Sept. 21† (2); Nov. 23 (2).
Jackson—Oct. 12 (2).
Macon—Aug. 24 (2); Dec. 7 (2).
Swain—July 27 (2); Oct. 26 (2).

TWENTY-FIRST JUDICIAL DISTRICT

Fall Term, 1942—Judge Gwyn.

Caswell—July 6; Nov. 16*; Nov. 23†.
Rockingham—Aug. 10* (2); Sept. 7† (2); Oct. 26† Nov. 2* (2); Nov. 30† (2); Dec. 14*.
Stokes—Aug. 24; Oct. 12*; Oct. 19†.
Surry—July 13† (2); Sept. 21*; Sept. 28† (2); Dec. 21*.

*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 GRACE T. VIVERETT, Deputy Clerk, Wilson.

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.
EDNEY RIDGE, 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; HENRIETTA PRICE, Deputy Clerk.

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

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

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

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

OFFICERS

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

LICENSED ATTORNEYS

FALL TERM, 1942.

I, Edward L. Cannon, Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the following named persons have duly passed examinations of the Board of Law Examiners as of August 7, 1942:

ALEXANDER, RALPH LEWIS	Kannapolis.
ALLEN, WILLIAM ANDERSON, JR.	Raleigh.
BOLMER, GRANT WILLIAM, JR.	Philadelphia, Pa.
BURGWYN, WILLIAM HYSLOP SUMNER, JR.	Woodland.
BYRUM, PORTER BROWN	Tyner.
CAHOON, ROBERT STRANGE	Wilmington.
CAMPBELL, PHYLLIS JANE	Chapel Hill.
CARLTON, PRITCHARD SYLVESTER, JR.	Salisbury.
COWEN, ROBERT HENRY	Williamston.
DALE, WHEELER	Morganton.
DOFFERMYRE, EVERETTE LASSITER	Potecasi.
GOLDBERG, ROBERT AARON	Wilmington.
GRIMES, JUNIUS DANIEL, JR.	Washington.
GUDGER, VONNO LAMAR, JR.	Asheville.
HAWKINS, CURTIS DULA	Marion.
HENDERSON, CHARLES JENKINS	Charlotte.
HOLLOWELL, WELDON AYDLETT	Tyner.
HOLTON, FRANK PETTY, JR.	Lexington.
HUNTLEY, CHARLTON ELLERBE	Aberdeen.
HUFF, JOSEPH BASCOM, JR.	Mars Hill.
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TATE, JOHN EVERETT, JR.	Winston-Salem.
TOWNSON, MYRA WINIFRED	Murphy.
YOW, CICERO PRESTON	Wilmington.

ADMITTED BY COMITY.

BAKER, HAROLD V.	Charlotte, from New York.
WOOD, A. Z. FOSTER	Greensboro, from District of Columbia.

Given over my hand and the seal of the Board of Law Examiners, this the 7th day of August, 1942.

EDWARD L. CANNON, *Secretary,*
The Board of Law Examiners of the State of North Carolina.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1942

ROSE MARIE PATRICK, BY HER NEXT FRIEND, A. R. PATRICK, v. J. E. TREADWELL AND COLGATE-PALMOLIVE-PEET COMPANY.

(Filed 23 September, 1942.)

1. Evidence § 45—

Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of the facts in issue requires some explanation of those facts or some deduction therefrom by persons who have scientific or specialized knowledge or experience.

2. Evidence § 49—

While it has been frequently held that expert testimony should be excluded when it invades the province of the court or jury, or when it expresses an opinion on the very issues of fact before the jury, this rule is not inflexible and is subject to exceptions; for example, the opinions of physicians as to cause of death, sanity, prognosis of disease or injury, and as to the ultimate facts in regard to matters of science, art, or skill.

3. Evidence §§ 45b, 49—

While the tendency is to liberalize the rule in this class of opinion evidence and to hold it admissible when it tends to aid the jury in the search for truth, even when the opinion of the expert, based on peculiar knowledge or skill and experience, is given as to the ultimate question in issue, this rule should not be relaxed to the extent of opening the door to the statement of an evidential fact in issue beyond the knowledge of the witness.

4. Same—

In an action to recover damages for alleged injuries to a child from a collision of two automobiles, where the child's arm had been broken and

set in a cast a short time before the accident, and it was alleged that the collision threw the child from the seat and broke the cast on the arm and caused the fragments of bone to be knocked out of place, resulting in permanent injury, it was error to permit the witness, a doctor, to state his belief that the automobile accident in question "caused the fragment of bone to be knocked out of place," or to testify, "I know the accident did it." *Dempster v. Fite*, 203 N. C., 697, cited and distinguished.

5. Negligence § 19: Automobiles § 11—

Motion for nonsuit properly denied where evidence discloses that defendant was driving his automobile at a high rate of speed and, in attempting to traverse a curve, swerved and struck a car, coming from opposite direction, in which plaintiff was riding, causing injury.

APPEAL by defendants from *Dixon, Special Judge,* at April Term, 1942, of PERQUIMANS. New trial.

This was an action to recover damages for a personal injury to the infant plaintiff, alleged to have been caused by the negligence of the defendants in the operation of an automobile.

There was evidence tending to show that on 18 July, 1941, the plaintiff, a child eight years of age, was riding in a Pontiac automobile driven by her father; that at a point a mile north of Hertford, the automobile in which she was riding was struck by a Buick automobile proceeding in the opposite direction, driven by defendants; that defendants' automobile was being driven at a high rate of speed, and that in attempting to traverse a sharp curve the automobile swerved and struck the automobile in which plaintiff was riding, and that as a result plaintiff fell from the seat to the floor of the automobile. It was further made to appear that previously, on 5 July, 1941, the plaintiff had accidentally broken her left arm above the elbow and at the time of the collision the fractured bone had been set, and was held in position by a plaster cast. It was contended by the plaintiff that as a consequence of the fall in the automobile, due to the collision, the cast was broken, and that it was subsequently discovered that the fractured ends of the bone in plaintiff's arm had separated. An operation was necessitated and a permanent injury resulted.

On the part of the defendants evidence was offered tending to show absence of negligence on the part of the defendants, and it was further contended that plaintiff's evidence failed to show that the separation of the ends of the fractured bone in plaintiff's arm was caused by the collision; and that upon failure of proof of this fact plaintiff could not maintain her case.

Defendants' motion for judgment of nonsuit was denied. Issues were submitted to the jury and verdict rendered for plaintiff establishing negligence and awarding substantial damages. From judgment on the verdict, defendants appealed.

McMullan & McMullan for plaintiff, appellee.
Worth & Horner for defendants, appellants.

DEVIN, J. An examination of the record leads us to the conclusion that plaintiff's evidence, considered in the light most favorable for her, was sufficient to warrant submission of the case to the jury, and that the motion for judgment of nonsuit was properly denied. However, we think there was error in the admission of testimony necessitating a new trial.

One of plaintiff's witnesses, Dr. W. H. Harrell, admitted to be a medical expert, testified, over objection, in response to questions, as follows:

"Q. Doctor, assuming the jury should find from the evidence and by its greater weight, that following Rose Marie's breaking her arm in the manner you have described on the 5th day of July, and that from that day until you saw her on the 11th day of July it was in the condition which you have heretofore described, that on the 18th day of July she was a passenger in an automobile being driven in Perquimans County, which was involved in an accident with a car driven by the defendant, Mr. Treadwell, the car in which she was a passenger being stricken with sufficient violence to throw her from the seat onto the floor of the car, and that as a result thereof the cast which you had put on her left arm was broken, that from the examination of her arm on the 11th day of July until this collision on the 18th the cast had remained intact, have you an opinion satisfactory to yourself as to what particular act of violence produced the injury to her arm which you saw on the 19th day of July?

"A. I have an opinion. It seems any violent blow or fall or jar or anything hard enough to break a cast would naturally break the fragments that had not had time to grow together properly.

"Q. Further assuming that the jury should find as a fact from the evidence and by its greater weight that that was the only act of external violence which she had sustained between the dates of July 11th and July 19th, have you such an opinion?

"A. Yes. I believe the accident caused the breaking of the cast and also caused the fragments of the bone to be knocked out of place.

"Q. You mean by that the automobile accident which we are talking about?

"A. Yes, sir.

"Q. You don't know what caused the dislocation of the bone?

"A. I know the accident did it, or whatever occurred."

The court below overruled defendants' objection to this testimony and permitted it to go to the jury. Defendants noted exception to this ruling, and assign same as error.

While some of this testimony was properly admitted in evidence, we think it was error to permit the witness to state his belief that the automobile accident in question "caused the fragments of the bone to be knocked out of place," or to testify, "I know the accident did it." It was competent for the expert witness to express an opinion as to the causes capable of producing the separation of the bones in plaintiff's arm, but having no personal knowledge, other than the subsequent discovery that the ends of the fractured bone were not in proper position, it was beyond his province as a witness to state to the jury as a fact that the result complained of was caused by the accident, that is, by the plaintiff's fall from the seat to the floor of the automobile, rather than by a blow, or a fall elsewhere or under other circumstances. That is the view taken by this Court in *Summerlin v. R. R.*, 133 N. C., 550, 45 S. E., 898, where it was said: "It would be competent for a physician or surgeon, who is properly qualified to give an opinion, to state that an injury might have been caused by a fall from a car, or that such a fall, in other words, could have produced it; but when he is called upon to say that the injury was caused by the fall from a car and not by a fall from any other elevated place, or in any other way that might just as well have produced the same result, it is beyond his competency as an expert to speak upon the subject, for he will then be deciding a fact and not merely giving an expert opinion founded upon a given state of facts."

It has been frequently stated by the courts that the testimony of an expert witness should be excluded when it invades the province of the jury, or when it expresses an opinion on the very issue before the jury. *United States v. Spaulding*, 293 U. S., 498. But this rule is not inflexible, is subject to many exceptions, and is open to criticism. Wigmore on Evidence, secs. 1920, 1921. For it is well settled that a physician may be permitted to testify from personal observation, or upon the hypothesis of facts in evidence, as to cause of death, sanity, prognosis of disease or injury, and other matters which are directly in issue. *McManus v. R. R.*, 174 N. C., 735, 94 S. E., 455; *Shaw v. Handle Co.*, 188 N. C., 222, 124 S. E., 325; *Martin v. Hanes Co.*, 189 N. C., 644, 127 S. E., 688; *Godfrey v. Power Co.*, 190 N. C., 24, 128 S. E., 485; *S. v. Fox*, 197 N. C., 478, 149 S. E., 735; *Green v. Casualty Co.*, 203 N. C., 767, 167 S. E., 38; *Yates v. Chair Co.*, 211 N. C., 200, 189 S. E., 500; *Leonard v. Ins. Co.*, 212 N. C., 151, 193 S. E., 166; *George v. R. R.*, 215 N. C., 773, 3 S. E. (2d), 286. However, while the tendency is to liberalize the rule as to this class of opinion evidence, and to hold it admissible when it tends to aid the jury in the search for truth (*S. v. Killeen*, 79 N. H., 201), even when the opinion of the expert based upon peculiar knowledge, skill and experience is given as to the ultimate question in issue, this rule should not be relaxed to the extent of opening the door to the statement

of an evidential fact in issue beyond the knowledge of the witness under the guise of an expert opinion. As was said by *Adams, J.*, speaking for the Court in *Godfrey v. Power Co.*, 190 N. C., 24, 128 S. E., 485, "It is upon this principle that opinion evidence is admitted, but in admitting it the courts are vigilant to see that the province of the jury shall not be invaded, and to this end exclude, as far as possible, any inference or conclusion as to the ultimate fact in issue. Application of the rule is made in *Nance v. R. R.*, 189 N. C., 638; *Hill v. R. R.*, 186 N. C., 475; *Smith v. Comrs.*, 176 N. C., 466; *Kerner v. R. R.*, 170 N. C., 94; *Mule Co. v. R. R.*, 160 N. C., 253; *Deppe v. R. R.*, 154 N. C., 523. But it is not an inflexible rule, and it is frequently relaxed in the admission of evidence as to ultimate facts in regard to matters of science, art, or skill, as may be seen by reference to *Holder v. Lumber Co.*, 161 N. C., 177; *Ferebee v. R. R.*, 167 N. C., 290; *Barrow v. Ins. Co.*, 169 N. C., 572; *Moore v. Ins. Co.*, 173 N. C., 532, and to many other cases."

The objection to the admission of opinion evidence of expert witnesses on the ground that in the particular instance it invades the province of the jury has been expressed by this Court in several decisions. *Summerlin v. R. R.*, 133 N. C., 550, 45 S. E., 898; *Mule Co. v. R. R.*, 160 N. C., 252, 75 S. E., 994; *Hill v. R. R.*, 186 N. C., 475, 119 S. E., 884; *S. v. Hightower*, 187 N. C., 300, 121 S. E., 616. Compare, Rogers Expert Testimony, page 50, *et seq.* In Jones on Ev. in Civil Cases, sec. 372, it is said: "Whatever liberality may be allowed in calling for the opinions of experts or other witnesses, they must not usurp the province of the court and jury by drawing conclusions of law or fact upon which the decision of the case depends."

However, it would seem that the proper test is whether additional light can be thrown on the question under investigation by a person of superior learning, knowledge or skill in the particular subject, one whose opinion as to the inferences to be drawn from the facts observed or assumed is deemed of assistance to the jury under the circumstances. Wigmore, sec. 1923; 28 A. L. R. (note), 751. Undoubtedly it would be competent for an expert witness to give his opinion as to what causes would produce the result observed, but this would not permit him to inject into the consideration of the jurors the weight of his assertion that such result was in fact produced by a particular cause. The general rule is stated in 20 Am. Jur., page 653, as follows: "Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of facts in issue requires some explanation of those facts or some deduction therefrom by persons who have scientific or specialized knowledge or experience. Such testimony does, in a broad general sense, encroach upon the province of the jury; and when it relates to matters directly in issue, it should not be admitted unless its admission is demanded by the necessities of the individual case."

In this case the witness, Dr. Harrell, had set the broken bones of the plaintiff's arm 5 July, had seen it last before the accident 11 July, and saw it again after the accident 19 July. But it was not determined until 21 July that the broken ends of the bone were not in position, and the fracture was reset 1 August. The testimony of this witness, in the respects pointed out, to which exception was duly noted, must be held to have been improvidently admitted to the consideration of the jury, and that its admission was prejudicial to the defendants.

The case of *Dempster v. Fite,* 203 N. C., 697, 167 S. E., 33, is cited by plaintiff as an authority in support of the competency of the evidence offered, but it will be noted that in that case the Court said: "The hypothetical questions were not addressed to the issue of negligence, but on the issue as to the extent of the injury. The answer of the doctor 'The accident caused the injury.' Taking the question and answer together, on the question of damages, we do not think the answer impinged the jury rule to such an extent that it should be held for prejudicial or reversible error." Here the evidence offered was addressed to the determinative question whether the plaintiff's injury was in fact caused by the negligence of the defendants, and under the facts of this case tended to give undue weight to the plaintiff's contention.

Other instances where the opinion evidence of a medical expert as to a material fact was held competent will be found in *George v. R. R.,* 215 N. C., 773, 3 S. E. (2d), 286, and *McManus v. R. R.,* 174 N. C., 735, 94 S. E., 455. But in those cases the expert was permitted to draw inferences from facts which he personally observed, in the light of his professional knowledge and skill. These decisions may not be held controlling on the facts of this case.

We do not deem it necessary to discuss the other exceptions noted at the trial and brought forward in the defendants' assignments of error as they may not arise upon another trial.

For the reasons stated, there must be a

New trial.

DAN W. McLEAN v. DURHAM COUNTY BOARD OF ELECTIONS.

(Filed 23 September, 1942.)

1. Statutes § 10—

Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts. The presumption is always against repeal by implication, which results only when the statutes are inconsistent, necessarily repugnant, or wholly and utterly irreconciliable.

2. Statutes § 5a—

The Australian Ballot Law, ch. 164, Public Laws 1929, and the Primary Law, ch. 101, Public Laws 1915, deal with the same subject matter and must be construed *in pari materia.* These acts are merely amendatory of, and supplementary to each other.

3. Constitutional Law § 10½—Election filing fee not a tax or local law.

The filing fee required by the Primary Law, Michie's Code, 6023, 6034, is in no sense a tax within the meaning of Art. II, sec. 14, or a local law as condemned by Art. II, sec. 29, of the Constitution of North Carolina.

4. Same—

So long as there is no unjust discrimination, the State Legislature has full power and authority, by the exercise of its inherent police power, to control and regulate primaries and elections, unaffected by any provisions of the Federal Constitution except the Fourteenth Amendment; and Primary Law, ch. 101, Public Laws 1915, as amended by the Australian Ballot Act, ch. 164, Public Laws 1929, is reasonable and constitutional.

5. Elections § 24—

The Primary Law provides an exclusive method for nomination of candidates for office, and requires that a candidate must file a notice of candidacy, sign a pledge to abide by the result of the primary and pay a filing fee; and only those who have complied with the Primary Law shall have their names printed on the official ballot. The plaintiff not having complied with these provisions is not the nominee of any political party within the Act, and demurrer to his complaint for *mandamus* was properly allowed.

APPEAL by plaintiff from *Parker, J.,* at June Term, 1942, of DURHAM. Affirmed.

Petition for *mandamus* to require defendant to print petitioner's name on the official ballot for the November, 1942, election.

On 23 May, 1942, plaintiff, a registered and qualified voter of Durham County, was selected by the Republican Party of said county as its candidate for clerk of the Superior Court of Durham County. The nomination was by the convention method.

Plaintiff's name, together with those of the other nominees so selected, was certified by the proper officers of the convention to the County Board of Elections 27 May, 1942. On 29 May, 1942, the County Board of Elections, by letter, refused to accept such certificate, denied plaintiff's right to have his name printed on the official ballot and asserted its purpose not to do so, assigning as its reason therefor that plaintiff had failed to comply with essential provisions of the State Primary Law. Thereupon, plaintiff filed his petition for a writ of *mandamus.*

The plaintiff never filed notice of his candidacy or paid any filing or other fee. Nor has he signed a pledge to abide by the result of the primary. His name was certified to the board more than five weeks after the final date for filing notice of candidacy and paying the filing fee as fixed by statute.

The defendant appeared and demurred to the complaint and the amended complaint for that they do not state facts sufficient to constitute a cause of action for a writ of *mandamus* in that it is not alleged that plaintiff filed notice of his candidacy with the County Board of Elections of Durham County and paid the filing fee required of candidates for the office of clerk of the Superior Court of Durham County, or that he has otherwise complied with the law applicable to Durham County governing the nomination of candidates for county offices in primary elections; and that it affirmatively appears on the face of plaintiff's pleadings that he was nominated by a method not permitted by the law applicable to Durham County.

When the cause came on to be heard on the demurrer the court below entered its order sustaining the demurrer and denying the writ of *mandamus*. Plaintiff excepted and appealed.

A. A. McDonald for plaintiff, appellant.

R. P. Reade for defendant, appellee.

Attorney-General McMullan and Assistant Attorney-General Patton for State Board of Elections, amicus curiæ.

BARNHILL, J. While plaintiff challenges the correctness of the judgment of the court below on a number of grounds, the primary and decisive question presented is this: May a candidate for county office be nominated by his political party in a manner other than that prescribed by the State Primary Law when such Primary Law is applicable?

Our original Primary Law was adopted in 1915. Ch. 101, Public Laws 1915. Various sections thereof have since been amended. In 1929 the General Assembly made provision for the use of the Australian Ballot "in all elections and in all primaries held in North Carolina." Ch. 164, Public Laws 1929. This act also repealed certain sections of the 1915 Act and amended other sections. The acts and the amendatory acts are all brought forward and codified in Michie's unofficial North Carolina Code of 1939. For convenience and brevity the pertinent sections of that publication are cited.

Plaintiff not only asserts that the 1915 Act is unconstitutional but also that, in effect, it was repealed by the 1929 Act.

Repeals by implication are not favored. *Bunch v. Comrs.*, 159 N. C., 335, 74 S. E., 1048; *Discount Corp. v. Motor Co.*, 190 N. C., 157, 129 S. E., 414; *S. v. Kelly*, 186 N. C., 365, 119 S. E., 755; *Story v. Comrs.*, 184 N. C., 336, 114 S. E., 493; *Hammond v. Charlotte*, 205 N. C., 469, 171 S. E., 612; and the presumption is always against implied repeal. *S. v. Perkins*, 141 N. C., 797. Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable

intendment of both acts. *Guilford County v. Estates Administration, Inc.*, 212 N. C., 653, 194 S. E., 295; or by reasonable construction of the statutes. *S. v. Calcutt*, 219 N. C., 545, 15 S. E. (2d), 9. Repeal by implication results only when the statutes are inconsistent, *Kearney v. Vann*, 154 N. C., 311, 70 S. E., 749; necessarily repugnant, *Guilford County v. Estates Administration, Inc., supra;* utterly irreconciliable, *S. v. Epps*, 213 N. C., 709, 197 S. E., 580; or wholly and irreconciliably repugnant, *Kelly v. Hunsucker*, 211 N. C., 153, 189 S. E., 664.

The Australian Ballot Law, ch. 164, Public Laws 1929, does not purport to supersede and replace the Primary Law, ch. 101, Public Laws 1915, but merely to write into the former law a progressive and desirable improvement. It contains abundant internal evidence that no repeal, except as therein expressly provided, was intended. It is merely amendatory of and supplementary to the 1915 Act, providing for the Australian Ballot and regulating the use thereof.

Just as the concepts of the direct primary and the secret ballot are consistent, so we think, are the laws providing for these mechanics of elections when construed according to the accepted rules of statutory construction.

As the Australian Ballot Law did not repeal the Primary Law and as the two acts deal with the same subject matter, they must be construed *in pari materia*. *Phillips v. Slaughter*, 209 N. C., 543, 183 S. E., 897.

Plaintiff's contention that he is entitled to have his name printed on the official ballot is bottomed on the provisions of section 5, ch. 164, Public Laws 1929; Michie's, section 6055 (a 5), which, in part, reads: "The ballots printed for use under the provisions of this chapter . . . shall contain the names of all candidates who have been put in nomination by any primary, convention, mass meeting, or other assembly of any political party in this State, or have duly filed notice of their independent candidacy." This language is substantially all-inclusive. Standing alone and unrelated to any other section or provision of the Primary and Election Law it must be said to furnish a sound basis for plaintiff's contention. Are there other related provisions which so modify this language as to deny plaintiff his right to have his name appear on the official ballot?

The Primary Law, Michie's, section 6018, *et seq.*, provides an exclusive method for the nomination of candidates for State and county offices. It regulates the nomination for State offices (1) by a political party; (2) of an independent candidate; and (3) to fill a vacancy caused by the death of a candidate. It is made applicable to nominations for county offices and provides that a candidate must file a notice of candidacy and sign a pledge to abide by the results of the primary. Sec. 6022, sec. 6034. He must likewise pay a filing fee equal to 1% of the annual

salary of the office he seeks. Sec. 6023, sec. 6034. And "Only those who have filed notice of their candidacy and who shall have complied with the requirements of law applicable to candidates before primaries with respect to such primary election shall have their names printed on the official ballot of their respective parties." Sec. 6033.

Originally, the Primary Law excepted forty-nine counties. It has been so amended that now only three counties are excluded. In these excluded counties nominations may be made in convention, mass meeting or other assembly in accord with party rule and regulation. In making provision for official printed ballots it was necessary that the General Assembly bear this in mind and to use language sufficiently broad to assure ballots in each and every county. Hence, the wording of section 6055 (a 5).

When the provisions for primaries and elections as contained in the several acts of the Legislature are considered as one composite whole, it clearly appears that only those who have been legally nominated for county office under the law applicable to the county in which the nomination is made shall have their names appear on the official ballot. A candidate is not a nominee unless and until he has been put in nomination as required by statute. Until he becomes a nominee in the required manner he cannot claim the right to have his name printed on the official ballot.

Plaintiff failed to file notice of his candidacy or to sign the required pledge or to pay the necessary filing fee. Neither he nor his party could disregard or evade these positive requirements. Hence, he is not the nominee of any political party, within the meaning of the Primary Law, and is not entitled to the relief he seeks.

In no sense is the filing fee required by section 6023 and section 6034 a tax within the meaning of Art. II, sec. 14, or a local law as condemned by Art. II, sec. 29, of the Constitution of North Carolina. It is only one of the reasonable means adopted by the Legislature to regulate primary elections for the selection of candidates for public office and to prevent an indiscriminate scramble for office and the wholesale filing of petitions for nomination regardless of fitness or qualification.

While elections should be frequently held, Art. I, sec. 28, they must be conducted in an orderly manner. Nominations for office must be in accord with reasonable rules and regulations. The power and authority to control and regulate primaries and elections as they affect county and State offices rests exclusively in the legislative branch of the State Government, unaffected by any provisions of the Federal Constitution except the Fourteenth Amendment. *Newberry v. U. S.*, 256 U. S., 232, 65 L. Ed., 913; *U. S. v. Gradwell,* 243 U. S., 476, 61 L. Ed., 857. So long as there is no unjust discrimination the State may, by exercising its inherent police power, suppress whatever evils may be incident to a

primary or convention for the designation of candidates for election to public office. *Newberry v. U. S., supra.* Statutes prescribing reasonable rules and regulations to this end are constitutional. *S. v. Cole,* 156 N. C., 618. See also *Socialist Party v. Uhl,* 155 Cal., 776, 103 Pac., 181; *Ex Parte, S. v. ex rel. Bragg,* 197 So., 32; *S. ex rel. Landis v. Carson,* 154 So., 150; *Koelsch v. Girard,* 35 Pac. (2d), 816; *S. v. Carrington,* 190 N. W., 390; *Whitney v. Skinner,* 241 S. W., 350; *Hamilton v. Davis,* 217 S. W., 431.

We find nothing in any of the pertinent acts which conflicts with any provision either of the State or of the Federal Constitution. Their enactment was a valid exercise of legislative authority and deprives plaintiff of no constitutional right.

The judgment below is

Affirmed.

STATE v. RALPH DUNCAN.

(Filed 23 September, 1942.)

1. Bastards § 1—

The Court is alert to exercise its power to protect illegitimate children who are entitled to the benefit of laws for their support and maintenance. *Story v. Story,* 221 N. C., 114, approved.

2. Judgments § 24: Bastards § 6—

The general rule is that the trial court loses jurisdiction to modify a judgment after the adjournment of the term, and in a bastardy proceeding, where defendant pleaded guilty and orders were made for the support of the child, the court has no authority to strike out a plea of guilty or a judgment at a former term; but, under N. C. Code, 1939 (Michie), sec. 276 (f), the court may modify the conditions of the former judgment, or increase from time to time the amount necessary for the child's support.

APPEAL by defendant from *Johnson, Jr., Special Judge,* at May Term, 1942, of BUNCOMBE.

This is a criminal action and originated in the General County Court of Buncombe County, N. C. On 31 December, 1940, by order of the judge of said court, this and all other cases pending in the General County Court of Buncombe County were transferred to the Superior Court of said county. The aforesaid order of transfer was ratified by an Act of the General Assembly, chapter 69, Public-Local Laws of 1941. The additional facts pertinent to this appeal are set forth in the following order:

"This cause coming on to be heard before His Honor, Jeff D. Johnson, Jr., Judge presiding at the May Criminal Term, 1942, of the Superior

Court of Buncombe County, and the Solicitor having made a motion in the cause to strike out the order entered by His Honor, A. Hall Johnston, Judge presiding at the April Term, 1941, as appears of record, for that the court was without jurisdiction or authority to enter said order, and for further order requiring the defendant to pay into court for the use and benefit of the defendant's illegitimate child a certain weekly sum, and the Court having heard certain evidence, finds the following facts:

"(1) That the defendant pleaded guilty in the General County Court of Buncombe County on the 16th day of September, 1939, to the charge of bastardy, wherein it was alleged and charged that he was the father of and had willfully failed and refused to support his illegitimate child, Phillip, the son of Ollie Belle Reaves, born April 4, 1939, and thereupon the defendant was ordered by the Court to pay into Court for the support of said child the sum of $3.00 per week.

"(2) That subsequent orders were made in said cause continuing the payments, to-wit, October 2, 1939, and May 4, 1940, and that at the December Term, 1940, at the request of the defendant and upon his motion, the payments at the rate of $3.00 per week were continued but the said defendant was allowed to make said payments direct to Ollie Belle Reaves for the use and benefit of said Phillip Reaves instead of paying the same into the office of the Clerk of the Court.

"(3) That at the April Term, 1941, an order was signed by His Honor, A. Hall Johnston, attempting to strike out all previous orders and decrees entered in said cause, and all of the aforesaid orders are referred to and made a part of these findings.

"(4) That at the instance of the defendant an affidavit was prepared by him and signed by the prosecuting witness to the effect that the defendant was not the father of her illegitimate child, but the Court finds as a fact that said affidavit was made by the prosecutrix, Ollie Belle Reaves, at the request and instance of the defendant and upon the representation of the defendant that by having the criminal charge dismissed he would be able to improve his standing with the Civil Service Commission and earn substantially more and that he would thereafter pay an additional amount towards the support of his illegitimate child, Phillip Reaves.

"The Court is of the opinion, and so finds, upon all the evidence, that the defendant is the father of the illegitimate child born to Ollie Belle Reaves, notwithstanding the affidavit which the defendant procured; and upon consideration of the entire record, including the defendant's plea of guilty, and the evidence offered at this hearing and the findings of the Court based thereon:

"IT IS THEREUPON ORDERED, ADJUDGED AND DECREED that the defendant be, and he is hereby required to pay into the office of the Clerk of the

Superior Court of Buncombe County the sum of $3.00 per week for the support of his illegitimate child, the first of said payments to be due and payable on May 23rd, 1942, and subsequent weekly payments to be made each week thereafter until the further orders of the Court, and the order of His Honor, A. Hall Johnston, entered at the April Term, 1941, to the extent of its conflict, if any, with the provisions of this order, is hereby modified. Jeff D. Johnson, Jr., Judge Presiding."

From the foregoing order, the defendant appeals and assigns error.

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

J. Scroop Styles and Claude L. Love for defendant.

DENNY, J. The assignments of error may be disposed of in this cause by a consideration of the question: Did His Honor have authority to enter the order at May Term, 1942, of the Superior Court of Buncombe County, as set forth above?

The appellant contends that the motion of the solicitor in this cause is tantamount to an appeal from one Superior Court judge to another. This contention is untenable. This cause was properly transferred to the Superior Court, and the statute, Public Laws of 1933, ch. 228, as amended by Public-Local Laws of 1937, ch. 432, as amended by Public Laws of 1939, ch. 217, N. C. Code, 1939 (Michie), sec. 276 (f), expressly provides where the defendant has been determined to be the father of an illegitimate child ". . . The Court shall fix by order, subject to modification or increase from time to time, a specific sum of money necessary for the support and maintenance of the particular child who is the object of the proceedings."

It is the general rule that the trial court loses jurisdiction to modify a judgment after the adjournment of the term. There are exceptions to this rule, however, and one of the exceptions is to a judgment or order in a bastardy proceeding for the support of an illegitimate child. His Honor, at the April Term, 1941, did not have authority to strike out the plea or the judgment entered prior thereto in this cause. *S. v. Auman,* 35 N. C., 242. However, under the statutes now in force in this State, the court did have authority to modify the conditions of the judgment entered in this cause. To that extent, and to that extent only, was the order valid. The plea of guilty and the judgment thus modified, remained on the docket of the Superior Court, subject to the further orders of the court which might be entered from time to time, pursuant to the provisions of applicable statutes.

In the case of *Story v. Story,* 221 N. C., 114, 19 S. E. (2d), 136, the plaintiff contended that the consent order for the custody and support

of a child, in a divorce proceedings, could not be modified without the consent of the parties. The Court held: "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* (167 N. C., 319, 83 S. E., 490). 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 towards its wards—the children of the State whose personal or property interests require protection."

The Court is equally alert to exercise its power to protect illegitimate children who are entitled to the benefit of laws enacted by the General Assembly to provide for their support and maintenance.

We hold His Honor did have authority to enter the order at May Term, 1942, of the Superior Court of Buncombe County, from which defendant appeals. The exceptions of the defendant cannot be sustained, and the judgment of the court below is

Affirmed.

W. B. COPPERSMITH & SONS, INC., AND N. F. EURE v. ÆTNA INSURANCE COMPANY, HARTFORD, CONN., THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONN., ET AL.

(Filed 23 September, 1942.)

1. Insurance § 44—

Plaintiff having taken out a fire and marine insurance policy on his boat, which policy contained a clause providing for a $1,000.00 deduction from the total of any and all claims covered, a nonsuit was properly granted where it appeared that the boat suffered only $890.00 damage, plaintiffs' contention that the deductible clause was inserted in the policy by mutual mistake being untenable, since all the evidence shows that there was no mistake on the part of the defendants in issuing the policy, and that plaintiff had full opportunity to read the policy and ascertain the facts but failed so to do.

2. Contracts § 12—

In an action for reformation it must be alleged and shown, by evidence clear, strong and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to *both parties*, or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to such agreement and the intention of the parties.

3. Contracts § 6—

A contractor must stand by the words of his contract and if he will not read it, he alone is responsible for his omission.

4. Same—

The signing of a written contract is not necessarily essential to its validity. It is equally efficacious if a written contract is prepared by one party and delivered to the other party, and acquiesced in by the latter without objection.

5. Equity § 2—

Equity will not afford relief to those who sleep on their rights, or whose condition is traceable to that want of diligence which may fairly be expected of a reasonable and prudent man.

APPEAL by plaintiffs from *Williams, J.*, at March Term, 1942, of PASQUOTANK.

This is an action instituted by the plaintiffs upon a fire and marine insurance policy issued by The Tugboat Underwriting Syndicate, composed of the sixteen insurance companies named as defendants therein. The policy in suit was written on the tug "Eureka" to cover the period from 15 July, 1940, to 15 July, 1941, and was for the sum of $8,000.00, loss, if any, payable to N. F. Eure, and contained, *inter alia,* the provision: "From the total amount of any and all claims covered here under . . . resulting from one casualty, the sum of $1,000.00 shall be deducted."

On 4 August, 1940, the tug "Eureka" sustained fire damage to her hull in the amount of $890.00. Claim was made by the plaintiffs upon the defendants for payment of this amount, which claim the defendants denied. Whereupon the plaintiffs instituted this action.

From a judgment as in case of nonsuit, upon defendants' demurrer to the evidence under C. S., 567, the plaintiffs appealed, assigning as error the court's action in sustaining the defendants' motion to dismiss and entering judgment accordingly.

R. Clarence Dozier for plaintiffs, appellants.

Worth & Horner for defendants, appellees.

SCHENCK, J. Since the policy in suit contained an unlimited one thousand dollar deductible clause, and since the loss in suit was only $890.00, it follows, nothing else appearing, that the action cannot be maintained.

However, the plaintiffs by an amendment to the original complaint seek to reform the policy to conform to what they allege was the policy actually purchased by the plaintiffs by striking therefrom the clause providing for $1,000 deductible in so far as it related to loss by fire, which said clause they allege was inserted in said policy (1) through mistake or inadvertence of the draftsman or scrivener, or (2) by mutual mistake of the parties, or (3) on account of mistake of the plaintiffs and fraud of the defendants.

There is no evidence in the record of either a mistake of the scrivener or of fraud of the defendants.

As to the allegation that the $1,000 deductible clause was made applicable to loss by fire through mutual mistake of the plaintiffs and the defendants, all of the evidence tends to show that the policy in suit was obtained for the plaintiffs from the defendants upon request of the plaintiffs by an application therefor on behalf of the plaintiffs made by one Dal H. Williams, who conducted a general insurance business in Elizabeth City, N. C., to insurance brokers in New York City, and that said application contained a $1,000 deductible clause, with no exception therefrom for loss by fire; and that the policy was issued by the defendants in accord with such application, including an unlimited $1,000 deductible clause. There is no evidence that such a clause was inserted in the policy by reason of any mistake on the part of the defendants. On the contrary, all the evidence tends to show that the policy was issued by the defendants in accord with the application made to it by the plaintiffs, through Williams. So even if it be conceded that the plaintiffs were mistaken as to the provision of the policy that the $1,000 deductible clause was limited to loss by collision, stranding and sinking, and loss by fire was excluded therefrom, there was still the lack of mutual mistake necessary for the plaintiffs to maintain their action. "In an action for reformation it must be alleged and shown, by evidence clear, strong and convincing, that the instrument sought to be corrected failed to express the true agreement of the parties, because of a mistake common to *both parties,* or because of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to such agreement and the intention of the parties." *Ricks v. Brooks,* 179 N. C., 204, 102 S. E., 207.

A further reason appears from the record why the plaintiffs cannot maintain their alleged cause of action for reformation of the policy.

All of the evidence tends to show that the plaintiffs are intelligent, experienced and educated businessmen and that the policy in suit was sent by the defendants to Williams at Elizabeth City, and was received and held by him with the knowledge and consent of the plaintiffs, and notwithstanding the fact that the policy was held by Williams from soon after 15 July, 1940, till after the fire on 4 August, 1940, and during this time the plaintiffs had free and full opportunity to read the policy and discover its contents, and if found not in accord with their understanding to have had it rewritten or to have declined to accept it, but failed to avail themselves of this opportunity. Equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man. *Clements v. Ins. Co.,* 155 N. C., 57, 70 S. E., 1076.

In speaking of the effect of the failure of one to read a contract from which he seeks to be relieved the Supreme Court of the United States says: "It will not do for a man to enter into a contract and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission." *Upton v. Tribilcock,* 91 U. S., 45, 23 L. Ed., 203, and authorities there cited. The signing of a written contract is not necessarily essential to its validity. It is equally efficacious if a written contract is prepared by one party and delivered to the other party, and acquiesced in by the latter without objection.

The judgment of the Superior Court is

Affirmed.

W. F. BRYSON AND WIFE, TEXIE BRYSON; FRED R. BRYSON AND WIFE, ARBUTUS BRYSON; WILLIS T. BRYSON AND WIFE, LESSIE BRYSON, v. C. C. HIGDON AND WIFE, VIOLET HIGDON, AND OSCAR HIGDON.

(Filed 23 September, 1942.)

1. Arbitration and Award §§ 6, 8—

Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under C. S., 898 (a), *et seq.,* but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action.

2. Arbitration and Award §§ 1c, 8—

It has been frequently said that arbitrators are "a law unto themselves," and they are not bound to decide according to law when acting within the scope of their authority, but may award according to their own notions of justice and without assigning any reason.

3. Arbitration and Award § 6—

Arbitrators need not adopt the precise methods of hearing in court or before referees and in many respects their procedure is not reviewable.

4. Arbitration and Award § 13—

When the law respecting submission to arbitration has been substantially followed—and the result has not been challenged on that ground—the award can be attacked only for fraud, undue influence, or improper conduct on the part of the arbitrators when acting within their authority.

5. Same—

The fact that the arbitrators divided the contested area with approximate equality between the parties does not give rise to a legal inference that they acted without evidence or beyond the pale of their authority.

APPEAL by defendants from *Gwyn, J.*, at May Term, 1942, of JACKSON. Affirmed.

Stillwell & Stillwell for plaintiffs, appellees.
Black & Whitaker for defendants, appellants.

SEAWELL, J. This suit began as an action to remove a cloud from the title to the lands described in the complaint. Defendant answered and, inferentially at least, joined issue with the plaintiff as to the title; and the case proceeded as in ejectment.

Pending the hearing, and at the instance of both parties, the controversy was submitted to arbitration, and an order of the court was made to that effect. C. S., 898 (a), *et seq.*

The record discloses that the arbitrators named took the matter in hand and, without difference of opinion or the necessity of selecting an umpire, heard evidence and argument of counsel and submitted their report, in which they ignored the lines contended for by the litigant parties and established an intermediate line, with the effect of awarding a portion of the contested area to each. The appellants contend that this is suggestive of compromise. The report was confirmed by the judge, and from this judgment defendants appealed.

The part of the order authorizing the arbitration which is supposed by the appealing parties to be significant reads as follows:

"That Thomas A. Cox and H. R. Queen be, and they are hereby appointed arbitrators, with the right and privilege to appoint the third arbitrator in conformity with the agreement hereinbefore set forth.

That the arbitrators be and they are hereby authorized forthwith to proceed to arbitrate the cause herein set forth as it relates to the title of land and the location of the boundary lines between the plaintiffs and the defendants, and as set forth in the complaint and answer and as embraced within the map and plat heretofore prepared under orders of this Court by S. M. Parker and R. Z. Coward.

"This order shall not be construed to mean that the arbitrators shall fix and establish the disputed lines at the places set forth on the court map as contended by the plaintiffs or at the places set forth on the court map as contended by the defendants, but may fix and establish the line or lines at one or the other of said lines contended, or at an intermediate line or lines as they may find from the evidence."

In their brief, appellants state the question which they conceive to be raised, as follows:

"May arbitrators, whose authority under the order of arbitration is to fix and establish certain land lines 'as they may find from the evidence,' fix the disputed line on a location not contended for by either party, where there is no evidence to support the location so fixed?"

Neither before Judge Gwyn, who confirmed the report of the arbitration, nor before this Court is there any record of the evidence, either oral, documentary, or demonstrative, upon which the arbitrators decided the controversy, and we cannot assume that there was none to support their action.

The courts have done all that they could in maintaining the purpose and spirit of this sort of arbitration by liberal construction of pertinent laws. It is, of course, not expected that arbitrators should adopt the precise methods of hearings in court or before referees in making up their decision, and in many respects their procedure is not reviewable by this Court, as would be that of inferior courts.

It has been frequently stated that they are "a law unto themselves." When the law respecting submission to arbitration has been substantially followed—and the result has not been challenged on that ground—the award can be attacked only for fraud, undue influence, or improper conduct on the part of the arbitrators when acting within their authority. *Millinery Co. v. Insurance Co.*, 160 N. C., 139, 140, *infra*. There is nothing in this case which would indicate to the Court that that authority has been exceeded.

It is said in *Patton v. Baird*, 42 N. C., 256: "Arbitrators are no more bound to go into particulars and assign reasons for their award than a jury is for its verdict. The duty is best discharged by a simple announcement of the result of their investigation."

"They are not bound to decide according to law when acting within the scope of their authority, being the chosen judges of the parties and a

law unto themselves, but may award according to their notion of justice and without assigning any reason." *Millinery Co. v. Insurance Co.*, 160 N. C., 140, 75 S. E., 944; *Ezzell v. Lumber Co.*, 130 N. C., 205, 41 S. E., 99; *Robbins v. Killebrew*, 95 N. C., 19.

The cited cases and references therein indicate the policy of the law and the care of the courts to liberally sustain this very effectual and valuable method of bringing controversies to an end, considering that in many instances the controversy may have a more friendly ending and a speedier determination, and even a greater probability of justice between the litigants than may be afforded by the more belligerent methods of trial in the courts of law. 3 Am. Jur., p. 830, sec. 2; *Martin v. Vansant*, 99 Wash., 106, 168 P., 990. With this in view, every reasonable intendment will be indulged in favor of the regularity and integrity of the proceeding. 6 C. J. S., 152, sec. 1. See above cited cases.

We find no indication in this record that the arbitrators exceeded their authority or power, and the judgment of the court below is

Affirmed.

MARGIE BELL WATERS v. TOWN OF BELHAVEN.

(Filed 23 September, 1942.)

1. Municipal Corporations § 14—

In an action for personal injuries against a town for negligently maintaining its streets, plaintiff was properly nonsuited when it appears that plaintiff stumbled over a barrel hoop imbedded in some mud in the street, since there was no evidence that the municipality or any of its agents caused the presence of the hoop in the street or had any actual or implied notice thereof, the only evidence being that a day or two before the accident, an employee of the town cleaned out a ditch and threw mud in the street, thus leaving the question of how and when the hoop got into the street and became imbedded in the mud to pure conjecture.

2. Same—

A municipality is required to use ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who have a right to use them in a proper manner.

3. Same—

In order to hold a municipality for negligence in maintaining its streets or sidewalks, the plaintiff must not only show the existence of a defect and the occurrence of an injury, but also that the officers of the city had actual or implied notice of such defect, that they knew, or by the exercise of ordinary diligence, should have known of the existence of such defect.

4. Same—

A municipality is chargeable for maintaining the respective portions of its streets and sidewalks in a reasonably safe condition for the purposes for which such portions of the streets and sidewalks are respectively devoted.

APPEAL by plaintiff from *Williams, J.*, at May Term, 1942, of BEAUFORT.

This is a civil action to recover damages for an injury received by plaintiff on the night of 26 February, 1941, which injury plaintiff alleges was caused by the negligence of the defendant in not keeping the street, where the injury occurred, "reasonably safe for pedestrians and causing and allowing said street to be obstructed in that part where plaintiff was walking and where street passengers and pedestrians were accustomed to walk to the knowledge of the defendant and its officers."

The plaintiff further alleges that there was no sidewalk on the north side of said street and that the sidewalk on the south side of the street "was not practical for her use, for that it was rough and not kept in proper condition . . . said sidewalk was unlighted and not in general use." Plaintiff also alleges "That the obstruction, which caused plaintiff's injury, was thrown into the street by the agent and employee of the defendant in the form of dirt, constituting a ditch bank, which covered a part of the wire which caught the plaintiff's foot and caused the fall; said snag and obstruction being there to the knowledge of the defendant corporation, and its officers and agents and employees, constituting a danger to pedestrian travel and rendered the street unsafe for such use, and in breach of its duty to keep the said street in a reasonably safe condition for pedestrian use."

The evidence discloses that the accident occurred on Wednesday night while plaintiff was returning home from church. That a man working for the defendant had, on Monday or Tuesday next before the accident, cleaned out the drainage ditch on the side of the street in question and had thrown mud or dirt into the street on the part thereof which was used by the public for vehicular and pedestrian traffic. The street is not paved. A wire hoop the size of plaintiff's finger and about two feet in diameter was imbedded in the mud with only a small part thereof exposed. The plaintiff did not see the hoop and caught her foot in it, causing her to fall and break her arm.

At the close of plaintiff's evidence the defendant moved for judgment as of nonsuit, which motion was allowed. Plaintiff appeals and assigns error.

John A. Wilkinson and H. S. Ward for plaintiff.
D. D. Topping for defendant.

DENNY, J. The only exception and assignment of error is to the granting of defendant's motion for judgment as of nonsuit.

The obligation of a municipality to maintain its streets and sidewalks in a condition reasonably safe for those who have a right to use them in a proper manner, is well settled by numerous decisions of this Court. In the case of *Markham v. Improvement Co.,* 201 N. C., 117, 158 S. E., 852, it is said: "The law imposes upon the governing authorities of a city or town the duty of exercising ordinary care to maintain its streets or sidewalks in a condition reasonably safe for those who may have occasion to use them in a proper manner. Such authorities are liable only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect and the occurrence of an injury; he must show that the officers of the city knew, or by ordinary diligence, might have known of the defect. But actual notice is not required. Notice of a dangerous condition in a street may be implied, and indeed will be imputed to the city or town if its officers should have discovered it in the exercise of due care. This principle has been adhered to in our decisions and is now regarded as firmly established. *Jones v. Greensboro,* 124 N. C., 310; *Kinsey v. Kinston,* 145 N. C., 106; *Revis v. Raleigh,* 150 N. C., 348; *Bailey v. Winston,* 157 N. C., 253." Likewise, in the case of *Oliver v. Raleigh,* 212 N. C., 465, 193 S. E., 853, *Justice Barnhill* said: "Ordinarily sidewalks are constructed for the use of pedestrians and public streets for vehicular travel, except at street intersections. This does not necessarily mean that a pedestrian is prohibited from using any portion of a street except at an intersection, or that a city in no event would be liable for injuries sustained by a pedestrian while traversing or walking upon a public street at a place other than an intersection. Each case must be determined upon its merits. All portions of a public street from side to side and end to end are for the public use in appropriate and proper method, but no greater duty is cast upon the city than that it shall maintain the respective portions of its streets in a reasonably safe condition for the purposes for which such portions of the streets are respectively devoted. *Kohlof v. Chicago,* 192 Ill., 249, 85 Am. S. R., 335."

The appellant is relying on the case of *Bailey v. Winston,* 157 N. C., 252, 72 S. E., 966, in which case the city of Winston had caused an excavation to be made in the street and had neglected to see that it was carefully guarded, so as to be reasonably free from danger to travelers upon the street. We do not think the facts in the above case are analogous to those in the instant case. The city of Winston had made a contract for the excavation in its street and was fixed with notice of the conditions which existed. The evidence here does not fix the defendant with notice.

Under the decisions of this Court, in order for the plaintiff to recover she must show that the defect in the street was created by the municipality itself, by someone under its direction, or that it had actual or implied notice of the defect. The only evidence on the question of notice is to the effect that on Monday or Tuesday, next before this accident occurred on Wednesday night, an employee of the defendant cleaned out the ditch between the street and sidewalk and threw the dirt or mud on that portion of the street used for vehicular and pedestrian traffic. There is no evidence that the employee of the defendant put the barrel hoop in the street or that it was there when he cleaned out the ditch. Neither is there any evidence of notice, actual or implied, to the officials of the town of Belhaven prior to this accident that the barrel hoop was imbedded in the dirt or mud which had been thrown into the street. In so far as the evidence in this case discloses, it is purely conjecture as to how and when the barrel hoop got into the street and became imbedded in the dirt or mud, causing the condition complained of by the plaintiff.

His Honor properly sustained defendant's motion for judgment as of nonsuit. The judgment of the court below is

Affirmed.

WILLIAM ELLER v. A. C. LAWRENCE LEATHER CO., ET AL.

(Filed 23 September, 1942.)

1. Master and Servant §§ 40d, 40e, 40f—

When on September 15, 1939, plaintiff while about his employer's business, was struck on the back of the head by hides he was jerking from hooks about 10 feet from the floor, and therefore had to stop work for a very short time, and as a result of said blow plaintiff contracted hemorrhagic pachymeningitis which has caused his total disability since 26 January, 1940, *held* an injury by accident, arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act.

2. Master and Servant § 55d—

Findings of fact by the Industrial Commission, if supported by competent evidence, are conclusive on appeal.

APPEAL by defendants from *Gwyn, J.*, at January Term, 1942, of HAYWOOD.

Proceeding by employee under Workmen's Compensation Act to obtain compensation for injuries; opposed by employer and insurance carrier.

From the record and evidence adduced on the hearing, the Industrial Commission, in addition to the jurisdictional findings, made the following essential factual determinations:

1. That the plaintiff employee, on or about 15 September, 1939, while jerking off two or three hides or "crops" of leather of a total weight of approximately 45 pounds, from hooks about 10 feet from the floor, was struck an unusually heavy blow on the back of his head by said leather, which staggered him and caused him to stop work for a very short time.

2. That the plaintiff employee has been, since he was disabled, and is at present time, suffering from hemorrhagic pachymeningitis, and that this condition is the direct cause of his disability.

3. That the hemorrhagic pachymeningitis from which the plaintiff is suffering was the result of the blow which the plaintiff received on the back of his head, while jerking hides or "crops" of leather from hooks, and specifically that this said blow or lick on the head was received by the plaintiff in the course of and out of his employment with the defendant employer.

4. That the plaintiff employee, on or about 15 September, 1939, sustained an injury by accident which arose out of and in the course of his employment with the defendant employer, and as a result therefrom the plaintiff has been totally disabled from 26 January, 1940, to the date of this hearing, and will continue to be totally disabled until such time as his condition materially improves.

Compensation was awarded, and the award was affirmed on appeal to the Superior Court. From this latter ruling, the defendants appeal, assigning errors.

Edwards & Leatherwood for plaintiff, appellee.

Morgan & Ward and Jones, Ward & Jones for defendants, appellants.

STACY, C. J. This is one of the border-line cases. It is not easy of decision. Procedural considerations may tip the beam in favor of affirmance. The findings of the Industrial Commission, when supported by competent evidence, are conclusive on appeal. *Buchanan v. Highway Com.*, 217 N. C., 173, 7 S. E. (2d), 382; *Carlton v. Bernhardt-Seagle Co.*, 210 N. C., 655, 188 S. E., 77. Likewise, the presumption against error is invoked by the plaintiff as an aid to his position. *Cole v. R. R.*, 211 N. C., 591, 191 S. E., 353; *Gold v. Kiker*, 218 N. C., 204, 10 S. E. (2d), 650.

There is evidence to support the findings of the Commission. There is some pointing in the opposite direction. This conflict, however, belongs to the fact-finding body, and not to the appellate courts. *Lassiter v. Tel. Co.*, 215 N. C., 227, 1 S. E. (2d), 542. Hemorrhagic pachymeningitis resulting in permanent disability and caused by a traumatic injury or blow on the head which the employee sustained while about the employer's business, may well be said to have arisen out of and in the course

of the employment and properly attributed to the injury by accident. This makes it compensable under our statute.

The finding is that plaintiff sustained an injury by accident which arose out of and in the course of his employment, and that this traumatic injury naturally and proximately resulted in his present disability. *Smith v. Creamery Co.*, 217 N. C., 468, 8 S. E. (2d), 231. The case is much stronger than *MacRae v. Unemployment Compensation Com.*, 217 N. C., 769, 9 S. E. (2d), 595, and *Blassingame v. Asbestos Co.*, 217 N. C., 223, 7 S. E. (2d), 478, where awards of the Industrial Commission were upheld.

In *Dove v. Alpena Hide & Leather Co.*, 198 Mich., 132, 164 N. W., 253, the widow of a deceased employee was held to be entitled to compensation where her husband's death was caused by inhaling infected dust arising from hides as they were piled in a poorly ventilated hide house, the Court saying: "The accidental feature of the case is that by chance the septic germ or germs were taken up by his respiratory organs and carried into his system, an occurrence which the testimony shows probably did happen, but which was unusual in the work at which he was engaged." In the instant case, the injury by accident is much more pronounced under the findings of the Commission.

Viewing the record in its entirety, the conclusion is reached that the judgment of the Superior Court should be upheld.

Affirmed.

RUTH ASHLEY ET AL. v. F-W CHEVROLET CO. ET AL.

(Filed 23 September, 1942.)

1. Master and Servant §§ 40d, 40e—

Where, in defendants' garage, it was customary for the employees to furnish their own tools and to borrow from each other, and an altercation between two employees over their tools occurring while they were working, resulting in an assault by one which killed the other, *held*, a finding by the Industrial Commission that such assault was an accident arising out of and in the course of the employment sufficient to sustain the award.

2. Same—

Under the Workmen's Compensation Act, an injury arises out of the employment, when it occurs in the course of employment and is a natural or probable consequence or incident of it, and if the injury had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected.

3. Same—

If one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment,

the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment; but if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment.

4. Same—

When the record contains evidence to support either a finding that the accident did or did not arise out of and in the course of employment, the findings of the Industrial Commission are conclusive on appeal.

APPEAL by defendants from *Bobbitt, J.*, at April Term, 1942, of SURRY.

Proceeding under Workmen's Compensation Act to determine liability of defendants to the surviving widow and minor son, sole dependents of Vanious Z. Ashley, deceased employee.

Vanious Ashley and Spencer Marlowe were employed by the F-W Chevrolet Company in its service garage at Elkin, N. C., the former as mechanic, the latter as helper.

The Industrial Commission, in addition to the jurisdictional determinations, made these essential findings:

1. That it was a custom in the shop for the workers and employees, and especially the deceased, Vanious Ashley, and Spencer Marlowe, to furnish their own tools with which they worked, or at least a part of them.

2. That it was a custom between Vanious Ashley and Spencer Marlowe to borrow each other's tools to be used in the work which they were doing for the defendant; that Vanious Ashley had a box of tools, and Spencer Marlowe had only two or three tools that he used and, therefore, Spencer Marlowe borrowed tools frequently from Vanious Ashley to be used in the work for which they were employed to do.

3. That a few days prior to 23 May, 1940, Vanious Ashley had become tired of allowing Spencer Marlowe to use his tools and was keeping his tools in a tool box with a lock on the same; that on 23 May, 1940, about 2:00 or 3:00 o'clock in the afternoon Vanious Ashley was working on a car in the garage of the defendant and Spencer Marlowe was working on another car near-by, and in the course of their work Spencer Marlowe passed near-by the tool box belonging to Vanious Ashley and remarked to Vanious Ashley, "You had better lock your tool box, you usually do," and Vanious Ashley replied that it was his "damn tool box," and he would lock it if he wanted to; and, that as a result of the feeling engendered between the two men about the tools to be used by them in carrying on their duties, and immediately after the exchange of said words and while on the premises of the defendant company and while about the duties of their employment, Spencer Marlowe struck Vanious Ashley in the back of the head either with his fist or some object and fractured his

skull, knocking him to the floor, and from which blow the said Vanious Ashley died within a few hours.

4. That the manager of the defendant, Chevrolet Company, knew that his employees, including Vanious Ashley and Spencer Marlowe, furnished a portion of their own tools with which they did their work in the plant of the defendant, and that they frequently borrowed each other's tools.

5. The Commission . . . finds as a fact that the injury sustained by Vanious Ashley . . . . arose out of and in the course of his employment.

Upon the facts found, the Commission awarded compensation, and this was affirmed on appeal to the Superior Court. From this latter ruling, the defendants appealed, assigning error.

William M. Allen and Hoke F. Henderson for plaintiffs, appellees.
Jones & Smathers for defendants, appellants.

STACY, C. J. Did Ashley's death result from an injury by accident arising out of and in the course of his employment? The record permits an affirmative inference.

By the terms of the Workmen's Compensation Act, a compensable death is one which results to an employee from an injury by accident arising out of and in the course of the employment. *Slade v. Hosiery Mills*, 209 N. C., 823, 184 S. E., 844. An injury is said to "arise out of" the employment when it occurs in the course of the employment and is a natural or probable consequence or incident of it. *Harden v. Furniture Co.*, 199 N. C., 733, 155 S. E., 728. "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266.

In the case of injuries inflicted by assault, the rule is that if one employee assault another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment. *Martin v. Sloss-Sheffield Steel & Iron Co.*, 216 Ala., 500, 113 So., 578. But if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. *Jacquemin v. Turner & Seymour Mfg. Co.*, 92 Conn., 382, 103 Atl., 115. The statement of the rule, as thus distilled from the authorities, is simple enough. Its application is sometimes fraught with puzzling effect. Here persuasive arguments may be advanced in favor of either conclusion, and were so

advanced on the hearing. When the record is such as to support either result, the findings of the Commission are controlling. *Lockey v. Cohen, Goldman Co.*, 213 N. C., 356, 196 S. E., 342; *Lassiter v. Tel. Co.*, 215 N. C., 227, 1 S. E. (2d), 542.

But for the custom or practice of borrowing tools in the plant, the incident here in question might not have occurred. Hence, it is permissible to infer that the injury by accident which resulted in harm to the employee arose out of the employment as an incident to the method of carrying on the work in the shop. It is clear that it occurred in the course of the employment. *Conrad v. Foundry Co., supra.*

The result is an affirmance of the judgment below.

Affirmed.

STATE v. CHARLIE COLSON.

(Filed 23 September, 1942.)

1. Intoxicating Liquor §§ 4d, 9c—

On a criminal prosecution for unlawful possession of intoxicating liquors, evidence of other sales is competent to prove *quo animo*, relevancy and not immediateness being the true test.

2. Criminal Law § 53a: Trial § 33—

A judge is not required by law to state the contentions of the litigants.

3. Trial § 33—

Where a judge in his charge states the contentions of one of the parties he must also fairly state the contentions of the adversary party. A failure to do so will be held for error.

4. Intoxicating Liquor § 9b—

Upon a trial on indictment for the sale of intoxicants there was evidence of sales at undisclosed times. *Held:* It will not be presumed that such sales occurred more than two years next preceding the prosecution when defendant has not pleaded C. S., 4512, or in apt time called it to the court's attention or offered evidence as to the dates of sale.

5. Criminal Law § 53a—

When there is evidence of several sales, a charge that if the jury finds that defendant made a sale of intoxicating liquor they should return a verdict of guilty is not objectionable as being too general.

APPEAL by defendant from *Dixon, Special Judge,* at March Term, 1942, of CURRITUCK. No error.

Criminal prosecution on a two-count bill of indictment charging (1) the unlawful possession of intoxicating liquors for the purpose of sale; and, (2) the unlawful sale of intoxicating liquors.

There was evidence that on 12 February, 1942, defendant sold one William Brinkley one quart of A.B.C. liquor at his place of business in Currituck County. The testimony tends to show that defendant had made other sales to other parties.

The officers searched the premises of the defendant and found drinking glasses with the odor of whiskey therein; one quart bottle about one-third full of whiskey; empty bottles in his place of business and a large quantity of broken bottles in a ditch about 10 or 20 feet from the rear door thereof.

There was a verdict of guilty on both counts. From judgment thereon the defendant appealed.

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

P. G. Sawyer and R. Clarence Dozier for defendant, appellant.

BARNHILL, J. There was evidence that the defendant had in his possession a certain quantity of liquor. Under the circumstances of this case such possession was not unlawful unless it was for the purpose of sale. The testimony tending to show that defendant had made sales of whiskey was competent, therefore, to prove the *quo animo*. *S. v. Simons,* 178 N. C., 679, 100 S. E., 239, and cases cited; *S. v. Crouse,* 182 N. C., 835, 108 S. E., 911. "Immediateness is not the true test, but relevancy." *S. v. Beam,* 184 N. C., 730, 115 S. E., 176. Apparently, the sales were made at about the same time. If this was not the fact the defendant could have so shown by cross-examination of the witnesses. In any event, it does not appear that the sales were so remote, in point of time, as to constitute evidence thereof irrelevant. Defendant's exceptions thereto cannot be sustained.

The defendant excepts for that the court, after stating the contentions of the State, failed to give in its charge any contentions of the defendant.

There is no law requiring the judge to state the contentions of litigants to the jury. *Trust Co. v. Ins. Co.,* 204 N. C., 282, 167 S. E., 854. When, however, the judge states the contentions of one of the parties he must fairly charge also as to the contentions of the adversary litigant. The failure to do so will be held for error. *Messick v. Hickory,* 211 N. C., 531, 191 S. E., 43. A careful examination of the record fails to disclose any error in this respect. It is true that one of the paragraphs of the charge begins, "The State contends and offers evidence tending to show." This, however, is followed only by a summary of the testimony of each witness. Hence, the court did not undertake to give any of the contentions.

The essential elements of the offense charged in the first count were explained to the jury. On the second count the court charged:

"If you should find from the evidence, beyond a reasonable doubt, that the defendant, Charlie Colson, made a sale of intoxicating liquor, it will be your duty to return a verdict of guilty on this count."

What more could the court have said in declaring and explaining the law on this feature of the case? The word "sale" is in common use among all classes. Its meaning is generally known and readily understood. Any further definition or explanation would have been of little or no benefit to the jury. Its use explained and made known to the jury the nature of the crime charged and constituent elements thereof. Its failure to amplify in this respect cannot be held for prejudicial error. *S. v. Graham,* 194 N. C., 459, 140 S. E., 26; *Sherrill v. Hood, Comr.,* 208 N. C., 472, 181 S. E., 330; *S. v. Puckett,* 211 N. C., 66, 189 S. E., 183.

The bill charged that the defendant "did unlawfully and wilfully barter, sell . . . intoxicating liquors." There was evidence of several sales but the exact time of some of them is not disclosed. The defendant did not plead the statute, C. S., 4512, or in apt time call it to the attention of the court. Nor did he, by cross-examination of the witnesses for the State or by independent evidence, undertake to show that such sales were not recently made within the two-year period. The defendant cannot now complain either that the language of the court was too general or that it failed to confine its charge to the evidence of the sale to Brinkley. *S. v. Brinkley,* 193 N. C., 747, 138 S. E., 138.

A careful examination of the other exceptive assignments of error leads us to the conclusion that no material or prejudicial error is disclosed.

In the judgment below there is

No error.

J. C. ROBERTS v. F. E. GROGAN.

(Filed 23 September, 1942.)

1. Bills and Notes § 27—

In an action upon a promissory note, its admission in evidence and the admission of its execution and nonpayment, notwithstanding maturity, make out a *prima facie* case, and denial of judgment of nonsuit is proper. C. S., 567.

2. Same—

While C. S., 540, provides that a copy of the instrument is sufficient, with the allegation of amount due thereon, such statute does not require the entire writing to be made a part of the complaint. Demurrer *ore tenus* properly overruled.

3. Pleadings §§ 14, 15—

Demurrer *ore tenus* does not lie where answer has been filed and the demurrer does not raise objection to the jurisdiction or that complaint does not state facts sufficient to constitute a cause of action. C. S., 518.

4. Taxation § 35: Bills and Notes § 22—

Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collections on the judgment. Michie's Code, 7880 (156) tt.

5. Contracts § 7d: Bills and Notes § 22—

While all purchases for resale have an element of speculation about them, the joint purchase, by two persons on a warehouse floor of tobacco for purposes of resale, is not such a gambling contract as to make a promissory note given for the purchase price unenforceable.

6. Evidence § 24: Limitation of Actions § 2a, 2e—

Where defendant by answer denies liability on a note on the ground that it was given on a gambling contract, and also that the note is barred by the three-year statute of limitations, evidence that defendant did not adopt the word "seal" after his name on the note was properly excluded. The absence of *allegata* is as fatal as the absence of *probata*.

APPEAL by defendant from *Bobbitt, J.*, at April Term, 1942, of ROCKINGHAM.

This is an action instituted on 13 November, 1941, upon a promissory note executed under date of 23 February, 1932, by the defendant and one J. P. Smith to Watts Warehouse, and by A. G. Irvin and A. P. Sands, Jr., assigned to J. C. Roberts, the plaintiff; the said Irvin, Sands and Roberts composing the partnership trading as Watts Warehouse.

From an adverse judgment predicated upon the verdict, the defendant appealed, assigning error.

F. Eugene Hester for plaintiff, appellee.
P. T. Stiers for defendant, appellant.

SCHENCK, J. The first group of assignments of error set out in the brief of the appellant relates to the refusal of the court to sustain defendant's demurrer to the evidence duly made and renewed, and denial of judgment as in case of nonsuit, C. S., 567, and to the overruling of defendant's demurrer *ore tenus*. These assignments are untenable for the reason that the admission of the execution of the note and the introduction in evidence thereof, together with the admission of its nonpayment notwithstanding its maturity, make out a *prima facie* case.

Likewise, the demurrer *ore tenus* was properly overruled. While C. S., 540, provides that "it is sufficient for the party pleading to give a copy

of the instrument, and to state that there is due to him thereon," such statute does not require that the entire writing be made a part of the complaint. *Sossamon v. Cemetery, Inc.*, 212 N. C., 535, 193 S. E., 720. And, further, a demurrer *ore tenus* does not lie since answer has been filed and no objection is taken by demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action. C. S., 518.

The position taken in appellant's brief that since it was shown that the taxes on the note sued on were unpaid the action cannot be maintained is met by the provision written into the judgment "that the amount of taxes, penalties and interest due and owing shall be paid the proper officer out of the first collection on said judgment." This is in accord with sec. 7880 (156) tt, N. C. Code of 1939 (Michie).

The argument that the contract, out of which the giving of the note sued upon arose, was a gambling contract, and therefore the note was illegal and unenforceable is likewise untenable. The evidence tends to show that the note was given to cover a balance due at the end of the tobacco season for tobacco bought on the floor of the warehouse by J. P. Smith in the name of the defendant, for which buying "Mr. Smith made arrangements with me (defendant) prior to the opening of the tobacco market to use my license and he was to pay me something for it." While what the plaintiff and defendant might realize from their joint interests in the purchase of the tobacco may have been problematical and speculative, it cannot be held that this constituted an illegal gambling contract. Practically all purchases for the purpose of resale have an element of uncertainty and speculation about them, but it would indeed be a harsh and drastic rule to construe all such contracts as illegal and void, and it would be particularly disconcerting to one of the principal interests of this State for it to be adjudged that the buying of tobacco on a warehouse floor for the purpose of resale is an illegal transaction. On the contrary, the evidence tended to show a valid contract based upon sufficient consideration, containing a waiver of presentment or demand for payment.

The second group of assignments of error set out in the brief of the appellant relates to the exclusion by the court of evidence tending to show that the defendant did not adopt the printed word "seal" after his name on the note sued upon as his seal, and for that reason the action is upon an unsealed instrument and is barred by the three-year statute of limitation. These assignments of error cannot be sustained for reason, possibly among others, that the defendant in his answer sets up only that he was an accommodation endorser on a gambling contract and that the plaintiff's cause of action, if any he had, against him was barred by the three-year statute of limitation. He does not plead, nor mention,

the absence of a seal. These assignments are therefore based upon a defense not set up in the answer, the necessity for allegation of which, as well as the burden of proof of which was upon the defendant. *Insurance Co. v. Morehead,* 209 N. C., 174, 183 S. E., 606. The absence of *allegata* is as fatal as the absence of *probata. Talley v. Granite Quarries Co.,* 174 N. C., 445, 93 S. E., 995. Recovery cannot be had on theory different than alleged in complaint, *Smith v. Cook,* 196 N. C., 558, 146 S. E., 229, and cases there cited, and by the same token defense cannot be maintained on theory different than alleged in answer. The defendant in his answer bottoms his defense upon an allegation of illegal transaction and at the trial attempts to show failure to adopt the printed seal and the consequent bar of the statute of limitation. He cannot swap horses in midstream. "It is well understood that . . . a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." *Ingram v. Power Co.,* 181 N. C., 359, 107 S. E., 209.

The court submitted the issues presented by the pleadings in a charge free from error, and the jury answered the issues in favor of the plaintiff, and the verdict supports the judgment.

On the record we find

No error.

MARTHA CAMERON MOYLE v. C. R. HOPKINS AND B. E. HOPKINS, PARTNERS, TRADING AS HOPKINS' BROS.

(Filed 23 September, 1942.)

1. Evidence § 2—

The courts will take judicial notice of the character of State Institutions established by public statutes.

2. Evidence §§ 15, 19—

The fact that a witness has been an inmate of the Caswell Training School (for the feeble-minded) is a subject of legitimate inquiry on cross-examination.

3. Evidence § 21—

The court refused to permit the plaintiff to recall her husband as a witness, after plaintiff had closed her rebuttal testimony, for the purpose of contradicting another witness, who was subpœnaed by both sides and who had been permitted without objection to return to his business, when it appeared that plaintiff's husband had been on the stand after the testimony he was called to contradict had been given. *Held:* In the discretion of the trial judge and, in the absence of abuse, not reviewable on appeal.

APPEAL by plaintiff from *Dixon, Special Judge,* at May Term, 1942, of PASQUOTANK.

MOYLE *v.* HOPKINS.

Civil action to recover for injuries allegedly resulting from actionable negligence.

Upon the trial below the jury answered the issue as to negligence in the negative. From judgment thereon, plaintiff appeals to the Supreme Court and assigns error.

J. W. Jennette and M. B. Simpson for plaintiff, appellant.
J. Henry LeRoy for defendants, appellees.

WINBORNE, J. Consideration of exceptive assignments *in seriatim* as brought forward in brief for plaintiff, appellant, fails to reveal prejudicial error.

Exceptions 1 and 2 are considered together. It appears that one Louise Simpson, witness for plaintiff, who gave testimony in corroboration of plaintiff's version of how the accident in question occurred, when being recalled for cross-examination, further testified that: "Up until I returned to Elizabeth City last year, I was at the Caswell Training School at Kinston." Then, in answer to question, "I believe the Caswell Training School is a State institution, is it not?" replied, "Yes, sir." Exception No. 1. Following this, the welfare officer of Pasquotank County, as witness for defendants, testified: "The Caswell Training School is a school for training of mental deficients—children. What we refer to as feeble-minded." Exception No. 2.

Here it may be pertinently noted that the Caswell Training School was created, and its objects defined, by acts of the General Assembly of North Carolina—a fact shown by public statutes, C. S., 5894, and C. S., 5895. Undoubtedly, the fact that the witness had been in the school was the subject of legitimate inquiry on cross-examination. Moreover, it appears in the record on this appeal that the welfare officer, without objection, and in the presence of the jury, testified: "I know and have known Louise Simpson about twenty years. Up until some time last year she resided in the Caswell Training School at Kinston. That is a State institution." Furthermore, as the objects of the school are matters appearing upon public statutes, of which the Court will take judicial notice, *Miller v. Roberts,* 212 N. C., 126, 193 S. E., 286, we fail to find prejudicial error in the admission of evidence in that regard.

Plaintiff's 4th exception is to the refusal of the court to permit her husband to be recalled as witness to testify to statement of Officer Winslow, contradictory to testimony given by him as witness for defendants. In this connection the record shows that upon objection by defendants that "it appearing that this witness had been on the stand twice previously, that plaintiff had finished her rebuttal testimony, and that Officer Winslow, subpœnaed by both sides, had been permitted to return

to his duties at a local shipyard with the knowledge, and with no objection" of either party, the court "refused to permit plaintiff to reopen this phase of the evidence, and sustained the objection."

It further appears from the record that this witness, husband of plaintiff, had gone upon the witness stand after the officer had testified, and thereby had opportunity to testify to matters now in question. The ruling was a matter within the discretion of the trial judge, the exercise of which, in the absence of abuse, is not subject to review on appeal. *McDonald v. McLendon,* 173 N. C., 172, 91 S. E., 1017; *House v. Boyd,* 173 N. C., 701, 91 S. E., 603; *Hunter v. Sherron,* 176 N. C., 226, 97 S. E., 5; *Woodall v. Highway Com.,* 176 N. C., 377, 97 S. E., 226.

Exceptions 5, 6 and 7 are to portions of the charge. With respect to the portion to which Exception 5 relates, it is stated in brief for plaintiff that: "While we cannot find much fault, as an abstract proposition, with the charge excepted to . . . we do insist that under section 564 of the Code it is the duty of the court to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon." Even so, a perusal of the record fails to show any exception to the failure of the court to charge as required by the statute. Only exceptive assignments of error are considered on appeal. *In re Will of Beard,* 202 N. C., 661, 163 S. E., 748; *S. v. Parnell,* 214 N. C., 467, 199 S. E., 601; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321; *Jones v. Griggs,* 219 N. C., 700, 14 S. E. (2d), 836.

Further, with respect to the portions of the charge covered by Exceptions 6 and 7, no reason nor argument is stated nor authority cited in support thereof. Hence, under Rule 28 of the Rules of Practice in the Supreme Court these exceptions are taken as abandoned by plaintiff. 213 N. C., 808.

In the judgment below, there is

No error.

STATE v. CLEMMIE V. CROMER.

(Filed 23 September, 1942.)

Criminal Law §§ 32a, 32b—

On a criminal prosecution for felonious burning and attempting to burn a barn, in the absence of proof that the fire was of incendiary origin, evidence that tracks of defendant were found at the scene of the fire and that there was ill feeling between the parties, other circumstances being consistent with innocence, is insufficient to support a conviction.

APPEAL by defendant from *Bobbitt, J.,* at April Term, 1942, of STOKES. Reversed.

STATE *v.* CROMER.

Criminal prosecution on a bill of indictment charging (1) the felonious burning of a certain barn and stable; and (2) the felonious attempt to burn said barn and stable.

The prosecuting witness Ferguson lives on his farm on a public road leading into the Mountain View road. The defendant owns an adjoining farm to the east occupied by her son-in-law. She also owns an adjoining farm across the road to the south. Ferguson's feed barn is located just north of the public road about 10 or 15 feet therefrom facing Ferguson's driveway with the side to the public road. In going from one farm to the other defendant can use either a private road which comes into the public road to the west of the Ferguson feed barn, or a footpath which comes into the road at the Ferguson pack house.

During the early morning of 29 July, 1941, Ferguson discovered a fire at his feed barn. Wheat chaff and other debris, a trailer and part of the barn were on fire. Tracks leading along the public road, thence across the road along the space between the road and the feed barn, thence back into and down the road to defendant's farm to the east of the Ferguson farm were found. These tracks were identified as those of the defendant. She admitted the tracks and stated that she had gone the night before to notify her son that he would have to go to work one hour earlier the next morning due to the change in time. There was also the appearance of other unidentified tracks on the wheat chaff.

In tracing the tracks the sheriff went to the defendant's farm. She drove up and asked, "What are you doing here?" He replied, "Somebody set Mr. Ferguson's barn afire and I am over investigating it." She replied, "You don't think I did it, do you?" Then, at the request of the sheriff, she showed him her shoes and he took her into custody, after which she was nervous and perspiring. Ill feeling had existed between the defendant and Ferguson for some time.

There was a verdict of guilty on the second count. From judgment thereon the defendant appealed.

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

Elledge & Wells and W. Reade Johnson for defendant, appellant.

BARNHILL, J. The evidence discloses that tracks of the defendant were found at the scene of the fire and that there was ill feeling between the parties. Just when the tracks were made is not disclosed. Whether the defendant passed by the barn just prior to or several hours before the fire does not appear. Nor is there any evidence tending to show the origin or cause of the fire. All the other circumstances are entirely consistent with the innocence of the defendant. It follows that there is

no evidence that the fire was of incendiary origin and no sufficient testimony tending to incriminate the defendant. Hence, this prosecution is not substantially distinguishable from that in *S. v. Jones,* 215 N. C., 660, 2 S. E. (2d), 867. The opinion in that case, as supported by the cited cases, is controlling.

The judgment below is

Reversed.

STATE v. JOHN PAUL JONES.

(Filed 23 September, 1942.)

1. Rape § 5—

Upon an indictment charging an assault with intent to commit rape, C. S., 4204, and C. S., 4205, defendant may be convicted of an assault upon a female as though separately charged, C. S., 4639, and motion to dismiss under C. S., 4643, is properly refused where there is sufficient evidence to convict of an assault.

2. Same—

Where, in an indictment charging an assault with intent to commit rape, the evidence shows an assault but fails to show an intent to commit rape, at all events and notwithstanding any resistance on the part of the intended victim, the court would err in refusing to give an instruction to limit the verdict to a less degree of the same crime. C. S., 4640.

APPEAL by defendant from *Williams, J.,* at June Term, 1942, of BEAUFORT.

Criminal prosecution upon indictment charging defendant with feloniously assaulting a female "with intent to rape, ravish and carnally know" her "forcibly and against her will." C. S., 4204, and C. S., 4205.

Verdict: Guilty of assault with intent to commit rape.

Judgment: Imprisonment in State Prison at Raleigh, assigned to work under the supervision of the State Highway and Public Works Commission at hard labor and to wear felon stripes for a term of not less than ten nor more than twelve years.

Defendant appeals to Supreme Court and assigns error.

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

Carter & Carter for defendant, appellant.

WINBORNE, J. The only exception appearing in the record on this appeal is to the refusal of the court to allow defendant's motion to dismiss the action as in case of nonsuit—made in accordance with the provisions of C. S., 4643.

Upon the evidence appearing in the record, this exception cannot be sustained, for as stated in *S. v. Hill,* 181 N. C., 558, 107 S. E., 140, "We cannot grant the nonsuit, as the defendant could have been convicted of an assault the same as if it had been separately charged in an indictment." C. S., 4639. See also *S. v. Holt,* 192 N. C., 490, 135 S. E., 324.

However, if there had been a request for instruction to limit the verdict to a less degree of the same crime, C. S., 4640, we are of opinion that upon the evidence appearing in the record, the court would have erred in refusing to give the instruction in the light of the principles enunciated in *S. v. Massey,* 86 N. C., 658, and approved and followed in *S. v. Jeffreys,* 117 N. C., 743, 23 S. E., 175; *S. v. Smith,* 136 N. C., 684, 49 S. E., 334; and *S. v. Hill, supra.* See also *S. v. Allen,* 186 N. C., 302, 119 S. E., 504.

In *S. v. Massey, supra, Ashe, J.,* adopting the view expressed in the dissenting opinion of *Rodman, J.,* in *S. v. Neely,* 74 N. C., 425, and speaking for the Court, said: "In order to convict a defendant on the charge of assault with intent to commit rape, the evidence should show not only an assault, but that the defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, notwithstanding any resistance on her part."

In *S. v. Hill, supra, Walker, J.,* stated that the above principle has been settled law in North Carolina ever since the case of *S. v. Massey, supra,* was decided.

The judgment below is

Affirmed.

C. H. LEARY, ADMINISTRATOR OF C. B. COOPER, DECEASED, v. NORFOLK SOUTHERN BUS CORPORATION;
and
N. P. McDUFFIE v. NORFOLK SOUTHERN BUS CORPORATION.

(Filed 23 September, 1942.)

Appeal and Error § 49a—

Where, on former appeal, a new trial was granted and at the second trial plaintiff offered substantially the same evidence as was offered at the former trial, motion for nonsuit is properly overruled and prayers for a directed verdict on the issues of negligence and contributory negligence properly refused.

APPEAL by defendant from *Williams, J.,* at April Term, 1942, of TYRRELL.

Civil action instituted by N. P. McDuffie to recover damages for personal injuries and property damage resulting from an automobile colli-

sion and a civil action instituted by C. H. Leary, Administrator, for the wrongful death of his intestate resulting from the same accident. The two actions were consolidated for trial by order of the judge. These same actions were consolidated for trial at the April Term, 1941. Judgments were rendered for the plaintiffs and the defendant appealed to this Court and the opinion will be found in 220 N. C., 745, 18 S. E. (2d), 426. The facts stated in the above opinion are substantially the same as those set forth in the present record and need not be repeated here.

Appropriate issues were answered in both cases in favor of plaintiffs and judgments were entered accordingly. From the judgments, defendant appeals and assigns error.

Sam S. Woodley and McMullan & McMullan for plaintiffs.
Ehringhaus & Ehringhaus and R. Clarence Dozier for defendant.

DENNY, J. The pertinent exceptions and assignments of error are to the overruling of defendant's motion for judgment as of nonsuit made at the conclusion of all the evidence and to the refusal of his Honor to give defendant's prayers for instruction to the jury. These prayers were to the effect that if the jury should find the facts to be as testified to by all the witnesses, the jury should answer the issues of negligence in favor of defendant and the issue of contributory negligence in the case of McDuffie against said plaintiff.

The defendant offered no evidence at the trial below.

The actions in both trials were tried upon the same pleadings except for an amendment to the answer in the *Leary case.* The issues submitted and answered by the respective juries were substantially the same. Unless the evidence varies in important particulars from that offered by the plaintiffs at the former trial, the motion for judgment as of nonsuit cannot be sustained on this record. *Fisher v. Fisher,* 218 N. C., 42, 9 S. E. (2d), 493; *Johnson v. Ins. Co.,* 219 N. C., 202, 13 S. E. (2d), 241; *Wall v. Asheville,* 220 N. C., 38, 16 S. E. (2d), 397; *Pinnix v. Griffin,* 221 N. C., 348, 20 S. E. (2d), 366.

An examination of the two records discloses the evidence offered at both trials by the plaintiffs was substantially the same. Therefore defendant's exception to the refusal of its motion for judgment as of nonsuit, and the exceptions to the refusal of his Honor to give instructions for a directed verdict on the issues of negligence and contributory negligence, cannot be sustained. The issues were properly submitted to the jury. *Clarke v. Martin,* 215 N. C., 405, 2 S. E. (2d), 10; *Page v. McLamb,* 215 N. C., 789, 3 S. E. (2d), 275; *Holland v. Strader,* 216 N. C., 436, 5 S. E. (2d), 311; *Christopher v. Fair Asso.,* 216 N. C., 795, 4 S. E. (2d), 513; *Bechtler v. Bracken,* 218 N. C., 515, 11 S. E. (2d), 721.

The remaining assignments of error are formal and without substantial merit. In the judgment of the court below, we find

No error.

STATE v. JACK REYNOLDS.

(Filed 23 September, 1942.)

Burglary and Unlawful Breaking § 1c—

On indictment for burglariously breaking and entering a room in a building used as a sleeping apartment, where the State's witness testified to a felonious breaking and entry, and identified defendant as the perpetrator, motion to nonsuit under C. S., 4643, is properly denied.

APPEAL by defendant from *Bobbitt, J.*, at June Term, 1942, of STOKES. No error.

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

Folger & Folger for defendant.

DEVIN, J. The defendant was charged with burglariously breaking and entering a room in a building used and occupied at the time by the State's witness as a sleeping apartment. It was charged that the breaking and entering were with intent to commit a robbery, and that the State's witness was robbed of a sum of money.

The solicitor announced that he would not ask for a verdict of guilty of burglary in the first degree. The jury returned verdict of guilty, and from judgment imposing prison sentence the defendant appealed.

The defendant assigns as error the denial by the court below of his motion for judgment as of nonsuit. An examination of the record before us leads to the conclusion that this motion was properly denied. The State's witness testified on the trial to the fact of the felonious breaking and entry, and identified the defendant as the perpetrator. While the force of this testimony was somewhat weakened by evidence tending to show contradictory statements made by the witness, the weight of the testimony and its probative value were matters for the jury.

The exceptions noted to the rulings of the court in the admission of testimony for the purpose of corroboration cannot be sustained.

In the trial we find

No error.

JUNIUS D. GRIMES v. COUNTY OF BEAUFORT AND L. A. SQUIRES, SINKING FUND COMMISSIONER.

(Filed 23 September, 1942.)

Appeal and Error §§ 6d, 37c, 40a—

Where findings of fact by a referee, supported by competent evidence, are approved by the court below, judgment approving the referee's conclusions of law will not be disturbed, no exception having been taken to the findings upon which the conclusions were based.

APPEAL by defendants from *Williams, J.*, at January Term, 1942, of BEAUFORT. Affirmed.

This case was here at Fall Term, 1940, and is reported in 218 N. C., 164, 10 S. E. (2d), 640, where the pertinent facts are stated. The cause was referred. Exceptions to the report of the referee were filed by the defendants. Upon the hearing in the court below, the referee's findings of fact were in all material respects approved and adopted by the court, as were also the referee's conclusions of law.

From judgment in favor of plaintiff upon the facts so found the defendants appealed.

Carter & Carter and Rodman & Rodman for plaintiff, appellee.
E. A. Daniel and P. W. McMullan for defendants, appellants.

DEVIN, J. The appellants assign as error in the judgment below the approval of the referee's conclusion of law that plaintiff's claim was not barred by the statute of limitations. There was, however, no exception to the referee's findings of fact upon which this conclusion of law was based. These findings were supported by competent evidence, and were adopted in all material respects by the court. Hence, the judgment in favor of the plaintiff upon the facts so established must be upheld. *Wilkinson v. Coppersmith,* 218 N. C., 173, 10 S. E. (2d), 670.

Judgment affirmed.

BESSIE FRANKLIN ET AL. v. ROY GENTRY ET AL.

(Filed 23 September, 1942.)

Appeal and Error § 12—

Where affidavit, upon which order for pauper appeal was allowed, was not made during the term or within five days thereafter, C. S., 649, the jurisdiction of the Supreme Court is defeated, and the appeal will be dismissed.

PIKE *v.* SEYMOUR and PIERCE *v.* SEYMOUR.

APPEAL by plaintiff from *Ervin, Special Judge,* at December Special Term, 1941, of MADISON.

Civil action to set aside deeds for alleged mental incapacity on the part of grantor and undue influence on the part of grantees.

Upon denial of the allegations of the complaint, and issues joined, the jury returned a verdict in favor of the defendants. From judgment thereon, the plaintiff appeals, assigning errors.

Calvin R. Edney and Carl R. Stuart for plaintiffs, appellants.
Guy V. Roberts and John H. McElroy for defendants, appellees.

PER CURIAM. A careful perusal of the record leaves us with the impression that no reversible error has been shown, and that the verdict and judgment should be upheld. However, it appears that the affidavit, upon which the order of appeal *in forma pauperis* was allowed, was not made during the term or within five days thereafter as required by C. S., 649. See *Powell v. Moore,* 204 N. C., 654, 169 S. E., 281; *McIntire v. McIntire,* 203 N. C., 631, 166 S. E., 732. This defeats our jurisdiction. *Berwer v. Ins. Co.,* 210 N. C., 814, 188 S. E., 618; *S. v. Mitchell,* 221 N. C., 460. "Giving bond on appeal, or granting leave to appeal without bond, are jurisdictional, and, unless the statute is complied with, the appeal is not in this Court, and we can take no cognizance of the case, except to dismiss it from our docket." *Honeycutt v. Watkins,* 151 N. C., 652, 65 S. E., 762.

Appeal dismissed.

DAVID V. PIKE v. S. B. SEYMOUR, JR., AND WALTER L. MIDGETT
and
LINFORD PIERCE v. S. B. SEYMOUR, JR., AND WALTER L. MIDGETT.

(Filed 30 September, 1942.)

1. Appeal and Error § 10c—

Where there is a controversy as to whether the case on appeal was served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon.

2. Same—

It is admitted on the record that defendants did not serve case on appeal within the time allowed, but defendants contend an agreed case on appeal was served and accepted by plaintiffs' counsel who filed exceptions to the case on appeal as served, and also filed a motion to strike,

held error for the trial court to pass on other matters without first ruling on whether or not plaintiffs' attorneys have waived failure to file case in time by accepting service of an agreed case.

3. Automobiles § 14—

It is not necessarily unlawful in all cases to park a vehicle at night on the paved portion of a highway without lights thereon, Michie's Code, 2621 (94), an emergency may arise thereby making it impossible to move such vehicle immediately.

4. Automobiles §§ 14, 18a, 18c: Negligence § 19—

In an action for damages due to negligence of defendants, who left their truck parked at night, without lights, on the right-hand side of a concrete highway, with plenty of room to pass on the left, defendants' motion for judgment as of nonsuit should have been sustained, where the evidence showed that plaintiffs, on a joint enterprise, driving their car about 2:00 o'clock a.m., at 40 or 45 miles per hour, lights dimmed so that they could not see ahead over 75 to 100 feet, never applied the brakes and failed to see the truck until after the collision, crashing into the back of the truck with terrific force, plaintiffs being guilty of contributory negligence which was a proximate cause. Michie's Code, 2621 (278) (280).

APPEAL by defendants from *Blackstock, Special Judge,* at January Term, 1942, of PERQUIMANS.

Civil action instituted by David V. Pike to recover damages for personal injuries resulting from an automobile collision, and a civil action instituted by Linford Pierce to recover damages for personal injuries and property damage resulting from the same collision. The actions were consolidated for the purpose of trial on motion of plaintiffs.

Plaintiffs allege that on 14 August, 1941, about 2 o'clock a.m., the defendant, S. B. Seymour, Jr., while driving a Chevrolet truck owned by defendant Walter L. Midgett, on business for said Midgett, on the N. C. Highway leading from Edenton to Hertford, wrongfully, carelessly and negligently parked said truck on the right side of said highway and upon the paved surface thereof; and, wrongfully, carelessly and negligently left the truck parked on the highway without placing lights thereon or without placing any flares about the same. That the plaintiff, David V. Pike, driving a Ford automobile owned by the plaintiff Linford Pierce, and accompanied by the said Pierce, while proceeding on said highway from Edenton to Hertford, on 14 August, 1941, about 2:00 o'clock a.m., ran said Ford automobile into the rear of the aforesaid Chevrolet truck, parked on the highway as set forth above, causing serious personal injuries to plaintiffs and plaintiff Pierce alleges completely demolishing his Ford automobile.

Plaintiff David V. Pike testified: "I recall the early morning of August 14th, 1941, the morning of this wreck. I would say the collision occurred around 2:00 o'clock in the morning. Prior to the collision I

had been to Edenton with Linford Pierce; I was driving Linford's car; he was with me. I drove it around Edenton for some time that night. . . . I had been driving the car most of the night. . . . Driving from Edenton to Hertford, on the particular point in the road where the collision occurred, there is a straight road for a mile and a half back of us, . . . toward Edenton. . . . We were driving 40 or 45 miles an hour. From the time we entered the straight stretch of highway, until the collision, I did not see the tail light on any car on that road ahead. . . . I had dim lights on the car. My lights lighted up the highway for 75 or 100 feet ahead of the car. When I say dim lights, I mean the lights were shining down on the highway, deflected from the lamps to the road. . . . I was 45 or 50 feet from the truck with which I collided when I first saw it. . . . I had my foot on the pedal but I did not have time to mash it. I did not actually apply the brakes. . . . My brakes were good. . . . When I said that my lights would show an object 75 to 100 feet ahead, I was talking about this night in question. I do not know why I didn't see the truck 75 or 100 feet ahead. All I had to do to put on the bright lights was to push a button on the wheel, it would take just a flick of the finger, but I did not push it. . . . I did not drive with the bright lights on at any time that night. . . . If I had seen the truck 75 or 100 feet ahead, I could have stopped or turned to the left. . . . The car hit the truck with terrific force. . . . It hit the truck so hard that the impact knocked the hood and cowl and the top right back against the front seat practically."

The plaintiff, Linford Pierce, testified: "On the night of August 13th, David Pike and I went off together in the car; we went to Edenton. We left Edenton about 1:30; we had put out the young ladies we had been riding with. Mr. Pike was driving the car. . . . We had bright lights on the car, all we had to do was push a button and turn them on. Neither Mr. Pike nor I pushed the button. With these dim lights we could see an object on the road about 75 or 100 feet ahead. We could not see further than that, no matter how big the object was. . . . Our brakes were good.

"We were traveling about 40 or 45 miles an hour. . . . I was looking straight ahead watching the highway; my head lights were burning. . . . I saw the truck after the wreck. I didn't see it at all before the accident took place. . . . Because the dim lights were showing down underneath the truck and the tires were so much like the highway, I could not see it and Pike could not see it, is what prevented Pike from seeing the truck. . . .

"I had been driving the car about a month. The bright lights would show an object far enough ahead that I could see it on the highway. I guess the bright lights would show an object 200 feet ahead. I don't

know how far they are supposed to show. If the bright lights had been on, we could have seen an object 150 feet away, is just a guess, and we could have stopped before we hit it; I guess he could have done it. No effort was made to turn my car to the left. Half of the concrete highway was open and there was a 10-foot shoulder over on that side; plenty of room to go by on this side without hitting it."

From the verdicts and judgments for the plaintiffs, the defendants appeal and assign error.

McMullan & McMullan for plaintiff David V. Pike.
R. Clarence Dozier for plaintiff Linford Pierce.
J. Henry LeRoy for defendants.

DEFENDANTS' APPEAL IN THE PIKE CASE.

DENNY, J. Counsel for plaintiff, David V. Pike, filed motion in this Court to affirm the judgment below for the reason that no case on appeal has been settled by agreement of counsel or by order of the court.

It is admitted on the record that the defendants did not serve statement of case on appeal within ninety days from 16 January, 1942, the time allowed by the court for serving said case; however, defendants contend an agreed case was served and accepted by plaintiff's counsel, as set forth in the following language: "Service of the foregoing accepted case on appeal accepted, this April 20, 1942. McMullan & McMullan, attorneys for plaintiff, Pike."

On 19 May, 1942, plaintiff's counsel filed exceptions to the case on appeal as served by defendants' counsel, and also filed a motion to strike said statement of case from the files of said cause and the records of the court, for alleged failure of the defendants to serve the case within the time allowed or to present same for acceptance of service within such time.

The trial court, in passing upon the exceptions of the plaintiff, allowed certain changes in the statement of case on appeal, but found as a fact that said changes were unimportant. The court also found that the statement of the case on appeal constituted a correct statement of all matters transpiring upon the joint trial of the two cases at the January Term, 1942, of the Superior Court of Perquimans County; and further found that the time for serving the case on appeal had expired at the time when service thereon was accepted by plaintiff's attorneys and that the court was without authority to settle a case on appeal in the Pike case.

The defendants, in apt time, excepted to and appealed from the failure of the trial court to rule that David V. Pike, through his attorneys, had accepted service of defendants' statement of case on appeal and had agreed that same constituted the case on appeal.

His Honor did not grant the motion to strike the statement of case on appeal from the files of said cause and the records of the court. Neither did the trial court pass upon the controversy as to whether or not plaintiff's counsel had accepted service of the statement of case on appeal as an agreed case on appeal, thereby waiving the time of service. If plaintiff's counsel accepted service of defendants' statement of case on appeal, and agreed or consented that such statement should constitute the case on appeal, thereby waiving the time of service, the trial court was without authority to settle the case. The record is not clear on this point. By not granting plaintiff's motion to strike the case from the files of said cause and the records of said court, the trial court may have considered that the case had been settled by agreement; for, if the statement of case on appeal was not served within the time provided, or within the time waived, it was the duty of the trial court to have allowed plaintiff's motion.

The rule laid down in *Smith v. Smith,* 199 N. C., 463, 154 S. E., 737: "Where there is a controversy as to whether the case on appeal was served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. *Holloman v. Holloman,* 172 N. C., 835, 90 S. E., 10; *Barrus v. R. R.,* 121 N. C., 504, 28 S. E., 187; *Walker v. Scott,* 102 N. C., 487, 9 S. E., 488; *Cummings v. Hoffman,* 113 N. C., 267, 18 S. E., 170."

There was error in the failure of the trial court to find as a fact whether or not the plaintiff's attorneys had accepted service and agreed upon the defendants' statement of case on appeal as constituting the case on appeal, thereby waiving the time of service, and to enter an appropriate order thereon.

Error and remanded.

DEFENDANTS' APPEAL IN THE PIERCE CASE.

We think the exceptions to the refusal of his Honor to grant defendants' motion for judgment as of nonsuit should be sustained. While it may be unlawful to park a vehicle at night on the paved portion of a highway without lights thereon, it is not necessarily so in all cases. An emergency may arise by reason of some mechanical defect in a motor vehicle thereby making it impossible to move such vehicle from the highway immediately. In the instant case, however, conceding the negligence of the defendants, we think the plaintiff was guilty of contributory negligence and therefore not entitled to recover.

David Pike and this plaintiff were on a joint enterprise. Pike was driving plaintiff's car. The collision took place about two o'clock in the morning. Pike testified he was driving 40 or 45 miles an hour at

the time of the accident. His dim lights were deflected from the lamps to the road and that he was 45 or 50 feet from the truck when he first saw it. That he had his foot on the brake pedal but did not have time to mash it. He did not apply the brakes. The lights lighted up the highway for 75 or 100 feet ahead of the car. He did not know why he did not see the truck 75 or 100 feet ahead. All he had to do to put on the bright lights was to push a button on the wheel, it would just take a flick of the finger, but he did not push it. He did not drive with the bright lights on at any time that night. If he had seen that truck 75 or 100 feet ahead, he could have stopped or turned to the left. The car hit with terrific force. It hit the truck so hard that the impact knocked the hood and the cowl and the top right back against the front seat.

The plaintiff testified he was looking straight ahead watching the highway, but that he never saw the truck until after the wreck. He gives as an explanation for not seeing the truck, the following: "Because the dim lights were showing down underneath the truck and the tires were so much like the highway, I could not see it and Pike could not see it, is what prevented Pike from seeing the truck." He further testified: "I guess the bright lights would show an object 200 feet ahead. If the bright lights had been on, we could have seen an object 150 feet away, is just a guess, and we could have stopped before we hit it; I guess he could have done it. No effort was made to turn my car to the left. Half of the concrete highway was open and there was a 10-foot shoulder over on that side; plenty of room to go by on this side without hitting it."

The Motor Vehicle Law of 1937, now in effect in this State, requires: Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, to be equipped with head lamps so constructed, arranged and adjusted that . . . they will at all times . . . under normal atmospheric conditions and on a level road, produce a driving light sufficient to render clearly discernible a person two hundred feet ahead. The law permits the dimming of lights on highways sufficiently lighted to reveal a person on the highway at a distance of two hundred feet ahead of the vehicle, and requires the dimming of lights when meeting another vehicle. Public Laws of 1937, ch. 407, as amended by Public Laws of 1939, ch. 275, N. C. Code, 1939 (Michie), sec. 2621 (278), and Public Laws of 1937, ch. 407, as amended by Public Laws of 1939, ch. 351, N. C. Code, 1939 (Michie), sec. 2621 (280).

The evidence of the plaintiff and of the driver of the car clearly shows a violation of the above statutes on the part of the driver of the car, and a failure to see what he could have seen within the range of the dimmed lights. The negligence of the driver of the car was at least one of the proximate or concurring causes of the collision. Therefore, the plaintiff

is not entitled to recover. This view is supported by many decisions of this Court, among them we cite: *Weston v. R. R.,* 194 N. C., 210, 139 S. E., 237; *Stallings v. Transport Co.,* 210 N. C., 201, 185 S. E., 643; *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108; *Lee v. R. R.,* 212 N. C., 340, 193 S. E., 395; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Dillon v. Winston-Salem,* 221 N. C., 512, 20 S. E. (2d), 845.

In the case of *Powers v. Sternberg, supra, Stacy, C. J.,* said: "There are a few physical facts which speak louder than some of the witnesses. The force with which the Bedenbaugh car run into the truck, with its attendant destruction and death, establishes the negligence of the driver of the car as the proximate cause of the injury."

The physical facts and the evidence in this case disclose the failure of the driver of plaintiff's car to exercise reasonable care for his own and plaintiff's safety. *Harrison v. R. R.,* 194 N. C., 656, 140 S. E., 598; *Porter v. Niven,* 221 N. C., 220, 19 S. E. (2d), 864.

The defendants' motion for judgment as of nonsuit should have been allowed. The judgment of the court below is

Reversed.

W. O. NESBIT, RECEIVER OF LITTLE SWIFT CREEK DRAINAGE DISTRICT, v. O. O. KAFER AND WIFE, LILLIAN KAFER.

(Filed 30 September, 1942.)

Drainage Districts §§ 6, 15—

Where, in a proceeding in Beaufort County, a drainage district, comprising lands in both Beaufort and Craven counties, is duly created and organized under the Drainage Act, sub-chapter III, chapter 94, of Consolidated Statutes of 1919-1924, sections 5312, *et seq.,* as amended, and assessment rolls, showing assessments against each tract of land in the district, have been made and filed in each county, such assessments, as they become due, are liens upon the lands within the district to which they relate, and it is error for the court to dismiss an action in the nature of a mortgage foreclosure, C. S., 7990, for the collection of such drainage assessments against lands in Craven County, even where the assessment rolls for Craven County have been removed and there is left in that county no other record relating to the drainage district, except a map on which are shown the boundaries of the several tracts of land within the district in Craven County—the map itself being sufficient notice to a subsequent purchaser of the proceedings, including the assessment rolls filed in Beaufort County.

APPEAL by plaintiff from *Williams, J.,* at May Term, 1942, of BEAUFORT.

NESBIT *v.* KAFER.

Civil action in nature of action to foreclose a mortgage, C. S., 7990, for collection of drainage assessments for the years 1923 to 1940, both inclusive, on certain lands described in the complaint, designated as Tract No. 139 shown on the map, and within the boundary of Beaufort County Drainage District No. 10—under provisions of C. S., 7990.

The case on appeal shows that by judgment of Superior Court of Beaufort County W. O. Nesbit was appointed Receiver of Little Swift Creek Drainage District, located partly in Beaufort County, and partly in Craven County, North Carolina, and authorized thereby, as well as by act of the General Assembly of North Carolina, Public-Local Laws 1941, ch. 315, to collect all drainage assessments "owing by lands situate in either county."

By written stipulation plaintiff and defendants agreed upon the following facts for the trial of this cause only:

"1. Little Swift Creek Drainage District was duly organized and created in accordance with the laws of the State of North Carolina pertaining to Drainage District, and that all acts and things necessary to the creation of said District were done at the time of its creation, including the filing of an assessment roll, showing the assessments placed against each tract of land in said District for the payment of bonds issued by said District. Said assessment roll was filed in Beaufort County, the County in which said District was organized, and in Craven County in which a large part of the lands in said District are situated. Said assessment rolls provide for assessments against the lands in said District to be paid in twenty-four annual installments, the last assessment to be due September 1, 1946.

"2. That the original assessment roll, which was filed in Craven County, was removed therefrom during the year 1934, or prior thereto and since such time there has been no assessment roll on file in Craven County, North Carolina, showing that any lands located in said Drainage District were liable for assessment in said District and no other record in file in Craven County relating to said Drainage District except a map which shows the boundaries of the several tracts of land located in said District which lie in Craven County.

"3. That never since the organization of said Drainage District has the Clerk of the Superior Court of Beaufort County prepared annually during the month of August, or any other time, a form of tax bills or receipts, with appropriate stubs attached, covering all the lands in the district located in Craven County together with an order to the Sheriff or Tax Collector in Craven County, to collect the same, as required by Section 5365 of the North Carolina Code.

"4. That Craven County foreclosed its tax lien against the lands described in the complaint in this cause for the non-payment of taxes

due it and sold said land at public auction as required by law and, in the absence of other bidders, became the purchaser thereof. On August 15th, 1938, the defendant in this action purchased said land from Craven County. At the time he purchased the same he had his attorney to look up the title thereto and he and his attorney together went to the office of the Clerk of the Superior Court of Craven County, to the office of the Sheriff of Craven County, and to the office of the Auditor and Tax Collector of Craven County and made diligent search to find out if there were any unpaid drainage assessments against the same and ascertained that there were no assessments against said land on file in Craven County."

Upon these facts, the court, being of "opinion that the assessments attempted to be levied by the Little Swift Creek Drainage District against the lands of the defendants described in the complaint do not constitute liens thereon," adjudged "that such assessments, being twenty-four (24) in number, the last assessment to be due September 1, 1942 (?), do not constitute liens against the lands of the defendants and that the plaintiff is not entitled to foreclose the same"—and dismissed the action. Plaintiff appeals therefrom to Supreme Court, and assigns error.

E. A. Daniel for plaintiff, appellant.
Carter & Carter for defendants, appellees.

WINBORNE, J. These questions are presented as decisive of this appeal:

1. Where in a proceeding instituted in Beaufort County a drainage district, comprising lands lying in both Beaufort and Craven counties, is duly created and organized in accordance with the Drainage Act, subchapter III, chapter 94, of the Consolidated Statutes of 1919-1924, sections 5312, *et seq.*, as amended, and the assessment rolls showing the assessments placed against each tract of land in the district for payment of bonds issued by the district, have been made and filed in each county, are such assessments, as they become due, liens upon the land within the district to which same relate?

2. If so, where the assessment rolls which were filed in Craven County have been removed therefrom, and there is left in that county no other record relating to the drainage district except a map on which are shown the boundaries of the several tracts of land within the district, in Craven County, is such map sufficient in itself to put a subsequent purchaser of such land in Craven County on notice of the proceedings, including the assessment rolls filed in Beaufort County?

The Drainage Act read as a whole furnishes an affirmative answer to each question.

1. Section 5361 of the Consolidated Statutes provides that drainage "assessments shall constitute a first and paramount lien, second only to State and county taxes, upon the lands assessed for the payment of bonds and interest thereon as they become due, and shall be collected in the manner and by the same officers as State and county taxes are collected," that the assessments shall become due and payable on the first Monday in September each year, and that "if the same shall not be paid in full by the thirty-first of December following, it shall be the duty of the sheriff or tax collector to sell the land so delinquent." See *Taylor v. Comrs.*, 176 N. C., 217, 96 S. E., 1027; *Pate v. Banks*, 178 N. C., 139, 100 S. E., 251.

In the light of these provisions, it is proper to inquire as to when "assessments" come into existence. After prescribing in preceding sections of the statute procedural requirements for the establishment of drainage districts, comprising lands in one or more counties, the preparation and filing of drainage maps "showing . . . the boundary . . . of the lands owned by each individual landowner within the district," the classification of the lands in the district, the calculation of the ratio of assessment of the different classes of land, the ascertainment of the cost of construction of the improvement to be undertaken, and the determination of the amount of bonds necessary to be issued and the issuance and sale thereof to defray the costs, it is provided in section 5360 of Consolidated Statutes that "the board of drainage commissioners shall immediately prepare the assessment rolls or drainage tax list, giving thereon the names of the owners of land in the district and a brief description of the several tracts of land assessed and the amount of assessment against each tract of land . . ." to provide funds each year sufficient to pay principal of and interest on bonds and certain other expenses, and that "these assessment rolls shall be signed by the chairman of the board of drainage commissioners and by the secretary of the board."

While this section further provides that "there shall be four copies of each of the assessment rolls, one of which shall be filed with the drainage record, one shall be filed with the chairman of the board of drainage commissioners . . . one shall be preserved by the clerk of the court, . . . and one shall be delivered to the sheriff, or other county tax collector, after the clerk of the Superior Court has appended thereto an order directing the collection of such assessments, and the assessments shall thereupon have the force and effect of a judgment as in the case of State and county taxes," the assessment arises upon the completion of the assessment rolls.

Thus it is clear that the Legislature intended that the assessments as shown on the assessment rolls which the board of drainage commissioners is required to prepare immediately upon the sale of the bonds, become

liens as they become due, affecting all of the lands on the assessment rolls, which relate to the entire district for the entire period over which the payment of the assessments is spread. In the present case it is agreed that the assessment rolls were not only prepared, but filed.

Furthermore, it may be noted that the order to be appended by the clerk, directing the collection of the assessments, is similar to that required in connection with county tax books delivered to the sheriff or tax collector as authority for collecting taxes, now appearing in Machinery Act, as section 1103 of chapter 310 of Public Laws of 1939, carried in Michie's Code as section 7971 (158), but which does not affect the right of the county to enforce the tax lien in an action in the nature of an action to foreclose a mortgage, C. S., 7990, which course is open to drainage districts. *Drainage District v. Huffstetler,* 173 N. C., 523, 92 S. E., 368; *Com. v. Epley,* 190 N. C., 672, 130 S. E., 497; *Wilkinson v. Boomer,* 217 N. C., 217, 7 S. E. (2d), 491.

But it is contended that under provisions of C. S., 5365, the assessments did not become a lien upon the lands in Craven County until the clerk of Superior Court of Beaufort County had prepared annually during the month of August, form of tax bills or receipts with appropriate stubs attached, covering all the lands located within the district in Craven County, and certified the same to the sheriff or tax collector of Craven County for collection. However, to ascertain the legislative intent this section may not alone be considered. The whole act must be read. And, in this connection it is proper to bear in mind that the receiver of the drainage district in question is not proceeding to have the land sold by the sheriff, but is proceeding in an action in the nature of an action to foreclose a mortgage under the provisions of C. S., 7990. Moreover, reading sections 5364 and 5365 of Consolidated Statutes together, it appears that they pertain to collection of assessments. The former relates to the preparation annually during the month of August, of receipts or tax bills and stubs, properly bound, for drainage assessments due on each tract of land recited in the assessment rolls which lie in the county in which the district is established, that is, in present case, Beaufort County. The latter relates to contemporaneous preparation of like receipts or tax bills and stubs, properly bound, covering all the lands in the drainage district located in other county, or counties, that is, in present case, Craven County. And in these sections, respectively, the clerk is required to enter an endorsement in prescribed form to the sheriff of the respective counties in which the lands lie, as his authority for collecting the assessments. Hence, the provision in C. S., 5365, that "thereupon such drainage assessments in such county shall have the force and effect of a judgment upon the lands so assessed, as in the case of State and county taxes, and shall in all other respects be as valid assess-

ments as those levied upon lands in the county in which the district was established," must be read in connection with the provisions of C. S., 5361, that "the assessments shall constitute a first and paramount lien, second only to State and county taxes upon the lands assessed for the payment of bonds and interest thereon as they become due, and shall be collected in the same manner and by the same officers as State and county taxes are collected." When so considered, it is clear that the quoted provision of C. S., 5365, is not in conflict with the quoted provisions of C. S., 5361, but is intended to implement collection of the assessment by the sheriff. Yet the assessment lien as declared in C. S., 5361, stands, and the drainage district, that is, the receiver, may proceed to enforce it under C. S., 7990.

2. The drainage act, with its various amendments, is a State-wide public statute. As originally enacted, Public Laws 1909, chapter 442, the act declared that drainage systems "shall be considered a public benefit and conducive to public health, convenience, utility and welfare." As so written, the Court, while holding that such a district is not a governmental agency like a township or county, *Pate v. Banks, supra,* decided in October, 1919, and citing *Sanderlin v. Luken,* 152 N. C., 738, 68 S. E., 225; *Comrs. v. Webb,* 160 N. C., 594, 76 S. E., 552; and *Leary v. Comrs.,* 172 N. C., 25, 89 S. E., 803, characterized a drainage district as "a geographical *quasi*-public corporation." Thereafter, in 1921, the General Assembly, in amendment to section 5312 of Consolidated Statutes of 1919, declared "that the districts heretofore and hereafter created under the law shall be and constitute political subdivisions of the State, with authority to provide by law to levy taxes and assessments for the construction and maintenance of said public works." And in same act in amending section 5360 of Consolidated Statutes of 1919, the General Assembly further provided "that the State having authorized the creation of drainage districts, and having delegated thereto the power to levy a valid tax in furtherance of the public purposes thereof, it is hereby declared that drainage districts heretofore or hereafter organized under existing law or any subsequent amendments are created for a public use and are political subdivisions of the State." See Public Laws 1909, chapter 442, section 1, sections 5312 and 5360 of Consolidated Statutes of North Carolina of 1919, as amended by Public Laws 1921, chapter 7, sections 5312 and 5360 of Consolidated Statutes of North Carolina of 1924, and *Wikinson v. Boomer, supra.*

Hence, the Little Swift Creek Drainage District, when created under the provision of the Drainage Act, became a political subdivision of the State with authority to levy taxes and assessments for the construction and maintenance of the public improvements for which it was created. Thus, upon the facts agreed in the present case, the map on file in

Craven County, showing that the land defendants proposed to buy lay within the boundaries of the drainage district, was sufficient to put defendants on notice of the existence of the drainage district, as well as of the provisions of the drainage act, including the provision that such a district covering land in Craven County could be established in a proceeding in Beaufort County. C. S., 5312. Furthermore, the defendants are presumed to have had knowledge of the law, and of the right of the drainage district as a political subdivision of the State to impose upon lands within the district the burden of expenses for public improvements as provided in the Drainage Act. See *Drainage Comrs. v. Farm Association,* 165 N. C., 697, 81 S. E., 947; *Taylor v. Comrs., supra;* and *Pate v. Banks, supra.* Accordingly, upon the facts of record, we hold that, in buying the land shown on the map of record to be within the boundaries of the drainage district, defendants took with notice of all that the record of the drainage proceeding in Beaufort County showed, including the assessment rolls containing assessments which had matured, as well as those to mature in the future, as liens upon the land in question.

The judgment below is

Reversed.

BURT L. OWNBEY v. PARKWAY PROPERTIES, INC.

(Filed 30 September, 1942.)

Mortgages §§ 30a, 31a, 31e: Limitation of Actions § 2a—

Actual possession by the mortgagor or grantor is a prerequisite to the bar of the ten-year statute of limitations against the foreclosure of mortgages and deeds of trust on realty, C. S., 2589 and 437 (3)—a mortgagor has no constructive possession and if he is not in actual possession the statute runs against him.

APPEAL by plaintiff from *Ervin, Special Judge,* at Special June Term, 1942, of BUNCOMBE. Affirmed.

Civil action in ejectment here on demurrer at the Spring Term, 1942. *Ownbey v. Parkway Properties, Inc.,* 221 N. C., 27.

The facts are fully set out in the case agreed as follows:

"1. The plaintiff, B. L. Ownbey, acquired title to Lot No. 16 of Block 15 of Royal Pines, plat of which is duly recorded . . . by a deed dated November 28, 1925, and recorded . . .

"2. That the plaintiff, B. L. Ownbey, under date of November 28, 1925, executed a deed of trust to Central Bank & Trust Company,

Trustee, securing notes executed by him for balance of purchase price in the aggregate sum of $750.00, and the last of said series of notes matured on November 28, 1928, said deed of trust being recorded in Deed Book 211, page 319.

"3. That under date of November 14, 1938, John W. Spicer was substituted as trustee, under the provisions of Consolidated Statutes, section 2583 (a), which substitution was certified by the Clerk of the Superior Court and recorded November 17, 1938, in Deed Book 511, page 587, in the office of the Register of Deeds for Buncombe County.

"4. That no payment of either principal or interest was ever made on any of the said notes.

"5. That after due notice and advertisement, as provided by law, the said John W. Spicer, Trustee, foreclosed and sold the said lot on December 19, 1938, and conveyed the said property to the defendant, Parkway Properties, Incorporated, by trustee's deed dated May 1st, 1940, and recorded May 21, 1940, in Deed Book 529, page 73, records of deeds for Buncombe County; the said foreclosure having been commenced a few days before the expiration of ten years from the maturity of the last note but was completed after the expiration of ten years from the maturity of the last maturing note.

"6. It is further agreed, that the plaintiff has never at any time, from the date of his purchase until the commencement of this action, been in the actual possession of said lot, and has never paid taxes thereon, or exercised any rights of ownership."

When the cause came on to be heard in the court below, the judge presiding, "being of the opinion that the statute of limitations relied upon in this cause by the plaintiff, there having been no possession of the land by the plaintiff, are inapplicable, and that the title of the defendant, as set forth in said agreed statement, is good," entered judgment that plaintiff take nothing by his action. Plaintiff excepted and appealed.

Charles Fortune for plaintiff, appellant.
Guy Weaver for defendant, appellee.

BARNHILL, J. If the actual possession of the mortgagor is a prerequisite to the bar of the statute of limitations against the foreclosure of mortgages and trust deeds the judgment below must be affirmed and if not *Spain v. Hines,* 214 N. C., 432, 200 S. E., 25, is controlling.

C. S., 2589, provides only that the power of sale in a mortgage or trust deed is barred when an action to foreclose would be barred. Hence, we must read into this section the provisions of C. S., 437 (3), relating to the bar of actions to foreclose. It is thus made to appear that a power

of sale contained in a mortgage becomes inoperative and unenforceable when not exercised 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, *"where the mortgagor or grantor has been in possession of the property."*

The application of this statute, as an affirmative bar, is dependent upon two conditions precedent: (1) lapse of time; and (2) possession by the mortgagor. No bar is provided except upon these conditions which must be coexistent.

This brings us to the crucial question: Must the possession of the mortgagor be actual?

Plaintiff argues that constructive possession follows the legal title; that seizin is presumed to rest in the owner of the legal title and that the owner of the legal title is, in law, in possession unless the contrary affirmatively appears.

Conceding this argument to be bottomed upon sound principles of law, it does not aid the plaintiff. A mortgage or trust deed conveys the legal title and the mortgagee or trustee is the owner thereof. *Credle v. Ayers,* 126 N. C., 11, 48 L. R. A., 751; *Wittkowski v. Watkins,* 84 N. C., 457; *Woodlief v. Wester,* 136 N. C., 162. Seizin in law is the right of the owner to the possession and enjoyment of a freehold estate and possession is presumed unless the contrary is shown. *Dobbs v. Gullidge,* 20 N. C., 197; *London v. Bear,* 84 N. C., 266; *Deming v. Gainey,* 95 N. C., 528; *Williams v. Wallace,* 78 N. C., 354. If neither party was in actual possession the constructive possession would be in the mortgagee. C. S., 432. *Weathersbee v. Goodwin,* 175 N. C., 234, 95 S. E., 491; *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210; *Crews v. Crews,* 192 N. C., 679, 135 S. E., 784. This principle, in itself, answers plaintiff's contention.

"The law bars the right of entry and of action or foreclosure under power of him only who can, but does not, either enter or sue." *Woodlief v. Wester, supra;* 2 Jones Mort. (6d), sec. 1210; *Bruner v. Threadgill,* 88 N. C., 361; *Lee v. McCoy,* 118 N. C., 518. The statute operates in favor of the mortgagor who is in actual possession. The presumption that the conditions of the mortgage have been fulfilled arises (barring foreclosure action and rendering the mortgage inoperative), when, and only when, the mortgagee fails to exercise his power of sale or to foreclose by action as against a mortgagor in actual possession. The mortgagor has no constructive possession and if he is not in actual possession the statute runs against and bars his right of redemption if he fails to act within the ten-year period. C. S., 437 (4).

Speaking to the subject in *Woodlief v. Wester, supra, Walker, J.,* says: "But we think the plaintiff must fail on his plea of the statute

by reason of the very words of the act itself. It is impossible to suppose that the Legislature intended a constructive possession, for the 'mortgagor or grantor' could never have such possession as against a mortgagee. The latter, we have already seen, has the right of possession by construction of law, as he has the legal title, and, if a constructive possession was intended, there was no use in requiring possession at all, as, if neither party was in actual possession, the constructive possession would always be in the mortgagee. . . . We cannot resist the conclusion from the language of the act itself, when read in the light of well-settled legal principles governing the relation of mortgagor and mortgagee, that an actual possession was intended. Besides, it had always been held, before the adoption of sec. 152 (3), (now C. S., 437 [3]), of The Code, that nothing short of an actual possession for the required period of time would be a good bar to the mortgagee's right."

This Court held in *Simmons v. Ballard,* 102 N. C., 105, that the possession of the mortgagor, in order to bar the right of the mortgagee to foreclose, must be the same kind as that required to be held by the mortgagee in order to bar the mortgagor's right to redeem, which is an actual possession, or the possession and the exercise of full ownership over the land, for the required period of time after the default of the mortgagor. *Edwards v. Tipton,* 85 N. C., 480; *Ray v. Pearce,* 84 N. C., 485; *Woody v. Jones,* 113 N. C., 253. The statute, C. S., 437 (4), barring this correlative right of the mortgagor to redeem is discussed in *Crews v. Crews, supra.* It is there held that nothing less than actual possession is contemplated.

We are not inadvertent to the fact that our conclusion serves to make the work of the abstracter more burdensome. Even though a mortgage, on the record evidence, is barred he must still ascertain the status of possession before forming a final conclusion. Such is the case as to payments. In any event, this is the law as written. If any change is to be effected it must be by legislative act. Perhaps this is what the General Assembly had in mind when it adopted ch. 192, Public Laws 1923, now C. S., 2594 (5).

The court below correctly applied the law to the facts agreed. Plaintiff, by his own admission, has abandoned his equity and has lost his right of redemption. The protective provisions of C. S., 2589, are not available to him. The judgment is

Affirmed.

W. S. BAILEY, JESSE LANE MOORE AND HUSBAND, JOHN E. MOORE, SADIE LANE HORN AND HUSBAND, F. HORN, REUBEN ETHERIDGE, WILMA ETHERIDGE, THERESA ETHERIDGE, MARY ETHERIDGE AND HERBERT ETHERIDGE, THE LAST FOUR BY THEIR GUARDIAN, T. A. BAUM AND A. D. ETHERIDGE, PETITIONERS, v. J. D. HAYMAN, DEFENDANT.

(Filed 30 September, 1942.)

1. Statutes § 5: Costs §§ 2, 3—

C. S., 1241, allowing plaintiffs costs as of course, upon recovery, in an action involving title to real estate, and C. S., 1243, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed *in pari materia*, and any conflicts, etc., reconciled.

2. Actions § 8: Partition § 5: Ejectment § 9a—

The plea of sole seizin converts a special proceeding for partition into a civil action to try title, and it becomes in effect an action in ejectment, and title being directly involved, there can be no partition until the issue thus raised is adjudicated.

3. Same: Costs § 3—

The plea of sole seizin converts a special proceeding for partition into a civil action to try title, and the party thus raising such issue must pay the costs thereby incurred if he does not sustain his plea.

4. Costs §§ 2, 3—

Where, in a petition for partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case was pending on the civil issue docket. This does not include costs of reference which may be taxed in the discretion of the court, C. S., 1244 (6). Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. C. S., 1244 (7).

5. Costs § 2—

The Superior Court is without power to modify former orders of the Supreme Court taxing costs on former appeals, as costs thus incurred are no part of Superior Court costs, but are taxed by, and executions issue out of, the Supreme Court. C. S., 1256.

6. Trial § 29a—

The court in its charge having made, by inadvertence, a patent error, and having at once corrected this *lapsus linguæ* and instructed the jury to disregard it, and later in the charge having again called its mistake to the attention of the jury, in language understandable to men of ordinary intelligence, and having correctly stated the law on this aspect of the case, an exception thereto is untenable.

BAILEY *v.* HAYMAN.

APPEAL by plaintiffs and by defendant from *Williams, J.*, at June Term, 1942, of PASQUOTANK. On plaintiffs' appeal: Modified and affirmed. On defendant's appeal: No error.

Petition for partition in which the defendant pleaded sole seizin. The cause was here on appeal at the Fall Term, 1940, *Bailey v. Hayman,* 218 N. C., 175, 10 S. E. (2d), 667, and again at the Fall Term, 1941, *Bailey v. Hayman,* 220 N. C., 402, 17 S. E. (2d), 520. The facts are fully stated in those opinions.

After the last appeal the cause was, on motion of plaintiffs, removed to the Superior Court of Pasquotank County for trial. On the trial below there was a verdict for the plaintiffs. The court entered judgment decreeing that the parties are tenants in common of the *locus in quo* and appointing commissioners to make sale for partition. It was further ordered and decreed "that all the costs of this action as of the date of signing this judgment, be paid by the parties to this action in proportion to the respective interests of each in the land in controversy, including Supreme Court costs and referee's fee." Both plaintiffs and defendant excepted and appealed.

R. B. Bridger, Martin Kellogg, Jr., and Worth & Horner for plaintiffs.
J. Henry LeRoy and McMullan & McMullan for defendant.

BARNHILL, J. The action of the court in taxing the costs to be paid proportionately by the several parties to this action must be held for error.

C. S., 1241, reads, in part: "Costs shall be allowed of course to the plaintiff, upon a recovery . . . (1) 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." C. S., 1244 (7), provides that all costs and expenses incurred in special proceedings for the division and sale of either real or personal property under the chapter entitled Partition shall be taxed against either party or apportioned among the parties in the discretion of the court. These are related sections of Art. 3, ch. 23, Consolidated Statutes, and pertain to the same subject matter. They must be construed *in pari materia* and any conflict or contradiction, real or apparent, in their terms must be reconciled so as to give effect to both and to express the true intent of the Legislature. *Guilford County v. Estates Adm., Inc.*, 212 N. C., 653, 194 S. E., 295; *S. v. Calcutt,* 219 N. C., 545, 15 S. E. (2d), 9. It is so declared in *Whitaker v. Whitaker,* 138 N. C., 205, where it is held that C. S., 103, constitutes an exception to C. S., 1241.

The primary purpose of partition proceedings is to sever the unity of possession. *McKimmon v. Caulk,* 170 N. C., 54, 86 S. E., 809. Title is

not at issue. The parties merely seek the aid of the court under the statute in apportioning the property among the several claimants to the end that each may own his share in severalty. This presupposes title in the claimants. Manifestly, in such cases each tenant in common should pay his proportionate part of the costs and expenses as provided by C. S., 1244 (7).

While the clerk has original jurisdiction of special proceedings for the partition of land held by tenants in common, this jurisdiction is divested or suspended by a plea of *non tenent insimul* or of sole seizin. He is required to forthwith transfer the cause to the civil issue docket for trial as in case of other civil actions. C. S., 758. *Haddock v. Stocks,* 167 N. C., 70, 88 S. E., 9.

The plea of sole seizin converts the special proceedings into a civil action to try title. It becomes, in effect, an action in ejectment. *Alexander v. Gibbon,* 118 N. C., 796; *Sipe v. Herman,* 161 N. C., 107, 76 S. E., 556; *Parker v. Taylor,* 133 N. C., 103; *Bullock v. Bullock,* 131 N. C., 29; *Ditmore v. Rexford,* 165 N. C., 620, 81 S. E., 994; *Huneycutt v. Brooks,* 116 N. C., 788; *Higgins v. Higgins,* 212 N. C., 219, 193 S. E., 158; *Gibbs v. Higgins,* 215 N. C., 201, 1 S. E. (2d), 554. Title is directly involved and there can be no partition until the issue thus raised has been adjudicated.

The defendant had the right to put the title to the property described in the petition in issue and to claim it as his own under his plea of sole seizin. When he elected so to do he compelled plaintiffs to prove title which otherwise was not at issue. The costs incurred while the cause was pending on the civil issue docket for the trial of the issue thus raised are not part of the costs of partition. They are, instead, costs incident to the trial of a case wherein "a claim of title to real property arises on the pleadings." They were incurred in adjudicating the issue the defendant, by his plea, had raised. Having raised the issue and lost he must pay the bill.

The plaintiffs are entitled to judgment for all costs incurred from and after defendant's answer was filed through the final judgment below, that is, all costs incurred while the case was pending on the civil issue docket. This does not include costs of reference which may be taxed in the discretion of the court. C. S., 1244 (6). The initial costs incurred before answer was filed and those to be incurred in the partition subsequent to the judgment below may be apportioned under C. S., 1244 (7).

The court below was without jurisdiction or authority to modify former orders of this Court taxing costs incurred on former appeals herein, or to apportion such costs among the parties contrary to the terms of such orders. Costs thus incurred are no part of the Superior Court

costs. They are taxed by, and executions issued out of, this Court. C. S., 1256, rule 43.

DEFENDANT'S APPEAL.

During the course of its charge the court below instructed the jury as follows:

"The court charges you that if, from the evidence and under the rules of law as laid down by the Court, you find that the lands in controversy are embraced within the description contained in the deed from Thos. J. Markham, Commissioner, to Hattie Dough, then it would be your duty to answer the first issue Yes." The defendant excepts to this charge and this exception is the basis of his only assignment of error.

If the *locus in quo* was embraced in the Markham deed then plaintiffs have no interest therein. Hence, the charge as given is clearly erroneous in that the answer, upon such findings, would be No, rather than Yes. It is so admitted by plaintiffs.

It further appears, however, that counsel for defendant immediately called this *lapsus linquæ* to the attention of the court, stating in the presence of the jury that the judge should have said the answer would be No. The court then instructed the jury: "You will disregard that, Gentlemen of the Jury, and will answer the first issue No if you find from the evidence and by the greater weight thereof, under the rules of law as laid down by the court, that the lands in controversy are embraced within the description contained in the Markham deed."

Counsel for the defendant properly called the attention of the court to its slip of the tongue in stating what the answer would be. The court immediately withdrew the erroneous charge and clearly and correctly instructed the jury as to the effect of a finding of the facts outlined and the conditions upon which the issue should be answered in the negative. Again later it correctly stated the law on this aspect of the case. The attention of the jury was called to the error with a view to correcting it and of removing the wrong impression made by the erroneous instructions. This was done in language men of average intelligence could understand. The correction was permissible. *May v. Grove,* 195 N. C., 235, 141 S. E., 750. And the court did all that was required. *Jones v. R. R.,* 194 N. C., 227, 139 S. E., 242; *Champion v. Daniel,* 170 N. C., 331, 87 S. E., 214; *Jones v. Ins. Co.,* 151 N. C., 54, 65 S. E., 602; *Wilson v. R. R.,* 142 N. C., 333.

In the *Champion case, supra,* it is said: "These references to our cases are sufficient to show how careful, if not exacting, we have been to require that if a judge has given conflicting instructions and wishes to correct the erroneous one, he should refer to the error and withdraw it from his charge, or so explain the matter to the jury that they may certainly understand that he means to correct the error and to give them the right

instructions as to the law." The court below fully complied with this rule. The exception of the defendant cannot be sustained.

On plaintiffs' appeal: Modified and affirmed.

On defendant's appeal: No error.

MAE A. SPAKE v. BARNEY PEARLMAN AND HATTIE PEARLMAN.

(Filed 30 September, 1942.)

1. Pleading § 15—

Demurrer to a complaint for failure to state a cause of action admits all of the allegations and all inferences that may reasonably be deduced therefrom under a liberal construction of its terms.

2. Same—

Upon demurrer to a complaint of negligent injury to plaintiff on the ground that it does not state a cause of action, it is sufficient if the complaint in a concise statement of the facts apprises the defendant and the court of the nonperformance of some duty of care or protection which the defendant owed the plaintiff and the proximate cause of the injury.

3. Same—

Where, in an action for damages due to negligence, plaintiff alleges that defendants did not furnish her a safe and suitable place to work, in that she was required, in the performance of her duties, to use an inside stairway which, with connecting halls, was dark and the stairway was covered with a loose and defective runner, that plaintiff was not shown the light switches, if any there were, and that plaintiff, in the performance of her duties, caught her foot in the loose runner as she descended the dark stairway and fell to her injury. *Held:* Error to allow a motion to dismiss for failure to state a cause of action, *non obstante veredicto.* Reversed and new trial.

APPEAL by plaintiff from *Olive, J.,* at January "A" Term, 1942, of BUNCOMBE. Reversed. New trial.

The plaintiff, a practical nurse, was employed to nurse the mother of the *feme* defendant in their home in Asheville. Among the duties required of the plaintiff was to carry food to the invalid on the second floor, where she was confined to the bed, and to return the dishes to the first floor.

On the day of her employment and while engaged in this duty and returning to the first floor, she fell down the stairway and was seriously injured.

She sued the defendants to recover for personal injuries, which she attributed to the negligence of the defendants. Pertinent parts of the complaint on the charge of negligence are as follows:

"3. That on the 20th day of February, 1941, about 8 o'clock in the morning of said day, the plaintiff entered upon her said duties and in the performance of same was carrying a tray containing food down said stairway; that said stairway and the halls leading thereto and therefrom were dark; that said stairway had no railing or banister to guide the plaintiff; and the plaintiff was not warned by the defendants that said stairway was dark or advised as to the whereabouts of light switches, if any there were, near, over or about said stairway; that on account of the darkness the plaintiff fell down several steps of said stairway and was seriously injured in her back, her right side, her chest, and her right leg, and received a severe shock to her nervous system; that on account of said injuries the plaintiff suffered great and intense pain in body and mind and has been sick, sore and lame; that it was necessary for the plaintiff to employ the services of a physician to treat her for said injuries; that the plaintiff is advised, informed, and believes, that said injuries are permanent; that the plaintiff was for a long period of time wholly incapacitated and unable to perform her usual duties as a nurse, and is advised, informed and believes that she will not be able again to perform said duties as a nurse, or to procure other employment, or to engage in any remunerative labor as she had heretofore been able to do and perform; that since receiving said injuries the plaintiff has been very nervous at all times and has endured great physical and mental suffering.

"4. That it was the duty of the defendants and each of them as employers of the plaintiff to furnish a suitable and safe location in which the plaintiff could perform her duties; that it was the duty of the defendants to inform the plaintiff of the condition of the stairway over which she was required to pass in the performance of her duties; that it was the duty of the defendants to advise the plaintiff as to the location of light switches, if any there were, to light said stairway; that it was the duty of the defendants to inform the plaintiff of any and all defects or points of faulty construction in said stairway; and that the defendants in every respect failed to do and perform all of their duties as herein set forth.

"5. That the plaintiff was unacquainted with the surroundings in said home of the defendants, unaware of the whereabouts of light switches, if any there were, to, over, about, or near said stairway, and unacquainted with the nature of said stairway, landings, etc., and was given no opportunity to examine said stairway to discover any defects or irregularities in same.

"5-A. That the said house of the defendants was improperly and negligently constructed in that there was a long inside stairway constructed therein leading from the first floor to the second floor, with a landing

thereon and other steps leading from said landing, and no outside window placed in or near said stairway or landing to furnish light to a person, or persons, ascending or descending said stairway; that consequently said stairway and landing was insufficiently lighted on the date alleged herein; that on account of the insufficiency of said light when the plaintiff started to go down said stairs as instructed to do in the course of her employment, she was unable to see the electric light switch, which she afterward ascertained had been negligently and carelessly placed at a point at the head of said stairway where a person unacquainted therewith and because of the insufficiency of the light would be unable to see and find; that before starting down said stairway plaintiff looked for an electric light switch and because of the things herein alleged, she was unable to see the same and as she started on down said stairway in the performance of her said duties, using all of her faculties in an effort to go down in safety, because of the negligence of the defendants in failing to provide the plaintiff with a reasonably safe place in which to work in that they had not made sufficient provision for the lighting of said stairway and because of the faulty construction of said building and the negligent placing of said electric light switch and because of their failure to instruct the plaintiff as alleged herein, she made one or two steps down said stairway when her right foot, either the heel or toe of her shoe thereon, caught in the side or edge or other portion of the plush runner located on or about the center of said stairway throwing the plaintiff down the remainder of said steps onto the landing and into the steps on the other side of said landing and against the marble top of a piece of furniture standing on said landing and injuring and damaging plaintiff as herein alleged.

"5-B. That the rug on said stairway was insufficiently maintained and its condition improperly inspected, and the defendants knew, or should have known by reasonable inspection that the said rug on said stairway was loose and not properly fastened to the floor of said stairway."

Upon the trial of the case, the usual issues were submitted to the jury; and upon the evidence adduced, the jury answered all of them in favor of the plaintiff.

The plaintiff tendered judgment upon the issues, which the presiding judge refused to sign.

The defendants having moved to dismiss the action for that the complaint did not state a cause of action, the motion was allowed and *non obstante veredicto,* a judgment was entered dismissing the case at plaintiff's cost.

The judgment holds that the evidence in the case would not warrant an amendment strengthening the complaint.

In apt time, the plaintiff filed proper exceptions and appealed.

Don C. Young for plaintiff, appellant.
Guy Weaver for defendants, appellees.

SEAWELL, J. Relative to the statement in the judgment that the evidence would not warrant an amendment to the complaint, we must keep in mind that the question posed for solution here does not arise out of a demurrer to the evidence or motion for judgment as of nonsuit for its insufficiency to go to the jury. The record does not disclose that any motion of that sort was made. If it was made, nevertheless the evidence was submitted to the jury and the defendants did not except or appeal. They got their deliverance from a different source. Demurrer to the complaint as not stating a cause of action may be made at any time after the pleading has been filed, either in the court below or here, pending consideration of an appeal. C. S., 511 (6), 518; *Raleigh v. Hatcher,* 220 N. C., 613, 18 S. E. (2d), 207. In its consideration, the court will not, of course, consider any evidence adduced at the trial. In the case at bar, the ruling on the demurrer to the complaint is the only thing at issue upon the appeal.

The complaint is challenged only with respect to the sufficiency of its allegations of negligence. Within the scope of this exception, it is sufficient if the complaint, in a concise statement of the facts, apprises the defendant and the court of the nonperformance of some duty of care or protection which the defendant owed the plaintiff and the proximate causation of injury. 38 Am. Jur., p. 651, sec. 11; *ib.,* p. 953, sec. 261: "Negligence and care are the sum and conclusion of a variety of attending circumstances characterizing the main acts bearing on or tending to prove the ultimate facts, and the rule of pleading is to charge them in this way, and to depend upon the evidence to establish the allegation."

One of the incidents of the shift from common law to code practice is the injunction placed upon the courts to construe pleadings liberally so that substantial justice may be done; whereas, at common law the pleading was strictly construed against the pleader. C. S., 535; *Sexton v. Farrington,* 185 N. C., 339, 117 S. E., 172; *Pridgen v. Pridgen,* 190 N. C., 102, 129 S. E., 419.

The demurrer admits all the allegations of the complaint and all inferences that may reasonably be deduced from it under a liberal construction of its terms. *Farrell v. Thomas and Howard Co.,* 204 N. C., 631, 632, 633, 169 S. E., 224; *Hendrix v. R. R.,* 162 N. C., 9, 77 S. E., 1001; *Brewer v. Wynne,* 154 N. C., 467, 70 S. E., 947; *Bank v. Duffy,* 156 N. C., 83, 72 S. E., 96; *Hartsfield v. Bryan,* 177 N. C., 166, 98 S. E., 379; *Hedgpeth v. Allen,* 220 N. C., 528, 17 S. E. (2d), 652; *Cheshire v. First Prebyterian Church,* 220 N. C., 393, 17 S. E. (2d), 344; *Purcell v. R. R.,* 108 N. C., 414, 424, 12 S. E., 954.

Judged by these standards, the complaint is not subject to successful demurrer.

Had the judgment dismissing the action been *non obstante veredicto,* the plaintiff would be entitled to the judgment tendered by her, but the verdict was set aside. The preamble suggests that this might have been done as a matter of law. But it is not strong enough to overcome the presumption which, nothing else appearing, would sustain the order as an exercise of discretion.

The judgment dismissing the action is reversed and the plaintiff is awarded a new trial.

Reversed. New trial.

MRS. CLARISSA WALKER v. THE TOWN OF WILSON.

(Filed 30 September, 1942.)

1. Municipal Corporations § 14—

Municipalities are liable for injuries from defects or obstructions in their streets for negligence only; they are not insurers and are not liable for consequences arising from unusual circumstances which could not be foreseen; but are required to use only ordinary care in maintaining their sidewalks and streets in a reasonably safe condition.

2. Same: Negligence § 19—

Where plaintiff, who was walking at night on a town sidewalk, which was perfectly smooth and level, with lights at the corners ahead and behind her, and on a street she was accustomed to use, stepped off the paved sidewalk into a depression between the paving and a retaining wall, thus causing the injury, defendant's motion for nonsuit should have been granted.

APPEAL by defendant from *Burney, J.,* at May Term, 1942, of WILSON.

Civil action to recover damages against the town of Wilson, resulting from an alleged failure of said town to keep in proper repair a small unpaved space between its sidewalk and a retaining wall on the property line.

The evidence was to the effect that the sidewalk on Nash Street, in the town of Wilson, is five feet wide and a retaining wall four or five feet high (complaint alleges the retaining wall is from ten inches to two feet in height), is flush with the sidewalk in front of the Harrell lot which adjoins the Williams lot. There was an unpaved space between the sidewalk and the retaining wall in front of the Williams lot, said space being approximately two feet in width. A drain pipe that takes

the water off of the Harrell lot empties into the space between the sidewalk and the retaining wall, causing a depression in the unpaved area. The depression was from eighteen to twenty-four inches wide and six or seven inches deep at "the deepest portion and then edges off to three inches."

Plaintiff testified: "In going down town I use the right side of Nash Street mostly, and the right side going back home. The Lattimore Williams lot is on the right side of Nash Street going out. On the night of October 29, 1941, about 7 o'clock, I was going out home. I had been uptown in the afternoon and had visited friends after the stores closed and about 7 o'clock I started out home, 7 o'clock old time or standard time. It is dark at that time in October. I was walking on the right side of Nash Street going out. As usual I walked to the right of the pavement, naturally I was walking close to the right side of the pavement and when I got along about in front of Mr. Lattimore Williams' side as I passed the wall that is out to the pavement I was still keeping to the right and my right foot stepped off of the pavement and I fell backward and pitched on this right hand and, of course, my weight caused it to break. I naturally grabbed for the wall and I missed it and knocked the knuckles off of my right hand as I came down the side of the wall. No one was there. I was alone. . . . when I was going home on this occasion I was using the sidewalk and the side of the street I usually use. I have not passed along that sidewalk so very many times in the last ten years. I don't go up town frequently, don't go on an average of once a week by any means. I don't know that I go as often as twice a month, walking. I suppose I have passed by that same spot quite frequently in walking prior to this time. I think the pavement of the sidewalk is perfectly level and smooth and at that particular point the sidewalk is straight. There is a little curve on this side but at the point where I am complaining about the depression, the sidewalk is perfectly straight. I was not meeting anybody. I had the whole sidewalk to myself. I wouldn't know the width of the sidewalk. I suppose it is five feet wide. I could, of course, see down the street to the next intersection. Nothing in front of me to obstruct my vision. The street light on the corner was burning and the street light back of me burning. I suppose the street light in front of Mr. Finch's house was burning."

From a verdict and judgment in favor of plaintiff, the defendant appeals and assigns error.

Connor, Gardner & Connor for plaintiff.
Lucas & Rand for defendant.

DENNY, J. The exceptions and assignments of error may be disposed of by a consideration of defendant's motion for judgment as of nonsuit.

Considering the evidence in the light most favorable to the plaintiff, we are of the opinion that the plaintiff has failed to establish liability for her injury on the part of the defendant.

The burden was on the plaintiff to show that the town of Wilson was negligent, and that its negligence was the proximate cause of her injury. This she has failed to do. *Love v. Asheville,* 210 N. C., 476, 187 S. E., 562. "The liability of a municipal corporation for injuries from defects or obstructions in its streets is for negligence and for negligence only; it is not an insurer of the safety of travelers, and is not liable for consequences arising from unusual or extraordinary circumstances which could not have been foreseen, but is required to exercise ordinary or reasonable care to maintain its streets and sidewalks in a reasonably safe condition for travel by those using them in a proper manner." 43 C. J., Municipal Corporations, sec. 1785, p. 998.

The plaintiff's testimony certainly does not lead to the conclusion that the town of Wilson was negligent in that it had failed to provide a safe way for her; on the contrary, she says: "The sidewalk is perfectly level and smooth and at that point is straight. . . . I was not meeting anybody. I had the whole sidewalk to myself. I could . . . see down the street to the next intersection. Nothing in front of me to obstruct my vision. The street light on the corner was burning and the street light back of me was burning. I suppose the street light in front of Mr. Finch's house was burning."

The evidence discloses no reason why the plaintiff could not, in the exercise of due care for her own safety, have observed the actual conditions which existed in the unpaved area between the sidewalk and the retaining wall. Moreover, she was accustomed to walking on that particular sidewalk. We think the rule laid down in *Burns v. Charlotte,* 210 N. C., 48, 185 S. E., 443, is applicable to the facts in the instant case, in which the Court said: "If one way is safe and the other dangerous, and a person knew, or by the exercise of due care ought to have known, of the dangerous way, and goes that way, the person is guilty of contributory negligence and cannot recover. *Groome v. Statesville,* 207 N. C., 538, 177 S. E., 638." *Houston v. Monroe,* 213 N. C., 788, 197 S. E., 571; *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424; *Gettys v. Marion,* 218 N. C., 268, 10 S. E. (2d), 799.

The plaintiff relies upon *Bunch v. Edenton,* 90 N. C., 431; *Wall v. Asheville,* 219 N. C., 163, 13 S. E. (2d), 260; and *Radford v. Asheville,* 219 N. C., 185, 13 S. E. (2d), 256. The facts in the above cases are distinguishable from those in the instant case.

Defendant's motion for judgment as of nonsuit should have been granted. The judgment of the court below is

Reversed.

MRS. EVELYN S. PEARSON, WIDOW, AND HOWARD PEARSON, SON OF NEWTON H. PEARSON (EMPLOYEE), DECEASED, v. NEWT PEARSON, INC. (EMPLOYER), AND TRAVELERS INSURANCE COMPANY (CARRIER.)

(Filed 30 September, 1942.)

1. Master and Servant § 37—

Ordinarily, the parties may not by agreement or conduct extend the provisions of the Workmen's Compensation Act; but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of benefits of that status, may work an estoppel after loss.

2. Master and Servant § 39a—

Where it appears that defendants, employer and carrier, with full knowledge that deceased was president and general manager of employer corporation, by their treatment of decedent's relationship to the corporation as that of employee rather than executive, and acceptance of the benefits of that status, have recognized his dual capacity and classification as an employee, they cannot, after loss sustained, assert the contrary, and an award by the Industrial Commission, based on sufficient evidence, is affirmed.

APPEAL by defendants from *Phillips, J.*, at May Term, 1942, of BUNCOMBE. Affirmed.

This was a proceeding under the Workmen's Compensation Act to secure compensation for the death of Newton H. Pearson. The Industrial Commission found that the death of the decedent was due to an injury by accident arising out of and in the course of his employment by Newt Pearson, Inc., and awarded compensation to his dependent. Upon appeal to the Superior Court the findings, conclusions and award of the Industrial Commission were affirmed, and the defendants appealed to this Court.

Chas. G. Lee, Jr., for plaintiffs.
Williams & Cocke for defendants.

DEVIN, J. The appeal raises the question whether under the findings of fact by the Industrial Commission the judgment affirming the award of compensation to the claimant under the Workmen's Compensation Act can be upheld.

The Industrial Commission found that the decedent was president and general manager of Newt Pearson, Incorporated; that he owned 58 of the 60 shares of the capital stock of the corporation; that the business of the corporation was the sale of automobiles as dealer agent of the

Chrysler Motor Co. and the operation of a garage; that when new cars were not obtainable, the corporation engaged in buying and selling used cars; that the decedent supervised the operation and business of the corporation, visiting the repair shop, and assisting in buying and selling cars, sometimes driving them in from distant points, and also engaged in collecting old accounts; that on 18 September, 1941, he left Asheville to visit Canton and Brevard for the purpose of collecting accounts; that on the road between Canton and Brevard the automobile in which he was riding was wrecked and he suffered an injury resulting in his death. It was found by the Industrial Commission that he sustained an injury by accident arising out of and in the course of his employment by Newt Pearson, Inc., while he was engaged in collecting for the corporation. There was evidence to support these findings.

It was further found by the Industrial Commission that the salary of the deceased was used in computing the total pay roll of the corporation for the purpose of determining the amount of the compensation insurance premiums due the defendant Insurance Company which were based on wages and pay roll; that the Insurance Company accepted the premiums based on the pay roll which included the salary of decedent, and that this had been the practice for several years. It was also found that no tender of refund of the premiums based on decedent's salary had been made prior to his death. These findings were supported by the evidence. The agent of defendant Insurance Company testified that the premiums were based on the aggregate wages and salaries of all the employees of Newt Pearson, Inc., including that of the decedent, and that he gave instructions that in getting up the totals the salary of decedent should be included; that in making up the figures, in co-operation with the deceased and the secretary-treasurer of the corporation, the salary of the decedent was included in the classification of employee. Defendant Insurance Company's agent countersigned the policy, delivered it to the corporation, received the premiums and forwarded same to the company. It also appeared that defendant Insurance Company from time to time audited the pay roll records of the corporation.

The defendants challenged the validity of the judgment affirming an award in this case on the ground that Newton H. Pearson was not an employee within the meaning of the Workmen's Compensation Act. It was contended with much force that since he was president and general manager, and owner of all the stock of the corporation except two qualifying shares, he was for all practical purposes sole owner, was an executive, not a workman, and could not be his own employer. They cite in support of this view *Gassaway v. Gassaway & Owen, Inc.*, 220 N. C., 694, 18 S. E. (2d), 120; *Hodges v. Mortgage Co.*, 201 N. C., 701, 161 S. E., 220, and numerous decisions from other jurisdictions.

On the other hand it was contended that the principal duties in which the decedent was engaged were those of a salesman and collector of accounts, and that he was injured while so engaged; that the doctrine of dual capacity recognized by the courts should be applied to the facts found, and the judgment upheld on that ground. *Hunter v. Auto Co.*, 204 N. C., 723, 169 S. E., 648; *Jones v. Trust Co.*, 206 N. C., 214, 173 S. E., 595; *Nissen v. Winston-Salem*, 206 N. C., 888, 175 S. E., 310; *Rowe v. Rowe-Coward Co.*, 208 N. C., 484, 181 S. E., 254; 12 A. L. R., 1285; 25 A. L. R., 373.

However, we deem it unnecessary to decide the precise point chiefly debated, whether or not, under the facts of this case, the president and general manager of a small corporation, who also works as salesman and collector of accounts, can be classified as an employee, since it appears that the defendants, by their treatment of the decedent's relationship to the corporation as that of employee rather than executive, and the acceptance of the benefits of that status, have recognized his dual capacity and classification as employee to such an extent that they should not now be permitted to assert the contrary after loss has been sustained. The record shows that the defendant Insurance Company's agent gave instruction that decedent be so classified, and that his salary be included in the totals of the wages of the corporation's employees, and that this was done after consultation between the agent of the Insurance Company and the secretary-treasurer of the corporation. The premiums thereon were collected accordingly and received by the Insurance Company over a period of several years. The Insurance Company was chargeable with notice that the computation of premiums was based on pay rolls which included decedent's salary, since this was done in accord with its agent's instructions (*Horton v. Ins. Co.*, 122 N. C., 498, 29 S. E., 944), and the corporation's records of classifications and wages were frequently inspected by its auditors. Thus the Insurance Company had knowledge that it was being paid for carrying the risk of accidental injury to decedent arising out of and in the course of his indicated employment in work other than that of an executive.

In *Southern Surety Co. v. Childers*, 87 Okl., 261, where upon facts similar to those in the case at bar the award of compensation for injury to the president of a corporation was upheld, it was said: "Furthermore, the premium paid was based upon the pay roll which included the remuneration of the claimant not to exceed $1,500 per annum. The Southern Surety Company treated the claimant as an employee for the purpose of collecting the premium, and cannot now, when called upon to pay the loss, be heard to deny that he was an employee." While ordinarily the parties may not by agreement or conduct extend the provisions of the Workmen's Compensation Act, in this case the defendants' continued and

definite recognition of the relationship of the president to the corporation as that of an employee, based upon knowledge of the class of work he performed, and the acceptance of the benefits of that classification, may well be regarded as having the effect of preventing them from changing their position after loss has been sustained.

In view of the facts found by the Industrial Commission, supported by competent evidence, we conclude that the ruling of the court below in affirming the award was correct, and that the judgment must be

Affirmed.

W. H. BELLMAN AND WIFE, PAULINE PRIDGEN BELLMAN; G. W. PRIDGEN; MRS. C. C. MONTGOMERY: MRS. EMMA PRIDGEN STRICKLAND; CORRINE PRIDGEN; HOWARD FRESHWATER AND WIFE, FLEETA PRIDGEN FRESHWATER; J. E. DICKINSON, INDIVIDUALLY; FRANCES D. NICHOLS AND HUSBAND, RICHARD NICHOLS; CARL DICKINSON; JAMES DICKINSON AND WIFE, WILLISTIENE DICKINSON; MRS. A. O. JOYNER, MINOR, AND HER HUSBAND, A. O. JOYNER; ANNIE GAY DICKINSON, MINOR; MRS. A. O. JOYNER AND ANNIE GAY DICKINSON, MINORS, BEING REPRESENTED BY J. E. DICKINSON, THEIR NEXT FRIEND; MRS. GRACE PRIDGEN, WOODRUFF PRIDGEN; JOE RUARK AND WIFE, GRACE PRIDGEN RUARK, AND ELIZABETH PRIDGEN, v. W. J. BISSETTE AND WIFE, MINNIE BISSETTE; L. F. BARBEE AND WIFE, NETTIE P. BARBEE; T. W. STERRETT, TRUSTEE; THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; R. O. MULLEN, TRUSTEE, AND F. D. BISSETTE.

(Filed 30 September, 1942.)

1. Pleadings § 16a—

A demurrer on the ground of misjoinder of parties and causes of action will not lie when the complaint sets out a series of transactions connected with the same subject of action, flowing from the same cause, all leading to one end, and plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to conclude the whole matter in one suit.

2. Same—

In a suit, alleging misconduct by trustees, to whom land was conveyed, and to enforce a trust agreement executed by grantees for the benefit of grantors' children and for an accounting, the plaintiffs and two of the defendants being all of the children and the only heirs at law of the grantors and the other defendants being the trustees and their grantees of a part of the trust property. *Held:* Demurrer for misjoinder of parties and causes properly overruled.

APPEAL by defendants L. F. Barbee and wife, Nettie P. Barbee, from *Frizzelle, J.*, at June Term, 1942, of NASH. Affirmed.

This was an action to enforce the provisions of a trust agreement with respect to land, and to require the conveyance of lands now held by defendants Bissette and Barbee, and for an accounting.

The defendants Bissette answered. The defendants Barbee demurred on the ground of misjoinder of parties and causes of action. From judgment overruling the demurrer defendants Barbee appealed.

H. D. Cooley, H. E. May, and Battle, Winslow & Merrell for plaintiffs, appellees.

L. L. Davenport and W. H. Yarborough for defendants Barbee, appellants.

O. B. Moss for defendants Bissette.

DEVIN, J. By their demurrer the appellants seek to have the complaint overthrown and the action dismissed as to them on the ground of misjoinder of parties and causes of action. This requires an examination of the complaint in the light of the indicated ground of attack. The complaint is lengthy, but the allegations material to the decision of the question presented may be concisely stated as follows: It is alleged that the plaintiffs and the defendants Mrs. Minnie Bissette and Mrs. Nettie P. Barbee are the children and only heirs of E. W. Pridgen and wife, now deceased; that 20 November, 1930, E. W. Pridgen and wife conveyed to the defendants Bissette three tracts of land, and contemporaneously defendants Bissette executed in writing a trust agreement whereby they undertook to hold the lands in trust for E. W. Pridgen and wife, cultivate the lands, pay off encumbrances, contribute to the support of the grantors during their lives, and upon their death convey the property to the children of the grantors, share and share alike. Out of the money derived from the use of the lands the defendants Bissette were to retain certain compensation, pay funeral expenses of E. W. Pridgen and wife, and divide the remainder among their children.

It is alleged that the defendants Bissette failed to comply with the terms of the trust agreement, committed waste, traded with themselves, failed to account for rents and profits, and further in violation of the trust conveyed one tract of the trust estate to the defendant Barbee who, it is alleged, took with notice of the terms of the trust and who has also committed waste, sold timber and failed to account for rents and profits, and for money received from a loan on the land extended by defendant Insurance Company.

It is alleged that the equitable title to the lands is in all the children of E. W. Pridgen and wife, and plaintiffs ask that defendants Bissette and Barbee as trustees be required to convey the lands in accordance with the terms of the trust agreement, and account for rents and profits.

Manifestly this is an equitable proceeding among members of the same family to close a trust in which both plaintiffs and defendants are interested, and to require the reconveyance of lands, the legal title to which is held by the defendants Bissette and Barbee as trustees for the benefit of all the children of E. W. Pridgen and wife, including the defendants Mrs. Minnie Bissette and Mrs. Nettie P. Barbee. The rights of the parties are controlled by the trust agreement under which the lands were conveyed by E. W. Pridgen and wife, and the transactions set out in the complaint affect all the parties and beneficiaries of that trust, both plaintiffs and defendants. Mrs. Barbee is a beneficiary of the trust and hence interested, as one of the children of E. W. Pridgen and wife, in having a conveyance of the land made to her, as well as to the other children, by defendants Bissette. And equally Mrs. Bissette, as well as all the other children of E. W. Pridgen and wife, is interested in securing a conveyance and accounting by defendant Barbee.

It would seem necessary for the proper enforcement of the rights of the plaintiffs, as well as of the defendants, that all those who hold the lands in trust for them, under the same trust agreement, be joined as parties, in order that the whole matter may be concluded in one suit. The causes of action set out in the complaint arise out of the same transaction or transactions connected with the same subject of action, and affect all the parties to the action. C. S., 507. The basis of the plaintiffs' action, as set out in the complaint, is the trust agreement which affects the rights of all, and out of which the rights of all arise. *Cole v. Shelton,* 194 N. C., 741, 140 S. E., 734.

The principle is stated in *Young v. Young,* 81 N. C., 92 (headnote), as follows: "Where a general right is claimed arising out of a series of transactions tending to one end, the plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to a conclusion of the whole matter in one suit." Upon similar facts in *Leach v. Page,* 211 N. C., 622, 191 S. E., 349, it was decided that a demurrer on the ground of misjoinder of parties and causes of action was properly overruled. To the same effect is the holding in *Bundy v. Marsh,* 205 N. C., 768, 172 S. E., 353, and *Cotton Mills v. Maslin,* 195 N. C., 12, 141 S. E., 348.

It has been frequently said by this Court that a demurrer on the ground of misjoinder of parties and causes of action will not be sustained when the complaint sets out a series of transactions connected with the same subject of action, flowing from the same cause, all leading to the one end and narrating a connected story. *Bedsole v. Monroe,* 40 N. C., 313; *Daniels v. Fowler,* 120 N. C., 14, 26 S. E., 635; *Hawk v. Lumber Co.,* 145 N. C., 48, 58 S. E., 603; *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465; *Lee v. Thornton,* 171 N. C., 209, 88 S. E., 232; *Trust Co.*

v. Peirce, 195 N. C., 717, 143 S. E., 524; *Barkley v. Realty Co.,* 211 N. C., 540, 191 S. E., 3; *Leach v. Page, supra.*

Appellants have cited a number of cases in which demurrers on this ground have been sustained by this Court, but upon examination we do not think them controlling here. In the last case on this subject to be considered, *Wingler v. Miller,* 221 N. C., 137, the demurrer was sustained for the reason as stated, that "different causes of action are attempted to be set up against different parties, not common to all." *Cf. Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705, and *Burleson v. Burleson,* 217 N. C., 336, 7 S. E. (2d), 706.

We conclude that the complaint in this action cannot be defeated by demurrer upon the ground of misjoinder of parties and causes of action, and that the judgment must be

Affirmed.

PHROCINE LATHAM PARKER v. LUCY F. EDWARDS, ELIZABETH JOSEPHINE PARKER, AND WESTERN UNION TELEGRAPH COMPANY.

(Filed 30 September, 1942.)

1. Libel and Slander § 1—

The general rule is that a defamatory statement, to be actionable, must be false; an admission of its truth is a complete defense to any action based thereon.

2. Libel and Slander § 14—

In an action for damages on an alleged libelous accusation, the truth of which was admitted, the court was correct in charging the jury that such accusation should not be taken into consideration as bearing upon any issue.

3. Libel and Slander § 13—

Where a telegraph company sends a message containing words that amount to a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. C. S., 2432.

4. Libel and Slander § 7b—

Although a telegram is libelous on its face, a public service telegraph company is required by law to transmit it under a qualified privilege, if in so doing it acts *bona fide,* and free from ill will or malice.

5. Same—

Where a qualifiedly privileged publication is admitted by defendant, the burden of proof is on the plaintiff to show malice in the publication.

STACY, C. J., dissents on appeal of defendant Western Union.

PARKER *v.* EDWARDS.

THIS is an action for libel tried before *Williams, J.*, at May Term, 1942, of BEAUFORT, based upon a telegram delivered by the defendant Lucy F. Edwards to the defendant Western Union Telegraph Company, and sent by said company from Wilson, North Carolina, by way of Richmond, Virginia, to Judge Frizzelle at Washington, North Carolina, where he was holding the Superior Court of Beaufort County, and engaged in the trial of the case of *Parker v. Parker,* wherein the plaintiff was one and the same person as the plaintiff in this case, and the defendant was Cheshire J. Parker, her husband, which telegram read:

"Judge Frizzelle Sept 23 1941
Washington NCar

"I am aunt of C J Parker and feel I can give you some information Phrocine Parker that will help Am in doctors care unable to leave house. Would be in your court C J Parker did not abandon her she drove him out of the home because she had an affair with Bill Midgett of Bath they separated May 1939. On Jan 14 1940 she had an abortion performed on her by a negro doctor she sent for me and thought she was going to die she admitted Bill Midgett was father of the child she drank and spent all of his money and kept him in debt she admitted her mother caused her to bring this suit her mother did the same thing her father had to leave his home. Cheshire requested his father to leave him this property though she could not sell it she told him she intended to leave him after his fathers death three people heard him request his father to give him only life interest Judge Frizzelle, All this is true so help me God

Lucy F Edwards
Town Creek School."

The action against the defendant Elizabeth Josephine Parker was dismissed and no appeal taken. The defendant Western Union Telegraph Company appeals from an adverse judgment predicated upon the verdict. The plaintiff Phrocine Latham Parker appeals from that portion of the judgment predicated on the fifth issue addressed to the measure of damage.

H. S. Ward for plaintiff, Phrocine Latham Parker.

Francis R. Stark and Rodman & Rodman for defendant, Western Union Telegraph Company.

APPEAL OF DEFENDANT WESTERN UNION TELEGRAPH COMPANY.

SCHENCK, J. The defendant telegraph company makes the subject of exceptive assignments of error the refusal of the court to sustain its demurrer to the evidence, and to enter a judgment as in case of nonsuit,

under C. S., 567. These assignments are untenable. The telegram in suit contained written words that amounted to a charge of incontinency against the plaintiff, a woman. C. S., 2432. The telegram was received and delivered by the company to the addressee, Judge Frizzelle. The defendant company defends upon the ground, *inter alia,* that in so far as it was concerned the telegram was a privileged communication, and that it was free from malice in transmitting the same to the addressee. The allegations to this effect raised the fourth issue submitted to the jury, to which no objection was made, said issue being: "4. Did the defendant, telegraph company, wrongfully and unlawfully transmit and deliver the said message as alleged?"

The court charged the jury in effect that even though the telegram was libelous on its face, the defendant, being a public service corporation, was required by law to transmit it, provided in so doing it acted in a manner free from malice—in other words, that the telegraph company acted under a qualified privilege, the qualification being that the receiving, sending and delivering of the telegram was *bona fide* in the regular course of its business, and free from ill will or malice, and that the burden of proof of want of good faith or of malice was upon the plaintiff. This was in accord with the authorities.

"A telegraph company is not liable for routine transmission of an interstate message, containing defamatory matter, except where transmitting agent knows that message is false or that sender was acting, not in protection of any legitimate interest, but in bad faith and for purpose of traducing another." 5th syllabus, *O'Brien v. Western Union Telegraph Company,* 113 Fed. Rep., 2d, 539.

"Where a qualifiedly privileged publication is admitted by defendant, the burden of proof is on the plaintiff to show malice in the publication." 5th syllabus, *Gattis v. Kilgo,* 128 N. C., 402, 38 S. E., 931. See, also, *Riley v. Stone,* 174 N. C., 588, 94 S. E., 434.

Upon a charge free from error, and based upon competent evidence, the jury answered the issue in the affirmative, against the defendant telegraph company.

On defendant telegraph company's appeal we find

No error.

APPEAL OF THE PLAINTIFF, PHROCINE LATHAM PARKER.

This appeal is from the judgment in so far as it is predicated upon the answer to the fifth issue, which reads: "5. What actual damage, if any, is the plaintiff entitled to recover for injury and damage to character?" and was answered: "$500.00."

The exceptive assignments of error relied upon by the plaintiff all relate to excerpts from the charge to the effect that the language of the

alleged libel "She had an abortion performed on her by a negro doctor" should not be considered by the jury on *any* issue, since the truth of the accusation had been admitted by the plaintiff on the witness stand, when the admission made by the plaintiff as a witness in her own behalf was that she "went to this doctor, but I couldn't bear the thought of this colored doctor examining me and I asked him if there was anything that he could give me that I could do and paid him $50.00 and he gave me a rubber tube and we went back home and used it and about two o'clock that night, in the presence of Dr. McClees and Lucy Edwards, I miscarried." The accusation in the telegram was that plaintiff had had an abortion performed on her by a negro doctor, and the admission made by her as witness was that she went to a negro doctor for the purpose of having an abortion performed and she purchased a rubber instrument from the negro doctor and used it as advised by him and produced an abortion.

The crime which is charged in the telegram and the crime admitted on the witness stand was one and the same, namely, an abortion. It is just as much a crime to produce an abortion under the advice of and with means furnished by another, as it is to have an abortion performed by another. The gravamen of the offense is the abortion, or the procuring of the abortion, and not the manner by which it is accomplished. The admission of procuring the means to produce an abortion and of the abortion was an admission of the accusation alleged to have been libelous, and we think, and so hold, that his Honor was correct in telling the jury in effect that since the accusation was admitted such accusation should not be taken into consideration as bearing upon any issue. The gravamen of the accusation was an abortion, the truth of which the plaintiff admitted, which admission was a complete defense to any action based upon such accusation. *Snow v. Witcher,* 31 N. C., 346. "It may be stated as a general rule . . . that a defamatory statement, to be actionable, must be false." 33 Am. Jur., Libel and Slander, par. 110.

We are of the opinion, and so hold, that his Honor was correct in instructing the jury not to consider on any issue the charge that the plaintiff had an abortion performed on her.

On plaintiff's appeal we find

No error.

STACY, C. J., dissents on appeal of defendant Western Union.

SCOTT DILLINGHAM v. L. H. GARDNER.

(Filed 30 September, 1942.)

Judgments §§ 29, 32—

A former judgment, in an action between plaintiff herein, then suing as sole trustee for a corporation, and defendant herein and another, adjudicating that a transaction between plaintiff and defendant was a purchase and sale and not a loan, is *res judicata* in the present action by plaintiff individually, seeking to recover usurious interest on the same transaction, where it appears that the interest of the plaintiff herein and of the company of which he was trustee in the former suit are in no way different, but are at least in privity.

APPEAL by plaintiff from *Phillips, J.*, at May Term, 1942, of BUNCOMBE.

This is an action for the recovery of alleged usurious interest charged on a loan made by the defendant to the plaintiff, wherein the defendant enters in bar a plea that the transaction between him and the plaintiff has been adjudged by a court of competent jurisdiction to be a sale and purchase of the notes involved, for a full and adequate consideration, before maturity, and not a loan, and the judgment of said court is pleaded as an estoppel.

From a judgment sustaining defendant's plea of *res judicata* in bar of plaintiff's recovery and dismissing the action the plaintiff appealed, assigning errors.

J. Scroop Styles and James E. Rector for plaintiff, appellant.
Don C. Young for defendant, appellee.

SCHENCK, J. It is admitted by the parties and found as a fact by the court that the only transaction ever had between the plaintiff and defendant was regarding two notes; that these two notes were involved in the case of "Scott Dillingham, sole trustee of the Southern Finance & Bonding Company, *v.* L. H. Gardner *et al.*," opinion in which appears in 219 N. C., at page 227, 13 S. E. (2d), 478, in which opinion judgment in the General County Court of Buncombe County, affirmed in the Superior Court of Buncombe County, was affirmed by this Court, in which it was found as a fact that the defendant, L. H. Gardner, for a full and adequate consideration, purchased both of said notes, before maturity, at the express solicitation of Scott Dillingham.

The first question presented in the instant case is whether the transaction between the plaintiff and defendant was a sale and purchase or a

loan; if the former, no action for usury will lie under C. S., 2306; if the latter, an action may lie, *Hendrix v. Cadillac Co.*, 220 N. C., 84, 16 S. E. (2d), 456, and authorities there cited. *Dillingham v. Gardner, supra,* adjudicated that question between the plaintiff in that case, Scott Dillingham, sole trustee for Southern Finance & Bonding Company, and L. H. Gardner, the defendant therein, specifically holding that the transaction was a sale and purchase.

The remaining question left for consideration is: were the nominal plaintiff in the former case, Scott Dillingham, sole trustee for Southern Finance & Bonding Company, and the plaintiff in the instant case, Scott Dillingham, individually, one and the same person, or if not, were they in privity, since in either instance the plaintiff in the instant case would be estopped by the judgment in the former case.

It is divulged by the record that Scott Dillingham verified all the pleadings in the former case, and seeks now in the instant case to have the Court reverse its former adjudication that the transaction involved was a sale and purchase, and to hold that it was a loan. It does not appear from the record that the Southern Finance & Bonding Company had any interests other than or different from the interests of Scott Dillingham—their interests, if in any way separate, were always at least mutual. It is further divulged by the judgment in the former case that Scott Dillingham secured a deed from his sister, Mary Elizabeth Scarborough, to himself as sole trustee for the said finance and bonding company, for property securing one of the notes involved, and now in the instant case alleges that she was holding title to the property in trust for him. It would therefore seem that the plaintiff himself has acted upon the assumption that the interest of the plaintiff in the former case and the interest of the plaintiff in the instant case were identical. It certainly appears that if their interests were not identical, they were at least in privity. "An estoppel operates on the parties to the transaction out of which it arises and their privies," 19 Amer. Jur., Estoppel, par. 152, p. 809, privies being "Persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them." Black's Law Dictionary (2d Ed.), p. 941.

We conclude that the action of the Superior Court in dismissing the action of the plaintiff should be

Affirmed.

LESLIE C. LEAVITT AND WIFE, MRS. FLORIA D. LEAVITT, v. TWIN COUNTY RENTAL COMPANY.

(Filed 30 September, 1942.)

1. Landlord and Tenant §§ 10, 11—

Ordinarily, a landlord owes no duty to the tenant to repair the premises, and is not commonly liable, whether in contract or tort, to the tenant, his family, servants or guests, for personal injuries, although such injuries are caused by the negligent breach of an agreement to repair, since such damages are too remote and are not within the contemplation of the parties.

2. Landlord and Tenant § 11: Negligence § 19—

In an action for damages for personal injuries by a tenant against his landlord, where it appeared that the tenant was injured by plaster falling from the walls, after repeated promises by the landlord to repair same, judgment of nonsuit on the evidence was proper.

APPEAL from *Frizzelle, J.*, at March Term, 1942, of EDGECOMBE. Affirmed.

The plaintiffs brought this action to recover for personal injuries alleged to have been sustained through the wrongful action of the defendant in its failure to repair a house which plaintiffs had rented from it and in which they were residing.

The evidence disclosed that the plaintiffs had rented the premises from the defendant. Some time during the occupancy, the plaintiffs discovered that the plaster in one of the rooms was in bad condition. A portion of it fell from the ceiling, and the plaintiffs notified the defendant of this condition. The defendant, through its agent, promised to repair it. Plaintiffs notified the defendant that unless the place was repaired, they would have to move out, and defendant requested the plaintiffs to remain as tenants of the house, promising to make the repairs. Plaintiffs remained in the occupancy of the house, making repeated requests that the repairs be made because of the dangerous condition of the plaster in the room.

Finally, a portion of the plaster fell and allegedly injured the *feme* plaintiff.

Upon the trial, the defendant made a motion for judgment as of nonsuit upon the evidence as substantially above related, and the motion was allowed. Plaintiffs appealed.

T. T. Thorne and John D. Odom for plaintiffs, appellants.
Gilliam & Bond for defendant, appellee.

SEAWELL, J. The law in this State is decidedly against the plaintiffs, and it seems to be in accord with the weight of authority throughout the country.

The rule is stated in the case of *Jordan v. Miller,* 179 N. C., 73, 101 S. E., 550, as follows:

"Even where the lessor contracts to keep the premises in repair, 'It has been held, with but few exceptions, that the breach by the landlord of his contract to repair the demised premises will not ordinarily entitle the tenant, his family, servants, or guests, personally injured from a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injury, whether in contract or tort, since such damages are too remote, and cannot be said to be fairly within the contemplation of the parties. A contract to repair does not contemplate as damages for the failure to perform it that any liability for personal injuries shall grow out of the defective condition of the premises; because the duty of the tenant, if the landlord fails to perform his contract to repair, is to do the work himself, and recover the cost in an action for that purpose, or upon a counterclaim in an action for rent, or if the premises are made untenable by reason of the breach of contract, the tenant may move out and defend in an action for rent as upon an eviction. In accordance with this view, in order to recover damages for personal injuries, there must be shown some clear act of negligence or misfeasance on the part of the landlord beyond the mere breach of covenant.' 16 R. C. L., 1095." (16 R. C. L., 1059).

In *Hudson v. Silk Co.,* 185 N. C., 342, 117 S. E., 165, the Court observed:

"In the absence of an express covenant to repair or keep in repair, a landlord is not ordinarily held liable for personal injuries to the tenant or his family by reason of defective conditions of the premises. And even with a covenant to repair, the general rule is that such a liability will not usually be imputed."

In *Tucker v. Yarn Mill Co.,* 194 N. C., 756, 140 S. E., 724, the rule is stated:

"It is well settled by the decisions of this Court that ordinarily a landlord owes no duty to the tenant to repair the premises, and is not ordinarily liable for personal injuries sustained by the tenant, although such injuries are caused by the negligent breach of an agreement to repair."

And in *Mercer v. Williams,* 210 N. C., 456, 187 S. E., 556, the rule in the *Jordan case, supra,* was reiterated.

We do not feel at liberty to overrule these well established cases, and the judgment of the court below is, therefore,

Affirmed.

CHARLES F. JENKINS v. METROPOLITAN LIFE INSURANCE COMPANY.

(Filed 30 September, 1942.)

Insurance § 34a—

In plaintiff's action to recover, on a policy of insurance, benefits for total and permanent disability, preventing him "permanently from engaging in any occupation or from performing any work for compensation or profit," where it appears from his own testimony that he actually did work almost continuously for more than eight months immediately preceding the trial of this action, defendant's motion of nonsuit should have been allowed.

APPEAL by defendant from *Sink, J.*, at Regular July Civil Term, 1942, of BUNCOMBE.

Civil action to recover on policy of insurance benefits for total and permanent disability.

Upon trial *de novo* in Superior Court on appeal thereto from a judgment of a court of a justice of the peace, in which the action was instituted on 2 January, 1942, this case was submitted to the jury on these issues, which were answered as shown:

"1. Is the plaintiff permanently and totally disabled as the result of bodily injury and disease so as to be prevented thereby from engaging in any occupation for wage or profit? Answer: 'Yes.'

"2. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$180.00.'"

On such trial evidence for plaintiff tended to show that as an employee of the Carolina Power & Light Company, the defendant issued to him a certain certificate of insurance under certain group policy which contained this provision:

"TOTAL AND PERMANENT DISABILITY BENEFITS: Under the terms of the Group Policy mentioned on page one of this Certificate, any employee shall be considered totally and permanently disabled who furnishes due proof to the Insurance Company that, while insured thereunder and prior to his sixtieth birthday, he has become so disabled, as a result of bodily injury or disease, as to be prevented permanently from engaging in any occupation or from performing any work for compensation or profit"; that plaintiff, who is now 58 years of age, was employed by the Carolina Power & Light Company for nineteen years, during four years of which he testifies that he "was totally and permanently disabled"; that the company discharged him on that account, and he left its employment on 31 May, 1941, and rested for twelve or thirteen weeks, during which time defendant paid him for temporary disability; that his "chest is

completely broken down" from pleurisy; that he has "to wear straps to try to work to feed an invalid wife" and "never sees a minute's ease"; that, though he testified that he is "not able as a result of bodily injury or disease, to engage in any occupation or perform any work for wage or profit," and though another witness testified that "beyond the shadow of a doubt" plaintiff "has been an invalid and not able to work," plaintiff went to Lincolnton about 8 September, 1941, and worked there two or three weeks, and made $46.00; that after working at Lincolnton, he came to Asheville and began to work at Martel Cotton Mills about 5 November, 1941, and continued to work there until the time of trial of this action in Superior Court in July, 1942; that he worked the number of hours each week "as shown on the time books of the company, and as reflected in questions propounded the witness," which, eliminating one week ending 25 April, when he did not work, and two weeks in December when he worked only five hours each week, show that during that period he worked from sixteen to sixty-one hours per week, or on an average of approximately thirty-two hours per week, and was paid thirty-seven and one-half to forty cents per hour. And the doctor, offered by plaintiff as a witness, testified that as a result of his examination of him on 26 November, 1941, he did not think that plaintiff was totally and permanently disabled so as to be unable to perform labor for wage or profit.

Upon judgment on verdict for plaintiff, defendant appealed to Supreme Court and assigns error.

J. Scroop Styles for plaintiff, appellee.
Harkins, Van Winkle & Walton for defendant, appellant.

WINBORNE, J. This is the question decisive of this appeal: Is there evidence, taken in the light most favorable to plaintiff, that plaintiff was totally and permanently disabled within the express language of the certificate or policy of insurance? A negative answer comes from recent decisions of this Court in *Thigpen v. Ins. Co.*, 204 N. C., 551, 168 S. E., 845; *Boozer v. Assurance Society*, 206 N. C., 848, 175 S. E., 175; *Hill v. Ins. Co.*, 207 N. C., 166, 176 S. E., 269; *Carter v. Ins. Co.*, 208 N. C., 665, 182 S. E., 106; *Lee v. Assurance Society*, 211 N. C., 182, 189 S. E., 626; and *Medlin v. Ins. Co.*, 220 N. C., 334, 17 S. E. (2d), 463.

Under the authority of these cases, defendant's motion for judgment as in case of nonsuit should have been sustained. Further treatment of the subject, at this time, would be unnecessarily repetitious.

In keeping with these decisions, it is sufficient to say that as plaintiff has agreed, so shall he be bound. And even though he and another say

that he is not able to work, the fact remains, as revealed in his testimony, that he worked for compensation almost continuously more than eight months, from 5 November, 1941, to July, 1942, the date of the trial of this action. Adverting to similar factual situation in the *Thigpen case, supra, Brogden, J.,* aptly said: "The law is designed to be a practical science, and it would seem manifest that a plain, everyday fact, uncontroverted and established, ought not to be overthrown by the vagaries of opinion or by scientific speculation."

The judgment below is

Reversed.

MRS. ADA V. WHITEHURST AND HUSBAND, CECIL WHITEHURST; MRS. FLOSSIE NOSAY AND HUSBAND, HENRY NOSAY, AND MRS. SOPHIA MORGAN AND HUSBAND, J. C. MORGAN, v. R. L. HINTON, E. V. HINTON, W. E. HINTON, MRS. IDA SAWYER AND HUSBAND, LEE SAWYER; MRS. RUTH MORGAN HINTON, AND SOPHIA, CHARLES L. AND JOHN L. HINTON, INFANTS, AND MRS. RUTH MORGAN HINTON, GUARDIAN AD LITEM OF SOPHIA, CHARLES AND JOHN L. HINTON, MINORS.

(Filed 30 September, 1942.)

1. Reference § 4—

In accordance with the opinion of the Supreme Court, the court below ordered a reference to determine the amount owed plaintiffs by defendants in the way of rents and profits accrued after a judgment invalidating a will. Plaintiffs excepted to the court's limiting the reference to the amounts due for rents and profits after the judgment, and appealed. *Held:* Appeal dismissed as fragmentary and premature. The court was authorized by the Supreme Court opinion to so limit the reference; and it does not appear that the court limited the reference because it had concluded that the plaintiffs were not entitled to proceeds from sales of lands and timber before the *caveat* judgment, the court not having passed on that question.

2. Pleadings § 21—

Amendments of pleadings are discretionary with the trial court.

3. Same—

A party cannot contend that any right he may have to amend his pleadings has been unduly restricted when he has tendered no amendment.

DEVIN, J., not sitting.

APPEAL by plaintiffs from *Williams, J.,* at March Term, 1942, of PASQUOTANK. Appeal dismissed.

The facts are fully stated in *Whitehurst v. Hinton,* 209 N. C., 392, 184 S. E., 66, a former appeal in this cause.

After the remand on the former appeal plaintiffs tendered an order of reference. In lieu of the order tendered the court signed an order

appointing a referee and directing that he "shall state an accounting and hear such further testimony as the parties to this action may desire to present or offer in support of, or tending to establish the respective contentions of the parties with respect to the determination of what amounts, if any, the defendants are indebted to the plaintiffs on account of rents and profits received by the defendants from lands of which plaintiffs and defendants are seized and possessed as tenants in common since the date on which it was finally adjudged the paper writing under which they claim is not the last will and testament of John L. Hinton, deceased." The order further granted leave to the parties to "amend or recast their pleadings in accordance with the opinion of the Supreme Court herein rendered, as heretofore certified." Plaintiffs excepted to so much of said order as limited the reference to the determination of the amounts, if any, due plaintiffs for rents and profits accruing after judgment in the *caveat* proceeding invalidating the will of John L. Hinton, deceased, and appealed.

P. W. McMullan and John H. Hall for plaintiffs, appellants.
W. I. Halstead and J. Kenyon Wilson for defendants, appellees.

BARNHILL, J. The former opinion, *Whitehurst v. Hinton, supra,* decided (1) that, as there is no evidence in the record that defendants, by fraud or undue influence, wrongfully procured the execution of the will of John L. Hinton, deceased, or that they had any knowledge or notice that the validity of said will would be attacked, the plaintiffs may not recover rents and profits for the period from the probate of the will to the date it was adjudged to be void; (2) that plaintiffs are entitled to recover rents and profits received by defendants after the invalidity of said will was adjudged; and (3) the grantees of defendants under deeds executed prior to judgment in the *caveat* proceedings are innocent purchasers and acquired good title as against plaintiffs.

Did the Court, in that opinion, hold that defendants are not accountable for the proceeds received from the sale of land and timber prior to the *caveat* judgment? This is the real question this appeal seeks to present. There are at least two reasons why the question is not now properly before us for decision.

1. The court below was authorized to limit the reference to an accounting, as set out in the order. The order is couched in the exact language of this Court as used in the former opinion. Appeal therefrom is fragmentary and premature. *Leroy v. Saliba,* 182 N. C., 757, 108 S. E., 303, and cases cited; *Johnson v. Ins. Co.,* 215 N. C., 120, 1 S. E. (2d), 381.

2. It does not appear that the court ruled either *pro* or *con* on the controverted question. The reference may have been limited by reason

of the language of this Court, or, perhaps, the court may have concluded that such issues as are presented by the pleadings on that question are readily triable by jury without the intervention of a referee. On this record we are unable to say and are unwilling to decide that the judge was motivated by the conclusion plaintiffs are entitled to recover only the rents and profits accruing after the judgment in the *caveat* proceeding.

The plaintiffs contend that their leave to amend was unduly restricted. This was discretionary with the court below. C. S., 547; *Biggs v. Moffitt,* 218 N. C., 601, 11 S. E. (2d), 870; *Smith v. Ins. Co.,* 208 N. C., 99, 179 S. E., 457; *Gordon v. Gas Co.,* 178 N. C., 435, 100 S. E., 878; *Hogsed v. Pearlman,* 213 N. C., 240, 195 S. E., 789; *Maggett v. Roberts,* 108 N. C., 174.

Even so, plaintiffs have tendered no amendment. Why should we surmise that such amendment as they may tender may be rejected as not being "in accordance with the opinion of the Supreme Court herein rendered." They complain before they are hurt.

Appeal dismissed.

DEVIN, J., not sitting.

FLETCHER LUMBER COMPANY v. A. E. WILSON AND C. L. WILSON, COMMISSIONERS; AND A. E. WILSON AND C. L. WILSON, INDIVIDUALLY.

(Filed 30 September, 1942.)

1. Pleadings § 16c—

In an action, alleging overpayments by plaintiff to defendants, based upon a contract of sale and purchase of timber and for damages for hindrance and delay in the performance of the contract, wrongfully caused by defendants, it appearing in the complaint that the contract in controversy is the basis of another action between the same parties in another county, a demurrer was properly sustained. C. S., 511 (3).

2. Pleadings § 15—

In an action, growing out of a contract for the sale and purchase of timber, entered into by plaintiff and defendants as commissioners in a special proceeding, and also against defendants, individually, there being no allegation that the individuals were parties to the contract, a demurrer was properly sustained. C. S., 511 (6).

APPEAL by plaintiff from *Sink, J.,* at February Term, 1942, of HENDERSON.

This is an action instituted in Henderson County to recover alleged overpayments made by the plaintiff to the defendants upon a contract

of sale and purchase of timber entered into in Yancey County by the defendants and plaintiff, and to recover damages for alleged hindrance and delay in the performance of said contract caused by the wrongful acts of the defendants.

In the complaint reference is made to an *Ex Parte* Special Proceeding pending in the Superior Court of Yancey County entitled "A. E. Wilson and C. L. Wilson, Administrators of the Estate of A. G. Wilson, deceased; Mrs. C. J. Wilson, widow of A. G. Wilson, Emma Hensley *et al.*, heirs at law of A. G. Wilson, petitioners, *Ex Parte*," and in the complaint reference is made to a contract of sale and purchase of timber between A. E. Wilson and C. L. Wilson, Commissioners, and the plaintiff, the Fletcher Lumber Company.

The defendants, as commissioners, demur to the complaint upon the ground that there was "another action pending between the same parties for the same cause." C. S., 511 (3).

The defendants, as individuals, demur to the complaint upon the ground that it does not state facts sufficient to state a cause of action against them as individuals. C. S., 511 (6).

To judgment sustaining both demurrers the plaintiff preserved exception, and appealed.

J. W. Haynes and Dover R. Fouts for plaintiff, appellant.
Anglin & Randolph and J. Scroop Styles for defendants, appellees.

SCHENCK, J. The reference made in the complaint to the Special Proceeding pending in Yancey County in effect incorporated that proceeding into this case. *Alexander v. Norwood,* 118 N. C., 381, 24 S. E., 119. The contract which is the basis of the cause of action alleged in the complaint is also the basis of the controversy involved in the Special Proceeding, and the parties to the cause of action alleged in the complaint are the same as the parties in the controversy involved in the Special Proceeding. Hence, the remedy of the plaintiff in this action is by a motion in the cause in the Special Proceeding, and not by an independent action. See opinion in said Special Proceeding, *post,* 99.

"If it appears upon the complaint that there is another action pending between the same parties for the same cause, it is ground for demurrer." McIntosh, N. C. Prac. & Proc., par. 440, p. 451, and cases there cited.

The demurrer of the defendants, as commissioners, was properly sustained.

The demurrer of the defendants, as individuals, was also manifestly properly sustained, since the complaint fails to allege that any contract was entered into by the defendants in their individual capacity.

The judgment of the Superior Court is

Affirmed.

OTTWAY AUSTIN v. THOMAS L. OVERTON.

(Filed 30 September, 1942.)

1. Negligence §§ 5, 11—

Plaintiff's negligence need not be the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of defendant; it is enough if plaintiff's negligence contributes to the injury.

2. Same—

"Contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury; and plaintiff cannot recover when his negligence concurs with that of defendant in proximately producing the injury.

3. Automobiles §§ 13, 14, 18a, 18c: Negligence § 19—

Where plaintiff was following defendant, both traveling at 45 to 50 miles per hour on a straight, 30-foot concrete road, no lights being on rear of defendant's car, and defendant slowed down suddenly and turned to the left side of the road, and either stopped or was moving very slowly, when plaintiff's car violently collided with defendant's, in an action for damages, plaintiff is guilty of contributory negligence and nonsuit was proper.

APPEAL by plaintiff from *Sink, J.*, at March Term, 1942, of YANCEY.

Civil action to recover damages for an alleged negligent injury suffered by plaintiff when his automobile ran into the rear of defendant's car near New Bridge, Buncombe County, on the Asheville-Weaverville Highway.

On the morning of 2 August, 1941, around 2:00 a.m., plaintiff was going from Weaverville to Asheville in his 1941 Ford V-8. The defendant was traveling in the same direction, in front of the plaintiff, driving a Chevrolet Sedan. Their speed was between 45 and 50 miles an hour.

Plaintiff testifies that at a point where the concrete road was approximately 30 feet wide and practically straight, the defendant, without signal or warning of any kind, pulled his car over to the left of the road and came to a sudden stop; that as a result he, the plaintiff, was unable to stop his vehicle in time to avoid running into the rear of defendant's car; that the defendant said on the scene he turned and stopped to avoid hitting a drunken man in the road and "that it was his fault"; that plaintiff looked and did not see anyone, drunk or sober, in the road.

The defendant testified that as he was making a slight left turn he dimmed his lights for an approaching car which failed to dim its lights, and as he switched his lights back on, there appeared a drunken man in the road in front of him; that he immediately applied his brakes, turned to the left and slowed to approximately 25 miles an hour, but did not stop; that in picking up speed he felt the impact of plaintiff's car, which

traveled between 20 and 25 feet after the collision; that the rear of his car was completely demolished—"the car was knocked out of line and both lights of the front were damaged by the twist of the impact. . . . I never said the collision was my fault."

From judgment of nonsuit entered on consideration of all the evidence, the plaintiff appeals, assigning error.

Briggs & Atkins for plaintiff, appellant.
Watson & Fouts for defendant, appellee.

STACY, C. J. Conceding that under *Holland v. Strader,* 216 N. C., 436, 5 S. E. (2d), 311, there may be some evidence of the defendant's negligence, though stressfully controverted by the defendant, still it would seem that plaintiff's own negligence was the proximate cause of his injury, or one of them. *Tarrant v. Bottling Co.,* 221 N. C., 390; *Sibbitt v. Transit Co.,* 220 N. C., 702, 18 S. E. (2d), 203; *Beck v. Hooks,* 218 N. C., 105, 10 S. E. (2d), 608. The plaintiff thus proves himself out of court. *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137. It need not appear that his negligence was the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of the defendant. *Absher v. Raleigh,* 211 N. C., 567, 190 S. E., 897. It is enough if it contribute to the injury. *Wright v. Grocery Co.,* 210 N. C., 462, 187 S. E., 564. The very term "contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury. *Fulcher v. Lumber Co.,* 191 N. C., 408, 132 S. E., 9. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the injury. *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672.

Plaintiff's evidence is to the effect that "no lights showed on the rear" of defendant's car. This, then, put him on notice that he could not rely upon these lights. *Miller v. R. R.,* 220 N. C., 562, 18 S. E. (2d), 232. He followed the defendant's car for some distance before the collision. He further says that as a part of the *res gestæ,* the defendant remarked, "it was my fault." Even so, the conclusion is a legal one, determinable alone by the facts. It is not supposed the defendant intended by this statement—which he denies making—to concede more than his own negligence. The physical facts speak louder than the witness. *Dillon v. Winston-Salem,* 221 N. C., 512.

The conclusion is inescapable that plaintiff's negligence contributed to the injury. *Pierce v. Seymour,* decided herewith, ante, 42; *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Davis v. Jeffreys,* 197 N. C., 712, 150 S. E., 488. Hence, the judgment of nonsuit will be upheld.

Affirmed.

S. C. BLANKENSHIP ET AL. v. CLARENCE M. ENGLISH ET AL.

(Filed 30 September, 1942.)

1. Equity § 2—

A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate, when put upon inquiry, he is chargeable with all knowledge he would have acquired, had he made the necessary effort to learn the truth.

2. Fraud §§ 7, 11: Limitation of Actions §§ 2e, 4—

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, judgment of nonsuit is properly allowed. C. S., 441 (9).

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

APPEAL by plaintiffs from *Blackstock, Special Judge,* January Term, 1942, of YANCEY.

Civil action to recover for alleged wrongful cutting and removal of timber.

By the terms of a consent judgment entered at the January Term, 1936, in the Superior Court of Yancey County in the case of "E. F. Watson, Executor, *et al. v.* S. C. Blankenship *et al.*," it was provided that deed should be made to the plaintiffs herein for the 1,000-acre tract of land in Prices Creek Township, Yancey County, known as the S. C. Blankenship lands, free and clear of encumbrances "excepting a contract . . . for the timber on said lands, which contract states the time . . . to remove said timber, but said time stated in the contract shall begin to run from January 22, 1936."

It was represented to the plaintiffs, so they allege, that the time for cutting the timber, as specified in the above contract, was 18 months. The timber contract was registered 6 October, 1936, and provides for three years within which to cut the timber. This action was instituted 26 July, 1941, to recover for the timber cut after the expiration of 18 months. The defendants plead the 3-year statute of limitations.

Plaintiff testified: "I never knew they had a 3-year contract until I saw it on the record," the last of May, 1939. (Cross-examination) "I was present when Mr. Fouts dictated the consent judgment . . . I reckon they told me within a week after July 22, 1937, they had a 3-year contract, or had 3 years to cut the timber in. . . . I knew then that they said the contract called for 3 years."

From judgment of nonsuit entered at the close of plaintiff's evidence, they appeal, assigning error.

J. W. Haynes, W. K. McLean, and Don C. Young for plaintiffs, appellants.

Anglin & Randolph for defendants, appellees.

STACY, C. J. Is the plaintiffs' cause of action, grounded on fraud, barred by the three-year statute of limitations? The trial court answered in the affirmative, and we cannot say there was error in the ruling.

It is provided by C. S., 441, subsection 9, that in an action to avoid an instrument on the ground of fraud the suit shall be commenced within three years after the cause of action accrues, *i.e.*, within three years after the discovery by the aggrieved party of the facts constituting fraud, or when such facts, in the exercise of proper diligence, should have been discovered. *Hargett v. Lee,* 206 N. C., 536, 174 S. E., 498.

It clearly appears that plaintiffs had information of the facts constituting the alleged fraud as early as "within a week after July 22, 1937," certainly enough to put them on inquiry; and the rule is that such notice carries with it a presumption of knowledge of all a reasonable investigation would have disclosed. *Wynn v. Grant,* 166 N. C., 39, 81 S. E., 949; *Collins v. Davis,* 132 N. C., 106, 43 S. E., 579. A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests. *Austin v. George,* 201 N. C., 380, 160 S. E., 364; *Wynn v. Grant, supra; Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348; *Sanderlin v. Cross,* 172 N. C., 234, 90 S. E., 213.

The action, therefore, was barred at the time of its institution; and judgment of nonsuit was properly entered in favor of the defendants pleading the statute of limitations and demurring to the evidence. *Drinkwater v. Tel. Co.,* 204 N. C., 224, 168 S. E., 410; *Tillery v. Lumber Co.,* 172 N. C., 296, 90 S. E., 196.

Affirmed.

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

R. H. PERNELL v. CITY OF HENDERSON AND HENRY T. POWELL, T. H. CRABTREE, W. R. TROGDEN, B. H. HICKS, M. W. WESTER, T. W. ELLIS, F. B. HIGHT, M. Y. COOPER AND C. M. HIGHT, INTERVENING DEFENDANTS, APPELLANTS.

(Filed 30 September, 1942.)

Municipal Corporations §§ 45, 48—

After an opinion of the Supreme Court, settling a controversy between a municipality and another over riparian rights in a stream on which the city maintains a water plant, citizens and taxpayers of the city will not be allowed to become interveners and reopen the case, as on no theory do they represent a separate justiciable right.

APPEAL from *Stevens, J.*, at March Term, 1942, of VANCE. Affirmed.

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

A. A. Bunn, City Attorney, Jasper B. Hicks and J. H. Bridgers—Attorneys for the intervening defendants—for defendants, appellants.

SEAWELL, J. For a statement of the facts in this case, we refer to *Pernell v. Henderson,* 220 N. C., 79, 16 S. E. (2d), 449, relating to the same controversy.

After the opinion in that case was handed down, certain citizens and taxpayers, now appellants, filed a motion before the clerk of the Superior Court to be allowed to intervene as parties defendant. The motion was allowed and they filed an answer to the complaint. Upon motion by plaintiff upon notice and hearing, Judge Stevens vacated the clerk's order and declined to permit the intervention. The moving parties appealed.

In filing their motion appellants based their right to intervene upon their status as taxpayers, upon whom "a portion of any recovery of damages" will fall in case of recovery by the plaintiff. However, the answer filed before the clerk is more revealing. In this they represent themselves as beneficiaries of a trust which the city administers for them as legal owner under the deed by which it holds its waterworks plant on Sandy Creek and argue that this constitutes them riparian owners, using the water through the vicarious offices of the city water department and distributing system. When the case was here before, it was argued that the city itself was riparian owner because its patrons—albeit at a price—used the water for domestic purposes.

We do not think it necessary at this stage of the case to go too profoundly into the learning which the research and resourcefulness of able counsel have uncovered. We are convinced that on no theory of relation of which we are aware could the appellants be necessary parties to the litigation. They represent no separate justiciable right or proprietary

interest which might be affected by the judgment; and there is no issue involved which the city is not competent to defend in its own corporate capacity. *Smith v. Morganton,* 187 N. C., 801, 123 S. E., 88; *Sink v. Lexington,* 214 N. C., 548, 200 S. E., 13; *Pernell v. Henderson,* 220 N. C., 79, 16 S. E. (2d), 449.

The judgment denying the intervention is

Affirmed.

CURT TEICH & CO. v. L. C. LECOMPTE—ASHEVILLE POST CARD CO.

(Filed 30 September, 1942.)

Evidence § 10: Contracts § 23—

In an action to recover for merchandise sold and delivered, plaintiff's claim was admitted and judgment accordingly. On defendant's counterclaim for breach of exclusive agency contract, an issue was submitted to the jury on evidence that exclusive agency agreement was for one year only and so acknowledged by plaintiff, and damages claimed after one year awarded. *Held:* Record shows no breach of agency contract and judgment on counterclaim reversed.

APPEAL by plaintiff from *Blackstock, Special Judge,* at March-April Term, 1942, of BUNCOMBE.

Civil action to recover for merchandise sold and delivered.

Curt Teich & Company, Inc., of Chicago, Ill., a manufacturer and publisher of post cards, etc., brings this action to recover of defendant the sum of $2,836.09, balance due for post cards and souvenir folders—Cotton Picking, Southern and Dixieland scenes—shipped to L. C. LeCompte, a jobber in the city of Asheville, N. C., trading under the name of Asheville Post Card Company.

The defendant denied liability and set up a counterclaim for alleged breach of exclusive agency, or contract for exclusive southern territory, in the sale of plaintiff's publications.

There was a reference under the Code, and the case tried before a jury on exceptions to the referee's report.

On the hearing, the amount of plaintiff's claim was admitted, and the issue of indebtedness for merchandise sold and delivered was accordingly answered by consent.

Over objection, the issue of damages raised by the pleadings on defendant's counterclaim was submitted to the jury and answered in the exact amount of plaintiff's claim, *i.e.,* $2,836.09. Exception.

From judgments "off-setting and liquidating each other," and taxing the costs "equally against the plaintiff and defendant," the plaintiff appeals, assigning errors.

Zeb F. Curtis and Lipscomb & Lipscomb for plaintiff, appellant.
Harkins, Van Winkle & Walton for defendant, appellee.

STACY, C. J. The case turns on the sufficiency of the record to support an award of damages on defendant's counterclaim.

It is in evidence that on 12 February, 1937, the plaintiff, by letter, agreed to refer to the defendant for handling all orders or inquiries for Cotton Picking, Southern and Dixieland scenes received by it from the states of North Carolina, South Carolina, Georgia, and the eastern part of Tennessee. "This agreement to be in effect to and including December 31st, 1937." On 5 January, 1939, the defendant addressed a letter to Mr. Curt Teich, Sr., of the plaintiff firm in which he said: "Your firm sent us a contract, and it is true, it was made out for only one year, 1937. However, we expected it to continue right along, or at least until our stock was reduced considerably. At present we have an inventory of your Dixieland cards and folders amounting to around $4500, so we need this protection now as much, or even more than we did in 1937." In reply, the plaintiff called attention to the fact that "our letter of February 12, 1937, stated plainly that the agreement we made was to be in effect to and including December 31st, 1937"; and that few orders had been received during 1938—in fact, not enough to take the trouble to find out by going over the ledgers.

It is the contention of the defendant that the "course of dealing" thereafter constituted a revival of the contract, and that the matter was properly submitted to the jury. The plaintiff contends otherwise and demurs.

We are constrained to hold that the record fails to show a breach of exclusive agency, or contract for exclusive southern territory, in the sale of plaintiff's publications. Hence, the verdict and judgment in respect of the defendant's counterclaim will be stricken out, and judgment entered for plaintiff on the issue answered by consent. It is so ordered.

Reversed and remanded.

MERRIMON HAWKINS v. CLYDE R. MOSS.

(Filed 30 September, 1942.)

1. Pleadings § 3a—

Ultimate facts are always such as are put directly in issue. Probative facts are those which may be in controversy but are not issuable. The ultimate facts are those which the evidence upon the trial will prove, and not the evidence required to prove those facts.

2. Pleadings § 29—

Ultimate facts, though alleged in decorative and high-flown language, are within the pale of proper pleading and should not, on motion, be

stricken out under C. S., 537; while allegations, which are wholly evidential and probative, have no place in stating a cause of action and should be stricken out.

APPEAL by defendant from *Phillips, J.*, at February Term, 1942, of BUNCOMBE.

Civil action to recover damages for alleged alienation of the affections of plaintiff's wife.

Motion of defendant, aptly made in court below, to strike certain portions of the complaint, was overruled, except as to one phrase. Defendant appealed therefrom to Supreme Court, and assigns error.

W. K. McLean and Vonno L. Gudger for defendant, appellant.
No counsel contra.

WINBORNE, J. "The function of a complaint" as stated by *Walker, J.*, in *Winders v. Hill,* 141 N. C., 694, 54 S. E., 440, "is not the narration of the evidence, but a statement of the substantive and constituent facts upon which the plaintiff's claim to relief is founded. The bare statement of the ultimate facts is all that is required, and they are always such as are directly put in issue. Probative facts are those which may be in controversy, but are not issuable. Facts from which the ultimate and decisive facts may be inferred are but evidence, and therefore probative. Those from which a legal conclusion may be drawn and upon which the right of action depends are the issuable facts which are proper to be stated in a pleading. The distinction is well marked in the following passage: 'The ultimate facts are those which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of those facts.' *Wooden v. Strew,* 10 How. Pr., 48; 4 Enc. of Pl. and Pr., p. 612." See also *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738.

Upon motion of any party aggrieved, aptly made, the court may strike out irrelevant and redundant matter appearing in a complaint. C. S., 537. Applying this statute and the principle above stated to the complaint in hand, it appears that all the portions to which exception is taken and which were not stricken out below, other than the allegations in paragraphs nine and ten, relate directly to the ultimate facts and, though of decorative quality and expressed in somewhat high-flown language, they are within the pale of proper pleading in statement of the cause of action. See *McDonald v. Zimmerman,* 206 N. C., 746, 175 S. E., 92. On the other hand, the allegations contained in paragraphs nine and ten are wholly evidential and probative, and have no place in stating the cause of action, and for that reason should be stricken out. Hence, the judgment below is modified in accordance with these rulings.

Modified and affirmed.

W. L. BAGLEY v. INDUSTRIAL BANK.

(Filed 30 September, 1942.)

Malicious Prosecution § 9—

In an action to recover damages for malicious prosecution, evidence that a collector for the defendant bank called on plaintiff for a past-due installment on his note held by the bank, received a check dated the next day which was not paid, and later swore out a criminal warrant for plaintiff upon which plaintiff was acquitted, without other evidence of the collector's authority from the bank to institute the prosecution on its behalf, *is held* insufficient, and judgment of nonsuit allowed.

APPEAL by plaintiff from *Dixon, Special Judge,* at April Term, 1942, of PERQUIMANS. Affirmed.

This was an action to recover damages for malicious prosecution. At the close of plaintiff's evidence motion for judgment of nonsuit was allowed, and from judgment dismissing the action plaintiff appealed.

C. R. Holmes and J. Henry LeRoy for plaintiff.

M. B. Simpson and McMullan & McMullan for defendant.

DEVIN, J. The only question presented by this appeal is whether plaintiff has offered sufficient evidence to carry the case to the jury as against the defendant bank. The material facts in evidence were these:

The plaintiff was indebted to the defendant bank on a note payable in monthly installments. One L. L. Morrisette, on 13 February, 1941, called on plaintiff for a past-due installment on the note. Plaintiff gave him a check for the amount, dated 14 February, 1941. Plaintiff testified: "I don't think I had enough money in the bank to pay it, and I told him I didn't have it." The check was not paid, and on 14 March, 1941, warrant was sworn out against the plaintiff by L. L. Morrisette charging him with uttering a worthless check. No representative of the bank appeared at the trial other than Morrisette, who was examined as a witness. Defendant was acquitted of the charge. The plaintiff's note to the bank was paid by an endorser. There was no evidence as to what Morrisette's connection with the defendant bank was except that he called on plaintiff for this payment and took the check therefor; that he charged plaintiff $1.25 for going there and collecting it; that he subsequently took plaintiff's car, which was security for the note, saying he was taking it back for the defendant bank, and delivered the car to the endorser of plaintiff's note; that he had been seen calling on delinquents for the bank for a year or more. It did not appear that Morrisette was an officer of

the bank, or either directly or by implication clothed with authority to institute a criminal prosecution on its behalf on account of a past transaction. The motion for judgment of nonsuit was properly allowed. *Willis v. R. R.*, 120 N. C., 508, 26 S. E., 784; *West v. Grocery Co.*, 138 N. C., 166, 50 S. E., 565; *Powell v. Fiber Co.*, 150 N. C., 12, 63 S. E., 159; *Lamm v. Charles Stores Co.*, 201 N. C., 134, 159 S. E., 444; *Parrish v. Mfg. Co.*, 211 N. C., 7, 188 S. E., 817; *Hammond v. Eckerd's*, 220 N. C., 596, 18 S. E. (2d), 151. In *Dickerson v. Refining Co.*, 201 N. C., 90, 159 S. E., 446, cited by plaintiff, there was some evidence that the prosecution was authorized by defendant's manager in charge.

The judgment must be

Affirmed.

STATE v. JAMES CHRISTOPHER.

(Filed 30 September, 1942.)

Municipal Corporations §§ 36, 39—

Municipal ordinance making criminal the use of streets for delivery of products and carrying on the business of selling certain specific merchandise, without first obtaining a license, is invalid under *Kenny Co. v. Brevard*, 217 N. C., 269.

APPEAL by defendant from *Sink, J.*, at March Term, 1942, of YANCEY.

Criminal prosecution upon a warrant charging the defendant with the violation of an ordinance of the town of Burnsville, "By using the streets of the Town for the delivery of his products and carrying on and enjoying the business of selling at wholesale, peanuts, candies, potato chips, etc., without first procuring a license and paying for the same from the Town Clerk." Verdict: Guilty. Judgment: Ten dollars and the costs.

From the foregoing judgment, defendant appeals and assigns error.

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

Reed Kitchin and Cogburn & Vrabel for defendant.

PER CURIAM. Defendant's motion for judgment as of nonsuit should have been allowed. The ordinance of the town of Burnsville, which defendant is charged with violating, is invalid under the decision of *Kenny Co. v. Brevard*, 217 N. C., 269, 7 S. E. (2d), 542.

The judgment of the court below is

Reversed.

A. E. WILSON AND C. L. WILSON, ADMINISTRATORS OF THE ESTATE OF A. G. WILSON, MRS. C. J. WILSON, WIDOW OF A. G. WILSON, AND EMMA HENSLEY ET AL., HEIRS AT LAW OF A. G. WILSON, PETITIONERS. EX PARTE.

(Filed 14 October, 1942.)

1. Executors and Administrators § 13c: Partition § 4d: Judicial Sales §§ 2, 5—

In special proceedings before the clerk to sell lands for partition or to make assets, the jurisdiction includes the right to accept a bid through commissioners, whether at public or private sale, and to compel the purchaser to comply with his contract; and the court has all powers necessary to accomplish its purpose.

2. Trial § 5—

Where relief can be given in the pending action it must be done by a motion in the cause and not by an independent action, which is allowed only where the matter has been closed by final judgment.

3. Judicial Sales §§ 5, 7: Executors and Administrators § 13c—

An order confirming a sale is not a final judgment, and, if the purchaser fails to comply with his bid, the remedy is by motion in the cause; and in like manner a purchaser may proceed to compel the execution of a deed.

4. Clerks of Superior Courts § 3: Judges § 2—

The clerk is only a part of the Superior Court and, when an action or special proceeding, pending before the clerk, is brought before the judge, the judge is vested with ample authority to deal with it. C. S., 637.

5. Executors and Administrators § 13c: Injunctions § 11: Judges § 2—

In a special proceeding for sale to make assets, by the administrators, widow and heirs at law of deceased, petitioners, there was a judgment by the clerk, authorizing a contract of sale of timber to a lumber company, and commissioners appointed, upon whose report the clerk confirmed and ratified the contract. Thereafter petitioners applied to the resident judge for a temporary restraining order against the lumber company, to stop cutting and removal, for failure to comply with the contract, which was granted and show cause order issued; whereupon the lumber company entered a special appearance and moved, before the judge holding the courts of the district, to vacate the restraining order, which motion was denied and restraining order continued to the hearing, and the lumber company appealed. *Held:* Lumber company is a party to the proceeding, no final judgment has been entered, and all orders valid.

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

APPEAL by the Fletcher Lumber Company from judgment of *Sink, J.*, at Chambers in Marion, 18 February, 1942. From YANCEY.

This is a special proceeding commenced by petition filed before the clerk of the Superior Court of Yancey County by the administrators,

widow and heirs at law of the late A. G. Wilson, being all the parties in interest and asking the same relief, under C. S., 759; wherein the petitioners seek a decree for the private sale of timber belonging to the estate of the decedent to make assets with which to pay off the debts of the decedent. Michie's N. C. Code, 1939, sec. 74.

In response to said petition the clerk of the Superior Court of Yancey County, by judgment dated 20 January, 1941, approved and authorized a proposed contract of sale of certain timber rights to the Fletcher Lumber Company (copy of which contract was made a part of the judgment), and appointed A. E. Wilson and C. L. Wilson commissioners to make sale in accord therewith, and closed the judgment with "This cause is retained for further direction," and on the same date, 20 January, 1941, the commissioners reported that they had entered into the approved contract with the Fletcher Lumber Company, and on 1 February, 1941, the clerk confirmed and ratified said contract.

On 19 December, 1941, the petitioners applied to Pless, Resident Judge, for an order restraining the Fletcher Lumber Company from cutting or removing any more timber from the land of the estate of the decedent for the reason that said company had failed to comply with the provisions of its contract with regard to payments and in regard to entering into an arbitration in event of disagreements, and for the further reason that said contract provided that "the title to all timber and its products sought to be sold by this contract is expressly retained by the sellers until full payment is made therefor." Whereupon Pless, J., ordered the Fletcher Lumber Company to appear and show cause, if any it had, why the restraining order should not be granted.

On 22 January, 1942, Pless, Resident Judge, issued an order restraining the Fletcher Lumber Company, its agents, servants and employees from removing any further lumber, timber or timber products cut by it under the aforesaid contract until further orders of the court, and directing the Fletcher Lumber Company to appear on 7 February, 1942, at Marion, and show cause, if any it had, why the restraining order should not be continued to the final hearing.

After giving ten days notice to the petitioners of its intention so to do, the Fletcher Lumber Company on 10 February, 1942, entered a special appearance before Sink, J., holding the courts of the 18th Judicial District, and moved the court to vacate the temporary restraining order issued by Pless, J., on 22 January, 1942, and on 10 February, 1942, Sink, J., vacated the temporary restraining order of Pless, J., but subsequently held such vacation "to be ineffectual" and continued the hearing till 18 February, 1942, when it was "considered, ordered and adjudged by the Court that the Fletcher Lumber Company, Inc., be and hereby is enjoined and restrained until a hearing from moving from the lands of

the petitioners the timber products referred to in the application as not having been paid for and the temporary order is continued until the hearing."

To the judgment of Sink, J., continuing the restraining order to the hearing the Fletcher Lumber Company reserved exception, and appealed.

Anglin & Randolph and J. Scroop Styles for petitioners, appellees.

Dover R. Fouts and J. W. Haynes for Fletcher Lumber Company, appellant.

SCHENCK, J. This appeal poses only two questions: first, Did the court err in denying appellant's motion, made under special appearance, to vacate the restraining order for the reason that the Fletcher Lumber Company was not a party to the original *ex parte* proceeding before the clerk?, and second, Did the court err in denying said motion for the reason that a final judgment had been entered in said proceeding? We are of the opinion, and so hold, that a negative answer is proper to both questions.

Appellant's position that the Fletcher Lumber Company is not a party to the *ex parte* proceeding is untenable. The contract with the lumber company is specifically made a part of the court order, and by signing said contract and beginning operations thereunder, after its submission to and approval by the court, the lumber company made itself a party to the proceeding and submitted itself to the jurisdiction of the court, and the court was thereby vested with the power to enforce compliance with the contract, and this power continues to exist until the contract is fully performed.

In a proceeding before the clerk to sell the land of tenants in common it was held that the jurisdiction of the court included the right to accept a private bid through its commissioner, as was done in the instant case, and "When the bid is accepted, whether it was at public or private sale, the Court has jurisdiction over the purchaser for the purpose of enforcing compliance with it." *Wooten v. Cunningham,* 171 N. C., 123, 88 S. E., 1, and cases there cited.

"In a proceeding to sell lands for assets the court of equity has all the powers necessary to accomplish its purpose and when relief can be given in the pending action it must be done by a motion in the cause and not by an independent action. The latter is allowed only where the matter has been closed by a final judgment. If the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, etc., and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. This course is adopted to avoid the multiplicity of suits, avoid delay, and save costs. *Hudson v. Coble,* 97 N. C., 260; *Pettillo, ex parte,* 80 N. C., 50; *Mason v. Miles,* 63 N. C., 564, and

numerous cases cited in them." *Marsh, Administrator, v. Nimocks et al.*, 122 N. C., 478, 29 S. E., 840.

The contention of the appellant that the order of the clerk of 20 January, 1941, approving the proposed contract between the petitioners and the Fletcher Lumber Company, and authorizing, empowering and directing its execution, and the collection of the payments due thereunder and the full performance of the provisions of the contract was a final judgment, and therefore the restraining order issued thereafter was unauthorized by law, is untenable.

This order of confirmation was not a final judgment for the reason that the contract provides for deferred payments to be made to the commissioners, who were officers of the court, to be applied on the debts of the decedent, and a final judgment could not be made until the last payment of the purchase price of the timber was made. "The action is not ended as long as anything remains to be done." *Hoff v. Crafton,* 79 N. C., 592.

In *Long v. Jarrett,* 94 N. C., 444, where an administrator had sold land to make assets and an independent action was brought by the administrator of the purchaser to have deed executed the court dismissed the action and held that a motion in the cause was the proper remedy, it is written: "The proceeding in which the land was sold has not been terminated by any final order or decree, nor will it be, until the purchase money for the land has been paid, and a proper order entered, directing title to be made to the purchaser, or to the person to whom he may have transferred his bid. That proceeding is still pending, in the contemplation of law, and if it has been allowed to disappear from the current docket of the Court, it may be brought forward upon motion therein for that purpose."

"By means of that proceeding, the Court has complete jurisdiction of the administrators of R. C. Puryear, his heirs at law, and the land in question, for the purpose of completing the sale of the land, and it ought to exercise its jurisdiction over the parties and subject matter of the proceeding, until the latter shall be determined according to law. The Court ought not, and will not, in another proceeding or action, take jurisdiction of the same parties and the same subject matter, and do therein what ought properly and regularly to be done in the incomplete proceeding. The law requires consistency in procedure, and in the exercise of jurisdictional authority. It avoids and prevents confusion and multiplicity of actions in respect to the same cause of action, and it will not allow its purpose in these respects to be defeated by the consent, assent, or inadvertence of parties. Hence it will not tolerate the inconsistency and practical absurdity of suspending or stopping an action before it is completed, and do what ought legitimately to be done in it, in another and distinct action."

The reverse is also true; that is, a motion in the cause is the proper remedy by an administrator to collect past-due payments from a purchaser of land sold to make assets, as well as by such purchaser against an administrator to compel the execution of deed for such land.

"Numerous adjudications have established the general proposition that where relief can be had in a pending cause, it must be there sought. . . . The authorities are also uniform that a court of general jurisdiction, ordering a sale of land, can and will afford a complete remedy in the proceeding against one buying under its decree." *Crawford v. Allen,* 180 N. C., 245, 104 S. E., 468.

And for a further reason, it appears from the order of the clerk of 20 January, 1941, approving and authorizing the contract between the petitioners and the Fletcher Lumber Company that it was not contemplated that such order was a final judgment, since it concludes with "This cause is retained for further direction."

Both the resident judge and the judge holding the courts of the district had jurisdiction to issue the orders made by them. This proceeding was before the clerk when he issued the order of 20 January, 1941, approving and authorizing the contract of sale and purchase of the timber belonging to the estate of the decedent, and on 1 February, 1941, when he confirmed and ratified the contract. The resident judge on 22 January, 1942, when he issued the temporary restraining order and notice to show cause why such order should not be continued to the final hearing, was vested with ample authority to deal with the case, as was likewise the judge holding the courts of the district on 18 February, 1942, when he continued the restraining order theretofore issued by the resident judge to the final hearing. "It is established by numerous decisions that the clerk is but a part of the Superior Court and when a proceeding of this character is brought before the judge for his approval, he is vested with ample authority to deal with it. *Williams v. Dunn, supra* (158 N. C., 399, 74 S. E., 99); *Smith v. Gudger, supra* (133 N. C., 627, 45 S. E., 955); *In re Anderson, supra* (132 N. C., 243, 43 S. E., 649)." *Perry v. Bassenger,* 219 N. C., 838, 15 S. E. (2d), 365. "Whenever a civil action or special proceeding begun before the clerk of a Superior Court is for any ground whatever sent to the Superior Court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action. . . ." C. S., 637.

The judgment of the Superior Court is

Affirmed.

BARNHILL, J., concurring: This appeal presents two primary questions. 1. Does a purchaser at a judicial sale by a commissioner ap-

pointed by the clerk of the Superior Court in a special proceedings to sell land to make assets, by virtue of his relationship, become a party to the proceeding so as to subject him to the further orders of the court in the cause? 2. If so, does the judge of the Superior Court have jurisdiction, on motion and notice, to issue a restraining order in a special proceedings, pending before the clerk, to sell land to make assets?

The majority opinion answers in the affirmative. I concur. In so doing I desire to discuss the second question, which is one of procedure important to the legal profession.

We have but one Superior Court, which is a court of general jurisdiction. The jurisdiction conferred on this court by the Legislature under authority of the Constitution (N. C. Const., Art. IV, sec. 12), is apportioned in part to the clerk of the Superior Court, in part to the judge in chambers and in part to the judge at term.

The clerk is charged with the exercise of important judicial powers (C. S., ch. 13), in the exercise of which he represents and acts as and for the court. His action is the action of the Superior Court. The court exercises its power through him, subject to the supervision and control of his action by the judge provided by law. That is, certain of the court's powers, specified by statute, are exercised by the clerk and his action, when taken, stands and prevails unless modified or set aside by the judge in the manner prescribed by statute. *Brittain v. Mull,* 91 N. C., 498.

Whenever the term "Superior Court" or "Court" is used in statutes relating to jurisdiction of the Superior Court it means clerk of the Superior Court unless otherwise specially stated, or unless reference is made to a term of court. C. S., 397. Likewise, jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the Superior Court is vested in the clerk unless the judge of the court or the court at term is expressly referred to. C. S., 403.

Whenever the clerk exceeds his jurisdiction and acts without authority, *Hodges v. Lipscomb,* 133 N. C., 199, or whenever the cause is improperly brought before the clerk, *Springs v. Scott,* 132 N. C., 548; *Smith v. Gudger,* 133 N. C., 627; *Ryder v. Oates,* 173 N. C., 569, 92 S. E., 508, or whenever the clerk has no jurisdiction, *Roseman v. Roseman,* 127 N. C., 494; *In re Anderson,* 132 N. C., 243; *Williams v. Dunn,* 158 N. C., 399, 74 S. E., 99, and the cause is "for any ground whatever" sent to the judge, the judge may retain jurisdiction and dispose of the cause as if originally returnable before him. *Perry v. Bassenger,* 219 N. C., 838, 15 S. E. (2d), 365. When an issue of fact is raised by the pleadings in a special proceeding the clerk is required to transfer it to the civil issue docket without motion or appeal. C. S., 758.

When the summons in a case of which the Superior Court has jurisdiction is brought before the clerk or before the clerk at term, or before the judge in chambers it is equally in the Superior Court and there can be no defect of jurisdiction. *Ewbank v. Turner,* 134 N. C., 77.

Hence, the clerk acts for, in and as a part of the Superior Court, and matters before the clerk are in the Superior Court. *Roseman v. Roseman, supra; Williams v. Dunn, supra; Perry v. Bassenger, supra.* The clerk and the judge each performs the duties and exercises the jurisdiction imposed upon him by statute, the jurisdiction of the judge in matters pending before the clerk not being derivative but supervisory in nature. *Perry v. Bassenger, supra.*

Procedural law should be simple, direct and efficacious, so framed as to promote the speedy administration of justice as cheaply as is consistent with due regard to the rights of the parties. To this end the Legislature enacted C. S., 637. This statute, which has done so much to facilitate the efficient administration of justice, has always received the liberal interpretation that would best promote its beneficent purpose. *Williams v. Dunn, supra; Bynum v. Bank,* 219 N. C., 109, 12 S. E. (2d), 898. While this case may not come within the letter of that act, it is within its spirit and intent. When a motion of this character is brought before the judge, all parties having been duly notified, there is no sound reason why the principles expressly established by this law in all civil actions and special proceedings should not prevail here. *Williams v. Dunn, supra.*

Aside from C. S., 637, I am of the opinion that the judge had authority to act. The proceeding was pending in the Superior Court before the clerk. The respondent was a party. The petitioners desired relief in equity which the clerk was without authority to grant. They applied by petition, after due notice, to the branch of the same court which had jurisdiction, for a writ necessary to hold the property *in statu quo,* pending further action by the clerk. This procedure does no one detriment, saves time and costs, and avoids the unseemly "marching and countermarching" incident to the old practice, when a plaintiff was put out of court but was permitted to come back into the same court provided he could correctly guess the door through which he should enter. *Ewbank v. Turner, supra; Harris v. Board of Education,* 216 N. C., 147, 4 S. E. (2d), 328; *Perry v. Bassenger, supra.*

This conclusion is not affected by the fact that this special proceeding was, under the old practice, a probate matter. The office of probate judge has been abolished and the duties heretofore pertaining to the clerks of the Superior Court as judges of probate are now performed by the clerk as such. C. S., 925; *Brittain v. Mull, supra.*

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

JOHN YANCEY, AND J. W. WINBORNE, EXECUTOR AND TRUSTEE OF THE ESTATE OF W. W. GUY, DECEASED; MRS. MATTIE GUY DANIEL, MISS ANNIE LAURA BLANTON, CHARLOTTE BLANTON, PAULINE BLANTON AND ALBERT BLANTON, JR., THE LAST NAMED THREE BEING MINORS, APPEARING BY THEIR NEXT FRIEND AND FATHER, ALBERT BLANTON, PETITIONERS, v. NORTH CAROLINA STATE HIGHWAY & PUBLIC WORKS COMMISSION, RESPONDENT.

(Filed 14 October, 1942.)

1. Statutes §§ 5a, 5b—

General statutes do not bind the State unless the State is expressly mentioned therein.

2. State § 2a—

Interest may not be awarded against the State, even on a sum certain which is overdue and unpaid, unless the State has manifested its willingness to pay interest by an act of the General Assembly or by a lawful contract to do so. C. S., 2309, providing that the amount of any judgment shall bear interest, has no application to a judgment against the State Highway and Public Works Commission.

3. State § 1a—

The State Highway and Public Works Commission is an unincorporated agency of the State and may only be sued by the citizen when authority is granted by the General Assembly, and the methods prescribed for entertainment of such an action are exclusive. C. S., 1715, *et seq.*

4. Constitutional Law §§ 15a, 15b, 15c: Eminent Domain § 1a—

The principle, forbidding the taking of private property for public use without just compensation, is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. N. C. Const., Art. I, sec. 17.

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

APPEAL by petitioners from *Clement, J.,* at July Term, 1942, of McDOWELL. Affirmed.

This was a proceeding under the statute to obtain compensation for land taken by respondent for highway purposes. Judgment on the verdict, fixing the amount of compensation, was rendered at December Term, 1941. On appeal to this Court by the petitioners, the case was heard at Spring Term, 1942, and is reported in 221 N. C., 185, where the pertinent facts are set out. It was there held that the petitioners were not entitled to add to the judgment an additional amount as interest on the value of the land from the time of the taking.

Thereafter the petitioners entered a motion in the cause, denominated petition for *mandamus,* to compel the payment of interest on the judgment from the date of its rendition to the time of payment. Respondent

demurred *ore tenus* to the petition and motion. The demurrer was sustained, and petitioners appealed.

Proctor & Dameron and Ehringhaus & Ehringhaus for petitioners, appellants.

Charles Ross for respondent, appellee.

DEVIN, J. The question presented by this appeal is whether the respondent as an agency of the State can be required by the court to pay interest on a judgment against it from the date of its rendition until paid.

From the facts set out in the petitioners' motion, admitted by the demurrer, it appears that judgment on the verdict was rendered 12 December, 1941, at a term of court which began 1 December, 1941, and that compensation for the taking of petitioners' property was fixed as of the trial in the sum of $56,250. On 19 December, 1941, oral tender of the exact amount of the judgment, in full settlement thereof, was made to petitioners, followed by formal tender 10 January, 1942. In both instances tender was refused. Payment of the principal sum was accepted under stipulation 16 May, 1942.

If the petitioners were entitled to interest on the judgment, interest ran from the first day of the term or from the date of rendition (*In re Chisholm's Will,* 176 N. C., 211, 96 S. E., 1031), and a subsequent tender of only the amount of the judgment without interest could not avail respondent to stop the running of interest. A tender, to be effective, must include the full amount the creditor is entitled to receive, including interest to the date of the tender. *Duke v. Pugh,* 218 N. C., 580, 11 S. E. (2d), 868.

But the ruling of the court below is bottomed upon the principle that interest on an unpaid claim is not recoverable against the State. Is this general rule controlling upon the facts of this case? The proper decision of this question requires consideration of several material factors. The State Highway and Public Works Commission is an unincorporated agency of the State, charged with the duty of exercising certain governmental functions, *Latham v. Highway Commission,* 191 N. C., 141, 131 S. E., 385; *McKinney v. Highway Commission,* 192 N. C., 670, 135 S. E., 772, and like the State may only be sued by a citizen when authority is granted by the General Assembly, *Carpenter v. R. R.,* 184 N. C., 400, 114 S. E., 693; and the methods prescribed for the entertainment of such an action are exclusive. While the various acts creating the State Highway Commission and prescribing its powers and duties do not declare in so many words that it may "sue and be sued," it sufficiently appears from the language of the statutes that in the matter of condemnation of land for highway purposes, and with respect to the

method of arriving at compensation therefor, right of action lies in the manner set out by statutes, Public Laws 1921, ch. 2, as amended, and C. S., 1715, *et seq.* The procedure prescribed is open to the property owner as well as to the Highway Commission.

The North Carolina Constitution, Art. I, sec. 17, provides that no person ought to be deprived of property "but by the law of the land." The quoted language, which traces its lineage to sec. 39 of Magna Charta, has been held equivalent to the due process of law required by the XIVth Amendment to the Constitution of the United States. *Parish v. Cedar Co.,* 133 N. C., 478, 45 S. E., 768. The Vth Amendment to the Constitution of the United States, forbidding the taking of private property "for public use, without just compensation," applies only to appropriations by the United States, but as was well said in *Johnston v. Rankin,* 70 N. C., 550, "the principle is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina." *Chicago, B. & O. R. R. v. Chicago,* 166 U. S., 226; *Dohany v. Rogers,* 281 U. S., 362.

In view of the requirement of the Vth Amendment to the Federal Constitution that just compensation be awarded for the taking of private property for public use, the Supreme Court of the United States has declared in several decisions, involving condemnation proceedings by the United States that, as an element of just compensation, interest on the value of the property appropriated from the time of the taking may be included. *Seaboard Air Line R. Co. v. United States,* 261 U. S., 299; *Jacobs v. United States,* 290 U. S., 13; *Smyth v. United States,* 302 U. S., 329; 96 A. L. R., 150 (note). It was said in *U. S. v. North American Transportation & Trading Co.,* 253 U. S., 330, that "interest is allowed in condemnation proceedings not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title. . . ."

However, that principle does not aid us under the facts of this case. Here the amount of compensation justly due the petitioners has been judicially determined by verdict and judgment as of the time of the trial, and on the former appeal in this case it was held that interest could not be added to the judgment, which was in accord with the verdict, by reason of matters occurring before judgment. This has become the law of the case. Compensation has been established according to the law of the land. An unliquidated claim has been translated into a judgment. The petition for *mandamus* now is not to require payment of compensation, or interest on the value from the time of the taking, but interest as interest on the judgment from and after its rendition. Petitioners were adjudged not entitled to add to the judgment an

additional amount as interest on the value of the land from the time of the taking. They now ask the court to add an additional amount to the judgment as interest on the judgment. It is a somewhat different matter from adding interest from the date of taking to the value of the property as part of the compensation, to adding interest to the judgment by which the full amount has already been fixed, from and after its rendition, as damages for delay in payment. It may be noted from the former appeal in this case that petitioners retained possession of the land after the filing of maps outlining the appropriated areas, and that actual deprivation of possession was delayed. The date of actual "taking" was not fixed by the jury. The verdict spoke as of the date of the trial, and the judgment was based upon the verdict as rendered. *Durham v. Davis,* 171 N. C., 305. There was no exception to the trial. It would seem that the matter of compensation was therein finally adjudicated.

In considering the question here presented, whether or not a judgment against the State Highway Commission as an agency of the State bears interest from the date of its rendition until paid, we are confronted with the established principle that interest may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so. *Cannon v. Maxwell,* 205 N. C., 420, 171 S. E., 624; *Bledsoe v. State,* 64 N. C., 392.

It was said by the Supreme Court of the United States in *U. S. v. North Carolina,* 136 U. S., 211, "But it is equally well settled, by judgments of the Supreme Court of North Carolina, that the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid." That case involved the right to collect interest on State bonds where, after maturity, payment was delayed, and it was held the State could not be compelled to pay interest after the maturity of the bond, there being neither contract nor statutory consent to do so. This is in accord with the common law rule that delay in payment cannot be attributed to the sovereign, and that liability for interest on that account cannot be imposed by an individual. *U. S. v. North American Transportation & Trading Co.,* 253 U. S., 330. It was said in *Cannon v. Maxwell, Stacy, C. J.,* speaking for the Court: "As far back as *Attorney-General v. Navigation Co.,* 37 N. C., 444, *Ruffin, C. J.,* delivering the opinion of the Court, declared the law of this jurisdiction to be accordant with the general rule, 'that the State never pays interest unless she expressly engages to do so.' And the law as thus declared, was upheld by the Supreme Court of the United States in *U. S. v. North Carolina,* 136 U. S., 211."

The petitioners' motion is that writ of *mandamus* be issued to compel the respondent, an agency of the State, to pay interest on a judgment.

Has the State consented to pay interest on a judgment against it? The petitioners contend that the State has expressly manifested its consent by the statute, C. S., 2309, which provides that "the amount of any judgment . . . rendered in any kind of action . . . shall bear interest until paid." They argue that the terms "any judgment" and "in any kind of action" necessarily include a judgment rendered in an action which the State has permitted to be brought against one of its governmental agencies. It may be conceded that the comprehensive language of the statute would be sufficient to include the judgment in question but for the established principle, repeatedly stated by the Court, that general statutes do not bind the State unless expressly mentioned in them. In *S. v. Garland,* 29 N. C., 48, decided in 1846, it was said by *Chief Justice Ruffin,* "But it is a known and firmly established maxim that general statutes do not bind the sovereign unless expressly mentioned in them. Laws are *prima facie* made for the government of the citizen and not of the State itself." This statement of the law has been cited with approval and without question in numerous decisions of this Court. *S. v. Adair,* 68 N. C., 68; *Harris, Ex parte,* 73 N. C., 65; *Guilford v. Georgia Co.,* 112 N. C., 34, 17 S. E., 10; *O'Berry v. Mecklenburg County,* 198 N. C., 357, 151 S. E., 880; *Cranfield v. Winston-Salem,* 200 N. C., 680 (682), 158 S. E., 241; *Seawell, J.,* in *Warrenton v. Warren County,* 215 N. C., 367. See also 59 C. J., 1103; 25 R. C. L., 784; *Carr v. The State,* 127 Ind., 204; *State v. Milwaukee,* 145 Wis., 131. Upon the same principle it was held that general statutes of limitations do not apply to the State, unless expressly named therein. *New Hanover County v. Whiteman,* 190 N. C., 332, 129 S. E., 808; *Asheboro v. Morris,* 212 N. C., 331, 193 S. E., 424.

The general statute as to interest on judgments, which is not a statute relating to procedure but one of general law, does not expressly refer to judgments against the State, nor do the statutes authorizing the instant proceedings against the State impliedly bring the State within its purview.

In *Reconstruction Finance Corp. v. J. G. Menihan Corp.,* 312 U. S., 81, it was said that, where Congress has conferred authority upon a corporate agency of the government "to sue and be sued," these words "normally include the natural and appropriate incidents of legal proceedings," such as, in that case, costs and the additional allowances awarded by courts of equity against unsuccessful litigants. But we think the authority to a citizen to institute adversary proceedings for the recovery of compensation for land taken for highway purposes, while involving many of the ordinary incidents of litigation, does not embrace consent by the State to be held to liability for interest on judgments under principles of general law rather than those pertaining to procedure.

By virtue of Art. IV, sec. 9, of the North Carolina Constitution, the Supreme Court has original jurisdiction to hear claims against the State, but it is expressly provided that its decisions shall be recommendatory only, and that no process in the nature of execution shall issue thereon. And it was held that this Court had no power to award interest in the absence of a special contract. *Bledsoe v. State,* 64 N. C., 392.

Statutes which provide that judgments shall bear interest from date of rendition are based upon the idea that the creditor is entitled to damages for delay in payment. 30 Am. Jur., 24; 33 C. J., 213. In *McNeill v. R. R.,* 138 N. C., 1, 50 S. E., 458, it was said that interest on judgments was recoverable "by way of damages for the detention of the money." In this case the tender of payment was made by respondent within a few days after the rendition of the judgment, and there was not such an unreasonable delay in payment as would constitute a denial of just compensation, under the principle stated in *Bragg v. Weaver,* 251 U. S., 57, and *Brooks-Scanlon Corp. v. U. S.,* 265 U. S., 106.

In the excellent brief of appellants numerous decisions from other jurisdictions are cited in support of their contentions. We will refer to several of these to which our attention was called as being in point.

In *State ex rel. The Steubensville Ice Co. v. Merrell,* 127 Ohio State, 453, the facts were very similar to those in the case at bar. It was there held that demurrer to an independent action for *mandamus* to compel payment of interest on a judgment, awarding damages for taking property for a road, should be overruled. The decision was based on the ground that the Ohio Constitution expressly required "just compensation," and hence compensation included interest from the taking to the time of payment.

In *Carr v. The State,* 127 Ind., 204, the action was to recover interest on state bonds after maturity. After stating the general rule that a state is not liable for interest unless it contracts to pay it, the decision in that case was based upon the view that the language of the statute authorizing the bonds contemplated payment of interest after maturity.

In *Simms v. Dillon,* 119 W. Va., 284, 193 S. E., 331, it was held that the provisions in the statute as well as the Constitution of that state for just compensation authorized the Court to provide for payment of interest during the time between the taking and the final payment of the money due. This was reaffirmed in *S. v. Painter,* 120 W. Va., 486, 199 S. E., 372.

In *Franklin Bros. v. Standard Mfg. Co.* (Texas civil appeals), 78 S. W. (2d), 294, it was held that a statute declaring that "all judgments" should bear interest applied to judgments against the state. To the same effect is *Commonwealth v. Lyon,* 24 Ky. Law., 1747, 72 S. W., 323. In that case it was held that the same rule as to interest applied to the

state as in suits between individuals. See also *DeVore v. State Highway Com.*, 143 Kan., 470, and *Chicago etc. R. R. v. Mundt*, 56 S. D., 530, 229 N. W., 394. In *Wagoner v. Morrison*, 279 Mich., 285, 271 N. W., 760, interest was held chargeable against the state in condemnation proceedings as part of just compensation. There was no specific reference to interest on judgments which had been rendered fixing the amount of compensation.

Petitioners also cite *Seaboard Air Line v. U. S.*, 261 U. S., 299. In that case the verdict of the jury fixed the value of the land taken by the United States as of the date of the taking. Judgment allowed interest from that date. It was said: "The rule is that in the absence of a stipulation to pay interest, or a statute allowing it, none can be recovered against the United States upon unpaid accounts of claims," but it was held that just compensation must be the equivalent in value of the property taken, and that this included interest from the time of the taking as a part of the just compensation.

In *Devlin v. New York*, 131 N. Y., 123, in condemnation proceeding under a statute which specifically provided for interest, it was held that interest was part of the compensation, rather than damages for failure to pay. See also *Crane v. Craig*, 230 N. Y., 452.

Giving due weight to those authorities, we think, however, we should adhere to the rule that the State may not be compelled to pay interest as such, in the absence of contract or statutory consent to do so, and that in this case, as there is neither contract, nor statute permitting it, the State may not be held liable for interest on the judgment. While in the Federal jurisdiction interest against the sovereign may be added in cases of condemnation of land for public use, by virtue of Vth Amendment to the Constitution of the United States, as part of just compensation, in this case all the elements of compensation to the time of trial have been adjudicated and reduced to judgment, and hence the petition for *mandamus* to compel the State's governmental agency now to pay interest, as interest, on the judgment was properly denied.

The procedural question whether, in any event, petitioners have the right, by motion in the cause after judgment, to invoke issuance of writ of *mandamus* to compel a State agency to pay interest on a judgment, is not presented on this record, and is not decided. C. S., 866.

For the reasons stated, we conclude that the judgment sustaining the demurrer to the petitioners' motion must be

Affirmed.

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

STATE v. LUCILLE DEGRAFFENREID.

(Filed 14 October, 1942.)

1. Homicide § 11—

On a plea of self-defense it is only necessary, in order to secure an acquittal, that the accused establish the facts upon which it is predicated to the satisfaction of the jury.

2. Homicide § 27f—

Upon the trial of a woman for murder, where she killed a man who violently and dangerously attacked her in her own home, after she repeatedly asked and demanded that he leave, a charge, that self-defense rests upon necessity, and cannot avail if there is a reasonable opportunity to retreat, and if the jury find, beyond a reasonable doubt, that she . . . killed deceased upon a *bona fide* apprehension of necessity, the verdict would be not guilty, is erroneous and new trial granted.

APPEAL from *Harris, J.*, at March Term, 1942, of LEE. New trial.

The defendant was tried upon a bill of indictment charging her with the murder of one Ollie Moore. Upon defendant's plea of not guilty, the solicitor announced in open court that the State would not ask a conviction of murder in the first degree, but only of murder in the second degree or manslaughter, as the facts might warrant.

The evidence for the State tended to show that a party was held at the house of the defendant and her husband on the night of the homicide in celebration of the departure of the husband for Ohio.

The deceased came to the party some time after it had been in progress—in fact, about 12:00 o'clock p.m. He took hold of the defendant's hand in an endeavor to look at her wrist watch, called her "Miss Bitch," and inquired what time it was. Defendant referred to him as a "big shot" and told him to get out and go home and find out what time it was.

During the progress of the party deceased began whispering to one of the guests, Fred McAllister, and defendant demanded that he quit whispering and leave.

The husband, Leon DeGraffenreid, prior to his departure sought to quell the disturbance, and when leaving, requested them all to go home.

Some time after DeGraffenreid had left, some members of the party came back into the house for one purpose or another, a part of them to secure some phonograph records that had been borrowed. Deceased reentered the house and reclined upon the sofa, with his head back and his mouth open as if asleep. The defendant ordered him to leave. He said that he would do so, but that he did not like something she had previously said. Defendant reiterated her request that he leave the house, and defendant and deceased began cursing. Deceased either threw defendant

down upon the sofa or she sat down in consequence of being pushed. She then got up and went into the kitchen, returning with both hands behind her and telling deceased that he would leave. Both of them surged towards the door, and some of the State's witnesses saw defendant with an uplifted knife in the attitude of striking deceased. He immediately cried out that he was cut and went outside the door, whence he was carried to the hospital at Sanford, dying a short time thereafter.

The State's evidence was to the effect that defendant had stated that she stabbed deceased with a table knife, which later was found on the mantelpiece, covered with blood. However, just outside the door there was found a butcher knife, covered with blood and dirt.

The defendant's witnesses testified that deceased was known to be a person of violent disposition, having a record of vicious assaults, and that he had before had altercation with defendant's husband. He was some twenty-five or thirty pounds heavier than defendant.

The defendant testified in her own behalf substantially as follows:

"Ollie Moore came to the party at my and my husband's house without any invitation. He had last year, before this, come to our house to a party and cut up rough and broke up the party and caused everybody to leave.

"On October 9th, Ollie Moore came a few minutes before Leon, my husband, left. When he came in he took hold of my arm and raised it like he was trying to look at my wrist watch and said, 'Hello, Miss Bitch, what time is it?' I told him he was such a big shot that if he wanted to know what time it was, to go home where he belonged and find out; that we did not want him there. He turned to Freddie McAllister and said, 'When Leon's gone we'll take the house.' Leon heard him and told them to please behave and not to make any disturbance. In a few minutes he went over and went to whispering with Freddie McAllister, and I again told him to leave and do his whispering elsewhere out in the street or on the railroad. I was afraid of him. He had gone to the hardware store where my husband worked, after breaking up the other party at our house, and my husband had trouble with him then about that. He had the name of having beaten up his aunt, and his sister's husband and of having had trouble with other people, and had the reputation in the community of being violent and being a very violent man. He was 25 or 30 pounds heavier than I was, and taller, broader and stronger. He had been drinking and was fussy that night, October 9th, when he came. There was being served no whiskey at the party, and I do not think he drank any after he came.

"When we went out to see Leon off, everybody went out, and my husband told these boys not to give any trouble, and he asked everybody to leave and told them good-bye. I went back in the house and Iredell

Buie went with me to get some records of Iredell Buie's we had been playing, so she could carry them home, and some of the people followed us back in. The party was over when Leon left.

"While I was getting these records I saw Ollie Moore had come back in. He was sprawled over on the davenport, with his head on one arm of it, and one leg over the other, and one foot on the floor. His eyes were shut and his mouth open. When I saw him I ordered him to get up and leave the house, and told him he could not be sleeping or doing that way at my house with my husband gone. When I spoke to him he straightened up and leaned back against the back and shut his eyes. I again ordered him to get up and leave. I went up in front of him this time. When I told him the second time that he could not be sleeping there and to go, he said he would leave, but that I had said something before he did not like. I ordered him again to leave. He grabbed me by the arms and shoved me down on the davenport and said he would leave when he damned pleased and called me 'Miss Bitch.' I called him another and told him to leave the house. When I got up from the davenport, the kitchen door was open and I noticed the door of the electric refrigerator had been left open by someone. I went in and closed that and came out and he was still there, standing about the middle of the floor. I told him if he did not leave I would send for Policeman McLeod. He said, 'Damn the law,' and I went over and turned the front door knob and began opening the door and told him, 'Get to hell out of here.' When I did, he jerked me so hard it slammed the door back closed, and everybody but us began running out of the back door.

"I called for help, but no one helped me. He pushed me back against the wall to the east of the front door so my back was against it, and I was half on and against a little iron table which was a few feet to the east of it against the wall. He had me partly on this table and had me by the throat with his left hand and struck at me with a knife. I threw my left hand up and he cut me between the thumb and first finger through the web joining them, and down in the palm of the hand. The scar is there now.

"He had me up against the wall and against the table and one of his legs was between mine and was forcing me back on the table and against the wall. When he cut me I called for help but no one helped me. While he had me against the wall and table, I picked up a butcher knife on this table where I had been using it in opening sardines in fixing sandwiches for my husband to take with him. The table tilted up and slipped from under me and I was standing up, stabbing the knife toward him to keep him off of me and telling him to stand back and not come on me.

"I did not intend to kill him, but only to make him stand back and stay off me, and to turn me loose and quit fighting me and let me alone. I told him to stand back and he came on, kept on coming, and pushed me against the wall again and by the force of his lunge toward me at this time he caused the knife to go into his body. Except for what he did himself, and the force he used, he would not have been seriously injured or killed. I did not strike at him hard enough to go into his body. He called out I had cut him, and he went out the front door and came back in before he bled any. Some of the boys got him in an automobile and carried him off."

Other parts of the evidence are not essential to an understanding of this decision.

Upon this evidence and relating to the matter of self-defense, the court charged the jury as follows:

"The principle of self-defense rests upon necessity, real or apparent, and cannot avail if there is a reasonable opportunity to retreat and avoid the difficulty; but if the assault in which the killing is brought about be violent and the circumstances are such that retreat would be dangerous, he is not required to retreat."

Elsewhere in his charge, the following instruction was given to the jury:

"If the deceased assaulted the prisoner in her own home and cut her with a knife and otherwise suddenly and violently assaulted her when he was requested to leave and the prisoner was without fault in bringing on the difficulty, the Court charges you that she did not have to retreat but she had the right to stand her ground and oppose force with force and to do whatever seemed to her at the time reasonably necessary to protect herself from the assault being made on her. And if at the time deceased was killed she had reasonable grounds to believe and did believe that she was in danger of losing her life or suffering great bodily harm as the result of an unlawful assault by deceased, she had the right if necessary, or if it at said time reasonably appeared to be necessary, to take the life of the deceased, and if you find beyond a reasonable doubt that she intentionally killed the deceased in such reasonable *bona fide* apprehension, that the same was necessary to protect her life or her person from great bodily harm, your verdict would be 'not guilty.'"

The jury found defendant guilty of manslaughter and judgment thereupon was rendered, sentencing the defendant to not less than ten years, nor more than twenty years in State's Prison.

The defendant appealed, assigning errors.

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

K. R. Hoyle for defendant, appellant.

SEAWELL, J. Counsel for the defendant argues here that the instructions given to the jury, as quoted above, do not fairly present to the jury the full right of self-defense which might be her due on certain phases of the evidence, particularly with regard to the necessity of retreating from an assault made upon her in her own house.

However much the evidence *contra* may preponderate, any phase of the evidence supporting the plea of self-defense demands that the instruction addressed thereto must apply the law to the facts which such evidence tends to show. *S. v. Anderson, post,* 148. There is, of course, no general rule or formula of expression which will apply the law of self-defense to every case. In the instant case, defendant complains that the jury might be confused with conflicting instructions and be unable to decide whether, under the law, it was the duty of the defendant to retreat from the assault made upon her before killing in self-defense or whether she might stand her ground, under the evidence which she herself advances that she was the victim of an unprovoked assault in her own home.

In the first place, it is pointed out that there was no necessity for presenting an inapplicable rule, designated by the State as a general rule—one which would require her to retreat under such conditions; and if the second instruction could be, for argument's sake, conceded to be correct, the jury would be still left in doubt as to which instruction they should follow.

We think, however, that there is an inadvertent statement, of a more serious nature, in the instruction which the State regards as curative, which would deny it that office. In this instruction the court would deprive the plea of self-defense of any effectiveness, unless proved to the jury beyond a reasonable doubt. In order to secure an acquittal on a plea of self-defense, it is only necessary that the accused establish the facts upon which it is predicated to the satisfaction of the jury. *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Fuller,* 114 N. C., 885, 19 S. E., 797.

In principle this case seems to be substantially on all fours with *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526, from which we quote:

"Defendant appropriately contends that while the doctrine of retreat enunciated in these instructions may be correctly applied to different factual situations, it does not apply to a controversy in a man's home, as in the present case. Hence, he contends that, even though the court did further instruct on the right of a man to protect his home and family, the instructions to which exception is taken are calculated to mislead the jury to his prejudice. With this contention we agree."

For the reasons stated, the defendant is granted a

New trial.

J. W. EDMONDS (INDUSTRIAL BANK OF ELIZABETH CITY, ASSIGNEE), v. JOHN L. WOOD (MRS. MARY C. FAUTH, INTERVENER).

(Filed 14 October, 1942.)

1. Partition §§ 1, 8: Judgments §§ 19, 20—

A judgment lien upon the undivided interest of a tenant in common is subordinate to the right of the cotenants to enforce partition; and, when it is made, the judgment lien is transferred to the portion assigned to the debtor in severalty, or to his share in the proceeds of sale, even though the judgment creditor is not a party to the proceedings for partition.

2. Partition §§ 2, 7, 8: Judgments §§ 19, 20—

A judgment creditor is given the right upon his own initiative to have partition, so that the moiety, upon which the lien of his judgment attaches, may be ascertained, and no doubt he would be allowed to intervene in a partition proceeding, and diligence might require it. C. S., 3217.

3. Partition § 4—

Liens erroneously declared against judgment debtor's share, which injuriously affect the judgment creditor's general lien under C. S., 614, are irregularities, which can be corrected only by motion in the cause.

4. Judgments § 4: Partition § 8—

A judgment in partition proceedings cannot be collaterally attacked except for fraud or want of jurisdiction in the court, rendering it void.

5. Judgments §§ 36, 41—

Where judgment debtor borrows from a bank, giving for the debt a note, to which there were guarantors, and with the proceeds, by agreement with the bank, paid a large portion of it to his judgment creditor, and had the judgment assigned to the bank as collateral security for his loan, *held*, in effect, a satisfaction of the judgment.

APPEAL by Mrs. Mary C. Fauth, intervener, from *Clawson L. Williams, Judge,* at June Term, 1942, of PASQUOTANK. Reversed.

John L. Wood died intestate in 1913, seized of a lot in Elizabeth City, herein referred to as the Road Street property, consisting of a lot on which was located a brick building. He left as heirs at law four children, of whom Lloyd S. Wood died unmarried and intestate, and John L. Wood, Elizabeth Wood Rice, and Helen Wood Sawyer, survive. John L. Wood, Sr., also left surviving him his widow, Mary C. Wood—by subsequent marriage Mary C. Fauth—mother of the above named children and present intervener in this action. John L. Wood, Jr., is the defendant named in the action, judgment debtor therein, and petitioner in the partition proceeding hereinafter mentioned.

From the death of her husband, the widow remained in possession of and resided in the Road Street property, collected the rents and profits.

paid the taxes and assessments thereupon, and made valuable permanent repairs and improvements on the property; and meantime supported the wife and minor child of John L. Wood after their abandonment by the husband and father, and, prior to the abandonment supported Wood, and expended substantial sums of money for these purposes over a long period of time, applying to that purpose the rents and profits of the building, and her earnings as seamstress.

In July, 1938, John L. Wood brought a proceeding in the Superior Court to have the lands of his decedent father sold for partition, claiming a one-third interest therein. He joined in the petition his mother, as dowress, and asked that her dower be allotted to her. The petition further demands an accounting by her for rents and profits during her occupancy of the premises and for certain sums alleged to have been received by her for a small portion of the real estate sold. In her answer, in which Mrs. Rice and Mrs. Sawyer joined, Mrs. Fauth denied that she had received any sum for the sale of real estate out of which the petitioner had not received his proportional part; set up a claim for support of defendant's wife and infant daughter, abandoned by petitioner, alleged to be much in excess of his share of the rents and profits, and alleged the expenditure of large sums of money for taxes, street assessments for paving and sidewalks, and extensive repairs to the building in the nature of major improvements, which she alleged constituted a lien upon the property. Mrs. Rice and Mrs. Sawyer disclaimed any demand for rents and profits from the property.

The case was referred. The referee heard evidence and filed his report, charging Mrs. Fauth with the rents and profits during her occupancy, charging the petitioner with the support of his wife and child down to 1935, when Wood and his wife were divorced, and charging Wood's share with the proportionate part of the taxes, which had been paid by Mrs. Fauth for about twenty-six years, street assessments, and repairs made by Mrs. Fauth. Among those repairs was the installation or construction of an entire new brick front when the building was condemned. After apportioning one-third of the taxes and street assessments and the costs of the repairs before mentioned to Mrs. Fauth, and charging petitioner with only his proportionate part of these items, the referee found that the petitioner Wood was indebted to Mrs. Fauth in a balance of $2,425.57, which constituted a lien upon his share and should be paid to her out of the proceeds of his distributive share from the partition sale.

At October Term, 1940, of Pasquotank Superior Court, the referee's report was confirmed and judgment entered ordering a sale of the lands for partition. At this sale Mrs. Fauth became the last and highest bidder for the whole property at the price of $1,051, and the commissioners' deed has been executed, but not delivered.

The Edmonds Judgment:

Meanwhile, after the institution of the partition proceeding above described, J. W. Edmonds brought an action for recovery upon a note for $300 executed by Wood, and on 23 October, 1939, obtained judgment thereon by default. The judgment was docketed and cross indexed the same day. The judgment in the partition proceeding was not docketed and cross indexed until final judgment at the October Term, 1940.

It is noted in the findings of fact that Mrs. Fauth knew of the pendency of the case of "Edmonds *v.* Wood"; and that at the time of the purported assignment thereof, the Industrial Bank had actual knowledge of the pendency of the partitioning proceeding. In neither case was notice of *lis pendens* filed under the statute.

The Edmonds judgment was purportedly assigned to the Industrial Bank of Elizabeth City (subsequently joined as plaintiff upon Mrs. Fauth's intervention) under the following circumstances:

John L. Wood borrowed from the Industrial Bank of Elizabeth City, North Carolina, the sum of $650.00, said borrowing and lending having been on 14 February, 1940, and at said time the said Wood executed to said bank his promissory note in said amount. That as a part of said borrowing and lending it was agreed between the said Wood and the said bank that he was to use a portion of the proceeds of said borrowing to obtain an assignment of the judgment in the Edmonds case to the said Industrial Bank as security for the aforesaid note, and this was done, by paying the proceeds of the loan to Wood who paid to J. B. McMullan, Esq., some amount thereof upon execution of the assignment of judgment referred to below. The assignment was made by the attorney of record, J. B. McMullan, Esq., and no special authority appears in the record or findings of fact.

At the partition sale an attorney for the Industrial Bank appeared and gave notice that the bank claimed a prior lien upon the share of John L. Wood.

Execution was then issued upon the Edmonds judgment and at the execution sale, an attorney for Mrs. Fauth appeared and gave notice that she claimed a lien on the share of John L. Wood superior to that of the bank. The Industrial Bank became the last and highest bidder at the price of $200.

In order to protect her interest as far as possible and place herself in position to seek judicial relief, Mrs. Fauth made an upset bid and deposited the required 10% with the clerk of the court. She then asked to be allowed to intervene in the Edmonds case and have the execution recalled, seeking to have her lien in the partition proceeding declared superior to that of the Edmonds judgment, or that, failing this relief, she might be permitted to exonerate the property by paying off the

superior lien of the Edmonds judgment, if it should be held to be superior. The clerk of the Superior Court, being of opinion he was without jurisdiction in the matter, declined the motion, and the movant appealed to the judge.

By consent, the matter came on to be heard upon the motion, and upon the merits, before Clawson L. Williams, Judge, at June Term, 1942. After making certain findings of fact, pertinent parts of which are recited above, the judge held as a matter of law that the lien of the Edmonds judgment was superior to any that the intervener may have had under the judgment in the partitioning proceeding, and ordered the sale under the execution to proceed under Mrs. Fauth's upset bid, incidentally denying her prayer to be permitted to exonerate the property by paying off the judgment.

From this judgment Mrs. Fauth, the intervener, appealed, assigning error.

J. Kenyon Wilson for intervener, appellant.
M. B. Simpson and John H. Hall for appellee.

SEAWELL, J. 1. Was the judgment creditor Edmonds or his assignee, the Industrial Bank, bound by the judgment in the partition proceeding to which the judgment debtor John L. Wood was a party?

The jurisdiction of the court to entertain the partitioning proceeding and proceed to judgment therein either by allotment of shares or by sale for division of the proceeds has not been challenged. Therefore, the question in so far as is necessary for a decision of this case may be answered by quotations from authorities which correctly state the law as it obtains here and elsewhere:

"A judgment lien upon the undivided interest of a tenant in common is subordinate to the right of the cotenants to enforce partition; and, when it is made, the judgment lien is transferred to the portion assigned to the debtor in severalty, or to his share in the proceeds of sale . . .

"If a sale of the undivided property is made for the purpose, the purchaser takes his title freed and discharged from such subordinate encumbrance on the share of the judgment debtor, and the creditor is remitted to his debtor's share of the proceeds of the sale, even though the judgment creditor is not a party to the proceedings for partition." Thompson on Real Property (1940 Ed.), section 1989.

"In case of partition, the lien attaches to the specific land allotted to the judgment debtor, or in case of sale for the purposes of partition, to the fund obtained thereby." Tiffany, Real Property, sec. 1583.

"The interest of a debtor in land, though charged with the lien of a judgment, may be subject to sale pursuant to the superior rights of

others as in case of property forming part of an estate or subject to partition. Under such circumstances, a judgment lien attaches to the proceeds to the extent of the debtor's interest therein or the surplus remaining after prior claims have been satisfied." Freeman on Judgments, 5th Ed., page 1981.

See, also, 40 Am. Jur., p. 110, sec. 130; 47 C. J., p. 617, sec. 940.

The judgment in the partitioning proceeding cannot be collaterally attacked except for fraud or want of jurisdiction in the court, rendering it void. Neither is suggested in the record. If, as appellees contend, liens were erroneously declared against the judgment debtor's share which injuriously affected the judgment creditor's general lien under C. S., 614—and this we do not decide—it would constitute a mere irregularity, which could be corrected only by a motion in that cause. Under C. S., 3217, the judgment creditor is given the right upon his own initiative to have partition so that the moiety upon which the lien of his judgment attaches may be ascertained. No doubt he would be allowed to intervene in a partitioning proceeding brought by a cotenant, his judgment debtor, and diligence might require it if his rights appeared to be imperiled. But upon sale of the land, the proceeds are actually or constructively in the custody of the court and execution is not available. Even though the money had not yet been paid into court, the judgment creditor cannot arrest the proceeding or prevent the consummation of the order by a simple resort to execution. Freeman on Judgments, op. cit. *supra.*

But the appellees are confronted with a more serious barrier growing out of the transaction through which the judgment debtor purportedly procured the transfer of the Edmonds judgment to the Industrial Bank.

The evidence discloses that Wood borrowed from the Industrial Bank $650.00, and made it a note in that amount, to which there were guarantors. He took the proceeds of the loan, and, by agreement with the bank, paid a large portion of it to Mr. McMullan, attorney of record in the Edmonds case, and had an assignment of the judgment made to the bank as collateral security for his loan.

The money was Wood's and he was still bound for it, and the agreement that he should buy in the judgment and have it assigned to the bank did not make it the money of the bank. This put the judgment debtor in the peculiar situation of attempting to capitalize on his own indebtedness.

We view this transaction and this payment by the judgment debtor as, in legal effect, satisfying the judgment. The execution should be withdrawn upon the motion of the intervener, and the judgment of the court below is, therefore,

Reversed.

CATHERINE GROVES PEELE, GUARDIAN OF JOSEPH PEELE, AND CATHERINE GROVES PEELE v. J. H. LEROY AND WIFE, GRACE C. LEROY.

(Filed 14 October, 1942.)

1. Trusts §§ 7, 12—

Plaintiffs, owning realty subject to a mortgage which they were unable to pay, conveyed same to the *feme* defendant, who on the same day executed, with her husband, an agreement in consideration of such conveyance, to save plaintiffs harmless on account of the said mortgage debt, by paying installments, taxes, repairs, etc., and upon a sale of the property, within seven years or at some other agreeable time, proceeds of sale to be divided between plaintiffs and defendants, subject to certain adjustments. *Held:* Upon suit to enforce a trust, error to sustain demurrer to complaint as not stating a cause of action.

2. Trusts §§ 1a, 1b—

The principle that a trust may be created by a declaration contained in a separate instrument, or in several instruments, other than the deed conveying the legal title, provided they have sufficient relation to each other and construed together evidence such trust, is generally recognized; and a declaration of trust, in this State, may be oral.

APPEAL by plaintiffs from *Thompson, J.,* at Chambers in Elizabeth City, N. C., 28 February, 1942. From PASQUOTANK.

The plaintiffs in this action, having executed a mortgage upon the premises described in the documents below set out, and having difficulty in preventing foreclosure thereupon, and being desirous of preserving such equity as they might have in the premises, did, on 7 May, 1931, convey to Grace C. LeRoy a certain parcel of land in Elizabeth City, upon a stated consideration of "ten dollars and other valuable considerations." On the same day the defendants J. H. LeRoy and Grace C. LeRoy executed to the plaintiffs, grantors in that deed, an "agreement" concerning the lands, as follows:

"NORTH CAROLINA—PASQUOTANK COUNTY.

"THIS AGREEMENT, made this the 7th day of May, 1931, by and between J. H. LeRoy, Jr. and wife, Grace C. LeRoy, hereinafter designated as the first parties, and Joseph Peele and wife, Catherine Groves Peele, hereinafter designated as the second parties.

"WHEREAS, the second parties have this day conveyed to Grace C. LeRoy certain property in Elizabeth City between Preyor Street and Fairfax Avenue, in connection with which and as a part of the consideration for said transfer the following covenants and agreements have been made.

"NOW, THEREFORE, this instrument WITNESSETH:

"That as a part of the consideration for said deed the first parties herein hereby covenant and agree to protect and save harmless the said second parties from any and all liability on account of the indebtedness secured by deed of trust to the Prudential Insurance Company, in the sum of Six Thousand ($6,000) Dollars; the cost of the insurance required in connection with said indebtedness; the taxes due Elizabeth City and Pasquotank County since the year 1929; and all repairs necessary to be made to the building on said property during the continuance of this agreement.

"It is understood and agreed that the property this day conveyed shall be sold for the best price obtainable at any time not less than three nor more than seven years from this day, or at such other time agreeable to the parties hereto, it being understood that the vacant lots may be sold at an earlier date if a reasonable price can be obtained and the parties hereto consent. From the proceeds of said sale there shall first be paid to the first parties all such sums as they have paid on the principal of the Six Thousand ($6,000) Dollar mortgage indebtedness together with annual interest thereon from the respective dates of payment at the rate of six per cent. Should any repairs become necessary because of fault of construction of the building the amounts paid out therefor shall be returned to the first parties. The remainder of the sale price shall be divided equally between the first parties and the second parties, the first parties jointly receiving fifty per cent thereof and the second parties jointly receiving fifty per cent thereof, but in no event shall the amount paid to the first parties exceed one thousand ($1,000) dollars. All sums over and above this amount shall be paid to the second parties.

"It is understood and agreed that, in the event the first parties become financially unable to pay said mortgage indebtedness, insurance, taxes, etc., they shall not be liable to the second parties because of said inability or because of the sale of said property under said deed of trust.

J. H. LEROY, JR. (Seal)
GRACE C. LEROY (Seal)"

The acknowledgment thereof is as follows:

"NORTH CAROLINA—PASQUOTANK COUNTY.

"PERSONALLY APPEARED before me this day J. H. LeRoy, Jr. and wife, Grace C. LeRoy, who acknowledged the due execution of the foregoing agreement for the purposes therein expressed.

"Witness my hand and notarial seal, this 8th day of May, 1931.

MARGUERITE LEIGH, Notary Public.

"My commission expires: January 19, 1933."

About 9 July, 1941, no sale of the land having been made, the plaintiffs took the matter up with the defendants, through an attorney, and demanded that the property be sold and the profits, if any, divided in accordance with their interpretation of the agreement. The plaintiffs, after some correspondence unsatisfactory to them, brought this action to enforce the agreement, complaining that defendants' delay in selling the property was a violation of the agreement, that the occupation of the property by defendants had become wrongful; demanded that a receiver be appointed and a sale be ordered by the court, that there be an accounting between plaintiffs and defendants, and that plaintiffs recover a reasonable rental for the premises, and have such other relief as the case may warrant.

The defendants demurred to the complaint as not stating a cause of action. On the hearing, the demurrer was sustained and plaintiffs appealed.

John T. Manning, W. D. Pruden, and Egbert L. Haywood for plaintiffs, appellants.

John H. Hall and P. W. McMullan for defendants, appellees.

SEAWELL, J. The principle that a trust may be created by a declaration contained in a separate instrument, or in several instruments, other than the deed conveying the legal title, provided they have sufficient relation to each other and construed together evidence such trust, is generally recognized. 65 C. J., p. 262, *et seq.*

Counsel for the defendants, appellees, do not dispute the proposition that the deed to Grace C. LeRoy and the agreement signed by her and her husband were simultaneously made and in law must be regarded as constituting the same transaction; but they do contend that, so considered, the agreement relates merely to the consideration to be paid for the land—or the proceeds of sale—and raises no enforceable trust between the parties affecting the land itself—citing *Michael v. Foil,* 100 N. C., 178, 6 S. E., 264; *Sprague v. Bond,* 108 N. C., 382, 13 S. E., 143; and *Bourne v. Sherrill,* 143 N. C., 381, 55 S. E., 799. Thus it was contended in the oral argument that if plaintiffs could state a cause of action at all based on the alleged transaction, it would necessarily be for a breach of contract sounding in damages, as to which the declaration, liberally construed, is equally defective. *Hawkins v. Land Bank,* 221 N. C., 73.

However, there are distinctions in fact and in legal principle between the cited cases and the case at bar which we think make them inapplicable as deciding authority in support of this contention. In *Michael v. Foil, supra,* and *Bourne v. Sherrill, supra,* the agreement, *in totidem verbis,* related to a division of proceeds or profits upon the sale of the

lands, if and when made. In *Sprague v. Bond, supra,* the oral agreement did purport to set up a trust requiring the lands to be sold and there was an agreement that after paying certain expenses the proceeds should be divided. That part of the agreement relating to the trust was held to be within the statute of frauds and unenforceable for that reason; but the part of the agreement relating to the division of the proceeds after the sale of the land (and on page 385 the expression "after the sale of the land" is written in italics) was held not to impinge upon the terms of the written conveyance, but to relate entirely to the payment of the consideration, and not being within the statute of frauds, it was enforceable. The record does not disclose that any basis had been laid in the complaint for the engrafting of a parol trust upon the deed.

The agreement under consideration is in writing and is, therefore, not within the statute of frauds. The appellees contend, however, that if the agreement should be viewed as creating a trust, it must then necessarily reinvest the plaintiff grantors in the deed of conveyance with some right, title or interest in the property which had gone out of them by virtue of their conveyance, and that, therefore, the instrument is void for want of privy examination of Mrs. LeRoy. C. S., 997; *Warren v. Dail,* 170 N. C., 406, 87 S. E., 126. And they contend that *Sprague v. Bond, supra,* followed by *Bourne v. Sherrill, supra,* have that connotation. Compare C. S., 997, and C. S., 988.

However, these expressions in *Sprague v. Bond, supra,* and the reference in *Bourne v. Sherrill, supra,* are *obiter dicta,* unnecessary to a decision in the case, since in each case the sale had been voluntarily made and the action related merely to a division of the proceeds. Had the question been squarely presented, there is no doubt that the Court would have given weight to the fact of simultaneous execution in harmony with general authority on the subject and considered decisions of our own Court. *Brogden v. Gibson,* 165 N. C., 16, 80 S. E., 966; *Newby v. Realty Co.,* 182 N. C., 34, 108 S. E., 323; *Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426.

In *Brogden v. Gibson, supra,* it is pointed out that that part of the English statute of frauds which requires a declaration of trust to be in writing had never been enacted in North Carolina; ours does not include them in its prohibition; and furthermore, a proper interpretation of C. S., 988, confines the expression "contracts to sell or convey lands" to sale and purchase between the parties whereby one or the other acquires some interest in the land.

And in *Newby v. Realty Co.,* 182 N. C., 34, 108 S. E., 323, the Court observes under the situation there existing: "The plaintiffs have not contracted to sell or convey any lands to the defendants, nor have the defendants agreed to buy and pay for the same, nor *vice versa.*"

Newby v. Realty Co., supra, and *Brogden v. Gibson, supra,* are parallel in pointing out the distinction which exists between a contract to sell or convey lands, which is within the statute of frauds, and the establishment of a trust, which is not. In the first class, a suit would be for specific performance of a contract; in the second, for enforcement of a parol trust.

In *Anderson v. Harrington, supra,* where the deed was made to the defendant in accordance with an agreement that the timber upon the land should be cut and the net proceeds turned over to Harrington until the purchase price had been paid, and the land should then be sold and the proceeds divided between them, the Court sustained the enforcement of the trust, although in parol.

"This is not an action for specific performance of a contract in the sale of land, but one to establish a trust. One of the four methods of creating a trust is by contract, based upon valuable consideration, to stand seized to the use of or in trust for another. *Wood v. Cherry,* 73 N. C., 115.

"It is so well settled in this State that the statute of frauds, requiring a memorandum in writing in respect to the sale of land to be signed by the party charged, does not apply to the declaration of trusts, that it is a waste of time to discuss the question at this late day. *Riggs v. Swann,* 59 N. C., 118.

"At common law it was not necessary that a trust be declared in any particular mode. In England the statute requires that declarations of trust be evidenced and proved by some writing, but in this State there is no such requirement, and therefore the matter stands as at common law. *Riggs v. Swann,* 59 N. C., 118; *Shelton v. Shelton,* 58 N. C., 292."

Declarations of trust made simultaneously with the acceptance of a legal title, although not embodied therein, have not generally been regarded as requiring formal execution or acknowledgment unless that is required by statute, and here there is no statute directly requiring it and it is not inferentially required since its character as a conveyance is thus negatived. Such declarations of trust made contemporaneously with transmission of the title are uniformly enforced. *Blackburn v. Blackburn,* 109 N. C., 488, 489, 13 S. E., 937; *Pittman v. Pittman,* 107 N. C., 159, 12 S. E., 61. Says the Court in *Blackburn v. Blackburn, supra:*

"*A fortiori* will the Court give effect to such a contemporaneous declaration when made in writing under seal and for a good consideration. No particular form of words is necessary to establish such a trust. 'The intent is what the Court looks to.' "

The question might be different if the *feme* defendant had obtained her title from some source other than the plaintiffs or if some circum-

stance, whether of time or relation, might eradicate the plain fact that the documents were simultaneously executed with a purpose, the understanding of which can be found only in their joint interpretation. It cannot be conceded that the title came to rest in Mrs. LeRoy, unaffected by the condition of its acceptance as expressed in the contemporaneous agreement. To do so would be, in effect, to construe the documents separately. This would destroy the legal inferences flowing from their simultaneous execution—their factual relation as a written expression of a single oral treaty would be denied its effect in determining the intent and purpose of the parties.

We are of the opinion that, considering the documents together and as relating to the same transaction, the agreement executed by Mr. and Mrs. LeRoy was no more than a contemporaneous expression of the trust by which she held the legal title and not a reconveyance of any interest she held in the land, and it, therefore, required no privy examination.

It may be a serious question whether equity will interfere to force a sale where the contract assumes the existence of profits which the holder of the title may not be able to realize upon the sale, but that question is not now before us.

Giving the pleading a liberal construction, which the practice requires, we think there was error in sustaining the demurrer, and the judgment is

Reversed.

J. W. WINBORNE, AS EXECUTOR AND TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF W. W. GUY, DECEASED, v. J. EMMETT GUY AND WIFE, DOROTHY H. GUY; E. C. GUY (A SINGLE MAN), ROBERT E. GUY AND WIFE, KITTY GUY; NANNIE GOOCH GUY LONG AND HUSBAND, EDWARD LONG; MATTIE GUY DANIEL (WIDOW), AND THE FIRST NATIONAL BANK OF MARION, N. C., A CORPORATION.

(Filed 14 October, 1942.)

1. Equitable Liens § 1—

Any agreement in writing, however informal, made by the owner of real or personal property, upon a valid consideration, by which an intention is shown that the property shall be security for the payment of money by him, creates an equitable lien upon the property described, which is enforceable against the property in the hands of the original contractor, his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice.

2. Equitable Liens § 3—

A suit in equity to foreclose is the proper remedy to enforce an equitable lien.

3. Equitable Liens §§ 1, 3—

Where a will devised testator's home to his wife for life, but authorized a sale under certain conditions, one of which was that a debt should be first paid from the proceeds, without disposing of the surplus, if any, and all of the children and heirs of testator entered into an agreement in writing, acknowledging the amount of the debt to be first paid from proceeds of the land, upon a sale for partition, an equitable lien on the land is created, and judgment sustaining demurrer to a suit to enforce same, after the death of testator's wife, was error.

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

APPEAL by plaintiff from *Sink, J.*, at June Term, 1942, of MCDOWELL. Reversed.

Civil action to foreclose an equitable lien.

In 1913, J. Emmett Guy died seized and possessed, among other property, of a certain lot or parcel of land situate in Marion, N. C. This was his home place. Said testator left him surviving his widow, now deceased, and the following children: W. W. Guy, plaintiff's testator, and the defendants J. Emmett Guy, E. C. Guy, Robert E. Guy, Nannie Gooch Guy Long, and Mattie Guy Daniel.

The said J. Emmett Guy in his last will and testament made the following provision in respect to his home place, to wit:

"It is my wish that after my death, the place that I own and occupy at Marion, North Carolina, shall be held and occupied by my wife, Mattie W. Guy, as a home and for her and our children as well as my daughter, Nannie, so long as my said wife shall live. But if it shall seem advisable to sell said place, or any part thereof, the said Mattie W. Guy shall have the right to sell and convey the same, provided any two of our children and one of *Mine,* shall write in the deed to the purchaser.

"In case such sale is made during the life of my wife, Mattie W. Guy, or after her death, it is my wish that before any distribution of the proceeds of such has been made, it is my desire that my son, Wright W. Guy, shall be repaid and reimbursed in full for the mortgage which W. C. Atwell held against me, with its accumulated interest and also for the cash with interest of any permanent improvement which he may have made or paid for on said place of the dwelling house thereon."

Thereafter, on 13 February, 1913, W. W. Guy entered into an agreement in writing with his brothers and sisters in terms as follows:

"NORTH CAROLINA—MCDOWELL COUNTY.

"Whereas, J. Emmett Guy of Marion, North Carolina, departed this life on the 11th. day of Feb'y, 1913, seized and possessed of a certain lot or parcel of land situate in said town of Marion, State of North Carolina, a life estate in which real estate he devised to his widow, Mattie W. Guy, for and during her natural life, but as to the remainder therein died

intestate, and which remainder descended and passed to his children and heirs at law share and share alike, which children and heirs at law are as follows, to-wit: Robt. E. Guy, Nannie Gooch Guy, W. Wright Guy, Edwin C. Guy, Mattie Guy Daniel and J. Emmett Guy;

"And Whereas, at the time of his death said decedent was indebted to said W. Wright Guy and his said widow, Mattie W. Guy, for certain moneys advanced by them to him, and for the cost of certain permanent improvements made by them upon said real estate, for the payment of which said decedent left no personal estate, and which indebtedness or debts are therefore proper charges against said real estate:

"Now, therefore, for valuable consideration it is hereby agreed that the sum total due said W. Wright Guy by said estate of said decedent, inclusive of the mortgage assigned him by W. C. Atwell and of all demands whatsoever, is of this date the sum of $1,000.00; and that the sum total due said Mattie W. Guy, inclusive of all demands whatsoever, is of this date the sum of $320.00; it is further agreed that said sums and each of them shall be paid from said real estate before any partition of the same to and amongst those entitled thereto, or be paid from the proceeds of sale of said real estate before any distribution of such proceeds to and amongst those entitled thereto; it is further agreed that said sums so due said W. Wright Guy and Mattie W. Guy shall bear interest from this date, and that neither of said sums nor any part of them shall be barred or prejudiced by any statute of limitations or otherwise, and the signers hereto other than the said W. Wright Guy and Mattie W. Guy, hereby waive the benefit of the statute of limitations, and any and all other benefits that might or could be pleaded to the prejudice of said debts.

"Witness our hands and seals this 13th. day of Feb'y, 1913."

On 2 April, 1932, W. W. Guy died leaving a last will and testament in which he named the plaintiff as executor and also as trustee for the beneficiaries therein named.

The widow of J. Emmett Guy, through whom the parties claim the *locus in quo,* having died, plaintiff instituted this action in which he seeks to have it adjudged that said paper writing constitutes an equitable lien on the home place and for a decree of foreclosure. The defendants J. Emmett Guy and wife and E. C. Guy appeared and demurred to the complaint for that: (1) the court has no jurisdiction of the subject of the action; (2) the jurisdiction affecting the subject matter of the action is vested in the clerk of the Superior Court; (3) plaintiff has an adequate remedy at law through petition before the clerk to sell lands to make assets; (4) the complaint does not state facts sufficient to constitute a cause of action; (6) the complaint expressly negatives jurisdiction of

the court and affirmatively shows jurisdiction of the clerk; (7) no sufficient facts are alleged to authorize the court to declare the debt sued upon a first lien against the property or to foreclose the same; and (8) no consideration for the execution of said contract is alleged and it is *nudum pactum.*

When the cause came on to be heard upon the demurrer the court below entered its judgment sustaining the demurrer and plaintiff excepted and appealed.

Proctor & Dameron for plaintiff, appellant.
Charles Hutchins for defendants, appellees.

BARNHILL, J. Does the agreement between the parties create an equitable lien upon the real property therein described? If so, plaintiff's remedy is by an action to foreclose.

There is more than one method of creating an equitable lien. Here, however, we are interested only in the law relating to the creation of such liens by written contract. Therefore, we may confine ourselves to that particular phase of the subject.

An equitable lien is not an estate or property in the thing itself, nor a right to recover the thing; that is, a right which may be the basis of a possessory action. It is neither a *jus ad rem* nor a *jus in re.* 17 R. C. L., 603, sec. 12; 1 Pomeroy, Eq. Jur., 219, sec. 165; *Garrison v. Vermont Mills,* 152 N. C., 643, 68 S. E., 142; *Arnold v. Porter,* 122 N. C., 242. Thus it is distinguished from a mortgage.

"In equity, any agreement in writing, however informal, made by the owner of land, upon a valid consideration, by which an intention is shown that the land shall be security for the payment of money by him, creates an equitable lien upon the land. Such an informal instrument or contract, by which the owner of land agrees or undertakes to secure his creditor upon the land, is ordinarily referred to as an 'equitable mortgage,' an expression which originated in the consideration that a transaction of this character, while absolutely ineffective at law, as not involving a transfer of the legal title, was effective in equity for the purpose for which a legal mortgage was ordinarily utilized, to secure the payment of money." 5 Tiffany, Real Property (3d), 659, sec. 1653; 4 Pomeroy, Eq. Jur., 696, sec. 1235. It is created by a written agreement to appropriate specific property to the discharge of a particular debt. 9 Thompson, Real Property, 197, sec. 4825.

The doctrine may be stated in its most general form, that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt

or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. 4 Pomeroy, Eq. Jur. (5th), 696, sec. 1235; *Cuppenheimer & Co. v. Mornin,* 101 A. L. R., 75.

It is well established that an agreement in writing to appropriate specific property to the discharge of a particular debt, or an instrument intended to be a mortgage, creates an equitable mortgage. The form of the instrument is not conclusive against either party. When the plain intent of the contract is shown by the instrument, aided by the surrounding facts and circumstances, equity will decree that the instrument is an equitable mortgage. *Parry v. Reinertson,* 63 A. L. R., 1051, 41 C. J., 293.

Where there is an intention coupled with a power to create a charge on property, equity will enforce such charge against all except those having a superior claim. Such liens are simply a right of a special nature over the thing which constitutes a charge or encumbrance upon the thing itself. 4 Pomeroy, Eq. Jur. (5th), 692, sec. 1233; *Ketchem v. St. Louis,* 101 U. S., 306, 25 L. Ed., 999; *Garrison v. Vermont Mills, supra.* See also *Fert. Works v. Newbern,* 210 N. C., 9, 185 S. E., 471; and *Godwin v. Bank,* 145 N. C., 320.

Applying these principles to the case in hand we are led to the conclusion that the agreement between the parties creates an equitable lien on the *locus in quo.* The contract is in writing. It sufficiently describes the home place, sets forth the debt and expresses the intent of the parties that the debt "shall be paid" out of the proceeds of the realty. *Jackson v. Carswell,* 34 Ga., 279.

Thus it appears that the agreement effectively pledges the land as security for the payment of the debt. It was executed and delivered in compliance with and in furtherance of the wish expressed in the will of the defendants' ancestor through whom they derive title. It creates an equitable lien upon the home place as security for the payment of the debt therein specified. 33 Am. Jur., 429.

The will itself acknowledges the debt which is the consideration of the contract and directs its payment in language sufficient to create a charge thereon. To that end the remainder was not devised but was left as an undevised asset for the discharge of this obligation.

It is apparent on the face of the agreement that its very purpose was to avoid the sale of the remainder, with its attendant disadvantages, before the expiration of the life estate, except with the consent and joinder of the life tenant. Lapse of considerable time was contemplated.

To guard against this and to prevent a loss of the creditor's right by reason thereof, defendants expressly agreed not to plead any statute of limitations. On this record it cannot be said that plaintiff has been guilty of such laches as would bar his right to proceed in equity.

Defendants' desire to hold the home place intact during the life of their mother to the end that she might have a home undisturbed by a sale to make assets was commendable. The creditor co-operated on the terms set out in the agreement. Now that the motivating purpose of the agreement has been accomplished, they are called upon to comply with their end of the bargain. This they must do.

The obligation created by the agreement was substituted for the creditor's remedy against the land under the will and the law covering estates. Plaintiff must now proceed against defendants individually in a civil action rather than in the probate court. He has no other adequate remedy.

A suit in equity to foreclose is the proper remedy. "A charge of . . . some specific sum upon land is usually enforceable in equity alone. . . . And the mode of enforcement is ordinarily by means of a decree for the sale of the land, and payment of the amount of the charge from the proceeds of the sale." 5 Tiffany, Real Property (3d), 657, sec. 1652; 4 Pomeroy, Eq. Jur. (5th), 692, sec. 1233; *Ketchem v. St. Louis, supra; Garrison v. Vermont Mills, supra.*

It is settled beyond question that a court of equity is the appropriate tribunal for the enforcement of an equitable, as distinguished from a statutory or common law, lien. 17 R. C. L., 614.

There was error in the judgment below sustaining the demurrer. It must be

Reversed.

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

IDA ROSSER BARBER v. L. R. POWELL ET AL.

(Filed 14 October, 1942.)

1. Removal of Causes §§ 3, 5—

There can be no doubt that suits against receivers, appointed by a court of the United States, may be removed for trial to the United States District Court, when diversity of citizenship and the requisite amount in controversy exist; and U. S. C. A., Title 28, sec. 125, allowing suits against such receivers, without previous leave of court, has not changed the usual course and practice.

2. Removal of Causes § 3—

Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons.

3. Removal of Causes §§ 3, 5—

In a civil action to recover damages for negligence, by plaintiff, a citizen and resident of North Carolina, against defendants, receivers of a railroad, citizens and residents of Virginia, the amount demanded being in excess of $3,000.00, defendants in apt time filed petition for removal to the District Court of the United States, on the ground of diverse citizenship, the order allowing petition was proper. U. S. C. A., Title 28, sec. 71.

APPEAL by plaintiff from *Stevens, J.*, at July Term, 1942, of LEE.

Civil action to recover damages for an alleged negligent injury, instituted by plaintiff, a citizen and resident of Lee County, North Carolina, against the defendants, receivers of the Seaboard Air Line Railway Company, citizens and residents of the State of Virginia.

The defendants, in apt time, filed their petition and bond for removal of the cause to the District Court of the United States for the Middle District of North Carolina for trial, on the ground of diverse citizenship. The petition was denied by the clerk, and allowed on appeal to the judge of the Superior Court. From this latter order, the plaintiff appeals, assigning error.

K. R. Hoyle for plaintiff, appellant.
Varser, McIntyre & Henry for defendants, appellees.

STACY, C. J. We have here the question whether diversity of citizenship between the plaintiff and Federal receivers of a railroad corporation gives the latter the right to remove from the State Court to the United States District Court for trial, a suit brought against them in their official capacity to recover for injuries negligently inflicted to person and property when a train operated by defendants collided with plaintiff's automobile at a grade crossing, and the amount demanded exceeds $3,000. The trial court answered in the affirmative, and we cannot say there was error in the ruling. *Davies v. Lathrop,* 12 Fed., 353.

The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts a right of removal on the ground of diverse citizenship, or that the suit is one "wholly between citizens of different States," to use the language of the Judicial Code. U. S. C. A. Title 28, sec. 71. The plaintiff is a resident of Lee County, this State. The defendants are residents of the State of Virginia. They are Federal receivers of the Seaboard Air Line Railway Company, having been appointed as such in an action pending in the United States District Court for the Eastern District of Virginia.

It is alleged that on 4 December, 1941, the plaintiff sustained an injury to her person and property amounting to $5,250.00, when her automobile in which she was driving was negligently struck by a Seaboard Air Line Railway passenger train at a street crossing in the town of Sanford, the said train being operated at the time by agents and servants of defendants.

If the defendants are entitled to stand on their own citizenship, as intimated in some of the cases, *Biggs v. Bowen,* 170 N. C., 34, 86 S. E., 692, undoubtedly the suit is between citizens of different States. *Brisenden v. Chamberlain,* 53 Fed., 307. And, nothing else appearing, this would give the defendants the right to remove the cause to the Federal Court for trial on the ground of diverse citizenship. *Tex. Pac. Ry. Co. v. Cox,* 145 U. S., 593. The suit is of a civil nature at law of which the District Court of the United States has jurisdiction. *Johnson v. Lumber Co.,* 189 N. C., 81, 126 S. E., 165. "A civil case, at law or in equity, presenting a controversy between citizens of different States, and involving the requisite jurisdictional amount, is one which may be removed from a State Court into the District Court of the United States by the defendant, if not a resident of the State in which the case is brought." *Wilson v. Republic Iron and Steel Co.,* 257 U. S., 92.

It was held in *Brisenden v. Chamberlain, supra,* that the defendant therein, receiver of the South Carolina Railroad Company, being a resident of New York, could remove for trial to the Federal Court a suit brought against him in his official capacity for causing death by wrongful act, although the railroad company itself was chartered under the laws of South Carolina, the State in which the suit was brought. The decision was grounded on the following quotation from *Amory v. Amory,* 95 U. S., 187: "Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. A petition for removal must, therefore, state the personal citizenship of the parties, and not their official citizenship, if there can be such a thing." See *Mexican Cent. Ry. Co. v. Eckman,* 187 U. S., 249, and *New Orleans v. Gaines,* 138 U. S., 430.

In the recent case of *Mecom v. Fitzsimmons Drilling Co.* (1931), 284 U. S., 183, 77 A. L. R., 904, it was observed that the Federal Courts have jurisdiction of suits by and against executors and administrators if their citizenship be diverse from that of the opposing party, although their testators or intestates might not have been entitled to sue or been liable to suit in those courts for want of diversity of citizenship.

Conceding all that is said above, the plaintiff relies upon U. S. C. A. Title 28, sec. 125, which provides: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in

which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."

This section abrogated the rule that a Federal receiver could not be sued without leave of the court appointing him, and gave the citizen the unconditional right to bring his action in the local courts. *Tex. Pac. Ry. v. Johnson,* 151 U. S., 81. *Cf. Sellers v. R. R.,* 205 N. C., 149, 170 S. E., 632. As said in *Gableman v. Peoria D. & E. R. Co.* (1910), 179 U. S., 335, "He ceased to be compelled to litigate at a distance, or in any other forum, or according to any other course of justice, than he would be entitled to if the property or business were not being administered by the Federal Court."

No reference is made to the right of removal, but it was observed in the *Gableman case, supra,* that the manifest object of the section "would be open to be defeated if the receiver could remove the case at his volition." This much is here conceded. The defendants point out, however, that the Court was there speaking to a petition filed by a Federal receiver to remove solely "upon the ground that it was a case arising under the Constitution and laws of the United States." The question of diverse citizenship was neither presented nor considered, and while the language "He ceased to be compelled to litigate . . . in any other forum . . . than he would be entitled to if the property or business were not being administered by the Federal Court," under one interpretation, might be broad enough to cover a case like the present, it is recalled that in *U. S. v. Burr,* 4 Cranch, 469, *Chief Justice Marshall* opined: "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered." The question of removal on the ground of diverse citizenship was not before the Court in the *Gableman case, supra.* 14 Am. Jur., 295.

The defendants go further and concede that the instant suit is not against them "for or on account of any act done under color of his (their receivership) office," *Ray v. Ruff,* 292 U. S., 25, 92 A. L. R., 970, which, if it were, would entitle them to remove, irrespective of the amount involved or the citizenship of the parties. U. S. C. A. Title 28, sec. 76; *Pope v. R. R.,* 173 U. S., 573.

In reply, the plaintiff says that notwithstanding the narrowness of the ground upon which the *Gableman case, supra,* might have been decided, the fact is a general interpretation of the section was announced in order to clarify its meaning and as a guide to the lower courts in future cases. *U. S. v. Poller,* 43 F. (2d), 911, 74 A. L. R., 1382. If more was said than necessary to a decision of the case, "it was said on full consideration and with the view of announcing the opinion of the Court on that subject." *Burlington, Etc., R. Co. v. Dunn,* 122 U. S., 513. Moreover, the

section applies only to receivers, and the decisions in respect of other representatives, executors, administrators, guardians, trustees, etc., are inapposite. The plaintiff further contends that the language of the opinion is not only broad enough to cover a case like the present, but was so intended, and that as such it constitutes an authoritative expression on the subject. If dictum, it was a judicial dictum, she says. 21 C. J. S., 316; 14 Am. Jur., 298. The plaintiff thus states her position forcefully and in a plausible manner, but it could hardly be supposed that contrary to the usual course and practice of the Court, a general advisory pronouncement in excess of the boundaries of the case was intended by the deliverance therein. 14 Am. Jur., 291. It is only when the jurisdiction of the Federal courts depends upon diverse citizenship that the citizenship of a receiver becomes important or is to be regarded. *Smith v. Rackliffe,* 87 Fed., 964. The right of removal in a case of this kind is purely statutory. *Berens v. Byram,* 26 F. (2d), 953.

The precise question here presented seems not to have been decided by the Court of last resort. At least, the diligence of counsel and our own research have failed to discover such a decision. The pertinent statutes and the general pronouncements of the Supreme Court, however, engender the conclusion that the right of removal exists. "There can be no doubt that suits against a receiver appointed by a court of the United States brought in the State court may be removed for trial to the United States District Court of the district where pending when diversity of citizenship and requisite amount in controversy exist"—*Ray, District Judge,* in *Matarazzo v. Hustis* (1919), 256 F., 882.

Hence, for the reasons above stated, the demurrer to the petition to remove, first interposed in the Superior Court and renewed in this Court, was properly overruled in the Superior Court and must be overruled here.

The result is an affirmance of the judgment below.

Affirmed.

STATE v. HERSCHEL KING.

(Filed 14 October, 1942.)

1. Criminal Law §§ 69, 76—

Where criminal prosecution in an inferior court, for unlawful possession and transporting of intoxicants, results in conviction and sentence to imprisonment, no appeal taken, and sentence suspended upon a certain condition, which was violated and original sentence ordered into effect, from which order defendant appealed to Superior Court, defendant's remedy is only by *certiorari* and in the absence of such writ, the Superior Court acquires no jurisdiction and the "appeal" should be dismissed.

2. Same—

When a criminal action has been brought from an inferior court to the Superior Court by writ of *certiorari*, the Superior Court acts only as a court of review.

APPEAL by defendant from *Johnson, Jr., Special Judge,* at Regular May Criminal Term, 1942, of BUNCOMBE.

Criminal prosecution upon a warrant issued out of the police court of the city of Asheville, charging defendant with commission of offenses of unlawful possession, and transportation of intoxicating liquor.

The record proper as set out in the transcript on this appeal contains: (1) Warrant issued out of the police court of the city of Asheville on 27 January, 1942, for the arrest of defendant upon charges of unlawful possession of intoxicating liquor for purpose of sale, and of carrying, transporting and delivering intoxicating liquor in violation of law, which warrant is numbered 3989, and is designated "Warrant and summons U. P. W. K. L. S. C. T. D."; (2) Judgment entitled "State of North Carolina, County of Buncombe in the municipal court," and signed "Sam M. Cathey, Judge municipal court," dated 11 February, 1942, which reads in pertinent part that defendant "is to be committed to the common jail of Buncombe County, North Carolina, for a period of twelve (12) months to be assigned to work under the direction and supervision of the State Highway Commission. This sentence is to be suspended for a period of two years upon the following expressed conditions": among others, "(1) That the defendant is not to drive any motor vehicle of any kind in Buncombe County during the life of this judgment." (3) A written statement (patently a return to notice of appeal) under the caption of "State *v.* Herschel King, No. 3989—City of Asheville in the police court," dated 17 May, 1942, and signed by "R. F. Messer, Clerk of the police court," which reads: "Upon hearing the evidence in the above entitled case the defendant is adjudged guilty and sentenced to a term of 12 months under the supervision of the SH&PWC on a charge of UPW&KLS, and CTD, said sentence to be suspended for a period of two years upon condition that set forth in the within enclosed judgment, the court finding as a fact after hearing evidence of J. M. Coffey the condition number 1 of said judgment having been violated on May 14th, 1942, evidence of the defendant operating a motor vehicle in the city of Asheville, said sentence ordered into effect. Plaintiff's attorney at that time giving notice of appeal to the May, 1942, term of the Superior Court upon the finding of the facts of violation of the judgment in the police court. Said appeal being granted by the police court. Appeal to the Superior Court of Buncombe County. Bond fixed at $1,250.00." (4) Bond of defendant in the sum of $1,250.00 for his appearance at May Term, 1942, of Superior Court of Buncombe

County, "to answer the charges preferred against him for appealed 12 months and to receive what shall by the court be then and there enjoined upon him . . ." (5) Judgment entered at May Criminal Term, 1942, of Buncombe County "upon appeal by the defendant from a judgment of Sam M. Cathey, judge of the police court of the city of Asheville," in which after finding as facts (a) that defendant was convicted in said police court on 11 February, 1942, on the charge of unlawfully possessing and transporting liquor, and, upon such conviction, was sentenced to a term of twelve months to be assigned to work upon the public highways under the direction and supervision of the State Highway and Public Works Commission, and that said sentence was suspended for a period of two years upon the condition, among others, "that defendant is not to drive any motor vehicle in the county of Buncombe during the life of this judgment"; (b) that from this judgment defendant did not appeal; and (c) that on 17 May, 1942, defendant was before judge of the police court on the charge that he had violated the above quoted condition upon which judgment of 11 February, 1942, was suspended, at which time and place Sam M. Cathey, judge of the police court of the city of Asheville, finding that the terms of said judgment had been violated, entered judgment putting the suspended sentence into effect, it appears that the court after hearing testimony, also finds "as a fact that the defendant drove an automobile on Patton Avenue in the city of Asheville on the 14th day of May, 1942, in violation of the terms and conditions upon which the judgment of the police court of the city of Asheville, dated 11 February, 1942, was suspended." It further appears in said judgment that "upon the foregoing findings of fact" the court adjudged that the defendant had so violated one of the express conditions upon which judgment of imprisonment against defendant was so suspended, and thereupon the court further adjudged that the judgment of the judge of the police court of the city of Asheville, dated 17 May, 1942, putting into effect the previous sentence of imprisonment against defendant "be, and the same is hereby in all respects affirmed, and it is ordered and adjudged that execution and commitment be issued, and that the defendant be committed and serve said sentence."

Defendant appeals therefrom to the Supreme Court and assigns error.

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

Sam J. Pegram and J. W. Haynes for defendant, appellant.

WINBORNE, J. The only exception, assigned by defendant for error on this appeal, is to the "findings of fact and judgment of the Superior Court." The exception is not tenable.

"Appeals in criminal cases are controlled by the statutes on the subject." *S. v. Rooks,* 207 N. C., 275, 176 S. E., 752.

While the statutes, under which the police court of the city of Asheville was created and now exists, with jurisdiction over criminal offenses therein defined, provide that "any person convicted in said court shall have the right to appeal to the Superior Court, and upon such appeal the trial in the Superior Court shall be *de novo,*" no provision is made for appeal in a case, such as this in hand, where the police court of the city of Asheville, upon finding that a condition upon which prison sentence imposed on defendant was suspended has been violated by the defendant, orders execution of the sentence. Private Laws 1905, chapter 35, as amended by Private Laws 1909, chapters 295 and 390, Private Laws 1911, chapter 323, Private Laws 1913, chapter 58, Private Laws 1915, chapter 47, Private Laws 1917, chapter 53, and Private Laws Extra Session 1920, chapter 38, and as re-enacted as a part of the amended charter of the city of Asheville, Private Laws 1923, chapter 16, sections 141 *et seq.,* as amended by Public-Local Laws 1941, chapter 464. See also *S. v. Lytle,* 138 N. C., 738, 51 S. E., 66; *S. v. Tripp,* 168 N. C., 150, 83 S. E., 630; and *S. v. Rhodes,* 208 N. C., 241, 180 S. E., 84, where similar situations are involved.

In such cases, however, the defendant is not without a remedy. The remedy, retained by statute, approved by the court and generally pursued, is *certiorari* to be obtained from the Superior Court upon proper showing aptly made. See C. S., 630; *S. v. Tripp, supra,* where the subject is clearly discussed. See also *S. v. Rhodes, supra,* and compare the civil cases of *Taylor v. Johnson,* 171 N. C., 84, 87 S. E., 981; *Drug Co. v. R. R.,* 173 N. C., 87, 91 S. E., 606. And in the absence of such writ the criminal action docketed in Superior Court, as upon appeal, should be dismissed.

In the *Tripp case, supra,* it is said: "No appeal on this subject having been provided by the statute, and there being nothing in the record to challenge the validity or propriety of the sentence, his Honor was clearly right in dismissing the appeal."

In the *Rhodes case, supra,* speaking to the same subject, it is stated: "The Superior Court was without authority to entertain the 'appeal,' unless treated as a return to writ of *certiorari. S. v. Tripp, supra.*"

When a criminal action has been brought from an inferior court to the Superior Court by means of a writ of *certiorari,* the Superior Court "acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record . . . and can only revise the proceedings as to regularity or on questions of law or legal inference. *S. v. Tripp, supra.*"

In the present case, no appeal being provided by statute, and there being nothing in the record to show that the action came to the Superior

Court by means of writ of *certiorari,* or to show that the case docketed in Superior Court as upon appeal was treated as a return to writ of *certiorari,* the Superior Court acquired no jurisdiction, and the case should have been dismissed. And, in this Court, where the lack of jurisdiction is apparent, the Court may, and will, on plea, suggestion, motion or *ex mero motu,* stop the proceedings. *Henderson County v. Smyth,* 216 N. C., 421, 5 S. E. (2d), 136, and authorities there assembled.

However, if this case were properly in Superior Court, while the record proper of the proceedings in the police court of the city of Asheville, as disclosed in the record on this appeal, is subject to the charge that it is incomplete and unduly abbreviated and ciphered, a practice that should not be pursued and is not approved in the recording of the proceedings of a court of record, it is sufficient in any event to meet the objection here raised, in that it shows: (1) That on 11 February, 1942, defendant was tried in the police court of the city of Asheville upon a warrant charging him with violating the prohibition laws of the State, and adjudged guilty and sentenced to a prison term of twelve months, which was suspended upon condition that he should not "drive any motor vehicle in the County of Buncombe during the life of this judgment"; and (2) that on hearing in said police court on 17 May, 1942, upon "evidence of J. M. Coffey," the judge of the police court found that defendant had on 14 May, 1942, violated the above condition by "operating a motor vehicle in the city of Asheville," and, thereupon, ordered the sentence into execution, from which order defendant then and there, through his attorney, gave notice of appeal. Such findings of fact of the judge of the police court and his judgment thereon are not reviewable unless there is manifest abuse of discretion. *S. v. Everitt,* 164 N. C., 399, 79 S. E., 274; *S. v. Greer,* 173 N. C., 759, 92 S. E., 147; *S. v. Hardin,* 183 N. C., 815, 112 S. E., 593. The record of the proceedings in the police court fails to reveal any fact tending to show abuse of discretion, or anything to challenge the validity or propriety of the sentence.

If the case had been properly before the judge of the Superior Court upon transcript of proceedings had in the police court of the city of Asheville, the fact that he heard evidence relating to, and made findings of fact as to the violation by defendant of the condition against driving any motor vehicle in Buncombe County, while unauthorized, *S. v. Tripp, supra,* would neither add to nor take from the sufficiency of the proceedings appearing upon the face of such transcript, and would be treated as surplusage.

The appeal will be dismissed and the case will be remanded for further proceedings as the law provides.

Appeal dismissed.

STATE v. C. B. McLEOD.

(Filed 14 October, 1942.)

1. Courts § 7—

The judge of an inferior court has no authority, after the term has ended, to modify a judgment, from which defendant had appealed, and permit defendant to withdraw his appeal.

2. Courts § 4—

When a judge leaves the bench and the term is left to expire by limitation, the term ends then and there.

3. Same—

Where the length of the term of an inferior court is not expressly stated by the statute other than that it shall continue until the business before it be disposed of, the term cannot last beyond the time fixed for the next succeeding term, unless perhaps a trial in actual progress should extend it.

APPEAL by defendant from *Harris, J.*, at May Criminal Term, 1942, of HARNETT.

Criminal prosecution in recorder's court of Harnett County upon a warrant charging defendant with the offense of unlawful possession of intoxicating liquors for the purpose of sale.

The record on this appeal shows:

1. That on Tuesday, 8 April, 1941, upon hearing in the recorder's court of Harnett County, defendant pleaded guilty to the charge in the warrant to which reference is above made. Whereupon, the court entered judgment sentencing defendant to jail for a term of six months to be assigned to work upon the roads under the direction of the State Highway and Public Works Commission—judgment to be suspended for two years upon condition that the defendant pay a fine of $1,000.00, and costs, and that "he do not violate prohibition laws for two years." From this judgment defendant appealed to Superior Court. "Bond fixed at $500.00."

2. That, thereafter, and on Saturday, 26 April, 1941, after the adjournment of the sitting of said court on 8 April, 1941, and while the court was not in session, the recorder of the recorder's court instructed the clerk of said court to modify, and the clerk did make and enter upon the records of said court this modification of the above judgment: "April 26, 1941. It appearing to the court that the statute requires that all licenses for the sale of beer, wines and all intoxicating bitters be revoked, it is therefore ordered that the license of the defendant be revoked on all such licenses and that $250.00 of the above fine be remitted, and upon

further condition that no alcoholic beverage be permitted on premises in any quantity. Defendant withdraws appeal and pays fine and costs."

3. That, thereafter, on Tuesday, 9 December, 1941, the following judgment was attempted to be entered by the said recorder of the recorder's court: "December 9th, 1941. It appearing to the court that the defendant has not complied with the terms of suspension of this judgment, commitment to issue at once. Whereupon defendant gave notice of appeal to Superior Court and his appearance bond fixed at $500."

4. That, thereafter, at the May Term, 1942, of the Superior Court of Harnett County, the solicitor moved the court for capias for and commitment of defendant upon the foregoing record, and, upon hearing of this motion and evidence in substantiation of same, Harris, J., presiding, entered the following judgment: "This cause coming on to be heard, and being heard . . . upon appeal of the defendant from a judgment heretofore entered in the recorder's court of Harnett County wherein the defendant was found guilty of violating the terms of a suspended sentence heretofore entered by the judge of the recorder's court of Harnett County and in which the said judge of the recorder's court of Harnett County found as a fact that this defendant, C. B. McLeod, had violated the terms of said suspended judgment in that he had intoxicating liquors on his premises, and this being found as a fact by the court, and judgment prayed upon the suspended judgment already given, this defendant, C. B. McLeod, was sentenced to six months, and from that judgment the defendant appealed to the Superior Court of Harnett County. That this appeal came on to be heard before the judge of the Superior Court at the regular May Criminal Term, 1942, of said court, and the State having offered evidence from K. C. Matthews and Merlin Cobb that two full pints and one half pint of intoxicating liquor was found on the premises of the said defendant, and this not being denied by the defendant, after the court had requested if he had any statement to make as to the evidence offered, whereupon the court, upon motion of the solicitor for a directed verdict against this defendant to enforce the judgment heretofore made by the judge of the recorder's court of Harnett County, and from which the defendant has appealed to this court, the court finds the above to be facts, and that the defendant did have intoxicating liquors on his premises and in his possession in direct violation of the suspended judgment entered against him in the recorder's court of Harnett County; Whereupon, it is ordered, adjudged and decreed that the defendant be sentenced to six months in jail of Harnett County to be assigned to the roads, the same being the length of sentence given him in the judgment of the judge of the recorder's court of Harnett County."

From this judgment defendant appealed to Supreme Court and assigns error.

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

J. R. Young and Neill McK. Salmon for defendant, appellant.

WINBORNE, J. This is the fundamental question upon which decision on this appeal rests: Did the recorder of the recorder's court of Harnett County have authority on 26 April, 1941, to modify the judgment entered by him on 8 April, 1941, from which defendant had appealed to Superior Court, and to permit defendant to withdraw such appeal? The answer is "No."

The terms of the recorder's court of Harnett County, a court of record, presided over by a recorder, are regulated by the statute, under which the court was created and now exists, Public-Local Laws 1913, chapter 602, section 19, as rewritten and re-enacted by Public-Local Laws 1915, chapter 422, section 3, as amended by Public-Local Laws 1927, chapter 616, and as further amended by Public-Local Laws 1939, chapter 482, section 2, and, as so regulated, the term at which the judgment of 8 April, 1941, was entered, had expired long before 26 April, 1941. The statute, as thus amended, now provides that said court "shall be opened at nine o'clock in the morning of each and every Tuesday of each month, at the county seat, and shall continue in session daily until the business before it shall be disposed of: Provided the recorder shall have power to convene his court at any time for the purpose of conducting preliminary examinations of criminal matters wherein said recorder's court has not final jurisdiction, and for the trial of criminal cases where the defendant is in jail and unable to give bail, provided such prisoner shall demand trial before the regular term of said court." And to this section, by the amendment in Public-Local Laws 1939, chapter 482, section 2, there is added another sentence which reads: "That said court shall convene on the first and third Wednesdays in each month for the trial of civil cases only, and shall continue in session daily until civil business shall be concluded: Provided, the court, by consent of the parties, may hear civil cases at any sitting of the court, and criminal cases after the civil business shall have been concluded."

From these provisions of the statute, it is clear that a new term of the recorder's court of Harnett County opened, that is, began, or commenced, at least, on each Tuesday morning, and while the length of such term is not expressly stated other than that "the court shall continue in session daily until the business before it shall be disposed of" (see *Delafield v. Construction Co.*, 115 N. C., 21, 20 S. E., 167), it is manifest that the term would terminate at the time fixed by the statute for the next succeeding term, 21 C. J. S., 233, Courts, section 151, unless, perhaps, a trial in actual process should extend into the next term.

Furthermore, the decisions of this Court are to the effect that when the judge leaves the bench and the term is left to expire by limitation, the term ends then and there, and the judge cannot hear motions or other matters outside the courtroom except by consent, unless they are such matters as are cognizable at chambers. *Delafield v. Construction Co., supra; May v. Ins. Co.,* 172 N. C., 795, 90 S. E., 890; *Cogburn v. Henson,* 179 N. C., 631, 103 S. E., 377; *Dunn v. Taylor,* 187 N. C., 385, 121 S. E., 659. This being so, the recorder of the recorder's court of Harnett County was without authority to enter the judgment of 26 April, 1941, and, by the same token, he was without authority to enter the judgment of 9 December, 1941, in the absence of a valid withdrawal of the original appeal.

Let the cause be remanded for disposition sanctioned by law.

Error.

STATE v. HERMAN ALLEN.

(Filed 14 October, 1942.)

1. Criminal Law § 44—

The granting of a motion for a continuance is in the discretion of the trial court and the decision thereon is not reviewable except for a clear abuse of discretion.

2. Same—

There is no abuse of discretion in denying a motion for continuance, in a trial for murder, on the ground that defendant's most material witness (his mother) was ill and unable to attend, defendant contending that she was the last person with whom he talked before the homicide and she knew of his intoxicated condition, where the record discloses no request to take the deposition of the witness nor what her testimony would have been, but does show that after leaving his mother defendant drank additional liquor and walked seven miles to the place of the killing.

3. Criminal Law § 45—

Motion, in a trial for murder, to have a venire from some other county, based upon newspaper articles appearing on the day set for the trial, properly refused where no abuse of discretion is shown.

4. Criminal Law § 29c: Homicide § 20—

In a trial for murder, evidence is competent to show threats, motive and that ill feeling had existed for some time between defendant and deceased; but the weight of such evidence is solely for the jury.

5. Homicide § 27c—

Where, on a trial for murder, the evidence shows that defendant had been drinking and violent, and was left by his wife and two other com-

panions on that account, and thereafter defendant walked six miles to his brother's, got a shotgun with which he shot a near neighbor, then walked seven miles to the home of his wife's mother and, upon being refused entrance, shot through the window and killed his wife's brother and entering the house dragged his wife into the yard and shot and killed her, motion for a directed verdict, for a crime less than first degree murder, properly refused.

APPEAL by defendant from *Johnson, Special Judge,* at February Term, 1942, of JOHNSTON.

Criminal prosecution tried upon indictment charging the defendant with the murder of Grady Lee. Verdict: Guilty of murder in the first degree. Judgment: Death by asphyxiation. The defendant appeals assigning errors.

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

Lawrence H. Wallace and E. J. Wellons for defendant.

DENNY, J. The record discloses that the defendant and his wife, with another couple, were out together on the evening of 14 January, 1942. After visiting a number of places, they drove to Benson's Filling Station and arrived there about one o'clock a.m. The party wanted to get something to eat. Defendant had been drinking rather heavily and was abusive and quarreling with his wife. The filling station was closed. The defendant left the car for the purpose of waking up the owner of the filling station. While the defendant was gone, the other members of the party decided it would be best for them to leave the defendant at the filling station, and did so. Thereafter the defendant walked from Benson's Filling Station to his mother's home, a distance of six or seven miles. He tried to get his brother to let him have his automobile, but he would not; he then got his brother's shotgun and nearly a box of shells. From there he went down the road four or five hundred yards to Cap Raynor's house, called him out and shot him twice and left him lying on or near the front porch; he then walked seven miles to the home of his wife's mother, Mrs. Claudia Lee. Upon defendant's request that the door be opened, the deceased, Grady Lee, brother of defendant's wife, asked what he wanted. Grady Lee was eating breakfast; it was before daylight and the lamp was burning on the table a few feet from the window. The defendant moved around to the window and shot through it, the shot entering the head of Grady Lee, from which injury he died. The defendant then entered the house, dragged his wife from her bed and out of the house into the yard where he shot and killed her. Defendant then took Grady Lee's automobile, drove to his home and gathered

up his clothes and started to Elizabeth City. He stopped at Guthrie Barefoot's house to get a tire repaired, and was arrested while there.

The first exception is based on the refusal of the court to continue the case on the ground that defendant's most material witness, to wit, his mother, was ill and unable to attend court. As stated in the case of *S. v. English,* 164 N. C., 497, 80 S. E., 72: "The granting of a motion for a continuance is in the discretion of the trial court. *S. v. Scott,* 80 N. C., 365; *S. v. Pankey,* 104 N. C., 840; *S. v. Sultan,* 142 N. C., 569; *S. v. Hunter,* 143 N. C., 607. The decision thereon is not reviewable, except to see whether there has been a clear abuse of discretion. *S. v. Lindsey,* 78 N. C., 499." *S. v. Sauls,* 190 N. C., 810, 130 S. E., 838; *S. v. Henderson,* 216 N. C., 99, 2 S. E. (2d), 357.

The record discloses no request to take the deposition of the witness. The defendant contends her testimony was important, because she was the last person with whom he talked before he killed Grady Lee, and he contends she knew of his intoxicated condition. The record does not disclose what her testimony would have been. However, defendant testified that after leaving his mother's home he drank some additional liquor and walked seven miles to the home of his mother-in-law, where he killed Grady Lee and the defendant's wife, Ruth Allen. No abuse of discretion has been shown in the ruling of his Honor, and the exception cannot be sustained. *S. v. Lea,* 203 N. C., 13, 164 S. E., 737; *S. v. Godwin,* 216 N. C., 49, 3 S. E. (2d), 347.

The second exception is to the refusal of the trial court to allow defendant's motion to have a venire drawn from some adjoining county, or some county other than Johnston. The motion was based on certain newspaper articles which appeared in a local paper on the day set for the hearing of the trial. A motion for change of venue or for a special venire, may be granted or denied in the discretion of the trial judge, and his decision in the exercise of such discretion is not reviewable here unless gross abuse is shown. *S. v. Hildreth,* 31 N. C., 429; *S. v. Smarr,* 121 N. C., 669, 28 S. E., 549; *S. v. Shipman,* 202 N. C., 518, 163 S. E., 657; *S. v. Godwin, supra.* We do not think the defendant has shown an abuse of discretion by his Honor in refusing to grant his motion.

The third and fourth exceptions are to the evidence of the witnesses R. D. Marler and Martha Allen. Marler testified: "That about two or three years prior to the homicide the witness Marler served a warrant on the defendant Herman Allen at his home. That the defendant stated that he knew that Grady Lee had reported him to the officer, and that the defendant and Grady Lee had had some trouble earlier that night and that a few licks passed between them." Martha Allen testified: "That in November, 1941, she heard fragments of a conversation between her grandfather, Allen Lee, who was an uncle of Grady Lee, and the

defendant, in which they were discussing the manner of living of Grady Lee and Ruth Lee Allen and that she heard the defendant say that Grady Lee and Ruth Lee Allen would not be living six months from that day. She said that they were talking about the spells that Grady Lee had been having just before that time."

The above evidence was offered to show that ill feeling had existed between the defendant and deceased for two or three years prior to the killing of the deceased by defendant. The evidence was competent as tending to show threats and motive; but, as stated in *S. v. Rose,* 129 N. C., 575, 40 S. E., 83, the weight to be given the evidence was a matter solely for the determination of the jury. However, we think in this case, as in *S. v. Merrick,* 172 N. C., 870, 90 S. E., 257, "the declarations here made, especially in view of the immediate facts surrounding the homicide, probably had exceedingly small if any weight with the jury." *S. v. Hudson,* 218 N. C., 219, 10 S. E. (2d), 730.

The fifth and sixth exceptions are to the refusal of the trial court to sustain defendant's motion for a directed verdict on the charge of murder in the first degree. The trial court properly overruled defendant's motions. The evidence was sufficient to justify the submission of the issue of murder in the first degree to the jury. *S. v. Cade,* 215 N. C., 393, 2 S. E. (2d), 7; *S. v. Hammonds,* 216 N. C., 67, 3 S. E. (2d), 439; *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321.

The seventh exception to a portion of the charge of the court has been abandoned. The other exceptions are formal and cannot be sustained.

Evidence on the pertinent issues was submitted to the jury and the defendant states in his brief that the charge of the court on his contentions was in accord with the law. The jury has spoken and in the trial below we find

No error.

STATE v. CLARENCE ANDERSON.

(Filed 14 October, 1942.)

1. **Homicide §§ 11, 12—**

Under the law of self-defense a person not only may take life in his own defense but also in defense of another, who bears to him the relationship of wife, parent, or child.

2. **Homicide §§ 11, 12, 13—**

One who, being in his own home, fights in defense of himself, his family, and his habitation, is not required to retreat, regardless of the character of the assault.

3. Homicide §§ 12, 27f—

Upon a trial for murder, where defendant, in his own home, killed a man in the act of making a violent assault upon defendant's wife, an uncorrected instruction that, unless the jury found that defendant was acting in his own defense, they must convict, was reversible error.

4. Criminal Law § 53a—

The judge, in his instructions, should not assume that a material fact has been proven beyond a reasonable doubt, in the absence of an admission of such fact.

APPEAL by defendant from *Harris, J.*, at April Term, 1942, of WAYNE. New trial.

Criminal action tried on bill of indictment for murder of one Sam Flowers.

The evidence favorable to the State is amply sufficient to sustain the verdict of guilty of manslaughter returned by the jury. However, the testimony is sharply conflicting.

The defendant offered evidence tending to show that preceding the homicide the sisters of defendant's wife and others were quarreling and fighting in the street and at their aunt's or father's house. Viola, defendant's wife, went over there and tried to quiet them. Not being able to do so she called "the law," but officers did not come. Sam Flowers, the deceased, a brother of Viola, came and walked up to Viola. Then in her words the following happened: "He walked up to me and I said, 'The Law will be here, you all had better quiet.' He struck me, first, right here, and my brother grabbed him. Then he picked up a strip and hauled back against the side of my head, and I goes home, and my husband came after me, and I was crying, telling my husband I was going to put the Law on him. He reached up and beat me against the corner of my porch; he beat my body with his fist. I mean Sammie did this. My husband came out of the house. I don't know where my husband was when Sammie was beating me in the front yard. My husband said, 'Come in this porch; no one better not bother you any more.' I said, 'I am going to put the man on you,' and he started off riding his wheel going north. He whirled around and came back, and hit me two or three more licks, and he drew back to hit me again, and when he walked up, my husband struck him with the brick."

There was evidence that Viola was pregnant; that deceased knocked her down and that when he last approached the home of defendant the defendant warned him not to come.

There was a verdict of guilty of manslaughter. From judgment thereon defendant appealed.

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

J. Faison Thomson for defendant, appellant.

BARNHILL, J. The court instructed the jury that since the defendant admitted "he threw the brick and did it in his own self-defense" they could not acquit unless he had satisfied them that he threw it in his own self-defense.

The instruction, as thus given, assumes that the brick struck deceased and that the wound inflicted caused death. At no time was the jury instructed that they must so find before returning a verdict of guilty.

Even though the evidence was uncontradicted its weight and credibility was for the jury. In the absence of an admission the cause should not have been submitted to the jury upon the assumption that a material fact had been fully proven beyond a reasonable doubt. *S. v. Howell,* 218 N. C., 280, 10 S. E. (2d), 815.

The defendant testified in part: "He came to beat my wife and make more doctor's bills. If I had known what was going to happen I would have let it gone, and paid it." Hence, it appears from this and all the other testimony that defendant was not relying upon the right to defend himself but upon his right to defend and protect a member of his family.

Under the law of self-defense a person not only may take life in his own defense but, by virtue of the rule of the common law, he may do so also in defense of another who bears to him the relationship of wife, parent, or child. 13 R. C. L., 836, sec. 139; 26 Am. Jur., 265, sec. 158; *S. v. Gray,* 162 N. C., 608, 77 S. E., 833; *S. v. Reynolds,* 212 N. C., 37, 192 S. E., 871; *S. v. Marshall,* 208 N. C., 127, 179 S. E., 427; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663.

In so far as the right to take human life is dependent upon the surrounding circumstances, a person acting in defense of his wife is in the same situation and upon the same plane as those who act in defense of themselves. The facts which excuse the killing in defense of self likewise excuse a killing in defense of a member of the family and the right of the husband to defend his wife is coextensive with the right of the wife to defend herself. 13 R. C. L., 837, sec. 140; *S. v. Francis,* 70 A. L. R., 1133; *S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Gaddy,* 166 N. C., 341, 81 S. E., 608.

Non constat the defendant relied upon his right to defend his wife and not upon his right to kill in his own necessary defense, the court reiterated the charge that the jury must convict unless they found that defendant was fighting in his own defense—a plea not made, and unsupported by evidence. This charge was not withdrawn, corrected or modified. Thus, the jury withdrew to consider the evidence under instructions to

return a verdict of guilty upon failure to find that the defendant threw the brick in his own defense.

It is true that at the conclusion of the charge, at the instance of counsel for the defendant, the court instructed the jury that a man has the right to protect his wife or property "and use such force in preventing the assault made on your wife and to protect as reasonably necessary to do so, and if he did not use more force than reasonably necessary he would not be guilty of a crime." The charge as given upon the right of defendant to protect his wife is not sufficiently comprehensive. It is not required that defendant show that it was "reasonably necessary" to kill. It is sufficient if he proves that he believed it to be necessary and that he had reasonable grounds for the belief—the jury being the judges of the reasonableness of the apprehension. *S. v. Bryant,* 213 N. C., 752, 197 S. E., 530, and authorities cited. *S. v. Reynolds, supra; S. v. Terrell,* 212 N. C., 145, 193 S. E., 161; *S. v. Marshall, supra.*

As the evidence favorable to the defendant tends to indicate that defendant acted in defense of his wife, instructions as to his right to defend himself are inapplicable and misleading. *S. v. Lee,* 193 N. C., 321, 136 S. E., 877. The court should have instructed the jury adequately on the law of self-defense *as it is applicable to the facts in the case.* "The correctness of the instructions given is determined by the rules of law governing the right of self-defense as applied to the situation developed by the evidence." 26 Am. Jur., 537, sec. 548.

The credibility of the evidence is not for us. It may be wholly unworthy of belief. Yet, it is in the record and defendant was entitled to have the law arising thereon explained and applied by the judge. C. S., 564.

All the evidence tends to show that defendant and his wife were in their home at the time of the alleged assault by deceased. Defendant was under no duty to retreat. One who, being in his own home, fights in defense of himself, his family and his habitation is not required to retreat, regardless of the character of the assault. *S. v. Glenn, supra; S. v. Bost,* 192 N. C., 1, 133 S. E., 176; *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526.

We are of the opinion that the indicated errors in the charge were prejudicial to the defendant. He is entitled to a

New trial.

MATTIE JOYCE JONES v. JOHN C. McBEE AND WIFE, MARGARET C. McBEE; HENRY GRINDSTAFF, S. W. BLALOCK AND C. C. ROBINSON.

(Filed 14 October, 1942.)

1. Pleadings § 28: Minerals and Mines § 2—

Where tenants in common, under the erroneous impression that they owned the fee, removed $8,605.50 in value of minerals from the property, upon suit by the other tenant in common for damages alleging C. S., 6927, and admission by the defendants of the cotenancy, removal and value, plaintiff is entitled to judgment on the pleadings, though not to damages under C. S., 6927.

2. Damages § 1a: Minerals and Mines § 2—

In the absence of a willful or intentional trespass or conversion, the measure of damages is the value of the mineral as it lay in the mine, immediately after severance from the realty, with no deduction for labor in effecting the severance.

APPEAL by defendants from *Clement, J.*, at August Term, 1942, of YANCEY.

Civil action to recover one-third of the value of minerals taken from certain lands in Stokes County, N. C., in which lands, it is admitted, the plaintiff is the owner of a one-third undivided interest, and owned said interest at the time of the removal of the minerals in question.

The defendants, John C. McBee and wife, Margaret C. McBee, and Henry Grindstaff, purchased the lands in question at a tax foreclosure sale and were under the erroneous impression then and at the time of the removal of the minerals from said lands, that they had obtained a fee simple title to the entire property; whereas, in fact, they obtained title to only a two-thirds undivided interest in said lands. The defendants Henry Grindstaff, C. C. Robinson and S. W. Blalock leased the premises for mining purposes and removed the minerals which are the subject of this controversy.

It is alleged by the plaintiff and admitted by the defendants that from 1 May, 1941, to 1 November, 1941, defendants removed and sold from said lands, valuable minerals commonly known as mica, of the value of $8,605.50. Defendants denied the right of plaintiff to recover anything for said minerals, except one-third of the customary royalty on the mica removed.

Upon motion of plaintiff's counsel for judgment on the pleadings, the court held the plaintiff was entitled to recover the sum of $2,868.50, one-third of the value of all mica removed from said lands by the defendants. By consent of plaintiff, judgment was entered for only $1,630.78, less

the sum of $80.00 for taxes paid by defendants on plaintiff's one-third interest in said lands.

From the foregoing judgment, defendants appeal and assign error.

Frank P. Burton and Dallas C. Kirby for plaintiff.
Charles Hutchins for defendants.

DENNY, J. Defendants except to the refusal of the court to submit the case to the jury and to the judgment as signed, which presents the question: Was plaintiff entitled to judgment on the pleadings?

Defendants contend in their brief that because the plaintiff alleged she was entitled to recover under the provisions of C. S. of N. C., 6927, the defendants had failed to plead in reduction of the damages claimed, the expenses incident to the removal and sale of the mica, which expenses represented a large part of the gross receipts from the sale of said mica. The defendants having failed to plead the expenses incident to the removal and sale of the mica in question, or to move to amend in that respect, are now too late for their contention to prevail. Besides, in their answer they expressly challenged the right of plaintiff to recover under the provisions of the above statute, admitted all the other material allegations of the complaint, including the value of the mica removed from the lands, and elected to take the untenable position that plaintiff was entitled to recover only one-third of the customary royalties on the mica removed.

We agree with the defendants and his Honor that plaintiff is not entitled to recover under the provisions of C. S. of N. C., 6927, but we do think she is entitled to judgment on the pleadings.

The further argument presented in defendants' brief, that the defendant lessors in no event can be held to account for more than one-third of the royalties they have received, is not convincing. This Court in an early decision laid down the rule which we think governs the rights of tenants in common in cases of this character. In *Anders v. Meredith,* 20 N. C., 339, the Court said: "The possession of one tenant in common is the possession of the other; each has a right to enter upon the land and enjoy it jointly with the others. If one tenant in common destroys houses, trees, or does any act amounting to waste or destruction in woods or other such property, the other tenant may have an action on the case against him. But he never can, in any event, have an action of trespass *quare clausum fregit* against his co-tenant. Co. Lit., 200; 1 Thomas Co. Lit., 785; 1 Chitty's Gen'l Prac., 271. The other defendants were not trespassers, as they entered and acted by the direction of Meredith."

Where the owner, as in this case, waives the right to recover the mineral and elects to sue for damages, the measure of damages is the value of the mineral at the mine after its separation from the realty.

This rule of damages for the conversion of minerals is aptly stated in 18 R. C. L., Mines, sec. 154, p. 1259: "Where neither the trespass nor the conversion is wilful or intentional, the measure of damages is the value of the mineral as it lay in the mine immediately after its severance from the realty, with no deduction for the value of the defendant's labor in effecting the severance. The measure of damages for the conversion of ore by a purchaser from a trespasser has been held to be the value of the ore sold, together with a sum equal to legal interest thereon from the time of conversion, less the reasonable and proper cost of raising it from the mine after it was broken, and hauling from the mine to the purchaser's place of business."

This Court has held that where an action is brought to recover for damages for logs cut and removed by one in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value of the logs in the woods from which they were taken, together with the amount of injury incident to removal. However, notwithstanding the good faith of the party removing the logs, he may not be allowed compensation for converting the trees into personal property. *Wall v. Holloman,* 156 N. C., 275, 72 S. E., 369; *Gaskins v. Davis,* 115 N. C., 85, 20 S. E., 188.

On the admission in the pleadings that the minerals sold were of the value of $8,605.50, and there being no plea in abatement of damages for expenses incurred in removing the minerals from the mine after severance and other costs incident to transporting and selling said minerals, the plaintiff was entitled to judgment for one-third of the above value. However, it appears in the record that the plaintiff consented to a reduction of the foregoing amount, and it is stated in plaintiff's brief filed in this Court that the reduction was allowed to cover defendants' expenses incident to the mining of said minerals. Therefore the reduction was apparently more liberal than required under the authorities herein cited.

The exceptions and assignments of error, as set out in this record, cannot be sustained.

The judgment of the court below is

Affirmed.

JOSEPH F. FORD v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 14 October, 1942.)

Insurance §§ 34a, 34c—

In an action to recover total disability benefits under life insurance policies which provided that insured must be wholly disabled from engag-

ing in any occupation whatever for remuneration or profit, and such disability occurring before the anniversaries of the policies nearest plaintiff's sixtieth birthday, a nonsuit was properly granted, the evidence showing that insured was gainfully employed in his profession for more than a year and a half after his sixtieth birthday.

APPEAL by plaintiff from *Sink, J.*, at July Term, 1942, of BUNCOMBE.

This is an action instituted to recover total disability benefits provided in three certain life insurance policies. On 14 December, 1923, 12 January, 1924, and 2 December, 1926, the defendant issued to the plaintiff life insurance policies in the sums of $1,000.00, $1,000.00, and $2,000.00 respectively, in which the wife of the insured was made beneficiary, and the policies are still in effect, all premiums due thereon having been duly paid. Each policy contains a total and permanent disability provision, together with a clause waiving premiums in the event of the described disability. The disability clause is substantially the same in the three policies, and is as follows:

"1. Disability shall be deemed to be total whenever the insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit. . . .

"3. Upon receipt at the Company's Home Office before default in payment of premium, of due proof that the insured is totally and presumably permanently disabled and that such disability occurred after the insurance under this policy took effect and before its anniversary on which the insured's age at nearest birthday is sixty years, the following benefits will be granted: (a) The company will pay to the insured a monthly income of $10 per $1000 of the face of the policy during his lifetime and continued disability. . . . (b) The company will waive payment of any premium falling due after approval of said proof and during such disability."

Notice of claim was duly filed by the plaintiff with the defendant in August, 1941, and suit was instituted in December, 1941.

At the close thereof the court sustained the defendant's demurrer to the evidence and entered a judgment as in case of nonsuit, C. S., 567, to which ruling and judgment the plaintiff preserved exception and appealed.

J. G. Merrimon and H. Kenneth Lee for plaintiff, appellant.
Johnson & Uzzell for defendant, appellee.

SCHENCK, J. This case poses the question: Was there sufficient evidence to be submitted to the jury upon the issue as to whether the plaintiff became totally and permanently disabled within the meaning of the

disability clause in the policies in suit before the anniversaries of the policies nearest the plaintiff's sixtieth birthday, namely, 28 October, 1939—that is, prior to 2 December, 1939, 14 December, 1939, and 12 January, 1940, respectively? We are constrained to answer in the negative.

The plaintiff's evidence, including his own testimony, was to the effect that he had practiced law continuously since 1905, and since that time he had had no other vocation, and that he continued to practice law until 1 June, 1941; that as a member of a firm he divided the fees thereof on a fifty per cent basis until the last mentioned date; that he received a net income from the practice of law alone for the year 1938 of $1,009.73, and for the year 1939 of $1,452.37, and for the year 1940 of $1,450.23; that early in 1941 plaintiff instituted suit against William Dudley Pelley for fees in the amount of $1,775.00 due him for professional services rendered—the plaintiff himself testifying that these services continued until October or November, 1940.

On the other hand, the plaintiff's evidence tended to show that he became ill in 1937, and was ill continuously from then until the present time, but that he was not advised as to the permanency of his illness until July or August, 1941; that he had cirrhosis of the liver, an incurable malady, which weakened his mental as well as his physical powers, and "he was quite a chronically ill man," and in the opinion of medical experts he was unable in 1937, 1938, 1939, and 1940, "to do and to perform the necessary acts in the practice of the profession of law with reasonable continuity or regularity"; that while he continued to go to his office the duties he performed there were limited in their scope, and that many of the legal documents he undertook to prepare had to be revised or rewritten by other members of his firm.

Notwithstanding the apparent conflicts in the evidence, it appears beyond question that the plaintiff reached the age of sixty years on 28 October, 1939, and that thereafter he continued to engage in the practice of law until 1 June, 1941, and actually received a substantial net income therefrom during his sixty-first year. These uncontroverted facts, appearing from his own testimony, prevent the plaintiff from coming within the provisions in the policies that the disability must occur before the anniversary of the policy nearest the insured's sixtieth birthday to entitle him to the disability benefits. Such facts, irrespective of some conflicts in the evidence as to other facts, bar as a matter of law any recovery by the plaintiff upon the policies in suit. It is not "so nominated in the bond." It is ours to interpret the policies as written, and not to rewrite them.

The case is governed by *Thigpen v. Ins. Co.*, 204 N. C., 551, 168 S. E., 845, where the action was bottomed upon a similar clause in an insur-

ance policy after the death of the insured. It is there written: "The ultimate question is whether the infirmities and disabilities of the insured wholly prevented him 'from pursuing any occupation whatsoever for remuneration or profit.' Must such a question be submitted to a jury, or upon admitted facts, is it a question of law for the court? Ordinarily, such questions must be submitted to a jury, but in the case at bar it is admitted that from January until June, a few days prior to his death, the insured received $40.00 per month as compensation for his services as court crier for the county court of Pitt County. It is true that physicians and many other prominent citizens of the community testified that the insured was neither physically nor mentally capable of discharging such duties. Nevertheless it is beyond question that the services of the court crier were satisfactory to the public authorities, because they actually paid him his monthly stipend of $40.00. The law is designed to be a practical science, and it would seem manifest that a plain, everyday fact, uncontroverted and established, ought not to be overthrown by the vagaries of opinion or by scientific speculation."

Again it is said in *Medlin v. Ins. Co.*, 220 N. C., 334, 17 S. E. (2d), 463: "This Court has frequently construed total and permanent disability clauses in life insurance policies to mean that the insured cannot recover disability benefits if he is able to engage with reasonable continuity in his usual occupation or in any occupation that he is physically and mentally qualified to perform substantially the reasonable and essential duties incident thereto. This rule of law has been given application to the extent of denying benefits to an insured who, though suffering from a severe disability, continues to work at a gainful occupation."

See, also, the recently decided case of *Jenkins v. Ins. Co., ante,* 83, wherein *Winborne, J.,* collects the authorities.

Upon a consideration of the entire record, the Court is of the opinion that the trial judge ruled correctly.

Affirmed.

STATE v. OTIS HARRIS.

(Filed 14 October, 1942.)

1. Rape § 1d—

In a criminal prosecution for rape, there was evidence that defendant criminally assaulted a woman at a place 200 yards from her home and in the absence of her husband, choking her into insensibility, fracturing her skull with a brick, and accomplishing his purpose, motion for nonsuit was properly denied.

2. Criminal Law § 41f: Rape § 1c—

In prosecution for rape the victim may testify to defendant's having improper relations with her, in the absence of evidence that she was not mentally competent on account of injuries received from the assault.

3. Evidence § 21—

Leading questions by the prosecutor have uniformly been held to be in the discretion of the trial judge and no prejudice therefrom is discernible here.

4. Criminal Law § 41c—

Testimony in corroboration of the prosecuting witness is competent and proper, since her evidence was subject to attack.

5. Criminal Law § 33—

The admission in evidence of defendant's confession to certain material facts was proper, the trial judge having heard evidence as to the circumstances and character of the alleged confession, and found the same voluntary and made without inducement, threat, or hope of reward.

6. Criminal Law § 32a—

The admission in evidence, in trial for rape, of a brick found by a pool of blood, shortly after and near the scene of the crime, with hairs clinging to it, was competent, defendant having admitted the assault, but having denied accomplishing his purpose and striking his victim with a brick.

APPEAL by defendant from *Stevens, J.*, at May Term, 1942, of BERTIE. No error.

The defendant was charged with the capital felony of rape. The jury returned verdict of guilty. From judgment imposing sentence of death the defendant appealed.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for the State, appellee.

Claude J. Gray and S. Russell Lane for defendant, appellant.

DEVIN, J. The evidence disclosed by the record was amply sufficient to support the verdict and judgment. Without undertaking to state the evidence in detail it may be said that there was testimony tending to show that on the occasion charged the State's witness, Mrs. Warren, the wife of a farmer, in the absence of her husband, was doing some work at a tobacco plant bed 200 yards from the house. The defendant, an employee of her husband, had been plowing in a field near-by. He came to the plant bed where she was and there criminally assaulted her, choking her into insensibility and fracturing her skull with a brick. There was evidence that the crime charged was completed. Every element necessary to constitute the felony of rape was made to appear. The defendant's motion for judgment as of nonsuit was properly denied.

The defendant's other assignments of error relate to the court's ruling on the admission of testimony. We will consider these in order.

The objection to the evidence that the State's witness' child had been burned, and that her husband had taken the child to the doctor is without merit. This was competent to account for the absence of her husband, and to show that she was alone at the time of the assault.

There was no error in permitting this witness to testify, in answer to a question, that the defendant had sexual relations with her, and the objection based upon the suggestion that she did not understand the meaning of the words used in the solicitor's questions, or that by reason of the injuries she received she was not competent to testify, cannot be sustained. There was no evidence that she was not mentally competent to testify. *Lanier v. Bryan,* 184 N. C., 235, 114 S. E., 6.

The fact that one of the solicitor's questions was leading affords no ground for complaint. Uniformly it has been held that this is a matter within the discretion of the trial judge, and no prejudice therefrom is discernible here. *S. v. Hargrove,* 216 N. C., 570, 5 S. E. (2d), 852; *S. v. Buck,* 191 N. C., 528, 132 S. E., 151. The objection to the testimony of several witnesses offered in corroboration of Mrs. Warren is untenable, since her testimony was subjected to attack. *S. v. Bethea,* 186 N. C., 22, 118 S. E., 800; *S. v. Gore,* 207 N. C., 618, 178 S. E., 209.

The defendant's exception to the admission in evidence of his confession as to certain material facts cannot be sustained. The trial judge heard evidence as to the circumstance and character of the alleged confession, and found that the defendant's statement was voluntary and made without inducement, threat or hope of reward. This finding was supported by evidence which was not contradicted. *S. v. Fain,* 216 N. C., 157, 4 S. E. (2d), 319. There was no evidence that defendant's confession was wrung from him "by flattery of hope, or by the torture of fear." *S. v. Livingston,* 202 N. C., 809, 164 S. E., 337.

The testimony that at the tobacco plant bed, shortly after the alleged assault, near a puddle of blood, was found a brick with hairs clinging to it, was competent, as was also the admission of the brick as an exhibit.

The defendant in his testimony on the trial admitted assaulting Mrs. Warren and striking her, but denied the accomplishment of the crime, or that he struck her with a brick. The court's charge to the jury was free from error, and no exception thereto was noted.

The defendant has received a fair trial. The evidence was direct and positive, and he has no legal ground of complaint that the jury accepted the State's evidence and found him guilty of the crime charged in the bill of indictment.

The judgment is affirmed, and in the trial we find

No error.

STATE v. J. C. CHAMPION.

(Filed 14 October, 1942.)

1. Homicide § 22: Criminal Law § 40—

It is a general rule in this State that, in the trial of a homicide case, evidence as to general character and general traits of character of the person killed is immaterial and incompetent; yet, there are exceptions to this rule, one of them pertinent here, that is, where there is evidence of self-defense, the general character of the deceased as a violent and dangerous man is admissible, to which the State may reply in rebuttal only and limited to deceased's general reputation for peace and quiet.

2. Homicide § 22—

Where, in support of a plea of self-defense, in a prosecution for murder, after defendant has testified that deceased was a man of violent character, it was prejudicial error for the State, on cross-examination of defendant's witnesses to elicit, over objection, evidence of deceased's general good character.

APPEAL by defendant from *Hamilton, Special Judge,* at Special May Term, 1942, of VANCE.

Criminal prosecution upon bill of indictment charging defendant with the murder of one William Reid.

Upon arraignment defendant pleaded not guilty.

The solicitor stated in open court that the State would not ask for a verdict of murder in the first degree, but for a verdict of murder in the second degree or manslaughter as the facts would justify.

Verdict: Guilty of murder in the second degree.

Judgment: Confinement in the State's Prison for a term of not less than ten nor more than fifteen years.

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

A. A. Bunn, J. M. Peace, and W. H. Yarborough for defendant, appellant.

WINBORNE, J. Upon the trial below after defendant in support of his plea of self-defense had testified that deceased, William Reid, was a "dangerous and violent man," the State in cross-examining several witnesses introduced by defendant, and over the objection of defendant, elicited evidence of the general good character of the deceased. This evidence is incompetent, and the admission of it constitutes prejudicial error for which defendant is entitled to a new trial.

It is a general rule, well and long established in this State, that, in the trial of a homicide case evidence as to the general character and the general traits of character of the person killed is immaterial and incompetent. *S. v. Barfield,* 30 N. C., 344; *S. v. Hogue,* 51 N. C., 381. Yet, there are two well settled exceptions to this rule which are as firmly imbedded in the law as is the rule and, in the words of *Bynum, J.,* in *S. v. Turpin,* 77 N. C., 473, 24 Am. Rep., 455, "have become a general rule subordinate to the principal rule." One of these exceptions is pertinent here, that is, where there is evidence tending to show that the killing may have been done in self-defense, evidence as to the general character of the deceased as a violent and dangerous man is admissible. See *S. v. Turpin, supra; S. v. Floyd,* 51 N. C., 392, and other cases too numerous to be listed here, where this exception to the rule as stated in the *Turpin case, supra,* has been applied to various factual situations where the competency of proffered testimony has been considered. See Shepard's Annotations. When and after such evidence is offered by the defendant and admitted by the court, the State may then offer evidence in rebuttal, but such evidence must be in rebuttal and limited to the general reputation of the deceased for peace and quiet. In the present case the evidence offered goes far beyond this limit.

In view of the fact that the case goes back for a new trial, other exceptions, seriously and forcefully pressed for error, need not be considered as they may not recur.

New trial.

L. R. LEE AND WIFE, ALLIE C. LEE, ET AL. v. N. M. JOHNSON AS AN INDIVIDUAL, AND TRADING AS THE JOHNSON COTTON COMPANY, AND WIFE, BESSIE JOHNSON, T. H. SANSOM, TRUSTEE, AND E. A. TART AND WIFE, ALMETA TART.

(Filed 14 October, 1942.)

Mortgages § 24: Limitation of Actions § 2e—

Plaintiffs executed to defendant on 29 January, 1931, a deed in fee simple on its face but in fact a mortgage, and on 22 November, 1934, defendant conveyed the *locus in quo,* with warranty, to an innocent purchaser for value, and suit brought 11 January, 1940, *held* that plaintiffs' only remedy is action for damages for wrongful alienation, which is barred by the statute of limitations. C. S., 441.

APPEAL by plaintiffs from *Harris, J.,* at Raleigh, N. C., 5 August, 1942, as of a regular term of JOHNSTON. Affirmed.

On 29 January, 1931, plaintiffs executed and delivered to defendant Johnson a paper writing which was, on its face, a deed in fee simple,

conveying the *locus in quo*. Under all the facts and circumstances surrounding the transaction it, in fact, constituted a mortgage to secure a debt. They surrendered possession to Johnson in the fall of 1931. On 22 November, 1934, Johnson conveyed said land by warranty deed to defendant E. A. Tart and said Tart entered into possession thereof. On 11 January, 1940, plaintiffs instituted this action for an accounting for rents and profits and to recover the realty described in the deed dated 29 January, 1931, which included a one-half acre tract not now involved in this action.

The cause was referred and the referee found that defendant Tart is an innocent purchaser for value without notice. To this finding plaintiffs do not except. He found also that Johnson is indebted to plaintiffs in the net sum of $1,100.89 and recommended judgment therefor. On appeal the court below, being of the opinion that plaintiffs' cause of action is barred by the three-year statute of limitations and by laches, entered judgment that plaintiffs recover nothing except as set forth in judgment rendered at the November Term, 1941. Plaintiffs excepted and appealed.

Parker & Lee for plaintiffs, appellants.
I. R. Williams and Lyon & Lyon for defendants, appellees.

PER CURIAM. The defendant Johnson, ostensible owner of a fee simple title, having conveyed the *locus in quo* to an innocent purchaser for value, plaintiffs' only remedy is by action for damages for the wrongful alienation and conversion of their land by the defendant Johnson. This action was instituted more than five years after the wrongful conversion. The ruling of the court below is sustained by *Davis v. Doggett*, 212 N. C., 589, 194 S. E., 288. See also *Ferguson v. Blanchard*, 220 N. C., 1, 16 S. E. (2d), 414, and *Massengill v. Oliver*, 221 N. C., 132.

The judgment below is

Affirmed.

STATE v. ARTHUR DOVE.

(Filed 14 October, 1942.)

1. Criminal Law § 55—

The ordering of a mistrial in a case less than capital is a matter of discretion.

2. Criminal Law § 19—

Where defendant indicted for murder, solicitor's election to ask for a verdict for murder in the second degree or manslaughter, is equivalent to a *nolle prosequi* on the capital charge.

HAYNES *v.* FELDSPAR PRODUCING CO.

APPEAL by defendant from *Harris, J.*, at May Term, 1942, of HARNETT. Appeal dismissed.

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

Neil McK. Salmon and C. L. Guy for defendant.

PER CURIAM. The defendant was indicted for murder. However, at the solicitor's election he was not put on trial for first degree murder but for murder in the second degree or manslaughter. This was equivalent to taking a *nolle prosequi* on the capital charge. *S. v. Gregory,* 203 N. C., 528, 166 S. E., 387. At the close of the State's evidence defendant's motion for judgment as of nonsuit was denied. The solicitor then moved to be permitted to offer additional testimony. This motion was allowed, and, it appearing that the evidence desired was not presently available, the court ordered a mistrial, and continued the case. The defendant excepted to the ruling of the trial judge, and appealed to this Court.

The ordering of a mistrial in a case less than capital is a matter in the discretion of the court. *S. v. Johnson,* 75 N. C., 123; *S. v. Upton,* 170 N. C., 769, 87 S. E., 328; *S. v. Ellis,* 200 N. C., 77, 156 S. E., 157; *S. v. Guice,* 201 N. C., 761, 161 S. E., 533; *S. v. Watson,* 209 N. C., 229, 183 S. E., 286. In capital cases only is the judge required to find the facts and place them on record so that upon a plea of former jeopardy the action of the court may be reviewed. *S. v. Tyson,* 138 N. C., 627, 50 S. E., 456; *S. v. Beal,* 199 N. C., 278 (295), 154 S. E., 604.

It is apparent that the appeal is premature and must be dismissed. *S. v. Andrews,* 166 N. C., 349, 81 S. E., 416; *S. v. Ford,* 168 N. C., 165, 83 S. E., 831.

Appeal dismissed.

JAMES R. HAYNES, SR., v. FELDSPAR PRODUCING COMPANY, EMPLOYER, AND BITUMINOUS CASUALTY CORPORATION, CARRIER.

(Filed 21 October, 1942.)

1. Master and Servant § 55d—

Findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive on appeal.

2. Master and Servant § 40b—

In a proceeding to recover compensation, under occupational disease sections of the Workmen's Compensation Act, alleging that plaintiff was afflicted with silicosis, there was evidence that plaintiff had worked in

feldspar mines for twenty years and had contracted silicosis before his last employment, which was as a mucker in defendant's mine from 24 September, 1940, to 24 January, 1941, it being an open pit mine using a drill twice a week, and tests showing that plaintiff was exposed to several times more dust particles per cubic foot than the maximum for the limit of safety, and an examination on 28 November, 1940, showing that plaintiff had moderately advanced silicosis with probable infection and was unable to perform normal labor as a mucker, both at that time and since. *Held:* (1) Testimony of a medical expert, in answer to a hypothetical question, fairly stating the essential facts, competent to show plaintiff injuriously exposed to the hazard of silicosis; and (2) the evidence generally sufficient to show injurious exposure and to sustain the award. C. S., 8081 (6).

BARNHILL, J., concurs in result.

APPEAL from *Johnston, Special Judge,* at March-April Term, 1942, of MITCHELL. Affirmed.

The plaintiff brought this proceeding to recover compensation under the occupational disease sections of the Workmen's Compensation Act, complaining that he was afflicted with silicosis and was last injuriously exposed to the hazards of such disease while employed by the defendant company. From the award made by the Industrial Commission, the defendants appealed; and at the hearing in the Superior Court, the award was affirmed and from this judgment defendants appealed to this Court.

The controversy here concerns the sufficiency of the evidence to support the findings of fact by the Commission that plaintiff was last injuriously exposed to the disease while working in the employment of defendant in its feldspar mine in Mitchell County.

The evidence discloses that the plaintiff had been working in feldspar mines in North Carolina for about twenty-eight years. From 1927 to 1940, he worked for the Tennessee Mineral Corporation at its English Knob Mine, which was an underground and closed mine, in which there was flint and dust.

At this mine the plaintiff did some drilling and worked close to the drillers. The "silica dust" in that mine was pretty bad, and plaintiff was exposed to it constantly. The method of dry drilling was used in the mine.

The plaintiff began working for the Producing Company at its Hoot Owl Mine in Mitchell County 24 September, 1940, working there as a mucker. As mucker his duties required him to shovel up feldspar and put it in the cars.

The Hoot Owl Mine was an open mine, using only one drill, and using this two days a week. Plaintiff worked in positions from five to thirty feet from where the drill was used on the days it was working. There

was dust there during the time the defendant was drilling, and on other days, about 10% of the time the dust would blow down from the banks and earth's surface. The dust came from feldspar and flint in that mine.

On 24 January, 1941, plaintiff received a letter from Dr. Vestal informing him that he had silicosis, and plaintiff worked no more after that date. The letter is as follows:

"NORTH CAROLINA
STATE BOARD OF HEALTH
RALEIGH

January 21, 1941

"MR. JAMES R. HAYNES, SR.,
Spruce Pine, N. C.

"DEAR MR. HAYNES: Reference is made to our examination of you at Spruce Pine on November 28th. Your history reveals a cough of seven years duration, dry in type and worse at night. Moderate shortness of breath which is not progressive is admitted over a period of three years. Your physical examination reveals little of importance, however, your x-ray reveals rather widespread disease distributed throughout both lungs which we believe to be due to your previous dust exposure. We believe that this places you in a classification of moderately advanced silicosis with probable infection. The infection may be of a tuberculous nature but this, of course, can only be determined by further study of your case, which should be done at a sanatorium.

"We are, of course, unable to issue to you a work card necessary for employees engaged in a dusty trade.

Yours very truly,
Signed: T. F. VESTAL, M.D.,
Director Division of
Industrial Hygiene.

"TFV: vh.
Cc: N. C. Industrial Commission.
Feldspar Producing Company."

Since that time plaintiff has been short-winded, his heart has beat fast, and he has coughed. He has done no work except in his vegetable garden at home.

Plaintiff testified that when he worked for the Tennessee Mineral Corporation, he was short-winded, too, and his heart beat fast, and his chest hurt him sometimes then. He had been coughing and short-winded for seven years, and during that time his heart had been beating fast.

M. F. Trice, engineer for the Division of Industrial Hygiene, a joint activity of the Industrial Commission and the State Board of Health, specializing in dust counts and occupational environments as they relate to occupational diseases, examined the Hoot Owl Mine of the defendant in the fall of 1936, and also on the day of his testimony. He testified that there had been no material changes in the mine since his examination in 1936. At that time he took specimens. The first sample represented dry drilling near the open wall of the open cut and the particle count on that sample indicated a dust concentration of 66½ millions per cubic foot of air. Another sample was taken 20 to 25 feet away from the driller and represented mucking. This indicated a dust count of 44.8 million particles per cubic foot of air. Then another sample was taken to represent exposure and dry drilling and on this test, the concentration was 271 million particles per cubic foot of air. Another sample was taken to evaluate the mucking operation 20 feet away from the driller, and the particle counts on that sample of dust indicated a concentration of 30.2 million particles per cubic foot. In the opinion of the witness, the dust concentration in this mine is sufficient to constitute a silicosis hazard.

"When there was drilling going on in the defendant's mine, the dust count would naturally be larger than it would be when there was no drilling going on. If drilling was done there today, for all practical purposes, the dust would be gone by tonight. The counts in 1936 were made while the drilling was being done at this mine, as we always want to get the worst possible condition. The United States Public Health Service found that anything less than 10 million particles of dust per cubic foot of air was all right. However, once you pass that point, whenever a man is exposed to concentrations of dust in excess of that, there is likelihood of some ill-effects. This is based on a constant concentration, year in and year out. Two drills make more dust than one drill. The man drilling is exposed to more dust than the man who is mucking. The closer the man is to the drill, the more apt he is to breathe some of the dust. The defendant's open mine is about 60 feet deep. There would not be much dust count growing out of mucking. When the wind was blowing, I should think that any dust in the mine would be picked up and carried away with the wind."

Dr. T. F. Vestal was examined for the plaintiff. When this witness was presented, it was explained to him that the expression "last injuriously exposed" as used in the statute, N. C. Code (Michie), sec. 8081 (6), meant an exposure which proximately augmented the disease to any extent, however slight. A hypothetical question was addressed to him, based on the evidence before the Commission, and he was asked to give an opinion as to whether or not under the conditions named and the

facts presented in the hypothetical question, the exposure to which the employee was subjected from 24 September, 1940, to 24 January, 1941, while working for the defendant employer, constituted an injurious exposure, or whether or not as a result of the exposure to said hazard, he was injuriously exposed to the hazard of the occupational disease of silicosis. The doctor replied: "You haven't left me much leeway. I have an opinion that it did constitute an injurious exposure."

The doctor further testified as follows:

"I examined the plaintiff on October 12, 1936, on November 8, 1937, on June 7, 1938, on October 24, 1938, and on November 28, 1940. In 1936, we found his condition negative. On November 8, 1937, we found that he had early silicosis, commonly referred to as silicosis one, without symptoms, and healed pulmonary tuberculosis. On October 25, 1938, I examined him and found that he had silicosis one. On November 28, 1940, I examined him and found that he had moderately advanced silicosis with probable infection. I have not seen the plaintiff from November 28, 1940, until today.

"I did not issue him a work card after the examination of November 28, 1940. This is the examination referred to in my letter to the plaintiff dated January 21, 1941 (heretofore introduced by the plaintiff and hereinabove set forth). In my opinion, the plaintiff is disabled to perform normal labor as a mucker and that he has been since the date of my report. During the four months while the plaintiff worked for the defendant employer, there were, as I understand, about 32 days on which the drill was operated there in the mine. If there had not been any dust on the other days, I don't think that this would amount to an injurious exposure. I can't state whether or not the plaintiff's silicosis advanced any at all between the time that he entered the defendant's employment and the time that he left it. I made no examination between October 25, 1938, and November 28, 1940, and it is entirely possible that the condition that I found on November 28, 1940, was existing on September 24, 1940. With the evidence and the knowledge that I have available to my mind, I can't say that he is so much as one degree worse off than he was on September 24, 1940. I don't think there are any cases of silicosis on record where the disease has developed in less than a year.

"I heard the plaintiff testify that he worked for the Tennessee Mineral Corporation and its predecessor up there at that mine for something more than 20 years. I know that he has had silicosis since 1936. There are cases on record in which the actual development of the disease has occurred after the individual has been removed from the exposure. I think that it is a reasonable assumption to say that if he is exposed five days a week, he would be more apt to be damaged than he would be

if he were exposed only two days a week, and that if he is exposed eight hours a day, he would be more apt to be injured than he would be if he were exposed only two hours a day over a period of time.

"An open-air mine or cut would have less potential hazardous dust than a closed, underground mine. If the ground in the mine is moist, the dust would be less likely to blow up and recirculate. As far as the plaintiff is concerned, I can't say that he is a bit worse off, not even 1% worse off, than he was on September 24, 1940. I can't say that he is 1% worse off or 1% better off."

Defendant introduced evidence to the effect that only one drill was employed in the mine, which was an open mine; that the bottom of the mine during the four months period was wet practically all the time, that it had rained a great deal, that the sides of the mine dripped and leaked through from the right side; that plaintiff was a mucker and did no drilling; that the drill was not used more than twice a week, and some weeks did not average that much; that plaintiff was generally at least twenty feet away from the place where the other man was using the drill; that the wind generally came from the east end of the mine and plaintiff generally worked in the middle of the mine, and that the drill was at the other end of the mine, so that the wind blew past the plaintiff toward the drill.

There was further testimony that after the receipt of the letter from Dr. Vestal plaintiff was discharged from employment; that from the "standpoint of the layman," plaintiff did not look any worse off the day he was discharged than the day he came to work. That except on occasional days, which were not more than twice a week, when the one drill was used, there was no dust in the mine except maybe the dirt that would be blown from the surface of the earth across the cut or mine—just normal dust like you would see out on any road.

There was further testimony from the defendant substantially to the same effect.

The defendants contend that there was no evidence to support the award.

Watson & Fouts for plaintiff, appellee.
Guthrie, Pierce & Blakeney for defendants, appellants.

SEAWELL, J. The appeal presents the single question whether there is any evidence to support the finding of the Commission that the plaintiff was injuriously exposed to conditions augmenting his already contracted silicosis while in the employment of the defendant company. It is elementary that we are bound by the findings of fact of the Industrial Commission when they are supported by competent evidence, both

under the statute itself and by the custom of the Court. We refrain from multiplying citations of authority. It is also equally well established that the evidence should be considered in the light most favorable to the plaintiff, and that he is entitled to the benefit of every reasonable inference therefrom.

If the hypothetical question addressed to Dr. Vestal by Mr. Kimzey, examining member of the Commission, fairly represents the facts of the evidence—and we think it does—the affirmative answer of this medical expert must be accepted as competent evidence in support of the finding of the Commission. It is true that the witness was apparently dissatisfied with the form of the question—a feeling which seemed to be prompted by the thought that any advance in plaintiff's disease during the comparatively short period of his employment by defendant might be regarded as negligible. Obviously, the witness could not be permitted to put his own construction on the law; and we think the definition supplied by the Commission was substantially correct.

But outside of this opinion evidence, we find testimony of facts from which reasonable inferences may be drawn amounting to legal evidence; how strong is not for us to say.

Dr. Vestal had examined the plaintiff on 12 October, 1936, 8 November, 1937, 7 June, 1938, 24 October, 1938, and 28 November, 1940. On the first examination, plaintiff's condition was negative; in 1937, he had early silicosis, commonly referred to as "silicosis one," without symptoms, and healed pulmonary tuberculosis; in 1938, his condition was still "silicosis one"; on 28 November, 1940, he had advanced silicosis with probable infection. This is the examination referred to in Dr. Vestal's letter of 21 January, 1941, and no examination had been made meantime.

Upon the last examination made after the plaintiff had been working in the defendant's mine for a period of two months, there was a remarkable advance in the disease over the condition existing at the previous examination. The plaintiff worked in defendant's mine from 24 September, 1940, to 24 January, 1941, a period of four months. The same causes which originally gave rise to the silicosis were present in defendant's mine in a very pronounced order. While the evidence shows that the maximum limit of safety is 10 million dust particles in a cubic foot of air, the plaintiff worked near the drill where there were 271 million dust particles per cubic foot of air, from there all the way to twenty feet from the drill where there were 30.2 million particles per cubic foot of air. Huge quantities of this flint-laden air must have been inhaled hourly. The same reasoning which would attribute a major portion of the plaintiff's much advanced condition of silicosis to his previous exposure in the Tennessee mines would refer at least a minor part of it to his exposure in defendant's mine. Otherwise, the Commission would

have been forced to accept the view that at the time the plaintiff entered the service of the defendant company, his disease had reached the point of saturation—that there was no longer any sound tissue in the lungs to be scarred by the cutting particles of flint and reduced to a fibroid state. But although his breath was short and his heart beat faster in an effort to oxygenate the blood through the narrowing lung area which still retained its function, we must assume, because he still lived and breathed, he was capable of further injury.

Perhaps on a comparative basis, the chief responsibility for plaintiff's condition morally rests upon his Tennessee employers; but not the legal liability. It must have been fully understood by those who wrote the law fixing the responsibility on the employer in whose service the last injurious exposure took place, that situations like this must inevitably arise, but the law makes no provision for a partnership in responsibility, has nothing to say as to the length of the later employment or the degree of injury which the deleterious exposure must inflict to merit compensation. It takes the breakdown practically where it occurs—with the last injurious exposure.

Whether this properly distributes the burden of compensation over the industry is not for us to say. The law in its present form appears in the statutes of many states. If experience should require revision, it must be at the hands of the Legislature. It is to be noted that the prospective employer can avoid liability, if he so desires, by insisting that the candidate for employment be examined, and a prompt report made, before he is received into the service.

A careful review leads us to the conclusion that the judgment of the court sustaining the award should be

Affirmed.

BARNHILL, J., concurs in result.

CHARLES L. McNEILL, LEE W. McNEILL, ANNA K. McNEILL, ORA BELLE McNEILL SIMMERLY, AND RILEY B. McNEILL, v. EDWARD BLEVINS AND ALICE BLEVINS.

(Filed 21 October, 1942.)

1. Deeds § 11—

The court seeks to ascertain the intent of the parties as embodied in the entire instrument, and each part of a deed must be given effect if this can be done by reasonable interpretation, and it is only after subjecting an instrument to this principle of construction that a subsequent clause may be rejected as repugnant or irreconcilable.

2. Deeds §§ 13a, 15—

Where the entire estate, in unmistakable terms, is given the grantee in a deed, both in the premises and *habendum*, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected.

3. Same—

The fee simple title conveyed to A in a regular warranty deed is not divested or limited by a clause, after the description, that the grantors "doth hereby except or retain our life's maintenance from off the land described above, and after our expiration this land with all interest and appurtenances thereto shall all belong to said A and his children only."

APPEAL by plaintiffs from *Johnston, Special Judge,* at March Term, 1942, of MITCHELL. Affirmed.

This was an action to remove cloud from plaintiffs' title to certain land, and was heard upon an agreed statement of facts. From judgment thereon that plaintiffs had no title to the land, and that the defendants were the owners thereof, the plaintiffs appealed.

Huskins & Wilson for plaintiffs.

M. L. Wilson and Charles Hutchins for defendants.

DEVIN, J. The determination of the question presented by this appeal depends upon the construction of the deed under which both plaintiffs and defendants claim. The pertinent portions of the deed are as follows:

"This deed, made this 21st day of August 1911, by R. N. McNeal and Margaret McNeal, of Mitchell County and State of North Carolina, of the first part, to Chas. L. McNeal, of Mitchell County and State of North Carolina, of the second part: WITNESSETH, that said R. N. McNeal and his wife, Margaret McNeal, in consideration of ten dollars, to them paid by Chas. L. McNeal, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents doth bargain, sell and convey to the said Chas. L. McNeal his heirs and assigns, a certain tract or parcel of land in Mitchell County (describing it). We, R. N. McNeal and Margaret McNeal doth hereby except or retain our life's maintenance from off the land described above, and after our expiration this land with all interest and appurtenances thereto shall all belong to said Chas. L. McNeal and his children only.

"To have and to hold the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging to the said Chas. L. McNeal, his heirs and assigns, to their only use and behoof forever," with covenants of seizin and warranty to "Chas. L. McNeal, his heirs and assigns."

It appears from the facts agreed that in 1926 Chas. L. McNeal, the grantee named in the deed, and his wife executed to the defendants a

mortgage on the described land to secure a debt. Default having been made in the payment of the debt, and in accordance with the power of sale contained in this mortgage, the mortgagees in 1941 sold the land at public auction and Taylor Blevins became the last and highest bidder. In due course deed was accordingly executed by the mortgagees and delivered to Taylor Blevins.

The plaintiffs are children of Chas. L. McNeal, and now spell the name McNeill. R. N. McNeal and wife are dead. The plaintiffs contend that by the clause immediately following the description in the quoted deed the grantors limited the conveyance to Chas. L. McNeal and his children; that while Chas. L. McNeal had no children at the time of the execution of the deed, Lee McNeill, born 2 January, 1912, was *in esse,* and that he and Chas. L. McNeill took as tenants in common. *Cullens v. Cullens,* 161 N. C., 344, 77 S. E., 228.

We are unable to agree with this construction of the deed. We do not think that the reservation of a charge on the land in favor of the grantors, followed by the expression that after their death the land should belong to Chas. L. McNeal and his children, should be held to express the intention on the part of the grantors to divest or limit the fee simple title which they had definitely conveyed, both in the premises and in the *habendum,* in both the preceding and subsequent clauses of the deed, to Chas. L. McNeal and his heirs.

It does not appear that the grantors by the insertion of this clause intended to introduce a new grantee, or that that interpretation should be given the language employed. At that time Chas. L. McNeal had no children in being. The premises of the deed designated the grantee as Chas. L. McNeal. The thing granted was described. The conveyance was in fee simple. Both the *habendum* and the warranty are in accord. No contingency is suggested upon which the title previously conveyed should be divested or limited. *Boyd v. Campbell,* 192 N. C., 398, 135 S. E., 121. If the clause be given the effect contended by plaintiffs, it would introduce an additional grantee, while in all other parts of the deed the conveyance is to Chas. L. McNeal alone. *Bryant v. Shields,* 220 N. C., 628, 18 S. E. (2d), 157.

Unquestionably the cardinal principle in the construction of deeds is to discover the intent of the grantors, and it is equally true that this intent is to be ascertained from the language of the deed itself; that is, from all parts of the instrument taken together. *Dismukes v. Wright,* 20 N. C., 346; *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356. While it has been declared that as a rule, if there are repugnant clauses in a deed, the first will control and the last will be rejected (*Benton v. Lumber Co.,* 195 N. C., 363, 142 S. E., 229, and *Boyd v. Campbell, supra*), this rule will

not be allowed to prevail against the obvious intention of the parties to the deed. It was said in *Bryant v. Shields,* 220 N. C., 628, 18 S. E. (2d), 157: "The principle is also established that for the purpose of ascertaining the intent of the maker all parts of the deed should be considered, but in doing so recognized canons of construction and settled rules of law may not be disregarded."

The court seeks to ascertain the intent of the parties as embodied in the entire instrument, and each part of the deed must be given effect if this can be done by reasonable interpretation, and it is only after subjecting an instrument to this principle of construction that a subsequent clause may be rejected as repugnant or irreconcilable. *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79; *Bagwell v. Hines,* 187 N. C., 690, 122 S. E., 659; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 924.

In *Wilkins v. Norman,* 139 N. C., 40, 51 S. E., 797, it was said: "The entire estate, in unmistakable terms, is given the grantee both in the premises and the *habendum.* The warranty is in harmony with the preceding parts of the deed; following the warranty there is introduced two entirely new clauses, both repugnant to the estate and interest conveyed." Upon the facts thus stated the repugnant clauses were rejected.

The principles upon which the decision in *Shephard v. Horton,* 188 N. C., 787, 125 S. E., 539, was based are not controlling on this record. In that case it was said that "ordinarily the written and printed parts of a deed are equally binding; but if they are inconsistent the writing will prevail over the printed form." Here the facts are not such as to invoke that principle. While the clause relied on by plaintiffs was written in ink, on a partly printed form, it also appears that in each instance in which apt words of conveyance designated Chas. L. McNeal as sole grantee, the words "Chas. L. McNeal and his heirs" were also written in ink.

No point is made of the fact that the grantee in the deed from the mortgagees is not a party here. It was said that he took with notice of plaintiffs' suit. However, as it has been adjudged that plaintiffs have no title to the land, the fact that Taylor Blevins does not appear as a formal party has now become immaterial.

Judgment affirmed.

C. L. BEAM v. K. W. WRIGHT AND WIFE, MARY B. WRIGHT, ORIGINAL PARTIES DEFENDANT, AND FIRST CITIZENS BANK & TRUST COMPANY, ADDITIONAL PARTY DEFENDANT.

(Filed 21 October, 1942.)

Pleadings § 16a—

In an action by plaintiff against original defendants on a promissory note, the original defendants filed answer and cross complaint making a bank a defendant and alleging a series of transactions with the bank in which they did not receive proper credits, and also alleging that plaintiff, an officer of the bank, while original defendants were negotiating a loan from the bank, lent them $700 or $800 temporarily by honoring their checks on the bank, and prevailed upon them to sign a note in blank to plaintiff personally to cover the checks, which note plaintiff filled out for $5,976.00, and which is the note in suit. *Held:* The bank's demurrer, under C. S., 511, should have been sustained, there being defects in the joinder of both parties and causes.

APPEAL by defendant First Citizens Bank & Trust Company from judgment overruling its demurrer to cross complaint filed by original defendants Wright and wife entered by *Frizzelle, J.*, at June Term, 1942, of CARTERET.

This is a civil action instituted by plaintiff C. L. Beam against original defendants K. W. Wright and wife, Mary B. Wright, upon an alleged promissory note for $5,976.00 dated 25 August, 1940, maturing 26 December, 1940. The complaint alleges the execution and delivery of the note, its maturity and nonpayment.

The original defendants, K. W. Wright and wife, Mary B. Wright, filed answer and cross complaint, and asked that the First Citizens Bank & Trust Company be made a party defendant. The answer and cross complaint allege a series of transactions between the Wrights and the First Citizens Bank & Trust Company beginning with a loan of $1,500.00 by the bank to the Wrights on 15 December, 1938, and continuing at various times thereafter with other loans evidenced by notes signed and delivered by them to the bank, for which, however, they did not receive proper credits on the records of the bank; and on 28 February, 1940, the Wrights executed a note to the bank for $4,700.00, which included all their indebtedness to the bank, and this last mentioned note was paid in full and thereafter the bank had no further claim against the Wrights; the answer and cross complaint of the Wrights further allege that in June, 1940, they applied to the bank for a loan of $2,000.00, and while waiting for this loan to be approved by the bank they borrowed from C. L. Beam, personally, $700.00 or $800.00, this being accomplished by

the Wrights drawing checks on the bank and the plaintiff C. L. Beam, who was an executive officer of the bank, having said checks honored and presumably, personally paying the bank; that subsequently, when the Wrights had issued checks on the bank to an amount between $700.00 and $800.00, the plaintiff C. L. Beam prevailed upon the Wrights to sign a note to him, as he represented to them, to cover the amount due him for checks drawn on the bank by the Wrights and paid by Beam, personally; that this note was in blank when signed, the plaintiff Beam representing that he did not know the exact amount due him, but that he would get it when the safe, which was under a time lock, could be opened, and that he would then fill the note out for the correct amount; that the plaintiff Beam took the note so signed in blank and filled it out for the sum of $5,976.00, when the true amount due the plaintiff Beam by the defendants Wright was between $700.00 and $800.00, and that the note sued on was the note so procured by the plaintiff. The defendants Wright admit an indebtedness to the plaintiff Beam of between $700.00 and $800.00.

The First Citizens Bank & Trust Company filed demurrer to the answer and cross complaint of the defendants Wright upon the ground, *inter alia,* that there is a defect of parties defendant and that several causes of action have been improperly united. C. S., 511.

The demurrer was overruled and the demurring defendant, the First Citizens Bank & Trust Company, excepted and appealed, assigning as error the court's action "in rendering the judgment as set out in the record."

L. I. Moore and R. E. Whitehurst for K. W. Wright and wife, Mary B. Wright, appellees.

Wheatley & Wheatley for First-Citizens Bank & Trust Company, appellant.

SCHENCK, J. We are constrained to hold that the judgment of the Superior Court overruling the demurrer was error.

If the defendants Wright did not receive proper credits on the records of the bank for notes to the bank which they signed and delivered, as they allege, their relief would be an action against the bank and not the plaintiff Beam; and if the defendants Wright owed the plaintiff Beam between $700.00 and $800.00 on a note which the Wrights executed to Beam, the bank would have no interest in the amount so due.

The First Citizens Bank & Trust Company, the appealing defendant, is not affected by and has no interest in the cause of action alleged in the complaint for the reason that said bank has no interest in any alleged cause of action between the plaintiff Beam and the defendants Wright.

The plaintiff Beam likewise is not affected by and has no interest in any cause of action alleged in the cross complaint of the defendants Wright against the First Citizens Bank & Trust Company.

The statute, C. S., 507, classifying what causes of action may be united, specifically provides that "the causes of action so united . . . must affect *all* the parties to the action," with certain exceptions, in which this action is not included. None of the causes of action alleged in the complaint or in the cross complaint affect *all* the parties to this action, and therefore the demurrer thereto should have been sustained. *Roberts v. Mfg. Co.*, 181 N. C., 204, 106 S. E., 664; *Bank v. Angelo*, 193 N. C., 576, 137 S. E., 705; *Shemwell v. Lethco*, 198 N. C., 346, 151 S. E., 729; *Wingler v. Miller*, 221 N. C., 137, 19 S. E. (2d), 247; *Finance Corporation v. Lane*, 221 N. C., 189, 19 S. E. (2d), 849.

The demurrer should have been sustained and the cross action dismissed, *Wingler v. Miller, supra*, and cases there cited, and the case is therefore remanded for such action.

Reversed.

W. L. POTTS v. UNITED SUPPLY CO. ET AL.

(Filed 21 October, 1942.)

Venue §§ 1c, 4a—

In an action in Catawba County, residence of plaintiff, for an alleged wrongful conspiracy and damages therefor which occurred in Wilkes County, against a corporation and two individuals acting as the corporation's agents, one of the individuals being described as a deputy sheriff of Wilkes County, a motion for change of venue to Wilkes County, under C. S., 464, was properly denied, there being no allegation that the acts complained of were done by the deputy sheriff by virtue of his office. *Quœre*, whether a deputy sheriff is a "public officer" within the meaning of this statute.

APPEAL by defendants from *Alley, J.*, at February Term, 1942, of CATAWBA.

Civil action for an alleged wrongful conspiracy and damages resulting from its execution, instituted in the county of plaintiff's residence, against citizens and residents of Wilkes County.

The complaint alleges that on 16 November, 1939, in Wilkes County, "the defendants, Paul J. Vestal and Homer Brookshire, the said Homer Brookshire acting and representing himself to be a deputy sheriff of Wilkes County, both of whom were acting as agents and representatives of their codefendant, United Supply Company, Inc., and within the scope of their employment, and with full knowledge and consent of their codefendant, United Supply Company, Inc.," did unlawfully and in

furtherance of an illegal conspiracy, enter upon the premises of the plaintiff and take into their possession and carry away certain personal property of the plaintiff to his great injury and damage; that "the acts and conduct of the United Supply Company, Inc., Paul J. Vestal and Homer Brookshire was all the result of a collusion between them," etc.

Before answering and before the time for answering had expired, the defendants moved for change of venue to Wilkes County as a matter of right on the ground that Homer Brookshire is a public officer of Wilkes County, to wit, a deputy sheriff, and that the action relates to an act done by him by virtue of his office.

The clerk ordered the case removed, which was reversed on appeal to the judge of the Superior Court. From this latter order, the defendants appeal, assigning error.

W. H. Childs and Fred D. Caldwell for plaintiff, appellee.
W. H. McElwee for defendants, appellants.

STACY, C. J. Defendants predicate their application for change of venue on C. S., 464, which provides that an action against a public officer or a person especially appointed to execute his duties, for an act done by him by virtue of his office, must be tried in the county where the cause of action, or some part thereof, arose, subject to the power of the court to change the place of trial for good cause shown.

It is contended that the cause of action arose in Wilkes County; that as to Homer Brookshire, it is based, in part at least, on an act done by him *colore officii,* and that, by the terms of the statute, the action must be tried in Wilkes County. *Kellis v. Welch,* 201 N. C., 39, 158 S. E., 742.

Concededly, the cause of action arose in Wilkes County. In respect of Homer Brookshire, however, it is not alleged that he participated in the conspiracy as a deputy sheriff, but as an agent and representative of the corporate defendant. This suffices to defeat the application for change of venue as a matter of right. The action is not against the sheriff for alleged malfeasance of his deputy. *Lyle v. Wilson,* 26 N. C., 226.

True, when an officer is sued for an act necessarily done *colore officii,* proper venue may not be defeated by alleging that the act was done by him as an individual. *Shaver v. Huntley,* 107 N. C., 623, 12 S. E., 316. But this is not the present case.

Moreover, there are cases, or *dicta,* which seem to suggest that a deputy sheriff is not a "public officer" within the meaning of this section. *Styers v. Forsyth County,* 212 N. C., 558, 194 S. E., 305; *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826; *Blake v. Allen,* 221 N. C., 445.

On the record as presented, the application was properly denied.

Affirmed.

STATE v. RAY DAVIS.

(Filed 21 October, 1942.)

1. Assault and Battery §§ 7d, 13—

In a prosecution for an assault with a deadly weapon, a hoe, where there was no evidence of the size, weight, length, etc., of the hoe, it was error for the trial judge to instruct the jury to convict, if they should be satisfied beyond a reasonable doubt that the defendant struck the person assaulted with a hoe.

2. Assault and Battery §§ 12, 13—

In a prosecution for an assault with a deadly weapon, a hoe, where there was evidence that defendant's wife was being assaulted and defendant went to her rescue and fought with her assailant, the lower court should have submitted the case with appropriate instructions as to defendant's defense of his wife and self-defense.

APPEAL by defendant from *Clement, J.*, at March Term, 1942, of WILKES. New trial.

Criminal prosecution tried on bill of indictment charging an assault with a deadly weapon, a hoe.

Defendant hired Carmie Hayes to take him and his wife to his mother's. Two others went along. On the way they stopped because of trouble with a tire. Defendant left to get a light or for some other purpose. Evidence as to what happened thereafter is sharply conflicting. Defendant offered testimony tending to show that when he returned he heard his wife calling or "hollering" and that he found Hayes making improper proposals to and assaulting her. It was dark and defendant could not see. He asked Hayes what he was doing and Hayes called him a vile name and told him that if he came down there he would shoot him. Defendant went on to him and Hayes struck him with a tire tube and knocked him down. "Ray come back up, then he went down. That was when Ray hit him with the hoe." Defendant had picked up the hoe as he returned, after hearing his wife's calls.

There was a verdict of guilty of an assault with a deadly weapon. From judgment thereon the defendant appealed.

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

F. J. McDuffie and Trivette & Holshouser for defendant, appellant.

BARNHILL, J. The court below instructed the jury: "If you are satisfied beyond a reasonable doubt that the defendant assaulted Hayes with a hoe, it would be your duty to convict him of an assault with a

deadly weapon." This, in effect, assumes or holds as a matter of law that a hoe is *per se* a deadly weapon.

The evidence fails to disclose the weight, size, length or other description of the hoe. Apparently it was not offered in evidence to be viewed either by the judge or the jury. Hence, the charge must be held for error. The question should have been submitted to the jury under proper instructions. *S. v. Watkins,* 200 N. C., 692, 158 S. E., 393, and cases cited.

Defendant's evidence indicates that he was relying on his right to defend his wife, as well as himself. He offered more than a scintilla of evidence to support that plea. *S. v. Maney,* 194 N. C., 34, 138 S. E., 441. The court below inadvertently failed to apply the law of self-defense to this aspect of the testimony. *S. v. Anderson, ante,* 148.

It is not amiss to call attention to the fact that the bill of indictment is defective in that it alleges that the assault resulted in great damage to the defendant, rather than to the person assaulted. The solicitor may deem it advisable to procure another bill.

For the reasons stated there must be a

New trial.

STATE v. LEO PATTERSON.

(Filed 21 October, 1942.)

Courts § 2a—

On appeal from the Superior Court of Craven County, from conviction of the unlawful possession of intoxicants, where the record shows that defendant was bound over to the county court of Craven County with no record of his having been tried in that court or that there was any appeal therefrom, the Superior Court is without jurisdiction, C. S., 4607, and upon motion of the Attorney-General, appeal dismissed.

APPEAL by defendant from *Frizzelle, J.,* at June Term, 1942, of CRAVEN. Appeal dismissed.

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

H. P. Whitehurst for defendant, appellant.

SEAWELL, J. The defendant was convicted at the regular term of the Superior Court for the county of Craven on a charge of the unlawful possession for sale of three gallons of nontax-paid liquor. At the con-

clusion of the State's evidence, the defendant demurred to the evidence and moved for judgment as of nonsuit, which was denied.

Upon an inspection of the record, however, it appears that the defendant had a preliminary examination before a justice of the peace upon which probable cause was found, and he was required to make his personal appearance before the county court of Craven County for trial. It does not appear in the record that he was ever tried in that court or that there was any appeal therefrom to the Superior Court.

The law under which the county court of Craven County was organized purports to declare all crimes under the degree of felony petty misdemeanors and within the jurisdiction of that court, and gives it exclusive original jurisdiction of such offenses. When appeal is made to the Superior Court, that court, acting under its derivative jurisdiction, may try an offender upon the original warrant. Not so, however, in the exercise of its original jurisdiction. C. S., 4607. For this court, at least, it is "not otherwise provided by law," and the trial must be upon indictment.

It is possible, of course, that the defendant was regularly tried in the county court, appeal taken from conviction therein to the Superior Court, and the entire record with regard to the county court omitted from the transcript of this appeal. We cannot, however, speculate in this regard, but must base our decision upon the record as we find it. Since it appears that the defendant was not tried upon an indictment as required by law, this, standing alone, would deprive the court of power to impose a sentence and, nothing else appearing, would entitle the defendant to his discharge.

The Attorney-General, however, has moved to dismiss the appeal because the record does not disclose that the court which tried accused had jurisdiction. While some paradoxical situations have arisen in the application of the rule, it has, nevertheless, been considered essential that the jurisdiction of the trial court should be made to appear in order to sustain an appeal to this Court. Rule 19; *Spence v. Tapscott,* 92 N. C., 577; *S. v. Butts,* 91 N. C., 524.

Since upon the record it does not appear that the Superior Court tried the case under a jurisdiction derived by appeal from the county court—the only way in which such jurisdiction could have been acquired under this record—the motion to dismiss the appeal is allowed.

Appeal dismissed.

J. RAY EDMUNDSON v. LILLIAN C. EDMUNDSON.

(Filed 4 November, 1942.)

1. Judges § 2a: Courts § 1a: Judgments § 2—

The judge, holding the courts of a judicial district, has authority to act in all matters within the jurisdiction of the Superior Court, with the consent of the parties, by signing judgments out of term and in or out of the county and out of the district. C. S., 1438.

2. Judgments § 1—

While judgment by consent is a contract between the parties, put upon the record with the sanction and approval of the court, it has the same force and effect as if it had been entered by the court in regular course.

3. Same: Divorce §§ 13, 14—

Judgments and decrees, entered by consent of all parties, may be sustained and enforced, though they are outside the issues raised by the pleadings, if the court has general jurisdiction of the matters adjudicated. Holding that, while alimony against a husband cannot be awarded in an adversary proceeding in the absence of allegation, evidence or finding that he was the party at fault, it may be so awarded in a judgment by consent.

4. Divorce §§ 13, 14—

Under a consent judgment, entered in an action by a husband against his wife where no pleadings were filed, providing for certain money payments in lieu of alimony by the husband to the wife and that it shall be more than a simple judgment for debt and as binding upon plaintiff as if rendered under C. S., 1667, and, upon proper cause shown, shall subject him to such penalties as the court may require in case of contempt of its orders, the court may commit the plaintiff upon his failure to make the payments required.

DEVIN, J., dissenting.
SCHENCK, J., concurs in dissenting opinion.
SEAWELL, J., dissenting.

APPEAL by plaintiff from *Johnson, Jr., Special Judge* of the Superior Court.

Civil action for divorce from bed and board and for custody of children of the marriage, instituted in Superior Court of Wayne County on 2 September, 1939. No pleadings were filed, but a consent judgment was entered. For alleged violation of terms of this judgment, citation for contempt was issued by Harris, Judge holding courts of the Fourth Judicial District, returnable at courthouse in Lillington, North Carolina, on Tuesday, 5 May, during May Civil Term, 1942, of Superior Court of Harnett County, and, by consent of parties, heard by Johnson, Jr., Special Judge presiding, under commission duly issued in lieu of Harris, the regular judge. This appeal is from judgment on such hearing.

The record discloses these facts:

(1) After summons was issued and the time for filing complaint was extended to 22 September, 1939, a judgment, by consent of plaintiff, J. Ray Edmundson, and his counsel, Paul B. Edmundson and J. Faison Thomson, and of defendant, Lillian C. Edmundson, and her counsel, McLean & Stacy, evidenced by their several signatures thereto, was signed on 29 September, 1939, at chambers in Kinston, North Carolina, by Williams, judge resident of the Fourth Judicial District, and ordered to be recorded in the minute book in the office of the clerk of the Superior Court of Wayne County. In this judgment, after finding facts, *inter alia,* that plaintiff and defendant were married on 19 March, 1928, and lived together as man and wife until 9 June, 1939, during which period of time defendant advanced certain moneys to plaintiff which he used in his business and for which he recognized his obligation to repay, that to the union between plaintiff and defendant two children were born, that plaintiff and defendant, being unable to live together agreeably as husband and wife, have lived separate and apart since 9 June, 1939, and that differences and disagreements existing between them render it reasonably necessary to their health and happiness that they continue to live separate and apart, it is adjudged and decreed, among other things, "(a) that plaintiff and defendant shall live separate and apart from each other," (b) . . . "(c) In lieu of alimony, or other marital rights or obligations, plaintiff shall pay to defendant the sum of One Hundred Dollars ($100) per month until he has paid the total sum of Sixty-nine Hundred Eleven and No/100 Dollars ($6911), no part of which said sum is to bear interest, except any installment due hereunder after its due date shall bear interest thereon. Plaintiff shall also pay to F. Ertel Carlyle, Trustee, the sum of Fifty Dollars ($50.00) per month until the total sum of Twenty-five Hundred Dollars ($2500) has been paid said trustee, no part of which said sum is to bear interest, except any installment due hereunder after its due date shall bear interest thereon; the purpose of said payments to F. Ertel Carlyle, Trustee, being to liquidate the principal of an obligation due by plaintiff and defendant to the Mills Home and secured by a deed of trust upon the home of the defendant in Lumberton, N. C., said payments to be made on the 15th day of September, 1939, and on the 15th of each month thereafter until paid in full. The money payments provided herein shall be more than a simple judgment for debt. They shall be as effectively binding upon plaintiff as if rendered under and by virtue of the authority of section 1667, Consolidated Statutes of North Carolina, and the failure of plaintiff to make the payments, as required by this judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be required by the court, in case of contempt of its orders.

"(d) This finding of fact and judgment rendered herein shall not operate as a bar to the right of either of the parties to this action to institute suit for absolute divorce upon the grounds of two years separation, if either of the parties to this action shall so elect after two years separation of the parties.

"(e) It is further, by consent, considered, ordered and adjudged that the said J. Ray Edmundson shall have the right to convey, without the joinder of his said wife, Lillian C. Edmundson, any realty now owned and possessed by the said J. Ray Edmundson of which the said J. Ray Edmundson may hereafter become seized and possessed of; and the said Lillian C. Edmundson shall have the right to convey any realty which she now owns or which she might hereafter become seized and possessed of, without the joinder and consent of the said J. Ray Edmundson; this consent judgment being a bar to any and all right of dower to which the said Lillian C. Edmundson is or might become entitled to, in any lands owned and possessed by the said J. Ray Edmundson, or in any lands to which he might hereafter own and possess; and this consent judgment shall be and is a bar to any right of curtesy to which the said J. Ray Edmundson is entitled or might hereafter become entitled to in any lands owned and possessed by the said Lillian C. Edmundson."

It is further ordered that, "This judgment shall be recorded in the Minute Book in the office of the Clerk of the Superior Court of Wayne County, North Carolina, but shall not be indexed and cross indexed in said office, nor shall the said judgment be a lien upon any lands owned and possessed by the said J. Ray Edmundson at this time or to which he might hereafter be seized and possessed of."

(2) Thereafter, on 20 March, 1942, plaintiff through his attorneys, J. Faison Thomson and Paul B. Edmundson, gave notice to defendant that motion "to modify the judgment for alimony heretofore entered in this cause," would be made before Grady, E. J., presiding at March Special Term, 1942, of Superior Court of Wayne County, at time and place named, which notice, with copy of the motion, was served upon defendant by the sheriff of Robeson County on 24 March, 1942. In this motion it is stated that plaintiff's income has been reduced from $400 per month, at the time of signing said judgment, to $168.28 per month. No hearing has been had on this motion.

(3) The defendant, answering, by affidavit, the allegations set out in the motion of plaintiff referred to in the last preceding paragraph, admits the allegations that at the time of signing said judgment, the plaintiff had an income from his work of approximately $400, but denies other material allegations, and further moved the court to adjudge plaintiff in contempt of court for his willful failure to comply with terms of said judgment.

(4) Thereafter, on 25 April, 1942, upon said affidavit of defendant, Harris, J., holding the courts of the Fourth Judicial District, cited plaintiff to appear before him "at the courthouse in Lillington, N. C., on Tuesday, May 5th, at 12 o'clock M., to show cause, if any he may have, why he should not be adjudged in contempt of court for violation of the judgment of the court entered by his Honor, Clawson L. Williams, resident judge of the Fourth Judicial District, in the above entitled cause on 29 September, 1939."

(5) Thereafter, as stipulated of record, the parties, through their respective attorneys, agreed to submit the citation for contempt in this cause to Johnson, Jr., Special Judge, who was duly commissioned to hold and preside over the May Civil Term, 1942, of Superior Court of Harnett County, North Carolina, in lieu of Harris, the regular judge holding the courts of the Fourth Judicial District, and that the same might be heard out of term time, out of the county, and out of the district.

(6) Thereafter, Johnson, Jr., Special Judge of the Superior Court, entered judgment in which it is recited that: "This cause came on for hearing before the undersigned special judge presiding at the May, 1942, Civil Term of the Superior Court of Harnett County, upon the return of the citation issued by Honorable W. C. Harris, Judge presiding over the courts of the Fourth Judicial District, commanding plaintiff, J. Ray Edmundson, to show cause, if any he may have, why he should not be adjudged in contempt of court for his alleged willful violation of the terms of the judgment entered in this cause by Honorable Clawson L. Williams, Resident judge of the Fourth Judicial District, on 29 September, 1939"; that "it was agreed by counsel representing plaintiff and defendant that the hearing upon the citation in this cause should be heard upon affidavits and briefs out of term time, out of the county, and out of the district by the undersigned Special Judge of the Superior Court"; and that, after considering the affidavits and briefs filed by and in behalf of the parties respectively, the court finds facts, substantially as hereinbefore stated, and the further specific fact that plaintiff, after making payments in compliance with terms of the said judgment of Williams, J., for twenty-eight months,—the last payment being for the month of December, 1941,—had willfully refused to pay any further amounts as he had therein agreed "unless defendant will accept $1100.00 in cash in full settlement of the money provisions of the judgment." Upon these facts it is adjudged by Johnson, Jr., Special Judge, (1) "that the willful refusal of plaintiff since December, 1941, to make any further payments on the judgment entered by Williams, J., in this cause on 29 September, 1939 (except the said conditional offer of $1100.00), is a direct contempt of this court and its orders, amounting to continuous, willful disobedience of the terms of the judgment of Williams, J., since

January, 1942," and (2) that plaintiff, "J. Ray Edmundson be confined in the common jail of Wayne County, North Carolina, until he has made payments required under said judgment, or until he is otherwise discharged according to law."

To the signing of this judgment, plaintiff, through his attorneys, J. Faison Thomson and Paul B. Edmundson, excepts and appeals to the Supreme Court and assigns same as error.

Murray Allen for plaintiff, appellant.
McLean & Stacy for defendant, appellee.

WINBORNE, J. Appellant, in challenging the correctness and validity of the judgment from which this appeal is taken, directs his attack solely upon the validity and effect of the consent judgment signed at chambers in Kinston in the Sixth Judicial District on 29 September, 1939, by Williams, Judge resident of the Fourth Judicial District.

Four contentions, stated as questions involved on this appeal, and quoted herein, are raised and debated in brief filed in this Court. We are of opinion, however, and hold that, on the present record, the judgment may not be successfully attacked on either ground.

First: "Has the resident judge jurisdiction to sign an order out of the county and out of the district in which the cause is pending at a time when, by the law of rotation, he is holding the courts of another district?" The answer is Yes, by virtue of the provisions of the act of the General Assembly, chapter 69, Public Laws 1939, amending section 1438 of Consolidated Statutes of North Carolina, 1919, which became effective on 2 March, 1939.

In this connection the Constitution of North Carolina vests the General Assembly with power to allot and distribute in such manner as it may deem best, that portion of the power and jurisdiction of the judicial department, "which does not pertain to the Supreme Court among the other courts prescribed in this Constitution, or which may be established by law." Article IV, section 12. *Bynum v. Powe,* 97 N. C., 374, 2 S. E., 170. The Constitution further provides that "the Superior Courts shall be, at all times, open for the transaction of all business within their jurisdiction, except the trials of issues of fact requiring a jury." Article IV, section 22. *Harrell v. Peebles,* 79 N. C., 26; *Shackelford v. Miller,* 91 N. C., 181; *Bynum v. Powe, supra.* In keeping with these provisions of the Constitution, the General Assembly has provided that, "The Superior Court has original jurisdiction of all civil actions whereof exclusive jurisdiction is not given to some other court." C. S., 1436. And the General Assembly has further provided, as pertains to jurisdiction, C. S., 1438, and as pertains to entering of judgments, C. S., 598,

that "in all actions where the Superior Court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the Superior Court in vacation, or in term time, at their election." Under this authority it is well settled that under the system of rotation prescribed by the Constitution, Article IV, section 11, the judge holding the courts of a judicial district has jurisdiction to act in all matters within the jurisdiction of the Superior Court, and by consent of parties, such judge may, out of term and in or out of the county and out of the district, sign a judgment affecting any matter within such jurisdiction. *Hervey v. Edmunds,* 68 N. C., 243; *Harrell v. Peebles, supra; Shackelford v. Miller, supra; McDowell v. McDowell,* 92 N. C., 227; *Coates v. Wilkes,* 94 N. C., 174; *Bynum v. Powe, supra; Fertilizer Co. v. Taylor,* 112 N. C., 141, 17 S. E., 69; *Benbow v. Moore,* 114 N. C., 263, 19 S. E., 156; *Bank v. Gilmer,* 118 N. C., 668, 24 S. E., 423; *Hawkins v. Cedar Works,* 122 N. C., 87, 30 S. E., 13; *Westhall v. Hoyle,* 141 N. C., 337, 53 S. E., 863; *Clark v. Machine Co.,* 150 N. C., 372, 64 S. E., 178; *Killian v. Chair Co.,* 202 N. C., 23, 161 S. E., 546; and numerous other cases.

And the General Assembly, in the Act of 2 March, 1939, chapter 69, Public Laws 1939, amending C. S., 1438, provided that "The resident judge of the judicial district and the judge regularly presiding over the courts of the district shall have concurrent jurisdiction in all matters and proceedings wherein the Superior Court has jurisdiction out of term." The judgment in question was entered after the statute became effective.

Second: "Can alimony against the husband be awarded when there is no allegation, evidence or finding that he was the party at fault?" In an adversary proceeding the answer would be "No," but where, as here, the parties acted in agreement and the judgment was entered by consent, the answer is "Yes." *Holloway v. Durham,* 176 N. C., 550, 97 S. E., 486; *Keen v. Parker,* 217 N. C., 378, 8 S. E. (2d), 209.

In the *Keen case, supra,* this Court said: "It is generally held that provisions in judgments and decrees entered by consent of all the parties may be sustained and enforced, though they are outside the issues raised by the pleadings, if the court has general jurisdiction of the matters adjudicated. Annotations, 86 A. L. R., 84. And, in this connection, this quotation from opinion by *Hoke, J.,* in *Holloway v. Durham, supra,* is appropriate: 'The decisions of this State have gone far in approval of the principle that a judgment by consent is but a contract between the parties put upon the record with the sanction and approval of the court and would seem to uphold the position that such a judgment may be entered and given effect as to any matters of which the court has general

jurisdiction, and this with or without regard to the pleadings,' citing cases." See also *Hervey v. Edmunds, supra.*

Third: "If and when neither plaintiff nor defendant has filed a complaint, answer, or reply, is a judgment by consent more than an agreement between the parties approved by the court?" Yes, "While the terms are settled by the parties, the judgment has the same force and effect as if it had been entered by the court in regular course, and, in that sense, it became the judgment of the court by virtue of its sanction in receiving it and ordering that it be spread upon its records." *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955. It is there also stated that "this is settled law as shown by many of our decisions." See also *Board of Education v. Comrs.,* 192 N. C., 274, 134 S. E., 852.

Fourth: "Can the consent judgment in this case be enforced against plaintiff by attachment for contempt?" Yes, it may be. See *Gardiner v. May, supra; Dyer v. Dyer,* 212 N. C., 620, 194 S. E., 278.

In the judgment in the instant case plaintiff is ordered to pay to, and for defendant definite amounts of money in monthly installments. And from other provisions it is clear that, though the phrase "in lieu of alimony, or other marital rights or obligations" is used, subsistence for the wife was in contemplation of the parties, a liability which plaintiff recognized, within the meaning of C. S., 1667. The language is not uncertain. It is agreed that: "The money payments provided herein shall be more than a simple judgment for debt. They shall be as effectively binding upon plaintiff as if rendered under and by virtue of the authority of section 1667, Consolidated Statutes of North Carolina, and the failure of plaintiff to make the payments, as required by this judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be required by the court, in case of contempt of its orders."

This agreement, sanctioned by the court, and ordered recorded in the minute book in the office of the clerk of the Superior Court of Wayne County, has the same force and effect as if it had been entered by the court in regular course. *Gardiner v. May, supra.* In the *Dyer case, supra,* the husband was held in contempt for willful failure to comply with the provisions of a consent judgment requiring him to pay to his wife a certain monthly allowance for subsistence. And on subsequent appeal in the same case, reported in 213 N. C., 634, 197 S. E., 157, relief was denied to the husband upon finding by the court that his continued refusal to pay alimony was willful.

In the present case the situation of the husband is not altered by the fact that the wife was willing that a part of subsistence provided should be applied to relieve her home from a deed of trust, securing an obligation due by them. A house in which to live may reasonably come

within the meaning of subsistence. The payment of the lien on her home was in part the means to attain the same end.

The judgment below is

Affirmed.

DEVIN, J., dissenting: I am unable to agree that the judgment below should be affirmed on this record.

In the beginning of the judgment appealed from it is recited that "This cause came on for hearing before the undersigned Special Judge presiding at May 1942 Civil Term of the Superior Court of Harnett County." But later in the same paragraph it is stated that "It was agreed by counsel representing plaintiff and defendant that the hearing upon the citation in this cause should be heard upon affidavits and briefs out of term time, out of the County and out of the District by the undersigned Special Judge of the Superior Court." A stipulation to the same effect appears in the record. The special judge resides in Sampson County, in the 6th Judicial District. It also appears that the affidavits, printed in the record, upon which the judgment appealed from was based, were verified subsequent to the May Civil Term of Harnett Superior Court and some as late as August, 1942. Thus the record is strongly persuasive that the hearing was had and the judgment rendered after the term of court for which the special judge had been commissioned had expired, and out of the county where the cause was pending. While it is not affirmatively so stated in the record, the clear implication to this effect is presented by the record itself, and I do not think it can be overlooked. Was the agreement referred to in the stipulation carried out, and as a matter of fact was the hearing had and judgment rendered otherwise than at the term of court for which the special judge was commissioned?

The majority opinion proceeds upon the view that the recitation in the preamble of the judgment that the cause came on for hearing at the May Civil Term of the court (for which the special judge was commissioned) is conclusive, in the absence of exception or assignment of error based upon contrary showing.

True, no reference is made to the matter in the brief. The only exception is to the judgment. Counsel, having entered into an agreement, doubtless felt personally bound by it, and have not sought to evade it. But what is the duty of the court when, upon appeal from the judgment, the entire record is before it and a fatal defect, rendering the judgment void, is apparent? Should not the court in the performance of its high duty of administering justice according to law, and in the exercise of its constitutional power of supervising and controlling the proceedings of courts below, in view of the condition of the record apparently indicating

a jurisdictional error, at least inform itself (if there be uncertainty) as to a fact upon which would depend the validity of the judgment?

If, as a matter of fact, the hearing was had and the judgment rendered out of term and after the commission of the special judge had expired, and at a time when he was no longer clothed with power and authority to exercise judicial functions in Harnett County, then the judgment would be void with the result that a citizen has been deprived of his liberty and committed to jail under a purported judgment rendered in excess of the authority given the judge by the Constitution and laws of the State. Under those circumstances the court should act *ex mero motu* upon that fact being made to appear in a case properly brought before it. *Branch v. Houston,* 44 N. C., 85; *S. v. King, ante,* 137 (141). For it is well settled that where power to hear and judicially determine a matter is wanting, jurisdiction cannot be conferred by consent. "Jurisdiction, not given by law, may not be conferred on a court or commission, as such, by waiver or consent of parties." *Dependents of Thompson v. Funeral Home,* 205 N. C., 801, 172 S. E., 500; *Reaves v. Mill Co.,* 216 N. C., 462, 5 S. E. (2d), 305. This was not an arbitration, but a judicial determination of a litigated cause properly constituted in the Superior Court.

What are the powers of special judges under the Constitution and laws of North Carolina? The constitutional provision for the appointment of special judges is set out in Art. IV, sec. 11, of the Constitution, from which I quote as follows: "The General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county, or district, when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold."

Thereafter the General Assembly, in the exercise of the power thus conferred, enacted ch. 51, Public Laws 1941 (amending previous statutes on the subject), section 5 of which I quote as follows: "To the end that such special judges shall have the fullest power and authority sanctioned by Article four, section eleven, of the Constitution of North Carolina, such judges are hereby vested, in the courts which they are duly appointed to hold, with the same power and authority in all matters whatsoever that regular judges holding the same courts would have. A special judge duly assigned to hold the court of a particular county shall have during said term of court, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising

in that judicial district that could properly be heard or determined by a regular judge holding the same term of court."

Naturally the General Assembly could not grant power and authority to special judges beyond that fixed by the Constitution. *Greene v. Stadiem,* 197 N. C., 472, 149 S. E., 685. Thus while the power and authority of special judges is that of regular judges of the Superior Court, these judicial powers, under the Constitution and the statute, are to be exercised by special judges only "in the counties which they are so appointed to hold." The power conferred is subject to that definite limitation. As was said by *Brogden, J.,* in *Ipock v. Bank,* 206 N. C., 791 (796), 175 S. E., 127, "Therefore it is manifest that the power of Special and Emergency Judges is defined and bounded by the words 'in the courts which they are so appointed to hold.'" Consequently, it has been held that a special judge must have a separate commission from the Governor for each term of court he is appointed to hold, and that the commission properly should recite the constitutional ground and necessity for the appointment. *Dunn v. Taylor,* 186 N. C., 254, 119 S. E., 495. The uniform decisions of this Court, interpreting these provisions of the Constitution and laws of the State, are to the effect that a special judge holding a term of court under commission from the Governor, has all the power and authority that a regular judge of the Superior Court could have, both as to the trial of causes, the hearing of motions, and the issuance of all orders, writs and judgments, in the court which he is appointed to hold, but that, when the term ends and he leaves the county, he becomes *functus officio,* and his authority as a judge in that particular county ceases, as much so as if his term of office had ended. *Ipock v. Bank,* 206 N. C., 791, 175 S. E., 127; *Reid v. Reid,* 199 N. C., 740, 155 S. E., 719; *Greene v. Stadiem,* 197 N. C., 472, 149 S. E., 685; *Dunn v. Taylor,* 186 N. C., 254, 119 S. E., 495.

In *Reid v. Reid, supra,* the action was for divorce, pending in Anson County. The wife, who was the defendant, filed motion for alimony *pendente lite.* The motion was continued to be heard before Judge Stack, resident judge in Union County, and was again continued, at the instance of the plaintiff, to be heard before Special Judge Thomas L. Johnson in Chambers at Albemarle in Stanly County. Johnson was then holding court under commission from the Governor appointing him to hold a specific term of court in Stanly County. Judge Johnson heard the matter and signed an order awarding the defendant alimony *pendente lite,* and the plaintiff, the husband, appealed. Here, it was held the order was void, and the cause was remanded. The Court said: "The fact that the defendant's motion was made returnable in Stanly County at the instance of the plaintiff, or even by consent, can have no bearing on the power of the court to hear the matter. Jurisdiction, withheld by

law, may not be conferred on a court, as such, by waiver or consent of the parties (citing authorities). The order, therefore, will be stricken out as the Special Judge was without authority to sign the same under the commission held by him at the time, and the cause will be remanded for further proceeding not inconsistent with the rights of the parties."

In the case at bar Special Judge Johnson's commission empowered him to hold the May Civil Term of Harnett Superior Court, a one-week term beginning 4 May, 1942. That commission expired at the end of the term. The judgment does not purport to have been rendered in any court for which Judge Johnson held commission other than the May Term, 1942, of Harnett.

In view of the condition of the record, indicating lack of jurisdiction and power on the part of the special judge to render the judgment appealed from, before affirming the indefinite imprisonment of the plaintiff thereunder, I think the Court should at least obtain, by proper means, information as to these jurisdictional facts, and that, in the event it is disclosed that the judgment was void as beyond the power of the special judge, the cause should be remanded for further proceedings according to law.

It may be that the plaintiff is guilty of willful contempt and disobedience of the orders of court, and subject to the coercive penalties of the law, but I think the determination should be by a tribunal with full power and authority, under the Constitution and laws of the State, to so adjudge, and to punish him therefor.

SCHENCK, J., concurs in this opinion.

SEAWELL, J., dissenting: I fully concur in the dissenting opinion of *Mr. Justice Devin,* and in apprehension that silence on the point may be considered as asquiescence, I wish to express my views on another phase of the case—the holding of the Court that the judgment in this case may be enforced by a proceeding for civil contempt.

The suit began as an action for divorce *a mensa et thoro,* if we may judge by the statement of the plaintiff when procuring time to file complaint. No pleadings were ever filed; but a consent judgment was entered in the case, which in its preamble and upon its face bases the award made to the *feme* defendant upon a debt which the husband owed her involved in the terms of a separation agreement.

Paragraph (c) of the judgment requires that the plaintiff shall pay to the defendant the sum of $6,911 in installments of $100 per month, which apparently under the preamble of the judgment is to repay the defendant for moneys advanced, and to pay $2,500 in installments of $50 a month to F. Ertel Carlyle, Trustee, to discharge certain obligations due

by both plaintiff and defendant upon the home of the defendant in Lumberton, N. C. The concluding part of the section of the judgment is significant: "The money payments provided herein shall be more than a simple judgment for debt. They shall be as effectively binding upon plaintiff as if rendered under and by virtue of the authority of section 1667, Consolidated Statutes of North Carolina, and the failure of plaintiff to make the payments, as required by this judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be required by the court, in case of contempt of its orders."

The judgment, I think, plainly recognizes that it is in reality a judgment for debt, but attempts to bring it within the provisions of section 1667 of the Consolidated Statutes and the penalties provided thereunder, so that it may be enforced by civil contempt. I do not attribute this device, which I regard as exceeding the power of the court, to the learned judge who signed the consent judgment.

Section 1667 of the Consolidated Statutes provides for alimony without divorce upon a suit instituted by the wife, and that statute is applicable only to independent suits for alimony. *Reeves v. Reeves,* 82 N. C., 349, 352; *Skittletharpe v. Skittletharpe,* 130 N. C., 72, 40 S. E., 851; *Dawson v. Dawson,* 211 N. C., 453, 190 S. E., 749; *Silver v. Silver,* 220 N. C., 191, 16 S. E. (2d), 834; *Shore v. Shore,* 220 N. C., 802, 18 S. E. (2d), 353; *Pollard v. Pollard,* 221 N. C., 47.

It is clear, then, that in an action for divorce from bed and board, which either the wife or the husband may bring, there can be no award of alimony without the divorce to which it is incident, and we think it is equally clear that the court is without power to change the character of the proceeding into one brought by the wife under C. S., 1667, for alimony without divorce. But passing this, the plain tenor of the judgment is to compel the payment of the obligations which had already been assumed both by the husband to the wife and by the wife and the husband which are recognized as debts, and to make such payments *in lieu of alimony* or other marital rights or obligations. "In lieu of alimony" means in place of alimony, instead of alimony, and, *in totidem verbis,* excludes alimony. The court cannot thereafter by its mere fiat change the character of these obligations into alimony—nor, indeed, does it purport to do so; nor can it invest a judgment with a legal character that it does not have under the law by a simple fiat "that the money payments provided herein shall be more than a simple judgment for debt"—a difficulty which obviously occurred to the parties when the judgment was framed. It protests too much. In so far as the consent of the plaintiff was concerned, he may just as well have agreed that a default in the payment of the debt should subject him to punishment under any criminal statute which may be found in the books.

Certainly the defendant consented to the judgment, but the Constitution which forbids imprisonment for debt is not made solely for the protection of the individual, but to remove a blight from our civilization, and it does not intend that any man shall mortgage his liberty to secure a debt.

The order should be dismissed.

J. G. HUFFMAN v. NELL AUSTIN PEARSON AND HUSBAND, CHARLES PEARSON; H. E. AUSTIN, M. L. SUDDRETH AND LAURA SUDDRETH.

(Filed 4 November, 1942.)

1. Boundaries §§ 1, 9—

In proceedings to establish a disputed boundary line, what constitutes the dividing line is a question of law for the court, but as to where the line is must be settled by the jury under correct instructions based upon competent evidence.

2. Boundaries §§ 4, 5—

In questions of boundary course and distance govern, allowing for variations of magnetic needle, unless there be some more certain description by which one or both may be controlled.

3. Partition § 1a—

A judgment in partition is conclusive in respect to the thing in which the parties had an estate in common, and also in respect to the share to which each is entitled, and to the parcel allotted to each. It does not divest the title of anyone not actually or constructively a party; but it operates by way of an estoppel as to parties, subject matter, and issues.

4. Boundaries § 9: Partition § 1a—

The primary purpose of partition is to sever the unity of possession of the tenants in common in and to the land in question and, unless specifically brought in issue by the pleadings, the lines of adjoining tracts are not involved and as to such lines neither the parties to the partition nor adjoining owners are estopped thereby. Holding incompetent the record of a partition proceeding between defendant and another, which recognized the lines in issue here.

5. Boundaries §§ 3, 4, 11—

In a processioning proceeding, where one corner of plaintiff and defendant is admitted and a partition in 1867 gives the course and distance from the admitted corner to an old blacksmith shop, now destroyed and the location of which was in dispute, it was error for the court to charge the jury that, if they should find that the line was run and marked and a corner made at the old blacksmith shop in 1867 which is the line called for in plaintiff's deed and shown on a map in evidence as running from B to A, they should answer the issue for plaintiff, as it assumes that the location of the blacksmith shop had been fixed.

HUFFMAN *v.* PEARSON.

APPEAL by defendants Nell Austin Pearson and husband, Charles Pearson, from *Alley, J.*, at May Term, 1942, of CALDWELL.

Processioning proceeding to establish boundary between adjacent lands of petitioner and of defendants, Nell Austin Pearson and her husband, Charles Pearson.

Petitioner alleges in his petition that he is the owner in fee simple and seized and possessed of a certain tract of land adjoining certain land of defendants, Nell Austin Pearson and her husband; that the location of the line between his land and that of said defendants is in dispute; and that the true and correct location of the dividing line is as therein specifically described.

In this connection petitioner alleges and offered documentary evidence tending to show in substance:

1. That on 26 December, 1867, the "Levi Hartley Commissioners" executed a deed to Callie Hartley and Sarah Hartley in which Lot No. 6 containing 300 acres more or less was "assigned and appropriated to Sarah Hartley in severalty," and Lot No. 7 containing 280 acres, more or less, was "assigned and appropriated to Caroline Hartley in severalty"; that as therein described Lot No. 6 begins "at a stake, formerly a white oak, on the south side of the creek in Richmond Hayes' line" and "runs north crossing the creek 272 18/25 poles to a stake; thence with the dower line south 20 W 236 p. to the blacksmith shop . . ."; and that as therein described Lot No. 7 begins on a poplar and runs various specified courses "to a stake, a corner of Lot No. 6; thence with line of said lot and dower line south 20 deg. West 236 poles to the blacksmith shop . . ."

2. That on 8 August, 1884, Callie Hartley and husband conveyed to Leonard Hartley thirteen and one-half acres of Lot No. 7, by description pertinent portion of which reads "thence north 80 deg. East 53 poles to a rock on top of a ridge in the line of Lot No. 6 and dower line; thence south 20 deg. West with said line 84 poles to a stone at the old blacksmith shop, corner of Lot No. 6 in the old Mulberry road"; that this tract of land less one and a half acres passed by *mesne* conveyances to Harvey E. Austin by deed dated 15 October, 1935, who conveyed to plaintiff on 12 August, 1936.

Petitioner further alleges that on 27 January, 1936, in a special proceeding instituted by Harvey E. Austin against Nell Austin Pearson and husband and others for partition of Lot No. 6, which had been "assigned and appropriated to Sarah Hartley (Austin), defendant Nell Austin Pearson was allotted Lot No. 1 A, containing 18 acres, described in pertinent part as, "beginning on an iron pipe on the east margin of highway No. 17 known as the old blacksmith shop corner, opposite the intersection of Collettsville road, and runs north 21 deg. east 84 poles to a

stone, T. W. Austin and George Austin's corner"; that the report of commissioners allotting the lands was duly confirmed and, with accompanying map, was duly recorded, and no appeal was taken from the judgment of confirmation; that at time this proceeding was instituted Harvey E. Austin owned the part of Lot No. 7 described in paragraph next above, that is, the land petitioner now owns; and that at the time the commissioners made their report and their map an iron stake was driven into the ground on the east margin of Highway No. 17 opposite the intersection of the Collettsville road evidencing the beginning corner of the defendant Nell Austin Pearson's tract of land allotted in the commissioners' report.

Petitioner further alleges that defendants Pearson are estopped by the judgment in said special proceeding to deny the location of the dividing line for which petitioner contends, as alleged—they and Harvey E. Austin, who then owned the lot petitioner now owns, being parties thereto.

Defendants Pearson deny that they are estopped by the judgment in this special proceeding to contend otherwise.

Upon the trial, petitioner offered in evidence the entire special proceeding, including the map attached to the report of the commissioners. Defendants Pearson except.

Petitioner further alleges and contends that the call in the description of his land, which reads "thence south 20 deg. west with said line 84 poles to a stone at the old blacksmith shop, corner of Lot No. 6 in the old Mulberry road," and the call in the description of the defendant Nell Austin Pearson's land, which reads, "Beginning on an iron pipe on the east margin of highway No. 17, known as the old blacksmith shop corner, opposite the intersection of the Collettsville road, and runs north 21 deg. East 84 poles to a stone, T. W. Austin's and George Austin's corner" constitute the true dividing line between petitioner and defendants, Nell Austin Pearson and her husband, and that same can be established by "beginning on a stone on top of the ridge, T. W. Austin and George Austin's corner, and running thence south 21 deg. West 84 poles to a stake, formerly an iron pipe stake in the east margin of highway No. 17, opposite the intersection of the Collettsville road, and known as the blacksmith shop corner," "as fully set out in defendants' deed" represented on white map by red line indicated by red letters B to A, or by reversing the same call.

Defendants Pearson, answering the amended petition of petitioner, admit the allegations as to how they and petitioner derive title to their respective tracts of land, and admit that the "stone on top of a ridge," called for in the deed from Callie Hartley and husband to Leonard Hartley, under which petitioner claims, and in description of Lot 1 A, allotted to defendant, Nell Austin Pearson, is located on the boundary

line between their land and that of petitioner; but they deny that the true dividing line is as petitioner alleges and contends, and deny that the judgment in the special proceeding instituted by Harvey E. Austin to which they were parties estops them to contend otherwise. On the other hand, they aver in substance that the dividing line was established in 1867 when the line "south 20 deg. West," the dower line, was called for in the descriptions of Lot No. 6 and Lot No. 7, respectively, assigned and appropriated to Sarah Hartley and to Callie Hartley, respectively, in severalty; that to correctly run that line 72 years later, at time of answering, in accordance with the United States Coast and Geodetic Survey, a magnetic variation of three minutes per year, or three degrees and thirty-six minutes, should be added to the course "south 20 deg. West," and that the line from the admitted "stone on top of a ridge," indicated by red letter B, should be run "south 23 degrees thirty-six minutes West 84 poles."

The record discloses that on trial below only one witness, Watt Presnell, undertook to testify as to the location of the "blacksmith shop" called for in descriptions in question. He testified that he was born and reared in Caldwell County, and in 1938 was 68 years of age and had been a resident of the State of Idaho since 1910, and that he was familiar with the Sarah Austin and Callie Hartley Austin lands. He further testified: "I recall the location of the blacksmith shop. Here sits the barn and the shop is south about 50 feet from the old barn. It is not more than 15 or 20 feet east of the old Blowing Rock road. Q. Mr. Presnell, if the dividing line between the Sarah Hartley Austin lands and the Callie Hartley Austin lands ran from the blacksmith shop north 20 degrees east, on which side of that line did the old barn stand? A. On the Callie Hartley Austin side. Q. Do you know the location of the line where the defendants claim the dower line to be? A. You mean where that stake is that is driven,—yes. It must be 50 yards west of the blacksmith shop where that stake is located." Then, as reason "why I remember being in the shop" the witness detailed the following incident: "When I was just a boy, about five or maybe six, nearer six than five, I went with my aunt . . . to see Mrs. Palmer, and, of course, her two boys, my age, or maybe a little older, and a boy by the name of Bill Munday, and I had always wanted to hear the anvil and so we went in to beat the anvil, and while we were there Joe Palmer came in and he had a hickory in his hand . . . and I thought he was going to kill us all, and I ran and hid behind an old willow tree." Then, continuing, on cross-examination, the witness said: "I was born about one mile from the Austin place . . . I do know where the residence was. Right that way from the old blacksmith shop. With reference to where the residence is now, it was due east, a little bit north. I do not mean east from the

blacksmith shop, about southeast from it, about 30 yards. I remember where the old barn was. It was the barn that Eli Hartley built . . . I do not know about any lines. And my attention has not been called to this disputed line until now when I am 68 years old . . . And the way I remember that it was a blacksmith shop, there was some wagon wheels and blacksmith tools, and I remember beating the anvil. That is the way I remember it, and Joe Palmer coming in there . . . Nothing at all has been mentioned in connection with any boundary or line concerning this case, to me at any time since my childhood until the time I had a discussion with Mr. Austin just before I arrived in North Carolina, nothing at all." Then, on redirect examination, witness said: "Mr. Huffman came and we went to the old place and I went to the old barn and told him I thought it was here where a willow tree was, the old blacksmith shop." And, finally, on recross-examination, the witness continued: "I did say that there had been three barns on that place; one at a time. One was back of the storehouse, this was the old Levi Hartley barn. Watt Austin built the next one over the creek, opposite the storehouse, and Watt Austin the one that is standing on the place now, the present barn. The second barn from the first barn was 75 feet, I guess. . . . Q. Did I understand you to say that the second barn and the old blacksmith shop stood on identically the same spot? A. No, the old barn was a little west of the old blacksmith shop, 20 or 25 feet."

This issue was submitted to and answered by the jury as shown:

"Is the line of the plaintiff's land located as indicated on the map, known as the white map, by the red line extending from red A to red B, as alleged in the amended petition? Answer: Yes."

From judgment in accordance therewith, defendants Pearson appeal to Supreme Court and assign error.

Hunter Martin and Max C. Wilson for plaintiff, appellee.
W. H. Strickland for defendants, appellants.

WINBORNE, J. Appellants' assignment of error is well taken to this portion of the charge of the court: "So, with respect to this issue, gentlemen, the burden of which is on the plaintiff as I have said, I charge you that if you find by the greater weight of the evidence that the stone on the ridge, indicated on the white map by the red letter 'B' is an admitted corner of both the plaintiff's and the defendants' land, and that the line runs from that point South 21 degrees West to the old blacksmith shop, and you further find that that is the call or line of what is known as the dower line; that that line was run and marked and a corner made at the old blacksmith shop in 1867; and if you further find by the greater weight of the evidence that that is the line called for in the plaintiff's

deed, and you also find by the greater weight of the evidence that that line as originally run in 1867 extended from the stone on the ridge at red 'B' on the white map to the blacksmith shop at red 'A,' as alleged in the petition, and testified to and pointed out by the witness, Watt Presnell, then and in that event I charge you that it would be your duty to answer the issue YES."

The error is the apparent assumption of fact that the blacksmith shop was located at the point indicated on the white map by the red letter A, and that the witness Watt Presnell had so testified and so pointed it out. The location of the blacksmith shop was in dispute. That it was located at the point indicated by the red letter A is a fact that the jury should find from the evidence and by its greater weight before giving an affirmative answer to the issue submitted. While appellants admit that "the stone on the ridge" is correctly represented by the red letter B on the white map, they controvert the location of the blacksmith shop. Furthermore, they contend that the testimony of the witness, Watt Presnell, leaves the location of the blacksmith shop in the realm of uncertainty, and that, on such evidence, the court should hold as a matter of law that the call from "the stone on the ridge" should be run in accordance with the course of the original line common to, and dividing Lots 6 and 7—south 20 degrees west with proper magnetic variation, that is, a variation of 3 degrees and 36 minutes.

It is settled law in this State that, in processioning proceedings to establish a boundary line, which is in dispute, what constitutes the dividing line is a question of law for the court, but a controversy as to where the line is must be settled by the jury under correct instructions based upon competent evidence. *Geddie v. Williams,* 189 N. C., 333, 127 S. E., 423; *Lee v. Barefoot,* 196 N. C., 107, 144 S. E., 547; *Shelly v. Grainger,* 204 N. C., 488, 168 S. E., 736; *Greer v. Hayes,* 216 N. C., 396, 5 S. E. (2d), 169; *Clegg v. Canady,* 217 N. C., 433, 8 S. E. (2d), 246; *Greer v. Hayes,* 221 N. C., 141, 19 S. E. (2d), 232, and many other cases.

It is also a well settled rule in questions of boundary that course and distance govern, unless there be some more certain description by which one or both may be controlled. In conformity with this rule, this Court has held in the case of *Fowler v. Coble,* 162 N. C., 500, 77 S. E., 993, that a call "to a stake at the (Harrington) house" is sufficient to control course and distance. Even so, it is easy to conceive difficulty in practical application of the rule to an object of the size of a house. Nevertheless, the rule as applied in the *Fowler case, supra,* pertinent to case in hand, places the burden upon the petitioner to satisfy the jury from the evidence, and by its greater weight, where the blacksmith shop stood in 1867, the date of the deed from "Levi Hartley commissioners" to Callie Hartley and Sarah Hartley, before the course and distance from "the

stone on the ridge," the agreed corner, should give way; and if the petitioner has failed to so satisfy the jury, then course and distance, with proper magnetic variation, would control.

Appellants further assign as error the admission in evidence of the partition proceeding by which Lot No. 6 was subdivided and under which defendant Nell Austin Pearson acquired land involved here.

While the general rule is that judgment of a court of competent jurisdiction is final and binding upon parties and privies, ordinarily to constitute a judgment an estoppel, there must be (1) identity of parties, (2) identity of subject matter, and (3) identity of issues. McIntosh N. C. P. & P., page 748; *Hardison v. Everett,* 192 N. C., 371, 145 S. E., 769; *Gibbs v. Higgins,* 215 N. C., 201, 1 S. E. (2d), 554, and cases cited.

Applying this principle to partition proceedings, it is stated by *Ruffin, C. J.,* in *Stewart v. Mizzell,* 43 N. C., 242, that "a judgment at law, in partition, is conclusive, in respect to the thing in which parties had an estate in common, and also in respect to the share to which each was entitled, and to the parcel allotted to each as his share." And in *Buchanan v. Harrington,* 152 N. C., 333, 67 S. E., 747, *Manning, J.,* citing from 30 Cyc., 310, quotes in part: " 'The truth is that a judgment in partition is as conclusive as any other. It does not create or manufacture a title, nor divest the title of anyone not actually or constructively a party to the suit; but it operates by way of estoppel; it prevents any of the parties from relitigating any of the issues presented for decision, and the decision of which necessarily entered into the judgment, and it divests all titles held by any of the parties at the institution of the suit.' " See *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421, and cases cited.

Furthermore, "the primary purpose of partition proceedings is to sever the unity of possession," *McKimmon v. Caulk,* 170 N. C., 54, 86 S. E., 809, of the tenants in common in and to land in question. Unless specifically brought in issue by the pleadings the lines of adjoining tracts are not involved. Hence, where under a judgment in a partition proceeding a party thereto accepts the allotment, in severalty, of a described part of the land, the subject of the action, which abuts on other land, which is not the subject of the action, and which is owned by another, such party is not estopped to contend for the true location of the outside boundary line of the part so allotted to him, even though the adjoining land be owned by one of the tenants in common in the subject of the action, and a party to the proceeding.

Hence, we are of opinion that the record in the partition proceeding is incompetent to show the location of an outside line of the land, which is the subject of partition. However, there may be circumstances under which such record may be competent as evidence tending to show acqui-

escence in the location of such outside line, yet such circumstances do not appear in the record on this appeal.

As the case must go back for a new trial, we express no opinion and make no decision on the question as to the sufficiency of the evidence to take the case to the jury as to the location of the blacksmith shop, particularly in view of the fact that on the issue as submitted a negative answer would leave unsettled the location of the dividing line between lands of petitioner and defendants Pearson. In *Greer v. Hayes,* 216 N. C., 396, 5 S. E. (2d), 169, the form for a single issue is suggested.

Other assignments are not considered here, as the matters to which they relate may not recur on another trial.

New trial.

TOWN OF TRYON v. DUKE POWER COMPANY.

(Filed 4 November, 1942.)

1. Declaratory Judgment Act § 1—

The broad terms of the Declaratory Judgment Act do not confer upon the court an unlimited jurisdiction; and the court will not entertain an *ex parte* proceeding or a proceeding which, while adversary in form, yet lacks the essentials of a genuine controversy.

2. Declaratory Judgment Act §§ 2a, 2b—

While the courts will not decide mere academic questions which are altogether moot, it is required only (by Declaratory Judgment Act) that plaintiff shall allege and show that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities, exists between, or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure.

3. Declaratory Judgment Act § 2c—

It need not be alleged and shown by plaintiff, in an action under the Declaratory Judgment Act, that the question in difference between the parties is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action.

4. Declaratory Judgment Act § 2a—

A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utility of the defendant, without a declaration in the complaint of plaintiff's intent to exercise its rights under the franchise contract, does not constitute a controversy under the Declaratory Judgment Act. Public Laws 1931, ch. 102.

APPEAL by plaintiff from *Pless, J.,* at Chambers, 8 August, 1942. From POLK. Affirmed.

The town of Tryon brought this proceeding under the Declaratory Judgment Act, chapter 102, Public Laws of 1931, to have declared and determined certain rights which it claimed the right to exercise against the defendant under a contract alleged to have been made between the town and defendant's predecessor in title to certain utilities.

It set up a franchise granted to Ralph C. Erskine and his associates operating the Tryon Electric Service Company and the ordinance granting the franchise, enacted by the governing body of the town at a meeting of the board in 1913 and subsequently confirmed.

Under this franchise the Tryon Electric Service Company supplied electric current to the residents of the town of Tryon, and maintained facilities, apparatus, and equipment in connection with the operation of the business. Later, the Duke Power Company, the defendant, succeeded to all the rights of Erskine and his associates under the ordinance and franchise, and the complaint alleges that because thereof the contract continues and exists between plaintiff and defendant.

Section 6 of the franchise, to which particular attention is directed, reads as follows:

"Section 6. That if, at any time in the future, the Town of Tryon shall decide to own and operate its own electrical lighting plant, it may first acquire, either by purchase or condemnation the property of the persons or corporations who shall then be operating and serving the public by virtue of this franchise. If the said town cannot agree with the owners upon the terms of purchase, then it may have said property valued by three commissioners to be appointed by the Judge of the Superior Court, and condemn the same to the public use, as provided by Chapter 86 of the public laws of 1911."

Plaintiff asks the court to render a declaratory judgment construing the contract and franchise, and "determining whether or not in the event the Town of Tryon decides to own and operate its own electrical lighting plant, it may first acquire either by purchase or condemnation the property of the defendant corporation, which is now operating and serving the public in the Town of Tryon by virtue of the franchise above referred to, and determining the rights of the Town of Tryon, with reference to the purchase of the property of the defendant referred to in paragraph 6 of said ordinance."

The defendant answered, admitting that it had succeeded to the rights and obligations of the Tryon Electric Service Company franchise, whatever the legal effect might be, and setting up a further defense not necessary to summarize here.

In this answer defendant denies the right of the plaintiff "to have said franchise, and particularly section 6 thereof, construed by the court in this proceeding as requested."

Upon notice, the matter came before his Honor, J. Will Pless, Jr., resident judge of the Eighteenth Judicial District, at Chambers in Marion, North Carolina, for judgment as a matter of law upon the pleadings. At that time it was the opinion of the court that as the complaint then stood, the plaintiff did not have the right to a declaratory judgment, since it had made no "declaration of a purpose to pursue any rights which it might have to acquire defendant's property pursuant to section 6 of the franchise." Thereupon, the court permitted the plaintiff to amend its complaint as follows:

"8. That the plaintiff requested the defendant to fix a price on its transmission lines and property mentioned and referred to in the aforesaid ordinance and franchise; that the defendant declined to do so; that in so declining the defendant contended that the plaintiff did not have the right to acquire said property in the manner set forth in said ordinance and franchise or in any manner; that there is an actual controversy existing between the plaintiff and the defendant respecting their rights under the said ordinance and franchise in that the plaintiff contends that under the same it has the right to purchase and acquire the transmission lines and property of the defendant mentioned and referred to therein, whereas the defendant contends to the contrary.

"9. That as long as the questions and differences exist between the plaintiff and the defendant regarding the rights of the plaintiff under the aforesaid contract and franchise, the plaintiff will be seriously handicapped in making financial arrangements to exercise the rights it claims under said contract and franchise, and the plaintiff, therefore, desires to have said questions adjudicated and determined, all to the end that the plaintiff may exercise its rights under said contract and franchise in accordance with the decision of this Court regarding said rights."

The defendant answered the amendments to the complaint, admitting that the town of Tryon had asked it to name a price on its properties, and it had declined to do so, and that it had denied the right of the town to condemn its property because of the repeal of chapter 86, Public Laws of 1911; defendant further admitted that there was a difference of opinion between plaintiff and defendant respecting plaintiff's right to condemn defendant's property, which right it denied; and averred that the effect of such difference of opinion upon plaintiff's financial arrangements "when and if undertaken" was conjectural and uncertain.

Defendant renewed the objection that upon the facts alleged, the plaintiff was not entitled to a declaratory judgment and moved to dismiss the action.

Judge Pless then entered a judgment finding certain facts and holding that the amendments above quoted "did not constitute a declaration of intent on the part of the plaintiff to exercise any rights which it might

have under section 6 of the defendant's franchise" (counsel for plaintiff having stated that the plaintiff had not authorized him to allege such intent), and dismissed the action.

Plaintiff appealed, assigning error.

McCown & Arledge for plaintiff, appellant.

W. S. O'B. Robinson, Jr., J. E. Shipman, and W. B. McGuire, Jr., for defendant, appellee.

SEAWELL, J. Section 1 of the Declaratory Judgment Act, chapter 102, Public Laws of 1931, empowers courts of record within their respective jurisdictions "to declare rights, status, and other legal relations," and section 2 has special relation to such "rights, status or other legal relations arising out of a municipal ordinance, contract or franchise," with special relation to the construction or validity thereof; but the apparent broad terms of the statute do not confer upon the court an unlimited jurisdiction of a merely advisory nature to construe and declare the law. Before a declaratory judgment may be obtained, the existence of those conditions upon which the jurisdiction of the court may be invoked must appear. Under the statute the court will not entertain an *ex parte* proceeding or a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy.

The difference between the operation of the Declaratory Judgment Act and that of C. S., 626, providing for the submission of controversies without action is pointed out in *Wright v. McGee,* 206 N. C., 52, 173 S. E., 31, by *Justice Connor,* writing the opinion of the Court: "Prior to its enactment, the courts of this State had no jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts. *Hicks v. Greene County,* 200 N. C., 73, 156 S. E., 164. Such jurisdiction was not conferred by C. S., 626; *Burton v. Realty Co.,* 188 N. C., 473, 125 S. E., 3. Actions or proceedings in which on the facts agreed there was no real controversy as to questions of law arising on such facts, which might be the subject of a civil action, were dismissed, for the reason that the Court was without jurisdiction to determine such questions. *Hicks v. Greene County, supra; Burton v. Realty Co., supra.* The distinction between C. S., 626, and chapter 102, Public Laws of North Carolina, 1931, is obvious. In *Light Co. v. Iseley,* 203 N. C., 811, 167 S. E., 56, it is said: 'It need not be alleged in the complaint or shown at the trial, in order that the Court shall have jurisdiction of an action instituted under the authority and pursuant to the provisions of chapter 102, Public Laws of North Carolina, 1931, that the question in difference between the parties is one which might be the subject of a

civil action at the time the action was instituted. It is not required for purposes of jurisdiction that the plaintiff shall allege or show that his rights have been invaded, or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement of the action.' "

In accord with the foregoing is *Green v. Inter-Ocean Casualty Co.*, 203 N. C., 767, 774, 167 S. E., 38, and other decisions of this Court, and current decision in the majority of jurisdictions having similar laws. 16 Am. Jur., 280, sec. 7, and cited cases. But conceding that the jurisdiction has been somewhat broadened to serve the commendable purpose of the law in preserving rights before they are actually invaded and avoiding liabilities before they are incurred—*Green v. Inter-Ocean Casualty Co., supra; Light Co. v. Iseley,* 203 N. C., 811, 167 S. E., 56; *Walker v. Phelps,* 202 N. C., 344, 162 S. E., 727; *Tolle v. Struve,* 124 Cal. Ap., 263, 12 P. (2d), 61; *Faulkner v. Keene,* 85 N. H., 147, 155 Atl., 195—nevertheless, the courts have construed the law in such manner that the jurisdiction may be protected against mere academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any right or the avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. The statute does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise. *Allison v. Sharp,* 209 N. C., 477, 481, 184 S. E., 27; *Light Co. v. Iseley, supra; Poore v. Poore,* 201 N. C., 791, 161 S. E., 532.

"It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Stacy, C. J.,* writing the opinion of the Court in *Poore v. Poore, supra,* cited in Annotation, 87 A. L. R., 1211.

The fundamental principle sought to be preserved is thus stated by *Chief Justice Hughes* in *Ashwander v. Tennessee Valley Authority,* 297 U. S., 287, 324, 80 L. Ed., 688: "The judicial power does not extend to a determination of abstract questions."

Thus the principle which protects the jurisdiction of the Court from the suggested invasions and keeps its decisions within the traditional judicial functions is the presence of a genuine controversy as a jurisdictional necessity.

The Federal Declaratory Judgment Act, 48 Stat. at L., 955, ch. 512, U. S. C. A., Title 28, sec. 400, expressly requires that the proceeding be based on an actual controversy, and that is true of similar statutes in several of the states. While our statute does not expressly so provide,

section 4 of the Act enlarges the specific categories mentioned elsewhere in the statute by making it applicable to "any proceedings . . . in which a judgment or decree will terminate the controversy or remove an uncertainty"; and section 5 empowers the court to refuse to render a declaratory judgment which would not have this effect. However, it is unnecessary to stress the legal inferences which might be drawn from this phraseology, since the point has been directly decided in this State. Quoting from *Light Co. v. Iseley, supra,* p. 820: "It is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. See *Walker v. Phelps,* 202 N. C., 344, 162 S. E., 727."

Indeed, it is uniformly held both in this country and in England that in the absence of any express provision making the existence of an actual controversy necessary to the jurisdiction, this limitation is nevertheless implied and will be observed by the courts. *Cryan's Estate,* 301 Pa., 386, 152 Atl., 675, 71 A. L. R., 1417; *Heller v. Shapiro,* 208 Wis., 310, 342 N. W., 174, 87 A. L. R., 1201; *Denver v. Lynch,* 92 Col., 102, 18 Pac. (2d), 907, 86 A. L. R., 907; see Annotations, 87 A. L. R., 1211, 68 A. L. R., 17, and 50 A. L. R., 45.

In marginal cases the rule may be difficult to apply, because it involves a definition, or at least an appraisal, of the term "controversy," which must, perhaps, depend upon the individual case; but in the case at bar, the Court does not feel that such embarrassment exists. A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utilities of the defendant—without any practical bearing on any contemplated action—does not constitute a controversy within the meaning of the cited cases. *Jefferson County Ex Rel. Coleman v. Chilton,* 236 Ky., 614, 33 S. W. (2d), 601.

The proceeding was properly dismissed, and the judgment of the court below is

Affirmed.

CLARENCE M. LIGHTNER ET AL. v. DANIEL F. BOONE, TRUSTEE.

(Filed 4 November, 1942.)

1. Trial § 4—

The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. A., Appendix 501, *et seq.*, is inapplicable where the rights of the litigant are not affected by reason of his military service.

2. Same—

In a suit by beneficiaries for the protection of, and accounting for, a trust fund against a trustee who had been called into the armed forces of the United States, where the court continued the cause to enable defendant to prepare his defense and secure other counsel, and, upon the case coming on for trial, the court ordered the trust funds impounded and found, from defendant's response, that he was speculating with the trust which was in a precarious condition, and that the answer admitted mismanagement and that the trustee had no defense, the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. A., Appendix 501, *et seq.*, will not stay the proceedings.

3. Same: Appearance § 2b—

Counsel, whose appearance is general, cannot limit such appearance for the sole purpose of moving for a continuance, the granting of such motion being a matter of discretion.

4. Trusts § 5—

However large may be the powers of a trustee, they are to be exercised only for effectuating the trust; and when such powers are perverted to the detriment of the *cestui que trust*, the court will promptly interpose its protective authority.

APPEAL by defendant from *Sink, J.*, at May-June Term, 1942, of HENDERSON.

Civil action for an accounting of trust funds.

By the will of Frances M. Lightner, late of Polk County, this State, published and probated in 1938, a trust fund of $40,000.00 was set aside for the proper college education of her grandchildren living at her death, and her son-in-law, Daniel F. Boone, an attorney of Winston-Salem, N. C., was named as trustee of this fund. An advisory committee was also named in the will, and the trustee was enjoined to consult this committee in the handling of the trust estate. The trust was to terminate as to each grandchild upon reaching the age of 30 years. After-born grandchildren were specifically excluded from the fund. The plaintiff, Martha Penelope Boone, who was born 14 September, 1938, falls in this excluded class.

In order to place the plaintiff, Martha Penelope Boone, on a parity with the other grandchildren, her grandfather, Clarence A. Lightner, assigned and transferred two of his life insurance policies, aggregating $15,449.10, to her mother, Martha Lightner Boone, with the understanding and agreement that the proceeds of such insurance, when collected, should constitute a trust fund for the education of Martha Penelope Boone, on the same terms and provisions as set forth in the will of Frances M. Lightner for the management and control of the educational trust fund provided therein for the other grandchildren. Clarence A. Lightner died 8 December, 1938. His life insurance policies were duly

collected and the proceeds were turned over to the defendant as an educational trust fund for the benefit of Martha Penelope Boone. The other plaintiffs allege an interest in this fund in case the whole fund is not properly expended prior to her attaining the age of 30 years.

Due to disclosures made in other litigation, *Lightner v. Boone,* 221 N. C., 78, 19 S. E. (2d), 144, the plaintiffs became apprehensive of the safety of the trust fund here involved, and on 21 June, 1941, they instituted this action in Polk County and caused summons and complaint to be personally served on the defendant on 23 June, 1941, by the sheriff of Forsyth County. The defendant filed answer 5 August, 1941, asking that the action be dismissed for that "because of what took place in the Superior Court of Forsyth County" on 23 June, 1941, he had concluded "on that date" to terminate his previous North Carolina domicile and residence and change it to Washington, D. C., by reason of which the courts of this State are without any jurisdiction in the matter, and further alleging that by virtue of written instructions given by Clarence A. Lightner, prior to his death, the defendant was authorized to expend said funds, in his discretion, "for the general care and education of Martha Penelope Boone." The plaintiffs challenge the validity of these instructions on the ground of mental incapacity of the maker. The defendant admitted "that he is not managing said fund pursuant to any directions in the will of Frances M. Lightner." His answer was signed by Roy L. Deal, Winston-Salem, N. C., attorney for defendant, and Clifford M. Toohy, Detroit, Mich., of counsel for defendant.

It appears that the defendant took a number of depositions in Washington and New York during the latter half of 1941, preparatory to his defense herein.

When the case was called for trial at the January-February Term, 1942, Polk Superior Court, the defendant, through his counsel, made application for a stay of the proceeding under the provisions of an Act of Congress, known as the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. A., Appendix 501, *et seq.* (printed in full in 130 A. L. R., 794), it being alleged that the defendant was a Major in the United States Army and had been called into active service on 8 November, 1940, and assigned to duty in Washington, D. C.

It was further made to appear that defendant's Michigan counsel was busily engaged in the trial of causes in Detroit and his resident counsel, also a Major in the United States Army, was expecting to be called immediately into the military service, and that, therefore, it would be necessary for defendant to procure additional counsel.

The court transferred the case to Henderson Superior Court and ordered a continuance until the May-June Term, 1942, thereof, and set the case peremptorily for hearing on the first day of the term, counsel

for defendant requesting "that the case be continued until May 25, 1942, in order to give the defendant ample time to employ other counsel."

On account of the nature of the action, and the charges involved, the court ordered the defendant to turn over to the clerk of the Superior Court of Henderson County, on or before 25 May, 1942, all securities, evidences of indebtedness, and moneys belonging to the said educational trust. It was further provided that a copy of the order be certified to the Adjutant General of the United States for such information and grants of leave as he might deem appropriate. These precautions were taken "to avoid undue delay to anyone."

When the case was again called for trial on 25 May, 1942, Henderson Superior Court, the defendant appeared through his counsel, R. R. Williams, of the Asheville bar, "for the sole purpose of moving for a continuance." The motion was overruled; whereupon counsel for the defendant declined to appear further in the case.

The trial proceeded before the jury and resulted in a verdict and judgment for plaintiffs. Judgment was signed on Tuesday, 26 May. Two days later, on 28 May, Mr. Cocke, of the firm of Williams & Cocke, appeared before the court, moved to set the verdict aside, objected to the judgment and the signing thereof, and gave notice of appeal to the Supreme Court.

J. E. Shipman and McCown & Arledge for plaintiffs, appellees.
R. R. Williams for defendant, appellant.

STACY, C. J. When the trial court was last called upon to stay proceedings herein under the Soldiers' and Sailors' Civil Relief Act of 1940, he was faced with defendant's report, filed that day with the clerk of the Superior Court of Henderson County, showing the trust account to be in a precarious condition. Eight items therein, aggregating $1,042.73, represented payments made by the defendant in preparing his defense in this action. Moreover, the admission in defendant's answer that he was "not managing said fund pursuant to any directions in the will of Frances M. Lightner," and the allegation that he was proceeding under *ante mortem* instructions from Clarence A. Lightner, which the plaintiffs challenged because of alleged incapacity of the maker, were sufficient to put the court on notice and inquiry respecting the status of the fund in suit. The court observed: "From the depositions giving the records of his bank account and the ledger sheets showing his speculations with the trust funds, it appears that the defendant did not have a defense." It is the duty of a court of equity to care for trust funds, especially where the rights of minors are involved. *Carter v. Young,* 193 N. C., 678, 137 S. E., 875. As said by *Merrimon, J.,* in *Albright v. Albright,* 91 N. C.,

220, "However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the *cestui que trust,* the court will promptly interpose its protective authority." See *Young v. Hood,* 209 N. C., 801, 184 S. E., 823; *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356, and cases there cited.

The burden of the appeal is, that the defendant has been deprived of his right to a stay of the proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940. This act provides:

"Sec. 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." 50 U. S. C. A., Appendix 521.

"Sec. 200. In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant . . . no judgment shall be entered . . . if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest," etc. 50 U. S. C. A., Appendix 520.

It was the opinion of the trial court that the ability of the defendant to conduct his defense was not materially affected by reason of his military service. The judgment recites a factual finding "that the defendant has had ample time and opportunity properly to prepare his defense in this case and that his military service has not prevented him from doing this. . . . His failure properly to handle the trust fund or to account for the same has not been affected in any way by reason of his military service." Indeed, the trial court was strongly convinced of the necessity of prompt action on the part of the court of equity to protect the fund in suit. He permitted the defendant to use the Act of Congress as a shield, and declined to permit him to use it as a sword. In this, we think the trial court pursued the intent of the statute. *Pope v. U. S. Fidelity & Guaranty Co.,* 20 S. E. (2d) (Ga. App.), 618; *Jamaica Sav. Bank v. Bryan,* 175 Misc., 978, 25 N. Y. S. (2d), 17; Annotation, Soldiers' and Sailers' Civil Relief Acts, 130 A. L. R., 774.

Speaking to a similar situation in the *Pope case, supra, Sutton, J.,* delivering the opinion of the Court, said: "So, it will be seen that a person in the military service is not entitled to a stay of a judgment against him as a matter of law under the provisions of the Act of Con-

gress just referred to, where in the opinion of the court passing on the matter the ability of such person to comply with the judgment is not materially affected by reason of his military service; nor is such person entitled to a stay of a proceeding against him, merely by virtue of said act, unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his military service."

To like effect is the declaration of the Circuit Court of Appeals, Sixth Circuit, in the case of *Royster v. Lederle,* 128 F. (2d), 197: "The object of the Act was to prevent injury to the civil rights of those in the armed services of the United States during that service in order that they would be free to devote all of their energies to the military needs of the Nation. Unless it is made to appear that the rights of the person in the service will be prejudiced by a proceeding against him, the Act is inapplicable." See, also, *Swiderski v. Moodenbaugh,* 45 F. Sup., 790.

Nor was it error for the court to proceed without appointing an attorney to represent the defendant. Such is the requirement only "if there shall be a default of any appearance by the defendant." Here, there was no default of any appearance by the defendant. He had duly filed answer. Depositions had been taken. His counsel appeared at the January-February Term, 1942, and moved for a continuance. This was granted, apparently upon satisfactory terms. The defendant again appeared through counsel at the May-June Term, 1942, and moved for a continuance. It is true, counsel then announced that he appeared "for the sole purpose of moving for a continuance." Nevertheless, the appearance was general, and the court was presented with a discretionary matter.

The exceptions entered to the trial are untenable. The defendant admitted in his answer that $15,449.10 had been turned over to him as a trust fund for the benefit of Martha Penelope Boone. It was clearly made to appear on the hearing that the defendant had undertaken to speculate with these funds by investing them in a marginal account in his own name with a brokerage firm in New York. Upon such showing, the court was justified in holding the defendant liable as for a breach of trust, Annotation 106 A. L. R., 271, and proceeding as in equity seemed just and right. *In re Estate of Smith,* 200 N. C., 272, 156 S. E., 494; 19 Am. Jur., 152; 10 R. C. L. (Equity), 349; 26 R. C. L. (Trusts), 1359. No valid reason appears for interfering with the results of the trial.

No error.

D. W. CLEVE AND WIFE, CLYDE CLEVE; W. A. CLEVE AND WIFE, LUCRETIA CLEVE; A. J. WALL AND WIFE, SOPHRONIA WALL; AND H. C. SMITH v. J. Q. ADAMS AND WIFE, ZEBBIE ADAMS.

(Filed 4 November, 1942.)

1. Judgments §§ 22b, 23, 32—

A motion in the cause, to vacate or set aside a judgment, presents questions of fact and not issues of fact, and it is for the court to hear the evidence, find the facts and render judgment; and an adverse ruling is *res judicata*, in a subsequent suit between the same parties, attacking the judgment on the same grounds.

2. Judgments §§ 29, 30—

Under our system of pleading and practice, a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all defenses available to him.

3. Limitation of Actions § 3a: Homestead and Personal Property Exemptions § 4—

The allotment of homestead suspends the running of the statute of limitations, C. S., 667, C. S., 728; N. C. Constitution, Art. X, sec. 2.

4. Homestead and Personal Property Exemptions §§ 5, 7, 8: Mortgages §§ 16, 17—

The conveyance of an allotted homestead by mortgage does not destroy the exemption or revive the right to issue execution on an outstanding and unsatisfied judgment; and a homestead may be allotted in mortgaged land. C. S., 729; N. C. Constitution, Art. X, sec. 8. Some of the law of North Carolina on title and rights of mortgagors and mortgagees discussed.

APPEAL by plaintiffs from *Burney, J.*, at March Term, 1942, of PITT. Affirmed.

Civil action under C. S., 1743, to quiet title to real property.

At the September Term, 1926, Pitt Superior Court, in an action entitled "J. Q. Adams *et al. v.* Sophronia Wall *et al.*," judgment was entered for plaintiff in the sum of $875.00 and costs.

On 31 August, 1927, execution issued on said judgment and homestead in the *locus in quo* was allotted to plaintiff Sophronia Wall.

On 13 December, 1938, Sophronia Wall and husband conveyed said land, by warranty deed, to D. W. and W. A. Cleve.

On 15 December, 1938, D. W. and W. A. Cleve conveyed same by warranty deed to plaintiff H. C. Smith.

On 29 November, 1939, Adams and wife instituted a civil action against the present plaintiffs in which they sought to have said judgment declared a subsisting and specific lien on the land in controversy and

for an order of foreclosure. The defendants therein—plaintiffs herein—answered, alleging that said judgment was void as to Sophronia Wall for that no summons, execution or other notice was ever legally served upon her in the original action; that she was, at the time, under 21 years of age and that she then, in fact, had no general guardian authorized to appear in said suit and answer in her behalf.

When the cause came on to be heard in the Superior Court the judge, on motion of the then defendants contained in their answer and renewed at the hearing, treated the answer as a motion in the original cause to set aside and vacate the judgment. After hearing the evidence on the motion the court concluded that defendants had not offered sufficient evidence to warrant a disturbance of said judgment, dismissed the motion "as of nonsuit," and adjudged the judgment a valid and subsisting lien. Defendants gave notice of appeal but failed to prosecute same.

On 30 January, 1928, Sophronia Wall and husband executed and delivered to D. W. and W. A. Cleve a mortgage on said premises to secure an indebtedness, evidenced by note, due by her to them. This mortgage was marked "paid and sudfied," 15 December, 1938.

On 17 November, 1941, plaintiffs herein—movants on the former hearing—instituted this action to remove cloud from their title cast by said judgment of record. They assigned the same grounds of attack as set forth in the motion. In addition, they alleged that defendants have been guilty of such laches in prosecuting their right under the judgment as to bar any further action by them.

On the trial below plaintiffs offered, for attack, the judgment rolls in *Adams v. Wall et al.,* and *Adams v. Cleve et al.* They also offered substantially the same evidence on the issue of the invalidity of the judgment as was offered on the hearing of the motion. They likewise offered the note and mortgage from Wall to Cleve.

The court, being of the opinion that the judgment entered on the motion to vacate the original judgment was *res judicata,* and that the execution of the note and mortgage to the Cleves was not material, entered judgment dismissing the action. Plaintiffs excepted and appealed.

Dink James for plaintiffs, appellants.
J. B. James and Julius Brown for defendants, appellees.

BARNHILL, J. The motion made in the original action to set aside the judgment against Sophronia Wall presented questions of fact and not issues of fact. It was for the judge to hear the evidence, find the facts and render judgment thereon. *Monroe v. Niven,* 221 N. C., 362, and cases cited. The judgment entered, though so labeled, was not a judg-

ment of nonsuit. It was a judgment fixing and adjudicating the rights of the parties.

The parties to the motion to set aside the Wall judgment are the parties to this action. Plaintiffs herein, in making the motion in the cause and in instituting this action, had the same object in view—the invalidation of the Wall judgment. Although the form of the proceedings is not the same, the allegations made and the relief sought are identical. The validity of the judgment was adjudicated at the hearing on the motion. It cannot again be litigated in this action. *Dillingham v. Gardner, ante,* 79; *Barcliff v. R. R.,* 176 N. C., 39, 96 S. E., 644; *Mutual Association v. Edwards,* 168 N. C., 378, 84 S. E., 359; *Ludwick v. Penny,* 158 N. C., 104, 73 S. E., 228; *Ingle v. Cassady,* 211 N. C., 287, 189 S. E., 776; *Ferguson v. Spinning Co.,* 207 N. C., 496, 177 S. E., 640; *Hampton v. Spinning Co.,* 198 N. C., 235, 151 S. E., 266; *Coltrane v. Laughlin,* 157 N. C., 282, 72 S. E., 1042; *Batson v. Laundry Co.,* 209 N. C., 223, 183 S. E., 413.

The additional documentary evidence—the note and mortgage—offered in the court below cannot affect this conclusion. Under our present system of pleading and practice a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all the defenses available to him. *Ludwick v. Penny, supra,* and cases cited. In any event, it has no bearing upon the regularity of the action in which the original judgment was rendered.

But the plaintiffs assert further that the mortgage conveyed the homestead and subjected the land to sale under execution on the judgment. Hence, they say, the judgment is barred by the 10 year statute of limitations, C. S., 667, and that it should be so adjudged.

The allotment of homestead suspended the running of the statute of limitations against the judgment. C. S., 667, C. S., 728; N. C. Const., Art. X, sec. 2; *Barnes v. Cherry,* 190 N. C., 772, 130 S. E., 611; *Formeyduval v. Rockwell,* 117 N. C., 320. This included the period from 31 August, 1927, to 13 December, 1938. It follows that the judgment is not barred unless the mortgage executed by Sophronia Wall 30 January, 1928, was a conveyance of the homestead within the meaning of C. S., 729; N. C. Const., Art. X, sec. 8.

In this State mortgages are practically the same as at common law, with the exception of the mortgagor's equity of redemption and its incidents. The legal title passes to the mortgagee, subject to the equitable principle that the passage of the legal title is primarily by way of security for the debt. For all other purposes, and as against all persons other than the mortgagee, the mortgagor is regarded as the owner of the land. *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210; *Gorrell v. Alspaugh,* 120 N. C., 362; *Weil v. Davis,* 168 N. C., 298, 84 S. E.,

395; *Bank v. Jones,* 211 N. C., 317, 190 S. E., 479; *Duplin County v. Harrell,* 195 N. C., 445, 142 S. E., 481; *Mitchell v. Shuford,* 200 N. C., 321, 156 S. E., 513; *Riddick v. Davis,* 220 N. C., 120, 16 S. E. (2d), 662. Except as against the mortgagee, he retains all the incidents of ownership. His estate therein may be devised or conveyed and it is subject to dower and to sale under execution. *Stevens v. Turlington, supra; Weathersbee v. Goodwin,* 175 N. C., 234, 95 S. E., 491; *Willington v. Gale,* 7 Mass., 138; Bispham's Equity, sec. 151; 27 Cyc., 1234. He may maintain an action for trespass even after default. *Bank v. Jones, supra.*

On the contrary, until foreclosure, or at least until possession is taken, the mortgage, as a general rule, is regarded and dealt with as a chose in action. A transfer of the debt transfers the mortgage security and a conveyance by the mortgagee—except under foreclosure—merely operates as an assignment of the mortgage. And if the mortgagee dies his interest in the mortgaged premises goes, not to the heirs, but to the personal representative. *Stevens v. Turlington, supra.*

Furthermore, that a homestead may be allotted in mortgaged land is well settled in this and other jurisdictions. *Cheek v. Walden,* 195 N. C., 752, 143 S. E., 465, and cases cited; *Crow v. Morgan,* 210 N. C., 153, 185 S. E., 668; *Chemical Corp. v. Stuart,* 200 N. C., 490, 157 S. E., 608; *Miller v. Little,* 212 N. C., 612, 194 S. E., 92. See also Anno. 89 A. L. R., 511, particularly at pp. 526 and 530.

It would seem to follow, of necessity, that a conveyance of the land embraced in a homestead by mortgage after the homestead is allotted does not serve to destroy the exemption or to revive the right to issue execution on an outstanding and unsatisfied judgment. We so conclude.

In so holding we are not inadvertent to *Dalrymple v. Cole,* 170 N. C., 102, 86 S. E., 988. It is there stated "the defendant and wife, by executing the mortgage deeds referred to, had already conveyed their homestead in the land in question within the meaning of section 686 of the Revisal, and the defendant cannot now be heard to claim a homestead therein." Apparently this question was not raised and the statement is nothing more than *dictum.* In any event, it is not in accord with the authorities in this and other jurisdictions.

Whether plaintiffs are guilty of laches in waiting 13 years to attack the judgment they seek to annul, as found by the court below, we need not now decide. See *Monroe v. Niven, supra.*

The judgment below is

Affirmed.

STATE v. WILLIAM MASON WELLMON.

(Filed 4 November, 1942.)

1. **Criminal Law §§ 81a, 81b—**

In an appeal from a conviction of a capital offense, the Supreme Court, of its own motion, will examine the record for error committed at the trial, both those where no exception was taken as well as those appearing on the face of the record.

2. **Criminal Law § 44—**

The granting or refusing a continuance, even in a capital case, is a matter in the sound discretion of the trial judge and is not reviewable in the absence of manifest abuse; holding that there was no abuse of discretion, where the grounds for the continuance were that witnesses beyond the State would testify to an alibi, it appearing that such witnesses were examined in a *habeas corpus* proceeding and their testimony admitted on the trial by consent of the solicitor.

3. **Criminal Law §§ 41d, 41e—**

The credit of a witness may be impeached by proof that he has made representations inconsistent with his present testimony, and whenever these representations respect the subject matter in regard to which he is examined, it is not necessary to inquire of the witness, before offering the disparaging testimony, whether he has or has not made such representations.

APPEAL by defendant from *Pless, J.*, at August Term, 1942, of IREDELL.

The defendant was tried and convicted upon a bill of indictment found at the August Term, 1941, of Iredell County, charging him with rape on 11 February, 1941. The defendant was extradited from the District of Columbia and brought to the common jail of Mecklenburg County on 4 August, 1942, and upon it being made to appear to the court that defendant was without counsel, the court, on 5 August, 1942, assigned him counsel, and on 9 August, 1942, defendant employed counsel, and was placed on trial on 11 August, 1942. Both counsel assigned and privately employed conducted the defense.

From a judgment of death, predicated upon a jury verdict of guilty of the felony of rape as charged in the bill of indictment, the defendant appealed, assigning errors.

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

Hosea V. Price for defendant, appellant.

SCHENCK, J. The defendant sets out in his brief but two groups of exceptive assignments of error. We discuss them in the order so set out.

The first group of assignments relate to the refusal of the court to grant the defendant's motion for a continuance, and cannot be sustained.

While there is no exception noted in the record to the court's refusal to grant the motion for a continuance, which would ordinarily preclude any consideration thereof by us, still, since the defendant has been convicted of a capital offense, his contentions as to errors committed at the trial will be reviewed, as well also as the record for errors appearing on its face. *S. v. Brown,* 218 N. C., 415, 11 S. E. (2d), 321.

Our decisions are to the effect that the granting or the denial of a motion for a continuance is a matter within the sound discretion of the trial judge and not the basis for valid exception, unless there has been manifest abuse. It is virtually necessary that this discretion be so vested in the trial judge, else it would be in the power of a defendant to postpone a conviction indefinitely by making affidavits with the requisite matter on the face of them. *S. v. Riley,* 188 N. C., 72, 123 S. E., 303; *S. v. Sauls,* 190 N. C., 810, 130 S. E., 848; *S. v. Whitfield,* 206 N. C., 696, 175 S. E., 93, and cases there cited.

We cannot hold that in denying the motion of the defendant for a continuance the court abused the discretion in it vested. The defendant had been arrested in the District of Columbia upon the charge in the bill of indictment approximately a year before he was finally brought to trial in Iredell County; he sought release in the district by a writ of *habeas corpus* and had resisted extradition for practically a year; he was finally brought to North Carolina on 4 August, 1942, and being without counsel was assigned counsel on 5 August, 1942, and employed counsel on 9 August, 1942, and was put on trial 11 August, 1942, in which trial he was represented by both counsel. His defense was an alibi and the ground urged for a continuance was that there were witnesses in the District of Columbia by whom he could prove that he was in the District at the time the offense with which he was charged was alleged to have been committed.

It was made to appear to the court that the witnesses desired by the defendant had testified in the *habeas corpus* proceeding in the District of Columbia, where the defendant sought to prove he was elsewhere at the time it was alleged the crime was committed, as to the defendant's whereabouts at that time, and that their testimony had been reduced to writing, and that the solicitor for the State agreed that the transcript of this testimony might be introduced in evidence, without objection, as the depositions of such witnesses. Under these circumstances, especially in view of the fact that the witnesses were beyond the boundaries of the State and not subject to the jurisdiction of its courts, we cannot hold that there was a denial of due process of law by a manifest abuse of the discretion vested in the trial judge by ruling the defendant to trial. "It

is now a familiar axiom that granting or refusing the continuance of a cause is a matter which rests in the discretion of the trial court and in the absence of gross abuse is not subject to review on appeal." *S. v. Rhodes,* 202 N. C., 101, 161 S. E., 722. "We do not interfere unless the discretion is abused." *Hensley v. Furniture Co.,* 164 N. C., 148, 80 S. E., 154.

The second group of assignments of error relate to the admission of evidence to the effect that a witness for the defendant, one John Mitchell, whose testimony in the *habeas corpus* proceeding in the District of Columbia was introduced by the defendant as the witness' deposition, had made statements contrary to the statements made by him in the *habeas corpus* proceeding. The witness Mitchell's testimony by way of deposition was to the effect that he worked with the defendant at Fort Belvoir, Virginia, and that the defendant was at Fort Belvoir on Tuesday, 11 February, 1941, the date the crime is alleged to have been committed by the defendant in Iredell County, North Carolina. And when asked on cross-examination: "Did you not tell Sergeant Carver that you had not seen Wellmon since December?" answered: "No, Sir, I did not." The State called the witnesses J. C. Carver, policeman of Washington, and J. W. Moore, sheriff of Iredell County, who each testified in effect, that the witness John Mitchell said in their presence in Washington before the defendant was extradited that he had not seen the defendant since December (1939) and January (1941), respectively.

These assignments of error are untenable. In the first place, they do not fall within the contention made by the defendant that the impeached witness must have been asked as to his statements under consideration, in order that he may have had an opportunity to explain them, before the impeaching witness can testify to inconsistent statements, *S. v. Wright,* 75 N. C., 439, for the reason that the record divulges that the witness was asked if he did not make the inconsistent statement to Sergeant Carver and he answered: "No, Sir, I did not."

The rule in this jurisdiction was enunciated by *Gaston, J.,* in *S. v. Patterson,* 24 N. C., 346, as follows: "It is well settled that the credit of a witness may be impeached by proof that he has made representations inconsistent with his present testimony, and whenever these representations respect the subject matter in regard to which he is examined, it never has been usual with us to inquire of the witness, before offering the disparaging testimony, whether he has or has not made such representations. But with respect to the collateral parts of the witness' evidence, drawn out by cross-examination, the practice has been to regard the answers of the witness as conclusive, . . ." The testimony of the impeaching witnesses assailed by the assignments of error respected the main subject matter in regard to which such witnesses were examined, namely, the whereabouts of the defendant at the time the offense is

alleged to have been committed. This testimony went to the very heart of the case, since the defendant's defense was that of an alibi, and could, in no view of the case, be construed to be only collateral.

The prosecutrix testified unequivocally that she was ravished by the defendant at her home two miles east of Statesville in Iredell County, North Carolina, shortly after 1:30 o'clock p.m., on 11 February, 1941, and her testimony was corroborated by the testimony of her neighbor, who testified that she saw the defendant about 2 o'clock in the afternoon of 11 February, 1941, in about 500 feet of the home of the prosecutrix, traveling in the direction thereof. The prosecutrix, as well as her neighbor, subsequently identified the defendant in the District of Columbia jail where he was first held, and at the trial of this case.

The defendant's testimony was to the effect that he did not ravish the prosecutrix and that he was not in Iredell County, North Carolina, but was living in Washington and working at Fort Belvoir, Virginia, on 11 February, 1941, and his testimony was corroborated by the testimony of his co-worker at Fort Belvoir, who testified that he rode in the same automobile with defendant from Washington to Fort Belvoir on the day the offense is alleged to have been committed, 11 February, 1941; and the social security record of the Chas. H. Thompson Company for its employees at Fort Belvoir was identified by an auditor of the company who testified that the record showed that the defendant worked from 7:30 a.m. to 4:00 p.m. on 11 February, 1941; and a labor foreman of the Thompson Company testified positively that the defendant worked under his direction at Fort Belvoir, Virginia, the 11 February, 1941; and the man in whose automobile the defendant rode from Washington to Fort Belvoir testified that the defendant rode with him on Tuesday, 11 February, 1941, and paid him on that day for his weekly transportation.

The evidence of the State and the evidence of the defendant as to the whereabouts of the defendant on 11 February, 1941, the date the offense is alleged to have been committed, is in direct conflict—the former being positively to the effect that he was near Statesville in Iredell County and the latter being positively to the effect that he was at Fort Belvoir in Virginia on the date in question.

The jury heard the witnesses, observed their demeanor on the stand, and under a charge presumably free from error (it not appearing in the record), returned a verdict of guilty of the felony as charged in the bill of indictment. Since the exceptive assignments of error set out in the appellant's brief cannot be sustained, and since we find no error on the face of the record, we must, notwithstanding the gravity of our action, affirm the judgment of death pronounced by the Superior Court.

The defendant has his right to apply to the pardoning power.

Upon the record, we find

No error.

P. M. MARSHBURN v. A. J. PURIFOY.

(Filed 4 November, 1942.)

1. Venue § 2a—

Where the recovery of personal property is the sole relief demanded or even the chief, main or primary relief, other matters being incidental, the county in which the personal property or some part thereof is situated is the proper venue. C. S., 463 (4).

2. Same—

In an action by a mortgagor, in the Superior Court of the county of his residence, against the mortgagee, to recover mortgaged personalty situated in another county and in the possession of the mortgagee, and to compel an accounting for the use and profits of the property involved, a motion in apt time, for removal to the county where the property was situated, should have been granted.

APPEAL by defendant from *Nimocks, J.*, at June Term, 1942, of LENOIR.

Civil action for (a) recovery of personal property, (b) an accounting for rents and profits accruing from possession and use of such property by defendant as mortgagee in possession, (c) to declare defendant holder of said property, and funds realized from use thereof as trustee for plaintiff, and (d) recovery of such amount as may be due plaintiff upon proper accounting.

At time summons was issued, plaintiff, in applying for extension of time within which to file complaint, stated the nature and purpose of the action to be as above set forth.

The cause was heard below upon motion, aptly made, for removal of action to Craven County for that action is for recovery of personal property in possession of defendant in Craven County. C. S., 463 (4).

The complaint for plaintiff alleges, in substance:

1. That plaintiff is a resident of Lenoir County, and defendant of Craven, in State of North Carolina.

2. That prior to 21 July, 1938, plaintiff had purchased from The Rudolph Wurlitzer Company of North Tonawanda, New York, ninety-one Wurlitzer coin operated phonographs, on the purchase price of each of which he had made a cash payment, and executed to said company a conditional sale contract covering the balance, payable on specified terms, and on said date, plaintiff executed and delivered to said company a renewal conditional sale contract on said ninety-one phonographs, identified by numbers, to cover the balance of $19,513.59, then due, to be paid on specified weekly installments, in which conditional sale contract

the title to said phonographs was retained until all installments should be paid.

3. That on 31 August, 1938, plaintiff executed and delivered to defendant his promissory note for $1,200.00, payable in specified monthly installments, and to secure same executed and delivered to him a chattel mortgage on the ninety-one phonographs, referred to in preceding paragraph, which chattel mortgage constituted a lien second to the conditional sale contract of 21 July, 1938.

4. That on 17 March, 1939, although plaintiff had by payments reduced the principal of amount due on the conditional sale contract to $14,250.00, and had made payments on the note secured by chattel mortgage, he was having difficulty in meeting payments thereon, and "defendant was pressing" . . . "for payment of the said note," and although defendant knew that plaintiff "had an equity of many thousands of dollars in the said phonographs," plaintiff alleges, upon information and belief, that defendant "formed the scheme and plan to acquire said property and the plaintiff's equity of redemption therein at a grossly inadequate price and in fraud of the relationship of mortgagor and mortgagee which existed between them," and, by means of such relationship and "the pressure exerted by defendant for the immediate payment of the indebtedness due to him by the plaintiff, and through the misconduct, undue influence and oppression of defendant and his unconscionable advantage," plaintiff was forced to enter into a transfer agreement (Exhibit A), whereby his equity in the ninety-one phonographs was transferred and assigned to defendant at the price of $450.00, notwithstanding it was worth a far greater sum. (This agreement shows that although defendant assumed "all the covenants, liabilities and obligations" of plaintiff under the conditional sale contract to The Rudolph Wurlitzer Company, the company consented to the transfer upon express agreement that plaintiff remain liable under said conditional sale contract.)

5. That, by reason of the matters stated in last preceding paragraph, said transfer from plaintiff to defendant was void, and, therefore, the relationship of mortgagor and mortgagee existing between plaintiff and defendant, and plaintiff's ownership of the equity in the phonographs were unchanged; and that when defendant took possession of the phonographs he did so as trustee, charged with duty to apply rents and profits therefrom and the proceeds of operation thereof to the payment of the indebtedness due thereon until such indebtedness was fully paid, "and then to restore the said property to the plaintiff."

6. That upon the execution of the transfer agreement, defendant took possession and has since had possession of all the phonographs and has received from the operation thereof a sufficient sum of money to pay not

only the balance due The Rudolph Wurlitzer Company under its conditional sale contract, but that due defendant on note of plaintiff secured by the chattel mortgage, and that in fact each has been paid in full—although both conditional sale contract and chattel mortgage remain unsatisfied of record; and "that plaintiff . . . avers that he is not only entitled to have said liens satisfied of record, and said property restored to him, but that he is also entitled to an accounting for all sums received by defendant" from operations of the phonographs, "over and above the amount necessary to pay off and discharge said liens."

The relief prayed is "(a) that the relationship of mortgagor and mortgagee between plaintiff and defendant be declared to exist and defendant decreed to be mortgagee in possession of the property hereinbefore described, and account to plaintiff for the proceeds received by defendant from the use and operation of said property, and that plaintiff have proper accounting therefor; (b) that plaintiff be adjudged to be the owner and entitled to the possession of the ninety-one phonographs hereinbefore described; and (c) that plaintiff be given such other and further relief as he may show himself entitled to upon the whole cause."

The motion for removal was denied both by the clerk of the Superior Court and the judge on appeal. Defendant appeals therefrom to Supreme Court and assigns error.

J. A. Jones and Sutton & Greene for plaintiff, appellee.
Albert J. Ellis and R. E. Whitehurst for defendant, appellant.

WINBORNE, J. Actions for the recovery of personal property must be tried in the county in which the property or some part of it is situated, subject to the power of the court to change the place of trial in cases provided by law. C. S., 463 (4). Under this statute, we are of opinion and hold that proper venue for this action is in Craven County.

Decisions of this Court, interpretive of the statutory rule, are to the effect that where the recovery of personal property is the sole relief demanded, or even the chief, main or primary relief, the other being an incidental part, the county in which the personal property or some part of it is situated is the proper venue. *Brown v. Cogdell,* 136 N. C., 32, 48 S. E., 515; *Edgerton v. Games,* 142 N. C., 223, 55 S. E., 145; *Fairley v. Abernathy,* 190 N. C., 494, 130 S. E., 184. See also Annotations 126 A. L. R., 1190 (n).

In *Brown v. Cogdell, supra,* it is said: "The recovery of personal property, being the chief object of this action, and not merely an incidental matter (*Woodard v. Sauls,* 134 N. C., 274), and the motion to remove having been made 'in writing' and in apt time, *i.e.,* 'before the time for answering' expired, the removal was a matter of right, not of discretion."

The headnote in *Edgerton v. Games, supra,* epitomizes the decision there in this manner: "Where a complaint sets out three different causes of action, one of which is for the recovery of personal property, the court properly granted the defendant's motion to remove the cause to the county in which such property is situated."

The case at bar expressly has, as one of its objects, the recovery of the ninety-one phonographs. And it is manifest from the allegations in the complaint that the other relief sought, that is, to have the relationship between plaintiff and defendant, regarding the phonographs, declared to be that of mortgagor and mortgagee so as to require defendant to account for the proceeds realized from the use and operation of the phonographs in an amount sufficient to pay the balance due on the conditional sale agreement and on the note secured by the chattel mortgage, is not for the purpose of predicating a recovery of damages, but for the recovery of the phonographs. Furthermore, the prayer for recovery of any surplus of the proceeds realized from use and operation of the phonographs, remaining in hands of defendant after satisfying plaintiff's obligations under the conditional sale contract and under the chattel mortgage, is based upon right of plaintiff to recover the property. Thus, it seems clear that the primary object of the action is the recovery of personal property—the phonographs in question.

The present action is distinguishable in factual situation from the cases of *Woodard v. Sauls, supra; Clow v. McNeill,* 167 N. C., 212, 83 S. E., 308; *Piano Co. v. Newell,* 177 N. C., 533, 98 S. E., 774; *Guy v. Gould,* 199 N. C., 820, 155 S. E., 925.

In the light of what is here said, the judgment below is

Reversed.

J. C. EXUM, AND J. C. EXUM, ADMINISTRATOR OF THE ESTATE OF J. EXUM, DECEASED, TRADING AS J. EXUM & COMPANY, v. CAROLINA RAILROAD COMPANY, M. S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY, AND H. K. COBB, SHERIFF OF GREENE COUNTY.

(Filed 4 November, 1942.)

1. Pleadings § 15—

In an action to remove a cloud from plaintiffs' title, caused by a docketed judgment alleged to be invalid, a demurrer to the complaint, as not stating a cause of action, was properly overruled, C. S., 1743, being sufficiently broad to entitle plaintiff to maintain an independent action.

2. Limitation of Actions § 2a—

Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the

adjournment of the August, 1931, Term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment is barred in 1939 by the ten years statute of limitations. *Adams v. Guy*, 106 N. C., 275, cited and distinguished.

APPEAL by plaintiffs from *Burney, J.*, at February Term, 1942, of GREENE. Reversed.

This was an action to remove cloud from title to plaintiffs' land, caused by a docketed judgment alleged to be invalid, and to restrain execution. Demurrer to the complaint was overruled, and defendants having excepted, answered. The determinative issue raised by the pleadings was whether defendants' judgment was barred by the statute of limitations. This was submitted to the jury upon an agreed statement of facts. The court being of opinion that upon these facts the judgment attacked was not barred, so instructed the jury.

From judgment on the verdict returned in accord with this ruling, the plaintiffs appealed.

Walter G. Sheppard and K. A. Pittman for plaintiffs.
Charles F. Rouse for defendants.

DEVIN, J. The question presented by this appeal is whether, upon the facts agreed, the defendants' judgment was barred by the ten years statute of limitations. C. S., 437.

The material facts were these: In 1926 the defendant Carolina Railroad Company obtained a judgment by default in Lenoir County against J. C. and J. T. Exum, the present plaintiffs, for a sum certain. The judgment was rendered by the clerk and was duly docketed. In 1931 the defendants in that action made a motion before the clerk to set aside the judgment. This motion was heard and denied by the clerk 3 August, 1931. The defendants in that action appealed to the judge. The clerk thereupon noted that execution should not issue on the judgment until the adjournment of the August, 1931, Term of Lenoir Superior Court. The appeal from the clerk was never at any time heard by a judge of the Superior Court, and is still pending. No other order was ever entered.

In February, 1939, the present owners of the judgment had the judgment docketed in Greene County, where the present plaintiffs reside and own land, and caused execution to issue, and the sheriff has indicated his intention to proceed to enforce the execution against the property of the plaintiffs. This action was instituted to have the judgment declared invalid and a cloud on the title to plaintiffs' land, and to restrain the sheriff from proceeding to enforce execution thereon.

Admittedly the judgment rendered in 1926 was barred by the statute of limitations in 1939, unless the pendency of the appeal to the judge

from the order of the clerk in 1931, denying the motion to set aside the judgment of 1926, had the effect of stopping the running of the statute. C. S., 614, provides that the time during which the judgment creditor shall have been restrained from proceeding thereon by injunction, or other order, or "by the operation of any appeal," shall not constitute any part of the ten years period. Here the appeal was from the clerk's denial of a motion to set aside the judgment. The judgment was still in force and the lien enforceable. There was no *supersedeas,* or injunction, or restraint upon execution, except for a short period during the month of August, 1931. The appeal to the judge from the clerk's ruling may not be held to have had the effect of a *supersedeas,* or restraining order, or to arrest the running of the statute. The judgment creditors had the right to cause execution to issue at any time within ten years from the date of the rendition of the judgment in 1926. Having failed to do so or take any action to enforce the lien of their judgment within ten years, the right to do so was thereafter barred by the statute. *Blow v. Harding,* 161 N. C., 375, 77 S. E., 340; *Lupton v. Edmundson,* 220 N. C., 188, 16 S. E. (2d), 840. In *Adams v. Guy,* 106 N. C., 275, 11 S. E., 535, cited by defendants, the appeal from the clerk to the judge was upon a motion to issue execution, and the decision that the judgment was not barred by the statute of limitations was based upon the ground that "the appeal did not leave the plaintiff at liberty to have an execution and enforce the same during its pendency."

Further referring to *Adams v. Guy, supra,* it may be noted that at the time of that decision (1890), in accord with the statute then in force (The Code, section 440, later codified as C. S., 668), a judgment became dormant after the lapse of three years from the entry of judgment, and execution thereon could not be issued until, after notice and proof that the judgment had not been satisfied, leave for that purpose was granted, and the judgment revived. But by ch. 24, Public Laws 1927, C. S., 668, was expressly repealed, and there was thereafter no restraint upon the right to issue execution at any time within ten years from the rendition of the judgment. C. S., 667. In the *Adams case, supra,* the judgment had become dormant. The motion for leave to issue execution was allowed, but from the clerk's order allowing the motion an appeal was taken to the judge, and, from the latter's affirmance, to this Court. During the pendency of the appeal the ten years period from the docketing of the judgment expired. At that time, as execution could not issue except by leave of the court, and as the appeal involved the right to issue execution, it was held that, under The Code, section 435 (now C. S., 614), the time of the pendency of the appeal should not be counted as part of the ten years period, and hence that the right to issue execution was not barred.

In the instant case the motion to set aside the judgment had no relation to the issuance of execution, and no order restraining execution was asked or obtained. Thus no restraint was effected by the appeal.

It appears also in the case at bar that in 1939, while the appeal from the clerk's order was still pending, and without waiting for its decision, the defendants caused execution to issue in the effort to enforce the lien of their judgment. We think this was then too late.

We conclude that there was error in the ruling of the court below as to the statute of limitations, and that upon the facts agreed the plaintiffs were entitled to have the court hold that the defendants' judgment was barred by the statute of limitations.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action in that plaintiffs had an adequate remedy at law by motion in the original cause in Lenoir County, and could not proceed by independent action. The demurrer was overruled by Judge Frizzelle, and the defendants excepted. They now ask that their challenge to the plaintiffs' right to maintain this action be considered. The defendants' exception to the overruling of their demurrer cannot be sustained. The provisions of C. S., 1743, are sufficiently broad to entitle the plaintiffs to maintain this action on the facts alleged, and the decisions of this Court are in full support. *Crockett v. Bray,* 151 N. C., 615, 66 S. E., 666; *Harris v. Distributing Co.,* 172 N. C., 14, 89 S. E., 789; *Stocks v. Stocks,* 179 N. C., 285 (289), 102 S. E., 306; *Mizell v. Bazemore,* 194 N. C., 324, 139 S. E., 453.

On plaintiffs' appeal,

Reversed.

On defendants' appeal,

Affirmed.

JOHN CRANDALL, MAGGIE CRANDALL LANGLEY, WILLIAM CRANDALL, ELISHA CRANDALL, DOCK CRANDALL, MARIAH CRANDALL PERKINS, ALEX CRANDALL, ABRAHAM CRANDALL AND MANIZA CRANDALL LANIER, *v.* ANNIE CLEMMONS.

(Filed 4 November, 1942.)

Taxation §§ 40a, 40b, 40c—

In an action by remaindermen against the life tenant to declare the life estate forfeited under C. S., 7982, for failure to pay 1939 county taxes within one year from sale of the land for taxes in September, 1940, where no foreclosure suit was instituted against life tenant, who paid the 1939 taxes in October, 1941; *held,* the county in 1940 was limited to a sale of the tax lien and the land can be sold only by a suit in the Superior Court in the nature of a foreclosure. Public Laws 1939, ch. 310, sec. 1715; C. S., 7971 (209) *et seq.*

CRANDALL *v.* CLEMMONS.

APPEAL by defendant from *Johnson, Jr., Special Judge,* at August Term, 1942, of PITT.

Civil action brought by the plaintiffs, remaindermen, under Consolidated Statutes of North Carolina, sec. 7982, to declare forfeited the life estate of the defendant in certain lands, for failure to pay the 1939 taxes thereon within one year from an alleged sale of the lands for the nonpayment of said taxes.

The facts and contentions pertinent to this appeal are as follows:

1. Defendant owns a life estate in and to a tract of land in Pitt County containing 250 acres, more or less, assessed for taxation in the year 1939 at a valuation of $7,000.00 by Pitt County.

2. The county and special district school taxes for the year 1939 amounted to $66.50.

3. Plaintiffs allege that the defendant suffered the lands to be sold by Pitt County for the nonpayment of the 1939 taxes, on the first Monday in September, 1940, and did not redeem the same as provided by Consolidated Statutes of North Carolina, sec. 7982, within one year from the date of said sale.

4. On 19 November, 1940, defendant paid to Pitt County, as a partial payment on said taxes, the sum of $40.00.

5. This action was instituted on 9 October, 1941, and the summons served on defendant 10 October, 1941. On the same day the summons was served in this action, defendant paid to Pitt County the balance due on the 1939 taxes, including all penalties and costs.

The jury answered the issues in favor of the plaintiffs and from judgment entered thereon, declaring the life estate of defendant forfeited, the defendant in the wrongful possession of said lands and adjudging the plaintiffs the owners and entitled to possession of the lands, the defendant excepted and appealed, assigning errors.

William J. Bundy for plaintiffs.
Dink James for defendant.

DENNY, J. The question to be answered in the disposition of this appeal is simply this: Did the defendant suffer the land referred to herein to be sold for the nonpayment of the taxes for the year 1939 and fail to redeem the same within one year from the date of sale, as provided in section 7982 of the Consolidated Statutes of North Carolina? We do not think so.

Prior to 1927, the sale of real property for delinquent taxes was governed by Article 14, ch. 131, of the Consolidated Statutes of North Carolina, sections 8010 through 8039. Chapter 221, Public Laws of 1927, among other things, provided: "Every county, person, firm or

corporation, private or municipal, who has purchased any lands or interest in the same at any tax sale, as evidenced by sheriff's certificate of sale, or becomes a holder of any sheriff's certificate of sale referred to in section 8024, Consolidated Statutes, shall have the right of foreclosure of said certificate of sale by civil action and this shall constitute his sole right and only remedy to foreclose the same."

The form of certificate authorized to be issued by the sheriff until 1939, is set forth in chapter 558, sec. 9, of the Public Laws of 1901, section 8024 of the Consolidated Statutes of North Carolina, which directs that the purchaser of real estate sold for taxes shall be given a certificate signed by the sheriff in the form prescribed. The form in substance is a certification that the real property described therein listed in the name of.....was sold to....., on the.....day of....., in the manner provided by law. The power to sell real estate for taxes was repealed by chapter 310, Public Laws of 1939, C. S., 7971 (209), *et seq.* (Michie's Code, 1939). The sheriff or tax collector is limited to the sale of the tax lien. Section 1715, ch. 310, Public Laws of 1939, sec. 7971 (224) (Michie's Code, 1939). The lien can be enforced only by an action in the Superior Court, in the county in which the land is situated, in the nature of an action to foreclose a mortgage. At the time it is alleged Pitt County sold the real estate referred to herein, to wit, the first Monday in September, 1940, the county was without authority to sell the land. It was only authorized to sell the lien for the unpaid taxes. The defendant has paid all the 1939 taxes to Pitt County, including costs and penalties. No foreclosure suit was ever instituted against the defendant by the county.

The appellees are relying on *Sibley v. Townsend,* 206 N. C., 648, 175 S. E., 107, and *Cooper v. Cooper,* 220 N. C., 490, 19 S. E. (2d), 237. Those decisions were governed by the law in effect prior to the enactment of chapter 310, Public Laws of 1939.

The statutes now in effect in this State for the enforcement of the collection of taxes on real property give the life tenant the same protection as any other interested party. The interest of the life tenant, as well as that of all other interested parties, including lienholders, can be divested only at the final tax sale, authorized by a judgment entered in a tax foreclosure suit in which they were made parties and duly served with process. Under our present tax foreclosure laws, life estates are no longer forfeited under the provisions of section 7982 of the Consolidated Statutes of North Carolina.

The judgment of the Superior Court is

Reversed.

WILLIAM I. SCHNEPP v. CURTIS A. RICHARDSON AND WIFE, BEATRICE W. RICHARDSON, AND JOE P. FISHER.

(Filed 4 November, 1942.)

1. *Laborers' and Materialmen's Liens* §§ 3, 5a—

The claim of a subcontractor or materialman supplants that of the contractor and the duty of the owner to pay is an independent and primary obligation created by statute. The owner is liable to the subcontractor only in the event he receives notice of claim prior to settlement with the contractor, and then only to the extent of the contract price still in hand. C. S., 2437; C. S., 2439-40.

2. Pleadings § 10—

The cross actions by defendant against codefendant or a third party permitted under our practice must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. Independent and irrelevant causes of action cannot be litigated by cross action.

3. Pleadings § 16—

In an action by a subcontractor against the owner of a building for work done and material furnished for improvements to the building by contract with principal contractor B., defendant by answer denied the material allegations and set up a cross action for breach of contract and damages against one F., alleging he was the principal contractor. *Held:* Demurrer by F. sustained on the ground of misjoinder of parties and causes.

APPEAL by defendants Richardson from *Ervin, Special Judge,* at February Term, 1942, of CABARRUS. Affirmed.

Civil action to enforce subcontractor's lien.

The plaintiff alleges that J. M. Blackwelder, as principal contractor, engaged to construct a building on premises belonging to defendants; that he, the plaintiff, as subcontractor under Blackwelder, did the plumbing and furnished the material therefor; that there is now still due him the sum of $286.00; and that he duly filed with the defendant an itemized statement thereof. He seeks a judgment for the amount due and a foreclosure of the statutory lien filed.

The defendants answered denying the material allegations of the complaint and setting up a cross action against one Joe P. Fisher.

In the cross action they allege that Fisher was the contractor; that he failed and refused to complete the construction of said building according to plans and specifications, thereby breaching his contract; and that defendants, by reason thereof, suffered damages in the sum of $2,500. They also allege damages (1) for rents paid; (2) for failure to complete the contract; (3) for failure to pay for materials furnished by others; and (4) for $100 unjustly retained by Fisher. They pray that Fisher

be made a party defendant to the end that the whole controversy may be litigated in this action.

On motion of defendants, after notice, Joe P. Fisher was made party defendant and was duly served with process. He appeared and demurred for misjoinder of parties and causes of action.

When the cause came on for hearing the court below sustained the demurrer and entered its judgment accordingly. Defendants excepted and appealed.

Barnhardt & Calloway and R. Lee Wright for appellants.
E. T. Bost, Jr., and Hartsell & Hartsell for appellee.

BARNHILL, J. The plaintiff, to recover, must prove: (1) his subcontract; (2) work done and labor performed in fulfillment thereof; (3) a balance due; (4) notice to the owner as required by statute prior to payment of the contract price to the principal contractor; and (5) a balance due the contractor. C. S., 2437; C. S., 2439-40. Upon such showing the law requires the owner to apply the unexpended contract price due the contractor to the payment of amounts due subcontractors and materialmen of whose claims the owner has received notice. C. S., 2439-40-41; *pro rata* if necessary. C. S., 2442; *Construction Co. v. Winston-Salem Journal,* 198 N. C., 273, 151 S. E., 631; *Brown v. Ward,* 221 N. C., 344; *Powder Co. v. Denton,* 176 N. C., 426, 97 S. E., 372; *Foundry Co. v. Aluminum Co.,* 172 N. C., 704, 90 S. E., 923; *Supply Co. v. Eastern Star Home,* 163 N. C., 513, 79 S. E., 964; *Clark v. Edwards,* 119 N. C., 115; *Mfg. Co. v. Holladay,* 178 N. C., 417, 100 S. E., 597.

The claim of the subcontractor or materialman supplants that of the contractor and the duty of the owner to pay is an independent and primary obligation created by statute. The owner is liable to the subcontractor, however, only in the event he received notice of claim prior to settlement with the principal contractor and then only to the extent of the unexpended contract price still retained by him. *Price v. Gas Co.,* 207 N. C., 796, 178 S. E., 567.

The plaintiff has alleged that Blackwelder was the contractor under whom he worked. He must stand or fall on this allegation. *Whichard v. Lipe,* 221 N. C., 53. Hence, he is not affected by any controversy between defendants and Fisher. But, conceding the identity of the contractor, the same conclusion follows. The cross action defendants seek to set up against Fisher is not germane to, founded upon or necessarily connected with the subject matter in litigation between plaintiff and defendants. Decision on the issues thus attempted to be raised is not essential to a full and complete determination of the cause of action

alleged by plaintiff. It should not be engrafted upon his action and thus compel him to stand by while defendants and Fisher litigate their differences in his suit. *Montgomery v. Blades,* 217 N. C., 654, 9 S. E. (2d), 397, and cases cited; *Wingler v. Miller,* 221 N. C., 137; *Burleson v. Burleson,* 217 N. C., 336, 7 S. E. (2d), 706; *Beam v. Wright, ante,* 174.

The cross action by a defendant against a codefendant or a third party permitted under our practice must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. Independent and irrelevant causes of action cannot be litigated by cross action. *Coulter v. Wilson,* 171 N. C., 537, 88 S. E., 857; *Montgomery v. Blades, supra; Wingler v. Miller, supra; Beam v. Wright, supra.*

Questions in dispute among the defendants may not be litigated by cross action unless they arise out of the subject of the action as set out in the complaint and have such relation to the plaintiff's claim as that their adjustment is necessary to a full and final determination of the cause. *Hulbert v. Douglas,* 94 N. C., 128; *Montgomery v. Blades, supra; Wingler v. Miller, supra; Beam v. Wright, supra.*

The presence of Fisher as a party is not essential to enable defendants to fully resist the claim of plaintiff. The defenses of "settlement with the contractor" and of "no debt due the contractor at the time of notice" are available to defendants on the pleadings as presently filed without the joinder of the contractor as a party defendant.

It is to be noted that the judgment entered sustains the demurrer but does not dismiss the action as to Fisher. The cross action is out but Fisher is not. He may defend on the issue as to the amount due by the owner to the contractor. Waiving the controversy as to who was the contractor, he is, perhaps, on this issue, a proper, though not a necessary, party.

We concur in the conclusion of the court below. There is a misjoinder both of parties and of causes of action. *Shore v. Holt,* 185 N. C., 312, 117 S. E., 165; *Bank v. Angelo,* 193 N. C., 576, 137 S. E., 705; *Rose v. Warehouse Co.,* 182 N. C., 107, 108 S. E., 389; *Taylor v. Ins. Co.,* 182 N. C., 120, 108 S. E., 502; *Roberts v. Mfg. Co.,* 181 N. C., 204, 106 S. E., 654; *Montgomery v. Blades, supra; Wingler v. Miller, supra; Beam v. Wright, supra.*

The plaintiff does not allege that at the time he filed statutory notice of his claim with the defendants they were then indebted to the contractor. Whether this is essential we need not now decide. If plaintiff deems it advisable to amend he may still seek permission to do so.

The judgment below is

Affirmed.

MAGGIE HEILIG v. HOME SECURITY LIFE INSURANCE COMPANY.

(Filed 4 November, 1942.)

1. **Insurance § 31c—**

An insurance company cannot avoid liability on its policy by reason of any facts known to it at the time the policy was delivered, and any knowledge of the company's agent, while acting in the scope of his authority, will, in the absence of fraud or collusion, be imputed to the company, though the policy contains a stipulation to the contrary.

2. **Trial § 22a: Appeal and Error § 40e—**

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact, pertaining to the issues involved, which may reasonably be deduced from the evidence.

3. **Trial § 22b: Insurance § 31c—**

In an action to recover on a life insurance policy, motion for nonsuit properly denied, where plaintiff's evidence showed that the policy was issued by the company's agent on an application, filled out by the agent, and signed by insured's father, who answered truthfully all questions asked and answers to other questions were inserted by the agent without the knowledge of the father, there being no evidence of fraud or collusion.

4. **Trial § 7—**

The decision of the trial judge on the question of the concluding argument is final and not reviewable.

APPEAL by defendant from *Nettles, J.*, at February Term, 1942, of ROWAN.

Civil action to collect the proceeds of an insurance policy issued by defendant on the life of Paul Heilig, payable to Maggie Heilig, beneficiary.

It is admitted the policy involved was issued 25 March, 1940, that the insured died 14 May, 1941, and the premiums were paid by Maggie Heilig, as required under the terms of the policy. However, the defendant denies the policy was ever in force, alleging that the insured perpetrated a fraud on the defendant in the issuance of the policy, in that certain answers in the application for the insurance were false.

O. L. Everhart, agent of the defendant, testified that on 14 March, 1940, he obtained from Paul Heilig, at the home of his parents in Spencer, N. C., an application for the policy of insurance now in controversy. He further testified that he asked the insured all the questions in the application and wrote the answers for him; and, that the insured signed the application in his presence and he witnessed the applicant's signature.

All the answers to questions in the application relative to any previous hospitalization, treatment by a physician within the past twelve months, and whether or not the applicant had suffered from any of the diseases enumerated therein, were answered in the negative.

The evidence discloses the insured had received treatment in a New York hospital within twelve months from the date of the application for this insurance, had been under the care of a physician within said period and died of pulmonary tuberculosis on 14 May, 1941.

The evidence of John Heilig, for the plaintiff, was substantially as follows: That he had a conversation with Mr. Everhart on 14 March, 1940, relative to some insurance on the life of his son, Paul Heilig. The conversation took place at his home in Spencer, N. C., in the presence of his wife, Maggie Heilig. He told Mr. Everhart that he wanted to take out some insurance on Paul. Mr. Everhart asked him if he was in good health, and he told him the last letter he had from him said he was well. Mr. Everhart said "All right." He then inquired as to Paul Heilig's age, where he was born, whether married or single, and who was to be named beneficiary. "He asked me no other questions about the condition of Paul's health. He asked me where Paul was and I told him in New York. . . . I did not tell him that Paul Heilig had been in the hospital in New York. I did not know it myself. I told him the last letter we got from Paul he said he was well." This witness testified he signed Paul Heilig's name to the application. He further testified Paul Heilig came home in April, 1940. It had been three years since he had seen his son. He had heard from him sometimes once a month and sometimes once in two or three months.

The testimony of Maggie Heilig was substantially the same as that of her husband.

The jury answered the issues in favor of the plaintiff. From judgment entered thereon, the defendant excepts and appeals, assigning error.

John C. Kesler and Kerr Craige Ramsay for plaintiff.
C. P. Barringer and H. L. Mangum for defendant.

DENNY, J. The first assignment of error is to the refusal of his Honor to sustain defendant's motion for judgment as of nonsuit. "On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved which may reasonably be deduced from the evidence." *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5.

The evidence offered by the plaintiff was properly submitted to the jury. The evidence of the plaintiff and defendant was conflicting, but the jury adopted the plaintiff's version as to the facts and circumstances

under which the policy of insurance was issued and answered the issues accordingly. It appears from the plaintiff's evidence and now supported by the verdict of the jury, that the agent asked the father of the applicant only the following questions: (1) Paul Heilig's age; (2) where he was born; (3) the condition of his health; (4) married or single; (5) who was to be named beneficiary; and (6) Paul Heilig's address. The answers to other questions, if inserted by the agent, without the knowledge of the applicant, in the absence of fraud or collusion between the insured and the agent, will not vitiate the policy of insurance issued pursuant to the information contained therein. *Cato v. Hospital Care Assn.*, 220 N. C., 479, 17 S. E. (2d), 671; *Cox v. Assurance Society,* 209 N. C., 778, 185 S. E., 12.

There is no suggestion or allegation that there was any collusion between the plaintiff or the insured and the agent of the company, or that the agent was not acting in the scope of his employment when he obtained the application for this insurance. Therefore, the jury having found that the insured did not make any false representations in the application for the insurance in controversy, the defendant is bound by the contract.

In *Cox v. Assurance Society, supra,* this Court said: "It is a well settled principle in this jurisdiction that an insurance company cannot avoid liability on a policy issued by it by reason of any facts which were known to it at the time the policy was delivered, and that any knowledge of an agent or representative, while acting in the scope of the powers entrusted to him, will, in the absence of fraud or collusion between the insured and the agent or representative, be imputed to the company, though the policy contains a stipulation to the contrary. *Follette v. Accident Assn.*, 110 N. C., 377; *Fishblate v. Fidelity Co.*, 140 N. C., 589; *Short v. Ins. Co.*, 194 N. C., 649; *Laughinghouse v. Ins. Co.*, 200 N. C., 434; *Colson v. Assurance Co.*, 207 N. C., 581; *Barnes v. Assurance Society,* 204 N. C., 800, and cases there cited."

The third assignment of error is to the refusal of the court to permit the defendant to have the concluding argument. The judge's decision on that question is final and not reviewable. Rule 6, Rules of Practice in the Superior Courts, 221 N. C., 574.

The remaining assignments of error are without merit.

In the judgment of the court below, we find

No error.

ALICE BEAVER v. TOWN OF CHINA GROVE.

(Filed 4 November, 1942.)

1. Municipal Corporations § 14—

A municipality is liable for the negligent failure to maintain its streets in a reasonably safe condition, but is not an insurer of the safety of travelers thereon.

2. Same—

It is a general rule that, in cases of exceptional danger, as where construction work is being performed in a street, of which the traveling public has full knowledge, the exercise of reasonable care means the exercise of such care as is commensurate with the exigencies of the occasion—the rule of the prudent man.

3. Same: Negligence § 19a—

Where an automobile was being driven on a public street, which was under construction and that fact known to the driver, who ran the car into a manhole protruding about two feet above the surface in the middle of the street with a driveway on each side and which could be seen for a hundred yards, resulting in injuries to a passenger, motion for judgment of nonsuit should have been granted, in an action for damages by the passenger against the town.

APPEAL by defendant from *Nettles, J.*, at May Term, 1942, of ROWAN.

Civil action to recover damages for personal injuries sustained by plaintiff on one of the public streets of the defendant town.

The record discloses that on the morning of 4 December, 1940, plaintiff and several other workers on the night shift in the Cannon Mills at Kannapolis were returning to their homes in China Grove in an automobile owned and operated by a fellow worker, Ray Albright, when plaintiff was thrown against the windshield, sustaining an injury to her left eye, as the car came to a sudden stop by striking a manhole in the center of Liberty Street. The time was approximately 7:30 a.m. (E. S. T.). It was daylight; the weather dry and clear.

Most of the streets of China Grove were under repair at the time. The town was engaged in a WPA project which involved the regrading of Liberty Street, an unimproved street approximately 30 feet in width. The street had been graded down on both sides, leaving a ridge of loose dirt and the manhole in the center, which was approximately 24 inches above the road level on either side. There were driveways on both sides of the manhole. The grading machine had cut the dirt somewhat on an incline up to the manhole. The top of the manhole and the brick and mortar construction were sticking up at least 12 or 14 inches above the dirt, brick and cast iron. The cast iron ring was 9 or 10 inches higher than the brick.

Ray Albright testified: "I had driven over this street the night before. . . . It was rough but I got past the place to the side of it without hitting the manhole. They had been working on all the streets and had rough roads all over town. You had to pick out the best spots and take it as you came to it. . . . There were not any caution signs or signals on the street anywhere. About the middle of Liberty Street I let Mr. Bost (one of the passengers) out of the car. That was about 30 feet from where the accident occurred. As I came from the curb out into the road, got the car started and changed to second gear, it hit the manhole. . . . I was traveling between 15 and 20 miles an hour. There was a road (passage way) on either side of the manhole. . . . I didn't see the manhole. . . . The brim of the axle hit it. . . . The axle of my car is about 10 inches from the ground. . . . The dirt around the manhole was soft and the car sunk down, which caused it to hit. . . . The top of the manhole was about a foot and a half across, built of brick. . . . The surface of the street on either side of the manhole seemed to be in good condition."

A. T. Bost, witness for plaintiff, testified: "I reside on Liberty Street. . . . The traffic moved on each side of the street. It was higher in the middle of the street where the manhole was. . . . On December 4th the manhole stuck up high enough that an automobile wouldn't pass over it. . . . Dirt was sticking up around the manhole. (Cross-examination.) I was about 100 yards away and saw the driver strike the manhole. . . . You could see it all the way from the highway (a distance of 600 feet). . . . It was sticking up above the level of the street like a sore thumb. On either side of it was a driveway that had been scraped out. . . . Anybody with normal vision could see the manhole a 100 yards away."

From verdict and judgment for plaintiff, assessing her damages at $500, the defendant appeals, relying chiefly upon its demurrer to the evidence.

C. P. Barringer for plaintiff, appellee.
Linn & Linn for defendant, appellant.

STACY, C. J. In the circumstances disclosed by the record, it would seem that the demurrer to the evidence should have been sustained, if not upon the principal question of liability, then upon the ground of insulated negligence. *Oliver v. Raleigh,* 212 N. C., 465, 193 S. E., 853; *Chinnis v. R. R.,* 219 N. C., 528, 14 S. E. (2d), 500; *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808.

There is no debate as to the liability of a municipality for the negligent failure to maintain its streets in a reasonably safe condition, *Ferguson v. Asheville,* 213 N. C., 569, 197 S. E., 146, albeit the municipality

is not an insurer of the safety of travelers upon its streets. *Watkins v. Raleigh,* 214 N. C., 644, 200 S. E., 424; *Houston v. Monroe,* 213 N. C., 788, 197 S. E., 571; *District of Columbia v. Moulton,* 182 U. S., 576; *Walker v. Wilson, ante,* 66.

It is likewise conceded that ordinarily one may assume the public streets to be in a reasonably safe condition. But this principle is not applicable here. *Welch v. McGowan,* 262 Mo., 709, 172 S. W., 18. The driver of the car in which plaintiff was riding had actual knowledge of the condition of the street, that it was then under repair.

It is a rule of general observance that in cases of exceptional danger, as where, for example, construction work is being performed in a street, of which the traveling public has full knowledge, the exercise of reasonable care, under such circumstances, means the exercise of such care as is commensurate with the exigencies of the occasion. McQuillin Municipal Corporations (2d), Vol. 7, p. 263; *Quirk v. Bradley Contracting Co.,* 161 N. Y. Sup., 296. The accepted standard under varying conditions is the conduct of the reasonably prudent man. *Cole v. R. R.,* 211 N. C., 591, 191 S. E., 353. "The standard is always the conduct of the reasonably prudent man, or the care which a reasonably prudent man would have used under the circumstances. *Tudor v. Bowen,* 152 N. C., 441, 67 S. E., 1015. The rule is constant, while the degree of care which a reasonably prudent man exercises varies with the exigencies of the occasion." *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358; *Meacham v. R. R.,* 213 N. C., 609, 197 S. E., 189.

The only allegation of negligence against the town of China Grove is, that it failed to warn the traveling public of the hazardous condition of the street. Even so, the driver of the car had driven over this street the night before. He knew the manhole was there. He does not say that he could not see it—only that he did not see it. As observed by the Supreme Judicial Court of Maine in *Lane v. Lewiston,* 91 Me., 292, "No one needs notice of what he already knows," and "knowledge of the danger is equivalent to prior notice." *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5.

It follows, therefore, that as the driver of the car in which plaintiff was riding had actual knowledge of the condition of the street and could see the manhole "sticking up above the level of the street like a sore thumb," the proximate cause of plaintiff's injury must be attributed to the negligence of the driver of the car. *Butner v. Spease, supra.* He says the roads were rough all over town, "you had to pick out the best spots and take it as you came to it." There was a safe way to pass without hitting the manhole. *Groome v. Statesville,* 207 N. C., 538, 177 S. E., 638. The record impels the conclusion that the active negligence of the driver was the real, efficient cause of the plaintiff's injury.

Smith v. Sink, 211 N. C., 725, 192 S. E., 108, and cases there assembled. Reversed.

STATE v. WILLIAM HENRY SHINE.

(Filed 4 November, 1942.)

1. Constitutional Law §§ 26, 27—

The Legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide other means of trial for the offense than by indictment and trial by jury. N. C. Const., Art. I, secs. 12, 13.

2. Criminal Law §§ 13, 15: Courts § 2a—

Upon conviction in a county court of a misdemeanor within the final jurisdiction of such court, upon a warrant sworn out before a justice of the peace, on appeal the Superior Court has derivative jurisdiction to try defendant upon the same warrant without a bill of indictment found by the grand jury.

APPEAL by defendant from *Stevens, J.,* at April Term, 1942, of DUPLIN. No error.

Upon a warrant sworn out before a justice of the peace, charging the defendant with unlawfully transporting and possessing intoxicating liquor for the purpose of sale, probable cause was found, and he was bound over to the general county court of Duplin County. In the county court he pleaded not guilty to the charge contained in the warrant, was convicted, and appealed to the Superior Court. In the Superior Court he was tried upon the original warrant and found guilty by the jury. From judgment on the verdict the defendant appealed to the Supreme Court.

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

Rivers D. Johnson for defendant.

DEVIN, J. The defendant challenged the validity of his conviction and sentence in the Superior Court upon the ground that he was tried upon the original warrant and without a bill of indictment having been found by the grand jury.

Since the offense with which he was charged was a misdemeanor, and, under the statute applicable to Duplin County, within the final jurisdiction of the general county court, his appeal from conviction in that court gave to the Superior Court derivative jurisdiction to try him upon the

same warrant without the necessity of a bill of indictment having been found by the grand jury. The procedure seems to have been in accord with the statutes as interpreted by this Court.

By virtue of ch. 216, sec. 13 (4), Public Laws 1923 (Michie's Code, 1608 [m]), the general county court of Duplin County had exclusive and final jurisdiction of the offense charged, it coming within the definition of petty misdemeanor as declared by the Act. This statute further provides that when a justice of the peace issues a warrant charging an offense not within his own jurisdiction, but within the jurisdiction of the general county court, he shall bind the defendant over to the county court. This procedure was followed in the case at bar, and the defendant having appeared and pleaded to the charge in the county court, that court had final jurisdiction, subject to the defendant's right of appeal.

Since the offense here charged was one of those declared by legislative definition to be a petty misdemeanor, it came within the provisions of Art. I, sec. 13, of the Constitution of North Carolina by which the Legislature was empowered to provide "other means of trial" (that is other than by indictment and jury trial), "for petty misdemeanors, with right of appeal." The declaration of Art. I, sec. 12, that no person shall be put to answer a criminal charge but by indictment, presentment or impeachment, is coupled with the phrase "except as hereinafter allowed." The Legislature, in the exercise of the power thus conferred, has designated the offense here charged a petty misdemeanor, and provided the means of trial. It was within the power of the Legislature to define what offenses should be classed as petty misdemeanors, provided the punishment therefor should not be that of a felony. *S. v. Crook,* 91 N. C., 536; *S. v. Lytle,* 138 N. C., 738, 51 S. E., 66; *S. v. Shine,* 149 N. C., 480, 62 S. E., 1080; *S. v. Hyman,* 164 N. C., 411, 79 S. E., 284; *S. v. Camby,* 209 N. C., 50, 182 S. E., 715.

The criminal offense charged having been sufficiently set out in the original warrant, upon which the defendant was bound over to the county court and to which he pleaded in that court, there was no necessity or requirement that a new warrant charging the same offense in the same language should have been issued by the county court, and upon the defendant's appeal to the Superior Court he was properly tried there upon the same warrant upon which the conviction appealed from had been had in the county court. *S. v. Turner,* 220 N. C., 437, 17 S. E. (2d), 501; *S. v. Samia,* 218 N. C., 307, 10 S. E. (2d), 916; *S. v. Saleeby,* 183 N. C., 740, 110 S. E., 844.

In *S. v. Johnson,* 214 N. C., 319, 199 S. E., 96, cited by defendant, the defendant in that case was tried before the Mayor of North Wilkesboro on the charge of operating a motor vehicle on the highway while under the influence of intoxicating liquor, and appeal was taken to the

Superior Court. It was held that, as the mayor did not have final jurisdiction of the offense, the defendant could not be tried in the Superior Court without a bill of indictment. The distinction between that case and the instant case is apparent.

Defendant's exceptions to the form of the verification of the complaint upon which the warrant was issued, to the admission of evidence in contradiction of one of defendant's witnesses, and to the failure of the court, in the charge, to comply with the requirements of C. S., 564, cannot be sustained.

In the trial we find

No error.

STATE v. GEORGE J. KING ET AL.

(Filed 4 November, 1942.)

1. **Larceny § 1—**

Physical presence at the scene of larceny is not deemed absolutely essential to conviction, if it appears that defendant actually advised and procured the crime, or aided and abetted the commission thereof; and he would be guilty whether or not he shared in the proceeds thereof.

2. **Larceny § 7—**

In a criminal prosecution for felonious breaking and entering, larceny and receiving against several defendants, resulting in conviction of one of them of larceny only, a motion for nonsuit under C. S., 4643, was properly denied, where the State's evidence tended to show that this defendant and one of the other defendants planned the theft and this defendant advised, aided and abetted his codefendant therein, though not personally present when the theft occurred.

APPEAL by defendant George J. King from *Nettles, J.*, at April Term, 1942, of CABARRUS.

The appellant King was convicted of larceny upon a bill of indictment which charged him and three others with a felonious breaking and entering, with the larceny of automobile tires and with the felonious receiving of said tires knowing them to have been stolen. Two of his codefendants were released upon demurrer to the evidence, C. S., 4643, and his remaining codefendant Luther Brice was convicted of a felonious breaking and entering and of larceny.

The State's evidence tended to show that defendant King and defendant Brice planned the larceny of automobile tires, the property of one Tom Stilwell from a warehouse in the city of Concord, and that as a result of such plan Brice broke and entered the warehouse and procured

the tires, and that they both took the tires in a truck to Greensboro and there delivered them to the brother-in-law of King, who paid King therefor, and the money so paid was delivered in part to Brice and retained in part by King; that King was not personally present when the tires were actually taken out of the warehouse by his codefendant Brice.

The appellant King's evidence, while it tends to show that he received the tires and delivered them to his brother-in-law in Greensboro, he did not plan the larceny of the tires, and that he did not know they had been stolen when he received them, and that he took them to Greensboro and sold them to his brother-in-law and paid his codefendant Brice with a portion of the funds received from his brother-in-law therefor, all in good faith and with no knowledge of the tires having been stolen, if they were stolen.

From a jury verdict of guilty of larceny as to him the defendant King appealed, assigning error.

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

E. Johnston Irvin and Hayden Clement for defendant King, appellant.

SCHENCK, J. The appellant in his brief seems to rely upon his exceptions to the refusal of the court to sustain his demurrer to the evidence and to grant his motion for dismissal lodged under C. S., 4643. He contends that since *all* the evidence tends to show that the appellant was not personally present at the time the goods were moved by his codefendant Brice from the warehouse of the owner thereof, he, the appellant, could not be found guilty of larceny, and that his motion for a dismissal on the larceny count should therefore have been allowed. He relies upon *S. v. Cannon,* 218 N. C., 466, 11 S. E. (2d), 301. The first syllabus of this case, which is a proper interpretation of the opinion, reads: "Where the State's evidence tends to show the actual theft of the goods in question by others, and fails to connect defendant therewith in any manner until after the goods had been asported, the presumption arising from defendant's possession of the goods a short time thereafter is insufficient to justify the submission of the question of defendant's guilt of larceny to the jury." The distinction between the cited case and the instant case is that in the former the evidence "fails to connect the defendant therewith (the actual theft) in any manner until after the goods had been asported," whereas in the latter the evidence of the State was to the effect that the appellant and his codefendant Brice planned the theft before it actually occurred, that the appellant procured a key to a door and delivered it to Brice to enable Brice to get to the portion

of the warehouse where the tires were stored, and otherwise did aid, abet, advise and procure in the actual theft.

"Consequently physical presence at the scene of larceny is not deemed to be absolutely essential to conviction if it appears that defendant actually 'advised and procured the crime' or aided and abetted the commission thereof. . . . the defendant would be guilty if the jury found beyond a reasonable doubt that he aided, abetted, advised or procured the commission of the crime whether he shared in the proceeds thereof or not." *S. v. Whitehurst,* 202 N. C., 631, 163 S. E., 732.

The appellant makes the subject of exceptive assignments of error certain excerpts from the charge to the effect that the appellant could not be guilty both of larceny and of feloniously receiving stolen goods knowing them to have been stolen, one of such excerpts, in effect similar to all of them, being as follows: "Now, gentlemen of the jury, a man cannot be guilty of larceny and of receiving stolen goods knowing the same to have been stolen. Therefore, if you find the defendant, George J. King, guilty of the crime of larceny, you would not consider whether or not he is guilty of the crime of receiving, but only in the event you find him not guilty of the crime of larceny will you consider whether or not the defendant King is guilty of the crime of receiving stolen property knowing the same to have been theretofore feloniously stolen and carried away."

The appellant's complaint seems to be that these instructions deprived the jury of the discretionary right to convict him of feloniously receiving stolen property rather than of larceny. Even if this should be error, which we do not decide, such error would be in favor of the defendant, and therefore harmless and not prejudicial.

There appears in the brief of the appellant the following: "Since the trial this action and the adjournment of the Superior Court of Cabarrus County at which this action was tried, the defendant has acquired knowledge of newly discovered evidence which, in his opinion, is sufficient to justify him to move in the Superior Court of Cabarrus County for a new trial on the grounds of newly discovered evidence, in the event the Supreme Court finds no error in his appeal." A reading of the brief causes us to suspect that the appellant relies more confidently on his prospective motion in the Superior Court for another trial upon newly discovered evidence, than upon his exceptive assignments of error in the record, since he cites no authorities in support of the latter except the one referred to above, which is not applicable to the instant case.

On the record we find

No error.

STATE v. CHRISTINE DAVID.

(Filed 11 November, 1942.)

1. **Evidence §§ 45a, 45b, 45c—**

There are two avenues through which expert opinion evidence may be presented to the jury: (a) By testimony of the witness based on his personal knowledge or observation; and (b) by testimony of the witness based on a hypothetical question addressed to him, in which pertinent facts are assumed to be so found by the jury.

2. **Evidence § 45c—**

An expert witness may base his opinion partly on facts of his own observation and partly on factual evidence of other witnesses, hypothetically presented.

3. **Evidence §§ 45c, 49—**

The opinion of one expert witness, based upon the opinion of another such witness, is incompetent as evidence.

4. **Evidence §§ 48b, 49—**

In a prosecution for murder, where a pathologist, who had performed an autopsy on the body of deceased, testified as an expert, in answer to a properly framed hypothetical question, that he found no condition which might have caused death other than indications of carbon monoxide poisoning which in his opinion caused the death, it was error for the trial court to allow an expert toxicologist to testify that in *his* opinion the deceased came to her death from such poisoning, admittedly basing his opinion substantially upon the opinion evidence of the pathologist, which had not been incorporated in the hypothetical question addressed to him.

APPEAL by defendant from *Burney, J.*, at August Term, 1942, of LENOIR. New trial.

The defendant was tried on a bill of indictment charging her with the murder of Lila Simpson Lawson, and was convicted of murder in the second degree. The evidence pertinent to an understanding of the appeal and of this decision may be summarized as follows:

The evidence of the State tended to show that the deceased, Mrs. Lawson, lived alone in an upstairs apartment, consisting of a living room, bedroom, and kitchenette, in the town of Kinston, to which access was made by an outside stairway. The defendant had been in her employment as maid for about two years. Mrs. Lawson was engaged in the business of making and furnishing sandwiches of various kinds to filling stations and stands where they were retailed, and defendant assisted her in this business.

During the latter part of May, 1942, Floyd Daughety, one of the State's witnesses, then visiting in Kinston and about to leave, decided

that he would call on Mrs. Lawson. He arrived near 10:00 o'clock, went up the stairway and found the door closed. He opened the door and called her and, receiving no answer, walked in and went straight back to the bedroom, looking into the kitchen as he passed, and then saw Mrs. Lawson's head. He found Mrs. Lawson lying down with "one hand kind of up," felt her arm, and found it was cold. Just at that time the telephone rang, and witness answering, found Fred Bates on the line and told him what he had found and asked him to come up, and then called Sheriff Churchill.

In the bedroom there was a rug thrown on the bed and the cover was "kind of pulled off the bed and a pillow was on the floor kind of under the bed and the other one was scattered around on the bed." Witness saw a "bunch of stuff looked like it had been dumped out of a pocketbook on the dresser." The dress deceased had worn the night before was "hanging on a coat hanger on the door that opened into the living room, and a pair of shoes were sitting under the bed right next to the head of the bed." There was only one sheet on the bed, and the other was under Mrs. Lawson's feet and tied around her feet. The cover on the bed looked like it had been wadded up; and the remaining sheet on the bed looked as if something had been dragged across it. One corner of the sheet tied around Mrs. Lawson's feet was wet.

This witness did not attempt to move the kitchen door before the others arrived. "It was open just wide enough for me to get my hand in there and feel her arm." "Mrs. Lawson had on just a nightgown. That was arranged on her body just like most anybody that would be lying down; it was on her all right. It was pulled down on her body. The sheet was wrapped around her legs and tied and the rest was around her or under her; there was a knot tied in the sheet just above her ankles kinder, just one tie."

Other witnesses described the position and condition of the body and of the several rooms in about the same way. It was stated by others, however, that the sheet was loosely tied, somewhat above the ankles, the corners twisted and drawn together, but not firmly knotted, so that a movement of the legs might have loosened the sheet. It was also stated that one corner of the sheet was wet, slick and slimy.

Several witnesses testified that portions of the body had a cherry red color. The evidence of the State further tended to show that the odor of gas was present and could be detected as one approached the apartment from the platform, and that it was present in the kitchen where Mrs. Lawson was lying; that a jet on the gas stove was open about one-third to one-half, and that the odor of gas was present in the room when the witnesses arrived.

The defendant was arrested on the same day the body was found, and there was found in her possession, under the mattress in a room where she resided, Mrs. Lawson's pocketbook. The defendant was questioned with regard to her movements and the death of Mrs. Lawson without material result, but she was transferred to a jail in an adjoining county. There she made a confession, which was introduced in the evidence. It was to the effect that she had gone to the apartment that morning, where she was employed as maid and cook, and found Mrs. Lawson drunk; "she began arguing and cursing me and we got into a scuffle; Mrs. Lawson fell on the floor in the kitchen, and I took a sheet and wound around the feet of Mrs. Lawson and I turned on the gas and then I took her pocketbook and her money and went home. I met Tink Davis when I left home and he asked me about borrowing some money. I gave him the money I got from Mrs. Lawson's pocketbook and asked him to keep it for me."

Oral testimony as to her confession added the particular that defendant had taken $39 from the pocketbook.

This confession the defendant later repudiated, stating that it had been obtained from her by threats, intimidation and abuse. She stated on her testimony that she went to the apartment of Mrs. Lawson in the morning; found her pocketbook upon the balcony; that the door was locked and she was unable to enter, and she, therefore, took the pocketbook to her home; that she had frequently taken care of Mrs. Lawson's pocketbook and that she took it now for that purpose. She stated that she frequently handled money for Mrs. Lawson when she would be going off Saturday nights and didn't want to take her money; that frequently Mrs. Lawson would give her the pocketbook for safekeeping when she got drunk.

After the indictment of the defendant, the body of Mrs. Lawson was disinterred by order of court and sent to Duke Hospital, where an autopsy was performed by Dr. Forbus, assisted by Dr. Taylor and others.

Dr. Forbus testified as to this autopsy and the conditions found as follows:

"I have had experience as a pathologist. My principal occupation is performing autopsies on bodies for the purpose of ascertaining the cause of death; I have been engaged in that occupation since 1923. I was engaged from 1923 to 1928, in Baltimore; from 1928 to 1930, in Europe, and from 1930 until now, in North Carolina. That is my principal occupation. I have either performed myself or have had performed under my direction studies of this sort approximately 8,000 cases.

"I was requested to make an autopsy of the body of Mrs. Lila Lawson of Kinston. The body was delivered to me by the undertaking establishment in Kinston, Mr. Jarman representing said undertaking establish-

ment. The body was at that time in the casket. I did perform the autopsy on the body of Mrs. Lawson. The examination I made consisted of an examination of all of the body as a whole and of all the tissues, that is organs of the internal parts of the body. That examination is made both by observation with the naked eye and also by observation with the microscope.

"I prepared a report of what I did and what I found in the performance of this autopsy. I performed this examination as I have described. I found three things; the first was a peculiar color of the body, both internally and externally, which I shall describe as cherry red color. I found a bruise on the upper right arm. I found a bruise on the right thigh. I found no other changes. I made a complete autopsy of the body. A complete autopsy consists of the examination of the external parts of the body and an examination of all of the internal parts of the body. The method that was used consists of using or utilizing one's gross powers of observation or examination with your eyes, and the other method is the study of the organs of the body by means of the microscope. I made a written report of my findings, and I have a copy of the original report with me. I have already explained that I found three things, the color of the body to be abnormal as I have described it as a cherry red; I also found the two bruises that I mentioned. The two bruises were of no consequence; that they were quite near the surface of the skin and I did not regard them as of any importance.

"The cherry red color that I found, that is characteristic of a person when that person is poisoned by a gas, which is called carbon monoxide. I found nothing other than that carbon monoxide and the two bruises and the color, that could have any bearing on the death of this person. This particular color is a direct indication of a chemical substance that is formed when carbon monoxide is taken into the blood. That is the condition that we call medically carbon monoxide poisoning.

"After having performed this autopsy as I have described, I further tested my own findings by calling into consultation a chemist, Dr. Haywood Taylor. I submitted to Dr. Taylor certain specimens for his examination for the purpose of determining critically the presence of carbon monoxide. I was assisted by Dr. Taylor and a group of other assistants. Dr. Wooten was present. I conducted the autopsy.

"Q. Dr. Forbus, assuming that the jury should find from the evidence and beyond a reasonable doubt that Mrs. Lila Lawson was found dead in her kitchen in her home at about the hour of 10 o'clock a.m., on May 31, 1942, and that her body was taken to an undertaking establishment in the city of Kinston and there treated for burial and embalmed and buried on June 1, 1942, and that subsequent thereto, to wit: on June 30, 1942, her body was removed and carried to Durham, whereupon a *post-*

mortem examination was made by you; and assuming further that the jury should find that there was gas in the room, in the kitchen where the deceased was found at the time of her death; that one of the jets on the gas stove in her kitchen was about half-open and that the odor of gas could be detected when entering the house and that at the time the body was discovered at around 10 o'clock a.m., on May 31, 1942, it had the appearance of a cherry red color, and from your autopsy and *post-mortem* examination do you have an opinion satisfactory to yourself as to the cause of the death of Mrs. Lila Lawson?"

Defendant objects—overruled—defendant excepts.

EXCEPTION No. 1.

"A. Yes, sir, I have an opinion.

"Q. What is your opinion?"

Defendant objects—overruled—defendant excepts.

EXCEPTION No. 2.

"A. It is my opinion that Mrs. Lila Lawson died of carbon monoxide poisoning."

Defendant moves to strike—motion denied—defendant excepts.

EXCEPTION No. 3.

"One dying of carbon monoxide poisoning would have to breathe it into their lungs in order to absorb it. I made a written report of the autopsy I performed. This is a copy of my report. (Counsel shows witness paper.) This is the original report made by me. (Shows witness another paper writing.)

(State offers said report in evidence as STATE'S EXHIBIT 4.)

"BY THE COURT: For what purpose is this offered?

"COUNSEL: To show the extent of the examination.

"The body of Mrs. Lawson was brought to me on June 30, 1942, and on that day I performed a complete *post-mortem* examination; that examination included an examination of the entire body of Mrs. Lawson and of all the internal organs. That examination also included a description of the organs of Mrs. Lawson as they were seen under the microscope. Following that examination I submitted to Dr. Haywood Taylor specimens of tissues, specimens of organs for a chemical examination for the presence of carbon monoxide.

"At the end of that examination, I summarized my findings, and after discussing in writing the case I expressed an opinion as to the cause of death. I made what I consider as a complete autopsy to determine the cause of the death of Mrs. Lawson, I now have an opinion as to the cause of her death. The body has a characteristic cherry red color; that color is also visible in all the internal organs of the body. I found the organs of this body to show this characteristic cherry red color.

"Q. State whether or not from your examination you found any other cause of death other than carbon monoxide, as testified by you?"

Defendant objects—overruled—defendant excepts.

EXCEPTION No. 4.

"A. I found no other cause for death than carbon monoxide poisoning.

"The time within which *rigor mortis* will set in after a person dies of gas poisoning varies somewhat. *Rigor mortis* ordinarily sets in within a period of one to two hours following death. In case of death without gas it would not be materially altered."

CROSS-EXAMINATION

"It is possible that there are other conditions that would produce a cherry red appearance of the skin and tissues; one could paint the skin, for example, and produce a cherry red color; artificial cosmetics might produce such color. Doubtless there are other things but I don't recall anything that would produce this particular color. The excessive use of alcohol would not do it. That does not alter the color of the skin. There is no difference in the appearance of the skin after death of a person who indulges in the excessive use of alcohol; of course, there would be a marked pallor. The use of embalming fluid has effect on the color of the skin, depending entirely on the character of the embalming fluid used. This body had been embalmed when I had it, and had been dead exactly thirty days, according to my record.

"Q. The color of the skin nor the color of the tissues are a conclusive indication of presence of carbon monoxide poisoning?

"A. Under certain circumstances.

"Q. Are they always?

"A. Not always.

"My findings are obviously influenced by what I was told about the history of the case. My findings in this case are influenced only in an immaterial way by what I was told about the case. In the hypothetical question which I was asked, the only reference to gas was because that gas was present in the room. It is entirely possible for a person to be present in a room in which there was gas and still not die from the effects of gas. It is entirely possible for a person to have the presence of carbon monoxide both in the blood and in the tissues and still not die as a result of it. Unless you have some recognized blood test to determine the saturation one is guided entirely by the intensity of and I was guided that way in this case. Within limits I can be governed by the color. What I am doing is simply giving an opinion. I think I do know what produced her death. I could, to be sure, make a mistake.

"Q. You say in your report: 'The color, I think is distinctive in the lung and in the spleen, but its intensity is not so marked in the kidney

and the quality is not so sharply defined as to make it possible for one to attribute it specifically to carbon monoxide'?

"A. That is correct, and that is what I say now. I refer you back to the statement regarding the lungs.

"My conclusions in respect to the death of Mrs. Lawson are not the result of the process of pathological elimination. I did not say that in my report.

"Q. You wrote: 'There seems to be little doubt about this'—No, let me find it—you wrote on the last page indicating an elimination of causes: 'In the absence of any other possible cause of death and in view of the known lethal effects of carbon monoxide, the finding of the poison in the tissues, together with the finding of tissue discolorations that are typical of poisoning by this substance leave no doubt that death was caused by the inhalation of a carbon monoxide containing gas'?

"A. Yes, sir.

"Q. Then you were following the process of elimination?

"A. May I refer you to the last sentence on the page which begins with the 'Summary of important findings'—I would like to refer you to a part of that report which you have not read. The last sentence of that paragraph reads: 'Although it is not possible to determine quantitatively the exact concentration of carbon monoxide in the tissues, the intensity of the typical discoloration indicates clearly that the poison was present in the tissues in a concentration which would cause death.'

"In my opinion it did cause death. I have said that there was the presence of circumstances indicating the presence of poison in an amount which might have produced death, and I have also said that there was no other cause of death demonstrated. There is a possibility that there may be a cause of death which a pathological examination would not disclose, but we are usually able to determine. I did have an examination made of the contents of the stomach, but not chemically. I made no chemical examination of the stomach.

"Q. How long would it take to produce death from gas poisoning in a room in which a gas stove with one jet from one-half to three-quarters the way open, within three or four feet of the window open, window two feet wide and four feet high, with the door open from four to six inches, opening into another room and with one window in that room open, how long would one subjected to that much gas, how long would it take to produce death?

"A. There are so many conditions that would change the concentration of gas in that room that it is impossible to answer that question. I cannot give an idea.

"Q. Would it take any longer to kill a human being than it would to kill a rabbit?

"A. I have had no experience in that.

"I don't know the quantitative difference in the effect of carbon monoxide in any other animal and a human being. In my opinion there is a difference; it is my opinion that the rabbit will die before the human being will, but I assure you that that is just an opinion. All I have testified to is an opinion based on my observations, but in this I have made no observation.

"I said *rigor mortis* would set in in about one or two hours. The period of time it would take to complete it is variable, depends on what a person dies of. Under certain conditions *rigor mortis* occurs very rapidly and under other conditions it occurs slowly. In order to tell how long it takes to complete *rigor mortis,* you would have to give an exact case and exact conditions under which death occurs and I think I can answer your question. As a minimum and maximum, anywhere from one to two hours *rigor mortis* will set in and be fairly well developed. The time that it would be completed is variable. The period of time after death when putrefaction begins to set in depends very largely on the disease from which the person dies. In some instances disintegration of the body, assuming that the body is allowed to lie in open air, it will disintegrate within two or three hours so it could be observed. If one died of carbon monoxide poisoning, the period of time it would take putrefaction to set in would depend entirely upon the temperature of the room in which the person is lying.

"Q. Without fire, and with the temperature we have in Eastern North Carolina, what would you say?

"A. I do not know the temperature.

"Q. Assuming it is 90 degrees on May 31st?

"A. It is usually warmer in June than in May. I can't give you an accurate opinion, but I should say that anybody that lies unpreserved for four hours in the summertime would certainly begin to show evidence of disintegration. There are many evidences of disintegration; some you can see and some that would require a more experienced person to observe.

"The presence of fluid flowing from the mouth, such as is described as flowing from the mouth of Mrs. Lawson, is not evidence of disintegration; that can happen almost immediately after death. I think generally speaking one would not say that disintegration begins immediately following the stoppage of the heart beat. I think the attending physician in a thing of that sort would be able to tell."

RE-DIRECT EXAMINATION.

"Q. Your report relative to your opinion as to the cause of death, state whether or not your report does show that you give an opinion as to the cause of death?"

Defendant objects—overruled—defendant excepts.

EXCEPTION No. 5.

"A. Yes, sir, there is an opinion expressed there."

Defendant objects—overruled—defendant excepts.

EXCEPTION No. 6.

"In my judgment it was not necessary to make a chemical analysis of the contents of the stomach in order to determine the cause of the death of Mrs. Lawson.

"Q. Doctor, does embalming the body prevent you from ascertaining the cause of the death?

"A. No, sir, it does not, that is within limits it does not, under certain circumstances it may."

Dr. Haywood M. Taylor was presented as an expert toxicologist, and testified as follows:

"I am now employed at Duke University Hospital, Durham, N. C. I have been there since July 1, 1940. I am Assistant Professor in Biochemistry and Toxicology. (It is here admitted that Dr. Taylor is an expert toxicologist.)

"I was present at the performing of the autopsy on the body of Mrs. Lila Lawson. I observed in the performing of the autopsy; I did not participate in the actual autopsy myself. I was in the room the majority of the time. Dr. Forbus turned over certain organs and material from the body of Mrs. Lawson to me. I made an examination thereof. I examined these organs for the presence of various poisonous materials. The only positive findings that we made was the presence of carbon monoxide, formaldehyde and phenol. The formaldehyde and phenol were unquestionably present from the embalming fluid.

"The only poisonous material that was present of any significance was the carbon monoxide gas. Carbon monoxide is not normally in the body. I made a report to Mr. F. A. Garner, Coroner of Lenoir County, of my examination of the organs of Mrs. Lawson. This is my report." (Shows witness paper writing.) (Witness reads report.)

Defendant objects to the last part of it relating to the pathological findings—objection sustained.

Said report is dated July 2, 1942.

"COURT: What organs were delivered to you for examination?

"A. Portion of the brain, kidney, muscle and blood, and there was also, I think it is not noted in this report, but there was also some liver.

"I examined a portion of the brain, some of the kidney, some clots of blood, a portion of the liver. These were submitted to routine examination for poisonous materials. As I have said before I found present in those tissues some phenol or carbolic acid, formaldehyde and carbon monoxide. The phenol and formaldehyde unquestionably were present

due to the body having been embalmed; these are constituents of embalming fluid, but carbon monoxide is not a constituent of embalming fluid and that was found to be present in the body.

"Q. Doctor, assuming that the jury should find from the evidence beyond a reasonable doubt that Mrs. Lila Lawson was found lying on the kitchen floor of her home in Kinston at about 10 o'clock on the morning of May 31, 1942; that at the time the body was found that it had a cherry red color; that there was a gas jet partly open in the kitchen; that the body was removed from the kitchen to the undertaking establishment in the city of Kinston and there embalmed and prepared for burial and that it was buried on June 1, 1942; that on the 30th day of June, 1942, the body was removed from the grave and transported to Durham at the Duke Hospital, in which you are working, and that there an autopsy was performed thereon by Dr. Forbus in your presence and that various organs, which you have described to the jury as being examined by you, were examined by you; have you an opinion satisfactory to yourself as to the cause of the death of Mrs. Lila Lawson?"

Defendant objects—overruled—defendant excepts.

EXCEPTION No. 7.

"A. I have.

"My opinion is that she died from carbon monoxide poisoning. It is necessary to inhale carbon monoxide in order to die from it. It is absorbed through the lungs and not through the body. Only to a certain extent can I correlate the amount of carbon monoxide present in the body from the color of the body; it can be done to a certain extent. I have been in the gas plant in the City of Kinston. I know the type gas manufactured there for cooking purposes.

"Q. Is gas made for cooking purpose heavier than air?"

Defendant objects—overruled—exception.

EXCEPTION No. 8.

"A. That is a question I cannot answer."

CROSS-EXAMINATION.

"It is possible that one might have a small amount of carbon monoxide poisoning in the tissues and that still not be the cause of death. One dying from some other cause and during the time death is ensuing and while he is still breathing if he breathes air containing carbon monoxide poison, he would still have that present in his tissues, if he breathes that in the air before he dies. Carbon monoxide is not absorbed after death, it must be absorbed before death. If a corpse is put in a space or place in which carbon monoxide is present, it would not be absorbed by the dead body. It has to be taken in through the lungs into the blood and then transported by the blood throughout the tissues. To determine

whether or not death was the result of carbon monoxide poison, the test ordinarily resorted to is an examination of the blood to determine the degree of saturation. One must have sufficient blood to make the determination, but there is correlation between the red color of the blood due to carbon monoxide, and in my experience with such cases people who have presented as much cherry red color as I saw in this case would indicate to me that there is an adequate amount of carbon monoxide in the system to cause death.

"Q. Your opinion is influenced by the color?

"A. Yes, in the absence of being able to make a quantitative examination.

"Q. Color itself is not always determinative of the presence of carbon monoxide poison?

"A. I know nothing else absorbed into the system that would give the color such as this.

"Q. Do I understand that the color itself is conclusive?

"A. This particular color in the skin is due to the presence of blood in the capillaries close to the surface and, after all, it is in the blood and I know of no other poison that will give this color other than carbon monoxide.

"Q. Then, you are saying that the color itself is a conclusive circumstance?

"A. I would be willing to state that it is; on the other hand, if I can go ahead and prove the presence of carbon monoxide, that is more proof.

"Q. Your opinion, in the absence of a sufficient quantity of blood to determine the degree of saturation, is based upon color and the presence of the poison in the tissues?

"A. Upon that and one other factor; the absence of any other causes of death and the presence of carbon monoxide in the tissues and the cherry red color in the skin and organs.

"Q. You say in the absence of any other cause, you refer to the pathological conclusions arrived at by Dr. Forbus?

"A. I do."

Defendant moves to strike the evidence of opinion given by this witness as above and on direct examination—motion denied, and defendant excepts.

EXCEPTION No. 9.

There was further evidence as to the content of the gas furnished the Lawson apartment by the Kinston plant and to the effect that it did contain carbon monoxide.

It is not deemed necessary to summarize other evidence in the record, since the setting of the case and the evidence pertinent to the exception upon which this decision is based may be found in the foregoing.

The jury found the defendant not guilty of murder in the first degree, but guilty of murder in the second degree, and from the judgment rendered upon the verdict the defendant appealed.

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

J. A. Jones for defendant, appellant.

SEAWELL, J. The theory upon which the State sought conviction was that the defendant brought about the death of the deceased through asphyxiation, or carbon monoxide poisoning, from gas issuing from a partially opened jet of the kitchen stove. When the autopsy was performed by the experts who testified for the State, the blood had been removed from the body in the embalming process, and it was admittedly impossible to make from the tissues of the body a conclusive quantitative analysis as to the degree of saturation. The necessity of establishing the cause of death by expert evidence and the important bearing of the testimony of Dr. Forbus, an expert pathologist, that he had made a *post-mortem* examination of the body and had found no condition which might have caused death other than the indications of carbon monoxide poisoning are apparent on perusal of the record. This leads to a serious consideration of defendant's objection to the testimony of Dr. Haywood M. Taylor, an expert toxicologist, who also gave his opinion that deceased came to her death from carbon monoxide poisoning, admittedly basing that opinion in substantial part upon the statement of Dr. Forbus that his examination disclosed no other cause of death. The objection is that this finding of Dr. Forbus had not been submitted to the witness in the hypothetical question addressed to him, and that the opinion was not predicated upon the assumption that the jury should find the evidence of Dr. Forbus to be true; and, further, that the opinion of one expert witness based upon the opinion of another is incompetent as evidence.

Dr. Forbus and Dr. Taylor had performed an autopsy and examined certain organs and tissues of the body some thirty days after it had been embalmed and interred, and both testified that the characteristic cherry red color of the tissues indicated carbon monoxide poisoning, but the finding that there was no other cause of death was peculiar to the examination and testimony of Dr. Forbus, Dr. Taylor not having made any examination or finding in that respect. The hypothetical question addressed to Dr. Taylor—which elicited his opinion as to the cause of death—made no mention of this finding or statement, directly or indirectly, or of the purported fact, or condition, thus put in evidence; and it did not transpire that Dr. Taylor had based his opinion on a state of facts not so presented to him until brought out on cross-examination. For convenience, we repeat these interrogatories and answers:

"Q. Your opinion, in the absence of a sufficient quantity of blood to determine the degree of saturation, is based upon color and the presence of the poison in the tissues?

"A. Upon that and one other factor; the absence of any other causes of death and the presence of carbon monoxide in the tissues and the cherry red color in the skin and organs.

"Q. You say in the absence of any other cause, you refer to the pathological conclusions arrived at by Dr. Forbus?

"A. I do."

The defendant then moved the court to strike out the testimony of Dr. Taylor—or rather, that part of it in which he gave his opinion as to the cause of death—and the motion was declined. Exception had been made previously to the admission of the evidence.

There are two avenues through which expert opinion evidence may be presented to the jury: (a) Through testimony of the witness based on his personal knowledge or observation; and (b) through testimony of the witness based on a hypothetical question addressed to him, in which the pertinent facts are assumed to be true, or rather, assumed to be so found by the jury. That an expert witness may base his opinion partly on facts of his own observation and partly on factual (as opposed to opinion) evidence of other witnesses, hypothetically presented, is, of course, within the rule.

It is clear that if in his testimony Dr. Taylor had reference to information concerning the Forbus finding obtained extrajudicially—that is, in any other manner than from the evidence given in court—the testimony is objectionable as based on a hearsay statement. If it had reference to the testimony of Dr. Forbus which immediately preceded his own, it is equally objectionable because it was not hypothetically presented—that is, was not predicated on an assumption that the jury should find the purported facts in the Forbus statement to be true. *Dempster v. Fite,* 203 N. C., 697, 167 S. E., 33; *Summerlin v. R. R.,* 133 N. C., 551, 45 S. E., 898; *Martin v. Hanes Co.,* 189 N. C., 644, 646, 127 S. E., 688; *Yates v. Chair Co.,* 211 N. C., 200, 189 S. E., 500.

Our practice and procedure does not permit an expert witness to sit in, overhear the evidence and give the jury his opinion or conclusions thereupon, without regard to what might be the attitude of the jury toward the credibility and weight of the evidence with which the witness is dealing and upon which his opinion is based. The assumption of its truth in the mind of the witness, however self-satisfying, cannot be substituted for the finding of the jury, and necessarily invades the province of the jury. It invades the province of the jury not because it gives an opinion as to the ultimate facts to be found by the jury, which is sometimes permissible, but because it permits the witness to determine for himself

the weight and credibility of the evidence of these facts, which ought always to be left to the jury. Even those jurisdictions which permit expert witnesses who have overheard the evidence to give an opinion upon it without a formal summation and interrogatory are strict in observing two conditions as requisite to competency: First, it must affirmatively appear that all the evidence pertinent to the inquiry has been heard by the witness; and, second, the opinion itself must be hypothetical—*i.e.,* based on the assumption that the jury shall find the evidence upon which the opinion is based to be true. (a) *State v. Medlicott,* 9 Kan., 257; *Kempsey v. McGinnis,* 21 Mich., 123; *Sebrell v. Barrows,* 36 W. Va., 212, 14 S. E., 996; *Howland v. Oakland Consol. St. R. Co.,* 115 Cal., 487, 47 Pac., 255; *Williams v. State,* 37 Tex. Crim. Rep., 348, 39 S. W., 687. (b) *Yardley v. Cuthbertson,* 108 Pa., 395, 1 Atl., 765; *Owings v. Dayhoff,* 159 Md., 403, 151 Atl., 240; *Scheller v. Schindel,* 153 Md., 547, 138 Atl., 415; *Ingles v. People,* 90 Colo., 51, 6 Pac. (2d), 455. Neither of these conditions obtained in the case under review.

In many jurisdictions—and we find the rule expressed in considered opinions—a witness is not allowed to give an opinion based on the testimony of another witness where that testimony is not incorporated in a hypothetical question. The content of the question controls the range of the answer, and thus keeps opinion evidence within its proper function. Typical of these cases, which are, of course, too numerous for exhaustive mention, we may cite and quote from the following:

In *Craig v. Noblesville & S. C. Gravel Road Co.,* 98 Ind., 109, 82 A. L. R., 1487, the rule is stated: "The only safe rule in allowing an expert witness to give an opinion, based upon the testimony of others, is to require the assumed facts, upon which an opinion is desired, to be stated hypothetically; then the jury can judge whether the assumed facts, upon which the opinion is based, have been proved, and weigh the opinion as applicable to them."

In *Ditton v. Hart,* 175 Ind., 181, 93 N. E., 961, the Court said: "It is settled that an expert witness will not be allowed to give his opinion upon his recollection and construction of the evidence in the case. He must base his opinion upon his own testimony or upon facts assumed to have been proven, which facts must be given to him as the foundation upon which to base his opinion."

In *Guetig v. State,* 66 Ind., 94, 32 Am. Rep., 99, it is said: "An expert cannot give his opinion upon evidence; it must be done upon admitted, proved or assumed facts."

In *Marx v. Ontario Beach Hotel & Amusement Co.,* 211 N. Y., 33, 105 N. E., 97, we find: "An expert witness may not draw inferences or state conclusions from the testimony of other witnesses. His opinion

must be based on facts which are stated in the form of a hypothetical question."

In *Brace v. Bath & H. R. Co.,* 154 N. Y. Supp., 931, it appeared on the cross-examination of a medical expert that his conclusion was not based wholly on the hypothesis contained in the question propounded, but partly on the evidence given in his presence, on the trial. The Court held that it was reversible error for the trial court to refuse to strike out the answer. See, also, *Ayres v. Water Comrs.,* 22 Hun. (N. Y.), 297.

In *Richmond v. Wood,* 109 Va., 75, 63 S. E., 449, the Court said: "Before the opinion of an expert, when it is based on facts which he has not himself testified to, can be admitted, he must fully understand the facts already proved, and his testimony must come in response to a hypothetical question which embodies the evidence." To the same effect is *Kerr v. Lunsford,* 31 W. Va., 659, 8 S. E., 493.

In *Dunagan v. Appalachian Power Co.,* 33 Fed. (2d), 876, 68 A. L. R., 1393, the rule is thus stated: "It is well settled that in the examination of experts as to matters which they have not themselves observed, testimony as to their opinions should be based on hypothetical statements propounded in proper questions, not on the testimony of other witnesses whom they have heard testify."

See 32 C. J. S., p. 347, sec. 551.

Our own decisions adopt this view.

In *Summerlin v. R. R., supra,* p. 554: "There is nothing better settled than that a witness can ordinarily speak only of facts within his own knowledge, unless he is an expert, having special scientific knowledge, in which case he may give his opinion, but only upon the facts as they may be found by the jury. It is usual, therefore, to formulate what is called a hypothetical question, which should contain a recital of such facts as may have been testified to by the other witnesses."

In *Dempster v. Fite, supra,* p. 708, the rule as stated in N. C. Handbook (Lockhart) 2d Ed., p. 240, is adopted. (Sec. 204): "An expert may express an opinion, but he must base his opinion upon facts within his own knowledge, or upon the hypothesis of the finding by the jury of certain facts recited in the hypothetical question." This is the rule established in *Martin v. Hanes Co., supra:* "While a medical expert may not express an opinion as to a controverted fact, he may, upon the assumption that the jury shall find certain facts to be as recited in a hypothetical question, express his scientific opinion as to the probable effect of such facts or conditions." See Annotations, 82 A. L. R., 1468, *et seq.*

We think the matter is too well settled in this jurisdiction to need further citation.

Hitherto, for convenience of discussion, we have treated the statement of Dr. Forbus—that there were no apparent conditions other than the indications of carbon monoxide poisoning to which death might be attributed—as a simple statement of fact, but it must be regarded as more. Since it involved the application of scientific, technical and medical knowledge in examining the body and recognizing the presence or absence of pathological conditions therein upon which the statement must necessarily be based, in a field entirely beyond the knowledge of a non-expert witness, it must be classified as opinion evidence. The opinion of Dr. Taylor based thereupon is, therefore, objectionable, as it is uniformly held that the opinion of one expert based upon that of another is incompetent and inadmissible as evidence. *McComas v. Wiley,* 134 Md., 572, 108 Atl., 196; *People v. Bowen,* 165 Mich., 231, 130 N. W., 706; *State v. King,* 158 S. C., 251, 155 S. E., 409. "It is generally agreed that the opinion of an expert, however qualified to speak, cannot be predicated either in whole or in part upon the opinions, inferences and conclusions of others, whether expert or lay witnesses." 20 Am. Jur., 665, sec. 791.

It is not thought necessary to advert to other objections and exceptions noted in defendant's brief.

For the error noted, the defendant is granted a new trial.

New trial.

BUCK STANLEY (EMPLOYEE), v. HYMAN-MICHAELS CO. (EMPLOYER) AND GENERAL ACCIDENT FIRE AND LIFE INSURANCE CORPORATION (CARRIER).

(Filed 11 November, 1942.)

1. Master and Servant §§ 52c, 55d—

Findings of fact by the Industrial Commission, based upon competent evidence, are conclusive on appeal.

2. Master and Servant § 40a—

The fact that the Workmen's Compensation Act states that certain injuries shall be deemed permanent and total disabilities (C. S., 8081 [mm]), does not mean that permanent and total disabilities can be found only in those cases enumerated, but that such injuries are conclusively presumed to be permanent total disabilities, and the Commission shall so find.

3. Same—

The Industrial Commission has power to find that injuries, or combination of injuries (other than those enumerated in the Workmen's Compensation Act) occurring in the same accident, may result in permanent total disability, and when the Commission so finds, the injured employee shall be compensated under sec. 29 of the Act. C. S., 8081 (kk).

4. Master and Servant § 41a—

Where an award is properly made under specific schedules and the Commission has found as a fact that the employee is not totally and permanently disabled, the Commission is only required to find the percentage of disability of the member or members. C. S., 8081 (mm), subsection (t).

5. Master and Servant § 55g—

Where the facts are found or where the Industrial Commission fails to find facts due to a misapprehension of the law, the court will, when the ends of justice require it, remand the case for further and more complete findings, in order that the evidence may be considered in its true legal light.

6. Master and Servant § 40a—

The rule seems to be universal that no award can be made for disfigurement, where an award has been made for total permanent disability.

7. Same—

The Workmen's Compensation Act authorizes the awarding of compensation for serious disfigurement resulting from the loss or partial loss of a member for which compensation is provided in the schedules.

8. Same—

In awarding compensation for serious disfigurement the Commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment.

APPEAL by plaintiff and defendants from *Frizzelle, J.*, at June Term, 1942, of EDGECOMBE.

Plaintiff, employee, brings this action under the provisions of the Workmen's Compensation Act, against the employer and insurance carrier, to obtain compensation for injuries.

The Industrial Commission, in addition to jurisdictional determinations, made the following pertinent findings of fact:

1. The plaintiff, as the result of his injury by accident on 21 December, 1939, has sustained the complete loss of his left leg, and 50 per cent permanent disability or loss of the use of his right foot, which said disability includes the loss of his great toe and three other toes on his right foot.

2. That as a result of said accident the plaintiff has been totally disabled for the period from 21 December, 1939, to the date of the hearing; namely, 25 March, 1941, but that on said date of 25 March, 1941, his total disability ended.

3. The plaintiff, as the result of his injury by accident on 21 December, 1939, has no disfiguring scars or blemishes on his body, except normal operative scars occasioned by the amputation of his left leg and the operation on his right foot.

4. That the plaintiff, as the result of his injuries referred to herein, has no permanent total disability as said term is defined by the provisions of the N. C. Workmen's Compensation Act.

Compensation for disfigurement was denied.

Compensation was awarded as provided in the schedules, section 31, Public Laws of 1929, ch. 120, as amended by Public Laws of 1931, ch. 164, sec. 8081 (mm), N. C. Code of 1939 (Michie).

On appeal to the Superior Court by the plaintiff, the Court held that so much of the judgment of the Commission as holds that the plaintiff is not entitled to an award of compensation for total permanent disability is correct and approved and affirmed the award of the Commission; the court reversed so much of the judgment of the Commission as holds that as a matter of law the plaintiff is not entitled to compensation for disfigurement; that the findings of fact by the Hearing Commissioner are incomplete and inadequate in that there is no finding of fact with respect to plaintiff's allegation and contention that he has suffered a diminution of earning capacity resulting from his disfigurement and is therefore entitled to specific additional compensation therefor. His Honor remanded the cause to the Industrial Commission with directions to make further findings as directed, and to make an award to compensate for disfigurement in accord with its findings pursuant to the provisions of the statute.

From the judgment entered, plaintiff and defendants appealed to the Supreme Court, assigning errors.

Battle, Winslow & Merrell for plaintiff.
Wilkinson & King for defendants.

PLAINTIFF'S APPEAL.

DENNY, J. The plaintiff's first assignment of error is to the conclusion of law of the Commissioner, affirmed by the Commission and by the court below, that the Workmen's Compensation Act does not permit a finding of total disability for the loss of one leg and the partial loss of the other foot, regardless of actual incapacity for work.

The statute construed, section 8081 (mm), subsection (t), N. C. Code, 1939 (Michie), Public Laws of 1929, ch. 120, as amended by Public Laws of 1931, ch. 164, reads as follows: "Total loss of use of a member or loss of vision of an eye shall be considered as equivalent to the loss of such member or eye. The compensation for partial loss of or for partial loss of use of a member or for partial loss of vision of an eye shall be such proportion of the payments above provided for total loss as such partial loss bears to total loss. Loss of both arms, hands, legs, or vision

in both eyes shall be deemed permanent total disability, and shall be compensated under section 29."

The Commissioner stated in his conclusions of law, in considering the above statute, "That this section does not state that the loss of a leg and the partial loss of the other foot or even the complete loss of the other foot would constitute permanent total disability. The Act is very specific on this point. This provision states definitely that the loss of both arms, hands, or vision in both eyes shall be deemed permanent total disability. The Commission, therefore, by no stretch of the imagination, can read into this section the legislative intent that the loss of one leg and the partial loss of the other foot should be deemed permanent total disability. Therefore, the Commission definitely concludes as a matter of law that the plaintiff should not be compensated for permanent total disability but should be compensated for his temporary disability, his loss of his leg, and the partial disability of his right foot."

The findings of fact that the plaintiff, as the result of his injury by accident, has sustained the complete loss of his left leg, 50 per cent permanent disability or loss of his right foot, and that he was totally disabled for the period from 21 December, 1939, until 25 March, 1941, are supported by competent evidence and are conclusive on appeal. *Lassiter v. Telephone Co.*, 215 N. C., 227, 1 S. E. (2d), 542.

While the construction placed on the statute by the Commission did not affect the award made in the instant case, in accord with the findings of fact, we think it proper to call attention to that construction or interpretation of the statute as set forth in the conclusions of law.

The Commission says: "This section does not state that the loss of a leg and the partial loss of the other foot or even the complete loss of the other foot would constitute permanent total disability. The Act is very specific on this point. This provision states definitely that the loss of both arms, hands, or vision in both eyes shall be deemed permanent total disability." The fact that the Workmen's Compensation Act states that certain injuries shall be deemed permanent and total disability, does not mean that permanent total disability can be found to occur only in those cases where the injuries come strictly within the enumerated class. The loss of both arms, hands, legs or vision in both eyes, under the statute, is conclusively presumed to be permanent total disability, and the Commission is directed so to find; however, the Commission still has power to find that other injuries or combination of injuries occurring in the same accident may result in permanent total disability and when the Commission so finds, the injured employee should be compensated as provided in section 29 of the Workmen's Compensation Act. What constitutes permanent and total disability is a fact for the determination of the Commission, except in those cases where the injuries are conclusively presumed

by the statute to result in permanent total disability. As stated in 71 C. J., page 842: "An award for permanent total disability is not limited to cases in which the employee suffers actual loss of members of the body, although the provision for compensation for total disability specifies that loss of said members shall be total disability, as this is not exclusive," citing *Safety Insulated Wire & Cable Co. v. Court of Common Pleas,* 100 Atl., 846, 9 N. J. L., 114; *Maryland Casualty Co. v. Mueller* (Tex.), 247 S. W., 609; *Spring Canyon Coal Co. v. Industrial Commission of Utah,* 277 Pac., 206.

We think, exclusive of the question of disfigurement, the award of the Commission was correct. One member was lost, but the other suffered only 50 per cent impairment; therefore the Commission properly awarded compensation, not for total disability, but for injuries compensable under the schedules.

Weekly compensation under the schedules cannot be increased by the inclusion of compensation for disfigurement. Compensation for disfigurement, if allowed, must be a separate award and the aggregate awards in no case may exceed the total compensation fixed in the Act. *Arp v. Wood & Co.,* 207 N. C., 41, 175 S. E., 719.

The second exception is to the findings of fact of the Commissioner, affirmed by the Commission and the court below, in that there is no finding of fact as to whether or not the plaintiff employee is able to follow with reasonable continuity such work as he is qualified, physically and mentally, to do. We think it is elementary where an award is properly made under specific schedules and the Commission has found as a fact that the employee is not totally and permanently disabled, as in the instant case, the Commission is only required to find the percentage of disability of the member or members effected. Therefore this exception cannot be sustained.

DEFENDANTS' APPEAL.

The defendants' appeal from that portion of the judgment entered in the Superior Court, which holds that so much of the judgment of the Commission as stated as a matter of law that the plaintiff is not entitled to compensation for disfigurement resulting from the loss of members for which compensation was awarded, is erroneous; and that the findings of fact by the Hearing Commissioner are incomplete and inadequate in that there is no finding of fact with respect to the plaintiff's allegation and contention that he has suffered a diminution of earning capacity resulting from his disfigurement and is, therefore, entitled to specific additional compensation therefor; and remands the same to the Industrial Commission with directions to make further findings as therein directed and to make an award with respect to compensation for disfigurement in accord with its findings pursuant to the provision of the statute.

The question involved here is this: Do the provisions of our Workmen's Compensation Act authorize compensation for disfigurement of a specific member of the body for which compensation is allowed for loss of or for partial loss of use of said member?

The Commission found as a fact "That the plaintiff, as the result of his injury by accident December 21, 1939, has no disfiguring scars or blemishes on his face or body except normal operative scars occasioned by the amputation of his left leg and the operation on his right foot." The Commission held, as a matter of law, that compensation for disfigurement should apply only to disfigurement of the face or to those parts of the body for which compensation is not provided in section 31 of the Act, Public Laws 1929, ch. 120, as amended by Public Laws 1931, ch. 164. In addition to the schedule of payments and the subsection (t) of the statute discussed in plaintiff's appeal herein, section 31 contains the following: "In case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed $2,500.00. The weekly compensation payments referred to in this section shall all be subject to the same limitations as to maximum and minimum as set out in section 8081 (kk), (Section 29, Public Laws of 1929, Chap. 120, as amended by section 1, Public Laws 1939, Chap. 277); provided, however, that the foregoing schedule of compensation shall not be deemed to apply and compensate for serious disfigurement resulting from any injury to any employee received while in and about the duties of his employment. And provided, further, that the Industrial Commission created by this article shall have power and authority to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this article, not to exceed twenty-five hundred ($2500) dollars. And provided, further, that disfigurement shall also include the loss or serious or permanent injury of any member or organ of the body for which no compensation is payable under the schedule of specific injuries set out in this section."

Section 31 was enacted in its entirety in 1929, except for the last sentence in said section, which was added by amendment in 1931. We think the amendment was intended to broaden, rather than to restrict, the powers of the Commission to compensate for disfigurement. If the Legislature intended to restrict compensation for disfigurement to those parts, members or organs of the body for which no compensation is provided in the schedules, we think it failed to express such intention in the statute. The statute expressly states, "That the foregoing schedule of compensation shall not be deemed to apply and compensate for serious disfigurement resulting from any injury to any employee received while in and about the duties of his employment."

The defendants take the position that no compensation can be awarded for disfigurement and also loss of use of the same member of employee's body, and, in support of their position, cite *Milling Machinery Co., Jones-Hettel Sater Const. Co. v. Thomas,* 174 Okla., 483, 50 Pac. (2d), 395; *International Coal & Mining Co. v. James Nichols,* 293 Ill., 524, 127 N. E., 703; *Wells Bros. Co. v. Ind. Com.,* 285 Ill., 647, 121 N. E., 256. However, an examination of the above cases and the Workmen's Compensation Acts of Oklahoma and Illinois discloses that the provisions of their Acts are not similar to ours. The Oklahoma Act provides that compensation for specific injuries shall be in lieu of all other compensation, except that provided for medical attention. Schneider's Compensation Law, Vol. 4, Supplementing Third Edition, page 3127. The Illinois Act limits compensation to that provided in the schedules and states the employee ". . . shall not receive any compensation for such injuries under any other provisions of this Act." Schneider's Comp. Law, Vol. 2, Supplementing Third Edition, page 852.

The General Assembly in enacting our Workmen's Compensation Act, undoubtedly gave consideration to the limitation of the recovery to that fixed in the schedules, for, as stated in *Rice v. Panel Co.,* 199 N. C., 154, 154 S. E., 59, the original bill as introduced provided: "In cases included by the following schedule, the incapacity in each case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be specified therein, *and shall be in lieu of all other compensation.*" However, the Act as adopted, being Public Laws of 1929, ch. 120, does not contain the clause in sec. 31, "and shall be in lieu of all other compensation."

It will be noted that the statute makes it mandatory on the Commission to award proper and equitable compensation in case of serious facial or head disfigurement. This is not the case in regard to disfigurement of other parts of the body. The statute provides that the Industrial Commission shall have power and authority to make and award a reasonable compensation for any serious bodily disfigurement received by any employee within the meaning of this article, not to exceed $2,500.00.

In principle this Court has already recognized the authority of the Commission to make an award for partial loss of use of a member and to award compensation for serious disfigurement of the same member. In the case of *Baxter v. Arthur Co.,* 216 N. C., 276, 4 S. E. (2d), 621, this Court affirmed an award made by the Commissioner, affirmed by the Commission and the court below, in which the Commission stated in its opinion: "With respect to the award for disfigurement to the right arm in which a 20 per cent partial permanent functional loss of use of the right arm was awarded, the Full Commission and the Hearing Commissioner took into consideration the fact that the scarring of this arm was

very extensive and entirely out of proportion to the 20 per cent functional loss, and for this reason the Commission considered the scarring of the right arm in addition to the functional loss of use along with the scarring on the rest of the body as heretofore indicated in arriving at the sum of $1,000 for disfigurement."

This Court, it appears, has not passed directly on the question as to whether or not disfigurement is compensable when there is no disfigurement except the normal operative scars occasioned by the amputation of a member or members of the body, for the loss of which the employee has been compensated under the schedules. In the instant case we have the loss of the left leg, 50 per cent permanent disability or loss of use of the right foot, which disability includes loss of the great toe and three other toes on this foot. We think the statute does authorize the Commission to award compensation for serious disfigurement resulting from the loss or partial loss of a member for which compensation is provided in the schedules.

In the case of *Elkins v. Lallier,* 38 New Mexico, 316, 32 Pac. (2d), 759, the Supreme Court of New Mexico allowed a recovery for the loss of an eye by enucleation and an additional sum for such facial disfigurement as inevitably resulted consequent to the enucleation. The Court said: "That serious facial disfigurement, wholly apart from the physical handicap resulting from loss of a member or organ, may operate to narrow the field of employment and thus impair the earning power, is now too well settled to be open to doubt. See separate opinions of *Judges Cardozo* and *Pound* in *Sweeting v. American Knife Co.,* 226 N. Y., 199, 123 N. E., 82, 83, affirmed in 250 U. S., 596, 40 S. Ct., 44, 63 L. Ed., 1161, and *Beal v. El Dorado Refining Co.,* 132 Kan., 666, 296 P., 723." *Donahue v. Adams Transfer Storage Co.,* 230 Mo. Ap. Rep., 215, 88 S. W. (2d), 432.

In the case of *Jewell v. R. B. Pond Co.,* 198 S. C., 86, 15 S. E. (2d), 684, the Supreme Court of South Carolina, in passing on the identical point which is now before us, and construing the provisions in a Workmen's Compensation Act, identical with those we are now considering, said: "It is now the settled law in this State (and the Act under discussion so provides), that an award for the loss of and disfigurement to the same member of the body may be made. Bodily disfigurement, when shown to affect a claimant's earning power by a diminution thereof is logically an element of compensation specifically provided for in the Act, though not compensable merely as such. *Burnette v. Startex Mills, et al.,* 195 S. C., 118, 10 S. E. (2d), 164. The amputation of a foot necessitating the wearing of an artificial limb, is *per se* a serious bodily disfigurement. Has this bodily disfigurement lessened claimant's earning capacity and deprived him in whole or in part of the power to obtain

employment? *Manning v. Gossett Mills, et al.,* 192 S. C., 262, 6 S. E. (2d), 256." The claimant was a common laborer and the Court in the above opinion further said: "Of course, for example, if claimant had been a bookkeeper, the serious bodily disfigurement which he suffered would not have been compensable as such; and this is definitely pointed out in the case of *Burnette v. Startex Mills, supra* (195 S. C., 118, 10 S. E. [2d], 166), wherein it is stated: 'The whole philosophy of our Workmen's Compensation Act is to compensate for, or relieve from, the loss or impairment of an employee's capacity to earn, or from the deprivation of support from his earnings, and not to indemnify for any physical ailment or impairment as such, except in the classes of case specifically provided in the Act; to exclude from allowable elements of compensation everything except diminution of earning power. Bodily disfigurement, when shown to affect this earning power, is therefore logically an element of compensation specifically provided for in the Act, to the extent therein covered, and we have heretofore so applied the Act.'"

In the case of *Burnette v. Startex Mills, supra,* the Supreme Court of South Carolina said the following: "In *Murdaugh v. Robert Lee Construction Company,* 185 S. C., 497, 194 S. E., 447, it was held that if the disfigurement is to members of the body other than the face or head *and it does not handicap the claimant in obtaining employment or reduce his earning power,* it is not of the compensable nature to which the Act refers. In *Manning v. Gossett Mills, et al.,* 192 S. C., 262, 6 S. E. (2d), 256, 259, it is stated: 'The criterion of the right of claimant to compensation under the Act is this: Has his injury lessened his earning capacity and deprived him in whole or in part of the power to obtain employment?'"

It will be noted that the rule seems to be universal that no award can be made for disfigurement, where an award has been made for total permanent disability. Likewise, disfigurement must be serious in order that compensation may be allowed therefor. 71 C. J., Workmen's Compensation Acts, sec. 518, p. 794.

Under our Act the Commission is bound to award proper and equitable compensation not to exceed $2,500.00, in case of serious facial or head injuries; and, as said by the Supreme Court of the United States in *Sweeting v. American Knife Co.,* 226 N. Y., 199, 123 N. E., 82, 83, 250 U. S., 596, 40 S. Ct., 44, 63 L. Ed., 1161: "Even were impairment of earning power the sole justification for imposing compulsory payment of workmen's compensation upon the employer in such cases, it would be sufficient answer to the present contention to say that a serious disfigurement of the face or head reasonably may be regarded as having a direct relation to the injured person's earning power, irrespective of its effect upon his mere capacity for work."

The decisions from other jurisdictions, while helpful in construing the provisions of our statute, are not controlling; neither is the interpretation placed upon a statute similar to ours, binding on this Court. In awarding compensation for serious disfigurement, we think the Commission, in arriving at the diminution of earning power from disfigurement and making its award, should take into consideration the natural physical handicap resulting from the disfigurement, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. What is reasonable compensation for serious disfigurement is for the determination of the Commission in each case in the light of the facts established by competent evidence.

The defendants challenge the power of the court below to remand a case to the Industrial Commission for further or more complete findings of fact. Where the facts are found or where the Commission fails to find facts due to a misapprehension of the law, the court will, when the ends of justice require it, remand the case in order that the evidence may be considered in its true legal light. *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324, and the authorities cited therein.

We find no error in either appeal.

Plaintiff's appeal affirmed.

Defendants' appeal affirmed.

STATE v. LORENZO DEBNAM.

(Filed 11 November, 1942.)

1. Homicide § 18a—

A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached or corroborated by other statements of the deceased relative to the homicide, although such statements do not qualify as dying declarations.

2. Homicide §§ 6b, 20, 27b, 27d—

The *intentional* use of a deadly weapon in a homicide imports malice and raises a rebuttable presumption that defendant is guilty of murder in the second degree. The presumption is not raised by the mere use of such a weapon, *Holding* a charge erroneous which omitted the word "intentional."

APPEAL by defendant from *Carr, J.,* at February Term, 1942, of FRANKLIN. New trial.

The defendant was charged with the murder of Foster Spivey. At the beginning of the trial the solicitor announced that he would not ask

for a verdict of murder in the first degree, but only for conviction of murder in the second degree. The jury returned a verdict finding the defendant guilty of manslaughter.

We understand from pertinent evidence in the case that a number of visitors had assembled at the house of one Jimmy Young, in the outskirts of Youngsville. The defendant, Lorenzo Debnam, and Foster Spivey approached the house, and a shot was heard by those within the house. Whereupon, several persons rushed out. Debnam and Spivey were seen walking toward the house, Spivey holding his right wrist with his left hand, and saying that he was shot. Debnam asked Spivey "where did I shoot you." When DeWitt Kearney came out of the house and approached, asking Debnam why he shot the boy, the latter said "get back, get back." When Kearney attempted to take the pistol from him, Debnam broke and ran around the side on the other side of the house, leveling the gun on Kearney.

Another witness stated that as Debnam and Spivey approached, Debnam was holding Spivey's right wrist with his own left hand, holding his pistol in his right hand, and asking Spivey where he had shot him, and that Spivey said "Don't shoot me no more cause you done killed me now"; and that when DeWitt Kearney approached Spivey, he ran under Kearney's arm, backed up to the house, and with his pistol out, said "Stand back, don't a damn soul come on me." Some of the witnesses went around the car and some back up to the house and around the house, and Debnam "tore off across the field" and went up a little road through the plantation.

Spivey pulled his jacket back and blood was seen running out through his ribs along the left side, and Spivey said, "I am dying as fast as dirt." Spivey was carried to the hospital, where he died some four days later.

The deceased made a statement to his father, which was introduced upon the trial as a dying declaration. In this statement, he said he was going to die and that Lorenzo Debnam had shot him, but he did not know why or what he shot him for.

The defendant testified in his own behalf, and stated that the shooting was altogether accidental. His version of the occurrence was that Spivey offered to let defendant keep his, Spivey's, pistol, and Debnam agreed to do so; whereupon, Spivey handed him the pistol by the barrel, "and just as soon as it was in my hand it shot. I didn't know what had happened. Just as it landed in my hand it shot. I never had nothing against him—me and him run together all the time." Defendant states that he then went to John Emory's house and asked him to keep the pistol, stating that he had shot Foster accidentally, and would not have done it for anything in the world. He later made the same statement to Mr. Mitchell and Mr. Monty Hoyle. He was then carried to the lock-up.

The defendant was corroborated as to his statement that the shooting was accidental by Mitchell and Hoyle. Hoyle testified as to the friendly relations between the defendant and the deceased.

This witness visited Foster Spivey while he was in the hospital—on Friday night and again on Sunday—and had a conversation with him in regard to the circumstances of the killing. The witness was asked to relate this conversation, and on objection by the State, it was excluded from the evidence. If permitted to answer, the witness would have testified as follows: "He said—when I went to see him at the hospital—he told me to go back home and tell Mr. Mitchell to get Lorenzo out of jail—that he didn't intend shooting me, it was accidental and I want him out of jail and I want him to come to see me—I didn't want him punished because we are the best of friends and it was accidental." Defendant excepted.

In his charge to the jury, the court gave the following instruction: "The question boils down as to whether or not the State has satisfied you beyond a reasonable doubt that the defendant shot the deceased with a deadly weapon, which resulted in the death of the deceased. If the State has satisfied you of that fact it would be your duty to return a verdict of guilty of manslaughter." To this defendant excepted.

The jury found the defendant guilty of manslaughter, and from the judgment imposed, the defendant appealed, assigning errors, including the matters to which the foregoing exceptions were made.

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

Yarborough & Yarborough for defendant, appellant.

SEAWELL, J. We first consider the exception of the defendant to the exclusion of the evidence offered by the defendant through the testimony of M. D. Hoyle relating to a conversation which he had with Foster Spivey after the shooting and while the latter was in the hospital. The defendant offered this for the purpose of impeaching the dying declaration of Spivey made to his father, introduced by the State. It must be conceded that, if admitted, it would have had that effect, since the dying declaration made by Spivey shortly after the shooting may properly engender the inference that the shooting was not accidental, but, on the contrary, had some motive, however unknown to the declarant. That is also the appraisal which the State seemed to put upon this item of evidence as justifying its introduction.

The theory on which dying declarations are excepted from the hearsay rule and admitted in evidence is that the declaration is made under the realization of approaching death, when there is no longer any motive for

making a false statement, thus creating a sanction for truth equal to that of an oath. *S. v. Williams,* 67 N. C., 12, 14; *S. v. Beal,* 199 N. C., 278, 297, 154 S. E., 604; *S. v. Laughter,* 159 N. C., 488, 74 S. E., 913. Perhaps a more potent reason, one strong enough to supersede the right of confrontation, so strongly entrenched in our law, is the necessity of preserving important evidence, which often could come from no other source, of the identity of the killer and such circumstances of the killing as come within the range of the exception. It can readily be understood that such significant declarations, often attended with such dramatic force as to powerfully affect the jury, should in justice be subject to the rules of impeachment which attend other testimony, when impeachment is possible or impeaching evidence available. See *S. v. Williams, supra,* in the cautionary statements on pages 14, 15.

Had the deceased been a sworn witness, testifying in court, the proffered testimony that he had made an inconsistent statement, and more favorable to the defendant, explanatory of the occurrence, would readily have been admitted. We do not conceive the rule to be different when the defendant has the more difficult task of refuting a dying declaration without, of course, the advantage of confrontation and cross-examination of the witness, whose testimony is to be admitted, if at all, as an exception to the rule.

Upon this point, authorities seem to be strongly in favor of the suggested rule, which we believe to be founded upon reason and justice. In *Carver v. U. S.,* 164 U. S., 694, 41 L. Ed., 602, the Court passing upon this point, said:

"There was also error in refusing to permit the defendant to prove by certain witnesses that the deceased, Anna Maledon, made statements to them in apparent contradiction to her dying declaration, and tending to show that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since we think they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. A dying declaration by no means imports absolute verity. . . . In nearly all the cases in which the question has arisen, evidence of other statements by the deceased inconsistent with his dying declarations has been received. *People v. Lawrence,* 21 Cal., 368 (an opinion by *Chief Justice Field,* now of this Court); *State v. Blackburn,* 80 N. C., 474; *McPherson v. State,* 9 Yerg., 279; *Hurd v. People,* 25 Mich., 405; *Battle v. State,* 74 Ga., 101; *Felder v. State,* 23 Tex. App., 447, 5 S. W., 145; *Moore v. State,* 12 Ala., 764."

In *Ashton's Case,* 2 Lewin (Eng.), 147, it is said: "When a party comes to the conviction that he is about to die, he is in the same practical state as if called on in a court of justice under the sanction of an oath,

and his declarations as to the cause of his death are considered equal to an oath, but they are, nevertheless, open to observation, for though the sanction is the same, the opportunity of investigating the truth is very different and, therefore, the accused is entitled to every allowance and benefit that he may have lost by the absence of the opportunity of more full investigation by the means of cross-examination."

In *People v. Lawrence,* 21 Cal., 368—the case referred to in the above opinion in the Supreme Court of the United States—*Mr. Justice Field,* then Chief Justice of the Supreme Court of California, said: "Though the condition of the person making the declaration in the last hours of life, under a sense of impending dissolution, might compensate for the want of an oath, it can never make up for the want of a cross-examination, and, therefore, there would be no justice in any rule which would deprive the accused in such circumstances of the right to impeach the credit of the deceased by proof that he had made contradictory statements as to the homicide and its cause." See Annotations, 16 A. L. R., pp. 417-423.

In the North Carolina Law Review, Volume 14, page 382, upon a review of the authorities, the conclusion is reached that: "A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached in the same manner as any other sworn statement."

It has been held in this State that dying declarations may be corroborated by evidence that the declarant had made the same or similar statement as to the homicide, although such testimony was not qualified as a dying declaration. *S. v. Blackburn,* 80 N. C., 474; *S. v. Craine,* 120 N. C., 601, 602, 27 S. E., 72. It is our belief that the converse of the rule is a necessary corollary, consonant with the theory on which dying declarations are admitted in evidence and founded on principles of justice. There was error in excluding the proffered evidence.

The objection of the defendant to the instruction to the jury above quoted is that it omits the word "intentional," and not only permits, but requires, conviction upon proof of the mere killing by the deadly weapon, whether intentional or otherwise. The objection is well taken.

The intentional use of a deadly weapon in a homicide imports malice and raises the rebuttable presumption that the defendant is guilty of murder in the second degree, placing the burden upon him to show such circumstances as may reduce the crime to manslaughter, or entitle him to an acquittal. The presumption is not raised by the mere use of such a weapon.

The use of an inexact formula, while not to be approved in any case, may not result in reversible error, where the intentional use of the weapon is admitted; but where the defense is based on the theory of accidental

shooting and the intentional use is not admitted, but, on the contrary, denied, and becomes the crux of the controversy, the court must be meticulous in instructing the jury that the *intentional* use of the deadly weapon is necessary to raise the presumption.

The State calls attention to the fact that in numerous other parts of the charge the court did correctly state the law in this respect; and to this the defendant replies that the lapse in that respect was at a critical point in the charge, where the court "boiled down" all its preceding instructions to the one controlling principle, which it gave as guidance to the jury—making conviction to depend on whether "the defendant shot the deceased with a deadly weapon, which resulted in the death of the deceased." If so, the jury was admonished that it would be their duty to return a verdict of guilty of manslaughter. Under these circumstances, we are unable to apply in aid of the State the principle of contextual construction in order to relieve the instruction of prejudicial error. The instructions were contradictory, and sufficiently so, we think, to have, in all probability, caused confusion in the minds of the jury. *S. v. DeGraffenreid, ante,* 113; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526.

It is to be noted that the instruction here was upon the question of manslaughter, of which defendant was found guilty; and this discloses a further inexactness in the instruction, which must have been prejudicial to the defendant, notwithstanding any previous explanation which the court might have given with regard to the privilege of the defendant to mitigate the charge, or exculpate himself entirely upon a proper showing.

For the reasons here given, the defendant is entitled to a new trial. It is so ordered.

New trial.

RANDALL L. LASSITER v. F. D. CLINE AND PAULINE T. ELLIS, EXECUTRIX OF LEON ELLIS.

(Filed 11 November, 1942.)

1. Master and Servant § 3—

In action for damages to plaintiff by the negligence of an agent of defendant, where plaintiff testified that he had known the alleged agent for two months prior to the accident, during which time said agent was driving the same truck which caused the collision complained of, which was loaded at the same place as trucks of defendant, and that he saw the alleged agent receive his pay check from defendant on one occasion along with other help of defendant. *Held:* Evidence of agency sufficient to go to the jury.

2. Master and Servant §§ 21a, 22a—

Where the employer has the right and power to control, direct and interfere with the employee and the employment, the employee is a servant: *Holding* that one who furnishes his own truck and is paid for hauling by the load, is still a servant and not an independent contractor, his employer retaining the right to terminate the employment at any time.

APPEAL by plaintiff from *Carr, J.*, at June Term, 1942, of WAKE.

This is a civil action to recover damage for personal injuries alleged to have been negligently inflicted by an agent and employee of the defendants upon the plaintiff by causing a collision between a truck driven by said agent and employee and a truck driven by the plaintiff on Riley Street at Fort Bragg.

The evidence of the plaintiff tended to show that on 9 October, 1941, the plaintiff was employed as a truck driver by the Construction Quartermaster of the United States Army, and as such employee was driving a truck on Riley Street when his truck was negligently run into by a truck loaded with "molten asphalt" and driven by one Herbert Thomas, an agent and employee of the defendants.

The evidence of the defendants, while admitting the collision between the two trucks, tended to show that Herbert Thomas, the driver of the truck which collided with the truck driven by the plaintiff, was an independent contractor and not an agent or employee of the defendants.

At the close of the evidence the defendants renewed a motion theretofore lodged when the plaintiff had rested his case for a judgment as in case of nonsuit, which motion was allowed, and from judgment predicated upon such ruling the plaintiff appealed, assigning errors.

Dupree & Strickland and Franklin T. Dupree, Jr., for plaintiff, appellant.

Thomas W. Ruffin for defendants, appellees.

SCHENCK, J. This case poses two questions: First, was there any evidence of agency existing between Herbert Thomas, the driver of the truck which collided with the truck plaintiff was driving, and the defendants? And, second, does all of the evidence tend to show that the said Herbert Thomas was an independent contractor?

We are constrained to hold that the first question should be answered in the affirmative, and the second question should be answered in the negative. Such holding precludes an affirmation of the judgment below.

The plaintiff testified that he had known Herbert Thomas for two months prior to 9 October, 1941, and during all this time he was hauling asphalt in defendants' truck, and that this truck was the same one involved in the collision, and that he was hauling asphalt for the defendants

from their plant near Fort Bragg to the place where they were paving streets; that the truck was loaded at the same place where the other employees of the defendants loaded their trucks; that he saw Thomas on one occasion get his pay check from the defendants along with their other employees, and that he was doing the same thing up to the time of the collision. This evidence more than meets the scintilla rule on the question as to Thomas being an agent and employee of the defendants, and being engaged in the business of his principal and employer at the time of the collision. There is adminicular evidence of the plaintiff's testimony.

On the second question: The defendants' witness Dean testified that he was superintendent in charge of defendants' operations in the Fort Bragg area on 9 October, 1941, and had charge of the job to which Herbert Thomas was hauling asphalt; that he made the contract between Thomas and the defendants for such hauling; that "the agreement was that we paid him thirty cents per ton for each ton delivered to the roadway. . . . I did not have anything to do with *how* he operated the truck and no one else connected with Cline & Ellis did"; that Thomas owned the truck he was driving that day; that the witness had the right to fire the men that were hired. "Q. You would have the right to fire Mr. Thomas if you wanted to? A. That's right."

"The most important test in determining whether a person employed to do certain work is an independent contractor or a mere servant is the control over the work which is reserved by the employer. Whether one is an independent contractor depends upon the extent to which he is, in fact, independent in performing the work. Broadly stated, if the contractor is under the control of the employer, he is a servant; if not under such control, he is an independent contractor. Where a contractor lets a portion of work to another contractor, the latter's independence is also determined by the same criterion. It is not, however, the fact of actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. The employer may leave to the contractor the details of the work, but if the employer has the absolute power to control the work, the contractor is not independent. Whether the employer exercises control may be a fact to be considered in the determination of the relation of the parties—that is, the circumstance that an employer has actually exercised certain control over the performance of the work may be considered as a factor tending to show the subserviency of the contractor, and the fact that during the performance of work, the employer has exercised no control may be considered as tending to show that he has no right to control." 27 Am. Jur., Independ-

ent Contractors, par. 6, p. 486. See, also, *Aderholt v. Condon,* 189 N. C., 748, 128 S. E., 337.

"The power of an employer to terminate a contract at any time, irrespective of whether there is or is not a good cause for so doing, is indisputably an evidential element which tends strongly to show that the person employed is not an independent contractor." 27 Am. Jur., Independent Contractors, par. 21, p. 501.

Certainly the "right to fire" is one of the most effective methods of control, and this power the defendants' witness testified he possessed over Thomas the driver of the colliding truck; and this irrespective of whether the truck belonged to Thomas or to the defendant. *Chief Justice Clark* in *Evans v. Lumber Co.,* 174 N. C., 31, 93 S. E., 430, thus states the law in this jurisdiction: "In this case the employer had power to terminate Spruill's employment at any time. This gave the defendant potential control over him and is conclusive that Spruill was not an independent contractor for whose negligence the defendant was not responsible."

The plaintiff having offered competent evidence of the relationship of principal and agent and of employer and employee existing between the defendants and Thomas, and of Thomas being engaged in his principal's or employer's business at the time of the collision, thereby made out a case sufficient to be submitted to the jury; and when the defendants interposed the defense of Thomas being an independent contractor the burden of proof upon the issue thus raised was upon the defendants, *Embler v. Lumber Co.,* 167 N. C., 457, 83 S. E., 740, and it was error to hold that all the evidence established the affirmative of this issue.

Since the case must go back for another trial any consideration of the exceptive assignments of error assailing his Honor's exclusion of certain evidence offered by the defendants becomes supererogatory.

The judgment of the Superior Court is

Reversed.

L. M. SUTTON, EVA SUTTON DAMRON, PRESTON SUTTON, ALENE ANDERSON, EVELYN ANDERSON, EUGENE ANDERSON, EVA ANDERSON AND MARY EMMA ANDERSON, THE LAST FIVE BEING MINORS, BY THEIR NEXT FRIEND, JESSE ANDERSON, v. AMANDA T. SUTTON, LUDDIE CATHERINE RITTER, CLEO JOSHUA SUTTON, CLAUDIE DAVID SUTTON, HAZEL BROWN COLIE, AND MRS. J. N. SUTTON, ADMINISTRATRIX C. T. A. OF THE ESTATE OF J. N. SUTTON, DECEASED.

(Filed 11 November, 1942.)

1. Wills §§ 2, 13—

The same mental capacity necessary to make a will is required to revoke one.

2. Insane Persons §§ 5, 7: Guardian and Ward §§ 3, 8—

Where a person has been adjudged incompetent for want of understanding to manage his own affairs, under C. S., 2285, and the court has appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his own affairs, in so far as parties and privies to the proceeding are concerned; and, while not conclusive as to others, it is presumptive, and the presumption continues unless rebutted in a proper proceeding.

3. Wills §§ 13, 21c—

A complaint in a civil action for fraud in preventing the revocation of a will, alleged that the will was made in 1917 and probated in 1941, and that in 1936 testator was adjudged incompetent and a guardian appointed on that account by the Superior Court, the guardianship continuing to his death in 1941, and that in 1938 testator called for his will, so that it could be destroyed, and was assured by his wife that the will was of no value and had been destroyed. *Held:* Error for the court below to overrule a demurrer on the ground that no cause of action stated.

APPEAL by defendants from *Grady, Emergency Judge,* at May Term, 1942, of LENOIR.

Civil action to establish fraud in connection with the prevention of the revocation of the last will and testament of J. N. Sutton, deceased, which will has been duly probated; and to declare the devisees in said will holders of the legal title to the property described therein, trustees for the use and benefit of the heirs at law and next of kin of J. N. Sutton, deceased; to the end that said estate may be distributed in the same manner as if the said J. N. Sutton had died intestate.

The pertinent facts and contentions are as follows:

1. On 24 November, 1917, J. N. Sutton executed a paper writing, purporting to be his last will and testament, in which he devised his home place to Amanda T. Sutton for life, with remainder to the children of the said Amanda T. Sutton, who was the second wife of the said J. N. Sutton; and the said instrument purports to devise to the plaintiffs the farm lands known as the Swamp Land.

2. J. N. Sutton and wife, on 24 October, 1936, executed and delivered a note to the Farmers Cotton Oil Co., a corporation of Wilson, N. C., and secured the payment of said note by the execution of a deed of trust to S. D. McCullen, Trustee, on the farm known as the Swamp Land, said instrument being recorded in the office of the register of deeds of Lenoir County, in Book 149, page 191.

3. On 28 November, 1938, J. N. Sutton was declared incompetent to handle his affairs because of his aged and infirm condition. Whereupon, L. M. Sutton, one of the plaintiffs, was appointed general guardian for the said J. N. Sutton by the clerk of the Superior Court of Lenoir County, and continued as such guardian until the death of J. N. Sutton, on 14 May, 1941.

4. L. M. Sutton, as guardian of J. N. Sutton, instituted an action in the Superior Court of Lenoir County, in an effort to avoid payment of the indebtedness represented by the note and secured by the deed of trust referred to herein. The land described in said deed of trust was sold by order of the court, the indebtedness paid, and the balance of the proceeds from the sale turned over to the guardian of J. N. Sutton.

5. Plaintiffs allege that shortly after the sale of the aforesaid lands, the said J. N. Sutton called upon his wife, Amanda T. Sutton, to deliver to him the paper writing purporting to be his last will and testament, dated 24 November, 1917, to the end that the same might be destroyed, so as to enable all the children of the said J. N. Sutton to share equally in the estate, as provided by law in cases of intestacy. That Amanda T. Sutton, for the purpose of concealing the existence of said instrument and to prevent the destruction of same, in order that she and her children might inherit all the remaining real estate owned by J. N. Sutton, stated to and assured the said J. N. Sutton that the paper writing was of no value by reason of the sale of the lands under the decree of the court and that the instrument had been destroyed.

6. Defendants filed a demurrer to the complaint for that, among other things, the complaint does not state facts sufficient to constitute a cause of action, in that the facts as alleged are insufficient to entitle the plaintiffs to the relief demanded.

From judgment overruling the demurrer, defendants appeal and assign error.

J. A. Jones for plaintiffs.
Sutton & Greene for defendants.

DENNY, J. The complaint alleges, on 28 November, 1938, J. N. Sutton was declared incompetent to handle his affairs because of his aged and infirm condition; whereupon L. M. Sutton, one of the plaintiffs, was appointed general guardian for J. N. Sutton by the clerk of the Superior Court of Lenoir County. It appears from the facts set forth in the complaint that L. M. Sutton continued to act as guardian for J. N. Sutton until the death of the said J. N. Sutton on 14 May, 1941.

The question arises as to whether or not a person declared incompetent to handle his affairs because of his aged and infirm condition, and for whom a guardian has been appointed, has the mental capacity to revoke his will. Consolidated Statutes of North Carolina, Vol. 3, sec. 2285, as amended by Public Laws 1929, chapter 203, provides: "Where a person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the Clerk may appoint a Trustee instead of guardian for said person."

Where a person has been adjudged incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age, disease or like infirmities, and the court has appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his affairs, in so far as parties and privies to the guardianship proceedings are concerned; and, while not conclusive as to others, it is presumptive proof of the mental incapacity of the ward, and this presumption continues unless rebutted in a proper proceedings. *Johnson v. Ins. Co.,* 217 N. C., 139, 7 S. E. (2d), 475; *Parker v. Davis,* 53 N. C., 460; *Rippy v. Gant,* 39 N. C., 443; *Christmas v. Mitchell,* 38 N. C., 535; *Armstrong and Arrington v. Short,* 8 N. C., 11. Therefore, in any event, in the absence of proof to the contrary, a person for whom a guardian has been appointed pursuant to the provisions of Consolidated Statutes of North Carolina, Vol. 3, sec. 2285, as amended by Public Laws 1929, chapter 203, is presumed to lack the mental capacity to make or revoke a will. It seems to be the general rule that the same mental capacity necessary to make a will is required to revoke one, and the rule is so stated in 68 C. J., sec. 479, p. 797: "The same mental capacity as is required to make a will has been held necessary to make a revocation of the will effective." The weight of authority supports the above view. *Vaughn v. Vaughn,* 217 Ala., 364, 116 So., 427; *In re Lang's Estate,* 65 Cal., 19, 2 Pac., 491; *Barnes v. Bosstick,* 203 Ind., 299, 179 N. E., 777; *Allison v. Allison,* 37 Ky., 90; *In re Loomis' Will,* 133 Me., 81, 174 A., 38; *Hunter v. Baker,* 154 Md., 307, 141 A., 368, 278 U. S., 627, 73 L. Ed., 546; *Watkins v. Watkins,* 142 Miss., 210, 106 S., 753; *In re Goldsticker's Will,* 192 N. Y., 35, 18 L. R. A. (N. S.), 99; *In re Quick's Will,* 263 N. Y. S., 146, 147 Misc., 28; *Ford v. Ford,* 26 Tenn., 92.

The demurrer should have been sustained in the court below, and the judgment is

Reversed.

STATE v. PAT TENNANT, ALIAS J. C. BRADY.

(Filed 11 November, 1942.)

1. Indictment § 12: Criminal Law § 56—

A defendant cannot take advantage after conviction of alleged deficiencies in a bill of indictment, where he has made no motion to quash or in arrest of judgment.

2. Embezzlement § 7—

In a prosecution for embezzlement, evidence that defendant came into the State, opened a place of business, bought on consignment goods to

a large amount, and within less than a month disappeared from the State with the bulk of the goods without paying therefor, *is held* sufficient to convict.

3. Criminal Law § 2—

The *scienter*, the guilty knowledge and intent, must exist at the time of the commission of the offense. It matters not when acquired so long as defendant acted knowingly and feloniously at the time.

APPEAL by defendant from *Carr, J.*, at May Term, 1942, of WAKE. No error.

Criminal prosecution tried on bill of indictment charging the crime of embezzlement.

Defendant and one C. W. Tennant of Alabama went to Apex in November or December, 1941. C. W. Tennant leased certain property designed for use as a filling station and defendants, representing that they were brothers, opened and began to operate a service station as partners. The station was operated in the name of C. W. Tennant Service Station. On 2 December, C. W. Tennant procured the delivery of tires, tubes and other auto accessories by Calloway Tire & Service Company, wholesale dealers in automobile accessories, under a verbal assignment agreement. It was agreed that the consignment agreement would be reduced to writing later. On 8 December, defendant came to Raleigh, obtained additional merchandise from the same firm and carried it to the station in Apex. On 9 December, an agent of the prosecutor carried a written consignment agreement to Apex for execution. This agreement was signed by defendant in the name of C. W. Tennant and in his assumed name on his own behalf. Ten or twelve days later the merchandise had disappeared and the station was closed. Defendant was arrested in Alabama and C. W. Tennant was arrested in Atlanta.

The State offered evidence tending to show that a large part, if not all, of the consigned merchandise was carried out of the State by automobile and sold or otherwise disposed of. There was other incriminating evidence.

Defendant and his associate admit that the merchandise was sold but contend it was disposed of in the regular course of business in Apex. They make no contention that it was ever accounted for.

There was a verdict of guilty. From judgment thereon defendant appealed.

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

A. B. Breece for defendant, appellant.

STATE *v.* TENNANT.

BARNHILL, J. Defendant's assignment of error, based on his exception to the refusal of the court to dismiss as of nonsuit under C. S., 4643, cannot be sustained. The evidence, when considered in the light most favorable to the State, tends to show a deliberate scheme on the part of the defendant and his associate to obtain possession of merchandise under the guise of *bona fide* retail dealers, to surreptitiously remove it from the State, convert the proceeds to their own use and then to depart the State and the jurisdiction of its courts. They were temporarily successful in their scheme but were later apprehended and put on trial. Now that defendant is brought to the bar of justice he cannot successfully challenge the sufficiency of the evidence against him.

Defendant tendered certain prayers for instruction to the effect that the jury could not convict unless they found that this defendant had actual knowledge of the prior verbal agreement and of the nature, kind and quantity of merchandise delivered thereunder at the time he signed the written agreement. He excepts for that the court declined to so instruct the jury.

The assignment cannot be sustained. The *scienter,* the guilty knowledge and intent, must exist at the time of the commission of the offense. It matters not when acquired so long as the defendant acted knowingly and feloniously at the time.

On this aspect of the case the court charged the jury in simple and understandable language that before they could convict the defendant they must find beyond a reasonable doubt that the merchandise was delivered and being held on a consignment agreement; that the defendant acquired and had actual knowledge that they were being so held; that with such knowledge he converted some or all of said merchandise to his own use or misapplied it "to such an extent that rendered it impossible for the owner thereof to again get possession of it"; and that at the time he so converted, or misapplied it, "he had the felonious and fraudulent intent to convert it to his own use and to misapply it to such an extent that the owner would be permanently deprived of the property." As defendant was a copartner this is as favorable to the defendant as he had any right to demand. *S. v. Summers,* 141 N. C., 841; *S. v. Shipman,* 202 N. C., 518, 163 S. E., 657; *S. v. Pace,* 210 N. C., 255, 186 S. E., 366.

Certain other exceptions are directed to alleged error in the admission of evidence relating to the codefendant. This evidence was for impeachment and affected C. W. Tennant only. Even if incompetent—and it was not—this defendant cannot complain.

In his argument here defendant made some reference to alleged deficiencies in the bill of indictment. However, there was no motion to quash or in arrest of judgment either here or in the court below. The sufficiency of the bill is not challenged.

Other exceptions appearing in the record are not of such merit as to require discussion. In the trial below we find

No error.

JOSEPH B. CHESHIRE, JR., TRUSTEE, UNDER THE WILL OF LAURA F. COSBY, v. FIRST PRESBYTERIAN CHURCH OF RALEIGH, PRESBYTERIAN ORPHANS' HOME, AND E. S. HARTSHORN, ADMINISTRATOR OF B. H. COSBY.

(Filed 11 November, 1942.)

Appeal and Error § 49a—

The decision of this Court on a previous appeal, between the same parties and upon the same facts then and now presented, constitutes the law of the case and is conclusive on the points so adjudged.

APPEAL by defendant Hartshorn, Administrator, from *Carr, J.*, at June Term, 1942, of WAKE. Affirmed.

Paul F. Smith for plaintiff, appellee.

James I. Mason for defendant Hartshorn, appellant.

DEVIN, J. This case was here at Spring Term, 1942, and is reported in 221 N. C., 205, 19 S. E. (2d), 855, where the facts are fully stated. On that appeal all the pleas set up by the defendant were considered, particularly those based upon the fact that the plaintiff had been appointed trustee under the will in a special proceeding before the clerk, rather than by the Superior Court in term, and it was decided that, while under the statutes, C. S., 4023, and C. S., 2583, the clerk was without power to make the appointment, all the parties now being properly in the Superior Court, the judge thereof, in the exercise of the equitable jurisdiction of the court, had power to make the appointment *nunc pro tunc*. We quote from the Court's opinion as follows: "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."

The cause was remanded to the Superior Court for proceeding not inconsistent with the opinion. Thereupon the court below, having all the parties to this action and all those interested in the trust before it, proceeded, in the exercise of the equitable jurisdiction of the court, to appoint the plaintiff trustee under the will, *nunc pro tunc,* and to validate his previous appointment by the clerk. The defendant's pleas in bar were overruled, and the cause was referred.

The rulings of the court below were in accord with the opinion of this Court and must be upheld. The decision of this Court on the previous appeal, upon the same facts then and now presented, constituted the law of the case. *Pinnix v. Griffin,* 221 N. C., 348; *Robinson v. McAlhaney,* 216 N. C., 674, 6 S. E. (2d), 517. The decision on the former appeal decided the questions now presented, and is therefore conclusive on the points so adjudged. For this reason the distinction between the case at bar and *N. C. R. R. v. Story,* 268 U. S., 286, cited by defendant, is apparent.

Judgment affirmed.

RALEIGH BUILDING CORPORATION v. MARY HARDY COOPER; A. L. PURRINGTON, JR., TRUSTEE; SECURITY NATIONAL BANK, TRUSTEE UNDER AN INSURANCE TRUST OF JOHN C. DREWRY, DECEASED; AND MARY HARDY COOPER, EXECUTRIX UNDER THE WILL OF JOHN C. DREWRY, DECEASED.

(Filed 11 November, 1942.)

Corporations § 14—

Failure of a corporation, within a reasonable time (here over ten years), to show compliance with a condition precedent to a subscription to its capital stock, makes the subscription unenforceable; and payments by the subscriber, without knowledge of the failure, do not constitute a waiver.

APPEAL by plaintiff from *Carr, J.,* at March Term, 1942, of WAKE.

Civil action to recover upon conditional stock subscription and to sell land to make assets to pay balance on such stock subscription.

In trial court judgment as of nonsuit was entered at close of evidence for plaintiff.

Plaintiff appeals to Supreme Court, and assigns error.

Paul F. Smith for plaintiff, appellant.

J. P. & J. H. Zollicoffer for defendant Cooper, appellee.

Ehringhaus & Ehringhaus for defendants Security National Bank and A. L. Purrington, Jr., Trustee, appellees.

PER CURIAM. This action, as regards recovery on conditional stock subscription made by John C. Drewry, upon which action is predicated, does not materially differ from the case *Raleigh Building Corporation v. Rodgers,* decided at the Spring Term, 1942, of this Court, 221 N. C., 204, 19 S. E. (2d), 625. The number of shares to be subscribed, upon which each subscription was conditioned, had not been subscribed when the corporation was organized in April, 1931. Twenty-four shares were lacking, and these twenty-four shares were not subscribed until September, 1941, more than ten years after the corporation was organized, and after the Rodgers suit was instituted, and in the month preceding the institution of the present action. While Rodgers made only 6 payments, Drewry made 23, but made none after 15 February, 1933. Drewry died on 12 September, 1937, and, on 9 September, 1941, after his estate had been settled, his widow, who was executrix under his will, and who is now Mary Hardy Cooper, defendant in this action, made a payment. However, it is not contended that the records show that at that time the required number of shares had been subscribed. Furthermore, speaking of difference in the two cases, appellant in brief filed here admits that "neither had knowledge of the fact that the total subscription of stock was less than the specified number of shares."

In the light of these facts plaintiff has failed to show a compliance with condition precedent, within a reasonable time. Moreover, plaintiff neither alleges nor shows a waiver of the condition. Hence, the same conclusion must be reached here as in the *Rodgers case, supra,* where judgment of nonsuit is affirmed. A denial of the prayer for sale of land to make assets to pay debts necessarily follows.

Affirmed.

WALTER WILSON, EMPLOYEE, v. TOWN OF MOORESVILLE, EMPLOYER, NEW AMSTERDAM CASUALTY COMPANY, CARRIER.

(Filed 25 November, 1942.)

1. Municipal Corporations § 11c—

A police officer, unknown to the common law, is a creature of statute, and as such has and can only exercise the powers given him by the Legislature, expressly or derivatively.

2. Same—

When city or town authorities appoint one to the office of policeman, and he accepts the appointment, the existing laws pertaining to the position enter into and become a part of the relationship thus established.

3. Same—

A municipality may give to one policeman the rank of chief over others, but it has no authority to enlarge or restrict the powers and duties conferred upon such officers by the Legislature; and the chief has no greater power than any other policeman, and custom can add nothing to his authority.

4. Same: Sheriffs § 4—

In the absence of statutory authority, the power of a sheriff or other peace officer is limited to his own county, township, or municipality, and he cannot without a warrant make an arrest out of his own county, township or municipality, where the person to be arrested is charged with the commission of a misdemeanor—beyond such limits his right to arrest is no greater than that of a private citizen. "Felon fleeing," "hue and cry" and "hot pursuit" discussed.

5. Master and Servant §§ 40e, 40f—

Where a policeman, in an effort to arrest without warrant a person who has in his presence committed an offense less than a felony, pursues such person beyond the boundaries of the town or district in which by statute he is authorized to act and, in such pursuit, is injured by accident outside of such boundaries: *Held* that injuries so suffered do not arise out of and in the course of his employment within the meaning of the N. C. Workmen's Compensation Act. The meaning of "arising out of" and "in the course of employment," as used by the Act, pointed out.

APPEAL by defendants from *Pless, J.*, at Regular June Term, 1942, of MECKLENBURG.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to claimant.

The Commissioner before whom the case was heard, after stating that the sole question in controversy in connection therewith is whether the injury by accident which claimant sustained on 20 July, 1941, arose out

of and in the course of his employment with defendant employer, made findings of fact substantially these:

That claimant, a regular policeman of the town of Mooresville, situated in Iredell County, North Carolina, "while dressed in his policeman's uniform and wearing his badge," and "patrolling a street" in said town "in an automobile furnished by the defendant employer for police work, saw an automobile which was speeding and thereby violating the motor vehicle laws of the State of North Carolina, and the speed laws of the town of Mooresville, N. C., and immediately thereafter turned on the siren in the police car and started in pursuit of the speeding automobile with the purpose of apprehending the driver" thereof; that in pursuing the speeding automobile, it was at all times in plain view of him; that the pursuit had continued for about six miles beyond the city limits of the town of Mooresville and about one-half mile beyond the Iredell County line into Mecklenburg County and through a part of the town of Davidson, in Mecklenburg County, when the car in which he was riding was wrecked, causing injury to claimant; that that part of the pursuit which was in Iredell County was through Coddle Creek and Davidson Townships; that the chief of police of the town of Mooresville, "plaintiff's superior or commanding officer," "had previously instructed claimant and his fellow police officers that they had the right to pursue a party who had violated a State of North Carolina law" in said town, "into adjoining counties to apprehend said law violators, provided . . . the policeman involved was at all times in view of the law violator or was in 'hot pursuit' of him"; and that it has been the long and well established custom for the police officers of said town to so pursue persons, who were seen violating a law in said town, "into adjoining counties if it was necessary to apprehend them, when said police officer was at all times in view of or in 'hot pursuit' of said law violator."

"Upon the detailed circumstances and facts hereinbefore found," the Commissioner, after making findings with regard to statutory authority of policemen of the town of Mooresville to make arrests in Coddle Creek and Davidson Townships in Iredell County, further finds as a fact that the injury by accident which claimant sustained "arose both out of and in the course of his employment" by the defendant town of Mooresville.

Upon such findings of fact the Commissioner concludes as a matter of law that claimant sustained injury by accident arising out of and in the course of his employment, and compensation was awarded.

Upon appeal thereto by defendants, the Full Commission ratified and affirmed and adopted the findings of fact, conclusions of law and award of the hearing Commissioner, all of which on appeal thereto by defendants, was affirmed by Superior Court.

Defendants appeal to Supreme Court and assign error.

Starr & Starr for plaintiff, appellee.
J. Laurence Jones for defendants, appellants.

WINBORNE, J. These are the questions for decision:

1. Where policeman, in effort to apprehend and arrest without warrant a person who has within the town and in his presence committed a breach of peace, or an offense less than a felony for which arrest may be so made, pursues such person to and beyond the boundaries of the town or district within which by statute he is authorized to act, and while pursuing such person outside such boundaries suffers injury by accident, does such injury arise out of and in the course of his employment as policeman of such town within the meaning of the North Carolina Workmen's Compensation Act?

2. If not, does the fact that the chief of police and superior officer instructed the policeman that he had a right to so pursue such person when in sight of and in "hot pursuit" of him, or the fact that it was customary for police officers of the town in an effort to effect arrest, without warrant, to so pursue such person under such circumstances, alter the situation?

Though conceding that a policeman, while within the town, by virtue of office, has authority, without warrant, to arrest a person for breach of the peace or an offense less than a felony for which arrest may be so made, committed in his presence—each of these questions is properly answered "No."

Under the North Carolina Workmen's Compensation Act, Public Laws 1929, chapter 120, as amended, the condition antecedent to compensation is the occurrence of an injury (1) by accident (2) arising out of and (3) in the course of employment. *Conrad v. Foundry Co.*, 198 N. C., 723, 153 S. E., 266; *Whitley v. Highway Com.*, 201 N. C., 539, 160 S. E., 827; *Beavers v. Power Co.*, 205 N. C., 34, 169 S. E., 825; *Plemmons v. White's Service, Inc.*, 213 N. C., 148, 195 S. E., 370; *Lockey v. Cohen, Goldman & Co.*, 213 N. C., 356, 196 S. E., 312.

The words "out of" refer to the origin or cause of the accident, and the words "in the course" to the time, place and circumstances under which it occurred. *Conrad v. Foundry Co., supra; Harden v. Furniture Co.*, 199 N. C., 733, 155 S. E., 728; *Hunt v. State*, 201 N. C., 707, 161 S. E., 203; *Ridout v. Rose's Stores, Inc.*, 205 N. C., 423, 171 S. E., 642; *Plemmons v. White's Service, Inc., supra; Lockey v. Cohen, Goldman & Co., supra.*

It has been said that the term "arising out of employment" is broad and comprehensive and perhaps not capable of precise definition. It must be interpreted in the light of the facts and circumstances of each

case, and there must be some causal connection between the injury and the employment. *Chambers v. Oil Co.*, 199 N. C., 28, 153 S. E., 594; *Harden v. Furniture Co., supra; Canter v. Board of Education,* 201 N. C., 836, 160 S. E., 924; *Walker v. Wilkins, Inc.,* 212 N. C., 627, 194 S. E., 89; *Plemmons v. White's Service, Inc., supra.*

"Arising out of," as said by *Adams, J.,* in *Hunt v. State, supra,* "means arising out of the work the employee is to do or out of the services he is to perform. The risk must be incidental to the employment." *Harden v. Furniture Co., supra; Chambers v. Oil Co., supra; Beavers v. Power Co., supra; Bain v. Mfg. Co.,* 203 N. C., 466, 166 S. E., 301; *Plemmons v. White's Service, Inc., supra.*

In the light of these principles, what services was claimant to perform, and what work was he to do under his appointment as policeman of the town of Mooresville? The statutory law affords the answer. A police officer, unknown to the common law, is a creature of statute, and as such has and can only exercise such powers as are given by the Legislature, expressly or derivatively. *S. v. Freeman,* 86 N. C., 683; *Martin v. Houck,* 141 N. C., 317, 54 S. E., 291.

In this State statutory power, applicable to all incorporated cities and towns, where same shall not be inconsistent with special acts of incorporation or special laws in reference thereto, C. S., 2625, is given to the boards of commissioners or aldermen or other governing municipal authority, to appoint town watch or police, C. S., 2641, and "a town constable." C. S., 2630. See *Riddle v. Ledbetter,* 216 N. C., 491, 5 S. E. (2d), 542. And the powers and duties of policemen and the territorial limits within which such powers and duties may be exercised are prescribed by statute. Thus, when the board of commissioners or aldermen of the town of Mooresville appointed claimant to office of policeman, and when he accepted the appointment, the existing laws pertaining to the position entered into and became a part of the relationship thus established, see *Bank v. Bryson City,* 213 N. C., 165, 195 S. E., 398, and cases cited; also *Wilkinson v. Boomer,* 217 N. C., 217, 7 S. E. (2d), 491; *McGuinn v. High Point,* 217 N. C., 449, 8 S. E. (2d), 462; *Motsinger v. Perryman,* 218 N. C., 15, 9 S. E. (2d), 511; *Comrs. v. Gaines,* 221 N. C., 324, 20 S. E. (2d), 377, and fixed the scope of employment.

What then are the statutory powers, and territorial limits upon the power of a policeman of the town of Mooresville, North Carolina, to make an arrest without warrant? It is provided by special statutes (1) "that arrest may be made by the town constable or any policeman of the town in the following cases: first, when he shall have in his hands a warrant duly issued by the mayor of the town or a justice of the peace of Iredell County; or, second, when an offense has been committed in his

presence and when an offense has been committed and the party is likely to escape before a warrant can be obtained"; and that "he shall execute the precepts of the mayor anywhere in the county of Iredell . . ."; Private Laws 1885, chapter 68, section 7, amending the charter of the town of Mooresville; and (2) that "the policemen of Mooresville shall have the same authority to make arrests and to execute criminal process within the territory in which the recorder's court of Mooresville has jurisdiction as is vested by law in a sheriff." Public-Local Laws 1937, chapter 89. And the recorder's court of Mooresville is vested with jurisdiction only over certain criminal offenses committed within the town of Mooresville and within Coddle Creek and Davidson Townships in Iredell County. Public-Local Laws 1913, chapter 613, section 7, as amended by Public-Local Laws 1925, chapter 530, as amended by Public-Local Laws 1927, chapter 682.

Furthermore, there is in this State a general statute, C. S., 2642, applicable to all incorporated cities and towns, where same shall not be inconsistent with special acts of incorporation or special laws in reference thereto, C. S., 2625, which provides that "a policeman shall have the same authority to make arrests and to execute criminal process within the town limits as is vested by law in a sheriff."

At common law justices of the peace, sheriffs, coroners, constables, and watchmen are recognized as peace officers, and as such have the right by virtue of office not only to arrest without warrant where a felony has been committed, but for any offense amounting to a breach of the peace committed in their presence. "Whether a peace officer, acting in his official capacity, has authority to make an arrest within the State, but outside of the county, township, or municipality of which he is peace officer, is dependent on the statutes in the particular jurisdiction." 6 C. J. S., 610, Arrest, section 12 (2). Hence, in the absence of statutory authority, the power of a sheriff or other peace officer is limited to his own county, township, or municipality, and he cannot with or without warrant make an arrest out of his own county, township or municipality, where the person to be arrested is charged with the commission of a misdemeanor. Beyond the limits of his county, township, or municipality his right to arrest for misdemeanor is no greater than that of a private citizen. 4 Am. Jur., pages 13, 14, 35, Arrest, sections 17, 18, 51; 6 C. J. S., 610, Arrest, section 12 (2). Also, a public officer appointed as a conservator of the peace for a particular county, municipality or district, as a general rule has no official power to apprehend a misdemeanant beyond the boundaries of the county, municipality or district for which he has been appointed. 4 Am. Jur., 13, *et seq.* Arrest, section 17, *et seq.* But as to township constables in this State, see C. S., 976, and *S. v. Corpening,* 207 N. C., 805, 178 S. E., 564.

Furthermore, in this State, the right of a sheriff to pursue law violators beyond the boundary lines of his county is limited to cases in which a felony has been committed in his county, and the felon flees. Public Laws 1935, chapter 204, effective 18 April, 1935, carried in Michie's Code of 1939 as section 4544 (1). Moreover, the old common law "hue and cry," as a process of pursuing or of fresh pursuit, applied only in case where a felony had been committed, or dangerous wound inflicted. Blackstone Commentaries, 4 Vol., 292.

If a policeman in this State be considered a counterpart of, and entitled to exercise the powers and perform the duties of a town constable, it is provided by statute, C. S., 2639, that "as a peace officer, the constable shall have within the town all the powers of a constable in the county; and as a ministerial officer, he shall have power to serve all civil and criminal process that may be directed to him by any court within his county, under the same regulations and penalties as prescribed by law in the case of other constables, and to enforce the ordinances and regulations of the board of commissioners as the board may direct . . ." These general provisions are substantially the same as those of the special act to which reference is hereinabove made. Private Laws 1885, chapter 68, section 7.

This Court, in the case of *S. v. Freeman, supra,* speaking of the powers of a constable, referred to in this statute, C. S., 2639, then section 23, chapter 111, of Battle's Revisal, said that a constable "in the apprehension of those who violate the law . . . is a conservator of the peace." In *S. v. Sigman,* 106 N. C., 728, 11 S. E., 520, referring to the same statute, then The Code, 3808 and 3810, and to a special statute, Private Laws 1885, chapter 23, section 24, with similar provisions, applicable to the case then in hand, the decision of this Court in pertinent part is epitomized in this headnote: "The powers conferred upon the city and town constables by sections 3808, 3810, The Code, are limited, in respect to arrests without warrant, to the territory embraced within the corporate boundaries . . ."

Also, the case of *Sossamon v. Cruse,* 133 N. C., 470, 45 S. E., 757, an action for recovery of damage for an assault is in point. There, plaintiff, whom defendant, a policeman of the town of Concord, was attempting to arrest without warrant for an offense committed within the town, escaped and fled beyond the town limit. Defendant pursued him and made the assault, upon which complaint is based, outside the town. The Court referring to The Code, sections 3810 and 3811, now C. S., 2639, held, as reflected in the second headnote, that "A policeman who makes an arrest without a warrant outside the corporate limits of a town for the breach of an ordinance is guilty of an assault." In the opinion it is said: "We do not think, therefore, that the defendant had a right

to pursue the plaintiff beyond the town limits in order to arrest him after he escaped. When the prisoner had escaped from the custody of the officer he certainly had no more power or authority to re-arrest him than he had when the original arrest was made, and his power in the latter case could only be exercised within the town limits."

And, in *Martin v. Houck, supra,* again considering the same statute, then Revisal, section 2939, now C. S., 2639, *Walker, J.,* said: "A policeman, as a peace officer, is given within the town all the powers of a constable in the county . . . His right to arrest when he has no warrant is confined necessarily by the statute to the limits of the town." See also *S. v. Loftin,* 186 N. C., 205, 119 S. E., 209.

Thus it is clear that the position, or office, of policeman of the town of Mooresville, in respect to making arrests, without warrant, is that of a peace officer, whose authority, powers and duties, in the broadest view of the applicable statutes, are confined to the boundaries of the town of Mooresville and the townships of Coddle Creek and Davidson, in Iredell County. His services as such policeman could be lawfully performed only within these territorial limits. The work he was to do as such policeman could only be done within these confines. When he undertook to go outside and into Mecklenburg County to make arrest without warrant for misdemeanor, his going was not incident to his employment. Hence, it follows as a matter of law that the injury by accident which he sustained in the town of Davidson in Mecklenburg County did not arise out of and in the course of his employment.

But it is contended that in view of the fact that the chief of police of the town of Mooresville had instructed claimant and his fellow police officers that they had the right, for purpose of arrest, when in view and in "hot pursuit," to pursue into an adjoining county a person who had violated a State law in said town, and of the fact that it was customary for policemen of said town to so pursue law violators, a liberal construction would extend the provisions of the North Carolina Workmen's Compensation Act to include injuries by accident sustained by a policeman of the town while so pursuing a law violator outside the county of Iredell. We do not so agree.

The statute, C. S., 2641, authorizes the board of commissioners of a town to appoint town watch or police "to be regulated by such rules as the board may prescribe." It makes no reference to rank or distinction among such appointees. Though the town may make rules for their regulation, such policemen as may be appointed are vested with the same powers and duties as peace officers, and are circumscribed by, and are subject to the same limitations upon such powers and duties. And though the town may as among them give to one policeman the rank of chief

over the others, it has no authority to enlarge or to restrict their powers and duties as peace officers conferred upon them by the Legislature.

In 37 Am. Jur., 698, on Municipal Corporations, section 87, it is stated that: "The police department of a municipality derives its authority from the State, and where the municipality is not expressly or impliedly authorized to do so, it can neither enlarge nor restrict the duties of the police department or of its officers and agents as defined by the legislature." And in McQuillin Municipal Corporations, 2nd Ed., Revised Vol. 6, page 520, section 2586 (2426), the author states that, "If the legislature has defined the powers and duties of police officers, greater or inconsistent powers cannot be conferred by ordinance." The chief of police of the town, therefore, has no greater power than any other policeman of the town to make arrest without warrant. Hence, any instruction in regard thereto which he may have given to claimant, could add nothing to and could not take anything from the authority claimant possessed as peace officer of the town.

Furthermore, "it is a well settled general rule that in order that a custom or usage may be regarded as binding, it is essential that it be legal, and that a custom will not be recognized which is contrary to established law." 27 R. C. L., 164, Usages and Customs, section 12.

And, in the case of *Gore v. Lewis,* 109 N. C., 539, 13 S. E., 909, where the plaintiff insisted that a custom of merchants in the city of Wilmington, where he resided and did business as a merchant, warranted the taking of interest in a way that was greater than that allowed by the statute and stipulated for in the notes, this Court said: "This contention is without foundation. Such custom, whatever it may be, cannot supersede or modify the statute."

Hence, while the Workmen's Compensation Act should be liberally construed so as to effectuate the Legislature's intent or purpose which is to be ascertained from the wording of the act, 71 C. J., 341; *Johnson v. Hosiery Co.,* 199 N. C., 38, 153 S. E., 591; *Rice v. Panel Co.,* 199 N. C., 157, 154 S. E., 69; *Reeves v. Parker-Graham-Sexton, Inc.,* 199 N. C., 236, 154 S. E., 66; *Williams v. Thompson,* 200 N. C., 463, 157 S. E., 430; *West v. Fertilizer Co.,* 201 N. C., 556, 160 S. E., 765, "the rule of liberal construction cannot be carried to the point of applying an act to employments not within its stated scope, or not within its intent or purpose." 71 C. J., 359; *Borders v. Cline,* 212 N. C., 472, 193 S. E., 826. "It is ours to construe the laws and not to make them." *Hoke, J.,* in *S. v. Barksdale,* 181 N. C., 621, 107 S. E., 505. The decisions on subject of custom upon which claimant relies are distinguishable from the instant case.

The judgment below is

Reversed.

STATE v. HARRY S. HOWARD.

(Filed 25 November, 1942.)

1. **Embezzlement § 2—**

The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within the meaning of the statute, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held.

2. **Embezzlement §§ 2, 4—**

Evidence of intent to return money embezzled, or that money fraudulently misapplied was after discovery repaid, or that defendant secured no personal benefit, will not necessarily exculpate the defendant, or compel his acquittal.

3. **Embezzlement § 6—**

There is no statute or rule of evidence which excludes one who has entered a plea of guilty to embezzlement from testifying against another who aided and abetted him in the crime.

4. **Criminal Law § 53e—**

The use of the words "the State has offered evidence which tends to show," in a charge to the jury, does not constitute an expression of opinion in violation of C. S., 564.

5. **Embezzlement § 8: Criminal Law §§ 53a, 53e—**

There are no stereotyped forms of instructions. The trial judge has wide discretion in presenting the issues to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proven.

6. **Embezzlement § 8: Criminal Law § 53e—**

Where, in a prosecution for embezzlement upon separate indictments under C. S., 4268, and C. S., 4269, counsel for defendant in argument to the jury commented on the severity of the minimum punishment prescribed by C. S., 4269, and the court in its charge read to the jury C. S., 4269, and the bill of indictment thereunder and also a portion of the general probation statute, and carefully cautioned them that punishment was not to be considered by them in any way as bearing upon the question of guilt or innocence of defendant. *Held:* While the reading of a statute to the jury in regard to punishment is not to be commended, it alone is insufficient to require a new trial.

APPEAL by defendant from *Phillips, J.*, at April Special Term, 1942, of WAKE. No error.

The defendant was charged with embezzlement in two cases. Separate bills of indictment were found against him. One bill charged him with embezzling property of the State of North Carolina while an officer and

agent of the State and cashier in the North Carolina Department of Revenue. In another bill he was charged as such officer, agent and cashier with aiding and abetting one C. W. Sneed, another officer and employee of the State, in embezzling property of the State. C. S., 4268; C. S., 4269.

By consent the cases were consolidated and tried together. There was verdict of "Guilty as charged in said bills of indictment." From judgment imposing sentence of not less than one nor more than three years in State's Prison, the defendant appealed.

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

Bunn & Arendell for defendant.

DEVIN, J. The defendant bases his appeal from the judgment below principally upon three grounds: 1. He assigns error in the ruling of the court in permitting C. W. Sneed to testify as a witness against him. According to the record Sneed had entered a plea of guilty to an indictment for embezzlement at a previous term of court, but had not been sentenced. The defendant cites *S. v. Bruner,* 65 N. C., 499, and *S. v. Owen,* 65 N. C., 464, in support of his position that Sneed was not a competent witness against him. The common law disqualification of a defendant in a criminal action from testifying in his own behalf, because of his interest, was removed by ch. 43, Public Laws 1866. Thereafter, by ch. 177, Public Laws 1869-1870, it was provided that codefendants in the same indictment could not testify for or against each other. While this last statute was in force the decisions cited were rendered. However, at the next session of the General Assembly the Act of 1869-1870 was expressly repealed and the former statute re-enacted. Ch. 4, Public Laws 1871-1872. So that at the time of the trial of this case there was no statute or rule of evidence that would require the exclusion of the testimony of Sneed, if in other respects competent. *S. v. Smith,* 86 N. C., 705; *S. v. Medley,* 178 N. C., 710, 100 S. E., 591; *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299; *S. v. Perry,* 210 N. C., 796, 188 S. E., 637; C. S., 1792.

2. The defendant assigns error in the denial of his motion for judgment as of nonsuit, but an examination of the record leads to the conclusion that there was no error in the ruling of the court in this respect. There was evidence tending to show fraudulent misapplication of the property of the State as charged in the bills of indictment.

Evidence of intention or expectation, subsequently, to return the money, or that the money so fraudulently misapplied was after discovery repaid, or that the defendant secured no personal benefit, would not

necessarily exculpate the defendant, or compel his acquittal. *S. v. Foust,* 114 N. C., 842, 19 S. E., 275; *S. v. Summers,* 141 N. C., 841, 53 S. E., 856; *S. v. Lancaster,* 202 N. C., 204, 162 S. E., 367; *S. v. McLean,* 209 N. C., 38, 182 S. E., 700. The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within the meaning of the embezzlement statutes, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the principal or employer for purposes other than those for which the property is held. *S. v. McDonald,* 133 N. C., 680, 45 S. E., 582; *S. v. Lancaster, supra; S. v. McLean, supra.* There was evidence sufficient to support the verdict and judgment.

3. The defendant excepted to the following portions of the judge's charge to the jury: "There has been quite a bit said in the argument here as to punishment. The Court charges you that the punishment is no concern to you. That is the Court's province and not the jury's. And you should not consider any argument in regard to punishment bearing upon the question of guilt or innocence of the defendant. You find the true facts from the evidence and apply such facts as found by you from the evidence to the law and thereby make up your verdict. Since there has been said something in the argument concerning the punishment, the Court will read you another section in regard to punishment, not that you shall consider punishment in any way in this case. You shall not. 'Suspension of sentence and probation. After conviction or plea of guilty or *nolo contendere* for any offense, except a crime punishable by death or life imprisonment, the judge of any court of record with criminal jurisdiction may suspend the imposition or the execution of a sentence and place the defendant on probation or may also fine and also place the defendant on probation.' I read that statute to you because there has been so much said in the case about punishment, but you will not consider punishment in arriving at your verdict in this case, and the Court so charges you."

From an examination of the record it appears that before giving the instructions complained of, the trial judge in his general charge had read to the jury one of the bills of indictment on which the defendant was being tried, and the statute, C. S., 4269, under which it was drawn. This statute prescribed a minimum sentence, upon conviction, of 20 years in prison, or $10,000 fine, or both. It appears that counsel for the defendant in their arguments to the jury had previously commented on the severity of the minimum punishment prescribed by this statute, and that the judge's reference to a general statute relating to punishment was evoked by the comments of counsel. The jury was carefully cautioned that matters of punishment were not to be considered by them in any way as bearing on the question of the guilt or innocence of the

defendant. Furthermore, it appears that the defendant was being tried on two bills of indictment, one charging violation of C. S., 4269, and the other drawn under C. S., 4268, which was also read to the jury. The punishment prescribed for violation of the latter statute is not less than four months and not more than ten years in prison. While the comments of counsel and the reference of the judge thereto were directed to the penal provisions of section 4269, the jury returned verdict of guilty as charged in both bills, and a single sentence was imposed—not less than one year nor more than three years in prison. Thus, it seems that the verdict rendered and the sentence imposed properly may be regarded as bottomed upon a different statute from that first read to the jury, and referred to in the portion of the charge excepted to, and without necessary relation thereto.

The exact question presented by this exception has not heretofore been decided by this Court. It has been held improper for the judge to convey to the jury the implication that a verdict of guilty would not require the imposition of the statutory penalty. In *S. v. Matthews,* 191 N. C., 378, 131 S. E., 743, the statement by the judge to the jury in a capital felony, after they had been out several hours, in response to inquiry, that they might return verdict of guilty of murder in the first degree with recommendation of mercy, was held to be error because calculated to induce the impression that the return of such a verdict would not result in the punishment prescribed by the statute. It was thought that otherwise the jury might have returned a different verdict. But that is not the case here.

While the reading of a statute to the jury in regard to punishment is not to be commended, we are not prepared to hold that it alone is sufficiently prejudicial to the defendant to require a new trial. Such a rule, strictly applied, might unduly fetter the judge in giving instructions to the jury, or advising them of the exact language of the statute the defendant is charged with violating. The trial judge has wide discretion as to the manner in which he presents an issue of fact to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proven. C. S., 564. It is his high duty to hold the scales evenly between all parties. There are no stereotyped forms of instructions. No two cases are exactly alike, and the trial judge's ruling should be considered by the appellate Court in the light of the circumstances of the trial. The rule prevails that in order to overthrow the verdict and judgment it must be made to appear not only that the action of the trial judge complained of was erroneous, but that it was "material and prejudicial, amounting to a denial of some substantial right." *Collins v. Lamb,* 215 N. C., 719, 2 S. E. (2d), 863.

The question of the propriety of reference in the judge's charge to the punishment that might be imposed after conviction has been considered in other jurisdictions, and we cite a number of cases showing the variety of circumstances under which the question has been raised.

In *People v. Alfano,* 322 Ill., 540, the trial judge instructed the jury that the penalty upon conviction was one to twenty years imprisonment, and further instructed the jury that after serving one year the defendant had the right to apply for parole, and that the parole board had the right to release him on parole then, or at any subsequent time within the maximum period. This was held error, but not of such character as to require a reversal of the judgment.

In *Coward v. Commonwealth,* 178 S. E. (Va.), 797, it was said that, while it was improper for the trial judge to tell the jury its sentence might be set aside, or cut down by some other arm of the state, it being the jury's province (under the Virginia law) to impose such punishment as appeared from the evidence to be just and proper, such instructions would be regarded as harmless when the minimum sentence was imposed, and that it was of little importance when the court itself fixed the penalty.

In *Ryan v. U. S.,* 99 F. (2d), 864, following argument by counsel as to the maximum and minimum punishment imposed by law in that case, the trial judge in instructing the jury commented at length on the subject, saying that one defendant, if found guilty, would not be sent to the penitentiary; that since the matter of punishment had been discussed he felt justified in saying that never, save in one instance, had he imposed the maximum penalty, and that in the case at bar not a third of the maximum would be imposed on any one. On appeal to the Circuit Court of Appeals, the Court said that a discussion in the trial court's instructions to the jury of the punishment that might be anticipated upon conviction was not to be commended, but that in that case, in view of the arguments presented on behalf of the defendants, the instructions complained of were provoked, and not inappropriate. True, in the Federal Courts, the judge is not precluded from expressing an opinion on the facts, so long as he instructs the jury they are not bound by his opinion, but the appellate Court's decision in affirming the judgment on this point was not based on that ground.

In *Freeman v. State,* 156 Ark., 592, on a trial for grand larceny, it was held that the action of the trial judge in reading to the jury a statute which provided for sending female felony convicts and those under eighteen years of age to reform school, was not error, unless it were done in a way to indicate the court's view as to the guilt or innocence of the defendant. In *Colley v. State,* 164 Ga., 88, 138 S. E., 65, where it was the duty of the court to fix the punishment on conviction

for a misdemeanor, it was held not error for the judge to read to the jury the general section as to the punishment for misdemeanors. In *Gandolfo v. State,* 11 Ohio St., 114, it was held that no error was committed by the trial judge in sending to the jury at their request the public statute relating to the offense with which the defendant was charged.

Where under a state statute the effect of recommendation to mercy is to reduce the punishment, it is proper for the judge to so instruct the jury. *Lovett v. State,* 30 Fla., 142.

Defendant cites *State v. Tennant,* 204 Iowa, 130. In that case the trial judge gave instructions as to the punishment of the defendant in the event of conviction, and particularly as to the power of the Iowa Parole Board in extending clemency. In granting a new trial the Supreme Court of Iowa said: "Its effect may have been to encourage a conviction, upon the theory that a moderate punishment might be imposed, or an early parole obtained." In *Bryant v. State,* 205 Ind., 372, a new trial was awarded because the judge, following argument as to the seriousness of the penalty upon conviction, instructed the jury at some length upon the right of the court to suspend the sentence in case of conviction, advising that in the event they found the defendant guilty he would not necessarily be punished, and saying, "You may safely trust to the court the right performance of whatever duty and responsibility is imposed by the legislature upon that officer, and you will make no mistake in such assumption."

In *Bean v. State,* 58 Okla. (Cr.), 432 (where the jury fixes the punishment), it was held that a charge to the jury as to the rules for commutation for good behavior after incarceration in prison was improper since the rules provided for conditions subsequent to conviction and sentence.

This was thought by the appellate Court to have led the jury to fix greater punishment than would otherwise have been imposed.

In *People v. Santini,* 221 App. Div. (N. Y.), 139, affirmed without opinion in 246 N. Y., 612, the defendant was on trial for manslaughter. The trial judge instructed the jury on this point, in part, as follows: "You must pass upon the facts, but inasmuch as the matter of punishment has been frequently referred to, it is only fair to say to you gentlemen, that in considering the question of punishment, if the jury finds this defendant guilty, this Court is prepared to take into consideration all the circumstances. . . . Do not imagine, gentlemen, that because counsel tells you that the punishment is 20 years for manslaughter in the first degree, or 15 years for manslaughter in the second degree, that if, from the facts you find this defendant is guilty, of either one of those charges, that the Court will impose any such punishment. It is not the Court's intention to do so."

In *People v. Harris,* 77 Mich., 568, the trial judge in his charge said to the jury: "I may take it upon myself to discharge this man. With that, however, you have nothing to do." This was thought likely to provoke indifference on the part of the jury in the consideration of the case and prejudicial to the defendant.

In *Miller v. U. S.,* 37 App. Cases (D. C.), 138, the trial judge said in part: "So it is a great mistake for the jury to labor under any embarrassment by reason of what they may imagine a sentence may be . . . The statute does not require a defendant convicted of embezzlement to be sent to the penitentiary at all. He may be sent there or he may be freed . . . depending on the circumstances as they may be shown to the court in addition to what has appeared here."

See also *Ellerbe v. State,* 79 Miss., 10; *State v. King,* 158 S. C., 251.

In *Territory v. Griego* (N. M.), 42 Pac., 81, where the judge suggested to the jury, after they had been unable to agree for forty hours, that a recommendation to mercy would be considered by the court, a new trial was ordered. See also *Randolph v. Lampkin* (Ky.), 14 S. W., 538, where the trial judge seems to have coerced a verdict.

In *McBean v. The State,* 85 Wisconsin, 206, the jury being equally divided, sent to the judge this inquiry, "If we bring in a verdict of guilty, can we depend on the clemency of the Court?", to which the judge replied, "Yes." In *Commonwealth v. Switzer,* 34 Penn. St., 383, the defendant was charged with obstructing a highway. In his charge the trial judge suggested to the jury the probable extent of the punishment in case of a verdict of guilty. In *State v. Kiefer,* 16 S. D., 180, the jury sent the judge the inquiry, "Can we recommend the defendant to the mercy of the Court?" The judge replied: "Yes; I have made it an invariable rule . . . to follow such recommendations." In *Hackett v. People,* 8 Colo., 390, similar assurances were given the jury by the court, and a new trial awarded.

An examination of the various decisions of the courts on this subject leads to conclusion that after all the propriety of instructions to the jury as to punishment must be considered on the basis of the language used, in the light of the circumstances of the trial, in order to determine whether substantial error was committed to the prejudice of the defendant.

It will be noted that in the cases where new trials have been granted on this ground, the trial judge's reference to punishment usually contained definite intimations of leniency in case of conviction without the accompanying caution that the matter of punishment was not to be considered by the jury on the question of the guilt or innocence of the defendant. In our case the judge in charging the jury had read one of the statutes under which defendant was being tried which prescribed a

heavy penalty upon conviction. As counsel for defendant had previously commented on the punishment imposed by this statute, the judge read a portion of the general probation statute, carefully cautioning the jury, however, that they should not consider the question of punishment in arriving at their verdict. In the words of *Allen, J.*, in *Lucas v. R. R.*, 165 N. C., 264, 80 S. E., 1076, "We must assume that the jury were sufficiently intelligent to understand the instruction and honest enough to follow it." Our entire system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and sufficient intelligence to fully understand and comply with the instructions of the court, and they are presumed to have done so. *S. v. Ray*, 212 N. C., 725, 194 S. E., 482.

In view of the previous arguments of counsel as to the penalty prescribed by C. S., 4269, and the court's reading in connection therewith a portion of a general probation statute, and the care with which the jury was instructed on this point, as well as the fact that the defendant was also found guilty under another bill charging violation of a different statute, and that the sentence imposed was in accord with the provisions of the latter statute, we are not inclined to hold that the action of the trial judge constituted prejudicial error requiring a new trial.

4. The only exception noted by defendant to the charge was that the court in stating the evidence used the expression "the State has offered evidence which tends to show." This form of expression may not be held to impinge the provisions of C. S., 564, or to constitute the expression of an opinion that any fact was fully or sufficiently proven. *S. v. Harris*, 213 N. C., 648, 197 S. E., 156; *Lewis v. R. R.*, 132 N. C., 382, 43 S. E., 919.

The other exceptions were formal.

On the record we find

No error.

C. M. BYERS v. SARA SHERMAN BYERS.

(Filed 25 November, 1942.)

1. Divorce §§ 1, 2—

Under N. C. Constitution, Art. II, sec. 10, divorce is purely statutory, and is under no obligation to the ecclesiastical or common law.

2. Divorce § 2a—

A divorce *a vinculo* can be had under Public Laws 1937, ch. 100, upon the ground that the parties "have lived separate and apart for two years," without requiring that the separation shall be by deed of separation or other mutual agreement. *Oliver v. Oliver*, 219 N. C., 299, clarified and recent divorce statutes discussed.

3. Divorce § 9—

In an action for divorce under Public Laws 1937, ch. 100, a charge by the court to the jury that the living separate and apart, required by that statute, means living separate and apart under mutual agreement only, was erroneous entitling plaintiff to a new trial.

4. Divorce § 2a—

The bare fact of living separate and apart for a period of two years, standing alone, will not constitute a cause of action for divorce. There must be an intention on the part of one of the parties to cease cohabitation, shown to have existed from the beginning of the separation period.

5. Same—

The law does not contemplate a repudiation by the husband of all marital obligations to come within the statute, and the fact that the husband has, during the separation, provided reasonable support for his wife will not defeat his divorce.

APPEAL by plaintiff from *Hamilton, Special Judge,* at 25 May, 1942, Extra Term, of MECKLENBURG. Error. New trial.

This is an action for divorce under chapter 100, Public Laws of 1937, based on the statutory grounds that plaintiff and defendant had lived separate and apart for two years. The *feme* defendant replied to the complaint, alleging that there was no separation in the sense contemplated in the statute, but that plaintiff abandoned her; and she set up a cross action, alleging cruelty and abandonment, C. S., 1666, and C. S., 1667, and failure to support defendant and the children of the marriage.

On the trial the plaintiff introduced evidence of the marriage and one year's residence in the State. The evidence as to the separation tended to show that more than two years prior to the commencement of the suit, that is, on 5 March, 1940, plaintiff notified defendant that he would live with her no longer, because of conduct on her part which he could not tolerate (much of which was detailed in the evidence), and that they had lived separate and apart ever since, in entirely different establishments in the same town, where plaintiff had his business.

Plaintiff admitted the removal from the house of certain articles of furniture and other articles belonging to plaintiff which were not needed by defendant, but testified that the home was left in a condition to afford ample comfort and protection to defendant and the children.

There was evidence tending to show that plaintiff had endeavored to secure an agreement as to the sum he should pay the defendant in order to provide support for her and the children, but had been unable to secure such agreement; but that defendant had, and used, an unlimited credit of plaintiff at the grocery store, the meat market, the oil fuel dealer, the dairy products dealer, the druggist, the doctors, dentists, the laundry, the dry cleaner, the jeweler, the florist, and all other dealers in the necessities and comforts of life in the city of Charlotte, and that he

provided both in this respect, and in all others, for such support. Plaintiff described the house on Sherwood Avenue, in which defendant lived, detailing its appointments and furnishings, and testified that he had spent during a period of nineteen months, from 1 October, 1940, through April, 1942, an average of $469.34 a month for the maintenance of the home and support of defendant and her two small children, introducing tabulated statements in corroboration, calculated from receipted bills and paid checks.

The evidence tends to show that during the separation period, at plaintiff's suggestion, the defendant went to Mercy Hospital and to Appalachian Hall, a private hospital, for treatment as an alcoholic and drug addict, remaining from 23 March to 19 September, 1940, during which time, and in her absence, plaintiff occupied the Sherwood Avenue home in order to take care of the children, but did not occupy the home during defendant's presence. Plaintiff paid the hospital bill of one thousand three hundred fifty-eight dollars and some cents.

Plaintiff was corroborated as to his intent not to live with defendant any more by his own declaration made to J. L. Wright about noon on 5 March, 1940.

The defendant introduced no evidence.

The case was submitted to the jury upon three issues, the first relating to the marriage, the third relating to the residence of plaintiff, and the second couched in language as follows: "2. Did the plaintiff and the defendant live separate and apart continuously for the past two years just prior to the institution of this action on 7 March, 1942, as alleged in the complaint?"

Upon this issue, the judge instructed the jury as follows: "The Court instructs you that under this evidence, and all of this evidence, as a matter of law, it would be your duty to answer that second issue No"; and again:

"And, adverting again to the second issue, the issue that has been read to you, dealing with the question of plaintiff and defendant living separate and apart, the Court instructs you that under all this evidence, as a matter of law, in the light of the act or statute under which this action is brought, your answer to that second issue would be No."

After the jury had deliberated for approximately fifteen minutes, they were recalled and this further instruction was given them:

"The Court calls your attention to the fact that there are two statutes in North Carolina with respect to divorce on the grounds of parties plaintiff and defendant living apart, that this action is brought under what is known as 1659 (a) of the North Carolina Code, or that which is also known as Chapter 100 of the Public Laws of 1937, and under that section under which this action is brought, living separate and apart

has been construed by our Court as meaning that the parties have been living separate and apart under mutual agreement, that is, that they agreed to live separate and apart. The Court instructs you, in the light of that, that there is no evidence in this case that the parties themselves, Mr. and Mrs. Byers, mutually agreed, agreed among themselves and between themselves, that they would live separate and apart, and that is why the Court instructed you and reiterates its instruction, as a matter of law, under all this evidence, if you believe this evidence and find the facts to be as all this evidence tends to show, you would have to answer that second issue No"; and again:

"Before that second issue could be answered YES, under the law, it would have to be found by the jury, from the evidence and by its greater weight, that the living separate and apart had been with mutual agreement, or agreement between the parties themselves, because, as already observed, this action is brought under that section of the statute which requires the living separate and apart by agreement between the parties."

To all of these instructions, *seriatim,* the plaintiff excepted.

When requested to read the Act under which the case was brought, the court replied: "No, sir, the Court has given this jury the instructions the Court thinks proper, and reiterates that under all this evidence, if you find the facts to be as all this evidence tends to show, as a matter of law you will have to answer that second issue NO." And to this, also, plaintiff excepted.

The jury answered the issue No, and from the adverse judgment ensuing, the plaintiff appealed, assigning error.

Thaddeus A. Adams for plaintiff, appellant.

G. T. Carswell and Joe W. Ervin for defendant, appellee.

SEAWELL, J. In defining the cause for divorce created by it, chapter 100, Public Laws of 1937, under which this action is brought, reads as follows:

"Section 1. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year."

The question posed for our consideration is whether a divorce *a vinculo* can be had under this law upon the ground that the parties "have lived separate and apart for two years," without requiring that the separation shall be by deed of separation or other mutual agreement. There should be no difficulty in giving this question an immediate affirmative

answer, except for the contention of the defendant that the court in defining the legal significance of separation in *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549—rendered since the statute went into force—still regards it necessary that the separation shall be by mutual consent. *Oliver v. Oliver, supra,* page 304.

We do not regard the opinion in *Oliver v. Oliver, supra,* as having that legal effect, but the situation does call for some clarifying statement of the law.

The history of divorce on the ground of separation discloses a number of statutes on the subject, interlaced with judicial interpretation and respectful legislative response. Omitting mention of previous legislation, section 1659 of the Consolidated Statutes (1919) provided for a divorce *a vinculo* if there had been a separation of husband and wife, and they had lived separate and apart for ten years, and the plaintiff in the suit had resided in the State for that period.

Chapter 63, Public Laws of 1921, by amendment, reduced the requisite period of separation to five years; and the law as it then stood was construed in *Lee v. Lee,* 182 N. C., 61, 108 S. E., 352, as not extending "to granting the decree upon the suit of the party in default." *Sitterson v. Sitterson,* 191 N. C., 319, 131 S. E., 641. The law was then amended by chapter 6, Public Laws of 1929, in a respect not material to this discussion.

Chapter 72, Public Laws of 1931, with the limitation that "this Act shall be in addition to other acts and not construed as repealing other laws on the subject of divorces" (sec. 2), provides as follows: "Section 1. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for five years, and no children have been born to the marriage, and the plaintiff in the suit for divorce has resided in the State for that period."

Chapter 163, Public Laws of 1933, amending this Act (with some inexactness of reference not material to the point at issue), substituted the following:

"Section 1. Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of either party, if and when there has been a separation of husband and wife, either under deed of separation or otherwise, and they have lived separate and apart for two years, and the plaintiff in the suit for divorce has resided in the State for a period of one year."

Recognizing that the 1933 Act was intended to operate independently and was not affected by other fringing laws on the subject, the Court,

in *Long v. Long,* 206 N. C., 706, 175 S. E., 85, held that the requirement of C. S., 1659, that the suit must be at the instance "of the injured party" did not apply. *Campbell v. Campbell,* 207 N. C., 859, 176 S. E., 250.

The statute was further construed in *Parker v. Parker,* 210 N. C., 264, 186 S. E., 346, where the decision was addressed more particularly to the wording of the statute—*"when there has been a separation of husband and wife, either under deed of separation or otherwise"*—and the Court held that a mutual agreement to separate was essential to divorce under the terms of the Act. *Hyder v. Hyder,* 210 N. C., 486, 187 S. E., 798; *Woodruff v. Woodruff,* 215 N. C., 685, 3 S. E. (2d), 5.

In the *Parker case, supra,* we find the definition of "separation," quoted in *Oliver v. Oliver, supra,* which constitutes defendant's sole reliance on this appeal: "The word separation as applied to the legal status of a husband and wife means more than abandonment; it means a cessation of cohabitation of husband and wife, by mutual agreement."

Parker v. Parker, supra, refers this definition to the case of *Lee v. Lee, supra,* and this, in turn, to Black's Law Dictionary, which again refers it generally to "Matrimonial Law"; and so, to the ecclesiastical and common law of England, where such a separation was accorded a legal status not thought to be inconsistent with the matrimonial policy. Perhaps, however, it was the assumption by the Court that the Legislature used the word in this technical sense, rather than its popular meaning, that induced the Court to construe the term "or otherwise" as meaning some other form of mutual consent.

Upon this, the Legislature made its latest statutory expression on the subject in chapter 100, Public Laws of 1937, quoted *supra,* which is amendatory of the 1931 law and the 1933 law, and preserves its status as creating an independent cause of divorce. Sec. 2. In this Act, the word "separation" nowhere occurs. In view of the history of the subject which we have just related, it was apparently the intention of the Legislature to drop it from the law, with all the doctrinal implications which attended it, and to substitute for it words descriptive of a factual situation less amenable to interpretive changes. At the same time, it struck out the requirement that the separation should be by deed of separation or otherwise, and we have neither occasion nor power to read it into the law. To do so would be to find that the General Assembly had wasted effort on useless legislation.

It may be well to observe that under Article II, sec. 10, of our Constitution, divorce is purely statutory, and is under no obligation to the ecclesiastical or common law. *Long v. Long, supra:* "The statute gives, and the statute takes away."

It is still true that the bare fact of living separate and apart for the period of two years, standing alone, will not constitute a cause of action for divorce. There must be at least an intention on the part of one of the parties to cease cohabitation, and this must be shown to have existed at the time alleged as the beginning of the separation period; it must appear that the separation is with that definite purpose on the part of at least one of the parties. The exigencies of life and the necessity of making a livelihood may sometimes require that the husband shall absent himself from the wife for long periods—a situation which was not contemplated by the law as a cause of divorce in fixing the period of separation. *Woodruff v. Woodruff, supra.*

Competent evidence of the dealings of the parties with each other during this period may be considered by the jury upon this question; but the fact that the husband has meantime attempted to fulfill his obligations to the law in providing reasonable support of the wife—obligations he cannot avoid without consent of the wife—where his acts are attributable to that necessity, will not defeat his divorce.

While it has been uniformly held by this Court that a husband may not obtain a divorce based, in whole or in part, upon his own wrong—*Reynolds v. Reynolds,* 208 N. C., 428, 430, 181 S. E., 338; *Brown v. Brown,* 213 N. C., 347, 349, 196 S. E., 333—still, as pithily expressed by *Mr. Justice Schenck* in *Hyder v. Hyder,* 215 N. C., 239, 240, "a husband is not compelled to live with his wife if he provides her adequate support." It must, therefore, be conceded that the law under review does not contemplate, as essential to an effectual separation under the statute, a repudiation of all marital obligations, which, of itself, would destroy his remedy.

The defendant has made a motion to amend her pleading here so as to set up as *res judicata* a former judgment between herself and her husband. While under C. S., 1414, this Court has certain power to allow amendments to pleadings, the record does not justify its exercise upon this appeal. The motion may be renewed in the Superior Court.

In the instructions noted there is error, entitling plaintiff to a new trial. It is so ordered.

Error. New trial.

COMMERCIAL NATIONAL BANK OF CHARLOTTE, N. C., EXECUTOR AND TRUSTEE UNDER THE WILL OF WINSTON DAVIS ADAMS, DECEASED, v. MOORESVILLE COTTON MILLS, C. P. McNEELY, ROBERT LASSITER, E. F. BOHANNON, JR., ZEB V. TURLINGTON, JOHN F. MATHESON, C. W. GUNTER, E. E. EDMISTON, G. W. TAYLOR, C. C. JOHNSTON, J. L. HARRIS, MRS. S. C. WILLIAMS, R. M. HANES, JULIAN PRICE, GEO. W. MOUNTCASTLE AND J. F. CRAVEN,

and

COMMERCIAL NATIONAL BANK, AS TRUSTEE UNDER THE WILL OF L. W. SANDERS, DECEASED, v. MOORESVILLE COTTON MILLS, C. P. McNEELY, ROBERT LASSITER, E. F. BOHANNON, JR., ZEB V. TURLINGTON, JOHN F. MATHESON, C. W. GUNTER, E. E. EDMISTON, G. W. TAYLOR, C. C. JOHNSTON, J. L. HARRIS, MRS. S. C. WILLIAMS, R. M. HANES, JULIAN PRICE, GEO. W. MOUNTCASTLE AND J. F. CRAVEN.

(Filed 25 November, 1942.)

1. Corporations §§ 8, 38—

C. S., 1217, gives the Superior Court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appeal from judgment entered therein.

2. Corporations §§ 8, 39, 40—

A reorganized corporation must deal with its dissenting stockholders in accordance with the contract existing between the corporation and such stockholders; and the fact that dissenting stockholders profit and secure a preference by the action of the majority will not divest them of their legal rights, when properly asserted.

3. Corporations §§ 8, 40—

While a dissenting stockholder, desiring to prevent the reorganization of the corporation, must act with reasonable promptness; this does not prevent a stockholder from asserting his rights under the contract contained in his preferred stock, in lieu of attacking the plan of reorganization.

4. Corporations § 8: Fiduciaries § 2—

In the reorganization of a corporation under C. S., 1217, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty to assert whatever legal rights they may have, which in their opinion will be for the best interest of the estates involved.

5. Same—

No cause of action arose under the provisions contained in the preferred stock until the declaration of a dividend, in violation of the terms thereof, and an action by a preferred stockholder to enjoin said payment is not

barred by the three-year statute of limitations, unless instituted more than three years after the declaration thereof.

APPEAL by defendant Mooresville Cotton Mills from *Hamilton, Special Judge,* at June Term, 1942, of MECKLENBURG.

Civil actions to restrain the payment of a dividend on common stock issued by Mooresville Cotton Mills, pursuant to the provisions of a plan of reorganization of the corporation, until the defendant corporation complies with the agreements contained in its certificates of preferred stock held by the plaintiffs, which they allege entitle them to a preference in the payment of dividends and distribution of principal.

By consent of all parties, the above entitled actions were consolidated for trial; trial by jury was expressly waived and the case submitted to the court upon the record and an agreed statement of facts.

The facts pertinent to a disposition of this appeal are as follows:

1. L. W. Sanders died a resident of Mecklenburg County, N. C., 28 June, 1927, leaving a last will and testament, and the Commercial National Bank of Charlotte was named executor and trustee therein; said bank duly qualified in such capacity 13 July, 1927, and is now holding the residue of the estate of L. W. Sanders, including the certificates of preferred stock now in controversy in this action.

2. Winston Davis Adams died a resident of Mecklenburg County, N. C., on 18 August, 1929, leaving a last will and testament, and the Commercial National Bank of Charlotte was named executor and trustee therein; said bank has duly qualified in such capacity and now holds, as such executor and trustee, the certificates of preferred stock in controversy in this action.

3. At the time of his death, the said L. W. Sanders was the owner of twelve shares of "new prior preferred" stock of the defendant corporation, and the certificate contains the following provisions: "RESOLVED, FIRST: That the Mooresville Cotton Mills issue 5,000 shares of preferred stock to be called 'new prior preferred stock' of the par value of $100.00 per share, aggregating $500,000.00 to be issued as of the date of May 1, 1927, which shall bear dividends annually at the fixed rate of seven per cent, payable quarterly on the first day of August, November, February and May in each year, and that said dividends shall be cumulative and shall be paid in full including all arrearages before any dividends whatsoever shall be set apart or paid upon the common stock of the corporation or the second series of preferred stock or the third series of preferred stock, and that the said cumulative dividends shall be a first lien upon the earnings of the said corporation until the same and all arrearages thereof shall be paid in full. . . . RESOLVED, THIRD: That during the life of the new prior preferred stock, or while any portion thereof is outstanding, the Mooresville Cotton

Mills shall not execute any deed of trust, mortgage or other lien or encumbrance upon the property of the corporation nor shall the corporation issue any other stock or class of stock which shall have any preference over or equality with this issue of preferred stock in the earnings, property or assets of the corporation." At the time of his death, L. W. Sanders was also the owner of thirteen shares of the Third Series of Preferred Stock and seventy-three shares of the common stock of the corporation. The holders of the Third Series of Preferred Stock are likewise entitled to seven per cent dividend annually, cumulative and payable before any dividend shall be payable on common stock.

4. At the time of his death, Winston Davis Adams was the owner of one hundred shares of the "new prior preferred stock" and one hundred shares of the common stock of the defendant corporation.

5. In May, 1932, an action was instituted in the Superior Court of Iredell County by Hunter Manufacturing and Commission Company against the Mooresville Cotton Mills, and, pursuant to a decree in said action, the Mooresville Cotton Mills was placed in the hands of a receiver, who operated the business until 5 August, 1933. The plaintiffs herein were not parties to the receivership proceedings.

6. On 4 August, 1933, a special meeting of the stockholders of the Mooresville Cotton Mills was held to consider and pass upon a plan of reorganization. The plan, briefly stated, is as follows: (a) Pay all debts of the corporation, except those to Hunter Manufacturing and Commission Company; (b) the receiver, W. B. Cole, shall execute a deed reconveying the property to Mooresville Cotton Mills, and the corporation, under and by virtue of a decree of court, as provided in C. S., 1217, will execute certain bonds of the corporation to the Hunter Manufacturing Co., securing them by a deed of trust on the real estate and physical property of the corporation; (c) the holders of common stock shall be issued fifty per cent of their present holdings in new no par value common stock, in lieu of their present shares of no par value common stock; (d) the holders of second and third preferred stock shall be issued sixty-six and two-thirds per cent of the number of shares of their present holdings in new no par value common stock, in lieu of their preferred stock and accumulated dividends; (e) the holders of prior preferred stock in the corporation, shall be issued one hundred per cent of the number of shares of their present holdings in new no par value common stock, in lieu of their prior preferred stock and accumulated and unpaid dividends. The plan was adopted by an affirmative vote in excess of two-thirds of the outstanding shares of stock. One thousand six hundred and thirty-seven shares were voted against the plan and the votes so recorded, including the shares held by the plaintiffs herein. Plaintiffs have at all times refused to surrender for exchange, in accord with the plan of reorganization, the preferred shares held by them.

7. The plan of reorganization was approved by the court on 5 August, 1933.

8. No dividends have been paid on the prior preferred stock since 1 November, 1930, and none paid on the third preferred stock since 1 January, 1926.

9. On 4 December, 1941, the directors of the defendant corporation declared a dividend of $1.00 per share on the thirty thousand (30,000) shares of common stock issued and outstanding.

10. After the institution of these actions, a consent decree was entered in both cases on 27 December, 1941, containing the following provisions: (a) Approving the execution of a bond by the defendant, Mooresville Cotton Mills, in the sum of $30,000.00, to protect the plaintiffs' rights herein; (b) authorizing the payment of the dividend as declared; (c) agreeing that if plaintiffs are held to be preferred stockholders that judgment may be entered against the Mooresville Cotton Mills for the par value of the stock and such dividends as the court shall hold have accumulated upon said stock to the date of judgment; and (d) entering a voluntary nonsuit as to all defendants except the Mooresville Cotton Mills.

11. From the judgment holding that the plaintiffs do retain their status as preferred stockholders, in accordance with the terms set forth in said certificates, and awarding judgment in favor of plaintiffs in accord with the consent decrees entered 27 December, 1941, the defendant appeals and assigns error.

Robinson & Jones for plaintiff.

Z. V. Turlington and Cochran & McCleneghan for defendant.

DENNY, J. Does C. S., sec. 1217, give the Superior Court the power in a receivership proceedings to approve a plan of reorganization of a corporation, when approved by a majority in interest of the stockholders of the corporation, whereby the stockholders are reduced and the capital structure changed? If so, are dissenting stockholders, not parties to the receivership proceedings, bound by the decree approving the plan of reorganization?

An examination of the above statute discloses that authority is given the corporation, when a majority in interest of the stockholders of the corporation have agreed upon a plan of reorganization and a resumption by it of the management and control of its property and business, with the consent of the court, upon a reconveyance to it of its property and franchises, either by deed or decree of court, to mortgage its property for an amount necessary for the purposes of reorganization; and to issue bonds, or other evidences of indebtedness, or additional stock, or

both, and use the same for the full or partial payment of creditors who will accept the same, or otherwise dispose of the same for the purposes of the reorganization. There is nothing in the statute to suggest that an adjustment of equities among stockholders is contemplated. However, the fact that the plan of reorganization provides for the readjustment of the capital structure does not make the plan of reorganization void or ineffective if approved by a majority in interest of the stockholders of the corporation with the consent of the court, but it cannot affect the rights of dissenting stockholders not parties to the receivership proceedings. Neither would it affect the vested rights of parties to the proceedings unless they failed to appeal from the judgment entered therein.

The general rule seems to be stated in Fletcher's Cyc. on Corporations, Vol. 11, sec. 5296, p. 732, as follows: "The contract between a corporation and the holders of its preferred stock cannot be changed, or their rights in any way impaired, without their consent, by any subsequent action of the corporation." Therefore, the reorganized corporation must deal with its dissenting stockholders in accord with the contract existing between the corporation and such stockholders. The fact that the dissenting stockholders may actually obtain a preference over other stockholders holding similar stock who consent to the plan of reorganization, is not controlling. The further fact that the dissenting stockholders have profited by the action of the majority in the reorganization of the corporation will not divest them of their legal rights when properly asserted. It appears from the record that the defendant corporation, under its plan of reorganization, has been operating profitably and that the majority in interest of the stockholders of the corporation, by their action in reorganizing it, has greatly enhanced the value of their holdings. However, the plaintiff in these cases, acting in its fiduciary capacity, as executor and trustee, not only has the right but the duty to assert whatever legal rights it may have which in its opinion will be for the best interests of the estates involved.

The weight of authority seems to be to the effect that a dissenting stockholder desiring to prevent the reorganization of a corporation under a proposed plan, must act with reasonable promptness. This, however, does not prevent a stockholder from asserting his rights under the contract contained in his preferred stock certificates, in lieu of attacking the plan of reorganization. 13 Am. Jur., sec. 1225, p. 1118. In view of the provisions of the statute pursuant to which this corporation was reorganized, the plaintiffs had no cause of action until the declaration of a dividend on the common stock of the corporation on 4 December, 1941, without first making provision for the payment of the cumulative and unpaid dividends on the preferred stock held by plaintiffs, in accordance with the provisions contained in said preferred stock. *Patterson v. Hosiery Mills,* 214 N. C., 806, 200 S. E., 906; *Patterson*

v. Henrietta Mills, 216 N. C., 728, 6 S. E. (2d), 531; *Clark v. Henrietta Mills,* 219 N. C., 1, 12 S. E. (2d), 682; *Patterson v. Henrietta Mills,* 219 N. C., 7, 12 S. E. (2d), 686.

These actions were brought on 24 December, 1941, and are not barred by the three-year statute of limitations. *Clark v. Henrietta Mills, supra.*

We think the judgment of the court below, holding that plaintiffs retain their status as preferred stockholders and awarding judgment in favor of plaintiffs, in accord with the consent decrees entered 27 December, 1941, is correct.

The judgment of the court below is

Affirmed.

ARTHUR PUE, R. M. CHESNEY, FRANK P. HOBGOOD, H. A. CHERRY, AND H. E. SPEARS v. GURNEY P. HOOD, COMMISSIONER OF BANKS OF THE STATE OF NORTH CAROLINA, CHARLES M. JOHNSON, CHAIRMAN OF THE STATE BANKING COMMISSION OF NORTH CAROLINA, HARRY McMULLAN, H. D. BATEMAN, B. BASCOM BLACKWELDER, R. P. HOLDING, R. C. LEWELLYN AND BOYD B. MASSAGEE, CONSTITUTING THE STATE BANKING COMMISSION OF THE STATE OF NORTH CAROLINA, AND THAD EURE, SECRETARY OF THE STATE OF NORTH CAROLINA.

(Filed 25 November, 1942.)

1. Banks and Banking § 2—

The right to engage in the banking business, through the agency of a corporation, is a franchise dependent on a grant of corporate powers by the State.

2. Same—

The business of banking so vitally affects the economic life and general welfare of the State as to warrant its prohibition, except under such conditions as the Legislature may prescribe.

3. Banks and Banking §§ 2, 3: Constitutional Law § 4c—

The jurisdiction of the Commissioner of Banks over banking institutions of the State is regulatory and was delegated by the General Assembly in the lawful exercise of its powers.

4. Same—

The duties imposed upon, and the discretion vested in, the Commissioner of Banks bears only upon the question of whether certain conditions exist justifying the creation of a proposed bank and they do not constitute the exercise of legislative or judicial powers.

5. Banks and Banking § 3—

In applying for a certificate of incorporation of a bank, the plaintiffs here were seeking a privilege or franchise, and not asserting a right. Their only right was to demand a consideration of their application as provided by statute.

6. Same: Pleadings § 15: Appeal and Error § 18: Mandamus § 2b—

Upon an application for an industrial bank charter, under Michie's Code, secs. 217 (b) and 225 (m), the Secretary of State has no authority to act without a favorable certificate from the Commissioner of Banks, and upon suit brought, in the absence of such certificate, to compel the issuance of a charter, alleging no bad faith, capricious acts, or disregard of law by the State officers. *Held:* The complaint fails to state a cause of action and is not sufficient as a petition for *certiorari* or as an application for a *mandamus.*

7. Mandamus § 1—

A writ of *mandamus* is an exercise of original and not appellate jurisdiction and is never used as a substitute for an appeal.

8. Mandamus § 2b: Appeal and Error § 18—

Where an administrative officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief.

9. Appeal and Error § 18—

A writ of *certiorari* is an extraordinary remedial writ which issues from a superior to an inferior court, officer, or commission acting judicially, and it lies only to review judicial or *quasi*-judicial action.

10. Same—

The writ of *certiorari* is obtained on petition, supported by affidavit, addressed to the appellate court having jurisdiction and must show merit, and only such errors as appear on the face of the record can be considered.

APPEAL by plaintiffs from *Carr, J.,* at March Term, 1942, of WAKE. Affirmed.

On 12 June, 1941, plaintiffs filed with the Secretary of State of North Carolina a proposed certificate of incorporation of an Industrial Bank. The proposed certificate in all respects complied with the requirements of law. The prescribed organization tax and recording fees were paid. The Secretary of State referred the application to the Commissioner of Banks pursuant to the provisions of the statute. (Michie's, sections 217 [b] and 225 [m]). The Commissioner of Banks, after giving notice to the plaintiffs and other interested parties, held a public meeting in Greensboro at which he heard evidence and argument of counsel. Thereupon he found certain facts and concluded that in his opinion the public convenience and advantage will not be promoted by the establishment of the proposed bank. He then submitted his report to the State Banking Commission which directed the finding of additional facts and approved his conclusion. He thereafter certified his conclusion to the Secretary of State. Upon receipt of the certificate from the Commissioner of Banks the Secretary of State declined to issue the proposed charter. Plaintiffs then instituted this action in the Superior Court of Guilford County.

On motion of the defendants the cause was removed to Wake County and the defendants appeared and filed a demurrer to the complaint for

that "the complaint does not state facts which, if true, would constitute a cause of action against the defendants, or either of them, or entitle the plaintiffs to the relief, or any part of the relief, prayed for in the complaint."

When the cause came on to be heard in the court below the demurrer was sustained and judgment was entered dismissing the action. Plaintiffs excepted and appealed.

Hobgood & Ward for plaintiffs, appellants.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for defendants, appellees.

BARNHILL, J. A writ of *certiorari* is an extraordinary remedial writ and (except in certain instances immaterial here) lies for two purposes: (1) as a writ of false judgment to correct errors of law; and (2) as a substitute for an appeal. *Williams v. Williams,* 71 N. C., 427. Its object is only to bring up the record of an inferior court or of an officer or commission acting judicially and to prevent an improper deprivation of appeal. *Hartsfield v. Jones,* 49 N. C., 309. It issues from a superior to an inferior court, officer or commission acting judicially, and it lies only to review judicial or *quasi*-judicial action. *Hartsfield v. Jones, supra;* 5 R. C. L., 258, sec. 10; Mechem, Public Officers, 666, sec. 1001. It is obtained on application supported by affidavit addressed to the appellate court having jurisdiction. *Taylor v. Johnson,* 171 N. C., 84, 89 S. E., 1066; *Bayer v. R. R.,* 125 N. C., 17.

On the other hand, the issuance of a writ of *mandamus* is an exercise of original and not appellate jurisdiction. Mechem, Public Officers, 625, sec. 931, and is never used as a substitute for an appeal.

Even so, and although this action originated in the Superior Court by the issuance of summons and filing of complaint, the plaintiffs argue and insist here that they seek a writ of *certiorari* for a review of the action of the Commissioner of Banks about which they complain. We will consider the appeal on their theory of the purpose and intent of the action.

They first attack the constitutionality of the act. (Michie's, sec. 217 [a], *et seq.*)

In considering an application for this writ only such errors or defects as appear on the face of the record can be considered. *Hartsfield v. Jones, supra; March v. Thomas,* 63 N. C., 249; *Short v. Sparrow,* 96 N. C., 348; and the application must show merit. *Taylor v. Johnson, supra; March v. Thomas, supra; Marler-Dalton-Gilmer Co. v. Clothing Co.,* 150 N. C., 519, 64 S. E., 366; *Hunter v. R. R.,* 161 N. C., 503, 77 S. E.. 678; Mechem, Public Officers, 670, sec. 1010; *Womble v. Gin Co.,*

194 N. C., 577, 140 S. E., 230; *Bank v. Parks,* 191 N. C., 263, 131 S. E., 637; *Finch v. Comrs.,* 190 N. C., 154, 129 S. E., 195.

In their complaint the plaintiffs do not attack the constitutionality of the Banking Act. Nor do they allege that the Commissioner of Banks had no power to act in the premises. In fact, they predicate their case upon the very statute they now seek to challenge. So far as this record discloses, this contention is presented for the first time in this Court. In any event, it is not a defect or "error of law" alleged in the complaint. As plaintiffs are not permitted to "change horses in the middle of the stream" or to obtain this relief except upon errors alleged, this contention will not be considered here. 16 C. J. S., 220, sec. 96; *Simons v. Lebrun,* 219 N. C., 42, 12 S. E. (2d), 644; *Potts v. Ins. Co.,* 206 N. C., 257, 174 S. E., 123; *Gorham v. Ins. Co.,* 214 N. C., 526, 200 S. E., 5; *Walker v. Burt,* 182 N. C., 325, 109 S. E., 43; *Lipsitz v. Smith,* 178 N. C., 98, 100 S. E., 247; *Shipp v. Stage Lines,* 192 N. C., 475, 135 S. E., 339; *Warren v. Susman,* 168 N. C., 457, 84 S. E., 760; *Holland v. Dulin,* 206 N. C., 211, 173 S. E., 310; 16 C. J. S., 220, sec. 96.

Does the complaint set forth such errors of law or defects in the proceedings before the Commissioner of Banks as would entitle plaintiffs to a review? The answer is No.

The subject matter of this action relates to the regulation of the conditions upon which, and the manner in which, banking corporations may be organized and incorporated with authority to engage in business as such. This is essentially legislative and administrative and not judicial.

While a banking institution is a private enterprise every depositor is, in a sense, an investor. Its stability and trustworthiness vitally affects the economic and business life of the community it serves and its solvency is a matter of public concern affecting the general welfare of the State.

It is wholly a creature of statute doing business by legislative grace and the right to carry on a banking business through the agency of a corporation is a franchise which is dependent on a grant of corporate powers by the State. 9 C. J. S., 32, sec. 4; *Divide County v. Baird,* 55 N. D., 45, 212 N. W., 236, 51 A. L. R., 296.

"We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary, we are of the opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe." *Noble State Bank v. Haskell,* 219 U. S., 104, 55 L. Ed., 112; *Divide County v. Baird, supra; Schaake v. Dolley,* 85 Kan., 598, 118 Pac., 80, 9 C. J. S., 35, sec. 7.

Hence, the State may limit the issuance of charters to those proposed institutions which will promote the public convenience and advantage. *Dybdal v. State Securities Com.,* 145 Minn., 221, 176 N. W., 759.

Who is to survey the field, ascertain the conditions, find the facts and make the conclusion that a proposed institution will or will not promote the public convenience and advantage?

It cannot be questioned that the Legislature would have the authority to investigate and decide this question before authorizing incorporation of a bank. But surely the Legislature cannot meet in session and determine the existence or nonexistence of this condition precedent which it has prescribed every time an application for a charter is received by the Secretary of State.

It may, instead, create an administrative, investigatory, fact-finding agency to perform this function, administrative and not judicial in nature.

The creation of such agencies and the delegation of investigatory, fact-finding, authority has never been considered a delegation of legislative power. *S. v. Harris,* 216 N. C., 746, 6 S. E., 854; *Cox v. Kinston,* 217 N. C., 391, 8 S. E. (2d), 252. The Legislature has always, without serious question, given such powers to administrative bodies.

While the Legislature cannot delegate its power to make a law it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside the halls of legislation. *Field v. Clark,* 143 U. S., 649; 36 L. Ed., 294; *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593; *Meador v. Thomas,* 205 N. C., 142, 170 S. E., 110; *Cox v. Kinston, supra.*

"The mere fact that an officer is required by law to inquire into the existence of certain facts and to apply the law thereto in order to determine what his official conduct shall be and the fact that these acts may affect private rights do not constitute an exercise of judicial powers. Accordingly, a statute may give to nonjudicial officers the power to declare the existence of facts which call into operation its provisions and, similarly, may grant to commissioners and other subordinate officers power to ascertain and determine appropriate facts as a basis for procedure in the enforcement of particular laws." 11 Am. Jur., 950; *Cox v. Kinston, supra.*

"It is one thing to provide that a thing may be done if it is made to appear that under the law a certain condition exists; it is another thing to provide that a thing may be done if in the opinion of a named party a certain situation exists." *Southeastern Greyhound Lines v. Georgia Public Service Commission,* 181 S. E., 834, 102 A. L. R., 517. The one, under some conditions, may be justiciable; the other is not. "An act is none the less ministerial because the person performing it may have to

satisfy himself that the state of facts exist under which it is right and duty to perform the act." 34 C. J. S., 1181, sec. 6.

The act under consideration was complete in every respect when it left the hands of the Legislature and the duty imposed upon and the discretion vested in the Commissioner of Banks bears only upon the question whether certain conditions exist justifying the creation of the proposed bank under the terms and procedure laid down in the statute. *Cox v. Kinston, supra.* His action and the certificate issued thereon merely constitute the prescribed procedure to determine whether the franchise applied for was grantable under the law.

It follows then that the jurisdiction of the Commissioner of Banks over the banks and banking institutions of the State is regulatory and was delegated by the General Assembly in the lawful exercise of its powers.

The complaint fails to allege any fact tending to show he did not act in strict accord with the provisions of the statute. Nor does it contain the allegation of any fact which would tend to indicate that he acted capriciously, in bad faith, or in disregard of the provisions of the statute under which he proceeded. Merit is not shown and his action (on allegations made), being in strict accord with the statute, cannot be challenged in the manner here attempted. The administrative features of the law are not to be set at naught by recourse to the courts. *R. R. Com. v. Oil Co.,* 310 U. S., 573, 84 L. Ed., 1368. Hence, *certiorari* will not issue to review his action. *Felton v. Georgia Federation of Labor,* 178 Ga., 313; *Southeastern Greyhound Lines v. Georgia Public Service Commission, supra; Riddle v. Comrs. of Banking and Insurance,* 100 Atl., 692; *Falco v. Kaltenbach,* 128 Atl., 394.

It must not be understood that we hold that an applicant for a charter is in all events remediless. When an officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief.

In applying for a certificate of incorporation plaintiffs here seek a privilege, a franchise. They are not asserting a right. The only right they had was the right to demand a consideration of their application as provided by the pertinent statute. No property interest of theirs was or is involved. No issues of law or fact was joined. The Commissioner of Banks did not sit as a court or judicial tribunal. In forming his opinion after investigation he rendered no decree. Nor did he decide any personal or property right of plaintiffs. Instead, he acted primarily for the benefit of the public at large. *Degge v. Hitchcock,* 229 U. S., 162, 57 L. Ed., 1135; *Southeastern Greyhound Lines v. Georgia Public Service Commission, supra.* Herein lies one of the material distinctions between this and the cases cited and relied on by plaintiffs.

As the defendants debated here the sufficiency of the complaint to support an application for a writ of *mandamus,* it is not amiss for us to say that in this respect also it fails to state a cause of action. The writ issues to compel action—not to direct a reversal of action. *Moore v. Board of Education,* 212 N. C., 499, 193 S. E., 732; *Edgerton v. Kirby,* 156 N. C., 347, 72 S. E., 365; *Harris v. Board of Education,* 216 N. C., 147, 4 S. E. (2d), 328. As to the Secretary of State, he has no authority to act without a favorable certificate from the Commissioner of Banks and the Court will not compel an unlawful act.

The judgment below is

Affirmed.

STATE v. ROBERT L. WARD, JR.

(Filed 25 November, 1942.)

1. Embezzlement § 1: Criminal Law §§ 8, 9—

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty; and this rule is applicable to the crime of embezzlement.

2. Embezzlement § 2—

In a prosecution for aiding and abetting in the crime of embezzlement, the question of fraudulent intent is for the jury; intent to eventually return the money wrongfully used does not, necessarily, exculpate defendant.

3. Embezzlement § 3—

The word "property," as used in the embezzlement statute, C. S., 4269, is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action.

4. Embezzlement § 5—

Where defendant, in prosecution for embezzlement, moves for a bill of particulars and the State files an answer in which it sets up certain detailed information respecting the charges in the indictment, and the matter is not pressed further by defendant, the rule in *S. v. Van Pelt,* 136 N. C., 633, has no application.

5. Same—

Where it is alleged in an indictment that defendant embezzled a specified sum and the evidence shows that defendant embezzled a much smaller sum, there is no fatal variance.

6. Embezzlement § 8: Criminal Law § 53e—

Where, in a prosecution for embezzlement, under C. S., 4268, and C. S., 4269, counsel for defendant, in argument to the jury, commented on the severity of the minimum punishment in C. S., 4269, and the court in its charge read to the jury C. S., 4269, and the indictment thereunder and also a portion of the general probation statute, carefully cautioning them that they were to decide the issue upon the evidence without regard to

the punishment which might or might not be imposed. *Held:* The charge was proper and not prejudicial.

7. Evidence § 48c—

A witness, offered by the State, who had been in the auditing and accounting business for over 10 years and an auditor for the State for 8 years, was found by the court to be an expert accountant and allowed to testify as such: *Held* sufficient and ruling not reviewable.

APPEAL by defendant from *Phillips, J.,* at April Special Term, 1942, of WAKE. No error.

Criminal prosecution tried on three bills of indictment charging embezzlement and aiding and abetting in the crime of embezzlement. The three cases were, by consent, consolidated for the purpose of trial and each bill was considered as a separate count.

The defendant, from 1938 to 1941, was Auditor and Chief of the Division of Accounts and Records in the Department of Revenue of the State of North Carolina. One C. W. Sneed was a deputy collector of revenue. He was accountable to defendant and it was his duty to receive reports and cash collected from field men; to file daily reports of collections with the defendant and to pay over to defendant moneys received by him. One Harry Howard was cashier in the Division of Accounts and Records, subordinate to Ward. Over a period of several years there were numerous peculations by Sneed totaling approximately $6,000. These were accompanied by false entries and reports. The peculations at times were represented by cash tickets or receipts. That is, a cash ticket would be substituted for the amount withdrawn and counted as cash. Sometimes they were accomplished by checks received with no intention that they should be presented to the bank. Application of funds received from individual taxpayers was frequently so manipulated as to conceal or delay discovery of the misuse of the money belonging to the State.

The Department of Revenue maintains what is known as an imprest fund. This is a revolving fund to which is charged items in suspense, such as bad checks of taxpayers, advances to field men and the like. When the bad checks are finally paid or the advances are refunded the amounts thus received are credited back to this account. This system makes it unnecessary to enter such items in the general accounts.

BILL # 4340

This bill was drawn under the general embezzlement statute, C. S., 4268, and charges that C. W. Sneed did embezzle and misapply, from time to time, cash, money, checks, etc., of the State of North Carolina totaling $5,999.30. Evidence offered by the State (the defendant having offered none), tends to show that Sneed, over a period of years, was

guilty of numerous peculations; that Ward, his superior officer, had full knowledge thereof and consented thereto; that he aided and assisted Sneed in concealing the defalcations, and that he himself received part of the funds as loans and advances, usually on checks delivered to and to be held by Sneed. Of the amounts received by Ward from time to time in this manner he has repaid $1,800 or $2,000. At the time his services were discontinued there was still several hundred dollars unaccounted for. When the misconduct of Sneed was discovered he talked to defendant and asked him to repay the money he had advanced. The defendant replied that he had an equity in some property in New Hanover County and that he was going to sell it, get rid of it, and pay Sneed.

BILL # 4341

This bill is drawn under C. S., 4269, and charges that on or about 1 May, 1941, the defendant embezzled $158.53, received by him by virtue of his office as Auditor and Chief of the Division of Accounts and Records. The defendant received a check in payment of taxes from the Green Grill. This check was not paid when presented to the bank. He received another check in lieu thereof for the amount due plus penalties. This check was likewise returned. The defendant then delivered the check to Sneed, his subordinate, with direction that he collect the same in cash. Sneed thereupon collected $158.53. He then returned to Ward's office and at Ward's request, delivered to him, separate from the other fund, $75.00, which defendant took and used for his own benefit and for which he has not accounted.

BILL # 4342

This bill is also drawn under C. S., 4269, and charges that the defendant, an officer of the State, to wit, Auditor and Chief of the Division of Accounts and Records, embezzled $203.95.

One L. C. Taylor, Jr., a deputy commissioner, was short in his accounts to the amount of $1,006.65, according to a statement prepared and furnished by the defendant. This statement gave the names of the several taxpayers from whom Taylor had collected and failed to account. Taylor's wife, in his behalf, made settlement of the shortage by paying the amount in cash to officials of the Revenue Department. This money was delivered to the defendant by virtue of his office. He proceeded to credit proper amounts to several taxpayers shown on the list, to the amount of $802.70. He then drew checks against the imprest fund for the difference of $203.95 and credited the amount thus received to taxpayers listed on the statement he had furnished. The balance of $203.95 is unaccounted for. It was required, under the rules of the department, that checks drawn on the imprest fund should be signed by at least two parties. These checks drawn by Ward were signed by one Bland, a subordinate of the defendant, at his direction.

There was a verdict of guilty on each count. The court thereupon pronounced judgment on each count with the provision that the sentences thus imposed should run concurrently. The defendant excepted and appealed.

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

W. B. R. Guion and D. L. Ward for defendant, appellant.

BARNHILL, J. The record and case on appeal, exclusive of exhibits, consumes 135 pages and discloses 325 exceptions. Many of these exceptions, however, are not brought forward in the brief. Others are abandoned under the rules of practice in this Court. Rule 28. We will discuss only those which are sufficiently presented for our consideration.

The defendant moved to quash each bill of indictment. The motions filed, however, assign no grounds therefor. No defect is alleged, no deficiency is designated.

In his brief here, he attacks # 4340 for that there is no such crime as aiding and abetting embezzlement. This assignment cannot be sustained. *S. v. Pearson,* 119 N. C., 871; *S. v. Hoffman,* 199 N. C., 328, 154 S. E., 314; *S. v. Beal,* 199 N. C., 278, 154 S. E., 604; *S. v. Everhardt,* 203 N. C., 610, 166 S. E., 738; *S. v. Epps,* 213 N. C., 709, 197 S. E., 580; *S. v. Kelly,* 216 N. C., 627, 6 S. E. (2d), 533.

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty. *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643; *S. v. Beal, supra.*

When the defendant persuaded Sneed, his subordinate, to advance State funds to him for his own use as a "loan," or upon checks to be held and not presented to the bank for payment, he misapplied such funds. Certainly, at least, he aided and abetted Sneed in misapplying the same. The question of fraudulent intent was for the jury.

That he may have intended to eventually return the money thus wrongfully used does not, necessarily, exculpate him. *S. v. Summers,* 141 N. C., 841; *S. v. Shipman,* 202 N. C., 518, 163 S. E., 657; *S. v. Pace,* 210 N. C., 255, 186 S. E., 266.

He now attacks # 4341 and # 4342 for that C. S., 4269, under which these bills are drawn, does not make it unlawful to misapply or embezzle money, notes, checks or drafts, and that the language used in the statute, to wit: "any bonds issued by the State, or any security or other property and effects of the same," when strictly construed, does not include or embrace money; that this particular statute does not make it unlawful for a State officer to embezzle or misapply money belonging to the State. He insists that under the rule of strict construction an officer is indict-

able under this section of the Code only for the embezzlement of the classes of property expressly named and designated therein.

Although this argument was forcefully presented we are unable to concur. While the word "property," as used in the embezzlement statute, relates only to personalty it is sufficiently all-inclusive to embrace money.

"The word 'property' in the embezzlement statute, includes money, goods, chattels, evidences of debt and things in action. *S. v. Orwig,* 24 Iowa, 102, 105." 34 Words and Phrases, 396; *Fidelity & Deposit Co. v. Arenz,* 290 U. S., 66; *Superior Bath House Co. v. McCarroll,* 312 U. S., 176. For a collection of cases to like effect see 34 Words and Phrases, pp. 480-484; 50 C. J., 737.

The defendant filed a separate motion on each bill or count, requesting and demanding a bill of particulars. The State separately, in answer to each motion, filed an answer in which it set up certain detailed information respecting the charge contained in the related bill. No further action was taken. The defendant, apparently satisfied with the information thus furnished, did not press further for an allowance of his motion. No bill of particulars was filed. The rule laid down in *S. v. Van Pelt,* 136 N. C., 633, has no application here.

Without attempting to detail the evidence further than as herein stated, it is sufficient to say that the court committed no error in overruling the defendant's motions to dismiss as of nonsuit. The evidence, if believed and accepted by the jury, is amply sufficient to warrant the conclusion that the defendant is guilty as charged in each of the bills of indictment.

When a witness is found by the court to be an expert he may testify as such in respect to audits made by him of pertinent books and records. This is accepted law with us. *S. v. Lancaster,* 202 N. C., 204, 162 S. E., 367, and cases cited; *S. v. Howard, ante,* 291.

The court held that the witness Burgess is an expert accountant and permitted him to testify as such. Exceptions thereto cannot be sustained.

The witness has been in the accounting and auditing business since 1931. He has been an auditor for the State for 8 years and Chief of the Auditing Division of the State Department of Revenue since 1 June, 1942. This is sufficient to support the ruling of the court which is not reviewable on appeal. *S. v. Gray,* 180 N. C., 697, 104 S. E., 647.

That the State alleged, in bill # 4341, that the defendant embezzled $158.53 and offered evidence tending to show only an embezzlement of $75.00 is not a fatal variance. *S. v. Dula,* 206 N. C., 745, 175 S. E., 80; *S. v. Gulledge,* 173 N. C., 746, 91 S. E., 362; *S. v. Lea,* 203 N. C., 13, 164 S. E., 737.

The only exception to the charge which is of sufficient merit to require discussion is exception # 312. This exception relates to that portion of the charge in which the court outlined and defined to the jury statutory provisions in relation to punishment.

The defendant undertook to argue to the jury the seriousness of the indictments charging that the defendant, a State officer, embezzled State property, by reason of the severity of the minimum punishment prescribed by statute. In so doing he inadvertently overlooked the modifying provisions of the Probation Statute, sec. 1, ch. 132, Public Laws 1937.

Considering this argument realistically we know that it was highly prejudicial to the State. The court undertook to remove the erroneous impression thus created and to place the cause back on an even keel so that it might be decided by the jury with complete fairness to all parties. In so doing he gave no intimation of opinion and made no implied promise of leniency. Instead, he carefully and fully cautioned the jury that they were to decide the issue upon the evidence without regard to the punishment that might or might not be imposed in the event of a conviction.

The charge was provoked by an erroneous argument as to the law. The jury was adequately cautioned in respect thereto. We are not disposed to hold, under these circumstances, that it was an instruction of which defendant may now take advantage. *S. v. Howard, ante,* 291.

This instruction and the one discussed in the *Howard case, supra,* are identical. In that opinion *Devin, J.,* cites and analyzes pertinent decisions and concludes that the charge was not prejudicial. That decision is controlling here.

After a careful examination of all the exceptions entered by the defendant in the court below we are unable to find any error of sufficient merit to justify a new trial.

No error.

EDWIN P. WEBSTER v. CITY OF CHARLOTTE.

(Filed 25 November, 1942.)

1. Municipal Corporations § 46—

In the absence of some valid excuse, compliance must be shown with the provisions of a city charter requiring notice of claim as a condition precedent to the institution of an action against a municipal corporation for the recovery of damages.

2. Same—

The sufficiency of notice of claim against a municipality, before bringing an action for damages, may be determined by the city charter; but it need not be drawn with the technical nicety necessary in pleadings.

3. Municipal Corporations §§ 46, 47—

Municipal charter provisions, requiring notice of a claim for damages before institution of suit, differ from the wrongful death statute, C. S.,

160, in that it is not essential that the action be brought within the time prescribed for giving notice, and inability to comply strictly with the requirement has been recognized as an exception to the rule.

4. Negligence § 19a: Municipal Corporations § 14—

In an action for damages by a child against a city for personal injuries occasioned by a defective sidewalk, where plaintiff's evidence showed that there was a short strip of pavement ending in the middle of the block, leaving a drop of four or five inches opposite a break in the curb, which had existed for a year and a half, and plaintiff, while walking along this sidewalk, between sundown and dark, fell because of the said drop, severely injuring his knee. *Held:* Judgment of nonsuit erroneous.

APPEAL by plaintiff from *Pless, J.*, at May Term, 1942, of MECKLENBURG.

Civil action to recover damages for personal injuries sustained by plaintiff when he fell on one of the public streets in the city of Charlotte, due to the defective condition of the sidewalk.

It is alleged that the defendant negligently permitted South A Street to become in a dangerous and unsafe condition "when it knew that the sidewalk adjacent to the curbing, as heretofore related, was uneven, that is, the surface of the sidewalk; that there were holes in it, and that a child would be liable to stumble on said sidewalk," etc.

The evidence discloses that on 5 September, 1931, the plaintiff, a boy eight years of age, was walking along the sidewalk on A Street, between sundown and dark, when he fell because of a drop of four or five inches where the pavement stopped in the middle of the block, and severely injured his knee. He says, "My knee struck the curbing where that slab was missing. The edge of the curb was ragged."

Plaintiff's attorney gave notice of claim on 16 March, 1936, when the plaintiff was thirteen years of age.

Before the plaintiff had rested his case, the court inquired of counsel whether they had any further evidence bearing upon the question of negligence. Counsel replied in the negative; whereupon, the court advised counsel that he did not think the plaintiff could get along on the issue of negligence. In deference to this suggestion, no further evidence was offered, but the parties stipulated what the evidence would be in respect of the extent of plaintiff's injuries.

From judgment of nonsuit entered upon the evidence as offered, the plaintiff appeals, assigning errors.

Guy T. Carswell and John M. Robinson for plaintiff, appellant.
Tillett & Campbell for defendant, appellee.

STACY, C. J. The plaintiff was injured on a public sidewalk in the city of Charlotte—the east sidewalk on South A Street. In the middle of the block there is a short strip of pavement, which ends about midway

the block. Opposite the north end of this pavement, there was a slab missing from the curbing. This caused the dirt to wash away, leaving a drop of four or five inches from the end of the pavement to the dirt portion of the sidewalk. The condition had existed for a year and a half prior to plaintiff's injury. Plaintiff alleges that he was injured as a result of the defect in the sidewalk.

Under the decisions in *Bell v. Raleigh,* 212 N. C., 518, 193 S. E., 712, and *Radford v. Asheville,* 219 N. C., 185, 13 S. E. (2d), 256, it would seem that the evidence was sufficient to carry the case to the jury on the issue of negligence.

The defendant contends, however, that the judgment of nonsuit should be sustained (1) because of the failure of the plaintiff to give notice of his claim within six months of his injury, as required by the defendant's charter, and (2) for that the notice given was insufficient.

Neither of these questions was mooted in the court below, and the case was cut short by the court's intimation that he did not think the plaintiff could get along on the issue of negligence. The situation is somewhat analogous to that appearing in the case of *Morgan v. Benefit Society,* 167 N. C., 262, 83 S. E., 439, where it was thought a kindred error may have disadvantaged the appellant in making out his case. *Midgett v. Nelson,* 212 N. C., 41, 192 S. E., 854. But however this may be, there has been no ruling in the court below on either question. See *Ex parte Kumezo Kawato,* October Term, 1942, ... U. S., ..., decided 9 November, 1942.

Undoubtedly, we have decisions to the effect that in the absence of some valid excuse (*Terrell v. Washington,* 158 N. C., 281, 73 S. E., 888; *Hartsell v. Asheville,* 166 N. C., 633, 82 S. E., 946; Annotation, 109 A. L. R., 975), compliance must be shown with the provisions of a city charter requiring notice of claim as a condition precedent to the institution of an action against a municipal corporation for the recovery of damages. *Trust Co. v. Asheville,* 207 N. C., 162, 176 S. E., 257; *Foster v. Charlotte,* 206 N. C., 528, 174 S. E., 412; *Dayton v. Asheville,* 185 N. C., 12, 115 S. E., 827; *Pender v. Salisbury,* 160 N. C., 363, 76 S. E., 228; *Cresler v. Asheville,* 134 N. C., 311, 46 S. E., 738. The condition is one precedent to bringing action, but it is not essential that the action be brought within the time prescribed for giving notice of demand. *Terrell v. Washington, supra.* And in this jurisdiction, inability to comply strictly with the requirement has been recognized as an exception to the rule. *Hartsell v. Asheville, supra; Foster v. Charlotte, supra.* In these respects, the usual-charter provision differs from the wrongful-death statute, C. S., 160. Compare *Dockery v. Hamlet,* 162 N. C., 118, 78 S. E., 13.

The sufficiency of the notice given may be determined by the requirement of the city charter. This provides that the notice shall be in

writing, stating when and where the injury occurred, and the amount of damages claimed therefor. It need not be drawn "with the technical nicety necessary in pleadings." *Graham v. Charlotte,* 186 N. C., 649, 120 S. E., 466.

The plaintiff is entitled to another day in court.

Reversed.

STATE v. J. WALTER BROOM.

(Filed 25 November, 1942.)

1. Jury §§ 5, 13: Constitutional Law § 27—

In a prosecution for murder the action of the judge in discharging one of the jurors, upon finding he was incapacitated, and substituting the thirteenth juror in his stead, was timely and proper and in accordance with the statute. Public Laws 1931, ch. 103, as amended by Public Laws 1939, ch. 35.

2. Criminal Law §§ 29b, 41b, 41d—

In a criminal case there is no error in permitting the prosecutor to ask the defendant, when on the stand as a witness, questions about collateral matters, including charges of other criminal offenses and degrading actions, for the purpose of impeaching his credibility, if the questions are based on information and asked in good faith; but upon denial by defendant, the State is bound by his answers and affirmative evidence, in contradiction of his denial, is incompetent.

3. Criminal Law §§ 41b, 41d—

During the cross-examination of the defendant, in a murder trial, the prosecution, for the purpose of impeaching his credibility, asked him if he had not been engaged in committing abortions on women, showing certain articles and instruments and also asking defendant if they were not instruments used for producing abortions, all of which defendant denied, though admitting the ownership of some of the articles—the court then allowing the instruments to be offered in evidence. *Held:* Prejudicial error, and subsequent withdrawal of these exhibits comes too late.

APPEAL by defendant from *Burgwyn, Special Judge,* at August Term, 1942, of MECKLENBURG. New trial.

The defendant was charged with murder in two cases. In the one he was indicted for the murder of Mrs. Ruby Middlebrook, and in the other for the murder of Mrs. Eula Harkey. The two homicides occurred at the same time and place, and death resulted from gunshot wounds admittedly inflicted by the defendant. The defendant pleaded self-defense. By consent, the two cases were consolidated for trial.

The jury returned verdict of guilty of murder in the first degree in the case of Mrs. Middlebrook, and guilty of murder in the second degree in

the case of Mrs. Harkey. From judgments imposing sentence of death in the one case, and thirty years in prison in the other, the defendant appealed.

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

Jake F. Newell and J. M. Scarborough for defendant.

DEVIN, J. The slaying by the defendant of the two women named in the bills of indictment, on the occasion alleged, was not controverted. The defendant on the stand admitted the shooting and killing of both, but pleaded self-defense in each case. His counsel also offered evidence tending to show that the defendant was not mentally responsible at the time.

On his appeal to this Court the defendant assigns error in the denial by the trial judge of his motion for judgment of nonsuit as to the charge of first degree murder, but an examination of the record indicates the correctness of this ruling. Likewise, the action of the judge in discharging one of the jurors, upon finding he was incapacitated, and substituting the thirteenth juror in his stead on the panel, was timely and proper, and in accord with the statute. Ch. 103, Public Laws 1931, amended by ch. 35, Public Laws 1939. *S. v. Dalton,* 206 N. C., 507, 174 S. E., 422.

However, we think there was error in the ruling of the court as to the admission in evidence of certain exhibits in the case over the objection of the defendant.

During the cross-examination of the defendant, when he was on the stand as a witness in his own behalf, the solicitor, for the purpose of impeaching his credibility, asked him if he had not been engaged in committing abortions on women, and obtaining money from such unlawful practices. This the defendant denied. Then the solicitor, showing certain articles and instruments, asked him if these were not instruments used for producing abortions. This the defendant also denied. The defendant admitted ownership or possession of some of the articles about which he was questioned, but denied that others were his. The instruments were then offered in evidence as State's exhibits, and were admitted as such over the objection of the defendant. The defendant in apt time excepted.

There was no error in permitting the solicitor to ask the defendant, when on the stand as a witness, questions about collateral matters, including charges of other criminal offenses and degrading actions, for the purpose of impeaching his credibility. This was permissible if the questions were based on information and asked in good faith, however damaging the suggestion created by the questions might be. But when

the defendant denied the impeaching questions as to such collateral matters, and denied the commission of the acts about which he was cross-examined, as well as the unlawful purpose of the articles, the State was bound by his answers, and affirmative evidence in contradiction of his denial was incompetent. This evidence was improvidently and doubtless inadvertently admitted. It was in no way connected with the crime with which defendant was charged. *S. v. Wilson,* 217 N. C., 123, 7 S. E. (2d), 11.

The trial judge subsequently, realizing the evidence afforded by these exhibits was not pertinent, withdrew this evidence from the consideration of the jury, but we think this came too late. Some time had elapsed, and in the meantime twelve other witnesses had been examined. The impression made upon the minds of the jurors by these exhibits thus presented could not then be removed. *Gattis v. Kilgo,* 131 N. C., 199, 42 S. E., 584; *Parrott v. R. R.,* 140 N. C., 546, 53 S. E., 432; *In re Will of Yelverton,* 198 N. C., 746, 153 S. E., 319.

The Attorney-General argued that, if there was error in the ruling of the court below in this matter, it was in any event harmless. But considering the nature of the case, the character of the defense, and the serious consequences to the defendant, we are unable to concur in that view. These articles, relating to collateral charges, were offered and admitted as tangible evidence to contradict the denial of the defendant and tended unduly to degrade and discredit him. *S. v. Jordan,* 207 N. C., 460, 177 S. E., 333.

We conclude that the evidence afforded by the exhibits was incompetent and that the error in admitting them was material and prejudicial, necessitating a

New trial.

MIKE PLUMIDIES v. E. J. SMITH.

(Filed 25 November, 1942.)

1. Animals § 3—

To recover damages for injuries inflicted by a domestic animal two essential facts must be shown: (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character and habits.

2. Appeal and Error § 40e: Negligence § 19a: Trial § 22—

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence.

3. Animals § 3: Negligence § 19a—

Where, in an action against the owner for injuries inflicted by his dog, plaintiff's evidence showed that for a year or more the dog, when plaintiff came to deliver papers, would run towards and bark at plaintiff so viciously that the owner would have to call the dog off, that the dog bit plaintiff's brother and was given away by defendant on account of its vicious character. *Held:* Judgment of nonsuit was error.

APPEAL by plaintiff from *Olive, Special Judge,* at Special March Term, 1942, of MECKLENBURG.

Civil action to recover damages for injuries inflicted by defendant's dog.

The complaint alleges that on the afternoon of 13 June, 1940, the plaintiff, a boy twelve years of age, was delivering papers in the city of Charlotte, near the defendant's home; that the defendant kept, harbored and allowed to run at large a Saint Bernard dog, which attacked and bit the plaintiff and seriously injured him; that the dog was mischievous, possessing a vicious propensity, and that this was known to the defendant.

Plaintiff testified: "At the time the dog bit me I was carrying Mrs. Robinson's paper, who lives two houses away. About every day the dog would bother me. I would see him four or five times a week. He would always bark at me and make at me like he was going to bite me. I saw him bite my brother. I don't know whether he bit him, but he snapped at his pants' leg and made a blue place. That was about a year before. The dog was running loose in that section."

W. J. Wentz testified: "I was acquainted with the dog owned by Mr. E. J. Smith. It was a St. Bernard, 36 inches around the neck, and weighed 170 pounds. . . . They knew that I loved dogs and gave him to me to find a good home for him. He had so many complaints against him. . . . I know the reputation the animal had in the community for viciousness and being fierce, and it was bad."

John Plumidies, plaintiff's brother, testified: "At the time the dog attacked me, both Mr. and Mrs. Smith were on the front porch in front of his home. . . . We would come down there and if the dog was out and Mrs. Smith wasn't around, we would first wait, and the way he was barking when he would first see us we would be two or three houses away and he would start barking, she would come out and usually stop him. . . . If Mr. Smith was at home he would come out and stop him. That lasted for a period of about a year, or maybe more. I was there when they gave the dog away."

There was contradictory evidence on behalf of the defendant in respect of the character and habits of the dog, and a denial of any knowledge of its vicious propensity.

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

Henry L. Strickland for plaintiff, appellant.
McDougle & Ervin for defendant, appellee.

STACY, C. J. The principles here applicable are well settled.

First. To recover for injuries inflicted by a domestic animal, in an action like the present, two essential facts must be shown: (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character and habits. *Hill v. Moseley,* 220 N. C., 485, 17 S. E. (2d), 676; *Banks v. Maxwell,* 205 N. C., 233, 171 S. E., 70; *Rector v. Coal Co.,* 192 N. C., 804, 136 S. E., 113; *S. v. Smith,* 156 N. C., 628, 72 S. E., 321; *Hallyburton v. Fair Assn.,* 119 N. C., 526, 26 S. E., 114; *Harris v. Fisher,* 115 N. C., 318, 20 S. E., 461; *Cockerham v. Nixon,* 33 N. C., 269. See, also, *Lloyd v. Bowen,* 170 N. C., 216, 86 S. E., 797.

Second. On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved, which may reasonably be deduced from the evidence. *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 358; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356.

Applying these principles to the facts in hand, it would seem that the issues were properly for the jury. The plaintiff and his brother had contrived to shun the defendant's dog for a year or more, while delivering their papers. This was known to the defendant. So many complaints were made against the dog that the defendant finally gave him away. He had attacked the plaintiff's brother a year before, which was also known to the defendant. Taken in its entirety, the evidence appears sufficient to warrant an inference of the essential elements of liability. The case is one for the twelve.

Reversed.

J. F. McKENZIE, FATHER, MRS. J. F. McKENZIE, MOTHER, AND STELLA McKENZIE, MINOR SISTER OF S. C. McKENZIE, DECEASED EMPLOYEE, v. CITY OF GASTONIA, EMPLOYER, AND GREAT AMERICAN INDEMNITY COMPANY, CARRIER.

(Filed 25 November, 1942.)

Master and Servant §§ 40e, 40f—

In a proceeding under the N. C. Workmen's Compensation Act, where the evidence shows that a policeman was killed in an accident, while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment, is sustained.

McKENZIE *v.* GASTONIA.

APPEAL by claimants from *Ervin, Special Judge,* at March Term, 1942, of GASTON.

This is a claim for compensation under the North Carolina Workmen's Compensation Act, ch. 120, Public Laws 1929, and amendments thereto, N. C. Code of 1939 (Michie), sections 8081 (h), *et seq.*

The hearing Commissioner made an award denying compensation, and upon appeal the Full Commission adopted the findings of fact and conclusions of law of the hearing Commissioner and affirmed his award.

Upon appeal to it the Superior Court entered judgment affirming the action of the Full Commission, to which judgment the claimants reserved exception and appealed to the Supreme Court.

Basil L. Whitener for claimants, appellants.

Sanders & Mullen and Paul E. Monroe for defendants, appellees.

PER CURIAM. The Commission concluded that the accident relied upon as a basis for compensation did not arise out of and in the course of the employment of the deceased employee, and since such conclusion is warranted by the facts found by the Commission, which facts are sustained by the evidence, it must stand. *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342.

The evidence is to the effect that the deceased employee, S. C. McKenzie, had obtained a leave of absence of a day or two from his duties as a policeman of the city of Gastonia, and was returning in his own automobile to the place from which he was required to start his work, the City Hall, when a collision with a police car of the city of Gastonia, recklessly driven, occurred, in which collision the deceased employee received injuries from which he died.

Since the evidence supports the finding that the deceased employee was returning to his duties from a leave of absence therefrom, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment is sustained, and the Superior Court and this Court are bound by such conclusion of the Full Commission. *Davis v. Mecklenburg County,* 214 N. C., 469, 199 S. E., 604.

Affirmed.

STAR MANUFACTURING COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 2 December, 1942.)

1. Evidence § 6: Negligence § 17a—

The burden of the issue is never shifted from the plaintiff, in an action for damages by negligence, and the most a *prima facie* case does, when made out, is to warrant, but not compel, a verdict for the plaintiff and therefore to carry the case to the jury. A *prima facie* case does not impose upon the defendant the burden of rebuttal by a preponderance of the evidence.

2. Evidence §§ 16, 19, 22—

The interest of a party or of a witness, in the event of the cause, is a circumstance available to impeach him; and a witness may be asked any questions on cross-examination which tend to test his accuracy, to show his interest or bias, or to impeach his credibility. *Holding*, in an action for damages allegedly caused by the negligent burning of a corporation's property, that the president of the corporation may be asked, on cross-examination, about his financial experiences and insolvency before and at the formation of the corporation, and his son's and wife's interests therein, and the present status of the corporate finances.

3. Evidence §§ 24, 25—

It is not necessary that evidence should bear directly on the issue. It is admissible if it tends to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict. *Holding* competent, on the issue of the origin of a fire at a lumber plant adjoining a railroad, evidence (1) that the night watchman of a near-by plant had seen on several occasions people loitering around plaintiff's plant at night, using flashlights and striking matches; (2) that metal cans, of the size "paraffin is mostly put in," which "had been exploded," were found on the premises after the fire; (3) that plaintiff had at its plant an oil stove used to heat a glue pot.

4. Evidence § 33—

Evidence of tax value listings on real estate, owned by parties to an action, is not competent on an issue of valuation, while evidence of such listings on personal property is competent on such an issue.

5. Evidence § 36—

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of such motion being in the discretion of the court. C. S., 1823, 1824, and the record failing to show that the requirements of these statutes were met by plaintiff, or that the written statements were in court.

6. Appeal and Error § 39d—

Plaintiff's exceptions and assignments of error to the admission of evidence are rendered impotent, where plaintiff's motions to strike the answers to the questions involved were allowed.

7. Appeal and Error § 39e: Trial § 33—

Any substantial errors, made by the court in the statement of the evidence or in the statement of the contentions of the parties, must be called to the attention of the court at the time they are made, in order to give opportunity to make correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal.

8. Railroads § 12: Negligence § 20—

Where there is no evidence that the fire originated on defendant's right of way, in an action against a railroad for negligently burning plaintiff's property, the court properly instructed the jury that their only inquiry as to negligence should be as to whether the engine of defendant was properly equipped, manned and managed.

9. Same—

In a case against a railroad for negligent burning, a charge to the jury is correct which states that a railroad is not required to be an insurer that no live sparks or cinders will come from the engine operated on its tracks, and should the jury find that the defendant used due care to prevent the escape of sparks and cinders and notwithstanding such care so found, if it should be found that the fire was caused by sparks and cinders from defendant's engine, the jury should answer the issue of negligence in the negative.

APPEAL by plaintiff from *Harris, J.*, at April Term, 1942, of JOHNSTON. No error.

This is an action to recover damage arising out of the destruction of plaintiff's mill, machinery, equipment and stock on hand by fire alleged to have been caused by sparks emitted from a locomotive of the defendant. The case was submitted to the jury upon two issues, which read: "1. Was the property of the plaintiff burned and damaged by negligence of the defendant as alleged in the complaint?" and "2. If so, what damage is plaintiff entitled to recover?"

All of the evidence tended to show that in Benson on 9 May, 1941, about 8 o'clock p.m., the freight train No. 2006 of the defendant passed the lumber mill of the plaintiff, on a lot near the right of way of the defendant, and that soon thereafter a fire was discovered about the mill, which spread rapidly and destroyed the building and its contents.

The jury answered the first issue in the negative, and left the second issue unanswered. From judgment for the defendant predicated on the verdict, the plaintiff appealed, assigning errors.

L. L. Levinson and Ehringhaus & Ehringhaus for plaintiff, appellant.

Thomas W. Davis, Abell, Shepard & Wood, and Rose & Lyon for defendant, appellee.

SCHENCK, J. Appellant's assignments of error Nos. 1 and 2 relate to the evidence elicited from the president of the plaintiff company, on cross-examination, over plaintiff's objection, as to his own financial experiences (covering exceptions 1 to 12, inclusive), including testimony to the effect that the witness, R. F. Smith, was financially insolvent before the formation of the plaintiff corporation, that the corporation was formed in 1917 by funds of his wife, $2,500.00, and that there were issued 25 shares of stock in the corporation, 23 of which are owned by his wife, and one share each by him and his son, Roy Smith, and that the corporation now owned property, real and personal, of many thousand dollars value. These exceptions are untenable, as all of the testimony assailed by them tended to show the interest and bias of the witness in the litigation, and was therefore competent to impeach his testimony. "There is no doubt that the interest of a party or of a witness, in the event of the cause, is a circumstance available to impeach him." Wigmore on Evidence, Vol. II, sec. 966. "Evidence tending to show bias on the part of a witness is competent as it enables the jury to properly weigh and consider his testimony." *Bailey v. Winston,* 157 N. C., 253, 72 S. E., 966. "Ordinarily, a witness may be asked any questions on cross-examination which tend to test his accuracy, to show his interest or bias, or to impeach his credibility." *S. v. Beal,* 199 N. C., 278, 154 S. E., 604.

The next assignment of error discussed in appellant's brief is designated as assignment of error No. 3 (covering exceptions 13 and 17 to 20, inclusive), and relates to the admission, over objections of plaintiff, of evidence as to statements made relative to valuations in the tax listings of the property destroyed by fire. The rule with us, ordinarily, is that evidence of tax value listings on real estate is not competent on an issue of valuation, while evidence of such listings on personal property is competent on such an issue. The evidence assailed refers to tax listings on personal property. And, further, a large part thereof relates to what the officers of the plaintiff company represented concerning the values placed on the personal property by them at the time the listments were made, such values being far less than the values sued for and testified to in the trial, the former being $3,575.00 and the latter being something over $107,000.00. Such evidence was competent to contradict, and thereby impeach, the testimony of said officers.

In speaking to the subject of alleged damage by fire, in *Peterson v. Power Co.,* 183 N. C., 243, 111 S. E., 8, *Walker, J.,* says: "It would be competent to show any estimate of its value made by the plaintiff (the owner of the damaged property) . . ."

The difference in the rule with regard to the competency of the tax list as to the value of real estate and the value of personal property

doubtless has its origin in the fact that the owner is required by the Machinery Acts to list his real estate by acreage, dimensions or other physical description, together with location, while he is required to list the "amount and value" of his personal property. In real estate listments the value is fixed by the tax authorities; in personal property listments the value is fixed, or, at least, "given in" by the owner, hence the values in the former would not be statements made by the owner in contradiction of subsequent statements made by him at variance therewith, they being *res inter alios acta,* whereas in the latter the reverse would be true.

Assignment of Error No. 3 is untenable.

Assignment of Error No. 4 (covering exceptions 14, 15 and 16) relates to the court's refusal to grant the plaintiff's motion for an order that the defendant produce certain written statements signed by the engineer, fireman and brakeman soon after the fire occurred, which these employees of the defendant testified they used to refresh their recollection before becoming witnesses. This assignment is untenable for the reason that C. S., 1823 and 1824, furnishing the method by which writings in the possession of an opposing party may be produced for inspection and copy, contain certain requirements of the party making application for an order for such production, and the record fails to disclose that any of such requirements were met by the plaintiff. Furthermore, when the requirements of the applicant are met, the statute does nothing more than vest the granting of such application in the discretion of the judge. *Bank v. Newton,* 165 N. C., 363, 81 S. E., 317; *Dunlap v. Guaranty Co.,* 202 N. C., 651, 163 S. E., 750. And, still further, it does not appear that the witnesses used, or attempted to use, on the stand the writings sought to be produced, nor that such writings were in court at the time they were testifying, which, it seems by the weight of authority, was requisite for their compulsory production. See case note citing authorities, including those of this jurisdiction, in 125 A. L. R., p. 200.

Assignments of Error Nos. 5 and 6 (covering exceptions 21 to 28, inclusive, and 28 A and 28 B), relate to exceptions to various evidence as to certain persons being upon the premises of the plaintiff at other times than the actual time of the fire, and as to certain articles and appliances used and found upon the premises before and after the fire.

A number of the exceptions covered by these assignments are rendered impotent by reason of the fact that plaintiff's motions to strike the answers to the questions to which they were addressed were allowed, among these being exceptions 21, 22 and 23, relative to people on the premises destroyed by fire.

Exceptions 24, 25, 26 and 27 all relate to the testimony of the witness Norris, who was a night watchman at the Benson Oil Mill located just

across the tracks of the defendant railroad from the plant of the plaintiff, to the effect that he had seen on several occasions people loitering around the plaintiff's plant at night using flashlights and striking matches under the plant. This testimony was competent to show that the fire which destroyed plaintiff's plant could have started from causes other than those alleged in the complaint. This evidence has especial significance, since the same witness testified, without objection, that he saw a car drive up to the plant of the plaintiff the night of the fire, and that men from the car were there about an half of hour before the fire was discovered.

Exception 28 relates to the testimony of the witness Hardee to the effect that after the fire he saw in the possession of the foreman of the plaintiff's plant certain metal cans found on premises after the fire which "had been exploded; they were blown open" and were "size 1½. Paraffin is mostly put in 1½ size cans." This evidence cannot be held to be foreign to the issue under investigation since it related to facts and circumstances which might have thrown light upon the fact sought to be ascertained, namely, the origin of the fire—it at least tended to establish a link in the chain of proof. "Greenleaf says (1 Green. Ev., sec. 51a), 'It is not necessary that the evidence should bear directly on the issue. It is admissible if it tends to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict in accordance with it.'" *Bank v. Stack,* 179 N. C., 514, 103 S. E., 6.

Exception 28 A has no merit since the defendant's motion to strike the answer to the question to which it was addressed was allowed.

Exception 28 B relates to certain testimony to the effect that the plaintiff had at its plant an oil stove used to heat a glue pot. If the admission of this testimony in the first instance was error, such error would seem to have been cured by the subsequent admission of testimony to the same effect from the same witness, without objection. However, we are not of the opinion that the admission of such testimony in the first instance was error. The testimony at least tended to establish a link in the chain of proof, or to prove a fact tending to show that the fire might have been caused by other means than those alleged in the complaint. *Bank v. Stack, supra.*

These assignments cannot be held for error.

Assignment of Error No. 7 relates to certain statements of the evidence (exceptions 29 to 32, inclusive), and to certain statements of the contentions (exceptions 33 to 44, inclusive) made by the court in its charge to the jury.

It is a well established rule in this jurisdiction that any substantial error made by the court in the statement of the evidence must be called to the attention of the court at the time such statement is made, in order

to give opportunity to make correction, and the failure to so call the court's attention is a waiver of any right to object and except thereto upon appeal. *Acceptance Corp. v. Edwards,* 213 N. C., 736, 197 S. E., 613, and cases there cited. There was no error in the statement of the evidence called to attention of the court at the time the charge was delivered.

It is also a well established rule with us that any error made by the court in the statement of the contentions of the parties must be called to the attention of the court at the time they are made in order to avail the appellant as an exceptive assignment of error. *S. v. Sinodis,* 189 N. C., 565, 127 S. E., 601, and cases there cited. No exception was noted to any statement of the contentions at the time the charge was delivered.

However, appellant contends that some of the contentions presented by the court were entirely without supporting evidence and therefore should be held for prejudicial error, and relies upon *S. v. Wyont,* 218 N. C., 505, 11 S. E. (2d), 473, and *Cummings v. Coach Co.,* 220 N. C., 521, 17 S. E. (2d), 662. We do not concur in this contention. The exceptions are to the contentions to the effect that (1) no one saw sparks drop on the premises of the plaintiff, (2) that there are many ways in which the fire could have started, (3) that someone might have thrown down a lighted cigarette which started the fire, (4) that the fire might have originated in the boiler room, (5) that the fire might have had its origin from the glue pot heater, and (6) that exploding paraffin cans might have caused the fire. While the evidence in support of some of these contentions is not as strong in some instances as in others, we cannot hold that any of the contentions were entirely without evidential support, as was the case in the cases relied upon by the appellant. In truth, since the burden of proof rested upon the plaintiff to establish the affirmative of the issue—that is, that the fire was caused by sparks negligently emitted from the defendant's engine, and since the defendant contended that the evidence was not sufficient to carry this burden, it would be legitimate for the defendant to contend that it was as logical to conclude that the fire originated from any of the suggested causes, as that the fire originated from the sparks emitted from the defendant's engine, and that therefore the plaintiff having failed to establish the affirmative of the issue by a preponderance of the evidence, the issue should have been answered in the negative.

Assignment of Error No. 8 (covering exceptions 45 to 55, inclusive), relates to the charge of the court upon the law involved in the case.

The first two of these exceptions discussed in the appellant's brief are exceptions 45 and 50 and relate to the statements in the charge to the effect that there was no evidence in the case that the fire originated on the right of way of the defendant railroad. We have read the evidence

closely, with these exceptions in mind, and we find no error in these statements. The evidence of the plaintiff tended to show that the fire originated either under the building or in the building, and the nearest approach to any evidence that the fire was ever on the right of way of the defendant was the testimony of the plaintiff's witnesses Walter Johnson and Ed. Winn. Johnson testified that: "It (the fire) started right there at the right of way," but he immediately preceded this testimony with the statement that: "There wasn't anything burning between the west wall of the plant and the railroad tracks, no more than what was in the building." The west wall of the building being near the edge of the right of way, it clearly appears that the witness did not mean to convey the idea that the building was ignited by a fire burning over the right of way. Ed. Winn testified: "I looked down there and saw a flame of fire burning down there and in just a few minutes the fire alarm blew in town. From where I was the flame of the fire looked pretty close to the railroad tracks." It is not controverted that the west wall of the plaintiff's plant was close to the railroad track and that the fire soon after it was started burned this wall, but the fact that the fire "looked pretty close to the railroad track" is no evidence that the fire had its origin from fire on the right of way. Furthermore, there is no allegation in the complaint that the fire originated on the right of way, or that the right of way was in a foul or negligent condition.

It would seem therefore that the court properly instructed the jury that there was no evidence of the fire having originated on the right of way, and that their only inquiry as to negligence should be as to whether the engine of the defendant was properly equipped, manned and managed. *Williams v. R. R.*, 130 N. C., 116, 40 S. E., 979.

The next group of exceptions discussed in appellant's brief (exceptions Nos. 46 to 49, inclusive, and 50 to 56, inclusive), is also directed to the charge of the court. It is contended by the appellant that it was deprived of the benefit of the rule that when the plaintiff has established by the greater weight of the evidence that the fire which destroyed the plaintiff's property was caused by a spark emitted from the engine of the defendant, that there arose a presumption that the fire was caused by the negligence of the defendant, which would warrant an answer of the issue in favor of the plaintiff, unless the defendant offered evidence in rebuttal showing that the engine was in proper condition, equipped with proper spark arrester, and operated in a skillful manner by a competent engineer.

The excerpt from the charge to which exception 48 is addressed is typical of the excerpts assailed by these exceptions, and reads as follows: "If the plaintiff has failed to satisfy you that this property was destroyed by sparks from the engine of this defendant, then you would

answer the first issue No; that is, you would answer that there was no negligence on the part of the defendant railroad company, and plaintiff could not recover. But, if the plaintiff has satisfied you, by the greater weight of the evidence, that the fire which burned the property of this plaintiff was caused by sparks which came from the defendant's engine, that fact alone would not entitle the plaintiff to have you answer the issue in his favor. The plaintiff must further satisfy you, by the greater weight of the evidence, that the escape of sparks from the engine was due to the negligence of the defendant. But there is this rule of law which the court lays down: if the jury finds from the evidence, and by its greater weight, that fire came out of the defendant's engine and set fire to, and burned up the plaintiff's property, that will make what we call in law a *prima facie* case; not that that fact alone would decide the matter, but if found by the jury, it would be sufficient to carry the case to the jury to determine upon all the evidence whether they are satisfied by its greater weight that the escape of sparks from the engine was due to the negligence of the defendant, as alleged in the complaint."

This statement of the law, as well as the similar statements assailed by other exceptions, is in accord with the law as enunciated in the opinions of this Court. *Mfg. Co. v. R. R.,* 191 N. C., 109, 131 S. E., 268, and cases there cited.

It is true that in some instances the court stated the *prima facie* case shifted the burden to the defendant to rebut the presumption of negligence by "the greater weight of the evidence," or "to satisfy" the jury to the contrary. If these statements were error (and they may be conceded so to be, although precedent seems to exist for them in some of the opinions of this Court), they were error against the defendant, the appellee, since the burden of the issue is never shifted from the plaintiff, and the most the *prima facie* case does, when made out, is to warrant, but not compel, a verdict for the plaintiff and therefore to carry the case to the jury. The defendant may or may not introduce evidence in rebuttal as he elects. If he does not introduce such evidence he takes the chance of an adverse verdict predicated upon the *prima facie* case.

As was said by *Adams, J.,* in *Cotton Oil Co. v. R. R.,* 183 N. C., 95, 110 S. E., 660: "When the plaintiffs proved that the property had been destroyed by fire escaping from the defendant's locomotive, they made a *prima facie* case of negligence for the consideration of the jury; or as *Mr. Justice Pitney* says, such proof furnished circumstantial evidence of negligence; but it did not impose upon the defendant the burden of rebutting the *prima facie* case by the preponderance of the evidence. *Sweeney v. Erving,* 228 U. S., 233. The principle upon which this proposition rests has been stated as follows: 'The burden of the issue, that is, the burden of proof in the sense of proving or establishing the

issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if upon the whole evidence he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced.' 1 Elliott on Evidence, 139. Standing alone, the *prima facie* case warranted but did not compel the inference of negligence; it furnished evidence to be weighed, but not necessarily to be accepted; it made a case to be decided by the jury, but did not forestall the verdict. *Sweeney v. Erving, supra.*"

The correct rule with us as to a *prima facie* case is properly set forth in the third syllabus of *White v. Hines,* 182 N. C., 275, 109 S. E., 31, as follows: "When a *prima facie* case of negligence is made out the jury will be justified in finding for the plaintiff thereon, the burden of the issue remaining on the plaintiff, it being for the jury to determine whether upon the entire evidence the plaintiff has established the defendant's negligence by the greater weight of the evidence, leaving it for the defendant to determine whether it will introduce further evidence or take the chance of an adverse verdict on the issue."

The appellant, in its exhaustive brief, says: "The crowning wrong done the plaintiff in this charge" appears in the following excerpt (exception 54): "the law does not require a railroad company to be the insurer that no live sparks or cinders will come from the engine operated on its tracks, for it is well known that locomotives or engines using coal as fuel cannot be so constructed to prevent all sparks and cinders from escaping and still be efficient as a motive power to operate trains." This was followed by instructions to the effect that if it should be found that the defendant used due care to prevent the escape of sparks and cinders, notwithstanding the fact that if it should be found that the fire was caused by sparks or cinders emitted from the defendant's engine, the jury should answer the issue in the negative, that is, in favor of the defendant.

Whatever else may be said, *pro* or *con,* as to this charge, it is in accord with the decisions of this Court. An early expression to the effect that a spark arrester cannot be constructed so as to prevent the

escape of all sparks without impairing the efficiency of the engine appears in *McMillan v. R. R.,* 126 N. C., 725, as follows: ". . . we know that no spark-arrester can be so constructed as to entirely prevent the emission of sparks, without destroying the efficiency of the engine." This statement is quoted with approval in *Williams v. R. R.,* 140 N. C., 623, 53 S. E., 448. Also in *Williams v. R. R.,* 130 N. C., 116, 40 S. E., 979, it is said: "The simple fact that the engine emitted black smoke and some sparks . . . is not such evidence of negligence, if any evidence at all, as should have been submitted to the jury to prove negligence, as it is shown that all engines emit some smoke and sparks. In fact, it is shown they cannot 'live' and work without doing so." Again in *Moore v. R. R.,* 173 N. C., 311, 92 S. E., 1, it is said: "It would be dangerous and might lead to great injustice" to hold or make "the railroad company an insurer of all the property along the right of way, unless it can show that the fire was not caused by its engine." And in *Aman v. Lumber Co.,* 160 N. C., 370, 75 S. E., 931, it is said: "The best constructed engines may sometimes emit live sparks." And in the later case of *Mfg. Co. v. R. R.,* 191 N. C., 109, 131 S. E., 268, we find: ". . . the law does not require railroad companies to prevent the escape of fire from engines entirely, but only to use reasonable care to prevent such escape. . . ."

In the oft cited case of *Williams v. R. R., supra, Clark, C. J.,* states "the rules of negligence applicable to cases of this kind," and states as the first rule: "If fire escapes from an engine in proper condition, having a proper spark-arrester, and operated in a careful way by a skilful and competent engineer, and the fire catches off the right of way, the defendant is not liable, for there is no negligence."

Since the excerpt in the charge assailed by exception 54 is in conformity with the precedents of this Court, we cannot concur in the contention of the appellant that it has been done any wrong thereby, and are impelled to overrule the exception.

Exception 56 is not set out in appellant's brief and is therefore taken as abandoned. Rule 28, Rules of Practice in the Supreme Court, 213 N. C., 825.

Exceptions 57 and 58 are formal, being directed to the court's refusal to set aside the verdict and to the signing of the judgment, and require no discussion other than has been made under the exceptions preceding them.

The record in this case pictures vividly a hotly contested trial between able, learned, experienced and skillful lawyers, conducted in accord with the best traditions of our bar, presided over by a fair and impartial judge, before a jury of "good men and true," wherein the vital issue was answered in favor of the defendant. We have weighed each of the

58 exceptions preserved, grouped in the appellant's brief under eight assignments of error, and find no prejudicial error.

No error.

MRS. FRANK W. MILLAR v. THE TOWN OF WILSON.

(Filed 2 December, 1942.)

1. Municipal Corporations § 6—

A municipal corporation is dual in character and exercises two classes of powers, one as a governmental agency and the other as a private corporation. Its activities, which are discretionary, political, legislative or public, and performed for the public good in behalf of the State, come within the class of governmental functions; while those activities which are commercial or chiefly for the advantage of the community are private.

2. Municipal Corporations §§ 6, 7, 8, 12—

When acting in behalf of the State in promoting or protecting the health, safety, security or general welfare of its citizens, a municipality is an agency of the sovereign, and no action in tort may be maintained for resulting injury to person or property; whereas a municipality is subject to suit in tort as a private corporation, when injury results from a negligent discharge of a ministerial or proprietary function.

3. Municipal Corporations §§ 12, 14—

The maintenance of public roads and highways is generally recognized as a governmental function, though an exception is made in respect to streets and sidewalks of a municipality.

4. Municipal Corporations § 14—

While municipal authorities have discretion in selecting the means by which the traveling public is to be protected against defects in the street, provided the means selected are adequate, there is no discretion as to the performance or nonperformance of the duty itself.

5. Negligence § 19a: Pleadings § 15—

In an action for damages for personal injuries against a town, where the complaint alleged that defendant's employee, while on his way to place a protective light at a dangerous hole in a street, negligently ran into the back of an automobile in which plaintiff was riding causing injury, a demurrer was properly overruled.

DEVIN, J., concurring in result.

SCHENCK, J., joins in concurring opinion.

APPEAL by defendant from *Burney, J.*, at May Term, 1942, of WILSON. Affirmed.

Civil action in tort to recover damages for personal injuries.

The complaint, in part, alleges "That on or about the 2nd day of June, 1941, the defendant, through its proper officers and employees of

one of its public utilities, to wit: The light and water plant, had dug a hole in one of the streets of said town for the purpose of installing water equipment, or repairing the same, or for some other purpose in connection with the operation of said public utilities, which hole it was necessary to guard by lights so as to give the public notice of its existence, and in furtherance of such purpose late in the afternoon of June 2nd sent its employees to said hole for the purpose of placing lights about the same." It alleges further that "a truck owned by the defendant and operated by its agents and employees in connection with its public utilities and for the purposes above alleged was being driven at a rapid rate of speed . . . and ran into the rear of the car in which plaintiff was riding and overturned the same causing the plaintiff serious injuries . . ."

The defendant demurred upon the ground that it appeared from the complaint that the defendant's employee, who is alleged to have caused the injury to the plaintiff by the negligent operation of the defendant's truck, was at the time engaged in the furtherance of a governmental function.

On the hearing in the court below the demurrer was overruled and defendant excepted and appealed.

Carter & Carter and Connor, Gardner & Connor for plaintiff, appellee.
Lucas & Rand for defendant, appellant.

BARNHILL, J. A municipal corporation is dual in character and exercises two classes of powers—governmental and proprietary. It has a twofold existence—one as a governmental agency, the other as a private corporation.

Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

When injury or damage results from the negligent discharge of a ministerial or proprietary function it is subject to suit in tort as a private corporation. 6 McQuillin, Mun. Corps. (2d), sec. 2792.

While acting "in behalf of the State" in promoting or protecting the health, safety, security or general welfare of its citizens, it is an agency of the sovereign. No action in tort may be maintained for resulting injury to person or property. *Parks v. Princeton,* 217 N. C., 361, 8 S. E. (2d), 217; *Hodges v. Charlotte,* 214 N. C., 737, 200 S. E., 889; *Lewis v. Hunter,* 212 N. C., 504, 193 S. E., 814; *Scales v. Winston-*

Salem, 189 N. C., 469, 126 S. E., 543; *Hill v. Charlotte,* 72 N. C., 55; *McIlhenney v. Wilmington,* 127 N. C., 146; *Harrington v. Greenville,* 159 N. C., 632, 75 S. E., 849; *Snider v. High Point,* 168 N. C., 608, 85 S. E., 15; *James v. Charlotte,* 183 N. C., 630, 112 S. E., 423; *Cathey v. Charlotte,* 197 N. C., 309, 148 S. E., 426; *Broome v. Charlotte,* 208 N. C., 729, 182 S. E., 325; *Hagerman v. Seattle,* 110 A. L. R., 1110, Anno., p. 1117.

The difficulty is not in ascertaining what the law is but in applying known and accepted principles of law to a given state of facts. The line between municipal operations that are proprietary and, therefore, a proper subject of suits in tort and those that are governmental and, therefore, immune from suits is sometimes difficult to draw.

Which principle—that of governmental immunity or that of corporate liability—should be applied here?

While the maintenance of public roads and highways is generally recognized as a governmental function, exception is made in respect to streets and sidewalks of a municipality.

This exception to the prevailing doctrine which imposes liability upon a municipality for damages resulting from failure to exercise ordinary care in keeping its streets and sidewalks in a reasonably safe condition—created by judicial decree—is an "illogical" exception to the general rule of the common law disallowing actions against municipalities for negligence in the discharge of duties imposed upon them for the sole benefit of the public and from which they derive no compensation or benefit in their corporate capacity. "It is obvious that the obligation, so far as travelers are concerned, is one of a public character, fulfilled, not for pecuniary profit or private corporate advantage, but exercised as a purely governmental function." 7 McQuillin, Mun. Corps. (2d), sec. 2902; *Hamilton v. Rocky Mount,* 199 N. C., 504, 154 S. E., 844.

None the less, the exception has been recognized and uniformly applied in this jurisdiction and the maintenance of streets and sidewalks is classed as a ministerial or proprietary function. *Sandlin v. Wilmington,* 185 N. C., 257, 116 S. E., 733, and cases cited; *Graham v. Charlotte,* 186 N. C., 649, 146 S. E., 571; *Willis v. New Bern,* 191 N. C., 507, 132 S. E., 286; *Michaux v. Rocky Mount,* 193 N. C., 550, 137 S. E., 578; *Hamilton v. Rocky Mount, supra; Speas v. Greensboro,* 204 N. C., 239, 67 S. E., 807.

The duty, as thus recognized, is positive. While the municipal authorities have discretion in selecting the means by which the traveling public is to be protected against a dangerous defect in the street, provided the means selected are adequate, there is no discretion as to the performance or nonperformance of the duty itself.

Here the defendant's employee was on his way to place a protective light at a dangerous hole in the street. He was undertaking to make

safe that which was unsafe and to protect the city against liability for failure to maintain its streets in a reasonably safe condition. This act was intimately connected with and directly related to the duty of the city to maintain its streets. We are of the opinion that it must be classified as a part and parcel of the performance of that duty.

It is true that the failure to provide a light to give warning of a hole in a street is not negligence. It is merely a relevant circumstance on the determinative questions whether the streets were kept in a reasonably safe condition and whether the authorities had properly performed their duty concerning them at the time and place of its occurrence. *Johnson v. Raleigh,* 156 N. C., 269, 72 S. E., 368; *Brady v. Randleman,* 159 N. C., 434. If recovery is had it is for the failure of the city to exercise ordinary care in inspecting and maintaining its streets in a reasonably safe condition and not for failure to provide lights as such. While evidence of the presence or absence of lights at holes, excavations or obstructions in streets is relevant, the failure to provide a light imposes no liability. *Johnson v. Raleigh, supra; Willis v. New Bern, supra; Tinsley v. Winston-Salem,* 192 N. C., 597, 135 S. E., 610.

It is likewise true that a city may select some other means or method of providing protection against the dangers caused by the existence of a dangerous defect. Even so, the employee was proceeding to the excavation for the purpose of making the street safe for travel by providing a warning of a dangerous condition. He was engaged in an act of maintenance.

It may be conceded, as stated, that the light would serve to promote the safety, security and general welfare of the traveling public. So does the maintenance of streets in every other respect.

While it is not our purpose to enlarge or extend the exception without legislative sanction, in exercising our "sovereign prerogative of choice" we conclude that the activities of the city's employee at the time comes within the exception and any negligence on his part while engaged in the discharge of this duty would impose liability upon the defendant.

The judgment overruling the demurrer is

Affirmed.

DEVIN, J., concurring in result: The allegation in the complaint that the truck which struck the plaintiff was owned and operated in connection with the city's public utilities, from which the city derived a substantial profit, saves it from a demurrer. *Hamilton v. Rocky Mount,* 199 N. C., 504, 154 S. E., 844. However, I do not think this ruling should be extended to holding that the operation of a city truck, used for public purposes and being driven on a public street in the discharge of a duty imposed for the public benefit, should burden the tax-

payers with liability for an injury incident to such operation, notwithstanding the discharge of such duty might also tend to protect the city from liability with respect to the maintenance of its streets. *Hodges v. Charlotte,* 214 N. C., 737, 200 S. E., 889; *Lewis v. Hunter,* 212 N. C., 504, 193 S. E., 814; *Broome v. Charlotte,* 208 N. C., 729, 182 S. E., 325. I do not think liability should be imposed as the result of considering matters beyond the immediate purpose and province of the operation involved, which was for the protection of the public.

SCHENCK, J., joins in this opinion.

STATE v. F. C. BONNER AND JUNIOR FOWLER.

(Filed 2 December, 1942.)

1. Criminal Law § 33—

In a prosecution for murder against several defendants, alleged confessions, separately made by defendants, are competent only against the defendant making the confession and are incompetent against any co defendant, who was not present at the time the alleged confession was made and who did not by word or conduct acquiesce therein.

2. Criminal Law § 47—

In criminal prosecutions for murder, upon separate indictments against several defendants, consolidated and tried together, it was prejudicial error to deny motions for separate trials, the State relying solely for conviction upon alleged separate confessions, incriminating defendants not present and who had not acquiesced therein.

APPEAL by defendants F. C. Bonner and Junior Fowler from *Thompson, J.,* at May Term, 1942, of COLUMBUS.

Criminal prosecutions upon separate bills of indictment, consolidated and tried together, charging each defendant with the murder of Ira L. Godwin.

The record discloses that about ten o'clock on night of 4 April, 1942, Ira L. Godwin was found in his filling station near Whiteville, North Carolina, lying in a pool of blood, and that he was dead; that appellants, F. C. Bonner and Junior Fowler, and two others, Lonnie Melton Todd and Joe McDaniel were charged individually and in separate bills of indictment with the murder of Godwin; and that motions of appellants for separate trials were overruled, and "defendants excepted."

The case on appeal further discloses that, upon the trial of the above named four persons charged with the murder of Ira L. Godwin, the

State offered as evidence and relied upon alleged confessions of defendants F. C. Bonner and Lonnie Melton Todd, separately made, and of Junior Fowler and Joe McDaniel, jointly made; that in the alleged confession of F. C. Bonner incriminating statements were made against the defendants Fowler and Todd; in the alleged confession of Lonnie Melton Todd, incriminating statements were made against Bonner and Fowler; and in the alleged joint confession of Fowler and McDaniel, incriminating statements were made against Bonner and Todd; that the court overruled the objections of these appellants, and they excepted; and that, thereupon, "the court here instructed the jury that they should not consider these confessions except as against the individuals making them; that they should not be considered as against any other defendant not making the particular confession, unless they should further find any other defendant was present at the time."

The defendants did not testify and offered no evidence on the trial.

The defendant Joe McDaniel, who allegedly made a joint confession with defendant Junior Fowler, was acquitted. Defendants F. C. Bonner and Junior Fowler and Lonnie Melton Todd were each convicted of murder in the first degree. Upon such verdict judgments were pronounced, in which, as relates to them, the appellants, F. C. Bonner and Junior Fowler, were each condemned to death by asphyxiation "on the day prescribed by law," and each appeals to the Supreme Court and assigns error.

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

Wm. F. Jones for defendant, appellant, Bonner.

E. M. Toon and Detlaw Sanderson for defendant, appellant, Fowler.

WINBORNE, J. Upon the record on this appeal the appellants contend stressfully, and we think with propriety, that each of them was prejudiced by the denial of their motions for separate trials. While at the time the motions were made and overruled, it doubtless did not appear that the State, in order to connect defendants with alleged murder of Ora L. Godwin, relied upon alleged confessions separately made by the defendants, which would be competent as evidence only against the defendant making the confession, and incompetent as evidence against any codefendant who was not present at the time the alleged confession was made, and who did not by word or conduct acquiesce therein. However, in view of the fact that in each of the alleged confessions incriminating statements were made against other defendants, we are unable to conclude that such incriminating statements were not prejudicial to such

others when it became apparent that the State relied solely upon such confessions for the conviction of the defendants. As stated in *S. v. Cotton,* 218 N. C., 577, 12 S. E. (2d), 246: "Without questioning the power of the court to consolidate cases for trial in proper instances, and in discretionary authority ordinarily to deal with an application for a severance . . . it would seem that a mistrial and severance at the close of all the evidence would have been in order."

As the case goes back for new trial, and as the record on appeal does not disclose in full the evidence upon which the court ruled as to competency of the alleged confessions, we make no decision thereon. However, we call attention to the case of *S. v. Anderson,* 208 N. C., 771, 182 S. E., 643, and cases therein cited, as well as other decisions on the subject.

Also, as there is to be a new trial we deem it unnecessary to deal with exception to form of judgment.

New trial.

STATE v. LONNIE MELTON TODD.

(Filed 2 December, 1942.)

1. Criminal Law § 52b—

Upon a motion of nonsuit, in a criminal action, the evidence is to be considered in the light most favorable for the State, but evidence which merely suggests the possibility of guilt, or which raises only a conjecture, is insufficient to require submission to the jury.

2. Criminal Law § 34a—

While the State, by offering in evidence a statement of a defendant in a criminal action, is not precluded from showing the facts were different, it presents the statement as worthy of belief.

3. Criminal Law § 52b: Homicide § 25—

In a prosecution of several persons for murder, where the State based its entire case against this defendant upon his written statement, which admitted that he drove the automobile, in which all defendants were riding, to the scene of the crime and that the two, who perpetrated the crime, got out and entered the filling station of deceased, shot him to death, and robbed him, the entire statement tending to relieve this defendant from any guilty knowledge of their purpose and failing to afford any substantial evidence that he aided or abetted in the perpetration of the robbery or murder, his motion of nonsuit should have been sustained.

APPEAL by defendant from *Thompson, J.,* at May Term, 1942, of COLUMBUS. Reversed.

The defendant was convicted of murder in the first degree in connection with the felonious slaying of Ira L. Godwin. At the same time

two others, F. C. Bonner and Junior Fowler, were also convicted of the murder of Ira L. Godwin. The appeals of Bonner and Fowler were considered at this term (*ante,* 344). Separate indictments against the three named defendants and one McDaniel were consolidated for trial. McDaniel was acquitted.

There was evidence tending to show that the deceased was shot and killed in the perpetration of a robbery. The only evidence offered to connect the defendant Todd with the murder was his own statement, which was reduced to writing and signed by him, the material parts of which may be stated as follows: On 4 April, 1942, defendant Todd, who was a soldier, left Fort Bragg, in company with F. C. Bonner, to go to Todd's home near Dufford, S. C. The two secured rides to Floyds Cross Roads, S. C., and after meeting with some friends, including Junior Fowler and Todd's half-brother, Joe McDaniel, Todd and McDaniel went to their home and ate supper. Todd's statement relates the subsequent events, as follows:

"After we ate supper it was around 8:30 p.m. Joe McDaniel and I then left to go see some girls living at Cedar Creek, S. C., which is about a mile and a half from home. We stopped a short distance from home where I had a bottle with some whiskey in it hid. We drank the whiskey in the bottle and throwed the bottle down. About that time we saw a car coming around the curve from towards Nichols, S. C. We stepped outside the road for the car to pass and the car came up and stopped. F. C. Bonner and Junior Fowler was in the car. It was a new Model Ford Coupe. F. C. Bonner was driving. F. C. Bonner said let's go to ride. As I opened the door on the right-hand side, F. C. Bonner said, 'Todd, you drive, you are a better driver than I am.' F. C. Bonner said that he ran up with an old friend of his in Mullins, S. C., and borrowed this car. I said you got a ready job there, we better go take our girls for a ride. F. C. Bonner said that he had to go to Aynor, S. C., let's go there.

"We stopped at a service station below Aynor, S. C., and got some gas. We then went to Homewood, S. C., near Conway, S. C., and turned left, and F. C. Bonner said keep going. When we got to Green Sea, S. C., F. C. Bonner said, 'Keep straight ahead.' When we got to Tabor City, N. C., F. C. Bonner said, 'Take a dirt street around town.' We came out at the highway going toward Whiteville, N. C. We came on to (till) we got to a junction near Whiteville, N. C., and F. C. Bonner said 'Turn right.' We turned right until we passed a station on the right. F. C. Bonner said he knew some girls that used to work there. We turned around a short distance beyond the station and F. C. Bonner said, 'Drive back by slowly.' After we passed the station the second time, F. C. Bonner said, 'Turn around and let's stop back by and get a package of cigarettes.' I stopped out of the driveway at the station and

F. C. Bonner and Junior Fowler went into the station. In about a minute I heard several shots in the station and F. C. Bonner and Junior Fowler came running to the car. F. C. Bonner had something bright that looked like a pistol in his hand. I said, 'What in the hell took place in there?' F. C. Bonner said, 'Drive, damn it, or I will shoot you.'

"We left, going towards New Brunswick, N. C. When we got beyond New Brunswick, Junior Fowler said, 'We had to shoot him.' F. C. Bonner said, 'And we killed hell out of him, too, but we got the money.' I said, 'It is a damn fool that will kill a man for money.' I said, 'You know a fellow in that kind of place wouldn't have much money on him.' Joe McDaniel said, 'What did you shoot him for?' F. C. Bonner said, 'We had to; Junior was shooting him and I had to.'

"We turned off a dirt road beyond New Brunswick. We went back into the Tabor City highway. We turned off a dirt road before we got to Tabor City and went back into S. C. We stopped in about a mile from Junior Fowler's home. We all got out of the car. I got out on the left and F. C. Bonner, Junior Fowler and Joe McDaniel got out on the right. I took another drink of whiskey. F. C. Bonner had some money in his hand. He pushed it across the seat to me and said, 'Here is your part.' I said, 'No thanks, I don't want it.' He said, 'To hell you don't.' I pushed the money back across the seat to him. We four got back in the car and went on to Junior Fowler's mail box and put him out and went on next home. We went to Floyds Cross Roads and turned in next to my house. Before we got to Joe Meyers' house, F. C. Bonner said, 'Stop the car and let me drive, this is a stolen car.' I had been driving the car all the time since I got in the car near my home. I looked on the driver's license and saw the car was in Archie Buffkin's name.

"F. C. Bonner said that he would have to drive the car in the river or some place to destroy it. I wouldn't let him. I told him to put the car where the old man could find it. We, F. C. Bonner, Joe McDaniel and I, got back in the car and went to my mail box. I got off and got my T Model and went on to Sandy Bluff, S. C., and got Joe McDaniel and F. C. Bonner and brought them back."

The jury returned verdict of guilty of murder in the first degree as to the defendant Todd, and from judgment on the verdict imposing sentence of death, he appealed, filing separate record in this Court.

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

Lyon & Lyon for defendant.

DEVIN, J. The defendant assigns error in the denial by the court below of his motion for judgment as of nonsuit. He contends that the

evidence offered by the State tended to exculpate rather than incriminate him, and was insufficient to warrant submission of the case to the jury or to support the verdict and judgment.

The only evidence offered by the State which in any way connected this defendant with the crime charged in the bill of indictment was the defendant's own statement to the officers. There was no other evidence. The statements or confessions of the other defendants who were tried at the same time were not competent against this defendant, and properly were excluded from the consideration of the jury as to him. While in his statement this defendant admits he drove the automobile to the scene of the homicide, and that the two who perpetrated the crime got out of the automobile, entered the filling station of the deceased and shot him to death, the entire statement tends to relieve him from the imputation of guilty knowledge of their purpose, and fails to afford any substantial evidence that he participated in or aided and abetted in the perpetration of the robbery or murder. His statement is to the effect that by direction of Bonner he drove the automobile by the filling station of the deceased, because Bonner said he knew some girls who used to work there, and was later told to stop for the purpose of getting some cigarettes; that shortly after Bonner and Fowler had entered the filling station he heard pistol shots, and the two ran out, got in the car, and, with threats of shooting him, ordered him to drive away. While the State by offering this statement was not precluded from showing that the facts were different, no such evidence was offered, and the State's case was made to rest entirely on the statement of the defendant, which the State presented as worthy of belief. *S. v. Freeman,* 213 N. C., 378, 196 S. E., 308; *S. v. Edwards,* 211 N. C., 555, 191 S. E., 1; *Smith v. R. R.,* 147 N. C., 603, 61 S. E., 575; *S. v. Mace,* 118 N. C., 1244, 24 S. E., 798.

Upon a motion for judgment of nonsuit the evidence is to be considered in the light most favorable for the State, but evidence which merely suggests the possibility of guilt or which raises only a conjecture is insufficient to require submission to the jury. *S. v. Shelnutt,* 217 N. C., 274, 7 S. E. (2d), 561; *S. v. Madden,* 212 N. C., 56, 192 S. E., 859; *S. v. Montague,* 195 N. C., 20, 141 S. E., 285; *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854; *S. v. Vinson,* 63 N. C., 335. Here, we think the defendant's statement fails to afford substantial evidence of his guilt of the offense charged in the bill of indictment, and rather tends to exculpate him, and hence his motion for judgment of nonsuit should have been sustained. *S. v. Cohoon,* 206 N. C., 388, 174 S. E., 91; *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769.

In *S. v. Cohoon, supra,* where the charge was embezzlement, the State relied for conviction upon statements contained in an affidavit which the defendant in that case had theretofore made. Since the material por-

tions of the affidavit tended to free the defendant from the imputation of guilt, it was held that the evidence was insufficient to sustain the verdict. In the language of the present *Chief Justice* in *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769, "We are of opinion that when a complete defense is established by the State's evidence a defendant should be allowed to avail himself of such defense on a motion for judgment as of nonsuit."

On the present record, we hold that the defendant Todd was entitled to have his motion for judgment of nonsuit sustained. C. S., 4643.

Reversed.

IN RE KATHERINE LEE GIBSON.

(Filed 2 December, 1942.)

1. Habeas Corpus § 3—

Habeas corpus is not available for divorced parents to determine the custody of their children.

2. Attorney and Client § 8—

A party litigant cannot discharge his counsel of record and withdraw from the case, without notice to the opposing side and approval of the court.

3. Attorney and Client §§ 7, 8—

No attorney or solicitor can withdraw his name, after he has once entered it on the record, without leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notices upon him is as valid as if served on the party himself.

4. Divorce § 19—

Accordant with the general rule, it is held in Florida that, where an action for divorce is brought by a resident against a nonresident, a divorce may be granted the nonresident on a cross-bill, albeit the local statute, in general terms, requires plaintiff in an action for divorce to have been a resident of the State for a designated period.

APPEAL by respondents, L. E. Holler and Alma Lee Gibson, from *Phillips, J.,* in Chambers at Rockingham, 12 September, 1942. From RICHMOND.

Petition for writ of *habeas corpus* to determine the custody of Katherine Lee Gibson, infant daughter of petitioner and Alma Lee Gibson.

The petitioner, W. E. Gibson, and the *feme* respondent were married on 12 March, 1933, and lived together as husband and wife until

6 August, 1940, when they separated. Thereafter, the petitioner moved to the State of Florida and instituted an action for divorce against his wife, and for the custody of his child, alleging in his complaint that he was a resident of Florida and his wife a resident of North Carolina. The complaint in said action was filed in the Circuit Court of Florida, Lake County, on 4 December, 1941, and was signed by James W. Smith, Jr., solicitor for plaintiff. While Alma Lee Gibson was not personally served with summons in this action, she voluntarily appeared and filed answer in January, 1942, denied that the plaintiff was entitled to a divorce, and asked for the custody of their minor child. A hearing was held before the circuit judge on 20 March, 1942, at which time the judge awarded the temporary custody of the minor child in question to Alma Lee Gibson, who immediately thereafter returned to North Carolina, bringing the said Katherine Lee Gibson with her, and neither she nor her daughter has ever returned to Florida.

On 6 April, 1942, W. E. Gibson returned to North Carolina and re-established his legal residence in Richmond County, since which time he has not returned to the State of Florida.

On 18 June, 1942, counsel for Alma Lee Gibson in Florida, after notice to counsel of record for plaintiff and after obtaining leave of the court, filed in the action therefore brought by W. E. Gibson against Alma Lee Gibson in the Circuit Court of Florida, Lake County, a "Cross-Bill and Amendment to Answer," in which she set up a cross action for divorce and asked for the permanent custody of Katherine Lee Gibson. On 13 July, 1942, a final decree was entered in favor of the defendant, granting her a divorce and awarding her the permanent custody of her minor child.

It was adjudged in the court below that this Florida decree was void for want of notice to the plaintiff in the action. W. E. Gibson testified that he released and discharged his counsel on 20 March, 1942, since which time he has had no representative in the State of Florida.

There were other findings upon which the custody of Katherine Lee Gibson was awarded to the petitioner for nine months in the year, during the school term, and to the *feme* respondent for three months in the year, during school vacation.

From this order, the respondents, Alma Lee Gibson and her father, L. E. Holler, appeal, assigning error.

McLeod & Webb and J. C. Sedberry for petitioner, appellee.
P. C. Froneberger for respondents, appellants.

STACY, C. J. The case turns on the validity of the final decree entered in the Circuit Court of Florida on 13 July, 1942. If this decree be

void, the petitioner and his wife are living in a state of separation, without being divorced, and *habeas corpus* will lie under C. S., 2241, to determine the custody of their minor child. But if this Florida decree be valid, the petition must fail, for as to divorced parents *habeas corpus* is not available to determine the custody of their children. *In re Ogden,* 211 N. C., 100, 189 S. E., 119, and cases there assembled.

We think there was error in holding on the facts of the present record that the decree of the Florida court is void. It is true, there is allegation and finding to the effect that W. E. Gibson discharged his Florida counsel on 20 March, 1942, and that he had no notice of the subsequent proceedings in the Florida action. Even so, there is no suggestion of any notice to the opposing side or to the court of Mr. Smith's discharge, or of his withdrawal from the case. He was still counsel of record during all of the subsequent proceedings. Indeed, it would seem that he was not aware of his discharge, for on 22 June, 1942, he wrote a letter to Mrs. Gibson's Florida attorney, saying: "I have received the copies of the two notices and pleadings in the above case (*Gibson v. Gibson*). I am writing my client about this matter, and if I do not get definite instructions from him . . . you may go ahead and obtain a final decree."

It is the established practice in courts of chancery that notice to counsel of record in an action is notice to the party. *Ladd v. Teague,* 126 N. C., 544, 36 S. E., 45.

Speaking to the subject in *U. S. v. Curry,* 47 U. S., 106, *Chief Justice Taney,* delivering the opinion of the Court, said: "No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notice upon him is as valid as if served on the party himself."

It follows, therefore, as the petitioner is deemed to have had notice of all that transpired in the Florida proceeding, he will not now be heard collaterally to say otherwise. He invoked the jurisdiction of the court of his then alleged domicile. It is but meet that he should be bound by its decree. *McIntyre v. McIntyre,* 211 N. C., 698, 191 S. E., 507.

Accordant with the general rule, it is the holding in Florida that where an action for divorce is brought by a resident of that State against a nonresident, a divorce may be granted the nonresident on his or her cross-bill, albeit the local statute, in general terms, requires the plaintiff in an action for divorce to have been a resident of the State for a designated period of time. *Krumrine v. Krumrine,* 90 Fla., 368, 106 So., 131; Annotation, 89 A. L. R., 1203; 17 Am. Jur., 287. The basis of the ruling is, that when equity once takes hold of a matter it pursues it

to the end in adjustment of the rights of all the parties. *McCormick v. Proctor,* 217 N. C., 23, 6 S. E. (2d), 870 (concurring opinion and authorities there assembled). "The court having obtained jurisdiction of the subject matter by reason of the complainant's residence and jurisdiction of the defendant by reason of her appearance in the cause, the power to render a decree dissolving the bonds of *matrimony* between them was complete." *Krumrine v. Krumrine, supra.*

Matrimony is a status, and it is this status which the plaintiff sought to have dissolved in the Florida court. The fact that he failed in his suit did not defeat the jurisdiction of the court to entertain the cross-bill of the defendant. Annotation, 89 A. L. R., 1209; 9 Ann. Cas., 1200; 17 Am. Jur., 288. Nor did his removal from the state before final decree deprive the court of its jurisdiction. *Waltz v. Waltz,* 18 Ind., 449; 27 C. J. S., 637-638.

The order entered on the writ of *habeas corpus* will be vacated and the petition dismissed.

Error and remanded.

BLANEY WILLIAM BATTS, JR., BY HIS NEXT FRIEND, C. W. BATTS, SR., v. SGT. W. N. LITTLE.

W. D. EDENS v. SGT. W. N. LITTLE.

JACQUELINE BATTS, BY HER NEXT FRIEND, C. W. BATTS, SR., v. SGT. W. N. LITTLE.

CHAUNCEY WINFORD BATTS, JR., BY HIS NEXT FRIEND, C. W. BATTS, SR., v. SGT. W. N. LITTLE.

(Filed 2 December, 1942.)

Trial § 4—

In an action against a soldier in active service, for personal injuries from negligence, upon motion by defendant that trial be stayed under U. S. Soldiers' and Sailors' Civil Relief Act of 1940, the court disallowed the motion, without finding the facts pertinent thereto. *Held:* Defendant's appeal is dismissed, but without prejudice to his right to renew his motion, have the facts found and his rights thereupon determined.

APPEAL by defendant from *Grady, Emergency Judge,* at September Term, 1942, of PENDER.

Clifton L. Moore for plaintiffs, appellees.

Carr, James & Carr for defendant, appellant.

SEAWELL, J. The above four cases grow out of one transaction—the alleged negligence, recklessness and wantonness of the defendant in operating an automobile, resulting in a collision whereby the several plaintiffs were injured. In their pleadings the plaintiffs asked for a judgment in compensation for their injuries and for an execution *in personam* if the judgments were not satisfied. The defendant answered, denying the material allegations of the complaints.

At the time of the alleged injuries, the defendant was a Sergeant in Battery B, 96th Coast Artillery of the United States Army, and was then located at Camp Davis in Onslow County.

Subsequently thereto, the defendant, under military orders, was transferred from Camp Davis to some destination unknown to the court, in the regular service of the Army, whether in this country or abroad does not appear.

The cases came on for trial at the September Term, 1942, of Pender Superior Court and were consolidated for trial. The defendant thereupon filed a motion, supported by affidavit, for relief under the Soldiers' and Sailors' Civil Relief Act of 1940, ch. 888, 54 Stat., 1178, 50 U. S. C. A., Appendix 521, setting up that his personal presence at the trial was necessary for his defense and for the conduct thereof; that his own testimony was necessary in the said defense; and that it was impossible for him to be present because of his service in the military forces of the United States and his necessary obedience to the orders of his superior officers, and prayed that the trial of the cause should be stayed as provided by the Act of Congress.

Thereupon, the trial court made the following order:

"The above entitled causes having come on for trial at this term, and the plaintiffs having insisted upon a trial, and it appearing to the Court that the defendant is a Sergeant in the United States Army, and that his present whereabouts is unknown, and it further appearing to the Court that his presence in Court at any time in the future is exceedingly questionable, and it also appearing to the Court that the defendant is represented in the above causes by Messrs. Carr, James & Carr, Attorneys of the City of Wilmington, and the Court finding as a fact that these causes ought to be tried, and that there is no valid reason why the same should not be tried:

"It is now, upon motion of the plaintiffs, ORDERED AND ADJUDGED that the said causes be consolidated for the purpose of trial, and that they be set for hearing on Monday, November 2, 1942, and any motion made by the defendant for a continuance is disallowed."

"It is suggested by the Court that the whereabouts of the defendant be ascertained from the Commanding Officer at Camp Davis, and that

his deposition be taken, if the defendant shall require or demand such deposition, and the plaintiffs, in open court, waive all formalities as to the taking of the said deposition.

"Let a copy of this judgment be mailed to Messrs. Carr, James & Carr, Wilmington, N. C., by the Clerk of the Court.

HENRY A. GRADY,
Judge Presiding."

From this order the defendant appealed.

The trial judge set the case for hearing 2 November, which had already passed when the appeal was heard in this Court. The defendant has sustained no injury to his right, unless it be that upon his motion the judge ought to have stayed further proceedings so that defendant might not be put to the necessity of renewing his motion from time to time when the case might be calendared for trial.

We are inclined to regard the Act of Congress as definitely requiring a more permanent action of the court when the conditions contemplated by the statute require it, rather than a mere postponement for the current term.

But in this case, the judge found no facts pertinent to the application of the cited Federal statute, and the assignments of error do not bring up for our review the failure to find these pertinent facts and base upon them an order staying the proceedings, as defendant contends is required by the Act.

The order apparently is simply based upon a finding that the defendant is represented by counsel, that his present whereabouts is unknown, and his presence in court at any future time is "exceedingly questionable"; that the cases ought to be tried, and there is no valid reason to the contrary.

Defendant's appeal is, therefore, dismissed, but without prejudice to his right to renew the motion and have his rights thereupon determined.

Appeal dismissed.

STATE v. BRANTLEY MOORE.

(Filed 2 December, 1942.)

1. Bastards § 7—

A proceeding to establish the paternity of an illegitimate child and to prosecute the father, who willfully neglects or refuses to support and maintain the same, may be instituted at any time within three years next after the birth of the child. C. S., 276 (a); C. S., 276 (c).

2. Evidence § 29—

The admission of evidence, in a bastardy proceeding, that defendant changed lawyers after trial of the cause in the recorder's court, is not error.

3. Bastards § 3: Indictment § 11—

Indictment, in a bastardy proceeding, which states that the child was born on 13 August, 1941, whereas the evidence was that the birth occurred on 13 November, 1940, is not fatally defective. C. S., 4625.

APPEAL by defendant from *Thompson, J.*, at June Term, 1942, of COLUMBUS.

Criminal prosecution tried upon indictment charging defendant with willful failure and neglect to support his illegitimate child.

Separate issues on the paternity of the child and the willful and unlawful failure of the defendant to support and maintain said illegitimate child were submitted and answered against the defendant. From the judgment entered thereon, the defendant appealed, assigning error.

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

Clayton C. Holmes for defendant.

DENNY, J. The first assignment of error is to the refusal of his Honor to dismiss the proceedings on the ground that the prosecution is barred by the statute of limitations. The statute under which the defendant has been convicted provides: "Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereafter provided." Public Laws of 1933, ch. 228, sec. 1; as amended by Public Laws of 1937, ch. 432, sec. 1; as amended by Public Laws of 1939, ch. 217, secs. 1 and 2; sec. 276 (a), N. C. Code of 1929 (Michie). There is a further provision contained in the Public Laws of 1933, ch. 228, sec. 3, as amended by Public Laws of 1939, ch. 217, sec. 3; sec. 276 (c), N. C. Code of 1939 (Michie), which contains the following

provision: "Proceedings under sections 276 (a)-276 (i) to establish the paternity of such child may be instituted at any time within three years next after the birth of the child, and not thereafter: Provided, however, that where the reputed father has acknowledged the paternity of the child by payments for the support of such child within three years from the date of the birth thereof, and not later, then, in such case, prosecution may be brought under the provisions of said sections within three years from the date of said acknowledgment of the paternity of such child by the reputed father thereof."

A proceedings to establish the paternity of an illegitimate child and to prosecute the father of such child, who willfully neglects or refuses to support and maintain the same, may be instituted at any time within three years next after the birth of the child. *S. v. Hodges,* 217 N. C., 625, 9 S. E. (2d), 24; *S. v. Killian,* 217 N. C., 339, 7 S. E. (2d), 702; *S. v. Bradshaw,* 214 N. C., 5, 197 S. E., 564; and *S. v. Spillman,* 210 N. C., 271, 186 S. E., 322.

The second assignment of error is to the admission of evidence showing defendant had changed lawyers after the trial in the recorder's court. We think this assignment of error without merit, but, were it otherwise, the record discloses that no objection was made nor exception taken to the testimony of the prosecuting witness concerning defendant's having changed lawyers since the trial in the recorder's court. Assignments of error must be based upon exceptions duly taken in apt time during the trial and preserved as required by the statute and the Rules of this Court. C. S., 643; Rule 19, sec. 3, and Rule 21 of the Rules of Practice in the Supreme Court, 221 N. C., 544, and *S. v. Bittings,* 206 N. C., 798, 175 S. E., 299.

The third assignment of error is based upon the refusal of his Honor to grant defendant's motion for judgment of nonsuit and his motion to quash the bill of indictment. The indictment sets forth the date of the begetting by the defendant of a bastard child upon the body of one Susie Smith, as 13 November, 1940, and further sets forth that said bastard child begotten by the defendant, Brantley Moore, was born on or about 13 August, 1941. The evidence of the prosecuting witness is to the effect that the defendant, Brantley Moore, had sexual intercourse with her in February, 1940, "that she had nothing to do with any other man," and that Brantley Moore is the father of her child which was born 13 November, 1940.

Was the bill of indictment fatally defective, in that the correct date of the birth of the child did not appear therein? The answer is "No."

Section 4625 of the Consolidated Statutes of North Carolina reads, in part, as follows: "No judgment upon any indictment for felony or misdemeanor, whether after verdict, or by confession, or otherwise, shall be

stayed or reversed for the want of the averment of any matter necessary to be proved, . . . nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; . . ."

The dates in the bill of indictment, as well as the correct date of the birth of the illegitimate child involved, were within three years from the institution of the proceedings. The willful neglect or refusal to support, not the bastardy, is the crime. Therefore, the time of birth is not of the essence of the offense.

The fourth assignment of error is formal, and without merit.

In the judgment of the court below, we find

No error.

MATTIE GILMORE (WIDOW), MATTIE GILMORE GRACE, LAMONT GILMORE, DEWITT GILMORE, WOODROW HARRIS, WIDOW AND CHILDREN OF DEAN GILMORE, DECEASED (EMPLOYEE), v. HOKE COUNTY BOARD OF EDUCATION AND ITS CARRIER, TRAVELERS INSURANCE COMPANY, AND/OR STATE SCHOOL COMMISSION, SELF-INSURER.

(Filed 16 December, 1942.)

1. Master and Servant § 40a—

Under the N. C. Workmen's Compensation Act, the employer shall pay compensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment; that is, the injury causing the death must be of such a character that without it the death would not have occurred.

2. Same: Master and Servant § 52b—

Where the evidence showed that plaintiff, a man of advanced years, who had an enlarged prostate gland, arteriosclerosis, myocarditis, and arthritis, all of long standing, accidentally fell and broke his leg, while working for defendant in the course of his employment, and by proper treatment his leg healed, but plaintiff died some seven months after the accident from arteriosclerosis, myocarditis, and arthritis, all of which may have been aggravated by his confinement while his leg healed. *Held:* Evidence will not support an award, as it is not sufficient to take the case out of the realm of conjecture and remote possibility.

APPEAL by defendants, Hoke County Board of Education and Travelers Insurance Company, from *Bone, J.*, at April Civil Term, 1942, of HOKE.

Proceeding under North Carolina Workmen's Compensation Act to determine liability of defendants to claimants.

Upon the hearing before single Commissioner of the North Carolina Industrial Commission, evidence was offered tending to show that on 17 July, 1939, Dean Gilmore, age 65 years, intestate of claimants, while washing windows in the new gymnasium of Hoke County High School, suffered injury to his right leg, breaks in two places, when the ladder on which he was standing slipped from under him; that Dr. G. W. Brown administered first aid and sent him to Highsmith Hospital, where Dr. J. F. Highsmith, Jr., attended him; and that Dr. A. L. O'Briant treated him for more than a month prior to his death on 28 February, 1940. These doctors, each admitted to be an expert in medical profession, testified as to his physical condition, and as to cause of his death in pertinent part as follows:

The testimony of Dr. G. W. Brown, in substance, is as follows:

That he treated Dean Gilmore in the new gymnasium after his injury on 17 July, 1939, bandaged his leg and sent him to Highsmith Hospital; that he, Gilmore, was suffering pain in his leg, but, at that time, did not complain of anything else; that he, the doctor, went to the hospital about a week afterward, and at that time Gilmore complained of pain in his stomach, suffering from retention of urine—his bladder affection; that, to question as to the cause of this retention of urine in the bladder at that time, the doctor answered, in his opinion as an expert, that Gilmore "had a mild form of cystitis, and his high arteriosclerosis, and enlarged prostate gland which all old people are subject to, which encroaches upon the stem of the bladder," which conditions were not caused by the accident; that he didn't think the fall had anything to do with causing this retention of urine in his bladder; that the accident itself did not so aggravate his condition in any way to cause it, "but being confined to the bed might have a little connection because at this time he had been used to leading an active life, and he had been confined to bed for a week—possibly something like a week at this time—and he had an extension on both his legs and possibly the close confinement could possibly have aggravated his bladder condition." And, continuing, the doctor stated that, having been his physician for twenty-five years, he had occasion to treat and examine Gilmore prior to the accident; that he treated him after he came from the hospital, until he went to Duke Hospital "about the last of October or the first of December"; removing the cast on 17 October; that he did not advise his going to Duke, "but owing to his condition he had become a little childish and was begging everybody to do something for him and he wasn't getting any better and the medicine he was taking wasn't doing him any good and he wanted to go somewhere where he thought they would be able to do him some good"; that at that time the most of his complaint "was shortness of breath and pains all over the body," none of which in his (the doctor's) opinion was caused

by the accident; that he, the doctor, knew that Gilmore, when last seen by him, had a disease, "general arteriosclerosis and arthritis," "which would eventually kill him"; "that his fingers were all swollen up and he had mitral-regurgitation of his heart"; that at that time he (Gilmore) didn't complain of his bladder; that he was swollen considerably and he had a septic orchitis from his bladder infection; that at that time Gilmore was walking about a little on crutches, and the condition of the fractured leg was good as far as he (the doctor) could tell; that, in his opinion, he did not think Gilmore, if he had lived, would have had any permanent disability due to the "original injury by accident"; that as result of the fracture he would have had no stiffness in his joints; that "his motion was limited, but it was caused from his arthritis, and his mitral-regurgitation; that his legs were swollen right considerably and caused from the condition of his heart." Finally, the doctor was asked: "So, in your opinion, this limitation of motion of the right leg was due to other causes other than the fracture? A. (Nod of the head.)"

Dr. J. F. Highsmith, Jr., in summary, testified:

Gilmore "was admitted to the hospital . . . about one hour after his accident. He had a fracture of the right tibia and fibula just below the knee and I don't recollect him complaining of anything other than his broken leg at that time. While he was in the hospital he had considerable trouble with his bladder which was due to enlarged prostate and being confined to his bed and he couldn't empty his bladder and required intermittent catherization . . . I reduced his fracture, applied a cast which I left on about six weeks. He . . . stayed in the hospital from the 17th through the 30th of July. He returned to the hospital in about six weeks, had his cast changed and at that time he had remarkably good union of his fracture for a person of his age . . . I re-applied his cast to stay on for another month or six weeks. He came back shortly after I re-applied his cast wanting me to remove it and I wouldn't because I didn't think it was sufficient time elapsed to remove his cast, and I never saw him any more . . . At the time he was in the hospital . . . his blood pressure was elevated. He had a marked generalized arteriosclerosis but during the time in the hospital his heart action was good, didn't show any signs of any decompensation, any failing compensation . . . A man of his age, I should think he would have been totally disabled for a minimum of from five to six months . . . At the rate he was going, I don't believe he would have had any disability other than probably a little limitation of motion in his knee but that was just probable . . . he was getting most remarkable results . . ."

Continuing, Dr. Highsmith testified that he was not familiar with the cause of Gilmore's death; and that Gilmore said he had not been having any bladder trouble prior to this accident. Then he gave as his opinion

that "his (Gilmore's) bladder condition could have been caused from lying in bed, his inability to pass his water." The doctor said "I imagine before that time he had been getting up to pass his water just like anybody else; he wouldn't hardly urinate lying down." Then, continuing, the doctor said that, upon examination of Gilmore, he found that he had "marked hardening of the arteries." And in reply to this question, "What other chronic condition did he have, prostate condition, and bladder condition resulting, and arteriosclerosis, and what else?" the doctor said, "That is about all I remember except he was prematurely old for his age. He gave a history of past two years of suffering from attacks of palpitation of the heart, intermittently associated with pain over his heart, and dizziness and when walking a tendency to fall to the right . . . I mentioned a while ago he didn't show any failing (of his heart) in the hospital; his heart action was good. His blood pressure, however, was elevated, 154/100."

Dr. A. L. O'Briant testified substantially as follows:

That according to his records he treated Gilmore on January 15th, 18th and 19th, and also February 27th, 1940, the last being the day before he died; that this was in "his final illness"; that at the time of this treatment the cast had been removed; that he made out the death certificate, and, to the best of his memory, he put on it, as the cause of death of Gilmore, chronic myocarditis and multiple arthritis; that he is sure he put chronic myocarditis—a condition of the heart; that multiple arthritis is an arthritis in several joints instead of one; that he didn't treat Gilmore for his bladder condition; that as he recalls, Gilmore did not at that time complain of bladder trouble; that he examined Gilmore's arteries and found them sclerosed; that he examined Gilmore's leg, and, the best he could make out, his leg was apparently well, that is, quoting "I mean as far as I could see on external examination; no swelling or deformity I could make out."

Then, continuing, in answer to hypothetical questions, Dr. O'Briant, after noting a distinction between proximate cause and contributory cause, and after stating that in his opinion the accident was a contributing cause of the death of Gilmore "due to the fact that the injured man was an aged person, and the injury necessitating confinement, which in my opinion—and the age—is detrimental to convalescence from various injuries," was asked: "Q. Doctor, do you have an opinion satisfactory to yourself as to whether the retention of the urine caused by this bladder complication in any way tended to aggravate or make worse the chronic myocarditis you described?

"A. Not any more than absorption from the retention of urine; that would aggravate his myocarditis.

"Q. Do you have an opinion satisfactory to yourself as to whether the retention of the urine due to the inability to eliminate from the bladder contributed to or aggravated the multiple arthritis?

"A. I think it possibly did.

"Q. How about the probability of it?

"A. It is most probable that it did. Of course, I didn't treat him for his prostatic condition, I am assuming he had retention."

Following these questions, Dr. O'Briant stated that arteriosclerosis, hardening of the arteries, and myocarditis which he "found present, and the immediate cause of his death were diseases of long standing," gradual development, and in themselves, independently, could have caused "this man's death," and frequently do cause death in men of his age and condition, and, as well as he remembers, "they were the primary causes of his death" as he listed it on the death certificate, and he thinks the contributing cause was multiple arthritis, and that he didn't mention the accident as being a contributing cause, and, in answer to question, "In your opinion, Doctor, wasn't the accident a remote cause if it did contribute at all? Wasn't it a remote cause?" the doctor said: "Yes, sir, I suppose you would call it remote."

Then, upon being asked by the Commission, "What was your answer to Mr. Sapp about a remote cause, that the accident was a remote cause? Explain that," the doctor said: "Well, remote, in other words, it is not an immediate or direct cause"; and that the accident didn't cause arteriosclerosis or myocarditis—one a "disease of the heart and muscle of the myocardium, and the other . . . the blood vessel." Finally these questions were asked by the Commissioner, and answered by Dr. O'Briant:

"Q. Dr. Highsmith testified in his opinion this inability of Dean Gilmore to properly eliminate or void his bladder was caused by lying in bed, and the lying in bed was the result of the fracture to the leg. Do you have an opinion satisfactory to yourself as to whether this inability to void would tend to aggravate or be the proximate cause of the flaring up of the arthritis and chronic myocarditis?

"A. Well, possibly, yes; probably for the arthritis, but I wouldn't say about the myocarditis.

"Q. Well, does the arthritis tend to aggravate or cause the flaring up of the chronic myocarditis?

"A. It does, yes.

"Q. So one aggravates one and that in turn aggravates the other?

"A. Yes, sir."

Evidence was also introduced regarding employment.

The Commissioner, before whom the case was heard, among others, found as a fact, "That on February 28, 1940, Dean Gilmore died as a result of the injury by accident that arose out of and in the course of his

employment by the Board of Education of Hoke County on July 17, 1939," and concluded as a matter of law, among others: "That the deceased sustained an injury by accident that arose out of and in the course of his employment by the Board of Education is sustained by all the evidence. That his death from this injury on February 28, 1940, is the opinion given by the medical experts and adopted as a finding by the Commission."

Upon such findings of fact and conclusions of law, an award of compensation was made against defendants Hoke County Board of Education and Travelers Insurance Company from which they appealed to the Full Commission.

Upon such appeal, and after hearing, the Full Commission finds as facts, among others, "A. That the plaintiff's deceased, Dean Gilmore, sustained an injury by accident on July 17, 1939, arising out of and in the course of his regular employment with defendant employer, Hoke County, . . .

"E. That the injury by accident which the deceased employee, Dean Gilmore, sustained on July 17, 1939, activated an(d) exaggerated a pre-existing, latent condition or disease, which said activation and/or exaggeration of said condition or disease caused said deceased employee, Dean Gilmore, to be totally disabled from the date of his injury by accident on July 17, 1939, to the date of his death on February 28, 1940; that the death of the deceased employee, Dean Gilmore, resulted naturally and unavoidably from an activation or exaggeration of a pre-existing, latent condition or disease, which said exaggeration or activation was directly and proximately caused by the injury by accident which he sustained on July 17, 1939."

The Full Commission further adopted as its own and in all respects affirmed and approved the findings of fact and conclusions of law of the single Commissioner, and further concluded, in pertinent part: "3. . . . that the deceased employee at the time he sustained his injury by accident arising out of and in the course of his regular employment on July 17, 1939, was exclusively an employee of the Board of Education of Hoke County, and, therefore, that the defendant, the State School Commission, is not liable for any compensation on account of his said death"; and "4," after quoting the provisions of Section 2 (f) of the Workmen's Compensation Act, Public Laws 1929, chapter 120, Michie's Code, 8081 (i), as follows: " 'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident," and a portion of section 38 of the Act, Michie's Code, 8081 (tt), which reads: "If death results proximately from the accident and within two years thereafter, *or while*

total disability still continues, and within six years after the accident, the employer shall pay for or cause to be paid, subject, however, to the provisions of the other sections of this Act in one of the methods hereinafter provided, to the dependents of the employee . . .," and, after stating that "In the case at bar the Commission has found as a fact that the death of the deceased employee resulted naturally and unavoidably from an exaggeration of a pre-existing condition or disease, which aggravation of the condition or disease was caused by the accident," and that "the Commission has consistently held that the disability resulting from the aggravation of a pre-existing, latent condition by an accident is compensable," the Commission concludes: "Therefore, it appears to the Full Commission upon a liberal construction of the foregoing provisions that the dependents of a deceased employee are entitled to compensation when the death of an employee results from an exaggeration or activation of a condition or disease when said activation results naturally and unavoidably from the accident."

The Full Commission further concludes: "In the case at bar the defendants contend that death did not result proximately from the accident and therefore that the widow is not entitled to compensation. Assuming that this contention is correct, which the Full Commission is not making a conclusion of law, the Commission has found as a fact, and in its opinion there is ample competent evidence to support the same, that death resulted while total disability of the employee still continued and within six years after the accident, and, therefore, that the said dependent is entitled to compensation for the death of the deceased employee."

Thereupon, compensation was awarded.

Upon appeal thereto by defendants, Hoke County Board of Education and the Travelers Insurance Company, the judge of Superior Court, being of opinion that there is sufficient evidence to support the Commission's findings of fact and that its decision and award are free from error of law, entered judgment affirming same. Said defendants appeal therefrom to Supreme Court and assign error.

H. W. B. Whitley for plaintiffs, appellees.

Sapp, Sapp & Atkinson for appellants.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for State School Commission.

WINBORNE, J. These questions present points decisive of this appeal: (1) If it be conceded, that on 17 July, 1939, Dean Gilmore suffered injury by accident arising out of and in the course of employment by

Hoke County Board of Education, is there sufficient competent evidence to support a finding of fact that his death on 28 February, 1940, resulted proximately from such injury? (2) If not, and it be conceded that his death, on 28 February, 1940, did not result proximately from accident which happened on 17 July, 1939, but did occur while total disability continued and within six years after the accident, is the employer liable for compensation for his death under the provisions of section 38 of the North Carolina Workmen's Compensation Act, Public Laws 1929, chapter 120?

Both questions must be answered in the negative.

(1) In considering the first question it is necessary to ascertain when, under the North Carolina Workmen's Compensation Act, compensation is allowable for death of employee. Adverting to provisions of the Act, defining words used therein, unless the context otherwise requires, "the term 'death' as a basis for a right of compensation means only death resulting from an injury," section 2 (j), and "'injury' . . . shall mean only injury by accident arising out of and in the course of employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident." Section 2 (f). And in providing compensation for death, the Act, section 38, prescribes that "if death results proximately from the accident and within two years thereafter, and while total disability continues, and within six years after the accident, the employer shall pay or cause to be paid . . . to the dependents of the employee . . . a weekly payment equal to sixty per cent of his average weekly wage," etc.

From these provisions the legislative intent is clear that, under the North Carolina Workmen's Compensation Act, the employer shall pay compensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment. The injury by accident must be the proximate cause, that is, an operating and efficient cause, without which death would not have occurred. And to establish a real relation of cause and effect between an injury to, and subsequent death of employee, the evidence must be such as to take the case out of the realm of conjecture and remote possibility, that is, there must be sufficient competent evidence tending to show a proximate causal relation between the injury and subsequent death.

When the evidence in the case in hand is tested by these rules the causal relation between the injury to Dean Gilmore on 17 July, 1939, and his death on 28 February, 1940, is conjectural. All the medical testimony is to the effect that Gilmore had general arteriosclerosis and arthritis, diseases "which would eventually kill him," and that he had an enlarged prostate gland, but there is no evidence that these diseases

were caused by the injury to his leg. On the contrary, the evidence tends to show that they were of long standing and gradual development. The evidence is that arteriosclerosis, hardening of the arteries, and myocarditis were "the immediate causes"—"the primary causes" of his death, and that multiple arthritis was a contributing cause. And in the light most favorable to claimant, the evidence is that if the accident did contribute at all, it was, in the opinion of Dr. O'Briant, who attended Gilmore in his last illness, a remote cause—"remote . . . not immediate or direct cause." Even so, this opinion is, as the doctor said, based upon the assumption that there was retention of urine in the bladder. And the only evidence of such retention related to the period when Gilmore was confined in the hospital, July 17 to July 30, for afterwards, when Dr. Brown last saw him, before he went to Duke, he was not complaining of his bladder trouble, and Dr. O'Briant did not treat him for it in his last illness.

The cases of *Williams v. Thompson,* 200 N. C., 463, 157 S. E., 430; *Clark v. Cotton & Woolen Mills,* 204 N. C., 529, 168 S. E., 816; and *Doggett v. South Atlantic Warehouse,* 212 N. C., 599, 194 S. E., 111, are distinguishable in factual situation from that in present case.

(2) As to second question, the fundamental condition upon which compensation may be allowed under section 38 of the North Carolina Workmen's Compensation Act is that death must have resulted "proximately from the accident." Under that section there are two conditions precedent to allowance of compensation: (1) If death results proximately from the accident and within two years thereafter, compensation will be granted; (2) if death results proximately from the accident, while total disability still continues and within six years after the accident, compensation will be granted. But, in either event, whether death occurs within two years after the accident, or while disability still continues, and within six years after the accident, compensation is only allowed for death which "results proximately from the accident."

Under these rules, death having occurred within two years after the accident, the case in hand is tested by the first condition. The second condition is not applicable. Hence, holding as we do, upon evidence of record, that the death of Gilmore did not result proximately from the accident, compensation is not allowable.

While the North Carolina Workmen's Compensation Act should be liberally construed so as to effectuate the legislative intent which is to be ascertained from the wording of the Act, the rule of liberal construction cannot be extended beyond the clearly expressed language of the Act. "It is ours to construe the laws and not to make them," *Hoke, J.,* in *S. v. Barksdale,* 181 N. C., 621, 107 S. E., 505; *Wilson v. Mooresville, ante,* 283, and cases cited.

It is proper to note that the Industrial Commission, finding that notice of claim therefor as required by the statute was not filed by the employee or by claimants, denied an award for disability between the date of injury and date of death of employee, and for medical expense, and that claimants have not appealed.

The judgment below is

Reversed.

IRENE BRADY, ADMINISTRATRIX OF THE ESTATE OF EARLE A. BRADY, DECEASED, v. SOUTHERN RAILWAY COMPANY.

(Filed 16 December, 1942.)

1. Master and Servant § 27: Negligence § 19a—

The breach of the duty to guard against injury to others imposes responsibility for consequences which are probable, and which could reasonably have been foreseen, according to ordinary and usual experience, but not for consequences which are merely possible according to occasional experience.

2. Master and Servant § 27—

In an action for damages, based on the wrongful death of a brakeman by the negligence of defendant railroad, where the evidence was that a freight car, being switched and on which the brakeman was riding, struck the blunt, or "wrong" end of an unlighted, closed derailer, in good mechanical order and of the ordinary type in general and approved use, which (derailer) should have been opened by the brakeman before switching, causing the freight car to be thrown with such force against the opposite rail, which was worn, as to derail the car, resulting in the death of the brakeman. *Held:* Defendant's motion of nonsuit should have been granted, as reasonably prudent foresight could not have anticipated the result.

3. Same: Negligence § 19c—

Where plaintiff's intestate, a brakeman, was killed by the derailment of the front trucks of a freight car, upon which he was riding in switching operations, and all of the facts relating to the derailment were known, alleged and set forth in evidence and the case tried on the grounds selected by plaintiff, without reference to *res ipsa loquitur*, the facts do not make out a case of *prima facie* negligence and carry the case to the jury on the theory that "the thing speaks for itself."

4. Master and Servant § 28: Negligence § 10—

The plaintiff fails to show that the injury and death of her intestate was the proximate result of defendant's negligence, when the evidence points unerringly to the conclusion that her intestate himself failed to open the derailer or to see that it was open, it being his duty so to do before signaling the engineer to move the cars, hence he conclusively assumed the risk of the resulting injury and death.

APPEAL by defendant from *Warlick, J.,* at March Term, 1942, of GUILFORD. Reversed.

This was an action under the Federal Employers' Liability Act to recover for the wrongful death of plaintiff's intestate alleged to have been caused by the negligence of the defendant.

Plaintiff's intestate was a brakeman employed by the defendant in interstate commerce, and was killed while so engaged. It was alleged that while he was a member of the crew of a freight train and engaged in shifting cars, at night, at Hurt, Virginia, a freight car on which he was standing, in order to signal switching operations, struck a derailer, and that in consequence the car was derailed, and he lost his life. The complaint alleged that his injury and death was due to the negligence of the defendant in that it failed to provide for him a reasonably safe place in which to work; that the track and instrumentalities at that point were worn and defective and the derailer improperly installed. It was also alleged that the defendant failed to provide a light or other warning to show that the derailer was at the time closed.

The defendant denied the several imputations of negligence, and also pleaded that plaintiff's intestate had assumed the risk of injury in the way in which he was injured, and that by his own negligence he had contributed to his injury and death.

Issues raised by the pleadings were submitted to the jury, and verdict rendered in favor of the plaintiff, finding that the death of plaintiff's intestate was due to the negligence of the defendant, that he did not assume the risk of being killed as alleged in the answer, nor by his own negligence contribute to his injury and death. Substantial damages for the benefit of the widow and dependent children of the decedent were awarded. From judgment in accordance with the verdict, defendant appealed.

Frazier & Frazier and D. E. Hudgins for plaintiff, appellee.
W. T. Joyner and R. M. Robinson for defendant, appellant.

DEVIN, J. The question chiefly debated on the appeal was whether the evidence offered by the plaintiff was sufficient to carry the case to the jury. The defendant assigns error in the failure of the court below to sustain its motion for judgment of nonsuit. The determination of this question requires a careful consideration of the evidence adduced at the trial as shown by the record before us. The material facts as thus made to appear may be stated as follows:

The plaintiff's intestate was a member of the train crew in charge of a freight train proceeding north, during the early morning hours of 25 December, 1938. There were thirty-seven cars in the train. The

crew consisted of five, viz.: engineer, fireman, conductor, flagman, and the brakeman, who was plaintiff's intestate. No other person was on or about the train at the time of the injury.

At Hurt, Virginia, the train stopped and backed into a siding or pass track to permit a northbound passenger train to pass. At this place the railroad ran north and south and there were four tracks, counting from west to east, as follows: house track, main line southbound, main line northbound, and a pass track, the easternmost of the tracks. On this pass track, near its northern terminus and a short distance south of the switch was located, on the east rail, a derailer. A derailer is a heavy metal safety device placed near the rail and controlled by a lever to enable it to be pulled close against the rail, so that when so placed the inclined groove and flange on the derailer will serve to guide a car wheel onto and across the top of the rail, and derail the car. Its purpose is to prevent freight cars on the sidetrack, which for any reason might be set in motion, from rolling down the track and onto the main line. The derailer is placed near the downgrade end of the side or pass track, and is ordinarily kept closed—that is, pulled up to the rail—so that a car moving toward the switch would be derailed.

On this particular pass track the grade was northward, and the derailer was connected to the east rail and so placed that when closed it would derail a car moving northward, that is with the derailer's upward inclination and flange, for the guidance of a car wheel, extending northward and outward. On the opposite side of the derailer, called by the witnesses the "blunt" or "wrong end," instead of presenting an inclined surface and flange, the derailer presented an end vertically abrupt, extending some three or four inches above the level of the crossties on which it was placed and sloping to the right. It appears from the photograph used in evidence that the flange designed to guide the car wheel over the rail when approaching from the "right" side, would tend to deflect the wheel in the opposite direction when the derailer was struck on the "wrong" end.

The freight train arrived at this point about 6 a.m. and the occurrences complained of took place while it was yet dark, and the trainmen used lanterns. The switching operations there were performed in the following sequence: The freight train pulled past the northern switch of the pass track, and the conductor got off, opened the switch and opened the derailer. The train backed into the pass track, and the switch and derailer were closed by the brakeman. There were twelve freight cars at the south end of the pass track which were to be picked up by this freight train. These were south of the south end of the train. The conductor and flagman then went to check up these twelve cars, seventy-five or eighty car lengths from the north end of the pass

track. After the passenger train passed, the north switch and the derailer were opened by the brakeman. The engineer, whose testimony was offered by the plaintiff, said he saw the brakeman set the derailer open. The freight train then pulled out on the main line, the switch was closed, and the freight train backed south along the main line track, south of a highway crossing. The brakeman then cut off four empty gondola shaped coal cars next to the engine, and the engineer with these empties, the brakeman on the rear, moved north beyond the switch for the purpose of backing into the pass track and picking up the twelve freight cars, which with the four empty coal cars were to be carried to Lynchburg. On this movement, the brakeman got off at the switch, opened the switch and got on the end of the rearmost coal car, standing on the metal step, on the southeast corner of the car, and with his lantern signaled to the engineer the movement of the engine and cars into the pass track. This cut of cars was moving at the rate of three or four miles per hour. When the lead coal car on which the brakeman was standing reached the derailer, it was found to be closed, and the wheels of the car struck the blunt or wrong end of the derailer, with this result. The front trucks of the lead coal car were derailed to the west, the brakeman was thrown off in some way, and was crushed under the wheels. The rear trucks of the lead coal car remained on the track. The front trucks of the next car were derailed to the east, the front trucks of the third car were derailed to the west, and those of the fourth car to the east. The rear trucks of each of the cars remained on the track. No rails were broken or track torn up.

Here a pertinent question arises. When the freight train pulled out of the pass track onto the main line, who closed the derailer? No witness has testified he saw the brakeman do so, but the conclusion seems inescapable from the circumstances disclosed by the testimony of the engineer (offered by plaintiff) that no one else could possibly have done so. He was the last man to touch the derailer. He opened it, together with the switch, for the freight train to pass out. He closed the switch for the movement of the train south on the main line. It was his job to look out for the switch and the derailer. When the cut of empty cars a few minutes later came back into the pass track the derailer was found closed. No one else but the brakeman had been there or had opportunity to touch it. The engineer and fireman were on the engine. The conductor and flagman were more than a quarter of a mile away. The conductor was checking the twelve cars, and the flagman flagging the south end of the freight train. There was no other trainman, or any other person, present. The opening and closing of the derailer was effected by a lever operated by hand. It was in no sense automatic.

The gravamen of plaintiff's complaint and the evidence upon which she bases her case was that the west rail of the pass track, opposite the derailer, was worn and defective, causing a slope westward, so that when the front wheel of the coal car struck the blunt end of the derailer, the defective condition of the west rail, in its relation to the derailer, caused the car to jump the track to the west; that if the west rail had been level and of proper height the wheels would likely have remained on the track in spite of the jolt from contact with the wrong end of the derailer. The plaintiff offered the testimony of two witnesses to the effect that the west rail was old and worn, that the ball or top of the rail was very thin and badly worn; that metal slivers were picked from the top of the rail and along on each side; that the crossties on which the derailer was resting slanted to the west; that the west rail had the date of 1912 stamped on it.

The plaintiff then presented two experienced railroad brakemen who had had ten years' experience as brakemen, switching on yards and making up trains, and offered them as expert witnesses. The court found them to be experts and permitted them to express their opinions in response to hypothetical questions. The hypothetical question propounded to each of those expert witnesses embraced the facts in evidence and was based on the finding by the jury that "the west rail on the pass track and particularly the ball and edges of the same were decayed, rusty, old and badly worn down and worn away; that the crossties, on which the pass track at and about the point where the derailer was located, sloped to the west." The question called for the expression of an opinion on these assumed facts as to what caused the derailment of the car upon which the deceased was riding. One of the expert witnesses, Mr. Holden, replied: "In my opinion it was caused by the inferior rail—that is, the rail opposite the derailer on the pass track." The other witness, Mr. Heritage, replied: "The derailment would be due to the defective rail on the west side." This witness also testified, from an examination of a photograph which had been offered to illustrate the testimony of witnesses, that on the derailer there was a groove which the flange of a car wheel coming from the wrong direction could follow if in line and this would tend to cause the wheel to come down on the rail, but if the derailer was out of line to the west it would have a tendency to twist the wheel that way, and the defective west rail would not have enough "ball" to hold the wheel and it would be likely to climb over and cause derailment; that the worn condition of the rail would tend to widen the gauge. He further testified that by reason of defective or worn condition of the west rail, when a car hit the wrong end of the derailer, it might cause the wheels to go outside the flange on the derailer, instead of into the groove, and thus throw the car to the west.

However, to cause the wheel on the car coming in contact with the wrong end of the derailer to go outside the flange, the opposite rail would have to be badly defective—that is, three-quarters of an inch would have to be worn away from the ball of the rail. The original width of the ball would be two and a half to two and three-quarters inches wide. He also testified that it was the duty of the brakeman to see that the derailer was open before signaling the engineer to back into a pass track.

Neither of these expert brakemen had seen more than two or three instances in their long experience where car wheels had struck the wrong end of a derailer. It appeared that that was never intended, was always to be avoided, and rarely happened. The derailer was not designed to afford passage over it by a wheel coming from the wrong direction.

There was no evidence that the gauge of the rails had been affected. There does not seem to be any evidence, or allegation, that the derailer itself was other than the ordinary type of derailer in general and approved use by railroads in this section, nor that there was anything broken or out of repair about this solid piece of iron or the lever by which it was controlled.

It may be observed that the rails on a pass track, as well as on all other tracks, are placed for the purpose of providing means for the passage of trains and cars. While there was evidence here that the west rail on the pass track opposite the derailer was old and worn, it had proved adequate to bear the weight of a long freight train and heavy engine which twice passed safely over it immediately before the four empty coal cars were derailed. Was the defendant negligent in failing to foresee that if the wheel of a freight car should strike the wrong or blunt end of the derailer, the worn place in the west rail opposite would cause the car to be derailed? Could the defendant, in the exercise of due care, have foreseen that retaining on its pass track a rail which was worn on top, but adequate for the passage over it of trains, would cause the derailing of a freight car and injury to a trainman in the unusual event the freight car should strike the wrong end of a derailer? The defects in the rail could only have caused injury in the event the wheels of a car struck the derailer on the blunt end, that is, coming from the opposite direction from that in which the derailer was intended to serve its useful purpose. Striking a derailer from the wrong direction, it appears from the evidence, was so unusual, so contrary to the purpose for which the derailer was placed and the use to which it was applied, that prevision to guard against possible consequences of such a contingency could hardly be charged to the railroad company. The contingency was remote so that we feel constrained to express the opinion that the duty to guard against it, in the exercise of due care, was more than should have been imposed upon the defendant, and that responsi-

bility should not attach for the unexpected consequences, however deplorable.

Where the duty to guard against injury to others grows out of certain relationships and circumstances, breach of such duty imposes responsibility for consequences which are probable, and which could reasonably have been foreseen, according to ordinary and usual experience, but not for consequences which are merely possible according to occasional experience. *Stone v. R. R.,* 171 Mass., 536, 41 L. R. A., 794. "The rule is that one is bound to anticipate those consequences of his negligent act or omission which in the ordinary course of human experience, might reasonably be expected to result therefrom." 38 Am. Jur., 710. Foreseeability is a necessary element in actionable negligence, and must be made to appear before liability can be imposed for the consequences of a wrongful act or omission. This principle was stated in *Osborne v. Coal Co.,* 207 N. C., 545, 177 S. E., 796, as follows: "The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor." This statement of the law has been frequently cited with approval, and the principle applied in numerous cases. *Butner v. Spease,* 217 N. C., 82, 6 S. E. (2d), 808; *Guthrie v. Gocking,* 214 N. C., 513, 199 S. E., 707; *Newell v. Darnell,* 209 N. C., 254, 183 S. E., 374; *Beach v. Patton,* 208 N. C., 134, 179 S. E., 446. *Justice Cardozo,* in *Bird v. St. Paul Fire & Marine Ins. Co.,* 224 N. Y., 47, expressed the same idea in these words: "The wrongdoer may be charged with those consequences only within the range of prudent foresight." In *Milwaukee & St. Paul Ry. Co. v. Kellogg,* 94 U. S., 469, it was said that "it must appear that the injury was the material and probable consequence of the negligent or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." From *Stone v. R. R., supra,* we quote, "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable." *Snyder v. R. R.,* 36 Col., 288.

"The substance of it all, stated and restated in various ways, is that negligence carries with it liability for consequences which, in the light of attendant circumstances, could reasonably have been anticipated by a prudent man, but not for casualties which, though possible, were wholly improbable. One is not charged with foreseeing that which could not be expected to happen." *Wyatt v. Chesapeake & Potomac Tel. Co.,* 158 Va., 470, 163 S. E., 370.

Negligence was also charged against the defendant for failure to light the derailer. It was testified, however, that lights were not used on derailers outside of yards, and the engineer testified he had not seen lights on a derailer. The fact that there was no light on the small target indicating the position of the derailer in question, under the circumstances of this case, would not alone be evidence of negligence, in the absence of showing that placing lights on such targets was in accord with general and approved usage. *Pleasants v. Barnes,* 221 N. C., 173. The testimony of a witness that at some time subsequent to the injury he saw, in the daytime, a light on this target could not be held competent to show negligence. *Parrish v. R. R.,* 221 N. C., 292 (299), 20 S. E. (2d), 299; *Shelton v. R. R.,* 193 N. C., 670, 139 S. E., 232; *Lowe v. Elliott,* 109 N. C., 581, 14 S. E., 51.

There was no evidence that the derailer in this case would not properly perform the function for which it was designed and installed, as was the case in *Mumpower v. R. R.,* 174 N. C., 742, 94 S. E., 515.

While the plaintiff does not invoke the doctrine of *res ipsa loquitur* or refer to it as ground for denial of defendant's motion for nonsuit, in view of the evidence that plaintiff's intestate came to his death as the result of the derailment of a freight car, we have considered the question, and reach the conclusion that the principle expressed by that phrase is inapplicable to the facts of this case. Here, all the facts relating to the derailment of the car are known, and the particular cause thereof is alleged in the complaint, and fully set forth in plaintiff's evidence. The case was fought out on ground selected by the plaintiff. Under the circumstances of this case we are not inclined to hold that the fact of the derailment of the front trucks of the freight car on which the brakeman was riding is alone sufficient to make out a *prima facie* case of actionable negligence and carry the case to the jury on the theory that "the thing itself speaks." *Baldwin v. Smitherman,* 171 N. C., 772, 88 S. E., 854; *White v. Hines,* 182 N. C., 275, 109 S. E., 31; *Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11.

In addition to what we must regard as the failure of the plaintiff to show that the injury and death of her intestate was the proximate result of actionable negligence on the part of the defendant, there is another ground upon which we think the plaintiff's case must fail. The plaintiff's evidence points unerringly to the conclusion that the brakeman, himself, unfortunately failed to open the derailer, or to see that it was open, before he signaled the engineer to move the four cars into the pass track. Hence, having himself handled the derailer, and having neglected to place it open for this last movement of cars, as it was his duty to do, he would be conclusively deemed to have assumed the risk of an injury which was caused by his own act or omission. *Southern Ry. Co. v.*

Youngblood, 286 U. S., 313; *Unadilla Valley Ry. Co. v. Caldine,* 278 U. S., 139, 73 L. Ed., 224 (note). And his negligence in this respect would be regarded as the sole proximate cause of his injury. *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88; *Butner v. Spease, supra; Jeffries v. Powell,* 221 N. C., 415. The amendment of 1939 to the Federal Employers' Liability Act is inapplicable here. *McCrowell v. R. R.,* 221 N. C., 366 (377).

This case is an important one to the parties, and its decision is not without difficulty. Counsel for both plaintiff and defendant presented their respective causes with ability, and their excellent briefs have been of assistance. After careful consideration, we reach the conclusion that defendant's motion for judgment of nonsuit should have been allowed, and that the judgment of the Superior Court must be

Reversed.

EUGENE WALL, ADMINISTRATOR OF THE ESTATE OF JAMES WALL, DECEASED, v. M. C. BAIN.

(Filed 16 December, 1942.)

1. Negligence § 19a: Trial § 22a—

In passing upon the negligence of defendant on a motion to nonsuit, the evidence must be taken in the light most favorable to the plaintiff, who is entitled to all reasonable inferences therefrom.

2. Same—

While the statute, C. S., 567, requires on a motion to nonsuit, a consideration of the whole evidence, it is clear that only that part of the defendant's evidence which is favorable to plaintiff can be taken into consideration, since, otherwise, the court would pass upon the weight of the evidence, the credibility of which rests solely with the jury.

3. Automobiles §§ 8, 9a—

It is the duty of the driver of a motor vehicle not merely to *look* but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen.

4. Automobiles §§ 9g, 18g—

Where one backs a truck along a city street, in a traffic lane devoted to travel in the opposite direction, the operation involves a greater danger than ordinary travel, and, in making such backward movement, the care required must be adequate to the danger involved. *Held:* The granting of a motion of nonsuit erroneous, where the driver of a truck stopped on a sharp downgrade of a city street, right side, and, after he and a companion had looked back on each side from the cab of the truck seeing no one, backed the truck about three feet, killing instantly a delivery boy coming after the truck on a bicycle, which showed signs of skidding for twenty-nine feet.

WALL *v.* BAIN.

APPEAL by plaintiff from *Johnson, J.*, at 21 September, 1942, Term, of GUILFORD. Reversed.

This is an action to recover damages for the alleged negligent injury to plaintiff's intestate, resulting in death. The negligence is alleged to have consisted in the operation of an oil truck by the defendant Bain, by which a collision was caused between the oil truck and a bicycle on which plaintiff's intestate was riding.

We summarize the evidence pertinent to decision:

The incident occurred on South Spring Street, near the intersection of Walker Avenue, in the city of Greensboro. At that point Spring Street runs north and south, is thirty-four feet wide, paved with asphalt, with a steep downgrade going north. The pavement was wet. At the time of the accident, the defendant Bain, accompanied by Joe Williams, had driven his truck along the right side of the street past a driveway, had stopped and was backing the truck in the opposite direction with the apparent purpose of entering the driveway. In doing so, he ran over and killed James Wall, a boy about sixteen years old, employed in delivering groceries, who was approaching on a bicycle on that side of the street. The boy was instantly killed and bore marks on his body showing that the rear wheel of the truck had passed over him. The bicycle was caught under the rear axle of the truck and was mashed to pieces, requiring some considerable trouble in pulling it out, and groceries were scattered over the ground from the basket in which he had been carrying them for delivery.

There were skid marks made by the bicycle for twenty-nine feet before the collision. The indications were that the boy was traveling along Spring Street in the same direction as the truck had been traveling and on his right side. He had room of twenty-four to twenty-five feet in which to pass the truck. For some distance the skid marks showed that the bicycle was skidding sideways—a wider skid near the truck. This skid mark started some eleven feet from the east curb, skidding toward the back of the truck and indicating that the brakes of the bicycle had been put on. The skid marks ended under the rear of the truck. "In other words, it was a straight line down to about 5 or 6 feet behind the truck and then it skewered (skewed) around sideways."

The evidence indicated that in order to carry the bushel basket of groceries, the boy had to hold it on the handlebars or on the frame of the bicycle with one hand while holding the handlebar with the other.

Several pictures of the scene were made by the officers before the body was removed and while the truck was standing in the position where it had been stopped, with the inner rear wheel some three or three and one-half feet from the curb, and the fore wheel around four or four and one-half feet from the curb. These were exhibited to the jury to illus

trate the evidence of the witnesses. The indications were that the boy might have had an unobstructed view of the truck over the basket he was carrying.

Some details of the occurrence were furnished by the defendant Bain, and Joe Williams, who was occupying the seat in the cab of the truck with him, and these were given to the jury through the testimony of H. L. Purcell and J. H. Burton, police officers of the city of Greensboro, who investigated the occurrence immediately after it happened. Williams' statement was made in the presence of Bain. From these admissions, it appears that Bain had driven his car past the driveway above mentioned and stopped below it in order to back into it and deliver some oil; that Bain looked to see if anyone was coming from the rear on his side and Joe looked out his window on his side to see if anyone was coming; that they did not see anyone coming at all. Bain stated that he had the truck in reverse at the time he looked, and when he did not see anyone coming, he started backing up slowly and had backed three or four feet when he bumped over something that felt like he had run over a rock; that he immediately stopped the truck and Joe Williams got out on his side and said, "Carson, you have run over a boy."

Both Bain and Williams said they did not see a soul on the street at that time, or any automobile, or any living human being.

More formal matters of proof are not necessary to the statement.

At the close of the plaintiff's evidence, the defendant moved for judgment as of nonsuit upon the evidence, and the motion was allowed. The defendant introduced no evidence.

From the judgment, the plaintiff appealed, assigning error.

Z. H. Howerton and Harry R. Stanley for plaintiff, appellant.
Sapp, Sapp & Atkinson for defendant, appellee.

SEAWELL, J. The appeal presents two questions: Whether there was any evidence of negligence on the part of defendant to take the case to the jury, and whether the conduct of the boy who met his death in the accident was, as a matter of law, contributorily negligent.

There could be little dispute as to the principles of law involved in the decision of these questions. It is true, as suggested in defendant's brief, that what constitutes negligence is a matter of law; and this principle will be applied in examining plaintiff's evidence on a question of nonsuit. But there are other more searching formulæ to be applied before the court comes to a conclusion.

In passing upon the negligence of the defendant on a motion to nonsuit, it is elementary that the evidence must be taken in the light most favorable to the plaintiff and that plaintiff is entitled to all reasonable

inferences therefrom. *Heilig v. Insurance Co., ante,* 231; *Gorham v. Insurance Co.,* 214 N. C., 526, 200 S. E., 5; *Inge v. R. R.,* 192 N. C., 522, 135 S. E., 522. While the statute, C. S., 567, requires a consideration of the whole evidence, it is clear that only that part of the defendant's evidence which is favorable to the plaintiff can be taken into consideration, since, otherwise, the court would necessarily pass upon the weight of the evidence, the credibility of which rests solely with the jury. *Davidson v. Telegraph Co.,* 207 N. C., 790, 178 S. E., 603. Taking the case away from the jury, while a duty sometimes unavoidable, is always a delicate task, involving much more than a strong feeling that the plaintiff ought not to recover. The power of the court is limited to the ascertainment whether there is any evidence at all which has probative value in any or all of the facts and circumstances offered in the guise of proof. *Willis v. R. R.,* 122 N. C., 905, 908, 29 S. E., 941; *Gates v. Max,* 125 N. C., 139, 34 S. E., 266. It is not a matter of passing upon the weight of evidence when it has weight. That power is denied us. *Willis v. R. R., supra.* It is a matter of dropping the proffered proof into evenly poised balances to see whether it weighs against nothing. *Cox v. R. R.,* 123 N. C., 604, 31 S. E., 848, and cited cases. The result often brings a consequence not to be desired, sometimes not even consonant with our sense of justice, but when it is shocking to the conscience, the judges of the Superior Court have a remedy with which we are not entrusted. C. S., 591; *Anderson v. Holland,* 209 N. C., 746, 184 S. E., 511; *Brantley v. Collie,* 205 N. C., 229, 231, 171 S. E., 88.

It is amazing how many cases may be marshaled on either side of this difficult proposition, supposed to be on all fours with the case presented for decision. But the variations in factual situations are practically unlimited, and while these cases are often valuable as repeating and emphasizing general principles of law applicable to the subject, nevertheless, as precedents for the evaluation of the evidence in any particular case, for the most part, from the very nature of the thing, they speak with uncertain authority. It is the privilege of the Court to make its own appraisal of the instruments of proof in each case as the circumstances may demand, under the guidance of the principles by which its powers are defined and limited.

In the case at bar, the Court is of the opinion that there is evidence from which the jury might infer negligence on the part of the defendant.

No reasonable person would move along the highway in reverse for any length of time, and in the wrong traffic lane, as a preferable mode of travel. That would be negligence *per se.* But although the defendant had not undertaken such an unusual feat, and had not gone far

he was, nevertheless, backing his truck along the street in a traffic lane devoted to travel in the opposite direction—an operation which involved a greater danger than ordinary travel, both because of the probability of oncoming traffic and the limited opportunity for outlook; and in protection of that movement, he must exercise ordinary care. To bring him within the protection of the rule of the ordinarily prudent man, that care should have been adequate to the danger involved. It is to be noted that the defendant might have turned into the driveway he intended to use by a forward movement, and the city ordinance required him to do so. Instead, he chose to drive completely past the driveway, stop and back up the street—a movement, the necessity of which is unexplained. Having chosen this mode of operation, his own statement is that he looked back up the street on his own side, and Joe Williams looked up on his side, and neither saw anyone coming; whereupon, he proceeded with the backward movement of the truck up the street.

The requirements of prudent operation are not necessarily satisfied when the defendant "looks" either preceding or during the operation of his car. It is the duty of the driver of a motor vehicle not merely to *look*, but to *keep an outlook* in the direction of travel; and he is held to the duty of seeing what he ought to have seen. In *Taulborg v. Andresen* (Neb.), 228 N. W., 528, 67 A. L. R., 642, this duty is expressed as follows: "It is his positive duty to look backward for approaching vehicles and to give them timely warning of his intention to back, when a reasonable necessity for it exists; and he must not only look backward when he commences his operation, but he must continue to look backward in order that he may not collide with or injure those lawfully using such street or highway. 42 C. J., 935; Blashfield, Cyc. Auto. Law, pp. 529-533; Berry, Auto., 4th Ed., secs. 235, 954; Huddy, Auto., p. 324; *Lee v. Donnelly*, 95 Vt., 121, 113 Atl., 542." *McManus v. Arnold Taxi Corp.*, 82 Calif. App., 215, 255 Pac., 755.

While the defendant states that neither of the occupants of the cab saw anyone approaching from up the street, the evidence, particularly that which is circumstantial and the fact that there was an almost immediate collision with the boy on the bicycle, raises a question to be dealt with by the jury whether the outlook satisfied the demands of prudence—whether it was too casual or not sufficiently sustained, and whether the view was partly obstructed by the body of the truck. The volume of traffic on Spring Street at any time is something that is left to conjecture. It is, however, a paved street in a populous city, and even if it were a highway in the country, traffic might be expected in the lane or part of the highway devoted to that purpose. In the case at bar it was unforeseen, rather than unforeseeable.

Since *Neal v. R. R.*, 126 N. C., 634, 36 S. E., 117—a case cited in our reports perhaps a hundred times—the Court has undertaken in proper cases to pass upon the conduct of the plaintiff as contributorily negligent when reasonable minds could draw only a single inference, and that unfavorable to him, from his own evidence and the aiding evidence of the defendant, considered in the light most favorable to the plaintiff. However, contributory negligence on the part of the plaintiff is an affirmative plea and the burden is upon the defendant to allege it and prove it. *Farris v. R. R.*, 151 N. C., 484, 66 S. E., 457; *Boney v. R. R.*, 155 N. C., 95, 108, 71 S. E., 87. The situation is directly the opposite of that presented in passing upon the negligence of the defendant, as to which the burden, both of allegation and proof, is upon the plaintiff. While the standard of conduct is the same, we apprehend, as a practical matter, that the Court might have more difficulty in finding that the evidence of the conduct of the plaintiff's intestate affirmatively establishes contributory negligence as a matter of law than it might have in finding that there is no evidence of negligence on the part of the defendant to take the case to the jury. See *Neal v. R. R., supra.* The danger of a too apt deliverance of the Court upon that point is obviated in some states by laws which prohibit the practice. 12 Am. Jur., 281, section 583.

In the case at bar, however, we do not feel that the situation affords embarrassment. The indications are that the victim of the accident was much nearer than the occupants of the truck supposed him to be when Bain began the backward movement, since according to his own statement, he felt the jar of the truck in running over the boy and bicycle almost immediately afterward. There was no eyewitness to the part James Wall played in the accident resulting in his death. His conduct must be deduced from circumstantial evidence and, as has often happened before, from the handwriting of destiny on the street. There is much discussion as to the meaning of these marks left by the bicycle on the pavement. The defendant reads them as signifying contributory negligence on the part of the victim of the accident; we are not satisfied that they may not as well be interpreted as indicating an effort on the part of the rider of the bicycle to escape the sudden peril into which he was thrown by the negligence of the defendant, in which case the law would not make nice distinctions as to the wisdom of his conduct. *Clark v. R. R.*, 109 N. C., 430, 14 S. E., 43; *Pridgen v. Produce Co.*, 199 N. C., 560, 155 S. E., 247; *Enos v. Norton* (Cal. App.), 292 Pac., 276; 38 Am. Jur., Negligence, ss. 77, 194.

For these and other reasons which might be assigned, we do not consider the aspects of the evidence upon which the defendant depends to sustain the nonsuit—that the boy was carrying and holding a basket on

the handlebars or frame of the bicycle while directing it with one hand, that he had a clear and unobstructed vision of the truck over the basket, and that he had an apparent avenue of escape—are sufficiently established as contributing proximate causes of the injury and death to bring the evidence within the single inference rule which would justify us in taking the case from the jury.

There was error in nonsuiting the case on either ground advanced, and the judgment to that effect is

Reversed.

MRS. LOIS BEACHAM CALLIHAN, WIDOW, MARY ANN CALLIHAN AND SARAH LEE CALLIHAN, MINOR CHILDREN OF WILLIAM BEAUFORT CALLIHAN, DECEASED EMPLOYEE, V. BOARD OF EDUCATION OF ROBESON COUNTY, BITUMINOUS CASUALTY CORPORATION, STATE SCHOOL COMMISSION AND/OR DIVISION OF VOCATIONAL EDUCATION, BOTH SELF-INSURERS.

(Filed 16 December, 1942.)

Schools § 23: Master and Servant § 39f—

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and Federal Governments, and, as such sole employer, is liable, with its insurance carrier, under the Workmen's Compensation Act, for the death of such teacher from an injury by accident arising out of and in the course of his employment. School Machinery Act of 1939, ch. 358, sec. 22.

APPEAL by Board of Education of Robeson County and Bituminous Casualty Corporation from *Johnson, Special Judge,* at 31 August, 1942, Term, of ROBESON. Affirmed.

This proceeding was brought before the Industrial Commission, under the Workmen's Compensation Act, for compensation to the widow and two children of William B. Callihan, deceased, against the Board of Education of Robeson County, the State School Commission, the Division of Vocational Education, and the Bituminous Casualty Corporation, insurance carrier for the Board of Education of Robeson County. The State School Commission and the Division of Vocational Education are designated as self-insurers.

W. B. Callihan began employment in St. Pauls public school in Robeson County on 1 July, 1941, under a contract reading as follows:

"AGREEMENT BETWEEN COUNTY OR LOCAL BOARD AND TEACHER:

"I agree to teach agriculture in the St. Pauls School at a salary of $187.00 per month or $2,244.00 a year, with $200.00 in addition to salary to pay traveling expenses in visiting projects and doing community work.

"My salary will start July 1, 1941. If I fail to send in reports on time, it is my understanding that the State Board of Vocational Education will discontinue aid until the reports are received. Any amount of money deducted from the State and Federal Funds for the above reason will be deducted from my salary.

Signed: W. B. CALLIHAN,
(Teacher of Agriculture.)
C. L. GREEN,
(County Superintendent.)
ROY H. THOMAS,
(State Supervisor Vocational Agriculture.)"

Accompanying this agreement there was an application by the local county board for State and Federal funds to maintain vocational agricultural instruction in St. Pauls School for the year 1941-1942, which took the form of an agreement, as follows:

"STATE DEPARTMENT OF PUBLIC INSTRUCTION
Division of Agricultural Education
State College Station
Raleigh, N. C.

APPLICATION FOR AID IN VOCATIONAL AGRICULTURE

AGREEMENT BETWEEN COUNTY OR LOCAL BOARD AND
STATE BOARD FOR VOCATIONAL EDUCATION

"We hereby make application for State and Federal Funds to maintain instruction in vocational agriculture in the St. Pauls School for the year 1941-1942. We agree to furnish the necessary equipment, rooms, provide one-third of the teacher's salary and provide satisfactory traveling allowance for the teacher to visit home projects and do community work.

Signed:
A. B. McRAE
(Chairman of School Board)
Elrod, N. C.
(Post Office).

C. L. GREEN,
(County Superintendent)
Lumberton, N. C.
(Post Office).

Agreed to this 1st day of July, 1941."

With this application the contract with Callihan was incorporated, and the following commitment was made:

"THIS INFORMATION TO BE FILLED IN BY THE STATE SUPERVISOR:

"On the basis of the above salary, the St. Pauls School will receive a total of $1,496.00 in quarterly payments.

Approved: ROY H. THOMAS,
(State Supervisor, Vocational Agriculture)."

On 2 October, 1941, Mr. Callihan came to his death in an automobile accident on the public highway en route from St. Pauls to Lumberton, in the same county, at the instance of Supervisor Osteen to attend a monthly meeting in the latter town in connection with his vocational work. There was evidence tending to show that the injury and death were caused by accident arising out of and in the course of his employment, and while discharging the duties of the employment.

The Board of Education of Robeson County carried employment insurance with its codefendant Bituminous Casualty Corporation, the latter on the face of the policy agreeing:

"(a) To pay promptly to any person entitled thereto under the workmen's compensation law and in the manner therein provided the entire amount of any sum due and all installments thereof as they become due.

"1. To such person, because of the obligation for compensation for any such injury imposed upon or accepted by this employer under such of certain statutes as may be applicable thereto, cited and described in an endorsement attached to this policy, each of which statutes is herein referred to as the workmen's compensation law, and

"2. For the benefit of such person, the proper cost of whatever medical, surgical, nurse or other hospital services, medical or surgical apparatus or appliance and medicine, or in the event of fatal injury, whatever funeral expenses are required by the provisions of such workmen's compensation law."

The face of the policy also contains the following provision:

"It is agreed that all of the provisions of each workmen's compensation law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation

or other benefits for any personal injury or death covered by this policy while this policy shall remain in force. Nothing herein contained shall operate to so extend this policy as to include within its terms any workmen's compensation law, scheme or plan not cited in an endorsement hereto attached."

The policy carries further agreements as to indemnity between employer and insurer not necessary to this statement.

On the policy is the following endorsement:

"Attached to and forming a part of Policy No. WC-89737, issued by the Bituminous Casualty Corporation, Rock Island, Illinois, to Robeson County Board of Education, Lumberton, N. C. Effective February 6, 1940 and notwithstanding anything contained in the policy to the contrary, it is understood and agreed that whereas the State of North Carolina may pay remuneration in whole or in part to all or a portion of the persons working in the named employer's schools, it is agreed that the insurance provided by the policy to which this endorsement is issued to form a part shall not provide workmen's compensation benefits as stated in said policy, to persons who are receiving their entire remuneration from the State of North Carolina at the time injury occurs, that the Company shall not be liable for a greater proportion of any such benefits than the remuneration paid by the named employer on the date of injury to the injured employee bears to the total remuneration received by the injured employee, both from the named employer and the State of North Carolina on date injury is sustained. Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or provisions of this policy other than as above stated.

BITUMINOUS CASUALTY CORPORATION
By: H. H. CLEAVELAND.
Dated February 7, 1940."

The School Machinery Act of 1939 contains the following provision pertinent to workmen's compensation liability:

"The county and city administrative units shall be liable for Workmen's Compensation for school employees whose salaries or wages are paid by such local units from local funds, and such local units shall likewise be liable for Workmen's Compensation of school employees employed in connection with teaching vocational agriculture, home economics, trades and industrial vocational subjects, supported in part by State and Federal funds, which liability shall cover the entire period of service of such employees. Such local units are authorized and empowered to

provide insurance to cover such compensation liability and to include the cost of such insurance in their annual budgets." Sec. 22.

It is in evidence from C. L. Green, Superintendent of the Robeson County Public Schools, that he interpreted the contract with Callihan as making him "an employee of Robeson County and the State of North Carolina," and that premiums on the policy were adjusted in that way.

The Full Commission construed the contract as making the Robeson County Board of Education sole employer, and held the endorsement on the policy as inapplicable to the law and facts of the employment. An award was made against the Robeson County Board of Education and Bituminous Casualty Company on this basis, and these defendants appealed. In the Superior Court the award was sustained, and the defendants appealed to this Court, making several assignments of error.

John S. Butler for plaintiffs.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for the State School Commission and the State Board for Vocational Education, defendants.

E. M. Johnson for Board of Education of Robeson County, defendant.

Guthrie, Pierce & Blakeney for Bituminous Casualty Corporation, defendant.

SEAWELL, J. There is plenary evidence to sustain the finding that Callihan came to his death from an injury by accident arising out of and in the course of his employment, and our review on that point can go no further. *Blevins v. Teer,* 220 N. C., 135, 16 S. E. (2d), 659; *Miller v. Caudle, ibid.,* 308, 17 S. E. (2d), 487. It is stipulated that plaintiffs are dependents.

The main controversy here is over the proper construction of Callihan's contract of employment. Does the fact that the ultimate source of two-thirds of the money expended by the local board in paying his salary is the State, or the State and the Federal Government, constitute the State a two-thirds employer, and is the remuneration paid in part by the State?

The answer to this question is, however, unnecessary to a decision of the appeal of the local board. Section 22 of the School Machinery Act of 1939 purports to make the local unit—in this case, the Robeson County Board of Education—liable "for Workmen's Compensation of school employees employed in connection with teaching vocational agriculture, home economics, trades and industrial vocational subjects, supported in part by State and Federal Funds, which liability shall cover the entire period of service of such employees." The law is based

on the equitable principle that the fund provided for State-wide support of the public schools, most of which do not enjoy the privilege of vocational instruction as part of the curriculum, should not bear a burden more appropriate to a local enterprise, to which the State has given its aid. At any rate, the Legislature had the power to put liability on the local unit, and it has done so. In the face of this statute, the appeal of the Robeson County Board of Education is without merit.

It appears from the record that vocational instruction in the schools fortunate enough to have that feature is maintained by a fund, one-third of which is raised by the local unit and two-thirds contributed by the State, of which one-half is a gift in aid by the Federal Government. The contract of employments purports to be "An Agreement Between County or Local Board and Teacher," and the Industrial Commission so construed it. In view of the fact that the State did not undertake to pay Callihan anything as salary or remuneration, but merely agreed to furnish the St. Pauls School $1,496.00 in quarterly payments, "on the basis" of the salary the local board, by accepting Callihan's offer, had agreed to pay, we think the construction placed on the various commitments evidenced by these related documents is reasonable, and we are in agreement with that view. We regard the attitude, and the relation, of the State toward local school enterprises seeking to afford vocational training as being very similar to that of the Federal Government toward the same project, resulting in a mere gift in aid. The fact that the State follows its investment with suitable supervision does not make it an employer. It does the same for the ninth month of school financed by local taxation.

Under this construction the Robeson County Board of Education was the sole employer of Callihan and, while obtaining the funds in part from local taxation and in part from State and Federal contributions, paid his remuneration—a factual situation to which the endorsement on the policy of insurance does not apply, however pertinent it may be to other parts of section 22, relating to the liability of the State and local units where the salary of the teacher is partly paid by each.

The judgment of the court below sustaining the award is

Affirmed.

MRS. NAN W. STEWART v. LINCOLN ROBERT STEWART, EXECUTOR OF THE ESTATE OF R. K. STEWART, DECEASED.

(Filed 16 December, 1942.)

1. Husband and Wife § 6a—

A man and a woman, contemplating marriage, may enter into a valid contract with respect to the property and property rights of each after marriage, and, in equity, such contracts will be enforced as written.

2. Husband and Wife § 6b—

Ante-nuptial agreements are to be construed liberally so as to secure the protection of those interests which, from the very nature of the instrument, it must be presumed were thereby intended to be secured.

3. Same—

Like other contracts, an ante-nuptial agreement should be construed to effectuate the intention of the parties. Words are to be given, *prima facie*, their ordinary meaning and, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.

4. Same—

Under an ante-nuptial agreement, which provided that the woman, if she shall survive her husband, shall receive the proceeds from certain life insurance policies, including accrued dividends, on her husband's life, but payable to his estate, specifically described by name, number and amount, she is entitled to receive, from her husband's estate, the full face value of such policies, including all accrued dividends, free and discharged from any and all amounts borrowed by her husband against such policies as security.

APPEAL by defendant from *Olive, Special Judge,* at August-September Term, 1942, of GUILFORD.

Controversy without action for recovery upon ante-nuptial agreement heard by consent before Olive, Special Judge, duly commissioned to hold the regular August-September Term, 1942, of the Superior Court of Guilford County. The facts agreed, sufficient for determination of this appeal, summarily stated, are these:

I. On 9 August, 1928, R. K. Stewart, as party of the first part, and Nan W. Farriss, as party of the second part, entered into an ante-nuptial agreement the terms of which are as follows:

"Whereas, a marriage is contemplated between the parties hereto, and the party of the first part has fully informed the party of the second part of his financial situation, including the amount of his assets, liabilities, and net income; and,

"Whereas, the parties hereto desire to make a fair and reasonable provision for the party of the second part, in lieu of the rights, which, after the consummation of said marriage, the party of the second part might, or could have, as wife, or widow, or otherwise, in the real and personal property which the party of the first part now has, or may hereafter own;

"Now, therefore, it is hereby mutually agreed as follows:

"First: That the party of the second part shall receive and accept from the estate of the party of the first part after his death, if she shall survive such party of the first part as his widow:

"The proceeds from certain policies of insurance upon the life of the party of the first part, including all accrued dividends, enumerated as follows:

"Policy No.	*Company*	*Amount*	*Beneficiary*
4832498-A	Metropolitan	5,000.00	Estate
174213	Jefferson Standard	1,000.00	Estate
176070	Jefferson Standard	1,000.00	Estate
2060674	Mutual Life	10,000.00	Estate

"And in addition thereto, the sum of $2,000.00 per annum shall be paid to the party of the second part so long as she may live, from the estate of the party of the first part, which amount shall be a charge upon the estate of the party of the first part, in place and stead of all rights which, as widow, the party of the second part might otherwise have, either as dower in the real estate of the party of the first part, or as a distributive share of the personal property of the party of the first part under any statute now or hereafter in force and effect.

"Second: That the party of the first part, his heirs or assigns, shall hold free from any claim, or right, of dower, inchoate, or otherwise, on the part of the party of the second part, all real property which he may now, or hereafter, own; and that the party of the second part will hereafter execute, or join as a party in, any instrument, which may be requested by the party of the first part, his heirs or assigns, for the purpose of divesting any claim of dower, inchoate, or otherwise, in said property.

"Third: That the party of the first part hereby agrees that the said monies derived from the policies of insurance set out above, together with the annuity of $2,000.00, shall be fully paid to the party of the second part, if she shall survive him as his widow, as soon after his decease as may be practicable; and said sum or sums, until paid, shall constitute a charge upon the entire estate, real or personal, of which the party of the first part may die seized or possessed.

"Fourth: That this agreement shall become effective, only in the event that the contemplated marriage between the parties hereto shall be solemnized."

II. The insurance policies described in the above agreement were in full force and effect, and "there were no liens or any obligations of any kind whatsoever" against them, "either to the insurance company or any person or company."

III. As contemplated in said ante-nuptial agreement the said R. K. Stewart and Nan W. Farriss intermarried on 12 August, 1928, and lived together as man and wife until his death on 6 September, 1941.

IV. R. K. Stewart died testate survived by the said Nan W. Stewart, his widow, and one son, Lincoln Robert Stewart, who was named, and who qualified, as executor of his last will and testament, dated 24 March, 1933, which was duly admitted to probate and recorded. Pertinent parts of the will are these:

"Item 2: Whereas by an ante-nuptial agreement dated August 9, 1928, I made provision for my wife, Nan W. Stewart, in consideration of which she released and relinquished all her dower and other rights in and to my estate, I now ratify said ante-nuptial agreement in every particular and declare that in no event is this will to be so construed as to make her, the said Nan W. Stewart, a devisee or legatee hereunder. I direct my executor, hereinafter named, to pay the sums specified in the said ante-nuptial agreement to the said Nan W. Stewart.

"Item 3: I give, devise and bequeath all my property of whatsoever kind and wheresoever situated, whether real, personal or mixed, to my son, Lincoln Stewart, otherwise known as Lincoln Robert Stewart, in fee simple. In the event that my said son, Lincoln Stewart, should predecease me, I give, devise and bequeath the property which would have been his hereunder to his children in equal shares.

"Item 4: I hereby nominate and appoint my son, Lincoln Stewart, otherwise known as Lincoln Robert Stewart, my lawful executor to execute this my last will and testament according to the true intent and meaning of same . . .

"Item 5: This will is made in contemplation of the fact that, in the event I should predecease my said wife, Nan W. Stewart, my estate must remain open and unsettled in the hands of my said executor, Lincoln Stewart, during the lifetime of my wife above named for the payment of the sums provided for in the aforesaid ante-nuptial agreement. I therefore confer upon my said executor, Lincoln Stewart, as full, absolute and unrestricted power and discretion in the management, control, investment and disposition of my estate as may be consistent with the provisions of the said ante-nuptial agreement."

V. On 12 April, 1937, R. K. Stewart, as evidence of money borrowed from it, executed to the Wachovia Bank and Trust Company, of High Point, North Carolina, his note in sum of $8,500, secured by an assignment of the insurance policies set out and described in the said antenuptial agreement of 9 August, 1928, which note, as renewed on 24 December, 1940, remained unpaid at the time of death of R. K. Stewart on 6 September, 1941. The proceeds of said loan were used in whole or in part by R. K. Stewart for the payment of a loan or loans obtained upon some or all of said life insurance policies from the companies issuing them, which loans were made subsequent to 9 August, 1928—the first from Metropolitan Life Insurance Company on 16 March, 1933, upon Policy No. 4,832,498-A, and the others subsequent to that date.

VI. The said Nan W. Farriss, now Nan W. Stewart, says she was not aware at any time of any loans which were secured by, or made a lien upon, the aforesaid policies.

VII. The beneficiary, "estate" of the insured, R. K. Stewart, named in said policies, remained and was never changed.

VIII. A controversy having arisen between Nan W. Stewart and Lincoln Robert Stewart, as executor of R. K. Stewart, deceased, as to her right to the face amount of said insurance policies and dividends and accumulations thereon, they, without prejudice to their rights specifically reserved each against the other, agreed (1) that Wachovia Bank and Trust Company should be paid the amount loaned to R. K. Stewart, as described in paragraph V above, (2) that Mrs. Nan W. Stewart should receive the balance of said face amount of the insurance policies plus dividends and accumulations thereon, and (3) that her right to the amount paid to Wachovia Bank and Trust Company as above agreed to be paid should be settled between the R. K. Stewart Estate and Mrs. Stewart by litigation.

IX. On 28 October, 1941, the face amount of said insurance policies, and dividends and accumulations thereon, amounting to $18,329.59, was collected by the Wachovia Bank and Trust Company and the executor, and, in accordance with the agreement as set forth in last preceding paragraph, $8,548.17 was paid to Wachovia Bank and Trust Company, and the remainder of said amount derived from said policies, $9,781.42, was paid to Mrs. Nan W. Stewart; and she, as plaintiff, contends that she is entitled to full proceeds of the insurance policies plus accumulations, and now demands and prays judgment that Robert Stewart, executor as aforesaid, as defendant, pay "to her out of the funds of the estate," the further sum of $8,548.17, that is, the difference between the sum of $18,329.59, so collected upon said insurance policies, and the amount of $9,781.42 so paid to her, with interest thereon from 28 Octo-

ber, 1941. On the other hand, defendant contends (1) that plaintiff had no vested interest in the life insurance policies until the death of R. K. Stewart; (2) that R. K. Stewart had the right to encumber the insurance policies as he did; and (3) that the proceeds of the insurance policies, under proper interpretation of the term as used in the ante-nuptial agreement was the sum of $9,781.42, which plaintiff received, and not the sum of $18,329.59, as she contends.

The court, being of opinion, upon the agreed case submitted without action, that plaintiff is entitled to recover of defendant the sum of $8,548.17, with interest thereon from 28 October, 1941, and that same is a charge upon the estate, real and personal, of which the defendant's testator, R. K. Stewart, died seized or possessed, entered judgment therefor in her favor.

Defendant appeals therefrom and assigns error.

Dalton & Lovelace and R. T. Pickens for plaintiff, appellee.
Louis J. Fisher, Jr., and Grover H. Jones for defendant, appellant.

WINBORNE, J. The only question debated on this appeal is as to the meaning of that part of the ante-nuptial agreement which provides that, if plaintiff survive R. K. Stewart as his widow, she shall receive and accept from his estate after his death the proceeds from certain policies of insurance on his life in which his estate was beneficiary.

The court below held in effect that it means that plaintiff should receive and accept the amount of money which, under the terms of the designated policies, was collectible, and which was collected thereon from the insurance companies, undiminished by the debt to the Wachovia Bank and Trust Company created by R. K. Stewart after the agreement was made. With this we are in accord.

In this State a man and woman, contemplating marriage, may enter into a valid contract with respect to the property and property rights of each after marriage, and, in equity such contracts will be enforced as written. As each has agreed, so shall he or she be bound. These are some of the cases in point: *Gause v. Hale,* 37 N. C., 241; *Hooks v. Lee* 43 N. C., 157; *Brooks v. Austin,* 95 N. C., 474; *Wright v. Westbrook,* 121 N. C., 155, 28 S. E., 298; *Harris v. Russell,* 124 N. C., 547, 32 S. E., 958; *Perkins v. Brinkley,* 133 N. C., 86, 45 S. E., 465.

Like other contracts, if an ante-nuptial agreement is not ambiguous, it should be construed in accordance with its wording to effectuate the intention of the parties as it existed at the time of the execution of the agreement. "In arriving at this intent words are *prima facie* to be given their ordinary meaning." *R. R. v. R. R.,* 147 N. C., 368, 61 S. E., 185.

"The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have," *Hoke, J.*, in *R. R. v. R. R., supra,* quoting Beach on Modern Law Contracts, section 702. See *King v. Davis,* 190 N. C., 737, 130 S. E., 707. See also *Jones v. Casstevens, post,* 411, at this term.

Moreover, in this State ante-nuptial agreements are to be construed liberally so as to secure the protection of those interests which from the very nature of the instrument it must be presumed were thereby intended to be secured. *Gause v. Hale, supra.*

In the case at hand, debate as to the intention of the parties seems to turn on the meaning of the word "proceeds." Webster defines "proceeds" as "that which results, proceeds or accrues from some possession or transaction." Webster's International Dictionary. Giving to it this meaning in the connection in which it is used in the ante-nuptial agreement, there is no uncertainty as to what the parties intended. That which results or accrues from a life insurance policy at the death of the insured manifestly is the amount of money payable by the insurer, the insurance company, under the terms of the policy. But, if there were any uncertainty as to the meaning of the phrase "proceeds from certain policies of insurance," that uncertainty is removed by the language used in the third paragraph. There R. K. Stewart, as the party of the first part, agrees that "the said monies derived from the policies of insurance set out above, . . . shall be fully paid to the party of the second part," who is the plaintiff, "if she shall survive him as his widow."

Thus it is apparent that, at the time the ante-nuptial agreement was executed, the parties thereto had in mind the moneys to be derived from the designated life insurance policies, and not what remains therefrom after paying a debt of the estate thereafter incurred.

Furthermore, while R. K. Stewart, in his last will and testament, specifies that if he should predecease plaintiff, she is not to be a devisee or legatee thereunder, yet he ratifies the ante-nuptial agreement and directs that she be paid "the sums specified" therein. So be it.

The case of *South Carolina National Bank of Columbia v. Bates,* 175 S. C., 168, 178 S. E., 611, upon which defendant relies, is distinguishable from case in hand.

The judgment below is

Affirmed.

JOHN L. TAYLOR v. MARGARET C. ADDINGTON AND HUSBAND, F. A. ADDINGTON, AGNES C. ROBINSON AND HUSBAND, H. H. ROBINSON, EUNICE C. HOLMES AND HUSBAND, J. J. HOLMES, AND MISS ANIESE CROMARTIE.

(Filed 16 December, 1942.)

1. Trusts § 1b—

In North Carolina an express trust may be impressed upon land by an adequate parol agreement, accompanying a conveyance of the legal title.

2. Same—

An express trust cannot be engrafted by parol upon an inheritance, which is a gift of the law and not a grant of the decedent.

APPEAL by plaintiff from *Bone, J.*, at April Term, 1942, of BLADEN. Affirmed.

Laura L. Taylor died intestate 6 April, 1939, leaving the plaintiff, her husband, and her four sisters, the defendants, surviving her. There were no children of the marriage.

The plaintiff brought this action against the defendants to have declared in his favor a parol trust upon the lands descended to them by the laws of inheritance from their deceased sister.

On the trial, plaintiff undertook to manifest his claim by introducing a letter, wholly in the handwriting of Mrs. Taylor, of date 24 December, 1938, and evidence as to declarations by the defendants, chiefly through his own testimony and that of H. L. Taylor, a brother. The letter is as follows:

"ELIZABETHTOWN, N. C.
December 24, 1938

"PAPA AND SISTERS:

"I am I think sane at this minute but how long it will last I dont know. I may do anything, but while I can please give John my land. He had to do and be with me so much I feel he should have what I have for he has been a dear good man and husband to me. This will be a surprise to him. If I last till I can see a lawyer I will will it to him, but if not I know you all will give it to him for me.

"Love to each of you and thank you for enduring me.

LOTTIE C. TAYLOR."

The plaintiff testified that he found the paper, shortly after his wife's death, in a trunk where she kept deeds, notes, receipts, and the like.

Plaintiff further testified as to the statements of defendants as follows:

"On Monday following after her death and before I found plaintiff's Exhibit 1, I talked with some of the defendants, Mrs. Taylor's sisters, the Monday following her funeral which was on Sunday. Mrs. Margaret Addington was out at home in the afternoon, I think it was that Monday. She told me that she had promised Lottie—and all of them, before her death, that is my wife, that what she had, her property that she had, that Lottie wanted me to have it, and that she was mighty glad she felt that way about it, and that they were willing; that was Mrs. Margaret Addington—said they were willing to it, and the next day, Tuesday, Mrs. Agnes Cromartie Robinson told me the same thing. They were, when they told me that, at home, at the house. My brother was there at the same time. He heard Mrs. Addington make the statement there—they called him in there to hear it. On Tuesday when they called my brother in, my brother and myself and Sara McDowell, a colored woman who was cooking and helping there, were present. My wife's sisters, Mrs. Robinson and Miss Aneise Cromartie and Mrs. Holmes, were there on Tuesday. Mrs. Addington didn't come back on Tuesday.

"They said practically the same thing on Tuesday with reference to it when they called in my brother to hear them make the statement. They said then that sometime before Lottie's death that they had promised Lottie that she had told them to see that I had what she had, if she passed away, the land, property, whatever she had that they were glad she felt that way about it and they were willing and ready to do it. Pursuant to that sometime after I procured deeds to be written—five or six weeks later, I guess. Mr. Hector Clark drew two deeds up for me of the places and I sent them up to them. That was a deed for each place, one for the place in Columbus County and one for the place we lived out there. The place we lived on out there is on the V. & C. S. Railroad. The Columbus County place is a small place, timber land, down in the edge of Columbus County.

"Mr. Hector Clark, a cousin of theirs, fixed the deeds up for me. I told him about this and sent them by the Clerk of the Court, Mr. Newton Robinson. They didn't sign them. I think Mr. Newton Robinson kept the deeds."

Further, on cross-examination plaintiff testified as to the conversation with Mrs. Robinson and Miss Aneise Cromartie as follows:

"On Tuesday, Mrs. Robinson and Miss Aneise Cromartie came to my place and they called my brother in. My brother was in a room that adjoins the one we were in. When he was called they did not call Virginia McDowell.

"No one called her in, she was the servant. They said the same thing that Mrs. Addington had said the day before, that they had promised Lottie something before her death that it was for me to have it and that

they were glad for me to have it and were glad that she felt that way—that was on Tuesday. They said that they had promised Lottie before she died sometime that her property, if she happened to pass away before I did, she wanted me to have it, and that they were glad she felt that way about it and they were willing. Six weeks later—sometime later—I had those deeds made out and sent to them. I didn't think it was necessary any time before. I had found the paper in the meantime. I showed it to Mr. Robinson, I did not show it to them, not then. I did about six months later. I didn't think it was necessary to show it to them right straight. I showed it to Mr. Heman Robinson, husband of Mrs. Robinson—he knew it. I showed it to Mr. Newton Robinson, Clerk of the Court and to Mr. Hector Clark when I found it or pretty soon after I found it. After they refused that time to sign them, I brought this paper down here to have it probated as a will. The reason for that was because one of them was in bad health at the time and Mr. Newton Robinson advised me to let it go for a while."

Plaintiff testified that during the period between 24 December, 1938, and 8 April, 1939—the time of her death—Mrs. Taylor was part of the time confined to the house and part of the time able to be out. Part of the time she was able to do her housework. She was subject to "spells of illness" and when not in one of those spells, was in "pretty good shape." During the indicated period she visited her father in the hospital at Lumberton three or four times. She came to Elizabethtown during the period, sometimes once a week, sometimes at periods of two weeks or more. Mr. Hector H. Clark, an attorney practicing in Elizabethtown, was her first cousin. "There were plenty of good lawyers practicing law in Lumberton."

H. L. Taylor testified as to a conversation between plaintiff and Mrs. Robinson and Miss Aneise Cromartie during which he was present, as follows:

"I recall that John L. Taylor took me to Kinston on Christmas Day of 1938, the Christmas before she died. After the funeral of Mrs. Taylor I heard a conversation between them and statements made by Mrs. Taylor's sisters to John L. Taylor about Mrs. Taylor's property. On Tuesday morning, the following Tuesday morning after she was buried on Sunday, I heard Mrs. Agnes Robinson and Miss Aneise Cromartie make a statement to him. They called me in there to hear it and said they wanted John to go ahead like he always did and said they had often heard Lottie say that when she was gone she wanted John to have what she had, and that they were glad for it to be like that and for him to go ahead like he always did."

The defendants, testifying in their own behalf, denied that they ever had the alleged conversations with the plaintiff, and were permitted

further, over plaintiff's objections, to testify that they had never made the alleged promises to the intestate, Mrs. Taylor. During the course of the trial, plaintiff took a number of exceptions to the admission and exclusion of evidence which, in view of the conclusion reached, are not thought pertinent to the decision.

At the close of the plaintiff's evidence and at the close of all the evidence, defendants moved for judgment as of nonsuit on the evidence, and the motion was allowed. Plaintiff appealed.

R. J. Hester, Jr., and Varser, McIntyre & Henry for plaintiff, appellant.

Clark & Clark for defendants, appellees.

SEAWELL, J. The paper writing referred to as a letter of Mrs. Taylor was offered for probate in solemn form upon caveat of these defendants; and from an adverse decree in the court below, the defendants appealed. *In re Will of Taylor,* 220 N. C., 524, 17 S. E. (2d), 654. A new trial was granted, and it is assumed from the record that the issue of *devisavit vel non* was found against the paper. It is now offered, with other evidence, to establish a parol trust in favor of plaintiff in the lands descended to defendants upon the death, intestate, of the sister, Mrs. Taylor. Since it does not appear from the evidence that the existence of the letter was known to the defendants until some time after the death of Mrs. Taylor, such commitments as they may have made were not based on the letter, and it has, at most, a minor evidential bearing in the case. Plaintiff must establish his right, upon the verity and sufficiency of the alleged promises made by the defendants to Mrs. Taylor. Accepting the evidence of plaintiff as true, for the purpose of discussion, and taking it in the light most favorable to him, we inquire whether it could possibly have the effect of establishing the suggested trust.

In North Carolina the seventh section of the English statute of frauds has not been enacted into law, and no equivalent has been adopted. Therefore, it is held that an express trust may be impressed on land by adequate parol agreement accompanying the conveyance of the legal title. *Peele v. LeRoy, ante,* 123; *Wilson v. Jones,* 176 N. C., 205, 97 S. E., 18; *Boone v. Lee,* 175 N. C., 383, 95 S. E., 659; *Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426; *Blackburn v. Blackburn,* 109 N. C., 488, 489, 13 S. E., 937; *Pittman v. Pittman,* 107 N. C., 159, 12 S. E., 61; *Riggs v. Swann,* 59 N. C., 118; *Shelton v. Shelton,* 58 N. C., 292.

But we have found no case supporting the view that such a parol trust may be engrafted upon an inheritance, as the plaintiff seeks to do. If the principle should be judicially recognized, the effect would be to substitute a prior parol agreement for a devise by a will, made with the

formalities and solemnities by which testamentary dispositions are protected, and open the door to endless frauds upon the laws of inheritance.

The transaction out of which an express parol trust of this nature may arise is necessarily one of contract. In considering the effect of the parol promise or agreement, we must not forget that the principal role in the creation of an express trust is taken by the owner with that intent; the parol promise is complementary and incidental to such action as is taken by the owner and in furtherance thereof. It is effectual only when made in connection with the transfer of title and, by necessary inference, to the party who makes the transfer. *Dover v. Rhea,* 108 N. C., 88, 13 S. E., 164. It presupposes that such party has control of the subject matter of the trust which he desires to create, and contributes it by conveyance of the land with that intent (Tiffany, Real Property, 1939, section 250), the grantee, at the same time, accepting the title as affected by his agreement. *Peele v. LeRoy, supra.* Devolution of title in a case of intestacy is no more the voluntary act of the decedent owner than is his own dissolution. It is a thing that will happen if let alone; the resulting inheritance is a gift of the law and not the grant of the decedent. The inheritance law is certainly innocent of any purpose to create a trust in determining the succession, and it imposes no condition of acceptance other than inheritability. There is nothing, in the legal sense, upon which a parol trust may be engrafted.

Moreover, the statute of descents invests the heir with the beneficial interest—in this case the fee—which is inconsistent with the theory of trust. We do not understand that—in the absence of fraud or mutual mistake—an express parol trust, entirely repugnant to its provisions, can be engrafted on a deed unmistakably conveying the beneficial interest. *Gaylord v. Gaylord,* 150 N. C., 222, 227, 63 S. E., 1028. The plaintiff is in no better position.

It must be assumed that all parties concerned knew that if the defendants survived, and Mrs. Taylor died intestate, the sisters would inherit in their own right. Interpreting the alleged agreement as favorably to the plaintiff as the circumstances will permit, it can be regarded only as a promise to convey the lands to the plaintiff if and when the defendants came into the inheritance. The plaintiff does not seek to recover on that theory, realizing, perhaps, that such a promise would be within the statute of frauds. If the defendants made any commitment to Mrs. Taylor in response to her desire that plaintiff should have the land in case she died intestate, the obligation is moral rather than legal.

Judgment as of nonsuit was properly entered and is

Affirmed.

A. E. GORDON v. CALHOUN MOTORS, INC.

(Filed 16 December, 1942.)

1. Bankruptcy § 1—

A bankruptcy proceeding does not terminate a suit in a State court, to which the bankrupt is a party; and the adjudication of a defendant as a bankrupt does not stay such an action.

2. Bankruptcy §§ 1, 7—

Where plaintiff in an action in the Superior Court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a bond under C. S., 861, upon the adjudication of the defendant a bankrupt, the State court may order that the cause proceed to trial, any judgment rendered for plaintiff to be collectible, *by execution*, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding.

APPEAL by defendant from *Olive, Special Judge,* at October Term, 1942, of DAVIDSON.

Civil action to recover from the assets of the defendant corporation one-half of the profits of said corporation for the period beginning 1 January, 1940, to the date of the institution of the action, to wit, 22 May, 1942, alleged to be due the plaintiff under and by virtue of a contract entered into the latter part of the year 1939, by and between the plaintiff and the defendant corporation through its president, C. W. Fulton.

Order appointing a temporary receiver was signed by Olive, Special Judge, 22 May, 1942, said receiver not to take possession of the property until 27 May, 1942, pending the execution of a bond by the defendant as provided in C. S., 861. Bond was not given. P. V. Critcher, as temporary receiver, was ordered to take possession of the assets of defendant on 28 May, 1942.

On 8 June, 1942, defendant with two justified sureties, as required by C. S., 861, executed a bond in the sum of $15,000 to pay the plaintiff whatever amount he might recover against the defendant, whereupon the receiver was discharged and the assets of the defendant, by order of court, were delivered to the defendant.

On 9 October, 1942, the defendant filed a voluntary petition in bankruptcy in the District Court of the United States for the Winston-Salem Division, Middle District of North Carolina, and the defendant was adjudged a bankrupt on the above date.

On 12 October, 1942, this case was called for trial in the Superior Court and the defendant was permitted to amend its answer and set up and plead that it had been adjudicated a bankrupt on 9 October, 1942.

The court entered an order, the pertinent part of which is as follows: "The defendant, thereupon, moved the Court to dismiss the action because of its plea in bar, as set out in the amendment to the answer, which was filed this date. The attention of the Court was directed to the fact that an undertaking was filed in this cause with two sureties, which said undertaking provided, among other things, that they would pay any judgment recovered in the action, etc.; and after hearing the argument of the counsel for plaintiff and defendant, the Court being of the opinion that the plaintiff in this action is entitled to proceed, and that a perpetual stay of execution would be issued as to the bankrupt, on any judgment rendered against it and that any judgment rendered in this action in favor of the plaintiff would be collectible only from the bond filed in this cause by the sureties, D. C. Lewis and C. W. Fulton, thereupon ordered said cause to proceed." To the above ruling defendant and each of the sureties, to wit, C. W. Fulton and D. C. Lewis, entered an exception and gave notice of appeal to the Supreme Court.

Don A. Walser and Phillips & Bower for plaintiff.
Folger & Folger, E. C. Bivens, and J. F. Spruill for defendant.

DENNY, J. The first exception and assignment of error is to the ruling of the court below that plaintiff is entitled to proceed to trial notwithstanding the fact that the defendant has been adjudicated a bankrupt.

11 U. S. C. A., sec. 103 (a), authorizes proof and allowance of claims against a bankrupt estate which are "founded upon (5) provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment."

11 U. S. C. A., sec. 29 (a), reads, in part, as follows: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined . . ."

The authority of the courts to stay actions pending in nonbankruptcy courts against a party at the time the party is adjudicated a bankrupt is not questioned, neither is the right of a trustee in bankruptcy to be made a party in any pending action. However, bankruptcy proceedings do not terminate an action already pending in a state court, to which the bankrupt is a party. The Supreme Court of the United States, in passing upon this question and in interpreting the provision in section 29, set forth above, in *Connell v. Walker,* 291 U. S., 1, 78 Law Ed., 613,

stated: "The question remains whether, the trustee having failed to assert any rights with respect to the pending action, the state court was required to stay it by any provision or necessary implication of the Bankruptcy Act. We find it necessary to decide whether sec. 11 (a), U. S. C., title 11, sec. 29 (a), authorizing a stay of certain suits pending against a bankrupt, lays down a rule for nonbankruptcy as well as bankruptcy courts, or whether it is applicable to suits like the present one or whether the bankrupt may invoke its provisions. For, if applicable here, the authority given by that section to stay pending suits after adjudication, which has taken place here, is not mandatory, but permissive, to be exercised in the sound discretion of the court."

Where liens are acquired by contract or judicial proceedings, more than four months prior to the adjudication in bankruptcy, as in this case, as a rule the courts will not stay a proceeding to enforce said lien, which is pending at the time of the adjudication in bankruptcy. *Metcalf Bros. v. Barker,* 187 U. S., 165, 47 Law Ed., 122, and other citations too numerous to cite, in accord with this view, are to be found in a note in 283 U. S., 319, 75 Law Ed., 1077.

We hold that the adjudication of the defendant as a bankrupt does not stay this action and the plaintiff may proceed to trial and judgment.

The court below found as a fact that the plaintiff had a lien on the property in the hands of the receiver, which lien attached 22 May, 1942, and that the property so attached, and which was in the custody of the court, was released and turned back to the defendant upon giving a bond as provided in C. S., 861.

While the defendant's second exception is to the order entered in the court below, the argument in the defendant's brief is addressed only to the following portion of the order: "That a perpetual stay of execution would be issued as to the bankrupt on any judgment rendered against it and that any judgment rendered in this action in favor of the plaintiff would be collectible only from the bond filed in this cause by the sureties, D. C. Lewis and C. W. Fulton."

We think the defendant is entitled to a modification of the order so that it will read as follows: "Any judgment rendered in this action in favor of plaintiff would be collectible *by execution* only from the bond filed in this cause by the sureties, D. C. Lewis and C. W. Fulton."

We do not think the court below intended to prevent the plaintiff or the sureties from proving whatever judgment may be obtained as a claim against the defendant in bankruptcy.

While the decisions are conflicting, we think the order of the court below, as modified, is in accord with the greater weight of authority and that plaintiff is entitled to proceed to judgment, with a perpetual stay of execution against the defendant, bankrupt. As stated in the case of

Manufacturers' Finance Corp. v. Vye-Neill Co., et al., 62 F. (2d) 625, in which the factual situation was almost identical with this case, except the defendant was adjudicated a bankrupt within four months from the institution of the action. A bond was executed and the property released, defendant appealed from an order granting the plaintiff's motion for a trial while the bankruptcy proceedings were still pending and before the discharge of the defendant from bankruptcy. The Court said: "We think the ruling by Judge Brewster was right, viz., that a bond given to discharge an attachment, the condition of which is to pay the amount which the plaintiff shall recover on his writ or any special judgment which may be entered in said action, is in the nature of an independent contract, the effect of which is to discharge the lien on the goods resulting from the attachment. In this respect it differs from a 'forthcoming bond,' the condition of which is to restore the property in case of judgment. In the former case both the Massachusetts court and federal courts hold that a discharge in bankruptcy does not discharge a surety, while in the latter case it does. While there is some difference of opinion, the rule in Massachusetts seems to be sustained by the greater weight of authority (citing *Guaranty Security Corporation v. Oppenheimer, et al.,* 243 Mass., 324, 137 N. E., 644, and other authorities). Where no property of the bankrupt is pledged to indemnify the surety against loss, the giving of such a bond is in the interest of the creditors of the bankrupt. If a surety assumes the obligation to pay the judgment without any security, we think the cases holding the surety liable, in case judgment is obtained against the bankrupt, are based on sound reasoning. The procedure followed by Judge Brewster of permitting the case to go forward to judgment, prior to a discharge being granted, in order to fix the liability of the surety in such cases, is also well supported by authority. In no other way can the bond be enforced except by a special judgment with perpetual stay of execution upon the filing of a discharge in bankruptcy. Such procedure may also be necessary to reduce to judgment unliquidated claims, in order that the plaintiff, or an indemnifying surety, may prove the claim in bankruptcy. It makes no difference whether a bond to pay a judgment was given prior to or within four months of the filing of the petition in bankruptcy, since no injury results to the bankrupt's creditors. The release of an attachment on a bankrupt's property within four months of the filing of a petition in bankruptcy by giving a bond does not deprive the other creditors of any share in the bankrupts estate; and, unless collusion or fraud is shown, or the bankrupt turns over property to the surety to protect it in case it is called on to satisfy a judgment obtained by the attaching creditor, of which there is no proof in this case, creditors of a bankrupt have no ground of complaint," citing authorities. United States Su-

preme Court denied petition for writ of *certiorari* in the above case, 289 U. S., 738, 77 Law Ed., 1486. See also *Hill v. Harding,* 130 U. S., 699, 32 Law Ed., 1083. Except to the extent indicated herein, this exception cannot be sustained.

Appellee moves the Court to dismiss the appeal of C. W. Fulton and D. C. Lewis. It appears from the record that C. W. Fulton and D. C. Lewis, sureties on defendant's bond, entered exceptions to the order in the court below and gave notice of appeal to this Court. It does not appear from the record that the sureties are parties to this action. No appeal was perfected in their behalf and no brief was filed, as required by Rule 28 of this Court—Rules of Practice in the Supreme Court of North Carolina, 221 N. C., 562.

The order of the court below is

Modified and affirmed.

H. F. BROWN v. THE BOARD OF COMMISSIONERS OF RICHMOND COUNTY: G. C. CADELL, CHAIRMAN; JAMES HAMER, JOHN C. MATHESON, PAUL F. BROWN AND ARTHUR CAPEL, MEMBERS.

(Filed 16 December, 1942.)

1. Mandamus § 4—

In *mandamus* proceedings, if the summons is made returnable before the judge at chambers, when it should have been made returnable in the regular way as a civil action, or *vice versa*, the action should not be dismissed, but a transfer to the proper docket made. C. S., 867, 868.

2. Same—

An action to have a writ of *mandamus* issue compelling a board of county commissioners to pay from the general county fund, in accordance with an Act of the Legislature, the salary of a county officer, is not such a "money demand" as to require the summons, pleadings and practice to be the same as prescribed for civil actions.

APPEAL by plaintiff from *Phillips, J.,* at Chambers at Rockingham, N. C., 3 November, 1942. From RICHMOND. Reversed.

In 1938, the plaintiff was elected judge of the recorder's court of Richmond County, and served in that capacity at a salary of $100.00 per month until the office was abolished by Act of the Legislature, chapter 610, Public-Local Laws of 1939, and a special county court was organized under chapter 357 of the Public Laws of 1939, at which time some person other than the plaintiff was appointed judge.

The ensuing Legislature passed chapter 11 of the Private Laws of 1941, in which, by preamble, it was found that prior to the abolition of his office, plaintiff had been elected for a term of two years at a fixed salary, and that he is now entitled to receive the emoluments of the office, as fixed by law, for the full term; and thereupon, the Act provides that the Board of Commissioners of Richmond County are "required to pay to H. F. Brown of Rockingham, North Carolina, the sum of one thousand nine hundred ninety ($1,990.00) dollars out of the general fund of Richmond County," this being the balance due on the salary which he would have drawn had the court for which he was elected judge not been abolished.

The plaintiff brought this action to have a writ of *mandamus* issue compelling the board of commissioners to pay him the sum of money named in the statute.

The action was begun by a summons issued by the clerk of the court of Richmond County, requiring defendants to appear before Judge F. Donald Phillips "at the Courthouse in Laurinburg, Scotland County, on the 2nd day of November, 1942, at 10:00 o'clock, and answer or demur to the complaint which has been filed in the office of the Clerk of the Superior Court of Richmond County, a copy of which is served herewith."

The defendants entered a special appearance and moved to dismiss upon various grounds, of which the following, as summarized, is pertinent to this decision:

That the clerk of the Superior Court of Richmond County was without authority to issue a summons requiring defendants to appear in Laurinburg, Scotland County, and answer the complaint before the judge at chambers there, or to make his summons returnable elsewhere than to the court from which the same was issued.

The action was dismissed on defendants' motion, and plaintiff appealed.

Thomas L. Parsons and George S. Steele, Jr., for plaintiff, appellant.
William G. Pittman for defendants, appellees.

SEAWELL, J. This appeal brings up procedural questions only, and in deciding them, we wish to make it clear that we do not pass in any way upon the merits of the case.

The procedure where the writ of *mandamus* is sought is governed by C. S., 866, *et seq.* (subchapter XIV, Article 39, Code of Civil Procedure). Section 866 provides:

"All applications for writs of *mandamus* must be made by summons and complaint, which must be duly verified."

Sections 867 and 868 divide the field between them and must be considered *in pari materia.* Section 867, as amended by chapter 349, Public Laws of 1933, reads as follows:

"In application for a writ of *mandamus* when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice are the same as prescribed for civil actions: 'Provided that in all applications seeking a writ of *mandamus* to enforce a money demand on actions *ex contractu* against any county, city, or town or taxing district within the state, the applicant shall allege and show in the complaint that the claim or debt has been reduced to a final judgment establishing what part of said judgment, if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuing of such writ.' "

Section 868 reads as follows:

"When the plaintiff seeks relief other than the enforcement of a money demand, the summons must be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court."

The defendants' motion to dismiss the action for want of jurisdiction is based on the theory that plaintiff's application for *mandamus* involves a money demand, exclusively governed by section 867, rather than by section 868, under which plaintiff has proceeded. If so, it is pointed out, since the practice under this section is expressly made to be the same as in other civil actions, the clerk was without authority to issue a summons requiring the defendants to appear and answer in a court in another county, whether at chambers or for trial at term, as was done in the case at bar, and that such process is void, conferring no jurisdiction on the designated court, citing *Rogers v. Jenkins,* 98 N. C., 129, 3 S. E., 821; *Belmont v. Reilly,* 71 N. C., 260, 261; and *Howerton v. Tate,* 66 N. C., 231.

The plaintiff contends that by virtue of the cited statute, chapter 11, Private Laws of 1941, entitled "An Act For the Relief of the Former Judge of Richmond County, H. F. Brown," the defendants are directed to pay to the plaintiff out of the general funds of the county the sum of one thousand nine hundred and ninety ($1,990) dollars; that the statute

is peremptory in its effect and imposes a ministerial duty; and the proceeding is properly brought before the judge at chambers.

Unfortunately, the decisions of the Court are not entirely clear as to what is meant by "a money demand" in these two statutes, and inconsistent results have followed. It is clear, however, that at least some demands involving money are not so considered. That has been held to be true when the controversy is over the custody of public funds which the plaintiff seeks to have turned over to him. *Coleman v. Coleman,* 148 N. C., 299, 62 S. E., 415; *Tyrrell County v. Holloway,* 182 N. C., 64, 108 S. E., 337; *Bearden v. Fullam,* 129 N. C., 477, 40 S. E., 304.

In *Coleman v. Coleman, supra,* it is observed: "They would get the money, it is true, but not because the defendant was indebted to them, but because the law required him to deliver it to them, and he had failed and refused to discharge the duty imposed upon him," citing *Martin v. Clark,* 135 N. C., 178, 47 S. E., 397; *Ewbank v. Turner,* 134 N. C., 77, 46 S. E., 508.

But apparently the fact that the demand is for a sum beneficially due the plaintiff by operation of law is not always sufficient to bring it within the definition of a "money demand" within the meaning of the statute, where the law has imposed a positive duty on a ministerial officer. *Audit Co. v. McKensie,* 147 N. C., 461, 61 S. E., 283; *Martin v. Clark, supra.* In the case at bar, the county commissioners are not strictly ministerial officers, although we do not doubt that the statute might impose upon them ministerial duties, nor are they custodians of the fund out of which payment is required to be made, although they have, under the general law and under the County Finance Act, supervisory powers over the fund and the power to disburse the same, or order payments therefrom in proper cases.

Tracing the origin of these companion sections from chapter 75, Public Laws of 1871-2, it was probably the intention of the law to provide for the hearing at term of cases which, upon the face, might require a jury trial, and those which might involve questions of law only, at chambers—with a saving provision that where issues of fact are raised and a jury trial demanded, the case might be transferred to the civil issue docket in order that these issues might be determined by a jury. *Cannon v. Wiscassett Mills Co.,* 195 N. C., 119, 126, 141 S. E., 344.

In the case at bar, it is not immediately apparent that any such questions of fact are involved. It is true that the law requires the payment of plaintiff's demand out of "the general funds" of Richmond County, and the commendable practice of budgeting has so impressed tax collections with priorities, such a fund may not be available, and the commissioners might be compelled to resort to taxation to meet the demand; but this would be a matter of defense.

Imprimis, at least, we regard the law which the plaintiff has invoked as sufficiently peremptory and positive in character as to justify the hearing at chambers under the more general provisions of section 868.

Under this section (868), it has been the uniform practice to require the attendance of parties at chambers, either in the county where the summons is issued or in another county in the same judicial district. *Cannon v. Wiscassett Mills, supra; Durham v. R. R.,* 185 N. C., 240, 117 S. E., 17. See bound records and briefs. In *Ewbank v. Turner, supra,* it is declared that when the cause has been improperly brought to chambers rather than for trial at term, the proper course is to transfer the action to the proper docket for trial. And in McIntosh, "North Carolina Practice and Procedure," page 1084, we find: "If the summons is made returnable before the judge at chambers when it should have been made returnable in the regular way as a civil action, or *vice versa,* the action should not be dismissed, but a proper transfer should be made."

In *Ewbank v. Turner, supra,* an examination of the original record shows that the case was brought to chambers in the county where the summons was issued; but we see no reason why the practice should be otherwise, assuming, as we must, that the judge had acquired jurisdiction elsewhere.

There was error in dismissing the action upon defendants' motion. The defendants will be permitted to answer or demur, or make such other defense as they may be advised.

The judgment dismissing the action is

Reversed.

STATE v. ANDY TOLA.

(Filed 16 December, 1942.)

1. Evidence § 33½: Courts § 4½a—

Court records may be identified by testimony, but their contents can not be altered, nor their meaning explained by parol.

2. Courts § 4½b—

The power of a court to amend its own records is exclusive and the proper procedure is by application to the court to have its record speak the truth.

3. Criminal Law § 26—

Under a plea of former jeopardy the burden of proof is upon the defendant to show that he is entitled to his release.

4. Evidence § 50—

The process or method used in ascertaining alcoholic content might be considered on the question of the credibility of an expert witness, but not on the competency or admissibility of his evidence.

5. Criminal Law § 41h—

A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. C. S., 1802.

6. Criminal Law § 41b—

The scope of cross-examination must rest largely in the discretion of the trial court.

7. Indictment § 12—

A defect in a warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment.

8. Indictment § 11—

A warrant, or indictment, is not fatally defective which charges that defendant unlawfully sold intoxicating liquors, whereas the proof was that he sold alcoholic beverages with a content of 20% or more of alcohol.

9. Criminal Law § 53b—

In a prosecution for the sale of wines with a content of over 20% alcohol, there being evidence *pro* and *con*, the defendant is not prejudiced by a charge to return a verdict of not guilty, if the jury should find that the drinks in question contained more alcohol than is allowed by law, if they should further find that the drinks came in bottles labeled twenty per cent or less alcoholic content when received by defendant.

APPEAL by defendant from *Olive, Special Judge,* at March Term, 1942, of CUMBERLAND.

Criminal prosecution tried upon a warrant issued by the recorder's court of Cumberland County containing five counts. Defendant was convicted and sentenced in the recorder's court. From the judgment entered, defendant appealed to the Superior Court. At the trial below, a plea of former jeopardy was entered as well as a plea of not guilty. Defendant was tried in the Superior Court on the first count in the original warrant, being the only count, as shown by parol evidence, on which defendant had been convicted in the recorder's court and from which he had appealed to the Superior Court. Evidence was offered by the defendant to show that he operated a Grade A restaurant, and held a permit from the State Alcoholic Beverage Control Board for the sale of sweet wines.

From a verdict of guilty and judgment thereon, defendant appealed to the Supreme Court, assigning error.

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

W. Brantley Womble and J. M. Templeton for defendant.

DENNY, J. The plea of former jeopardy cannot be sustained on this record. The record shows that in the Superior Court the defendant was tried on one count of the five contained in the warrant, being the count on which defendant was convicted in the recorder's court and from which he had appealed to the Superior Court. The defendant argues that he was prejudiced before the jury by reason of the failure of the court to ascertain before the close of the State's evidence, what count or counts in the warrant would be submitted to the jury. The judgment of the recorder's court shows only that the defendant was found guilty. It was not until the defendant called the judge of the recorder's court to the witness stand that it was established by parol that the defendant had been found guilty only on the first count in the warrant and not guilty as to the other counts. At the close of all the evidence, his Honor stated in open court that he would allow the case to go to the jury only on the first count. We find no error in this procedure, in view of the fact that under a plea of former jeopardy the burden of proof is upon the defendant to show that he is entitled to his release. *S. v. White,* 146 N. C., 608, 60 S. E., 505.

The defendant was permitted to introduce parol testimony in explanation of the judgment entered in the recorder's court. The State did not object to this testimony and the court gave the defendant the benefit of it; therefore the defendant cannot complain because the State did not undertake to contradict or explain the judgment entered in the recorder's court which stated: "After hearing the evidence in this case, it is adjudged that the defendant, Andy Tola, is guilty." Beginning with *Cline v. Lemon,* 4 N. C., 323, this Court said: "No principle of law in relation to evidence, is better settled, than that parol testimony in contradiction of matters of record is inadmissible." Again, in *Wade v. Odeneal,* 14 N. C., 423, *Ruffin, J.,* said: "The question is, how this judgment is to be proved. Courts of record speak only in their records. They preserve written memorials of their proceedings, which are exclusively the evidence of those proceedings. . . . The records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. The acts of the court cannot thus be established." *R. R. v. Reid,* 187 N. C., 320, 121 S. E., 534; *Gauldin v. Madison,* 179 N. C., 461, 102 S. E., 851; *Forbes v. Wiggins,* 112 N. C., 122, 16 S. E., 905; 23 R. C. L., at sec. 7, p. 158. In lieu of parol testimony to explain a judgment of a court, the proper procedure is an application to the court which entered the judgment to have the record amended so as to speak

the truth. This Court said, in *Walton v. Pearson,* 85 N. C., 35: "In the uncertainty as to the real character of the judgment, growing out of the inconsistent and contradictory entries upon its dockets, the law imposed the duty of determining the question upon the court in which the judgment was rendered and lodged with it alone the power to make the records consistent in themselves and with the truth. It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and without regard to the effect upon the rights of parties or of third persons; and neither is it open to any other tribunal to call in question the propriety of its action or the verity of its record as made. This power of a court to amend its records has been too often recognized by this Court, and its exercise commended, to require the citation of authorities—other than a few of the leading cases on the subject. See *Phillips v. Higdon,* Busb., 380; *Foster v. Woodfin,* 65 N. C., 29; *Mayo v. Whitson,* 2 Jones, 231; *Kirkland v. Mangum,* 5 Jones, 313." *R. R. v. Reid, supra.*

The exceptions directed to the method used by the expert chemist in ascertaining the alcoholic content of the drinks purchased at the defendant's place of business, cannot be sustained. The process or method used in ascertaining alcoholic content might be considered on the question of the credibility of the expert witnesses, but not on the competency or admissibility of their evidence.

Other exceptions are directed to questions propounded to the wife of the defendant on cross-examination. Defendant contends his wife was an incompetent witness to testify as to anything that occurred at his place of business. It is true the State could not have compelled her to testify against her husband in this trial, but, when she took the witness stand to testify in his behalf, she was subject to cross-examination in the same manner and to the same extent as any other witness. C. S., 1802; and, as stated in *S. v. Coleman,* 215 N. C., 716, 2 S. E. (2d), 865: "The scope of the cross-examination must rest largely in the discretion of the trial court. *S. v. Beal,* 199 N. C., 278 (298), 154 S. E., 604; Wigmore on Evidence (2d Ed.), sec. 944, *et seq.,* 28 R. C. L., 445."

The defendant also assigns as error the refusal of his Honor to dismiss the action on the ground that the warrant charged that defendant had sold alcoholic beverages and not that he had sold alcoholic beverages with a content of twenty per cent (20%) or more of alcohol. The count in the warrant upon which defendant was tried reads as follows: "T. L. Hon, being duly sworn, on information and belief complains and says that at and in said county, on the 10th day of October, 1941, Andy Tola, not being an authorized Alcoholic Beverage Control Board Store law-

fully established for such purpose, unlawfully and willfully, through himself and his agents and employees, did barter, sell, furnish, deliver, exchange and otherwise unlawfully dispose of intoxicating liquors."

A defect appearing in a warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment. Neither motion was made. However, we do not think the warrant fatally defective by reason of the omission pointed out by the defendant.

The State offered evidence to the effect that drinks were purchased and sold at defendant's place of business on 10 October, 1941, to an officer of the State Alcoholic Beverage Control Board and to the chemist of said board, which drinks were analyzed for their alcoholic content by volume. Mr. Hege, the chemist for the State Alcoholic Beverage Control Board, testified that he found the drinks to contain thirty-one per cent (31%) alcohol by volume. Mr. Cheek, another chemist, who made an analysis of the drinks sometime after Mr. Hege's analysis, testified he found the drinks to contain twenty-seven and eight-tenths per cent (27.8%) alcohol by volume.

On the other hand, the defendant offered evidence to the effect that the drinks or cocktails in question were made from sweet wines and other ingredients, which defendant was authorized by law to sell and which came from bottles, the contents of which were marked twenty per cent (20%) or less of alcohol by volume.

Chapter 339, Public Laws of 1941, sec. 6, authorizes the sale of sweet wines in hotels, Grade A restaurants, drug stores and grocery stores in any county in which the operation of Alcoholic Beverage Control Stores is authorized by law; such sales, however, shall be subject to the rules and regulations of the State Alcoholic Beverage Control Board. These wines are defined as follows: "Sweet wines shall be any made by fermentation from grapes, fruits or berries, to which nothing but pure brandy has been added, which brandy is made from the same type of grape, fruit or berry which is contained in the base wine to which it is added, and having an alcoholic content of not less than fourteen per centum (14%) and not more than twenty per centum (20%) of absolute alcohol, reckoned by volume."

Section B of this Act prohibits the sale of fortified wines at any place in the State except through county operated Alcoholic Beverage Control Stores. Sec. 1 of the Act defines these wines as follows: "Fortified wines shall mean any wine or alcohol beverages made by fermentation of grapes, fruit and berries and fortified by the addition of brandy or alcohol or having an alcoholic content of more than fourteen per cent (14%) of absolute alcohol, reckoned by volume."

The defendant was not prejudiced by the omission in the warrant, in view of the fact that his Honor, in his charge to the jury, carefully pointed out that a verdict of guilty should not be returned unless the jury was satisfied beyond a reasonable doubt that the defendant had sold alcoholic beverages containing in excess of twenty per centum (20%) alcohol by volume; and the court directed the jury to return a verdict of not guilty if they should find that the drinks sold by the defendant contained more alcohol than is allowed by law, if the jury should further find that the drinks came in bottles labeled twenty per cent (20%) or less alcoholic content when received by the defendant.

The case was one for the jury, and, upon a careful consideration of the exceptions and the charge of the court, to which there was no exception, we do not find sufficient error to disturb the verdict of the jury.

No error.

MAUSLEY E. JONES v. H. E. CASSTEVENS ET AL.

(Filed 16 December, 1942.)

1. Contracts § 8—

It is permissible for the parties to agree, at the time of the execution of a note, that it shall be paid only in a certain manner, *i.e.*, out of a particular fund, by foreclosure of collateral, or collection of rents, etc. *Holding* valid a written stipulation in a note that, in case of default and sale of the security, the makers should not be liable for any deficiency, and that the deficiency judgment statute has no application to the facts of this case.

2. Same—

If the words employed in a contract are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have, and such intent is to be gathered from the entire instrument, so that context, subject matter, and surrounding circumstances may affect the meaning of words used.

3. Evidence § 40: Contracts § 22—

In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specific credits should be allowed.

APPEAL by plaintiff from *Grady, Emergency Judge,* at June Term, 1942, of GUILFORD.

Civil action to recover on promissory note.

On 1 February, 1940, the plaintiff sold the defendants his one-half interest in the jewelry business of Glenn & Jones, Inc., including 13

shares of stock in the company, for $2,250.00. The sum of $250.00 was to be paid on 1 July, 1940, and the balance on or before 1 February, 1942. The defendant executed his note under seal for the amount secured by second deed of trust on a house and lot in the city of Greensboro.

Following the attestation clause and above the defendants' signature, there appears in the note this provision: "If default in payment is made and the premises securing by deed of trust this note is foreclosed, and if the property when sold should not wholly satisfy any part of this note, it is understood that the makers of this note will not be liable for any deficiency judgment."

The initial payment of $250.00 was made on 1 July, 1940. Thereafter the encumbered premises were sold under foreclosure of the first deed of trust, and brought no more than enough to pay the indebtedness secured thereby.

From judgment on the pleadings denying recovery, the plaintiff appeals, assigning error.

Herbert S. Falk for plaintiff, appellant.
Frazier & Frazier for defendants, appellees.

STACY, C. J. Was it the intention of the parties that in case of a sale of the encumbered premises under foreclosure, either of the first or second deed of trust, payment of the defendants' note should be made exclusively out of funds derived from such foreclosure? The trial court answered in the affirmative, and we approve.

There are four principal reasons inducing the conclusion:

First. It is axiomatic in the law of contracts that "as a man consents to bind himself, so shall he be bound." Elliott on Contracts (Vol. 3), sec. 1891; *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356. Here, upon the face of the note it is stipulated that the defendants are "not to be liable for any deficiency judgment." That is to say, in case of default and sale of the property under foreclosure, if it fail to bring enough to satisfy in whole any part (either the first or second installment) of the note held by the plaintiff, the defendants are not to be sued for any deficiency. The stipulation was inserted with a view to a possible foreclosure and the attendant sacrifice or loss of defendants' house and lot, in which event, the defendants were to be relieved of any further liability on the note in suit. Such is the agreement.

Second. It is permissible for the parties to agree at the time of the execution of a note, that it shall be paid only in a certain manner, *i.e.,* out of a particular fund, by the foreclosure of collateral, or the collection of rents, etc. *Wilson v. Allsbrook,* 203 N. C., 498, 166 S. E., 313, and cases there assembled. The stipulation in the instant note is, that in

case of default and a sale of the collateral security under foreclosure, the makers are to be relieved from any deficiency liability.

While this provision is in writing—having been inserted in the note—it is the holding with us that "parol evidence is admissible to show an agreed mode of payment and discharge other than that specified in the bond." Brown on Parol Evidence, 117; *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97, 55 S. E., 417.

In *Evans v. Freeman,* 142 N. C., 61, 54 S. E., 847, the alleged agreement was, that the note "should be paid out of the proceeds of the sale of the stock-feeder." The Court held that this part of the agreement, though resting in parol, could be shown as it did not conflict with what had been written. To like effect is the holding in *Bank v. Winslow,* 193 N. C., 470, 137 S. E., 320, where the alleged agreement was, that the note "was to be paid from the sale of peanuts then in the possession of the payee." See, also, *Wilson v. Allsbrook, supra,* where the alleged agreement was, that the note "was to be paid from rents collected by the defendant." Speaking to the subject in *Kindler v. Trust Co.,* 204 N. C., 198, 167 S. E., 811, it was said: "In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specified credits should be allowed."

Third. When a written instrument is presented for construction, the question for decision is, What did the parties intend by their agreement? *Lewis v. May,* 173 N. C., 100, 91 S. E., 691. If there be no dispute as to the terms, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written. *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791; *Patton v. Lumber Co.,* 179 N. C., 103, 101 S. E., 613; *Cole v. Fibre Co.,* 200 N. C., 484, 157 S. E., 857; *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906. "If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have." *King v. Davis,* 190 N. C., 737, 130 S. E., 707.

The law is stated with accuracy and clarity by *Hoke, J.,* in *Simmons v. Groom,* 167 N. C., 271, 83 S. E., 471, as follows: "In *R. R. v. R. R.,* 147 N. C., 382, in speaking to certain rules of interpretation applicable to these written contracts which are sufficiently ambiguous to permit of construction, the Court said: 'It is well recognized that the object of all rules of interpretation is to arrive at the intention of the parties as expressed in the contract, and that in written contracts which permit of construction this intent is to be gathered from a perusal of the entire instrument.' In Paige on Contracts, sec. 1112, we find it stated: 'Since the object of construction is to ascertain the intent of the parties, the

contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole.' And while in arriving at this intent words are *prima facie* to be given their ordinary meaning, this rule does not obtain when the 'context or admissible evidence shows that another meaning was intended.' Paige, sec. 1105. And further, in section 1106, it is said that the context and subject-matter may affect the meaning of the words of a contract, especially if in connection with the subject-matter the ordinary meaning of the term would give an absurd result. Again, as said by *Woods, J.*, in *Merriam v. United States,* 107 U. S., 441, 'In such contracts it is a fundamental rule of construction that the courts may look to not only the language employed, but to the subject-matter and surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made.' And in Beach on Modern Law Contracts, sec. 702, the author says: 'To ascertain the intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects they had in view. The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have.' "

Fourth. The statute pertaining to deficiency judgments, ch. 36, Public Laws 1933, has no application to the facts of the present record. *Brown v. Kirkpatrick,* 217 N. C., 486, 8 S. E. (2d), 601. The rights of the parties are to be determined by the stipulation appearing on the face of the note.

The correct result seems to have been reached in the court below.

Affirmed.

MARION L. WINNER v. D. CARL WINNER,
and
MARION L. WINNER v. D. CARL WINNER AND WIFE, MARGUERITE WELLS WINNER.

(Filed 16 December, 1942.)

1. Trusts §§ 1b, 15: Gifts § 1—

Imposition, fraud, duress, undue influence, or the like must be shown, by clear, strong and convincing evidence, to engraft a trust upon a gift of money by a parent to one of his children. A showing of favoritism, unequal division and detriment to other children is not sufficient.

2. Trusts §§ 1b, 15: Gifts § 3—

Where a father conveyed a fee simple title in lands to one of his sons and such son's wife, and thereafter the father had prepared a deed, reconveying the same lands to himself, and requested such son and wife to

execute the same, which they refused to do. *Held:* The evidence is insufficient to establish a constructive trust on the lands in favor of the father, or his heirs.

APPEAL by plaintiffs from *Thompson, J.,* at March Term, 1942, of NEW HANOVER.

There were two actions originally instituted by Marion L. Winner, who died during the pendency thereof, and his next of kin, heirs at law, widow and administrator were made parties plaintiff. The actions were consolidated for the purpose of trial.

The first action is to recover personal property, certain liberty bonds and cash, alleged to have been given by Marion L. Winner, the original plaintiff, to his son, the defendant D. Carl Winner, to be held in trust by the donee for the donor; which said personal property the said defendant refused to surrender.

The second action is to recover certain land situated in the town of Carolina Beach, for which Marion L. Winner, the original plaintiff, executed and delivered a deed conveying a fee simple title, subject to the reservation of life estates in the grantor and his wife, to his son D. Carl Winner and his wife, Marguerite Wells Winner, the defendants; title to which said land the plaintiffs contend is subject to a constructive trust in favor of the grantor.

When the plaintiffs had introduced their evidence and rested their case, the defendants moved in each action for a judgment as in case of nonsuit (C. S., 567), which motions were allowed, and from judgments predicated upon this ruling the plaintiffs appealed, assigning such ruling and judgments as error.

Kellum & Humphrey and Aaron Goldberg for plaintiffs, appellants.

W. L. Farmer and Rodgers & Rodgers for defendants, appellees.

SCHENCK, J. As to the personal property involved in the first action, there is no evidence that the defendant D. Carl Winner ever received any liberty bonds of his father Marion L. Winner, as alleged in the complaint. There is some evidence, however, that D. Carl Winner did at one time have in his possession about $6,000.00 in cash formerly the property of his father, Marion L. Winner. Albeit, there is no evidence as to how, when or why he obtained this possession. The same testimony to the effect that D. Carl Winner said that he had certain moneys of his father, Marion L. Winner, also was to the effect that D. Carl Winner said, "Papa gave me the money and told me to throw it in the ocean before I let anyone else get it." There is nowhere in the record any evidence that D. Carl Winner practiced any fraud, deceit or wrongdoing

upon his father, Marion L. Winner, before or at the time of the delivery of any money to him. There is no evidence that the money was delivered to the defendant upon any condition or trust. In fact, there is no evidence as to under what circumstances such delivery was made, if indeed such delivery was made. The mere fact that the donee was the son of the donor and that the gift might result in an unequal division of the property among the children of the donor is not sufficient to engraft a constructive trust upon the gift in favor of the personal representative of the donor. Something more than the natural influence springing from the relationship of a father to his children to deal equally with them must be shown to defeat a gift to one of his children to the detriment of the others; imposition, fraud, importunity, duress, or something of that nature must appear, otherwise that disposition of property which accords with the wishes of the donor at the time of the gift, whatever may have motivated such wishes, must be sustained. "Right or wrong, it is to be expected that a parent will favor a child who stands by him, and to give to him, rather than the others, his property." Certainly the law does not prohibit such favoritism, and such a gift will not be rendered nugatory by engrafting a trust thereupon in favor of others, in the absence of evidence clear, strong and convincing of fraud, deceit, undue influence or wrongdoing practiced upon the donor. *Plemmons v. Murphey,* 176 N. C., 671, 97 S. E., 648.

We find no error in the ruling of the judge in the first cause of action and the judgment of nonsuit entered therein is therefore affirmed.

As to the land involved in the second action, it appears from the admissions and evidence in the record that Marion L. Winner, the original plaintiff, executed and delivered a deed therefor, conveying a fee simple title, subject to the reservation of life estates in favor of the grantor and his wife, for the consideration of love and affection, to his son D. Carl Winner and his wife, Marguerite Wells Winner, the defendants. There is in the deed no expression of trust or agreement that the land is to be reconveyed. There is also no other written or documentary evidence of such a trust or agreement.

The strongest and practically the only evidence tending to show that the deed was delivered and received with an agreement to reconvey by the grantee to the grantor upon demand of the latter is the testimony to the effect that Marion L. Winner had prepared a deed from D. Carl Winner and his wife, to him, and presented said deed to D. Carl Winner with the request that he and his wife, the defendants, execute the same, which they refused to do. This evidence is the testimony of Walter Winner, another son of the original plaintiff, and is as follows: "Carl said, 'I want to wait for a while first.' Father said, 'No, I don't want to wait; I want it signed now.' Carl said, 'You will have to wait a little

while; I will have to see a lawyer first.' Papa said, 'There was not a damn thing said about seeing any lawyer when I deeded that land to you, and you promised to deed it back to me when I asked you for it,' and Carl said, 'I will see a lawyer first,' and he walked out of the room, and Father fell back on the bed, and his eyes filled with water. . . ."

There is no evidence in the record of any fraud, mistake or undue influence practiced upon the grantor, Marion L. Winner, at the time of the execution and delivery of the deed from him to the defendants, D. Carl Winner and his wife, Marguerite Wells Winner. While there is allegation, there is in fact no evidence as to when, how or why the deed was executed and delivered. Under these circumstances the cause of action of the plaintiffs, who rely upon a constructive trust arising out of a cotemporaneous agreement that the grantee would hold the land for the benefit of the grantor and reconvey it upon his demand, must fail.

In *Gaylord v. Gaylord*, 150 N. C., 222, 63 S. E., 1028, *Hoke, J.*, declares the law applicable to this case in these clear words: "Nor do we think it permissible upon the evidence that the plaintiffs should engraft a parol trust on a deed of the kind presented here by express declaration or agreement. The seventh section of the English Statute of Frauds, forbidding 'the creation of parol trusts or confidences of lands, tenements or hereditaments, unless manifested and proved by some writing,' not being in force with us, and no statute of equivalent import having been enacted, these parol trusts have a recognized place in our jurisprudence and have been sanctioned and upheld in numerous and well-considered decisions. *Avery v. Stewart*, 136 N. C., 436; *Sykes v. Boone*, 132 N. C., 199; *Shelton v. Shelton*, 58 N. C., 292; *Strong v. Glasgow*, 6 N. C., 289. Upon the creation of these estates, however, our authorities seem to have declared or established the limitation that except in cases of fraud, mistake or undue influence, a parol trust, to arise by reason of the contract or agreement of the parties thereto, will not be set up or engrafted in favor of the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on the face of the instrument that such a title was intended to pass. *Dickenson v. Dickenson, supra; Bonham v. Craig*, 80 N. C., 224; *Jackson v. Cleveland, supra*, reported also in 90 Amer. Dec., 226, with a full and learned note on this phase of the doctrine; *Dean v. Dean*, 6 Conn., 285; *Cain v. Cox*, 23 West Va., 594, 605; *Dyer v. Dyer*, White and Tudor Leading Cases in Equity (part 1), pp. 314, 344, 354, 355, 356, etc." See, also, *Newton v. Clark*, 174 N. C., 393, 93 S. E., 951; *Chilton v. Smith*, 180 N. C., 472, 105 S. E., 1; *Sorrell v. Sorrell*, 198 N. C., 460, 152 S. E., 157.

The judgment in the second action is

Affirmed.

STATE v. HECTOR NORTON.

(Filed 16 December, 1942.)

1. Indictment § 8: Criminal Law § 47—

The court is authorized by statute 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 that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C. S., 4622.

2. Criminal Law § 41g—

Ordinarily, a defendant in a criminal action is competent and compellable to testify for or against a codefendant, provided his testimony does not incriminate himself.

3. Criminal Law § 52b—

When upon the trial of a criminal action, the State produces its evidence and rests, and the defendant preserves his exception to the refusal of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of the evidence of the State, but of all the evidence, C. S., 4643; and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion.

4. Criminal Law § 47—

In the trial of two or more defendants, who have been separately indicted and their cases consolidated for trial, each defendant is entitled to have the jury pass upon his guilt or innocence independently of the guilt or innocence of his codefendant.

APPEAL by defendant from *Rousseau, J.*, at March Term, 1942, of SCOTLAND.

Criminal prosecution upon indictment purportedly charging defendant with assault upon one Floyd Breeden with deadly weapon with intent to kill.

The record and case on this appeal show these facts: Defendant Hector Norton and Liston Carter and Erwin Mumford were each charged in separate bills of indictment with an assault upon one Floyd Breeden with a deadly weapon, with intent to kill. The three cases were by order of the court, and without objection, consolidated and tried together. Before the taking of evidence was concluded, Erwin Mumford entered a plea of guilty. At close of evidence for the State, motion of defendant Hector Norton for judgment as of nonsuit was denied, to which he excepted. Thereupon, defendant Liston Carter, and others in his behalf, testified. Defendant Hector Norton, in his own behalf, also testified. And at the close of all the evidence, defendant Hector Norton

renewed his motion for judgment as of nonsuit, to denial of which he excepted.

The record further shows that after being out for a short time the jury returned to the courtroom when and where the court, upon inquiry in regard thereto, being informed that a verdict had not been reached, gave instruction as to the duty of the jury in respect to reaching a verdict; that after the jury had deliberated "for some time," the court sent for the jury to return to the courtroom, and inquired if the court could be of help, to which the foreman replied in the negative; that, thereupon, the court gave more extended instructions as to duty of jurors with respect to arriving at a verdict; that, thereupon, the foreman stated: "There is just a question of one of the defendants. Can we render a verdict on one and not decide on the other, or not?" To which the court replied, "No, you cannot." To this last instruction, defendant Hector Norton excepts.

The record further shows that, after further deliberation, the jury again returned to the courtroom, with request to have read a part of testimony of Norton and of Breeden, after which the jury retired, and "shortly thereafter" rendered a verdict, finding both Liston Carter and Hector Norton guilty of an assault on Floyd Breeden with a deadly weapon.

Judgment as to defendant Hector Norton: Confinement in the common jail of Scotland County for a period of twenty-two months to be assigned to labor under the supervision of the State Highway and Public Works Commission.

Defendant Hector Norton appeals therefrom to Supreme Court and assigns error.

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

Thos. J. Dunn for defendant, appellant.

WINBORNE, J. There are two questions for decision:

First: Is there error in refusing motion for judgment as of nonsuit at close of all the evidence under provisions of C. S., 4643?

Appellant concedes that if testimony of his codefendant, Liston Carter, and his witnesses be taken into consideration in passing upon the motion, the evidence against him, Hector Norton, presents a case for the jury. He contends, however, that in view of the fact that he is charged in separate bill of indictment from that against his codefendant, Liston Carter, the consolidation of the cases for purpose of trial should not deprive him of the right to nonsuit, upon the evidence offered by the State supple-

mented by such of his own testimony, and inferences therefrom, as are favorable to the State. The position is untenable.

In the first place, defendant has not challenged the consolidation of the two indictments for trial. The offenses charged are of the same class, relate to an assault upon the same person, and appear to be so connected in time and place as that evidence at the trial upon one of the indictments would be competent and admissible at the trial of the other. In such cases there is statutory authority for consolidation. C. S., 4622; *S. v. Combs,* 200 N. C., 671, 158 S. E., 252; *S. v. Rice,* 202 N. C., 411, 163 S. E., 112; *S. v. Chapman,* 221 N. C., 157, 19 S. E. (2d), 250, and numerous cases there cited.

In *S. v. Combs, supra,* it is said: "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."

Furthermore, ordinarily, a defendant in a criminal action is competent and compellable to testify for or against a codefendant, provided his testimony does not incriminate himself. *S. v. Smith,* 86 N. C., 705; *S. v. Weaver,* 93 N. C., 596; *S. v. Medley,* 178 N. C., 710, 100 S. E., 591; *S. v. Perry,* 210 N. C., 796, 188 S. E., 648.

Moreover, in the present case not only did the codefendant of appellant testify, but others not interested in the event of the action testified against him.

It is also provided by statute, C. S., 4643, as construed by decisions of this Court, that when on trial of a criminal action in the Superior Court, or in any criminal court, the State has produced its evidence and rested its case, and defendant has preserved exception to the refusal of the court to allow his motion then made for judgment as in case of nonsuit, and, after offering evidence, and the case is closed, defendant renews his motion for judgment as in case of nonsuit, the court must act upon the latter motion in the light not only of evidence offered by the State, but of all of the evidence then before the court. C. S., 4643; *S. v. Killian,* 173 N. C., 792, 92 S. E., 499; *S. v. Pasour,* 183 N. C., 793, 111 S. E., 779; *S. v. Earp,* 196 N. C., 164, 145 S. E., 23.

In such case defendant is entitled to the benefit only of exception to the refusal of the latter motion. C. S., 4643; *S. v. Brinkley,* 183 N. C., 720, 110 S. E., 783.

Second: Did the court err when, in answer to this question of the jury, speaking through its foreman, "Can we render a verdict on one and not decide on the other . . . ?" The court replied, "No, you cannot." The instruction standing alone is erroneous. The Attorney-General con-

cedes this, but earnestly contends (1) that if it be considered with other portions of the instructions, no error appears; and (2) that if, whether taken alone or in conjunction with other portions of the instructions, it be erroneous, there is nothing in the record, other than the three affidavits appearing in but not a part of the record, to show that defendant Norton has been prejudiced thereby. While it is true that, just before this question was asked by the jury, the court gave pertinent instruction as to the duty of the jury with regard to reaching a decision, to which no exception is taken, we are unable to agree that no error appears. And, though the affidavits be eliminated as they should be and not considered, and we do not consider them, the instruction, given under the existent circumstances, is clearly prejudicial to appellant. The question of the foreman manifests that the jury was having trouble in agreeing on a verdict as to one of the defendants. The instruction of the court, in response to the question, was tantamount to ruling that the guilt or innocence of each defendant depended upon the guilt or innocence of the other—that the verdict as to both should be guilty or not guilty—that the jury could not find one guilty and fail to agree as to the other. Appellant was entitled to have the jury pass upon his guilt or innocence independent of the guilt or innocence of his codefendant. Hence, as the instruction was erroneous, we must assume, in passing upon appropriate exception thereto, that the jury, in coming to a verdict, was influenced by that portion of the charge which is incorrect. *S. v. Starnes,* 220 N. C., 384, 17 S. E. (2d), 346; *S. v. Floyd,* 220 N. C., 530, 17 S. E. (2d), 658. The error is, as stated by *Stacy, C. J.,* in *S. v. Kline,* 190 N. C., 177, 129 S. E., 417, "one of those casualties which, now and then befalls the most circumspect in the trial of causes on the circuit." See *S. v. Starnes, supra; S. v. Floyd, supra.* Nevertheless, for reason stated, let there be a

New trial.

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 16 December, 1942.)

LIGHTNER *v.* BOONE.

1. Executors and Administrators § 30d—

As a general rule personal liability of an executor or administrator to distributees for interest, where there has been delay in closing the estate, depends entirely upon whether the delay was reasonable or unreasonable under all the circumstances, the personal representative being free from liability where the delay was reasonable and chargeable with interest where the delay was unreasonable.

2. Executors and Administrators §§ 29, 30d: Trusts § 12—

Where one in a fiduciary capacity uses the trust funds for his own advantage and never accounts therefor until compelled to do so, he is liable for interest on the funds so used. An executor and trustee is liable for interest on amounts paid himself as attorney's fees.

3. Executors and Administrators § 29: Trusts § 12—

When in an *in rem* proceeding such items of costs as referee's allowances and stenographic reporter's bills are taxed in the discretion of the court against the fund in litigation, C. S., 1244 (6), they may not be retaxed by subsequent order.

APPEAL by defendant from *Clement, J.*, at August-September Term, 1942, of POLK. Modified and affirmed.

Civil action for an accounting.

This case was here on former appeal at the Spring Term, 1942. *Lightner v. Boone,* 221 N. C., 78. After the opinion on the former appeal was certified down plaintiffs moved for judgment in accord therewith. They likewise moved for correction of certain errors in the calculations contained in the referee's report and for interest on the amount adjudged to be due from the date of the institution of this action, to wit: 29 October, 1940.

Thereupon, after the parties had been given opportunity to be heard, judgment was entered for $15,070.84 (the amount due after correction of errors), and for interest thereon from 29 October, 1940. The costs were taxed against the defendant individually, as directed by this Court. The judgment specifically directed that certain items be taxed as a part of the costs. These included, among others: (1) referee's fee of $250.00; (2) charges of stenographic reporter at referee's hearing, $132.24, and balance of $12.50; (3) receiver's fee and expenses, including cost of bond, total $336.83; (4) stenographer's charges for typing record proper, case on appeal to Supreme Court, $34.35; and (5) notary's charge for taking depositions, $16.74.

The defendants excepted and appealed, assigning as error the allowance of interest and taxation of the named items of cost.

McCown & Arledge for plaintiffs, appellees.
Williams & Cocke for defendant, appellant.

BARNHILL, J. The defendant, in his brief, abandons his exceptions to the taxation of receiver's commissions and expenses and charges of the stenographer for copying record proper on appeal as a part of the costs. Hence, the appeal presents these questions for decision: (1) are the plaintiffs entitled to interest from the date of the institution of this action on the amount recovered, or any part thereof; (2) were the allowances to the referee and to the stenographer reporting the referee's hearings properly taxed against the defendant; (3) is the amount allowed the notary for taking depositions a proper part of the costs?

Judgment for interest, except as herein noted, was erroneous.

In the absence of unreasonable delay, diversion of funds, or other wrongdoing, an executor or administrator is not personally liable for interest. *Walton v. Avery,* 22 N. C., 405; *Pickens v. Miller,* 83 N. C., 543, and cases cited; *Clark v. Knox,* 70 Ala., 607, 45 Am. Reports, 93; Anno., 31 L. R. A. (N.S.), 351.

"It may be stated as a general rule that the personal liability of an executor or administrator to the distributees of his estate for interest where there has been delay in the closing up and settlement of the estate depends entirely upon the question whether the delay was reasonable or unreasonable under all of the circumstances of the particular case, he being free from personal liability for interest where the delay was reasonable, and chargeable with interest where the delay was unreasonable." *Clark v. Knox, supra.*

The plaintiffs pray interest only from and after the date the action was instituted. Hence, defendant's conduct since that time is the proper criterion.

Upon the institution of this action a temporary receiver was appointed and the funds belonging to the estate were delivered to him. When the motion to make the temporary receivership permanent came on for hearing the temporary receiver was discharged and the court directed that, upon the filing of a proper bond by defendant, the balance of said funds remaining after disbursements ordered by the court should be returned to him. Since that time he has been guilty of no conduct such as would charge him with interest on the amount thus received.

It was not improper for him to decline to settle until after final judgment on the opinion certified by this Court. In fact, it affirmatively appears that it was necessary for the court below to correct errors of calculation before the true amount could be adjudged. Furthermore, the referee allowed no interest and plaintiff did not except. The judgment was for the amount due as reported by the referee and plaintiffs, on their appeal, did not assign this as error. Their motion, made many months after judgment was entered, comes too late.

As to the $6,000 withdrawn by the executor from the estate as payment on an attorney fee for himself, the facts are quite different. He did not

account to the receiver for this amount. It was not allowed by the referee or adjudged to be due by the court below. Judgment therefor was directed by this Court and the plaintiffs, at the first opportunity thereafter, asserted their claim to interest. This was in apt time.

In our opinion defendant is clearly liable personally for interest on this amount, at least from and after the date prayed, to wit: 29 October, 1940. This sum was withdrawn from the trust estate by defendant and applied to his own use. To this extent the estate has not been "kept sacred and intact for the *cestuis que trustent* as their property, ready to be delivered to them so that profit could not have been made thereon." *Peyton v. Smith,* 22 N. C., 325; *Pickens v. Miller, supra.* Instead, he has used trust funds for his own advantage and never accounted therefor until compelled to do so. *Arnett v. Linney,* 16 N. C., 369; *Pickens v. Miller, supra; Overman v. Lanier,* 157 N. C., 544, 73 S. E., 192; 30 Am. Jur., 18, sec. 21; Anno., 31 L. R. A. (N.S.), 362; *McIntire v. McIntire,* 192 U. S., 116, 48 L. Ed., 369.

The stenographer who reported the referee hearings filed a bill therefor in the sum of $132.24. Gwyn, J., approved the bill and ordered that it be paid by the executor. Phillips, J., entered an order fixing the compensation of the referee at $250.00 and directing that it be paid out of the estates involved. Were these items thus taxed against the estates? If so, the court below was without authority to reverse and tax against the defendant.

We are of the opinion that it should be so held. These items were taxable in the discretion of the court. C. S., 1244 (6). They are not necessarily taxed against the losing party. *Bailey v. Hayman, ante,* 58.

Ordinarily, in litigation over a fund in the nature of an *in rem* proceedings such items of cost are taxed against and paid out of the fund. Except for the maladministration of defendant that would have been the procedure here as a matter of course. That this was the intent and purpose of the orders entered sufficiently appears.

The item of $12.50, balance due the stenographer, was not included in either of these orders. This amount was properly taxed against the defendant.

The fees allowed a notary public for taking necessary depositions constitutes a part of the cost of the case. Exception thereto cannot be sustained.

In justice to the court below it may be said that the opinion in this Court was followed literally. There was nothing in the opinion to indicate that we did not intend to reverse former discretionary orders taxing particular items of costs.

The judgment below must be modified in accord with this opinion.

Modified and affirmed.

STATE v. O. W. BAYNES AND P. H. DUNNAGAN.

(Filed 16 December, 1942.)

1. Municipal Corporations § 10: Evidence § 35½—

Records of the governing body of a municipal corporation are properly admissible in evidence to prove the facts stated therein; and evidence will not be admitted, in a collateral action, to vary or contradict such record, when regular and complete on its face.

2. Same—

Where statutes expressly require a full and accurate record of the governing body of a municipality to be kept, parol evidence is not admissible to aid, extend or supplement the record; but when there is no such statutory requirement, and the record contains nothing to show whether or not any action whatever was taken on a certain matter, parol evidence is admissible to show that action was actually taken, though it should be allowed with caution.

3. Same—

A lost or destroyed municipal record may be proven by parol.

4. Same—

Where an ordinance is adopted by the governing board of a municipality and that fact is shown, there is a presumption in favor of the validity of the ordinance.

5. Constitutional Law § 6b—

When the constitutionality of a city ordinance is attacked, its validity or invalidity will not be decided, when the appeal may be disposed of on other grounds.

6. Criminal Law § 52b—

In a criminal prosecution for violating a city ordinance, which prohibited the peddling of wares, publications or other merchandise on the *sidewalks* in the business section, the evidence showing only that one of defendants sold papers in the *street* and not on the sidewalks of the prohibited area, a motion for judgment as of nonsuit should have been allowed.

7. Criminal Law § 53c—

In a criminal prosecution for violating a city ordinance, which prohibited the peddling of wares, publications or other merchandise on the *sidewalks* in the business section, there is prejudicial error in a charge to the jury that if they should find that another defendant sold the prohibited articles on the public *streets* within the area, he would be guilty.

APPEAL by defendants from *Warlick, J.*, at June Term, 1942, of DAVIDSON.

Criminal prosecution tried upon a warrant in Davidson County Court for the violation of an ordinance of the city of Lexington, N. C., pro-

hibiting any individual, firm, corporation or association "from peddling their wares, publications or other merchandise of whatsoever kind or description on the sidewalks in the city of Lexington in the business section," which area is set forth in the ordinance. Upon conviction in the county court, the defendants appealed to the Superior Court. Trial *de novo* in the Superior Court of Davidson County resulted in a verdict of guilty as to both defendants. Judgment: That each defendant shall pay the costs of the action as taxed by the clerk.

Defendants appeal therefrom to the Supreme Court and assign error.

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

John J. Henderson, of Burlington, N. C., and Hayden C. Covington, of Brooklyn, N. Y., for defendants.

DENNY, J. The State offered in evidence page 78 of the Minute Book of the Board of Commissioners of the city of Lexington, which contained only a copy of the ordinance, which defendants are charged with violating, together with the following statement: "Approved by the Ordinance Committee and adopted by the Board of City Commissioners in regular session, Monday, April 13, 1942."

The City Clerk, who is also a member of the Board of City Commissioners of Lexington, was permitted to testify, over the objection of the defendants, that the Board of Aldermen or Commissioners of the city of Lexington consists of ten members, that nine members were present at the regular meeting held on Monday, 13 April, 1942, that the ordinance in question was introduced and passed unanimously at said meeting. Generally speaking, parol evidence is not admissible to explain, extend or supplement the record of proceedings of a municipal council. In 19 R. C. L., Municipal Corporations, sec. 202, p. 902, it is stated: "Records of a municipal council are not only properly admissible in evidence to prove the facts stated therein, but it is well settled that evidence will not be admitted, in a collateral action, to vary or contradict such record when regular and complete on its face. . . . So also when the statutes expressly require a true and complete record of the proceedings of a municipal council to be kept, parol evidence is not admissible to aid, extend or supplement the record, or to prove that action was taken by the council which does not appear thereon. When, however, there is no express statutory provision that a complete record be kept, and the record contains nothing to show whether or not the council took any action whatever with respect to a certain matter, parol evidence is admissible to show that action was actually taken, but such a proceeding is fraught with so much danger that the rule should be administered with caution,

the alleged unrecorded proceeding not being held established without clear evidence thereof." Also in Vol. 23, R. C. L., Records, sec. 9, p. 159, we find there stated: "The law requires a record of municipal proceedings to the end that those who may be called to act under it may have no occasion to look beyond it, and to avoid the mischief of leaving municipal corporate action to be proved by parol evidence. The record made by the Clerk of a town meeting, board of supervisors, city council, school district or similar organization is conclusive of the facts therein stated, not only on the town, county or city, but on all the world so long as it stands as the record. Its accuracy cannot be drawn in question collaterally. It can be contradicted or impeached only in proceedings instituted directly for the purpose, and to the end that it may be corrected. So long as it is in existence, and can be produced, it is the only competent evidence of the action of the town or county. If it is destroyed or lost, parol evidence may be received to show what it was, but not to prove what the vote was by which the facts recorded were reached, except in so far as such proof may tend to establish the contents of the record."

The governing board of a town or city in this State is required by section 2822 of the Consolidated Statutes of North Carolina, to keep a full and accurate journal of its proceedings. All legislative sessions shall be open to the public, and every matter shall be put to a vote, the result of which shall be duly recorded. Section 2823 of the Consolidated Statutes of North Carolina, reads, in part, as follows: "No ordinance shall be passed finally on the date on which it was introduced, unless by two-thirds vote of those present."

We think it was error to admit parol testimony in an effort to show that the ordinance had been passed as required by statute. However, where an ordinance is adopted by the governing board of a municipality and that fact is shown, there is a presumption in favor of the validity of the ordinance. *Durham v. R. R.*, 185 N. C., 240, 117 S. E., 17. The minutes do not show when the ordinance was introduced, but only when it was passed. The governing board of a town, city or county has the right to have its minutes speak the truth and to that end may amend its records. *Power Co. v. Clay County,* 213 N. C., 698, 197 S. E., 603; *R. R. v. Reid,* 187 N. C., 320, 121 S. E., 534.

The validity of the enactment of the ordinance and the constitutionality thereof, are both challenged in the record. These questions will not be decided when the appeal may be disposed of on other grounds. *S. v. High, post,* 434; *S. v. Lueders,* 214 N. C., 558, 200 S. E., 22.

The defendants excepted to the refusal of his Honor to allow their motion for judgment as of nonsuit at the close of all the evidence. We think this motion should have been allowed as to the defendant P. H. Dunnagan. The evidence does not show that he sold any merchandise

on the sidewalks in the prohibited area. According to the evidence, he sold papers on the street within said area. It is a violation of the ordinance to sell wares, publications or other merchandise on the sidewalks, not in the street, in the business section of Lexington, as described in the ordinance.

As to the defendant O. W. Baynes, the motion for judgment of nonsuit was properly denied. However, after his Honor had charged the jury, the jury returned and asked the court, in writing, the following question: "Is his religious freedom and rights infringed upon, his rights to distribute this literature, by the City Ordinance?" The court answered: "This, Gentlemen of the Jury, is not directly the issue, and is not necessarily presented. It is a violation of the City Ordinance, as I have previously instructed you, for one to sell, that is peddle, literature, etc., on the public streets within the areas set forth in said ordinance, and this ordinance applies to all persons equally, both in and out of the city of Lexington, and which does in no wise as a matter of law infringe upon his religious freedom. If the defendant O. W. Baynes, sold any literature within this area for a valuable consideration to a third person, and you so find beyond a reasonable doubt, then peddling such, he would be guilty. Therefore, in the charge against O. W. Baynes, if you believe the evidence and find it sufficient beyond a reasonable doubt, then he would be guilty, and I so instruct you." Defendant duly excepted to the above portion of the charge.

His Honor inadvertently did not confine the sales made by this defendant to the sidewalks within the area set forth in the ordinance. We think this was prejudicial and for which this defendant is entitled to a new trial. We deem it unnecessary to discuss the other exceptions.

New trial as to O. W. Baynes.

Reversed as to P. H. Dunnagan.

STATE v. JOHN BAKER.

(Filed 16 December, 1942.)

1. Assault and Battery § 12a: Homicide § 11—

Where a person's home has been violently invaded, under such circumstances as to make it appear that a warning or order to desist would be ineffective to stop an apparently murderous assault, the law does not require a challenge to the assailant before taking adequate measures for defense.

2. Homicide § 25: Criminal Law §§ 52b, 52c—

In a prosecution for murder, the evidence for the State showing that deceased was attempting to force his way into the house of his brother,

with whom he was not on good terms, was cursing and violently threatening his brother, had broken the back window through which he had projected his head and shoulders, when his brother, the defendant, standing about ten feet inside the house, shot and killed deceased, with no warning whatever, *held* defendant's motion for judgment of nonsuit or for a directed verdict was properly denied.

3. Homicide § 27b—

In a trial for murder, where defendant pleaded not guilty and did not go upon the stand, but his counsel admitted "that deceased died as a result of a gunshot wound inflicted by defendant," it was error for the court to charge the jury that, upon such admission, the law raises two presumptions, first that the killing was unlawful, and second that it was done with malice, and places the burden on the defendant to satisfy the jury that he was wholly justified on the ground of self-defense, or that there was no malice.

APPEAL by defendant from *Bone, J.*, at January Term, 1942, of CUMBERLAND. New trial.

The defendant was indicted for the murder of Ezzelle Baker. The jury returned verdict of guilty of manslaughter.

The evidence pertinent to the questions raised on the appeal may be concisely stated as follows: On 23 November, 1941, Ezzelle Baker, in company with Walter Hart, went to the home of his brother, John Baker, several miles from Hope Mills, to see his mother, who lived with John. Ezzelle Baker and Hart, being unable to gain admittance, went away and came back again late in the afternoon, under the influence of liquor. After knocking and calling and receiving no answer, Ezzelle attempted to force an entrance. Finding the doors and windows barred and the shades down, he kicked the front door, cut the putty away from the front window frames, and then went to the back window, and, cursing and threatening, removed two panes of glass, cut out a part of the frame with a knife, and climbed up so as to get his head and shoulders in the room, declaring he was going to kill the defendant. As he was attempting to effect entrance through the window, the defendant John Baker, standing in the door of an adjoining room, eight or ten feet away, shot him in the face and killed him. It seems that the brothers had not been on good terms, and that John had with his mother moved to their present home to get away from Ezzelle, and had not seen him in two years.

The only evidence offered by the State as to the circumstances of the shooting came from Walter Hart, and police officer Butler, who in his testimony, related the defendant's statement of the facts of the occurrence. The defendant did not testify.

At the close of the State's evidence it was stated by defendant's counsel that he was willing for the record to show "that the deceased died as a

result of a gunshot wound inflicted by the defendant John Baker." In his charge to the jury, the trial judge, referring to this statement of counsel, said: "Upon that admission the law raises two presumptions; first, that the killing was unlawful; and, second, that it was done with malice; and places upon the defendant the burden of satisfying the jury, not beyond a reasonable doubt nor even by the greater weight of the evidence, but simply to the satisfaction of the jury, either that he was wholly justified on the ground of self-defense, or that there was no malice." The defendant noted exception to this instruction.

The defendant's motion for judgment of nonsuit or for directed verdict was denied. The jury returned verdict of guilty of manslaughter, and from judgment imposing prison sentence, the defendant appealed.

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

W. C. Downing and James R. Nance for defendant, appellant.

DEVIN, J. It appears that in the development of the testimony, in the trial, the State put in evidence the defendant's narrative of the circumstances of the homicide, which tended to show that the fatal wound was inflicted by the defendant in the defense of himself and his home, against an attempt on the part of the deceased to enter by force with threats to kill. It was earnestly argued that this constituted a complete defense, and that this evidence having been offered by the State, without other showing, entitled the defendant to his motion for judgment of nonsuit or for a directed verdict in his favor. *S. v. Fulcher,* 184 N. C., 663, 113 S. E., 769; *S. v. Todd, ante,* 346.

However, an examination of the evidence set out in the record reveals that while the deceased was attempting to force an entrance into defendant's home, and had gone so far as to break the back window of the house and project his head and shoulders through the aperture at the time he was shot, the State's testimony does not show the defendant at any time ordered him to desist, or gave him any warning of his purpose to shoot if he persisted. The shades of the room were down and the presence of the defendant and his gun apparently were not clearly observable. No word was spoken by the defendant, and, when the head of the intruder appeared through the window, he shot. It is true, where a person's home has been violently invaded under such circumstances as to make it appear that a warning or order to desist would be ineffective to stop an apparently murderous assault, the law would not require a challenge to the assailant as a prerequisite to taking adequate measures for defense. In the expressive language of *Chief Justice Pearson,* "One cannot be expected to encounter a lion as he would a lamb." *S. v. Floyd,*

51 N. C., 392; *S. v. Hough,* 138 N. C., 663, 50 S. E., 709. But we think under all the circumstances of this case, whether the defendant used more force than appeared reasonably necessary for the protection of himself or his home was a question for the jury, and that the motion for judgment of nonsuit was properly denied. *S. v. Goode,* 130 N. C., 651, 41 S. E., 3; *S. v. Cox,* 153 N. C., 638, 69 S. E., 419; *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617; *S. v. Glenn,* 198 N. C., 79, 150 S. E., 663; *S. v. Bryson,* 200 N. C., 50, 156 S. E., 143; *S. v. Roddey,* 219 N. C., 532, 14 S. E. (2d), 526.

But we think the learned judge who presided over the trial of this case fell into error in his interpretation of the extent and effect of the admission of counsel. We do not think this was alone sufficient to relieve the State of the burden of showing beyond a reasonable doubt that the defendant intentionally killed the deceased with a deadly weapon, or to require the defendant to assume the burden of satisfying the jury that he was justified on the ground of self-defense. The defendant had pleaded not guilty. He had not gone upon the stand nor made any admission other than the statement of counsel. This statement should not be given an interpretation beyond the necessary implication of the words used. The portion of the charge excepted to properly could be predicated only on a definite admission, or the finding by the requisite degree of proof, that the defendant intentionally slew the deceased with a deadly weapon, thus making out a *prima facie* case of murder in the second degree. *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Howell,* 218 N. C., 280, 10 S. E. (2d), 815; *S. v. Quick,* 150 N. C., 820, 64 S. E., 168.

We think the instruction complained of tended to relieve the State of the burden of proof which was placed upon it by the defendant's plea of not guilty, and that a new trial should be awarded.

New trial.

CHARLES F. VAIL v. MAGGIE STONE AND C. F. STONE.

(Filed 16 December, 1942.)

1. Appeal and Error § 19—

Where the record does not show the organization of the court below or the authority of the special judge who signed the judgment, or disclose that the judgment was entered at term, the appeal is dismissed under Rule 19 of this Court.

2. Trusts §§ 1b, 7, 15—

Where a complaint alleges that defendant, mother of plaintiff, when plaintiff was a minor, deposited in bank money belonging to plaintiff and

afterwards bought a lot therewith, taking title in her own name but explaining to plaintiff that she held the lot for him and would, as soon as he reached his majority, convey same to him and that, shortly after plaintiff became of age he built a house on said lot, has paid the taxes since, and had no notice of any disavowal of the trust until very shortly before filing complaint. *Held:* (1) A demurrer *ore tenus* was properly overruled, both an express trust and a resulting trust being alleged; (2) and motion for judgment on the pleading is without merit, the only material admission in the answer being that plaintiff has been in possession for some time, exercising the incidents of ownership; and (3) motion for trial on plea of statute of limitations, before trial on merits, was properly denied.

APPEAL by defendants from *Olive, Special Judge,* at August Term, 1942, of GUILFORD. Affirmed.

Civil action to have plaintiff adjudged the beneficial owner of certain real property, title to which is now vested in the *feme* defendant and to compel conveyance thereof.

This action was instituted in the municipal court of High Point. When the cause came on for trial the defendants demurred *ore tenus* to the complaint for that it does not state a cause of action. The demurrer was overruled and the defendants excepted. They then moved for judgment on the pleadings. The motion was overruled and the defendants excepted. Thereupon, they moved for a trial on the issue raised by the plea of the state of limitations before a trial on the merits. Motion was overruled and defendants excepted.

Upon appeal to the Superior Court each exception of the defendants was overruled, the judgment of the municipal court was sustained and the cause was remanded for trial. The defendants excepted and appealed.

Walser & Wright for appellants.
Byron Haworth for appellee.

BARNHILL, J. The record here does not show either the organization of the court below or the authority of the special judge who signed the judgment. Nor does it disclose that the judgment was entered at term. The appeal is, therefore, dismissable under Rule 19 of this Court. *Brown v. Johnson,* 207 N. C., 807, 198 S. E., 570. Even so, we have considered the assignments of error presented.

The complaint alleges:

"3. The defendant, Maggie Stone, is the mother of the plaintiff, Charles F. Vail, and C. F. Stone is the husband of Maggie Stone. About twenty years ago while the plaintiff was a minor under the age of twenty-one years, he saved up money given to him by relatives and friends. When the amount of the savings reached One Hundred Dollars

the defendant, Maggie Stone, deposited said sum in a bank in her name in trust for the plaintiff. Shortly thereafter, on September 15, 1926, the defendant, Maggie Stone, bought a lot, 50 ft. by 200 ft., on the Fairfield Road, being Lot No. 6 of the Rufus King property as recorded in Plat Book 7, Page 9 in the office of the Register of Deeds of Guilford County, North Carolina. The said lot was purchased with the money deposited in the bank in the name of Maggie Stone, being in trust for the plaintiff, Charles F. Vail. The defendant, Maggie Stone, explained to the plaintiff that she was purchasing the said lot for the plaintiff, and that as soon as he reached his majority she would convey said lot to him in fee simple; that the plaintiff became 21 years of age October 4, 1931."

It further alleges that the plaintiff entered into actual possession of the premises in 1934, shortly after reaching his majority; that he built a house thereon; that he has paid all taxes and has remained in possession since said date, and that he had no notice of any disavowal of the trust created by the purchase until recently when the defendant C. F. Stone, husband of the defendant Maggie Stone, notified him that defendants not only declined to make deed but were then seeking a loan on said premises for their own benefit.

The allegations made are sufficient to repel a demurrer. Plaintiff expressly asserts a trust created by contract. Only the plaintiff may take advantage of his infancy. If he is able to offer evidence to sustain the allegations made he will then be entitled to a judgment declaring the trust and requiring a conveyance accordingly.

If we disregard the allegation of contract, even then there is allegation that money belonging to the plaintiff was knowingly used by the *feme* defendant in the purchase of real estate, title to which she took in her own name. She agreed to hold title for plaintiff's benefit. These facts, if established, create a resulting trust. *Teachey v. Gurley,* 214 N. C., 288, 199 S. E., 83.

The motion of defendants for judgment on the pleadings is without merit. The only material admissions contained in the answer are to the effect that plaintiff has been in possession of said premises for some time, collecting the rents therefrom and exercising all the incidents of ownership thereof. Certainly then the facts admitted do not entitle the defendants to a judgment.

As to the third assignment of error the appeal is clearly fragmentary and premature. Even so, it is without merit. Except in case of reference, a defendant is not entitled to a trial on the issue raised by a plea in bar independent of and prior to the trial upon the merits. Such is not in accord with the general practice in our courts.

The judgment below is

Affirmed.

STATE v. J. D. HIGH, JR., AND TOM MATTOX.

(Filed 16 December, 1942.)

1. Constitutional Law § 6b—

This Court never anticipates a question of constitutional law and it will not decide the challenged constitutionality of an act when the appeal may be disposed of on other grounds.

2. Criminal Law § 54e—

A special verdict rendered, in a criminal prosecution, under Public-Local Laws 1941, ch. 259, which does not find that the lot, upon which junk or scrapped automobiles are kept, is within 200 yards of a residential area as defined in the Act, is insufficient to support a verdict of guilty.

APPEAL by defendants from *Burney, J.*, at February Term, 1942, of WILSON. Reversed.

Criminal prosecution on warrant issued under ch. 259, Public-Local Laws 1941.

The warrant charges that on or about 1 July, 1941, "within the corporate limits of the Town of Wilson, or within five miles outside said town limits" the defendants operated and maintained "an open storage for and/of junked and disused automobiles and automobile parts, within 200 yards of resident building and resident lots which exceed mercantile and manufacturing establishments."

When the cause came on to be heard the jury returned a special verdict as follows:

"That the defendants, Jimmie D. High and Tom Mattox, operate and maintain, upon premises maintained by them, a garage for the repair of automobiles and the sale of automobile parts; the buildings in which said business is maintained and conducted faces the extension of Goldsboro Street and is on U. S. Highway No. 301; that in connection therewith they own or are in the possession of and maintain a lot of land extending back from Highway No. 301, parallel with *Briggs Street* for a distance of about *450* feet, and on this lot they maintain and permit to be maintained a large number, to-wit—at least *550,* of junked, scrapped disused automobiles and the parts from a large number of junked, scrapped and disused automobiles on said lot, which lot is maintained by them; the garage thereon and the lot being situate within the corporate limits of the Town of Wilson; that the buildings are within an area within 200 yards of which residences and residence lots exceed in number mercantile and manufacturing establishments, and the said junked, scrapped and disused automobiles and automobile parts are not stored within or under a roofed building; and the defendants have been

so maintaining said premises for more than twelve months last past. And prior to the enactment of chapter 259 of the Public-Local Laws of 1941.

"If from your verdict and findings of fact the Court is of the opinion that the defendants are guilty, then the jury returns a verdict of 'Guilty'; if, however, upon your findings of fact and verdict the Court is of the opinion that the defendants are not guilty then the jury returns a verdict of 'Not Guilty.'"

The jury then, upon instruction of the court as to the legal effect of their findings, returned a verdict of "Guilty" upon the special verdict. From judgment thereon defendants appealed.

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

Sharpe & Grimes and Connor & Connor for defendants, appellants.

BARNHILL, J. The primary objective of this appeal is to test the constitutionality of ch. 259, Public-Local Laws 1941, under which defendants were indicted, it being contended by the defendants that this statute is a local law relating to the abatement of nuisances and is prohibited by Art. II, sec. 29, N. C. Const. Decision on this question must be reserved. This Court never anticipates a question of constitutional law and it will not decide the challenged constitutionality of an act when the appeal may be disposed of on other grounds. *Person v. Doughton,* 186 N. C., 723, 120 S. E., 481; *S. v. Edwards,* 190 N. C., 322, 129 S. E., 808; *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14; *Newman v. Comrs. of Vance,* 208 N. C., 675, 182 S. E., 453; *Wood v. Braswell,* 192 N. C., 588, 135 S. E., 529. The record here will not permit a determination of the question thus sought to be presented.

The special verdict is insufficient to support the judgment entered. The act does not condemn the maintenance of buildings within the designated area. Nor does it prohibit the keeping and storing of junk within a building. The conduct made or attempted to be made unlawful is the maintenance of "any storage or dump or parking lot for the storage or placing or keeping of junk or scrapped or disused automobiles or automobile parts . . . within or adjacent to any residential area of the town of Wilson." For the purpose of the act the residential area is "any area or place within 200 yards of which residences or residence lots exceed in number mercantile or manufacturing establishments." "Roofed" buildings are expressly excepted.

The jury found that the lot is within the corporate limits of the town, but this alone is not sufficient to support the verdict. They found also that the buildings are within the prohibited area. They failed, however,

to find that the lot upon which junked or scrapped automobiles are stored or kept is likewise within 200 yards of a residential area as defined in the act. This is of the essence—the *sine quo non*—of the offense created by the statute. It may be that the buildings are and the junk lot is not within such area. Hence, there is no sufficient finding of fact to support a verdict of guilty.

The judgment below is

Reversed.

STATE v. PALMER MEARES.

(Filed 16 December, 1942.)

1. Homicide §§ 16, 28—

In a prosecution for murder, evidence which showed that defendant went to the home of deceased to ask if deceased had reported him to the officers as the owner of a still and sugar found near the homes of both, whereupon a fight ensued and defendant shot and killed deceased, who was unarmed, shooting him several times and in the back as deceased fled out of his house, around the yard and down to his barn, *held* ample to support a verdict of murder in the first degree.

2. Homicide § 27b—

In an instruction to the jury, in a murder trial, that if the defendant has failed wholly to satisfy you that he was fighting in self-defense, then he would be guilty of murder in the second degree at least, the use of the word "wholly" is not prejudicial error, when considered with the other portions of the charge which were correct.

APPEAL by defendant from *Bone, J.*, at June Term, 1942, of ROBESON.

Criminal prosecution tried upon indictment charging the defendant with the murder of George Allen.

Verdict: Guilty of murder in the first degree.

Judgment: Death by asphyxiation.

Defendant appeals, assigning errors.

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

F. D. Hackett for defendant.

STACY, C. J. The record discloses that on the morning of 20 May, 1942, the defendant went to the home of the deceased to inquire whether he had reported him to the officers as the owner of the still and a quantity of sugar which the sheriff and his deputies had seized on the day before in the woods near the homes of the parties. The two had been in the illicit distillery business together for a number of years. They

were related by affinity, the defendant having married a niece of the deceased. The defendant found the deceased and his wife at breakfast. The evidence is in conflict as to just what happened prior to the killing, but the jury has found that it took place under circumstances amounting to murder in the first degree. There is ample evidence to support the verdict. The defendant interposed a plea of self-defense, which was rejected by the jury. It is certain that a fight ensued and several shots were fired by the defendant. The deceased ran out of the house, around the yard, and down to his barn. He was shot in the back while going to the barn. The deceased had no firearm. It is in evidence that he called to his wife to bring him his gun, which she never did.

The exceptions discussed in defendant's brief relate to portions of the charge, and of these, only one would seem to merit any discussion. The burden of establishing the defendant's guilt beyond a reasonable doubt was properly placed upon the State. Correct instructions were also given in respect of defendant's plea of mitigation and self-defense. Near the end of the charge and in summation, the court gave this instruction:

"If the defendant has failed wholly to satisfy you that he was fighting in self-defense, then he would be guilty of murder in the second degree at least, and if the State then has gone forward and satisfied you from the evidence beyond a reasonable doubt that the killing was wilful, malicious and with premeditation and deliberation, as those terms have been explained to you by the Court, then it would be your duty to return a verdict of guilty of murder in the first degree."

The defendant's quarrel with the instruction is, that the use of the word "wholly" deprived him of his plea of mitigation and self-defense unless established by a greater intensity of proof than "to the satisfaction of the jury." *S. v. DeGraffenreid, ante,* 113; *S. v. Beachum,* 220 N. C., 531, 17 S. E. (2d), 674; *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Carland,* 90 N. C., 668. If the instruction stood alone, the argument of defendant's counsel would present a more serious question. However, considering it in connection with other portions of the charge, as we are required to do, it is not thought the jury could have been misled in the matter. *S. v. Smith,* 221 N. C., 400, 20 S. E. (2d), 360. The charge is to be read contextually. *S. v. Lee,* 192 N. C., 225, 134 S. E., 458.

The other exceptions to the charge may readily be resolved in favor of upholding the trial by the same formula of contextual consideration. *S. v. Johnson,* 219 N. C., 757, 14 S. E. (2d), 792.

A careful perusal of the entire record leaves us with the impression that no reversible error has been made to appear. The verdict and judgment will be upheld.

No error.

T. L. KEARNS v. BILTWELL CHAIR & FURNITURE COMPANY ET AL.

(Filed 16 December, 1942.)

Master and Servant §§ 52c, 55d—

Findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive on appeal, in both the Superior and Supreme Courts.

BARNHILL, J., dissents.

APPEAL by defendants from *Olive, Special Judge,* at September Term, 1942, of DAVIDSON.

Proceeding under Workmen's Compensation Act to determine liability of defendant employer and insurance carrier to plaintiff, injured employee.

On 4 August, 1941, the plaintiff, while in the employ of Biltwell Chair & Furniture Company at its plant in Denton, N. C., operating a machine known as a sander, discovered a big-headed, rusty upholstering tack sticking through the sole of his shoe and entering his right foot beneath the big toe, from which infection set in, finally necessitating the amputation of his right leg.

The Industrial Commission found that the injury by accident which the plaintiff sustained arose out of and in the course of his employment, and accordingly awarded compensation. The defendants appealed to the Superior Court, challenging the sufficiency of the evidence to support the findings of the Commission.

From judgment affirming the award of the Commission, the defendants appeal, assigning errors.

J. F. Spruill for plaintiff, appellee.

Don A. Walser for defendants, appellants.

STACY, C. J. There is ample evidence to support the findings of fact made by the Industrial Commission, and, on the facts found, the award appears to be correct.

To debate the different inferences which the parties seek to draw from the evidence would be to travel again the same ground covered by the Industrial Commission. The findings of fact, supported as they are by competent evidence, are "conclusive and binding as to all questions of fact" (N. C. Code 1939, sec. 8081 [ppp]), and on appeal are not subject to review by the Superior Court or this Court, even though we might be inclined to a contrary view if permitted to review the factual deter-

minations. *Lassiter v. Tel. Co.*, 215 N. C., 227, 1 S. E. (2d), 542; *Beach v. McLean*, 219 N. C., 521, 14 S. E. (2d), 515; *Reed v. Lavender Bros.*, 206 N. C., 898, 172 S. E., 877; *Greer v. Laundry*, 202 N. C., 729, 164 S. E., 116.

The record presents only a factual dispute, which the Commission has resolved in favor of the injured employee.

Affirmed.

BARNHILL, J., dissents.

C. H. JONES AND MRS. C. H. JONES v. JONES LEWIS FURNITURE COMPANY.

(Filed 16 December, 1942.)

1. Pleadings § 15—

While it is provided by statute that in construction of a pleading for the purpose of determining its effect, the allegations therein shall be liberally construed with a view to substantial justice between the parties, C. S., 535, the complaint must state a cause of action, and the court will not construe into a pleading that which it does not contain.

2. Same: Sales § 14—

In an action to recover for breach of an express warranty, where the complaint alleges that defendant's salesman guaranteed that a second-hand bed was free of bugs, and relying thereon plaintiff purchased the bed which was infested with bugs, a demurrer *ore tenus* to the complaint for that it does not state a cause of action, C. S., 518, made in this Court is allowed.

APPEAL by defendant from *Olive, Special Judge*, at 1 June, 1942, Term of GUILFORD.

Civil action to recover for alleged breach of express warranty.

Plaintiffs in their complaint, in pertinent part allege:

"3. That on or about May 10, 1941, the plaintiffs purchased from the defendant, and the defendant sold to the plaintiffs, one wine colored sofa-bed for the sum of $16.43.

"4. That at the time of the sale the defendant's salesman explained to the plaintiffs that the bed was a second-hand article; that thereupon the plaintiffs inquired of the defendant's salesman if the bed were free of bedbugs, stating that unless it were free of bugs they were not interested in purchasing it; that the defendant's salesman and employee guaranteed to plaintiffs that the bed was free of bugs; that, relying upon said guarantee, the plaintiffs purchased the bed."

Plaintiff further alleges that in fact "the bed was infested with bugs," and thereby the warranty was breached to their humiliation and damage.

Defendant, in answer filed, admits the sale of the "sofa-bed" to plaintiffs, but denies other material allegations.

Upon trial below there was judgment on verdict for plaintiffs. Defendant appeals therefrom to Supreme Court and assigns error.

T. J. Hill and York & Boyd for plaintiffs, appellees.

Hoyle & Hoyle for defendant, appellant.

WINBORNE, J. Demurrer *ore tenus* to the complaint for that it does not state facts sufficient to constitute a cause of action, C. S., 518, interposed in this Court by defendant, is well taken.

It is contended, and it so appears, that there is no allegation that the defendant made any warranty. The allegation is that "defendant's salesman and employee guaranteed," and "relying upon said guarantee, the plaintiffs purchased the bed." This is far from alleging that the defendant made the warranty.

While it is provided by statute in this State that in the construction of a pleading for the purpose of determining its effect, the allegations therein shall be liberally construed with a view to substantial justice between the parties, C. S., 535, the complaint must allege a cause of action, and the Court will not, under this rule, construe into a pleading that which it does not contain. McIntosh, N. C. P. & P., p. 373, section 369.

Demurrer sustained.

STATE v. DANIEL PHILLIPS AND ROSANA LIGHTNER PHILLIPS.

(Filed 16 December, 1942.)

Criminal Law § 80—

The defendants having failed to prosecute their appeals, the motion of the Attorney-General to docket and dismiss is allowed. However, pursuant to custom in capital cases, the Supreme Court has examined the record for errors upon its face, and finds none.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the October Term, 1942, Durham Superior Court, the defendants herein, Daniel Phillips and Rosana Lightner Phillips, were tried upon indictment charging them with the murder of Harry F. Watkins, which resulted in convictions of murder in the first degree and sentences of death as the law commands. From the judgments thus entered, the defendants gave notice of appeal to the Supreme Court. No bonds were required, as the defendants were granted the privilege of appealing *in forma pauperis*. *S. v. Stafford,* 203 N. C., 601, 166 S. E., 734.

The Clerk certifies that no case on appeal has been filed in his office; that the time for filing same has expired, and that he is advised by counsel "no appeal has been perfected." Hence, as the defendants have failed to prosecute their appeals, the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455. However, pursuant to custom in capital cases, we have examined the record proper to see that no error appears upon its face. None has been found on the present record. *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507.

Judgment affirmed. Appeal dismissed.

BELK'S DEPARTMENT STORE, INC., v. GUILFORD COUNTY; GEORGE L. STANSBURY, CHAIRMAN, J. W. BURKE, R. C. CAUSEY, JOE F. HOFFMAN AND FLAKE SHAW, CONSTITUTING THE BOARD OF COMMISSIONERS OF GUILFORD COUNTY, NORTH CAROLINA, AND ALSO CONSTITUTING A BOARD OF EQUALIZATION AND REVIEW; AND A. C. HUDSON, TAX SUPERVISOR OF GUILFORD COUNTY, NORTH CAROLINA.

(Filed 8 January, 1943.)

1. Constitutional Law §§ 4c, 17: Taxation § 25—

The provision of the North Carolina Constitution, relating to trial by jury (Art. I, sec. 19), does not require court review of the valuation of land for taxation, or determination of such value by a jury in a *de novo* hearing, and will not support resort to *certiorari* for that purpose.

2. Taxation § 25: Appeal and Error § 18b—

Certiorari will not lie to bring up for review the valuation of land fixed by the State Board of Assessment, on appeal from the county commissioners acting as a board of equalization, where the proceeding was in accordance with the statute and no want of jurisdiction or abuse of power or discretion is charged, and only errors of judgment are involved.

3. Appeal and Error § 18b—

Where *certiorari* is used as a substitute for an appeal expressly provided in the law, which has been lost without fault of the petitioner, the

hearing in the court must necessarily be *de novo*, if the appeal provided is of that nature; but it is otherwise when the writ is used, as at common law, to bring up for review the action of inferior courts or tribunals upon the principle that the acts sought to be reviewed are judicial or *quasi*-judicial.

4. Constitutional Law §§ 3b, 4c—

Where the written Constitution does not otherwise direct, the Legislature may distribute powers and functions of government as it may deem proper for the best interests of the public and may make the action of administrative boards, set up for that purpose, final and conclusive.

STACY, C. J., dissenting.

APPEAL by defendants from *Olive, Special Judge,* at 31 August, 1942, Civil Term, of GUILFORD. Reversed.

The plaintiff, a corporation under the laws of this State, is the owner of a lot and building thereon at the southeast corner of the intersection of South Elm Street and East Market Street, in the city of Greensboro, Guilford County. The property was listed for taxation as of 1 January, 1941, and appraised or valued for the purpose of tax assessment in regular course by the authorities established by law for that purpose.

In the county of Guilford a Revaluation Board of Assessors had been established by statute applicable to that county, chapter 86, Public-Local Laws of 1941, which, in the order of procedure provided, first undertook the appraisal of the property and made separate findings as to the value of the lot and the value of the building thereupon, and finding the total value of the property therefrom. The value of the land was fixed at $271,190.00 and a "tax value" of $230,511.50 resulted by reason of a rule, uniformly applied, that for taxing purposes 85% of the real value should be observed. The record does not disclose the total valuation of land and building together.

The plaintiff, contending that the valuation was excessive, filed a complaint before the Guilford County Board of Equalization and Review, a board created under authority of the above cited statute, ch. 86, Public-Local Laws of 1941, requesting a reduction of the valuation set on the land alone, not complaining of the value placed on the building. This complaint was filed 16 December, 1941. The plaintiff was represented at the hearing, which resulted in a reduction of $6,825.00, which it appears was to correct an error as to the frontage of the lot on Elm Street. Contending that the valuation was still excessive, plaintiff appealed from this board to the Board of County Commissioners of Guilford County, sitting as a Board of Equalization and Review. Machinery Act of 1939, sec. 1105, *et seq.* (Michie's Code of 1939, sec. 7971 [160], *et seq.*). The appeal was heard on 16 April, 1942, and on 15 June, 1942, the board denied any further reduction of the valuation. Appeal was

then taken to the State Board of Assessment (*q.v.*, Michie's Code of 1939, secs. 7971 [106]-7971 [110], Machinery Act of 1939, secs. 200-204), where plaintiff was given a hearing on 29 July, 1942, as a result of which the valuation theretofore made was confirmed.

It is alleged in the petition that no oral testimony had been taken on the hearings; but that petitioner has filed statement of its contentions, "together with a tabulation of the figures involved," and that at the hearing before the State Board of Assessment, it introduced a "certificate of valuation" made by the Greensboro Real Estate Board, in which the value of petitioner's land was placed at $222,264.00. The petition recites various evidential matters in support of the merit of its contention that the value placed on the land is excessive.

As bearing on the right to the writ, plaintiff points out in the petition that there is no provision in the Machinery Act for an appeal from an adverse decision of the State Board of Assessment and avers that it is advised and believes that in such case access to the courts may be had by *certiorari*. The prayer of the petition is for a writ of *certiorari* to the State Board of Assessment to bring up the cause for a hearing in the Superior Court.

The defendants moved to dismiss the petition, assigning as grounds: (1) That plaintiff paid taxes voluntarily for the year 1941 on the property as valued; (2) that petitioner's only remedy by way of attack on the assessment was to pay the taxes and sue for recovery; (3) for that petitioner seeks a review of a finding of fact by the State Board of Assessment without alleging any error of law, want of evidence to sustain the finding of fact, or any allegation of want of jurisdiction in the State Board of Assessment, and without any allegation that the valuation fixed on petitioner's property by the State Board of Assessment was not equalized with the valuation of other property in the county; and (4) that the petition discloses no ground entitling the petitioner to a writ of *certiorari* or a jury trial to determine the facts in the matter.

Upon the hearing, Judge Olive, holding the August, 1942, Term of Guilford Superior Court, overruled the motion to dismiss the petition, and ordered that the writ be issued as prayed for by plaintiff. From this order defendants appealed, assigning error.

York & Boyd for plaintiff, appellee.

D. Newton Farnell, Jr., H. C. Wilson, and B. L. Fentress for defendants, appellants.

SEAWELL, J. The plaintiff contends that the action of the State Board of Assessment in fixing the value of its property for purposes of taxation was a *quasi*-judicial act and, therefore, subject to court review,

which may be had by *certiorari,* since the statute does not provide for an appeal to the court. Upon this theory, the propriety or necessity for review would be referred to the general power of the court to supervise inferior courts and tribunals with respect to judicial acts, and in this State the scope of such review would be controlled by the rules of the common law. But plaintiff is not content to rest its alleged right of review on this basis alone—probably because, where the practice obtains, review by *certiorari* on this principle is generally confined to errors of law—principally those affecting the jurisdiction of the board or the validity of the procedure—and does not include questions of fact or, to be specific, valuation of property for purposes of taxation. The plaintiff goes further than such a review would imply, and demands a *de novo* hearing in the Superior Court upon the merits, in which the value of the property may be fixed by a jury. Counsel for plaintiff in support of this demand call to our attention Article I, sec. 19, of the Constitution, relating to trial by jury, and cite certain decisions of this Court which they regard as having a favorable connotation: *Dougan v. Arnold,* 15 N. C., 99; *Petty v. Jones,* 23 N. C., 408; *Lunceford v. McPherson,* 48 N. C., 174; *Hartsfield v. Jones,* 49 N. C., 309; *Walls v. Strickland,* 174 N. C., 298.

It can readily be seen that where *certiorari* is used as a substitute for an appeal expressly provided in the law, which has been lost without the fault of the petitioner, the hearing in the court must necessarily be *de novo,* if the appeal provided is of that nature. It is otherwise when *certiorari* is used as at common law to bring up for review the action of inferior courts or tribunals upon the principle that the acts sought to be reviewed are judicial or *quasi*-judicial, or within the supervisory or "superintending" power of the court. 10 Am. Jur., Certiorari, sec. 4; *Hartsfield v. Jones,* 49 N. C., 309, 310.

Rhyne v. Lipscombe, 122 N. C., 650, 29 S. E., 57, and *Taylor v. Johnson,* 171 N. C., 84, 87 S. E., 981, rest upon the principle that the Legislature in creating an inferior court, without express right of appeal, cannot thus destroy the constitutional authority of the Superior Court or by act of the Legislature create courts of equal dignity and jurisdiction, and that in the absence of a provision for an appeal from such court, *certiorari* will lie as a substitute therefor. There is no doubt that the function of such a writ would be the same as the appeal usually provided in connection with such courts and would, in proper instances, bring up the case for a trial *de novo.* That principle has not been extended to a review by *certiorari* of the action of administrative bodies. When not otherwise provided by statute, the review is within the scope of common law rules.

1. *Certiorari will not lie to bring up for review the valuation of land fixed by the State Board of Assessment on appeal from the county commissioners acting as a board of equalization, where the proceeding was in accordance with the statute and no want of jurisdiction or abuse of power or discretion is charged, and only errors of judgment are involved.*

The statute restoring the writ of *certiorari* subsequent to the adoption of the Code of Civil Procedure, provides: "Writs of *certiorari, recordari* and *supersedeas* are authorized as heretofore in use." C. S., 630. Its use here closely follows that of the common law; and our Reports disclose no instance in which it has been used for the purposes suggested by the appellee, and no case, which, in our judgment, serves as authority for such use.

The scope of review under the writ as used at common law has been thus defined: "According to the weight of authority, where the scope of the writ has not been narrowed by statute, its office extends to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the action complained of, and all questions of irregularity in the proceedings, that is, of the question whether the inferior tribunal has kept within the boundaries prescribed by the express terms of the statute law or well-settled principles of the common law." 10 Am. Jur., p. 524, sec. 3.

When *certiorari* is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held that the power of review, as in other instances of its use under the common law, does not extend to questions of valuation, but only to jurisdictional or procedural irregularities or errors of law. *State ex rel. American Exp. Co. v. State Board of Assessment and Equalization,* 3 S. D., 338, 53 N. W., 192; *People ex rel. Onderdonk v. Queens County,* 1 Hill (N. Y.), 195; *Tomlinson v. Board of Equalization,* 88 Tenn., 1, 12 S. W., 414; *State ex rel. Vance v. Dixie Portland Cement Co.,* 151 Tenn., 53, 267 S. W., 595; *Colonial Trust Co. v. Scheffey* (N. J.), 69 Atl., 455. In New York and New Jersey, and possibly some other states, *certiorari* has been made a special proceeding, giving to the reviewing court, under certain conditions, power to consider questions of valuation; Cooley on Taxation, section 1633; but even in those courts *certiorari* has been denied where the question raised as to valuation concerns only the exercise of a discretion on the part of the valuing board. *Colonial Trust Co. v. Scheffey, supra; People ex rel. Onderdonk v. Queens County, supra.*

In Cooley on Taxation, the outstanding authority on this subject, after reviewing numerous leading authorities on the subject, the author makes this observation: "The following conclusions are deduced by the authorities from these general principles:—that assessments cannot be re-

vised and set aside on this writ on the ground merely that they are excessive or unequal, except where the statute otherwise provides; or that the assessors have erred in any matter of judgment, or have been guilty of irregularities in the exercise of their authority, not being of a nature to deprive them of jurisdiction or to take from the party complaining any substantial right." And again, "The discretionary action of a county board in equalizing the assessments of the county, like the assessments themselves, is not subject to review on this process." And again, "It (*certiorari*) will not lie to review any merely discretionary action of any tribunal; nor is it within the proper scope of the writ to review the decisions of inferior tribunals on the merits." Cooley on Taxation, sec. 1633, pp. 3274, 3275-6.

Consistently with this principle, *certiorari* has been recognized in this State as a proper writ to bring up for review and correction action of the State Board of Assessment involving errors of law and mistakes or defects of procedure. *Power Co. v. Burke County,* 201 N. C., 318, 160 S. E., 173; *Caldwell County v. Doughton,* 195 N. C., 62, 141 S. E., 289. Neither of these cases is authority for the contention of the plaintiff that *certiorari* will lie to review the valuation of property or redetermine it in court where no error in law is charged.

We do not regard the references to these cases in *Hooker v. Pitt County,* 202 N. C., 4-6, 161 S. E., 542, as justifying the use of the writ where only the simple question of valuation is involved, without any charge or showing that in such valuation the board exceeded its powers or abused its discretion. Upon the theory presented by the plaintiff, it would have as much right to appeal by way of *certiorari* had the overvaluation amounted only to a few dollars rather than a few thousand.

Some attention might be given here to the apparent assumption upon which this petition for *certiorari* proceeds—that every act of an administrative board involving the exercise of sound judgment and discretion must be submitted to court review on the theory that the act is judicial. It is not expected that the law will be administered by robots. It is inevitable that in following the ordinary procedure imposed upon them by statute, boards of this kind must perform some acts not purely ministerial, make some decisions to which sound judgment and discretion must be applied—as, for instance, in the ascertainment of facts and conditions as a basis for further administrative action. The simple fact that the result is reached by similar processes of reason, common to all men, does not expropriate the exercise of these faculties to the judiciary. The action could only be judicial in any proper sense if it went to the determination of some right the protection of which, under our system of jurisprudence, is the peculiar office of the courts. No such right was involved in the challenged action; but, however labeled, we do not find

in it that necessity of court review which must exist as a justification for the writ. *Person v. Watts,* 184 N. C., 499, 506, 115 S. E., 336.

2. *The provision of the Constitution relating to trial by jury does not require court review of the valuation of land for taxation or determination of such value by a jury in a de novo hearing, and will not support resort to certiorari for that purpose.*

Article I, sec. 19, of the Constitution provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

Similar provisions are found in the constitutions of most of the American states. A summary of these expressions may be found in Page & Jones on Taxation, sec. 201.

Under this clause of the Constitution, trial by jury is only guaranteed where the prerogative existed at common law or by statute at the time the Constitution was adopted. *Groves v. Ware,* 182 N. C., 553, 109 S. E., 568; *R. R. v. Parker,* 105 N. C., 246, 11 S. E., 328.

In Page & Jones on Taxation, after the summary above noted, we find, sec. 202: "These provisions are held to be intended to secure and protect the right of trial by jury in cases where such right existed at common law. They are not intended, unless such affirmative intention is expressly stated, to extend the right of trial by jury to cases in which no such right existed at common law, as in cases of taxation." Cooley on Taxation, sec. 1220.

A difference between the owner and the State Board of Assessment with regard to the proper value to be placed upon the land for the purpose of taxation is not a controversy at law respecting property within the meaning of the constitutional provision. The purpose of the valuation is merely to produce a yardstick by which the amount of the tax may be measured and equalized with other subjects of taxation within the same class. Of itself it does not affect any right in the property or in its use.

In *Cowles v. Brittain,* 9 N. C., 204, *Chief Justice Taylor,* speaking to this point, said:

"There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct; and if the officers entrusted with the execution of the laws transcend their powers to the injury of an individual the common law entitled him to redress. But to pursue every delinquent liable to pay taxes through the forms of process and a jury trial would materially impede, if not wholly obstruct, the collection of the revenue; and it is not believed that such a mode was contemplated by the

Constitution." *Unemployment Compensation Commission v. Willis,* 219 N. C., 709, 713, 15 S. E. (2d), 4.

3. *Valuation under the current Machinery Act, where no error in law or abuse of discretion is alleged, is final and conclusive.*

The distribution of the power of government in any state is a political privilege. Where the written Constitution does not otherwise direct, the Legislature may distribute these powers and functions as it may deem proper for the best interests of the public, and where notice and hearing is provided may make the action of administrative boards set up for that purpose final and conclusive, without violating due process of law. This is true with regard to the assessment of taxes. Cooley on Taxation, sec. 1118; *Wade v. Commissioners, infra.*

The section of the Machinery Act relating to the final disposition of the proceeding for valuation—Michie's Code of 1939, sec. 7971 (162)—and providing that the valuation "shall be entered upon the fixed and permanent records and shall constitute the valuation for taxation," in our opinion, contemplates that such valuation shall be final and conclusive. *Wade v. Commissioners,* 74 N. C., 81. It follows that the courts, acting only under such supervisory powers as they may have under the Constitution, have no power to interfere except where the jurisdiction is invoked for the review of errors in law.

This does not mean, of course, that under the guise of tax assessment a property owner may be made the victim of fraud or oppression, or subjected to a confiscation of his property, or otherwise injured by any illegal act on the part of the officials or boards charged with the administration of the law. This would make the valuation in point of law no valuation at all, and for such injuries the law is replete with remedy. It does mean that where the taxing laws and procedure are not themselves in contravention of the Constitution, and when boards and officers authorized to administer them act within their jurisdiction, in accordance with the procedure laid down, and without abuse of discretion, there is neither the necessity nor the legal ground of court review.

But while appeal was not provided or expected under the former law, *Wade v. Commissioners, supra,* the plaintiff here has enjoyed the full right of appeal to three successive boards beyond the original board by which the property was valued, all of which were empowered to hear, and did hear, the matter upon the merits, and now wishes to be further heard before a jury as in a civil action.

In *Tomlinson v. Board of Equalization, supra,* referring to the question of valuation, the Court said: "Every interest of the state alike demands that such questions shall be settled cheaply and speedily. Where an act creating a special tribunal, even exercising judicial functions, gives it power and authority to settle particular grievances, such as this, and either expressly or by plain implication declares that the

judgment of such special tribunal shall be final, and it confines itself within its jurisdiction and does not 'act illegally,' the writ of *certiorari* will not lie to review its action upon the merits."

Inasmuch as it appears that some five thousand complaints were disposed of by the Guilford County boards alone, the following quotation from *Colonial Trust Co. v. Scheffey* (N. J.), 69 Atl., 455, in denying a petition for *certiorari,* meets our approval: "The only substantial question sought to be raised before this court is one of fact or rather of opinion, *viz.,* whether the assessment is too high. This question has already been disposed of adversely to the prosecutor by the county board of taxation and by the state board of equalization of taxes. The object of the creation and maintenance of these boards was, in part, to provide tribunals having peculiar opportunity and machinery for the investigation of questions of valuation, and, in part, to relieve the regular courts of this administrative function when disconnected with any violated principle of law.—Each of these objects will be frustrated if this court is to take on these cases of disputed valuation just as if no special tribunals for this purpose had been provided."

4. We have tried to avoid the citation of decisions turning solely upon the application of local statute law, but we consider the cases cited as expressing the law in this jurisdiction as applied to the facts of this case. We do not intend to lay down any comprehensive rule regarding the use of the writ; that is a broader subject, to be dealt with when occasion arises. Limiting our opinion to the point involved in the appeal and in the petition for *certiorari*—the question of valuation—it is sufficient to say that in no aspect of the petition is the plaintiff entitled to the writ as an instrument of review or to secure a *de novo* trial upon the merits.

It would be a waste of time to speculate upon what the plaintiff's remedy might be for grievances of which it does not complain.

The order of the court below directing the writ to issue is reversed. Judgment will be entered in the court below dismissing the petition.

Reversed.

STACY, C. J., dissenting: The appeal should be dismissed or else the ruling on the motion should be affirmed.

A landowner feeling aggrieved at the excessive valuation of his property for purposes of *ad valorem* assessment and taxation, after exhausting the administrative machinery of the State to little or no avail, applies to the Superior Court for relief. He alleges, without any undue characterization, that the method of assessment adopted by the local authorities was erroneous and unjust in result; that it caused the valuation of his property to be excessive, wide of the mark, at variance with the provisions of the Machinery Act and discriminatory, and that "the State

Board of Assessment, in its opinion denying relief to the petitioner, failed to take into account any of the petitioner's evidence, save the purchase price of the land, and this is rejected as not being controlling." (Par. 14.)

The merits of the case are not now before us. The only question sought to be presented is whether the petition should be entertained. The majority says "No." The judge of the Superior Court thought otherwise, and I agree with him.

I. PROCEDURAL CONSIDERATIONS.

In the first place, the appeal is premature and should be dismissed *ex mero motu*. *Thomas v. Carteret County,* 180 N. C., 109, 104 S. E., 75. No appeal lies from a refusal to dismiss an action or proceeding. *Goldsboro v. Holmes,* 183 N. C., 203, 111 S. E., 1; *Farr v. Lumber Co.,* 182 N. C., 725, 109 S. E., 383; *Bradshaw v. Bank,* 172 N. C., 632, 90 S. E., 789; *Goode v. Rogers,* 126 N. C., 62, 35 S. E., 185. While an appeal lies from a ruling on a demurrer which goes to the whole cause of action, the practice is otherwise on denial of motion to dismiss, even where the basis for the motion is alleged deficiency of allegation to state a cause for relief. *Shelby v. R. R.,* 147 N. C., 537, 61 S. E., 377; *Mullen v. Canal Co.,* 112 N. C., 109, 16 S. E., 901. The reason no appeal lies from a refusal to dismiss is that it does not come within the purview of the statute, C. S., 638, permitting 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; *Leak v. Covington,* 95 N. C., 193. Perhaps a hundred cases could be cited in support of this position. *Chambers v. R. R.,* 172 N. C., 555, 90 S. E., 590. Indeed, speaking to the point in *Joyner v. Roberts,* 112 N. C., 111, 16 S. E., 917, it was said: "There are some questions which, by reiterated and uniform adjudications in regard to them, should be deemed settled. This is one of them." The reason for adhering to this procedure is, that the rights of the parties are different on formal demurrer from what they are on motion to dismiss. C. S., 515; *Shelby v. R. R., supra.*

The rule is in the interest of fairness to both sides. If the trial should result in favor of the respondents, they will not desire to appeal; if it is against them, their exception in the record for refusal to dismiss is not waived, and they will have the benefit of it on appeal from the final judgment. The disadvantage, if any, is not with the appellants, but with the appellee, since if he wrongfully insist on the refusal of such motion, instead of asking for an opportunity to make good his position, he may find that his victory is barren, and that he has the costs to pay for his bootless clamor. *Joyner v. Roberts, supra; Mullen v. Canal Co., supra.*

The uniform decisions are to the effect that a refusal to dismiss an action or proceeding before the final hearing does not "affect a substantial right" within the meaning of C. S., 638, and that an appeal therefrom will be dismissed. *Wilson v. Lineberger,* 82 N. C., 412; *Mitchell v. Kilburn,* 74 N. C., 483.

It is true, on petition for *certiorari* the applicant must show merit, but we are here dealing with an appeal from an order of the Superior Court denying a motion to dismiss. The two are not the same. The one is addressed to the chancellor with authority to entertain amendments if desired; the other is not appealable.

The respondents are seeking to cut short the matter by appealing from a refusal to dismiss and presenting the case as upon demurrer without its incidents. The majority approves; I disagree.

The argument at the bar centered around the appropriateness of the writ rather than the sufficiency of the petition. The opinion of the majority seems to have taken its cue from the argument. More of this anon.

II. APPLICATION OF MACHINERY ACT.

Secondly, it is provided by Art. V, sec. 500, of the Machinery Act. ch. 310, Public Laws 1939, that the assessment of property for purposes of taxation shall be "at its true value in money," and *ad valorem* taxes are to be levied "uniformly on valuations so determined." It is further declared to be the intent and purpose of the Act to have all property and subjects of taxation assessed at their true and actual value in money, "in such manner as such property and subjects are usually sold," not by forced sale, but for what the property and subjects "can be transmuted into cash when sold in such manner as such property and subjects are usually sold."

The petition alleges that this provision of the Machinery Act has been ignored or violated in the assessment of petitioner's property. Beyond all peradventure it would seem that such an allegation ought to suffice to sustain an application for *certiorari.* Even where the findings of fact made by an administrative body are conclusive on appeal, the courts are disposed to set them aside, if, in making them, the fact-finding body has disregarded or misconceived the law. *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324.

It seems quite clear that an allegation such as the petitioner makes here in respect of the misapplication of the Machinery Act belongs to the courts for final adjudication. This allegation alone should save the petition from dismissal. In addition, however, it is alleged that the State Board of Assessment "failed to take into account any of petition-

er's evidence save the purchase price of the land." What more is needed to excite the interest of a court of equity?

III. PERTINENT ORGANIC PROVISIONS.

Thirdly, there is something in the Constitution on the subject-matter of the petition:

1. "The power of taxation shall be exercised in a just and equitable manner. . . . Taxes on property shall be uniform as to each class of property taxed." Art. V, sec. 3.

2. "No person ought to be . . . in any manner deprived of his . . . property, but by the law of the land." Art. I, sec. 17.

In numerous decisions, it has been said that the pervading principles to be observed in matters of taxation are equality of treatment and fair play. *Rockingham County v. Elon College,* 219 N. C., 342, 13 S. E. (2d), 618. It is the will of the people of this State, as expressed in the organic law, that justice shall prevail in tax matters, with "Equal rights to all and special privileges to none." Of course, in devising a scheme of taxation, "some play must be allowed for the joints of the machine," and many practical inequalities may exist, still they are not to result from obvious discrimination. The goal must be kept in sight. The thesis of the Constitution is, that all similarly situated are entitled to like treatment from the government they support. *Leonard v. Maxwell,* 216 N. C., 89, 3 S. E. (2d), 316. A discrimination in assessment is as much a violation of the rule of uniformity as a discrimination in the rate of levy. 2 Cooley's Const. Lim. (8 Ed.), 1066, *et seq.* In either case, the result is unequal taxation. To say that arbitrariness must be alleged in the one case and not in the other to give the courts jurisdiction is to make a distinction not heretofore observed in the decisions. Even so, a liberal interpretation of the present petition, which the pleader is entitled to have made, C. S., 535, would seem to suffice as against a motion to dismiss. It is going rather far to say that equity cares nothing for the allegations of this petition. It invokes the judicial process to make sure that fairness dominates the administration of the law.

The procedure here followed has been suggested in a number of cases; first, in *Caldwell County v. Doughton,* 195 N. C., 62, 141 S. E., 289, then in *Power Co. v. Burke County,* 201 N. C., 318, 160 S. E., 173, and, lastly, in *Hooker v. Pitt County,* 202 N. C., 4, 161 S. E., 542. Presumably, these suggestions are now to be regarded as apocryphal. At any rate, the present petitioner, in following them, has only had his toils for his pains.

Heretofore, the question of form has not been regarded as capitally important, as the above cases will disclose. Equity concerns itself with the substance. It is not bound by form. Moreover, if the thesis of the

majority be correct, there is no valid appeal in this Court. But instead of engaging in over-refined distinctions, the point should be stressed that we are here dealing with a matter which affects every property owner in the State.

A discriminatory assessment is just as unlawful as a discriminatory levy, and equally as hurtful. They both fall in the same category; and it is not after the manner of the courts of equity to close their doors on allegations of illegality involving either. *Anderson v. Asheville,* 194 N. C., 117, 138 S. E., 715; *Banks v. Raleigh,* 220 N. C., 35, 16 S. E. (2d), 413. It can make no difference whether the inequality inheres in the law or results from its administration, the effect is the same so far as the citizen is concerned. A charge of discrimination, whether in the assessment or in the rate of tax, presents a question of law as well as fact, sufficient to support an application for *certiorari.* A direct attack upon an administrative determination made in an appellate proceeding on *certiorari,* "unlike that on a writ of error at law, extends to the findings of fact as well as to the ruling on questions of law." *Panama Mail S. S. Co. v. Vargas,* 281 U. S., 670.

A mode of assessment which disregards the established method and results in discrimination falls short of the constitutional requirement of "due process" or that no person shall be deprived of his property "but by the law of the land." What becomes of this guarantee if the courts will not entertain an allegation of illegality or discrimination in the administration of the law? The Constitution forbids discrimination, either in the law itself or in its administration, and, hence, a discriminatory assessment, even under the statutory formula, runs counter to the law of the land. *Brinkerhoff-Faris Co. v. Hill,* 281 U. S., 673. This position has heretofore been taken for granted. The suggestions in the cited cases appear to have been made as a matter of course. Here, however, we have the question debated and decided against the petitioner, not upon the merits of the case, but as a matter of procedure. An administrative discrimination is just as unlawful as a legislative one. In the *Hill case,* just cited, the Supreme Court of the United States dealt with an excessive and discriminatory assessment on *certiorari,* and reversed a judgment of the Supreme Court of Missouri, because it "denied to the plaintiff due process of law." The petitioner ought not to be required to raise a Federal question in order to get into the State courts. The allegation in paragraph 14 alone is sufficient to invoke the aid of equity. It needs no embellishment with descriptive adjectives or conclusional characterizations. The failure to accord the protestant an adequate hearing was the basis of the reversal in the *Hill case, supra.*

An *ad valorem* tax on a discriminatory assessment, not only offends against the constitutional requirement of uniformity, Art. V, sec. 3, but

also against the inhibition of unlawful deprivation. Art. I, sec. 17. Such is the gist of the petition in the instant case. I am not willing to say that the judiciary is exhausted or that equity is impotent to entertain the petition. Nor yet that the petition is feckless. "Procedural instruments are means for achieving the rational ends of law." *Adams v. U. S. ex rel. McCann,* 317 U. S., ... (decided 21 December, 1942). The judicial power of the State resides in the courts. Const., Art. IV, sec. 2. If the General Assembly is not permitted to discriminate in taxing property of the same class, it follows that it may not provide for the freezing of a discriminatory assessment in the administration of the law. The petition ought to be heard. It alleges an invasion of the right of equality of treatment. *Greene v. L. & I. R. R. Co.,* 244 U. S., 499.

The argument *ab inconvenienti* would seem to answer itself when it is recalled that the establishment of justice is the end of all government. To abandon its pursuit in the face of a charge of discrimination is to admit defeat. It is not in caste for equity to be so easily daunted. Its arms are neither short nor palsied. It is given to exalting substance over form and lending an attentive ear to allegations of maladministration. Such is its mission. The procedure in the Superior Court will depend upon the issues raised by the pleadings. These have not yet been determined in the instant case. Equity molds its decrees to meet the exigencies of the particular case. It is fully capable of directing that to be done which of right ought to be done. *McNinch v. Trust Co.,* 183 N. C., 33, 110 S. E., 663, *Suum Cuique.*

There is no difference in principle between an unlawful exemption and an excessive assessment. The one results in a discrimination in favor of the landowner; the other in a discrimination against him. We hear the one (*Odd Fellows v. Swain,* 217 N. C., 632, 9 S. E. [2d], 365) and decline to hear the other. We told the plaintiff in *Hooker v. Pitt County, supra,* that his remedy was by application for a *certiorari.* The present petitioner applies for a *certiorari* and we tell him that his application will not lie.

No case is cited, and none has been found, where equity has turned its back on allegations such as the petitioner makes here. My vote is to dismiss the appeal; failing in this, I vote for an affirmance.

STATE v. SAM HAIRSTON.

(Filed 8 January, 1943.)

1. Criminal Law § 33—

The competency of a confession is a preliminary question for the trial court and its admission will not be disturbed, where the court finds, upon proper evidence, that it was made freely and voluntarily.

2. Rape § 1a—

The commission of the crime of rape does not require deliberation and premeditation as a prerequisite to conviction, but the intent is inferred from the commission of the act.

3. Rape §§ 1e, 5—

In a trial upon an indictment for rape, where all of the evidence tended to show that the act of carnal knowledge was committed against the will of the prosecutrix and no evidence of a lesser offense was offered, defendant is not entitled to an instruction on the count of an assault with intent to commit rape.

4. Criminal Law § 5a—

On a plea of insanity the capacity of the accused to distinguish right from wrong in respect to the act charged as a crime, at the time of its commission, is made the test of his responsibility, and not his capacity to distinguish right from wrong in the abstract. Such capacity need not be general, it is only necessary that it relate to the particular act in question.

5. Criminal Law § 5b—

On a plea of drunkenness as a defense, the burden is on defendant to satisfy the jury that, at the time of the commission of the crime, he was intoxicated to such an extent that he did not know what he was doing, or trying to do, and was incapable of forming a criminal intent.

6. Same—

Where a defendant drinks intoxicants for the purpose of giving him nerve and courage to commit a crime, then such voluntary drunkenness will not be an excuse for a crime committed while thus intoxicated.

7. Criminal Law § 53a—

The charge of the court must be considered as a whole; and if when so considered, it presents the law fairly and correctly, there is no ground for reversing the judgment, though some of the expressions, when standing alone, may be regarded as erroneous.

APPEAL by defendant from *Armstrong, J.*, at February Term, 1942, of FORSYTH.

Criminal prosecution tried upon an indictment charging the defendant with rape.

The prosecutrix, a woman 52 years of age and a partial invalid, resided in Salem Chapel Township, in Forsyth County, with her father, who is 82 years of age and partially deaf. On Sunday night, 30 November, 1941, the prosecutrix retired between 10:30 and 11:00 o'clock. She slept upstairs and her father slept downstairs. On this night she and her father were alone in the house. About 1:30 in the morning the prosecutrix was awakened, the bed quilts were over her head and someone was lying on her and she was being choked. She managed to cut on the light by her bed and her assailant knocked the light off the table, disconnected it and then hit her on "the head with something very hard." She hollered several times, but her assailant had his hand over her mouth and again choked her. She managed to get her hand on his head and felt the nap of his hair and knew him to be a Negro. He had sexual intercourse with her. He heard her father coming upstairs and jumped through a window, tearing off a screen which had been tacked to a frame. Upon examination of the room after the attack, a hammer was found on the bed. A bottle containing about one-third of a pint of liquor, was found on the stair steps.

On the afternoon of 1 December a medical examination of the prosecutrix disclosed severe bruises, abrasions, with raw places on the face and neck, and evidence of penetration.

Defendant lived near the home of the prosecutrix, had worked for her father and had helped in the home. He had swept the house upstairs and downstairs. The prosecutrix was not able to sweep on account of her paralytic condition. Defendant was working for her father on the morning of 1 December, 1941, chopping wood, when he was arrested. Shortly after his arrest, according to the State's evidence, the defendant confessed the crime to G. K. Fontaine, a deputy sheriff, and thereafter repeated his confession in the presence of a brother of the prosecutrix and Mr. Speas, another deputy sheriff. In the afternoon of the same day of his arrest, the defendant repeated his confession to E. G. Shore, sheriff of Forsyth County. The confession was taken down by a stenographer, transcribed, read to the defendant and signed by him. This confession was admitted in evidence on behalf of the State.

Defendant contends all these confessions were involuntary, that he was threatened and coerced into making them, and further contends that he does not remember making them, and if he did make them it was while he was drunk and he cannot remember what he said. The State offered evidence to the effect that defendant was not threatened in any manner, that before he confessed he was informed of his rights, that he did not have to make any statement but if he did make one it would be used against him. The evidence further discloses that on the other two occasions when the confession was repeated by the defendant, he was in-

formed of his rights and warned that his statements would be used against him.

The defendant entered a plea of not guilty and introduced evidence as to his weak mentality from childhood and of his habitual drunkenness. Defendant testified he did not commit the act for which he was being tried, but that if he did he was so drunk he did not remember anything about it.

Verdict: "Guilty of rape as charged in the bill of indictment." Judgment: Death by asphyxiation. The defendant appeals, assigning errors.

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

John D. Slawter and Richmond Rucker for defendant.

DENNY, J. The defendant presents for consideration twenty assignments of error based on thirty-nine exceptions. Obviously we cannot discuss them *seriatim.*

The first assignment of error is to the ruling of his Honor that the confession of the defendant was voluntary. A preliminary examination of Sheriff Shore was conducted to determine whether or not the confession made to him by the defendant, which was reduced to writing, read to the defendant and signed by him, was made voluntarily. The court found as a fact that any statement made by defendant to the witness was free and voluntary. The competency of a confession is a preliminary question for the trial court, and the court's ruling will not be disturbed, if supported by any competent evidence. See *S. v. Manning,* 221 N. C., 70, 18 S. E. (2d), 821, and cases there cited.

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

The defendant assigns as error his Honor's charge, instructing the jury it could return one of two verdicts, as it found the facts to be, from all the evidence—guilty as charged in the bill of indictment or not guilty. The pertinent part of C. S., sec. 4639, reads as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and find a verdict of guilty of assault against the person indicted if the evidence warrants such finding." C. S., sec. 4640, reads as follows: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." The defendant is relying on the above statutes and the case of *S. v. Williams,* 185 N. C., 685, 116 S. E., 736, in which case there was ample evidence to support a convic-

tion of a lesser offense than that charged in the bill of indictment, and the Court said: "It is a well recognized principle that where one is indicted for a crime, and under the same bill he may be convicted of a lesser degree of the same crime, and there is evidence tending to support the milder verdict, the prisoner is entitled to have this view presented to the jury under a correct charge, and an error in this respect is not cured by a verdict convicting the prisoner of a higher offense, for in such case it cannot be determined that the jury would not have convicted of the lesser crime if the view had been correctly presented by the judge, upon evidence. *S. v. White,* 138 N. C., 715; *S. v. Foster,* 130 N. C., 666-673; *S. v. Jones,* 79 N. C., 630." However, in the instant case, the defendant admits he was not entitled to an instruction on the count of an assault with intent to commit rape for the reason that all the evidence tended to show the act of carnal knowledge was committed and against the will of the prosecutrix. In the trial below the defendant offered no evidence to support a contention of guilt of a lesser offense than that charged in the bill of indictment, but, on the contrary, denied the commission of the crime and interposed as affirmative defenses, if he did commit the crime, insanity and drunkenness.

In view of the evidence adduced at the trial below, we think the decision of this Court in *S. v. Jackson,* 199 N. C., 321, 154 S. E., 402, is controlling, in which case the Court said: "At the trial of this action, there was no request by the defendant that the court instruct the jury that under the indictment upon which defendant was on trial, if the jury should fail to find that defendant is guilty of rape, as charged in the indictment, or that he is guilty of an assault with intent to commit rape, as is also charged therein, they could, in accordance with the provisions of C. S., 4639, and C. S., 4640, return a verdict that defendant is guilty of an assault with a deadly weapon, or of an assault upon a female, or of a simple assault. It is apparent from the record that no contention to this effect was made by the defendant or in his behalf at the trial, for the reason that all the evidence, if believed by the jury, showed that the crime of rape was committed as alleged in the indictment. No contention to the contrary was made by the defendant, on his cross-examination of the prosecutrix, or of the witness for the State. He offered no evidence in support of such contention. For his defense, defendant relied solely upon an alibi. *S. v. Williams,* 185 N. C., 685, 116, S. E., 736, where it was held that the refusal of the trial judge to give the instruction requested by the defendant in that case, does not sustain the contention of the defendant in the instant case, that there was error in the failure of the court to so instruct the jury. Where all the evidence at a trial upon an indictment for rape shows that the crime was committed, as alleged in the indictment, and the defendant makes

no contention to the contrary, but for his defense relies solely upon an alibi, the principle upon which a new trial was ordered in *S. v. Williams, supra,* does not apply." *S. v. Ferrell,* 205 N. C., 640, 172 S. E., 186; *S. v. Keaton,* 206 N. C., 682, 175 S. E., 296; *S. v. Satterfield,* 207 N. C., 118, 176 S. E., 466; *S. v. Manning, supra.*

It is contended that the charge was erroneous and misleading on the affirmative defenses of insanity and intoxication. The defendant contends that on the question of insanity the court should have instructed the jury "That if they found from the evidence that by reason of a diseased mind, the defendant had lost the power to control or govern his actions, then in that event it would be their duty to acquit him." There was some evidence to the effect that defendant had a venereal disease and that some years prior to the time of the trial below he had received medical treatment for same and thereafter served an enlistment of some six months in a C.C.C. Camp. An examination of the testimony discloses that in the trial below the defendant offered many witnesses in an effort to show that the defendant was weak minded and had always been so. His mother testified he was three years old before he could walk, that he did not develop properly mentally or physically, and that he did not have much sense. The pertinent part of the charge on the plea of insanity is as follows: "Gentlemen of the Jury, when the plea of insanity is set up by a person charged with the commission of a crime, the burden is on the person setting up that defense, that is, as in this case, the defendant, Sam Hairston, to show to the Jury, not by the greater weight of evidence or not beyond a reasonable doubt, but merely to your reasonable satisfaction, that he was insane. (Insanity, Gentlemen of the Jury, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act which he is committing.) Also, Gentlemen of the Jury, the Court instructs you that while the term 'insanity' is not strictly speaking a legal term, it can be defined legally as a manifestation of disease of the brain characterized by a general or partial derangement of one or more faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened or destroyed, to such an extent as to render a person incapable of distinguishing between right and wrong or not conscious at the time of the nature of the act he is committing. (In other words, Gentlemen of the Jury, to excuse one from criminal responsibility, he must be insane.) The defendant must be in such a state of mind from mental disease as to not know the nature and quality of the act he was committing, or if he did know it, that he did not know he was doing what was wrong. No other degree of insanity will excuse a person from liability or responsibility. (The

Court instructs you, Gentlemen of the Jury, that if a defendant is able to distinguish between right and wrong in respect to the charge of carnally knowing and abusing any female person at the time it occurred, if it did occur, and conscious of the criminal nature of it, then, he is criminally responsible—he would, under such circumstances, be bound, legally, to exercise self control, and some mental aberation he may have, unless he is insane, will not exempt or excuse him from responsibility.) Also, Gentlemen of the Jury, the court charges you, that insanity in a legal sense does not necessarily mean a total loss of reason. (The abnormal mental condition may relate to a single subject, or only to a few, leaving the mind otherwise free to act in a normal course; but if such abnormal mental condition renders the defendant incapable of distinguishing between right and wrong or not conscious of the nature of the act he is committing, at the time of committing the alleged rape so as not to know the nature and quality of the act he is doing, or if he did know it, that he did not know he was doing wrong, then he would be so criminally insane that he would not be responsible for his acts.) So, under our law, Gentlemen of the Jury, an insane person cannot be convicted of any crime, and it would make no difference what caused him to become insane. (If at the time of the commission of the crime charged in the bill of indictment, if you should find beyond a reasonable doubt that the defendant did commit the crime charged—should find to your reasonable satisfaction that the defendant was insane from any cause he should be acquitted, and you should return a verdict of 'not guilty.') (However, the Court specifically charges you, that although there may be some mental derangement, still if the defendant had sufficient mental capacity to adequately comprehend the nature and extent of his act, if you find beyond a reasonable doubt that he committed any act, to distinguish between right and wrong, and a mind sufficient to form a criminal intent to ravish, he would not be entitled to an acquittal on the ground of mental capacity)." The defendant excepts and assigns error to those portions of the charge in parentheses.

To establish a defense on the ground of insanity, it must be proven to the satisfaction of the jury that at the time of the commission of the act the accused was laboring under such a defect of reason, from a diseased 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. Likewise, "insanity" includes a mental condition resulting from low mentality or a weak mind which makes the possessor thereof incapable of distinguishing between right and wrong or of comprehending the nature and consequence of his act. In 14 R. C. L., sec. 55, page 600, we find the test of legal responsibility, when the plea of insanity is interposed, to be as follows: "The prevailing view is apparently to the effect that

capacity of the accused to distinguish right from wrong in respect to the act charged as a crime at the time of its commission is made the test of his responsbility, and not his capacity or ability to distinguish right from wrong in the abstract. According to this view the capacity to distinguish between right and wrong need not be general; it is only necessary that it relate to the particular act in question. A person may be perfectly sane on every subject but one, and yet if that one subject is the very act with which he is charged, and with respect to it he is unable to distinguish between right and wrong, his defense is complete. But his defense is not complete and he is not entitled to acquittal on the ground of insanity if at the time of the commission of the crime he had sufficient capacity to enable him to distinguish between right and wrong, to understand the nature and consequence of his act, and had mental power sufficient to apply that knowledge to his own case. If a person has knowledge and consciousness that the act he is doing is wrong and will deserve punishment, whatever may be his mental weakness, he is in the eye of the law of sound mind and memory, and subject to punishment." The foregoing is in accord with our decisions. This Court, in *S. v. Brandon,* 53 N. C., 463, said: "To excuse one from criminal responsibility the mind must, in the language of the judge below, be insane. The accused should be in such a state from mental disease as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong, and this should be clearly established. This test, a knowledge of right and wrong, has long been resorted to as a general criterion for deciding upon legal accountability, and, with a restricted application to the act then about to be committed, is approved by the highest authorities. But we do not undertake to lay down any rule of universal application." *S. v. Cooper,* 170 N. C., 719, 87 S. E., 50; *S. v. Terry,* 173 N. C., 761, 92 S. E., 154.

The defendant also excepts to the following part of his Honor's charge on his plea of drunkenness: "The Court instructs you that if the defendant in this case was under the influence of intoxicating liquor or drinks to such an extent that his normal functions of body and mind were so interfered with—that is, if he was in such condition that he could not form an intent to commit rape—that is, if you find beyond a reasonable doubt that he did commit rape—that is, if he did not know what he was doing and what he was about and what he was trying to do; if he was so affected by the liquor or intoxicating drink that he could not form an intent, then he could not be guilty of the charge as contained in this bill of indictment, and it would be your duty to return a verdict of 'not guilty.' Now, Gentlemen of the Jury, the Court also instructs you that if a man gets several drinks of liquor, or two or three drinks of liquor,

or any intoxicating drink, for the purpose of getting up his nerve, or giving him courage to commit some crime, that that would not be any excuse, but a person, Gentlemen of the Jury, to have a defense available to him of intoxication must have consumed a quantity of intoxicating drink to such an extent that he could not form a criminal intent."

On the plea of drunkenness as a defense, the burden is on the defendant to satisfy the jury that at the time of the commission of a crime he was intoxicated to such an extent that he did not know what he was doing, or trying to do, and was incapable of forming a criminal intent. However, if a defendant drinks liquor or other intoxicants for the purpose of giving him nerve and courage to commit a crime, then such voluntary drunkenness would not be an excuse for a crime committed while thus intoxicated. *S. v. Adams,* 214 N. C., 501, 199 S. E., 716. The commission of the crime of rape, unlike murder in the first degree, does not require deliberation and premeditation as a prerequisite to conviction, but the intent is inferred from the commission of the act, just as malice is presumed when a person kills another with a deadly weapon. Therefore, if the defendant in the instant case committed the crime charged in the bill of indictment, and had sufficient knowledge to comprehend the nature and consequence of his act, at the time of the commission of the crime, he was not entitled to acquittal upon his plea of insanity or drunkenness.

We do not think the charge on the plea of insanity and drunkenness prejudicial to the defendant, but, on the contrary, that the charge fairly presented to the jury the defendant's contentions and defined his rights in respect thereto in substantial accord with the requisites of the law. No prayer for instruction was tendered by the defendant and none requested in response to an inquiry by the court if any further instructions were desired.

When the charge of the court is considered contextually, the remaining assignments of error thereto do not show reversible error. As stated in *S. v. Cooper, supra;* "The charge of the court must be considered as a whole, in the same connected way as given to the jury, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly to the jury, there is no ground for reversing the judgment, though some of the expressions, when standing alone, may be regarded as erroneous. *Kornegay v. R. R.,* 154 N. C., 389; *S. v. Robertson,* 166 N. C., 356; *S. v. Lance,* 149 N. C., 551; *McNeill v. R. R.,* 167 N. C., 390; Thompson on Trials, sec. 2407." *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 *S. v. Manning, supra.*

The other assignments of error do not show sufficient prejudicial error to warrant a disturbance of the verdict below.

The defendant has been convicted of a heinous crime. He has been represented by able and painstaking counsel. His defenses were presented for the consideration of the jury, and the jury, in the light of all the evidence, returned a verdict of guilty as charged in the bill of indictment. In the trial below, we find

No error.

JANE MONTGOMERY v. GRACE M. BLADES, ADMINISTRATRIX OF WILLIAM B. BLADES, DECEASED, SOUTHERN RAILWAY COMPANY AND CITY OF DURHAM.

(Filed 8 January, 1943.)

1. Negligence § 5—

The proximate cause of an event must be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred.

2. Negligence §§ 7, 19d—

The intervening active negligence of a responsible third party insulates the original passive negligence of another, where the conduct of the other would not have resulted in injury except for the intervening negligence, which thus becomes the sole proximate cause of the injury. *Held:* Demurrer to the evidence by a railroad and a city, codefendants with the driver of an automobile in an action for damages, should have been sustained, where all the evidence tended to show that the collision of the automobile, in which plaintiff was riding as a guest, with a pillar supporting a railroad track in the middle of a city street, was caused by the negligence of the driver.

3. Appeal and Error § 49a—

A demurrer to a complaint challenges the sufficiency of the pleading, a demurrer to the evidence challenges the sufficiency of the evidence, and a decision of the Supreme Court failing to sustain the first, does not become the "law of the case" upon an appeal from the second.

APPEAL by defendants, Southern Railway Company and city of Durham, from *Parker, J.*, at May Term, 1942, of DURHAM. Reversed.

This was a civil action to recover damages for personal injuries to the plaintiff, alleged to have been caused by the wrongful act, neglect and default of the defendants.

The facts necessary to the understanding of the disposition of this case are these: The plaintiff, a young woman 26 years of age, was riding as a guest in an automobile owned and operated by William B. Blades,

on 21 February, 1939, on Chapel Hill Street in the city of Durham. Across Chapel Hill Street is an overpass constructed and maintained by the defendant railway company by and with the consent and approval of the defendant city. In the center of said street there was a row of concrete pillars about 13½ feet high and 18 inches thick to support the tracks of the defendant railway company, which row of pillars extended the entire width of the tracks.

The westernmost pillar is under the western edge or side of the overpass and in the center of Chapel Hill Street. The automobile of William B. Blades, operated by him and in which the plaintiff was riding as a guest, was proceeding east on Chapel Hill Street from the intersection of said street and Duke Street, and ran headlong into said pillar, causing the death of Blades, the driver, and serious and permanent injury to the plaintiff, a guest passenger.

At the close of the evidence, it having been made to appear that the plaintiff, for and in consideration of the payment of $4,500.00, had entered into a covenant not to sue the Blades' estate, the court, by agreement of the plaintiff and defendant administratrix, entered a voluntary nonsuit as to said estate.

The defendant railway company and city both moved the court at the close of the plaintiff's evidence, and renewed their motions at the close of all the evidence, for a judgment as in case of nonsuit. C. S., 567. These motions were denied, and the appealing defendants preserved exceptions.

The jury answered the issues submitted in favor of the plaintiff, and from judgment predicated upon the verdict, the defendants, Southern Railway Company and city of Durham, appealed, assigning errors.

Victor S. Bryant and James R. Patton, Jr., for plaintiff, appellee.

W. T. Joyner and Hedrick & Hall for defendant Southern Railway Company, appellant.

Claude V. Jones and S. C. Brawley for defendant city of Durham, appellant.

SCHENCK, J. Among other defenses set up by the appealing defendants is the contention that all of the evidence, both of the plaintiff and of the defendants, tends to show that the collision of the automobile in which the plaintiff was riding as a guest with the pillar supporting the railway tracks in the center of Chapel Hill Street was caused by the negligence of the driver of said automobile, which negligence insulated any negligence of the appealing defendants in the construction and maintenance of said pillar, and became the sole proximate cause of the collision and consequent injuries to the plaintiff, and for that reason it

was reversible error to deny the motions lodged by the appealing defendants for judgment as in case of nonsuit under C. S., 567. With this contention we agree.

In our discussion of the case it will be conceded, but it is not decided, that the appealing defendant railway company and city were negligent in the construction and maintenance of the supporting pillar in the center of the street.

In *Haney v. Lincolnton,* 207 N. C., 282, 176 S. E., 573, which was an action for the alleged wrongful death of the plaintiff's intestate, Sue Gurley, the facts were: The intestate was a guest passenger in an automobile driven by one Guy Barringer. The automobile was being driven on Church Street, approaching Mills Street, in the town of Lincolnton. Church Street intersected but did not cross Mills Street. On the opposite side of Mills Street from where Church Street intersected it there was a declivity some 6 or 10 feet deep. There was no barrier or light to warn a driver that Church Street did not cross Mills Street, or of the declivity opposite the intersection of Church Street. If it be conceded that the defendant town was negligent in failing to erect and maintain a barrier or light at the intersection, and that the driver of the automobile negligently failed to observe the situation and drove the automobile across Mills Street over the declivity, resulting in the death of the guest passenger, we have a case practically "on all fours" with the case at bar. In that case the Court said: "It further appears that the immediate cause of the plaintiff's intestate's unfortunate death was the negligence of Guy Barringer, the driver of the car, and not that of the defendant. This doctrine of insulating the conduct of one, even when it amounts to inactive negligence, by the intervention of the active negligence of a responsible third party, has been applied in a number of cases. *Baker v. R. R.,* 205 N. C., 329, 171 S. E., 342; *Hinnant v. R. R.,* 202 N. C., 489, 163 S. E., 555; *Herman v. R. R.,* 197 N. C., 718, 150 S. E., 361."

Baker v. R. R., supra, was an action to recover for the alleged wrongful death of the plaintiff's intestate, who was riding as an invited guest in an automobile driven by one Williams. Williams, the driver, fell asleep and the automobile collided with a concrete pillar standing in the middle of the highway, to support a railroad trestle over the highway underpass. In that case the Court, after stating it made no definite ruling as to whether the defendant could be held liable for negligent construction of the underpass in view of its approval by the State Highway Commission, said: "In any event, the negligence of the defendant, if any, was only passive, while that of the driver of the automobile was active, and must be regarded as the sole, proximate cause of the plaintiff's intestate's death. *Brigman v. Construction Co.,* 192 N. C., 791, 136 S. E., 125."

In the *Haney case, supra,* we have the passive negligence of the defendant in not constructing and maintaining a barrier or light or warning at the non-crossing intersection conceded. In the *Baker case, supra,* we have the passive negligence of the defendant in constructing and maintaining a concrete supporting pillar in the center of the highway conceded. In the former case the Court held that the passive negligence of the defendant was insulated by the active negligence of the driver of the automobile in not seeing and observing the situation, and driving across the intersected street and down the declivity on the other side thereof. In the latter case the Court held that the passive negligence of the defendant was insulated by the active negligence of the driver of the automobile in falling asleep and driving the automobile into the pillar.

It is difficult, in truth we have found it impossible, to distinguish the case at bar from the *Haney case, supra,* and the *Baker case, supra.* In the case at bar, while it is conceded that the defendant railway company and the defendant city were negligent in the construction and maintenance of the pillar in the center of Chapel Hill Street, still this pillar was static, and the negligence was passive, while the negligence of Blades, the driver of the automobile in which the plaintiff was riding as a guest passenger, in driving the automobile into the pillar was active, but for which the injury to the plaintiff would not have occurred, and therefore insulated the negligence of the defendants, and became the sole proximate cause of the plaintiff's injury.

All of the evidence of both the plaintiff and the defendants tends to establish the negligence of Blades, the driver of the automobile, and that but for his negligence the injury to the plaintiff would not have occurred. The plaintiff herself testified that in her action against the administratrix of Blades she alleged in her complaint that Mr. Blades "carelessly and negligently failed to keep a lookout for said post or obstruction in the street and negligently and carelessly failed to exercise due and proper precaution in the operation of his automobile in that he negligently failed to keep a lookout for and negligently failed to see said obstruction and negligently failed to drive his automobile on the right-hand side of the street at said point."

Also, the plaintiff's witness Herbert Richardson, referring to the automobile driven by Blades, testified: "When I got to the intersection of Chapel Hill Street and Duke Street I stopped for a traffic light. A car pulled up behind me and the light turned to caution just as he pulled up and he didn't have to stop but just passed on by me. He was going eastward. When he passed by me the light come green and I went on following that car. That car went down the hill just straddling the white line and I taken a notice of it. That is the white line in the center

of the street and this car was straddling that white line. It went perfectly straight to my knowing and I was following behind it. It was going about 18 to 20 miles an hour. There is an underpass down there at the end of that block and the street goes under the railroad. There is a cement pillar in the middle of the street. The automobile which had passed me and which I was following just centered that line and ran right into the cement post." And on cross-examination: "I followed this car from Duke Street down until it collided with the pillar at the underpass. Mr. Blades' car went perfectly straight to the best of my knowledge. He started on the white line at Duke Street and kept astride the white line until he hit the underpass. That white line is in the center of Chapel Hill St. Chapel Hill Street is a wide street, something like 40 feet wide, I guess. . . .

"This white line that ran down the center of the street from Duke Street down to the underpass was something like 5 or 6 inches wide, probably 8 inches. The surface of the street is asphalt and this line is a white line on the asphalt. I have been back and forth through the underpass a good many times and am familiar with it. I had seen those reflector buttons on the column before. You come down the street going east on Chapel Hill Street at night and the headlights on your car, if they are burning, will pick up that reflection off the column from those buttons.

"They will pick up the reflection a right good little ways, I think they would pick up the reflection west of Willard Street. This accident happened on Tuesday. The time that I had been through this underpass next before that Tuesday was on Saturday night before. I was going eastward, my lights were burning that night, I saw the reflector signal that night. The lights from my car shone on the reflector signal that night. I didn't pay attention to it until I got pretty close to it. I don't know how far away your headlights would pick up that reflector signal going eastward on Chapel Hill Street."

While there may be evidence tending to show that the reflector signal on the pillar was minus several reflector buttons and was dimmed with dust and dirt and therefore not in the best condition, still no witness testified that the pillar could not readily be seen. In fact, the preponderance of the evidence tends to show it was plainly visible.

In the case of *Ballinger v. Thomas and Railway Company,* 195 N. C., 517, 142 S. E., 761, this Court, in sustaining a demurrer filed by the defendant railway company, said: "The demurrer might be overruled and the judgment upheld but for the allegation against the defendant Thomas, the driver of the automobile in which the plaintiff was riding (set out in paragraph 'e' above), to the effect that said defendant, upon observing the oncoming locomotive, carelessly and negligently turned his

automobile off the highway and ran it into a hole so that it turned over and injured the plaintiff. This alleged negligent conduct of the defendant Thomas, it will be observed, took place after he had seen the oncoming locomotive, which necessarily 'insulated' the negligence of the appealing defendant, as it was no longer operative or active, and rendered Thomas' negligence the proximate cause of plaintiff's injury. *Harton v. Tel. Co.*, 146 N. C., 430, 59 S. E., 1022. Note, it is not alleged in the complaint that Thomas, the driver of the automobile, ran his machine off the highway to avoid a collision or in an effort to extricate himself and the plaintiff from a position of peril, produced by the negligence of the railroad company, but the allegation is that said defendant carelessly and negligently, *i.e.*, needlessly, drove his car off the highway after he had all the information which bell or whistle signal would have given him, and injured the plaintiff. This necessarily means that the alleged negligence of the railroad company was remote, while that of the defendant Thomas was proximate. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672. Hence, upon all the facts alleged by the plaintiff in her complaint, it appears that the negligence charged against the defendant, Southern Railway Company, was not in law the proximate cause of her injury."

NOTE: The allegation in the complaint of the plaintiff in the case at bar in her action against the administratrix of Blades, the driver of the automobile in which she was riding as a guest passenger, was that Blades "negligently failed to see said obstruction and negligently failed to drive his automobile to the right-hand side of the street at this point."

The establishment of the fact that the negligence of the appealing defendants was the proximate cause of the injury to the plaintiff is just as essential to the plaintiff's cause of action as is the establishment of the negligence itself. "'The proximate cause of the event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. . . . The test by which to determine whether the intervening act of an intelligent agent which has become the efficient cause of an injury shall be considered a new and independent cause, breaking the sequence of events put in motion by the original negligence of the defendant, is whether the intervening act and the resultant injury is one that the author of the primary negligence could have reasonably foreseen and expected.'" *Beach v. Patton*, 208 N. C., 134, 179 S. E., 446.

To hold that defendant railway company and city owed to the plaintiff the duty to foresee that a driver of an automobile would drive it on a city street for a whole block "just straddling the white line," going "perfectly straight," with nothing to obstruct his view, and centering

the white line and run "right into the cement post" in the middle of the street, when the street was open and clear twenty feet wide to the right of the post, "would not only 'practically stretch foresight into omniscience,' *Gant v. Gant,* 197 N. C., 164, but would, in effect, require the anticipation of 'whatsoever shall come to pass.' We apprehend that the legal principles by which individuals are held liable for their negligent acts impose no such far-seeing and all-inclusive duty. The law only requires reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted." *Beach v. Patton, supra.* Ordinarily at least, one party is not required to anticipate and foresee the negligent acts of another party. *Hinnant v. R. R., supra.*

The doctrine of intervening active negligence of a responsible third party insulating the original passive negligence of another, where the conduct of the other would not have resulted in injury except for the intervening negligence, is discussed in many of our decisions and we think impels the conclusion we have reached in this case. See, in addition to the cases already cited, *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; *Peoples v. Fulk,* 220 N. C., 635, 18 S. E. (2d), 147; *Reeves v. Staley,* 220 N. C., 573, 18 S. E. (2d), 239; *Jeffries v. Powell,* 221 N. C., 415, 20 S. E. (2d), 561.

It is contended that the "law of the case" was written when this case was before us at the fall term of 1940, 218 N. C., 680, 12 S. E. (2d), 217. At that term we held that the demurrer to the complaint should not have been sustained. We are now holding that the demurrer to the evidence in this case should be sustained. There is no inconsistency in such holdings. "The case was here before, 210 N. C., 815, on demurrer to the complaint, C. S., 511. It is here now on demurrer to the evidence, C. S., 567. The two are not the same in purpose or result. One challenges the sufficiency of the pleadings; the other the sufficiency of the evidence. In negligence cases, it is proper to sustain a demurrer to the evidence and to enter judgment of nonsuit." *Smith v. Sink,* 211 N. C., 725, 192 S. E., 108. When the *Smith case, supra,* was first before us on demurrer to the complaint, such demurrer was overruled; when before us the second time the demurrer to the evidence was sustained. Exactly the same situation exists in the case at bar.

The sustaining of the demurrer to the evidence disposes of the appeal and obviates any necessity for the discussion of the other interesting

questions presented in the able briefs and arguments before us. In referring to exceptions relating to the admission of certain evidence and to certain excerpts from the judge's charge this Court said: "However, these exceptions become immaterial and the errors, if any, harmless, since we think the evidence insufficient to require the submission of the case to the jury, and that defendant's motion for judgment of nonsuit should have been allowed." *Chinnis v. R. R., supra.*

For the reasons stated we are of the opinion, and are impelled to hold, that the motions for judgments as in case of nonsuit duly lodged by the appealing defendants under C. S., 567, should have been allowed. It, therefore, follows that the judgment below must be reversed, and it is so ordered.

Reversed.

CLARA LEE WARD v. J. C. HEATH AND WIFE, NONA HEATH, LUMBERMEN'S MUTUAL CASUALTY COMPANY, AND H. A. GREENE.

(Filed 8 January, 1943.)

1. Torts § 8a: Fraud § 9—

A release, executed by the injured party and based on a valuable consideration, is a complete defense to an action for damages for the injuries, and, where the execution of such release is admitted or established by the evidence, the burden is on the plaintiff to prove matters in avoidance, such as fraud.

2. Fraud § 1—

To establish actionable fraud, or deceit, it is generally recognized that the following essential facts must appear: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party. The essentials of fraud and deceit discussed.

3. Torts § 8a: Fraud § 11—

Where a literate plaintiff, five months after leaving the hospital where she was treated for injuries received in an automobile accident, signed and delivered with the advice and counsel of her husband, in consideration of a substantial sum, a full and complete release, after consulting her physicians and after many conferences with the insurance carriers of defendant, who represented to her and her husband that her injuries were temporary, the evidence is insufficient to establish fraud and deceit in the procurement of the release.

APPEAL by plaintiff from *Olive, Special Judge,* at First June Term, 1942, of GUILFORD. Affirmed.

WARD *v.* HEATH.

Civil action in tort to recover damages for personal injuries resulting from an automobile collision and to vacate and annul a release alleged to have been procured by fraud.

On 28 January, 1940, about 4:30 p.m., 4 automobiles were proceeding westwardly on the Greensboro-Winston-Salem highway. Snow had been removed from the hard surface portion of the highway and was banked on the shoulders of the road. The hard surface or traveled portion of the road was covered by a thin coating of ice which was melting.

The plaintiff and her husband and child were riding on the back seat of the third car. Defendants Heath were on the fourth car, which belonged to defendant Nona Heath. J. C. Heath, her husband, was driving.

The front car attempted to turn into a filling station. This caused the second car to stop suddenly. The driver of the third car, seeing the situation, put on brakes and in order to prevent a collision cut the front of his car into the snow bank. The Heath car then skidded into the car occupied by plaintiffs striking it with such force that she, her husband and child were thrown to the foot of the automobile. As a result plaintiff's sacroiliac joint was dislocated, her pelvic bone was fractured, her collar bone and one or more ribs were broken and other injuries were inflicted.

On 20 June, 1940, plaintiff and her husband executed and delivered to agents of the corporate defendant, liability insurance carrier for the defendant Nona Heath, three releases. One in consideration of $1,975.00 released all claims of plaintiff; one in consideration of $25.00 released all claims for injuries to the child and the third was to cover medical and other expenses incurred to that date in the sum of $174.00.

On 12 July, 1941, plaintiff instituted this action. The complaint states two causes of action. The first is for damages proximately resulting from the alleged negligent manner in which defendant J. C. Heath operated the automobile of the defendant Nona Heath. The second is for damages for the wrongful conduct of defendants in procuring the execution of the release by plaintiff, which conduct plaintiff alleges was pursuant to and in furtherance of a conspiracy entered into between defendants.

When the cause came on to be heard the court, on motion of defendants made at the conclusion of the evidence for plaintiff, entered judgment of nonsuit. Plaintiff excepted and appealed.

H. L. Koontz and C. L. Shuping for plaintiff, appellant.

Henderson & Henderson for defendants, appellees.

BARNHILL, J. If the release is valid it is an effective bar and plaintiff may not proceed on either cause of action. Hence, we may pass the question of the sufficiency of the evidence on the issue of negligence without decision and come directly to the vital and decisive questions presented. (1) Has plaintiff offered any evidence tending to show that she was induced to sign the release by the fraud of the defendants; and (2) if so, has she by her conduct, notwithstanding the fraud, ratified the same?

A release executed by the injured party and based on a valuable consideration is a complete defense to an action for damages for the injuries and where the execution of such release is admitted or established by the evidence it is necessary for the plaintiff to prove the matter in avoidance. *Aderholt v. R. R.*, 152 N. C., 411, 67 S. E., 978; *Butler v. Fertilizer Works*, 193 N. C., 632, 137 S. E., 813; *Sherrill v. Little*, 193 N. C., 736, 138 S. E., 14. Hence, as plaintiff pleads the release and acknowledges its execution both in her pleadings and in her testimony, the burden is on her to establish the fraud alleged and relied on by her to invalidate the instrument.

What is fraud? No precise or all-inclusive definition has or can be given. Yet, to establish actionable fraud it is generally recognized that in all cases certain essential facts must appear. These are: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party. McIntosh, Cases on Contract (2d), XXXI.

The material elements of fraud, a commission of which will justify the court in setting aside a contract or other transaction, are well settled. First, there must be a misrepresentation or concealment. Second, an intent to deceive or negligence in uttering falsehoods with intent to influence the acts of others. Third, the representations must be calculated to deceive and must actually deceive. And, fourth, the party complaining must have actually relied upon the representations. *Pritchard v. Dailey*, 168 N. C., 330, 84 S. E., 392; *Bolich v. Ins. Co.*, 206 N. C., 144, 173 S. E., 320; *McNair v. Finance Co.*, 191 N. C., 710, 133 S. E., 85; 12 R. C. L., 239, sec. 10.

The conditions under which representations as to material facts in the course of a bargain may be made the basis of an action for deceit as a general proposition are well stated in Pollock on Torts (7d), 276, as follows: "To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

"(a) It is untrue in fact.

"(b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"(c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitting to induce him to act upon it.

"(d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage."

It must be a false representation of fact materially affecting the value of the contract and which is peculiarly within the knowledge of the person making it and in respect to which the other person in the exercise of proper vigilance has not an equal opportunity of ascertaining the truth. Smith on Fraud, sec. 3. See also *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Cooper v. Schlesinger,* 111 U. S., 148; 28 L. Ed., 382; Kerr on Fraud and Mistake, p. 68; 23 R. C. L., 395, sec. 24, 396, sec. 25.

It is not always necessary in order to establish actionable fraud that a false representation should be knowingly made. It is well recognized with us that under certain conditions and circumstances if a party to a bargain avers the existence of a material fact recklessly or affirms its existence positively when he is consciously ignorant whether it be true or false he must be held responsible for a falsehood. Plaintiff must establish either positive fraud or that she was deceived and thrown off her guard by false statements designedly made at the time and that such statements were reasonably relied upon by her. *Butler v. Fertilizer Works, supra.* False assurances and statements of the other party may, of themselves, be sufficient to carry the issue to the jury when there has been nothing to arrest the attention or arouse suspicion concerning them. *Butler v. Fertilizer Works, supra; McCall v. Tanning Co.,* 152 N. C., 648, 68 S. E., 136; *Whitehurst v. Ins. Co., supra; Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299.

Applying these generally recognized principles to the facts of this case we are constrained to hold that plaintiff has offered no sufficient evidence of fraud in the procurement of the release to justify the submission of an issue to the jury. It fails to induce the conclusion that the parties to the release did not deal at arm's length.

Her only allegations of fraud are these: that defendant caused and procured her to accept the sum of $1,975.00 as compensation for the injuries sustained by her "representing to plaintiff and to her husband that her injuries were only temporary, and upon definite assurances by them that plaintiff was going to be all right. . . . The said Greene always insisting that plaintiff's injuries were of a temporary character. . . . And insisted that plaintiff's injuries were only of a temporary character" which induced plaintiff "to believe that her injuries were of such nature that she would, in a reasonable time, fully recover therefrom

without any serious and permanent results and without further hospitalization, medical or other expenses," and that she accepted settlement and signed the release "on the assurance that her said injuries were temporary and not permanent and that she was soon going to be all right."

The substance of plaintiff's testimony in support of these allegations may be briefly stated.

One Chapman, an agent of the corporate defendant, called on her shortly after the accident. He was seeking a statement as to how the accident occurred. Its agent Greene next went sometime thereafter. He inquired as to her condition but neither made nor requested a proposition of settlement. Altogether he made six trips. On the third visit Greene inquired whether plaintiff and her husband had decided what they wanted to do. He received a negative answer. He asked about plaintiff's condition and talked as if he thought her injuries were only temporary. On the fourth trip he wanted to talk settlement but plaintiff's husband told him she was in no condition to talk settlement. On his sixth trip the releases were signed. On none of his visits, except the last, did he press for settlement. On one occasion he proposed a settlement for $800.00 and expenses and suggested that plaintiff consult Dr. Register, a bone specialist, to ascertain her condition. She went and the corporate defendant paid for this trip. Dr. Maness, plaintiff's family physician, was along and then turned the case over to Dr. Register who thereafter treated her, both before and after the releases were signed. Dr. Maness was also consulted and prescribed sedatives to relieve her pain. Greene, on his last several trips, "always assured me that my injuries were just temporary and that I would be all right . . . he assured me that Dr. Register said I would be all right; that it was just temporary . . . Mr. Greene said he represented the Lumbermen's Casualty Company and said he felt sure his company would take care of the expenses."

Some time in May plaintiff told Greene that she would take $2,500.00 if she was all right—would be all right. From that time on she was demanding this sum. She always said she would take this amount if she was all right. On June 18th or 19th Greene phoned and made an engagement to call and attempt to arrive at a settlement. He and one Young from the home office went on the afternoon of the 20th and remained two hours or more during which time they were talking settlement. They first offered $1,500.00 and the plaintiff countered with her offer to take $2,500.00 "if I am all right." Greene and Young, during the course of the negotiations, told plaintiff she was stubborn or determined. They said: "My injuries were temporary and as time went on I would be all right; that the doctor said I would be all right . . . they did not see why my injuries would make me have to go back to the

hospital any more . . . during that time we were discussing the matter of the settlement and that I would be all right. . . . If we went through court it would be long-drawn-out, lot of expense, doctors and lawyers to pay." She further testified: "I signed the papers because I thought I was going to be all right—they said I would be all right—that it was just temporary." No copy of the release was left with her.

Plaintiff's husband was present at the conference, participating in the negotiations and counseling and advising plaintiff. He testified that during the negotiations the agents (Young doing most of the talking) told them "Dr. Register had released her—that she was all right—there would be no other expenses, that she was released from the doctor and would not have to go back to him . . . her condition was temporary and that there was nothing to even think of being uneasy about and there was no reason why she should not go right along and in a month or two be in perfect health." He told them, "If you assure us that my wife is all right and Dr. Register has released her, which you say he has, we are willing to do what is right as far as anyone is concerned. . . . I told him we would take $2,500.00 if she was all right."

At the time of these negotiations plaintiff had not consulted an attorney. She was nervous and in considerable pain and was financially unable to engage in litigation. Due to her nervousness she could not wear a cast but was wearing a garment substituted therefor on the advice of Dr. Register.

Barring the lack of allegation in respect thereto, this evidence—particularly that of the husband—standing alone and unrelated to other facts, might well be said to constitute more than mere "sales talk." Positive representations were made. If untrue, it could be contended with force that they were calculated to deceive and did deceive plaintiff and threw her off her guard. *Butler v. Fertilizer Works, supra.*

But there are other pertinent facts appearing from the testimony of plaintiff which have their proper place in the picture and go to make up the whole story as delineated on this record.

Plaintiff is literate. It was her duty to read the instrument and it is presumed, in the absence of evidence *contra,* that she did so. *Aderholt v. R. R., supra; Presnell v. Liner,* 218 N. C., 152, 10 S. E. (2d), 639; *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406. She did, in fact, read it. It contained statements as follows:

"I/we hereby declare and represent that the injuries sustained may be permanent and progressive and that recovery therefrom is uncertain and indefinite, and in making this release and agreement it is understood and agreed that I/we rely wholly upon my/our own judgment, belief and knowledge of the nature, extent and duration of said injuries, and that

I/we have not been influenced to any extent whatever in making this release by any representations or statements regarding said injuries, or regarding any other matters, made by the persons, firms or corporations who are hereby released, or by any person or persons representing him or them, or by any physician or surgeon by him or them employed.

"I/we understand that this settlement is the compromise of a doubtful and disputed claim, and that the payment is not to [be] construed as an admission of liability on the part of the persons, firms and corporations hereby released by whom liability is expressly denied.

"This release contains the ENTIRE AGREEMENT between the parties hereto, and the terms of this release are contractual and not a mere recital.

"I/we further state that I/we have carefully read the foregoing release and know the contents thereof, and I/we sign the same as my/our own free act."

Furthermore, the settlement was made approximately 5 months after plaintiff left the hospital. The parties were negotiating over a period of time. There were propositions and counter propositions. Plaintiff's husband was present counseling and advising her. "After we discussed the thing back and forth they finally came up to our figure and paid us what we asked when they came out that day." They knew that the instrument constituted a full and complete release. It was so stated in the instrument and the agents so advised them. The X-rays had been shown to her and the nature of her injuries explained. She was then suffering and was unable to walk unassisted. She was still wearing the garment substituted for the cast. On 19 June, after the appointment for the 20th had been made, she went to consult Dr. Register to ascertain what her condition was "to see whether or not he thought I was in such shape as to settle this case and to see what he said about it." He examined her on that occasion. Significantly, she did not testify as to what he told her; she did not examine him as a witness and she did not tender him for cross-examination. She was content to say that she chose to rely on the statements of a layman as to her condition rather than on those of her physician.

In addition, when her husband asked the agent in the presence of the plaintiff "if your wife was in the condition my wife is in would you even think about making a settlement?" He frankly replied: "No, sir, I would not."

If the representations relied on by plaintiff were true there is no element of fraud. If they were untrue she not only had adequate opportunity to ascertain the truth but she, in fact, availed herself of that opportunity. She went directly to the best source of information—the

same quoted by the agents—Dr. Register. She went for the specific purpose of ascertaining her condition. When she signed she knew that her claim was "doubtful and disputed"; that her injuries might be "permanent and progressive"; and that recovery therefrom was "uncertain and indefinite." She acted voluntarily, relying on her own knowledge and belief as to the extent and duration of her injuries, without being influenced by any statement or representation made to her. She so stated in writing at the time.

Under the circumstances here disclosed plaintiff is not in a position to contend successfully that she is the victim of fraud. The evidence is insufficient to support an inference that the parties were not dealing at arms length or that the agents of the corporate defendant, by false representations, misled and deceived plaintiff and induced her to execute a contract she otherwise would not have signed.

As we conclude that the record fails to disclose any sufficient evidence of fraud to be submitted to a jury, it is unnecessary for us to discuss the question of ratification debated in the briefs.

That the defendants Heath assert in their answer that they had no knowledge of the release prior to the institution of this action will not avail the plaintiff. She alleges that the corporate defendant was the liability insurance carrier for the Heaths and that the release was obtained for their protection. She was told at the time she signed that "it was to keep us from bringing suit against Mr. and Mrs. Heath." It inures to their benefit.

The judgment below is

Affirmed.

BEULAH HUGGINS ARCHIE (WIDOW), WILHELMINA, LUCIA MAE AND JEANNETTE ARCHIE (MINOR CHILDREN) OF WILLIE C. ARCHIE, DECEASED (EMPLOYEE), v. GREENE BROTHERS LUMBER COMPANY (EMPLOYER), (SELF-INSURER).

(Filed 8 January, 1943.)

1. Master and Servant § 52c—

The findings of fact made by the Industrial Commission in a matter properly before that body, when based upon competent evidence, are conclusive, and not open to review by the courts.

2. Master and Servant §§ 40a, 40h: Negligence § 11—

The negligence of the employee, under the N. C. Workmen's Compensation Act, does not disbar him from compensation for injury by accident

arising out of and in the course of his employment, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another.

3. Master and Servant §§ 40e, 40f—

Where an employer was under obligation to transport its employees from the woods where they worked to a camp on the employer's premises, as an incident to their employment, and provided for that purpose a safety car, and warned its employees not to use its more hazardous log train, which also ran from the woods to the camp, and was sometimes used for that purpose in spite of warning, and deceased employee was killed in attempting to get on the log train to return to camp. *Held:* The finding by the Industrial Commission that employee was killed as result of injury by accident arising out of and in the course of his employment was based on evidence, and his dependents are entitled to compensation.

BARNHILL, J., dissenting.
SCHENCK, J., concurs in dissent.

APPEAL by plaintiffs from *Thompson, J.*, at September Term, 1942, of BLADEN. Reversed.

This was a proceeding under the Workmen's Compensation Act to obtain compensation for the injury and death of Willie C. Archie, an employee of the defendant Lumber Company. It was not controverted that both the employee and the employer were subject to the provisions of the Act, and that the claimants were the only dependents of the employee.

The hearing Commissioner denied compensation. On review by the Full Commission a contrary conclusion was reached and compensation awarded. On appeal to the Superior Court the trial judge held that, on the facts found by the Industrial Commission, the injury to Willie C. Archie, which resulted in his death, did not arise out of and in the course of his employment, and denied plaintiffs' claim for compensation.

The plaintiffs, claimants, appealed to the Supreme Court.

Felder & Rosen and McLean & Stacy for plaintiffs, appellants.
Clark & Clark for defendant, appellee.

DEVIN, J. The findings of fact made by the Industrial Commission in a matter properly before that body, when based on competent evidence, are conclusive, and not open to review by the courts. *Tindall v. Furniture Co.*, 216 N. C., 306, 4 S. E. (2d), 894. Since it is apparent from an examination of the record in this case that the findings of the Commission, detailing the circumstances of the fatal injury sustained by Willie C. Archie, are supported by competent testimony, it follows that the only question presented by the appeal is whether upon the facts so found his dependents are entitled, under the Workmen's Compensation Act, to an award of compensation for his injury and death.

The Industrial Commission concluded that the decedent came to his death from an injury by accident arising out of and in the course of his employment by the defendant, but the trial judge, being of opinion that this conclusion was erroneous in law, overruled the Commission and denied compensation. The appeal brings the question to us for decision.

The findings of the Industrial Commission pertinent to the appeal are as follows:

"The full commission further finds as a fact that on the date of the injury and death of the deceased he had been for some time an employee of the defendant's wood crew; that the defendant employer regularly furnished transportation to the employees who were working in the woods to and from the place said employees were working; that the means of said transportation was an enclosed car, sometimes called the 'Safety Car,' which had been built by the defendant employer for the purpose of transporting his employees to and from work; that in addition to the operation of the enclosed car there was another train that operated from the same place and leaving the same place at approximately the same time, a car or train loaded with logs, and that sometimes the employees of the defendant company would catch and ride the log train from the woods into the shed where the train was kept during the night; that the plaintiffs' deceased, together with the other employees of the defendant, had been warned not to ride the log train but to use the safety car which had been provided for their transportation; that, however, notwithstanding these instructions, some of the employees who were working in the woods rode the defendant's log train from the woods into the car shed or barn occasionally; that the plaintiffs' deceased sustained his injury by accident, which caused his death, while attempting to board the log train of the defendant in order to ride the same to the employees' camp; that the injury by accident which resulted in the deceased employee's death occurred on the premises of the employer and about five minutes to one-half hour after the said employees had quit work for the day but before they had been transferred by the employer from the woods to the camp where the employer was under obligations to transport them; and that the rule which the defendant employer had made warning the employees, including the deceased, not to ride on the log train of the defendant employer and (had) not at the time of said employee's injury and subsequent death been approved by the North Carolina Industrial Commission. . . . It is not controverted, and is well established by the evidence in this case, that the employer was at the time of the injury and death of the deceased in this case under obligation to furnish his transportation to and from his work and from the point where he was seeking the ride at the time of his injury in to the camp, and that the obligation of the employer to the employee under the evidence in this case had not

been fulfilled in that transportation had not been furnished from the woods in to the camp; and it was for this purpose that the deceased was attempting to procure a ride upon one of the trains of the employer that was about to start from the woods into the camp at the time he received the fatal injury."

It is thus made to appear that the defendant Lumber Company, in connection with its logging operations, maintained on its premises a camp for its employees and a railroad between it and the woods where the employees, including the decedent, performed the principal part of their work. At the time of the injury to claimants' intestate, he was still subject to orders, and within the period of his daily labor, which included transportation from the woods to the camp which the defendant was under obligation to furnish. The transportation was incident to his employment. He was hurt while attempting to get on defendant's log train for the purpose of being transported from the woods to the camp. While this train was operated by the defendant between these points on its own premises, and thus afforded a means of transportation, the use of the log train for that purpose had been forbidden by a rule promulgated by the defendant for the safety of its employees, and a safe means of transportation in an enclosed car had been provided. On the occasion of the injury the car was available. It is contended that the violation of the rule established for the employee's safety, and his choice of hazardous and forbidden means of transportation should debar the claimants from compensation for an injury to him resulting therefrom.

The negligence of the employee, however, does not debar him from compensation for an injury by accident arising out of and in the course of his employment. The only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another. The Act was designed to eliminate the fault of the employee as a basis for determining compensation for injury incidental to employment in industry. As was said by *Brogden, J.*, speaking for the Court, in *Chambers v. Oil Co.*, 199 N. C., 28, 153 S. E., 594, "It is generally conceded by all courts that the various compensation acts were intended to eliminate the fault of the workman as a basis for denying recovery." This principle was reaffirmed in *Michaux v. Bottling Co.*, 205 N. C., 786, 172 S. E., 406, where claimant was injured while attempting to climb upon a moving truck. *Rowe v. Rowe-Coward Co.*, 208 N. C., 484, 181 S. E., 254; *Hawkins v. Bleakly*, 243 U. S., 210.

Here it was conceded, and properly so, that if the employee had been hurt while attempting to get on the enclosed car, rather than the log train, in order to be transported from the woods to the camp, his injury would have been compensable under the statute. Getting on a convey-

ance furnished by the defendant for transportation on its premises from the woods to the camp was incidental to his employment and was part of the employee's duty. We do not think compensation should be denied his dependents because he made an error of judgment and attempted to use a more hazardous means of transportation, likewise under the control of the defendant, nor because in so doing he violated a rule which was not always observed by the employees. *Dependents of Phifer v. Dairy,* 200 N. C., 65, 156 S. E., 147; *Bellamy v. Mfg. Co.,* 200 N. C., 676, 158 S. E., 246; *Edwards v. Loving Co.,* 203 N. C., 189, 165 S. E., 356; *Gordon v. Chair Co.,* 205 N. C., 739, 177 S. E., 485; *Smith v. Gastonia,* 216 N. C., 517, 5 S. E. (2d), 540; *Mion v. Marble & Tile Co., Inc.,* 217 N. C., 743, 9 S. E. (2d), 501.

The only provision made by the statute with regard to an injury caused by the willful failure of an employee to use a safety appliance, or by the willful breach of a rule or regulation adopted by the employer and approved by the Industrial Commission, is to require that his compensation be reduced ten per cent. The statute does not deny compensation when those facts appear, but only subjects the injured employee to the penalty of a reduction in the compensation to be awarded. In the instant case the Commission reduced compensation ten per cent, without finding, however, that the employer's rule had been approved. Whether this action by the Commission was proper is not presented, as the claimants did not appeal.

The cases cited by the defendant from other jurisdictions, where different conclusions were reached on similar facts, do not seem to be in accord with what we regard as the proper interpretation of the North Carolina Workmen's Compensation Act, and may not be held controlling here.

We are of opinion, and so hold, that the court below was in error in ruling that the claimants were not entitled to compensation on the facts found and conclusions reached by the Industrial Commission, and that the judgment appealed from must be

Reversed.

BARNHILL, J., dissenting: I am unable to concur in the majority opinion. On the contrary, I take the view that the hearing Commissioner and the court below correctly concluded that claimants are not entitled to recover.

There are certain principles of law relating to Workmen's Compensation which seem to have become well established in this and other jurisdictions.

Ordinarily, the employer is not liable for an injury suffered by an employee while going to and from his work. This is upon the theory

that such injury does not arise out of or in the course of his employment. *Dependents of Phifer v. Dairy,* 200 N. C., 65, 156 S. E., 147; *Davis v. Mecklenburg County,* 214 N. C., 469, 199 S. E., 604; *Bray v. Weatherly & Co.,* 203 N. C., 160, 165 S. E., 332; *Smith v. Gastonia,* 216 N. C., 517, 5 S. E. (2d), 540; *Lassiter v. Tel. Co.,* 215 N. C., 227, 1 S. E. (2d), 542; *Rourke's Case,* 129 N. E. (Mass.), 603; *Padgorski v. Kerwin,* 175 N. W. (Minn.), 694; *Nesbitt v. Twin City Forge & Foundry Co.,* 177 N. W. (Minn.), 131; *Ogden Transit Co. v. Ind. Comm.* (Utah), 79 Pac. (2d), 17; Schneider, Workmen's Compensation Law (2d), 769, sec. 265. There is no liability even though the employee is paid for the time consumed in going to and fro. *Hunt v. State,* 201 N. C., 707, 161 S. E., 203.

In the absence of a contract transportation of the employee by the employer to and from his work is presumed to be gratuitous and no liability attaches for injuries suffered by the employee while being so transported. *Lassiter v. Tel. Co., supra.*

To entitle a claimant who is injured while being transported to or from his work to recover it must be made to appear that he accepted transportation as a matter of right, under an express or implied contract, as an incident of his employment. *Lassiter v. Tel. Co., supra; Hunt v. State, supra; Edwards v. Loving Co.,* 203 N. C., 189, 165 S. E., 356; *Dependents of Phifer v. Dairy, supra,* and cases cited; *Smith v. Gastonia, supra;* Anno. 10 A. L. R., 169; Anno. 21 A. L. R., 1223; Anno. 24 A. L. R., 1233; Anno 62 A. L. R., 1438.

The rule that has been generally followed is stated by the Massachusetts Court in *Donovan's case,* 217 Mass., 76, 104 N. E., 431, as follows: "The rule has been established, as we consider in accordance with sound reason, that the employer's liability in such cases depends upon whether the conveyance has been provided by him, after the real beginning of the employment, in compliance with one of the implied or express terms of the contract of employment, for the mere use of the employees, and is one which the employees are required, or as a matter of right are permitted, to use by virtue of that contract." See 25 Harvard Law Review, 401, and A. L. R. Anno. above cited; 1 Honnold, Workmen's Compensation, sec. 110; *Harrison v. Central Con. Corp.,* 108 Atl. (Conn.), 346; *American Coal Mining Co. v. Crenshaw,* 133 N. E. (Ind.), 394.

The risk which caused the injury must be incidental to and arise out of the employment. *Hunt v. State, supra; Harden v. Furniture Co.,* 199 N. C., 733; *Hollowell v. Department of Conservation and Development,* 206 N. C., 206, 173 S. E., 603; *Hildebrand v. Furniture Co.,* 212 N. C., 100, 193 S. E., 294; *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342.

It follows that to recover plaintiffs must prove an express or implied contract to transport as a part of the employment and an injury sustained while being so transported. They have shown, and the Commission found, that there was a contract, but they have signally failed to show an injury sustained while being transported in the manner and upon the conveyance provided by the contract. The *contra* affirmatively appears, both from the evidence and from the findings of the Commission.

What was the contract? The Commission found "that the defendant employer regularly furnished transportation to the employees who were working in the woods to and from the place said employees were working; that the means of said transportation was an enclosed car sometimes called the 'safety car' which had been built by the defendant employer for the purpose of transporting his employees to and from work . . . that the plaintiffs' deceased, together with other employees of the defendant, had been warned not to ride the log train but to use the safety car which had been provided for their transportation."

It is clear then that the contract was to transport by means of the safety car and not by log train. The log train was excluded both by rule and by express instructions. It is equally clear that plaintiffs have failed to bring themselves within the contract upon which they rely.

Had there been no contract to transport plaintiffs could not recover. This is conceded. It seems to me that as to this particular occurrence the conclusion that it had no relation to or connection with, but was completely outside, the contract is inescapable.

The employee had quit work more than 5 minutes before the accident. The safety car was not yet ready to depart. Evidently becoming impatient and unwilling to await the departure of the safety car, the conveyance provided under the contract, he, for his own convenience, deviated or departed from the course of his employment and chose his own means of travel without the consent and against the will of his employer. The log train was not the conveyance provided by the employer "in compliance with one of the terms of employment for the mere use of the employees." It was not "one which the employees were required to use by virtue of that contract." The deceased was not "using it by permission or as a matter of right." On the contrary, he was doing so in defiance of specific instructions and in violation of an express rule of the employer.

The employee worked in the woods. His duties did not require him to go on or about the log train. He was to be transported by means of the safety car. The risk incurred by attempting to board the log train was in no sense a risk "incidental to and arising out of" his employment. It was a risk created by him for his own convenience and had no relation

to the work he was engaged to do. 71 C. J., 669, sec. 410; *Wither's case,* 147 N. E., 831; *Jacobson's case,* 143 N. E., 317.

The rule that forbade the employees to ride the log train was not a safety rule. A safety rule relates to the manner and method of doing the work assigned or to the tools, equipment or materials to be used. This rule had no relation to either. It was, in effect, a limitation of the contract to transport. The employer, both by rule and by express instructions, made it clear that employees were not permitted and had no right to use this train as a means of conveyance within the meaning of the contract.

The cases cited in the majority opinion do not sustain its conclusion.

In *Michaux v. Bottling Co.,* 205 N. C., 786, 172 S. E., 406, the use of the truck was an essential part of the work.

In *Edwards v. Loving Co., supra,* the employee was injured while riding to work in a conveyance furnished by the employers under the contract of employment.

In *Gordon v. Chair Co.,* 205 N. C., 739, 172 S. E., 485, the employee was not injured while going to or from his work.

In *Bellamy v. Mfg. Co.,* 200 N. C., 676, 158 S. E., 246, the employee was injured while on an elevator within the building where he worked and which he was permitted to use.

In *Smith v. Gastonia, supra,* the employer furnished the means of transportation and permitted its use.

In *Mion v. Marble & Tile Co., Inc.,* 217 N. C., 743, 9 S. E. (2d), 501, there was a contract to transport and the employee was using a vehicle he was directed to use because the regular vehicle was already overcrowded.

For the reasons stated, I vote to affirm.

SCHENCK, J., concurs in dissent.

G. L. AMICK v. W. V. COBLE, CHARLES R. COBLE, YANK D. COBLE, AND J. TALMADGE ISLEY, OFFICERS AND DIRECTORS OF THE CENTRAL GROCERY COMPANY, INC.

(Filed 8 January, 1943.)

1. Appeal and Error § 29—

Where defendants not only assign as error the several conclusions of law made by the court and on which the judgment below is founded, but also excepts to and assigns as error the findings of fact upon which the

conclusions of law are based, yet in their brief challenge only the conclusions of law and judgment, under Rule 28 of the Supreme Court the exceptions to the findings of fact will be taken as abandoned.

2. Corporations § 16—

In a suit under C. S., 1178, to compel the directors of a corporation to declare and pay dividends from profits for 1940 and 1941, in excess of the capital stock and working capital reserve, where all profits prior to 1940, except small amounts paid in dividends, had been, by consent of all stockholders, allowed to remain in the treasury as a surplus, and the directors having taken no action in good faith to designate a reserve as working capital for 1940 and 1941, there is no error in a judgment directing the payment of cash dividends from the profits for those years.

3. Same—

Where, in a suit to require that dividends be paid stockholders, C. S., 1178, it was not error for the court to refuse to order all profits, as shown by the company's statements for the years 1940-41, paid out in cash dividends, such profits being subject to deductions for income taxes, allowance for bad debts, and inventory adjustments; but the court erred in allowing a ten per cent deduction from such profits to cover probable expense, and the order should have directed the payment in dividends of the full net profits, the company showing at the end of 1941 a surplus of $38,000 on a capital of $7,800.

APPEAL by plaintiff and by defendants from *Carr, J.*, at 23 May, 1942, Term, of ALAMANCE.

Civil action to require defendants to pay dividends. C. S., 1178.

It is uncontroverted that Central Grocery Company, a corporation, was organized in 1927 by the plaintiff and defendant, W. V. Coble, with a paid-in capital stock of $10,000 composed of 100 shares of the par value of $100 per share, for the purpose of carrying on a general wholesale grocery business; that the corporation also borrowed $10,000 with which to do business; that plaintiff became secretary-treasurer and general manager of the corporation, and continued in that capacity until 15 February, 1940; that at the end of the year 1939, seventy-eight shares of the capital stock were outstanding—the other twenty-two shares having been bought in by the corporation and held as treasury stock; that also at the end of the year 1939 the corporation had built up a surplus of $39,971.38, in addition to earnings of $5,528.96 in that year, based upon merchandise inventory $38,614.93, as plaintiff contends, or $21,623.89 based upon a merchandise inventory reduced to $29,389.15 as averred by defendants; that at a meeting of the board of directors held early in 1940, plaintiff, as secretary-treasurer and general manager, was superseded by defendant W. V. Coble; that the corporation made a profit in each of the years 1940 and 1941.

Plaintiff, in his complaint, seeks to have all of the surplus accumulated prior to 1940 declared as a stock dividend, and to have the profits for the years 1940 and 1941 paid out in cash dividends.

Upon hearing in Superior Court, a jury trial was waived and it was agreed that the court might find the facts and enter judgment accordingly. "From the pleadings, the evidence presented and admissions of the counsel during the hearing of the cause" as stated in the judgment rendered, the court found these facts:

"1. That the Central Grocery Company is a corporation organized in 1927 by the plaintiff and one of the defendants, W. V. Coble, and from that time until the present time has been engaged in the wholesale grocery business.

"2. That the plaintiff, G. L. Amick, was secretary-treasurer and general manager of said corporation until some time during the first of the year 1940, when he was voted out of the company as a paid officer by the other stockholders.

"3. That the outstanding capital stock of said company at the beginning of the year 1940 was 78 shares of the par value of $100.00; that the plaintiff, G. L. Amick, is the owner of 35 shares, and W. V. Coble is the owner of 25 shares, Charles R. Coble 9 shares, Yank D. Coble 6 shares, and J. Talmadge Isley 3 shares, and said corporation has been under the control and management of the said W. V. Coble and the other named defendant stockholders since the early part of 1940; and three of said defendants are brothers and J. Talmadge Isley is a nephew. That the said plaintiff, G. L. Amick, has had no connection with the management of said business since the early part of 1940. He has, however, attended stockholders' meetings, and is still listed as a member of the board of directors.

"4. That the annual statement of the assets and liabilities of said company for the year 1940 was attached to the complaint filed in this action and admitted to be the financial statement and condition of said company, showing both the balance statement of said assets and liabilities and statement of operations for the year 1940. That according to said statement, the defendant company made a net profit of $17,585.47, but it is found by the court that no income tax or other proper deductions had been allowed. That after income tax was paid and a definite sum set up for bad debts there was a net profit of $11,862.69. The court finds as a fact, however, that there had been an adjustment of inventory as compared with the inventory at the end of the year 1939, which statement is referred to as the Amick Statement and which showed an inventory at the end of the year 1939 of $38,614.93, and the statement under the Coble management showed that said inventory had been reduced from said amount to $29,389.15, a difference of $9,225.78, and this amount

is reflected in the showing of surplus or net profit at the end of the year 1940. Making this deduction of $9,225.78 from the net profit of $11,862.69, the defendant company would show a net profit for that year of at least $2,636.91, and the court finds that the said company made as a net profit for that year the said amount.

"5. A statement for the year 1941 was attached to the said complaint and admitted to be a true statement of the condition of said company and its operations at the end of 1941; that the net profit as shown by said statement was $9,993.36 before the payment of income tax and other taxes and before any sum was set aside for bad debts, and a completed statement shows that there is deducted from said sum for income tax purposes and bad debts the sum of $6,410.78; that additional sums were deducted for other taxes and adjustments showing a total deduction of $7,796.44, leaving a balance as net profit of $2,116.92.

"6. That the surplus of said company at the beginning of the year 1940 was approximately $44,075.00; and that the surplus of said company at the end of the year 1941 was approximately $43,056.14.

"7. That after this action was heard and before the court rendered judgment, the defendants caused a special meeting of the stockholders and directors to be called. The said meeting was called to be held on Thursday, May 7, 1942, at 8 o'clock p.m., at the office of the company in the City of Burlington. The notice stated that 'the purpose of this meeting is to establish the working capital of this company for the year 1942, and to designate by resolution a reserve as working capital for the years 1940 and 1941.' The meeting was held and the minutes of said meeting disclose that a resolution was passed designating a reserve as working capital for the year 1941 and also a resolution setting forth the working capital for the year 1942. The resolution discloses that for the year 1942 the said majority stockholders and directors voted and set aside the sum of $50,000 as working capital. It is found from an examination of the statement for the year 1941 and attached to the pleadings in this cause that the total net worth of the company at the end of the year 1941 was $50,856.14, and this was before any sum had been paid out for income taxes and other taxes or any reserve set up for bad debts, and that the completed statement for said year shows that the sum of $7,796.44 was deducted from the net profit for the year 1941, which is set out in Finding No. 5 of this judgment. That the defendants, majority stockholders and directors, by resolution set aside and reserved the sum of $43,500 as working capital for the year 1941, which also appears to be more than the surplus at the end of 1941 and before taxes had been paid and a reserve for bad debts set up. That the aforesaid meeting of the stockholders was held by and with the consent of the court and at the court's suggestion to the end that the court might have the evidence of

the action taken at said meeting before it prior to rendering judgment. The court, however, made no suggestion as to what action the stockholders should take with respect to the amount to be set aside for working capital. That the plaintiff attended said meeting and voted against all of said resolutions.

"8. That all of the defendants, majority stockholders and directors who constitute a family corporation did, during the year 1941 increase their salaries and voted themselves bonuses; that the salary of W. V. Coble had increased from $2,700.00 at the end of 1939 to the sum of $4,445.00, which included a bonus for the year 1941, and that the other officers' salary had been increased approximately one-third during said period.

"9. That the cash on hand at the end of the year 1940 was $4,505.78, and that the cash on hand at the end of the year 1941 was $1,352.46. That the said company is engaged in the sale of merchandise which is a turn-over in inventory and that it could have at the end of each of said years secured ample funds to pay dividends.

"10. Counsel for plaintiff and defendants admit and it is, therefore, found as a fact that prior to the year 1940 the stockholders and directors by mutual consent each year turned all of the net earnings of the corporation as the same were earned, except the amount declared as a dividend, back into the business of the corporation. These earnings were used in whatever way the corporation needed them, but by far the larger portion of them was used to increase the stock of goods owned by the corporation. There was never any resolution adopted with respect to such action.

"11. It is further found as a fact upon admission of the parties that at the regular annual meeting of stockholders and directors held in February, 1941, a four per cent (4%) dividend was declared and was paid to and received by all of the stockholders, including the plaintiff. That at the annual meeting in February, 1942, a five per cent (5%) dividend was declared, but the plaintiff refused to accept the dividend tendered him as a stockholder owning 35 shares of stock."

Upon such findings of fact the court concluded as matters of law:

"1. That the action of the defendants, stockholders, taken on May 7, 1942, in setting aside as working capital $50,000 for 1942 and $43,500 for 1941 as appears in the seventh finding of fact was apparently due to an incorrect interpretation of the meaning of the term "working capital" as the same applies to a wholesale grocery business whose assets consist largely of its stock of goods. That the defendants have no right in law or equity to set aside the whole of the surplus which for the most part is invested in the corporation's stock of merchandise as 'working capi-

tal.' That the sums so set aside are far in excess of that which could in good faith be legally set aside for said purpose.

"2. That after deducting the whole of the accumulated profits for 1940 and 1941 in the sum of $4,753.83 from the surplus on hand at the end of the year 1941, being the sum of $43,056.15, there will remain in said surplus $38,302.31, which is an amount far in excess of that which could in good faith be legally set aside for 'working capital.' That the plaintiff, therefore, has a clear legal right to have the whole of the net accumulated profits for the years 1940 and 1941 declared and paid out as dividends.

"3. That inasmuch as it appears that much of the surplus is invested in the stock of merchandise and the defendants will, no doubt, be required to convert merchandise into money or borrow money in lieu of converting merchandise into cash in order to pay what the stockholders are entitled to receive as a dividend, and this will require the defendants to incur some expense which the court finds should not exceed ten per cent (10%) of the amount of said net accumulated profits, and when said expense is deducted, there will be left at least the sum of $4,278.44, which should be declared and paid out in dividends.

"4. That if plaintiff is not entitled to a writ of *mandamus* he is entitled to relief in the form of a mandatory injunction commanding the defendants to declare and pay out the sum of $4,278.44 in dividends."

Upon such findings of fact and conclusions of law, the court "ordered, adjudged and decreed that the directors of the Central Grocery Company of Burlington, North Carolina, W. V. Coble, Charles R. Coble, Yank D. Coble, and J. Talmadge Isley, officers and directors of the Central Grocery Company, Inc., be, and are hereby commanded to immediately declare $4,278.44 as dividends to stockholders of said company payable on or not later than the 15th day of June, 1942, and the defendants to pay the costs of the action to be taxed by the clerk."

Both plaintiff and defendants except to the foregoing judgment and appeal to the Supreme Court, and assign error.

Thos. C. Carter and John H. Vernon for plaintiff, as appellee and as appellant.

J. Elmer Long and Clarence Ross for defendants, appellants.

DEFENDANTS' APPEAL.

WINBORNE, J. While defendants not only assign as error the several conclusions of law upon which the judgment below is founded, and the judgment, but except to and assign as error the findings of fact made by the court upon which the conclusions of law are based, yet in their brief

they challenge only the correctness of the conclusions of law and the judgment. Hence, under Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C., 554, the exception to the findings of fact will be taken as abandoned, leaving for consideration the challenge to the conclusions of law and judgment. As to these, and upon the facts found, we find no error of which defendants may complain. C. S., 1178. *Cannon v. Mills Co.,* 195 N. C., 119, 141 S. E., 344.

The statute relating to corporations, chapter 22, Consolidated Statutes of North Carolina, section 1178, provides that: "The directors of every corporation created under this chapter, shall, in January of each year, unless some specific time for that purpose is fixed in its charter, or by-laws, and in that case at the time so fixed, after reserving, over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand. . . ."

The court finds as a fact that at the beginning of the year 1940 the corporation had a surplus of approximately $44,075.00, and at the end of year 1941 the surplus was approximately $43,156.14. Also while the court further finds that prior to 1940 the stockholders paid only small dividends and the earnings were permitted to remain in the treasury of the company and be used in whatever way the corporation needed them, and mainly in the increase of stock of goods, it also finds that no corporate resolution had been adopted with respect to this surplus. Moreover, it appears that no corporate action was taken by the stockholders until after the hearing of this action in the court below, when, at the suggestion, and with the consent of the court, a special meeting of stockholders and of directors was called at the instance of defendants, the stated purpose of which was "to establish the working capital of this company for the year 1942, and to designate by resolution a reserve as working capital for the years 1940 and 1941." And the court finds that at such meeting the stockholders by majority vote set aside as working capital for the year 1941 an amount which is more than the surplus at the end of that year—before taxes had been paid and a reserve for bad debts set up. Upon this the court in effect holds that the defendants as majority stockholders did not act in good faith. Therefore, if it be conceded that at such meeting the majority stockholders, acting in good faith, could have set aside a working capital after the institution of this action, the ruling below is tantamount to holding that no such action has been taken in good faith. The effect of this is that no valid corporate action has been taken with respect to setting aside a working capital either before or after the institution of this action. Consequently, the

accumulated profits are available for dividends, and the directors are controlled by the provisions of C. S., 1178, and have no discretion with respect to the performance of the duty imposed. *Cannon v. Mills Co., supra.* But it appears that the plaintiff seeks to have paid in cash only the profits for the years 1940 and 1941, and there is, therefore, no error in the judgment directing the payment of cash dividends from the profits for those years.

PLAINTIFF'S APPEAL.

Plaintiff assigns as error the refusal of the court to order paid as cash dividends the whole of the profits for the years 1940 and 1941, as shown in the annual statements rendered at the end of those years, respectively. However, the court finds that the profits shown on the 1940 statement are subject to income tax, to allowance for bad debts, and to inventory adjustment; and that the profits shown on the statement for the year 1941 are subject to income tax and to deduction for bad debts, thereby reducing the total profits for those years to $4,753.83. Manifestly, the income tax, allowance for bad debts, and the inventory adjustment are properly deductible in order to ascertain the net profits. However, we are of opinion that the court erred in allowing ten per cent of the net accumulated profits for 1940 and 1941 to be deducted to cover probable expenses. The order should have directed the payment of the full amount of $4,753.83. That this may be done without impairing the capital structure of the corporation is, on this record, patent. For after paying this amount as dividend, there still remains of the surplus as of the end of the year 1941, the sum of $38,302.31, on a paid-in and outstanding capital of $7,800.00, as shown by facts found by the court to which no exceptions are presented.

As the court rendered no judgment with respect to the payment of the accumulated profits prior to the year 1940, we make no ruling with regard thereto, and leave the matter for future determination in this action, if any of the parties so move.

On defendants' appeal—Affirmed.

On plaintiff's appeal—Modified and affirmed.

BERTHA M. SMITH WILLIARD, MERENDA SMITH HOLDER, EFFIE SMITH STAFFORD, PARTHELIA SMITH WILLIARD, W. H. SMITH AND JOHN R. SMITH v. EARLY WEAVIL AND ELWOOD SMITH, EXECUTORS OF WILLIAM YANCEY SWAIM, DECEASED.

(Filed 8 January, 1943.)

1. Estates §§ 9a, 15: Wills § 33d—

A life estate, with remainder over to designated persons, may be created in personalty, at least personalty of a more permanent nature, directly by will, without the intervention of a trustee; and money comes within the rule.

2. Estates §§ 9a, 15—

A bequest of property "*quae ipso usu consumuntur*" conveys the absolute title and is not a subject of a life estate.

3. Same: Wills §§ 33d, 34—

Where testator provided by will that all of his property should be sold and go to his estate except certain realty allotted his widow for her support, and at the death of his widow his executors were directed to sell the land allotted for the widow's support "and the proceeds of which shall go to my estate and shall be equally divided between my eight children but my daughter Mary Jane shall have her part only for her lifetime and at her death her part shall go back to her brothers and sisters." *Held:* Mary Jane takes an absolute title in the general estate and her life estate is confined to the lands assigned to the widow and directed to be sold by the executors after the widow's death.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at May Term, 1942, of FORSYTH.

This action was brought by the plaintiffs to recover from the estate of William Yancey Swaim, deceased, trust funds alleged to have been left to them by the will of Lewis L. Smith. They filed their complaint, from which we summarize the facts alleged.

The will is as follows:

"WILL OF LEWIS L. SMITH: I, Lewis L. Smith of the State of North Carolina, Forsyth County & Broad Bay township knowing the uncertainty of Life and the certainty of Death I do herein make my last will and testament on earth as follows, first my widow Tempy Smith if she should be the longest liver of us too Shall have one cow, one hog and all of my real estate on the North West side of the Creek as long as she lives for her support and my Executors Shall see to Renting the Same, and if there be any surplus over after her support it shall go back to my

estate. Second My Personal Property at my Death Shall be sold at Public Sale and the Proceeds go into my Estate. *Third.* and the remainder of my Real Estate not included in allotment for my widow Shall be sold Either Public or Private in the Judgment of my Executors and at the Death of my Widow my Executors of this my will Shall Sell first mentioned land (widows allottment) and the Proceeds of which Shall go to my Estate and shall be Equally Divided between my Eight children but my Daughter Mary Jane Shall have her part only her life time and at her death her part Shall go back to her Brothers and Sisters, and I furthermore give my Executors the full Right and Power to Make all titles to said Lands & according to Law, and the Executors of this my last will Shall be my three sons W. Harrison Smith, John R. Smith, Elwood L. Smith they shall be Sole Executors of this my last will.

"This the Nineteenth Day of November A D Nineteen hundred and Fifteen

L L SMITH

Witnesses
J. M. MCGUISTON
J. A. BOYLES"

L. L. Smith died 23 July, 1924, having disposed of all his real estate by deed, with the exception of the tract allotted to the widow. Mary Jane Smith Swaim, the daughter whose distributive share in the property of the decedent was limited to a life estate, with the remainder over to the other children named in the will, died on 27 May, 1927, leaving a will in which she devised and bequeathed all her property to her husband, William Yancey Swaim, naming him as executor.

It is alleged that during the life of Mary Jane Smith Swaim funds from the L. L. Smith estate, allegedly trust funds of the plaintiffs, to the extent of $3,450.00, had been paid to her by the executors of L. L. Smith's will, which funds had been deposited in the bank; that during the lifetime of the said Mary Swaim, her husband, W. Y. Swaim, by undue influence and by virtue of his marital relation, caused the said Mary Swaim to surrender possession of the trust funds to him; and that he became possessed of the remainder of the trust funds by virtue of his office as executor of her will, and acknowledged receipt as her executor of moneys aggregating $2,141.11.

It is further alleged that William Yancey Swaim used the trust funds for his own benefit from the time he obtained possession of them until his death on 30 April, 1939; and that he had never accounted for any part of them, or for the interest or other income derived therefrom, but had never by words or conduct repudiated the trust.

That portion of the lands allotted to the widow of L. L. Smith was sold by Smith's executors and converted into cash upon her death, which occurred 2 August, 1928, and certain of the real estate was not disposed of by the said executors until 23 April, 1934; that the said real estate was disposed of by the executors, pursuant to court order, by executing and delivering a deed of conveyance to the plaintiffs and Elwood L. Smith as tenants in common, and has never been fully converted into cash; that the executors of the will of Lewis L. Smith did not file a final report as such executors until 19 May, 1934.

William Yancey Swaim left a will, in which no provision was made for the payment of the trust funds to the plaintiffs and the defendant Elwood L. Smith.

Upon this the plaintiffs demanded judgment against the executors of William Yancey Swaim for the sum of $2,957.14, with interest thereon from 7 May, 1927 (the date of Mary Swaim's death), until paid, and for other and further relief.

The case came on for hearing at the 25 May, 1942, Term of Forsyth Superior Court, and defendants demurred *ore tenus* to the complaint for that it failed to state a cause of action; and thereupon the following judgment was rendered:

"This cause coming on to be heard before the undersigned Judge Presiding at this the May 25th 1942 Term of the Superior Court for Forsyth County, upon a demurrer *ore tenus* to the amended complaint filed in his cause, and the Court being of the opinion that the Will of Lewis L. Smith, which is incorporated by reference in the complaint, did not vest in Mary Jane Smith Swaim any life interest in the personal property referred to therein, and, therefore, the Court is of the opinion that the plaintiff has failed to state a cause of action for the reason that the matters and things alleged in the complaint upon which the cause of action is based are predicated upon the said Mary Jane Smith Swaim receiving merely a life interest in the personal estate of Lewis L. Smith under the Will aforementioned.

"Now, therefore, upon motion of counsel for the defendants, it is ORDERED, CONSIDERED AND DECREED that the demurrer to the complaint be and the same is hereby sustained and the plaintiffs' action is dismissed and the plaintiffs are taxed with the cost of this action.

"This 26th day of May, 1942.

HENRY A. GRADY,
Judge Presiding."

From this judgment the plaintiffs appealed, assigning error.

Whitman & Motsinger for plaintiffs, appellants.

Wm. H. Boyer and Ingle & Rucker for defendants, appellees.

SEAWELL, J. It seems to be settled here that a life estate, with remainder over to designated persons, may be created in personalty, at least personalty of a more permanent nature, directly by will, without the intervention of a trustee. *Smith v. Barham,* 17 N. C., 420. Where the bequest is of property *"quae ipso usu consumuntur,"* it comes within the reason of the older law and the bequest conveys the absolute property in the chattels. *Smith v. Barham, supra.* But our decisions recognize that bequests of money do not come within the rule pertaining to personal property which perishes with use—could not be put to the ordinary use without being consumed; and such a bequest, therefore, does not invest the first taker with the absolute property in the subject of the bequest—in the absence of some expression in the will indicating a contrary intent. The rule is, of course, subject to the stronger rule that the intention of the testator controls. *Haywood v. Wright,* 152 N. C., 421, 67 S. E., 982; *Burwell v. Bank,* 186 N. C., 117, 118 S. E., 881. Under such a bequest, the holder for life is not permitted to invade the *corpus* of the estate given him, but is confined to the use of the interest or income therefrom. *Jones v. Simmons,* 42 N. C., 178; *Burwell v. Bank, supra; Bryan v. Harper,* 177 N. C., 308, 98 S. E., 822; *In re Knowles,* 148 N. C., 461, 62 S. E., 549; *Holt v. Mfg. Co.,* 177 N. C., 170, 86 S. E., 1031.

If the plaintiffs could establish a bequest of that kind under the terms of L. L. Smith's will, they would, under the allegations of the complaint, have the right to pursue the property as trust funds, and recover the same from the estate of Yancey Swaim. But the will itself, taken with the allegations in the complaint, presents serious obstacles to that result.

Smith required that all his personal property be sold at his death and that the same should go into his estate, but at this point, the will makes no disposition of it. The record is silent as to whether he had cash or moneys on hand at his death in addition to other personalty and there is no presumption favoring either condition, except that it is unlikely he should use the term "proceeds" in designation thereof.

Further on in the will (and we repeat for the purpose of clarity), it is provided: *"Third.* and the remainder of my Real Estate not included in allotment for my widow Shall be sold Either Public or Private in the Judgment of my Executors and at the Death of my Widow my Executors of this my will Shall Sell first mentioned land (widows allottment) and the Proceeds of which Shall go to my Estate and shall be Equally Divided between my Eight children but my Daughter Mary

Jane Shall have her part only her life time and at her death her part shall go back to her Brothers and Sisters."

Opposite interpretations have been made of this language by the plaintiffs and the defendants respectively. The plaintiffs urge that the phrase "shall be equally divided" refers to the whole property left by the testator. They point out that the will denotes a general scheme of distribution of all the property, whereby it is to be reduced to cash to go into the estate of the testator and there to be equally distributed, with the restriction that Mary Jane's share shall be for life only. They point out that the expression "shall be equally divided" comes at a point in the will just after the plan of reducing the property to cash has been expressed item by item; and they call to their aid the presumption against intestacy, which they argue will justify an expansion of the phrase denoting the bequest so as to include the entire property, or even a transposition of the language used, if necessary to that construction, and cite *McIver v. McKinney,* 184 N. C., 393, 114 S. E., 399, having to do with equitable conversion, and *Holmes v. York,* 203 N. C., 709, 712, 166 S. E., 889.

Defendants point out that this scheme was not subsequently followed by the testator; that the use of the term "proceeds" and the distribution thereof occurs in close connection with the sale of the lands by the executors and must be confined to its grammatical sense—to the connection in which it is employed—and that it is intended to affect, and does affect only the proceeds of the sales of land by the executors.

The lower court was evidently of the opinion that the apt use of the term "proceeds" as descriptive of the funds to be divided and the close juxtaposition of sale, proceeds and division in Item Three rather compel the adoption of the interpretation placed on the will by the defendants, and with this we are constrained to agree. We are not inadvertent to the presumption against intestacy, called to our attention by the plaintiffs; but this rule, however strong, is but a rule of construction, which must yield to the true intent of the testator when that can be ascertained. *Smith v. Barham, supra.* It does not authorize the Court to make a will or to add to a testamentary disposition something which, by reasonable inference, is not there, or to make intestacy impossible. *Alexander v. Alexander,* 41 N. C., 229, 231. It is the opinion of the Court that the adoption of the view urged by the plaintiffs would do too much violence to the language employed in the will. Our interpretation of the will, therefore, is that the restriction to a life estate of the share of Mary Jane Smith Swaim is confined to the bequest from the proceeds of the real estate directed to be sold by the executors, and not to any distribution of the estate generally.

Since the lands allotted to the widow were not sold by the executors until many years after the death of Mary Jane Swaim, and no part of the proceeds are alleged to have come into her hands; and since it appears that the testator, L. L. Smith, had sold and disposed of the other real estate prior to his death, and the purchase price had come into his hands not as proceeds from a sale by his executors and devoted to a special purpose under the will, but as his own money, subject to his complete control and disposition, free from any testamentary obligation; it follows that the plaintiffs are not entitled to pursue and recover the proceeds as trust funds from the estate of Yancey Swaim, if they could still be identified.

Under the facts alleged, the plaintiffs have failed to connect their claim with any property from the bequest upon which they base their right of recovery, and the judgment sustaining the demurrer is

Affirmed.

J. H. McADEN v. R. F. CRAIG ET AL.

(Filed 8 January, 1943.)

1. Contracts §§ 3, 4, 10—

A contract results from an offer to sell for cash and notice of acceptance, duly communicated in the terms of the offer, and the payment of the money and the delivery of the property belong to the performance of the contract, to take place simultaneously or as concurrent acts.

2. Contracts § 8—

In arriving at the intention of parties to a contract, its purpose, the nature of the offer, the circumstances of its making and the objects in mind and the ends in view must be regarded, and words capable of more than one meaning are to be given that meaning it is apparent the parties intended them to have.

3. Same—

In respect of the manner of executing a contract, the general custom in the business or trade may be considered in arriving at the intention of the parties.

4. Contracts §§ 10, 16, 20—

Following the consummation of a contract, the plaintiff must show that he offered to perform his part of the agreement, or that such offer was rendered unnecessary by the refusal of the defendant to comply, before an action will lie, either for its breach or for specific performance.

5. Estoppel § 6d—

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation is begun,

change his ground, and put his conduct upon another and different consideration, thus mending his hold. He is estopped from so doing.

SCHENCK, J., dissenting.
SEAWELL, J., concurs in dissent.

APPEAL by plaintiff from *Pless, J.,* at March Term, 1942, of MECKLENBURG.

Civil action to recover damages for alleged breach of alleged contract to sell and deliver the capital stock of a corporation.

On 11 April, 1941, the defendant executed and delivered to the plaintiff the following written offer:

"STANLEY, N. C. 4/11/41

"If you pay me $150,000.00 cash I will deliver you at any time in 30 days from date the entire capital stock—common and preferred—of Lola Mills, Inc. if then unsold. R. F. CRAIG."

There is evidence tending to show that on 28 April, the plaintiff went to Stanley to see the defendant and to accept his offer. Finding him out and after waiting a while for his return, the plaintiff asked his son, Hubert Craig, to tell his father that he accepted his offer and would meet him the next day in Gastonia to close the transaction. Hubert Craig communicated the plaintiff's acceptance to his father. On the following day, the defendant wrote the plaintiff he was not in position to deliver the stock because of a prior commitment.

There was evidence, however, that the defendant's commitment was to his son Hubert, made on 29 April, without consideration, after receiving notice of the plaintiff's acceptance. Even so, the defendant says, "I told him all along it had to be cash. . . . Now, McAden, don't come back here with any offers or propositions of any kind. . . . If you come back, you come with the cash and nothing but the cash."

At the close of plaintiff's evidence, judgment of nonsuit was entered as to the defendant, Hubert Craig, to which no exception was noted.

On the issue as to whether the defendant's offer had been accepted while still outstanding and according to its terms, the court first instructed the jury that if the plaintiff's notice of acceptance was communicated to the defendant by his son, Hubert, while the offer was still outstanding, "that would constitute an acceptance of the offer."

Later, the court instructed the jury as follows:

"The Court construes the proposal, Exhibit 1, to mean that the plaintiff could accept the same only by paying or tendering to the defendant $150,000 cash, which was a condition precedent necessary to be per-

formed by the plaintiff before any duty rested upon the defendant to assign the stock to him; and if you find, from the evidence, that the defendant did not, while the said offer was outstanding, pay or tender to the defendant $150,000 in cash, then the Court instructs you to answer the first issue No." Exception.

The issue of acceptance was answered in the negative, and from judgment thereon, the plaintiff appeals, assigning errors.

Robinson & Jones for plaintiff, appellant.
Tillett & Campbell for defendant, appellee.

STACY, C. J. The defendant lives in Gaston County; the plaintiff in Mecklenburg. On 11 April, 1941, the defendant made an offer in writing to deliver to the plaintiff, at any time within thirty days, the entire capital stock of Lola Mills, Inc., "if you pay me $150,000.00 cash," subject to prior sale in the meantime. It is in evidence that within the time specified, to wit, on 28 April, and while the offer was still outstanding, the plaintiff accepted the offer, and so notified the defendant. On the day following, the defendant wrote the plaintiff that he did not feel obligated to deliver the stock because "On Thursday of last week I committed myself to another party. I am, therefore, not in position to deliver the stock to you or your customer." It turned out on the hearing, however, that the defendant had "committed" himself without consideration to his son Hubert on 29 April, after receiving the plaintiff's notice of acceptance.

The case, then, turns on whether the payment or tender of $150,000.00 in cash was essential to the acceptance of defendant's offer. The defendant did not so understand his offer. Neither did the plaintiff. *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706; *Rucker v. Sanders,* 182 N. C., 607, 109 S. E., 857. The first time this position was taken was when the defendant filed his answer. The point seems to have been an afterthought, suggested, no doubt, by the pressure and exigencies of the case.

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." *Railway Co. v. McCarthy,* 96 U. S., 258.

It was not within the contemplation of the parties that the plaintiff should first pay the money and then trust to the defendant to deliver the stock. This would leave the plaintiff unprotected. *Lennon v. Habit,* 216 N. C., 141, 4 S. E. (2d), 339. The payment of the purchase price

and the delivery of the stock were to take place simultaneously or as concurrent acts. Such was the understanding of both parties. *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857. The case is not far different from *Rucker v. Sanders, supra,* where, on facts in principle quite similar, it was held that a contract resulted from the notice of acceptance, duly communicated, and that the payment of the money belonged to the performance of the contract.

In *Skinner v. Stone,* 144 Ark., 353, 222 S. W., 360, 11 A. L. R., 808, the appellant, in response to an inquiry, wrote the appellee, "I will sell the land and timber, 120 acres, for $2,500 cash." The appellee replied by mail, "Your price . . . is rather high, but I am accepting your offer, to take $2,500 cash for this land . . . attach draft to deed and . . . I will take care of same." The Court held the acceptance to be unconditional, and the request to "attach draft to deed," etc., a mere suggestion to expedite the consummation of the agreement.

It is generally understood that where an offer to sell for cash is accepted, the payment of the money and the delivery of the property are to take place simultaneously or as concurrent acts. *Northwestern Iron Co. v. Meade,* 21 Wis., 474, 94 Am. Dec., 557; *Hughes v. Knott,* 138 N. C., 105, 50 S. E., 586, 3 Ann. Cas., 903; *Blalock v. Clark,* 133 N. C., 306, 45 S. E., 642; *S. c.,* 137 N. C., 140, 49 S. E., 88. Indeed, in respect of the manner of executing the contract, it has been held that the general custom in the business or trade may be considered in arriving at the intention of the parties. *Hughes v. Knott, supra;* Annotation, 11 A. L. R., 811.

It should be remembered we are here dealing with the acceptance of an offer, and not with the exercise of an option. *Johnson v. Ins. Co.,* 221 N. C., 441; *Gaylord v. McCoy,* 161 N. C., 685, 77 S. E., 959. The usual method of accepting an offer is by notice of acceptance communicated to the offerer. *Hall v. Jones,* 164 N. C., 199, 80 S. E., 228; Anson on Contracts, p. 22, *et seq.* It is true, the acceptance must be in the terms of the offer, but acceptance and performance are not to be confused. *Rucker v. Sanders, supra;* 12 Am. Jur., 537. The one deals with the making of the contract; the other with its execution. *Blalock v. Clark, supra.*

"An offer to buy or sell becomes a binding agreement when the person to whom the offer is made accepts it and communicates his acceptance." *Owens v. Wright,* 161 N. C., 127, 76 S. E., 735. Of course, following the consummation of a contract, the plaintiff must show that he offered to perform his part of the agreement, or that such offer was rendered unnecessary by the refusal of the defendant to comply, before an action will lie, either for its breach or for specific performance. *Northwestern*

Iron Co. v. Meade, supra; Gaylord v. McCoy, supra. But here the first issue was addressed solely to the matter of acceptance or the consummation of the contract.

In arriving at the expressed intent—the real purpose of every writing—regard must be had to the nature of the offer, the circumstances of its making, and the objects in mind or the end in view. *Simmons v. Groom,* 167 N. C., 271, 83 S. E., 471. "The words employed, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have." Beach on Modern Law Contracts, sec. 702; *Jones v. Casstevens, ante,* 411. This necessarily works a new trial in the instant case, as it follows, from what is said above, there was error in charging the jury that payment or tender of the purchase price was essential to the acceptance of the offer. Such payment or tender is not stipulated as a condition precedent to the acceptance of the offer. It was the understanding of the parties, according to their own interpretation, that this would belong to the performance of the contract, if and when consummated. *Cole v. Fibre Co., supra.* It is true, consummation and performance might have gone hand in hand, but it is not so nominated in the offer that consummation shall be by tender or payment of the purchase price.

For error in the charge, as indicated, the plaintiff is entitled to another hearing. It is so ordered.

New trial.

SCHENCK, J., dissenting: This is an action to recover damage for a breach of an alleged contract to sell and deliver the capital stock of the Lola Mills, Inc.

The plaintiff alleged that the defendants made an offer to him that they would deliver the entire capital stock of the Lola Mills, Inc., upon his paying to them the sum of $150,000.00, and that he, the plaintiff, put himself in a position to make the payment of the amount to the defendants in accord with the offer and accepted the offer and thereby consummated the contract of sale and delivery, and thereafter the defendants breached said contract by giving notice that they would not deliver the stock, thereby making the payment or tender of said amount an idle and useless ceremony. *Samonds v. Cloninger,* 189 N. C., 610, 127 S. E., 706.

The defendants in answer admit that R. F. Craig made to the plaintiff an offer to sell and deliver to him the capital stock of the Lola Mills, Inc., upon the payment by plaintiff to him of $150,000.00 cash, but deny that the plaintiff ever put himself in a position to accept and comply with the conditions of such offer, and aver that no payment or tender of

the $150,000.00 was ever made to R. F. Craig, and that no waiver of such payment or tender was ever made by him and that there was no consummation of a contract to sell and deliver the capital stock of the Lola Mills, Inc., and consequently no breach of such contract.

At the conclusion of the plaintiff's evidence a motion for a judgment as in case of nonsuit was allowed as to the defendant Hubert Craig, to which no exception was lodged.

The case as it related to the defendant R. F. Craig was submitted to the jury upon four issues, the first of which read: "Did the plaintiff, while the offer set forth in Plaintiff's Exhibit No. 1 was outstanding, accept same, in accordance with its terms, as alleged?" The first issue was answered in the negative, and the remaining issues left unanswered.

The offer (Plaintiff's Exhibit No. 1) made by the defendant to the plaintiff is in the following language:

"STANLEY, N. C., 4/11/41.

"If you pay me $150,000.00 cash I will deliver you at any time in 30 days from date the entire capital stock—common and preferred—of the Lola Mills, Inc., if then unsold. R. F. CRAIG."

The $150,000.00 cash was never paid or tendered to the defendant by the plaintiff. The plaintiff, however, contends that he consummated the contract of sale and delivery by notifying the defendant that he accepted the defendant's offer, and that the defendant waived the necessity of his making the payment or of making a tender thereof to the defendant by notifying the plaintiff that he, the defendant, would not deliver the stock to the plaintiff even if payment was tendered or made.

Since the offer clearly calls for the payment of cash and since it is admitted that no payment nor tender of cash was made, and since the plaintiff relies upon a waiver of such payment or tender, the case poses the sole question: Was there sufficient evidence to be submitted to the jury upon the issue of waiver of payment or tender thereof? I am of the opinion that there was not.

The plaintiff's testimony is to the effect that on 28 April, 1941, he went to the office of the defendant at Stanley with the view of notifying defendant of his acceptance of defendant's offer, and finding the defendant R. F. Craig absent, plaintiff told defendant's son, Hubert Craig, that he came to Stanley to accept his father's offer to deliver the stock of the Lola Mills, Inc., that plaintiff asked Hubert Craig to convey this information to R. F. Craig; that at that time the plaintiff made no payment or tender of payment of $150,000.00, and, while he did not then have that much cash or credit in the banks, he could get it from his clients;

that on the next day, 29 April, 1941, Hubert Craig delivered the message of the plaintiff to his father, R. F. Craig, in Gastonia; that up until 29 April, 1941, the defendant had done nothing to indicate a withdrawal or cancellation of his offer to deliver the stock upon the payment of the cash; and, also, on 29 April, 1941, at Gastonia, Hubert Craig delivered to the plaintiff a letter from his father, the defendant, notifying the plaintiff of his withdrawal of his offer of 11 April, 1941; that this was the first notice, or even intimation, given by the defendant of any withdrawal or cancellation of his offer.

The letter of the defendant to the plainiff dated 29 April, 1941, relied upon by the plaintiff as a waiver of the payment or tender of the cash, contained the following: "On Thursday of last week I committed myself to another party. I am, therefore, not in position to deliver the stock to you or your customer. You will also recall that I told you, in the presence of Mr. Powell, I would not give an option, that I wanted to be free to do as I pleased. I, therefore, do not feel I am under any obligation to you." This is a definite notice from the defendant to the plaintiff of defendant's withdrawal or cancellation of his offer, and such being the case, if the plaintiff received the letter after his alleged acceptance of the offer, such acceptance was not valid because the payment or tender of the cash was still a requisite thereof; on the other hand, if the plaintiff received the letter before his alleged acceptance of the offer, it could avail the plaintiff nothing, since the letter withdrew and canceled the offer, and such alleged acceptance came too late.

The offer being one given without consideration and not under seal was revocable at the will of the offerer at any time before acceptance or compliance therewith by the offeree; and, since on 29 April, 1941, there had been no valid acceptance of the offer as made, the defendant was at liberty to withdraw or cancel his offer on that date, which he did. *Insurance Co. v. Moize,* 175 N. C., 344, 95 S. E., 552.

The defendant having exercised his right to withdraw or cancel his offer before any valid acceptance thereof was made by the plaintiff, the plaintiff's action, in my opinion, should fail.

SEAWELL, J., concurs in dissent.

A. P. RUSS v. THE WESTERN UNION TELEGRAPH CO.

(Filed 8 January, 1943.)

1. Telephone and Telegraph Companies § 2—

In certain cases substantial damages may be recovered for mental anguish, proximately resulting from the wrongful or negligent failure of a telegraph company to transmit correctly and deliver promptly a telegraphic message, independently of any bodily or pecuniary injury; and a sendee or addressee is permitted, under our practice, to maintain the action.

2. Same—

Proof or admission that the telegraph company received the message for transmission and failed to deliver it to the sendee within a reasonable time raises a *prima facie* case of negligence and imposes upon the defendant the duty of going forward with such facts as it may rely upon, if it does not care to risk an adverse verdict.

3. Same—

In an action for damages for failure to deliver a telegram, where the evidence showed that the telegram, announcing the death of sendee's brother and stating "burying eleven Monday," addressed to a well-known person by post office box number and town, was received at destination 5 p.m. Sunday, remained undelivered at 6:30 p.m., when it was mailed to sendee and never received by him, although he lived only a short distance from the telegraph office, a demurrer to the evidence was properly overruled.

4. Negligence § 1a: Damages § 1a—

Negligence is a breach of duty imposed by law, which ordinarily entitles the injured party to recover all damages proximately resulting therefrom; but, when the law prescribes a duty with a limitation of liability appendant, the injured party must take the law as he finds it, and measure his rights accordingly.

5. Public Utilities § 2b: Telephone and Telegraph Companies § 1—

Intrastate tariff schedules of public utility companies, providing uni form, classified services and rates, with limited liability in certain classi fications at lower rates, promulgated under authority of statute, declare to be exclusive, and approved by the Utility Commission, become the lega standard, which the parties may not vary or change by agreement. Th classification is a part of the rate; likewise, the limitation of liability *Holding* valid a $500 limit on recovery against a telegraph company fo failure to deliver in a reasonable time an unrepeated, intrastate "deat message."

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

APPEAL by defendant from *Bone, J.*, at May Term, 1942, of ROBESO

RUSS *v.* TELEGRAPH CO.

Civil action to recover damages for alleged negligent failure to deliver a prepaid, unrepeated, intrastate telegram, sent from Elizabethtown, N. C., in words and figures as follows, to wit:

"February 1, 1942

"Mr. A. P. Russ
P. O. Box 402
Lumberton, N. C.
"Papa's dead, Burying Eleven Monday.
J. A. Russ."

This message was filed with the defendant's agency in Elizabethtown on Sunday morning for transmission by telephone to its Lumberton office when it opened at five o'clock that afternoon. It was so transmitted. The operator sent it out by a messenger boy who was going into the Negro section, across the river, to deliver two telegrams to colored people. The boy asked at two filling stations if they knew Mr. Russ. He soon returned the message to the telegraph office. The operator called the post office and was advised by the clerk that Mr. Russ had a post office box, but the clerk did not know his home address. The husband of the operator was in the telegraph office when the message was received. He advised his wife that he did not know Mr. Russ. At 6:30 p.m. a stamp was placed on the telegram and it was dropped in the mail, and the office was closed.

The plaintiff never received the telegram. He is a white man, 67 years of age, and lived about five blocks from the telegraph office on one of the principal streets of the town. He had been a resident of Lumberton five or six years. He is a member of the Episcopal Church, votes in Lumberton and has a son who attends the Lumberton schools. He was known to the Chief of Police and to the Chief of the Fire Department, both of whom were on duty at their headquarters on that day. The Fire Department is within two blocks of the telegraph office.

The plaintiff did not learn of his brother's death until the following Tuesday, the day after the funeral. He testified to substantial damages.

The jury found that the defendant had negligently failed to deliver the message to the plaintiff, and assessed his damages at $750.00.

From judgment on the verdict, the defendant appeals, assigning errors.

L. J. Britt and McLean & Stacy for plaintiff, appellee.

Francis R. Stark, Varser, McIntyre & Henry, and Junius G. Adams for defendant, appellant.

STACY, C. J. The first question for decision is whether the defendant's demurrer to the evidence or motion for judgment of nonsuit should

have been sustained. The trial court answered in the negative, and we cannot say there was error in the ruling.

I. MENTAL ANGUISH AS BASIS OF RECOVERY.

The law is well settled in this jurisdiction that, in certain cases, substantial damages may be recovered for mental anguish proximately resulting from the wrongful or negligent failure of a telegraph company to transmit correctly and deliver promptly a telegraphic message, independently of any bodily or pecuniary injury. *Penn v. Tel. Co.*, 159 N. C., 306, 75 S. E., 16, 41 L. R. A. (N. S.), 223; *Young v. Tel. Co.*, 107 N. C., 370, 11 S. E., 1044, 22 Am. St. Rep., 883, 9 L. R. A., 669; 26 R. C. L., 606. Here, the sendee or addressee of the message brings the action, and alleges negligence in its delivery with resultant mental anguish. He is permitted to maintain the suit under our decisions. *Penn v. Tel. Co., supra.*

The plaintiff made out a *prima facie* case when he showed acceptance of the message by the telegraph company for delivery and failure to deliver it with reasonable diligence. *Hoaglin v. Tel. Co.*, 161 N. C., 390, 77 S. E., 417; *Medlin v. Tel. Co.*, 169 N. C., 495, 86 S. E., 366. The duty of explanation then shifted to the defendant, if it did not care to risk the chance of an adverse verdict. *Hendricks v. Tel. Co.*, 126 N. C., 304, 35 S. E., 543; *McDaniel v. R. R.*, 190 N. C., 474, 130 S. E., 208.

"Proof or admission that the company received a message for transmission and failed to deliver it to the sendee within a reasonable time, raises a *prima facie* case of negligence and imposes upon the defendant the burden of alleging and proving such facts as it may rely on in excuse." *Cogdell v. Tel. Co.*, 135 N. C., 431, 47 S. E., 490.

Whether the defendant had exercised due diligence in the instant case was for the jury. *Medlin v. Tel. Co., supra.* The telegram on its face showed that it was a death message. It was received in Lumberton at 5:00 o'clock on Sunday afternoon. The purpose of the message was to inform the sendee not only of his brother's death, but also of the hour of the funeral, "Eleven Monday." We cannot say as a matter of law that mailing the telegram was a sufficient compliance with the defendant's duty under the circumstances disclosed by the record. *Kivett v. Tel. Co.*, 156 N. C., 296, 72 S. E., 388; *Hendricks v. Tel. Co., supra; Western U. Tel. Co. v. Broesche*, 72 Tex., 654, 13 Am. St. Rep., 843.

It is true, in *Lefler v. Tel. Co.*, 131 N. C., 355, 42 S. E., 819, it was said that where a telegram is addressed to a person in care of a corporation, in that case "So. Railway Co.," delivery to an agent of the corporation would suffice to discharge the duty of the telegraph company. And there is authority for the holding that where a telegraph company receives a message addressed to a person at a designated post office box, it

performs its contract when it places the message in an envelope, correctly addressed, in the mail at the post office within a reasonable time. *Taylor v. Tel. Co.*, 136 Ky., 1, 123 S. W., 311; 62 C. J., 168. But this position would seem to be discordant with the authorities in this jurisdiction. *Kivett v. Tel. Co., supra; Hendricks v. Tel. Co., supra; Hoaglin v. Tel. Co., supra; Green v. Tel. Co.*, 136 N. C., 489, 49 S. E., 165, 67 L. R. A., 985, 103 Am. St. Rep., 955.

In the instant case, the direction was to deliver the message to A. P. Russ, not to a post office box, an inanimate receiver. *Western Union Tel. Co. v. Scarborough* (Tex. Civ. App.), 44 S. W. (2d), 751; *Western Union Tel. Co. v. Freeland* (Tex. Civ. App.), 12 S. W. (2d), 256. Nor is the case controlled by the decision in *Lefler v. Tel. Co., supra.* There, the message was sent in care of an agent who presumably would be in position to care for it or to see that it was delivered to the sendee. Here, it was apparent that by mailing the telegram late Sunday afternoon, in all probability, the sendee would not receive it in time to attend the funeral the following morning. Moreover, the sending of the telegram, rather than resorting to the postal system, was enough to indicate its importance, and the necessity of delivering it promptly. *Gibbs v. Tel. Co.*, 196 N. C., 516, 146 S. E., 209. In all likelihood, if the sender had known the message was to be mailed in Lumberton, he would have dispatched a letter rather than a telegram. "A prompt delivery was of the essence of the contract." *Western U. Tel. Co. v. Adams*, 75 Tex., 531, 12 S. W., 857, 16 Am. St. Rep., 920, 6 L. R. A., 844.

The conclusion is reached "upon consideration of all the evidence," C. S., 567, that the case was properly submitted to the jury for a determination of the issues raised by the pleadings.

II. LIMITATION OF LIABILITY.

In the alternative, or failing in its motion for judgment of nonsuit, the defendant presents the question of its limited liability. This was reserved upon the hearing, and by consent, ruled upon as a matter of law. The trial court denied the defendant's claim of limited liability, and entered judgment on the verdict.

The telegram in question was written on one of defendant's regular forms, which had printed upon it, *inter alia*, the following stipulations:

1. "All messages are accepted for transmission subject to the classifications hereinafter set forth, and to the conditions and stipulations adopted for each of the respective classifications. . . .

2. "Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed . . . The Telegraph Company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any message received

for transmission at the unrepeated rate beyond the sum of Five Hundred Dollars," etc.

These provisions, stipulations and conditions had theretofore been inserted in the defendant's "Tariff N. Car. U. C. No. 1, Schedule A-1," and approved by the North Carolina Utilities Commission, 15 September, 1941.

It is provided by C. S., 1066, that the Corporation Commission (now its successor, the Utilities Commission, ch. 134, Public Laws 1933) "shall make reasonable and just rates and charges, in intrastate traffic, and regulate the same, of and for . . . 2. The transmission and delivery of messages by any telegraph company." It is also provided, C. S., 1067, that "the rates or charges established by the Commission shall be deemed just and reasonable, and any rate or charge . . . other than those so established, shall be deemed unjust and unreasonable."

It is further provided by ch. 307, Public Laws 1933, that the term "rate" shall mean and include "every compensation, charge . . . and classification, or any of them, demanded, observed, charged or collected by any public utility, for any service . . . offered by it to the public, and any rules, regulations . . . affecting any such compensation . . . or classification." And then in section 4, "every public utility shall file with the commission . . . schedules showing all rates established by it," etc. And finally, in section 5, "No public utility shall . . . collect or receive from any person a greater or less compensation for any service rendered . . . than that prescribed in the schedules . . . then filed in the manner provided in this act, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules."

It is the contention of the defendant that the effect of this legislation on the business of telegraph companies is to place the approved intrastate tariff regulations on a parity with the approved interstate tariff regulations so far as the respective rates and limitations of liability are concerned. *Hardie v. Tel. Co.,* 190 N. C., 45, 128 S. E., 500. It is conceded that if the message in question were an interstate message, the stipulation would be valid under an amendment to the "Act to Regulate Commerce" adopted by Congress on 18 June, 1910. 36 At L., 539; *Western Union v. Esteve Bros. & Co.,* 256 U. S., 566; *Western Union v. Nester,* 309 U. S., 582; *Meadows v. Tel. Co.,* 173 N. C., 240, 91 S. E., 1009.

In the enactment of the above legislation, the General Assembly undoubtedly had in mind the establishment of uniform service by public utilities, and likewise the establishment of uniform rates for such service within the prescribed classifications. The classification is made a part of the rate, and the approval of the tariff schedule makes it the legal

standard, which the parties may not vary or change by agreement. The rate then becomes a matter of law rather than one of contract. The parties agree with respect to the transmission and delivery of the telegram and its classification. The rate is fixed by the approved uniform tariff schedule. Assent to the rate is rendered immaterial because when the rate is used, dissent is without effect. *Ita lex scripta est.* The classification is a part of the rate; likewise, the limitation of liability. "Such limitations are inherent parts of the rates themselves." *State ex rel. Western Union v. Public Service Com.,* 304 Mo., 505, 264 S. W., 669, 35 A. L. R., 328.

If uniformity is to prevail, the tariff schedule must represent the whole duty and the whole liability of the company rendering the service. *Knight v. Coach Co.,* 201 N. C., 261, 159 S. E., 311. Thus, the company is not contracting against its negligence. The law fixes the rate to be paid and the extent of the liability to be assumed. Neither party is allowed to depart from this standard of duty and measure of liability. The two are component parts of an integrated whole. The one is as sacrosanct as the other. The "rate" as the term is used in the statute with all that it implies, is withdrawn from the field of agreement. The approved tariff schedule is not subject to modification or change by the parties. It contains both the legal standard and the limitation of liability. Annotation, 35 A. L. R., 336.

Negligence is a breach of some duty imposed by law, which ordinarily entitles the injured party to recover all damages proximately resulting therefrom. *Clark v. Traction Co.,* 138 N. C., 77, 50 S. E., 518, 107 Am. St. Rep., 526; 15 Am. Jur., 593. But when the law prescribes a duty with a limitation of liability appendant, the injured party must take the law as he finds it, and measure his rights accordingly. *Lytle v. Tel. Co.,* 165 N. C., 504, 81 S. E., 759. This is the basis of the decision in *Knight v. Coach Co., supra.*

Our attention has been directed to the decisions in *Young v. Tel. Co.,* 168 N. C., 36, 84 S. E., 45; *Brown v. Tel. Co.,* 111 N. C., 187, 16 S. E., 179, and the dictum in *Hardie v. Tel. Co., supra.* It is enough to say these cases were before ch. 307, Public Laws 1933, providing for equality in service and uniformity in the rates to be charged or collected by public utilities.

It follows, therefore, from what is said above, the plaintiff's recovery should have been limited to $500.00. Judgment accordingly.

The defendant will be taxed with the cost of the record and its brief.

Modified and affirmed.

SEAWELL, J., concurring in part and dissenting in part: I concur in the view that there is sufficient evidence to support the jury's verdict.

I cannot agree that it is within the power of the Utilities Commission, under the guise of fixing rates and classifying the service to which they apply, to limit recovery in an action for personal injury sustained through negligence in nondelivery of a message.

Nowhere in the Act under which the Utilities Commission operates is any such power expressly, impliedly, or by remote inference given. It is seen as a by-product of the rate-making powers of a nonlegislative body, yet it emerges as substantive law of such vigorous quality as to repeal existing law, destroy or severely limit common law rights, and make a greater change in the laws of negligence than the Legislature itself had seen fit to make in half a century.

No one questions the power of the Commission to establish one rate for an unrepeated message and a higher rate for a repeated message, based on a reasonable classification *of the service performed.* But there the power stops: The limitation on recovery has no functional relation to the service in either case—it is just super-added. It, therefore, emerges as an independent subject with which the Utilities Commission could not deal, since it has no legislative power. Such power could not be delegated to it by the Legislature, either directly or through any device, no matter how ingenious.

The argument in the supporting cases cited in the main opinion cannot be regarded as more than specious when applied, as in some of the cited cases they are, in opposition to the public policy against agreement of the parties limiting liability for negligence resulting in personal injury. *McNeill v. R. R.,* 135 N. C., 682, 47 S. E., 765; *Young v. Tel. Co.,* 168 N. C., 36, 84 S. E., 45, and cases cited. There has been no change in the statute law pertaining to the rate-making body which could affect the authority of these cases. The opinion in chief regards the contract for the service—that is, sending the message—as an acceptance of the rate and classification, including in the classification the limitation of the liability. The validity of the limitation cannot be made, directly or indirectly, to depend upon the assent of the sender.

Many thoughtful members of the profession have never been strongly attracted to the view that damages should be recoverable for mere mental anguish ensuing upon the negligent nondelivery of a telegram. The thing is intimate, noncommercial, not easily measured by money standards, and the awards are likely to be punitive rather than compensatory; but the limitations sustained in this decision go as well to commercial transactions in which negligence may spell disaster, and I see no reason why telegraph companies should be accorded an immunity from liability which is not enjoyed by other public utilities operating under State regulation. Barring the validating effect of contractual stipulation—which is of no force here—such limitation of liability by direct action of the

Legislature would be discriminative, and I cannot see how it can be more effectual as the by-product of rate-making by a regulatory board to which the Legislature gave no more power than was necessary to the performance of the function assigned to it.

A patron of a public utility of any sort should not be required to shop about in order to buy, at a price considered by an administrative board as reasonable, security for a common law or constitutional right, still unaffected by substantive law, only to find that there is no rate offered for a message, unrepeated, repeated, or re-repeated, under which the full measure of his right may be safeguarded.

Without reflecting in any way upon the carefully considered and ably written opinion in this case, with which I am constrained to dissent, I am of the opinion that the judgment of the court below should be affirmed.

BARNHILL, J., dissenting: I am in accord with what is said in the majority opinion in respect to the limitation of liability. However, I cannot agree that the judgment should be affirmed.

The defendant, in my opinion, complied with its contract when it delivered the telegram in the post office in Lumberton, as, in effect, it was directed to do by the sender. *Lefler v. Tel. Co.*, 131 N. C., 355; *Gainey v. Tel. Co.*, 136 N. C., 262; *Hobbs v. Tel. Co.*, 206 N. C., 313; *Taylor v. Tel. Co.*, 136 Ky., 1, 123 S. W., 311; 62 C. J., 168.

The cases cited in the majority opinion are not in conflict with the decisions in the foregoing cases. In *Kivett v. Tel. Co.*, 156 N. C., 296, "there is no evidence that the defendant 'offered' the message" at the address given in the telegram. In *Hendricks v. Tel. Co.*, 126 N. C., 304, the telegram was not delivered to the party in whose care it was sent. *Hoaglin v. Tel. Co.*, 161 N. C., 390, was decided on an entirely different point. In *Green v. Tel. Co.*, 136 N. C., 489, there was an error in transmission, and defendant did not make inquiry at or deliver the message to the designated address.

If this be not the law—and the majority opinion so holds—even then, in my opinion, there was error in the admission of evidence sufficiently prejudicial to entitle defendant to a new trial.

Plaintiff tendered Hinton McLeod and Ed Glover. McLeod testified that he is a police officer and was on duty at the police station at Lumberton on February 1; that he knows plaintiff and that no inquiry was made of him. Glover testified that he is chief of the fire department of Lumberton; that he knows plaintiff; that he was on duty at the city hall on February 1; and that no inquiry was made of him.

Defendant, recognizing that it was permissible for plaintiff to offer evidence tending to show that he was generally known in Lumberton,

did not object to the first part of this testimony. It only objected to that part which tended to prove that no inquiry was made of either of these witnesses to ascertain the whereabouts of plaintiff. This part of the testimony of these two witnesses was competent only in the event that evidence of a failure to inquire of them is evidence of a negligent failure to exercise due care. If it is evidence of negligence, then it is sufficient to support the verdict. So it comes to this: We hold that a failure of the defendant to contact a particular police officer or a particular fireman of the town is sufficient evidence of negligence on the part of the defendant to support an adverse verdict.

In so holding, we establish an unsound rule and open a Pandora's box that will give no end of trouble. If the failure to make inquiry of a particular police officer or fireman is evidence of negligence, then the failure to inquire of the preachers and the doctors and the lawyers, "the merchant, the baker and the candlestick maker" constitutes a want of due care. If the defendant should have gone to a particular fireman or policeman and his failure to do so is, as a matter of law, evidence of a failure to exercise due care—then it should have gone to the registrar of elections and to the tax listers, to the sheriff and to the city clerk. When once we open the door, there is no end in sight. We do, however, place an unreasonable and burdensome duty on defendant not contemplated under the rule of due care.

RUDOLPH BINDER v. GENERAL MOTORS ACCEPTANCE CORPORATION AND JIM DAVIS AND A. G. HUDSON.

(Filed 8 January, 1943.)

1. Trespass § 8—

Where there is such a show of force as to create a reasonable apprehension in the mind of one in possession of property that he must yield to avoid a breach of the peace, and he does so yield, this is a yielding upon force and constitutes forcible trespass.

2. Damages § 2—

In a "pure tort" case, the wrongdoer is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong.

3. Damages §§ 2, 10—

Special damages, which are unusual and not the common consequence of the wrong complained of or implied by law, must be pleaded specifically and in detail.

4. Damages § 7—

Punitive damages may be awarded if the wrongful act is accompanied by recklessness or other unlawful and wanton aggravation, or if a tort is willful, wanton or committed under circumstances of gross negligence.

5. Damages § 8—

The trial court did not err in submitting an issue as to punitive damages, in an action for the wrongful taking and conversion of an automobile, where there was evidence that defendants' agents demanded the car of plaintiff in a high-handed and summary manner, on a prominent city street, alleging default in payments which was untrue, and seizing the car without legal process, to the humiliation of plaintiff.

6. Damages §§ 10, 12, 13—

In an action to recover damages for the wrongful taking and conversion of plaintiff's automobile by defendants, where there was allegation and evidence of special damages for the loss of the use of the automobile, a charge by the trial court, that plaintiff might be awarded damages for the loss of the use of the automobile wrongfully seized, in addition to its value, was proper.

APPEAL by plaintiff from *Olive, Special Judge,* at September Term, 1942, of GUILFORD.

This was an action instituted and tried in the municipal court of the city of High Point to recover damages for the wrongful taking and conversion of an automobile of the plaintiff by the defendants.

In the municipal court, upon issues submitted, the jury found that the defendants wrongfully seized and converted to their own use the plaintiff's automobile, that the plaintiff was entitled to recover actual damages, and also punitive damages. From judgment of the trial court predicated on the verdict the defendants appealed to the Superior Court of Guilford County.

The Superior Court entered judgment reversing in part the judgment of the trial court and awarding a new trial. From the judgment of the Superior Court the plaintiff appealed to the Supreme Court, assigning errors.

C. A. York and Rupert T. Pickens for plaintiff, appellant.

Gold, McAnally & Gold for defendants, appellees.

SCHENCK, J. The judgment of the Superior Court contains the following: ". . . the Court after hearing the cause is of the opinion that error in the trial of the cause exists in two respects: first, that error was committed on the facts in this case, in that the Court instructed the jury with regard to the measure of damages, that it might award damages for loss of use of the automobile; and, second, in submitting the following

issue to the jury: 'What amount of punitive damages, if any, is plaintiff entitled to recover of the defendants?' there being in this Court's opinion no evidence of punitive damages; nor issue found on which to award punitive damages."

This appeal poses but two questions: First, did the court err in holding that the trial court committed error in charging the jury "that it might award damages for the loss of the use of the automobile"? and, second, did the court err in holding that the trial court committed error in submitting the issue as to punitive damages?

As to the first question: It was held by the Superior Court that the judge of the trial court erred in charging the jury that it might award damages, in addition to the value of the automobile wrongfully seized, for the loss of the use of the automobile. In view of the fact that the complaint alleged as special damages the loss of the use of his automobile in going to his several beauty shops in different towns for the purpose of supervision, and that there was evidence to sustain such allegation, the charge of the trial court was in accord with the law as enunciated, and the holding of the Superior Court that the trial court erred was error.

"Only the damages which are the necessary result of the acts complained of can be recovered under a plea of general damages. Hence, it is generally held that special damages, which are the natural but not necessary result of the wrongful acts or injury, must be particularly averred in the complaint to warrant proof of or recovery therefor, . . ." 25 C. J. S., 753. " 'If the damages sought to be recovered are those known as special damages—that is, those of an unusual and extraordinary nature, and not the common consequence of the wrong complained of or implied by law, it is necessary, in order to prevent surprise to the defendant, that the declaration state specifically and in detail the damages sought to be recovered.' But the rule in pleading is not so stringent as to require a special averment of every immediate cause of the injury suffered. The primary and efficient cause of all the injury, however directly produced, and all the consequences resulting therefrom, are within the compass of the demand for compensatory damages. *Davis v. Wall,* 142 N. C., 450, 452, citing *Hammond v. Schiff,* 100 N. C., 161. 'It is well established, in a "pure tort," the case presented here, the wrong-doer is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong, under the facts as they exist at the time the same is committed and which can be ascertained with a reasonable degree of certainty. A wrong-doer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote: "that direct losses are necessarily proximate, and compensation, therefore, is always recoverable; that consequential losses are proximate

when the natural and probable effect of the wrong." '" *Conrad v. Shuford,* 174 N. C., 719, 94 S. E., 424, and cases there cited.

So it would therefore appear that whether the loss of the use of the automobile was a common consequence of its wrongful taking—a necessary result of the acts complained of, that is a general damage, or whether a special damage, the charge was correct, since such damage is specifically pleaded and is sustained by the evidence. It follows, therefore, that the holding of the Superior Court that the judge of the trial court erred in instructing the jury that it should consider the loss of the use of the automobile by the plaintiff was error.

As to the second question: It was held by the Superior Court that the judge of the trial court erred in submitting to the jury the issue as to punitive damages. We are of the opinion that there was likewise error in this holding of the Superior Court.

There was evidence tending to show that the plaintiff was accosted on a prominent street in the city of High Point by one of the defendants, an agent of the corporate defendant and acting in the course of his agency, and was told that the agent had come to get the automobile or the money due on a title retained contract thereon, and that when plaintiff informed said agent that he was not in arrears in his payments on his contract, and asked the agent to investigate before taking the automobile, the agent replied that he had investigated, that he knew the plaintiff was in arrearage and that he was going to take the car or have the money; that the plaintiff was not in arrearage and that the defendants subsequently admitted that they were mistaken due to the action of an inexperienced bookkeeper; that the plaintiff was humiliated in a public place and in the presence of his employees.

The defendants did not bring claim and delivery proceedings for the automobile, but elected to seize it, and were therefore liable for any damages which were proximately caused by their wrongful summary action.

The manner in which the automobile was taken from the plaintiff by the agent of the defendant corporation amounted to more than a mere wrongful conversion; it was a trespass. The plaintiff was forced either to surrender the automobile, pay again an installment already paid, or, at least, assume the risk or accept the hazard of bringing about a breach of the peace. "Where there is such a show of force as to create a reasonable apprehension in the mind of the one in possession of premises that he must yield to avoid a breach of the peace, and he does so yield, this is a yielding upon force, and constitutes forceable trespass." *Freeman v. Acceptance Corporation,* 205 N. C., 257, 171 S. E., 63, and cases there cited.

The testimony of the agent was that "I went there and it was my duty to get the automobile or the money. To the best of my ability I was either going to have the automobile, or the money," and those near-by testified they heard one of the two agents present say, "Let's take the damn thing, anyhow." Certainly this was sufficient to put the plaintiff on notice that any physical resistance he might make to the taking of the automobile would likely bring about a breach of the peace.

Punitive damages may be allowed if the wrongful act was accompanied by recklessness or other unlawful and wanton aggravation on the part of the defendants. *Worthy v. Knight,* 210 N. C., 498, 187 S. E., 771. "Primarily, then, the court is concerned with only two questions: (1) Whether there is any evidence to be submitted to the jury; and (2) whether the award is excessive. The balance is for the twelve. *Tripp v. Tobacco Co.,* 193 N. C., 614, 137 S. E., 871." *Worthy v. Knight, supra.* Punitive damages may be awarded where a wrongful act is done with negligence evincing a willful disregard of the rights of another, *Arthur v. Henry,* 157 N. C., 393, 73 S. E., 206; or if a tort is willful and committed under such circumstances as to show gross negligence, *Horton v. Coach Co.,* 216 N. C., 567, 5 S. E. (2d), 828; and cases there cited, or from a corporation for a tort wantonly committed by its agents in the course of their employment. *Tripp v. Tobacco Co., supra.*

For the reasons stated, the judgment appealed from must be reversed; and the case remanded to the Superior Court of Guilford County that a judgment affirming the judgment of the municipal court of the city of High Point may there be entered, and it is so ordered.

Reversed and remanded.

INDUSTRIAL LITHOGRAPHIC COMPANY v. HARVEY A. MILLS, PERSONALLY, AND HARVEY A. MILLS, TRADING AS THE PAPER PRODUCTS COMPANY.

(Filed 8 January, 1943.)

1. Reference § 3: Pleadings § 7—

A plea in bar is a plea so peremptory as to be sufficient to destroy the plaintiff's action and prevent its further prosecution, if established by proof.

2. Same—

The mere denial of the relationship of principal and agent between the plaintiff and defendant will not constitute a plea in bar of reference.

3. Contracts § 18—

The strict performance of a contract may be waived, and a person for whose benefit a thing is to be done may dispense with any part of it, or circumstance in the mode of performance; and where he is present to receive performance, whatever is not exacted is considered waived.

4. Reference § 3—

In a suit by a principal against his agent for damages for the breach of an exclusive contract by failure of defendant to give his undivided service to plaintiff and by defendant's handling rival products, defendant's answer alleging acquiescence and consent by plaintiff to defendant's selling products of others and waiver of the right of plaintiff to complain, constitutes a plea in bar of a compulsory reference.

DEVIN and BARNHILL, JJ., concur in result.

APPEAL by defendant from *Warlick, J.,* at March Term, 1942, of GUILFORD.

There are four separate causes of action alleged in the complaint.

The gravamen of the first alleged cause of action is that the defendant was employed by the plaintiff to sell its products, hosiery packings and hosiery transfers, in the southeastern states, and that the contract was of such a nature as to require the defendant's undivided time, service, ingenuity and loyalty; that the defendant breached this contract by selling on commission products of others in competition with the sale of the products of the plaintiff; and that the plaintiff is entitled to recover of the defendant the commissions which the defendant realized from the extraneous business engaged in by him while he was employed by and received compensation from the plaintiff for his undivided time and efforts. The action is bottomed upon the theory that the defendant occupied a fiduciary relationship with the plaintiff, and he was liable to the plaintiff for damages resulting from the disloyal conduct of the defendant in breaching his exclusive contract of principal and agent with the plaintiff.

In the second alleged cause of action the plaintiff seeks to recover the amount of the compensation it paid the defendant while the defendant was engaging in business in competition with the business of the plaintiff.

In the third alleged cause of action the plaintiff seeks to recover damages of the defendant for certain tortious acts of the defendant in connection with patterns and machines belonging to the plaintiff.

In the fourth alleged cause of action the plaintiff seeks to recover punitive damages of the defendant on account of the matters alleged in the other three causes of action.

The defendant filed answer and denied that the relationship of exclusive agency, or any other fiduciary relationship, existed between him

and the plaintiff; and further alleged that even if any such relationship was ever created between them, the plaintiff well knew of the defendant's engaging in selling certain other products than those of the plaintiff, and with such full knowledge acquiesced in and consented to such action on the part of the defendant, and thereby waived the exclusive right, if such right he ever had, to the undivided time and efforts of the defendant. The defendant pleads this waiver as a defense to the plaintiff's alleged causes of action.

The court, upon motion of the plaintiff, entered an order of compulsory reference as to the first cause of action alleged, and denied as a matter of law such an order as to the remaining causes of action alleged, stating in said order "that it appears to this Court that the issues of fact in this case involves an accounting for profits made by an agent arising out of competitive business with his principal and that the records upon which that accounting is to be made involves 3,591 exhibits, mostly invoices, taken from the records of the defendant upon an adverse examination, covered by 87 pages of record; and also involves a computation of salary to the defendant based on percentages of the volume of business done through 1937, 1938, 1939, 1940, and through February 15, 1941, consisting of thousands of items of debits and credits; and also involves a third rather long account covering rent from the summer of 1939, through February 15, 1941, at $10.00 per month for space occupied by a seal machine in the plant of the plaintiff, which machine was used by the defendant or someone for him, which account involves a number of items of debits and credits."

To the order of compulsory reference of the first alleged cause of action made by the court the defendant in apt time objected, excepted and appealed to the Supreme Court, assigning as error the entering of such order.

Wasserman, Behr & Shagan and J. Allen Austin for plaintiff, appellee.

Dalton & Myers and Rupert T. Pickens for defendant, appellant.

SCHENCK, J. We are of the opinion that the merits of this appeal turn upon the question: Does the defense set up in the defendant's answer constitute a plea in bar of reference of the plaintiff's first alleged cause of action? If this question be answered in the affirmative, the order of compulsory reference should be reversed; if answered in the negative, such order should be affirmed.

It may be conceded that the mere denial of the relationship of principal and agent between the plaintiff and defendant will not constitute a plea in bar of reference. *Reynolds v. Morton,* 205 N. C., 491, 171 S. E., 781. However, the defendant goes further than denying this relationship

and alleges that even if it be found that such relationship existed the plaintiff well knew of the defendant's selling other products than those of the plaintiff, and with such knowledge acquiesced and consented to such action on the part of the defendant. If such allegation of the defendant be proven, the acquiescence and consent of the plaintiff to such action of the defendant would constitute a waiver of the plaintiff's right to complain and completely defeat his first alleged cause of action.

" 'The strict performance of a contract may be waived. A person for whose benefit anything is to be done, may, if he pleases, dispense with any part of it, or circumstance in the mode of performance. Where he is present to receive performance, whatever is not exacted is considered as waived, for if objection had been made on the ground of those matters in which the proposed performance was deficient, these might have been supplied at the time, and therefore it is not proper to surprise the party who performed the act, by an objection to the mode of performance, after his vigilance has been disarmed by an apparent acquiescence, for that would be a fraud.' 6 R. C. L., 990; *Decamp v. Foy,* 9 A. D., 372." *Morrison v. Walker,* 179 N. C., 587, 103 S. E., 139.

"The doctrine of waiver, in proper cases, is now as firmly established as the doctrine of the rigidity and inflexibility of the written word. For instance, it is stated in *Highway Commission v. Rand,* 195 N. C., 799, 141 S. E., 892: 'Provisions in a contract may be waived.' A waiver has been variously defined and applied. See *Makuen v. Elder,* 170 N. C., 510, 87 S. E., 334; *Allen v. Bank,* 180 N. C., 608, 105 S. E., 401. An extensive discussion of the principle is found in *Mfg. Co. v. Building Co.,* 177 N. C., 104, 97 S. E., 718. The Court assembles various definitions of the term, including the following from Herman on Estoppel: 'A waiver takes place where a man dispenses with the performance of something which he has a right to exact. A man may do that not only by saying that he dispenses with it, that he excuses the performance, or he may do it as effectually by conduct which naturally and justly leads the other party to believe that he dispenses with it.' " *Mfg. Co. v. Lefkowitz,* 204 N. C., 449, 168 S. E., 517.

"What constitutes a plea in bar has been considered and accurately defined by this Court in *Bank v. Evans,* 191 N. C., 538, as follows: 'In a legal sense it is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action, a special plea constituting a sufficient answer to an action at law, and so called because it barred—*i.e.,* prevented—the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether.' *Haywood County v. Welch,* 209 N. C., 583; *Jones v. Beaman,* 117 N. C., 259." *Preister v. Trust Co.,* 211 N. C., 51, 188 S. E., 622.

We are constrained to hold that the allegation of acquiescence and consent by the plaintiff to the action of the defendant in selling products of others than of the plaintiff is an allegation of a waiver of the plaintiff's right to complain of such action of the defendant, and that the allegation of a waiver of the right of the plaintiff to complain constitutes a plea in bar of a compulsory reference, since it raises an issue which ought to be settled before such reference is had. The issue goes to the very heart of the controversy, and if answered in favor of the defendant completely settles the whole controversy, without the expenses and time incident to a reference. We, therefore, conclude that the answer to the question posed in the outset should be in the affirmative, and that it was error to have ordered the compulsory reference prior to the determination of the plea in bar. *Cheshire v. First Presbyterian Church,* 221 N. C., 205, 19 S. E. (2d), 855; *Preister v. Trust Co., supra; Bank v. Evans,* 191 N. C., 535, 132 S. E., 563.

The order of compulsory reference entered by the court below is Reversed.

DEVIN and BARNHILL, JJ., concur in result.

STATE v. GORDON REDDICK.

(Filed 8 January, 1943.)

1. Criminal Law § 59—

A motion to set aside a verdict is addressed to the sound discretion of the trial court and a refusal to grant it is not reviewable.

2. Criminal Law § 65—

An exception to a judgment of imprisonment in the State's Prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, is untenable, since the judgment is within the statute. C. S., 4250.

3. Criminal Law § 53a—

In a criminal prosecution an exception to a statement in the court's charge which merely gives the defendant's contentions as to evidence of his good character, is untenable, where no exception was taken at the time nor was it called to the attention of the court before verdict, and the court prior thereto had correctly charged the jury on "character evidence."

4. Criminal Law § 41g—

A conviction may be had in a criminal prosecution on the unsupported testimony of an accomplice.

5. Criminal Law § 53a

A reversal of conviction in a criminal case will not be granted for failure of the court to instruct upon a subordinate feature, in the absence of a special request therefor. Applying the rule to the failure of the court to charge the jury that they should receive the testimony of accomplices and accessories with caution.

APPEAL by defendant from *Bobbitt, J.,* at July Term, 1942, of FORSYTH.

The defendant was tried and convicted upon a bill of indictment charging that on 27 May, 1942, he did unlawfully, willfully and feloniously receive stolen goods, to wit: automobile tires of the value of $393.00, the property of W. D. Holt and others, knowing at the time he received the same they had been feloniously stolen.

Upon a jury verdict of guilty as charged, judgment of imprisonment in the State's Prison for a term of three years was pronounced, from which judgment the defendant appealed, assigning errors.

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

Fred Folger and Jones & Brassfield for defendant, appellant.

SCHENCK, J. The first two exceptions set out in the appellant's brief are Exception No. 1 to the refusal of the court to set aside the verdict, and Exception No. 2 to the judgment of the court. The motion to set aside the verdict was addressed to the sound discretion of the judge and a refusal to grant it is not reviewable. *S. v. Wagstaff,* 219 N. C., 15, 12 S. E. (2d), 657. The exception to the judgment is untenable since the judgment is well within the provision of the statute, C. S., 4250; *S. v. Daniels,* 197 N. C., 285, 148 S. E., 244, and cases there cited.

The third exception set out in the appellant's brief is Exception No. 8, which is lodged to the following excerpt from the charge of the court: "The defendant argues and contends that you should accept his testimony about the matter as to what his intention was and as to what his knowledge was, that men have come here and testified that they have known him, that he is a man of good reputation and character. The defendant argues and contends that you should accept his testimony and this testimony as to his general character as bearing upon the weight that you will give his own testimony upon the witness stand and also as bearing on the question as to whether or not a person of good reputation and character would be likely to commit a crime involving felonious intent and guilty knowledge such as that of which the defendant stands charged, the defendant argues and contends."

In the early part of the charge the court gave a proper instruction as to "character evidence," how it should be considered in the dual capacity of evidence in corroboration of the defendant's testimony and evidence of a substantive nature bearing upon the defendant's guilt or innocence. His Honor's words were: "The defendant has gone upon the witness stand and has testified in his own behalf as he has the right to do under the law. In reference to the testimony of the defendant, the law says that you should scan and scrutinize his testimony carefully in the light of his interest in your verdict and in the outcome of the trial. The law says further that after you have so scanned and scrutinized his testimony, if you reach the conclusion that he is telling the truth, then you will give his testimony the same weight that you would give to the testimony of a disinterested, credible witness.

"Now, the defendant has offered the testimony of certain witnesses, namely, J. H. Baggs of Winston-Salem, Willis Jessup, Chief of Police of Mount Airy, W. H. Holcomb of the John H. Midkiff Hardware Company of Mount Airy, J. S. Miller, Sherman Nichols, all of whom have testified that they know the general reputation of the defendant and that the general reputation of the defendant during the period each one has known him respectively, is good. This evidence, which we speak of as character evidence, is to be considered by you in two aspects. In the first place, you may consider it as corroborative evidence; that is, as bearing upon the subject as to the weight, if any, you will give to the testimony of the defendant while witness was upon the witness stand, bearing upon the credibility of the defendant as he testified as a witness on the witness stand during this trial. Also, you will consider this evidence, Gentlemen of the Jury, as substantive evidence; that is, as bearing upon the question as to whether the person of good general reputation and character would be likely to commit a crime of the nature and character of that of which this defendant is now on trial." This charge is in accord with our decisions.

It will be noted that the excerpt to which the exception is addressed was a mere statement of the defendant's contentions, and no exception was made thereto at the time it was delivered, nor was it in any way called to the attention of the court before verdict was rendered to enable the court to make correction if error had been made. Under these circumstances the exception is untenable. *S. v. Hobbs,* 216 N. C., 14, 3 S. E. (2d), 431, and cases there cited; *S. v. King,* 219 N. C., 667, 14 S. E. (2d), 803.

The fourth exception set out in the appellant's brief is Exception No. 9 addressed to the court's failure to charge the jury that it was their duty to receive the testimony of accomplices and accessories (in this case the State's witnesses Jones and Ayers) with caution, and that

they should be cautious in convicting upon the uncorroborated testimony of accomplices. There was no request for special instructions to this effect, and the exception is therefore untenable. This Court has held in various decisions that a conviction may be had upon the unsupported testimony of an accomplice. *S. v. Gore,* 207 N. C., 618, 178 S. E., 209; *S. v. Ashburn,* 187 N. C., 717, 122 S. E., 833. It has also been often held with us that a reversal will not be granted for failure of the court to instruct upon a subordinate feature in the absence of a special request therefor. *S. v. Bohanon,* 142 N. C., 695, 55 S. E., 797; *S. v. Cagle,* 209 N. C., 114, 182 S. E., 697.

In the case of *S. v. Wallace,* 203 N. C., 284, 165 S. E., 716, *Justice Adams,* in speaking for the Court and discussing the court's failure to instruct the jury to scrutinize the testimony of an alleged accomplice in the crime, said: "The principle is sustained in a number of our decisions and explicitly approved in the following words: 'Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction.' *S. v. O'Neal,* 187 N. C., 22; *S. v. Sauls,* 190 N. C., 810."

The remainder of the exceptions in the record are not set out in the appellant's brief and are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 221 N. C., 562 (563). *S. v. Abernethy,* 220 N. C., 226, 17 S. E. (2d), 25.

The only exceptions to the charge are the ones heretofore discussed. The charge is comprehensive and fair. The verdict is based upon sufficient evidence. The judgment is supported by the verdict and the law. In the record we find no prejudicial error.

No error.

MRS. VERNIA T. LONG, ADMINISTRATRIX GEORGE NORMAN (BUCK) LONG, v. NORFOLK & WESTERN RAILWAY COMPANY; J. E. PRICE AND C. E. WINGFIELD.

(Filed 8 January, 1943.)

1. Negligence § 10—

The act of plaintiff's intestate in placing himself in a dangerous position at or near the defendant's railroad track is such an act of negligence on his part as will bar recovery, unless defendant had the last clear chance to avoid the injury.

2. Same—

Evidence tending to show that, at the time plaintiff's intestate was struck by defendant's train, he was down on the track in a helpless condition is not sufficient. The plaintiff must further show (1) that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout, could have seen his intestate in time to have stopped the train before striking him; and (2) that the engineer failed to exercise such care, as the proximate result of which the injury occurred.

3. Negligence § 19—

Where an engineer, operating a railroad train in the night at about 35 miles an hour, was unable to see, as he rounded a curve, a public road crossing 100 feet ahead or any object at or near the same, but did observe an object near the far side of the crossing, somewhat concealed thereby, which he discovered at about 40 feet distant to be plaintiff's intestate, who was instantly killed by the train striking him. *Held:* Judgment of nonsuit at conclusion of evidence proper, and plaintiff's contention that the railroad was responsible for the dangerous location of the crossing, is without merit, as the road in question was a public county road.

APPEAL by plaintiff from *Johnson, Special Judge,* at May Term, 1942, of ORANGE. Affirmed.

Civil action to recover damages for wrongful death.

Defendant operates a railroad extending in a north-south direction from Roxboro to Durham. Near Duncan's Filling Station, 4 or 5 miles south of Roxboro, there is a county road extending easterly from U. S. Highway No. 501, which is west of the railroad, across the railroad to another county road which parallels the railroad on the east. The railroad crossing is just south—less than 120 feet—of a sharp curve in the railroad track, so that at night the engineer or fireman on a train going south cannot see the crossing or any object thereon until the train is within two or three car lengths of the crossing. There are no crossing signs at this crossing.

On 17 September, 1939, at about 4:10 a.m., defendant was operating a double-header freight train going south. As it rounded the curve the fireman, who was operating the forward engine, saw an object near the track about 3 or 4 feet beyond the crossing. The train was then about 2 car lengths from the crossing. When the train was about 1 car length away he discovered that the object was a human being. It was plaintiff's intestate. The body was lying 2 to 4 feet south of the crossing on the outside of and at right angles to the west rail. The head was near the rail and the feet extended toward the ditch. The body was partly concealed from the view of the fireman by the ridge or hump made by the road crossing. No whistle or bell was sounded or other warning given of the approach of the train.

As the train passed some part of the engine struck the head of the deceased, inflicting injuries which caused almost instant death.

The empty Ford automobile of deceased was found some distance away near the intersection of the county road and Highway No. 501. His auto seat cushion was found near-by on the ground in a clump of trees.

There was evidence that at times deceased had a catch in one of his knees that would cause him to fall and it would be from 30 minutes to an hour or so before he could get up. There was no evidence as to why he was on the track or as to how long he had been there.

The court below, at the conclusion of the evidence for plaintiff and on motion of the defendants, entered judgment as of nonsuit. Plaintiff excepted and appealed.

Graham & Eskridge and K. R. Hoyle for plaintiff, appellant.

Guthrie & Guthrie for defendants, appellees.

BARNHILL, J. The act of the deceased in placing himself in a dangerous position on or near the defendant's railroad track was such an act of negligence on his part as would bar recovery unless the defendant had the last clear chance to avoid the injury. *Mercer v. Powell,* 218 N. C., 642, 12 S. E. (2d), 227, and cases cited; *Justice v. R. R.,* 219 N. C., 273, 13 S. E. (2d), 553. It is on this doctrine of the last clear chance that plaintiff, in part, relies.

Plaintiff offered evidence tending to show that at the time his intestate was struck by the train of defendant he was down on the track in an apparently helpless condition. This is not sufficient. He must further show (1) that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout, could have seen him in time to have stopped the train before striking him; and (2) that the engineer failed to exercise such care, as the proximate result of which the injury occurred. *Mercer v. Powell, supra,* and cases cited; *Justice v. R. R., supra,* and cases cited.

It is not the duty of an engineer to stop his train every time he sees some object on the track. The plaintiff must show that the engineer saw, or by the exercise of ordinary care could have seen, an object having the appearance of a human being lying on or dangerously near the track, and that he saw it, or by the exercise of ordinary care could have seen it, in time to stop his train before striking the body. *Morrow v. R. R.,* 213 N. C., 127, 195 S. E., 383.

The plaintiff has failed to offer evidence tending to establish these two essential facts. On the contrary, all his testimony negatives the existence of either.

As the train came around the curve at night the engineer could not see the crossing or any object on or near it until he was within 100 feet

or less of the crossing. Traveling at 35 miles per hour, as he was on that night, it was impossible for him to stop the train in less than 500 or 600 feet. While the fireman discovered the object when the train was 75 or 80 feet away, he did not discover that it was a human being until he was within 35 or 40 feet. This was due to the fact that the body was beyond and somewhat concealed by the elevation or hump caused by the construction of the county road. On this showing plaintiff is not entitled to recover.

But plaintiff insists that his right to recover under the circumstances of this case, is not dependent entirely upon the doctrine of the last clear chance; that defendant created a condition that made it impossible for its agents in charge of the train to see and observe a human being down on the track at the crossing when otherwise they could have seen him in ample time to have avoided the injury.

He contends that his evidence tends to show that the defendant permitted a private crossing to be maintained across its tracks so close to a sharp curve in the track that in approaching from the north it was impossible, particularly at night, for a person to be seen by the engineer on this crossing until it was too late for him to avoid the injury.

This position assumed by plaintiff would present a novel and interesting question of law if the evidence was sufficient to support it. However, on this record, conceding the correctness of his legal conclusion, there are at least three reasons why plaintiff cannot prevail.

1. It is alleged and the evidence tends to show that this was a county road. A county road is a public road and the public authorities and not the railroad control the location of public crossings. The location of this crossing in close proximity to a curve is not chargeable to the defendant.

2. There is no evidence that plaintiff's intestate was using or attempting to use the crossing so as to make him a licensee rather than a trespasser.

3. Deceased was not on the crossing. He was 2 to 4 feet to the south thereof—at a place where he had no right to be.

Hence, it is not shown either that the defendant permitted the maintenance of the crossing dangerously near a curve or that the existence of the crossing had any relation to the injury and death of plaintiff's intestate other than that it partly obscured the body so that the employee in charge of the train could not discover it earlier than he did. On the circumstances here disclosed the cases cited by plaintiff are inapposite.

For the reasons stated the judgment below is

Affirmed.

JOHN C. WALKER v. T. R. MANSON, MRS. ATTRICE K. MANSON AND MRS. ALMA KERNODLE.

MRS. N. L. WALKER v. T. R. MANSON, MRS. ATTRICE K. MANSON AND MRS. ALMA KERNODLE.

MRS. A. CLAY MURRAY v. T. R. MANSON, MRS. ATTRICE K. MANSON AND MRS. ALMA KERNODLE.

(Filed 8 January, 1943.)

1. Master and Servant § 21c: Automobiles § 24a—

The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged at the time of, and in respect to, the very transaction out of which the injury arose, and general employment alone is not sufficient to impose liability.

2. Master and Servant § 21c; Automobiles §§ 24a, 24c—

In an action for damages on account of injuries sustained by plaintiff in an automobile collision, evidence that defendant M., a son-in-law of defendant K., was hauling a cow and calf belonging to K., in a truck, when the truck collided with the car in which plaintiffs were riding, causing injury, without any evidence of the ownership of the truck or that K. exercised any control over the same, is insufficient and demurrer thereto was properly sustained.

APPEAL by defendant, Mrs. Alma Kernodle, from *Ervin, Special Judge,* at May Term, 1942, of ALAMANCE.

Three civil actions by consent consolidated for the purpose of trial. The actions are to recover damages for injuries to the person and property of the plaintiffs alleged to have been negligently inflicted by the defendants in causing a collision between a Dodge Tudor automobile driven by the plaintiff John C. Walker and a Ford pickup truck driven by the defendant T. R. Manson, on a public highway in Alamance County, on 24 November, 1941.

Demurrer to the evidence as to the defendant Mrs. Attrice K. Manson was sustained, and the cases dismissed as to her, from which action of the court no appeal was taken.

Demurrers to the evidence as to the defendants T. R. Manson and Mrs. Alma Kernodle were overruled, and exception to such action was preserved by the defendant, Mrs. Kernodle.

The jury answered the issues in favor of each of the plaintiffs and against the defendants, T. R. Manson and Mrs. Alma Kernodle. From judgment predicated on the verdict, the defendant, Mrs. Alma Kernodle,

appealed to the Supreme Court, assigning as error, *inter alia,* the refusal of the court to sustain her demurrer to the evidence duly lodged and renewed under C. S., 567.

Barnie P. Jones and Thomas C. Carter for plaintiffs, appellees.

Louis C. Allen and Long, Long & Barrett for Mrs. Alma Kernodle, appellant.

SCHENCK, J. The first issue submitted to the jury read: "1. Was the defendant, T. R. Manson, at the time of and in respect to the transaction out of which the plaintiffs' alleged injuries arose, acting within the scope of his employment as a servant of the defendant, Mrs. Alma Kernodle, as alleged in the complaint?"

The appealing defendant, Mrs. Kernodle, contends that there was insufficient evidence to justify the submission of this issue, and presents her contention under her exception to the refusal of the court to sustain her demurrer to the evidence. The plaintiffs contend to the contrary. So the appeal poses but the single question: Was there more than a scintilla of evidence that the defendant T. R. Manson, the driver of the pickup truck, was the agent and employee of the appealing defendant, Mrs. Kernodle, and acting within the scope of his agency and employment at the time the collision involved occurred? We are of the opinion, and so hold, that the answer to the question posed is in the negative.

Taking the evidence most favorable to the plaintiffs bearing upon the question posed, it tends to show that the appealing defendant, Mrs. Alma Kernodle, owned a farm in Alamance County, that she rented the farm in 1941 to one Fuller on shares, that T. R. Manson, her son-in-law and codefendant, negotiated the rental contract with Fuller; that Manson "looked after the farm for her"; that Fuller moved on the farm on 1 January, 1941, and that Manson brought a cow and calf there in March, 1941; that the cow and calf were owned by Mrs. Kernodle; that Manson took the cow and calf away in a Ford pickup truck about 3:30 o'clock p.m., on 24 November, 1941; and that the cow and calf were in the truck when it collided with the automobile driven by the plaintiff, John C. Walker.

There is no evidence as to why the defendant T. R. Manson was taking the cow and calf away from the farm, or as to where he was taking them; nor is there any evidence that the appealing defendant, Mrs. Alma Kernodle, directed, requested, or authorized Manson to haul the cow and calf away from the farm. The record is absolutely silent as to the destination or purpose of the removal of the cow and calf. While there is evidence that Mrs. Kernodle had expressed a desire to sell the cow, there is no evidence that she did sell her or authorized her removal. There is

likewise no evidence that the appealing defendant exercised any control over the truck transporting the cow and calf, or directed in any way the manner and way of its operation.

There is no evidence as to who owned the pickup truck driven by T. R. Manson, involved in the collision. However, it does appear in the "statement of the case on appeal," which is agreed to by the parties, that the plaintiff John C. Walker "was in a collision with the Ford pickup truck of the defendant, T. R. Manson," and the evidence tends to show that T. R. Manson was frequently seen to drive the truck. There is no evidence that Mrs. Kernodle, or any person other than the driver thereof, was in the pickup truck at the time of the collision. The evidence tends to show that T. R. Manson was alone while driving the truck on which the cow and calf were loaded.

The plaintiffs seek to hold the appealing defendant, Mrs. Alma Kernodle, liable under the doctrine of *respondeat superior.*

"The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person so sought to be charged at the time of and in respect to the very transaction out of which the injury arose. . . . Proof of general employment alone is not sufficient to impose liability. . . . It must be made to appear that the particular act in which the employee was at the time engaged was within the scope of his employment and was being performed in the furtherance of his master's business. . . . Liability of the master is not to be determined by the extent of the authority of the agent, but by the purpose of the act in which the agent was engaged at the time. . . ." *Smith v. Moore,* 220 N. C., 165, 16 S. E. (2d), 701, and cases there cited.

"This doctrine (of *respondeat superior*) applies only when the relation of master and servant, employer and employee, or principal and agent, is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose." *Creech v. Linen Service Corp.,* 219 N. C., 457, 14 S. E. (2d), 408.

Van Landingham v. Sewing Machine Co., 207 N. C., 355, 177 S. E., 126, is in many respects similar to the case at bar. In that case the Court said: "If we consider, with the admissions, only the evidence offered by the plaintiff upon the issue as to whether the defendant Russell was acting within the scope of his employment and in the furtherance of the business of the Singer Sewing Machine Company at the time and place alleged, we have, and no more, the admission that Russell was employed by his codefendant and was, at said time and place, driving an automobile which he himself owned and used when occasion required in the business of the codefendant; and evidence tending to show that at

said time and place there was on the rear of said automobile a Singer sewing machine. We do not think these admissions and evidence make out a *prima facie* case upon this issue."

The doctrine enunciated in the foregoing cases is reaffirmed in a *per curiam* opinion in *Tribble v. Swinson,* 213 N. C., 550, 196 S. E., 820, where many authorities are collected and cited.

There being no evidence in the record tending to show that the appealing defendant, Mrs. Alma Kernodle, had any control of the pickup truck involved in the collision and driven by T. R. Manson, it would appear that under the authority of *Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296, her demurrer to the evidence should have been sustained.

For the reasons given we are of the opinion, and so hold, that the appealing defendant, Mrs. Alma Kernodle, was entitled to have her demurrer to the evidence sustained and the actions against her dismissed, and it is accordingly so ordered.

Reversed.

SUMMERS HARDWARE COMPANY, INC., v. D. P. JONES AND JIM JONES.

(Filed 8 January, 1943.)

1. Judgments §§ 19c, 19d, 20—

Defendants inherited certain lands from their mother and subsequent thereto a large number of judgments were taken and docketed against them; and defendants then inherited other lands and personalty from their father and thereafter other judgments were docketed against them. Plaintiff, one of the first set of judgment creditors, brought suit and attached all of the lands and personalty of defendants, the other judgment creditors were brought in as parties, and plaintiff claimed a specific lien on the attached property, superior to the liens of other judgment creditors. *Held:* (1) With reference to the lands acquired from the mother, all of the judgments have priorities in the order of their docketing; (2) as to the lands acquired from the father, all judgments docketed prior to such acquisition are on a parity and must prorate, while those docketed since, take priority in the order of their docketing; (3) the attachment of the personalty gives the plaintiff a lien superior to all others.

2. Judgments § 19d: Equitable Liens § 1—

When by his diligence a creditor uncovers, by legal proceeding, new or hidden assets, not available to creditors but for such diligent action, he ordinarily acquires a lien superior to others; but here plaintiff brought in, by his suit and attachment, nothing which it was not the right of all holders of docketed judgment to proceed against by execution, if and when they so desired.

3. Judgments § 19d: Attachment § 14—

Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, the judgment creditor will prevail over the attaching creditor.

APPEAL by plaintiff from *Rousseau, J.,* at July Civil Term, 1942, of ASHE. Affirmed.

Various creditors of the defendants, among them the plaintiff, had reduced their claims to judgment and docketed the same, respectively acquiring under C. S., 614, liens upon all the real property the judgment debtors had, at the time, in the county where the judgments were docketed, and any they might acquire within ten years after the rendition of the respective judgments. None of the judgments antedated the death, intestate, of the mother, Mahala Jones, which occurred in 1916, and from her the defendants inherited an undivided interest in lands, subject to the life tenancy by the curtesy of the father, Norman H. Jones, which terminated on his death 1 May, 1938. From him, by devise, J. C.—"Jim"—Jones received an undivided interest in other lands. Other judgments were taken and docketed subsequent to that date.

The plaintiff, holding a judgment docketed 22 May, 1923, brought action thereupon, and caused an attachment to be levied upon the defendants' interest in the parcels of land acquired from Mahala Jones and from Norman H. Jones, alleging defendants to be nonresidents. The various judgment debtors were made parties to the action. The plaintiff contended that, by virtue of the attachment, it had obtained a specific lien on the attached property, superior to the liens of other judgment creditors, whensoever acquired. Other judgment creditors controverted this contention and asserted their own claims.

By agreement the action was tried before Judge J. A. Rousseau at a Superior Court in Ashe County, without the intervention of a jury. Finding the facts, the judge concluded that, by virtue of the attachment and levy thereunder, plaintiff acquired a specific and paramount lien on the personal property attached, the distributive share of Jim Jones in the personal estate of his father, but as to the real estate in controversy, he found as follows:

"5. That all judgment creditors of the said D. P. Jones and Jim Jones whose judgments were docketed prior to May 1, 1938, according to their respective interest, hold liens of equal dignity against all the real estate which may belong to the said D. P. Jones and Jim Jones by descent or devise from the estates of their father and mother, Norman H. Jones and Mahala Jones.

"6. That the plaintiff, Summers Hardware Company, Incorporated, in so far as said real estate is concerned, did not acquire any superior or preferred lien under and by virtue of the levy referred to in Finding of Fact No. 2, but, according to said amount of its docketed judgment, is entitled to share *pro rata* with the other said judgment creditors therein."

Judgment was entered accordingly, and plaintiff appealed.

Bowie & Bowie for plaintiff, appellant.

W. B. Austin, Grant Bauguess, and Ira T. Johnston for defendants, appellees.

SEAWELL, J. The Court is of the opinion that the trial judge was correct in his interpretation of the law and its application to the facts of the case.

With reference to the lands, or interest therein, which defendants acquired from their mother in 1916, since all the judgments listed were taken subsequent to that date, they have priorities in the order of their docketing. *Titman v. Rhyne,* 89 N. C., 64; *Dillard v. Walker,* 204 N. C., 67, 167 S. E., 632; *Hardy v. Carr,* 104 N. C., 33, 10 S. E., 128; *Jones v. Currie,* 190 N. C., 260, 129 S. E., 605. As to the land acquired by J. C. Jones 1 May, 1938, by devise from his father, all the judgments which have been docketed prior to that date are on a parity and must pro rate, since the liens attached simultaneously upon the death of the devisor. *Linker v. Linker,* 213 N. C., 351, 196 S. E., 329; *Johnson v. Leavitt,* 188 N. C., 682, 125 S. E., 490. The two judgments docketed after 1 May, 1938, are entitled to be paid in their order after judgments having prior liens have been satisfied.

Since, under C. S., 614, no lien attaches to personalty by reason of the docketing of the judgment, although such a lien may be acquired by levy, the order of Judge Rousseau sustaining the prior lien of the attachment as to the personal property of J. C. Jones is correct.

The plaintiff contends that its lien under the attachment is superior to those of other judgment creditors because of the diligence it exercised beyond that of other judgment creditors in discovering that the defendants were nonresidents and not entitled to a homestead against execution, and in acting thereupon. But the principle on which the plaintiff depends ordinarily applies when such diligence has uncovered new funds to which resort may be had in satisfaction of the debt; as, for example, when an equitable lien may exist in favor of a creditor who has instituted a proceeding supplemental to execution and has uncovered property fraudulently concealed or put beyond the reach of execution. But in the case at bar, when the defendants became nonresidents, their entire real property, free of homestead exemption, became presently subject to

execution—Constitution, Art. X, sec. 2; *Taylor v. Hayes,* 172 N. C., 663, 90 S. E., 801; *Baker v. Legget,* 98 N. C., 304—a right which inured to all the judgment creditors and which could not be affected by resort to attachment. Under chapter 359, Public Laws of 1885, a docketed judgment has a lien upon the homestead even after it has been set apart; and plaintiff brought in by its attachment nothing against which it was not the right of all the holders of docketed judgments to proceed by execution, if and when they so desired.

As expressed in 7 C. J. S., page 40, Attachment, "Where a judgment has become a lien on property of defendant, before the levy of an attachment on the same property, a judgment creditor will prevail over the attaching creditor." That is the law in this State. *Hambley v. White,* 192 N. C., 31, 133 S. E., 399; *Moore v. Jordan,* 117 N. C., 86, 33 S. E., 259; *Pasour v. Rhyne,* 82 N. C., 149.

The judgment of the lower court is

Affirmed.

JESSE SEVERT, BLAND SEVERT, DEAN SEVERT AND THELMA SEVERT, BY THEIR NEXT FRIEND, D. L. FRANCIS, v. NELLIE SEVERT LYALL, NELIA SEVERT CHURCH AND HUSBAND, FLOYD W. CHURCH.

(Filed 8 January, 1943.)

1. **Descent and Distribution § 1—**

Under the common law rule an estate in land, not accompanied by actual possession, was not inheritable. There was no full and complete ownership until the owner had made an actual corporal entry into the lands.

2. **Same—**

Seizin of the common law requires that there shall be either actual possession or the right of immediate possession, while the statute, C. S., 1654, requires that there need be only a right to or interest in the inheritance, with or without actual possession or the present right of possession, in order to establish a *stirps* sufficient as a source of descent.

3. **Estates § 9a—**

When the owner of a fee conveys it to one for life with remainder to another, the remainderman takes a vested estate by purchase and becomes a new *stirps* of inheritance, or new stock of descent.

4. **Same: Descent and Distribution § 10a—**

Where the owner of land, subject to an outstanding life estate, predeceases the life tenant, intestate and without issue, his interest, being vested, passes to his heirs who are then *in esse,* that is in life, or born within ten lunar months thereafter. C. S., 1654.

APPEAL by plaintiffs from *Rousseau, J.,* at July Term, 1942, of ASHE. Affirmed.

Civil action to quiet title to real property.

One J. G. Severt died 5 March, 1907, seized and possessed of certain land in Ashe County which is the subject matter of this controversy. He left a last will and testament in which he devised said land "to my beloved wife, Letha Severt, during her natural life, and at her death to go in fee simple to Clarence Odell Severt, son of W. A. Severt."

Clarence Odell Severt, the remainderman, survived the testator but died 23 August, 1914, intestate, and without issue. He predeceased the life tenant. At the time of his death he left surviving as his heirs at law two sisters of the whole blood, the defendants Nellie Severt Lyall and Nelia Severt Church. After his death there were born to his father and second wife four children, the plaintiffs herein. The eldest was born in December, 1919, many years after the death of the remainderman, but all were born prior to the death of the life tenant.

Letha Severt, the life tenant who had intermarried with W. T. Perkins 13 September 1940, left a last will and testament in which she undertook to devise the *locus in quo* to Nelia Clementine Witherspoon, who is the same person as the defendant Nelia Severt Church. On 23 February, 1941, defendant Nellie Severt Lyall conveyed her interest in said property, by deed, to defendant Nelia Severt Church.

Plaintiffs instituted this action 14 November, 1941, alleging that they, as the brothers and sister of Clarence Odell Severt, the remainderman, surviving at the time of the death of the life tenant, are the owners and entitled to the possession of the *locus in quo* and that the will of Letha Severt Perkins and the claim of defendants that they are the heirs of the remainderman cast a cloud on their title. They pray that they be adjudged the owners of said property free and clear of said claims. The defendants Nelia Severt Church and husband, W. Floyd Church, answering the complaint, pleaded ownership in fee in Nelia Severt Church and prayed judgment accordingly.

When the cause came on to be heard, trial by jury was waived and it was agreed that the judge should hear the evidence, find the facts therefrom and render judgment thereon. After hearing the evidence and finding the facts, which appear of record, the court below entered judgment decreeing that the defendant Nelia Severt Church is the owner in fee simple and is entitled to the possession of the lands in controversy. Plaintiffs excepted and appealed.

Bowie & Bowie for plaintiffs, appellants.

R. F. Crouse and Ira T. Johnston for defendants, appellees.

BARNHILL, J. When the owner of land, subject to an outstanding life estate, predeceases the life tenant, intestate and without issue, who

inherits his interest in the land? Is the roll called and his heirs ascertained as of the date of his death or as of the date of the later death of the life tenant? These are the questions presented on this appeal.

The court below concluded that the roll is called as of the date of the death of the remainderman and that, therefore, title to the *locus in quo,* upon the death of Clarence Odell Severt, descended to and vested in the *feme* defendants. We concur.

Under the common law rule an estate in land not accompanied by actual possession was not inheritable. There was no full and complete ownership until the owner had made an actual corporal entry into the lands. The rule is stated by Blackstone as follows:

"So, also, even in descents of lands by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium,* or full and complete ownership, till he has made an actual corporal entry into the lands; for if he dies before entry made, his heir shall not be entitled to take the possession, but the heir of the person who was last actually seized. It is not, therefore, only a mere right to enter, but the actual entry, that makes a man complete owner, so as to transmit the inheritance to his own heirs; *non jus, sed sesina, facit stirpitem.*"

This common law rule, with one modification, prevailed in this State for many years. It is thus stated in the Revised Statutes of 1837, ch. 38:

"Rule 1. Inheritances shall lineally descend to the issue of the person, who died last actually or legally seized, forever, but shall not lineally ascend, except as is hereafter provided for."

Thus, under the common law actual seizin was required. A bare right or title to enter or be otherwise seized would not do. 2 Black. Com., 209; Co. Lit., 15. Under our law as expressed in the 1837 Code, legal seizin or the present right to possession was sufficient. *Lawrence v. Pitt,* 46 N. C., 344; *Exum v. Davie,* 5 N. C., 475; *Bell v. Dozier,* 12 N. C., 333.

Under our rule as it then existed, as well as under the common law rule, neither plaintiffs nor defendants would take title as heirs of the remainderman for he was not in possession, either actual or legal, and his estate was not transmittible by inheritance.

But the Revised Code of 1854 made material and substantial changes in our statute of descents as it relates to the requirement of seizin. The pertinent part of the statute is as follows:

"1. When any person shall die seized of any inheritance, or of any right thereto, or entitled to any interest therein, not having devised the same, it shall descend under the following rules:

"Rule 1. Every inheritance shall lineally descend forever to the issue of the person, who died last seized, entitled or having any interest therein, but shall not lineally ascend, except as is hereinafter provided. . . .

"Rule 13. (Added by codifiers.) Every person, in whom a seizin is required by any of the provisions of this chapter, shall be deemed to have been seized, if he may have had any right, title, or interest in the inheritance." Ch. 38, Revised Code of 1854.

The statute, as thus written, has been brought forward in subsequent codes and is the law as it presently exists in this State. C. S., 1654.

Thus the seizin either in law or in deed of the common law is not the seizin of the statute. The former requires that there shall be either actual possession or the right of immediate possession, while the latter requires that there need be only a right to or interest in the inheritance, with or without actual possession or the present right of possession, in order to establish a *stirps* sufficient as a source of descent.

Clarence Odell Severt, upon the death of the testator and by virtue of the devise to him, became seized of a vested remainder. *Priddy & Co. v. Sanderford,* 221 N. C., 422. This seems to be conceded. Being a vested remainder, it was a fixed interest in land to take effect in possession after the particular estate is spent. *Priddy & Co. v. Sanderford, supra.* As the owner of the remainder he had a vested interest in the land and was "seized" of an interest in the inheritance and the remainder owned by him became a new estate acquired by purchase. It passed by inheritance in the line of the new purchaser. 2 Minor Institutes, 442.

When the owner of the fee conveys it to one for life with the remainder to another the remainderman takes by purchase and becomes a new *stirps* of inheritance or new stock of descent. On his death the estate passes directly to his heirs at law. *King v. Scoggin,* 92 N. C., 99; *Early v. Early,* 134 N. C., 258; *Tyndall v. Tyndall,* 186 N. C., 272, 119 S. E., 354; *Allen v. Parker,* 187 N. C., 376, 121 S. E., 665; *Hines v. Reynolds,* 181 N. C., 343, 107 S. E., 144.

It follows that the *feme* defendants, the nearest blood kin of Clarence Odell Severt, living at the time he died, acquired title by inheritance at his death. Plaintiffs cannot take as his heirs. They were not "in life" at the time of the death of the remainderman and were not born within ten lunar months thereafter. C. S., 1654, Rule 7.

The judgment below is

Affirmed.

STATE v. DR. A. U. FORTE.

(Filed 8 January, 1943.)

1. Abortion §§ 1, 8—

While, for many purposes, a child *in ventre sa mere* is supposed in law to be born, such child has no separate or distinct existence until advanced to that state of maturity designated by the term "quick with child," and a woman is not "quick with child" until she herself has felt the child alive within her.

2. Abortion §§ 5, 8—

On the trial of an indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, C. S., 4226, where the proof tends to show the performance of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and defendant's motion for nonsuit should have been allowed. C. S., 4643.

APPEAL by defendant from *Armstrong, J.*, at 8 June, 1942, Term, of FORSYTH.

Criminal prosecution upon indictment charging defendant with offense of abortion.

The indictment, founded upon provisions of the statute, C. S., 4226, charges that "Dr. A. U. Forte and Albert Clark, late of the County of Forsyth, on the 28th day of March, A.D. 1942, with force and arms, at and in the county aforesaid, unlawfully, willfully and feloniously did minister and prescribe and advise and procure Elmer Lee McClure, a woman quick with child, to take any drug or medicine and did employ, use an instrument or other means with intent thereby to destroy the said child, the same not being necessary to preserve the life of the said Elmer Lee McClure against the form of the statute in such cases made and provided and against the peace and dignity of the State."

Upon the trial in Superior Court, evidence for the State tended to show these facts: That Elmer Lee McClure, 15 years of age, as result of sexual relations with Albert Clark, became pregnant in January, 1942; that on 28 March, 1942, she and Albert Clark went to office of defendant, Dr. A. U. Forte, who, for an agreed fee, examined her and pronounced her to be pregnant; and that then for a further stipulated fee, Dr. Forte agreed to perform, and did perform an operation upon Elmer Lee McClure, details of which are not essential, as a result of which "a little form of the baby" was discharged the next morning. The evidence for State fails to show a quickening of the child.

On the other hand, defendant, Dr. Forte, having pleaded not guilty, offered evidence tending to show an alibi upon which he relied as a

defense. When the State rested its case, defendant Forte moved to dismiss the case by judgment as of nonsuit. C. S., 4643. The motion was denied and he excepted; and, again, at close of all the evidence, said defendant renewed his motion for judgment as of nonsuit. The motion was denied and he excepted.

Verdict: Guilty.

Judgment: Confinement in the State's Central Prison for a period of not less than two and one-half, nor more than five years, and assigned to such labor as provided by law.

Defendant appeals to Supreme Court, and assigns error.

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

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

WINBORNE, J. Defendant logically and convincingly presses for error in the trial below the denial of his motion for judgment as of nonsuit upon all the evidence taken in the light most favorable to the State, for that there is a fatal variance between the offense contained in the bill of indictment and the proof offered. *S. v. Gibson,* 169 N. C., 318, 85 S. E., 7; *S. v. Corpening,* 191 N. C., 751, 133 S. E., 14; *S. v. Dowless,* 217 N. C., 589, 9 S. E. (2d), 18. The bill charges defendant with performing an operation upon "a woman quick with child" with intent thereby to destroy the child. C. S., 4226. The proof tends to show that the defendant performed an operation upon a pregnant woman, C. S., 4227, but it fails to show an operation upon a woman quick with child as charged.

In this State there are two statutes pertaining to abortion, C. S., 4226, and C. S., 4227. In pertinent part section 4226 makes it unlawful to administer drugs to or perform an operation upon a woman "either pregnant or quick with child . . . with intent thereby to destroy such child." And section 4227 makes it unlawful to administer drugs to or to perform an operation upon "a pregnant woman . . . with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman." The first relates to the destruction of the child, and the second, to miscarriage of, or to injury or destruction of the woman. Greater punishment is prescribed for a violation of the provisions of C. S., 4226, than for a violation of those of C. S., 4227. Manifestly, the Legislature intended to declare two separate and distinct offenses.

The question then arises as to how far the pregnancy shall be advanced before the child is capable of being destroyed. The general rule is that the child with which the woman is pregnant must be so far advanced as to be regarded in law as having a separate existence—a life capable of being destroyed.

While, for many purposes, a child *in ventre sa mere* is supposed in law to be born, "life," as stated Blackstone, "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 Bl. Com., 129; *Commonwealth v. Parker* (Mass.), 9 Metcalf, 263; *S. v. Cooper,* 22 N. J. L., 52, 51 Am. Dec., 248; *Evans v. The People,* 49 N. Y., 86; *Foster v. State* (Wis.), 196 N. W., 233.

In *Commonwealth v. Parker, supra,* it is said: "It was only considered by the ancient common law that the child had a separate and distinct existence when the embryo had advanced to that degree of maturity designated by the term 'quick with child,' " and, further, "that a woman is not considered to be quick with child until she has herself felt the child alive and quick within her."

In *S. v. Cooper, supra,* the principle is stated in this language: "In contemplation of law life commences at the moment of quickening, at that moment when the embryo gives that first physical proof of life, no matter when it first received it."

In the *Evans case, supra,* the Court said: "It was error to charge that the death of a child could be caused or produced before it had given evidence of life, had become 'quick' in the womb."

And in *Foster v. State, supra,* the Supreme Court of Wisconsin, referring to a statute in which the offense of destroying a child, with which a woman is pregnant, is declared to be manslaughter, and otherwise similar to our statute, C. S., 4226, states: "Neither in popular nor in scientific language is the embryo in the early stages called a human being. Popularly it is regarded as such for some purposes, only after it has become 'quick,' which does not occur until four or five months of pregnancy have elapsed. . . . It is obvious that no death of a child can be produced where there is no living child. Sec. 4352 requires the existence of a living child and the causing of its death, or that of the mother, before the offense there defined is committed. If pregnancy has not advanced sufficiently so that there is a living child—that is, a quick child—then felonious destruction of the fetus constitutes a miscarriage only." Webster defines "quickening" as: "The first movement of the fetus in the uterus felt by the mother, occurring usually about the middle of the term of pregnancy. A popular supposition ascribes it to the acquiring of independent life by the fetus." And in Black's Law Dictionary, it is stated that in medical jurisprudence "quickening" is "the first motion of the fetus in the womb felt by the mother, occurring usually about the middle of the term of pregnancy." And it is a matter of common knowledge that the term of pregnancy is ten lunar months, or 280 days.

Thus, applying the above principles to the case in hand, evidence for the State tends to show that the pregnancy of Elmer Lee McClure began

in January, 1942, and the operation was on 28 March, 1942, a period much shorter than half the term of pregnancy, and there is no evidence of a quickening of the child, proof of which is required when the State proceeds under the provisions of C. S., 4226, as it does in the bill of indictment under which defendant stands charged. The proof does not conform to the allegation.

In the criminal law it is elementary that defendant must be convicted, if at all, of the particular offense alleged in the bill of indictment. The evidence must correspond with the charge and sustain it, at least in substance, before there can be a conviction.

For reasons stated defendant's motion for judgment as of nonsuit should have been granted. Therefore, the judgment below is

Reversed.

H. M. MILLER, INDIVIDUALLY, AND AS TAX COLLECTOR OF ASHE COUNTY, v. J. F. NEAL, EXECUTOR OF F. H. NEAL, DECEASED; J. F. NEAL AND WIFE, RUTH NEAL, AND BLANCHE McDANIEL AND HUSBAND, E. W. McDANIEL, INDIVIDUALLY.

(Filed 8 January, 1943.)

1. Taxation §§ 32a, 35—

A tax lien is discharged when the tax record is marked paid and the original receipt delivered to the taxpayer.

2. Same—

The fact that a county tax collector accepted a check in payment for 1931 taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under C. S., 7990. Having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Michie's Code, sec. 7971 (219).

3. Limitation of Actions § 2c—

A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes, when the action is not instituted within three years of the date the check was issued. C. S., 441.

APPEAL by defendant, J. F. Neal, Executor, from *Bobbitt, J.*, at July Term, 1942, of ASHE.

Civil action to foreclose an alleged tax lien under C. S., 7990. The facts pertinent to the appeal are as follows:

1. The plaintiff was sheriff and tax collector of Ashe County, N. C., during the period from 1 December, 1930, to 1 December, 1936.

2. In the year 1931, F. H. Neal owned certain lands in Ashe County, N. C., which were assessed for taxes by said county and taxes duly levied, as provided by law, in the sum of $96.14.

3. The above taxes became due and payable on the first Monday in October, 1931.

4. On 29 May, 1932, F. H. Neal executed and delivered to H. M. Miller, tax collector, his check for $96.14, and in exchange therefor obtained the original tax receipt for the 1931 taxes. Check was returned unpaid by the bank, for the reason that F. H. Neal had insufficient funds in the bank to pay the same.

5. On 3 September, 1932, F. H. Neal paid H. M. Miller, tax collector, $50.00, to be applied on the aforementioned check, leaving $46.14 unpaid.

6. H. M. Miller, in his settlement with the Board of Commissioners of Ashe County for the 1931 taxes, did account for and pay to said county the said sum of $46.14.

7. F. H. Neal is dead, testate, and J. F. Neal is the duly appointed, qualified and acting executor of his last will and testament. All parties in interest are parties to this action.

8. This action was instituted 5 February, 1942, and defendants pleaded the 18-months, the 24-months, and the 3-year statutes of limitation in bar of any recovery.

The jury answered the issues in favor of plaintiff and from judgment entered thereon, appointing a commissioner to sell said lands, in the event the defendant executor did not pay the judgment within thirty days from the adjournment of court, the defendant executor appeals to the Supreme Court, assigning error.

Bowie & Bowie for plaintiff.
Ira T. Johnston for defendants.

DENNY, J. Plaintiff bottoms his right to recover in this action on the authority contained in section 7990 of the Consolidated Statutes of North Carolina and section 1710, ch. 310, Public Laws of 1939, Michie's Code of North Carolina, section 7971 (219), which reads, in part, as follows: "Taxes shall be payable in existing national currency. No tax collector shall accept a note of the taxpayer in payment of taxes. Any collector may, in his discretion and at his own risk, accept checks in payment of taxes, and either issue the tax receipt immediately or withhold said receipt until the check has been collected. In any case in which a collector accepts a check and issues a receipt, and said check is thereafter returned unpaid, without negligence on the part of said collector in presenting said check for payment, the taxes for which said check was given shall be deemed unpaid; and the collector shall imme-

diately correct his records and shall proceed to collect said taxes either by civil suit on the check or by the use of any remedy allowed for the collection of taxes; Provided, that the lien for said taxes shall be inferior to the rights of purchasers for value and of persons acquiring liens of record for value, when such purchasers or lienholders acquire their rights, in good faith and without actual knowledge that such check has not been collected, after examination of the collector's records during the time such records showed the taxes as paid or after examination of the official receipt issued to the taxpayer."

Substantially the same provision for the protection of tax collectors in the event checks accepted in payment of taxes were returned unpaid, were contained in chapter 151, Public Laws 1931, which remained in force until the repeal thereof by Public Laws 1939, chapter 310.

The fact that the plaintiff accepted a check in payment of taxes, and the check was returned, and the plaintiff in his settlement with the Board of County Commissioners paid the taxes, does not give him a lien which may be foreclosed under C. S., 7990. The plaintiff, having failed to correct the tax record so as to show the check had been returned and that the taxes were not paid, the tax lien was not reinstated. He could have protected himself and preserved the tax lien if he had followed the procedure outlined in the statute; this he failed to do and the returned check was but a simple promise to pay. Since the provisions of the statute enacted for the protection of the plaintiff were not complied with, and the plaintiff elected to hold the returned check as evidence of the nonpayment of the taxes, he is in no better position than if he had accepted a note in lieu of the check.

The tax lien was discharged when the tax record was marked "Paid," and the original receipt delivered to the taxpayer. The plaintiff failed to exercise his statutory right to reinstate the lien upon the return of the unpaid check, and therefore no lien exists. *Guaranty Co. v. McGougan,* 204 N. C., 13, 167 S. E., 387, and cases there cited.

A plea of the three-year statute of limitations will bar a recovery in a civil action to collect a check given for the payment of taxes, when the action is not instituted within three years of the date the check was issued. C. S., 441.

The defendants' motion for judgment of nonsuit should have been granted.

Reversed.

STATE v. EARNEST HOWARD VINCENT.

(Filed 8 January, 1943.)

1. Indictment § 10—

Where defendant is indicted for a capital offense under the name "Vincent," testifies that his name is Vincent, appeals *in forma pauperis* as "Vinson," and then claims his name is "Furgerson," there is a clear case of *idem sonans*. Defendant was tried as Vincent, without objection or challenge, convicted and sentenced under the same name, and there is no question of his identity. He will not now be heard to say his real name is "Furgerson."

2. Criminal Law § 31f—

The State has a right to have a prisoner identified, and there was no error, in a prosecution for rape, for the court to require the defendant to stand up, while prosecutrix was on the witness stand, and allow her to identify him as the man who assaulted her on the night in question.

3. Rape § 1d—

In a prosecution for rape, where the State's evidence tended to show that defendant and another held up a man and a woman in a parked automobile at night, robbed the man and defendant ravished the woman, who positively identified him, defendant admitting his presence and aiding and abetting in the robbery, but testified that his confederate was the ravisher, motion for nonsuit was properly denied. C. S., 4643.

APPEAL by defendant from *Bone, J.*, at October Term, 1942, of DURHAM.

Criminal prosecution tried upon indictment charging the defendant with rape.

There is evidence on the record tending to show that on the night of 7 June, 1941, the defendant and one Clarence Willis, both residents of Durham, N. C., went out to stage a hold-up or robbery. They found an automobile parked on a side road near the Oxford Highway just outside the city limits of Durham. The prosecutrix, a deaf and dumb woman, and Bono Williams, who is partially deaf and dumb, were in the car. They were on the back seat. It is in evidence that the defendant robbed the man, jerked his wrist watch off, took the keys out of the car, motioned the woman to get out, which she did, told her companion to tell her he had a gun, which he did, and the defendant then proceeded to ravish the prosecutrix. *S. v. Long,* 93 N. C., 542.

The defendant testified on the hearing that Clarence Willis was the culprit in the case; that he, Willis, put on the defendant's cap and coat and went to the car while the defendant watched the road from behind a tree.

Verdict: "Guilty of rape."
Judgment: Death by asphyxiation.
The defendant appeals, assigning errors.

Attorney-General McMullan and Assistant Attorneys-General Patton and Rhodes for the State.
Bennett & McDonald for defendant.

STACY, C. J. The defendant is indicted under the name of Earnest Howard Vincent. He testified on the hearing that his name was "Earnest Howard Vincent." In his application to appeal *in forma pauperis,* he uses the name Earnest Howard Vinson. He now says that his real name is Earnest Howard Furgerson. It is admitted "that in the above named cause the name Earnest Howard Vincent is the one and the same name and person as Earnest Howard Vinson." Whatever the defendant's real name may be, there can be no doubt that the person who was tried under the name of Earnest Howard Vincent pleaded to the indictment under this name and was identified by the prosecutrix as her assailant. He was sentenced under the name of Earnest Howard Vincent, and he is now held in custody under the same name. It seems to be a clear case of *idem sonans,* there being no question as to the identity of the defendant. *S. v. Vestal,* 82 N. C., 563; *Hubner v. Reickhoff,* 103 Iowa, 368, 64 Am. St. Rep., 191; 38 Am. Jur., 612.

It was said in *Pitsnogle v. Commonwealth,* 91 Va., 808, 50 Am. St. Rep., 867, quoting with approval from 1 Bishop on Crim. Proc., sec. 689, that "if two names may be sounded alike without doing violence to the power of the letters found in the variant orthography, the variance is immaterial."

The term *"idem sonans"* means sounding the same. Here, the two names, "Vincent" and "Vinson," sound almost alike. No point was made of the variance, if such it be, on the trial, and, of course, the defendant will not now be heard to say that his real name is "Furgerson." He was tried under the name of Vincent, without objection or challenge, and sentenced under the same name. There being no question as to his identity, he may retain the name for purposes of judgment. *S. v. Patterson,* 24 N. C., 346.

While the prosecutrix was on the stand as a witness, the defendant was asked to stand up in the presence of the jury. The prosecutrix then pointed him out as the man who had assaulted her on the night in question. The defendant complains at this procedure, on the ground that he was thus required to give evidence against himself in a criminal prosecution. For this position, he relies upon *S. v. Jacobs,* 50 N. C.,

259, where the defendant, whose *status* as a free Negro was at issue, was required to exhibit himself to the jury, and the action of the trial court was held for error. Compare, *Holt v. United States,* 218 U. S., 245. Here, however, the identity of the defendant, and not his status or degree of color, was at issue. *S. v. Garrett,* 71 N. C., 85. In this respect, the case comes squarely under the decision in *S. v. Johnson,* 67 N. C., 55, where it was held that the State had a right to have the prisoner identified as the person charged.

In *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720, it was said: "It was the right of the State to have the defendants present at the trial, both for the purpose of identification and to receive punishment if found guilty, *S. v. Johnson,* 67 N. C., 55, and if a defendant should persist, for example, in wearing a mask while on trial, the court would be fully justified in ordering the mask removed, so that he might be identified by the witnesses. *Warlick v. White,* 76 N. C., 179."

The defendant insists that his motion for judgment of nonsuit should be allowed under C. S., 4643, because, he says, the State's evidence is unreasonable and unworthy of belief. In making this argument, the defendant overlooks the fact that his own testimony tends to corroborate many of the circumstances detailed by the State's witnesses. He admits that he was present, aiding and abetting Clarence Willis in the commission of a robbery. *S. v. Whitehurst,* 202 N. C., 631, 163 S. E., 683. Moreover, 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. Smith,* 221 N. C., 400, 20 S. E. (2d), 360. 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.

The remaining exceptions are too attenuate to warrant any extended discussion. It is conceded they are technical, but defendant says he should be given the benefit of every possible defect in the trial. We have found none of sufficient merit to disturb the result. The verdict and judgment will be upheld.

No error.

STATE v. MARY NEAL, ALIAS MARY GARDNER.

(Filed 8 January, 1943.)

1. Homicide §§ 20, 21—

Where defendant was charged with murder by cutting deceased with a knife, evidence was competent and material which showed that, after a prior difficulty on the night of the homicide between the same parties, the defendant repossessed the knife with which she shortly thereafter slew deceased, her conversation relative to the knife, her possession of same at the scene of the homicide, and that she said to deceased, if he did not let her see where she had before cut his hand, she would cut him to pieces.

2. Criminal Law §§ 29b, 41b—

In a criminal prosecution it has been uniformly held that the defendant, when on the stand as a witness, may be cross-examined as to infractions of the law, tending to show the commission of crimes, for the purpose of impeaching his credibility, provided such questions are based on information and asked in good faith, and the extent of such questions is largely in the sound discretion of the trial judge.

APPEAL by defendant from *Bobbitt, J.*, at September Term, 1942, of FORSYTH. No error.

The defendant was indicted for the murder of one Sidney Austin, Jr.

There was evidence offered by the State tending to show that on the night of 8 August, at the Cannonball Cafe in Winston-Salem, the defendant and the deceased became engaged in an altercation and fight, in the course of which the defendant was knocked down and the deceased received a cut on his hand. Later in the night they met again at another cafe and again quarreled. The deceased went out on the sidewalk and the defendant followed, with knife in her hand, and demanded to see where she had previously cut his hand. On his refusal to permit her to do so she fatally stabbed him. The defendant's testimony tended to show self-defense, or, at least, circumstances which would reduce the grade of the offense.

The jury returned verdict of guilty of murder in the first degree, and from judgment imposing sentence of death, the defendant appealed.

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

W. Avery Jones for defendant.

DEVIN, J. The only assignments of error brought forward in the defendant's appeal relate to the rulings of the court in the admission of testimony. These will be considered in order.

1. The exception to the question propounded by the solicitor as to whether, on the occasion of the homicide, the defendant was drinking, and to the witness' reply that she did not appear to be, is untenable.

2. Evidence to the effect that after the first difficulty in the Cannonball Cafe, and after the deceased had left, the defendant insisted that another who had taken the knife from her should return it to her, was competent to show the repossession of the knife with which she shortly afterwards slew the deceased, and her conversation in respect to it was relevant and material.

3. The exception to the admission of testimony tending to show that when the defendant came out on the sidewalk at the scene of the homicide she had the knife in her hand, and that she said to the deceased if he did not let her see where she had cut his hand she would cut him to pieces, cannot be sustained.

4. The defendant assigns error in the action of the court in permitting the solicitor on cross-examination to question the defendant at length as to her various infractions of law, including cutting affrays, larceny, vagrancy, nuisance and violation of the prohibition law. It has been uniformly held, however, that witnesses may be asked questions tending to show the commission of other offenses for the purpose of impeaching their credibility, provided the questions are based on information and asked in good faith, *S. v. Broom, ante,* 324, and that whether the cross-examination goes too far or is unfair is a matter for the determination of the trial judge, and rests largely in his sound discretion. *S. v. Snipes,* 166 N. C., 440, 81 S. E., 409; *S. v. Little,* 174 N. C., 793, 94 S. E., 97; *S. v. Beal,* 199 N. C., 278 (298), 154 S. E., 604. In the case at bar the defendant admitted most of the impeaching questions as to her past derelictions, and her objection, when, on one point, the State offered to contradict her, was sustained. Furthermore, the court cautioned the jury that these questions were admitted for the purpose of impeaching her credibility and not for the purpose of proving other offenses. The questions objected to appear to have been competent under the rule, and the fact that the court permitted the solicitor to ask them may not be held for error, in the absence of showing of improper prejudice or abuse of discretion on the part of the trial judge, and the record fails to show either. There was no exception to the judge's charge.

We have examined the record carefully and are unable to find error in any ruling of the court of which the defendant can justly complain. While there was evidence on the part of the defendant tending to show a lesser degree of homicide, the jury has accepted the State's evidence with its more serious implications. As there was evidence to support

the verdict, we have no power, even if so disposed, to review the action of the jury.

In the trial we find

No error.

JOHN STONE, JR., SUBSTITUTED PLAINTIFF FOR MOSES GRIMES, v. CICERO GUION, AMELIA GUION AND BUDDY GUION.

(Filed 8 January, 1943.)

1. Appeal and Error § 49a—

In a civil action to recover land, defendant claimed title by answer, alleging a parol contract with the plaintiff, to which a demurrer was sustained and affirmed on appeal to the Supreme Court. It appeared thereafter to the court that the *locus in quo* had, pending this action, been conveyed to another, who was thereupon substituted as plaintiff and defendant allowed to amend answer, which defendant did by setting up the identical defense already disposed of by demurrer on the former appeal. *Held:* Defense properly stricken out.

2. Evidence § 42c—

Where, in an action to recover lands and rents therefor, defendant in her answer admits her possession of the lands described in the complaint, refers to the same deeds and plot as alleged in the complaint and offered in evidence, admits that the description covers the lands in question, her assignment of error, based on plaintiff's failure to sufficiently describe the land, cannot be sustained.

3. Evidence § 43a—

The declarations of parties to suits are always admissible against, though not for, them.

4. Ejectment § 15: Evidence § 42a—

In an action to recover land, where plaintiff offered a chain of title to himself, and his predecessors in title, from a common source from which defendant asserts title, by deeds recorded and set out in his complaint, containing the same description of the *locus in quo* as is admitted in defendant's answer, a *prima facie* case for plaintiff is made out and defendant's motion to nonsuit was properly overruled. C. S., 567.

APPEAL by defendant Amelia Guion from *Bone, J.*, at June Term, 1942, of ROBESON.

With John Stone, Jr., substituted as plaintiff for Moses Grimes, this is the same action as was before us at the Fall Term, 1941, *Grimes v. Guion,* 220 N. C., 676, 18 S. E. (2d), 170.

This is a civil action to recover land and rents therefor and damages for waste committed thereon.

The plaintiff in his complaint alleges *inter alia* that he is the owner and entitled to the possession of a certain tract of land in Robeson County described in a deed from L. E. Whaley and wife to Cornelia Merrick Smith, and in a deed from Simon Peter Dunham and others, the children and heirs at law of Cornelia Merrick Smith, to Moses Grimes, and a deed from Moses Grimes to the plaintiff, John Stone, Jr.

This action was originally instituted by Moses Grimes and during the pendency thereof John Stone, Jr., was substituted as plaintiff upon it being made to appear to the court that Moses Grimes had conveyed the *locus in quo* to John Stone, Jr.

By the same order making John Stone, Jr., plaintiff, the defendant Amelia Guion was allowed to file amended answer. Amelia Guion filed answer and alleged that she was the owner of the *locus in quo* by reason of a parol contract between her and the original owner thereof, Cornelia Merrick Smith. This was the identical defense made and dismissed upon demurrer when the case was first before us. *Grimes v. Guion, supra.* Upon motion of the plaintiff this defense was stricken from the answer.

At the close of the evidence a judgment as in case of nonsuit was entered as to the defendants other than Amelia Guion.

The case was submitted to the jury upon the following issues: "1. Is the plaintiff John Stone, Jr., the owner and entitled to the immediate possession of the tract of land described in the complaint filed herein?" and "2. Is the defendant Amelia Guion in the unlawful possession of said tract of land?" Both issues were answered in the affirmative, and from judgment predicated on the verdict the defendant Amelia Guion appealed, assigning errors.

F. D. Hackett for plaintiff, appellee.

L. J. Britt and McLean & Stacy for defendant, appellant.

SCHENCK, J. The first exceptive assignment of error is to the court's striking out the defendant's alleged defense of a parol contract existing between the original owner, Cornelia Merrick Smith, and the defendant Amelia Guion, to convey the *locus in quo* to her. John Stone, Jr., having received a deed for the *locus in quo* from the original plaintiff, Moses Grimes, during the pendency of the suit, took such title thereto as Moses Grimes possessed, and with the knowledge that the defense sought to be interposed had been adjudicated adversely to the defendant. The issue raised by the filing of this defense having been adjudicated in the former appeal, the defense was very properly stricken out when attempted to be set up a second time.

The exceptive assignments of error based upon the contention that the plaintiff has failed to show sufficient description of the land which he

seeks to recover cannot be sustained, in view of the fact that the defendant in her original, and in her amended, answer admits that she entered into the possession of the lands described in the complaint and is in the possession of the same. The complaint contains the same description as is contained in the deeds to which these assignments of error are addressed, and refer to the same plat which is recorded in the office of the Register of Deeds of Robeson County. The defendant by reference in her pleadings to the description as contained in the complaint which is the same as the description contained in the deeds and plat offered in evidence admits that such description covers the lands which are the subject of this action.

The exceptive assignments of error based upon the admission in evidence of certain allegations contained in the defendant's original answer filed in this cause are untenable. "'The declarations of parties to suits are always admissible evidence against, though not for, them.'" *Byrd v. Spruce Co.,* 170 N. C., 429, 87 S. E., 241.

The appealing defendant's demurrer to the evidence and motion for judgment as in case of nonsuit, C. S., 567, was properly overruled. The plaintiff offered a chain of title to himself and his predecessors in title from a common source from which the defendant asserts title, namely, Cornelia Merrick Smith. This chain of title consisted of a deed to John Stone, Jr., from Moses Grimes, the original plaintiff, a deed to Moses Grimes from Simon Peter Dunham and others, the children and the heirs at law of Cornelia Merrick Smith, deceased, and a deed to Cornelia Merrick Smith from L. E. Whaley and wife, all of which deeds were duly recorded in the registry of Robeson County and contained the same description as that contained in the complaint, and was the same description as that of the land of which the defendant admits in her answers she entered into the possession and remained therein. These deeds made out at least a *prima facie* case sufficient to be submitted to the jury, and, in the absence of any evidence to the contrary introduced by the defendant or otherwise, entitled the plaintiff to an instruction to the effect that if they found the facts to be as all of the evidence tended to show, or if they believed the evidence, they would answer the issues in favor of the plaintiff. *Roberts v. Dale,* 171 N. C., 466, 88 S. E., 778, and cases there cited.

If there was a conflict, and therefore error, in the first instruction of the court that the evidence of the plaintiff made out a *prima facie* case in his favor, and the subsequent instruction to the jury that "if you believe the evidence and find the facts to be as it tends to show, I instruct you to answer the issue, Yes," the error was harmless.

In the trial below we find

No error.

MRS. ELSIE K. WEBB v. MRS. MARY T. WEBB, EXECUTRIX OF THE ESTATE OF LOUIS H. WEBB.

(Filed 8 January, 1943.)

1. Divorce § 14: Limitation of Actions § 1a—

An action may be maintained in this State to recover unpaid installments of alimony decreed under a Louisiana judgment; and the North Carolina statute of limitations, rather than the Louisiana statute of prescription, applies.

2. Divorce § 14—

It appearing in a suit to recover unpaid installments of alimony on a Louisiana judgment, that certain payments were not credited upon the amounts claimed due, it was error necessitating a new trial, for the court to instruct the jury, if they found the facts as the evidence tended to show, to answer the issue, as to the amount due, the full amount claimed.

APPEAL by defendant from *Johnson, Special Judge,* at May Term, 1942, of ORANGE. New trial.

This was an action to recover unpaid installments of alimony decreed in a judgment rendered by the Civil District Court for the Parish of Orleans, in the State of Louisiana. The defendant did not deny the validity of the judgment, but pleaded the Louisiana three years' statute of limitations or prescription as to arrearages of alimony, and also pleaded payment.

Upon issues submitted to the jury, in accordance with instructions from the court, verdict was rendered in favor of the plaintiff, finding that the action was not barred, and that plaintiff was entitled to recover $5,850, the full amount claimed. From judgment on the verdict, defendant appealed.

Graham & Eskridge for plaintiff, appellee.

L. J. Phipps and Bonner D. Sawyer for defendant, appellant.

DEVIN, J. The court below correctly ruled that plaintiff was entitled to maintain her action here for unpaid installments of alimony decreed under the Louisiana judgment (*Lockman v. Lockman,* 220 N. C., 95, 16 S. E. [2d], 670), and that the North Carolina statute of limitations, rather than the Louisiana statute of prescription, applied. *Arrington v. Arrington,* 127 N. C., 190, 37 S. E., 212; *Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11.

However, it appears from the plaintiff's testimony that certain payments made to her by the defendant's intestate were not credited upon

the amounts now claimed to be due as alimony. Thus, an open question for the jury was raised as to the amount plaintiff was entitled to recover, and the instruction to the jury, if they found the facts to be as the evidence tended to show, to answer the issue, as to the amount due, $5,850, the full amount claimed, was erroneous and prejudicial to the defendant, necessitating a new trial. *Combs v. Cooper,* 194 N. C., 203, 139 S. E., 224.

New trial.

A. L. LEONARD v. W. H. COBLE AND WIFE, DAISY COBLE.

(Filed 8 January, 1943.)

1. Courts § 2d—

The jurisdiction of the Superior Court in appeals from justices of the peace is entirely derivative, and is no greater than that of a justice's court. *Held:* On appeal from a justice's court, the Superior Court has no jurisdiction to enter judgment on a counterclaim in excess of two hundred dollars.

2. Justices of the Peace § 3—

A defendant may set up a counterclaim in excess of two hundred dollars in bar of recovery in a justice's court, but the plea can only defeat a recovery by the plaintiff and will not give defendant the right to have a judgment entered for the amount of the counterclaim.

APPEAL by plaintiff from *Parker, J.,* at March Term, 1942, of ALAMANCE.

This action was instituted by plaintiff in a justice's court, to recover $126.87, alleged to be due by contract and to enforce a laborers' and materialmen's lien. Defendants admitted they entered into a contract with plaintiff to erect a residence for them at a cost of $1,300.00, which building was to be constructed in a workmanlike manner and that good materials were to be used. Defendants alleged in their answer that at the request of plaintiff they advanced to him the sum of $225.00 on the contract; that the materials used in the foundation for the residence were of such poor quality that they were of no value and would have to be torn out and rebuilt; and, defendants denied that they were indebted to plaintiff in any amount and set up a counterclaim for the recovery of the aforesaid $225.00. Judgment for plaintiff was entered in the justice's court, from which defendants appealed to the Superior Court, where issues were submitted to the jury and answered as follows:

"In what amount, if any, are defendants indebted to the plaintiff? Answer: Nothing.

"In what amount, if any, is plaintiff indebted to the defendants? Answer: $225.00."

Judgment was entered in favor of the defendants in the sum of $225.00, with interest. Plaintiff appeals to the Supreme Court, assigning error.

C. C. Cates, Jr., and Long, Long & Barrett for plaintiff.

J. Elmer Long and Clarence Ross for defendants.

DENNY, J. The sole question presented is whether or not on appeal from a justice's court, the Superior Court has jurisdiction to enter judgment on a counterclaim in excess of two hundred ($200.00) dollars. The answer is "No."

The jurisdiction of the Superior Court in appeals from justices of the peace is entirely derivative, and is no greater than that of the justice's court. *Perry v. Pulley,* 206 N. C., 701, 175 S. E., 89.

A defendant may set up a counterclaim in excess of $200.00 in bar of a recovery in a justice's court, but the plea can only defeat a recovery by the plaintiff and will not give the defendant the right to have judgment entered for the amount of said counterclaim. See *Cheese Co. v. Pipkin,* 155 N. C., 395, 71 S. E., 442, where *Justice Hoke,* in an able and exhaustive opinion decided the question raised here and assembled the authorities.

Defendants having pleaded, and the verdict having established, a counterclaim in their favor, in the sum of $225.00, and plaintiff not having recovered anything, the defendants are entitled to have judgment entered that they go without day and recover their costs.

It was error to enter judgment in favor of defendants for $225.00 with interest, and to that extent the judgment of the court below is

Reversed.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1943

DR. JOHN L. LISTER v. M. W. LISTER, ADMINISTRATOR, AND MRS. GOLDIE LISTER MARKHAM, ADMINISTRATRIX OF THE ESTATE OF E. W. LISTER, DECEASED.

(Filed 24 February, 1943.)

1. Evidence § 32—

While in the trial of an action, based upon a paper writing, against the personal representative of a decedent, the plaintiff, or other party interested in the event, is incompetent to testify that he saw the deceased person actually sign the particular paper, C. S., 1795, he is competent to prove that the paper in question or the signature thereto is in the handwriting of the deceased.

2. Evidence § 43a—

Declarations, in the interest of the party making them, are incompetent as evidence; the law does not allow a party to make evidence for himself and those who claim under him. Check stubs *held* incompetent.

3. Same—

Declarations of a deceased person cannot be introduced in evidence by his personal representative, unless they are a part of the same conversation or statements proven by the opposite party.

4. Limitation of Actions §§ 2b, 2e, 2g, 10—

Where, in an action against administrators, who qualified in May, 1934, on promissory notes, maturing in January, 1933, and April, 1933, and signed by the intestate, who died in April or May, 1934, upon a plea of the statutes of limitation, C. S., 412, 438 and 441, there being evidence

tending to show that plaintiff filed his claims with the administrators within one year after their qualification and the claims were admitted, motions by defendants for nonsuit were properly denied. C. S., 567.

5. Seals §§ 2, 3: Bills and Notes § 2c: Limitation of Actions § 16—

In an action upon a promissory note, concluding with the words "Witness my hand and seal" and signed by the maker, with the word "seal" in parentheses after his name, the burden is on defendant to satisfy the jury by the greater weight of the evidence that the word "seal" so appearing was not adopted by the maker.

6. Bills and Notes § 25—

There is a presumption that a note, bearing the recital "for value received," was executed for a valuable consideration; and C. S., 3004, provides that every negotiable instrument is deemed *prima facie* to have been issued for value.

7. Trial § 37—

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly.

APPEAL by defendants from *Hamilton, Special Judge,* at October, 1942, Regular Term, of PASQUOTANK.

Civil action instituted 18 May, 1942, to recover on certain promissory notes.

These facts appear to be uncontroverted: Dr. E. W. Lister, brother of plaintiff, and intestate of defendants, died in the latter part of April, or first of May, 1934. Defendant M. W. Lister, a brother, and defendant, Mrs. Goldie Lister Markham, a sister of Dr. E. W. Lister and of plaintiff, qualified as administrator and administratrix, respectively, of the estate of Dr. E. W. Lister, deceased, on 22 May, 1934.

Plaintiff in his complaint alleges these facts, among others: "2. That the said E. W. Lister . . . on April 19th, 1932, executed and delivered to the plaintiff, Dr. J. L. Lister, his promissory note in words and figures as follows:

"Elizabeth City, N. C.

"$750.00

"For value received, on or before April 19, 1933, I promise to pay to the order of Dr. John L. Lister Seven Hundred and Fifty Dollars with interest from date at the rate of 6% per annum, payable annually.

"This note is secured by Deed of Trust on . . . of even date herewith.

"As witness my hand and seal this the 19th day of April, 1932.

E. W. LISTER (SEAL)

"Witness:

....."

That on 14 July, 1932, he executed and delivered to the plaintiff, Dr. John L. Lister, his promissory note in words and figures as follows:

"Elizabeth City, N. C.

"250.00

"For value received, on or before January 1, 1933, I promise to pay to the order of Dr. John L. Lister Two Hundred and Fifty Dollars with interest from date at the rate of 6% per annum, payable annually.

"As witness my hand and seal this the 14th day of July, 1932.

E. W. LISTER (SEAL)

"Witness:....."

Plaintiff further alleges and on trial below offered evidence tending to show that said notes were duly presented to defendants, administrator and administratrix, for payment within twelve months from the date of their qualification as such administrator and administratrix, and that no intimation or suggestion from them "with respect to any contention about payment of same was made, and although payment thereof has been requested and demanded on numerous occasions, said defendants have failed to pay same."

Plaintiff further alleges: That said notes are valid obligations against the estate of intestate, are long past due and unpaid, though there are sufficient assets belonging to the estate to pay all indebtedness against it, together with cost of administration; and that the defendants are indebted to him in the principal sum of each note with interest from date for which judgment is prayed.

Defendants, in their answer, while admitting the death of E. W. Lister, and their qualification as administrator and administratrix of his estate, and that "plaintiff sometime after the death of Dr. E. W. Lister made claim against these defendants upon the paper writings which he now alleges to be notes," deny all other material allegations of the complaint; and aver in substance: (1) That if E. W. Lister "subscribed his name to any paper writing or paper writings such as purport to be copied in paragraph 2 of the complaint, such subscription or signing of his name was done without the intention on the part of the late E. W. Lister to adopt, as his own, the word 'SEAL' appearing after his name, according to the copies set forth in the said paragraph of the two said paper writings"; (2) that if E. W. Lister delivered "such paper writings" to plaintiff, "such delivery was without consideration . . . in that the said plaintiff was a brother of the late E. W. Lister and for a long number of years had been indebted to the said E. W. Lister for money borrowed, in various large and substantial sums, and that any

money or other thing of value which may have passed from the plaintiff to the said E. W. Lister on or about 19 April, 1932, and on or about 14 July, 1932, did not represent and was not . . . any consideration for the said paper writings . . . but that any money or thing of value delivered to the said E. W. Lister by the said plaintiff . . . were . . . payments by the said plaintiff to the said E. W. Lister for and on account of indebtedness theretofore due and owing by said plaintiff to said E. W. Lister, and these defendants plead such failure of consideration in bar of the plaintiff's right to recover in this action"; (3) that "said paper writings are not, and never were, in fact promissory notes and did not . . . represent any indebtedness from the late Dr. E. W. Lister, or his estate, to plaintiff, Dr. J. L. Lister, and were not given by the one or received by the other with any understanding that the sums of money therein mentioned were ever to be paid, but that on the contrary it was understood between them that such sums were never to be paid by Dr. E. W. Lister to Dr. J. L. Lister; that it was understood and agreed between them that said papers were merely receipts for money paid, or were written in the form of promissory notes in order to permit plaintiff to borrow money thereon,—Dr. E. W. Lister thereby lending his credit to said brother, or were executed solely for some other use to be made thereof by J. L. Lister, but always with the understanding that they evidenced no debt by E. W. Lister to J. L. Lister."

And by way of further answer and defense and for counterclaim defendants aver and say: (1) That the paper writings declared on in the complaint are not "sealed instruments" within the purview of section 437 of N. C. Consolidated Statutes, 1919, and that any cause of action thereon is barred by the three-year statute of limitation, which is pleaded in bar of any recovery thereon; (2) that summons in this action issued 18 May, 1942, more than one year after the issuance of letters of administration to defendants; that claims upon said notes were not duly filed with these defendants within one year of their qualification and the issuance of letters of administration to them, nor were said claims admitted by the defendants; that the personal assets have been exhausted in the payment of debts and defendants have in hand only such funds of the estate as are sufficient to pay certain parts of secured debts, and costs of administration of the estate, upon all of which defendants plead the one-year statute of limitation, C. S., 412, in bar of any recovery by plaintiff; (3) that more than seven years have elapsed since the date of defendants' qualification, and the making of advertisement for creditors of E. W. Lister to present their claims as required by law, in May, 1934, in manner specified, and the seven-year statute of limitation, C. S., 438, is pleaded in bar of any recovery by plaintiff; and (4) that plaintiff is indebted to estate of E. W. Lister (a) in sum of $2,000 with interest

as of 1 January, 1933; (b) in the sum of $224, with interest, by reason of accommodation endorsements as alleged which he had to pay, that is, $122 in December, 1932, and $102 in December, 1933; and (a) in the sum of $500, with interest from 1 January, 1934, for services rendered in collecting certain rents; for all of which judgment is prayed by defendants.

In reply, plaintiff denies the material averments of defendants as set forth in their further defense and counterclaim, and alleges, and on trial below offered evidence tending to show: That his claim was duly filed according to law and accepted and received by and had the approval of defendants; that, after their qualification defendants listed his claim as an item of indebtedness against the estate in inheritance tax report filed by them in 1934, and claimed and were allowed, as a deduction in settlement of inheritance tax, the amount of principal and interest as stated therein, being the same amount for which claim was presented by plaintiff to defendants, that is, the sum of $1,132.92, principal and interest then due; and that in October, 1939, defendants, with joinder of plaintiff, instituted an action in the Superior Court of Pasquotank County for the purpose of selling land to create assets with which to pay the indebtedness of the estate, including plaintiff's claim, which proceeding was pending until May Term, 1942, of said Superior Court, when defendants took a voluntary nonsuit therein, whereupon plaintiff alleges that he instituted this action "as a continuing process or action to recover his claim." Plaintiff further pleads the three-year statute of limitation, C. S., 441, in bar of defendants' right to recover on each of the several causes of action set out in the counterclaim.

Such other evidence as was adduced in the trial court, as is necessary to proper consideration of decisive questions, will be referred to in the opinion hereinafter.

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

"1. Is the claim against defendants' intestate's estate barred by the seven-year statute of limitations? Answer: No.

"2. Is the claim against defendants' intestate's estate barred by the three-year statute of limitations? Answer: No.

"3. Is the claim against defendants' intestate's estate barred by the one-year statute of limitations? Answer: No.

"4. Did the defendants' intestate, E. W. Lister, execute and deliver to plaintiff for valuable consideration the notes in question and made the basis of the claim for the plaintiff? Answer: Yes.

"5. If so, did the defendants' intestate, E. W. Lister, adopt as his own the seal appearing on the note opposite his signature at the time of the execution of the note? Answer: Yes.

"6. What amount, if any, is plaintiff entitled to recover of defendant? Answer: $750 with interest. $250.00 with interest."

From judgment thereon in favor of plaintiff, defendants appeal to Supreme Court and assign error.

W. I. Halstead and Ballard S. Gay for plaintiff, appellee.

J. Kenyon Wilson and Sam B. Underwood, Jr., for defendants, appellants.

WINBORNE, J. While appellants assign as, and stress for error many exceptions taken in the trial below, we deem the treatment of basic questions to be sufficient for correct determination of the points involved. These are accordant with the theory of the trial below, in which we find no prejudicial error.

1. Where in the trial of this action plaintiff produces paper writings, in the form of negotiable notes purporting to be payable to him and to be signed by intestate of defendants, administrator and administratrix, upon which the action is based, and testifies to his possession of them since certain dates, even though such dates correspond with the purported dates of such paper writings, and identifies the purported signatures thereto to be in the handwriting of said intestate, are such paper writings admissible in evidence? Yes. See *Pate v. Brown,* 85 N. C., 166; *Pugh v. Grant,* 86 N. C., 40; *Kiff v. Weaver,* 94 N. C., 274; *Johnson v. Gooch,* 116 N. C., 64, 21 S. E., 39; *Trust Co. v. Bank,* 167 N. C., 260, 83 S. E., 474.

However, defendants contend that such paper writings are inadmissible in that the admission of them in evidence contravenes the provisions of C. S., 1795, which, briefly stated, provides that upon the trial of an action a party or a person interested in the event shall not be examined as a witness in his own behalf against the administrator of a deceased person, concerning a personal transaction or communication between the witness and the deceased person.

This contention is untenable for these reasons: (1) This Court, in construing this statute, C. S., 1795 (formerly C.C.P., 343, the Code, 590, and Revisal, 1631, successively), has adopted, and applied in a long line of decisions the construction that while such party is incompetent to testify that he saw the deceased person actually sign the particular paper, he is competent to prove the handwriting of such deceased person. *Peoples v. Maxwell,* 64 N. C., 313; *Rush v. Steed,* 91 N. C., 226; *Hussey v. Kirkman,* 95 N. C., 63; *Ferebee v. Pritchard,* 112 N. C., 83, 16 S. E., 903; *Sawyer v. Grandy,* 113 N. C., 42, 18 S. E., 79; *Satterthwaite v. Davis,* 186 N. C., 565, 120 S. E., 328. It was no doubt in deference to

these decisions that no exception was taken to testimony of plaintiff. Moreover, after the notes were offered in evidence, M. W. Lister, called as witness for plaintiff, testified that he knew his brother E. W. Lister's signature, that the signature on the notes is his genuine signature, and that the writing in the notes is that of E. W. Lister.

While the purported negotiable notes standing alone do not of themselves constitute evidence, yet accompanied as they are by competent evidence as to handwriting and signature of intestate of defendants, from which jury may infer that the notes are authentic and that they were executed by E. W. Lister, the party by whom they purport to be, they are admissible in evidence. After being identified by such evidence, which is not in conflict with provisions of C. S., 1795, the admission of the notes in evidence is not violative of such provisions.

2. The second question relates to the correctness of the ruling of the court in refusing to grant defendants' motions, aptly made, for judgment as in case of nonsuit. C. S., 567.

Defendants, in their brief filed in this Court, debating the exceptions to refusal to grant these motions, direct their attack upon the ruling only in so far as it relates to their pleas of the three-year, and the seven-year statutes of limitation, under C. S., 441, and C. S., 438, but say nothing, in this connection, with regard to their plea of the one-year statute, under C. S., 412. Thus it appears that the challenge to the ruling on the motions in so far as it is affected by the plea under C. S., 412, is abandoned by defendants. If, however, this were not the case, the evidence appearing in the record, and tending to show that plaintiff filed his claim with defendants within one year after their qualification, and that they admitted it, is sufficient to take the case to the jury with respect thereto. C. S., 412, in pertinent portion, provides: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against the personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar . . ." See *Rodman v. Stillman,* 220 N. C., 361, 17 S. E. (2d), 336, and cases cited. And the record discloses that the court, in charging the jury on the issues submitted as to the several statutes pleaded by defendants, in bar of the right of plaintiff to maintain this action, made the answer thereto to turn upon the facts the jury should find from the evidence, and by its greater weight, as to whether the claim of plaintiff filed with

defendants as personal representatives of E. W. Lister, deceased, within one year after the issuing of letters of administration, was admitted by them. In this connection it is proper to note that plaintiff alleges in his complaint that the notes sued upon were duly presented to the defendants for payment within twelve months from the date of their qualification; that in answer thereto the defendants admit that "plaintiff some time after the death of Dr. E. W. Lister made claim against the defendants upon the paper writings which he now alleges to be notes"; that on the trial the plaintiff testified that he presented his "claim for those two notes just introduced in evidence" to the administrators in August, 1934; that the defendant M. W. Lister, the administrator, as witness for the plaintiff, testified that his brother E. W. Lister died the latter part of April, 1934; and that "some time in June" the plaintiff "sent the papers to us, of course to file," and on cross-examination said, "This claim was mailed to me in June, 1934"; and that there is no evidence to the contrary. Thus, patently, the court was correct in assuming that plaintiff had filed claim with the personal representatives within one year after the issuing of letters of administration, leaving open for the jury's determination the question as to whether the defendants, the administrators, had admitted the claim as filed. Such construction in the light of the pleadings and the evidence is in harmony with proper construction of the provisions of C. S., 412. And if the claim were admitted it would not be necessary to bring an action on such claim to prevent it being barred. *Rodman v. Stillman, supra.* On the other hand, if the claim had not been filed and admitted plaintiff could not maintain the action. Hence, as one note in suit matured on 19 April, 1933, and the other on 1 January, 1933, each less than three years prior to the date of death of E. W. Lister, an action on the notes was not then barred by the three-year statute of limitation, C. S., 441, and the filing of claim, and the admission of it, in accordance with the provisions of C. S., 412, would prevent the claim being barred. And any question as to whether the notes were or were not under seal becomes immaterial in this phase of the case.

Moreover, the provisions of C. S., 438 (2) (formerly C. C. P., section 32, Code, section 153, and Revisal, section 392, successively), as construed by this Court in the case of *Redmond v. Pippen,* 113 N. C., 90, 18 S. E., 50, applies to an action against a personal, and where necessary the real representatives, to compel the performance of some right of which the debt itself is the foundation. *MacRae, J.,* writing for the Court, said: "This is the more reasonable, as the result of an action against the personal representative upon an ordinary obligation of the deceased, is simply to ascertain the amount of the debt and fix it in a judgment." Under this construction, C. S., 438 (2), is not applicable to case in hand.

3. The third question relates to the charge of the court that the burden of proof as to the fifth issue is upon the defendants to satisfy the jury on the evidence, and by its greater weight, that E. W. Lister did not adopt as his own the word "Seal" appearing on the notes. The charge is in keeping with the decisions of this Court in the cases of *Allsbrook v. Walston,* 212 N. C., 225, 193 S. E., 151, and *Currin v. Currin,* 219 N. C., 815, 15 S. E. (2d), 279. Furthermore, here the words, "Witness my hand and seal," appear in the body of the notes above the signature, and the notes contain all the evidence bearing on the subject.

4. The fourth question relates to those portions of the charge on the fourth issue wherein the court instructed the jury to the effect that as each of the notes in question bears the recital "for value received," there is a presumption that each was executed for a valuable consideration. This is in accord with the statute, C. S., 3004, which provides that "every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value." Upon this rule the court instructed the jury that "under all the evidence . . . if you believe it and find the facts to be as all the evidence tends to show, you would answer that fourth issue Yes . . ." Careful consideration of the evidence in the record fails to show that this instruction is not well founded.

5. The fifth question pertains to the exclusion of certain entries in the handwriting of E. W. Lister, the intestate, in a book which he kept and which was found in his room after his death. Exceptions 11 and 13. The entries are these:

"1932

"April 19th, 1932
Dr. John L. Lister Paid
700.00
on his note 638.85
I gave him my note as
a receipt for same.

"July 14, 1932
Pd. by check $250.00
Receipt given."

Plaintiff's objection thereto is well taken (1) for that a personal representative cannot introduce declarations of the deceased unless they are a part of the same conversation or statements proven by the opposite party, *Johnson v. Armfield,* 130 N. C., 575, 41 S. E., 705; and (2) for that they were in the interest of the party making them—that is, "the

law does not allow a party to make evidence for himself and those who claim to take benefit of such declarations under him." *Austin v. King,* 91 N. C., 286.

6. The sixth question is as to the sufficiency of the issues submitted. Exceptions 17 to 28, both inclusive. Defendants tendered eleven issues, the first eight of which relate to plaintiff's alleged cause of action, and the last three to defendants' alleged counterclaim, all of which the court refused to submit.

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Hill v. Young,* 217 N. C., 114, 6 S. E. (2d), 830, and cases cited. Also, *Saieed v. Abeyounis,* 217 N. C., 644, 9 S. E. (2d), 399; *Oliver v. Oliver,* 219 N. C., 299, 13 S. E. (2d), 549. When tested by this rule, the issues submitted in the present case meet all the requirements, in so far as the plaintiff's cause of action is concerned. However, issues pertaining to defendants' counterclaim arise upon the pleadings, and these, tendered by defendants, were refused by the court, to wit:

"9. In what amount, if any, is plaintiff indebted to defendants by reason of the 1927 loan of $2,000 and the 1929 loan of $1,600?

"10. In what amounts, if any, is plaintiff indebted to defendants by reason of payments made by Dr. E. W. Lister to Zenas Pritchard?

"11. In what amount, if any, is plaintiff indebted to defendants by reason of services of Dr. E. W. Lister as managing agent for plaintiff?"

In this connection the record fails to show that plaintiff made a motion for judgment as in case of nonsuit, or that the court made any ruling as to defendants' counterclaim. Hence, the question arises as to whether there is any evidence in the record of sufficient probative force to support a verdict on either of the above issues numbered 9, 10 and 11. And this necessitates also consideration of exceptions to exclusion of certain evidence offered by defendants. Exceptions 14 and 15.

9th Issue: As to indebtedness of plaintiff for loan or loans to which this issue relates, the case on appeal contains no evidence whatever tending to show any such particular transactions.

10th Issue: As to indebtedness of plaintiff for payments made by Dr. E. W. Lister to Zenas Pritchard, defendants proposed to introduce in evidence two checks in the handwriting of, and drawn by Dr. E. W. Lister on the First and Citizens National Bank of Elizabeth City, N. C., to order of Zenas Pritchard, the first dated 21 December, 1932, for $122.00, and the second dated 23 December, 1933, for $102.00, each bearing endorsement "Zenas Pritchard," the first being stamped "PAID 12-21-32," and the second, "PAID 12-27-," together with these entries

on corresponding stubs, also in the handwriting of Dr. E. W. Lister. The first reads:

"$102.00
20.00

$122.00
Dec. 21, 1932.
To J. L. L. note Int.
For_____";

and the second:

"102.00
Dec. 23, 1933.
To Zenas Pritchard
For J. L. L. 1933 int."

Upon objection, these checks and entries were excluded. Defendants except.

Manifestly, the entries on the check stubs are incompetent for the reasons assigned above in considering the eleventh and thirteenth exceptions. *Johnson v. Armfield, supra; Austin v. King, supra.* The checks, while payable to Zenas Pritchard, show nothing in themselves to indicate, or from which it may be inferred, that they were being drawn for the benefit, or in payment of debts of plaintiff, J. L. Lister. Without some earmark, other than self-serving declarations, to identify the checks as having been given for the benefit of plaintiff, they are immaterial and incompetent as evidence against him. But defendants contend that, in the light of the testimony of plaintiff that he gave his note to Dr. E. W. Lister for $1,700 and he "signed it on the back" and got the money from Zenas Pritchard for the note, interest on that amount for one year at the rate of six per centum per annum would be $102, the amount of one of the checks, and that this is some evidence from which the jury may infer that the check was in payment of interest due by plaintiff on his said note. This is speculative—and insufficient. And it is fair to state that plaintiff testified, without objection, that he paid the Pritchard note, "made all the payments of both principal and interest, but not direct to Mr. Pritchard."

11th Issue: As to indebtedness of plaintiff on account of services of Dr. E. W. Lister as his managing agent, there is no evidence from which the jury could infer that anything he did in looking after farms of plaintiff was for or in expectation of pay, or how much such services as he rendered were worth. On the other hand, plaintiff testified, without objection, that "Dr. Elisha Lister looked after some of my farms for

me in Pasquotank County sometimes. They were rented out to tenants and sometimes Dr. Elisha arranged for the management of those farms in my behalf. I did not pay Dr. Elisha Lister any money for these services and he never presented me a bill for anything. That was a proposition between us. We settled that together ourselves . . . I don't know what he did about looking after the work going on on the farm during the year . . . he had been looking after the farm during the growing of the crops and would tell me about it, and it was a pleasure for him to do that . . . My brother never charged me anything for looking after the farms. I never heard of there being any claim until after this suit was started."

Thus we find no error in the refusal of the court to submit the 9th, 10th and 11th issues tendered by defendants.

Other exceptive assignments have been given due consideration. In the judgment below, we find

No error.

BOARD OF SCHOOL TRUSTEES OF WASHINGTON CITY ADMINISTRATIVE UNIT v. J. S. BENNER, COUNTY ACCOUNTANT FOR BEAUFORT COUNTY.

(Filed 24 February, 1943.)

1. Schools §§ 4, 26½—

Public Laws 1923, ch. 136, sec. 178, providing per capita allotment of county school funds between special charter districts and all other schools of the county, is no longer applicable to the present type of school administration and is supplanted by the current law. School Machinery Acts 1935, 1937, 1939 and 1941. *Held:* It is the duty of the county treasurer to apportion all county-wide current expense school funds to county and city administrative units monthly and to remit the same on a per capita enrollment basis.

2. Schools §§ 24, 25—

The budgets of public school administrative units are not merely tentative, informative, advisory; when prepared and approved by the successive authorities to whose consideration they are referred, these budgets become, to all intents and purposes, appropriations from available funds to be applied to the objects specifically named.

3. Schools § 25—

When a public school administrative unit budget is perfected by approval, the power of the various authorities instigating, adopting and approving it is *functus officio*, and neither these officials, nor any others in their stead, are clothed with the power of budgetary control, which might be invoked to modify its terms.

4. Same—

The law provides a measure of review where disputes arise between the proponents of the budget and those called upon to adopt or approve it, respecting its adequacy in certain respects; and doubtless budgets which violate the terms of the law might, under proper conditions, be made the subject of court review.

APPEAL by defendant from *Parker, J.*, at December Term, 1942, of BEAUFORT.

This action was brought by the plaintiff against Benner, County Accountant for Beaufort County and *ex officio* Treasurer of said county, to compel a proper distribution between Washington City Administrative Unit and the County Administrative Unit of Beaufort County of the funds collected and budgeted for debt service in said county for the years 1941 and 1942.

After appropriate pleadings had been filed, the case came on for a hearing before Parker, J., at the December Term, 1942, of Beaufort Superior Court. By consent of parties, the controversy was heard by Judge Parker without the intervention of a jury.

From the stipulation of parties made in open court and the evidence offered, the following facts were found and incorporated in the judgment:

"1. Beaufort County is a political subdivision of the State of North Carolina. The public schools of the State within Beaufort County are administered by two administrative agencies: (a) Washington City Administrative Unit, which Unit comprises the City of Washington, N. C., Washington Township, and a part of Long Acres Township; and (b) Beaufort County Board of Education. The school affairs within Beaufort County have been administered by those respective units since prior to 1933, and each unit has been recognized and dealt with by the State School Commission as a proper unit for the administration of school affairs within their respective territory.

"2. Beaufort County has no Treasurer. The defendant, J. S. Benner, is and for several years has been County Accountant of Beaufort County and *ex officio* performs the duties of County Treasurer.

"3. Each of said school administrative units has each year filed 'current expenses,' 'capital outlay,' and 'debt service' budgets on the forms furnished by the State School Commission, which budgets have been annually approved within the time required by law by the authorities charged with the duty of approving the same.

"4. The debt service budget for the Washington City Administrative Unit for the fiscal year beginning July 1, 1941, showed the service requirements of $29,305.00, and sources of income of $29,305.00, of which latter amount $8,297.63 was estimated to be paid from the County per capita levy for debt service.

"5. The State School Commission has certified that the enrollment for Beaufort County Administrative Unit is 5,628, and for Washington City Administrative Unit 3,243, the percentages being 63.44 and 36.56 for the fiscal year 1940-41. The per capita collection owing to the City Administrative Unit for said fiscal year, based on the foregoing percentages, was $8,999.62. There was paid to Washington City Administrative Unit for debt service during said year the sum of $7,393.20.

"6. The budget filed by the Washington City Administrative Unit for the fiscal year 1942-43, beginning July 1, 1942, shows debt service requirements of $28,355.00, and an estimated income of $28,355.00, of which income $4,900.00 is estimated to come from County per capita collections.

"7. During the months of July, August, September and October, 1942, the defendant, J. S. Benner, has received the sum of $7,674.11 applicable to the debt service requirements of the schools of Beaufort County, of which, based upon the per capita enrollments as certified by the State School Commission, there should have been paid to Washington City Administrative Unit $2,867.81. The defendant Benner has paid over to the said City Administrative Unit during said period the sum of $1,441.90.

"8. During the fiscal year 1941-42, Beaufort County School Administrative Unit did not expend for debt service requirements the amount estimated in the budget filed for that year and for that purpose, the amount actually expended per pupil by Beaufort County School Administrative Unit for debt service being less than the estimated expenditure and less than the actual expenditure for that purpose by Washington City Administrative Unit from county funds. After the budgets for the fiscal year, beginning July 1, 1942, had been filed and approved by the governing authorities, the defendant Benner undertook to charge against the funds to be received by Washington City Administrative Unit for debt service, the amount which it had expended for debt service during the past year on a per capita basis in excess of the amount expended for that purpose by Beaufort County Administrative Unit.

"9. During June, 1941, Washington City Administrative Unit and Beaufort County School Administrative Unit filed current expense budgets and capital outlay budgets, which were duly approved by the governing authorities.

"10. The defendant Benner, during the fiscal year 1941-42, apportioned monthly the current expense funds to County and City Administrative Units, based on enrollment as certified by the State School Commission. The City Administrative Unit actually expended more for

current expense per pupil than was expended during said year by the County per pupil.

"11. In June, 1942, each School Administrative Unit filed current expense and capital outlay budgets on forms prescribed by the State School Commission, which budgets were duly approved by the governing authorities as required by law, and has certified for the fiscal year 1941-42 the County's enrollment was 6,401 and the City's 3,222, and the respective percentages were 62.63 and 37.37.

"12. During the months of July, August, September and October, 1942, the defendant Benner has received for the current expenses of the schools of Beaufort County the sum of $9,606.86, of which based on the enrollment as certified by the State School Commission $3,590.07 was applicable to the current expenses of the schools of Washington City Administrative Unit. During said time he has only paid over to the said Washington City Administrative Unit for current expenses the sum of $960.97, contending that as the County expenditure per pupil during 1941-42 was less than the City Administrative Unit expenditure, the excess of such expenditure should be deducted from the amounts to be received by the City Administrative Unit during the fiscal year 1942-43.

"13. The defendant Benner has in hand the sum of $2,629.10, which with the amount heretofore paid would make the amount which should have been paid to the City Administrative Unit, if the Court is of the opinion that the deduction was improper, and is prepared to pay over the funds so withheld, if such withholding is not required by law."

The contentions of the parties are thus stated in the judgment:

"Plaintiff contends that under the School Machinery Act that 'all county-wide current expense school funds shall be apportioned to county and city administrative units monthly' and if the County Administrative Unit spends less per pupil than the amount estimated in its budget, that such excess expenditure within the budget by the City Administrative Unit cannot be deducted from the budget estimates for the next fiscal year. Defendant Benner contends that while he is required to distribute the funds monthly as collected, if at the end of the year the City has expended more per capita than the County has expended per capita, such excess expenditure shall be deducted or charged to estimated income from the City Unit during the next following year."

Upon the foregoing findings of fact, His Honor rendered the following judgment:

"1. It is the duty of the defendant, J. S. Benner, to pay to Washington City Administrative Unit monthly, as funds are collected for debt service for schools, its percentage of said funds as certified by the State School Commission up to, but not in excess of, its budget requirements as shown by its budget. The defendant Benner is directed to pay over

to the Washington City Administrative Unit the sum of $1,425.91, which, with the amount heretofore paid over, will give to the said City Administrative Unit its per capita collections for debt service for the months of July, August, September and October, 1942, and he is directed to continue to pay to the City Administrative Unit its proper percentage of all funds collected for debt service at the end of each month until he has paid to the said City Administrative Unit its debt service requirements as shown by its budget. If there be collected for debt service on a per capita basis an excess above the budget requirements of the said City Administrative Unit, the defendant Benner will hold the same as a trust fund, applicable to the debt service requirements for the next fiscal year.

"2. The defendant Benner is directed to forthwith pay to Washington City Administrative Unit the sum of $2,629.10 for current expenses of said schools, which with the sum of $960.97 heretofore paid to said City Administrative Unit will represent its per capita of the current expense funds collected by the defendant Benner during the months of July, August, September and October, 1942, and he will forthwith pay to the said City Administrative Unit its per capita of the current expense funds collected for the month of November as determined by the school enrollment certified by the State School Commission. He will hereafter continue to pay to the Washington City Administrative Unit during this fiscal year 37.37% of all current expense school funds collected by him, said payments to be made at the end of each month for the collections made during said month, and said payments will continue to be made even though they may exceed the estimated revenue shown in the budget of Washington School Administrative Unit as income for said purpose, but the said City Administrative Unit will not expend said funds beyond its budget estimates, except as may be authorized or provided by law.

R. HUNT PARKER,
Judge Presiding."

The defendant objected and excepted to the judgment, and appealed, assigning error.

Rodman & Rodman for plaintiff, appellee.

E. A. Daniel for defendant, appellant.

SEAWELL, J. The defendant does not question that the budgets with which this review is concerned were made and approved in strict conformity with the law. He does challenge their conclusiveness as instruments for the control of expenditures referred to their authority. Under the circumstances of this case, it is argued that the budget must yield to what defense counsel regards as a superior principle of law: The

"equality" and "equity" which would confine disbursements for current expense within the city administrative unit to the per capita outlay experienced in the county administrative unit.

As far as the argument discloses, the defendant bases his action in withholding from the plaintiff the funds allocated in the 1942-43 budget almost altogether on chapter 136, section 178, Public Laws of 1923, which he quotes as follows:

"The County Board of Education shall allow for current expense, except as otherwise provided herein, the same per capita amount per pupil enrolled for the previous school year to the special charter districts that is allowed to all other schools of the County." . . . "The County Board of Education shall allow for capital outlay the same per capita amount per pupil enrolled for the previous school year to the special charter district that is allowed to all other schools." . . . "Said Board shall allow for the debt service fund the same per capita amount per pupil enrolled for the previous school year to the special charter district and districts voting bonds or borrowing from the County Board of Education for said building purposes that is allowed to all other schools of the County: provided, the amount allowed for any year shall not exceed the actual debt service need of said school district in any year."

To determine what parts of the 1923 School Code now stand unrepealed would doubtless require expert and studious attention, but the part of the statute quoted—if it could in any way affect the issue raised here, which is not conceded—is obviously inapplicable to the present type of school administration and is supplanted by the provisions of the current law. In 1923, and for many years afterward, the basic support of the six months school term came from county taxation—largely from property taxes, supplemented by a State-provided equalization fund. The special charter districts were not strictly regarded as part of the public school system—*Frazier v. Commissioners,* 194 N. C., 49, 38 S. E., 433—but were included in the fiat of chapter 562, Public Laws of 1933, section 4, which abolished them along with all other districts of whatsoever type for purposes of administration (*Bridges v. Charlotte,* 221 N. C., 472, 476, 20 S. E. [2d], 825), and the present type of administration was substituted. However, the principle upon which county-wide taxes were apportioned under the earlier law is fundamentally just and is preserved in the current School Machinery Act, which, after successive amendments (see Public Laws of 1935, 1937, 1939 and 1941), reads as follows:

"All county-wide current expense school funds shall be apportioned to County and City Administrative Units monthly and it shall be the duty of the County Treasurer to remit such funds monthly as collected to each Administrative Unit located in said county on a per capita enrollment

basis. County-wide expense funds shall include all funds for current expenses levied by the Board of County Commissioners in any county to cover items for current expense purposes and including also all fines, forfeitures, penalties, poll and dog tax and funds for vocational subjects. All county-wide debt service funds shall be apportioned to County and City Administrative Units at the time of collection and when available shall be expended in the same manner as are county-wide current expense school funds."

The budget, an indispensable device where governmental agencies are required to estimate the needs for public expenditure and make funds available for the objects of support, has, we think, a more important function, and a more definite authority, in financial control than the defense concedes it to have. The budgets under attack are not merely tentative, informative, advisory; when prepared and approved by the successive authorities to whose consideration they are referred, the budgets become to all intents and purposes appropriations from available funds to be applied to the objects specifically named. The "equities" and "equalities" of distribution—which the defendant strongly insists should be preserved—are determined in that forum and at that time—under legal procedure. Upon the finality of that determination, the law sets its seal and predicates the conduct of further administration, prescribing duties which are definite, ministerial and mandatory. When the budget is perfected by approval, the power of the various authorities instigating, adopting and approving it is *functus officio*—it is a task performed—and neither these officials, nor any others in their stead, are clothed with the power of budgetary control, which might be invoked to modify its terms. The budget is based on reasonably predictable factors and it has not been thought necessary in the course of administration to provide further niceties of adjustment, except that the law itself in particulars now under consideration provides that excesses over the budgetary needs shall be charged against the allotment of the succeeding year, which in itself negatives the theory advanced by the defendant.

The law elsewhere provides a measure of review where disputes have arisen between the proponents of the budget and those called upon to adopt or approve it, respecting its adequacy in certain respects; and doubtless budgets which violate the terms of the law might, under proper conditions, be made the subject of court review. But that subject is foreign to the issue in this case.

Certainly, with respect to the issue here, whether we refer decision to the authority of the budget or to the positive terms of the law, there could be no ambiguity. Under the statute above quoted, it became the duty of the defendant to apportion all county-wide current expense school

funds to the county and city administrative units monthly and to remit the same on a per capita enrollment basis.

It is not always wise for the Court to attempt a justification of a law which is clearly within the legislative privilege. It must be observed, however, that the theory of the defendant, if adopted and put into execution, would cause the utmost confusion and result in the very injustice which he seeks to avoid. The indebtedness in the Washington City Administrative Unit was incurred largely in the support of the six months school term—a duty recognized as that of the State and vicariously performed by the county. In a great many taxing districts, similar indebtedness has been taken over by the county upon that principle. *Hickory v. Catawba County,* 206 N. C., 165, 173 S. E., 56; *Reeves v. Board of Education,* 204 N. C., 74, 167 S. E., 454, where pertinent statutes are discussed.

The Washington City Administrative Unit cannot, under the law, be penalized by the withdrawal or withholding of its quota of county-wide taxes available for that purpose while the indebtedness is still a burden of that area.

The judgment is

Affirmed.

J. MILTON CARTWRIGHT, CO-EXECUTOR OF MISS SARAH E. ELLIOTT, DECEASED, v. W. B. COPPERSMITH, SR., AND WIFE, LIZZIE COPPERSMITH (ORIGINAL PARTIES DEFENDANT) AND LYDIA MAE WHITEHURST (ADDITIONAL PARTY DEFENDANT).

(Filed 24 February, 1943.)

1. Bills and Notes § 7a—

Where a negotiable instrument is payable to order, its transfer from one person to another is by endorsement, completed by delivery, actual or constructive. C. S., 3010.

2. Bills and Notes §§ 7a, 25—

The burden of proof is upon one claiming a negotiable instrument, payable to order, to show not only an endorsement by the payee, but also that the intention to give or assign such instrument to claimant was completed by delivery, actual or constructive.

3. Same—

To constitute delivery of a negotiable instrument there must be a parting with the possession and with power and control over it by the maker or endorser for the benefit of the payee or endorsee; however, an actual delivery is not essential, and a constructive delivery will be held sufficient if made with the intention of transferring the title, but there must be some unequivocal act, more than the mere expression of an intention or

desire. *Held:* A special endorsement by a payee is insufficient where payee retained possession, without evidence of a delivery or intention to part with control of the instrument.

4. Evidence § 32—

The restriction upon the introduction of testimony in the trial of an action, contained in C. S., 1795, refers by its express terms to a person who is a party to the action, or interested in the event, and prohibits his examination as a witness in his own behalf, or in behalf of a party succeeding to his title or interest, against a deceased person, concerning a personal transaction or communication between him and the deceased.

APPEAL by defendant, Lydia Mae Whitehurst, from *Hamilton, Special Judge,* at October Term, 1942, of PASQUOTANK. No error.

This was an action instituted by plaintiff Cartwright, as executor of the estate of Sarah E. Elliott, to recover of defendants, W. B. Coppersmith, Sr., and wife, Lizzie Coppersmith, the sum of $2,500 evidenced by four notes executed by these defendants to Sarah E. Elliott in 1935 and 1936. In the complaint recovery of the amount due on the notes, together with interest and costs, was prayed. The defendants filed answer admitting the execution of the notes sued on and their liability thereon, but denied the notes were the property of the estate of Sarah E. Elliott, and alleged the notes in question were the sole property of Lydia Mae Whitehurst. They asked that she be made a party. Thereafter Lydia Mae Whitehurst, having been made party, filed separate answer, with other counsel, also admitting the execution by defendants Coppersmith of the notes sued on, and alleging that she was the sole owner of the notes by virtue of endorsement and delivery of the notes to her by Sarah E. Elliott in her lifetime. She prayed that she be adjudged owner of the notes sued on, and that she recover her costs in this behalf expended.

It was admitted that the balance due on the notes was $2,500 with interest from January 1, 1939. Mrs. Lizzie Coppersmith, a defendant and one of the makers of the notes, having died, W. B. Coppersmith, Sr., qualified as her administrator. In response to issues submitted, the jury found that the notes belonged to the estate of Sarah E. Elliott, and that the defendants Coppersmith were indebted to said estate in the sum due on the notes. Judgment on the verdict was rendered that plaintiff recover of defendants Coppersmith the amount so determined, together with the costs of action.

The defendant, Mrs. Lydia Mae Whitehurst, appealed.

J. W. Jennette and McMullan & McMullan for plaintiff, appellee.

W. I. Halstead for defendant, appellant.

DEVIN, J. The appellant, Mrs. Whitehurst, assigns error in the ruling of the court below in the exclusion of portions of the testimony of defendant W. B. Coppersmith, Sr. By this witness it was sought to prove certain personal transactions and communications between him and the deceased Sarah E. Elliott. Upon objection this testimony was excluded by the court on the ground that it was rendered incompetent by C. S., 1795.

While this statute provides specifically that "a party or person interested in the event" shall not be examined as a witness in his own behalf or interest, against the executor of a deceased person, concerning a personal transaction or communication with the deceased, it is urged that this witness, though a party to the action, was not interested in the event. Coppersmith admitted that he owed the notes, was able to pay them, and was indifferent to whom payment should be adjudged.

In the clear and comprehensive analysis of this statute by *Justice Clark,* in *Bunn v. Todd,* 107 N. C., 266, 11 S. E., 1043, parties and persons interested in the event of the action are placed in separate classifications. This was also the holding in *Wilson v. Featherstone,* 122 N. C., 747, 30 S. E., 325, where this categorical expression appears: "Rankin is a party and incompetent"; and in *Benedict v. Jones,* 129 N. C., 475, 40 S. E., 223, it was said, "It is immaterial whether he was or not interested in the land mortgaged. He is a 'party to the action' and is excluded under the very terms of the section." In *Wilder v. Medlin,* 215 N. C., 542, 2 S. E. (2d), 549, the Court used this language: "The restriction upon the introduction of testimony in the trial of an action contained in C. S., 1795, refers by its express terms to a person who is a party to the action (*Benedict v. Jones,* 129 N. C., 475, 40 S. E., 223; *Grier v. Cagle,* 87 N. C., 377), or interested in the event, and prohibits his examination as a witness in his own behalf, against the administrator of a deceased person, concerning a personal transaction or communication between him and the deceased. *Bunn v. Todd,* 107 N. C., 266, 11 S. E., 1043; *Bank v. Wysong & Miles Co.,* 177 N. C., 284, 98 S. E., 769." In *Johnson v. Cameron,* 136 N. C., 243, 48 S. E., 640, the language is "The Code, sec. 590 (C. S., 1795), disqualifies a party to an action, or one interested in the event thereof." See also *Ballard v. Ballard,* 75 N. C., 190; *Brown v. Adams,* 174 N. C., 490, 93 S. E., 989.

However, in *Allen v. Allen,* 213 N. C., 264, 195 S. E., 801, where T. W. Allen and wife pooled their respective lands and by deeds divided them among their children, when an action arose between certain of the children, the testimony of J. N. Davis, the husband of one of the daughters, as to communications with T. W. Allen, deceased at time of trial, was held not incompetent under C. S., 1795. Said *Barnhill, J.,* speaking for the Court, "A husband is not precluded from testifying in behalf of

his wife in a lawsuit in which the provisions of said statute may be invoked. It may be noted, however, that this is not a suit between the estate of T. W. Allen and the wife of J. N. Davis." J. N. Davis was a nominal party defendant in that case.

In *Coward v. Coward,* 216 N. C., 506, 5 S. E. (2d), 537, Wm. Coward and his wife entered into an agreement to pool their lands for division among their children. An action in relation thereto subsequently arose between the children. At that time the wife of Wm. Coward was dead, as was also one of the sons whose representatives were parties defendant. Wm. Coward was a party plaintiff. In an opinion by *Schenck, J.,* the following language was used: "The assignments of error relating to the testimony of William Coward, one of the plaintiffs, to the effect that the said Wm. Coward and his wife, Mary Argent Coward, had entered into an agreement to pool their lands and divide them among their children upon the ground that Wm. Coward was 'a party interested in the event' and was being examined as a witness against the survivors of a deceased person in violation of C. S., 1795, are untenable, for the reason that it appears from the pleadings and from the evidence that the estate of Wm. Coward in the lands involved would be the same irrespective of which parties prevailed in this action, his interest being a life estate as tenant by the curtesy in any event. William Coward had no interest in the event, that is, he had no legal or pecuniary interest, such as is required by the statute, in the result of the litigation."

It is not understood that the Court intended by the decision on the facts presented in the case last cited to establish the interpretation of the statute to the effect that a necessary party to the action would be rendered competent to testify to a personal transaction with the deceased if he was not interested in the event of action. The question whether a mere nominal party, who has no interest in the event of the action, is disqualified is not necessarily presented on the record in this case. It was contended with some force that W. B. Coppersmith, Sr., was not only a necessary party but that he had a direct pecuniary interest in the event of the action, and was thus testifying in his own behalf or interest. The purpose of the plaintiff's action was to recover from him $2,500, and also the costs of the action, while the interplea of Mrs. Whitehurst prayed only that she be adjudged owner of the notes, and that she recover her costs. Furthermore, it appears that defendant Coppersmith retained counsel, actively defended the action, and sought to defeat plaintiff's recovery. Hence, it was argued that under any construction of the statute he was rendered incompetent to testify to a personal transaction or communication with the deceased.

However, we find it unnecessary to determine the correctness of the ruling of the court below in sustaining the objection to the proffered

testimony of W. B. Coppersmith, for we think the testimony which would have been given by this witness, if allowed, was insufficient to show a valid transfer of the title to the notes in question from Sarah E. Elliott to Mrs. Whitehurst, since there was no evidence of delivery of the notes, actual or constructive. Whether the transaction which constituted the basis of the appellant's case be regarded as the assignment of a negotiable instrument (C. S., 3010), or a gift *inter vivos,* in order to vest the title to the notes in Mrs. Whitehurst it must have been completed by delivery, actual or constructive, and the burden was upon her to show this.

Mr. Coppersmith, in the absence of the jury, was examined as to the circumstances of the transaction and communications between him and the deceased. Upon this evidence alone Mrs. Whitehurst relied to make out her case. The pertinent portions of the excluded testimony tended to show that while the witness was on a visit to Sarah E. Elliott, in 1937, she asked him to assign the Coppersmith notes to Mrs. Whitehurst. "She wanted her to have those notes after her death. The only thing she wanted was the interest as long as she lived, and she wanted me to pay the notes to Mrs. Whitehurst." Witness advised her the only way she could do that without making a will was to endorse the notes and make them payable to Mrs. Whitehurst. The notes were kept in an envelope in the possession of Sarah E. Elliott, and she went and got them and brought them to a little table in the room near the door. Not having a pen convenient, the witness wrote with pencil on each note, "Pay within note to Lydia Mae Whitehurst without recourse," and Sarah E. Elliott signed the endorsement on each note and retained possession of the notes. That was 10 July, 1937. Mrs. Whitehurst was there, standing in the door. Witness further stated that he paid the interest on the notes afterwards; that he saw the notes some six or twelve months before her death (in 1940) in possession of Sarah E. Elliott at her home, and the endorsements were still on them. Afterwards, he or his son paid the interest "in the office there," and when witness saw them the endorsements had been erased, but the notes showed dimly the endorsements and date. Witness did not make the erasures and did not know who did. Sarah E. Elliott never said anything to him about it.

The testimony of this witness was offered as "defendants' evidence," and was the only evidence offered by defendants. After defendants rested plaintiff Cartwright testified that he was one of the executors of Sarah E. Elliott, and that he first came into possession of these notes in November, 1939; that Sarah E. Elliott had possession of them before they came into his possession; that at the time the notes came into his possession there were no endorsements on them, but he could see that there had been endorsements thereon which had been erased; that he

did not erase the endorsements; that after the notes came into his possession he collected some interest from Mr. Coppersmith. Defendant Whitehurst moved to amend the prayer for relief in her pleading so as to ask for judgment against the makers of the notes for the amount thereof and for costs, but the record does not show that this motion was allowed.

The burden of proof was upon Mrs. Whitehurst to show not only the endorsement of the notes by Sarah E. Elliott, but also that the intention to give or assign them to her was completed by delivery, actual or constructive. In this we think she has failed, even if the entire evidence of Mr. Coppersmith had been admitted.

It is provided by C. S., 3010, that if a negotiable instrument is made payable to order (as were these notes) the transfer from one person to another is "by the endorsement of the holder, and completed by delivery." To constitute delivery there must be a parting with the possession and with power and control over it by the maker or endorser for the benefit of the payee or endorsee. To constitute delivery it must be put out of possession of the endorser. *Barnes v. Aycock,* 219 N. C., 360, 13 S. E. (2d), 611. An actual delivery, however, is not essential, and a constructive delivery will be held sufficient if made with the intention of transferring the title, but there must be some unequivocal act, more than the mere expression of an intention or desire.

The general rule is stated in 7 Am. Jur., p. 809, as follows: "While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet, to constitute a delivery, it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it and intentionally placing it under the power of the payee or of some third person for his use."

In *Newman v. Bost,* 122 N. C., 524, 29 S. E., 848, involving the validity of a gift, we find this application of the rule: "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." An intention to give is not a gift. Without delivery the gift is but a promise to give, and being without consideration is not obligatory, and may be revoked at will. *Adams v. Hayes,* 24 N. C., 361 (368).

The most recent case in which this subject has been considered by this Court is *Bynum v. Bank,* 221 N. C., 101, 19 S. E. (2d), 121, where, in a well considered opinion by *Denny, J.,* it was held that the delivery to the donee of the keys to a lock box with the statement by the donor, "Everything in that box is yours," was sufficient to go to the jury on the

question of delivery of the choses in action contained in the box. The distinction between that case and the case at bar is apparent.

It is true the fact of retention of possession by the endorser is not always fatal to a claim of constructive delivery. It is said in 10 C. J. S., p. 513: "There may be a delivery notwithstanding the maker keeps the note in his possession, where it is apparent that he intended to hold it for the benefit and as the agent of the payee." The same principle was stated by *Justice Seawell* in *Everett v. Mortgage Co.,* 214 N. C., 778, 1 S. E. (2d), 109.

But here the proffered testimony falls short of coming within that principle. According to the evidence no word was ever spoken by Sarah E. Elliott to Mrs. Whitehurst. The notes were retained in possession by the endorser, after signing the endorsement, without any declaration of agency or purpose other than that she wished the endorsee to have them after her death. The notes continued in her exclusive possession until some two years later when they came into the possession of J. M. Cartwright for her, with the endorsements erased. There was no parting of control over them either to the endorsee or to any other person for her benefit. The expressed intention did not contemplate a present transfer but a prospective donation. The intention not having been completed by delivery, title did not vest in the endorsee.

The defendant, Mrs. Whitehurst, noted exception to certain portions of the judge's charge to the jury. While we see nothing in the instructions themselves that should be held for error or prejudicial to this defendant, in the view we take of the case this becomes immaterial, since there was no evidence of delivery of the notes to the defendant Whitehurst so as to transfer the title to the notes to her.

The exceptions to the testimony of J. M. Cartwright cannot be sustained. There was nothing to render him incompetent to testify to facts within his personal knowledge. No self-serving or other declaration of the decedent was offered. Nor did this testimony open the door for the admission of the testimony of W. B. Coppersmith, as this was offered subsequent to the testimony of Coppersmith. Even if this could be held, under the rule in *Walston v. Coppersmith,* 197 N. C., 407, 149 S. E., 381, sufficient to let down the bars, Coppersmith's testimony was not thereafter reoffered.

After careful consideration of the entire case, we reach the conclusion that the result below must be upheld.

No error.

SUSIE M. SAMPLE, ADMINISTRATRIX OF ROBERT SAMPLE,
v. CARLEY I. SPENCER.

(Filed 24 February, 1943.)

1. Negligence § 13a: Automobiles § 18c—

Negligence of the driver of a motor vehicle will not be imputed to a guest passenger having no interest in the car and no control over the driver.

2. Negligence § 6: Automobiles § 18d—

In an action for damages on account of the alleged negligent killing of a guest passenger in an automobile accident, where there is evidence of negligence on the part of the driver of the car in which the guest was riding and of defendant, whether the negligence of the defendant concurred with the negligence of the driver of the car and constituted the efficient cause of the injury and death is a question for the jury.

3. Same—

If the negligence of the defendant, in an automobile accident, contributed to the injury and death of plaintiff's intestate as one of the proximate causes thereof, the defendant would be liable notwithstanding the negligence of the driver of the car in which plaintiff's intestate was riding as a guest.

APPEAL by plaintiff from *Parker, J.,* at September Term, 1942, of PASQUOTANK.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendant.

Plaintiff's intestate, Robert Sample, met his death on 8 March, 1941, while riding as a guest in a Dodge Sedan, owned and operated by the intestate's uncle, Charles Sample. On the above date, Charles Sample and his nephew, Robert Sample, left Elizabeth City shortly before 5:00 o'clock a.m., for Norfolk, Va., where both were employed. After they had proceeded a distance of some 33 miles, the car in which they were riding collided with the rear end of a truck loaded with lumber, parked on the paved portion of the highway and headed in the same direction the automobile was being driven.

The truck was owned by the defendant, Carley I. Spencer, and was being operated by Woodrow Brickhouse and a helper, Herbert Brickhouse. The collision occurred near Great Bridge, in the State of Virginia. The truck of the defendant had hit and killed a mule a few minutes before the automobile collision. The mule was lying across the left side of the road with his nose about six inches across the middle line of the highway.

The accident occurred around 10 minutes to 6:00 o'clock. The driver of the automobile testified: "As I came up the road and neared the home of Jesse Warren, the first thing I noticed on the road was the lights of an automobile parked off on my left side, on the dirt, on the shoulder, with the lights in my eyes. I slowed up and just as I got right to the lights I discovered something in the road, and I cut my car short to the right. A mule was in the road with his head across the black line, and just as I shot my car to the right I saw the truck there in about 15 feet of me. I put on my brakes but I hit the truck. I hit the steel bolster that comes out on the left of the truck. My car was torn up, the right side was completely cut off, the right front fender, the top of it was torn up all the way back. The bolster killed Robert Sample instantly. He was riding on the front seat on the right side of the car. . . . I was 15 to 18 feet from the truck before I saw it. When I saw it, I put my foot on the brake and cut it right short back to the left to try to avoid hitting it. The truck and trailer were parked on the hard surface about 18 inches from the right wheel to the edge of the concrete. There were 18 inches of concrete between the right side of the truck and the shoulder. The truck was heading in the same direction in which I was going. It was not moving. There was no one on the truck in the cab or any other part of the truck or trailer. There were no lights on the truck or trailer. No, sir. There were no flares out on the road. The condition of the shoulder on the right of the highway right off against the spot where this truck was parked was sandy. I would call them good shoulders. It was around 11 feet wide. Yes, sir, a vehicle could have driven off on that shoulder. . . . It was misting rain that morning, foggy. It had not quit raining—just misting and rain enough to run the windshield wiper. . . . I was driving about 40 miles per hour."

The defendant's witness, Woodrow Brickhouse, testified that the shoulders of the road were soft and muddy, and that he could not park his truck off of the hard surface road. That he parked it on the right side of the road within 3 or 4 inches of the edge of the pavement. Then he flagged down a passing motorist and got him to turn his automobile around and shine his "ground lights" on the mule in the road. That there were six red lights on the rear of the truck, all of which were burning. That one flare had been placed near the mule's nose and he was taking the other one further down the road when the Sample car approached. He tried to flag the car by waving the flare, but the driver of the car did not slow up and ran his car into the rear of the truck. "I would say he was running at least 70 miles an hour."

J. A. Barnett testified, he saw the collision from the porch of his home, a distance of about 150 feet away, and that in his opinion the Sample

car approached from the south at a speed not less than 65 to 70 miles an hour, and passed the mule at a speed of 40 to 45 miles an hour. He further testified that one flare was placed on the road before the Sample car approached and that a man tried to flag the car with a flare in his hand.

Frank Katzain, witness for defendant, testified: "Before I got to the place of the accident I saw red lights on the back of the trailer. I saw them first just a little before I got around the curve. I never counted the lights but there was a bunch of them. As I approached the truck a man about 5 yards back of the truck waved me down. The mule was a right good way from the truck. The man asked me to turn my car around, and I went between the mule and the truck and turned the car around and put my parking lights on the mule, and we got busy there and lit all the flares. I drove to within a yard or a yard and a half of the mule. My lights were deflected down, and I was there when Mr. Sample came up. I would say I had been there no longer than five minutes when I saw the Sample car approaching. My lights were then as I have described them. I first saw his car when it came around the curve. The flares had been set then. One was in front of the truck, one was right at the mule's nose, and Mr. Brickhouse had one in his hand waving it. He was a right good ways south of the mule; he had to jump on my right side to get out of the way of the car. The car did not stop; I do not think it slowed down, but I could not tell you."

Charles H. Harris testified for plaintiff that he heard Mr. Katzain make the statement the day after the collision occurred that: "There were not lights on the truck and trailer, that it was on the right-hand side of the road and the dead mule was on the left-hand side of the road when this car came up into the back of it."

There is a sharp conflict in the evidence as to whether or not any flares had been placed in the road at the time of the accident, and also as to whether or not red lights were burning on the rear of the truck, as required by the Virginia statutes. Likewise, there is a conflict in the evidence as to the distance the truck was parked from the carcass of the mule. A witness for the defendant testified the distance was 39 paces. Defendant's evidence also is to the effect that only one flare had been placed in the road in the direction of approaching traffic, and that it had been placed within a few inches of the mule's nose. The other flare had not been placed but was being waved by the driver of the truck while proceeding in the direction of the approaching car. According to defendant's evidence, no flare or other signal had been placed in the road between the carcass of the mule and the parked truck, as required by a Virginia statute, the pertinent part of which is as follows: "Flares and other signals: Whenever any bus or truck is disabled and stops upon

any portion of the traveled portion of any highway in this State, . . . at any time during which lights are required upon motor vehicles by Section 94 of this Act, the operator of such bus or truck shall place, or cause to be placed, on the highway three flares or torches of a type approved by the director. One of said flares shall be placed in the center lane of traffic occupied by the disabled bus or truck, and not less than 40 paces therefrom in the direction of traffic approaching in that lane, nor not less than 40 paces from such bus or truck in the opposite direction, and one at the traffic side of such bus or truck, not closer than 10 feet from the front or rear thereof." Section 86 (a) of the Motor Vehicle Code of Virginia.

The usual issues were submitted. The jury answered the issue of negligence in the negative, and judgment was entered that the plaintiff recover nothing. Plaintiff appeals and assigns error.

M. B. Simpson and John H. Hall for plaintiff.
McMullan & McMullan for defendant.

DENNY, J. Plaintiff's intestate was a guest passenger and according to the evidence had no interest in the car nor control over the driver. Therefore, under the decisions applicable to this case, the negligence of the driver will not be imputed to plaintiff's intestate. *Albritton v. Hill,* 190 N. C., 429, 130 S. E., 5; *Gaines v. Campbell,* 159 Va., 504, 166 S. E., 704.

There is evidence of negligence on the part of the driver of the car and of the defendant. Whether the negligence of the defendant concurred with the negligence of the driver of the car, and constituted the efficient cause of the injury to plaintiff's intestate, is a question for the jury.

The plaintiff, in apt time, excepted to the charge, in that the court failed to declare and explain the law arising upon the evidence as required by C. S., 564, especially in that the court did not declare and explain the doctrine of concurrent negligence and apply such law to the facts in this case.

The court below, in its charge, fully instructed the jury upon the law and the evidence in respect to plaintiff's contention that the negligence of the defendant was the sole proximate cause of the death of plaintiff's intestate. It likewise fully instructed the jury upon the contention of the defendant that the negligence of the driver of the car was the sole proximate cause of the death of plaintiff's intestate. However, the court did not charge the jury that if the negligence of the defendant contributed to the injury and death of plaintiff's intestate as one of the proximate causes thereof the defendant would be liable notwithstanding the negligence of the driver of the car. The exception is well taken

and must be sustained. This view is in accord with the opinion and authorities cited in the case of *Harvell v. Wilmington,* 214 N. C., 608, 200 S. E., 367, where the factual situation was similar to that of the instant case. In the above case the Court said: "Where, in this type of cases, there is evidence of negligence on the part of the defendant and likewise of negligence of a third party, which negligence is not attributable to the plaintiff, the defendant is liable if its negligent act constituted one of two proximate causes of the injury. If the defendant's negligence contributed to plaintiff's injury as one of the proximate causes thereof the defendant is liable notwithstanding the negligence of the third party. *Albritton v. Hill, supra.* If the negligence of the owner and driver of the car was the sole and proximate cause of plaintiff's injury the defendant would not be liable; for, in that event, the defendant's negligence would not have been one of the proximate causes of the plaintiff's injury. *Bagwell v. R. R.,* 167 N. C., 615, 83 S. E., 814; *Evans v. Construction Co.,* 194 N. C., 31, 138 S. E., 411. If, however, the negligence of the city concurring with the negligence of the third party constituted the proximate cause of plaintiff's injury, it would be liable, because the defendant cannot be excused from liability unless the total causal negligence or proximate cause be attributable to another or others. When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, it is liable. *Evans v. Construction Co., supra; Wood v. Public-Service Corporation,* 174 N. C., 697, and cases there cited; *Albritton v. Hill, supra; Hanes v. Utilities Co.,* 191 N. C., 13, 131 S. E., 402. The law of concurrent negligence, as thus stated, is applicable to the conflicting evidence in this case. The plaintiff has a right to rely thereon, and it was the duty of the court to apply this doctrine of the law to the evidence, and to declare and explain the law of concurrent negligence as it applied to the evidence without any special prayer. It is part of the law of the case. The fact that the jury found by its verdict that the plaintiff was not injured by the negligence of the defendant city does not render the failure of the court to charge on the doctrine of concurrent negligence immaterial or harmless. The jury was given the choice of finding either that the negligence of the city, if they found such existed, was the sole proximate cause of plaintiff's injury, or that the negligence of the driver, if such was established, was the sole proximate cause. The jury was not given an opportunity to consider the evidence under the law which permitted it to find that the negligence, if any, of the city was only one of the proximate causes of plaintiff's injury and that such negligence, concurring with that of the driver, constituted the efficient proximate cause of plaintiff's injury. The evidence in this case is such as entitles the plaintiff to have this view of the law stated and explained and applied to the evidence by the judge in the trial of his cause."

We are advertent to the case of *Smith v. Bonney,* 215 N. C., 183, 1 S. E. (2d), 371, where this Court said: "The case was tried upon the theory that the negligence of the defendant was the proximate cause of the death of the intestate, the allegation of the complaint being that the automobile of Charlie Smith, in which the intestate was a passenger, was being operated in a careful and lawful manner, and that the collision was caused by the negligent operation of the defendant's automobile. Hence, the issue of the concurrent negligence of Charlie Smith and of the defendant was not raised, but only the issue of the negligence of the defendant." However, in the instant case the issue was raised in the trial below by the defendant, and having been raised, the plaintiff was entitled to have the court in its charge to the jury explain the law under the doctrine of concurrent negligence and apply such law to the facts in the case.

We deem it unnecessary to discuss the other exceptions, since they may not arise on a new trial.

New trial.

W. C. PITT AND JULIET C. MARROW, PARTNERS, TRADING AS MARROW-PITT HARDWARE COMPANY, v. W. L. SPEIGHT AND WIFE, BINGHAM M. SPEIGHT.

(Filed 24 February, 1943.)

1. Husband and Wife § 16—

A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven.

2. Same—

The law presumes that where improvements are made on the wife's land by the husband they are made as gifts to the wife by the husband.

3. Landlord and Tenant § 7—

In the absence of an 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, even though the improvements are such that they become a part of the freehold. Ordinarily, the creditors of the tenant have no more right to charge the land with the value of improvements than the tenant would have.

4. Husband and Wife §§ 16, 17—

Where a husband operates his wife's farm, as her tenant, and purchases merchandise and material used for improvements thereon, in an action to recover therefor brought against the husband and wife, based upon a verified, itemized statement of account, there was error in refusing the wife's motion for judgment of nonsuit.

PITT *v.* SPEIGHT.

APPEAL by the *feme* defendant Bingham M. Speight from *Williams, J.*, at October Term, 1942, of EDGECOMBE.

This is an action to recover the amount alleged to be due on an open account for goods and merchandise sold and delivered over the period from 27 August, 1936, to 18 October, 1941.

The plaintiffs allege and contend that the goods and merchandise were sold and delivered to the defendant W. L. Speight on account of himself and of his wife, Bingham M. Speight, for whom the said W. L. Speight was acting as agent in the purchase and procurement of the said goods and merchandise.

The defendant W. L. Speight answered and admitted the indebtedness by him for an agreed amount, but denied that he was acting as agent of his wife and codefendant Bingham M. Speight in the purchase and procurement of said goods and merchandise.

The defendant Bingham M. Speight filed separate answer and denied her indebtedness for the said goods and merchandise, alleging that they were sold and delivered solely to her husband and codefendant W. L. Speight, and that she had no legal interest therein or liability therefor.

The following issue was submitted to the jury and answered in the affirmative, to wit:

"Did the defendant, W. L. Speight, act as agent for his wife, Bingham M. Speight, in creating the indebtedness sued on in this action?"

From judgment against both parties for the amount agreed upon, the defendant Bingham M. Speight appealed, assigning as error the denial by the court of her motion for judgment as in case of nonsuit duly lodged when the plaintiffs had introduced their evidence and rested their case, and renewed when all the evidence was in. C. S., 567.

Henry C. Bourne for plaintiffs, appellees.

Gilliam & Bond for defendant Bingham M. Speight, appellant.

SCHENCK, J. The plaintiffs introduced what purported to be a verified itemized statement of account in accord with C. S., 1789. This document, in the absence of other evidence of agency between Bingham M. Speight and W. L. Speight, is not sufficient evidence against the *feme* defendant, the appellant Bingham M. Speight, to carry the case to the jury on the issue submitted, since it is captioned "Sold to Mr. W. L. Speight, New Bern, N. C., Account of Speight Farm," and the verification reads: ". . . that the attached statement of account against the Speight Farm is just and correct; that the goods and merchandise represented by the items therein contained were respectively sold and delivered as therein shown upon the dates therein set forth; . . . that the balance

thereof as shown by said account . . . is still justly due and owing to the said Marrow-Pitt Hardware Company."

It will be noted that the wording of the verification is that the "statement of account against the Speight Farm is just and correct" and that the articles therein itemized "were sold and delivered as therein shown on the dates therein set forth." No mention of the name of Bingham M. Speight is made anywhere in the account introduced. The most that the plaintiffs seem to contend that the statement of account tends to prove is that the articles itemized therein were actually "sold to W. L. Speight, New Bern, N. C., Account of Speight Farm." They do not contend in their brief that this verified itemized account makes out a *prima facie* case against the appellant Bingham M. Speight.

The contention of the plaintiffs is that the evidence tends to show that in the ordering of the articles set forth in the verified statement of account the defendant W. L. Speight was acting as the agent of his wife and codefendant, Bingham M. Speight, and that therefore the issue involving this agency was properly submitted to the jury.

There is evidence tending to show that defendant W. L. Speight lived in New Bern, N. C., with his wife and codefendant, Bingham M. Speight; that W. L. Speight ordered the articles itemized on the statement of account, and that said articles were delivered by the plaintiffs to the Speight Farm a short distance from Tarboro, N. C., which farm was owned by Bingham M. Speight.

There was no evidence offered by the plaintiffs that the defendant W. L. Speight was operating the Speight Farm for his wife, Bingham M. Speight, or that she knew what articles were being delivered at the farm; or that she had any legal interest in the fruits of such operation; or that any bills were ever rendered to her, or that she was ever notified by the plaintiffs that they were looking to her for payment of the articles ordered.

The evidence of the defendants, it is true, does show that the *feme* defendant Bingham M. Speight owned what was known as the Speight Farm, and that her husband and codefendant, W. L. Speight, leased the farm from her in consideration of the payment by him of $800.00 per year on a purchase price mortgage given by her on the farm, and of $200.00 annually upon the taxes thereon, and that any profit from the operation of the farm inured to the benefit of W. L. Speight, and any loss suffered was borne by him.

The plaintiffs do not contend that there was any evidence of express authority having been given to W. L. Speight by his wife, Bingham M. Speight, to make the purchase of the articles itemized, or that the articles were purchased under any express order from her. Their contention is that the purchases were made by W. L. Speight upon implied

authority from Bingham M. Speight, or that she is estopped to deny such implied authority. A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven. *Towles v. Fisher,* 77 N. C., 437. "It would seem, however, that no presumption arises by reason of the relationship that he is the agent of his wife. 1 A. & E., 958. The agency must be proven. Reinhardt on Agency, 51. 'The husband may act as agent of his wife, but in order to bind her he must previously be authorized to do so, or his act must with full knowledge be ratified.' *McLaren v. Hall,* 26 Iowa, 297. 'The wife may constitute the husband her agent, but to establish this the evidence must be clear and satisfactory and sufficiently strong to explain and remove the equivocal character in which she is placed by reason of her relation of wife.' *Rowell v. Klein,* 44 Ind., 290; 15 Am. Rep., 235." *Francis v. Reeves,* 137 N. C., 269, 49 S. E., 213. See also *Thompson v. Coats,* 174 N. C., 193, 93 S. E., 724, where there is a similarity of facts with the facts in the instant case, and the court quotes from *Branch v. Ward,* 114 N. C., 148, 19 S. E., 104, the following words: "Only positive and unequivocal assent of the wife to a disposition by her husband of crops raised on her land, and not mere silence, will estop her from asserting her title to the same."

The fact that there was evidence tending to show that a large majority of the material and labor included in the itemized statement of account went into the permanent improvement of the land, owned by the defendant Bingham M. Speight, does not help the plaintiffs' case, since the law presumes that where improvements are made on the wife's land by the husband they are made as gifts to the wife by the husband. *Kearney v. Vann,* 154 N. C., 311, 70 S. E., 747; *Nelson v. Nelson,* 176 N. C., 191, 96 S. E., 986.

To allow the plaintiffs in this action to recover of the *feme* defendant because she was the owner of the land and the land was improved by the material and labor furnished by them, would be to allow the creditors of the male defendant to recover where the male defendant himself could not recover. This is contrary to our decisions. *Pomeroy v. Lambeth,* 36 N. C., 65. The improvements placed upon the land of the wife by the husband is presumed to be a gift, for which the husband cannot recover, *Kearney v. Vann, supra;* and likewise, "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. . . . 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." *Barnhill, J.,*

in *Brown v. Ward,* 221 N. C., 344, 20 S. E. (2d), 324. Such being the law, the creditors of the husband, who was at most a lessee or tenant, cannot recover for the material and labor furnished by them to the husband, the lessee or tenant, to make such improvements, in the absence of any evidence of authorization of such improvements by the wife, the lessor or landlord.

For the reasons indicated, we are of the opinion, and so hold, that his Honor erred in denying the motion of the *feme* defendant for a judgment as in case of nonsuit as to her properly lodged and renewed under the provisions of C. S., 567. The judgment of the Superior Court, in so far as it relates to the *feme* defendant Bingham M. Speight is, therefore,

Reversed.

G. W. WILLIAMS v. H. A. COOPER AND WIFE, MRS. H. A. COOPER.

(Filed 24 February, 1943.)

1. Courts § 2a—

A motion to dismiss an action in a recorder's court, for want of jurisdiction of either the parties or the subject matter of the suit, challenges plaintiff's right to maintain his action in such court and defendants have the right to appeal from an order overruling same. An appeal being denied, petition for writ of *certiorari* is the proper remedy.

2. Appearance § 1—

When jurisdiction of the person is challenged for lack of legal service of summons, a motion to dismiss made on special appearance is ordinarily the proper method of presenting the question for decision.

3. Appearance § 2b—

A general appearance waives any defects in the jurisdiction of the court for want of a valid summons or proper service thereof.

4. Pleadings § 14—

Objection to the jurisdiction of the court over the subject matter of the action is presented by demurrer, C. S., 511, and a demurrer is a plea to the cause of action set out in the complaint.

5. Appearance § 2a—

A motion or demurrer which pertains to the merits of the cause or alleged deficiencies in the pleadings constitutes a general appearance and subjects the movant to the jurisdiction of the court. *Held:* An objection, that the court has no jurisdiction of the subject matter of the action, is taken to the merits and not merely to the jurisdiction over the person, and is in fact a general appearance which waives any defects in jurisdiction for want of proper service.

6. Courts § 7—

The recorder's court of the city of Reidsville has jurisdiction, concurrent with the Superior Court, in a civil action founded on a contract wherein the sum demanded does not exceed $1,500.00, under Public-Local Laws 1915, ch. 324, as amended by Public Laws 1931, ch. 24, and Public-Local Laws 1915, ch. 324, is not in violation of N. C. Constitution, Art. II, sec. 29.

7. Courts § 2a—

Where a preliminary question, such as jurisdiction, has been decided against movant by the Superior Court, on appeal or other review from an inferior court, the cause should be remanded to the inferior court for trial. *Held:* Trial *de novo* in the Superior Court means a new trial after final judgment in an inferior court.

APPEAL by defendants from *Gwyn, J.*, 28 December, 1942. From ROCKINGHAM. Affirmed.

Petition for *certiorari.*

On 16 October, 1942, plaintiff, a resident of Rockingham County, instituted this action in the recorder's court of Reidsville against the defendants, residents of Lee County, to recover an alleged balance of $260.02 due on a note in the sum of $600.00, executed by defendants in Guilford County, dated 16 October, 1931, and payable 16 October, 1932, to the North Carolina Industrial Bank of Greensboro. Plaintiff alleges that he acquired said note by purchase from the Commissioner of Banks acting as statutory receiver of the payee bank. Summons under seal was issued out of said recorder's court to the sheriff of Lee County and was served upon the defendants by him. Thereupon, defendants entered a special appearance and moved to dismiss the action for that the recorder's court of Reidsville Township was without jurisdiction of either the parties or the subject matter of the suit.

On 1 December, 1942, the judge of the recorder's court heard said motion, overruled same and ordered the defendants to file answer. The trial judge having denied defendants' right to appeal from his order dismissing the motion made on special appearance, on the grounds that such appeal was premature, the defendants applied by petition to the Superior Court for a writ of *certiorari.*

Thereafter, the parties entered into a written stipulation that the petition for *certiorari* should be submitted to Gwyn, J., resident judge and judge holding the courts of the 21st Judicial District, to determine the questions of law arising on said petition and to render judgment thereon, with authority on the part of the court to find the facts, if the finding of facts should become necessary. Pursuant to said stipulation the court considered the petition and concluded "that said recorder's

court has jurisdiction of the subject matter and the parties to this action." Judgment was entered sustaining the order of the recorder overruling and dismissing the special appearance made by the defendants. The cause was remanded to the recorder's court to the end that defendant may file answer and trial may be had on the issues thus raised. The defendants excepted and appealed.

Sharp & Sharp for plaintiff, appellee.
K. R. Hoyle for defendants, appellants.

BARNHILL, J. The parties agreed in the stipulation filed that the questions of law presented for decision by the Superior Court were: (1) Did the defendants have the right of immediate appeal to the Superior Court of Rockingham County upon the overruling of their special appearance and motion to dismiss without having first answered and before trial had in the recorder's court; and (2) if so, does the recorder's court of Reidsville Township have jurisdiction of the parties and the subject matter of this action either under general legislation or Public-Local Laws of North Carolina? Ch. 324, Public-Local Laws 1915; ch. 24, Public Laws 1931.

The motion or demurrer challenges the right of the plaintiff to maintain his action in the recorder's court of Reidsville. Defendants had the right to appeal from the order overruling the same. C. S., 509; C. S., 514; C. S., 638; *Jones v. Oil Co.*, 202 N. C., 328, 162 S. E., 741. McIntosh P. & P., 470. An appeal having been denied, petition for writ of *certiorari* was the proper remedy. *Pue v. Hood, Comr. of Banks, ante,* 310.

On the second question defendants deny jurisdiction either of the person or of the subject matter of the action.

The local court had jurisdiction of the person of the defendants for two reasons: (1) there was a valid service of summons; and (2) the defendants made general appearance.

The local court was authorized by the statute creating it to issue a summons running out of the county, and the issuance of the summons to another county addressed to the sheriff of that county is authorized by statute, C. S., 478 (a). Admittedly this summons was served on defendants.

Jurisdiction of the person depends on notice and the duty to give notice by service of a valid summons rests upon plaintiff. When jurisdiction of the person is challenged for that there was no legal service of a valid summons a motion to dismiss made on special appearance is ordinarily the proper method of presenting the question for decision.

Credit Corp. v. Satterfield, 218 N. C., 298, 10 S. E. (2d), 914; *Lindsay v. Short,* 210 N. C., 287, 186 S. E., 239; *Smith v. Haughton,* 206 N. C., 587, 174 S. E., 506; *Suskin v. Trust Co.,* 213 N. C., 388, 196 S. E., 407; *Bank v. Derby,* 215 N. C., 669, 2 S. E. (2d), 875; *Denton v. Vassiliades,* 212 N. C., 513, 193 S. E., 737. A general appearance waives any defect in the jurisdiction of the court for want of valid summons or proper service thereof. *Credit Corp. v. Satterfield, supra; Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175; *Bank v. Derby, supra.*

On the other hand, objection to the jurisdiction of the court over the subject matter of the action is presented by demurrer, C. S., 511, and a demurrer is a plea to the cause of action set out in the complaint. *Motor Co. v. Reaves, supra; Shaffer v. Bank,* 201 N. C., 415, 160 S. E., 481; *Credit Corp. v. Satterfield, supra.*

A motion or demurrer which pertains to the merits of the cause or alleged deficiencies in the complaint constitutes a general appearance and subjects the movant to the jurisdiction of the court. *Motor Co. v. Reaves, supra; Shaffer v. Bank, supra; Credit Corp. v. Satterfield, supra.*

An objection that the court has no jurisdiction of the subject matter of the action is considered in law as taken to the merits and not merely to the jurisdiction of the court over the person of the defendant and an appearance for the purpose of entering such objection is, in fact, a general appearance which waives any defect in the jurisdiction arising either from want of service on defendants or from a defect therein. *Motor Co. v. Reaves, supra; Credit Corp. v. Satterfield, supra; Gilbert v. Hall,* 115 Ind., 549.

It follows that defendants are in court both by service of summons and by general appearance made when they filed their motion to dismiss for want of jurisdiction of the subject matter of the action.

This brings us to the primary question presented for decision: Does the recorder's court of Reidsville have jurisdiction of the cause of action set out in the complaint?

Defendants' challenge of this jurisdiction is bottomed upon language used in the Act first conferring on this court limited jurisdiction in civil actions. Ch. 324, Public-Local Laws 1915. The jurisdiction conferred by this Act is "in civil actions arising in said county out of contract where the sum demanded is not over $500." Plaintiff's cause of action did not arise in Rockingham County. Hence, the defendants argue, the local court is without jurisdiction.

Plaintiff, we understand, concedes that if the 1915 Act is controlling then the local court is without jurisdiction. He asserts, however, that ch. 24, Public Laws 1931, vested this court with general jurisdiction concurrent with that of the Superior Court over all civil actions on

contract where the amount demanded does not exceed $1,500, unlimited by the provisions of the 1915 Act.

This Act, in section 1 (a), provides:

"In addition to the civil jurisdiction already conferred upon the Recorder's Court of the City of Reidsville, the said Court shall have concurrent jurisdiction with the Superior Court of Rockingham County in all civil actions founded on contract wherein the sum demanded shall not exceed fifteen hundred dollars and wherein the title to real estate shall not be in controversy and other civil actions not founded on contract wherein the value of the property in controversy or the sum demanded does not exceed one thousand dollars."

The language used is sufficiently comprehensive to embrace all civil actions within the prescribed limitations without regard to whether they arose in or outside Rockingham County, subject, of course, to the provisions of the venue statute. The jurisdiction thus conferred is in addition to the civil jurisdiction then existing and is not limited by the language "arising in said county" used in the 1915 Act. If there is any conflict then the former act, to the extent of such conflict, is repealed by the 1931 statute. We are of the opinion that it clearly embraces plaintiff's cause of action.

The enactment of this Public-Local Law is not inhibited by Art. II, sec. 29, of the Constitution. We so held in *Provision Co. v. Daves,* 190 N. C., 7, 128 S. E., 593. See also *S. v. Horne,* 191 N. C., 375, 131 S. E., 753; *Deese v. Lumberton,* 211 N. C., 31, 188 S. E., 857. Whether that part of the Act which extended the territorial limitations of the court is valid is not, on this record, material.

The defendants also assign as error that part of the judgment which remands the cause to the recorder's court for trial. This assignment is without merit.

The pertinent statute provides, in effect, for trial *de novo* in the Superior Court in all appeals from the Reidsville recorder's court. Trial *de novo* as thus used means a retrial or a new trial in a Superior Court of a cause theretofore heard in an inferior court. There can be no trial *de novo* until there has first been a trial in the inferior court. This cause reached the Superior Court on a preliminary skirmish to determine the right of the local court to proceed. No issue of fact has been joined by answer. No trial has been had and no final judgment has been entered by the inferior court. Hence, there was no error in the order of remand.

All the cases cited by defendants in support of this contention relate to and discuss appeals from final judgments. They are not authoritative here.

That the local court is sometimes referred to as the recorder's court of the town of Reidsville and sometimes as the recorder's court of the city of Reidsville is not material here. It did not mislead defendants. They knew to what court they were summoned and they duly appeared.

The judgment below is

Affirmed.

NORFOLK SOUTHERN RAILWAY COMPANY, SUCCESSOR TO M. S. HAWKINS AND L. H. WINDHOLZ, RECEIVERS OF NORFOLK SOUTHERN RAILROAD COMPANY, v. W. D. GLOVER, TRADING AS W. C. GLOVER.

(Filed 24 February, 1943.)

1. Carriers § 8—

Generally it is the duty of the consignee to unload cars within the free time given by the published tariffs of the carrier, and the obligation to pay demurrage for their detention is classified with other duties and obligations imposed by law, and, where the failure of the consignee to unload within the free time is caused entirely by a *vis major*, the consignee is not liable for demurrage.

2. Same—

In an action by a railroad against a shipper to recover demurrage for failure of defendant to unload car, evidence of defendant, that he bought soybeans for export in 1939 and 1940 and that due to the war abroad ships could not be had in which to load the beans, shows only that unloading was rendered unpracticable, unprofitable and expensive but not impossible, and it does not make out a case of *vis major*.

APPEAL by defendant from *Hamilton, Special Judge,* at October Term, 1942, of PASQUOTANK.

This action to recover demurrage charges for failure to unload certain cars within the time permitted by the tariffs of the company published as provided by law was originally instituted by the receivers of the plaintiff railroad company, who were subsequently succeeded by the company itself as plaintiff upon the vacation of the receivership and the restoration to it of all property and claims of the company.

The demurrage sought to be recovered is alleged to have accrued upon certain freight cars ordered from the plaintiff by the defendant to move soybeans from the area of Elizabeth City, North Carolina, in interstate commerce, to Norfolk, Virginia, for foreign export. The total amount sought to be recovered was $765.60, with interest, composed of $399.30 accruing between 7 December, 1939, and 23 January, 1940, and $366.30 accruing in November and December, 1940.

A stipulation was entered into by the parties, plaintiff and defendant, to waive jury trial and authorize the court to find the facts, make its conclusions of law, and enter judgment accordingly.

Prior to entering judgment the court announced that it "would hold that there was no sufficient evidence introduced or offered upon which a finding of fact could be predicated that the demurrage, either in whole or in part, was occasioned by or was the result of war or other circumstances which would excuse or relieve the defendant of the demurrage charges as set out in the complaint." To this holding the defendant preserved exception.

From judgment entered by the court that the plaintiff recover of the defendant the sum of $765.60, with interest, the defendant appealed, assigning error.

J. Kenyon Wilson for plaintiff, appellee.

John H. Hall for defendant, appellant.

SCHENCK, J. It may be stated as a general proposition of law that the duty of a consignee to unload cars within the free time given by the published tariffs of the carrier, and the obligation to pay demurrage for their detention, are classified with other duties and obligations imposed by law, and, where the failure of the consignee to unload within the free time is caused entirely by the intervention of a *vis major,* the consignee is not liable for demurrage. *Chesapeake & Ohio Ry. Co. v. Board,* 100 W. Va., 222, 130 S. E., 524, 44 A. L. R., 826.

In the case at bar there was evidence to sustain the allegations of the complaint that the cars were ordered out by the defendant and were furnished by the plaintiff, and that there was a failure on the part of the defendant to unload the cars within the free time allowed by the company's published tariffs, but the defendant averred, and relied thereupon as a defense, that he was prevented by a *vis major,* namely, war, from unloading and releasing the cars involved in time to avoid demurrage. Therefore, we have presented the question: Was there sufficient evidence upon which to predicate a finding that the failure to unload the cars within the free time allowed by the published tariffs of the railway company resulted from war? We are of the opinion, and so hold, that the answer is in the negative.

While his Honor announced he would hold that there was not sufficient evidence upon which to predicate a finding that the demurrage was "occasioned by or was the result of war or other circumstances which would excuse or relieve the defendant of demurrage charges," the only circumstance urged on the appeal as an excuse was war.

The evidence of the defendant is to the effect that he bought soybeans for shipment to Norfolk for foreign export, that due to war ships could not be had at Norfolk in which to load and export the beans, that the elevators in Norfolk were filled, and his own warehouses in Elizabeth City were filled, and for these reasons he could not release the cars upon which the beans were loaded. While even if these facts be conceded, they only tend to establish that the defendant was confronted with an inconvenience or unpracticable or unprofitable procedure, and not with a condition impossible of relief. There is no evidence that he could not have rented other warehouses than his own in Elizabeth City, or other places than the elevators at Norfolk for storage. The most that the record discloses is that the retaining of the beans in the cars and the consequent delay and demurrage was the result of the inconvenience and expense of unloading and storing them. The impossibility of unloading the beans is not made to appear.

The defendant relies upon *Chesapeake & O. R. Co. v. Board, supra,* wherein the defendant was relieved of liability for demurrage charges because he was prevented from unloading sand and slag from the cars involved by armed resistance incident to a strike, known as "Armed March." That case is distinguishable from the case at bar in that the defendant therein was actually forbidden to and prevented from unloading the cars by armed resistance, which rendered the unloading of the cars impossible, notwithstanding his *bona fide* efforts to so unload them; whereas in the case at bar while the unloading may have been rendered unpracticable, unprofitable and expensive by the inability to procure ships, such unloading, so far as the record discloses, was not rendered impossible. Our case resembles more closely the facts involved in Ruling 358 of the Interstate Commerce Commission cited in *Chesapeake & O. R. Co. v. Board, supra,* wherein it was held that the defendant could not escape demurrage charges upon cars loaded with coal because the arrival of vessels in which to unload the coal was delayed by storms. The Court says: "The facts upon which this ruling was made do not present a situation of impossibility of performance. The delay in the arrival of the vessels was caused by an 'Act of God,' but the coal designed for the vessels might have been unloaded from the cars and reloaded on the vessels upon their arrival. This procedure would have been costly and unpracticable, perhaps, but it was nevertheless possible."

The evidence in the case at bar fails to disclose that it was impossible for the defendant to unload the beans and thereby release the cars—in truth, it fails to disclose that there was a necessity for loading the beans on the cars at the time and place they were so loaded. The most that the evidence tends to disclose is that it may have been convenient to load the beans on the cars at the time and place they were loaded, and

it may have been inconvenient, unpracticable or unprofitable to unload them. This would not support a finding of fact that "the demurrage, either in whole or in part, was occasioned by or was the result of war or other circumstances which would excuse or relieve the defendant of the demurrage charges," and therefore there was no error in his Honor's holding that there was no sufficient evidence upon which to predicate such a finding.

While it may be conceded that a *vis major* may relieve a consignee from liability for demurrage, and while a war in which this country is engaged may be such a *vis major,* or the actions of belligerent nations opposing this country may be the "acts of the public enemy," still at the time the demurrage involved in this action accrued, in 1939 and 1940, this country was not at war and there were no "acts of the public enemy." Hence a finding of a fact to the effect that the defendant was relieved of demurrage charges by war or acts of the public enemy or a *vis major* would not be sustained by the evidence.

For the reasons given, the judgment of the Superior Court must be sustained, and it is so ordered.

Affirmed.

C. H. BRICKHOUSE v. TOWN OF COLUMBIA.

(Filed 24 February, 1943.)

1. Municipal Corporations § 14—

The failure of a municipality to light a street sign, which was already illuminated so as to be clearly visible, cannot be held for actionable negligence.

2. Negligence § 19a—

All of the evidence showing that plaintiff, a guest passenger, was injured when the automobile in which he was riding collided with a "dummy policeman" parking sign, in the center of a brilliantly lighted intersection of two city streets, defendant's motion of nonsuit was properly allowed.

APPEAL by plaintiff from *Hamilton, Special Judge,* at October Term, 1942, of TYRRELL. Affirmed.

Civil action to recover damages for personal injuries.

On the night of 29 December, 1939, while riding as a passenger on the front seat of an automobile operated by N. A. Hopkins, the plaintiff, in a collision between said car and a parking sign placed and maintained by the defendant at the intersection of Main and Broad Streets in the defendant town, received certain personal injuries.

In the southwest corner of the intersection there is an Esso filling station and in the northwest corner a Texaco filling station. The northeast corner is occupied by an office building and residences. The parking sign, which was on the center line, was approximately five feet high and consisted of a round iron or cement base 19 inches in diameter and about 1 inch thick. An iron pipe or shaft 1 to 1½ inches in thickness extended upward from the base, upon which rested the sign proper, a round or oval plate approximately 24 inches in diameter and ⅛ of an inch in thickness upon which was printed in 2½ x 2 inch letters, the words "Park To the Right." The over-all height of the sign was 60 inches. The base and shaft of the marker were of a dark color while the face of the sign proper was white with black lettering.

The collision occurred about 6:30 p.m. just after plaintiff and Hopkins started home from a point on West Main Street. At the time of the accident the car was being operated at from 12 to 15 miles per hour. A 250 watt street light was burning and the Esso and Texaco filling stations were brightly lighted. There was no light on the parking sign. There was a mist, and the windshield wiper on the driver's side was operating. The one on the passenger's side was not working.

The marker was provided to direct parking on Main Street and the printed sign faced Main Street. One witness for plaintiff testified that at 5:30 it was facing Broad Street. All witnesses who testified in respect thereto at the time of the accident stated that it was facing Main Street at that time.

Hopkins drove his automobile into and over the sign, veered to the right and struck a car parked at the curb 25 or 30 feet away. Both his car and the parked car were damaged to a considerable extent.

The foregoing is a summary of the evidence for the plaintiff. The evidence for the defendant, in many respects, is more favorable to it.

At the conclusion of all the evidence the defendant renewed its motion to dismiss as of nonsuit first made at the conclusion of the evidence for the plaintiff. The motion was sustained and judgment was entered accordingly. Plaintiff excepted and appealed.

McMullan & McMullan for plaintiff, appellant.

W. L. Whitley for defendant, appellee.

BARNHILL, J. A consideration of the evidence appearing on this record, viewed in the light most favorable to the plaintiff, leads us to the conclusion that judgment of nonsuit was properly entered.

The only allegation of negligence contained in the complaint is in the following language:

"That the defendant was negligent in that . . . a heavy, iron object of the type commonly referred to as a dummy policeman was wrongfully, carelessly and negligently placed in the center of said intersection (Broad and Main) without lights or other means by which passing motorists could identify and avoid this obstruction to traffic, and in that the defendant wrongfully, carelessly and negligently permitted said obstruction to remain in said condition and position for a period of approximately two weeks though well knowing, or in the exercise of ordinary care and diligence they should have known that such sign and obstruction in its continuous unlighted condition was a menace to motorists passing along this main artery of traffic."

The rights of plaintiff and the liability of the defendant under this allegation of negligence are to be determined from the facts as they existed at the time of the accident. That the sign was or was not at the time adequately lighted—not how or by whom—is the material fact. If it was clearly visible to a motorist using Main Street at night, the collision must be attributed solely to the negligence of the driver as the proximate cause thereof. The failure of the city to light a sign which was already illuminated so as to be clearly visible cannot be held for actionable negligence.

All the evidence tends to show that the intersection and sign were lighted by a 250 watt street light and by electric lights at the Esso and Texaco stations, totaling several thousand candle power. "The dummy policeman" was "lit up pretty fair. You could see the marker a pretty good ways." The intersection was "brilliantly lighted." "It (the marker) was standing in a brilliantly lighted section at night." So the witnesses for plaintiff testified.

It is true that Hopkins testified that he did not and could not see it although he was keeping a lookout. Even so, it was there to be seen but he would not see. *Powers v. Sternberg,* 213 N. C., 41, 195 S. E., 88. At least plaintiff has failed to produce evidence tending to show that any act or omission of the defendant caused him to fail to see.

The plaintiff suggests that a car approaching the intersection at right angles on Broad Street caused Hopkins to veer to the left and strike the sign. Conceded, *arguendo,* this fact does not tend to show defendant maintained an unguarded and unlighted obstruction in its streets or that it failed to keep its streets in a reasonably safe condition.

The judgment below is

Affirmed.

STATE v. LEON W. TRIPPE.

(Filed 24 February, 1943.)

1. Criminal Law § 52b: Rape § 3—

On the trial of an indictment for carnal knowledge of a female under sixteen years of age, C. S., 4209, where there was competent evidence for the State tending to show that defendant, a man 48 years of age, had sexual intercourse with the State's witness at a time when she was only 14 years of age and that she had theretofore never had sexual intercourse with any person, motion for judgment of nonsuit was properly denied.

2. Indictment §§ 11, 24: Rape § 3—

It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved, time not being of the essence of the offense. C. S., 4209; C. S., 4625.

3. Criminal Law § 41f—

The prosecuting witness, on trial upon indictment of a man for carnal knowledge of a female under sixteen years of age, may give competent testimony as to her age.

4. Criminal Law § 54c—

The court's refusal to discharge the jury, in a prosecution for the carnal knowledge of a female under sixteen, upon their report of disagreement after five hours of deliberation, presents no ground for a new trial, there being no attempt to coerce them on the part of the judge and the jury, after further consideration, having reached a verdict.

APPEAL by defendant from *Parker, J.*, at November Term, 1942, of PASQUOTANK. No error.

The defendant was charged with carnal knowledge of a female under the age of sixteen years, in violation of C. S., 4209. There was verdict of guilty, and from judgment imposing prison sentence the defendant appealed.

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

J. Henry LeRoy for defendant.

DEVIN, J. The defendant assigns error in the denial by the court below of his motion for judgment as of nonsuit, but an examination of the record leads to the conclusion that the case was properly submitted to the jury.

The statute under which the defendant was indicted and convicted declares that "if any male person shall carnally know or abuse any

female child, over twelve and under sixteen years of age, who has never before had sexual intercourse with any person, he shall be guilty of a felony. . . ." In this case all the essential elements of the crime charged were made to appear. *S. v. Swindell,* 189 N. C., 151, 126 S. E., 417. There was competent evidence on the part of the State tending to show that the defendant, a man 48 years of age, had sexual intercourse with the State's witness at a time when she was only 14 years of age, and that she had theretofore never had sexual intercourse with any person. The State's witness, now 15 years of age, testified to four acts of intercourse with the defendant, the first time in June, 1941, again in September, 1941, and twice in 1942, and that she had never had intercourse with any person other than the defendant. She further testified that as a result of such intercourse she became pregnant, and in April, 1942, gave premature birth to a baby which did not live. The doctor thought from her statement this was six months after conception.

The bill of indictment charged that the criminal act occurred 13 September, 1941, but the fact that the date so alleged was subsequent to the date on which the witness testified the first act of intercourse occurred would not support the contention that there was a failure of proof that at the time alleged in the bill she had never before had sexual intercourse with any person. The date mentioned in the bill of indictment was not of the essence of the offense charged. In such case, both by statute and by the decisions of this Court, it has been established that variance between allegation and proof as to time is not material where no statute of limitations is involved. C. S., 4625; *S. v. Overcash,* 182 N. C., 889, 109 S. E., 626; *S. v. Newsom,* 47 N. C., 173. In the words of *Chief Justice Stacy,* in *S. v. Williams,* 219 N. C., 365, 13 S. E. (2d), 617, "The exact dates are not regarded as capitally important." It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man. *S. v. Houpe,* 207 N. C., 377, 177 S. E., 20; *S. v. Porter,* 188 N. C., 804, 125 S. E., 615.

Evidence in the case at bar that the State's witness had for the first time had intercourse with the defendant in June, 1941, and had never theretofore had intercourse with any person, coupled with competent evidence of her age as being at the time within the prohibited period of twelve to sixteen years, was sufficient to sustain the ruling of the trial judge in submitting the case to the jury. The testimony of the State's witness as to her age was competent (*S. v. Best,* 108 N. C., 747, 12 S. E., 907; Wigmore on Ev., sec. 667), and this was supported by the testimony of her father and mother, and by the vital statistics record. C. S., 7111. Nor do we know of any reason why it was not competent

for her to say that the birth of the baby was premature. The testimony of the attending physician was to the same effect.

The exception to the court's instructions to the jury cannot be sustained, nor is any unfairness apparent in the statement of the contentions of the State and the defendant. The fact that the court declined to discharge the jury upon their report of disagreement after five hours of deliberation presents no ground for a new trial. That was a matter in the discretion of the court, and we can discover nothing in the action of the court which could be held in any wise prejudicial to the defendant. There was no attempt at coercion on the part of the judge, and the jury after further deliberation reached an agreement.

Though the defendant denied improper relations with the State's witness, and offered evidence of his good character, the triers of the facts have accepted the State's evidence, and found him guilty as charged. On the record we perceive no just ground upon which to disturb the result.

In the trial we find

No error.

CURT TEICH & COMPANY, INC., v. L. C. LECOMPTE, TRADING AS ASHEVILLE POST CARD COMPANY.

(Filed 24 February, 1943.)

Interest § 2—

Where judgment of the Superior Court awards judgments to both plaintiff and defendant in the same principal sum to each and further provides that the judgments offset and liquidate each other and on appeal this Court reversed the judgment on defendant's counterclaim and confirmed plaintiff's judgment, upon motion in the Superior Court for judgment, in accordance with Supreme Court opinion, plaintiff is entitled to interest only from the date of his original judgment.

APPEAL by defendant from *Blackstock, Special Judge,* at November Term, 1942, of BUNCOMBE.

This case was before the Court at the Fall Term, 1942. The judgment of the Superior Court on defendant's counterclaim was reversed. The opinion appears *ante,* 94.

At the November Term, 1942, of the Superior Court of Buncombe County, the plaintiff moved for judgment in accord with the opinion of the Supreme Court. Judgment was entered for plaintiff against the defendant in the sum of $2,836.09, with interest from 1 April, 1939.

In apt time defendant excepted to the judgment and appealed to the Supreme Court, assigning error.

Zeb F. Curtis and Lipscomb & Lipscomb for plaintiff.
Harkins, Van Winkle & Walton for defendant.

DENNY, J. The original judgment in this cause was based upon two issues and the answers thereto. The first issue was answered by consent in favor of the plaintiff, fixing the amount it was entitled to recover of the defendant in the sum of $2,836.09, with interest. The jury fixed the amount the defendant was entitled to recover from the plaintiff on his counterclaim for damages in the sum of $2,836.09. Whereupon judgment was entered, the pertinent part of which is as follows: "Ordered and Adjudged by the Court that the plaintiff have and recover judgment against the defendant in the sum of $2,836.09, and that the defendant have and recover judgment against the plaintiff in the sum of $2,836.09, said judgments to off-set and liquidate each other."

When the plaintiff moved for judgment in accord with the opinion of the Supreme Court, his Honor held the plaintiff was entitled to judgment for $2,836.09, with interest from 1 April, 1939. The original judgment, holding that the claim of the plaintiff and defendant offset and liquidate each other, adjudicated the question raised on this appeal. The court below held in effect that plaintiff had no claim in excess of the claim of the defendant. Certainly the defendant had no claim for interest on his counterclaim for damages until the amount was ascertained. The reversal of the judgment for defendant on his counterclaim did not affect the plaintiff's claim for interest. *Teich & Co. v. LeCompte, ante,* 94. The court having held that the claims of the plaintiff and defendant offset and liquidated each other, the plaintiff is only entitled to judgment for $2,836.09, with interest from the effective date of the judgment entered at March-April Term, 1942, of the Superior Court of Buncombe County. *In re Chisholm's Will,* 176 N. C., 211, 96 S. E., 1031. The judgment entered at the November Term, 1942, of the Superior Court of Buncombe County will be modified accordingly.

Modified and affirmed.

WILLIAM ELLER v. A. C. LAWRENCE LEATHER CO., ET AL.

(Filed 24 February, 1943.)

1. Master and Servant § 47—

A finding by the Industrial Commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued under the N. C. Workmen's Compensation Act, sec. 22, ch. 120, Public Laws 1929, prior to the giving of such notice.

2. Same—

A finding by the Industrial Commission under the N. C. Workmen's Compensation Act, sec. 22, ch. 120, Public Laws 1929, that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award from and after such notice; but not for benefits which may have accrued prior thereto.

PETITION to rehear this case, reported *ante,* 23.

Edwards & Leatherwood for plaintiff.

Morgan & Ward and Jones, Ward & Jones for defendants.

STACY, C. J. The case was brought back for reconsideration of one matter because of an alleged oversight in the application of section 22 of the Workmen's Compensation Act (ch. 120, Public Laws 1929) to the facts of the instant record. This section provides that immediately upon the occurrence of an accident, or as soon thereafter as practicable, written notice shall be given to the employer of the accident, and the injured employee is not entitled to physician's fees nor to any compensation which may have accrued under this article prior to the giving of such notice, "unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or fraud or deceit of some third person." It is further provided that no compensation shall be payable unless such written notice is given within thirty days after the occurrence of the accident or death, "unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice, and the Commission is satisfied that the employer has not been prejudiced thereby."

Thus, it will be seen that the injured employee is not entitled to any benefits which may have accrued under the article prior to the giving of

written notice of the accident, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the injured employee had been prevented from giving such notice by reason of physical or mental incapacity, or the fraud or deceit of some third person, and that no compensation is payable unless such written notice is given within thirty days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission, and the Commission is satisfied the employer has not been prejudiced thereby.

Here, the Commission finds that the injured employee, plaintiff herein, sustained an injury by accident 15 September, 1939, which arose out of and in the course of his employment; that he became totally disabled therefrom on 26 January, 1940; and that he gave written notice thereof to the employer on 31 May, 1940.

The Commission further finds (1) that "from all the evidence it would appear reasonable to believe the plaintiff on account of the type of his injury and of his suffering, his memory was affected, and he was not capable at the time he was examined by the physicians of coherent, normal thought; and, (2) that "the employer has not been prejudiced by the failure of the plaintiff to give said defendant notice prior to the time said notice was given. . . . For a long time, neither the doctor nor the plaintiff was able to ascertain the condition from which he was suffering and the cause of it."

Upon these findings, the Commission awarded compensation from 26 January, 1940, to the date of the hearing, and thereafter "so long as the plaintiff's physical condition does not improve within the total limits of 400 weeks or $6,000 as provided by the terms of the Act."

A careful perusal of the finding that plaintiff was not capable of coherent, normal thought at the time of his examination by the physicians engenders the conclusion that it falls short of a finding he was prevented from giving written notice of his injury "by reason of physical or mental incapacity" so as to entitle him to the benefits which may have accrued under the article prior to the giving of such notice. Indeed, the purpose of this finding was to explain the delay in ascertaining the cause of plaintiff's injury. The second finding that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within thirty days after the accident, suffices to sustain the award from and after such notice, but not for benefits which may have accrued prior thereto. The judgment will be modified accordingly.

Petition allowed.

DAVID V. PIKE v. S. B. SEYMOUR, JR., AND WALTER L. MIDGETT.

(Filed 24 February, 1943.)

1. Appeal and Error § 10b—

Where the trial court finds that the case on appeal was not served within the time fixed or allowed, or service within such time waived, an order, directing the appellants' case on appeal stricken from the files of the cause and the records of the court, is proper.

2. Appeal and Error §§ 10b, 31b—

When appellants' case on appeal is stricken from the record as not filed in time, on motion in the cause to affirm the judgment below and it appearing that no error exists on the face of the record proper, the judgment is affirmed.

APPEAL by defendants from *Blackstock, Special Judge,* at Chambers in Charlotte, N. C., 14 December, 1942. From PERQUIMANS.

This case was tried before Blackstock, Special Judge, at January Term, 1942, of Perquimans Superior Court. The case was consolidated for trial with the case of *Pierce v. Seymour, Jr., et al.* Defendants appealed to the Supreme Court. This case was remanded to the trial judge for additional findings of fact. See the former opinion *ante,* 42.

The trial court found as a fact that the time for serving case on appeal expired 16 April, 1942; that on 20 April, 1942, plaintiff's counsel accepted service of defendants' statement of case on appeal; but did not at any time accept or agree that defendants' statement of case on appeal should constitute the case on appeal in the Supreme Court, thereby waiving the time for service; nor did plaintiff's counsel at any time, in any way or manner, extend or waive the time of service. Thereupon, judgment was entered striking defendants' statement of case on appeal from the files of said cause and from the records of the court.

Defendants appealed to the Supreme Court.

McMullan & McMullan for plaintiff.

J. Henry LeRoy for defendants.

DENNY, J. Where the trial court finds the case on appeal was not served within the time fixed or allowed, or service within such time waived, an order directing the appellants' case on appeal stricken from the files of said cause and the records of the court, is proper. *Hicks v. Westbrook,* 121 N. C., 131, 28 S. E., 188; *Roberts v. Bus Co.,* 198 N. C., 779, 153 S. E., 398. Motion having been made in this cause to affirm the

judgment below, and it appearing that no error exists on the face of the record proper, the judgment is affirmed. *McNeill v. R. R.*, 117 N. C., 642, 22 S. E., 268; *Roberts v. Bus Co., supra.*

Affirmed.

JUANITA WALKER AND HUSBAND, PAUL WALKER, v. STANDARD OIL COMPANY OF NEW JERSEY AND LUCILLE HARDIN, EXECUTRIX OF THE ESTATE OF LAURISTON HARDIN, DECEASED.

(Filed 24 February, 1943.)

Pleadings § 16a: Trial § 25—

Upon demurrer by defendants for misjoinder of causes, plaintiffs' agreement, for the court to strike the demurrable part of complaint, is tantamount to taking a nonsuit on the objectionable cause, hence it was error to sustain the demurrer.

APPEAL by plaintiffs from *Sink, J.*, at 8 January, 1943, Term of HAYWOOD.

Civil action for recovery for destruction of property by fire—heard upon demurrer to complaint.

In their complaint, plaintiffs, husband and wife, allege that on 14 July, 1942, by reason of joint and concurrent negligence of defendant, Standard Oil Company of New Jersey, and its superintendent and vice-principal, Lauriston Hardin, in the manner alleged, these properties, owned as respectively indicated, were destroyed: (1) "The home and residence of plaintiffs," and other specified improvements, standing on a piece, parcel and tract of land located in the town of Waynesville, North Carolina, of which "the plaintiff, Juanita Walker, was the owner," and "that while the deed to said property was vested in the name of Juanita Walker, her coplaintiff and husband, Paul Walker, had an equity in said real estate and improvements erected thereon, and for this reason is made a party plaintiff to this action"; (2) "furniture and equipment" in "the plaintiffs' said home," "including kitchen equipment and utensils, bathroom equipment, linens, lamps, china, silver, jewelry, clothing of various kinds and description for both male and female, including costly wedding presents and rugs," itemized statement of which is attached to complaint and marked "Exhibit A," which is a descriptive list of approximately three hundred and fifty items, including items of wearing apparel for men, women and children; "that said articles of personal property . . . were primarily owned by the plaintiff, Juanita Walker, but certain articles of said property, such as wedding presents,

were owned jointly by Juanita Walker and husband, Paul Walker, and that the said Paul Walker has an equity and interest in all of said personal property and for said reason is made a party plaintiff with his said wife in this action"; and (3) "their books, ledgers and accounts receivable records, indebtedness against various and sundry parties" in connection with a discontinued automobile business; "that said accounts and evidence of indebtedness had been assigned to the plaintiffs and were the property of the plaintiffs on the date set forth"; and for all of which recovery is prayed. And (4) it is also alleged: "13. That at the time of the destruction of plaintiffs' property as hereinbefore set forth, the plaintiff, Paul Walker, was temporarily absent from home in Baltimore, Maryland, and that by reason of the wrongful and unlawful conduct of the defendant, Standard Oil Company of New Jersey and of Lauriston Hardin, as hereinbefore set forth, it became and was necessary for the plaintiff, Paul Walker, to make a trip to Waynesville for the purpose of assisting his family after having lost their home and all personal belongings and that the necessary expenses incurred in making said trip and loss of time from his employment, amounted to $148.00, for which said amount the defendants are justly indebted to the plaintiffs."

Defendants demurred to the complaint for that it appears upon the face thereof that there is a misjoinder of parties and of causes of action.

The court, being of opinion that the demurrer should be sustained, entered judgment in accordance therewith, and dismissed the action. Plaintiffs appeal therefrom to Supreme Court and assign error.

Jones, Ward & Jones for plaintiffs, appellants.

Edwin S. Hartshorn and Morgan & Ward for defendants, appellees.

PER CURIAM. Plaintiffs, appellants, in their brief filed on this appeal, state that "when the demurrer was interposed, plaintiffs, in order that they might not be delayed in the trial of their action . . . agreed that the court might strike paragraph 13 from the complaint—that is, the item representing the expenses of $148.00." This was tantamount to taking a nonsuit on this cause of action in which male plaintiff alone is interested—a right which plaintiffs could exercise at any time before verdict. When this cause of action is eliminated, and admitting the truth of the facts alleged in the complaint with respect to the other three causes of action, as we must do in testing the demurrer, there is neither misjoinder of parties nor misjoinder of causes of action. Hence, the judgment below is reversed, and the cause remanded for further procedure in accordance with law.

Reversed.

STATE v. O. B. WILLIAMS AND LILLIE SHAVER HENDRIX.

(Filed 24 February, 1943.)

Constitutional Law § 23—Full Faith and Credit.

Judgment herein upholding conviction, 220 N. C., 445, vacated or set aside and cause remanded for a new trial, in accordance with opinion of the Supreme Court of the United States, rendered 21 December, 1942, on *certiorari.* And defendants will recover their costs.

ON mandate from Supreme Court of the United States.

Criminal prosecution tried in Caldwell County upon indictment charging the defendants with bigamy in violation of C. S., 4342.

Verdict: Guilty as charged in the bill of indictment.

Judgments: Imprisonment in the State's Prison for terms specifically set out.

The defendants appealed, assigning errors.

Verdict and judgments were upheld at the Fall Term, 1941, reported in 220 N. C., 445, 17 S. E. (2d), 769.

The defendants applied to the Supreme Court of the United States for writ of *certiorari,* which was granted 30 March, 1942, and the judgment of affirmance "reversed" 21 December, 1942. Mandate received 28 January, 1943.

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

W. H. Strickland for defendants.

PER CURIAM. The judgment heretofore entered in this cause upholding the conviction and judgments entered at the February-March Term, Caldwell Superior Court, reported in 220 N. C., 445, 17 S. E. (2d), 769, will be vacated or set aside, and the cause remanded for a new trial in accordance with the opinion of the Supreme Court of the United States, rendered 21 December, 1942, on *certiorari* to this Court. See *O. B. Williams and Lillie Shaver Hendrix, petitioners, v. State of North Carolina,* 317 U. S., ..., 87 L. Ed., 189, decided 21 December, 1942. Accordingly, the defendants will recover their costs incurred in the Supreme Court of the United States, and the costs heretofore assessed in this Court will be retaxed.

Judgment vacated; new trial ordered.

W. S. HARRISON v. J. P. BROWN, RECEIVER OF BLUE RIDGE BUILDING & LOAN ASSOCIATION.

(Filed 3 March, 1943.)

1. Trial § 54—

The trial judge, a jury trial having been waived, may find the facts with the force and effect of a jury verdict, and declare his conclusions of law arising thereon. The statute, C. S., 569, requires that his findings and conclusions be stated in writing.

2. Trial §§ 24, 54—

Where a jury trial is waived and the court makes no specific findings of fact, all of the evidence, when taken in the light most favorable to plaintiff, must be insufficient to support a favorable finding for plaintiff to justify a judgment of nonsuit.

3. Corporations § 31—

A receiver is an administrative officer of the court and can exercise only the powers and authority conferred upon him by the court. He is controlled by its proper decrees and the property he administers is *in custodia leges.*

4. Same—

In dealing with others a receiver cannot evade the ordinary incidents of contractual and property rights on the ground that he is an agent of the court, and, within the limits of the authority expressly conferred, he may impose liability upon the estate he is appointed to administer.

5. Same—

While C. S., 1209 (4), empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given.

6. Brokers and Factors § 11—

When a real estate broker procures a purchaser acceptable to the owner and a valid contract is drawn up between them, the broker's commission for finding a purchaser is earned, although the purchaser later defaults or refuses to consummate the contract.

7. Same: Corporations §§ 31, 34—

Where the court authorizes a receiver to sell the property in his charge upon specified terms, through a certain real estate broker whose commissions are authorized and fixed by the court's order, upon a valid offer, procured by such broker from a solvent party, payment of a substantial sum on the purchase price, and acceptance by the receiver, all in accordance with the court's order, payment of the broker's commission cannot be resisted either on the ground that the sale was not consummated, or because, in his acknowledgment of an assignment of the commission by

the broker to plaintiff, the receiver inserted a clause "unless otherwise ordered by the court" and the court thereafter annulled the offer and acceptance.

APPEAL by plaintiff from *Sink, J.*, at December Term, 1942, of BUNCOMBE. Reversed.

This was an action by plaintiff as assignee of a real estate broker to recover for services in connection with the sale of certain real property by defendant, receiver, under orders of court.

The defendant Brown is the duly appointed and acting receiver of the Blue Ridge Building & Loan Association, and as such is engaged in the liquidation of its assets, pursuant to the orders of the Superior Court. In the course of the receivership the following order was made by Presiding Judge Phillips, dated 29 January, 1942: "That with a view of early liquidation, the Court appoints J. Y. Jordan, Jr., James A. Carroll and Guy Weaver as an Advisory Committee, and directs that the said Committee shall forthwith examine and go over the list of properties and revise the prices heretofore fixed by the appraisers, with a view of scaling the said prices down approximately 25% on the whole, but with discretion to raise or lower any or all prices, in accordance with their best judgment with respect to each individual item, and that thereupon the said Committee shall appoint one real estate broker to have charge of, negotiate and sell off the properties in connection with the Receiver, the said broker to receive 5% commission on all properties directly sold by him, and he is directed to list with all members of the real estate board said property at the revised prices so fixed, and any of said brokers making sales shall receive 3% of the commission and 2% to go to the broker having the property in charge. . . . The Receiver is hereby authorized and directed to make sale and convey any and all properties sold at the prices fixed by the Advisory Committee, or at such price as may be by them approved, without further order of this Court."

By authority of this order, J. A. Carroll, a real estate broker, was appointed to have charge of the sale of the real property of the Association in the hands of the receiver upon the terms specified, and in accordance with the court's instructions listed with all members of the real estate board the property at the prices fixed by the Advisory Committee. Thereafter, on 11 February, 1942, Arthur A. York, a broker, transmitted to Carroll the offer of one C. S. Badgett, in writing, to purchase the property in Asheville known as the Blue Ridge Building for the sum of $50,000 cash, the price fixed by the Advisory Committee, and, as evidence of good faith, to be applied on the purchase price, deposited $2,500. The offer was reported to the receiver. The receiver referred

the offer to the Advisory Committee and was authorized and directed by the Committee to accept the offer and to sell the property for the price and on the terms set forth in the offer. Thereupon, on 12 February, 1942, the receiver in writing accepted the offer, and the $2,500 was turned over to him. It was admitted in the pleadings that C. S. Badgett had authorized York to make the offer, and there was evidence that Badgett was worth $500,000, and owned real property in Asheville.

On 6 March, 1942, J. A. Carroll assigned to the plaintiff the $1,000 commission alleged to be due him in connection with the sale of the property referred to, and in writing authorized the receiver to pay this amount to the plaintiff. This assignment was accepted by the receiver, in writing, as follows:

"I, J. P. Brown, Receiver, hereby agree to carry out the assignment as outlined above of the commission due J. A. Carroll, the real estate broker appointed by the Advisory Committee to sell the properties of the Blue Ridge Building & Loan Association under authority of an order entered in the Superior Court of Buncombe County, N. C., and agree to pay to the assignee the amount stipulated above out of funds now in my hands, which funds represent the deposit made by the purchaser of the building hereinabove described, unless otherwise ordered by the court.

J. P. BROWN, Receiver."

It further appeared from the pleadings offered in evidence by the plaintiff that the receiver prepared the papers necessary to convey title to C. S. Badgett, and tendered same and demanded payment of the balance of the purchase price, $47,500. Payment was refused. Thereafter, 30 March, 1942, Arthur A. York petitioned the court to be allowed to withdraw the offer to purchase and to recover the $2,500 previously paid. The receiver filed answer to this petition and asked for specific performance of the contract of purchase and for the recovery of $47,500. The matter was heard 14 May, 1942, by Judge Phillips, who entered the following order: "This cause coming on to be heard, and being heard before the undersigned presiding judge, upon the petition of Arthur York and upon the answer filed by the Blue Ridge Building & Loan Association, and upon the oral evidence and affidavits introduced by both parties, and being heard, and the receiver having announced in open court that he was not going to appeal from this order, and for that reason there is no necessity of finding facts, it is therefore ordered by the court that the offer heretofore be, and the same is hereby adjudged of no force and effect and the Receiver, J. P. Brown, with whom the $2,500 in controversy has been deposited is hereby ordered and directed

to forthwith refund said money to the said Arthur York. This 14th day of May, 1942."

From this order the receiver did not appeal. Neither the plaintiff nor Carroll, his assignor, was made party to this proceeding or had notice thereof.

Plaintiff applied to the court for leave to bring an independent action against the receiver for the commission claimed, and this was allowed by order of court 5 September, 1942. Pleadings were filed and the case was heard at December Term, 1942, of Buncombe Superior Court, at which term it was agreed that jury trial be waived, and that the court should hear the same, find the facts and state his conclusions of law. However, the defendant's motion for judgment of nonsuit made at the close of plaintiff's evidence and renewed at the close of all the testimony was allowed, and plaintiff's cause of action was nonsuited. The judgment recited: "It is therefore, ordered, adjudged and decreed that the plaintiff's cause of action be and the same is hereby nonsuited, and the same is dismissed, and the plaintiff taxed with the costs thereof." There were no findings of fact or conclusions of law stated.

The plaintiff appealed.

Don C. Young for plaintiff, appellant.
Jordan & Horner for defendant, appellee.

DEVIN, J. The plaintiff was permitted by order of court to institute an independent action against the receiver to determine the validity of his claim. McIntosh, p. 1011. A jury trial having been waived, the trial judge could have found the facts with the force and effect of a jury verdict, and declared his conclusions of law arising thereon. The statute requires that when issues of fact are tried by the judge the decisions shall contain a statement of the facts found and conclusions of law separately. C. S., 569; McIntosh, p. 553; *Dailey v. Ins. Co.*, 208 N. C., 817, 182 S. E., 332. Here, however, the judge elected to dispose of the case by a judgment of nonsuit. This permitted the plaintiff to challenge the correctness of the judgment below if there was any substantial evidence presented in support of his claim. As was said by *Winborne, J.*, in *Ins. Co. v. Carolina Beach*, 216 N. C., 778 (789), 7 S. E. (2d), 13, where jury trial was waived and the court made no specific findings of fact, ". . . the effect of the written judgment is that when taken in the light most favorable to plaintiffs, all the evidence is insufficient to support a favorable finding for plaintiffs on any issue raised by the pleadings." Hence the only question presented for our decision is whether the evidence in the view most favorable for the plaintiff was sufficient to withstand a motion for nonsuit.

A receiver is a ministerial officer of the court (*S. v. Whitehurst,* 212 N. C., 300, 193 S. E., 657), and can exercise only the power and authority conferred upon him by the court. He is controlled by its proper decrees, and the property he administers is said to be *in custodia leges.* But within the limits of the authority expressly conferred upon him, in dealing with others he may not evade the ordinary incidents of contractual and property rights on the ground that he is an administrative agent of the court, and by his acts which he performs within the scope of the authority given, he may impose liability upon the estate he is appointed to administer. While the statute, C. S., 1209 (4), empowers the receiver to convey the estate, ordinarily, the receiver of a corporation may not be permitted to dispose of a substantial part of the assets with which he is entrusted without authorization from the court, and the sale is subject to confirmation, unless authority to convey on specified terms is expressly given beforehand. High on Receivers (3rd Ed.), sec. 199 (c).

In the case at bar the order of court not only authorized the sale of the property in question, but prescribed the method by which the price should be determined and fixed the compensation of those employed in connection therewith. The receiver was directed to sell and convey the property at the price approved by the Advisory Committee "without further order of court." The price of the Blue Ridge Building was accordingly fixed at $50,000. J. A. Carroll was appointed the real estate broker to have charge of the sales of this and other properties. Pursuant to this authority Carroll listed the property with the members of the real estate board upon the terms specifically mentioned in the order of court, that is, if another broker procured a purchaser at the price approved by the Advisory Committee, such broker would receive 3% and Carroll 2% of the purchase price. Within a short time a broker procured a purchaser for the Blue Ridge Building at $50,000 cash. The purchaser was well able to pay. He put up $2,500 as evidence of good faith and as part payment. The offer in writing was addressed to Carroll and by him transmitted to the receiver. The offer was submitted to the Advisory Committee and approved. The receiver conformable to instructions signed a formal acceptance of the offer as made.

Considering the evidence offered by the plaintiff in the light most favorable for him, as is the rule on a motion for nonsuit, in accord with the principle enunciated in *Trust Co. v. Adams,* 145 N. C., 161, 58 S. E., 1008, and *House v. Abell,* 182 N. C., 619, 109 S. E., 877, we are of opinion that plaintiff's claim for commission earned should not have been dismissed by judgment of nonsuit. The negotiations for the sale were under Carroll's charge. As a result of his activity a responsible purchaser was procured, and an apparently valid contract was executed on

the prescribed terms. He had performed all the things necessary to entitle him to the compensation specified in the order of court. His assignment to the plaintiff of the commission earned was agreed to by the receiver.

True, the sale was not consummated. The record discloses no reason why this was not done. It appears that the purchaser declined to pay on tender of deed, and shortly thereafter filed petition to the court to be permitted to withdraw his offer and recover the advanced payment. Over the objection of the receiver this was allowed by the court. No facts were found by the court. Doubtless the judge had good reason for his action, but none appears in the record on which the case comes to us for review.

The receiver resists payment of the 2% commission to the plaintiff as assignee of Carroll, principally, on two grounds; first, that the sale was not consummated, through no fault of the receiver, and, second, because in his acknowledgment of the assignment of Carroll's rights to the plaintiff, the receiver added the clause "unless otherwise ordered by the court." Neither of these positions can be sustained.

The plaintiff's rights were not dependent upon the subsequent action of York, the other broker, as his assignor's compensation was independent of that accruing to the procuring broker, and was fixed by the terms of the order of court. Neither Carroll nor the plaintiff was a party to the proceeding wherein Judge Phillips adjudged the purchase offer of no force and effect, and ordered the return of the initial payment, and no reference was made in that order to the compensation of the broker. The plaintiff cannot be held debarred by that order. Nor was Carroll's right to compensation precluded by the failure of the purchaser to fulfill his contract and complete the purchase. He was not the agent or employee of Badgett. He was employed under order of court by the receiver, with a definite compensation fixed for specified service. Under the evidence appearing in the record his compensation would be regarded as a necessary expense of the receivership. *Mortgage Co. v. Winston-Salem,* 216 N. C., 726, 6 S. E. (2d), 501.

The general rule is stated in 8 Am. Jur., 1099, as follows: "It may be generally stated that when a real estate broker procures a purchaser who is accepted by the owner, and a valid contract is drawn up between them, the commission for finding such purchaser is earned, although the purchaser later defaults or refuses to consummate the contract." This rule is equally applicable where no known reason for the default of the purchaser appears. 51 A. L. R., 1392. The receiver consented to the assignment of Carroll's commission to the plaintiff Harrison, and agreed "to pay to the assignee the amount stipulated above out of the funds now in my hands, which funds represent the deposit made by the pur-

chaser of the building hereinabove described, unless otherwise ordered by the court." The last clause we think susceptible of the reasonable interpretation as having reference only to the fund from which the receiver expected to pay it, and on a motion for nonsuit plaintiff is entitled to the aid of every reasonable inference from the facts in evidence. Certainly, if the compensation had already been earned in accordance with the court's order, the receiver could not properly confine the payment to a particular fund. Nor would we be disposed to hold that the plaintiff's case should fail because the judge subsequently held the purchase offer ineffective and permitted the withdrawal of the fund mentioned. Judge Phillips' last order did not refer to the matter of plaintiff's compensation. Even if the words relied on by the defendant be understood to impose a condition on the right to the commission itself, as being dependent on the subsequent order of the court, we doubt the power of the court to decree avoidance of the obligation of a valid contract, after compensation thereunder had been earned. Defendant's contention that the plaintiff was reimbursed by Carroll is not borne out by the evidence.

Considering the plaintiff's evidence in the most favorable light for him, we are constrained to hold that the judgment of nonsuit was improvidently entered, and must be reversed and the cause remanded for further proceeding.

Reversed.

J. M. ETHERIDGE v. T. A. ETHERIDGE.

(Filed 3 March, 1943.)

1. Automobiles § 12c—

Statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter the intersecting highway, and does not apply to an accident to an automobile running into a ditch and turning over 100 to 150 feet beyond the intersection.

2. Negligence §§ 1a, 19a—

Generally, negligence will not be presumed from the mere happening of an accident; but on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed.

3. Negligence § 19a—

Direct evidence of negligence is not required, but the same may be inferred from facts and circumstances, and if the facts proved establish the more reasonable probability that defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury.

4. Same—

When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care.

5. Same: Automobiles § 18g—

Where defendant was driving an automobile, free from disclosed mechanical defect, at about 35 miles per hour on a good road and the car struck a bump at an intersection, ran on the right side of the road for some distance, into the right drain ditch, overturned and injured plaintiff, there is a reasonable inference of want of due care and judgment of nonsuit was error.

6. Negligence § 17a—

The fact that an inference of negligence may be drawn from the evidence does not shift the burden but merely constitutes evidence defendant is required to meet or risk an adverse verdict.

APPEAL by plaintiff from *Dixon, Special Judge,* at September Term, 1942, of NASH. Reversed.

Civil action in tort to recover damages for personal injuries.

On Sunday, 27 April, 1941, plaintiff and defendant, brothers, were returning to Whitakers, N. C., from Bellamy's Mill in an automobile owned and operated by defendant. Defendant was driving about 35 miles per hour on a dirt road. As they approached an intersection or fork in the road defendant passed another vehicle going about 20 miles per hour. "He swerved around that car and ran into that intersection and lost control of the car and ran in the ditch (on the right) and the car turned over. He crossed the intersection and was making the bend to the left and the speed he couldn't make it and hit the bank on the right side. After you crossed the intersection the road curves to the left." The car ran into the drain ditch and turned over. Plaintiff suffered substantial injuries.

Defendant passed the car before reaching the intersection and the car turned over 100 to 150 feet beyond the intersection. It was dusty at the time.

Defendant offered evidence tending to show that as he crossed the intersection his car hit a "kinder" bump, went to the right and stayed on the right-hand side until the accident occurred. He tried to turn back to the middle of the road but could not. He does not know why. He applied his brakes "but they did not seem to take hold." There was judgment of nonsuit and plaintiff appealed.

O. B. Moss and Ben H. Neville for plaintiff, appellant.
Battle, Winslow & Merrell for defendant, appellee.

BARNHILL, J. On this record the testimony tending to show that the accident occurred near an intersection is immaterial. Statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter, the intersecting highway. Sec. 103, ch. 407, Public Laws 1937. This accident occurred some distance from the intersection. While the defendant's speed is a circumstance to be considered, that he may or may not have been exceeding the limit prescribed for intersections has no causal connection with the subsequent occurrence.

Nor is there any evidence that the dust interfered with the vision of defendant. He passed the other car in order to avoid its inconvenience. This evidence, except as one of several circumstances, does not tend to show negligence.

Is there, then, any sufficient evidence of want of due care, requiring the submission of the cause to a jury?

The statute prohibits the operation of a motor vehicle without due caution and circumspection or at a speed or in a manner so as to endanger or be likely to endanger, any person or property, section 102, ch. 407, Public Laws 1937, or at a speed greater than is reasonable and prudent under the conditions then existing. Sec. 103, ch. 407, Public Laws 1937. Plaintiff's complaint, liberally construed, alleges a violation of these provisions of our Motor Vehicle Law. We are constrained to hold that he has offered evidence tending to support the allegation.

Generally, a defendant's negligence will not be presumed from the mere happening of an accident, but, on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed. Even so, "it has never been suggested that evidence of negligence should be direct and positive. In the nature of the case, the plaintiff must labor under difficulties in proving the fact of negligence, and as that fact is always a relative one it is susceptible of proof by evidence of circumstances bearing more or less directly on the fact of negligence—a kind of evidence which might not be satisfactory in other classes of cases open to clear proof." *Dail v. Taylor,* 151 N. C., 284, 65 S. E., 1101.

Direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances; and if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. *Fitzgerald v. R. R.,* 141 N. C., 530; *Dail v. Taylor, supra.*

There are instances where this requirement is met by simply proving the occurrence and the resulting injury. "Though mere accident is not proof of negligence, some accompanying elemental facts may, under ruling by the Court, afford room for the jury to infer that the negligence of the defendant caused the injury." *Chaisson v. Williams,* 156 Atl., 154.

Hence, this rule has been formulated and generally followed: When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care. 9 (part 2) Blashfield, sec. 6043, p. 306; Sherman & Redfield, Negligence (4d), sec. 59; Jaggard, Torts, 938; *Roberts v. Economy Cabs,* 2 N. E. (2d), 128; *Smith v. Kirby,* 178 Atl., 739; *Morrow v. Hume,* 3 N. E. (2d), 39; *Zwich v. Zwich,* 163 N. E., 917; *Howard v. Texas Co.,* 205 N. C., 20, 169 S. E., 832; Anno. 64 A. L. R., 255; *Feldman v. Chicago Railways Co.,* 6 A. L. R., 1291.

The rule permits the jury, but not the court, to draw an inference of negligence. In other words, it is a circumstance from which the jury may, but is not compelled to, infer a want of due care. *Howard v. Texas Co., supra; Hinnant v. Power Co.,* 187 N. C., 288, 121 S. E., 540. The inference, sometimes referred to as a presumption, yields to contrary proof—the weight of the inference as well as the weight of the explanation offered to meet it (when in dispute) being for the jury. *Schovanner v. Toelke,* 163 N. E., 493; Blashfield, *supra,* p. 303.

The rule has found limited application in automobile cases. It applies when the accident is one which does not happen in the ordinary course of events where reasonable care is used, *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464, and the cause of the accident or the loss of control resulting in the accident, such as an obstruction in the road, a flat tire, or skidding, does not affirmatively appear.

It does not apply where the evidence discloses that the injury might have occurred by reason of the concurrent negligence of two or more persons, or that the accident might have happened as a result of one or more causes, or where the facts will permit an inference that it was due to a cause other than defendant's negligence as reasonably as that it was due to the negligence of the defendant, or where the supervening cause is disclosed as a positive fact—and skidding, *Springs v. Doll,* 197 N. C., 240, 148 S. E., 251, Anno. 64 A. L. R., 261, or a puncture or blowout, *Clodfelter v. Wells,* 212 N. C., 823, 195 S. E., 11; *Giddings v. Honan,* 79 A. L. R., 1215; *Ingle v. Cassady,* 208 N. C., 497, 181 S. E., 562, is

such fact. Blashfield, *supra,* sec. 6046. When the supervening cause appears as an affirmative fact it never applies. No inference of negligence then arises from the fact of accident or injury.

As stated by *Brogden, J.,* in *Springs v. Doll, supra,* it does not apply "(1) when all the facts causing the accident are known and testified to by the witnesses at the trial, *Baldwin v. Smitherman,* 171 N. C., 772, 88 S. E., 854; *Orr v. Rumbough,* 172 N. C., 754, 90 S. E., 911; *Enloe v. R. R.,* 179 N. C., 83, 101 S. E., 556; (2) where more than one inference can be drawn from the evidence as to the cause of the injury, *Lamb v. Boyles,* 192 N. C., 542, 135 S. E., 464; (3) where the existence of negligent default is not the most reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture, *Dail v. Taylor,* 151 N. C., 284, 66 S. E., 135; (4) where it appears that the accident was due to a cause beyond the control of the defendant such as the act of God or the wrongful or tortious act of a stranger, *Heffter v. Northern States Power Co.,* 217 N. W., 102, 25 A. L. R., 713, note 2; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Saunders v. R. R.,* 185 N. C., 289, 117 S. E., 4; (6) where the injury results from accident as defined and contemplated by law."

Applying the rule in *Baker v. Baker,* 124 So., 740, the Court said: "In the absence of obstructions, defect in the road or car or other supervening cause, the wreck of a car under the circumstances disclosed (overturned on curve) readily warrants an inference of negligence in operation."

In *Tabler v. Perry,* 85 S. W. (2d), 471, it was held that the inference of negligence is from the fact that the automobile is driven in such manner and with such lack of control that it leaves the proper part of highway safe for travel and encounters or creates dangers to persons, whether such persons are occupying the automobile or are near or along the highway.

In *Nassar v. Interstate Motor Freight System,* 16 N. E. (2d), 832, the Court concluded that where the evidence discloses that a truck, without coming in contact with any obstacle, left the highway and plunged into a creek, and the cause for its so doing and the circumstances connected therewith preclude the finding as a matter of law that the driver was not negligent, explanation is called for. *Feldman v. Chicago Ry. Co.,* 289 Ill., 25; *Masten v. Cousins,* 216 Ill. App., 268.

"It is well settled in Virginia, and generally held, that when an automobile leaves a public driveway and injures a pedestrian on the sidewalk, the fact itself creates a presumption of negligence and casts upon the defendant the burden of showing that there was no negligence." *Bromm Baking Co. v. West,* 186 S. E., 289.

The following cases are among the many in which the rule was held to apply on proof of facts similar to those here disclosed: *Mansfield v. Pickwick Stages Northern Division,* 229 Pac., 890 (motor bus left paved highway and ran into gulch); *Lawrence v. Pickwick Stages Northern Division,* 229 Pac., 885 (bus left paved highway, ran into ditch and overturned); *Bower Auto Rent Co. v. Young,* 274 S. W., 295 (auto ran off road and overturned); *Morrow v. Hume,* 3 N. E. (2d), 39 (auto left road and collided with telephone pole); *Masten v. Cousins, supra* (auto being driven at about 40 m.p.h. left road and ran into tree); *Rindge v. Holbrook,* 149 Atl., 231 (auto ran off road and into fence); *Kinary v. Taylor,* 276 N. Y. S., 688 (auto left highway and struck telephone pole); *Zwich v. Zwich,* 163 N. E., 917 (auto left road and ran into telephone pole at street corner); *Nassar v. Interstate Motor Freight System,* 16 N. E. (2d), 832 (vehicle left road and ran into creek); *Baker v. Baker,* 124 Sou., 740 (auto overturned on curve); *Goss v. Pac. Motor Co.,* 259 Pac., 455 (truck was diverted from main course and ran upon the sidewalk, struck down a lamp post and injured a pedestrian); *Harke v. Haase,* 75 S. W. (2d), 1001 (car left street and struck person on sidewalk); *Francisco v. Circle Tours Sight-Seeing Co.,* 265 Pac., 801 (car ran off road into drain ditch and hit bank); *Seney v. Pickwick Stages Northern Division,* 255 Pac., 279; *Tabler v. Perry, supra* (car left road and ran into ditch).

The evidence offered by plaintiff meets all the requirements of the rule, and, without more satisfactory explanation than that contained in this record, permits an inference of negligence.

The defendant was in control of and was operating the automobile. He was traveling about 35 m.p.h. The road was in good condition and his car was free from any disclosed mechanical defect. Even so, his automobile left the traveled portion of the highway, ran into the drain ditch and overturned. He struck the bump at the intersection. The accident happened some distance away and he does not say that the bump caused him to lose control of his car. The evidence offered does not disclose the cause of the loss of control and resulting wreck as a definite fact.

Such an occurrence does not usually happen in the absence of negligence on the part of the one in the control of an automobile. On the contrary, an automobile being operated with due care and circumspection under the conditions as they then exist and at a reasonable rate of speed, in the absence of some explainable cause, will remain upright and on the traveled portion of the highway. Surely the accident was not one which happens in the ordinary course of things. It was not a natural or unusual result of careful driving. The inference that it resulted from the want of due care is reasonable and is more than mere speculation or conjecture.

The fact that an inference of negligence may be drawn from the evidence does not shift the burden but merely constitutes evidence defendant is required to meet or risk an adverse verdict. All that is required of him is to produce evidence acceptable to the jury sufficient to meet the effect of the plaintiff's showing. He is not required to offset it by a preponderance of evidence. *Stewart v. Carpet Co.*, 138 N. C., 60; *White v. Hines*, 182 N. C., 275, 20 R. C. L., 185, sec. 156; *Eaker v. Shoe Co.*, 199 N. C., 379, 154 S. E., 667; *Seney v. Pickwick Stages Northern Division*, 255 Pac., 279; *Roberts v. Economy Cabs, supra.*

Our conclusion here is not in conflict with former decisions of this Court. Defendant's evidence does not disclose a flat tire, *Clodfelter v. Wells, supra; Ingle v. Cassady, supra,* or other mechanical defect creating an emergency. Nor does it disclose skidding as in the line of cases represented by *Springs v. Doll, supra.* It does not tend to explain or to show any condition or circumstance which produced the unfortunate result *non constat* due care on his part.

As said in the *Doll case, supra,* "skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time . . . It is a well known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there." Hence, it was held that mere skidding will not permit the inference of negligence. That and similar cases are not controlling here.

The evidence offered by plaintiff raises an issue of fact for the jury. The judgment of nonsuit is

Reversed.

CATHERINE E. WOOD AND JOHN R. HEMPHILL, ORIGINAL PARTIES PLAINTIFF, AND J. G. FORD, INTERVENER, ADDITIONAL PARTY PLAINTIFF, v. RICHARD P. WILDER, EDWARD H. WILDER, WILLIAM R. WILDER, W. B. FERGUSON, ADMINISTRATOR OF THE ESTATE OF W. D. WILDER, DECEASED, AND OTHENA HERRON.

(Filed 3 March, 1943.)

1. Partition § 10: Tenants in Common § 3: Husband and Wife § 11—

An exchange of deeds by tenants in common, where the purpose is clearly partition, does not create or confer upon the parties any additional, or new, or different title, and each party to the partition holds precisely the same title he had before the partition, which only severs the unity of possession. Where a husband, in such a partition, is made a joint grantee with his wife he acquires no title.

2. Pleadings § 15: Appeal and Error § 37a—

While the general rule does not allow a party to adopt, in the Supreme Court, a different theory from that upon which he tried his case below, the rule has no application on demurrer based upon an alleged failure of the complaint to state a cause of action.

3. Pleadings § 15—

A demurrer admits every factual averment in the complaint and all reasonable inferences therefrom.

APPEAL by plaintiffs from *Sink, J.*, at August Term, 1942, of BUNCOMBE. Reversed.

The plaintiffs described their suit as an action to remove a cloud from their title, but it may be construed and treated as an action in ejectment. It is here upon appeal from a successful demurrer to the complaint made *ore tenus* as not stating a cause of action.

Substantially, the complaint sets up the following facts, in which is incorporated a history of the plaintiffs' alleged title:

John R. Hemphill died intestate 15 June, 1889, the owner in fee of a tract of land containing one hundred and twenty-five acres, situated in Buncombe County. He left surviving him, as his heirs at law, five children: John R. Hemphill, T. C. Hemphill, Catherine E. Wood, Mary C. Ballard and Othena Herron. It is alleged that Othena Herron, because of previous advancements received by her by conveyance of other lands, laid no claim to any part of the one hundred and twenty-five acre tract and was, therefore, not considered in the partition of the land subsequently made. The amended pleadings, however, set up as an independent allegation that Othena Herron is, by reason of the said advancement, not entitled to any portion of the lands in controversy.

The other four children held the lands as tenants in common until 3 October, 1901, when they agreed to partition the lands and thereafter hold their shares in severalty. In pursuance of this agreement they divided the lands into four parts, agreed upon the allotments, and consummated the partition by deeds. The precise mode adopted was peculiar; each of the four received a deed to his or her share, executed by the other three. It is stated in the complaint that the forms of the deeds are similar. When, however, they came to the share of Mary C. Ballard, the lands here in controversy, the other three heirs and cotenants named executed and delivered a deed thereto to the said Mary C. Ballard and her husband, R. S. Ballard, in the form of a conveyance in fee, with covenants and warranties of title and citing a consideration of $200.00. The plaintiffs allege that R. S. Ballard was made one of the grantees through error.

Mrs. Ballard died 28 January, 1930, intestate and leaving no children; none were born of the marriage with R. S. Ballard. It is stated in plaintiffs' pleadings that after the death of his wife, R. S. Ballard attempted to convey the lands to his nephew, W. D. Wilder, without consideration.

While the parties were impleading each other and after answer had been made to the complaint, the defendants made a motion to render judgment against the plaintiffs Catherine E. Wood and John R. Hemphill on the grounds of alleged "admissions and allegations not denied" which would estop the plaintiffs by their record from maintaining this cause. It is not stated in this motion what these admissions and allegations are. The motion was denied, and thereafter the plaintiffs were permitted by order of court to file an amended complaint, in which substantially the foregoing allegations were reiterated and additional matter was inserted intending to exclude any rights which Othena Herron might have had and pleading advancements made to her.

Thereupon, the defendants demurred *ore tenus* for that the complaint failed to state a cause of action, and the demurrer was sustained. From this order plaintiffs appealed, assigning error.

T. B. Galloway for plaintiffs, appellants.

E. L. Loftin for defendants, appellees.

SEAWELL, J. The allegations of the complaint do not permit us—at least for the purpose of this review—to regard the deed made to Mary Ballard and her husband as a separate, detached transaction, and to draw certain inferences from its form which, without attending circumstances, might defeat the action and sustain the demurrer. The plaintiffs allege that at the time this deed was made there were other deeds of similar purport and purpose executed and exchanged between the parties as a part of the same transaction—a transaction which, as they allege, explains and characterizes the deed under consideration.

It is alleged that the lands to which these deeds refer were component parts of a tract of land inherited from the deceased father and held in common. It is further alleged that the tenants in common had agreed to divide the land by voluntary partition, and had determined upon the moiety which each was to receive, and that the sole purpose of these deeds, including the Ballard deed, was to make effectual this partition, and set apart the parcel which each of the tenants in common might thereafter hold and enjoy in severalty. They contend, therefore, that the deeds should be construed together in the light of the attendant circumstances and the purpose for which they were made and exchanged. *Millard v. Smathers,* 175 N. C., 56, 94 S. E., 1045; *Jelly v. LaMar,* 242 Mo., 44, 145 S. W., 799; *Casstevens v. Casstevens,* 227 Ill., 547,

81 N. E., 709; 118 American State Reports, 291; 40 Am. Jur., p. 15, sec. 17; 47 C. J., 274, sec. [19] 2.

Upon the alleged facts of the complaint, the case falls within the principle expressed in *Sprinkle v. Spainhour,* 149 N. C., 223, 62 S. E., 910, and *Speas v. Woodhouse,* 162 N. C., 66, 77 S. E., 1000; *Jelly v. LaMar, supra.* Speaking to the question in *Sprinkle's case, supra,* and construing a deed similar in form and made under like circumstances, *Brown, J.,* said:

"Assuming for the sake of the argument that this particular deed, under the circumstances attending it, had conveyed an estate in fee to husband and wife, both, the husband and those claiming as his heirs would not be permitted to set up a claim to the land. It descended to S. E. V. Sprinkle from her ancestor, and this partition deed was made during her coverture. At the date of its execution the land belonged to her separate estate. It is one of the essentials of the peculiar estate by entireties sometimes enjoyed by husband and wife, that the spouses be *jointly entitled* as well as jointly named in the deed. Hence if the wife alone be entitled to a conveyance, and it is made to her and her husband jointly, the latter will not be allowed to retain the whole by survivorship. And it matters not if the conveyance is so made at her request, because being a married woman she is presumed to have acted under the coercion of her husband. *Moore v. Moore,* 12 B. Mon., 664; *Babbitt v. Scroggins,* 1 Duval, 273; *Gillan v. Dixon,* 65 Pa. St., 395, all cited in 18 Am. Dec., 383, 384."

If Mrs. Ballard already held title to the parcel which she received in the division by inheritance from her father—and that, as we have seen, is the allegation—the deed of the cotenants to her and her husband made under the circumstances alleged could not have the effect of creating an estate by entirety, since the grantees, husband and wife, are not jointly entitled, and the husband would not be entitled to hold on the theory of survivorship. Moreover, there is no conveyance by the wife to the husband of the interest thus held; and, therefore, he got no title by the deed of the cotenants without her joinder. This defect of title would, of course, extend to those who hold by inheritance or *mesne* conveyance stemming from Ballard.

It has been repeatedly held that such a deed from cotenants, where the purpose is clearly partition, does not create or confer upon the parties any additional or new or different title, and that each party to the partition holds precisely the same title he had before the partition—the deeds exchanged operating only to sever the unity of possession. *Wallace v. Phillips,* 195 N. C., 665, 143 S. E., 244; *Valentine v. Granite Corporation,* 193 N. C., 578, 137 S. E., 668; *Virginia-Carolina Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646; *Lindsay v. Beaman,* 128 N. C.,

189, 38 S. E., 811; *Harrison v. Ray,* 108 N. C., 215, 12 S. E., 993. See 47 C. J., p. 282, [38] b.

In *Cottrell v. Griffiths,* 108 Tenn., 191, 195, 65 S. W., 397, the effect of such a deed is thus expressed:

"Partition by decree or deed between tenants in common, when they are married women, and the decree or deed includes husbands with wives as decretal parties or joint conveyees, carries no other or more interest to the husband than if such decree or partition deed had been made to the wife alone."

The defendants insist that the plaintiffs have attempted, but ineffectually, to set up a cause of action for reformation of the Ballard deed on the ground of mistake—that they pitched battle upon that issue in the Superior Court and should not be allowed to adopt a different theory of the case on appeal. The rule which defendants invoke has been followed here with some consistency where an actual trial has been had in the court below, and it is obvious to the appellate court that the adoption of a different theory here would be unfair and would tend to defeat justice. It is not applicable to the situation before us.

The demurrer, as has been frequently said, admits every factual averment in the complaint and all reasonable inferences therefrom. *Mallard v. Housing Authority,* 221 N. C., 334, 338, 20 S. E. (2d), 281. To prevail, it must wipe the slate clean. Against the demurrer, the plaintiffs are entitled to have their pleading appraised by reference to any cause of action which it sufficiently expresses. *Hawkins v. Land Bank,* 221 N. C., 73, 75, 18 S. E. (2d), 823. In this instance, the inclusion in the pleading of an inadequately stated cause of action for equitable relief (if, indeed, the explanatory references in the complaint could be so construed), not essential to the relief demanded, or at least to relief of some sort upon the facts alleged, is, therefore, not fatal.

The demurrer to the complaint was erroneously sustained, and the judgment of the court below in that respect is

Reversed.

JAMES E. BROWN v. SOUTHERN PAPER PRODUCTS COMPANY, INC., AND M. O. HAMPTON.

(Filed 3 March, 1943.)

1. Automobiles § 11—

Ordinarily, a motorist has a right to assume that a driver of a vehicle coming from the opposite direction will obey the law and to act on such assumption in determining his own manner of using the road. This right is not absolute, it is qualified by circumstances.

2. Automobiles §§ 9a, 10, 11—

In a road wide enough for only one vehicle neither of two cars, going in opposite directions, has a "right" or "left" side within the restricted passageway. The right of way belongs to him who enters before the other approaches and it is the duty of that other, in the exercise of proper care, to yield it to him; provided, of course, conditions are such that he can observe them by keeping a proper lookout.

3. Automobiles §§ 9d, 11, 18g—

Where the evidence of plaintiff tended to show that he was traveling by automobile at about 20 to 25 miles per hour and, after entering a lane 10 feet wide, caused by deep snowbanks piled on each side of the road for a distance of 50 to 75 feet, he observed defendant about 400 feet distant, coming from the opposite direction at about 45 miles per hour, who entered the lane without slowing down, and their cars collided in the lane, where the snowbanks prevented turning out, causing damage, a judgment of nonsuit was reversible error.

APPEAL by plaintiff from *Sink, J.*, at October Term, 1942, of BUNCOMBE. Reversed.

Civil action in tort to recover for damages to an automobile and for loss of services of plaintiff's wife resulting from automobile collision, in which the corporate defendant sets up counterclaim for damages to its car.

On 5 March, 1942, plaintiff was traveling in a southerly direction on the Asheville-Hendersonville Highway. Defendant Hampton was operating the automobile of the corporate defendant at the same time on the same highway traveling in a northerly direction. The two cars collided, resulting in damage to each.

At the conclusion of the evidence for the plaintiff there was a voluntary nonsuit as to the defendant Hampton, and the court, on motion of defendant, entered judgment of nonsuit as to the corporate defendant. Plaintiff appealed.

Williams & Cocke for plaintiff, appellant.

Smathers & Meekins for defendants, appellees.

BARNHILL, J. The evidence offered by plaintiff, considered in the light most favorable to him, tends to show the following facts:

There had been a heavy snow shortly prior to the accident and the road was icy. The Highway Commission had scraped the snow off the paved portion of the highway, creating heavy banks of snow on each side. At and near the point of collision the snow had not been completely removed from the traveled portion of the road. About 150 feet north of the point of collision the snowbank began to gradually encroach upon the hard surface on the west side until a lane only about 10 feet

wide on plaintiff's left side of the road remained for use. This lane continued about 50 or 75 feet and then opened up "all at once to two lanes." Plaintiff entered the restricted area as he rounded a curve and was in the narrow 10-foot passageway when Hampton approached. At that point the snowbank on the west half of the road was 2 or 3 feet high and was observable by motorists approaching from the south. While plaintiff was in this narrow lane he observed Hampton about 400 feet away approaching from the south traveling about 45 miles per hour. Hampton did not slow down, but entered the narrow lane before plaintiff could get out to a point where he could safely turn to his right. Plaintiff attempted to cut to the right on the snow bank, but was unable to do so, and the cars collided. Plaintiff was traveling 20 to 25 miles per hour. He had chains on his wheels.

Is this evidence sufficient to repel the motion for judgment as in case of nonsuit? We are constrained to answer in the affirmative.

While the statute provides a maximum permissible speed on rural roads and highways when no special hazard exists, the primary, controlling provisions are these: "No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the circumstances then existing." He must at all times operate his vehicle with due regard to the width, traffic, and condition of the highway, and he must decrease speed and keep his car under control "when traveling upon a narrow . . . roadway or when special hazard exists with respect to . . . other traffic or by reason of weather or highway conditions, and speed shall be decreased as may be necessary to avoid colliding with any . . . vehicle or other conveyance on . . . the highway in compliance with legal requirements and the duty of all persons to use due care." Sec. 103, ch. 407, Public Laws 1937 (Michie's, sec. 2621-288).

On the evidence offered it appears that the weather conditions had narrowed the usable part of the highway at the scene of the accident to a one-way lane, and that plaintiff had already entered this narrow lane when Hampton approached. The testimony will likewise support the conclusion that defendant did see, or by the exercise of ordinary care could have seen, the snowbank on the west side which prevented plaintiff from turning further to the right in ample time to stop and permit plaintiff to reach the point of exit in safety, but that instead he failed to observe the situation or, having seen, failed to slow down or take any other precaution to avoid a collision.

Ordinarily, a motorist has the right to assume that a driver of a vehicle coming from the opposite direction will obey the law and to act on such assumption in determining his own manner of using the road. 2 Blashfield, 60, sec. 919 (Citations n 29); *Murray v. R. R.*, 218 N. C., 392 (Citations p 401), 11 S. E. (2d), 326. He may assume that the

driver of a vehicle approaching on the same side or on his left-hand side will yield half of the highway or turn out in time to avoid a collision. Blashfield, *supra,* 61, sec. 919 (Citations note 31). But this right is not absolute. It may be qualified by the particular circumstances existing at the time. Sec. 108, ch. 407, Public Laws 1937. Among that totality of circumstances which determine whether a motorist has fulfilled his duty of care, the proximity, position and movement of the other vehicle and the condition of the road as to usable width and the like are always important.

We have here, under the conditions as they then existed, a one-way or one-lane road—not a two-lane highway. Plaintiff had already entered and was traveling in this one-way lane before Hampton approached. If Hampton did see and observe this condition which created a special hazard and made it impossible for two cars to pass in safety, or if by keeping a proper lookout he could have seen, it was his duty to slow down and if necessary to stop in order to yield the right of way within the narrow lane to plaintiff. If he failed so to do he was guilty of negligence which the jury may find was the proximate cause of the collision.

Under normal conditions it is true plaintiff was traveling on his left and on defendant's right side of the road, but conditions were not normal. Neither car had a "right" or "left" side within the restricted passageway. The right of way belonged to him who entered before the other approached and it was the duty of the other, in the exercise of proper care, to yield it to him; provided, of course, conditions were such that he could have observed them had he kept a proper lookout. *Wald v. Board of Comrs.,* 124 So., 701; *Krousel v. Thieme,* 128 So., 670.

If defendant did not slow down and yield the right of way, either because of failure to keep a proper lookout or because his speed made it impossible, a finding of actionable negligence is permissible.

But defendant relies primarily upon the alleged contributory negligence of plaintiff as a bar to recovery. It alleges that plaintiff was negligent in that he (1) was driving at a high rate of speed under the conditions as they then existed; (2) on slick, icy concrete; (3) negligently applied brakes so as to make his car skid; and (4) operated his car without due care and circumspection, and negligently ran into and collided with defendant's car.

The evidence offered fails to point to any negligent act of plaintiff in either of the respects alleged with that degree of certainty which would require a conclusion as a matter of law that it was a contributing proximate cause of the collision. It only presents a question for the jury.

In its argument here defendant insisted that plaintiff was guilty of contributory negligence in that he failed to turn reasonably to the right.

This, of course, depends upon the conditions of the road at that time, and presents a question for the jury.

It likewise contended that plaintiff's failure to give any signal or warning by horn or otherwise was a proximate cause of the collision, sustaining the nonsuit. This is not alleged. Even so, we could not so hold as a matter of law. Defendant's employee should take notice of what he saw and needed no warning of the condition he readily observed. If the contour of the road or other condition prevented him from seeing, or if he was inattentive and did not see, a warning might have attracted his attention in ample time to allow him to take all necessary precautions. Hence, it is for the jury upon all the evidence to say whether plaintiff failed to give warning, and if so, whether such failure on his part was one of the proximate causes of the collision.

What we have said here is bottomed on plaintiff's evidence, considered in the light most favorable to him. We express no opinion on the merits of the controversy. Defendant's evidence may cast an entirely different light on the issues presented.

The judgment below is

Reversed.

THELMA STANSILL BROWN v. SOUTHERN PAPER PRODUCTS COMPANY, INC., AND M. O. HAMPTON.

(Filed 3 March, 1943.)

APPEAL by corporate defendant from *Sink, J.*, at October Term, 1942, of BUNCOMBE. Appeal dismissed.

Civil action to recover damages for personal injuries.

Plaintiff was a passenger on the automobile of the plaintiff in *Brown v. Products Co., ante,* 626, and the evidence is the same as in that case.

The court below overruled defendant's motion for judgment as in case of nonsuit and submitted the cause to the jury. The jury having failed to agree, a juror was withdrawn and a new trial was ordered. Defendant appealed, assigning error in the ruling on the motion for judgment of nonsuit.

Williams & Cocke for plaintiff, appellee.

Smathers & Meekins for defendant, appellant.

BARNHILL, J. The order for a new trial entered in the court below was interlocutory. It does not affect the merits of the case and is in no sense final. Hence, the appeal is premature.

In view of what has been said in *Brown v. Products Co., ante,* 626, there is no sound reason why we should exercise our discretionary right to express an opinion on the merits of the exceptive assignment of error as requested by defendant. *Knight v. Little,* 217 N. C., 681, 9 S. E. (2d), 377.

Appeal dismissed.

MRS. KATHERINE P. SISK, AS ADMINISTRATRIX OF THE ESTATE OF EDWARD SISK, DECEASED, v. OLD HICKORY MOTOR FREIGHT, INC., AND D. L. WILSON.

(Filed 3 March, 1943.)

Process § 6h: Corporations § 48—

The continuance of corporate existence, by C. S., 1193, makes service of process on a corporation, after it has been adjudged a bankrupt and its charter forfeited under C. S., 1190, reasonable notice and a valid service. These statutes must be read *in pari materia.* Michie's Code, 1137 (a).

APPEAL by defendant Old Hickory Motor Freight, Inc., from *Clement, J.,* at December Term, 1942, of MCDOWELL. Affirmed.

(Facts necessary to an understanding of the case are stated in the opinion.)

Proctor & Dameron for plaintiff, appellee.
W. R. Chambers and Paul J. Story for defendant, appellant.

SEAWELL, J. The defendant corporation, on which it was sought to serve process in this action, was created under the laws of this State, and carried on the business authorized by its charter until 1 May, 1942, when it was adjudged a bankrupt, and its charter became forfeited by operation of C. S., 1190. Its principal office was located in Thomasville, Davidson County. Thereafter, plaintiff brought this action; and, the sheriff of Davidson County, to whom summons was directed, having made a return upon the summons that after due diligence and search he had been unable to find any person designated as process agent of defendant, or any other officer, director or agent of the defendant, and that none of these were to be found in the county, caused service to be made on the Secretary of State under the provisions of chapter 133, Public Laws of 1937 (Michie's Code, 1939, sec. 1137-a).

The defendant entered a special appearance and moved to dismiss the action for lack of service and consequent want of jurisdiction. The motion was denied and defendant appealed.

No question has been presented for our consideration except the validity of the service.

We examine the contentions of the parties in the light of the pertinent statutes.

The cited statute—chapter 133, Public Laws of 1937, secs. 1 and 3—provides as follows:

"Every corporation chartered under the laws of North Carolina shall have an officer or agent in the county where its principal office is located upon whom process can be had, and shall at all times keep on file with the secretary of state the name and address of such process officer or agent, and upon the return of any sheriff or other officer of such county that such corporation or process officer or agent cannot be found, service may be had upon such corporation by leaving a copy with the secretary of state, who shall mail the copy so served upon him to the process agent or officer at the address last given and on file with him, or if none, to the corporation at the address given in its charter; and any such corporation so served shall be in court for all purposes from and after the date of such service on the secretary of state.

"This section shall not be in derogation of any other act or law pertaining to the service of summons or process, but shall be in addition thereto."

The defendant contends that the mode of service provided in the statute is inapplicable to a corporation whose charter has become forfeited by reason of an adjudication in bankruptcy, as provided in the statute—C. S., 1190. The pertinent provision reads as follows:

"When a corporation chartered under the laws of this state is adjudged bankrupt under the laws of the United States . . ., the charter of the corporation is forfeited without further action, unless the stockholders determine by appropriate resolutions to continue the corporate existence of the corporation after the adjudication in bankruptcy, . . ."

Defendant insists that upon forfeiture of the charter the corporation becomes "defunct" or "dissolved"—at least *pro tempore,* citing *VonGlahn v. DeRosset,* 81 N. C., 467, 474-476, and *Dobson v. Simonton,* 86 N. C., 492—and that it had not the power to appoint a process agent or any officers upon whom process could be served.

However, this statute must be read *in pari materia* with C. S., 1193, the application of which also is necessary to determine the status of a corporation suffering a forfeiture of its charter under C. S., 1190, by reason of bankruptcy:

"All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or

against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established."

By virtue of this Act, the immediate dissolution of the defendant corporation in the sense contended for by counsel for the defense was obviated. *General Electric Co. v. West Asheville Improvement Co.,* 73 Fed., 386, 388. The corporate existence of defendant was continued for three years from the forfeiture—after the time when it "would have been dissolved"—for the purpose of prosecuting and defending actions and for winding up its affairs. Its disability applies to continuing the business for which the corporation was established.

Under such circumstances—that is, where provision is made for continuing corporate existence for purposes of suit—the rule generally applied is that service may be made on such persons as are designated for that purpose by the statute prior to the forfeiture of the charter. 19 C. J. S., 1567, sec. 1776, and cases noted.

In point is *Hould v. Squire,* 91 N. J. L., 103, 79 Atl., 282, in which, construing a statute identical with ours, the Court held that the continuance of corporate existence for the purpose of prosecuting and defending suits preserved the statutory mode for serving process existing at the time of the forfeiture. Incidentally, this was an action in tort brought after the forfeiture and discontinuance of the charter, as in the present case.

The provision for service upon the Secretary of State is not in the nature of a penalty upon the corporation for not having an agent upon whom process could be had, and not keeping the name of such agent on file with the Secretary of State, which might be condoned because of the alleged inability of the corporation to comply with the statute. It is a device for public convenience and is sustained upon the theory that it is reasonably adequate notice, either to be employed alternatively or where other forms of notice are unavailable.

The Secretary of State is required to mail the copy of the process served upon him to the process agent or officer at the address last given and on file with him, or if none, to the corporation at the address last given in its charter. This provision is questioned by the defendant as not constituting reasonable notice, because of the uncertainty of relaying the notice to a defendant under the circumstances here presented. The constitutionality of similar statutory provisions as due process of law was upheld in *Smith v. Finance Co.,* 207 N. C., 367, 368, 177 S. E., 183; *Lunceford v. Association,* 190 N. C., 314, 315, 129 S. E., 805; *Goodwin v. Claytor,* 137 N. C., 224, 232, 49 S. E., 173; *Fisher v. Insurance Co.,* 136 N. C., 217, 222, 48 N. C., 667. The objectionable feature, however,

might have been obviated by proper attention of the defendant to the provisions of the statute.

We are unable to accommodate the supposed finality of the *VonGlahn case, supra,* to the facts at issue here. In that case, the corporation and its directors were exonerated because no action whatever had been taken within the three years of grace following the expiration of the charter.

This action does not concern any of the assets of the corporation, presently or prospectively, in the hands of the trustee in bankruptcy, but C. S., 1193, covers cases of forfeiture not nearly so horrendous as bankruptcy. We do not think that it was the intention of the cited statutes to bring about a situation in which a corporation could be alive to its assets, but dead to its obligations, or enjoy the security of an indefeasible *non est inventus* during the time corporate existence is continued by statute for the purpose of suing and being sued.

We regard the service as legally sufficient, and the judgment of the court below is

Affirmed.

STATE v. TILLERY RICE.

(Filed 3 March, 1943.)

1. Criminal Law § 41h: Homicide §§ 17, 22—

In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. C. S., 1802.

2. Homicide § 22—

When the evidence of defendant's wife of threats made against her husband by deceased was excluded, in a homicide case in which there was a plea and evidence of self-defense, there is reversible error, which is not cured by the defendant being later permitted to testify to the threat as communicated to him by his wife.

APPEAL by defendant from *Sink, J.,* at August Term, 1942, of MADISON.

Criminal prosecution tried upon indictment charging the defendant with the murder of one Harve Rice.

The record discloses that on Wednesday, 1 July, 1942, Harve Rice stole $325 from the defendant's home, which was "every penny he had." The defendant lived about twelve miles from Marshall, N. C. On the following Saturday, 4 July, while talking with the defendant at his home, Harve Rice admitted taking the defendant's pocketbook contain-

ing the $325. A controversy ensued; both men were armed; the defendant fired three shots, at least one taking effect; Harve Rice was carried to a hospital in Greeneville, Tenn., and died a few days thereafter. The deceased was a large man, about six feet tall, weighing 265 pounds, and had the reputation of being a dangerous and violent man. The defendant is a small man, weighing 144 pounds. The defendant interposed a plea of self-defense and offered evidence tending to support his plea.

The defendant's wife testified that on Thursday, 2 July, the deceased came to her home about 9:00 o'clock in the morning and asked where her husband was. She was then asked: "What did he say when he first came in?" Objection; sustained. In the absence of the jury the witness said she informed him he had gone to town to have a search warrant taken out for his money; that in reply the deceased said, "If he has me searched I will kill the s. o. b."; and that she later communicated this threat to her husband. On objection, the proffered evidence was excluded. Exception.

On being recalled, the defendant testified: "She (his wife) told me that Harve said if I had him searched over the money he would kill the s. o. b."

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's Prison for not less than 20 nor more than 22 years.

Defendant appeals, assigning errors.

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

John H. McElroy, W. K. McLean, and George M. Pritchard for defendant.

STACY, C. J. The appeal may be made to turn on whether in a homicide case, where there is plea and evidence of self-defense, it is competent for the defendant's wife to testify to a threat made by the deceased against her husband which she communicated to the defendant before the killing.

It is conceded that the question should be answered in the affirmative. C. S., 1802; *S. v. Baldwin,* 155 N. C., 496, 71 S. E., 212. There was error in excluding the proffered testimony of the defendant's wife. *S. v. Jones,* 89 N. C., 559. See *S. v. Cotton,* 218 N. C., 577, 12 S. E. (2d), 246.

It is the position of the State, however, that on the present record, no harm has come to the defendant because he was later permitted to testify to the threat as communicated to him by his wife. Even so, the defendant was denied the benefit of his wife's testimony and its credibility.

S. v. Dickey, 206 N. C., 417, 174 S. E., 316. The jury might have accepted what she would have said, while inclined to discredit the defendant's version of what she told him, especially as the defendant's statement was unsupported by the wife's evidence given on the trial. *Eaves v. Coxe,* 203 N. C., 173, 165 S. E., 345; *Burns v. R. R.,* 125 N. C., 304, 34 S. E., 495.

The evidence admitted is not the same as that excluded, nor by the same witness. Hence, the rule against granting new trials where competent evidence is excluded and later given by the same witness, *Baynes v. Harris,* 160 N. C., 307, 76 S. E., 230, appears to be inapplicable to the facts of the instant record. More appropriate would seem to be the pronouncement of *Brogden, J.,* in the *Eaves case, supra:* "Obviously if a party offers the competent testimony of a given number of witnesses, but the court excludes the testimony of one, even though the testimony of the others is admitted without objection, notwithstanding the offering party is entitled to the credibility and weight of testimony of the excluded witness. Otherwise the total weight and credibility of the testimony would be reduced for the reason that a jury might have believed the testimony of witness whose evidence was excluded and for one reason or another might not believe the testimony of the witnesses whose testimony was received without objection."

The State further insists that when the jury returned, the witness was asked "what threats, if any, she had ever heard the deceased make against her husband"; that the court permitted this question, instructing the witness to confine herself exclusively to statements made by the deceased, if any, and that the witness failed to repeat her testimony given in the absence of the jury. In answer to this position, it is enough to say the witness understood, as did her counsel, that what the deceased had said on the morning of 2 July, had been excluded as incompetent. Hence, in answer to the question, the witness proceeded to tell only what she heard on the day of the homicide and omitted any reference to what was said two days earlier. As a result, the defendant was deprived of the weight and credibility of his wife's testimony in respect of the alleged communicated threat made on Thursday. 3 Am. Jur., 590.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to arise on the further hearing, it is deemed supererogatory to consider them now.

For the error as indicated in excluding the wife's proffered testimony, a new trial must be had. It is so ordered.

New trial.

WASHINGTON COUNTY v. NORFOLK SOUTHERN LAND COMPANY, JOHN L. ROPER LUMBER COMPANY, BANKERS TRUST COMPANY, AS SUCCESSOR TRUSTEE TO MANHATTAN TRUST COMPANY, CENTRAL UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO CENTRAL TRUST COMPANY, C. W. GRANDY, RUFUS KIRN, CHARLES WEBSTER, NATIONAL BANK OF COMMERCE & TRUSTS, E. R. MIXON, TREASURER OF ALBEMARLE DRAINAGE DISTRICT, THE BOARD OF DRAINAGE COMMISSIONERS OF ALBEMARLE DRAINAGE DISTRICT (BEAUFORT COUNTY DRAINAGE DISTRICT No. 5), THE BOARD OF DRAINAGE COMMISSIONERS OF WASHINGTON COUNTY DRAINAGE DISTRICT No. 5, THE BOARD OF DRAINAGE COMMISSIONERS OF WASHINGTON COUNTY DRAINAGE DISTRICT No. 4, THE BOARD OF DRAINAGE COMMISSIONERS OF PUNGO RIVER DRAINAGE DISTRICT, EASTERN CAROLINA HOME & FARM ASSOCIATION, INC., AND ALL OTHER PERSONS HAVING OR CLAIMING ANY INTEREST AS BONDHOLDERS, LIENHOLDERS OR OTHERWISE IN SAID LANDS.

(Filed 3 March, 1943.)

1. Appeal and Error § 1—

The rules of the Supreme Court, governing appeals, are mandatory and not directory.

2. Appeal and Error § 19—

The pleadings are not contained in the record, only excerpts from the complaint to which the parties agree. Hence, in accordance with the uniform practice in such cases, the appeal must be dismissed. Rule 19, sec. 1; Rule 20. Rules of Practice in the Supreme Court, 221 N. C., 544.

APPEAL by plaintiff and by respondents, C. T. Gaines, J. C. Kirkman and S. D. Davis, from *Williams, J.*, at October Term, 1942, of WASHINGTON.

Two civil actions, numbered in Superior Court 52 and 54, instituted 26 January, 1940, under provisions of C. S., 7990, for foreclosure of liens upon real estate for taxes due thereon, in each of which, after judgments entered and sales had and deeds executed pursuant thereto, and appeal in *Washington County v. Gaines,* 221 N. C., 324, 20 S. E. (2d), 377, plaintiff moved in the causes for, and obtained order making new parties defendant, and thereafter a successor trustee and *cestui que trust,* under a deed of trust affecting said real estate, entered special appearances and moved for orders setting aside decrees of foreclosure, and sales, and commissioner's deeds thereunder, consolidated for hearing the latter motions.

Upon such hearing, judgment was entered in each action at October Term, 1942, in which it is adjudged among other things: (1) That the

order of sale of the land for taxes, the sale thereof by the commissioner, the order of confirmation and the deed to the county of Washington made thereunder, be and same are set aside and declared to be void and of no effect; (2) that the respondents, C. T. Gaines, J. C. Kirkman and S. D. Davis, who have entered into certain contracts with the county of Washington to purchase the timber and all of the land purchased by it under said order of sale, "are privies to the aforesaid sale," and have been duly served with notice of the motion being heard, and participated in the hearing thereof, and that the deeds, contracts or conveyances of any portion of said land to them are void and of no effect, and that the county of Washington is directed to return and pay over to the said C. T. Gaines, J. C. Kirkman and S. D. Davis all moneys that have been paid to and are now held by the county on any such purchase; and (3) that the county of Washington be allowed to make such other and additional parties to this action as may be necessary and required by law for the foreclosure of a tax lien under section 7990 of the Consolidated Statutes of North Carolina, and to proceed according to law for the foreclosure of such tax lien as it may have on the property herein described.

From such judgments, plaintiff, county of Washington, and respondents, C. T. Gaines, J. C. Kirkman and S. D. Davis, appeal to the Supreme Court, and assign error.

Margaret C. Johnson and Norman & Rodman for plaintiff, appellant.
Carl L. Bailey for respondents, appellants.
L. I. Moore for defendants, appellees.

WINBORNE, J. While it may well be doubted that any valid exceptive assignment of error has been made to appear, it is noted at the threshold of this appeal that the pleadings are not contained in the record. Only excerpts from the complaint are shown in the findings of fact, to which the parties agree. Hence, in accordance with the uniform practice in such cases, the appeal must be dismissed. See *S. v. Lumber Co.*, 207 N. C., 47, 175 S. E., 713, and cases there cited. Rule 19, section 1, of the Rules of Practice in the Supreme Court, 221 N. C., 544, at page 553, requires "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." And, in Rule 20 of said Rules of Practice, it is provided that "memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent." See *Plott v. Construction Co.*, 198 N. C., 782, 153 S. E., 396. Moreover, it is pointed out in *Pruitt v. Wood*, 199 N. C., 788, 156 S. E., 126, and in numerous later decisions, "that the rules of this Court, governing appeals, are manda-

tory and not directory." "The pleadings are essential in order that we may be advised as to the nature of the action or proceeding. . . . We can judicially know only what properly appears on the record." *S. v. Lumber Co., supra.*

Appeal dismissed.

MAY MERRIMON DAVIS v. DR. WILLIAM E. WILMERDING.

(Filed 3 March, 1943.)

1. Trial § 22a—

On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved which may reasonably be deduced from the evidence.

2. Physicians and Surgeons §§ 15a, 15b, 15c—

The law holds a physician or surgeon liable for an injury to his patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to use reasonable care and diligence in the practice of his art, or for the failure to exercise his best judgment in the treatment of the case.

3. Physicians and Surgeons § 15c—

A departure from approved methods in general use, if injurious to the patient, suffices to carry the case to the jury on the issue of negligence.

4. Physicians and Surgeons § 15c—

Where, in an action for damages against a physician, the plaintiff's evidence tended to show that defendant, in treating the broken arm of plaintiff, removed the cast once or twice a week and massaged the hand and arm, which was a departure from approved methods in general use, and after some months plaintiff's hand and arm were useless and an X-ray showed the wrist and hand out of alignment and the bone out of position, a motion for judgment of nonsuit was properly denied.

APPEAL by defendant from *Sink, J.*, at August Term, 1942, of BUNCOMBE.

Civil action to recover damages for alleged negligence on the part of the defendant in failing properly to treat the plaintiff after setting a broken bone in her right forearm.

On 15 November, 1940, the plaintiff fell and broke the large bone in her right forearm. The defendant, a physician and retired army officer living in Skyland, N. C., was called to treat her. He set the bone and put the arm and wrist on a board splint. Later he removed the board splint and used a metal cast, at the same time massaging the plaintiff's arm and hand. After that, the defendant saw the plaintiff once or

twice a week. Plaintiff says: "Each time he came he brought a tube or something and massaged my arm. He would take my arm out of the cast and massage it. He would not support the broken part of my arm while he was massaging it. . . . He held it with the fingers in one hand and rubbed my arm and hand with his other hand."

At the end of three months and ten days the plaintiff's hand was bent and drawn so she could not use it. Her fingers were rigid.

Finally, the defendant took the plaintiff to Dr. Cherry in Asheville, who examined her arm and took an X-ray. He found the wrist and hand out of alignment, the bone out of position. He testified that the displacement could have occurred when the physician removed the arm from the splint. There was further expert evidence to the effect that the manner in which the defendant massaged plaintiff's arm "was unusual" and not according to the general practice; also that "too frequent removal of a broken bone from the cast is bad practice. . . . I would not approve . . . twice a week"—Dr. Herbert.

Plaintiff then secured the services of another physician, who rebroke and reset her arm, with only partially satisfactory results.

The jury answered the issues of negligence and contributory negligence in favor of the plaintiff and assessed her damages at $600.00.

From judgment on the verdict, the defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit.

Don C. Young for plaintiff, appellee.

Harkins, Van Winkle & Walton for defendant, appellant.

STACY, C. J. The case is here on demurrer to the evidence. The appeal presents no other question.

The applicable principles of law are well settled:

First. On motion to nonsuit, the plaintiff is entitled to the benefit of every fact and inference of fact pertaining to the issues involved which may reasonably be deduced from the evidence. *Diamond v. Service Stores,* 211 N. C., 632, 191 S. E., 355.

Second. The law holds a physician or surgeon liable for an injury to his patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to use reasonable care and diligence in the practice of his art, or for the failure to exercise his best judgment in the treatment of the case. *Nash v. Royster,* 189 N. C., 408, 127 S. E., 356.

Third. A departure from approved methods in general use, if injurious to the patient, suffices to carry the case to the jury on the issue of negligence. *Covington v. James,* 214 N. C., 71, 197 S. E., 701.

Viewing the evidence with that degree of liberality required on motion to nonsuit, the conclusion is reached that the permissible inferences are such as to make the issue of liability one for the twelve.

It appears that the removal of the cast once or twice a week and the massaging of plaintiff's hand and arm without any support under the broken part was unusual and a departure from approved methods in general use. The jury was warranted in concluding that this was injurious to the plaintiff.

It results, therefore, that the verdict and judgment must be upheld.

No error.

A. L. MIZELLE v. B. A. CRITCHER, COMMISSIONER, GILBERT ROGERSON AND ETHEL M. ROGERSON.

(Filed 3 March, 1943.)

Judgments § 29—

A commissioner, appointed by a judgment of court and directed therein to convey certain lands in controversy to a specified person, is without power to convey the lands to any other person and his deed to another is void.

APPEAL by defendants from *Dixon, Special Judge,* at November Term, 1942, of MARTIN. Affirmed.

This was an action to declare void a deed made by the defendant Critcher as commissioner to defendant Ethel M. Rogerson.

From judgment for plaintiff defendants appealed.

H. L. Swain for plaintiff, appellee.

B. A. Critcher and H. G. Horton for defendants, appellants.

DEVIN, J. It was admitted in the pleadings that under a judgment heretofore rendered in the Superior Court of Martin County, in an action entitled "Eli Bowen and others *v.* A. L. Mizelle," the present defendant B. A. Critcher was appointed commissioner of the court and ordered to convey a one-half interest in the land in controversy in that suit to the plaintiff A. L. Mizelle upon the payment to the said commissioner of the sum of two hundred and fifty dollars. It was also admitted that instead of conveying the land to the plaintiff the commissioner conveyed the land to defendant Ethel M. Rogerson, who is the daughter of the plaintiff. This was done without authority from the plaintiff.

We agree with the court below that the commissioner was without power to convey the land to any person other than to the plaintiff, and

that his deed to the defendant Ethel M. Rogerson was inoperative and void. The judgment under which he acted fixed the limits of his authority. There was no evidence sufficient to require its submission to the jury that the plaintiff had authorized or acquiesced in the conveyance to the defendant Rogerson, or that he had in any manner conveyed his interest in the land to her or her husband.

It was accordingly adjudged that the deed to the defendant Rogerson was void, and the defendant B. A. Critcher, Commissioner, was directed to convey the one-half interest in the land to the plaintiff upon the payment by the plaintiff to the commissioner of the sum of $135.00. This amount appears to have been agreed to in view of the amounts received by defendants Rogerson from the rents of the land, and there was no exception to this part of the judgment brought forward in the appeal. The commissioner seems to have acted under a misapprehension in the attempted conveyance to Ethel M. Rogerson, and no costs were taxed against him.

We think the case has been correctly decided, and the judgment of the Superior Court is

Affirmed.

STATE v. BILL BRYANT.

(Filed 3 March, 1943.)

1. Criminal Law § 80—

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of Attorney-General, after the Court has examined the record proper for errors on its face.

2. Same—

Where no appeal has been perfected, in a capital case, defendant's brief cannot be considered and his only course is to present the matter to the pardoning authorities.

MOTION by State to docket and dismiss appeal.

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

Roy W. Davis for defendant, appellant.

PER CURIAM. At the September Term, 1942, of Superior Court of McDowell County, the defendant, Bill Bryant, was tried upon indictment charging him with the murder of Joseph R. McNeely, which

resulted in conviction of murder in the first degree and sentence of death as the law commands.

From the judgment thus rendered, defendant gave notice of appeal to the Supreme Court. Defendant was given the privilege of appealing without bond, that is, *in forma pauperis.*

The Clerk certifies that the time for perfecting appeal has expired; that no case on appeal has been filed; and that he has inquired of counsel for defendant and has been informed by him that he does not intend to perfect the appeal. Hence, as the defendant has failed to prosecute his appeal, the motion of the Attorney-General to docket and dismiss must be allowed. *S. v. Phillips, ante,* 440, 23 S. E. (2d), 342. However, pursuant to custom in capital cases, we have examined the record proper to see that no error appears upon its face—and none is found on the present record. *S. v. Phillips, supra,* and numerous other cases.

The Clerk also certifies that "after the time for the perfecting of the appeal expired, counsel for the defendant left a short brief in" the Clerk's "office and asked that same be forwarded with the record if and when the record was called for," and the Clerk enclosed the brief with and under his certificate. Counsel debates therein the competency of a confession of defendant which, as stated in the brief was admitted in evidence on the trial in the Superior Court, and as to which counsel states that at the time of the trial he "had impression that the statement was voluntary, but since reviewing the evidence and reflecting on the matter, there appears some doubt about it." But as no case on appeal was filed in behalf of defendant, the evidence as to the alleged confession, and as to the circumstances under which it was made, does not appear in the record in this Court, and, hence, we have nothing before us on which to consider the challenge attempted to be made to the correctness of the ruling of the court below in admitting in evidence the alleged confession of defendant. Moreover, having failed to serve case on appeal and to perfect his appeal, defendant has lost his right to have the court review the trial except in so far as is revealed by the record proper. The only course now open is for defendant to present the matter to the pardoning authorities, who doubtless will thoroughly investigate the circumstances under which the alleged confession was made.

Judgment affirmed. Appeal dismissed.

E. A. SMYTH, 3RD, LEWIS D. BLAKE AND JOHN A. HUDGENS, EXECUTORS OF THE LAST WILL AND TESTAMENT OF ELLISON A. SMYTH, DECEASED; E. A. SMYTH, 3RD, LEWIS D. BLAKE, JOHN A. HUDGENS AND ELLISON S. McKISSICK, AS TRUSTEES; E. A. SMYTH, 3RD, AND ELLISON S. McKISSICK, INDIVIDUALLY, v. MARGARET S. McKISSICK, ANNIE P. BLAKE, SARAH S. HUDGENS, MARY HUTCHINSON SMYTH, MARY S. McKAY, JAMES A. SMYTH, JR., JULIA S. REEVES, L. PIERCE SMYTH, MOULTRIE H. SMYTH, LEWIS B. SMYTH, MRS. EDWARD M. ARMFIELD, ELLISON S. BLAKE, ANNIE PIERCE BLAKE HAYNIE, EDWARD BLAKE, JULIUS A. BLAKE, SADIE BLAKE ROGERS, LEWIS D. BLAKE, JR., JOHN ALLISON HUDGENS, JR., ELLISON SMYTH HUDGENS, SARAH S. HUDGENS, JR., THOMAS ALLISON HUDGENS, ELLA HUDGENS CAMENZIND; DAVID HUTCHINSON SMYTH, A MINOR, DEFENDED HEREIN BY HIS GUARDIAN AD LITEM; MARGARET S. McKISSICK, II, A. FOSTER McKISSICK, ELLISON S. McKISSICK, JR., MARY C. BLAKE, WILLIAM R. HAYNIE, LEWIS BLAKE HAYNIE, KATHRYN ALLIE BLAKE, JULIUS A. BLAKE, JR., JULIA VARENA BLAKE, ANN LEWIS BLAKE, ALICE BLAKE, ROY A. CHENEY, JR., LEWIS BLAKE CHENEY, JULIA ANN HUDGENS, WILLIAM McKAY, MARY HUTCHINSON McKAY, ADGER SMYTH McKAY, LAWRENCE HAZELHURST McKAY, ELLISON ADGER SMYTH, V, ROSS JORDAN SMYTH, JAMES McGREGOR SMYTH, HELEN BOND SMYTH, JAMES ADGER SMYTH, 3RD, ALL MINORS, AND ANY AND ALL PERSONS NOW IN BEING AND UNBORN PERSONS WHO ARE OR MAY UPON ANY CONTINGENCY BECOME BENEFICIARIES UNDER THE TRUSTS AND WILL OF ELLISON A. SMYTH, DECEASED, DEFENDED HEREIN BY THEIR GUARDIAN AD LITEM; AND FRANCES THROWER SMYTH.

(Filed 17 March, 1943.)

1. Trusts § 8a: Wills § 31—

Where trust indentures conveyed personalty to trustees, in trust for children and grandchildren, with directions as to the distribution of the income and principal thereof, and a devise of additional funds by will contemplated the sale of realty and a similar distribution of the income and *corpus* thus devised, the ordinary rules of descent and distribution and those governing the devolution of estates are applicable to the instruments under consideration, to determine the rights of those who are to participate in accordance with the intent of the trustor.

2. Same—

In a conveyance or devise principal and income go together, in the absence of a clear intention to separate the income from the principal.

3. Trusts § 8b: Wills § 33c—

Beneficiaries of trust property, who are *sui juris* and whose rights are vested, may dispose of their equitable interests in the trust; but here the children of trustor's grandchildren take by purchase and not by descent, and the interests of the grandchildren are defeasible and upon their dying, during the life of the first takers, leaving children, who, in that event, take

the part to which their parents would have been entitled, if living, and, upon the death of a grandchild during the trust period, only those coming within the description, or those then entitled, are capable of answering the roll call for annual or final distribution.

4. Adoption § 13—

In a trust agreement, describing those who are to become beneficiaries therein, the use of the word "child," to designate the one to take upon the death of a grandson of the maker, is not comprehensive enough to include a child adopted by such grandson several years after the agreement became effective.

5. Same: Wills § 41½—

Where a trust is created by will for a son, with provision that upon the death of the son the principal of the trust shall be paid to his child or children, the word "child" includes a child adopted some time before the death of the testator and with his knowledge and approval.

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

APPEAL from *Alley, J.*, at Chambers, January, 1943. From HENDERSON.

This was a suit by the executors and trustees under the will and trust indentures of Ellison A. Smyth, deceased, for construction of these instruments and advice as to the proper distribution of the income and *corpus* of the trusts thereby created, and for an adjudication of the rights and interests of the various beneficiaries. All the parties now living and those unborn who might by any possibility have an interest in the estate, have been made parties and are represented by counsel. The case was presented below upon facts agreed, the pertinent portions of which may be stated as follows:

Ellison A. Smyth, the testator and trustor, in 1932, executed an irrevocable trust agreement or indenture whereby he established a trust fund consisting of stocks, bonds and notes of the value of more than a million dollars, and designated himself as trustee, and the plaintiffs as successor trustees. To these he conveyed the described property in trust to hold, invest and reinvest, and receive the revenues, incomes and profits arising therefrom. The trustees were directed to divide the net income derived from this property into four parts and distribute the same annually as follows:

"a. The first part shall be ten (10%) per cent thereof, and shall be paid to Margaret S. McKissick, now residing at Greenville, South Carolina, for and during the term of her natural life, and upon and after her death this share of the income from this trust shall be distributed among her children in equal shares.

"b. The second part shall be thirty-five (35%) per cent thereof, of which two-thirds shall be equally divided among the children of James

Adger Smyth, deceased, lately residing in Henderson County, North Carolina, and the remaining one-third thereof shall be paid to Mary Hutchinson Smyth, now residing in Henderson County, North Carolina, widow of James Adger Smyth, during her lifetime, and so long as she does not remarry, provided that upon her marriage during her lifetime, and/or upon her death unremarried, the one-third herein provided for her shall be distributed equally among the children of the said James Adger Smyth, deceased.

"c. The third part shall be twenty-five (25%) per cent thereof, and shall be paid to Annie P. Blake, now residing at Belton, South Carolina, for and during the term of her natural life, and after her death this share shall be distributed among her children in equal shares.

"d. The fourth part thereof shall be thirty (30%) per cent thereof, and shall be paid to Sarah S. Hudgens, now residing in Henderson County, North Carolina, for and during the term of her natural life, and after her death this share of the income from this trust shall be distributed among her children in equal shares.

"e. The child or children of any deceased child of Margaret S. McKissick, James Adger Smyth (deceased), Annie P. Blake, and Sarah S. Hudgens, shall equally take the part to which his or her parent would have been entitled, if living.

"f. If, for any cause whatever, there should be a failure of persons within any of the respective classes designated in sub-sections a, b, c and d, next foregoing, for the division of the income from this trust, then the share designated for such extinct class shall be distributed among the surviving classes, equally."

The trust indenture also contained the following provision: "Upon the death of the survivor among Margaret S. McKissick, Annie P. Blake, and Sarah S. Hudgens, and upon the death or re-marriage of Mary Hutchinson Smyth, but not in any event before the year 1941, then and as soon thereafter as practicable, there shall be a final distribution of the *corpus* of this trust, by dividing the same into four parts and distributing same as follows:" The method for the distribution of the *corpus* of the trust was expressed in the same language in which the trustor had previously directed the annual income, that is, to the same classes and in the same proportions, and identified by the same letters, a, b, c and d, together with the limitations in paragraphs "e" and "f."

In 1936 Ellison A. Smyth executed another trust indenture identical in form and language with the first, the only difference being the addition to the trust of certain life insurance policies of the face value of $170,000, with the same directions for the distribution of annual income and *corpus* to the same four groups of beneficiaries, again designated by letters a, b, c and d, with the same limitations "e" and "f."

In 1934 Ellison A. Smyth executed his will, naming the plaintiffs as executors thereof and trustees of an additional trust set up therein. By the will all the remainder of the decedent's estate, real and personal, after the payment of certain legacies, was devised to the plaintiffs as trustees to hold, invest and reinvest, and to distribute annually the income derived therefrom to the same beneficiaries who were designated in the identical language set out in the trust indentures, that is, the executors and trustees were directed to divide the income into four parts and distribute annually to the four groups, using the same words and same method of designation by the letters a, b, c and d, with same limitations under "e" and "f," as hereinbefore set out. The final distribution of the fund was directed to be made "upon the death of all" the testator's children and the death or remarriage of his daughter-in-law, and not earlier than 1944. "Then" the trustees were to distribute the *corpus* of the estate by dividing it into four parts and distributing to the same four groups, designated and described in the same language, and by the same letters, according to the same percentages. The testator explained that the apparent discrimination in the distribution of his estate was not due to discrimination in affection, but was based upon his estimate of their several needs and the objects of their care, maintenance and education.

Thomas Smyth, one of the children of James Adger Smyth, and grandson of the testator, Ellison A. Smyth, was married in November, 1932, to Frances Thrower Smyth. Having no children born to them, in 1938, they adopted for life the infant, David Hutchinson Smyth, who was not related by blood to any of the parties herein. The adoption proceedings were had in the State of Illinois and were in all respects regular, and the final judgment of the proper court of that state, decreeing the adoption, was valid and binding. Thomas Smyth died 2 April, 1941, leaving a last will and testament by which he disposed of all his property to his widow Frances Thrower Smyth.

On 3 August, 1942, Ellison A. Smyth, the testator and trustor, died, leaving the following children and grandchildren:

(a) Margaret S. McKissick, a daughter, who has one child, the plaintiff, Ellison S. McKissick.

(b) Seven living children of his deceased son, James Adger Smyth, and the adopted child of the deceased Thomas Smyth.

(c) Annie P. Blake, a daughter, who had seven children, all now living except one, Julia Blake Cheney, who died before the testator, leaving two minor children.

(d) Sarah S. Hudgens, a daughter, who has five children, all living.

It was admitted that Ellison A. Smyth knew of and approved the adoption by his grandson, Thomas Smyth, of the infant David Hutchin-

son Smyth in 1938, and treated this child as he did the children born to his other grandchildren, giving him presents and keeping a photograph of him in his home.

The court below, construing the trust indentures and the will in the light of the facts agreed, adjudged that the trust indentures became effective from date of execution, and the will from the date of the death of the testator; that under those instruments the living children of the three daughters took undivided vested interests in the net income and *corpus* of the trust and estate property, in the proportions designated, subject to the payment of the income to the first takers for life; that one of the daughters of Annie P. Blake having died, leaving two children surviving, these children took a vested interest in the share of their mother in the income and *corpus* of the trust and estate property; that the seven living children of James Adger Smyth, deceased, took each an absolute vested interest in one-eighth of the designated proportion of the net income and *corpus* of the trust and estate property, subject to the payment of one-third of the income to Mary Hutchinson Smyth, widow of James Adger Smyth, for her life; and that as Thomas Smyth, son of James Adger Smyth, was living at the execution of the two trust indentures he took a vested interest in one-eighth of the designated proportion of the net income and *corpus* of the trust property embraced in the trust indentures, and having died before the testator, his interest therein passed to his wife, Frances Thrower Smyth, by his will, and she became entitled to an absolute vested interest in the share to which Thomas Smyth would have been entitled under the trust indentures.

It was further adjudged that Thomas Smyth having legally adopted for life the infant David Hutchinson Smyth, the said infant became the lawful child of Thomas Smyth, and upon the death of Thomas Smyth before the death of the testator Ellison A. Smyth, David Hutchinson Smyth took, by purchase under the will of Ellison A. Smyth by substitution in the place of his father Smyth, a vested interest in the share of his father, Thomas Smyth, in the income and *corpus* of the estate property devised in the will, subject to the payment of his proportion of the income to the widow of James Adger Smyth, for her life.

It was further adjudged that, as to the grandchildren of Ellison A. Smyth now living, upon the death of any leaving child or children such child or children would take *per stirpes* the share of income and *corpus* of the trust and estate property which the parent would have taken if living. It was further adjudged that the vested interests under the trust indentures and will were subject to defeasance only in the event that all persons under any of the respective groupings should become extinct; that in determining such extinction Frances Thrower Smyth should not

be counted at all, and David Hutchinson Smyth included only within the group under the will.

From the judgment, for the purpose of determinative review, all the parties, except defendant Frances Thrower Smyth, appealed.

Smathers & Meekins for plaintiffs.

Geo. A. Shuford for defendant David Hutchinson Smyth.

Robert Lee Smith for defendant Frances Thrower Smyth.

Wm. F. Toms for defendants Margaret S. McKissick, II, and other infant defendants.

J. Samuel Lieberman for defendants Margaret S. McKissick and other adult defendants.

DEVIN, J. Ellison A. Smyth died 3 August, 1942, at the advanced age of ninety-four, leaving him surviving three daughters, the widow of a deceased son, nineteen grandchildren and twenty-four great-grandchildren. His estate was valued at approximately two million dollars. Some time before his death in order to provide for the distribution of his estate among his descendants he executed two trust indentures and a will whereby he conveyed a portion of his estate and devised the remainder to the plaintiffs as trustees and executors for the purposes therein expressed. These three instruments, covering different species of property, were similar in form and purpose, and the designation of the beneficiaries was in substantially the same language in each. The trustees, to whom the property was thus conveyed and devised, were charged with the duty of holding and investing the funds, and receiving the revenues, income and profits arising therefrom, and making distribution to the trustor's children and grandchildren, both as to income and *corpus*. For the purposes of distribution he divided the beneficiaries, both under the trust indentures and in his will, into four groups or classes. These groups were designated and identified in each instrument by the same letters a, b, c and d, and the trustees were directed to distribute both income and *corpus* of the funds to those embraced in these groups according to certain percentages. The three daughters and the daughter-in-law of the trustor were to receive annually their respective percentages of the income during their natural lives, and then the income was to be distributed to their children in each group, with the proviso "e" that the child of any deceased child should take the part his parent would have been entitled to if living. There was the further provision in clause "f" that if there should be a failure of persons in any of the classes for the division of the income from these trusts, then the share designated for such extinct class should be distributed among the surviving classes.

Upon the death of the survivor of the three daughters and daughter-in-law the trustees were directed then to make final distribution of the funds of the trusts and *corpus* of the estate to those embraced in the four groups according to the percentages fixed, with the same proviso "e" that the child of any deceased child should take the part to which his parent would have been entitled, if living, and with the additional proviso "f" for distribution in the event all the members of any class should become extinct. Subsequent to the execution of the trust indentures and the will, but before the death of the trustor, another angle was introduced into the situation by the fact that Thomas Smyth (embraced in group "b"), son of James Adger Smyth and grandson of the trustor, having no children born of his marriage with Frances Thrower Smyth, in 1938, adopted for life an infant named David Hutchinson Smyth, and thereafter in 1941 died leaving a last will and testament wherein he devised all his property to his said wife.

The plaintiffs as executors and trustees ask the advice of the Court as to the proper distribution of the income and *corpus* of the trust funds, and for an adjudication of the respective rights of the beneficiaries under the trust indentures and the will.

At the outset two important questions are presented: (1) What, if anything, did Frances Thrower Smyth take under the will of Thomas Smyth? (2) What, if anything, did David Hutchinson Smyth, the adopted son of Thomas Smyth, take under the trust indentures and will of Ellison A. Smyth?

1. While the trust indentures conveyed personal property to trustees with directions as to the distribution of the income and principal thereof, and the devise of an additional fund in the will contemplated the sale of real property and the distribution of the income and *corpus* thus devised, the ordinary rules of descent and distribution and those governing the devolution of estates are applicable to the provisions of the instruments under consideration, in order to determine the rights of those who are to participate in the benefits thereby conferred in accord with the ascertained intent of the trustor.

The trust indentures directed the trustees to pay the income derived from the trust property to the trustor's descendants according to groups and classes. The group embracing the widow and children of the trustor's deceased son, James Adger Smyth, was designated by the letter "b." To this group was set apart 35% of the total net income. Of this, one-third was to be paid the widow for the term of her natural life, the remaining two-thirds to be equally divided among the children of James Adger Smyth. As one of the children of James Adger Smyth, Thomas Smyth received one-eighth of two-thirds of 35% of the total net income from the trust property until his death in 1941. The trust indentures

contained provision "e" to the effect that the child or children of any deceased child of James Adger Smyth should take the part to which his parent would have been entitled, if living. That meant that the child of Thomas Smyth, upon the death of the latter, would be the one to succeed to his share. Thus, the interest of Thomas Smyth, if vested, was defeasible upon his death before the final vesting of the estate in the ultimate takers. The person to take on the death of Thomas Smyth was to be ascertained at that time. *Mercer v. Downs,* 191 N. C., 203, 131 S. E., 575; *Trust Co. v. Stevenson,* 196 N. C., 29, 144 S. E., 370; *Woody v. Cates,* 213 N. C., 792, 197 S. E., 561. As was said by *Adams, J.,* in *Trust Co. v. Stevenson, supra,* "Considered in the light of these decisions the words 'if living,' in the fifth item of the will, are manifestly referable to the death of the life tenant." What then passed to Thomas Smyth's devisee from the trust fund? It follows that when Thomas died his will so far as the trust fund was concerned conveyed nothing, and that the interest he would have been entitled to if living passed by the terms of the trust instruments to his child, if there was one capable of qualifying as such, or to those entitled to take upon his death during the lives of the first takers.

The contingency of one or more of the trustor's grandchildren dying without children does not seem to have been specifically provided for, other than the direction in paragraph "f." However, we think, by analogy to the statutes of distribution, the implication is that he intended in case one of his grandchildren died without issue, his part of the income from the trust would pass to his surviving brothers and sisters, and only upon extinction of an entire group would it pass to other surviving groups.

The final distribution of the *corpus* of the trust funds established by the trust indentures was postponed until after the death of the trustor's three daughters and daughter-in-law. It was declared that "upon the death of the survivor" of the four, "then and as soon thereafter as practicable," distribution should be made by dividing the *corpus* into four parts, of which one part—35%—should be divided among the children of James Adger Smyth, the child of any deceased child to take the part to which his parent would have been entitled if living. So that, if Thomas Smyth had survived to the time fixed for the final distribution, he would have received one-eighth of 35% of the *corpus* of the trust estate. Since he died in 1941, prior to that time, his child, if any, was the one designated as capable of taking the part to which Thomas Smyth would have been entitled. Thomas Smyth received the income from the trust as long as he was able to answer the annual roll call, and when he died his devisee could not answer for him. Mrs. Frances Thrower Smyth cannot bring herself within the description,

expressed in the trust indentures and will, of the person to take upon the death of Thomas Smyth (*Bowen v. Hackney,* 136 N. C., 200, 48 S. E., 997). Likewise, when the last survivor of the life tenants shall pass away, "then" upon the final roll call only those then entitled can answer. At that time, it is provided that if there should be a failure of persons within any of the classes designated for distribution of the *corpus* of the trust, the share of such extinct class shall be distributed among the surviving classes.

In its simplest form we have this situation: The trustor conveys property to trustees in trust to pay the income derived therefrom annually to A during the lifetime of B, and, upon the death of B, to pay the *corpus* to A. A dies during the lifetime of B, leaving a will bequeathing all his property to C. If that were all, the solution would not be difficult. But the addition of the further provision that in case of the death of A, his child should take the part A would have been entitled to if living, presents a different situation.

If the conveyance of property in trust for the payment of income to Thomas Smyth be regarded as creating in him a vested interest in the income and *corpus* of the trust fund, it was defeasible upon his death before the expiration of the trust period, and it seems, from the language in which the beneficiaries are designated and the method of distribution declared, that the trustor's intention should be ascertained to mean that upon the death of Thomas Smyth his child would stand in his shoes, and that both as to annual income and final distribution only those then entitled could answer to the roll call. This seems to be the rule established by the decisions in *Bowen v. Hackney,* 136 N. C., 187, 48 S. E., 997; *Haywood v. Rigsbee,* 207 N. C., 684, 178 S. E., 102; and *Knox v. Knox,* 208 N. C., 141, 179 S. E., 610. The distinction between these cases, here controlling, and those cases in which the person to take is determined at the death of the testator, is clearly drawn in *Witty v. Witty,* 184 N. C., 375, 114 S. E., 482.

The facts in the case at bar are distinguishable from those in *Lyon v. Bank,* 128 N. C., 75, 38 S. E., 251, where a fund was established for the payment of income to certain beneficiaries for life, with provision that as each one died his part of the *corpus* be paid to his personal representative. This was held subject to disposition by will.

True, the beneficiaries of trust property who are *sui juris* and whose rights are vested may dispose of their equitable interests in the trust property (26 R. C. L., 1264), but where the interest of a beneficiary is made defeasible upon his dying with children to whom the interest passes by substitution, a different rule applies. The distinction between the case where the devolution is dependent upon a contingency rendering uncertain who is to take, and the case where the vesting of the property

right depends upon a contingency but the person to take is certain, is illustrated by *Fisher v. Wagner,* 109 Md., 243, 21 L. R. A. (N. S.), 121. In that case the devise was to Aminta Green, but in case she died without children, to Fisher, his heirs and assigns, absolutely. Fisher died in the lifetime of Aminta Green, leaving a will wherein he devised the property to his wife. The will of Fisher was held good, since the person to take in the event Aminta Green died childless was certain. See also *Reilly v. Mackenzie,* 134 Atl., 502, 48 A. L. R., 778.

It is suggested that the conveyance or devise of the income from the trust fund vests the title to the fund in the beneficiary, but we do not think this principle applicable here. It was said in *Benevolent Society v. Orrell,* 195 N. C., 405, 142 S. E., 493: "In the absence of a clear intention to separate the income from the principal an absolute devise of the income from the land passes the land itself." But it was noted in that case that the rule would be otherwise if the trustor expressed an intention inconsistent with the transfer of the title to the beneficiary and indicated an intention to separate the income from principal, as by the appointment of a trustee. *Cole v. Bank,* 186 N. C., 514, 120 S. E., 54, 69 C. J., 402.

In support of the view that the trustor intended that the interests of the children of his son and daughters, both as to annual income and principal, should survive to those only who could answer to the description at the roll call, it may be noted that the grandchildren are designated by class rather than by name. *Wooten v. Hobbs,* 170 N. C., 211, 86 S. E., 811; *Mebane v. Womack,* 55 N. C., 301. However, from a consideration of the language in which the several instruments are couched, for the purpose of ascertaining the intent of the testator (*Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356), we think the children of the trustor's grandchildren took by purchase and not by descent, and that the interests of the grandchildren were defeasible upon their dying during the life of the first takers, leaving children, who, in that event, were to take the part to which their parents would have been entitled, if living, and that upon the death of a grandchild during the trust period only those coming within the description, or those then entitled, were capable of answering the roll call for annual or final distribution.

2. The trust indentures executed by Ellison A. Smyth in 1932 and 1936 became effective as of those dates. The rights and interests thereby conveyed became fixed, and the description of those who were to become beneficiaries was then defined. At that time Thomas Smyth was living and no child had been adopted. Therefore, it follows that the word "child" used in these instruments to designate the one to take upon the death of Thomas Smyth was not comprehensive enough to include a child adopted by him several years thereafter. *Leeper v. Leeper,* 347 Mo.,

442, 147 S. W. (2d), 660, 133 A. L. R., 586, annotation 597; *Re Puterbaugh,* 261 Pa., 235, 104 Atl., 601, 5 A. L. R., 1277, annotation 1280, 1 Am. Jur., 664. The general rule is that the word "child," standing alone, when used in a deed as referring to those to take in succession, does not include the adopted child of another, unless it appears from the instrument itself or attendant circumstances that it was so intended. There is nothing in the language of the trust indentures here to indicate that the testator intended to include any others than those of his blood, and there were no extraneous circumstances, existing at the time of or before the execution of the trust indentures, which would lend color to the suggestion that an adoption by Thomas Smyth was anticipated or contemplated. 69 C. J., 177. Hence, we conclude that David Hutchinson Smyth, the subsequently adopted child of Thomas Smyth, is not entitled to take under the trust indentures, since it could not have been in the contemplation of the trustor, at the effective dates of these instruments, to include an adopted child within the meaning of the word "child" as used therein in paragraph "e" to designate those to take upon the death of the trustor's grandchildren.

However, we think a different result is reached when we come to consider the right of the adopted child to take the part set aside for his father under the will. The will of Ellison A. Smyth spoke from his death in 1942. At that time Thomas Smyth was dead, leaving an adopted child. David Hutchinson Smyth had become in law the child of Thomas Smyth and Frances Thrower Smyth, as respects them, as much so as if he had been born to them by natural law. While his adoption did not constitute him an heir of Ellison A. Smyth (*Grimes v. Grimes,* 207 N. C., 778, 178 S. E., 573), yet as the lawful child of Thomas Smyth he was entitled to take in substitution and as representative of his adopting father. He was then qualified in every legal aspect, as the "child" of Thomas Smyth, to step into his father's shoes, and as the son of his father take property rights which had been set aside for his father. This was evidently what *Justice Brogden* had in mind when he wrote for the Court, in *Tankersley v. Davis,* 195 N. C., 542, 142 S. E., 765, "The words of the deed 'during the term of her natural life, and thereafter to any child or children she may have surviving her in fee,' nothing else appearing, would undoubtedly vest the title to the property in the adopted child."

In *Mooney v. Tolles,* 111 Conn., 1, 149 Atl., 515, 70 A. L. R., 608, where a trust was created by will, for the benefit of a son and his child or children, with provision that upon the death of the son the principal of the trust should be paid to his child or children, it was held, under the Connecticut statute, that the word "child" included a child adopted some time before the death of the testatrix and with her knowledge and

approval. In the annotation under the *Mooney case* in 70 A. L. R., 621, will be found numerous decisions bearing on this point.

We have recently dealt with the question of the hereditable rights of adopted children in *Grimes v. Grimes,* 207 N. C., 778, 178 S. E., 573. The facts in that case were these: T. J. Grimes died intestate in 1933. His son, W. T. Grimes, died intestate, and without issue in 1931, but having previously, in 1924, adopted for life a child, William P. Grimes. It was held in a well considered opinion by *Schenck, J.,* that the adopted child could not take as heir of T. J. Grimes. Under the statute then in force the adopted child, by virtue of the establishment of the relationship of parent and child, was entitled to take as heir and next of kin the real and personal property of his adoptive father, but the statute did not extend to the child the right to inherit from his father's ancestors or other kindred. This interpretation of the statute is in accord with the concensus of judicial opinion in other jurisdictions where similar statutes prevail. 120 A. L. R., 837, 70 A. L. R., 621; 1 Am. Jur., 662. However, the ruling on the facts in the *Grimes case, supra,* is not controlling on the facts of the case at bar, since they differ in material respects. Here the property passed by will, and the will used the word "child" to designate the one capable of succeeding to Thomas Smyth's share of the fund. That designation must be held sufficient to include the adopted child, when considered in connection with the admitted fact that Ellison A. Smyth four years before his death knew and approved of the adoption of David Hutchinson Smyth, thereafter recognized him as a member of the family, and treated him as he did his other great-grandchildren, and so continued after Thomas Smyth died leaving no natural children, without changing his will or limiting the meaning of the word "child" to those related by blood.

Upon a due consideration of the will, in the light of all the surrounding circumstances, construing the provision that upon the contingency of the death of Thomas Smyth during the life of the first takers the one to take his part was his child, we think that David Hutchinson Smyth, who was at the time the will became effective legally qualified as the child of Thomas Smyth, was capable, upon the death of Ellison A. Smyth, of taking by substitution the share already created and set apart for Thomas Smyth.

3. It follows from what has been said that the children of the trustor's daughters, designated by the letters "a," "c" and "d," took a vested interest (subject to the life rights of their mothers), defeasible upon their dying during the lifetime of their respective mothers, since in that event the child of any deceased child of Margaret S. McKissick, Annie P. Blake or Sarah S. Hudgens would "take the part to which his or her parent would have been entitled, if living."

As Mrs. McKissick had only one child, in case of his death in her lifetime, his children would take the share he would have been entitled to if living; and in case of his death, before that of his mother, without children or issue of children, then his share would be divided among the surviving classes according to paragraph "f," subject to the life right of Mrs. McKissick.

In the case of the children of Mrs. Blake and Mrs. Hudgens the same rule would be applied as herein applied to the children of James Adger Smyth, subject to the right of these daughters of the trustor to receive the percentage of income designated in the trust indenture and the will during the term of their natural lives.

Except as herein modified the judgment of Judge Alley is in all respects affirmed. The costs of this Court will be paid by the estate.

Modified and affirmed.

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

MRS. ZILPHIA CREECH v. MRS. BEULAH CREECH, INDIVIDUALLY, AND MRS. BEULAH CREECH, EXECUTRIX OF J. M. CREECH ESTATE.

(Filed 17 March, 1943.)

1. Trusts §§ 14, 15—

In the absence of circumstances indicating a contrary intent, where the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase price.

2. Trusts § 15—

A resulting trust may be established by parol, and no formality of words is necessary where the unequivocal intent can be determined from the attendant circumstances.

3. Trusts § 18c—

The purchase of property by a parent, who takes title in the name of a child, raises a presumption of fact and not of law that the purchase is intended as an advancement. This presumption may be rebutted by evidence of a contrary intent.

4. Equity § 2—

The tendency of the courts is to measure laches by the pertinent statute of limitations, wherever the latter is applicable to the situation, and not to regard the delay of the actor to assert the right within that period effective as estoppel, unless upon special intervening facts demanding that exceptional relief.

5. Limitation of Actions § 2c—

An action to engraft a resulting trust upon a deed in fee on its face is not barred by the three-year statute of limitation.

6. Trusts § 18d—

In a suit where plaintiff seeks to have a trust declared in her favor against land conveyed to her son in fee and by such son conveyed to her husband, now dead, who after such conveyance divorced plaintiff and married defendant, executrix, who did not go upon the stand, evidence attacking the characters of both the executrix and deceased husband is not relevant to the issues, and its admission is reversible error.

APPEAL by defendant from *Johnson, Special Judge,* at November Term (second week), 1942, of JOHNSTON. New trial.

The plaintiff seeks to have a parol or resultant trust declared in her favor respecting certain lands to which the defendant now claims title through the instruments hereinafter mentioned. The plaintiff claims that she paid the purchase price of the lands through a son, J. E. Creech, on a parol agreement that the latter would take title in the name of himself and wife and hold the lands for her temporarily, to be reconveyed to her as she should require. She alleges that thereafter the son, contrary to the trust, conveyed the lands to J. M. Creech, then husband of plaintiff, but afterwards divorced, who took title to the lands with a knowledge of her equity; and that the lands came into the hands of the defendant, his second wife, by the will of J. M. Creech, charged with this equity.

The defendant denied the material allegations of the complaint, alleging that the deed of J. E. Creech to the father, J. M. Creech, was in pursuance of the parol trust agreement between the plaintiff, J. M. Creech and J. E. Creech, and that no trust in favor of plaintiff resulted therefrom. Defendant also alleged that the action was barred by the three-year statute of limitation (C. S., 441); that the parol trust attempted to be set up was in contravention of the statute of frauds; and that plaintiff's action was barred by her own laches.

In support of her claim, plaintiff introduced evidence from which we summarize parts pertinent to the decision:

The documentary evidence of plaintiff consisted in part of the deed of W. P. Aycock and Winfield H. Lyon, Commissioners, to J. E. Creech, *et ux,* recorded 21 February, 1933, in Book 30, page 321, in the office of the Register of Deeds of Johnston County; deed of J. E. Creech and wife, Mary Creech, to J. M. Creech, registered in the office of the Register of Deeds of Johnston County, in Book of Deeds 375, page 481, *et seq.,* 22 November, 1937. Both deeds are absolute in form, purporting to convey the same property and reciting the same consideration ($1,430.00).

Testifying in her own behalf, Zilphia Creech, plaintiff, deposed:

That before her marriage to Rev. J. M. Creech in April, 1896, she was Zilphia Aycock, the daughter of Joe Aycock, from the division of whose estate she had acquired certain property; that after her marriage to J. M. Creech, she built a house on the land she got by division from her father's estate and she and her husband went to live on it, and she farmed it. Later, this land was sold and plaintiff bought with the proceeds a tract of land from John F. Wellons, living there for fifteen years, farming it and raising cotton, selling it and living on it. Plaintiff testified that she sold the cotton and lived on the money, as far as it went; that she accumulated crops grown on this land, principally cotton. She further testified that she sold her cotton grown on the Wellons land, saved the money and put it in the post office in Smithfield; that she had as much as $1,430.00 in money on hand 13 February, 1933; that she drew her money out of the post office, gave it to her son, J. E. Creech, to buy the Fulghum place—the lands in controversy—for herself; that J. E. Creech and wife paid nothing on the purchase price. Recalled, she stated that she gave J. E. Creech the money to buy the land for herself; that she did not give J. E. Creech and his wife any direction or authority to convey the land in controversy to J. M. Creech and got no money from them.

Mrs. Ida Martin testified that she had been for many years past postal savings clerk at the Smithfield post office and had custody of the records of the office, and presented certain records which she testified were made by her and under her supervision. The record disclosed that Mrs. Creech, the plaintiff, opened a savings account in the postal savings department 27 January, 1930, and the account was closed 15 February, 1933, at which time Mrs. Creech drew out $1,015.00.

J. E. Creech testified that his mother had thirty bales of cotton accumulated from her cotton from the Wellons tract; that she placed the proceeds of this cotton in the postal savings department in the post office at Smithfield and that he knew what became of the money. His mother, the plaintiff, gave him the money—not as a gift—but to pay for the land for herself, asking him to take title in the name of himself and wife; that she gave no instruction or authority to make the title to anybody else. That he did not pay his mother anything after the deed was executed by himself and wife to J. M. Creech.

J. M. Creech, Jr., testified that he was the youngest son of J. M. Creech; that he knew of the surplus crops raised by his mother on her Wellons land—mostly cotton—which she stored in the shed at home. That she afterwards sold it, carrying the money to the post office for safekeeping. That he remembered about the time of the purchase of the Fulghum land, and knew that his mother furnished the money with

which to buy it. He testified that his mother told his brother, J. E. Creech, to take the title to the land and keep it for awhile, until further notice from her.

He testified that his father told him that they got together—that is, his mother and father—and decided that they would let Joe have title to the land until they let him know what they were going to do about it. The mother was not present at the time of this conversation—which was the time title was taken, February, 1933. In November, 1937, while Mrs. Creech was in Fayetteville visiting a sick daughter, witness went with his father to the home of J. E. Creech. J. M. Creech told the witness that he "was going to have the deed to the land," as he might probably need it to get money on "right quick" while he was "preaching around"—it would be a good idea to have some security to borrow money. Witness replied that he thought it "all right" and J. M. Creech went to J. E. Creech, brother and son of witness and J. M. Creech, and got the deed.

D. B. Oliver, a witness for the plaintiff, testified that he had a conversation with Rev. J. M. Creech during the latter part of November, 1937—in October—at that time Creech applied to him for a loan of $250.00, of which he said he was in urgent need. Witness said that he told Creech that the latter already owed him about $300.00 on an open account; that if he would secure that and his wife would sign the note, he would let him have the money. Creech said, "No, I will not ask her to sign any more notes." He further said that he had some property, the Fulghum land, "have got a deed to it in my own name, bought and paid for," and offered to give him a mortgage on the Fulghum land, and said he had the deed with him.

M. H. Howell, a witness for the plaintiff, testified that he had a conversation with Rev. J. M. Creech with reference to conveyance of the Fulghum tract of land to J. E. Creech and wife. Creech stated to the witness that Fulghum was an uncle and that Creech wished to keep the property in the family. "He said he asked his wife to 'let's sell her cotton and buy that farm and keep it in the family.' He told me he had sold his cotton and put the money in the Postoffice to pay for that place. And after he sold it I talked with him about it and he said he had bought the place, his wife had bought the place."

There was also testimony to the effect that Creech sometimes referred to the purchase of the Fulghum land as having been made by himself and sometimes as having been made by his wife and himself; and also that he stated he had "sold his cotton and put the money in the Post Office to pay for that place," and afterwards stated that "he had bought the place, his wife had bought the place." There was evidence tending to show generally the impecunious condition of J. M. Creech and

his protracted absence from home during periods covered by farming operations. There was also evidence of admissions on the part of J. M. Creech, made some time in 1937, that it took what he got in his preaching work to "keep the expenses down with him and Miss Hunnings"—then employed by him in the evangelistic work—and after his divorce from plaintiff, his wife, the present defendant—and that he "didn't get any money to send home." There was other evidence bearing upon his financial condition.

The evidence is voluminous, and it is not thought necessary to consume more space upon this phase of the case.

The defendant, by pertinent exceptions, covered other phases of plaintiff's evidence offered in support of her contentions, which it is necessary to summarize with distinguishing references to the exceptions.

Over objection and exception of defendant, a witness, J. K. Hartley, was permitted to state that Miss Hunnings had an automobile which Mr. Creech admitted buying for her (Exception No. 96, R., p. 47); that he saw Mr. Creech give Miss Hunnings a $50.00 check, which she tore up and threw down, stating that if he would not give her any more than that, she would not have any. Whereupon, he wrote her a $75.00 check. Witness stated, "Miss Hunnings was mad; she kicked him on the legs, and rubbed her fists in his face" (Exception 101, R., p. 48); "and told him if he could not give her more than that she would not have any, and she would see what she could do with him" (Exception 102, R., p. 48).

Witness was further permitted to say, over objection, that Creech told him Miss Hunnings was "over-bearing in everything, and was calling on him for money and he didn't have it, and said he had sent home for some money—that she was just over-bearing with him, and forbid him doing anything only just for her, and said he was afraid of her" (Exception 105, R., p. 49); "he said that he didn't know what she would do with him if he was to do that" (Exception No. 106, p. 49). The witness further testified over objection that Miss Hunnings said to him: "She said if he came home—she dared him to come home, and said his people were bad to him, his wife and family were bad to him and made home miserable for him, and she forbid him going home on that account." (Exception 114, R., p. 50.)

Further, this witness was permitted to testify that Creech told him that she, Miss Hunnings, "proposed to him to marry her, but he would not leave his first wife and marry another as good as she was to him." (Exception 120, p. 52.) Witness further testified, over objection, that Miss Hunnings told witness that "she would kill him; that he should not go back." (Exceptions 124 and 125, R., p. 52.)

Witness further testified, over objection, that Creech told him that he (Creech) was afraid of Miss Hunnings.

Over the objection of defendant, plaintiff was permitted to introduce the entire record of the divorce proceeding in the State of Florida, which resulted in the divorce of Creech from the plaintiff and his marriage to Miss Hunnings, now Beulah Creech, the defendant. (R., pp. 91-109).

The defendant moved for judgment as of nonsuit at the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, and the motion was overruled.

Issues were framed and the cause submitted to the jury. Upon favorable answer to the issues, judgment was signed in favor of the plaintiff. Defendant appealed, assigning errors as covered by numerous exceptions.

Lyon & Lyon and F. H. Brooks for plaintiff, appellee.
J. A. Jones and R. F. Mintz for defendant, appellant.

SEAWELL, J. Due to the vigilance of counsel during the trial, an unusual number of exceptions were taken. This has demanded careful perusal of the record, but the basis of decision relieves the Court of a more detailed report of our conclusions.

For the purpose of discussion, two questions may be posed: (a) Whether the evidence was sufficient to go to the jury on plaintiff's allegation that a trust exists in her favor on the lands described in the complaint; and (b), whether there was error in the admission of evidence introduced in her behalf to support the claim.

Usually an exception to the denial of a motion to nonsuit on the evidence demands priority of consideration, since upon it depends further action and expense of the parties in litigation and further travail of the courts; and the just and speedy determination of a controversy is much to be desired. In this case, however, we feel that the more important of these desirables is, under the evidence, a question for the jury.

I. While we do not wish to direct the course of the trial below any more than may be necessary, we do feel that, in order to avoid further resort to this Court upon unsettled questions, it is incumbent upon us to deal with some of the legal questions presented in the argument and contentions of the parties.

At this stage of the case the label we apply to the trust sought to be established by the plaintiff is of no great importance—whether a resulting trust arising by operation of law, or an express trust arising out of a parol agreement—since the evidence may be sufficient to establish either, or failing in one, it may be sufficient as to the other.

The overwhelming weight of authority recognizes the general rule that in the absence of circumstances indicating a contrary intent, where

the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase. *Harris v. Harris,* 178 N. C., 8, 100 S. E., 125; *Avery v. Stewart,* 136 N. C., 426, 48 S. E., 775; *Summers v. Moore,* 113 N. C., 394, 18 S. E., 712; 26 R. C. L., 1219, s. 64, note 1; 65 C. J., p. 382, s. 154 (5), note 14. The presumption is regarded as so powerful that the payment of the purchase price under such circumstances draws the equitable title to the payor "as if by irresistible magnetic attraction." *Ricks v. Wilson,* 154 N. C., 282, 286, 70 S. E., 476. And a resulting trust in favor of the party paying the consideration will arise, although the conveyance is made to another with the knowledge and consent of the payor. *Summers v. Moore, supra.* Such a trust may be established by parol evidence.

It is true that, nothing else appearing, the purchase by a father who takes title in the name of a child will not raise a presumption of trust, but, on the contrary, the purchase will be presumed to be an advancement to the child—*Egerton v. Jones,* 107 N. C., 284, 12 S. E., 434; and we may concede that this presumption has been broadened in this country to include purchase by a mother under like circumstances, although the English rule predicated the presumption not upon the bare parental relation, but upon the duty of the father to provide for the child, and the original basis for the rule does not exist in the case of a married woman. Underhill, Trusts and Trustees, 9th Ed., p. 172. However this may be, in any event the presumption is one of fact and not of law, and may be rebutted by evidence of circumstances tending to show a contrary intent or that the purchaser did not intend the ostensible grantee or grantees to take beneficially. Underhill, Trusts, p. 169. In the case at bar, there is evidence from which such contrary intent may be inferred.

Without impairing the validity or application of the foregoing rules, it may be noted that the transaction under review had the substantial *indicia* of an express parol trust. The declaration of trust need not be explicit, but the nature and terms of the transaction may give rise to an express trust and no formality of words is necessary where the unequivocal intent can be determined from the attending circumstances. *Laws v. Christmas,* 178 N. C., 359, 100 S. E., 587; *Rousseau v. Call,* 169 N. C., 173, 85 S. E., 414; *Blackburn v. Blackburn,* 109 N. C., 488, 13 S. E., 937. We have no doubt that where the property is purchased with the funds of another, who pays the purchase price upon the express condition that the purchase shall be for his benefit and that the title shall be taken and held in the name of the agent, who himself carries out such instruction, the act of the latter in compliance therewith will imply assent and agreement, and supply a want of direct or express promise to hold the lands in trust.

Trusts of the character above outlined may be established by parol evidence. The seventh section of the English Statute of Frauds has not been enacted in this State, and the creation of such a trust in the manner indicated does not contravene our statute of frauds. C. S., 988. *Peele v. LeRoy, ante,* 123, 22 S. E. (2d), 244; *Anderson v. Harrington,* 163 N. C., 140, 79 S. E., 426; *Newby v. Realty Co.,* 182 N. C., 34, 108 S. E., 323; *Brogden v. Gibson,* 165 N. C., 16, 80 S. E., 966. Under the trust theory, the taker of the original title never had any beneficial interest—"The legal title is a mere naked form and only evidence of title in favor of the *cestui que trust* because his money paid for it," 26 R. C. L., Trusts, section 73—and once sufficient basic facts are established, equity will, when necessary, enforce or execute the trust against the person so holding, *in invitum.*

Applying these standards to the case at bar, we think there is evidence—of whatever weight the jury alone may say—tending substantially to support the claim that a trust in favor of plaintiff has resulted and become attached to the legal title held by defendant, because of the transactions competently presented in the testimony, notwithstanding such contradictions as may appear therein.

The courts are slow to substitute doctrinal uncertainties for the well considered and easily applied legislative enactments. On the question of laches, the tendency is to measure laches by the pertinent statute of limitations wherever the latter is applicable to the situation and not to regard the delay of the actor to assert the right within that period effective as estoppel, unless upon special intervening facts demanding that exceptional relief. We do not find that the equities between the parties have been affected by any change of circumstances due to the lapse of time that would justify the application of the doctrine to the facts of the present case.

Plaintiff's action is not based upon fraud or mistake in the execution of the deed conveying a legal title upon which she seeks to engraft a parol trust. In *Briley v. Roberson,* 214 N. C., 295, 199 S. E., 73, action was brought by the grantor to reform a deed which he himself had made. See *Tire Co. v. Lester,* 192 N. C., 642, 135 S. E., 778. The right of the plaintiff is, therefore, not subject to the three-year statute of limitation, as defendant suggests. The appropriate statute, if any might be applicable to the case, is C. S., 445 (Code, sec. 158). *Norton v. McDevit,* 122 N. C., 755, 759, 30 S. E., 24. Plaintiff's action was commenced 26 August, 1940; and both the commissioner's deed to J. E. Creech, upon which the action is based, and the deed of J. E. Creech to J. M. Creech, which plaintiff claims violated the trust, were executed within the ten-year period next preceding the commencement of the action.

Upon the record before us, the statute of limitations is not available to defendant.

The motion to nonsuit was properly denied.

II. The defendant complains that the trial of the case was discursive and took in more of the surrounding scenery than was good for the jury. Generally, the complaint is that although the evangelist Creech, to whose subversive activities most of plaintiff's legal difficulties are attributed, was dead, and although Mrs. Beulah Creech, the second wife and defendant in the action, did not go upon the stand, the character of each of them was attacked by plaintiff's evidence, and this by testimony directed to specific delinquencies. This testimony was concerned largely with relations between these parties before the plaintiff was divorced from Creech in Florida and the defendant became married to him.

The issue before the court was not which of the two contenders was more morally fit to have custody of the Fulghum land, but whether the land came into the hands of the defendant affected with the alleged equity in favor of the plaintiff. We are unable to see how the character of the parties, or the suggested misconduct of either Creech or the defendant, has relevancy to this issue. Much of the evidence covered by the exceptions tended only to show marital disloyalty on the part of Creech, induced by the defendant, and her control of him, whatever its secret, and has no appreciable bearing upon the existence of the trust, however it may have contributed, incidentally, to its breach. On the other hand, the evidence may be criticized as staging a drama as old as Adam and Lilith, and as modern as yesterday's newscast, in which the designing woman, the philandering husband and the wronged wife, etched and framed with no mean artistry, might move the jury to follow the principles of poetic justice rather than rules of law. The prejudicial tendency of evidence of this character is gravely apparent.

It is, of course, not our intention to approve of all the evidence admitted over defendant's objection and not here specifically pointed out, nor to approve of all the exceptions to the evidence which have been taken on the trial, in many of which we do not find merit. Consideration *seriatim* of the 167 exceptions taken by the defendant, most of them to the admission of evidence, would not, we think, add anything new to the volume of learning on that subject, and we prefer to leave at least something to the sound legal judgment of those who undertake to develop and present the case anew. We have attempted above to summarize the more meritorious of defendant's exceptions; and for error in the admission of the indicated evidence, the defendant is entitled to a new trial. It is so ordered.

New trial.

H. C. PEEDIN v. D. B. OLIVER, W. B. OLIVER, JR., AND WIFE, MARY P. OLIVER.

(Filed 17 March, 1943.)

1. Mortgages § 32b—

In notices for the sale of realty under mortgages, or deeds of trust, the identical description of the land, as contained in the instrument, is not required by the provisions of C. S., 2588, and a description "substantially" as in the conveyance, is sufficient.

2. Mortgages §§ 32c, 34c—

The validity of a mortgage sale is not impaired by the failure of the mortgagee to make report thereof to the clerk of the Superior Court, there being no advanced bid. C. S., 2591.

3. Mortgages §§ 32c, 35a, 39a—

Where a mortgagee of land purchases at his own sale, directly or indirectly, the sale is not void, but only voidable, and, ordinarily, can be avoided only by the mortgagor, or his heirs and assigns, who have the election (1) to ratify the sale and settle on that basis; or (2) to pursue one of two remedies: (a) treat the sale as a nullity and have it set aside; or (b) sue the mortgagee for the wrong and hold him liable for the true worth of the property.

4. Mortgages § 42: Equity § 2: Estoppel § 6d—

The estate of the mortgagee, acquired by his purchase at his own sale, being voidable only, may be confirmed by any means by which an owner of a right in equity may part with it: (1) By a release under seal. (2) By such conduct as would make assertion of his right fraudulent against the mortgagee or a third person and which would, therefore, operate as an estoppel. (3) By long acquiescence after full knowledge.

5. Equity § 2: Estoppel § 6d—

Where plaintiff, a mortgagor, attended the foreclosure sale by defendant, his mortgagee, who had the property bid off by his son and plaintiff, with full knowledge of the facts, rented the land for several years from the purchaser, who had acquired a life estate therein, allowed improvements to be made and vacated the same, after expiration of the life estate, on notice from the purchaser, all without protest for nearly eight years, his laches is such as to be fatal to any rights which he may have had.

APPEAL by plaintiff from *Stevens, J.*, at September-October Term, 1942, of JOHNSTON.

Civil action to set aside foreclosure sale and deed made pursuant thereto by defendant D. B. Oliver, as mortgagee, to defendant W. B. Oliver, Jr., as cloud upon title.

The uncontroverted facts are these:

1. Plaintiff, being in possession of a certain tract of land situated in Boon Hill and Pine Level Townships, Johnston County, North Caro-

lina, containing 53 acres more or less, of which he was "the owner in fee" subject to the life estate of his mother, with the joinder of his wife, executed to defendant D. B. Oliver a mortgage deed, dated 6 December, 1929, conveying therein the said land by specific description, as security for a certain indebtedness therein described, payable in ten equal annual installments, with interest—"the first installment to be due one year from December 6, 1929," with power of sale in the event of default in payment of installments.

2. Plaintiff was unable to, and did not pay any of the indebtedness due in the years 1930 to 1933, both inclusive, or the taxes levied on the land in the years 1929 to 1933, both inclusive.

3. Defendant D. B. Oliver, acting under the power of sale contained in the mortgage deed from plaintiff and his wife, and through his attorney, advertised the land, in the manner hereinafter shown, for sale at noon on Monday, 5 February, 1934, at the courthouse door in Smithfield, when and where the only bid submitted was $1,750.00, made in the name of W. B. Oliver, Jr., who is the son of D. B. Oliver, upon which bid the crier declared the land sold, and, pursuant thereto, and on 16 February, 1934, defendant D. B. Oliver, as mortgagee, executed and delivered to W. B. Oliver, Jr., a deed for said land, which deed is of record in office of register of deeds of Johnston County.

Plaintiff in his complaint alleges, and upon the trial below offered evidence tending to show substantially these pertinent facts: (a) The notice of sale, as published in newspaper, is as follows:

"NOTICE OF SALE. By virtue of a mortgage deed dated December 6, 1929, by H. C. Peedin and wife, Addie May Peedin, recorded in Book 243, page 86, of the Johnston County Registry, default having been made in payment of the bond hereby secured, I will on Monday, February 5, 1934, at 12 M., at the Courthouse door in Smithfield, offer for sale at public auction for cash, that certain tract of land lying in Boon Hill and Pine Level Townships, Johnston County, North Carolina, adjoining S. A. Wellons and George Worley and others, and containing fifty three (53) acres, more or less, and fully described by metes and bounds in the aforesaid mortgage. This January 5, 1934. D. B. OLIVER, Mortgagee. ED F. WARD, Attorney."

(b) Plaintiff, his wife, and his sister and her husband, attended the sale on 5 February, 1934. Defendant D. B. Oliver and his attorney, Ed F. Ward, were present. W. B. Oliver, Jr., was not present. "Just prior to the sale," and, while in front of the Courthouse preparing to make the sale, "defendant D. B. Oliver directed his attorney . . . to bid his claim and make the deed to his son, W. B. Oliver, Jr." After the attorney had read the notice of sale, he "made one bid," "and there

was no other bid." No report of the sale was filed or recorded in the office of the clerk of Superior Court.

On the other hand, defendant D. B. Oliver and defendants W. B. Oliver, Jr., and wife, in separate answers filed, deny the material allegations of the complaint, and assert that the foreclosure sale was regularly advertised and conducted and that W. B. Oliver, Jr., became the last and highest bidder, and that the sale to him is valid. Defendants further plead that the plaintiff, at the time, had full knowledge of all the facts and circumstances in connection with the foreclosure sale, and made no objection thereto, and by his conduct has since ratified the same, and is estopped to attack the validity of the foreclosure, and of the deed pursuant thereto. They further plead laches of plaintiff, and the three-year statute of limitations, C. S., 441, in bar of plaintiff's right to recover in this action.

Plaintiff in reply denies the material averments in the further answers of the defendants.

Upon the trial below plaintiff offered in evidence: (1) Deed from B. I. Peedin and wife, Hepsie Peedin, father and mother of plaintiff, to plaintiff, dated 4 April, 1910, registered 4 May, 1910, for recited consideration of $1,000.00, in which the land in question is conveyed "in fee," and which "reserves and excepts the life estate of the said B. I. Peedin and Hepsie Peedin." (2) Quitclaim deed from Hepsie Peedin to W. B. Oliver, Jr., dated 5 January, 1934, and registered, for recited consideration of $100.00, therein describing the land as in the mortgage deed from plaintiff and wife to D. B. Oliver of date 6 December, 1929; (3) summons in this action, dated 8 November, 1941, and served 12 November, 1941.

And plaintiff, in his own behalf further testified, in pertinent part, that on 6 December, 1929, and prior thereto he was in possession of the land described in the mortgage deed; that his mother had a life estate in said land; and that she did not sign the mortgage deed. Speaking directly, he testified: "I heard a conversation between Mr. Ward and Mr. Oliver. Mr. Oliver told Mr. Ward to bid off the land for what he had in it and to make the deed to 'B.' Mr. Ward read the description and cried a bid of $1,750.00, and said 'Three times and sold.' No one else bid at the sale. I applied at the Federal Land Bank for a loan in 1934, but this application was made either after the sale or was made after the sale was advertised. Mr. Oliver told me not to make an application as he did not want the money. This loan was approved for $2,175.00, which was enough to pay the mortgage. I did not get approval of the loan before the land was foreclosed by this sale. After the sale I continued to live on the land during the years 1934, 1935 and 1936. While I continued to live on the land some wood was cut, but all

of it was used on that place." Then plaintiff named those who had cut wood, approximately thirty cords, "worth about $1.50 a cord," and, continuing, said: "No timber was cut by anyone except the stovewood. The only improvements made on the place while I was there was the painting of the house by Mr. Oliver at a cost of about $50.00, so far as I know. I left the land at the end of the year 1936. My mother's name was Hepsie Peedin. She died October 6, 1936. The rental value of the land from 1929 to 1932 was $400.00 to $500.00 a year. The rental value for 1932 was $600.00." And, continuing, plaintiff further testified that W. B. Oliver, Jr., the son of D. B. Oliver was working in his father's store on 5 February, 1934, but that he did not know in what capacity, and that plaintiff "was told by 'B' that he was getting $126.00 a month and had been working in the store since he got through college."

On cross-examination plaintiff continued, by saying: "'B' Oliver's grandfather was named W. B. Oliver, who used to own this business which is still known as 'W. B. Oliver & Son,' and is now owned by D. B. Oliver. 'B' Oliver did not own any interest in the business at the time of this mortgage sale in 1934, so far as I know . . . I applied for a Federal Land Bank loan in January, 1934, when I heard the land was going to be sold. I went to see Mr. Oliver and he told me he did not want the money. It was the land he wanted. I did not have time to get the money before the land was foreclosed . . . I rented the land from D. B. Oliver in 1934 for $100.00. It is worth more, but that is all the rent he charged. I rented it from 'B' in 1935, on shares, and also in 1936. About August, 1936, 'B' rented the land to someone else. I left at the end of that year and moved to Wayne County and stayed two years, and then moved to near Clayton, in Johnston County. About two years ago I saw they had built a pack house and a small smoke house. When I attended the sale of the land I did not make any objection to the sale or raise any question about it, and never did make any protest to anyone or tell anyone that I had or claimed any interest in the land after the sale until the institution of this action. After I left the place in 1936, I was back at the place very often. My people lived there. At the time Mr. Oliver was making improvements on the land I did not make any protest to him or claim any interest in the land. I did not know I could then."

Mrs. Annie May Peedin, wife of plaintiff, testified in part, in corroboration of plaintiff as to what D. B. Oliver told his attorney at the sale with regard to bidding and making of deed to "B," and as to improvements made on the land while they "were there."

The clerk of Superior Court testified that there is no report or record made by D. B. Oliver of the foreclosing of the mortgage deed in question.

To judgment of nonsuit at the close of plaintiff's evidence, plaintiff excepted and appeals to the Supreme Court, and assigns error.

Parker & Lee and Wellons & Wellons for plaintiff, appellant.
G. A. Martin for defendants, appellees.

WINBORNE, J. A careful consideration of the evidence shown in the record on this appeal, taken in the light most favorable to plaintiff, fails to show error in the judgment of nonsuit entered in Superior Court. Plaintiff's challenge thereto is controlled by answer to three questions:

First: Does the notice of foreclosure sufficiently describe the land to be sold? The answer is Yes. While the statute, C. S., 2588, provides that "in sales of real estate under deeds of trust or mortgages it is the duty of trustee or mortgagee making such sale to fully describe the premises in the notice required by law substantially as same is described in the deed of authority under which said trustee or mortgagee makes such sale," this Court in applying this statute has held that an identical description of the land as contained in the deed of trust or mortgage is not required, and that a description "substantially" as in the conveyance is sufficient. *Douglas v. Rhodes,* 188 N. C., 580, 125 S. E., 261; *Blount v. Basnight,* 209 N. C., 268, 183 S. E., 405.

In the case in hand, though the notice of sale does not contain the specific description as is set out in the mortgage, it recites that it is by virtue of a mortgage deed, names the mortgagors, gives the date and the book and page of the registry where the mortgage deed is recorded, and describes the land as "lying in Boon Hill and Pine Level Townships, Johnston County, North Carolina, adjoining S. A. Wellons and George Worley and others, and containing 53 acres more or less, and fully described by metes and bounds in the aforesaid mortgage." This is sufficient to inform the public of the land to be sold, and to enable intending purchasers, in the exercise of ordinary diligence, to identify the land. In fact, plaintiff and his wife, and his sister and her husband were sufficiently informed, for they were present at the time and place named for the sale, and knew what land was being sold.

Second: Is the validity of the sale impaired by the failure of the mortgagee to make report thereof to the clerk of Superior Court—there being no advanced bid? The statute, C. S., 2591, and decisions of this Court provide a negative answer. See *Pringle v. Loan Assn.,* 182 N. C., 316, 108 S. E., 914, and *Dillingham v. Gardner,* 219 N. C., 227, 13 S. E. (2d), 478, and cases cited therein.

Third: Conceding that there is evidence tending to show, or from which it may be inferred that defendant, D. B. Oliver, mortgagee, in the name of his son, W. B. Oliver, Jr., bid, and became the purchaser of

the land at the foreclosure sale, has plaintiff, by his conduct as shown by the evidence taken in the light most favorable to him, ratified or confirmed the sale? Has he been guilty of laches in asserting his equitable rights in the land? An affirmative answer to each question is appropriate.

The uniform decisions of this Court, on the subject, hold that where a mortgagee of land purchases at his own sale, directly or indirectly, the sale is not void, but only voidable, and, ordinarily, can be avoided only by the mortgagor or his heirs and assigns. *Joyner v. Farmer,* 78 N. C., 196; *Whitehead v. Whitehurst,* 108 N. C., 458, 13 S. E., 166; *Averitt v. Elliott,* 109 N. C., 560, 13 S. E., 785; *Shuford v. Bank,* 207 N. C., 428, 177 S. E., 408; *Davis v. Doggett,* 212 N. C., 589, 194 S. E., 288; *Council v. Land Bank,* 213 N. C., 329, 196 S. E., 483; *Smith v. Land Bank,* 213 N. C., 343, 196 S. E., 481; *Mills v. B. & L. Assn.,* 216 N. C., 664, 6 S. E. (2d), 549.

The mortgagor, in such case, has the election (1) "To ratify the sale and accept the proceeds, or settle on that basis"; or (2) to pursue one of two remedies: (a) he "may treat the sale as a nullity and have it set aside"; or (b) acting in repudiation of the sale, he may sue the mortgagee for the wrong done in making such a sale, and hold him liable for the true worth of the property. *Froneberger v. Lewis,* 70 N. C., 456, and 79 N. C., 426; *Brothers v. Brothers,* 42 N. C., 150; *Patton v. Thompson,* 55 N. C., 285; *Bruner v. Threadgill,* 88 N. C., 361; *Burnett v. Supply Co.,* 180 N. C., 117, 104 S. E., 137; *Council v. Land Bank, supra; Smith v. Land Bank, supra.* See also *Harris v. Hilliard,* 221 N. C., 329, 20 S. E. (2d), 278.

Nevertheless, the estate of the mortgagee acquired by the sale, being voidable only, may be confirmed by any of the means by which an owner of a right in equity may part with it: (1) By a release under seal. (2) By such conduct as would make assertion of his right fraudulent against the mortgagee or against third persons, and which would, therefore, operate as an estoppel against its assertion. (3) By long acquiescence after full knowledge. *Joyner v. Farmer, supra; Shuford v. Bank, supra; Council v. Land Bank, supra.* See also *Hare v. Weil,* 213 N. C., 484, 196 S. E., 869; *Wolfe v. Land Bank,* 219 N. C., 313, 13 S. E. (2d), 533.

Applying these principles to the facts in the instant case, it is apparent that plaintiff, with full knowledge of how the sale was conducted, has by his conduct, and long acquiescence ratified the sale, and is now estopped to challenge the validity of it. Summary of the evidence manifests clear intention of plaintiff to recognize the sale and to treat purchaser as the landlord, and to assume for himself the role of tenant. Plaintiff attended the sale and heard D. B. Oliver, the mortgagee, direct his attorney, who cried the sale, "to bid his claim and make deed to his

son, W. B. Oliver, Jr." He knew that, upon a bid of $1,750.00, W. B. Oliver, Jr., was declared to be the purchaser of the land, and that, pursuant to the sale, deed therefor was made to W. B. Oliver, Jr. Thereafter, although he obtained the approval of a loan from the Land Bank in sufficient amount to pay the indebtedness secured by the mortgage deed, and for which the land was sold, as well as the unpaid taxes levied on the land, the evidence fails to show that he made any demand, or effort to redeem. On the other hand, he rented the land from D. B. Oliver for the year 1934 for a cash rental, and from W. B. Oliver, Jr., for the year 1935, and again for the year 1936 on crop-sharing plan. He saw the house painted at the expense of Oliver, and saw wood cut from the land. He knew that in August, 1936, before his mother died in October, 1936, W. B. Oliver, Jr., rented the land to someone else for the year 1937. He vacated the land, after the death of his mother, upon notice from W. B. Oliver, Jr. He saw that a pack house and small smoke house had been built on the land. And, in the face of these facts, and with this knowledge, he says, "I did not make any objection to the sale or raise any question about it, and never did make any protest to anyone or tell anyone that I had or claimed any interest in the land after the sale until the institution of this action." Nearly eight years elapsed between those dates. Acquiescence by plaintiff for so long a period, in the light of the circumstances and of his conduct, is such laches as should prevent a repudiation of the sale at this date—irrespective of any statute of limitation. *Teachey v. Gurley,* 214 N. C., 288, 199 S. E., 83. See also *Jones v. Stewart,* 212 N. C., 228, 193 S. E., 143; *Wolfe v. Land Bank, supra.* As stated by *Barnhill, J.,* in the *Teachey case, supra,* "Under such circumstances, one whose laches is so pronounced cannot successfully seek relief in a court of equity."

Plaintiff, however, contends that in view of the fact that his interest in the land was subservient to the outstanding life estate which defendant W. B. Oliver, Jr., acquired on 5 January, 1934, and under which Oliver was entitled to possession, his renting of the land should be taken to be under Oliver's ownership of the life estate, rather than under the title acquired by him at the mortgage sale. Even so, the undisputed facts are that plaintiff, in obedience to a notice from W. B. Oliver, Jr., vacated the land after the expiration of that life estate, and, with full knowledge, revealed by the facts hereinbefore stated, remained silent and made no protest for nearly five years, and until the institution of this action. Such neglect under the circumstances is fatal to any rights which he may have had.

The judgment below is

Affirmed.

STATE v. GAITHER WATSON.

(Filed 17 March, 1943.)

1. Homicide § 4c—

In a trial for murder, a charge that the elements of premeditation and deliberation are usually not provable by direct evidence and for that reason are susceptible of proof by circumstantial evidence, enumerating, merely as examples of such circumstantial evidence, ill will, previous difficulty between the parties, declarations of intent to kill, or a brutal or felonious manner of killing, is proper.

2. Homicide § 4a—

A charge, in a prosecution for murder, that intent is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, but is arrived at by such just and reasonable deductions from the acts and facts proven, as the guarded judgment of a reasonably prudent and cautious man would ordinarily draw therefrom, is not objectionable as being contrary to the rule that the State must prove intent beyond a reasonable doubt.

3. Homicide § 7a—

Where the court had charged that a killing under the influence of passion or in heat of blood, produced by reasonable provocation, constitutes manslaughter, and then added that this principle would seem to suggest, as the general rule, that reason should be, at the time, obscured by passion to such an extent as to render an ordinary man liable to act rashly and without reflection, and from passion rather than from judgment, there is no error.

4. Homicide § 27c—

A charge that one is guilty of murder in the first degree, if he kills deceased "of his willful, deliberate and premeditated malice aforethought" is not harmful error, for these words constitute no real deviation from the stereotyped language usually used in defining first degree murder as the killing of a human being "with malice and with premeditation and deliberation."

5. Homicide § 27f—

There being no evidence whatever, in a prosecution for murder, that defendant retreated or attempted to retreat or withdraw from the combat, an exception cannot be sustained to a charge by the court that self-defense is the right which the law gives to a person, when he is in a place where he has a right to be and who is himself without fault.

6. Same—

An objection to a charge on the question of self-defense, where the court used the words "it would seem that the law should permit" the right of self-defense, rather than more positive words, is without merit, when the charge taken contextually leaves no basis for equivocation as to the legal right of self-defense.

7. Same—

On a prosecution for murder, where the court had previously charged the jury correctly on the question of self-defense, there was no error in the court's suggestion to the jury that they ask themselves on this question: "Did he (defendant) act with ordinary firmness and prudence, under the circumstances as they reasonably appeared to him, and under the belief that it was necessary to kill in order to save his own life, or to protect his person from serious bodily harm?"

APPEAL by defendant from *Burgwyn, Special Judge,* at August Term, 1942, of BERTIE.

The defendant was tried and convicted of murder in the first degree upon a bill of indictment drawn in conformity with C. S., 4614.

The evidence of the State tended to show that the defendant fired at least one shot from a pistol in the hall of the house in which his wife, the deceased, was living, and then forced open the door of the living room in which his wife was standing near the stove, and fired another shot from the pistol which struck his wife in the breast, inflicting a mortal wound.

The evidence of the defendant tended to show that he did not fire his pistol before opening the door to the living room where his wife was, and that when the door was opened his wife immediately fired at him with a rifle, and he shot only one time in necessary self-defense.

The jury returned a verdict of guilty of murder in the first degree, and from sentence of death predicated upon the verdict, the defendant appealed, assigning errors.

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

S. Russell Lane and J. H. Spruill for defendant, appellant.

SCHENCK, J. The assignments of error appearing in the record and set out in the appellant's brief all relate to the charge of the court.

The first exception discussed in the appellant's brief assails an excerpt from the charge addressed to the elements of premeditation and deliberation necessary to constitute the crime of murder in the first degree, which reads: "Ordinarily these elements (premeditation and deliberation) are not susceptible of direct proof, but are inferred from various circumstances such as ill will, previous difficulty between the parties, declaration of intent to kill either before or after striking the fatal blow, or where the evidence shows the killing was done in a brutal and felonious manner."

This was but another way of charging the jury that premeditation and deliberation are not usually susceptible of direct proof, and are,

therefore, susceptible of proof by circumstances from which the facts sought to be proven may be inferred. That these essential elements of murder in the first degree may be proven by circumstantial evidence has been repeatedly held by this Court. *S. v. McCormac,* 116 N. C., 1033, 21 S. E., 693; *S. v. Roberson,* 150 N. C., 837, 64 S. E., 182; *S. v. Cain,* 178 N. C., 724, 100 S. E., 884; *S. v. Buffkin,* 209 N. C., 117, 183 S. E., 543.

The defendant in his brief contends that his Honor's charge was tantamount to telling the jury that they must infer premeditation and deliberation upon the finding by them of any one of the facts enumerated, namely, ill will, previous difficulty, declaration of intent to kill, or killing done in a brutal and felonious manner. With this contention we do not concur. His Honor simply charged that the elements of premeditation and deliberation were usually not provable by direct evidence, and for that reason were susceptible of proof by circumstantial evidence, and gave the facts enumerated merely as examples of circumstantial evidence by which the essential elements of the crime might be proven. The excerpt from the charge to which the exception is addressed does nothing more than instruct the jury that the finding of any of the facts enumerated might be considered by the jury as circumstantial evidence of the existence of premeditation and deliberation.

The excerpt assailed is in accord with the utterances of this Court. In *S. v. Roberson, supra,* this Court affirmed a charge of the Superior Court in the following language: "This premeditation and deliberation, like any other fact, may be shown by circumstances, and in determining there was such the jury may consider evidence of absence of provocation, absence of a quarrel at the time of the killing, and threats, if there is such evidence. Not that you are compelled to find premeditation and deliberation from such evidence, but that if there is such evidence you may consider it in determining whether there was such premeditation and deliberation as I have indicated." The Court, continuing, said: "Almost every word in this charge has been repeatedly upheld by this Court. It follows all the decisions from *S. v. Fuller,* 114 N. C., 885, to *S. v. Banks,* 143 N. C., 652. The charge is substantially the charge which was approved by this Court in *S. v. Teachey,* 138 N. C., 598." In *S. v. Cain, supra,* we find: "Premeditation and deliberation, like any other fact, may be shown by circumstances and in determining as to whether there was such premeditation and deliberation the jury may consider the entire absence of provocation, and *all* the circumstances under which the homicide is committed. *S. v. Roberson,* 150 N. C., 837; Kerr on Homicide, sec. 72. If the circumstances show a formed design to take the life of the deceased, the crime is murder in the first degree. This subject is so fully discussed in the many cases in our reports that

it is useless to pursue the matter further." Again in *S. v. Evans,* 198 N. C., 82, 150 S. E., 678, there appears: "In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the prisoner, before and after, as well as at the time of, the homicide, and *all* the attendant circumstances." And *Devin, J.,* in *S. v. Buffkin, supra,* uses this language: "In determining the question of premeditation and deliberation, it is proper for the jury to take into consideration the conduct of the defendant, before and after, and *all* attendant circumstances, and it is immaterial how soon after resolving to kill the defendant carried his purpose into execution. *S. v. Evans,* 198 N. C., 82; *S. v. Miller,* 197 N. C., 445. In *S. v. Evans, supra, Chief Justice Stacy* quotes with approval from Kerr on Homicide, sec. 72: . . . 'the want of provocation, the preparation of a weapon, proof that there was no quarreling just before the killing may be considered by the jury, with other circumstances, in determining whether the act shall be attributed to sudden impulse or premeditated design.' "

This exception cannot be sustained.

The second exception discussed in the appellant's brief assails an excerpt from the charge which reads: "Intent is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, but is arrived at by such just and reasonable deductions from the acts and facts proven, as the guarded judgment of a reasonably prudent and cautious man would ordinarily draw therefrom." We do not concur in the contention made by appellant that this portion of the charge was tantamount to an instruction that the burden of proof resting upon the State of a criminal intent was of a less grade than beyond a reasonable doubt. The excerpt assailed by the exception is nothing more than an instruction that a criminal intent may be, in truth ordinarily is, proven by circumstantial evidence, that is, by proving the fact of such an intent by proving other facts from which the intent might be inferred, *S. v. Smith,* 211 N. C., 93, 189 S. E., 175, accompanied by words suggesting the use of caution in finding the essential elements of a capital offense from purely circumstantial evidence. If this charge was in any way at variance with the rule, such variance was favorable to the appellant and, therefore, harmless. In other portions of the charge the court instructed the jury very definitely that the burden of showing beyond a reasonable doubt a criminal intent rested upon the State. This assignment cannot be held for error.

The third exception discussed in the appellant's brief is to an excerpt from the charge, which reads: "The principle involved would seem to suggest as the general rule that reason should at the time of the act be disturbed or obscured by passion to the extent which might render an

ordinary man of fair average disposition liable to act rashly or without due deliberation or reflection, and from passion rather than from judgment." The appellant's sole comment in his brief upon this exception is "The court should state what the law is rather than what it would seem to be."

In the preceding sentence the court had charged the jury that a killing under the influence of passion or in the heat of blood produced by adequate or reasonable provocation constituted manslaughter, and the excerpt assailed was simply a statement of the rationale of the rule. The language used could not have been construed so as to make the rule governing the mitigation of the offense to a lesser grade a doubtful one.

This exception cannot be sustained.

The fourth exception discussed in the appellant's brief is to an excerpt from the charge, which reads: "Self-defense, gentlemen, is the right which the law gives to a person when he is in a place where he has a right to be and who is himself without fault." The appellant in his brief complains of this statement because, as he contends, it fails to take into consideration the provision of the law that a person, although in a place where he had no right to be and is not without fault, has a right to retreat and withdraw from the combat, and, having done so, he then has the right of self-defense restored to him. Under certain circumstances the law as thus asserted by the appellant may be conceded to be correct, but the exception cannot be sustained for the reason that there is no evidence in the record that the defendant ever retreated or attempted to retreat or withdraw or attempted to withdraw from the combat.

The fifth exception discussed in the appellant's brief is to an excerpt from the charge, which reads: "It would seem that the law should permit the latter (the defendant) to act in obedience to the natural impulses of self preservation, and to defend himself against what he supposed to be threatened attack." Here the appellant's complaint is again addressed to the use of the words "it would seem" rather than "it does" or "it is." When the whole of the charge is examined it is apparent that the court clearly presented the right of self-defense as it is vouchsafed by the law to the defendant. The words complained of were used simply in advancing as a reason for the existence of the right the "first law of nature," self preservation. The charge when read contextually leaves no basis for equivocation as to the existence of the legal right of self-defense. This exception cannot be sustained.

The sixth exception discussed in the appellant's brief is to an excerpt from the charge where the court was suggesting to the jury certain questions that they ask themselves in deciding whether the defendant was guilty of first degree murder. The court suggested the question:

"Did he (defendant) kill the deceased of his willful, deliberate and premeditated malice aforethought?" and charged the jury that if they answered that question in the affirmative, together with certain other questions, they should return a verdict of guilty of murder in the first degree. The quoted question contained the only reference to premeditation and deliberation in this immediate connection. The appellant complains because his Honor used the adjectives "deliberate" and "premeditated" modifying the noun "malice," instead of the nouns "premeditation" and "deliberation." It is difficult to discern any substantial difference between the expression "of his willful, deliberate and premeditated malice" and "with malice and with premeditation and deliberation," since the premeditation and deliberation essential to constitute murder in the first degree must of necessity be malicious. There certainly could have been no harmful result from the slight deviation from the stereotyped language usually used in defining murder in the first degree as being the killing of a human being with malice and with premeditation and deliberation. Especially is this true in the light of other portions of the charge where the court did charge the jury along the beaten path, for instance: "First, murder in the first degree, which is the unlawful killing of a human being with malice and with premeditation and deliberation. Second, murder in the second degree, which is the unlawful killing of a human being with malice, but without premeditation and deliberation, and third, manslaughter, which is the unlawful killing of a human being without malice and without premeditation and deliberation." And again, "The presence in the one case of premeditation and deliberation and the absence in the other of one or both these elements is the distinguishing difference between murder in the first degree and murder in the second degree."

This assignment cannot be held for error.

The seventh exception discussed in the appellant's brief is to an excerpt from the charge when the court was suggesting to the jury certain questions that they ask themselves in deciding whether the defendant had made good his plea of self-defense, and charged the jury that an affirmative answer to such questions would make it their duty to acquit the defendant. The defendant contends that this portion of the charge made the right of self-defense depend upon whether the defendant was at a place where he had a right to be, and being without fault in bringing about the difficulty, whereas, although the defendant may not have been at a place where he had a right to be, and may not have been free from fault in bringing about the difficulty, still if he retreated and withdrew from the combat, his right of self-defense would have been restored. This contention is untenable for the reason, as heretofore expressed,

there was no evidence that the defendant retreated or attempted to retreat, or withdrew or attempted to withdraw from the combat.

The defendant further contends that the question suggested by the court was erroneous, for the reason that it failed to convey to the jury that they were the judges of the reasonableness of the grounds of such apprehension, and that they must determine the question from the facts as they appeared to the defendant at the time he fired the fatal shot. The question assailed was: "Did he act with ordinary firmness and prudence under the circumstances as they reasonably appeared to him, and under the belief that it was necessary to kill in order to save his own life, or to protect his person from serious bodily harm?"

It is the contention of the defendant that this question could have been construed to make the right of self-defense dependent upon facts and circumstances as they appeared at the time of the trial rather than upon their appearance to the defendant at the time of the killing. We do not concur with the contention that the language of the question supports such an interpretation. The phrase "circumstances as they reasonably appeared to him" would seem obviously to refer to appearances to the defendant at the time he committed the alleged criminal act. Considering the question in connection with previous instructions, no other construction is possible.

The court had previously charged, with reference to the necessity for resorting to self-defense, that "This, however, is to be determined by the jury from the facts and circumstances as they find them to be from the evidence, and as they reasonably appeared to the prisoner at the time of the fatal encounter," and also that "The reasonableness of his apprehension must always be for the jury and not for the defendant to pass upon, but the facts and circumstances as they appeared to the prisoner at the time he committed the alleged criminal assault."

This exception cannot be held for reversible error.

A careful examination of the entire charge and of the record leaves us with the impression that the defendant has had a fair and impartial trial, and, notwithstanding the gravity of the result to the defendant, we are impelled to hold that no error appears.

No error.

E. L. KRITES AND WIFE, LILLIAN KRITES, v. ROY PLOTT AND WIFE, HATTIE PLOTT.

(Filed 17 March, 1943.)

1. Deeds § 11—

A deed is construed by its "four corners," taking all of its provisions together and, in case of an apparent repugnance, adopting that construction which is most consonant with the intent of the parties.

2. Deeds § 13a—

A deed from husband to wife, reserving a life estate and containing the following, after the conveyance clause and description, "the party of the first part makes this deed to his beloved wife Cora Thompson her lifetime at her death it is to go to Roy Plott and his wife Hattie Plott and their heirs," conveys a fee simple remainder to Roy Plott and his wife, Hattie Plott, following the life estates.

STACY, C. J., concurring.

WINBORNE, J., joins in concurring opinion.

APPEAL by plaintiffs from *Alley, J.*, at November Term, 1942, of YADKIN. Affirmed.

The plaintiffs sued the defendants in ejectment for the recovery of the tract of land described in the complaint. The defendants answered the complaint, denying plaintiffs' title and claiming the land by adverse possession under colorable title for seven years next preceding the institution of the action. C. S., 428. The plaintiffs replied, setting up the deed under which they allege the defendants claim title, alleging that it conveys no title, but constitutes a cloud upon plaintiff's title, which they ask to have removed.

By consent of parties, the cause was heard before Judge Felix E. Alley at the November Term, 1942, of Yadkin Superior Court, without the intervention of a jury. The parties entered into a stipulation, whereby it was agreed that the deed referred to in the pleadings was that same deed executed by U. J. Thompson to Cora Thompson, 21 July, 1932, and recorded in Book 37, page 20, in the office of the register of deeds for Yadkin County, reading as follows:

"THIS DEED, Made this 21st day of July, A.D. 1932, by U. J. Thompson of Yadkin County and State of North Carolina, of the first part, to Cora Thompson of Yadkin County and State of North Carolina, of the second part:

"WITNESSETH, That said U. J. Thompson, in consideration of One Dollar Dollars, to his paid by Said party of the second part the receipt of which is hereby acknowledged, have bargained and sold, and by these

presents do grant, bargain, sell and convey to said Said party of second part their heirs and assigns, a certain tract or parcel of land in Yadkin County, State of North Carolina, adjoining the lands of Pill Smith, John White, and others, and bounded as follows, viz.:

"BEGINNING at iron stake in Pill Smith line and on the West side of the road leading from the church to Thompson mills then East 31 chs. and 20 links to Iron stake on the West Side of the old Georgia Road, the Westard corse with the old Georgia road, as it meanders 32 chs. and 56 links to the Phill Smith corner then North in Smiths line 5 ch. and 15 links to a stone Then West with Smith line on with the Church lot 7 chs. to a stone, in the center of the Road Then North with Phill Smith line 8 ch. 74 links to the Beginning containing 28 acres more or less.

"Now be it understood in this that the party of the first part makes this deed to his beloved wife Cora Thompson her life time at her death it is to go to Roy Plott and his wife Hattie Plott and their heirs.

"Now be it Remembered that U. J. Thompson of the first part is to hold the above land his life time.

"TO HAVE AND TO HOLD the aforesaid tract or parcel of land, and all privileges and appurtenances thereto belonging, to the said Cora Thompson her heirs and assigns, to her only use and behoof forever.

"And the said U. J. Thompson for his self and his heirs, executors and administrators, covenant with said party of the second part their heirs and assigns, that he is seized of said premises in fee, and have right to convey in fee simple; that the same are free and clear from all incumbrances, and that he does hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever.

"IN TESTIMONY WHEREOF, the said U. J. Thompson have hereunto set his hand and seal, the day and year first above written.

HIS
U. J. (×) THOMPSON
MARK

"Attest: J. C. MILLER."

It was further stipulated that U. J. Thompson died 7 August, 1932, Cora Thompson, his wife, surviving him. Cora Thompson died 24 August, 1933. She left a son by a former marriage, E. L. Krites, the plaintiff in this action, who is married to Lillian Krites, co-plaintiff, and is the only son and heir at law of Cora Thompson. Roy Plott is not related by blood or marriage to U. J. Thompson, but was reared by the said Thompson, having lived with him until he reached a majority.

It was agreed that both plaintiffs and defendants are claiming under the deed above set out; that defendants are in possession of the property described in the pleadings and have been in possession since the death of Cora Thompson.

Upon the call of the case for trial, plaintiffs and defendants, in open court, waived a jury trial and agreed that the only question involved was a question of law for the court in the interpretation of the aforesaid deed.

Thereupon, Judge Alley, finding the facts, signed judgment for the defendants, and the plaintiffs appealed.

S. Carter Williams and Whitman & Motsinger for plaintiffs, appellants.

A. T. Grant and Hall & Zachary for defendants, appellees.

SEAWELL, J. We agree with the construction placed upon the deed by the trial judge.

In the construction of deeds, the Court has endeavored to follow and apply the principles adopted and promulgated in *Triplett v. Williams,* 149 N. C., 394, 63 S. E., 79, rather comprehensively expressed in the rule that such an instrument must be construed from "its four corners" in order that its true intent may be given effect. *Seawell v. Hall,* 185 N. C., 80, 82, 116 S. E., 189. *Triplett v. Williams, supra,* cites with approval 1 Jones, Real Property, section 568: "The inclination of many courts at the present day is to regard the whole instrument without reference to its formal divisions." With the *Triplett case, supra,* passed into discard many of the artificial rules and doctrines, which put the construction of deeds of conveyance in a class separate and apart from other instruments to which more liberal rules have been applied for the purpose of ascertaining their intent. Especially, the order in which its different clauses are arranged is not considered of such technical importance as to be controlling against the intent of the deed, when that could be reasonably ascertained by a consideration of the whole instrument. *Jones v. Whichard,* 163 N. C., 241, 79 S. E., 507. Cited with approval in the *Triplett case, supra,* are the following: "All parts of the deed should be given due force and effect." *Doren v. Gillum,* 136 Ind., 134, 35 N. E., 1101. "Words deliberately put in a deed, and inserted there for a purpose, are not to be lightly considered or arbitrarily thrust aside." *Mining Co. v. Becklenheimer,* 102 Ind., 76, 1 N. E., 202.

To adopt now the rule that the effect of repugnant clauses in a deed must be determined by their order of precedence—the first expression controlling—and that technical and formal expressions of conveyancing must control at any cost, would be to put the rules of construction back

to the condition which prevailed prior to *Triplett v. Williams, supra; Jones v. Whichard, surpa,* and other cases adopting the more liberal construction canons which put the intent uppermost. The true test is to take all of the provisions together and in the case of an apparent repugnance, to adopt that construction which is most consonant with the intent of the deed; and it cannot be questioned that this intent is not infrequently found in the later expressions of the instrument, and that they are sometimes of a character so impressive as to override the more formal technical expressions in which conveyances are sometimes couched.

In *Brown v. Brown,* 168 N. C., 4, 84 S. E., 25, we find the expression:

"Words deliberately put in a deed and inserted there for a distinct purpose are not to be lightly considered or arbitrarily thrust aside, the discovery of the intention of the parties being the first and main object in view; and when it is ascertained, nothing remains to be done but to execute it without excessive regard for merely technical inaccuracies or formal division of the deed."

In the deed under consideration, inserted after the conveyance clause and description of the property, we have the following rather impressive statement:

"Now be it understood in this that the party of the first part makes this deed to his beloved wife Cora Thompson her life time at her death it is to go to Roy Plott and his wife Hattie Plott and their heirs.

"Now be it Remembered that U. J. Thompson of the first part is to hold the above land his life time."

At this point the intention to give to Cora Thompson a life estate and to Roy Plott and his wife, Hattie Plott, the remainder in fee we think is obvious. Since U. J. Thompson predeceased his wife, Cora Thompson, we need not consider the apparent reservation of a life estate to him.

There was nothing in the opinion or dissenting opinion in *Jefferson v. Jefferson,* 219 N. C., 333, 13 S. E. (2d), 745, indicating a tendency to depart from the rule of construction laid down in the *Triplett case, supra.* Applying this rule to the construction of the deed under review, and considering it as a whole, we get the distinct impression that it is expressive of the intention of the grantor, U. J. Thompson, to give to Roy Plott and Hattie Plott, defendants in this action, a fee simple remainder following the life estates to himself and wife, and this we hold to be its legal effect.

It therefore follows, under the stipulations upon which the trial was had, that the defendants are now the owners in fee.

The judgment of the court below is

Affirmed.

STACY, C. J., concurring: The law favors the unfettering of estates and enjoins the fee construction of conveyances, "unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." C. S., 991; *Triplett v. Williams,* 149 N. C., 394, 65 S. E., 79; C. S., 4162; *Jolley v. Humphries,* 204 N. C., 672, 167 S. E., 417.

Here, we have a deed which in plain and express words shows that the grantor meant to convey to his wife a life estate with remainder in fee to Roy Plott and his wife, Hattie Plott, after reserving to himself a life interest in the land. That such is plainly intended appears from the two paragraphs inserted immediately following the description and before the *habendum.* Nor is this conclusion overborne by the technical words of inheritance found in the formal parts of the deed, the use of which evidently resulted from the adaptation of a printed form to the purposes of the conveyance. It is also noted that in the granting clause the word "their," instead of "her," is used before the words "heirs and assigns." It was patently not intended that Cora Thompson should take a fee.

The object of all interpretation is to arrive at the intent and purpose expressed in the writing, looking at the instrument from its four corners, and to effectuate this intent and purpose unless at variance with some rule of law or contrary to public policy. *McAden v. Craig, ante,* 497 (offer); *Winders v. Kenan,* 161 N. C., 628, 77 S. E., 687 (option); *Jones v. Casstevens, ante,* 411 (contract); *Whitley v. Arenson,* 219 N. C., 121, 12 S. E. (2d), 906 (deed); *Heyer v. Bulluck,* 210 N. C., 321, 186 S. E., 356 (will); *Trust Co. v. Hood, Comr.,* 206 N. C., 268, 173 S. E., 601 (statute); *Muse v. Motor Co.,* 175 N. C., 466, 95 S. E., 900 (pleading).

The heart of every text is the intent and purpose therein expressed and thereby sought to be conveyed.

When the language of a writing is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of construction. It must be given its plain and obvious meaning. *Brock v. Porter,* 220 N. C., 28, 16 S. E. (2d), 410; *Potato Co. v. Jenette,* 172 N. C., 1, 89 S. E., 791.

It is only in the case of ambiguity or uncertain meaning that the rules of construction are applicable. These rules, adopted as legal aids, are intended to make for certainty and uniformity in the interpretation of doubtful instruments. When regarded, the intent is thus legally ascertained; if ignored, the court may become the creator, rather than the discoverer, of the intent. *Whitley v. Arenson, supra.*

Probing the minds of doubtful writers, long after they have written and moved on, presents some of the most difficult problems known to the law. *Cole v. Fibre Co.*, 200 N. C., 484, 157 S. E., 857. This is necessarily so, for those who write cloudily convey different impressions to different minds. The writing would not be doubtful if it had the same meaning to everyone. Then, too, the use of words is capable of an infinite variety of combinations. For example, the words "up" and "down" have opposite meanings; and yet to the motorist on the highway, when preceded by the word "slow" (slow up, slow down), they both have the same meaning. Language is a method of conveying thought, and it may vary greatly in color and content according to the circumstances and time of its use. *Towne v. Eisner*, 245 U. S., 418; *Warrenton v. Warren County*, 215 N. C., 342, 2 S. E. (2d), 463. Consequently, the suggestion has been made that precedent is of less value in the work of interpretation and construction than in other branches of the law. *Patterson v. McCormick*, 181 N. C., 311, 107 S. E., 12. In some instances it may be "no more than guesswork." *Clement v. Whisnant*, 208 N. C., 167, 179 S. E., 430. Yet after saying this, and whatever its character, we assiduously pursue the adjudicated cases for any gleam of light that may help us with the problem in hand. Worthy ideas expressed elsewhere and on other occasions, like nuggets of truth whenever and wherever found, know no barriers of time and place. *Smith v. Mears*, 218 N. C., 193, 10 S. E. (2d), 659. The goal is to discover the true meaning in every case.

WINBORNE, J., joins in concurring opinion.

STATE OF NORTH CAROLINA v. WILLIAM DUDLEY PELLEY, PRINCIPAL, AND CARRIE THRASH DORSETT, SURETY, AND GEORGE B. FISHER, SURETY.

(Filed 17 March, 1943.)

1. Bail § 4—

The conditions of a bail bond are absolute and its purpose is to make the sureties responsible for the appearance of the defendant at the proper time and not to enrich the public treasury.

2. Same—

The surety on a bail bond is not entitled to relief unless he can show that performance of his undertaking has been rendered impossible or excusable (a) by an act of God, such as death or severe illness of the principal; (b) by an act of the obligee, such as imprisonment within the

State pursuant to a judgment of a State court of competent jurisdiction; or (c) by an act of the law, such as surrender of the principal to a Federal Court within the State by a prior bondsman or his being sent out of the State by the Governor on requisition.

3. Same—

Upon failure of the principal in a bail bond to appear, due to his detention in another jurisdiction for violation of its criminal laws, this State may, but it is under no obligation to demand his surrender even though it may have prior jurisdiction.

4. Same—

It is not error for the court to fail to hear a motion to relieve sureties on a bail bond before the defendant is called and fails to answer.

5. Same—

Failure to give notice to defendants of hearing, when judgment absolute was entered against sureties on a bail bond, is not reversible error, where the matter had been continued from time to time for several months and no motion was made to set aside the judgment for excusable neglect. C. S., 600.

APPEAL by Carrie Thrash Dorsett and George B. Fisher from *Sink, J.*, at September Term, 1942, of BUNCOMBE.

At the January Term, 1942, of the Superior Court of Buncombe County, a judgment was entered against William Dudley Pelley, and from said judgment appeal was taken to the Supreme Court.

The defendant Pelley was released on a bail bond in the sum of $10,000.00, executed 21 January, 1942, by the defendant as principal and Carrie Thrash Dorsett and George B. Fisher, as sureties. The bond was conditioned upon the appearance of the defendant Pelley, at the next term of the Superior Court of Buncombe County, N. C., to be held after the judgment of the Supreme Court of North Carolina was handed down, and then and there to abide the judgment of the Court.

George B. Fisher, being a nonresident of the State of North Carolina, executed the aforesaid bail bond as surety for $2,500.00 cash and deposited said sum with the clerk of the Superior Court of Buncombe County.

The Supreme Court affirmed the judgment of the Superior Court, on 24 June, 1942. The opinion was certified to the clerk of the Superior Court of Buncombe County and received by said court on 25 June, 1942. Whereupon, the Superior Court of Buncombe County, on 26 June, 1942, issued a capias for the arrest of William Dudley Pelley.

The term of court to which Pelley was compelled to appear, under the terms and conditions contained in his bail bond, began in the Superior Court of Buncombe County, N. C., on 27 July, 1942.

On the convening of court on 27 July, 1942, the appellants, who are the sureties on said bail bond, and before the defendant Pelley was called, filed a motion for discharge from liability on said bond. Whereupon, the defendant William Dudley Pelley was solemnly called and failed to answer. *Sci fas instanter* were ordered and issued by the court against the defendant Pelley, and Carrie Thrash Dorsett and George B. Fisher, sureties. The sureties, through counsel, waived service of *sci fas* and filed an answer, and the cause was continued from time to time until the September Criminal Term, 1942, of the Superior Court of Buncombe County. At the aforesaid term, the cause was heard and judgment absolute entered against the sureties in the sum of $10,000.00, George B. Fisher, however, to be discharged upon the payment of the sum of $2,500.00, and the funds in the hands of the clerk of the Superior Court of Buncombe County, deposited by the said George B. Fisher, were condemned for the payment of said sum. Judgment for the balance, to wit, $7,500.00, was entered against Carrie Thrash Dorsett, and the clerk of the Superior Court of said county was ordered to issue execution against the said Carrie Thrash Dorsett for the collection of said judgment.

In answering the *sci fas* issued herein, the sureties set up as a bar to the right of the State of North Carolina to forfeit the bond executed by them, the fact that on 24 July, 1942, the said William Dudley Pelley was taken into custody by the United States Marshal for the Southern District of Indiana, for removal to the United States District Court for the District of Columbia, upon an indictment returned 21 July, 1942, charging him with certain offenses; and further, Pelley having announced his inability to furnish bail in that proceeding, Adelaide M. Pelley surrendered him to the District Court for the Southern District of Indiana, on 24 July, 1942, and was permitted to take down the sum of $15,000.00, which she had deposited with the Court as a bond for the appearance of William Dudley Pelley in said Court on 28 July, 1942. The record is silent as to the amount of the bond fixed by the authorities in connection with the indictment in the District of Columbia, which bond Pelley announced his inability to give.

From the judgment entered in the Superior Court the defendants, Carrie Thrash Dorsett and George B. Fisher, appeal to the Supreme Court, assigning error.

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

Claude L. Love for the Board of Education of Buncombe County.

Guy Weaver for the respondent, Carrie Thrash Dorsett.

DENNY, J. The appellant, George B. Fisher, failed to file a brief in this Court, as required by Rule 28 of the Rules of Practice in the Supreme Court, 221 N. C., 563. Therefore, upon motion of the Attorney-General and the Board of Education of Buncombe County, the appeal of George B. Fisher is dismissed.

The first assignment of error is to the failure of the court to hear the motion to relieve the sureties of liability before the defendant was called and failed to answer. The second exception and assignment of error is based upon the failure of the court to give notice to the defendants or their counsel of the hearing held at September Criminal Term, 1942, of the Superior Court of Buncombe County, when judgment absolute was entered against the sureties. These exceptions cannot be sustained. The record discloses that this matter was continued from time to time until the September Term of said court, at which term a hearing was held and judgment entered. It will be noted that counsel for defendants at that time, as well as the present counsel for the appealing defendant, made no motion to set aside the judgment herein for excusable neglect. C. S., 600; *Bank v. Duke,* 187 N. C., 386, 122 S. E., 1; *Hill v. Hotel Co.,* 188 N. C., 586, 125 S. E., 266; *Hooks v. Neighbors,* 211 N. C., 382, 190 S. E., 236.

The third assignment of error, challenging the correctness of the judgment below, does present the real question involved in this appeal. Has the defendant, Carrie Thrash Dorsett, shown a valid legal reason for her failure to have William Dudley Pelley appear in the Superior Court of Buncombe County, N. C., as provided in her bond? If so, the judgment is erroneous.

An examination of the case of *United States v. William Dudley Pelley,* Circuit Court of Appeals, Seventh Circuit, 132 Federal Reporter, 2nd Series, 170, discloses that Pelley was tried in the District Court of the United States for the Southern District of Indiana, convicted and sentenced to prison for a term of fifteen years, for offenses committed after he and his sureties executed the bond under consideration on this appeal. Therefore, it follows that the bond in the sum of $15,000.00, for his appearance in the United States District Court for the Southern District of Indiana on 28 July, 1942, was posted after the execution of the bond in North Carolina. It also appears from the record herein that Pelley was indicted on 21 July, 1942, by a grand jury in the United States District Court for the District of Columbia, and arrested pursuant thereto on 24 July, 1942. However, it will be noted that in the order, dated 24 July, 1942, releasing the $15,000.00 cash bond and directing the delivery of said funds to Adelaide M. Pelley, it was ordered by the Court: "That the said William Dudley Pelley be, and he hereby is,

remanded to the custody of the United States Marshal for the Southern District of Indiana, pending further order of this Court."

The appellant herein, Carrie Thrash Dorsett, is not entitled to the relief she seeks unless she can show that the performance of her undertaking has been rendered impossible or excusable (a) by an act of God; (b) by an act of the obligee; or (c) by an act of law. Where the principal in a bail bond dies before the day of performance or is prevented by illness from appearing, the case is within the first category. Where the principal in a bail bond is in prison within the State, pursuant to a judgment of a court of competent jurisdiction of the State, the case comes within the second category. *S. v. Eller,* 218 N. C., 365, 11 S. E. (2d), 295; 6 Am. Jur., sec. 139, p. 102. Where the party has been turned over to the Federal Court within the State by a prior bondsman and is serving a sentence imposed by that Court; or if the party has been arrested in the State where the obligation is given and sent out of the State by the Governor upon requisition from another State or other foreign jurisdiction, the case falls within the third category. *S. v. Welborn,* 205 N. C., 601, 172 S. E., 174; *U. S. v. Marrin,* 170 Federal Reporter, 476; 6 Am. Jur., sec. 140, p. 103; 8 C. J. S., sec. 77, p. 148.

The appellant herein contends that it was the duty of the State of North Carolina to demand the surrender of Pelley by the Federal authorities to the North Carolina court, on the theory that the North Carolina court had prior jurisdiction. She contends that her principal was prevented from making his appearance in the court below by reason of the failure of North Carolina, the obligee, to assert its right to his custody. The position is untenable. Upon the execution of the bail bond, William Dudley Pelley was delivered into the custody of his sureties. The very purpose of the bond was not to enrich the treasury of Buncombe County, but to make the sureties responsible for the appearance of the defendant at the proper time. In the case of *United States v. Marrin, supra,* the defendant was released on a bail bond for his appearance in the District Court of the United States for the Eastern District of Pennsylvania. While Marrin was out on bond he went to New York, where he was arrested, convicted upon charges of forgery and grand larceny and sentenced to a term of imprisonment of fifteen years in Sing Sing. The surety on the bail bond in Pennsylvania raised the same question as to the duty of the United States Court to have requested the custody of the principal. The Court said: "Though the United States attorney was present at the hearing, his failure to request Marrin's release was no such act of the obligee as to relieve the surety, because *non constat* that the request would have been granted by the court. It was Marrin's own act in going into that jurisdiction that rendered his appearance impossible. Our attention has not been called

to any case holding that under any circumstances the prosecuting attorney of a district in which the recognizance runs is required to make an effort to secure the removal or release of an alleged criminal arrested in another jurisdiction. He may do so, but he is not required to act. The recognizance is taken to secure that very result. Its condition is absolute in this regard, and, in our judgment, it would be a very dangerous innovation to require the government to not only see to it that responsible bail is secured, but, in addition, required it to keep its prosecuting officers in readiness to appear in other and distant jurisdictions to aid the principal in the recognizance to extricate himself from an arrest from which alone the latter is to blame."

We come now to the question whether or not Pelley's imprisonment under a sentence imposed in another jurisdiction is such an act of law as to release the appealing surety from liability on her bond. The answer is "No."

In the case of *United States v. Van Fossen et al.,* Case No. 16,607, 28 Fed. Cas., 357, William S. Dunn, as principal, and the defendants, as sureties, executed a bail bond for the appearance of Dunn in the United States District Court for the District of Kansas. Dunn failed to appear at the term specified. After the execution of the bond, Dunn went beyond the jurisdiction of the United States District Court, into the State of Missouri, where he committed the crime of grand larceny, for which he was duly indicted and convicted in a Missouri Court and sentenced for a term of six years in the State penitentiary. The sureties there, as in the instant case, sought to be released from the penalty of their bond by reason of the imprisonment of their principal in a foreign jurisdiction. The Court said: "The United States and the State of Missouri are wholly distinct parties, and the action of the state authorities cannot be imputed to the Government of the United States as an obstruction or interruption by it to the performance of the condition of the recognizance. It is therefore plain that there is no act of the obligee which excuses the default of the principal obligor. Hence, the defense pleaded must rest upon the proposition that the performance was excused by the act of the law. This makes it necessary to consider what is an act of the law, in the sense of the rule. 'There is a diversity,' said *Brian, C. J.*, 'where a condition becomes impossible by the act of God, as death, and where by a third person (or stranger), and where by the obligor, and where by the obligee; the first and last are sufficient excuses of forfeiture, but the second is not; for in such case, the obligor has undertaken that he can rule and govern the stranger, and in the third case, it is his own act.' Vin. Abr. tit. 'Condition,' G. C., pl. 19, quoted by *Nelson, C. J.*, in *People v. Bartlett, supra.* A distinction is, in my opinion, to be observed between the act of the law, proper, and the act

of the obligor, which exposes him to the action and control of the law. The facts pleaded by the sureties show that their principal was prevented from appearing, not by an act of the law, properly viewed, but by reason of his own voluntary act, which rendered him amenable to the criminal laws of another jurisdiction. There would be no one so bold as to claim that the principal should be allowed to set up, as a defense to this recognizance, that he had thus been prevented from appearing; and the sureties are so far bound up with their principal, that they must show that he had a sufficient excuse for not keeping the condition of the bond. The case stands thus: The United States had the actual custody of the principal, to answer an indictment which had already been preferred against him. Upon the recognizance being taken, the principal was delivered into what Blackstone calls the 'friendly custody' of his sureties, instead of being committed to prison. 4 Bl. Comm., 301. They henceforth became invested with full authority over his person. They are his jailers. They may take him at any time or place; in the state, or beyond it. They are aptly said to have the principal always upon the string, and they may pull it when they please, to surrender him in their own discharge. 6 Mod., 231. If they do not exercise their power to prevent his going beyond the jurisdiction, and he does so, with or without their consent, and commits an offense, and is sentenced to prison for it, this cannot be accepted by the state in whose tribunals the recognizance was taken, as a defense thereto. . . . Other considerations arising out of the peculiar relations of the state and general government, tend to vindicate the correctness of the view that the defense must be held insufficient. The general government and the several states have their separate criminal codes. If a person is in the actual custody of the United States for a violation of its laws, no state can by *habeas corpus,* or any other process, take such person from the custody of the federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a state, is, by express enactment, beyond the reach of the federal courts or judges. Judiciary Act, sec. 14; Act March 2, 1933, sec. 7; 4 Stat., 634; *Ex Parte Dorr,* 3 How. (44 U. S.), 103, 105; *U. S. v. French, supra* (Case No. 15,165); *Ex Parte Forbes* (Case No. 4,921). When the State of Missouri arrested Dunn for an offense against its laws, there was no power in the United States Government to take him from the custody of the State, and subject him to trial and punishment for his prior violation of the laws of the United States. Not only so, but the principle would be the same if Dunn had remained in Kansas, and had been in the custody of that State for an offense against its laws—he would be beyond the reach or process of the federal courts, though sitting in the same district. In the exercise of their respective systems of criminal jurisprudence, neither

the state nor the United States could admit the sufficiency of such a defense as is here pleaded. In this case, Dunn was indicted for an offense against the general government, of a highly penal nature. It is punished much more severely than the offense for which he was subsequently convicted in Missouri; and if the defense here insisted on were to prevail, a defendant guilty of a grave offense, would be allowed the opportunity of evading or postponing punishment therefor, by giving bail (who incur no liability) and then committing, against another jurisdiction, a lesser offense, and submitting himself to its actual custody. Neither a state nor a federal court can be expected to recognize as law, a principle which is attended with such consequences, and which not only defeats justice, but has a tendency to encourage the commission of crime."

The Circuit Court of Appeals, Eighth Circuit, in the case of *Weber v. U. S.*, 32 Federal Rep., 2nd Series, 110, speaking on this identical question, said: "But, as an act of grace, we consider whether Weber is at all aided by the facts stipulated. We think it too plain for argument that he is not, and hold that the incarceration of the principal in a different jurisdiction for a second and different offense against the laws of that jurisdiction, even where the principal is prevented from appearing to answer his bail by such incarceration, does not exonerate the surety. This view is fortified by the great weight of authority, both in state and federal courts. In fact, the cases seem to be practically unanimous in so holding. *S. v. Horn,* 70 Mo., 466, 35 Am. Rep., 437; *United States v. Van Fossen,* Fed. Cas. No. 16,607, 1 Dill., 406; *Devine v. State,* 5 Sneed (Tenn.), 623; *Taintor v. Taylor,* 36 Conn., 242, 4 Am. Rep., 58; *United States v. Marrin* (D. C.), 170 F., 476; *Mix v. People,* 26 Ill., 32; *Yarborough v. Commonwealth,* 89 Ky., 151, 12 S. W., 143, 25 Am. St. Rep., 524; *Adler v. State,* 35 Ark., 517, 37 Am. Rep., 48." See also *Taylor v. Taintor,* 83 U. S., 366; 21 L. Ed., 287; 6 Am. Jur., sec. 140, p. 103; and 8 C. J. S., sec. 77, p. 148.

The surety appealing herein had from 24 June, 1942, until 24 July, 1942, to obtain actual custody of her principal and bring him back to North Carolina, after the Supreme Court had affirmed the decision of the court below, and before he was arrested in Indiana. On this point, the Supreme Court of the United States, in the case of *Taylor v. Taintor, supra,* said: "The shortness of the time that intervened between the arrest in New York and the imprisonment in Maine on the one hand, and the failure and the forfeiture in Connecticut on the other, are entirely immaterial. Whether the time were longer or shorter, one year or one day, the legal principle involved is the same, and the legal result must be the same. If McGuire had remained in Connecticut he would probably not have been delivered over to the authorities of Maine, and would not, therefore, have been disabled to fulfill the condition of his

obligation. If the demand had been made upon the Government of Connecticut, he might properly have declined to comply until the criminal justice of his own state had been satisfied. This right, it is not to be doubted, he would have exercised. Had he failed to do so, the obligation of the recognizance would have been released. The plaintiffs in error are in fault for the departure from Connecticut, and they must take the consequences. But their fault reached further. Having permitted their principal to go to New York, it was their duty to be aware of his arrest when it occurred, and to interpose their claim to his custody. *Alguire v. Com.,* 3 Bl. Mon., 349, 351. We have shown that when McGuire was arrested in New York the original imprisonment, under the information in Connecticut, was continued; that the bail had a right to seize him wherever they could find him; that the prosecution in Connecticut was still pending, and that the Superior Court having acquired jurisdiction, it could neither be arrested nor suspended *in invitum* by any other tribunal. Though beyond the jurisdiction of Connecticut, he was still, through his bail, in the hands of the law of that state, and held to answer for the offense with which he was charged. Had the facts been made known to the executive of New York by the sureties at the proper time, it is to be presumed that he would have ordered McGuire to be delivered to them and not to the authorities of Maine. The result is due, not to the Constitution and law of the United States, but to their own supineness and neglect. Under the circumstances, they can have no standing in court to maintain this objection. The act of the Governor of New York, in making the surrender, was not 'the act of the law' within the legal meaning of those terms; but in view of the law was the act of McGuire himself. He violated the law of Maine, and thus put in motion the machinery provided to bring him within the reach of the punishment denounced for his offense. But for this that machinery, so far as he was concerned, would have remained dormant. To hold that the surrender was the act of the law, in the sense contended for, would be as illogical as to insist that the blow of an instrument used in the commission of a crime of violence is the act of the instrument and not of the criminal. It is true that in one case there would be a will and purpose as to the result in question, which would be wanting in the other, but there would be in both, the relation of cause and effect, and that is sufficient for the purposes of the analogy. The principal in the case before us cannot be allowed to avail himself of an impossibility of performance thus created; and what will not avail him cannot avail his sureties. His contract is identical with theirs. They undertook for him what he undertook for himself."

It matters not whether Pelley left the jurisdiction of this State with or without the permission of his sureties, he was entrusted to their

custody. His conduct while in their custody set in motion the machinery of the law in other jurisdictions which made his appearance in Buncombe County, N. C., on 27 July, 1942, impossible. Had Pelley not committed the offenses for which he was tried and convicted in Indiana, and for which he is now imprisoned, he doubtless could have answered to the call of the Superior Court in Buncombe County, N. C., at the proper time. He alone is responsible for his inability to appear in the North Carolina court at the time required in his bail bond. He cannot avail himself of his own wrong and thereby escape the penalty of his bond; and, as stated in *Taylor v. Taintor, supra,* "What will not avail him, cannot avail his sureties."

Appellant is relying on the case of *S. v. Welborn, supra.* The case is distinguishable. The sureties on Welborn's bond were released because Welborn was surrendered by his bondsmen for his appearance in Federal Court in this State. The Federal bail bond had been executed prior to the execution of the bond in the State court. The defendant Welborn was surrendered by his sureties, who had the right to surrender him. Further, there is no evidence that Welborn ever left the jurisdiction of the North Carolina court. When North Carolina took Welborn's bond he was in the technical custody of a Federal Court having jurisdiction in this State. These and other distinguishing facts render that case inapposite, and, therefore, not controlling.

Whether or not the Federal authorities, before Pelley's trial and conviction in the United States District Court for the Southern District of Indiana, would have recognized the superior right of Pelley's sureties to his custody, in order that he might appear at the appointed time in the North Carolina court, had they made a request for his surrender to them, we need not consider; since, according to the record, no request was made by them to the Federal authorities for his return to North Carolina.

It is indeed unfortunate for the appealing surety herein, but, when she executed the bail bond for Pelley, she undertook to answer for one who by his own conduct prevented the fulfillment of his obligation. For his default she obligated herself to pay the penalty in the bond.

The judgment below is

Affirmed.

PAUL E. TURLINGTON AND WIFE, NETTIE TURLINGTON; SILAS E. TURLINGTON AND WIFE, WINNIE TURLINGTON; FRED A. TURLINGTON AND WIFE, ILA TURLINGTON, AND SIDNEY TURLINGTON, v. ERNEST NEIGHBORS AND RAY NEIGHBORS, A MINOR REPRESENTED BY HIS GUARDIAN AD LITEM, L. M. CHAFFIN,

and

PAUL E. TURLINGTON AND WIFE, NETTIE TURLINGTON; SILAS E. TURLINGTON AND WIFE, WINNIE TURLINGTON, AND FRED A. TURLINGTON AND WIFE, ILA TURLINGTON, v. SIDNEY CLYDE TURLINGTON AND MYRTLE TURLINGTON.

(Filed 17 March, 1943.)

1. Trial § 54—

Findings of Fact by the court, when a trial by jury has been waived by consent, will not be disturbed on appeal, if based upon competent evidence.

2. Evidence § 32—

The blind husband of a grantee, in a deed reserving a life estate in the grantor, who was present and heard the grantor acknowledge its execution and delivery, is a competent witness to prove such execution and delivery, his wife having died prior to the grantor and the title therefore being vested in her son. His evidence discloses no personal transaction or communication and he is not a party in interest within C. S., 1795.

3. Same—

The grantee in one of two deeds under attack in this suit, who is also a party to the suit and one of the heirs of the grantor in both deeds, is clearly incompetent as a witness to prove the execution and delivery of such deeds. C. S., 1795.

4. Deeds § 5—

A deed is consummated by its delivery by the grantor and its acceptance by the grantee and becomes operative from that time. In other words, when the time of delivery is established, the time when the deed took effect is also established as a matter of law. The "making" of deeds of gift used in C. S., 3315, means such consummation.

5. Same—

Ordinarily, a deed is presumed to have been delivered on the date appearing in the deed; the presumption, however, continues only in the absence of proof as to the actual time of delivery, and is rebutted by such proof.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at October Term, 1942, of HARNETT.

Civil actions to set aside, cancel of record and declare void two deeds of gift executed by Virginia A. Turlington.

Sidney Turlington is the grantee in one of the deeds in controversy and Pearl Neighbors is grantee in the other. Both deeds are dated

8 January, 1926, were acknowledged 13 February, 1926, and filed for registration 13 February, 1928. The grantor reserved a life estate in both deeds.

Pearl Neighbors died 16 December, 1928, leaving one son, the defendant Ray Neighbors.

Virginia A. Turlington died 12 February, 1942, leaving as her sole heirs at law the following children: Paul E. Turlington, Silas E. Turlington, Fred A. Turlington, Sidney Turlington and one grandchild, Ray Neighbors.

By consent of all parties the cases were consolidated for trial. Trial by jury was waived, and it was agreed that his Honor might hear the evidence, find the facts and render such judgment as in his opinion was proper.

After hearing the evidence, his Honor found as a fact, that while both deeds bear the date of 8 January, 1926, that they were not delivered to the grantees until the day they were acknowledged, to wit, 13 February, 1926, before Jesse B. Lee, Notary Public of Harnett County; and, as the record shows, both deeds were filed and recorded on 13 February, 1928, the deeds were recorded within two years from the making thereof, as required by C. S., 3315, and are, therefore, valid.

Judgment was entered accordingly. Plaintiffs appealed to the Supreme Court, assigning error.

Neill McK. Salmon and J. R. Young for plaintiffs.

Dupree & Strickland and I. R. Williams for Ernest Neighbors and Myrtle L. Turlington, defendants.

L. M. Chaffin for Ray Neighbors, defendant.

DENNY, J. The first assignment of error is to findings of fact numbered two and five. These findings of fact are to the effect that Virginia A. Turlington, owner of the lands in controversy, acknowledged the deeds in question 13 February, 1926, before Jesse B. Lee, Notary Public for Harnett County, and delivered said deeds to the grantees therein named, on the same day they were acknowledged.

The second assignment of error challenges the competency of the evidence of Ernest Neighbors, father of the defendant, Ray Neighbors, on the ground that his testimony is inadmissible by reason of the provisions of C. S., 1795. Unquestionably the first assignment of error cannot be sustained if the testimony of this witness is competent. The witness testified substantially, as follows: That his first wife, Pearl Neighbors, died 16 December, 1928. She was the daughter of Virginia A. Turlington, who died 12 February, 1942. Sheriff Byrd came to his

house on the 12th or 13th day of February, 1926, and inquired if Mrs. Virginia A. Turlington was there. She was there and he heard Sheriff Byrd tell her he had the deeds ready for her, and that she had to take them before a Notary Public and have them signed. Sheriff Byrd delivered the deeds to Mrs. Turlington. Mrs. Turlington and his wife, Pearl Neighbors, took the deeds to Dunn that day to have them signed. When Mrs. Turlington returned she said she had signed the deeds and gave them to Pearl and she read them in his presence and in the presence of Mrs. Turlington. About a year later Mrs. Turlington came back and asked if the deeds had been recorded, and, upon finding they had not, said "She had better have Stewart Turlington take them to Lillington and have them recorded." The witness testified he had been blind for 27 years.

There is nothing in the testimony of this witness relative to the execution of the deeds in question that discloses a personal transaction or communication between the witness and the deceased, if we should concede him to be an interested party. *Abernathy v. Skidmore,* 190 N. C., 66, 128 S. E., 475, and the cases there cited. But, the witness has no interest or title in the property conveyed to bring his testimony within the prohibitions of C. S., 1795. His wife died prior to the termination of the life estate, and his son, Ray Neighbors, is the sole owner of the property and the witness has no curtesy in the land conveyed. *In re Dixon,* 156 N. C., 26, 72 S. E., 71. The evidence was properly admitted and neither of these exceptions and assignments of error can be sustained.

The third assignment of error is to the refusal of the court to permit Sidney Turlington, the grantee in one of the deeds, to testify as to when the deeds were made. We think his evidence on this question clearly inadmissible. Suppose his Honor had found upon his evidence that the deeds in question had been signed, sealed and delivered more than two years prior to their registration, as required by the statute; then the testifying witness would inherit a one-fifth undivided interest in the lands conveyed to Pearl Neighbors. The objection was properly sustained. C. S., 1795; *Allen v. Allen,* 213 N. C., 264, 195 S. E., 801; *Honeycutt v. Burleson,* 198 N. C., 37, 150 S. E., 634. However, if the evidence had been competent, plaintiffs could not complain, for the witness was afterwards permitted to testify without objection that the deeds were signed the 8th day of January, 1926, and delivered on that date. The evidence is conflicting as to the date of delivery. His Honor's findings of fact that the deeds in controversy were acknowledged and delivered on 13 February, 1926, are supported by competent evidence, and therefore binding on appeal. *Hill v. Lindsay,* 210 N. C., 694, 188 S. E., 406; *Assurance Society v. Lazarus,* 207 N. C., 63, 175 S. E., 705; *Harrison v. New Bern,* 193 N. C., 555, 137 S. E., 582;

Buchanan v. Clark, 164 N. C., 56, 80 S. E., 424. This exception cannot be sustained.

The remaining exception presents this question: What is included in the execution or making of a deed? "A deed is consummated by its delivery by the grantor and its acceptance by the grantee and becomes operative from that time. In other words, when the time of delivery is established, the time when the deed took effect is also established as a matter of law." 16 Am. Jur., sec. 321, p. 620. We find in 7 Thompson on Real Property, sec. 3830, the statement that "The 'execution' of a deed means the making thereof, which includes all such acts as signing, sealing and delivering." Ordinarily, a deed is presumed to have been delivered on the date appearing in the deed; the presumption, however, continues only in the absence of proof as to actual time of delivery, and if such proof is presented the presumption is rebutted and the execution of the deed must then be referred to the time when the testimony shows that the grantor parted with its possession for the purpose of giving effect to it, and in such manner as to deprive him of the right to recall it. 8 R. C. L., sec. 73, p. 1015.

"The execution of a deed means the making thereof, and includes all acts which are necessary to give effect thereto." 26 C. J. S., sec. 32, p. 224.

In the case of *Newlin v. Osborne,* 49 N. C., 157, this Court said: "The delivery of a deed is the final act of its execution. It is that which gives it force and effect, and without which, it is a nullity. When a deed is said to be executed, the meaning is, that, with all the other requisites, it has been delivered by the one party to, or for, the other. The date of a deed which is proved to have been delivered at the same time, is *prima facie* evidence that it was executed on that day; *Lyerly v. Wheeler,* 34 N. C., 290. This evidence may be rebutted by proof that it was not delivered on that day, and its execution must then be referred to the time when the testimony shows that the grantor parted with the possession for the purpose of giving effect to it, and in such a manner as to deprive him of the right to recall it; *Baldwin v. Maultsby,* 27 N. C., 505; *Roe v. Lovick,* 43 N. C., 88; *Kirk v. Turner,* 16 N. C., 14." *Buchanan v. Clark, supra; In re Cunningham,* 64 F. (2d), 296.

C. S., 3315, reads as follows: "All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration."

The "making" of a deed referred to in the foregoing statute, means the date of its execution. The execution of a deed is not complete until the instrument is signed, sealed and delivered.

The judgment below is

Affirmed.

MISS EUNICE HARRINGTON, TRUSTEE, AND A. B. HARRINGTON, v. A. G. BUCHANAN, SHERIFF OF LEE COUNTY, NORTH CAROLINA; W. H. CAMPBELL, ADMINISTRATOR OF MISS TANNIE S. CAMPBELL; AND W. H. CAMPBELL, ADMINISTRATOR D. B. N., C. T., A. OF W. H. HENLEY, DECEASED.

(Filed 17 March, 1943.)

1. Injunctions § 5: Judgments § 38—

In an action to restrain levy and sale under execution and to adjudge the validity of a transfer of the judgment, where plaintiffs show *prima facie* that they are the owners of the judgment, they are entitled, at least, to an injunction against the sale of their property.

2. Judgments § 36—

The entry of transfer of a judgment, under C. S., 618, by the attorney of the judgment creditor, upon the margin of the judgment as docketed in the office of the clerk of the Superior Court, is *prima facie* evidence of transfer.

3. Attorney and Client § 6—

Ordinarily, an attorney, by virtue of his employment as such, has control and management of the suit in matters of procedure and may make agreements affecting the remedy he is endeavoring to pursue; but this comprehensive authority does not continue after judgment.

4. Same—

As the primary objective of a suit on a money demand is the collection of the debt, obtaining judgment is merely a necessary step to that end and it will not be assumed that an attorney, employed to prosecute the action, is not authorized to receive and receipt for the money demanded.

5. Judgments §§ 36, 38—

The statute itself, C. S., 618, makes it the duty of the attorney, when a judgment is paid by one of several judgment debtors, who requests a transfer, to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same.

APPEAL by plaintiffs from *Grady, Emergency Judge,* at September Term, 1942, of LEE. Reversed.

Civil action to restrain levy and sale under execution and to adjudge validity of transfer of judgment made of record.

On 21 January, 1935, judgment in favor of Tannie S. Campbell, executrix of W. H. Henley, deceased, and against J. L. Covington, Mrs. Madge Covington, J. C. Watson and A. B. Harrington, for $925.00, interest and costs, subject to certain credits, was docketed in the judgment docket of Lee County.

On 4 April, 1936, H. M. Jackson, attorney for Tannie S. Campbell, executrix, made on said judgment docket, at the foot of said judgment, the following entry:

"For value received and without recourse on me this judgment is assigned to Miss Eunice Harrington, trustee.

"This April 4, 1936.

TANNIE S. CAMPBELL,
Executrix W. H. Henley Estate,
By H. M. JACKSON, Attorney for
Tannie Campbell, Executrix."

This entry was witnessed by the clerk and was made pursuant to agreement with A. B. Harrington, one of the judgment debtors, who at the same time delivered to Jackson a check which was admittedly good. The transfer was for the use and benefit of said judgment debtor.

The check was held until 27 June, 1936, and then returned to Harrington, who in turn delivered it to the clerk of the Superior Court. At about the same time Jackson struck lines across the entry of transfer and made notation on the record as follows:

"Check never accepted by Tannie Campbell therefore judgment never was paid by A. B. Harrington."

Tannie S. Campbell having died, W. H. Campbell, on or about 26 February, 1941, qualified as administrator, *d. b. n., c. t. a.*, of the estate of W. H. Henley, and thereafter procured the issuance of an execution on said judgment. In so doing he was acting for the estate and not for A. B. Harrington, beneficiary of the alleged transfer. The sheriff undertook to levy upon property of Harrington and this action was instituted.

When the cause came on for trial the plaintiff offered "the admissions contained in the answer that the transfer on page 281, Judgment Book 8, was signed by H. M. Jackson." He also offered the entry of assignment to the trustee in its unmutilated form. It was admitted that the check delivered by Harrington to Jackson was good and would have been paid on presentation and that it was not returned because it did not constitute legal tender.

Plaintiffs then rested and the court, on motion of defendants, entered judgment of nonsuit. Plaintiffs excepted and appealed.

K. R. Hoyle for plaintiffs, appellants.

E. L. Gavin and H. W. Gavin for defendants, appellees.

BARNHILL, J. There are many allegations and counter-allegations in the pleadings, the merits of which are not presented on this record. On the contrary, the question presented has little, if any, relation to the vital issues raised. Be that as it may, we must deal with the record as it is presented to us.

The evidence offered poses this question: Is the entry of transfer of a judgment, made under C. S., 618, by the attorney of the judgment creditor upon the margin of the judgment as docketed in the office of the clerk of the Superior Court, *prima facie* evidence of transfer? We are constrained to answer in the affirmative.

It is to be noted that plaintiff offered the original entry without the lattice markings indicating cancellation or spoliation thereof. It was admitted without objection. Hence, as presented to us, there are no "lattice lines" drawn across the transfer and no entry indicating cancellation or invalidation. We have the transfer to a trustee for the use and benefit of one of several judgment debtors signed by the attorney for the judgment creditor—and nothing more. We may take judicial notice of this fact only, unrelated to other matters alleged.

The right of an attorney to compromise a judgment, ratification by the executrix, the application of the statute of limitations, and other legal questions debated in the briefs, are not presented.

Ordinarily, an attorney, by virtue of his employment as such, has control and management of the suit in matters of procedure and may make agreements affecting the remedy he is endeavoring to pursue. Usually an implied authority for such agreements during the progress of the suit is presumed from his office and employment. *Chemical Co. v. Bass,* 175 N. C., 426, 95 S. E., 766; *Harrill v. R. R.,* 144 N. C., 542; *Gardiner v. May,* 172 N. C., 192, 89 S. E., 955; *Deitz v. Bolch,* 209 N. C., 202, 183 S. E., 384. See also *In re Gibson, ante,* 350.

This comprehensive authority existing during the pendency of a suit does not continue after the rendition of judgment. Thereafter there are substantial limitations upon his implied right to act for and in behalf of his client. What those limitations are, however, we need not now discuss or define, for here the statute itself confers, *prima facie* at least, the necessary authority. C. S., 618, makes provision for the transfer of judgments and expressly prescribes the duty of the attorney when a judgment is paid by one of several judgment debtors who requests a transfer. Having acted under the statute it is presumed that he acted within the scope of his authority. *Bank v. Penland,* 206 N. C., 323, 173 S. E., 945; 7 C. J. S., 875, sec. 73; 5 Am. Jur., 307. Furthermore, the primary objective of a suit on a money demand is the collection of the debt. The obtaining of judgment is merely a necessary step to that end. It will not be assumed that an attorney who is employed to prosecute an action to judgment is not also authorized to receive and receipt for the money demanded.

This was a public record. The entry of transfer by the attorney is expressly authorized by statute. There is nothing in the transfer to indicate that he received less than full value. Anno., 66 A. L. R., 115.

The entry is presumed to speak the truth and, in the absence of proof to the contrary, is evidence of the actual authority of the attorney. To hold otherwise would tend to destroy confidence in public records and, in many instances, would create such uncertainty as to render them of little practical value.

The plaintiff did not offer any particular excerpt from the answer. The form in which admissions therein are offered, considered in connection therewith, leaves the meaning of the evidence too ambiguous for serious consideration.

The plaintiffs having shown, *prima facie,* that they are the owners of the judgment, they are entitled, at least, to an injunction against sale of Harrington's property under execution thereon.

The judgment below is

Reversed.

H. D. McCANLESS ET AL. v. W. F. BALLARD ET AL.

(Filed 17 March, 1943.)

1. Boundaries § 1—

What constitutes the boundary line between plaintiffs and defendants is a matter of law for the court; the location of the line is a matter of fact peculiarly for the jury.

2. Boundaries § 6—

Processioning is appropriate only in case of a disputed boundary between adjoining landowners, and if the lands of the parties do not join the whole case comes to naught.

3. Boundaries § 10—

In a processioning proceeding, under C. S., 361-364, to establish a boundary line between adjoining landowners, applicable only to disputes as to its true location, the plaintiff is the actor and has the burden of establishing the true location of the dividing line.

4. Same—

In an action between adjoining owners over their boundary line, where two issues on the line's location were submitted to the jury, the first as to plaintiffs' contention and the second based on defendants' contention, in the absence of an agreement that one or the other is the true line, a negative answer to the first issue does not perforce result in an affirmative answer to the second issue.

5. Same—

Where disputes arise over boundary lines confusion might be avoided and simplicity might be served by a single issue for the jury, substantially as follows: Where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants?

APPEAL by plaintiffs from *Clement, J.*, at August Term, 1942, of YANCEY.

Special proceeding to establish dividing line between adjoining landowners.

It is the contention of the plaintiffs that the true dividing line between plaintiffs' and defendants' lands is the "Red Line, 1, 2, 3 and 4," shown on the map made by the court surveyor, while the defendants contend that it is the "Blue Line, A, B, C and D," as shown on the map. There is no concession, however, that either the one or the other is the true dividing line between the lands of the plaintiffs and those of the defendants.

The following issues were submitted to the jury:

"1. Is the red line, 1, 2, 3, and 4, the boundary line of the lands of the plaintiffs?

"2. Is the blue line, A, B, C, and D, the boundary line of the lands of the defendants?"

The court concluded its charge with the following instructions:

"If the plaintiffs have failed to satisfy you by the greater weight of the evidence that that is the true dividing line, then you would come to the second issue, and it would be your duty to answer the second issue. Exception 9. In other words, the burden is on the plaintiffs to satisfy you, by the greater weight of the evidence, of their contentions. Exception 10. . . . The defendants contend that when you weigh and consider all of the evidence, if you should be satisfied by the greater weight of the evidence if that is the true dividing line and that you should answer that issue No. If you find it not the true dividing line, then you would answer the second issue, which reads as follows: 'Is the blue line, A, B, C, D, the true boundary line of the defendants?' Exception 11."

The first issue was answered "No" and the second issue "Yes." From judgment thereon, the plaintiffs appeal, assigning errors.

Charles Hutchins for plaintiffs, appellants.
Watson & Fouts for defendants, appellees.

STACY, C. J. In a processioning proceeding under C. S., 361-364, to establish the boundary line between adjoining landowners, which is applicable only in case of a dispute as to its true location, *Wood v. Hughes,* 195 N. C., 185, 141 S. E., 569, the plaintiff is the actor and has the burden of establishing the true location of the dividing line. *Garris v. Harrington,* 167 N. C., 86, 83 S. E., 253; *Hill v. Dalton,* 140 N. C., 9, 52 S. E., 425; *Woody v. Fountain,* 143 N. C., 66, 55 S. E., 425.

Here the court properly instructed the jury that the plaintiffs had the laboring oar in establishing the true dividing line, but in the absence

of an agreement that the line was at either the one or the other of the two locations, *i.e.*, the "Red Line" or the "Blue Line," as was the case in *Boone v. Collins,* 202 N. C., 12, 161 S. E., 543, a negative answer to the first issue would not perforce result in an affirmative answer to the second issue, as the court apparently assumed in its charge to the jury. *Marsh v. Richardson,* 106 N. C., 539, 11 S. E., 522. The location of the line was peculiarly for the jury. *Mann v. Archbell,* 186 N. C., 72, 118 S. E., 911; *Rhodes v. Ange,* 173 N. C., 25, 91 S. E., 356.

Some confusion may have arisen from the fact that two issues were submitted instead of one. In *Greer v. Hayes,* 216 N. C., 396, 5 S. E. (2d), 169, it was suggested that simplicity might be served if a single issue were submitted substantially as follows: Where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants? See, also, *Huffman v. Pearson, ante,* 193. What constitutes the line, is a matter of law; where it is, is a matter of fact. *Geddie v. Williams,* 189 N. C., 333, 127 S. E., 423. It is the province of the court to declare the one; that of the jury to ascertain the other. *Tatem v. Paine,* 11 N. C., 64; *Miller v. Johnston,* 173 N. C., 62, 91 S. E., 593; *Von Herff v. Richardson,* 192 N. C., 595, 135 S. E., 533.

There is also a contention on the part of the defendants that the plaintiffs' land as described in the deed under which they claim falls short by 13 poles of reaching the land of the defendants which necessarily defeats the proceeding, as processioning is appropriate only in case of a disputed boundary between adjoining landowners. The jury was instructed that if the land described in the deed under which the plaintiffs claim, "does not join the land of the defendants, but lies away from it, then the plaintiffs would not be entitled to recover." Thus, it will be seen, if this were the basis of the jury's answer to the first issue, the whole case must go out as the plaintiffs and defendants under such finding would not be adjoining landowners, and the answer to the second issue would likewise go for naught. The record fails to disclose upon what theory the jury returned its verdict.

A new trial appears necessary. It is so ordered.

New trial.

C. MAYLON TRUELOVE, ADMINISTRATOR FOR THE ESTATE OF GERTRUDE TRUELOVE, DECEASED, v. DURHAM & SOUTHERN RAILWAY CO.

(Filed 17 March, 1943.)

1. Pleadings § 3a—

The function of a complaint is not the narration of evidence but a statement of the material, essential or ultimate facts upon which the plaintiffs claim to relief is founded. Only facts to which the pertinent legal or equitable principles of law are to be applied should be stated.

2. Negligence § 1a—

Actionable negligence exists only where one whose acts occasion injury to another owes to the latter a duty, either by contract or by operation of law, which he has failed to discharge; and there must be a causal connection between the breach of duty and the injury.

3. Pleadings § 29—

Where, in an action for damages against a railroad for death of plaintiff's intestate from an automobile-train collision at a public crossing, plaintiff alleged as an act of negligence that defendant allowed its train to leave a station ahead of schedule, motion to strike this allegation should have been allowed.

APPEAL by defendant from *Harris, J.*, at September Term, 1942, of HARNETT. Error and remanded.

Civil action to recover damages for wrongful death resulting from automobile-train collision at a public crossing, heard on motion to strike certain parts of plaintiff's complaint.

After the complaint was filed defendant moved to strike paragraph 7 thereof. The clerk overruled the motion and defendant appealed. When the appeal came on to be heard before the court below the judge reversed the clerk and ordered that said paragraph be stricken from the complaint. At the same time an order was entered permitting the plaintiff to substitute an allegation as follows:

"7. That this plaintiff is advised and believes, and thereupon alleges, that the train which collided with and caused the death of the plaintiff's intestate had left the Town of Dunn, approximately three miles away, about thirty minutes ahead of schedule, while had it left as per regular schedule, which plaintiff's intestate knew and relied upon, as plaintiff is advised and believes, the plaintiff's intestate would not have been hurt; and that said train left Dunn ahead of schedule without any cause or reason therefor, but negligently left ahead of time contrary to schedule as published and posted, and as fixed."

Defendant then moved to strike paragraph 7 as amended. This motion was overruled and defendant appealed.

Neill McK. Salmon and J. R. Young for plaintiff, appellee.

Fuller, Reade, Umstead & Fuller, I. R. Williams, and Dupree & Strickland for defendant, appellant.

BARNHILL, J. The function of a complaint is not the narration of the evidence but a statement of the material, essential or ultimate facts upon which the plaintiff's claim to relief is founded. *Winders v. Hill,* 141 N. C., 694; *Revis v. Asheville,* 207 N. C., 237, 176 S. E., 738; *Hosiery Mill v. Hosiery Mills,* 198 N. C., 596, 152 S. E., 794; *Hawkins v. Moss, ante,* 95; McIntosh P. & P., 389, sec. 379. Only the facts to which the pertinent legal or equitable principles of law are to be applied should be stated. *Winders v. Hill, supra; Revis v. Asheville, supra; Hawkins v. Moss, supra.*

Actionable negligence exists only where one whose acts occasion injury to another owes to the latter a duty created either by contract or by operation of law which he has failed to discharge. There must be an act or omission by which a legal duty or obligation to the complaining party is breached and there must be a causal connection between the breach of duty and the injury.

Conceding, *arguendo,* that it was an act of negligence for the defendant to permit its train to leave Dunn ahead of schedule, such act on its part was in no sense a breach of any duty it owed plaintiff's intestate. Nor does it bear any causal relation to her injury and death.

To contend that if the train had left Dunn on scheduled time it would not have reached the crossing until after the automobile had passed in safety is plausible but not persuasive reasoning. Accept that and the reverse would be equally true. Had plaintiff approached the crossing a few minutes earlier or later, or had the automobile been operated just a little faster or slower, no accident would have occurred. Either position is untenable.

The train and the automobile upon which deceased was traveling approached a public crossing at approximately the same time. This imposed certain duties and obligations on the operators of each and the resulting rights, duties and obligations must be ascertained upon the basis of this primary fact.

If the fact that the train was not running on schedule affected the degree of care either was required to exercise under the circumstances, *Godwin v. R. R.,* 220 N. C., 281, 17 S. E. (2d), 137, it is probative only. It is a matter of common knowledge that trains are not always "on time" and that extras are frequently operated. That a train was or was not then due to pass, to the knowledge of the motorist, is merely a circumstance bearing upon the question of due care. That deceased or the driver of the automobile may have known the schedule of trains did

not relieve them of the duty the law imposes upon one who is approaching and about to cross a railroad track. The track is a warning of danger and the traveler must take notice and govern his conduct accordingly. *Godwin v. R. R., supra.*

It follows that the allegation is not of a material, essential or ultimate fact upon which the plaintiff's right of action depends. It should be stricken from the complaint.

Error and remanded.

LEWIS W. STANCIL v. W. J. WILDER.

(Filed 17 March, 1943.)

1. Judgments § 30—

A judgment is decisive of the points raised by the pleadings or which might properly be predicated thereon. This does not embrace any matters which might have been brought into the litigation, or any causes of action which plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings.

2. Judgments § 32—

In a suit to foreclose a mortgage, which had been assigned to plaintiff, judgment of foreclosure is not *res judicata*, in a subsequent action by the mortgagor against the plaintiff in the foreclosure suit to have him declared a trustee holding the title to the lands foreclosed for the benefit of the mortgagor.

APPEAL by plaintiff from *Stevens, J.*, at September Term, 1942, of JOHNSTON.

This is a civil action to have the defendant declared a trustee holding title for the plaintiff of certain lands formerly owned by the plaintiff and bid in at a foreclosure sale and deed taken therefor by the defendant.

The plaintiff in his complaint alleges that he was the owner of the *locus in quo* prior to 1922; that on 15 December, 1922, he executed a note for $2,000.00, payable in sixty-six semiannual installments to the Federal Land Bank of Columbia, which note was secured by a mortgage on the *locus in quo;* that said note and mortgage were transferred to the defendant by the Land Bank pursuant to an agreement between the plaintiff and defendant that the defendant was to hold said note and mortgage in trust and to permit the plaintiff to pay them on the same terms as he was paying the Land Bank, as well also as to protect the plaintiff from a small balance due on a second note and mortgage for $2,163.16 which he had executed 1 January, 1924, on the *locus in quo,* to one Creech, which had been assigned to one Godwin; that pursuant to

said agreement the plaintiff had surrendered to the defendant his receipts for, and other evidences of payments of, the Creech-Godwin indebtedness, and had also written the Land Bank requesting the transfer of the note and mortgage it held to the defendant; that after the defendant had procured the transfer to himself of the Land Bank note and mortgage pursuant to the agreement between plaintiff and defendant, the defendant failed to make settlement of the junior note and mortgage to Creech, assigned to Godwin, as he agreed, and allowed said mortgage to be foreclosed, and instituted foreclosure action of the Land Bank mortgage which had been assigned to him, and at the foreclosure sale thereof he, the defendant Wilder, became the last and highest bidder for the *locus in quo,* and received deed therefor in his own name.

The plaintiff prays judgment "that the defendant be adjudged as holding the lands described in the complaint in trust for the plaintiff," that an accounting be had, and that a receiver be appointed "to take charge of said trust property pending a final termination of the action."

After filing answer the defendant lodged a motion to dismiss the plaintiff's action for the reason that it is *res judicata,* which motion was allowed, and from judgment of dismissal predicated on this ruling, the plaintiff appealed, assigning error.

Thomas J. Moore and Parker & Lee for plaintiff, appellant.

E. J. Wellons for defendant, appellee.

SCHENCK, J. The question posed by this appeal is: Was the foreclosure action, in which W. J. Wilder was plaintiff and Lewis W. Stancil and others were defendants, *res judicata* in the present action, wherein Lewis W. Stancil is plaintiff and W. J. Wilder is defendant, to have the defendant declared a trustee holding title for the plaintiff? We are of the opinion, and so hold, that the answer is in the negative.

No reference is made in the pleadings in the foreclosure action instituted by W. J. Wilder against Lewis W. Stancil to the agreement between the said Stancil and Wilder alleged in the complaint as the basis of the present action. The agreement alleged in the present action was in no wise put in issue in the foreclosure action, and was not necessarily involved therein. While it may be conceded that the alleged agreement between the plaintiff and defendant might have been pleaded in the foreclosure action, and might have been adjudicated therein, still the fact remains that it was not so pleaded, and the pleading thereof was not necessary to determine the issues involved in the foreclosure action, mainly, the indebtedness of the defendant Stancil to the Land Bank, the assignment thereof to the plaintiff Wilder, and the default in the payment thereof by the defendant Stancil.

The judgment entered in the foreclosure action was decisive only of the points raised by the pleadings, or which might properly be predicated upon them, and does not embrace any causes of action which might have been brought into the litigation, but which were neither actually joined nor embraced in the pleadings.

The apposite law in the present action is clearly and succinctly stated in *Tyler v. Capehart,* 125 N. C., 64, 34 S. E., 108, quoted with approval in *Shakespeare v. Land Co.,* 144 N. C., 516, 57 S. E., 213; and in *Jefferson v. Sales Corp.,* 220 N. C., 76, 16 S. E. (2d), 462, as follows: "The judgment is decisive of the points raised by the pleadings or which might properly be predicated on them. This certainly does not embrace any matters which might have been brought into the litigation, or any causes of action which plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings."

Without intending to express any opinion affecting the ultimate disposition of the case, we reverse the judgment below and direct a new trial.

Reversed.

IN RE JO ANNA YOUNG.

(Filed 17 March, 1943.)

1. Habeas Corpus § 3—

Habeas corpus may be used to decide a contest between husband and wife, who are living in a state of separation without being divorced, in respect to the custody of their children. It is not available as between other parties, nor as between divorced parents. C. S., 2241.

2. Judgments § 29: Estoppel § 4—

A judgment regularly entered by a court of competent jurisdiction, however erroneous, so long as it stands, operates as an estoppel against the party instituting the action.

APPEAL by respondent, Mildred Clayton Young, from *Alley, J.,* in Chambers at Wilkesboro, 18 December, 1942. From AVERY.

Petition for writ of *habeas corpus* to determine the custody of Jo Anna Young, alleged infant daughter of Hall Young and Mildred Clayton Young.

The facts are these:

1. On 8 April, 1941, Hall Young and the respondent herein, Mildred Clayton Young, were duly married.

2. Thereafter, on 11 June, 1941, in the Circuit Court of Virginia, Isle of Wight County, Hall Young instituted an action for divorce

against his wife, alleging that at the time of their marriage "the said Mildred Clayton Young was, without the knowledge of your complainant, with child by some person other than your complainant."

3. On 20 June, 1941, Jo Anna Young, the subject of this controversy, was born.

4. On 25 July, 1941, a decree was entered in the above mentioned divorce action dissolving the bonds of matrimony between the parties on the ground that Hall Young was not the father of Jo Anna Young.

5. Thereafter, on 1 March, 1942, Hall Young and Mildred Clayton Young were again duly married. They are now living in a state of separation, without being divorced.

6. The application here is by the alleged paternal grandparents of the infant "brought by them on behalf of said father, Hall Young."

7. The infant in controversy is now in the custody of the petitioners, and has been since about the middle of October, 1942, when she was placed with them by Hall Young. The petitioners' son, Hall Young, was inducted into the United States Army Air Corps on 26 October, 1942, and is still in the military service.

From judgment awarding the custody of Jo Anna Young to the petitioners, until the further orders of the court, the respondent appeals, assigning errors.

J. V. Bowers for petitioners, appellees.

M. Anderson Maxey and Charles Hughes for respondent, appellant.

STACY, C. J. The appropriateness of *habeas corpus* to determine the present rightful custody of Jo Anna Young is challenged on two grounds:

First, because the petitioners have shown no authority to make the application on behalf of Hall Young.

Secondly, even if such authority exists, Hall Young himself would be estopped by the divorce proceeding in Virginia to assert his fatherhood of Jo Anna Young, a necessary averment to support the writ.

It is provided by C. S., 2241, that *habeas corpus* may be used to decide a contest "between any husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children." It is not available as between other parties, nor as between divorced parents. *In re Gibson, ante,* 350; *In re Ogden,* 211 N. C., 100, 189 S. E., 119.

"The object of the writ of *habeas corpus* is to free from illegal restraint. When there is none, the writ cannot be used to decide a contest as to the right custody of a child (except when the contest is between the parents of the child. Revisal, sec. 1853). . . . In short, the writ of *habeas corpus* cannot be used as a claim and delivery of the person"—

Clark, C. J., in *In re Parker,* 144 N. C., 170, 56 S. E., 878. And in the same case, *Hoke, J.,* in a concurring opinion, says: "Section 1853, Revisal (now C. S., 2241), was enacted to enable the court to make proper regulations as to the care and custody of children as between husband and wife who are living in a state of separation without being divorced. It seems to be confined to such cases."

In a contest between Hall Young and Mildred Clayton Young over the custody of Jo Anna Young, Hall Young would be in no position to assert that the infant is "their child," so as to bring it within the terms of the statute. In a former action instituted by him and on his own testimony it was adjudged that he was not the father of Jo Anna Young. Having invoked the Virginia Court to try the issue in an action for divorce, it is but meet that as against the rights of the respondent he should be estopped to say otherwise in any subsequent action or judicial proceeding. *Distributing Co. v. Carraway,* 196 N. C., 58, 144 S. E., 535; *McIntyre v. McIntyre,* 211 N. C., 698, 191 S. E., 507. As between Hall Young and Mildred Clayton Young, "his mouth is shut, and he shall not say that is not true which he had before in a solemn manner asserted to be true." *Armfield v. Moore,* 44 N. C., 157; *Yerys v. Ins. Co.,* 210 N. C., 442, 187 S. E., 583; *Crawford v. Crawford,* 214 N. C., 614, 200 S. E., 421. A judgment regularly entered by a court of competent jurisdiction, however erroneous, so long as it stands, operates as an estoppel upon the party instituting the action. *Cameron v. McDonald,* 216 N. C., 712, 6 S. E. (2d), 497; *McIntyre v. McIntyre, supra.*

There was error in entertaining the application for *habeas corpus.* The order entered on the writ will be vacated and the petition dismissed.

Error and remanded.

IN THE MATTER OF N. W. HOWARD, ADMINISTRATOR OF THE GOODS, CHATTELS AND CREDITS OF N. C. RAY, DECEASED, v. LYDIA RAY, JENNIE R. McKENZIE, SALLIE RAY, MRS. FLORA M. BRITT AND HUSBAND, D. H. BRITT, MRS. MARY BELLE MONROE AND HUSBAND, H. M. MONROE, CLARENCE RAY AND WIFE, MRS. CLARENCE RAY, AND BLANCHE RAY ..... AND HUSBAND, ...

(Filed 17 March, 1943.)

Executors and Administrators § 13c—

In a special proceeding by an administrator to sell land to make assets to pay debts whether the bid be raised under authority of C. S., 86, and C. S., 2591, or motion be made by a party interested in the proceeds for an order of resale under C. S., 86, only, it is clear that a private sale is

open to either course for ten days from the date and report of sale. During that period the bidder acquires no right of possession or title. He is merely a preferred bidder.

APPEAL by plaintiff from *Sink, J.*, at January Term, 1943, of LEE.

Special proceeding to sell real property to create assets with which to pay debts of decedent.

When the proceeding came on for hearing, the clerk, appointing commissioner for the purpose, ordered that the land be sold "at public auction or private sale and/or as otherwise required by law in such cases." The commissioner, under date 24 September, 1942, reported in pertinent part that he had sold to K. E. Seymour certain portions of the land at private sale for the sum of $600, which offer seemed "fair and adequate" therefor, and that "the administrator herein joins in recommending that sale be ordered confirmed to the purchasers indicated above." The clerk, finding that "the sale was in all respects duly and properly conducted and made," and that the price offered is "fair and adequate and the fair value of the land," entered order on Monday, 5 October, 1942, confirming the sale, and ordered the commissioner to execute and deliver deed in fee simple to the purchaser for said land upon payment of the purchase price. Thereafter, on 12 October, 1942, W. W. Stedman filed with the clerk a written offer to raise the said bid of K. E. Seymour by ten per cent. Thereupon, the clerk, being of opinion, and so holding, that W. W. Stedman is not entitled to have a re-sale at public auction as provided by C. S., section 86, refused to order re-sale. W. W. Stedman excepted thereto and appealed to judge holding courts of the Fourth Judicial District. Upon hearing on such appeal, the judge, presiding at January Term, 1943, of Superior Court of Lee County, finding as facts "that the report of private sale of lands to make assets was first made and filed in clerk's office on October 5th, 1942, or on October 6th, 1942, . . . and said sale was confirmed on the same day report was first filed in clerk's office," and "that on October 12, 1942, and in less than ten days, W. W. Stedman offered and filed in writing, and deposited in office of clerk, a raised bid ten per cent of the purchase price thereof," ordered that the land to which the bid relates "be re-advertised as provided by C. S., 86." The administrator excepts thereto, and appeals to Supreme Court and assigns error.

T. J. McPherson for N. W. Howard, administrator.
D. B. Teague of counsel for plaintiff, appellant.
K. R. Hoyle for defendant, appellee.

WINBORNE, J. The order of resale of land in question from which appeal is taken appears to be in accordance with statutory authority. C. S., 86, and C. S., 2591.

When in special proceeding to sell real property to create assets with which to pay debts of a decedent an order for private sale is made by any Superior Court of the State, the statute, C. S., section 86, provides that "the provisions of section 2591, chapter, Mortgages and Deeds of Trust, not inconsistent with this section shall apply." And in said section 2591 it is provided that a sale of real estate under the provisions thereof shall not be deemed to be closed under ten days, and that, if in ten days from the date of sale, the sale price be increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of Superior Court, the clerk shall issue an order to require advertisement and resale of the real property.

The facts in the case in hand bring it within the purview of these statutes. It is contended, however, that the bidder, offering to raise the bid, is not interested in the proceeds of the sale. While in this connection it is true that in C. S., 86, after providing that "the provisions of section 2591, chapter, Mortgages and Deeds of Trust, not inconsistent with this section shall apply," it is further provided "and the court may also, upon motion of any person interested in the proceeds of such sale, filed in writing within ten days from the date and report of said sale, together with satisfactory proof that said real estate has not been sold for its real value, require the sale to be re-opened, and thereupon the court may issue an order for the sale of such premises at public sale, as required by section 2591, chapter, Mortgages and Deeds of Trust," the wording clearly indicates that the latter quoted provision is in addition to the former quoted provision. Moreover, whether the bid be raised under authority of C. S., 2591, as therein prescribed, or motion be made by party interested in the proceeds for an order of resale under C. S., 86, as above quoted, it clearly appears that a private sale is open to either course for ten days from the date and report of sale. During that period the bidder acquires no right of possession or title. He is merely a preferred bidder. *Creech v. Wilder,* 212 N. C., 162, 193 S. E., 281, and cases cited. See also *Building & Loan Assn. v. Black,* 215 N. C., 400, 2 S. E. (2d), 6.

The cases *Thompson v. Rospigliosi,* 162 N. C., 145, 77 S. E., 113, and *Barcello v. Hapgood,* 118 N. C., 712, 24 S. E., 124, upon which appellant relies, are distinguishable from, and are not inconsistent with decision here reached.

The judgment below is

Affirmed.

THOMAS H. HAWLEY v. LEGH. R. POWELL, JR., ET AL.

(Filed 17 March, 1943.)

1. Trial § 49: Appeal and Error § 37b—

The discretionary action of the trial court in setting aside the verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. It is likewise a matter of discretion as to whether the verdict shall be set aside in whole or in part.

2. Same—

Where, on motion to set aside a verdict on the first issue as contrary to the weight of the evidence and as to the second issue for excessive award of damages, and the motion is overruled as to the first issue and allowed as to the second issue, an appeal is premature, for defendants have preserved their exceptions to the trial on the first issue and these may be presented upon appeal from the final judgment.

APPEAL by defendants from *Grady, Emergency Judge,* at October Term, 1942, of HARNETT.

Civil action to recover damages for false arrest and wrongful ejection of plaintiff from one of defendants' passenger trains.

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

"1. Did the defendant wrongfully and unlawfully cause the plaintiff to be arrested and ejected from its train in Sanford, N. C., as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damages, if anything, is the plaintiff entitled to recover of the defendant? Answer: '$2,000.00.' "

Motion by defendants to set aside the verdict as contrary to the weight of the evidence and for excessive award of damages. Motion overruled as to first issue; allowed as to second issue, and new trial ordered on the issue of damages. Exception and appeal by defendants, assigning error in the failure to nonsuit, insufficiency of the first issue, refusal to charge as requested and in the charge as given.

Neill McK. Salmon and D. C. Wilson for plaintiff, appellee.
Murray Allen for defendants, appellants.

STACY, C. J. The discretionary action of the trial court in setting aside the verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. C. S., 591; *Anderson v. Holland,* 209 N. C., 746,

184 S. E., 511; *Bailey v. Dibbrell Mineral Co.*, 183 N. C., 525, 112 S. E., 29; *Goodman v. Goodman*, 201 N. C., 808, 161 S. E., 686. It was likewise a matter of discretion as to whether the verdict should be set aside in whole or in part. *Geer v. Reams*, 88 N. C., 197.

The defendants have preserved their exceptions to the trial on the first issue, and these may be presented on appeal from the final judgment, if, indeed, an appeal is taken therefrom. *Thomas v. Carteret*, 180 N. C., 109, 104 S. E., 75. No judgment has yet been entered in the cause. Hence, the present appeal is premature, and must be dismissed. *Strayhorn v. Bank*, 203 N. C., 383, 166 S. E., 312.

Appeal dismissed.

MARTHA J. McLAMB v. W. L. ADAMS.

(Filed 17 March, 1943.)

1. Judgments §§ 22c, 37a—

The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof must be on the one who alleges the contrary.

2. Judgments §§ 37a, 38, 41—

A judgment debtor is not charged with knowledge of the assignment of the judgment and, therefore, he may rightly pay his original judgment creditor until he has notice that another has become his creditor. Payment, before docketing, *is held* valid against an assignment of an interest to attorneys for judgment creditor.

APPEAL by defendant from *Stevens, J.*, at October Term, 1942, of JOHNSTON. Reversed.

This was a motion in the cause by the defendant, before the clerk, to recall execution and cancel the judgment on the ground that the judgment had been fully paid. Motion was denied, and defendant appealed to the judge, who confirmed the findings of fact and conclusions of law of the clerk. Defendant appealed to this Court.

Parker & Lee for plaintiff, appellee.
J. R. Barefoot for defendant, appellant.

DEVIN, J. The defendant's only exception is to the judgment. Hence, the single question for decision is whether, upon the facts found by the clerk and confirmed by the judge, the defendant was entitled to the relief sought.

At January Term, 1940, plaintiff McLamb recovered judgment against defendant Adams in sum of $172.49. Previously the plaintiff Martha J.

McLamb had agreed with her counsel, Stevens, Farmer & Hill, to assign to them one-half of the recovery. It was found by the clerk that defendant, on 1 February, 1940, paid the judgment in full to Martha J. McLamb, $172.49, and took her receipt acknowledging complete satisfaction of the judgment. But the clerk found that this was without the consent and knowledge of plaintiff's attorneys, and that the payment did not impair the right of the attorneys to fifty per cent of the judgment and to execution thereon. It appears that the judgment in *McLamb v. Adams* was not actually entered on the judgment docket until 5 February, 1940, and that at the same time the assignment of fifty per cent of the judgment to the attorneys was filed by them and noted on the record by the clerk's deputy. It also appeared from the affidavit of one of plaintiff's attorneys, introduced in evidence, that before the judgment was paid he asked defendant's counsel about payment of the judgment, and was informed by the latter that he thought Adams was going to pay it that day to Mrs. McLamb. Asked if her counsel had been paid, plaintiff's counsel replied, "If you should pay it to Mrs. McLamb, we are protected."

There was no evidence that either Adams or his counsel had notice or knowledge of the assignment *pro tanto* of the judgment to plaintiff's attorneys. The mere statement "we are protected" may not be held to constitute notice that the judgment itself had been assigned. Under these facts we think the judgment, so far as the recovery was concerned, was fully satisfied, and that, without notice of any assignment of the judgment, in whole or in part, payment in full to the judgment creditor constituted a discharge.

"The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof must be on the one who alleges the contrary." *Brown v. Harding,* 170 N. C., 253 (261), 86 S. E., 1010.

It was said by *Ruffin, C. J.,* in *Hewett v. Outland,* 37 N. C., 438: "It is true the (judgment) debtor is not charged with knowledge of the assignment of a demand that is not negotiable, and, therefore, he may rightly pay his original creditor, until he knows that another person has become his creditor." See also 30 A. L. R., 820 (note); 30 Am. Jur., 892.

We think the plaintiff's attorneys as assignees of the judgment are not entitled to execution on the judgment, since the recovery has been paid in full to the judgment creditor without notice or knowledge of the assignment, and that the order overruling defendant's motion to recall the execution must be

Reversed.

JOSEPH W. BAILEY v. LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 24 March, 1943.)

1. Insurance § 13a: Contracts § 8—

An insurance policy is only a contract and is interpreted by the rules applicable to other written contracts, and the intention of the parties is the object to be obtained. Terms which are clear and unambiguous, are to be taken and understood in their plain, ordinary and popular sense.

2. Insurance § 34a—

"Disease" is defined as an alteration in the state of the human body, or of some of its organs or parts, interrupting or disturbing the performance of the vital functions, or some of them.

3. Insurance §§ 34a, 34e—

In an action to recover for total disability, under a policy of insurance providing total disability payments for insured, whenever he becomes disabled by bodily injury or disease so that he is wholly prevented thereby from engaging in any occupation or performing any work for compensation or profit, where the evidence tends to show that for many years plaintiff has been highly nervous and has drunk whiskey to excess and is an inebriate, without any evidence of serious injury or damage to any vital organ or function, a judgment of nonsuit, at the close of all the evidence, was properly allowed.

APPEAL by plaintiff from *Williams, J.*, at September Term, 1942, of MARTIN.

Civil action to recover on policy of insurance benefits for total and permanent disability and for waived premiums paid.

The "total and permanent disability provisions" of the policy of insurance issued to plaintiff by defendant on 11 February, 1931, upon which claim was filed by plaintiff in August, 1940, and upon which this action is based, are these: "Upon receipt of proof satisfactory to the company at its Home Office that while the said policy was in full force and effect, before default in the payment of premiums and before the anniversary of said policy on which the age of the insured at nearest birthday is sixty years, the insured has become totally disabled as defined below and will be continuously so totally disabled for life, or if the proof submitted is not conclusive as to the permanency of such disability but establishes that the insured is, and for a period of not less than four consecutive months immediately preceding receipt of proof has been, totally disabled as defined below, the company will (1) waive the payment of any premium falling due under said policy during such disability . . . and (2) pay to the insured . . . a monthly income of one hundred and 00/100 Dollars. . . . Disability shall be considered total

whenever the insured becomes disabled by bodily injury or disease so that he is wholly prevented thereby from engaging in any occupation and performing any work for compensation or profit . . . The disability benefit herein provided shall not be payable if disability shall have resulted . . . from bodily injuries self inflicted."

For cause of action, in this connection, plaintiff in his complaint alleges "that for many years plaintiff has been suffering from a nervous and mental trouble, also from ulcerated stomach and other diseases of the body and said suffering and diseases have so affected the physical condition of this plaintiff that he has been unable since the early fall of 1938 to do any work and same has prevented him from engaging in any occupation for remuneration or profit," which "condition has grown worse from time to time and since the fall of 1938 he has not been able and has not done any work whatsoever for remuneration or profit and has been totally and permanently disabled."

In answer thereto defendant denies this allegation, and (1) avers that plaintiff is not totally and permanently disabled as defined in the disability provision contained in the policy upon which he sues; and (2) that even though plaintiff be totally and permanently disabled, his condition has been caused and brought about by a voluntary, excessive and continuous use of alcohol and drugs, and is not covered by the wording and intendment of the policy.

Evidence for plaintiff is substantially as follows: Plaintiff, 40 years of age, has been licensed to practice law and practiced in Williamston, North Carolina, until the latter part of the year 1939, when he closed his office. He "has been a nervous man" for many years. Though "he drank a little before his father's death" in 1938, afterwards he was known to drink whiskey to excess, and "when he was drinking bad, he drank two or three pints a day, or during the night and day." After the death of his father, his mother states, "he would take too much whiskey and I sent him to Westbrook at Richmond four different times." He remained at Westbrook for a total of seventy-eight days during the period beginning 17 February, 1939, and ending 26 June, 1942. He also "went to Pine Bluff once" and "to Raleigh three times," "not entirely for drinking," but "to get his nerves straight." "Once or twice he wasn't drinking at all." His mother testified: "He is what I call a nervous wreck. He is just so nervous at times he is like a worm in the fire; he can't be still anywhere. It has been coming on him gradually for seven or eight years." She also says: "There were periods of time in the last two or three years that he did not drink any whiskey. Sometimes he would go all to pieces so bad he felt like he had to have something. He would be so nervous that he couldn't be still and had to take a drink of whiskey to try to quiet himself, and at times that would sort of quiet his

nerves. Of course the after-effect would be worse than before he started. . . . When he went to Westbrook first it was in February, 1939. When he came back he was sober for a while, didn't drink any whiskey. During this time he was very nervous and could not sleep. . . . He came back in the middle of the summer the last time and since that time has been a sober man. . . . He is at home. He came down here and saw Dr. Darden this morning and he went to pieces so bad we thought it best for him to go back home. . . . He was sober." She further testified that plaintiff also "went to Johns Hopkins Hospital for treatment for his stomach—complained of his stomach, and that for the last two or three years he has been troubled with hemorrhoids" . . . and that "he has also had trouble with his teeth." His wife testified: "On August, 1940 (that is the date when plaintiff filed claim for disability benefits), and the year prior to that time, he was just as nervous to me as anybody could be. . . . He has been a nervous man all the years I have known him, but he has grown worse . . . as far as his nerves are concerned."

Dr. O. B. Darden, a medical expert and psychiatrist connected with Westbrook Sanatorium at Richmond, Virginia, as witness for plaintiff, testified: "J. W. Bailey, plaintiff, was admitted to our institution four times. The first time was February 17, 1939, and he remained under treatment until March 16, 1939. I examined him and I saw him virtually every day. The next time he entered the institution was September 27, 1941, and he remained until October 24, 1941. I again examined him both physically and mentally and he was under my observation and treatment each day. He again entered the institution on October 28, 1941, and left November 3, 1941. I again diagnosed his case and saw him every day while he was there. He was admitted again on June 11, 1942, and stayed until June 26, 1942. I again examined him and gave him treatment each day that he remained." Then, under cross-examination as to the above, the doctor testified: "I first saw Bailey in February, 1939. He came to our institution. I think I admitted him. He had been drinking. He said he did not come to get off drinking. The purpose of his being in our institution was, I think, to be treated for what was wrong with him. He was drinking, but that was not the fundamental thing. I have no idea as to the extent of his drinking. The first time, according to the informant, he had been drinking excessively. He had stepped it up at night from one-half pint to a pint and quart during the day. The second time he came to our institution he was not drinking when he was admitted. The third time he left us against our advice on the 24th and came back the 28th. He went to town and began drinking. The second time he stayed from September 27th till October 21st, and he left against our advice and went up town and got drunk and he came back and stayed until October 28th. The third time he went on June 11th

and left on June 26th. He was drinking then. Our treatment was directed towards getting him to understand his condition, so that he could make a better adjustment in the community. After three days we withdrew whiskey. This is general treatment we give. We did not treat him for inebriacy." Again reverting to testimony of the doctor on direct examination—"From my various examinations and observations of him on these various visits I thought he was mentally sick. This conclusion was reached from the symptoms that I observed and the history of him that we received and the results of our examination. As to his physical status, we found nothing significant from the standpoint of his present condition. We found some pyorrhea and dental infection and bad teeth, and he was underweight. We found no external nor internal hemorrhoids. He was very nervous and very restless . . . physically and mentally. . . . He had to be doing something all the time, walking around, up and down, and in his talks he was continuously trying to make himself impressive, though what he was saying had no meaning in so far as we were concerned in the application of what we felt about his own situation. In so far as he was concerned there was no reason for his being there; he didn't need treatment and there was nothing wrong with him. There was something in his situation, meaning his situation at home and in his business, that made it impossible for him to get down to work and stick to it, which he explained as being some outside influence that kept him from his business and from him taking his rightful place in the group at home, and for that reason he wanted to go home, thought it mandatory that he do, his business needed him, and characteristically of such people, he would write us a letter to impress that upon us, but he did complain of being restless, nervous, and did not sleep well. At times he would break down and cry without any reason, showing a very definite emotional instability. There was no evidence that his judgment was at all good. We thought it was definitely impaired because of his sickness. . . . We went into his condition as thoroughly as we could and from the standpoint of a laboratory there was nothing organically wrong. He had been drinking some, and, as most people who drink, showed some . . . in his urine. It cleared up, and examination of the blood showed that there was no damage . . . because of damaged kidneys, so both urine examination and the blood examination showed that the kidneys were not damaged. There was no evidence of any liver damage, and there was no evidence of any damage to the central nervous system, that is, the brain and the nerves, from any injurious substances. The heart and vessels were normal. There was, as I said, some trouble with his teeth, which we thought was insignificant." And in answer to question as to what led him to believe that Bailey was a sick man, both physically and mentally, the doctor said: "His impaired judgment, his lack of

reasoning, lack of consideration of other people, his absolute lack of understanding of his own condition and situation, and he had no appreciation of what he should do, his proper place in society. There was no apology because he was not working; so far as he was concerned he was satisfied with the position he was having at that particular time, demanding of others, but wholly inattentive to his responsibilities and obligations. . . . I think he is weak in the ordinary meaning of the word in that he has not kept himself in good shape, but his organs are in good condition. . . . In so far as his condition has been since I have known him up to this time, I think there is no question that he has been totally disabled to do any sustained work or put forth any sustained effort over sufficient time to be self supporting, and I can only express an opinion, of course, as to the future, and based upon what I have found in him, my feeling is that his condition is permanent unless something is done to help him, and I have no assurance that it would be materially improved with all the help anybody could give him. I think there has been a progressive instability and a progressive change in his makeup, in his reactions, and in his feelings, progressive towards the worse. In other words, I think he was in worse condition the last time he was in our institution than the first. In regard to the allegation that his trouble is self inflicted and liquor being the primary cause of his condition, there is no evidence to show anything poisonous has damaged any tissues. I mean the kidneys, the liver, and the brain. I would say that my examination and conclusion that liquor is not the primary cause of his condition." And in this connection, under cross-examination, Dr. Darden continued: "I do not think whiskey drinking is a disease and I do not think it, *per se,* can be treated. The underlying situation can be treated. I do not think anybody drinks whiskey just to drink it. Some disease causes all whiskey drinking, all that I have ever seen. I have never seen it when it was not secondary to something else. . . . Nobody drinks whiskey that is not diseased and the disease is causing the drinking. We never treat drinking at Westbrook *per se.* We try to treat something else. . . . I think whiskey drinking is a symptom just as fever is a symptom of pneumonia. Whether it is excessive drinking or just ordinary drinking like everybody does is a big question, but I think that everybody who drinks whiskey, even the so-called social drink, is to change their prospective. I think that if he did not want to change his attitude at the particular moment, he would not take a drink. I think this situation is a dissension with a particular situation. I do not call it a disease. It may be momentary or transient. . . . As to how we treated Judge Bailey from June 11th to June 26th, all of our thoughts about his condition have been the same when we got him away from whiskey, and so what we thought the fundamental condition was and we

have thought and told him that, and we have told members of his family and we have told his referring physician that we did not think he was well when he stayed there the first time, though he was off whiskey and had been for three weeks. . . . I think those who drink whiskey are very unsatisfactory patients because we often have the same trouble with them that we had with Judge Bailey and we cannot get them to understand their situation and very often no co-operation from the family is given. Drinkers of whiskey, if they do not understand their situation, give us more trouble, though not all of them. . . . Judge Bailey never got out of Richmond one time before he went to the hotel and began drinking." And, Dr. Darden, on re-direct examination, concluded by saying: "The fundamental trouble of Judge Bailey is not liquor, absolutely not. That is my opinion. It is the disease of the mind and body that finally brought about the drinking."

Dr. J. E. Ward, as witness for defendants, testified: "I have known J. W. Bailey for twenty years. I have treated him when he was drinking and I couldn't say when he started drinking. The first I knew about it was some time after his father's death, maybe a year or two. He drank pretty severely. He was a heavy drinker. I should say that I knew his condition at the time I treated him. He was a nervous temperament and had some trouble with his stomach, but I didn't find any serious illness that I knew of. I examined him several times and he seemed all right. He has always been nervous since I have known him. I think without whiskey he would be able to have carried on all right. He had been doing all right for years and if there was any sudden change in his makeup I didn't discover it. He was nervous and had some trouble with his stomach. He had been to Baltimore and had some X-ray pictures made. As to his stomach, I do not know of anything definite. No definite diagnosis was made. I think he would have been able to attend to his business affairs if he had left whiskey alone." On cross-examination: "He was also suffering from hemorrhoids. They gave him trouble at times and at times didn't. I have not treated him for several months." Then on re-direct examination, the doctor said: "I believe his not being able to work was caused by drinking. I think he is what we would term an inebriate. He is weak. He does not have any will power. Maybe he wants to quit but he does not. I think if he would co-operate and get the right attitude he could quit. He seems to have the idea that he does not have any resistance. He has been very nervous and can't sleep . . ."

C. B. Roebuck, sheriff of Martin County, as witness for defendant, testified: "I know J. W. Bailey. He has been drinking right much for the last three or four years. I have had occasion to be called to his home several times. I carried him off once or twice. I carried him to

Westbrook one time, Pine Bluff one time, and to Raleigh two or three times. I carried him for the treatment of drinking. . . . I carried him to Raleigh and he lacked just a little of drinking two pints from here to Raleigh. It took me about three hours to go. I saw him take one-half pint at one time on my way to Raleigh." On cross-examination the sheriff said: "I don't know anything at all about Walter's physical condition. I have known him since 1913. He was extremely nervous. . . . I carried him to Westbrook as the commitment directed."

There was other evidence bearing upon the question of plaintiff's disability to engage in any occupation and to perform any work for compensation or profit.

The court overruled motion of defendant for judgment as of nonsuit at close of evidence for plaintiff, to which defendant excepted, but such motion at close of all the evidence was allowed.

Plaintiff excepted and appeals to Supreme Court and assigns error.

B. A. Critcher, Wheeler Martin, and Clarence Griffin for plaintiff, appellant.

Elbert S. Peel for defendant, appellee.

WINBORNE, J. If it be conceded that there is evidence tending to show, or from which it may be inferred, that plaintiff is totally disabled, is there evidence that he became so "by bodily injury or disease" within the meaning of the policy of insurance? Careful consideration of the evidence taken in the light most favorable to plaintiff, as we must do in passing upon the correctness of judgment as in case of nonsuit, dictates a negative answer.

"An insurance policy is only a contract, and is interpreted by the rules of interpretation applicable to other written contracts, and the intention of the parties is the object to be attained," *Varser, J.*, in *McCain v. Ins. Co.*, 190 N. C., 549, 130 S. E., 186, applied in *Stanback v. Ins. Co.*, 220 N. C., 494, 17 S. E. (2d), 666. See also *Crowell v. Ins. Co.*, 169 N. C., 35, 85 S. E., 37; *Powers v. Ins. Co.*, 186 N. C., 336, 119 S. E., 481; *Bolich v. Ins. Co.*, 205 N. C., 43, 169 S. E., 826. In the *Powers case, supra, Adams, J.*, speaking for the Court, said: "But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used; and if they are clear and unambiguous their terms are to be taken and understood in their plain, ordinary and popular sense." See also *Bray v. Ins. Co.*, 139 N. C., 390, 51 S. E., 922.

And in the *Bolich case, supra, Connor, J.*, speaking of the meaning to be given the word "explosion," there under consideration, expressed the

rule in this manner: "The word as used in the policy of insurance should be construed in its popular sense, as used by ordinary men, and not in the scientific sense as used by scientific men." "We can only construe the contract as the parties have made it," *Devin, J.*, in *Sanderlin v. Ins. Co.*, 214 N. C., 362, 199 S. E., 275, and cases cited.

The language of the policy under consideration clearly states that "disability shall be considered total whenever the insured becomes disabled by bodily injury or disease so that he is wholly prevented thereby from engaging in any occupation or performing any work for compensation or profit." It is not contended that plaintiff is disabled by reason of bodily injury. Therefore, is his disability the result of "disease"? "Disease" has been defined as "an alteration in the state of the human body . . . or of some of its organs or parts interrupting or disturbing the performance of the vital functions, or of a particular instance or case of this"; as "deviation from the healthy or normal condition of any of the functions or tissues of the body"; and as a "morbid condition of the body." Black's Law Dictionary, 3rd Edition, 18 C. J., 1139. See also *McGregor v. Assurance Corp.*, 214 N. C., 201, 198 S. E., 641, where it is said that these definitions have been adopted in one form or the other in decisions of numerous courts, citing cases.

When, under the above rule of construction, these definitions are applied to the facts of the case in hand, the evidence fails to show that plaintiff's disability is the result of disease, as the term is understood in its plain, ordinary and popular sense. While there is evidence that plaintiff has for many years been highly nervous and has drunk whiskey to excess, for which he has taken treatment at several places, the evidence shows there is nothing organically wrong with him. The testimony of his witness, Dr. Darden, who examined him and had him under observation almost every day for seventy-eight days, during the period from February, 1939, to June, 1942, is that "the kidneys were not damaged"; that "there was no evidence of any liver damage"; that "there was no evidence of any damage to the central nervous system, that is, the brain and the nerves, from any injurious substances"; that the "heart and vessels were normal"; that though there was some trouble with his teeth it was thought to be insignificant; and that "no external or internal hemorrhoids" were found. The doctor, theorizing that whiskey drinking is not a disease but a symptom—that some disease causes all whiskey drinking, gives as his opinion that plaintiff's "fundamental trouble is not liquor" but that "it is the disease of the mind and body that finally brought the drinking." Yet the doctor fails to state what is the fundamental trouble. And on being asked "What led you to believe that he was a sick man, both physically and mentally?" the doctor answered:

"His impaired judgment, his lack of reasoning, lack of consideration of other people, his absolute lack of understanding of his own condition and situation, and he had no appreciation of what he should do, his proper place in society. There was no apology because he was not working; so far as he was concerned he was satisfied with the position he was having at that particular time, demanding of others, but wholly inattentive to his responsibilities and obligations."

On the other hand, Dr. Ward, witness for defendant, who has known plaintiff for twenty years, who has been the family physician, and who has treated plaintiff when he was drinking, says that he "didn't find any serious illness," and that in his opinion plaintiff "is what we would term an inebriate." And there is no contention on this record that inebriacy or drunkenness is a disease. In fact, plaintiff's evidence tends to show that, from a scientific point of view, whiskey drinking is not a disease but a symptom of some disease which causes whiskey drinking and fails to show a "disease" in the plain, ordinary and popular sense of the word.

The judgment below is

Affirmed.

MRS. HELEN P. BRYAN, WIDOW, AND ADMINISTRATRIX OF JAMES S. BRYAN, DECEASED, EMPLOYEE, v. T. A. LOVING COMPANY AND ASSOCIATES, EMPLOYER, AND UNITED STATES CASUALTY COMPANY, CARRIER.

(Filed 24 March, 1943.)

1. Master and Servant §§ 40e, 40f—

An injury received by an employee, while going to and from his work, is not compensable unless he is being transported by the employer under the contract of employment.

2. Master and Servant §§ 40e, 40f, 40g—

The N. C. Workmen's Compensation Act does not contemplate compensation for every injury an employee may receive during the course of his employment, but only those from accidents arising out of, as well as in the course of employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant.

3. Master and Servant §§ 40e, 40f—

Where, in a proceeding for compensation under the N. C. Workmen's Compensation Act, the evidence tends to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a Marine Base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on the public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer, and his injury and death did not arise out of and in the course of his employment.

APPEAL by defendants from *Harris, J.*, at November Term, 1942, of CRAVEN. Reversed.

Claim for compensation under the Workmen's Compensation Act.

The defendant employer was the construction contractor at Cherry Point Marine Base. The Government property is enclosed by a fence which is located about 1 foot inside the property line. In part, this fence parallels Highway No. 101. It has a number of entrance gates. Gate No. 2 faces Highway No. 101 and is the entrance to the administration office buildings used by the employees, salesmen and others having business at the offices. A small house, 6 x 6, was just outside the gate for use of the guard during bad weather. Deceased was a civilian (not an official) guard and was stationed at gate No. 2, his hours being from 6 a.m. to 2 p.m. His duties were to prevent parking of cars on the outside of the fence, to direct motorists who desired to stop to the lot on the inside used as a parking lot, to guard against entry of unauthorized persons and to regulate and direct automobile traffic through the gate. In regulating such traffic he, at times, assisted the State patrolman and at rush periods during shifts he would stop traffic on the highway so as to permit those leaving the premises through gate No. 2 to do so more rapidly and conveniently. This was done under the direction of the employer and not by virtue of any police power vested in him. While he wore a "special officer" badge he was not an officer of the law.

On the day of his injury, a few minutes before 6 a.m., he was on his way to his work. He rode to a point in front of gate No. 2 on a bus. The bus stopped on the shoulder of the road opposite the gate. Deceased alighted and as the bus moved off he started across the public road toward gate No. 2 where it was his duty then to relieve the night watchman on guard. Just as he passed from behind the bus there was another car about even with the back of it going in the opposite direction. Deceased "kind of hesitated just a moment like he kind of saw the car. All at once he shot out presuming he could make it." He was struck by

the car and thrown to the side of the road. He died from the injuries received before reaching the hospital.

Deceased was not required to formally "check in" when he reported for work each morning. The gate was locked at night and the night guard remained on the inside. When the deceased arrived the night guard unlocked and opened the gate, gave the key to deceased and left, being relieved by deceased. This was the only form of "check in" and "check out" that was used. At the time of the injury the night watchman was unlocking and opening the gate. He intended, but had not had time, to deliver the key to the deceased.

In addition to the foregoing facts which appear from the evidence and the findings of the hearing Commissioner the hearing Commissioner found the following:

"F. That the defendant employer was a contractor doing construction work on the property owned by the Federal Government; that said defendant employer neither owned the property on which he was doing construction work nor owned the property and right of way of the highway immediately in front of gate No. 2, but that the defendant employer customarily used the property owned by the Federal Government within the limitations required by his construction work as if it were his own premises, and that the defendant employer customarily used that portion of the highway and highway right of way immediately in front of gate No. 2 within reasonable limitations for the proper traffic regulations as if it were his own premises. Therefore, the Commission specifically finds as a fact that for the purposes of the provisions of the Workmen's Compensation Act the plaintiff's deceased was on the premises of the defendant employer at the time he sustained his injury by accident which resulted in his death.

"G. Upon the evidence that more than 90% of the traffic on the highway in front of gate No. 2 was composed of the employees of the defendant employer and other workmen who were erecting the Marine Base, together with the evidence that the plaintiff's deceased was a civilian guard employed as a traffic policeman, the Commission specifically finds as a fact that the deceased employee was subjected to an extraordinary and a greater hazard of being injured or being struck by an automobile than that to which the public generally was subjected or that was common to the neighborhood.

"H. The Commission further specifically finds as a fact that the injury by accident which plaintiff's deceased sustained on April 20th, 1942, and which resulted in his death, arose both out of and in the course of his employment with the defendant employer. The reasons for this Finding of Fact will be fully discussed in the Conclusions of Law hereinafter made."

The hearing Commissioner, after making his conclusions of law on the facts found, awarded compensation and the defendants appealed to the Full Commission. The Full Commission affirmed and the defendants appealed.

When the cause came on for hearing in the court below the award of the Industrial Commission was affirmed and defendants appealed.

R. E. Whitehurst for plaintiff, appellee.
Lawrence A. Stith for defendants, appellants.

BARNHILL, J. The hearing Commissioner, through a very interesting and persuasive process of reasoning, comes to the conclusion that the deceased was for all practical purposes on the premises of his employer; that his employment involved unusual risks; and that, therefore, the injury arose out of and in the course of the employment. The Full Commission supplements this conclusion by finding that he was in the ambit of his employment and affirms. Thus, it affirmatively appears that the award was not made upon the theory that the deceased had begun his employment for the day or was actually engaged in the performance of any duty of his employment, or was about his master's business at the time of the injury. Instead, it is based upon the theory that he was on the premises of his employer at the time or was in such close proximity to such premises "that he was for all practical effect on the defendant employer's premises," or, at least, he had reached the ambit of his employment. If sustainable at all, the award must be sustained on this theory, for there is no evidence in the record that the deceased, on the occasion of his injury, had undertaken to direct traffic or to perform any other duty of his employment.

On the contrary, the uncontradicted evidence tends to show that he was at the time on his way to his place of employment to report for work. He alighted from the bus that had carried him to a point in front of and across the highway from his gate or station. He continued on foot across the highway immediately behind the bus to relieve the guard then on duty. He saw an oncoming car, hesitated and then attempted to cross the road ahead of the car. He was on the public highway and was hit while he was still on the hard surface.

An injury received by an employee while going to and from his work is not compensable unless he is being transported by the employer under contract of employment. *Dependents of Phifer v. Dairy,* 200 N. C., 65, 156 S. E., 147; *Davis v. Mecklenburg County,* 214 N. C., 469, 199 S. E., 604; *Bray v. Weatherly & Co.,* 203 N. C., 160, 165 S. E., 332; *Smith v. Gastonia,* 216 N. C., 517, 5 S. E. (2d), 540; *Lassiter v. Tel. Co.,* 215 N. C., 227, 1 S. E. (2d), 542; *Rourke's Case,* 129 N. E. (Mass.), 603;

Padgorski v. Kerwin, 175 N. W. (Minn.), 694; *Nesbitt v. Twin City Forge & Foundry Co.,* 177 N. W. (Minn.), 131; Schneider, Workmen's Compensation Law (2d), 769, sec. 265. The findings of fact bring this case within the general rule.

Had the deceased been injured while directing traffic under the instructions of his superior it would be immaterial whether he was on or off the premises of his employer. The mere fact, however, that at times the performance of his duties required him to go upon the highway and to assume the extra risk occasioned thereby does not justify or support the conclusion that the public highway was a part of the premises. Nor does the fact that employees of defendant constituted the great majority of those who used the highway as such alter this conclusion. Neither is it important that the operator of the car that struck deceased was also an employee of defendant. At the time he was on his way to get breakfast before reporting for work. Though, generally speaking, he was an employee he was then merely a member of the traveling public using the highway as such.

Even if we accept the finding or conclusion of the Commission that the deceased was on the premises of his employer and within the ambit of his employment the injury and death is not compensable.

Under our statute, ch. 120, Public Laws 1929, as amended, to sustain an award of compensation it must be made to appear that the injury "arose out of" and "in the course of" the employment. These terms have been so often defined by this Court that they now have an established and well recognized meaning. *Plemmons v. White's Service, Inc.,* 213 N. C., 148, 195 S. E., 370, and cases cited; *McGill v. Lumberton,* 215 N. C., 752, 3 S. E. (2d), 324; *Lockey v. Cohen, Goldman & Co.,* 213 N. C., 356, 196 S. E., 342; *Robbins v. Hosiery Mills,* 220 N. C., 246, 17 S. E. (2d), 20. Mere repetition would serve no good purpose.

The Act does not contemplate compensation for every injury an employee may receive during the course of his employment but only those from accidents arising out of, as well as, in the course of employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment. *Lockey v. Cohen, Goldman & Co., supra; Walker v. Wilkins, Inc.,* 212 N. C., 627, 194 S. E., 89; *Marsh v. Bennett College,* 212 N. C., 662, 194 S. E., 303; *Plemmons v. White's Service, Inc., supra.* The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. *Lockey v. Cohen, Goldman & Co., supra.*

That the employee at the time of the injury is on his employer's premises, that his employment involved unusual hazards, and that he was within the compass of his employment are important facts. Yet, they are not alone sufficient to justify or support the conclusion that the injury arose out of the employment or to support an award. *McNeill v. Construction Co.*, 216 N. C., 744, 6 S. E. (2d), 491; *Plyler v. Country Club*, 214 N. C., 453, 199 S. E., 622; *Plemmons v. White's Service, Inc., supra; Walker v. Wilkins, supra; Marsh v. Bennett College, supra; Bain v. Travora Mfg. Co.*, 203 N. C., 466, 166 S. E., 301.

Conceding *arguendo* that deceased was vested with all the authority of a traffic officer, *Davis v. Mecklenburg County, supra,* and *McKenzie v. Gastonia, ante,* 328, are, in principle, directly in point.

In the *Davis case, supra,* the employee was a rural policeman. He was within his county—the ambit of his employment. He had the right, if occasion arose, to investigate crime, to regulate traffic or to make arrests. He was, however, at the time on his way to report for active duty, and he suffered death from a hazard incident to travel on a public road. Compensation was denied.

In the *McKenzie case,* the employee was a city policeman injured while in the city on his way to report for duty. He likewise had authority to quell a disturbance, to make arrests, or to perform any other duty of his employment. His injury, however, arose out of a hazard common to those who use a public highway and compensation was denied.

The employee's journey had not been completed. He was still on his way to work. He was master of his own movements. The hazard created by traffic on the highway under the circumstances of this case cannot fairly be traced to the employment. It cannot be said that it was, at the time and place and under the circumstances disclosed, a natural incident of the work. It was not created by the employer. It did not arise out of the exposure occasioned by the nature of the employment. It was neither an ordinary nor an extraordinary risk directly or indirectly connected with the services of the employee. On the contrary, any other person undertaking to cross a public highway under the same or similar circumstances would be subjected to the identical hazard encountered by him.

It is conceded that if deceased had been injured 100 yards down the road the injury would not be compensable. That he was instead within 30 or 40 feet of his destination does not alter the purpose of his going or warrant a different conclusion.

We are aware that one witness testified deceased had reported to his post. This witness, however, repeatedly stated thereafter that he was not present but that he received his information from another. Hence, this

evidence is hearsay. Furthermore, it is in conflict with all the competent testimony.

The hearing Commissioner cited and relied on certain cases from other jurisdictions. Decisions of other courts are always helpful. When, however, a case involves the interpretation of a local statute first consideration must be given to the difference, if any, in the wording contained in the statute under consideration.

The Utah Act makes injuries arising out of or in the course of employment compensable. The disjunctive is used and courts of that State interpret "in the course of" to include "a reasonable margin of time and space necessary to be used passing to and from the place where work is to be done." Hence, Utah cases on the question here presented are not authoritative or persuasive.

In *Bountiful Buick Co. v. Giles,* 276 U. S., 154, 72 L. Ed., 507, the Court only decided that the Utah Workmen's Compensation Act does not contravene the Due Process Law Clause of the Fourteenth Amendment.

Barnett v. Britline Cafeteria Co., 143 Sou., 813 (Ala.), was decided by a divided Court and is in direct conflict with the decisions of this Court, which are controlling.

Freire v. Matson Navigation Co., 109 Pac., 1022 (Cal.), is factually distinguishable. There the hazard was created by other employees of the company as such and not as members of society at large.

The facts in *Martin v. Metropolitan Co.,* 189 N. Y. S., 467, are not at all similar. The claimant was using an elevator within the building where she worked which was furnished, in part, for the convenience of employees. She was injured when the operator started the elevator while she was in the act of getting off.

We conclude that the claimant has failed to bring her claim within the provisions of the Workmen's Compensation Statute. The specific facts found are insufficient to sustain the conclusion that the injury resulting in death arose out of and in the course of the employment. Hence, the award must be vacated. To that end the judgment below is

Reversed.

S. L. MOSELEY, J. A. MOSELEY, WILLIS MOSELEY, MARY ELIZA LANGLEY, WILLIAM MOSELEY, ELISHA MOSELEY, JACK MOSELEY, LOUISE M. ELLIS, NORMAN MOSELEY, AMOS MOSELEY, THURHAM MOSELEY (MINOR), SYLVESTER MOSELEY (MINOR), GLADYS MOSELEY (MINOR), CHILDREN OF J. T. MOSELEY, DECEASED, AND ERNEST MOSELEY, J. G. MOSELEY, RUBY MOSELEY AND MARY MOSELEY, CHILDREN OF JIM MOSELEY, HEIRS AT LAW AND NEXT OF KIN OF ELISHA MOSELEY, DECEASED, THE MINOR CHILDREN HEREIN BEING REPRESENTED BY THEIR DULY APPOINTED NEXT FRIEND, S. L. MOSELEY; AND MITTIE MOSELEY, WIDOW OF ELISHA MOSELEY, DECEASED, v. RUBY BELLE TILGHMAN DEANS AND HUSBAND, LOUIS DEANS.

(Filed 24 March, 1943.)

1. Process §§ 1, 9: Appearance § 2a—

The purpose of judicial process is to give notice, and its proper service brings the party within the jurisdiction of the court from which the process issued, and hence acceptance of notice and waiver of service by an officer and voluntary appearance in court dispenses with service. Irregularity in the form of the summons is waived. C. S., 489, 490.

2. Appearance § 2b—

A general appearance cures all defects and irregularities of process.

3. Process §§ 3, 9: Appearance § 2a—

While the statute (C. S., 476) requires that a summons, directed to the sheriff of a county other than that from which it is issued, shall be attested by the seal of the court, the absence of a seal will not invalidate a judgment where service has been accepted and the defendant has voluntarily appeared.

4. Adoption §§ 5, 8: Appearance §§ 2a, 2b: Pleadings § 6: Judgments § 6—

In a proceeding for adoption of a minor, under C. S., 182-184, now repealed, upon the filing of petition alleging the material facts and making the only living parent of the minor a party thereto and such parent accepting service of summons and a copy of the petition and consenting in writing on the summons to the adoption, this in effect constitutes a voluntary appearance and answer and is sufficient to support a judgment of adoption.

5. Adoption § 5: Appearance § 2a: Judgments § 6—

The fact that petitioner's counsel wrote part of the form of acceptance and consent, to be signed by the parent, on the back of a summons in an adoption proceeding, is not sufficient to destroy its legal effect, in the absence of any indication of fraud or undue influence.

APPEAL by defendants from *Stevens, J.*, at September Term, 1942, of PITT. Reversed.

This was an action for partition of land among the collateral heirs of Elisha Moseley, who died intestate and without issue, and to declare void a judgment rendered by the clerk in 1927, purporting to legalize the adoption by Elisha Moseley and his wife of Ruby Belle Tilghman (now Deans).

The defendants allege that the adoption was valid, and that Ruby Belle Tilghman thereby became in law the child of Elisha Moseley and upon his death intestate, she inherited the land and is now the sole owner thereof.

The record of the adoption proceedings, referred to in the complaint and admitted in the answer, showed that petition before the clerk for the adoption for life of Ruby Belle Tilghman, daughter of Luther Tilghman, was filed by Elisha Moseley and his wife, Mittie Moseley, 7 October, 1925. The petition was signed by S. J. Everett, attorney, and verified by both petitioners. Luther Tilghman, the father of the child, the mother being dead, was made party defendant. Summons on the same date was issued by the clerk and directed to the sheriff of Lenoir County. The summons was not attested by the seal of the court. On the back of the summons appeared the following: "I, Luther Tilghman, the defendant named in this summons, do hereby accept service of same, with a copy of the petition to adopt Ruby Belle Tilghman, my child, and say that I have no objection to same. This October 10, 1925, with the understanding that I may have the privilege of going to see her when I see fit and she can come to see me sometime when she wants to and we will both be allowed to recognize each other." The words down to the date were in the handwriting of S. J. Everett, and the remaining words were added by Luther Tilghman in his own handwriting. Copy of the adoption petition was delivered to Luther Tilghman before or at the time of the acceptance of service of the summons. Ruby Belle Tilghman was then living with petitioners. In March, 1927, the following judgment was entered:

"Elisha Moseley
Mittie Moseley
—v—
Luther Tilghman
Ruby Belle Tilghman. } Judgment.

"This special proceedings coming on to be heard upon the petition of Elisha Moseley and Mittie Moseley for the adoption of minor child, Ruby Belle Tilghman, for life; and it appearing that summons has been served, with a copy of the petition, upon Luther Tilghman, the father of the said child, he having filed no answer or other plea within the time fixed law, and not objecting thereto except that in accepting

service he requests that the child be permitted to visit him and he visit her enough to keep alive the affectionate relations of father and child, which is acceptable to the petitioners, it is now, therefore, ordered and adjudged that the said Ruby Belle Tilghman be and she is hereby adopted to and by the said petitioner with all the rights given said petitioners and said minor child under the law with the agreement above recited being a part of the judgment, except that the plaintiff petitioners shall have full control and authority over said child at all times. This March 29, 1927.

J. F. HARRINGTON, Clerk Superior Court."

Upon consideration of the record of the adoption proceedings the court was of opinion that the purported adoption was void, and declined to hear the testimony of Luther Tilghman, offered as a witness by defendants. Judgment was entered for the plaintiffs. The defendants appealed.

Albion Dunn for plaintiffs, appellees.

R. T. Martin and J. B. James for defendants, appellants.

DEVIN, J. The question presented by the appeal is whether the judgment rendered in the proceeding instituted by Elisha Moseley and his wife for the adoption of Ruby Belle Tilghman, daughter of Luther Tilghman, was sufficient in law to create the relationship of parent and child between petitioners and Ruby Belle Tilghman and to constitute the latter the heir of the adopting parent.

Elisha Moseley, from whom the land descended and the petitioner in the adoption proceeding, died intestate with no natural child surviving him. The plaintiffs are the brothers and sister and representatives of deceased brothers of Elisha Moseley. The mother of the child Ruby Belle Tilghman died before the institution of the adoption proceedings.

The plaintiffs challenge the validity of the adoption proceedings on four grounds: (1) That the summons was void for want of seal; (2) that the consent of Luther was never filed; (3) that, if the words on the back of the summons be treated as an answer and voluntary appearance, they were written by the attorney for the petitioners; and (4) that no hearing was had by the clerk and judgment rendered upon the allegations of the petition.

None of these objections can be sustained. While the statute (C. S., 476) requires that a summons directed to the sheriff of a county other than that from which it is issued shall be attested by the seal of the court, the absence of a seal would not invalidate a judgment where service has been accepted and the defendant has voluntarily appeared. *Stancill*

v. Gay, 92 N. C., 455; *Caldwell v. Wilson,* 121 N. C., 425 (453), 28 S. E., 554; *Rector v. Logging Co.,* 179 N. C., 59, 101 S. E., 502. The purpose of judicial process is to give notice, and its proper service brings the party within the jurisdiction of the court from which the process issued, and hence acceptance of notice and waiver of service by an officer and voluntary appearance in court dispenses with service. Irregularity in the form of the summons is waived. *Peoples v. Norwood,* 94 N. C., 167; *S. v. Jones,* 88 N. C., 683. The statute declares that the voluntary appearance of a defendant is equivalent to personal service (C. S., 490), and that the written admission of the defendant constitutes proof of service (C. S., 489). "A general appearance cures all defects and irregularities in the process." *Harris v. Bennett,* 160 N. C., 339, 76 S. E., 217.

The pertinent provisions of the statutes in force at the time of the institution of the adoption proceedings in this case required that in order to constitute a valid adoption petition be filed in the Superior Court, setting forth the material facts, including the name and age of the child and the names of the child's parents, and that the living parent must be made a party of record. C. S., 182 and 183. The statute also provided that "upon the filing of such petition, and with the consent of the parent or parents, if living," the court should have power to sanction and allow the adoption by an order to that effect. C. S., 184. Here the only living parent of Ruby Belle Tilghman was made party and signed on the back of the summons an admission of service of the summons, together with a copy of the petition, and declared in response to the petition that he had no objection to the ends thereby sought, to wit, the adoption of his daughter by petitioners. This must be understood to constitute both acceptance of service of process and voluntary appearance and submission of himself to the court's jurisdiction, as well as signifying in writing his consent to the adoption. It was in effect an answer to the petition. The petitioners having filed proper petition, duly verified, and both notice to and consent of the surviving parent appearing, the court had jurisdiction of the subject matter and of the persons necessary to an adoption, and was clothed with the power to sanction the adoption by an order to that effect. The defects in the adoption proceedings held fatal in *Truelove v. Parker,* 191 N. C., 436, 132 S. E., 295; *Ward v. Howard,* 217 N. C., 201, 7 S. E. (2d), 625; and *In re Holder,* 218 N. C., 136, 10 S. E. (2d), 620, do not appear on the record of this case.

Though some of the words appearing on the back of the summons were written by counsel for petitioners, these were adopted by the voluntary act of Luther Tilghman, the father, by signing his name thereunder and by adding other words in his own handwriting signifying his consent to

the adoption. It was upon consideration of the father's voluntary appearance and written statement that judgment was rendered, the clerk being careful to incorporate in his decree the father's expressed understanding that this did not sever the ties of affection between him and his motherless daughter.

We do not regard the action of the petitioners' counsel in writing on the back of the summons the form for acceptance of service, to be used by the father in case he so elected, as sufficient to destroy the legal effect of the acceptance of service. Here there was nothing to indicate that Luther Tilghman was unduly influenced by petitioners' counsel, or thereby "thrown off his guard." *Moore v. Gidney,* 75 N. C., 34; *Patrick v. Bryan,* 202 N. C., 62, 162 S. E., 207; *Gilliam v. Saunders,* 204 N. C., 206, 167 S. E., 799. No fraud or imposition is alleged or shown. Presumably the petitioners knew the father was consenting to the adoption, or the petition would not have been filed. While the decisions of this Court are to the effect that a judgment in an adversary proceeding will not be allowed to stand when it appears that the same attorney represented both plaintiff and defendant in the action (*Kerr v. Mosley,* 152 N. C., 223, 67 S. E., 482; *Arrington v. Arrington,* 116 N. C., 170, 21 S. E., 181; *Gooch v. Peebles,* 105 N. C., 411, 11 S. E., 415), we do not think that principle applicable here. The facts of this case are substantially different from those in *Molyneux v. Huey,* 81 N. C., 106, where counsel for both plaintiffs and defendant, who had antagonistic interests, advised defendant to confess judgment when a defense was available; or *Gooch v. Peebles,* 105 N. C., 411, 11 S. E., 415, where the same attorney attempted to represent conflicting interests in litigation at the same time; or *Cotton Mills v. Cotton Mills,* 116 N. C., 647, 21 S. E., 431, where upon motion of an attorney judgment was entered against the party for whom he appeared; or *Arrington v. Arrington, supra,* where the attorney for executors and devisees also represented claimants against the estate and procured judgment; or *Marcom v. Wyatt,* 117 N. C., 129, 23 S. E., 169, where plaintiff's attorney drew the answer for the guardian *ad litem* for the defendant; or *Johnson v. Johnson,* 141 N. C., 91, 53 S. E., 623, where separate counsel for plaintiff and defendant joined in same motion to set aside a judgment annulling a marriage; or *Patrick v. Bryan, supra,* where counsel for defendant through court action arranged a compromise settlement for an injury to an infant. In the last case this Court declined to set aside the judgment. See also *Henry v. Hilliard,* 120 N. C., 479, 27 S. E., 130; Weeks on Attorneys, sec. 271; Thornton on Attorneys, secs. 174, 175; 5 Am. Jur., 297.

In adoption proceedings the statute requires that the parent be made party of record, and also that he shall consent to the adoption prayed for

by petitioner. Thus, the concurrence of all parties is contemplated by the statute, and their agreement, in the absence of imposition or fraud, is not to be regarded as adversely affecting the validity of the proceeding. It may be noted that Luther Tilghman was present at the trial below and his offer to testify for the defendants was declined by the court, since its ruling on the record would not have been affected by testimony in support of defendants' contentions.

Here it is made to appear from the record that the surviving parent was made a party to the proceeding, that he accepted service of the summons and the petition, and, with knowledge of the contents of the petition and its purpose to legalize the adoption of his daughter, responded thereto by a statement to the court in writing that he had no objection to the adoption, with the understanding this did not prevent his seeing his child when he desired. Hence, nothing else appearing, it would seem that the requirements of the statute have been substantially complied with. The hearing before the clerk was presumed to have been in all respects regular, and on its face the judgment is apparently effectual for the purposes therein decreed.

On the record before us, we conclude that the court below was in error in adjudging the adoption proceedings void and entering judgment for the plaintiffs.

Reversed.

E. N. MOORE AND WIFE, FLORENCE W. MOORE, H. B. MOORE AND WIFE, ESTHER R. MOORE, BETH MOORE HUNTER (WIDOW), SALLIE H. LEGGETT AND HUSBAND, L. W. LEGGETT, ELIZABETH HYMAN (UNMARRIED), EMILIE HYMAN (UNMARRIED), W. E. HYMAN AND WIFE, HILDA E. HYMAN, AND E. P. HYMAN AND WIFE, BESSIE E. HYMAN, v. MARTHA NORMAN (PATTIE) BAKER (WIDOW), SALLIE BAKER EVERETT AND HUSBAND, B. B. EVERETT, AND JOHN B. CHERRY AND SUSIE HYMAN BOWDEN.

(Filed 24 March, 1943.)

1. Partition § 4b—

Proceedings for the partition of land do not ordinarily place the title at issue, and unless the title is placed at issue, petitioners are not required to prove title as in an action for ejectment.

2. Partition § 4a—

A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. The actual possession may be in a life tenant. C. S., 3234.

3. Partition § 4b—

Where tenants in common allege that they are the owners of land and seized of the fee simple title thereto, the law presumes possession.

4. Partition § 4a: Pleadings § 16a—

In a petition for partition of land, alleging that petitioners and defendants, except John B. Cherry, are tenants in common and owners of, and are seized in fee of the lands therein described, an additional statement that Cherry is in wrongful possession of some part of the land is insufficient to oust jurisdiction and a demurrer thereto should have been overruled.

5. Partition § 4a—

The presence of a party in a partition proceeding, not shown to be a necessary party, is immaterial except as affecting costs.

APPEAL by plaintiffs from *Frizzelle, J.*, at August Term, 1942, of HALIFAX.

This is a special proceedings instituted before the clerk of the Superior Court of Halifax County, N. C., 4 February, 1942, for the partition of certain lands.

It is alleged that the petitioners and the defendants are now tenants in common and are the owners of and are seized in fee simple of the lands referred to in the petition, except the defendant John B. Cherry, and that the petitioners are informed and believe that the said John B. Cherry is now "in possession of some part of said lands, to which possession he is not entitled."

Defendants Martha Norman (Pattie) Baker, Sallie Baker Everett and B. B. Everett demurred to the petition on the ground that the court has no jurisdiction, in that the interest of John B. Cherry is not set out and it is affirmatively stated in the petition that said defendant is now in possession of part of the said land, to which possession he is not entitled.

On 28 July, 1942, the clerk of the Superior Court entered judgment sustaining the demurrer.

On appeal from the clerk, his Honor sustained the demurrer, for that: "The court is without jurisdiction due to an improper joinder of (a) parties, and (b) causes of actions."

His Honor held that since in his opinion the Court is without jurisdiction, and having sustained the demurrer on that ground, the second cause of demurrer, to wit, "That the complaint does not in law state a cause of action," is not before the Court.

From the judgment sustaining the demurrer, plaintiffs appeal to the Supreme Court, assigning error.

I. T. Valentine and Wilkinson & King for plaintiffs.

Irwin Clark and R. O. Everett for defendants.

DENNY, J. Prior to the enactment of chapter 214, sec. 2, of the Public Laws of 1887, C. S., 3234, cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate.

A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the cotenants thereof. 40 Am. Jur., sec. 28, p. 22. The possession need not be actual. The actual possession may be in a life tenant, but that is no longer a bar to a proceeding for partition instituted by tenants in common, who are remaindermen or reversioners. Under the above statute, tenants in common are deemed to be seized and possessed as if no life estate existed. But the actual possession of the life tenant cannot be disturbed so long as it exists. The tenants in common, however, have the immediate right of possession, subject only to the termination of the life estate. *Priddy & Co. v. Sanderford,* 221 N. C., 422, 20 S. E. (2d), 341.

The petitioners herein allege that the petitioners and the defendants, except John B. Cherry, are tenants in common and are the owners of and are seized in fee simple of the tracts of land described in the petition.

The demurring defendants contend that the affirmative statement in the petition, that John B. Cherry is in the possession of some part of the lands described in the petition and that the possession is wrongful, is sufficient to oust the jurisdiction of the court, and that this proceeding cannot be maintained until an action in ejectment against Cherry is instituted and the tenants in common have actual possession of all the land sought to be partitioned. They further contend that an allegation of possession in the petitioners is essential to give the court jurisdiction in partition proceedings, citing *Alsbrook v. Reid,* 89 N. C., 151. In *Alexander v. Gibbon,* 118 N. C., 796, 24 S. E., 748, the decision of this Court on that question is succinctly stated in the syllabus of the case, as follows: "There is no statute or judicial ruling in this State which makes an allegation of possession vitally essential to a petition for partition, except the decision in *Alsbrook v. Reid,* 89 N. C., 151, which case is overruled on that point."

The appellees also cite the case of *Church v. Trustees,* 158 N. C., 119, 73 S. E., 810, and rely upon the following statement therein: "If the individual churches were tenants in common they could not procure an order for partition, for they are not in possession. *Clemmons v. Drew,* 55 N. C., 314; *Wood v. Sugg,* 91 N. C., 93; *Osborne v. Mull, ibid.,* 203." The facts in that case are distinguishable from those in the instant case.

There the legal title of the property sought to be partitioned was in the trustees. Where tenants in common allege they are the owners of land and seized of the fee simple title thereto, the law presumes possession. *Alexander v. Gibbon, supra.* In the case of *Church v. Trustees, supra,* plaintiff did not claim to have the title to the property; in other words, the Church had neither an estate in possession nor the right of possession, and the cases cited therein involving real property were cited in support of that position. Otherwise, the cases would not have been in point, for at the time the case was decided cotenants in reversion or remainder had been given the right to have a compulsory partition of lands. C. S., 3234.

We come now to consider the allegation relative to the wrongful possession of John B. Cherry. The allegation is insufficient to convert this action into an action for ejectment and may therefore be treated as surplusage, except as affecting costs. This Court said in *Baggett v. Jackson,* 160 N. C., 26, 76 S. E., 86: "The presence of the other defendant, Jackson, if not shown to be a necessary party by the petition, was immaterial except as affecting costs. *Ormond v. Ins. Co.,* 145 N. C., 142." There, as in the instant case, the petition alleged Jackson was in wrongful possession and had no interest in the land. He was a son of Mrs. M. A. Baggett by a former marriage, was living with his mother on the premises and he and his mother were in possession of all the land while his mother was entitled only to a dower interest in the land.

Proceedings for the partition of land do not ordinarily place the title at issue, and unless the title is placed at issue, petitioners are not required to prove title as in an action for ejectment. *Talley v. Murchison,* 212 N. C., 205, 193 S. E., 148; *Baugham v. Trust Co.,* 181 N. C., 406, 107 S. E., 431; *Buchanan v. Harrington,* 152 N. C., 333, 67 S. E., 747.

It was intimated in the argument before this Court that the defendant Cherry named in the petition, may not have been served with process. There is nothing in the briefs or in the record to support the suggestion that the J. B. Cherry actually served is not the John B. Cherry named in the petition; hence, we do not consider the question before the Court.

The demurrer should have been overruled.

Reversed.

JOE HALLOW v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 24 March, 1943.)

1. Negligence § 11—

Only where on the face of the complaint itself the contributory negligence of the plaintiff is patent and unquestionable, so as to bar his recovery, will the court allow advantage to be taken thereof by demurrer instead of by answer.

2. Negligence § 19b—

Where the complaint, in an action against a railroad for negligence, alleges that plaintiff entered the train, assisting a passenger, with the permission of the conductor and porter and with their assurance that there was ample time, and before he could get a seat for his companion the train started, and when he hastened to the platform he found the door closed over the steps and open above, and before he could return to the car a sudden jerk or lunge threw him out of the door and as he was falling to the ground, he caught the handbar at the entrance steps and was injured. *Held:* Demurrer *ore tenus*, on the ground that the complaint does not state a cause of action, was properly overruled.

APPEAL by defendant from *Burgwyn, Special Judge,* at February Term, 1943, of WAYNE.

Civil action to recover damages for alleged negligent injury.

The complaint alleges:

1. That on 6 April, 1942, the plaintiff purchased a ticket for his daughter and as they were about to enter one of the defendant's trains at Wilson, N. C., the plaintiff asked the porter and conductor, who were standing upon the ground, if he would have sufficient time to accompany his daughter upon the train for the purpose of finding her a seat and assisting her with her baggage, and being advised that he might enter the train and that there was ample time for him to do so, he went into the car and attempted to find a seat for his daughter; that only a few minutes elapsed when, to his amazement, he discovered the train was in motion; that the plaintiff thereupon hastened to the platform and found the bottom part which covered the steps closed and the door portion open.

2. That upon this discovery, the plaintiff immediately decided to remain upon the train, but before he could return to the coach those in charge of the operation of the train carelessly and negligently caused said train to make a sudden jerk or lunge, which threw the plaintiff out through the door, and as he was falling to the ground, he caught the handbar at the entrance steps and was injured.

3. That the defendant was negligent in the following particulars:

(a) In closing the platform steps when the defendant's employees knew that plaintiff expected to alight from the train before it started.

(b) In permitting the door on the platform to remain open while the train was in motion.

(c) In causing the train to be suddenly and violently jerked, thus throwing the plaintiff, who was on the platform, out through the open door.

The defendant interposed a demurrer *ore tenus* to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. Demurrer overruled. Defendant appeals, assigning error.

Langston, Allen & Taylor and Paul B. Edmundson for plaintiff, appellee.

Thomas W. Davis, D. H. Bland, and W. B. R. Guion for defendant, appellant.

STACY, C. J. The thesis of the demurrer is, that plaintiff was contributorily negligent in attempting to alight from a moving train, which bars recovery, and that this affirmatively appears from the complaint. *Stamey v. R. R.*, 208 N. C., 668, 182 S. E., 130; *Ballinger v. Thomas*, 195 N. C., 517, 142 S. E., 761; *Morrow v. R. R.*, 134 N. C., 92, 46 S. E., 12; *Burgin v. R. R.*, 115 N. C., 673, 20 S. E., 473.

We do not so understand the allegations of the complaint. It is alleged that when the plaintiff discovered he could not alight in safety he immediately decided to remain on the train. This is what he should have done according to the opinion in *Morrow's case, supra.*

The negligence of which the plaintiff complains became active and hurtful after he had decided to return to the coach. His injury then resulted, not from an effort on his part to alight from the train while in motion, but from the failure of the defendant to allow him reasonable time to depart and from the jerk which threw him through the open door. *Riggs v. R. R.*, 188 N. C., 366, 124 S. E., 749. He was on the platform as a result of the permission and assurance which the porter and the conductor had previously given him. He entered the train with their knowledge and consent. They knew the plaintiff expected to leave the train before it started and they had advised him that he had ample time to do so. At least, this is what he alleges, and for the purpose of the demurrer, it is to be taken as true.

Speaking to a similar pleading in *Ramsey v. Furniture Co.*, 209 N. C., 165, 183 S. E., 536, where the authorities are fully reviewed, *Devin, J.*, writing for the Court, says: "So that it must be held that only where on the face of the complaint itself the contributory negligence of the plaintiff is patent and unquestionable, so as to bar his recovery, will the court allow advantage to be taken thereof by demurrer instead of by answer, as required by the statute."

The plaintiff is entitled to a liberal interpretation of his complaint. C. S., 535. So construed, it appears to be good as against a demurrer.

Affirmed.

MAGGIE BYNUM v. THE LIFE INSURANCE COMPANY OF VIRGINIA.

(Filed 24 March, 1943.)

1. Insurance § 30a: Limitation of Actions § 2e—

In an action to recover premiums paid by plaintiff on forfeited life insurance policies on the lives of certain relatives of plaintiff, where summons was issued 17 February, 1942, and the evidence tended to show that such premiums were paid only to 1936, defendant having pleaded the three-year statute of limitations, C. S., 441, 6465, judgment of nonsuit was properly allowed. C. S., 567.

2. Insurance § 30a—

In an action to recover premiums paid by plaintiff on a forfeited life insurance policy, where the evidence shows that the premiums were paid to date and the policy still in force, there is no cause of action stated and the suit cannot be maintained.

3. Insurance § 32d: Appeal and Error § 39a—

In an action to recover premiums paid on forfeited life insurance policies, judgment of nonsuit, containing a proviso, "without prejudice to the rights of plaintiff in the paid-up policies listed in paragraph (c) of the further answer," if not in favor of plaintiff, is harmless error.

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

APPEAL by plaintiff from *Pless, J.*, at September Term, 1942, of BUNCOMBE.

This is an action to recover the premiums paid by the plaintiff on five policies of life insurance, three of which were originally issued in 1898, one in 1901 and one in 1903; four being on the lives of certain relatives of the plaintiff and one on her own life.

The premiums on the four policies on the lives of the relatives of the plaintiff were paid by her until 1936, and the premiums on the policy on her own life were paid by her up to the time of the institution of this action, 17 February, 1942.

When the plaintiff had introduced her evidence and rested her case the defendant moved for a judgment as in case of nonsuit (C. S., 567), which motion was allowed, and from judgment predicated upon such ruling the plaintiff appealed, assigning error.

George F. Meadows for plaintiff, appellant.
Adams & Adams for defendant, appellee.

SCHENCK, J. The defendant interposed a plea of the three years statute of limitation to the plaintiff's alleged cause of action in so far as it related to the premiums paid on the policies issued on the lives of the relatives of the plaintiff. The evidence of the plaintiff is to the effect that these policies were canceled for the nonpayment of premiums on 19 March, 1936.

It is stipulated by the parties that summons was issued 17 February, 1942; hence, it appears that the action was barred by the provisions of C. S., 441 and 6465, the latter of which, in part, reads: "No action shall be maintained to recover under a forfeited policy unless the same is instituted within three years from the day upon which default was made in paying the premium, installment, interest, or portion thereof for which it is claimed that forfeiture ensued."

Since this action is stated to be for the recovery of premiums paid on forfeited policies, and since the evidence of the plaintiff is to the effect that the premiums on the policy on the life of the plaintiff herself have been paid to date and that the policy is still in force, no cause of action to recover premiums on a forfeited policy can be maintained on the policy involved.

It follows that there was no error in sustaining the demurrer to the evidence of the plaintiff and entering judgment as in case of nonsuit.

However, the plaintiff appellant complains that his Honor added to his judgment the following proviso: "Without prejudice, however, to the rights of the plaintiff in the paid-up policies listed in paragraph (c) of the further answer, as follows:

"Policy No. 769037, on the life of Annie Bynum $49.00
Policy No. 793721, on the life of Henry Bynum $47.00
Policy No. 1054743, on the life of Annie Bynum $46.00
Policy No. 1385773, on the life of Martha Bynum ..... $41.00."

If this proviso be error, such error, if not in favor of the plaintiff, appellant, was certainly harmless to her. It was doubtless entered to put of record that the court did not intend to foreclose by the judgment any person from any benefits he or she might have under the paid-up policies which the defendant admitted existed upon the death of the insureds therein named. The record, however, does not divulge who the beneficiaries of the policies are, and the proviso is therefore not binding against any person who may be interested in any benefits under the policies.

Affirmed.

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

STATE v. EVERETTE CLARKE, PRINCIPAL, AND PERMAN CLARKE, SURETY.

(Filed 24 March, 1943.)

1. Bail § 4: Appeal and Error § 37b—

Where in a criminal prosecution, after appeal from a municipal court to the Superior Court, defendant is called and fails to appear in accordance with his bond, and judgment *nisi, sci fa* and capias is entered, an appeal from order of the Superior Court made at a subsequent term, refusing to strike out the forfeiture, is premature and should be dismissed for such order is in no wise final but only *nisi*, and defendants may protect their rights by exception and appeal from the final judgment, if adverse.

2. Execution § 4—

No execution may issue on a judgment *nisi* until it is finally made absolute.

3. Judgments § 13—

Whether a judgment *nisi* will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the Superior Court. C. S., 4588.

APPEAL by defendants from *Nettles, J.*, at November Term, 1942, of CATAWBA.

The defendant Everette Clarke on 13 March, 1942, was convicted in the municipal court for the city of Hickory for the willful neglect and refusal to support his illegitimate child begotten upon Mildred Cody (Public Laws 1933, ch. 228, and amendments thereto), and from judgment therein pronounced appealed to the Superior Court, executing and delivering a bond in the sum of five hundred dollars to make his personal appearance at the next term of the Superior Court to be held for the county of Catawba on the first Monday in July, 1942, with Perman Clarke as surety thereon. On 9 July, 1942, the following entry was made on the Minute Docket of the Superior Court of the county of Catawba: "No. 54. State *vs.* Everette Clarke. Failure to support illegitimate child. Defendant called and failed. Judgment *nisi, instanter sci fa* and *instanter capias.* Direct this process to the Sheriff of Caldwell County." *Scire facias* issued by the clerk of the Superior Court of Catawba County on 9 July, 1942, to Caldwell County, was served by the sheriff of Caldwell County upon the defendant Everette Clarke and his surety, Perman Clarke, on 23 July, 1942. The defendant Everette Clarke filed answer to the *sci fa* in which he averred that he was prevented from attending the July Term, 1942, of the Superior Court of Catawba County, "by reason of the fact that . . . Everette Clarke experienced automobile difficulties which prevented his immediate return to North

Carolina." This answer is undated and it does not appear upon what date it was filed.

On 25 July, 1942, presumably after the adjournment of the July Term, 1942, of the Superior Court of Catawba County, the solicitor of the 16th Judicial District addressed a letter to the clerk of the Superior Court of Catawba County, in which he stated in effect that it would be satisfactory to him for the clerk to return the papers in the case of State *v.* Clarke to the municipal court of the city of Hickory for final disposition. Pursuant to the solicitor's letter the papers in the case were sent by the clerk to the municipal court, and on 29 July, 1942, the municipal court, upon a plea of guilty having been entered by Everette Clarke, pronounced judgment to the effect that the defendant be confined for a term of six months to be assigned to work on the roads, to be suspended upon condition that the defendant pay to Mildred Cody $500.00 as a lump sum settlement for the support and maintenance of his illegitimate child; and further provided "that the payment of said $500.00 as a lump sum settlement shall be and constitute a complete bar to any other prosecution of the defendant by the said Mildred Cody for and on behalf of said illegitimate child."

Subsequently, at the November Term, 1942, of the Superior Court of Catawba County, Judge Nettles, after finding the facts, made the following order, to wit: "The Court, upon the foregoing Findings of Fact, being of the opinion that the case is still pending in the Superior Court of Catawba County, and the Court heretofore having declared a forfeiture upon the bond, as appears of record herein, at the request of the attorney for the defendant, and after considering the Answer of the bondsman filed herein, refuses to strike out the forfeiture heretofore entered in this cause. This 16 November, 1942."

To this order the defendant Everette Clarke and his bondsman, Perman Clarke, excepted and appealed therefrom to the Supreme Court, assigning errors.

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

W. H. Strickland for Perman Clarke, Surety, appellant.

SCHENCK, J. It will be noted that the order of Judge Nettles from which appeal is taken simply "refuses to strike out the forfeiture heretofore entered in this cause." This is in no wise a final judgment, and in no way affects a substantial right which could not be protected upon an appeal from a final judgment, and therefore the appeal is premature and should be dismissed. The proper procedure was to note an exception and appeal from the final judgment, if adverse to the defendants.

Morris v. Cleve, 194 N. C., 202, 139 S. E., 230; *Smith v. Matthews,* 203 N. C., 218, 165 S. E., 350; N. C. Prac. & Proc. (McIntosh), sec. 676 (7).

"The forfeiture heretofore entered," referred to in the order appealed from, is likewise in no aspect a final judgment. It is only a "judgment *nisi*" entered at the July Term, 1942, of the Superior Court of Catawba County, and does not become a judgment absolute until so ordered by a judge at term. So far as the record discloses this has never been done. Therefore, if execution has issued upon, or is contemplated upon, the record as it appears before us it should be withdrawn or withheld. If the judgment *nisi* is finally made absolute, an execution may issue thereupon; but if the judgment *nisi* is stricken out, no execution may issue. Whether the judgment *nisi* will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge presiding at the future terms of the Superior Court of Catawba County. C. S., 4588. *S. v. Morgan,* 136 N. C., 593, 48 S. E., 604.

The appeal is dismissed.

STATE v. HARVEY WILFONG.

(Filed 24 March, 1943.)

Criminal Law § 80—

The defendant having failed to prosecute his appeal, the motion of the Attorney-General to docket and dismiss is allowed. However, pursuant to custom in capital cases, the Supreme Court has examined the record for errors upon its face, and finds none. Rule 17 of Rules of Practice in the Supreme Court.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the September Special Term, 1942, Catawba Superior Court, the defendant herein, Harvey Wilfong, was tried upon indictment charging him with the capital offense of arson, which resulted in a verdict "Guilty of the capital offense of arson as charged in the bill of indictment," and sentence of death as the law commands on such conviction. C. S., 4238.

From the judgment thus entered, the defendant gave notice of appeal to the Supreme Court and was allowed the statutory time to make up and serve his statement of case on appeal, and the solicitor was allowed the statutory period thereafter to prepare and serve exceptions or countercase. Appeal bond was fixed at $100. The record fails to show that any was given.

The clerk certifies that "the said Harvey Wilfong has not filed in this office any statement of his case on appeal and I am informed by his counsel that he does not intend to do so, and the time for serving statement of case on appeal has expired."

Hence, in the absence of error, which the record now before us fails to disclose, the motion of the Attorney-General to docket and dismiss the appeal under Rule 17 must be allowed. *S. v. Morrow,* 220 N. C., 441, 17 S. E. (2d), 507; *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed. Appeal dismissed.

M. L. MARTIN v. H. W. WEAVER, J. E. RICHMOND AND G. W. CONLEY, TRADING AND DOING BUSINESS AS THE TRI-STATE LUMBER COMPANY.

(Filed 23 September, 1942.)

APPEAL by defendant H. W. Weaver from *Bobbitt, J.,* at April Term, 1942, of STOKES.

Civil action to recover for lumber sold and delivered.

At the time of the institution of this action, on 24 April, 1941, plaintiff caused warrant of attachment to issue against defendants, as nonresidents of North Carolina. Under the warrant the sheriff attached certain property, among other things one Tower-Double saw gang edger, an office table and a "roll top desk," to the ownership of which defendant H. W. Weaver set up claim.

Upon the trial the evidence for plaintiff failed to show that a partnership existed between defendants, but did tend to show that defendant J. E. Richmond was indebted to plaintiff in the amount claimed in his complaint, with respect to which, issue as to Richmond's liability was submitted to jury, and answered in the affirmative.

Plaintiff further offered evidence tending to show that, while defendant Weaver had looked at the table and desk in the store, with the view to buying it, he did not complete the purchase, and defendant Richmond later went to the store and bought and paid for them; and that the edger was brought by Richmond to Weaver's mill. On the other hand, defendant Weaver offered evidence tending to show that he bought the

table and desk, and that, though Richmond paid for it, he did so as a part payment on amount due by him to Weaver for dressing lumber; and that he, Weaver, purchased the edger from Richmond about the first of March, 1941, at price of $270, payment of which was by agreement offset by $140 then due to him by Richmond for dressing lumber, and the balance paid by further dressing of lumber for which Richmond became indebted to him.

The court submitted an issue as to whether J. E. Richmond was the owner of the edger, table and desk, or any of them, to which the jury answered, "Yes, all." From judgment thereon defendant H. W. Weaver appealed to Supreme Court and assigns error.

Petree & Petree for plaintiff, appellee.
J. W. Hall for defendant, appellant.

PER CURIAM. We are of opinion that the evidence bearing on issue as to whether J. E. Richmond owned the edger, table and desk, when taken in the light most favorable to plaintiff, was sufficient to take the case to the jury, and to support the verdict thereon. It was purely an issue of fact, which the court fairly presented to the jury, and the jury has taken plaintiff's version.

We find

No error.

WILLIAM M. WELLS v. JOSIE McCULLERS WELLS.

(Filed 23 September, 1942.)

THIS is an appeal by the plaintiff from *Burney, J.*, at May Term, 1942, of Wilson, from an order denying his motion to strike out defendant's answer and plea *puis darrein continuance.*

Moore & Brinkley and Varser, McIntyre & Henry for plaintiff, appellant.

Ehringhaus & Ehringhaus and Lucas & Rand for defendant, appellee.

PER CURIAM. The Court being equally divided in opinion, *Barnhill, J.*, not sitting, the judgment of the Superior Court is affirmed as the disposition of this appeal without becoming a precedent, in accord with the practice of the Court. *Martin v. R. R.*, 208 N. C., 843; *Collins v. Ins. Co.*, 213 N. C., 800.

Affirmed.

JAKE LEWIS RAMSEY v. PARKLAND CHEVROLET COMPANY.

(Filed 30 September, 1942.)

APPEAL by plaintiff from *Johnston, Special Judge,* at March Term, 1942, of BUNCOMBE. Affirmed.

W. K. McLean for plaintiff.
Chas. G. Lee, Jr., for defendant.

PER CURIAM. This was an action to recover damages for fraud and deceit in the sale of an automobile. Plaintiff alleged that defendant sold him a used car represented as a 1935 Model when in fact the motor was a 1933 Model. Plaintiff drove the car eight or nine thousand miles during the following ten months before instituting this action. At the close of plaintiff's evidence judgment of nonsuit was entered. An examination of the record leads to the conclusion that there was a failure of proof of the *scienter,* one of the essential elements of actionable fraud. *Electric Co. v. Morrison,* 194 N. C., 316, 139 S. E., 455; *Hill v. Snider,* 217 N. C., 437, 8 S. E. (2d), 202.

Judgment affirmed.

MARY MILLER v. BERT MOORE, TRADING AND DOING BUSINESS AS MOORE AUTO SALES.

(Filed 30 September, 1942.)

APPEAL by plaintiff from *Sink, J.,* at April Term, 1942, of RUTHERFORD. Affirmed.

Boucher & Boucher, Stover Dunagan, and Chas. F. Gold, Jr., for plaintiff, appellant.
Hamrick & Hamrick for defendant, appellee.

PER CURIAM. The plaintiff brought this action to recover damages for personal injuries sustained through the alleged negligence of the defendant in the operation of an automobile by his representative and agent.

The Court is unable to find any substantial difference between the evidence in the instant case and that upon which a judgment as of nonsuit was sustained in the case of *Smith v. Moore,* 220 N. C., 165—a

case growing out of the same accident, to which the plaintiff in that case and the plaintiff in this have identical relation. The judgment of nonsuit upon the evidence in this case must be sustained on that authority.

Judgment affirmed.

SIDNEY SMITH BRADFIELD v. ESTELLE M. BRADFIELD (BARENE).

(Filed 30 September, 1942.)

APPEAL by plaintiff from *Phillips, J.*, 7 March, 1942. From BUNCOMBE. Affirmed.

Action for divorce heard on petition in the cause for the custody of the children of the marriage.

In 1938 plaintiff procured a decree of absolute divorce wherein the court awarded the three children of the marriage to the plaintiff. Thereafter, defendant appeared and filed a petition praying that the former order be modified and that she be awarded the custody of said children. When the cause came on to be heard the court found the facts and upon the facts found awarded custody of said children to Don S. Elias, step-grandfather, with provision allowing plaintiff to visit them. The order further provided that the custodian may permit said children to visit the defendant in California, where she now lives. The plaintiff excepted and appealed.

J. G. Merrimon and H. Kenneth Lee for plaintiff, appellant.

Williams & Cocke for defendant, appellee.

PER CURIAM. The only exception in the record is to the signing of the judgment. There is sufficient evidence in the record to sustain the findings of fact. The facts as found support the judgment. "The findings of fact made by the Judge of the Superior Court, found as they are upon competent evidence, are conclusive." *In re Hamilton,* 182 N. C., 44, 108 S. E., 385. Plaintiff's exception cannot be sustained. The cause remains open for such further orders and decrees as circumstances may require. C. S., 1664.

The judgment below is

Affirmed.

MRS. BESSIE POPE KORNEGAY, ADMINISTRATRIX OF R. C. KORNEGAY, v. D. C. WILLIAMS, JR., TRADING AS WILLIAMS LUMBER COMPANY.

(Filed 14 October, 1942.)

APPEAL by plaintiff from *Grady, Emergency Judge,* at March Term, 1942, of WAYNE.

J. Faison Thomson and J. T. Flythe for plaintiff, appellant.
Royall, Gosney & Smith for defendant, appellee.

PER CURIAM. This is an action for the alleged wrongful death of the plaintiff's intestate, who was killed when struck by a trailer loaded with lumber and drawn by an automobile of the defendant upon Breazeale Avenue (U. S. No. 117), near the intersection with Main Street (N. C. No. 55), in the town of Mount Olive.

The Court being of the opinion that the case is governed by the principles enunciated in *Pack v. Auman,* 220 N. C., 704, 18 S. E. (2d), 247, and *Mitchell v. Melts,* 220 N. C., 793, 18 S. E. (2d), 406, the demurrer to the evidence was properly sustained and the judgment as in case of nonsuit was properly entered.

Affirmed.

STATE v. JOHN GOSS.

(Filed 14 October, 1942.)

APPEAL by defendant from *Clement, J.,* at March Term, 1942, of WILKES.

Criminal prosecution upon bill of indictment charging defendant with the murder of one Paul Wall.

The defendant entered a plea of not guilty.

The solicitor announced in open court that the State would not ask for the capital felony of murder in the first degree, but would ask for a verdict of murder in the second degree or manslaughter, as the evidence may appear to justify.

Verdict: Guilty of manslaughter.

Judgment: Confinement in the State's Prison not less than two nor more than five years.

Defendant appeals to Supreme Court and assigns error.

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

Trivette & Holshouser for defendant, appellant.

PER CURIAM. Careful consideration of the several assignments of error shown in the record on this appeal fails to reveal prejudicial error, if any error there be. They present no tenable reason for disturbing the trial below.

Hence, in the judgment from which appeal is taken, we find

No error.

CONRAD JACKSON AND WIFE, BLANNIE JACKSON, HATTIE LOUISE TURNAGE, MOLLIE PHILLIPS AND HUSBAND, COY PHILLIPS, v. JACK TURNAGE AND WIFE, LILLIE TURNAGE, WALTER BUTLER AND WIFE, MARY JANE BUTLER, AND NANCY JACKSON.

(Filed 4 November, 1942.)

APPEAL by defendant Nancy Jackson from *Grady, Emergency Judge,* at May Term, 1942, of LENOIR.

This action was originally instituted for the sale of land for partition. The decree authorizing the sale of the land was entered 31 March, 1941, and from which there was no appeal.

On 25 August, 1941, the defendant Nancy Jackson, through her attorney, made a special appearance and moved before the clerk of the Superior Court of Lenoir County to vacate the decree entered on 31 March, 1941, alleging among other things that there had been no legal service of summons on her. On 5 January, 1942, the clerk, after hearing evidence and argument of counsel, denied the motion. Defendant appealed to the Superior Court. On 21 May, 1942, Grady, Emergency Judge, heard the motion on the record and affidavit of movant and found as a fact that the movant was served with summons and a copy of the petition for sale and partition, and that she was represented by counsel at the hearing before the clerk at the time the original judgment was entered, from which there was no appeal, and denied the motion.

The movant, Nancy Jackson, excepted to the ruling of his Honor and appealed, assigning error.

Alvin Outlaw and F. E. Wallace for plaintiffs.

Charles L. Abernethy for defendant, appellant, Nancy Jackson.

PER CURIAM. An examination of the record and the assignment of error discloses no error in the judgment below.

Affirmed.

S. BROWN SHEPHERD v. J. M. JENRETTE, ADMINISTRATOR.

(Filed 11 November, 1942.)

APPEAL by defendant from *Carr, J.*, at May Term, 1942, of WAKE.

Civil action to recover balance due on two promissory notes.

From verdict and judgment for $2,290.35 with interest from 11 January, 1939, the amount claimed by the plaintiff, the defendant appeals, assigning errors.

Briggs & West for plaintiff, appellee.
E. D. Flowers for defendant, appellant.

PER CURIAM. The record contains no exceptive assignment of error which can be sustained. Hence, the verdict and judgment will not be disturbed.

No error.

T. LACY WILLIAMS, ADMINISTRATOR OF THE ESTATE OF M. M. REYNOLDS, DECEASED, v. L. R. POWELL, JR., AND HENRY W. ANDERSON, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 11 November, 1942.)

APPEAL by defendants from *Carr, J.*, at May Term, 1942, of WAKE.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the negligence of the defendants.

Defendants demurred to the complaint upon the ground that it does not contain facts sufficient to constitute a cause of action, in that it appears from the facts alleged that plaintiff's intestate, by his own negligence, contributed to his death.

Demurrer overruled, defendants appeal and assign error.

W. H. Yarborough, Jr., for plaintiff.
Murray Allen for defendants.

PER CURIAM. Upon an examination of the allegations in the complaint filed in this action, we think the judgment of the court below should be affirmed under the authority of and for the reasons stated in the opinion in *Ramsey v. Furniture Co.*, 209 N. C., 165, 183 S. E., 536.

The judgment of the court below is

Affirmed.

FURMAN WISHON v. GASTONIA WEAVING COMPANY, INC.

(Filed 25 November, 1942.)

APPEAL by plaintiff from *Pless, J.*, at March Term, 1942, of GASTON. Affirmed.

This was an action to recover balance due for work performed in defendant's mill under the contract alleged in the complaint. Defendant demurred to the complaint on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained and plaintiff appealed.

J. L. Hamme for plaintiff, appellant.

Cherry & Hollowell for defendant, appellee.

PER CURIAM. An examination of the complaint, in connection with the contract which is attached to and made a part of the complaint, fails to reveal any agreement to pay the plaintiff the amount of wages he now claims. Hence, the demurrer was properly sustained.

Judgment affirmed.

JAMES R. THOMAS, ADMINISTRATOR OF LOREAIN SMITH v. GATE CITY INSURANCE COMPANY.

(Filed 25 November, 1942.)

APPEAL by plaintiff from *Pless, J.*, at March Term, 1942, of GASTON. Affirmed.

Civil action to recover on life insurance policy.

The complaint alleges, in substance, that plaintiff is the administrator of Loreain Smith, deceased; that deceased was an unemancipated infant; that she procured the issuance by defendant of a policy of insurance on her life, naming a third party as beneficiary; that the premiums were paid out of her earnings, which, by reason of her infancy, belonged to her mother, Mrs. M. L. Thomas; and that the mother, by reason of the matters and things alleged, is entitled to the proceeds of said policy.

The defendant answered and thereafter the cause was called for trial. Thereupon, the defendant demurred *ore tenus* for that the complaint fails to state a cause of action. The demurrer was sustained and plaintiff appealed.

J. L. Hamme for plaintiff, appellant.
George B. Mason for defendant, appellee.

PER CURIAM. The right of action, if any, alleged in the complaint accrues to the mother of deceased. The plaintiff has no interest or estate therein. He is not the real party in interest and has no right to maintain the action. C. S., 446; *Rental Co. v. Justice,* 211 N. C., 54, 188 S. E., 609.

Furthermore, the appeal is dismissable for failure of the record to show the organization of the court below. Rule 19; *Brown v. Johnson,* 207 N. C., 807, 178 S. E., 570.

Affirmed.

MARTHA L. McBRIDE, JOSEPHINE L. TIMMONS, H. K. HELMS, ADMINISTRATOR OF THE ESTATE OF HARRISON LOWERY, DECEASED; ELVY LOWERY, WIDOW, AND J. C. LOWERY, LONIE LOWERY, ROSALIE LOWERY, ELIHU LOWERY AND BRENTON LOWERY, THE LAST TWO NAMED APPEARING BY THEIR NEXT FRIEND, ELVY LOWERY, HEIRS AT LAW OF HARRISON LOWERY, DECEASED, v. JESSE A. WILLIAMS.

(Filed 2 December, 1942.)

APPEAL by plaintiffs from *Rousseau, J.,* at February Term, 1942, of UNION.

Civil action to recover damages for alleged breach of alleged parol trust agreement to convey land.

In the trial court, for its verdict on this issue, "Did the defendant contract and agree with plaintiffs to convey lands described in complaint, in consideration of payment by plaintiffs of balance owing on note secured by deed of trust on said property and the expenses of foreclosure?" the jury answered "No."

Plaintiffs moved to set aside this verdict as being contrary to the weight of the evidence. The trial judge denied the motion, and plaintiffs excepted and appeal to Supreme Court and assign error.

O. L. Richardson, G. T. Carswell, and Joe W. Ervin for plaintiffs, appellants.
W. B. Love and J. F. Milliken for defendant, appellee.

PER CURIAM. Assignments for error pertain to the denial of plaintiffs' motion to set aside the verdict as being against the weight of the evidence. Such motion is addressed to the discretion of the trial judge,

whose ruling, in the exercise of such discretion, in the absence of abuse thereof, is final and binding on appeal. Such abuse does not appear. Upon all of the evidence, it was a case for the jury.

Affirmed.

A. E. LANIER, ADMINISTRATOR, v. SOUTHERN RAILWAY CO. ET AL.

(Filed 16 December, 1942.)

APPEAL by plaintiff from *Olive, Special Judge,* at October Term, 1942, of DAVIDSON.

Civil action to recover damages for the alleged wrongful death of plaintiff's intestate at a railroad crossing.

In apt time, and before answering, the defendant moved to strike certain alleged irrelevant or redundant matters from the complaint. The motion was allowed in part and denied in part. From this ruling, the plaintiff appeals, assigning errors.

B. Irvin Boyle, G. T. Carswell, and Joe W. Ervin for plaintiff, appellant.

Don A. Walser and Linn & Linn for defendants, appellees.

PER CURIAM. It does not appear that the plaintiff has been prejudiced by the deletion of certain clauses and allegations from his complaint, even if it be conceded that some of the matters stricken out, while redundant, may not have been irrelevant. C. S., 537. As no harm has come to the plaintiff, the judgment will be upheld.

Affirmed.

RUDOLPH DOVE, BY HIS NEXT FRIEND, GEORGE W. DOVE, v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 16 December, 1942.)

APPEAL by plaintiff from *Thompson, J.,* at February Term, 1942, of COLUMBUS.

This is a civil action to recover damages for personal injuries, sustained by plaintiff when he ran his automobile into a train belonging to the defendant, which train, at the time of the alleged injury, was standing on the tracks of the defendant across Brown Street in the town of

Chadbourn. From judgment of nonsuit, plaintiff appeals, assigning errors.

H. L. Lyon, A. B. Brady, and Varser, McIntyre & Henry for plaintiff.
L. J. Poisson and Tucker & Proctor for defendant.

PER CURIAM. We have carefully examined and considered plaintiff's exceptions and assignments of error, and are of the opinion that the judgment of the court below is correct.

Affirmed.

SUSIE MITCHELL v. THOMAS BAILEY AND G. B. BAILEY.

(Filed 8 January, 1943.)

APPEAL by plaintiff from *Grady, Emergency Judge,* at April Term, 1942, of DURHAM. Affirmed.

Bennett & McDonald for plaintiff, appellant.
M. Hugh Thompson for defendants, appellees.

PER CURIAM. This was an action to recover damages for libel. The defamatory matter complained of was alleged to have been published in an answer filed in court by the defendants in another suit. The defendants now plead privilege as a bar to plaintiff's action. After hearing plaintiff's evidence and examining the pleadings in the other suit, judgment of nonsuit was entered in the court below, and the plaintiff appealed.

In a recent case decided by this Court, *Harshaw v. Harshaw,* 220 N. C., 145, 16 S. E. (2d), 666, it was said: "Undoubtedly, the general rule is that pleadings are privileged when pertinent and relevant to the subject under judicial inquiry, however false and malicious the defamatory statements may be. *Baggett v. Grady,* 154 N. C., 342, 70 S. E., 618; *Nissen v. Cramer,* 104 N. C., 574, 10 S. E., 676; 33 Am. Jur., 145."

Here, the defamatory language complained of was contained in a formal pleading filed in court and was set up as a defense in response to allegations appearing in the complaint in that suit. Hence, we conclude that the matters so pleaded were pertinent and relevant, and, therefore, under the rule, privileged.

The judgment of nonsuit will be upheld.

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, AND JOHN W. BEAMAN, GUARDIAN AD LITEM OF THE UNBORN CHILD OR CHILDREN OF FRANCIS STRINGER DUFFY, JR., AND THE FUTURE WIFE OR WIVES OF FRANCIS STRINGER DUFFY, JR.

(Filed 8 January, 1943.)

APPEAL by guardian *ad litem* from *Harris, J.*, at October Term, 1942, of CRAVEN.

John W. Beaman, guardian ad litem.

R. A. Nunn for Mrs. Kate Bryan Duffy and Francis Stringer Duffy and wife, Shirley Avery Duffy, and Francis Stringer Duffy by Kate Bryan Duffy, his next friend.

L. T. Grantham and W. B. R. Guion for Henry Bryan Duffy and wife, Helen Johnson Duffy.

PER CURIAM. It appears that following the opinion on former appeal reported in 221 N. C., 521, where the facts are fully stated, judgment was rendered in Superior Court, to which all parties, except the guardian *ad litem,* consented, and in which the parties agree upon a division of the property to which former appeal related, in such manner as to preserve intact the trust estate referred to in statement of facts on former appeal, and so as to eliminate objections upon which former decision turned. Therefore, the judgment below is

Affirmed.

FANNIE F. BOGER v. DR. O. L. ADER.

(Filed 8 January, 1943.)

APPEAL by plaintiff from *Bobbitt, J.*, at September Term, 1942, of FORSYTH. Affirmed.

Civil action to recover damages for personal injuries alleged to have been caused by an overdose of elixir of bromide prescribed by defendant.

Plaintiff, who was attending her mother during her last illness, had a "nervous spell" which was a recurrence of nervousness from which she

had been suffering. The defendant, the attending physician, examined her and then prescribed, prepared and gave her a dose of elixir of bromide. Thereafter she became numb. She remained in that condition for several hours. Then splotches or big spots appeared on her skin and she had the sensation of ants crawling on her body. The defendant said her condition was due to the reaction of the medicine. Later she suffered other physical ailments which she alleges proximately resulted from the overdose of bromide.

At the conclusion of the evidence for plaintiff the court below, on motion of defendant, entered judgment of nonsuit. Plaintiff excepted and appealed.

William Porter and W. Reade Johnson for plaintiff, appellant.
Womble, Carlyle, Martin & Sandridge for defendant, appellee.

PER CURIAM. The evidence in this case invokes the application of the principles of law discussed and decided by this Court in *Lippard v. Johnson,* 215 N. C., 384, 1 S. E. (2d), 889; see also *Mauney v. Luzier's, Inc.,* 215 N. C., 673, 2 S. E. (2d), 888, and *Sweeney v. Erving,* 228 U. S., 233, 57 L. Ed., 815. The plaintiff has failed to make out a case for the jury.

The judgment below is

Affirmed.

WILLIAM M. NESBY v. CLARA NESBY, FLOYD T. HALL, GUARDIAN AD LITEM OF WADE NESBY (INSANE), CHARLIE NESBY AND WIFE, WILLIE FOWLER NESBY, BUTLER NESBY, OSCAR O. EFIRD, TRUSTEE, AND WINSTON-SALEM BUILDING & LOAN ASSOCIATION.

(Filed 8 January, 1943.)

APPEAL by defendants from *Blackstock, Special Judge,* at April Term, 1942, of FORSYTH. No error.

Hosea V. Price for plaintiff, appellee.
A. B. Cummings for defendants, appellants.

PER CURIAM. The plaintiff brought this action to have himself declared the beneficial owner of certain lands, the purchase price of which was paid by him, and which are alleged to have been held in trust for him by Addie Nesby, now deceased, and of which the legal title had become vested in the defendants as heirs at law. He sought to have the defendants convey the lands to him in termination of the trust.

Upon the hearing in this Court, it developed that the statute of limitations had been pleaded and that the jury answered that issue favorable to the plaintiff, although it appears in the record of the judgment that the issue was answered otherwise. However, both parties admitted that the recital of the answer to that issue in the judgment on this point was erroneous. If the error occurs in the original judgment as signed and docketed, it may be corrected on motion.

There was sufficient evidence to take the case to the jury, and we perceive no error in the trial justifying interference with the result. Since there is no new principle of law involved, no formal opinion is necessary.

We find

No error.

DORA L. BARNETT v. CITY OF ELIZABETH CITY.

(Filed 24 February, 1943.)

APPEAL by plaintiff from *Hamilton, Special Judge,* at October Term, 1942, of PASQUOTANK.

Civil action to recover damages for personal injuries sustained by plaintiff when she fell on a public sidewalk in the city of Elizabeth City.

The record discloses that on Sunday evening, 23 June, 1940, about dusk, the plaintiff was out walking with her husband in Elizabeth City. As she was about to cross Martin Street to get on the opposite side thereof, an automobile coming at a high rate of speed attracted her attention and she stepped into a depression or "sink down hole" approximately 8 or 10 inches in diameter, 5 or 6 inches deep, and covered with grass. It was about 18 inches from the curbing. The sidewalk was unpaved. Plaintiff says: "The hole was grown up, and I did not see it. I stepped into it accidentally."

Plaintiff gave notice of her claim on 29 January, 1941. The city charter requires such notice to be given within 90 days after cause of action accrues.

From judgment of nonsuit entered at the close of plaintiff's evidence, she appeals, assigning error.

W. W. Cohoon and R. Clarence Dozier for plaintiff, appellant.

J. W. Jennette for defendant, appellee.

PER CURIAM. A careful perusal of the record leaves us with the impression that the demurrer to the evidence was properly sustained, if not upon the principal issue of liability, *Houston v. Monroe,* 213 N. C., 788,

197 S. E., 571; *Pace v. Charlotte,* 221 N. C., 245, 19 S. E. (2d), 871, then for failure to give written notice of claim as required by the city charter. *Trust Co. v. Asheville,* 207 N. C., 162, 176 S. E., 257; *Pender v. Salisbury,* 160 N. C., 363, 76 S. E., 228. In either event, the result is an affirmance of the judgment of nonsuit.

Affirmed.

STATE v. JOHN HENRY LEE, ALIAS "DICK" LEE.

(Filed 24 February, 1943.)

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.

DEFENDANT gave notice of appeal from *Frizzelle, J.,* at October Term, 1942, of CAMDEN. Appeal dismissed.

Motion by State to docket and dismiss defendant's appeal.

PER CURIAM. The defendant was convicted of the capital felony of rape. Sentence of death by asphyxiation was imposed. Defendant gave notice of appeal, but no case on appeal was served within the time allowed by the order of the court below, and no request for extension of this has been made. No steps have been taken to perfect the appeal.

The Attorney-General moves to docket and dismiss the appeal. This motion must be allowed, but according to the usual rule of the Court in capital cases we have examined the record to see if any error appears. In the record we find no error. Appeal dismissed.

Judgment affirmed.

ARTHUR G. MANGUM v. B. E. ROGERS.

(Filed 24 February, 1943.)

APPEAL by both plaintiff and defendant from *Williams, J.,* at October Term, 1942, of WILSON.

This was a civil action to recover damages for personal injuries alleged to have been negligently inflicted by the defendant upon the plaintiff by driving an automobile upon the plaintiff while on a public highway.

From judgment awarding the plaintiff damages in the sum of one thousand dollars both plaintiff and defendant appealed, assigning errors.

Sharpe, Grimes & Pittman and Oliver G. Rand for plaintiff.
Royall, Gosney & Smith for defendant.

PER CURIAM. The defendant's appeal presents the sole question as to whether there was sufficient evidence to carry the case to the jury. Since we are of the opinion that the evidence is plenary for this purpose, it follows that the exceptions to the court's refusal to grant the defendant's motion for a judgment as in case of nonsuit under the provisions of C. S., 567, cannot be sustained.

The plaintiff's appeal is only from the finding of the jury upon the third issue, which related to the measure of damage fixed at one thousand dollars. We have examined the exceptions set out in the plaintiff's brief, and are of the opinion that no error prejudicial to the plaintiff was committed either in the rulings of the court upon the admission and exclusion of evidence, or in the charge to the jury.

Since no new questions are presented on this appeal, it is not deemed necessary or expedient to discuss the exceptions set out in detail.

In the trial before the Superior Court we find

No error.

W. M. FRADY v. ROBERT N. BALLARD.

(Filed 24 February, 1943.)

APPEAL by plaintiff from *Sink, J.*, at December Term, 1942, of BUNCOMBE. Affirmed.

Civil action in tort to recover damages for personal injuries.

Plaintiff's evidence tends to show the following: He was a passenger on defendant's bus, which was standing in the bus company parking lot in Asheville, N. C. There was a disturbance in the bus before the driver started up. Another passenger became sick—apparently epileptic fit. He became violent, causing the disturbance. The bus driver requested plaintiff several times to assist him in getting the man out of the bus into the fresh air. Plaintiff finally agreed to help and they got him to the front. Plaintiff got off first with the sick man between him and the driver. As they got the man off the steps to the ground the driver "turned him loose" and "he reached around and caught me by the finger and broke it, so I held him until he got quiet and the law came and that

is all I know—this happened as quickly as we hit the ground, we got to scuffling and he caught me by the finger."

There was judgment of nonsuit and plaintiff appealed.

Smathers & Meekins for plaintiff, appellant.

J. W. Haynes for defendant, appellee.

PER CURIAM. We concur in the conclusion of the court below. The evidence fails to disclose actionable negligence on the part of the defendant's driver.

The judgment below is

Affirmed.

STATE v. LEWIS MOODY.

(Filed 17 March, 1943.)

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.

Attorney-General McMullan for the State.

PER CURIAM. The defendant was tried before his Honor, R. D. Dixon, Special Judge, and a jury, at the August Term, 1942, of Northampton Superior Court upon a bill of indictment charging him with the murder of John Arthur Kee, and was convicted of murder in the first degree. Thereupon, he was sentenced to death by asphyxiation, as provided by law; and from this judgment, he gave notice of appeal to the Supreme Court.

The case on appeal was not docketed here within the time prescribed under the Rules of Court, and the defendant has filed no brief.

Thereupon, the Attorney-General moved to dismiss the appeal for failure to docket the same and send up the transcript as required by Rule 17, and for not having filed a brief as required under Rule 28.

We have carefully examined the record, and find therein no error. *S. v. Watkins,* 101 N. C., 702, 8 S. E., 346. The motion of the Attorney-General is, therefore, allowed.

The judgment of the court below is affirmed and the appeal is dismissed. *S. v. Watson,* 208 N. C., 70, 179 S. E., 455.

Judgment affirmed. Appeal dismissed.

ECLIPSE MACHINE DIVISION OF BENDIX AVIATION CORPORATION v. SANFORD COTTON MILLS, INC.

(Filed 17 March, 1943.)

APPEAL by plaintiff from *Grady, Emergency Judge,* at September Term, 1942, of LEE.

Civil action, instituted 15 May, 1941, to recover on an open account in the sum of $1,968.75. Plaintiff alleges $1,000.00 became due on 31 March, 1937, and the balance of $968.75 became due on 22 April, 1937.

Defendant pleaded as a bar to plaintiff's right of recovery the three-year statute of limitations.

The only evidence offered by plaintiff to repel the statute of limitations was two letters from defendant, signed with a rubber stamp, informing the plaintiff the amount of the account as it appeared upon the books of the company and requesting verification thereof directly to its auditors, giving the name and address of the auditors. Both letters were written within three years from and after 22 April, 1937.

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

Gavin, Jackson & Gavin for plaintiff.
Teague & Williams for defendant.

PER CURIAM. The defendant, not having made "either a promise to pay, or an acknowledgment of the debt as an existent obligation," after the expiration of three years from 22 April, 1937, as required by the statute, C. S., 416, the judgment of nonsuit was properly entered. *Trust Co. v. Lumber Co.,* 221 N. C., 89, 19 S. E. (2d), 138.

Affirmed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Brady v. R. R., 222 N. C., 367. Petition for *certiorari* denied April 19, 1943.

Brady v. R. R., 222 N. C., 367. Petition allowed May 3, 1943.

Lightner v. Boone, 222 N. C., 205. Petition for *certiorari allowed* March 8, 1943.

S. v. Williams, 220 N. C., 445. Remanded December 21, 1942.

ADDRESS

BY CAROL D. TALIAFERRO

ON

PRESENTATION OF A PORTRAIT

OF THE LATE

HERIOT CLARKSON

TO THE

SUPREME COURT OF NORTH CAROLINA

NOVEMBER 10, 1942

May it please this Honorable Court:

The family of the late Senior Associate Justice Heriot Clarkson have done me great honor in choosing me to present his portrait to this Court. Certainly they could have chosen no one who had for him a higher admiration or more affectionate regard; nor who owes a greater debt for the example of his great life.

Heriot Clarkson was born on August 21, 1863, in Richland County, South Carolina, to William Clarkson and Margaret Simons Clarkson. For a few years thereafter his family lived in Columbia, South Carolina; but moved to Charlotte, North Carolina, in the year 1873, and Charlotte was thereafter "home" to him. He was descended on both sides from a long line of cultured gentle folk of mixed Scotch and Huguenot blood; and although he exhibited no slightest trace of snobbishness, he was justly proud of his ancestors, intimately acquainted with their history and constantly endeavored to emulate their best qualities.

Judged by modern standards, his formal education was rather brief. After primary school education of the character then in vogue in the South, he entered the Carolina Military Institute, which was then conducted by Col. J. P. Thomas, in the city of Charlotte. However, his family, as was the common lot in our Southland at that time of *post-bellum* disorganization and depression, could not afford to furnish him with higher educational opportunities; nor could Heriot Clarkson, the young boy, have accepted the sacrifice which it would no doubt have entailed upon his parents had he accepted such opportunities. Therefore,

he proceeded to carve out his own career, and at the age of seventeen he became office boy and, later, law clerk in the Charlotte law offices of Col. Hamilton C. Jones and General Robert D. Johnston. He applied himself with industry, became enamoured of the law, and after three years had saved enough to enter the University of North Carolina Law School on January 4, 1884, graduating therefrom at the head of his class on October 5, 1884. Thus, we see evidenced in his youthful years those qualities of ambition, determination to succeed and loyalty to a task which he exercised so fruitfully in his later years.

Young Lawyer Clarkson was admitted to the bar of this Court on October 7, 1884, and returned to Charlotte, where he immediately engaged in the practice of the law. In 1888, he formed with the late Hon. Charles H. Duls a partnership which continued until the elevation of Judge Duls to the Superior Court in June, 1913. Thereupon, he took your speaker into partnership; and this association continued, changed only by the admission of his son, Francis O. Clarkson, therein upon his return from World War I in 1919, until Justice Clarkson took his seat upon the bench of this Court.

Justice Clarkson was always a very active, industrious and successful practitioner of the law and attracted a clientele of the most varied kind. He was a most able adviser, who always chose the safer course and attempted to spare his clients the vicissitudes and expense of litigation; but once having joined issue with an opponent before a jury, he was magnificently effective and secured a very high percentage of favorable verdicts. This was brought about not only by his knowledge of the law, but also by his industry in the preparation of his causes and the dynamic, straightforward, forceful way in which he presented his cases to the court and the jury.

In 1905, Justice Clarkson was appointed by Governor Charles B. Aycock as Solicitor of the then Twelfth Judicial District, composed of Mecklenburg, Gaston, Lincoln, Cleveland and Cabarrus counties, and served in that office until he voluntarily retired therefrom in 1911. As Solicitor, he won the admiration and respect of all classes and sought courageously to enforce the law against high and low alike. It will be recalled that, during his service as Solicitor, the prohibition question was a burning issue in this State; and although in the campaign, which resulted in the adoption of State-wide prohibition in 1909, Justice Clarkson took a most active and leading role, and no doubt at that time displayed many evidences of extreme partisanship, yet in the performance of his duty as Solicitor to indict and try one accused of violation of the liquor law, he showed the same fairness, humanity and sense of justice that he displayed in the trial of any other defendant. Indeed, he seems to have leaned over backwards in this attitude; because he habit-

ually refused to excuse jurors whom he knew to be violently opposed to prohibition, taking the position that the trial of the defendant was not a partisan issue, but one of the enforcement of law and justice. This attitude seems to have added to, rather than to have reduced, the number of convictions secured in his court. The fairness, ability, learning and courage with which he performed the duties of Solicitor are attested to by the fact that, during the six years of his service, only one case which he prosecuted was overruled by this high Court. This is a remarkable testimonial; a record no doubt without parallel.

To us of the bench and bar who realize how much energy, study, thought and time it takes to successfully practice law, it is astounding that he still had in reserve sufficient energy and time to take a successful and leading part in so many movements for the public good.

Justice Clarkson was never an ambitious politician for the sake of publicity or purely political honors; to him, politics were merely the means of accomplishing something for the public weal. However, he did take an active part in politics from the latter standpoint, and was a life-long, militant Democrat, serving with distinction in a number of political offices. In 1887, after having practiced law for only three years, he was elected an Alderman and Vice-Mayor of Charlotte and held the same offices for several terms thereafter. He served a number of terms as City Attorney of Charlotte and compiled two official Codes of its ordinances. He was a charter member of the Democratic Club for White Supremacy; and as a member of the Legislature of 1899, he was one of the leaders in the fight for the so-called Grandfather Clause in our Constitution. He always stood for purity of elections, and in 1901 he drew the first Registered Primary Law applicable to Mecklenburg County and the first Australian Secret Ballot Law for the city of Charlotte. Although he was always ready to fight the battles of Democracy, Justice Clarkson, after the adoption of the Prohibition Law in this State, took only such part in politics as is the duty of every loyal citizen, until in 1920 he managed the successful gubernatorial campaign of his friend and our distinguished fellow citizen, the Hon. Cameron Morrison.

Justice Clarkson probably became first well known to the whole State of North Carolina through his early, successful and unceasing fight for prohibition. Although there were so many good causes which appealed to his heart, it may be said that his desire to eradicate the evils of liquor was with him an overwhelming passion. It was in 1892 that, as an Alderman of the city of Charlotte, he cast his first vote against liquor, and from that date forward and until his death he maintained and conscientiously fought for his deep conviction and belief that the misuse of liquor was one of the greatest scourges of our civilization. In that fight, as in no other, he was in truth a partisan; but a partisan without

bitterness, without hatred; being motivated solely by a determination to remove from the weak the terrible temptation of liquor. We have all heard some professional political prohibitionists sneeringly described as "voting dry" and "drinking wet"; we have all heard men accused of using prohibition for political purposes; but I can state without fear or contradiction by one single voice, that the sincerity of his belief and the purity of his motives on this or any other issue have never been questioned or challenged. In spite of the highly controversial character of the prohibition question and the extreme bitterness of the contests, he always won and retained the confidence and respect of his opponents. As Chairman of the Anti-Saloon League, he conducted the campaign which resulted in the abolition of the saloon in Charlotte in July, 1904. In 1908, as President of the Anti-Saloon League, he managed the campaign as a result of which the State voted for prohibition in North Carolina; and he drafted and helped secure the passage through the succeeding Legislature of the act which implemented this vote of the people. Later, after the adoption of national prohibition, in which he also took an active part, he was chairman of the committee which drew and sponsored what we know as the Turlington Act, adopted in 1923.

But Justice Clarkson's fight for purity in politics and against the evils of liquor were but two of his many strivings for the moral, social and material uplift of his city and State. I venture to set out a partial list, which is astounding in its variety, quality and volume, of his activities and accomplishments:

For a number of years he served as an officer in the State Guard. Beginning in 1888, he served continuously for thirty-five years as a Director of the Charlotte Young Men's Christian Association, ending his service only upon going upon the bench; and in 1935, he was made President of the Interstate Young Men's Christian Associations of the Carolinas and served as such until his death. While a member of the Legislature in 1899, he collaborated with the late Daniel A. Tompkins in founding the Textile School at State College. He drafted and secured passage by the Legislature of the charter of the Society of the Cincinnati and was made a hereditary member thereof. He was one of the promoters and drew the charter of the Charlotte Crittenton Home and was thereafter at all times its active patron and adviser. He was one of the promoters and drew the charter of the Charlotte Carnegie Library. He drew and secured passage of the original Parks and Playgrounds Act for the city of Charlotte, providing therein for accommodations for both races. He was chairman of the committee which in 1905 drafted the Building and Loan Law of this State, and for more than thirty years acted as attorney for one of these associations in Charlotte. He drew and secured passage of the first Drainage Law for Mecklenburg County

and served for years as attorney and adviser of the Drainage Commission appointed thereunder. He acted for six years as Director of the State Hospital at Morganton. During the first World War, he was Chairman of the Legal Advisory Board under the Draft Act. In 1917, he drew and secured passage of the act authorizing the establishment by counties and cities of reformatories for women, and under that act he secured the establishment of the Mecklenburg Industrial Home. He took a leading part in drafting what we now know as the Municipal Act and the Municipal Finance Act. He was Chairman of the Committee of the Good Roads Association to prepare highway legislation in 1921, and took a leading part in the drafting and subsequent passage of this legislation, services which were recognized by the presentation to him of the pen which signed the bill. He served for years as a member of the North Carolina Historical Commission. He was for many years a very active member of the Board of Trustees of St. Peter's Hospital in Charlotte, probably the first charity hospital established in this State.

On December 10, 1889, he was married to Miss Mary Lloyd Osborne, of Charlotte, a daughter of the late beloved Colonel Edwin A. Osborne, which was, I am sure he felt, the most successful step of his life. This union was blessed with four splendid children, who now survive: my loyal friend and partner, Francis Osborne Clarkson, who is following so valiantly in his father's footsteps, Edwin Osborne Clarkson, of Charlotte, the Reverend Thomas Simons Clarkson, now a chaplain in the United States Army, and Margaret Fullarton Clarkson, now the wife of John Garland Pollard. I believe that Justice Clarkson's home life should be described as ideal; and we can no doubt attribute in large measure the courage, zeal, patience and faith with which he attacked every problem of his life, to the sustaining sympathy and encouragement which he received at his own fireside.

Justice Clarkson was born, baptized and confirmed in the Protestant Episcopal Church, and during all of his life took an active, leading part in the church. At the age of twenty-three, he was elected a Vestryman of St. Peter's Protestant Episcopal Church, in Charlotte, and thereafter served from time to time, and until his duties took him to Raleigh, as Vestryman, Junior Warden and Senior Warden. He took a leading part in building the present St. Peter's Episcopal Church in Charlotte. As a memorial to his father, William Clarkson, who fought so valiantly in the cause of the South, he erected St. Andrew's Chapel, near the city of Charlotte. I have heard him say that every gentleman should attend church at least once every week; but his religion did not stop with its formal observances. It is hard to pick out the predominant element of his character, but it is very certain that charity ranked high among his attributes. His hand was forever stretched out: either to lift the fallen,

to aid and guide the weak, to assist the struggling, to give a "pat on the back" to the one who overcame his difficulties; or to strike down those whom he thought were imposing upon the helpless and weak.

For himself he set the highest standards: in thought, in speech, in action; and be it said to his glory that he came as near living up to those self-imposed standards as it was humanly possible for him to do. But he never judged another by the standards that he set for himself, being ever ready to forgive the weakness and faults of others and to bear without malice any wrong that was done to him. I well remember that when I entered his office as a callow young lawyer I saw pinned up over his desk, written in his own handwriting on a slip of foolscap paper, this text: "Count that day lost whose low descending sun has seen by thy hand no generous action done." I believe that text epitomized his life and character.

In June, 1923, Justice Clarkson was appointed by Governor Morrison to the seat on the bench of this high Court left vacant by the death of the dearly beloved and respected Justice Platt D. Walker. This was a drastic change in the routine of a life the major portion of which had been spent in an active legal career and as a humanist battling in the political arena for the betterment of mankind; and he was faced with a difficult task in donning the robe of the learned Justice Walker. However, it soon became apparent that Justice Clarkson was destined to become outstanding among those who have so well administered the business of this Court. The bent of his mind was such that he could never have much patience with the refined technicalities of the black letter law; nor could he be frightened by precedents when he was convinced that the precedent was not in accordance with human justice. One who has assiduously read his opinions delivered for this Court, and his opinions dissenting from the majority of the Court, is left with the impression that he first carefully mastered and analyzed all the facts in the case; that he next carefully studied all the legislative enactments and judicial decisions bearing on the questions at issue, and that he then decided in his own mind in the light thereof what was right and just in the ultimate ethical sense, and declared that, so far as he was concerned, to be the law. In writing an opinion, he never forgot that it would probably become a ruling precedent; and that principles of law laid down were of little value unless all of the facts and circumstances of the case were furnished for a proper appraisal of the points of law decided. To my mind, it is impossible to read one of his decisions without fully realizing the whole background of the case, all of the facts involved and the exact principle upon which the case was decided.

Justice Clarkson's first opinion concurred in the decision of the Court upholding the conviction of the defendant in the case of *State v. Steen,*

185 N. C., at page 776, where he spoke boldly against awarding new trials for harmless or unsubstantial errors. His last opinion was in the case of *State v. Johnson,* 220 N. C., at page 773, in which he took a strong stand for enforcement of law, decency and morals. Between these, his first and last opinions, through thirty-six volumes of our reports, he displayed a courageous and unremitting zeal to preserve the ancient landmarks and foundations of our democratic form of government; to see that no pains were spared to render justice to the underdog, and to be sure that no demagogic appeal resulted in injustice to those in a higher estate. As is pointed out in the resolution adopted by this Court upon Justice Clarkson's death, twelve of his opinions were affirmed, and only one reversed, by the Supreme Court of the United States; and at least forty-seven of his opinions were deemed of sufficient importance, as establishing some new principle of law, to merit publication in *American Law Reports.*

Justice Clarkson's opinion in the case of *Hinton v. State Treasurer,* 193 N. C., 496, upholding the constitutionality of the statute, providing for the sale of State bonds for the purpose of aiding veterans of the World War in acquiring homes, is a fine example of his complete grasp of the law, and at the same time of his realization of the human values involved.

A good instance of the tremendous care which he took in setting forth the facts and the law is his opinion in the case of *Reynolds v. Reynolds,* 208 N. C., 578, wherein he upheld the right of the Superior Court to approve a family settlement under a disputed will, with a view to obviating acrimonious family disputes and litigation. His statement of the facts and his opinion on the law in that case cover some fifty pages and set forth with meticulous care every fact and analyze every decision bearing upon the question.

Another decision typical of Justice Clarkson is his opinion in the case of *Corporation Commission v. Transportation Committee,* 198 N. C., 317, wherein he upheld the order of the Corporation Commission requiring bus lines to provide separate accommodations for white and Negro passengers; but spared no pains to insist that accommodations so separately provided should be equal.

It is unnecessary for me here to discuss in more detail Justice Clarkson's work as a member of this Court. In his opinions printed in the reports of this Court he has left a permanent record of a conscientious, just, able, industrious and inspiring judge; one of which his family, his friends and his State can be justly proud.

Justice Clarkson died at the home of his son in Charlotte on January 27, 1942, after a short illness and while still in harness. His last few active days were spent in his dearly beloved Little Switzerland, his haven

of refuge and rest. Justice Clarkson never indulged in any sports; he never played any games; he never had any light diversions; he got his chief pleasure in life out of performing well the tasks which came to his hands, out of facing his difficulties with courage and faith, and, above all, from association with his fellowman. His only hobby was Little Switzerland, which was never planned as, nor ever became, a commercial enterprise; but was founded for and still remains a haven of rest and a place of beauty. I cannot help but think that Little Switzerland, his only hobby, was not in the first instance, or ever, primarily for his own pleasure and enjoyment, but rather that he planned it for the pleasure and enjoyment of others.

In recognition and appreciation of Justice Clarkson's character and achievements, the University of North Carolina conferred upon him the honorary degree, Doctor of Laws, in June, 1928, with the following citation:

"Lawyer of distinction with a long record of honorable service at the bar, he has played an important role in the social, civic and religious life of Charlotte and of North Carolina. As champion of education, State-wide prohibition, good roads and internal improvements, he has wrought well and successfully for the general welfare and advancement of this commonwealth. During the past five years he has served with ability and devotion upon the Supreme Court of North Carolina."

Justice Clarkson lived his life courageously, honestly, charitably, chastely, but withal humanly. He would neither have claimed nor accepted any reward or praise for these qualities which he considered the *sine qua non* of a gentleman; but what he did wish to earn, and did deserve and earn in the greatest measure, was the love of his fellowman. I believe he can best be described by the words "a sincere humanist."

The life of Justice Clarkson should prove a comfort and an inspiration to all of us who have survived him and to those yet unborn. In inscribing his epitaph, I think we can paraphrase in reverse Marc Anthony's famous reference to the dead Caesar:

"The good that he did lives after him;
No evil is interred with his bones."

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE ASSOCIATE JUSTICE HERIOT CLARKSON, IN THE SUPREME COURT ROOM, 10 NOVEMBER, 1942.

The Court has heard with interest and appreciation the carefully prepared address of Mr. Carol D. Taliaferro of the Charlotte Bar in delineating the career and services of the late Associate Justice Heriot Clarkson, and in presenting his portrait to be added to those whose likenesses have been preserved to us through the generosity of families and friends, and whose lives and labors reflect credit upon the judiciary of the State. The appraisal is complete within itself. It needs no amplification. The members of the profession all know, from Justice Clarkson's own pen, the contribution he has made to the law of the Commonwealth, as recorded in his opinions in thirty-six volumes of the North Carolina Supreme Court Reports, beginning with the 185th and ending with the 220th. These will endure and carry to later generations a just conception of who he was and what he did while with us.

It has aptly been said that one who serves here really never ceases to be a member of the Court. The sitting members are only a part of that greater Court which participates in the settlement of controversies. The opinions of our predecessors are daily cited as controlling. Their views are to be found in the long row of volumes before us, and they continually play a part in the consideration and decision of causes. The written word abides, but it is powerless to transmit the outer personality of one as seen and known by those among whom he lived and had his being. This can best be done by the art of photography or the painter's brush. In galleries the world over are to be observed the features of those who deserved well of their countrymen.

We welcome the opportunity of receiving this splendid portrait. The Marshal will see that it is assigned to its proper place, and these proceedings will be published in the forthcoming volume of the Reports.

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While a child *in ventre sa mere* is supposed in law to be born, such child has no separate or distinct existence until advanced to that state designated by the term "quick with child," and a woman is not "quick with child" until she herself has felt the child alive within her. *S. v. Forte*, 537.

§ 5. Indictment and Variance.

On indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, C. S., 4226, where proof shows an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and motion for nonsuit should have been allowed. C. S., 4643. *S. v. Forte*, 537.

§ 8. Evidence, Sufficiency.

While, for many purposes, a child *in ventre sa mere* is supposed in law to be born, such child has no separate or distinct existence until that state of maturity designated "quick with child," and a woman is not "quick with child" until she herself has felt the child alive within her. *S. v. Forte*, 537.

On indictment charging the performance of an operation upon a woman "quick with child," with intent thereby to destroy the child, C. S., 4226, where proof of an operation upon a pregnant woman, with no evidence that she was "quick with child," there is a fatal variance and motion for nonsuit should have been allowed. C. S., 4643. *Ibid.*

ADOPTION.

§ 5. Proceedings for—Notice and Parties.

In a proceeding for adoption of a minor, under C. S., 182-184, now repealed, upon filing of petition alleging material facts and making the only living parent a party and such parent accepting service of summons and petition and consenting in writing on the summons to the adoption, constitutes a voluntary appearance and answer and is sufficient to support a judgment. *Moseley v. Deans*, 731.

The fact that petitioner's counsel wrote part of the form of acceptance and consent, to be signed by the parent, is not sufficient to destroy its legal effect, in the absence of any indication of fraud or undue influence. *Ibid.*

§ 8. Final Decree.

In a proceeding for adoption of a minor, under C. S., 182-184, now repealed, upon filing of petition alleging material facts and making the only living parent a party and such parent accepting service of summons and petition and consenting in writing on the summons to the adoption, constitutes a voluntary appearance and answer and is sufficient to support a judgment of adoption. *Moseley v. Deans*, 731.

§ 13. Rights of Child.

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ADOPTION—*Continued.*

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ANIMALS.

§ 3. Domestic—Liability for Injuries by.

To recover damages for injuries inflicted by a domestic animal two essential facts must be shown: (1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character and habits. *Plumidies v. Smith*, 326.

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Where, in an action against the owner for injuries inflicted by his dog, evidence that for a year or more the dog, when plaintiff came to deliver papers, would run towards and bark at plaintiff so viciously that the owner would have to call the dog off, that the dog bit plaintiff's brother and was given away by defendant on account of its vicious character. *Held:* Judgment of nonsuit was error. *Ibid.*

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The rules of the Supreme Court, governing appeals, are mandatory and not directory. *Washington County v. Land Co.*, 637.

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§ 10b. Settlement, Case on Appeal—Duty of Court.

Where there is a controversy as to whether the case on appeal was served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. *Pike v. Seymour* and *Pierce v. Seymour*, 42.

It is admitted on the record that defendants did not serve case on appeal within the time allowed, but defendants contend an agreed case on appeal was served and accepted by plaintiffs' counsel who filed exceptions to the case on appeal as served, and also filed a motion to strike, *held* error for the trial court to pass on other matters without first ruling on whether or not plaintiffs' attorneys have waived failure to file case in time by accepting service of an agreed case. *Ibid.*

Where the trial court finds that the case on appeal was not served within the time fixed or allowed, or service within such time waived, an order, directing the appellants' case on appeal stricken from the files of the cause and the records of the court is proper. *Pike v. Seymour*, 606.

When appellants' case on appeal is stricken from the record as not filed in time, on motion in the cause to affirm the judgment below and it appearing that no error exists on the face of the record proper, the judgment is affirmed. *Ibid.*

§ 12. Pauper Appeals—Affidavit.

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§ 18. Certiorari.

A writ of *certiorari* is an extraordinary remedial writ which issues from a superior to an inferior court, officer, or commission acting judicially, and it lies only to review judicial or *quasi*-judicial action. *Pue v. Hood, Comr. of Banks*, 310.

The writ of *certiorari* is obtained on petition, supported by affidavit, addressed to the appellate court having jurisdiction and must show merit, and only such errors as appear on the face of the record can be considered. *Ibid.*

Where an administrative officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief. *Ibid.*

Upon an application for an industrial bank charter, under Michie's Code, secs. 217 (b) and 225 (m), the Secretary of State has no authority to act without a favorable certificate from the Commissioner of Banks, and upon suit brought, in the absence of such certificate, to compel the issuance of a charter, alleging no bad faith, capricious acts, or disregard of law by the State officers, *Held:* The complaint fails to state a cause of action and is not sufficient as a petition for *certiorari* or as an application for a *mandamus*. *Ibid.*

§ 18b. Certiorari—To Bring up Case for Review.

Certiorari will not lie to bring up for review the valuation of land fixed by the State Board of Assessment, on appeal from the county commissioners acting as a board of equalization, where the proceeding was in accordance with the statute and no want of jurisdiction or abuse of power or discretion is charged, and only errors of judgment are involved. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

APPEAL AND ERROR—*Continued.*

Where *certiorari* is used as a substitute for an appeal expressly provided in the law, which has been lost without fault of the petitioner, the hearing in the court must necessarily be *de novo*, if the appeal provided is of that nature; but it is otherwise when the writ is used, as at common law, to bring up for review the action of inferior courts or tribunals upon the principle that the acts sought to be reviewed are judicial or *quasi*-judicial. *Ibid.*

§ 19. Necessary Parts of Record.

Where the record does not show either the organization of the court below or the authority of the special judge who signed the judgment, nor disclose that the judgment was entered at term, the appeal is dismissed under Rule 19 of this Court. *Vail v. Stone*, 431.

Pleadings.

The pleadings are not contained in the record, only excerpts from the complaint to which the parties agree. Hence, in accordance with the uniform practice in such cases, the appeal must be dismissed. Rule 19, sec. 1; Rule 20. Rules of Practice in the Supreme Court, 221 N. C., 544. *Washington County v. Land Co.*, 637.

§ 29. Abandonment of Exception—Failure to Discuss Proof.

Where defendants not only assign as error the several conclusions of law made by the court and on which the judgment below is founded, but also except to and assign as error the findings of fact upon which the conclusions of law are based, yet in their brief challenge only the conclusions of law and judgment, under Rule 28 of the Supreme Court the exceptions to the findings of fact will be taken as abandoned. *Amick v. Coble*, 484.

§ 30b. Jurisdiction and Hearings of Motions to Dismiss—In the Supreme Court.

While the general rule does not allow a party to adopt, in the Supreme Court, a different theory from that upon which he tried his case below, the rule has no application on demurrer based upon an alleged failure of the complaint to state a cause of action. *Wood v. Wilder*, 622.

§ 37a. Matter Reviewable in General—No Change of Ground in Supreme Court.

While the general rule does not allow a party to adopt, in the Supreme Court, a different theory from that upon which he tried his case below, the rule has no application on demurrer based upon an alleged failure of the complaint to state a cause of action. *Wood v. Wilder*, 622.

§ 37b. Matters in Discretion of Lower Court.

Where, on motion to set aside a verdict on the first issue as contrary to the weight of the evidence and as to the second issue for excessive award of damages, and the motion is overruled as to the first issue and allowed as to the second issue, an appeal is premature, for defendants have preserved their exceptions to the trial on the first issue and these may be presented upon appeal from the final judgment. *Hawley v. Powell*, 713.

The discretionary action of the trial court in setting aside the verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. It is likewise a matter of discretion as to whether the verdict shall be set aside in whole or in part. *Ibid.*

APPEAL AND ERROR—*Continued.*

Decision of trial court on question of concluding argument is final and not reviewable. *Heilig v. Ins. Co.*, 231.

Where in a criminal prosecution, after appeal to the Superior Court, defendant is called and fails to appear in accordance with his bond, and judgment *nisi, sci fa* and capias is entered, an appeal from order at a subsequent time, refusing to strike out the forfeiture, is premature for such order is only *nisi*, and defendants may protect their rights by exception and appeal from the final judgment, if adverse. *S. v. Clarke*, 744.

Whether judgment *nisi* will be made absolute or whether it will be stricken out, either upon condition or otherwise, rests in discretion of judge of Superior Court. *Ibid.*

§ 37e. Review of Findings.

Where findings of fact by a referee, supported by competent evidence, are approved by the court below, judgment approving the referee's conclusions of law will not be disturbed, no exception having been taken to the findings upon which the conclusions were based. *Grimes v. Beaufort County*, 41.

Findings of fact by court, when a trial by jury has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. *Turlington v. Neighbors*, 694.

§ 39a. Prejudicial and Harmless Error—In General.

In an action to recover premiums paid on forfeited life insurance policies, judgment of nonsuit, containing a proviso, "without prejudice to the rights of plaintiff in the paid-up policies listed in paragraph (c) of the further answer," if not in favor of plaintiff, is harmless error. *Bynum v. Ins. Co.*, 742.

§ 39d. Admission Evidence Harmless, Where Motion to Strike Allowed.

Plaintiff's exceptions and assignments of error to the admission of evidence are rendered impotent, where plaintiff's motions to strike the answers to the questions involved were allowed. *Mfg. Co. v. R. R.*, 330.

§ 39e. Harmless in Instructions Where Not Called to Court's Attention.

Any substantial errors, made by the court in the statement of the evidence or in the statement of the contentions of the parties, must be called to the attention of the court at the time they are made, in order to give opportunity to make correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal. *Mfg. Co. v. R. R.*, 330.

§ 40e. Review—Motion to Nonsuit.

On motion to nonsuit, plaintiff is entitled to benefit of every fact and inference of fact, pertaining to issues involved which may reasonably be deduced from evidence. *Heilig v. Ins. Co.*, 231; *Plumidies v. Smith*, 326.

§ 49a. Force of Supreme Court Decision.

Where, on former appeal, a new trial was granted and at the second trial plaintiff offered substantially the same evidence as was offered at the former trial, motion for nonsuit is properly overruled and prayers for a directed verdict on the issues of negligence and contributory negligence properly refused. *Leary v. Bus Corp.* and *McDuffie v. Bus Corp.*, 38.

APPEAL AND ERROR—*Continued.*

Law of Case.

The decision of this Court on a previous appeal, between the same parties and upon the same facts then and now presented, constitutes the law of the case and is conclusive on the points so adjudged. *Cheshire v. Church*, 280.

A demurrer to a complaint challenges the sufficiency of the pleading, a demurrer to the evidence challenges the sufficiency of the evidence, and a decision of the Supreme Court failing to sustain the first, does not become the "law of the case" upon an appeal from the second. *Montgomery v. Blades*, 463.

In a civil action to recover land, defendant claimed title by answer, alleging a parol contract with the plaintiff, to which a demurrer was sustained and affirmed on appeal to the Supreme Court. It appeared thereafter to the court that the *locus in quo* had, pending this action, been conveyed to another, who was thereupon substituted as plaintiff and defendant allowed to amend answer, which defendant did by setting up the identical defense already disposed of by demurrer on the former appeal. *Held:* Defense properly stricken out. *Stone v. Guion*, 548.

APPEARANCE.

§ 1. Special.

When jurisdiction of the person is challenged for lack of legal service of summons, a motion to dismiss made on special appearance is ordinarily the proper method of presenting the question for decision. *Williams v. Cooper*, 589.

§ 2a. Acts—Constituting General Appearance.

A motion or demurrer which pertains to the merits of the cause or alleged deficiencies in the pleadings constitutes a general appearance and subjects the movant to the jurisdiction of the court. *Williams v. Cooper*, 589.

The purpose of judicial process is to give notice, and service brings the party within the jurisdiction of the court, and hence acceptance of notice and waiver of service and voluntary appearance in court dispenses with service. C. S., 489, 490. *Moseley v. Deans*, 731.

While the statute (C. S., 476) requires that a summons, directed to the sheriff of a county other than that from which it is issued, shall be attested by the seal of the court, the absence of a seal will not invalidate a judgment where service has been accepted and the defendant has voluntarily appeared. *Ibid.*

In a proceeding for adoption, under C. S., 182-184, now repealed, upon filing of petition alleging the material facts and making the only living parent a party and such parent accepting service of summons and petition and consenting in writing on the summons to the adoption, constitutes a voluntary appearance and answer and is sufficient to support a judgment of adoption. *Ibid.*

The fact that petitioner's counsel wrote part of the form of acceptance and consent, to be signed by the parent, on the back of a summons in an adoption proceeding, is not sufficient to destroy its legal effect, in the absence of any indication of fraud or undue influence. *Ibid.*

§ 2b. General—Effect.

Counsel, whose appearance is general, cannot limit such appearance for the sole purpose of moving for a continuance. *Lightner v. Boone*, 205.

APPEARANCE—*Continued.*

§ 2b. General—Waives All defects in Summons and Service.

A general appearance waives any defects in the jurisdiction of the court for want of a valid summons or proper service thereof. *Williams v. Cooper*, 589.

A general appearance cures all defects and irregularities of process. *Moseley v. Deans*, 731.

ARBITRATION AND AWARD.

§ 1. Nature and Requisites.

It has been frequently said that arbitrators are "a law unto themselves," and they are not bound to decide according to law when acting within the scope of their authority, but may award according to their own notions of justice and without assigning any reason. *Bryson v. Higdon*, 17.

§ 6. Hearings and Appraisals.

Arbitrators need not adopt the precise methods of hearing in court or before referees and in many respects their procedure is not reviewable. *Bryson v. Higdon*, 17.

Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under C. S., 898 (a), *et seq.*, but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action. *Ibid.*

§ 8. Award—Form and Requisites.

It has been frequently said that arbitrators are "a law unto themselves," and they are not bound to decide according to law when acting within the scope of their authority, but may award according to their own notions of justice and without assigning any reason. *Bryson v. Higdon*, 17.

Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under C. S., 898 (a), *et seq.*, but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action. *Ibid.*

§ 13. Attack and Setting Aside Award.

When the law respecting submission to arbitration has been substantially followed—and the result has not been challenged on that ground—the award can be attacked only for fraud, undue influence, or improper conduct on the part of the arbitrators when acting within their authority. *Bryson v. Higdon*, 17.

The fact that the arbitrators divided the contested area with approximate equality between the parties does not give rise to a legal inference that they acted without evidence or beyond the pale of their authority. *Ibid.*

ASSAULT AND BATTERY.

§ 7d. Deadly Weapon.

In a prosecution for an assault with a deadly weapon, a hoe, where there was no evidence of the size, weight, length, etc., of the hoe, it was error for the trial judge to instruct the jury to convict, if they should be satisfied beyond a reasonable doubt that the defendant struck the person assaulted with a hoe. *S. v. Davis*, 178.

ASSAULT AND BATTERY—*Continued.*

§ 12. Defenses.

In a prosecution for an assault with a deadly weapon, a hoe, where there was evidence that defendant's wife was being assaulted and defendant went to her rescue and fought with her assailant, the lower court should have submitted the case with appropriate instructions as to defendant's defense of his wife and self-defense. *S. v. Davis*, 178.

Where a person's home has been violently invaded, under such circumstances as to make it appear that a warning or order to desist would be ineffective to stop an apparently murderous assault, the law does not require a challenge to the assailant before taking adequate measures for defense. *S. v. Baker*, 428.

§ 13. Instructions.

In prosecution for assault with deadly weapon, a hoe, where evidence fails to show size, weight, etc., of hoe, it was error for trial judge to instruct jury to convict if they should be satisfied beyond reasonable doubt that defendant is guilty of assault. *S. v. Davis*, 178.

In a prosecution for an assault with a deadly weapon, a hoe, where there was evidence that defendant's wife was being assaulted and defendant went to her rescue and fought with her assailant, the lower court should have submitted the case with appropriate instructions as to defendant's defense of his wife and self-defense. *Ibid.*

ATTORNEY AND CLIENT.

§ 6. Scope of Authority, Generally.

Ordinarily, an attorney, by virtue of his employment as such, has control and management of the suit in matters of procedure and may make agreements affecting the remedy he is endeavoring to pursue; but this comprehensive authority does not continue after judgment. *Harrington v. Buchanan*, 698.

On Money Demand.

As the primary objective of a suit on a money demand is the collection of the debt, obtaining judgment is merely a necessary step to that end and it will not be assumed that an attorney, employed to prosecute the action, is not authorized to receive and receipt for the money demanded. *Harrington v. Buchanan*, 698.

§ 8. Termination of Relation.

No attorney or solicitor can withdraw his name, after he has once entered it on the record, without leave of the court. And while his name continues there, the adverse party has a right to treat him as the authorized attorney or solicitor, and the service of notices upon him is as valid as if served on the party himself. *In re Gibson*, 350.

A party litigant cannot discharge his counsel of record and withdraw from the case, without notice to the opposing side and approval of the court. *Ibid.*

AUTOMOBILES.

III. Operation and Law of the Road

9a. Attention to Road and Proper Lookout. Wall v. Bain, 375; Brown v. Products Co., Inc., 626.

9d. Sudden Emergency. Brown v. Products Co., Inc., 626.

9g. Backing. Wall v. Bain, 375.

10. Right side of Highway. Brown v. Products Co., Inc., 626.

11. Passing Vehicles on Highway. Patrick v. Treadwell, 1; Brown v. Products Co., Inc., 626.

AUTOMOBILES—*Continued.*

12c. Speed at Intersections. Etheridge v. Etheridge, 616.
13. Stopping, Starting and Turning. Austin v. Overton, 89.
14. Stopping, Parking and Parking Lights. Pike v. Seymour, 42; Austin v. Overton, 89.
18a. Negligence and Proximate Cause. Pike v. Seymour, 42; Austin v. Overton, 89.
18c. Contributory Negligence. Sample v. Spencer, 580.
18d. Concurring and Intervening Negligence. Montgomery v. Blades, 463; Sample v. Spencer, 580.
18g. Sufficiency of Evidence and Nonsuit. Wall v. Bain, 375; Etheridge v. Etheridge, 616; Brown v. Products Co., Inc., 626.
V. Liability of Owner for Driver's Negligence
24a. Agents and Employees—In General. Walker v. Manson, 527.
24c. Competency and Sufficiency of Evidence. Walker v. Manson, 527.

§ 9a. Attention to Road—Lookout.

It is the duty of the driver of a motor vehicle not merely to *look* but to keep a *lookout* in the direction of travel; and he is held to the duty of seeing what he ought to have seen. *Wall v. Bain*, 375.

In a road wide enough for only one vehicle neither of two cars, going in opposite directions, has a "right" or "left" side within the restricted passageway. The right of way belongs to him who enters before the other approaches and it is the duty of that other, in the exercise of proper care, to yield it to him; provided, of course, conditions are such that he can observe them by keeping a proper lookout. *Brown v. Products Co., Inc.*, 626.

§ 9d. Sudden Emergency.

Where the evidence of plaintiff tended to show that he was traveling by automobile at about 20 to 25 miles per hour and, after entering a lane 10 feet wide, caused by deep snowbanks piled on each side of the road for a distance of 50 to 75 feet, he observed defendant about 400 feet distant, coming from the opposite direction at about 45 miles per hour, who entered the lane without slowing down, and their cars collided in the lane, where the snow banks prevented turning out, causing damage, a judgment of nonsuit was reversible error. *Brown v. Products Co., Inc.*, 626.

§ 9g. Backing.

Where one backs a truck along a city street, in a traffic lane devoted to travel in the opposite direction, the operation involves a greater danger than ordinary travel, and, in making such backward movement, the care required must be adequate to the danger involved. *Wall v. Bain*, 375.

§ 10. Right Side of Highway—Narrow Road.

In a road wide enough for only one vehicle neither of two cars, going in opposite directions, has a "right" or "left" side within the restricted passageway. The right of way belongs to him who enters before the other approaches and it is the duty of that other, in the exercise of proper care, to yield it to him; provided, of course, conditions are such that he can observe them by keeping a proper lookout. *Brown v. Products Co., Inc.*, 626.

§. 11. Passing on Highway—High Speed.

Motion for nonsuit properly denied where evidence discloses that defendant was driving his automobile at a high rate of speed and, in attempting to traverse a curve, swerved and struck a car, coming from opposite direction, in which plaintiff was riding, causing injury. *Patrick v. Treadwell*, 1.

Ordinarily, a motorist has a right to assume that a driver of a vehicle coming from the opposite direction will obey the law and to act on such assumption in determining his own manner of using the road. This right is not absolute, it is qualified by circumstances. *Brown v. Products Co., Inc.*, 626.

AUTOMOBILES—*Continued.*

In a road wide enough for only one vehicle neither of two cars, going in opposite directions, has a "right" or "left" side within the restricted passageway. The right of way belongs to him who enters before the other approaches and it is the duty of that other, in the exercise of proper care, to yield it to him: provided, of course, conditions are such that he can observe them by keeping a proper lookout. *Ibid.*

Where the evidence of plaintiff tended to show that he was traveling by automobile at about 20 to 25 miles per hour and, after entering a lane 10 feet wide, caused by deep snowbanks piled on each side of the road for a distance of 50 to 75 feet, he observed defendant about 400 feet distant, coming from the opposite direction at about 45 miles per hour, who entered the lane without slowing down, and their cars collided in the lane, where the snowbanks prevented turning out, causing damage, a judgment of nonsuit was reversible error. *Ibid.*

§ 12c. Speed at Intersections.

Statutory regulation of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter the intersecting highway, and does not apply to an accident to an automobile running into a ditch and turning over 100 to 150 feet beyond the intersection. *Etheridge v. Etheridge*, 616.

§ 13. Turning.

Where plaintiff was following defendant, both traveling at 45 to 50 miles per hour on a straight, 30-foot concrete road, no lights being on rear of defendant's car, and defendant slowed down suddenly and turned to the left side of the road, and either stopped or was moving very slowly, when plaintiff's car violently collided with defendant's, in an action for damages, plaintiff is guilty of contributory negligence and nonsuit was proper. *Austin v. Overton*, 89.

§ 14. Stopping, Parking, Lights.

It is not necessarily unlawful in all cases to park a vehicle at night on the paved portion of a highway without lights thereon, Michie's Code, 2621 (94), an emergency may arise thereby making it impossible to move such vehicle immediately. *Pike v. Seymour* and *Pierce v. Seymour*, 42.

Plaintiff driving about 2 a.m., at 40 or 45 miles, lights dimmed, crashed with great force into defendant's truck parked without lights on paved highway with room to pass, guilty of contributory negligence. *Ibid.*

Where plaintiff was following defendant, both traveling at 45 to 50 miles per hour on a straight, 30-foot concrete road, no lights being on rear of defendant's car, and defendant slowed down suddenly and turned to the left side of the road, and either stopped or was moving very slowly, when plaintiff's car violently collided with defendant's, in an action for damages, plaintiff is guilty of contributory negligence and nonsuit was proper. *Austin v. Overton*, 89.

§ 18a. Contributory Negligence—Proximate Cause.

In an action for damages against defendants, who left truck parked at night, without lights, on concrete highway, with room to pass on the left, defendants' motion for nonsuit should have been sustained, where evidence showed plaintiffs, driving their car about 2:00 o'clock a.m., at 40 or 45 miles per hour, lights dimmed, never applied the brakes and failed to see the truck until after the collision, crashing into the back of the truck, plaintiffs being

guilty of contributory negligence which was a proximate cause. *Pike v. Seymour* and *Pierce v. Seymour*, 42.

Where plaintiff was following defendant, both traveling at 45 to 50 miles per hour on a straight, 30-foot concrete road, no lights being on rear of defendant's car, and defendant slowed down suddenly and turned to the left side of the road, and either stopped or was moving very slowly, when plaintiff's car violently collided with defendant's, in an action for damages, plaintiff is guilty of contributory negligence and nonsuit was proper. *Austin v. Overton*, 89.

§ 18c. Contributory Negligence.

Negligence of the driver of a motor vehicle will not be imputed to a guest passenger having no interest in the car and no control over the driver. *Sample v. Spencer*, 580.

§ 18d. Concurring and Intervening Negligence.

The intervening active negligence of a responsible third party insulates the original passive negligence of another, where the conduct of the other would not have resulted in injury except for the intervening negligence, which thus becomes the sole proximate cause of the injury. *Montgomery v. Blades*, 463.

In an action for damages on account of the alleged negligent killing of a guest passenger in an automobile accident, where there is evidence of negligence on the part of the driver of the car in which the guest was riding and of defendant, whether the negligence of the defendant concurred with the negligence of the driver of the car and constituted the efficient cause of the injury and death is a question for the jury. *Sample v. Spencer*, 580.

If the negligence of the defendant, in an automobile accident, contributed to the injury and death of plaintiff's intestate as one of the proximate causes thereof, the defendant would be liable notwithstanding the negligence of the driver of the car in which plaintiff's intestate was riding as a guest. *Ibid.*

§ 18g. Nonsuit.

The granting of a motion of nonsuit erroneous, where the driver of a truck stopped on a sharp downgrade of a city street, right side, and, after he and a companion had looked back on each side from the cab of the truck seeing no one, backed the truck about three feet, killing instantly a delivery boy coming after the truck on a bicycle, which showed signs of skidding for twenty-nine feet. *Wall v. Bain*, 375.

Where defendant was driving an automobile, free from disclosed mechanical defect, at about 35 miles per hour on a good road and the car struck a bump at an intersection, ran on the right side of the road for some distance, into the right drain ditch, overturned and injured plaintiff, there is a reasonable inference of want of due care and judgment of nonsuit was error. *Etheridge v. Etheridge*, 616.

Where the evidence of plaintiff tended to show that he was traveling by automobile at about 20 to 25 miles per hour and, after entering a lane 10 feet wide, caused by deep snowbanks piled on each side of the road for a distance of 50 to 75 feet, he observed defendant about 400 feet distant, coming from the opposite direction at about 45 miles per hour, who entered the lane without slowing down, and their cars collided in the lane, where the snowbanks prevented turning out, causing damage, a judgment of nonsuit was reversible error. *Brown v. Products Co., Inc.*, 626.

AUTOMOBILES—*Continued.*

§ 24a. Liability of Owner for Drivers—In General.

The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged at the time of, and in respect to, the very transaction out of which the injury arose, and general employment alone is not sufficient to impose liability. *Walker v. Manson* and *Murray v. Manson*, 527.

§ 24c. Sufficiency of Evidence.

In an action for damages on account of injuries sustained by plaintiff in an automobile collision, evidence that defendant M., a son-in-law of defendant K., was hauling a cow and calf belonging to K., in a truck, when the truck collided with the car in which plaintiffs were riding, causing injury, without any evidence of the ownership of the truck or that K. exercised any control over the same, is insufficient and demurrer thereto was properly sustained. *Walker v. Manson* and *Murray v. Manson*, 527.

BAIL.

§ 4. Liability on Bail Bonds.

The conditions of a bail bond are absolute and its purpose is to make the sureties responsible for the appearance of the defendant at the proper time. *S. v. Pelley*, 684.

The surety on a bail bond is not entitled to relief unless he can show that performance has been rendered impossible or excusable (a) by an act of God; (b) by an act of the obligee; (c) by an act of the law. *Ibid.*

Upon failure of the principal in a bail bond to appear, due to his detention in another jurisdiction for violation of its criminal laws, this State may, but it is under no obligation to demand his surrender. *Ibid.*

It is not error for the court to fail to hear a motion to relieve sureties on a bail bond thirty days before the defendant is required to appear. *Ibid.*

Failure to give notice of hearing, when judgment absolute was entered against sureties, is not reversible error, where the matter had been continued from time to time for several months and no motion was made to set aside the judgment for excusable neglect. C. S., 600. *Ibid.*

Appeal, Judgment Nisi.

Where in a criminal prosecution, after appeal to the Superior Court, defendant is called and fails to appear in accordance with his bond, and judgment *nisi*, *sci fa* and capias is entered, an appeal from order at a subsequent time, refusing to strike out the forfeiture, is premature, such order is only *nisi*, and defendants may protect their rights by exception and appeal from the final judgment, if adverse. *S. v. Clarke*, 744.

No execution may issue on a judgment *nisi* until it is finally made absolute. *Ibid.*

Whether a judgment *nisi* will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the Superior Court. C. S., 4588. *Ibid.*

BANKRUPTCY.

§ 1. Jurisdiction.

A bankruptcy proceeding does not terminate a suit in a State court, to which the bankrupt is a party; and the adjudication of a defendant as a bankrupt does not stay such an action. *Gordon v. Calhoun Motors, Inc.*, 398.

BANKRUPTCY—*Continued.*

§ 7. Claims and Priority.

Where plaintiff in an action in the Superior Court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a bond under C. S., 861, upon the adjudication of the defendant a bankrupt, the State court may order the cause procede to trial, any judgment rendered for plaintiff to be collectible, *by execution*, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding. *Gordon v. Calhoun Motors, Inc.*, 398.

BANKS AND BANKING.

§ 2. State Banks, Control and Regulation.

The right to engage in the banking business, through the agency of a corporation, is a franchise dependent on a grant of corporate powers by the State. *Pue v. Hood, Comr. of Banks*, 310.

The business of banking so vitally affects the economic life and general welfare of the State as to warrant its prohibition, except under such conditions as the Legislature may prescribe. *Ibid.*

The jurisdiction of the Commissioner of Banks over banking institutions of the State is regulatory and was delegated by the General Assembly in the lawful exercise of its powers. *Ibid.*

§ 3. Incorporation.

The duties imposed upon, and the discretion vested in, the Commissioner of Banks bears only upon the question of whether certain conditions exist justifying the creation of a proposed bank and they do not constitute the exercise of legislative or judicial powers. *Pue v. Hood, Comr. of Banks*, 310.

In applying for a certificate of incorporation of a bank, the plaintiffs here were seeking a privilege or franchise, and not asserting a right. Their only right was to demand a consideration of their application as provided by statute. *Ibid.*

BASTARDS.

§ 1. Courts Alert to Protect.

The Court is alert to exercise its power to protect illegitimate children who are entitled to the benefit of laws for their support and maintenance. *Story v. Story*, 221 N. C., 114, approved. *S. v. Duncan*, 11.

§ 3. Warrant and Indictment, Variance.

Indictment, in a bastardy proceeding, which states that the child was born on 13 August, 1941, whereas the evidence was that the birth occurred on 13 November, 1940, is not fatally defective. C. S., 4625. *S. v. Moore*, 356.

§ 6. Judgments, Modified.

In a bastardy proceeding, where defendant pleaded guilty and orders were made for the support of the child, the court has no authority to strike out a plea of guilty or a judgment at a former term; but, under N. C. Code, 1939 (Michie), sec. 276 (f), the court may modify the conditions of the former judgment, or increase from time to time the amount necessary for the child's support. *S. v. Duncan*, 11.

§ 7. Limitations.

A proceeding to establish the paternity of an illegitimate child and to prosecute the father, who willfully neglects or refuses to support and maintain

BASTARDS—*Continued.*

the same, may be instituted at any time within three years next after the birth of the child. C. S., 276 (a); C. S., 276 (c). *S. v. Moore*, 356.

BIGAMY.

§ 2. Prosecution and Punishment.

Judgment herein upholding conviction of bigamy, after Nevada divorce, 220 N. C., 445, vacated or set aside and cause remanded for a new trial, in accordance with opinion of the Supreme Court of the United States, rendered 21 December, 1942, on *certiorari*. And defendants will recover their costs. *S. v. Williams*, 609.

BILLS AND NOTES.

§ 2c. Execution—Seals.

In action upon promissory note, concluding "Witness my hand and seal" and signed by maker, with the word "seal" in parentheses after his name, the burden is on defendant to satisfy the jury that the word "seal" was not adopted by the maker. *Lister v. Lister*, 555.

§ 7a. Negotiation—Transfer in General.

Where a negotiable instrument is payable to order, its transfer from one person to another is by endorsement, completed by delivery, actual or constructive. C. S., 3010. *Cartwright v. Coppersmith*, 573.

The burden is upon one claiming a negotiable instrument, payable to order, to show not only an endorsement, but also that the intention to assign such instrument was completed by delivery, actual or constructive. *Ibid.*

A special endorsement by a payee is insufficient where payee retained possession, without evidence of a delivery or intention to part with control of the instrument. *Ibid.*

§ 22. Defenses—Payment of Taxes.

Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collections on the judgment. Michie's Code, 7880 (156) tt. *Roberts v. Grogan*, 30.

Gambling Contract.

The joint purchase, by two persons on a warehouse floor of tobacco for purposes of resale, is not such a gambling contract as to make a promissory note given for the purchase price unenforceable. *Ibid.*

§ 25. Presumptions and Burden of Proof.

There is a presumption that a note, bearing the recital "for value received," was executed for a valuable consideration; and C. S., 3004, provides that every negotiable instrument is deemed *prima facie* to have been issued for value. *Lister v. Lister*, 555.

§ 27. Sufficiency of Evidence—Nonsuit.

In an action upon a promissory note, its admission in evidence and the admission of its execution and nonpayment, notwithstanding maturity, make out a *prima facie* case, and denial of judgment of nonsuit is proper. *Roberts v. Grogan*, 30.

BILLS AND NOTES—*Continued.*

Demurrer.

While C. S., 540, provides that a copy of the instrument is sufficient, with the allegation of amount due thereon, such statute does not require the entire writing to be made a part of the complaint. Demurrer *ore tenus* properly overruled. *Ibid.*

BOUNDARIES.

§ 1. General Rules.

In proceedings to establish disputed boundary line, what constitutes the dividing line is a question of law for court, but as to where the line is must be settled by the jury. *Huffman v. Pearson*, 193; *McCanless v. Ballard*, 701.

§ 5. Variations of Magnetic Pole—Courses and Distance.

In questions of boundary course and distance govern, allowing for variations of magnetic needle, unless there be some more certain description by which one or both may be controlled. *Huffman v. Pearson*, 193.

§ 6. Grounds and Conditions—Processioning.

Processioning is appropriate only in case of a disputed boundary between adjoining landowners, and if the lands of the parties do not join the whole case comes to naught. *McCanless v. Ballard*, 701.

§ 9. Evidence.

In proceedings to establish a disputed boundary line, what constitutes the dividing line is a question of law for the court, but as to where the line is must be settled by the jury under correct instructions based upon competent evidence. *Huffman v. Pearson*, 193; *McCanless v. Ballard*, 701.

The primary purpose of partition is to sever the unity of possession and, unless specifically brought in issue by the pleadings, the lines of adjoining tracts are not involved. Holding incompetent the record of a partition proceeding between defendant and another, which recognized the lines in issue here. *Huffman v. Pearson*, 193.

§ 10. Issues and Burden of Proof.

In an action between adjoining owners over their line, where two issues on the line's location were submitted to the jury, the first as to plaintiffs' contention and the second based on defendants' contention, in the absence of an agreement that one or the other is the true line, a negative answer to the first issue does not perforce result in an affirmative answer to the second issue. *McCanless v. Ballard*, 701.

Where disputes arise over boundary lines confusion might be avoided and simplicity might be served by a single issue for the jury, substantially as follows: Where is the true location of the dividing line between the lands of the plaintiffs and those of the defendants? *Ibid.*

In a processioning proceeding, under C. S., 361-364, to establish a boundary line between adjoining landowners, applicable only to disputes as to its true location, the plaintiff is the actor and has the burden of establishing the true location of the dividing line. *Ibid.*

§ 11. Instructions.

In a processioning proceeding, where one corner is admitted and a partition in 1867 gives the course and distance from the admitted corner to an old blacksmith shop, the location of which was in dispute, it was error for the court to charge the jury that, if they should find that the line was run and

BOUNDARIES—*Continued.*

marked and a corner made at the old blacksmith shop in 1867, they should answer the issue for plaintiff, as it assumes that the location of the blacksmith shop had been fixed. *Huffman v. Pearson*, 193.

BROKERS AND FACTORS.

§ 11. Commissions—Sale Not Completed.

When a real estate broker procures a purchaser acceptable to the owner and a valid contract is drawn up between them, the broker's commission for finding a purchaser is earned, although the purchaser later defaults. *Harrison v. Brown*, 610.

Where the court authorizes a receiver to sell the property upon specified terms, through a certain real estate broker whose commissions are fixed by the court's order, upon a valid offer, and acceptance by the receiver, in accordance with the court's order, payment of the commission cannot be resisted either on the ground that the sale was not consummated, or because, in his acknowledgment of an assignment of the commission the receiver inserted "unless otherwise ordered by the court" and the court thereafter annulled the offer and acceptance. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS.

§ 1c. Breaking and Entering Otherwise Than Burglariously.

On indictment for burglariously breaking and entering a room in a building used as a sleeping apartment, where the State's witness testified to a felonious breaking and entry, and identified defendant as the perpetrator, motion to nonsuit under C. S., 4643, is properly denied. *S. v. Reynolds*, 40.

CARRIERS.

(See Railroads.)

§ 8. Loading, Unloading, etc., Demurrage.

Generally it is the duty of the consignee to unload cars within the free time given by tariffs of carrier, and the obligation to pay demurrage is classified with other obligations imposed by law, and, where the failure of the consignee to unload is caused entirely by a *vis major*, the consignee is not liable for demurrage. *R. R. v. Glover*, 594.

In an action by a railroad against a shipper to recover demurrage for failure of defendant to unload car, evidence of defendant, that he bought soybeans for export in 1939 and 1940 and that due to the war abroad ships could not be had in which to load the beans, does not make out a case of *vis major*. *Ibid.*

CERTIORARI.

(See Appeal and Error § 18; Criminal Law §§ 69 and 76.)

CONSTITUTIONAL LAW.

§ 3b. Construction—Delegation of Powers.

Where the written Constitution does not otherwise direct, the Legislature may distribute powers and functions of government as it may deem proper for the best interests of the public and may make the action of administrative

boards, set up for that purpose, final and conclusive. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

§ 4c. Delegation of Power.

The jurisdiction of the Commissioner of Banks over banking institutions of the State is regulatory and was delegated by the General Assembly in the lawful exercise of its powers. *Pue v. Hood, Comr. of Banks*, 310.

The duties imposed upon, and the discretion vested in, the Commissioner of Banks bears only upon the question of whether certain conditions exist justifying the creation of a proposed bank and they do not constitute the exercise of legislative or judicial powers. *Ibid.*

Where the written Constitution does not otherwise direct, the Legislature may distribute powers and functions of government as it may deem proper for the best interests of the public and may make the action of administrative boards, set up for that purpose, final and conclusive. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

The provision of the North Carolina Constitution, relating to trial by jury (Art. I, sec. 19), does not require court review of the valuation of land for taxation, or determination of such value by a jury in a *de novo* hearing, and will not support resort to *certiorari* for that purpose. *Ibid.*

§ 6b. Power and Duty to Determine.

This Court never anticipates a question of constitutional law and it will not decide the challenged constitutionality of an act when the appeal may be disposed of on other grounds. *S. v. Baynes*, 425; *S. v. High*, 434.

§ 10½. Elections.

The filing fee required by the Primary Law, Michie's Code, 6023, 6034, is in no sense a tax within the meaning of Art. II, sec. 14, or a local law as condemned by Art. II, sec. 29, of the Constitution of North Carolina. *McLean v. Board of Elections*, 6.

So long as there is no unjust discrimination, the Legislature has full authority, by the exercise of its police power, to control and regulate primaries and elections, unaffected by any provisions of the Federal Constitution except the Fourteenth Amendment; and Primary Law, ch. 101, Public Laws 1915, as amended by the Australian Ballot Act, ch. 164, Public Laws 1929, is reasonable and constitutional. *Ibid.*

§ 15c. Taking of Property for Public Use.

The principle, forbidding the taking of private property for public use without just compensation, is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. N. C. Const., Art. I, sec. 17. *Yancey v. Highway Com.*, 106.

§ 17. Right of Trial by Jury—Tax Valuation.

The provision of the North Carolina Constitution, relating to trial by jury (Art. I, sec. 19), does not require court review of the valuation of land for taxation, or determination of such value by a jury in a *de novo* hearing, and will not support resort to *certiorari* for that purpose. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

§ 23. Full Faith and Credit (Divorce).

Judgment herein upholding conviction of bigamy, 220 N. C., 445, vacated or set aside and cause remanded for a new trial, in accordance with opinion of

CONSTITUTIONAL LAW—*Continued.*

the Supreme Court of the United States, rendered 21 December, 1942, on *certiorari*. And defendants will recover their costs. *S. v. Williams*, 609.

§ 26. Necessity for Indictment.

Legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide other means of trial for offense than by indictment and trial by jury. *S. v. Shine*, 237.

§ 27. Right of Trial by Jury.

In a prosecution for murder the action of the judge in discharging one of the jurors, upon finding he was incapacitated, and substituting the thirteenth juror in his stead, was timely and proper and in accordance with the statute. Public Laws 1931, ch. 103, as amended by Public Laws 1939, ch. 35. *S. v. Broom*, 324.

Legislature has power to designate the unlawful possession and transportation of intoxicants a petty misdemeanor and to provide other means of trial for offense than by indictment and trial by jury. *S. v. Shine*, 237.

CONTRACTS.

§§ 3, 4. Offer and Acceptance.

A contract results from an offer to sell for cash and acceptance, duly communicated in the terms of the offer, and the payment of the money and the delivery of the property belong to the performance of the contract, to take place simultaneously or as concurrent acts. *McAden v. Craig*, 497.

§ 6. Form and Requisites.

A contractor must stand by the words of his contract and if he will not read it, he alone is responsible for his omission. The signing of a written contract is not necessarily essential to its validity. It is equally efficacious if a written contract is prepared by one party and delivered to the other party, and acquiesced in by the latter without objection. *Coppersmith v. Ins. Co.*, 14.

§ 7d. Gaming—Note.

The joint purchase, by two persons on a warehouse floor of tobacco for purposes of resale, is not such a gambling contract as to make a promissory note given for the purchase price unenforceable. *Roberts v. Grogan*, 30.

§ 8. General Rules of Construction.

The parties may agree, at the time of the execution of a note, that it shall be paid only in a certain manner, *i.e.*, out of a particular fund, by foreclosure of collateral, or collection of rents, etc. *Holding* valid a written stipulation in a note that, in case of default and sale of the security, the makers should not be liable for any deficiency. *Jones v. Casstevens*, 411.

If the words employed in a contract are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have, and such intent is to be gathered from the entire instrument, so that context, subject matter, and surrounding circumstances may affect the meaning of words used. *Ibid.*

In arriving at the intention of parties to a contract, its purpose, the nature of the offer, the circumstances of its making and the objects in mind and the ends in view must be regarded, and words capable of more than one meaning are to be given that meaning it is apparent the parties intended them to have. *McAden v. Craig*, 497.

CONTRACTS—*Continued.*

In respect of the manner of executing a contract, the general custom in the business or trade may be considered in arriving at the intention of the parties. *Ibid.*

An insurance policy is only a contract and is interpreted by the rules applicable to other written contracts, and the intention of the parties is the object to be obtained. Terms which are clear and unambiguous, are to be taken and understood in their plain, ordinary and popular sense. *Bailey v. Ins. Co.*, 716.

§ 12. Reformation.

In an action for reformation it must be alleged and shown, by evidence clear, strong and convincing, that the instrument failed to express the true agreement, because of a mistake common to *both parties*, or of the mistake of one party induced by the fraud or inequitable conduct of the other party, and that by reason of ignorance, mistake, fraud, or undue advantage something material has been inserted, or omitted, contrary to the intention of the parties. *Coppersmith v. Ins. Co.*, 14.

§ 16. Performance—In General.

A contract results from an offer to sell for cash and acceptance, duly communicated in the terms of the offer, and the payment of the money and the delivery of the property belong to the performance of the contract, to take place simultaneously or as concurrent acts. *McAden v. Craig*, 497.

Following the consummation of a contract, the plaintiff must show that he offered to perform his part of the agreement, or that such offer was rendered unnecessary by the refusal of the defendant to comply, before an action will lie, either for its breach or for specific performance. *Ibid.*

§ 18. Waiver of Breach.

The strict performance of a contract may be waived, and a person for whose benefit a thing is to be done may dispense with any part of it, or circumstance in the mode of performance; and where he is present to receive performance, whatever is not exacted is considered waived. *Lithographic Co. v. Mills*, 516.

§ 20. Conditions Precedent to Right of Action.

Following the consummation of a contract, the plaintiff must show that he offered to perform his part of the agreement, or that such offer was rendered unnecessary by the refusal of the defendant to comply, before an action will lie, either for its breach or for specific performance. *McAden v. Craig*, 497.

§ 22. Evidence and Burden of Proof.

In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specific credits should be allowed. *Jones v. Casstevens*, 411.

§ 23. Evidence, Sufficiency and Nonsuit.

In an action to recover for merchandise sold, plaintiff's claim was admitted and judgment accordingly. On defendant's counterclaim for breach of exclusive agency contract, evidence that exclusive agency agreement was for one year only and so acknowledged, and damages claimed after one year awarded. *Held:* No breach and judgment on counterclaim reversed. *Teich v. Le Compte*, 94.

CORPORATIONS.

§ 8. Stockholders—Rights and Liabilities.

A reorganized corporation must deal with its dissenting stockholders in accordance with the contract existing between the corporation and such stockholders; and the fact that dissenting stockholders profit and secure a preference by the action of the majority will not divest them of their legal rights, when properly asserted. *Bank v. Cotton Mills*, 305.

In the reorganization of a corporation under C. S., 1217, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty to assert whatever legal rights they may have, which in their opinion will be for the best interest of the estates involved. *Ibid.*

While a dissenting stockholder, desiring to prevent the reorganization of the corporation, must act with reasonable promptness; this does not prevent a stockholder from asserting his rights under the contract contained in his preferred stock, in lieu of attacking the plan of reorganization. *Ibid.*

No cause of action arose under the provisions contained in the preferred stock until the declaration of a dividend, in violation of the terms thereof, and an action by a preferred stockholder to enjoin said payment is not barred by the three-year statute of limitations, unless instituted more than three years after the declaration thereof. *Ibid.*

§ 14. Stock Subscription Agreements.

Failure of a corporation, within a reasonable time (here over ten years), to show compliance with a condition precedent to a subscription to its capital stock, makes the subscription unenforceable; and payments by the subscriber, without knowledge of the failure, do not constitute a waiver. *Building Corp. v. Cooper*, 281.

§ 16. Dividends.

In a suit under C. S., 1178, to compel the directors of a corporation to declare and pay dividends from profits for 1940 and 1941, in excess of the capital stock and working capital reserve, where all profits prior to 1940, except small amounts paid in dividends, had been, by consent of all stockholders, allowed to remain in the treasury as a surplus, and the directors having taken no action in good faith to designate a reserve as working capital for 1940 and 1941, there is no error in a judgment directing the payment of cash dividends from the profits for those years. *Amick v. Coble*, 484.

Where, in a suit to require that dividends be paid stockholders, C. S., 1178, it was not error for the court to refuse to order all profits, as shown by the company's statements for the years 1940-41, paid out in cash dividends, such profits being subject to deductions for income taxes, allowance for bad debts, and inventory adjustments; but the court erred in allowing a ten per cent deduction from such profits to cover probable expense, and the order should have directed the payment in dividends of the full net profits, the company showing at the end of 1941 a surplus of $38,000 on a capital of $7,800. *Ibid.*

§ 31. Title and Authority of Receiver.

A receiver is an administrative officer of the court and can exercise only the powers and authority conferred upon him by the court. He is controlled by its proper decrees and the property he administers is *in custodia legis*. *Harrison v. Brown*, 610.

In dealing with others a receiver cannot evade the ordinary incidents of contractual and property rights on the ground that he is an agent of the court,

CORPORATIONS—*Continued.*

and, within the limits of the authority expressly conferred, he may impose liability upon the estate. *Ibid.*

While C. S., 1209 (4), empowers receivers to convey the estate, the receiver of a corporation may not ordinarily dispose of a substantial part of the assets entrusted to him without authority of court, and sales are subject to confirmation unless authority to convey on specified terms is expressly given. *Ibid.*

§ 34. Claims Against Receiver.

Where the court authorizes a receiver to sell the property upon specified terms, through a real estate broker whose commissions are fixed by the court's order, upon a valid offer, and acceptance, all in accordance with the court's order, payment of the broker's commission cannot be resisted either on the ground that the sale was not consummated, or because, in his acknowledgment of an assignment of the commission to plaintiff, the receiver inserted "unless otherwise ordered by the court" and the court thereafter annulled the offer and acceptance. *Harrison v. Brown*, 610.

§ 38. Rights to Reorganize.

C. S., 1217, gives the Superior Court, in a receivership, power to approve a plan for the reorganization of a corporation, which provides for the readjustment of the company's capital structure, when approved by a majority in interest of the stockholders; but it cannot affect either the rights of dissenting stockholders not parties to the receivership, or the vested rights of parties to the proceedings unless they fail to appeal from judgment entered therein. *Bank v. Cotton Mills*, 305.

§ 39. Reorganization—Requisites and Conditions.

A rorganized corporation must deal with its dissenting stockholders in accordance with the contract existing between the corporation and such stockholders; and the fact that dissenting stockholders profit and secure a preference by the action of the majority will not divest them of their legal rights, when properly asserted. *Bank v. Cotton Mills*, 305.

§ 48. Forfeiture, Charter, Service Process.

The continuance of corporate existence, by C. S., 1193, makes service of process, Michie's Code, 1137 (a), on a corporation, after it has been adjudged a bankrupt and its charter forfeited under C. S., 1190, reasonable notice and a valid service. These statutes must be read *in pari materia*. *Sisk v. Motor Freight, Inc.*, 631.

COSTS.

(In Civil Action and Special Proceeding.)

§§ 2, 3. Ejectment—Partition.

Where, in partition, defendant pleads sole seizin, and the trial of such issue results in a verdict for plaintiffs, and in judgment that the parties are tenants in common and appointing a commissioner to make sale, plaintiff is entitled to all costs from the filing of the answer through the final judgment below, that is, while the case was pending on the civil issue docket. This does not include costs of reference which may be taxed in the discretion of the court, C. S., 1244 (6). Costs of the partition proceeding, exclusive of the issue of sole seizin, may be apportioned. C. S., 1244 (7). *Bailey v. Hayman*, 58.

C. S., 1241, allowing plaintiffs costs as of course, upon recovery, in an action involving title to real estate, and C. S., 1243, providing apportionment of costs

COSTS—*Continued.*

in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed *in pari materia*, and any conflicts, etc., reconciled. *Ibid.*

The Superior Court is without power to modify former orders of the Supreme Court taxing costs on former appeals, as costs thus incurred are no part of Superior Court costs, but are taxed by, and executions issue out of, the Supreme Court. C. S., 1256. *Ibid.*

COURTS.

§ 2a. Superior, Jurisdiction—Appeal from County or Recorder's Court.

On appeal from Superior Court, from conviction of possession of intoxicants, where record shows defendant bound over to county court with no record of his having been tried in that court or any appeal therefrom, Superior Court is without jurisdiction. C. S., 4607. *S. v. Patterson*, 179.

Upon conviction in county court of a misdemeanor within final jurisdiction of such court, upon warrant sworn out before justice of the peace, on appeal the Superior Court has jurisdiction to try defendant upon same warrant without a bill of indictment. *S. v. Shine*, 237.

A motion to dismiss an action in a recorder's court, for want of jurisdiction of either the parties or the subject matter of the suit, challenges plaintiff's right to maintain his action in such court and defendants have the right to appeal from an order overruling same. An appeal being denied, petition for writ of *certiorari* is the proper remedy. *Williams v. Cooper*, 589.

Where a preliminary question, such as jurisdiction, has been decided against movant by the Superior Court, on appeal or other review from an inferior court, the cause should be remanded to the inferior court for trial. *Held:* Trial *de novo* in the Superior Court means a new trial after final judgment in an inferior court. *Ibid.*

§ 2d. Appeals from Justices of the Peace.

The jurisdiction of the Superior Court in appeals from justices of the peace is entirely derivative, and is no greater than that of a justice's court. *Held:* On appeal from a justice's court, the Superior Court has no jurisdiction to enter judgment on a counterclaim in excess of two hundred dollars. *Leonard v. Coble*, 552.

§ 4. Terms.

When a judge leaves the bench and the term is left to expire by limitation, the term ends then and there. *S. v. McLeod*, 142.

§ 4½a. Records Proven.

Court records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. *S. v. Tola*, 406.

§ 4½b. Records Amended.

The power of a court to amend its own records is exclusive and the proper procedure is by application to the court to have its record speak the truth. *S. v. Tola*, 406.

§ 5. Establishment and Terms.

When judge leaves bench and term is left to expire by limitation, term ends. *S. v. McLeod*, 142.

COURTS—*Continued.*

Judge of inferior court has no authority after term ends to modify judgment from which appeal taken and permit withdrawal of appeal. *Ibid.* Where term of inferior court is not expressly stated by statute, term cannot last beyond time for next succeeding term, unless trial in actual progress extends it. *Ibid.*

§ 7. Jurisdiction.

The judge of an inferior court has no authority, after the term has ended, to modify a judgment, from which defendant had appealed, and permit defendant to withdraw his appeal. *S. v. McLeod*, 142.

The recorder's court of the city of Reidsville has jurisdiction, concurrent with the Superior Court, in a civil action founded on a contract wherein the sum demanded does not exceed $1,500.00, under Public-Local Laws 1915, ch. 324, as amended by Public Laws 1931, ch. 24, and Public-Local Laws 1915, ch. 324, is not in violation of N. C. Constitution, Art. II, sec. 29. *Williams v. Cooper*, 589.

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§ 2. Intent.

The *scienter*, the guilty knowledge and intent, must exist at the time of the commission of the offense. It matters not when acquired so long as defendant acted knowingly and feloniously at the time. *S. v. Tennant*, 277.

§ 5a. Mental Capacity—In General.

On a plea of insanity the capacity of the accused to distinguish right from wrong in respect to the act charged as a crime, at the time of its commission, is made the test of his responsibility, and not his capacity to distinguish right from wrong in the abstract. Such capacity need not be general, it is only necessary that it relate to the particular act in question. *S. v. Hairston*, 455.

§ 5b. Mental Capacity—Intoxicants.

On a plea of drunkenness as a defense, the burden is on defendant to satisfy the jury that, at the time of the commission of the crime, he was intoxicated to such an extent that he did not know what he was doing, or trying to do, and was incapable of forming a criminal intent. *S. v. Hairston*, 455.

Where a defendant drinks intoxicants for the purpose of giving him nerve and courage to commit a crime, then such voluntary drunkenness will not be an excuse for a crime committed while thus intoxicated. *Ibid.*

§ 8. Principals.

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty; and this rule is applicable to the crime of embezzlement. *S. v. Ward*, 316.

§ 14½. Jurisdiction—Appeals to Superior Court.

Upon conviction in county court of misdemeanor within final jurisdiction of such court, upon a warrant sworn out before justice of the peace, on appeal the Superior Court has jurisdiction to try defendant upon same warrant without bill of indictment. *S. v. Shine*, 237.

§ 19. Nolle Prosequi.

Where defendant indicted for murder, solicitor's election to ask for a verdict for murder in the second degree or manslaughter, is equivalent to a *nolle prosequi* on the capital charge. *S. v. Dove*, 162.

§ 26. Burden of Proving Plea—Former Jeopardy.

Under a plea of former jeopardy the burden of proof is upon the defendant to show that he is entitled to his release. *S. v. Tola*, 406.

§ 29b. Evidence of Guilt of Other Offenses.

In a criminal case there is no error in permitting the prosecutor to ask the defendant, when on the stand as a witness, questions about collateral matters, including charges of other criminal offenses and degrading actions, for the purpose of impeaching his credibility, if the questions are based on information and asked in good faith; but upon denial by defendant, the State is bound

CRIMINAL LAW—*Continued.*

by his answers, and the extent of such questions is largely in the sound discretion of the trial judge. *S. v. Broom*, 324; *S. v. Neal*, 546.

§ 29e. Motive—Malice.

In a trial for murder, evidence is competent to show threats, motive and that ill feeling had existed for some time between defendant and deceased; but the weight of such evidence is solely for the jury. *S. v. Allen*, 145.

§ 31f. Identification by Sight.

The State has a right to have a prisoner identified, and there was no error, in a prosecution for rape, for the court to require the defendant to stand up, while prosecutrix was on the witness stand, and allow her to identify him as the man who assaulted her on the night in question. *S. v. Vincent*, 543.

§ 32a. Circumstantial Evidence—Ill Feeling.

On a criminal prosecution for felonious burning and attempting to burn a barn, in the absence of proof that the fire was of incendiary origin, evidence that tracks of defendant were found at the scene of the fire and that there was ill feeling between the parties, other circumstances being consistent with innocence, is insufficient to support a conviction. *S. v. Cromer*, 35.

In trial for rape, evidence of brick found by pool of blood shortly after and near scene of crime with hairs on it, competent, defendant having admitted assault but denied striking victim with brick. *S. v. Harris*, 157.

§ 33. Confession.

The admission in evidence of defendant's confession to certain material facts was proper, the trial judge having heard evidence as to the circumstances and character of the alleged confession, and found the same voluntary and made without inducement, threat, or hope of reward. *S. v. Harris*, 157.

The competency of a confession is a preliminary question for the trial court and its admission will not be disturbed, where the court finds, upon proper evidence, that it was made freely and voluntarily. *S. v. Hairston*, 455.

In a prosecution for murder against several defendants, alleged confessions, separately made by defendants, are competent only against the defendant making the confession and are incompetent against any codefendant, who was not present at the time the alleged confession was made and who did not by word or conduct acquiesce therein. *S. v. Bonner*, 344.

§ 34a. In General.

While the State, by offering in evidence a statement of a defendant in a criminal action, is not precluded from showing that the facts were different, it presents the statement as worthy of belief. *S. v. Todd*, 346.

§ 40. Evidence—Character of Defendant as Substantive.

In trial of homicide case, evidence as to general character of person killed is immaterial and incompetent; yet, there are exceptions, one that where there is evidence of self-defense general character of deceased as violent and dangerous man is admissible, to which State may reply only as to deceased's general reputation for peace and quiet. *S. v. Champion*, 160.

§ 41a. Examination of Witness.

In prosecution for rape the victim may testify to defendant's having improper relations with her, in the absence of evidence that she was not men-

tally competent on account of injuries received from the assault. *S. v. Harris*, 157.

The prosecuting witness, on trial upon indictment of a man for carnal knowledge of a female under sixteen years of age, may give competent testimony as to her age. *S. v. Trippe*, 600.

§ 41b. Cross-examination.

The scope of cross-examination must rest largely in the discretion of the trial court. *S. v. Tola*, 406.

Leading questions by the prosecutor have uniformly been held to be in the discretion of the trial judge and no prejudice therefrom is discernible here. *S. v. Harris*, 157.

In a criminal prosecution it has been uniformly held that the defendant, when on the stand as a witness, may be cross-examined as to infractions of the law, tending to show the commission of crimes, for the purpose of impeaching his credibility, provided such questions are based on information and asked in good faith, and the extent of such questions is largely in the sound discretion of the trial judge. *S. v. Neal*, 546.

§ 41d. Examination of Witness—Evidence Impeaching.

Credit of witness may be impeached by proof that he has made representations inconsistent with his present testimony, and it is not necessary to inquire of the witness, before offering the disparaging testimony, whether he has or has not made such representations. *S. v. Wellmon*, 215.

In a criminal case there is no error in permitting the prosecutor to ask the defendant, when on the stand as a witness, questions about collateral matters, including charges of other criminal offenses and degrading actions, for the purpose of impeaching his credibility, if the questions are based on information and asked in good faith; but upon denial by defendant, the State is bound by his answers and affirmative evidence, in contradiction of his denial, is incompetent. *S. v. Broom*, 324.

During the cross-examination of the defendant, in a murder trial, the prosecution, for the purpose of impeaching his credibility, asked him if he had not been engaged in committing abortions on women, showing certain articles and instruments and also asking defendant if they were not instruments used for producing abortions, all of which defendant denied, though admitting the ownership of some of the articles—the court then allowing the instruments to be offered in evidence. *Held:* Prejudicial error, and subsequent withdrawal of these exhibits comes too late. *Ibid.*

§ 41e. Evidence—corroboration.

Testimony in corroboration of the prosecuting witness is competent and proper, since her evidence was subject to attack. *S. v. Harris*, 157.

§§ 41f, 41g. Credibility of Defendant—Competency and Credibility of Accomplices.

Ordinarily, a defendant in a criminal action is competent and compellable to testify for or against a codefendant, provided his testimony does not incriminate himself. *S. v. Norton*, 418.

A conviction may be had in a criminal prosecution on the unsupported testimony of an accomplice. *S. v. Reddick*, 520.

CRIMINAL LAW—*Continued.*

§ 41h. Testimony—Husband and Wife Against Each Other.

A wife cannot be compelled to testify against her husband in a criminal action; but when she takes the stand in his behalf, she is subject to cross-examination in the same manner and to the same extent as any other witness. C. S., 1802. *S. v. Tola*, 406.

In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. C. S., 1802. *S. v. Rice*, 634.

§ 44. Time of Trial, Continuance—In General.

The granting of a motion for a continuance is in the discretion of the trial court and the decision thereon is not reviewable except for a clear abuse of discretion. *S. v. Allen*, 145.

There is no abuse of discretion in denying a motion for continuance, in a trial for murder, on the ground that defendant's most material witness (his mother) was ill and unable to attend, where the record discloses no request to take the deposition of the witness nor what her testimony would have been. *Ibid.*

The granting or refusing a continuance, even in capital case, is matter in sound discretion of trial judge and is not reviewable in the absence of manifest abuse. *S. v. Wellmon*, 215.

§ 45. Preliminary—Venire from Another County.

Motion, in a trial for murder, to have a venire from some other county, based upon newspaper articles appearing on the day set for the trial, properly refused where no abuse of discretion is shown. *S. v. Allen*, 145.

§ 47. Consolidating Indictments for Trial.

In criminal prosecutions for murder, upon separate indictments against several defendants, consolidated and tried together, it was prejudicial error to deny motions for separate trials, the State relying solely for conviction upon alleged separate confessions, incriminating defendants not present and who had not acquiesced therein. *S. v. Bonner*, 344.

The court is authorized by statute 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 that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C. S., 4622. *S. v. Norton*, 418.

In the trial of two or more defendants, who have been separately indicted and their cases consolidated for trial, each defendant is entitled to have the jury pass upon his guilt or innocence independently of the guilt or innocence of his codefendant. *Ibid.*

§ 52b. Taking Case from Jury and Nonsuit.

Upon motion of nonsuit, in a criminal action, the evidence is to be considered in the light most favorable for the State, but evidence which merely suggests the possibility of guilt, or which raises only a conjecture, is insufficient to require submission to the jury. *S. v. Todd*, 346.

In a prosecution of several persons for murder, where the State based its entire case against this defendant upon his written statement, which admitted that he drove the automobile, in which all defendants were riding, to the scene of the crime and that the two, who perpetrated the crime, got out and entered the filling station of deceased, shot him to death, and robbed him, the

entire statement tending to relieve this defendant from any guilty knowledge of their purpose and failing to afford any substantial evidence that he aided or abetted in the perpetration of the robbery or murder, his motion of nonsuit should have been sustained. *Ibid.*

When upon the trial of a criminal action, the State produces its evidence and rests, and the defendant preserves his exception to the refusal of his motion for judgment as of nonsuit, and, after offering evidence and the case closed, defendant renews his motion for judgment as of nonsuit, the court must act, not only in the light of the evidence of the State, but of all the evidence, C. S., 4643; and, in such case, the defendant is entitled to the benefit only of his exception to the refusal of the latter motion. *S. v. Norton*, 418.

In a criminal prosecution for violating a city ordinance, which prohibited the peddling of wares, publications or other merchandise on the *sidewalks* in the business section, the evidence showing only that one of defendants sold papers in the *street* and not on the sidewalks of the prohibited area, a motion for judgment as of nonsuit should have been allowed. *S. v. Baynes*, 425.

In a prosecution for murder, the evidence for the State showing that deceased was attempting to force his way into the house of his brother, with whom he was not on good terms, was cursing and violently threatening his brother, had broken the back window through which he had projected his head and shoulders, when his brother, the defendant, standing about ten feet inside the house, shot and killed deceased, with no warning whatever, *held* defendant's motion for judgment of nonsuit was properly denied. *S. v. Baker*, 428.

On the trial of an indictment for carnal knowledge of a female under sixteen years of age, C. S., 4209, where there was competent evidence for the State tending to show that defendant, a man 48 years of age, had sexual intercourse with the State's witness at a time when she was only 14 years of age and that she had theretofore never had sexual intercourse with any person, motion for judgment of nonsuit was properly denied. *S. v. Trippe*, 600.

§ 52c. Directed Verdict.

In a prosecution for murder, the evidence for the State showing that deceased was attempting to force his way into the house of his brother, with whom he was not on good terms, was cursing and violently threatening his brother, had broken the back window through which he had projected his head and shoulders, when his brother, the defendant, standing about ten feet inside the house, shot and killed deceased, with no warning whatever, *held* defendant's motion for a directed verdict was properly denied. *S. v. Baker*, 428.

§ 53a. Instructions.

A judge is not required by law to state the contentions of the litigants. *S. v. Colson*, 28.

Where a judge in his charge states the contentions of one of the parties he must also fairly state the contentions of the adversary party. A failure to do so will be held for error. *Ibid.*

When there is evidence of several sales, a charge that if the jury finds that defendant made a sale of intoxicating liquor they should return a verdict of guilty is not objectionable as being too general. *Ibid.*

The judge, in his instructions, should not assume that a material fact has been proven beyond a reasonable doubt, in the absence of an admission of such fact. *S. v. Anderson*, 148.

CRIMINAL LAW—*Continued.*

There are no stereotyped forms of instructions. The trial judge has wide discretion in presenting the issues to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proven. *S. v. Howard*, 291.

Where, in a prosecution for embezzlement, under C. S., 4268, and C. S., 4269, counsel for defendant, in argument to the jury, commented on the severity of the minimum punishment in C. S., 4269, and the court in its charge read to the jury C. S., 4269, and the indictment thereunder and also a portion of the general probation statute, carefully cautioning them that they were to decide the issue upon the evidence without regard to the punishment which might or might not be imposed. *Held:* The charge was proper and not prejudicial. *S. v. Ward*, 316; *S. v. Howard*, 291.

The charge of the court must be considered as a whole; and if when so considered, it presents the law fairly and correctly, there is no ground for reversing the judgment, though some of the expressions, when standing alone, may be regarded as erroneous. *S. v. Hairston*, 455.

In a criminal prosecution an exception to a statement in the court's charge which merely gives the defendant's contentions as to evidence of his good character, is untenable, where no exception was taken at the time nor was it called to the attention of the court before verdict, and the court prior thereto had correctly charged the jury on "character evidence." *S. v. Reddick*, 520.

A reversal of conviction in a criminal case will not be granted for failure of the court to instruct upon a subordinate feature, in the absence of a special request therefor. Applying the rule to the failure of the court to charge the jury that they should receive the testimony of accomplices and accessories with caution. *Ibid.*

§ 53b. Instructions—Evidence.

In a prosecution for the sale of wines with a content of over 20% alcohol, there being evidence *pro* and *con*, the defendant is not prejudiced by a charge to return a verdict of not guilty, if the jury should find that the drinks in question contained more alcohol than is allowed by law, if they should further find that the drinks came in bottles labeled twenty per cent or less alcoholic content when received by defendant. *S. v. Tola*, 406.

§ 53c. Instructions—Burden of Proof.

In a criminal prosecution for violating a city ordinance, which prohibited the peddling of wares, publications or other merchandise on the *sidewalks* in the business section, there is prejudicial error in a charge to the jury that if they should find that another defendant sold the prohibited articles on the public *streets* within the area, he would be guilty. *S. v. Baynes*, 425.

§ 53e. Instruction—Opinion.

The use of the words "the State has offered evidence which tends to show," in a charge to the jury, does not constitute an expression of opinion in violation of C. S., 564. *S. v. Howard*, 291.

There are no stereotyped forms of instructions. The trial judge has wide discretion in presenting the issues to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly without expressing an opinion as to whether any fact has been fully or sufficiently proven. *Ibid.*

CRIMINAL LAW—*Continued.*

§ 54c. Jury's Disagreement and Then Agreement.

The court's refusal to discharge the jury, in a prosecution for the carnal knowledge of a female under sixteen, upon their report of disagreement after five hours of deliberation, presents no ground for a new trial, there being no attempt to coerce them on the part of the judge and the jury, after further consideration, having reached a verdict. *S. v. Trippe*, 600.

§ 54e. Special Verdict.

A special verdict rendered, in a criminal prosecution, under Public-Local Laws 1941, ch. 259, which does not find that the lot, upon which junk or scrapped automobiles are kept, is within 200 yards of a residential area as defined in the Act, is insufficient to support a verdict of guilty. *S. v. High*, 434.

§ 55. Mistrial in Capital Case Discretionary.

The ordering of a mistrial in a case less than capital is a matter of discretion. *S. v. Dove*, 162.

§ 56. Motion in Arrest of Judgment.

A defendant cannot take advantage after conviction of alleged deficiencies in a bill of indictment, where he has made no motion to quash or in arrest of judgment. *S. v. Tennant*, 277.

Defect in warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment. *S. v. Tola*, 406.

§ 59. Motion to Set Aside Verdict Discretionary.

A motion to set aside a verdict is addressed to the sound discretion of the trial court and a refusal to grant it is not reviewable. *S. v. Reddick*, 520.

§ 65. Attack Judgment and Sentence.

An exception to a judgment of imprisonment in the State's Prison for a term of three years, pronounced against a defendant upon a verdict of guilty of receiving stolen goods, knowing them to be stolen, is untenable, since the judgment is within the statute. C. S., 4250. *S. v. Reddick*, 520.

§§ 69, 76. Certiorari.

When a criminal action has been brought from an inferior court to the Superior Court by writ of *certiorari*, the Superior Court acts only as a court of review. *S. v. King*, 137.

Where criminal prosecution in inferior court results in conviction and sentence to imprisonment, no appeal taken, and sentence suspended upon a certain condition, which was violated and original sentence ordered into effect, from which defendant appealed to Superior Court, defendant's remedy is only by *certiorari* and in the absence of such writ, the Superior Court acquires no jurisdiction. *Ibid.*

§ 80. Failure to Docket Capital Case.

A capital case will be docketed and dismissed for failure to perfect appeal, on motion of Attorney-General, after the Court has examined the record proper for errors on its face. *S. v. Bryant*, 642.

Where no appeal has been perfected, in a capital case, defendant's brief cannot be considered and his only course is to present the matter to the pardoning authorities. *Ibid.*

CRIMINAL LAW—*Continued.*

The defendants having failed to prosecute their appeals, the motion of the Attorney-General to docket and dismiss is allowed. However, pursuant to custom in capital cases, the Supreme Court has examined the record for errors upon its face, and finds none. *S. v. Phillips*, 440; *S. v. Bryant*, 642; *S. v. Wilfong*, 746.

§§ 81a, 81b. Matters Reviewable—Capital Case.

On an appeal from conviction of capital offense, the Supreme Court, of its own motion, will examine record for error committed at the trial, both those where no exception was taken as well as those appearing on the face of record. *S. v. Wellmon*, 215.

DAMAGES.

§ 1a. In General—Compensatory—Limited.

Negligence is a breach of duty imposed by law, which ordinarily entitles the injured party to recover all damages proximately resulting therefrom; but, when the law prescribes a duty with a limitation of liability appendant, the injured party must take the law as he finds it, and measure his rights accordingly. *Russ v. Telegraph Co.*, 504.

§ 1a. Compensatory—Minerals.

In the absence of a willful or intentional trespass or conversion, the measure of damages is the value of the mineral as it lay in the mine, immediately after severance from the realty, with no deduction for labor in effecting the severance. *Jones v. McBee*, 152.

§ 2. Direct and Remote—Tort.

In a "pure tort" case, the wrongdoer is responsible for all damages directly caused by his misconduct, and for all indirect or consequential damages which are the natural and probable effect of the wrong. *Binder v. Acceptance Corp.*, 512.

Special damages, which are unusual and not the common consequence of the wrong complained of or implied by law, must be pleaded specifically and in detail. *Ibid.*

§ 7. Conditions—Punitive.

Punitive damages may be awarded if the wrongful act is accompanied by recklessness or other unlawful and wanton aggravation, or if a tort is willful, wanton or committed under circumstances of gross negligence. *Binder v. Acceptance Corp.*, 512.

§ 8. Punitive—Submission to Jury.

The trial court did not err in submitting an issue as to punitive damages, in an action for the wrongful taking and conversion of an automobile, where there was evidence that defendants' agents demanded the car of plaintiff in a high-handed and summary manner, on a prominent city street, alleging default in payments which was untrue, and seizing the car without legal process, to the humiliation of plaintiff. *Binder v. Acceptance Corp.*, 512.

§ 10. Pleaded—Special Damages Must Be.

Special damages, which are unusual and not the common consequence of the wrong complained of or implied by law, must be pleaded specifically and in detail. *Binder v. Acceptance Corp.*, 512.

DAMAGES—*Continued.*

In an action to recover damages for the wrongful taking and conversion of plaintiff's automobile by defendants, where there was allegation and evidence of special damages for the loss of the use of the automobile, a charge by the trial court, that plaintiff might be awarded damages for the loss of the use of the automobile wrongfully seized, in addition to its value, was proper. *Ibid.*

§§ 12, 13. Sufficiency Evidence—Special and Instructions.

In an action to recover damages for the wrongful taking and conversion of plaintiff's automobile by defendants, where there was allegation and evidence of special damages for the loss of the use of the automobile, a charge by the trial court, that plaintiff might be awarded damages for the loss of the use of the automobile wrongfully seized, in addition to its value, was proper. *Binder v. Acceptance Corp.*, 512.

DECLARATORY JUDGMENT ACT.

§ 1. In General.

The broad terms of the Declaratory Judgment Act do not confer upon the court unlimited jurisdiction, and court will not entertain an *ex parte* proceeding or a proceeding adversary in form, which lacks essentials of genuine controversy. *Tryon v. Power Co.*, 200.

§ 2a. Subject of Action.

The Declaratory Judgment Act requires only that plaintiff shall allege and show that a real controversy, arising out of their opposing contentions, exists between or among parties, and that the relief prayed will make certain that which is uncertain and secure that which is insecure. *Tryon v. Power Co.*, 200.

Mere difference of opinion between parties as to whether plaintiff has right to purchase or condemn, or otherwise acquire the utility of the defendant, without declaration in complaint of plaintiff's intent to exercise its rights under the franchise contract, does not constitute a controversy under Declaratory Judgment Act. *Ibid.*

§ 2b. Legal Controversy.

While the courts will not decide mere academic questions which are altogether moot, it is required only (by Declaratory Judgment Act) that plaintiff shall allege and show that a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities, exists between, or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. *Tryon v. Power Co.*, 200.

§ 2c. That Matter Might Be the Subject of a Legal Action.

It need not be alleged and shown by plaintiff, in an action under the Declaratory Judgment Act, that the question in difference between the parties is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action. *Tryon v. Power Co.*, 200.

DEEDS.

§§ 5, 6. Delivery and Deed of Gift.

A deed is consummated by its delivery by the grantor and its acceptance by the grantee and becomes operative from that time. In other words, when

DEEDS—*Continued.*

the time of delivery is established, the time when the deed took effect is also established as a matter of law. The "making" of deeds of gift used in C. S., 3315, means such consummation. *Turlington v. Neighbors*, 694.

§§ 5, 6. Delivery and Deed of Gift—Presumption.

Ordinarily, a deed is presumed to have been delivered on the date appearing in the deed; the presumption, however, continues only in the absence of proof as to the actual time of delivery, and is rebutted by such proof. *Turlington v. Neighbors*, 694.

§ 11. Construction.

The court seeks to ascertain the intent of the parties as embodied in the entire instrument, and each part of a deed must be given effect if this can be done by reasonable interpretation, and it is only after subjecting an instrument to this principle of construction that a subsequent clause may be rejected as repugnant or irreconcilable. *McNeill v. Blevins*, 170.

A deed is construed by its "four corners," taking all of its provisions together and, in case of an apparent repugnance, adopting that construction which is most consonant with the intent of the parties. *Krites v. Plott*, 679.

§ 13a. Estate Created.

Where the entire estate, in unmistakable terms, is given the grantee in a deed, both in the premises and *habendum*, the warranty being in harmony therewith, other clauses in the deed, repugnant to the estate and interest conveyed, will be rejected. *McNeill v. Blevins*, 170.

A deed from husband to wife, reserving a life estate and containing the following, after the conveyance clause and description, "the party of the first part makes this deed to his beloved wife Cora Thompson her lifetime at her death it is to go to Roy Plott and his wife Hattie Plott and their heirs," conveys a fee simple remainder to Roy Plott and his wife, Hattie Plott, following the life estates. *Krites v. Plott*, 679.

§ 15. Reservations and Exceptions.

The fee simple title conveyed to A in a regular warranty deed is not divested or limited by a clause, after the description, that the grantors "doth hereby except or retain our life's maintenance from off the land described above, and after our expiration this land with all interest and appurtenances thereto shall all belong to said A and his children only." *McNeill v. Blevins*, 170.

DESCENT AND DISTRIBUTION.

§ 1. Nature in General—Land.

Under the common law rule an estate in land, not accompanied by actual possession, was not inheritable. There was no full and complete ownership until the owner had made an actual corporal entry into the lands. *Severt v. Lyall*, 533.

Our present statute, C. S., 1654, requires only legal seizin or the present right to possession to make an interest in land inheritable. *Ibid.*

§ 10a. Collateral Heirs—In General.

Where the owner of land, subject to an outstanding life estate, predeceases the life tenant, intestate and without issue, his interests, being vested, passes to his heirs who are then *in esse*, that is in life, or born within ten lunar months thereafter. C. S., 1654. *Severt v. Lyall*, 533.

DIVORCE.

§§ 1, 2. In General—Purely Statutory.

Under N. C. Constitution, Art. II, sec. 10, divorce is purely statutory, and is under no obligation to the ecclesiastical or common law. *Byers v. Byers*, 298.

§ 2a. Separation.

A divorce *a vinculo* can be had under Public Laws 1937, ch. 100, upon the ground that the parties "have lived separate and apart for two years," without requiring that the separation shall be by deed of separation or other mutual agreement. *Oliver v. Oliver*, 219 N. C., 299, clarified and recent divorce statutes discussed. *Byers v. Byers*, 298.

The bare fact of living separate and apart for a period of two years, standing alone, will not constitute a cause of action for divorce. There must be an intention on the part of one of the parties to cease cohabitation, shown to have existed from the beginning of the separation period. *Ibid.*

The law does not contemplate a repudiation by the husband of all marital obligations, and the fact that the husband has, during the separation, provided reasonable support for his wife will not defeat his divorce. *Ibid.*

§ 9. Instructions.

In an action for divorce under Public Laws 1937, ch. 100, a charge by the court to the jury that the living separate and apart, required by that statute, means living separate and apart under mutual agreement only, was erroneous entitling plaintiff to a new trial. *Byers v. Byers*, 298.

§ 13. Alimony Without Divorce.

Alimony against husband cannot be awarded in an adverse proceeding in absence of allegation, evidence or finding that he was party at fault, but it may be so awarded in judgment by consent. *Edmundson v. Edmundson*, 181.

§ 14. Enforcement of Payment of Alimony.

Under consent judgment, in action by husband against his wife where no pleadings were filed, providing for certain money payments in lieu of alimony by the husband and that it shall be as binding upon plaintiff as if rendered under C. S., 1667, and, upon proper cause shown, shall subject him to such penalties as the court may require in case of contempt of its orders, court may commit plaintiff upon his failure to make payments required. *Edmundson v. Edmundson*, 181.

It appearing in a suit to recover unpaid installments of alimony on a Louisiana judgment, that certain payments were not credited upon the amounts claimed due, it was error necessitating a new trial, for the court to instruct the jury, if they found the facts as the evidence tended to show, to answer the issue, as to the amount due, the full amount claimed. *Webb v. Webb*, 551.

An action may be maintained in this State to recover unpaid installments of alimony decreed under a Louisiana judgment; and the North Carolina statute of limitations, rather than the Louisiana statute of prescription, applies. *Ibid.*

§ 19. Foreign Decrees.

Accordant with the general rule, it is held in Florida that, where an action for divorce is brought by a resident against a nonresident, a divorce may be granted the nonresident on a cross-bill, albeit the local statute, in general terms, requires plaintiff in an action for divorce to have been a resident of the State for a designated period. *In re Gibson*, 350.

DIVORCE—*Continued.*

Judgment upholding conviction of bigamy, after Nevada divorce, vacated or set aside and cause remanded for new trial in accordance with opinion of Supreme Court of the United States. *S. v. Williams*, 609.

DRAINAGE DISTRICTS.

§§ 6, 15. Levy of Assessments—Notice—Enforcement of Payment.

Where drainage district, comprising lands in two counties, is duly created and organized under drainage act, and proper assessment rolls are made and filed in each county, it is error for court to dismiss action in nature of mortgage foreclosure for collection of assessments against lands. C. S., 7990. Assessment rolls duly made and filed against lands in drainage district, with a map of lands assessed, are liens upon such lands and map itself should be sufficient notice to subsequent purchaser. *Nesbit v. Kafer*, 48.

EJECTMENT.

§ 9a. To Try Title—Nature of Action.

The plea of sole seizin converts a special proceeding for partition into a civil action to try title, and it becomes in effect an action in ejectment, and title being directly involved, there can be no partition until the issue thus raised is adjudicated. *Bailey v. Hayman*, 58.

§ 15. Sufficiency of Evidence.

In an action to recover land, where plaintiff offered a chain of title to himself, and his predecessors in title, from a common source from which defendant asserts title, by deeds recorded and set out in his complaint, containing the same description of the *locus in quo* as is admitted in defendant's answer, a *prima facie* case for plaintiff is made out and defendant's motion to nonsuit was properly overruled. C. S., 567. *Stone v. Guion*, 548.

ELECTIONS.

§ 24a. Nomination for Office.

The Primary Law provides an exclusive method for nomination of candidates for office, and requires that a candidate must file a notice of candidacy, sign a pledge to abide by the result of the primary and pay a filing fee; and only those who have complied with the Primary Law shall have their names printed on the official ballot. The plaintiff not having complied with these provisions is not the nominee of any political party. *McLean v. Board of Elections*, 6.

EMBEZZLEMENT.

§ 1. In General—Aiders and Abettors.

Where two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty; and this rule is applicable to the crime of embezzlement. *S. v. Ward*, 316.

§ 2. Intent.

The fraudulent intent which constitutes a necessary element of the crime of embezzlement, within the meaning of the statute, is the intent to embezzle or otherwise willfully and corruptly use or misapply the property of the

EMBEZZLEMENT—*Continued.*

principal or employer for purposes other than those for which the property is held. *S. v. Howard*, 291.

Evidence of intent to return money embezzled, or that money fraudulently misapplied was after discovery repaid, or that defendant secured no personal benefit, will not necessarily exculpate the defendant, or compel his acquittal. *Ibid.*

In a prosecution for aiding and abetting in the crime of embezzlement, the question of fraudulent intent is for the jury; intent to eventually return the money wrongfully used does not, necessarily, exculpate defendant. *S. v. Ward*, 316.

§ 3. Property.

The word "property," as used in the embezzlement statute, C. S., 4269, is sufficiently all inclusive to embrace money, goods, chattels, evidences of debt and things in action. *S. v. Ward*, 316.

§ 4. Defenses.

Evidence of intent to return money embezzled, or that money fraudulently misapplied was after discovery repaid, or that defendant secured no personal benefit, will not necessarily exculpate the defendant, or compel his acquittal. *S. v. Howard*, 291; *S. v. Ward*, 316.

§ 5. Indictment—Bill of Particulars.

Where defendant, in prosecution for embezzlement, moves for a bill of particulars and the State files an answer in which it sets up certain detailed information respecting the charges in the indictment, and the matter is not pressed further by defendant, the rule in *S. v. Van Pelt*, 136 N. C., 633, has no application. *S. v. Ward*, 316.

Where it is alleged in an indictment that defendant embezzled a specified sum and the evidence shows that defendant embezzled a much smaller sum, there is no fatal variance. *Ibid.*

§ 6. Evidence—Competency and Sufficiency—Accessories.

There is no statute or rule of evidence which excludes the testimony given by one, who has entered a plea of guilty to embezzlement, against another who aided and abetted him in the crime. *S. v. Howard*, 291.

§ 7. Sufficiency of Evidence.

In a criminal prosecution for embezzlement, evidence *held* sufficient to convict showing that defendants came into the State, opened a place of business and, within less than a month, bought on consignment goods to a large amount, disappeared from the State with the bulk of the goods and without paying therefor, and upon arrest in a distant state nothing of value accounted for. *S. v. Tennant*, 277.

Evidence of intent to return money embezzled, or that money fraudulently misapplied was after discovery repaid, or that defendant secured no personal benefit, will not necessarily exculpate the defendant, or compel his acquittal. *S. v. Howard*, 291.

§ 8. Instructions.

There are no stereotyped forms of instructions. The trial judge has wide discretion in presenting the issues to the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and

EMBEZZLEMENT—*Continued.*

fairly without expressing an opinion as to whether any fact has been fully or sufficiently proven. *S. v. Howard*, 291.

Where, in a prosecution for embezzlement, under C. S., 4268, and C. S., 4269, counsel for defendant, in argument to the jury, commented on the severity of the minimum punishment in C. S., 4269, and the court in its charge read to the jury C. S., 4269, and the indictment thereunder and also a portion of the general probation statute, carefully cautioning them that they were to decide the issue upon the evidence without regard to the punishment which might or might not be imposed. *Held:* The charge was proper and not prejudicial. *Ibid.; S. v. Ward*, 316.

EMINENT DOMAIN.

§ 1a. In General.

The principle, forbidding the taking of private property for public use without just compensation, is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina. N. C. Const., Art. I, sec. 17. *Yancey v. Highway Com.*, 106.

EQUITABLE LIEN.

§§ 1, 2. Nature—Property Subject to Equitable Lien.

Any agreement in writing, however informal, made by the owner of real or personal property, upon a valid consideration, by which an intention is shown that the property shall be security for the payment of money by him, creates an equitable lien upon the property described, which is enforceable against the property in the hands of the original contractor, his heirs, administrators, executors, voluntary assignees and purchasers or encumbrancers with notice. *Winborne v. Guy*, 128.

§ 3. Proceedings to Enforce.

Suit in equity to foreclose is proper remedy to enforce equitable lien. *Winborne v. Guy*, 128.

§ 4. Evidence, Sufficiency of.

Where a will devised testator's home to his wife for life, but authorized a sale under certain conditions, one of which was that a debt should be first paid from the proceeds, without disposing of the surplus, if any, and all of the children and heirs of testator entered into an agreement in writing, acknowledging the amount of the debt to be first paid from proceeds of the land, upon a sale for partition, an equitable lien on the land is created, and judgment sustaining demurrer to a suit to enforce same, after the death of testator's wife, was error. *Winborne v. Guy*, 128.

EQUITY.

§ 2. Laches.

Equity will not afford relief to those who sleep on their rights, or whose condition is traceable to that want of diligence which may fairly be expected of a reasonable and prudent man. *Coppersmith v. Ins. Co.*, 14.

A party having notice must exercise ordinary care to ascertain the facts, and if he fails to investigate, when put upon inquiry, he is chargeable with all knowledge he would have acquired, had he made the necessary effort to learn the truth. *Blankenship v. English*, 91.

The tendency of the courts is to measure laches by the pertinent statute of limitations, wherever the latter is applicable to the situation, and not to

EQUITY—*Continued.*

regard the delay of the actor to assert the right within that period effective as estoppel, unless upon special intervening facts demanding that exceptional relief. *Creech v. Creech*, 656.

The estate of the mortgagee, acquired by his purchase at his own sale, being voidable only, may be confirmed by any means by which an owner of a right in equity may part with it: (1) By a release under seal. (2) By such conduct as would make assertion of his right fraudulent against the mortgagee or a third person and which would, therefore, operate as an estoppel. (3) By long acquiescence after full knowledge. *Peedin v. Oliver*, 665.

Where plaintiff, a mortgagor, attended the foreclosure sale by defendant, his mortgagee, who had the property bid off by his son and plaintiff, with full knowledge of the facts, rented the land for several years from the purchaser, who had acquired a life estate therein, allowed improvements to be made and vacated the same, after expiration of the life estate, on notice from the purchaser, all without protest for nearly eight years, his laches is such as to be fatal to any rights which he may have had. *Ibid.*

ESTATES.

§ 9a. Life Estates—Creation and Termination—Personalty.

A life estate, with remainder over to designated persons, may be created in personalty, at least personalty of a more permanent nature, directly by will, without the intervention of a trustee: and money comes within the rule. *Williard v. Weavil*, 492.

When the owner of a fee conveys it to one for life with remainder to another, the remainderman takes a vested estate by purchase and becomes a new *stirps* of inheritance, or new stock of descent. *Severt v. Lyall*, 533.

Where the owner of land, subject to an outstanding life estate, predeceases the life tenant, intestate and without issue, his interests, being vested, passes to his heirs who are then *in esse*, that is in life, or born within ten lunar months thereafter. C. S., 1654. *Ibid.*

§ 15. Estates in Personalty—Life Estates.

A life estate, with remainder over to designated persons, may be created in personalty, at least personalty of a more permanent nature, directly by will, without the intervention of a trustee; and money comes within the rule. *Williard v. Weavil*, 492.

A bequest of property "*quae ipso usu consumuntur*" conveys the absolute title and is not a subject of a life estate. *Ibid.*

ESTOPPEL.

§ 4. Of Record—Effect.

A judgment regularly entered by a court of competent jurisdiction, however erroneous, so long as it stands, operates as an estoppel against the party instituting the action. *In re Young*, 708.

§ 6d. Ground of—Conduct.

Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation is begun, change his ground, and put his conduct upon another and different consideration, thus mending his hold. He is estopped from so doing. *McAden v. Craig*, 497.

The estate of the mortgagee, acquired by his purchase at his own sale, being voidable only, may be confirmed by any means by which an owner of a right

ESTOPPEL—*Continued.*

in equity may part with it: (1) By a release under seal. (2) By such conduct as would make assertion of his right fraudulent against the mortgagee or a third person and which would, therefore, operate as an estoppel. (3) By long acquiescence after full knowledge. *Peedin v. Oliver*, 665.

Where plaintiff, a mortgagor, attended the foreclosure sale by defendant, his mortgagee, who had the property bid off by his son and plaintiff, with full knowledge of the facts, rented the land for several years from the purchaser, who had acquired a life estate therein, allowed improvements to be made and vacated the same, after expiration of the life estate, on notice from the purchaser, all without protest for nearly eight years, his laches is such as to be fatal to any rights which he may have had. *Ibid.*

EVIDENCE.

I. Judicial Notice
- 2. Of Judicial, Legislative and Executive Acts of Officers and Agencies of This State. Moyle v. Hopkins, 33.

II. Burden of Proof
- 6. In General. Mfg. Co. v. R. R., 330.
- 10. Counterclaims. Teich v. LeCompte, 94.

IV. Credibility of Witnesses, Impeachment and Corroboration
- 15. In General. Moyle v. Hopkins, 33.
- 16. Of Parties Interested in the Event. Mfg. Co. v. R. R., 330.
- 19. Evidence Competent to Corroborate Witness. Moyle v. Hopkins, 33.

V. Examination of Witnesses
- 21. Direct Examination. Moyle v. Hopkins, 33.
- 22. Cross-examination. Mfg. Co. v. R. R., 330.

VI. Relevance and Materiality of Evidence
- 24. In General. Mfg. Co. v. R. R., 330; Roberts v. Grogan, 30.

VII. Competency of Evidence in General
- 29. Evidence at Former Trial or Proceedings. S. v. Moore, 356.
- 32. Transactions or Communications with Decedent. Lister v. Lister, 555; Cartwright v. Coppersmith, 573; Turlington v. Neighbors, 694.

VIII. Documentary Evidence
- 33. Governmental Acts and Documents of This State. Mfg. Co. v. R. R., 330.
- 33½. Court Records. S. v. Tola, 406.
- 35½. Municipal Records. S. v. Baynes, 425.
- 36. Accounts, Ledgers and Records and Private Writings. Mfg. Co. v. R. R., 330.

X. Parol or Extrinsic Evidence Affecting Writings. Jones v. Casstevens, 411.

XI. Hearsay Evidence
- 42c. Res Gestae. Stone v. Guion, 548.
- 43a. Declarations—In General. Stone v. Guion, 548; Lister v. Lister, 555.

XII. Expert and Opinion Evidence
- 45a. In General. Patrick v. Treadwell, 1; S. v. David, 242.
- 45b. Facts Not Within Personal Knowledge of Witness. Patrick v. Treadwell, 1.
- 45c. Technical Basis for Expert Testimony. S. v. David, 242.
- 48c. Expert Testimony of Accountant. S. v. Ward, 316.
- 49. Invasion of Province of Jury. Patrick v. Treadwell, 1; S. v. David, 242.
- 50. Conclusiveness of Expert and Opinion Evidence. S. v. Tola, 406.

§ 2. Judicial Notice of State Institutions.

The courts will take judicial notice of the character of State Institutions established by public statutes. *Moyle v. Hopkins*, 33.

§ 6. Burden of Proof—Negligence.

The burden of the issue is never shifted from the plaintiff, in an action for damages by negligence, and the most a *prima facie* case does, when made out, is to warrant, but not compel, a verdict for the plaintiff and therefore to carry the case to the jury. A *prima facie* case does not impose upon the defendant the burden of rebuttal by a preponderance of the evidence. *Mfg. Co. v. R. R.*, 330.

§ 10. Counterclaims.

In an action to recover for merchandise sold, plaintiff's claim was admitted and judgment accordingly. On defendant's counterclaim for breach of exclu-

sive agency contract, an issue was submitted to the jury on evidence that exclusive agency agreement was for one year only and so acknowledged by plaintiff, and damages claimed after one year awarded. *Held:* Record shows no breach of agency contract and judgment on counterclaim reversed. *Teich v. Le Compte*, 94.

§ 15. Credibility, etc.—Inmate of Asylum.

The fact that a witness has been an inmate of the Caswell Training School (for the feeble-minded) is a subject of legitimate inquiry on cross-examination. *Moyle v. Hopkins*, 33.

§ 16. Parties Interested—Impeaching.

The interest of a party or of a witness, in the event of the cause, is a circumstance available to impeach him; and a witness may be asked any questions on cross-examination which tend to test his accuracy, to show his interest or bias, or to impeach his credibility. *Mfg. Co. v. R. R.*, 330.

§ 19. To Impeach—Inmate of Asylum.

The fact that a witness has been an inmate of the Caswell Training School (for the feeble-minded) is a subject of legitimate inquiry on cross-examination. *Moyle v. Hopkins*, 33.

§ 21. Direct Examination—Recall, Discretion.

The court refused to permit the plaintiff to recall her husband as a witness, after plaintiff had closed her rebuttal testimony, for the purpose of contradicting another witness, who had been permitted without objection to return to his business, when it appeared that plaintiff's husband had been on the stand after the testimony he was called to contradict had been given. *Held:* In the discretion of the trial judge. *Moyle v. Hopkins*, 33.

§ 22. Cross-Examination—Impeaching.

The interest of a party or of a witness, in the event of the cause, is a circumstance available to impeach him; and a witness may be asked any questions on cross-examination which tend to test his accuracy, to show his interest or bias, or to impeach his credibility. *Mfg. Co. v. R. R.*, 330.

§ 24. Relevance and Materiality—In General.

It is not necessary that evidence should bear directly on the issue. It is admissible if it tends to prove the issue or constitutes a link in the chain of proof, although alone it might not justify a verdict. *Mfg. Co. v. R. R.*, 330.

Where defendant by answer denies liability on a note on the ground that it was given on a gambling contract, and also that the note is barred by the three-year statute of limitations, evidence that defendant did not adopt the word "seal" after his name on the note was properly excluded. The absence of *allegata* is as fatal as the absence of *probata*. *Roberts v. Grogan*, 30.

§ 29. Former Trial on Proceeding—Bastardy.

The admission of evidence, in a bastardy proceeding, that defendant changed lawyers after trial of the cause in the recorder's court, is not error. *S. v. Moore*, 356.

§ 32. Transactions, etc.—Deceased.

While in the trial of an action, based upon a paper writing, against the personal representative of a decedent, the plaintiff, or other party interested in

EVIDENCE—*Continued.*

the event, is incompetent to testify that he saw the deceased person actually sign the particular paper, C. S., 1795, he is competent to prove that the paper in question or the signature thereto is in the handwriting of the deceased. *Lister v. Lister*, 555.

The restriction upon the introduction of testimony in the trial of an action, contained in C. S., 1795, refers by its express terms to a person who is a party to the action, or interested in the event, and prohibits his examination as a witness in his own behalf, or in behalf of a party succeeding to his title or interest, against a deceased person, concerning a personal transaction or communication between him and the deceased. *Cartwright v. Coppersmith*, 573.

The blind husband of a grantee, in a deed reserving a life estate in the grantor, who was present and heard the grantor acknowledge its execution and delivery, is a competent witness to prove such execution and delivery, his wife having died prior to the grantor and the title therefore being vested in her son. His evidence discloses no personal transaction or communication and he is not a party in interest within C. S., 1795. *Turlington v. Neighbors*, 694.

The grantee in one of two deeds under attack in this suit, who is also a party to the suit and one of the heirs of the grantor in both deeds, is clearly incompetent as a witness to prove the execution and delivery of such deeds. C. S., 1795. *Ibid.*

§ 33. Tax Values.

Evidence of tax value listings on real estate, owned by parties to an action, is not competent on an issue of valuation, while evidence of such listings on personal property is competent on such an issue. *Mfg. Co. v. R. R.*, 330.

§ 33½. Court Record.

Court records may be identified by testimony, but their contents cannot be altered, nor their meaning explained by parol. *S. v. Tola*, 406.

§ 35½. Municipal Records.

Records of the governing body of a municipal corporation are properly admissible in evidence to prove the facts stated therein; and evidence will not be admitted, in a collateral action, to vary or contradict such record, when regular and complete on its face. *S. v. Baynes*, 425.

Where statutes expressly require a full and accurate record of the governing body of a municipality to be kept, parol evidence is not admissible to aid, extend or supplement the record; but when there is no such statutory requirement, and the record contains nothing to show whether or not any action whatever was taken on a certain matter, parol evidence is admissible to show that action was actually taken, though it should be allowed with caution. *Ibid.*

A lost or destroyed municipal record may be proven by parol. *Ibid.*

Where an ordinance is adopted by the governing board of a municipality and that fact is shown, there is a presumption in favor of the validity of the ordinance. *Ibid.*

§ 36. Private Writings.

The trial court's refusal to grant plaintiff's motion, for an order that defendant produce certain written statements signed by witnesses, employees of defendant, which statements these employees testified they used to refresh their recollection before becoming witnesses, was not error, the granting of

such motion being in the discretion of the court, C. S., 1823, 1824, and the record failing to show that the requirements of these statutes were met by plaintiff, or that the written statements were in court. *Mfg. Co. v. R. R.*, 330.

§ 40. Exceptions to Parol Evidence Rule.

In proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specific credits should be allowed. *Jones v. Casstevens*, 411.

§ 42c. Admissions by Parties.

Where, in an action to recover lands and rents therefor, defendant in her answer admits her possession of the lands described in the complaint, refers to the same deeds and plot as alleged in the complaint and offered in evidence, admits that the description covers the lands in question, her assignment of error, based on plaintiff's failure to sufficiently describe the land, cannot be sustained. *Stone v. Guion*, 548.

§ 43a. Declarations by Parties—In General.

The declarations of parties to suits are always admissible against, though not for, them. *Stone v. Guion*, 548.

Declarations, in the interest of the party making them, are incompetent as evidence; the law does not allow a party to make evidence for himself and those who claim under him. Check stubs *held* incompetent. *Lister v. Lister*, 555.

Declarations of a deceased person cannot be introduced in evidence by his personal representative, unless they are a part of the same conversation or statements proven by the opposite party. *Ibid.*

§ 45a. Expert and Opinion—In General.

Opinion testimony of experts is only admissible in cases of necessity, where the proper understanding of the facts in issue requires some explanation. *Patrick v. Treadwell*, 1.

There are two avenues through which expert opinion evidence may be presented to the jury: (a) By testimony of the witness based on his personal knowledge or observation; and (b) by testimony of the witness based on a hypothetical question addressed to him, in which pertinent facts are assumed to be so found by the jury. *S. v. David*, 242.

§ 45b. Expert and Opinion, Facts Beyond Knowledge of Witness.

The tendency to liberalize the rule in opinion evidence when it tends to aid the jury in the search for truth, even when the opinion of the expert, based on peculiar knowledge or skill and experience, is given as to the ultimate question in issue, should not be relaxed to the extent of opening the door to the statement of an evidential fact in issue beyond the knowledge of the witness. *Patrick v. Treadwell*, 1.

§ 45c. Expert and Opinion—Technical Basis.

There are two avenues through which expert opinion evidence may be presented to the jury: (a) By testimony of the witness based on his personal knowledge or observation; and (b) by testimony of the witness based on a hypothetical question addressed to him, in which pertinent facts are assumed to be so found by the jury. *S. v. David*, 242.

EVIDENCE—*Continued.*

An expert witness may base his opinion partly on facts of his own observation and partly on factual evidence of other witnesses, hypothetically presented. *Ibid.*

Opinion of one expert witness, based upon opinion of another such witness, is incompetent as evidence. *Ibid.*

§ 48c. Expert—Accountant.

A witness, offered by the State, who had been in the auditing and accounting business for over 10 years and an auditor for the State for 8 years, was found by the court to be an expert accountant and allowed to testify as such: *Held* sufficient and ruling not reviewable. *S. v. Ward*, 316.

§ 49. Expert and Opinion, Invading Province of Jury.

While it has been frequently held that expert testimony should be excluded when it invades the province of the court or jury, or when it expresses an opinion on the very issues of fact before the jury, this rule is not inflexible and is subject to exceptions; for example, the opinions of physicians as to cause of death, sanity, prognosis of disease or injury, and as to the ultimate facts in regard to matters of science, art, or skill. *Patrick v. Treadwell*, 1.

In an action to recover damages for alleged injuries to a child from a collision of two automobiles, where the child's arm had been broken and set in a cast a short time before the accident, and it was alleged that the collision threw the child from the seat and broke the cast on the arm and caused the fragments of bone to be knocked out of place, it was error to permit a doctor to state his belief that the automobile accident in question "caused the fragment of bone to be knocked out of place," or to testify, "I know the accident did it." *Ibid.*

In a prosecution for murder, where a pathologist testified as an expert, in answer to a properly framed hypothetical question, that he found no condition which might have caused death other than indications of carbon monoxide poisoning, it was error for the trial court to allow an expert toxicologist to testify that in *his* opinion the deceased came to her death from such poisoning, admittedly basing his opinion substantially upon the opinion evidence of the pathologist, which had not been incorporated in the hypothetical question addressed to him. *S. v. David*, 242.

§ 50. Conclusiveness of Expert.

The process or method used in ascertaining alcoholic content might be considered on the question of the credibility of an expert witness, but not on the competency or admissibility of his evidence. *S. v. Tola*, 406.

EXECUTION.

§ 4. Limitations on Issuance—Judgment Nisi.

No execution may issue on a judgment *nisi* until it is finally made absolute. *S. v. Clarke*, 744.

EXECUTORS AND ADMINISTRATORS.

§ 13c. Sale and Confirmation.

In proceedings before clerk to sell lands for partition or make assets, jurisdiction includes right to accept bid at public or private sale, and to compel purchaser to comply with his contract. *Wilson, Ex Parte*, 99.

EXECUTORS AND ADMINISTRATORS—*Continued.*

Order confirming sale is not final judgment, and, if purchaser fails to comply with bid, remedy is by motion in cause, and in like manner purchaser may compel execution of deed. *Ibid.*

In a special proceeding by an administrator to sell land to make assets to pay debts whether the bid be raised under authority of C. S., 86, and C. S., 2591, or motion be made by a party interested in the proceeds for an order of resale under C. S., 86, only, it is clear that a private sale is open to either course for ten days from the date and report of sale. During that period the bidder acquires no right of possession or title. He is merely a preferred bidder. *Howard v. Ray*, 710.

§ 29. Costs, Commissions and Attorneys' Fees.

Where one in a fiduciary capacity uses the trust funds for his own advantage and never accounts therefor until compelled to do so, he is liable for interest on the funds so used. *Holding* an executor and trustee liable for interest on amounts paid himself as attorney's fees. *Lightner v. Boone*, 421.

Ordinarily, in litigation over a fund in the nature of an *in rem* proceeding, such items of costs, as referee's allowances and stenographic reporter's bills, are paid out of the fund, although taxable in the discretion of the court, C. S., 1244 (6). *Holding* that, when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally. *Ibid.*

§ 30d. Personal Liability—Interest.

As a general rule personal liability of an executor or administrator to distributees for interest, where there has been delay in closing the estate, depends entirely upon whether the delay was reasonable or unreasonable under all the circumstances, the personal representative being free from liability where the delay was reasonable and chargeable with interest where the delay was unreasonable. *Lightner v. Boone*, 421.

Where one in a fiduciary capacity uses the trust funds for his own advantage and never accounts therefor until compelled to do so, he is liable for interest on the funds so used. *Holding* an executor and trustee liable for interest on amounts paid himself as attorney's fees. *Ibid.*

FIDUCIARIES.

§ 2. Duties and Liability.

In the reorganization of a corporation under C. S., 1217, executors, trustees, and other fiduciaries, holding stock in the corporation, not only have the right, but it is their duty to assert whatever legal rights they may have, which in their opinion will be for the best interest of the estates involved. *Bank v. Cotton Mills*, 305.

FRAUD.

§ 1. In General.

To establish actionable fraud, or deceit, it is generally recognized that the following essential facts must appear: (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does, in fact, deceive; (5) to the hurt of the injured party. The essentials of fraud and deceit discussed. *Ward v. Heath*, 470.

FRAUD—*Continued.*

§ 7. Waiver and Abandonment.

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, judgment of nonsuit is properly allowed. C. S., 441 (9). *Blankenship v. English*, 91.

§ 9. Burden of Proof.

A release, executed by the injured party and based on a valuable consideration, is a complete defense to an action for damages for the injuries, and, where the execution of such release is admitted or established by the evidence, the burden is on the plaintiff to prove matters in avoidance, such as fraud. *Ward v. Heath*, 470.

§ 11. Evidence, Sufficiency.

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, judgment of nonsuit is properly allowed. C. S., 441 (9). *Blankenship v. English*, 91.

Where a literate plaintiff, five months after leaving the hospital where she was treated for injuries received in an automobile accident, signed and delivered with the advice and counsel of her husband, in consideration of a substantial sum, a full and complete release, after consulting her physicians and after many conferences with the insurance carriers of defendant, who represented to her and her husband that her injuries were temporary, the evidence is insufficient to establish fraud and deceit in the procurement of the release. *Ward v. Heath*, 470.

Imposition, fraud, duress, undue influence, or the like must be shown, by clear, strong and convincing evidence, to engraft a trust upon a gift of money by a parent to one of his children. A showing of favoritism, unequal division and detriment to other children is not sufficient. *Winner v. Winner*, 414.

GIFTS.

§ 1. Nature and Essentials.

Imposition, fraud, duress, undue influence, or the like must be shown, by clear, strong and convincing evidence, to engraft a trust upon a gift of money by a parent to one of his children. A showing of favoritism, unequal division and detriment to other children is not sufficient. *Winner v. Winner*, 414.

§ 3. Revocation.

Where a father conveyed a fee simple title in lands to one of his sons and such son's wife, and thereafter the father had prepared a deed, reconveying the same lands to himself, and requested such son and wife to execute the same, which they refused to do. *Held:* The evidence is insufficient to establish a constructive trust on the lands in favor of the father, or his heirs. *Winner v. Winner*, 414.

GUARDIAN AND WARD.

§ 8. Proof of Appointment and Attack.

Where a person adjudged incompetent for want of understanding to manage his own affairs, and court appoints a guardian, the ward is presumed to lack mental capacity and presumption continues unless rebutted in proper proceeding. *Sutton v. Sutton*, 274.

HABEAS CORPUS.

§ 3. To Obtain Custody of Children.

Habeas corpus is not available for divorced parents to determine the custody of their children. *In re Gibson*, 350.

Habeas corpus may be used to decide a contest between husband and wife, who are living in a state of separation, without being divorced, in respect to the custody of their children. It is not available as between other parties, nor as between divorced parents. C. S., 2241. *In re Young*, 708.

HOMESTEAD AND PERSONAL PROPERTY EXEMPTION.

§ 4. Homestead—In General.

The allotment of homestead suspends the running of the statute of limitations, C. S., 667, C. S., 728; N. C. Constitution, Art. X, sec. 2. *Cleve v. Adams*, 211.

§ 5. Homestead—Property in Which It May Be Assigned.

Conveyance of allotted homestead by mortgage does not destroy exemption or revive right to issue execution on outstanding and unsatisfied judgment, and homestead may be allotted in mortgaged land. *Cleve v. Adams*, 211.

§ 7. Homestead—Conveyance, Effect of.

The conveyance of an allotted homestead by mortgage does not destroy the exemption or revive the right to issue execution on an outstanding and unsatisfied judgment; and a homestead may be allotted in mortgaged land. C. S., 729; N. C. Constitution, Art. X, sec. 8. *Cleve v. Adams*, 211.

HOMICIDE.

II. Murder in the First Degree
- 4a. Intentional Killing of Human Being. S. v. Watson, 672.
- 4c. Premeditation and Deliberation. S. v. Watson, 672.

III. Murder in the Second Degree
- 6b. Malice. S. v. Debnam, 266.

IV. Manslaughter
- 7a. In General. S. v. Watson, 672.

V. Defenses
- 11. Self-defense. S. v. DeGraffenreid, 113; S. v. Anderson, 148; S. v. Baker, 428.
- 12. Defense of Others. S. v. Anderson, 148.
- 13. Defense of Property. S. v. Anderson, 148.

VII. Evidence
- 16. Presumptions and Burden of Proof. S. v. Meares, 436.
- 17. Relevance and Competency in General. S. v. Rice, 634.
- 18a. Dying Declarations. S. v. Debnam, 266.
- 18b. Threats. S. v. Rice, 634; S. v. Allen, 145.
- 20. Evidence of Motive and Malice. S. v. Allen, 145; S. v. Debnam, 266; S. v. Neal, 546.
- 21. Evidence of Premeditation and Deliberation. S. v. Neal, 546.
- 22. Evidence Competent on Issue of Self-defense. S. v. Champion, 160; S. v. Rice, 634.

VIII. Trial
- 25. Sufficiency of Evidence and Nonsuit. S. v. Todd, 346; S. v. Baker, 428.
- 27b. On Presumptions and Burden of Proof. S. v. Debnam, 266; S. v. Baker, 428; S. v. Meares, 436.
- 27c. On Question of Murder in First Degree. S. v. Allen, 145; S. v. Watson, 672.
- 27d. On Question of Murder in Second Degree. S. v. Debnam, 266.
- 27f. On Question of Defenses. S. v. DeGraffenreid, 113; S. v. Anderson, 148; S. v. Watson, 672.
- 28. Verdict. S. v. Meares, 436.

§ 4a. Intent.

A charge, in a prosecution for murder, that intent is an act or emotion of the mind, seldom, if ever, capable of direct or positive proof, but is arrived at by such just and reasonable deductions from the acts and facts proven, as the guarded judgment of a reasonably prudent and cautious man would ordinarily draw therefrom, is not objectionable as being contrary to the rule that the State must prove intent beyond a reasonable doubt. *S. v. Watson*, 672.

HOMICIDE—*Continued.*

§ 4c. Premeditation and Deliberation.

In a trial for murder, a charge that the elements of premeditation and deliberation are usually not provable by direct evidence and for that reason are susceptible of proof by circumstantial evidence, enumerating, merely as examples of such circumstantial evidence, ill will, previous difficulty between the parties, declarations of intent to kill, or a brutal or felonious manner of killing, is proper. *S. v. Watson*, 672.

§ 6b. Malice—Use of Deadly Weapon.

The *intentional* use of a deadly weapon in a homicide imports malice and raises a rebuttable presumption that defendant is guilty of murder in the second degree. The presumption is not raised by the mere use of such a weapon, *Holding* a charge erroneous which omitted the word "intentional." *S. v. Debnam*, 266.

§ 7a. Manslaughter, in General.

Where the court had charged that a killing under the influence of passion or in heat of blood, produced by reasonable provocation, constitutes manslaughter, and then added that this principle would seem to suggest, as the general rule, that reason should be, at the time, obscured by passion to such an extent as to render an ordinary man liable to act rashly and without reflection, and from passion rather than from judgment, there is no error. *S. v. Watson*, 672.

§ 11. Self-Defense.

On a plea of self-defense it is only necessary, in order to secure an acquittal, that the accused establish the facts upon which it is predicated to the satisfaction of the jury. *S. v. DeGraffenreid*, 113.

One who, being in his own home, fights in defense of himself, his family, and his habitation, is not required to retreat, regardless of the character of the assault. *S. v. Anderson*, 148.

Upon a trial for murder, where defendant, in his own home, killed a man in the act of making a violent assault upon defendant's wife, an uncorrected instruction that, unless the jury found that defendant was acting in his own defense, they must convict, was reversible error. *Ibid.*

Where a person's home has been violently invaded, under such circumstances as to make it appear that a warning or order to desist would be ineffective to stop an apparently murderous assault, the law does not require a challenge to the assailant before taking adequate measures for defense. *S. v. Baker*, 428.

§ 12. Defense of Others.

Under the law of self-defense a person not only may take life in his own defense but also in defense of another, who bears to him the relationship of wife, parent, or child. *S. v. Anderson*, 148.

One who, being in his own home, fights in defense of himself, his family, and his habitation, is not required to retreat, regardless of the character of the assault. *Ibid.*

Upon a trial for murder, where defendant, in his own home, killed a man in the act of making a violent assault upon defendant's wife, an uncorrected instruction that, unless the jury found that defendant was acting in his own defense, they must convict, was reversible error. *Ibid.*

HOMICIDE—*Continued.*

§ 13. Defense of Property.

One who, being in his own home, fights in defense of himself, his family, and his habitation, is not required to retreat, regardless of the character of the assault. *S. v. Anderson*, 148.

§ 16. Presumptions and Burden of Proof.

In a prosecution for murder, evidence which showed that defendant went to the home of deceased to ask if deceased had reported him to the officers as the owner of a still and sugar found near the homes of both, whereupon a fight ensued and defendant shot and killed deceased, who was unarmed, shooting him several times and in the back as deceased fled out of his house, around the yard and down to his barn, *held* ample to support a verdict of murder in the first degree. *S. v. Meares*, 436.

§ 17. Evidence, by Wife of Threats.

In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. C. S., 1802. *S. v. Rice*, 634.

§ 18a. Dying Declaration—Weight—Impeached.

A dying declaration is not conclusive, its weight and credibility being for the jury to determine. It may be impeached or corroborated by other statements of the deceased relative to the homicide, although such statements do not qualify as dying declarations. *S. v. Debnam*, 266.

§ 18b. Threats.

In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. C. S., 1802. *S. v. Rice*, 634.

In a trial for murder, evidence is competent to show threats, motive and that ill feeling had existed for some time between defendant and deceased; but the weight of such evidence is solely for the jury. *S. v. Allen*, 145.

§ 20. Evidence—Motive and Malice.

In a trial for murder, evidence is competent to show threats, motive and that ill feeling had existed for some time between defendant and deceased; but the weight of such evidence is solely for the jury. *S. v. Allen*, 145.

The *intentional* use of a deadly weapon in a homicide imports malice and raises a rebuttable presumption that defendant is guilty of murder in the second degree. The presumption is not raised by the mere use of such a weapon, *Holding* a charge erroneous which omitted the word "intentional." *S. v. Debnam*, 266.

Where defendant was charged with murder by cutting deceased with a knife, evidence was competent and material which showed that, after a prior difficulty on the night of the homicide between the same parties, the defendant repossessed the knife with which she shortly slew deceased, her conversation relative to the knife, her possession of same at the scene of the homicide, and that she said to deceased, if he did not let her see where she had before cut his hand, she would cut him to pieces. *S. v. Neal*, 546.

§ 21. Premeditation and Deliberation.

Where defendant was charged with murder by cutting deceased with a knife, evidence was competent and material which showed that, after a prior difficulty on the night of the homicide between the same parties, the defendant repossessed the knife with which she shortly slew deceased, her conversation relative to the knife, her possession of same at the scene of the homicide, and that she said to deceased, if he did not let her see where she had before cut his hand, she would cut him to pieces. *S. v. Neal*, 546.

§ 22. Evidence—Self-defense—General Character.

In trial of homicide case, evidence as to general character of person killed is immaterial and incompetent; yet, there are exceptions, one that where there is evidence of self-defense general character of deceased as violent and dangerous man is admissible, to which State may reply only as to deceased's general reputation for peace and quiet. *S. v. Champion*, 160.

Where, in support of a plea of self-defense, in a prosecution for murder, after defendant has testified that deceased was a man of violent character, it was prejudicial error for the State, on cross-examination of defendant's witnesses to elicit, over objection, evidence of deceased's general good character. *Ibid.*

In a homicide case, where there is a plea and evidence of self-defense, it is competent for defendant's wife to testify to a threat made by deceased against her husband, which she communicated to defendant before the killing. C. S., 1802. *S. v. Rice*, 634.

When the evidence of defendant's wife of threats made against her husband by deceased was excluded, in a homicide case in which there was a plea and evidence of self-defense, there is reversible error, which is not cured by the defendant being later permitted to testify to the threat as communicated to him by his wife. *Ibid.*

§ 25. Sufficiency of Evidence and Nonsuit.

In a prosecution of several persons for murder, where the State based its entire case against this defendant upon his written statement, which admitted that he drove the automobile, in which all defendants were riding, to the scene of the crime and that the two, who perpetrated the crime, got out and entered the filling station of deceased, shot him to death, and robbed him, the entire statement tending to relieve this defendant from any guilty knowledge of their purpose and failing to afford any substantial evidence that he aided or abetted in the perpetration of the robbery or murder, his motion of nonsuit should have been sustained. *S. v. Todd*, 346.

In a prosecution for murder, the evidence for the State showing that deceased was attempting to force his way into the house of his brother, with whom he was not on good terms, was cursing and violently threatening his brother, had broken the back window through which he had projected his head and shoulders, when his brother, the defendant, standing about ten feet inside the house, shot and killed deceased, with no warning whatever, *held* defendant's motion for judgment of nonsuit or for a directed verdict was properly denied. *S. v. Baker*, 428.

§ 27b. Instructions—Presumptions.

The *intentional* use of a deadly weapon in a homicide imports malice and raises a rebuttable presumption that defendant is guilty of murder in the second degree. The presumption is not raised by the mere use of such a

weapon, *Holding* a charge erroneous which omitted the word "intentional." *S. v. Debnam*, 266.

In a trial for murder, where defendant pleaded not guilty and did not go upon the stand, but admitted through counsel "that deceased died as a result of a gunshot wound inflicted by defendant," it was error for the court to charge the jury that, upon such admission, the law raises two presumptions, first that the killing was unlawful, and second that it was done with malice, and places the burden on the defendant to satisfy the jury that he was wholly justified on the ground of self-defense, or that there was no malice. *S. v. Baker*, 428.

In an instruction to the jury, in a murder trial, that if the defendant has failed wholly to satisfy you that he was fighting in self-defense, then he would be guilty of murder in the second degree at least, the use of the word "wholly" is not prejudicial error, when considered with the other portions of the charge which were correct. *S. v. Meares*, 436.

§ 27c. Instructions—Murder in First Degree.

Where, on a trial for murder, the evidence shows that defendant had been drinking and violent, and was left by his wife and two other companions on that account, and thereafter defendant walked six miles to his brother's, got a shotgun with which he shot a near neighbor, then walked seven miles to the home of his wife's mother and, upon being refused entrance, shot through the window and killed his wife's brother and entering the house dragged his wife into the yard and shot and killed her, motion for a directed verdict, for a crime less than first degree murder, properly refused. *S. v. Allen*, 145.

A charge that one is guilty of murder in the first degree, if he kills deceased "of his willful, deliberate and premeditated malice aforethought" is not harmful error, for these words constitute no real deviation from the stereotyped language usually used in defining first degree murder as the killing of a human being "with malice and with premeditation and deliberation." *S. v. Watson*, 672.

§ 27d. Instructions—Murder in Second Degree.

Intentional use of deadly weapon in homicide imports malice and raises rebuttable presumption that defendant is guilty of murder in second degree. *S. v. Debnam*, 266.

§ 27f. Instructions—Defense.

Upon the trial of a woman for murder, where she killed a man who violently and dangerously attacked her in her own home, after she repeatedly asked and demanded that he leave, a charge, that self-defense rests upon necessity, and cannot avail if there is a reasonable opportunity to retreat, and if the jury find, beyond a reasonable doubt, that she . . . killed deceased upon a *bona fide* apprehension of necessity, the verdict would be not guilty, is erroneous and new trial granted. *S. v. DeGraffenreid*, 113.

Upon a trial for murder, where defendant, in his own home, killed a man in the act of making a violent assault upon defendant's wife, an uncorrected instruction that, unless the jury found that defendant was acting in his own defense, they must convict, was reversible error. *S. v. Anderson*, 148.

There being no evidence whatever, in a prosecution for murder, that defendant retreated or attempted to retreat or withdraw from the combat, an exception cannot be sustained to a charge by the court that self-defense is the right which the law gives to a person, when he is in a place where he has a right to be and who is himself without fault. *S. v. Watson*, 672.

HOMICIDE—*Continued.*

An objection to a charge on the question of self-defense, where the court used the words "it would seem that the law should permit" the right of self-defense, rather than more positive words, is without merit, when the charge taken contextually leaves no basis for equivocation as to the legal right of self-defense. *Ibid.*

On a prosecution for murder, where the court had previously charged the jury correctly on the question of self-defense, there was no error in the court's suggestion to the jury that they ask themselves on this question: "Did he (defendant) act with ordinary firmness and prudence, under the circumstances as they reasonably appeared to him, and under the belief that it was necessary to kill in order to save his own life, or to protect his person from serious bodily harm?" *Ibid.*

§ 28. Verdict.

In a prosecution for murder, evidence which showed that defendant went to the home of deceased to ask if deceased had reported him to the officers as the owner of a still and sugar found near the homes of both, whereupon a fight ensued and defendant shot and killed deceased, who was unarmed, shooting him several times and in the back as deceased fled out of his house, around the yard and down to his barn, *held* ample to support a verdict of murder in the first degree. *S. v. Meares*, 436.

HUSBAND AND WIFE.

§ 6a. Ante-nuptial Contracts.

A man and a woman, contemplating marriage, may enter into a valid contract with respect to the property and property rights of each after marriage, and, in equity, such contracts will be enforced as written. *Stewart v. Stewart*, 387.

§ 6b. Ante-nuptial Contracts—Construed.

Ante-nuptial agreements are to be construed liberally so as to secure the protection of those interests which, from the very nature of the instrument, it must be presumed were thereby intended to be secured. *Stewart v. Stewart*, 387.

Like other contracts, an ante-nuptial agreement should be construed to effectuate the intention of the parties. Words are to be given, *prima facie*, their ordinary meaning and, if capable of more than one meaning, are to be given that meaning which it is apparent the parties intended them to have. *Ibid.*

Under an ante-nuptial agreement, which provided that the woman, if she should survive her husband, shall receive the proceeds from certain life insurance policies, including accrued dividends, on her husband's life, but payable to his estate, specifically described by name, number and amount, she is entitled to receive, from her husband's estate, the full face value of such policies, including all accrued dividends, free and discharged from any and all amounts borrowed by her husband against such policies as security. *Ibid.*

§ 11. Estate by Entirety—Not by Partition Deed.

An exchange of deeds by tenants in common, where the purpose is clearly partition, does not create or confer upon the parties any additional, or new, or different title, and each party to the partition holds precisely the same title he had before the partition, which only severs the unity of possession. Where a husband, in such a partition, is made a joint grantee with his wife he acquires no title. *Wood v. Wilder*, 622.

HUSBAND AND WIFE—*Continued.*

§ 16. Rights and Liabilities of Husband—Agent.

A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven. *Pitt v. Speight*, 585.

Where a husband operates his wife's farm, as her tenant, and purchases merchandise and material used for improvements thereon, in an action to recover therefor brought against the husband and wife, based upon a verified, itemized statement of account, there was error in refusing the wife's motion for judgment of nonsuit. *Ibid.*

The law presumes that where improvements are made on the wife's land by the husband they are made as gifts to the wife by the husband. *Ibid.*

§ 17. Husband as Tenant.

Where a husband operates his wife's farm, as her tenant, and purchases merchandise and material used for improvements thereon, in an action to recover therefor brought against the husband and wife, based upon a verified, itemized statement of account, there was error in refusing the wife's motion for judgment of nonsuit. *Pitt v. Speight*, 585.

INDICTMENT.

§ 8. Joinder of Counts and Parties.

The court is authorized by statute 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 that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. C. S., 4622. *S. v. Norton*, 418.

§ 10. Identification—Idem Sonans.

Where defendant is indicted for a capital offense under the name "Vincent," testifies that his name is Vincent, appeals *in forma pauperis* as "Vinson," and then claims his name is "Furgerson," there is a clear case of *idem sonans*. Defendant was tried as Vincent, without objection or challenge, convicted and sentenced under the same name, and there is no question of his identity. He will not now be heard to say his real name is "Furgerson." *S. v. Vincent*, 543.

The State has a right to have a prisoner identified, and there was no error, in a prosecution for rape, for the court to require the defendant to stand up, while prosecutrix was on the witness stand, and allow her to identify him as the man who assaulted her on the night in question. *Ibid.*

§ 11. Definiteness and Sufficiency.

Indictment, in a bastardy proceeding, which states that the child was born on 13 August, 1941, whereas the evidence was that the birth occurred on 13 November, 1940, is not fatally defective. C. S., 4625. *S. v. Moore*, 356.

A warrant, or indictment, is not fatally defective with charges that defendant unlawfully sold intoxicating liquors, whereas the proof was that he sold alcoholic beverages with a content of 20% or more of alcohol. *S. v. Tola*, 406.

It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. C. S., 4209; C. S., 4625. *S. v. Trippe*, 600.

INDICTMENT—*Continued.*

§ 12. Motion to Quash—Time to Make.

Defendant cannot take advantage after conviction of alleged deficiencies in indictment, where he has made no motion to quash or in arrest of judgment. *S. v. Tennant*, 277.

A defect in a warrant or bill of indictment can be taken advantage of only by motion to quash or by motion in arrest of judgment. *S. v. Tola*, 406.

§ 24. Allegations to Support Proof.

It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. C. S., 4209; C. S., 4625. *S. v. Trippe*, 600.

INJUNCTIONS.

§ 5. Against Civil Action—Execution.

In an action to restrain levy and sale under execution and to adjudge the validity of a transfer of the judgment, where plaintiffs show *prima facie* that they are the owners of the judgment, they are entitled, at least, to an injunction against the sale of their property. *Harrington v. Buchanan*, 698.

INSANE PERSONS.

§ 5. Appointment of Guardian.

Where a person adjudged incompetent for want of understanding to manage his own affairs, and court appoints a guardian, the ward is presumed to lack mental capacity and presumption continues unless rebutted in proper proceeding. *Sutton v. Sutton*, 274.

§ 7. Guardianship—Attack of Appointment.

Where person adjudged incompetent for want of understanding to manage own affairs, and court appoints guardian, the ward is presumed to lack mental capacity and presumption continues unless rebutted in proper proceeding. *Sutton v. Sutton*, 274.

INSURANCE.

§ 13a. Contract—Construction.

An insurance policy is only a contract and is interpreted by the rules applicable to other written contracts, and the intention of the parties is the object to be obtained. Terms which are clear and unambiguous, are to be taken and understood in their plain, ordinary and popular sense. *Bailey v. Ins. Co.*, 716.

§ 30a. Forfeiture, Nonpayment Premium—In General.

In an action to recover premiums paid by plaintiff on forfeited life insurance policies on the lives of certain relatives of plaintiff, where summons was issued 17 February, 1942, and the evidence tended to show that such premiums were paid only to 1936, defendant having pleaded the three-year statute of limitations, C. S., 441, 6465, judgment of nonsuit was properly allowed. C. S., 567. *Bynum v. Ins. Co.*, 742.

In an action to recover premiums paid by plaintiff on a forfeited life insurance policy, where the evidence shows that the premiums were paid to date and the policy still in force, there is no cause of action stated and the suit cannot be maintained. *Ibid.*

INSURANCE—*Continued.*

§ 31c. Avoidance or Forfeiture—Knowledge and Waiver.

Insurance company cannot avoid liability by reason of facts known to it at time policy was delivered and any knowledge of its agent, acting in scope of authority, will, in absence of fraud or collusion, be imputed to the company. *Heilig v. Ins. Co.*, 231.

In action on life policy, motion for nonsuit properly denied where evidence shows that policy was issued by company's agent on application signed by insured's father, and questions and answers were inserted therein by agent, without the father's knowledge, there being no evidence of fraud or collusion. *Ibid.*

§ 32d. Rights Upon Cancellation.

In an action to recover premiums paid on forfeited life insurance policies, judgment of nonsuit, containing a proviso, "without prejudice to the rights of plaintiff in the paid-up policies listed in paragraph (c) of the further answer," if not in favor of plaintiff, is harmless error. *Bynum v. Ins. Co.*, 742.

§ 34a. Disability Clauses—Construction.

In plaintiff's action to recover, on a policy of insurance, benefits for total and permanent disability, preventing him "permanently from engaging in any occupation or from performing any work for compensation or profit," where it appears from his own testimony that he actually did work almost continuously for more than eight months immediately preceding the trial of this action, defendant's motion of nonsuit should have been allowed. *Jenkins v. Ins. Co.*, 83.

"Disease" is defined as an alteration in the state of the human body, or of some of its organs or parts, interrupting or disturbing the performance of the vital functions, or some of them. *Bailey v. Ins. Co.*, 716.

In an action to recover for total disability, under a policy of insurance providing total disability payments for insured, whenever he becomes disabled by bodily injury or disease so that he is wholly prevented thereby from engaging in any occupation or performing any work for compensation or profit, where the evidence tends to show that plaintiff is an inebriate, without any evidence of serious injury or damage to any vital organ or function, a judgment of nonsuit, at the close of all the evidence, was properly allowed. *Ibid.*

§ 34c. Disability During Life of Policy.

In action to recover total disability under life policies, which provided insured be wholly disabled from engaging in any occupation for profit and such disability occurring before anniversaries of policies nearest plaintiff's sixtieth birthday, nonsuit properly granted, evidence showing insured gainfully employed for more than year and half after sixtieth birthday. *Ford v. Ins. Co.*, 154.

§ 34e. Evidence.

In an action to recover for total disability, under a policy of insurance providing total disability payments for insured, whenever he becomes disabled by bodily injury or disease so that he is wholly prevented thereby from engaging in any occupation or performing any work for compensation or profit, where the evidence tends to show that plaintiff is an inebriate, without any evidence of serious injury or damage to any vital organ or function, a judgment of nonsuit, at the close of all the evidence, was properly allowed. *Bailey v. Ins. Co.*, 716.

INSURANCE—*Continued.*

§ 44a. Deductible Clause.

Plaintiffs having taken out a fire and marine insurance policy on his boat, which policy contained a clause providing for a $1,000.00 deduction from the total of any and all claims covered, a nonsuit was properly granted where it appeared that the boat suffered only $890.00 damage. *Coppersmith v. Ins. Co.*, 14.

INTEREST.

§ 1. Items Drawing Interest.

Interest may not be awarded against the State, even on a sum certain which is overdue and unpaid, unless the State has manifested its willingness to pay interest by an act of the General Assembly or by a lawful contract to do so. C. S., 2309, has no application to a judgment against the State Highway and Public Works Commission. *Yancey v. Highway Com.*, 106.

§ 2. Time and Computation.

Where judgment of the Superior Court awards judgments to both plaintiff and defendant in the same principal sum to each and further provides that the judgments offset and liquidate each other and on appeal this Court reversed the judgment on defendant's counterclaim and confirmed plaintiff's judgment, upon motion in the Superior Court for judgment, in accordance with Supreme Court opinion, plaintiff is entitled to interest only from the date of his original judgment. *Teich & Co., Inc., v. Le Compte*, 602.

INTOXICATING LIQUORS.

§ 4d. Presumption from Possession and Sales.

On a criminal prosecution for unlawful possession of intoxicating liquors, evidence of other sales is competent to prove *quo animo*, relevancy and not immediateness being the true test. *S. v. Colson*, 28.

§ 9b. Presumption and Burden of Proof.

Upon a trial on indictment for the sale of intoxicants there was evidence of sales at undisclosed times. *Held:* It will not be presumed that such sales occurred more than two years next preceding the prosecution when defendant has not pleaded C. S., 4514, or in apt time called it to the court's attention or offered evidence as to the dates of sale. *S. v. Colson*, 28.

§ 9c. Evidence—Competency and Relevancy.

On a criminal prosecution for unlawful possession of intoxicating liquors, evidence of other sales is competent to prove *quo animo*, relevancy and not immediateness being the true test. *S. v. Colson*, 28.

JUDGES.

§§ 2a, 2b. Rights and Powers.

The clerk is only a part of the Superior Court and, when an action or special proceeding, pending before the clerk, is brought before the judge, the judge is vested with ample authority to deal with it. C. S., 637. *Wilson, Ex Parte*, 99.

Judge, holding courts of judicial district, has authority to act in all matters within jurisdiction of Superior Court, with consent of parties, by signing judgments out of term and in or out of county and out of district. *Edmundson v. Edmundson*, 181.

JUDGES—*Continued.*

§ 2c. Term.

When a judge leaves the bench and the term is left to expire by limitation, the term ends then and there. *S. v. McLeod*, 142.

JUDGMENTS.

I. Judgments by Consent
1. Nature and Essentials. Edmundson v. Edmundson, 181.
2. Jurisdiction to Enter. Edmundson v. Edmundson, 181; Moseley v. Deans, 731.

IV. Summary Judgments
13. Proceedings and Renditions. S. v. Clarke, 744.

VII. Docketing and Lien
19. Attachment of Lien and Priorities. Edmonds v. Wood, 118.
20. Land Upon Which Lien Attaches. Edmonds v. Wood, 118.

VIII. Validity, Modification and Attack
22b. Procedure: Direct and Collateral Attack. Edmonds v. Wood, 118; Cleve v. Adams, 211.
22c. Pleadings and Hearings. McLamb v. Adams, 714.
23. Pending Action for Motions Affecting Judgments. Cleve v. Adams, 211.
24. Modification and Correction. S. v. Duncan, 11.

IX. Conclusiveness of Judgment
29. Parties Concluded. Dillingham v. Gardner, 79; Cleve v. Adams, 211; Mizelle v. Critcher, 641; In re Young, 708.
30. Matters Concluded. Cleve v. Adams, 211; Stancil v. Wilder, 706.

X. Operation of Judgments as Bar to Subsequent Actions
32. In General. Dillingham v. Gardner, 79; Cleve v. Adams, 211; Stancil v. Wilder, 706.

XI. Assignment
36. Right to Assign. Edmonds v. Wood, 118; Harrington v. Buchanan, 698; McLamb v. Adams, 714.
37a. Rights and Remedies of Assignee—In General. Harrington v. Buchanan, 698; McLamb v. Adams, 714.
37b. Upon Payment by One of Parties Jointly and Severally Liable. Harrington v. Buchanan, 698.
38. Rights and Liabilities of Judgment Debtor. Harrington v. Buchanan, 698; McLamb v. Adams, 714.

XIII. Payment and Discharge
41. Payment to Judgment Creditor. Edmonds v. Wood, 118; McLamb v. Adams, 714.

§ 1. Nature and Essentials.

While judgment by consent is contract between parties, put upon record with approval of court, it has same force and effect as if it had been entered by court in regular course. *Edmundson v. Edmundson*, 181.

Judgments and decrees entered by consent of all parties may be sustained and enforced, though outside the issues raised by the pleadings if the court has general jurisdiction of the matters adjudicated. *Ibid.*

§ 2. Jurisdiction to Enter.

Judge, holding courts of judicial district, has authority to act in all matters within jurisdiction of Superior Court, with consent of parties, by signing judgments out of term and in or out of county and out of district. *Edmundson v. Edmundson*, 181.

In a proceeding for adoption of a minor, under C. S., 182-184, now repealed, upon the filing of petition making the only living parent of the minor a party thereto and such parent accepting service of summons and petition and consenting in writing on the summons to the adoption, this constitutes a voluntary appearance and answer and is sufficient to support a judgment of adoption. *Moseley v. Deans*, 731.

The fact that petitioner's counsel wrote part of the form of acceptance and consent, to be signed by the parent, on the back of a summons in an adoption proceeding, is not sufficient to destroy its legal effect, in the absence of any indication of fraud or undue influence. *Ibid.*

JUDGMENTS—*Continued.*

§ 13. Summary—Rendition.

Whether a judgment *nisi* will be made absolute, or whether it will be stricken out, either upon condition or otherwise, rests in the discretion of the judge of the Superior Court. C. S., 4588. *S. v. Clarke*, 744.

§§ 19, 20. Land on Which Lien Attaches.

Judgment lien upon undivided interest of tenant in common is subordinate to right of cotenants to enforce partition, and when made, judgment lien is transferred to portion assigned to debtor in severalty, or to his share in proceeds of sale even though judgment creditor is not party to the partition. *Edmonds v. Wood*, 118.

Judgment creditor is given right upon his own initiative to have partition, so that moiety upon which lien of judgment attaches may be ascertained and he would be allowed to intervene in partition proceeding, diligence might require it. *Ibid.*

§ 22b. Validity and Attack—Collateral and Direct.

A judgment in partition proceedings cannot be collaterally attacked except for fraud or want of jurisdiction in the court, rendering it void. *Edmonds v. Wood*, 118.

Motion in cause, to vacate or set aside judgment, presents questions of fact and not issues of fact, and it is for court to hear evidence, find facts and render judgment, and an adverse ruling is *res judicata* in a subsequent suit between same parties, attacking judgment on same ground. *Cleve v. Adams*, 211.

§ 22c. Pleadings and Hearings—Burden of Proof.

The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof must be on the one who alleges the contrary. *McLamb v. Adams*, 714.

§ 23. Pending Action for Motion Affecting Judgment.

A motion in the cause, to vacate or set aside a judgment, presents questions of fact and not issues of fact, and it is for the court to hear the evidence, find the facts and render judgment; and an adverse ruling is *res judicata*, in a subsequent suit between the same parties, attacking the judgment on the same grounds. *Cleve v. Adams*, 211.

§ 24. Modification After Term.

The general rule is that the trial court loses jurisdiction to modify a judgment after the adjournment of the term. *S. v. Duncan*, 11.

§ 29. Parties Concluded.

A former judgment, in an action between plaintiff herein, then suing as sole trustee for a corporation, and defendant herein and another, holding that a transaction between plaintiff and defendant was a purchase and sale and not a loan, is *res judicata* in the present action by plaintiff individually, seeking to recover usurious interest on the same transaction. *Dillingham v. Gardner*, 79.

Under our system of pleading and practice, party is conclusively presumed, when sued in second action on matters before litigated, to have set up in former action all defenses available to him. *Cleve v. Adams*, 211.

A commissioner, appointed by a judgment of court and directed therein to convey certain lands in controversy to a specified person, is without power to

convey the lands to any other person and his deed to another is void. *Mizelle v. Critcher*, 641.

A judgment regularly entered by a court of competent jurisdiction, however erroneous, so long as it stands, operates as an estoppel against the party instituting the action. *In re Young*, 708.

§ 30. Matters Concluded.

Under our system of pleading and practice, a party is conclusively presumed, when sued in a second action on matters before litigated, to have set up in the former action all defenses available to him. *Cleve v. Adams*, 211.

A judgment is decisive of the points raised by the pleadings or which might properly be predicated thereon. This does not embrace any matters which might have been brought into the litigation, or any causes of action which plaintiff might have joined, but which, in fact, are neither joined nor embraced in the pleadings. *Stancil v. Wilder*, 706.

§ 32. Bar to Subsequent Action.

A former judgment, in an action between plaintiff herein, then suing as sole trustee for a corporation, and defendant herein and another, holding that a transaction between plaintiff and defendant was a purchase and sale and not a loan, is *res judicata* in the present action by plaintiff individually, seeking to recover usurious interest on the same transaction. *Dillingham v. Gardner*, 79.

A motion in the cause, to vacate or set aside a judgment, presents questions of fact and not issues of fact, and it is for the court to hear the evidence, find the facts and render judgment; and an adverse ruling is *res judicata*, in a subsequent suit between the same parties, attacking the judgment on the same grounds. *Cleve v. Adams*, 211.

In a suit to foreclose a mortgage, which had been assigned to plaintiff, judgment of foreclosure is not *res judicata*, in a subsequent action by the mortgagor against the plaintiff in the foreclosure suit to have him declared a trustee holding the title to the lands foreclosed for the benefit of the mortgagor. *Stancil v. Wilder*, 706.

§ 36. Assign—Right to.

Where judgment debtor borrows from a bank, giving for the debt a note, to which there were guarantors, and with the proceeds, by agreement with the bank, paid a large portion of it to his judgment creditor, and had the judgment assigned to the bank as collateral security for his loan, *held*, in effect, a satisfaction of the judgment. *Edmonds v. Wood*, 118.

In an action to restrain levy and sale under execution and to adjudge the validity of a transfer of the judgment, where plaintiffs show *prima facie* that they are the owners of the judgment, they are entitled, at least, to an injunction against the sale of their property. *Harrington v. Buchanan*, 698.

The entry of transfer of a judgment, under C. S., 618, by the attorney of the judgment creditor, upon the margin of the judgment as docketed in the office of the clerk of the Superior Court, is *prima facie* evidence of transfer. *Ibid.*

The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof must be on the one who alleges the contrary. *McLamb v. Adams*, 714.

§ 37a. Rights of Assignee—In General.

The entry of transfer of a judgment, under C. S., 618, by the attorney of the judgment creditor, upon the margin of the judgment as docketed in the

office of the clerk of the Superior Court, is *prima facie* evidence of transfer. *Harrington v. Buchanan*, 698.

The presumption is that the plaintiff in a judgment is the owner of it, and the burden of proof must be on the one who alleges the contrary. *McLamb v. Adams*, 714.

A judgment debtor is not charged with knowledge of the assignment of the judgment and, therefore, he may rightly pay his original judgment creditor until he knows that another has become his creditor. Payment, before docketing, *is held* valid against an assignment of an interest to attorneys for judgment creditor. *Ibid.*

§ 37b. Rights of Assignee—Payment by One of Debtors.

The statute itself, C. S., 618, makes it the duty of the attorney, when a judgment is paid by one of several judgment debtors, who requests a transfer, to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same. *Harrington v. Buchanan*, 698.

§ 38. Rights, etc., Judgment Debtor.

In an action to restrain levy and sale under execution and to adjudge the validity of a transfer of the judgment, where plaintiffs show *prima facie* that they are the owners of the judgment, they are entitled, at least, to an injunction against the sale of their property. *Harrington v. Buchanan*, 698.

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§ 41. Payment to Judgment Creditor.

Where judgment debtor borrows from a bank, giving for the debt a note, to which there were guarantors, and with the proceeds, by agreement with the bank, paid a large portion of it to his judgment creditor, and had the judgment assigned to the bank as collateral security for his loan, *held*, in effect, a satisfaction of the judgment. *Edmonds v. Wood*, 118.

A judgment debtor is not charged with knowledge of the assignment of the judgment and, therefore, he may rightly pay his original judgment creditor until he knows that another has become his creditor. Payment, before docketing, *is held* valid against an assignment of an interest to attorneys for judgment creditor. *McLamb v. Adams*, 714.

JUDICIAL SALES.

§§ 2, 5. Procedure and Orders—Report and Confirmation.

In proceedings before clerk to sell lands for partition or to make assets jurisdiction includes right to accept bid at public or private sale, and to compel purchaser to comply with his contract. *Ex Parte Wilson*, 99.

Order confirming sale is not final judgment, and, if purchaser fails to comply with bid, remedy is by motion in cause, and in like manner purchaser may compel execution of deed. *Ibid.*

JUDICIAL SALES—*Continued.*

§ 7. Title and Right of Purchaser.

Order confirming sale is not final judgment, and, if purchaser fails to comply with bid, remedy is by motion in cause, and in like manner purchaser may compel execution of deed. *Wilson, Ex Parte*, 99.

JURY.

§§ 5, 13. Number of Jurors.

In a prosecution for murder the action of the judge in discharging one of the jurors, upon finding he was incapacitated, and substituting the thirteenth juror in his stead, was timely and proper and in accordance with the statute. Public Laws 1931, ch. 103, as amended by Public Laws 1939, ch. 35. *S. v. Broom*, 324.

JUSTICE OF THE PEACE.

§ 3. Civil Jurisdiction—Counterclaim.

A defendant may set up a counterclaim in excess of two hundred dollars in bar of recovery in a justice's court, but the plea can only defeat a recovery by the plaintiff and will not give defendant the right to have a judgment entered for the amount of the counterclaim. *Leonard v. Coble*, 552.

LABORERS' AND MATERIALMEN'S LIENS.

§§ 3, 5a. Laborers, Subcontractors and Materialmen—Notice and Filing Claim.

Claim of subcontractor or materialman supplants that of contractor and duty of owner to pay is an independent and primary obligation and owner is liable to subcontractor only in event he receives notice prior to settlement with contractor and only to extent of contract price still in hand. *Schnepp v. Richardson*, 228.

LANDLORD AND TENANT.

§ 7. Improvements.

In the absence of an 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, even though the improvements are such that they become a part of the freehold. Ordinarily, the creditors of the tenant have no more right to charge the land with the value of improvements than the tenant would have. *Pitt v. Speight*, 585.

§ 10. Duty to Repair—None.

Ordinarily, a landlord owes no duty to the tenant to repair the premises, and is not commonly liable, whether in contract or tort, to the tenant, his family, servants or guests, for personal injuries, although such injuries are caused by the negligent breach of an agreement to repair. *Leavitt v. Rental Co.*, 81.

§ 11. Liability for Injuries—Unsafe Premises.

In an action for damages for personal injuries by a tenant against his landlord, where it appeared that the tenant was injured by plaster falling from the walls, after repeated promises by the landlord to repair same, judgment of nonsuit on the evidence was proper. *Leavitt v. Rental Co.*, 81.

LARCENY.

§ 1. Elements—Physical Presence.

Physical presence at scene of larceny is not absolutely essential if it appears that defendant actually advised and procured crime, or aided and abetted therein. *S. v. King*, 239.

§ 7. Evidence, Sufficiency.

In prosecution for felonious breaking and entering, larceny and receiving against several defendants, resulting in conviction of one for larceny only, motion for nonsuit properly denied where evidence tended to show that this defendant and one of other defendants planned theft and this defendant advised, aided and abetted codefendant therein, though not personally present. *S. v. King*, 239.

LIBEL AND SLANDER.

§ 1. General Rule—True or False.

The general rule is that a defamatory statement, to be actionable, must be false; an admission of its truth is a complete defense to any action based thereon. *Parker v. Edwards*, 75.

§ 7b. Qualified Privilege.

Although a telegram is libelous on its face, a public service telegraph company is required by law to transmit it under a qualified privilege, if in so doing it acts *bona fide*, and free from ill will or malice. *Parker v. Edwards*, 75.

Where a qualifiedly privileged publication is admitted by defendant, the burden of proof is on the plaintiff to show malice in the publication. *Ibid.*

§ 13. Sufficiency of Evidence.

Where a telegraph company sends a message containing words that amount to a charge of incontinency against a woman, demurrer to the evidence, as in case of nonsuit, is properly denied. C. S., 2432. *Parker v. Edwards*, 75.

§ 14. Instructions.

In an action for damages on an alleged libelous accusation, the truth of which was admitted, the court was correct in charging the jury that such accusation should not be taken into consideration as bearing upon any issue. *Parker v. Edwards*, 75.

LIMITATIONS OF ACTIONS.

§ 1a. Nature and Construction—In General.

An action may be maintained in this State to recover unpaid installments of alimony decreed under a Louisiana judgment; and the North Carolina statute of limitations, rather than the Louisiana statute of prescription, applies. *Webb v. Webb*, 551.

§ 2a. Ten Years.

Where defendant by answer denies liability on a note on the ground that it was given on a gambling contract, and also that the note is barred by the three-year statute of limitations, evidence that defendant did not adopt the word "seal" after his name on the note was properly excluded. *Roberts v. Grogan*, 30.

Actual possession by the mortgagor or grantor is a prerequisite to the bar of the ten-year statute of limitations against the foreclosure of mortgages

and deeds of trust on realty, C. S., 2589 and 437 (3)—a mortgagor has no constructive possession and if he is not in actual possession the statute runs against him. *Ownbey v. Parkway Properties, Inc.*, 54.

Where judgment taken in 1926, and in 1931 defendant moved before clerk to set judgment aside, which motion denied and appeal to judge, and clerk ordered execution should not issue until adjournment of August, 1931, Term, and appeal to judge never heard, order of clerk and appeal to judge did not stop statute and judgment is barred in 1939 by ten-year statute of limitation. *Exum v. R. R.*, 222.

§ 2b. Seven Years.

Where, in an action against administrators, who qualified in May, 1934, on promissory notes, maturing in January, 1933, and April, 1933, and signed by the intestate, who died in April or May, 1934, upon a plea of the statutes of limitation, C. S., 412, 438 and 441, there being evidence tending to show that plaintiff filed his claims with the administrators within one year after their qualification and the claims were admitted, motions by defendants for nonsuit were properly denied. C. S., 567. *Lister v. Lister*, 555.

§ 2e. Three Years.

Where defendant by answer denies liability on a note on the ground that it was given on a gambling contract, and also that the note is barred by the three-year statute of limitations, evidence that defendant did not adopt the word "seal" after his name on the note was properly excluded. *Roberts v. Grogan*, 30.

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, judgment of nonsuit is properly allowed. C. S., 441 (9). *Blankenship v. English*, 91.

Plaintiffs executed to defendant on 29 January, 1931, a deed in fee simple on its face but in fact a mortgage, and on 22 November, 1934, defendant conveyed the *locus in quo*, with warranty, to an innocent purchaser for value, and suit brought 11 January, 1940, *held* that plaintiffs' only remedy is action for damages for wrongful alienation, which is barred by the statute of limitations. C. S., 441. *Lee v. Johnson*, 161.

A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes, when the action is not instituted within three years of the date the check was issued. C. S., 441. *Miller v. Neal*, 540.

Where, in an action against administrators, who qualified in May, 1934, on promissory notes, maturing in January, 1933, and April, 1933, and signed by the intestate, who died in April or May, 1934, upon a plea of the statutes of limitation, C. S., 412, 438 and 441, there being evidence tending to show that plaintiff filed his claims with the administrators within one year after their qualification and the claims were admitted, motions by defendants for nonsuit were properly denied. C. S., 567. *Lister v. Lister*, 555.

An action to engraft a resulting trust upon a deed in fee on its face is not barred by the three-year statute of limitation. *Creech v. Creech*, 656.

In an action to recover premiums paid by plaintiff on forfeited life insurance policies on the lives of certain relatives of plaintiff, where summons was issued 17 February, 1942, and the evidence tended to show that such premiums were paid only to 1936, defendant having pleaded the three-year statute of

LIMITATION OF ACTIONS—*Continued.*

limitations, C. S., 441, 6465, judgment of nonsuit was properly allowed. C. S., 567. *Bynum v. Ins. Co.*, 742.

§ 2g. One Year.

Where, in an action against administrators, who qualified in May, 1934, on promissory notes, maturing in January, 1933, and April, 1933, and signed by the intestate, who died in April or May, 1934, upon a plea of the statutes of limitation, C. S., 412, 438 and 441, there being evidence tending to show that plaintiff filed his claims with the administrators within one year after their qualification and the claims were admitted, motions by defendants for nonsuit were properly denied. C. S., 567. *Lister v. Lister*, 555.

§ 3a. Accrual of Right of Action and Time, etc.

The allotment of homestead suspends the running of the statute of limitations, C. S., 667, C. S., 728; N. C. Constitution, Art. X, sec. 2. *Cleve v. Adams*, 211.

§ 4. Fraud and Ignorance.

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, judgment of nonsuit is properly allowed. C. S., 441 (9). *Blankenship v. English*, 91.

§ 10. Death and Administration.

Where, in an action against administrators, who qualified in May, 1934, on promissory notes, maturing in January, 1933, and April, 1933, and signed by the intestate, who died in April or May, 1934, upon a plea of the statutes of limitation, C. S., 412, 438 and 441, there being evidence tending to show that plaintiff filed his claims with the administrators within one year after their qualification and the claims were admitted, motions by defendants for nonsuit were properly denied. C. S., 567. *Lister v. Lister*, 555.

§ 16. Burden of Proof.

In an action upon a promissory note, concluding with the words "Witness my hand and seal" and signed by the maker, with the word "seal" in parentheses after his name, the burden is on defendant to satisfy the jury by the greater weight of the evidence that the word "seal" so appearing was not adopted by the maker. *Lister v. Lister*, 555.

MALICIOUS PROSECUTION.

§ 9. Evidence, Sufficiency.

In an action to recover damages for malicious prosecution, evidence that a collector for defendant bank called on plaintiff for payment on his note, received a check dated the next day which was not paid, and later swore out a criminal warrant upon which plaintiff was acquitted, without evidence of the collector's connection with the bank, except his statement that he represented the bank, *is held* insufficient, and judgment of nonsuit allowed. *Bagley v. Bank*, 97.

MANDAMUS.

§ 1. Nature.

A writ of *mandamus* is an exercise of original and not appellate jurisdiction and is never used as a substitute for an appeal. *Pue v. Hood, Comr. of Banks*, 310.

MANDAMUS—*Continued.*

§ 2a. Ministerial or Legal Duty.

Whether petitioners entitled to writ of *mandamus*, on motion after judgment, to compel a State agency to pay interest on a judgment not presented. *Yancey v. Highway Com.*, 106.

§ 2b. Discretionary Duty.

Where an administrative officer acts capriciously, or in bad faith, or in disregard of law, and such action affects personal or property rights, the courts will not hesitate to afford prompt and adequate relief. *Pue v. Hood, Comr. of Banks*, 310.

Upon an application for an industrial bank charter, under Michie's Code, secs. 217 (b) and 225 (m), the Secretary of State has no authority to act without a favorable certificate from the Commissioner of Banks, and upon suit brought, in the absence of such certificate, to compel the issuance of a charter, alleging no bad faith, capricious acts, or disregard of law by the State officers. *Held:* The complaint fails to state a cause of action and is not sufficient as a petition for *certiorari* or as an application for *mandamus*. *Ibid.*

§ 4. Procedure.

In *mandamus* proceedings, if the summons is made returnable before the judge at chambers, when it should have been made returnable in the regular way as a civil action, or *vice versa*, the action should not be dismissed, but a transfer to the proper docket made. C. S., 867, 868. *Brown v. Comrs. of Richmond*, 402.

An action to have a writ of *mandamus* issue compelling a board of county commissioners to pay from the general county fund, in accordance with an Act of the Legislature, the salary of a county officer, is not such a "money demand" as to require the summons, pleadings and practice to be the same as prescribed for civil actions. *Ibid.*

MASTER AND SERVANT.

I. The Relation

3. Evidence Competent to Establish Contract of Employment. Lassiter v. Cline, 271.

IV. Employer's Liability for Employee's Negligent Injury of Third Person

21a. "Employee" within Meaning of Rule. Lassiter v. Cline, 271; Walker v. Manson, 527.

22a. Independent Contractors. Lassiter v. Cline, 271.

V. Federal Employers' Liability Act

27. Negligence of Railroad Employer. Brady v. R. R., 367.

28. Assumption of Risk. Brady v. R. R., 367.

VII. Workmen's Compensation Act

37. Nature and Construction of Compensation Act in General. Pearson v. Pearson, Inc., 69.

39a. Who Are Employees Within the Meaning of the Act—In General. Pearson v. Pearson, Inc., 69.

39f. School Teachers. Callahan v. Board of Education, 381.

40a. Injuries Compensable—In General. Stanley v. Hyman-Michaels Co., 257; Gilmore v. Board of Education, 358; Archie v. Lumber Co., 477.

40b. Diseases. Haynes v. Feldspar Producing Co., 163.

40d. Whether Injury Results from an "Accident." Eller v. Leather Co., 23; Ashley v. Chevrolet Co., 25.

40e. Whether Accident "Arises Out of the Employment." Eller v. Leather Co., 23; Ashley v. Chevrolet Co., 25; Wilson v. Mooresville, 283; McKenzie v. Gastonia, 328; Archie v. Lumber Co., 477; Bryan v. Loving Co., 724.

40f. Whether Accident "Arises in the Course of the Employment." Eller v. Leather Co., 23; Ashley v. Chevrolet Co., 25; Wilson v. Mooresville, 283; McKenzie v. Gastonia, 328; Archie v. Lumber Co., 477; Bryan v. Loving Co., 724.

40h. Intoxication. Archie v. Lumber Co., 477.

47. Notice and Filing of Claim. Eller v. Leather Co., 604.

52b. Evidence and Burden of Proof. Gilmore v. Board of Education, 358.

52c. Findings by Commission. Stanley v. Hyman-Michaels Co., 257; Kearns v. Furniture Co., 438; Archie v. Lumber Co., 477.

52d. Additional Evidence. Stanley v. Hyman-Michaels Co., 257.
55d. Matters Reviewable. Eller v. Leather Co., 23; Ashley v. Chevrolet Co., 25; Haynes v. Feldspar Producing Co., 163; Stanley v. Hyman-Michaels Co., 257; Kearns v. Furniture Co., 438; Archie v. Lumber Co., 477.
55g. Determination and Disposition of Appeal. Stanley v. Hyman-Michaels Co., 257.

§ 3. Evidence—to Establish Contract of Employment.

In action for damages by the negligence of an agent of defendant, where plaintiff testified that he had known the alleged agent for two months prior to the accident, during which time said agent was driving the same truck which caused the collision complained of, which was loaded at the same place as trucks of defendant, and that he saw the alleged agent receive his pay check from defendant on one occasion along with other help of defendant. *Held:* Evidence of agency sufficient to go to the jury. *Lassiter v. Cline*, 271.

§ 21a. Liability of Master—Employee.

Where the employer has the right and power to control, direct and interfere with the employee and the employment, the employee is a servant: *Holding* that one who furnishes his own truck and is paid for hauling by the load, is still a servant and not an independent contractor, his employer retaining the right to terminate the employment at any time. *Lassiter v. Cline*, 271.

The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged at the time of, and in respect to, the very transaction out of which the injury arose, and general employment alone is not sufficient to impose liability. *Walker v. Manson* and *Murray v. Manson*, 527.

In an action for damages on account of injuries sustained by plaintiff in an automobile collision, evidence that defendant M., a son-in-law of defendant K., was hauling a cow and calf belonging to K., in a truck, when the truck collided with the car in which plaintiffs were riding, causing injury, without any evidence of the ownership of the truck or that K. exercised any control over the same, is insufficient and demurrer thereto was properly sustained. *Ibid.*

§ 22a. Parties Liable—Independent Contractor.

Where employer has right and power to control, direct and interfere with employee and employment, the employee is servant and not independent contractor. *Lassiter v. Cline*, 271.

§ 27. Negligence of Railroad Employee.

The breach of the duty to guard against injury to others imposes responsibility for consequences which are probable, and which could reasonably have been foreseen, according to ordinary and usual experience, but not for consequences which are merely possible according to occasional experience. *Brady v. R. R.*, 367.

In an action for damages, based on the wrongful death of a brakeman by the negligence of defendant railroad, where the evidence was that a freight car, being switched and on which the brakeman was riding, struck the blunt, or "wrong" end of an unlighted, closed derailer, in good mechanical order and of the ordinary type in general and approved use, which (derailer) should have been opened by the brakeman before switching, causing the freight car to be thrown with such force against the opposite rail, which was worn, as to derail the car, resulting in the death of the brakeman. *Held:* Defendant's motion of nonsuit should have been granted, as reasonably prudent foresight could not have anticipated the result. *Ibid.*

MASTER AND SERVANT—*Continued.*

Where plaintiff's intestate, a brakeman, was killed by the derailment of the front trucks of a freight car, upon which he was riding in switching operations, and all of the facts relating to the derailment were known, alleged and set forth in evidence and the case tried on the grounds selected by plaintiff, without reference to *res ipsa loquitur*, the facts do not make out a case of *prima facie* negligence and carry the case to the jury on the theory that "the thing speaks for itself." *Ibid.*

§ 28. Assumption of Risk.

The plaintiff fails to show that the injury and death of her intestate was the proximate result of defendant's negligence, when the evidence points unerringly to the conclusion that her intestate himself failed to open the derailer or to see that it was open, it being his duty so to do before signaling for the engineer to move the cars, hence he conclusively assumed the risk of the resulting injury and death. *Brady v. R. R.*, 367.

§ 37. Construction, Workmen's Compensation Act.

Ordinarily, the parties may not by agreement or conduct extend the provisions of the Workmen's Compensation Act; but continued and definite recognition of the relationship of employer and employee, based on knowledge of the work performed, and acceptance of benefits of that status, may work an estoppel after loss. *Pearson v. Pearson*, 69.

§ 39a. Who Are Employees.

Where it appears that defendants, employer and carrier, with full knowledge that deceased was president and general manager of employer corporation, by their treatment of decedent's relationship to the corporation as that of employee rather than executive, and acceptance of the benefits of that status, have recognized his dual capacity, they cannot, after loss sustained, assert the contrary. *Pearson v. Pearson*, 69.

§ 39f. Who Are Employees—Teachers.

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and Federal Governments, and, as such sole employer, is liable, with its insurance carrier, under the Workmen's Compensation Act, for the death of such teacher from an injury by accident arising out of and in the course of his employment. School Machinery Act of 1939, ch. 358, sec. 22. *Callahan v. Board of Education*, 381.

§ 40a. Injuries Compensable—In General—Permanent and Total—Disfigurement.

The fact that the Workmen's Compensation Act states that certain injuries shall be deemed permanent and total disabilities (C. S., 8081 [mm]), does not mean that permanent and total disabilities can be found only in those cases enumerated, but that such injuries are conclusively presumed to be permanent total disabilities, and the Commission shall so find. *Stanley v. Hyman-Michaels Co.*, 257.

The Industrial Commission has power to find that injuries, or combination of injuries (other than those enumerated in the Workmen's Compensation Act) occurring in the same accident, may result in permanent total disability, and when the Commission so finds, the injured employee shall be compensated under sec. 29 of the Act. C. S., 8081 (kk). *Ibid.*

MASTER AND SERVANT—*Continued.*

Where an award is properly made under specific schedules and the Commission has found as a fact that the employee is not totally and permanently disabled, the Commission is only required to find the percentage of disability of the member or members. C. S., 8081 (mm), subsection (t). *Ibid.*

The Workmen's Compensation Act authorizes the awarding of compensation for serious disfigurement resulting from the loss or partial loss of a member for which compensation is provided in the schedules. *Ibid.*

The rule seems to be universal that no award can be made for disfigurement, where an award has been made for total permanent disability. *Ibid.*

In awarding compensation for serious disfigurement the Commission, in arriving at the consequent diminution of earning power, should consider the natural physical handicap resulting, the age, training, experience, education, occupation and adaptability of the employee to obtain and retain employment. *Ibid.*

Under the N. C. Workmen's Compensation Act, the employer shall pay compensation for death of employee only when the death results proximately from injury by accident arising out of and in the course of employment; that is, the injury causing the death must be of such a character that without it the death would not have occurred. *Gilmore v. Board of Education*, 358.

The negligence of the employee, under the N. C. Workmen's Compensation Act, does not disbar him from compensation for injury by accident arising out of and in the course of his employment, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. *Archie v. Lumber Co.*, 477.

§ 40b. Workmen's Compensation Act—Diseases.

In proceeding to recover compensation, under occupational disease sections of Workmen's Compensation Act, on facts of this case evidence *held* competent to show plaintiff injuriously exposed to hazard of silicosis and sufficient to sustain award. *Haynes v. Feldspar Producing Co.*, 163.

§ 40d. Workmen's Compensation Act, Injury Resulting from Accident.

On September 15, 1939, plaintiff while about his employer's business, was struck on the back of the head by hides he was jerking from hooks, and had to stop work for a short time, and as a result of said blow contracted hemorrhagic pachymeningitis which caused his total disability since 26 January, 1940, *held* an injury by accident, arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act. *Eller v. Leather Co.*, 23.

Where, in defendants' garage, it was customary for the employees to furnish their own tools and to borrow from each other, and an altercation between two employees over their tools occurring while they were working, resulting in an assault by one which killed the other, *held*, a finding by the Industrial Commission that such assault was an accident arising out of and in the course of the employment sufficient to sustain the award. *Ashley v. Chevrolet Co.*, 25.

§§40e, 40f. Workmen's Compensation Act, Accident Arising in Course of Employment.

On September 15, 1939, plaintiff, while about his employer's business, was struck on the back of the head by hides he was jerking from hooks, and had to stop work for a short time, and as a result of said blow contracted hemorrhagic pachymeningitis which caused his total disability since 26 January, 1940, *held* an injury by accident, arising out of and in the course of his em-

MASTER AND SERVANT—*Continued.*

ployment within the meaning of the Workmen's Compensation Act. *Eller v. Leather Co.*, 23.

Under the Workmen's Compensation Act, an injury arises out of the employment, when it occurs in the course of employment and is a natural or probable consequence or incident of it, and if the injury had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. *Ashley v. Chevrolet Co.*, 25.

If one employee assaults another solely from anger, hatred, revenge, or vindictiveness, not growing out of or as an incident to the employment, the injury is to be attributed to the voluntary act of the assailant, and not as an incident of the employment; but if the assault be incidental to some duty of the employment, the injuries suffered thereby may properly be said to arise out of the employment. *Ibid.*

Where, in defendants' garage, it was customary for the employees to furnish their own tools and to borrow from each other, and an altercation between two employees over their tools occurring while they were working, resulting in an assault by one which killed the other, *held*, a finding by the Industrial Commission that such assault was an accident arising out of and in the course of the employment sufficient to sustain the award. *Ibid.*

Where a policeman, in an effort to arrest without warrant a person who has in his presence committed an offense less than a felony, pursues such person beyond the boundaries of the town or district in which by statute he is authorized to act and, in such pursuit, is injured by accident outside of such boundaries: *Held* that injuries so suffered do not arise out of and in the course of his employment within the meaning of the N. C. Workmen's Compensation Act. The meaning of "arising out of" and "in the course of employment," as used by the Act, pointed out. *Wilson v. Mooresville*, 283.

In a proceeding under the N. C. Workmen's Compensation Act, where the evidence shows that a policeman was killed in an accident, while returning to work from a leave of absence, the conclusion that he did not sustain injury by accident arising out of and in the course of his employment, is sustained. *McKenzie v. Gastonia*, 328.

Where an employer was under obligation to transport its employees from the woods where they worked to a camp, and provided for that purpose a safety car attached to its railroad train, having forbidden its employees to use the more hazardous log train, and deceased was killed in attempting to get on the log train and thus return to camp. *Held:* Employee was killed as result of injury by accident arising out of and in the course of his employment, and his dependents are entitled to compensation. *Archie v. Lumber Co.*, 477.

An injury received by an employee, while going to and from his work, is not compensable unless he is being transported by the employer under the contract of employment. *Bryan v. Loving Co.*, 724.

The N. C. Workmen's Compensation Act does not contemplate compensation for every injury an employee may receive during the course of his employment, but only those from accidents arising out of, as well as in the course of employment. Where an injury cannot fairly be traced to the employment as a contributing proximate cause, or comes from a hazard to which the workman would have been equally exposed apart from the employment, or from a hazard common to others, it does not arise out of the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. *Ibid.*

MASTER AND SERVANT—*Continued.*

Where, in a proceeding for compensation under the N. C. Workmen's Compensation Act, the evidence tends to show that plaintiff's intestate, a civilian guard of a construction company, stationed at a main gate of a Marine Base to direct traffic and parking about such gate and on the highway immediately adjoining, was at the time of the accident on his way to his place of employment to report for work and was killed, after alighting from a bus, on the public highway immediately in front of such main gate, as he attempted to cross the highway ahead of an oncoming car, an award was error, as deceased was not on the premises of his employer, and his injury and death did not arise out of and in the course of his employment. *Ibid.*

§ 40h. Intoxication.

The negligence of the employee, under the N. C. Workmen's Compensation Act, does not disbar him from compensation for injury by accident arising out of and in the course of his employment, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. *Archie v. Lumber Co.*, 477.

§ 47. Notice and Filing Claim.

A finding by the Industrial Commission that plaintiff was not capable of coherent, normal thought at the time of his examination by physicians falls short of a finding that he was prevented from giving written notice of his injury by reason of physical or mental incapacity so as to entitle him to the benefits which may have accrued under the N. C. Workmen's Compensation Act, sec. 22, ch. 120, Public Laws 1929, prior to the giving of such notice. *Eller v. Leather Co.*, 604.

A finding by the Industrial Commission under the N. C. Workmen's Compensation Act. sec. 22, ch. 120, Public Laws 1929, that the employer has not been prejudiced by the failure of the plaintiff to give notice of the injury within 30 days after the accident, suffices to sustain the award from and after such notice; but not for benefits which may have accrued prior thereto. *Ibid.*

§ 52b. Evidence and Burden of Proof.

Where the evidence showed that plaintiff, a man of advanced years, who had an enlarged prostate gland, arteriosclerosis, myocarditis, and arthritis, all of long standing, accidentally fell and broke his leg, while working for defendant in the course of his employment, and by proper treatment his leg healed, but plaintiff died some seven months after the accident from arteriosclerosis, myocarditis, and arthritis, all of which may have been aggravated by his confinement while his leg healed. *Held:* Evidence will not support an award, as it is not sufficient to take the case out of the realm of conjecture and remote possibility. *Gilmore v. Board of Education*, 358.

§ 52c. Hearings Before Commission—Findings.

The findings of fact made by the Industrial Commission in a matter properly before that body, when based upon competent evidence, are conclusive, and not open to review by the courts. *Stanley v. Hyman-Michaels Co.*, 257; *Kearns v. Furniture Co.*, 438; *Archie v. Lumber Co.*, 477.

§ 52d. Additional Evidence.

Where the facts are found or where the Industrial Commission fails to find facts due to a misapprehension of the law, the court will, when the ends of justice require it, remand the case for further and more complete findings,

MASTER AND SERVANT—*Continued.*

in order that the evidence may be considered in its true legal light. *Stanley v. Hyman-Michaels Co.*, 257.

§ 55d. Workmen's Compensation Act—Matters Reviewable.

Findings of fact by the Industrial Commission, when supported by competent evidence, are conclusive on appeal, in both the Superior and Supreme Courts. *Eller v. Leather Co.*, 23; *Ashley v. Chevrolet Co.*, 25; *Haynes v. Feldspar Producing Co.*, 163; *Stanley v. Hyman-Michaels Co.*, 257; *Kearns* v. Furniture Co., 438; *Archie v. Lumber Co.*, 477.

§ 55g. Appeal and Review—Remand for Findings.

Where the facts are found or where the Industrial Commission fails to find facts due to a misapprehension of the law, the court will, when the ends of justice require it, remand the case for further and more complete findings, in order that the evidence may be considered in its true legal light. *Stanley v. Hyman-Michaels Co.*, 257.

MINERALS AND MINES.

§ 2. Damages.

In the absence of a willful or intentional trespass or conversion, the measure of damages is the value of the mineral as it lay in the mine, immediately after severance from the realty, with no deduction for labor in effecting the severance. *Jones v. McBee*, 152.

Where tenants in common, under the erroneous impression that they owned the fee, removed minerals from the property, upon suit by the other tenant in common for damages and admission by the defendants of the cotenancy, removal and value, plaintiff is entitled to judgment on the pleadings, though not to damages under C. S., 6927. *Ibid.*

MORTGAGES.

§ 1. In General.

Some of the law of North Carolina on title and rights of mortgagors and mortgagees discussed. *Cleve v. Adams*, 211.

§ 16. Estate and Rights of Parties—Homestead.

The conveyance of an allotted homestead by mortgage does not destroy the exemption or revive the right to issue execution on an outstanding and unsatisfied judgment; and a homestead may be allotted in mortgaged land. C. S., 729; N. C. Constitution, Art. X, sec. 8. *Cleve v. Adams*, 211.

§ 24. Transfer by Mortgagee.

Plaintiffs executed to defendant, 29 January, 1931, deed in fee simple on face but in fact mortgage, and, 22 November, 1934, defendant conveyed *locus in quo* with warranty to innocent purchaser for value, suit brought, 11 January, 1940, *held* plaintiff's only remedy is action for damages for wrongful alienation which is barred by statute of limitations. *Lee v. Johnson*, 161.

§ 30a. Right to Foreclose and Defense.

Actual possession by the mortgagor or grantor is a prerequisite to the bar of the ten-year statute of limitations against the foreclosure of mortgages and deeds of trust on realty, C. S., 2589 and 437 (3)—a mortgagor has no constructive possession and if he is not in actual possession the statute runs against him. *Ownbey v. Parkway Properties, Inc.*, 54.

MORTGAGES—*Continued.*

§ 31a. Foreclosure by Action—Limitations.

Actual possession by the mortgagor or grantor is a prerequisite to the bar of the ten-year statute of limitations against the foreclosure of mortgages and deeds of trust on realty, C. S., 2589 and 437 (3)—a mortgagor has no constructive possession and if he is not in actual possession the statute runs against him. *Ownbey v. Parkway Properties, Inc.*, 54.

§ 32b. Advertisement and Notice.

In notices for the sale of realty under mortgages, or deeds of trust, the identical description of the land, as contained in the instrument, is not required by the provisions of C. S., 2588, and a description "substantially" as in the conveyance, is sufficient. *Peedin v. Oliver*, 665.

§ 32c. Conduct of Sale.

Where a mortgagee of land purchases at his own sale, directly or indirectly, the sale is not void, but only voidable, and, ordinarily, can be avoided only by the mortgagor, or his heirs and assigns, who have the election (1) to ratify the sale and settle on that basis; or (2) to pursue one of two remedies: (a) treat the sale as a nullity and have it set aside; or (b) sue the mortgagee for the wrong and hold him liable for the true worth of the property. *Peedin v. Oliver*, 665.

§ 32e. Foreclosure by Power—Limitations.

Actual possession by the mortgagor or grantor is a prerequisite to the bar of the ten-year statute of limitations against the foreclosure of mortgages and deeds of trust on realty, C. S., 2589 and 437 (3)—a mortgagor has no constructive possession and if he is not in actual possession the statute runs against him. *Ownbey v. Parkway Properties, Inc.*, 54.

§ 34c. Report and Confirmation.

The validity of a mortgage sale is not impaired by the failure of the mortgagee to make report thereof to the clerk of the Superior Court, there being no advanced bid. C. S., 2591. *Peedin v. Oliver*, 665.

§ 35a. Right of Mortgagee to Bid in Property.

Where a mortgagee of land purchases at his own sale, directly or indirectly, the sale is not void, but only voidable, and, ordinarily, can be avoided only by the mortgagor, or his heirs and assigns, who have the election (1) to ratify the sale and settle on that basis; or (2) to pursue one of two remedies: (a) treat the sale as a nullity and have it set aside; or (b) sue the mortgagee for the wrong and hold him liable for the true worth of the property. *Peedin v. Oliver*, 665.

§ 42. Title of Purchaser.

The estate of the mortgagee, acquired by his purchase at his own sale, being voidable only, may be confirmed by any means by which an owner of a right in equity may part with it: (1) By a release under seal. (2) By such conduct as would make assertion of his right fraudulent against the mortgagee or a third person and which would, therefore, operate as an estoppel. (3) By long acquiescence after full knowledge. *Peedin v. Oliver*, 665.

MUNICIPAL CORPORATIONS.

§ 6. Governmental and Private Powers.

A municipal corporation is dual in character and exercises two classes of powers, one as a governmental agency and the other as a private corporation. Its activities, which are discretionary, political, legislative or public, and performed for the public good in behalf of the State, come within the class of governmental functions; while those activities which are commercial or chiefly for the advantage of the community are private. *Millar v. Wilson*, 340.

§§ 7, 8. Power in General.

When acting in behalf of the State in promoting or protecting the health, safety, security or general welfare of its citizens, a municipality is an agency of the sovereign, and no action in tort may be maintained for resulting injury to person or property; whereas a municipality is subject to suit in tort as a private corporation, when injury results from a negligent discharge of a ministerial or proprietary function. *Millar v. Wilson*, 340.

The maintenance of public roads and highways is generally recognized as a governmental function, though an exception is made in respect to streets and sidewalks of a municipality; *holding* demurrer properly overruled in an action against a town for personal injuries, where the complaint alleged that defendant's employee, while on his way to place a protective light at a dangerous hole in a street, negligently ran into the back of an automobile in which plaintiff was riding, causing injury. *Ibid.*

§ 10. Meetings and Proceedings of Governing Boards, as Evidence.

Records of the governing body of a municipal corporation are properly admissible in evidence to prove the facts stated therein; and evidence will not be admitted, in a collateral action, to vary or contradict such record, when regular and complete on its face. *S. v. Baynes*, 425.

Where statutes expressly require a full and accurate record of the governing body of a municipality to be kept, parol evidence is not admissible to aid, extend or supplement the record; but when there is no such statutory requirement, and the record contains nothing to show whether or not any action whatever was taken on a certain matter, parol evidence is admissible to show that action was actually taken, though it should be allowed with caution. *Ibid.*

A lost or destroyed municipal record may be proven by parol. *Ibid.*

Where an ordinance is adopted by the governing board of a municipality and that fact is shown, there is a presumption in favor of the validity of the ordinance. *Ibid.*

§ 11c. Police Officer.

A police officer, unknown to the common law, is a creature of statute, and as such has and can only exercise the powers given him by the Legislature, expressly or derivatively. *Wilson v. Mooresville*, 283.

When city or town authorities appoint one to the office of policeman, and he accepts the appointment, the existing laws pertaining to the position enter into and become a part of the relationship thus established. *Ibid.*

A municipality may give to one policeman the rank of chief over others, but it has no authority to enlarge or restrict the powers and duties conferred upon such officers by the Legislature; and the chief has no greater power than any other policeman, and custom can add nothing to his authority. *Ibid.*

In the absence of statutory authority, the power of a sheriff or other peace officer is limited to his own county, township, or municipality, and he cannot

without a warrant make an arrest out of his own county, township or municipality, where the person to be arrested is charged with the commission of a misdemeanor—beyond such limits his right to arrest is no greater than that of a private citizen. "Felon fleeing," "hue and cry" and "hot pursuit" discussed. *Ibid.*

§ 14. Defects—Streets and Sidewalks.

A municipality is required to use ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who have a right to use them in a proper manner. *Waters v. Belhaven*, 20; *Beaver v. China Grove*, 234.

In order to hold a municipality for negligence in maintaining its streets or sidewalks, the plaintiff must not only show the existence of a defect and the occurrence of an injury, but also that the officers of the city had actual or implied notice of such defect, that they knew, or by the exercise of ordinary diligence, should have known of the existence of such defect. *Waters v. Belhaven*, 20.

Municipalities are liable for injuries from defects or obstructions in their streets for negligence only; they are not insurers and are not liable for consequences arising from unusual circumstances which could not be foreseen; but are required to use only ordinary care in maintaining their sidewalks and streets in a reasonably safe condition. *Walker v. Wilson*, 66; *Beaver v. China Grove*, 234.

Where plaintiff, who was walking at night on a town sidewalk, which was perfectly smooth and level, with lights at the corners ahead and behind her, and on a street she was accustomed to use, stepped off the paved sidewalk into a depression between the paving and a retaining wall, thus causing the injury, defendant's motion for nonsuit should have been granted. *Walker v. Wilson*, 66.

In cases of exceptional danger, as where construction work is being performed in a street, exercise of reasonable care means exercise of such care as is commensurate with exigencies of occasion. *Beaver v. China Grove*, 234.

Where evidence shows that driver of automobile, with full knowledge that street was under construction, drove automobile into manhole protruding two feet above surface resulting in injuries to passenger, motion for nonsuit should have been granted in action for damages by passenger against town. *Ibid.*

In an action for damages by a child against a city for personal injuries occasioned by a defective sidewalk, where plaintiff's evidence showed that there was a short strip of pavement ending in the middle of the block, leaving a drop of four or five inches opposite a break in the curb, which had existed for a year and a half, and plaintiff, while walking along this sidewalk, between sundown and dark, fell because of the said drop, severely injuring his knee. *Held:* Judgment of nonsuit erroneous. *Webster v. Charlotte*, 321.

The maintenance of public roads and highways is generally recognized as a governmental function, though an exception is made in respect to streets and sidewalks of a municipality; *holding* demurrer properly overruled in an action against a town for personal injuries, where the complaint alleged that defendant's employee, while on his way to place a protective light at a dangerous hole in a street, negligently ran into the back of an automobile in which plaintiff was riding, causing injury. *Millar v. Wilson*, 340.

While municipal authorities have discretion in selecting the means by which the traveling public is to be protected against defects in the street, provided

MUNICIPAL CORPORATIONS—*Continued.*

the means selected are adequate, there is no discretion as to the performance or nonperformance of the duty itself. *Ibid.*

The failure of a municipality to light a street sign, which was already illuminated so as to be clearly visible, cannot be held for actionable negligence. *Brickhouse v. Columbia*, 597.

§ 39. Police Powers—Public Safety.

Municipal ordinance making criminal the use of streets for delivery of products and carrying on the business of selling certain specific merchandise, without first obtaining a license, is invalid under *Kenny Co. v. Brevard*, 217 N. C., 269. *S. v. Christopher*, 98.

§ 46. Notice and Filing Claim.

In the absence of some valid excuse, compliance must be shown with the provisions of a city charter requiring notice of claim as a condition precedent to the institution of an action against a municipal corporation for the recovery of damages. *Webster v. Charlotte*, 321.

The sufficiency of notice of claim against a municipality, before bringing an action for damages, may be determined by the city charter; but it need not be drawn with the technical nicety necessary in pleadings. *Ibid.*

Municipal charter provisions, requiring notice of a claim for damages before institution of suit, differ from the wrongful death statute, C. S., 160, in that it is not essential that the action be brought within the time prescribed for giving notice, and inability to comply strictly with the requirements has been recognized as an exception to the rule. *Ibid.*

§ 48. Actions Against—Parties.

After an opinion of the Supreme Court, settling a controversy between a municipality and another over riparian rights in a stream on which the city maintains a water plant, citizens and taxpayers of the city will not be allowed to become interveners and reopen the case, as on no theory do they represent a separate justiciable right. *Pernell v. Henderson*, 93.

NEGLIGENCE.

§ 1a. Defined—In General.

Negligence is a breach of duty imposed by law, which ordinarily entitles the injured party to recover all damages proximately resulting therefrom; but, when the law prescribes a duty with a limitation of liability appendant, the injured party must take the law as he finds it, and measure his rights accordingly. *Russ v. Telegraph Co.*, 504.

Actionable negligence exists only where one whose acts occasion injury to another owes to the latter a duty, either by contract or by operation of law, which he has failed to discharge; and there must be a causal connection between the breach of duty and the injury. *Truelove v. R. R.*, 704.

Generally, negligence will not be presumed from the mere happening of an accident; but on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed. *Etheridge v. Etheridge*, 616.

§§ 2, 3. Sudden Peril—Dangerous Instrumentalities.

In cases of exceptional danger, as where construction work is being performed, the exercise of reasonable care means such care as is commensurate with the exigencies of the occasion. *Beaver v. China Grove*, 234.

NEGLIGENCE—*Continued.*

§ 5. Proximate Cause.

Plaintiff's negligence need not be the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of defendant; it is enough if plaintiff's negligence contributes to the injury. *Austin v. Overton*, 89.

"Contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury; and plaintiff cannot recover when his negligence concurs with that of defendant in proximately producing the injury. *Ibid.*

The proximate cause of an event must be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event, and without which such event would not have occurred. *Montgomery v. Blades*, 463.

§ 6. Concurrent.

In an action for damages on account of the alleged negligent killing of a guest passenger in an automobile accident, where there is evidence of negligence on the part of the driver of the car in which the guest was riding and of defendant, whether the negligence of the defendant concurred with the negligence of the driver of the car and constituted the efficient cause of the injury and death is a question for the jury. *Sample v. Spencer*, 580.

If the negligence of the defendant, in an automobile accident, contributed to the injury and death of plaintiff's intestate as one of the proximate causes thereof, the defendant would be liable notwithstanding the negligence of the driver of the car in which plaintiff's intestate was riding as a guest. *Ibid.*

§ 7. Intervening.

The intervening active negligence of a responsible third party insulates the original passive negligence of another, where the conduct of the other would not have resulted in injury except for the intervening negligence, which thus becomes the sole proximate cause of the injury. *Montgomery v. Blades*, 463.

§ 10. Last Clear Chance.

The plaintiff fails to show that the injury and death of her intestate was the proximate result of defendant's negligence, when the evidence points unerringly to the conclusion that her intestate himself failed to open the derailer or to see that it was open, it being his duty so to do before signaling for the engineer to move the cars, hence he conclusively assumed the risk of the resulting injury and death. *Brady v. R. R.*, 367.

The act of plaintiff's intestate in placing himself in a dangerous position at or near the defendant's railroad track is such an act of negligence on his part as will bar recovery, unless defendant has the last clear chance to avoid the injury. *Long v. R. R.*, 523.

Evidence tending to show that, at the time plaintiff's intestate was struck by defendant's train, he was down on the track in a helpless condition is not sufficient. The plaintiff must further show (1) that the engineer saw, or by the exercise of ordinary care in keeping a proper lookout, could have seen his intestate in time to have stopped the train before striking him; and (2) that the engineer failed to exercise such care, as the proximate result of which the injury occurred. *Ibid.*

§ 11. Contributory.

"Contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury; and plaintiff cannot recover when his negligence concurs

with that of defendant in proximately producing the injury. *Austin v. Overton*, 89.

Plaintiff's negligence need not be the sole proximate cause of the injury, as this would exclude any idea of negligence on the part of defendant; it is enough if plaintiff's negligence contributes to the injury. *Ibid.*

The negligence of the employee, under the N. C. Workmen's Compensation Act, does not disbar him from compensation for injury by accident arising out of and in the course of his employment, except only in cases where the injury is occasioned by his intoxication or willful intention to injure himself or another. *Archie v. Lumber Co.*, 477.

Only where on the face of the complaint itself the contributory negligence of the plaintiff is patent and unquestionable, so as to bar his recovery, will the court allow advantage to be taken thereof by demurrer instead of by answer. *Hallow v. R. R.*, 740.

§ 13a. Imputed.

Negligence of the driver of a motor vehicle will not be imputed to a guest passenger having no interest in the car and no control over the driver. *Sample v. Spencer*, 580.

§ 17a. Burden of Proof.

The burden of the issue is never shifted from the plaintiff, in an action for damages by negligence, and the most a *prima facie* case does, when made out, is to warrant, but not compel, a verdict for the plaintiff and therefore to carry the case to the jury. A *prima facie* case does not impose upon the defendant the burden of rebuttal by a preponderance of the evidence. *Mfg. Co. v. R. R.*, 330.

The fact that an inference of negligence may be drawn from the evidence does not shift the burden but merely constitutes evidence defendant is required to meet or risk an adverse verdict. *Etheridge v. Etheridge*, 616.

§ 19a. Sufficiency of Evidence and Nonsuit.

Motion for nonsuit properly denied where evidence discloses that defendant was driving his automobile at a high rate of speed and, in attempting to traverse a curve, swerved and struck a car, coming from opposite direction, in which plaintiff was riding, causing injury. *Patrick v. Treadwell*, 1.

Defendant left truck at night, without lights, on right side of paved highway, with room to pass, and plaintiffs, driving at 2 a.m., 40 or 45 miles per hour, lights dimmed, never applied brakes and failed to see truck, crashing into same with great force, nonsuit proper. *Pike v. Seymour* and *Pierce v. Seymour*, 42.

Where plaintiff, who was walking at night on a town sidewalk, which was perfectly smooth and level, with lights at the corners ahead and behind her, and on a street she was accustomed to use, stepped off the paved sidewalk into a depression between the paving and a retaining wall, thus causing the injury, defendant's motion for nonsuit should have been granted. *Walker v. Wilson*, 66.

In an action for damages for personal injuries by a tenant against his landlord, where it appeared that the tenant was injured by plaster falling from the walls, after repeated promises by the landlord to repair same, judgment of nonsuit on the evidence was proper. *Leavitt v. Rental Co.*, 81.

Where plaintiff was following defendant, both traveling at 45 or 50 miles per hour on a straight, 30-foot concrete road, no lights being on rear of defend-

ant's car, and defendant slowed down suddenly and turned to the left side of the road, and either stopped or was moving very slowly, when plaintiff's car violently collided with defendant's, in an action for damages, plaintiff is guilty of contributory negligence and nonsuit was proper. *Austin v. Overton*, 89.

Where evidence shows that driver of automobile, with full knowledge that street was under construction, drove automobile into manhole protruding two feet above surface resulting in injuries to passenger, motion for nonsuit should have been granted in action for damages by passenger against town. *Beavers v. China Grove*, 234.

In an action for damages by a child against a city for personal injuries occasioned by a defective sidewalk, where plaintiff's evidence showed that there was a short strip of pavement ending in the middle of the block, leaving a drop of four or five inches opposite a break in the curb, which had existed for a year and a half, and plaintiff, while walking along this sidewalk, between sundown and dark, fell because of the said drop, severely injuring his knee. *Held:* Judgment of nonsuit erroneous. *Webster v. Charlotte*, 321.

Where, in an action against the owner for injuries inflicted by his dog, plaintiff's evidence showed that for a year or more the dog, when plaintiff came to deliver papers, would run towards and bark at plaintiff so viciously that the owner would have to call the dog off, that the dog bit plaintiff's brother and was given away by defendant on account of its vicious character. *Held:* Judgment of nonsuit was error. *Plumidies v. Smith*, 326.

In an action for damages for personal injuries against a town, where the complaint alleged that defendant's employee, while on his way to place a protective light at a dangerous hole in a street, negligently ran into the back of an automobile in which plaintiff was riding causing injury, a demurrer was properly overruled. *Millar v. Wilson*, 340.

While the statute, C. S., 567, requires on a motion to nonsuit, a consideration of the whole evidence, it is clear that only that part of the defendant's evidence which is favorable to plaintiff can be taken into consideration, since, otherwise, the court would pass upon the weight of the evidence, the credibility of which rests solely with the jury. *Wall v. Bain*, 375.

All of the evidence showing that plaintiff, a guest passenger, was injured when the automobile in which he was riding collided with a "dummy policeman" parking sign, in the center of a brilliantly lighted intersection of two city streets, defendant's motion of nonsuit was properly allowed. *Brickhouse v. Columbia*, 597.

Generally, negligence will not be presumed from the mere happening of an accident; but on the contrary, in the absence of evidence on the question, freedom from negligence will be presumed. *Etheridge v. Etheridge*, 616.

Direct evidence of negligence is not required, but the same may be inferred from facts and circumstances, and if the facts proved establish the more reasonable probability that defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury. *Ibid.*

When a thing which caused an injury is shown to be under the control and operation of the party charged with negligence and the accident is one which, in the ordinary course of things, will not happen if those who have such control and operation use proper care, the accident itself, in the absence of an explanation by the party charged, affords some evidence that it arose from want of proper care. *Ibid.*

Where defendant was driving an automobile, free from disclosed mechanical defect, at about 35 miles per hour on a good road and the car struck a bump at an intersection, ran on the right side of the road for some distance, into the

right drain ditch, overturned and injured plaintiff, there is a reasonable inference of want of due care and judgment of nonsuit was error. *Ibid.*

§ 19b. Evidence—Nonsuit—Contributory.

Where an engineer, operating a railroad train in the night at about 35 miles an hour, was unable to see, as he rounded a curve, a public road crossing 100 feet ahead or any object at or near the same, but did observe an object near the far side of the crossing, somewhat concealed thereby, which he discovered at about 40 feet distant to be plaintiff's intestate, who was instantly killed by the train striking him. *Held:* Judgment of nonsuit at conclusion of evidence proper, and plaintiff's contention that the railroad was responsible for the dangerous location of the crossing is without merit, as the road in question was a public county road. *Long v. R. R.*, 523.

Where the complaint, in an action against a railroad for negligence, alleges that plaintiff entered the train, assisting a passenger, with the permission of the conductor and porter and with their assurance that there was ample time, and before he could get a seat for his companion the train started, and when he hastened to the platform he found the door closed over the steps and open above, and before he could return to the car a sudden jerk or lunge threw him out of the door and as he was falling to the ground, he caught the handbar at the entrance steps and was injured. *Held:* Demurrer *ore tenus*, on the ground that the complaint does not state a cause of action, was properly overruled. *Hallow v. R. R.*, 740.

§ 19c. Res Ipsa Loquitur.

Where plaintiff's intestate, a brakeman, was killed by the derailment of the front trucks of a freight car, upon which he was riding in switching operations, and all of the facts relating to the derailment were known, alleged and set forth in evidence and the case tried on the grounds selected by plaintiff, without reference to *res ipsa loquitur*, the facts do not make out a case of *prima facie* negligence and carry the case to the jury on the theory that "the thing speaks for itself." *Brady v. R. R.*, 367.

§ 19d. Sufficiency of Evidence—Negligence of Defendant.

The intervening active negligence of a responsible third party insulates the original passive negligence of another, where the conduct of the other would not have resulted in injury except for the intervening negligence, which thus becomes the sole proximate cause of the injury. *Held:* Demurrer to the evidence by a railroad and a city, codefendants with the driver of an automobile in an action for damages, should have been sustained, where all the evidence tended to show that the collision of the automobile, in which plaintiff was riding as a guest, with a pillar supporting a railroad track in the middle of a city street, was caused by the negligence of the driver. *Montgomery v. Blades*, 463.

§ 20. Instructions.

Where there is no evidence that the fire originated on defendant's right of way, in an action against a railroad for negligently burning plaintiff's property, the court properly instructed the jury that their only inquiry as to negligence should be as to whether the engine of defendant was properly equipped, manned and managed. *Mfg. Co. v. R. R.*, 330.

In a case against a railroad for negligent burning, a charge to the jury is correct which states that a railroad is not required to be an insurer that no

NEGLIGENCE—*Continued.*

live sparks or cinders will come from the engine operated on its tracks, and should the jury find that the defendant used due care to prevent the escape of sparks and cinders and notwithstanding such care so found, if it should be found that the fire was caused by sparks and cinders from defendant's engine, the jury should answer the issue of negligence in the negative. *Ibid.*

PARTITION.

§ 1a. In General.

A judgment lien upon the undivided interest of a tenant in common is subordinate to the right of the cotenants to enforce partition; and, when it is made, the judgment lien is transferred to the portion assigned to the debtor in severalty, or to his share in the proceeds of sale, even though the judgment creditor is not a party to the proceedings for partition. *Edmonds v. Wood*, 118.

Judgment in partition is conclusive in respect to thing in which parties had estate in common, and to share to which each is entitled and to parcel allotted to each and it operates by way of estoppel as to parties, subject matter and issues. *Huffman v. Pearson*, 193.

Purpose of partition is to sever unity of possession and, unless specifically brought in issue by pleadings, lines of adjoining tracts are not involved and as to such lines neither parties to partition or adjoining owners are estopped thereby. *Ibid.*

A judgment creditor is given the right upon his own initiative to have partition, so that the moiety, upon which the lien of his judgment attaches, may be ascertained, and no doubt he would be allowed to intervene in a partition proceeding, and diligence might require it. *Edmonds v. Wood*, 118.

§ 4a. Parties and Procedure.

Liens erroneously declared against judgment debtor's share, which injuriously affect the judgment creditor's general lien under C. S., 614, are irregularities, which can be corrected only by motion in the cause. C. S., 3217. *Edmonds v. Wood*, 118.

A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. The actual possession may be in a life tenant. C. S., 3234. *Moore v. Baker*, 736.

The presence of a party in a partition proceeding, not shown to be a necessary party, is immaterial except as affecting costs. *Ibid.*

In a petition for partition of land, alleging that petitioners and defendants, except John B. Cherry, are tenants in common and owners of, and are seized in fee of the lands therein described, an additional statement that Cherry is in wrongful possession of some part of the land is insufficient to oust jurisdiction and a demurrer thereto should have been overruled. *Ibid.*

§ 4b. Hearings and Evidence.

Proceedings for the partition of land do not ordinarily place the title at issue, and unless the title is placed at issue, petitioners are not required to prove title as in an action for ejectment. *Moore v. Baker*, 736.

Where tenants in common allege that they are the owners of land and seized of the fee simple title thereto, the law presumes possession. *Ibid.*

PARTITION—*Continued.*

§ 4d. Sale and Confirmation.

In proceedings before clerk to sell lands for partition or to make assets the jurisdiction includes right to accept bid at public or private sale, and compel purchaser to comply with his contract. *Ex Parte Wilson*, 99.

§ 5a. Sole Seizin, Plea of.

The plea of sole seizin converts a special proceeding for partition into a civil action to try title, and it becomes in effect an action in ejectment, and title being directly involved, there can be no partition until the issue thus raised is adjudicated. *Bailey v. Hayman*, 58.

§ 8. Effect—Collateral Attack.

A judgment in partition proceedings cannot be collaterally attacked except for fraud or want of jurisdiction in the court, rendering it void. *Edmonds v. Wood*, 118.

A judgment lien upon the undivided interest of a tenant in common is subordinate to the right of the cotenants to enforce partition; and, when it is made, the judgment lien is transferred to the portion assigned to the debtor in severalty, or to his share in the proceeds of sale, even though the judgment creditor is not a party to the proceedings for partition. *Ibid.*

A judgment creditor is given the right upon his own initiative to have partition, so that the moiety, upon which the lien of his judgment attaches, may be ascertained, and no doubt he would be allowed to intervene in a partition proceeding, and diligence might require it. *Ibid.*

§ 10. Exchange of Deeds—No Change of Title.

An exchange of deeds by tenants in common, where the purpose is clearly partition, does not create or confer upon the parties any additional, or new, or different title, and each party to the partition holds precisely the same title he had before the partition, which only severs the unity of possession. Where a husband, in such a partition, is made a joint grantee with his wife he acquires no title. *Wood v. Wilder*, 622.

PHYSICIANS AND SURGEONS.

§§ 15a, 15b, 15c. Use of Knowledge.

The law holds a physician or surgeon liable for an injury to his patient proximately resulting from a want of that degree of knowledge and skill ordinarily possessed by others of his profession, or for the omission to use reasonable care and diligence in the practice of his art, or for the failure to exercise his best judgment in the treatment of the case. *Davis v. Wilmerding*, 639.

A departure from approved methods in general use, if injurious to the patient, suffices to carry the case to the jury on the issue of negligence. *Ibid.*

§ 15e. Sufficiency of Evidence.

Where, in an action for damages against a physician, the plaintiff's evidence tended to show that defendant, in treating the broken arm of plaintiff, removed the cast once or twice a week and massaged the hand and arm, which was a departure from approved methods in general use, and after some months plaintiff's hand and arm were useless and an X-ray showed the wrist and hand out of alignment and the bone out of position, a motion for judgment of nonsuit was properly denied. *Davis v. Wilmerding*, 639.

PLEADINGS.

§ 3a. Complaint—Statement of Cause of Action.

Ultimate facts are always such as are put directly in issue. Probative facts are those which may be in controversy but are not issuable. The ultimate facts are those which the evidence upon the trial will prove, and not the evidence required to prove those facts. *Hawkins v. Moss*, 95.

The function of a complaint is not the narration of evidence but a statement of the material, essential or ultimate facts upon which the plaintiffs claim to relief is founded. Only facts to which the pertinent legal or equitable principles of law are to be applied should be stated. *Truelove v. R. R.*, 704.

§ 6. Answer—In General.

In a proceeding for adoption, the filing of petition and making the only living parent a party, and such parent accepting service and a copy of the petition and consenting in writing on the summons to the adoption, is in effect a voluntary appearance and answer. *Moseley v. Deans*, 731.

§ 7. Traverse or Denial—In Bar.

A plea in bar is a plea so peremptory as to be sufficient to destroy the plaintiff's action and prevent its further prosecution, if established by proof. *Lithographic Co. v. Mills*, 516.

§ 10. Counterclaims, Set-Offs, Cross Actions.

Cross actions by defendant against codefendant or third party permitted under our practice must be in reference to claim made by plaintiff and based upon an adjustment of that claim. *Schnepp v. Richardson*, 228.

§ 14. Demurrer—Jurisdiction.

Demurrer *ore tenus* does not lie where answer has been filed and the demurrer does not raise objection to the jurisdiction or that complaint does not state facts sufficient to constitute a cause of action. *Roberts v. Grogan*, 30.

Objection to the jurisdiction of the court over the subject matter of the action is presented by demurrer, C. S., 511, and a demurrer is a plea to the cause of action set out in the complaint. *Williams v. Cooper*, 589.

§ 15. Demurrer—Failure to State Cause of Action.

Demurrer *ore tenus* does not lie where answer has been filed and the demurrer does not raise objection to the jurisdiction or that complaint does not state facts sufficient to constitute a cause of action. *Roberts v. Grogan*, 30.

Demurrer to a complaint for failure to state a cause of action admits all of the allegations and all inferences that may reasonably be deduced therefrom under a liberal construction of its terms. *Spake v. Pearlman*, 62.

Upon demurrer to a complaint of negligent injury to plaintiff on the ground that it does not state a cause of action, it is sufficient if the complaint in a concise statement of the facts apprizes the defendant and the court of the nonperformance of some duty of care or protection which the defendant owed the plaintiff and the proximate cause of the injury. *Ibid.*

Where, in an action for damages, due to negligence, plaintiff alleges that defendants did not furnish her a safe and suitable place to work, and that plaintiff, in the performance of her duties, caught her foot in the loose runner as she descended the dark stairway and fell to her injury. *Held:* Error to allow a motion to dismiss for failure to state a cause of action, *non obstante veredicto*. *Ibid.*

In action to remove cloud from plaintiff's title, caused by docketed judgment alleged to be invalid, demurrer to complaint properly overruled, C. S., 1743,

being sufficiently broad to entitle plaintiff to maintain independent action. *Exum v. R. R.*, 222.

Upon application for an industrial bank charter, under Michie's Code, secs. 217 (b) and 225 (m), the Secretary of State has no authority to act without a favorable certificate from the Commissioner of Banks, and upon suit brought, in the absence of such certificate, to compel the issuance of a charter, alleging no bad faith, capricious acts, or disregard of law by the State officers, *Held:* The complaint fails to state a cause of action and is not sufficient as a petition for *certiorari* or as an application for *mandamus*. *Pue v. Hood, Comr. of Banks*, 310.

In an action for damages for personal injuries against a town, where the complaint alleged that defendant's employee, while on his way to place a protective light at a dangerous hole in a street, negligently ran into the back of an automobile in which plaintiff was riding causing injury, a demurrer was properly overruled. *Millar v. Wilson*, 340.

While it is provided by statute that in construction of a pleading for the purpose of determining its effect, the allegations therein shall be liberally construed with a view to substantial justice between the parties, C. S., 535, the complaint must state a cause of action, and the court will not construe into a pleading that which it does not contain. *Jones v. Furniture Co.*, 439.

In an action to recover for breach of an express warranty, where the complaint alleges that defendant's salesman guaranteed that a second-hand bed was free of bugs, and relying thereon plaintiff purchased the bed which was infested with bugs, a demurrer *ore tenus* to the complaint for that it does not state a cause of action, C. S., 518, made in this Court is allowed. *Ibid.*

While the general rule does not allow a party to adopt, in the Supreme Court, a different theory from that upon which he tried his case below, the rule has no application on demurrer based upon an alleged failure of the complaint to state a cause of action. *Wood v. Wilder*, 622.

A demurrer admits every factual averment in the complaint and all reasonable inferences therefrom. *Ibid.*

§ 16a. Misjoinder—Parties and Causes.

A demurrer on the ground of misjoinder of parties and causes of action will not lie when the complaint sets out a series of transactions connected with the same subject of action, flowing from the same cause, all leading to one end, and plaintiff may join several causes of action against defendants who have distinct and separate interests, in order to conclude the whole matter in one suit. *Bellman v. Bissette*, 72.

In a suit, alleging misconduct by trustees, to enforce a trust agreement for the benefit of grantors' children and for an accounting, the plaintiffs and two of the defendants being all of the children and the only heirs at law of the grantors and the other defendants being the trustees and their grantees of a part of the trust property. *Held:* Demurrer for misjoinder of parties and causes properly overruled. *Ibid.*

In an action, growing out of a contract for the sale and purchase of timber, entered into by plaintiff and defendants as commissioners in a special proceeding, and also against defendants, individually, there being no allegation that the individuals were parties to the contract, a demurrer was properly sustained. C. S., 511 (6). *Lumber Co. v. Wilson*, 87.

In action by plaintiff against original defendants on promissory note, original defendants filed answer and cross complaint making bank a defendant and alleging transactions with bank and alleging that plaintiff, an officer of

PLEADINGS—*Continued.*

bank loaned them $700 temporarily, prevailed upon them to sign note in blank to plaintiff personally to cover same, *held* defects in joinder of parties and causes. *Beam v. Wright*, 174.

In action by subcontractor against owner of building for work done and material furnished for improvements by contract with principal contractor B, where defendant denied material allegations and set up cross action for breach of contract and damages against one F, demurrer by F sustained on ground of misjoinder of parties and causes. *Schnepp v. Richardson*, 228.

Upon demurrer by defendants for misjoinder of causes, plaintiffs' agreement, for the court to strike the demurrable part of complaint, is tantamount to taking a nonsuit on the objectionable cause, hence it was error to sustain the demurrer. *Walker v. Oil Co.*, 607.

In a petition for partition of land, alleging that petitioners and defendants, except John B. Cherry, are tenants in common and owners of, and are seized in fee of the lands therein described, an additional statement that Cherry is in wrongful possession of some part of the land is insufficient to oust jurisdiction and a demurrer thereto should have been overruled. *Moore v. Baker*, 736.

§ 16c. Demurrer—Another Action Pending.

In an action, alleging overpayments by plaintiff to defendants, based upon a contract of sale and purchase of timber and for damages, it appearing in the complaint that the contract in controversy is the basis of another action between the same parties in another county, a demurrer was properly sustained. C. S., 511 (3). *Lumber Co. v. Wilson*, 87.

§ 21. Amendments—Discretion.

Amendments of pleadings are discretionary with the trial court. *Whitehurst v. Hinton*, 85.

A party cannot contend that any right he may have to amend his pleadings has been unduly restricted when he has tendered no amendment. *Ibid.*

§ 28. Judgment on Pleadings.

Where tenants in common, under the erroneous impression that they owned the fee, removed minerals from the property, upon suit by the other tenant in common for damages, and admission by the defendants of the cotenancy, removal and value, plaintiff is entitled to judgment on the pleadings, though not to damages under C. S., 6927. *Jones v. McBee*, 152.

§ 29. Motion to Strike.

Ultimate facts, though alleged in decorative and high-flown language, are within the pale of proper pleading and should not, on motion, be stricken out under C. S., 537; while allegations, which are wholly evidential and probative, have no place in stating a cause of action and should be stricken out. *Hawkins v. Moss*, 95.

Where, in an action for damage against a railroad for death of plaintiff's intestate from an automobile-train collision at a public crossing, plaintiff alleged as an act of negligence that defendant allowed its train to leave a station ahead of schedule, motion to strike this allegation should have been allowed. *Truelove v. R. R.*, 704.

PRINCIPAL AND AGENT.

§ 9. Notice and Knowledge of Agent.

An insurance company cannot avoid liability on its policy by reason of any facts known to it at the time the policy was delivered, and any knowledge

of the company's agent, while acting in the scope of his authority, will, in the absence of fraud or collusion, be imputed to the company, though the policy contains a stipulation to the contrary. *Heilig v. Ins. Co.*, 231.

§ 13. Proof of Agency.

In an action for malicious prosecution, evidence that a collector for defendant bank called on plaintiff for payment on his note, received a check dated the next day which was not paid, and later swore out a criminal warrant upon which plaintiff was acquitted, without evidence of the collector's connection with the bank, except his statement that he represented the bank, *is held* insufficient, and judgment of nonsuit allowed. *Bagley v. Bank*, 97.

In action for damages to plaintiff by the negligence of an agent of defendant, where plaintiff testified that he had known the alleged agent for two months prior to the accident, during which time said agent was driving the same truck which caused the collision complained of, which was loaded at the same place as trucks of defendant, and that he saw the alleged agent receive his pay check from defendant on one occasion along with other help of defendant. *Held:* Evidence of agency sufficient to go to the jury. *Lassiter v. Cline*, 271.

A husband is not *jure mariti* the agent of his wife, and if such agency is relied upon it must be proven. *Pitt v. Speight*, 585.

PROCESS.

§ 1. Form and Requisites.

The purpose of judicial process is to give notice, and its proper service brings the party within the jurisdiction of the court from which the process issued, and hence acceptance of notice and waiver of service by an officer and voluntary appearance in court dispenses with service. Irregularity in the form of the summons is waived. C. S., 489, 490. *Moseley v. Deans*, 731.

§ 3. Defective Process and Amendments.

While the statute (C. S., 476), requires that a summons, directed to the sheriff of a county other than that from which it is issued, shall be attested by the seal of the court, the absence of a seal will not invalidate a judgment where service has been accepted and the defendant has voluntarily appeared. *Moseley v. Deans*, 731.

§ 6h. Corporation—Charter Forfeited.

The continuance of corporate existence, by C. S., 1193, makes service of process, Michie's Code, 1137 (a), on a corporation, after it has been adjudged a bankrupt and its charter forfeited under C. S., 1190, reasonable notice and a valid service. These statutes must be read *in pari materia*. *Sisk v. Motor Freight, Inc.*, 631.

§ 9. Waiver of Service.

Acceptance of notice and waiver of service by an officer and voluntary appearance in court dispenses with service. Irregularity in the form of the summons is waived. C. S., 489, 490. *Moseley v. Deans*, 731.

While the statute (C. S., 476), requires that a summons, directed to the sheriff of a county other than that from which it is issued, shall be attested by the seal of the court, the absence of a seal will not invalidate a judgment where service has been accepted and the defendant has voluntarily appeared. *Ibid.*

PUBLIC UTILITIES.

§§ 2a, 2b. In General—Regulation—Rates.

Intrastate tariff schedules of public utility companies, providing uniform, classified services and rates, with limited liability in certain classifications at lower rates, promulgated under authority of statute, declared to be exclusive, and approved by the Utility Commission, become the legal standard, which the parties may not vary or change by agreement. *Russ v. Telegraph Co.*, 504.

RAILROADS.

(See Carriers.)

§ 12. Fires.

Where there is no evidence that the fire originated on defendant's right of way, in an action against a railroad for negligently burning plaintiff's property, the court properly instructed the jury that their only inquiry as to negligence should be as to whether the engine of defendant was properly equipped, manned and managed. *Mfg. Co. v. R. R.*, 330.

In a case against a railroad for negligent burning, a charge to the jury is correct which states that a railroad is not required to be an insurer that no live sparks or cinders will come from the engine operated on its tracks, and should the jury find that the defendant used due care to prevent the escape of sparks and cinders and notwithstanding such care so found, if it should be found that the fire was caused by sparks and cinders from defendant's engine, the jury should answer the issue of negligence in the negative. *Ibid.*

RAPE.

§ 1a. Elements—Intent Inferred.

The commission of the crime of rape does not require deliberation and premeditation as a prerequisite to conviction, but the intent is inferred from the commission of the act. *S. v. Hairston*, 455.

§ 1c. Evidence—Competency.

In prosecution for rape the victim may testify to defendant's having improper relations with her, in the absence of evidence that she was not mentally competent on account of injuries received from the assault. *S. v. Harris*, 157.

§ 1d. Evidence—Sufficiency.

In a criminal prosecution for rape, there was evidence that defendant criminally assaulted a woman at a place 200 yards from her home and in the absence of her husband, choking her into insensibility, fracturing her skull with a brick, and accomplishing his purpose, motion for nonsuit was properly denied. *S. v. Harris*, 157.

In a prosecution for rape, where the State's evidence tended to show that defendant and another held up a man and a woman in a parked automobile at night, robbed the man and defendant ravished the woman, who positively identified him, defendant admitting his presence and aiding and abetting in the robbery, but testified that his confederate was the ravisher, motion for nonsuit was properly denied. C. S., 4643. *S. v. Vincent*, 543.

§ 1e. Instructions.

In a trial upon an indictment for rape, where all of the evidence tended to show that the act of carnal knowledge was committed against the will of the prosecutrix and no evidence of a lesser offense was offered, defendant is not

entitled to an instruction on the count of an assault with intent to commit rape. *S. v. Hairston*, 455.

§ 3. Carnal Knowledge of Girl 12 to 16 Years.

On the trial of an indictment for carnal knowledge of a female under sixteen years of age, C. S., 4209, where there was competent evidence for the State tending to show that defendant had sexual intercourse with the State's witness when she was only 14 years of age and that she had theretofore never had sexual intercourse with any person, motion for judgment of nonsuit was properly denied. *S. v. Trippe*, 600.

It is to the girl's first act of intercourse with a man, when she is under sixteen years of age, that the law attaches criminality on the part of the man, and a variance between allegation and proof as to time is not material where no statute of limitations is involved. C. S., 4209; C. S., 4625. *Ibid.*

§ 5. Less Degree of Crime—Assault.

Upon an indictment charging an assault with intent to commit rape, C. S., 4204, and C. S., 4205, defendant may be convicted of an assault upon a female as though separately charged, C. S., 4639, and motion to dismiss under C. S., 4643, is properly refused where there is sufficient evidence to convict of an assault. *S. v. Jones*, 37.

Where, in an indictment charging an assault with intent to commit rape, the evidence shows an assault but fails to show an intent to commit rape, at all events and notwithstanding any resistance on the part of the intended victim, the court would err in refusing to give an instruction to limit the verdict to a less degree of the same crime. C. S., 4640. *Ibid.*

REFERENCE.

§ 3. Plea in Bar—In General.

A plea in bar is a plea so peremptory as to be sufficient to destroy the plaintiff's action and prevent its further prosecution, if established by proof. *Lithographic Co. v. Mills*, 516.

The mere denial of the relationship of principal and agent between the plaintiff and defendant will not constitute a plea in bar of reference. *Ibid.*

In a suit by a principal against his agent for damages for the breach of an exclusive contract by failure of defendant to give his undivided service to plaintiff and by defendant's handling rival products, defendant's answer alleging acquiescence and consent by plaintiff to defendant's selling products of others and waiver of the right of plaintiff to complain, constitutes a plea in bar of a compulsory reference. *Ibid.*

§ 4. Effect.

In accordance with the opinion of the Supreme Court, the court below ordered a reference to determine the amount owed plaintiffs by defendants in the way of rents and profits accrued after a judgment invalidating a will. Plaintiffs excepted to the court's limiting the reference to the amounts due for rents and profits after the judgment, and appealed. *Held:* Appeal dismissed as fragmentary and premature. *Whitehurst v. Hinton*, 85.

REMOVAL OF CAUSES.

§§ 3, 5. Diverse Citizenship and Jurisdictional Amount.

Where the jurisdiction of the courts of the United States depends upon the citizenship of the parties, it has reference to the parties as persons. *Barber v. Powell*, 133.

Suits against receivers, appointed by U. S. Court, may be removed to U. S. District Court, when diversity of citizenship and requisite amount in controversy exist and U. S. C. A., Title 28, sec. 125, allowing suits against such receivers, without previous leave of court, has not changed rule. *Ibid.*

In civil action to recover damages for negligence by plaintiff, resident of North Carolina, against defendants, receivers of railroad, residents of Virginia, amount being in excess of $3,000, petition for removal to U. S. District Court on ground of diverse citizenship allowed. *Ibid.*

SALES.

§ 14. Express Warranty.

In an action to recover for breach of an express warranty, where the complaint alleges that defendant's salesman guaranteed that a second-hand bed was free of bugs, and relying thereon plaintiff purchased the bed which was infested with bugs, a demurrer *ore tenus* to the complaint for that it does not state a cause of action, C. S., 518, made in this Court is allowed. *Jones v. Furniture Co.*, 439.

SCHOOLS.

§ 4. Special Charter Districts.

Public Laws 1923, ch. 136, sec. 178, providing per capita allotment of county school funds between special charter districts and all other schools of the county, is no longer applicable to the present type of school administration and is supplanted by the current law. School Machinery Acts 1935, 1937, 1939 and 1941. *Held:* It is the duty of the county treasurer to apportion all county-wide current expense school funds to county and city administrative units monthly and to remit the same on a per capita enrollment basis. *School Trustees v. Benner*, 566.

§ 23. Compensation.

A county board of education is the sole employer of one under contract to teach vocational agriculture in a county school, where such teacher's salary is paid in part from funds furnished as a gift to such board by the State and Federal Governments, and, as such sole employer, is liable, with its insurance carrier, under the Workmen's Compensation Act, for the death of such teacher from an injury by accident arising out of and in the course of his employment. School Machinery Act of 1939, ch. 358, sec. 22. *Callahan v. Board of Education*, 381.

§ 24. Budgets—Additional Appropriations.

The budgets of public school administrative units are not merely tentative, informative, advisory; when prepared and approved by the successive authorities to whose consideration they are referred, they become appropriations from available funds to be applied to the objects specifically named. *School Trustees v. Benner*, 566.

§ 25. Budget—Revision.

When a public school administrative unit budget is perfected by approval, the power of the various authorities instigating, adopting and approving it is

SCHOOLS—*Continued.*

functus officio, and neither these officials, nor any others in their stead, are clothed with the power of budgetary control, which might be invoked to modify its terms. *School Trustees v. Benner*, 566.

The law provides a measure of review where disputes arise between the proponents of the budget and those called upon to adopt or approve it, respecting its adequacy in certain respects; and doubtless budgets which violate the terms of the law might, under proper conditions, be made the subject of court review. *Ibid.*

§ 26½. Allotment of School Funds to County and City.

Public Laws 1923, ch. 136, sec. 178, providing per capita allotment of county school funds between special charter districts and all other schools of the county, is no longer applicable to the present type of school administration and is supplanted by the current law. School Machinery Acts 1935, 1937, 1939 and 1941. *Held:* It is the duty of the county treasurer to apportion all county-wide current expense school funds to county and city administrative units monthly and to remit the same on a per capita enrollment basis. *School Trustees v. Benner*, 566.

SEALS.

§§ 2, 3. Adoption and Burden of Proof.

In an action upon a promissory note, concluding with the words "Witness my hand and seal" and signed by the maker, with the word "seal" in parentheses after his name, the burden is on defendant to satisfy the jury by the greater weight of the evidence that the word "seal" so appearing was not adopted by the maker. *Lister v. Lister*, 555.

SHERIFF.

§ 4. Duties and Authority.

In the absence of statutory authority, the power of a sheriff or other peace officer is limited to his own county, township, or municipality, and he cannot without a warrant make an arrest out of his own county, township or municipality, in cases of a misdemeanor. "Felon fleeing," "hue and cry" and "hot pursuit" discussed. *Wilson v. Mooresville*, 283.

STATE.

§ 1a. Boards and Agencies.

The State Highway and Public Works Commission is an unincorporated agency of the State and may only be sued by the citizen when authority is granted by the General Assembly, and the methods prescribed for entertainment of such an action are exclusive. C. S., 1715, *et seq.* *Yancey v. Highway Com.*, 106.

§ 2a. Actions Against.

Interest may not be awarded against the State, even on a sum certain which is overdue and unpaid, unless the State has manifested its willingness to pay interest by an act of the General Assembly or by a lawful contract to do so. C. S., 2309, has no application to a judgment against the State Highway and Public Works Commission. *Yancey v. Highway Com.*, 106.

STATUTES.

§ 5a. Construction, In General.

The Australian Ballot Law, ch. 164, Public Laws 1929, and the Primary Law, ch. 101, Public Laws 1915, deal with the same subject matter and must be construed *in pari materia*. These acts are merely amendatory of, and supplementary to each other. *McLean v. Board of Elections*, 6.

C. S., 1241, allowing plaintiffs costs as of course, upon recovery, in an action involving title to real estate, and C. S., 1243, providing apportionment of costs in a special proceeding for the division or sale of realty or personalty are related sections, pertain to the same subject matter, and must be construed *in pari materia*, and any conflicts, etc., reconciled. *Bailey v. Hayman*, 58.

General statutes do not bind State unless State is expressly mentioned therein. *Yancey v. Highway Com.*, 106.

The continuance of corporate existence, by C. S., 1193, makes service of process, Michie's Code, 1137 (a), on a corporation, after it has been adjudged a bankrupt and its charter forfeited under C. S., 1190, reasonable notice and a valid service. These statutes must be read *in pari materia*. *Sisk v. Motor Freight, Inc.*, 631.

§ 10. Repeal by Implication.

Statutes on the same subject are to be reconciled if this can be done by giving effect to the fair and reasonable intendment of both acts. The presumption is always against repeal by implication, which results only when the statutes are inconsistent, necessarily repugnant, or wholly and utterly irreconcilable. *McLean v. Board of Elections*, 6.

TAXATION.

§ 25. Valuation and Revaluation.

Certiorari will not lie to bring up for review the valuation of land fixed by the State Board of Assessment, on appeal from the county commissioners acting as a board of equalization, where the proceeding was in accordance with the statute and no want of jurisdiction or abuse of power or discretion is charged, and only errors of judgment are involved. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

§ 32a. Liens—Date Attached and Discharge.

A tax lien is discharged when the tax record is marked paid and the original receipt delivered to the taxpayer. *Miller v. Neal*, 540.

The fact that a county tax collector accepted a check in payment for 1931 taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under C. S., 7990. Having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Michie's Code, sec. 7971 (219). *Ibid.*

§ 35. Collection, etc.

Nonpayment of taxes on a note in suit is nullified by a provision in the judgment on the note that taxes, penalties and interest due shall be paid to the proper officers out of the first collections on the judgment. Michie's Code, 7880 (156) tt. *Roberts v. Grogan*, 30.

A tax lien is discharged when the tax record is marked paid and the original receipt delivered to the taxpayer. *Miller v. Neal*, 540.

TAXATION—*Continued.*

The fact that a county tax collector accepted a check in payment for 1931 taxes, and the check was returned unpaid, and the collector in his settlement with the county paid the taxes in question, does not give him a lien which may be enforced under C. S., 7990. Having failed to correct the tax record so as to show the check returned and the taxes unpaid, the tax lien was not reinstated. Michie's Code, sec. 7971 (219). *Ibid.*

§§ 40a, 40b. Sale, Certificates and Foreclosure.

In action by remaindermen against life tenant to declare life estate forfeited for failure to pay 1939 county taxes within one year from sale of land for taxes, where no foreclosure suit was instituted against life tenant, *held* that county in 1940 was limited to sale of tax lien and land can be sold only by suit in Superior Court in nature of foreclosure. *Crandall v. Clemmons*, 225.

TELEPHONE AND TELEGRAPH.

§§ 1a, 1b. Regulation and Control—In General.

Intrastate tariff schedules of public utility companies, providing uniform, classified services and rates, with limited liability in certain classifications at lower rates, promulgated under authority of statute, declared to be exclusive, and approved by the Utility Commission, become the legal standard, which the parties may not vary or change by agreement. *Holding* valid a $500 limit on recovery against a telegraph company for failure to deliver "death message." *Russ v. Telegraph Co.*, 504.

§ 2. Liability—Failure to Deliver.

In certain cases substantial damages may be recovered for mental anguish, proximately resulting from the wrongful or negligent failure of a telegraph company to transmit correctly and deliver promptly a telegraphic message, independently of any bodily or pecuniary injury; and a sendee or addressee is permitted, under our practice, to maintain the action. *Russ v. Telegraph Co.*, 504.

Proof or admission that the telegraph company received the message for transmission and failed to deliver it to the sendee within a reasonable time raises a *prima facie* case of negligence and imposes upon the defendant the duty of going forward with such facts as it may rely upon, if it does not care to risk an adverse verdict. *Ibid.*

In an action for damages for failure to deliver a telegram, where the evidence showed that the telegram, announcing the death of sendee's brother and stating "burying eleven Monday," addressed to a well-known person by post office box number and town, was received at destination 5 p.m. Sunday, remained undelivered at 6:30 p.m., when it was mailed to sendee and never received by him, although he lived only a short distance from the telegraph office, a demurrer to the evidence was properly overruled. *Ibid.*

TENANTS IN COMMON.

§ 3. Title, Exchange of Deeds.

An exchange of deeds by tenants in common, where the purpose is clearly partition, does not create or confer upon the parties any additional, or new, or different title, and each party to the partition holds precisely the same title he had before the partition, which only severs the unity of possession. Where a husband, in such a partition, is made a joint grantee with his wife he acquires no title. *Wood v. Wilder*, 622.

TORTS.

§ 8a. Release—Fraud.

A release, executed by the injured party and based on a valuable consideration, is a complete defense to an action for damages for the injuries, and, where the execution of such release is admitted or established by the evidence, the burden is on the plaintiff to prove matters in avoidance, such as fraud. *Ward v. Heath*, 470.

Where a literate plaintiff, five months after leaving the hospital where she was treated for injuries received in an automobile accident, signed and delivered with the advice and counsel of her husband, in consideration of a substantial sum, a full and complete release, after consulting her physicians and after many conferences with the insurance carriers of defendant, who represented to her and her husband that her injuries were temporary, the evidence is insufficient to establish fraud and deceit in the procurement of the release. *Ibid.*

TRESPASS.

§ 8. Nature of Forcible Trespass.

Where there is such a show of force as to create a reasonable apprehension in the mind of one in possession of property that he must yield to avoid a breach of the peace, and he does so yield, this is a yielding upon force and constitutes forcible trespass. *Binder v. Acceptance Corp.*, 512.

TRIAL.

§ 4. Continuance—Soldiers' and Sailors' Civil Relief Act.

The Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. A., Appendix 501, *et seq.*, is inapplicable where the rights of the litigant are not affected by reason of his military service. *Lightner v. Boone*, 205.

In suit by beneficiaries for protection of, and accounting for, trust fund against a trustee who had been called into armed forces of U. S., where the court ordered trust funds impounded and found. from defendant's response that he was speculating with the trust and that answer admitted mismanagement and that trustee had no defense, Soldiers' and Sailors' Civil Relief Act will not stay proceedings. *Ibid.*

Counsel, whose appearance is general, cannot limit such appearance for the sole purpose of moving for a continuance, the granting of such motion being a matter of discretion. *Ibid.*

In an action against a soldier in active service, for personal injuries from negligence, upon motion by defendant that trial be stayed under U. S. Soldiers' and Sailors' Civil Relief Act of 1940, the court disallowed the motion, without finding the facts pertinent thereto. *Held:* Defendant's appeal is dismissed, but without prejudice to his right to renew his motion, have the facts found and his rights thereupon determined. *Batts v. Little* and *Edens v. Little*, 353.

§ 5. Course and Procedure—In General.

Where relief can be given in pending action it must be done by motion in cause and not by independent action. *Ex Parte Wilson*, 99.

§ 7. Argument and Conduct of Counsel.

Decision of trial judge on question of the concluding argument is final and not reviewable. *Heilig v. Ins. Co.*, 231.

§ 22a. Nonsuit—Evidence—In General. (See Appeal and Error 40e.)

On motion to nonsuit, plaintiff is entitled to benefit of every fact and inference of fact, pertaining to issues involved which may reasonably be deduced from evidence. *Heilig v. Ins. Co.*, 231; *Plumidies v. Smith*, 326; *Wall v. Bain*, 375; *Davis v. Wilmerding*, 639.

While the statute, C. S., 567, requires on a motion to nonsuit, a consideration of the whole evidence, it is clear that only that part of the defendant's evidence which is favorable to plaintiff can be taken into consideration, since, otherwise, the court would pass upon the weight of the evidence, the credibility of which rests solely with the jury. *Wall v. Bain*, 375.

§ 22b. Nonsuit—Sufficiency of Evidence.

In action on life policy, motion for nonsuit properly denied where evidence shows that policy was issued by company's agent on application signed by insured's father, and questions and answers were inserted therein by agent, without the father's knowledge, there being no evidence of fraud or collusion. *Heilig v. Ins. Co.*, 231.

§ 24. Sufficiency of Evidence Where Trial by Judge.

Where a jury trial is waived and the court makes no specific findings of fact, all of the evidence, when taken in the light most favorable to plaintiff, must be insufficient to support a favorable finding for plaintiff to justify a judgment of nonsuit. *Harrison v. Brown*, 610.

§ 25. Voluntary Nonsuit.

Upon demurrer by defendants for misjoinder of causes, plaintiffs' agreement, for the court to strike the demurrable part of complaint, is tantamount to taking a nonsuit on the objectionable cause, hence it was error to sustain the demurrer. *Walker v. Oil Co.*, 607.

§ 29a. Instructions—Lapsus Linguæ Corrected.

The court in its charge having made, by inadvertence, a patent error, and having at once corrected this *lapsus linguæ* and instructed the jury to disregard it, and later in the charge having again called its mistake to the attention of the jury, in language understandable to men of ordinary intelligence, and having correctly stated the law on this aspect of the case, an exception thereto is untenable. *Bailey v. Hayman*, 58.

§ 33. Statement of Contentions.

A judge is not required by law to state the contentions of the litigants. *S. v. Colson*, 28.

Where a judge in his charge states the contentions of one of the parties he must also fairly state the contentions of the adversary party. A failure to do so will be held for error. *Ibid.*

Any substantial errors, made by the court in the statement of the evidence or in the statement of the contentions of the parties, must be called to the attention of the court at the time they are made, in order to give opportunity to make correction, and the failure to so call them to the court's attention is a waiver of any right to object and except thereto on appeal. *Mfg. Co. v. R. R.*, 330.

§ 37. Issues and Verdict—Sufficiency of Issues.

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties oppor-

tunity to introduce all pertinent evidence and to apply it fairly. *Lister v. Lister*, 555.

§ 49. Motions to Set Aside Verdict.

The discretionary action of the trial court in setting aside the verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. It is likewise a matter of discretion as to whether the verdict shall be set aside in whole or in part. *Hawley v. Powell*, 713.

Where, on motion to set aside a verdict on the first issue as contrary to the weight of the evidence and as to the second issue for excessive award of damages, and the motion is overruled as to the first issue and allowed as to the second issue, an appeal is premature, for defendants have preserved their exceptions to the trial on the first issue and these may be presented upon appeal from the final judgment. *Ibid.*

§ 54. Trial by Court—Findings, etc.

The trial judge, a jury trial having been waived, may find the facts with the force and effect of a jury verdict, and declare his conclusions of law arising thereon. The statute, C. S., 569, requires that his findings and conclusions be stated in writing. *Harrison v. Brown*, 610.

Where a jury trial is waived and the court makes no specific findings of fact, all of the evidence, when taken in the light most favorable to plaintiff, must be insufficient to support a favorable finding for plaintiff to justify a judgment of nonsuit. *Ibid.*

Findings of fact by the court, when a trial by jury has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. *Turlington v. Neighbors*, 694.

TRUSTS.

§ 1a. In General, Creation.

The principle that a trust may be created by a declaration contained in a separate instrument, or in several instruments, other than the deed conveying the legal title, provided they have sufficient relation to each other and construed together evidence such trust, is generally recognized; and the declaration of trust, in this State, may be oral. *Peele v. LeRoy*, 123.

§ 1b. Parol Trust.

A trust may be created by declaration contained in separate instrument or in several instruments other than by deed conveying legal title, provided they have sufficient relation to each other and construed together evidence such trust; and declaration of trust may be oral. *Peele v. LeRoy*, 123.

In North Carolina an express trust may be impressed upon land by an adequate parol agreement, accompanying a conveyance of the legal title. *Taylor v. Addington*, 393.

An express trust cannot be engrafted by parol upon an inheritance, which is a gift of the law and not a grant of the decedent. *Ibid.*

Imposition, fraud, duress, undue influence, or the like must be shown, by clear, strong and convincing evidence, to engraft a trust upon a gift of money by a parent to one of his children. A showing of favoritism, unequal division and detriment to other children is not sufficient. *Winner v. Winner*, 414.

Where a complaint alleges that defendant, mother of plaintiff, when plaintiff was a minor, deposited in bank money belonging to plaintiff and afterwards bought a lot therewith, taking title in her own name but explaining to plaintiff

that she held the lot for him and that, shortly after plaintiff became of age he built a house on said lot, has paid the taxes since, and had no notice of any disavowal of the trust until very shortly before filing complaint. *Held:* (1) A demurrer *ore tenus* was properly overruled; (2) and motion for judgment on the pleading is without merit; and (3) motion for trial on plea of statute of limitations, before trial on merits, was properly denied. *Vail v. Stone*, 431.

A resulting trust may be established by parol, and no formality of words is necessary where the unequivocal intent can be determined from the attendant circumstances. *Creech v. Creech*, 656.

§ 5. Control and Management.

However large may be the powers of a trustee, they are to be exercised only for effectuating the trust; and when such powers are perverted to the detriment of the *cestui que trust*, the court will promptly interpose its protective authority. *Lightner v. Boone*, 205.

§ 7. Actions to Establish.

Plaintiffs, owning realty subject to mortgage which unable to pay, conveyed same to defendant, who on same day executed agreement to save plaintiffs harmless from mortgage debt by paying installments, taxes, etc., and upon a sale proceeds to be divided between plaintiffs and defendant, subject to certain adjustments. *Held:* Complaint states cause of action. *Peele v. LeRoy*, 123.

Where a complaint alleges that defendant, mother of plaintiff, when plaintiff was a minor, deposited in bank money belonging to plaintiff and afterwards bought a lot therewith, taking title in her own name but explaining to plaintiff that she held the lot for him and that, shortly after plaintiff became of age he built a house on said lot, has paid the taxes since, and had no notice of any disavowal of the trust until very shortly before filing complaint. *Held:* (1) A demurrer *ore tenus* was properly overruled; (2) and motion for judgment on the pleading is without merit; and (3) motion for trial on plea of statute of limitations, before trial on merits, was properly denied. *Vail v. Stone*, 431.

§ 8a. Construction—In General.

Where trust indentures conveyed personalty to trustees, in trust for children and grandchildren, with directions as to the distribution of the income and principal thereof, and a devise of additional funds by will contemplated the sale of realty and a similar distribution of the income and *corpus* thus devised, the ordinary rules of descent and distribution and those governing the devolution of estates are applicable to the instruments under consideration, to determine the rights of those who are to participate in accordance with the intent of the trustor. *Smyth v. McKissick*, 644.

In a conveyance or devise principal and income go together, in the absence of a clear intention to separate the income from the principal. *Ibid.*

§ 8b. Title and Right.

Beneficiaries of trust property, who are *sui juris* and whose rights are vested, may dispose of their equitable interests in the trust; but here the children of trustor's grandchildren take by purchase and not by descent, and the interests of the grandchildren are defeasible and upon their dying, during the life of the first takers, leaving children, who, in that event, take the part to which their parents would have been entitled, if living, and, upon the death of a grandchild during the trust period, only those coming within the descrip-

tion, or those then entitled, are capable of answering the roll call for annual or final distribution. *Smyth v. McKissick*, 644.

§ 12. Accounting and Settlement.

Plaintiffs, owning realty subject to a mortgage which unable to pay, conveyed same to the defendant, who on the same day executed an agreement to save plaintiffs harmless on account of said mortgage by paying installments, taxes, repairs, etc., and upon a sale of the property, proceeds to be divided between plaintiffs and defendant, subject to certain adjustments. *Held:* Upon suit to enforce a trust, error to sustain demurrer to complaint as not stating a cause of action. *Peele v. LeRoy*, 123.

Ordinarily, in litigation over a fund in the nature of an *in rem* proceeding, such items of costs, as referee's allowances and stenographic reporter's bills, are paid out of the fund, although taxable in the discretion of the court, C. S., 1244 (6). *Holding* that, when such costs have been ordered paid from the estate, they cannot afterwards be taxed against an executor personally, *Lightner v. Boone*, 421.

Where one in a fiduciary capacity uses the trust funds for his own advantage and never accounts therefor until compelled to do so, he is liable for interest on the funds so used. *Holding* an executor and trustee liable for interest on amounts paid himself as attorney's fees. *Ibid.*

§ 14. Resulting Trust.

In the absence of circumstances indicating a contrary intent, where the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a trust in favor of the payor arises by operation of law and attaches to the subject of the purchase price. *Creech v. Creech*, 656.

§ 15. Constructive Trust.

Imposition, fraud, duress, undue influence, or the like must be shown, by clear, strong and convincing evidence, to engraft a trust upon a gift of money by a parent to one of his children. A showing of favoritism, unequal division and detriment to other children is not sufficient. *Winner v. Winner*, 414.

Where a father conveyed a fee simple title in lands to one of his sons and such son's wife, and thereafter the father had prepared a deed, reconveying the same lands to himself, and requested such son and wife to execute the same, which they refused to do. *Held:* The evidence is insufficient to establish a constructive trust on the lands in favor of the father, or his heirs. *Ibid.*

Where a complaint alleges that defendant, mother of plaintiff, when plaintiff was a minor, deposited in bank money belonging to plaintiff and afterwards bought a lot therewith, taking title in her own name but explaining to plaintiff that she held the lot for him and that, shortly after plaintiff became of age he built a house on said lot, has paid the taxes since, and had no notice of any disavowal of the trust until very shortly before filing complaint. *Held:* (1) A demurrer *ore tenus* was properly overruled; (2) and motion for judgment on the pleading is without merit; and (3) motion for trial on plea of statute of limitations, before trial on merits, was properly denied. *Vail v. Stone*, 431.

§ 15. Acts and Transactions Creating Resulting Trust.

In the absence of circumstances indicating a contrary intent, where the purchase price of property is paid with the money of one person and the title is taken in the name of another, for whom he is under no duty to provide, a

TRUSTS—*Continued.*

trust in favor of the payor arises by operation of law and attaches to the subject of the purchase price. *Creech v. Creech*, 656.

A resulting trust may be established by parol, and no formality of words is necessary where the unequivocal intent can be determined from the attendant circumstances. *Ibid.*

§ 18c. Burden of Proof.

The purchase of property by a parent, who takes title in the name of a child, raises a presumption of fact and not of law that the purchase is intended as an advancement. This presumption may be rebutted by evidence of a contrary intent. *Creech v. Creech*, 656.

§ 18d. Evidence.

In a suit where plaintiff seeks to have a trust declared in her favor against land conveyed to her son in fee and by such son conveyed to her husband, now dead, who after such conveyance divorced plaintiff and married defendant, executrix, who did not go upon the stand, evidence attacking the characters of both the executrix and deceased husband is not relevant to the issues, and its admission is reversible error. *Creech v. Creech*, 656.

VENUE.

§ 1c. Parties, Action Against Public Officer.

In action in Catawba County, residence of plaintiff, for conspiracy and damages which occurred in Wilkes County, against corporation and two individuals as its agents, one of individuals being deputy sheriff of Wilkes, motion for change of venue to Wilkes, under C. S., 464, properly denied, there being no allegation that acts complained of were done by deputy sheriff by virtue of his office. *Quære*, whether deputy sheriff is "public officer" within meaning of statute. *Potts v. Supply Co.*, 176.

§ 2a. Subject of Action—Personalty.

Where recovery of personal property is sole relief demanded, other matters being incidental, the county in which personal property or some part thereof is situated is the proper venue. *Marshburn v. Purifoy*, 219.

In action by mortgagor, in Superior Court of county of his residence, against mortgagee, to recover mortgaged personalty situated in another county and in possession of the mortgagee, and to compel an accounting, motion in apt time, for removal to county where property was situated, should have been granted. *Ibid.*

§ 4a. Motion for Change as Matter of Right.

In action in Catawba County, residence of plaintiff, for conspiracy and damages which occurred in Wilkes County, against corporation and two individuals as its agents, one of individuals being deputy sheriff of Wilkes, motion for change of venue to Wilkes, under C. S., 464, properly denied, there being no allegation that acts complained of were done by deputy sheriff by virtue of his office. *Quære*, whether deputy sheriff is "public officer" within meaning of statute. *Potts v. Supply Co.*, 176.

WILLS.

§ 2. Testamentary Capacity.

The same mental capacity necessary to make a will is required to revoke one. *Sutton v. Sutton*, 274.

WILLS—*Continued.*

§ 13. Revocation by Testator.

The same mental capacity necessary to make a will is required to revoke one. *Sutton v. Sutton*, 274.

A complaint in civil action for fraud in preventing revocation of a will, alleged that will made in 1917 and probated in 1941 and in 1936 testator was adjudged incompetent and a guardian appointed who acted to his death in 1941 and in 1938 testator called for his will to destroy it, and was assured that will was of no value and destroyed. Error for court below to overrule a demurrer on the ground that no cause of action stated. *Ibid.*

§ 21c. Grounds of Attack—Fraud, Duress, etc.

A complaint in civil action for fraud in preventing revocation of a will, alleged that will made in 1917 and probated in 1941 and in 1936 testator was adjudged incompetent and a guardian appointed who acted to his death in 1941 and in 1938 testator called for his will to destroy it, and was assured that will was of no value and destroyed. Error for court below to overrule a demurrer on the ground that no cause of action stated. *Sutton v. Sutton*, 274.

§ 31. Construction, In General.

Where trust indentures conveyed personalty to trustees, in trust for children and grandchildren, with directions as to the distribution of the income and principal thereof, and a devise of additional funds by will contemplated the sale of realty and a similar distribution of the income and *corpus* thus devised, the ordinary rules of descent and distribution and those governing the devolution of estates are applicable to the instruments under consideration, to determine the rights of those who are to participate in accordance with the intent of the trustor. *Smyth v. McKissick*, 644.

§ 31. Construction—Principal and Income.

In a conveyance or devise principal and income go together, in the absence of a clear intention to separate the income from the principal. *Smyth v. McKissick*, 644.

§ 33c. Vested, Contingent and Defeasible Interest.

Beneficiaries of trust property, who are *sui juris* and whose rights are vested, may dispose of their equitable interests in the trust; but here the children of trustor's grandchildren take by purchase and not by descent, and the interests of the grandchildren are defeasible and upon their dying, during the life of the first takers, leaving children, who, in that event, take the part to which their parents would have been entitled, if living, and, upon the death of a grandchild during the trust period, only those coming within the description, or those then entitled, are capable of answering the roll call for annual or final distribution. *Smyth v. McKissick*, 644.

§§ 33d, 34. Estates in Trust and Interests.

A life estate, with remainder over to designated persons, may be created in personalty, at least personalty of a more permanent nature, directly by will, without the intervention of a trustee; and money comes within the rule. *Williard v. Weavil*, 492.

Where testator provided by will that all of his property should be sold and go to his estate except certain realty allotted his widow for her support, and at the death of his widow his executors were directed to sell the land allotted

for the widow's support "and the proceeds of which shall go to my estate and shall be equally divided between my eight children but my daughter Mary Jane shall have her part only for her lifetime and at her death her part shall go back to her brothers and sisters." *Held:* Mary Jane takes an absolute title in the general estate and her life estate is confined to the lands assigned to the widow and directed to be sold by the executors after the widow's death. *Ibid.*

§ 41½. Adopted Children.

Where a trust is created by will for a son, with provision that upon the death of the son the principal of the trust shall be paid to his child or children, the word "child" includes a child adopted some time before the death of the testator and with his knowledge and approval. *Smyth v. McKissick*, 644.

WORKMEN'S COMPENSATION ACT.

(See Master and Servant 36, *et seq.*)

CONSOLIDATED STATUTES AND MICHIE'S CODE CONSTRUED.

(For convenience in annotating.)

SEC.

74, 759. Special proceeding to sell land for assets, *ex parte* where all parties ask for same relief. *Ex Parte Wilson*, 99.

86. In proceeding by administrator to sell land for assets, whether bid is raised hereunder and under C. S., 2591, or motion for order of resale, a private sale is open to either course for ten days from report. *Howard v. Ray*, 710.

160. Action hereunder must be brought within the time prescribed, differing from notices of claims against municipalities. *Webster v. Charlotte*, 321.

182-184. These sections on adoption of a minor are now repealed, but proceeding thereunder by partition alleging material facts and making only living parent a party, who accepted service and consented to adoption on summons, sufficient to support judgment of adoption. *Moseley v. Deans*, 731.

217 (a), *et seq.* The jurisdiction of the Commissioner of Banks over banking institutions is regulatory and was delegated to the Legislature in the lawful exercise of its powers. *Puc v. Hood, Comr. of Banks*, 310.

217 (b), 225 (m). On application hereunder for industrial bank charter, Secretary of State acts only on certificate from Commissioner of Banks and suit to compel issuance, which alleges no bad faith, capricious acts, or disregard of law by State officers, does not state cause of action and is not sufficient as petition for *certiorari* or as application for *mandamus*. *Puc v. Hood, Comr. of Banks*, 310.

276 (a). Conviction, failure to support illegitimate child. *S. v. Clarke*, 744.

276 (a), 276 (i). Proceeding to establish paternity and prosecute father of illegitimate child for failure to support, may be instituted within 3 years after birth. *S. v. Moore*, 356.

276 (f). In bastardy, court may modify judgment or increase allowance for support. *S. v. Duncan*, 11.

361-4. Processioning proceedings hereunder applicable only to disputed boundaries between adjoining landowners, and burden is on plaintiff. *McCanless v. Ballard*, 701.

397-403. Jurisdiction of Superior Courts is given by statute to the clerk unless otherwise expressly stated or unless the judge or the court at term are referred to. *Ex Parte Wilson*, 99.

412, 438, 441. In action against administrators who qualified in May, 1934, on notes of intestate maturing in January and April, 1933, where evidence that plaintiff's claim filed with administrators within one year of appointment and admitted, nonsuit properly denied. *Lister v. Lister*, 555.

428. Unnecessarily pleaded where defendants have a fee title. *Kritcs v. Plott*, 679.

437. Judgment before clerk and appeal taken and never heard, barred after ten years by this section. *Exum v. R. R.*, 222. Where note recites

CONSOLIDATED STATUTES—*Continued.*

SEC.

"witness my hand and seal" and signature followed by "seal" presumption that seal adopted by maker. *Lister v. Lister*, 555.

437 (3), 437 (4). Actual possession by mortgagor is prerequisite to bar of ten-year statute of limitations against foreclosure. *Ownbey v. Parkway Properties, Inc.*, 54.

441. Action on unpaid check given for payment of taxes barred after three years from date of check. *Miller v. Neal*, 540. Action to engraft resulting trust on deed in fee is not barred in three years. *Creech v. Creech*, 656. Pleaded by mortgagee, who purchased at his own sale against mortgagor. *Peedin v. Oliver*, 665. Action for damages account of wrongful alienation barred in three years. *Lee v. Johnson*, 161.

441 (9). Action for cutting timber, based on mistake as to time, barred three years after discovery of mistake. *Blankenship v. English*, 91.

441, 6465. In suit to recover premiums paid on life insurance policies, where summons issued in 1942 and evidence showed premiums paid only to 1936, defendant having pleaded three-year statute of limitations, nonsuit proper. *Bynum v. Ins. Co.*, 742.

445. Is the appropriate statute, if any, to bar an action to establish a parol trust upon a conveyance of land. *Creech v. Creech*, 656.

463 (4). Recovery of personalty main relief, other matters being incidental, proper venue county where situated. *Marshburn v. Purifoy*, 219.

464. Change of venue denied where one defendant a deputy sheriff of another county. *Potts v. Supply Co.*, 176.

476. Requires that summons directed to sheriff outside the county must be attested by seal of court, but absence of seal will not invalidate judgment, where service accepted. *Moseley v. Deans*, 731.

478 (a). Where a local court is authorized to issue a summons running out of the county, this section authorizes that such court address such summons to sheriff of that county. *Williams v. Cooper*, 589.

489, 490. The purpose of process is notice and acceptance of service and voluntary appearance dispenses with formal service. *Moseley v. Deans*, 731.

507. Series of transactions connected with the same subject of action and all leading to one end may be joined against defendants having different interests—to conclude matter. *Bellman v. Bissette*, 72. Classifying what causes may be joined, does not include allegations here. *Beam v. Wright*, 174.

509, 514. Motion to dismiss on demurrer challenges plaintiff's right to maintain his action, and defendant has right to appeal from an adverse ruling. *Williams v. Cooper*, 589.

511. Demurrer to complaint challenges sufficiency of pleading and a demurrer to the evidence challenges the sufficiency of evidence, and an adverse decision on the first does not become "law of the case" on appeal from second. *Montgomery v. Blades*, 463. Demurrer to jurisdiction over subject matter of the action is a plea to the merits and constitutes a general appearance. *Williams v. Cooper*, 589.

CONSOLIDATED STATUTES—*Continued.*

SEC.

511 (3). Complaint showing contract in controversy is subject of action in another county between same parties, demurrable. *Lumber Co. v. Wilson*, 87.

511 (4), 511 (5), 511 (6). In suit on note, cross action by defendant from fraud against new party, misjoinder of parties and causes. *Beam v. Wright*, 174. Demurrer for failure to state cause of action may be made at any time. *Spake v. Pearlman*, 62. Action against defendants as commissioners to sell timber does not state cause of action against defendants as individuals. *Lumber Co. v. Wilson*, 87.

518. Where answer filed, demurrer *ore tenus* does not lie except to jurisdiction or failure to state cause of action. *Roberts v. Grogan*, 30. Demurrer for failure to state cause of action may be made *ore tenus* in Supreme Court. *Jones v. Furniture Co.*, 439.

535. Pleadings construed liberally in favor of pleader. *Spake v. Pearlman*, 62. Providing that pleadings be liberally construed does not allow court to construe into pleading what it does not contain. *Jones v. Furniture Co.*, 439. Plaintiff entitled to liberal interpretation of his complaint, and here good against demurrer. *Hallow v. R. R.*, 740.

537. Ultimate facts alleged in pleading in decorative and high-flown language should not be stricken out. *Hawkins v. Moss*, 95.

540. Copy of instrument for payment of money sufficient for pleading, but does not require entire writing to be set out. *Roberts v. Grogan*, 30.

547. Amendments to pleadings in discretion of court. *Whitehurst v. Hinton*, 85.

564. Right of defendant in criminal case to have court explain and apply law to evidence, and not express an opinion. *S. v. Anderson*, 148; *S. v. Shine*, 237; *S. v. Howard*, 291; *Sample v. Spencer*, 580.

567. On motion for nonsuit, plaintiff entitled to all reasonable inferences from evidence. *Wall v. Bain*, 375; *Montgomery v. Blades*, 463. On facts, nonsuit under this section not proper. *Roberts v. Grogan*, 30; *Parker v. Edwards*, 75; *Russ v. Tel. Co.*, 504; where plaintiff and defendant claim title under exactly same deeds and from common source. *Stone v. Guion*, 548; where notes of deceased filed with administrator. *Lister v. Lister*, 555; nonsuit proper, *Coppersmith v. Ins. Co.*, 14; *Ford v. Ins. Co.*, 154; *Winner v. Winner*, 414; *Walker v. Manson*, 527; *Pitt v. Speight*, 585; *Bynum v. Ins. Co.*, 742.

569. Findings and conclusions by trial judge, a jury trial having been waived, must be in writing. *Harrison v. Brown*, 610.

591. Setting aside verdict hereunder is in discretion of trial judge and not appealable in absence of denial of some legal right. *Hawley v. Powell*, 713.

598. Judgments by consent may be entered in vacation or in term time as parties may elect. *Edmundson v. Edmundson*, 181.

600. Failure to give notice when judgment against sureties made absolute, no error, no motion having been made hereunder to set aside judgment. *S. v. Pelley*, 684.

614. Erroneous liens declared by judgment in partition corrected by motion. *Edmonds v. Wood*, 118. Does not stop statute where appeal from

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clerk's order refusing to set aside judgment was never heard and no *supersedeas* or restraining order. *Exum v. R. R.*, 222. Judgments acquire lien against realty in order of docketing; but there is no lien of a judgment on personalty until levy, so that attachment of personalty by one judgment creditor gives priority over other judgment creditors. *Hardware Co. v. Jones*, 530.

618. Entry of transfer of judgment by attorney of judgment creditor *prima facie* evidence of transfer. *Harrington v. Buchanan*, 698.

626. Difference between Declaratory Judgment Act and submission of controversies without action. *Tryon v. Power Co.*, 200.

628 (a) *et seq.* Declaratory Judgment Act confers jurisdiction only where real controversy exists. *Tryon v. Power Co.*, 200.

630. *Certiorari* will not lie to bring up for review valuation of land for taxation, fixed by State Board of Assessment on appeal from county commissioners acting as board of equalization. *Belk's Dept. Store, Inc., v. Guilford County*, 441. *Certiorari* proper remedy where no right of appeal. *S. v. King*, 137.

637. When matter before clerk is brought before the judge, judge is vested with ample power to deal with it. *Ex Parte Wilson*, 99.

643. Assignment of error must be based on exception duly taken and preserved. *S. v. Moore*, 356.

649. Affidavit for pauper appeal not made during term. Supreme Court acquires no jurisdiction. *Franklin v. Gentry*, 41.

667. Allotment of homestead suspends running of statute of limitations. *Cleve v. Adams*, 211.

668. Judgment no longer dormant and there is no restraint on right to issue execution. *Exum v. R. R.*, 222.

728, 729. Conveyance of homestead by mortgage does not destroy exemption or revive right of execution. *Cleve v. Adams*, 211.

758. In special proceedings issues of fact must be transferred to civil issue docket. *Bailey v. Hayman*, 58; *Ex Parte Wilson*, 99.

861. Bond given hereunder to release property from lien is not affected by bankruptcy of defendant and State court may proceed to trial and judgment against bond. *Gordon v. Calhoun Motors, Inc.*, 398.

866. Whether petitioners have right by *mandamus* to compel State agency to pay interest on judgment, not presented. *Yancey v. Highway Com.*, 106.

867, 868. In *mandamus*, if summons returnable at chambers, instead of as civil action, or *vice versa*, proceeding should not be dismissed, but transferred to proper docket. *Brown v. Comrs. of Richmond*, 402.

898 (a), *et seq.* On arbitration, presumption of evidence to support award. *Bryson v. Higdon*, 17.

925. Office of probate judge abolished and duties assigned to clerk of Superior Court. *Ex Parte Wilson*, 99.

988. Creation of trust by parol does not controvene our statute of frauds. *Creech v. Creech*, 656.

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997, 998. No application to parol trust. *Peele v. LeRoy*, 123.

1066, 1067, 1112 (1), 1112 (36). Interstate tariff schedules of public utility companies, providing uniform, classified services, with limited liability in certain classifications of lower rates, promulgated under statute with approval of Utilities Commissioner, and declared to be exclusive, become legal standard which parties may so vary by agreement. *Russ v. Tel. Co.*, 504.

1137 (a), 1190-1193. Continuance of corporate existence by C. S., 1193, makes service of process on corporation after it has been adjudged a bankrupt and its charter forfeited under C. S., 1190, reasonable notice and valid service. *Sisk v. Motor Freight, Inc.*, 631.

1178. In suit to compel payment of dividends from accumulated profit of corporation, it was proper to order cash dividends from net profits, where there was large accumulated surplus and directors had taken no action to designate reserve and working capital. *Amick v. Coble*, 485.

1209 (4). Empowers receivers of corporation to convey estate, but receiver may not ordinarily dispose of substantial part of assets without authority of court and sales are subject to confirmation unless authorized expressly on specified terms. *Harrison v. Brown*, 610.

1217. Gives Superior Court power to approve reorganization of corporation on approval of majority of stockholders, but it cannot affect either dissenting stockholders or vested rights of those who do not consent, except parties who fail to appeal. *Bank v. Cotton Mills*, 305.

1241, 1243. These statutes relative to costs refer to same subject matter and are construed *in pari materia*. *Bailey v. Hayman*, 58.

1244 (6). In litigation in nature of *in rem* proceeding, costs of reference, etc., are usually paid out of fund though taxable in discretion of court. *Lightner v. Boone*, 421; *Bailey v. Hayman*, 58.

1244 (7). Where sole seizin pleaded in partition proceeding, and decided adversely, costs of reference in discretion of court and costs of partition may be apportioned. *Bailey v. Hayman*, 58.

1256. Superior Court without power to modify costs taxed by Supreme Court. *Bailey v. Hayman*, 58.

1414. Supreme Court has power to allow amendments to pleadings but record herein does not justify its exercise. *Byers v. Byers*, 298.

1436. Superior Court has jurisdiction of all matters not given to some other court. *Edmundson v. Edmundson*, 181.

1438. Judge holding courts of district has jurisdiction by consent, to sign judgment out of term, in or out of county and out of district. *Edmundson v. Edmundson*, 181.

1608 (m). Gives general county court exclusive and final jurisdiction of all offenses defined as petty misdemeanors by the act. *S. v. Shine*, 237.

1654. Requires only legal seizin or present right of possession to make an interest in lands inheritable, so upon death of remainderman, before life tenant, fee passes to remainderman's heirs then *in esse*. *Severt v. Lyall*, 533.

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1659. Living separate and apart for two years hereunder does not require such separation to be by deed or other mutual agreement. *Byers v. Byers*, 298.

1664. In divorce action, court acquires jurisdiction over support and custody of children. *S. v. Duncan*, 11.

1667. Judgment by consent, no pleadings filed, providing payments to wife in lieu of alimony, may subject husband to penalties hereunder and he may be committed for failure to pay. *Edmundson v. Edmundson*, 181.

1715. Highway Commission an agency of State and may be sued only in such manner as General Assembly has provided. *Yancey v. Highway Com.*, 106.

1743. Sufficiently broad to cover action to remove cloud on title caused by docketed judgment. *Exum v. R. R.*, 222.

1792. Allows testimony of one who entered a plea of guilty, against another who aided and abetted him in the crime. *S. v. Howard*, 291.

1795. While, in action against personal representative of deceased, a party in interest cannot testify that he saw deceased sign a particular writing, he is competent to prove that the writing in question or the signature thereto is in the handwriting of deceased. *Lister v. Lister*, 555. Restriction upon testimony refers to person who is party, or interested in event and prohibits his giving evidence in own behalf or in behalf of one succeeding to his title or interest. *Cartwright v. Coppersmith*, 573. Blind husband of grantee, who heard grantor acknowledge and deliver deed, wife being dead, is not incompetent hereunder. *Turlington v. Neighbors*, 694.

1802. Wife not compelled to testify against husband in criminal action, but when she takes stand in his behalf she is subject to cross-examination as any other witness. *S. v. Tola*, 406. In homicide case, on plea of self-defense, wife may testify to threats made against her husband by deceased and communicated to defendant, before killing. *S. v. Rice*, 634.

1823, 1824. Order for inspection and producing of writings in discretion of court. *Mfg. Co. v. R. R.*, 330.

2241. *Habeas corpus* will lie to determine custody of children of parents separated but not divorced. *In re Gibson*, 350. Is not available to decide contest for custody of children between divorced parents or others, but is available to parents separated but not divorced. *In re Young*, 708.

2285. Where guardian appointed hereunder, conclusive presumption that ward is incompetent. *Sutton v. Sutton*, 274.

2306. Where transaction is sale and not loan, no action for usury will lie. *Dillingham v. Gardner*, 79.

2309. Has no application to State, which is not liable for interest in absence of act of Legislature or special contract. *Yancey v. Highway Com.*, 106.

2330 (a). Upon finding juror incapacitated, proper for court to discharge him and substitute thirteenth juror in his stead. *S. v. Broom*, 324.

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2432. Telegram charging incontinency against woman actionable, and demurrer denied. *Parker v. Edwards*, 75.

2437, 2439-40, 2442. Claim of subcontractor and materialman supplants that of contractor and on notice duty of owner to pay, independently of primary contract, to extent of contract price in hand. *Schnepp v. Richardson*, 228.

2583. While clerk without power hereunder to appoint a trustee under a will, all parties being before Superior Court, it may appoint, *nunc pro tunc*. *Cheshire v. Church*, 280.

2588. Does not require that description in notice of sale under mortgage be identical with that in instrument. *Peedin v. Oliver*, 665.

2589. Actual possession by mortgagor is prerequisite to bar of ten year statute of limitations against foreclosure and power of sale barred only when foreclosure barred. *Ownbey v. Parkway Properties, Inc.*, 54.

2591. Mortgage sale not impaired for failure to report to clerk, where no raise of bid. *Peedin v. Oliver*, 665.

2593 (f). This statute not applicable to contract in secured note that maker should not be liable for any deficiency. *Jones v. Casstevens*, 411.

2594 (5). Possible intent of General Assembly when adopting this statute as to presumption of compliance with conditions of mortgages, etc. *Ownbey v. Parkway Properties, Inc.*, 54.

2621 (94). Not unlawful in *all* cases to park on highway without lights. *Pike v. Seymour*, 42.

2621 (278), 2621 (280). Defendant parked on highway at night without lights, plaintiff without lights required by statute, crashed into defendant's car, plaintiff's contributory negligence proximate cause. *Pike v. Seymour*, 42.

2621 (287), 2621 (288), 2621 (293). Statutory regulations of speed at intersections has for its purpose the protection of those who are in, entering, or about to enter intersecting highway, and have no application where the accident occurred some distance away. *Etheridge v. Etheridge*, 616. Where snow has narrowed a road to a one-way lane, person first entering lane has right of way. *Brown v. Products Co., Inc.*, 626.

2625. Applicable to all incorporated cities and towns, where not inconsistent with special acts of incorporation. *Wilson v. Mooresville*, 283.

2630, 2641. Town commissioners' power to appoint constables. *Ibid.*

2639, 2642. Police in town appears to have authority of sheriffs. *Wilson v. Mooresville*, 283. Limited powers to arrest without warrant. *Ibid.*

2822, 2823. Require an accurate record of governing body of municipality and in such case parol evidence thereof is not admissible. *S. v. Baynes*, 425.

3004. Presumption that all negotiable instruments issued for value. *Lister v. Lister*, 555.

3010. Negotiable instrument payable to order is transferred by endorsement and delivery, actual or constructive. *Cartwright v. Coppersmith*, 573.

3217. Judgment creditor given right of partition so that moiety upon which his lien attaches may be ascertained. *Edmonds v. Wood*, 118.

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SEC.

3234. Tenant in common entitled to partition if he has estate in possession or right of possession. Possession need not be actual, which may be in life tenant. *Moore v. Baker*, 736.

3315. "Making" of a deed of gift hereunder means its consummation by delivery and acceptance. *Turlington v. Neighbors*, 694.

4023. While clerk without power hereunder to appoint trustee under a will, all parties being before Superior Court it may appoint, *nunc pro tunc*. *Cheshire v. Church*, 280.

4204, 4205, 4639. On indictment for assault with intent to commit rape, there may be conviction of simple assault. *S. v. Jones*, 37.

4209, 4625. In prosecution for carnal knowledge of girl under sixteen, where ample evidence of act and that victim was under sixteen, nonsuit properly overruled and variance between allegation and proof as to time not material where statute of limitations not involved. *S. v. Trippe*, 600.

4226, 4227. Indictment for operation on woman "quick with child" and proof that woman pregnant only, fatal variance and nonsuit proper. *S. v. Forte*, 537.

4238. Conviction hereunder of capital offense of arson. *S. v. Wilfong*, 746.

4250. Imprisonment in State's Prison for three years for receiving stolen goods, etc., is within statute. *S. v. Reddick*, 520.

4268, 4269. In prosecution under these sections, counsel for accused commented on punishment prescribed and court in charge read C. S., 4269, indictment and part of probation statute and cautioned jury that punishment was not to be considered by them, no error. *S. v. Howard*, 291. "Property" in embezzlement statute includes money, goods, chattels, and choses in action. *S. v. Ward*, 316.

4342. Conviction for bigamy and judgment thereon, where remarriage after Nevada divorce, set aside by Supreme Court of U. S. *S. v. Williams*, 609.

4512. Limitation on prosecution for misdemeanors must be pleaded or called to attention of court or proven. *S. v. Colson*, 28.

4544 (1). Sheriff may arrest fleeing felon outside his county. *Wilson v. Mooresville*, 283.

4588. Whether judgment *nisi* will be made absolute or stricken out, in discretion of judge of Superior Court. *S. v. Clarke*, 744.

4607. On appeal in criminal case from county court to Superior Court, without record of trial in, or appeal from county court, Superior Court has no jurisdiction. *S. v. Patterson*, 179.

4614. Indictment referred to as drawn in accordance with this section. *S. v. Watson*, 672.

4622. Court may consolidate for trial two or more indictments, where two or more defendants are charged with crimes of same class, so connected in time or place that evidence on one will be competent at trial of other. *S. v. Norton*, 418. Each defendant is entitled to have jury pass on his case independently of codefendant's case. *Ibid.*

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4625. In bastardy, variance in date of birth not of essence, where statute of limitations not involved. *S. v. Moore*, 356.

4639, 4640. In prosecution for rape, where all evidence tended to show carnal knowledge against victim's will and no evidence of less offense, defendant not entitled to instruction of court on assault with intent to commit rape. *S. v. Hairston*, 455. Where no evidence of major crime charged, court should instruct to limit verdict to less degree of same crime. *S. v. Jones*, 37.

4643. On indictment for assault to commit rape, where evidence of assault, motion to dismiss properly denied. *S. v. Jones*, 37. Charge burglarious breaking, and evidence of felonious breaking only, nonsuit properly denied. *S. v. Reynolds*, 40. Charge of murder based on written statement of accused, entire statement tending to relieve him of any guilty act or knowledge, motion of nonsuit should have been sustained. *S. v. Todd*, 346. Where accused preserves exception to refusal of nonsuit on State's evidence and offers his evidence and renews his motion after case closed, court must act in light of all evidence and defendant is entitled only to benefit of his exception to refusal of his latter motion. *S. v. Norton*, 418. Personal presence not necessary in larceny and nonsuit properly denied on evidence. *S. v. King*, 239. Disappearing with large amount of unpaid-for goods, nonsuit on charge of embezzlement properly denied. *S. v. Tennant*, 277. Indictment for operation on woman "quick with child" proof that woman pregnant only, nonsuit proper. *S. v. Forte*, 537.

5312, *et seq.*, 5360-1, 5364-5. Assessment rolls filed against land in drainage district with map are liens thereon and sufficient notice to purchasers. *Nesbit v. Kafer*, 48.

5780 (84), *et seq.* Duty of county treasurer to apportion all county-wide current expense school funds to county and city administrative units monthly and to remit on per capita enrollment basis. *School Trustees v. Benner*, 566. Budgets of school administrative units are, to all intents and purposes, appropriations to be applied to objects named. *Ibid.*

5780 (145). County Board of Education is sole employer of teacher in county school, whose salary is paid in part by State and Federal funds, and as such is liable, under Workmen's Compensation Act, for death of such teacher. *Callihan v. Board of Education*, 381.

5894, 5895. Courts take judicial notice of State institutions. *Moyle v. Hopkins*, 33.

6018, *et seq.* Provides an exclusive method of nomination of candidates for State and county offices. *McLean v. Board of Elections*, 6.

6022, 6034. Candidates for State and county office must file notice of candidacy and sign pledge to abide by primary. *Ibid.*

6023, 6034. Candidates for State and county offices must pay filing fees, which in no sense is a tax nor is the Act a local law. *Ibid.*

6033, 6055 (a5). Only candidates for State and county offices complying with Primary Law may have names on ballot. *Ibid.*

6927. Suit between tenants in common for wrongful removal of minerals, plaintiff entitled to judgment on admission of cotenancy and removal, but not to damages hereunder. *Jones v. McBee*, 152.

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SEC.

7880 (156) tt. Nonpayment of taxes on note in suit nullified by judgment therein that taxes, etc., be paid first from proceeds of judgment. *Roberts v. Grogan*, 30.

7971 (106), (110), (160), (162). N. C. Constitution does not require jury trial to determine valuation of land for taxation and *certiorari* will not lie to review such valuation fixed by State Board of Assessment on appeal from county commissioners, acting as board of equalization. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

7971 (209), *et seq.* Authorizes sale of tax lien and land can be sold only by foreclosure in Superior Court. *Crandall v. Clemmons*, 225.

7971 (219). Tax lien not reinstated, where collection accepts check for taxes which is unpaid and record not corrected. *Miller v. Neal*, 540.

7982. Life tenant does not forfeit estate where no foreclosure for failure to pay taxes. *Crandall v. Clemmons*, 225.

7990. Assessment rolls filed against lands of drainage district in two counties, error to dismiss foreclosure hereunder. *Nesbit v. Kafer*, 48. Tax collector has no lien hereunder where he accepts check for taxes, which is unpaid, and he afterwards pays tax in settlement with county. *Miller v. Neal*, 540. In suit hereunder to enforce tax liens, appeal dismissed for failure to set out pleadings in record. *Washington County v. Land Co.*, 637.

8081 (dd). Finding, that plaintiff was not capable of coherent, normal thought when examined by physicians, falls short of finding which would excuse the notice of injury hereunder; but finding that employer was not prejudiced by failure to give notice within 30 days will sustain award from, and after such notice. *Eller v. Leather Co.*, 604.

8081 (h), *et seq.* Workmen's Compensation Act liberally construed. *Wilson v. Mooresville*, 283. Policeman injured while returning to work from vacation, not injured by accident arising out of and in course of employment. *McKenzie v. Gastonia*, 328. To sustain award, the Act requires that injury arose out of and in course of employment and hazard must be peculiar to work and not independent of relation of master and servant. *Bryan v. T. A. Loving Co.*, 724.

8081 (i), 8081 (tt). Death must result proximately from injury arising out of and in course of employment—injury must be such that without it death would not have occurred. *Gilmore v. Board of Education*, 358.

8081 (kk). Industrial Commission has power to find that injuries other than those named in Act may result in permanent and total disability, and when so found shall compensate therefor. *Stanley v. Hyman-Michaels Co.*, 257.

8081 (mm). Deeming certain injuries permanent and total, does not mean that no others are such, but that those named are conclusively permanent and total. *Ibid.*

8081 (ppp). Findings of Industrial Commission, when supported by competent evidence, are conclusive on appeal. *Kearns v. Furniture Co.*, 438.

8081 (6). Evidence sufficient to show injurious exposure to silicosis. *Haynes v. Feldspar Producing Co.*, 163.

CONSTITUTION OF NORTH CAROLINA, SECTIONS OF, CONSTRUED.

(For convenience in annotating.)

ART.

I, sec. 8. Where written Constitution does not otherwise direct, the Legislature may distribute powers of government as it deems proper for best interests of public and may make action by administrative boards final. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

I, secs. 12, 13. Legislature has power to designate possession and transportation of intoxicants a petty misdemeanor and provide other means of trial for offense than by indictment and jury. *S. v. Shine*, 237.

I, sec. 17. Forbids taking of private property for public use without just compensation. *Yancey v. Highway Com.*, 106.

I, sec. 19. Does not require court review of land valuation for taxation, or the fixing of such value by a jury *de novo* hearing. *Belk's Dept. Store, Inc., v. Guilford County*, 441.

I, sec. 28. Elections and primaries, subject to reasonable regulations by Legislature under police power. *McLean v. Board of Elections*, 6.

II, sec. 10. Divorce hereunder is purely statutory. *Byers v. Byers*, 298.

II, sec. 14. Primary Law filing fee not tax. *McLean v. Board of Elections*, 6.

II, sec. 29. Primary Law not local law. *Ibid.* Public-Local Laws 1915, ch. 324, as amended by Public Laws 1931, ch. 24, giving jurisdiction up to $1,500 on contract actions to recorder's court of Reidsville, does not violate this section. *Williams v. Cooper*, 589. This Court never anticipates question of constitutional law and will not pass upon constitutionality of a statute if appeal can be disposed of on other grounds. Special verdict in this case not sufficient to support judgment. *S. v. High*, 434.

IV, sec. 9. Supreme Court has original jurisdiction of suits against State, decision only recommendatory. *Yancey v. Highway Com.*, 106.

IV, sec. 11. Judge holding courts of district has jurisdiction by consent to sign judgments out of term and in or out of county and out of district. *Edmundson v. Edmundson*, 181.

IV, sec. 12. Jurisdiction of Superior Court is apportioned by Legislature hereunder between clerk and judge. *Ex Parte Wilson*, 99. Also in courts inferior to Supreme Court. *Edmundson v. Edmundson*, 181.

IV, sec. 22. Superior Courts always open for business. *Ibid.*

X, sec. 2. Allotment of homestead suspends statute of limitations. *Cleve v. Adams*, 211. All judgment creditors may issue execution upon judgment debtor becoming a nonresident. *Hardware Co. v. Jones*, 530.

X, sec. 8. Conveyance of homestead by mortgage does not destroy exemption, or revive right to issue execution. *Cleve v. Adams*, 211. Homestead may be allotted in mortgaged property. *Ibid.*